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Soldier, Officer, Citizen: Applying Just War Theory to Police Use of Force

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A hallmark of law in the United States is the concept of due process or equal treatment under the law. Police are the gatekeepers of due process, the common initiators of the rules of law in civil society. A police officer's badge is the emblem of a shield, meant to protect and serve citizens from violence and crime. Yet today, so many citizens feel their shield is absent, if not weaponized against them. This perception of malfeasance has become evident in the waves of outrage and protest that followed high profile applications of coercive and lethal force by the police in recent years¹. One need only look at the armor and munitions police deploy in the searches of citizens² and on perimeters of protests³ as evidence that the tools of the police mission are converging with those of a soldier's mission. Such tools and tactics of the soldier are typically designed to treat people as potential combatants rather than citizens entitled to due process; yet we do not ask the same combat discipline of police as we do soldiers. Considering that these arsenals and tactics have been adopted in the advent of policy pushes coined as the War on Drugs and War on Terror, it stands to reason that police officers and citizens will benefit from a more comprehensive theory regarding justification of force. In this paper, I argue that the just war tradition, modified for domestic policing, can fulfill this need and solve the issues the citizens and activists have with police use of force. The following paper shows that under just war principles, the current ease police offers have in applying force to citizens cannot be justified, that certain threats posed to police cannot justify lethal force, and current principles governing the use of force ultimately undermine the police mission. I offer an introduction to Just War Theory and explain benefits of just war principles in Section I, modify them into just force principles appropriate for domestic policing in Section II, justify why said principles are accurate to apply to police as opposed to other sets in Section III, apply said principles to certain case studies and theory of policing in Section IV, and finally deal with potential objections that can be made to this application in Section V.

I. The Just War Tradition and its principles

The history of Just War Principles (JWP) roughly starts at the beginning of the Roman Empire. One of the first JWP theorists was the Stoic philosopher Cicero, who in 44 B.C.E. outlined the two main domains of JWPs: *jus ad bellum*, covering the initiation of war and *jus in bello*, constraints for the practices in war⁴. Theologian philosophers Augustine in the 5th century A.D. and Aquinas in the 13th century also expanded upon

¹ Daniel Funke and Tina Susman, "From Ferguson to Baton Rouge: Deaths of black men and women at the hands of police," *Los Angeles Times*, July 12, 2016, <http://www.latimes.com/nation/la-na-police-deaths-20160707-snap-htmlstory.html>.

² American Civil Liberties Union, *War Comes Home: The Excessive Militarization of American Policing*, (New York: ACLU Foundation, 2014), <https://www.aclu.org/sites/default/files/assets/jus14-warcomeshome-report-web-rel1.pdf>.

³ Marlena Baldacci, Emanuella Grinberg, and Holly Yan, "Dakota Access Pipeline: Police Remove Protesters; Scores Arrested," CNN, last modified October 27, 2016, <http://www.cnn.com/2016/10/27/us/dakota-access-pipeline-protests/>.

⁴ Wendy L. Hicks, "Constraints in the Police Use of Force: Implications of the Just War Tradition," *American Journal of Criminal Justice* 28, no. 2 (2004): 256.

Cicero's work on just war⁵. Notably, Aquinas helped set in place the specific criteria that would fall under the two domains Cicero developed.⁶

<i>Jus ad Bellum</i> (before war)	<i>Jus in Bello</i> (during war)
Just Cause	Discrimination/non-combatant immunity
Just Intent	Proportionality
Legitimate Authority	Necessity
Last Resort	

Throughout the centuries, many nations in the Western world used these principles as the basis for justifying war and leaders, philosophers, and jurists have continuously evaluated wars under this theory. This theoretical tradition has been around for so long that it has been enshrined in the international law of the United Nations Charter, Hague, and Geneva Conferences⁷. Even the field manuals of the US Armed Forces consider themselves bound to *jus in bello* considerations outlined in the Geneva conventions⁸.

Traditional *jus ad bellum* principles

The principles of *jus ad bellum* are the criteria for the initiation of a war typically applied by one state to another. Lackey defines war as “a controlled use of force, undertaken by persons organized in a functioning chain of command...the use of force in war must be directed to an identifiable political result”⁹. The bulleted list below provides the principles one actor has to fulfill in order to justify the initiation of war.

- Just Cause: the guiding and underwriting principle, namely that defense against aggression is the only cause in which war is justified.
- Competent Authority: this principle determines who can actually go to war and how. It prescribes that for a war to be just, a nation must initiate war via the proper authority and processes and do so publicly. So in the US, this would be fulfilled by congress making a declaration of war as specified in the Constitution. Traditionally, the only competent authorities are nation-states or political parties within such states that can maintain a military force¹⁰.
- Right Intention: this principle states that the motive for war must be “right and for the sake of the right.”¹¹ In other words, this rule is meant to eliminate certain secondary or tertiary motivations to war, such as racial hatred, potential spoils, and revenge.
- Last Resort: this principle states that “a war cannot be just unless the evil that can reasonably be expected to ensue from the war is less than the evil that can be reasonably expected if the war is not fought.”¹² This is also called the principle of

⁵ Hicks, "Constraints" 256-260.

⁶ Hicks, "Constraints," 258.

⁷ Douglas P. Lackey, "Just War Theory," in *Ethics of War and Peace* (Upper Saddle River, NJ: Pearson Education Inc., 1989), 263-264, 266-268. (Page #s in Applied Ethics 5th Ed)

⁸ Lackey, "Just War Theory," 268. Cite the original sources

⁹ Lackey, "Just War Theory," 263.

¹⁰ Such things as terrorists as competent authorities are controversial in contemporary discussion of the theory

¹¹ Lackey, "Just War Theory," 264

¹² Lackey, "Just War Theory," 267.

proportionality, reasonable success, or necessity. It demands every other step be taken before resorting to war and that it will be “winnable.”

These must all be fulfilled for a war to be considered justified; the failure to execute any aspect of these makes the war illegitimate on the part of the state. For example, if Cuba made an unannounced armed incursion into Florida, the aggression would justify American retaliation (just cause); however, the other principles must be accounted for. In order for competent authority to be fulfilled it has to adhere to a nation's established rules to war. The governors of Georgia or Florida could not declare war on Cuba because it takes an act of Congress to initiate war against the intruders. Right intent constrains the mission of the war: the right intent would be to repel the Cubans back to their nation. Continuing the war to annex Cuba, whether for its tobacco fields or retaliation over the Bay of Pigs, violates the justification to war. Last resort gets fulfilled by exercising other options to repel the invaders, such as the US encouraging the United Nations to enact sanctions that will impoverish Cuba. Last resort also means setting conditions for "winning." Say the US has fulfilled all these criteria but estimates it cannot win a war in Florida without destroying at least half its infrastructure and x thousand citizens. It is at this point the proportional calculus may¹³ prove the war unwinnable.

Traditional *jus in bello* principles

The principles of *jus in bello* are the criteria that govern actions within a war, typically applied to the military officials. They are as follows:

- Discrimination: this principle prohibits the targeting of noncombatants.
- Proportionality: the scope of this principle is different from its *jus ad bellum* counterpart in that soldiers may only use force proportional to the end they seek.
- Necessity: this principle states that collateral harm is permissible in the pursuit of military objectives only when the least harmful means are chosen.

These principles must also be fulfilled during the course of the war for it to be justified; failure to uphold these despite complying with *jus ad bellum* considerations still makes the war unjustified. A contemporary illustration of *jus in bello* principles at work is troops securing a village so that friendly transport can travel unmolested. The "target" village is along a well-traveled supply route within or near enemy territory. All intelligence has indicated that the majority of the village is civilian farmers but there may still be combatant holdouts hiding out. If the troops fail to exercise basic discrimination, they may turn the entire town hostile against their efforts. If they discover enemies within the village, they must do their best to protect the civilians and their property with proportional force. If the enemy takes a civilian building for defensive shelter, simply calling an air strike or heavy ordinance to destroy it would be disproportional. If the enemy is trying to blend in with the civilian population, troops must use the minimal amount of force necessary to "flush them out;" shooting into or above a crowd to see who retaliates is an unnecessary application. These active principles are meant to ensure the agents are using their force in a discriminate, proportional, and justifiable manner against enemy agents. When a soldier ignores these they put their nation's mission in danger.

¹³ I say "may" because different perspectives on proportionality that are addressed later in this section.

It should be noted that both last resort and proportionality each have subjective and objective variants regarding how they are weighed or considered. The following comes from Thomas Hurka:

An objective version assesses a war or act in light of its actual effects, that is, the relevant good it actually produces and its actual destructiveness; a subjective version does so considering only an item's likely effects given the evidence available to the agents at the time.¹⁴

While both variants must make similar probability estimates they differ enough so that sometimes the results can differ i.e. this war or act in war was objectively proportionate while subjectively disproportionate or vice versa. For the purposes of this paper I will be leaning heavily on objective proportionality and I do this for two reasons. First, the conduct of law enforcement should aim for objectivity so that an officer's actions are right and consistent throughout their role in any particular case. Second, a subjective reading hinges on the "fog of war" concept, otherwise known as situational unawareness. As a preliminary concern, I do not believe fog of war concepts should be applicable to a just force argument because they are justifications to force born out of ignorance and supposition. This concept of fog of war and subjective readings shall be revisited in later sections.

IIa. Just War to Just Force

In this section I pivot from Just War Principles to what I call Just Force Principles (JFPs). JFPs translate JWPs to the context of the police force and explain when force is justified against civilians. First, I define police force and formulate the Just Cause JFP. Second, I argue that because police have a greater agency than soldiers, they must be held to an interdependent reading between *jus ad bellum* and *jus in bello* domains. Third, I examine some benefits of the Just Force Principled Policing. The final part of this section will refine the language of the remaining just war principles into one more fitting for JFPs.

The Embodiment of Force, the basis of just cause

The police are the gatekeepers of the legal system, and much of their agency is related to compelling cooperation with the system and enacting coercive force on those who oppose the system. The primary issue of a just force oriented theory is to determine what degree the actions of a police officer are force. Many departments use a force spectrum that starts with simple interaction¹⁵, and escalates through verbal command, passive techniques (handcuffs), chemical agents, active physical techniques, and ending with lethal force¹⁶. This spectrum, while seemingly simple, has developed much context over years of litigation and judicial review so as to define most actions of police interaction as force. Take the Supreme Court decision of *Rodriguez v. United States*

¹⁴ Thomas Hurka, "Proportionality in the Morality of War," *Philosophy and Public Affairs* 33, no. 1 (January 2005): 38, doi:10.1111/j.1088-4963.2005.00024.x.

¹⁵ It should be noted for the purposes of this paper simple interaction is not considered force despite its codification into use of force protocols

¹⁶ Hicks, "Constraints," 266.

(2014) as an example of the potential nuance to force. The petitioner, Rodriguez, was stopped for driving on the shoulder, a violation of state law. After the officer checked identification and issued a warning to the offender, he asked if his search K-9 could walk around the car. Rodriguez refused and the officer held him there for back up to arrive. Once back up arrived the K-9 was deployed and alerted a presence of methamphetamine in the vehicle. Rodriguez's attorneys argued that the stop had been unlawfully extended to conduct the search, and their client had already been detained (held) for the purposes of the stop. The Supreme Court affirmed this and held that "absent reasonable suspicion, the police extension of a traffic stop in order to conduct a dog sniff violates the Constitution's shield against unreasonable seizures."¹⁷ In essence, the court said the police had completed their mission once the warning for the initial offense was issued and holding Rodriguez was unreasonable and unjustifiable force. Even simple actions by police, such as holding a citizen for an additional 7-8 minutes beyond typical due diligence (as in the Rodriguez case), can constitute unreasonable force.

Another issue at hand when defining force is that not all agencies define force in the same way. A case in point is the comparative use of force policies of the Dallas Police¹⁸, Las Vegas Metro Police¹⁹, and the U.S. Customs and Border Protection(CBP)²⁰ agencies, which are seventeen, thirty-three, and one hundred seventeen pages respectively. Each of them deal with levels of control, force techniques, subject resistance, and weapon policies, but they all vary in the depth of their descriptions. While there are similar points between the Dallas and Las Vegas police guides, they differ in key places. Las Vegas, for instance, lists three levels of control: Low Level, Intermediate, and Lethal force. Twenty-two "tactics" are split across these levels ranging from officer presence, handcuffs, K-9 deployment to high speed car maneuvers, and Firearm use. Dallas lists five levels of control: Officer Presence, Verbal Control, Empty Hand Control, Intermediate Weapons, and Deadly Force with catch-all terms for certain tactics like Soft Empty Hand Control (Pressure Points, Handcuffing) and exact terms for others like Electronic Control Weapon (ECW). Discrepancies arise when Las Vegas and US Customs say ECWs are considered intermediate force while Dallas puts ECWs under Empty Hand Control or the "resort to force" level. The discrepancies become more evident when Las Vegas uses sixteen pages to define every tactic it lists²¹, CBP splits deadly force and less lethal force into two chapters spanning twenty pages²², and Dallas spends eight pages on Pepper Spray and ECWs while physical holds and impact weapons together barely take up half a page²³. These are the documents used to define force for

¹⁷ SCOTUS, "Rodriguez v. United States," SCOTUS, last modified October 2014, https://www.supremecourt.gov/opinions/14pdf/13-9972_p8k0.pdf.

¹⁸ Dallas Police Department, "Dallas Police Department General Order: Force Continuum," Dallas Police Department, last modified March 6, 2015, <https://static1.squarespace.com/static/56996151cbced68b170389f4/t/569ad58a0e4c1148e6b1079b/1452987794280/Dallas+Use+of+Force+Policy.pdf>.

¹⁹ Las Vegas Metropolitan Police Department, "Use of Force," COPS Office: Grants and Resources for Community Policing, accessed February 20, 2017, <https://cops.usdoj.gov/pdf/Use-of-Force.pdf>.

²⁰ U.S. Customs and Border Protection, "Use of Force Policy Handbook," U.S. Customs and Border Protection | Securing America's Borders, last modified May 2014, <https://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf>.

²¹ Las Vegas Metropolitan Police Department, "Use of Force," 7-23

²² U.S. Customs and Border Protection, "Use of Force Policy Handbook," 17-37

²³ Dallas Police Department, "Force Continuum" Pepper Spray 4-7, ECW 12-15, Holds and Impact 8-9

these particular agencies, yet there is little consistency between their descriptions. This is not to say that the agents of these departments would be as disparate as their force policies suggest, but civilians looking for redress have only these to rely on.

Before I begin to transit to just cause and what reasonable force looks like via JFP I need to define basic force. For the purposes of this paper, force is defined as a physical coercive act beyond simple interaction. I define simple interaction as an officer conversing with a citizen, whether for investigative purpose or suspicion of a crime. If the officer believes to have enough evidence to arrest someone (for a crime that requires arrest) and the suspect surrenders willingly then we would say little to no force has been used. It is important to make the distinction of "simple interaction" because such simple interactions can make the difference and it complicates the mission of police to consider a basic inquiry as force. The distinction is also made to recognize that while police do have the capability to stop and question citizens, that capability be abused crossing into force. This abuse would be evident in cases where a citizen is not stopped for legitimate legal purposes but as a harassment tactic, maybe in retaliation for an acquittal or some other motive. Now that I have defined force its important to see what is justifiable force.

To better define reasonable police force at this stage we should look to the Just Cause principle. This principle states that defense against aggression is the only justifiable cause to go to war i.e. use force. When modifying the principle to policing there is a temptation to term "aggression" as the wholesale violation of law, since law encompasses all of what the police are trying to protect and serve. I argue that force can only be applied to laws pertaining to general security of life and liberty, which I will call protective laws. Examples of these include what the FBI calls index crimes: criminal homicide, rape, robbery, aggravated assault, burglary motor vehicle theft, and arson.^{24,25} These are crimes that all involve an aggressive party who aims to circumvent the security of general good. Therefore Just Cause as JFP will apply to the defense of protective laws as they are the laws that are broken by violent aggression and can deprive a victim of life and liberty. It should also follow that this is the underwriting principle of all following JFPs, and any deployment of force not in defense of a protective law fails to be justified.

Greater agency

Traditionally, what merits the demarcation between domains is how the structure of military command system is set up. Initiation of war is reserved to executive and legislative authority, for distinct mission parameters upon which the military hierarchy acts, attempts, and reports back to the executive for guidance should those parameters be threatened. According to traditionalist theory, there is a distinct firewall between the agents of initiation and the agents of conflict: soldiers are responsible and report to the officers of military command and not the legislative or executive force that authorized force. This is reinforced by the soldier's agency being restricted by military discipline; they are oath bound and contracted, trained and paid to live and act according to command. In essence, an active duty soldier is denied a complete civilian agency for the

²⁴ Federal Bureau of Investigation, "Uniform Crime Reporting Statistics," Federal Bureau of Investigation, last modified January 23, 2009, <https://www.ucrdatatool.gov/offenses.cfm>.

²⁵ Larceny-theft is also an index crime but I have removed it on the basis that it is described as theft "*not taken by force and violence or by fraud*" italics added for emphasis

purpose of the mission, as long as they are active they are not private citizens. This is in stark contrast to law enforcement: legislative power determines the mission of law, the enforcement agents then initiate contact based on suspicion of a crime. As evidence accumulates they are given greater latitude to pursue a violation of the law. Once the figurative trigger is pulled on a mission, soldiers will execute their orders and keep knowledge of the orders constricted to chain-of-command. Provided there is no evidence of *jus in bello* violations they will repeat this process. The police mission is to charge a civilian with criminal acts for which they have collected sufficient evidence for judicial review and potentially a civilian jury. Should the civilian resist the progression of due process, it falls on police to both initiate (*jus ad bellum*) and execute (*jus in bello*) a coercive force. This difference is the reason why principles from both domains should cross over for our examination.

The Moral Benefit of Just Force Principled Policing

When we discuss the benefits of JFP policing it is important to discuss just war's origins in morality. Many of the philosophers and theologians discussed previously were concerned with the horrors of war and how to reconcile them in a civil and moral framework. Cicero developed qualifications and justifications to war with a belief that within natural law a just war's primary purpose would be peace. Augustine believed that the waging of war was not evil in itself, but those who waged a noble honorable war for the common good would be just in their violence. Aquinas thought war was for two purposes, punishment of sin and rectification of wrong wrought on the common good. All of these early progenitors thought that violence in warfare must have some underlying moral components to be justified. Thus, when we talk about just force we are, in a way, talking about morality constraining violence to ultimately prevent more violence.

The re-centering morality in police use of force is the advantage of a JFP approach to policing. Often, when the public perceives excessive force from agents of the law, the typical agency's response is something along the lines of "Suspect resisted obedience, officer followed training and acted within confines of the law." This response is problematic because police represent the confines of the law. How well or poorly they do their jobs sets these confines, accidental killings and excessive application of force devalues law because such harms collapse due process. To a certain extent this is understandable because moral superiority has great potential to come into play when one pledges to be an agent of the law. There is also the basic dynamic of suspicion in police work as the primary justification to further embroil one in the justice process. These two aspects of police work lend themselves to a conflation of moral superiority and legal suspicion. Such a conflation would lead to what we might call the improper embodiment of law, in which law enforcement agents tend to view themselves as the law proper, rather than an agent subservient to law. Thus, when we arrive at another controversial application of force, the police response (possibly without outright recorded evidence to the contrary) signifies the moral superiority of suspicion: suspect resisted obedience to the law, officer as law upheld practice of law, officer properly upheld the confines of law. JFP policing seeks to remedy this by using JFPs, rather than suspicion and conflation that one's particular failure or lack of obedience to an agent is the same disobedience to the general good the law aims to protect. By definition, police are always dealing with some

form of disobedience of the law. JFPs help better define the conditions in which force is necessary, safe, and most importantly, justified.

II.b The Principles of Just Force

Jus ad bellum (to initiate force) principles

Just Cause

Just Cause is the underlying principle in determining both when war is justified and when police force is justified. In a police context, it applies to protective laws meant to secure the life and liberty of citizens. This principle means that for force to be initiated, the crime has to pose a threat to a particular victim's life or liberty. Preventative or preemptive force is typically unjustifiable as JFP. The only possible exception is in cases where there is an established preponderance of evidence that the specific target has committed and is willing to commit further violence. I will call this the manhunt exception, in which force can be deployed to prevent the further escape of an individual who has either already been sentenced in violation of a protective law or a suspect in the phase of apprehension to be formally charged for a protective violation. It should be stressed the manhunt exception is for people still willing to commit violence, if a suspect is cooperative in surrendering then the exception does not apply.

Right Intention

This principle states that the intent of force must be precisely for the defense of protective law. Should any other motive be found as the primary intention to force then that force is unjustified. Prohibited intentions would include retaliatory force applications in response to an officer injured or killed on duty. Also prohibited is shock tactics like making an example out of a particular suspect, or a widespread drug raid in a neighborhood because of a high profile overdose. These may be reasons for police to increase their enforcement efforts regarding a particular crime, but such reasons can never necessitate a relaxed resort to force or an increased baseline of force.

Competent Authority

This is the professional officer principle, which separates officers from conventional citizenry and defines what they owe to the citizenry. An officer of the law is someone who pledges an oath to protect their specific community, who typically wears a uniform to make their power and responsibility known, and engages in a continuous defensive effort of their community. It is under this principle that police identify themselves and the relevant crime during an arrest. Also, it should be noted that a competent police authority also keeps proper and complete records of force involved between their agency and their community. This last portion is for the citizens' right to examine the competence of their authorities to establish force for positive achievable results. Police cannot be considered competent if they cannot publicly account for all uses of force they have applied to their community.

Last Resort

This principle states that all other methods to subdue a suspect must be reasonably employed before a resort to force. If an officer reasonably believes a suspect can be "talked down" from their actions they must attempt to do so before using force. While it might be strange to consider it proportional, a general threat of force can also be considered as an attempt to get a suspect to stand down before force is used. This is proportional in that it notifies the suspect that should these more diplomatic efforts fail to gain acquiescence, then force as the last resort will be applied. Reasonability is paramount in the application of this principle: obviously a man about to plunge a dagger into someone else can reasonably be expected to have defensive force used against him. One could say this disadvantages the mentally unfit or disabled but if an officer can discern such mental states and reasonably believe they can protect the potential victim by extending the confrontation until a specialist comes in, they should.

Should all these principles be fulfilled then an officer is obliged to consider jus in bello principles before they are permitted to use force. Should they be able to fulfill all those principles they will determine the extent, degree, and focus of force will be justified by the following principles.

Jus in bello (using force) principles

Discrimination

This principle prohibits the targeting of any civilians not suspected in the violation of a protective law. This means that force can only be enacted upon the suspect who has gone through the jus ad bellum justification. Each person who may become further involved must be evaluated separately and clear all principles.

Proportionality

This principle states that an officer may only use force proportional to the force a suspect threatens. At the beginning of a force application, an officer can only deploy the least amount of force to attain a given end. If a single suspect is unarmed but uncooperative, then after a warning, the officer would engage in physical altercation to subdue the suspect. On a larger scale this principle allows lethal force in an active shooter situation, or less lethal²⁶ force in a riot situation. This also means the force application scales up in an asymmetric interaction if two suspects were facing a single officer and down if two officers were facing one suspect. This principle, when applied to one-on-one unarmed interactions, is physically agnostic. Basic physical attributes of the officer and suspect should not influence the force application. Professional officers are expected to be trained in hand to hand combat and to be physically fit regardless of base stature: those who are not fit and use such physical "disproportionality" to justify greater force are unfit to be agents of the law.

Necessity

²⁶ Less lethal in this case referring to the class of weaponry or ammunition that if used properly can subdue a person but has the potential to become lethal in certain cases i.e. flashbangs, bean bags, pepper shells, tear gas.

While the just war iteration of this principle states that collateral harm is permissible in pursuit of a military objective only when the least harmful means are chosen, this is not true of JFP. Necessity as just force cannot accept collateral harm to people because no criminal, no matter how severe, can be brought to justice at the cost of innocent bystanders. So necessity as JFP aims to reduce the application of force as it applies to citizens proximate to the suspect. If there is a situation in which the suspect could be better apprehended with minimal force then that is the more justifiable option. If there is a situation where the potential harm to bystanders can be negated, then that is the more justifiable option. For example, if the police have the evidence to arrest a drug dealer for violent crimes but their house is filled with kids every evening, the necessity principle dictates that the attempt should be made at a time when children are not present.

These are the just force principles I defend in the remainder of the paper. They are roughly equivalent to their just war counterparts and the changes made are those with respect to the different setting in which law enforcement engages in their mission as opposed to the military. All further references to the names of these principles will assume the just force stance described above unless noted otherwise.

III. Justifying Just Force Application

The importance of JFPs can be justified in a few ways, which I explore in this section. The first will be a historical view in which I show that similar principles were used in the establishment of modern police. Second, I will examine some key Supreme Court cases that have used criteria similar to JFPs in defining police force. Finally, I will show how the policies of the domestic "wars" against Drugs and Terror push the police closer to military style tactics that necessitate the more rigorous JFP application. The examination of all these areas will show the inherent utility of these principles but also demonstrate that without the interacting context of other principles, they fall short of a consistent force usage theory.

The Peel Principles

As mentioned before, a just war philosophy has existed for millennia prior to the existence of modern policing. For hundreds of years, many people enforcing order domestically or abroad were soldiers or knights beholden to sovereign power. The first state backed police force was established in Paris, France 1667 A.D. when King Louis XIV established the office of lieutenant general of police, seventeen centuries after Cicero coined Just War domains. Modern Policing and many of its hallmarks can be credited to Sir Robert Peel's establishment and passing of the Metropolitan Police Act in London 1829²⁷. This was done to consolidate the inconsistent organizations, private and public, policing around London the prior century. To assure the citizenry that the police

²⁷ Mayors Office for Policing and Crime, "The Metropolitan Police How It All Began - Metropolitan Police Service," Home - Metropolitan Police Service, accessed November 21, 2016, <http://content.met.police.uk/Article/The-Metropolitan-Police-how-it-all-began/1400015336362/1400015336362>.

were there for the public good, Peel had nine principles of Law Enforcement attributed to him:

1. The basic mission for which police exist is to prevent crime and disorder as an alternative to the repression of crime and disorder by military force and severity of legal punishment.
2. The ability of the police to perform their duties is dependent upon *public approval* of police existence, actions, behavior and the ability of the police to secure and maintain *public respect*.
3. The police must secure the willing cooperation of the public in voluntary observance of the law to be able to secure and maintain public respect.
4. The degree of cooperation of the public that can be secured diminishes, proportionately, to the necessity for the use of physical force and compulsion in achieving police objectives.
5. The police seek and preserve public favor, not by catering to public opinion, but by constantly demonstrating absolutely impartial service to the law, in complete independence of policy, and without regard to the justice or injustice of the substance of individual laws; by ready offering of individual service and friendship to all members of society without regard to their race or social standing, by ready exercise of courtesy and friendly good humor; and by ready offering of individual sacrifice in protecting and preserving life.
6. The police should use physical force to the extent necessary to secure observance of the law or to restore order only when the exercise of *persuasion, advice and warning* is found to be insufficient to achieve police objectives; and police should use only the minimum degree of physical force which is necessary on any particular occasion for achieving a police objective.
7. The police at all times should maintain a relationship with the public that gives reality to the historic tradition that *the police are the public and the public are the police*; the police are the only members of the public who are paid to give full-time attention to duties which are incumbent on every citizen in the intent of the community welfare.
8. The police should always direct their actions toward their functions and never appear to usurp the powers of the judiciary by avenging individuals or the state, or authoritatively judging guilt or punishing the guilty.
9. The test of police efficiency is the *absence* of crime and disorder, not the *visible evidence* of police action in dealing with them²⁸

A quick overview of these outline some rough analogs to just war/force principles. P1²⁹ is analogous to the just cause for police force. P5, P8, P9 trace prescriptions for what can be considered right intentions for police and their work: the phrase "never appear to" in P8 suggests that even the public perception of extra-legal tactics is bad for police. P4 and P6 have strains of both last resort and proportionality in them by noting proportionality in relation to public cooperation and when an individual refuses "persuasion, advice and warning." Necessity is also established in P6 in the phrase, "should use only the minimum degree of physical force which is necessary." Within six of the Peel principles there exists some analog to five of seven just force principles; however it is in ascertaining the remaining discrimination and competent authority JFPs where Peel principles become problematic.

One of the attractions of the Peel Principles is that they outline a dynamic that empowers community policing. However, that dynamic fails the more specific use of force context of JFP. This dynamic reveals itself when we look for principles resembling discrimination and competent authority. When looking at the nine Peel Principles as a whole, six of them explicitly mention the public and establish relation functions between

²⁸ Robert Peel, "Sir Robert Peel's Principles of Law Enforcement 1829," Durham Constabulary, last modified 1829, https://www.durham.police.uk/About-Us/Documents/Peels_Principles_Of_Law_Enforcement.pdf. *italics are from original text*

²⁹ Shorthand reference to principles P1 = Peel Principle 1, P2 = Principle 2 and so on

public and police. Competent authority and discrimination become complicated because if we take these six public Peel Principles to describe what makes police power competent and forceful, there are quite a few different public definitions to contend with. First is P2, which says police ability is dependent on "*public approval*" of police existence and their ability to secure "*public respect*." Then P3 specifies *public respect* be secured through "willing cooperation of the public in voluntary observance of the law". P4 states this cooperation deteriorates proportional to the necessity of force and compulsion. Three principles by themselves set up a rudimentary formula for competent authority but structurally set up a negative feedback loop based on their existence to detect those who do not cooperate and coerce them to justice.

The problem is further complicated in P5 when its distinction between "public favor" and "public opinion" and preserving public favor entails "impartial service to the law" independent of policy and the substance of laws. P5 makes impartiality difficult when police must offer service, friendship, courtesy, good humor, and ready sacrifice in protecting life. While all of these are what we should expect from police, it is hard to differ from public favor and opinion, especially in the case when the public has a right to protest policy and the substance of a law. P7 further confuses the matter, stating police relations should "give[s] reality to the historic tradition that *the police are the public* and *the public are the police*". P7 illustrates the symbiotic truth of a functioning justice system, but as a systemic premise it blows any chance at developing a criterion for discrimination. Furthermore, it makes the equation for competent authority a complex balance of courting public approval, respect, favor, and perception. So while the Peel Principles illustrate the intuitiveness of JFPs, their scope is too wide to make any sort of consistent force application theory superior to them.

The Supreme Court Principles

The next place we can look to justify JFP application is in rulings from the US Supreme Court and their use of similar criteria. For example, we can see the Just Cause principle at play in the ruling of *Tennessee v. Garner* (1985). Responding on a potential "proowler" call, Memphis police responded to a woman who indicated she had heard a break in the house next door. Upon investigating the back of the house, Officer Hymon heard a door slam and saw someone run across the yard. At the edge of the yard, Officer Hymon cornered suspect Garner who was crouched against a 6-foot high chain link fence. Officer Hymon approached the suspect after reasonably determining Garner was unarmed and verbally commanded him to stop. Garner then attempted to climb the fence, at which point Officer Hymon determined Garner would escape if he did clear the fence. Hymon discharged his firearm to prevent escape and killed Garner. The law at stake was a Tennessee Statute that allowed an officer "all necessary means" to effect arrest after providing notice to arrest a suspect³⁰. The Supreme Court ruled against the application of force, saying that lethal force was an unreasonable seizure of the person in question, developing this standard:

Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm,

³⁰ SCOTUS, "*Tennessee V. Garner* (full Text) :: 471 U.S. 1 (1985) :: Justia U.S. Supreme Court Center," Justia Law, last modified March 27, 1985, <https://supreme.justia.com/cases/federal/us/471/1/case.html>.

deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given (*Tennessee v. Garner*, 1985, p. 12).

This language establishes that the rationale for lethal force must be that of a defensive nature in which the intention towards serious violence is obvious. This also further resembles Just Cause in that it stipulates the nature of justifiable defense is rooted in life and not property, as was case in *Tennessee v. Garner*.

Another decision which borrows similar just war criteria is the ruling of *Graham v. Connor* (1989). The Petitioner Graham, after feeling the onset of an insulin reaction, asked his friend to drive him to a convenience store for orange juice. Graham entered the store and upon seeing the line for the register promptly left. Outside officer Connor had witnessed Graham quickly enter and leave the store, so he made an investigative stop, and ordered the pair to wait while he found out what happened at the store. Responding Officers handcuffed Graham and ignored any attempts he made to explain his condition and reason for leaving the store. During this hold Graham was injured in multiple places and he filed suit, alleging the officers had used excessive force and violated his rights under the Fourteenth Amendment of the Constitution³¹. The court ruled against Graham, stating that his suit regarding excessive force needed to be evaluated by the "objective reasonableness" standard of the Fourth Amendment, rather being based in the "substantive due process" protection of the Fourteenth Amendment. The court then explicitly affirmed this four part test as the standard from which excessive force could be judged:

The factors to be considered in determining when the excessive use of force gives rise to a cause of action under 1983: (a) the need for the application of force; (b) the relationship between that need and the amount of force that was used; (c) the extent of the injury inflicted; (d) whether the force was applied in a good faith effort to maintain and restore discipline or maliciously, and sadistically for the very purpose of causing harm. (*Graham v. Connor*, 1989, p.391)

Common principles are at work here in these established criteria. Part (a) roughly mirrors necessity by establishing that there must be need for a force application and by implication suggests last resort in that the officer use alternative means before needing force. Part (b) is almost a word for word reading of proportionality, establishing the same relation between need and amount of force. Part (c) is the objective state that is used in conjunction with the other parts to determine excessiveness. Finally with part (d) the language clearly links to right intent in that force application must always be in good faith, but also can be read as a last resort constraint in that a malicious or sadistic force application cannot be one of last resort. Similar criteria and restrictions on force application are enshrined in this supreme court decision.

While the four part test set in *Graham v. Conner* (1989) uses principles similar to JFP, it also sets up a dilemma regarding proportionality in setting another standard. This standard is conveyed in the phrase, "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."³² It is here that standard of evidence meriting use of force is ultimately up to the situation the officer is in at the time, or what was earlier referred to as a subjective reading of proportionality. The considerations must be according to the evidence at the time, yet the language of part(c) in the four part test is objective as to "the

³¹ SCOTUS, "Graham V. Connor :: 490 U.S. 386 (1989) :: Justia U.S. Supreme Court Center," Justia Law, last modified May 15, 1989, <https://supreme.justia.com/cases/federal/us/490/386/>.

³² SCOTUS, "Graham v. Connor." 490 U.S. 396

extent of injury inflicted". This may create a dilemma for JFP as formulated in this paper because of the focus on objective readings of proportionality for the theory.

This dilemma illustrates the asymmetry that has to be resolved in the translation of Just War to Just Force. In Just War a common precept is that soldiers, by engaging in a military command structure, forfeit their right to life, e.g. are liable to be killed in acts of war. War, justified or unjustified, still has symmetry of agency between opposing militaries. With Just Force we must determine the agencies involved in a civilian population. However, officers of the law are not immersed in some theater of conventional lawlessness like a soldier may be deployed in. Officers do have right to life, but it must be argued here that right does not supersede that of citizens, guilty or innocent. That is not to say that under JFP police cannot rely in what they believe to be proportional on the scene, but is a reminder that police actions, including applications of force, are ultimately validated and justified by the completion of lawful due process.

The similarities of these principles matters in that, through other means, the justification of violence arrived at similar intuitions. While just war principles were developed for macro scale operations of violence, these legal analogs were arrived at examining micro scale instances of violence. This indicates is that there is a common intuition regarding the justifications to violence for the better good. However, the similarity ends by virtue of how these legal principles came about. Because these principles have been arrived at through cellular instances of violence and certain cases have developed certain principles they lacks the systemic unity to perform a consistent just force calculus. In other words, other legal precedents can be injected to alter the legal principle calculus. JFPs can still improve upon these principles because of their fragmented through litigation nature.

Domestic "Wars"

The next and possibly the most important reason to justify JFP application is the expansion of police powers and technology under the auspices of a war footing, thus meriting the application of rules governing war. The first of these is the "War on Drugs," a set of policy initiatives coined by President Nixon aimed at tackling the nation's drug problem with new laws and resources. These initiatives, which were echoed and enforced by the administrations that followed, have created a special class of crime that has allowed the police to adopt extraordinary force in the execution of warrants and subpoenas.

An example of such a policy is section 1208 of the National Defense Authorization Act (NDAA) of 1990, which allowed for the transfer of military equipment from the Department of Defense to federal and state agencies specifically for counter-drug use. This section would be changed to the better known section 1033 in the 1997 NDAA, which broadened language of enforcement agencies and their mission, with preference given to counter-drug and counter terrorism purposes³³. Such policies have had the effect of equipping almost every city with its own Special Weapons and Tactics

³³ Defense Logistics Agency, "1033 Program FAQs," Defense Logistics Agency, accessed November 22, 2016, <http://www.dla.mil/DispositionServices/Offers/Reutilization/LawEnforcement/ProgramFAQs.aspx>.

(SWAT) team, a paramilitary unit designed to handle hostage, barricade, or active shooter situations.

While SWAT teams existed prior to the War on Drugs, they were seldom used. At the beginning of Nixon's Drug War there were a few hundred drug related deployments of the teams each year. At the turn of the 21st century, there were over forty thousand drug raids a year across the country³⁴. The majority of SWAT raids are searches for drugs conducted by numerous armored officers equipped with military grade assault rifles and tactical grenades. Sometimes they arrive in military style vehicles, breaking down doors or windows to gain entry, and screaming at gunpoint to whomever is on the property, including instances in which children are known to be present³⁵.

Then there is the Reagan Administration's contribution to the War on Drugs, namely allowing any law enforcement agency to fold the spoils of any drug related seizure (otherwise known as civil asset forfeiture) into their coffers for any use. Congress granted that federal agencies could retain all proceeds from forfeitures and state and local agencies could retain up to 80 percent of proceeds.³⁶ These funds do not go back to the community in which they were seized but to the enforcement agency itself. Thus it increased the benefit to pursue these specific crimes through capture of resources. Just these two efforts have effectively created a force that looks very much like a roving army intent to reap the spoils of war regardless of the collateral damage. This behavior is in spite of the fact they engage many civilians who are innocent.

The tools of war combined with the Reagan-era incentives to use them have created a situation in which police more easily resort SWAT shock tactics whereas their necessity is questionable. According to a 2011-2012 ACLU study of 20 SWAT enabled organizations, "of the incidents in which officers believed a weapon would be present, a weapon was actually found at the scene in only 35 percent of cases"³⁷ further bringing into question the need for so many brute force raids. This data also indicates a convergence between police and soldiers that merits a JFP application.

The other main policy measure that illustrates the merit of a Just Force application is the "War on Terror". While this term typically refers to the international conflicts started in response to the 9/11 attacks, it also refers to a set of domestic policies meant to deter and detect plots within the country. A keystone policy of this War is the USA PATRIOT Act signed into law October 26, 2001, later reaffirmed in a modified format in the 2015 USA FREEDOM Act. This set of laws essentially created a more unconstrained set of enforcement powers, provided the civilian was under suspicion of terrorism, computer fraud or abuse, or being a foreign agent engaged in clandestine activities. PATRIOT also effectively changed the mission language of Foreign Intelligence Surveillance Court (also called FISA) to relax restrictions when foreign surveillance concurred with separate criminal investigations, making it easier to secure a secret warrant for electronic surveillance of a suspected citizen. Such policies also drove the development of new surveillance technologies such as the StingRay cell phone surveillance device, which is now widely used by federal and local law enforcement

³⁴ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010), 73

³⁵ American Civil Liberties Union, "War Comes Home". 2

³⁶ Michelle Alexander, *The New Jim Crow*, 77-78

³⁷ American Civil Liberties Union, "War Comes Home". 4

agencies³⁸. It is these policies that have pushed law enforcement officers closer to the role of soldiers and certain investigative capabilities closer to military style intelligence.

The War on Terror, much like War on Drugs, adds a new dimension to the mission of law enforcement, a special class that distorts due process and gives them better tools for their mission. What is troubling about these tools is that they were initially designed for military and intelligence objectives against known or suspected enemies of the state, not citizens of the state. Using these tools against civilians creates a greater potential for indiscriminate use, especially if an agency has to justify the purchase or acquisition of such tools. Combine the intelligence tools with military styled armor, munitions, equipment and the convergence of officer and soldier appears closer and closer. Such a convergence of roles and abilities necessitate a JFP examination to evaluate whether the advance

IV. The Just Force Application

In this section I apply Just Force Principles to certain cases relevant to police use-of-force. The first application is the Broken Windows theory of policing, its origins, and the controversial practices that spawned in its wake. The second case is the War on Drugs and its tactic of SWAT searches discussed in the last section as meriting these principles. Third will examine Department of Justice reports of Ferguson and Baltimore police and reevaluating some of their findings through JFP justification. Finally, stemming from the DOJ reports, I make the case that corporate interests of police currently come into conflict with the competent authority and by extension right intent principles. These examinations will show that JFPs can be applied to a wide variety of theory and tactics, prove such force practices to be unjustified and yet illustrate how and where practices can be improved.

Broken Windows

One of the theories under fire today is the concept of Broken Windows or order maintenance policing³⁹. The main source of Broken Windows policing comes from an article in the *Atlantic* by George L. Kelling and James Q. Wilson, about surprising results from a controlled experiment within a New Jersey police foot patrol program. While the foot patrols had not reduced crime rates in communities, the residents of those communities felt safer, believed crime was reduced, and had a higher opinion of police⁴⁰. Officers who performed the patrol reported higher morale and a better opinion of the citizens they served in return⁴¹. These results surprised Kelling and Wilson, who knew that data had largely discredited foot patrols as effective policing methods. All the officers did on a foot patrol was keep to an area, know the people who lived or traveled through there, and keep informal rules about how certain types behaved in their area. An

³⁸ Kate Klonik, "Stingrays, IMSI Catchers: How Local Law Enforcement Uses an Invasive Surveillance Tool," *Slate Magazine*, last modified October 11, 2014, http://www.slate.com/articles/technology/future_tense/2014/11/stingrays_imsi_catchers_how_local_law_enforcement_uses_an_invasive_surveillance.html.

³⁹ Other Police departments like the NYPD refer to such arrests as Quality-of-Life arrests.

⁴⁰ George L. Kelling and James Q. Wilson, "Broken Windows," *The Atlantic*, last modified March 1982, <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>.

⁴¹ Kelling and Wilson, "Broken Windows."

example of the informal rules and how they played out is with the local drunks/addicts. While typically harmless, drunks/addicts were expected to sit up when on stoops and have their drinks in paper bags. They could drink on side streets but not at major intersections, and there was a stark prohibition against bothering people at bus stops⁴². Violators of these rules would be ridiculed by the community, and be arrested for vagrancy if not responsive to police command. Kelling and Wilson believed that there must be some causal link between disorder and crime for these results to occur. In their piece they pointed to a social experiment by Phillip Zimbardo as the paradigm for why. Zimbardo had, thirteen years earlier, set up an experiment in which he placed cars with the hood up and without plates in two different places to observe what would happen. One was placed in a poor area of the Bronx in New York City, where it was vandalized by others after only 10 minutes and destroyed within a day. Another was placed in affluent Palo Alto, California where it stood untouched for over a week, until Zimbardo smashed part of it with a sledgehammer and then it was vandalized to destruction. Kelling and Wilson reasoned that in the poorer Bronx, very few people respected property as much as people in affluent Palo Alto. In Palo Alto, the smashed car signaled that "no one cared" for it. Hence the Broken windows concept: small victimless crimes (graffiti, public intoxication, prostitution) signal the disorder of a community to more serious criminals and serious crimes.

While the foot patrols demonstrated a way of community policing, Kelling and Wilson's Broken Windows theory would later end up justifying more nefarious police practices. The most notable of these would be the Zero Tolerance policy and later the Stop-and-Frisk programs implemented in New York City⁴³. Zero Tolerance in the 90s would be used to arrest fare jumpers on the subway, people selling loose cigarettes, anyone drinking in public, smoking marijuana, panhandlers, and many more. Stop-and-Frisk in the 00s would shed the pretense of misdemeanors and stop people for "furtive movements"; in practice, people were stopped on suspicion of physical appearance. These policies would continue despite Kelling's insistence that the "theory was never intended to be a high-arrest program"⁴⁴, or that further studies have failed to confirm Broken Windows much less the link between disorder and crime⁴⁵. Stop-and-Frisk only came to end in 2013 when a judge ruled that the practice was disproportionately used against people of color⁴⁶. In the end, while Broken Windows (as envisioned by Kelling and Wilson) might have had good results in it's original community setting, its implementation in other places would lead to high profile and sometimes lethal force applications that started as interactions over misdemeanor crimes like jaywalking or selling loose cigarettes.

⁴² Kelling and Wilson, "Broken Windows."

⁴³ Shankar Vedantam et al., "How A Theory Of Crime And Policing Was Born, And Went Terribly Wrong : NPR," NPR.org, last modified November 1, 2016, <http://www.npr.org/2016/11/01/500104506/broken-windows-policing-and-the-origins-of-stop-and-frisk-and-how-it-went-wrong>.

⁴⁴ George L. Kelling, "Don't Blame My 'Broken Windows' theory for Poor Policing," Politico, last modified August 11, 2015, <http://www.politico.com/magazine/story/2015/08/broken-windows-theory-poor-policing-ferguson-kelling-121268#.Vcy6tJc6-ff>.

⁴⁵ Center for Evidence Based Crime Policy, "Broken Windows Policing," Center for Evidence Based Crime Policy - George Mason University, accessed November 26, 2016, cebc.org/evidence-based-policing/what-works-in-policing/research-evidence-review/broken-windows-policing/.

⁴⁶ Vedantam, "How a Theory of Crime."

Broken Windows is impermissible in light of the JFPs I defend above. It fails just cause because many of these crimes do not put others at risk of violence. The theory also violates right intention in that the motive to enact force on these crimes is not the protection of others, but negating the perception of the community as "disordered". It is important to remind the reader that any one violation rules the theory impermissible, the fact it fails both illustrates its incoherence.

It should be noted Broken Windows may pass last resort. If we take the theory as originally envisioned, a beat cop who uses informal rules to deal with misdemeanors without immediately resorting to arrest, it does demonstrate a proportional option short of force. However if we take the aforementioned policies inspired by Broken Windows in which force is used, then it fails proportionality by its indiscriminate pursuit of the victimless crimes. Ultimately the Broken Windows theory has some intuitive thoughts about community policing, but in practice its actions cannot be justified through JFPs.

The Drug War

The War on Drugs is rife with examples of JFP violations as the lack of its effectiveness has played out over the decades. As discussed in Section III, the Drug War has contributed to a convergence of police and soldier agencies primarily through its use of SWAT tactics. These tactics are being deployed against crimes involving the sale, distribution, and use of drugs. From the outset, the elevation of force for drug crimes violates just cause in that -absent other factors- a drug trade by itself does not involve violence. While some do use violence as a means for their drug trade, it is the violence, not the exchange of drugs for money, that make SWAT force justifiable. When SWAT teams spend the majority of deployments performing simple searches, mostly for drugs⁴⁷, then their intent cannot be for protective defense but to serve an example of a social ill. While these alone would disqualify the majority SWAT searches under a JFP application, it is important to examine other metrics to determine where else they fail.

The justifiability of these deployments is further corroded by the fact that many of these searches are initiated by what is called a no-knock warrant. These are warrants to storm a property without notifying its occupants at the time. It should be restated at this point that these deployments can involve upwards of 25 officers, all with military grade armor and weapons. They can arrive at the location in an armored personnel carrier, using a battering ram (hand or vehicle attached) or breaching charge to make entry. Once they enter, they treat all citizens inside as hostile, throwing them onto the floor, deploying flash grenades to disorientate them, and handcuffing children in certain cases. The argument of these warrants is that an unannounced forceful entry prevents the suspect from destroying whatever evidence is the focus of the search. What makes this excuse problematic is that anywhere from 36 to 65 percent of these deployments do not produce drugs⁴⁸ and 32 to 65 percent do not produce weapons if they are expected to be on the

⁴⁷ American Civil Liberties Union, *War Comes Home: The Excessive Militarization of American Policing*, (New York: ACLU Foundation, 2014), <https://www.aclu.org/sites/default/files/assets/jus14-warcomeshome-report-web-re11.pdf>. 31

⁴⁸ American Civil Liberties Union, "War Comes Home." 34.

property⁴⁹. These no-knock tactics violate last resort in two ways. The first is that a brute force search is disproportionate to the goal of preserving evidence of a nonviolent crime. This logic violates last resort because its dynamic assumes that because evidence is class x , it necessitates brute force, despite no requirement to establish evidence x as the result of violent activity. The second violation is demonstrated when the tactic regularly fails to produce one to two thirds of the time, the means it fails the reasonable expectation to win requirement of last resort.

Another point of concern with SWAT tactics has to do with how they violate the rest of the *jus in bello* principles. By applying force equally to anyone, even children, within the house, a SWAT search violates the discrimination and necessity principles. Even if there is legitimate evidence to merit a no knock warrant, the target is the suspect, not whomever happens to be in their vicinity at the time. Indiscriminate force in a SWAT search only makes sense when using the suspect's domicile as a catch-all trap and not a truly defensive purpose. SWAT tactics also violate proportionality by deploying military equipment to storm what are typically domestic residences. Such military force might be necessary if the suspect in question was also tied to murders, known to have other violent suspects on his property and/or lived in a fortified compound, but such a justified target is rare in SWAT deployments.

While using SWAT tactics for simple searches violates many JFPs, the most obvious violation is necessity. The violation is evident in the destruction that has been wrought in certain deployments: officers destroying cushions, walls, cabinets, and whatever else that has the potential to contain drugs or weapons. From the current perspective this destructive search, whether it be the suspect's property or not, is considered acceptable collateral damage in pursuit of the objective. But in many cases these searches do not yield enough to offset the damage to a particular property. The fact that the majority of these deployments fail *jus in bello* principles indicates that the current practice relies on chance more than actual principled force measures. Make no mistake - there are justifiable SWAT deployments, situations where heroes with tactical grit are needed, like school shootings and hostage crises, but deploying these people for simple searches will only detract and devalue that heroism.

Ferguson & Baltimore: A Case Study

While much of this paper has been devoted to theory and isolated applications of JFPs it is important to check them against real world investigations. The following section examines specific acts and behavior of two departments that have been investigated by the Department of Justice for excessive force: Ferguson and Baltimore. Both of these reports evaluate these agencies against constitutional laws, but I can show that much of these behaviors are invalidated by JFPs as well. I also show how the competent authority principle can be compromised by the collective corporate interest of these violations.

⁴⁹ American Civil Liberties Union, "War Comes Home." 33.

An issue with police today particularly exemplified in the Ferguson⁵⁰ and Baltimore⁵¹ reports is use of force in reaction to speech or recording police. In these departments, the act of saying something vulgar to police, or even inquiring about your rights during a stop could result in force and/or arrest. Such cases are referred to as "contempt of cop" and usually result in the "offending" citizen being charged with Failure to Comply, Disorderly Conduct, or paradoxically, Resisting Arrest⁵².

Even more troubling is the resistance these departments have exhibited in the public recording of police activity. Both reports^{53 54} found cases in which police officers escalated their tactics upon discovery that they were being recorded, arresting said recorder, and confiscating the recording device and deleting the data involved. While an officer must focus on the task at hand in any case, arresting on the simple basis of vulgar/derogatory language aimed at officers or recording a police interaction fails almost every JFP. It fails just cause because such acts involve no violent crime nor is there a reasonable defensive threat being telegraphed by such acts. These arrests also fail right intent in that they occur because an officer is merely spurned, not threatened. The paramount failure of this behavior is in regards to last resort and proportionality in that there is barely any physicality in either swearing or recording until the officer arrests. Swearing at police is not respectful, but it is purely a superficial slight. To say it indicates a threat is to equate every curse to a physical threat, and then we have a discrimination problem.

The same situation exists in regards to recording, there is no reason this act should be considered a threat. If anything, additional video of a supposedly lawful arrest is reaffirming the public requirement of competent authority. While police might not like getting sworn at or being recorded, it is something that many others go through daily at their respective jobs without recourse to arrest.

Another problem both reports indicate is that of weak accountability and lax paperwork when force has been used. Both Ferguson⁵⁵ and Baltimore⁵⁶ were critiqued about inconsistent force reporting and lack of supervisor follow-up on force usage. This negligence shows these departments do not do everything they could do administratively to track and identify problematic patterns in use of force amongst officers or the department as a whole.

While this part of use-of-force processing is technically in the aftermath of force application, it does still compromise the competent authority principle. First, competent authority has basis in the organization of the force wielding party, so if supervisors don't follow up on force usage, they are complicit in undermining the hierarchy that is supposed to ensure competency. Second, the principle has basis in publicity: the authority is competent because the public knows who the agents are, and the public acknowledges

⁵⁰ US Department of Justice, *Investigation of the Ferguson Police Department*, (United States Department of Justice Civil Rights Division, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf. 24

⁵¹ US Department of Justice, *Investigation of the Baltimore City Police Department*, (United States Department of Justice Civil Rights Division, 2016), <https://www.justice.gov/opa/file/883366/download.116>

⁵² US Department of Justice, "Ferguson PD" 25

⁵³ US Department of Justice, "Ferguson PD" 26

⁵⁴ US Department of Justice, "Baltimore PD" 119

⁵⁵ US Department of Justice, "Ferguson PD" 26

⁵⁶ US Department of Justice, "Baltimore PD" 129

that force will be used in x cases because x cases are publicly known. By having inconsistent or missing paperwork in regards to use-of-force, police hide their force and at that point it is no longer public nor is it a competent authority. Records of force are part of how force is legitimized in due process. They are the legal proof of force, to ignore the due diligence required is to destroy evidence.

Corporate interest vs. Competent authority

There are three types of will at work in a government; private, corporate, and the general (or public) will⁵⁷. The purpose of government is that government should aim to benefit the general will which benefits all, as opposed to a corporate (group) or a private (individual) will. When we think of law and/or due process in this country, it is generally considered to be good to the general will of all. However, a potential problem with any government entity is that such an entity will want to preserve its own power over time, which can lead to the development of a corporate interest at conflict with the general will. Examples of such wills being contended with can be found in both reports, albeit with different behaviors.

An example of this conflicting interest is when the Ferguson city administration colludes with police leadership to maintain the writing of municipal fines and fees to support roughly 10% of the city budget⁵⁸. Ferguson's acting prosecutor also coordinated with officers to make sure "all necessary summonses are written"⁵⁹, in other words, making sure certain offenses were bundled with others, leading to multiple charges being issued in one interaction. Productivity in Ferguson was considered a reflection of revenue via citations rather than any sense of public safety or reduction in a particular crime⁵³. We can call these interests corporate, relative to JFP, because they are strategies that have financial enrichment instead of public safety as the end goal. The most flagrant violation is right intent: these directives are for money and not protective service. A just war equivalent directive would be sending troops to seize foreign resources to pay down the national debt: it is nowhere close to being justified. There is also the outright disregard for last resort evident in the bundled charges directive, which effectively ignores the minimum action needed component because it seeks to maximize potential profit.

In Baltimore, corporate interest plays out in protection of its agents by actively stymieing civilian complaints and investigations into them⁶⁰. The main hurdle that citizens must go through to get a complaint addressed is to have their misconduct allegation signed and notarized in specific physical places. If a complaint specifically involves excessive force, they must swear under penalty of perjury. The DOJ found any allegation not made in this in-person format was not followed up⁶¹. Couple this with officers who were shown to "actively discourage" complaints, sometimes to the point of harassment or ridicule⁶² and you have a situation that further abuses possible victims of injustice. Following that there is the willful negligence of supervisors misclassifying

⁵⁷ Special thanks to Jean-Jacques Rousseau's *On the Social Contract* for this model of wills

⁵⁸ US Department of Justice, "Ferguson PD" 10

⁵⁹ US Department of Justice, "Ferguson PD" 11

⁶⁰ US Department of Justice, "Baltimore PD" 139

⁶¹ US Department of Justice, "Baltimore PD" 140

⁶² US Department of Justice, "Baltimore PD" 141

accepted complaints to avoid or soften the internal affairs investigation into the specific misconduct. Finally, there is the formal process that a misconduct investigation does not typically start until the complainant shows up for a video interview, which delays any sort of evidence gathering procedures.

All of these behaviors together show a force that has no claim to competent authority because any attempt for civilian redress is considered an oppositional act. I say oppositional because the threat of perjury in respect to excessive force is at the forefront of any complaint. This forces a civilian into an extra-legal gambit, one that implies if their claims cannot be validated they will be charged as a criminal again before any formal charges, investigation, or evidence beyond the initial complaint. Such practices that protect the corporate will of police effectively corrode competent authority. The oppositional stance against complaints also violates right intent. Right intent gets violated because these complaints should be treated as complaints of potential criminal action not something that gets lost in the bureaucratic ether.

Under the guise of organizational survival, these behaviors and characteristics indicate a corporate will that supersedes the actual mission of the police. These are directly at odds with right intent because they give the public an impression of agents out for themselves. This is not to say a corporate will in police is necessarily a bad thing (e.g. police unions), however the more that corporate will appears in contempt of the general will, the more an authority's competence in relation to their public mission will be questioned. Police unions are there to help officers have basic operational rights as any workers union does, but the problem arises when they vigorously defend their officers in the light of allegations still in the process of being substantiated. Such a defense indicates police are judged by a better standard than citizens i.e. corporate will.

Thus concludes the application of JFPs in this paper. These applications have shown that these principles can be scaled to any size for examination. I've shown how Broken Windows theory fails on its basic premises and leads to indiscriminate force. JFPs have shown how the War on Drugs violates the rights of citizens in the pursuit of a cause that is unjustifiable. Finally, I've shown how these principles can more easily violate the unjustifiable actions that have plagued certain police departments. Admittedly there are many more places, instances, and theories where these principles can and should be applied. However, I argue that this application and its examples have demonstrated the ease and scalability of a Just Force Principled outlook.

V. Objections

In this section I examine two potential objections in regards to JFP applications. The first objection (I call convergence) argues that if we are using force principles derived from war conditions aren't we in effect solidifying the convergence of officer into soldier? The second objection (I'll call citizen expectation) argues that this JFP application is insufficient in that it addresses none of agency expectation of citizens, earlier noted as the problem of asymmetry. These are the objections I consider to be the most pressing to my the encouragement of JFP applications

The convergence objection

This objection stems from the simple premise that police should not be soldiers and using principles derived from war effectively drives the agencies together. Intuition suggests that this is possible, but in reality it can only level the expected ethics gap between police and soldiers. As argued in section III, police have already been militarized via equipment, tactics, and policy wars. While soldiers adhere to universal conventions on ethics in war, police have no similar universal charter for their force applications. Yet so often an argument is made that the mission of police is roughly equivalent to soldiers on the frontline, and both agencies should be accorded a similar amount of respect that ignores the lack of universal charter. Thus we need these principles more than ever so this country's violence can be justified consistently domestic and abroad.

Another answer to this objection is that the differences made in the translation from just war to just force effectively prohibit the concern of JFP making police more militaristic. By putting the emphasis on more objective oriented proportionalities, we respect the place due process has in our legal system by justifying force through the courts. With the more stringent prohibition against collateral damage, force from police must become more surgical and deliberate. Most important is the strength of competent authority as an active principle that can be more easily validated as just force rather than the domestic just war formulation. While it might be intuitive to say using war derived principles push police to more warlike tactics, it is the key differences that elevate police to more unique agency.

The citizen expectation objection

This objection originates in the fact that this argument has been devoted to the agency of police utilizing JFPs for Use-of Force whereas little has been mentioned about citizen agency under this application. While I have dealt with the problem of asymmetry in prior sections, it is important to revisit it here at the end. My reasoning is that civilian agency or expectation does not really change under this theory. We still expect people to be good, to not commit crime, and to report it whenever witnessed. JFPs focus on police because, taking law as the paradigm, they are the only ones capable of enacting justifiable force. Citizens can be justified in defending themselves against an aggressor, but this is a consequence of the state of nature prior to legal (police) intervention. There might be a traditionalist intuition that will examine at what point does the collective violations of competent authority necessitate retaliatory force from citizens. While such an argument might exist, the political realities for citizen force to be justified crosses back into the just war tradition. Part of the benefit to JFPs is that they are a universal force protocol that citizens can more easily understand rather than the fragmented force spectrum that varies in legal language from municipality to municipality.

Conclusion

Soldier, officer, citizen: these are the roles that Just Force Principles seek to preserve and keep distinct. I have shown the historical precedent of such principles and

how they benefit from grounds of moral distinction. While similar principles are utilized in regards to police force, their lack of the remaining JFP collective makes their usage problematic. The tactics of nationwide "War on" policies have led to militaristic mission creep and are in most cases unjustifiable. I've demonstrated how departments use unjustifiable force to protect their corporate will at the risk of their competent authority. Despite all of these violations, what this paper demonstrates is that JFPs have the potential to resolve many controversies with today's law enforcement. If departments across the country start using these principles in regards to how they define and resort to force, the public they serve will be better informed and more willing to assent to the justification of force. Violence may be an unfortunate truth of our humanity, but its deployment for a better good-for less violence overall-must be one of the most principled aspects of our society and Just Force Principles are apt for the challenge.

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