LETHAL FORCE AT HOME AND ABROAD

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ABSTRACT

This Article compares the legal treatment of lethal force exercised by the President with the legal treatment of lethal force exercised by police officers. In doing so, it examines the distinction between the crime paradigm and the war paradigm, complicates assumptions about when our rights as citizens are the strongest, and offers lessons about how to create meaningful constraints for lethal force. The Article concludes descriptively that when contemplating lethal force, the President is subject to more constraints than are police officers. Two insights follow from this claim. 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 improve ex ante regulation for the police.

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I.
INTRODUCTION

The President authorizes a drone strike against a suspected terrorist outside of active hostilities. A police officer shoots a man who allegedly threatens him. How do the respective legal treatments differ? While lethal force by the President and lethal force by the police pose similar regulatory challenges,[1] the literature so far has analyzed them in isolation.[2] In comparing the two, this Article observes that the tools of criminal and constitutional law do not constrain the police more than the President. Moreover, because the President is constrained by alternative means—such as international law, authorizing statutes, and internal policy—the net result is more constraint for the President. Understanding this yields lessons about the nature of our rights in different contexts and suggests that regulatory tools traditionally used to constrain the otherwise unbound President may be useful for regulating police lethal force as well.

Consider an example from each context. On September 30, 2011, the CIA killed Anwar al-Awlaki, a U.S. citizen born in New Mexico, by directing Hellfire missiles at his car in northern Yemen.[3] Announcing the strike later that day, President Obama described Awlaki as "the leader of external operations for

1. It may be useful to note that the U.S. government kills its citizens in four legally distinct ways. The most formal iteration is the death penalty, which requires the most judicial process. On the other end of the spectrum is the killing of citizens who fight against the state in war, which requires no process. The subjects of this article exist between these process poles—the two modes of killing that have each taken on the moniker "lethal force." One is lethal force ordered by the executive branch against a citizen outside of an active war zone. The other is lethal force used by police officers. *See generally* Luis E. Chiesa & Alexander K. A. Greenawalt, *Beyond War: Bin Laden, Escobar, and the Justification of Targeted Killing*, 69 WASH. & LEE L. REV. 1371 (2012) (discussing the legal frameworks regulating lethal force against citizens during war, outside of war, and domestically); Gregg v. Georgia, 428 U.S. 153 (1976) (establishing the modern Eighth Amendment framework for regulating the death penalty).

2. *Compare, e.g.*, Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SECURITY J. 145 (2010) (discussing the various legal frameworks applicable to targeted killings used by the executive branch in counterterrorism efforts), *with* Rachel A. Harmon, *When is Police Violence Justified*, 102 NW. U.L. REV. 1119 (2008) (arguing that the concepts of justification defenses should be used to improve the Fourth Amendment doctrine regulating police violence).

3. Mark Mazzetti, Eric Schmitt & Robert F. Worth, *Two-Year Manhunt Led to Killing of Awlaki in Yemen*, N.Y. TIMES (Sept. 30, 2011), http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html [https://nyti.ms/2lp10l0].

al-Qaeda in the Arabian Peninsula."[4] In that role, Awlaki is alleged to have directed the failed attempt to blow up a passenger plane in the United States in 2009 and the failed attempt to blow up U.S. cargo planes in 2010.[5] In killing Awlaki, the U.S. government asserted that the threat he posed was imminent and that capturing him was infeasible.[6]

Nearly three years later on August 9, 2014, a Ferguson, Missouri police officer killed Michael Brown, a U.S. citizen born in Missouri,[7] by shooting him six to eight times with a Sig Sauer pistol.[8] Discussing the shooting a day later, St. Louis County Police Chief Jon Belmar described Brown as having "assaulted" a police officer.[9] The officer who shot Michael Brown later alleged that the shooting was justified because Brown posed an imminent threat to his life, and that he could not safely incapacitate Brown by other means.[10] Despite the factual similarities of these killings, their respective legal treatments diverge dramatically.[11] The two uses of force are placed in largely separate regulatory

4. Remarks at the Change of Command Ceremony for the Chairman of the Joint Chiefs of Staff at Fort Myer, Virginia, 2 PUB. PAPERS 1183, 1183 (Sept. 30, 2011), https://www.gpo.gov/fdsys/pkg/PPP-2011-book2/pdf/PPP-2011-book2-Doc-pg1183.pdf [https://perma.cc/AYZ2-ZSH3].

5. *Id.*

6. Scott Shane, *Judging a Long, Deadly Reach*, N.Y. TIMES (Sept. 30, 2011), http://www.nytimes.com/2011/10/01/world/american-strike-on-american-target-revives-contentious-constitutional-issue.html [https://nyti.ms/2hAnzT6].

7. John Eligon, *Michael Brown Spent Last Weeks Grappling with Problems and Promise*, N.Y. TIMES (Aug. 24, 2014), https://www.nytimes.com/2014/08/25/us/michael-brown-spent-last-weeks-grappling-with-lifes-mysteries.html?_r=0 [https://nyti.ms/2lxHr6K].

8. U.S. DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 7 (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf [https://perma.cc/3NBT-XHTZ] [hereinafter DOJ REPORT ON SHOOTING DEATH OF MICHAEL BROWN].

9. Julie Bosman & Emma G. Fitzsimmons, *Grief and Protests Follow Shooting of a Teenager*, N.Y. TIMES (Aug. 10, 2014), https://www.nytimes.com/2014/08/11/us/police-say-mike-brown-was-killed-after-struggle-for-gun.html [https://nyti.ms/2lr7Rcb] ("As the officer began to leave his vehicle, one of the men pushed the officer back into the car and 'physically assaulted' him, according to the police department's account.").

10. DOJ REPORT ON SHOOTING DEATH OF MICHAEL BROWN, *supra* note 8, at 7*;* Damien Cave, *Officer Darren Wilson's Grand Jury Testimony in Ferguson, Mo., Shooting*, N.Y. TIMES, at 42 (Nov. 25, 2014) https://www.nytimes.com/interactive/2014/11/25/us/darren-wilson-testimony-ferguson-shooting.html [https://nyti.ms/2nx5YJy] ("Q: In your mind him grabbing the gun is what made the difference where you felt you had to use a weapon to stop him? A: Yes. Once he was hitting me in the face, that enough, was in my mind to authorize the use of force.").

11. Note that the pertinent question is not whether one of these killings is more legally justified than the other. Neither is the question whether they are factually the same. Of course, they are not. While both the police and the President would claim that the danger was imminent, the alleged danger in the police context is arguably more temporally urgent. On the other hand, the threat posed by Awlaki may be deemed graver in terms of potential lives lost. Moreover, while one instance of force is the product of long-term planning, the other is not. Thus, there is a significant informational imbalance between the President and a police officer when they contemplate lethal force. These differences deserve attention, but do not preclude a generative comparison. The key similarity is the decision-making trajectory, which includes a perceived threat, a perceived inability

worlds, falling on opposite sides of a controlling conceptual line—that dividing the crime paradigm and the war paradigm.[12] While these modes of lethal force do not represent the archetypes of the dichotomy between the paradigms (as might the death penalty and the killing of citizens in war), they do fall distinctly into the two categories. 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. 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. For example, consider the requirements of detention. In the crime context, prolonged detention of a citizen inheres a right to trial and requires a determination of guilt.[13] In the war context, however, the burden is placed on the citizen-detainee to challenge her detention.[14] The same goes for evidentiary requirements at trial, which are relaxed for a citizen captured on a battlefield abroad.[15] This dynamic can be justified on numerous grounds, including capacity (e.g. that the tools of constitutional and criminal enforcement afford greater rights protection domestically) and necessity (e.g. that we give broader discretion to leaders in the war context because they ostensibly protect against greater collective harms). When cast on lethal force, the crime/war distinction predicts that restrictions on the police would be greater than restrictions on the President.

However, this relationship is inverted in the context of lethal force. When evaluating whether a particular exercise of lethal force will be lawful, the President faces greater hurdles than does the average police officer. This is so in at least four ways: 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.[16] Additionally,

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to meet the threat without lethal force, and a decision to use lethal force.

12. *See, e.g.*, Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J.L. & PUB. POL'Y 457, 457 (2002) ("Is terrorism crime, or is it war? What conceptual framework will or should the United States use to conceptualize its fight against terror? The distinction between crime and war, embodied in international and domestic legal regimes, institutional-administrative divisions, and in such legislation as the Posse Comitatus Act, requires serious rethinking in the light of the terrorist attacks of September 11, 2001.").

13. The Sixth Amendment, for example, provides, "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." U.S. CONST. amend. VI.

14. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 535 (2004) ("[T]he full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting.").

15. *See, e.g.*, *id.* at 533–34 (gracing the use of hearsay and burden-shifting for citizen-detainees captured abroad and charged as enemy combatants).

16. *See infra* Part III.C.

while both standards have an imminence requirement[17] in name, the executive imminence requirement is stricter.[18] Therefore, citizens have more protection if lethal force is contemplated by the President instead of the police.

This is a simplified account of the differences. The remainder of the Article makes the comparison at a more granular level. It proceeds by considering how various regulatory tools (criminal law, constitutional law, international law, authorizing statutes, and internal policy) operate on the police and the President. Part II contends that constitutional law and criminal law provide a similarly minimal amount of constraint on both the President and the police. Looking beyond constitutional law and criminal law, Part III identifies where the regulatory systems diverge: While police regulation largely rests on ineffective constitutional and criminal law, regulation of the President is supplemented by an additional infrastructure of constraint—namely international law,[19] authorizing statutes,[20] and internal policy.[21] It is this set of supplemental regulatory tools that accounts for the more robust constraint on the President; Part IV considers how to translate them to the police context. On the whole, the analysis indicates that while the President and the police are similarly unconstrained by constitutional and criminal law, the President is more significantly constrained by alternative means.

Recognizing this yields a number of benefits. First, it complicates assumptions about where and when rights are strongest. The example of lethal force puts pressure on the general account that rights are more robust and the government is more constrained in the crime paradigm and counsels against arguments that presuppose the superiority of crime paradigm regulatory tools without further functional analysis. Constitutional and criminal law should be forced to earn their reputation as superior regulatory tools.

Second, by viewing police lethal force in light of lethal force by the President, this Article draws on a heretofore untapped resource to contribute to the debate about how to regulate police lethal force.[22] Put differently, what does

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17. An imminence requirement generally establishes that force may not be used unless the threat of violence becomes imminent. *See, e.g.*, Press Release, White House, Office of the Press Sec'y, Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities (May 23, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism [https://perma.cc/ZM2T-YYSY] [hereinafter White House Use of Force Policy] (stating that force may only be used against a target that poses a "continued and imminent" threat).

18. *See infra* Part III.C.

19. *See infra* Part III.A.

20. *See infra* Part III.B.

21. *See infra* Part III.C.

22. For more examples of scholarship that draws upon other areas of the law to aid the regulation of police lethal force, see, for example, Harmon, *supra* note 2 (arguing that the justification standard from self-defense law—imminence, necessity, and proportionality—should be imputed into Fourth Amendment doctrine on police violence); Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211 (2017) (calling for tactical

regulation of the President teach about regulating the police? The President has become more constrained than the police because she is not just limited by constitutional and criminal law, but also by norms of international law,[23] ex ante authorizing statutes,[24] and internal policy.[25] It is this type of ex ante regulation that is missing in the police context. In so arguing, this Article lends support to the body of literature calling for ex ante regulation of the police,[26] and further suggests that to the extent ex ante regulation is needed for policing generally, it is especially so for lethal force.

At bottom, the suggestion of this Article is modest. It argues descriptively that when contemplating lethal force, the Executive is subject to constraints that police officers are not. Two insights follow from this claim. 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.

II.
UNDERPERFORMING CRIME PARADIGM REGULATORY TOOLS

It is generally believed (correctly) that criminal law and constitutional law provide only weak constraints on the President's use of lethal force.[27] It is also believed (incorrectly) that they provide stronger constraints on the police.[28] This is because police have more formal risks of liability. When police use lethal force, they are theoretically subject to federal criminal liability, state criminal liability, and constitutional civil liability. By contrast, the President can

research on lethal force to be injected into police policy and jurisprudence).

23. *See infra* Part III.A.

24. *See infra* Part III.B.

25. *See infra* Part III.C.

26. *See, e.g.*, Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1832 (2015) ("Rather than attempting to regulate policing primarily post hoc through episodic exclusion motions or the occasional action for money damages, policing policies and practices should be governed through transparent democratic processes such as legislative authorization and public rulemaking."); Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 763 (2012) (arguing that constitutional law is insufficient for police regulation); Carl McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659, 674–75 (1972) (arguing that police departments should make rules to govern policing); Christopher Slobogin, *Panvasive Surveillance, Political Process Theory, and the Nondelegation Doctrine*, 102 GEO. L.J. 1721, 1759 (2014) (arguing that ex ante democratic rulemaking should be used to regulate technologically-aided mass surveillance programs carried out by police).

27. *See, e.g.*, Al-Aulaqi v. Panetta, 35 F. Supp. 3d 56, 78 (D.D.C. 2014) ("In this delicate area of warmaking, national security, and foreign relations, the judiciary has an exceedingly limited role.").

28. *See generally* Harmon, *supra* note 26, at 763 ("[Courts and commentators] have largely treated the legal problem of policing as limited to preventing the violation of constitutional rights and its solution as the judicial definition and enforcement of those rights. The problem of regulating police power through law has been shoehorned into the narrow confines of constitutional criminal procedure.").

reasonably assume that she will not face criminal or civil liability at any level.[29] Criminal laws and constitutional laws of course still operate on the President, but functionally only through the Justice Department's Office of Legal Counsel (OLC) as an ex ante check.[30] Despite the opportunity afforded by constitutional and criminal enforcement, however, effective constraints have failed to materialize for the police. Therefore, contrary to conventional wisdom, criminal law and constitutional law provide only weak limits for both the police and the President.

A. Constitutional Law

While the Fourth Amendment applies to both the President and the police, the mode of application differs. In the executive context, courts decline to decide whether executive actions like the killing of Awlaki violate the Fourth Amendment,[31] leaving the enforcement work to OLC.[32] By contrast, courts at all levels apply the Fourth Amendment to the use of lethal force by police.[33] This section considers whether constitutional law is more constraining on the police than on the President, and concludes that it is not.

1. The Police

The constitutional constraints imposed on the police use of force are weak. The Constitution prohibits the use of force only if it is "unreasonable."[34] This

29. Of course, certain egregious conduct could result in legal liability. Here I refer to strikes similar to the one used against Awlaki, where the Executive makes an assertion that they are acting lawfully.

30. For further discussion of the OLC's role as an ex ante check on action taken by the President, see generally, for example, Arthur H. Garrison, *The Opinions by the Attorney General and the Office of Legal Counsel: How and Why They Are Significant*, 76 ALB. L. REV. 217 (2012–2013) (describing the influence of OLC opinions on executive behavior); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1321 (2000) (discussing various models of understanding the role of the OLC in relation to the President).

31. *See generally* Ruairi McDonnell, *The Vice of Prudence: Judicial Abstention and the Case of* Al-Aulaqi v. Obama, 74 U. PITT. L. REV. 759, 762–63 (2013) (discussing the Court's unwillingness to address the merits).

32. Memorandum from David J. Barron, Acting Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, to the Attorney Gen., Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi, at 41 (July 16, 2010), https://www.aclu.org/legal-document/aclu-v-doj-foia-request-olc-memo?redirect=national-security/anwar-al-aulaqi-foia-request-olc-memo [https://perma.cc/9ZBU-ZM92] [hereinafter OLC Memo].

33. *See, e.g.*, Randall v. Peaco, 927 A.2d 83 (Md. Ct. Spec. App. 2007) (reaching the merits to determine whether the officer's use of force violated the Fourth Amendment); Pauly v. White, 814 F. 3d 1060 (10th Cir. 2016), *vacated*, 137 S. Ct. 548 (2017) (per curiam) (same); County of Los Angeles v. Mendez, 137 S. Ct. 1539 (2017) (same).

34. U.S. CONST. amend. IV. While this article addresses police lethal force, and thus focuses its constitutional analysis on the Fourth Amendment, excessive force claims are also brought under the Eighth Amendment and the Fourteenth Amendment when they relate to force used on

prohibition comes from the Fourth Amendment—protecting the right to be secure against unreasonable seizures.[35] Because the Court has largely declined to specify the meaning of "reasonable," the constitutional standard limiting the use of force remains indeterminate. In a 1985 case, *Tennessee v. Garner*, the Court came the closest to establishing clear rules for lethal force. *Garner* established the relatively clear rule that a police officer may not use lethal force against a fleeing felon unless "it is 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."[36] *Garner* also required that warning be given "where feasible."[37] Together, these two rules represent the apex of clear constitutional limits on lethal force. But even these rules are neither entirely clear nor strict.

A weakness of *Garner* is that the Court did not specify what suffices for an officer to infer a "threat of . . . serious physical injury."[38] The Court did provide an example, but it creates rather than resolves ambiguity. "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," *Garner* held, "deadly force may be used if necessary to prevent escape."[39] This leaves open the possibility that an officer may use the fact of an already-completed violent crime to infer imminent danger. The implication is that if Edward Garner had not just broken into a home and stolen a purse, but also assaulted the resident of that home, the officer might have been justified in shooting him as he climbed the fence, despite the same facts that he was "young, slight, and unarmed."[40] Nonetheless, while this ambiguity weakens the protective force of *Garner*, it does not dissolve *Garner*'s central conclusion that it is constitutionally unreasonable to use lethal force against non-dangerous fleeing felons. Unfortunately, the Court's path after *Garner* navigated further from clarity. In 1989, in *Graham v. Connor*,[41] the Court crafted a standard for all use of force cases, not just the lethal force against a fleeing felon that was addressed in *Garner*. The standard set forth in *Graham* was objective reasonableness, to be determined by the totality of circumstances.[42] To aid lower courts in the analysis, the Court listed some relevant factors to consider. In no

prisoners. For a recent example of a case including such claims, see Shand v. Chapdelaine, No. 3:17-cv-1947, 2018 WL 279980 (D. Conn. Jan. 3, 2018).

35. *Id.*

36. 471 U.S. 1, 3 (1985).

37. *Id.* at 12.

38. *Id.* at 3.

39. *Id.* at 11.

40. *Id.* at 21.

41. 490 U.S. 386 (1989).

42. *Graham* held that the test for reasonableness is objective. *Id.* at 397 ("[A]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.").

particular order and with no specified weight, the factors were: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[43]

Because of this balancing, *Graham* represents a departure from anything rule-like about *Garner*. While *Garner* used balancing to produce a rule for lower courts, *Graham* simply instructed lower courts to balance. This undermines some of the rules set forth in *Garner*. For example, while *Garner* suggested that danger was a minimum requirement, *Graham* reduced danger to a non-dispositive factor to be balanced.[44] The indeterminacy of *Graham*, especially with respect to imminent danger, poses a problem given that these cases double as instructional tools for officers.[45] In addition, as discussed in Part II.C., the functional cost of indeterminacy increases exponentially in the context of qualified immunity. In *Scott v. Harris*, the Court moved even further from rules and into totality of circumstances balancing.[46] In 2007, a Georgia police officer rammed the back of Victor Harris' car to end a high-speed chase, leaving Harris a quadriplegic. Using a totality of circumstances balancing test, *Scott* held that the officer did not violate the Fourth Amendment and rejected the notion that the Fourth Amendment imposes specific requirements on the use of lethal force.[47] In response to the plaintiff's argument that the requirements of *Garner* were not met, the Court noted that, "*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.' *Garner* was simply an application of the Fourth Amendment's 'reasonableness' test."[48] *Scott* departed from *Graham* as well, because while *Graham* provided relevant factors to consider in the balancing, *Scott* simply instructed courts to "slosh [their] way through the factbound morass of 'reasonableness.'"[49] This is where the law stands today.

43. *Id.* at 396.

44. Though *Graham* does not make danger a minimum requirement for reasonableness, I know of no case where a court has found lethal force reasonable absent danger. The Sixth Circuit, noting the ambiguity in *Graham*, has specifically made "the threat factor from *Graham* a minimum requirement for the use of deadly force: such force may be used only if the officer has probable cause to believe that the suspect poses a threat of severe physical harm." Sample v. Bailey, 409 F.3d 689, 697 (2005).

45. *See generally* Abraham N. Tennenbaum, *The Influence of the* Garner *Decision on Police Use of Deadly Force*, 85 J. OF CRIM. LAW & CRIMINOLOGY 241 (1994) (documenting, inter alia, the role that *Garner* has played as an instructional tool).

46. 550 U.S. 372 (2007).

47. *Id.* at 385.

48. *Id.* at 380 ("Whether or not Scott's actions constituted application of 'deadly force,' all that matters is whether Scott's actions were reasonable.").

49. *Id.* at 383.

2. The President

The same Fourth Amendment standard applies to lethal force executed by the President. The only public application of the standard, however, comes with OLC's analysis of the Awlaki strike, which found that the Fourth Amendment would not be violated by his killing.[50] The memo drew reference to *Garner*,[51] but rested its analysis on *Scott*'s totality of circumstances balancing. In balancing the totality of circumstances, the memo considered that the citizen was a member of an enemy force and was engaged in the continuous planning of attacks against the United States, that capture was unfeasible,[52] and that high-level officials had made the decision (even though that is doctrinally irrelevant).[53] The memo found that the balance weighed in favor of the government—perhaps not a shocking outcome given that on one side of the scale is the asserted prevention of mass violence against U.S. citizens. The OLC memo thus shows that like police officers using lethal force, all that the Fourth Amendment requires of the President is reasonableness, determined by the totality of circumstances.

Unlike the police, however, the President is also constrained by the Fifth Amendment; the OLC memo applied the Fifth Amendment to executive lethal force, even though it is not applied to the police.[54] In applying the Fifth Amendment, the memo cited to *Hamdi* and applied the *Mathews* balancing analysis.[55] Weighed broadly, the government interest was national security. More specifically, the memo noted that the suspect posed a "continued and imminent threat of violence or death" to U.S. persons.[56] The citizen's interest in the risk of an erroneous deprivation of his life, the memo noted, was "very real."[57] As for the possibility and burden of additional process, the memo noted that in the current process, "the highest officers in the intelligence community" reviewed the factual basis for the operation.[58] The memo did not consider what additional process might look like, nor whether that process would have

50. OLC Memo, *supra* note 32, at 41.

51. *Id.* This reference betrays the assumption that domestic constraints are more robust, noting that, "*even* in domestic law enforcement operations, the Court has noted that 'where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.'" *Id.* (emphasis added).

52. *Id.*

53. *Id.*

54. *Id.* at 38–41.

55. Mathews v. Eldridge, 424 U.S. 319 (1976) (holding that courts should balance three factors in due process analysis: the interests of the individual in her property, the risk of erroneous deprivation of the property, and the government's interest in the taking of the property and in the mode of process). Notably, no case has ever applied *Mathews* to the taking of life.

56. OLC Memo, *supra* note 32, at 40.

57. *Id.* (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 530 (2004)) ("[A]s the *Hamdi* plurality observed, 'the risk of erroneous deprivation of a citizen's liberty in the absence of sufficient process . . . is very real.'").

58. *Id.* at 41.

burdened the government. It did note that capture (and thus other procedures like a trial) would be unfeasible. In conclusion, the memo found that the weight of the government interest was such that the Constitution did not require additional process.[59] Because the memo failed to consider the burden of additional process, it is difficult to view the application of the Fifth Amendment here as meaningfully constraining. Instead, the Fifth Amendment analysis accepted the weight of the government interest as pushing the required process to whatever the government sees fit, which in this case was high-level review. Since high-level review was found to be sufficient but not necessary, we do not know exactly what the Fifth Amendment demands for lethal force process. The extent to which the Fifth Amendment provides a constraint for the President that is not present for the police is therefore unclear. In sum, the constitutional protections against lethal force are weak for both the police and the President.

B. Criminal Law

1. The President

Despite the presence of applicable criminal laws, the President maintains significant leeway to use lethal force without committing a crime. The OLC memo that analyzed the legality of the Awlaki killing raised the possibility that three criminal statutes constrain executive use of lethal force.[60] Ultimately, though, the memo found that none of them prohibited the Awlaki strike.[61]

The first such statute makes it illegal for a citizen to kill another citizen abroad.[62] The public authority justification, however, exempts public officials when they act lawfully.[63] "Lawfully" turns on analysis of authority and limits from constitutional and international law. In this way, while adherence to this statute requires constitutional and international law compliance, it does not impose independent limits for public officials. The same public official exemption applies to the second relevant statute, which prohibits conspiring

59. *Id.* at 40 ("[T]he weight of the government's interest in using an authorized means of lethal force against this enemy are such that the Constitution would not require the government to provide further process to the U.S. person before using such force.").

60. OLC Memo, *supra* note 32, at 12, 32, 35, 37.

61. For analysis of this component of OLC's logic, see Rebecca Ingber, *International Law Constraints as Executive Power*, 57 HARV. INT'L L.J. 49 (2016) (exploring "the Executive's invocation of international law to support expansive interpretations of statutory or constitutional grants of authority").

62. 18 U.S.C. § 1119(b) (2012). This law, "Foreign murder of United States nationals," was passed to close a loophole that became apparent when one teacher from the U.S. allegedly killed another while in South Korea, but returned to the United States before South Korea could bring charges. At the time, the United States had no statute to bring charges for murders committed abroad. *See* 137 Cong. Rec. 8675 (1991) (statement of Sen. Thurmond) (using the murder of Carolyn Abel in 1988 as an example of the loophole that creates the need for such a law). *See also* OLC Memo, *supra* note 32, at 12–34.

63. *Id.* at 14–15.

within the United States to commit murder abroad.[64] The third relevant statute, the War Crimes Act,[65] does provide an independent outer limit for the operation. Pursuant to the War Crimes Act, the President is prohibited from using lethal force against someone who takes no active role in the hostilities, whether she is a prisoner of war or a former soldier who has now laid down arms.[66] The OLC memo found, however, that this limitation did not apply to Awlaki, who was determined to be taking an active role in hostilities.[67] Given the factual leeway to assert that somebody is taking part in hostilities, this criminal limitation on executive lethal force cannot be regarded as particularly strict. In sum, criminal laws give the Executive substantial leeway when it comes to the use of lethal force.

2. The Police

The role of criminal law is also minimal in the context of lethal force by the police. The federal vehicle for police criminal liability is 18 U.S.C. § 242, which enables federal prosecutors to charge law enforcement with willfully depriving a person of her constitutional rights while acting under color of law.[68] Structured this way, an element of the criminal violation is a constitutional violation. Therefore, because prosecutors can only bring criminal cases when constitutional rights have been violated, federal criminal laws do not add to pre-existing constitutional limits. Neither do state criminal laws. While the constitutional standard does serve as the basis for civil liability and possible federal criminal liability, it does not control state criminal law.[69] A state may both criminalize behavior that the Court deems constitutional and decline to criminalize behavior that the Court deems unconstitutional.[70] Presently, state statutes fall into two

64. 18 U.S.C. § 956(a) (2012). For the applied analysis of this law, "Conspiracy to kill, kidnap, maim, or injure persons or damage property in a foreign country," see OLC Memo, *supra* note 32, at 35–37.

65. 18 U.S.C. § 2441(d)(1)(D) (2012). *See also* OLC Memo, *supra* note 32, at 37.

66. This would constitute a "grave breach" of Common Article 3 of the Geneva Conventions, which § 2441 defines as a war crime.

67. OLC memo, *supra* note 32, at 38.

68. *See, e.g.*, United States v. Brugman, 364 F.2d 613 (5th Cir. 2004) (against federal law enforcement); United States v. Teel, 299 F. App'x 387 (5th Cir. 2008) (against state law enforcement); United States v. McRae, 702 F.3d 806 (5th Cir. 2012) (against local law enforcement).

69. *See, e.g.*, People v. Couch, 461 N.W.2d 683, 684 (Mich. 1990) ("[*Tennessee v.*] *Garner* was a civil case which made no mention of the officer's criminal responsibility for his 'unreasonable' actions. Thus, not only is the United States Supreme Court without authority to require this state to make shooting a non[-]dangerous fleeing felon a crime, it has never even expressed an intent to do so."). *See generally* Chad Flanders & Joseph Welling, *Police Use of Deadly Force: State Statutes 30 Years After* Garner, 35 ST. LOUIS U. PUB. L. REV. 109, 110, 124–26 (2015) (discussing the variation among state statutes).

70. *See, e.g.*, Timothy A. Baughman, MICH. CRIM. L. & PROC. SEARCH & SEIZURE § 5:61 (2d ed. 2017) ("*Garner* means that the use of deadly force by the police without regard to dangerousness violates the Fourth Amendment, but, of course, the U.S. Supreme Court cannot

categories: eleven states follow the common law rule[71] and thirty-eight states follow the *Garner* rule.[72] The common law rule permits the use of lethal force to make an arrest of a fleeing felon, making no distinction among felonies and not requiring dangerousness. The *Garner* rule, described above, requires that the felony be dangerous or that the felon be presently dangerous.[73] Therefore, this tally demonstrates that as compared to the constitutional requirements for the use of lethal force, eleven states have less restrictive criminal law requirements and thirty-eight states have similarly restrictive criminal law requirements.[74] In sum, for both the police and the President, criminal law does not impose meaningful limitations beyond the constitutional floor.

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change the state substantive criminal law, and this action would therefore not be a state law crime.").

71. ALA. CODE § 13A-3-27(b)(1) (LexisNexis 2015) (deadly physical force justifiable when committed to "make an arrest for a felony"); FLA. STAT. ANN. § 776.05(3) (West 2011) (deadly force justified "when necessarily committed in arresting felons fleeing from justice"); MISS. CODE ANN. § 97-3-15(1)(g) (West 2011) (homicide justifiable when committed to apprehend "any person for any felony committed"); MO. ANN. STAT. § 563.046(3)(2)(a) (West Supp. 2017) (deadly force justifiable to make an arrest of someone the officer reasonably believes to have "committed or attempted to commit a felony offense involving the infliction or threatened infliction of serious physical injury"); OR. REV. STAT. § 161.239(1)(a) (2015) (lethal force justifiable for arrest for crime that is felony or attempted felony "involving the use or threatened imminent use of physical force"); 12 R.I. GEN. LAWS § 12-7-9 (2014) (use of deadly force allowed when pursuing someone who has committed or attempted to commit a felony); S.D. CODIFIED LAWS § 22-16-32(3) (2006) (officer justified in committing "homicide" to arrest fleeing felon); WIS. STAT. ANN. § 939.45(4) (West 2005) (defense of privilege can be claimed "[w]hen the actor's conduct is a reasonable accomplishment of a lawful arrest"); People v. Spears, No. 267572, 2007 WL 1203537, at *2 (Mich. Ct. App. Apr. 24, 2007) (per curiam) (summarizing that, in order to justify the use of deadly force to prevent the escape of a fleeing felon: "(1) the evidence must show that a felony actually occurred, (2) the fleeing suspect against whom force was used must be the person who committed the felony, and (3) the use of deadly force must have been 'necessary' to ensure the apprehension of the felon"); Sheppard v. State, 594 S.E.2d 462, 473 (S.C. 2004) (affirming that, "an officer may use whatever force is necessary to effect the arrest of a felon including deadly force"); Posey v. Davis, No. 11-1204, 2012 WL 5857309, at *2 (W. Va. Nov. 16, 2012) ("Police officers are authorized to exert physical force in seizing a suspect."). *See generally* Flanders & Welling, *supra* note 69 (analyzing the variations among state statutes); AMNESTY INT'L, DEADLY FORCE: POLICE USE OF LETHAL FORCE IN THE UNITED STATES (2015), https://www.amnestyusa.org/wp-content/uploads/2017/04/aiusa_deadlyforcereportjune2015.pdf [https://perma.cc/8HZX-HQHY] (same).

72. The remaining state, Montana, has no statutes or case law on point. *See* Flanders & Welling, *supra* note 69, at 134.

73. Tennessee v. Garner, 471 U.S. 3, 11 (1985).

74. Of course, finer points could be made. The language of the state statutes, while falling into two categories, varies in subtle ways that likely play some role in adjudicative outcomes. *Compare, e.g.*, MISS. CODE ANN. § 97-3-15(1)(g) (West 2011) (homicide justifiable when committed to apprehend "any person for any felony committed"), *with* MO. ANN. STAT. REV. § 563.046(3)(2)(a) (West Supp. 2017) (deadly force justifiable to make an arrest of someone the officer reasonably believes to have "committed or attempted to commit a felony offense involving the infliction or threatened infliction of serious physical injury"). For now, though, it is sufficient to note that the body of state criminal law is either as restrictive or less restrictive than the constitutional standard.

Therefore, constitutional and criminal law provide only weak constraints on both the President and the police. This is unsurprising in the executive context, but notable in the police context because criminal and constitutional liability are tools that lawyers and the public expect to meaningfully constrain police officers. Evidently, such an expectation is unwarranted.

C. Enforcing Constitutional and Criminal Law

The foregoing analysis points out that the criminal and constitutional lethal force standards are similarly weak for the police and the President. But of course, it is possible that the same weak standards are enforced more robustly against the police, thereby creating more constraint. In both the criminal and the constitutional context, this turns out not to be the case. In the constitutional context, the difference between enforcement by OLC (for the President) and enforcement by federal and state courts (for police officers) suggests that the probability of enforcement is higher in the police context. After all, courts have contempt power and OLC does not.[75]

But the reality is more complicated. The doctrine of qualified immunity diminishes the capacity for the Constitution to be enforced against police officers. Under qualified immunity law, an officer cannot be held liable for violating an individual's rights unless, at the time of the incident, "it would [have been] clear to a reasonable officer that his conduct was unlawful."[76] Because the Court's doctrine on lethal force remains non-specific, it is unlikely that an officer would find it "clear" that her behavior violates the Fourth Amendment. The Court admits as much. *Brosseau v. Haugen* concluded that *Graham* is not clear enough to provide officers with notice that would satisfy qualified immunity requirements.[77] The interaction of the indeterminate constitutional standard and qualified immunity means that constitutional violations go unenforced. As Professor Harmon notes, indeterminacy is always unfortunate, but "in the

75. *See generally, e.g.*, Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 805 (2017) ("Scholars have suggested that the failure of OLC to constrain presidential power in recent publicized episodes means that executive branch legalism ought to become more court-like."); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1460 (2010) (citing JACK GOLDSMITH, THE TERROR PRESIDENCY 35 (2007)) ("[OLC] opinions are not back-stopped by a court's contempt power, but neither are they merely precatory. In short, [the OLC's] work 'is something inevitably, and uncomfortably, in between.'").

76. Saucier v. Katz, 533 U.S. 194, 202 (2001).

77. 543 U.S. 194, 198–99, 203 (2004) (per curiam). *See also Saucier*, 533 U.S. at 201–02 (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)) ("There is no doubt that *Graham v. Connor* . . . clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet that is not enough. Rather, we emphasized in *Anderson* 'that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" (citation omitted)).

context of 1983 litigation, because of qualified immunity, it is devastating."[78] Whether qualified immunity renders enforcement against the police as weak as OLC enforcement against the President cannot be said with certainty, but it undoubtedly weakens any enforcement advantages that § 1983 would otherwise afford.

Still, though, the nature of enforcement in court could provide other types of constraints on police officers not experienced by the President. Consider, for example, if lower courts particularized[79] the general standard articulated by the Supreme Court. While OLC only applies the law articulated by the Supreme Court, if lower courts developed the general constitutional standard into more particular rules, police officers would be subject to them. But particularization has not come to pass. While examples of particularization do exist, the Court's reasonableness standard has, on the whole, not been meaningfully developed. In *Smith v. City of Hemet*, for example, the Ninth Circuit introduced an additional factor to determine reasonableness: "the availability of alternative methods of capturing or subduing a suspect."[80] In *Sharrar v. Felsing*, the Third Circuit listed a number of possible factors to augment the reasonableness inquiry, including "the possibility that the persons subject to the police action are themselves violent or dangerous, the duration of the action, whether the action takes place in the context of effecting an arrest, the possibility that the suspect may be armed, and the number of persons with whom the police officers must contend at one time."[81] The Sixth Circuit took up the critical question of whether there are any minimum requirements for the lawful use of force. Reading *Graham* literally, there are none. But *Sample v. Bailey* established *Graham*'s threat factor as "a minimum requirement for the use of deadly force."[82] In another effort at particularization, the Ninth Circuit found that pre-seizure conduct was relevant to reasonableness.[83] Last term, however, the Supreme Court rejected this effort, requiring a return to general reasonableness.[84]

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78. Harmon, *supra* note 2, at 1140.

79. Particularization is the process whereby a general standard becomes increasingly specific and rule-like through judicial decision-making. *See, e.g.*, Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363, 370 (1982) ("The first task, that of classification, may be accomplished largely by resort to deeply ingrained principles of political theory. Traditional analysis, at least since Montesquieu, has divided the operations of government into three distinct power phases: first, the enunciation of generally applicable rules; second, the implementation of the rules; and third, the particularization of rules to specific fact situations in the context of resolving disputes between parties. We tend to identify the legislature with enunciation; the executive with implementation; and the judiciary with particularization.").

80. 394 F.3d 689, 701 (9th Cir. 2005); *accord* Griffith v. Coburn, 473 F.3d 650, 658 (6th Cir. 2007) (quoting St. John v. Hickey, 411 F.3d 762, 774–75 (6th Cir. 2005)) (requiring the "least intrusive force reasonably available"). *But see* Wilkinson v. Torres, 610 F.3d 546, 551 (9th Cir. 2010) (holding that reasonableness does not require the least intrusive means of force).

81. 128 F.3d 810, 822 (3d Cir. 1997).

82. Sample v. Bailey, 409 F.3d 689, 697 (6th Cir. 2005).

83. *See* Billington v. Smith, 292 F.3d 1177, 1189 (9th Cir. 2002) ("[W]here an officer

Notwithstanding these few efforts at particularization, the general *Graham*/*Scott* practice of "sloshing" through the "morass" reigns.[85] In large part, lower courts state the reasonableness test in *Graham*, note the relevant factors to be considered, and then apply (or occasionally ignore)[86] the factors in their analysis.[87] Thus, despite its potential, particularization has not brought about additional constraint for police officers.

Taken together, the strength of qualified immunity doctrine and the lack of particularization serve to mute any enforcement advantages that courts have over OLC enforcement. This is not to say that the differences in the mode of enforcement do not matter—they do. But the story is not one of robust enforcement in the police context and weak OLC enforcement in the executive context. It is instead a story of two imperfect enforcement regimes, applying the same, weak constitutional standard. In form and function, the Constitution fails to provide meaningful regulation for police and executive lethal force. While the deficiency of constitutional enforcement against the President is well documented,[88] the deficiency in the police context cuts against assumptions underlying the distinction between war and crime. In the criminal context, it could be argued that even though the standard for criminal liability is similarly weak for the President and the police, the real threat of prosecution makes it more constraining for the police. But the reality of criminal prosecution of lethal force does not support such a claim. While there is insufficient data to clearly establish the deterrent effect of criminal law on the use of lethal force, there is reason to believe it is not strong. First, charges and convictions are infrequent. Of the thousands of fatal shootings by police from 2005 to 2016, only fifty-four

intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force."). *See generally* Aaron Kimber, *Righteous Shooting, Unreasonable Seizure? The Relevance of an Officer's Pre-Seizure Conduct in an Excessive Force Claim*, 13 WM. & MARY BILL RTS. J. 651 (2004) (arguing that pre-seizure conduct should be incorporated into the totality of circumstances analysis to determine the reasonableness of the seizure).

84. County of Los Angeles v. Mendez, 137 S. Ct. 1539 (2017) (holding that the Fourth Amendment provides no basis for the 9th Circuit's provocation rule).

85. Scott v. Harris, 550 U.S. 372, 383 (2007) ("Although respondent's attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still *slosh* our way through the factbound morass of 'reasonableness.'") (emphasis added).

86. *See, e.g.*, Thacker v. Lawrence Cnty. Local Gov't, No. 1:04-CV-00265, 2005 WL 1075019, at *6–9 (S.D. Ohio 2005) (quoting but not considering the *Graham* factors); Byrd v. Hopson, 265 F. Supp. 2d 594, 611–13 (W.D.N.C. 2003) (same); DeBellis v. Kulp, 166 F. Supp. 2d 255, 271–74 (E.D. Pa. 2001) (same). *See generally* Harmon, *supra* note 2, at 1140 (noting the pattern of courts stating but not engaging the *Graham* factors).

87. Even when courts do apply the *Graham* factors in a particular case, the widespread practice of deference to officer testimony undermines enforcement. *See generally, e.g.*, Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995 (2017) (providing a historical account of judicial deference to police testimony).

88. *See, e.g.*, Samuel S. Adelsberg, *Bouncing the Executive's Blank Check: Judicial Review and the Targeting of Citizens*, 6 HARV. L. & POL'Y REV. 437 (2012).

officers were charged, and eleven convicted.[89] The weak substantive standard accounts for some of this, but there are also institutional challenges in getting to a conviction such as the role of police unions in opposing convictions,[90] the conflict of interest presented by the relationship between prosecutors and police departments,[91] and the power of grand juries to not indict, even where probable cause is found.[92] Finally, even if the threat of a successful prosecution were serious, the deterrent value is weakened in the context of lethal force, because in the instances where officers do perceive a threat to their lives (reasonably or not), it is unlikely that the threat of prosecution will alter their decisionmaking. When deciding between loss of life and litigation, the preference is unsurprising. To be sure, criminal liability is more possible for police than for the President, but it would be a mistake to think that the mere possibility is meaningfully constraining. Constitutional litigation and criminal prosecution are the visible centerpieces of police lethal force regulation. Citizens expect them to work and protest for their efficacy.[93] Scholars invest time and research to improve the constitutional standard and enable effective criminal prosecutions. Practitioners litigate toward these ends. Investment in these vehicles of regulation, however, is not clearly efficient. This is evident from how little regulation the standards provide. Even while constitutional and criminal law are useful regulatory tools in other areas, advocates might do well to view them with skepticism for the regulation of lethal force.

89. Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/?utm_term=.f59c63488f60 [https://perma.cc/VDJ9-ALNE]. For a comprehensive study on crimes by police and the attendant charges, see generally PHILIP MATTHEW STINSON, SR., JOHN LIEDERBACH, STEVEN P. LAB & STEVEN L. BREWER, POLICE INTEGRITY LOST: A STUDY OF LAW ENFORCEMENT OFFICERS ARRESTED (2016), https://www.ncjrs.gov/pdffiles1/nij/grants/249850.pdf [https://perma.cc/99DX-XKV3].

90. *See, e.g.*, Katherine J. Bies, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 STAN. L. & POL'Y REV. 109, 112 (2017) (illustrating how police unions have advocated to keep records of misconduct secret and how they have "established highly developed political machinery that exerts significant political and financial pressure on all three branches of government").

91. *See* Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447 (2016) (arguing that local prosecutors lack authority to prosecute police officers because of a conflict of interest).

92. *See* Ric Simmons, *The Role of the Prosecutor and the Grand Jury in Police Use of Deadly Force Cases: Restoring the Grand Jury to Its Original Purpose*, 65 CLEV. ST. L. REV. 519 (2017) (describing the power of the grand jury process in determining the outcome of use of force cases).

93. *See, e.g.*, Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), https://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html [https://nyti.ms/2jD6h5O].

III.
OVERPERFORMING WAR PARADIGM REGULATORY TOOLS

In regulating the President's actions abroad, great hope has never rested on finding criminal or constitutional liability. Instead, an alternative infrastructure of regulation has emerged to constrain the President. This regulatory infrastructure rests primarily on three tools: international law, authorizing statutes, and internal policies. These tools also regulate police lethal force. The difference is that for the Executive, they play a central role and impose meaningful restrictions; for the police, they are background players that add little to the weak constitutional standard. While these tools are frequently understood as second best alternatives to the preferred tools of constitutional and criminal law, here in the context of lethal force they prove to be more effective. The following sections analyze these regulatory tools in turn, showing how they constrain the President more than the police.

A. International Law

International law exerts influence on lethal force decisions made by the President, but not on those made by the police. This is unfortunate because international law offers a functional approach much needed for all lethal force regulation. International law does not rely exclusively on legal sanction for compliance, but also leverages the force of moral and normative sanction.[94] The modes of sanction in international law are diverse because there is recognition that judicial sanction cannot bear the compliance burden alone. International humanitarian law (IHL), for example, acknowledged this limitation in its design. Because it could not be presumed that courts would enforce IHL, its development "proceeded on the basis of moral sociology, discerning the possibility of a viable norm of restraint."[95] The product of such an effort, at least

94. *See* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2659 (1997) ("[M]oral, normative, and legal reasons are in fact conjoined in the context of *obedience*. A transnational actor's moral obligation to obey an international norm becomes an internally binding domestic legal obligation when that norm has been interpreted and internalized into its domestic legal system."). Given the role that Harold Koh has played in developing the legal justification for President Obama's targeted killing program, this citation is ironic. Perhaps it is an appropriate reminder that while international law does provide useful functional limits, the boundaries of those limits, and their durability in the face of asserted exigency, are disputed.

95. Jeremy Waldron, *Justifying Targeted Killing with a Neutral Principle*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 112, 127 (Claire Finkelstein, Jens David Ohlin & Andrew Altman eds., 2012) [hereinafter Waldron, *Justifying Targeting Killing*]. For general discussion of norms as a form of regulation, see Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 666 (1998) (suggesting that norms have the power to offer a wider range of regulatory power than just laws alone); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 907 (1996) (suggesting that norms could help further the objectives of laws); Bryan H. Druzin, *Social Norms as a Substitute for Law*, 79 ALB. L. REV. 67, 72 (2015) (suggesting that social norms can be used to augment or altogether replace regulation); Jeremy Waldron, *Are Constitutional Norms Legal Norms?*, 75 FORDHAM L. REV. 1697, 1712 (2006) (discussing the role of norms in the system of constitutional law).

with respect to lethal force, is a set of analytically useful limitations for the President that unfortunately do not apply to the police.

1. The Police

International law plays functionally no role in the regulation of police lethal force within the United States. United Nations Basic Principles do establish limits on the use of force by law enforcement officials. For example, Principle 9 dictates, inter alia, that lethal force can only be used when "less extreme means are insufficient."[96] Basic principles, however, are non-binding, and perhaps more importantly from a practical lens, have little norm-forming power to regulate domestic law enforcement policy.

2. The President

International law, by contrast, does play a role in the regulation of executive lethal force. While it cannot be said that the President expects enforcement of international law against her decisions to use lethal force, it is evident that the norm-forming component of international law has influenced executive branch decisions to use lethal force. The OLC memo analyzing the Awlaki strike dedicated significant attention to international law (much more than to the Fourth Amendment, for example).[97] It first established that the killing of Awlaki sat within a non-international armed conflict, which made international humanitarian law the relevant legal framework.[98] It then listed IHL's "four fundamental principles that are inherent to all targeting decisions": military necessity, humanity, proportionality, and distinction.[99]

Some of these principles supplement the Fourth Amendment requirements in meaningful ways. Proportionality, for example, requires a comparison between the "concrete and direct military advantage" and the expected "incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof."[100] Notably, this is a balancing framework. But because

96. Eighth U.N. Congress on the Prevention of Crime and the Treatment of Outsiders, *U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* ¶ 9, U.N. Doc. A/CONF.144/28/Rev.1, at 110–16 (Aug. 27–Sept. 9, 1990), https://www.unodc.org/documents/congress/Previous_Congresses/8th_Congress_1990/028_ACONF.144.28.Rev.1_Report_Eighth_United_Nations_Congress_on_the_Prevention_of_Crime_and_the_Treatment_of_Offenders.pdf [https://perma.cc/FCT9-3UFS]. The Principles were later affirmed by the General Assembly, G.A. Res. 45/166 (Dec. 18, 1990), http://www.un.org/documents/ga/res/45/a45r166.htm [https://perma.cc/APX8-M88F].

97. OLC Memo, *supra* note 32, at 28–30.

98. The OLC memo cited *Hamdan* for this proposition. *See id.* at 24 ("In *Hamdan v. Rumsfeld*, the Supreme Court held that the United States is engaged in a non-international armed conflict with al-Qaida.").

99. *Id.* at 28 (citing U.S. Air Force, *Targeting*, Air Force Doctrine Doc. 2-1.9, at 88 (June 8, 2006)).

100. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 51(5)(b), June 8, 1977,

it requires articulation of the costs and benefits, it is stronger than Fourth Amendment "reasonableness" balancing.[101] There is some evidence that this constraint played a functional role in decisions leading up to Awlaki's death—the strike was delayed for around a month while Awlaki was in a village, so that he could be killed on a road far from populated areas.[102]

Humanity is another principle that requires more than the Fourth Amendment. Then-Attorney General Eric Holder described the principle of humanity as requiring that the use of force "will not inflict unnecessary suffering."[103] This adds a layer of analysis that is doctrinally murky in the Fourth Amendment. While the type of force used (car, bullet, chokehold) is likely considered in Fourth Amendment reasonableness analysis, there is no doctrinal requirement to consider whether less pain-inducing means are available. Proportionality and humanity, then, provide an analytical strength to executive lethal force analysis that is absent from the police context.

Other IHL principles, however, do not add much to the Fourth Amendment standard, or otherwise are not relevant to the police context. The principle of necessity requires that the target, "have definite military value."[104] The equivalent in the police context is the requirement (per *Garner*) or factor (per *Graham*) that the suspect poses a danger. Separately, the principle of distinction requires "reasonable certainty" that the person the missile is trained on is actually the person on the kill list.[105] While this is of some significance in the drone context, it adds little when placed in the policing context. It is an implicit requirement of the Fourth Amendment that the force is used against the proper person.

While it would go too far to say that international law creates binding rules on the Executive to which the police are not subject, IHL does provide analytic and norm-forming tools for lethal force analysis that are non-existent in the

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1125 U.N.T.S. 3, 26, https://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17513-English.pdf [https://perma.cc/UR5Z-EZHE] [hereinafter Geneva Conventions Additional Protocol I].

101. For a more thorough discussion of proportionality, see Gregory S. McNeal, *Targeted Killing and Accountability*, 102 GEO. L.J. 681, 691 (2014).

102. Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES (Oct. 8, 2011), http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html [https://nyti.ms/2kujyLF].

103. Eric Holder, U.S. Attorney Gen., Attorney General Eric Holder Speaks at Northwestern University School of Law (Mar. 5, 2012), http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html [https://perma.cc/CG6Z-U5J9] [hereinafter Holder, Northwestern Speech].

104. *Id.*

105. *See* Declaration of Jonathan Manes, Ex. A: Joint Chiefs of Staff, Joint Targeting Cycle and Collateral Damage Estimation Methodology (CDM) at 26, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-civ-1469). For a clear articulation of the principle of distinction, see Geneva Conventions Additional Protocol I, art. 48, *supra* note 100, 1125 U.N.T.S. at 25 (requiring that parties to a conflict, "at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives").

police context. International law is characterized as a regulatory "middle road"[106] because even while it allows "[b]elligerent [p]arties much leeway," it also circumscribes their "freedom of action."[107] This functionalist approach of international law might be useful to domestic police use of force.[108]

B. Authorizing Statutes

For both the President and the police, authorizing statutes could meaningfully limit the circumstances under which force is permitted. Because authorizing statutes involve the creation of limits through the ex ante legislative process, rather than the ex post judicial process, they are better suited to formulate specific and informed limits on lethal force.[109] While authorizing statutes are largely impotent in the police context, they do provide some limits on executive lethal force.

1. The Police

Police authorizing statutes are often vague and permissive.[110] New York City's is typical, authorizing the police to, inter alia, "preserve the public peace," "prevent crime," and "detect and arrest offenders."[111] The breadth diminishes capacity for constraint. While some jurisdictions have passed legislation that specifically limits certain areas of police practice, such as the push to statutorily require the use of body cameras, such efforts are largely absent in the context of lethal force.[112] Authorizing statutes effectively forfeit the lethal force regulatory game.

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106. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 17 (2004).

107. *Id.*

108. For one such attempt, see PRINCIPLES OF THE LAW: POLICING, Ch. 5 (Use of Force) (AM. LAW. INST. Revised Tentative Draft No. 1, 2017). While the ALI does not cite to principles of international law, it does transpose the principles of necessity, humanity, proportionality, and distinction to its recommendation for police.

109. *See generally, e.g.*, Friedman & Ponomarenko, *supra* note 26, at 1832 ("Rather than attempting to regulate policing primarily post hoc through episodic exclusion motions or the occasional action for money damages, policing policies and practices should be governed through transparent democratic processes such as legislative authorization and public rulemaking."). In the executive context, the role of authorization finds voice in political process theory. *See, e.g.*, Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 5 (2004).

110. *See generally* Friedman & Ponomarenko, *supra* note 26, at 1843 ("There is remarkably little legislative direction for America's policing officials. Compared to the sprawling administrative codes that detail every aspect of agency practice, laws governing the police are notably sparse—if they exist at all."); Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079 (1993).

111. N.Y.C. CHARTER § 435 (2012).

112. *See Law Enforcement Overview*, NAT'L CONFERENCE OF STATE LEGISLATURES (last updated Dec. 16, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/lawenforcement.

2. The President

The statutory authorization of executive lethal force is more complicated and more limiting. Executive authority to use lethal force is analyzed under the *Youngstown* framework, such that authority is conditioned by the relationship between statutory permission and constitutional power.[113] This framework provides more than one route to find authorization for lethal force outside of active hostilities. Both President Bush and President Obama, for example, have claimed inherent Article II powers to use force even without congressional authorization.[114] Whether that inherent power would extend to the killing of Awlaki is unsettled, but also presently moot, because OLC has found that such a strike is authorized by statute. The executive branch exercises lethal force either through the Department of Defense (DOD) or the Central Intelligence Agency (CIA), each of which has distinct statutory authority. DOD operations constitute "military activities" which are governed by statutes in Title 10 of the U.S. Code. CIA operations, by contrast, constitute "intelligence activities" which are governed primarily by the National Security Act of 1947 (NSA).[115] Prior to the killing of Awlaki, it was undecided which agency would take the action, so OLC analyzed the authorizing statutes of each, and determined that both granted sufficient authority.[116] The relevant question here, however, is how and whether the statutes constrain the use of force. As for DOD authority, the Authorization for the Use of Military Force (AUMF) authorizes the President,

> to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism

aspx [https://perma.cc/V5QC-ZN6M] (illustrating the general absence of lethal force initiatives, with a notable exception being Washington state's 2016 legislative task force to reduce deadly force encounters between police and the public).

113. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–39 (1952) (Jackson, J., concurring).

114. *See, e.g.*, Authority to Use Military Force in Libya, 35 Op. O.L.C. 2, 6–7 (2011), https://www.justice.gov/file/18376/download [https://perma.cc/JJY7-YPQC]; Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., & Robert J. Delahunty, Special Counsel, U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, & William J. Haynes, II, Gen. Counsel, U.S. Dep't of Def., at 6 (Oct. 23, 2001), http://www.justice.gov/olc/docs/memomilitaryforcecombatus10232001.pdf [https://perma.cc/URD4-776M]. *See generally* McNeal, *supra* note 101, at 691 ("[B]oth the Bush and Obama Administrations have invoked, through the legal memoranda issued by the U.S. Department of Justice Office of Legal Counsel, various analyses that claim that the President has the power under Article II of the Constitution to use force even without congressional approval.").

115. *See* Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV. NAT'L SECURITY J. 283, 353 (2011) ("In brief, the law relating to the armed forces is found in Title 10 of the United States Code, while that dealing with the intelligence services is located in Title 50.").

116. *See* OLC Memo, *supra* note 32, at 21.

> against the United States by such nations, organizations or persons.[117]

The key limitation here, absent in the police context, is the anchoring to 9/11.[118] While an equivalent in the police context is not obvious, we might imagine an authorizing statute that only permitted lethal force in response to certain serious crimes.[119] Such a component of an authorizing statute would limit constitutional doctrine, which now permits lethal force in high-speed car chases that escalate from mere traffic violations. To be sure, the AUMF does not live up to the potential regulatory control of an authorizing statute, but it does provide more limits than does the average police authorizing statute.

CIA authority comes from a different statute—the NSA.[120] The first four categories of authority granted to the CIA by the NSA enable it to centralize and streamline traditional intelligence activity. The "fifth function," though, is a catchall clause, which now reads, "[t]he Director of the Central Intelligence Agency shall . . . perform such other functions and duties related to intelligence affecting the national security as the President or the Director of National Intelligence may direct."[121] It is this phrase that empowers the CIA to take covert action internationally.[122] The assassination attempt of Fidel Castro, for example, was a product of the fifth function.[123] While OLC redacted its analysis of how this authorized the strike against Awlaki, it nonetheless concluded that it did.[124]

One limitation likely included in OLC's fifth function analysis is that most individual covert actions require approval through an executive finding, whereby the executive branch determines whether the action "is necessary to support identifiable foreign policy objectives" and "is important to the national security of the United States."[125] Frankly this is not a difficult hurdle, but it is one step of

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117. Authorization of the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224-25 at § 2 (2001).

118. OLC Memo, *supra* note 32, at 21.

119. Ian Ayres & Daniel Markovitz, *Ending Excessive Police Force Starts with New Rules of Engagement*, WASHINGTON POST (Dec. 25, 2014), https://www.washingtonpost.com/opinions/ending-excessive-police-force-starts-with-new-rules-of-engagement/2014/12/25/7fa379c0-8a1e-11e4-a085-34e9b9f09a58_story.html?utm_term=.70115279bad5 [https://perma.cc/B3WT-VSNX] (arguing that, inter alia, police should be prevented from using force in misdemeanor arrests).

120. National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (codified as amended at 50 U.S.C. § 3001 (Supp. 2013–2015)).

121. 50 U.S.C. § 3036(d)(4) (Supp. 2013–2015).

122. For an in-depth discussion of the evolution of the fifth function clause and its permissiveness to CIA action, see David W. Opderbeck, *Drone Courts*, 44 RUTGERS L.J. 413, 427–32 (2014).

123. ALLEGED ASSASSINATION PLOTS ON FOREIGN LEADERS, AN INTERIM REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. 4 (1975).

124. OLC Memo, *supra* note 32, at 20.

125. 50 U.S.C. § 3093(a) (Supp. 2013–2016) (formerly 50 U.S.C. § 413b(a)).

review and reflection not required of the police. What this might look like in the police context is an authorizing statute that required police departments to produce a lethal force policy—something that some departments still lack.[126]

In sum, while the authorizing statutes of executive lethal force are not models of restriction, they do provide small mechanisms of constraint not included in police authorizing statutes. One plausible explanation for this divergence is that members of Congress understand that if they fail to limit the Executive through authorizing statutes, little regulation will appear elsewhere. By contrast, such a burden is not felt in the police context where the regulatory work is expected to be done by the courts.[127]

C. Internal Policy

Self-regulation by the police and the President provides certain comparative advantages. The police and the President have the most intimate knowledge of the quality of the threat to which they respond. As such, to the extent they are willing, they can impose specific, clear, and functional guidelines on how to avoid situations that tend to result in the use of lethal force. Moreover, making these rules public would improve accountability.[128] This mode of regulation is utilized more by the President than by the police. While White House lethal force policy takes the regulatory system of constitutional, statutory, and international law as a floor and builds up from there, police departments on balance do not add to the underlying criminal and constitutional requirements.

1. The President

At least since 9/11, internal policy on the use of lethal force abroad was developing within the White House. It became public in a piecemeal fashion, the most comprehensive version of it being released in a 2013 document called "U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism

126. The most recent national study of local police department policies found that three percent of police departments lacked written policies on lethal force and four percent of police departments lacked written policies on less-than-lethal force. *See* BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 231174, LOCAL POLICE DEPARTMENTS, 2007, at 18 (2010), https://www.bjs.gov/content/pub/pdf/lpd07.pdf [https://perma.cc/ZE2C-6P92].

127. *See generally, e.g.*, Emad H. Atiq, *Why Motives Matter: Reframing the Crowding Out Effect of Legal Incentives*, 123 YALE L.J. 1070 (2014) (providing background discussion of crowding out theory in the context of private actors).

128. *See generally* DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION (Adam Przeworski, Susan C. Stokes & Bernard Manin eds., 1999) (discussing models of democratic accountability); Jeremy Waldron, Accountability: Fundamental to Democracy 10–14 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 14-13, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2410812 (discussing what he calls agent-accountability, whereby "the principal may demand from the agent an account of the work that the agent has been doing in the principal's name or on the principal's behalf, enabling the principal if she sees fit to sanction or replace the agent or terminate the agency relationship").

Operations Outside the United States and Areas of Active Hostilities."[129] The document claims that it includes "certain key elements" of the standard and also that "[administration officials] are continually working to refine, clarify, and strengthen [the] standards and processes."[130] The document contains a number of policy restrictions on the use of force that go beyond the requirements of law. First, the policy states that one requirement for the use of force is an assessment that "no other reasonable alternatives exist to effectively address the threat to U.S. persons."[131] This incorporates two limits not required by law. First, it invokes a principle of force minimization requiring that non-lethal or less-lethal force be used wherever possible. As noted earlier, constitutional and statutory law do not require that less-lethal force be used wherever possible. Second, the language in the policy also implicitly requires that non-violent solutions, such as de-escalation, be considered before the use of force. Constitutional and statutory law do not require this. In *Scott*, for example, the Court conceded that the threat could have been addressed if the cops simply stopped chasing the fleeing car. Nonetheless, the Court found that the police decision to ram the car was reasonable under the Fourth Amendment.[132] The White House policy is also clear about the imminence requirement in a way that the constitutional standard is not.[133] The policy states that force may only be used against a target that poses a "continued and imminent" threat.[134] Compare this to *Graham*, where the imminence and timing of the threat is relevant but not dispositive.[135] Even the *Garner* requirement, slightly stronger than *Graham*'s, leaves open the possibility that the severity of the crime committed may justify the use of lethal force even when the imminence of a future threat is questionable.[136] The executive policy explicitly prevents such an ambiguity by stating that "[i]t is simply not the case that all terrorists pose a continuing, imminent threat to U.S. persons; if a terrorist

129. On May 23rd, 2013, President Obama gave a speech at National Defense University on lethal force, see Remarks at National Defense University, 2013 DAILY COMP. PRES. DOC. 5 (May 23, 2013), https://www.gpo.gov/fdsys/pkg/DCPD-201300361/pdf/DCPD-201300361.pdf [https://perma.cc/T8Y2-7K3U], and simultaneously made public the White House policy on lethal force, see White House Use of Force Policy, *supra* note 17.

130. *Id.*

131. *Id.* ("Lethal force will be used only . . . when capture is not feasible and no other reasonable alternatives exist to address the threat effectively.").

132. Scott v. Harris, 550 U.S. 372, 381 (2007).

133. As Holder described the standard: "'[I]mminent threat' [analysis] incorporates considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attacks against the United States." Holder, Northwestern Speech, *supra* note 103.

134. *See* White House Use of Force Policy, *supra* note 17.

135. Graham v. Connor, 490 U.S. 386, 396 (1989) (listing "whether the suspect poses an immediate threat to the safety of the officers or others" as one of four factors to balance).

136. Tennessee v. Garner, 471 U.S. 1, 11 (1985) ("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, deadly force may be used if necessary to prevent escape.").

does not pose such a threat, the United States will not use lethal force."[137] Another requirement added by the policy is near certainty that non-combatants will not be injured or killed.[138] This is absent from statutory and constitutional law. Consider *Plumhoff v. Rickard*, where the Court found that the presence of a non-active passenger—who was killed by the decision to ram the driver's vehicle—was irrelevant to the reasonableness of the use of force.[139] Finally, the policy requires that the decision to use lethal force against a citizen must be made at the "most senior levels" of U.S. government.[140] As noted above, the OLC memo found that this review was sufficient for the Fifth Amendment, but did not state whether it was necessary.[141] The import of the policy, then, is to make it necessary. While one might doubt the feasibility of having every instance of police lethal force approved by senior police officials, it is sometimes possible. Consider for example the killing of Micah Johnson, where the decision to detonate a robotic bomb was not a quick one.[142] A reasonable rule might require that where time permits, officers must get approval. In sum, even though not demanded by statute or the constitution, the executive policy requires that force only be used as a last resort, that only the minimum required force is used, and that the consequence of lethal force to bystanders is considered.[143] It also creates a strict imminence requirement.[144] In this way, executive branch policy supplements existing legal requirements.

2. The Police

Police policy does not. Note first that while there is one White House, there are close to 18,000 policing agencies in the U.S.[145] The task then cannot be to

137. *See* White House Use of Force Policy, *supra* note 17.

138. *Id.*

139. Plumhoff v. Rickard, 134 S. Ct. 2012, 2022 (2014) ("In arguing that too many shots were fired, respondent relies in part on the presence of Kelly Allen in the front seat of the car, but we do not think that this factor changes the calculus.").

140. *See* White House Use of Force Policy, *supra* note 17. The status of this particular safeguard is uncertain, given that President Trump has indicated his desire to do away with it. *See* Charlie Savage & Eric Schmitt, *Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids*, N.Y. Times (Sept. 21, 2017), https://www.nytimes.com/2017/09/21/us/politics/trump-drone-strikes-commando-raids-rules.html?_r=0 [https://nyti.ms/2jRoPSa] (reporting that Trump intended to remove two restrictions: that the target must be a high-level one (versus a foot soldier, for example) and that the decision to strike must be subject to review by a high-level official).

141. OLC Memo, *supra* note 32, at 40.

142. Richard Fausset, Manny Fernandez & Alan Blinder, *Micah Johnson, Gunman in Dallas, Honed Military Skills to a Deadly Conclusion*, N.Y. TIMES (July 9, 2016), https://www.nytimes.com/2016/07/10/us/dallas-quiet-after-police-shooting-but-protests-flare-elsewhere.html [https://nyti.ms/2jHskLc].

143. *See* White House Use of Force Policy, *supra* note 17.

144. *Id.*

145. MATTHEW J. HICKMAN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 196002, LOCAL POLICE DEPARTMENTS 2000 (2003), http://www.bjs.gov/content/pub/pdf/lpd00.pdf [https://perma.cc/PQ9G-MC5Q].

compare each agency policy to the White House's lethal force policy. Instead, the comparative question is necessarily a rough one, asking whether the average police department policy imposes limits on lethal force not already required by law. Even this, however, is difficult to establish. A recent study surveyed police departments for more detailed information about their lethal force policies.[146] While this survey does not use random sampling or get close to catching most of the nearly 18,000 agencies, it focuses on the fifty largest police departments as a proxy. The authors of the survey intentionally chose the largest departments because they expected them to have the most developed, researched, and detailed policies on lethal force. In light of this expectation, the results of the survey are troubling. First, there is a problem with transparency and accountability. Unlike the public nature of the White House policy, the study found that only seventeen of the fifty largest agencies make their policies available publicly.[147] More substantively, the survey found that most of the departments surveyed did not discuss de-escalation tactics in their policies.[148] Neither did most policies have requirements to minimize the degree of force used.[149] Compare this to the executive requirement that no alternative exists to the use of force.[150] Additionally, only a slim majority of the policies encouraged or required verbal warnings before the use of force.[151] Therefore, even among the policies expected to be most thorough, only some added to the constitutional standard.[152] Internal policy has a meaningful role to play in lethal force regulation. It allows for the actors with the most intimate knowledge of the dynamics of lethal force to self-impose specific rules and make them public for the sake of accountability. Currently, the executive branch makes use of this tool but police departments do not. Why exactly this divergence exists is debatable, but one reasonable explanation is the fact that constitutional litigation is available against the police but not the President. The presence of constitutional litigation both symbolically deflects responsibility from police departments to create strict rules of their own and rationally disincentivizes such policies as those policies can then be used to hold police departments liable. In this way, not only does constitutional litigation

146. *Id.*

147. *Id.* at 280.

148. *Id.* at 283 ("[T]wenty-four agency policies discussed de-escalation specifically").

149. *Id.* at 281 ("Just under half, or twenty-four, of these large agencies counseled minimizing the need to use force, or that officers use the minimum force necessary.").

150. *See* White House Use of Force Policy, *supra* note 17 ("Lethal force will be used only . . . when capture is not feasible and no other reasonable alternatives exist to address the threat effectively.").

151. Garrett & Stoughton, *supra* note 22, at 282 ("Thirty-two of the policies obtained encourage or require the use of verbal warnings before using deadly force, typically stating that such warnings be given where feasible rather than requiring their use.").

152. This weak state of substantive internal constraints creates a ceiling for the efficacy of other tools of police oversight, such as civilian review boards. Therefore, while it may be argued that these boards promote accountability, they nonetheless cannot provide accountability for rules that do not exist.

fail in its own right, it also might crowd out the creation of alternative modes of regulation, such as internal policy.

IV.
LESSONS FOR POLICE CONSTRAINT

To the extent that war paradigm regulation—i.e. international law, authorizing statutes, and internal policy—has produced functional constraints on the President, advocates of police reform may find it productive to use similar types of regulation to guide the police. This section offers suggestions on how this might be done.

A. Demoting Ex Post Regulation

First, the relative constraint of war paradigm regulation of lethal force calls for humility about the regulatory capacity of criminal and constitutional law. Not only is it true that criminal and constitutional law are structurally suboptimal as regulators of lethal force, it is also possible that by failing to recognize this fact, advocates for police reform are channeling energy into the wrong places. We should recognize the possibility that investment in constitutional and criminal regulation might crowd out investment in alternative infrastructures of regulation.

To reflect this recognition, discourse in the aftermath of tragic incidents of lethal force could assert clearly both the value and the shortcomings of constitutional and criminal law as a response. The value of criminal and constitutional law after incidents of lethal force is largely about accountability. As a reflection of a moral imperative against unjustified police violence, accountability is important and individuals and communities are not misguided in pursuing it. That said, accountability should not be confused with functional regulation. As this Article has demonstrated, criminal and constitutional law do not provide sufficient constraint on police use of force, and that is not likely to change—the difficulty of second guessing officers who assert a fear for their lives is inherent to ex post enforcement. Therefore, demands that are made by advocates could include not only legal accountability, but also steps to enact ex ante regulation.

Hopefully, a public recognition that ex post criminal and constitutional enforcement serves accountability goals but not regulatory goals will generate an investment in alternative regulatory tools. Once free from the illusion that criminal and constitutional law suffice to constrain the police, finding other tools of constraint will become a more urgent project.

B. Promoting Ex Ante Regulation

One place to look is the regulation of executive lethal force. There, the regulatory gap left by criminal and constitutional law is recognized, and

international law, authorizing statutes, and internal policy are used to fill it. Numerous tools of constraint used in the executive context may be drawn upon by reform advocates for application to the police. First, the theoretical underpinnings of regulation in the international context may be helpful for discussions about developing functional police regulation. In particular, international humanitarian law, in recognition that it may not be given teeth by the courts, was designed in consideration of workable constraints that could be enacted through norm formation.[153] A similar process—discerning viable norms of restraint—is a useful starting point for all discussions of police policy.

Moving from there, a number of specific rules imposed on the Executive may be productively applied to the police through authorizing statutes and police policies. One such rule is that force must only be used as a last resort.[154] If incorporated into a police policy, this would instruct officers to use other methods to mitigate the threat where possible. Such a policy would benefit from accompanying training on de-escalation, as those tactics would very often be the reasonable alternatives to lethal force. The case of *Scott* illuminates the change that this rule would make.[155] There, an officer chose to ram the back of a fleeing car instead of letting it go—two methods to end the present risk of a high-speed chase. The last resort rule would require that the officer let the car go instead of ramming it. To be sure, some might object to the incentive structure this sets up, but it is no different than the approach the Court took in *Garner*, instructing officers not to shoot at non-dangerous fleeing felons.

Another candidate for translation is the force-minimization principle. Such a principle is reflected in international humanitarian law, requiring that the use of weapons does not "inflict unnecessary suffering."[156] Applied to the police context, this rule would control the type of force used and demand that officers use the minimum force required so as not to inflict unnecessary suffering. While consideration of these factors is generally baked into current Fourth Amendment reasonableness analysis, there is no rule requiring minimization.

Police policies should also establish clarity on the rules surrounding the presence of non-active parties or bystanders. In the executive context, it is required that the consequence of lethal force to bystanders is considered.[157] If translated to a police policy, this rule would very likely save lives. In the situation that led to *Plumhoff v. Rickard*, for example, where an officer rammed the driver's vehicle and in doing so killed the passenger,[158] a police policy

153. *See* Waldron, *Justifying Targeted Killing*, *supra* note 95, at 127.

154. The language in the executive policy specifically requires that, before using force, there must be an assessment that "no other reasonable alternatives exist to effectively address the threat." White House Use of Force Policy, *supra* note 17.

155. Scott v. Harris, 550 U.S. 372, 374 (2007).

156. Holder, Northwestern Speech, *supra* note 103.

157. The language used in the executive policy requires "near certainty that non-combatants will not be injured or killed." White House Use of Force Policy, *supra* note 17.

158. Plumhoff v. Rickard, 134 S. Ct. 2012, 2017–18 (2014).

consistent with the executive policy would have changed the outcome. Had the officer been aware of internal policy requiring near certainty that non-active people would not be injured or killed, perhaps the officer would not have rammed the vehicle.

Police policies might also be aided by a clear imminence requirement. While the imminence requirement for police was left unclear by *Garner*,[159] the executive policy states that force may only be used against a "continuing and imminent" threat and that "[i]t is simply not the case that all terrorists pose a continuing, imminent threat to U.S. persons."[160] Translated to the police context, this language might express that an "imminent threat cannot be inferred solely by the fact that somebody previously committed a crime." Such language would clarify the ambiguity left open by *Garner*.

In sum, advocates for police reform can gain much by looking to regulation of the President's use of lethal force. First is a paradigm-shift in how we think about the regulation—moving from a reliance on the ex post enforcement of criminal and constitutional law to a call for ex ante regulations that instruct officers before violence occurs. Second is the adoption of specific constraints that have been leveraged in the executive context, but not in the police context, including the last resort rule, the principle of force minimization, the bystander rule, and the imminence rule.

V.
CONCLUSION

The crime/war distinction forecasts that police lethal force will be more constrained than executive lethal force. But the reverse is true. The regulation of lethal force by the police and the President is similar in the way that criminal law and constitutional law fail to provide meaningful constraint. The difference is that while the President is also constrained by alternative forms of regulation, the police are not. Indeed, while both are largely free from constraint by the traditionally "first best" tools of regulation, only the President is constrained by the "second best" tools of international law, authorizing statutes, and internal policy. Recognizing this relationship generates two further claims.

First, it complicates the assumption of the crime/war distinction that rights are stronger and that the government is more limited at home. The presence of criminal and constitutional judicial proceedings in the police context (as compared to the absence in the executive context) triggers an expectation of rights protection. This Article determines that this expectation is unwarranted. And while this Article presents the law of lethal force as merely one exception to the utility of the crime/war distinction, it is worth asking if there are others. One possibility is government surveillance. The crime/war distinction was central to

159. Tennessee v. Garner, 471 U.S. 1, 11 (1985).

160. *See* White House Use of Force Policy, *supra* note 17.

the purpose of FISA, which sought to selectively relax restrictions on government surveillance.[161] Approval for warrantless surveillance under FISA required, inter alia, a showing that the primary purpose of the surveillance was to gather foreign intelligence information.[162] Surveillance would not be approved by a FISA court if the primary purpose was criminal law enforcement.[163] That distinction no longer exists. Capping many years of tension over the distinction, including failed attempts by Congress to diminish it with the PATRIOT Act, the Foreign Intelligence Surveillance Court of Review eradicated it in 2002.[164] The court held that gathering foreign intelligence information need only be a significant purpose of the surveillance,[165] in part because the crime/war distinction was "inherently unstable, unrealistic, and confusing."[166] The result is that where there once was a consequential distinction between rights against surveillance in the criminal context and the war context, there no longer is.[167] Perhaps, then, this is another example where the crime/war distinction is unhelpful, putting more pressure on its utility.

Second, the descriptive claim of this Article also lends support to growing calls for ex ante regulation of the police. By noting that regulation of executive lethal force is aided by ex ante tools, this Article suggests that regulation of police lethal force could be too. But more than that, it advances more narrow claims in two directions. The first is that lethal force, as compared to policing in general, is in especially urgent need of ex ante regulation. This is because the problems of ex post regulation are particularly acute when applied to the qualities of lethal force. Consider, for example, how deterrence, judicial decision-making, and remedies operate in the context of lethal force. The

161. *See* Laura K. Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573, 1747 (2011) ("The entire purpose of enacting FISA was to preserve a distinction between criminal law and national security concerns.").

162. The FISA provision required that "a significant purpose" of the search be to obtain foreign intelligence information. *See* 50 U.S.C. 1804(a)(6)(B) (2012) (electronic surveillance); 50 U.S.C. 1823(a)(6)(B) (2012) (physical search). Courts uniformly interpreted this to mean the "primary purpose." *See, e.g.*, United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991); United States v. Pelton, 835 F.2d 1067, 1075 (4th Cir. 1987); United States v. Badia, 827 F.2d 1458, 1464 (11th Cir. 1987); United States v. Duggan, 743 F.2d 59, 78 (2d Cir. 1984).

163. David S. Kris, *The Rise and Fall of the FISA Wall*, 17 STAN. L. & POL'Y REV. 487, 487 (2006) ("[A]ll three branches of the federal government assumed or decided, as a matter of law or policy, that [FISA] could not or should not be used primarily to support law enforcement methods of protecting national security. Thus, for example, FISA electronic surveillance could be conducted primarily to acquire information necessary to recruit a foreign spy as a double agent, but not to acquire information necessary to prosecute and incarcerate the spy.").

164. *In re* Sealed Case, 310 F.3d 717 (FISA Ct. Rev. 2002) (holding that the FISA did not preclude or limit the government's use of foreign intelligence information in a criminal prosecution).

165. *Id.* at 735 ("So long as the government entertains a realistic option of dealing with the agent other than through criminal prosecution, it satisfies the significant purpose test.").

166. *Id.* at 743.

167. *See generally* Kris, *supra* note 163, at 488 (describing how the FISA wall between crime and war was established and eventually deconstructed).

regulatory worth of ex post regulation rests on deterrence, yet the value of deterrence is weakened in the context of lethal force because a government actor is operating in response to what she perceives to be life-threatening. This same quality—that government actors are responding to perceived threats to life—also complicates judicial decision-making. If judges are hesitant to exclude evidence in Fourth Amendment search jurisprudence, consider the extent to which they would be hesitant to impose sanctions on someone claiming to have chosen between individual or collective death and the use of lethal force. Add to that the factual and evidentiary complexity of lethal force incidents, which makes it difficult for judges to second guess claims of existential threat. This is not to excuse or condemn judges, but simply to point to the structural forces that push them away from finding liability. Finally, lethal force is lethal and no remedy can resuscitate. Whereas monetary, injunctive, or evidentiary relief may be meaningful in certain situations, the finality of lethal force renders them symbolic at best. These qualities of lethal force make it impervious to ex post criminal and constitutional regulation. Accordingly, ex ante guidance for lethal force is especially warranted.

The second is that a misguided reliance on criminal and constitutional law is crowding out alternative infrastructures of regulation in the police context.[168] This dynamic is illustrated by the public response to lethal force in each context. For example, when reports circulated that President Trump intended to relax internal constraints on lethal force,[169] critics responded with calls to constrain him with Congressional action[170] and international norms.[171] Contrast this response to that typically following incidents of lethal force by the police: a call to prosecute and sue using criminal and constitutional law.[172] While crowding out is difficult to prove as a matter of fact, this comparison indicates that a belief in the efficacy of criminal and constitutional law for the police might be hindering the development of other regulation. This raises the question, what would we demand of police departments if we did not believe that criminal law

168. *See generally, e.g.*, Atiq, *supra* note 127 (providing background discussion of crowding out theory in the context of private actors).

169. *See* Savage & Schmitt, *supra* note 140.

170. *See, e.g.*, Charlie Savage, *Will Congress Ever Limit the Forever-Expanding 9/11 War?*, N.Y. TIMES (Oct. 28, 2017), https://www.nytimes.com/2017/10/28/us/politics/aumf-congress-niger.html [https://nyti.ms/2iGY0jp].

171. *See, e.g.*, Letter from Civil Rights Orgs. to Lt. Gen. H.R. McMaster, Jr., at 1 (June 1, 2017), http://www.humanrightsfirst.org/sites/default/files/McMaster-Letter-June.pdf [https://perma.cc/9HGC-RWRT] ("As more countries and non-state armed groups around the world acquire armed drones, it is critical that the United States seek to set an example for other nations and demonstrate that its use of force practices adhere to its obligations under international law.").

172. *See, e.g.*, Editorial Board, *A Fair Inquiry for Michael Brown*, N.Y. TIMES (Aug. 20, 2014), https://www.nytimes.com/2014/08/21/opinion/a-fair-inquiry-for-michael-brown.html [https://nyti.ms/2DuL45X] ("[H]undreds of peaceful protesters continue to gather each day to demand justice in the case of Michael Brown, the unarmed black teenager who was shot by a white police officer on Aug. 9. Now it's up to local and federal officials to show that they are aggressively pursuing that demand.").

and constitutional law already put demands on them? One answer might be in the executive context, where a sober recognition of the weaknesses of constitutional and criminal law results in an investment in other tools, such as international law, authorizing statutes and internal policy. Rather than doubling down on criminal and constitutional law, regulation for police lethal should follow suit.

A first step to making this happen is extricating police lethal force from the assumptions of regulation in the crime paradigm. This Article intends to do that. Despite the forecasting of the crime/war distinction, our rights are no stronger against the police's Sig Sauer in Missouri than against the President's Hellfire missile in Yemen. Discourse, scholarship, and the law would do well to acknowledge this fact.