A JUST WAR INQUIRY OF POLICE, PROSECUTORS & DEADLY FORCE

RYAN GEISSER*

INTRODUCTION

Law enforcement is authorized to use deadly force under limited circumstances in the United States. Most do not dispute that there are some clear cases when the use of deadly force is warranted, such as when a person runs at police with a knife and swears they intend to kill the officer. The more controversial issues arise when attempting to articulate the limits on when lethal force is justified. While theorists and academics can contemplate how police officers should act in the abstract, law enforcement does not have the same luxury when they are out on patrol and their lives are in constant jeopardy. Oliver Wendell Holmes said it best when he proclaimed "[d]etached reflection cannot be demanded in the presence of an uplifted knife."[1]

The present analysis will attempt to create a clear framework for determining when law enforcement are justified in using lethal force, applying just war theory to bridge the difference between theoretical approaches and the reality of police officers faced with a split-second decision. This inquiry will not begin from a legalist paradigm, but a moral one. Once a robust descriptive account of the current state of the law is developed, the principles of just war theory will be used as a framework to provide compelling normative responses to two questions. First, when is a police officer justified in using deadly force on a fleeing felon? Second, what is required of prosecutors who make the decision not to seek indictment of a police officer who used deadly force? This article advocates for a nationwide implementation of what I refer to as the "California Model"[2], a rigorous and transparent protocol for determining whether a

* J.D. Candidate (2018), Washington University School of Law

[1] Brown v. United States, 256 U.S. 335, 343 (1921).

[2] While referred to as the "California Model," the practice of publishing "declination reports" in cases where the County declines to prosecute an officer who used deadly force is only a confirmed practice of four offices: the Los Angeles County District Attorney's Office ("LADA"), San Diego County District Attorney's Office ("SDCDA"), Santa Clara County District Attorney's Office ("SCCDA"), and Orange County District Attorney's Office ("OCDA"). Though it is possible other state prosecuting agencies regularly publish declination reports, as of October of 2017 at least fourteen other District Attorney's Offices across the country either publish no declination reports at all, or at a minimum do not make their reports even remotely as accessible as LADA, SDDA, and SCDA.

prosecuting agency will initiate criminal proceedings against a police officer that used deadly force and publicizing the rationale for that decision.

The goal of this analysis is not to articulate a complete statutory scheme encompassing all circumstances under which a law enforcement officer is justified in using deadly force. Instead, the analysis will proceed in two steps: first, demonstrating the applicability of the just war tradition to the law governing use of deadly force by law enforcement, particularly in the context of the "fleeing felon," and second, drawing on just war principles to evaluate how prosecutorial agencies should proceed after a police officer has used deadly force.

There is no shortage of arguments on both sides of an officer's decision to use deadly force Yet there is surprisingly little written about what should happen *after* a deadly force incident occurs. Obviously, if the prosecuting agency determines that the use of deadly force was not justified in a given instance, and there is sufficient evidence to prove beyond a reasonable doubt that the officer's use of deadly force was unlawful, the right course of conduct is to initiate criminal proceedings against the officer involved. However, the question of what prosecuting agencies should do when the killing was lawful, or when there is insufficient evidence to prove beyond a reasonable doubt that the use of deadly force was not unlawful, remains unanswered. A simple response is that the prosecutorial agency will not initiate criminal proceedings against the officer. But whether this is all a prosecuting agency should do remains unresolved.

This absence of analysis regarding what should happen after an armed conflict has occurred is mirrored in the just war tradition. There, the bulk of academia focuses on the decision to wage war, *jus ad bellum*, and just conduct within war, *jus in bello*. But there is surprisingly little written about the just termination of a war, *jus post bellum*. Drawing on the parallel ideas of and scholarship of just war theory, this article will consider what law enforcement agencies should do as they move to wrap up an armed conflict involving police officers.[3]

There are two paradigms that justify lethal force: the war paradigm and the law enforcement paradigm. The principles of just war theory are particularly applicable to the context of law enforcement use of deadly force because it provides a reasonable premise from which to begin: a peace officer should not be justified in the use of deadly force where a soldier of war is not. The purpose justifying deadly force in the domestic sphere

[3] MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS (REV, Basic Books 2006).

should likewise parallel the purpose justifying armed conflict in the international sphere.

In the international realm, the aim of a just war is to attain a more secure and more just state of affairs than existed prior to the war.[4] Applying the concept to the domestic realm, the just aim of police use of deadly force is to attain a more secure and more just state of affairs than existed prior to the officer's decision to discharge his weapon. The purpose of the present anlaysis is to defend the following proposition: the mere exercise of prosecutorial discretion of whether to bring an indictment against a public officer for violating a state's law governing use of deadly force in the line of duty fails to achieve the goal for which the force was used. When a prosecuting agency decides not to bring an indictment, in order to attain a more secure and more just state of affairs than existed prior to the police officer's use of deadly force, it is necessary for an objective independent body to publicly release its reasoning for not initiating criminal proceedings against the officer.

The practice of publically releasing reasons for not initiating criminal proceedings realizes the goals of just war by restoring trust and providing legitimacy to the entire law enforcement apparatus. It serves this purpose effectively for three reasons: (1) it promotes transparency; (2) it improves accountability, both of prosecutors and legislators; and (3) publishing a declination report in this context creates a political check on the prosecutor's power not to charge.

Part I will briefly cover the history of law enforcement and its function. This will include an examination of how police officers are trained in contemporary America. Examination of the function of police officers will demonstrate why law enforcement officers, both police and prosecutors, are properly analyzed through the just war framework. After the normative underpinnings of the law enforcement apparatus are adequately developed, Part II surveys the prevailing law governing the use of deadly force by law enforcement to apprehend fleeing persons suspected of committing a felony ("fleeing felons"). This encompasses the constitutional analysis of deadly force, as well as state criminal law regulating the same issue. Part III will conclude with a brief survey of the criticisms and defenses of the current state of the law governing the use of deadly force by law enforcement, both in theory and in practice.

Part III introduces just war theory, and the three sets of rules that compromise the just war tradition. These include *jus ad bellum*, *jus in bello*,

---

[4] Brian Orend, *Justice After War*, 16 ETHICS & INT'L AFF. 43, 45 (2002).

and *jus post bellum*. This section of the article demonstrates why the principles of just war theory are uniquely applicable to the use of deadly force by public officers, and the value of drawing on the just war tradition to examine the many controversies that arise when a police officer kills in the line of duty. Missouri's law governing deadly force to apprehend a fleeing felon will be evaluated at the end of Part III using the *jus in bello* principles of discrimination, proportionality, and minimum necessity. This will demonstrate how these principles are in large part already reflected in the statutes governing deadly force by public officials.

After demonstrating the applicability of the just war tradition to the law governing police officer use of deadly force, Part IV will address the second objective of this article: to evaluate how prosecutorial agencies should proceed after a public officer uses deadly force. This requires constructing a general set of principles to guide communities seeking to resolve their armed conflicts fairly. This section of the article will introduce the the "California Model" used by the Los Angeles County District Attorney's Office (LADA) following a law enforcement officer's use of deadly force. Under this model, when LADA prosecutors decide not to seek indictment of the officer involved, the agency publishes a declination report explaining the reasons why initiating criminal proceedings is not warranted for this particular instance. This section will conclude by illustrating the California Model through an in-depth examination of one officer-involved shooting where LADA elected not to seek an indictment of the officer.

Part V will critically assess the strengths of the California Model and ways in which this model might be improved. The analysis concludes that the California Model promotes transparency, increases accountability, and functions as a much needed political check on the prosecutor's power not to charge. As such, LADA's approach should be implemented nationwide to restore faith in the legitimacy of the law enforcement apparatus.

I. HISTORY AND TRAINING OF POLICE OFFICERS

In the early American colonies, policing was informal and largely left to volunteer community members.[5] The transformation toward modern centralized municipal police departments began in the nineteenth century, when the British Metropolitan Police Act of 1829 created one of the first

[5] Dr. Gary Potter, *The History of Policing in the United States, Part 1*, EASTERN KENTUCKY UNIVERISTY: POLICE STUDIES ONLINE, *available at* http://plsonline.eku.edu/insidelook/history-policing-united-states-part-1.

formal, uniformed, paid, civil-service police forces in England.[6] In America, states quickly followed suit, creating their own police forces modeled after the British system.[7]

Today, nearly every city and town has a professional police force. With this institutionalization and professionalization of the police force has come more extensive and standardized training. However, this training is heavily tilted toward tactics for responding to violence with force, at the expense of training in nonviolent de-escalation tactics. A Police Executive Research Forum survey of 281 police agencies found that while the median time for police firearm training is 58 hours and the median time for defensive tactics is 49 hours, the median time spent on de-escalation and crisis intervention is just 8 hours each, with many departments providing no training in either.[8] This focus may be misguided. One former police officer describes de-escalation as a literal lifesaver, giving voice to a popular sentiment among critics of the frequency with which police officers resort to deadly force. "[P]olice officials, as well as critics of the police, are asking a very reasonable question about why their cops all too often rush to judgment, initiating physical confrontations or firing their weapons, when far safer outcomes could be achieved by slowing things down, sizing up situations, and calming tensions."[9]

Of course, law enforcement officers rarely have the luxury of time to deescalate a potentially violent situation. According to experts, a police officer has approximately half a second to pull a weapon when confronted with someone perceived as dangerous and about to inflict harm.[10] "Studies show that it takes a quarter of a second for an officer to recognize a threat, such as when a person is reaching for a gun, and another quarter-second for that officer to draw his gun. It takes another .06 seconds to pull the trigger."[11] One of the challenges police academies inevitably must face is training new recruits for situations where there is no time to reflect, and only time to react. Recruits are trained early on to recognize and react to a

---

[6] NORM STAMPER, TO PROTECT AND SERVE: HOW TO FIX AMERICA'S POLICE (Nation Books, 2016), at 22-23.

[7] Stamper, *supra* note 6, at 23. Boston enacted its police force in 1838, New York in 1845, Philadelphia in 1854, St. Louis Metropolitan Police Department in 1846, Los Angeles PD in 1869.

[8] Ryan J. Reilly, *Police Group Makes A Big Admission About 'Justifiable' Police Shootings*, THE HUFFINGTON POST, (Aug. 19, 2015), http://www.huffingtonpost.com/entry/police-shootings-police-executive-research-forum_us_55d4f4ede4b07addcb456c76.

[9] Stamper, *supra* note 6, at 59.

[10] Debbi Baker, *How Police Are Trained In Deadly Force*, THE SAN DIEGO UNION-TRIBUNE, (Aug. 24, 2014) http://www.sandiegouniontribune.com/news/crime-courts-fire/sdut-police-deadly-force-training-academy-ferguson-2014aug23-story.html.

[11] *Id*.

movement that looks like a gun being drawn.[12] They are also trained to constantly scan their surroundings, processing all the information as they approach a potentially lethal exchange. However, police say "it is the suspect who dictates what happens, whether he or she follows the officer's commands or actively resists."[13] This is particularly significant in the context of the present analysis, examining those situations in which a fleeing felon actively resists the officer's commands.

II. DEADLY FORCE TO APPREHEND FLEEING FELON

A. Constitutional Law

The Supreme Court addressed police use of deadly force in the landmark decision *Tennessee v. Garner*.[14] In *Garner*, police were called to investigate a "prowler inside" call.[15] When they arrived, a homeowner reported that a break-in was underway at the neighboring house.[16] As the police officer began to investigate, he heard a door slam and saw someone run across the backyard of the house.[17] The fleeing suspect, Edward Garner, stopped at the edge of the backyard, where a 6-foot-high chain link fence obstructed his path.[18] The officer later testified he saw no signs indicating Garner possessed a weapon, and was "reasonably sure" and "figured" that Garner was unarmed.[19] The officer called out to Garner to halt; Garner proceeded to climb the fence. Convinced that if Garner succeeded in climbing over the fence he would evade capture, the police officer shot him.[20] Garner died later that evening.[21] Ten dollars and a purse taken from the house were found on Garner. He was 17 or 18 years old.[22]

The Tennessee statute at issue in the case authorized law enforcement to use "all necessary means to effect the arrest" of a criminal suspect that flees apprehension, so long as the officer has given notice of an intent to

---

[12] *Id*.

[13] *Id*. "If you comply with an officer's orders, the chance of being involved in a shooting is minimal to none." *Id*.

[14] Tennessee v. Garner, 471 U.S. 1 (1985).

[15] *Id*. at 3.

[16] *Id*.

[17] *Id*.

[18] *Id*.

[19] *Id*.

[20] *Id*. at 4. Garner's father brought an action under 42 U.S.C. § 1983 for asserted violations of Garner's constitutional rights. *Id*. at 5.

[21] *Id*. at 4.

[22] *Id*. at 3.

arrest.[23] The Court conceded that the arresting officer in this case had acted under the authority of the statute and pursuant to the Police Department policy.[24] The Court then evaluated the constitutionality, under the Fourth Amendment, of a law authorizing use of deadly force to prevent the escape of an apparently unarmed suspected felon.

The Court first established that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.[25] On the particular facts of this case, the Court held that "such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.[26] In so holding, the Court rejected implicit assumptions in the defense's arguments advocating for the use of deadly force to prevent the escape of all felony suspects, whatever the circumstances. "It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."[27]

The Supreme Court returned to the constitutionality of law enforcement use of force in *Graham v. Connor*.[28] Like *Tennessee v. Garner*, this case involved a civil action under 42 U.S.C. § 1983.[29] The plaintiff in *Graham v. Connor* was a diabetic.[30] Feeling the onset of an insulin reaction, he asked a friend to drive him to a convenience store to buy some juice to counteract the reaction.[31] Seeing a long line in the convenience store, the

---

[23] *Id*. at 4. The statute provided that "[i]f, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest." Tenn. Code Ann. § 40-7-108 (1982).

[24] *Ibid*.

[25] *Id*. at 7. Under the reasonableness inquiry, the Court balances "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Id*. at 8. The Court further stipulates that "reasonableness depends on not only when a seizure is made, but also how it is carried out." *Ibid*.

[26] *Id*. at 3. The Court further held that law enforcement should give some warning prior to using deadly force to prevent an escape where feasible. *Id*. at 11-12.

[27] *Id*. at 11.

[28] Graham v. Connor, 490 U.S. 386 (1989).

[29] 42 U.S.C. § 1983. The statute states in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and its laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…"

[30] Graham v. Connor, 490 U.S. at 388.

[31] *Id*.

two left the store in a hurry to find another place to acquire juice.[32] A nearby police officer became suspicious when he saw the plaintiff and his friend hastily enter and exit the store.[33] He pulled them over close to the store, and ordered the two to wait to determine whether the two had committed a crime at the convenience store.[34] More officers arrived on the scene. During the encounter with law enforcement, the plaintiff lost and regained consciousness from the insulin reaction, and suffered multiple injuries at the hands of law enforcement.[35] The plaintiff sustained a broken foot, cuts on his wrists, a bruised forehead, and claims to have developed a perpetual loud ringing in one of his ears.[36]

On these facts the Supreme Court held that "[w]here, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is more properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons…against unreasonable…seizures' of the person."[37] Echoing the analysis of *Tennessee v. Garner*, the Court made explicit that claims of excessive force should be analyzed under the Fourth Amendment and its "reasonableness" standard.[38] The Supreme Court acknowledged that the test of reasonableness under the Fourth Amendment requires "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[39] Moreover, the Court emphasized that "reasonableness" in this context is an objective standard, to be judged from the perspective of a reasonable officer on the scene, and not with the benefit of hindsight.[40] "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[41] The Court rejected the lower courts' analysis of the subjective motivations of the individual officers, reasoning

---

[32] *Id*. at 388-89.
[33] *Id*. at 389.
[34] *Id*.
[35] *Id*. at 389-90.
[36] Graham v. Connor, 490 U.S. 386, 390 (1989).
[37] *Id*. at 394.
[38] *Id*. at 395.
[39] *Id*. at 396.
[40] *Id*. "The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."
[41] *Id*. at 396-97.

that this has no bearing on whether a particular seizure is "unreasonable" under the Fourth Amendment.[42]

Therefore, the use of deadly force that is objectively unreasonable constitutes a violation of the Fourth Amendment. Following *Garner*, many states modified their substantive criminal law to reflect the more restrictive standard on the use of deadly force by law enforcement.[43]

B. Critics of the Prevailing State of the Law

Criticisms of the laws governing police use of deadly force as well as individual police officer's decision to use deadly force are both numerous and diverse. A brief overview of the most prominent of these objections will help shape the analytical framework for law enforcement use of deadly force.

One of the most prominent criticisms regards the disproportionate use of deadly force on racial minorities and impoverished groups. "It is undisputed that Blacks are disproportionately represented among the victims of police shootings…nearly every study that has examined this issue [has] found that blacks are represented disproportionately among the wrong end of police guns."[44]

Another criticism of the current state of law enforcement use of deadly force addresses the near-impossibility of obtaining convictions. For example, in Washington State, if a law enforcement officer kills a person while on duty, prosecutors are prohibited from seeking an indictment against her so long as she acted in good faith and without malice.[45] But it is not only the law that minimizes the likelihood that a police officer will be prosecuted for an unjustified killing in the line of duty. There are also

---

[42] Graham v. Connor, 490 U.S. 386, 397 (1989).

[43] *See* Gillespie Mich. Crim. L. & Proc. Search & Seiz. § 5:60 (2d ed.) ["*Garner* means that the use of deadly force by the police without regard to dangerousness violates the Fourth Amendment, but, of course, the U.S. Supreme Court cannot change the state substantive criminal law, and this action would therefore not be a state law crime"] .

[44] Cynthia Lee, *'But I Thought He Had a Gun' – Race and Police Use of Deadly Force*, HASTINGS RACE & POVERTY L. J. 1, 3 (2004).

[45] Steve Miletich Et Al., *Shielded by the Law*, THE SEATTLE TIMES, (Sept. 26, 2015), http://projects.seattletimes.com/2015/killed-by-police/?utm_source=WhatCountsEmail&utm_medium=Company%20Updates&utm_campaign=%22Shielded%20by%20the%20law%22%20Special%20Report.

psychological explanations for this trend: research shows that police officers tend to garner sympathy among jurors.[46]

Yet another critique of the current state of the law concerns how legitimate objects of deadly force are distinguished from illegitimate objects of deadly force. Take the limited circumstance of the "fleeing felon." Some states permit police to use deadly force to apprehend a person suspected of committing *any* felony. But these states prohibit using lethal force as a means of apprehending a person suspected of committing a misdemeanor. When behavior that constitutes a felony in one state constitutes only a misdemeanor in another state, problems arise. Indeed, what constitutes a felony in one state could in fact be *legal* conduct in another state.

For example, in Colorado, possession of less than one ounce (approximately 28 grams) of marijuana is lawful.[47] But in Florida, possession of more than 20 grams of marijuana is a felony.[48] Law enforcement in Florida may use "any force necessary…when necessarily committed in arresting fleeing felons from justice."[49] Therefore, a person in possession of 21 grams of marijuana in Colorado is not engaged in any unlawful conduct, while in police in Florida would be justified to use deadly force upon that person in the event she chose to flee police apprehension. There is something worrisome about a circumstance in which a person does not break the law in one state, yet could be killed in another for the same conduct when they flee apprehension by law enforcement.

C. Defenders of the Prevailing State of the Law

Police officers put their lives at risk every day they put on their uniform. They know the danger they face, and yet they choose to accept the risk inherent in their line of work. Critics of the current state of the law that advocate for altogether abolishing a police officer's ability to use deadly force in the line of duty face a very real pragmatic hurdle: who would want to be a police officer if the law prohibited law enforcement from using deadly force when they objectively believed their life to be in danger? Those that advocate for a complete prohibition on the use of deadly force by law enforcement inevitably must accept an unsavory consequence: that by

---

[46] Kimberly Kindy and Kly Kimbriell, *Thousands Dead, Few Prosecuted*, THE WASHINGTON POST, (April 11, 2015), http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/.

[47] Colo. Const. art. XVIII, § 16.

[48] Fla. Stat. Ann. §§ 893.03, 893.13.

[49] Fla. Stat. Ann. § 776.05.

becoming a law enforcement officer, an individual would give up the right to self-defense that they have when not wearing their uniform. A complete ban on the use of deadly force by law enforcement seems problematic at best, and at worst could endanger society. As long as the law permits widespread possession of guns by civilians and law enforcement alike, it is unclear whether armed criminals could be stopped by unarmed police officers. Further, defenders of the prevailing state of the law ask why someone is running from police in the first place. Implicit in this question is the premise that innocent people do not run from law enforcement.[50]

III. JUST WAR THEORY APPLIED TO THE DOMESTIC REALM

A. HISTORY AND NATURE OF JUST WAR THEORY

Just war theory concerns the justification of how and why wars are fought.[51] Just war theory is not a single theory but, rather, "a tradition within which there is a range of interpretation. That is, just war theory is best thought of as providing a framework for discussion about whether a war is just, rather than as providing a set of unambiguous criteria that are easily applied."[52] For the sake of simplicity, this Note adheres to the orthodox interpretation of just war theory, most notably put forth by Michael Walzer in his groundbreaking work *Just and Unjust Wars: A Moral Argument With Historical Illustrations*.[53]

Just war theorists typically divide the moral reality of war into two parts: (1) the reasons states have for fighting, and (2) the means which such states adopt. The former is referred to as *jus ad bellum*, while the latter is known as *jus in bello*. Under the traditional approach to just war theory, *jus ad bellum* and *jus in bello* operate independently of one another.[54] There is

---

[50] However, in light of recent studies concerning the criminal justice system's apparent disparate treatment of minority groups, it could make sense why even innocent people would run from the police. So the assumption that innocent people do not run from police might be inconsistent with reality. *See* Jennifer Turner and Jamil Dakwar, *Hearing on Reports of Racism in the Justice System of the United States*, AMERICAN CIVIL LIBERTIES UNION, (Oct. 27, 2014), https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf.

[51] Alexander Moseley, *Just War Theory*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY (last visited Nov. 2, 2016) http://www.iep.utm.edu/justwar/.

[52] ANDREW VALLS, ETHICS IN INTERNATIONAL AFFAIRS: THEORIES AND CASES, 68 (Rowman & Littlefield, 2000).

[53] MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS (REV, Basic Books 2006). I will make minor deviations from the traditional approach to just war theory to more easily analogize the principles of war to the domestic realm, but these will be discussed later in the analysis.

[54] Just war theorists do not universally accept this proposition, and compelling arguments have been put forth that cast doubt on this assumption. However this is outside the scope of the present

a third, less discussed dimension of just war theory that has unique application to the controversies surrounding law enforcement use of deadly force – *jus post bellum*. This concerns justice after the termination of an armed conflict, and will be expanded upon in greater detail.

The just war framework relies on several key concepts that have a technical definition contrary to their plain meaning. The term "innocent" has at least three different meanings in the just war literature. These meanings include: (1) a person that is not a legitimate target of attack; (2) a person that is morally innocent, or not guilty or culpable; and (3) a person that is "'currently harmless,' and opposed not to 'guilty' but to 'doing harm.'"[55] Another way of understanding these three meanings of innocence is through a series of dichotomies: (1) legitimate targets of attack vs. illegitimate targets of attack; (2) morally culpable vs. morally innocent; and (3) currently doing harm vs. currently harmless.

The concept of innocence is closely related to the notion of a noncombatant. "In the reigning theory of the just war, to be innocent in the generic sense of having done nothing to lose one's right is also to be innocent in the sense given by etymology--that is, to be unthreatening or harmless."[56] A noncombatant is someone who, in the context of warfare, does not pose a threat.[57] It follows that a combatant is one that does pose a threat. Therefore, in traditional just war theory a noncombatant is an "innocent," while a combatant is not. So, in just war theory, to say that an "individual is not innocent is not to say that he is guilty, that he deserves to die, that his life is less valuable, or that his death is less tragic. It is only to say that he has done something to meet the criterion for liability to attack…"[58]

Also worth defining for the purposes of the present analysis are the interrelated concepts of permissibility, justification, and excuse. Hugo Grotius, one of the earlier theorists to write of the normative foundation of war, identified a critical distinction in how philosophers and academics use the concept of "permissibility." In his more well-known work, *De iure belli ac pacis* (On the Law of War and Peace), Grotius explains that, in one sense, a permissible act is "that which is done with impunity, although not without a moral wrong," while in another sense a permissible act is "that which is

---

analysis.

[55] JEFF MCMAHAN, KILLING IN WAR, 9-11 (Oxford University Press, 2009).

[56] *Id*. at 11.

[57] *Ibid.*

[58] Jeff McMahan, *The Ethics of Killing in War*, 114 ETHICS 693, 695 (Jul. 2004) https://www.law.upenn.edu/institutes/cerl/conferences/targetedkilling/papers/McMahanEthicsofKillinginWar.pdf.

free from moral wrong, even if virtue would enjoin not to do it."[59] This distinction suggests an ambiguity between two categories of permissible acts: (1) acts that are morally wrong but excusable, and (2) acts which are morally acceptable, but perhaps not praiseworthy.

Contemporary just war theorist Jeff McMahan addressed the relationship between the concepts of permissibility, justification, and excuse in the war paradigm.[60] "Acts that are permitted or justified have in common that they are not wrong. When an act is wrong but the agent who does it is not blameworthy, he or she is excused."[61] Thus, McMahan resolves the ambiguity Grotius identified in the nature of a permissible act. For the purposes of this analysis, then, a *permissible* act is "that which is free from moral wrong, even if virtue would enjoin not to do it," while an actor is *excused* if the act "is done without impunity, but although not without a moral wrong."[62] According to McMahan, an act is *justified* "if and only if it is permissible in the circumstances *and* there is a positive moral reason to do it."[63]

Characterizing an act as permissible or justifiable encompasses both an objective and a subjective dimension. An act is objectively permissible or justifiable "when what explains its permissibility or justifiability are facts that are independent of the agent's beliefs."[64] Alternatively, an act is subjectively permissible or justifiable when "two conditions are satisfied: first, the agent acts on the basis of beliefs, or perhaps reasonable or justified beliefs, that are false, and, second, the act *would* be objectively permissible or justified if those beliefs were true."[65]

With the key concepts adequately defined, the three dimensions of the just war tradition can be introduced.

B. *Jus Ad Bellum*

Jus ad bellum refers to the moral rules that concern resorting to war. Traditional just war theory stipulates five conditions that must be satisfied

---

[59] Hugo Grotius, *De iure belli ac pacis, bk III, Ch. IV*, *in* The Ethics of War 385, 425. "For sometimes it is said to be permissible (*licere*) which is right (*rectum*) from every point of view and is free from reproach, even if there is something else which might more honourably be done…In another sense, however, something is said to be permissible, not because it can be done without prejudice to piety and rules of duty, but because among men it is not liable to punishment." *Id.* at <1>, <2>.

[60] JEFF MCMAHAN, KILLING IN WAR (Oxford University Press, 2009).

[61] *Id*. at 111.

[62] Grotius, at 425.

[63] McMahan, at 110.

[64] JEFF MCMAHAN, KILLING IN WAR (Oxford University Press, 2009), at 43.

[65] *Id*.

for the waging of war to be just: (1) just cause; (2) legitimate authority; (3) likelihood of success; (4) last resort and (5) proportionality.[66] However, because the present analysis is focused on analogizing (1) killing in war to killing in the domestic realm, and (2) just resolution of an armed conflict in the international and domestic spheres, the *jus ad bellum* requirements will not be discussed in greater detail.

C. *Jus in Bello*

Jus in bello, or just conduct in war, restricts the means a soldier can use to achieve her objectives in the theatre of war. *Jus in bello* is generally viewed as embodying three principles: (1) discrimination; (2) proportionality; and (3) minimum necessity.[67] The requirement of discrimination "holds that combatants must intentionally attack only those who are legitimate targets."[68] Traditional just war theorists posit that the criterion of liability to attack in war is simply posing a threat.[69] Combatants pose a threat to one another, while noncombatants do not. Therefore, under orthodox interpretations of the *jus in bello* requirement of discrimination, combatants are morally liable to attack, while noncombatants are morally immune from attack. On this view the only legitimate targets of attack in war are combatants.[70]

Proportionality concerns how much force is morally appropriate. In general, a harmful action is appropriate if the harm it causes is less severe than the harm it seeks to avert. Proportionality can be further divided into a *narrow* sense and a *wide* sense. *Narrow* proportionality concerns the harm inflicted on those who were potentially liable to lesser harms. An action is narrowly proportionate if it is proportionate in relation to the potential liability of the individual being acted upon. *Wide* proportionality concerns the harm inflicted on those who were not liable to any harm at all.[71] In other words, wide proportionality requires the harm that an act of war would foreseeably, but unintentionally, inflict on noncombatants not be excessive in relation to the act's expected good effects.

International law codifies the proportionality principle. Article 51 of the 1977 Geneva Protocol I articulates a critical principle of the just war

---

[66] Moseley, *supra* note 61.
[67] McMahan, at 16-23.
[68] *Id.* at 16.
[69] *Id.* at 11.
[70] *Id.* Because a combatant is defined as one that poses a threat to another, the only persons that are legitimate targets of intentional attack are those that pose a threat to others.
[71] *Id*. at 21.

convention: the principle of noncombatant immunity.[72] This principle forbids inflicting harm on noncombatants as either a means to an end or an end in itself. This is because under traditional just war theory, noncombatants have a right to not be deliberate targets of attack.

There is also a third requirement, which is the requirement of minimal force; this is the *in bello* version of the requirement of necessity.[73] However, the requirements of minimal force and narrow proportionality tend to blur together when considerations of probability and risk arise. "If, for example, attempting to incapacitate the enemy combatants would have a slightly lower probability of success than trying to kill them, or if it would be riskier for one's own combatants, the issue arguably becomes one of narrow proportionality."[74] Conventional just war theory would find the use of deadly force under such conditions not disproportionate, and therefore permissible.[75]

D. Jus Post Bellum

Jus post bellum concerns the principles regulating the termination phase of war. It provides a normative framework for what participants should do as they move to conclude a war. Analysis of how an armed conflict is resolved fairly is influenced by the aims for which a just war is fought. Central to a *jus post bellum* inquiry are the goals to be achieved by the settlement of the conflict.

Brian Orend argues that the just goal of a just war, once won, "must be a more secure and more just state of affairs than existed prior to the war…the aim of a just and lawful war is the resistance of aggression and the vindication of the fundamental rights of political communities, ultimately on behalf of the human rights of their individual citizens."[76] Walzer shares a similar sentiment, asserting that the overall aim of a just war is "'to

---

[72] ADAM ROBERTS AND RICHARD GUELFF, EDS., DOCUMENTS ON THE LAWS OF WAR (Oxford, Clarendon Press, 1982), at 416. (*available at* https://treaties.un.org/doc/publication/unts/volume%201125/volume-1125-i-17512-english.pdf).

[73] The requirement of minimal force is an intuitive notion and can be most readily discerned through a simple hypothetical: a soldier encounters an enemy combatant who poses a threat. Suppose the soldier can eliminate the threat with equal effectiveness by either killing the enemy combatant or by incapaciting the soldier without killing him. The requirement of minimal force demands the combatant be incapacitated instead of killed. It would be wrong to kill the combatant in these circumstances because the soldier could eliminate the threat through less forceful means. *McMahan* at 23.

[74] *Id*.

[75] *Id*.

[76] Brian Orend, *Justice After War*, 16 ETHICS & INT'L AFF. 43, 45 (2002).

reaffirm our own deepest values' with regard to justice, both domestic and international."[77]

Orend draws heavily on the already established principles of the just war tradition to develop a set of principles to regulate what he calls an ethical "exit strategy" to an armed conflict.[78] These principles are: (1) proportionality and publicity; (2) rights vindication; (3) discrimination; (4) punishment for war crimes, which can be distinguished into *jus ad bellum* crimes and *jus in bello* crimes; (5) compensation; and (6) rehabilitation.[79]

E. Purpose of Applying Just War Theory to Domestic Realm

There are two paradigms that justify lethal force: the war paradigm and the law enforcement paradigm. Therefore, the principles of just war theory are particularly applicable to the context of law enforcement use of deadly force because it provides a reasonable premise from which to begin: a peace officer should not be justified in the use of deadly force where a soldier of war is not. This is especially relevant when comparing a police officer contemplating deadly force on a fleeing felon, and a soldier contemplating the same on a fleeing enemy combatant. Statutes governing the use of deadly force to apprehend a "fleeing felon" already embody the *jus in bello* principles.

F. Jus in Bello Applied to Missouri's Fleeing Felon Statute

The preceding analysis has identified three requirements fighting in war must satisfy in order to be just: (1) discrimination, (2) proportionality, and (3) minimal force. Up until now this framework has been applied exclusively in the context of war. But upon closer examination, it appears that many states' approach to the conditions under which law enforcement is authorized to use deadly force actually embody the *jus in bello* principles. The *jus in bello* principles serve as an effective way to evaluate a state's approach to law enforcement use of deadly force, particularly where key *jus in bello* principles are lacking. Examination of one state's statute will demonstrate the veracity of this proposition.

Missouri addresses law enforcement use of deadly force in former section 563.046 of the Missouri Penal Code.

---

[77] *Id*., (citing *Walzer*, *supra* note 53, at 117).

[78] *Id.*

[79] *Id*. at 55-56. As many of these principles are uniquely applicable to the theatre of war, they are only mentioned in passing.

> In affecting an arrest or in preventing an escape from custody, a law enforcement officer is justified in using deadly force only: (1) When such is authorized under other sections of this chapter; or (2) When the officer reasonably believes that such use of deadly force is immediately necessary to effect the arrest or prevent an escape from custody and also reasonably believes that the person to be arrested: (a) Has committed or attempted to commit a felony offense involving the infliction or threatened infliction of serious physical injury; or (b) Is attempting to escape by use of a deadly weapon or dangerous instrument; or (c) May otherwise endanger life or inflict serious physical injury to the officer or others unless arrested without delay.[80]

As stated, the principle of discrimination requires that the person attacked must be a legitimate target of attack. In the context of war, the identification of a legitimate target of attack depends on an individual's status as a combatant or noncombatant. Under Missouri's statute, for a person to be a legitimate target of attack, it is necessary that the officer have a reasonable belief that the person has either already posed a threat to others, or will pose a threat to others in the future. Under the orthodox interpretation of just war theory, a combatant is one that poses a threat to others. Therefore, the requirement of discrimination in war perfectly parallels the requirement of discrimination under the Missouri statute.

However, an objection could be raised to this line of reasoning. The Missouri statute authorizes the use of deadly force to effectuate the arrest of a person that "has committed a felony offense involving the infliction or threatened infliction of serious physical injury."[81] It is questionable whether a person who has in the past posed a threat of harm to others therefore necessarily poses a threat of harm to others in the present. By definition, a combatant is one who poses a threat to others; implicit in the choice of phrasing is that the threat of harm is ongoing. Use of deadly force is meant to be instrumental; lethal force is used to prevent some greater harm from occurring. This challenge will be revisited later in the analysis. For now it is enough to flag the issue.

---

[80] Mo. Ann. Stat. § 563.046(3)(2016)(amended Jan. 1, 2017).
[81] Mo. Ann. Stat. § 563.046(2)(a).

Next is the principle of proportionality. Under the Missouri statute, the requirement of proportionality is codified in the qualifying language of "infliction of serious physical injury" and "deadly weapon."[82] The statute defines "deadly force" as "physical force which the actor uses with the purpose of causing or which he or she knows to create a substantial risk of causing death or serious physical injury."[83] Therefore, "infliction of serious physical injury" implies a similar level of harm as that posed by deadly force. Thus, on a cursory examination, Missouri's statute governing the use of deadly force by law enforcement seems to adhere to the requirements of discrimination and proportionality.

The final inquiry under the principles of just war theory involves what constitutes minimal force, the *in bello* requirement of necessity. At first look, the language of necessity appears to be contained within the statute ("when the officer reasonably believes such use of deadly force is immediately necessary"). However, the necessity of force is conditioned upon the reasonable belief of the officer. The reasonable belief of the officer depends, in part, upon considerations of probability and risk. As stated previously, where considerations of probability and risk arise, the principle of minimal force tends to blur with the concept of narrow-proportionality. Recall that an action is narrowly proportionate if it is proportionate in relation to the potential liability of the individual being acted upon. Therefore, if an officer had a reasonable belief that use of deadly force was "immediately necessary," and this belief turned out to be mistaken, then the killing was narrowly disproportionate, and also violated the principle of minimal force. The principle of minimal force is violated where an officer mistakenly believes deadly force is necessary because deadly force was not, in fact, necessary. Such use of deadly force would violate the principles of just war theory, but is deemed justified under the Missouri statute.

Thus, while Missouri's statute governing law enforcement use of deadly force is consistent with the principles of discrimination and proportionality, an in-depth examination reveals that the statute does not abide by the principle of minimal force. Rather, a more accurate conclusion is that Missouri's statute acknowledges the importance of using minimal force, but does not create an absolute prohibition against using greater force than may actually be necessary, if the officer possesses a reasonable belief that deadly force is in fact necessary.

---

[82] Mo. Ann. Stat. § 563.046(2)(a)-(c).
[83] Mo. Ann. Stat. § 563.011(1).

The preceding analysis demonstrates that the *jus in bello* principles are applicable to state law regulating law enforcement use of deadly force. Moreover, these principles provide an effective framework to evaluate the law's normative force.

IV. *JUS POST BELLUM* APPLIED TO PROSECUTORIAL DISCRETION: THE CALIFORNIA MODEL

The foregoing section applied the *jus in bello* dimension of the just war tradition to law enforcement use of deadly force. While most analyses of police use of deadly force focus on the conditions when police officers should use deadly force, comparatively little has been written about what prosecuting agencies should do following a deadly force incident. I respond to the latter inquiry by articulating a normative theory of what prosecuting agencies should do after investigating a police officer's use of deadly force, with particular emphasis on the decision not to seek indictment of the officer involved. Using the *just post bellum* principles, I will demonstrate why justice requires more than simply deciding whether to seek an indictment, and why the California Model should be emulated by prosecuting agencies across the nation.

First the California law governing police use of deadly force will be articulated. Next, the California Model will be developed. The strength of the California Model will be demonstrated by analyzing one case in which a police officer used deadly force on an unarmed individual, and the prosecuting agency made the decision not to seek indictment. Regardless of whether one agrees with the outcome of this particular use of force, the value of the California Model lies in its ability to promote transparency and accountability in the law enforcement apparatus. The California Model expands the discourse of law enforcement deadly force, empowering the public to make educated and informed decisions about the justice of decisions to forego a criminal prosecution.

A. California Law Governing Law Enforcement Use of Deadly Force

California's law governing the use of deadly force by law enforcement officers is codified in California Penal Code section 196 ("Justifiable Homicide Statute").[84] The statute states, in its entirety:

[84] Cal. Ann. Pen. Code § 196.

> Homicide is justifiable when committed by public officers and those acting by their command in their aid and assistance, either—
> 1. In obedience to any judgment of a competent Court; or,
> 2. When necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty; or,
> 3. When necessarily committed in retaking felons who have been rescued or have escaped, or when necessarily committed in arresting persons charged with felony, and who are fleeing from justice or resisting such arrest.[85]

The California courts' interpretation of section 196 deviates from the plain meaning of statute.[86] Subsection (3) addresses the use of deadly force to apprehend a fleeing felon.

The plain language of Penal Code section 196(3) would justify a killing to prevent any felony but, "in light of the large number of relatively non-serious felonies, this defense has been limited to those felonies which are 'forcible and atrocious.'"[87] The justification codified in 196(3) applies to peace officers, or others acting at their direction in apprehending dangerous felons. Dangerous felons are those persons who either: (1) pose a significant threat of death or serious bodily injury to others, or (2) who have committed a forcible and atrocious felony.[88]

In California, the evaluation of the reasonableness of a police officer's use of deadly force employs a reasonable person acting as a police officer standard.[89]

---

[85] *Id*.

[86] *See e.g.* Kortrum v. Alkire, 69 Cal.App.3d 325, 333 (Cal. Ct. App. 1977) (finding deadly force may be used on felony suspects only if the felony is a 'forcible and atrocious' one); People v. Ceballos, 12 Cal.3d 470 (Cal. Ct. App. 1974); People v. Piorkowski, 41 Cal.App.3d 324, 328 (Cal. Ct. App. 1974).

[87] LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE, 15-0201, OFFICER INVOLVED SHOOTING OF HECTOR MOREJON (2016), 9. *See* Kortum v. Alkire, 69 Cal.App.3d 325, 333 (Cal. Ct. App. 1977) ("the California Penal Code, as construed by the courts of this state, prohibit the use of deadly force by anyone, including a police officer, against a fleeing felony suspect unless the felony is of the violent variety, i.e., a forcible and atrocious one which threatens death or serious bodily harm, or there are other circumstances which reasonably create a fear of death or serious bodily harm to the officer or another").

[88] Foster v. City of Fresno, 392 F.Supp.2d 1140 (E.D. Cal. 2005) (finding that, under California law, an officer may use deadly force to effect an arrest "only if the felony for which the arrest is sought is 'a forcible, and atrocious one which threatens death or serious bodily harm, or there are other circumstances which reasonably create a fear of death or serious bodily harm to the officer or to another.'") *See* People v. Ceballos, 12 Cal.3d 470, 479 (Cal. Ct. App. 1974).

[89] People v. Mehserle, 206 Cal.App.4th 1125, 1146 (Cal. Ct. App. 2012) (holding that California

B. The California Model For Just Resolution of Law Enforcement Use of Deadly Force

In Los Angeles County, California, the Justice System Integrity Division (JSID) of the Los Angeles County District Attorney's Office (LADA) investigates all police involved shootings. The primary objective of JSID is "to accurately, thoroughly, and objectively investigate all relevant evidence and to determine the potential criminal liability, or lack thereof, of any party" in the context of a police-involved shooting.[90] When a police-involved shooting has occurred, a JSID investigator is immediately dispatched to the scene in order to investigate. While the investigating law enforcement agency has the primary responsibility of conducting a thorough, objective, and professional investigation of the incident, the District Attorney's Office has the authority to conduct an independent investigation.[91] The objective of this investigation is twofold: to determine whether the use of force was justified, and if not, whether there is sufficient evidence to bring charges against the law enforcement officer for the unlawful use of force. The investigating agency submits all relevant reports regarding the incident to JSID as soon as possible, usually within 60 to 90 days.[92] These reports include statements from witnesses, interviews with the officers involved, physical evidence, etc. JSID then reviews and analyzes the evidence to determine whether the officer acted lawfully. The JSID prosecutor applies the law governing police use of force to the facts of the case, and makes a decision whether to initiate criminal proceedings against the officer.

If the investigating prosecutor determines either that the use of force was justified, or that they cannot prove beyond a reasonable doubt that the use of force was unlawful (as is their burden for charging any individual), there are two expected consequences. The first is that LADA will not initiate criminal proceedings against the officer involved. The second is that JSID will release a report, "summarizing the results of the investigation and

---

law "follows the objective 'reasonable person' standard – the trier of fact is required to evaluate the conduct of a reasonable person in the defendant's position [citations omitted]…the jury should consider all relevant circumstances surrounding the defendant's conduct. This enables the jury to evaluate the conduct of a reasonable person functioning as a police officer in a stressful situation – but this is not the same as following a special 'reasonable police officer' standard.")

[90] Protocol for District Attorney Officer-Involved Shooting Response Program, LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE (2014), *available at* http://da.lacounty.gov/sites/default/files/policies/JSID%20DART%20Protocol%202014.pdf.

[91] *Id*.

[92] *Id*.

analyzing the evidence…[and] address[ing] the question of whether or not there is proof beyond a reasonable doubt that an officer, deputy, or any other person committed a crime."[93] Included in the report is a statement of JSID's determination, either that the use of force was justified, or that there was insufficient evidence to prove beyond a reasonable doubt that the use of force was unlawful. There is a description of the facts surrounding the use of force, shown by the statements provided by any witnesses to the shooting. There are also statements provided by the law enforcement officers involved in the incident (including those that did not use force but were merely present). The forensic evidence and autopsy conducted are also included when available. The next section is the Legal Analysis. This section includes all the relevant law governing police use of force that is applicable to the specific use of force under scrutiny.[94] The relevant law is then applied to the facts of the case, demonstrating why the use of force was justified or, in the alternative, why there was insufficient evidence to prove beyond a reasonable doubt that the use of force was unlawful. The report ends with a summation of the analysis of the overall circumstances surrounding the officer's use of force, and an explanation of the reasons why LADA decided not to indict the officer involved. This report is then made readily accessible to the public.[95]

The level of transparency and accountability these reports represent is precisely what is needed to address the growing distrust and perceived illegitimacy of law enforcement agencies held by many citizens in contemporary America.[96] The reports themselves support this proposition, as the recent shooting of Hector Morejon in Los Angeles County illustrates.

---

[93] *Id*.

[94] For instance, if JSID determines the use of force was a lawful defense of others, the legal analysis section will begin with a statement of California's law governing the justifiable use of force for self-defense and the defense of others.

[95] A link to these reports is available on the home page of the LADA website: http://da.co.la.ca.us/reports/ois.

[96] One way of understanding how transparency and accountability restore trust and legitimacy in the law enforcement apparatus is to understand these values as essential components to a fully functioning democracy. Jeff Rosen, the District Attorney for Santa Clara County, emphasized the importance of such reports in his own office during a speech at the University of Santa Clara. "In those cases where the officer did not commit a crime, I issue a very detailed report because I think that, in a democracy, people are, of course, entitled to disagree with their elected officials. People disagree with me from time to time, and they let me know about their disagreement. And that's how it should be in a democracy. But I think everyone is entitled to this information. And the same information that I reviewed in deciding whether or not to file charges against an officer in a fatal shooting situation is the information that I then release to the public." Jeff Rosen, Santa Clara County District Attorney, Remarks at a panel held at Santa Clara University on Race, Justice, and Ethics (Oct. 21, 2015), *available at* https://www.scu.edu/ethics/focus-areas/government-ethics/resources/role-of-prosecutors-in-officer-involved-shootings/.

C. Officer Involved Shooting of Hector Morejon

To demonstrate both the breadth and depth of analysis contained in the officer-involved use of force reports, it is necessary to examine one. This particular report is one of only a few cases currently available where police did not recover a weapon from the scene and where LADA made the decision not to seek an indictment of an officer who used deadly force. The individual killed in this event was Hector Morejon.[97] The following statement of facts and legal analysis is meant to summarize the contents of the report, but is by no means as robust and exhaustive as the report itself.

1. JSID: Statement of Facts

On April 23, 2015, Long Beach Police Department (LBPD) received a report that 11 individuals broke into 1148 Hoffman Avenue and were vandalizing the interior of the residence.[98] 1148 Hoffman Avenue is "claimed" by the Eastside Longo criminal street gang and is known for violent activity.[99] LBPD Officers Jeffrey Meyer and Xavier Veloz responded to the area to investigate possible trespassers.[100] There were four units at the location, all of which were being remodeled, and appeared unoccupied.[101] Three of the four units were locked and unoccupied. Unit 1150, however, had a partially broken window on one side of the unit, and a partially open window on another side of the unit.[102] A bicycle was visible through the partially open window.[103] To conduct further investigation inside Unit 1150, officers contacted the property management company.[104] A representive of the property management company was dispatched to unlock the front door of Unit 1150. [105]

While Veloz waited for the representative to arrive, Meyer went alone to walk around the perimeter of unit 1150.[106] On the north side of the unit,

---

[97] For a complete understanding of the subtleties and nuances of this case, I highly recommend reading through the report. The complete report is available at: http://da.lacounty.gov/sites/default/files/JSID_OIS_09_2016_Morejon.pdf.

[98] LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE, 15-0201, OFFICER INVOLVED SHOOTING OF HECTOR MOREJON 2 (2016).

[99] *Id.* at 1.

[100] *Id.* at 2.

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE, 15-0201, OFFICER INVOLVED SHOOTING OF HECTOR MOREJON 2 (2016).

[105] *Id.*

[106] *Id.*

Meyer was not visible to Veloz.[107] Here, Meyer saw a broken window, and noticed two overturned five gallon buckets beneath the window.[108] Meyer un-holstered his service weapon and approached the window.[109] Meyer did not announce his presence, identify himself as a police officer, or notify Veloz of his intentions to investigate the interior of the unit.[110]

Meyer's written report following the incident stated the following facts. Meyer lifted the vertical blinds covering the window to look inside.[111] His head and part of his shoulder were exposed while he looked inside.[112] Meyer put his firearm through the window and used the flashlight attached to the firearm to illuminate the interior of the residence.[113] While scanning the interior, Meyer saw the profile of a Hispanic male wearing a grey shirt.[114] This individual was later identified as Hector Morejon. Meyer wrote that Morejon turned quickly to his right while "simultaneously turning at me and raising and extending his right arm in my direction in one movement."[115] Meyer further wrote that he saw a "dark object" protruding from Morejon's hand and saw Morejon take a "firing stance."[116] Meyer then fired his service weapon one time.[117] Meyer stated that he fired because he feared Morejon was armed with a firearm and was about to shoot him.[118] Meyer explained that he discharged his weapon without ever identifying himself as a police officer "because of how fast everything was happening."[119] After firing the single shot, Meyer retreated from the window, and returned to his partner, Veloz, to notify him that he had just fired his weapon.[120]

Numerous police officers responded to the scene.[121] Five individuals, including Morejon, exited the residence and were detained by law enforcement.[122] Morejon had suffered a single gunshot wound to his torso.

---

[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE, 15-0201, OFFICER INVOLVED SHOOTING OF HECTOR MOREJON 2 (2016).
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.* at 3.
[115] *Id.*
[116] LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE, 15-0201, OFFICER INVOLVED SHOOTING OF HECTOR MOREJON 3 (2016).
[117] *Id.*
[118] *Id.*
[119] *Id.* at 5.
[120] *Id.*
[121] *Id.*
[122] LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE, 15-0201, OFFICER INVOLVED

He was transported to a nearby hospital where he underwent surgery and later died.[123]

Law enforcement searched the interior of 1150 Hoffman Avenue.[124] While a significant amount of graffiti was found inside the residence,[125] no weapon was located.[126]

An autopsy of Morejon's body concluded the gunshot wound caused his death.[127] The medical examiner opined that the bullet entered the left side of Morejon's back and exited his right upper abdomen.[128] Thus, the corresponding bullet path was left to right and back to front.[129]

Officer Meyer was interviewed one week after the shooting by representatives of LBPD's homicide division.[130] LADA representatives were not present during the interview. At the outset of the interview Meyer was informed that the bullet's entrance wound was to Morejon's back.[131] Meyer responded by saying that Morejon was facing him when he fired. Meyer explained Morejon was in the process of turning towards Meyer at the time that he fired.[132] Meyer stated that once he saw Morejon turning, he released the blinds with his left hand and started to back up to move behind the exterior wall for protection.[133] Meyer admitted he did not really see Morejon's body position as he fired,[134] but believed Morejon was facing him.[135] Meyer believed he shot Morejon in the front and "that's what he was aiming for."[136]

Law enforcement officials interviewed the three other trespassers who were present when Meyer shot and killed Morejon. Two of these individuals presented a consistent explanation of the events: they arrived several hours

---

SHOOTING OF HECTOR MOREJON (2016), 5.

[123] *Id.* at 3.

[124] *Id.*

[125] The unit was tagged with gang graffiti, including Morejon's gang moniker ("Dynamite").

[126] LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE, 15-0201, OFFICER INVOLVED SHOOTING OF HECTOR MOREJON 3 (2016).

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] It is important to note that this was a non-compelled, voluntary interview. Interviews can be compelled where an officer refuses to voluntarily submit to an interview.

[131] LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE, 15-0201, OFFICER INVOLVED SHOOTING OF HECTOR MOREJON 5 (2016).

[132] *Id.*

[133] *Id.*

[134] This is inconsistent with Meyer's written report, where he stated that the male Hispanic he saw inside the residence (Morejon) was taking a "firing stance" when Meyer fired.

[135] LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE, 15-0201, OFFICER INVOLVED SHOOTING OF HECTOR MOREJON, 5 (2016).

[136] *Id.*

before the shooting, they were both asleep prior to the shooting, and they were awoken either to the sound of a gunshot or to Morejon's own screams after he was shot. They both smelled burnt gunpowder in the room. Several minutes after they woke up, they exited the residence and were detained by police. These individuals were interviewed the same day as the shooting.[137]

The third individual, Edgar Rodarte, was a more complicated witness. He was interviewed on three separate occasions, and he gave inconsistent statements throughout. During the first interview on April 25, 2015, Edgar was adamant that he did not see Morejon holding anything in his hands immediately prior to the shooting, and that Morejon did not turn toward the kitchen window immediately prior to the shooting.[138] Edgar also stated that that the two other trespassers in the residence with him were in fact fully awake before the shooting, contrary to their own statements to law enforcement.[139] A member of LADA was present during this interview.

Edgar was again interviewed on September 25, 2015. However, no member of LADA was present. This time Edgar stated that the two other trespassers in the residence with him were asleep prior to the shooting.[140] Of greater significance is that Edgar conceded during this interview it was "possible" Morejon had a glove in his hand at the time of the shooting.[141] Edgar also stated that Morejon turned and pointed just before he was shot.[142] Following the September 25 interview, Edgar participated in a video reenactment of Morejon's movements immediately prior to being shot.[143] Edgar demonstrated how Morejon turned from facing the back of the unit while simultaneously pointing with his right hand.[144]

Edgar's final interview occurred on May 6, 2016. This time a member of LADA was present. Unlike the first two interviews, this one was tape-recorded.[145] At the time of the interview, Edgar was serving a sentence for an unrelated crime in county jail.[146] The report makes explicit that Edgar was not promised or given any reduction in his sentence or any other benefit

---

[137] *Id.* at 2-3.

[138] This is inconsistent with both Officer Meyer's written report of the incident and his subsequent interview.

[139] LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE, 15-0201, OFFICER INVOLVED SHOOTING OF HECTOR MOREJON, 6 (2016).

[140] *Id* at 7.

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE, 15-0201, OFFICER INVOLVED SHOOTING OF HECTOR MOREJON, 7 (2016).

[146] *Id.*

in exchange for being re-interviewed.[147]

Edgar was confronted with the inconsistencies between his first two interviews. The critical inconsistences were: (1) whether the two other trespassers were fully awake before the shooting; (2) whether he saw the muzzle flash when the firearm was shot; and (3) Morejon's actions just prior to the shooting. As to the first inconsistency, Edgar explained that the two other trespassers were not awake before the shooting. Edgar admitted he attempted to conform his statement during the interview on September 25 to the statements given by the other trespassers on April 23, 2015.[148]

As to the second inconsistency, Edgar stated that he did in fact see a muzzle flash.[149] He explained his failure to relate that he saw the muzzle flash during the first interview might have been the result of his having used drugs prior to the shooting and being shaken up by the incident.[150]

Concerning Morejon's actions just prior to the shooting, Edgar was unable to cogently provide an explanation for the marked inconsistencies regarding Morejon's movements immediately prior to being shot.[151] However, he affirmed his recitation of the facts contained within the September 25 video reenactment as an accurate reflection of his memory of the events that took place.[152]

At the end of the third interview, Edgar denied that anybody tried to influence him to change his statements between the first and second interviews.[153] He also stated that no one tried to influence him to change his statement prior to being re-interviewed on May 6, 2016.[154]

The preceding constitutes an example of the universe of facts with which JSID determines whether it will seek an indictment of the officer involved in the shooting. Rather than the investigation taking place behind a veil, obfuscating inner workings of the law enforcement apparatus from the public eye, JSID's report empowers citizens to examine the facts of a given case, and provides them with an opportunity to understand how JSID reached its conclusions.

---

[147] *Id.* at 8.
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE, 15-0201, OFFICER INVOLVED SHOOTING OF HECTOR MOREJON, 8-9 (2016).
[152] *Id.* at 9.
[153] *Id.*
[154] *Id.*

2. JSID: Legal Analysis

While the report's fact section permits a reader to gain a robust understanding of a particular incident, the legal analysis section permits a reader to understand the law governing the use of deadly force by police officers in California. This in turn makes the law more accessible to the community, a worthy goal in its own right. A summary of the legal analysis provided in the JSID report follows.

In California, murder is defined as the unlawful killing of a human being with malice.[155] The elements of murder are: (1) a person was killed; (2) the killing was unlawful; and (3) the killing was done with malice aforethought; or (3a) the killing occurred during the commission or attempted commission of a listed, or an inherently dangerous felony.[156]

A killing which is legally justified is a lawful killing.[157] The use of deadly force is justified, not unlawful, when the killer actually and reasonably: (1) believes there is an imminent danger that the other person will kill him or cause him great bodily injury and, (2) believes that it is necessary to use deadly force to avoid death or great bodily injury.[158] Thus, California law permits the use of deadly force in self-defense if it reasonably appears that the person claiming the right of self-defense actually and reasonably believed that he was in imminent danger of great bodily injury or death.[159]

A killing which is partially justified is unlawful but does not constitute murder. A partially excused killing will support a charge of voluntary manslaughter when the killer harbored an actual but unreasonable belief in the need for self-defense.[160]

Evaluating a police officer's reasonable use of deadly force employs a reasonable person acting as a police officer standard.[161] The right of self-defense is the same whether the danger is real or apparent.[162]

Under California negligence law "pre-shooting circumstances might show that an otherwise reasonable use of deadly force was in fact

---

[155] LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE, 15-0201, OFFICER INVOLVED SHOOTING OF HECTOR MOREJON, 9 (2016); Cal. Pen. Code § 187.

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.* at 9-10 (citing *People v. Randle*, 35 Cal.4th 987, 994 (Cal. Ct. App. 2005)).

[160] *Id.* at 10.

[161] LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE, 15-0201, OFFICER INVOLVED SHOOTING OF HECTOR MOREJON, 10 (2016) (citing *People v. Mehserle*, 206 Cal.App.4th 1125, 1146 (2012)).

[162] *Id.* at 11 (citing *People v. Toledo*, 85 Cal.App.2d 577 (1948)).

unreasonable," and a peace officer's "pre-shooting conduct is included in the totality of the circumstances surrounding an officer's use of deadly force and therefore the officer's duty to act reasonably when using deadly force extends to pre-shooting conduct."[163] However, even if a police officer negligently provokes a violent response, that negligent act will not transform an otherwise reasonable use of responsive force into a Fourth Amendment violation.[164] In *Billington v. Smith*, the 9th Circuit held that if the police intentionally or recklessly provoke a violent response and their provocation is an independent constitutional violation, then such reckless pre-shooting conduct may render the police subsequent use of defensive force unreasonable under the 4th Amendment.[165] Therefore, under a constitutional analysis, the prosecution would need to prove that (1) Meyer intentionally or recklessly provoked Morejon's actions; and (2) that Meyer's provocation was an independent constitutional violation, in order to introduce Meyer's pre-shooting tactical deficiencies to rebut Meyer's contention that his decision to shoot was reasonable under the circumstances.[166]

Additionally, an officer's failure to warn a suspect, when feasible, can be factored into the evaluation of the objective reasonableness of the officer's decision to use force.[167]

3. JSID: Conclusion

Perhaps the most significant part of the JSID report is the conclusion. First, the author of the Morejon report acknowledges that there was no serious crime committed that required an immediate and forceful police intervention. This is supported by three important facts: (1) the nature of the call Officers Meyer and Veloz responded to; (2) the information officers obtained from their initial investigation of the location; and (3) Officer Veloz's actions after completing the initial reconnaissance of the premises. As to the nature of the call, Officer Meyer responded to a trespassing call with possible vandalism. This hardly poses the sort of life endangering criminal conduct requiring an immediate forceful response. Next, despite the fact the area the officers responded to is "claimed" by the Eastside

---

[163] *Id.* (citing Hayes v. County of San Diego, 57 Cal.4th 622, 633 (Cal. Ct. App. 2013)).

[164] *Id*. (citing Billington v. Smith, 292 F.3d 1177 (9th Cir. 2002)).

[165] *Id*. at 14 (citing Billington, 292 F.3d at 1190-91.

[166] *Id*. at 14.

[167] LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE, 15-0201, OFFICER INVOLVED SHOOTING OF HECTOR MOREJON (2016), 11 (citing Bryan v. MacPherson, 630 F.3d 805, 831 (9th Cir. 2010)).

Longo gang, Officers Meyer and Veloz did not encounter any gang activity in progress. Finally, the conduct of Officer Veloz reveals that the alleged criminal conduct posed no exigency. After completing their investigation of the premises, the officers had concluded the unit that was unlawfully occupied was 1150 Hoffman Avenue. The property management company had been contacted, and a representative was on the way to open the front door of the premises.

In light of these facts, the author of the report concludes, "Given the minor, non-exigent nature of the alleged criminality, a reasonable and appropriate police response was to wait for the property manger to arrive."[168] Officer Meyer's response was not to wait for the property manager to arrive, but to covertly approach the window of the unlawfully occupied house. Meyer did this without his partner's knowledge, and with his weapon drawn. The author of the report states that such a decision "cannot be tactically justified. There was no legitimate law enforcement reason for Meyer to escalate the danger to himself and the occupants inside the unit by placing himself in this tactically compromised position."[169] Officer Meyer's decision to arm himself and secretly approach the window increased the potential for a violent encounter without any legitimate reason.[170]

Despite suggesting the reasonable and appropriate police response was to wait for the property manager to arrive, and Officer Meyer's decision not to engage in that "reasonable and appropriate police response," the author of the report concludes that Officer Meyer "actually or honestly believed that he was in imminent danger at the time he fired."[171] Edgar's statements[172] and those provided by Officer Meyer himself support this conclusion.[173] Officer Meyer stated that the reason he fired his weapon was because Morejon turned toward him, raised his right arm, and then took a "firing stance."[174] While the author of the report acknowledges that "it is

---

[168] *Id.* at 12.

[169] *Id.*

[170] *Id.* The author goes on to write "It is unclear what response Meyer reasonably expected from the occupants of the residence in a known gang area upon being confronted with the muzzle of a firearm silently pointing through the window." *Id.*

[171] *Id.* at 13.

[172] The author first casts doubt on Edgar's veracity, pointing to his contradicting statements over the course of the three interviews he participated in. However, Edgar's later statements corroborate Meyer's contention that Morejon turned quickly with his arm outstretched immediately prior Officer Meyer's decision to discharge his firearm.

[173] LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE, 15-0201, OFFICER INVOLVED SHOOTING OF HECTOR MOREJON, 13 (2016). Officer Meyer was consistent in both his written statement and his voluntary interview.

[174] *Id.*

illogical to assume that Morejon would point at Meyer with nothing in his hand, particularly if all that was visible protruding through the window was the barrel of a firearm," the author goes on to state that "there is no direct evidence to contradict Meyer's perception that Morejon was pointing something at him."[175]

In light of the universe of evidence surrounding this use of deadly force, the author concludes that the evidence suggest Morejon made some turning movement with his hand extended just before Meyer fired. Because there is no evidence to suggest Meyer fired for any reason other than his perception he was in imminent danger, the author concludes that he actually and honestly believed he was in imminent danger at the time he fired. Therefore, his "actual and honest belief prevents prosecution for murder."[176]

The remainder of the report addresses the issue of whether Meyer's belief in the need for self-defense was objectively reasonable. There are two distinct dimensions to this issue: a state law negligence analysis, and a constitutional analysis under the Fourth Amendment. The success of both the negligence claim and the constitutional claim hinge on the admissibility of Meyer's pre-shooting tactical failures.[177] If admissible, these failures could subvert Meyer's claim that at the time he fired it was reasonable to do so.

For the constitutional analysis, "the People would have to prove that Meyer intentionally or recklessly provoked Morejon's actions and that Meyer's provocation was an independent constitutional violation, in order to introduce Meyer's pre-shooting tactical deficiencies to rebut Meyer's claim that his decision to shoot was reasonable."[178] In this context, the term "reckless" is an extremely high bar that "requires both a knowledge that one's conduct creates a high risk of danger and [a] conscious decision to engage in the conduct despite the elevated risk."[179]

The author of the report concedes that "clearly, Meyer's tactical deficiencies were a substantial, if not the primary cause of Morejon's death. In essence Meyer's negligent tactical failures created the situation which

---

[175] *Id*. There is an open question whether the autopsy, which demonstrated that Morejon was shot in the back, would constitute direct evidence that contradicts Meyer's perception that Morejon was pointing something at him.

[176] *Id*.

[177] *Id*. at 14.

[178] *Id*.; *see* Billington, 292 F.3d at 1190-91.

[179] LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE, 15-0201, OFFICER INVOLVED SHOOTING OF HECTOR MOREJON, 14 (2016). "[C]onduct which creates not only an unreasonable risk but also a 'high degree' of risk (something more than mere 'unreasonable' risk) may be termed 'gross negligence,' and if in addition the one who creates such a risk realizes that he does so, his conduct may be called 'recklessness.'"

then prompted him to use deadly force."[180] However, in light of the recklessness standard, the difficult question is whether Meyer's decision to enter the breezeway alone, arm himself and surreptitiously peer through the kitchen window without announcing his presence was reckless given the totality of the circumstances.[181]

The author of the report does not give a concrete answer to this question, but acknowledges the possibility that Meyer's actions were reckless given the totality of the circumstances. However, even assuming Meyer's conduct was reckless leading up to the shooting, the author notes that under the prevailing law, Meyer's actions preceding the shooting are admissible only if they also constitute a separate constitutional violation.[182] However, as described elsewhere, Meyer's actions preceding the shooting do not constitute a separate constitutional violation. Thus, "because the People would be unable to establish the separate constitutional violation required by *Billington*, the evidence of Meyer's pre-shooting conduct would be inadmissible to rebut the argument that Meyer's decision to fire was objectively reasonable in a prosecution of Meyer for voluntary manslaughter."[183]

Without the evidence of the pre-shooting conduct, the author determines that the remaining evidence supports the conclusion that Meyer's decision to fire was not objectively unreasonable under the circumstances.[184] While the author acknowledges "Meyer's failure to give Morejon any opportunity to submit to police authority is deeply troubling," and further expresses "serious concern about Officer Meyer's tactical decisions prior to the shooting," a prosecutor is obligated to apply the law; and "the state of the law prevents the introduction of Meyer's pre-shooting conduct to directly rebut the reasonableness of Meyer's decision to use lethal force."[185] As such, because the evidence is insufficient to prove beyond a reasonable doubt Meyer's actions were criminal, the report concludes with a statement that LADA declines to initiate criminal prosecution in this matter.[186]

---

[180] *Id.* at 14.

[181] *Id.*

[182] *Id.* at 15. The author explains that trespassers, like Morejon, do not have a reasonable expectation of privacy in the spaces they are unlawfully occupying. *See* People v. Satz, 61 Cal.App.4th 322, 71 (Cal. Ct. App. 1998). Because Meyer could not have violated Morejon's reasonable expectation of privacy where none existed, Meyer's conduct did not constitute a separate constitutional violation.

[183] *Id.*

[184] *Id.*

[185] LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE, 15-0201, OFFICER INVOLVED SHOOTING OF HECTOR MOREJON (2016), 15-16.

[186] *Id.* at 16.

D. Analysis of JSID Report

What can a layman glean from the officer-involved shooting report? They can obtain a robust understanding of the facts surrounding the shooting, significantly more than those available from a brief news article published after the shooting. The report also equips members of the public with the law that governs police use of deadly force, including both the statutory language and the jury instructions explaining the law in terms more accessible than the usual legalese. They can see LADA's reasoning when applying the law to the facts, and how the agency reached its ultimate conclusion that it could not prove beyond a reasonable doubt that the killing was unlawful. They could also see how this conclusion left the writer of the report with discomfort about Officer Meyer's tactics.

Armed with this report, a reader can conduct their own review of LADA's decision. They can first assess whether they agree with the conclusion reached by the JSID prosecutor who wrote the report. Even if a layperson agrees that, under the prevailing law, it could not be proven beyond a reasonable doubt that the use of deadly force was not lawful, the layperson is empowered to pass value judgments over the prevailing state of the law itself.

The JSID report gives the community an opportunity to understand *why* a prosecutor has declined to seek indictment of the officer involved. This provides the public with the tools they need to make an informed decision as to whether they believe allegations of police misconduct are addressed fairly in practice. Members of the public can engage in a discussion about whether they agree with the prosecutor's analysis. A prosecutor who knows that their decision not to seek an indictment will be subject to intense public scrutiny will therefore be quite thorough in their explanation of why their decision not to pursue criminal charges is compelled given the prevailing state of the law.

Any compelling normative theory necessarily must be grounded in an accurate descriptive account. The JSID report is this accurate descriptive account. The JSID report empowers a layperson to look to the law governing the use of deadly force by law enforcement through a normative lens to determine whether the law, in practice, is precisely what it should be.

E. Jus Post Bellum Applied To California Model

Recall that the guiding principle of the *jus post bellum* inquiry is to secure a more just state of affairs then existed prior to the conflict. The

California Model best conforms to the principles of *jus post bellum* guiding principle because of its ability to promote: (1) transparency of the law enforcement apparatus; (2) accountability, both of prosecutors and legislators; and (3) a political check on the prosecutor's power not to charge. Each of these will be briefly addressed.

1. Transparency

The California Model promotes transparency of the criminal justice system. "[I]n communities where there is a lack of confidence between police and minority residences and a perception that complaints about police misconduct will not be addressed fairly, [a police officer's use of force] can…easily lead to violent disturbances."[187] The most effective way to combat the perception that police misconduct will not be addressed fairly is to reveal the process by which police misconduct is addressed. The decision not to seek indictment of a police officer that uses deadly force, without more information as to why no indictment will be sought, only confirms the suspicion that police officers are above the law. Increasing the transparency of a prosecutor's decision not to seek indictment of a police officer's use of deadly force empowers a community to understand why criminal charges will not be sought.[188]

2. Accountability

The JSID reports provide the public with three critical pieces of information for evaluating a specific circumstance where a police officer uses deadly force: the facts of the case, the governing law, and the conclusion the prosecutor reached by applying the law to the facts. As a result, the community has the opportunity to understand why a prosecutor

---

[187] *Police Use of Force: Addressing Community Racial Tensions*, U.S. DEP'T OF JUSTICE CMTY. RELATIONS SERV., https://www.justice.gov/archive/crs/pubs/policeuseofforce092003.html.

[188] California legislators have recently enacted another measure, SB 227, to promote transparency in the criminal justice system. In August of 2015, Governor Jerry Brown signed SB 227 into law, which prohibited grand juries from determining whether police officers in involved in fatal shootings should face criminal charges. Legislators believed that SB 227 would "help make judicial proceedings more transparent and more accountable." Melanie Mason, *Gov. Brown Signs Law Barring Grand Juries in Police Deadly Force Cases*, LOS ANGELES TIMES, (Aug. 11, 2015), http://www.latimes.com/local/political/la-me-pc-brown-grand-juries-20150811-story.html. However, less then two years later, a California appeals court held the law was unconstitutional. *See Court Tosses California Law That Barred Grand Juries From Investigating Police Shootings*, LOS ANGELES TIMES, (Jan. 11, 2017), http://www.latimes.com/local/lanow/la-me-ln-grand-jury-police-shootings-20170111-story.html.

has declined to seek indictment of the officer involved. This provides the public with the tools they need to make an informed decision as to whether they believe allegations of police misconduct are addressed fairly in practice. Members of the public can engage in a discussion about whether they agree with the prosecutor's analysis. Additionally, a prosecutor who knows that their decision not to seek an indictment will be subject to intense public scrutiny has incentive to be thorough in explaining their decision not to pursue criminal charges given the prevailing state of the law.

The California Model also promotes legislative accountability by providing the public with a robust understanding of the laws regulating police use of deadly force. If they disagree with the law, an informed public can call on their legislatures to modify it so that it more accurately reflects contemporary moral sentiments. A legislator that fails to heed the wishes of her constituents could jeopardize her aspirations for reelection. If the prosecutor is precluded from seeking indictments given the current state of the law, then perhaps "the public should instead hold the legislature accountable for failing to provide the prosecutor with the legal tools to charge officers with this type of offense."[189]

3. Political Check

There is no judicial check on a prosecutor's decision not to seek indictment in a given case.[190] Publishing a declination report creates a political check on the prosecutor's power (not) to charge. Publication of declination reports empowers the public to serve as legitimate oversight of prosecutorial decision-making.

V. CONCLUSION

Law enforcement use of deadly force has come under close scrutiny, by the federal government, the media and the greater public. It is an emotionally charged topic, both for critics and defenders of the prevailing state of the law. It should come as no surprise that discussion among divergent viewpoints is often strained, at best.

---

[189] Jeri Neff, Article, *A Pyrrhic Victory: Why California's Grand Jury Law (Still) Won't Hold Officers Liable for Murder*, LOY. L.A. L. REV. (forthcoming 2017) https://ssrn.com/abstract=2945695.

[190] *See* Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2d. Cir. 1973) (holding the Court could not force prosecutors to pursue criminal charges against prison guards who allegedly murdered inmates during a brutal prison uprising as such judicial review would violate the separation of powers doctrine).

The discursive framework detailed above is not limited to the circumstances leading up to an officer's decision to use deadly force, but encompasses the decision whether to initiate criminal proceedings against the officer involved. My goal was to craft a different way of thinking about the many controversies surrounding police use of deadly force. To that end I have advocated for the use of the just war tradition. Just war theory contains principles uniquely applicable to the context of state-sanctioned killing, both in the international and domestic spheres. I have demonstrated that a state law regulating police use of deadly force can be evaluated using the *jus in bello* principles of proportionality, discrimination, and minimum necessity. Analysis of the Missouri statute revealed that these values were already reflected in the law itself, though perhaps not to the degree demanded by the principle of minimum necessity. The language of *jus in bello* expands the discourse of police deadly force, providing a more objective way of discussing an often emotionally-charged topic for all interested parties.

The *jus post bellum* analysis is a particularly intriguing dimension of the just war tradition that has the potential to address many of the controversies surrounding police use of deadly force. Examining what steps a prosecuting agency should take following the decision not to seek an indictment could serve as an invaluable tool for restoring trust, faith and confidence in the law enforcement apparatus. Accepting the premise that the just aim of a just armed conflict is to attain a more secure and more just state of affairs then existed prior to the conflict,[191] I advocate for prosecuting agencies to adopt the California Model when deciding not to seek the indictment of a police officer's use of deadly force upon another. The strengths of the California Model lie in its ability to promote (1) transparency of the law enforcement apparatus; (2) accountability, both of prosecutors and legislators; and (3) a political check on the prosecutor's power not to charge. Each of these strengths reinforces the legitimacy of the criminal justice system and faith in the law enforcement apparatus.

When a crime has been committed, society itself has been wronged. That is why criminal complaints proclaim "The STATE" versus the defendant. The prosecutor advocates on behalf of the public. Is it not

[191] One could object to the proposition that the aim of a just armed conflict involving a police officer is to attain a more secure and more just state of affairs then existed prior to the officer's use of deadly force. I have advocated for the application of the just war framework to the context of police use of deadly force. An alternative premise for the aim of a just armed conflict could be proposed without undermining the use of the just war framework for analyzing controversies surrounding the discourse of deadly force by law enforcement.

reasonable to hold the prosecutor accountable to those she advocates for? Should not the representative be held to answer by those she represents? The California Model answers these questions in the affirmative, and promotes the just resolution of an armed conflict where a police officer uses deadly force.