FOR WHEN THE SKY IS NOT THE LIMIT: NON-LETHAL DRONE USE BY LAW ENFORCEMENT

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I. INTRODUCTION

Michael Brown. Tamir Rice. Walter Scott. These three names gained notoriety across the United States in the past three years as unarmed African American males that died as a result of fatal police shootings.[1] In 2014, Michael Brown was shot and killed by Police Officer Darren Wilson after Wilson received a call that Brown robbed a convenience store.[2] Officer Wilson reported to the scene and, while there are differing reports of what happened that day, ultimately fired twelve rounds from his firearm, striking Brown and killing him.[3] Three months later, twelve-year-old Tamir Rice was shot and killed by Officer Timothy Loehmann after Rice pulled a pellet gun out from his waistband.[4] Officer Loehmann fired his own gun thinking Rice's pellet gun was real. It was not discovered until after the shooting that the "weapon" was in fact a toy gun.[5] In April 2015, Walter Scott was shot and killed by Officer Michael Slager who fired eight rounds into Walter's back as Walter ran away from the scene.[6]

Although the three scenarios recounted above might seem to suggest that the purpose of this Note is to address police brutality or racial injustice, it is not. Instead, the purpose of this Note is to address the question of whether police officers would feel less inclined to discharge their weapons if they were operating a weaponized drone from above. While the thought of a police officer operating a weaponized drone might seem like a scene pulled from an action-packed thriller movie, this situation is more realistic than most people might think. In August 2015, North Dakota became the first state to allow police to equip drones with non-lethal weapons, including tasers and rubber bullets.[7] While this law currently only affects a small portion of Americans, this legislation sets a

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[1] Larry Buchanan et al., *What Happened in Ferguson?*, N.Y. TIMES (Aug. 10 2015), http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html; Ashley Fantz, Steve Almasy, & Catherine E. Shoiceht, *Tamir Rice Shooting: No Charges for Officers*, CABLE NEWS NETWORK (Dec. 28, 2015), http://www.cnn.com/2015/12/28/us/tamir-rice-shooting/; Catherine E. Shoichet & Chandler Friedman, *Walter Scott Case: Michael Slager Released from Jail After Posting Bond*, CABLE NEWS NETWORK (Jan. 5, 2016), http://www.cnn.com/2016/01/04/us/south-carolina-michael-slager-bail/.

[2] Buchanan et al., *supra* note 1.

[3] Buchanan et al., *supra* note 1.

[4] Fantz et al., *supra* note 1.

[5] Fantz et al., *supra* note 1.

[6] Shoichet & Friedman, *supra* note 1.

[7] H.R. 1328, 64th Leg. Assemb., Reg. Sess., 2015 N.D. LAWS 239; Marco della Cava, *Police Taser Drones Authorized in N.D.*, USA TODAY (Aug. 28, 2015), http://www.usatoday.com/story/tech/2015/08/28/police-taser-drones-authorized—north-dakota/71319668/.

precedent for other states to follow. At the end of last year, Tennessee and South Carolina introduced drone laws to their state legislatures that give police the option to weaponize their drones.[8]

There are two theories behind the idea of weaponizing drones, but these theories were developed as part of deploying drones overseas and as principles of international law.[9] The first theory, one that opposes the deployment of weaponized drones, is the humanitarian view that holds deploying armed drones as wrong on all accounts because it dehumanizes war.[10] It creates what is known as a "PlayStation mentality/phenomenon" and increases the likelihood that soldiers would be more willing to shoot people from a distance rather than up close.[11] "Operators, rather than seeing human beings, perceive mere blips on a screen."[12] Proponents of this view believe that drones should not be weaponized or, in the alternative, call for an end to using drones for indiscriminate killings.[13]

The second philosophy is a protectionist view and supports the use of weaponized drones. The theory is that when a country is at war, the less boots deployed on the ground the better because then there are fewer casualties.[14] "The idea that drones offer a low cost, low risk solution to conflict is a seductive one in military circles."[15] Military personnel are captivated by the fact that they can win a war without ever having to incur a single casualty.[16]

The purpose of this Note is to examine whether, under international theories of firing armed drones, deploying non-lethally weaponized drones above United States soil would make American police officers more or less likely to shoot their weapons. This Note seeks to determine whether this drone deployment would create more hostility between the American people and police or if it could decrease the building tension

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[8] Joe Wolverton, II, *Tennessee, South Carolina Could "Green Light" Weaponized Police Drones*, THE NEW AM. (Dec. 3, 2015), http://www.thenewamerican.com/usnews/constitution/item/22238-tennessee-south-carolina-could-green-light-weaponized-police-drones.

[9] *See* Frederic Megret, Symposium, *The Legal and Ethical Limits of Technological Warfare: The Humanitarian Problem with Drones*, 2013 UTAH L. REV. 1283 (2013).

[10] *Id.*

[11] Chris Cole, Mary Dobbing, & Amy Hailwood, *Convenient Killing: Armed Drones and the 'PlayStation' Mentality*, (Sept. 2010), http://static1.squarespace.com/static/54c00acde4b022a64cd0266b/t/5584a5d0e4b040d94305c96e/1434756560707/drones-conv-killing.pdf.

[12] *Id*.

[13] *See* Hitomi Takemura, *Unmanned Aerial Vehicles: Humanization from International Humanitarian Law*, 32 WIS. INT'L L.J. 521 (2014).

[14] Megret, *supra* note 9, at 1302.

[15] Cole et al., *supra* note 11.

[16] Cole et al., *supra* note 11.

between the two parties. Part II of this Note looks at the constitutionality of deploying armed drones above American soil. Part III delves into the history of drones and their use in the military. Part IV discusses current drone laws at the federal and state level. Part V discusses international policies about armed drones and applies those theories to domestic law. Part VI debates whether deploying non-lethally armed drones by law enforcement above the United States would help deescalate rising police tensions with the public or whether they would exacerbate them further.

II. USE OF FORCE UNDER THE CONSTITUTION

In *Mathews v. Eldridge*, the Court established the framework for evaluating due process claims under the Fifth Amendment.[17] Under the Social Security Act, George Eldridge started receiving disability benefits in June of 1968, but in March 1972, a state agency reassessed his condition and found that his disability benefits should cease.[18] Eldridge commenced an action arguing that the administrative processes used by the Secretary of Health, Education, and Welfare were constitutionally invalid.[19] Eldridge believed he should continue to receive benefits while his appeal was pending.[20] In deciding whether the procedures in place were constitutionally adequate, the Court looked at three different factors:

> [f]irst, the private interest that w[ould] be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and . . . finally the Government's interest, including the function . . . and fiscal and administrative burdens that . . . [the] procedural requirement would entail.[21]

After examining these three factors, the Court ruled in favor of the Secretary and held that administrative procedures fully corresponded with due process.[22]

The comparative case to assess the due process clause under the Fourteenth Amendment for a state claim is *Johnson v. Glick*.[23] In *Johnson v. Glick*, Australia Johnson filed a complaint against the Warden of the Manhattan House of Detention for Men and Correction Officer John Fuller.[24] Fuller had reprimanded Johnson for not following his instructions, but when Johnson explained that he was following the

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17 Mathews v. Eldridge, 424 U.S. 319 (1976).
18 *Id.* at 323-24.
19 *Id.* at 324-25.
20 *Id.* at 325.
21 *Id.*
22 *Id*. at 349.
23 Johnson v. Glick, 481 F.2d 1028 (2nd Cir. 1973).
24 *Id.* at 1029.

direction of another officer, Fuller hit Johnson twice over the head.[25] After striking him in the head, Fuller left Johnson in a holding cell for two hours before returning him to his cell.[26] Later when Johnson requested medical attention, Fuller escorted Johnson from his cell and left him in a holding cell for another two hours before allowing him to see the doctor.[27] The court discussed the Eighth Amendment—freedom from cruel and unusual punishment—as well as the Fourteenth Amendment but decided that only the Fourteenth Amendment applied.[28] The court stated, "We assume that brutal police conduct violates the right guaranteed by the due process clause of the Fourteenth Amendment."[29]

However in 1989, the case *Graham v. Connor* overruled the decision of the *Johnson* court.[30] In *Graham*, a police officer stopped a car leaving a convenience store after one of the passengers in the car, Graham, was seen hastily leaving the store.[31] However, Graham, a diabetic, was not robbing the store. Graham was instead feeling the onset of an insulin reaction and was waiting on line at the convenience store to buy orange juice.[32] When he realized the wait was too long, he exited the store and asked the driver of the car to drive him to a friend's house instead.[33] The police, however, would not listen to Graham's diabetic predicament and instead proceeded to arrest him using extreme force.[34] "At some point during his encounter with the police, Graham sustained a broken foot, cuts on his wrist, a bruised forehead, and an injured shoulder; he also claim[ed] to have developed a loud ringing in his right ear . . . ."[35]

When the case was originally decided by the district court, the court held that the police's use of force violated Graham's Fourteenth Amendment right secured to him under due process of the law.[36] In analyzing due process, the court looked at the following factors,

> (1) the need for the application of force; (2) the relationship between that need and the amount of force that was used; (3) the extent of the injury inflicted; and (4) "[w]hether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose

25 *Id*.
26 *Id*.
27 *Id* at 1030.
28 *Id*.
29 *Id*. at 1031.
30 Graham v. Connor, 490 U.S. 386, 397 (1989).
31 *Id*. at 388-89.
32 *Id*.
33 *Id*.
34 *Id*.
35 *Id*. at 390.
36 Graham v. Connor, 490 U.S. 386, 386 (1989).

of causing harm."[37]

The Supreme Court decided against using the due process test to assess the violation of Graham's rights and instead looked to the Fourth Amendment's prohibition against "unreasonable search and seizure."[38] "[A]ll claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its objective 'reasonableness' standard, rather than under a 'substantive due process' approach."[39] The Fourth Amendment analysis requires balancing the individual's interest with the government's stake.[40] Therefore, the Court determined that the district court erred in its decision, and the case was remanded to the lower court.[41]

III. DRONE BACKGROUND

An unmanned aerial vehicle ("UAV") or drone "is the popular description for anything that flies without a pilot at the controls, whether it is controlled directly by an operator on the ground or is capable of autonomous flight with no direct human intervention."[42] Drones have received a firestorm of criticism and commentary in the past fifteen years during the "War on Terror" in Iraq and Afghanistan.[43] However, this feat in modern technology is not as new as popularly assumed.[44] "In World War II, radio-controlled B-24s were sent on bombing missions over Germany. Remotely controlled aircrafts carried still cameras over battlefields in Vietnam. The Israeli Army used drones for surveillance and as decoys over Lebanon's Bekaa Valley in 1982."[45] In 1973, aerospace engineer Abe Karem created a new type of drone, known as Amber, which eventually adapted into the Gnat 750 under General

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[37] *Id*. at 390 (quoting Graham v. Charlotte, 644 F. Supp. 246, 248 (W.D.N.C. 1986)).

[38] *Id*. at 397.

[39] *Id*. at 395.

[40] *Id*. at 396.

[41] *Id*. at 399.

[42] Mark Corcoran, *Drone Wars: The Definition Dogfight*, AUSTRALIAN BROAD. CORP. (Feb. 28, 2013), http://www.abc.net.au/news/2013-03-01/drone-wars-the-definition-dogfight/4546598.

[43] Charlie Savage, *U.N. Report Highly Critical of U.S. Drone Attacks*, N.Y. TIMES (June 2, 2010), http://www.nytimes.com/2010/06/03/world/03drones.html.

[44] Ajoke Oyegunle, *Drones in the Homeland: A Potential Privacy Obstruction Under the Fourth Amendment and the Common Law Trespass Doctrine*, 21 COMMLAW CONSPECTUS 365, 370 (2013).

[45] Mark Bowden, *How the Predator Drone Changed the Character of War*, SMITHSONIAN MAGAZINE (Nov. 2013), http://www.smithsonianmag.com/history/how-the-predator-drone-changed-the-character-of-war-3794671/?no-ist.

Atomics.[46] This unprecedented piece of equipment could fly for twelve hours at a time and gave military commanders access to see as far as sixty miles.[47]

> By July 1994 General Atomics had incorporated satellite links into the Gnat itself, giving the drone a gently rounded nose that belied its pugnacious new name: Predator. America now had a platform that could loiter over a target area for days[] [and] provide infra-red and optical surveillance in all weathers . . . .[48]

On February 4, 2002, the United States used a UAV in Afghanistan for the first targeted killing executed by a drone in American history.[49] The Central Intelligence Agency ("CIA") believed that the target "tall man" was Osama bin Laden, but it was mistaken.[50] "After the February 2002 strike, military officials quickly acknowledged that the 'tall man' was not bin Laden. But, they insisted the targets were 'legitimate,' although they struggled to explain why, using vague and even coy language to cover up what appeared to be uncertainty."[51] Since the drone strike in February of 2002, the United States has carried out an increasingly large number of drone strikes in the War on Terror. The Bureau of Investigative Journalism has estimated that in Pakistan alone from 2004 to January 31, 2015, between 2,400 and 3,000 people have been killed, while over 1,000 more have been injured.[52] In May of 2013, President Barak Obama acknowledged drone related deaths, especially of innocent civilians in the Middle East. He stated, "It is a hard fact that U.S. strikes have resulted in civilian casualties . . . These deaths will haunt us."[53]

A. Drones Used to Kill United States Citizens Abroad

One of the most newsworthy stories about drones broke in May 2014 when the Justice Department made public a secret memo from 2011 that

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[46] *The Dronefather*, ECONOMIST (Dec. 1, 2012), http://www.economist.com/news/technology-quarterly/21567205-abe-karem-created-robotic-plane-transformed-way-modern-warfare.

[47] Bowden, *supra* note 45.

[48] *The Dronefather*, *supra* note 46.

[49] John Sifton, *A Brief History of Drones*, THE NATION (Feb. 7, 2012), http://www.thenation.com/article/brief-history-drones/.

[50] *Id.*

[51] *Id.*

[52] Jack Serle, *Almost 2,500 Now Killed by Covert US Drone Strikes Since Obama Inauguration Six Years Ago: The Bureau's Report for January 2015*, THE BUREAU OF INVESTIGATIVE JOURNALISM (Feb. 2, 2015), https://www.thebureauinvestigates.com/2015/02/02/almost-2500-killed-covert-us-drone-strikes-obama-inauguration/.

[53] Fawaz Gerges, *Why Drone Strikes are Real Enemy in 'War on Terror'*, CABLE NEWS NETWORK (June 21, 2013), http://www.cnn.com/2013/06/21/opinion/terrorism-gerges/.

justified the killing of American terrorist suspects overseas.[54] In September 2011, drones killed four United States citizens in Yemen, including cleric Anwar al-Awlaki, who was targeted by the CIA as the "head of foreign operations for al-Qaeda in the Arabian Peninsula."[55] In the years leading up to his death, al-Awlaki attempted multiple terrorist plots that were foiled. In 2009, al-Awlaki directed Umar Farouk Abdulmutallab to detonate a bomb hidden in his underwear on a Delta Airlines flight bound for Detroit on Christmas.[56] Additionally, the instructions provided that Abdulmutallab detonate the bomb only after the plane was flying over United States soil.[57] Al-Awlaki was also involved in a 2010 terror plot to blow up a United States cargo plane that involved planting bombs in printers.[58] In addition to the death of al-Awlaki, three other American citizens were killed by drone strikes abroad. Samir Kahn, Abdul Rahman Anwar al-Awlaki, and Jude Kenan Mohammed "were not targeted by the United States" but were killed nonetheless.[59] Abdul Rahman Anwar al-Awlaki, the sixteen-year-old son of Al-Awlaki, was killed about two weeks after his father was killed in Pakistan.[60]

Information regarding the drone strike became public after a Freedom of Information Act ("FOIA") request was filed for the memo in the midst of the nomination of David J. Barron for a federal appeals court judgeship.[61] Originally the federal court rejected the FOIA request, but the Second Circuit reversed and ordered the release of the memo.[62] Barron was a Harvard University law professor and authored the secret memo that legally justified the killings of American citizens abroad.[63] Barron was eventually confirmed by the Senate and currently serves on

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[54] Eyder Peralta, *U.S. Court Releases Obama Administration's 'Drone Memo',* NPR (June 23, 2014), http://www.npr.org/sections/thetwo-way/2014/06/23/324863099/u-s-court-releases-obama-administrations-drone-memo.

[55] Karen DeYoung & Sari Horowitz, *U.S. to Reveal Justification for Drone Strikes Against American Citizens*, WASH. POST (May 20, 2014), https://www.washingtonpost.com/world/national-security/us-to-reveal-justification-for-drone-strikes-against-american-citizens/2014/05/20/f607bb60-e066-11e3-8dcc-d6b7fede081a_story.html.

[56] Carol Cratty & Joe Johns, *Holder: Drone Strikes Have Killed Four Americans Since 2009*, CABLE NEWS NETWORK (May 23, 2013), http://www.cnn.com/2013/05/22/politics/drone-strikes-americans/.

[57] *Id*.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] Andrew Westney, *2nd Circ. Releases Redacted Memo on Drone Attacks*, LAW360 (June 23, 2014), http://www.law360.com/articles/550696/2nd-circ-releases-redacted-memo-on-drone-attacks.

[62] *Id*.

[63] DeYoung & Horowitz, *supra* note 55.

the United States Court of Appeals for the First Circuit.[64]

The Department of Justice White Paper entitled, "Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associate Force," sets out the legal reasoning for the constitutionality of killing an American citizen living abroad that is involved in terrorist operations.[65] The Department of Justice concluded that a U.S. operation that uses lethal force in a foreign country against a U.S. citizen who is a senior operational leader of al-Qa'ida or an associated force of al-Qa'ida would only be lawful if:

> (1) an informed, high level official of the U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States; (2) capture is infeasible, and the United States continues to monitor whether capture becomes feasible; and (3) the operation would be conducted in a manner consistent with applicable law of war principles.[66]

The White Paper determined two sets of legal reasoning for the constitutionality of killing a United States citizen abroad.[67] The first legal basis is established under the Due Process Clause of the Fifth Amendment and the due process balancing test under *Mathews v. Eldridge*.[68] As mentioned above, under *Mathews,* the test for due process consists of three factors.[69] The test first looks at "the private interest that will be affected by the official action."[70] Second, it examines "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards."[71] Lastly, the test examines "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[72]

Under the *Mathews* test, Barron justified the killing of al-Awlaki.[73] Although there is no private interest more substantial than one's own life, when it is weighed against the protection and lives of millions of

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64 Adam Serwer, *Senate Confirms David Barron to be Federal Judge*, MSNBC (May 22, 2014), http://www.msnbc.com/msnbc/david-barron-confirmed.

65 DEP'T OF JUSTICE, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen who is a Senior Operational Leader of Al-Qa'ida or an Associate Force* (Dep't of Justice White Paper, Nov. 8, 2011), http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf [*hereinafter* White Paper].

66 *Id.* at 2.

67 *Id.*

68 *Id.*

69 Mathews v. Eldridge, 424 U.S. 319, 321 (1976).

70 *Id.* at 335.

71 *Id.*

72 *Id.*

73 White Paper, *supra* note 65, at 6.

Americans, the interest in killing one American citizen, who is also a terrorist, is very compelling.[74]

> The realities of combat render certain uses of force "necessary and appropriate," including the use of force against U.S. citizens who have joined enemy forces in armed conflict against the United States and whose activities pose an imminent threat of violent attack against the United States – and "due process" analysis need not blink at those realities.[75]

The government has a substantial interest in protecting their citizens and preventing an imminent attack.[76]

The second legal basis implemented by the White Paper is the Fourth Amendment's unreasonable search and seizure.[77] "The Supreme Court has made clear that the constitutionality of a seizure is determined by 'balancing the nature and quality of the intrusion on the individual's Fourth Amendment interest against the importance of the governmental interest alleged to justify the intrusion.'"[78] In other words, a "reasonableness test" is used.[79]

In this circumstance, the reasonableness test weighs heavily in favor of killing a United States citizen, who is an al-Qaeda leader abroad, in order to protect millions of United States citizens living on American soil.[80]

> [I]n circumstances where the targeted person is an operational leader of an enemy force and an informed, high-level government official has determined that he poses an imminent threat of violent attack against the United States, and those conducting the operation would carry out the operation only if capture were infeasible, the use of lethal force would not violate the Fourth Amendment.[81]

When a U.S. citizen is a leader of a terrorist organization, it is constitutionally permissible for the U.S. government to kill that leader in another country because they pose an imminent threat to the American people.[82]

In a press conference regarding the memo, President Obama stated, "For the record, I do not believe it would be constitutional for the government to target and kill any U.S. citizen – with a drone, or with a

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74 White Paper, *supra* note 65, at 6

75 White Paper, *supra* note 65, at 6 (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 531 (2004)).

76 White Paper, *supra* note 65, at 6.

77 White Paper, *supra* note 65, at 2.

78 White Paper, *supra* note 65, at 9 (quoting Tennessee v. Garner, 471 U.S. 1, 8 (1985)).

79 White Paper, *supra* note 65, at 9.

80 White Paper, *supra* note 65, at 9.

81 White Paper, *supra* note 65, at 9.

82 White Paper, *supra* note 65, at 9.

shotgun – without due process, nor should any president deploy armed drones over U.S. soil."[83] Although no lethally weaponized drones have been approved to fly over American soil, North Dakota passed a law in April 2015 that allows law enforcement to deploy non-lethally weaponized drones against their residents.[84]

IV. DRONES FLYING OVER THE UNITED STATES

Before North Dakota passed its law in 2015, most state laws focused primarily on regulation of UAVs for surveillance purposes and for agricultural or hunting objectives.[85] In February 2015 the Federal Aviation Administration ("FAA"), under the Department of Transportation ("DOT"), set forth the federal government's proposed rules on drone regulation.[86] However, these are only *proposed* rules, and they have no effect on the current states that have passed UAV legislation.

A. Federal Law

The FAA Modernization and Reform Act of 2012, which was established to decipher how to incorporate UAVs into the national airspace, prompted the formation of the "Operation and Certification of Small Unmanned Aircraft Systems."[87] Under the proposed rule, UAVs could be used for multiple purposes, including "crop monitoring and inspecting, research and development, educational and academic uses, power-line and pipeline inspection . . . , antenna inspection, aiding certain rescue operations . . . , bridge inspection, aerial photography, and wildlife nesting area evaluations."[88] Operation of drones would need to adhere to strict limitations. Some restrictions include that UAVs must weigh less than fifty-five pounds, be within the line of sight of the operator at all times, not fly over 100 miles per hour, and only be flown during the day.[89] Additionally, the operator of the drone would need to meet certain standards. For example, the operator would have to pass an aeronautic knowledge test, the Transportation and Security Administration ("TSA")

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83 DeYoung & Horowitz, *supra* note 55.

84 H.R. 1328, 64th Leg. Assemb., Reg. Sess. § 5(1), 2015 N.D. LAWS 239.

85 *Current Unmanned Aircraft State Law Landscape*, NAT'L CONF. OF STATE LEGS. (Mar. 31, 2017), http://www.ncsl.org/research/transportation/current-unmanned-aircraft-state-law-landscape.aspx.

86 Operation and Certification of Small Unmanned Aerial Vehicles, 80 Fed. Reg. 9544 (proposed Feb. 23, 2015) (to be codified at 14 C.F.R. pts. 21, 43, 45, 47, 61, 91, 101, 107, & 183).

87 Operation and Certification of Small Unmanned Aerial Vehicles, 80 Fed. Reg. 9544.

88 Operation and Certification of Small Unmanned Aerial Vehicles, 80 Fed. Reg. 9545.

89 Operation and Certification of Small Unmanned Aerial Vehicles, 80 Fed. Reg. 9546.

would need to scrutinize the possible operator, and the operator would need to be at least seventeen years old.[90]

The requirements established by the FAA are an attempt to address two specific safety concerns.[91] "The first safety concern is whether the person operating the small unmanned aircraft, who would be physically separated from the aircraft during flight, would have the ability to see manned aircraft in the air in time to prevent a mid-air collision between the small unmanned aircraft and another aircraft."[92] The second concern the rule attempts to correct is the possibility that the control link, which connects the UAV with the operator's control system, would fail.[93] These are valid safety concerns, but the proposed rule only reaches civilian operation of small UAVs. The regulations fail to reach law enforcement personnel or model aircrafts.[94] A "model aircraft" is an "[unmanned aircraft system ("UAS")] that is used for hobby or recreational purposes."[95]

> To date, the FAA has used its discretion to not bring enforcement action against model-aircraft operations that comply with AC 91-57. However, the use of discretion to permit continuing violations of FAA statutes and regulations is not a viable long-term solution for incorporating UAS operation into the [national air space].[96]

Advisory Circular 91-57 simply encourages model aircraft flyers to take precautions that do not harm those around them.[97] This rule, however, has shown to be ineffective because there are reports of drones flying in restricted airport flying space every day on the news.[98]

On April 22, 2015, Texan House Representative Michael C. Burgess introduced House Resolution 1939 to amend the FAA Modernization and Reform Act of 2012 to prevent UAVs from operating in national airspace.[99] The amendment is known as the "No Armed Drones Act of 2015" ("NADA").[100] The main language of the statute says that the

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[90] *Id.*

[91] Operation and Certification of Small Unmanned Aerial Vehicles, 80 Fed. Reg. 9548-49.

[92] Operation and Certification of Small Unmanned Aerial Vehicles, 80 Fed. Reg. 9548.

[93] Operation and Certification of Small Unmanned Aerial Vehicles, 80 Fed. Reg. 9544, 9549.

[94] *Id.*

[95] Operation and Certification of Small Unmanned Aerial Vehicles, 80 Fed. Reg. 9544, 9550.

[96] *Id.*

[97] *Id.*

[98] Bruce Bennett, *Report Finds Scores of Close Encounters Between Pilots, Drones*, CBS (Dec. 11, 2015), http://www.cbsnews.com/news/drones-pilots-close-encounters-report/.

[99] No Armed Drones Act of 2015, H.R. 1939, 114th Cong. (2015).

[100] *Id.*

"Secretary of Transportation may not authorize a person to operate an unmanned aircraft system in the national airspace system for the purpose, in whole or in part, of using the unmanned aircraft system as a weapon or to deliver a weapon against a person or property."[101] However, there is an exception for the Secretary of Transportation to permit armed public UAVs related to operations conducted by United States Customs and Border Protection, the Department of Defense, and government entities for national defense purposes or in response to terrorism.[102] Although this Bill has a long road before it is passed, it has the potential to preempt any state law that allows state law enforcement to equip their drones with lethal or non-lethal weapons.[103]

B. State Laws

In 2015, twenty states passed twenty-six pieces of legislation on drones: Arkansas, California, Florida, Hawaii, Illinois, Louisiana, Maine, Maryland, Michigan, Mississippi, Nevada, New Hampshire, North Carolina, North Dakota, Oregon, Tennessee, Texas, Utah, Virginia and West Virginia.[104] States such as Hawaii, Maryland, and Illinois have not passed legislation in order to facilitate the use of drones in their airspace, but rather have passed UAV laws to become more knowledgeable.[105] For example, Hawaii's UAV law discusses testing sites for drones, while Illinois' law sets up a task force to consider use of drones, and Maryland's law simply discusses the benefits of using UAVs.[106] Five other states approved resolutions associated with drones, including Alaska, Georgia, New Mexico, Pennsylvania, and Rhode Island.[107] In 2016, the number of states addressing drone laws increased to thirty-eight, including: Alaska, Arizona, California, Delaware, Idaho, Illinois, Indiana, Kansas, Louisiana, Michigan, Oklahoma, Oregon, Rhode Island, Tennessee, Utah, Vermont, Virginia and Wisconsin.[108] Moreover in 2017, five states, Kentucky, South Dakota, Utah, Virginia, and Wyoming,

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101 *Id.*

102 *Id.*

103 U.S. CONST. art. VI, § 2.

104 *State Unmanned Aircraft State Law Landscape*, NAT'L CONF. OF STATE LEGS. (Sept. 30, 2016), http://www.ncsl.org/research/transportation/state-unmanned-aircraft-systems-uas-2015-legislation.aspx.

105 *Id.*

106 S.B. 661, 28th Leg., Reg. Sess., 2015 HAW. SESS. LAWS 208; S.B. 44, 99th Gen. Assemb., 20 ILL. COMP. STAT. 5065/1 (2015); S.B. 370, 435th Gen. Assemb., Reg. Sess., 2015 MD. LAWS 164.

107 *State Unmanned Aircraft State Law Landscape*, *supra* note 104.

108 *Current Unmanned Aircraft State Law Landscape*, *supra* note 85.

passed eight pieces of legislation.[109]

When comparing all state drone laws, it seems most laws address the uses of UAVs for hunting and agricultural purposes. For example, Michigan passed a law that prohibits operating a UAV "that uses aerodynamic force to achieve flight or that operates on the surface of the water or underwater, to affect animal or fish behavior in order to hinder or prevent the lawful taking of an animal or fish."[110] Similarly, New Hampshire's law forbids conducting drone surveillance on those that are lawfully hunting, fishing, or trapping animals unless prior written consent was given.[111] Almost in direct opposition is West Virginia's law that prohibits hunting animals with the assistance of a UAV.[112] Louisiana is an outlier state that strictly regulates procedures of drones for agricultural purposes.[113]

Other drone laws that were passed address the issue of privacy. Arkansas, for example, has a bill that addresses the use of unmanned aerial vehicles for voyeurism.[114] The statute reads, "It is unlawful to knowingly use an unmanned vehicle or aircraft . . . that is concealed, flown in a manner to escape detection, or disguised to secretly or surreptitiously videotape, film, photograph, record, or view by electronic means a person" without one's consent and without one's knowledge for one's own gratification.[115] California passed its law on UAVs in response to the paparazzi's use of drones for spying on celebrities, and discusses issues of trespass and invasion of privacy.[116] Under California law,

> A person is liable for physical invasion of privacy when the person knowingly enters onto the land or into the airspace above the land of another person without permission or otherwise commits a trespass in order to capture any visual image, sound recording or other physical impression of the plaintiff engaging in a private, personal, or familial activity and the invasion occurs in a manner that is offensive to a reasonable person.[117]

Mississippi's law also concerns privacy as well and criminalizes the

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109 *Current Unmanned Aircraft State Law Landscape*, *supra* note 85.

110 S.B. 54, 98th Leg., Reg. Sess., 2015 MICH. PUB. ACTS 12.

111 S.B. 22, 164th Sess., Reg. Sess., 2015 N.H. LAWS ch. 38, § 1.

112 H.B. 2515 82nd Leg., Reg. Sess., 2015 W. VA. ACTS ch. 242.

113 S.B. 183, 2015 Reg. Sess., 2015 LA. ACT 166.

114 H.B. 1349, 90th Gen. Assemb., Reg. Sess., 2015 ARK. ACTS 293.

115 *Id.*

116 Assemb. B. 856, 2015-2016 Reg. Sess., 2015 CAL. STATS. ch. 521, § 1; Amanda Fitzsimmons & Monica D. Scott, *Drones in California: The Proposals*, LAW360 (Mar. 8, 2016), https://www.law360.com/articles/767445/drones-in-california-the-laws-the-proposals.

117 Assemb. B. 856, 2015-2016 Reg. Sess., 2015 CAL. STATS. ch. 521, §1.

use of UAVs for "peeping toms."[118]

Other states have chosen to strictly regulate law enforcement's use of drones. Florida's "Freedom from Unwarranted Surveillance Act" is very comprehensive and provides Florida law enforcement with a wide range of uses for drones.[119] Law enforcement agencies are allowed to use drones for surveillance and investigation if they first obtain a warrant signed by a judge.[120] The police are also allowed to use UAVs if "swift action is needed to prevent imminent danger to life or serious damage to property, to forestall the imminent escape of a suspect or the destruction of evidence, or to achieve purposes including, but not limited to, facilitating the search for a missing person."[121] Additionally, law enforcement can use UAVs to counter a possible terroristic threat if deemed credible by Homeland Security.[122]

Utah is another state that allows law enforcement to "obtain, receive, or use data acquired through" a UAV if the information is received pursuant to a warrant or "to locate a lost or missing person in an area in which a person has no reasonable expectation of privacy."[123] In addition, Utah's drone law, entitled the "Government Use of Unmanned Aerial Vehicles" statute, sets forth data retention and reporting requirements.[124]

As another example, Virginia's drone law allows law enforcement to investigate suspects with a UAV pursuant to a warrant and also allows police to use a drone without a warrant in certain exceptions, including Amber Alerts, Silver Alerts, Blue Alerts, and where there is immediate danger to any person.[125] Similarly, Nevada's law allows drones to be used by law enforcement after first obtaining a warrant.[126] However, Nevada law includes five exceptions to the warrant provision, which include if "a person has committed a crime, is committing a crime, or is about to commit a crime" and if there is an imminent threat to an individual or the public.[127] Nevada's law also sets forth a provision prohibiting the weaponization of UAVs, but this section presumably criminalizes these actions for civilians.[128] It does not make mention of

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118 S.B. 2022, 2015 Leg., Reg. Sess., 2015 MISS. LAWS 489.

119 S.B. 766 177th Leg., Reg. Sess., 2015 FLA. LAWS ch. 26.

120 *Id.*

121 *Id.*

122 *Id.*

123 H.B. 296, 2015 Gen. Sess., 2016 UTAH LAWS 101.

124 *Id.*

125 H.B. 2125, 2015 Sess., Gen. Assemb., 2015 W. VA. ACTS ch. 764; S.B. 1301, 2015 Sess., Gen. Assemb., 2015 W. VA. ACTS ch. 774.

126 Assemb. B. 239, 78th Leg., 2015 NEV. STAT. 327.

127 *Id.*

128 *Id.*

Nevada law enforcement weaponizing drones. Maine's law takes a similar position as Nevada's law with regard to law enforcement drone use in that Maine's law requires a warrant for an investigation with the assistance of a drone; however, it also sets minimum standards for the operators of the drone, including training and certification requirements.[129]

Oregon's drone legislation discusses law enforcement's use of drones, and it is very comprehensive. Like most states, Oregon's law allows drones to help the police after they have obtained a warrant or if there is an emergency situation.[130] However, Oregon also has a specific section in its statute discussing registration requirements and the filing of annual reports.[131] Most noteworthy is Section 9, which states, "A public body may not operate an unmanned aircraft system that is capable of firing a bullet or other projectile, directing a laser, or otherwise being used as a weapon."[132] This law is in direct opposition to North Dakota's drone law.

The North Dakota drone law, enacted on April 15, 2015, has garnered much media attention.[133] Section 5 of North Dakota law (House Bill 1238) states that a "law enforcement agency may not authorize the use of, including granting a permit to use, an unmanned aerial vehicle armed with lethal weapons."[134] However, although this law specifically prohibits lethal weapons, there is no limit on non-lethal weapons, which includes tasers, rubber bullets, bean bags, and tear gas.[135] Originally, the objective of introducing UAV legislation in North Dakota was to require police to obtain a warrant before investigating with the use of a drone. It was also supposed to prohibit the weaponization of drones.[136] However, after intense lobbying from law enforcement groups, legislation was passed with a loophole that allowed the installation of non-lethal weapons on drones.[137] The law specifically states that a law enforcement agency cannot use a UAV armed with lethal weapons, but it makes no mention

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129 Legis. Doc. 25, 127th Leg., First Reg. Sess., 2015 ME. LAWS 307.

130 H.B. 4066, 78th Leg. Assemb., 2016 Reg. Sess., 2016 ORE. LAWS 72.

131 *Id.*

132 *Id.*

133 Laura Wagner, *North Dakota Legalizes Armed Police Drones*, NAT'L PUB. RADIO (Aug. 27, 2015), http://www.npr.org/sections/thetwo-way/2015/08/27/435301160/north-dakota-legalizes-armed-police-drones; Marco della Cava, *Police Taser Drones Authorized in N.D.*, USA TODAY (Aug. 28, 2015), http://www.usatoday.com/story/tech/2015/08/28/police-taser-drones-authorized—north-dakota/71319668/.

134 H.R. 1328, 64th Leg. Assemb., Reg. Sess., 2015 N.D. LAWS 239.

135 Wagner, *supra* note 133.

136 Wagner, *supra* note 133.

137 Wagner, *supra* note 133.

of non-lethal weapons.[138]

North Dakota Republican House Representative Rick Becker, sponsor of the original bill, vowed to try to reverse this portion of the law when the House reconvened in two years.[139] However, the North Dakota State Legislature reconvened in 2017 and left the current legislation in place.[140] To pass the section of the Bill that required police to acquire a search warrant when using a drone, Becker was forced to make concessions on the issue of weaponization.[141]

The North Dakota law is in direct opposition to the viewpoint of the American Civil Liberties Union ("ACLU"), which has firmly held that UAVs should not have lethal *or* non-lethal weapons.[142] Tasers, for example, deliver a 50,000-volt shock and are designed to override a subject's central nervous system.[143] Amnesty International reported that since 2001, there have been 670 deaths from the use of tasers.[144] Between January and November 2015, police tasers killed at least forty-eight people in the United States.[145] Additionally, "Rubber bullets, beanbags and tear gas canisters have also caused extensive injuries and even death."[146]

V. INTERNATIONAL HUMANITARIAN LAW COMPARED TO THE REASONABLENESS STANDARD OF DOMESTIC POLICING

At the core of international humanitarian law ("IHL") are four fundamental principles: humanity, distinction, necessity, and proportionality.[147] "Humanity" is the understanding that everyone has the capability to show compassion and respect to all people, even their

138 Wagner, *supra* note 133.

139 Wagner, *supra* note 133.

140 Andrew Hazzard, *ND House: Nonlethal Drone Weapons Stay Legal for Law Enforcement*, DICKINSON PRESS (Feb. 21, 2017), http://www.thedickinsonpress.com/news/4222456-nd-house-nonlethal-drone-weapons-stay-legal-law-enforcement.

141 *Id*.

142 *Domestic Drones*, AM. CIVIL LIBERTIES UNION, https://www.aclu.org/issues/privacy-technology/surveillance-technologies/domestic-drones (last visited Feb. 2, 2017).

143 Michelle E. McStravick, *The Shocking Truth: Law Enforcement's Use and Abuse of Tasers and the Need for Reform*, 56 VILL. L. REV. 363, 372 (2011).

144 Karen Kucher, *Tasers Give Cops an Option to Guns, but Risks Exists*, SAN DIEGO UNION TRIBUNE (Jan. 2, 2016), http://www.sandiegouniontribune.com/news/2016/jan/02/tasers-offer-cops-option-to-guns-but-come-with/.

145 Cheryl W. Thompson & Mark Berman, *Improper Techniques, Increased Risks: Deaths Have Raised Questions About the Risk of Excessive or Improper Deployment of Tasers*, WASH. POST (Nov. 26, 2015), http://www.washingtonpost.com/sf/investigative/2015/11/26/improper-techniques-increased-risks/?utm_term=.0a13cf6ef606.

146 Wagner, *supra* note 133.

147 David Akerson, *Applying Jus in Bello Proportionality to Drone Warfare*, 16 OR. REV. INT'L. L. 173, 178 (2014).

enemies.[148] "Distinction" means that parties to an armed conflict should only target militarized areas and avoid heavily populated civilian areas.[149] "Necessity" is the third element and, while international law recognizes that destruction and casualties are a byproduct of war, it also understands that opposing parties do not have free range to do whatever they want. The final principle examines proportionality. As such, "IHL proportionality is rooted in humanitarianism. An attack is proportionate when the expected civilian harm is not excessive in relation to the expected value of the attack."[150]

The advantages of using drones in a military setting are very clear. First, military drones can decrease casualties.[151] When attacking an opposing military target, soldiers can sit far away in a control room without having to risk their lives on the battlefield.[152] Second, drones cost less money to operate, can fly for longer periods of time, and do not have the limitations that restrict humans.[153] UAVs "are cheaper to make and carry an array of sensors and cameras that can watch both day and night. Without a pilot, drones can fly at altitudes of up to 33,000 feet without needing pressurization and temperature control."[154] Furthermore, unlike a pilot, drones do not get drowsy or drained.[155] Pilots in the air cannot simply switch operators midflight, while drone operators can continuously rotate in a control room. Some drones can stay in the air for over forty hours of flight.[156] Lastly, drones "greatly reduc[e] the time between the identification of a potential target that could be a great distance away and the deployment of deadly force against that target."[157]

Although there are many advantages to using drones in a war setting, there is a distinct drawback in using an armed drone in armed conflict. Detaching an individual from the battle creates a conflict with the first

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148 IHL Resource Center, *Basic Principles of IHL* (Oct. 30, 2013), https://www.diakonia.se/en/ihl/the-law/international-humanitarian-law-1/introduction-to-ihl/principles-of-international-law/.

149 Rule of Law in Armed Conflicts Project, *International Humanitarian Law*, GENEVA ACADEMY OF INT'L HUMANITARIAN LAW AND HUMAN RIGHTS, http://www.geneva-academy.ch/RULAC/international_humanitarian_law.php (last accessed Apr. 2, 2017).

150 Akerson, *supra* note 147, at 185.

151 Cole et al., *supra* note 11.

152 Cole et al., *supra* note 11.

153 Cole et al., *supra* note 11.

154 Cole et al., *supra* note 11.

155 Cole et al., *supra* note 11.

156 Cole et al., *supra* note 11.

157 Special Rapporteur Christof Heyns, *Promotion and Protection of Human Rights: Human Rights Questions, Including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms*, GAOR, 68th Sess., ¶ 18, U.N. Doc. A/68/382 (Sep. 13, 2013).

principle of IHL—humanity. Moreover, "There is, symbolically, an extraordinarily dehumanizing aspect to drone warfare in that it deprives its targets from ever even being able to engage in a humanitarian gesture that would manifest their good will and constitute as moral agents of war."[158]

Although drones have only been used in armed conflicts abroad, there have been discussions about using lethally armed drones strikes on American soil to stop domestic terrorists.[159] Discussions on this controversial topic arose after President Barak Obama ordered the targeted drone killing of al-Alwaki, the al-Qaeda leader and American citizen. It was ultimately ruled that the killing was constitutional, but it also queried whether a targeted killing of an American citizen could be undertaken on American soil.[160] The Authorization for the Use of Military Force ("AUMF"), coupled with the laws of armed conflict, creates a sufficient basis for United States military to use an armed drone to target American citizen terrorists on American soil.[161] There are certain precautions and threshold requirements that the United States military must meet before they follow through with a targeted killing. For example, "First, the U.S. government has determined after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States; second, capture is not feasible; and third the operation would be conducted in a manner consistent with applicable law of war principles."[162]

Although it has been established that the United States military can use armed drones against American citizens that are terrorists, the question arises as to whether armed drones can be used on American citizens who are not terrorists but who are criminals that commit heinous acts. The Posse Comitatus Act "was enacted after the Civil War to keep local civilian law enforcement from using military personnel and equipment. It stands for the principle that the military should never be used to enforce civil laws in the United States."[163] This would presumably prevent the local law enforcement from using armed drones on their own because drones first started as military equipment. However, Title 10, Section 372 of the United States Code, which is titled

158 Megret, *supra* note 9, at 1312.

159 Letter from Eric H. Holder Jr., Attorney General, to Sen. Rand Paul (Mar. 4, 2013), *available at* https://www.paul.senate.gov/files/documents/BrennanHolder Response.pdf.

160 Marshall Thompson, Comment, *The Legality of Armed Drone Strikes Against U.S. Citizens Within the United States*, 2013 BYU L. REV. 153, 153-54 (2013).

161 *Id*.

162 *Id*. at 170.

163 *Id*. at 167.

"Use of Military Equipment and Facilities," states that "[t]he Secretary of Defense may, in accordance with other applicable law, make available any equipment (including associated supplies or spare parts), base facility, or research facility of the Department of Defense to any Federal, State, or local civilian law enforcement official for law enforcement purposes."[164] This statute presumably allows for military equipment, such as drones, to be utilized by law enforcement officials for policing purposes.[165]

VI. ANALYSIS

The core humanitarian principles, specifically proportionality, used in international law can be compared to the use of force and reasonableness requirements arising from the Fourth Amendment and *Graham v. Connor*. While the proportionality principle looks at civilian harm compared to the expected value of the attack for the aggressor, the Fourth Amendment's balancing test requires an evaluation of the protected victim's individual privacy interest in comparison to the government's stake.[166] When conducting a Fourth Amendment analysis of excessive force, it is necessary to look at "(1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether he is actively resisting arrest or attempting to evade arrest by flight."[167] Simply put, did the officer take reasonable action? While the presence of armed drones in war has increased, international law scholars have debated whether the existence of armed drones has had a positive or negative impact on war.[168] These findings can be used to help determine whether deploying armed drones by law enforcement officials in the United States will escalate or diminish the problem of police brutality in America. Based on all the information set forth above, allowing local police departments to deploy non-lethally armed drones on American soil would only escalate tensions between the American people and law enforcement. The use of armed drones by law enforcement should be completely banned.

Deploying armed drones by law enforcement officials in the United States could bring many of the same benefits that drones have provided

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164 10 U.S.C. § 372 (2017).

165 Eric Brumfield, *Armed Drones for Law Enforcement: Why it Might be Time to Re-Examine the Current Use of Force Standard*, 46 MCGEORGE L. REV. 543, 550 (2014).

166 Graham v. Connor, 490 U.S. 386, 396 (1989).

167 McStravick, *supra* note 143, at 372 (quoting *Graham*, 490 U.S. at 396).

168 Akerson, *supra* note 147. *Contra* Doyle McManus, *The Drone Warfare Drawbacks*, L.A. TIMES (July 5, 2014), http://www.latimes.com/opinion/op-ed/la-oe-mcmanus-column-drones-20140706-column.html.

in a war setting, most importantly the protection of police officers. Cases of police brutality have been springing up across the country, and while some police officers may have abused their power and privilege that accompanies gun ownership, many cases involved police officers who were generally fearful for their lives and were under the belief that they were in a life-threatening situation.[169] At Washington State University Spokane, officers participated in a study with a state-of-the-art stimulator known as the Violence Confrontation Lab.[170] One reporter from the media outlet, Today, "observed on monitors as one officer walked through a realistic scenario, during which a simulated suspect fired on him and the officer returned fire. Within 1.1 seconds, the suspect fired twice and the officer fired four times."[171] The reporter was then able to test the simulator himself. In his simulation, a suspect appeared and pulled out an object that the reporter believed to be a gun and started firing.[172] The object was not a gun, however, but simply a beer bottle.[173] It can be very difficult for officers to determine whether objects are guns or something else, but if a suspect does pull out a gun, the police officer could be dead before they have time to decide.

The appeal of non-lethally armed drones is that they can limit police officer's exposure to these life-threatening situations while also deescalating the situation with a non-deadly alternative. While this is definitely an attractive alternative, it also raises some important questions: would a decrease in a threatening situation give police officers more time to react, thereby making them less likely to shoot? Or, would the distance between a police officer and a possible suspect make the officer more likely to shoot from a drone that possesses a non-lethal weapon?

The latter question has been addressed at the international level and has been dubbed the "PlayStation mentality/phenomenon."[174] The PlayStation theory states that "it is less likely that a person controlling a remote drone will hesitate to use lethal force because physical distance

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169 Buchanan et al., *supra* note 1.

170 Jeff Rossen & Josh Davis, *To Shoot or Not to Shoot? Researchers Test How Police React to Danger*, TODAY (Feb. 24, 2015), http://www.today.com/news/shoot-or-not-shoot-researchers-test-how-police-react-danger-t4961; Linda Byron, *WSU Lab Studies the Science Behind Police Shootings*, NBC KING 5 NEWS (Apr. 23, 2015), http://www.king5.com/story/news/2015/04/23/wsu-violence-confrontation-lab-police/26271391/.

171 Rossen & Davis, *supra* note 170.

172 Rossen & Davis, *supra* note 170.

173 Rossen & Davis, *supra* note 170.

174 Hitomi Takemura, *Unmanned Aerial Vehicles: Humanization from International Humanitarian Law*, 32 WIS. INT'L L.J. 521, 526 (Fall 2014).

can break the psychological barrier that inhibits one person from killing another human being. Armed drones can diminish the deterrent effects of war by rendering death akin to virtual reality."[175] Regarding law enforcement use of drones, although police are not using lethal force, the PlayStation theory can still apply. In fact, it may even apply more aptly because of the lack of lethal force. If police officers think that they can only temporarily harm a suspect, it may give them greater incentive to shoot a taser or use a beanbag cannon to apprehend a suspect. As such, "[D]isconnecting a person from armed conflict, 'especially via distance, makes killing easier and [makes] abuses and atrocities more likely' to occur."[176]

Although weaponized drones, lethal or non-lethal, should not be used by law enforcement personnel in America, that does not mean that *unarmed* drones should be banned completely. Drones that can be used for surveillance purposes should be embraced with proper regulation.[177] In fact, one of the reasons drones were first introduced in America was for the specific purpose of surveillance.[178] In 2004, the United States Customs and Border Protection ("CBP") had its first test flight of an unmanned drone, and in October 2005, the CBP used a drone to fly along the United States-Mexican border.[179] Currently, drones along the United States borders are used for three purposes: patrolling the borders, investigating crimes, and disaster response.[180] States that have not passed drone legislation should follow the direction of states, such as Utah, Virginia, Nevada, Maine, Florida, and Oregon. These states have passed laws allowing drones to be used, pursuant to a warrant, when obtaining information about ongoing criminal investigations or in dire circumstances, such as locating a missing person.[181] Drones have the potential to aid law enforcement without needing to resort to weapons or violence. In fact, North Dakota was the first state to use a drone in a lawful arrest.[182] Rodney Brossart was arrested after six cows wandered onto his farm and he refused to return them. Police were called to the

175 *Id.*

176 *Id.*

177 *Domestic Drones*, *supra* note 142.

178 Arthur Holland Michel, *Customs and Border Protection Drones*, CTR. FOR THE STUDY OF THE DRONE AT BARD COLL. (Jan. 7, 2015), http://dronecenter.bard.edu/customs-and-border-protection-drones/.

179 *Id.*

180 *Id.*

181 *State Unmanned Aircraft State Law Landscape*, *supra* note 104.

182 Jason Keobler, *North Dakota Man Sentenced to Jail in Controversial Drone-Arrest Case*, U.S. NEWS (Jan. 15, 2014), http://www.usnews.com/news/articles/2014/01/15/north-dakota-man-sentenced-to-jail-in-controversial-drone-arrest-case.

scene and, after a sixteen-hour armed standoff police, used a predator drone on loan from the Department of Homeland Security's Customs and Border Patrol to help the situation.[183] There, "The drone was able to locate Brossart and his three armed sons on the property and let police know it was safe to make an arrest."[184] Accordingly, unarmed drones, such as those used for surveillance, may be beneficial for law enforcement. On the other hand, the use of weaponized drones, lethal or non-lethal, is too unpredictable, and could exacerbate the tensions between police and citizens even further.

VII. CONCLUSION

Recently, the North Dakota Legislature reconvened to discuss this issue of weaponizing drones, and opponents of House Bill 1238 tried to pass House Bill 1167, which would have "barred law enforcement from using nonlethal weapons on drones."[185] However, the new bill failed, leaving the old law, allowing police to non-lethally weaponize their drones, in place.[186] The police departments in North Dakota that own drones have consistently held that they will not be non-lethally weaponizing their drones, but the possibility is still available to them.[187] Moreover, the law sets a precedent for future states to follow, and South Carolina and Tennessee have already contemplated the subject by placing the issue on the table for their legislatures to debate.[188] On March 31, 2017, Connecticut authorized a bill that would allow police to lethally weaponize their drones after the state legislature's joint Judiciary Committee approved of the Bill in a 34-7 vote.[189] The Bill is currently pending in the House of Representatives and would set monumental precedent if it were to pass.[190]

Deploying armed drones across the United States has many appealing features including the protection and safety of police officers, but it also has many drawbacks. Drones eliminate human interaction between police officers and the public they are tasked with protecting. By examining the use of UAVs internationally, it can be determined that introducing non-lethally armed drones in America is a terrible idea. The

183 *Id*.

184 *Id*.

185 Hazzard, *supra* note 140.

186 Hazzard, *supra* note 140.

187 Hazzard, *supra* note 140.

188 Wolverton, *supra* note 8.

189 Amanda Morris, *Connecticut Bill Would Make Weaponized Drones Legal for Cops*, CNN (Mar. 31, 2017), http://www.cnn.com/2017/03/31/us/connecticut-drone-bill-trnd/.

190 *Id.*

"PlayStation mentality" provides a menacing picture of what could happen if armed drones are introduced into the police force, and with a country already overflowing with allegations of police brutality, armed drones will be another distraction. If law enforcement is going to continue to use drones, they should do so in a surveillance capacity. Whether drone laws continue to embrace North Dakota's position or regress from the stance is a question that can only be answered with time. Whatever one's opinion is on the subject, however, drones are here to stay. President Barak Obama said it best, "I think creating a legal structure, processes, with oversight checks on how we use unmanned weapons is going to be a challenge for me and for my successors for some time to come."[191]

[191] Bowden, *supra* note 45.