DEFENSIVE KILLING BY POLICE:
ANALYZING UNCERTAIN THREAT SCENARIOS

Jennifer M. Page

Abstract

In the United States, police use of force experts often maintain that controversial police shootings where an unarmed person's hand gesture was interpreted as their "going for a gun" are justifiable. If an officer waits to confirm that a weapon is indeed being pulled from a jacket pocket or waistband, it may be too late to defend against a lethal attack. This article examines police policy norms for self-defense against "uncertain threats" in three contexts: (1) known in-progress violent crimes, (2) interactions with civilians behaving non-aggressively, and (3) interactions with civilians behaving aggressively. It is argued that the context of a known in-progress violent crime gives rise to threat probability-, fairness-, and lesser evil-based reasons for a norm permitting police officers to use lethal force. However, in the contexts of civilians behaving non-aggressively and civilians behaving aggressively, such a norm is not justifiable. In the former case, I introduce two conditions, the Justification condition and the Valuing Civilian Lives condition, which I argue are not presently met. In the latter case, these two conditions again not met; aggression may moreover be excused or justified due to background injustices around race and the criminal justice system.

All self-defense is undertaken under uncertain circumstances. If amidst a violent encounter, someone pulls out and unlocks a gun, takes aim, and begins to squeeze the trigger, it is always possible for the gun to jam or to be out of bullets.[1] However, there are self-defense scenarios that are far more uncertain, where a person has not revealed a clear intent to use deadly force, but makes a movement indicating that they could be about to draw a gun. From the standpoint of a would-be defender, waiting to see what is in the prospective attacker's hands increases the odds of being killed. By the time a gun is visible, the attacker is already in a position to fire, and it may be too late to retrieve one's own weapon to use in self-defense.

In the United States in most jurisdictions, police officers are permitted—and sometimes trained—to use lethal force in scenarios where there is a suspicious movement but no visible weapon. As Urey Patrick and John Hall, two career FBI agents and police use of force experts, write in a prominent practitioner handbook on police self-defense:

> It is the reasonable belief in the "imminent danger" that creates the "necessity" for deadly force because only deadly force promises to be effective enough within the crucial time constraints needed to protect against imminent danger.
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> "Imminent" means simply that the danger could happen at any moment—it need not have happened, or be happening yet, but *could* happen at any moment… The best use of justified deadly force is preemptive. That means that it is timely enough, and effective enough, to prevent an *imminent* risk of serious injury (about to happen) from becoming a *definite* attempt to cause serious injury (in fact happening)…
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> One aspect of deadly force training involves educating police officers that 'imminent risk' is reasonable and real much sooner in a confrontation than they may realize.[2]

Federal Law Enforcement Training Centers (FLETC) materials similarly emphasize the need for police officer to act quickly in response to movements indicative of threats. "Some may remember the old television westerns where the good guy always let the bad guy go for his gun first," Tim Miller, FLETC use of force expert, writes. "The fact is, action is faster than reaction. Letting someone reach for a gun may be too late for the officer… [Constitutional law] allows officers to react to the threat of violence rather than violence itself."[3] Indeed, as the Eighth Circuit appellate court pronounced in *Thompson v. Hubbard*, "An officer is not constitutionally required to wait

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[1] Ripstein, *Equality, Responsibility, and the Law*, 193; Alexander, "A Unified Theory," 1476–79; Ferzan, "Justifying Self-Defense," 714–15.
[2] Patrick and Hall, *In Defense of Self and Others...*, 100–103.
[3] Miller, "Introduction."

until he sets eyes upon the weapon before employing deadly force to protect himself against a fleeing suspect who turns and moves as though to draw a gun."[4]

The present policy norm of permitting police officers to respond to suspicious hand gestures with lethal force can be questioned, however. This is a circumstance where police officers sometimes erroneously kill unarmed persons. But this does not mean that such killings are automatically unjustified. Experts who defend the police use of lethal force in what I call "uncertain threat scenarios" have a point. In a country like the U.S. where guns are widely available, it is true that certain kinds of hand gestures and movements could be indicative of a lethal attack on the officer or other people. Reaction time studies have moreover illustrated the truth of "action beats reaction." Even highly trained police officers with their guns drawn take longer to perceive that a civilian is firing on them and fire their own gun than it takes for a civilian to fire.[5]

This article evaluates police defensive force policy norms in uncertain threat scenarios, assessing the justifiability of present norms from a moral perspective.[6] This is a novel undertaking in at least two respects. Much of the contemporary philosophical literature on the ethics of defensive force examines the context of war, with very little said about the policing context.[7] This is surprising, since self-defense is one of the primary reasons for the police use of force.[8] Further, though the philosophical self-defense literature has burgeoned in recent years, uncertain threat scenarios have not been specifically examined.[9]

The inquiry begins by examining differences between the police and civilian defensive force contexts, motivating the present focus on police self-defense against uncertain threats. From there, uncertain threat scenarios are introduced, followed by a discussion of what we know from existing (inadequate) data about how often U.S.

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[4] *Thompson v. Hubbard* at 899.
N.B. The ~18,000 police departments in the U.S. operate with considerable autonomy. Individual departments may appear to prohibit lethal force if a civilian is not visibly displaying a weapon. For example, a recently revised use of force policy for the Cleveland Division of Police states that "[o]fficers shall use force only as necessary, meaning only when no reasonably effective alternative to the use of force appears to exist…" Deadly force "may be used only if a subject, through their own actions, poses an imminent threat of death or serious physical harm to an officer or another." "Use of Force," 1–4. It would not seem necessary, and the threat posed by a civilian would not seem to be imminent, if an assumed lethal weapon is not visible. However, as the passages from use of force trainers quoted above show, requiring that officers use lethal force only when necessary against imminent threats does not necessarily preclude firing at a civilian who makes a suspicious movement, depending on how "necessity" and "imminence" are interpreted.

[5] Blair et al., "Reasonableness and Reaction Time."

[6] In focusing on use of force policy norms rather than general considerations of permissibility, I take inspiration from Jorgensen's work on self-defense norms. (Published under Bolinger, "Reasonable Mistakes"; and Bolinger, "Moral Grounds.")

[7] Among the exceptions are Fabre, "War, Policing, and Killing," and Miller, *Shooting to Kill*.

[8] Harmon, "When Is Police Violence Justified?"

[9] However, philosophical work on mistaken self-defense (e.g, Bolinger, "Reasonable Mistakes"; Bolinger, "Moral Grounds") and merely apparent threats (e.g., Ferzan, "The Bluff") is relevant. Lazar, "In Dubious Battle," addresses questions of uncertainty in the defensive force context; his analysis implicitly assumes a continuum between non-threats, uncertain threats, and near-certain threats. I agree wholeheartedly that there is a continuum, but nevertheless will try to show that it is meaningful in the policing context to conceptualize uncertain threats as distinct defensive force phenomena.

police mistakenly kill unarmed persons. Finally, police self-defense policy norms for uncertain threats are explored in three contexts: (1) known in-progress violent crimes, (2) interactions with civilians behaving non-aggressively, and (3) interactions with civilians behaving aggressively. As I argue, a norm permitting police officers to use lethal force in uncertain threat scenarios is morally justifiable in context (1). In contexts (2) and (3), the case for such a norm is extremely weak.

I. POLICE VS. CIVILIAN SELF-DEFENSE: SOME DIFFERENCES

Are uncertain threat scenarios unique to the policing context? In one respect, the answer is clearly no. If Michael is in an argument with his neighbor Charlie and suspects she's about to attack him with a concealed firearm, Charlie's moving her hand towards her waistband might be the last piece of evidence Michael uses to determine that an attack is imminent before drawing and firing his weapon. However, police shootings of civilians who make suspicious movements are particularly salient, occupying a place in the popular imagination and in media commentary.[10] What is more, some features of police self-defense make it likelier that police officers, compared to their civilian counterparts, encounter situations where they discern an uncertain threat and defensively use lethal force. These features have to do with (1) the nature of the police role, (2) the kinds of signals police officers are trained to pick up on, and (3) the kinds of behaviors that the exercise of police authority sometimes provokes.

Police officers, by virtue of their role, face distinctive kinds of unpredictability and danger. They encounter violent criminal suspects in their capacity as violent criminal suspects and are assigned the duty of standing their ground on the state's behalf.[11] The role of an officer making an arrest is thus directly and immediately coercive, and it is natural that some criminal suspects do what they can to avoid apprehension, including using a lethal weapon against an officer.[12] Even a non-criminal suspect questioned by an officer might be concealing something that could be grounds for arrest. Attacking an officer might disable them (either temporarily or permanently) and allow for an escape, so a life-threatening fight response could come seemingly out of nowhere. Outside the law enforcement sphere, individuals typically do not face the prospect of violent resistance in performing their standard employment-related duties.

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[10] For example, the popular 2018 movie *The Hate U Give* centers around the fictional police shooting of a young Black man, Khalil, who's killed after reaching into his car for a hairbrush. The relationship between uncertain threat scenarios and mistaken object scenarios is discussed in Section II; the description of an uncertain threat scenario fits because Khalil is shot so quickly. See also Balko, "When Unarmed Men Reach"; Delaney and Jeanty, "Police Shootings"; Chung, "U.S. Top Court Won't Review." Irvin identifies "reaching for the waistband" as a type of post-facto rationalization for shootings of unarmed Black men by police. Irvin, "Policing, Racialization, and Resistance."

[11] Donnelly, "Police Authority and Practices"; Harmon, "When Is Police Violence Justified?"

[12] Bittner, "The Functions of the Police"; Donnelly, "Police Authority and Practices"; Alpert and Dunham, *Understanding Police Use of Force*. In this article, I set aside issues related to citizen's arrests and stand-your-ground laws.

Police officers learn how to deal with potentially life-threatening situations in defensive force training programs.[13] Part of this training is intended to improve upon officers' native threat detection abilities, so that nuances like a slight sag of the clothing are noticed.[14] However, this also means that police officers are in an epistemic position to perceive innocuous behavior as threatening if it lines up with the danger signs they are trained to pick up on. Nick Jacobellis recounts almost firing on an innocent couple:

> While looking for smugglers on Key Biscayne one night, I identified myself and asked a male passenger in a car that was stopped near a boat ramp if there were any firearms in their vehicle. Instead of saying, "Yes, officer," and telling me where his pistol was located, the passenger said absolutely nothing as he leaned forward very quickly, enough to startle me, and opened the glove compartment of the car. I raised my service pistol with my right hand and yelled something like, "U.S. Customs! Don't move…! Don't move!" Adding to the chaos, my partner yelled commands at the woman behind the steering wheel who was, of course, screaming at her boyfriend. Seconds passed like hours, as I prepared to shoot. Fortunately, the young male passenger froze just as he started to reach inside the glove compartment. I reached in and recovered a Walther PP from the glove compartment, and disassembled it on the hood of the car. Once we cleared the couple of any wrongdoing, my partner and I left the area after learning a very important lesson… Some law abiding people simply don't realize that their actions can appear threatening to the police.[15]

In spite of having had this experience and recognizing the complexities of knowing who the "good guys" and "bad guys" are in a country where concealed carry is legally permitted, Jacobellis—who is writing to his fellow law enforcement officials as a *POLICE Magazine* contributor—makes it a point to say multiple times that anyone could be armed: "Write this in bold block letters somewhere across your mind: You cannot assume that someone is unarmed." "Just remember that you can't assume that even a jaywalker is unarmed. So as you approach a subject, suspect, or violator you must be prepared to go tactical at a moment's notice."[16] Though police officers are trained to distinguish threats from non-threats, the upshot of this training is the possibility of construing a threat when there is none.

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[13] Ho, "Individual and Situational Determinants." This being said, in the vast majority of police-civilian encounters—99 percent—no force whatsoever is used. Bureau of Justice Statistics, "Contacts between Police and the Public."

[14] Dorn and Dorn, "Seven Signs." However, though there's not extensive research on the subject, one experimental study found that novice and experienced police officers were no better than psychology students at detecting a concealed weapon carried by a male walking into a courthouse. Moreover, experienced officers were likelier to say that the subject was in fact concealing a weapon, regardless of whether or not this was true. Sweet, Meissner, and Atkinson, "Assessing Law Enforcement Performance."

[15] Jacobellis, "How to Spot a Concealed Firearm."

[16] Jacobellis.

The way police officers exercise their authority can also produce the appearance of a threat. Since police officers are trained to always be on guard against an attack, this itself might trigger behaviors indicative of the very kind of threat the officer is aiming to avoid.[17] Again, Jacobellis: "Your job is to ensure that you always remain in a position to exert complete control at all times," he writes, explaining how to visually monitor the situation at hand. "[Q]uickly scan a subject's eyes and hands then scan the area around you.... Repeat this process until you complete the stop or field interview."[18] It can be highly unnerving to interact with an armed authority figure who avoids eye contact and treats you as if you might pose a threat to their life. This may provoke nervous verbal responses, fidgeting, or other irregular behavior on the part of civilians who pose no threat, which may be indistinguishable from behaviors typical of civilians who do pose a threat. These behaviors may alert the officer to the possibility that the civilian is concealing a weapon, and a subsequent hand gesture towards the pocket or waistband may prompt the officer to defensively use lethal force. Indeed, social psychologists have found this to be especially true of encounters between police officers and Black people due to "stereotype threat." The racial stereotype of Black men as violent is longstanding in U.S. society;[19] stereotype threat refers to changes in person's cognition and behavior when their identity and associated stereotypes become salient.[20] Researchers have found that Black men asked about their awareness of the Black male stereotype are particularly likely to exhibit nervousness and ostensibly suspicious behavior in interactions with police officers.[21] By treating Black men as potentially threatening, police officers can activate threatening-seeming behavior, if the very fact of the encounter has not activated this kind of behavior already.

These last two points about the signals police officers are trained to pay attention to and how police authority might induce threatening-seeming behavior give some context for why a police officer may end up mistaking a harmless movement for the beginning of an attack. However, this itself does not invalidate a policy of permitting police officers to use lethal force in uncertain threat scenarios. In using defensive force, mistakes are always a possibility. If we wished to eliminate all mistakes in self-defense, we would have to eliminate all self-defense.

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[17] Obviously, there are also cases where officers antagonize civilians by yelling, swearing, hurling insults or racial slurs, being unnecessarily physically aggressive, adopting a macho demeanor, and so on—the stereotypical bad cops of Hollywood films are sometimes found on the street. See, e.g., many of the police encounters described by Chicago youth in Futterman, Hunt, and Kalven, "Youth/Police Encounters." "Officer-created jeopardy" situations are when an officer's bad tactical decisions puts them at a heightened risk of harm. Lee, "Officer-Created Jeopardy." It is clear that forms of police misconduct such at these might lead civilians to act in ways that police officers perceive as threatening. But appropriate and routine police behavior can do this too.

[18] Jacobellis, "How to Spot a Concealed Firearm."

[19] Muhammad, *The Condemnation of Blackness.*

[20] Steele, *Whistling Vivaldi.*

[21] Najdowski, Bottoms, and Goff, "Stereotype Threat."

II. CONCEPTUALIZING UNCERTAIN THREAT SCENARIOS

The terminology of "uncertain threats" is useful for thinking about police policy norms. Whereas terms like "waistband shootings" and "cell phone shootings" refer to the police shooting of an unarmed person based on the mistaken perception of a threat, the concept of an "uncertain threat" encompasses both eventual mistakes and non-mistakes.[22] What are uncertain threat scenarios? The clearest explanation involves a contrast with "ordinary threat" scenarios. Here, there is an agent who is *liable* to defensive harm, and thus is "not wronged by its infliction—she has no justified complaint against being harmed—and she may not, ordinarily, harmfully defend herself against its infliction."[23] Authors disagree about whether it is culpability;[24] moral responsibility for posing a threat to another's life;[25] moral responsibility for failing to avail oneself of a reasonable opportunity to avoid posing a threat;[26] treating others as if they lack moral rights against harm that they do in fact possess;[27] or something else that renders an individual liable. Nevertheless, liability means that an individual may not justifiably claim a right against harm when defensive force is used against her, and is not entitled to compensation from a self-defender.

In uncertain threat scenarios, however, from the standpoint of the evidence the self-defender has access to, the liability of a potentially threat-imposing civilian is uncertain.[28] If the civilian is in fact reaching for a gun with the intention to use it to kill a police officer, they are the prototypical aggressor who is liable to being killed in self-defense. However, they may also be non-liable. If a police officer making an arrest commands a civilian to stop and put their hands in the air, they may be attempting to comply, but arm fatigue may cause them to drop their hands, or they may have an involuntary reflex to scratch an itch. If the officer inflicts harm and acts permissibly in doing so, this must be in virtue of something other than the civilian's liability.

Accordingly, in an ordinary threat scenario, there is an A who φs, and φ-ing is the type of action that, on the evidence, indicates that A has the intent and means to seriously harm or kill B in the next moment. In an uncertain threat scenario, on the evidence, A's φ-ing *could* indicate that A has the intent and means to seriously harm or kill B in the next moment—the probability of this being the case falls short of the

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[22] For "waistband shootings" and "cell phone shootings," see Aveni, "The MMRMA Deadly Force Project"; Bobb, "LASD Report"; Taylor, "Dispatch Priming and the Police Decision to Use Deadly Force"; Taylor, "Engineering Resilience."

[23] Frowe, *Defensive Killing*, 72.

[24] Ferzan, "Justifying Self-Defense"; Ferzan, "Culpable Aggression"; Burri, "Morally Permissible Risk Imposition."

[25] McMahan, "The Basis of Moral Liability"; Gordon-Solmon, "What Makes a Person Liable."

[26] Frowe, *Defensive Killing*, chap. 3.

[27] Quong, *The Morality of Defensive Force*.

[28] Maybe "uncertain threat scenarios" is not the best term, because it could connote cases where, e.g., Innocent Threat is launched through the air against their will by Villain, who loudly announces this. The probability that they'll land on Person Stuck in Well, crushing them to death, within seconds is below the probability typical in ordinary Innocent Threat scenarios, but it is not so low that we can automatically rule out the permissibility of Person Stuck in Well pushing a vaporizer button to obliterate Innocent Threat midair—*if* it is permissible to defensively kill Innocent Threats, that is. This wouldn't qualify as an uncertain threat scenario on the definition I give, since it is known that Innocent Threat has no intent to crush Person Stuck in Well.

probability typical in ordinary threat scenarios, but it is not so low that we can automatically rule out the permissibility of A defensively using lethal force.[29]

In both ordinary and uncertain threat scenarios, liability to being killed is not the only justification available for the use of defensive force. There are also lesser evil justifications, where a person not known to be liable is killed for the sake of a greater good—say, saving an appropriately-high number of other persons.[30] Moreover, as I've phrased things, B could be the individual deciding whether to use lethal force in self-defense, or there could be another person, C, who faces an other-defense decision about saving one or more persons in B's position.[31]

Again, one reason why it is controversial for police officers to use lethal force in uncertain threat scenarios is the risk of mistakenly shooting an unarmed, non-liable person. In "cell phone shooting" cases, an unarmed person is shot while reaching for an object like a phone or wallet.[32] In some cases, a police officer might see the non-weapon object and still shoot. Is this an uncertain threat scenario? The answer depends on the details. In the police academy, simulation-based training exercises teach cadets to recognize cues that a person is armed, form the right judgment about whether a civilian is reaching for a weapon, and shoot persons reaching for a weapon before they fire on the officer.[33] All this happens extremely fast. In a slow-motion version of events, we may be able to see a chronology where a police officer makes the decision to shoot, activating a sequence where they unholster their gun, unlock the safety, aim, and pull the trigger. If sometime during this sequence the civilian makes the object they're holding visible and it is a phone, it may be too late for the officer to hold their fire. Once the sequence is in motion, training-based muscle memory kicks in, and it can be very hard to halt the brakes.[34] It may even be that the decision to fire is made a split-second after a phone is made visible, because the officer processes the object so quickly that he misperceives what it is. An error of this kind fits the parameters of an uncertain threat scenario: The civilian's φ-ing is his quickly taking an object out of his pocket that could be a gun. However, this is different from mistaken threat scenarios where a non-weapon object is visible all along and a police officer fires because they misperceive it as a weapon. The latter scenario—an evidence- and fact-relative non-threat paired with a belief-relative perception of a threat—does not count as an uncertain threat scenario.[35]

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[29] The terminology I'm using is a simplification of the wordier terms "ordinary *lethal* threat scenarios" and "uncertain *lethal* threat scenarios": I'm not thinking of cases that potentially involve a hard push or a shove, but rather, a threat to a person's life.

[30] McMahan, *Killing in War*; Bazargan, "Killing Minimally Responsible Threats"; Frowe, *Defensive Killing*; Lazar, "In Dubious Battle."

[31] Zimring finds that in over 95 percent of cases of police killings, police officers used lethal force to protect the lives of police officers. He doesn't disaggregate this statistic into officers protecting themselves versus officers protecting other officers. Zimring, *When Police Kill*, 63.

[32] Taylor, "Dispatch Priming and the Police Decision to Use Deadly Force"; Taylor, "Engineering Resilience."

[33] Ho, "Individual and Situational Determinants"; "Simulators Teach Police."

[34] Aveni, "The MMRMA Deadly Force Project," 18–19.

[35] For more on the language of "belief-relative," "evidence-relative," and "fact-relative," see Parfit (2011, Ch. 7).

In the policing context, φ-ing often refers to dropping one's hands towards one's waistband, touching one's waistband, putting one's hand in one's pocket, reaching into a car window or a compartment of one's car, and so on. People use guns with their hands, so police officers are trained to be alert to what a person's hands are doing.[36] Uncertain threat scenarios are broader than cases of suspicious hand gestures, however. Every year individuals are killed by U.S. police because their vehicles are perceived as lethal weapons.[37] If an aggressor with lethal intent is accelerating in an officer's direction and the latter cannot move away, this is an ordinary threat scenario where the driver is liable to being killed. However, in some cases a driver moves their car in a way that could indicate their intent to seriously harm or kill the officer—running the officer over or dragging them—but it is nevertheless ambiguous as to whether this is the case. This is an uncertain threat scenario, even though this kind of φ-ing is quite different from φ-ing in waistband cases.

We do not have data—from the laboratory or the real world—on uncertain threat scenarios exactly fitting the parameters described above. Still, there's been enough interest in police shootings where unarmed civilians make suspicious hand gestures or are holding non-weapon objects that we can get a rough empirical sense of the phenomenon. In a study conducted by Aveni, actors were videoed turning and reaching into their clothing; they then displayed either a weapon, an object like a wallet or phone, or were empty-handed. The lighting conditions were poor, simulating nighttime conditions typical of many police shootings, and the broader context of the civilian's movement was either a burglary, a mugging, or a robbery. Collectively, 307 officers participating in the study shot 38 percent of unarmed persons.[38]

A 2011 report on the Los Angeles County Sheriff's Department (LASD) examined the prevalence of "state of mind" shootings, where civilians "were perceived to be reaching for or holding a firearm, but were not confirmed to be holding a weapon at the time the shooting occurred."[39] The report found 21 percent of all shootings from 2005 to 2010 to fit this description, disproportionately of Black and Latino men. The majority (61 percent) were confirmed as unarmed immediately after they were shot; a small minority (4 percent) were confirmed as armed.[40] Though the 61 percent unarmed statistic suggests a much higher error rate than in the lab, if a person makes a sudden hand gesture and it turns out that they are in fact pulling out

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[36] Siegfried, "How to Watch the Hands." N.B. It doesn't have to be unknown whether a person is armed with a gun for the situation to count as an uncertain threat scenario. In the U.S., it is legal for most people to carry concealed weapons and it cannot be assumed that every armed person intends to harm others. Situations where a civilian interacting with a police officer visibly has a weapon, or informs the officer that they have a weapon, or is reported to have a weapon by someone who has phoned this into a police dispatcher, or is licensed to carry a concealed weapon according to a database consulted by the officer, all have the potential to be uncertain threat scenarios. However, because Section III is already lengthy, I don't specifically consider a scenario where, on the evidence, someone being questioned or resisting arrest has a gun.

[37] Lowery, Bever, and Mettler, "Police Have Killed Nearly 200 People."

[38] Aveni, "The MMRMA Deadly Force Project."

[39] Bobb, "LASD Report," 51.

[40] The rest escaped apprehension and were unarmed later upon arrest (13 percent), discovered to have discarded a weapon nearby (9 percent) or earlier (4 percent), or had an unknown weapon status (8 percent). Bobb, 58–59.

a gun, officers are unlikely to say that they fired their weapons based on a suspicious movement. Instead, they will probably say that seeing a weapon was the reason they fired, and the case will be classified as a standard police shooting of an armed suspect, not a state of mind shooting. Despite this, the LASD data gives a picture of the overall rate at which LASD officers use lethal force against unarmed, likely non-liable persons—at minimum, 12.8 percent of persons in the dataset.[41] This is higher, however, than a Philadelphia dataset that considers "threat perception failure" shootings, where an officer wounds or kills an unarmed civilian because of a movement or misperceiving a non-weapon object. 7.3 percent of police shootings from 2007 to 2013 fit this description—accounting for around half of all shootings of unarmed people—disproportionately of Black civilians.[42]

Unfortunately, there is no national-level equivalent of the Los Angeles County and Philadelphia reports, since the U.S. federal government does not have a mandatory reporting system for tracking the police use of lethal force. Several crowdsourced databases have stepped in.[43] According to six years of data collected by the *Washington Post*'s Fatal Force project, 6.4 percent of all fatal police shootings are of unarmed persons.[44] This means that the national rate at which unarmed people are killed by police is lower than the rate of threat perception failure shootings in Philadelphia. What accounts for this? Geography may be playing a role: The highest rates of killings by police are in the African American neighborhoods of large cities and in rural regions of the West and Midwest.[45] Perhaps more crucially, however, unlike Los Angeles County and Philadelphia, the *Washington Post* database does not consider nonfatal police shootings—no national-level data exists, crowdsourced or otherwise, on people wounded by police firearms. As Zimring discusses, when individuals are shot, there's a positive correlation between the number of bullets that hit and the death rate.[46] Though this is speculative, perhaps when police officers are in uncertain threat scenarios, they fire fewer bullets. This would result in a higher rate

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[41] This calculation is based on the statistic that 61 percent of state of mind shootings were of persons immediately confirmed as unarmed who had not discarded a weapon.

[42] Fachner and Carter, "Assessment of Deadly Force," 2–3; 30–33.

[43] The *Washington Post*'s Fatal Force project, the *Guardian*'s The Counted project (2015-2016), and Fatal Encounters run by D. Brian Burghart and team are the most prominent. The *Washington Post* collects data on police shooting deaths, whereas the *Guardian* collected data on all non-self-inflicted police killings, e.g., shooting deaths, Taser deaths, chokehold deaths, and police vehicle deaths. The Fatal Encounters database is the broadest and includes self-inflicted deaths in police custody or during a police pursuit. Here I reference the *Washington Post*'s statistics because of its exclusive focus on police shooting deaths. When someone moves their hands towards their waistband from the surrender position, police officers potentially respond by firing their weapons, not by putting the civilian in an asphyxiating chokehold.

[44] This statistic is from early July 2021. At this point in time, 6,419 people were recorded as being fatally shot by U.S. police since 2015: besides those counted as unarmed, 58.7 percent were armed with a gun, 17.1 percent had a knife, 3.3 percent were counted as being armed with a vehicle, 3.6 percent had a toy weapon, and the weapon status of the rest—8.2 percent and 2.7 percent—were classified as "other" and "unknown" respectively "Fatal Force.". U.S. police deaths are overwhelmingly caused by firearms: Of the 58.4 officers killed annually between 2008 and 2013, 92 percent were fatally shot. Zimring, *When Police Kill*, 95.

[45] O'Flaherty and Sethi, *Shadows of Doubt*, chap. 8.

[46] Zimring, *When Police Kill*, 63–69.

of overall uses of lethal force in response to suspicious movements compared to fatal uses alone.

III. POLICE SELF-DEFENSE AGAINST UNCERTAIN THREATS ACROSS CONTEXTS

We are looking for the right police policy norm for uncertain threat scenarios. Different kinds of uncertain threat scenarios raise different kinds of considerations about what police officers should do. Let us examine three contexts: (1) known in-progress violent crimes; (2) interactions with civilians behaving non-aggressively; and (3) interactions with civilians behaving aggressively.

(1) Known in-progress violent crimes

Consider a case, *Bank Robbery*, where police officers dispatched to a bank robbery are told that the suspect has a gun and has already shot a teller. They arrive and a male fitting the suspect's description is yelling orders. One officer commands the suspect to freeze and put his hands in the air. The suspect, who's not visibly displaying a weapon, does not freeze and moves his hands downward in the direction of his waistband. When the context of an uncertain threat scenario is a known in-progress violent crime, what policy norms should govern the police use of lethal force?

To begin with, the police clearly have probable cause to arrest the robbery suspect. It is important to distinguish between force used to make arrests and defensive force. The suspect's hand gesture could indicate other crimes that he may have to answer for in a court of law—e.g., (attempted) assault on an officer—but apprehending him for this and for alleged crimes committed beforehand is a separate matter from police officers defending themselves and bystanders.

Despite this, the robbery suspect's immediately prior alleged crimes are not irrelevant to the police officers' decision whether to use force. They factor into the threat probability- and fairness-based considerations that should be taken into account. From a threat probability standpoint, the police know that the suspect is reportedly armed and violent; that he has already shot a teller says something about his willingness to use lethal force against innocent persons. Compared to, say, a compliant driver at a traffic stop who makes an equivalent hand gesture, there is greater evidence of the robbery suspect's gesture indicating his liability to being defensively killed.

From a fairness perspective, though a firearm is not visible, the robber's prior actions create a situation where the police are not unreasonable to perceive him as having a gun. There's a fine line to be walked here. On one hand, as a criminal suspect, the robber is presumptively innocent. The police may not make an affirmative judgment on his guilt on matters that extend beyond the immediate threat he may or may not pose—there's truth to the adage that we don't want the police to be the judge,

jury, and executioner when it comes to criminal conduct.[47] On the other hand, his prior violent actions, which also happen to be criminal actions, are the basis of the evidence the police have for gauging a higher-than-usual probability of his suspicious hand gesture indicating a lethal threat. These actions matter not only from a descriptive threat probability standpoint, but also have further normative meaning. Say the robber, after shooting the teller, ditches his gun, which the police don't know when they spot him moving his hands downward. Though he no longer poses a threat, he still seems to have changed the normative landscape through his prior actions.

A case discussed by Ferzan is relevant here: A robber points an unloaded gun at a 7-Eleven clerk, demands money, and says he's going to murder him. Though the threat is insincere, Ferzan points out that we often consider insincere actions as altering our rights and duties. An insincere promise is still a promise. The insincere abandonment of property is still the abandonment of property. It is thus plausible to say that the 7-Eleven robber forfeits his rights against being defensively killed by the clerk.[48] On Jorgensen's account, the 7-Eleven robber's actions similarly entail a forfeiture of certain rights. She rejects the language of liability, but explains that such an individual makes themselves "vulnerable" to defensive harm.[49] From a risk distribution standpoint, it would be unfair for the 7-Eleven robber to retain his rights against harm, so the clerk does not wrong him by killing him.[50]

There are normatively important differences between the 7-Eleven robber and the suspect in *Bank Robbery*, however. Whereas all evidence points to the 7-Eleven robber posing an ordinary threat in the moment of being defensively killed, the meaning of bank robber's hand gesture is uncertain from an evidentiary standpoint. The 7-Eleven robber's actions (pointing a gun, stating that he will murder the clerk) have the widely recognized function of communicating the presence of a lethal threat. Moving one's hands downward, even in the context of an armed bank robbery where the suspect is not following police orders, fall short of this standard. Again, the movements police officers pick up on as signals that a person is going for a gun are oftentimes so subtle that agents cannot be expected to avoid making them; it cannot be assumed that they are made intentionally. It could be that the robber is about to put his hands in a surrender position, but through some neuromuscular fluke, his hands slightly drop downwards on the way to going upward. The bank robber thus

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[47] It is widely thought—though not universally accepted (see Tadros, *The Ends of Harm*)—that defensive harm and punitive harm are separate matters. If Thief starts attacking Victim to steal their wallet, and Victim averts the attack by punching Thief once, if Victim delivered further blows, it is intuitive to say that this is punitive and thus unjustified. Frowe, *Defensive Killing*, 108–9. Fletcher goes further and argues for the defensive–punitive harm distinction on the grounds that private self-defense is instrumentally necessary for maintaining a system of social cooperation, whereas state punishment serves the cause of justice. Fletcher, "Punishment and Self-Defense."

Of course, here we are talking about police self-defense rather than private self-defense, but the underlying logic of the defensive–punitive harm distinction would seem to still stand. See also McMahan, *Killing in War*, 67.

[48] Ferzan, "The Bluff."

[49] Bolinger, "Moral Grounds," 4.

[50] For Jorgensen, reasonable mistakes can sometimes wrong a victim, but I take Ferzan's 7-Eleven robber case to be equivalent to Jorgensen's *Stalker* case where the mistakenly-defended-against party isn't wronged. See Bolinger, 2.

would not seem to have forfeited his rights against harm in the same way the 7-Eleven robber has.

Nevertheless, the bank robber would seem to have forfeited *something* due to his actions prior to making the suspicious hand gesture. This something—here invoking a formulation more in line with Jorgensen than Ferzan—is his claim-right to being treated as having a moral status equal to that of an innocent person in determining a fair allocation of risk.[51] Forfeiting such a right would not seem to be an all-or-nothing affair. There are possible versions of *Bank Robbery* where the robber's wrongful actions vary in their severity, e.g., shooting five bank tellers versus pistol-whipping one teller. In all cases it seems appropriate that the robber bear a level of risk that is greater than the innocent persons who are present at the crime scene. However, if the pistol-whip does not do much harm, this would not seem to reduce the robber's moral status very much, whereas an individual who commits an extremely morally serious wrong (like shooting any number of bank tellers) may effectively be in a morally indistinguishable position from the individual who intentionally presents himself as posing, or who in fact poses, an ordinary threat. The rights against harm that this individual retains are so minimal as to be practically nonexistent. The benefit of this overall formulation is that it allows for sensitivity to circumstantial differences in different kinds of violent crime-based uncertain threat scenarios.

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[51] With such a formulation, would I consider the *Bank Robbery* suspect *liable* to being defensively killed? As I have conceptualized uncertain threat scenarios, the uncertain element is precisely a civilian's liability: A driver at a traffic stop who in fact reaches for a gun to use against a police officer is liable to being killed; a driver reaching for his wallet is not. At first glance, this would also seem to be the case for the suspect in *Bank Robbery*: His posing a fact-relative threat is a necessary condition for him to be liable. But maybe things are not so simple. Accounts by Ferzan, "The Bluff," as well as McMahan, "Who Is Morally Liable," 555–56, and Quong, *The Morality of Defensive Force*, 42–45—but not Bolinger, "Moral Grounds," 4, or Frowe, *Defensive Killing*, 85–86—endorse the language of liability to describe the moral situation of the bluffing 7-Eleven bank robber even though he poses no fact-relative threat. Is the *Bank Robbery* suspect liable to being defensively killed based on his actions leading up to his hand gesture, despite his hand gesture's meaning being uncertain?

For my own part, I'm reluctant to say that an unarmed suspect who drops his hands as a result of a neuromuscular fluke is liable to being killed for reason of his prior actions; I think that this objectionably collapses the distinction between defensive harm and punishment. However, suppose the suspect's hands are in the surrender position and he intentionally drops them a few times, repeating to the police officers, "Wanna fight? Wanna fight?" If he's unarmed, he is in the same position as the bluffing 7-Eleven robber; here I *am* fine saying that he's liable to being killed. The difference seems to be the degree of agency exercised by the suspect in making the movement that the police consider decisive in determining that he poses an imminent lethal threat. A willful movement seems to render the suspect liable. A non-willful movement is different—his movement is equivalent to the bodily movements made by the non-liable Innocent Threats of the self-defense literature (e.g., Otsuka, "Killing the Innocent"; McMahan, *Killing in War*, chap. 4; Quong, *The Morality of Defensive Force*, chap. 3; Burri, "The Toss-Up"; Frowe, *Defensive Killing*, chap. 2)—except that if he unarmed, he is not even a threat, so why should we consider him liable? Nevertheless, his right to be treated as having a moral status equal to that of an innocent person in determining a fair allocation of risk has been so diminished that in practice he is indistinguishable from his liable counterpart. With such a formulation, I'm happy to follow Jorgensen and label such an individual "vulnerable" to being defensively killed rather than using the language of liability. Bolinger, "Moral Grounds." This leaves it open for debate as to whether, e.g., he may claim compensation for his injuries if he survives the police shooting. See also Frowe, who emphasizes that only individuals who pose a fact-relative threat are potentially liable to *defensive* harm; nevertheless, there are cases where non-threatening individuals acting unjustly are liable to other kinds of harm besides the defensive kind. Frowe, 85–86.

The threat probability- and fairness-based considerations that factor into the police officers' decision whether to shoot a violent criminal suspect who poses an uncertain threat are not the only considerations in play. Police officers have an extremely difficult job in a situation like *Bank Robbery*: Not only are they required to instantaneously recognize the nature of the suspect's hand gesture, they must also have enough situational awareness to factor in at least two other considerations. First, how many bystanders' lives are potentially at risk? Police officers with good tactical skills will have chosen a position from which to confront the suspect where, if the suspect begins shooting in their direction, the bullets are less likely to hit innocent bystanders. Standing in front of 20 bank customers is a bad idea; standing in front of no one, taking cover if possible, is much better. However, tactical positioning may not always be possible, making it necessary to consider how many innocent lives are in potentially in danger if the police wait to verify that the suspect is in fact drawing a gun before they fire. Second, what is the distance between the suspect and the police officers, and what are the officers' expected hit rates based on this distance?[52] How many bystanders could be shot by stray bullets if the police miss their target? Is the robber (perhaps strategically) standing in front of 20 bank customers?

Questions like these matter because there may be a lesser evil justification for using lethal force against the suspect in *Bank Robbery*. Lazar has stressed the importance of considering lesser evil justifications, and not just liability justifications, when it comes to defensive force decision-making under uncertainty.[53] He argues against a fixed threshold view where, once it is sufficiently likely—say, a probability of 90 percent—that an individual is liable to being killed, this activates a permission to defensively kill them. Rather, just as deontologists admit that an innocent person may be sacrificed in order to save the lives of a sufficiently high number of innocent others, high stakes may justify lowering the threshold for the probability that an individual is liable to being defensively killed. If the robbery suspect is potentially able to harm many innocent people if given the time to draw a gun, depending on the numbers at stake, it may be justifiable for the police to use lethal force against the robbery suspect based on this alone, even if we're considering the pistol-whipping variation on *Bank Robbery*.

In sum, when we start thinking about the likelihood of the robbery suspect's hand gesture indicating a genuine threat, the degree to which he's forfeited his right to be treated as an innocent person from a risk allocation standpoint, the risks of waiting to verify a weapon and potentially allowing the suspect to fire, and the risk of accidentally shooting bystanders, there are clearly many factors that should influence a police officer's decision to shoot. Nevertheless, in the context of a known in-progress violent crime like *Bank Robbery*, the threat probability-based, fairness-based, and lesser evil reasons for a police officer to respond to uncertain threats with lethal force form an overall justification for a policy norm permitting this. This doesn't mean

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[52] Empirical studies on U.S. policing have long shown that officers in the field do not hit their targets with great accuracy; a recent study of Dallas data shows that only 123 of 354 bullets fired by police between 2003 and 2017 hit their intended target—a 35 percent hit rate. Donner and Popovich, "Hitting (or Missing) the Mark."
[53] Lazar, "In Dubious Battle."

that every police shooting of a violent criminal suspect who poses an uncertain threat is automatically justified—on the contrary—but police officers should be given the latitude to make their best judgment as to whether the context warrants the use of lethal force. Without a norm permitting lethal force, police officers would be prohibited from, e.g., firing on an active school shooter who makes a movement to retrieve the weapon he's briefly concealed.

Two caveats. First, what is communicated in police firearms training matters normatively. Instructors ought to emphasize that neither the use of lethal force itself nor a lower evidentiary threshold for using lethal force are permissible as a punishment for the suspect's alleged crimes, or based on the idea that the suspect is a "bad guy" whose life has less inherent worth than anyone else's. Second, the specification that the scenario is a *known* in-progress violent crime is extremely important. It puts the evidentiary threshold for a police officer to judge that in-progress violent crime is occurring much higher than, say, in the case of a "suspected" in-progress violent crime. That the meaning of a suspect's hand gesture is uncertain does not imply that the context can be uncertain as well.

(2) Civilians behaving non-aggressively

Consider *Loud Music*. A shop owner calls the police to complain about a man lingering outside her store; there have been a number of recent car break-ins on the street. Two officers respond, see the man outside the shop, and decide to strike up a conversation. The man, unbeknownst to them, is listening to loud music in the wireless headphones hidden by his winter hat. He cannot hear what they're saying and reaches into his jacket pocket for his phone to turn down the music. They yell at him to freeze and slowly show his hands; his jacket pocket is weighted down in a way that could mean he has a gun. But the man cannot hear them and he's not making eye contact. He quickly moves his hand out of his pocket and one officer shoots him.

Loud Music fits in with Jorgensen's work on mistaken self-defense.[54] A self-defender forms an erroneous belief that another person is about to mount an attack. According to what norms should we judge mistaken self-defenders? Jorgensen points to a major issue with evidentialist norms, which require that self-defenders form reasonable judgments about when to use defensive force on the basis of available evidence.[55] Running through a large body of empirical literature on implicit racial bias in the self-defense context, she argues that being Black might be a "perverse signal" that society uses as a heuristic for assessing threateningness. Black people have "a justice-based claim against being put in a position where they appear threatening by default."[56] Ideally, we'd work as a society to reduce racial biases, but if reform efforts fall short, the next-best alternative is a fact-relative norm. As normatively attractive as it is to give self-defenders space to make reasonable mistakes, because society might

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[54] Here I refer to Bolinger, "Reasonable Mistakes."

[55] Jorgensen is primarily concerned with the civilian self-defense context but briefly discusses police self-defenders as susceptible to implicit racial biases. Bolinger, 206–7.

[56] Bolinger, 209.

be systematically biased in terms of why a mistake counts as reasonable, our remaining option is to hold strictly accountable all self-defenders who harm or kill a person who, like the police shooting victim in *Loud Music*, objectively posed no threat.

From a law enforcement perspective, applying Jorgensen's proposal to the policing context would be highly controversial. In *Graham v. Connor*, the Supreme Court made eminently clear that the legal standard to be used in assessing the police use of force, the "reasonable officer" standard, is evidence-relative, not fact-relative.[57] Aside from this, comparing the police and civilian self-defense contexts, civilians may be more prone to making uninformed defense decisions based on gut feelings: There is little that ensures that civilian self-defenders are knowledgeable about when defensive force is legally and morally justifiable.[58] For civilians who make a defensive force decision based on an erroneous instinct of feeling threatened, a fact-relative norm could at least promote accountability after wrongful harm has been inflicted. Accountability, however, is a poor substitute for avoiding a serious injury or death. Since police are trained on when to use lethal force, if we think there's a problem with the officer's decision to fire in *Loud Music*, policy changes could prevent, or at least discourage, mistakes like this from taking place.

Relevant to *Loud Music* is the fact that the victim was not being violent or aggressive towards the officer. Though he appeared to be ignoring the officer's commands, this was only because he couldn't hear what the officer was saying. He's a completely innocent party, in other words, but the police officer, also an innocent party, doesn't know that. As the officer interpreted the situation, the man's failure to heed orders, his sagging jacket pocket, and the way he moved his hands were evidence of an imminent attack. Philosophical authors have long been concerned with the ethics of defensive force between innocent parties. In one commonly discussed case, residents of a town where a serial killer is known to be hiding are shown the killer's picture and told that he will immediately kill anyone upon sight. In the coincidence of all coincidences, the serial killer's identical twin happens to be driving through town and has car trouble. He knocks at a resident's door for help, she answers, and immediately attacks him in self-defense.[59] The case of *Resident* tests at least two moral questions that arise in thinking about mistaken self-defense between innocent parties. May the twin fight back against the resident in counter-defense, given that her belief that he poses a threat is arguably well-founded? Also, if a third-party observer with a sniper rifle (a police officer, say) grasps the resident's mistake but is too far away to shout a warning, should they shoot the resident to save the twin? Has the resident made herself liable to harm, in other words, even though her mistake is nonculpable?

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[57] Police officers making a split-second decision don't have the luxury of "the 20/20 vision of hindsight," the ruling emphasized. *Graham v. Connor* at 396–97. "Monday morning quarterbacking is not allowed," as a Third Circuit ruling puts the point. *Lamont v. New Jersey* at 183.

[58] Simons, "Self-Defense: Reasonable Beliefs or Reasonable Self-Control?," 53–55; 88–89. Though many U.S. states require that individuals take a course on gun safety and the laws of defensive firearm use as part of the gun carry permit process, 20 states allow permitless carry. Buchholz, "Which States Allow the Permitless Carry of Guns?" Civilian self-defenders who use forms of force other than firearms would not necessarily have any knowledge of the law and ethics of self-defense.

[59] McMahan, "The Basis of Moral Liability"; McMahan, *Killing in War*; Quong, *The Morality of Defensive Force*; Ferzan, "Culpable Aggression"; Bazargan, "Killing Minimally Responsible Threats."

Several prominent accounts view the resident as liable, though there's disagreement why—for McMahan, the resident is morally responsible for engaging in a foreseeably risk-imposing activity; for Quong, the resident erroneously treats the twin as if he lacks rights that people normally possess.[60] The resident's liability means that the twin is morally entitled to counter-defend against her use of defensive force, and a third-party observer may intervene and choose the twin's life over the resident's. Importantly, though the goal of analyzing a case like *Resident* is to work out the nature of liability to defensive harm (and the implications for persons who are only minimally responsible for the threats they pose in war), the possibility of counter-defense and third-party intervention also serve as built-in checks against fact-relative wrongful defensive harm.

However, these checks do not straightforwardly carry over into the policing context. If a civilian is able to counter-defend against a police officer making a fact-relative mistake, this is likely to be perceived by the officer as a threat, plain and simple, and things are not likely to go well for the civilian.[61] Moreover, consider a variant on *Loud Music* where the partner of the officer who shoots believes the victim to be unarmed. Even if the partner were extremely confident that his colleague was making a mistake and could intervene in time, he is unlikely to act like the police officer who chooses the innocent twin over the innocently mistaken resident. It is hard to imagine a police officer seriously harming or killing a fellow officer to prevent an act of self-defense against a civilian misconstrued as posing a threat.

The lack of checks available to innocent civilians subject to mistaken defensive force by police officers puts the former in a vulnerable position. It is possible that this is nevertheless defensible. However, there are two conditions not currently met that would seem to be requisite: a Justification condition and a Valuing Civilian Lives condition. To meet the Justification condition, the government would have to show that the trade-offs made in a policy that allows the police use of lethal force against non-aggressive civilians who pose uncertain threats is justifiable overall. To meet the Valuing Civilian Lives condition, police cultural norms would have to mirror democratic norms, and at the very least recognize the lives of police officers and civilians as equally valuable. (It would also be permissible to prioritize the protection of civilian lives.)

Let us turn to the Justification condition first. It is a basic democratic idea that the policies that involve the government's exercise of power, particularly its coercive power, over citizens must be justified.[62] Forst puts citizens' "right to justification" at

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[60] McMahan, "The Basis of Moral Liability," 402; McMahan, *Killing in War*, 176–78; Quong, *The Morality of Defensive Force*, 34–39. Bazargan argues that the resident may be permissibly killed by a third party in order to save the twin, but she is not liable to this fate since it is disproportionate to her level of moral responsibility. (The twin's life is to be preferred because it is a greater injustice to be killed when you are both non-liable and your threatener is more morally responsible than you for the situation.) Bazargan, "Killing Minimally Responsible Threats."

[61] A civilian defending themselves against a police officer making a reasonable mistake is a case discussed by Draper, "Defense," 74.

[62] There is a large public justification literature devoted to unpacking this idea. Must government policies be justifiable only to an idealized reasonable citizenry, or to actual embodied individuals who

the center of political legitimacy.[63] For Waldron, it is a matter of respect for individual agency that "all aspects of the social order should be either made acceptable or be capable of being made acceptable to every last individual."[64] As Gaus writes, "Unlike private citizens, public officials are under a standing obligation to justify themselves… Public officials must be able to provide publicly accessible reasons justifying what they do."[65] There are few instances of state coercion so weighty as a public officer taking a citizen's life, as "the right to life and physical security" is "the most basic claim of every human being."[66] For a policy that allows police officers to use lethal force against persons whose liability to defensive harm is unknown, the bar of justification is thus high.

This high bar is not met at present. Even though some evidence suggests that the shooting victim *Loud Music* may have been armed, there is only uncertain evidence—nothing like the much higher probability of an armed attack continuing as in *Bank Robbery*. It is moreover only from a police officer's perspective that it is possibly reasonable to construe this uncertain evidence as involving a threat. If a random pedestrian went to talk to the man in *Loud Music* and was met with non-responsiveness as he fumbled with his jacket pocket, it would be completely unreasonable for her to perceive an attack and immediately kill the man in self-defense. It is only because police authority will sometimes bring out suddenly violent behavior, and because the man's behavior fit some of the signs police officers are trained to pick up on, that the officer who fired shots interpreted the evidence as he did.

Our central question is not, however, whether it is evidence-relative permissible for police officers to use lethal force in a given uncertain threat scenario. It is about what police policy norms should be. The evidence relevant to setting justifiable policy norms is not only what a given officer sees in the moment, but also how this evidence maps onto aggregate data about similar cases.

Recall the abysmal state of official data collection on police shootings in the U.S., however. "[W]e still live in a society in which the best data on police use of force come to us not from the government or from scholars, but from the *Washington Post*," as James Fyfe, one of the 20th century's leading police of use of force researchers, lamented in 2002.[67] U.S. federal, state, and local governments have made no sincere attempt to provide evidence that a policy permitting the police use of lethal force in uncertain threat scenarios is justifiable. Granted, it is hard to collect objective data on "waistband shootings" and the like—again, when civilians do not have a lethal weapon, police officers will explain that they formed a reasonable belief that a civilian was armed and fired their gun because of the hand gesture the civilian made, but when civilians are in fact reaching for a gun, the shooting is likely to be framed as an ordinary

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may not always be reasonable? Further, not all authors agree that specific policies must be justifiable, so long as the basic structure of society and constitutional essentials are. Admittedly, my point here hinges on the idea that individual policies must be justifiable.

[63] Forst, *The Right to Justification*.

[64] Waldron, "Theoretical Foundations," 128.

[65] Gaus, *Justificatory Liberalism*, 251, 199.

[66] Ashworth, "Self-Defence," 282.

[67] Fyfe, "Too Many Missing Cases," 99.

threat posed by an armed attacker. Nevertheless, with body and dashboard cameras being increasingly used, it is possible for a slow-motion video analysis to pinpoint the exact moment a police officer decided to use lethal force, and determine what kind of threat the officer faced at that point in time.[68] From there, calculations would need to be made about the likelihood of suspicious hand gestures indicating an armed attack in different kinds of contexts.[69] How often are officers mistakenly shooting and injuring or killing unarmed persons (or armed persons misconstrued as reaching for their gun)? How often are officers injured or killed by armed attackers? Is the risk of serious injury or death so great for police officers that a sufficiently high number of lives are saved by a lesser evil justification-based policy that permits shooting persons who pose uncertain threats? Police rhetoric often suggests that this is the reality, and such a claim seems credible enough in a case like *Armed Robbery* without there being a strong need for further justification. But in other kinds of cases, the U.S. public is not obligated to take law enforcement officials at their word. If the data showed that a comparatively large number of non-liable civilians are seriously injured or killed to protect a comparatively small number of police officers in situations where non-aggressive civilians make suspicious hand gestures, it would not be justifiable to have a policy permitting the use of lethal force in such cases.

This takes us to the Valuing Civilian Lives condition. Police use of force policies sometimes incorporate sanctity of life provisions, e.g., "It is the policy of the Philadelphia Police Department, that officers hold the highest regard for the sanctity of human life, dignity, and liberty of all persons."[70] At the same time, a common mentality about officer safety is encapsulated in law enforcement aphorisms like "Better to be judged by twelve than carried out by six" and "shoot first."[71] Seth Stoughton, a former police officer and use of force researcher, describes how in police training, officer safety "is so heavily emphasized that it takes on almost religious significance":

> Rookie officers are taught what is widely known as the "first rule of law enforcement": An officer's overriding goal every day is to go home at the end of their shift. But cops live in a hostile world. They learn that every encounter, every individual is a potential threat. They always have to be on their guard because, as cops often say, "complacency kills"… Hesitation can be fatal. So officers are trained to shoot before a threat is fully realized, to not wait until the last minute because the last minute may be too late.[72]

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[68] For an example of this kind of analysis, see *The Killing of Harith Augustus*.

[69] Though I discuss three contexts in this article, there are others I do not specifically consider, including "fleeing felon" cases, cases involving known owners of concealed handguns, and cases of individuals having mental health crises and/or attempts at "suicide by cop." Interestingly, in suicide by cop cases, data from Los Angeles suggests that police officers are not a great risk of harm. In 419 fatal and nonfatal cases examined by researchers, only one LAPD officer suffered an injury, and 98 percent of the time, LAPD officers were able to resolve incidents with no force or less-lethal force. Jordan, Panza, and Dempsey, "Suicide by Cop."

[70] "Directive 10.1."

[71] Waegel, "How Police Justify the Use of Deadly Force," 147.

[72] Stoughton, "How Police Training Contributes."

Along similar lines, a *New York Magazine* journalist narrates the experience of Officer Richard Haste, a White New York City police officer who killed Ramarley Graham, an unarmed Black teenager, in 2012:

> He remembered the video-game-like simulator he'd trained on at the Academy. Often the targets were guys reaching into their waistbands. When Haste was slow to shoot, a sergeant was always there to yell, 'You're dead now!' 'I had no more time left,' Haste later told investigators. 'I felt that if I waited one more second that this person was going to draw a firearm and shoot me."[73]

By their very nature, such training methods do not value police officers and civilians equally, but heavily weight the interests of the officer in police–civilian encounters. By teaching novice police officers that, once their adversary begins to reach for a gun, there is no time for an officer to do anything but fire before being fired upon, this all but says that police officers are not required to bear any risk of being harmed in this situation—better that a civilian who is not actually an adversary be wounded or killed than an officer's hesitation put him at a heightened risk. This amounts to norm of police culture where the lives of civilians are valued less than the lives of police officers.[74]

From a democratic standpoint, such a norm is dubious: The idea that "[n]o one person should have his interests counted more than those of any other person" is a fundamental democratic value.[75] For the interests of state representatives to be given more weight than those of political subjects is particularly indefensible, given democracy's longstanding vigilance towards state encroachments on individual freedoms. The state's very claim to political authority derives from its status as a guarantor of basic democratic rights; of these, an individual's right to his or her continued existence is surely the most important and inviolable.[76] Democracy thus demands that police and civilian lives are valued equally. Novice police officers should not enter into the job believing that its dangers are mitigated by special self-defense protections.

Some have argued, however, not that police and civilian lives should be valued equally, but that the lives of civilians should be valued significantly more. This argument is closely linked to the traditional (albeit often idealized) British view of the police role. The "beloved" British bobby is depicted in the figure of PC Dixon, the fictional police officer at the center of the 1950 movie *The Blue Lamp*. Dixon is a heroic figure committed to always doing the right thing; he dies after being shot by a gun-

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[73] Walsh, "Can Ramarley Graham's Family Get Justice."

[74] Not every law enforcement organization actively promotes this outlook. See the Police Executive Research Forum (PERF) publication *Guiding Principles*. Granted, PERF's original recommendations received so much law enforcement pushback that significant revisions were made to be more aligned with officer safety-focused views. Ranalli, "Adding Perspective."

[75] Brettschneider, *Democratic Rights*, 23.

[76] Valentini, "Human Rights," 580–83.

brandishing criminal with whom he tries to reason instead of using force.[77] In this spirit, Gardner emphasizes the positive duty of police officers to protect members of the public, seeing the police-civilian relationship as analogous to the parent-child relationship.[78] Filicide evokes a very particular moral horror because the very person who is supposed to protect and care for a child has perverted this duty in murdering them; similarly, "killings by police officers are among the worst there can be."[79] For Gardner, even when it is clearly necessary to kill a person who will otherwise kill their fellow citizens, this is a moral event whose significance should not be understated, a tragedy he likens to *Sophie's Choice*.[80] Civilians' interests should thus be given more weight in defensive force encounters, and heavily so.

Arguably, having a police culture which sees the protectorate role as possibly requiring self-sacrifice is more feasible when there is a low likelihood of police officers actually facing this outcome: In the period between 2012 and 2020, no on-duty British police officers were fatally shot.[81] But this alone does not refute Gardner. The protection of civilian lives is recognizable as a democratic public good. The contingencies of individual personality make some people more attracted to careers where they assume higher levels of personal risk for public-spirited reasons. Individuals are surely permitted to take on these risks. A democratic government would seem to also be permitted to fashion the police role such that it is incumbent on police officers, based on how they are trained and police cultural norms, to be willing to sacrifice themselves to advance the project of democratic states as guarantors of rights.[82] On this logic, there is no issue with England recruiting individuals to serve in the tradition of bobbies like PC Dixon who would die before killing a civilian who threatens his life, so long as they are fully informed. And this would be permissible even in democratic contexts where gun violence is much more prevalent than in England.

However, I do not think that Gardner's argument shows that democratic governments are required to fashion the policing profession such that civilians' lives are favored heavily over police officers'. Beneath their roles, police officers are individuals who are the moral equals of the civilians they encounter. At most, the Valuing Civilian Lives discussion seems to show that the state is prohibited from treating the rights of police officers as significantly weightier than those of civilians. There is space for the state to construct the police role in a range of ways consonant with this prohibition—from giving the lives of civilians and police officers the same weight to heavily weighting the lives of civilians.

A final observation before moving on. I have discussed the Valuing Civilian Lives condition mostly in terms of police culture, but the condition may also require that certain kinds of policy changes be implemented. It is an empirical matter as to

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[77] Reiner, *The Politics of the Police.*

[78] Gardner, "Criminals in Uniform." I thank Tarek Yusari Khaliliyeh for bringing Gardner's essay to my attention.

[79] Gardner, 106.

[80] Gardner, 107–8, 113.

[81] "United Kingdom Annual Roll."

[82] See also Harmon, "When Is Police Violence Justified?," 1157.

what policy measures would be effective in reducing the number of non-liable civilians who are killed by police, but suppose that there are such measures—e.g., requiring that police officers retreat or use de-escalation tactics when appropriate, spending more resources on conflict resolution training, maintaining crisis intervention teams staffed by mental health professionals to respond to certain kinds of calls, and so on. It seems plausible to say that if police culture were to change but no further concrete measures were taken to reduce civilian deaths, the Valuing Civilian Lives condition would not be satisfied.

By way of summary: If (1) data released to the U.S. public showed that suspicious hand gestures by non-aggressive civilians are, in the aggregate, so overwhelmingly indicative of a deadly threat that a sufficiently high number of lives are saved by a policy that permits police officers to defensively use lethal force, and (2) U.S. law enforcement demonstrated a strong commitment to safeguarding civilian lives, a policy permitting killing non-aggressive civilians in cases like *Loud Music* would be defensible. As things stand currently, neither condition is met.

(3) Civilians behaving aggressively

Despite what has been said about the failure of U.S. law enforcement to meet the Valuing Civilian Lives condition, if police officers used lethal force every single time a detainee moved their hands, the number of people killed by U.S. police each year in scenarios like *Loud Music* would be much higher than it currently is. Police officers are trained to develop good judgment about when suspicious hand gestures mean actual danger. Though non-aggression typically indicates a lower likelihood that a civilian poses a threat, aggressive noncompliance indicates the opposite. "Police training universally recognizes noncompliance as a danger signal," Patrick and Hall write.[83]

A noncompliant individual is not liable to being killed by the police because of being noncompliant.[84] At the same time, one might think that if a civilian has made a threatening movement or gesture while acting aggressively, if there is one party who should bear the greater risk of harm, it should be the civilian. Let us examine the strongest argument for a policy permitting police officers to use lethal force by supposing that the Valuing Civilian Lives condition is met. In *Resisting Arrest*, a non-self-favoring police officer is in the process of arresting a civilian for a crime he's suspected of. The civilian refuses to follow the officer's commands. He struggles and

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[83] Patrick and Hall, *In Defense of Self and Others...*, 105.

[84] I accept that a noncompliant individual might be subject to harm of some kind to make a legal arrest or to proportionate force in order that a police officer protect themselves from nonlethal harm; my only claim here is about the noncompliant person's non-liability to being defensively *killed* due to being noncompliant. As *Bank Robbery* showed, however, an actively violent criminal suspect can be noncompliant. This section's focus is cases where a noncompliant civilian has not shown signs of being *harmfully violent*. In *Resisting Arrest* below, I assume that it hurts to get kicked in the shins, but that this does not cause an injury to the officer. But what if the civilian punches the officer, giving them a black eye? What if the civilian is a "fleeing felon," whom some authors have argued are liable to being defensively killed under certain circumstances (e.g., Miller, *Shooting to Kill*, 129–37)? Alas, I set such questions aside in the present analysis.

twists as the officer is trying to grab ahold of him and kicks him in the shins, asking if he wants to fight and saying that the officer has it coming.

Philosophical work on "provocateurs" is relevant to a case like this. Clearly, it is not permissible for the police officer to respond by harming the provocateur-civilian simply because he gives in to the provocation.[85] Ferzan argues, however, that if a respondent impermissibly inflicts harm due to being provoked, the provocateur who "started the fight" may not subsequently defend themselves and is not owed compensation for their injuries.[86] Like the 7-Eleven robber who threatens a clerk with an unloaded gun, the provocateur has forfeited certain rights through their culpable actions.

If this correct, it seems plausible that if a provocateur-civilian makes a gesture indicative of an uncertain threat, it is only fair that they are no longer entitled to be treated as an innocent party and the officer's moral equal. Through their culpable actions, they have created a situation where it is reasonable for the police officer to feel threatened, and it seems plausible for the latter to be permitted to defend themselves against the risk of the provocateur-civilian's movement indicating a lethal threat. Moreover, threat probability-based considerations may come into play here: Compared to a non-aggressive person, the provocateur-civilian would seem likelier to escalate to genuine physical violence.[87]

This conclusion might seem to be supported by arguments made by Jorgensen, who's defended the idea that mistakes in self-defense are reasonable when they conform to an "assumptive signaling" norm.[88] According to this norm, self-defenders may act on signals of aggression that can easily and reasonably be avoided by their performer and are a matter of public knowledge. Consider a man who trails a woman's exact path in a parking garage. He may be lost in thought and not thinking about her perception of him as he heads to his car, but it is fair to say that he should pay closer attention in this situation. The cost of avoiding this behavior would be minimal and he can be expected to know that parking lots are places where women face a heightened sexual assault risk. He has thus transgressed the relevant assumptive signaling norm. While a woman who sprays him with Mace is reasonable even though she's mistaken, a White person in West Oakland who is getting money out of an ATM, sees a Black man approach, assumes he's about to rob her, and uses Mace acts unreasonably. Being Black and being an ATM customer are not things that a just society should require that he avoid, thus the features of the situation leading her to decide that he is a threat do not pass the test for being valid assumptive signals.

Following Jorgensen, it would be extremely unfair to require that individuals avoid listening to loud music lest they are unable to hear the commands of a police

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[85] Ferzan, "Provocateurs"; Hecht, "Provocateurs and Their Rights." For Ferzan, provocateurs are individuals who do not pose a fact-relative threat, but for our purposes, it is more useful to construe *Resisting Arrest* as a case where the provocateur's underlying intents are unknown, which is closer to Hecht's understanding.

[86] Ferzan, "Provocateurs," 599, 614–16. Hecht argues that it matters how much provocateurs contribute to the wrongful harm against themselves; they may counter-defend against harm that exceeds their contribution. Hecht, "Provocateurs and Their Rights," 176–80.

[87] Hecht, "Provocateurs and Their Rights," 174.

[88] Bolinger, "Moral Grounds."

officer who happens to decide to interview them. But the situation of noncompliant civilians seems different. Individuals surely have a fair opportunity to avoid noncompliant behavior, and should also be able to predict that failing to heed police commands and fighting off an officer might lead them to think that they're looking to mount a lethal attack.

However, this conclusion is too hasty. Aggressively resisting police authority is not necessarily valid as an assumptive signal of danger and as a basis for a civilian's being subject to lethal harm if they make a suspicious movement. This is because there are a range of circumstances where aggressive conduct might be excused or even justified.

First, noncompliant behavior may be a response to being repeatedly subject to unjust police practices. In low-income, majority Black communities in the U.S., police officers frequently engage in forms of public order policing, including the practice of stop-and-frisk, that violate individuals' rights of free movement and privacy. At a systemic level, these policing practices can perpetuate race- and class-based second-class citizenship and deprive residents of the freedoms that democracies are supposed to safeguard.[89] In his discussion of inner-city ghettos, Shelby defends individuals' right to dissent under such conditions. "It is crucial, given the duty of justice and on grounds of self-respect, that the ghetto poor make manifest their principled dissatisfaction with the existing social order," he writes.[90] It may be permissible for an individual who objects to being recurrently detained as part of a public order policing project to engage in noncompliant behavior—as well as it being overly burdensome to ask that this individual *not* engage in noncompliant behavior.[91]

Second and relatedly, because of the stereotype of Black people as violent, in the Black community, there's a common view that one should unconditionally submit to police authority since it is unsafe to do otherwise. "The Talk" is a rite of passage where parents explain the importance of behaving obediently in interactions with police officers, even if an officer is rude or uses unwarranted force. In Paul Butler's words:

> It is best not to assert too many rights. If you are not sure whether you actually are being detained, politely ask, "Officer, am I free to go?" If they say, "no," don't ask them what their reasonable suspicion is. Do not, at this point, ask to see an attorney (you don't have a right to one during a stop anyway). Do not ask if their body camera is on. Don't ask why they are touching your private parts or going into your pockets. Never tell cops, "You can't do this." It sets them off, and, under the law of the streets, yes, they can…[92]

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[89] Roberts, "Race"; Natapoff, *Punishment without Crime*, chap. 6.
[90] Shelby, *Dark Ghettos*, 227. Italics removed. See also Valentini, "Human Rights," 587–88.
[91] Bolinger, "Moral Grounds," 10.
[92] Butler, *Chokehold*, 206.

Facing a heightened risk of being harmed or killed by law enforcement officials because of one's race is deeply unjust.[93] In the thick of an interaction with the police, an individual may be overcome by a sense of cynicism towards an institutional arrangement whose the logic The Talk encapsulates, and protest by doing the opposite of what The Talk counsels.

Third, noncompliance could be a way of protesting the enforcement of an unjust law. It might be unjust for the state to criminalize what it criminalizes, and there may be racial disparities both in what is criminalized and how criminal statutes are enforced.[94] Noncompliant behavior might be a legitimate form of civil disobedience.

Fourth, a police officer might arrest a civilian illegally or wrongly suspect them of a crime they did not commit. Some argue that the court is the right place to fight an illegal or wrongful arrest, since noncompliant behavior will neither prove the civilian's innocence nor change the officer's mind about making the arrest.[95] However, a civilian may reasonably believe that the bail amount will be so high that he will be stuck in pretrial detention and will lose his job, neglect his dependents, etc.; and/or that he will be forced into an unfair plea bargain; and/or that the ordeal will get him into "the system" from which it will be impossible to extricate himself. Noncompliance might be a form of self-defense against the harm of an arrest to which he is not liable. Of course, given that the police officer acts with the power of the state, self-defense is likely to be futile. A success condition is often incorporated into theories of self-defense. However, as some have argued, the success condition need not be met if there are other important interests at stake, like the victim's registering their protest of the wrong. If a rape victim knows that she cannot overpower her rapist, she is still permitted to harm him to stand up for her moral worth.[96]

In sum, we have considered a case, *Resisting Arrest*, where a provocateur-civilian acts in ways that make it reasonable for a police officer to perceive them as intending violence. If they make a movement indicative of an uncertain threat, they arguably forfeit their right to be treated as an innocent party and the officer's equal in determining a fair allocation of risk. This would make it justifiable to have a norm permitting the police officer to defend themselves against the risk of a lethal attack by using lethal force. However, considerations around over-policing, race, and the injustice of the U.S. carceral system undermine the normative validity of noncompliant, aggressive behavior as a signal of threateningness. Moreover, it is plausible to think that an individual who engages in aggressive behavior to protest an

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[93] Why are Black people are killed by police at higher rates than White people in the U.S.? O'Flaherty and Sethi distinguish between the fear hypothesis, where Black people are shot more often because police officers implicitly see Black civilians as more threatening, and the contact hypothesis, which says that because Black people have more police encounters, a higher rate of police shootings is statistically logical. See O'Flaherty and Sethi, *Shadows of Doubt*, chap. 8. Importantly, though some critics of the Black Lives Matter movement point to contact hypothesis research as evidence that there is not racism in U.S. law enforcement, the two hypotheses roughly map onto the distinction between individual (implicit) racism and structural racism. The latter may describe why Black communities are disproportionately overpoliced and subject to higher rates of police shootings.

[94] Bobo and Thompson, "Unfair by Design."

[95] Chevigny, "The Right to Resist," 1136.

[96] Statman, "On the Success Condition"; Frowe, *Defensive Killing*, 109–18.

unjust criminal justice system does not actually intend to harm a police officer; they just want to register their protest and perhaps create an opportunity to flee. This suggestion is in principle empirically verifiable, and if it is right, it would mean that suspicious movements in certain kinds of arrest scenarios indicate a lower risk of a fact-relative threat to the officer than is typically assumed. Hence fairness- and hypothesized threat probability-based considerations—paired with the non-satisfaction of the Justification and Valuing Civilian Lives conditions—argue against a norm permitting the police use of lethal force against aggressive civilians who pose uncertain threats.

And if this is not convincing, consider that the details of *Resisting Arrest* were deliberately fashioned to make the civilian fit the description of a provocateur who is intentionally trying to pick a fight with the officer. This was done in an effort to lay out the best possible argument for aggressive civilians forfeiting their right to be treated as a police officer's equal. But not all real-world scenarios where individuals resist arrest, fail to comply with an officer's commands during a stop, etc., are like this—oftentimes individuals are simply reacting to the circumstances at hand in a heated way and do not aim to incite a police officer into using force.[97] Thus it should not be assumed that a typical case of noncompliance involves a civilian making incendiary threats. If a civilian is not a provocateur, it is much less clear that their right to be treated as the police officer's equal is forfeited to such a radical extent that it becomes permissible for the officer to use lethal force. This further undermines the argument for a police policy norm permitting lethal force to be used against aggressive civilians in uncertain threat scenarios.

CONCLUSION

As I have argued in this paper, focusing on the United States, the context of a known in-progress violent crime is a special case where there may be threat probability-based, fairness-based, and lesser evil reasons for a police officer to use lethal force against a suspect who poses an uncertain threat. Taken together, these reasons form a justification for a policy norm permitting the police use of lethal force in this context. This does not mean that police officers are automatically justified in shooting a violent criminal suspect who poses an uncertain threat, but it is justifiable to have a norm allowing officers to make a judgment-based determination that there is an all-things-considered reason to use lethal force.

However, circumstances are markedly different in the context of a police interaction with a non-aggressive civilian, where a policy norm permitting the police use of lethal force is not justified. In order to be justified, state officials would have to show that the norm saves lives overall (satisfying a "Justification" condition) and that police cultural norms meet democratic standards, seeing police and civilian lives as, at the very least, equally valuable (satisfying a "Valuing Civilian Lives" condition). Neither condition is currently satisfied, as I've argued.

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[97] Chevigny, "The Right to Resist," 1134.

Finally, this paper has considered a scenario where a civilian is a "provocateur" who makes a suspicious hand gesture while behaving aggressively towards a police officer. That a civilian is engaged in culpable, avoidable behavior would seem to argue for a policy norm permitting the police use of lethal force in this kind of situation. However, unjust background conditions in the U.S. may mean that certain forms of aggressive behavior are excused or justified, and may also decrease the likelihood that aggressive behavior indicates a fact-relative lethal threat to an officer. These considerations, paired with the non-fulfillment of the Justification and Valuing Civilian Lives conditions, casts doubt upon the defensibility of a policy norm permitting police officers to use lethal force against aggressive persons who pose uncertain threats.

Of course, there are a range of other types of cases that were not examined in the paper, e.g., mental health crises, attempts at "suicide by cop," "fleeing felon" cases, and situations where non-aggressive civilians are armed with a concealed handgun, among others. Future work is needed to assess norms permitting the police use of lethal force against persons who pose uncertain threats in such contexts.[98]

University of Zurich
jennifer.page@uzh.ch

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