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**Banned in War, Permitted at Home:
The Incoherent Use of Force Constraints on
the Police and Military**

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Introduction

During the Black Lives Matter protests in the summer of 2020, 22-year-old Sarah Grossman died after exposure to tear gas and pepper spray deployed by police in Columbus, Ohio as part of routine and legal crowd control measures.¹ Though this tragic death was a rare case, the use of tear gas and pepper spray was not. Between May and October 2020, U.S. domestic police forces used tear gas at least 175 times and pepper spray at least 148 times against overwhelmingly peaceful protestors, according to research groups Bellingcat and Forensic Architecture, who identified, verified, and archived over 1,000 incidents of police violence against protestors that summer.² Although the researchers did not track the number of injuries caused by the chemical irritants, a 2017 study concluded that the “use and misuse of these chemicals may cause serious injuries,” “leading to unnecessary morbidity and mortality,” despite being considered generally safe by police.³ The use of chemical irritants during the summer of 2020 was even more dangerous given the respiratory pandemic circulating through the population at the time.

Eight years earlier, New York City police officers fatally shot an out-of-work fashion designer accused of killing a coworker, injuring nine bystanders in the process with gunfire and bullet fragments.⁴ The police had used hollow-point bullets, a type of expanding or dum-dum bullet, which are supposed to mushroom upon striking someone, theoretically making it less

¹ Jael Goldfine, “A Protester Has Died After Being Tear Gassed by Police in Ohio,” *Paper Magazine*, June 10, 2020, <https://www.papermag.com/sarah-grossman-protester-death-tear-gas-ohio-2646167581.html?rebelltitem=2#rebelltitem2>.

² Charlotte Godart, “A New Platform Maps US Police Violence Against Protesters,” Bellingcat, October 29, 2020, <https://www.bellingcat.com/news/americas/2020/10/29/a-new-platform-maps-us-police-violence-against-protesters/>.

³ Rohini J. Haar, et al., “Health impacts of chemical irritants used for crowd control: a systematic review of the injuries and deaths caused by tear gas and pepper spray,” *BMC Public Health* 17, 2017, <https://bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-017-4814-6>.

⁴ Chris Francescani, “All nine bystanders wounded in Empire State shooting hit by police,” *Reuters*, August 27, 2012, <https://www.reuters.com/article/us-usa-shooting-empirestate-police/all-nine-bystanders-wounded-in-empire-state-shooting-hit-by-police-idUSBRE87Q04X20120827>.

likely to pass through a victim and strike another bystander in a crowd. However, the metal cavity at the bullet's tip is prone to fragment or ricochet when striking a solid object, like the concrete barriers used around New York City to prevent terrorist attacks. The 2012 incident was also not a rare instance—most police forces in the U.S. issue hollow-point rounds to their officers.⁵

Stories of militarized police and their use of force on the U.S. domestic population are nothing new, nor are U.S. police forces alone in their use of hollow-point bullets, or of tear gas and pepper spray, also known as “riot control agents.”⁶ What makes these instances unique among other uses of force by U.S. police is that they represent acts of violence deemed too brutal for war, and thus illegal under international humanitarian law. Deemed a cause of unnecessary and indiscriminate suffering, riot control agents like tear gas and pepper spray were understood as prohibited for use in war under the Geneva Protocol of 1925 and made explicit under the Chemical Weapons Convention of 1997.⁷ Similarly judged as wantonly cruel, expanding bullets were outlawed in war by the Hague Convention of 1899.⁸

Soldiers and police officers are the only two agents of the state authorized to use lethal force, though different bodies of law and regulatory regimes dictate that usage. In terms of weapons and tactics, less rigorous training, and weaker legal accountability, police generally have fewer constraints placed on the use of force, lethal or otherwise, than the military. To be

⁵ Evan Holden, “Opinion | American police use weapons too brutal for warfare?,” *The Breeze*, November 12, 2020, https://www.breezejmu.org/opinion/opinion-american-police-use-weapons-too-brutal-for-warfare/article_6e10ddb-245b-11eb-b0ab-875568ae7b5c.html.

⁶ Other notable international examples include the pro-democracy protests in Hong Kong and the Arab Spring Uprising.

⁷ Shireen Daft, “Tear gas and pepper spray are chemical weapons. So, why can police use them?,” *The Conversation*, June 11, 2020, <https://theconversation.com/tear-gas-and-pepper-spray-are-chemical-weapons-so-why-can-police-use-them-140364>.

⁸ “Declaration (IV,3) concerning Expanding Bullets,” International Committee of the Red Cross, July 29, 1899, <https://ihl-databases.icrc.org/ihl/INTRO/170%3FOpenDocument>.

sure, police officers and soldiers do break the law, but at least guardrails show you where the road is.

Given this legal discrepancy, my research asks: How and why are U.S. domestic police forces authorized to use weapons and tactics against their own population that soldiers abroad are not? This question is especially puzzling given the rapid militarization of the police in recent decades and the ever-blurring line between the military and police in the U.S. While the militarization of the police accelerated, legal constraints lagged. The two institutions' de facto roles have merged significantly while their attendant legal regimes remain separate.

As recent scholarship from Kraska (2007), Balko (2013), Go (2020), and others have demonstrated, theories explaining why, how, and when civilian police have grown militarized abound.⁹ However, fewer efforts exist exploring why, how, and when civilian police actually *exceed* the military when it comes to the use of force. Through a systematic, descriptive study, this research project will demonstrate the ways in which police face fewer constraints on the use of force than the military despite a convergence of the two institutions. The topic raises important questions over the legal justifications of the use of force at home and abroad and whether there's a legal incoherence to U.S. efforts to keep domestic and international law separate while blurring the lines between war and peace and keeping battlefields undefined. The paper's conclusions complicate mainstream narratives of the militarization of police in the U.S. and may provide transportable lessons for militarized police forces around the world.

⁹ See Peter B. Kraska, "Militarization and Policing—Its Relevance to 21st Century Police," *Policing: A Journal of Policy and Practice*, Volume 1, Issue 4, 2007, 501–513; Radley Balko, "How Did America's Police Become a Military Force on the Streets? Rise of the Warrior Cop," *ABA Journal* 99, no. 7 (July 1, 2013): 43–52; and Julian Go, "The Imperial Origins of American Policing: Militarization and Imperial Feedback in the Early 20th Century," *American Journal of Sociology* 125, no. 5 (March 2020): 1193–1254.

The paper proceeds as follows. Section I traces a brief history of the separation of the civilian police force and the military in U.S. society. Section II describes the distinct legal and regulatory regimes that govern the use of force for the police and the military. Section III traces the breakdown of military/police dichotomy through the militarization of the police. Section IV highlights several case studies in which the police face fewer legal constraints on the use of force than the military despite the convergence of the two institutions. Finally, the paper concludes with suggestions for further research to be taken up in this new agenda.

Section I: The Birth of the Military/Police Dichotomy

From its inception, U.S. police forces evolved along the “local civilian” or “state civilian” model, which refers to “police controlled by civilian officials with subnational and local jurisdiction,” and which is distinct from the “state military” model similar to France’s Gendarmerie National or Italy’s carabinieri.¹⁰ The local civilian model originated in 1829 with the founding of the London Metropolitan Police. The officials who championed this new type of police force faced a challenge: they wanted to find a way to manage riots, strikes, and other forms of public disorder without relying on the military, a method which they assumed unpalatable and far too continental for English citizens.¹¹ As such, these early police forces were often inefficient, feckless, unprofessional and corrupt, focusing more on the management of public disorder rather than the suppression of crime.¹²

Architects of the London Metropolitan Police sought an institution whose purpose was to “allow the state to penetrate civil society with a legitimacy that militaristic forces lacked, making

¹⁰ Go, “Imperial Origins,” 1194.

¹¹ Go, “Imperial Origins,” 1195.

¹² Go, “Imperial Origins,” 1197.

it more acceptable to the populace.”¹³ As the former Commissioner of Police of the Metropolis James Monro wrote in 1890 upon retiring his post, a strict military/police dichotomy in the first civilian police force was intentional. “Although some of the duties performed by the Metropolitan Police are imperial in their character, and extend far beyond the local limits of the metropolis, the force in its constitution is distinctively local, and the sphere of its ordinary operations is restricted to what is known as the Metropolitan Police District,” explained Monro.¹⁴ The principle of organization was “one of local decentralization, tempered by centralization for administrative purposes,” in contrast with a centralized militaristic command structure.¹⁵ In terms of personnel, Monro wrote it would be a “mistake” to assume officers were furnished by the army, because “The training of a soldier does not fit him for discharging many of the most important duties of a policeman, and the principle aimed at in the army with reference to military efficiency is diametrically opposed to that which must be followed in the ranks of the police.”¹⁶

In the U.S., a similar dichotomy emerged in inchoate policing and solidified in the first police forces. In antebellum slave patrols, considered the “forerunner of modern American Law enforcement,”¹⁷ and the first professionalized police departments established in Boston in 1838 and New York in 1845, “a strict demarcation between the police and the military” was present from the beginning, in line with the Anglo-American local civilian model.¹⁸ Like the British police, U.S. civilian police initially shied away from military-style uniforms, training, and even

¹³ Go, “Imperial Origins,” 1195.

¹⁴ James Monro, “The London Police,” *The North American Review* 151, no. 408 (1890): 616.

¹⁵ Monro, “The London Police,” 620.

¹⁶ Monro, “The London Police,” 621.

¹⁷ K. B. Turner, David Giacomassi, and Margaret Vandiver, “Ignoring the Past: Coverage of Slavery and Slave Patrols in Criminal Justice Texts,” *Journal of Criminal Justice Education* 17, no. 1 (2006): 186.

¹⁸ Jude McCulloch, “Police, Crime and Human Rights,” Chap. 30 in *The Routledge International Handbook of Criminology and Human Rights*, eds. Leanne Weber, Elaine Fishwick, and Marinella Marmo, (London: Routledge, 2016).

firearms.¹⁹ Thus in London, New York, and elsewhere “the police have emerged historically *as an alternative to the military.*”²⁰

Despite Scotland Yard serving as an inspiration for U.S. civilian police forces, important early divergences led to historical differences. As historian Jill Lepore has documented in *The New Yorker* and elsewhere, in cities like New York, Boston, Philadelphia, Chicago, and Baltimore, American police forces grew out of racial animus and hostility to immigration.²¹ U.S. police officers also soon began to carry guns, albeit compact revolvers, because many Americans themselves carried guns.²² And despite Monro’s assertion that the London Metropolitan Police remained decentralized, U.S. police forces remained even more so, with politically-appointed police commissioners running organizations often with limited supervision.²³ Together, these distinctly American features of policing helped to contribute to perhaps the most enduring and urgent divergence between U.S. and English civilian police forces: the lethal use of force. Modern comparative statistics are dramatic—in the first 24 days of 2015, U.S. police killed more people than British and Welsh police did in the past 24 years.²⁴

Constitutional amendments and laws passed in Congress reinforced the military/police dichotomy. The idea that the military should not interfere in the affairs of civilian government “finds expression in the Constitution’s division of power over the military between Congress and the president, and in the guarantees of the Third, Fourth, Fifth, and Sixth Amendments,

¹⁹ Go, “Imperial Origins,” 1196.

²⁰ Go, “Imperial Origins,” 1194.

²¹ Jill Lepore, “The Invention of the Police,” *The New Yorker*, July 13, 2020, <https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police>.

²² Lepore, “The Invention of the Police.”

²³ Lepore, “The Invention of the Police.”

²⁴ Paul J. Hirschfeld, “Lethal Policing: Making Sense of American Exceptionalism,” *Sociological Forum* 30, no. 4 (December 2015): 1111.

which were in part reactions to abuses committed by the British army against American colonists.”²⁵

In 1878, Congress further strengthened the dichotomy with the passing of the Posse Comitatus Act. During the Reconstruction Era, as white supremacists and former confederates returned to political power in Southern states, they sought to keep the federal military from intervening in the establishment of a segregationist Jim Crow South.²⁶ Initially only pertaining to the United States Army, the Posse Comitatus Act’s subsequent amendments came to encompass the Air Force, Navy, Marine Corps, and Space Force, and the law itself came to serve as a legal and symbolic touchstone for the military/police dichotomy, embodying “the traditional American principle of separating civilian and military authority.”²⁷ While some modern day analysts view the Posse Comitatus Act’s “ignominious origins” as an unfortunate beginning to ultimately honorable ends, divorcing the Act from its original impetus obscures its meaning and the entire military/police dichotomy.²⁸ These racist origins are central to the military/police dichotomy, which was established not so much to protect U.S. citizens than to police its racialized populations with impunity. Other scholars have documented imperial and colonial efforts to define the “geography” of international humanitarian law and keep efforts to quell uprisings and revolutions within domestic law under the guise of “maintaining order,” “pacification,” or “colonial maintenance.”²⁹

²⁵ Joseph Nunn, “The Posse Comitatus Act Explained,” Brennan Center for Justice, October 14, 2021, <https://www.brennancenter.org/our-work/research-reports/posse-comitatus-act-explained>.

²⁶ Jennifer K. Elsea, “The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law” U.S. Library of Congress, Congressional Research Service, November 16, 2018, <https://sgp.fas.org/crs/natsec/R42659.pdf>, 22.

²⁷ Matthew Carlton Hammond, “The Posse Comitatus Act: A Principle in Need of Renewal,” 75 *WASH. U. L. Q.*, 1997, 953.

²⁸ Hammond, “The Posse Comitatus Act.”

²⁹ Frédéric Mégret, “From ‘savages’ to ‘unlawful combatants’: a postcolonial look at international humanitarian law’s ‘other,’” from *International Law and Its ‘Others,’* ed. Anne Orford (Cambridge: Cambridge University Press, 2006): 270–271.

Section II: The Crime/War Paradigm

Military and police power rest on the same state-sanctioned capacity to use force to guarantee external and internal security, respectively.³⁰ Soldiers and police officers are the only people authorized to use lethal force on behalf of the state, but beyond this commonality, the military and the police belong to different legal worlds, one of war and one of crime. The distinction between war and crime is “embodied in international and domestic legal regimes, institutional-administrative divisions, and in such legislation as the Posse Comitatus Act.”³¹ These largely separate legal worlds dictate that “in regulatory, popular, and academic contexts, police lethal force is situated in the sphere of domestic law enforcement and executive lethal force is situated in the sphere of international military affairs.”³²

Determining whether to respond to a threat within the war or crime paradigm proscribes certain uses of force and permits others, even if the threat itself remains unchanged. For example, the United States chose to respond to al-Qaeda’s terrorism through a war paradigm in its “War on Terror,” while the United Kingdom eventually settled on criminal law when responding to the Irish Republican Army’s terrorism in Northern Ireland.³³ Though the contexts obviously differed, these paradigmatic choices led to vastly different methods and tools at the disposal of government agents.

³⁰ Peter B. Kraska “The Police and Military in the Post-Cold War Era: Streamlining the State’s Use of Force Entities in the Drug War,” *Police Forum*, 1994, 4(1): 1–8.

³¹ Noah Feldman, “Choices of Law, Choices of War,” *Harvard Journal of Law & Public Policy*, Vol. 25, Issue 2 (Spring 2002), 457–486.

³² Daniel B. Loehr, “Lethal Force at Home and Abroad,” *NYU Review of Law & Social Change* 42, no. 3 (2018): 495–527.

³³ Brandon Garrett and Christopher Slobogin, “The Law on Police Use of Force in the United States,” *German Law Journal*, Vol. 21, Issue 8 (December 2020), 1526-1540.

Departmental policies often dictate any use of force, all of which fall on a so-called use-of-force continuum, beginning with mere officer presence and ending with lethal force (figure 1).

Figure 1: Example of a Use-of-Force Continuum from the National Institute of Justice³⁴

- Officer Presence — No force is used. Considered the best way to resolve a situation.
 - The mere presence of a law enforcement officer works to deter crime or diffuse a situation.
 - Officers' attitudes are professional and nonthreatening.
- Verbalization — Force is not-physical.
 - Officers issue calm, nonthreatening commands, such as "Let me see your identification and registration."
 - Officers may increase their volume and shorten commands in an attempt to gain compliance. Short commands might include "Stop," or "Don't move."
- Empty-Hand Control — Officers use bodily force to gain control of a situation.
 - *Soft technique*. Officers use grabs, holds and joint locks to restrain an individual.
 - *Hard technique*. Officers use punches and kicks to restrain an individual.
- Less-Lethal Methods — Officers use less-lethal technologies to gain control of a situation.
 - *Blunt impact*. Officers may use a baton or projectile to immobilize a combative person.
 - *Chemical*. Officers may use chemical sprays or projectiles embedded with chemicals to restrain an individual (e.g., pepper spray).
 - *Conducted Energy Devices (CEDs)*. Officers may use CEDs to immobilize an individual. CEDs discharge a high-voltage, low-amperage jolt of electricity at a distance.
- Lethal Force — Officers use lethal weapons to gain control of a situation. Should only be used if a suspect poses a serious threat to the officer or another individual.
 - Officers use deadly weapons such as firearms to stop an individual's actions.

Non-governmental, lightly regulated police professional associations such as the International Association of Chiefs of Police (IACP), also set use of force standards.³⁵ IACP develops model policies, which provide “police agencies with concrete guidance and directives by describing in sequential format the manner in which actions, tasks, and operations are to be performed,” white

³⁴ “The Use-of-Force Continuum,” National Institute of Justice, August 3, 2009, <https://nij.ojp.gov/topics/articles/use-force-continuum>.

³⁵ Forthcoming research from Andrew McCall.

papers, and other brief FAQs.³⁶ For example, the model policy on “crowd management” sets out which uses of force are permitted (e.g., “chemical agents are primarily offensive weapons that shall be used with the utmost caution” and “may be deployed defensively to prevent injury when lesser force options are either not available or would likely be ineffective”) and which are not (e.g., canine teams “may respond as backup when appropriate but should not be deployed for crowd control (i.e., containment or dispersal),” and “canines should remain in patrol vehicles or other secure locations and, whenever reasonably possible, out of the view of the crowd, but “may be deployed in appropriate circumstances related to bomb detection, pursuit of suspects in buildings, and related situations”).³⁷

When a police officer arrives at the final stage of the continuum—the use of lethal force—the action falls under domestic law and the crime paradigm, and the officer is theoretically subject to federal criminal liability, state criminal liability, and constitutional civil liability.³⁸ As these levels of liability suggest, many overlapping and intersecting regulatory bodies dictate the police’s lethal use of force.³⁹ Constitutionally, the Fourth Amendment, which guarantees the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,” sets a baseline right to bodily security and a standard of reasonableness for the use of force when arresting suspects.⁴⁰ The Eighth Amendment, which states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,” provides legal restrictions on excessive

³⁶ “Crowd Management,” International Association of Chiefs of Police, April 2019, <https://www.theiacp.org/sites/default/files/2020-08/Crowd%20Management%20FULL%20-%2008062020.pdf>.

³⁷ “Crowd Management,” International Association of Chiefs of Police.

³⁸ Loehr, “Lethal Force,” 500.

³⁹ For a state-by-state breakdown of lethal force statutes, see “State Use of Force Statutes,” Amnesty International USA, https://www.policinglaw.info/assets/downloads/US_states_rules_on_lethal_force.pdf.

⁴⁰ “United States,” The Law on Police Use of Force Worldwide, <https://www.policinglaw.info/country/united-states>.

use of force by law enforcement against suspects in custody.⁴¹ Subsequent case law also establishes use of force restrictions, including the U.S. Supreme Court's 1989 decision *Graham v. Connor*, which set the basic U.S. legal standard for determining legality of any use of force by law enforcement as "objectively reasonable."⁴² Relatedly, in the 1985 *Tennessee v. Garner* decision, the Court held that the "the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon" was limited to cases in which "necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."⁴³ Though, as a partnership organization led by the Institute for International and Comparative Law in Africa called Policing Law points out, this threshold is much lower than the international standard.⁴⁴

Given that the U.S. military exercises force almost exclusively abroad, a soldier's use of force falls under international legal regimes, including international humanitarian law during armed conflict and international human rights law, which applies during times of both war and peace. As a general rule, international humanitarian law, despite permissive targeting rules, "restricts the choice of means and methods that the belligerents can employ," banning "explicitly the use of weapons and methods that are of a nature to 'cause superfluous injury or unnecessary suffering.'"⁴⁵ Stemming from this grounding principle, this body of law prohibits and restrictions on the use of specific methods and weapons. In general, U.S. troops are subject to U.S. legal interpretations of the law of armed conflict (LOAC), which is not a single law but rather a body

⁴¹ "United States," The Law on Police Use of Force Worldwide.

⁴² U.S. Supreme Court, *Graham v. Connor*, 490 US 386 (1989), Decided on 15 May 1989, at 396.

⁴³ U.S. Supreme Court, *Tennessee v. Garner*, 471 US 1 (1985), Decided on 27 March 1985.

⁴⁴ "United States," The Law on Police Use of Force Worldwide.

⁴⁵ Cornelius Rust Wiesener, "Tear Gas, Expanding Bullets and Plain-Clothed Personnel: The Interface between Human Rights and Humanitarian Law in Modern Military Operations," *Journal of International Law of Peace and Armed Conflict* 30, no. ¾ (2017): 83.

of several international treaties, including the 1949 Geneva Conventions, customary international law, and domestic laws, regulations, and interpretations, such as U.S. Army Field Manual.⁴⁶

Despite the seeming multiplicity of statutory and regulatory bodies constraining the use of force by the U.S. military, soldiers are ultimately only accountable to a single entity—or set of entities—the U.S. Department of Defense. Police officers, on the other hand, face constraints and forms of accountability from several sources: department policies, state policies, court precedents, and Department of Justice guidelines. These overlapping and intersecting may give the impression that the police are much more constrained in the use of force than the military, and such an assumption would also remain in line with other aspects of the war/crime paradigm. As Loehr writes, “In many areas of law, the crime/war distinction determines the extent to which government action is regulated. Citizens are generally more protected, and the government more restricted, in a domestic crime context than in an international military context.”⁴⁷

Section III: Breakdown of the Military/Police Dichotomy and the Militarization of the Police

Despite decades of legal, historical, and cultural precedent the military/police dichotomy began to break down, beginning long before many academics realized. As Kraska argues, prior to the mid-2000s, “police academics in the United States, with only a few exceptions, have been quite comfortable with the military/police dichotomy,” and “assume that studying the police and military is a mutually exclusive undertaking.”⁴⁸ Citing Giddens (1985), Kraska interprets this

⁴⁶ Bryan Frederick and David E. Johnson, “The Continued Evolution of U.S. Law of Armed Conflict Implementation: Implications for the U.S. Military,” RAND Corporation, 2015,, https://www.rand.org/pubs/research_reports/RR1122.html, 2.

⁴⁷ Loehr, “Lethal Force,” 3.

⁴⁸ Kraska, “Militarization and Policing,” 501.

tendency to take the dichotomy at face value as a function of the police/military demarcation as a pre-eminent feature of the modern nation-state.

The separate legal and regulatory worlds of the war/crime paradigm, as well as the attendant analysis by police scholars, would be justified if the institutions under their umbrellas also remained separate. However, as Kraska and others have demonstrated, over the past several decades, “we have been witnesses to a little noticed but nonetheless momentous historical change—the traditional distinctions between military/police, war/law enforcement, and internal/external security are rapidly blurring.”⁴⁹ This historical change is the militarization of the police. Kraska defines militarism as “a set of beliefs, values, and assumptions that stress the use of force and threat of violence as the most appropriate and efficacious means to solve problems,” emphasizing the exercise of military power, hardware, organization, operations, and technology as its primary problem-solving tools.”⁵⁰ Militarization is the implementation of this militaristic ideology, “the process of arming, organizing, planning, training for, threatening, and sometimes implementing violent conflict.”⁵¹ Police militarization applies these concepts to law enforcement: “the process whereby civilian police increasingly draw from, and pattern themselves around, the tenets of militarism and the military model.”⁵²

While scholars disagree on when police militarization began in earnest, and through which causal factors, many police researchers now agree that the process has accelerated in recent decades. Go places the origin of police militarization in the United States’ imperial adventures of the early twentieth century, arguing that “local police borrowed tactics, techniques, and organizational templates from America’s imperial-military regime that had been developed

⁴⁹ Kraska, “Militarization and Policing,” 501.

⁵⁰ Kraska, “Militarization and Policing,” 503.

⁵¹ Kraska, “Militarization and Policing,” 503.

⁵² Kraska, “Militarization and Policing,” 503.

to conquer and rule foreign populations.”⁵³ This process, which Go calls “imperial feedback,” was aided by “imperial importers,” or veterans of the U.S. imperial-military apparatus, “who constructed analogies between colonial subjects abroad and racialized minorities at home.”⁵⁴ These imperial importers straddled two legal worlds—one dictating the use of lethal force abroad and one at home once they returned.

Kraska and others have tracked several empirical indicators that demonstrate a significant increase in the militarization of the U.S. civilian police over the past few decades, far beyond the initial militarization in the early twentieth century.⁵⁵ In the legal realm, the federal government, aided in particular by Congress, eroded the Posse Comitatus Act since the 1990s. Left with what they perceived as a military without a mission at the end of the Cold War, the government began to involve the military in drug enforcement, border control, and other “domestic support” operations.⁵⁶ The result was not just the abstract slow death of the military/police dichotomy—there were also tragic consequences. In 1997, a group of U.S. Marines shot and killed a teenager in Texas as he tended a flock of goats. Fully armed and hidden in camouflage ghillie suits, the Marines were not permitted to interact with civilians, only to observe supposed drug trafficking and report their findings to the Border Patrol. But after the teenager shot a .22 caliber rifle at something in the brush, the Marines engaged—and shot him dead.⁵⁷ Since then, the number of domestic missions the military has accepted, and the number of troops deployed in the United States has only increased.⁵⁸

⁵³ Go, “Imperial Origins,” 1193–1254.

⁵⁴ Go, “Imperial Origins,” 1193–1254.

⁵⁵ Kraska, “Militarization and Policing,” 502.

⁵⁶ Craig T. Trebilcock, “Posse Comitatus – Has the Posse outlived its purpose?,” Center for Strategic & International Studies,” April 1, 2000, <https://www.csis.org/analysis/posse-comitatus-%E2%80%93-has-posse-outlived-its-purpose>.

⁵⁷ Michael German, “The Erosion of Posse Comitatus,” ACLU, September 15, 2009, <https://www.aclu.org/blog/national-security/privacy-and-surveillance/erosion-posse-comitatus>.

⁵⁸ German, “The Erosion of Posse Comitatus.”

The erosion of the Posse Comitatus Act affected the police as well. The military's growing involvement in domestic affairs led to the rise of "an unprecedented cooperative relationship between the US military and US civilian police at both the highest and lowest level of organization."⁵⁹ This cooperation included "technology transfers, massive military weapons transfers, information sharing between the military and police targeted at domestic security, a close operational relationship in both drug control and terrorism control efforts."⁶⁰ The so-called War on Drugs beginning in the 1980s accelerated police militarization through, among other things, cross-training in special weapons and tactics (SWAT) teams, which are modeled after military elite special operations units. Paramilitary deployments like SWAT teams dramatically increased in this period, up 1,400% between 1980 and 2000, with an average of 3,000 deployments in the 1980s, up to an average of 45,000 deployments by the year 2000.⁶¹ and a high level of cross-training in the area of special weapons and tactics team (SWAT) and counter-civil disturbance, counterinsurgency, and antiterrorism exercises."⁶²

As the military/police dichotomy broke down, so too did the war/crime paradigm. Continuing the trend of the War on Drugs, the so-called War on Terror led police to rely even more on the military/war model for crime. Police began to redefine criminality to "insurgency" and crime control to "low-intensity conflict."⁶³ Here, the empirical indicators and causal mechanisms of police militarization can start to blur. The use of warlike rhetoric by elected officials with regard to law enforcement can have strong impacts on public attitudes and behaviors, but the use of this language by police themselves is especially pernicious.⁶⁴ Police

⁵⁹ Kraska, "Militarization and Policing."

⁶⁰ Kraska, "Militarization and Policing."

⁶¹ Kraska, "Militarization and Policing."

⁶² Kraska, "Militarization and Policing."

⁶³ Kraska, "Militarization and Policing."

⁶⁴ Carl Boggs, *Imperial Delusions: American Militarism and Endless War*, (Lanham: Rowman & Littlefield, 2005).

training emphasizes the role of officers as “warriors,” a mindset “extolled in books, articles, interviews, and seminars intended for a law enforcement audience.”⁶⁵ This venerated warrior mindset can lead to police officers seeing the communities they serve as enemy territory for them to occupy and control, calling to mind not only military occupation by soldiers, but also imperial police officers patrolling colonial possessions.⁶⁶

The language and culture of the “warrior cop” have led police officers to talk like soldiers, and federal programs arming police departments have led officers to walk like soldiers too. These federal grant programs provide funding for and incentivize police militarization. One such program is the 1033 Program, which began in 1989 and authorized the transfer of surplus military equipment from the federal government (i.e., the military) to police agencies at the federal, state, and local levels. This program allows police forces to receive military-grade equipment from the federal government at no cost.⁶⁷ For example, the 1033 Program allows domestic civilian police to acquire equipment like armored personnel carriers, a battlefield vehicle resembling a tank, which were previously used in Afghanistan and Iraq.⁶⁸ With an absence of violent crime warranting military-grade armaments in most—if not all—of the recipient towns and cities, it is unclear what the police departments are using the military materiel for, other than responding disproportionately to non-violent crime or harassing peaceful protesters. The program both enables acquisition of military equipment and incentivizes its use thereafter—the federal government requires police departments to use 1033 equipment within

⁶⁵ Seth, Stoughton, “Law Enforcement’s ‘Warrior’ Problem,” *Harvard Law Review Forum* 128, vol. 225 (2014): 225–234; and Seth Stoughton, “Principled Policing: Warrior Cops and Guardian Officers,” *Wake Forest Law Review* 51, vol 61 (2016): 1–76.

⁶⁶ Seth, Stoughton, “Law Enforcement’s ‘Warrior’ Problem,” *Harvard Law Review Forum* 128, vol. 225 (2014): 225–234; and Seth Stoughton, “Principled Policing: Warrior Cops and Guardian Officers,” *Wake Forest Law Review* 51, vol 61 (2016): 1–76.

⁶⁷ Rahall, “Green to Blue Pipeline.”

⁶⁸ Rahall, “Green to Blue Pipeline.”

one year of receiving it.⁶⁹ Similar to the 1033 Program, the 1122 Program allows for police agencies to purchase new military hardware at no cost. This program primarily allows police agencies to maintain equipment acquired through the 1033 Program through the purchase of replacement parts.⁷⁰

The 1033 Program came under scrutiny following the militarized response to protests in Ferguson, Missouri in August 2014:

A phenomenon not previously subject to much public debate, it became front-page news as battle-ready police confronted mostly peaceful protesters, firing tear gas and wooden bullets from armored military vehicles.² Snipers with ballistic helmets were seen perched atop what appeared to be tanks, aiming at the unarmed civilians below.³ The images prompted the public to question why a police department in a city of 20,000 residents looked like an invading army engaged in urban warfare against its own citizens.⁷¹

Though it received significant media attention, Ferguson's militarized police department was only one such example of a then widespread phenomenon, which continued despite coming under a microscope in the media. At the time, the federal government spent billions of dollars every year to fund and equip domestic police departments with military-grade weaponry and equipment.⁷² Examples of over-militarization abound, with towns of less than 700 people regularly acquiring millions of dollars' worth of military gear from the federal government.⁷³ In one egregious example, the police department of Morven, Georgia, a town with a population of 565 residents, received "\$4 million worth of property, including three boats, SCUBA gear (in a town with no bodies of water), a Humvee, an unspecified APC, and surplus rifles that its sheriff intends to use to build a SWAT team."⁷⁴

⁶⁹ "War Comes Home: The Excessive Militarization of American Police," ACLU, June 2014, <https://www.aclu.org/report/war-comes-home-excessive-militarization-american-police>.

⁷⁰ Rahall, "Green to Blue Pipeline," 1792.

⁷¹ Rahall, "Green to Blue Pipeline," 1786–1787.

⁷² Rahall, "Green to Blue Pipeline," 1787.

⁷³ Rahall, "Green to Blue Pipeline," 1787.

⁷⁴ Rahall, "Green to Blue Pipeline," 1794.

While police departments often clamored for this equipment on their own, intense lobbying by defense contractors also contributed to the flow of arms from the federal government into the local civilian police forces. These companies redoubled lobbying efforts as the wars in Afghanistan and Iraq wound down.⁷⁵ Over the past two decades, defense companies spent \$2.5 billion in lobbying efforts to influence defense policy and funneled \$285 million into campaign coffers.⁷⁶ While not all of these efforts were directed at police militarization, the figure gives a sense of the scale of influence that defense companies have on the American political system. Weapons manufacturer lobbying is especially pernicious given the perverse profit incentives that motivate these companies. Specifically, companies that manufacture hollow point bullets, tear gas, and pepper spray for use in law enforcement represent an extreme version of this phenomenon, as they craft weapons that in many cases have been banned in war for over a century. These manufacturers often advertise their products, which if used by a soldier would constitute a war crime, directly to police departments. As Rahall demonstrated, weapons companies “employ several marketing strategies, from videos to trade shows, where they set up booths to entice law enforcement personnel to try out the gear.”⁷⁷ Direct-to-department advertising has occurred since the early twentieth century, though it sounded much different back then, according to Anna Feigenbaum, author of *Tear Gas: From the Battlefields of World War I to the Streets of Today*: “I would say that [the use of tear gas] now is exactly the same as its use then, only then they didn’t have euphemisms for it. It was just called things like ‘blinding,

⁷⁵ Rahall, Karena. “The Green to Blue Pipeline: Defense Contractors and the Police Industrial Complex.” *SSRN Electronic Journal*, 2014.

⁷⁶ Dan Auble, “Capitalizing on conflict: How defense contractors and foreign nations lobby for arms sales,” Open Secrets, February 25, 2021, <https://www.opensecrets.org/news/reports/capitalizing-on-conflict>.

⁷⁷ Rahall, Karena. “The Green to Blue Pipeline: Defense Contractors and the Police Industrial Complex.” *SSRN Electronic Journal* (2014): 1807.

painful poison gas.’ The ads would run with lines like: ‘Make a mob terrified and cry screaming.’”⁷⁸

This entire process, in which the police come to resemble the military aesthetically, functionally, and in terms of capacity, can also be thought of as the breakdown of the military/police dichotomy. This alone is a problem. As Lawson found, there is a positive and significant association between police militarization and number of suspects killed, controlling for other factors, and “police have a great deal of discretion in deciding how to handle situations they encounter, and militarization affects the decision making of police by moving their preferences toward more violent responses to suspects.”⁷⁹ But this phenomenon of police militarization, like all aspects of policing, disproportionately affects racialized and low-income urban communities. Meeks demonstrated how militarized police target racialized and/or working-class urban communities, or the “urban underclass,” which “become both enemy and victim in an obscure economic and social war that is sanctioned by federal, state, and local governments.”⁸⁰

Section IV: Case Studies in Militarized Police Excesses

Missing from analyses of police militarization is a discussion on uses of force deployed by the domestic police on civilian populations yet prohibited in war for use by the military under international law. The militarization of the police and the erosion of the military/police dichotomy would alone constitute a moral and ethical problem even if the legal constraints on

⁷⁸ Anna Feigenbaum, “The disturbing history of how tear gas became the weapon of choice against protesters,” Vox, June 3, 2020, <https://www.vox.com/2020/6/3/21277995/police-tear-gas-protests-history-effects-violence>.

⁷⁹ Edward Lawson Jr., “Police Militarization and the Use of Lethal Force,” *Political Research Quarterly* 72, no. 1 (March 2019), 177–189.

⁸⁰ Daryl Meeks, “Police Militarization in Urban Areas: The Obscure War Against the Underclass,” *The Black Scholar* 35, no. 4 (2006), 33–41.

the use of force kept pace with those of the military. This section will offer case studies highlighting where U.S. domestic police forces are *less* constrained than the military in the use of force, complicating straightforward comparisons between the police and the military, as well as unidirectional narratives of police militarization. These case studies illustrate how the police have come to wield a different sort of force, an amalgam of traditional police and military force deployed against racialized domestic populations and characterized by disproportionality and impunity. Any of these case studies alone would constitute a gross abuse of state power and a legal incoherence governing state violence, and their accumulation only strengthens the case. As the case studies will demonstrate, police are less constrained in the use of lethal force in terms of legal accountability, weapons, and tactics.

Legal accountability

In many aspects of the crime/war paradigm, the legal protections afforded to citizens under the crime paradigm are stronger than those afforded to foreign fighters in war. For example, take detention: “In the crime context, prolonged detention of a citizen inheres a right to trial and requires a determination of guilt. In the war context, however, the burden is placed on the citizen-detainee to challenge her detention.”⁸¹ This protection is guaranteed by, among other laws and statutes, the Sixth Amendment, which states, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.”⁸² On the other hand, cases like *Hamdi v. Rumsfeld* significantly curtail those protections for enemy combatants: “[T]he full protections that accompany challenges to

⁸¹ Loehr, “Lethal Force.”

⁸² U.S. Const. amend. VI.

detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting.”⁸³ The number of detainees held at Guantanamo Bay detention camp without trial only underscore this asymmetry of rights. In June 2022, one Afghan prisoner was freed after 15 years. In the first nine years, he had no access to a lawyer, and his family feared him dead. Though he was finally released, he never received a trial, and he was never convicted of any wrongdoing.⁸⁴

As Loehr argues, when it comes to the crime/war paradigm, “this relationship is inverted in the context of lethal force.”⁸⁵ Using the commander-in-chief as a proxy for the military, Loehr demonstrates how the president faces greater legal hurdles in evaluating the lethal use of force than the average police officer:

Unlike the police, the constraints on the Executive require that force only be used as a last resort, that only the minimum required force is used, and that the effects of lethal force on bystanders are considered. Additionally, while both standards have an imminence requirement in name, the executive imminence requirement is stricter.⁸⁶

This is not to say that the legal restrictions on the military’s lethal use of force are particularly strong, however. Both the military and the police are “similarly unconstrained by constitutional and criminal law,” but “the President is more significantly constrained by alternative means,” including tools of international law, authorizing statutes, and internal policy.”⁸⁷

One significant force behind limited legal accountability is police unionization. As William Finnegan documented in *The New Yorker*, the Police Benevolent Association of New York City (PBANYC), which represents rank-and-file officers in the New York City Police Department, offers an instructive case study. The PBANYC, which wields significant influence

⁸³ U.S. Supreme Court, *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004)

⁸⁴ “Afghan held at Guantanamo Bay freed after 15 years without trial,” *al-Jazeera*, June 24, 2022, <https://www.aljazeera.com/news/2022/6/24/afghan-prisoner-at-guantanamo-bay-released-after-15-years>.

⁸⁵ Loehr, “Lethal Force,” 498.

⁸⁶ Loehr, “Lethal Force,” 498–499.

⁸⁷ Loehr, “Lethal Force,” 499.

in its current form, was not always the political force it is today. From humble origins, it grew into one of the most powerful labor unions in the United States⁸⁸:

When the [PBANYC] was founded, in the eighteen-nineties, it was a feeble thing, dedicated to raising money for the widows of fallen officers. The job was brutal then. Officers were badly paid, untrained, overworked—and thrown out of their jobs every time political power changed hands. They could plead for a living wage or an eight-hour day, but the rising labor movement wanted nothing to do with them. Cops were strikebreakers or worse; the first unionists killed in the American labor struggle, in 1850, were tailors clubbed to death by the New York police, at Ninth Avenue and Thirty-eighth Street.⁸⁹

It was not until the 1960s—during which the civil rights movement grew, street crime increased, white flight intensified, and other public sector unions flourished—that New York City Mayor Robert Wagner, Jr. granted the PBANYC collective bargaining rights after the union promised not to strike or affiliate with other unions.⁹⁰ However, the PBANYC quickly flexed its muscle at City Hall. In its first move of political influence, the police union defeated a move by Wagner’s successor to establish a strong civilian complaint review board—essentially an effort to quash oversight into police misconduct, including the use of lethal force.⁹¹

The PBANYC’s campaign against the civilian complaint review board included thinly veiled racist tropes, with one poster depicting a young, affluent white woman walking down a dark street with the caption, “The Civilian Review Board must be stopped! Her life . . . your life . . . may depend on it.” Another television commercial showed a Harlem damaged by rioting, with an accompanying voiceover somberly lamenting, “The police were so careful to avoid accusations that they were virtually powerless.”⁹² But as Finnegan points out, this thin veil was

⁸⁸ It should be noted that some labor historians take issue with categorizing police unions as labor unions, given their antagonistic history with organized labor.

⁸⁹ William Finnegan, “How Police Unions Fight Reform,” *The New Yorker*, August 3, 2020, <https://www.newyorker.com/magazine/2020/08/03/how-police-unions-fight-reform>.

⁹⁰ Finnegan, “How Police Unions Fight Reform.”

⁹¹ Finnegan, “How Police Unions Fight Reform.”

⁹² Finnegan, “How Police Unions Fight Reform.”

dispensed of entirely by PBANYC leadership. In a statement, PBANYC President John Cassese said, “I am sick and tired of giving in to minority groups, with their whims and their gripes and shouting.”⁹³ These “whims and gripes” that Cassese disregarded included frequent murders of Black people at the hands of police officers, including in 1964, when a police officer killed 15-year-old Black student, James Powell, sparking riots in Harlem. Footage of the aftermath of these riots were used in the anti-civilian complaint review board campaign by the PBANYC.

Police killings of Black people, public outrage in response, and subsequent efforts by the PBANYC and other police unions to block any forms of accountability have continued cyclically ever since. As Benjamin Sachs, a professor of labor and industry at Harvard Law School, found, police unions use collective bargaining to shield rank-and-file members from accountability for the illegal lethal use of force, especially with regard to racist killings. Using data from the 100 largest cities in the United States, Sachs found that police protections from union contracts were “significantly and positively correlated with the killing of unarmed civilians.”⁹⁴ In Florida, the extension of collective bargaining rights to sheriffs’ offices “led to an estimated 40% increase in violent incidents among sheriffs’ offices that elected to unionize.”⁹⁵ And historically, another paper found that “the introduction of collective bargaining rights for police officers between the 1950s and 1980s led to modest increases in police compensation, insignificant impacts on total crime, and substantial increases in police killings of civilians with disproportionate impact on racial minorities.”⁹⁶

⁹³ Finnegan, “How Police Unions Fight Reform.”

⁹⁴ Benjamin Sachs, “Police Unions: It’s Time to Change the Law and End the Abuse,” On Labor, June 4, 2020, <https://onlabor.org/police-unions-its-time-to-change-the-law/#more-36217>.

⁹⁵ Sachs, “Police Unions.”

⁹⁶ Sachs, “Police Unions.”

The PBANYC’s mission to block police accountability for the use of force is mutually reinforced by the pervasive culture of silence among police departments. The U.S. police’s so-called “Blue Wall of Silence” is an informal understanding among officers not to report—and sometimes cover up—a colleague’s misconduct, from small administrative errors to illegal use of lethal force.⁹⁷ This understanding is not new:

The Wickersham Commission, the first of many Presidential commissions set up to study and explain lawlessness and civil disorder, observed, in 1931, “It is an unwritten law in police departments that police officers must never testify against their brother officers.” In what modern urban police officers experience as an increasingly hostile environment, both in the workplace of the low-income neighborhood and in the crosshairs of constant criticism by clever academics and articles like this one, it should not be a surprise that cops feel that they have no choice but to cover for one another. No one else has their backs.⁹⁸

Indeed, Balko’s “warrior cop” has its warrior culture, similar to the Southern Italian Mafia’s omertà or the Irish Republican Army’s code of silence. The Blue Wall of Silence acts as a form of impunity; with little threat of accountability or reprisal, a police officer may feel less constrained when using force.

Though also made up of warriors with its own warrior culture, the U.S. military differs significantly from the U.S. domestic civilian police when it comes to holding peers accountable. For example, in 2019, then President Donald Trump pardoned former SEAL commando Edward Gallagher, who was convicted of killing an Iraqi teenager in 2017.⁹⁹ The pardon drew many high profile criticisms from members of the U.S. military, and followed almost unanimous condemnation of Gallagher’s actions from Navy top brass and fellow SEALs.¹⁰⁰ Of course,

⁹⁷ Gabriel Jackson Chin and Scott Wells, “The ‘Blue Wall of Silence’ as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury,” *University of Pittsburgh Law Review* 59, (1998): 233–299.

⁹⁸ Finnegan, “How Police Unions Fight Reform.”

⁹⁹ Dwight Stirling, “Why the US military usually punishes misconduct but police often close ranks,” *The Conversation*, December 6, 2019, <https://theconversation.com/why-the-us-military-usually-punishes-misconduct-but-police-often-close-ranks-127898>.

¹⁰⁰ Stirling, “Why the US military usually punishes misconduct.”

members of the U.S. military have committed atrocities with impunity—the Vietnam War’s My Lai massacre and Iraq War’s Abu Ghraib scandal as two obvious examples. But as one military police officer remarked after the George Floyd protests of 2020, “There are, without a doubt, problems—and there are bad military police officers, obviously. But nowhere near what you see in the civilian world.”¹⁰¹

Weapons

Not only do police face fewer constraints than the military on *whether* to use lethal force, they are also less constrained when considering *how* to use lethal force. The use of dum-dum bullets, also called hollow point or expanding bullets, offers a case in point. Developed by the British in India and named after the factory in the Dum-Dum area of Calcutta in which they were produced, dum-dum bullets were designed to cause maximum damage by expanding upon impact, rather than passing through a body via an exit wound.¹⁰² However, this very design made them a target for prohibition by advocates of international humanitarian law and architects of the laws of war first in the Brussels Declaration of 1874, which prohibited “the employment of arms, projectiles or material calculated to cause unnecessary suffering,” under which dum-dum bullets would likely fall.¹⁰³ The Hague Convention of 1899 then targeted the projectiles more explicitly, declaring that “[t]he Contracting Parties agree to abstain from the use of bullets which expand or

¹⁰¹ Stirling, “Why the US military usually punishes misconduct.”

¹⁰² Steve Wright, “This will blow your mind,” *The Guardian*, May 12, 1999, <https://www.theguardian.com/technology/1999/may/13/onlinesupplement11>.

¹⁰³ <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=31364F80ED69E269C12563CD00515549>

flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.”¹⁰⁴

Initial arguments for the use of dum-dum bullets turned on both the inferiority and inhumanity of so-called “savages,” a term used by imperial, often white majority nations to generally refer to what W.E.B. Du Bois called “the darker nations of the world—Asia and Africa, South and Central America, the West Indies and the islands of the South Seas.”¹⁰⁵

Defending their use by imperial soldiers against colonized peoples at the Hague Convention of 1899, British military officer John Charles Ardagh argued:

In civilized war a soldier penetrated by a small projectile is wounded, withdraws to the ambulance, and does not advance any further. It is very different with a savage. Even though pierced two or three times, he does not cease to march forward, does not call upon the hospital attendants, but continues on, and before anyone has time to explain to him that he is flagrantly violating the decision of the Hague Conference, he cuts off your head. For this reason, the English delegate demands the liberty of employing projectiles of sufficient efficacy against savage races.¹⁰⁶

Ultimately the British proposal to allow the use of dum-dum bullets against so-called “savages” was voted down 19 to 1 at the Hague Convention, with the United States delegation voting with the majority.¹⁰⁷ But the winning arguments against their use were revealing. As Mégret (2006) wrote:

[F]or all the occasional passionate defences of humanitarianism, many of the arguments put forward by those who favoured including ‘savages’ within the ambit of humanitarian law reflected a sort of weak instrumentalism. One fear was that use of certain means or methods of combat in the colonies might be a prelude to their use on the European battlefield. As Edward M. Spiers puts it, concerns about uses of dum-dum bullets against the Afridis by the Tirah Expeditionary Force were fuelled by the possibility that ‘[f]uture

¹⁰⁴ Project of an International Declaration concerning the Laws and Customs of War, Article 13, Brussels, August 27, 1874, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?documentId=F5FF4D9CA7E41925C12563CD0051616B&action=openDocument>

¹⁰⁵ W. E. B. DuBois, “The African Roots of War,” *The Atlantic*, May 1915, <https://www.theatlantic.com/magazine/archive/1915/05/the-african-roots-of-war/528897/>.

¹⁰⁶ Mégret, “From ‘savages’ to ‘unlawful combatants,’” 293.

¹⁰⁷ Mégret, “From ‘savages’ to ‘unlawful combatants,’” 276.

wars would become even more atrocious if all armies, especially the well-armed forces of Continental Europe, procured this kind of ammunition'.¹⁰⁸

This reciprocal logic would help to explain that, while outlawed in war with other states, dum-dum bullets remained perfectly legal for use on civilians at home. In the United States, populations on the receiving end of police violence are often racialized and marginalized, with a low likelihood of mounting an armed struggle against the police and using their own tactics against them. It is telling that around at the same time colonial powers placed restrictions on the use of force against foreign soldiers, those same restrictions were not extended to police exercising uses of force on domestic civilian populations.

Congress ratified the Hague Declaration in the early twentieth century, incorporating this prohibition on the use of dum-dum bullets against enemy combatants into U.S. law. Though they were deemed wantonly cruel and outlawed in war, dum-dum bullets have become the ammunition of choice for many police departments in the United States. Law enforcement typically puts forward two arguments justifying the use of hollow point rounds: "First, they maximize the chances that, once hit, the suspect will be put out of action and instantly prevented from firing back. Second, they minimize the risk that the bullet will pass through the body of the suspect and wound or kill a bystander."¹⁰⁹ Advocates of hollow point bullets may provide hypothetical situations, like a suicide bomber or hostage-taker, in which the instant death caused by a hollow point bullet is necessary and justified because of its protection of innocent lives.¹¹⁰ However, as the round of choice for most police departments, these hypotheticals very rarely play out in such a way.

¹⁰⁸ Mégret, "From 'savages' to 'unlawful combatants,'" 277.

¹⁰⁹ Samuel Longuet, "Permitted for law enforcement purposes but prohibited in the conduct of hostilities: The case of riot control agents and expanding bullets," *International Review of the Red Cross* 98, no. 901 (2017).

¹¹⁰ Wiesener, "Tear Gas," 83

Given the fact that U.S. citizens on the receiving end of hollow point bullets are disproportionately people of color, other justifications may be at play. Today's justifications echo those made by Ardagh, the British delegation at the Hague Convention. At the time, one article in *La Semaine Médicale* responded to British arguments for the use of dum-dum bullets against colonial subjects, decrying the existence of “two principles of philanthropy, two weights, and two measures, one applied to civilized peoples, the other to barbarian races and distant countries’.”¹¹¹ These “two principles” are equally deplorable in any context, and even hollow point bullet manufacturers seem to be aware of it. In 1970, when asked about the use of ammunition against mostly minority communities at home while banned in war abroad, Lee Jurras, who developed a popular hollow point bullet for Super Vel Ammunition, said, “This is a touchy subject. A lot of minority groups might object. We like to keep the discussion within law enforcement circles.”¹¹²

In addition to ammunition, U.S. civilian police are also less constrained in their use of riot control agents, such as tear gas and pepper spray. Like dum dum bullets, riot control agents came under the scrutiny of international humanitarian law advocates in the early twentieth century. In 1925, the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (Geneva Protocol) treaty prohibited “the use in war of asphyxiating, poisonous or other gases.”¹¹³ The 1997 Chemical Weapons Convention, to which the U.S. and an additional 192 countries are party, considers tear gas and pepper spray as “riot control agents,” and bans their use in war “for the sake of humankind.”¹¹⁴

¹¹¹ Mégret, “From ‘savages’ to ‘unlawful combatants,’” 276.

¹¹² “Internationally Outlawed Bullets Used by American Police,” *Triton Times*, February 13, 1970, https://library.ucsd.edu/dc/object/bb62127503/_1.pdf.

¹¹³ Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 94 LNTS 65, 17 June 1925 (entered into force 9 May 1926).

¹¹⁴ Daft, “Tear gas and pepper spray are chemical weapons.”

Arguably already banned under the foundational prohibition on weapons and tactics that “cause superfluous injury or unnecessary suffering,” riot control agents and other chemical weapons are banned in war for a number of reasons. Although police departments and other institutions consider them “non-lethal,” many riot control agents can cause severe or lethal injuries, depending on a number of factors, including concentration and bodily location of the exposure, as well as the overall health of the person exposed.¹¹⁵ And, before their prohibition, “riot control agents were notoriously used as the first chemical weapons in modern warfare and carry the danger of escalation, including the use of more dangerous substances.”¹¹⁶ One example is the trenches of World War I, during which soldiers affected by riot control agents became “an easy target for enemy firearms, regardless of their being *hors de combat*.”¹¹⁷ Like other chemical weapons, riot control agents also violate a key tenant of just war principles: discrimination. Weapons used in war must discriminate between combatants and non-combatants, or civilians. Airborne riot control agents can drift with the wind, causing indiscriminate suffering on anyone within range.¹¹⁸

Despite the international law prohibition on riot control agents, the reasons behind it, and the U.S. Centers for Disease Control and Prevention’s classification of riot control agents as poison, between May and October 2020 alone, U.S. domestic police forces used tear gas at least 175 times and pepper spray at least 148 times against overwhelmingly peaceful protestors.¹¹⁹ A specific exception for domestic usage allowed this to happen. Some scholarship suggests that “without an exception for riot control agents, countries would never have agreed to the Chemical

¹¹⁵ Wiesener, “Tear Gas,” 83.

¹¹⁶ Wiesener, “Tear Gas,” 83.

¹¹⁷ Wiesener, “Tear Gas,” 83.

¹¹⁸ Wiesener, “Tear Gas,” 83-4

¹¹⁹ Charlotte Godart, “A New Platform Maps US Police Violence Against Protesters,” Bellingcat, October 29, 2020, <https://www.bellingcat.com/news/americas/2020/10/29/a-new-platform-maps-us-police-violence-against-protesters/>.

Weapons Convention.”¹²⁰ As one scholar told the *Bulletin of Atomic Scientists*, “This was the catch, which is that countries reserve the right to effectively use chemical weapons on their own people.”¹²¹

Even in cases where the military and police use the same weapons or military equipment, the police use these military-grade weapons with much less oversight and accountability than the military itself. Oversight and accountability with regard to the use of deadly weapons are a distinct form of constraints on the use of lethal force. And yet, even in this regard, the police are less constrained. The 1033 and 1022 Programs that allow police to acquire and maintain these weapons do not provide “any regulatory oversight of police departments and the manner in which they use military equipment.”¹²² Generally, oversight of this equipment from the most powerful military in the world consists only of “inventory checks and random field visits to ensure the inventory is secure.”¹²³ Any policy beyond that governing the use, maintenance, or storage of 1033 military equipment is largely absent.

Tactics

In addition to weapons deemed too brutal for war, domestic police also use tactics outlawed under the law of armed conflict. One example is perfidy, defined as acts “inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence,” which is prohibited by the Additional Protocol (I) to the Geneva Conventions,

¹²⁰ Matt Field, “Why is tear gas banned in war but not from peaceful protests?,” *Bulletin of the Atomic Scientists*, June 4, 2020, <https://thebulletin.org/2020/06/why-is-tear-gas-banned-in-war-but-not-from-peaceful-protests/>.

¹²¹ Field, “Why is tear gas banned in war.”

¹²² Rahall, “Green to Blue Pipeline.”

¹²³ Rahall, “Green to Blue Pipeline,” 1792.

1977.¹²⁴ Despite this prohibition, U.S. police often engage in forms of perfidy, including undercover operations and other methods of trickery.¹²⁵ In 2007, for example, the U.S. Federal Bureau of Investigation (FBI) authorized its agents to pose as a reporter for a news agency, the Associated Press (AP), to investigate high school bomb threats.¹²⁶ During the sting operation, FBI agents created a fake online news article and sent the link to a student who was a suspect in the investigation. By clicking the link, the student unknowingly downloaded malware that allowed the FBI to surveil and ultimately arrest him. The AP only learned of the episode seven years later thanks to documents released under a Freedom of Access to Information request, after which it wrote a letter of protest to the Justice Department. The letter claimed that the FBI “undermined the most fundamental components of a free press—its independence.”¹²⁷ In his response letter to the *New York Times*, then FBI Director James Comey defended his agency’s actions, and stated simply, “We do use deception at times to catch crooks, but we are acting responsibly and legally.”¹²⁸

Section V: Conclusion

As this paper has demonstrated, the separate legal worlds dictating the use of force for police officers and soldiers make little sense in the context of police militarization and the breakdown of the military/police dichotomy. Fewer constraints on police use of force, while

¹²⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/470-750046?OpenDocument>.

¹²⁵ Laura Smith-Spark, “FBI director defends impersonation of AP reporter,” *CNN*, November 7, 2014, <https://edition.cnn.com/2014/11/07/us/fbi-associated-press-deception/index.html>.

¹²⁶ “Deceptions of the F.B.I.,” *New York Times*, October 31, 2014, <https://www.nytimes.com/2014/11/01/opinion/deceptions-of-the-fbi.html>.

¹²⁷ Karen Kaiser, “Letter to Attorney General Eric Holder,” *Associated Press*, October 30, 2014, https://corpcommap.files.wordpress.com/2014/10/letter_103014.pdf.

¹²⁸ James B. Comey, “To Catch a Crook: The F.B.I.’s Use of Deception,” *New York Times*, November 6, 2014, https://www.nytimes.com/2014/11/07/opinion/to-catch-a-crook-the-fbis-use-of-deception.html?ref=opinion&_r=1.

problematic in itself, grow even less coherent as the line between police and military blurs. What then, should scholars and policy analysts make of this legal incoherence?

The few scholars who have researched similar phenomena reach a number of opposing conclusions. For example, Rachel Tecott and Sarah Plana, who wrote an article for the *Washington Post* called “Maybe U.S. police aren’t militarized enough. Here’s what police can learn from soldiers,” use “militarized” as synonymous with what they view as positive aspects of the military vis-a-vis the police, namely more rigorous training and legal accountability for the misuse of force.¹²⁹ To their argument, the police should be subject to more constraints, and could even learn from the military in terms of training in de-escalation and more robust forms of legal accountability. However, Tecott and Plana seem to interpret the militarized domestic police force as a *fait accompli*. Instead, police forces should demilitarize in all senses of the word, whether by restricting access to military-style weapons and other weapons and tactics banned in war, which would reduce the opportunity to exercise lethal force in the first place.

For Daniel Loehr, two insights follow the claim that when contemplating lethal force, the president (who serves as a proxy for the military in this legal analysis) is subject to more constraints than are police officers: “First, lethal force is an exception to the assumed rule of broader rights and limited government in the crime paradigm. Second, the relative utility of ex ante regulation for the President provides yet another reason to consider using ex ante regulation for the police.”¹³⁰ Given the problematic nature of a militarized police force, modeling police accountability on the military or vice versa seems inappropriate. Instead, further research is

¹²⁹ Rachel Tecott and Sara Plana, “Maybe U.S. police aren’t militarized enough. Here’s what police can learn from soldiers,” *The Washington Post*, August 16, 2016, <https://www.washingtonpost.com/news/monkey-cage/wp/2016/08/16/maybe-u-s-police-arent-militarized-enough-soldiers-are-better-trained-to-deescalate/>.

¹³⁰ Loehr, “Lethal Force.”

needed to evaluate the feasibility of other democratic constraints, such as community review boards or other tools wholly unavailable to the military.

By demonstrating the legal incoherence of holding a militarized police force accountable only to domestic non-military law, this research project suggests a wholesale reconsideration of the legal justifications for the use of force at home and abroad. Such a reconsideration undoubtedly requires further research beyond the scope of this project. Further research could look at similar phenomena in other police forces across the world, many of which are even less constrained than in the U.S.

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