When police kill in the line of duty: mistaken belief, professional misconduct and ethical duties after *R(W80)*

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Introduction

The capacity of police to use legitimate coercive force, including lethal force, is one of their unique competences in liberal democracies.[1] In some situations, too often marked by structural inequality and racial prejudice, deadly force is unnecessary and disproportionate in the extreme. [2] It will be beyond legal justification. We need look no further than the horrific murder of George Floyd in Minneapolis in March 2020 by police officer Derek Chauvin. In England and Wales, the death of citizens by police is a remarkably less common occurrence – not least because the vast majority of officers and communities are unarmed.[3] In 2019-20, there were 19,372 firearm operations in England and Wales, of which 91 percent involved specialist firearms officers.[4] Between 2004/5 and 2019/20, there have been 43 fatalities where officers fired the fatal shot using a conventional firearm.[5] But in these fraught situations, which often require decisions to be made rapidly based on imperfect intelligence assessments, mistakes can, and tragically are, made. Mistaken beliefs include the misidentification of the suspect,[6] or misjudgements of the risk they really pose.[7] There is, after all, always a risk of error in self-defence type cases.[8] The individual officer must account for their use-of-force but when, if at all, will they be held liable for acting on an honest but mistaken belief that the suspect is a grave danger to the lives of others?

As a matter of criminal law, this question will likely be a familiar one to readers of the *Review*.[9] The common law as clarified by the Criminal Justice and Immigration Act 2008 allows an individual to rely upon a genuinely held belief, regardless of whether or not that belief turns out to be mistaken or the reasonableness of that mistake.[10] In the absence of doubt over whether the belief is honestly held, assuming the other elements of self-defence are satisfied, it is unlikely a prosecution will follow.[11] But that is not the end of the matter. Perhaps less familiar to readers is a central, but rarely discussed,[12] dimension of police accountability that lies in wait for the officer who acts on a fatal mistake: police professional misconduct hearings, applying a distinct use-of-force standard and held irrespective of whether a criminal prosecution is brought. In cases concerning the use of lethal force, misconduct investigations are conducted by the Independent Office of Police Conduct (IOPC) and heard by police professional standards departments.[13] Disciplinary hearings are formal legal proceedings that can result in punitive outcomes, including a written warning, reduction in rank or ultimately dismissal with or without notice.[14]

This article offers a critical analysis of the use-of-force standard in the context of police professional misconduct hearings. The immediate motivation for examining the topic in some detail arises from the recent decision of the Court of Appeal in *R(W80)*.[15] The case emerged out of the fatal shooting of Mr Jermaine Baker in London by 'W80', an on-duty armed police officer. The Crown Prosecution Service (CPS) decided there was insufficient evidence to prosecute W80.[16] The IOPC concluded, however, that W80 had a case to answer for gross misconduct because, on the facts, a disciplinary panel could find that W80's mistaken belief, although genuine, was not reasonable. The Metropolitan Police Service (MPS) disagreed. It contended the IOPC

had been incorrect as a matter of law in applying the civil law test for self-defence, rather than the criminal law test. The MPS sought judicial review. The issue on appeal was what was required of officers acting in self-defence for the purposes of the police use-of-force professional standard. Overturning the decision of the Divisional Court,[17] the Court of Appeal interpreted the standard as requiring that an officer's belief in the necessity to use force is both honestly held *and* (objectively) reasonable.

The article has three aims. The first is to critically engage with the judgment in *R(W80).* In its statutory interpretation of the use-of-force standard, the court adopts an approach which, it is respectfully submitted, sits uneasily with the regulatory hierarchy that governs police professional misconduct. The reasoning adopted conflates the standard-setting role of the statutory Police Code of Conduct with the communicative role performed by the non-statutory Code of Ethics issued by the College of Policing. An alternative interpretive approach is offered which arrives at the same outcome but via a route that, it is argued, is more faithful to the legislative context. The second is to use *R(W80)* to examine in greater detail the use-of-force standard in police professional misconduct hearings as an important, but rarely discussed, means of police accountability. This involves a discussion of its interaction with the relatively recent arrival of the College of Policing's Code of Ethics, but also its practical implications for police training and officers' individual accountability where mistakes are made. Having argued that, as a matter of law, the proper interpretation of the use-of-force standard *is* an objective one, the third aim of the paper is to offer a justification for why this ought to be so as a matter of principle. These three aims structure the article. It begins, though, by comparing the use-of-force standards in law as applicable to the police and introducing the appeal in *R(W80)* in greater detail, before examining the regulatory context.

The use-of-force, self-defence and the appeal in *R(W80)*

It is helpful to start by considering how the law has come to accommodate the justification or excuse (depending on the normative stance one takes)[18] of the use-of-force by one person against another acting in self-defence. As observed by Hughes LJ in *Keane and McGrath*, '[t]he law of self-defence is not complicated. It represents a universally recognised commonsense concept.'[19] It is structured around a two-stage analysis. The first stage, which can be described as the trigger, is whether the facts, as the defendant believed them to be, were such that the use of force was necessary for the purposes stated. This is a subjective assessment of whether the defendant had an honest and genuine belief as to the necessity; a mistaken belief, whether reasonable or not, is relevant only to any doubt it might cast on whether the belief really was honestly held.[20] An unreasonably belief, if honestly held, will suffice. The second stage, which can be labelled the response, concerns whether the degree of force used by the defendant was reasonable (or proportionate), in response to the circumstances as the defendant perceived them to be. This is an objective evaluation, but a response which the defendant honestly and instinctively thought necessary will be strong evidence it was reasonable.

The two-stage test is the established framework for assessing whether the use-of-force is justified. This framework does allow, though, for an alternate formulation of the requisite belief at stage one, the necessity to use force for the purpose stated (or trigger). This has come about in the formulation of self-defence in the civil law of tort. The civil law test requires that the respondent show an honest *and* objectively reasonable belief the use-of-force was necessary.[21] The rationale for the requirement of reasonable belief is returned to later in the article. So too did an objective standard at stage one initially appear to be a constituent part of the use-of-lethal-force standard

under Article 2 of the ECHR (the right to life). Article 2(2) states that 'deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use-of-force which is no more than absolutely necessary' in pursuance of any of the legitimate aims listed in that provision. In determining what 'absolute necessity' meant in the context of the actions of state agents who act on a mistaken belief, the European Court of Human Rights (ECtHR) alluded to an objective test in the seminal case of *McCann and Others v UK* that:

> use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 of the Convention may be justified under this provision where it is based on an honest belief which is perceived, *for good reasons*, to be valid at the time but which subsequently turns out to be mistaken.[22]

The ECtHR's reference to 'good reasons' appeared again in *Bubbins v UK*, another case arising from police use-of-lethal-force in circumstances where the belief in the threat the suspect posed turned out to be mistaken.[23] However, subsequent judgments of the ECtHR have retreated from this objective formulation of necessity. In *Armani da Silva v UK,* the ECtHR accepted the UK government's submission that the test of 'absolute necessity' in Article 2(2) of the ECHR ought to be assessed from the standpoint of the person wielding lethal force in self-defence without any requirement of reasonableness by reference to the objectively established facts. Formulated in the following terms, the ECtHR accepted that self-defence in domestic criminal law did not fall short of Article 2(2):

> The subjective reasonableness of that belief (or the existence of subjective good reasons for it) is principally relevant to the question of whether it was in fact honestly and genuinely held. Once that question has been addressed, the domestic authorities have to ask whether the force used was "absolutely necessary". This question is essentially one of proportionality, which requires the authorities to again address the question of reasonableness, that is, whether the degree of force used was reasonable, having regard to what the person honestly and genuinely believed.[24]

For the purposes of both UK domestic law and Article 2 of the ECHR, the focus is on whether an honest and genuine belief that the use-of-force was necessary existed; the reasonableness of that belief was relevant to the determination of whether it was honestly and genuinely held.[25]

In summary, across criminal law, civil law and human rights law the use-of-force is assessed using a two-stage framework, centred around the trigger and the response. The key variable, which has been the topic of academic commentary and the basis of legal challenges, has been whether the necessity to use force is to be based on a purely subjective evaluation, thus permitting a mistaken belief (reasonable or otherwise), or combined with an objective assessment, thus requiring a mistaken belief to have been a reasonable one to have made.

The analytical clarity of this two-stage framework, does not, unfortunately, extend to the use-of-force standard governing police professional misconduct. The test is set out in the Standards of Professional Behaviour, contained in Schedule 2 of the Police (Conduct) Regulations 2020. It requires that officers '*only use force to the extent that it is necessary, proportionate and reasonable in all the circumstances*'. The formulation of the standard is an unhelpful intermingling of the typically distinct appraisal of the necessity to use force in the first place (stage one) and the degree (or proportionality) of the force used (stage two). The use-of-force in the Standards of Professional Behaviour gestures towards stage one, in so far as it refers to 'necessity' but also stage two, by virtue of its reference to 'proportionality'. In the absence of the two-stage analysis, the key issue arising in some of the most controversial police

shootings in recent years is difficult to discern: will it suffice that the officer had an honest belief of the necessity to use force or must the mistaken belief have been an objectively reasonable one to have made? In the absence of any reference to an honest or genuine belief, '*reasonable in all the circumstances*' could be said to include the mistaken belief the officer was operating under because it extends to include the accurate picture which later emerges when all the facts are established. Alternatively, it could be understood as requiring a scope of inquiry wide enough to encompass the honest belief of the police officer.

The litigation in *R(W80)* arose from diverging interpretations of use-of-force standard by members of the police family, specifically the Independent Office of Police Conduct, the Metropolitan Police Service, the College of Policing and the National Police Chiefs' Council (NPCC). The IOPC (the Independent Police Complaints Commission at the time) investigated the fatal shooting of Mr Baker by W80. The IOPC applied the civil law test. The Divisional Court found in favour of the MPS and NPCC. The correct test for the necessity to use force was a subjective one which replicated the stage one standard in self-defence under the criminal law. The Divisional Court relied on references in Paragraph 4.4. of the Code of Ethics, issued by the College of Policing, which officers are trained according to. This states that officers are '*required to justify the use of force is an honestly held belief at the time*'. The Divisional Court quashed the IOPC's decision. On appeal, counsel for the appellants submitted that the civil law of self-defence standard ought to apply. Public scrutiny and accountability demanded that a public misconduct hearing should decide whether, in a situation of this kind, an officer's honest belief was reasonable.

The Court of Appeal was not swayed by the respondent's argument. The 'plain language' of the use-of-force in the Standards of Professional Behaviour, the court insisted, was 'simply drafted and readily comprehensible'.[26] The court stated, 'misconduct proceedings were essentially *sui generis*' and Paragraph 4.4 of the Code of Ethics was not determinative of the statutory standard:

> Paragraph 4.4 does not address the question of the criminal law subjective test versus the civil law objective test for self-defence. It simply gives guidance as to how the officer is to seek to justify his use of force, namely by reference to his honestly held belief at the time.[27]

The court nonetheless considered a series of non-statutory sources of interpretation, including what the College of Policing's intent might or might not have been in drafting Paragraph 4.4 of the Code of Ethics,[28] the silence of the criminal or civil test for self-defence in Paragraph 4.4,[29] and the implications that could or could not be drawn from other provisions in the Code of Ethics.[30] The court concluded there was nothing in the Regulations, Code of Ethics or Home Office Guidance to warrant importing the criminal law (subjective) test of self-defence, as the Divisional Court had done. Without expressly stating it, and without making the positive case for why it must be so, the Court of Appeal opted for what amounts to the objective test of self-defence in the civil law of tort: 'the IOPC was justified in concluding that it was open to a reasonable panel at a misconduct hearing to make a finding of misconduct if W80's honest, but mistaken, belief that his life was threatened was found to be unreasonable.'[31]

The regulatory context

To ground the analysis that follows of the Court of Appeal's approach to statutory interpretation it is important to be clear on how police professional standards are devised and given effect to, including the institutional actors involved. The

regulatory tapestry unravels from the Police Act 1996, which grants the Secretary of State for the Home Department (the Home Office) the power to devise standards of police behaviour for professional disciplinary matters.[32] In exercising this statutory power, the Home Office has devised the Standards of Professional Behaviour that are set out in the Code of Conduct, contained in Schedule 2 of the Police (Conduct) Regulations. Misconduct is defined in the Regulations as a breach of the Standards of Professional Behaviour.[33] The use-of-force standard in the Code of Conduct states: 'Police officers only use force to the extent that it is necessary, proportionate and reasonable in all the circumstances.' The standard is reproduced verbatim in two further non-statutory documents. First, the Code of *Ethics*, published by the College of Policing, which briefly expands on the standard, noting what officers should consider when explaining how they have satisfied the standard. As noted earlier, in explaining the use-of-force standard the Code of Ethics states, at Paragraph 4.4, 'You will have to account for any use-of-force, in other words justify it based upon your honestly held belief at the time that you used the force.' Second, the Home Office Guidance to the Regulations. This notes that the Code of Ethics underpins the statutory standards and should inform any assessments when deciding if formal disciplinary action is to be taken.[34]

Behind this regulatory scheme are the Home Office but also the Police Advisory Board for England and Wales, a non-departmental body sponsored by the Home Office. The Board includes representatives of the NPCC, the IOPC, Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services, as well as the Home Office. The Board considers draft regulations made under the Police Act 1996. Its members are included in Home Office policy forums and its representations are taken into consideration in finalising regulations.[35] Importantly, the Board was specifically tasked with updating the Standards of Professional Behaviour in the Code of Conduct that was subsequently enacted in the 2008 Regulations, and which included an amendment made to the use-of-force standard, discussed below.[36] The 2008 amendments to the Standards of Professional Behaviour were approved by all organizations represented on the Board's working party.[37] In updating the Regulations in 2012 and 2020 – which retained the use-of-force standard as introduced in 2008 – the Home Office consulted with the Board, as well as the IOPC and NPCC independently.[38] In sum, the Standards of Professional Behaviour in the Code of Conduct, contained in the Police (Conduct) Regulations, are the product of extensive deliberation, policy-making and formal reviews undertaken over the last fifteen years. This underscores their status at the top of the regulatory hierarchy.

The Code of Conduct is distinct from the Code of Ethics. The latter is a more recent document published by the College of Policing in 2014. The Code of Ethics seeks to guide officers' behaviour and features extensively in officers' formal training and assessment. Yet the College of Policing has no special role or authority when it comes to making regulations that relate to the conduct of police officers. It is worth looking carefully at the legislative basis upon which the Code of Ethics rests, section 39A of the Police Act 1996. This grants a discretion to the Home Office to issue codes of practice to promote the general efficiency and effectiveness of police and states specifically that such codes are to be directed to the discharge of functions *by chief constables* of police forces. The Home Office chose to exercise this discretion and seemingly delegated the power to issue codes to the College of Policing. It seems slightly misleading, therefore, for the College of Policing's to claim that the Code of Ethics 'sets and defines the exemplary standards of behaviour for everyone who works in policing' and for the Preamble to the Code of Ethics to expressly state there is an expectation *all* officers will use the Code of Ethics to guide their behaviour.[39] In fact, before the Court of Appeal, the College acknowledged that the Code of Ethics does not lay down the use-of-force test that should be applied in misconduct

proceedings. Indeed, how could it be otherwise given that the current use-of-force standard was first enacted in the 2008 Regulations and re-enacted in the 2012 Regulations, when neither the College of Policing nor its Code of Ethics had come into being yet. Finally, neither the Police Act 1996 nor the Regulations elevate the Code of Ethics as a document that must be considered in professional misconduct investigations. This is a claim made in the Home Office Guidance; a document which expressly does not provide a definitive interpretation of the statutory Standards of Professional Behaviour.

For a regulatory regime that ought to offer clear, predictable and authoritative standards, there is an unwelcome degree of complexity and duplication. This arises from the co-existence of two separate codes, published by distinct bodies and the product of independent policymaking processes: on the one hand, the Standards of Professional Behaviour contained in the Code of *Conduct*, and accompanying Home Office Guidance, and on the other hand, the Code of *Ethics*, issued by the College of Policing. The Code of Ethics, which forms the basis of training and assessments, incorporates parts of the Code of Conduct but also goes beyond it, by fleshing out, or 'explaining' the standards, without providing an authoritative interpretation of them. This is not to doubt the value of foregrounding ethical principles into contemporary policing, and regulatory function such principles can indeed perform,[40] but to observe that the legislative basis for doing so, and the regulatory format adopted, could be both clearer and transparent.

The complexity is especially pronounced when compared to the legal framework in Northern Ireland. In this region, a more coherent, attractive scheme is provided by the pioneering Code of Ethics that governs the Police Service of Northern Ireland. The Code was issued by the Northern Ireland Policing Board in 2003 and revised in 2008, following extensive consultation with the Police Service of Northern Ireland (PSNI). The statutory basis for the Code itself and the authority to issue is it, is intelligibly set out in section 52(1)(a) of Police (Northern Ireland) Act 2000. This establishes that the Board shall issue a code of ethics for the purpose of laying down standards of conduct and practice for police officers. It does not run alongside a secondary explanatory code produced by another institution, informed by a distinct policymaking and consultation process, as is the case in England and Wales. Rather, the PSNI Code of Ethics is directly incorporated into the Schedule of the Police (Conduct) Regulations (Northern Ireland) 2016, with its Preamble and articles set out in full. This avoids the blurry distinction that currently exists in England and Wales between a statutory document that *sets* standards (the Code of Conduct) and a non-statutory document *explaining* them (the Code of Ethics). So too are the ten articles of the PSNI Code of Ethics clear in their formulation, detailed yet not overly technical, and transparent because they explicitly cite the legal sources from which the standards are drawn.

Interpreting the use of force professional standard in *R(W80)*

As the proceeding analysis has sought to demonstrate, the regulatory tapestry is comprised of a series of interwoven standards that must be disentangled, and the hierarchy of the codes upon which they are based identified, in order to properly interpret the use-of-force standard. Returning now to *R(W80)*, it is respectfully submitted the flaw in the approach of both the Divisional Court and Court of Appeal was to place near-exclusive reliance on the Code of Ethics, rather than the Code of Conduct, as the source for resolving the ambiguity in the use-of-force standard in the Police (Conduct) Regulations. The Divisional Court considered the Code of Ethics as 'intended to and does set out the details of [the] Standards of Professional

Behaviour'.[41] Relying heavily on the reference to an officer's need to justify their use-of-force on 'honestly held belief' in Paragraph 4.4 of the Code of Ethics, and the reference in the Home Office Guidance as to the importance of the Code of Ethics, Faux LJ considered both documents to 'pose insuperable obstacles' to interpreting the statutory use-of-force standard to require an objective test.[42] The Court of Appeal, however, rightly noted this was to let the tail wag the dog: the use-of-force standard is a statutory one set out in the Regulations and while 'elaborated upon and explained by the Code [of Ethics]' the fact remains that 'the Code [of Ethics] cannot alter the standard itself.'[43] Having identified this defect in the Divisional Court's reasoning, it is especially unfortunate that the Court of Appeal proceeded to invest nine of the ten paragraphs of its analysis trying to determine the proper construction of Paragraph 4.4 of the Code of Ethics.[44] Having done so, but in the absence of any offering positive basis for why the objective test interpretation was to be favoured, the Court of Appeal concluded that a genuinely held mistake must also be a reasonable one.

This conclusion is the right one, but considering the regulatory context set out above, the route the Court of Appeal used to arrive at there is unconvincing and distorts the (already unclear) statutory regime that governs police professional misconduct. The Home Office Guidance states that the Code of Ethics should inform any assessment or judgment of conduct when deciding whether formal action is to be taken, not least by the IOPC. Ultimately, though, as a matter of law, the definition of misconduct is to be found in the Standards of Professional Behaviour, established in the Police (Conduct) Regulations, a statutory instrument that is the offspring of its parent act, the Police Act 1996, which expressly provides the power of the Home Secretary to establish professional standards of police conduct. To take seriously the Court of Appeal's own recognition of legislative primacy in the context of the police professional misconduct is to foreground the use-of-force standard as set out in the Code of Conduct's Standards of Professional Behaviour, not as it is explained in the College of Policing's Code of Ethics.[45] Adopting a more orthodox approach to statutory interpretation offers two compelling reasons for concluding that the objective standard requiring an officer to have a reasonable basis for a genuine mistake is the proper one for the purposes of the Standard of Professional Behaviour established in Schedule 2 of the Police (Conduct) Regulations 2012.

The first is an inference from the legislative context which the standard of 'reasonable in all the circumstances' arose out of. The principle that Parliament must be presumed to have been aware of relevant pre-existing statute law and case law when it passed an Act,[46] ought to similarly apply to the drafters of secondary legislation. The significance of a genuinely held but unreasonable belief was a live issue for Parliament and the Home Office when the use-of-force standard, as it currently appears, was first introduced in the Police (Conduct) Regulations 2008. Provisions of the Criminal Justice and Immigration Act (CJIA) 2008 were being enacted specifically to clarify and consolidate the common law's position on the use-of-force in self-defence. Parliament, in a series of subsections, recognized the common law's development of self-defence. What was 'reasonable in the circumstances' was to be determined according to the circumstances as understood by the defendant, who is entitled to rely on genuine but mistaken belief, regardless of whether the mistake was a reasonable one to have made.[47] Indeed, to give effect to parts of the Police (Conduct) Regulations 2008, the Home Office sought amendments to the Police Act 1996 through the CJIA 2008. The drafting template for excluding unreasonable beliefs in the circumstances from the ambit of police misconduct was readily available in the provisions freshly enacted in the CJIA 2008. The drafters of the 2008 Regulations did not replicate these express provisions permitting a wholly subjective belief in the Standard of Professional Behaviour. The inference to be drawn is that this subjective test, fresh in the minds of the drafters, was not to be similarly offered

to those seeking to justify use-of-force in the context of police professional misconduct.

But the basis for this inference does not end there. The context surrounding the subsequent re-enactment of the use-of-force standard in the Police (Conduct) Regulations 2012 is arguably of relevance too. This took place against the backdrop of the Court of Appeal in *Keane* [2010] which drew attention to phrase 'reasonable in all the circumstances' in the specific context of mistaken belief and re-stated the subjective formulation of the test at stage one of self-defence.[48] Further still, the permissibility of a genuinely held but unreasonable mistake in the particular context of police use of lethal force was a live issue the Home Office ought to have been alert due to ongoing legal consideration of the compatibility with Article 2 of the ECHR of the subjective element of stage one of self-defence in criminal law. Of special relevance was the admissibility decision of the ECtHR in *Bennett v UK*, delivered in December 2010, which was a mistaken belief case involving the fatal shooting of a man by police. In observing that no sufficiently great difference existed between the domestic definition of self-defence and the 'absolute necessity' test under Article 2, the ECtHR again re-stated the subjective element at stage one of self-defence.[49] The Home Office, benefitting as it does from the input of the Police Advisory Board, must be presumed to have been aware of the relevant, high-profile case law when drafting the Police (Conduct) Regulations 2012. Against the backdrop of this litigation, the Home Office nonetheless opted, once again, to proceed with a use-of-force standard that did not allude to, let alone replicate, the subjective formulation of self-defence that had, by this point, been examined and clarified by both the domestic courts and Strasbourg – including in the specific context of police use of lethal force.

The second is a further inference that ought to be drawn from the legislative history. It is generally accepted that assistance in construing statutory provisions can be derived from looking to earlier legislation. This is especially so where the subject matter is so closely connected to the legislation under consideration and where it can be discerned that the draftsperson sought to depart from the meaning of the predecessor legislation.[50] The formulation of the use-of-force standard in Schedule 2 of the 2012 Regulations has its origins in the Schedule of the Police (Conduct) Regulations 2008. Prior to this, the use-of-force standard was set out in the Police (Conduct) Regulations 2004. It stated: '*officers must never knowingly use more force than is reasonable, nor should they abuse their authority*.' To act knowingly, per the OED, is to do so 'with knowledge or awareness of what one is doing or a fact'. A mistake is a belief that is contrary to fact. Reference to 'knowingly' would seem to preclude a mistaken belief from the test if one accepts the distinction made in criminal law between knowledge, which requires the veracity of a belief, and belief itself, which can turn out to be mistaken.[51] This earlier test, then, is a subjective one based on an officer's awareness of the reasonableness or otherwise of their use-of-force. The revocation of the 'knowingly' standard in the 2004 Code of Conduct and introduction of 'reasonable in all the circumstances' in the 2008 Code of Conduct resulted from an extensive drafting process involving a public consultation in 2006 and a further consultation on the draft Regulations in 2007. It is both reasonable, and in keeping with orthodox principles of interpretation, to assume that the drafters of the 2008 Regulations introducing the new use-of-force standard, were aware of the pre-existing subject test of 'knowingly'. It is submitted that the proper inference to be drawn from the removal of the subjective test and its replacement with 'reasonable in all the circumstances' is that, from 2008, an officer's genuine but mistaken belief must have been a reasonable one.

The implications of *R(W80)* for policing

An important implication of the judgment relates to the regulatory framework itself. The outworking of the Court of Appeal's approach suggests that in future the Code of Ethics will be a weighty document for construing the Standards of Professional Behaviour, rather than the legislative context in which those standards were drafted. So too did the Court of Appeal signal the importance of the Code of Ethics to IOPC professional misconduct investigations because of its endorsement of the IOPC's observation that it felt bound to have regard to the Code of Ethics, citing the Home Office Guidance. With the Code of Ethics, rather than the Code of Conduct, taking centre stage, future consultations, or revisions to the latter, especially amendments to how it explains or elaborates on the Standards of Professional Behaviour, seem especially important to respond to and engage with. Similarly, it might seem proper that the knowledge and expertise offered by the Police Advisory Board of England and Wales, as well as the recommendations of further reviews of police standards and discipline, are attuned to and channelled towards the work undertaken by the College of Policing. Without wishing to question at all the value and expertise of the College, it seems questionable whether Parliament intended this shift of emphasis away from the Code of Conduct when it granted a discretionary power to the Home Secretary to establish codes of conduct for chief officers of police forces.

So much for the regulatory hierarchy. What does the judgment mean for frontline officers? The clarification of the professional use-of-force standard has special salience for the 6,653 authorized firearms officers involved in almost 20,000 firearms incident last year alone.[52] The National Armed Policing Lead for the NPPC explained that armed officers are trained in the subjective (criminal law) test for self-defence and are *not* instructed that the objective (civil law) test applies for the purpose of misconduct hearings.[53] As a matter of fair warning, the Court of Appeal's interpretation of the use-of-force standard ought to be communicated promptly to officers, and amendments made to the Code of Ethics and the Authorized Professional Practice the College of Policing produces for training and assessing officers. Particular heed should be taken of the Court of Appeal's observation that Paragraph 4.4 of the Code of Ethics is not well drafted.[54] It that should be amended to make clear that a genuinely held belief that use-of-force is necessary and proportionate in the circumstances is the test for criminal law and human rights law standards but for the purposes of professional misconduct, officers' actions will be subject to an objective assessment of the reasonableness of that belief.

This divergence in use-of-force standard raises the question of how much more demanding is the requirement of an honest *and* reasonable belief is likely to be? The fear of 'on the job trouble' from oversight is one that permeates police work.[55] Police operate under the fog of suspicion and must make split-second decisions in fraught situations in which personal and professional risks loom large. A concern voiced by the NPCC's National Armed Policing Lead is that recruitment and retention of specialist armed officers is negatively impacted by 'concerns about what would happen in the event they have to discharge their firearm in terms of the risk of being criminally prosecuted and/or dismissed.'[56] This is related to a further fear that the requirement that officers must not act on an unreasonable belief might 'add a dangerous layer of complexity and hesitation' in police operations to the serious detriment of safety of the public and officers.[57] It should, however, be some re-assurance to officers that 'in the agony of the moment', an honest and instinctive belief may likely be deemed by disciplinary panels as strong, albeit not conclusive, evidence that the force is, objectively, reasonable, as the courts have done.[58] Indeed, in *Armani da Silva*, the Grand Chamber noted that the ECtHR has never found that a person purporting to act in self-defence honestly believed that the use-of-force was necessary but proceeded to find a violation of Article 2 on the ground that the belief

was not perceived, for good reasons, to be valid at the time.[59] It seems sensible to suggest, therefore, that it will be circumstances in which the honestly of the officer's belief is in doubt where the reasonableness of the belief will come under particular scrutiny.

A further issue is the extent to which the individual officer can be said to have made an unreasonable mistake if the basis for the unreasonableness is a consequence of the intelligence the officer, quite properly, relied upon in deciding the fatal shot was necessary. The realities of operational policing are such that the actions of firearms officers will be directed by earlier surveillance, live intelligence assessments, and authorizations given by firearms commanders with specific operations roles.[60] In *R(W80)*, for example, it was because of operational briefings that the firearms officers came to believe that the men in the car were dangerous individuals who were armed and prepared to use their weapons. Where the officer's (mistaken) belief was based on an (mistaken) intelligence assessment of their fellow officers, perhaps even attached to orders, it seems extremely unlikely a disciplinary panel would single out the officer who fired the fatal shot as having acted on an unreasonably mistaken belief. This, at least, is the approach taken by the appellate courts, which have keenly recognized that, for practical reasons, officers must be able to rely upon each other in taking decisions.[61] In the context of reasonableness standard attached to the power of arrest, for example, the Court of Appeal has noted that the 'information given by others [fellow officers], attached to orders issued by them, can be and usually will be part of the information which goes to his [the officer's] grounds for belief.'[62]

Significantly, though, the objective standard will still enable scrutiny by disciplinary panels of the steps officers made, or ought to have made, in the moments immediately prior to the use-of-force in order to ascertain the necessity to shoot the suspect. As Rogers argues, as a matter of law and principle, accountability quite properly requires an explanation from the officer who deploys lethal force that goes beyond an unquestioning acceptance of what they have been told to do by their superiors or fellow officers.[63] In *R(W80)* itself the police mounted a large operation and deployed firearms officers, of which W80 was one. The intelligence was that the men in the car were armed and intended to use their weapons to free the two prisoners. The car's windows were steamed up; visibility was poor. W80 shouted orders to the men inside the car, before opening the door and instructing Mr Baker to place his hands on the dashboard. Mr Baker's hands moved up quickly to a shoulder bag around his chest. Fearing for his and his colleagues' lives, W80 fired one fatal shot at Mr Baker. As it transpired, however, there was no firearm in the bag, just an imitation gun in the rear of the car. Although, the intelligence assessment put the officers on notice that suspects in the car might pose a lethal danger, the real question of the reasonableness of W80's belief arose because he shot Mr Baker at a very early stage of the interception and almost immediately after opening the front passenger door and issuing the warning.[64]

Finally, the judgment also has some relevance for the professional misconduct standards, and associated training and assessment, governing officers in Police Scotland. Although the judgment does not, of course, apply to Police Scotland directly, its salience lies in the fact that the use-of-force standard in the Standards of Professional Behaviour in Scotland replicates the same standard as in England and Wales.[65] Indeed, thinking about the use-of-force standard for professional misconduct across the four regions of the UK, it is noteworthy that the objective test in England and Wales and Scotland places officers under greater scrutiny than their counterparts in Northern Ireland. The PSNI Code of Ethics expressly permits a subjective belief of the necessity to use lethal or potentially lethal force: 'a police officer shall discharge a firearm only where the officer honestly believes it is absolutely necessary to do so in order to save life or prevent serious injury.'[66]

However, unlike the Code of Conduct provisions in either England and Wales, the PSNI Code of Ethics replicates the stricter and more compelling requirement of 'absolute necessity'; a standard the European Court of Human Rights has deemed core to the right of life under Article 2 of the ECHR.[67]

Can the objective standard be justified?

The normative appeal of the objective test for the use-of-force professional standard, as decided by the Court of Appeal, is, of course, a further matter. It is one that the Home Office may indeed wish to consider, drawing on the experience and expertise of the Police Advisory Board for England and Wales. As a matter of principle, the inclusion of the objective dimension at stage one of the civil law test of self-defence and its exclusion in its criminal law counterpart can, according to the appellate courts, be justified on the basis that 'the ends of justice which the two rules respectively exist to serve are different.'[68] This speaks to a much wider debate over whether negligent behaviour ought to be punished or not. It has been argued that punitive sanctions and the censure conveyed by a criminal conviction ought to be reserved for those who have in mind the idea of harming someone. As Lord Scott observed in *Ashley* 'one should not be punished for a crime that he or she did not intend to commit or be punished for the consequences of an honest mistake.'[69] In the academic commentary, it has been argued by Horder that the subjective test in self-defence properly takes account of emotional considerations, like fear, that ethically well-disposed agents quite naturally experience.[70] The function of civil law, in contrast to criminal law, is said to be one of balancing the conflicting rights of individuals, rather than tempering the coercive power of the state to punish. In the context of self-defence, it has been suggested the rights to be balanced are (a) the right not to be subjected to physical harm by the intentional actions of another person and (b) the right also to protect oneself by using reasonable force to repel an attack or to prevent an imminent attack.[71] Setting aside the threat of criminal censure or sanction, the civil law, through its award of damages to compensate the loss suffered by the claimant, is prepared to demand more of those who interfere with the rights of others without a reasonable basis for doing so.

This criminal-civil law distinction used to ground the subjective/objective tests of self-defence is, of course, open to general challenge. But of greater concern here is that the civil/criminal distinction neither translates easily to the context of police professional misconduct, nor offers an adequate normative justification as to which test ought to be adopted. If criminal law serves to censure and sanction harmful behaviour, civil law functions to balance private rights and human rights law compels the state to respect, protect and fulfil the core civil-political interests of its citizens, what is the role of police professional standards and the misconduct regime? It would seem to function as medley of all of three these and more. It seeks to 'protect the public': the disciplinary system purports to 'encourage a culture of learning and development within the police. All forces should have procedures in place to share learnings from individual misconduct cases.'[72] But disciplinary proceedings are also formal legal proceedings. They are held in public, presided over by a legally qualified chair and the officer accused of breaching their professional obligations are given an opportunity to defend themselves. Such proceedings have a flavour of the civil law in so far as hearings are determined according to the civil standard of proof and concern a dispute between two individual parties – the police organization and the individual officer. But unlike civil law, disciplinary proceedings can result in punitive sanctions against, and censure directed at, the officer including formal warnings, reduction in rank or even dismissal. Finally, and further emphasizing their *sui generis*

nature, professional misconduct regimes, by way of public hearings and independent investigations, seek to 'maintain public confidence in and the reputation of the police service'.[73]

Little is to be gained, then, by attempting to ground the appropriate test for use-of-force by way of conceptual alignment with either criminal or civil proceedings. Reasoning by analogy is of limited assistance. The absence of an obvious 'fit' for the use-of-force standard alongside existing legal regimes is a welcome invitation to return to first principles. There is, I think, an appealing normative basis for the objective test to be found in John Gardner's provocatively titled essay, '*Criminals in Uniform*'.[74] Gardner's thesis is that the killing of a person is made more shocking, and requires more thorough scrutiny and compelling justification, where the killers are police officers on duty. By virtue of their profession, police have a special moral position that arises from people's normative expectations of how police ought to behave. This is not to overlook that self-defence actions, including when it comes to police use-of-force, often occur in moments where there is limited time for reflection; indeed to speak of 'firm beliefs' in such fraught instances can itself suggest a naïve grasp of the realities encountered by officers.[75] Rather, it is recognize that we have recruited, trained, armed and ultimately entrusted this group of civilians in uniform to act in fraught situations where decisions must be made based on rapid assessments of the threat, harm and risk the suspect poses. There are two core moral duties that, Gardner argues, flow from this special moral position and which, I would add, are all the more salient in the context of specialist firearms officers.

The first duty is to protect people from being killed. When an officer kills a person, this is not merely a failure to protect but an inversion of the officer's very duty as protector. Gardner does accept, though, that the 'special moral awfulness' of a breach of the duty to protect is abrogated in circumstances where the threat posed by a person to the lives of others is, in fact, a real one.[76] The second moral duty of police officers, however, is an enduring one that is not abrogated in such circumstances: the duty to uphold the rule of law. This is a weighty undertaking that demands 'high epistemic competence' from officers, such as being 'particularly free from bias, superstition, gullibility, and prejudice' and 'the sort of person who does not maintain easy assumptions or jump to conclusions.'[77] So too does the duty to uphold the rule of law include the equal protection of all citizens; officers ought to protect 'criminals' just as much as 'decent folk'. To regard suspects fatally shot by police as 'targets' who are somehow less deserving of protection or having stepped outside of the safeguards of the law, is an affront to the rule of law police are under a moral duty to uphold. This requires thorough scrutiny and compelling justifications when lethal force is used, even against individuals who have crossed the moral threshold by virtue of their own criminal acts. Of special salience in the context of police use-of-force is also of course the equal and dignified treatment of ethnic minority and marginalized communities that risk being 'over policed and under protected'.[78]

This second of the moral duties Gardner's subscribes to the police – the upholding of the rule of law – offers the strongest normative basis for the objective test for the use-of-force when it comes to professional misconduct. This duty is intimately connected to the symbolic and instrumental function of professional standards and the misconduct regime to maintain public confidence and uphold high standards in the police.[79] As observed by Lord Carswell in *R(Green)*:

> Public confidence in the police is a factor of great importance in the maintenance of law and order in the manner which we regard as appropriate in our polity. If citizens feel that improper behaviour on the part of police officers is left unchecked and they are not held accountable for it in a suitable manner, that confidence will be eroded.[80]

When left unexplained or properly accounted for, racial disproportionality in use-of-force in particular can have a profound effect on already strained relationships between police and ethnic minority communities.[81] The very conduct that is deemed to warrant disciplinary action is that which 'damages public confidence in policing'.[82] It is, according to the Home Office, behaviour that learning from alone would not be a sufficient response 'given the gravity or seriousness of the matter'.[83] The public are entitled to expect highly skilled and specially trained firearms officers, supported by surveillance technologies and operational command structures, not to make unreasonable mistakes that result in a person being killed.

Officers should be prepared, in Gardner's words, 'to show themselves fit for their role as upholders of the rule of law'. What Gardner describes as the 'epistemic competence' of police ought to be proven to an officer's own professional community, overseen by a legally qualified chair, and investigated by an independent body like the IOPC.[84] including a demonstratable commitment to equal protection of all under the law. Doing so harnesses the competence of disciplinary panels – comprised of fellow professionals from the organisation who have recruited, trained and managed officers – to assess the reasonableness of their actions in the exigencies of the situation and its operational context. The ability of misconduct panels to critically review officer's behaviour and hold them to account remains, of course, a matter of debate given that they are staffed by the 'police family'. Scholars of police culture have long discussed how officers' solidarity and loyalty might contribute to a 'blue code of silence' which undermines self-regulatory initiatives like ethical codes and protects officers who breach the criminal law.[85] Yet there remains something potentially powerful about the communicative value of disciplinary panels when they *do* hold officers to account – precisely because are drawn from the professional community to which officers belong. This was strikingly illustrated during the trial of Derek Chauvin when a series his erstwhile colleagues, including a chief officer and police trainer, condemned his use-of-force, insisting it was not only counter to the police organization's policy but also its ethics and values.[86] By determining whether an officer has acted in accordance with standards that all members of the group have signed up to in the police ethical codes, and to which they are trained to adhere to, a professional misconduct panel's determinations send an authoritative signal to officers of what their own community expects of them. An objective standard enables this kind of authorisation evaluation of mistaken beliefs in a way that a subjective test would not.

In thinking about what it means for officers to show themselves fit for their role as upholders of the rule of law, a demonstrable commitment to policing without *bias or prejudice* is especially significant when it comes to police use-of-force because of marked racial disparities. Of police fatal shooting from 2004/5 to 2019/20 in England and Wales, 19 percent of those killed were from Black ethnic groups made (despite making up only 3.3 percent of the population) and 12 percent of those killed were from Asian ethnic groups (7.5 percent of the population).[87] Police officers are more than nine times as likely to have drawn (but not discharged) Tasers on Black people than on White people.[88] More generally, use-of-force – ranging from handcuffing and ground restraint to the use of firearms – are five times more likely to be used against those perceived as being from a Black ethnic group than a White ethnic group.[89] As acknowledged by Her Majesty's Inspector of Constabulary in 2021, disproportionality does not, in itself, evidence discrimination or misapplication of police powers; the point is that police organizations ought to be able to provide what David Lammy has described as an 'evidence-based explanation for apparent disparities'.[90] While contested allegations of institutional police racism continue to be made two decades on from the MacPherson Report,[91] there has been greater acceptance of the need to detect and confront implicit bias, albeit the efficacy of such

initiatives remains a matter of debate.[92] The Independent Review of Deaths and Serious Incidents in Police Custody, published in 2018, drew particular attention to the stereotyping of young Black men as 'dangerous, violent and volatile', which it described as 'a longstanding trope that is ingrained in the minds of many in our society.'[93]

Whether the objective standard, through its test of what is 'reasonable', can, or should, be used hold officers to account for mistaken beliefs arising from implicit racial bias is contested. Even if we accept that a mistaken belief because implicit racial basis is unreasonable – in the sense it is defective, irrational or repugnant – the question is whether we should attribute culpability to it.[94] It has been argued a racial bias, even if deemed unreasonable, is insufficiently blameworthy. First, implicit bias can be comprised of confirmation bias (the disposition to more readily believe evidence consistent with prior beliefs) and familiarity bias (disposition to make preferential judgements of things familiar to us).[95] Unlike explicit bias, these types of biases are said to be harder to avoid, with our perceptual judgements distorted by aspects of their cognition of which they are unaware. Second, it has been suggested that imposing liability for such biases is to attribute undue responsibility to an individual for what is effectively a collective failing in so far as 'current understandings in social psychology attribute the causes of implicit biases to broader social and structural problems – prevalent stereotypes and inequalities that we may, as individuals, disavow.'[96]

In the context of fatal shootings by police, however, these arguments seem less convincing. When it comes to fair warning, implicit bias is something officers are increasingly made aware of and trained in, while high profile reports continue to emphasize the need for racial disparities in the use-of-force to be addressed and explained by police organizations. But more fundamentally, we ought to return to the special status of police as symbolic representations of order and authority in society. The police as an organisation have come to 'provide an iconography of the *nation* state',[97] expressing a collective identity strongly linked to community and belonging, thus serving as a 'condensation symbol' for wider social sensibilities.[98] To permit misconduct panels to excuse lethal shootings by police on grounds of implicit racial bias sends an unconscionable signal to communities of what the nation state stands for. As described by Holroyd and Picinali, it comes too close to state sanction of 'the deployment of racist stereotypes, permitting reliance on mistaken associations between black people and weapons to govern behaviour.'[99] Police, as representatives of the state, risk perpetuating the very biases that can contribute to racial disparities in the use of police powers. In the words of the Independent Review, unless investigatory bodies are 'seen to give all due consideration to the possibility that stereotyping may have occurred or that discrimination took place in any given case, families and communities will continue to feel that the system is stacked against them.'[100]

It is helpful to connect this discussion to Rogers' account of culpable mistaken belief which is also set within the socio-political context of police power.[101] Rogers is dissuaded from attributing culpability to mistaken beliefs arising from inadvertence, including racial stereotypes unless a racist-driven desire to use force is present.[102] But he does draw attention to how the cognitive focus of the objective test might distract from two specific aspects of mistaken belief that warrant liability: a motivation by an officer to assert power over victims or an 'attitude of unaccountability' whereby the officer operates with a felt sense of impunity in the use of unlawful force. It is only by asking *why* the officer perceived the person to pose a threat or *why* they thought arguably excessive force was reasonable that, Rogers argues, we can elicit motivations and attitudes in mistaken belief cases that are blameworthy. There is much to be said for this nuanced appraisal of mistaken beliefs. But Rogers is sceptical

whether an objective standard is capable of capturing these considerations with sufficient precision.[103] It might seem under-inclusive because where a defendant acts in a situation of emergency, the test of reasonableness will almost inevitably apply in the defendant's favour, but also over inclusive because in the absence of sinister motivations or attitudes, a mistaken belief born out of inadvertence or negligence might be thought to lack the requisite culpability.

By way of gentle pushback, the objective standard of reasonableness does, I think, provide some platform for evaluating the basis of an officer's mistaken belief, even if it is not as refined in screening for the specific motivations and attitudes Rogers identifies. The officer whose mistaken belief is born out of a latent desire to assert power or punish subordinate groups could still be detected through the rubric of reasonableness precisely because it requires – unlike a subjective test – the officer to specify *why* they thought their mistake was *justifiable*, not simply honestly held. Indeed, Rogers suggests that where an officer refuses to listen to a person's insistence that they are unarmed this may permit an inference to be drawn that the officer preferred to believe what they wanted to believe about the person's intentions.[104] When set against specific features of the alleged misconduct or previous complaints against the officer, a misconduct panel may also infer the presence of sinister motivations, including racist motivations, which result in the unnecessary taking of life. This is consistent with the Independent Review's recommendation that the IOPC should be alert not only to overt discrimination but where it can be inferred from the evidence in that specific case or from similar cases involving the same officer.[105]

Conclusion

As many a police officer has recounted to the author in the course of fieldwork, policing is all about managing risk and avoiding 'trouble'. The article has explored the law's response where the perceived risk turns out to be mistaken in the context of fatal police shootings. Typically, the academic discussion of mistaken beliefs has, quite understandably, centred around self-defence in criminal law and issues arising from compatibility of the domestic law with Article 2 of the ECHR. This paper has focused instead on the issue of use-of-force and mistaken belief in the rarely discussed, but practically important, area of law which governs police professional misconduct. In this *sui generis* regulatory regime, the Court of Appeal in *R(W80)* has interpreted police law in a manner that parts ways with the criminal law by requiring an officer have both a genuine *and* reasonable belief in the necessity to use force. The paper analysis has sought to critically engage with the judgment in *R(W80)*. It has argued that the objective standard is indeed was the correct one but that the Court of Appeal's route to this destination was based on an inversion of the regulatory framework. The focus ought to have been on the legislative context of the statutory Code of Conduct, and appropriates inferences that could be drawn from this, rather than situating the discussion so firmly in the standard's appearance in the College of Policing's Code of Ethics. An alternative interpretation has been suggested which, it is respectfully submitted, is more faithful to the regulatory regime.

If there is an appetite for a legislative review of this regime, there is much to be said for introducing a single professional code setting out the standards more clearly, and, when it comes to use-of-force, adopting the established two-stage trigger-response framework. It has been argued that the objective standard will be more demanding in certain circumstances and that this can be justified as a matter of principle. This normative claim is grounded in Gardner's account of the 'high

epistemic competence' we should expect of police, not least specialist firearms officers, and their moral duty they to uphold the rule of law. An objective standard, brought to bear in professional misconduct hearings, has the potential to give effect to this moral duty. No doubt few of us would wish to stand in the shoes of the firearms officer whose job demands that when faced with a potentially deadly threat, they make a life-or-death decision in a split second. Yet we should still expect specially trained firearms officers to explain to their peers why a fatal mistake was made that resulted in the death of a person who posed no such threat. The objective test for the use-of-force in the professional standards enables such critical discussions to take place. The formal setting of misconduct hearings and the sanctions that can result, when combined with the objective test, are a proper reflection of weighty responsibilities and trusted capabilities of police officers.

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[1] A claim made by E. Bittner in his classic account 'Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police' in H. Jacob (ed.) *Potential for Reform of Criminal Justice* (Beverley Hills, CA: Sage, 1974).

[2] The rate of fatal police shootings of unarmed Black people in the USA is more than 3 times as high as it is among White people. For an overview of the recent data from the USA see E. Lett et al. 'Racial inequity in fatal US police shootings, 2015–2020' *J Epidemiol Community Health* (2021) 75 394.

[3] Over the past four years, the proportion of armed officers to unarmed officer has remained stable at around 5 percent (Home Office, *Police use of firearms statistics, England and Wales: April 2019 to March* 2020, p9).

[4] Specialist officers are deployed in Armed Response Vehicles adapted to accommodate specialist equipment and enable firearms officers to be transported swiftly to deal with incidents, ibid, p1, 4.

[5] It should be noted this is likely an underestimate because not all forces record fatal shootings (*Deaths during or following police contact: Statistics for England and Wales*, IOPC, 2020, p8.) Inquest estimates there has been a total of 75 fatal police shootings in England and Wales between 1990-2020 (https://www.inquest.org.uk/fatal-police-shootings) [Accessed 14 December 2020]

[6] As in the case of Jean Charles de Menezes' death.

[7] See, e.g., *Bennett v UK* [2011] 52 EHRR SE7, where the suspect pointed a gun-shaped cigarette lighter which the officer mistook for a firearm) and *Davis v Commissioner of Police of the Metropolis* [2016] EWHC 38 (QB), in which the officer mistook the suspect's grip on jump-lead handles as the suspect about to fire a gun).

[8] See H. Stewart 'The Role of Reasonableness in Self-Defence' (2003) 14 *Canadian Journal of Law and Jurisprudence* 317.

[9] See, e.g., commentary in the *Review* by K. Laird (Crim. L.R. 2018, 8, 655-657; Crim. L.R. 2016, 6, 438-442) and E. Cape (Crim. L.R. 2018, 5, 388-391; Crim. L.R. 2015, 9, 713-715) and, more generally, A. Simester, Mistakes in Defences (1992) 12(2) O.J.L.S. 295-310 and A. Norrie 'The Problem Of Mistaken Self-Defense: Citizenship, Chiasmus, and Legal Form' *New Criminal Law Review* (2010) 13(2) 357-378.

[10] Criminal Justice and Immigration Act 2008, s.76(3), s.76(4)(ii)(b), albeit this is subject to the mistaken belief not arising from voluntary intoxication; for the position under the Criminal Law Act 1967, s.3(1) see *Gladstone Williams* [1983] EWCA Crim 4.

[11] This was the case for the Officer W80 (https://www.theguardian.com/uk-news/2017/jun/14/met-officer-who-shot-jermaine-baker-wont-face-charges). See in contrast, though, the fatal shooting of Azelle Rodney which resulted in the prosecution of firearm officer Anthony Long, who (successfully) claimed self-defence to the charge of murder (https://www.theguardian.com/uk-news/2014/oct/03/metropolitan-police-anthony-long-charged-azelle-rodney). [Accessed 15 December 2020]

[12] This topic does, unsurprisingly, excite public debate in the wake of police shootings though. See 'Police chief condemns IPCC plan to keep officers apart after shootings' '(https://www.theguardian.com/uk-news/2014/may/18/police-ipcc-armed-officers-conferring) and 'Anthony Long: Officer cleared after Azelle Rodney shooting attacks IPCC' https://www.bbc.com/news/uk-england-london-37015033 [Accessed 15.12.20]

[13] The Police (Complaints and Misconduct) Regulations 2020, Regulation 46.
[14] Police (Conduct) Regulations 2012, Regulation 42(2)-(3).
[15] *R (Officer W80) v Director General of the Independent Office for Police Conduct v The Commissioner of Police of the Metropolis, Eftehia Demetrio, the College of Policing, the National Police Chiefs' Council* [2020] EWCA Civ 1301 (herein *R(W80)*).
[16] Mr Baker was suspected of being part of a plot to snatch two prisoners from custody whilst in transit from prison to the Crown Court for sentencing. Police intelligence suggested Mr Baker, along with two other men, were lying-in wait in a car parked nearby.
[17] *R (W80) v Director General for the Independent Office for Police Conduct* [2019] EWHC 2215 (Admin).
[18] On the distinction between imperfect justifications bearing on the offence (what is done is right but misconceived) and a separatory category of excusatory defences (what is done is wrong but excusable), but also the 'wobbliness' of the line between the two in the context of self-defence, see Norrie (n 9 above) pp363-364, 375.
[19] *R v Keane and McGrath* (2010) EWCA Crim 2514.
[20] *R v Williams (Gladstone)* [1987] 3 All ER 411; CJIA 2008, s.76(4)(a).
[21] *Ashley v Chief Constable of Sussex* [2008] UKHL 25.
[22] *McCann and others v UK* [1996] 21 EHRR 97 at § 200- 201. Emphasis added.
[23] *Bubbins v United Kingdom* (2005) 41 EHRR 458 at § 138.
[24] *Da Silva v United Kingdom* [2016] 63 EHRR 12 at § 251.
[25] Ibid. For discussion of the compatibility of the self-defence in domestic criminal law with Article 2 see F. Leverick, 'Is English Self-defence Law Incompatible with Article 2 of the ECHR?' [2002] Crim. L.R. 347; S. Foster and G. Leigh, 'Self-defence and the right to life; the use of lethal or potentially lethal force, UK domestic law, the common law and article 2 ECHR' E.H.R.L.R 2016 4 398-410; C. Wang 'The Police are Innocent As long as They Honestly Believe: The Human Rights Problems with English Self-Defense Law' *Columbia Human Rights Law Review* 49 3:1 373-414.
[26] *R(W80)* at [50].
[27] Ibid at [47].
[28] Ibid at [44].
[29] Ibid at [47]
[30] Ibid at [45].
[31] Ibid at [45].
[32] Police Act 1996, s.50.
[33] Police (Conduct) Regulations 2012, Regulation 3(1).
[34] Home Office Guidance: Police Officer Misconduct, Unsatisfactory Performance and Attendance Management Procedures 2012, para 1.4.
[35] Explanatory Memorandum to Police (Conduct) Regulations 2020, parA 10.2.
[36] Ibid, para 7.8. This followed recommendations of the Taylor Review of Police Disciplinary Arrangements, commissioned in 2004, by the then Home Secretary.
[37] Ibid at Paragraph 7.13.
[38] Ibid at Paragraph 7.9.
[39] See https://www.college.police.uk/What-we-do/Ethics/Pages/archive_DO_NOT_DELETE/Code-of-Ethics.aspx [Accessed 20 November 2020].
[40] See R. Martin *Policing Human Rights: Law, Narratives and Practice* (Oxford: Oxford University Press, 2021).
[41] Above n 17, at [66].
[42] Ibid.
[43] *R(W80)* [2020] EWCA Civ 1301 at [42].
[44] *R(*W80) at [41]-[50].
[45] Clarity was not aided by Chip Chapman's description of the College of Policing, written in the context of the Code of Ethics, as being 'responsible for setting standards' (p.8) in the Independent Review of the Police Disciplinary System in England and Wales.
[46] See e.g., *R v G and Another* [2003] UKHL 50, Lord Steyn at [46].
[47] Criminal Justice and Immigration Act 2008, s.76(3) and s.76(4)(b)(ii).
[48] *R v Keane and McGrath* [2010] EWCA Crim 2514, Hughes LJ at [5].
[49] *Bennett v UK* [2011] 52 EHRR SE7 at § 70-71.
[50] Authority from *Understanding Legislation* at p105, 109. Neither the Explanatory Memorandum nor Explanatory Note of the 2012 Regulations reveal how the Standards of Professional Behaviour ought to be understood.
[51] See Haden-Cave J 'one can be said to know something if one is absolutely sure it is so.' in *R v Godir (Mohammed Abdi)* [2018] EWCA Crim 2294 at [16]. An officer might, though, have 'knowingly'

used more force than reasonable if it was an excessive degree force even on the circumstances the officer honestly belied.
[52] Home Office Police use of firearms statistics, 25 July 2019 (London: Home Office) at p.1.
[53] *R(W80)* at [27].
[54] *R(W80)* at [44].
[55] P.A.J. Waddington, *Liberty and Order: Public order policing in a capital city* (London, UCL Press: 1994) and R. Martin *Policing Human Rights: Law, Narratives and Practice* (Oxford: OUP, forthcoming), chapter 7.
[56] *R(W80)* at [26].
[57] *R(W80)* at [28].
[58] See Hughes LJ in *Keane and McGrath* [2010] EWCA Crim 2514 at [5].
[59] *Da Silva v United Kingdom* [2016] 63 EHRR 12 at § 247
[60] *Authorized Professional Practice*: *Armed Policing*, College of Policing, October 2014. https://www.app.college.police.uk/app-content/armed-policing/command/ [Accessed 18.12.20].
[61] *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1996] UKHL 6,
[62] *Hayes v Chief Constable of Merseyside Police* [2011] EWCA Civ 911, Hughes LJ at [41].
[63] J. Rogers, 'Culpability in Self-defence and Crime Prevention' in GR Sullivan and I Dennis (eds) *Seeking Security: Pre-Empting the Commission of Criminal Harms* (Hart: Oxford), 265-292, 272.
[64] *R(W80)* at [12].
[65] Standards of Professional Behaviour, Police Service of Scotland (Conduct) Regulations 2014, Schedule 1.
[66] PSNI Code of Ethics, Article 4.4.
[67] *McCann and others v UK* at § 149 and *Tagayeva and Others v. Russia* [2017] App no 26562/07 at § 595.
[68] *Ashley and others v Chief Constable of Sussex Police* [2008] UKHL 25, Lord Bingham at [3] and *R (Duggan) v HM Assistant Deputy Coroner* [2017] EWCA Civ 142, at [91]-[93]. On self-defence in the context of security personnel see J. Rogers, 'Justifying the use of firearms by policemen and soldiers: a response to the Home Office's review of the law on the use of lethal force' *Legal Studies* (2006) 18(4) 486-509.
[69] *Ashley and others v Chief Constable of Sussex Police* [2008] UKHL 25, Lord Scott at [17]
[70] J. Horder 'Cognition, Emotion and Criminal Responsibility' (1990) 106 LQR 469.
[71] *Ashley and others v Chief Constable of Sussex Police* [2008] UKHL 25, Lord Scott at [18].
[72] Home Office, *Conduct, Efficiency and Effectiveness: Statutory Guidance on Professional Standards, Performance and Integrity in Policing*, February 2020, para 6.43.
[73] College of Policing, *Guidance on outcomes in police misconduct proceedings*, 2017, paragraph 2.3.
[74] J. Gardner, 'Criminals in Uniform' in A. Duff, L. Farmer, S. Marshall, M. Renzo and V. Tadros (eds), *The Constitution of Criminal Law* (Oxford: Oxford University Press, 2012). This forms part of a broader debate on justification defences in criminal law, see J. Gardner, 'Justification under Authority' *Canadian Journal of Law and Jurisprudence* (2010) 23(1) 71-98.
[75] Rogers (n 63 above), p272.
[76] Gardner, 2012, ibid, p108.
[77] Gardner, 2012, ibid, p110.
[78] David Muir, quoted in Home Office (1999) *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny* (1999), Cm 4262-I, 313.
[79] College of Policing, *Guidance on outcomes in police misconduct proceedings*, 2017, paragraph 2.3.
[80] *R(Green) v Police Complaints Authority* [2004] UKHL 6, Lord Carswell at [78].
[81] Report of the Independent Review of Deaths and Serious Incidents in Police Custody (Home Office: London, 2017), para 5.8.
[82] Home Office, above n 72, para 4.34.
[83] Ibid, para 4.36.
[84] Gardner (2012), above n 74, p110.
[85] L. Westmarland and M. Rowe, 'Police ethics and integrity: can a new code overturn the blue code?' *Policing and Society* (2018) 28(7) 854-870.
[86] '"The lessons of this moment." The testimony by police brass at Derek Chauvin's trial is unprecedented' CNN, 10 April 2021. Available https://edition.cnn.com/2021/04/10/us/derek-chauvin-george-floyd-trial-testimony/index.html [Accessed 30.04.21]
[87] IOPC (2020) 'Deaths during or following police contact: Statistics for England and Wales, Time series tables 2004/05 to 2019/20'
[88] Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services (HMICFRS), 'Disproportionate use of police powers A spotlight on stop and search and the use of force' (London, 2021), p2

[89] Home Office, above n 3, p21.
[90] Above n.87, p2; D. Lammy, *The Lammy Review: An Independent Review into the Treatment of, and Outcomes for, Black, Asian and Minority Ethnic Individuals in the Criminal Justice System* (London: Lammy Review, 2017).
[91] 'Racism 'alive and kicking in UK police forces,' MPs told' *The Independent* 17 June 2020. Available at https://www.independent.co.uk/news/uk/home-news/uk-police-racism-blm-floyd-home-affairs-a9570956.html [Accessed 30.04.21]
[92] See, e.g., P. Quinton and D. Packham, 'College of Policing stop and search training experiment' (College of Policing: London: 2016) and HMICFRS, above n 87, p15.
[93] Ibid, Para 5.18.
[94] For a helpful analysis of this issue see J. Holroyd and F. Picinali 'Implicit Bias, Self-Defence, and the Reasonable Person' in C. Lernestedt and M. Matravers (eds) *The Criminal Law's Person* (Oxford: Oxford University Press, forthcoming).
[95] Ibid.
[96] Ibid, p12.
[97] I. Loader and N. Walker, 'Policing as a public good: Reconstituting the connections between policing and the state' (2001) *Theoretical Criminology* 5(1), 20, original emphasis.
[98] I. Loader and A. Mulcahy, *Policing and the Condition of England: Memory, Politics and Culture* (Oxford: OUP, 2003).
[99] Above n 94, p15.
[100] Above n 81, para 5.17.
[101] Rogers, above n 63.
[102] Ibid, p279-280.
[103] Ibid, p273.
[104] Ibid, p281.
[105] Above n 81, p93.