



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

Seumas Miller

Print publication date: 2016

Print ISBN-13: 9780190626136

Published to Oxford Scholarship Online: November 2016

DOI: 10.1093/acprof:oso/9780190626136.001.0001

# Police Use of Lethal Force and Suicide Bombers

Seumas Miller

DOI:10.1093/acprof:oso/9780190626136.003.0006

## Abstract and Keywords

In this chapter the morality of the use of lethal force by police against a suicide bomber in a well-ordered jurisdiction in a liberal democratic state is analyzed. Such operations involve a team of police officers with different roles, such as surveillance officers and firearms officers. So the question arises as to who is morally responsible for any mistakes leading to loss of innocent life (e.g., the Menezes killing by London police in 2005). Three key theoretical claims are: (1) collective moral responsibility is a species of relational individual moral responsibility; namely, joint moral responsibility; (2) police scenarios of this kind involve chains of institutional and moral responsibility; (3) an individual participant in a morally required joint action (omission) scenario that fails is not morally culpable if she or he did all that could be reasonably be expected but might share in the collective responsibility.

*Keywords:* lethal force, suicide bombers, police, collective moral responsibility, chains of responsibility Menezes shooting

AS WE SAW in the last chapter, the use of lethal force by police raises a wide range of moral problems. In this chapter the focus is on the use of lethal force by police in counterterrorism operations and, in particular, in relation to suicide bombers.<sup>1</sup> Naturally, the range of permissible uses of lethal force by security agencies, such as police and military forces, in counterterrorist operations varies according to the nature and extent of the terrorist threat in the context in question. The concern in this chapter is restricted to police use of lethal force against terrorists in the context of well-ordered, liberal democratic states, as

opposed to, for example, disorderly or failed states or theaters of war. I take it that the latter kinds of context imply a military or paramilitary response, even if it also involves the police. Accordingly, I deal with these contexts in later chapters concerned principally with the military use of lethal force.

The use of lethal force by police in many counterterrorism operations does not raise moral problems that are essentially different from those that arise in combating other kinds of violent crime. Nevertheless, there do seem to be some important differences when it comes to the use of lethal force against suicide bombers, in particular. In this chapter I focus on some of the moral problems arising from the use of lethal force against suspected suicide bombers operating in well-ordered, liberal democratic **(p.139)** states. I do so because these operations seem to require a less restrictive use of lethal force on the part of police than do other related and potentially murderous criminal actions, such as, for example, an armed bank robber who has taken hostages and with whom police have entered into negotiations.

In the case of suspected suicide bombers, police are not able to issue a warning, since this would alert the bomber to their presence, and he or she would immediately set off the bomb. Moreover, in the case of suicide bombers, the harm to be done is both potentially very great (e.g., dozens or even hundreds of innocent lives) and perpetrated by a single action—unlike, for example, in the case of serial murderers. Finally, there is typically the problem of uncertainty, which is an epistemic problem (to use the philosophical term for knowledge). There is often uncertainty, until it is too late, as to whether or not the suspect is in fact a suicide bomber about to set off a bomb. In this respect, suicide bombers are unlike, for example, lone gunmen shooting at passersby. Moreover, there is likely to be a potentially problematic division of labor in the case of police confronted by a suspected suicide bomber; the police firearms officer (the one who is to do the shooting) is heavily reliant on intelligence provided by other police officers that the person he is contemplating shooting is in fact a suicide bomber. The problem of mistaken identity leading to a fatal shooting by police of an innocent person wrongly suspected of being a suicide bomber was exemplified in the fatal shooting by police of an innocent Brazilian, Jean Charles de Menezes, in London in 2005—a case discussed in some detail below.

This particular conjunction of factors creates an especially acute set of moral problems for police contemplating whether or not to use lethal force against someone suspected to be a suicide bomber. Specifically, it raises the question of individual versus collective moral responsibility for police use of lethal force. If a police firearms officer shoots dead a suspected suicide bomber on the basis of intelligence provided by other police officers, and the suspect turns out not to be a suicide bomber, who, if anyone, is to be held morally responsible? Is it only the firearms officer who fired the fatal rounds? Is it the firearms officer as well as the members of the surveillance team who provided the incorrect intelligence

with respect to the identity of the suspect? Or is no one morally responsible? Let us begin with an outline of the above-mentioned fatal shooting by police of the innocent Brazilian, Menezes.

**(p.140)** 5.1 The Fatal Shooting of Jean Charles de Menezes

In London in July 2005, a day after a failed bomb attack, police shot dead a terrorist suspect who turned out to be an innocent, defenseless Brazilian electrician, Jean Charles de Menezes, going about his day-to-day business. Menezes was an innocent person wrongly suspected by police of being a terrorist suicide bomber, and he was intentionally killed by police in the belief that he was a mortal threat to the passengers in the London underground station where he was shot dead. The ethical issue to be addressed in this chapter concerns the individual and/or collective *moral* responsibility, if any, for the killing of an innocent person.<sup>2</sup>

While the events that terminated in Menezes's death involved a number of mistakes or errors of judgement on the part of police, I will focus on just three: (1) the failure of the surveillance team located at Scotia Road in London from where Menezes emerged to determine whether or not he was the terrorist suspect Hussain Osman, and to clearly communicate their determination to their commanding officer, Commander Cressida Dick, that Menezes was or was not Osman, or that they did not know or were otherwise uncertain of their subject's identity; (2) the failure on the part of Commander Dick to see to it that Menezes was challenged and stopped at some point after leaving Scotia Road, but prior to his entering the underground railway station (i.e., at a location that would not have compromised the surveillance operation at Scotia Road), and in a manner that would not have required killing him (he being at most a threat to himself, the arresting officers, and, perhaps, one or two passersby); (3) the failure on the part of the two officers who shot Menezes to provide themselves with adequate grounds for believing that they were shooting dead a suicide bomber who was at the time in question, a mortal threat to the train passengers. In relation to error 3, I note that the person shot dead was merely a suspected suicide bomber, and that the firearms officers had no clear evidence that he was carrying a bomb—because the operation had not been declared by Commander Dick to be a Kratos operation. A Kratos operation is one involving someone known to be a suicide bomber, and therefore calling for the use of lethal force to prevent the would-be bomber **(p.141)** detonating his or her bomb and killing innocent persons. The firearms officers did not at any point perceive a bomb, nor were they otherwise provided with good evidence that the suspect was carrying a bomb.

In referring to these failures as mistakes or—especially in the case of Commander Dick and the firearms officers—errors of judgement, I am not ipso facto ascribing moral culpability to the police; mistakes, even ones in respect of morally significant actions, do not necessarily entail moral culpability. Whether or not there was moral culpability is a matter to be determined. Certainly, as

stated above, there was no intention to kill an innocent person; indeed, police actions were carried out with the intention to save innocent lives. Moreover, the police obviously did not foresee that an innocent life would be taken.

A related moral issue concerns Kratos as a mode of police operations. Is Kratos a morally sustainable operational policy? If not, then a question arises in relation to the moral responsibility of those who put the policy in place for any untoward consequences that might emanate from its application on the ground. In relation to the moral acceptability of Kratos, suppose that the police shot dead a person under the same circumstances as they shot Menezes, except that the person turned out to be Osman; would their actions have been justified if, for example, Osman was *not* carrying a bomb with him at the time? Osman was, after all, only a suspected suicide bomber; otherwise, why was the plan to “let him run” upon leaving Scotia Road? At no point was any good evidence provided that the person under surveillance was actually carrying a bomb.

Is it, therefore, morally justifiable for police to shoot dead a suspect without warning, when the suspect is in a crowded location and they have good evidence that he is a would-be suicide bomber, that he intends at some point *in the future* to denote a bomb killing himself and others, but they do not know whether he has a bomb on him *at this time*? In short, they do not know whether his intended suicidal and murderous act is imminent. Arguably, if the police did have a policy to shoot known suicide bombers under these conditions, then they would have a shoot to kill on sight policy of the sort, for example, that is used by military forces in relation to combatants. Naturally, the additional problem, both in this and in the military scenario, is the epistemic one. The police do not know whether the suicide bomb attack is imminent. However, as will be argued in later chapters, while this is not necessarily crucial in military contexts it is of the first importance in policing contexts.

**(p.142)** If shooting dead a person under these circumstances is not permissible under Kratos, because it is not permissible under the relevant criminal laws, is it nevertheless not likely that under Kratos police will end up shooting suspect suicide bombers under these circumstances? Indeed, on one construal of events—a construal that is admittedly at odds with the testimony of the police and not found by the coroner to be correct by the standard of being beyond reasonable doubt—this is exactly what happened in the case of the shooting of Menezes. The firearms officers, rightly or wrongly, reasonably or unreasonably, believed the situation was a *de facto* Kratos operation and, therefore, did not give Menezes any warning, did not afford him the opportunity to be arrested without the use of force, and, for his part, Menezes did not fail to comply with any instruction from the police.

## 5.2 Moral Responsibility

We first need to distinguish some different senses of responsibility.<sup>3</sup> Sometimes to say that someone is responsible for an action is to say that the person had a reason, or reasons, to perform some action, then formed an intention to perform that action (or not to perform it), and finally acted (or refrained from acting) on that intention—and did so on the basis of that reason(s). Note that an important category of reasons for actions comprises ends, goals, or purposes; an agent's reason for performing an action is often that the action realizes a person's goal. Moreover, it is assumed that, in the course of all this, the person brought about or caused the action, at least in the sense that the mental state or states that constituted the reason for performing the action was causally efficacious (in the right way), and that the resulting intention was causally efficacious (in the right way). I will dub this sense of being responsible for an action "natural responsibility." To say that someone had natural responsibility for an action is to say, in essence, that an action of theirs was under their control. This sense of being responsible is relevant to the actions of the firearms officers in shooting Menezes, in that they intentionally performed an action of shooting Menezes dead, and did so for the reason that they believed him to be a suicide bomber.

**(p.143)** On other occasions, what is meant by the term "being responsible for an action" is that the person in question occupies a certain institutional role, and that the occupant of that role is the person to decide what is to be done in relation to certain matters, and to see to it that what ought to be done is in fact done. Here what ought to be done comprises one's institutional duties. Moreover, a role occupant, A, has only discharged A's responsibility with respect to A's duties when A *intentionally* does A's duty. Note, however, that A's motive for doing A's duty is irrelevant (see Chapter 3, section 3.1). Thus the members of the surveillance team had the responsibility to identify Hussain Osman, video record anyone leaving the premises, and communicate information in a clear and precise manner to the control room, irrespective of whether or not they did so, or even contemplated doing so. This notion of institutional responsibility is prospective (as opposed to retrospective). Clearly, they failed in respect of their institutional responsibility in this regard. Accordingly, they might be held to be institutionally responsible for this failure; that is, institutionally responsible in the retrospective sense. If they had succeeded, then they would have discharged their (prospective) institutional responsibility and, therefore, could be said to be institutionally responsible in the retrospective sense—albeit, in this instance, responsible for a successful action.

A third sense of "being responsible" for an action is a species of our second sense. If the matters in respect of which the occupant of an institutional role has an institutionally determined duty to decide what is to be done include ordering other agents to perform, or not to perform, certain actions, then the occupant of the role is responsible for those actions performed by those other agents. We say of such a person that he is responsible for the actions of other persons in virtue

of being the person in authority over them. Thus, as the person in authority, Commander Dick had a responsibility to see to it that the police on the ground interdicted Menezes before he entered the underground station. Her failure in this respect was a failure to discharge her institutional responsibility as the person in authority. However, even if a person in authority fails to discharge his or her institutional responsibility to see to it that others perform some set of individual actions or some joint action, it does not follow that the subordinates in question are not also institutionally responsible for their failure to do the action(s) in question. The person in authority and the subordinates might be jointly institutionally responsible (see Chapter 3, section 3.1).

**(p.144)** The fourth sense of responsibility is in fact the sense that we are principally concerned with here; namely, moral responsibility. Roughly speaking, an agent is held to be morally responsible for an action or omission if the agent was responsible for that action or omission in one of our first three senses of responsibility, and if that action is morally significant. An action or omission can be morally significant in a number of ways. The action or omission could be morally permissible, morally impermissible, morally obligatory, and so on. It could be intrinsically morally wrong, as in the case of a rights violation. Or the action or omission might have moral significance by virtue of the end that it was performed to serve, or because of the foreseen or reasonably foreseeable outcome that it actually had, such as the killing of an innocent person, as in the case of Menezes. We can now make the following preliminary claim concerning moral responsibility:

If an agent is responsible for an action or omission (or foreseen or reasonably foreseeable outcome of that action or omission) in the first, second, or third sense of being responsible, and the action, omission, or outcome is morally significant, then—other things being equal—the agent is morally responsible for that action, omission or outcome, and—again, other things being equal—ought to attract moral praise or blame and (possibly) punishment or reward for it.

Here the “other things being equal” clauses are intended to be interpreted in terms of a capacity for morally responsible action. For example, suppose the agent was a psychopath, or there were exculpatory conditions, either by way of justification or excuse. Thus, other things might not be equal if, for example, the agent was coerced, or there was some overriding moral justification for performing what would otherwise have been a morally wrong action. Note also that, contra some accounts of moral responsibility, I am distinguishing this notion from that of blameworthiness or praiseworthiness.

Let us first consider Commander Cressida Dick. Given the moral stakes and the existence of a plan (namely, to stop any suspected suicide bomber before she or he got to an underground train station or similar locale) that she could

reasonably have been expected to adhere to, she can be held morally responsible for failing to see to it that Menezes was interdicted prior to going into the underground. I say this notwithstanding the existence of **(p.145)** mitigating circumstances. Of course, in making this claim regarding her moral responsibility for the failure to interdict Menezes, I am not claiming that the Commander Dick is morally responsible for his death.

What of the firearms officers? I discuss their moral responsibility in more detail below. Suffice it to say here that if a firearms officer deliberately shoots a suspect dead then the officer is morally responsible for the killing. However, it is a further question whether the officer was morally culpable. The answer to this latter question turns on the moral justification the officer had for the killing.

### 5.3 Lethal Force and Individual Moral Responsibility

Police officers need to exercise authority on a daily basis; they have institutional responsibilities in the sense explained above. Historically, policing in the United Kingdom and Australia has made use of a distinctive notion of authority, so-called original authority. In relation to the concept of original authority, we need to distinguish compliance with laws from obedience to the directives of men and women, especially one's superiors. Thus, according to the law, an investigating officer must not prosecute a fellow police officer if the latter is self-evidently innocent. On the other hand, the investigator might be ordered to do so by a superior officer. Now, individual police officers are held to be responsible to the law as well as their superiors in the police service. However, their first responsibility is to the law. So, a police officer should disobey a directive from a superior officer that is clearly unlawful. And yet the admittedly controversial doctrine of original authority does not end here. It implies further that there are at least some situations in which a police officer has a right to disobey a superior's *lawful* command, if obeying it would prevent that officer from discharging the lawful obligation to uphold the law.<sup>4</sup>

**(p.146)** According to the doctrine of original authority, there are at least some actions, including the decision to arrest or not arrest (at least in some contexts) or to shoot or not shoot, which are ultimately matters for the decision of the individual officer, and decisions for which the officer is, or might be, individually legally liable.<sup>5</sup> The contexts in question are ones in which the lawful action of arresting a given person would, nevertheless, prevent the police officer from discharging his other lawful obligations to the law, such as his obligation to keep the peace. For example, arresting an unlawful protester might enrage an already volatile crowd and trigger a riot. If this is indeed the legal situation, then it reflects a commitment to something akin to professional autonomy. In the case of a surgeon, for example, it is up to the surgeon—and not the surgeon's employer—to decide whether or not she or he will operate on a patient who might suffer complications if operated on (assuming, of course, the patient has given consent).<sup>6</sup> It is not that the surgeon has the right to decide whether the

patient will be operated on (the patient decides that), or even the right to decide who will be the one (i.e., the particular surgeon) to have the right to operate on the patient (presumably, that is the joint decision of the patient, the employer of the surgeon, and the surgeon). Rather, the surgeon may not simply be ordered, either by the employer or by the patient, to perform the operation; the right to operate is conferred on the surgeon by the patient (and the employer of the surgeon, supposing there to be one); being a right to operate, the surgeon may choose not to operate.

By way of illustration, consider a situation in which a police officer is confronted with passive noncompliance on the part of a criminal known to be dangerous and likely to be carrying a weapon. (See, for example, the case of David Martin, discussed in Chapter 4, section 4.4). As we saw in Chapter 4, the criminal, in refusing to comply with the officer's directives, creates a trilemma. If the officer shoots the criminal and he turns **(p.147)** out to be unarmed, the officer might face a murder charge. Yet the officer puts his own life at risk if he approaches the criminal with a view to overpowering him. Nor is the third option preferable: the option to let him go free. For the officer has a moral and a legal duty to apprehend dangerous persons. Indeed, if the officer simply allowed the criminal to go free, and that criminal went on to murder an innocent person, this neglect of duty might be held by a court to be criminal negligence. Let us now assume that the officer's superior officer is present and issues a lawful directive to the officer to shoot the offender, on the grounds that the evidence indicated that he was probably concealing a dangerous weapon and was highly likely to use it. In light of the doctrine of original authority, the subordinate police officer might well be acting within his legal rights to refuse to do so. For he might reasonably disagree with the superior officer's judgement. In addition, he knows that he might find himself legally liable for wrongful killing if it turned out that the offender was unarmed.

The above-described individual civil and criminal liability of police officers, supposing it is correct, stands in some contrast with military combatants. A civilian would, in general, sue the military organization itself, rather than the soldier whose actions resulted in harm to the civilian. Moreover, presumably soldiers do not reserve a general institutional right to refuse to shoot to kill when (lawfully) ordered to do so by their commanding officers. My understanding is that in keeping with the absence of such a general right, criminal liability in relation to negligence and many categories of wrongful killing is generally applied to the military officer who issued the command, rather than his subordinates who were his instrument.

Whatever the legal situation a soldier has a natural discretionary right to use or not use lethal force, assuming it is morally permissible in the circumstances in question. In this respect soldiers are no different from police officers or ordinary civilians. Moreover, arguably, neither a soldier nor anyone else can transfer this



natural right to others. Nevertheless, the possibility of waiver remains. Accordingly, I suggest that soldiers, but not ordinary civilians or police officers, waive their natural right to use lethal force in favor of their superiors. They do so when they accept the institutional role of a military combatant and embark on a war. I note that being a natural right it is not conferred (as in the case of the surgeon's right to operate). If this is correct, then it has two important implications. First, it entails an important difference between the basis for different elements of original authority (and, possibly, professional autonomy). One basis **(p.148)** derives from the nature of the relevant institution and its institutional purposes. If individual police officers have a right to refuse a lawful command by a superior to arrest someone in some circumstances, then this is because, speaking generally, their possession of this right makes for a more effective police service; so it is a conferred institutional and moral right derived from the collective good realized by the institutional role of police officers. Accordingly, matters might be different with regular soldiers, given the different institutional purposes of their role.

However, the second basis, as I have suggested above, is an inalienable natural moral right—it is a moral right with respect to *one's own lethal actions*, as opposed to the lethal actions of others. Moreover, being an inalienable right, it cannot be transferred to others, such as one's institutional superiors. This right that a person, A, has with respect to A's own lethal actions is logically consistent with A's lethal action, x, being either morally obligatory or morally impermissible. The latter concerns the objective properties of A's act or omission, whereas the former concerns the moral decision maker. It is one thing for a person to have the right to make a decision, and another for that person to make the right decision.

The second implication is that the above-mentioned contrast between the police and the military would be much less sharp. As we have seen, soldiers, like police, may well have a natural discretionary moral right with respect to the use of lethal force. However, a distinction between the military and the police might still be able to be drawn at the institutional level in terms of the notion of waiving one's right. Perhaps by virtue of their institutional role individual soldiers, but not police, waive their natural right to decide whether or not to use lethal force in certain circumstances; specifically, in circumstance in which they were (lawfully i.e. in accordance with *ius in bello* principles, let us assume) directed by their superiors to use lethal force or to refrain from using lethal force. So, in effect, soldiers waive this natural right in favor of their superior officers. Of course, these soldiers retain this natural right qua human beings; so they are not transferring the right to their superiors. Accordingly, an individual soldier would not be the one to decide whether or not to shoot to kill in cases where he or she was directed by a superior to do so (or not to do so); rather, the superior would be the one to decide. In the case of police officers, this would not be the case; an individual police officer has not waived his or her right to decide

whether or not to use lethal force in favor of a superior officer. Instead, the individual police officer—the shooter—would be the one to decide. The situation is further muddied **(p.149)** by the existence of paramilitary police roles, such as police snipers. Let us now return to the firearms officers involved in the shooting death of Menezes.

The first point is that it was the moral responsibility of each of the firearms officers to decide whether or not to shoot Menezes, irrespective of whether he had been ordered to do so; and, evidently, this is reflected in the law.<sup>7</sup> The second point is that he had not been ordered to do so; the situation had not been declared to be a Kratos operation. So, for better or worse, individual moral responsibility can in principle be assigned to a firearms officer who kills an innocent person, depending, of course, on the facts of the case.

What of exculpatory conditions? Each of the firearms officers said that they believed that Menezes was a suicide bomber. Even supposing this to be true—and the jury did not accept it on the balance of probabilities—there remains the question of the justification for that belief. Did each have sufficient evidence to warrant that belief? Arguably, neither did, especially given that good and decisive evidence is required in a case where the taking of another human life is concerned. Nevertheless, there is another important moral consideration in play here. Each of the firearms officers had a moral obligation to protect the lives of innocent train passengers. If the officers had failed to shoot the suspect dead, and he had turned out to be Osman carrying a bomb, then in all probability there would have been a far greater loss of life. This consideration has considerable moral weight, notwithstanding the inadequacy of the evidence for their individually held beliefs (or judgments) that Menezes was Osman and a mortal threat at the time.

So whatever the legal situation, and whatever any past failure to satisfy themselves with regard to the identity of Menezes, at the point of decision whether or not to shoot him, the firearms officers confronted what was in effect a moral dilemma: (1) shoot dead a person they believe is highly likely to be a suicide bomber about to detonate a bomb, though if he turns out not to have a bomb, they will have killed an innocent person; (2) refrain from shooting him, though if he turns out to be a suicide bomber about to detonate a bomb, numerous innocent passengers and the police officers themselves will be killed. In these circumstances it is difficult not to view the “other things being equal” as having application. Arguably, there was not a good and decisive reason in favor of either course of action. Rather, **(p.150)** at the point of decision, great risks were attached to each of the available options, there was a moral balancing act to be performed, and a split second decision had to be made. In these circumstances, each of the firearms officers might be held to be morally responsible for the death of an innocent person, but surely neither can be held

to be morally *culpable* for what they did; they were morally responsible but not morally blameworthy.

#### 5.4 Collective Moral Responsibility

Above we distinguished four senses of responsibility, including moral responsibility. Let us now consider collective moral responsibility.<sup>8</sup> As is the case with individual responsibility, we can distinguish four senses of collective responsibility. In the first instance I will do so in relation to joint actions. Thus the first sense of responsibility for a joint action is natural responsibility. Accordingly, to say that some persons are collectively responsible in this sense for a joint action is just to say that they deliberately performed the joint action. That is, each person had a collective end, each intentionally performed their contributory action (and having this end and this intention was under the person's control, etc.) and each did so because each believed the others would perform their contributory action, and that therefore the collective end would be realized. So in the Menezes shooting scenario, the members of the surveillance team performed the joint action of surveilling Scotia Road.

It is important to note here that each agent is individually (naturally) responsible for performing his contributory action, and responsible by virtue of the fact that he intentionally performs this action, and the action is not intentionally performed by anyone else. Of course the other agents (or agent) *believe* that he is performing, or is going to perform, the contributory action in question. But mere possession of such a belief is not sufficient for the ascription of responsibility to *the believer* for performing the individual action in question. So what are the agents *collectively* (naturally) responsible for? The agents are collectively (naturally) responsible for the realization of the (collective) *end* that results from their **(p.151)** contributory actions. Consider two agents jointly killing someone in a crowded setting, one by grabbing him and holding him fast, the other by shooting him in the head. Each is individually (naturally) responsible for his own action, and the two agents are collectively (naturally) responsible for bringing it about that the person is dead, given that the actions of both were necessary.

Again, if the occupants of institutional roles have institutional responsibilities with respect to their performance of joint actions (or joint omissions) then these responsibilities are collective institutional responsibilities. This is the second sense of collective responsibility. Note that in some cases these collective institutional responsibilities will be prospective, such as in cases where there is a *joint* institutional duty to realize the collective end of some joint action. Here the individual duty of each to perform his or her contributory action is interdependent with the individual duty of each of the others to perform theirs. (See Chapter 1, subsection 1.2.2, for an account of joint obligations.) On the other hand, as we saw in the case of individual institutional responsibility,

collective institutional responsibility can also be retrospective, such as in cases where the institutional actors have failed to do their joint duty.

There is a third sense of collective responsibility that might be thought to correspond to the third sense of individual responsibility. The third sense of individual responsibility concerns those in authority. Suppose the members of the cabinet of country A (consisting of the prime minister and his or her cabinet ministers), or the members of the relevant police authority, collectively decide to exercise their institutionally determined right to introduce a counterterrorism measure, such as Kratos. The cabinet and/or the relevant police authority (say, ACPO (Association of Chief Police Officers)) are then collectively responsible for this policy, and potentially for the untoward consequences of its implementation.

There are a couple of things to keep in mind here. First, the notion of responsibility in question is, at least in the first instance, institutional—as opposed to moral—responsibility. Second, the “decisions” of committees, as opposed to the individual decisions of the members of committees, need to be analyzed in terms of the notion of a joint institutional mechanism (introduced and analyzed in detail elsewhere<sup>9</sup>). So the “decision” of **(p.152)** the cabinet, and also perhaps of the ACPO, can be analyzed as follows: At one level each member of the cabinet or the ACPO voted for or against Kratos. Let us assume some voted in the affirmative and others in the negative. But at another level, each member of the cabinet or ACPO (or both) agreed to abide by the outcome of the vote; each voted having as a collective end that the outcome with a majority of the votes in its favor would be realized. Accordingly, the members of the cabinet and/or the ACPO were jointly institutionally responsible for the policy change; that is, the cabinet and/or ACPO were collectively institutionally responsible for the change.

What of the fourth sense of collective responsibility, collective *moral* responsibility? Collective moral responsibility is a species of joint responsibility. Accordingly, each agent is individually morally responsible, but this is conditional; it is based on the others being likewise individually morally responsible. (For more detail on this see Chapter 1.2.1.) There is interdependence in respect of moral responsibility. This account of collective moral responsibility arises naturally out of the account of joint actions. It also parallels the account given of individual moral responsibility.

Thus we can make our second preliminary claim about moral responsibility:

If agents are collectively responsible for a joint action or omission (or the realization of a foreseen or reasonably foreseeable outcome of that action or omission), in the first or second or third senses of collective responsibility, and if the joint action, omission, or outcome is morally significant, then—other things being equal—the agents are collectively

morally responsible for that action, omission, or outcome, and—other things being equal—ought to attract moral praise or blame, and (possibly) punishment or reward for bringing about the collective end of the action and/or its outcome.

As is the case with the parallel account of individual moral responsibility, there are crucial “other things being equal” clauses to provide for the possibilities that the agents in question either lack the requisite moral capacities—and so cannot be held morally responsible—or are possessed of moral capacities but in the circumstances in question have an excuse or justification for their joint actions and omissions, and for the outcomes of such actions and omissions.

Notice that there can be cases where the morally significant collective end of a joint action is realized, yet one individual (or a minority) **(p.153)** fails to successfully perform his contributory individual action, and cases where the morally significant collective end of a joint action is not realized because most fail to perform their contributory actions, yet one individual (or a minority) successfully performs his contributory individual action.

Consider the cases in which one individual (or a minority<sup>10</sup>) fails to successfully perform his contributory action. Assuming the individual (or minority) had the collective end in question (and, therefore, tried, albeit unsuccessfully, to perform his individual contributory action), the individual shares in the collective moral responsibility for the realization of the collective end, notwithstanding his individual failure to perform his contributory action. For, as was the case with the other agents, the individual had the collective end in question. Moreover, as was also the case with the other agents, the individual (indirectly) causally contributed to the realization of the collective end, notwithstanding his failure to perform his contributory action. He made an indirect causal contribution since the other individuals acted in part on the basis of their beliefs that the individual in question would perform his contributory action. Nevertheless, the failure of such an individual to perform his individual contributory action reduces his share of the collective moral responsibility for the realization of the collective end.

Now consider cases in which the morally significant collective end is not realized due to the fact that most fail to perform contributory actions, yet one individual (or a minority) performs his. Once again, assuming all the individuals had the collective end in question (and, therefore, tried, albeit unsuccessfully, to perform their contributory actions), then the individual shares in the collective moral responsibility for the failure to realize the collective end, notwithstanding his individual success in performing his contributory action. For, as was the case with the other agents, the individual had the collective end in question, and that end was not realized; in short, each agent, including the individual in question, failed to realize an end each had (the collective end), and each failed to make a

causal contribution to that end. Nevertheless, the success of such an individual in performing his own individual contributory action reduces his share of the collective moral responsibility for the failure to realize the collective end. In response to this it might be argued that the individual **(p.154)** cannot have a share in the collective *moral* responsibility for the failure because, after all, he had the collective end in question and performed his contributory action; he did all that he could reasonably have been expected to do. Certainly, he is not morally culpable or blameworthy, but then neither are the others morally culpable or blameworthy, given they tried to perform their own contributory actions. The theoretical conclusion to be drawn at this point is twofold: (1) moral responsibility, including collective moral responsibility, should not be equated with culpability/nonculpability or blameworthiness/praiseworthiness; and (2) agents can be (individually or collectively) morally responsible for failing to realize an outcome, even if they did all that can be reasonably expected of them; responsibility is not simply a matter of possession of the relevant subjective states, such as intentions and ends.

It is consistent with this that if an individual (or minority) *culpably* failed to realize his or her individual end, yet knew that the collective end would nevertheless be realized, then that individual does *not* share in the collective moral responsibility for the successful outcome, since, for one thing, the individual did not, in fact, have the collective end. It is also consistent with the above that if an individual (or minority) *culpably* failed to realize his or her individual end in the knowledge that, as a consequence of this culpable failure, the collective end would not be realized, then the individual (a) does not have the collective end, and (b) is individually morally responsible for the collective failure (of the others) to realize the collective end. So there is no collective moral responsibility, let alone collective moral culpability, for the failure.

### 5.5 Distributing Moral Responsibility

In light of our account of collective moral responsibility, what sense can we now make of the police killing of Jean Charles de Menezes? Before doing so, I note that institutional arrangements such as the one in question—in which there is a separation of sequentially performed roles and associated responsibilities (e.g., between members of the surveillance team and the firearms officers), but nevertheless a common further end, or collective end (e.g., prevention of a suicide bombing)—involve what I have referred to elsewhere as a “chain of institutional and moral responsibility.”<sup>11</sup> In **(p.155)** chains of institutional and moral responsibility: (1) each participant aims at the collective end constitutive and distinctive of their particular institutional role (e.g., that of member of the surveillance team); (2) the occupants of any given constitutive role (the links in the chain) perform their role-based actions sequentially with the actions of the occupants of the other roles (e.g., the actions of the surveillance team are performed prior to actions of the firearms officers), and; (3) in doing so, all the participants aim (or should be aiming) at a collective end (e.g., preventing the

suicide bombing) that is an end further to those ends that are both constitutive and distinctive of their particular roles. Moreover, all the participants (at least, in principle) share in the *collective responsibility* for the realization of this end (or the failure to realize this end, as the case may be).

The first point is that, as noted already, collective moral responsibility for an outcome is consistent with individual moral responsibility for individual actions that are in part constitutive of some joint action, omission, or outcome. As we have seen, the individual members of the surveillance team were collectively (jointly) morally responsible for failing to clearly communicate to the control room whether or not Menezes was Osman—or that they were uncertain in this regard. Moreover, Commander Dick is morally responsible for failing to see to it that Menezes was stopped prior to his entering the underground station. Finally, the two firearms officers were collectively (jointly) morally responsible for failing to provide themselves with good and decisive evidence for the proposition that Menezes was a suicide bomber and a mortal threat to the train passengers. Here I stress that these failures all had mitigating factors.

The second point is that each of these failures was a necessary condition for the outcome; that is, the outcome that may be described as the killing of an innocent person. This second point gives rise to the question of whether the members of the surveillance team, Commander Dick, and the firearms officers are collectively morally responsible for that outcome, albeit none individually intended the outcome and none individually foresaw the outcome. I suggest that, notwithstanding that the failure of each might have been a necessary condition for the outcome, this causal chain was not accompanied by a collective end (so there was no joint action or intentional joint omission). Moreover, the members of the group did not, as a group, foresee the outcome; indeed, not even one of these individuals foresaw the outcome.

Could the members of the group reasonably have foreseen that the consequences of their actions would be the killing by police of an innocent **(p. 156)** person, bearing in mind that they had, and ought to have had, as part of their collective end to avoid taking innocent life? Surely not all of them, or even most of them, could reasonably have foreseen this outcome. For example, the members of the surveillance team could not reasonably have foreseen that that an innocent person would be killed. Accordingly, the members of the team of police officers in question—members of the surveillance team, Commander Dick, and the two firearms officers—were not collectively morally responsible for the death of an innocent person, Jean Charles de Menezes. Were the members of some subset of the team of police officers collectively morally responsible for the death of Menezes? The most obvious candidates for members of such a subset are the two firearms officers, since they did the shooting. Presumably, they were collectively morally responsible for shooting Menezes dead, albeit, for the reasons given above, neither was morally culpable. However, the theoretical

point to be made here is that they were only one link (the final link) in the chain of institutional and moral responsibility. So this collective moral responsibility of the two firearms officers does not embrace the other police involved in the death of Menezes.

Notwithstanding the conclusion that the members of the team of police officers were not collectively morally responsible for killing Menezes, it could still be argued that they were collectively morally responsible for failing to ensure that an innocent person was not killed. After all, the members of the team had—as they ought to have had—the morally significant collective end of avoiding or, at least, minimizing loss of innocent life.<sup>12</sup> Obviously, this collective end was achievable, but in fact it was not achieved. Moreover, each (or, at least most, of the police officers apparently failed in respect of some or other of his or her institutional and moral duties, and did so in a manner that contributed to the failure to realize this collective end—the avoidance of loss of innocent life. In this respect, the members of the surveillance team, Commander Dick, and the two firearms were collectively morally responsible, albeit not morally culpable. I further suggest that each had a share in this collective responsibility; that is, each was partially responsible jointly with the others, but none was fully morally responsible.

### **(p.157)** 5.6 Conclusion

In this chapter I have analyzed the morality of the use of lethal force by police against a (potential) suicide bomber in a well-ordered jurisdiction in a liberal democratic state. Given that such operations involve a team or teams of police officers with different roles (e.g., surveillance officers and firearms officers), the question arises as to who is morally responsible for failures leading to loss of innocent life. Specifically, in the real-life scenario analyzed, the killing of Menezes by London police in 2005, the question arose as to who was responsible for this killing of an innocent person, mistakenly believed to be a suicide bomber. I have argued that such cases typically involve collective moral responsibility at various levels and in various respects. Three key theoretical claims relevant to this argument are: (1) the individual moral responsibility for deliberately killing or refraining from killing another human being cannot be alienated; (2) collective moral responsibility, properly understood, is a species of relational individual moral responsibility—namely, joint moral responsibility; (3) police scenarios of the kind in question involve chains of institutional and moral responsibility, and the individual participants in such a chain are collectively morally responsible for its foreseeable and avoidable endpoint; (4) an individual participant in a morally required joint action (omission) scenario that fails is not morally culpable if she or he did all that could be reasonably be expected, but might, nevertheless, have a (diminished) share in the collective moral responsibility for the failure to realize the collective end she or he was aiming at; (5) Arguably, in the Menezes shooting, the members of the surveillance team, Commander Dick, and the two firearms officers were collectively morally



responsible, albeit not morally culpable, for failing to avoid the loss of innocent life.

### Notes:

(1.) An earlier version of the material in this chapter appeared in Part 2 (written by Miller) of Gordon and Miller, "The Fatal Police Shooting of Jean Charles de Menezes."

(2.) See Independent Police Complaints Commission (IPCC), *Stockwell One: Investigation into the Shooting of Jean Charles de Menezes at Stockwell Underground Station* (February 2007), [http://webarchive.nationalarchives.gov.uk/20100908152737/http://www.ipcc.gov.uk/stockwell\\_one.pdf](http://webarchive.nationalarchives.gov.uk/20100908152737/http://www.ipcc.gov.uk/stockwell_one.pdf)

(3.) See, for example, John Martin Fischer and Mark Ravizza, *Responsibility and Control: A Theory of Moral Responsibility* (Cambridge: Cambridge University Press, 1998).

(4.) Relevant legal cases here are the "Blackburn cases," principally *R v. Metropolitan Police Commissioner, ex parte Blackburn* (1968) 2 QB 118, cited in Keith Bryett, Arch Harrison, and John Shaw, *An Introduction to Policing: The Role and Function of Police in Australia*, Vol. 2 (Sydney: Butterworths, 1994), 43, in which Lord Denning considered the Commissioner of the London Metropolitan Police "to be answerable to the law and to the law alone" in response to a demand for *mandamus* from a plaintiff seeking to get the courts to require police intervention; and *Fisher v. Oldham Corporation* (1930) 2 KB 364, cited as above at 42, in which the court found the police service was not vicariously liable in virtue of the original authority of the office of constable. Concerning the exercise of original authority in decisions to arrest, in some jurisdictions, proceeding by summons has increased significantly and officers do not possess original authority in respect of any part of the summons process. To this extent, their original authority has diminished.

(5.) A concept very close to original authority is sometimes referred to as a species of discretionary power, namely the concept of a discretionary decision that cannot be overridden or reversed by another official. See Dworkin, *Taking Rights Seriously*, 32. Here we need to distinguish a decision that cannot, as a matter of fact, be overridden, such as the use of deadly force by a lone officer in the field, and a decision that cannot be overridden as a matter of law. Only the latter can be referred to as a species of authority.

(6.) Miller, *Moral Foundations of Social Institutions*, 186–188.

(7.) See Miller and Gordon, "The Fatal Police Shooting of Jean Charles de Menezes," Part 1.

(8.) Miller, "Collective Moral Responsibility." For a related analysis, see Gregory Mellema, *Individuals, Groups, and Shared Responsibility* (New York: Peter Lang, 1988). See also Larry May, "Vicarious Agency and Corporate Responsibility," *Philosophical Studies* 43 (1983): 69–82; and David Copp, "The Collective Moral Autonomy Thesis," *Journal of Social Philosophy* 38, no. 3 (2007): 369–388. For criticisms of Copp, see Miller, "Against the Moral Autonomy Thesis."

(9.) Miller, "Joint Action," 291–295; Miller, *Social Action*, 174–179; Miller, *Moral Foundations of Social Institutions*, 50–52; Seumas Miller, "Joint Epistemic Action: Some Applications," *Journal of Applied Philosophy* (online first, 2016).

(10.) Note that the arguments below are also valid in the case of minorities, as opposed to individuals. However, in order to reduce verbal clutter, I won't refer to minorities on every occasion.

(11.) Seumas Miller, "Police Detectives, Criminal Investigations and Collective Moral Responsibility," *Criminal Justice Ethics* 33, no. 1 (2014): 21–39.

(12.) They also had the collective end of killing a suicide bomber, if there was one and if it was necessary to do so. Given that, as it turned out, there was no suicide bomber, this collective end was otiose.

Access brought to you by: