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Cynthia A. Brown Ph.D.

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DIVIDED LOYALTIES: ETHICAL CHALLENGES FOR AMERICA'S LAW ENFORCEMENT IN POST 9/11 AMERICA

By Cynthia A. Brown, J.D., Ph.D.[*]

The martial trend within American police agencies may have begun nearly twenty years prior to the events of 9/11, but the terrorist attacks and a decade of military conflict since bear significant responsibility for the widespread, integrated militarization of our nation's law enforcement. Military appearance, tactics, operations, weaponry and culture, including the rise and normalization of police paramilitary units, are all components of the country's post-9/11 counterterrorism efforts and contributors to what may be viewed as an identity crisis among police officers. The crisis of identity arises when officers become torn between their sworn duty to protect and serve the community consistent with the tenets of the U.S. Constitution, on the one hand, and the national call to arms in the "war on terror" on the other. The tension experienced by many arises when officers must decide which interest receives their loyalty and which standard guides their choice of decision. Unfortunately, the increased militarization of America's civilian police force is impinging upon the professional ethics of its officers.

[*] © Copyright 2011, Cynthia A. Brown. Dr. Brown is an Assistant Professor of Legal Studies in the Department of Legal Studies at the University of Central Florida in Orlando, Florida. She wishes to thank Neal E. Trautman, Executive Director of the National Institute of Ethics.

I. INTRODUCTION

From inception, organized civilian police forces have been distinguishable from the military—a design of deliberate distinction. Because early opponents feared civilian police forces would, in fact, be an extension of standing armies acting as secret spies, limiting individual freedoms and perpetuating governmental abuses, the introduction of an organized crime prevention body enabled with government authorized coercive power was quite controversial. Compared to increased crime, though, new police forces were eventually perceived as the lesser evil, and with reduced resistance, the creation of civilian police agencies quickly spread across America. Recently, the progression of the paramilitary character of the nation's civilian law enforcement and, conversely, the increasing law enforcement character of the military forces abroad,[1] have provoked new heights of criticism within professional, academic and secular circles.

A nascent realization is that America's law enforcement today may be confirming, in some respects, many of the original concerns of those opposing civilian police forces. Nearly two centuries since they were first voiced, issues like repressive criminal laws, abuse of governmental authority, and infringement on citizens' rights are sparking debate and being revisited. The blurring of the constitutional and statutory principles that established a bright line dichotomous model separating armed military forces from domestic civilian police is engendering a bevy of critical appraisal, not the least of which concerns law enforcement's digression from its professional code of ethics.

The author hypothesizes that a significant expansion of militarization in America, particularly including normalizing the use of military–style tactics in mainstream police functions, undergirded by the theory of just war, is largely responsible for increases in unethical decision-making by

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[1] *See* Rachel Bronson, *When Soldiers Become Cops*, 81 FOREIGN AFF. 122, 122 (2002) ("Because the United States has no paramilitary units and only poorly organized civilian policing tools, elite combat forces have ended up filling the void."). Increasingly, American combat forces are called upon to handle civil strife in foreign countries where we have a military presence, mining soldiers in policing operations. The U.S. military, unfortunately, is poor-equipped to fulfill the responsibility of establishing post-conflict security in precarious political environments, often deemed peacekeeping and policing missions. *Id.* at 124–126. "On the war's international front, military interventions increasingly take the form of peacekeeping police actions; while on the home front, the military are increasingly engaged or prepared for internal intervention and policing is progressively militarized [sic]." Jude McCulloch, *Blue Armies, Khaki Police and the Cavalry on the New American Frontier: Critical Criminology for the 21st Century*, 12 CRITICAL CRIMINOLOGY 309, 310 (2004). A thorough analysis of soldiers' post-conflicting policing roles is outside the scope of this article.

police officers.[2] Deluged by martial rhetoric, fear, and constant threat of harm, many law enforcement officers find themselves conflicted when confronted by choices between professional ethics and their supposed obligations to wage "war" on any number of valid concerns—crime, drugs, terrorism. This article considers what impact enlarged militarization and the "just war" tradition may be having on those sworn[3] to protect and serve. Part II of the article proceeds with an overview of the evolution and eventual expansion of militarization within the United States and an introduction of just war theory. Part III examines both the traditional role of American law enforcement and the modern adaptations of the nation's civilian police force, particularly since September 11, 2001. Finally, the article concludes with thoughts about how the militarization of America—bolstered by the traditional just war principles—impinges on the professional ethics of law enforcement officers and may be responsible for an identity crisis among police.

II. MILITARIZING AMERICA

Considering the concept of militarization, it is probably advisable to first briefly introduce the broader notion of militarism. *Militarism*, originally popularized in the 1860s, describes "the adoption of war and military behaviors as ideals: the glorification of war and military power as ends themselves, as dominant or even defining values in a society in which the military establishment has disproportionate social and political influence

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[2] Kevin Johnson, *Police Brutality Cases up 25%; Union Worried over Dip in Hiring Standards; Shortages may lead to "Scrimping" on Training*, USA TODAY, Dec. 18, 2007, at 1A. Kevin Johnson, a USA Today journalist, reports on an analysis of federal law enforcement prosecutions compiled by Transactional Records Access Clearinghouse at Syracuse University (TRAC) report. Charges of excessive use of force and other tactics that violate civil rights have increased at least twenty-five percent since 2001. *Id.*

[3] A typical example of a law enforcement officer's oath of office is:

> On my honor,
> I will never betray my badge
> my integrity, my character,
>
> or the public trust.
> I will always have
> the courage to hold myself
> and others accountable for our actions.
> I will always uphold the Constitution
> my community and the agency I serve.

See International Association of Chiefs of Police [IACP], *Presentation of the Oath of Honor*, IACP, http://www.theiacp.org/PoliceServices/ExecutiveServices/ProfessionalAssistance/Ethics/WhatistheLawEnforcementOathofHonor/PresentingtheOathofHonor/tabid/160/Default.aspx (2011).

relative to other elites or institutions."[4] Speier defines militarism as existing "when the distribution of power and esteem assumes the form of centralization of control, an attendant state monopoly of raising, controlling and equipping armies, and a universality of military mores."[5] *Militarization,* on the other hand, occurs as a society adopts the tenets of militarism. Military historian Richard Khon suggests militarization is "the degree to which a society's institutions, policies, behaviors, thought, and values are devoted to military power and shaped by war."[6] Militarization is rooted in the notion that there may exist in a culture various "customs, interests, prestige, actions, and thought associated with armies and wars"[7] but it all transcends true military purposes. The transcendence beyond the martial requirements makes these customs, interests, prestige, actions and thought irrelevant, unnecessary, and, at times, even dysfunctional to war making.[8]

A. The Evolution of America's Militarization

Until the first of the two World Wars, the ideals of war and peace were highly differentiated in the American experience. Any militarization was but a brief interruption during which citizens took up arms as the nation fortified for battle. As soon as the crisis passed, little time was wasted before civilians returned to their normal pursuits, and the government disbanded its defensive force, designed as a temporary creation that expired with the crisis.[9]

The First World War, or the Great War, would nurture an American culture in the 1920s and 1930s profoundly influenced by thoughts of war and military intervention.[10] Notwithstanding the nation's attentions on war, the United States had not yet moved toward militarization. That would

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[4] Richard H. Kohn, *The Danger of Militarization in an Endless "War" on Terrorism*, 73 THE JOURNAL OF MILITARY HISTORY 177, 182 (2009).

[5] HANS SPEIER, SOCIAL ORDER AND THE RISKS OF WAR: PAPERS IN POLITICAL SOCIOLOGY 230 (1952).

[6] Kohn, *supra* note 4, at 182. Professor Kohn derives his definition for militarization from descriptions previously provided by German historian Michael Geyer and Michael Sherry. Geyer Submits that militarization is "the contradictory intense social process in which civil society organizes itself for the production of violence." Michael Geyer, *The Militarization of Europe, 1914–1945, in* THE MILITARIZATION OF THE WESTERN WORLD 79 (John R. Gillis ed., 1989). Sherry, on the other hand, suggests a broader meaning for militarization offering that it is "the process by which war and national security became consuming anxieties and provided the memories, models and metaphors that shaped broad areas of national life." MICHAEL S. SHERRY, IN THE SHADOW OF WAR: THE UNITED STATES SINCE THE 1930S XI (1995).

[7] ALFRED VAGTS, A HISTORY OF MILITARISM: CIVILIAN AND MILITARY 13 (1959).

[8] *See id.*

[9] Kohn, *supra* note 4, at 184.

[10] *See id.* at 185.

come as the conflict ended. World War I experienced renewed life through political issues further buoyed by the emerging conflict that culminated in another World War. The armed forces sought assistance from American businesses to mobilize industry and the national economy for the ensuing mass conflict. Both the governmental defense agencies and private enterprise worked to advance technologies and integrate improvements in America's military capabilities to ensure the nation's defense.[11] World War I brought American government and business together in a partnership that gave rise to a military power that would become the "Arsenal of Democracy" in World War II.[12] Because of this, World War I proved to be America's turning point toward militarization, taking "a major and seemingly irrevocable step in the direction of becoming a warfare or national security state."[13] In these ways and others, war and military gradually became a central paradigm for the country,[14] but it was not until the Cold War that the nation's expansive military establishment evolved into both a regular and prominent feature of American life.

Threats of communist expansion, at a minimum, and nuclear assault,[15] at worst, characterized the Cold War and motivated efforts to expand the nation's conventional forces and upgrade her military readiness.[16] Much attention was centered on establishing a democratic presence along

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[11] *See* PAUL A. C. KOISTINEN, PLANNING WAR, PURSUING PEACE: THE POLITICAL ECONOMY OF AMERICAN WARFARE, 1920–1939 xiv (1998).

[12] Kohn, *supra* note 4, at 184.

[13] KOISTINEN, *supra* note 11, at 298; *see also*, PAUL L MURPHY, WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES (1979); NEIL A. WYNN, FROM PROGRESSIVISM TO PROSPERITY: WORLD WAR I AND AMERICAN SOCIETY (1986).

[14] William E. Leuchtenburg, *The New Deal and the Analog of War*, *in* CHANGE AND CONTINUITY IN TWENTIETH-CENTURY AMERICA 81 (John Braemen, Robert H Bremner, & Everett Walters eds., 1964).

[15] *See* Catherine Lutz, *Making War at Home in the United States: Militarization and the Current Crisis*, 104 AMERICAN ANTHROPOLOGIST 723, 727 (2002).

> U.S.-Soviet enmity became associated with a new mode of warfare. Termed "nuclearism," it was initiated in 1945 with the bombing of the U.S. western desert and then Hiroshima and Nagasaki. While technocentrism suggests that the new weapon and its massive destructive power were key to the transformation that began that year, what changed, more importantly, was the perception of danger among the people purportedly protected by nuclear weapons and the new social relations that emerged because of these weapons' manufacture . . . . This mode of warfare also spawned expanded codes of secrecy to protect the technical knowledge involved in weapons development . . . [and] also fundamentally deformed norms of democratic citizenship already under pressure from consumerist notions of self and eroded civil liberties.

Id.

[16] Kohn, *supra* note 4, at 187.

the communist periphery.[17] This was accomplished, in part, by constructing foreign bases in strategic locales.[18] Additionally, diplomacy efforts concentrated on securing the ancillary programs and services necessary to reinforce America's global presence and advance American military power worldwide.[19]

At home, military services worked in tandem both with civilian groups and leading political figures to establish programs aimed at indoctrinating Americans in citizenship and national (including military) values "to strengthen the national character and . . . to transform society along lines favorable to a martial mind-set."[20] In less than a decade following World War II, the United States was a nation that had mobilized, at least psychologically, for military conflict.[21]

From the late 1940s through the 1980s, the need to combat the communist threat filled American life and fueled American politics. "[T]he needs of the military establishment and the possibility of war pervaded the economy and American society more deeply, and for a more extended period of time, than ever before, with the exception of those brief periods when the nation engaged in a shooting war."[22]

> Fears of internal subversion roiled the 1940s; antinuclear protests and antiwar demonstrations recurred in the 1950s, 1960s, 1970s, and 1980s. For the first time on a continuing basis, military preparedness and spending, weapons systems, and the shape and character of the military establishment periodically intruded into partisan politics and may have decided some elections. All sorts of domestic needs, from superhighways to the reform of education and even racial integration were justified by the overwhelming need to combat the communist menace . . . . Many aspects of life in the United States came to be measured against the ability of Americans to compete with communism: the divorce rate, race relations, worker

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17 *Id.*

18 *Id.*

19 *Id.*

20 LORI LYN BOGLE, THE PENTAGON'S BATTLE FOR THE AMERICAN MIND: THE EARLY COLD WAR 16 (2004).

21 Kohn, *supra* note 4, at 190. The President of the American Historical Association in 1949, argued "We must clearly assume a military attitude if we want to survive . . . Total war, whether it be hot or cold, enlist everyone and calls upon everyone to assume his part . . . Confronted by such alternatives as Mussolini and Hitler and last of all Stalin have imposed, we must clearly assume a militant attitude if we are to survive . . . . This sounds like the advocacy of one form of social control as against another. In short, it is. But I see no alternative in a divided world. Probably in any planned world we can never be altogether free agents, even with our tongue and pen. The important thing is that we shall accept and endorse such controls as are essential for the preservation of our way of life." Conyers Read, *The Social Responsibilities of the Historian*, *available at* http://www.historians.org/info/AHA_History/cread.htm (last visited Apr. 14, 2011), *cited in* Kohn, *supra* note 4, at 190.

22 Kohn, *supra* note 4, at 188.

> productivity, the moral fiber of American youth, even the viability of the American family itself.[23]

The collapse of the Soviet Union, marking with it the end of the Cold War, would have seemingly eliminated America's need to prepare for war and its corresponding defense expenditures devoted to building and maintaining the military. That was not the case. Rather, there was an apparent national agreement that the United States should take necessary steps to remain the world's dominant military power, a global superpower.[24] Large numbers of veterans groups, which were formed after both World Wars, the Korean conflict, and the Vietnam War, pressed for massive defense expenditures.[25] Industrial and business enterprises promoted military preparedness.[26] And, the Pentagon, of course, continually called for amplified defense prowess.[27]

By the late 1990s, America's military had grown and the nation's defense budget had swollen to three times the percentage of the gross domestic product, a point that exceeded any other peacetime period in the country's history.[28] Unknowingly, it would serve as a harbinger for what would come. After September 11, 2001, the nation's resolve for military domination grew even more resolute. The terrorist attacks on home soil brought an intensification of America's militarization that now dominates not only foreign relations but also all aspects of the country's domestic life.

B. The Infusion of Militarization Across Society

Over the last eighty years, the United States has experienced decades of depression, the Second World War, the Cold War, the Korean conflict, the Vietnam War, the Civil Rights Movement, and international pri-

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[23] *Id. at* 190–91 (citations omitted).

[24] The United States Commission on National Security/21st Century, also known as the Hartman-Rudman Commission, completed the most thorough review of American national security in a generation and concluded the United States' budget in the late 1990s included military and defense expenditures that exceeded those of the next ten countries combined. UNITED STATES COMMISSION ON NATIONAL SECURITY/21ST CENTURY, NEW WORLD COMING: AMERICAN SECURITY IN THE 21ST CENTURY 3 (1999). The next ten countries included Great Britain, China, France, Germany, India, Japan, Russia, Saudi Arabia, South Korea, and Taiwan. *Id.* The Commission also reported that the "United States will remain the principal military power in the world . . . both absolutely and relatively stronger than any other state or combination of states." *Id.*

[25] Kohn, *supra* note 4, at 187.

[26] *Id.*

[27] ADAM YARMOLINSKY, THE MILITARY ESTABLISHMENT: ITS IMPACTS ON AMERICAN SOCIETY 13–15 (Harper & Row 1971).

[28] Eliot A. Cohen, *Defending America in the Twenty-first Century*, 79 FOREIGN AFFAIRS 40–56 (2000).

macy. With each event came another degree of militarization expanding beyond anything experienced before in American history. This is no less true following the tragic events of September 11, 2001. Most certainly, the "war on terror" has proved to be an unprecedented contributor to America's militarization and, some would argue, digression toward militarism.

"[E]very American is a soldier, and every citizen is in this fight,"[29] declared President George W. Bush. Within days of the terrorist attacks the President addressed a Joint Session of Congress during which he declared that the United States "will direct every resource at our command—every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war—to the disruption and to the defeat of the global terror network."[30] The President warned "this *war* [on terror] will not be like the war against Iraq a decade ago, with a decisive liberation of territory and a swift conclusion . . . . Americans should not expect one battle, but a lengthy campaign, unlike any other we have ever seen."[31] This and other martial rhetoric worked to militarize the whole of American society to the war paradigm.

Bush's initial use of "war on terror" in describing the United States' reaction to 9/11 was yet another illustration in a much longer list of examples in which America had begun applying "war" metaphors to matters perceived to be national problems:

> Declarations of war on social problems are dramatic events: they call for society to rally behind a single policy, against a common foe. Typically the initial pronouncements receive favorable attention in the mass media; the press details the nature of the problem and outlines the efforts designed to wage war against it. Usually, the enemy . . . has no one speaking on its behalf. There is the sense that society is united behind the war effort. Declaring war seizes the moral high ground.[32]

As early as the 1980s, Congressman Newt Gingrich was "at war" with then Speaker of the House Tip O'Neill. Preparing for battle, Gingrich spent two weeks at Fort Leavenworth studying military strategy. "When asked if O'Neill knew he was at war, Newt Gingrich replied: 'if he doesn't he'll soon find out.'"[33] Congressman Gingrich's foreboding came to fruition in the 1990s when he employed the war paradigm to help Republicans wrest

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[29] Elisabeth Bumiller, *A Nation Challenged: The President; Bush Announces a Crackdown on Visa Violator*s, N.Y. TIMES, Oct. 30, 2001, at B5.

[30] George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), http://www.dhs.gov/xnews/speeches/speech_0016.shtm.

[31] *Id.* (emphasis added).

[32] JOEL BEST, RANDOM VIOLENCE 144 (University of California Press 1999).

[33] Kohn, *supra* note 4.

control of Congress from the Democrats.[34] National politics became so bitter and so polarized that one Republican senator described the atmosphere as "trench warfare."[35]

Space is another stage where militarization is visible. Established in 1985, the U.S. Space Command is responsible for coordinating the space activities of the Army, Navy, and Air Force.[36] The Space Command's ex-Commander-in-Chief General Howell M. Estes III stated, "As stewards for military space, we must be prepared to exploit the advantages of the space medium."[37] Described as the "fourth medium of warfare along with land, sea and air," space is the dimension in which the country sought to achieve "Full Spectrum Dominance" allowing the "U.S. military to dominate in any conflict, waged in any terrestrial or extraterrestrial medium."[38]

One of the earliest continuing widespread uses of the war metaphor can be found in the "war on drugs."[39] In 1986, drug trafficking became a "national security" threat when President Ronald Reagan declared it to be so.[40] With that, the war on drugs and the militarization of drug enforcement commenced. "A 'war on drugs' offers the opportunity for more money, more personnel, and more importantly, greater police powers."[41] Writing on America's quest for prohibition, the late William F. Buckley Junior challenged America's "wartime zeal, the legal equivalent of the My Lai massacre."[42] Despite the rhetoric, sensationalism, raging debates, and resources,

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[34] LINCOLN D. CHAFEE, AGAINST THE TIDE: HOW A COMPLIANT CONGRESS EMPOWERED A RECKLESS PRESIDENT 33 (Warner-Tamerlane Publishing Co. 2008); *see also*, ROBERT C. BYRD, LOSING AMERICA: CONFRONTING A RECKLESS AND ARROGANT PRESIDENCY 32–36 (2004).

[35] *Id.*

[36] Jackie Orr, *The Militarization of Inner Space*, 30 CRITICAL SOCIOLOGY 451, 452 (2004).

[37] *Id.*

[38] *Id.* at 452–53.

[39] President Richard Nixon first declared war on illegal drugs in response to the return of servicemen from Vietnam who came home with drug addiction problems. One in four servicemen were reported to have drug problems. *See*, JIM FISHER, SWAT MADNESS AND THE MILITARIZATION OF THE AMERICAN POLICE: A NATIONAL DILEMMA 9–10 (ABC-CLIO 2010).

[40] FISHER, *supra* note 39, at 9. After President Reagan made drug enforcement a police priority, Congress passed the Military Cooperation with Law Enforcement Act, allowing armed forces to assist civilian law enforcement agencies in drug enforcement. *See also*, John Paul & Michael L. Birzer, *Militarization of the American Police Force: A Critical Assessment*, *in* CRIMINAL ABUSE OF WOMEN AND CHILDREN 17 (2010).

[41] VICTOR E. KAPPELER, MARK BLUMBER, & GARY W. POTTER, THE MYTHOLOGY OF CRIME AND CRIMINAL JUSTICE 144 (Waveland Press 2000). Initially, the federal budget dedicated to the "drug war" was an estimated $65 million. In 2009, the figure approached expenditures nearing $20 billion.

[42] *The War on Drugs Is Lost*, NATIONAL REVIEW (July 1, 1996), http://www.nationalreview.com/12feb96/drug.html.

the issues presented by selling, trafficking and using drugs remain unresolved.

> The war on drugs was becoming a ubiquitous metaphor, used by the media, politicians, and citizens in everyday talk and elaborated floridly in references to "battle plans," "fronts," and "enemies." . . . Americans were finding "wars" to wage all over their political and cultural agenda. As they did so, they marked the completion of the inward turn of militarization.[43]

Utilizing the war metaphor for addressing national problems has been applied broadly and loosely. A *New York Times* editorial, in fact, called for a "war on pet gluttony."[44] The National Academy of Sciences issued a report that a quarter of the western world's household pets, specifically dogs and cats, were seriously overweight.[45] Reporting on the story, a sardonic editorial took journalistic license with the much employed war metaphor.

Evidence of the war paradigm further fueled by the "war on terror" expands beyond employing war metaphors and into other areas of American culture. This century, the military began to rise to iconic status despite the fact that public trust in the federal government was declining dramatically. Veterans became revered as a constituency in both Congress and public rhetoric; Americans registered more trust and confidence in the military than any other institution.

The media and Hollywood have aided both the acceleration and the pervasiveness of America's militarization. The television network CNN, for example, after 9/11 contributed to the branding of "America's New War" by consistently airing the moniker in the fashion of a commodity.[46] The major television networks jointly agreed in unprecedented fashion to carry only carefully edited versions of any videotaped statements from al-Qaeda in an effort to prevent the use of American television to broadcast coded messages to followers.[47] Filmmakers have also played a substantial role in further militarizing the nation after 9/11. In October 2001, Hollywood's studio executives offered to help the war efforts against terrorism through their film-

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[43] MICHAEL S. SHERRY, IN THE SHADOW OF WAR: THE UNITED STATES SINCE THE 1930S 431(Yale University Press 1997).

[44] *Porky Pets*, N.Y. TIMES, Sept. 15, 2003, at A18.

[45] *Id.*

[46] Catherine Lutz, *Making War at Home in the United States: Militarization and the Current Crisis,* 104 AMERICAN ANTHROPOLOGIST 723, 731 (2002).

[47] *See*, Clyde Haberman, *A Nation Challenged: An Overview*, N. Y. TIMES, Oct. 11, 2001, at A1 and Oct. 12, 2001, at B7. U.S. National Security Adviser Condoleezza Rice asked all five of the major television networks to assist the war effort by refusing to disseminate broadcasts that could contain coded messages or inflammatory propaganda. *Id.*

ing efforts.[48] In fact, the script for the movie *Black Hawk Down* received editing by the White House and the Pentagon, and both worked closely with film producers in the production of the film.[49]

Perhaps, one of the most significant effects of U.S. militarization is in the blurring of the boundary between policing and the military.[50] The "war on terror" has exacerbated the weakening of these boundaries and caused the role convergence to be questioned. Additionally, the militarization of the nation and the terrorist targets identified in America's declaration of war strain the traditional justifications for waging war. Thus, administrative efforts to craft a military agenda consistent with the concepts of "just war" theory produce a circular effect. The martial rhetoric at the center of its efforts encourages a societal acceptance of the justification for our engaging in military conflict. Such acceptance lends itself to further militarization feeding the continued distribution of a national call to arms.

C. Just War Theory on the Streets of America

It was St. Augustine who provided the just war approach to the whole problem of war. Breaking with the tradition of Christian pacifism, St. Augustine interprets war along the lines inspired by the Old Testament.[51]

> When war is undertaken in obedience to God, who would rebuke, or humble, or crush the pride of man, it must be allowed to be a righteous war; for even the wars which arise from human passion cannot harm the eternal well-being of God, nor even hurt His saints; for in the trial of their pa-

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[48] *Hollywood Considers Role in War Effort*, CNN (Nov. 11, 2001) http://articles.cnn.com/2001-11-11/us/rec.hollywood.terror_1_war-effort-hollywood-community-families-need-support?_s=PM:US (explaining the substance of the meeting between representatives of Hollywood's major studios and a delegation from the White House on how the entertainment industry could use its resources to aid the government's war on terrorism by shaping public perception).

[49] *See* Adrian Brune, Protesting *Black Hawk Down*, THE NATION (Feb. 27, 2002), http://www.alternet.org/story/12508/protesting_black_hawk_down.

[50] Carole Moore, *When Good Cops Go to War*, 34 LAW ENFORCEMENT TECHNOLOGY 80, 83 (2007), *available at* http://www.officer.com/print/Law-Enforcement-Technology/When-Good-Cops-Go-to-War/1$36967 (part of the problem stems from traditional close ties between the military and law enforcement. For years, agencies have targeted the U.S. Armed Forces as prime hunting grounds for new recruits. It makes perfect sense; the military ingrains an understanding of chain of command, the ability to respond to dangerous situations both instantaneously and instinctively, and a knowledge of weapons and their use. Former military have a high success rate in law enforcement careers for all the reasons mentioned above. Additionally, they possess the right mindset—an appreciation of physical readiness and courage. Since they are predisposed to work well within a criminal justice structure, they often enjoy long and fruitful post-military careers as sworn officers). *Id.* Law-Enforcement-Technology/When-Good-Cops-Go-to-War/1$36967.

[51] John Langan, *The Elements of St. Augustine's Just War Theory,* 12 J. OF RELIGIOUS ETHICS 19, 20–21 (1984).

> tience, and the chastening of their spirit, and in bearing fatherly correction, they are rather benefited then injured.[52]

In the year 400 A.D., St. Augustine wrote to defend Moses and the wars of the Israelites in the vein of command ethics.[53] His effort to defend, "with regret, the possibility that war may be just if it is waged in defense of the common good and to protect the innocent from certain destruction,"[54] gave birth to just war theory and what would become the classic just war tradition.[55]

Though often viewed as the Christian approach to the problem of violence, just war theory has arisen as the dominant ethical framework for considering war and has enjoyed a long and rich historical development.[56] It is a theory articulated in the U.S. Uniform Code of Military Justice, taught at the U.S. military academies, and institutionalized in international law.[57] Just war theory is an approach for examining the justice of war, more so than a guide for determining whether any particular war is just. Nonetheless, modern just war theorists begin by asking, "whether the cause is just."[58] In order to be "just," proponents argue that the only unambiguous legitimate reason for the use of force is self-defense.[59] Thus, in the name of self-defense, just war theory permits armed aggression with force.[60] The just war ethos does not allow for preventive war or revenge, but if an attack is imminent, preemptive action is allowed to forestall the realization of the threat.[61]

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[52] St. Augustine, *Contra Faustum Manichaeum*, ¶75 *in* THE NICENE AND POST-NICENE FATHERS (Philip Schaff ed., 1887).

[53] Langan, *supra* note 51, at 20.

[54] Jean Bethke Elshtain, *Reflections on War and Political Discourse: Realism, Just War and Feminism in a Nuclear Age*, 13 POLITICAL THEORY 39 (1985).

[55] Anthony Burke, *Just War or Ethical Peace? Moral Discourses of Strategic Violence after 9/11*, 80 INT'L AFFAIRS 329, 336 (2004).

[56] Neta C. Crawford, *Just War Theory and the U.S. Counterterror War*, 1 PERSPECTIVES ON POLITICS 5, 6 (2003). Alternative ethics of war include *militarism*, which presupposes a right to war; *pacifism*, which denies any legitimation of warfare; *realism*, which postulates a reciprocal necessity for the right to declare war; and, *idealism*, which denies any fundamental right to war. William E Murnion, *A Postmodern View of Just War*, *in* A INTERVENTION, TERRORISM, AND TORTURE: CONTEMPORARY CHALLENGES TO JUST WAR THEORY 30 (S. P. Lee ed., 2007).

[57] *See* Crawford, *supra* note 56, at 6. *See generally* LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT (2000). "Together with the Brussels and Hague treaties and the Geneva conventions . . . the measures adopted by the League of Nations and the United Nations . . . have institutionalized the just war ethic in international law." Murnion, *supra* note 56, at 29.

[58] Crawford, *supra* note 56, at 7.

[59] *Id.*

[60] *Id.*

[61] *Id.*

A guide "for assessing both the prospect of engaging in war and the merits of various forms of warfare,"[62] the just war theory's two primary prescriptions consist of (1) justifications for military action—when is war morally acceptable (*jus ad bellum*), and (2) moral limits on conduct (*jus in bello)*.[63] The first component of just war theory requires that war be the last resort undertaken by sovereign states.[64] Operating within the theory's constraints then requires states to undertake serious inquiry into alternatives to military force.[65] Non-military options, such as mediation and diplomacy, must generally be attempted prior to engaging use of force. Finally, the good that comes of the war must outweigh any harm caused by action.[66]

The second component of just war theory is based on the notions of proportionality and discrimination.[67] The violence delivered must be in direct proportion to the aims of the conflict. Discrimination, the admonition to avoid harm or injury to noncombatants, requires "some sign of a positive commitment to saving [noncombatant] lives."[68]

> War is just if the cause and intention are just: namely, self-defense and the promotion of peace. War should be a last resort; it should be undertaken by competent authorities only if there is a possibility of success and if the overall good of the war will outweigh the harm it does. War must also be conducted justly: unnecessary violence should be avoided, and non-combatants should not be deliberately targeted.[69]

Most recently, the United States consciously structured its response to 9/11 and its counterterrorism strategies in just war terms, notwithstanding the fact that classic just war theory fails to acknowledge terrorists as legitimate combatants.[70] As employed by governmental executives, just war themes, such as self-defense, ongoing threats, and preemptive action, remain stubborn constituents in the administration's martial rhetoric. Fur-

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62 Murnion, *supra* note 56, at 23.

63 *Id.*

64 *Id.*

65 *Id.*

66 *See id.*

67 Crawford, *supra* note 56, at 7.

68 MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 155–56 (4th ed. 2006).

69 Crawford, *supra* note 56, at 7.

70 The ideology or alternative ethic of war applicable to modern terrorism is that associated with the idea of total war and is militarism. It is characterized by the complete mobilization for war by a nation, indiscriminate attach upon combatants and non-combatants, and the employment of weapons of mass destruction. *Id.* at 5, 8.

thermore, by transforming terrorism into a new kind of war, the nation's leaders were better able to explain the "war on terror" as a just response.[71]

The "Global War on Terror" was predicted to be unlike any the United States has experienced: "indefinite in duration, fought less with military forces than through intelligence, law enforcement, attacks on terrorist financing, diplomatic cooperation with allies, and a concerted effort to beef up homeland defenses."[72] The change in threat perception motivated restructuring at the federal and state levels to help in the new battle.[73] National security pervaded both domestic and foreign policy. The United States promoted what it declared to be the universal values and norms of democracy, freedom, liberty, and human rights as the only true safety and manner of self-defense against terrorism.[74] With self-defense as the national mantra, America proceeded to "invade countries or overturn governments suspected of developing or possessing weapons of mass destruction and harboring or cooperating with terrorists—and would do so on the basis of a military superiority it intended to maintain."[75]

Absent the ability to craft a new type of war designation for the war on terror, America's leaders were challenged to fit the new conflict within the confines of just war theory. By emphasizing the need for self-defense, the constant domestic threat assessment, perceived threat level, and a vigilance against the certainty of additional attacks, the administration success-

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[71] *See* Donald H. Rumsfeld & General Richard Myers, *Briefing on Enduring Freedom*, U.S. DEP'T OF DEF. (Oct. 7, 2001), http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2011.

> The only way to deal with the terrorists that has all the advantage of offense is to take the battle to them, and find them, and root them out. And that is self-defense. And there is no question but that any nation on Earth has the right of self-defense. And we do. And what we are doing is going after those people, and those organizations, and those capabilities wherever we're going to find them in the world, and stop them from killing Americans.

Secretary Rumsfeld Interview with Wolf Blitzer, CNN, U.S. DEP'T OF DEF., http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2221. What has been characterized as the late modern or contemporary paradigm of just war arose in response to an expansion in militarism during the 19th and 20th centuries. *See*, JAMES TURNER JOHNSON, JUST WAR TRADITION AND THE RESTRAINT OF WAR: A MORAL AND HISTORICAL INQUIRY 229–77 (1981).

[72] *Id.*

[73] Matthew C. Waxman, *Police and National Security: American Local Law Enforcement and Counterterrorism After 9/11*, 3 J. NAT'L SEC. L. & POL'Y 377, 381 (2009). Congress created the new Department of Homeland Security, consolidating approximately two dozen federal agencies, and the Department of Defense expanded its efforts domestically. Local governments began shifting personnel, budgetary and policy considerations to efforts to prevent and prepare for other potential terrorist attacks. *Id.*

[74] Khon, *supra* note 4, at 197.

[75] *Id.*

fully employed war rhetoric and propaganda ostensibly as a call to arms to all Americans as well all nations that oppose terrorism. This approach was necessary on numerous fronts. Complying with just war theory was essential to garner international support. It was also important in aligning the American people and her allies to the war effort.

Doing what was necessary to validate military action after 9/11 was not without domestic consequences. Some of the most threatening consequences can be seen in America's internal security; increased power in the presidency; a corresponding weaknesses in both Congress and the judiciary; a prominence of national security thinking and discourse; expanded surveillance authority domestically; and correlated abuses of civil liberties for American citizens.[76] In militarizing the threat of terrorism, the nation sanctioned—and even requested—that law enforcement officers adopt a more militant role centered around the detection, capture, or destruction of the evil doers threatening the nation and the American way of life. Implicit was a message that unknown enemy combatants walking the streets of our communities and neighborhoods must be stopped. Arming police agencies with the responsibilities and latitudes of warriors substantially weakened the boundaries or demarcations that had segregated the military from the domestic civilian peacekeepers we call police.

III. BLURRING THE LINES OF POLICE DUTY

A. The Traditional Role of American Police

As with America's common-law tradition, the modern origins of policing are directly linked to the nation's English heritage.[77] In colonial America, the county sheriff, an appointee of the territorial governor, became the most important law enforcement agent in rural areas. His duties might include apprehending criminals, serving subpoenas, appearing in court, and collecting taxes.[78] In the more populated areas, law enforcement duties fell to constables and the night watch.[79] These were not the positions that gener-

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[76] *Id.* at 198–200.

[77] Craig D. Uchidah, *The Development of the American Police: An Historical Overview, in* CRITICAL ISSUES IN POLICING: CONTEMPORARY READINGS 21(Roger G. Dunham & Geoffrey P. Alpert eds., 2005).

[78] *Id.* at 23. A colonial sheriff received compensation on a per task basis, receiving higher fees based on the taxes collected. Consequently, other duties within the sheriffs' job description, including apprehending criminals, were of lower priority. *Id.*

[79] *Id.* Both constables and the night watch carried out a variety of tasks that were broadly defined. For instance, constables were responsible for delivering suspects to court, eliminating health hazards and ensuring witnesses were in court. A typical inventory of responsibilities held by the night watch included reporting fires, raging the hue and cry, maintaining streetlamps, arresting or detaining suspicious persons, and walking the rounds.

ally required great initiative or foresight. Rather, "these men responded to criminal behavior only when requested to do so by victims or witnesses."[80] They were not required to prevent crime, discover criminal behavior, or act in any other "proactive" manner.[81]

The colonies became states, and the new nation expanded. The complexion of the country changed as did its requirements of law enforcement. The arrival of foreign immigrants in search of a better life contributed to a swelling population. Turmoil grew as more and more workers competed for both skilled and unskilled positions, and accompanying the increased tensions came increasing numbers of social and economic conflicts. The constable-watch system was no longer adequate. Following the trend in Great Britain, the United States adopted a new police system based on the preventive model.[82]

English magistrates Henry and John Fielding, Patrick Colquhoun, and philosopher Jeremy Bentham led efforts to create a professional police force that would have as its principal object the prevention of crime.[83] They advocated that such a force would deter criminal activity and restore order.[84] English opponents feared an organized civilian police force too closely, resembled a standing army, and promised to provide the government with objectionable control over its citizens.[85] Mounting disorder and escalating crime rates in London, however, eroded oppositional vigor and eventually swayed the debate in favor of the new police system.[86]

Sir Robert Peel, England's Home Secretary, crafted the ideas of Fielding, Colquhoun, and Bentham into London's first Metropolitan Police Act.[87] He succeeded in convincing Parliament that the proposed police force was needed, and he led the early formation of the new force.[88] In so doing,

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80 Uchidah, *supra* note 77, at 23.

81 *Id.* at 23.

82 *See generally* ROGER LANE, POLICING THE CITY: BOSTON, 1822–1885 (1967); JAMES F. RICHARDSON, THE NEW YORK POLICE: COLONIAL TIMES TO 1901 (1970) ; WILBUR R. MILLER, COPS AND BOBBIES: POLICE AUTHORITY IN NEW YORK AND LONDON, 1830–1870 (1977); SAMUEL WALKER, A CRITICAL HISTORY OF POLICE REFORM: THE EMERGENCE OF PROFESSIONALISM (1977); 3 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750: CROSS-CURRENTS IN THE MOVEMENT FOR THE REFORM OF THE POLICE (1956); CHARLES REITH, A NEW STUDY OF POLICE HISTORY (1956); T. A. CRITCHLEY, A HISTORY OF POLICE IN ENGLAND AND WALES (Patterson Smith 1972) (1967).

83 Uchidah, *supra* note 77, at 24.

84 *Id.*

85 *Id.*

86 *Id.*

87 ROY ROBERG, KENNETH NOVAK, & GARY CORDNER, POLICE & SOCIETY 34 (2009).

88 *Id.* Peel's success followed an arduous toil fraught with resistance. He worked for over seven years to secure the political support necessary to enact the Metropolitan Police Act and it nearly cost him his life. After Parliament's heated debate over the proposed legislation and

Peel created the first organized English metropolitan police force and the forerunner to modern-day police, as well.[89] Peel is credited for orchestrating and securing his force's legitimacy in the eyes of the English citizens it served.[90] He was able to accomplish this in part by selecting officers who were reserved in demeanor; choosing uniforms that were unassuming; insisting that the officers be restrained and polite; and by barring officers from carrying guns.[91] The "bobbies" or "Peelers," governed by rules of law and empowered by the institution of government, succeeded in gaining public approval.[92]

America may have followed in the footsteps of Great Britain, but the nation's first police departments refrained from embracing the British model in its entirety, choosing instead to borrow selectively from it.[93] The greatest similarity was perhaps in the adoption of the preventive patrol idea. Americans agreed that a police presence through patrol would deter crime and maintain order. A significant departure, however, was that the American police systems favored the decentralization and democratic participation of local and municipal governments.[94] Initially, the police were an extension not of local government, but of the different political factions that made up municipal government.[95] It was the local political leaders in a particular ward or precinct that recruited and selected police officers.[96] Rather than

its passage, Daniel M'Naghten made an attempt to kill Peel, fatally shooting his secretary by mistake. M'Naghten's notoriety extends further linked to the insanity defense that bears his name. *See* PHILIP P. PURPURA, POLICE AND COMMUNITY: CONCEPTS AND CASES 10 (2001).

89 *Id.*; *see also* A. GERMANN, F. DAY & R. GALLATI, INTRODUCTION TO LAW ENFORCEMENT AND CRIMINAL JUSTICE 62 (1974). Although Peel hoped the planned civilian police organization would be established across the whole of Great Britain, initially the new force's implementation was limited to metropolitan London. By the 1850s, however, every county and borough in England had assembled a civilian police force. *See* H. A. JOHNSON, HISTORY OF CRIMINAL JUSTICE 173–75 (1988); D. R. JOHNSON, AMERICAN LAW ENFORCEMENT: A HISTORY 20–21 (1981).

90 *Id.* at 12–13. Peel restricted Police involvement in political activity and required all appointments to be on the basis of merit instead of patronage. These requirements of neutrality legitimized the police force such that journalists commented that the police, "know[s] nothing of politics; the man in blue always preserves his neutral tint." A. GERMANN, F. DAY & R. GALLATI, INTRODUCTION TO LAW ENFORCEMENT AND CRIMINAL JUSTICE 62 (1974).

91 *Id.* at 3, 12–13. Peel's system required officers to maintain strict impartiality to gain public acceptance.

92 *See supra* note 90 and accompanying text. The London citizenry began affectionately referring to police officers as "bobbies" or "Peelers." The "bobbies" moniker continues today. GERMANN, *supra* note 90, at 62.

93 MILLER, *supra* note 82 at 132.

94 *Id.* at 18–19.

95 *Id.* at 16–17. "Police were initially appointed by the aldermen of the wards in which they were to serve and had a fixed term of office. . . Police became a political issue."

96 *Id.*

relying on formal institutional power, like that of their English brethren, American police trusted the informal control of individual authority.[97] Each police officer was responsible for establishing his own authority among the citizens he patrolled rather than on drawing on institutional legitimacy like that accomplished by Peel.

From the middle of the eighteenth century through the 1920s, politics dominated American policing, and the period was dubbed the "Political Era." What developed during this time was aptly named the political model of policing.[98] Officers enjoyed a great deal of discretion and ability to exercise authority. Consequently, political and economic corruption was a common occurrence in police departments during this period. The police departments, often vital components in the political machine's ability to maintain political control, turned a blind eye when they did not openly sanction the corrupt practices of their officers.[99] Officers, as well, tended to support the machine and its boss, in part because they were beholden to them for their jobs, but also because many shared the perspectives of the machine and boss they served.[100]

Reform was not an option, and cleaning up the corruption became a predominant focus of the reform era. Between the 1920s and the 1960s, policing experienced what has been described as the most significant period in the development of law enforcement in the United States.[101] It was during this period that the foundations for the professionalization of policing

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97 *Id.*

98 ROY ROBERG, KENNETH NOVAK, & GARY CORDNER, POLICE & SOCIETY 39 (2009). There was little that escaped the reach of politics; every aspect of law enforcement—who I was the hired, who was promoted, who was selected as chief, who was appointed to the police commission—was a decision dictated by politics. *See also* PHILIP T. PURPURA, POLICE AND COMMUNITY 18 (2001).

99 ROBERG ET AL., *supra* note 98, at 41.

100 *Id.* Graper writes,

> Only in recent years has it come to be recognized that something more than a police manual, a uniform, a club, a revolver, and a fair degree of brute strength is needed to transform a recruit into an efficient policeman. Heads of police department's have too often been appointed for political considerations and have acted on the principle that party loyalty constituted the highest qualification required for the appointment of subordinates. Tenure of office, dependent largely upon party success, was apt to be brief and therefore stimulated the use of every opportunity for gain. This produced collusion with criminals and police corruption that mar the police records of many American cities. As aptly put by a prominent chief of police, "This was the era of instability, immigrants, vitality, and graft."

ELMER GRAPER, American Police Administration 108 (1921).

101 ROBERG ET AL., *supra* note 98, at 42.

emerged, and the legalistic model provided the preeminent thinking about police work.[102]

Commissions organized and financed by private citizens conducted investigations to expose corruption within government and its subdivisions, including police departments.[103] Efficient and centralized administrations committed to professionalism began replacing the political meddling that had so dominated the political era.[104] Professionalism included the adoption of a code of ethics, improved police behavior and performance, better selection and training of officers, and enhanced management of police agencies.[105]

Since the 1970s American policing has been operating within what Kelling and Moore denominate as the "Community Era" of law enforcement.[106] The political era, characterized by decentralized and neighborhood-oriented policing, facilitated pervasive corruption. To address this, the reform era that followed focused on distancing police officers from the community, restraining discretion, and formalizing operations, a strategy that had its own weaknesses. Subsequently, the community era developed in response to defects in the reform period, including a return to developing relationships between the police and the citizens. Relatedly, policing in this era touts a problem-solving approach to crime and community problems. The influencing philosophy is known as community policing.[107] Simultaneously, the subversive movement is increased militarization.

B. The Revised Role of American Police after 9/11

Prior to 1980, a strict demarcation between the police and the military existed, not only in America, but also in a host of democracies of the Anglo-American tradition.[108] While there are elements shared by both systems, the divide is made more distinct with the understanding that the operational and philosophical principles guiding each differ,[109] as do their mis-

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102 *Id.* Other names for the legalistic model include the professional model, the bureaucratic model, the reform model, and the quasi- or semi-military model. *Id.*

103 PURPURA, *supra* note 98.

104 *Id.*

105 ROBERG ET AL., *supra* note 98, at 42.

106 George L. Kelling & Mark H. Moore, *The Evolving Strategy of Policing*, 4 PERSPECTIVES ON POLICING (1988).

107 *See* PURPURA, *supra* note 98, at 245–78.

108 McCulloch, *supra* note 1, at 310.

109 *Id.*

sions, rules of engagement, risk management practices, and standard operating procedures.[110]

The military, employed almost exclusively against external enemies in times of war, are trained to kill by the use of overwhelming force.[111] The objectives of military forces are directed toward the capture or destruction of assets, and any level of force necessary to achieve the objectives is authorized.[112] Police, on the other hand, enforce laws and keep the peace applying the minimal force necessary, bound by law to ensure civil liberties and protect life.[113] The goals of law enforcement center around the capture of criminal suspects in order to bring them to trial, and employing force to achieve the goal is permissible only if it is reasonable and in compliance with strict guidelines.[114]

> Military rules of engagement allow for the (accidental) killing of non-combatants, and have a restricted concept of "rights" for civilian populations. Law enforcement rules of engagement are strictly constrained by the constitutional rights of everyone involved—including the perpetrator, and they place paramount importance on saving lives—again, including the perpetrator's.[115]

Notwithstanding unambiguous dividing lines, mission creep occurs, though it is typically characteristic of the totalitarian or authoritarian regimes. The closer the operational and ideological relationship between the police and the military, the more nearly a society approaches a totalitarian governance.[116] Since 9/11, America has experienced an arguably dangerous weakening of the traditional separation between these two occupations, a blurring of the boundary lines separating the military and the police, and a move toward, rather than away from, a more authoritarian dispensation. The nature of policing in the 21st century is changing.[117]

Even before 9/11, study results indicated a spread of militarization to domestic civilian law enforcement fueled, in part, by militaristic training

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110 Ralph Mroz, *Are You an LE Professional? How About Your Instructors?*, POLICE OFFICERS SAFETY ASSOC. (Feb. 7, 2011, 11:25 PM), http://www.officer.com/online/article.jsp?id=51445&siteSection=30&&cPage=2&OrderBy=InsertDate&Dir=ASC.

111 McCulloch, *supra* note 1, at 310.

112 Ralph Mroz, *Militarization of Civilian LE? Don't Believe the Hype,* POLICE OFFICERS SAFETY ASSOC. (Feb. 7, 2011, 11:25 PM), http://www.officer.com/web/online/POSA Militarization-of-Civilian-LE/30$48667.

113 McCulloch, *supra* note 1, at 310.

114 Mroz, *supra* note 112.

115 *Id.*

116 *See* McCulloch, *supra* note 1, at 310–11 (citations omitted).

117 Peter B. Kraska, *Militarization and Policing – Its Relevance to 21st Century Police*, 1 POLICING 501, 502 (2007).

provided by military and ex-military instructors.[118] The end of the Cold War and the disarming of the communist threat left many military and ex-military professionals in need of a purpose. The military industrial complex lacked external enemies to mobilize against, making it easier to focus on internal conflicts and internal "enemies"—dangerous offenders, rioters and drug dealers—as the new national threat.[119] In many instances, domestic civilian police forces provided a new outlet both for military personnel and surplus equipment.[120] America's internal security forces helped fill yet another void of the post-Cold War era, the loss of a national moral imperative, a distinction previously held by America's drive to defeat communism. Taking the place of anti-communism campaigns, drugs and crime stepped in and emerged as the nation's new moral imperatives.[121] Through drugs and crime, a national purpose and unification was constructed "allowing for extreme measures to be taken in order to 'fight' the feared enemy."[122] The nation's civilian police officers manned the "front lines" of America's new conflict.

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[118] *See* Peter B. Kraska, *Questioning the Militarization of U.S. Police: Critical Versus Advocacy Scholarship*, 9 POLICING AND SOCIETY 141, 143 (1999). Kraska provides:

- U.S. military special operations active-duty soldiers provide training to nearly half of all large and small department police paramilitary units (PPUs).
- Three years of field research . . . and an exhaustive examination of magazines and literature from the practicing SWAT community have demonstrated that the highly popular militaristic subculture surrounding military special operations teams such as the Navy Seals and Army Rangers also provides the central ideological fuel driving PPU subculture.
- The U.S. military in an attempt to become more "socially useful" in the post-cold war era is donating or selling a massive amount of military weaponry, surplus, and technology to the police institution (e.g., armored personnel carriers, M-16s, night vision technology, fatigues, etc.).
- The U.S. Department of Defense and U.S. Department of Justice have collaborated in numerous joint technology, weaponry, personnel transference, and training programs.

Id. at 143–44 (citations omitted).

[119] Sergio Herzog, *Militarization and Demilitarization Processes in the Israeli and American Police Forces: Organizational and Social Aspects*, 11 POLICING AND SOCIETY 181, 202 (2001).

[120] *See generally*, MICHAEL S. SHERRY, IN THE SHADOW OF WAR: THE UNITED STATES SINCE THE 1930S (1995) (discussing Militarization in the U.S. since 1933).

[121] ETHAN A. NADELMAN, COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT 475 (1993) ("Where once anticommunism represented the principal moral imperative of U.S. foreign policy, drug enforcement and other criminal justice objectives have emerged as the new moral imperatives.").

[122] Peter B. Kraska, *Crime Control as Warfare: Language Matters*, *in* MILITARIZING THE AMERICAN CRIMINAL JUSTICE SYSTEM 18 (Peter B. Kraska ed., 2001) (Professor Kraska and his colleagues performed groundbreaking research that addresses the concepts of militarization and militarism and the shadow they cast on the nature of policing today).

After 9/11, the law enforcement personnel heard a similar and more urgent directive—straight from the White House. Our nation's Commander in Chief appealed to the police for assistance in fighting a new kind of war that had been brought to the streets of America by a global enemy. While the martial trend prior to 9/11 may have been disquieting, the integration of the military model into today's police force is even more disturbing.

The "war on terrorism" influenced a new, heightened militarized role for America's police agencies.[123] Local police forces mobilized in support of national efforts to combat terrorist threats.[124] In actuality, terrorism on U.S. soil had not been a priority issue.[125] In the wake of the tragedies, however, terrorism rose to become the preeminent priority. President Bush declared that "[e]very American is a soldier,"[126] including the domestic civilian police forces, further endorsing a national warrior culture.

Police departments began purchasing military armored personnel carriers (APCs) with the assistance of homeland security funding.[127] Some agencies are actually using these vehicles for aggressive, proactive patrol work,[128] deploying APCs for "street sweeps" in high-crime neighborhoods, manned with SWAT personnel in full paramilitary uniforms and weaponry.[129] No-knock or quick-knock raids are becoming more prevalent for the purpose of collecting evidence from private residences.[130] Frequently, officers conduct these raids during predawn hours, attired in black military Bat-

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123 The terror attacks on 9/11 were not the first time local police have been called to "war." Following World War I, J. Edgar Hoover's Bureau of Investigation (the precursor to the Federal Bureau of Investigation) had police agencies conduct "Palmer Raids" on suspected radicals for Attorney General A. Mitchell Palmer. Thousands of immigrants across the United States were subjected to violent warrantless arrests and targeted for deportation for suspected radical political beliefs. Thirty years later the FBI sought police assistance in monitoring subversive political groups that included many participants in the civil rights movement. Matthew C Waxman, *Police and National Security: American Local Law Enforcement and Counterterrorism After 9/11,* 3 J. OF NAT'L SECURITY LAW & POLICY 377, 379 (2009).

124 *Id.* A mid-1990s survey revealed that less than 40 percent of state law enforcement agencies and only approximately one-half of local police agencies had no plans for dealing with terrorist threats. *Id.* at 381. Acts of terrorism were typically addressed by criminal statutes and treated as crimes rather than acts of war.

125 *See* Laura K. Donohue & Juliette N. Kayyem, *Federalism and the Battle over Counterterrorist Law: State Sovereignty, Criminal Law Enforcement, and National Security,* 25 STUD. IN CONFLICT & TERRORISM 1, 1 (2002) (recalling that "a new threat to U.S. security" emerged following incidents including the 1993 World Trade Center bombing and the 1995 Oklahoma City bombing).

126 Bumiller, *supra* note 29, at A1.

127 Kraska, *supra* note 117, at 507.

128 Charlie Dietch, *Military Police,* PITTSBURGH CITY PAPER, at 1–3 (2007).

129 Kraska, *supra* note 117, at 507.

130 *Id.*

tle Dress Uniforms (BDUs), hoods, and military helmets.[131] Often, battering rams, entry explosives, or flash-bang grenades are employed to disorient the occupants before officers begin a frantic room-by-room search of the residence.[132] These officers "derive their appearance, tactics, operations, weaponry, and culture to a significant extent from military special operation units,"[133] like the Navy Seals. In the wake of 9/11, "[t]he rise and normalization of police paramilitary units [such as these examples] is one dimension of the blurring boundaries in the U.S. government's police/military security apparatus."[134]

Post-9/11 counterterrorism efforts are occurring in the midst of the community policing era,[135] furthering the militarization/democratization paradox. In fact, the two forces run counter to each other. One explanation for the dual existence may be found in a second or later strand of community policing that is moving to the forefront today. It "has in many instances transformed into a zero-tolerance policing model [and a rise in paramilitary policing], where the police strictly enforce all infractions of law and order using an array of aggressive tactics such as street sweeps, proactive enforcement of not just the law but community order, and a proliferation of drug raids on private residences."[136] Such macro-level changes in criminal justice practices remain contradictory and potentially volatile. Further, the ongoing conflict and continuing threats associated with the "war on terror" encourage rather than discourage the martial trends.

Political scientist Harold Lasswell warned that protracted military crises may blur civilian and military functions through a "socialization of danger" in which freedoms are replaced by compulsions, and obedience and service become the cardinal values. It is a time when propaganda characterizes government communications and guides morale. "All organized social

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131 *Id.*

132 *Id.*

133 *Id.* at 506.

134 Kraska, *supra* note 118, at 144.

135 Community policing is actually an old idea that has been revitalized, revised, and expanded. Its roots are found in early England, the Peelian Reform Movement in England, the urban neighborhood foot patrol officer, and the small town police officer who, even today, communicates with residents, knows almost everybody, and works with "the locals" to solve problems and maintain order. *See* RONALD D. HUNTER, POLICE COMMUNITY RELATIONS AND THE ADMINISTRATION OF JUSTICE 190–197 (8th ed. 2011).

136 Kraska, *supra* note 118, at 509. There are two competing strands of community-oriented policing. Police reformers Radelet and Trojanowicz promoted the contrarian approach consisting of community empowerment, cultivating constructive relationships with disenfranchised minority groups, and establishing partnerships between the public and the police. The objective was to achieve communities in which the residents policed their own community. *Id.*

activity will be governmentalized,"[137] more closely regimented, and centralization becomes paramount.[138] These words may have been written nearly nine decades ago, but their cautions resound poignantly in 21st century America.

IV. PAYING THE PRICE FOR DIVIDED LOYALTIES

Singularly, either militarization or the just war ethos can significantly influence an officer's perspective and conduct. In tandem, however, the combined effect may exact a high cost where an officer's ethical responsibilities are at issue. The effect justifies, if not encourages, hyper-enforcement thinking and action enhancing the probabilities that officers will adopt a "means-justifies-ends" rationale for their conduct. A transformation from "Officer Friendly" into "Officer Rambo"[139] becomes not just possible but probable.

This article suggests that the incongruity of professional police ethics and the federal "war on terror" produces an identity crisis for the nation's domestic security force. Law enforcement officers experience a sense of divided loyalty—on one hand each has taken an oath to protect and serve and uphold the Constitution,[140] and on the other hand, each has received a call to wage war on home soil against an enemy combatant committed to harming all of America. Though domestic national security efforts involving local police agencies are not, in and of themselves, in conflict with law enforcement's code of ethics, they represent a value system that does conflict with the police ethic. Wars are fought by soldiers authorized to use extreme force, to kill, and to do what is necessary to prevail over the enemy. Police officers possess no necessity to "defeat an enemy."[141] The national agenda may broadcast a fight between right and wrong or a battle of the just versus the unjust, but a state of moral confusion arises for police officers who find themselves caught between the two value systems and required to make a decision.

Relatedly, there is a condition known as "fog of war."[142] The term refers to the combination of a number of factors that may impair an individual's ability to make proper ethical judgments under pressure. In the "war

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137 Harold S. Lasswell, *The Garrison State*, 46 AM. J. SOCIOLOGY 455, 462–63 (1941).

138 *Id.* at 67.

139 *See* Ken Adachi, *Sanctioned Torture and Summary Execution in America*, *available at* http://educate -yourself.org/pnt/index.shtml (last visited Apr. 14, 2011).

140 *See* International Association of Chiefs of Police, *supra* note 3.

141 Ted A. van Baarda, *Military Ethics in Peacekeeping and in War: Maintaining Mora Integrity in a World of Contrast and Confusion*, *available at* http://www.jha.ac/articles/a 129.htm (last visited Apr. 14, 2011).

142 *Id.* (discussing "fog of war").

on terror" as waged by law enforcement officers on the streets of America, harmful factors to ethical decision making may include a sense of nationalism, fear, stress, frustration, and fatigue. Application of the concept "fog of war" is not limited to armed conflict on the battlefield, and it certainly encapsulates the differences between what may be considered morally acceptable on the battlefield as opposed to the ethically appropriate behavior off the battlefield. Again, conflicting value systems and incompatible ethical considerations can tear at an officer who finds himself doing battle on the streets, pulling him in different directions, and reducing the predictability of his conduct.[143]

V. CONCLUSION

In addition to what some classify as a role reversal,[144] civilian law enforcement officers in America today are facing a crisis of identity. Torn between their sworn duty to protect and serve the community consistent with the tenets of the U.S. Constitution or the national call to arms in the "war on terror," many officers become conflicted in deciding which interest receives their loyalty and which standard guides their choice of decision. Unfortunately, too often it is the police organizational culture that sabotages its officers and presents the most significant obstacle to change.[145]

The specter of the military model "haunts the real world of contemporary policing, despite the recent rhetoric of democratic reforms."[146] Police at every level are habituated to act and to think consistent with militaristic principles. The pervasive expansion of a larger paramilitary culture throughout the United States since 9/11 provides sustaining effects for the retention of war/military paradigm as an authoritative framework for crime control thinking—not just in the ranks of the nation's civilian police force but also among politicians, bureaucrats, the media, and the public.

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143 *Id.*

144 *See generally*, Donald J. Campbell & Kathleen M. Campbell, *Soldiers as Police Officers/Police Officers as Soldiers: Role Evolution and Revolution in the United States*, 26 ARMED FORCES & SOCIETY 227 (2010).

145 *See generally*, Eugene A. Paoline III, *Taking Stock: Toward a Richer Understanding of Police Culture*, 31 JOURNAL OF CRIMINAL JUSTICE 199 (2003); Eugene A. Paoline III, *Shedding Light on Police Culture: An Examination of Officers' Occupational Attitudes*, 7 POLICE QUARTERLY 205 (2004); Eugene A. Paoline III, Stephanie M. Myers, & Robert E. Worden, *Police Culture, Individualism, and Community Policing: Evidence from Two Police Departments*, 17 JUSTICE QUARTERLY 575 (2000); and Steve Herbert, *Police Subculture Reconsidered*, 36 CRIMINOLOGY 343 (1998).

146 Peter B. Kraska & Louis J. Cubellis, *Militarizing Mayberry and Beyond: Making Sense of American Paramilitary Policing*, 14 JUSTICE QUARTERLY 607 (1997).