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When the Police Must Retreat: Deadly Force and the Logic of Necessity

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Police officers are legally permitted to use deadly force in self-defense, rather than abandon an attempt to enforce the law. This permission effectively expands the set of law enforcement goals that police may use deadly force to achieve, hollowing out other restrictions on the use of force. This Article argues that police should not have this permission. Police officers should have a legal duty to retreat, if they can do so safely, rather than use deadly force. This may seem radical, but it is a conclusion we ought to accept once we combine judgements of proportionality already embodied in law with a recognition that necessity is a logical constraint on means–ends justifications.

I. INTRODUCTION

What laws need to change to reduce the number of people who are needlessly and unjustifiably killed by police? There are many, but perhaps the most obvious laws to change are ones that have not yet received serious attention: laws that currently permit the police to use deadly force even when doing so is not needed to achieve a goal important enough to justify the use of deadly force.[1] In many states, the police are permitted to use deadly force in self-defense rather than retreat to safety. This Article argues that such laws need to change. For many people this may seem radical. Yet this conclusion is logically entailed by principles that are not radical and are already embodied in law. The argument is moral and philosophical rather than legal. It is not an argument about what the law is but about what it ought to be.

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[1] Critiquing the use of deadly force by police is not a new project, and authors have approached it in many different ways. Many authors have critiqued the vagueness and permissiveness of the Supreme Court's Fourth Amendment reasonableness standard. *See, e.g.*, Nancy C. Marcus, *From Edward to Eric Garner and Beyond: The Importance of Constitutional Limits on Lethal Use of Force in Police Reform*, 12 DUKE J. CONST. L. & PUB. POL'Y 53 (2016); Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1185–86 (2017). Others have specifically argued the use of deadly force is unjustified to make an arrest, *see, e.g.*, Mordechai Kremnitzer, Doron Menashe, and Khalid Ghanayim, *The Use of Deadly Force by the Police*, 53 CRIM. L. Q. 67, 81 (2007); Jelani Jefferson Exum, *The Death Penalty on the Streets: What the Eight Amendment Can Teach about Regulation Police Use of Force*, 80 MO. L. REV. 987 (2015); to prevent a riot, *see, e.g.*, Barbra Rhine, *Kill or Be Killed: Use of Deadly Force in the Riot Situation*, 56 CAL. L. REV. 829 (1968); or to prevent an escape, *see, e.g.*, Robert Leider, *Taming Self-Defense: Using Deadly Force to Prevent Escapes*, 70 FLA. L. REV. 971 (2018). There are also authors who have discussed and criticized stand your ground laws for civilians. *See, e.g.*, Cynthia V. Ward, *Stand Your Ground and Self-Defense*, 42 AM. J. CRIM. L. 89 (2015); Pamela Cole Bell, *Stand Your Ground Laws: Mischaracterized, Misconstrued, and Misunderstood* 46 U. MEM. L. REV. 383 (2015). This Article makes a novel contribution to this literature by showing that police should not be permitted to stand their ground when attacked.

Here is an example. Nearly everyone agrees the police are not justified in using deadly force to arrest a suspect for a non-violent crime, such as stealing food from a grocery store. State criminal codes would not allow such a use of deadly force, nor would the Model Penal Code, and it would be constitutionally excessive force under the Fourth Amendment.[2] Yet what if the suspected grocery thief resists arrest, compelling the police to choose between (1) using deadly force against the suspect, (2) risking serious injury to themselves, or (3) giving up on the attempted arrest and retreating to safety? Suddenly, the Model Penal Code and many states' laws would permit the police to use deadly force.[3] This is because the police are legally permitted to use deadly force in self-defense, even if they have the option to retreat.

If the police kill the resisting grocery thief, what goal has been achieved that is important enough to justify the use of deadly force? It cannot be the goal of protecting the officers because that goal could also be achieved by retreating. Killing the suspect is the only way to prevent his escape, but that is not an important enough goal to justify the use of deadly force.[4] The uncontroversial moral principle that stopping a grocery store thief is not an important enough goal to justify the use of deadly force implies that, when required to choose between using deadly force and letting a grocery store thief escape, we cannot choose deadly force.[5] Our laws do not seem to accept that implication. In a case like this, the absence of a duty to retreat essentially permits the police to use deadly force to prevent the escape of a grocery thief. In this way, the absence of a duty to retreat hollows out other restrictions on the use of force.

We are used to the idea that the police should not retreat in the face of resistance. This image of police as warriors who do not retreat in the face of danger is itself a part of the problem.[6] Requiring police officers to retreat rather than use deadly force would require them to change the

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[2] *See infra* notes 37 and 51.

[3] *See infra* notes 43-46.

[4] This is the case even though the suspect may now be guilty of both theft and resisting arrest. Arresting a person for the crime of resisting arrest is not an important enough goal to justify the use of deadly force. *See infra* Section IV(A).

[5] This Article considers a series of objections in greater detail below. But, briefly, would requiring the police to retreat undermine the rule of law? No, that is a circular argument. *See infra* Section IV. Is the use of deadly force needed to deter other grocery thieves? It might deter other thieves, but that is just another way of using deadly force to prevent the theft of groceries: one that might be even harder to justify morally. Will society break down if the police are forced to retreat rather than use deadly force? That would be a good reason to allow the use deadly force, but it is not realistic. A more realistic consequence might be that the police would use less lethal weapons and techniques once they can no longer fall back on deadly force. *See infra* Section VI. There are also some less obvious and perhaps more interesting counterarguments. *See infra* Section V(B).

[6] *See* Seth Stoughton, *Law Enforcement's "Warrior Problem"*, 128 HARV. L. REV. F. 225, 228 (2015) ("Officers learn to treat every individual they interact with as an armed threat and every situation as a deadly force encounter in the making. *Every* individual, *every* situation—no exceptions . . . 'Remain humble and compassionate; be professional and courteous — and have a plan to kill everyone you meet.' That plan is necessary, officers are told, because everyone they meet may have a plan to kill *them*." (quoting John Bennett, *How Command Presence Affects Your Survival*, POLICEONE.COM (Feb. 1, 2021), https://perma.cc/B728-47MH.)). *See also* Rosa Brooks, *Stop Training Police Like They're Joining the Military*, ATLANTIC, June 10, 2020, at 3 ("In most police departments, paramilitary traditions extend well beyond the academy. Senior police officials commonly refer to patrol officers as 'troops,' chain of command is rigidly enforced, and it's undeniably true that many departments have made enthusiastic use of federal authorities such as the Defense Department's 1033 Program, which provide surplus military equipment—including armored vehicles and grenade launchers—to domestic law-enforcement agencies.").

way they think about themselves. It would also force them to change the kind of tools they use to achieve their goals.

This Article proceeds as follows. Section II outlines the laws that currently permit and regulate the use of deadly force by the police. Section III argues that police should have a legal duty to retreat before using deadly force. This argument relies on two crucial premises. First, the only law enforcement goal important enough to justify the use of deadly force by the police against a suspect is the goal of preventing that suspect from wrongfully creating a substantial risk of death or serious injury to others.[7] Second, inflicting some amount of harm is justified only if inflicting that amount of harm is necessary for the achievement of a goal that is important enough to justify that amount of harm. Together these premises support the argument that the police should not be permitted to use deadly force rather than retreat to safety.

Section IV defends the first premise. The Model Penal Code deems four goals to be important enough to justify the use of deadly force: (1) making an arrest; (2) preventing an escape; (3) suppressing a riot; and (4) preventing death or serious injury. By considering these goals one at a time, we can see that that the goal of preventing a suspect from wrongfully creating a substantial risk of death or serious injury to others is the only law enforcement goal important enough to justify the use of deadly force against that suspect.

Section V defends the second premise. The importance of achieving a goal does not give us any reason whatsoever to incur a greater cost than is necessary to achieve that goal. It follows that inflicting some amount of harm is only justified by a goal if that amount of harm is necessary to achieve that goal. This may seem obvious, but there are some important counterexamples and rival theories of necessity that have been developed in the philosophical literature on the ethics of war and self-defense. This Article seeks to expand the focus of the philosophical literature on killing in war and self-defense to include the use of deadly force by the police.

Finally, Section VI responds to two further objections: first, that the argument in this Article ignores the special moral status of the police; and second, that imposing a duty to retreat on police would allow too many suspects to escape. Section VII offers a conclusion.

II. THE LAW OF DEADLY POLICE FORCE

The use of deadly force by the police in the United States is both regulated and explicitly permitted by constitutional, tort, and criminal law.[8] In all these contexts, the police are authorized to stand their ground

[7] This does not mean that the amount of force that may permissibly be used to make an arrest, or achieve some other law enforcement goal, is independent of the seriousness of the crime for which the person is arrested. It simply means that the maximum force permitted to arrest a suspect for even the most serious crime is less than deadly force.

[8] There is some controversy among scholars as to whether administrative law rules should be extended to cover policymaking within police departments. *See* Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 NW. U. L. REV. 1, 4 (2019) ("Elsewhere in government, notice-and-comment rulemaking is used primarily to ensure that agencies regulate us sensibly . . . The Administrative Procedure Act's ('APA') notice-and-comment requirements, in turn, require agencies to obtain public input before these sorts of outward facing (or 'legislative') rules go into effect. Policing agencies do not—and may not—use rules in the same way. The police are not authorized to

and use deadly force rather than retreat, even if they can retreat without taking a substantial risk of harm to themselves or others. Deadly force is not necessarily force that causes death. Instead, it is a legally defined term that means force likely to cause death or intended to cause death.[9] For example, the Model Penal Code defines deadly force as

> force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily injury. Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force.[10]

Following this definition, a person could use deadly force without causing death. However, because the use of deadly force creates a substantial risk of death or serious bodily harm, a person should not use deadly force unless she is justified in causing death. The following Sections assume the use of force is only justified in situations in which killing would be justified.

A. Constitutional and Tort Law Restrictions

The United States Supreme Court has interpreted the Fourth Amendment to prohibit the use of excessive force by the police. The use of excessive force violates "the right of the people to be secure in their persons . . . against unreasonable . . . seizures."[11] The Supreme Court has developed a reasonableness standard, which is applied to "all claims that law enforcement officers have used excessive force."[12]

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regulate the public through rules. When scholars argue in favor of police rulemaking, the sorts of rules they have in mind are rules that tell officers what they can and cannot do in enforcing the law. They are, in short, rules that policing agencies use to regulate themselves."). For a detailed survey of department level policies on the use of force, *see* Brandon Garrett and Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. R. 211, 219 (2017) ("The empirical study [of the policies of the fifty largest police departments] reflects wide variation, but leading agencies incorporate lessons from decades of police-tactics research, consistently adopting detailed rules that are far more instructive and protective than the constitutional baseline. A substantial number of agencies specifically addressed certain aspects of police tactics, including guidance on de-escalation (twenty-four), the need to minimize use of force (twenty-four), and suggesting tactics that could prevent the need to use force (twenty-seven). As those numbers suggest, many of the fifty largest agencies lack clear policies on these important issues. And even those comparatively sophisticated agencies that had written policies had very different approaches and many lacked guidance on key subjects. For example, many agencies did not require officers to provide, when feasible, verbal warnings before using deadly (and nondeadly) force.").

[9] Under this definition even force that is very unlikely to cause death is still "deadly force" if used with the intent to cause death. We can set this issue aside and focus on cases of deadly force in which the force used has a substantial likelihood of causing death, such as shooting in the head or torso.

[10] MODEL PENAL CODE § 3.11(2).

[11] U.S. CONST. amend. IV.

[12] Graham v. Connor, 490 U.S. 386, 395 (1989). For a recent critique of this reasonableness standard, *see* Exum, *supra* note 1, at 988 ("When police force is likened to punishment, the use of fatal force by police officers can be considered the administration of the death penalty on the streets, absent the procedural protections and focus on human dignity given in the criminal justice system through the Eighth Amendment. When considered in the context of punishment, the reasonableness analysis can be transformed to incorporate the value of human dignity and focus on protections against fatal police force that ought to be in place to protect the lives of all individuals."). *See also* Ristroph, *supra* note 1.

The Supreme Court has directly considered the reasonableness of deadly force under the Fourth Amendment in two important cases.[13] In *Tennessee v. Garner*,[14] the Court held that shooting a suspect in the back to prevent him from escaping arrest violated the Fourth Amendment protection against unreasonable seizures.[15] The Court determined that deadly force "may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."[16] The Court implied that such a threat could be presumed if the crime for which the suspect was to be arrested involved the threatened or actual infliction of serious violence.[17]

This holding was arguably weakened in *Scott v. Harris*,[18] in which the Court held that the use of deadly force was justified to stop a high speed car chase because the chase posed a risk of death or serious injury to bystanders.[19] The decision in *Harris* demonstrates the danger and illogic of allowing police officers to use deadly force rather than abandon an attempt to enforce the law. Justice Stevens, writing a lone dissent, asked the logically crucial question: "What would have happened if the police had decided to abandon the chase?"[20] If abandoning the chase would have removed the risks to bystanders, then using deadly force was unnecessary to remove the risk to bystanders.[21]

In practice, the relevance of these constitutional limits is limited by the doctrine of qualified immunity.[22] Qualified immunity prevents public officials from being held personally liable for violating constitutional rights unless those rights are "clearly established" under existing law.[23] This doctrine makes it difficult to bring a successful civil action against a public official, even when the plaintiff's rights have clearly been violated.[24] To take just one shocking example, in *Mattos v. Agarano*,[25] the Ninth Circuit sitting en banc was divided over whether qualified immunity protected two police officers who fired a taser three

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[13] Some have found a justification for the use of deadly force implied in the Second Amendment. *See* District of Columbia v. Heller, 554 U.S. 570 (2008); Darrel A. H. Miller, *Retail Rebellion and the Second Amendment*, 86 IND L.J. 939 (2011); Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment* 108 CALIF. L. REV. 63 (2020).
[14] 471 U.S. 1 (1985).
[15] *Id.* at 3.
[16] *Id.*
[17] *Id.*
[18] 550 U.S. 372 (2007).
[19] *Id.* at 386.
[20] *Id*. 393.
[21] Justice Scalia, writing for the majority, raised this question but did not consider it dispositive. *See id.* 285–86 (Scalia, J., dissenting).
[22] *See* Safford Unified Sch. Dist. v. Redding, 129 S. Ct. 2633 (2009) (holding that an officer searching students while in school is protected even if he violates the student's right to be safe from unreasonable searches and seizures as long as the right was not clearly established under law); Pearson v. Callahan, 555 U.S. 223 (2009) (giving trial courts more flexibility in applying the standard for qualified immunity); Anderson v. Creighton, 483 U.S. 635 (1987) (clarifying that a police officer conducting a search is protected by qualified immunity if a reasonable officer could have believed the search was constitutional); Malley v. Briggs, 457 U.S. 335 (1986) (applying an objective reasonableness standard to the decisions of police officers); Harlow v. Fitzgerald, 457 U.S. 900 (1982) (holding that federal government officials are entitled to qualified immunity).
[23] Saucier v. Katz, 533 U.S. 194, 201 (2001).
[24] *See* Malley v. Briggs, 475 U.S. 335, 341 (1986) (stating that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"). *See generally* Joanna Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014).
[25] 661 F.3d 433 (9th Cir. 2011).

times into a pregnant woman to arrest her during a routine traffic stop.[26] The unreasonableness of this use of force should not be controversial. Clearly, any attempt to meaningfully regulate the use of deadly force through the civil law will have to contend with the doctrine of qualified immunity.

Tort law grants police officers permission to use force in the performance of their duties.[27] The Restatement (Second) of Torts permits police officers to use force to prevent some felonies, to suppress dangerous riots, and to make arrests.[28] Section 131 specifies that deadly force may be used to effect an arrest as long as the arrest is for a felony and the officer reasonably believes deadly force is necessary to effectuate the arrest.[29] This is clarified by a comment to the Restatement:

> *f. Necessity of deadly force.* The use of force intended or likely to cause death for the purpose of arresting another for treason or for a felony is not privileged unless the actor reasonably believes that it is impossible to effect the arrest by any other and less dangerous means . . . The interest of society in the life of its members, even though they be felons or reasonably suspected of felony, is so great that the use of force involving serious danger to them is privileged only as a last resort when it reasonably appears to the actor that there is no other alternative except abandoning his attempts to make the arrest.[30]

Section 131 allows an officer to use deadly force to make an arrest for a felony even if the officer could avoid the need to use deadly force by abandoning their attempted arrest.[31] There is no requirement that the officer or members of the public be in imminent danger of serious harm. In any event, the effectiveness of these tort restrictions as a deterrent is questionable since most states also require governments to indemnify police officers for tort damages arising in the course of their employment.[32] This indemnification, combined with the doctrine of

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[26] *Id.* at 436–37, 452.

[27] *See* RESTATEMENT (SECOND) OF TORTS §§ 112–144 (AM. LAW INST. 1965). In addition to the permission to use deadly force in law enforcement, the Restatement grants permission to use deadly force in defense of oneself or others. *See id.* §§ 65, 76, 79. *See also* Arthur H. Garrison, *Criminal Culpability, Civil Liability, and Police Created Danger*, 28 GEO. MASON U. CIV. RTS. L.J. 241 (2018).

[28] RESTATEMENT (SECOND) OF TORTS §§ 142, 143, 131 (AM. LAW INST. 1965).

[29] *Id.* § 131.

> The actor's use of force against another, for the purpose of effecting a privileged arrest of the other, by means intended or likely to cause death is privileged if:
> (a) the arrest is made under a warrant which charges the person named in it with the commission of treason or a felony, or if the arrest is made without a warrant for treason or for a felony which has been committed, and
> (b) the other is the person named in the warrant if the arrest is under a warrant, or the actor reasonably believes the offense was committed by the other if the arrest is made without a warrant, and
> (c) the actor reasonably believes that the arrest cannot otherwise be effected.

Id.

[30] *Id.* cmt. f.

[31] In this respect, it goes much further than the personal right of self-defense, which, with some exceptions, imposes a duty to retreat. *See* RESTATEMENT (SECOND) OF TORTS § 65(3) ("The privilege stated in Subsection (1) does not exist if the actor correctly or reasonably believes that he can with complete safety avoid the necessity of so defending himself by (a) retreating if attacked in any place other than his dwelling place, or in a place which is also the dwelling of the other, or (b) relinquishing the exercise of any right or privilege other than his privilege to prevent intrusion upon or dispossession of his dwelling place or to effect a lawful arrest.").

[32] *See* Neal Miller, *Less-than-lethal Force Weaponry: Law Enforcement and Correctional Agency Civil Law Liability for the Use of Excessive Force*, 28 CREIGHTON L. REV. 733, 738 (1995)

qualified immunity, makes it very difficult to bring a successful civil action for damages against a police officer.

B. Criminal Law Restrictions

The criminal law of each state permits the use of force by police officers, creating exceptions to the laws which otherwise criminalize the use of violence. These exceptions fall into two categories. There are general exceptions that are available to everyone and special exceptions available only to public officers, including police officers and those assisting police officers in enforcing the law.[33] State criminal law restrictions on the use of deadly force are independent of constitutional and tort restrictions on the use of force. So, for example, a use of deadly force could constitute an unconstitutional seizure without being a crime.[34]

State criminal law governing the use of deadly force by police varies by state but generally fits into one of two categories. A minority of states follow variations on traditional common law rules for the use of deadly force by police.[35] These rules can be somewhat vague and do not place specific restrictions on the use of deadly force. For example, in Georgia, a police officer may use "reasonable" force in fulfilling her duties and making an arrest.[36]

By contrast, the majority of states generally follow the more systematic approach of the Model Penal Code.[37] The Code itself permits the use of deadly force against a person to (1) prevent that person from escaping from arrest,[38] (2) prevent that person from escaping from prison

("Governmental bodies in most states are responsible for indemnifying peace officers against whom court damages have been levied, except in the most egregious cases of excessive force.").

[33] *Compare* MODEL PENAL CODE § 3.04 *with* MODEL PENAL CODE § 3.07(2)(b)(ii)(2). The Model Penal Code grants a fairly narrow exception for the use of deadly force in self-defense but offers public officers a much broader exception to use deadly force in self-defense while enforcing the law.

[34] MODEL PENAL CODE § 3.01(2) ("The fact that conduct is justifiable under this Article does not abolish or impair any remedy for such conduct which is available in any civil action.").

[35] *See, e.g.*, AZ. ST. § 13-409 (2020); FLA. STAT. ANN. § 776.05 (West 2020); GA. CODE ANN. § 16-3-20(4) (2020); IOWA CODE ANN. §§ 704.12, 804.8 (West 2020); LA C. CR. P. ART. (West 2020); KAN. STAT. ANN. § 21-5227 (2020); MINN. STAT. ANN. § 609.066 (West 2020); MISS. CODE ANN. § 97-3-15 (West 2020); MO. ANN. STAT. § 563.046 (Vernon 2020); MONT. CODE ANN. § 46-6-104 (West 2020); N.M. STAT. ANN. § 30-2-6 (West 2020); OR. REV. STAT. §§ 161.235, 161.239 (West 2020); R.I. GEN. LAWS § 12-7-9 (West 2020); S.C. CODE ANN. §§ 17-13-10, 16-11-450; S.D. CODIFIED LAWS §§ 22-16-32, 22-18-3 (2020); WIS. STAT. ANN. § 939.45(4) (West 2020).

[36] GA. CODE ANN. § 16-3-20(4).

[37] *See, e.g.*, ALA. CODE § 13a-3-27 (2020) ALASKA STAT. §§ 11.81.370, 11.81.335 (West 2020); CAL. PENAL CODE § 835(a) (West 2020); COLO. REV. STAT. § 18-1-707 (2020) (a new and more restrictive version of this provision comes into force in September of 2020); CONN. GEN. STAT. §§ 53a-19, 53a-22 (2019); DEL. CODE ANN. TIT. 11, §§ 464, 467 (2020); HAW. REV. STAT. § 703-307 (2020); IDAHO CODE §§ 18-4011, 19-610 (2020); ILL. ST. CH. 720 § 7-5 (Smith-Hurd 2020); IND. CODE ANN. § 35-41-3-3 (West 2020); KY. REV. STAT. & R. SERV. § 503.090 (Baldwin 2020); ME. REV. STAT. ANN. TIT. 17-A, § 107 (West 2020); NEB. REV. STAT. § 28-1412 (Reissue 1989); NEV. REV. STAT. § 171.1455 (West 2020); N.H. REV. STAT. ANN. § 627:5 (2020); N.J. STAT. ANN. § 2C:3-7 (West 2020); N.Y. PENAL LAW § 35.30 (Mckinney 2020); N.C. GEN. STAT. § 15a-401 (West 2020); N.D. CENT. CODE § 12.1-05-07 (2020); OKLA. STAT. ANN. TIT. 21, § 732 (West 2020); PA. STAT. ANN. TIT. 18 § 508 (2020); TENN. CODE ANN. § 39-11-620 (2020); TEX. PENAL CODE ANN. § 9.51 (West 2020); UTAH CODE ANN. § 76-2-404 (2020); WASH. REV. CODE ANN. § 9a.16.040 (West 2020).

[38] MODEL PENAL CODE § 3.07(2)(b) (Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest."). This is subject to some important restrictions. *See infra* Section IV(A).

or other such institution,[39] (3) suppress a riot or mutiny,[40] or (4) prevent that person from committing a crime that, if not prevented, would lead to death or serious injury.[41] Notably, the Code permits the use of deadly force to effect an arrest only if the officer believes either (1) that the crime for which the arrest is to be made involved the threat or use of deadly force or (2) that there is a "substantial risk" the suspect will cause death or serious injury if not promptly arrested.[42]

Crucially, for the purposes of this Article, many state criminal codes *explicitly* exempt police officers from the requirement to retreat before using deadly force in self-defense. The Model Code states that the use of deadly in self-defense is not permitted if

> the actor knows that he can avoid the necessity of using such force with complete safety by retreating . . . except that . . . a public officer justified in using force in the performance of his duties or a person justified in using force in his assistance or a person justified in using force in making an arrest or preventing an escape is not obliged to desist from efforts to perform such duty, effect such arrest, or prevent such escape because of resistances or threatened resistance by or on behalf of the person against whom such action is directed.[43]

In essence, this provision permits police officers to stand their ground and use deadly force to enforce the law rather than retreating in the face of resistance. This permission has been included in the law of many states, including Connecticut, Delaware, Hawaii, North Carolina, North Dakota, Nebraska, New Hampshire, New Jersey, and New York.[44]

States that do not follow the Model Penal Code have comparable statutes permitting the police to stand their ground and use deadly force rather than retreat in the face of resistance. For example, under Nevada law, "[h]omicide is justifiable when committed by a public officer . . . when necessary to overcome actual resistance to the execution of the legal process."[45] Similar provisions can be found in Alaska, California, Florida, Idaho, Kansas, Louisiana, Minnesota, Mississippi, Montana, Nevada, New Mexico, Oregon, South Carolina, South Dakota, and Texas.[46]

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[39] *Id.* § 3.07(3) ("[A] guard or other person authorized to act as a peace officer is justified in using any force, including deadly force, which he believes to be immediately necessary to prevent the escape of a person from a jail, prison, or other institution for the detention of persons charged with or convicted of a crime."). *See infra* Section IV(B).

[40] *Id.* § 3.07(5)(a)(ii) ("[T]he use of deadly force [is not justified under this subsection unless *inter alia*] the actor believes that the use of such force is necessary to suppress a riot or mutiny after the rioters or mutineers have been ordered to disperse and warned, in any particular manner that the law may require, that such force will be used if they do not obey."). *See infra* Section IV(C).

[41] *Id.* ("[T]he use of deadly force [is not justified under this subsection unless *inter alia*] the actor believes that there is a substantial risk that the person whom he seeks to prevent from committing a crime will cause death or serious bodily harm to another unless the commission or the consummation of the crime is prevented and that the use of such force presents no substantial risk of injury to innocent persons."). *See infra* Section IV(D).

[42] *Id.* § 3.07(2)(b)(iv).

[43] *Id.* § 3.04(2)(b)(ii).

[44] *See, e.g.*, CONN. GEN. STAT. §§ 53a-19 (2019); DEL. CODE ANN. TIT. 11, § 464; HAW. REV. STAT. § 703-304; N.C. GEN. STAT. § 15a-401 (West 2020); N.D. CENT. CODE § 12.1-05-07 (2020); NEB. REV. STAT. § 28-1409 (West 2020); N.H. REV. STAT. ANN. § 627:4 (2020); N.J. STAT. ANN. § 2C:3-4 (West 2020); N.Y. PENAL LAW § 35.15 (Mckinney 2020).

[45] NEV. REV. STAT. § 200.104 (West 2020).

[46] ALASKA STAT. § 11.81.335(b)(2); CAL. PENAL CODE § 835a (West); FLA. STAT. ANN. § 776.05 (West 2020); IDAHO CODE § 18-4011; KAN. STAT. ANN. § 21-5227 (2020); L.A. C. CR. P. ART. (West 2020); MINN. STAT. ANN. § 609.066 (West 1987); MISS. CODE. ANN. § 97-3-15 (West 2020);

In summary, the law currently both explicitly permits and regulates the use of deadly force by police. Although, procedural barriers make it difficult to enforce these laws through civil actions. The criminal law could be enforced by willing prosecutors, but it gives police officers considerable discretion to use deadly force. In particular, in many states the police are explicitly permitted to use deadly force in self-defense even if they could safely avoid the need to use deadly force by abandoning an attempt to enforce the law.

III. WHY THE POLICE SHOULD RETREAT RATHER THAN USE DEADLY FORCE

This Section summarizes this Article's main argument. When the use of deadly force by police is justified, it is justified as a way to achieve an important law enforcement goal.[47] The moral and legal justification for the use of deadly force by police is what we might call a means–ends justification: the costs associated with the means[48] (using deadly force) are justified by the law enforcement goal they might achieve.[49] To justify the use of deadly force in a given case one must (1) identify a goal that is important enough to justify the use of deadly force and (2) show that deadly force is actually necessary to achieve that goal in that case.[50]

Most people would agree that preventing property crimes and other crimes that will not result in a serious bodily injury, such as theft from a grocery store, is not an important enough law enforcement goal to justify the use of deadly force. This conclusion is reflected in the Model Penal Code, Fourth Amendment jurisprudence, and the laws of many states.[51] The goal of arresting a suspect is similarly not capable of

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MO. ANN. STAT. § 563.046 (Vernon 2020); NEV. REV. STAT. § 200.104 (West 2020); N.M. STAT. ANN. § 30-2-6 (West 2020); OR. REV. STAT. §§ 161.235, 161.239 (West 2020); S.C. CODE ANN. § 17-13-10 (2020); S.D. CODIFIED LAWS § 22-16-32 (2020); TEX. PENAL CODE ANN. § 9.51 (West 2020).

[47] *See* Scott v. Harris, 550 U.S. 372, 383 (2007) ("in determining the reasonableness of the manner in which a seizure is effected, we must balance the nature of and the quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion" (citing United States v. Place, 42 U.S. 696 (1983)).

[48] Throughout this Article, the phrase "harmful means" includes the harmful side-effects of choosing that means. The distinction between harming as a means and harming as a side-effect of a means may be philosophically significant, but for our purposes it should be set aside. On the philosophical significance of harming as a means, *see generally* Larry Alexander, *The Means Principle*, 138 SAN DIEGO LEGAL STUD. PAPER 1 (2014).

[49] The alternative is that the use of deadly force is justified because it is, in itself, good. This is not plausible because the use of force is distinct from the death or other consequences it causes. Even the (implausible) argument that a fleeing felon deserves to die justifies the use of deadly force as a *means* to achieve the goal of causing death.

[50] A goal that is important enough to justify deadly force might be the goal of avoiding some amount of risk or of achieving some probability of success. Such a goal can only justify as much harm as is needed to avoid that risk or gain that probability of success. If there is a less harmful means of achieving the same reduction in risk, or probability of success, then the more harmful means are not justified by the goal of achieving that reduction in risk or probability of success. *See infra* Section IV(D) and Section V(A).

[51] *See* MODEL PENAL CODE § 3.07(5) ("The use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary to prevent such other person from . . . the commission of a crime involving or threatening bodily harm, damage to or loss of property or a breach of the peace, except that: . . . the use of deadly force is not in any event justifiable under this Subsection unless: the actor believes that there is a substantial risk that the person whom he seeks to prevent from committing a crime will cause death or serious bodily harm to another unless the commission or the consummation of the crime is prevented and that the use of such force presents no substantial risk of injury to innocent persons."); Tennessee v. Garner, 471

justifying the use of deadly force. After all, as the Supreme Court noted in *Garner*, killing a suspect is a "self-defeating" means of making an arrest.[52] The only law enforcement goal clearly important enough to justify the use of deadly force against a suspect is the goal of preventing that suspect from wrongfully creating a substantial risk of death or serious bodily harm to others. This does not mean that preventing lesser crimes and making arrests are not important enough goals to justify some amount of force. However, these goals are not important enough to justify *deadly* force. This is not a controversial claim, and it is already widely embodied in law.[53]

Whatever law enforcement goal is important enough to justify the use of deadly force, the only circumstances in which that goal can justify deadly force are circumstances in which deadly force is necessary to achieve that goal. This is not a legal or moral point, and it should not be controversial. It is simply a logical fact about means–ends justifications. The importance of achieving a goal does not give one any reason to impose more harm than is necessary to achieve that goal.[54]

If the police can safely retreat from a confrontation, without taking a substantial risk of death or serious injury to themselves or others, then the use of deadly force is not needed to protect the officers or others in that confrontation. Thus, unless there is some other goal that is important enough to justify the use of deadly force—and there is not—using deadly force to end that confrontation is unjustified.[55] Using deadly force against a person without a sufficient justification is a very serious wrong and should be illegal. Therefore, the police should have a legal duty to retreat, rather than use deadly force, if they can do so without creating a substantial risk of death or serious injury to themselves or others.

Here is the argument spelled out more precisely:

> (1) The only goal important enough to justify the use of deadly force by the police against a suspect is the goal of preventing that suspect from wrongfully creating a substantial risk of death or serious injury to others. (Call this the proportionality premise.)
>
> (2) Inflicting some amount of harm is justified only if inflicting that amount of harm is necessary for the

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U.S. 1, 12 (1985) ("A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead. The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects."). *See also supra* note 37.

[52] 471 U.S. at 13 ("The use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion. If successful, it guarantees that that mechanism will not be set in motion.").

[53] *See, e.g.*, *id.* ("It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and not threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."); MODEL PENAL CODE § 3.07(5)(a)(ii) (limiting the permission to use deadly force to prevent crimes to the prevention of dangerous crimes, riots, and mutinies); *supra* note 37.

[54] *See infra* Section V(A).

[55] We consider why there is not another goal important enough to justify the use of deadly force *infra* in Section IV.

> achievement of a goal that is important enough to justify that amount of harm. (Call this the necessity premise.)
>
> Thus,
>
> (3) The use of deadly force by the police against a suspect is justified only if the use of deadly force is necessary to prevent the suspect from wrongfully creating a substantial risk of death or serious injury to others.
>
> (4) If the police could retreat instead of using deadly force against a suspect, without taking a substantial risk of death or serious injury to themselves or others, then the use of deadly force is not necessary to prevent the suspect from wrongfully creating a substantial risk of death or serious injury to themselves or others.
>
> Thus,
>
> (5) The use of deadly force by the police against a suspect is not justified if the police could retreat rather than use deadly force without taking a substantial risk of death or serious injury to themselves or others.

This argument is sound.[56] Premise (4) is true because, if the use of deadly force was actually necessary to prevent a substantial risk of death or serious injury, then a failure to use deadly force would result in a substantial risk of death or serious injury. The conclusion follows from premises (3) and (4), and premise (3) follows from premises (1) and (2). Thus, if we accept premises (1) and (2), we must accept the conclusion, however surprising it may be. The challenge for anyone who disagrees with this conclusion is to show why either premise (1) or premise (2) is false. The following Sections defend these premises one at a time.

IV. THE PROPORTIONALITY PREMISE

This Article argues police should have a legal duty to retreat rather than use deadly force, if they can retreat without creating a substantial risk of death or serious injury to themselves or others. This argument depends on two crucial premises, which were summarized in the previous Section. The present Section establishes the first of these crucial premises: the only goal important enough to justify the use of deadly force against a suspect is the goal of preventing that suspect from wrongfully causing death or serious injury to others. To some readers, this first premise may seem obvious, to others it may not.

One common reaction to the suggestion that police officers should have a duty to retreat is that requiring the police to retreat would undermine the rule of law. The police, it might be thought, should never

[56] An argument is valid if it is impossible for the premises to be true and the conclusion false. A sound argument is a valid argument with true premises.

retreat in the face of resistance. For the police to retreat from resistance would undermine "the rule of law" and the very basis of "our way of life."[57] Emotionally, this may be a powerful objection. Logically, however, it is circular.

This objection is circular because the use of deadly force does not promote the rule of law if it is illegal to use deadly force. It is a mistake to assume that police violence necessarily tends to promote rather than undermine the rule of law. Illegal police violence undermines the rule of law. We are now investigating whether it should be legal for the police to use deadly force in these cases. Without begging the question, we cannot assume that the rule of law is undermined if the police are required to retreat.

A more plausible version of this argument is that there are legitimate law enforcement goals—other than preventing death or serious injury—that cannot be achieved if the police are required to retreat. If these other legitimate law enforcement goals cannot be achieved, then the rule of law may suffer.

The Model Penal Code contemplates four goals that can justify an officer in using deadly force against a person: (1) arresting that person and keeping that person in custody; (2) preventing that person from escaping from prison or other such institution; (3) suppressing a riot or mutiny; and (4) preventing that person from committing a crime that will cause death or serious bodily harm.[58] Of these, only preventing death or serious bodily harm is important enough to justify the use of deadly force. The others—effecting an arrest, preventing an escape, and suppressing a riot or mutiny—are disproportionate to the use of deadly force.[59] This Section defends this conclusion by considering these four goals one at a time.

A. Killing is Unjustifiable as a Means of Effecting an Arrest

The Model Penal Code permits the use of deadly force to effect an arrest. More specifically, the Model Penal Code permits the use of deadly force to effect an arrest for a felony if "the crime for which the arrest is made involved . . . the use or threat of deadly force [or] there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed."[60] Perhaps the reason for these qualifications is that the use of deadly force to effect an arrest is only justified if it is reasonable to suppose the suspect will cause death or serious bodily harm to others if she is not promptly arrested. This is a separate justification for the use of deadly force, which is addressed *infra* in sub-Section D. The present sub-Section considers whether the goal of

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[57] *See, e.g.*, Leider, *supra* note 1, at 974, 1089 ("An important component of political authority is to conditionally threaten and, if necessary, use force to ensure compliance with the laws. The justification for the fleeing felon rule should look to the fleeing criminal's stubborn refusal to submit to the rule of law.").

[58] *See supra* notes 38, 39, 40, and 41.

[59] As we concede later, preventing the escape of a convicted person from prison may under some limited circumstances justify the use of deadly force. At least, we cannot prove that it is not justified without appealing to moral premises that some readers may not share. Setting this issue aside does not undermine our argument outside of the prison context.

[60] MODEL PENAL CODE 3.07(2)(b)(iv).

effecting and maintaining an arrest is by itself important enough to justify killing the suspect.

1. Standard Arguments Against the Use of Deadly Force to Effect an Arrest

There are two standard arguments against the use of deadly force to effect an arrest. The first standard argument is that effecting an arrest is a nonsensical justification for deadly force because a person killed by police cannot then be arrested.[61] Justice White observed in *Garner* that "the use of deadly force is a self-defeating way of apprehending a suspect."[62] As one group of jurists put it, "There is no rational relationship between the means (lethal force) and the objective (arrest)."[63] If the purpose of arrest is to "bring the suspect to justice," that goal is not achieved if the suspect is killed.[64]

The second standard argument is that killing a suspect to prevent her from escaping arrest is excessive because, even if the suspect is eventually found guilty, she will not be sentenced to death.[65] The use of lethal force to make an arrest was at one time limited to arrests for felonies, most of which were punishable by death.[66] Today, the death penalty has been widely abandoned and curtailed.[67] If the interests served by punishing a convicted criminal are not enough to justify killing, then surely the interests served by bringing a criminal to trial cannot be enough to justify killing.

The problem with both these standard arguments is that some might think killing a suspect is justified as a second-best option if bringing the suspect to trial is not possible. We do not typically think of arrests as punishments, but perhaps the use of deadly force can be used as a substitute for punishment if an arrest is impossible.[68] Killing a murderer

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[61] *See, e.g.*, Kremnitzer et. al., *supra* note 1, at 81.
[62] Tennessee v. Garner, 471 U.S. 1, 12 (1985).
[63] Kremnitzer et. al., *supra* note 1, at 81.
[64] This argument by itself places no limits on the amount of force that can be used to arrest a suspect who will survive that use of force. As a moral matter, there must be some limits. For example, it is surely disproportionate to use a very painful electric shock to stop a person suspected of a minor crime from escaping arrest. The focus of this Article is on the justification for deadly force. This focus is justified by the widespread use of handguns by police and the serious consequences of deadly force. It is a separate issue, implicating some but not all of the same arguments, whether there are limits to the amount of pain and loss that can justifiably be inflicted to prevent a suspect from escaping arrest.
[65] *See, e.g.*, Exum, *supra* note 1, at 988 (pointing out that those subjected to deadly police force are given far fewer protections than those subjected to the death penalty). Rhine, *supra* note 1, at 855 (mentioning the "possible due process problems" with killing a suspect to prevent his escape from arrest).
[66] *See Garner*, 471 U.S. at 13 (1985) ("It is insisted that the Fourth Amendment must be construed in light of the common law rule, which allowed the use of whatever force was necessary to effect the arrest of a fleeing felon . . . It has been pointed out many times that the common law rule is best understood in light of the fact that it arose at a time when virtually all felonies were punishable by death." (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *98 ("The idea of felony is indeed so generally connected with that of capital punishment that we find it hard to separate them; and to this usage the interpretations of the law do now conform. And therefore if a statute makes any new offence felony, the law implies that is shall be punished with death, *viz.* by hanging, as well as with forfeiture.")).
[67] *See* Kennedy v. Louisiana, 554 U.S. 407 (2008) (interpreting the Eighth Amendment, in light of a growing consensus among state lawmakers, to limit the use of the death penalty, for crimes against individuals, to those crimes that result in death).
[68] This seems to be the reasoning behind limiting the use of deadly force to make an arrest to those crimes (i.e., felonies) punishable by death. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES *97.

might be unjustified as opposed to imprisoning her for life, yet still be justified as opposed to letting her go free. In addition, by voluntarily fleeing arrest, when the police have no other options, the suspect is arguably responsible for bringing about a situation in which the police are forced to either kill her or let her go free.[69] It might be argued that, if the suspect is responsible for bringing about a situation in which the police are forced either to kill her or let her go free, then the suspect cannot reasonably complain if she is killed to prevent her escape. We should reject this argument. We have strong reasons to conclude that the police should not be authorized to kill a suspect, even as a second-best alternative to punishing the suspect after a conviction at trial.

2. Due Process and the Use of Deadly Force as a Substitute for Punishment

Giving police the authority to kill suspects as a second-best alternative to punishment after a conviction conflicts with the widely accepted legal principle, embodied in the Fifth, Sixth, and Fourteenth Amendments, that criminal punishments cannot be imposed without a trial.[70] We follow this principle even though we know that following it allows some guilty people to avoid punishment. As the Supreme Court has observed,

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered . . . [They] reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.[71]

It seems obvious that a judge should not be authorized to summarily sentence a defendant as a second-best alternative to conducting a jury trial. It should be equally obvious that a police officer should not be authorized to kill a suspect as a second-best alternative to punishing the suspect after a conviction.

A suspect's right to a trial is not forfeited even if that suspect is arguably responsible for the fact that a trial is impossible.[72] A criminal

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For a modern discussion of this way of understanding the use of deadly force *see* Exum, *supra* note 1.

[69] Justice Scalia seems to be making this point in *Harris*. *See* Scott v. Harris, 550 U.S. 372, 384 (2007) ("It was respondent, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that Scott confronted.").

[70] *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . ."). *See also* Hamdi v. Rumsfeld, 524 U.S. 507 (2004) (holding that a U.S. citizen detained as a hostile combatant in a war zone is entitled to contest his detention before a neutral decision maker); Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (holding that a military commission could not exclude a prisoner (alleged to be Osama Bin Laden's former chauffer) from his own trial); Boumediene v. Bush, 553 U.S. 723 (2008) (holding that foreign and U.S. citizens held at Guantanamo Bay have a right to challenge their detention in federal court).

[71] Duncan v. Louisiana, 391 U.S. 145, 155–56 (1968).

[72] Although the Sixth Amendment forbids conviction without trial, a defendant may forfeit some of his evidentiary Sixth Amendment Rights by his own wrongdoing. For example, a defendant can forfeit his right to confront a witness if the defendant's own wrongful conduct prevents the witness from appearing at trial. *See* Crawford v. Washington, 541 U.S. 36 (2004); Giles v. California, 128 S.

defendant cannot be convicted without a trial as a second-best alternative even if the defendant actively tries to undermine the fairness of the trial.[73] This is because the right to a trial is not a right the defendant can forfeit through wrongful conduct.[74] Thus, although a fleeing suspect may be responsible for the fact that the police must either kill her or allow her escape, this responsibility is irrelevant to the fact that the police should not be authorized to kill the suspect to prevent her escape.

3. Deadly Force and Dangerous Suspects

The Model Penal Code describes two conditions that are each sufficient to justify the use of deadly force to effect an arrest: (1) the arrest is made for a crime that involved the threat or use of deadly force; or (2) the officer believed the arrest to be necessary to avoid a "substantial risk" of death or serious injury to others.[75] Do either of these conditions justify the use of deadly force simply to make an arrest? We can consider these conditions one at a time.

The first of these conditions might reflect the thought that it is more important to make arrests for more serious crimes. It seems plausible that more force can be justified as a means to make an arrest for a more serious crime. However, as we have seen, even if the arrest is to be made for a very serious crime, killing the suspect is not an effective way of making the arrest. Nor is killing the suspect justified as a second-best solution if capture is not an option.

More plausibly, the first of these conditions might be justified on the assumption that if there is probable cause to arrest a person for a crime involving deadly force, then it can be *presumed* that the arrest is necessary to avoid a substantial risk to others. This brings the first condition into line with the second condition. It also fits the approach the Supreme Court has taken, holding in *Garner* that deadly force may not be used to effect an arrest unless the officer reasonably believes the suspect poses a risk of serious death or injury to others.[76] This justification for the use of deadly force—and whether it is reasonable to presume that a person suspected of a dangerous crime poses an ongoing danger to others—is discussed in sub-Section IV(D) *infra*.

Ct. 2678 (2008). *See generally* Rebecca Sims Talbot, *What Remains of the "Forfeited" Right to Confrontation? Restoring Sixth Amendment Values to the Forfeiture-by-Wrongdoing Rule in Light of* Crawford v. Washington *and* Giles v. California, 85 N.Y.U. L. REV. 1291 (2010).

[73] *See, e.g.*, U.S. v. Ruggiero, 846 F.2d 117 (1988) (affirming a trial judge's decision that there was a manifest necessity to declare a mistrial after the trial judge found evidence of jury tampering by the defendants). Notice that the remedy, a new trial, still preserves the right to a fair trial. That right is not forfeited by wrongful conduct.

[74] This is not to say a defendant cannot waive that right by pleading guilty. *See* Brady v. United States, 397 U.S. 742 (1970) (holding that plea bargaining, trading the right to trial for a reduced charge or sentence, is constitutional and consistent with the idea that the waiver of the right to trial must be free and uncoerced).

[75] MODEL PENAL CODE § 3.07(2)(b) ("The use of deadly force is not justifiable under this Section unless [*inter alia*] 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.").

[76] Tennessee v. Garner, 471 U.S. 1, 1 (1985) ("This case requires us to determine the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon. We conclude that such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.").

For now, we can conclude that it is always disproportionate to kill a suspect simply to prevent her from escaping arrest. Accepting this principle may allow some guilty people to go free.[77] As long as we accept that the right to a fair trial is more important than ensuring that no guilty people are allowed to go free, this is a price we should be willing to pay.

B. Killing is Unjustifiable as a Means to Prevent Escape

The second circumstance in which the Model Penal Code permits police officers to use deadly force is to prevent escape from a prison or other such institution.[78] The Code distinguishes between escaping custody in general and escaping from a prison or other "institution for the detention of persons charged with or convicted of a crime."[79] The Code states that "any force, including deadly force" may be used if it is immediately necessary to prevent an escape from prison or other such institution.[80] State law on this matter varies, but at least sixteen states follow some version of the Code's rule.[81]

The distinction the Code makes between escaping custody in general and escaping from an institution is unjustifiable. Suppose the police arrest a person whom they catch painting graffiti onto a public building. The Model Penal Code suggests deadly force cannot be used to prevent this suspect from escaping from the back of a police car but can be used to prevent her from escaping from a police holding cell after she has been charged.[82] It is absurd to suppose the place from which the suspect escapes is relevant to whether it is permissible to kill the suspect as she runs away.[83] It is also absurd to suppose deadly force can be used to prevent a person charged *but not convicted* of a minor, non-violent offence from escaping custody.

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[77] *Id.* at 11 ("It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect.").
[78] MODEL PENAL CODE § 3.07(3) ("The use of force to prevent the escape of an arrested person from custody is justifiable when the force could justifiably have been employed to effect the arrest under which the person is in custody, except that a guard or other person authorized to act as a peace officer is justified in using any force, including deadly force, which he believes to be immediately necessary to prevent the escape of a person from a jail, prison, or other institution for the detention of persons charged with or convicted of a crime.").
[79] *Id.*
[80] *Id.*
[81] *See* 119 DEL. CODE ANN. TIT. 11, § 467 (2018); FLA. STAT. § 776.07 (2018); HAW. REV. STAT. § 703-307(4) (2017); 720 ILL. COMP. STAT. 5/7-9 (2018); IND. CODE § 35-41-3-3(E) (2018); KY. REV. STAT. ANN. § 503.090 (West 2018); MONT. CODE ANN. § 45-3-106 (2017); NEB. REV. STAT. § 28-1412 (2018); N.J. STAT. ANN. § 2C:3-7(C) (West 2018); N.Y. PENAL LAW § 35.30(5) (Mckinney 2018); OR. REV. STAT. § 161.265 (2018); PA. CONS. STAT. § 508 (2018); TEX. PENAL CODE ANN. § 9.52 (West 2018); WASH. REV. CODE § 9A.16.040(C) (2018); WIS. ADMIN. CODE DOC § 306.07(4)(d) (2018). *See also* Leider, *supra* note 1, at 312.
[82] MODEL PENAL CODE § 3.07(3) ("The use of force to prevent the escape of an arrested person from custody is justifiable when the force could justifiably have been employed to effect the arrest under which the person is in custody, except that a guard or other person authorized to act as a peace officer is justified in using any force, including deadly force, which he believes to be immediately necessary to prevent the escape of a person from a jail, prison, or other institution for the detention of persons charged with or convicted of a crime.").
[83] Arguably this difference is explicable by the desire to create the impression in the mind of detained suspects that they cannot escape. It is not clear, however, why it is more important to create this impression with respect to a police station than it is with respect to a police car or police custody on the street. If anything, there is a greater need to discourage escape while escape is more reasonably possible.

However, there is a related distinction that may be relevant to the proportionality of deadly force. It may be relevant whether the person is escaping from pre- or post-conviction custody. As we have seen, the right to due process is a strong reason against killing suspects to prevent their escape from arrest. If a person has been convicted of a crime, she is no longer protected from punishment for that crime by her right to a trial. In such cases, some might argue that the use of deadly force is justified as a second-best alternative to imprisonment if the use of deadly force is the only means of preventing escape.

For killing a person to be a reasonable second-best option, the punishment from which the person would otherwise escape must be both justified and very severe. It is not reasonable to suppose that killing a person is a reasonable second-best option to letting her go free if she has been sentenced to spend a few days in prison. It may be more reasonable to suppose that killing a person is a reasonable second-best option to letting her go free if she has been convicted of a serious crime and justly sentenced to life in prison. At least, we cannot prove this is unreasonable, without relying on moral intuitions that may not be widely shared. However, the fact that the use of deadly force may be proportionate in such cases does not prove that the use of deadly force will ever be justified in these cases. To be justified, the use of deadly force must also be *necessary* to prevent the person from permanently escaping. In practice, this will rarely be the case because recapture is almost always feasible.[84]

C. Killing is Unjustifiable as a Means to Suppress a Riot or Mutiny

The third circumstance in which the Model Penal Code permits the use of deadly force is "to suppress a riot or mutiny" after the rioters or mutineers have been warned that deadly force will be used if they do not obey.[85] This is currently law in at least eight states.[86] As written, this provision of the Model Penal Code could permit police officers to fire lethal weapons into a crowd if that crowd could reasonably be considered a riot and did not disperse after a warning that deadly force would be used. Even if police officers can be trusted not to use this permission, it should not be given to them.[87]

We should be wary of any law that allows police officers to treat rioters and mutineers as a group rather than considering their rights as individuals. Even if some members of a gathering risk causing serious harm, this does not justify the use of deadly force against other members of that gathering. We should also be wary of an exception that makes it easier to use deadly force against rioters, because the distinction between

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[84] *See* Kremnitzer et. al., *supra* note 1, at 83.

[85] MODEL PENAL CODE § 3.07(5)(a)(ii)(2) ("[T]he use of deadly force is not in any event justifiable under this subsection unless [*inter alia*] the actor believes that the use of such force is necessary to suppress a riot or mutiny after the rioters or mutineers have been ordered to disperse and warned, in any particular manner that the law may require, that such force will be used if they do not obey.").

[86] *See* AZ. ST. § 13-410 (2020); DEL CODE ANN. TIT. 11, § 467 (2018); IDAHO CODE § 18-4011(2020); MISS. CODE ANN. § 97-3-15 (West 2020); NEB. REV. STAT. § 28-1412 (2018); PA. CONS. STAT. § 508 (2018); S.D. COD. L. § 22-16-33 (2020); WASH. REV. CODE § 9A.16.040(c) (2018).

[87] *See* Rhine, *supra* note 1, at 875 (arguing that the law justifying the use of deadly force to suppress a riot is unjustified at least insofar as it gives a greater discretion to use deadly force than is necessary to protect the public from death or serious injury).

a riot and a legitimate protest can be subjective. Research suggests that a person's cultural background and political beliefs influence the way they perceive protesters.[88] Property crimes sometimes occur alongside, and hidden within, peaceful protests.[89] For these reasons, what appears to outside observers to be a peaceful protest may appear to some police officers to be a riot.

As the Model Penal Code itself makes clear, the goal of preventing looting and other minor property crimes is not by itself important enough to justify the use of deadly force.[90] The fact that property crimes take place within a riot does not make it more important to prevent those crimes. It might be proportionate to use deadly force to prevent rioters or mutineers from causing death or serious bodily injuries to innocent people. However, using deadly force to suppress a riot or mutiny where there is no risk of death or serious bodily injury is not justified.[91]

1. A Warning is Not a Justification

The most interesting part of this provision of the Model Penal Code is the requirement that the rioters or mutineers be warned that deadly force will be used if they do not obey. We should consider, more generally, whether warnings of this kind are relevant to the proportionality of deadly force. At first glance, it might seem as though warnings can help justify the use of deadly force. If a person is committing a crime and a police officer tells her, "Stop or I'll shoot," some might argue the person cannot reasonably complain if she does not stop and the officer shoots. This reasoning motivates the dissent in *Garner*. Justice O'Connor reasons that,

> The officer's use of [deadly] force resulted because the suspected burglar refused to heed this command . . . The legitimate interests of the suspect in these circumstances are adequately accommodated by the Tennessee statute: to avoid the use of deadly force and the consequent risk to his life, the suspect need merely obey the valid order to halt.[92]

If a suspect has no right to behave as she does and is warned she might be killed if she did not stop, it might seem reasonable to use deadly force to stop her.

However, on further reflection, it is clear that a warning cannot render an otherwise disproportionate use of deadly force proportionate. Suppose a homeowner warns their neighbor that the homeowner will shoot

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[88] *See* Dan Kahan et. al. *They Saw a Protest: Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STANFORD L. REV. 851, 864 (2012) (showing that an observer is more likely to view protesters as "obstructing" or "threatening" when the observer disagrees politically with the protesters). This is a specific instance of the broader phenomenon of motivated cognition "the ubiquitous tendency of people to form perceptions, and to process factual information generally, in a manner congenial to their values and desires." *Id* at 853; *see generally* Emily Balcetis & David Dunning, *See What You Want to See: Motivational Influences on Visual Perception*, 91 J. PERSONALITY & SOC. PSYCHOL. 612 (2006).

[89] Derek Hawkins, *"Black Bloc" Protesters Return for Trump Era, Leaving Flames, Broken Windows from D.C. to Berkeley*, WASH. POST, Feb. 2, 2017.

[90] MODEL PENAL CODE § 3.06. The use of deadly force to prevent property crimes is limited to cases in which the crime creates a risk danger of death or injury. *Id.*

[91] *See* Rhine, *supra* note 1, at 875.

[92] Tennessee v. Garner, 471 U.S. 1, 29 (1985).

the neighbor if they try to pick any of the flowers in the homeowner's garden. Even if the neighbor ignores this warning, it is still not proportionate for the homeowner to kill the neighbor to prevent the neighbor from picking flowers. The neighbor has no right to pick the flowers and has been warned, but neither of these facts make the goal of stopping the neighbor from picking flowers important enough to justify killing the neighbor. In the same way, threatening to use deadly force against rioters cannot make an otherwise disproportionate use of force proportionate.

This does not mean police officers should not issue warnings or that these warnings are not morally significant. Issuing warnings is one way to be more certain that deadly force is actually necessary. If the mere threat of deadly force would be sufficient to achieve a goal, then the actual use of deadly force is not necessary to achieve that goal. Thus, while a warning cannot make an otherwise disproportionate use of force proportionate, warnings are still required by the constraint of necessity.

D. Self-Defense and the Defense of Others

There is one circumstance in which it is clearly proportionate for police officers to use deadly force. It is proportionate to use deadly force against a person when doing so is necessary to prevent that person from wrongfully causing death or serious bodily harm to another.[93] For example, it is clearly proportionate for the police to use deadly force against a person to stop that person from killing, raping, or mutilating another. Several provisions of the Model Penal Code grant police officers permission to use deadly force against a person to prevent that person from creating a substantial risk of death or serious injury to another.[94]

What constitutes a "substantial" risk of death or serious injury for our purposes? In other words, how likely must it be that a suspect will otherwise wrongfully kill or seriously injure someone before a police officer is permitted to use deadly force?[95] This is an area where it is hard

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[93] *See, e.g.*, *id.* at 11 (stating the use of deadly force is justified to prevent a suspect from causing "serious physical harm" to the officer or to others). *See also* Judith Jarvis Thomson, *Self-Defense*, 20 PHILOSOPHY AND PUBLIC AFFAIRS 283, 283 (1991) (noting that self-defense against a villainous aggressor is "obviously permissible."). There is of course a substantial difference between killing an aggressor to prevent that aggressor from wrongfully causing harm and killing an innocent bystander to prevent somebody else from causing harm. However, in this Article we are only considering the proportionality of using deadly force against someone to prevent that person from culpably causing a serious injury to another. The difference between harming an aggressor in self-defense and harming a bystander in self-defense may therefore be set aside. There is substantial philosophical literature exploring the justification for the use of deadly force against culpable aggressors. Philosophers often explain these cases by positing that the culpable aggressor is *liable* to be harmed in self-defense because she has *forfeited* her right not to be harmed. To keep things simple, for the purposes of this Article we have built liability and forfeiture into the proportionality analysis. The harm it is proportional to inflict on a person will depend in large part on whether that person is a culpable aggressor or a bystander. For a discussion of the concept of liability in the context of self-defense, *see generally*, Jeff McMahan, *The Basis of Moral Liability to Defensive Harming*, 15 PHILOSOPHICAL ISSUES 386 (2005).

[94] MODEL PENAL CODE §§ 3.04, 3.05, 3.07.

[95] It is useful to distinguish between the objective probability that death or serious injury will occur if police do not use deadly force and the belief-relative and evidence-relative perspective of the officer. *See* DEREK PARFIT, ON WHAT MATTERS VOL. I 102 (distinguishing between fact-relative, evidence-relative, and belief-relative justification). We can assume there is some level of objective risk to others that justifies the use of deadly force in a fact-relative sense. Thus, whether an officer is fact-relative justified in using deadly force depends, amongst other things, on the objective risk of not

for the law to be too precise. Some codes specify that deadly force is justified when it is "immediately necessary," or when the officer believes it is immediately necessary, to prevent the suspect from wrongfully killing or seriously injuring someone.[96] The requirement that the officer believe the need for deadly force to be "immediate" can be a proxy for how sure the officer must be that the suspect will otherwise wrongfully kill or seriously injure someone.[97] We can imagine hypotheticals in which future threats are somehow just as certain as an immediate threat, but in most cases immediacy is a fair proxy for certainty. We can conclude that a "substantial" risk, capable of justifying the use of deadly force, is a risk akin to the risk of a specific imminent threat: a suspect pointing a gun or a knife at another.

If there is probable cause to arrest a person for a dangerous crime, then perhaps it can be *presumed* the suspect is so dangerous that arresting her is important enough to justify killing her. The Supreme Court seems to endorse this presumption in *Garner*.[98] This presumption also seems to underlie the Model Penal Code rule allowing the use of deadly force to make an arrest for a crime that involved the use or threat of deadly force.[99]

This presumption does not stand up to scrutiny, for two reasons. First, probable cause is itself a very low standard of proof.[100] A reasonable belief that a person may have committed a crime involving the threat or use of deadly force might be enough to justify temporarily depriving that person of her liberty, but it cannot be enough to support a presumption that the person is so dangerous that she must be killed if she cannot be arrested. Second, depending on the nature of the crime for which a person is to be arrested, there may be little reason to suppose the person poses a risk to

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using deadly force. A police officer may also be reasonably or unreasonably mistaken in believing this level of risk exists. How officers who act based on a reasonable or unreasonable mistake should be treated by the law is a separate issue from determining the level of objective risk that fact-relative justifies the use of deadly force. This separate issue is secondary to determining the fact-relative circumstances in which the use of force is justified because we must know whether some circumstance in fact justifies the use of force before we can know whether a belief that that circumstance obtains justifies the use of force in a belief-relative sense. Failing to distinguish between objective risk and evidence-relative risk is a potential source of considerable confusion in these debates. For clarity, the focus of this Article is on objective-probability-relative justifications. *See generally* Carl Hoefer, *The Third Way On Objective Probability: A Skeptic's Guide To Objective Chance*, 116 MIND 546 (2007); Karl R. Popper, *The Propensity Interpretation Of Probability*, 10 BRITISH J. OF THE PHILOSOPHY OF SCIENCE 25 (1959).

[96] MODEL PENAL CODE §§ 3.04, 3.05, 3.07 ("The use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary to prevent such other person from committing suicide, inflicting serious bodily harm upon himself, committing or consummating the commission of a crime involving or threatening bodily harm, damage to or loss of property or a breach of the peace.").

[97] On this issue, *see generally* Kimberly Kessler Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 ARIZ. L. REV. 213 (2004) (arguing that in addition to being a proxy for necessity imminence is itself required for justified self-defense because "imminence serves as the *actus reus* for aggression, separating those threats that we may properly defend against from mere inchoate and potential threats.").

[98] *See* Tennessee v. Garner, 471 U.S. 1, 13 (1985).

[99] *See* MODEL PENAL CODE § 3.07(2)(b).

[100] *See* Locke v. United States, 7 Cranch. 339, 348 (1813) ("the term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation."); Illinois v. Gates, 462 U.S. 213, 234 (1983) ("Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision. While an effort to fix some general, numerically precise degree of certainty corresponding to 'probable cause' may not be helpful, it is clear that 'only the probability, and not a *prima facie* showing, of criminal activity, is the standard of probable cause.'" (quoting Spinelli v. United States, 393 U.S. 410, 419)).

anyone else. For example, suppose there is probable cause to believe a person killed their abusive husband. Is there any reason to suppose they are likely to continue killing other people unless they are arrested?

One way to think about this issue is to imagine that judges, rather than police officers, had to decide ex ante whether the use of deadly force is justified to arrest a suspect. Suppose that when issuing an arrest warrant a judge had the discretion to specify that the police were authorized to kill the suspect, if necessary, rather than let him escape. What showing should a prosecutor have to make before a judge would consider issuing such a "dead or alive" warrant? Surely, it would not be sufficient to show probable cause that the suspect committed a crime involving the use or threat of deadly force in the past. At minimum, the prosecutor should have to show some further reason, perhaps based on the nature of the crime, to believe the person poses an ongoing risk if not arrested. More realistically, the prosecutor ought to show a high level of certainty, far beyond probable cause, that the person poses an ongoing threat if not detained. Some may be uncomfortable with judges having the power to issue such "dead or alive" warrants in any circumstances. To the extent we are uncomfortable with judges having the power to issue "dead or alive" warrants, we should be even more uncomfortable with criminal codes that make any arrest warrant for a crime involving the use or threat of deadly force a de facto "dead or alive" warrant.

We can concede, for the sake of argument, that the police may sometimes be justified in using deadly force to prevent the escape of a highly dangerous suspect.[101] Nevertheless, a belief that a person committed a serious crime in the past is not the same as a belief that the person will wrongfully kill or seriously injure someone in the future. Before the police are justified in killing a suspect, they ought to have a very good reason to believe the suspect will otherwise wrongfully kill or seriously injure someone in the future. It is therefore not reasonable to presume that, if there is probable cause to arrest a person for a crime involving deadly force, she must be so dangerous that killing her is better than letting her escape.

The only goal important enough to justify the use of deadly force against a suspect is the goal of preventing that suspect from wrongfully creating a substantial risk (akin to the risk of a specific imminent attack) of death or serious injury to others. The other goals contemplated by the Model Penal Code—making an arrest, preventing an escape, and suppressing a riot—are not important enough by themselves to justify the use of deadly force. This moral conclusion follows from widely accepted principles of proportionality that, in various ways, are already embodied in law.

V. THE NECESSITY PREMISE

Suppose the arguments in the last Section were persuasive. The only goal important enough to justify the use of deadly force by the police is the goal of preventing a substantial risk of death or serious injury to themselves or others. Does it then follow that the police should retreat, if

[101] *But see* Ferzan, *supra* note 97.

they can do so safely, rather than use deadly force in self-defense? That conclusion follows if we also accept the necessity premise: inflicting some amount of harm is justified only if inflicting that amount of harm is necessary for the achievement of a goal that is important enough to justify that amount of harm. This Section defends the necessity premise.

The necessity premise might seem logically obvious when taken in isolation, but our current laws and police training seem to contradict it. Now infamous "stand your ground" laws seemingly contradict the necessity premise by allowing a civilian to use deadly force in self-defense even when deadly force is not actually necessary for their defense.[102] Notice that stand your ground laws still require the use of deadly force to be proportionate. The force must be used to achieve a goal (self-defense) that is important enough to justify the use of deadly force. However, stand your ground laws relax the constraint of necessity, by allowing the use of deadly force to achieve the goal of self-defense even when there are other less harmful means of self-defense available, such as retreat.

While stand your ground laws for civilians have become notorious for permitting unjustified killing, stand your ground laws for police have gone unquestioned. At first glance, this difference is understandable. When confronted with violent resistance, many people want the police to fight back rather than retreat to safety. In the eyes of many, a necessity constraint applies to the use of deadly force by civilians but does not apply to the use of deadly force by police.

Current police training seems to reflect this popular idea that a necessity constraint applies to civilians but not to the police. Police are trained on what they call a "use of force continuum" or "use of force matrix."[103] The idea is that the degree of force it is appropriate for a police officer to use depends on the degree of resistance she encounters.[104] The use of force continuum trains police to respond proportionally and to avoid escalation.

However, by its very nature the use of force continuum sidelines the concept of necessity. Necessity is a relationship between an act of violence and the goal that act is trying to achieve. That relationship is sidelined when police are trained to focus on the correlation between the

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[102] These laws have become highly controversial in recent years and have been linked to shocking cases of unjustified deadly force. *See, e.g.*, *Zimmerman is Acquitted in Trayvon Martin Killing*, N.Y. TIMES (July 13, 2013), https://perma.cc/Z97L-NDV9. For an academic discussion of these laws and their historical justifications, *see* Cynthia V. Ward, *supra* note 1 (providing a historical background to these laws, and noting that they seem to contradict, or make an exception to, the requirement of necessity). *See also* Pamela Cole Bell, *supra* note 1.

[103] *See* Garrett & Stoughton, *supra* note 8, at 269 ("The most common incarnation of proportionality today can be found in the 'force matrix' used by thirty one of the fifty largest police agencies . . . Often, some types of force—say, tackling someone to the ground—will be appropriate while other types of force such as deadly force—will not be. Many police policies and training materials communicate this point through the use of a 'force matrix' that visually depicts when police may use escalating degrees of force."). *See also id*. at 269 n.257 ("We use 'force continuum' to refer to a standalone classification of officer force and 'force matrix' to refer to a force continuum in combination with a resistance continuum. It is common to see less precise usage in which the two terms are synonymous."). The Author uses the term "force continuum" since it is the more widely used and recognizable term.

[104] *Id.* ("A force matrix correlates the force continuum with the resistance continuum, creating a formalized representation of how the gradations of force can be applied in response to various types of resistance.").

suspect's violence and the level of violence police use in return.[105] For example, one sample continuum matches "aggressive physical resistance" by a suspect with "deadly force" by police.[106] It might be proportionate to use deadly force to protect oneself from an aggressive suspect, but that does not mean it is necessary. Training police on the use of force continuum reinforces the idea that the necessity constraint does not apply to police.

Police training has also been criticized for deliberately instilling a "warrior mindset" in officers. Police use military style training that can make officers think of themselves as combatants.[107] Standing one's ground and not retreating in the face of violent resistance is a virtue for soldiers. Instilling that virtue in police, and creating a militarized culture around them, further reinforces the idea that the necessity constraint does not apply to police.

There seems to be widespread acceptance that the police, unlike civilians, should be permitted to stand their ground. So we must take seriously the possibility that the necessity premise is false, at least when applied to police. How could this be the case? It depends on whether we think of the necessity constraint as logical—an inescapable feature of any coherent justification—or deontological—a moral rule that depends on the duties we owe to each other.

If necessity is understood as a deontological constraint on the use of violence, then it makes sense that there are different rules for civilians and police. It makes sense that the police and civilians might owe different duties to each other. The idea that necessity should be understood deontologically is not a fringe position. Indeed, it is the dominant view among moral philosophers.[108] This Article rejects these deontological accounts of necessity in favor of a simpler logical account. On the logical account, necessity is simply a logical feature of means–ends justifications.

A. Deriving the Necessity Premise from the Logic of Means–Ends Justifications

Suppose there are two equally effective means of achieving a goal. The importance of achieving the goal does not give us *any reason* to choose one of the two means over the other, because they are both equally

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[105] *See id.* at 273 ("It is important to note the limits of force matrices. They apply without reference to the underlying justifications for the police-civilian encounter or the relative importance of the state interest at stake; once a legitimate law enforcement purpose has been established, a force matrix guides the officer's response to resistance occasioned during the pursuit of that purpose.").
[106] *Id.* at 270–271.
[107] *See supra* note 6.
[108] The dominant theory of the necessity constraint amongst philosophers is what is sometimes called the moral weighting account. Versions of this theory are defended by both Jeff McMahan and Seth Lazar. *See* Seth Lazar, *Necessity in Self-Defense and War*, 40 PHILOSOPHY AND PUBLIC AFFAIRS 11 (2012); Jeff McMahan, *The Limits of Self-Defense*, THE ETHICS OF SELF-DEFENSE, ed. by Christian Coons and Michael Weber (2016). They argue that the necessity constraint permits the use of deadly force only if using deadly force would bring about the least morally weighted harm when compared to the available alternatives. On this view, the constraint of necessity requires the officer to use her non-lethal weapon rather than her gun because using the non-lethal weapon would bring about less harm overall than either doing nothing (and allowing the murder) or using the gun (and killing the criminal). Essentially the moral weighting account tells us we should not bring about outcomes that are worse than other available outcomes. The main alternative to this moral weighting account, Quong's rescue view, is similarly deontological and is discussed at length below. *See infra* Section V(B).

effective. Now suppose that one of the means is more costly, by some metric, than the other. We cannot appeal to the importance of achieving the goal to justify that extra cost, because, as we just agreed, the importance of achieving the goal does not give us any reason to choose one means over the other. Thus, we cannot appeal to the importance of achieving a goal to justify incurring extra cost, because the importance of achieving a goal does not give us *any reason* to incur more cost than is necessary to achieve that goal.[109]

This is a logical fact about means–ends justifications with which we are all familiar. For example, suppose that you work in Chicago and your boss wants you to attend a sales convention in New York. You want to get lots of air miles, so you book a flight from Chicago to San Diego and another from San Diego to New York. When you send the bill to your boss she is rightfully outraged by the unnecessary expense. It would be absurd to claim the expense is justified by the goal of attending the conference in New York. It is absurd because the goal of getting to New York does not give you any reason to incur the extra expense of traveling via San Diego.

We can see the same thing in the example of deadly force we discussed above. Suppose the police face a choice between (1) using deadly force against a suspect, (2) allowing themselves to be seriously injured, and (3) safely retreating. The goal of preventing serious injury to the police and bystanders can be achieved by either option (1) or option (3). So, the goal of preventing death or serious injury to the police or bystanders does not give the police any reason to choose option (1) over option (3). Option (1) imposes a much greater harm on the suspect than option (3). Thus, if imposing that extra harm is justified, it must be justified by a goal other than the goal of preventing death or serious injury.

Once we accept that the importance of achieving a goal cannot provide any reason to incur a greater cost than is necessary to achieve that goal, we must also accept the necessity premise. Inflicting some amount of harm is justified by a given goal only if inflicting that amount of harm is necessary for the achievement of that goal. Inflicting some amount of harm is justified as a means to achieve a goal only if that goal is important enough to justify that amount of harm. Thus, inflicting some amount of harm is justified only if inflicting that amount of harm is necessary for the achievement of a goal that is important enough to justify that amount of

[109] This logical account of necessity is consistent with the fact that, as Lazar and McMahan have pointed out, necessity can be traded off against the deontological concept of proportionality. *See* McMahan, *supra* note 108 and Lazar, *supra* note 108. For example, suppose that an attacker attacks a victim and we have only two defensive options: (a) kill the attacker and thereby remove 100% of the risk to the victim or (b) stun the attacker and thereby remove only 80% of the risk to the victim. In this case the simple question "is it necessary to kill the attacker in order to save the victim" does not have a simple answer. However, we can and must apply the logic of necessity to this case. Necessity tells us that the importance of achieving a particular goal does not give us any reason to inflict more harm than is necessary to achieve that goal. In this case, the goal of preventing 80% of the risk to the victim can be achieved merely by stunning the attacker. Logically, therefore, we cannot appeal to the goal of preventing 80% of the risk to the victim in order to justify killing the attacker instead of stunning him. However, we can appeal to the goal of preventing the remaining 20% of the risk to the attacker in order to justify killing the attacker instead of stunning him. Thus, whether we should choose (a) or (b) depends on whether the goal of preventing the remaining 20% of the risk to the attacker is important enough to justify killing the attacker instead of stunning him. This is a moral question that requires us to make a judgement of proportionality. In this way, the logic of necessity can reveal the right moral question to ask. However, necessity itself is simply a logical constraint on means–ends justifications.

harm. In this way, the necessity premise can be derived from the logic of means–ends justifications.

Incidentally, this understanding of necessity allows us to better understand the relationship between necessity and proportionality, a relationship which is quite complicated under some deontological theories.[110] It demonstrates that proportionality and necessity arise necessarily from the logic of means–ends justifications. Proportionality simply requires that the goal be important enough to justify the cost of the means, a necessary condition of a sufficient means–ends justification. Similarly, necessity requires that the goal actually provides reason to accept the cost of the means, which is also a necessary condition for a sufficient means–ends justification.

More importantly, for the purposes of this Article, this logical derivation of the necessity constraint does three things. First, it proves the necessity premise of our argument is true. Second, it shows that, contrary to popular opinion, there is no basis for applying the necessity constraint to civilians but not the police. Third, once the necessity premise is combined with the rest of the argument, it shows that police should not be permitted to use deadly force rather than retreat, if they can retreat without creating a substantial risk of death or serious injury to themselves or others.

B. A Deontological Objection

Have we been too hasty? Why do moral philosophers have a deontological view of necessity? What might one of these philosophers say to defend the idea that the necessity constraint should be understood deontologically? This sub-Section offers a deontological objection to the necessity premise. To reply to this objection, we must distinguish between the duty to retreat and the duty to avoid confrontations.

A moral philosopher might argue that this logical account of necessity cannot be correct because it produces a morally absurd result. She might point out there are some cases in which, as a matter of morality, there seem to be exceptions to necessity. She might argue that a deontological theory of necessity can explain these exceptions, but a logical theory of necessity cannot. Consider this hypothetical case recently proposed by Jonathan Quong:

> There is a party tonight, and Betty is deciding whether to go. A completely reliable person has warned her that Al will be at the party, and he will assault Betty if she turns up. Betty justifiably believes that if she goes to the party, Al will threaten to assault her, and she will then need to use (and be able to use) serious defensive force to avert his wrongful assault (such force is . . . proportionate given the seriousness of Al's threatened assault). Going to the party is not very important to Betty—she could also stay home and finish the novel she's reading.[111]

[110] *See supra* note 109.

[111] JONATHAN QUONG, THE MORALITY OF DEFENSIVE FORCE, 133–34 (2020). The Author has changed Al's name from Albert and clarified Al's relationship to Betty. Otherwise this example comes verbatim from Quong.

Quong is correct that Betty may permissibly go to the party and kill Al in self-defense, even though she could avoid killing Al by staying home. This seems like a problem for our logical account of necessity, because it suggests there are exceptions to necessity that the logical account cannot explain. After all, killing Al is not necessary for Betty to defend herself, because she could defend herself just as easily by staying home.

We can easily imagine a version of this hypothetical involving police. Consider:

> A police officer is deciding whether to go on patrol in a certain area. A completely reliable person has warned her that Al will be in the area, and that he will assault the officer if she goes on patrol in that area. The officer justifiably believes that if she goes on patrol, Al will threaten to assault her, and she will then need to use (and be able to use) deadly force to avert his wrongful assault (such force is proportionate given the seriousness of Al's threatened assault). Patrolling the area is not a particularly important police goal—the officer could work on solving a recent crime instead.

The officer should be permitted to go on patrol. It would be absurd if the logical account of necessity committed one to the view that the officer must work on the recent crime instead. This presents a problem for the logical account of necessity, and thus for the necessity premise of our argument.

Unlike the logical account of necessity, deontological theories of necessity seem well placed to explain these apparent exceptions. Quong defends a deontological account of necessity which he calls the rescue view.[112] According to the rescue view, necessity is a moral demand that attackers like Al can reasonably make of people like Betty or our police officer. It is reasonable to demand that a person not harm their attacker more than is necessary in self-defense. However, in some cases it is unreasonable for Al to make this demand, because it treats his future conduct as something for which he is not responsible. Such demands fail what G. A. Cohen calls the "interpersonal test."[113] Quong describes the test like this:

> If a moral demand depends on an empirical premise, and the person issuing the demand (or on whose behalf it could be issued) is also the person whose future decisions will make the empirical premise true, then if that person cannot provide a satisfactory justification of why she will choose to behave in a manner that makes the empirical premise true, this undermines the moral demand that the premise supports.[114]

If Al were to demand that the officer refrain from going on patrol, this demand would be unreasonable because it would fail the interpersonal test. Al's demand that the officer not go on patrol depends on the empirical

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[112] As Quong points out, the moral weighting view seems to get the wrong answer in this case. According to the moral weighting view, the constraint of necessity requires Betty to stay home because that is the option that results in the least morally weighted harm. *See id*. McMahan, in conversation, accepts this implication of the moral weighting view and rejects the intuition that Betty is permitted to go to the party.

[113] G. A. COHEN, RESCUING JUSTICE AND EQUALITY, 39–40 (2008). A similar idea has been explored by Johann Frick. *See* Johann Frick, *What We Owe to Hypocrites: Contractualism and the Speaker-Relativity of Justification*, 44 PHILOSOPHY AND PUBLIC AFFAIRS 223 (2016).

[114] Quong, *supra* note 111, at 138.

premise that if the officer goes on patrol, Al will attack her, and she will have to use deadly force in self-defense. But whether this empirical premise is true is up to Al. He could, and should, choose not to attack the officer. Al cannot give a satisfactory justification for why he will attack the officer. So, according to the interpersonal test, Al cannot reasonably demand that the officer refrain from going on patrol. In this way, the rescue view can explain why the officer is permitted to go on patrol.

We can respond to this deontological objection by showing (1) that the rescue view cannot actually explain the apparent exception to necessity in this hypothetical, and (2) that the logical view of necessity can explain this apparent exception. We can reject the rescue view's explanation because it is too permissive. Where the rescue view goes wrong is in treating necessity as a reasonable moral demand that Al makes of the officer. There are some cases in which the necessity constraint requires things of the officer that it would be *unreasonable* for Al to demand. For example, suppose that when the officer leaves on her patrol, she must choose between bringing her gun or her non-lethal weapon. She knows that if she takes her gun, she will have to kill Al, but if she takes her non-lethal weapon, she can incapacitate him harmlessly. It seems obvious that necessity requires the officer to take her non-lethal weapon. Knowing that Al will attack her, it would be wrong for her to take the gun instead.[115]

Yet, according to the rescue view, necessity does not require the officer to bring her non-lethal weapon instead of her gun. Al cannot reasonably demand that the officer bring her non-lethal weapon instead of her gun because such a demand would fail the interpersonal test. It is better for Al that the officer bring her non-lethal weapon only because Al will attack her. Whether Al attacks the officer is something that Al can control. Thus, Al's demand that the officer bring her non-lethal weapon instead of her gun fails the interpersonal test. According to the rescue view, this means the necessity constraint does not require the officer to bring her non-lethal weapon instead of her gun. This seems like the wrong result.

Having rejected the rescue view's account of this case, we still need to show that the logical view of necessity can explain why the officer may go on patrol even though doing so will mean using deadly force against Al. According to the logical view, the officer cannot appeal to the goal of saving her own life to justify going on patrol. Yet, this does not mean that going on patrol is unjustified. We just need to look for another justification.

The officer is justified in going on patrol, if she wants to, because she should not be required to avoid otherwise permissible behavior simply because Al unreasonably finds that behavior provocative. Requiring a person to avoid some behavior only because another person will react unreasonably to that behavior is not compatible with those people living as equal members of society. This is particularly obvious in the case of Betty's desire to go to a party, but it is equally true of the officer's desire

[115] This case raises another philosophically difficult problem that this Article does not discuss: how the constraint of necessity applies over time. This philosophical problem is crucial to the pre-seizure reasonableness analysis, but the subject is much too complex to be adequately explored here. *See generally* Aaron Kimber, *Righteous Shooting, Unreasonable Seizure? The Relevance of an Officer's Pre-Seizure Conduct in an Excessive Force Claim*, 13 WM. & MARY BILL RTS. J. 651 (2004).

to go on patrol. Requiring Betty to avoid doing things just because Al might find those things provocative would force Betty to internalize Al's unreasonable preferences and would allow Al's tendency towards violence to dominate Betty's life in a particularly harmful way. The goal of preventing this kind of harmful domination is important enough to justify going to the party or going on patrol. This is why Betty is not morally required to stay home from the party and why the officer is permitted to go on patrol.

While the officer is permitted to go on patrol, she is not permitted to neglect other precautions to avoid harming Al. For example, the officer is required to choose a non-lethal weapon over a lethal weapon so that she does not have to kill Al. The officer should choose a non-lethal weapon over a lethal weapon because using a lethal weapon is very harmful to Al. Requiring the officer to avoid things that are harmful to Al is consistent with the officer and Al living as equals. It is not the same as requiring the officer to avoid behavior because Al reacts unreasonably to that behavior. Requiring the officer to avoid some behavior because Al reacts unreasonably to that behavior requires the officer to internalize Al's unreasonable preferences in a way that is particularly harmful to her ability to treat Al as an equal. In contrast, requiring the officer to avoid things harmful to Al just requires her to show Al the same concern she shows everyone else.

Have we conceded too much? If the officer is permitted to go on patrol, then surely she can stand her ground, rather than retreat, when she is attacked. Thus, it might be objected, by permitting the officer to go on patrol, we have conceded the central claim that police officers should not be permitted to stand their ground when attacked. More generally, it might be objected that, according to the argument in this Article, no police officer should ever be allowed to go anywhere, since she might have to use deadly force in self-defense.

This objection fails, because there is an important difference between a duty to retreat and a duty to avoid a situation in which one might be compelled to use deadly force. An officer's reason for retreating, rather than using deadly force, is not that the suspect would respond unreasonably to the use of deadly force. Her reason is simply that using deadly force would be very harmful to the suspect. The requirement that an officer try to avoid harming a suspect does not subject the officer to harmful domination. In contrast, requiring the officer to avoid behavior that the suspect might unreasonably find provocative would subject the officer to harmful domination.

Distinguishing between a duty to retreat before using deadly force and a duty to avoid behavior that others might unreasonably find provocative is highly relevant for police. Police officers should be required to use non-lethal weapons, and to retreat if safely possible, before resorting to deadly force. However, this does not mean that police officers must avoid putting themselves in situations in which they may be compelled to use deadly force because of the wrongful reactions of other people. Officers need not stay home simply because their presence may provoke a situation in which it is necessary to use deadly force.

This leaves us with two arguments to support the necessity premise. First, the necessity premise can be derived from the logic of

means–ends justifications. This alone is enough to prove that the necessity premise is true. Second, for people worried about counterexamples like Betty's case, the logical account of necessity can not only explain Betty's case, but it can also help us find a better explanation of Betty's case than Quong's deontological view.

Recall the argument laid out at the beginning of the Article. We have now seen that each of the crucial premises, the proportionality premise and necessity premise, are true. Once we accept these premises, we must accept that the use of deadly force by the police against a suspect is not justified if the police could instead retreat, without creating a substantial risk of death or serious injury to themselves or others.

VI. TWO FURTHER OBJECTIONS

There are two possible objections we have not yet considered. First, it might be claimed that the police have a special moral status of which this Article's argument does not take sufficient account. Police officers have both the right and the obligation to use force to defend others and enforce the law. It might be objected that this special status needs to be considered in any account of the justification for the use of deadly force by police. Second, it might be objected that this Article's conclusions, if accepted, would make it too easy for suspects to escape arrest and would create a perverse incentive for suspects to violently resist arrest. We can consider these objections one at a time.

First, we can acknowledge that the police have both a greater permission and a greater duty to use force than civilians. The police are publicly authorized to make arrests and enforce the law.[116] This public authorization distinguishes the police from mere vigilantes. The police also have a duty to protect others from harm. Even if a civilian is permitted to use force to protect another person from harm, she is generally not obligated to do so.[117] In contrast, the police are morally and professionally obligated to use force to protect others from harm.[118] Both of these factors, the right and duty to use force, contribute to the special moral status of police.

The special moral status of police would be highly relevant if we were comparing the amount of force a police officer could permissibly use with the amount of force a civilian could permissibly use in a given situation. There may well be cases in which it is permissible for a police officer to use force that it would not be permissible for a civilian to use. For example, the legal power of police to make arrests is rightly much broader than the power of the civilians to detain others.[119] In addition, the fact that police officers are under an obligation to use force in the defense of others may well be relevant to how we should treat officers who make reasonable mistakes about how much force to use. The implications of the

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[116] *See* Model Penal Code § 3.07.

[117] The common law does not impose a general duty to rescue on civilians. *See* Marin Roger Scordato, *Understanding the Absence of a Duty to Reasonably Rescue in American Tort Law*, 82 TUL. L. REV. 1447 (2008).

[118] We can set aside the question of whether police are legally obligated to use force to protect others. The moral and professional obligations of police officers are enough to establish their special moral status.

[119] *See, e.g.*, Model Penal Code §§ 3.04(3), 3.06(4), 3.07.

obligation to use force for the culpability of police officers may be an important topic for further research.

However, the special moral status of police does nothing to undermine the argument in this Article. The argument is not undermined because we have already implicitly accounted for the special status of police. In Section IV, we considered the goals that could justify the use of deadly force *by police*. We did not consider the use of deadly force in general, but specifically considered the moral and legal limits on the use of force by police. In doing so, we implicitly took account of the special moral status of police. Based on widely accepted moral intuitions already embodied in law, we concluded that even the police are not justified in using deadly force against a suspect except as a means to prevent that suspect from wrongfully inflicting a substantial risk of serious injury on others.[120] In Section V, we explicitly considered whether the constraint of necessity applies to police. We concluded that because necessity is best understood as a logical constraint on means–ends justifications it must apply even to the police. The special moral status of police is relevant to the comparison between the use of force by police and the use of force by civilians. We have not considered the use of force by civilians, so we have not explicitly discussed the special moral status of police until now. Nevertheless, we have already tacitly accounted for the special moral status of police, by considering the justification for the use of force by the police. Thus, the special moral status of police does nothing to undermine our argument.

Second, it might be objected that imposing a duty to retreat on police would allow too many suspects to escape. It would let suspects know that they can escape arrest simply by putting police officers in a situation in which the officers must either retreat or use deadly force. This might create a perverse incentive for suspects to violently resist arrest in order to force the police to retreat.

There are at least two problems with this objection. First, as we have already seen, making arrests is simply not an important enough goal to justify the use of deadly force. That some suspects might seek to exploit our moral principles does not give us a reason to abandon those principles. One could level the same criticism at the Court's decision in *Garner*. There, the Court announced that police officers could not legally shoot an unarmed suspect attempting to flee from arrest for a non-violent crime. In essence, the Court announced that any unarmed suspect could avoid arrest for a non-violent crime simply by running away. The Court was not unaware of this practical consequence. Yet it correctly reasoned that this practical consequence was a clear implication of its conclusion that effecting an arrest is not by itself an important enough goal to justify the use of deadly force.

Second, it is a mistake to assume that it is up to the suspect to determine how much force must be used to place him under arrest. In most cases it is up to the police. The police decide how much force must be used to arrest a suspect through their choice of tactics and equipment. Unless

[120] As noted above, preventing the escape of prisoners convicted of very serious crimes may also be important enough to justify the use of deadly force. At least, we cannot prove that it is not within the confines of this Article.

the suspect is threatening to create a substantial risk of serious harm to the officers or others, in which case the use of deadly force might be permissible, the police can always afford to wait and negotiate. Police forces have repeatedly demonstrated the ability to end armed stand-offs peacefully through patience and negotiation.[121] These are skills the police will have to use if they are no longer permitted to fall back on the use of deadly force.

The equipment police have at their disposal also affects how much force must be used to make a given arrest. For example, the choice to carry a gun instead of a less lethal weapon can affect the amount of force it is necessary for the officer to use to make an arrest in the face of serious resistance.[122] Laws that permit the police to stand their ground and use deadly force in the face of resistance reduce the incentives to find better non-lethal means to achieve law enforcement goals. These laws have allowed guns to remain default equipment for police officers. This is absurd because, as we have seen, most of the law enforcement goals that police pursue are not important enough to justify the use of deadly force. This makes guns useless as a tool to achieve most law enforcement goals. Even if police need to carry guns for the rare instances in which the use of deadly force is permissible, they need to be given other tools in order to do their jobs effectively. Forcing the police to make these changes to their tactics and equipment is not a problem. It is one of the key advantages of requiring the police to retreat to safety rather than use deadly force.

VII. CONCLUSION

These practical implications bring us back to where we started, with the example of a person robbing a grocery store and the police trying to stop him. In our example, the suspect resists and forces the police to choose between: (1) using deadly force, (2) accepting a substantial risk of harm to themselves, or (3) letting the suspect go and retreating to safety. If the police use deadly force, and kill the suspect in this case, it is a tragedy. It is a tragedy not only because the suspect dies, but because his killing is unjustified. The suspect's death is not necessary to achieve any law enforcement goal that is important enough to justify the use of deadly force. He might be blameworthy for robbing the grocery store and for resisting arrest, but killing him is a wholly unjustified response.[123] Letting the suspect go, even if it is frustrating, is the only justifiable option.

This Article is a work of legal theory, although it makes practical suggestions for how the laws governing the use of force by the police should be reformed. It has argued that the police should not be permitted to use deadly force to arrest suspects, even if the arrest is for a very serious

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[121] *See, e.g.*, Azi Paybarah and Christina Morales, *Texas Man Surrenders to Police, Ending 16-Hour Standoff*, THE NEW YORK TIMES, August 16, 2020; David Struett, *16-Hour Armed Standoff Ends Peacefully at Morton Grove Home*, THE CHICAGO SUN TIMES, APRIL 13, 2021; Dave Seminara, Richard Pérez-Peña and Kirk Johnson, *Oregon Standoff Ends as Last Militant Surrenders*, THE NEW YORK TIMES, Feb. 11, 2016.

[122] *See* John M. Macdonald et. al., *The Effect of Less-Lethal Weapons on Injuries in Police Use-of-Force Events*, 12 AM. J. PUBLIC HEALTH 2268 (2009) (offering statistical evidence that the use of less-lethal weapons decreases the incidence of injury from the use of police force).

[123] The Author assumes that the suspect is blameworthy merely for the sake of argument. There are many reasons why a person might resist the police and not be blameworthy for it.

crime. The police should not be permitted to use deadly force to prevent escapes from custody or to suppress riots. Most importantly, the police should not be permitted to stand their ground and use deadly force in self-defense if they could safely retreat instead. To the extent that current state laws give the police greater freedom to use deadly force, these laws should be changed.

These conclusions were reached by combining premises the law already accepts with a logical theory of necessity. It may seem radical to propose that police should be required to retreat when confronted with violent resistance. Yet this is a conclusion we must accept, once we consider the goals that are actually important enough to justify the use of deadly force and recognize that the importance of achieving a goal cannot justify imposing more harm than is necessary to achieve that goal. How these suggestions should be implemented depends on more than theory. However, recognizing the unjustified and contradictory nature of the laws currently permitting the use of deadly force by the police is a useful first step towards changing these laws for the better.