DEADLY FORCE AND CAPITAL PUNISHMENT

A COMPARATIVE APPRAISAL

Frederick A. Elliston, Ph. D.
Senior Research Associate
CSEP

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Center for the Study of Ethics in the Professions
Illinois Institute of Technology
Chicago, Illinois 60616

I. Introduction

The topic of deadly force has received considerable attention in the newspapers, on television and radio, and recently in scholarly journals as well. To date, most of the attention from researchers has served to provide demographic details about police shootings -- the age, sex and race of the victim and the officer, along with other facts about the incident[1].

Through discussions in law journals important steps have been taken toward formulating an appropriate public policy[2]. The common law fleeing-felon provision has come under increasing attack, and a consensus is growing that it is inadequate. There is far less consensus on an acceptable substitute.

Philosophers have just recently begun to look at the criminal justice system, and at police work in particular. In the fall of 1980, I codirected a conference with Dr. Norman Bowie of the University of Delaware that covered moral issues in policing and other phases of the criminal justice system.[3] In late February 1981, the Hastings Center, as part of its work on the teaching of ethics in higher education, sponsored the first workshop on police ethics that brought together many of the university faculty teaching in this area[4]. In the fall of 1981 I codirected a conference with Dr. Michael Feldberg at Boston University that brought together criminologists, police scientists and practitioners, and moral philosophers to debate a wide array of topics ranging from privacy and deception to corruption and discretion[5] The conference at John Jay College was a fourth indication that work in this area is well underway.

However, it is difficult to develop a strategy to deal with the subtle and elusive moral dilemmas posed by police work. The expression "applied philosophy" belies the complexity of using traditional ethical theories, whether of a utilitarian or a deontological sort, as a basis for developing a new field within professional ethics -- namely police ethics.[6] At present no adequate theory of business or occupational ethics has been

developed, and, indeed, a widespread dispute exists as to whether such a theory is in principle possible.[7]

Consequently, in trying to provide an ethical analysis of deadly force, the philosopher immediately faces a difficult choice: where to turn? How does one begin to provide an account?

My primary purpose in this paper is to argue for one particular strategy. I shall not, first and foremost, try to explain when the police should shoot to kill and why.[8] Rather, I want to argue for a strategy to address the question.

If my proposed strategy succeeds, then it will identify the moral factors that need to be weighed in developing a defensible position. It will specify the arguments and counter-arguments that need to be taken into account, providing a plan of attack. My goal then is a moral topography, one that will reveal the lay of the ethical landscape.

II. Strategic Options

When should the police shoot to kill -- this is the question to be addressed. There are many different ways to attempt an answer. One could look at the laws on the books in the fifty states, and at their rationales. One could look at the regulations adopted in various police departments, and how they were put in place,[9] or one could look at the behavior of police officers themselves, and the reasons they give. In each case one would have the task of trying to bring a moral perspective to bear on these, and to develop ex nihilo an adequate ethical account.

I propose to forgo all of these, for each has the disadvantage of placing an enormous burden on the individual philosopher of starting from scratch. It would be much easier and more profitable if we could take advantage of the work done by others, to build on their prior insights and accomplishments. And this, I think, we can do.

A voluminous literature already exists on a closely related practice -- capital punishment. It is this literature that I

propose to use to identify the moral factors that must be weighed to develop a defensible position on police use of deadly force. Accordingly, I shall begin with a defense of this strategy before turning to its implementation.

III. Capital Punishment and Police Homicide

This strategy is attractive and indeed compelling for three different reasons. First, consistency requires that the principles used to defend the right of the state to take a citizen's life apply equally to both capital punishment and police homicides. If different moral principles operate at different stages in the criminal justice system, a specific feature of those stages must be shown to make a moral difference. In the absence of such a proof, the same principle or set of principles must prevail at every stage. Second, conceptually it may be argued that police homicides are themselves cases of capital punishment. Such actions of police officers satisfy standard philosophical criteria for punishment, and hence all the arguments for or against capital punishment apply mutatis mutandi to deadly force. And third, even if these two claims are false, the two practices are so closely tied that a comparison is fruitful in illuminating a philosophically much neglected practice.

In the case of both capital punishment and police homicide, the crux of the issue is the right to take human life. This right is claimed on other occasions. In the case of the young, it is called infanticide. In the case of the dying, it is called euthanasia. And in the case of the unborn, it is called abortion. This right is not to be exercised lightly: careful deliberation is in each case required, and some higher right must be invoked to justify such drastic actions. In the case of the terminally ill or involuntarily pregnant, it is a person's right over his or her own body. But personal autonomy cannot be invoked so readily to defend the taking of another's life against the person's expressed will, by agents of the State.

Police homicides and capital punishment belong in the same conceptual boat: in each case, a state authority willfully and deliberately takes another's life, against his or her will. They share a second feature that distinguishes them from the others: the life taken is that of the guilty, or one presumed to be guilty. A successful claim of innocence would effectively rebut the state's right. Given these similarities, the two practices belong together, and whatever principles are used to justify the one must be applied to the other as well. Consistency in the principles that underlie the criminal justice system demands a careful extension of arguments raised in the case of capital punishment to police use of deadly force.

Second, it may be argued, deadly force is itself a form of punishment -- and hence any thorough discussion of capital punishment requires treating deadly force as well. Though three courts have held that an officer's use of deadly force to arrest is not punishment within the meaning of the Eighth Amendment,[10] legal writers have argued that justified police homicide is _in fact_ a form of capital punishment.[11] They cite the Supreme Court decision in _Trop. v. Dulles_ and _Kennedy v. Mendoza-Martinez_.[12] In philosophical terms, one can make a similar case based on the criteria for punishment as expounded by H.L.A. Hart.[13]

According to Hart, for an action to be punishment in the legal sense, it must satisfy the following five conditions:

1) it must involve pain or other consequences normally considered unpleasant;
2) it must be for an offense against legal rules;
3) it must be of an actual or supposed offender for his offense;
4) it must be intentionally administered by someone 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.

Those who believe that deadly force[14] is not punishment may take issue with the second condition: the actions of the police are not undertaken for an offense, but for the apprehension of an offender. But this distinction seems tenuous at best. Clearly, it is in the light of an offense, or a presumed offense, that the police actions are taken. This objection could be taken as a rejection of the fourth condition: the officer's intention is not to punish someone, but to apprehend a suspect or to protect human life, perhaps that of the officer himself. But here again, the claim is ambiguous. Frequently, the officer does fully intend to do what he does, namely, shoot the fleeing felon.

The objection may be recast in terms of a means/end dichotomy: he shoots as a means of apprehending, not of punishing. The difficulty with this qualification is that it makes the legal definition of punishment circular, and excludes police homicides by fiat. It therefore begs the question of whether to count it as punishment.

The most useful contrast in excluding deadly force from the domain of punishment would the contrast between prior to and post adjudication. One could argue that punishment is what the state does to someone found guilty after sentencing. But why draw the line there? Why not see the entire system as punitive -- the punishment is the process. The advantage of this thesis is that it places the burden of proof on those who inflict harm on others in the name of the State. Since their actions are painful or unpleasant, undertaken as a result of a (presumed) violation of society's rules, directed to an offender, deliberate and fully authorized, they should be treated as punishment, and justified in those terms.

Third, even if this contention is mistaken, it will prove instructive to conceptualize deadly force as being similar to, though not identical with, capital punishment. The comparison functions as a heuristic device that enables us to draw on a philosophical debate full of moral insights. Retreating from the

strong identity thesis (that the two concepts are the same) to a weaker similarity thesis (that they bear a "family resemblance" to each other) enables us to take advantage of a rich literature.

IV. The Death Penalty Debate

Accordingly, I wish to turn now to the discussion of capital punishment. In so doing, I shall not attempt a detailed review of a literature which by now is voluminous.[15] Because of constraints of space, the most I can hope to accomplish is a brief survey of the main arguments. The primary objective is to see in each case how they can illuminate police use of deadly force.

A careful review of all the arguments raised in the capital punishment debate indicates six major factors to be weighed: (1) justice, (2) social defense (incapacitation and deterrence), (3) fallibility or irrevocability, (4) the sanctity of human life, (5) due process, and (6) contemporary moral standards.

In what follows I shall take each of these in turn, summarize the arguments, and then extend each to police homicides.

V. Principles of Justice

Retentionists have defended capital punishment in terms of the retributivist and the expressive theories of punishment. According to the retributivist's principle of lex talionis, death is what murderers deserve.[16] They must be punished even when this punishment serves no further purpose. No punishment is more severe than death, and it must be reserved for the most heinous of crimes. Closely related is the expressive function of punishment: capital punishment conveys the community's ultimate condemnation of someone's deed by the ultimate punishment, death.[17]

Abolitionists have countered by pointing to the impracticality of lex talionis. Taken literally, it demands a punishment equal in both severity and kind. But though one can satisfy this principle by executing a murderer for a murder, a single execution would not suffice for multiple murders or for multiple crimes

culminating in a murder (as in rape-murder cases). And what should we do for other categories of offenses? Should we assault assaulters, rob robbers, rape the wives of rapists, and molest the children of child molesters? In view of this problem of matching the punishment to the offense, some have abandoned the pure principle of lex talionis. Andrew von Hirsch reverts to a principle of proportionality: the severity of punishment should be proportional to, not equal to, the seriousness of the crime.[18] This modified retributivist principle of proportionality requires only that society construct a scale of punishment of increasing severity and declare one form as ultimate. The most severe punishment need not be death. Incarceration without parole would suffice. The deprivation of life is no longer necessary for justice. This same argument applies to the expressive theory of punishment: as long as society has declared one form of punishment ultimate, it expresses the ultimate condemnation. Death at the hands of the state is not required.

The principles of justice -- whether the pure retributivism of Kant or the modified version of von Hirsch -- raise the issue of comparative severity. How serious is the offense compared with the harm the State imposes as punishment? In the case of the police, we must ask how serious the presumed offense must be before deadly force is warranted.

According to the common law rule, a police officer (as well as a citizen) can use as much force as is necessary to prevent a felony or arrest a fleeing felon. But, as many writers have pointed out, this rule survives as a vestige of an era when all felonies were punishable by death: the killing by the police officer was merely "a premature execution of the inevitable judgement."[19] In view of the extension of the term "felony" over the past 100 years to include a host of non-violent crimes which carry, at worst, a maximum penalty of one year, this law stands today as a historical anachronism.[20]

One must take into account as well the increasing sophistication in weapons which accurately and regularly kill at a distance. Such technological developments make the use of deadly force no longer a matter of self-defense in hand-to-hand combat.

Clearly it is too severe for the police to kill criminals when the State would not execute them upon conviction but merely sentence them to jail for one year. Indeed, in those jurisdictions where capital punishment has been abolished, defenders of deadly force face the paradoxical situation that officers are licensed to kill people before trial who would not be executed if convicted afterwards. In jurisdictions that have abolished the death penalty, even the "forcible felon" rule has difficulty withstanding the challenge of comparative severity.

To take account of the proliferation of felonies, policymakers must specify the types of crimes in which a police officer is empowered to use deadly force. Only through precise and detailed regulations will a just balance be achieved between the harm the criminal causes the victim and the harm the State causes the criminal.

VI. The Argument from Social Defense

The previous discussion relies on deontological principles of justice, which hold independently of the consequences. A second principle that moral philosophers can bring to bear is utilitarian: weigh the advantages and disadvantages, and adopt the policy that is socially most beneficial.

In the capital punishment debate, utilitarians have appealed to the general deterrent value of capital punishment, as well as its function of permanently incapacitating dangerous offenders who cannot repeat their crimes.

Such an appeal has a tenuous empirical base. At present, we have been unable to obtain conclusive evidence for the comparative deterrent effect of capital punishment. The question is not whether capital punishment deters, for obviously it does. More

precisely, we must ask whether it has any uniquely superior deterrent values when compared with other forms of punishment, and for what kinds of offenses. Unfortunately, none of the studies on the general deterrent values of capital punishment can give a satisfactory answer to these two questions. The first requires a comparison of the rates of offense punishable by death in two societies comparable in all respects, including their penal systems, save for the difference in the use of capital punishment. Studies of the same jurisdiction, before and after the abolition or introduction of capital punishment, will not, strictly speaking, suffice, because not all the societal variables can be kept constant. The second question requires that societies which use capital punishment for a variety of crimes be compared, using the same method, to societies that do not use capital punishment for that same set of crimes. Studies of this sort are impossible, so one can only guess from imperfect empirical data what the deterrent value is of capital punishment.

Ernest van den Haag has used the "best bet" argument.[21] Given our uncertainty about the number of lives which could be saved by the deterrent effect of capital punishment, he claims it is preferable to execute convicted murderers -- at least their guilt is fairly certain. This argument can be extended to the incapacitative value of capital punishment: it permanently prevents those most likely to be guilty from harming those most likely to be innocent.

In both deterrence and incapacitation, the "best bet" argument hinges on our ability (or inability) to predict future crimes (either by the same offender or by others whom we wish to deter) and to prevent them by intervening. But reliable predictions are difficult to make, especially when dealing with violent crimes, since the base rate for committing or repeating such crimes is low. As a result, the number of "false positives" is high: many predicted to commit violent crimes do not do so. We must also not overlook the problem of false negatives: many predicted not to

offend actually do. Should policy-makers decide to adopt such drastic measures as taking human life, they must be prepared to justify them by demonstrating that the social benefits of the gamble exceed the cost. Given the problems of prediction, this demonstration will be weak -- too weak for some critics to justify state-sanctioned killings.

How would the "best bet" argument apply to police homicide? An officer can have probable cause for his belief in the guilt and dangerousness of a suspect, but he cannot have anything approaching knowledge. He therefore risks a human life with less certainty than the courts with their standard of "beyond a reasonable doubt." Moreover, often -- more often than the courts -- he is wrong.

Admittedly, a felon who successfully flees generally undermines the effectiveness of law enforcement. As in the case of capital punishment, though, one has ask whether or not the use of deadly force serves as a uniquely superior deterrent. Is it excessive, or will lesser measures suffice? If radio calls for assistance, patience on a stakeout, more cooperation from citizens, or simply more police power would do as well, and would result in no more if not fewer deaths, then police killings are unwarranted. In the case of fleeing felons, even fleeing "forcible" felons, one must question the necessity and appropriateness of deadly force. Given the current level of sophistication of police communication and technology in the detection and apprehension of criminals, it seems plausible that less drastic, though more expensive, means would suffice.

In addition to alternative means for accomplishing the same ends, we must carefully consider whether the danger is immediate or predicted, an issue proponents of capital punishment prefer to ignore. Both the "forcible felon" rule and the Model Penal Code permit police use of deadly force when there is no direct threat to the life of the police officer or the public. Both appeal to the probable future danger of the suspected felons should their apprehension be delayed. This difference between immediate and

predicted danger is only implied in the "forcible felon" rule, but it is stated explicitly in the Model Penal Code. Only the FBI defense of life policy restricts deadly force to cases of immediate danger when the loss of life or limb is imminent. If the protection of society is indeed a justification, the distinction between actually immediate and merely predicted danger is real and significant. One must deal with the problems in predictions, should one appeal to social benefits in any utilitarian calculation.

VII. Fallibility and Irrevocability

The prediction problem proves troublesome because we can only guess at the likelihood that in the future someone convicted of a capital offense, or a felon fleeing from justice, will endanger someone. Insofar as we can only offer a guess, albeit a calculated one, we can be wrong. Furthermore, the fallibility problem is not confined only to predictions. It arises in conviction for capital offenses, and in the police officer's judgment about deadly force, regardless of the standards set.

The fallibility problem is important because the result of our action in both cases is irrevocable: dead people cannot be brought back to life. Abolitionists like Charles Black[22] have argued that the higher the stakes, the more certain we should be. When a human life is at stake, we must be absolutely certain -- indeed infallible. But we are all fallible, and so no one should be granted power over life and death.

Retentionists for capital punishment have countered that all punishment is irrevocable: the past is past, and cannot be altered, and consequently the abolitionists' fallibility argument carries no special weight in this debate. Abolitionists insist that it is worse to kill an innocent person than to imprison him, and that compensation can be made when a person is shown to have been wrongly convicted.

In the case of police homicide, we must ask: given that a police officer is fallible, on which side should we err? The common law "forcible felon" rule and the Model Penal Code err in favor of the public and against the suspect, while the FBI defense of life rule prefers the opposite. Only the FBI defense of life rule is consistent with the widely accepted common law principle that it is better to allow ten guilty persons to go free than to cause one innocent person to suffer. How we distinguish the innocent from the guilty prior to conviction is a difficult question policymakers must nevertheless decide.

VIII. The Sanctity of Human Life

The irrevocability argument is prominent among abolitionists because of their belief in the sanctity of human life, which they consider an almost absolute value. Retentionists prefer to talk about the quality of life and point out that life imprisonment, the usual alternative to capital punishment, condemns someone to a lengthy period of misery. The issue is not whether the criminal prefers death or life imprisonment, but whether the sanctity of life principle can be compromised. Has an offender, by his crime, opened himself to a compromise? And if so, for what class of offenses or what types of offenders? Should we take someone's life only when he or she has violated the sanctity of life principle?

In setting policy on police use of deadly force, these same questions must be answered. Both the common law and "forcible felon" rule have answered the first question affirmatively. While the former allows the compromise to be applied to all felonies but not misdemeanors, the latter restricts it to "violent" or "forcible" felonies. The answer of those who would compromise the sanctity of life depends on where they stand on the problems of comparative severity and the best bet.

IX. Due Process

Another issue, intricately related to justice, is arbitrary usage and due process. Abolitionists have contended that capital punishment is unjust because of the disproportionate number of poor and black persons sentenced to death. They attribute this imbalance to the arbitrary and discriminatory power of jurors and the criminal justice system in capital punishment cases. Retentionists, on the other hand, have countered that the injustices are located not in our penal but our social system, and that the discrimination objection can be raised to all forms of punishments. Because it would overthrow the entire criminal justice system, it does not lend special support to the case of capital punishment.

The same argument has already been applied to police homicides. Surveying cases in the U.S. between 1965 and 1969, Kobler found 42 percent of the victims of police killings to be black, while 89 percent of the police officers involved were white.[23] Though the representation of blacks in the victim population is very high (42 percent) compared to their representation in the general population (12 percent), it should be noted that 42 percent is not disproportionate to their rate of arrest for violent crimes. Nor are whites overly represented as officers involved in police homicides when compared to their numbers in police departments. Nonetheless, the question remains: Is the police use of deadly force a denial of equal protection and due process? If it is, when can summary actions be taken?

According to criteria set forth in "Deadly Force to Arrest,"[24] this is a deceptive argument. Deadly force must be permitted in situations like self-defense, where an officer's discretion is just as great.

As to summary deprivation, the Supreme Court has held that the permissible abrogation of due process is limited to the seizure of property, and is justified only if it is "directly necessary to secure an important governmental or general public interest" and when there is "a very special need" for "very prompt action."[25]

At issue is whether summary deprivation should be extended to the seizure of life. If so, the compelling reasons for such an action would need to be carefully specified, and they would need to be of the highest order.

Ironically, few writings on police homicide have mentioned its denial of a long-standing principle: an individual is presumed innocent until proved guilty. Prior to conviction, the relevant kind of proof is lacking. This oversight is especially evident in the wording of the Model Penal Code, which holds that the use of deadly force is not justified unless "the actor believes that the force employed creates no substantial risk of injury to innocent persons." (italics added) No doubt "innocent persons" is intended to refer only to bystanders who might accidentally be struck by a police bullet. The person shot at is not deemed "innocent," in direct violation of the common law principle. If the fleeing suspect has not been pronounced guilty by a court, then for what is he being killed? Such actions violate the Due Process Clause since it clearly forbids the action of officers who "decide to take the law into their own hands and act as prosecutor, jury, judge, and executioner."[26]

It has been argued that the right to due process, like the right to life, is not subject to the "balancing test" and is an absolute rule unless competing individual interests are at stake.[27] Applied to the police, deadly force would be permissible only under circumstances of self-defense or defense of life. No utilitarian justification could even be attempted in terms of the common good.

X. Accepted Moral Standards

Whether capital punishment and police homicide are actually considered justified within our system of punishment and law enforcement depends on their "moral acceptability at this time in history."[27] Unlike capital punishment, where the centuries-old debate seems unresolvable, there has been fifty years of

near-unanimous scholarly criticism of the common law rule and a long series of public protests over police use of deadly force in minority communities. Taken together they indicate that the public would opt for more stringent standards than the common law. And it is probably for this reason that many police departments across the country have developed more restrictive regulations.

XI. Implications for Policymakers

If one extends retentionist arguments for capital punishment to police use of deadly force, a "balancing test" is required. Any policy must be formulated on grounds of compelling reasons for overriding individual rights in order to further a specified common good, and must be restricted in its application to a small number of suspected offenders so dangerous to the public interest that they must be stopped even at the cost of a human life. Such a policy would resemble the one proposed by the Model Penal Code (1962),[29] in which the suspect to be apprehended must use or threaten use of deadly force in order for the police to use an equal degree of force in return.

If one follows the abolitionist arguments against capital punishment, a policy on police use of deadly force must respect a citizen's fundamental rights and the sanctity of human life. Accordingly, any policy can only permit police homicide when there is conflict between individuals exercising basic rights, especially the right to life. Therefore, the format this policy will take probably resembles the FBI defense of life rule, in which an officer can use deadly force only in self-defense when his or her life is threatened, or to protect the lives of members of the public from immediate danger.

In either case, the common law rule which permits the use of deadly force to prevent any felony or to apprehend any fleeing felon, and the "forcible felon" rule which permits the same use except that the felony must be "forcible," must be deemed

inconsistent with the values which guide other policies in our criminal justice system, and therefore must be repealed.

Notes

1. For a thorough summary of the empirical literature, see William A. Geller's "Deadly Force: What We Know," Journal of Police Science and Administration 10, no.2 (1982):151-77.

2. See, for example, Lawrence W. Sherman, "Execution Without Trial: Police Homicide and the Constitution," Vanderbilt Law Review 33, no.1 (January 1980): 71-100. His paper is reprinted in an excellent anthology Readings on Police Use of Deadly Force, ed. James Fyfe (Washington, D.C.: The Police Foundation Press, 1982).

3. The proceedings from this conference have been published as Ethics, Public Policy and Criminal Justice, ed. Frederick Elliston and Norman Bowie (Cambridge, Mass: Oelgeschlager, Gunn, and Hain, 1982).

4. This conference, organized by Professor William Heffernan, is described in his "Criminal Justice Ethics: An Emerging Discipline," Police Studies 4, no.3 (Fall 1981): 24-28.

5. See Moral Issues in Police Work, ed.,Frederick Elliston and Michael Feldberg (Totowa, N.J.: Littlefield Adams, forthcoming).

6. See Frederick Elliston, "Teaching Police Ethics," Newsletter on Teaching Philosophy 3, no. 1 (Autumn, 1981): 3-6 and Howard Cohen's very insightful summary of his and Dr. Michael Feldberg's program for police training academy instructors: "A Working Ethics for Police Officers," Teaching Philosophy, 6, no.2 (April 1983): 000-000.

7. See, for example, Alan Goldman's The Moral Foundations of Professional Ethics (Totowa, N. J.: Littlefield Adams, 1980).

8. I have attempted this elsewhere. See "Police Use of Deadly Force: An Ethical Analysis," in New Perspectives on Urban Crime, ed. Steven Lagoy (Jonesboro, Tenn: Pilgrimage Press/Anderson Publishers, 1981, pp. 91-110).

9. In various jurisdictions across the United States, the police are empowered to use deadly force under six circumstances, depending on the jurisdiction:

a) in self-defense,
b) to prevent a commission of a crime,
c) to arrest a fleeing felon,
d) to recapture after an escape from arrest,
e) to recapture after an escape from a penal institution,
f) to stop a riot.

10. Cunningham v. Ellington, 323 F.Supp. 1072,1075 (W.D. Tenn. 1971); Mattis v. Schnarr, 404 F.Supp. 643,650 (E.D. Mo. 1975).

11. See "Deadly Force to Arrest: Triggering Constitutional Review," Harvard Civil Rights - Civil Liberties Law Review 11, no.2 (1976): 361-89.

12. 356 U.S. 86, 125 (1958) and 372 U.S. 144, 168-69 (1963), respectively.

13. See his "Prolegomenon to the Principles of Punishment," in Punishment and Responsibility (Oxford: Clarendon Press, 1968), Ch. 1).

14. Here, as elsewhere, I shall use the term according to the following definition:
> 'Deadly force' means force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm. Purposefully firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force.

See "Justifiable Use of Deadly Force by the Police: A Statutory Survey," William and Mary Law Review 12, no.1 (1970): 67.

15. One useful collection of philosophical essays is The Death Penalty in America, ed. Hugo Adam Bedau (Chicago: Aldine, 1967).

16. The classic statement of pure retributivism is by Immanuel Kant in his Philosophy of Law, trans. W. Hastie (Edinburgh: Clarke, 1887).

17. See Joel Feinberg, Doing and Deserving (Princeton, N.J.: Princeton University Press, 1976).

18. See Andrew von Hirsch, Doing Justice (New York: Hill and Wang, 1976).

19. Note on "Legalized Murder of a Fleeing Felon," Virginia Law Review 15 (1929), 582,583.

20. See Lawrence W. Sherman, "Restricting the License to Kill -- Recent Development in Police Use of Deadly Force," Criminal Law Bulletin 14 (1978): 285-310.

21. See Ernest van den Haag, "On Deterrence and the Death Penalty," Journal of Criminal Law, Criminology and Police Science 60, no.2 (1969): 141-47. The argument is also discussed in D. A. Conway's "Capital Punishment and Deterrence," Philosophy and Public Affairs 3 (1974): 431-44.

22. See Charles Black, Capital Punishment: The Inevitability of Caprice and Mistake (New York: W. W. Norton and Co., 1974).

23. A.L. Kobler, "Figures (and Perhaps Some Facts) on Police Killing of Civilians in U.S., 1965-1969," Journal of Social Issues 3, no.1 (1975): 185-191.

24. Comment, note 4 supra.

25. For full discussion, see Comment, note 4 supra.

26. Screws v. United States, 325 U.S. 91,106 (1945).

27. Ronald Dworkin, "Taking Rights Seriously" in Oxford Essays in Jurisprudence, 2d series, ed. A. Simpson (Oxford: Clarendon Press, 1973), pp. 202, 214. Quoted in Notes, "Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing," Harvard Law Review 88 (1975): 1510,1527.

28. This phrase as used by Justice Marshall in Furman v. Georgia, 408 U.S. 238 (1972).

29. Model Penal Code, 3.07-3.09 (1962).