

Regulating Police Use of Deadly Force

Roger Wertheimer

A WINTER OF DISCONTENT

It was the winter of 1969, a year and a half after the Chicago Democratic Convention. Open season on police had been publicly and privately declared by revolutionaries and random snipers. Demonstrations, riots, and confrontations between the police and the people had become a national custom. A few months later in the summer of 1970, Portland, Oregon would host the American Legion Convention and its featured speaker, Spiro Agnew. Rumor had it that every Yippie, hippie, Weatherman, and war protester in the West was going to descend on Portland to demonstrate. The predicted turnout, according to rumors respected by the Portland Police Department and the Multnomah County Sheriff's Office, ranged from 40,000 to upwards of 100,000—some said it would be bigger than Woodstock. The state of Oregon would sponsor a rock festival in the next county in the hopes of drawing the protesters out of the city; it was, I believe, the first and only state-subsidized drug fest in American history. Police paranoia had ceased to be discriminable

as a pathological condition. Major police departments were looking at tank-type weapons for crowd control. And one local deputy sheriff used to turn livid every time a five-year-old waved to him the "V" peace sign; he was convinced that the kids had been indoctrinated by hippies and were really giving him the finger.

There I was: a dope-smoking, draft-resisting doctor of philosophy and Multnomah County deputy sheriff assigned the task of drafting a revision of the department's Rules and Procedures Manual, particularly the section entitled "Police Restraint," which specified the policies, regulations, and procedures governing the use of force and deadly force by members of the department, which consisted of, as I recall, roughly 250 deputies, correctional officers, and assorted staff.

MORAL AIMS AND REALITY CONSTRAINTS

The issue of police use of deadly force might be considered as a problem within an *a priori* moral theory, or within the context of constructing state legislation, or again in the context of the judicial application of the laws. The context of constructing an enforcement agency's own internal regulations is, I believe, both theoretically and practically, more interesting and fundamental. This is so for various reasons.

Though we may find it altogether natural to pass judgment on a policeman's actions using only our moral common sense, the ideal we operate with must give way when it conflicts with what the officer would be directed to do by the best set of departmental regulations. Since Hume, we have become familiar with the idea that to achieve our moral aims we need institutions and systems of rules, which, sometimes regretfully, transmit to each action the constraints that operate on the system as a whole. More recently, John Rawls has elaborated and made famous Nelson Goodman's conception of the dialectical process for improving our normative beliefs by correcting our intuitive judgments on particular cases in the light of our general principles, and vice versa.¹ It is quite in the spirit of Rawls, especially considering his concern with the stability of a society implementing a set of principles, to suppose that deliberations on the best set of rules for a police department might properly lead us to alter our beliefs about how a policeman should behave. The principles of justice governing the framework of a society must be both theoretically and practically consistent with the society's specific institutional rules. Our judgments about the best institu-

tional rules may be grounds for assessments of our general normative principles and not merely derivations from those principles.

Just as a scientific theory is evaluated by criteria other than and at times incompatible with conformity to observational data, institutional rules must meet criteria other than abstract (pre-institutional) moral truth. Rightly or wrongly, a police department cannot have regulations permitting officers to violate state statutes or local ordinances. (Whether it might have *practices* of that sort is a more problematic matter.) Beyond this there are myriad unofficial external pressures. The internal regulations an enforcement agency sets for itself do not have the status of law, and many of them are classified information. However, they are often intended as public declarations, and thus, for example, incidents may arise in which complaints are brought against the agency that appeal to its announced rules and policies. For obvious reasons, police agencies must, far more so than most institutions, construct their rules and policies with an eye continuously on such contingencies. Later I shall focus on a particular instance of this.

If a rule is to achieve its aims, it must be obeyed, and if it is not respected the costs of enforcement may become high, even prohibitively high. That is another generality with special poignancy for the regulation governing police use of force. Most citizens realize that an officer is not likely to respect a rule that threatens his own safety, but few citizens have any realistic conception of how much and what kinds of force are necessary to accomplish certain tasks safely. Moreover, still fewer citizens appreciate that a policeman is not likely to respect a rule he views as a threat to his own self-respect because it bars him from effective action, as, for example, the Miranda rules were thought to do. Restrictions on police use of force are specially problematic since they may jeopardize an officer's sense of worth as well as his sense of security.

Another fact about rules we may elsewhere overlook is that following a rule is a complex psychological operation, and the more complex the rule, the more complex the operation. A civil code for property or contracts can go merrily on for pages because the circumstances in which the rules are normally applied allow for the requisite study and deliberation. Codes for police behavior must reckon with their being applied to behavior that regularly pre-empts reflection upon them. While much police work is routine and much of it that isn't proceeds at a pace permitting deliberation or consultation with the department manual or a supervisor, when resort to deadly force is a live option, time for research and reflection usually becomes a scarce resource. To give a policeman a set of standards

too sophisticated to be applied by a normal human being in real situations is only to give him cause for resentment and cynicism. A rule that regulates behavior in a crisis must be short, simple, and memorable; fine distinctions, nice qualifications, and carefully specified special exceptions may come to have diminishing marginal utility. The rules for police use of force must be general guidelines covering the most common situations; the moral subtleties of the casuist must be sacrificed for the sake of simplicity.

Yet this need for simplicity must contend with strong internal political pressure for clarity, precision, and completeness. The latter demands went unsatisfied by the existing state statutes on the use of force. ORS 133.280 (Oregon Revised Statutes, 1968), entitled "Means of Effecting Arrest," says only, "If after notice of intention to arrest the defendant, he either flees or forcibly resists, the officer may use all necessary and proper means to effect the arrest." This is standard statutory language in this area. The words "necessary" and "proper" (like the expression "not excessive" used in other jurisdictions) permit simplicity at the cost of rendering the rule utterly incapable of providing an officer real guidance.

A policeman wants to know *beforehand* just what is meant here by "necessary" and "proper." He wants the regulations to be reasonable. He wants them to permit him to do his job safely and successfully. But even more than that he wants the directives to be clear and well defined. Unless the organization is in chaos or decay, he needs and seeks the support and approval of his superiors. He commonly operates alone, making choices in crisis conditions under extreme uncertainty where the risks and stakes are very high, the circumstances largely unique, and the need for action immediate. And he knows he will be held accountable.

Despite the much-talked-of police discretion, the modern officer is and behaves as a petty bureaucrat. He must answer for his mistakes and misconduct. He might hide some of them on his own, but most of them can be swept under the rug only if someone up the chain of command supplies a carpet. He is not much worried about answering charges in a criminal or civil proceeding. I presume it needs no proving here that the use of force by police is not and perhaps cannot be, *de facto*, regulated by the legal system in the same way and degree as the use of force by ordinary citizens is.² As in most organizations, effective control over the details of conduct is inversely proportional to the distance within the chain from command to execution. Thus, the prudent policeman acts with an eye more on departmental rules than on state statutes.

Again, an officer wants to know *in no uncertain terms* what his

department requires of him. If he and his fellow officers feel that he could not have been expected to know that he would be criticized for what he did, then the rule he is said to have violated, along with the rest of the rules and the superiors who enforce them, will lose respect. Yet this understandable demand clashes with the demand for simplicity. Moreover, it is most doubtful whether even in principle such terms as "necessary" and "proper" are altogether eliminable. Some compromise must be struck between simplicity and specificity, and, I would argue, no single solution is demonstrably best, not even for any one department, let alone all departments.

"POLICE RESTRAINT," SECTIONS I-V

Space does not permit detailed discussion of the rules, procedures, and policies set forth in the document I drafted, so I shall focus primarily on those aspects of theoretical interest. Section I is a general policy statement which recognizes that the police have diverse functions, such as the prevention of crime, the apprehension of criminals, and the maintenance of order and of respect for the legal system, but then insists that the *protection of every person* within the department's jurisdiction has the highest priority. Section II, "General Code of Conduct," tries to clarify the most general do's and don'ts of police use of force. For example, one paragraph categorically prohibits threatening or causing harm for the purpose of retaliation, or as a means of coercing respect, or in response to verbal abuse or exhibitions of disrespect, or as a means of procuring information or evidence. Section III defines "use of force," requires the reporting of every use of force, describes the procedures for making such reports, and delineates special restrictions on the use of the baton and chemical devices. Section V specifies restrictions on the possession, wearing, storage, and transfer of weapons.

Section IV covers the troublesome topic of firearms and the use of deadly force. It defines a use of deadly force as being either (1) discharging a firearm in the direction of a person or as a means of causing harm or fear of harm to a person, or (2) any action that would cause a reasonable person to fear for his life. Behind this definition there lies a dictum that is taught in the police academy and understood by every police officer: you don't shoot at someone unless you mean to kill him. The idea of shooting to wound is strictly for the movies. My instructors insisted, on the authority of FBI statistics, that in the vast majority of gunfights the participants are no more than seven yards apart; thus most of our practice on the

firing range was done at that distance. The circumstances in which you fire at someone are conditions fit for fear, rage, and excitement, conditions not conducive to control and finesse. You aim at the person's mass, the center of his chest, and you hope to God that you hit something—and, what is not the same thing, that you stop him cold. In police work there is no room for a meaningful distinction between shooting at someone and attempting homicide. Granted, circumstances may arise in which an officer could shoot to wound without running substantially greater risks, and there it would be best if he did not shoot to kill. However, such occasions are so exceptional that an officer will be both more effective in his role and more protected psychologically if he operates on the principle of shooting to kill. It is better for him to act automatically on that maxim and make adjustments when the situation allows than to try to make case-by-case applications of some principle such as that of inflicting the minimum harm possible.

DEADLY FORCE: LAW VS. MORALITY

In Oregon, as in most jurisdictions then and now, the statutory provisions on police use of deadly force were outrageously permissive. ORS 163.100 defined justifiable homicide as follows:

The killing of a human being is justifiable when committed: (1) By public officers or those acting in their aid and assistance and by their command: (a) When necessarily committed in overcoming resistance to the execution of a legal duty. (b) When necessarily committed in retaking persons charged with or convicted of crime who have escaped or been rescued. (c) When necessarily committed in arresting a person fleeing from justice who has committed a felony.

Case law supplemented this statute with rulings on such secondary matters as how justified an officer must be in believing that the person he is killing is actually a fleeing felon or an escaped prisoner. However, the troubling issue remained: to put it crudely, it seems morally insane to permit police to gun down someone for nothing more than fleeing after shoplifting some merchandise worth \$75. (If it were worth only \$74.99, the crime would be a misdemeanor and the miscreant would not be fair game—until he had been in custody and formally charged!)

Fortunately the legislature did not prohibit the department from having a more restrictive policy. No statute requires an officer to

shoot at every fleeing felon or escaped prisoner. Still, there is at least a statutory requirement that the department and its officers faithfully execute their duties and fulfill their functions. And, legal consequences aside, it would hardly have been politic for the department to have a more restrictive policy without a good reason. Politically, the best reasons are usually *ad hominem*.

Paragraph B of Section IV presents a plausible principle and a peculiar rationale.

Members will use deadly force with *maximum restraint*. By abandoning capital punishment, the State of Oregon has acknowledged that a man's past misdeeds, however grave or criminal, do not justify the use of deadly force. Members will comply with that public policy. The use of deadly force against a human being is unwarranted unless there is preponderant evidence that that person will attack another human life.

This paragraph will seem unremarkable only if one supposes that penal principles may be unproblematically applied to a policeman's use of force. That seems to be the supposition of Frederick Elliston, who contends that the police use of deadly force is just a form of capital punishment.³ This conclusion, he argues, follows from H.L.A. Hart's widely accepted definition of punishment, which contains five necessary and jointly sufficient conditions:

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

If Hart's definition does imply that police use of deadly force is a form of capital punishment, then, *contra* Elliston, the proper inference to draw is that Hart's definition of punishment is seriously defective. If Elliston is right, then *every* police use of force in making an arrest or capture or thwarting an unlawful attack is a punishment. So too, since arrest involves a loss of liberty (not to mention embarrassment, inconvenience and the like), in Elliston's view *every arrest* is a punishment. What is true is that *some* policemen sometimes use force (deadly or otherwise) or arrest to punish. This is so-called street justice. The officer intentionally inflicts suffering on individuals he knows or believes to be lawbreakers, usually be-

cause he believes the persons deserve to suffer (and/or they or their group need to be deterred) and may not or will not suffer efficiently or severely enough through the mechanisms of the judicial and penal systems. Such policemen intend to and do punish their targets. However, nowadays this is regarded by most good folks as a paradigm of police misbehavior, an egregious misuse of police power. Elliston's conception seems to imply that such policemen cannot be criticized for punishing, because that is the policeman's job. (Indeed, if punishing were a police function, generally the police couldn't even be criticized for using "unnecessary" or "excessive" force, unless that means that the punishments they dealt out are excessively severe; but in fact, generally police punishments are both swifter and milder than the sentences assigned by the courts.)

Arguably, Hart's definition does not imply that an arrest is a punishment, because an arrest does not satisfy Condition 2 (and thus also not Condition 3), which requires that a punishment be for an offense against legal rules. Arguably, the expression "the crime for which S is arrested" cannot be parallel to "the crime for which S is punished." If a court operates on a presumption of innocence until the accused is convicted by the court, it cannot acknowledge that S's commitment of a crime is (part of) a reason for arresting S before it can acknowledge that S has committed a crime. He may be arrested *for* a crime only in the sense that the reasons to believe he committed a crime are legally sufficient to justify holding him to determine whether he did commit the crime. Thus "arrest for a crime" must be elliptical for "arrest to answer for a crime." By contrast, to punish S the court can and must acknowledge that S has committed a crime and that (part of) its reason for punishing S is that S has committed a crime. Further, since a use of force to arrest is a means to an end and justifiable in the court's eyes only as a means to an end, the court cannot acknowledge S's having committed a crime as a reason for using force to arrest. So an officer could not lawfully punish S by arresting him or by using force to arrest him.

This whole argument rests on the court's presumption of innocence until the accused is convicted by the court. Thus it has no bearing on the retaking of an escaped convict and the use of force thereto, nor on the arrest and needed use of force in jurisdictions where the court operates on a presumption of guilt, nor on the use of force to protect against unlawful attack. Moreover, even in our system, though before conviction the court cannot believe or acknowledge that the arresting officer knew or knows that S is guilty of committing a crime, after the court has reached its conviction of

guilt it can acknowledge that the officer knew all along—as well as he knew anything in the world—that S was guilty. And the court may know all along that the officer's confidence may be much better justified than is the confidence with which juries commonly make their decisions. The court's own rules of evidence may insure that the arresting officer is in a far better position than any jury to judge a man's guilt. Better, that is, if the only criteria here are strictly epistemic. But clearly they are not. The rules of our criminal justice system answer to various considerations other than, and often incompatible with, the goal of making findings of guilt as accurate as possible. In *Mapp. v. Ohio*,⁴ the Supreme Court reaffirmed its strategy of excluding from criminal trials evidence obtained ^{unlawfully}. So, a lawful punishment cannot be distinguished from a lawful infliction ^{of} harm by police in terms of the epistemic situation regarding the guilt of the person harmed.

The order of explanation must go the other way. An arrest and the needed force to effect it require no more assurance than "probable cause," whereas punishment is improper where even a "reasonable doubt" of guilt remains. The different standards of epistemic adequacy cannot be because the greater the suffering inflicted, the more certain we must be of the propriety of inflicting it. First, the suffering permissibly inflicted by arrest and custody or a use of force may be equal to or greater than that of a proper punishment, and secondly, the same degree of certainty is required for all punishments regardless of their severity, and for all arrests and uses of force regardless of their extent of harm. We seem to assume that something about punishment demands a kind of proof and certainty that are not required for other proper inflictions of harm. This is reflected in the difference between punishing an innocent man and inflicting harm by arrest or use of force upon an innocent man. In both cases the officials might faithfully observe due process and have legally sufficient reasons for their acts. But if the wrong man is arrested or shot at, he is not wronged, and the officials have committed no injustice; if the victim recognizes their duty and their epistemic situation he can simply excuse them. But when an innocent man is punished for something he didn't do, an injustice, a wrong is done him, and he cannot simply excuse the punisher; to restore the relationship the condemned would have to forgive. He can simply excuse his jailers, floggers, and the like if they are only doing their job, for their job is not to punish him but only to execute the sentence of punishment. They do not punish, for they inflict the suffering not because they have condemned him, but only because they have been ordered to carry out the court's

sentence. What requires forgiveness and not mere excuse is not the evil inflicted *per se*, but the condemnation, the will to inflict an evil.

INTENTIONALITY

Missing from Hart's definition is the feature of condemnation. A punishment involves a damning, a cursing, a wishing of evil upon the offender. Hart's first condition requires the presence of pain or other consequences normally considered unpleasant, but his statement lacks an essential feature. If the "unpleasantness" of the act is not itself intended, then however great, inevitable, or foreseen the evil may be, the act is not a punishment. Punishment differs from other lawful inflictions of suffering in principle.

An act is not a punishment unless the agent intentionally inflicts an evil. To intentionally inflict an evil he must *intend* to inflict an evil, and, in consequence of that intention, inflict an evil (i.e., cause his target to suffer a harm). (If he fails to inflict the evil he intends, yet in consequence of his intention causes his target to suffer some other evil, he may still be intentionally inflicting an evil and thereby punishing.) To intend to inflict an evil he must believe that what he intends to inflict (e.g., deprivation of liberty) is an evil for the target. Whether the target or others agree with this valuation is inessential: prisoners who seek their own imprisonment are nonetheless receiving punishment.

By contrast, the belief of the target and others that what is inflicted is an evil is essential to the efficacy of the infliction as a means to such ends as deterring the target or others from unlawful acts. But while the deterrer may also believe that what he inflicts is an evil, his own belief has no role in the explanation of his acting to deter (except perhaps as his evidence of what the target and others probably believe). The deterrer acts from his belief about what the target and others believe to be evil; his agreeing with their belief is quite inessential for the efficacy of what he inflicts as a means of preventing unlawful acts.

Admittedly, some causal chains leading to some goods require, at least as a practical matter, that the punisher believe that he is inflicting an evil. For punishment to serve an educative function the punisher's righteous indignation must seem sincere and his will to inflict harm must seem genuine. Consider the sense of outrage and rebelliousness that naturally arises in the criminal and the public when they suspect that the authority thinks its punishments are excessive and cruel, or that its laws are unjust, or that it

is punishing innocent men. The educative function is unfulfillable unless the criminal and public believe that the punisher believes he is inflicting pain and is doing so intentionally; whether their belief is correct is not essential, although practically speaking it is far more difficult to insure that they will believe this if the facts are otherwise. Moreover, the importance of their believing that the punisher has certain beliefs and attitudes only testifies to the importance of his beliefs and attitudes to the status of an act as a punishment.

An arresting officer knows that to arrest, to deprive someone of his liberty is to inflict an evil; yet he is to intentionally deprive someone of his liberty but not to intend to inflict an evil. He is not to be ruled by ill will. He is to effect his arrest and perform all his duties with the intent of causing the minimum harm to each person he affects. The intent of an arrest or any police duty is not to inflict an evil, but rather to charge a suspect with a crime or protect a person from an unlawful attack, or the like. Again, when a police officer shoots to kill, though he knows that death is an evil, its being an evil is not to be part of his reason for acting. The fact that death is unwanted or "unpleasant" should not be part of the explanation of why he uses deadly force. Only when he goes after a subject with the intent of doing him harm do we say that he is punishing, and criticize him accordingly. An officer's acts *can* be punishments since he can seek to make the subject suffer, but he need not do so and cannot do so lawfully. (Hart's definition might be defended by claiming that his fourth condition supplies the requirement of intentionality. Perhaps so, but I read the condition, "it must be intentionally administered by human beings other than the offender," as insisting that the punishment be intentionally administered only in the sense that an arrest must also be intentionally administered and not specifically that the evil be intentionally administered.)

PUNISHMENT AND ANGER

A punisher may be a pure retributivist, someone who intends to inflict an evil, and intends nothing beyond that. Teleologists have insisted, perhaps rightly, that this retributivist has insufficient reason for inflicting an evil. The principle here is that evil should not be inflicted unless some compensating good is consequent upon it: if no one is harmed by refraining from harming, then, since someone is benefited by refraining, there is reason to refrain. A pure teleologist insists further that the only reason for acting is the attainment of some good. But, the retributivist objects,

that makes punishment impossible: the agent could not then act from the belief that he is inflicting an evil, for his valuation of his act's effects seems irrelevant to the production of those valuable effects.

Now consider the nature of anger. As a biologically structured response to harms and threats of harm, anger is part of our natural endowment because it has survival value. The action patterns of attack against the object of anger, the source of harm, are generally useful. But not always. Sometimes anger is an appropriate emotional response, but acting on the urge to inflict harm would produce no good other than that of satisfying the urge to inflict harm. If no one is harmed by refraining from harming, and since someone is benefited from refraining, there is reason to refrain. However, insofar as one is angry, one is motivated to deprive the target of benefits and to inflict harms. But where satisfying the urge of anger is the only reason to inflict harm, generally there is some good reason to refrain. There may be the possibility of retaliation or other unwanted consequences by the object of anger or by those who identify with him—a group which may include not only his friends and relatives, but also strangers who sympathize with the suffering of a fellow human being, including persons who identify with the punisher but cannot or do not feel as angry as he and thus cannot be as impervious to the sufferings of his target. Then too, anger can “cool” after the threat has passed, the harm is past, and ~~just~~ the urge to inflict harm has dissipated, perhaps leaving instead a vulnerability to sympathy with the object of anger. (It is most difficult to restore and maintain easy social relations with someone you have intentionally harmed unless you feel yourself justified or he forgives you. This helps incline us to ridding ourselves of those we punish by killing, ostracizing, or imprisoning them.)

When we feel ourselves wronged, we may feel angry, but more than that we may feel that our anger is appropriate and justified (and perhaps indeed it is). But we may nonetheless feel ourselves to be foolish, imprudent, or just self-indulgent, if we act on the urge of anger despite having the foresight and self-control to stifle the impulse to retaliate when it is counterproductive. (Not everyone feels this way. Some people insist not only on their right to be angry, but on their right to express it. There can be no question that a person may have every right to be angry at another for the harm he caused, though there may be a question about *how* angry he has a right to be. Yet some people feel that to fail to exercise their right, is to fail to assert it and that is to let it be called into question—and they may be fearful of any doubts about their rights, their powers, and

their status. Punishment can be a point of pride or of honor, akin to vengeance.)

When we have been wronged we are likely to feel hostile impulses and to approve of them. We may need only the assurance that acting on them will indeed be prudent. The teleological considerations of reform, deterrence, incapacitation, and the rest provide us with a rationale or rationalization for acting on hostile impulses that we regard as appropriate. These valued ends cannot motivate punishment without the righteous anger, for the attainment of these ends does not require us to act from the belief that we are inflicting an evil. And so too, these ends cannot motivate a punishment greater than is sanctioned by the righteous anger. We call a punishment excessive if we believe the evil inflicted exceeds the degree of anger the punisher has a right to. But if the *punisher* believes that the evil he inflicts exceeds what his righteous anger prompts him to—if he ceases to seek evil for the target and must explain his action without reference to that wish—then the overplus⁺ suffering is not punishment, excessive or otherwise, for the character of the enterprise has changed. The punisher then needs a different justification for what he does.

APPLYING PENAL PRINCIPLES TO POLICE USE OF FORCE

Principles of penal policy cannot be directly translated into standards for police use of deadly force. If they could—if police use of deadly force were a form of capital punishment—then where the latter is prohibited, police could not lawfully use deadly force even to protect against an unlawful lethal attack. Punishment must be a more restricted activity than other inflictions of comparable evil. It cannot outrun our sense of the appropriate hostility toward the lawbreaker, whatever the benefits of doing so may seem to be. Other lawful inflictions of suffering are not so constrained: in general the question is simply whether the costs are necessary and the benefits sufficient.

Still, some arguments from penal principles to police use of force might be legitimate. Arguably, there is even statutory justification for linking the two. As in most jurisdictions, in Oregon the felony-misdemeanor distinction is defined in terms of the penal code. ORS 161.030 says, in essence, that a crime is a felony if it is punishable by imprisonment in the state penitentiary, but if it also is punished by a fine or imprisonment elsewhere it is a misdemeanor. Further, recall that the ORS restrictions of justifiable homicide employ this

felony-misdemeanor distinction. This suggests that some kinds of linkage between penal policy and the proprieties of police use of deadly force may have a basis in law.

Some arguments here might be otiose in a court of law, but nonetheless have considerable power in a political context. Police have not been empowered to punish, so the law does not allow them to use retributivist principles to justify inflicting death or harm. Still, there is some rhetorical point to saying that the state has abolished capital punishment and has thus denied all legal support to the supposition that a man can deserve to die for his criminal acts. There are officers and citizens who would be moved by that consideration, and not improperly so.

The absence of a death penalty implies nothing for the most important and uncontroversial use of deadly force, protection of a human life against an unlawful attack. Customarily, a state execution is performed only when the criminal is safely in custody, and thus killing him is not a necessary means to prevent him from committing some crime, certainly not homicide. That the state is unwilling to kill a prisoner is hardly reason to think the state inconsistent in tolerating killing him when that would be a necessary means of preventing him from causing some evil. And if the harm to be prevented is not only grave but also irreparable and uncompensable, the state might well have sufficient grounds to legitimate killing him.

While the absence of the death penalty does not argue against permitting deadly force to be used to protect life, it can argue for restricting that permission to just the protection of human life. Certainly the history behind the legislation argues that the abolition is a declaration by the state that it regards the taking of a human life with the greatest abhorrence and disfavor, so much so that it condones killing only when it is necessary to protect something of equal importance, another human life. This was, for us, a useful rationale for confining police use of deadly force to the defense of human life. Useful, but not strictly necessary. A similar argument might be made as long as capital punishment were reserved for only homicide and other life-endangering crimes, such as treason.

ADDITIONAL STIPULATIONS IN "POLICE RESTRAINT"

We restricted the use of deadly force still further by insisting on maximum caution. Paragraph C prohibited the discharge of

firearms and employment of deadly force when the safety of innocent persons would be jeopardized. Paragraph D, as a reminder, prohibited threatening or using deadly force or firearms in a manner or for a purpose that would violate Section II, which detailed the rules governing the use of force in general. Paragraph E specified the particulars of the two circumstances permitting the use of deadly force. The first circumstance is that the officer "has no reasonable alternative means of protecting himself or another person against a clear and present danger of death or serious injury from an unjustifiable attack." Again, this seems largely uncontroversial, except perhaps in its stringency, and defensible independent of the abolition of capital punishment.

The second and more debatable circumstance specified is that the officer has no reasonable alternative means of preventing an escape or effecting an arrest or capture and (a) he has good reason to believe that the subject is a violent and dangerous public menace, (b) the arrest, capture or prevention of escape is lawful, (c) the subject is known to be an adult, (d) the subject is known to have committed a felony, (e) the officer exerts every reasonable effort to make known his authority and purpose to the subject.

This section could be construed as narrowing the statutory conditions for justifiable homicide to allow deadly force to be used in an arrest or retaking only where it was warranted by serving to protect human life. It might also be construed as expanding the justification of deadly force given by the protection of life to include situations other than that of imminent peril. One might complain that we allowed too little: if the justifying goal were the protection of life then the prior commission of a felony could not be a separate condition, but only evidence of dangerousness, and surely neither necessary nor sufficient evidence at that. So too, for the restriction of targets to adults. Or one might instead complain that we allowed too much. To permit killing in the name of some vague and distant peril might open a floodgate of problems comparable to but more fatal than those of silencing speech and the press for dangers beyond the clear and present.

The dilemma posed is real; both complaints have some force. That is the cost of compromise. Yet while this compromise cannot as a consistent application of some single principle, it may nonetheless be defended as reasonable. In recent years some police departments have adopted more restrictive policies permitting deadly force only against clear and present unlawful lethal attacks. As my opening remarks might suggest, in 1969 the police and the public

be defended.

were not much in the mood to support such a restrictive policy; internal and external political factors argued against attempts to institute it. Moreover, even in less hysteria-ridden circumstances I would be willing to defend this permissive provision.

However, I would not not advocate it as some universal rule that should govern every enforcement agency. The crucial issues here are matters of costs and benefits, and these vary from agency to agency. The main benefits are the lives and limbs of innocent persons saved by effective police action. The main costs are the lives and limbs of innocent persons lost due to police mistakes and abuses of rules. (These are not the only costs and benefits, but they dwarf all others here.) The real question here concerns the probabilities and risks involved. Some people might object to our permissive policy by arguing *a priori* that the death of an innocent person is so great a cost that no risk, however small, is acceptable. However, that seems no more plausible than the contrary claim that the saving of an innocent human life is so great a benefit that no risk, however great, is unacceptable. The question of risk is an empirical matter, and doubtless it can rarely be answered with much precision. Still, one may have sufficient reason to think that some departments are no more prone than a typical court to inflict harm unnecessarily or excessively.

Again, the essential point here is that the risks and costs and benefits will vary from department to department. As for my own department there seemed to be adequate evidence that the level of integrity and good judgment was sufficiently high to make it unlikely that the level of improper harms would be unacceptably high. In all the years that they had operated under the broad Oregon statutes, the officers had rarely fired at anyone inappropriately. Meanwhile, whatever the court verdicts may be, other departments in this country have established a frightening record of reckless or malicious killing or injuring of innocent and guilty persons alike. Their toll is too great to be justified by any beneficial consequence that could reasonably be claimed for it. In such cases the only realistic remedy is to deny the officers the occasion or pretext for misuse of deadly force.

These remarks may quiet the complaint that we were permitting too much, but they do not respond to the complaint that we were permitting too little. Why did we restrict our class of likely violent aggressors to adult felons? The short answer is that it was matter of state law. The principle behind the restriction is not retributive; the presupposition was not that only felons deserve to die. Rather the point is that an individual must (be reasonably believed to) have done something unlawful for an officer to be entitled to use

any force at all against him. The question for us was whether the mere commission of a felony was sufficient grounds for using *deadly* force pursuant to an arrest or retaking. We decided, I believe rightly, that it wasn't. The extra stipulation that the felon be an adult is normally a redundancy, but we added it, moved by nothing better than humanitarian sentiments.

The use of deadly force was to be governed by one further stipulation. Paragraph F stated that:

Even when a member is permitted by E (above) to use deadly force, he may refrain from doing so if he deems it inadvisable in a particular case. A member will not be censured if a subject is not apprehended after all reasonable methods except deadly force have been used, and the member deems the use of deadly force inadvisable.

We wanted to make clear to the officers that they could err on the side of restraint and caution with impunity. Our principle here is an analogue of another famous principle in the design of the criminal justice system: better that ten guilty men go free than that one innocent be convicted. Beyond that there is a matter of the conscience of individual officers that should be respected. A police department is not and should not be conceived of as a paramilitary force. Police officers are not soldiers with the prime function of killing the enemy. Many of the officers on our force had never in their entire career fired at someone; only a very few had ever killed anyone. We wanted it understood that scrupulousness in the taking of a human life would not interfere with the fulfillment of the duties of an officer.

NOTES

1. Cf. *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), pp. 17-21, 577-586.
2. While drafting my document I was constantly reminded that the state statutes on these matters are rarely (though certainly not entirely) beside the point. At that time a Portland police officer was on trial for murder. He had chased down a wanted criminal, a local thug whose wife he had been sleeping with. He cornered him in some bushes. The criminal, unarmed, surrendered. The officer blew him away with a shotgun—both barrels, as I recall. For this he was convicted of manslaughter.
3. Frederick Elliston, "Deadly Force: An Ethical Analysis," forthcoming in Stephen Lagoy, ed., *Perspectives on Urban Crime* (Long Island City, N.Y.: Pergamon Press).
4. 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).