

## Applying the Imminence Requirement to Police

**Abstract:** In many jurisdictions in the United States and elsewhere, the law governing deadly force by police and civilians contains a notable asymmetry. Often civilians but not police are bound by the *imminence requirement*—that is, a necessary condition for justifying deadly force is reasonable belief that oneself or another innocent person faces imminent threat of grave harm. In U.S. law enforcement, however, there has been some shift toward the imminence requirement, most evident in the use-of-force policy adopted by the Department of Justice in 2022. This article defends that shift and argues that the ethical case for the imminence requirement in policing is stronger than Shannon Brandt Ford suggests in a recent article. Though the imminence requirement's impacts on policing and public safety require ongoing study, the principle of equality before the law and the Doctrine of Doing and Allowing both provide moral grounds for this requirement, especially given the lack of evidence that the status quo helps protect life.

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Criminal law often imposes on civilians the *imminence requirement*: a necessary condition to justify deadly force is reasonable belief that oneself or another innocent person faces imminent threat of grave harm,<sup>1</sup> commonly understood as death, serious bodily injury, kidnapping, or rape.<sup>2</sup> Police, though, have long been exempt from the imminence requirement. The common law allowed police to use deadly force against any fleeing felon if necessary to prevent their escape, what became known as the fleeing felon rule.<sup>3</sup> *Tennessee v. Garner*, which struck down the fleeing felon rule as unconstitutional in the United States, still permits police deadly force to prevent the escape of suspects who are dangerous but not necessarily an imminent threat.<sup>4</sup>

In a recent article in *Criminal Justice Ethics*, Shannon Brandt Ford criticizes imposing on police the imminence requirement because of their special responsibility to ensure public safety. This responsibility, he argues, requires more expansive permissions for police to use deadly force against non-imminent but future threats.<sup>5</sup> The ethical case for the imminence requirement in policing proves stronger than Ford suggests, however. There is little empirical evidence that exempting police from the imminence requirement advances public safety and helps protect life. Such an exemption also conflicts with two core principles from law and ethics: equality before the law and the Doctrine of Doing and Allowing (DDA)—that is, it is harder to justify causing harm than allowing it. Together, these considerations leave the prevailing status quo on shaky moral footing.

This article defends the imminence requirement for police at a time when the U.S. Department of Justice and other agencies have adopted this policy.<sup>6</sup> I examine a thought experiment by Ford and show that it fails to suggest that police should be exempted from the imminence requirement. I then discuss why the principle of equality before the law and the DDA provide moral grounds to extend the imminence requirement to police. Since applying the

imminence requirement to police remains a minority practice in law and policy,<sup>7</sup> further study is necessary to evaluate its effects on policing and public safety. When considering the imminence requirement, police administrators and policymakers should recognize the need for such study and support it. But they should not see this potential policy as inherently at odds with officers' ethical responsibilities.

### **Shift toward the Imminence Requirement in U.S. Policing**

When making the case against the imminence requirement in policing, Ford cites one example of the view he opposes<sup>8</sup>—an article by legal scholars Gabriella Blum and Philip Heyman.<sup>9</sup> That portrayal of the opposing view offers an incomplete picture. Notably, numerous law enforcement organizations in the U.S. have the imminence requirement in their use-of-force policies. Big city police departments in places like Chicago,<sup>10</sup> Houston,<sup>11</sup> and New York<sup>12</sup> have implemented such a requirement to restrict deadly force by their officers. The Commission on Accreditation for Law Enforcement Agencies (CALEA) also endorses the imminence requirement. CALEA recommends the following policy for agencies: “deadly force may only be used when an officer reasonably believes the action is in defense of any human life in imminent danger of death or serious bodily injury.”<sup>13</sup>

Perhaps the most significant shift in U.S. law enforcement toward the imminence requirement occurred in 2022 when the Department of Justice updated its use-of-force policy. The updated policy states: “Law enforcement officers and correctional officers of the Department of Justice may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person.”<sup>14</sup> This clear articulation of the imminence

requirement applies to all law enforcement officers in agencies under Department of Justice, like the Federal Bureau of Investigation. It also has the potential to influence use-of-force policies for state and local agencies.

Beyond agency policies, there also have been steps toward implementing the imminence requirement into state law. In response to the high-profile police killing of a Black unarmed teenager who was fleeing, Antwon Rose II,<sup>15</sup> state lawmakers in Pennsylvania introduced a bill to impose the imminence requirement on police.<sup>16</sup> Though that bill did not pass, shortly after Massachusetts did enact legislation that applied the imminence requirement to police. Its law reads: “A law enforcement officer shall not use deadly force upon a person unless de-escalation tactics have been attempted and failed or are not feasible based on the totality of the circumstances and such force is necessary to prevent imminent harm to a person and the amount of force used is proportionate to the threat of imminent harm.”<sup>17</sup>

In most of the U.S., the imminence requirement still does not apply to police and the recent shift toward such a requirement, by itself, fails to indicate that there is a strong moral case for it. But when we examine this requirement, it is important to recognize that it does not represent a marginal view only defended by critics of police. Rather, the requirement is a policy that leading law enforcement agencies have voluntarily adopted.

### **Limitations of Ford’s Thought Experiment**

To explain why applying the imminence requirement would be too restrictive and prevent police from fulfilling their ethical responsibilities, Ford offers the following thought experiment, which I refer to as *Bombing Threat* for the sake of convenience:

*Bombing Threat:* Olivia has a bomb in a backpack that will explode only when her GPS indicates that she has reached the busy town square of Walterville. Police have reliable

intelligence that Olivia has a bomb, that it will go off in Walterville, and that otherwise she is unarmed. A lone officer, Peter, at a rural checkpoint over a day from Walterville recognizes Olivia on her motorbike as the suspect and orders her to stop and surrender. Olivia refuses and speeds off toward Walterville. Peter has good reason to believe that no one will be able to stop Olivia before her target unless he shoots and kills her now.<sup>18</sup>

According to the imminence requirement or “standard self-defense paradigm” as Ford calls it, Peter is not permitted to shoot Olivia. But that view seems wrong since “it would be negligent of Peter in his role of police officer to let Olivia escape and allow the risk that she reaches her intended target.”<sup>19</sup> Ford therefore concludes that “police are *not* bound by the same *immediate threat condition* that is required by the standard self-defense and defense-of-others paradigms.”<sup>20</sup>

It is doubtful, though, that *Bombing Threat* offers compelling grounds for applying different deadly force permissions to police and civilians when facing non-imminent threats. Consider a slightly altered version of *Bombing Threat*: Peter is an armed civilian instead of an officer, yet the other relevant facts remain the same—he correctly believes that Olivia has a deadly bomb that will detonate in a crowded place and his shooting her is the only way to stop this grave threat. Though a civilian, Peter seems equally justified in using deadly force as in the version of *Bombing Threat* where he is an officer. In both cases, under the circumstances stipulated, deadly force is necessary to prevent someone from inflicting grave future harm, even if they pose no imminent threat. A standard view in ethical reasoning on deadly force is that such force is morally justified when necessary to stop an aggressor’s grave and unjust harm.

At most, then, Ford’s thought experiment casts doubt on the imminence requirement generally—for police *and* civilians. But Ford never questions this requirement for civilians. He only rejects it for police. His thought experiment fails to offer a reason for that distinction.

Though Ford’s thought experiment has broader implications than he recognizes, one could respond that this fact does not undermine his policy recommendation: police should not be

bound by the imminence requirement. His thought experiment's broad implications make them more dubious, however, since they conflict with a long-established principle—civilians should be bound by the imminence requirement—that many accept.

Looking more closely at the underlying rationale for the imminence requirement helps highlight further problems with Ford's argument. Since deadly force decisions almost always occur under uncertainty, moral and legal theory often rely on imminence as a proxy for necessity.<sup>21</sup> In policing and law, a standard definition of an imminent threat is someone with the present (1) ability, (2) opportunity, and (3) apparent intent to cause immediate harm. Such a threat is clearly at hand and will occur at once, absent intervention.<sup>22</sup> The concept of imminence communicates that a threat is temporally close, leaving little time for other events to intervene and eliminate it. For a non-imminent threat, though, the opposite is true and there is less certainty that the harm will be realized. Using deadly force against such a threat comes with greater risk of inflicting harm that turns out to be gratuitous.<sup>23</sup> The imminence requirement represents a strategy to advance the morally laudable goal of reducing unnecessary harm.

Critics of this requirement appeal to thought experiments like Ford's where imminence and necessity come apart. Almost always, such thought experiments stipulate certainty about future threats that is incredibly rare or nonexistent in real life. Before introducing his own hypothetical to critique the imminence requirement, Fritz Allhoff admits that actual "cases simply do not exist" where defensive force is necessary despite no imminent threat.<sup>24</sup>

It is impossible for any rule guiding deadly force to guarantee the morally optimal recommendation in all cases given uncertainty and reasonable errors. Inevitably, such rules involve tradeoffs in the comparative level of risk borne by parties in an interaction. Defenders of the imminence requirement can point to numerous *actual* cases—like the 2018 killing of Antwon

Rose mentioned above<sup>25</sup> or the 2005 killing of Jean Charles de Menezes, mistakenly identified as a terrorist and future threat by London police<sup>26</sup>—where not following the rule led to unnecessary grave harm. In contrast, critics of the requirement focus on harms confined to thought experiments.<sup>27</sup> It is morally dubious, to say the least, to prioritize minimizing the latter harms over the former. For this reason, thought experiments like Ford’s do little to weaken the moral case for the imminence requirement.

### **Equality before the Law**

The argument for exempting police from the imminence requirement runs into additional difficulties beyond just the limitations of Ford’s thought experiment. To impose the imminence requirement on civilians but not police—the prevailing status quo in many jurisdictions—goes against a fundamental legal principle: equality before the law. This principle enshrined in Article 7 of the Universal Declaration of Human Rights, the 14th Amendment of the U.S. Constitution, and other foundational documents captures the idea that law should reflect the moral equality of individuals by giving them equal protection. When the law exempts officers from the imminence requirement, it gives them a more expansive right to use deadly force. Such differential treatment conflicts with the idea that the law should treat everyone equally.

The principle of equality before law should be understood as a presumption in favor of equal treatment, which requires compelling reasons to override it. Those in occupations like law and medicine have more extensive legal rights due to their specialized training and professional responsibilities. Similarly, one could argue that police should have more expansive permissions to use deadly force against non-imminent threats given their training and responsibilities.

To evaluate this claim, it helps to start by identifying what, in effect, exempting police from the imminence requirement does. This feature of the law authorizes officers to determine whether someone, despite posing no imminent threat of grave harm, would cause such harm *in the future* that requires deadly force *now* to prevent it. The imminence requirement prohibits civilians from acting on such judgments by limiting justifications for deadly force to only imminent threats. It is understandable why the law places that restraint on civilians: it is difficult to know whether someone will pose a threat of grave harm in the future when they pose no such threat now, let alone whether deadly force now is the only way to stop the future threat. Do we have reason to believe that police can predict which fleeing suspects will pose a future danger with reliable accuracy—a judgment that the law does not trust civilians to make?

Though empirical research on policing has advanced our understanding of which rules help reduce unnecessary deadly force,<sup>28</sup> we lack research specifically on the accuracy of police judgments regarding non-imminent threats. So far, there have been no efforts to gather and analyze data relevant to whether police can reliably identify which fleeing suspects pose a grave future threat and whether they are more accurate in those judgments than civilians. This dearth of research means that no evidence-based training or practices are available to guide police in deadly force decisions against suspects who are purportedly dangerous but pose no imminent threat. As a result, officers make these decisions absent research, training, and ongoing evaluation to help ensure reliable accuracy.

Notably, in other criminal justice contexts with far more time for deliberation—capital sentencing—predictions of future dangerousness prove to be wholly unreliable. Studies find that capital defendants deemed a future danger are no more violent than those not deemed a future danger, even when incarcerated in similar conditions.<sup>29</sup> The criminal justice system’s poor track

record of predicting future dangerousness casts doubt on police's ability to do so reliably, especially given that officers make those predictions under duress with limited information.

To summarize, the principle of equality before the law favors applying the imminence requirement to police and civilians rather than just the latter, and we currently lack any strong evidence to override that presumption. This claim need not imply that the law governing deadly force by civilians and police must be equivalent in *all* respects. For instance, consider the duty to retreat—the legal requirement to avoid defensive force and retreat when there is a safe opportunity to do so<sup>30</sup>—which applies to civilians in some jurisdictions. That requirement on police would conflict with their ethical responsibility to respond to public safety threats in a more fundamental way than the imminence requirement does. The imminence requirement places constraints on what tactics police can use when pursuing suspects who resist, whereas the duty to retreat would preclude police from pursuing those suspects altogether. We can leave open the possibility of compelling reasons that override the presumption for equal treatment and provide a moral basis for some exemptions for police from the standard rules governing deadly force. Such reasons, though, are absent in the case of the imminence requirement.

### **Doctrine of Doing and Allowing**

Another ethical principle that supports the imminence requirement for police over the status quo is the Doctrine of Doing and Allowing (DDA). Generally accepted in ethical reasoning on defensive force, the DDA says that it is more difficult to justify causing harm than allowing it, all else being equal.<sup>31</sup> For example, the bar needed to justify not intervening to prevent a child from drowning is lower than the bar needed to justify forcibly drowning the child. Like the principle of equality before the law, the DDA is not a categorical rule but can be overridden by other

moral considerations. Lesser evil justifications illustrate that point. They recognize the DDA as a relevant consideration and therefore require that, to be morally justified, an action causing harm must prevent significantly greater harm.<sup>32</sup>

The DDA proves relevant for the imminence requirement because of the errors that this requirement favors. Ideally, when making deadly force decisions against fleeing suspects who pose no imminent threat, officers would avoid both *false-positive* and *false-negative* errors. In this context, false positive errors involve using deadly force against a suspect mistakenly identified as a future threat who in fact would have caused no grave harm if they escaped. False-negative errors involve not using deadly force against suspects who are a future threat and inflict grave harm after their escape.<sup>33</sup> Neither the imminence requirement nor the prevailing status quo for police can avoid both errors entirely. The imminence requirement places a more stringent restriction on deadly force than the status quo and thus comes with greater risk of false-negative errors. Conversely, the status quo comes with greater risk of false-positive errors. Since false-negative errors allow harm and false-positive errors cause harm, the DDA treats the latter as having a higher justificatory bar.

Now if the less restrictive status quo prevented significantly more false-negative errors and resulted in only slightly more false-positive errors than the imminence requirement, there would be a moral case for the status quo even after taking the DDA into account. But as mentioned already, we lack any research suggesting that the status quo better prevents grave harm than the imminence requirement.

Some may question the relevance of the DDA in the context of policing given officers' responsibility to prevent harm. Clearly, police have more demanding obligations to intervene and prevent grave harm than do civilians.<sup>34</sup> That point, however, does not render the DDA morally

irrelevant for policing. As evident from mass protests prompted by police shootings, the public generally assigns greater moral blame to officers when they use deadly force that proves unnecessary and could have been avoided than when they fail to prevent a similar level of grave harm. Such reactions can be understood as reflecting public support for the DDA in the context of policing. One way to be responsive to that ethical judgment is to follow the DDA's implications and apply the imminence requirement to police.

### **Conclusion**

Worries that the imminence requirement conflicts with officers' ethical responsibilities prove misplaced. Rules governing police deadly force should prioritize the protection of life,<sup>35</sup> but neither the imminence requirement nor exempting police from it eliminates all risk of false-positive and false-negative errors against purportedly dangerous fleeing suspects. We have little evidence that the prevailing status quo—exempting police from the imminence requirement—minimizes errors and better protects life than imposing this requirement on police. Normative principles favoring the imminence requirement—equality before the law and the Doctrine of Doing and Allowing—along with the lack of empirical evidence to support the status quo put this requirement in the context of policing on firm ethical footing.

Whether the imminence requirement for police remains on solid moral ground depends on future research. Decades ago, a key step in ending the fleeing felon rule was research showing that this reform reduced police shootings without jeopardizing officer or public safety.<sup>36</sup> If research finds that applying the imminence requirement to police has similar benefits, this reform has the potential to follow a similar path from minority practice to nationwide law. In the post-*Garner* era, the imminence requirement represents a compelling candidate for constraining

police deadly force in a way that still allows officers to respond to and prevent grave harm. As such, the policy deserves broader adoption and closer study.

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### Notes

<sup>1</sup> See Ferzan, “Defending Imminence”; Leverick, *Killing in Self-Defence*, 87–108; Harmon, “When Is Police Violence Justified?”; Baron, “Self-Defense: The Imminence Requirement”; Allhoff, “Self-Defense without Imminence.”

<sup>2</sup> Dubber, *An Introduction to the Model Penal Code*, 164.

<sup>3</sup> Stoughton, Noble, and Alpert, *Evaluating Police Uses of Force*, 81–82.

<sup>4</sup> Some interpreters mistakenly claim that Garner imposes the imminence requirement on police. See Smith, “Police Use of Deadly Force,” 109; Smith, “Reimagining the Use of Force,” 239; Marcus, “From Edward to Eric Garner,” 57; Stoughton, Noble, and Alpert, *Evaluating Police Uses of Force*, 82. Garner’s holding never mentions the words imminent or immediate. See *Tennessee v. Garner*, 471 U.S. 1, 1 (1985). In addition, Garner lists various circumstances where police deadly force would be constitutional. Notably, some of these circumstances involve past violence without necessarily an imminent threat: “Where the officer has probable cause to

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believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.” See *Tennessee v. Garner*, 471 U.S. 1, 11–12 (1985).

<sup>5</sup> Ford, “Restraining Police Use of Lethal Force.” Other ethicists share Ford’s view that police should be exempted from the imminence requirement. See, e.g., Miller, *Shooting to Kill*, 137.

<sup>6</sup> U.S. Department of Justice, “Department of Justice Policy.”

<sup>7</sup> Lee, “Reforming the Law,” 656.

<sup>8</sup> Ford, “Restraining Police Use of Lethal Force,” 2–3.

<sup>9</sup> Blum and Heymann, “Law and Policy of Targeted Killing,” 146.

<sup>10</sup> Chicago Police Department, *General Orders*, G03-02.

<sup>11</sup> Houston Police Department, *General Orders*, 600-17.

<sup>12</sup> New York City Police Department, *Patrol Guide*, 221-01.

<sup>13</sup> Commission on Accreditation for Law Enforcement Agencies, *Standards for Law Enforcement Agencies*, § 4.1.2.

<sup>14</sup> U.S. Department of Justice, “Department of Justice Policy.”

<sup>15</sup> Bradbury, “Pa. Dems Discuss Proposal.”

<sup>16</sup> Pennsylvania General Assembly, House Bill 1664.

<sup>17</sup> General Court of the Commonwealth of Massachusetts, Bill S.2963, Ch. 6E § 14. Colorado also passed a bill that comes close to applying the imminence requirement to police. It requires that police face an imminent threat to justify deadly force in apprehending a suspect but fails to

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require that the suspect's threat be proportionate to deadly force, i.e., a grave threat. See Colorado General Assembly, Senate Bill 20-217, § 5.

<sup>18</sup> Ford, "Restraining Police Use of Lethal Force," 3. This thought experiment is lightly edited for brevity, but all morally relevant facts remain the same.

<sup>19</sup> *Ibid.*, 4.

<sup>20</sup> *Ibid.*, 5.

<sup>21</sup> For an alternative rationale for the imminence requirement, which appeals to the idea that imminence indicates actual aggression, see Ferzan, "Defending Imminence," 217.

<sup>22</sup> See, e.g., Association of State Criminal Investigative Agencies et al., *National Consensus Policy*, 11; California Penal Code, § 835a; 720 Ill. Comp. Stat. 5/7-5.

<sup>23</sup> Leverick, *Killing in Self-Defence*, 89.

<sup>24</sup> Allhoff, "Self-defense without Imminence," 1544.

<sup>25</sup> See Ward, "Teen Pleads Guilty."

<sup>26</sup> See Miller, *Shooting to Kill*, 140–42.

<sup>27</sup> When criticizing the imminence requirement for police, Ford mentions one actual case: the police shooting and wounding of a fleeing suspect who attempted to assassinate Israeli Ambassador Shlomo Argov in London in 1982 (Ford mistakenly says it occurred in 1983). See Ford, "Restraining Police Use of Lethal Force," 4; Rattner, "Israeli Ambassador Wounded." In this case, the suspect's gun jammed but he remained armed. Given these circumstances, the suspect still could have represented an imminent threat from the officer's perspective—after all, gun jams can be temporary. If an active shooter exits a crowded street, remains armed, and runs down an otherwise empty alley toward another crowded street, the suspect remains an imminent threat in the alley since they have shown the intent to kill, have the ability to kill, and in

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moments will have the opportunity to kill. If the officer reasonably believed that the suspect fleeing from the assassination attempt satisfied those conditions, the imminence requirement would permit deadly force. If the officer reasonably believed that those conditions were not met, then there is a strong case that deadly force was unnecessary and should not have been used against the fleeing suspect.

<sup>28</sup> See, e.g., Tennenbaum, “The Influence of the *Garner* Decision”; Zimring, *When Police Kill*; Shjarback, White, and Bishopp, “Can Police Shootings Be Reduced?”

<sup>29</sup> Marquart, Ekland-Olson, and Sorensen, “Gazing into the Crystal Ball”; Edens et al., “Predictions of Future Dangerousness”; Cunningham, Sorensen, and Reidy, “Capital Jury Decision-Making”; Cunningham et al., “Life and Death”; Reidy, Sorensen, and Cunningham, “Probability of Criminal Acts.” For an overview of this research and its relevance for moral debates over capital punishment, see Jones, “Death Penalty Abolition.”

<sup>30</sup> Leverick, *Killing in Self-Defence*, 69–85.

<sup>31</sup> See Quinn, “Actions, Intentions, and Consequences”; McCarthy, “Harming and Allowing Harm”; Woollard, *Doing and Allowing Harm*.

<sup>32</sup> See Alexander, “Lesser Evils”; Rodin, “The Lesser Evil Obligation”; Frowe, “Lesser-Evil Justifications”; Gordon-Solmon, “How (and How Not) to Defend Lesser-Evil Options”; Jones and Tian, “Hobbes’s Lesser Evil Argument.”

<sup>33</sup> See Bolinger, “The Moral Grounds of Reasonably Mistaken Self-Defense,” 144.

<sup>34</sup> Fabre, “Mandatory Rescue Killings,” 371.

<sup>35</sup> See Klinger, “Prioritization of Life”; Jones, “Police-Generated Killings,” 367–68.

<sup>36</sup> Fyfe, “Administrative Interventions”; Fyfe, “Police Use of Deadly Force”; Sherman, “Reducing Police Gun Use”; Sherman, “Reducing Fatal Police Shootings,” 424–26.