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Execution Without Trial: Police Homicide and the Constitution*

*Lawrence W. Sherman***

The national debate over the State's right to take life has been sidetracked, in a sense, on the issue of "capital punishment," or more precisely, execution after trial. Far more deadly in impact is the body of law permitting execution without trial through justified homicide by police officers. In 1976, for example, no one was executed and 233 persons were sentenced to death after trial, yet an estimated 590 persons were killed by police officers justifiably without trial.[1] Even in the 1950s, when an average of seventy-two persons were executed after trial each year,[2] the average number of police homicides was 240 a year, according to official statistics,[3] and 480 a year according to one unofficial estimate.[4] Since record keeping began in 1949, police actions have been by far the most frequent method with which our government has intentionally taken the lives of its own citizens.

The significance of police homicide is not, however, derived solely from its frequency. Equally important is the nature of the crimes that justify police use of deadly force. Unlike executions after trial, executions before trial are not limited to extremely serious crimes such as murder, rape and treason. Twenty-four states follow what is thought to be the traditional common-law doctrine, which permits the use of deadly force whenever necessary to prevent a felony or to arrest someone whom an officer has reasonable grounds

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1. The official death records of the National Center for Health Statistics, preserved on tape, show a total of 295 deaths by legal intervention of police for 1976. Independent tests of the death record data, however, reveal that they are rather consistently under-reporting police homicides by about 50%. Sherman & Langworthy, *Measuring Homicide by Police Officers* 70 J. CRIM. L. & CRIMINOLOGY 546 (1979). On the number of post-trial death sentences, see U.S. DEP'T OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, NATIONAL CRIMINAL JUSTICE INFORMATION AND STATISTICS SERVICE, CAPITAL PUNISHMENT, 1976: NATIONAL PRISONER STATISTICS BULLETIN SD-NPS-CP5 at 3 (1977) [hereinafter cited as CAPITAL PUNISHMENT STATISTICS].

2. CAPITAL PUNISHMENT STATISTICS, *supra* note 1, at 13.

3. VITAL STATISTICS OF THE UNITED STATES, 1950-1959 (Annual).

4. *See* note 1 *supra.*

to believe has committed a felony[5]—any felony, including, in at least one state, spitting on a policeman.[6] Eight states have adopted the more restricted version of this common-law doctrine proposed by the Model Penal Code;[7] ten other states have adopted statutes allowing police to use deadly force to arrest suspects of "violent" or "forcible" felonies,[8] which in some states may include burglary.[9] Even under these relatively recent restrictions, most police officers are still legally empowered to shoot unarmed fleeing burglary suspects in the back.

The available evidence suggests that when the police do use deadly force, their targets are often suspects of less serious crimes.[10] Approximately half of the people at whom police shots were fired in the several cities studied have not carried guns, and the proportion of those shot while fleeing is substantial.[11] To be sure, many

5. Comment, *Deadly Force to Arrest: Triggering Constitutional Review,* 11 HARV. C.R.-C.L. L. REV. 361, 368 (1976); Note, *Justifiable Use of Deadly Force by the Police: A Statutory Survey,* 12 WM. & MARY L. REV. 67 (1970). On the common law, see, e.g., 2 HALE'S P.C., 76-77.

6. Comment, *Policeman's Use of Deadly Force in Illinois,* 48 CHI.-KENT. L. REV. 252, 252 (1971).

7. The Code provides, in part:

> The use of deadly force is not justifiable under this Section unless:
>
> (i) the arrest is for a felony; and
>
> (ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and
>
> (iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and
>
> (iv) the actor believes that:
>
> (1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or
>
> (2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

MODEL PENAL CODE, § 3.07(2)(b) (1962).

8. Sherman, *Restricting the License to Kill—Recent Developments in Police Use of Deadly Force,* 14 CRIM. L. BULL. 577, 581 (1978).

9. Comment, *supra* note 5, at 365 n.34.

10. The following table is constructed from four empirical studies of police use of deadly force: (1) A study of the 32 persons killed by Philadelphia police officers in 1950-1960. *See* Robin, *Justifiable Homicides by Police,* 54 J. CRIM. L.C. & P.S. 225 (1963). (2) A study of 911 police killings reported in newspapers around the country in 1965-69. *See* Kobler, *Figures (and Perhaps Some Facts) on Police Killings of Civilians in the United States, 1965-1969,* 31 J. SOC. ISSUES 185 (1975). (3) A study of police department records, producing pooled data for 1973 and 1974 in Birmingham, Alabama; Oakland, California; Portland, Oregon; Kansas City, Missouri; Indianapolis, Indiana; and Washington, D.C., and in Detroit for all of 1973 and part of 1974, on 320 police firearms discharges in which a bullet wounded or killed someone. *See* C. MILTON, J. HALLECK, J. LARDNER, G. ABRECHT, POLICE USE OF DEADLY FORCE (1977) [hereinafter cited as C. MILTON]. (4) A study of 5,111 incidents in which New York City Police Department officers discharged their weapons, regardless of impact, during 1971-1975. *See* J. Fyfe, Shots Fired: A Typological Examination of New York City Police Firearms Discharges (1978) (unpublished Ph.D. dissertation, School of Criminal Justice, State University of New York at Albany).

police homicides occur in defense of life, although the data are not precise enough to determine how many. There is no doubt, however, that many executions without trial occur in response to crimes against property without any defense justification.

A review of the legal history of police homicide shows that the rule that any felony warrants the use of deadly force is a common law anachronism to which our courts and legislatures continue to cling long after the Crown Courts have treated the doctrine as dead and Parliament has laid it to rest through criminal law reform. More important, an analysis of the constitutional status of the any-felony rule shows that it should be held to violate the due process clause

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Events Preceding Police Use of Deadly Force

Event Type	STUDY FINDINGS*							
	Robin, 1963 (N=32)		Kobler, 1975b (N=911)		Milton, *et al*, 1977 (N=320)		Fyfe, 1978 (N=5111)	
	%	Rank	%	Rank	%	Rank	%	Rank
Disturbance Calls: Family Quarrels Disturbed Persons Fights Assaults "Man with a gun"	31	(2)	17	(4)	32	(1)	25	(2)
Robbery: In Progress Pursuit of Suspect	28	(3)	20	(3)	21	(2)	39	(1)
Burglary: In Progress Larceny Tampering with Auto Pursuit of Suspects	37	(1)	27	(2)	20	(3)	7	(4)
Traffic Offenses: Pursuits Vehicle Stops	3	(4)	30**	(1)	8	(5)	12	(3)
Officer Personal Business: Dispute Horseplay Accident	?	—	?	—	4	(6.5)	?	—
Stakeout/Decoy	?	—	?	—	4	(6.5)	?	—
Other	0	(5)	6	(5)	11	(4)	6	(5)

*Percentages may not total 100 due to rounding
**Includes other misdemeanors not listed above

of the fifth amendment, the ban on cruel and unusual punishment of the eighth amendment, and the equal protection clause of the fourteenth amendment. Both the historical and constitutional lines of inquiry suggest that only the defense-of-life doctrine is appropriate to govern police use of deadly force.

I. THE ANY-FELONY RULE: AN HISTORIC ANACHRONISM

The original meaning of the common-law justification for homicide to effect a felony arrest was very different from its current meaning. A barbaric legal doctrine[12] transplanted to England before the common law began,[13] the justification arose at a time when (1) there were no accurate and reliable weapons available that could kill at any distance, (2) the label "felony" was reserved for only the most serious crimes, all of which were punishable by death, and (3) there was virtually no communication among law enforcement officers in different communities. Each of these three elements of the historical context has changed drastically over the centuries, and with it the practical meaning of the doctrine.

The medieval weaponry used in "hue and cry"[14] during the early years of the any-felony rule was apparently limited to knives, swords, farm tools, and halberds. The longbow was not introduced until 1415,[15] and in 1504 the Tudors restricted the crossbow to lords

11. Of the studies cited in note 10, *supra,* Kobler, at 188, found 50% of those shot by the police to have carried guns at the time and 25% to have been completely unarmed. MILTON, at 22, found 45% to have had guns and 43% to have been unarmed. Fyfe, at IV-30, found 54% to have had guns, and 30% to have lacked a gun or a knife. Another study found 53% of the 1969-70 police homicide victims in Chicago to have carried a gun, and 23% to have lacked any weapon. Harding & Fahey, *Killings by Chicago Police, 1969-70: An Empirical Study,* 46 S. CAL. L. REV. 284, 292-93 (1973).

Kobler, at 165, also found that, measured by a defense-of-life standard, only 40% of the killings would have been justified; the rest were either killings of suspects in flight or to prevent a nonviolent crime. In contrast, Fyfe, at 279, found that 71.5% of the police firearms incidents in his New York sample were reportedly in defense of life, a finding consistent with the tradition of relative restraint in that department. Other cities are quite different. A study of Philadelphia police use of deadly force in 1970-74 found that approximately 45% of those people shot had been fleeing at the time, and in approximately 25% of the incidents the shooting victim was both fleeing and unarmed. A study by the Boston Police Department found that 102 of the 210 targets of Boston police firearms discharges in 1970-73 were fleeing at the time, and 80 of the 102 were unarmed. *See* Mattis v. Schnarr, 547 F.2d 1007, 1019-20 n.30 (8th Cir. 1976).

12. *See* 4 W. BLACKSTONE, COMMENTARIES 180 (1800) (citing VON STIERNHOOK, TREATISE ON GOTHIC LAW).

13. W. MELVILLE-LEE, A HISTORY OF POLICE IN ENGLAND 35 (1901).

14. "Hue and cry," under old English law, refers to the loud outcry with which robbers, burglars, and murderers were pursued. All who heard the outcry were obliged to join in pursuit of the felon. *See* 4 W. BLACKSTONE, *supra* note 12, at 293.

15. L. SMITH, THIS REALM OF ENGLAND 1399-1688, at 15 (1966).

and large landowners.[16] Henry VIII allowed noblemen and wealthy commoners to own guns,[17] but "[t]he musket of Shakespeare's time could not reach an enemy thoughtless enough to stand farther than eighty or ninety yards away."[18] A "typical" London street brawl in the reign of Henry VIII was put down by a band of constables, none of whom were armed with any weapons other than those used in hand to hand combat.[19] In this technological context, then, the practical meaning of the deadly force doctrine was that suspects could be killed if they resisted in a hand to hand struggle, but it did not mean that they could be killed from a distance behind while they were in flight.

That meaning changed in the nineteenth century with the invention of the revolver. Police officers in large American cities, who had been disarmed since the decline of Indian attacks before the Revolutionary War, began to carry revolvers in the 1850s after criminals used revolvers to shoot and kill their colleagues.[20] The dumping of thousands of army revolvers on the surplus market after the Civil War speeded the general rearmament of an increasingly violent urban society[21] and led to official acceptance of police use of revolvers.[22] The immediate effect of this change was that the police could, and did, shoot fleeing suspects who were posing no immediate threat to anyone.

The effect of the revolution in weaponry on police homicide was compounded by the expansion in the scope of felonies. Originally reserved under the common law for felonious homicide, mayhem, arson, rape, robbery, burglary, larceny, prison breach, and rescue of a felon, all punishable by death,[23] the felony label was attached to many more crimes after the advent of the revolver.[24] Moreover, while the scope of felonies was expanding, the scope of capital felonies contracted, leaving the death penalty in most states only applicable to treason and crimes endangering life or bodily security.[25]

16. L. KENNETT & J. ANDERSON, THE GUN IN AMERICA 22 (1975).

17. *Id.* at 23.

18. R. SHERRILL, THE SATURDAY NIGHT SPECIAL 4 (1973).

19. G. ELTON, POLICY AND POLICE 4, 5 (1972).

20. L. KENNETT & J. ANDERSON, *supra* note 16, at 151; R. LANE, POLICING THE CITY 103-04 (1967); J. RICHARDSON, THE NEW YORK POLICE 113 (1970).

21. L. KENNETT & J. ANDERSON, *supra* note 16, at 91.

22. This did not occur without the strenuous objections of some police commanders who thought the use of revolvers was cowardly. *See* W. MILLER, COPS AND BOBBIES, 51-53 (1977).

23. R. PERKINS, CRIMINAL LAW 10-11 (2d ed. 1969). As Blackstone noted, "The idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them. . . ." 4 W. BLACKSTONE, *supra* note 12, at 98.

24. Comment, *Use of Deadly Force in the Arrest Process,* 31 LA. L. REV. 131, 132-33 (1970); *see* 4 W. BLACKSTONE, *supra* note 23.

25. Furman v. Georgia, 408 U.S. 238, 333-41 (1972) (Marshall, J., concurring).

These changes in the legal context of police homicide significantly altered the meaning of the common-law any-felony doctrine. The changes greatly expanded the number of situations in which the police could kill without trial, and they created a gross difference in proportion between the severity of the post-trial penalty and the severity of the penalty for attempting to escape arrest.

While advances in weapon technology and changes in the criminal law were expanding the scope and potency of the any-felony rule, one of the primary reasons for its existence was fading. By the late nineteenth century, the rise of bureaucratic police agencies with the capacity to communicate information about suspects at large was undermining the necessity for the use of deadly force in the apprehension of felons. The escaping suspect of eleventh-century England might establish a new life in another community with little fear of eventual capture, and the social goal of retribution was thus easily frustrated by a fleeing felon. By the eighteenth century, however, Justice Fielding was circulating descriptions of wanted criminals outside of London,[26] and by the early twentieth century American detectives consulted their colleagues in other cities about various thieves and their whereabouts.[27] The effect of the increasingly sophisticated apprehension techniques meant that it was no longer absolutely necessary to kill a suspect, if his identity were known, in order to insure his eventual capture.

These changes in the scope and impact of the any-felony doctrine did not escape public notice and criticism. An 1858 *New York Times* editorial questioned one of the first police shootings there, making a value judgment supported by the constitutional analysis below. The *Times* suggested, "if a policeman needed to defend his life, the use of force was permissible, but if he was chasing a suspect, he had no right to shoot the man. A policeman either had to be swift enough to catch the suspect or justice must be lost."[28] Another *Times* editorial the same year expressed grave concern about a possible future in which "[e]very policeman is to be an absolute monarch, within his beat, with complete power of life and death over all within his range, and armed with revolvers to execute his decrees on the instant, without even the forms of trial or legal inquiry of any kind,"[29] a future that, to a large extent, has been realized.

These changes did not escape the notice of the courts. As early

26. P. PRINGLE, HUE AND CRY 133 (1955).

27. THE PROFESSIONAL THIEF, BY A PROFESSIONAL THIEF (E.H. Sutherland, ed.) 112 (1937).

28. *Quoted in* L. KENNETT & J. ANDERSON, *supra* note 15, at 150.

29. *Quoted in* MILLER, *supra* note 21, at 146.

as 1888 the Supreme Court of Alabama, observing the legislative inflation of crimes to felony status, pronounced that "the preservation of human life is of more importance than the protection of property." The court restricted the common-law rule by disallowing deadly force in the prevention of secret felonies not accompanied by force.[30] Several other decisions grappled with the obsolete common-law standard,[31] but generally the courts were, as one commentator noted, "reluctant to abandon a convenient pigeon-hole disposal of cases on the basis of whether the crime was a felony or a misdemeanor."[32]

Meanwhile, the English common law had already effectively abandoned the absolute right to kill to prevent felonies or apprehend felons. It replaced the any-felony doctrine with a balancing test emphasizing necessity and proportion:

> The circumstances in which it can be considered reasonable to kill another in the prevention of crime must be of an extreme kind; they could probably arise only in the case of an attack against a person which is likely to cause death or serious bodily injury and where killing the attacker is the only practicable means of preventing the harm. *It cannot be reasonable to kill another merely to prevent a crime, which is directed only against property.*[33]

This principle was so well established in case law that by 1879 the Criminal Code Bill Commission took it as a "great principle of the common law" that the "mischief done by [the use of force to prevent crimes should not be] disproportioned to the injury or mischief which it is intended to prevent."[34] Moreover, a close reading of the original common-law codifiers Foster, Blackstone, Hawkins, and East reveals so many internal contradictions and exceptions to the right to kill all felons[35] that one may question whether there ever was such a rule. Thus, in 1965 the Criminal Law Revision Committee reported to Parliament that despite "old authority" for the right to kill all felons, "the matter is very obscure; . . . owing no doubt to the restraint of the police there is a dearth of modern authority on it;" and concluded that their central proposal to reclassify crimes would have no effect on police powers since "the likelihood that

30. Storey v. State, 71 Ala. 329, 340 (1882) (involving the theft of a horse).

31. *E.g.*, United States v. Clark, 31 F. 710, 713 (8th Cir. 1887); Reneau v. State, 70 Tenn. 720 (1879).

32. Pearson, *The Right to Kill in Making Arrests*, 28 MICH. L. REV. 957, 976 (1930).

33. Regina v. McKay [1957] V.R. 560, 572-73 (Smith, J., dissenting); 11 HALSBURY'S LAWS OF ENGLAND § 1179 (4th ed. 1976) (emphasis added). The question of deadly force to prevent flight is either implied in this formulation, or so far beyond the pale that the current formulations make no mention of it. *See also* Lanham, *Killing the Fleeing Offender*, 1 CRIM. L.J. (Australia) 16, 17-18 (1977).

34. Quoted in Regina v. McKay, [1957] V.R. 560, 572-73 (Smith, J., dissenting).

35. *Id.* at 572.

anything would turn nowadays on the distinction between felony and misdemeanor is very slight."[36]

In this country, however, the use of the distinction remained anything but slight. As recently as 1977 the Sixth Circuit upheld a Tennessee statute under which the Memphis police shot and killed a sixteen-year-old burglary suspect fleeing from a hardware store.[37] Noting that "the legislative bodies have a clear state interest in enacting laws to protect their own citizens against felons," and that the statute "merely embodied the common law which has been in force for centuries and has been universally recognized"[38] (something that we have seen is clearly *not* the case in English common law), the court rejected a broad constitutional challenge to the statute. An argnment that the statute violated the eighth amendment's ban on cruel and unusual punishment was rejected on the grounds that police homicide is not "punishment."[39] The assertion that the statute violated due process protections was rejected on the grounds that state interests served by police homicide were more important than an individual's right to trial before being killed by police.[40] While recognizing that the Eighth Circuit had recently held that a similar Missouri statute did violate fifth and fourteenth amendment due process guarantees,[41] the Sixth Circuit criticized that decision for intruding into legislative matters.[42] Finally, the Sixth Circuit case dismissed a claim of racial discrimination in violation of the fourteenth amendment because "both white and black fleeing felons . . . have been fired upon or shot by Memphis police."[43] The Supreme Court denied certiorari.[44]

The Sixth Circuit's cursory treatment of the threshold issue of whether police homicide constitutes punishment, however, is hardly definitive. Measured against well established Supreme Court standards, police homicide clearly constitutes punishment. When police homicide is viewed as punishment, the fifth, fourteenth, and eighth amendment arguments that all present police homicide statutes

36. CRIMINAL LAW REVISION COMMITTEE, SEVENTH REPORT: FELONIES AND MISDEMEANOURS 7 (1965); 18 PARLIAMENTARY PAPERS (House of Commons and Command) (1964-65).

37. Wiley v. Memphis Police Dep't, 548 F.2d 1247 (6th Cir.), *cert. denied* 434 U.S. 822 (1977).

38. *Id.* at 1252.

39. *Id.* at 1251.

40. *Id.* at 1252.

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

42. Wiley v. Memphis Police Dep't, 548 F.2d 1247, 1252-53 (6th Cir.), *cert. denied* 434 U.S. 822 (1977).

43. *Id.* at 1254.

44. Wiley v. Memphis Police Dep't, 434 U.S. 822 (1977).

and case law are constitutionally unsound are much more compelling.

II. CONSTITUTIONAL ANALYSIS

A. *The Characterization of Police Homicide as Punishment*

The often elusive definition of punishment in philosophy and jurisprudence has been a "major obsession with the English linguistic philosophers of this century."[45] The definitions vary sharply, with distinctions focusing upon the intent of the putative punisher, or the purpose of inflicting pain or suffering.[46] As the recent ruling in *Bell v. Wolfish*[47] reveals, the issue of intent has likewise proved to be divisive in the Supreme Court's efforts to define deprivations that constitute punishment. Justice Rehnquist, delivering the opinion of the Court, held that in determining whether particular conditions accompanying pretrial detention amount to punishment in the constitutional sense a "court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose."[48] "Absent a showing of an expressed intent to punish," Justice Rehnquist continued, "that determination will turn on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it],' "[49] (quoting *Kennedy v. Mendoza-Martinez*,[50] apparently as the controlling case on the subject). Justice Stevens, however, pointed out in his dissent that the *Mendoza* Court also recognized that evidence of intent would sometimes be "unavailable or untrustworthy."[51] "In such cases," Justice

45. G. NEWMAN, THE PUNISHMENT RESPONSE 7 (1978).

46. Professor Hart, for example, suggests five defining characteristics of punishment:

(1) It must involve pain or other consequences normally considered unpleasant
(2) It must be for an offense against legal rules
(3) It must be imposed on an actual or supposed offender for his offense
(4) It must be intentionally administered by human beings other than the offender
(5) It must be imposed and administered by an authority constituted by a legal system against which the offense is committed.

H. HART, PUNISHMENT AND RESPONSIBILITY 4, 5 (1968).

Professor Packer, in contrast, finds that definition insufficiently clear as to the distinction between the purposes and effects of punishment, and proposes a sixth defining characteristic of punishment: "It must be imposed for the dominant purpose of preventing offense against legal rules or of exacting retribution from offenders, or botb." H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 21-23, 31 (1969).

47. 99 S. Ct. 1861 (1979).
48. *Id.* at 1873.
49. *Id.* at 1873-74.
50. 372 U.S. 144 (1963).
51. 99 S. Ct. at 1899.

Stevens said, "the [*Mendoza*] Court stated that certain other 'criteria' must be applied 'to the face' of the official action to determine if it is punitive."[52] Even Justice Rehnquist, whose opinion in *Bell v. Wolfish* reveals a very restrictive conception of what constitutes punishment, cited the seven *Mendoza* criteria approvingly. Although he did not, as Justice Marshall pointed out,[53] make full use of them, he nonetheless refers to them as "useful guideposts in determining" what is punishment, calling them "the tests traditionally applied to determine whether a governmental act is punitive in nature."[54]

With the original intent of the Gothic chieftains in establishing the kill-to-arrest rule lost in history, and determination of the subjective intent of police officers acting within the rule vulnerable to "hypocrisy and unconscious self-deception,"[55] it is necessary to turn to the criteria used in *Mendoza* and apply them "to the face" of police homicide to determine whether that action constitutes punishment. The decision offered seven criteria:

> [1] Whether the sanction involves an affirmative disability or restraint,
> [2] whether it has historically been regarded as a punishment,
> [3] whether it comes into play only on a finding of *scienter*,
> [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence,
> [5] whether the behavior to which it applies is already a crime,
> [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and
> [7] whether it appears excessive in relation to the alternative purpose assigned. . . .[56]

The *Mendoza* Court noted that all of these criteria are relevant to the inquiry, although they "may often point in differing directions."[57] All seven criteria, however, suggest that police homicide constitutes punishment, as is clear when each criterion is examined.

(1) *Whether the sanction involves an affirmative disability or restraint.* Recent pronouncements by the Court leave no doubt that the sanction of police homicide constitutes "an affirmative disability or restraint." It is not only a deprivation of rights, but a deprivation of "the right to have rights,"[58] not only a sanction, but a "unique" sanction. As Justice Brennan stated, "[i]n a society that so strongly affirms the sanctity of life, . . . the common view is that

52. *Id.*
53. *Id.* at 1887 (Marshall, J., dissenting).
54. *Id.* at 1873.
55. *Id.* at 1898 (Stevens, J., dissenting); H. PACKER, *supra* note 45, at 33.
56. 372 U.S. at 168-69.
57. *Id.* at 169.
58. Furman v. Georgia, 408 U.S. 238, 290 (1972) (Brennan, J., concurring).

death is the ultimate sanction."[59] Five members of the present Court have "expressly recognized that death is a different kind of punishment from any other which may be imposed in this country" and stated that "[f]rom the point of view of the defendant, it is different in both its severity and finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action."[60] The right to life has consistently been held fundamental and preeminent.[61] Its deprivation has the same effect no matter what the expressed purpose may be.

(2) *Whether it has historically been regarded as punishment.* The historical record clearly demonstrates that executions without trial, including the kill-to-arrest doctrine, were generally viewed as punishment. Thieves were often killed outright during the hue and cry, even after they had been captured. "Let all go forth where God may direct them to go," urged the tenth-century laws of Edgar; "Let them do justice on the thief."[62] Suspicion sufficed to convict thieves without any trial at all, and "execution in such cases often followed immediately on arrest."[63] According to the preamble to Act 24 of Henry VIII, it appears that the common law authorized the victims of crimes and attempted crimes to kill the criminal, regardless of whether it was necessary to prevent the felony.[64] In the twelfth and thirteenth centuries "outlaws could be beheaded by anyone, and a reward was paid for their heads under Richard I."[65] Abjurors of the realm (felons who had escaped into religious sanctuary and agreed to leave the country forever) who strayed from the highway on their journey to the sea could also be beheaded by anyone.[66] In the context of the times in which the kill-to-arrest doctrine evolved, it was clearly linked to a philosophy of summary justice that can only be viewed as punishment.

Modern commentators have taken the same view of the historical status of the doctrine. Professor Perkins notes that "as the felon had forfeited his life by the perpetration of his crime, it was quite

59. *Id.* at 286.

60. Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (Stevens, J., concurring).

61. Roe v. Wade, 410 U.S. 113, 157 (1973); Screws v. United States, 325 U.S. 91, 123 (1945); Johnson v. Zerbst, 304 U.S. 458, 463 (1938); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886); Mattis v. Schnarr, 547 F.2d 1007, 1018 (1976).

62. Quoted in T. CRITCHLEY, A HISTORY OF POLICE IN ENGLAND AND WALES (2d ed. 1972).

63. J. BELLAMY, CRIME AND PUBLIC ORDER IN ENGLAND IN THE LATER MIDDLE AGES 134 (1973).

64. *Cited in* Regina v. McKay, [1957] V.R. 560, 571-72 (Smith, J., dissenting).

65. R. HUNISETT, THE MEDIEVAL CGRONER 67 (1961).

66. *Id.* at 49.

logical to authorize the use of deadly force."[67] Another commentator on killing fleeing felons described "the extirpation [as] but a premature execution of the inevitable judgment" in the era of capital punishment for all felonies.[68] With the passing of that era, premature execution is of course more severe than the "inevitable judgment." The historical character of police homicide as punishment, however, is not altered by the modern disproportion between pretrial and post-trial sanctions.

(3) *Whether it comes into play only on a finding of* scienter. The basis and parameters of the *Mendoza* Court's "*scienter*" criterion are unclear. Of the two cases cited to support the relevance of *scienter* to a punishment characterization,[69] one in fact holds that penalties may constitute punishment regardless of *scienter*, apparently contradicting the point for which it was cited. The holding stated that, regardless of *scienter,* any fine imposed on an import merchant for underestimating the value of certain goods was "still punishment and nothing else."[70] The other case cited in *Mendoza* only mentions in passing that the exemption from a federal child labor "tax" of employers who do not know that their workers are underage suggests that the tax is really a penalty. The court in that case opined that, "[S]cienter is associated with penalties, not with taxes."[71] Neither case actually holds that punishment is only imposed after a finding of *scienter.*

The apparent contradictions notwithstanding, the Supreme Court has held that "the general rule at common law was that *scienter* was a necessary element . . . of every crime."[72] Regardless of criticisms of this usage,[73] one may proceed from it to infer that when an officer finds sufficient cause to believe someone is a felon and thus has met a requisite justification for killing him, the officer finds *scienter* at the same time. If the officer does not have probable cause to believe that *scienter* is present, then he does not have probable cause to believe the person is a felon, and killing is not justified. Justified police homicide therefore historically presumes *scienter,* and satisfies the apparent meaning of this *Mendoza* criterion of punishment.

(4) *Whether its operation will promote traditional aims of punishment—retribution and deterrence.* Police homicide clearly pro-

67. R. PERKINS, *supra* note 23, at 985.
68. Note, *Legalized Murder of a Fleeing Felon,* 15 VA. L. REV. 582, 583 (1929).
69. Helwig v. United States, 188 U.S. 605 (1902).
70. *Id.* at 612.
71. Child Labor Tax Case, 259 U.S. 20 (1921).
72. United States v. Balint, 258 U.S. 250, 251 (1922).
73. *See, e.g.,* R. PERKINS, *supra* note 23, at 771.

motes retribution, the first of the two "traditional aims of punishment" named by the *Mendoza* Court. As the dissent in *Mattis v. Schnarr,*[74] a recent Eighth Circuit decision, argued in support of the any-felony rule, which the court had found unconstitutional, "[t]here is no constitutional right to commit felonious offenses and to escape the consequences of those offenses." In that context, "consequences" strongly implies "just desserts," or retribution.

Whether police homicide, or indeed any punishment, actually promotes deterrence, the second of the two traditional aims named, may be an impossible question to answer.[75] If undisputed empirical evidence of a deterrent effect is required to evaluate whether a sanction is a punishment, then many social scientists would argue that few sanctions qualify. If, on the other hand, a deterrent effect need only be hypothesized for the sanction to be a punishment, then police homicide passes the test. The assumption by legal scholars that police homicide has a deterrent effect is reflected in the American Law Institute's debates over the issue. The deterrence of flight from arrest[76] and the deterrence of robbery[77] were both specifically mentioned, albeit with differences of opinion. The deterrence hypothesis is also implied in recent federal cases, such as *Jones v. Marshall,*[78] a Second Circuit opinion in which a three judge panel upheld Connecticut's common law permitting police to kill fleeing felons, observing that the states had the right to place a higher value on order than on the rights of suspects. The only way such a homicide could achieve order is through deterrence.

(5) *Whether the behavior to which it applies is already a crime.* All of the behavior to which police homicide applies is already a crime, or the officer must reasonably believe it to be a crime. There is, however, some question about *which* crime police homicide is

74. 547 F.2d 1007, 1023 (8th Cir. 1976).

75. J. GIBBS, CRIME, PUNISHMENT AND DETERRENCE (1975).

76. Professor Waite argued for extending the right to kill to arrest for all offenses in order to deter flight, for otherwise "we say to the criminal, 'You are foolish . . . if you submit to arrest. The officer dare not take the risk of shooting at you. If you can outrun him, outrun him and you are safe. . . . If you are faster than he is you are free and God bless you.' I feel entirely unwilling to give that benediction to the modern criminal." 9 ALI PROCEEDINGS 195 (1931), *quoted in* J. MICHAEL & H. WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION 81-82 n.3 (1940).

77. Judge Learned Hand once commented that "It has been constantly supposed here that if you are able to shoot a robber you are less likely to have a robber. I question that. I challenge it altogether. I don't believe that possibility figures at all in the commission of crime." 35 ALI PROCEEDINGS 258-334 (1958), *quoted in* Mattis v. Schnarr, 547 F.2d 1007, 1015 (8th Cir. 1976). While Judge Hand's remarks were directed specifically towards private citizens' rights to defend property, the *Mattis* court observed that he was speaking to the larger problem of justification to use deadly force in general. *Id.* at 1015 n.17.

78. 528 F.2d 132, 142 (2d Cir. 1975).

punishing. As Professor Mikell asked in his often quoted statement to the American Law Institute:

> May I ask what we are killing [the suspect] for when he steals an automobile and runs off with it? Are we killing him for stealing the automobile? . . . It cannot be . . . that we allow the officer to kill him because he stole the automobile, because the statute provides only three years in a penitentiary for that. Is it then . . . for fleeing that we kill him? Fleeing from arrest . . . is punishable by a light penalty, a penalty much less than that for stealing the automobile. If we are not killing him for stealing the automobile and not killing him for fleeing, what are we killing him for?[79]

No matter how little sense it makes in relation to the post-trial penalty, we are in fact killing the auto thief for the volatile combination of felony and flight, both of which are crimes.

(6) *Whether an alternative purpose to which it may rationally be connected is assignable for it.* The purposes of capture and crime prevention, rather than punishment, may no doubt be rationally connected to police homicide as alternatives to the purpose of punishment. Just as the *Wolfish* Court held that overcrowding and other disabilities imposed on pretrial detainees in a federal jail did not constitute punishment because they were merely an "inherent incident" of the objective of insuring detainee's presence at trial,[80] it could be argued that death is merely an inherent incident to insuring that felony suspects are captured and that felonies are prevented. By this logic, death from police homicide is not a punishment if the expressed intent of the officers using deadly force is to apprehend felony suspects.

An equally strong case, however, could be made that the presence of multiple purposes in a governmental action does not automatically grant preeminence to the non-punitive purpose. One purpose of prison systems in some states is the manufacture of license plates, but a penitentiary sentence could hardly be described as merely an inherent incident of a legitimate state interest in manufacturing license plates. Implicit in the *Wolfish* Court's reasoning is a judgment about the primary purpose of any governmental action that has more than one purpose. Punishment rather than apprehension can be judged the primary purpose of police homicide. As one court once noted, "[t]he reason for . . . killing felons . . . in attempts to arrest them . . . is obvious . . . . [T]he safety and security of society require the speedy arrest and punishment of a felon."[81]

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79. ALI PROCEEDINGS, 186-87, *quoted in* J. MICHAEL & H. WECHSLER, *supra* note 76.

80. 99 S. Ct. at 1873.

81. Holloway v. Moser, 193 N.C. 185, 136 S.E. 375, (1927), *quoted in* Pearson, *supra* note 32, at 964.

Unlike the other *Mendoza* criteria, this one is explicitly qualified by the succeeding criterion, which questions whether the possible alternative purpose to punishment appears excessive. No matter what the primary purpose of police homicide is judged to be, then, if it appears excessive in relation to a nonpunitive purpose, it must be defined as punishment. As Justice Stevens interprets *Mendoza* in his *Wolfish* dissent, "when there is a significant and unnecessary disparity between the severity of the harm to the individual and the demonstrated importance of the regnlatory objective, . . . courts must be justified in drawing an inference of punishment."[82]

(7) *Whether it appears excessive in relation to the alternative purpose assigned to it.* The disparity between the death of a suspect and the purposes of prevention (of nonviolent crimes) and capture is both significant and unnecessary, and therefore excessive in relation to those purposes. It is significant in the case of capture because, once again, the means used to prevent the suspect's escape is far more severe than the maximum penalty that would be imposed upon sentencing for all crimes (depending on the jurisdiction) except murder, treason, and rape. It is significant in the case of prevention of nonviolent crimes because the evil imposed is greater than the evil prevented. It is unnecessary in the case of capture because most suspects can eventually be recaptured, and in the case of prevention because nonlethal intervention is usually possible. A sanction that takes a life to prevent the theft of an ear of corn[83] or a chicken[84] cannot, in a society that values life, be other than excessive.

Each of the *Mendoza* criteria point to the conclusion that the use of deadly force to capture felons and prevent felonies constitutes punishment, and is therefore subject to the constitutional restraints on the use of punishment. Even if it were ruled not to be punishment, however, it is still a deprivation of rights subject to the due process requirements of the fifth and fourteenth amendments. Although a ruling that police homicide constitutes punishment has the added advantage of subjecting it to eighth amendment review, that review is generally reached only after due process guaranties have been satisfied.[85] In the case of police homicide, the due process guaranties are anything but satisfied.

82. 99 S. Ct. at 1899 (Stevens, J., dissenting).
83. Storey v. State, 71 Ala. 329, 341 (1882).
84. Regina v. McKay, [1957] V.R. 560.
85. Ingraham v. Wright, 430 U.S. 651, 671-72, n.40 (1977).

B. Due Process Requirements

Although police homicide raises serious due process questions if viewed merely as a deprivation of rights, when recognized as punishment its apparent violation of due process guaranties is striking. The framers "intended to safegnard the people of this country from punishment without trial by duly constituted courts,"[86] and "under the due process clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."[87] The limitation on imposing death, under the fifth amendment, is particularly strict. It requires that "[n]o person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a grand jury." Indeed, the Eighth Circuit observed that a literal reading of the due process clause would mean that "life could never be taken without a trial."[88] And that is precisely what it should mean, with respect to life taken under the authority exercised on behalf of the State. A less rigid standard, however, must be applied when deadly force is used by an individual in accordance with the self-defense doctrine.[89] In addition to personal defense, this doctrine includes the defense of "another person against what is reasonably perceived as an immediate danger of death or grievous bodily harm to that person from his assailant."[90]

The Eighth Circuit, the only circuit to hold that the any-felony rule violates the fourteenth amendment, finds this interpretation too extreme. "Such a literal reading," it stated, "would fail to recognize the interests of the state in protecting the lives and safety of its citizens," and therefore the court held that the situations in which the State can take a life without according a trial to the person whose life is taken are to be determined by balancing society's interest in public safety against the right to life of an individual.[91] Irrespective of their conclusion, the use of the balancing test is a fundamentally flawed procedure for determining whether the right to a form of due process specified in the Constitution is applicable. The fifth amendment does not depend upon a showing that it is in the community's best interests that the procedures be accorded.[92] As Professor Dworkin has observed, "a right against the

86. United States v. Lovett, 328 U.S. 303, 317 (1946).

87. 99 S. Ct. at 1872.

88. Mattis v. Schnarr, 547 F.2d 1007, 1018-19 (8th Cir. 1976).

89. Brown v. United States, 256 U.S. 335 (1921).

90. 40 AM. JUR. 2d *Homicide* §§ 170-71, *quoted in* Mattis v. Schnarr, 547 F.2d 1007, 1015 (1976).

91. Mattis v. Schnarr, 547 F.2d 1007, 1019 (1976).

92. Note, *Specifying the Procedures Required by Due Process: Towards Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510, 1524 (1975).

Government must be a right to do something even when the majority would be worse off for having it done."[93] The majority is no doubt worse off whenever a fleeing felon escapes, but that should not alter the felon's fifth amendment right to grand jury review and trial before he is executed.

The balancing test is, however, the prevailing method of determining how much process is due once it is determined that due process applies.[94] Although the severity of individual deprivation and the relative importance of governmental interest in summary action is arguably incommensurable,[95] even a balancing procedure should lead reasonable men and women to a more restrictive scope of executions without trial. Both the fifth and fourteenth amendments specifically forbid deprivation of life without due process of law, so there is no question that some process is due. The issue of when to allow executions without the due process of trial must then balance the individual's fundamental right to life[96] and the right not to be deprived of life without the due process of trial[97] against the state's interest, not just the interest in general public safety, but its narrow interest in protecting the property and lives of other specific individuals. We have long since decided that life is more important than property, and that no property offender, no matter how serious or recidivistic, may be executed after trial for his offenses. It should follow that the state's interest in protecting the property of others is not compelling enough to allow execution without the due process of trial.

The state's interest in protecting the lives and bodies of other individuals is, however, far more compelling, and much more appropriate for a balancing test.[98] When someone poses an immediate threat of grievous injury to another, the use of a balancing test would lead to the conclusion that the state's interest in protecting the other person allows it to commit an execution without the due process of a trial. It is not necessary, however, to adopt the balancing test procedure in order to conclude that police officers may kill in defense of life. The self-defense doctrine gives them that power as individuals irrespective of their association with the state. The police can kill those posing an immediate threat of violence without

93. Dworkin, *Taking Rights Seriously, in* OXFORD ESSAYS IN JURISPRUDENCE 202, 214 (2d Series 1973), *quoted in* Note, *supra* note 92, at 1527 n.76.

94. Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961).

95. Note, *supra* note 92, at 1519.

96. *See* note 61 *supra* and accompanying text.

97. *See* Palko v. Connecticut, 302 U.S. 319, 327 (1937); Comment, *supra* note 5, at 378.

98. Note, *supra* note 92, at 1528-29.

violating the fifth amendment rights of those killed, just as any citizen can. The legitimate concern some courts have shown with police officer's safety[99] can, accordingly, be satisfied without a fleeing-felon or any-felony rule. If a fleeing felon whom the officer reasonably believes to be armed turns toward the pursuing officer, with reasonably apparent intent to shoot the officer, the officer may kill him under the self-defense doctrine. The fleeing-felon rule in no way increases the officer's safety beyond the safeguard of the self-defense rule.

If a balancing test is used, however, the final and most difficult problem is to assess the state's interest in insuring public safety. An escaped felony suspect is certainly free to commit other crimes, but that should not be a compelling justification for the use of deadly force. A released convict who has served a full penitentiary sentence may be equally likely to commit more crimes, but that justifies neither his execution nor his incarceration beyond the end of his sentence. Far more compelling is the deterrence argument that the failure to kill fleeing felons will encourage more felonies. No empirical attempt to evaluate this argument has been made to date, but let us assume, *arguendo,* that each police homicide prevents eight, or even eighty, robberies. Are we to measure the value of life in such utilitarian terms? Is it a lesser evil that a life be lost than several hundred or thousands of dollars be stolen? In a society that punishes million dollar white collar frauds with a four month prison term,[100] it seems difficult to answer that question affirmatively.

Our primary concern, however, is with the Constitution, and not with the greatest good for the greatest number. Even if a balancing test determined that the state's interest in maintaining public safety allowed it to execute fleeing and in-progress felons without trial under the due process requirements of the fifth and fourteenth amendments, those executions could still be ruled unconstitutional as either cruel and unusual punishment under the eighth amendment, or a denial of equal protection under the fourteenth amendment.

C. Police Homicide as Cruel and Unusual Punishment

The lack of guidance on the framers' intent in banning cruel and unusual punishment makes that phrase difficult to define pre-

99. Wiley v. Memphis Police Dep't, 548 F.2d 1247, 1251-52 (8th Cir. 1976). *See also* Terry v. Ohio, 392 U.S. 1, 23 (1968).

100. For an example of such a sentence, see the case of nursing home operator Bernard Bergman, reported in N.Y. Times, June 18, 1976, § A, at 1, col. 7.

cisely.[101] Nonetheless, four criteria for judging whether a given punishment is cruel and unusual can be clearly discerned in *Furman v. Georgia*[102] and its predecessor cases. The criteria are whether the penalty is (1) inherently cruel,[103] (2) disproportionately severe to the offense it punishes,[104] (3) unacceptable to contemporary society,[105] or (4) inflicted arbitrarily.[106] None of the four seems to have been overruled in the death penalty cases since *Furman,* and all but the third are specifically addressed in the opinion of the Court—a consensus the *Furman* Court lacked—in *Gregg v. Georgia.*[107] Any of the four criteria can make a punishment cruel and unusual. Police homicide satisfies at least three, and on occasion all four criteria.

(1) *Inherent cruelty.* The present Court has consistently held that death is not, per se, an unconstitutional punishment.[108] Previous courts have, however, considered whether particular modes of inflicting death are unconstitutionally cruel.[109] Shooting and electrocution have both withstood challenges, but it is doubtful that any court would uphold death inflicted by a sustained beating after a suspect has been subdued,[110] or by a drowning or a choke-hold.[111] Nonetheless, police have used all three methods to kill suspects in cases that have received widespread attention, and have sometimes received light penalties for doing so. Yet most police homicides do not receive much attention or review.[112] Under the present any-

101. Furman v. Georgia, 408 U.S. 238, 258 (1972) (Brennan, J., concurring).

102. 408 U.S. 238 (1972).

103. Robinson v. California, 370 U.S. 660 (1962); Louisiana v. Resweber, 329 U.S. 459 (1947); *In re* Kemmler, 136 U.S. 436 (1890); Wilkerson v. Utah, 99 U.S. 130 (1878).

104. Robinson v. California, 370 U.S. 660, 676 (1962) (Douglas, J., concurring); O'Neil v. Vermont, 144 U.S. 323, 339 (1892) (Field, J., dissenting).

105. Trop v. Dulles, 356 U.S. 86 (1958).

106. 408 U.S. at 256 (Douglas, J., dissenting).

107. 428 U.S. 153 (1976).

108. *Id.* at 169; *see* Coker v. Georgia, 433 U.S. 584 (1977); Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976).

109. *See* Louisiana v. Rosweber, 329 U.S. 459 (1947); Wilkerson v. Utah, 99 U.S. 130 (1878).

110. *See* Screws v. United States, 325 U.S. 91 (1945).

111. *See* Sherman, *The Breakdown of the Police Code of Silence,* 14 CRIM. L. BULL. 149, 150-51 (1978) (discussing the Joe Campos Torres beating and drowning case). At least four southern Californian men died from police choke-holds in one recent year. *See* Cory, *Deadly Force,* POLICE MAGAZINE, Nov. 1978, at 5, 6.

112. One study found that police homicide cases are typically not referred to a grand jury, and that only three cases in some 1,500 led to police officers being criminally punished. Kobler, *Police Homicide in a Democracy,* 31 J. SOC. ISSUES 163 (1975). A study of police use of deadly force in 49 Los Angeles county police agencies found that of 18 incidents officially designated as having been in violation of the department's firearms policies, only one was referred for criminal prosecution, only two led to dismissals, two led to suspensions, and 13 (72%) led to either a reprimand or no punishment at all. Uelman, *Varieties of Police Policy:*

felony rule, prosecutors are on firm ground for declining to prosecute police officers who beat felony suspects to death when the beating is necessary to effect an arrest. Unless such action can be justified by the self-defense doctrine, it would seem to be an inherently cruel and unusual form of punishment.

(2) *Disproportionate severity.* The determination whether a punishment is proportionately severe to the crime it punishes is essentially a moral judgment, not based on objective assessments of the necessity or efficacy of the penalty imposed.[113] When judged in accord with contemporary standards, police homicide is "grossly out of proportion to the severity"[114] of most of the crimes it punishes.[115] As a former Oakland, California police chief graphically explained when restricting his officers' right to shoot fleeing burglars beyond the state law's limitations:

> Considering that only 7.65 percent of all adult burglars arrested and only .28 percent of all juvenile burglars arrested are eventually incarcerated, it is difficult to resist the conclusion that the use of deadly force to apprehend burglars cannot conceivably be justified. For adults, the police would have to shoot 100 burglars in order to have captured the eight who would have gone to prison. For juveniles, the police would have to shoot 1,000 burglars in order to have captured the three who would have gone to the Youth Authority.[116]

Comparisons to actual punishments typically imposed after trial would probably show that killing a fleeing suspect of any crime, even murder, would impose a more severe punishment without trial than could be expected after conviction. In the case of murder, treason, and rape, a state's decision to make available the death penalty for post-trial punishment might mean that pretrial execution would not be disproportionately severe. But murder and rape do not even appear as categories in most studies of police use of deadly force, since they comprise such a small percentage of all crimes punished by police homicide. Under the proportional severity test used for the past century in English law, which embodies social values quite similar to our own, even fleeing murderers could probably not be killed justifiably in order to arrest them once they no longer posed an immediate threat of violence.[117]

A Study of Police Policy Regarding the Use of Deadly Force in Los Angeles County, 6 LOY. L.A.L. REV. 1, 40 (1973). A study of police records in six cities found that of the eight percent of shooting incidents judged improper by administrative reviews punishment "generally consisted of a reprimand rather than suspension or termination." MILTON, *supra* note 10, at 28.

113. 408 U.S. at 394 (Burger, C.J., dissenting).

114. *Id.* at 393 (Burger, C.J., dissenting).

115. *See* note 10 *supra.*

116. MILTON, *supra* note 10, at 46.

117. The justification, however, is up to the jury to determine in light of all the circumstances of a particular case. *See* 11 HALSBURY'S LAWS, *supra* note 33, § 1180.

When analyzed from a utilitarian perspective, police homicide is as disproportionately severe as it is when evaluated by moral standards as a punishment.[118] Assuming that prevention of escape is the utilitarian goal served by police homicide, the fact that modern apprehension techniques have diminished considerably the importance of immediate capture leaves police homicide disproportionately severe in relation to the utilitarian purposes it might serve. Whether viewed as a punishment or a method of capture, the severity of police homicide is disproportionate to its objective.

(3) *Lack of acceptability in contemporary society.* Although police homicide in arresting serious felons did not shock the conscience[119] of medieval England, the eighth amendment must be interpreted in light of the evolving standards of a maturing society.[120] Three of four available objective indicators,[121] police department administrative policies, scholarly opinion, and mass public protests, show a considerable evolution in the attitudes toward police homicide in recent years. A fourth indicator, legislative authorization, lags behind the others, but that alone does not demonstrate the acceptability of police homicide to society. Moreover, even the legislative arena has markedly changed its approach toward police homicide over the past decade.

Until quite recently, police department policies were either vague or silent on the use of deadly force,[122] but that is rapidly changing. Since 1977, police policies in Los Angeles, Birmingham, and Houston, among others, have restricted the use of deadly force far beyond the limits of state law. Los Angeles adopted a modified defense-of-life policy after officers shot and killed a naked chemist.[123] Houston reportedly adopted a defense-of-life policy in the wake of the beating and drowning of a young Chicano male.[124] Birmingham adopted a more restrictive policy after a Police Foundation study of seven cities showed Birmingham to have the highest police shooting rate[125]—the public outcry over which lends some

118. *See* 408 U.S. at 279-80 (Brennan, J., concurring).

119. "[The Court], before it reduces a sentence as 'cruel and unusual,' must have reasonably good assurances that the sentence offends the 'common conscience,' " which not even opinion polls can measure. United States v. Rosenberg, 195 F.2d 583, 608 (2d Cir. 1952), *quoted in* Furman v. Georgia, 408 U.S. 238, 360 (1972) (Marshall, J., concurring).

120. Trop v. Dulles, 356 U.S. 86, 100-01 (1958).

121. 408 U.S. at 278 (Brennan, J., concurring).

122. MILTON, *supra* note 10, at 45-49.

123. *Gun Rules Tightened,* L.A. Times, Sept. 9, 1977, at 1.

124. Cory, *Police on Trial in Houston,* POLICE MAGAZINE, July 1978, at 33, 40.

125. *Findings of Police Deadly Force Study Spark Three-Way Controversy in Birmingham,* LAW ENF. NEWS, June 21, 1977, at 1, col. 1; Personal Communication with B.R. Myers, Police Chief, Birmingbam, Alabama. (November 1978).

support to Justice Marshall's hypothesis that the public is more likely to find a punishment unacceptable when it knows the full facts.[126]

Police policies more restrictive than state law are far from new, however. A 1974 study by the Boston Police Department found that the majority of the large cities surveyed permitted their officers to use deadly force only to apprehend suspects who present a threat of serious injury or death to someone.[127] In 1975 the California Peace Officer's Association and the California Police Chiefs' Association jointly adopted a similar policy.[128] The policy of the Federal Bureau of Investigation since at least 1972 has been "that an agent is not to shoot any person except, when necessary, in self-defense, that is, when he reasonably believes that he or another is in danger of death or grievous bodily harm."[129] The federal Bureau of Narcotics and Dangerous Drugs, which operates one of the most hazardous types of law enforcement programs,[130] adopted a similar policy in 1971.[131]

These policies were preceded by some fifty years of nearly unanimous scholarly criticism of the any-felony rule. Law reviews,[132] professional police publications,[133] and a Presidential commission[134] all lobbied for a change in the rule. A more powerful force for change, however, has been the long series of public protests—often vio-

126. *See also* Sarat and Vidmar, *Public Opinion, The Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis,* 1976 WIS. L. REV. 171, 179.

127. Planning and Research Division, Boston Police Department, The Use of Deadly Force by Boston Police Personnel, (May 3, 1974), *cited in* Mattis v. Schnarr, 547 F.2d 1007, 1016 n.19. *See also* Clance, *Police Tell Firearm Policies,* San Diego Union, Oct. 16, 1975, (nine of ten cities in San Diego County employ a defense-of-life police firearms policy). *Contra,* Leeds & Lowe, *Survey Finds Few Rules on Police Use of Guns,* Chicago Tribune, Dec. 6, 1977.

128. Baker, *Model Firearms Policy for California Law Enforcement,* 10 J. CAL. L. ENFORCEMENT 5 (1975).

129. FBI, Memorandum 31-72 (Nov. 21, 1972), *quoted in* Mattis v. Schnarr, 547 F.2d 1007, 1015 (8th Cir. 1976). Policies more restrictive than state law are also reported in Comment, *The Use of Deadly Force in Arizona by Police Officers,* 1973 L. AND SOC. ORDER 481.

130. In the 40 year history of federal narcotics enforcement, 17 agents have heen killed by assault in the line of duty, almost as many as in the FBI which has had at least four times as many agents and a longer history. J. WILSON, THE INVESTIGATORS 48 (1978).

131. Mattis v. Schnarr, 547 F.2d 1007, 1015 (8th Cir. 1976). Even these policies, however, may be ambiguous. The FBI policy reportedly goes on to allow the use of any force necessary to effect an arrest. Personal communication with Dr. Charles Wellford, Office of the United States Attorney General (Dec. 7, 1979).

132. *See, e.g.,* Pearson, *supra* note 32; Safer, *Deadly Weapons in the Hands of Police Officers, On Duty and Off Duty,* 49 J. URB. L. 565 (1972); Note, *supra* note 68; Note, *supra* note 5; Comment, *supra* note 24; Comment, *supra* note 6; Comment, *supra* note 23. *But see* Miller, *The Law Enforcement Officer's Use of Deadly Force: Two Approaches,* 8 AM. CRIM. L.Q. 27 (1969).

133. *See, e.g., Police Policy on the Use of Firearms,* THE POLICE CHIEF, July 1967, at 16.

134. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 189-90 (1967).

lent—over police use of deadly force in minority communities. In the 1960s, several race riots were precipitated by police shootings.[135] In the 1970s, police homicides have produced more limited protests with less violence, but with a clear focus on the problem of police homicide. New York, Houston, Los Angeles, Dallas and other cities repeatedly felt such protests throughout the late 1970s.[136] In the Southwest, minority groups even managed to enlist President Carter's concern for the problem,[137] leading to an intensified effort at federal prosecution of police for civil rights violations.[138] Yet as long as the any-felony rule survives, many of the incidents that stir public outrage will remain legal and beyond prosecution.

Although state legislatures appear less vulnerable to such protests than police chiefs and mayors, a steadily growing number of legislatures have nonetheless reflected the apparent change in public sentiment toward police homicide. Since 1973, at least eight states[139] have adopted the Model Penal Code limitations on the use of deadly force to arrest. Minnesota has even required that all police shootings be reported to the state government, in part for monitoring purposes.[140] Taken in conjunction with the developments in police policy, scholarly opinion, and public protests, the state legislative actions are consistent with the general trend toward restricting executions without trial as unacceptable to society.

(4) *Arbitrary infliction.* Relative to the total number of arrests and police-citizen encounters, police homicide is inflicted so rarely and with such arbitrariness as to be wanton and freakish.[141] It can be likened to a virtual lottery system in which there are no safeguards for the capricious selection of criminals for the punishment of death.[142] Even in police departments with comparatively restric-

135. For example, such riots occurred in San Francisco, St. Louis and Los Angeles in 1966. *See id.* at 189.

136. *Killings of Chicanos by Police Protested,* N.Y. Times, Oct. 12, 1977, § A, at 17 col. 1; *Houston Quiet After Violence Hospitalizes Over 12,* N.Y. Times, May 9, 1978, at 22 col. 1; *2,000 Assail Police at Black Rally As Off-Duty Officers Meet Nearby,* N.Y. Times, July 17, 1978, § B, at 3, col. 1; *Los Angeles Police Scored on Shooting,* N.Y. Times, Aug. 15, 1977, at 13 col. 1.

137. Gilman, *In Washington, A New Zeal for Prosecuting Police,* POLICE MAGAZINE, Nov. 1978, at 15, 18.

138. *Id.* Measured by the number of cases in which the victim died, however, Justice Department prosecutions of police officers have actually declined under the Carter administration. From 1970 through 1976, the average number of federal civil rights prosecutions for police homicide was four per year; in 1977 and 1978 it was only two per year. Personal communication from Daniel F. Rinzel, Civil Rights Division, U.S. Department of Justice (November 30, 1978).

139. *See* MINN. STAT. § 609.066 (1976); Comment, *supra* note 5, at 368-69.

140. MINN. STAT. § 626.553 (1976).

141. Furman v. Georgia, 408 U.S. 238, 310 (Stewart, J., concurring).

142. *Id.* at 293 (Brennan, J., concurring).

tive deadly force policies, the discretion that even those policies allow officers in the use of deadly force is so uncontrolled that people literally "live or die, dependent on the whim of one man."[143] The available evidence strongly suggests that police homicide is inflicted in a trivial number of the cases in which it is legally available, through procedures that give room for the play of racial and other prejudices. Unlike convictions for capital offenses, there are no records kept of the number of felony suspects whose actions make them legally vulnerable to execution without trial. The fact that the rate of police homicide was only one per 6,822 Part I Index[144] arrests in 1975, however, provides a reasonable inference that the sanction is rarely used even when it is available, since the rate of flight per attempted arrest seems likely to be much larger. Moreover, the extreme rarity of occurrence alone raises a strong inference of arbitrariness.[145]

Despite the progressive policies of many police departments, many other departments still allow their officers total discretion to use their legal power to kill.[146] Even the departments with restrictive policies typically say when officers *may* use their weapons, and not when they *must*. Noninvocation of available legal penalities is the common practice in American policing, as extensive research has shown, and police homicide is no exception.[147] As a Kansas City, Missouri police officer recently said about the control of firearms discretion in that department (one of the best managed police agencies in the country), "they pretty much leave it up to your own conscience to decide" whether or not to shoot someone when their restrictive policy allows it.[148] Many police officers are punished for

143. *Id.* at 253 (Douglas, J., concurring).

144. Computed from NATIONAL CENTER FOR HEALTH STATISTICS, PUBLIC HEALTH SERVICE, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, VITAL STATISTICS OF THE UNITED STATES 1975 II *Mortality* Part A 1-168; FBI, CRIME IN THE UNITED STATES 1975-1979. Using the unofficial estimated number of police homicides, the rate was one per 3,411 Part I Index arrests.

145. Goldberg and Dershowitz, *Declaring the Death Penalty Unconstitutional,* 83 HARV. L. REV. 1773, 1790 (1970), *quoted in* Furman v. Georgia, 408 U.S. 238, 249 (1972) (Douglas, J., concurring).

146. Until 1968, one large southwestern department employed the following policy on the use of a firearm, quoted in its entirety: "Never take me out in anger; never put me back in disgrace." MILTON, *supra* note 10, at 47. Other "policies" have included "Leave the gun in the holster until you intend to use it," and "It is left to the discretion of each individual officer when and how to shoot." *Id.* at 47-48.

147. K. DAVIS, POLICE DISCRETION (1975); NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, POLICE DISCRETION: A SELECTED BIBLIOGRAPHY (1978); Black, *The Social Organization of Arrest,* 23 STAN. L. REV. 1087 (1971); Goldstein, *Police Discretion Not to Invoke the Criminal Process: Law Visibility Decisions in the Administration of Justice,* 69 YALE L.J. 543 (1960).

148. Personal interview (January, 1979).

using their guns when they should not have, but recent research[149] has found no case in which an officer was punished for not using force when he or she could have.

The inconsistency among police officers in deciding when to use force is further demonstrated by a recent experimental study of twenty-five randomly selected Connecticut police officers who were given identical information about three arrest situations. When asked if they would be likely to use deadly force, their responses were almost evenly split, even though they were all making decisions under Connecticut common law.[150]

In comparison to the vigorous controls on the post-trial death penalty described and approved in *Gregg v. Georgia,*[151] the use of deadly force by police is virtually uncontrolled. The trier of fact, without any information from a record keeper about what the typical police action has been in previous situations similar to an instant case must also determine the sentence. If decision making without access to that information is an unconstitutionally arbitrary way to impose the death penalty after the careful finding of facts at trial, then surely it must be so without a trial.

D. Police Homicide and Equal Protection

A final argument against the use of deadly force to arrest is that present practices deny equal protection to blacks. The argument is not without its weaker points, for discrimination in the use of deadly force is methodologically difficult to prove. Nonetheless, the extremely disproportionate impact of executions without trial on blacks compels consideration of the argument.

According to official statistics, blacks constituted forty-six percent of the people killed by official police action in 1975,[152] while they only constituted 11.5 percent of the population.[153] The national death rate from police homicide of black males over age ten in a recent ten year period was nine to ten times higher than the rate for

149. The Project on Homicide by Police Officers, Criminal Justice Research Center, State University of New York at Albany, has studied this area.

150. G. Hayden, Police Discretion in the Use of Deadly Force: An Empirical Study of Information Usage in Deadly Force Decision Making (1979) (unpublished paper, University of New Haven).

151. 428 U.S. 153 (1976).

152. NATIONAL CENTER FOR HEALTH STATISTICS, *supra* note 144. The total figure for all minority group members is probably somewhat higher, but no official statistics for other nonwhites are reported.

153. BUREAU OF THE CENSUS, DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 25 (1976).

white males.[154] Studies in specific cities have found even greater racial disparities in the rate of police homicides.[155] There have been some attempts to explain the disparity using arrest rates for FBI Part I Index crimes,[156] but that approach has several limitations. First, the power to use deadly force under the common-law rule is not limited to arrests for "index" crimes. Indeed, as the empirical studies[157] show, most police shooting incidents arise out of situations in which the initial criminal offense is clearly not an Index crime. Second, in many police shooting situations there is no offense recorded unless the police intervention precipitates more violence. Many violent family fights, for example, are not reported as crimes,[158] although they are reported if a police officer is assaulted. Third, the evidence of racial discrimination in arrests undermines any use of arrest rates to show an absence of discrimination in police homicide.[159]

Even if arrest rates by race were an appropriate means of showing that the disparity in police homicide rates is not discriminatory, they do not always match the police homicide rates. In Philadelphia from 1950 to 1960, for example, where eighty-seven percent of the police homicide victims but only twenty-two percent of the city's population were black, only thirty-one percent of the arrest population was black.[160] More recently, a study of the Chicago police found the police homicide rate per 10,000 arrests (for all charges) in 1969-70 to be 1.00 for whites and 2.01 for blacks.[161] Nationally, in 1975 blacks accounted for forty-six percent of the police homicide victims and only thirty-three percent of the Part I FBI Index offense arrests.[162]

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154. P. Takagi, *A Garrison State in a "Democratic" Society*, in POLICE COMMUNITY RELATIONS 358 (A. Cohn & E. Viano eds.).

155. *See* note 10 *supra*.

156. *E.g.*, MILTON, *supra* note 10, at 19; Burnham, *3 of 5 Slain by Police Here are Black, Same as the Arrest Rate*, N.Y. Times, Aug. 26, 1973, at 50, col. 3. *See also The Management of Police Killings*, CRIME & SOC. JUST., Fall-Winter 1977, at 34; Goldkamp, *Minorities as Victims of Police Shootings: Interpretations of Racial Disproportionality and Police Use of Deadly Force*, 1 JUST. SYS. J. 169 (1977).

157. *See* note 5 *supra* and accompanying text.

158. Parnas, *The Police Response to the Domestic Disturbance*, 1967 WIS. L. REV. 914.

159. *See* Black, *supra* note 147. The fact that the greater likelihood of police to arrest black suspects can he largely attributed to (a) the greater tendency of blacks to be antagonistic to the police and (b) the greater tendency of black complainants—who do almost all of the accusing of black suspects during street encounters with the police—to demand an arrest does not remove discrimination in a legal sense. Neither suspect's attitudes nor a complainant's preference constitute proper grounds for enforcement decisions. *Id.* at 1097-1107.

160. Robin, *supra* note 10.

161. R. Knoohuizen, R. Fahey, & D. Palmer, The Police and Their Use of Fatal Force in Chicago 21 (1972) (unpublished study).

162. NATIONAL CENTER FOR HEALTH STATISTICS, *supra* note 144; FBI, *supra* note 144.

The existence of racial discrimination in police homicides can be neither proved nor disproved with the available evidence. Resolution of the issue would require data on the number of blacks and whites who committed acts that made them legally vulnerable to police homicide: assaulting or threatening to assault police or others, fleeing from arrest for felonies, participating in a riot, or engaging in other specifically covered behavior.[163] Short of a mammoth systematic observation study[164] costing millions of dollars, there is no reliable way to obtain such data. A sample of the narrative accounts found in arrest reports, somewhat less expensive, would be the next best measure of legal vulnerability of whites and blacks, but no such study has yet been done.

In the absence of more conclusive evidence, the demonstrably higher rates of police homicide for blacks strongly suggests[165] racial discrimination on a national basis. Although such patterns are quite likely to vary from one city to the next, such a variation would support the argument that present procedures allow police homicide to be administered in a discriminatory fashion.

III. Summary and Conclusion

This analysis of police homicide and the Constitution leads to the conclusion that the present state laws are unconstitutional, not just in the common-law states, but in the Model Penal Code and "forcible felony" states as well.[166] The present laws of every state in the union deny police homicide victims fifth and fourteenth amendment rights to due process, allow the punishment of death to be imposed in a cruel and unusual fashion, and appear to deny equal protection to blacks. The only constitutional alternative apparent is to remove police homicide from the realm of punishment and confine justification for it to the self-defense doctrine, more properly called a defense-of-life doctrine. In short, the conclusion is that the police throughout the country should adopt the first section of the firearms policy of the Federal Bureau of Investigation.[167]

163. Comment, *supra* note 5.

164. *See, e.g.*, A.J. Reiss, The Police and the Public (1971); Reiss, *Systematic Observation of Natural Social Phenomena*, in Sociological Methodology 3-33 (H. Costner, ed. 1971). Since police only draw their weapons once in every hundred citizen encounters (and patrol cars in many large cities average no more than ten encounters in eight hours), it could typically require two weeks of observation in order to capture one drawing of a weapon. *See* Cruse & Rubin, *Determinants of Police Behavior*, in Project Report to National Institute of Law Enforcement 194 (1972).

165. Other equal protection arguments can be made in addition to those concerning race. *See* Comment, *supra* note 5, at 375-80.

166. For a survey of the differing state approaches, see materials cited in note 5 *supra*.

167. *See* notes 129 & 131 *supra* and accompanying text.

The defense-of-life policy has the virtue of being both constitutional and highly practical. It is constitutional, first, because it demonstrably does not constitute punishment. Since self-defense is an individual action rather than a state action, it is not subject to evaluation by the *Mendoza* criteria. The right to life is fundamental, and so the right to defend life need not be granted by the State; it is, rather, something the State may not restrict. Police and other citizens may kill under self defense on the same evidentiary basis—eyewitnessing an immediate threat to life. If police were not granted special powers, police killings in self defense could be distinguished from punishment administered by the state. The adoption of such an approach would signal a return to the English tradition of citizen-police officers, whose only special power is to arrest on probable cause (as citizens could only do during the hue and cry), and a rejection of the Continental tradition of soldier-police that we have unconsciously adopted by giving the police special powers to kill.[168] Police homicide in defense of life is nonpunitive by its very nature. It is inherently preventive. It uses an overt act—such as refusing to drop a gun on demand—as the evidentiary basis for taking preventive action. By preventing the consummation of a violent crime threatened by an overt act, the defense-of-life killing looks toward the offender's behavior in the future. Present police homicide rules all look primarily toward the offender's past behavior, and therefore constitute punishment.

Moreover, the defense-of-life policy is constitutional because it does not violate due process. As a solely individual action, police killings in defense of life do not deprive citizens of rights on behalf of the state, but merely on behalf of protecting their own rights. Finally, the defense-of-life policy does not constitute cruel and unusual punishment. It is neither inherently cruel, nor disproportionate to the conduct to which it responds, nor unacceptable to society, nor imposed in an arbitrary and capricious manner. The defense-of-life policy would still leave room, hypothetically, for racial discrimination, but it seems most unlikely that police would grant preferential treatment to whites who pose immediate threats to life and limb.

The defense-of-life policy would also be more practical to implement than any of the other attempts to create a policy more restrictive than the common-law doctrine. The Model Penal Code exemplifies the practical problems. As the dissent observed in

168. *See generally* B. CHAPMAN, POLICE STATE (1970); R. FOSDICK, EUROPEAN POLICE SYSTEMS 17-20 (1915); Bayley, *The Police and Political Development in Europe* in THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE 328-79 (C. Tilly, ed. 1975).

Mattis v. Schnarr,[169] a policy that allows police to kill someone who the officer reasonably believed "would use deadly force against the officers or others if not immediately apprehended" requires too much guessing and analysis for an emergency situation. This language differs sufficiently from the "immediate danger" language of the FBI's policy to include the killing of a fleeing felon merely because he is labeled "armed and dangerous," (as opposed to someone who is actually committing an overt act such as pointing a gun at someone else). The police are not armed with a crystal ball. Predicting that a fleeing felon is likely to kill someone is no more possible than predicting that a paroled felon is likely to kill someone. Such a policy places an undue burden on the police officer. When people commit overt threatening acts, however, there is much less ambiguity.

A self-defense policy avoids the Model Penal Code's problems in allowing police officers to shoot fleeing felons only when they have used or threatened to use deadly force. Professor Perkins argues that this provision of the Code "goes too far" because officers making split-second decisions will find it difficult to evaluate all the details of the suspect's conduct.[170] On the contrary, for precisely that reason the Model Penal Code does not go far enough.

The self-defense policy also avoids the practical problems of allowing officers to shoot fleeing suspects of specificed "forcible" felonies, the approach used in ten states. As a former Los Angeles Police Department policy observed, "[it] is not practical to enumerate specific felonies."[171] An informal survey of police officers from three New York state police departments found that none of them could remember the types of felonies which warranted the use of deadly force under New York state law.[172] With a self-defense policy, there is nothing complex to remember, and no need to consider prior events; the officer need only evaluate the information he observes to assess whether someone is committing an overt act signaling an immediate threat to the officer or someone else.

It is not the practicality of the defense-of-life rule that makes it constitutional, however; that is merely a fortunate byproduct. Rights cannot depend on administrative convenience, especially not the right to life. The defense-of-life rule is necessary for the simple

169. *See* Mattis v. Schnarr, 547 F.2d 1007, 1023 (8th Cir. 1976) (Gibson, C.J., dissenting).

170. PERKINS, *supra* note 23, at 986.

171. MILTON, *supra* note 10, at 48.

172. This survey was conducted by the Project on Homicide by Police Officers, Criminal Justice Research Center, State University of New York at Albany.

reason that anything else constitutes execution without trial, in violation of the Constitution.