

9-2021

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Recommended Citation

Brennan-Marquez, Kiel, "Toward a Political Theory of Police Violence" (2021). *Connecticut Law Review*. 507.

https://opencommons.uconn.edu/law_review/507

CONNECTICUT LAW REVIEW

VOLUME 53

SEPTEMBER 2021

NUMBER 3

Essay

Toward a Political Theory of Police Violence

KIEL BRENNAN-MARQUEZ

We are in the midst of a long overdue reevaluation of police violence. To date, most conversations have focused on excessive uses of force—a problem of dismaying reach, with deep and lurid historical roots. Behind these conversations, however, a more fundamental question looms: what justifies police force even when it is not excessive? This question lacks a consensus answer; despite the prevalence of police violence in our legal order, it turns out we do not have a unified political theory to account for such violence. In this Essay, I sketch a number of familiar rationales for police violence and show why each—at least in its current configuration—is insufficient to carry the conceptual burden.

ESSAY CONTENTS

INTRODUCTION 697
I. THE “SOVEREIGN PEDIGREE” THEORY..... 698
II. THE “PRECURSOR-TO-PUNISHMENT” THEORY 699
III. THE “LINE OF FIRE” THEORY 702



Toward a Political Theory of Police Violence

KIEL BRENNAN-MARQUEZ *

INTRODUCTION

The tumult around policing in the United States—the killings, the uprisings, the “stand with blue” counter-mobilizations, the efforts toward legislative reform—has brought a number of disturbing revelations to light. One of the most startling is conceptual: we appear to lack a stable political theory of police violence. When the police use force against civilians (especially, but not exclusively, lethal force), what authorizes that act? On what normative foundation, ultimately, does the enterprise of policing come to rest?

We do not know. And by this, I do not mean simply to cast doubt on the legitimacy or wisdom of any particular act of police violence. My goal here is not to diagnose cases of police abuse—by contrast to reasonable uses of force. It is more fundamental. I mean to suggest that we lack a clear account of what makes even *justifiable* police violence legitimate; we lack a theory of police authority that adequately accounts for the forms of police violence to which legal institutions have traditionally lent their blessing.

I am not saying there can be no legitimate instances of police violence, though—consistent with the abolitionist spirit of this Commentary¹—I would be happy to entertain that possibility. My primary goal is exploratory. In what follows, I examine the three political theories typically on offer in discussions of police violence—the “sovereign pedigree” theory, the “precursor-to-punishment” theory, and the “line of fire” theory—and I show why each fails to carry its burden. The first supplies, at most, a necessary but insufficient condition of police authority. The second conflates a claim of practical urgency with an argument for authority. And the third, though forceful, grounds police authority in the same Hobbesian foundation—an inalienable right of self-defense—that grounds *civilian* authority to use force. As such, it fails to explain what makes police authority distinct.

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¹ See, e.g., Jamelia Morgan, *Lawyering for Abolitionist Movements*, 53 CONN. L. REV. 603 (2021) (providing background on abolitionism as a legal and political movement).

I. THE “SOVEREIGN PEDIGREE” THEORY

The first theory—the “sovereign pedigree” theory—reaches back to the early days of common law. The idea is simple: enforcement officials, as agents of the sovereign, wield authority equivalent to what the sovereign could wield directly, absent an agent. In a monarchy, this chain of delegation could be imagined literally: what the King could do of his own hand, agents of the Crown could likewise do. If the King could demand entry into a private home, he could also license—by general warrant—his soldiers to do the same. If the King could inflict violence on one of his subjects for failing to, say, pay taxes, he could also deputize other officials to do the same. And so on. In a democracy, by contrast, the claim is more figurative. There is no corporeal sovereign; the people as a whole are sovereign. So, enforcement officials, as agents, have to be understood to enjoy an authority that no specific human could, in principle, have acted upon directly. But the core point holds. A self-governing polity may delegate to specific agents the sovereign authority that derives from democratic rule. Indeed, practically speaking, it *must* do so—that is the only way things get done.

Of course, to say the delegation of sovereign authority may occur in principle tells us very little about the “when” and the “how.” In practice, determining whether such authority actually *has been* delegated is different—and typically far more complicated—than determining that it is the kind of authority that can be delegated at all. The first question has spawned complex lines of doctrine in virtually all areas of public law. And understandably so: when assessing the legitimacy of official conduct, one thing we virtually always want to know is whether it arose from validly delegated authority; that is, whether the authority had the right pedigree. Was the official actually acting in her capacity *as an official*—a role bound, in the first instance, by sovereign delegation? If not, then the official’s action was *ultra vires*: presumptively unlawful.²

As political theories of policing go, the problem here is straightforward. Sovereign pedigree may be *necessary* to the legitimacy of police conduct—violent or otherwise—but it is not sufficient to produce legitimacy.³ In other words, to decide if a given act of police violence was permissible, we need to know more than simply whether the officer in question complied with democratically-enacted positive law. If the act fell short of even this hurdle, that alone may make it illegitimate. But democratic delegation, even of the most robust and well-functioning variety, can never be the end of the story. The reason is the same reason, at bottom, that we have constitutional law at

² Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2181–88 (2019).

³ For further background on the proposition that democratic delegation is necessary to the legitimacy of policing, see BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION 307 (2017); Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039, 1048 (2016).

all: majoritarianism is no guarantor of legitimacy. Sometimes, in fact, it is precisely the obstacle.⁴

Imagine, after all, if a legislature were to enact a statute empowering police to physically assault anyone suspected of a crime; so, in addition to the usual search-and-seizure powers, police would have the power to directly and purposely inflict pain. Would it matter if the democratic pedigree of such a statute were pristine? Furthermore, would it matter if, under the statute's terms, "assault authority" were conditioned on probable cause, or even a more stringent standard of suspicion? To both questions, the answer is plainly no. Subjecting civilians to deliberate suffering based exclusively on the judgment of an executive official, with no input from the judiciary—indeed, no legal process of any kind—plainly flouts the rule of law. Throughout history, of course, many states, in many times and places, have operated like this—and some have even had a democratic mandate. But those are not the kinds of states on which our political theories should be modeled.

II. THE "PRECURSOR-TO-PUNISHMENT" THEORY

Fair enough—one might say—but one goal we know democratic polities *do* legitimately pursue, and which plainly requires the delegation of authority to wield violent force, is the assignation, prosecution, and punishment of criminal activity. This goal runs into substantive limits, of course; some activities, for instance, are constitutionally immune from criminalization (e.g., religious worship), and due process requires adherence to various procedural requirements in the factual assessment of criminal guilt. But putting these limits aside, the fact remains: criminalization and punishment—subject to the proper constraints of process—are among the goals that democratic polities may authorize officials to carry out. This does not mean that everyone will agree about which activities to criminalize, or about the proper form and magnitude of punishments for different crimes; nor does it preclude abolitionism.⁵ It simply means that, as a goal for the state to pursue, criminal punishment is *legitimate*—the goal's wisdom is another matter entirely.⁶

From this observation, a second political theory unfurls: the idea that police derive authority to use force from the precursor role they play in the process of criminal punishment. Or to put it more schematically: if (1) it is legitimate, in principle, for the state to subject certain activities to criminal

⁴ Needless to say, I am putting to one side the fact that, in the real world, much police violence has *not* been licensed via democratic delegation. The point is that even if it were so licensed, that alone would fail, in principle, to establish its legitimacy.

⁵ See generally Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781 (2020) (setting out a scholarly and political agenda for police abolitionism).

⁶ See, e.g., Michele Goodwin, *Pregnancy and The New Jane Crow*, 53 CONN. L. REV. 543 (2021) (making the case for the abolition of various forms of policing that intersect with reproductive autonomy).

punishment, and furthermore, if (2) police violence is necessary, in at least some cases, to initiate eventual punishment—for example, many accused parties would be unwilling in the absence of (threatened) police violence to submit to the trial process—then (3) authority for *at least some* police violence is implied by the state’s authority to punish. In the end, this theory, too, is about democratic pedigree; it simply imagines the substantive criminal law, and the authority to punish that underlies it, as the instrument of delegation.⁷

But the conclusion does not follow from the premises. Despite the prevalence of the idea that authority to punish entails authority to enforce—which would legitimize police violence, in at least some cases, as a precursor to prosecution—there is no necessary connection between the two. As a conceptual matter, it is perfectly possible for a legal order to authorize deliberately-inflicted state violence only in cases where the subject of violence had been convicted, in court, of a crime—and never in cases where the subject was simply *suspected* of a crime. The distinction here is, after all, a central pillar of liberal legalism: the presumption of innocence. Whatever authority the state may possess to inflict pain and suffering on subjects who have been convicted of crimes, it does not possess the same authority with respect to presumed-innocent subjects; if it did, the presumption would unravel. (And once again, all this is true irrespective of one’s view of how criminal punishment ought to be wielded. Even for those who would argue against most uses of criminal punishment—even for those who would call for elimination of criminal punishment entirely—the state’s *authority* to punish remains intact.)

In practice, of course, the state often *does* exercise violence against presumed-innocent subjects as a precursor to prosecution. Arrest warrants—authorizing an otherwise-unjustified interference with liberty—are not just pieces of paper, backed up by a threat of opprobrium and non-violent sanctions in the event of non-compliance. Rather, they are backed up by a threat of force. Resisting arrest can lead to physical restraint, to chokeholds, to broken limbs, to death.⁸

The question, however, is not whether any of this happens in practice—it does, routinely. The question is whether this state of affairs is legitimate:

⁷ For different takes on this notion of delegation, see generally Malcolm Thorburn, *Punishment and Public Authority*, in *CRIMINAL LAW AND THE AUTHORITY OF THE STATE* 7 (Antje du Bois-Pedain, Magnus Ulväng & Petter Asp eds., 2017) (arguing that enforcement authority is coextensive with penal authority); Gabriel S. Mendlow, *Why Is It Wrong to Punish Thought?*, 127 *YALE L.J.* 2342 (2018) (arguing that enforcement authority is entailed by penal authority); Kiel Brennan-Marquez, *Rethinking the Relationship Between Punishment and Policing*, 17 *OHIO ST. J. CRIM. L.* 399 (2020) (expressing skepticism about the nexus between enforcement authority and penal authority).

⁸ See Alice Ristroph, *The Constitution of Police Violence*, 64 *UCLA L. REV.* 1182 (2017) (exploring the ways that extant constitutional law—by taking enforcement authority as given, subject only to procedural constraints—licenses police violence); Stephen L. Carter, *Law Puts Us All in Same Danger as Eric Garner*, *BLOOMBERG* (Dec. 4, 2014, 10:56 AM), <https://www.bloomberg.com/opinion/articles/2014-12-04/law-puts-us-all-in-same-danger-as-eric-garner>.

whether a sound political theory underwrites it. On that front, the “precursor-to-punishment” theory falls short, because it rests on a conflation of urgency and authority. It posits that if initial police violence is necessary to bring about an eventual punishment—if punishment would not occur but for an act of police violence—then the act is authorized. But why would this be? Ultimately, this logic is little more than a form of sophisticated wishful thinking; literally, it boils down to the idea that the state’s wish to exercise power conjures the corresponding authority into existence. If initial police violence is necessary to bring about an eventual punishment, all that *really* tells us is that if the necessary police violence is unauthorized, then punishment will not occur.

This may sound obvious, or like a mere restatement of the first claim. But at some level, that is just the point; the first claim, about the necessity of police violence to punishment, tells us nothing about the scope of police authority. For it to bear *that* burden, the necessity claim would have to be paired with a corollary: that criminal punishment—making sure that viable criminal prosecutions go forward—is a normative good of overriding priority; a “trump,” to use the lexicon of fundamental rights, though repurposed here in the service of permitting, rather than restricting, the exercise of state power.

In any event, if this were true—if criminal punishment were a good of trumping importance—it might supply grounds, at least in principle, to draw a line from necessity to authority. In cases, for example, of a genuine and immanent existential threat, like an enemy plot, there *can* be a viable argument—though not always a winning one—that necessity (of defense) implies authority (to use force to defend), because the goal whose vindication necessitates force is the precondition of the state’s capacity to perform other functions.⁹ The same is simply not true of criminal punishment. If, for want of authorized police violence, some crimes escaped prosecution, that would be an outcome just like many governance outcomes: a disappointing (to some) cost of legal liberalism. After all, many crimes *do* escape prosecution today, some because of legal constraints on power, others because of practical constraints on capacity—and this is because no one, even among defenders of status quo police violence, believes criminal punishment is a good of overriding priority.

On reflection, none of this should come as a surprise. There are, after all, many things the state may fervently wish to do—often with the support

⁹ This is the conceptual origin of the “military necessity” doctrine in international humanitarian law. Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT’L L. 795, 796–97 (2010). It also invites a distinction, tracing back to Carl Schmitt (no relation to Michael), between “criminal” threats and “enemy” threats. When dealing with the latter, claims of necessity can, in principle, get off the ground; not so with the former. See Paul W. Kahn, *Criminal and Enemy in the Political Imagination*, 99 YALE REV. 148, 148 (2011) (exploring the link between the designation of “enemies” and the notion of an existential threat).

of many members of the polity—but that it nevertheless lacks authority to carry out. In a liberal legal order, that is a sign of health, not a symptom of illness.

III. THE “LINE OF FIRE” THEORY

Finally, we turn to the most commonly offered political theory of policing—common, perhaps, out of an implicit recognition that the first two theories cannot be expected to bear the needed weight. It goes something like this: In the course of their occupation, the police take many risks and often find themselves, or at any rate *can* find themselves, in life-or-death situations.¹⁰ Accordingly, the thought goes, police should be entitled to greater dispensation in matters of violence.¹¹ They should be allowed to do things civilians, as well as other officials, would not be permitted to do¹²—in the same way soldiers are permitted, on the battlefield, to comport themselves in a manner that would be impermissible back home.

One variant of the “line of fire” theory can be put to rest summarily. Namely, it cannot be that a police officer’s decision to voluntarily put himself in potential harm’s way is sufficient to confer them greater dispensation in matters of violence. Put simply, *many* officials put themselves in potential harm’s way—firefighters, for instance, or state hospital workers during a pandemic. But that, by itself, obviously does not give these officials greater license to use physical force.

The more promising variant of the line of fire theory is not about risk to safety in general, but about specific threats to the physical well-being of officers themselves and civilians in their vicinity. Here, the idea is that police, as guardians, should be empowered to use force when dealing with assailants. In this case, unlike with the first two theories, the problem is not one of substance, but scope. No one thinks the fact that police sometimes confront specific threats (to themselves or otherwise) provides *blanket* license to use force. At a maximum, it provides license for use of force in the context of a given threat; the authorization is still bound by an imminence requirement.¹³ But if that is true, what distinguishes the greater authority that police enjoy, when dealing with imminent physical threats, than the equivalent increase in authority that ordinary civilians enjoy? The common law has long recognized, and current law (at least in every jurisdiction of which I am aware) continues to reflect, justification defenses stemming from the existence of imminent threats.¹⁴ In other words, when ordinary civilians encounter imminent threats, either to themselves or to others, use of force

¹⁰ Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1170 (2008).

¹¹ *See id.* (discussing a justification for “an easing of the imminence requirement” for police use of force).

¹² *Id.*

¹³ *See generally* Harmon, *supra* note 10.

¹⁴ *Id.* at 1146–48, 1167.

against the assailant is exempt from criminal punishment.¹⁵

There are, of course, limits to justification defenses and the authorization they entail. The use of force still must comply, broadly speaking, with the requirements of reasonableness. But that is also true of police violence. So the question becomes: What distinguishes *police* authorization to deploy force in response to an imminent threat from *civilian* authorization to do the same? One tempting response might be that police are more likely than an average civilian to happen upon imminent acts of violence in the world; or likewise, that police tend to possess greater skill (and equipment, etc.) to contend with such violence, relative to civilians. Yet even supposing these empirical claims are true—which is hardly self-evident, given how much police work mostly involves sitting behind desks, and how prevalent civilian-on-civilian violence can be—it is not clear why distinctions like this should make a difference.

That police are more likely to happen upon imminent acts of violence is no reason to afford them more authority in *specific cases*. In determining whether a justification defense applies, the key question is whether the party deploying the force had reasonable fear, in context, for their own or another's safety. Why would it make a difference how frequently the party encounters dangerous situations as a general matter?¹⁶ Nor can expertise or armament—or anything else about the relative *capability* of police to deal with violence—make the difference. If enhanced capability sufficed to enlarge the sphere of authorization, concerned civilians—or to use the less polite term, vigilantes—could vest themselves with greater-than-usual license to use force against fellow civilians simply via rigorous training.

In the end, police officers and their advocates are not wrong to point to justification principles—in the criminal-legal sense—as a wellspring of legitimacy for particular uses of force. In fact, justification principles *do*, in some circumstances, license police violence. The trouble is that they license civilian violence to the same extent. Which is to say, insofar as justification principles license police violence, they do so not because the police are police, but because the police, even as police, have not ceased to be rights-bearing subjects, entitled to defend themselves and others—so long as the fear motivating that decision is reasonable.¹⁷

This is the sense, to borrow Alice Ristroph's formulation, in which citizens can be understood to enjoy a "right of resistance"—even against

¹⁵ For a rich discussion of justification defenses, both in concept and as applied to police violence, see *id.* at 1146–66.

¹⁶ If anything, it seems more plausible that police familiarity with violence would *limit* the scope of context-specific authorization to use force—at least as a functional matter, if not formally—because they would have less cause, on the margins, to claim subjectively-reasonable fear in objectively low-risk situations.

¹⁷ For further background on these themes, see generally Jeff McMahan, *Self-Defense and Culpability*, 24 LAW & PHIL. 751 (2005).

justifiable exercises of state power.¹⁸ The idea here traces to Hobbes. The sovereign, he famously argues, emerges from an agreement among citizens—the social contract. But there is also an important flip-side: the agreement cannot be expected to consign individuals to violence at the state’s hand. When the state comes for you, bearing arms or other implements of death, you cannot be expected to consent, or to relinquish your right of self-defense.¹⁹ Nor should police be expected to do the equivalent. At moments of genuine threat, the state of nature is temporarily reproduced, and distinctions of rank and office dissipate; self-defense, as a natural right, becomes the organizing norm of conduct.

But all this raises an important question: if the most promising theory of police violence is one that has traditionally been thought to govern circumstances in which the social contract has broken down—either because the state is radically absent or because the state is the one who poses a threat—where are we left?

Practically speaking, we certainly act *as though* the police have authority above and beyond that of other civilians to defend themselves and others. The law adopts labels like “guardian” and “community caretaker,”²⁰ and part of the dismay that surrounds police violence today—part of what seems especially disturbing about police violence gone awry—is the sense that a greater sense of responsibility ought to accompany the greater authority they wield. But what does this authority consist of? The point of this Essay has not been to suggest that no answer is forthcoming; only that, at present, a satisfying one is not on offer. Perhaps a variant of either the “precursor-to-punishment” theory or the “line of fire” theory could be refashioned to deal with the objections elaborated here. Until they are, however, the mystery persists. And so does the practical worry that efforts to reform or abolish the police—laudable as they may be—will prove ineffective, or even pyrrhic, in the shadow of theoretical confusion.

¹⁸ See generally Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 CALIF. L. REV. 601 (2009).

¹⁹ See Paul Kahn & Kiel Brennan-Marquez, *Statutes and Democratic Self-Authorship*, 56 WM. MARY L. REV. 115, 165–66 (2014) (unpacking this Hobbesian idea).

²⁰ See *Caniglia v. Strom*, 593 U.S. ____ (2021) (outlining the “community caretaking” exception to the warrant requirement).