

ONLINE ARTICLE

The Image of Combat, Not Community: A Critique on Law Enforcement Use of Military Equipment*

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[†] Muchisimas gracias to my family, friends, mentors, and other amazing people who made this piece a reality. Pa'lante!

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Introduction

Her breath caught in her throat as she saw the scene play out on the screen before her. A Mine Resistant Ambush Protected (MRAP) vehicle lumbered down the street, and a line of forces stood wearing combat loads. She remembered the weight of the gas mask from her own service, but this was different. The news scroll indicated that this scene was in South Carolina, not Afghanistan.¹

The killings that inspired the 2020 and 2014 protests against police brutality and systemic racism – as well as police use of military equipment to respond to the protests themselves – have thrust the militaristic tactics and equipment of law enforcement into the spotlight.² The image of combat-ready police amplified the outrage over police use of force.³ While the protests highlighted calls to abolish or defund police,⁴ another demand played out in the media: calls to demilitarize the police. Servicemembers and veterans publicly questioned law enforcement use of military equipment, noting how police have access to more gear than some soldiers did while deployed. The presence of militaristic tactics and equipment on American streets was thrust against two decades of military forces adapting tactics to de-escalate, protect humanity, and honor the right to protest.⁵ The military and police had each changed their image. For police, the change means fear; police could now use military equipment to hurt the very people they are meant to protect.⁶

While many excellent pieces of legal scholarship devoted to substantive changes in criminal justice exist, this article focuses on police use of military equipment. More specifically, this piece uniquely analyzes the role of military equipment by exploring military use and the regulations thereof, subsequently comparing military use to police use of the same equipment. The piece asserts that the current regulations are too vague, too unclear, and too subjective, necessitating significant changes at the federal level to ensure the protection of the American people.

Part I of this piece explores the topic's tie to national security. Part II explores the background of military equipment use by law enforcement, focusing on the foundational rationales behind its use, before Part III examines the ways law enforcement agencies acquire the equipment. Part IV analyzes the regulation of military equipment and the different levels of regulation in the military

¹ Casey Tolan & Sergio Hernandez, *As Demand for Police Reform Grows, Military Equipment Program Faces New Scrutiny*, CNN (last updated June 17, 2020, 5:55 PM), <https://www.cnn.com/2020/06/17/politics/protests-police-reform-military-supplies-invs/index.html>.

² *Id.*

³ See, e.g., Ana Radelat & Gregory B. Hladky, *Connecticut Police Receive Millions of Dollars in Military Equipment from Program That's Under Fire*, CT MIRROR (June 12, 2020), <https://ctmirror.org/2020/06/12/connecticut-police-receive-millions-of-dollars-in-military-equipment-from-program-thats-under-fire/>; Nick Shroeder, *Maine Police Have Been Armed With Nearly \$10M Worth of Military Equipment*, BANGOR DAILY NEWS (June 15, 2020), <https://bangordailynews.com/2020/06/15/news/maine-police-have-been-armed-with-nearly-10m-worth-of-military-equipment/>.

⁴ See, e.g., Ruairi Arrieta-Kenna, *The Deep Roots—and New Offshoots—of 'Abolish the Police'*, POLITICO (June 12, 2020, 7:30 PM), <https://www.politico.com/news/magazine/2020/06/12/abolish-defund-police-explainer-316185>; Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html>.

⁵ See, e.g., *id.*; Lyle Jeremy Rubin, *A Former Marine Explains All the Weapons of War Being Used by Police in Ferguson*, THE NATION (Aug. 20, 2014), <https://www.thenation.com/article/archive/catalog-ferguson-police-weaponry/>.

⁶ See Daryl Meeks, *Police Militarization in Urban Areas: The Obscure War Against the Underclass*, 35 Black Scholar 33, 36 (2006).

and domestic policing contexts. Part V details trends and patterns of actual use. Part VI builds on the previous parts, detailing policy shifts since 2020 as well as proposing key changes to the current system. The piece concludes that law enforcement use of military equipment should be significantly limited and highly regulated.

I. A MATTER OF NATIONAL SECURITY

Military equipment use by law enforcement goes beyond domestic policing – it is a matter of national security. The lens of national security is uncommon in this area, for most research contains perspectives derived from criminology and sociology. This piece posits that the broad implications of law enforcement use of military equipment merits analysis as a national security issue. National security is used as a lens for two reasons: 1) state and local law enforcement agencies are a crucial part of the post 9/11 national security apparatus and 2) the use of the equipment against protesters raises civil liberties concerns that could propel civil unrest or international intervention.

National security was reshaped in the aftermath of 9/11. Threats were no longer confined to the battlefield. Threats were viewed as hiding amidst our communities, striking the general population when least expected. The response to national security threats likewise shifted. Building on the perception of threats within communities, local law enforcement agencies became an important part of the intelligence network.⁷ The government positioned local agencies as foundational to threat assessment, with capacity to identify risks and expand intel beyond what federal agencies could accomplish.⁸

The September 11th terrorist attacks also forced the nation to assess its preparedness. Cities questioned how they might detect or address terrorism and found themselves unprepared, lacking knowledge, training, and equipment.⁹ In response, local agencies created counterterrorism units and domestic preparedness for national security threats became “as much a staple of law enforcement operations as crime analysis, criminal intelligence, and crime prevention.”¹⁰ Local law enforcement agencies then used counterterrorism as the primary rationale to justify access to military equipment. Local law enforcement agencies also strengthened existing connections to other areas included in national security such as immigration enforcement.¹¹ With law enforcement agencies becoming part of the national security apparatus after 9/11, police use of military equipment has become a national security issue. Law enforcement use of military equipment also raises national security concerns based on how police use the equipment. Law enforcement has used military equipment against civilian protesters in almost every major post-9/11 protest,¹²

⁷ See Michael Price, National Security and Local Police, BRENNAN CENTER FOR JUSTICE 1 (2013), https://www.brennancenter.org/sites/default/files/publications/NationalSecurity_LocalPolice_web.pdf.

⁸ See *id.* at 6; Lois M. Davis et al., *Long-Term Effects of Law Enforcement's Post-9/11 Focus on Counterterrorism and Homeland Security*, RAND CORP., at 2 (2010), <https://www.ncjrs.gov/pdffiles1/nij/grants/232791.pdf>.

⁹ Davis, *supra* note 8, at 5.

¹⁰ Joel Leson, *Assessing and Managing the Terrorism Threat*, U.S. DEPARTMENT OF JUSTICE, at vii (2005), <https://www.ojp.gov/pdffiles1/bja/210680.pdf>.

¹¹ See, e.g., Law Enforcement Assistance Center, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <https://www.ice.gov/leac>

¹² The largest exception is the women's march which may have been more a display of white privilege, thus bolstering claims that there is a racial tilt to who is being targeted by the use of military equipment. See, e.g., Lavanya Ramanathan, *Was the Women's March Just Another Display of White Privilege*, WASH. POST, (Jan. 24, 2017),

including protests in Ferguson, the Dakota Access Pipeline,¹³ and Occupy Wall Street.¹⁴ Critics have observed a racialized tilt to how and when law enforcement uses the equipment, noting that it is primarily in response to protests by Black, Brown, and Indigenous Americans. The use of military equipment thus amplifies distrust and fear of police, lowering their reputation. Outrage over police conduct can then spark more protests, which spurs further escalation by police. In an extreme scenario, such a situation could lead to a revolution or spark foreign intervention. Through design or outsider intervention, law enforcement use of military equipment is a matter of national security.

II. THE WHY: HISTORY AND RATIONALES OF EQUIPMENT USE

The summer of 2020 spurred two primary questions as people spotted MRAPs rolling down their street: why was this equipment being used, and how was it acquired? Part II and III answer these critical questions, exploring the rationales behind equipping law enforcement with military gear and then explaining the means by which law enforcement acquires the equipment.

The history of military equipment use is best understood through examining key changes in policing. Crucially, police have emerged as an alternative to the military.¹⁵ The state military model, which was rejected in the United States, is national and militaristic, and generally acts as an extension of the armed forces.¹⁶ In contrast, the United States crafted a sub-national, civilian model where police are controlled by non-military officials.¹⁷ Modeled after the London Metropolitan Police, professional police forces were designed to be an alternative to a powerful standing army.¹⁸ Rather, American police departments were created to be a part of the communities they served.

The militarization of policing has occurred through several eras and reforms, with the most significant growth post-9/11. The first period of reform occurred in the early Twentieth Century. Borrowing from military customs, reformers sought to create order and accountability.¹⁹ The 1960's marked another period of change. During this period, SWAT units emerged in Los Angeles in response to the Watts riots of 1965.²⁰ The original program name championed by founder Daryl F. Gates, Special Weapons Attack Team, embodied the armed squad whose equipment was firmly

https://www.washingtonpost.com/lifestyle/style/was-the-womens-march-just-another-display-of-white-privilege-some-think-so/2017/01/24/00bbdcca-e1a0-11e6-a547-5fb9411d332c_story.html.

¹³ See Alan Taylor, *Water Cannons Used Against Dakota Pipeline Protesters*, THE ATLANTIC (Nov. 21, 2016), <https://www.theatlantic.com/photo/2016/11/water-cannons-and-tear-gas-used-against-dakota-accesspipeline-protesters/508370/>.

¹⁴ See, e.g., *Suppressing Protest: Human Rights Violations in the U.S. Response to Occupy Wall Street*, THE GLOBAL JUSTICE CLINIC (2012). <https://chrgj.org/document-center/suppressing-protest-human-rights-violations-in-the-u-s-response-to-occupy-wall-street/>.

¹⁵ See Julian Go, *The Imperial Origins of American Policing: Militarization and Imperial Feedback in the Early 20th Century*, 125 AM. J. OF SOCIOLOGY 1193, 1194 (2010) (noting racial analogization between enemy combatants abroad and civilians of color domestically).

¹⁶ *Id.* at 1195.

¹⁷ *Id.*

¹⁸ *Id.* at 1196.

¹⁹ *Id.* at 1197.

²⁰ Clyde Haberman, *The Rise of the SWAT Team in American Policing*, N.Y. TIMES (Sept. 7, 2014), <https://www.nytimes.com/2014/09/08/us/the-rise-of-the-swat-team-in-american-policing.html>.

modeled after the military.²¹ However, the original SWAT mandate was narrowly tailored, limited to situations where peaceful methods had been exhausted and to extreme scenarios such as massive shootouts and hostage takings.²²

SWAT programs gained popularity throughout the 1990's, but leaders still sought to distinguish military and police. Where police lacked the capacity to address large-scale riots, military troops were activated.²³ As Lawrence J. Korb, an assistant defense secretary in the Reagan administration, noted in 1997, "[t]he military is much more likely to use force of arms because that's what they're trained to do."²⁴ Equipment use during the 1990's also displayed a desire to distinguish military and police. Even with the increasing establishment of SWAT teams, military equipment was not widespread during the 1990's. For example, cities and towns had a stark difference in their supplies. Whereas large cities had active SWAT programs with militaristic equipment, small towns usually only had limited supply of heavy weaponry that matched the needs of rural areas, such as a pump-action shotgun or hunting rifle.²⁵ After 2001, domestic preparedness for terrorism became a significant concern, and funding ballooned to equip law enforcement at all levels.

The rationales and subsequent responses to law enforcement use of military equipment can be largely viewed in three groups: officer safety, community safety, and crime deterrence. For instance, the National Association of Police Organizations has heralded the use of military equipment as "lifesaving" and "essential" for officers to remain safe in response to terrorist attacks and criminals with increasingly sophisticated arsenals.²⁶ Community safety rationales include enabling search and rescue operations, disaster response, and response to active shooter situations.²⁷ Proponents have also highlighted military equipment as deterring crime, "send[ing] a strong message."²⁸ Across the three main rationales, proponents have highlighted how programs are vital to equipping police for services they could not otherwise afford to provide.²⁹ Proponents also note the financial stewardship of using gear that would otherwise go to waste.

In addition to the accounts of police, advocates for military equipment use rely on several studies showing benefits to equipment use. One study found a reduction in street-level crime and

²¹ See *id.*

²² See *id.*; Arthur Rizer & Joseph Hartman, *How the War on Terror has Militarized the Police*, THE ATLANTIC (Nov. 7, 2011), <https://www.theatlantic.com/national/archive/2011/11/how-the-war-on-terror-has-militarized-the-police/248047/>.

²³ See, e.g., C. J. Chivers, *Trump Didn't 'Send in the Troops.' They Were Already There*, N.Y. TIMES (June 23, 2020), <https://www.nytimes.com/2020/06/23/magazine/la-riots-1992.html> (noting deployment of troops during 1992 LA Riots).

²⁴ Haberman, *supra* note 20.

²⁵ See Rizer & Hartman, *supra* note 22.

²⁶ NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, *Statement on Policy and Position Law Enforcement Priorities* (2016), http://www.napo.org/files/8915/4723/8241/NAPO_LE_Priorities_Position_Paper_Trump_2016.pdf [hereinafter NAPO].

²⁷ See *id.*; H. RES. 559, <https://www.govinfo.gov/content/pkg/BILLS-114hres559ih/pdf/BILLS-114hres559ih.pdf>.

²⁸ Jeff Sessions, *Remarks at the 63rd Biennial Conference of the National Fraternal Order of Police, Monday, August 28, 2017*, <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-63rd-biennial-conference-national-fraternal>.

²⁹ NAPO, *supra* note 26.

a deterrent effect of equipment use.³⁰ Another study bolstered deterrent claims, finding that increased police militarization through equipment use reduces violent crime rates, in part due to the advantage of projecting power.³¹ Lastly, one study found that clothing and armor reduced assaults against officers.³² However, these claims have been undermined in subsequent studies that point to fatal flaws in the design. For example, the study showing lower crime rates creates a false causal connection, allowing equipment in one part of a county to be viewed as causing lower rates in another area.³³ When researchers fixed the flaw by using agency, rather than county-level data, there was no crime decrease where military equipment was used by police.³⁴ Another study analyzed past data that failed to account for several factors, including the destruction of weapons and alternate sources for military equipment.³⁵ After fixing the errors, the study found no evidence to support claims that “militarization ‘saves lives’—or that demilitarization risks them.”³⁶ Opponents of military equipment use by police have also used empirical studies, demonstrating that vehicles had no impact on crime rates or officer casualties and that receiving more military equipment increases civilian deaths.³⁷ The data thus demonstrate neutral to negative results.

III. THE HOW: PROGRAMS ENABLING ACCESS

There are a variety of means by which law enforcement can acquire military equipment. The two main avenues of acquisition are funding and surplus. Each of these avenues are run by the federal government.

A. Funding

1. Department of Homeland Security Grants

The 9/11 Commission Act of 2007 (“9/11 Act”) created the Homeland Security Program, a mechanism for allocating DHS grant funds.³⁸ Managed by FEMA, the funds are allotted into three separate grant programs that direct federal funds to state and local governments.³⁹ The grant programs are: the State Homeland Security Program, the Urban Areas Security Initiative, and Operation Stonegarden.⁴⁰ The State Homeland Security Program provides federal funds for the purpose of preparing for and responding to acts of terrorism.⁴¹ The Urban Areas Security Initiative is geared towards assisting high-risk urban areas in terrorism prevention as determined by a FEMA

³⁰ Vincenzo Bove & Evelina Gavrilova, *Police Officer on the Frontline or a Soldier? The Effect of Police Militarization on Crime*, 9 AM. ECON. J. ECON. POL’Y 1, 1 (2017).

³¹ J. Britton Hayes Jr. & Alexander F. McQuoid, *The Thin Blue Line: Police Militarization and Violent Crime*, NY ECON. REV. 49, 27 (2018).

³² Kevin R. Carriere & William Encinosa, *The Risks of Operational Militarization: Increased Conflict Against Militarized Police*, 23 PEACE ECON., PEACE SCIENCE, & PUBLIC POL’Y 1, 10 (2017).

³³ Anna Gunderson et al., *Counterevidence of Crime-reduction Effects from Federal Grants of Military Equipment to Local Police*, 5 NATURE HUMAN BEHAVIOR 194, 194 (2021).

³⁴ *Id.*

³⁵ *Id.* at 205-206.

³⁶ *Id.* at 209.

³⁷ Casey Delehanty et al., *Militarization and Police Violence: The Case of the 1033 Program*, 4 RES. & POL. 1 (2017).

³⁸ Jeffrey A. Endebak, *More Bang for Their Buck: How Federal Dollars are Militarizing American Law Enforcement*, 47 J. MARSHALL L. REV. 1479, 1487 (2014).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 1488.

Administrator.⁴² Operation Stonegarden is dedicated to border control.⁴³ These grants enable localities from large cities to small towns to purchase new military-grade equipment.⁴⁴

The monetary value of the grants is significant. For fiscal year 2021, the funding totaled well over 1.1 billion dollars.⁴⁵ While the majority of the money funds the Urban Area Security Initiative, the State Homeland Security Program and Operation Stonegarden still receive over 400 and 90 million dollars respectively. The DHS grants have become the primary means of obtaining military-grade equipment for law enforcement agencies.⁴⁶ Participants may purchase items such as tactical breathing apparatuses, tactical protective gear, small unmanned aircraft, and robots.⁴⁷

2. Department of Justice Byrne Justice Assistance Grant

The Department of Justice provides the Edward Byrne Memorial Justice Assistance Grant which is a “leading source of federal justice funding to state and local jurisdictions.”⁴⁸ Different states and territories are allotted different levels of support based on a congressionally mandated formula that can be impacted by a state’s share of the national population or share of the country’s violent crime statistics.⁴⁹ The grant requires quarterly reporting, but can be used for a variety of initiatives and items, including purchasing military equipment.⁵⁰ In Fiscal Year 2019, there was \$263.8 million available under these grants.⁵¹ In Fiscal Year 2020, there was \$235 million available.⁵²

3. Equitable Sharing Programs

State and local law enforcement agencies may receive an equitable share of resources from asset forfeiture, the seizure of property linked to crime, when partnering with a coordinating federal agency.⁵³ There are two similar equitable sharing programs that govern such resources: one through the Department of Justice and the other through the Department of Treasury. Proceeds

⁴² *Id.* at 1489.

⁴³ *Id.*

⁴⁴ Transcript of Militarization of Police Means U.S. Protesters Face Weapons Designed for War, NPR (July 1, 2020), <https://www.npr.org/2020/07/01/885942130/militarization-of-police-means-u-s-protesters-face-weapons-designed-for-war> [hereinafter NPR Transcript].

⁴⁵ FEMA, *Homeland Security Grant*, <https://www.fema.gov/homeland-security-grant-program> (last visited Jan. 12, 2022).

⁴⁶ NPR Transcript, *supra* note 44.

⁴⁷ FEMA, *Authorized Equipment List*, <https://www.fema.gov/grants/guidance-tools/authorized-equipment-list> (last visited July 7, 2020).

⁴⁸ Bureau of Justice Assistance, DOJ, *Edward Byrne Memorial Justice Assistance Grant (JAG) Program*, <https://bja.ojp.gov/program/jag/overview> (last visited July 7, 2020) [hereinafter Byrne JAG].

⁴⁹ Bureau of Justice Assistance, DOJ, *Edward Byrne Memorial Justice Assistance Grant (JAG) Program Fact Sheet* (May 18, 2020) [hereinafter Byrne JAG Fact Sheet].

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Bureau of Justice Assistance, DOJ, *Edward Byrne Memorial Justice Assistance Grant (JAG) Program Fact Sheet* (May 2021), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/jag-fact-sheet.pdf>.

⁵³ DOJ & U.S. DEP’T OF TREASURY, *Guide to Equitable Sharing for State, Local, and Tribal Law Enforcement Agencies* 1 (July 2018).

may then be spent on a variety of equipment including body armor and firearms.⁵⁴ There appear to be no restrictions on purchasing military-grade equipment with equitable share proceeds.⁵⁵

B. Surplus

Surplus gains of military equipment are acquisitions of items that are categorized as excess personal property because it is no longer needed by an agency to carry out official functions.⁵⁶ For military equipment, the process is overseen by DoD's Defense Logistics Agency (DLA).

1. The 1033 Program

The 1033 program is arguably the most well-known means of law enforcement agencies obtaining military equipment. Derived from the counterdrug efforts of the 1980s, the current iteration allows any state-approved law enforcement agency with the ability to arrest and charge suspects.⁵⁷ The program offers a catalog of different surplus items ranging from filing cabinets and printers to MRAPs.⁵⁸

The 1033 program came under significant scrutiny in 2014 after the killing of Michael Brown in Ferguson, Missouri.⁵⁹ The Obama administration made a series of reforms, including efforts to mandate civilian authorization and to reclassify items.⁶⁰ In 2017, the Trump administration repealed these Obama-era reforms with EO 13809.⁶¹ The murder of George Floyd once again renewed scrutiny of the 1033 program.⁶²

A key component of the 1033 program is the designation of property as uncontrolled or controlled. Uncontrolled items are items for which law enforcement agencies gain title after one year of control.⁶³ Uncontrolled items are generally standard and non-tactical, such as first aid kits and office supplies.⁶⁴ Controlled items are those for which DoD retains ownership,⁶⁵ and includes

⁵⁴ *Id.* at 15.

⁵⁵ *See id.*

⁵⁶ *Id.*

⁵⁷ Aaron C. Davenport et al., *Department of Defense's Excess Property Program: Law Enforcement Agency Equipment Acquisition Policies, Findings, and Options*, RAND 2 (2018); DEFENSE LOGISTICS AGENCY, *1033 Program FAQs*, <https://www.dla.mil/DispositionServices/Offers/Reutilization/LawEnforcement/ProgramFAQs.aspx> (last visited July 7, 2020) [hereinafter DLA FAQ]; Daniel H. Else, *The "1033 Program," Department of Defense Support to Law Enforcement*, CONG. RES. SERV. (Aug. 28, 2014). The expansion occurred in the National Defense Authorization of 1997 which focused on general law enforcement purposes. *Id.*

⁵⁸ *See id.*; Davenport et al., *supra* note 57, at xii.

⁵⁹ NPR Transcript, *supra* note 44.

⁶⁰ Davenport et al., *supra* note 57; Exec. Order No. 13,688, 3 C.F.R. 13688 (2016).

⁶¹ Exec. Order No. 13,809, 82 Fed. Reg. 41,499 (Aug. 28, 2017).

⁶² Davenport et al., *supra* note 57, at xii; NPR Transcript, *supra* note 44; see Laura Withers, *How Bearcats Became Toys: The 1033 Program and Its Effect on the Right to Protest*, 84 GEO. WASH. L. REV. 812, 833-34 (2016); Ken MacNavin et al., *Shedding Light*, DEFENSE LOGISTICS AGENCY (Nov. 1, 2016), <https://www.dla.mil/AboutDLA/News/NewsArticleView/Article/998344/shedding-light/>.

⁶³ Anna Gunderson et al., *Does Military Aid to Police Decrease Crime? Counterevidence from the Federal 1033 Program and Local Police Jurisdictions in the United States*, SEMANTIC SCHOLAR 13 (2019), <https://www.semanticscholar.org/paper/Does-Military-Aid-to-Police-Decrease-Crime-from-the-Gunderson-Cohen/3d6e76afaf1aec7950dc4742a0cacf265dfefa96>.

⁶⁴ Davenport et al., *supra* note 57, at xii.

⁶⁵ DLA FAQ, *supra* note 57.

rifles and vehicles.⁶⁶ Although the 1033 program has some transparency, the varied status of items drastically impacts the available data.⁶⁷ The lists do not include any uncontrolled items that have already transferred ownership.⁶⁸ In addition, the list is updated quarterly without any retention of data from previous quarters.⁶⁹ The lack of historical data ensures that the public has no easy access to original data with which to examine trends or patterns.

There are around 8200 participants from 49 states and four U.S. territories.⁷⁰ While the vast majority of items are non-controlled, controlled items make up a significant portion of the monetary value.⁷¹ Furthermore, not all low cost items are innocuous. The most common item with a value of \$100 was a pistol.⁷² Although the 1033 may not be the largest contributor of military equipment to law enforcement agencies, the program's efforts are still significant.

C. Other Programs

The other main program used to obtain military equipment is neither funding nor surplus. The 1122 Program allows state and local governments to purchase law enforcement equipment with federal procurement rates.⁷³ The general requirement is that the equipment shall be used in the performance of counter-drug, homeland security, or emergency response activities.⁷⁴ Only 33 states and territories currently use the 1122 program, but the program can allow for significant savings.⁷⁵ Participants can acquire a host of different equipment including: weapons, ammunition, vehicles, heavy equipment, body armor, and less lethal ammunition including chemical munitions.⁷⁶

Law enforcement has many methods of obtaining military equipment, but one thing remains clear: the federal government has control over the vast majority of these methods. Whether through funding, surplus, or discounting, various federal agencies have enabled law enforcement to obtain and use military equipment. Looking forward, the larger structure of acquisition means that federal level reforms are crucial to implementing change. Suggestions and prescriptive measures will be further discussed in Part VI.

⁶⁶ Davenport et al., *supra* note 57, at xii; Withers, *supra* note 62, at 825.

⁶⁷ See Gunderson et al., *supra* note 63. DLA keeps an updated list of all items currently in the possession of law enforcement agencies. DEFENSE LOGISTICS AGENCY, *LESO Public Information*, <https://www.dla.mil/DispositionServices/Offers/Reutilization/LawEnforcement/PublicInformation/> (last visited July 7, 2020).

⁶⁸ *See id.*

⁶⁹ *See id.*

⁷⁰ DLA FAQ, *supra* note 57.

⁷¹ *Id.*

⁷² Nick Routley, *Charting the \$1.7B Transfer of Military Equipment to Police Departments*, VISUAL CAPITALIST (Jun. 26, 2020), <https://www.visualcapitalist.com/billion-dollar-transfer-of-military-equipment-to-police-departments/>.

⁷³ U.S. GENERAL SERVICES ADMIN., *1122 Program*, <https://www.gsa.gov/buying-selling/purchasing-programs/gsa-schedules/schedule-buyers/state-and-local-governments/1122-program> (last visited July 7, 2020).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ U.S. GENERAL SERVICES ADMIN., *1122 Program Equipment and Supplies Catalog* (2014).

IV. THE EQUIPMENT AND ITS REGULATION

A. The Military Equipment

Law enforcement has used a host of different military or military-style equipment. This section gives a brief overview of the type of equipment in use. They can be grouped by primary function as protective, disorientating, incapacitating, and vehicular.

Protective equipment embodies wearable gear known as a combat load. It can include Kevlar helmets, gas masks, combat gloves, knee pads, shin guards, body armor, and M4 carbine rifles.⁷⁷ In contrast, disorientation equipment is traditionally used by military forces to minimize heavy fire from combatants while conducting flanking attacks, retreats, and a range of other strategies.⁷⁸ Disorientation equipment includes smoke grenades and bombs,⁷⁹ stun grenades,⁸⁰ Long Range Acoustic Devices,⁸¹ chemical irritants,⁸² and pepper spray.⁸³ Incapacitation equipment primarily encompasses less lethal projectiles that are meant to stop a target.⁸⁴ They include impact projectiles such as rubber bullets, wooden bullet projectiles, and bean bag

⁷⁷ Rubin, *supra* note 5.

⁷⁸ *Id.*

⁷⁹ Rubin, *supra* note 5.

⁸⁰ Also known as flashbangs, stun grenades are designed to temporarily blind and deafen through the use of a shrapnel-free casing that emits light and sound upon explosion. *Id.*; ACLU OF MASSACHUSETTS, *Less Lethal Force: Proposed Standards for Massachusetts Law Enforcement Agencies* 7 (2015), <https://www.aclum.org/sites/default/files/wp-content/uploads/2015/06/reports-less-lethal-force.pdf> [hereinafter ACLU Mass.]. The range is broad, leading to an indiscriminate impact. NPR Transcript, *supra* note 44. While now commonly used by both American SWAT teams and Israeli soldiers, the stun grenade was first used by British special forces in the 1960s. *Id.* Effects typically last between 45 seconds and 15 minutes. ACLU Mass., *supra* note 80. However, stun grenades have led to numerous casualties, extensive injuries, and a variety of damage due to the flammable nature. Rubin, *supra* note 5.

⁸¹ The LRAD is a sonic weapon often used to keep pirates away or regulate wildlife movement. Rubin, *supra* note 5. It emits a pain-inducing sound that has been used domestically against protestors. *Id.* While blaring sounds have been used by the U.S. military in different capacities such as during the Vietnam War, the LRAD was used in Iraq as a means to disperse potential suicide bombers at crucial checkpoints. Eric Niller, *Sonic Weapons' Long, Noisy History*, *History*, <https://www.history.com/news/sonic-weapons-warfare-acoustic> (last updated Aug. 27, 2018). The U.S. Navy continues to use the LRAD to deter small ships from approaching American vessels. *Id.*

⁸² The agents chloroacetophenone (“CN”) and orthochlorobenzalmalononitrile (“CS”) are collectively known as “tear gas.” ACLU Mass., *supra* note 80, at 2. The U.S. military first used CN following WWI until the introduction of the more chemically stable CS in 1959. Corey J. Hilmas et al., *Riot Control Agents*, in HANDBOOK OF TOXICOLOGY OF CHEMICAL WARFARE AGENTS 153 (R.C. Gupta ed., 2009). CS was first widely used by American forces during the Vietnam War to draw enemy combatants out of tunnels and bunkers. *Id.* at 153–54. While neither agent causes instant incapacitation, exposure leads to numerous effects including involuntary eye closure and severe burning sensation. ACLU Mass., *supra* note 80, at 2. One specific type being used is the Triple Chaser CS, a less lethal weapon which has three canisters which separate, allowing for a broader area of effect. *Defense Technology, Triple-Chaser Separating Canister, CS*, <https://www.defense-technology.com/product/triple-chaser-separating-canister-cs/> (last visited Aug. 25, 2020).

⁸³ Pepper spray, as it is commonly called, or Oleoresin capsicum (“OC”) is a less lethal weapon derived from cayenne pepper extract. ACLU Mass., *supra* note 80, at 3. A successor to CS in the military context, pepper spray is generally used by military police for self-protection. HARRY SALEM ET AL., *RIOT CONTROL AGENTS, in MEDICAL ASPECTS OF CHEMICAL WARFARE* 443 (Shirley D. Tuorinsky ed., 2008). Although it requires less decontamination and has shorter effects than its chemical counterparts CN and CS, pepper spray may lead to fatalities when combined with pre-existing respiratory issues or certain positional restraints. ACLU Mass., *supra* note 80, at 3. The projectile form of pepper spray known as “pepper balls” continues to be used in some cities despite bans in Boston and Eugene, Oregon. Rubin, *supra* note 5. Pepper balls have been known to kill civilians. *Id.* See ACLU Mass., *supra* note 80, at 5.

⁸⁴ See ACLU Mass., *supra* note 80, at 4.

projectiles.⁸⁵ The last category, vehicles, is perhaps the most visible. The military vehicles in common use by law enforcement are MRAPs.⁸⁶ With the current level of regulation, police have the potential of receiving technologies that have yet to be imagined.⁸⁷

B. Regulation of Military Equipment

The regulatory frameworks for the use of military equipment by the military and by domestic law enforcement agencies are extremely different. For military forces, movements are highly regulated with a variety of different authorities. In contrast, domestic police have haphazard guidance that leaves significant discretion to use military equipment against community members. This section begins by highlighting the existing framework for regulating military equipment when used by the military. The piece then proceeds by detailing the framework for domestic police use before noting the crucial differences between both scenarios.

1. The Regulatory Framework of Military Use

The regulatory framework is detailed and vast.⁸⁸ It covers a range of issues and consists of several layers of authority:⁸⁹ overarching principles, principles in action, restrictions on domestic

⁸⁵ Impact projectiles are designed to incapacitate through blunt force trauma, rendering a target “incapable of pursuing a violent or threatening objective.” ACLU Mass., *supra* note 80, at 4. These projectiles are generally launched through shotguns or “riot guns.” *Id.* See also Rubin, *supra* note 5. A catch term, the group of riot guns includes the ARWEN 37 and SAGE SL-6, both of which are part of the broader grenade launcher family and reminiscent of the M203 Grenade launcher. Rubin, *supra* note 5. See ACLU Mass., *supra* note 80, at 4. These are capable of protecting less lethal rounds such as tear gas canisters or wooden bullet projectiles. These weapons can cause severe trauma or death, especially when fired at close range. ACLU Mass., *supra* note 80, at 4. However, reports indicate instances of killing individuals at a range of approximately 25 feet. *Id.* Certain types of impact projectiles have been the subject of litigation and been barred in police departments. See Nick Penzenstadler & Daphne Chen, *Protests Against Police Put \$454 Million in Military Gear Under Spotlight*, USA TODAY (Jun. 12, 2020), <https://www.usatoday.com/story/news/investigations/2020/06/12/surplus-military-gear-keeps-flowing-after-trump-reversed-policy/5340013002/>.

⁸⁶ MRAPs are heavy armored vehicles and their more maneuverable truck counterpart the Mine Resistant Ambush Protected All-Terrain Vehicles (M-ATVs) became a mainstay in Iraq and Afghanistan before many were transferred to law enforcement agencies. Chivers, *supra* note 23. They were initially developed to address the issue of small arms ambushes and improvised bombs that had been used to kill and wound American troops in Iraq. *Id.* While useful against the specific purpose of protecting against improvised explosive devices, MRAPs also have functional failings such as the tendency to tear up roads, tip over, and need costly maintenance. NPR Transcript, *supra* note 44. MRAPs can still be found throughout police departments across the United States. *Id.*; Chivers, *supra* note 23. Additionally, a police version, the Ballistic Engineered Armored Response Counter Attack Truck (BEARCAT) was designed as a SWAT equivalent to the MRAP. Rubin, *supra* note 5; Chivers, *supra* note 23.

⁸⁷ See, e.g., David Hambling, *Pentagon’s Non-Lethal SPECTER Could Be a Game Changer For Crowd Control*, FORBES (July 14, 2020, 8:55 AM), <https://www.forbes.com/sites/davidhambling/2020/07/14/pentagons-new-non-lethal-specter-is-a-game-changer-for-crowd-control/amp/> (describing new less lethal electroshock projectile dubbed SPECTER).

⁸⁸ While the regulatory structure for military action is detailed and vast, there have been occasions of unlawful use of force during conflict even in the last 20 years. See, e.g., *Haditha Killings Fast Facts*, CNN (last updated Mar. 18, 2020, 10:02 AM), <https://www.cnn.com/2013/10/30/world/meast/haditha-killings-fast-facts/index.html> (noting the change of procedure to address “US troops implicated in the abuse or murder of civilians in war zones.”). Those instances are beyond the scope of this piece, but nonetheless serve as reminders that increased regulation is by no means a complete nor perfect solution.

⁸⁹ Although this piece uses the term “authority,” it is not used in the legal sense as a synonym of power. Instead, it is used to denote the source of restrictions regardless of their binding effect.

soil,⁹⁰ and restrictions on less lethal weapons. Notably, the many rules governing military use of equipment make a distinction between actions that are allowed during an armed conflict and actions that are allowed during peacetime.

i. International Authority

International authority over military use of military equipment is derived from two primary sources: the law of armed conflict and international human rights law.

The law of armed conflict (LOAC), or as it is sometimes called, International Humanitarian Law (IHL), is the body of law that governs actions in armed conflict.⁹¹ LOAC is derived from treaties such as the 1949 Geneva Conventions,⁹² and from customary international law.⁹³ Although there are many laws governing conduct in hostilities under LOAC, one relevant area is the principle of distinction. The principle of distinction is the “cornerstone” of IHL, asserting who and what may be targeted, including a prohibition of the intentional targeting of civilians even in conflict.⁹⁴

International Human Rights Law (IHRL) is a body of law that protects inherent individual rights on grounds of humanity and dignity.⁹⁵ IHRL provides “universal recognition that basic rights and fundamental freedoms are inherent to all human beings” and apply to everyone regardless of any status, identity, or characteristic.⁹⁶ The basis for IHRL began in the United Nations Charter and the Universal Declaration of Human Rights.⁹⁷ IHRL is affirmed and expanded in a series of international conventions including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).⁹⁸ The United States limits the effect of IHRL, using LOAC principles as the *lex specialis* even where IHRL would provide more protections.⁹⁹ The United States also reads IHRL treaties narrowly, asserting that certain treaties do not apply abroad, including the ICCPR which it

⁹⁰ This piece uses an American perspective of international concepts in an effort to more accurately compare regulation on American troops and American police.

⁹¹ LOAC applies both in international armed conflict (IAC) between states and in non-international armed conflict (NIAC) including conflict between a state and a non-state armed group. U.S. DEPT’ OF THE ARMY & U.S. DEPT’ OF THE NAVY, The Commander’s Handbook on the Law of Land Warfare, FM 6-27/MCTP 11-10C § 1-14,1-15 (Aug. 2019) [hereinafter Commander’s Handbook]; See Law of War Manual, *supra* note 94, § 3.

⁹² See GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW 149 (2010).

⁹³ OFFICE OF THE GENERAL COUNSEL, DOD, LAW OF WAR MANUAL § 1.8 (rev. ed., Dec. 2016) [hereinafter Law of War Manual]. Relevant customary international law is so generally and consistently practiced as to create a sense of legal obligation. See *id.*

⁹⁴ PRINCIPLE OF DISTINCTION, INT’L COMM. RED CROSS, <https://casebook.icrc.org/law/principle-distinction> (last visited Aug. 3, 2022). Commander’s Handbook, *supra* note 92, § 1-55; see Judge Advocate General’s Legal Center & School, Operational Law Handbook 81 (Maj Dustin Kouba ed., 2018) [hereinafter JAG 2018]. There is a significant difference in treatment of civilians by military and American law enforcement. Under IHL, military forces use distinction to target those with direct participation in hostilities. See generally NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009). In contrast, police use of force occurs against civilians during peacetime.

⁹⁵ JAG 2018, *supra* note 94, at 45.

⁹⁶ UNITED NATIONS, *Human Rights Law*, <https://www.un.org/en/sections/universal-declaration/human-rights-law/index.html> (last visited July 16, 2020) [hereinafter UN Human Rights Law].

⁹⁷ Solis, *supra* note 92, at 25.

⁹⁸ JAG 2018, *supra* note 94, at 46.

⁹⁹ Law of War Manual, *supra* note 93, § 1.6.3.1.

views as creating obligations only “to persons within its territory.”¹⁰⁰ Nonetheless, IHRL remains important for it applies in some conflict settings and in the domestic context.¹⁰¹

ii. Federal Authority

The United States Armed Forces are subject to a significant amount of federal laws and regulations. The broadest authority comes under the United States Constitution, such as the president’s power as Commander in Chief and Congress’s duty to organize and provide for the armed forces.¹⁰² Congress also plays a crucial role in building up the body of statutory authority.¹⁰³ However, it is the administrative authority of the Department of Defense which arguably has the most impact on military action. The main layers of federal authority are Department of Defense’s interpretations of international law, the standing rules of engagement, and the standing rules for the use of force.

The Department of Defense provides rules for all of the Armed Forces, including establishing definitive U.S. interpretations of LOAC.¹⁰⁴ The U.S. views LOAC as permissive, allowing for actions which would be unacceptable outside of conflict.¹⁰⁵ The Department of Defense also asserts that LOAC reflects the bare minimum legal standards,¹⁰⁶ noting that LOAC reflects “‘elementary considerations of humanity’” which “‘must be adhered to in all circumstances.’”¹⁰⁷ As such, DoD urges LOAC compliance even when not required by law.¹⁰⁸

The standing rules of engagement (SROE) establish a template for developing and executing rules of engagement for all military operations within the peace to war spectrum.¹⁰⁹ The SROE give guidance primarily on the application of force and the right of self-defense,¹¹⁰ providing a default set of rules.¹¹¹ The SROE are permissive, allowing the use of any lawful weapon or tactic unless otherwise restricted by a higher authority.¹¹² The standing rules for the use of force (SRUF) are rules within the SROE that apply to all instances of DoD personnel performing law enforcement functions at any DoD installation.¹¹³ The SRUF are less permissive than the SROE, for some weapons and tactics require approval before use.¹¹⁴

¹⁰⁰ See *id.* § 1.6.3.3.

¹⁰¹ See Law of War Manual, *supra* note 93, § 1.6.3. See JAG 2018, *supra* note 94, at 46.

¹⁰² U.S. Const. art. 2 § 2, art. 1 § 8.

¹⁰³ See, e.g., William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, PUBLIC LAW 116–283—JAN. 1, 2021 (a congressional act authorizing a variety of military spending and related restrictions).

¹⁰⁴ See Law of War Manual, *supra* note 93, § 1.1.

¹⁰⁵ See *id.* § 1.3.3.2.

¹⁰⁶ See *id.* § 3.1.1.

¹⁰⁷ Law of War Manual, *supra* note 93, § 3.1.1.2.

¹⁰⁸ See *id.* § 3.1.1.2; JAG 2018, *supra* note 94, at 93.

¹⁰⁹ JAG 2018, *supra* note 94, at 80. The current SROE are from 2005. *Id.* at 79.

¹¹⁰ *Id.*

¹¹¹ Solis, *supra* note 92, at 498. The SROE apply to all military operations and contingencies outside of U.S. territory and air and maritime homeland defense missions within U.S. territory. JAG 2018, *supra* note 94, at 80.

¹¹² Solis, *supra* note 92, at 502.

¹¹³ JAG 2018, *supra* note 94, at 80. The SRUF also apply to civil support missions and land defense missions within U.S. territory. *Id.*

¹¹⁴ *Id.* at 93.

The last layer of federal authority is composed of directives and regulations specific to particular branches of service and rules governing specific missions. For example, there is a separate LOAC manual published by the U.S. Army that guides Soldiers and Marines.¹¹⁵ This U.S. Army publication articulates policy and practice guidelines that are not legally required, incorporating branch rules and principles.¹¹⁶ Of particular note is the rule to “treat all civilians humanely.”¹¹⁷

While the SROE provide a template, the rules of engagement (ROE) are military directives that narrow the default directives to specific circumstances.¹¹⁸ ROE are mission-specific and are based on international law, political objectives, and mission limitations.¹¹⁹ ROE may be more restrictive than the law requires.¹²⁰ ROE are also designed to be “understandable, memorable, and applicable.”¹²¹ Escalation of Force (EOF) is an important measure related to ROE,¹²² which has become increasingly popular since operations in Iraq.¹²³ EOF asserts that combatants should use a lower level of force when feasible and when U.S. forces are not endangered.¹²⁴ EOF measures have also been used to assess threats and establish when hostile intent exists.¹²⁵ The central escalation has been embodied in the simple phrase, “Shout, show, shove, shoot.”¹²⁶ Mission-specific rules on the use of force (RUF) may also be established to restrict military action.¹²⁷ The federal rules play an important role in operationalizing the international principles. Furthermore, the federal rules create clear rules for a wide variety of scenarios that embody overarching principles.

iii. Overarching Principles

The legal protections around military use of equipment reflect overarching principles that show normative judgements about how to treat one another. The principles can be embedded at any level of regulation, from international to mission-specific. Guiding military behavior, the principles impact the use of military equipment by creating cultural norms. Since the restrictions during hostilities are a minimum standard, the principles provide insight beyond the baseline.¹²⁸

At the international layer, several key principles set a framework for legal action. For example, LOAC is grounded on a spectrum between military necessity and humanity wherein actions must balance the two.¹²⁹ In fact, LOAC can be viewed as judgements on which acts are too inhumane

¹¹⁵ Commander’s Handbook, *supra* note 91, at v.

¹¹⁶ *Id.* at vii.

¹¹⁷ *Id.*

¹¹⁸ Law of War Manual, *supra* note 93, § 1.6.5.

¹¹⁹ JAG 2018, *supra* note 94, at 79.

¹²⁰ *Id.* at 78; Law of War Manual, *supra* note 93, § 1.6.5.

¹²¹ JAG 2018, *supra* note 94, at 85.

¹²² *Id.* at 87.

¹²³ *Id.*

¹²⁴ *See id.*

¹²⁵ *Id.*

¹²⁶ Solis, *supra* note 92, at 504.

¹²⁷ JAG 2018, *supra* note 94, at 90.

¹²⁸ *See* Law of War Manual, *supra* note 93, § 3.1.1.

¹²⁹ *See* Commander’s Handbook, *supra* note 91, § 1-29.

or are never a military necessity.¹³⁰ Similarly, IHRL is embedded on the overarching principle of humanity, upholding inalienable rights grounded in equity and dignity.¹³¹

The Department of Defense and each of the branches of the Armed Forces also uphold specific principles. In particular, honor is a core value within the U.S. military, embodying fairness, respect, loyalty, and integrity.¹³²

Another, perhaps more nuanced, principle found throughout international, national, and branch restrictions is that treatment should be considerably different during hostilities and during peace. IHRL sets strict use of force regulations for when the military is acting during peace in a law enforcement capacity.¹³³ More specifically, efforts must be made to minimize force to the greatest extent possible, using Escalation of Force procedures.¹³⁴ For example, the Army guides military law enforcement to follow the principles of prevention, public support, restraint, legitimacy, transparency, and assessment.¹³⁵ In fact, one particular series of tactics, counterinsurgency, has become increasingly popular in Iraq and Afghanistan, prioritizing the protection of civilians over destroying an enemy.

iv. Principles in Action: Civil Unrest During Conflict

The overarching principles ground military conduct and are cemented at the branch, operation, or mission levels. One area where the principles are practiced is civil unrest during conflict. Conflict provides a minimum standard and serves as an ideal vehicle for later comparison to practices of domestic police in peacetime. As explored later in this part, regulations in the United States should be more protective than conflict restrictions.

Civil unrest encapsulates a wide range of scale, scope, and nature of civil gatherings, spanning from small groups verbally protesting to full-blown riots with violence against others.¹³⁶ Civil unrest is distinct from general conflict scenarios. It is governed by law enforcement restrictions with a recognition that actors must avoid error, arbitrariness, and escalation.¹³⁷ ROE and regulations establish clear guidance on the proper use of force.¹³⁸ For instance, Army regulations indicate that proper escalation for law enforcement operations is to begin with verbal persuasion, continue with unarmed defense techniques, and only then escalate to chemical use if allowed.¹³⁹ In particular, Army regulations note that severe enforcement tactics should be avoided,¹⁴⁰ and the best means for preventing negative outcomes is negotiated management wherein commanders

¹³⁰ *Id.*, § 1-25.

¹³¹ See UN Human Rights Law, *supra* note 96.

¹³² Commander's Handbook, *supra* note 91, § 1-31.

¹³³ See Nils Melzer & Gloria Gaggioli Gasteyger, *Conceptual Distinction and Overlaps Between Law Enforcement and the Conduct of Hostilities*, in THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 70 (Terry D. Gill & Dieter Fleck eds., 2015).

¹³⁴ *Id.* at 70, 78.

¹³⁵ U.S. DEP'T OF THE ARMY, MILITARY POLICE OPERATIONS, FM 3-39 § 1-32 (Apr. 2019).

¹³⁶ U.S. DEPT' OF THE ARMY, Civil Disturbances, ATP 3-39.33 vi (Apr. 2014) [hereinafter Army Civil Disturbances].

¹³⁷ See Melzer & Gasteyger, *supra* note 133, at 84.

¹³⁸ THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS § 6.09 (Terry D. Gill & Dieter Fleck eds., 2015).

¹³⁹ U.S. DEPT' OF THE ARMY, *Carrying of Firearms and Use of Force for Law Enforcement and Security Duties*, AR 190-14 § 3-1 (Mar. 12, 1993).

¹⁴⁰ Army Civil Disturbances, *supra* note 136, § 1-1.

work with protest group leaders, leading to groups self-policing.¹⁴¹ The assumption for civil unrest is that “[m]ost protesters are law-abiding citizens who intend to keep their protests nonviolent.”¹⁴² Regulations recognize the many valid causes for tension,¹⁴³ and emphasize the need to understand the crowd.¹⁴⁴ The Army clearly indicates the right to assembly, noting that “[p]articipating in a legal demonstration to express views is a right of all people, not just Americans in the United States.”¹⁴⁵ Individuals should be treated with reasonable courtesy, dignity, and respect.¹⁴⁶ The military is regulated in a manner that switches tactics for civil unrest, upholding the rights of protestors, using a clear escalation of force, and embodying the principle of respect.

v. Military Action on Domestic Soil

A significant restriction on military action involves domestic soil and is derived from the Posse Comitatus Act.¹⁴⁷ Found at 18 U.S.C. § 1385, the Posse Comitatus Act was passed in 1878 and criminalizes the use of the Army and Air Force to execute the law within the U.S.¹⁴⁸ There are three tests for determining violations of the Posse Comitatus Act: whether the action was “active” or “passive,” whether the use “pervaded the activities of civilian law enforcement officials,” and whether the action subjected citizens to regulatory, proscriptive, or compulsory military power.¹⁴⁹ The Posse Comitatus Act does not prohibit sharing information, providing advice or training, and loaning, maintaining, or operating equipment and facilities.¹⁵⁰ Any loan of equipment that falls under potentially lethal support, including firearms, ammunition, vehicles, vessels, or aircraft, must be approved by the Secretary of Defense.¹⁵¹ Under the Insurrection Act, the law also places an exception to the Posse Comitatus Act for extraordinary and extreme circumstances of civil disturbance where military forces are used as a last resort.¹⁵²

vi. Military Use of Less Lethal Weapons and Riot Control Agents

The regulations surrounding less lethal weapons and riot control agents also exemplify the array of rules governing military use of equipment. Less lethal weapons, or non-lethal weapons as they are called in DoD material, are weapons, munitions, and devices designed to incapacitate.¹⁵³ Less lethal weapons have reversible effects, minimizing fatalities and overall damage to people and property.¹⁵⁴ However, less lethal weapons generally have the capacity to kill or seriously injure a target.¹⁵⁵ Less lethal weapons are also governed by many of the same restrictions placed on

¹⁴¹ *Id.* § 2-28, 2-33.

¹⁴² *Id.* § 1-1.

¹⁴³ *Id.*

¹⁴⁴ *Id.* § 1-3.

¹⁴⁵ *Id.* § 2-112.

¹⁴⁶ *Id.*

¹⁴⁷ JAG 2018, *supra* note 94, at 190.

¹⁴⁸ *Id.* DoD Directive 3025.21 effectively extends the Posse Comitatus Act to all members of the U.S. military.

¹⁴⁹ *Id.* at 192. The Posse Comitatus Act does not apply where an action furthers a foreign affairs or military purpose of the U.S. *Id.* at 190. Such actions include investigations of military violations, protection of classified information, and protection of DoD personnel. *Id.* at 190.

¹⁵⁰ *Id.* at 194.

¹⁵¹ *Id.*

¹⁵² *Id.* at 196.

¹⁵³ Law of War Manual, *supra* note 93, § 6.5.10.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

conventional weapons, including the international, national, branch, and mission specific authorities.¹⁵⁶

In international law and throughout other forms, weapons are examined under the general terms of illegality: per se or by use.¹⁵⁷ Treaties and customs may bar use of a specific weapon entirely or a weapon used in a specific manner. For instance, the Chemical Weapons Convention bars riot control agents as a method of warfare, but they can be used under international law in a law enforcement context.¹⁵⁸

At the federal level, less lethal weapons must go through the same extensive legal review process as lethal weapons.¹⁵⁹ Review is conducted by a Weapons Review Board, occurs prior to procurement, and ensures compliance with domestic and international law.¹⁶⁰ The United States also places restrictions on riot control agents beyond those required by international law.¹⁶¹ Executive Order 11850 bars U.S. forces from using riot control agents in most circumstances.¹⁶² The exceptions to the prohibition are narrow defensive situations focused on saving lives, including rescue missions, protection for convoys in non-combat areas, and to disperse civilians who are being used to screen attacks.¹⁶³ Riot control agents may also be used for first use in an international armed conflict pursuant to prior presidential approval.¹⁶⁴ Despite the Convention and Executive Order 11850, the U.S. maintains the right to use riot control agents when in peacetime operations in a conflict area or during UN peacekeeping scenarios.¹⁶⁵

Today, the most relevant guidance for the usage of less lethal weapons can be found in manuals and regulations. Although unavailable to the public, the procedures for less lethal weapons are regularly updated.¹⁶⁶ The extensive restrictions on military use of less lethal force and riot control agents are generally consistent with the detailed regulation of military use of force overall. As will be discussed below, this level of regulation stands in stark contrast to the regulation of law enforcement.

2. The Regulatory Framework of Police Use

The laws and rules governing law enforcement in the United States pale in comparison to the uniformity and specificity of their military counterparts. There is virtually no regulation of police use of military equipment. Localization and lack of transparency further amplify the lack of regulation. While military action is largely governed at the international and federal level, police

¹⁵⁶ *Id.* § 6.5.10.3.

¹⁵⁷ *See* JAG 2018, *supra* note 94, at 27.

¹⁵⁸ *Id.*; Melzer & Gateyger, *supra* note 133, at 87.

¹⁵⁹ U.S. Department of Defense, Directive No. 3000.03E ¶ 11 (rev. ed., Aug. 31, 2018); Law of War Manual, *supra* note 94, § 6.5.10.4.

¹⁶⁰ JAG 2018, *supra* note 94, at 27; Susan D. LeVine & Joseph A. Rutigliano, Jr., *U.S. Military Use of Non-Lethal Weapons: Reality vs Perceptions*, 47 CASE W. RES. J. INT'L L. 239, 254 (2015).

¹⁶¹ *See* Melzer & Gateyger, *supra* note 133, at 87.

¹⁶² Solis, *supra* note 92, at 615.

¹⁶³ Law of War Manual, *supra* note 93, § 6.16; JAG 2018, *supra* note 94, at 30.

¹⁶⁴ JAG 2018, *supra* note 94, at 30.

¹⁶⁵ *Id.*; Law of War Manual, *supra* note 93, § 6.16.

¹⁶⁶ *See* U.S. DEPT' OF THE ARMY, Multi-Service Tactics, Techniques, and Procedures for the Employment of Nonlethal Weapons, ATP 3-22.40 (May 29, 2020).

action is highly localized. Out of the 18,000 police agencies in the U.S, the vast majority, or approximately 15,000, are controlled at the city or county level.¹⁶⁷ The localized nature of law enforcement causes a vast amount of variance between regulations, and therefore citizens across the country have significantly different levels of legal protection. For example, the definition of unnecessary use of force can change drastically between departments.¹⁶⁸ The law enforcement system also lacks data tracking and transparency. Each of these particularities of law enforcement in the United States has important implications for the use of military equipment. This section explores the legal protections around police forces by examining the layers of authority, the overarching principles, and the militarization of police.

i. International Authority and Guidance

As noted previously in the military context, international human rights law (IHRL) is a body of law that protects inherent individual rights on grounds of humanity and dignity.¹⁶⁹ IHRL is composed of both customary and treaty law. Customary IHRL protects fundamental human rights that are determined to be *jus cogens*, unable to be set aside. The fundamental human rights include prohibitions against genocide, slavery, murder, and systematic racial discrimination.¹⁷⁰ Customary IHRL binds a state's forces both inside and outside of a state's territory.¹⁷¹ The IHRL prohibition on systematic racial discrimination may legally prohibit many instances of law enforcement use of military equipment insofar as it is used to uphold systematic racial discrimination. However, customary IHRL presents challenges regarding enforcement, giving few tangible legal protections.

Treaties are the core of IHRL. While the U.S. asserts that certain IHRL treaties do not apply extraterritorially, IHRL does apply within the borders of the United States.¹⁷² This body of law therefore presents parameters in the context of law enforcement. IHRL does not provide a fully binding authority because the United States has not signed and ratified all 11 core treaties.¹⁷³

¹⁶⁷ Seth W. Stoughton et al., *How to Actually Fix America's Police*, THE ATLANTIC (June 3, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/how-actually-fix-americas-police/612520/>.

¹⁶⁸ Candice Norwood, *Can Use of Force Restrictions Change Police Behavior? Here's What We Know*, PBS (Jul. 23, 2020), <https://www.pbs.org/newshour/politics/can-use-of-force-restrictions-change-police-behavior-heres-what-we-know>. Departments also differ in how robustly they define "objectively reasonable" use of force. Compare HELENA POLICE DEPARTMENT, *Standard Operating Procedures* ch. 5 (2001), <https://www.helenamt.gov/government/departments/police-department/helena-police-policy-procedure> with BUFFALO POLICE DEPARTMENT, *Use of Force Policy* §6.1(a) (2020), <https://www.buffalony.gov/documentcenter/view/7587>. There has been reluctance in some police departments to make their use of force policies public. The rationales follow national security rhetoric on a much smaller scale. See Joseph Darius Jaafari & Ed Mahon, *Some Police Departments Say Publicizing Use-of-force Policies Builds Trust. Others Say the Public Can't be Trusted*, WITF (July 6, 2020), <https://www.witf.org/2020/07/06/some-police-departments-say-publicizing-use-of-force-policies-builds-trust-others-say-the-public-cant-be-trusted/>. The different perspectives on transparency exemplify the vast differences between department policies.

¹⁶⁹ JAG 2018, *supra* note 94, at 45.

¹⁷⁰ *See id.* at 49.

¹⁷¹ *Id.*

¹⁷² *See* Law of War Manual, *supra* note 93, § 1.6.3.

¹⁷³ JAG 2018, *supra* note 94, at 46.

However, the United States has ratified or signed each treaty that relates to law enforcement use of military equipment.¹⁷⁴

The International Covenant on Civil and Political Rights (ICCPR) was ratified by the United States in 1992. As the premiere IHRL treaty on civil rights, ICCPR has binding authority for law enforcement and deserves further examination. The ICCPR notes that freedom is only achieved where “everyone may enjoy [their] civil and political rights.”¹⁷⁵ Furthermore, States will ensure those rights “without distinction of any kind” or status.¹⁷⁶ States must also ensure that remedies are available, even where the violator was acting in an official capacity.¹⁷⁷ The highlighted obligations provide parameters on law enforcement action within the United States. As a country that has signed and ratified the ICCPR, the United States has a legal obligation to provide legal protections and remedies for individuals when their civil and political rights are being impeded by law enforcement.

The international community also has established guidance on a variety of issues. While neither legally binding nor technically authority, these codes serve as advisory regulations. Guidance also includes adopted principles that encourage rather than mandate, such as the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (“Basic Principles”) which were adopted by the United Nations in 1990. The Basic Principles assert that countries should avoid the use of force and any restrictions on people should not “disproportionately affect the rights of those involved.”¹⁷⁸ Like the Basic Principles, the 1979 Code of Conduct for Law Enforcement Officials (“Code of Conduct”) also serves as a foundation for international legal guidance on law enforcement.¹⁷⁹ The Code of Conduct notes that human rights and dignity shall be upheld,¹⁸⁰ and use of force shall be allowed only where strictly necessary.¹⁸¹ Less lethal weapons have been the subject of further guidance by the United Nations Human Rights Commission.¹⁸² The guidance highlights the severity of less-lethal weapons, noting that “extrajudicial killings and acts of torture or other forms of cruel, inhuman or degrading treatment” have been enacted with less lethal weapons or related equipment.¹⁸³ The guidance advocates for avoiding contact between law enforcement and members of the public if contact is likely to make the use of force more likely.¹⁸⁴ Other important aspects of the guidance for law enforcement use of military equipment include: not using force likely to cause injury against a passive resistor,¹⁸⁵

¹⁷⁴ The core human rights treaties that have at least some connection to law enforcement use of military equipment are: International Convention on the Elimination of All Forms of Racial Discrimination ratified in 1994, International Covenant on Civil and Political Rights ratified 1992, International Covenant on Economic, Social and Cultural Rights signed 1977, Convention on the Rights of Persons with Disabilities signed in 2009. JAG 2018, *supra* note 94, at 46.

¹⁷⁵ International Covenant on Civil and Political Rights pmbl., Dec. 16, 1966, 999 U.N.T.S. 171.

¹⁷⁶ *Id.* art. 2.

¹⁷⁷ *Id.*

¹⁷⁸ INT’L COMM. RED CROSS, INTERNATIONAL RULES AND STANDARDS FOR POLICING 23 (2015).

¹⁷⁹ GENEVA ACADEMY OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS, USE OF FORCE IN LAW ENFORCEMENT AND THE RIGHT TO LIFE: THE ROLE OF THE HUMAN RIGHTS COUNCIL 5 (Nov. 2016).

¹⁸⁰ G.A. Res. 34/169, art. 2 (Dec. 17, 1979).

¹⁸¹ *Id.*

¹⁸² OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *Guidance on Less-Lethal Weapons in Law Enforcement* (2020).

¹⁸³ *Id.* § 1.2.

¹⁸⁴ *See id.* § 2.6.

¹⁸⁵ *See id.* § 2.10.

implementing transparency, instituting effective accountability,¹⁸⁶ and amending policies pursuant to lessons learned.¹⁸⁷ Despite the availability of guidance, international sources lack clear articulation of affirmative obligations for law enforcement of the kind that exist for military. The vagueness and lack of enforcement mechanisms ensure that law enforcement in the U.S. rarely incorporates international standards.

ii. Federal Authority

Federal laws governing law enforcement use of military equipment are sparse. The outer limits of legal protections with regard to law enforcement are derived from the Fourth Amendment of the Constitution. The Fourth Amendment protects against unreasonable search and seizure and has been interpreted to include protections against excessive force.¹⁸⁸ Several legal devices hinge on Fourth Amendment protection to allow for remedies for excessive force. For example, the Civil Rights Act of 1871, 42 U.S.C. § 1983, allows for an individual police officer to be sued for a violation of the Fourth Amendment.¹⁸⁹ The remedy structure has several functional barriers to relief including qualified immunity for law enforcement,¹⁹⁰ and a high “clearly established” law requirement.¹⁹¹ In particular, qualified immunity has been the subject of significant debate with calls for ending qualified immunity becoming a popular rallying cry amidst organizers, politicians, scholars, and jurists.¹⁹² The other crucial mechanism providing legal protections of constitutional rights is 42 U.S.C. § 14141. This section of the U.S. Code allows the DOJ to seek injunctive relief against law enforcement agencies.¹⁹³ However, § 14141 has primarily been used as a threat to encourage negotiated settlement and has lost some of its weight after the first attempt to mandate reform failed.¹⁹⁴

In addition to Constitutional barriers, use of force is another important factor of legal protections for action by law enforcement. The striking element of use of force at the federal level is its absence. There is no federal definition of use of force nor a universal set of rules governing the use of force in the United States.¹⁹⁵ A use of force continuum is acknowledged, but not required or even encouraged.¹⁹⁶ While the DOJ notes that law enforcement “should use only the amount of force necessary,” the vague and permissive language allow for wildly disparate definitions of necessary force between agencies.¹⁹⁷ The federal government also lacks concrete information about police use of force in the United States. In 2019, the FBI began the National Use-of-Force

¹⁸⁶ See *id.* § 3.1-3.3.

¹⁸⁷ *Id.* § 3.11.

¹⁸⁸ U.S. Const. amend. IV; ACLU Mass., *supra* note 80, at 11.

¹⁸⁹ ACLU Mass., *supra* note 80, at 11.

¹⁹⁰ Kami N. Chavis & Conor Degnan, 11 *Curbing Excessive Force: A Primer on Barriers to Police Accountability*, AM. CONST. SOC’Y L. & POL’Y 28-31 (2017).

¹⁹¹ *Id.* at 7.

¹⁹² Whitney K. Novak, *Policing the Police: Qualified Immunity and Considerations for Congress*, CONGRESSIONAL RESEARCH SERVICE (rev. ed. June 25, 2020); Paul Stern, *Hold Police Accountable by Changing Public Tort Law, Not Just Qualified Immunity*, LAWFARE (Jun. 24, 2020), <https://www.lawfareblog.com/hold-police-accountable-changing-public-tort-law-not-just-qualified-immunity>; Stoughton et al., *supra* note 4.

¹⁹³ Chavis & Degnan, *supra* note 189, at 10.

¹⁹⁴ *Id.* at 10-11.

¹⁹⁵ NATIONAL INSTITUTE OF JUSTICE, *Overview of Police Use of Force*, <https://nij.ojp.gov/topics/articles/overview-police-use-of-force> (last visited Aug. 21, 2020).

¹⁹⁶ See *id.*

¹⁹⁷ *Id.* See Norwood, *supra* note 168.

Data Collection project.¹⁹⁸ Participation was voluntary and therefore only 40 percent of law enforcement agencies submitted data.¹⁹⁹ The need for data collection has been so significant as to spur several news outlets to begin independent tracking.²⁰⁰

Each of these elements of federal authority are especially crucial for conversations about law enforcement use of military equipment. In particular, the lack of data leads to zero assurances that military equipment is being used properly rather than in instances of discrimination or excessive force. Military equipment used by law enforcement is one small part of the law enforcement landscape, but it remains a topic that the federal government has both the authority and unique interest in solving.

iii. State and Local Authority

The state and local levels contain virtually all of the regulations and guidelines for law enforcement action. Despite being the most important entities for law enforcement regulation, regulation by state and local authorities pales in comparison to regulation of military conduct at the federal level. Regulation at this level suffers from a patchwork of inconsistent laws across states, unworkable vagueness, and unresponsiveness to police killings of civilians. At the state level, there is significant diversity among laws, regulations, and guidelines. There are 36 states that have some regulation regarding lethal and non-lethal force, but state statutes and doctrines can inhibit good practices.²⁰¹ For example, some states always permit use of force so long as an arrest is lawful.²⁰² The majority of states assert that officers may use “reasonably necessary” force, leaving a vague standard that leaves significant room for interpretation by officers.²⁰³ A few states, such as Washington and California, have clear use of force statutes that predate 2020.²⁰⁴ Other states have found recent success in passing long-planned police reforms with the renewed public outcry surrounding the killings of George Floyd, Breonna Taylor, Tony McDade and many other Black and Brown civilians.²⁰⁵ For example, New York repealed a law that kept police disciplinary records secret.²⁰⁶ The District of Columbia also passed recent changes, including several that are specifically relevant to the discussion of equipment: bans on chemical irritants, riot gear, and stun grenades during the exercise of First Amendment rights.²⁰⁷ In Minnesota, the state passed reforms seeking to directly address police militarization by banning “warrior” training for officers.²⁰⁸

¹⁹⁸ Norwood, *supra* note 168.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Stoughton et al., *supra* note 4.

²⁰⁴ *Id.*

²⁰⁵ See Luis Ferré-Sadurní & Jesse McKinley, *N.Y. Bans Chokeholds and Approves Other Measures to Restrict Police*, N.Y. TIMES (Jun. 12, 2020), <https://www.nytimes.com/2020/06/12/nyregion/50a-repeal-police-floyd.html>.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Walker Orenstein & Peter Callaghan, *The Legislature Just Passed a Police Reform Bill. What it Does — and Doesn't do — to Reshape Law Enforcement in Minnesota*, MINNPOST (July 21, 2020), <https://www.minnpost.com/state-government/2020/07/the-legislature-just-passed-a-police-reform-bill-what-it-does-and-doesnt-do-to-reshape-law-enforcement-in-minnesota/>.

Despite state power, local regulations are the most significant restrictions for the majority of law enforcement action in the United States. These rules and regulations can be enacted in several ways, but many regulations come directly from police department manuals. Some cities like Cincinnati have vast restrictions on use of force.²⁰⁹ Others, such as Camden, New Jersey, have extensive policies emphasizing de-escalation.²¹⁰ Some cities have a clearer use of force continuum,²¹¹ but the efficacy of many of these regulations are still in question.²¹² In addition, some law enforcement agencies have been found to have accountability systems that are neither implemented nor audited.²¹³

Police departments continue to alter their manuals in the wake of the 2020 protests, but often fail to capture the need for law enforcement to protect human rights and civil rights. For example, the Louisville Police Department's Standard Operating Procedures were altered after Breonna Taylor was killed by excessive use of force.²¹⁴ However, the department still allows the use of less lethal weapons without clear escalation procedures and explicit restrictions.²¹⁵ Even in police departments that scale use of force, there is often no mention of balancing civil rights or considering a civilian perspective of the interaction.²¹⁶ Where there is some recognition of the unique nature of protests, manuals present a full range of less lethal weapons in order to “bring an unlawful situation under effective control.”²¹⁷ The recognition of civil rights and civil liberties is sorely lacking, further exacerbated by vague platitudes and lack of explicit escalation of force procedures

iv. Overarching Principles

Unlike the overarching principles discussed in the military context, law enforcement principles are rarely operationalized. Overarching principles in American law enforcement start with the common epithet: to protect and serve. While simply a winning entry in a 1955 competition for the LAPD,²¹⁸ the motto embodies protection and service, two fundamental principles of law enforcement. The Law Enforcement Code of Ethics, adopted in 1957, articulates these virtues.²¹⁹ While non-binding, the code signals important principles that are meant to guide police work, including the “fundamental duty...to serve the community” and “to respect the constitutional rights of all.”²²⁰ The lack of operationalization has led some law enforcement officers to call for a

²⁰⁹ Norwood, *supra* note 168.

²¹⁰ *Id.*

²¹¹ See ACLU Mass., *supra* note 80, at 22.

²¹² See, e.g., Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1213 (2017) (highlighting position of use-of-force continuums to further normalize intolerance of disobedience and resistance being met with force).

²¹³ ACLU Mass., *supra* note 80; Stoughton et al., *supra* note 4.

²¹⁴ LOUISVILLE METRO POLICE DEPARTMENT, *Standard Operating Procedures* § 9.1 (rev. ed., 2020).

²¹⁵ *Id.*

²¹⁶ See PHOENIX POLICE DEPARTMENT, *Operations Order Manual* § 1.5 (rev. ed., June 2017); Minneapolis Police Department, Policy & Procedure Manual § 5-312, <http://www2.minneapolismn.gov/police/policy/mpdpolicy> (last visited July 7, 2020).

²¹⁷ Minneapolis Police Department, *supra* note 245.

²¹⁸ LOS ANGELES POLICE DEPARTMENT, *The Origin of the LAPD Motto*, http://www.lapdonline.org/inside_the_lapd/content_basic_view/1128 (last visited Aug. 16, 2020).

²¹⁹ International Association of Chiefs of Police, Law Enforcement Code of Ethics (1957).

²²⁰ *Id.*

new code that reflects a commitment to “opposing unnecessary force.”²²¹ In contrast to the military context, principles lack a cohesive, federal mandate and principles remain vague, non-specific guidance. Police are left to individually determine what it means to protect and serve a community. For example, police are tasked with deciding which community members can be targeted with force and treated as hostile.²²² As discussed further below, law enforcement principles have little weight on how police act on a wide scale, including during times of civil unrest or protest.

3. Crucial Differences Between Contexts

Overall, the military is much more regulated than police when using the same equipment in very different circumstances. The regulatory frameworks demonstrate that police fail to adopt military restrictions when using military equipment. The lack of regulation is crucial because it allows police, the group in constant contact with American civilians in peacetime, significant latitude to choose how, when, and against whom to use equipment that was made for war.

The first important difference between the military and police contexts is that the latter lacks a meaningful minimum standard. International authority in the military context provides clear parameters for what actions cannot be taken even in the midst of war and other atrocities. Both treaty and customary international law is respected in the military context, with significant effort made to follow law and guidance. In contrast, international obligations are vague and unenforced in the policing context. International guidance provides some protections for civilians, but it lacks binding authority and is largely ignored.

Another important difference between the two contexts is derived from the structure. The military is a federal entity with federal accountability. Policing in the United States is localized and created to be distinct from the military. While this distinction is by design, it proves striking in the context of military equipment. Law enforcement use of military equipment is enabled by federal programs, yet federal oversight is minimal and largely clerical. Reporting mandates fail to capture substantive information like use of force statistics. The lack of federal accountability also fails to provide a minimum standard, ensuring that the same American can be treated significantly differently by police throughout the country for the same action. In the context of protests, the differences become even more jarring, for some Americans can peacefully use their freedom of assembly where others are deterred for fear of police.

The different contexts also demonstrate the importance of operationalizing principles. For instance, even abstract principles such as honor are given tangible definitions in the military context.²²³ Principles are required norms that are embedded in law, rules, and regulations. In contrast, law enforcement principles are solely aspirational, avoiding limits and lacking concrete directives. The shift in posture forces law enforcement officers to make self-determinations, asking themselves what it means to protect or to serve. The lack of operationalization in the police context has significant and sometimes deadly consequences. For instance, a police officer who lacks

²²¹ Jeremiah P. Johnson, *A Hippocratic Oath for Policing*, NAT. POLICE FOUND. (2020), <https://www.policefoundation.org/a-hippocratic-oath-for-policing/>.

²²² Cf. Principle of Distinction, *supra* note 94. In stark contrast, the military follows the principle of distinction which bars the intentional targeting of civilians. *Id.*

²²³ See Commander’s Handbook, *supra* note 91, § 1-31.

concrete examples of serving the public with respect might view a civilian's inquiry as an insult, eventually escalating information gathering into use of force.

The military context further demonstrates the importance of training, repetition, and accessibility. As exemplified in Rules of Engagement and Escalation of Force, regulations are designed to be followed by the average servicemember. The military focuses on clarity and memorization so individuals can internalize their duties and act accordingly in the moment. Law enforcement regulations lack the same clarity. Even where regulations exist that provide for more community protections, departments lack procedures to train police and hold them accountable for violations. The lack of internalized directives means that police have fewer habitual methods to rely upon in crisis. Police reactions, as armed professionals, can then too easily become the tragedy of another child being killed.

The military also recognizes the importance of separating military and law enforcement functions. Regulations become much more restrictive when military forces are acting in a law enforcement capacity abroad. The same restrictive posture is strikingly absent from the law enforcement context. Despite not having a military function, police departments are being increasingly militarized through the use of military equipment while also lacking the appropriate restrictions. Adopting restrictions and practices similar to those that exist when the military is acting in a law enforcement capacity provides a workable minimum standard for law enforcement.

Each of these differences is highlighted in the context of civil unrest. Military regulations and manuals show a clear understanding of the validity of citizen concerns and highlight assembly as a democratic freedom. Favored tactics are negotiation and listening to the cause of the civil unrest. As noted in section 1, international, federal, and branch restrictions prohibit the intentional targeting of civilians and contain the principle that restrictions on the use of force should be higher in peacetime than in conflict. A similar positioning of values and tactics in law enforcement is lacking, yet would have a profound impact on how or if military equipment is used.

V. ACTUAL USE OF MILITARY EQUIPMENT BY LAW ENFORCEMENT

In addition to understanding regulatory frameworks, it is important to examine how law enforcement actually use military equipment within what the framework allows. For example, the acquisition of military equipment has not always been an upward trajectory, for there have been some changes in gear since the protests of 2014.²²⁴ Most notably, there have been fewer sightings of rifles and armored vehicles alongside increased drone usage to monitor the protests.²²⁵ However, police departments still possess equipment that they may not have utilized during recent protests. For instance, many police departments did not use the armored vehicles still in their possession and bayonets, another common item, were not widely reported during the protests.²²⁶ Actual use of military equipment is varied across the United States, but can be analyzed through the phenomena of police militarization and a case study of Wisconsin.

²²⁴ NPR Transcript, *supra* note 44.

²²⁵ *Id.*

²²⁶ *Id.*

A. Police Militarization

The regulatory flaws governing law enforcement use of military equipment, namely a lack of principle operationalization, clarity, and oversight, serve as a foundation for a significant issue: police militarization. The militarization of law enforcement has been a significant topic of research that encompasses culture, tactics, and equipment.²²⁷ Critics argue that the influx of military equipment and tactics have led to increasingly militarized police forces.²²⁸ The visual image of law enforcement outfitted like the military has caused apprehension, inspiring U.S. Army Gen. Mark Milley and Defense Secretary Mark Esper to denounce scenarios wherein police appear to be military.²²⁹ The concerns of militarization and the lack of widespread police regulations have spurred many military veterans to call for significant change.²³⁰ One former Marine states, “if cops are going to steal our gadgetry, they might consider adopting our overarching strategy too.”²³¹ Much of the criticism notes that, while military forces have shifted tactics to “win the hearts and minds of the people,” law enforcement seems to be increasingly antagonizing its citizenry often along racial lines.²³²

The disconnect between the respective shifts in the military and in law enforcement are exacerbated in the context of law enforcement use of military equipment. For example, while the military has worked hard to destroy notions of being an occupying force,²³³ law enforcement agencies are now using military equipment to intimidate protesting Americans.²³⁴ The juxtaposition inspires further analytics, and begs the question: if the military is avoiding using equipment in an occupying fashion on foreign soil, then why are there such frequent and public instances of U.S. law enforcement officers using the same equipment to intimidate and harm their neighbors? Why is it that the military structure upholds the humanity of those designated an enemy whereas the police structure allows for a neighbor to be deemed a threat solely on the basis of skin color?

The lack of clear legal and institutional parameters to protect citizens and their civil rights only serves to inflame worries of police militarization as a crucial tool against communities of color.²³⁵ The fear is a common and atrocious reality: “[t]he freedoms established by the Constitution have no bearing when confronted by masked and heavily armed police officers.”²³⁶ In the context of

²²⁷ Rosa Brooks, *Stop Training Police Like They're Joining the Military*, THE ATLANTIC (June 10, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/police-academies-paramilitary/612859/>.

²²⁸ ACLU, *War Comes Home: The Excessive Militarization of American Policing* 2 (2014).

²²⁹ David Choi, *Defense Department Says it's Concerned About Law Enforcement Dressing Up in Army Uniforms*, BUSINESS INSIDER (July 21, 2020, 4:31 PM), <https://www.businessinsider.com/us-military-speaking-out-about-law-enforcement-wearing-army-uniforms-2020-7>; see Bishop Garrison et al., *Congress Must Seize This Chance to Help Demilitarize Law Enforcement*, JUST SECURITY (July 15, 2020), <https://www.justsecurity.org/71428/congress-must-seize-this-chance-to-help-demilitarize-law-enforcement>.

²³⁰ Rubin, *supra* note 5; Stoughton et al., *supra* note 4.

²³¹ Rubin, *supra* note 5.

²³² Rubin, *supra* note 5.

²³³ Army Civil Disturbances, *supra* note 117. (“2-113. U.S forces should never be seen as a military policing force on our own soil or as an occupying force in another country.”).

²³⁴ Rubin, *supra* note 5.

²³⁵ See Meeks, *supra* note 6.

²³⁶ Jamar Myers-Montgomery, *Militarized Police and Unpermitted Protest: Implementing Policy That Civilizes the Police*, 16 CULTURAL STUDIES ↔ CRITICAL METHODOLOGIES 278, 278 (2016).

military equipment used by law enforcement, the cost, especially to communities of color, is well beyond the monetary.

B. Regulation and Militarization in Action: The Case of Wisconsin

The principles inherent in regulation, militarization, and law enforcement use of military equipment are exemplified in Wisconsin. Wisconsin makes an excellent case study for several reasons. Like most states, Wisconsin has stark differences within its borders, from demographics to beliefs. It has cities and rural areas. It is a political “swing” state.²³⁷ It also has vocal proponents and opponents of military equipment use. Most relevant to the case study, Wisconsin has experienced both the action of using federal programs for military equipment and the reaction of protests, several of which were well-recorded incidents involving excessive use of force. As in most states, Wisconsin cities and towns have also encountered competing calls for bolstering, reforming, and abolishing police. Wisconsin serves as an important and representative example of why police use of military equipment needs more regulation, and how severe the effects of this lack of regulation can be.

Law enforcement agencies across Wisconsin have acquired military equipment. Wisconsin is in the Top 10 states nationwide for per capita 1033 use.²³⁸ Agencies have received around 45 million dollars’ worth of surplus military equipment that includes 42 MRAPs to a total of 39 separate agencies across Wisconsin.²³⁹ Of the 39 law enforcement agencies in Wisconsin with MRAPs, 22 of them serve populations of less than 50,000 people and include several that have a population less than 15,000.²⁴⁰ For example, the city of Whitewater lacks a dedicated grocery store yet has an MRAP in the city garage.²⁴¹ Wisconsin’s largest city, Milwaukee, did not receive armored vehicles through the 1033 program.²⁴² The disparity between rural and urban acquisition is typical, but cities are generally eligible for greater funding than towns through DHS and DOJ grants.

Inventory and training are key components across the state, but there is significant inconsistency in when military equipment is used. In 2020, Wisconsin cities including Kenosha, Madison, Milwaukee, and Wauwatosa had law enforcement use military equipment against protestors.²⁴³ Some of the equipment could not easily be traced to the city where it was used. For example, although Milwaukee has not used the 1033 program to acquire MRAPs, surrounding

²³⁷ See, e.g., Laurel White, *How Long Has Wisconsin Been a Swing State?*, WISCONSIN PUBLIC RADIO (May 26, 2020), <https://www.wpr.org/how-long-has-wisconsin-been-swing-state>.

²³⁸ Routley, *supra* note 72.

²³⁹ Sarah Volpenhein, *Wisconsin Police Departments Have More Than \$45 Million in Surplus Military Equipment, Including Armored Vehicles*, MILWAUKEE J. SENTINEL (Jun. 16, 2020), <https://www.jsonline.com/story/news/2020/06/16/wisconsin-police-departments-have-more-than-45-million-surplus-military-equipment/3180445001/>; Henry Redman, *State’s Police Forces Have Military Arsenals*, URBAN MILWAUKEE (Jun. 24, 2020, 4:22 PM), <https://urbanmilwaukee.com/2020/06/24/states-police-forces-have-military-arsenals/>.

²⁴⁰ *Id.*

²⁴¹ Redman, *supra* note 239.

²⁴² Volpenhein, *supra* note 239.

²⁴³ Clara Neupert, *Aggressive policing escalates violence at protests, research shows. A former Madison police chief touts a better way*, WISCONSIN WATCH (Dec. 9, 2020), <https://wisconsinwatch.org/2020/12/aggressive-policing-violence-protests-david-couper/>

towns deployed their MRAPs to Milwaukee during the 2020 protests against police brutality.²⁴⁴ The cross-jurisdictional use of military equipment is not uncommon. While beneficial for disaster relief, cross-jurisdiction use as a deterrent or in response to protests raises a host of issues with lack of accountability and lack of regulation.

The use of MRAPs can also undermine a town's values. In Whitewater, Wisconsin, Common Council member Brienne Diebolt-Brown noted her shock and horror at learning that the city had an MRAP especially because of the city's desire not to use force.²⁴⁵ While the justification for obtaining the MRAPs is to rescue civilians, that is often not the actual usage.²⁴⁶ For instance, a 2014 incident occurred when an armored vehicle was sent by Marathon County Sheriff to seize property from an elderly couple.²⁴⁷ Police records indicate that rescue operations are not the norm, instead highlighting equipment used to apprehend homicide suspects or for the rare high-risk search warrant.²⁴⁸ MRAPs are also used to engage the community and promote police departments. Some Wisconsin agencies have used MRAPs at parades and county fairs, a far cry from their original justification.²⁴⁹

The use of military equipment by law enforcement has proponents and opponents across the state. Critics have shared outrage at the use of military equipment against protestors.²⁵⁰ Some of the critiques come from within police forces. In Superior, Chief Nick Alexander returned the department's MRAP in 2018, citing a reluctance to use unnecessary military equipment without community support.²⁵¹ Former Madison Police Chief David Couper has also been outspoken on the use of military equipment against protestors.²⁵² During his tenure, Couper set a blueprint that advocated for community trust-building and working to uphold free speech.²⁵³ His model, including using restraint and valuing people over property, remains enshrined in Madison's standard operating procedure.²⁵⁴ But Couper is among the critics of the recent tactics, noting that the use of military-style equipment loses trust for generations.²⁵⁵ For some, the use of military equipment is a major deterrent, not on violence, but on exercising their free speech and ability to protest.²⁵⁶

Wisconsin law enforcement's use of force and subsequent use of military equipment in response to protestors became highly publicized in August 2020, highlighting how police militarization creates a chaotic, violent environment. As calls for reform rang across the state,

²⁴⁴ Volpenhein, *supra* note 239.

²⁴⁵ Redman, *supra* note 239.

²⁴⁶ Volpenhein, *supra* note 239.

²⁴⁷ *Id.*

²⁴⁸ Redman, *supra* note 239.

²⁴⁹ *Id.*

²⁵⁰ See, e.g., Scott Gordon, *Banning tear gas in Madison Shouldn't Even be a Debate*, TONEMADISON (July 15, 2020), <https://www.tonemadison.com/articles/banning-tear-gas-in-madison-shouldnt-even-be-a-debate>.

²⁵¹ See Penzenstadler & Chen, *supra* note 85.

²⁵² Neupert, *supra* note 243.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ See *id.*

²⁵⁶ See *id.*

Jacob Blake was critically injured after being shot by police multiple times in the back.²⁵⁷ The incident occurred in Kenosha as Blake's three small children watched.²⁵⁸ Gov. Evers and Lt. Gov. Mandela Barnes both admonished the act, with Barnes noting the irony of Blake attempting to deescalate whereas police did not.²⁵⁹ However, the police unions maintained that there were other elements at play.²⁶⁰ While no military equipment was implicated in the shooting of Jacob Blake, military equipment was involved in the ensuing protests.²⁶¹ Protesters were met with "an armored vehicle" and the police were reported to have thrown "gas" into the crowd.²⁶² Two days after Blake was shot, Kyle Rittenhouse answered a call for vigilantes to protect property in Kenosha from protesters.²⁶³ Amidst the tear gas and rubber bullets used against protestors, it was Rittenhouse who was violent, fatally shooting two people and injuring a third.²⁶⁴ Selika Ducksworth-Lawton, a University of Wisconsin history professor specializing in civil rights and the military noted that Kenosha was "ripe" for the chaos, having "a history of racial problems" that they have failed to mitigate.²⁶⁵

The aftermath of the protests and attempts for reform further demonstrate the need for clear and consistent regulation of police use of military equipment. Reforms occurred across the state. Gov. Tony Evers introduced a series of nine bills spanning a variety of issues including a statewide standard for use of force and subsequent disciplinary procedures for violators.²⁶⁶ The reforms proposed have either received long support or widespread implementation in Wisconsin law enforcement agencies, noted Jim Palmer from the Wisconsin Professional Police Association.²⁶⁷ However, support was not always meaningful. The city of Milwaukee conducted an audit of their participation in the 1033 program. While the audit looked at a variety of factors, it focused primarily on increasing training and record accuracy.²⁶⁸ The audit never questioned the need for 1033 participation, instead recommending that the police department educate the community on why participation was needed.²⁶⁹ The police department's response to the audit highlighted how it was already meeting the recommendations, demonstrating that the recommendations failed to seriously consider alternatives.²⁷⁰ In Madison, the reforms were equally mixed. The Madison Common Council passed an ordinance that limited the type of equipment the city could obtain

²⁵⁷ Elliott C. McLaughlin & Amir Vera, *Wisconsin Police Shoot a Black Man as His Children Watch from a Vehicle, Attorney Says*, CNN (Aug. 24, 2020), <https://www.cnn.com/2020/08/24/us/kenosha-police-shooting-jacob-blake/index.html>.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ Neupert, *supra* note 243.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ Danielle Kaeding, *Evers Introduces Package of Bills Targeting Police Reforms*, WISC. PUB. RADIO, <https://www.wpr.org/evers-introduces-package-bills-targeting-police-reforms>.

²⁶⁷ *Id.*

²⁶⁸ See City of Milwaukee, *Audit of the Milwaukee Police Department Excess Property Acquired Through the Department of Defense, Law Enforcement Support Program*, June 2021, at 13–14 https://city.milwaukee.gov/ImageLibrary/Groups/ccClerk/IG/Reports/MPDExcessPropertyAcquiredThroughtheDoDLESO1033Program_062521.pdf.

²⁶⁹ *Id.* at 14.

²⁷⁰ See *id.* at 67–70.

from the 1033 program.²⁷¹ It also required high value items to receive approval from the Common Council and mandated a bi-annual report.²⁷² However, the council voted down a ban on tear gas, amending proposed ordinances to merely search for tear gas alternatives.²⁷³ In Kenosha, bystanders saw military equipment in full use at the trial of Kyle Rittenhouse.²⁷⁴ The one significant difference: this time it was wielded by Wisconsin guard troops rather than local police.²⁷⁵

Wisconsin demonstrates the key issue with law enforcement use of military equipment: it should be limited and have increased regulation. Increased regulation of military equipment could have profoundly altered the events that unfolded. Wisconsin is no anomaly, for what occurred is a predictable outcome stemming from lack of regulation.

VI. CHANGING THE IMAGE TO COMMUNITY NOT COMBAT

The images of combat throughout communities in the United States sparked worries of law enforcement use of military equipment. Journalists, politicians, and community members alike questioned the necessity and use of the equipment. Despite the criticisms, little has been done to address the use of military equipment federally. For instance, then-candidate Joe Biden called for the government to “stop transferring weapons of war to police forces, improve oversight and accountability, [and] to create a model use of force standard,” with “[n]o more excuses, no delays.”²⁷⁶ However, the Biden administration has failed to reform or abolish any of the funding or surplus programs. While federal politicians pushed for several reforms, none of them came to fruition. Notably, a comprehensive amendment to the National Defense Authorization Act led by Senator Brian Schatz fell short of the necessary votes.²⁷⁷ The amendment sought to change the 1033 program through bans of certain transfers, prevention of use against peaceful protests, and instituting additional accountability and transparency.²⁷⁸ Public organizing continues, but has also failed to garner substantive change. For instance, the ACLU began a campaign in 2020 that provided individuals with a scripted message to demand the end of the 1033 program and a “reigning in” of the Byrne Justice Assistance Grants.²⁷⁹ At the local level, some changes occurred. For example, San Francisco Mayor London Breed directed the San Francisco Police Department

²⁷¹ Gretchen Gerlach, *Madison Common Council limits MPD's use of military surplus program*, NBC 15 (Oct. 7, 2020), <https://www.nbc15.com/2020/10/08/madison-common-council-limits-mpds-use-of-military-surplus-program/>

²⁷² *Id.*

²⁷³ See Neupert, *supra* note 243; CITY OF MADISON, *Meeting Minutes*, October 6, 2020, <https://madison.legistar.com/View.ashx?M=M&ID=803258&GUID=DE737AE9-AF50-4932-945A-274854195D87>

²⁷⁴ Steve Beynon, *500 Wisconsin Guard Troops Deployed Ahead of Rittenhouse Verdict*, MILITARY TIMES (Nov. 15, 2021), <https://www.military.com/daily-news/2021/11/15/500-wisconsin-guard-troops-deployed-ahead-of-rittenhouse-verdict.html>.

²⁷⁵ *Id.*

²⁷⁶ Joseph Biden, *Remarks in Philadelphia on Protests for George Floyd*, June 2, 2020, <https://www.rev.com/blog/transcripts/joe-biden-philadelphia-speech-transcript-on-protests-for-george-floyd>.

²⁷⁷ Jordain Carney, *Senate Rejects Broad Restrictions on Transfers of Military-Grade Equipment to Police*, THE HILL (July 21, 2020, 3:29 PM), <https://thehill.com/homenews/senate/508377-senate-rejects-broad-restrictions-on-transfers-of-military-grade-equipment-to>.

²⁷⁸ Garrison, *supra* note 229.

²⁷⁹ ACLU, *Congress: End Police Militarization and Over-Policing in Our Communities Now*, <https://action.aclu.org/send-message/congress-end-police-militarization-and-over-policing-our-communities-now> (last visited Aug. 16, 2020).

to create an explicit policy banning the use of military-grade weapons against unarmed civilians.²⁸⁰ However, regulations of military equipment remain the exception, with proposals becoming less frequent as more time passes from the 2020 protests against police brutality.

Given the bleak landscape, this piece builds on the many elements of law enforcement use of military equipment to provide tangible suggestions. This part advances several common calls for action while highlighting how each change would address the lack of regulation of law enforcement use of military equipment. Given that various aspects of the federal government enable law enforcement to acquire military equipment, the main focus will be on changes possible at the federal level with some secondary highlights on possible local reforms. In addition, priority is given to highlight changes that would directly impact the issue of military equipment being used by law enforcement.

A. General Federal Reforms

Establish meaningful efforts to increase diversity at all levels of federal service including, but not limited to the military, administrative agencies, and elected officials. Increased diversity is broad in scope. While it may initially seem divorced from the topic of military equipment use, it is a crucial element. The federal government should be representative of the nation at all levels, particularly in decision-making roles. Laws, policies, and regulations are shaped by those with power, yet disproportionately the members of the most impacted communities are left out of the process. The federal government must broadly analyze and improve recruitment practices in order to foster change. The racialized tilt of how and against whom police use military equipment demonstrates gaps in the decision-making process that would be served by an increase in representation.

Institute a wide-scale community and justice enforcement initiative to address civil rights violations by law enforcement. While this would be a significant undertaking, it would envision new methods of enforcement that circumvent those institutions that have been accused of or have committed civil rights violations. This initiative would explore independent monitoring practices as well as means of shifting culture and creating new social norms. While large in scale, this suggestion is consistent with previous efforts for independent review bodies such as the Consumer Financial Protection Bureau. Furthermore, such an initiative would also be consistent with calls for Congressional support for effective external police oversight.

Implement federal mandatory use of force reporting that is published annually and publicly available. As noted earlier in this piece, a significant flaw in the current system is the lack of data. Such data should include information regarding general use of force as well as both specific and intersectional analysis covering impacted communities including people of color, people with disabilities, LGBTQ+ people, and people with low incomes. While there have been recent efforts to increase federal tracking of law enforcement use of force, the voluntary nature causes huge gaps in information. A reporting requirement should be conditional. For instance, Congress could require reporting compliance for receipt of federal law enforcement funds. The

²⁸⁰ Maura Dolan, *London Breed Pushes San Francisco Reforms: Police No Longer Will Respond to Noncriminal Calls*, L.A. TIMES (Jun. 12, 2020), <https://www.latimes.com/california/story/2020-06-12/san-francisco-police-reforms-stop-response-noncriminal-calls>.

annual reporting and public availability will allow for increased transparency, accountability, and for analysis in order to determine best practices.

Create additional requirements of civilian participation for law enforcement enrollment in any federal funding, surplus, or related program. More specifically, enrollments in any such program should require civilian governing approval and appropriate general civilian participation such as an open forum, town hall, or notice and comment. Enrollment in federal programs should also have an automatic sunset wherein civilians should once again be engaged to reenroll. Each of these provisions would allow for civilian checks on acquisition of military equipment regardless of its source. Communities would have the opportunity for democratic participation. Furthermore, the requirement of both governing and general civilian approval would ensure that the communities that are most impacted, namely Black and Brown communities, would have a tangible means of expressing concern regardless of any potential political barriers that might otherwise prevent these communities from having power in civilian governing authorities.

Regulate the commercial purchase of military and militaristic equipment by law enforcement agencies. While calls for defunding police gained popularity in 2020, police departments can feasibly avoid regulations by purchasing equipment commercially. Consideration should be given to how best address this possibility.

B. Program Specific Reforms

Eliminate ammunition, less lethal weapons, and chemical irritants from the 1022 program. This would ensure that law enforcement would still be able to obtain necessary life-saving or disaster readiness supplies at a reduced rate. However, no reduced rates would be allowed on any items that are meant for incapacitation. This would force law enforcement agencies to pay full-price and have full accountability through ordinary budget constraints.

Reformat the 1033 program to only include innocuous items. This would enable items like office supplies to be reused rather than sold or disposed. This shift would also address many of the concerns around police militarization that have led to demands for total elimination of the 1033 program.²⁸¹

Recall any items not allowed in the reformatted 1033 program.²⁸² This would include MRAPs, weapons, and the remaining military equipment that has been at the forefront of use against communities. This would ensure that any controlled gear that becomes prohibited or no longer available can return to federal possession rather than be left in local communities.

Eliminate law enforcement preferential ranking in 1033 and other related programs.²⁸³ This would enable other agencies to obtain supplies from the military that are suited to their

²⁸¹ See, e.g., Charlotte Lawrence & Cyrus J. O'Brien, *Federal Militarization of Law Enforcement Must End*, ACLU (May 12, 2021),

<https://www.aclu.org/news/criminal-law-reform/federal-militarization-of-law-enforcement-must-end/>; Jason Fritz, *How to Get Started on Rolling Back Police Militarization*, WAR ON THE ROCKS (June 8, 2020), <https://warontherocks.com/2020/06/how-to-get-started-on-rolling-back-police-militarization/>.

²⁸² See, e.g., *id.*

²⁸³ See Lawrence & O'Brien, *supra* note 281.

functions. For instance, first aid kits and cold weather gear might first go to ranger services or firefighters who provide emergency services without police power.

C. Department of Defense Reforms

Institute a task force to determine alternate sustainable usage for controlled items that previously were sent to law enforcement agencies through 1033. Since items would no longer be transferred for reuse by law enforcement, the DoD will need to implement new ways to handle items that remain consistent with financial stewardship and environmental sustainability. A task force would allow for assessment and strategic development.

Establish a cross-agency Disposal Review Board akin to the Weapons Review Board that would review the benefits and detriments of transferring items outside of the DoD. The Weapons Review Board is crucial to verifying the legality of weapons development, considering a multitude of costs and benefits before acquiring new weapons. Similarly, a Disposal Review Board would examine the legality of military items in a domestic setting, exploring the different context, operational purpose, and consequences of transfer or disposal.

Lead a cross-agency use of force guide for less lethal weapons and other popular military equipment that would provide clear guidelines for law enforcement agencies. One of the most significant issues throughout the law enforcement structure is the lack of clarity. A use of force guide led by the institutions that interact with the legality of force the most often will be able to provide clear guidelines for implementation. The guide would provide a model and allow for simple adoption. A use of force guide would also provide crucial information that would enable law enforcement agencies to widely communicate prohibitions, parameters, and best practices, akin to rules of engagement. The guide would also provide a framework where law enforcement agencies are not subject to regulations, such as if they purchase equipment commercially and thus avoid other regulations.

D. Local Reforms

In addition to the many federal reforms that would foster positive change regarding law enforcement use of military equipment, there are several reforms at the local level that merit attention. Local governments should make commitments to ban military equipment prohibited by international bodies or by global counterparts such as other cities and towns. Such bans should be forward looking, encompassing new technologies. Police department manuals and local regulations should be changed with input from the general communities served. Police should adjust their tactics and procedures. Local governments should also require law enforcement agencies to have transparent, participatory budget processes that include non-police authorization for purchase of ammunition, less lethal weapons, and other tactical equipment. Local law enforcement agencies should implement accessible training on clear policies so that officers can implement changes and be conscious of prohibitions.

CONCLUSION

Videos depicting police officers in combat loads responding to protests on police brutality have renewed discussions about law enforcement use of military equipment. This piece has explored the many components of law enforcement use with a focus on highlighting the stark differences

between military and law enforcement restrictions of the same equipment in very distinct circumstances. On a deeper level, this piece examines normative judgements and closely held principles to posit how changes can more closely resemble American values and ideals. By highlighting ways of creating substantive change that involve and amplify directly impacted communities while leveraging the experience of the military, this piece serves as a call to action. Our communities, our nation, deserve meaningful change.