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THE GREEN TO BLUE PIPELINE: DEFENSE CONTRACTORS AND THE POLICE INDUSTRIAL COMPLEX

Karena Rahall†

Images of police in tactical gear, pointing automatic weapons at unarmed demonstrators in Ferguson, Missouri, represented a flashpoint in public awareness that American police are rapidly militarizing. Federal grants have been quietly arming police with tanks, drones, and uniforms more suited to waging war than patrolling the streets. As police have acquired more military gear, Special Weapons and Tactics teams and deployments have proliferated. Even small towns receive surplus military materiel to fight the “wars” on drugs and terrorism. In addition, police training uses a military approach that threatens to transform the traditional police mandate of protecting and serving into one of engaging and defeating. This Article is the first in legal scholarship to analyze the causes of police militarization and the obstacles to curbing it.

This Article analyzes the factors that drive police militarization, from a historical, legal, and financial perspective. It examines the multiple federal grant programs that provide the funding for, and incentivize, militarization—like the Department of Defense Program that distributes military materiel with little oversight regarding its use, and the Department of Homeland Security grant program that dispenses billions in funds to buy weapons and equipment. It exposes defense industry efforts to ensure Congress keeps the gear flowing; as the wars in Afghanistan and Iraq wind down, the industry turns to the domestic market to fill the gap in sales. The Article analyzes the failure of the judicial system to address excessive force claims in the context of ever-increasing militarized SWAT team raids, and proposes more effective routes to reform.

† Visiting Assistant Professor, Seattle University School of Law. Thanks to Anna Roberts, Charlotte Garden, Nancy Leong, Brooke Coleman, Julie Shapiro, and Nicole Bellina for such helpful guidance and advice. A special thanks also to Beth Kregor and the organizers of the 2014 Association of American Law Schools (AALS) Clinical Conference Works In Progress Program, where a draft of this Article was presented.

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INTRODUCTION

Events in Ferguson, Missouri during August 2014, brought militarization of the domestic police into the public eye.¹ A phenomenon not previously subject to much public debate, it became front-page news as battle-ready police confronted mostly peaceful protesters, firing tear gas and wooden bullets from armored military vehicles.² Snipers with ballistic helmets were seen perched atop what

¹ See Julie Bosman & Timothy Williams, *Missouri Police Cite Threats in Deciding Not to Name Officer Who Shot Teenager*, N.Y. TIMES, Aug. 12, 2014, <http://www.nytimes.com/2014/08/13/us/ferguson-police-cite-safety-risk-in-decision-not-to-name-officer-in-shooting.html> (reporting on protests by citizens when an unarmed teenage boy was shot and killed by a police officer).

² See Julie Bosman & Matt Apuzzo, *In Wake of Clashes, Calls to Demilitarize Police*, N.Y. TIMES, Aug. 15, 2014, at A1.

appeared to be tanks, aiming at the unarmed civilians below.³ The images prompted the public to question why a police department in a city of 20,000 residents looked like an invading army engaged in urban warfare against its own citizens.⁴ This Article answers that question and analyzes how militarization of domestic police came to fruition, detailing its escalation and the failure of the judicial system to stop it.

Although the events in Ferguson presented a disturbing picture, it is far from the only striking example of the increased militarization of the police.⁵ Towns with fewer than 700 residents have acquired military gear from the federal government costing millions of dollars.⁶ Special Weapons and Tactics (SWAT) teams have increased dramatically in both number and in the frequency of deployments, including for nonemergency purposes like investigating organic farms, nightclubs, barbershops, and even poker games.⁷ SWAT deployments have increased more than 1400% since the 1980s with the implementation of the “war on drugs.”⁸ The “war on terror” only exacerbated the expansion. Currently, the federal government spends billions of dollars annually to fund and equip domestic police departments with military hardware like the Lenco Ballistic Engineered Armored Response Counter Attack Truck (BearCat),⁹ one of the vehicles used by police in Ferguson during the demonstrations.¹⁰ Despite the costs, local police departments clamor for such items, which they contend may be necessary in case of a rare but deadly incident like the school shooting in Newtown, Connecticut.¹¹

³ See *id.*

⁴ See *id.*; see also Zeke J. Miller, *Obama Voices Concerns on Police Militarization in Wake of Ferguson*, TIME, Aug. 18, 2014, <http://time.com/3138267/obama-ferguson-police-militarization>.

⁵ See *infra* Parts I, III.

⁶ See *AP IMPACT: Little Restraint in Military Giveaways*, NAT'L PUB. RADIO (July 31, 2013, 7:32 PM), <http://www.npr.org/templates/story/story.php?storyId=207340981> [hereinafter *AP IMPACT*].

⁷ See RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES* 286 (2013).

⁸ See Peter B. Kraska, *Militarization and Policing—Its Relevance to 21st Century Police*, 1 POLICING: J. POL'Y & PRAC. 501 (2007). Paramilitary police deployments increased 1400% between 1980 and 2000. *Id.* In the 1980s, there was an average of 3000 deployments per year; and by the year 2000, that number escalated to an average of 45,000 deployments per year. *Id.*

⁹ See *BearCat® Variants*, Lenco ARMOR, <http://www.lencoarmor.com/law-enforcement/bearcat-variants> (last visited Mar. 28, 2015). Marketed to law enforcement, the BearCat touts its urban tactics capability and weighs approximately 17,000 pounds, with a rotating roof hatch and multiple side gun ports.

¹⁰ See Bosman & Apuzzo, *supra* note 2 (depicting a BearCat).

¹¹ See Rob Wolfe, *Police Get Military Gear: Upper Valley Agencies Use Defense Program*, VALLEY NEWS, Jan. 11, 2015, <http://www.vnews.com/news/14841225-95/police-get-military-gear-upper-valley-agencies-use-defense-program>; Aaron Cantú, *4 Shocking Examples of Police Militarization in America's Small Towns*, SALON (Mar. 28, 2014, 8:00 AM), http://www.salon.com/2014/03/28/4_shocking_examples_of_police_militarization_in_americas_small_towns_partner; Zachary T. Sampson et al., *Local Law Enforcement Nets Military Supplies Through Controversial Pentagon Program*, TAMPA BAY TIMES (Jan. 3, 2015, 6:45 PM),

While the public is becoming more aware of the presence of military equipment and the kinds of military tactics employed by police departments, such awareness is insufficient to craft meaningful reform unless one also understands the forces and incentives that have impelled its rapid growth and that make it so challenging to stop. This Article fills two gaps in legal scholarship by offering both the first detailed examination of the phenomenon of police militarization, and the first analysis of the factors—historical, legal, and financial—that permit and foster it.

Part I traces the key factors that have led to the current level of police militarization. After a brief explanation of police militarization's historical roots, this Part uncovers and performs a critical analysis of two central factors contributing to its recent growth: (1) grants and other assistance to police departments from multiple federal agencies; and (2) lobbying by the defense industry and law enforcement. Part II demonstrates that legal claims relating to the effects of militarization, principally claims of excessive force, have failed to provide a remedy for the harms involved in militarized policing. Part III asserts that a remedy is needed, and explores what that remedy might be. Part III.A highlights recent examples of militarization to demonstrate the types of harm involved. Part III.B analyzes the kinds of solutions that are being proposed, and makes additional recommendations.

This Article asserts that militarization in both tactics and equipment has led to an escalation in violent encounters between citizens and police that is not being addressed by the judicial system and that requires holistic action. With the wars in Afghanistan and Iraq drawing down and defense contractors seeking new markets,¹² domestic militarization has undergone an expansion, through a process this Article terms the “green to blue pipeline.” This trend threatens to further erode what was once a clear delineation between military and

<http://www.tampabay.com/news/publicsafety/local-law-enforcement-nets-military-supplies-through-controversial/2212335>; see also National Defense Authorization Act for Fiscal Year 1998, H.R. 1119, 105th Cong. § 1033 (1998), available at <http://www.gpo.gov/fdsys/pkg/BILLS-105hr1119enr/pdf/BILLS-105hr1119enr.pdf>; *Justice Assistance Grant (JAG) Program*, BUREAU JUST. ASSISTANCE, U.S. DEP'T JUST., https://www.bja.gov/ProgramDetails.aspx?Program_ID=59 (last visited Mar. 29, 2015) (“Byrne Grant” Awards descriptions).

¹² See Darwin BondGraham, *From Top Cop to the Corporate Boardroom: Ex-Police Chiefs Spin Through Revolving Doors into the Private Sector*, TRUTHOUT (Dec. 11, 2013, 9:29 AM), <http://www.truth-out.org/news/item/20554-from-top-cop-to-the-corporate-boardroom-ex-police-chiefs-spin-through-revolving-doors-into-the-private-sector>; see also Dvrtransfer, *Urban Shield 2009 - Highlight Video*, YOUTUBE (Jan. 25, 2010), <https://www.youtube.com/watch?v=TAWp-bjEAXs> (showing videos of “Urban Shield” SWAT Competition Events sponsored by Blackhawk Industries, Lenco Armored Vehicles, and other military defense contractors); Nemi Jones, *The Lenco Bearcat G3.mp4*, YOUTUBE (Feb. 9, 2012), <https://www.youtube.com/watch?v=gipHbhgJaX4> (promotional video for Lenco Armored Vehicles).

domestic policing.¹³ The influence of federal and corporate money on police decisionmaking means that insufficient attention is given to what local communities actually need. As the juggernaut of militarization moves forward, the police are at risk of being transformed from protectors of the community into soldiers fighting a war against it.

I. HOW DID SMALLVILLE GET AN MRAP?

The presence of military weaponry in domestic policing is not entirely new. The first SWAT team was formed in 1967 by Los Angeles Police Inspector Daryl Gates, in response to what he viewed as the police department's failure to control and suppress the riots in the Watts neighborhood of Los Angeles, California.¹⁴ Paramilitary Police Units (PPUs),¹⁵ like SWAT, proliferated in the decade that followed but were limited to small groups of police officers within a department who had specialized military training¹⁶ to deal with riots, hostage situations, and terrorists.¹⁷ Over time, that mission has expanded to deal first with the so-called "war on drugs" and now the "war on terrorism."¹⁸ With mission expansion came SWAT expansion around the United States. According to Peter Kraska, who has done some of the most extensive empirical studies of SWAT teams available, approximately 59% of police departments serving populations of 50,000 or more had SWAT teams in 1982, but by the mid-1990s that number had reached 89%.¹⁹ This expansion is not limited to large cities; currently, 80% of towns with populations below 50,000 have some form of paramilitary tactical team, while only 20% had them in 1980.²⁰ Between 1980 and 2000, there was a 1400% increase in SWAT deployments.²¹ So while the hardware and tactical methodology associated with paramilitary policing has existed since the 1960s, the expansion and escalation of these units has increased primarily in response to the "wars" on drugs and terrorism.

¹³ Since 1878, the Posse Comitatus Act (PCA) has generally provided that federal military troops are not permitted to act as domestic law enforcement officers. *See* 18 U.S.C. § 1385 (2012). Although certain exceptions related to emergency powers and information sharing have been passed by Congress—thus eroding the original force of the statute—the heart of the law remains intact. *See id.*

¹⁴ *See* BALKO, *supra* note 7, at 61–63.

¹⁵ While PPU's cover all types of tactical paramilitary units (of which SWAT is one) this Article will employ the term "SWAT" throughout, unless a particular tactical unit of a different name is sourced.

¹⁶ *See* BALKO, *supra* note 7, at 96.

¹⁷ *See* Kraska, *supra* note 8, at 6.

¹⁸ *See id.* at 5–6.

¹⁹ *See id.* at 6.

²⁰ *Id.*

²¹ *Id.*

Federal assistance to domestic police agencies has increased dramatically since the 1990s,²² and has enabled this trend to continue unabated. Research done by Kraska, among others, has demonstrated that when police have access to weapons and armament, they tend to use them, even if not for their intended purpose.²³ Section I.A details the federal programs that exist to supply weapons, tactical gear, armored personnel carriers (APCs), and training to domestic police agencies around the United States. Section I.B exposes the financial incentives to continue and escalate this trend by tracing the corporate lobbying efforts directed at both politicians and police departments. With more transparency about those who benefit most, either financially or politically, the public and legal scholars might better understand how this trend threatens democratic institutions of self-governance and find ways to reverse it.

A. *Federal Grants to Police: “Wars” on Terrorism and Drugs*

In 1989, the federal government, through the Department of Defense (DOD), allocated funds to supply domestic police departments with military hardware and training for the purpose of combatting illegal drug activity.²⁴ Since then, several other programs have been created through the DOD, the Department of Homeland Security (DHS), and the Department of Justice (DOJ) to support domestic policing efforts related to both the “war on drugs” and the “war on terrorism.”²⁵ The extraordinary expansion of these programs—and the funds directed to support them—has led to an unsurprising escalation in the militarization of police in American towns and cities.²⁶ This militarization takes the form of both weapons deployment and tactical strategies, which continue to increase, unchecked, with little to no oversight either federally or at the state and local levels. This Section will outline the background of these programs and the current allocation of federal resources to domestic police departments. The Section will also look at several examples in which military hardware has been deployed domestically in order to illustrate the depth of the militarization of police departments in both large and small communities. Moreover, it

²² See AM. CIVIL LIBERTIES UNION, WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING 24 (2014) [hereinafter ACLU Report], available at <https://www.aclu.org/feature/war-comes-home?redirect=war-comes-home-excessive-militarization-american-policing>.

²³ See ACLU Report, *supra* note 22, at 16; Kraska, *supra* note 8.

²⁴ See National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 1208, 103 Stat. 1352 (1989).

²⁵ See *infra* Part II.A.1–2.

²⁶ See BALKO, *supra* note 7, at 202–03.

will consider what, if any, oversight exists to ensure that these weapons are properly deployed in the context of public service rather than war.

1. Department of Defense Programs

Within the DOD, there are two distinct programs dedicated to supplying domestic police departments with military hardware. The strategy and implementation that funds police agencies to wage the “wars” on drugs and terrorism, using military weapons and armaments, originated in the DOD and expanded from there to other federal agencies. With the approval of Congress—and the concomitant support of the defense industry that supplies the materiel—these programs have funneled military vehicles (for land, sea, and air), weapons, ammunition, and tactical training valued in the billions of dollars to local police departments in the United States.

a. 1033 Program: Transfer of Equipment

In 1989, a temporary funding allocation authorized the transfer of surplus military equipment from the federal government to federal, state, and local police agencies primarily for the purpose of dealing with illegal drug activity.²⁷ The 1997 National Defense Authorization Act (NDAA) made the program permanent and expanded its mandate to include law enforcement efforts to address terrorism.²⁸ Commonly referred to as the 1033 Program,²⁹ this DOD program allows law enforcement agencies to receive military hardware including armored vehicles (for air, sea, and land), night vision goggles, ballistic helmets, tactical vests, televisions, cameras, computers, and even camping gear.³⁰ Those agencies can find the equipment by either browsing online³¹ or shopping for equipment at one of the physical locations where the equipment is stored.³² Since its inception, the program has dispersed

²⁷ See ACLU Report, *supra* note 22, at 16.

²⁸ See 10 U.S.C. § 2576a (2012).

²⁹ The original section pertaining to surplus military equipment transfer in NDAA 1997 was 1033.

³⁰ See *The 1033 Program*, JUSTNET, https://www.justnet.org/other/1033_program.html (last visited Mar. 29, 2015). Local law enforcement agencies apply to participate in the 1033 Program through their State Point of Contact (SPOC) and, if approved, the application is sent to the DOD’s Law Enforcement Support Office (LESO), which is run by the Defense Logistics Agency. *See id.*

³¹ See *Property Search*, DISPOSITION SERVICES, DEF. LOGISTICS AGENCY, <http://www.dispositionservices.dla.mil/leso/Pages/PropertySearch.aspx> (last visited Mar. 29, 2015) (LESO website page with listings of available property).

³² See *DLA Disposition Services Site Locator Tool*, DISPOSITION SERVICES, DEF. LOGISTICS AGENCY, <http://www.dispositionservices.dla.mil/drmo/Pages/default.aspx> (last visited Mar. 29, 2015) (LESO website page for interactive location search for stored equipment; aircraft, tactical vehicles, and weapons, however, are not listed in the online database).

property valued at more than \$5.1 billion, including \$450 million in 2013 alone.³³ According to the DOD, over 11,500 domestic law enforcement agencies take part in the 1033 Program.³⁴

The 1033 Program does not provide any regulatory oversight of police departments and the manner in which they use military equipment. Of the many different types of equipment transferred, APCs provide a stark example of how police departments are not only looking more like the military, but acting like small armies.³⁵ APCs used in the wars in Afghanistan and Iraq are being repurposed for use in American cities and towns by SWAT teams.³⁶ In addition, most jurisdictions do not have policies governing the circumstances under which SWAT teams should deploy,³⁷ nor do most police departments collect data on those deployments in order to assess whether they are effective or necessary under various circumstances.³⁸ Moreover, under the 1033 Program, recipients must use the equipment they receive within one year of its acquisition.³⁹ Finally, oversight by the DOD on the use of the equipment it gives away consists only of inventory checks and random field visits to ensure the inventory is secure.⁴⁰ The combination of military materiel intended for use in war zones and a lack of oversight gives rise to the unchecked escalation of militarization of domestic police forces, in which no regulatory body tracks the manner in which the equipment is used or crafts policy governing appropriate uses.

Because there is little oversight and no policy governing appropriate use of 1033 Program gear, it is difficult to know how departments are utilizing what they receive. If police departments lack the need for APCs to combat violent crime, they must find other uses for them per the 1033 requirement.⁴¹ Thus, it is concerning that a significant number of small towns, with little crime, have obtained these

³³ See *LESO Homepage*, DISPOSITION SERVICES, DEF. LOGISTICS AGENCY, <http://www.dispositionsservices.dla.mil/leso/Pages/default.aspx> (last visited Mar. 29, 2015) (LESO website page about the 1033 Program).

³⁴ See OFFICE OF THE SEC'Y OF DEF., U.S. DEP'T OF DEF., FISCAL YEAR (FY) 2015 BUDGET ESTIMATES (2014), available at http://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2015/budget_justification/pdfs/02_Procurement/1_PROCUREMENT_MasterJustificationBook_Defense_Wide_PB_2015_Vol_1.pdf. Others put that number closer to 17,000. *But see* ACLU Report, *supra* note 22, at 24; BALKO, *supra* note 7, at 210.

³⁵ See Sadbh Walshe, *Ferguson Is What Happens when White Suburban Cops Get Weapons of War*, GUARDIAN, Aug. 14, 2014, <http://www.theguardian.com/commentisfree/2014/aug/14/ferguson-cops-military-weapons-michael-brown-shooting-protests> (noting that Ferguson, Missouri, has only about 21,000 residents, but deployed APCs, including a Lenco BearCat, and fired rubber bullets and tear gas at people protesting the police shooting of an unarmed black teenager days earlier).

³⁶ See ACLU Report, *supra* note 22, at 22.

³⁷ See *id.* at 4.

³⁸ *Id.*

³⁹ *Id.* at 16. (citing Memoranda of Agreement between the DOD and each state).

⁴⁰ *Id.* at 83–89.

⁴¹ See *id.* at 16.

military vehicles and armaments.⁴² For example, Roanoke Rapids, North Carolina, has a population of less than 16,000 but acquired both Humvees⁴³ and a Mine-Resistant, Ambush-Protected (MRAP) vehicle in 2013.⁴⁴ Merrillville, Indiana, with 35,000 residents, got an MRAP for their SWAT team in 2013.⁴⁵ Even Ohio State University got one.⁴⁶ Small towns like Neenah, Wisconsin;⁴⁷ Currituck, North Carolina;⁴⁸ Washington, Iowa;⁴⁹ and Watertown, Connecticut⁵⁰ all applied for and received free MRAPs. Approximately 500 police departments have received MRAPs so far.⁵¹ They all must put them to use in some way within a year of acquisition and this requirement gives rise to an increasing number of SWAT team formations and deployments.

Aside from APCs, police departments in small towns and cities have received other military hardware that seems out of place for their sizes. In Fairmount, Georgia, a town of 7000 people, the police department has acquired 17,145 items through the 1033 Program.⁵² Bloomington, Georgia, only has 2713 residents, yet it acquired four grenade launchers.⁵³ Tupelo, Mississippi, with a population of 35,000, got a free helicopter that costs \$20,000 per year to maintain.⁵⁴ Rising Star, Texas, with a population of 835, employing one full-time police officer, garnered \$3.2 million in 1033 Program property over a fourteen-

⁴² See Michael Virtanen, *Spoils of War: Police Getting Leftover Iraq Trucks*, ASSOCIATED PRESS (Nov. 24, 2013, 11:42 AM), <http://bigstory.ap.org/article/spoils-war-police-getting-leftover-iraq-trucks>.

⁴³ The High Mobility Multi-Purpose Wheeled Vehicle (HMMWV), commonly known as the Humvee, is manufactured by AM General LLC. See *AM General Vehicles & Components*, AM GEN., <http://www.amgeneral.com/vehicles> (last visited Mar. 29, 2015).

⁴⁴ Hank Johnson & Michael Shank, *Small Town America Shouldn't Resemble War Zone: Column*, USA TODAY (Mar. 10, 2014, 5:07 PM) <http://www.usatoday.com/story/opinion/2014/03/10/america-police-military-weapons-column/5789445>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Matt Agorist, *Wisconsin Police Reassure Residents They Won't Be Shot at from Military Truck*, THEFREETHOUGHTPROJECT.COM (May 20, 2014), <http://thefreethoughtproject.com/wisconsin-police-reassure-residents-wont-shot-military-truck/#1jE0SLT54wXEVriy.01>.

⁴⁸ Jeff Hampton, *Currituck Sheriff's Office Gets an 18-Ton Armored Truck*, PILOTONLINE.COM (Dec. 2, 2013), <http://hamptonroads.com/2013/12/currituck-sheriffs-office-gets-18ton-armored-truck>.

⁴⁹ Ben Collins, *Your Local Police Force's Next Vehicle: Tanks. Actual Tanks*, ESQUIRE (Apr. 11, 2014), <http://www.esquire.com/news-politics/news/a28322/local-police-tanks>.

⁵⁰ See Taylor Wofford, *How America's Police Became an Army: The 1033 Program*, NEWSWEEK, Aug. 13, 2014, <http://www.newsweek.com/how-americas-police-became-army-1033-program-264537>.

⁵¹ See ACLU Report, *supra* note 22, at 5.

⁵² See Lorenzo Franceschi-Bicchierai, *Small-Town Cops Pile up on Useless Military Gear*, WIRED (June 26, 2012, 6:31 AM), <http://www.wired.com/2012/06/cops-military-gear/all>.

⁵³ See Wofford, *supra* note 50. Another small Georgia town, Bloomingdale, also received armored trucks, personnel carriers, and grenade launchers. See Rhonda Cook, *Military Equipment Flowing to Local Law Enforcement Raises Questions*, ATLANTA J.-CONST. (Jan. 27, 2013, 5:00 AM), <http://www.ajc.com/news/news/military-equipment-flowing-to-local-law-enforcemen/nT7ZK>.

⁵⁴ See Franceschi-Bicchierai, *supra* note 52.

month period.⁵⁵ Oxford, Alabama, with a population of 20,000, received \$3 million worth of equipment, including M-16s, helmet-mounted infrared goggles, and their very own Puma tank.⁵⁶ Morven, Georgia only has 565 residents but it got \$4 million worth of property, including three boats, SCUBA gear (in a town with no bodies of water), a Humvee, an unspecified APC, and surplus rifles that its sheriff intends to use to build a SWAT team.⁵⁷ Given that it is a small farming community, it is difficult to comprehend why the SWAT team is necessary in the town.

Problems with oversight result in an inability to analyze exactly how 1033 items are utilized once transferred,⁵⁸ but abuse of even the limited oversight that exists in the program has occurred on numerous occasions. In 2012, the DOD temporarily suspended all firearms transfers through its 1033 Program after a series of troubling incidents,⁵⁹ including one in which a sheriff in Illinois was caught lending M-14 rifles to friends.⁶⁰ The state property manager tasked with securing 1033 materiel in North Carolina pled guilty to stealing assault weapons and selling them on eBay,⁶¹ and in Arizona, the Pinal County sheriff was discovered loaning weapons and other equipment to non-law enforcement personnel and planning to auction other equipment to make money for his department.⁶² In yet another incident, an M-16 simply went missing altogether.⁶³ Still, these incidents resulted in only a brief suspension of firearms transfers; other 1033 Program equipment transfers remained unaffected.⁶⁴ These incidents underscore the difficulty the 1033 Program has had maintaining sufficient oversight of its transferred stockpiles. The possibly more concerning issue, which is not addressed by the program—and is examined in Part III—is how

⁵⁵ Paul Szoldra, *Small-Town Police Departments Are Getting Billions in Big Military Hardware*, BUS. INSIDER (July 31, 2013, 8:07 PM), <http://www.businessinsider.com/police-department-militarization-2013-7>.

⁵⁶ See Franceschi-Bicchierai, *supra* note 52.

⁵⁷ See AP IMPACT, *supra* note 6; 2010 Census Population for Morven City, Georgia, AM. FACTFINDER, U.S. CENSUS BUREAU, http://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml (search “Morven City, Georgia”; then follow “Go” hyperlink) (last visited Apr. 12, 2015).

⁵⁸ See ACLU Report, *supra* note 22, at 30.

⁵⁹ See Radley Balko, *Pentagon Suspends Program that Gives Military Weapons to Cops*, HUFFINGTON POST (June 11, 2012, 10:32 AM), http://www.huffingtonpost.com/2012/06/11/pentagon-suspends-weapons-program-cops-military_n_1585328.html.

⁶⁰ See AP IMPACT, *supra* note 6.

⁶¹ *Id.*

⁶² See Dennis Wagner, *Pinal County Policies Spur Pentagon to Order Military-Gear Crackdown*, AZCENTRAL.COM (June 1, 2012, 11:18 PM), <http://www.azcentral.com/news/politics/articles/2012/06/01/20120601pinal-policies-pentagon-military-gear-crackdown.html>.

⁶³ See Nate Carlisle, *Utah Deputy Had Missing M-16 in Safe for Eight Years, Sheriff Says*, SALT LAKE TRIB. (Apr. 19, 2014, 7:51 PM), <http://www.sltrib.com/news/1415926-155/deputy-rifle-sheriff-office-county-release>.

⁶⁴ See ACLU Report, *supra* note 22, at 80 (citing responses to written questions posed by Congressman Hank Johnson to the DOD and Defense Logistics Agency).

these items are used by police departments and whether they are necessary, effective or dangerous.

b. 1122 Program: Purchase of New Equipment

In addition to offering law enforcement agencies military hardware at no cost, the federal government also offers a method by which those agencies can purchase parts to maintain the hardware, as well as new equipment. Through what is known as the 1122 Program, the DOD acts as a pass-through for both equipment purchases and parts.⁶⁵ Originally part of the NDAA of 1994, the program was intended to assist law enforcement in counterdrug activity.⁶⁶ Like the amendment to the 1033 Program, the Act covering the 1122 Program was amended to include procurement for counterterrorism activity.⁶⁷ While the 1033 Program deals primarily with surplus military equipment that the military no longer needs or will not use,⁶⁸ the 1122 Program is limited to the purchase of new equipment.⁶⁹ Law enforcement agencies benefit from the purchasing power of the federal government—which can buy equipment in bulk—on behalf of the agencies. Unlike the 1033 Program, the 1122 Program does not furnish the equipment for free, but allows law enforcement to purchase items with their own funds through the DOD.⁷⁰ Items available for purchase through the program include weapons and ammunition, aviation parts, night vision goggles, personnel carriers, joint light tactical gear, battle dress uniforms (BDUs), and “land weapon systems” parts.⁷¹

Having access to parts through the 1122 Program allows police agencies to maintain the equipment that it receives through the 1033 Program. Maintenance for some vehicles can be particularly expensive; for example, one tire replacement for the MRAP costs approximately

⁶⁵ See *1122 Program*, U.S. GEN. SERVICES ADMIN., http://www.gsa.gov/portal/content/202569?utm_source=FAS&utm_medium=print-radio&utm_term=1122program&utm_campaign=shortcuts (last visited Mar. 29, 2015). The 1122 Program refers to the original section of the National Defense Authorization Act of 1994 that allocated funds and authority for local law enforcement to procure new military hardware through the federal governments requisition channels.

⁶⁶ See National Defense Authorization Act of 1994, 10 U.S.C. § 381 (2012).

⁶⁷ See *id.* (as amended by section 885 of the Duncan Hunter National Defense Authorization Act of 2009).

⁶⁸ See ACLU Report, *supra* note 22, at 80 (noting that 36% of all equipment transferred under the 1033 Program is not surplus but newly purchased by the DOD solely for domestic purposes).

⁶⁹ *1122 Program*, *supra* note 65.

⁷⁰ Items may be purchased in three possible ways: (1) directly from the Department of the Army; (2) through the Defense Logistics Agency; and (3) using third party contractors through the DOD supply chain and purchasing structure. See *The 1122 Program*, JUSTNET, https://www.justnet.org/other/1122_program.html (last visited Mar. 29, 2015).

⁷¹ See U.S. GEN. SERVS. ADMIN., 1122 PROGRAM EQUIPMENT AND SUPPLIES CATALOG (2014), available at http://www.gsa.gov/portal/mediaId/186487/fileName/1122_CatalogFeb2014Finalv2.action.

\$2500,⁷² while the less expensive Lenco BearCat's tires are \$7083 for a set of six.⁷³ So the programs often work in support of one another, and consequently, defense contractors can expect to profit through both manufacturing and maintenance.

2. Department of Justice Programs

The DOJ administers two grants programs aimed at fighting the “war on drugs.” While the mandates for these grants have expanded to include counterterrorism activity and more generally violent crime issues, they are still focused more specifically on addressing illegal drug crimes.⁷⁴ Though these programs do not rely solely on military equipment to achieve their goals, they do provide the financial incentive to utilize both military weapons and tactics because arrest statistics are tied to funding allocations, rewarding grant recipients for high numbers of drug arrests.⁷⁵ Since SWAT teams deploy for the purpose of serving search warrants for drugs the vast majority of the time, these grants fuel militarization.⁷⁶ Despite their mandates that include drug treatment and community policing,⁷⁷ these programs incentivize patterns and practices which serve to remake the police from a force that serves the public to one that sees the public as a revenue-generating mechanism at best—and as an enemy at worst.

a. Byrne Justice Assistance Grants

In 1968, Congress created a \$100 million grant program to provide states and municipalities with funding to research the social causes of criminal activity, provide alternative sanctions for juveniles, and combat street crime.⁷⁸ Edward Byrne Memorial Justice Assistance (Byrne JAG)

⁷² See Jeremy Fugleberg, *Wyoming Cops Pick up Their Fourth Military Surplus Armored MRAP Vehicle*, CASPER STAR-TRIB. (June 21, 2014, 6:00 AM), http://trib.com/news/state-and-regional/wyoming-cops-pick-up-their-fourth-military-surplus-armored-mrap/article_bd597095-355f-5628-a1a0-93fc8cc738d6.html.

⁷³ See FED. SUPPLY SERV., U.S. GEN. SERVS. ADMIN., AUTHORIZED FEDERAL SUPPLY SCHEDULE PRICE LIST (2013), available at https://www.gsaadvantage.gov/ref_text/GS07F0390M/GS07F0390M_online.htm.

⁷⁴ See ACLU Report, *supra* note 22.

⁷⁵ See BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, EDWARD BYRNE JUSTICE ASSISTANCE GRANT (JAG) PROGRAM FACT SHEET (2014) [hereinafter BJA JAG Fact Sheet], available at https://www.bja.gov/Publications/JAG_Fact_Sheet.pdf.

⁷⁶ See ACLU Report, *supra* note 22, at 31 (finding 79% of SWAT deployments used to serve warrants and 60% of those were for drug searches).

⁷⁷ See ALEXIA D. COOPER & KIMBERLY MARTIN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JUSTICE ASSISTANCE GRANT (JAG) PROGRAM, 2014 (2014) [hereinafter Byrne Grant Technical Report], available at <https://www.bja.gov/Publications/JAGTechRpt.pdf>.

⁷⁸ Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 520, 82 Stat. 197 (codified as amended at 42 U.S.C. § 16925(a) (2012)), available at http://transition.fcc.gov/Bureaus/OSEC/library/legislative_histories/1615.pdf.

grants—named for a New York City Police officer killed by drug dealers in 1988—are the present-day method by which these grants are allocated.⁷⁹ Byrne JAG grants have awarded over \$5 billion since 2005 alone.⁸⁰ The DOJ is permitted to allocate over \$1 billion per year in Byrne JAG grants.⁸¹ However, the funding averaged \$500 million a year until 2009 when the program experienced a windfall \$2 billion infusion through the American Recovery and Reinvestment Act of 2009.⁸² The funding covers a broad swath of criminal justice areas and the amount of funding can be increased based on crime statistics within the state or locality.⁸³ Therefore, if crime goes up, funding follows.

While Byrne JAG grants cover such criminal justice reform efforts as drug rehabilitation and alternative sentencing,⁸⁴ the bulk of the funding goes directly to law enforcement activity.⁸⁵ In fact, between 2012 and 2013, 64% of the funds were spent on law enforcement—which includes equipment for police cars, radios, uniforms, tactical vests, hiring additional officers, and funding devoted to 680,667 hours of overtime pay.⁸⁶ During the same time period, funds spent on grants dedicated to drug treatment, which includes enforcement mechanisms like probation, were just 5%.⁸⁷ So while the program purports to fund areas that are generally considered reform-minded, the lion's share of the funded activity is directly related to policing and not education or rehabilitation.⁸⁸ Moreover, it is directed primarily at drug enforcement which comprises the majority of paramilitary deployments.

⁷⁹ See BJA JAG Fact Sheet, *supra* note 75; *About Officer Byrne*, BUREAU JUST. ASSISTANCE, U.S. DEP'T JUSTICE, <https://www.bja.gov/Programs/OfficerByrne.html> (last visited Mar. 29, 2015). The Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, 118 Stat. 2809 (2004), merged a discretionary grant program (originally part of the 1988 Anti-Drug Abuse Act) with a formula-based block grant program called Local Law Enforcement Block Grant program (LLEBG). BJA JAG Fact Sheet, *supra* note 75. Currently, grants are awarded based on the population of the state and its share of violent crime statistics with 60% allocated to the state and 40% discretionary funding to local governments deemed eligible. *Id.* The grants cover the following program areas: (1) law enforcement; (2) prosecution and courts; (3) corrections and community corrections; (4) drug treatment; and (5) planning, evaluation, and technology improvement. *Id.*

⁸⁰ *Id.*

⁸¹ See *Program and Funding History*, NAT'L CENTER FOR JUST. PLAN., <http://ncjp.org/byrne-jag/history> (last visited Mar. 29, 2015).

⁸² See *OJP's Information Related to the American Recovery and Reinvestment Act of 2009*, OFF. JUST. PROGRAMS, U.S. DEP'T JUSTICE, <http://ojp.gov/recovery> (last visited Mar. 29, 2015) [hereinafter *Recovery Act Overview*].

⁸³ See OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS RECOVERY ACT GRANTS (2009), available at <http://ojp.gov/recovery/pdfs/ojpfactsheet.pdf>.

⁸⁴ See *Byrne Grant Technical Report*, *supra* note 77.

⁸⁵ BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, GRANT ACTIVITY REPORT: JUSTICE ASSISTANCE GRANT (JAG) PROGRAM 2 (2013) [hereinafter *JAG Activity Report*], available at https://www.bja.gov/Publications/JAG_LE_Grant_Activity_03-13.pdf.

⁸⁶ *Id.* at 2–5.

⁸⁷ *Id.* at 2.

⁸⁸ See *id.* at 6, 10. Almost a quarter of all Byrne JAG funding goes to joint task forces that focus on drug arrests, gang arrests, and firearm seizures. See *id.* at 6. These task forces combine

State and local police agencies have come to depend on the largesse of Byrne JAG funding, which rewards police for combatting drug crimes and incentivizes the types of military deployments that are increasingly used in anti-drug enforcement.⁸⁹ Police agencies use that funding for hiring, overtime, and equipment;⁹⁰ in turn, they make as many drug and other arrests as necessary to qualify for further funding.⁹¹ The number of drug raids and arrests is thus tied to federal funding and federal priorities,⁹² rather than defined by local policies that might determine whether such raids are a net benefit to the community. Illustrative of this point is the response by law enforcement when Byrne JAG funding was threatened with a 67% reduction in 2007.⁹³ Police departments and joint drug task forces across the country staged “Operation Byrne Blitz,” in which they spent twenty-four hours in a nonstop effort to demonstrate the value of the work the grants fund, arresting hundreds of people and seizing large—and, in some cases, quite small—quantities of drugs.⁹⁴ The funding was restored in 2009, with a one-time infusion

local, state, and federal law enforcement personnel and provide police departments with the ability to hire new officers to take part, pay for overtime for existing officers, and pay for the equipment and vehicles used in the services of the task forces. *See id.* Approximately 75% of all arrests resulting from task force and anti-drug enforcement were charged as felonies. *Id.* at 8.

⁸⁹ *See* COUNCIL OF STATE GOV'TS, RESOLUTION IN SUPPORT OF FULL FUNDING FOR THE BYRNE JUSTICE ASSISTANCE GRANT (JAG) PROGRAM (2008), available at <http://www.csg.org/knowledgecenter/docs/JAGResolution-Final.pdf> (“According to Iowa Senator Tom Harkin, each year Byrne JAG dollars fund over 4,000 police officers and prosecutors working on over 750 drug enforcement task forces in all 50 states across hundreds of urban and rural countries and cities.”); Letter from Nat'l Ass'n of Attorneys Gen. to the Leadership of Congress (Mar. 3, 2008), available at http://www.naag.org/assets/files/pdf/signons/20080331.Byrne_JAG_Funding.pdf (“Byrne/JAG is currently the only source of funding available for multi-jurisdictional drug enforcement, including methamphetamine initiatives, and is critical for drug courts, law enforcement information sharing, gang prevention, and prisoner reentry programs.”); Press Release, TomPAC, Harkin Fights to Restore Anti-Drug Program Funding (Feb. 28, 2008), available at <http://www.tomharkin.com/2008/2/28/harkin-fights-to-restore-anti-drug-program-funding/index.html> (claiming that Iowa would lose its ability to fight drug crimes if funding was not restored); Ronnie Garrett, *The Over Byrne Cuts*, OFFICER.COM (Apr. 1, 2008), <http://www.officer.com/article/10249004/the-over-byrne-cuts> (citing examples of drug task forces that would be eliminated by decreased funding).

⁹⁰ *See* JAG Activity Report, *supra* note 85, at 2.

⁹¹ *See* BJA JAG Fact Sheet, *supra* note 75; BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, PROGRAM PERFORMANCE MEASURES FOR JUSTICE ASSISTANCE GRANT (JAG) PROGRAMS (2012), available at https://www.bja.gov/Programs/JAG_Questionnaire_All.pdf (questions include numbers of arrests and amounts of property seized).

⁹² *See* JAKE WIENS, PROJECT ON GOV'T OVERSIGHT, GETTING BYRNE BY JUSTICE: FAVORITISM IN THE DEPARTMENT OF JUSTICE BYRNE DISCRETIONARY GRANT PROGRAM (2008), available at <http://pogoarchives.org/m/co/byrne/doj-grant-report-20080619.pdf> (detailing failure of BJA to follow its own peer review process while awarding grants based on patronage and Congressional earmarks).

⁹³ *See* Radley Balko, *Burn the Byrne*, REASON.COM (Apr. 15, 2008), <http://reason.com/archives/2008/04/15/burn-the-byrne>.

⁹⁴ *See id.*; *see also* Press Release, Sheriff's Office, Towns County, “Operation: Byrne Blitz” a Success in Towns County (Mar. 7, 2008), available at http://townssheriff.com/files/Op_byrne_blitz_press.pdf; Kelly Foreman, *CKADTF Arrests Total 13, Part of National Drug Blitz*, RICH. REG.

of \$2 billion, and continues as of 2014.⁹⁵ Whether the “blitz” garnered more drug kingpins than low level offenders is unknown, but the point of the exercise was to show a large quantity of arrests and seizures, and measured by that standard it appears to have been a success. Becoming dependent on such funding and tying it to arrest and conviction statistics is dangerous, foments corruption, and has led to numerous illegal arrests and prosecutions carried out by Byrne JAG grant recipients.⁹⁶ Coupled with the kind of military hardware, weaponry, and training available through other federal funding, this program raises serious concerns about the semi-federalized policing standards in operation across the United States.

b. Community Oriented Policing Services Grants

In addition to the funds available for hiring through Byrne JAG grants, the DOJ also administers grants for training and supporting local law enforcement agencies through Community Oriented Policing Services (COPS) grants.⁹⁷ The primary mandate of COPS is to hire more police officers and supply funds for overtime pay and training.⁹⁸ Formulated in 1994 in another effort to wage the “war on drugs,” this program offers funds to cover 75% of the cost of any approved grants but the Attorney General can waive the matching funds requirement and increase the grant to 100%.⁹⁹ In its first two years, COPS spent an average of \$1.4 billion per year with the goal of adding 100,000 police officers to departments across the country.¹⁰⁰ After another large influx of federal money in 2009,¹⁰¹ many of the programs were transferred to

(Mar. 8, 2008, 8:20 PM), http://www.richmondregister.com/news/local_news/ckadtf-arrests-total-part-of-national-drug-blitz/article_fa24c260-fa46-5ade-8e0c-2c9bdca28386.html; Tim Harlow, *Operation Byrne Blitz Drug Sweep Nets 172 Arrests*, STAR TRIB. (Mar. 7, 2008, 11:42 AM), <http://www.startribune.com/local/16385271.html> (“As part of Operation Byrne Blitz, drug task forces from throughout the state arrested 172 people and seized 23 pounds of marijuana, 1½ pounds of powder cocaine, 3½ pounds of methamphetamine and 3 pounds of various prescription drugs in a sweep on Wednesday.”); *Statewide Drug Sweep Nets 757 Arrests, Major Drug Seizures*, FLA. DEP’T L. ENFORCEMENT (Mar. 7, 2008), <http://www.fdle.state.fl.us/Content/News/2008/March-2008/Statewide-Drug-Sweep-Nets-757-Arrests,-Major-Drug-.aspx>.

⁹⁵ See *Justice Assistance Grant (JAG) Program*, BUREAU JUST. ASSISTANCE, U.S. DEP’T JUSTICE, https://www.bja.gov/ProgramDetails.aspx?Program_ID=59#horizontalTab1 (last visited Mar. 29, 2015); Recovery Act Overview, *supra* note 82. In 2013, Byrne JAG awards totaled approximately \$280 million. See BJA JAG Fact Sheet, *supra* note 75.

⁹⁶ See *Drug Task Force Scandals: A National Look*, PBS, <http://www.pbs.org/independentlens/tuliatexas/scandals.html> (last updated Feb. 23, 2009) (displaying an interactive map of recent Byrne task force-related scandals).

⁹⁷ See 42 U.S.C. § 3796dd (2012).

⁹⁸ See NATHAN JAMES, CONG. RESEARCH SERV., RL33308, COMMUNITY ORIENTED POLICING SERVICES (COPS): BACKGROUND AND FUNDING 1 (2014), available at <https://www.hsdl.org/?view&did=750707>.

⁹⁹ See 42 U.S.C. § 3796dd(g).

¹⁰⁰ See JAMES, *supra* note 98, at 4.

¹⁰¹ *Id.*

another administrator and the budget for 2014 is a much lower—but still significant—\$200 million.¹⁰² With these funds, even small towns were able to muster enough troops to start their own SWAT teams, and by keeping arrests high, even small departments can justify the continued flow of gear and money.¹⁰³

While the name suggests that the grants might fund opportunities for police to engage more fully with their local communities in an effort to handle crime concerns cooperatively, COPS has no such mandate. However, some view militarized policing as a type of community policing strategy¹⁰⁴ so the name is only a misnomer if one assumes a particular, perhaps even provincial, definition of the term. In fact, when asked about community policing in his study on SWAT teams, Peter Kraska reported that 63% of respondents in his survey viewed the role of SWAT teams as an important component of community policing.¹⁰⁵ While oversight for COPS grants includes possible random site visits and a self-assessment to ensure departments are not reducing the budget for officer salaries just to take advantage of the grants, there is nothing about the program that restricts using the funding for paramilitary activity.¹⁰⁶ Notably, even a senior researcher for COPS, Karl Bickel, has flagged the militarization trend as a serious problem that undermines the traditional notion of what community policing should be.¹⁰⁷ In tracing the escalation of militarized police encounters through paramilitary forces like SWAT, Bickel notes that merely wearing the BDUs (which has become so ubiquitous for even patrol officers) can produce aggressive tendencies in the wearer.¹⁰⁸ The barriers that this warrior mentality invokes are, according to Bickel, an impediment to a sustainable cooperative relationship of mutual respect between the police and the community.

¹⁰² *Id.*

¹⁰³ See BALKO, *supra* note 7, at 207. COPS, Byrne, and other block grants were awarded to departments based entirely on the number of drug arrests made by each department and drug arrests skyrocketed as a result. Steven Elbow, *Military Muscle Comes to Mayberry: U.S. Donates Gear, Grenade Launchers*, CAP. TIMES, Aug. 18, 2001, <http://www.mapinc.org/drugnews/v01/n1519/a06.html>. The resulting funding followed suit and small towns in Wisconsin were able to start their own SWAT teams and qualify for military armaments under the 1033 Program. *Id.*

¹⁰⁴ See Kraska, *supra* note 8, at 8–10.

¹⁰⁵ *Id.* at 9.

¹⁰⁶ See *Nonsupplanting Requirement*, COMMUNITY ORIENTED POLICING SERVICES, U.S. DEP'T JUSTICE, <http://www.cops.usdoj.gov/Default.asp?Item=2282> (last visited Mar. 29, 2015).

¹⁰⁷ See Karl Bickel, *Will the Growing Militarization of Our Police Doom Community Policing?*, COMMUNITY POLICING DISPATCH (Dec. 13, 2013), http://cops.usdoj.gov/html/dispatch/12-2013/will_the_growing_militarization_of_our_police_doom_community_policing.asp.

¹⁰⁸ *Id.*

3. Department of Homeland Security Grants

The DHS offers grants to state and local entities in order to respond to possible terrorist threats and other emergencies.¹⁰⁹ Formulated in response to recommendations of the 9/11 Commission,¹¹⁰ DHS has distributed over \$18 billion to law enforcement agencies since 2002.¹¹¹ The original intent of the program was to target likely terrorism targets, generally in large cities or locales with critical infrastructure.¹¹² However, the formula to distribute the funds gradually came under scrutiny when Wyoming received more antiterrorism funding per capita than New York;¹¹³ the formula has since been changed to account for specific risk assessments but that has not ended the controversy.¹¹⁴ In 2012, Senator Tom Coburn released a report highlighting some of the grants awarded to small towns and cities with little known risk, and accused fellow lawmakers of playing politics in order to direct money to their own districts, despite little risk of terror attacks in many of them.¹¹⁵ Still, the funding for 2014 is expected to top \$1 billion with cities like Kansas City celebrating the restoration of antiterror funds that were briefly withheld after Coburn's report and media scrutiny stalled their eligibility.¹¹⁶

Under the DHS grant program, small towns have been able to purchase heavy military-grade vehicles and weaponry that is unlikely to protect the population against terror attacks and much more likely to be

¹⁰⁹ Implementing Recommendations of 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266; FED. EMERGENCY MGMT. AGENCY, U.S. DEP'T OF HOMELAND SEC., FY 2013 HOMELAND SECURITY GRANT PROGRAM (HSGP) FUNDING OPPORTUNITY ANNOUNCEMENT (FOA): OVERVIEW INFORMATION (2013), available at http://www.fema.gov/media-library-data/20130726-1916-25045-6176/fy_2013_hsgp_foa.pdf (HSGP is managed by FEMA and covers five projects related to emergency preparedness and counterterrorism initiatives).

¹¹⁰ Implementing Recommendations of 9/11 Commission Act of 2007.

¹¹¹ OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., THE FEDERAL EMERGENCY MANAGEMENT AGENCY'S REQUIREMENTS FOR REPORTING HOMELAND SECURITY GRANT PROGRAM ACHIEVEMENTS 1 (2012), available at http://www.oig.dhs.gov/assets/Mgmt/2012/OIG_12-92_Jun12.pdf.

¹¹² FED. EMERGENCY MGMT. AGENCY, U.S. DEP'T OF HOMELAND SEC., FY 2012 HOMELAND SECURITY GRANT PROGRAM (HSGP) FUNDING OPPORTUNITY ANNOUNCEMENT (FOA): OVERVIEW INFORMATION 29-30 (2012), available at http://www.fema.gov/pdf/government/grant/2012/fy12_hsgp_foa.pdf.

¹¹³ See Alexandra Marks, *Security Funding: New York vs. Wyoming*, CHRISTIAN SCI. MONITOR (Oct. 24, 2005), <http://www.csmonitor.com/2005/1024/p01s03-uspo.html>.

¹¹⁴ See FED. EMERGENCY MGMT. AGENCY, *supra* note 112, at 6-8.

¹¹⁵ See TOM COBURN, HOMELAND SEC. & GOVERNMENTAL AFFAIRS COMM., SAFETY AT ANY PRICE: ASSESSING THE IMPACT OF HOMELAND SECURITY SPENDING IN U.S. CITIES (2012), available at <https://info.publicintelligence.net/SenatorCoburn-UASI.pdf>.

¹¹⁶ See *Kansas City Celebrates Federal Terrorism Risk Funding*, THE STREAM BLOG (Mar. 19, 2014, 7:16 PM), <http://america.aljazeera.com/watch/shows/the-stream/the-stream-officialblog/2014/3/19/kansas-city-celebratesfederalterrorismriskfunding.html>; Tom Ragan, *Las Vegas to Again Get Federal Security Funding*, LAS VEGAS REV.-J. (Mar. 18, 2014, 6:33 PM), <http://www.reviewjournal.com/news/las-vegas-again-get-federal-security-funding>.

used to execute search warrants.¹¹⁷ One of the stories Coburn used to illustrate how easy it has become to get free military gear through the DHS grant application process involves Keene, New Hampshire, where the city of 23,000 invoked its annual pumpkin festival as a potential terrorist target and was rewarded with a Lenco BearCat armored personnel carrier.¹¹⁸ While the story garnered a good deal of scorn and ridicule,¹¹⁹ there is no shortage of tenuous explanations given to acquire these military weapons;¹²⁰ one need not rely solely on this outrageous anecdote to make the point that this hardware risks exceeding the mandate that has traditionally driven domestic law enforcement, and bringing about a shift from preserving the peace to engaging the enemy. Nor does the acquisition of military equipment serve the mandate of protecting against terrorist attacks in places where they are extremely unlikely to occur.

Oversight for the DHS grant program has been called into question by both members of Congress¹²¹ and DHS's own 2012 audit.¹²² Among the charges, the audit found that DHS had no system in place to assess whether the funded projects and equipment would assist the grantees in preventing or responding to either terrorist attacks or any other major emergencies.¹²³ Moreover, grantees are not required to report any accomplishments or show that the funding provides any enhancement to their existing emergency preparedness abilities at all.¹²⁴ DHS tracks whether grantees bought the equipment they claimed was necessary, however, the use of the equipment is reported in such broad terms that it is impossible to know anything specific about what police departments are doing with it.¹²⁵ Given such lax oversight, small towns can purchase vehicles like BearCats and MRAPs without demonstrating how they will be used in furtherance of the grant's priorities consistent with protecting citizens against terrorism and other emergencies.¹²⁶

¹¹⁷ See ACLU Report, *supra* note 22, at 31.

¹¹⁸ See COBURN, *supra* note 115, at 42.

¹¹⁹ See, e.g., Kari Huus, *NH City's New Military Muscle Raises Some Hackles*, NBC NEWS (Mar. 14, 2012, 4:10 PM), http://usnews.nbcnews.com/_news/2012/03/14/10689730-nh-citys-new-military-muscle-raises-some-hackles; Doug Saffir, *John Oliver Pulls Keene, N.H. into Police Militarization Debate*, BOSTON.COM (Aug. 18, 2014, 1:02 PM), <http://www.boston.com/news/nation/2014/08/18/john-oliver-pulls-keene-into-police-militarization-debate/nbU17y3w5jG8W40TJpsoAL/story.html>.

¹²⁰ See COBURN, *supra* note 115, at 31–47 (citing numerous examples of cities that have no counterterrorism use for armored vehicles and drones but received them with DHS grants, including Clovis, California, where the city acquired a BearCat but paraded it to the local Easter egg hunt, and a town in Washington that used its BearCat to pull over drunk drivers).

¹²¹ See generally Coburn, *supra* note 115.

¹²² See OFFICE OF INSPECTOR GEN., *supra* note 111, at 4.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ See COBURN, *supra* note 115, at 53.

B. *Private Defense Contractors and Domestic Profits*

The military equipment being used by domestic police departments, received through federal grants like those discussed in Part I.A, is manufactured by defense industry companies with a vested interest in expanding into new markets.¹²⁷ As the wars in Iraq and Afghanistan are winding down, some military armaments are being destroyed to prevent their use by antigovernment forces.¹²⁸ Others are brought back to the United States and either used by the military or transferred as surplus through the 1033 Program.¹²⁹ The private defense industry¹³⁰ stands to lose significant profits as government contracts to fill orders decrease for wars, so the domestic market represents a new profit frontier. Additionally, defense contractors reach out to domestic police departments directly to sell their military equipment, whether the departments pay with their own funds or those secured through federal grants. Finally, police have their own lobbyists through groups like the National Tactical Officers Association (NTOA), who work to secure government funding to purchase the vehicles, weapons, and gear necessary to outfit SWAT teams. The cadre of financial stakeholders has become a powerful force that continues to steer money and gear through the green to blue pipeline.

1. Lobbying Congress

An influential voice in politics, the defense industry spent \$132 million lobbying Congress in 2012,¹³¹ and contributed \$27 million to political candidates and political action committees (PACs)¹³² during

¹²⁷ See Jon Lundberg, *Challenging Times for Land Systems, but Opportunities Still Remain*, COUNTERPOINT MARKET INTELLIGENCE (Dec. 8, 2013), <http://www.cpmil.com/news/challenging-times-for-land-systems-but-opportunities-still-remain-2> (discussing makers of MRAPs and other light tactical vehicles with plans to expand market share through more government contracts despite decrease in orders for wars).

¹²⁸ See Max Fisher, *The US Bombing Its Own Guns Perfectly Sums up America's Total Failure in Iraq*, VOX (Aug. 8, 2014, 3:02 PM), <http://www.vox.com/2014/8/8/5982501/the-us-is-now-bombing-its-own-military-equipment-in-iraq>; Ernesto Londoño, *Scrapping Equipment Key to Afghan Drawdown*, WASH. POST, June 19, 2013, http://www.washingtonpost.com/world/asia_pacific/scrapping-equipment-key-to-afghan-drawdown/2013/06/19/9d435258-d83f-11e2-b418-9dfa095e125d_story.html.

¹²⁹ See *supra* Part I.A.1.a.

¹³⁰ The term covers a wide range of companies that manufacture, supply, and maintain military materiel primarily for the federal government, but also for international and private sources.

¹³¹ See Ctr. for Responsive Politics, *Defense: Background*, OPENSECRETS.ORG, <http://www.opensecrets.org/industries/background.php?cycle=2014&ind=D> (last updated Aug. 2013).

¹³² See Ctr. for Responsive Politics, *What Is a PAC?*, OPENSECRETS.ORG, <https://www.opensecrets.org/pacs/pacfaq.php> (last visited Mar. 30, 2015).

the 2012 campaign cycle.¹³³ Over 900 lobbyists represented 266 defense companies working to ensure that their clients' interests were represented in Congress.¹³⁴ The money spent to influence Congressional Senate and House members is focused primarily on retaining and securing government contracts that culminate in more profit for those companies.¹³⁵ Whether those contracts achieve profits through primary markets like the military and police, or in the secondary market through maintenance, the priority is to fill orders for the materiel they produce.¹³⁶

Defense industry companies lobby, contribute to PACs, and give money directly to political campaigns; the largest recipients are those politicians who sit on committees responsible for defense funding and oversight.¹³⁷ For example, Congressman Buck McKeon, the Chairman of the House Armed Services Committee,¹³⁸ received \$567,000 from the defense industry in the 2012 campaign cycle.¹³⁹ Dick Durbin, who chairs the Senate Subcommittee on Defense,¹⁴⁰ was the third biggest recipient of defense industry money in 2014, receiving \$307,899.¹⁴¹ Funding for the 1033 and DHS grant programs supplies a steady flow of orders for manufacturers of military equipment destined for American police departments.¹⁴² In order to secure those orders, Congress must appropriate the funding, and relies on subcommittees to make recommendations and handle oversight.¹⁴³ Of course, there is no guarantee that a lawmaker will vote a particular way just because they receive hefty donations, but evidence suggests that the spending pays off for the industry. The Abrams tank is a case in point; when the Pentagon insisted that it no longer needed or wanted General Dynamics' tank, Congress appropriated half a billion dollars for it anyway in 2013.¹⁴⁴ More recently in June 2014, when Congressman Alan Grayson introduced legislation to limit the transfer of certain weapons—like

¹³³ *Defense: Background*, *supra* note 131.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *See id.*

¹³⁹ *See id.*

¹⁴⁰ *See Committee Assignments*, U.S. SENATOR DICK DURBIN ILL., <http://www.durbin.senate.gov/about/committees-assignments> (last visited Mar. 30, 2015).

¹⁴¹ *See* Ctr. for Responsive Politics, *Defense: Top Recipients*, OPENSECRETS.ORG, <http://www.opensecrets.org/industries/recips.php?cycle=2014&ind=D> (last visited Mar. 30, 2015).

¹⁴² *See supra* Part I.A.

¹⁴³ *See, e.g., Committee Jurisdiction*, U.S. SENATE COMMITTEE ON APPROPRIATIONS, <http://www.appropriations.senate.gov/content/committee-jurisdiction> (last visited Mar. 30, 2015).

¹⁴⁴ *See* Anna Mulrine, *Pentagon Budget Woes: Furlough Civilians, Buy Tanks You Don't Want*, CHRISTIAN SCI. MONITOR (Apr. 29, 2013), <http://www.csmonitor.com/USA/Military/2013/0429/Pentagon-budget-woes-furlough-civilians-buy-tanks-you-don-t-want>.

tanks, missiles, grenade launchers, and toxicological agents—through the 1033 Program, it was soundly defeated.¹⁴⁵ Members who voted against the amendment received 70% more money in campaign contributions in the previous two years than those who voted for it.¹⁴⁶ With more than 900 lobbyists deployed to influence Congress, and millions spent on donations, the industry remains a powerful force.

Companies that make MRAPs, a favorite of the 1033 Program, have spent handsomely to secure contracts. Textron, Inc., for example, is one maker of the MRAP and spent more than \$680,000 in 2014 alone on contributions to PACs and members of Congress; it also spent nearly \$4.6 million more on lobbying efforts.¹⁴⁷ General Dynamics, one of the largest defense contractors in the United States, makes an MRAP and spent more than \$12 million on combined lobbying and contributions in 2014.¹⁴⁸ BAE Systems also makes their own version of the MRAP and spent over \$5 million on contributions and lobbying in 2014.¹⁴⁹ The amount spent is not tied solely to the investment return these companies expect to gain in the domestic market; they are lobbying for overall funding, which includes equipment destined for foreign deployment.¹⁵⁰ However, the domestic homeland security market

¹⁴⁵ See H. Amdt. 918 to H.R. 4870, 113th Cong. (2014). Representative Grayson sponsored the failed amendment to the Department of Defense Appropriations Act, which stated, in part:

[This] amendment . . . prohibit[s the] use of funds to transfer aircraft (including unmanned aerial vehicles), armored vehicles, grenade launchers, silencers, toxicological agents . . . , launch vehicles, guided missiles, ballistic missiles, rockets, torpedoes, bombs, mines, or nuclear weapons . . . through the Department of Defense Excess Personal Property Program established pursuant to . . . the 'National Defense Authorization Act for Fiscal Year 1997.'

Id.; see also Tim Starks, *Defense Industry Donations and the Alan Grayson Police Militarization Amendment*, ROLL CALL BLOG (Aug. 15, 2014, 3:07 PM), <http://blogs.rollcall.com/five-by-five/fergusondefense-industry-donations-and-police-militarization>.

¹⁴⁶ See *Department of Defense Appropriations Act, 2015 – House Vote: H. Amdt. 918 (Grayson) to H.R. 4870*, MAPLIGHT, [http://maplight.org/us-congress/bill/113-hr-4870/4318251/contributions-by-vote?sort=asc&order=%24%20From%20Interest%20Groups%3Cbr%20%2F%3EThat%20Opposed&party\[D\]=D&party\[R\]=R&party\[I\]=I&vote\[AYE\]=AYE&vote\[NOE\]=NOE&vote\[NV\]=NV&voted_with\[with\]=with&voted_with\[not-with\]=not-with&state=&custom_from=01%2F01%2F2011&custom_to=12%2F31%2F2013&politicians=&all_pols=1&kuid=53121&interests-support=&interests-oppose=D2000-D3000-D5000-D9000-D8000-D4000-D0000&from=01-01-2011&to=12-31-2013&source=pacs-nonpacs&campaign=congressional](http://maplight.org/us-congress/bill/113-hr-4870/4318251/contributions-by-vote?sort=asc&order=%24%20From%20Interest%20Groups%3Cbr%20%2F%3EThat%20Opposed&party[D]=D&party[R]=R&party[I]=I&vote[AYE]=AYE&vote[NOE]=NOE&vote[NV]=NV&voted_with[with]=with&voted_with[not-with]=not-with&state=&custom_from=01%2F01%2F2011&custom_to=12%2F31%2F2013&politicians=&all_pols=1&kuid=53121&interests-support=&interests-oppose=D2000-D3000-D5000-D9000-D8000-D4000-D0000&from=01-01-2011&to=12-31-2013&source=pacs-nonpacs&campaign=congressional) (last visited Apr. 2, 2015) (showing the average campaign contributions interest groups gave House members who voted for and against the amendment).

¹⁴⁷ See Ctr. for Responsive Politics, *Textron Inc: Summary*, OPENSECRETS.ORG, <https://www.opensecrets.org/orgs/summary.php?id=D000000201> (last visited Apr. 2, 2015).

¹⁴⁸ See Ctr. for Responsive Politics, *General Dynamics: Summary*, OPENSECRETS.ORG, <https://www.opensecrets.org/orgs/summary.php?id=D000000165> (last visited Apr. 2, 2015).

¹⁴⁹ See Ctr. for Responsive Politics, *BAE Systems: Summary*, OPENSECRETS.ORG, <https://www.opensecrets.org/orgs/summary.php?id=D000000583> (last visited Apr. 2, 2015).

¹⁵⁰ Political spending is not broken down by issue or Congressional bill. Information is available for specific candidates, PACs, and overall lobbying.

represents approximately \$20 billion in overall value.¹⁵¹ The money spent on politicians underscores the high stakes involved in procuring government contracts and the willingness of the industry to spend freely to secure them.

In addition to the defense industry, trade associations—or lobbying groups, who represent police—also lobby Congress for appropriations that will secure both funding and equipment for their departments.¹⁵² Law enforcement lobbying focuses on programs like COPS and Byrne JAG grant funding.¹⁵³ The Fraternal Order of Police (FOP) is a powerful lobby that routinely argues in favor of the federal grant programs most responsible for the escalation in militarized policing, arguing that they are only trying to keep up with the kinds of weapons and gear criminals employ.¹⁵⁴ In terms of needing semiautomatic handguns, the FOP might have had a good point in the 1980s,¹⁵⁵ but the armored tanks and the grenade launchers transferred today are harder to justify. There are also lobbying groups devoted primarily to securing funding and equipment transfers solely for paramilitary units, like the NTAO.¹⁵⁶ These lobbyists work to assure that money for tactical gear like ballistic vests and helmets, tanks, APCs, M-16s, and money for salaries keep flowing from the federal government to local law enforcement agencies.

2. Lobbying Police Departments

Defense contractors also target police departments directly to urge them to select particular products given the number of choices that

¹⁵¹ See Andrew Becker & G.W. Schulz, *Local Police Stockpile High-Tech, Combat-Ready Gear*, CENTER FOR INVESTIGATIVE REPORTING (Dec. 21, 2011), <http://centerforinvestigativereporting.org/reports/local-police-stockpile-high-tech-combat-ready-gear-2913> (citing a report by the Homeland Security Research Corporation projecting \$19.2 billion in spending in 2014).

¹⁵² See Ctr. for Responsive Politics, *Lobbying Spending Database – Law Enforcement & Crime, 2014*, OPENSECRETS.ORG, https://www.opensecrets.org/lobby/issue_spec.php?%20id=LAW&year=2014 (last visited Apr. 2, 2015) (listing of bills that law enforcement lobbied for and against, including funding for COPS, anti-drug task forces, and Byrne JAG funding); see also *About NAPO*, NAT'L ASS'N POLICE ORGS., <http://www.napo.org/about/overview> (last visited Apr. 2, 2015).

¹⁵³ See *About NAPO*, *supra* note 152.

¹⁵⁴ See Tim Devaney, *Congress Under Pressure from Left and Right to 'Demilitarize' Police*, HILL (Aug. 15, 2014, 6:00 AM), <http://thehill.com/regulation/defense/215207-left-right-unify-behind-push-to-demilitarize-the-police#ixzz3ASqzUWM7>.

¹⁵⁵ See Lou Salseda, *Double-Action, Semi-Auto Pistols Fall Out of Favor*, POLICE MAG., Sept. 24, 2013, <http://www.policemag.com/blog/firearms-and-tactics/story/2013/09/do-da-semi-auto-pistols-still-belong-in-le.aspx>.

¹⁵⁶ See *About NTOA*, NAT'L TACTICAL OFFICERS ASS'N, <http://ntoa.org/about> (last visited Apr. 2, 2015).

abound.¹⁵⁷ To further help market their wares, some companies help police departments navigate the complicated landscape of available federal grants. Lenco, which makes the BearCat APC, assists police departments in drafting their grant proposals.¹⁵⁸ Several other companies hoping to benefit from federal grants to police departments sponsor a website that also helps police agencies find, track, and write grants for equipment offered by DHS and 1033 Program grants.¹⁵⁹ Once police departments find the gear they want, the companies then guide them through every step of the process, making it as easy as possible to attain military hardware. Given that the equipment is free—or heavily discounted depending on the grant—police departments are highly incentivized to apply for federal grants, with the help of the manufacturers.

Along with grant assistance, companies employ several marketing strategies, from videos to trade shows, where they set up booths to entice law enforcement personnel to try out the gear.¹⁶⁰ Lenco produced a slick marketing video touting the BearCat, complete with an AC/DC soundtrack and quick edits showing SWAT teams breaking down doors with the optional battering ram attachment, wielding M-16s, and wearing tactical ballistic vests and helmets; the police in the video look like Marines engaged in an urban assault mission.¹⁶¹ Halo Corporation, a tactical training services company, has sponsored trade shows like “Counter-Terrorism 2012,” which featured hands-on exhibits and drone demonstrations at a San Diego resort.¹⁶² Getting police from around the country to attend and pay the \$1000 entrance fee might seem prohibitive, but DHS covered all travel and expenses for its existing grant recipients.¹⁶³ Another popular event held each year is called “Urban Shield,”¹⁶⁴ a multipurpose affair showcasing military and tactical

¹⁵⁷ The MRAP is made by several different companies including, Safariland (formerly Armor Holdings), BAE Systems, Force Protection, General Dynamics, Navistar, and Textron. Lenco is the only maker of the BearCat, but it competes with makers of the MRAP for domestic law enforcement APC market share.

¹⁵⁸ See *Lenco Armored Vehicles Grant Assistance Request Form*, POLICEGRANTSHelp.COM, <http://www.policegrantshelp.com/Lenco-Armored-Vehicles/direct-grant-assistance-request-form> (last visited Apr. 2, 2015).

¹⁵⁹ See POLICEGRANTSHelp.COM, <http://www.policegrantshelp.com> (last visited Apr. 2, 2015). The site is sponsored by Lenco, Taser, Night Optics, LDV specialized law enforcement vehicles, and Argus thermal imaging equipment, among others. See *id.*

¹⁶⁰ See *News and Events*, HALO CORP., <http://www.thehalocorp.com/news-and-events> (last visited Apr. 2, 2015).

¹⁶¹ See *Lenco BearCat G3 Armored Police Vehicles*, YOUTUBE (July 22, 2013), <https://www.youtube.com/watch?v=NqZY1ApWrpU&feature=share> (promotional video).

¹⁶² See HALO CORP., *supra* note 160.

¹⁶³ See COBURN, *supra* note 115, at 24.

¹⁶⁴ See URBAN SHIELD, <http://www.urbanshield.org> (last visited Apr. 2, 2015).

gear from its sponsors,¹⁶⁵ with training exercises and competitions between SWAT teams.¹⁶⁶ Urban Shield's highlight video from 2009 also features a heavy metal soundtrack and images of police in full military gear in simulated urban warfare scenarios.¹⁶⁷ DHS is one of the sponsors of the event.¹⁶⁸ The International Association of Chiefs of Police (IACP) has an annual exposition of its own, featuring hundreds of exhibitors with booths showcasing their hardware and services.¹⁶⁹ DHS did not appear to pay the travel, hotel, or entrance fees for the IACP event held in Orlando, Florida, in 2014, but it is permissible for officers to use funds confiscated under federal forfeiture laws to attend the conference each year.¹⁷⁰ The marketing strategy for these events is to make the gear and its effectiveness seem as close to a military experience as possible.¹⁷¹ The images, the demonstrations, and the simulations all attempt to mirror urban warfare, not civil service.

II. THE LIMITATIONS OF LEGAL REMEDIES

With Part I having laid out the key forces perpetuating police militarization, this Part points out the inability of current legal regimes to remedy its effects. The two Fourth Amendment avenues to challenge the harms involved in police militarization that this Article addresses fall under 42 U.S.C. § 1983 and the exclusionary rule. Both remedies are

¹⁶⁵ See *Vendors*, URBAN SHIELD, <http://www.urbanshield.org/index.php/vendors> (last visited Apr. 2, 2015) [hereinafter *Urban Shield Vendors*]. Event sponsors have included Blackhawk Industries (maker of military-grade helicopters), Armored Mobility, Incorporated (makers of ballistic shields, HaloDrop), drone manufacturers, and many others. See *id.*

¹⁶⁶ See *SWAT*, URBAN SHIELD, <http://www.urbanshield.org/index.php/2012-urban-shield-exercise/special-wepons-and-tactics> (last visited Apr. 2, 2015). According to the website for the 2014 event: "Teams will arrive on September 5, 2014, and receive mission and safety briefings as well as an introduction to the latest technology to be used in the training scenarios." *Id.*

¹⁶⁷ See *Urban Shield 2009 - Highlight Video*, YOUTUBE (Jan. 25, 2010), <https://www.youtube.com/watch?v=TAWp-bjEAXs>.

¹⁶⁸ See *Urban Shield Vendors*, *supra* note 165.

¹⁶⁹ See *IACP 2014: Exhibitors List*, IACP CONF., <http://www.theiacpconference.org/iacp2014/Public/exhibitors.aspx?ID=1219&sortMenu=104001> (last visited Apr. 2, 2015).

¹⁷⁰ See *IACP 2014: Registration Categories & Fees*, IACP CONF., <http://www.theiacpconference.org/iacp2014/Public/Content.aspx?ID=1039&sortMenu=102003> (last visited Apr. 2, 2015). Registration for the conference notes that attendees may use funds derived from the DOJ's Asset Forfeiture Program, commonly known as the "Equitable Sharing Program." Equitable Sharing is a mechanism through which state and local law enforcement can claim a share of the proceeds of any property seized as part of a joint task force with a participating federal agency, or may ask such agency to adopt a local seizure so that the local agency can claim proceeds otherwise impermissible under state or local law. Funds distributed under the program may be used for training purposes, like the IACP Conference. See ASSET FORFEITURE & MONEY LAUNDERING SECTION, U.S. DEP'T OF JUSTICE, GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES (2009), available at <http://www.justice.gov/usao/ri/projects/esguidelines.pdf>.

¹⁷¹ See Becker & Schulz, *supra* note 151.

designed to deter police from violating citizens' civil rights and yet both fail to adequately address the increasingly violent and militarized nature of police encounters.

Part II.A analyzes the current state of the law in addressing civil claims stemming from allegations of excessive force during encounters between citizens and police. Part II.B considers similar claims brought in the context of criminal prosecutions, where defendants move to exclude evidence by invoking the exclusionary rule under the Fourth Amendment. Both avenues lack the necessary authority under current constitutional interpretation to adequately address the escalation in militarized tactics, and use of military hardware by police departments today.

A. *Fourth Amendment Challenges Under 42 U.S.C. § 1983 and Bivens*

Section 1983 provides civil relief for excessive force claims brought under the Fourth Amendment,¹⁷² but has failed to adequately address the aggressive militarized SWAT raids increasingly used to conduct searches. In order to prevail on a claim for damages under Section 1983, a plaintiff must show that a person acting under color of state law—and not protected by qualified immunity—deprived the plaintiff of a clearly established constitutional right.¹⁷³ Establishing a constitutional violation is not enough to prevail on a claim; the court must also find that a reasonable officer would have known that his actions violated a clearly established law under the circumstances to overcome a claim of qualified immunity.¹⁷⁴ Determining whether the law was clearly established can be difficult in cases involving excessive force, which are fact specific, unless precedent exists to hold that a particular action violated a constitutional right.¹⁷⁵ Without precedent, the analysis becomes more difficult and remedies are much harder to attain for an aggrieved plaintiff.¹⁷⁶ The problems inherent in finding precedent, in order to apply the requisite standards to specific case facts, are myriad

¹⁷² See 42 U.S.C. § 1983 (2012); see also *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (applying qualified immunity to federal agents while 42 U.S.C. § 1983 applies to state claims).

¹⁷³ See 42 U.S.C. § 1983; *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). These are *Bivens* actions for federal officers.

¹⁷⁴ See *Harlow*, 457 U.S. at 806.

¹⁷⁵ See generally Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405 (2012) (noting that when courts find that a law was not clearly established before addressing whether a constitutional violation occurred, the law never becomes clearly established because precedent is never made regarding a particular action).

¹⁷⁶ *But see* *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978) (“[I]t is when execution of a government’s policy or custom, whether made by its lawmakers or those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.”).

and have been addressed exhaustively by scholars.¹⁷⁷ It is not within the purview of this Article to cover the same ground or suggest a better methodology for courts to apply. Instead, the focus here is to demonstrate how the law, as currently constructed and applied, fails to properly analyze and remedy excessive force claims in the context of military police tactics, particularly as applied to SWAT raids. This Section situates and highlights the problem in order to demonstrate the current inability of the justice system to address the increased aggressive and excessive force used in those kinds of paramilitary raids.

Because courts are permitted to find qualified immunity before considering the merits of an excessive force claim, it has become difficult to create precedent. When a plaintiff brings a tort claim under the Fourth Amendment against state or federal officers, two issues come into play: (1) the merits of the plaintiff's constitutional claim; and (2) the defendant's right to invoke qualified immunity.¹⁷⁸ In order to overcome a claim to qualified immunity, a plaintiff must show that the defendant's actions were inconsistent with those of an objectively reasonable officer under the circumstances, and were in abrogation of clearly established law.¹⁷⁹ Qualified immunity provides an opportunity to avoid trial on the merits. Therefore, the possibility that qualified immunity is found at the summary judgment stage—based on a lack of clearly established law of which a reasonable officer would be aware—creates an obstacle for plaintiffs hoping to rely on precedent.¹⁸⁰ If the law must be clearly established in order for the case to be heard on the merits, creating precedent for future cases becomes far more difficult.¹⁸¹ In *Saucier v. Katz*,¹⁸² the Supreme Court attempted to address that problem by requiring a two-step procedure in which the merits of the constitutional claim are considered first, before reaching the qualified immunity question.¹⁸³ It held that if a court then found a constitutional violation, the court should consider whether qualified immunity applied.¹⁸⁴ In doing so, the Court hoped to provide some ground on which precedents could be developed for future clarity.¹⁸⁵ However, the requirements laid out in *Saucier* have since been rescinded and the two-

¹⁷⁷ See generally Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761 (2012); John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115; Leong, *supra* note 175.

¹⁷⁸ See *Anderson v. Creighton*, 483 U.S. 635 (1987); *Harlow*, 457 U.S. at 802–03.

¹⁷⁹ See *Harlow*, 457 U.S. at 801.

¹⁸⁰ See Jeffries, *supra* note 177, at 120; Leong, *supra* note 175.

¹⁸¹ See Jeffries, *supra* note 177, at 120; Leong, *supra* note 175, at 411.

¹⁸² 533 U.S. 194 (2001).

¹⁸³ See *id.*

¹⁸⁴ See *id.* at 201.

¹⁸⁵ See *id.*

step process made discretionary.¹⁸⁶ So once again, courts may not reach the merits of a claim before finding qualified immunity applies, making it difficult for plaintiffs to demonstrate that the law violated was clearly established.¹⁸⁷

If claims of excessive force do not find their way into established precedent, plaintiffs who seek a remedy under Section 1983 for such claims must rely more heavily on decisions from criminal cases in which exclusion was sought as a remedy.¹⁸⁸ However, in criminal cases, use of force is often overlooked as a “manner” violation, not germane to the issue of exclusion, as further discussed below.¹⁸⁹ In addition, courts are far less likely to find in favor of defendants in cases where suppressing evidence is the remedy. This leaves the Section 1983 plaintiff wanting for precedent to overcome the need for “clearly established” law.¹⁹⁰

Alternative tort remedies remain elusive, given that the Supreme Court has made clear that excessive force claims must be analyzed under the Fourth Amendment.¹⁹¹ Yet, because the standard for both qualified immunity and excessive force—objective reasonableness—is both fact driven and based on the general principle of reasonableness,¹⁹² finding clearly established precedents is difficult.¹⁹³ In attempting to parse the two types of reasonableness, courts will often look for precedent that matches the facts exactly, or apply a very broad reasonable force test; both analyses present a high bar to plaintiffs.¹⁹⁴

Even where clearly established law may exist for a claim of excessive force, the damages may be hard to quantify in monetary terms. This leaves courts unable to furnish a remedy for individual acts of unreasonable force in which humiliation, degradation, and disrespect are the outcomes, rather than a damaged front door or physical

¹⁸⁶ See *Pearson v. Callahan*, 555 U.S. 223 (2009) (recognizing the importance of developing precedent, the Court nonetheless held that precedent would be created in the criminal context, thus feeding the civil one).

¹⁸⁷ See *id.* at 224–25 (suggesting criminal realm would provide precedent).

¹⁸⁸ But see Daniel K. Siegel, *Clearly Established Enough: The Fourth Circuit’s New Approach to Qualified Immunity in Bellotte v. Edwards*, 90 N.C. L. REV. 1241 (2012) (analogizing to cases that were distinguishable from the case at bar in order to deny qualified immunity and find clearly established law).

¹⁸⁹ See *Hudson v. Michigan*, 547 U.S. 586 (2006); *United States v. Ankeny*, 502 F.3d 829 (9th Cir. 2007), *cert. denied*, 553 U.S. 1034 (2008); *United States v. Jones*, 214 F.3d 836 (7th Cir. 2000); see also *supra* Part I.B.2.

¹⁹⁰ See Leong, *supra* note 175, at 411–12.

¹⁹¹ See *Graham v. Connor*, 490 U.S. 386, 395 (1989).

¹⁹² See *Scott v. Harris*, 550 U.S. 372 (2007); see also Leong, *supra* note 175, at 446 (noting that the Court distinguished *Garner* and failed to apply the factors in *Graham*, which included a list of actions constituting excessive force; instead, the Court applied a general balancing test weighing public safety against the individual).

¹⁹³ See Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 118 (2009); Leong, *supra* note 175, at 448–49.

¹⁹⁴ See Leong, *supra* note 175, at 447.

injury.¹⁹⁵ If the court can furnish only two remedies—money or suppression of evidence—this may leave the individual victim of excessive force without remedy and further fails to regulate or deter uses of force.¹⁹⁶ For example, the use of a flash-bang¹⁹⁷ grenade during the execution of a raid might be extremely unpleasant—it might even damage the carpet or the furniture—but for the plaintiff seeking a Section 1983 remedy, the monetary value might be quite small.¹⁹⁸ Prevailing in such a situation would be difficult even if the plaintiff could show that the officers behaved unreasonably in using a flash-bang *and* that using it violated clearly established law, since there is no remedy to extract from the officers. Plaintiffs could bring the action against the municipality, but there they have to prove the police acted within established policy or custom.¹⁹⁹ Plaintiffs in search of precedent might then turn to the criminal realm where a similar case might have been adjudicated under the exclusionary rule, but there, the obstacle is the likely presence of contraband; in such cases it is far more likely that the use of a flash-bang would be considered reasonable after the application of the reasonableness test.²⁰⁰ Thus, a gap exists in constitutional tort law in terms of providing proper remedies and deterrents where police officers use excessive force.

B. *Fourth Amendment Challenges Under the Exclusionary Rule*

Fourth Amendment challenges that seek the remedy of exclusion do not bar the petitioner from constitutional tort claims but are necessarily the product of criminal prosecutions in which evidence was

¹⁹⁵ *But see* *Floyd v. City of New York*, 813 F. Supp. 2d 457 (S.D.N.Y. 2011). In *Floyd*, a section 1983 claim was made on behalf of several petitioners seeking injunctive relief to halt arbitrary and race-based stop-and-frisk efforts in New York City. *See id.* The city was ordered to remedy the program and is currently doing so, having dropped its appeal when a new Mayor, Bill DeBlasio, took office in 2014. *See Floyd, et. al. v. City of New York, et al.*, CENTER CONST. RTS., <http://ccrjustice.org/stopandfrisk> (last visited Apr. 2, 2015).

¹⁹⁶ *See infra* Part III.A for examples.

¹⁹⁷ “Flash-Bangs are used by special tactical units during hostage rescue and high-risk warrants. It is an ATF [Bureau of Alcohol, Tobacco and Firearms] controlled Class-C explosive device that emits a bright light and thunderous noise to distract potentially dangerous individuals.” *See Flash Bangs*, COMBINED SYS., <https://www.combinedsystems.com/products/?cid=92> (last visited Apr. 2, 2015) (manufacturer of flash-bang grenades).

¹⁹⁸ *But see* Alexis Stevens, *Toddler Critically Injured by “Flash-Bang” During Police Search*, ATLANTA J.-CONST. (May 30, 2014, 12:16 PM), <http://www.ajc.com/news/news/breaking-news/toddler-critically-injured-by-flash-bang-during-po/nf9XM>.

¹⁹⁹ *See Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).

²⁰⁰ *See United States v. Jones*, 214 F.3d 836, 837 (7th Cir. 2000) (finding use of flash-bang device unreasonable).

obtained.²⁰¹ Like Section 1983 claims, Fourth Amendment motions to suppress now depend almost entirely on a general balancing test with reasonableness as a guiding principle.²⁰² Probable cause is generally still required for search warrants, but given that search warrants make up only approximately 1% of all searches, most searches are subject only to the general balancing test.²⁰³ Even so, there is no longer a bright separation between cases in which warrants were obtained and those that do not involve a warrant. The analysis is now the same and deals only with whether the search was reasonable, balancing the interests of the individual against that of the government.²⁰⁴ This is so whether the court is analyzing a violation involving the manner in which the search was undertaken, or one in which a violation of the scope of the search is claimed.²⁰⁵ In other words, courts will look at what was searched and the manner in which the search was conducted, determining the reasonableness of each, depending on the requested relief. If a scope violation occurs, exclusion is a possible remedy.²⁰⁶ However, if a manner violation is found, the only remedy available is a civil action under Section 1983.²⁰⁷ As discussed above, the deterrent effects of qualified immunity and lack of precedent to show clearly established law violations make remedies for manner violations extremely difficult to obtain.

Where the Fourth Amendment violation consists of excessive force, suppression is not an available remedy as long as the scope of the search is found to be reasonable.²⁰⁸ Where the Supreme Court once presumed warrantless searches unreasonable and applied the exclusionary rule, codified in modern jurisprudence in the seminal case *Katz v. United States*,²⁰⁹ the Court no longer makes that presumption.²¹⁰ In *Katz*, the officers were found to have acted reasonably, and yet the remedy was exclusion because they lacked a warrant.²¹¹ Where there is

²⁰¹ See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (applying exclusionary rule to state courts); *Weeks v. United States*, 232 U.S. 383, 398 (1914) (applying exclusionary rule to federal courts), *overruled by Mapp*, 367 U.S. 643.

²⁰² See *Samson v. California*, 547 U.S. 843 (2006).

²⁰³ See Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1666 (2012).

²⁰⁴ See *Scott v. Harris*, 550 U.S. 372 (2007).

²⁰⁵ See Richard M. Re, Comment, *United States v. Ankeny: Remediating the Fourth Amendment's Reasonable Manner Requirement*, 117 YALE L.J. 723 (2008).

²⁰⁶ See *United States v. Leon*, 468 U.S. 897 (1984) (holding deterrence as goal in finding exclusion inappropriate for good faith violation of scope).

²⁰⁷ *Id.*

²⁰⁸ See *Hudson v. Michigan*, 547 U.S. 586 (2006); *United States v. Ankeny*, 502 F.3d 829 (9th Cir. 2007), *cert. denied*, 553 U.S. 1034 (2008).

²⁰⁹ 389 U.S. 347 (1967).

²¹⁰ See *Herring v. United States*, 555 U.S. 135 (2009); *Hudson*, 547 U.S. at 586.

²¹¹ See Sam Kamin & Justin Marceau, *Double Reasonableness and the Fourth Amendment*, 68 U. MIAMI L. REV. 589, 595 (2014).

no warrant to search, the scope of a search is permissible as long as it is reasonable under the circumstances.²¹² Even the requirement of probable cause is virtually usurped by exceptions,²¹³ and more recently in *Samson v. California*,²¹⁴ ignored altogether.²¹⁵ It then follows that the manner in which the search is conducted is also analyzed using the same reasonableness standard as in warrantless searches. So too, where a warrant defines the scope of a search, the manner becomes irrelevant for purposes of exclusion. The Supreme Court has held, in two recent cases, that exclusion is a last resort and not a presumptive remedy.²¹⁶ For manner violations, the lack of precedent is a clear impediment to providing both remedies and incentives to reform policy regarding SWAT raids and aggressive tactics.

Some judges have attempted to address the gap into which excessive force falls, but their views currently appear solely in dissents.²¹⁷ The dissents in *Hudson* and *Ankeny* have suggested that exclusion is the only remedy for excessive force violations.²¹⁸ Still, the Court precedents have been clear that where evidence would have been obtained anyway,²¹⁹ exclusion is not the proper remedy for a claim of excessive force;²²⁰ only constitutional tort law can provide relief.²²¹ Furthermore, the Supreme Court has been clear in a number of cases related to its reluctance to suppress evidence in excessive force cases, that suppression is either inappropriate or ineffective for purposes of deterrence.²²² In *Hudson*, Justice Scalia found that the cost of suppressing evidence far outweighed the deterrent benefit it might produce, given that police are better disciplined and trained today than they were in 1961, at the time *Mapp v. Ohio*²²³ was decided. He went further, finding that “[m]assive deterrence is hardly required” for violations of the “knock-and-announce” rule²²⁴—in which officers must

²¹² *Id.* at 600–02.

²¹³ *Id.* at 603–08.

²¹⁴ 547 U.S. 843 (2006).

²¹⁵ Kamin & Marceau, *supra* note 211, at 606.

²¹⁶ *See* *Herring v. United States*, 555 U.S. 135, 135 (2009); *Hudson v. Michigan*, 547 U.S. 586 (2006).

²¹⁷ *See Hudson*, 547 U.S. at 604, 608–09 (Breyer, J., dissenting); *United States v. Ankeny*, 502 F.3d 829, 841–42 (9th Cir. 2007) (Reinhardt, J., dissenting), *cert. denied*, 553 U.S. 1034 (2008).

²¹⁸ *See Hudson*, 547 U.S. at 608–09; *Ankeny*, 502 F.3d at 842–43.

²¹⁹ *See Nix v. Williams*, 467 U.S. 431, 444 (1984) (establishing the doctrine of inevitable discovery in which the exclusionary rule does not apply to cases in which constitutional violations are found if police would have discovered the evidence absent the violation in any event).

²²⁰ *See Murray v. United States*, 487 U.S. 533, 536–41 (1988).

²²¹ *See Hudson*, 547 U.S. at 586; *Ankeny*, 502 F.3d at 829.

²²² *See Hudson*, 547 U.S. at 594 (citing *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998)); *see also United States v. Leon*, 468 U.S. 897, 907 (1984).

²²³ *Mapp v. Ohio*, 367 U.S. 643 (1961); *see Hudson*, 547 U.S. at 598–99.

²²⁴ *Hudson*, 547 U.S. at 596; *see Wilson v. Arkansas*, 514 U.S. 927 (1995) (holding that Fourth Amendment incorporates common law requirement that police knock and announce identity as police before forcibly entering dwelling).

identify themselves as such before breaching the door to serve a warrant—since it would only prevent the obtainment of evidence and jeopardize the safety of officers.²²⁵ Finding that civil tort claims were the proper remedy for such violations, Scalia conceded that the Court is unaware of whether violations of the “knock-and-announce” rule have been successful in the civil context but cited to a few cases pending before federal courts to show that such suits are possible, and stated that given the lack of evidence, the Court can assume such suits will be given their proper due process in civil courts.²²⁶ The majority did not address the problem of creating “clearly established” law as it did in *Pearson v. Callahan*,²²⁷ when it suggested that criminal cases would provide the ground on which Section 1983 cases could stand to find precedent.²²⁸ However, the dissenters in *Hudson* argued that not only could suppression be a deterrent in a case involving violation of the “knock-and-announce” rule, but also that despite Scalia’s assertion that such violations do not represent systemic problems, the evidence is just the opposite. Violations, they found, “are legion.”²²⁹ Further, the dissenters argued that the lack of monetary damages should lead the Court to conclude that suppression is the only remedy.²³⁰

The doctrine of inevitable discovery²³¹ leaves excessive force claims without a home, or at least in a home with a rickety roof. Moreover, the balancing test applied to exclusion analysis—deterrence effects against social costs—leaves most claimants without a remedy for aggressive SWAT raids. Therefore, attempting to address excessive force and the rise of militarization as a systemic problem using Fourth Amendment remedies is simply ineffective. There is nothing in current Fourth Amendment precedent that declares a tank cannot be used to break up a poker game. While such activity may seem unreasonable, there is nothing unconstitutional about it. Where courts address excessive force at all²³²—generally in cases in which nothing illegal was found—the only issue is whether damages can be obtained for the harm caused in a civil cause of action.²³³ Even then, if courts find that officers had a reasonable

²²⁵ See *Hudson*, 547 U.S. at 596.

²²⁶ See *id.* at 598.

²²⁷ 555 U.S. 223 (2009).

²²⁸ See *id.* at 242.

²²⁹ *Hudson*, 547 U.S. at 610.

²³⁰ See *id.* at 611 (“To argue that there may be few civil suits because violations may produce nothing more than nominal injury is to confirm, not to deny, the inability of civil suits to deter violations.” (internal quotation marks omitted)).

²³¹ See *Nix v. Williams*, 467 U.S. 431 (1984).

²³² See *Leong*, *supra* note 175, at 440–41 (citing numerous instances in which force is not addressed in analysis while focus placed entirely on scope of search).

²³³ See *United States v. Jones*, 214 F.3d 836, 837–38 (7th Cir. 2000). Despite the Court’s assertion that “police cannot automatically throw bombs into drug dealers’ houses, even if the bomb goes by the euphemism ‘flash-bang device,’” the Court did not rule that exclusion was the proper remedy because it had no effect on the inevitable discovery of the evidence obtained. *Id.*

fear that led to the use of the force, there is no remedy at all, even if someone is killed during a poker raid, for example.²³⁴ The very lack of definition given to “reasonableness” in Fourth Amendment analysis means that other solutions must be sought if the rising incidents of force are to be curbed. In many instances, force is not addressed at all.²³⁵ Even where courts find excessive force problematically related to a search, the prevailing law does not provide for exclusion as long as the scope of the search is found to have been reasonable.²³⁶

III. THE CONSEQUENCES OF MILITARIZATION AND POSSIBLE REMEDIES

As indicated in Part II, current legal regimes can do little to remedy the harms created by militarization. Part III seeks to demonstrate that there is a need for remedy, and to explore possible approaches.

Due to the nature of policing and the potential for an encounter between suspect and officer to result in arrest and incarceration, some interactions can escalate resulting in injury to either party; however, the DOJ does not keep statistics on police misconduct or excessive force complaints.²³⁷ Since there are no statistics tracking use of force complaints nationwide, there is no way to know whether their prevalence is increasing or whether incidents are more violent, resulting in more severe injuries. Even if one examines only those encounters of which there is some publicly available documentation, however, one realizes that the consequences of militarization are disturbing and that reform is necessary.

Part III.A aims to convey a sense of the variety and risks of militarized encounters, by describing a sample of the encounters and the relatively new tactics being employed with regularity, amplified by weaponry and militarized training. Domestic police have access to hardware that has traditionally been reserved for military use, and that access continues to expand,²³⁸ but understanding both how this hardware influences behavior and the purposes for which it is deployed is also vital to assessing whether police have transformed their mission from protectors of the community to soldiers fighting a war against it. In light of Part II’s analysis of the gap in judicial response, Part III.B

²³⁴ See *Scott v. Harris*, 550 U.S. 372 (2007). Because the Court uses a general balancing test rather than a list that includes officer safety as one of a number of factors, officer safety weighs more heavily in favor of government interest against individual interest. *Id.*

²³⁵ See, e.g., *United States v. Ramirez*, 523 U.S. 65 (1998) (holding that the only matter in issue was whether forcible entry was justified but not the manner in which it was effectuated).

²³⁶ See *United States v. Ankeny*, 502 F.3d 829, 841–42 (9th Cir. 2007) (Reinhardt, J., dissenting) (taking holistic approach), *cert. denied*, 553 U.S. 1034 (2008).

²³⁷ See ACLU Report, *supra* note 22, at 29 (citing the areas covered by the DOJ and the Bureau of Justice Statistics).

²³⁸ See *supra* Part I.A.

looks beyond the justice system, at the ongoing efforts to demilitarize the police in several federal, state, and local jurisdictions around the country. It offers insight into the struggle to reverse the trend of arming the police with military weaponry, and to craft policy solutions to address the military tactics increasingly being employed by police officers.

A. *Blurring the Lines Between Military and Police: Deadly Outcomes*

“Dynamic entry” raids²³⁹ have become an integral part of SWAT tactics, even when police have no information to conclude that officers might be in danger.²⁴⁰ They are employed for drug raids where marijuana possession is suspected, where a suspect is wanted but not known to be armed; even knock-and-announce warrants can become no-knock raids if officers on the scene have a reasonable fear that they might be in danger.²⁴¹ Part III.A.1 discusses incidents that have occurred since federal grant programs and militarized training have come into being that have resulted in disastrous results for suspects, innocent civilians, and officers.²⁴² These incidents underscore the thesis of this Article: that militarization in both tactics and equipment has led to an escalation of violent encounters between citizens and police that is not being addressed by the justice system and requires holistic action.²⁴³

The consequences of both military training and the use of weapons designed for war have created an atmosphere in which police-citizen encounters too often escalate and become violent. Part III.A.2 addresses escalation of police confrontations with alleged suspects and how the mandate of the police appears to have shifted from keeping peace to engaging the enemy, with an inherent fear and distrust on the part of

²³⁹ See Glenn French, *Dynamic Entry Versus Deliberate Entry*, POLICEONE.COM (Aug. 3, 2010), <http://www.policeone.com/SWAT/articles/2154851-Dynamic-entry-versus-deliberate-entry>.

Dynamic entry relies on surprise, speed, and domination marked by a quick entry, use of diversionary devices when warranted, and overwhelming dominating force. *See id.*

²⁴⁰ See Radley Balko, *Troubling New Details About the Violent Police Raid in Iowa*, WASH. POST, Feb. 5, 2014, <http://www.washingtonpost.com/news/opinions/wp/2014/02/05/troubling-new-details-about-the-violent-police-raid-in-iowa> (discussing incident in which police executed a “knock-and-announce” warrant with dynamic entry looking for different suspect wanted for alleged credit card fraud).

²⁴¹ See *Hudson v. Michigan*, 547 U.S. 586, 594 (2006) (holding that failure to knock-and-announce does not trigger exclusion of evidence because of the inevitable discovery doctrine, when police had a warrant requiring that they knock and announce themselves but failed to do so citing safety concerns). The Court held that police may determine whether to knock and announce their presence before a dynamic entry, based on the circumstances at the time. *See id.* at 589–90.

²⁴² See *Botched Paramilitary Police Raids: An Epidemic of “Isolated Incidents,”* CATO INST., <http://www.cato.org/raidmap> (last visited Apr. 2, 2015).

²⁴³ *See infra* Part III.B.

police that seems more akin to soldiers facing suspected insurgents in wartime. This Subpart questions the training that influences and sustains a culture of militarism that infects even simple encounters with police.

Police now use paramilitary units to carry out raids on unlikely targets, expanding their traditional function to nonemergency investigations with little oversight. SWAT raids have been deployed to investigate organic farms, nightclubs, barbershops, and even poker games. Part III.A.3 addresses some of the expanded uses of SWAT teams to handle nonviolent investigations and arrests, from regulatory violations to administrative searches. Given that federal grant programs require the use of the equipment that they fund and transfer, this practice is not surprising. Moreover, policies governing the use of SWAT teams are scant, so there is little oversight either on the federal, state, or local level to determine when and how to deploy them.

1. SWAT Raids

The original purpose of SWAT was to respond to active shooters, barricaded suspects, and hostage situations;²⁴⁴ that purpose has now been extended to include service of search warrants, which now comprise 79% of all SWAT deployments, 60% of them for drugs.²⁴⁵ Between 2011 and 2013, only 7% of SWAT deployments were executed for hostage or active shooter scenarios.²⁴⁶ As recently as about twenty-five years ago, use of SWAT for drug searches of private homes was extremely rare and considered highly dangerous and unnecessary.²⁴⁷ Today, with military training and hardware, police deploy SWAT for even low-level drug possession searches and sometimes the consequences are deadly for the suspects, their families, their pets,²⁴⁸ and even for the police.²⁴⁹ Moreover, BearCats, MRAPs, and other APCs

²⁴⁴ See Kraska, *supra* note 8, at 8.

²⁴⁵ See ACLU Report, *supra* note 22, at 5, 38.

²⁴⁶ *Id.*

²⁴⁷ See Kraska, *supra* note 8, at 8.

²⁴⁸ See, e.g., David Heinzmann, *Family Gets \$333,000 for 2009 Raid in Which Cops Killed Dog*, CHI. TRIB., Aug. 19, 2011, http://articles.chicagotribune.com/2011-08-19/news/ct-met-police-shoot-dog-20110819_1_family-dog-damages-officers (SWAT raid found neither drugs nor criminal activity but shot dog after resident offers to lock it up and officers refuse).

²⁴⁹ See Rachel Cox, *Man Accused of Killing Veteran SWAT Officer Returns to Court*, KWTX NEWS 10 (June 19, 2014), <http://www.kwtx.com/home/headlines/Killeen-Man-Charged-In-Veteran-SWAT-Officers-Shooting-Death-263742841.html> (stating that Detective Charles Dinwiddie was killed executing a “no-knock” warrant when the homeowner shot him as he climbed through the window); see also Radley Balko, *Some Justice in Texas: The Raid on Henry Magee*, WASH. POST, Feb. 10, 2014, <http://www.washingtonpost.com/news/opinions/wp/2014/02/10/some-justice-in-texas-the-raid-on-henry-magee> (where informant told police that they would find ten to twelve large marijuana plants, stolen guns, and a vicious dog at the residence;

are used routinely in SWAT raids in many jurisdictions.²⁵⁰ Rolling tank-like vehicles through neighborhoods at night to execute search warrants for nonviolent offenses has proven unnecessary in most instances, given the number of deployments in which they were not used for anything other than transport.²⁵¹

“No-knock” warrant executions present particularly dangerous circumstances for both police and suspects since they permit a forced, “dynamic” entry without prior identification of the officers.²⁵² Sixty percent of such warrants are used to search for drugs.²⁵³ In some cases, the results are deadly.²⁵⁴ In others, such raids can be terrifying and cause serious injury. A SWAT team in Cornelia, Georgia, with a population under 5000, executed a “no-knock” raid looking for a man who had allegedly sold an informant methamphetamine.²⁵⁵ During their “dynamic entry,” an officer threw a flash-bang grenade—intended to distract and startle the residents—into a crib where a nineteen-month old baby was sleeping.²⁵⁶ The child was severely injured and transported to a hospital where he was placed in a medically induced coma.²⁵⁷ The suspect was not home at the time; only his family visiting from out of town was present. No drugs or weapons were recovered during the raid.²⁵⁸ In fact, according to police, the suspect did not live there and was arrested later at his home without incident.²⁵⁹ Despite the severe injuries to the child, which required weeks in hospital, the county has determined that it is not going to pay any medical bills,²⁶⁰ leaving the family with a constitutional tort claim under Section 1983 as their only

homeowner shot one officer as they breached his door and was charged with capital murder but a grand jury declined to indict).

²⁵⁰ See ACLU Report, *supra* note 22, at 38 (citing New Haven, Connecticut, Allentown, Pennsylvania, and Unified Police Department, Utah, as examples where SWAT teams are deployed routinely).

²⁵¹ See *id.*

²⁵² See Kraska, *supra* note 8, at 7.

²⁵³ See ACLU Report, *supra* note 22, at 33.

²⁵⁴ See Matt Agorist, *Police Officer Shot and Killed During No-Knock Raid*, THEFREETHOUGHTPROJECT.COM (May 12, 2014), <http://thefreethoughtproject.com/police-officer-shot-killed-no-knock-raid> (citing two separate cases in which police officers were killed during such raids).

²⁵⁵ See Stevens, *supra* note 198.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ See Alecia Phonesavanh, *A Swat Team Blew a Hole in My 2-Year-Old Son*, SALON (June 24, 2014, 7:45 AM), http://www.salon.com/2014/06/24/a_swat_team_blew_a_hole_in_my_2_year_old_son.

²⁵⁹ See M. Alex Johnson, *‘Militarized’ SWAT Teams Under Scrutiny as Toddler Recovers from Grenade*, NBC NEWS (July 7, 2014, 9:41 PM), <http://www.nbcnews.com/news/us-news/militarized-swat-teams-under-scrutiny-toddler-recovers-grenade-n150246>.

²⁶⁰ See Radley Balko, *The Drug War Means Never Having to Say You’re Sorry*, WASH. POST, Aug. 18, 2014, <http://www.washingtonpost.com/news/the-watch/wp/2014/08/18/no-accountability-no-recompense-for-botched-drug-raids-that-brought-injury-and-death/#comments>.

recourse. The visiting family came to stay after their out-of-state home was destroyed in a fire, so it is quite possible that the police did not know a child was present, and therefore might successfully argue that the officers' actions were reasonable.²⁶¹ This episode raises real and grave concerns about using explosives and dangerous ordnance developed for the battlefield in the course of investigating nonviolent crimes that do not pose immediate public safety risks, like drug activity.

Even in "knock-and-announce" raids, results can be disastrous, especially given that the entry can follow only a few seconds after the announcement.²⁶² In 2013, the Los Angeles SWAT team conducted a raid on the home of Eugene Mallory after an officer reported smelling chemicals downwind from the eighty-year-old man's house.²⁶³ Mallory was shot in his bed but, as an audio recording revealed, the police officer shot him six times *before* telling him to drop his gun, which was found on his bedside table.²⁶⁴ No methamphetamine was recovered. No officers were disciplined or charged in the incident. In 2011, Jose Guerena was killed when a Pinal County SWAT team conducted a raid on his home, executing a warrant primarily focused on his brother's alleged drug activity.²⁶⁵ His wife heard a noise and saw a man outside their window; Guerena told her to hide with their four-year-old son in a closet where she called 911 and stayed on the recorded line throughout the incident.²⁶⁶ Sirens were engaged on an APC, and concussion grenades were set off in the yard seven seconds before the door was breached; Guerena had grabbed his rifle, but the safety was engaged.²⁶⁷ He was shot sixty times.²⁶⁸ His brother was not found at the residence and no drugs were found.²⁶⁹ Incidents like these call into question the efficacy of conducting such raids where homeowners are surprised, children are present, and the information is murky, as in the Guerena

²⁶¹ See *supra* Part II.A for an explanation of the standard for qualified immunity.

²⁶² See *Hudson v. Michigan*, 547 U.S. 586 (2006). The police waited three to five seconds and the Court held that there should be no time limit but that cases should be decided based on the totality of the circumstances. See *id.* at 588.

²⁶³ See Zach Weissmueller, *Video: Police Shoot, Kill 80-Year-Old Man in His Own Bed, Don't Find the Drugs They Were Looking for*, REASON.COM HIT & RUN BLOG (Feb. 15, 2014, 3:00 PM), <http://reason.com/blog/2014/02/15/yet-another-example-of-why-americas-drug>.

²⁶⁴ *Id.*

²⁶⁵ See Fernanda Echavarrri, *SWAT Raid Fatal Drama is Revealed in 911 Call*, ARIZ. DAILY STAR (May 14, 2011, 1:00 PM), http://tucson.com/news/local/crime/swat-raid-fatal-drama-is-revealed-in-call/article_b3177522-baa0-5c9e-9f0d-d3d7da6e9e4b.html; Amanda Lee Myers, *Jose Guerena Ortiz, Killed by SWAT Team, Was Trying to Protect His Family, Wife Says*, HUFFINGTON POST (Nov. 28, 2011, 5:44 PM), http://www.huffingtonpost.com/2011/11/28/jose-guerena-ortiz-killed_n_1116239.html.

²⁶⁶ Echavarrri, *supra* note 265.

²⁶⁷ See *id.* Police originally claimed he fired on them until an investigation revealed the safety was engaged and no shots were fired. See *id.*

²⁶⁸ *Id.*

²⁶⁹ See *id.*; Myers, *supra* note 265.

case. It subsequently came to light that investigating officers knew little about Guereña or that he had a regular work schedule; the warrant claimed surveillance had been done and that Guereña never went to work, which militated in favor of the assumption that he was dealing drugs with his brother.²⁷⁰ Even when surveillance is done and the information obtained is reliable, night raids on unsuspecting civilians are highly dangerous and yet often such raids—and the warrants that facilitate them—are based on shoddy information and lead to the deaths of innocents.²⁷¹

Even raids that do not end with the death of a person can cause great emotional harm that the justice system does not remedy because of the expansive discretion afforded police in how they carry out searches.²⁷² When a SWAT team in Columbia, Missouri—wearing BDUs and ballistic helmets, and armed with assault weapons—executed a nighttime raid on Jonathon Whitworth’s home to look for marijuana, they first shot the family dog as Whitworth opened the door, and then held his wife and seven-year-old son at gunpoint while they searched for large marijuana plants and guns.²⁷³ The entire entry was video-recorded by the police.²⁷⁴ Whitworth was charged with possession of drug paraphernalia and fined \$300.²⁷⁵ His Section 1983 case was dismissed.²⁷⁶

²⁷⁰ See Morgan Loew, *Depositions Show Contradictions in Fatal SWAT Raid*, CBS 5 AZ KPHO (Dec. 2, 2013, 10:09 PM), <http://www.kpho.com/story/20142545/depositions-show-contradictions-in-fatal-swat-raid>. Officers gave conflicting accounts in depositions regarding Guereña’s involvement in his brother’s alleged drug activity, including saying that he was surveilled over a six-month period and never went to a job when in fact he had worked at a copper mine for more than a year, working the night shift. *See id.* He was sleeping when the raid occurred at 9:30 AM. *See* Echavarrí, *supra* note 265.

²⁷¹ See Liz Fabian, *Attorney Alleges ‘Invalid’ Warrant Led to Laurens Deputies Killing East Dublin Man*, TELEGRAPH (Oct. 1, 2014), http://www.macon.com/2014/10/01/3338309_attorney-alleges-warrant-problems.html?rh=1. David Hooks was killed in a nighttime SWAT raid when the man who burglarized Mr. Hooks’ car two days earlier was arrested and told police that the methamphetamine recovered in the car belonged to his victim, Mr. Hooks. *See id.* Police obtained a “knock-and-announce” warrant and raided Hooks’ home that night. *See id.* His wife thought the burglars had returned when she saw men in camouflage outside their home and woke her husband who grabbed his gun. *See id.* She reported that no announcement was made and police shot Hooks upon entering and seeing his gun. *See id.* Police searched the home for forty-four hours and recovered nothing. *See id.*

²⁷² *See supra* Part II.A.

²⁷³ See *SWAT Narcotics Raid in Columbia, Missouri*, YOUTUBE (May 9, 2010), <https://www.youtube.com/watch?v=24tYWMWVEto> [hereinafter *SWAT Narcotics Raid, Columbia*]; see also Radley Balko, *A Drug Raid Goes Viral*, REASON.COM (May 11, 2010), <http://reason.com/archives/2010/05/11/a-drug-raid-goes-viral>. An informant told police Whitworth had large marijuana plants in his home eight days prior to the raid. *See* Balko, *supra*.

²⁷⁴ See *SWAT Narcotics Raid, Columbia*, *supra* note 273. Audio includes sounds of both dogs being shot and whimpering. *See id.*

²⁷⁵ See Balko, *supra* note 273. Possession of marijuana for personal use was decriminalized in Missouri. *See id.*

²⁷⁶ See P.M. *ex rel.* Whitworth v. Bolinger, No. 2:10-CV-04208-NKL, 2011 WL 5838406 (W.D. Mo. Nov. 21, 2011).

The judge found that the police officers' actions were reasonable.²⁷⁷ Whitworth alleged that he was kicked in the face when he put his hands behind his head instead of his back as commanded.²⁷⁸ His wife and son were held in a squad car sobbing for two hours while animal control removed their dead dog, and the mother's request to have a relative come pick up the child and remove him from the traumatic situation was denied.²⁷⁹ Still, granting qualified immunity to the defendants, the court found every single action by police officers in that case reasonable and dismissed the case on summary judgment.²⁸⁰ Moreover, the court found that the city had no obligation to make changes to its policies governing dynamic entries since it found no liability on the part of any officer.²⁸¹ This case is illustrative of how the law fails to address manner violations appropriately, the consequence of which is failure to change policies about the appropriate use of paramilitary forces. The police had received a tip from an informant eight days prior to the raid about marijuana plants, yet the police chose to stage a dynamic nighttime SWAT raid.

When police raid the wrong address, the strategy of using paramilitary tactics and "dynamic" entry is terrifying for the innocent home dweller.²⁸² It should call into question the policy of such raids, usually executed at night with the potential for disastrous results, but police continue to conduct them at an alarming rate nonetheless.²⁸³ Jessica Walker was home with her four children getting ready to take a bath when the Bakersfield, California, SWAT team executed a "no-knock" warrant at night, using their battering ram to breach her security door.²⁸⁴ With Walker half dressed, police forced her to the floor at gunpoint while her children screamed; eventually, police learned that the apartment they wanted to search was, in fact, next door.²⁸⁵ Such botched raids have become ubiquitous in recent years,²⁸⁶ with

²⁷⁷ *Id.* at *6.

²⁷⁸ *Id.* at *2, *5.

²⁷⁹ *Id.* at *3.

²⁸⁰ *Id.* at *1, *5.

²⁸¹ *Id.* at *7 (citing *Brockinton v. City of Sherwood*, 503 F.3d 667, 674 (8th Cir. 2007)) (holding that individual liability must attach before municipal liability may be considered).

²⁸² For more examples of wrong-address raids, see *Wrong Address*, POLICE STATE USA, <http://www.policestateusa.com/tag/wrong-address> (last visited Feb. 8, 2015).

²⁸³ See Kraska, *supra* note 8.

²⁸⁴ See Cris Ornelas, *Bakersfield Police Ram Down Door of Wrong Apartment in Search for a Suspect*, 23ABC NEWS (Apr. 24, 2014, 6:38 PM), <http://www.turnto23.com/news/local-news/bakersfield-police-ram-down-door-of-wrong-apartment-in-search-for-a-suspect-042414>.

²⁸⁵ See *id.*

²⁸⁶ See *Botched Paramilitary Police Raids*, *supra* note 242; see also Jaywon Choe & Michael Brendan Dougherty, *9 Horrifying Botched Police Raids*, BUS. INSIDER (Feb. 3, 2012, 12:52 PM), <http://www.businessinsider.com/9-horrifying-botched-police-raids-2012-2>; Jodie Gummow, *11 Over-the-Top U.S. Police Raids that Victimized Innocents*, SALON (Aug. 29, 2013, 8:40 AM), http://www.salon.com/2013/08/29/11_over_the_top_u_s_police_raids_that_victimized

paramilitary SWAT raids becoming a routine manner in which to serve search warrants in suspected drug cases.²⁸⁷

2. Escalation and Violent Encounters

When police are trained to view themselves as soldiers, it is unsurprising that they sometimes treat encounters with suspects as an engagement with the enemy.²⁸⁸ The “war on drugs” has influenced training and deployment tactics by defining the landscape as a war and police officers as fighters in it.²⁸⁹ Similarly, the “war on terrorism” has created yet another domestic warfront in which trainers encourage police officers to fight as soldiers on a battlefield.²⁹⁰ Within a culture of battle, war, and combat, police are trained to engage with the communities they serve and face adversity the same way a soldier might.²⁹¹ Police officers are trained using a stress-based military curriculum in the academy,²⁹² and they also sometimes train with the military directly.²⁹³ The fear-based mentality that stress-based training encourages can lead to escalation during police-citizen encounters that

innocents; *No-Knock Raid*, POLICE STATE USA, <http://www.policestateusa.com/tag/no-knock-raid> (last visited Mar. 5, 2015); *SWAT Narcotics Raid*, *Columbia*, *supra* note 273.

²⁸⁷ See Kraska, *supra* note 8.

²⁸⁸ See ACLU Report, *supra* note 22, at 18 (noting that most police academies employ a military-style, stress-based training curriculum); see also *id.* at 23 (citing training manual for Carey, North Carolina, SWAT team entitled, “Steel Your Battlemind,” in which officers are told to face their fear with the mindset of a soldier at war).

²⁸⁹ See *id.* at 18 (citing Sargent Glenn French, a Sterling Heights, Michigan, police officer and trainer who wrote, “We trainers have spent the past decade trying to ingrain in our students the concept that the American police officer works a battlefield every day he patrols his sector”); see also Glenn French, *Police Militarization and an Argument in Favor of Black Helicopters*, POLICEONE.COM (Aug. 13, 2013), <http://www.policeone.com/SWAT/articles/6385683-Police-mil> (arguing that police face the same dangers on the streets as soldiers do in war).

²⁹⁰ See ACLU Report, *supra* note 22, at 23 (citing a presentation at a conference sponsored by International Association of Law Enforcement Firearms Instructors, in which police are encouraged to think like soldiers and explaining that because U.S. law prohibits the military from addressing attacks on the homeland, police are “our Delta force”).

²⁹¹ *Id.* A lieutenant with the Albuquerque, New Mexico, police department advertised classes to members of the department on the subject of “killology,” or “the study of killing.” See Radley Balko, *Albuquerque Police Lieutenant Advertises “Killology” Classes*, WASH. POST, Nov. 20, 2014, <http://www.washingtonpost.com/news/the-watch/wp/2014/11/20/albuquerque-police-lieutenant-advertises-killology-classes>. Notably, this advertisement was sent out just after the city signed a consent decree with the DOJ agreeing to reform its aggressive policing tactics. *Id.*

²⁹² See ACLU Report, *supra* note 22, at 18.

²⁹³ See John Monk, *COLUMBIA, SC: Richland Deputies, U.S. Military Carry Out Secretive—And Noisy—Joint Exercise Monday and Tuesday*, PREPPER PODCAST RADIO NETWORK (Jan. 21, 2014), <http://prepperpodcast.com/columbia-sc-richland-deputies-u-s-military-carry-out-secretive-and-noisy-joint-exercise-monday-and-tuesday/#axzz3WDFamkpZ> (Columbia, South Carolina, police conducted secret trainings with military personnel at Fort Bragg Army base, home to Delta Force).

leaves both vulnerable to sustaining injury.²⁹⁴ Given that courts award great deference to police in excessive force cases when they claim to have been in fear, this training only exacerbates the problem for plaintiffs seeking redress through constitutional tort remedies.²⁹⁵

When police encounter people with physical or mental impairments, the fear-based military culture instilled in them can test the little patience they may have for getting a suspect to comply quickly enough, which can lead to death or to injury.²⁹⁶ James Boyd was a mentally disturbed homeless man who was camping in the foothills of Arizona illegally.²⁹⁷ Police in tactical gear, carrying assault rifles, arrived and attempted to frisk him, but he claimed to be a government agent and threatened them verbally.²⁹⁸ During a three-hour confrontation—all of which is available on video²⁹⁹—officers stood down the hill from him; Boyd told officers he feared that they would shoot him and refused to come down. They assured him that they would not, and he finally agreed to walk down the hill and come with them, picking up his bags. Just then, an officer yelled, “Do it!” and a flash-bang was thrown at Boyd, who reached into his pocket for what police say was a knife. He was then shot multiple times, attacked by a police dog, and then shot multiple times with bean bag rounds; he died the next day.³⁰⁰ The Albuquerque Police Department cleared all of the officers involved and found the shooting justified because the officers deemed Boyd a threat.³⁰¹ The incident capped a string of police shootings in Albuquerque, in which twenty-five people were killed in four years.³⁰² The DOJ sent a letter to Albuquerque’s mayor two weeks after Boyd was killed, finding that police in Albuquerque had engaged in a pattern or

²⁹⁴ See ACLU Report, *supra* note 22, at 23.

²⁹⁵ See *supra* Part II.A for an explanation of the standard for reasonable conduct on the part of police.

²⁹⁶ See Kelley Bouchard, *Across Nation, Unsettling Acceptance when Mentally Ill in Crisis Are Killed*, PORTLAND PRESS HERALD (Dec. 9, 2012), <http://www.pressherald.com/2012/12/09/shoot-across-nation-a-grim-acceptance-when-mentally-ill-shot-down>; Brian Hamacher, *Man with Down Syndrome in Clash with Cops*, NBC MIAMI (Sept. 17, 2011, 12:06 AM), <http://www.nbcmiami.com/news/local/Man-With-Down-Syndrome-in-Clash-With-Cops-129820353.html>; Tux Turkel, David Hench & Kelley Bouchard, *Deadly Force: Police & the Mentally Ill*, PORTLAND PRESS HERALD (Dec. 8–11, 2012), http://www.pressherald.com/interactive/maine_police_deadly_force_series_day_1.

²⁹⁷ See, e.g., Chris McKee, *APD: Officer Involved Shooting Was Justified*, KRQE NEWS 13 (Oct. 17, 2014, 1:05 PM), <http://krqe.com/2014/03/21/apd-officer-involved-shooting-was-justified>.

²⁹⁸ See *id.*

²⁹⁹ See *id.*

³⁰⁰ Sebastian Murdock, *Police Shoot Homeless Man During Camping Arrest*, HUFFINGTON POST (Mar. 25, 2014, 1:59 PM), http://www.huffingtonpost.com/2014/03/24/james-boyd-killed-by-cops_n_5021117.html.

³⁰¹ See *id.*

³⁰² See Cindy Carcamo, *Tensions over Albuquerque Police Shootings Intensify Despite Talks*, L.A. TIMES, May 9, 2014, <http://www.latimes.com/nation/la-na-ff-albuquerque-police-20140510-story.html>.

practice of excessive and deadly force in violation of the Fourth Amendment and other laws.³⁰³ The police department is currently working on training reforms.³⁰⁴ In addition, despite the position taken by the Albuquerque Police Department, two of the officers who shot Boyd were charged with murder ten months after the incident.³⁰⁵ This incident underscores the need for police to engage people who have a mental illness with some patience and consider nonlethal force when there is no clear and present danger to officers. Given that Boyd was not a public safety threat out in the foothills—and was charged only with camping—the response was extreme; had the officers employed a less aggressive strategy he might still be alive.

Even in mundane encounters like *Terry* stops,³⁰⁶ a confrontation can escalate quickly. Gilberto Powell was approached by Miami police because an officer noticed a bulge in his pants.³⁰⁷ When Officer Villa tried to frisk him, the twenty-two-year-old with Down Syndrome tried to run back into his home.³⁰⁸ According to his family who stepped outside during the confrontation, two officers tackled Powell, stripped him, and punched him in the face.³⁰⁹ Officers said he fell down and hit his head, but photographs of the man appear to show much more injury than would be caused by a mere fall.³¹⁰ The bulge turned out to be Powell's colostomy bag, which was torn from his body during the scuffle.³¹¹ In response to Powell's mother screaming that her son was impaired, Officer Villa reportedly told her he could not possibly have known since he is "not a doctor."³¹² However, before he ever

³⁰³ See Letter from Jocelyn Samuels, Acting Assistant Att'y Gen., Dep't of Justice & Damon P. Martinez, Acting U.S. Att'y, Dist. of N.M., to Richard J. Berry, Mayor, City of Albuquerque (Apr. 10, 2014), available at http://www.justice.gov/crt/about/spl/documents/apd_findings_4-10-14.pdf.

³⁰⁴ See K. Annabelle Smith, *Albuquerque's Shoot-First Police Finally Begin Facing Questions*, ESQUIRE (Apr. 4, 2014), <http://www.esquire.com/blogs/news/albuquerque-shootings>.

³⁰⁵ Mike Gallagher & Ryan Boetel, *Officers Charged with Murder*, ALBUQUERQUE J. (Jan. 12, 2015, 9:46 AM), <http://www.abqjournal.com/524987/news/da-to-see-murder-charges-against-officers-in-james-boyd-shooting.html>.

³⁰⁶ See *Terry v. Ohio*, 392 U.S. 1 (1968) (holding that a person may be stopped and frisked on the street absent probable cause if police have reasonable suspicion that the person has committed, is committing, or is about to commit a crime).

³⁰⁷ See Hamacher, *supra* note 296.

³⁰⁸ See Michael E. Miller, *Fernando Villa, DUI Cop, Was Involved in Two Fatal Shootings and Beating a Man with Down Syndrome*, MIAMI NEW TIMES (Dec. 26, 2011), <http://www.miaminewtimes.com/news/fernando-villa-dui-cop-was-involved-in-two-fatal-shootings-and-beating-a-man-with-down-syndrome-6554738>.

³⁰⁹ See *Family Hires Attorney After Police Scuffle with Special Needs Man*, CBS MIAMI (Sept. 14, 2011, 10:48 PM), <http://miami.cbslocal.com/2011/09/14/family-hires-attorney-after-police-scuffle-with-special-needs-man>.

³¹⁰ See *id.* (picturing Powell's injuries).

³¹¹ See *id.*

³¹² See *Five Foot Tall Man with Down Syndrome Beaten by Police for ?Bulge in Pants? That Turns Out to Be on*, YOUTUBE (Oct. 29, 2013), <https://www.youtube.com/watch?v=LpZsY0JRKKI>; see also Hamacher, *supra* note 296.

encountered Powell, Villa had served on the city's SWAT team; he was on street patrol when the incident transpired because he had been transferred following a controversial sting operation in which four people were killed, including the undercover informant who was shot while trying to surrender as he lay on the ground.³¹³ Incidents like the one involving Powell are escalating with alarming frequency as a result of officers trained to react with soldier mentalities to a public that is usually not aware of being engaged in a war, even if the public is one that is unencumbered by a mental disability.³¹⁴

Training for war has sometimes led police to react too quickly—before properly assessing real potential risks—with disastrous results. In one such instance, a police officer pulled behind a car in a convenience store and as the driver got out to enter the store, asked him to produce a driver's license.³¹⁵ When the driver turned back toward his car and reached in for his wallet, the officer almost immediately began firing at

³¹³ See Interoffice Memorandum from Staffing/Review Team, Office of the State Att'y, Eleventh Judicial Circuit, to Katherine Fernandez Rundle, State Att'y (Mar. 13, 2014), available at <https://cbsmiami.files.wordpress.com/2014/03/redlandcloseout.pdf>.

³¹⁴ See, e.g., Travis Gettys, *Jury Can't Decide if Cop Who Destroyed Woman's Eyeballs with Pepper Spray Should Go to Prison*, RAW STORY (May 20, 2014, 9:41 AM), <http://www.rawstory.com/rs/2014/05/20/jury-cant-decide-if-cop-who-destroyed-womans-eyeballs-with-pepper-spray-should-go-to-prison> (woman blinded when officer sprayed JPX pepper gel at 400 miles per hour directly into her face slicing through both eyeballs after she squirmed while being handcuffed); Jessica Glenza, *Cleveland Medical Examiners Rule Death of Tamir Rice a Homicide*, GUARDIAN (Dec. 12, 2014, 1:24 PM), <http://www.theguardian.com/us-news/2014/dec/12/death-black-child-ruled-homicide> (responding to call of a juvenile with a possible toy gun, officers are seen on video quickly approaching in their police car, jumping out, and shooting twelve-year-old Tamir Rice in about two seconds; the officers, however, did not face charges); Michael Kinney, *Case Closed in Rodriguez Death*, NORMAN TRANSCRIPT (Oct. 13, 2014, 1:19 PM), http://www.normantranscript.com/news/local_news/article_7598b088-c853-5ee8-8713-6d1bdcce4f49.html (officers' actions found reasonable in case of man beaten to death outside movie theater when police respond to fight between man's wife and daughter and believe him to be threat when he folds arms and attempts to walk around officer after being asked for identification); Phil Trexler, *Deputy Pries Open Woman's Mouth After She Takes Tylenol*, AKRON BEACON J. (May 15, 2014, 1:09 PM), <http://www.ohio.com/news/break-news/deputy-pries-open-woman-s-mouth-after-she-takes-tylenol-1.488137> (woman in courthouse waiting room took two Tylenol and sheriff's deputy demanded she spit them out but she had already swallowed, so deputy threw her to ground and attempted to pry them from her mouth causing bleeding and pulling out her hair, then charged her with resisting arrest); Justin Warmoth, *Dayton Beach Police Officer Resigns After Body Camera Turned Off During Arrest*, CLICK ORLANDO (May 15, 2014, 6:02 PM), <http://www.clickorlando.com/news/daytona-beach-police-officer-fired-after-body-camera-turned-off-during-arrest/25982532> (woman slammed to ground and flashlight jammed into her mouth when officers thought she swallowed cocaine resulting in several broken teeth); see also Adam Ferrise, *Cleveland Officer Who Shot Tamir Rice Had 'Dismal' Handgun Performance for Independence Police*, PLAIN DEALER (Dec. 4, 2014, 7:28 AM), http://www.cleveland.com/metro/index.ssf/2014/12/cleveland_police_officer_who_s.html (officer who killed Tamir Rice fired from another department before joining Cleveland Police Department because he could not follow simple instructions or handle his weapon properly).

³¹⁵ See Tony Santaella & Steven Dial, *Trooper on Shooting: 'He Kept Coming Towards Me'*, WLTX 19 (Sept. 27, 2014, 1:55 AM), <http://www.wltx.com/story/news/local/2014/09/26/sean-groubert-gives-his-account-of-shooting-levar-jones/16295527>.

him, striking him in the hip.³¹⁶ The officer was fired and faces charges in the incident, but what is conspicuous about the video recording of the incident is how clear it appears that the officer was truly terrified.³¹⁷ Notably, the officer was white and the victim was black, so how and whether race played a role in the officer's snap decision to begin firing—without provocation—is more than a little concerning, given the fear-based training that officers undergo. Similarly, in Beavercreek, Ohio, John Crawford was killed by police while walking around a Walmart carrying an air rifle he picked up from a store shelf.³¹⁸ Video of that incident shows the officer approached the far end of the aisle where Crawford was talking on his phone, holding the rifle downward, and immediately shooting him dead.³¹⁹ The officer was not indicted despite the fact that Ohio is an “open carry” state—so had it been a real, loaded gun, Crawford's actions would have been perfectly legal.³²⁰ The white officer (who shot that black victim) had, some days earlier, attended a training on active shooter scenarios in which slides of the shooting aftermath at Sandy Hook Elementary School were shown, with the caption, “If not you, then who?”³²¹ When police training mirrors military training, and fear becomes the primary motivator, bad outcomes are hardly surprising.

3. SWAT and Nonemergency Deployments

One indicator of the culture of police militarization is the increasing use of SWAT teams for nonemergency purposes.³²² Driven primarily by the “war on drugs,” SWAT teams are deployed to serve warrants more than any other activity.³²³ However, police deploy them for other nontraditional activities as well.³²⁴ The presence of heavily

³¹⁶ Clif LeBlanc, *Motorist Shot by Trooper Gets Nearly \$300,000 Settlement from State Government*, CHARLOTTE OBSERVER (Feb. 7, 2015, 12:09 PM), <http://www.charlotteobserver.com/news/local/crime/article9509405.html>.

³¹⁷ *See id.*

³¹⁸ *See* Jon Swaine, *Ohio Police Given 'Pep Talk' on Shooting Scenarios Ahead of Walmart Encounter*, GUARDIAN (Sept. 25, 2014, 4:53 PM), <http://www.theguardian.com/world/2014/sep/25/ohio-walmart-police-slideshow-active-shooter-presentation>.

³¹⁹ *See id.*

³²⁰ *See* Mikki Kendall, *John Crawford: Killed Holding a 'Gun' in an Open Carry State*, EBONY (Aug. 13, 2014), <http://www.ebony.com/news-views/john-crawford-killed-405>; *see also* Swaine, *supra* note 318.

³²¹ *See* MIKE DEWINE, OHIO ATT'Y GEN., SINGLE OFFICER RESPONSE TO ACTIVE THREATS: WHAT TO DO WHEN YOU ARE THE FIRST ON THE SCENE (July 23–24, 2014), *available at* <http://www.scribd.com/doc/241009406/Beavercreek-police-training-presentation>; Swaine, *supra* note 318.

³²² *See* BALKO, *supra* note 7, at 191–92.

³²³ *See* ACLU Report, *supra* note 22, at 3.

³²⁴ *See* Natasha Lennard, *Arkansas Town's Martial Law Plan*, SALON (Jan. 29, 2013, 5:08 PM), http://www.salon.com/2013/01/29/arkansas_town_enacts_martial_law. In 2013, the police chief

armed police using military weapons and armor to carry out nonemergency tasks contributes to the sense that the line between the police and the military is becoming very thin.

Using SWAT teams to handle nonviolent situations in which there is no evidence or information that officers might be in danger is a misuse of paramilitary tactics that threatens civilians and requires reform. Radley Balko, an expert on police militarization, has collected a number of stories of SWAT teams operating in nonemergency scenarios.³²⁵ One case involved Sal Culosi, who was killed by a SWAT team when an officer accidentally discharged his weapon.³²⁶ The SWAT team was initially deployed to arrest him for illegal gambling.³²⁷ Culosi had befriended a detective with whom he made small bets on sports games, and over the course of a year he began to make bets high enough to qualify for felony charges.³²⁸ A SWAT presence was entirely unwarranted and caused his death. Similarly, SWAT raids have been deployed for numerous poker games, including a Veterans of Foreign Wars charity tournament.³²⁹

In some cases, regulatory agencies are sending SWAT teams to perform administrative investigations. In Alaska, the Environmental Protection Agency (EPA) carried out a fully armed raid on the tiny mining village of Chicken—with seventeen full-time residents—looking for violations of the Clean Water Act.³³⁰ The miners wondered why they did not simply come and ask to check the water. Instead, in full battle gear, eight armed EPA officers swept into the village.³³¹ Over the course of several months in 2010, SWAT teams were sent to black and Hispanic-owned stores to enforce administrative laws.³³² They charged thirty-four people with barbering without a license.³³³ The fact that such administrative searches are not, on their face, intended to search for illegal drugs, allows SWAT teams to conduct them without warrants if a member of the regulatory agency comes with them.³³⁴ However, this use of SWAT teams is wholly unnecessary and serves no purpose other than

in Paragould, Arkansas, informed the public that his SWAT team would be conducting routine patrols armed with AR-15 assault rifles and stopping every person they saw, demanding identification, and inquiring about where they were going and why. *See id.* The plan was scrapped after public outcry. *See id.*

³²⁵ *See* BALKO, *supra* note 7.

³²⁶ *See id.* at 280–81.

³²⁷ *See id.*

³²⁸ *Id.*

³²⁹ *Id.* at 283.

³³⁰ *See* Sean Doogan, *Gold Miners Near Chicken Cry Foul over 'Heavy-Handed' EPA Raids*, ALASKA DISPATCH NEWS, Sept. 3, 2013, <http://www.adn.com/article/20130903/gold-miners-near-chicken-cry-foul-over-heavy-handed-epa-raids>.

³³¹ *See id.*

³³² *See* BALKO, *supra* note 7, 283–84.

³³³ *Id.* at 284.

³³⁴ *Id.*

to utilize the military gear police departments have acquired and to foment fear.

B. *Efforts to Curb the Escalating Militarization of Police*

As laid out in Part II, courts have been slow to respond to the harmful effects of police militarization. Given the current state of jurisprudence, relief is unlikely to be found in the Supreme Court.³³⁵ Since the Court is more focused on violations involving the scope of searches rather than the manner in which they are executed, SWAT transgressions are difficult to regulate in the judicial arena. However, as the landscape shifts and citizens begin to demand redress, the Court may find itself forced into action in the near future, not to change its recent precedents, but to recognize that a gap exists that must be filled by more than legislation. The Court may come to recognize that there are constitutional implications to manner violations that have not found a forum to accommodate them as cases proliferate and public outcry amplifies the extent of the problem. Meanwhile, policymakers in other arenas have made efforts to slow—and even end—the practice of arming and training domestic police with military equipment and tactics. Part III.B analyzes these efforts and offers some possible remedies to slow or even stop the precipitous transformation of police, from peace officers to soldiers.

Federal legislation is one avenue by which militarization can be regulated and possibly reversed. While Congressman Alan Grayson's bill³³⁶—attempting to limit certain weapons and armaments transferred through the 1033 Program—was defeated in 2013, Congressman Hank Johnson sponsored a bill in 2014 called the “Stop Militarizing Law Enforcement Act.”³³⁷ The timing of the bill coincides with a surge in public awareness and anger about police militarization—culminating in prolonged nationwide protests³³⁸—that began when police responded to demonstrations over the police shooting of an unarmed teenager named

³³⁵ See *supra* Part II.A.

³³⁶ See H. Amdt. 918 to H.R. 4870, 113th Cong. (2014) (introduced by Representative Alan Grayson on June 19, 2014).

³³⁷ See H.R. 5478, 113th Cong. (2014), available at <https://www.congress.gov/bill/113th-congress/house-bill/5478/all-actions> (currently in committee and cosponsored by forty-nine House members); see also Anna Palmer & Jake Sherman, *Dem Pushes Ferguson Machine Gun Bill*, POLITICO (Aug. 15, 2014, 6:29 AM), <http://www.politico.com/story/2014/08/dem-pushes-ferguson-machine-gun-bill-110011.html>.

³³⁸ See Matt Taibbi, *The Police in America Are Becoming Illegitimate*, ROLLING STONE, Dec. 5, 2014, <http://www.rollingstone.com/politics/news/the-police-in-america-are-becoming-illegitimate-20141205>.

Michael Brown in August 2014.³³⁹ Nightly protests in Ferguson, Missouri, a town with a majority black population and majority white police force,³⁴⁰ raised questions among the public about the need for BearCats, snipers, wooden bullets, and tear gas to respond to predominately peaceful demonstrations.³⁴¹ Johnson spoke out about militarization before events in Ferguson unfolded, and explained his intention to craft such a bill in response to the federal grant programs fueling militarized policing.³⁴² However, events in Ferguson—and other protests across the United States related to a string of violent police-involved deaths of unarmed black victims³⁴³—prompted him and other lawmakers, including Senator Rand Paul, to ramp up their efforts to address the issue.³⁴⁴ In December 2014, as protests spread and the issue of police accountability continued to dominate the news, Congress passed a measure requiring states to report the number of people killed in police custody or incident to arrest.³⁴⁵ Such requirements have not been in effect since the same law lapsed in 2006—despite four attempts to reauthorize it—until now.³⁴⁶ As lawmakers from both the Republican and the Democratic parties begin raising a call to action, it is possible that Congress could pass legislation that might begin to curb federal programs that give both the funding and the military equipment to

³³⁹ See Julie Bosman & Timothy Williams, *Missouri Police Cite Threats in Deciding Not to Name Officer Who Shot Teenager*, N.Y. TIMES, Aug. 12, 2014, <http://www.nytimes.com/2014/08/13/us/ferguson-police-cite-safety-risk-in-decision-not-to-name-officer-in-shooting.html>.

³⁴⁰ See *id.*

³⁴¹ See Elizabeth R. Beavers & Michael Shank, Op-Ed., *Get the Military Off of Main Street: Ferguson Shows the Risk of Police Militarization*, N.Y. TIMES, Aug. 14, 2014, <http://www.nytimes.com/2014/08/15/opinion/ferguson-shows-the-risks-of-militarized-policing.html>.

³⁴² See Hank Johnson & Michael Shank, *Small Town America Shouldn't Resemble a War Zone*, USA TODAY, Mar. 10, 2014, <http://www.usatoday.com/story/opinion/2014/03/10/america-police-military-weapons-column/5789445>.

³⁴³ Responding to the failure of a grand jury to indict officers charged with choking Eric Garner to death during an incident captured entirely on video, for selling loose cigarettes, protesters in New York held numerous demonstrations and marches. See *Protests Continue Over Eric Garner Case*, N.Y. TIMES, Dec. 14, 2014, <http://www.nytimes.com/slideshow/2014/12/14/ny-region/20141214NYPROTESTS.html>; see also *'Black Lives Matter' Protests*, CNN (Feb. 4, 2015, 4:26 PM), <http://www.cnn.com/2014/12/13/us/gallery/black-lives-matter-protests> (slideshow depicting protests from New York, Seattle, Chicago, Oakland, and Washington, D.C. under the hashtag “#blacklivesmatter,” in response to the police killings of Michael Brown, John Crawford, Eric Garner, and Tamir Rice, a twelve-year-old shot in Cleveland while he was playing with a toy gun).

³⁴⁴ See Rand Paul, *We Must Demilitarize the Police*, TIME, Aug. 14, 2014, <http://time.com/3111474/rand-paul-ferguson-police>.

³⁴⁵ See Death in Custody Reporting Act of 2013, H.R. 1447, 113th Cong. (2014), available at <https://www.congress.gov/congressional-record/2014/12/10/senate-section/article/S6579-3>.

³⁴⁶ See Hunter Schwarz, *Congress Decides to Get Serious About Tracking Police Shootings*, WASH. POST POL. BLOG (Dec. 11, 2014), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/12/11/congress-decides-to-get-serious-about-tracking-police-shootings> (noting legislation reauthorizing same bill that was in effect from 2000–2006).

police departments that encourage the kind of aggressive policing national protests have sought to address.

Only a handful of state legislatures have addressed militarized policing policies so far. In 2010, Maryland passed legislation requiring police to track and record all SWAT team raids.³⁴⁷ That law expired in 2014, although lawmakers intend to reintroduce it in 2015.³⁴⁸ The law required police to generate a report every six months that included information about each deployment, including the purpose, the type of warrant used, the arrests made, and the property seized.³⁴⁹ The results of that transparency were striking, since such data is usually not made public, if it is tracked at all. The Maryland data covering 2012 showed that SWAT teams were used 4.5 times each day, with one county responsible for over 500 deployments.³⁵⁰ About two-thirds of SWAT raids used dynamic entries and almost 90% were to execute search warrants, half of those for drugs.³⁵¹ In a third of the raids, no arrests were made, and in 15% of them, no contraband was seized.³⁵² The results from 2014 showed a 2.4% increase in SWAT deployments, with 93% for the purpose of carrying out search warrants.³⁵³ The other statistics remained relatively unchanged.³⁵⁴ Utah passed a similar bill in 2014 requiring police to track information and report annually on all tactical deployments.³⁵⁵ It includes requiring information on all injuries, including those to pets.³⁵⁶ Utah is also considering one of the boldest initiatives in the country to address state law governing any forcible entry.³⁵⁷ The bill would ban “no-knock” raids for the preservation of evidence and require the suppression of evidence obtained in violation of the “knock-and-announce” requirement.³⁵⁸ The Utah law would

³⁴⁷ See MD. CODE ANN., PUB. SAFETY § 3-507 (2010) (abrogated July 1, 2014); MD. STATISTICAL ANALYSIS CTR., GOVERNOR’S OFFICE OF CRIME CONTROL & PREVENTION, FIFTH REPORT TO THE STATE OF MARYLAND UNDER PUBLIC SAFETY ARTICLE § 3-507: FISCAL YEAR 2014 SWAT TEAM DEPLOYMENT DATA ANALYSIS (2014), available at <http://www.goccp.maryland.gov/msac/documents/SWATReportFY2014.pdf>.

³⁴⁸ See Justin George, *Police Agencies No Longer Need to Report Race, SWAT Deployments*, BALT. SUN, July 5, 2014, http://articles.baltimoresun.com/2014-07-05/news/bs-md-sun-investigates-race-law-20140705_1_law-enforcement-agencies-deborah-jeon.

³⁴⁹ *Id.*

³⁵⁰ See Radley Balko, *Shedding Light on the Use of SWAT Teams*, WASH. POST, Feb. 17, 2014, <http://www.washingtonpost.com/news/the-watch/wp/2014/02/17/shedding-light-on-the-use-of-swat-teams>.

³⁵¹ *See id.*

³⁵² *See id.*

³⁵³ See MD. STATISTICAL ANALYSIS CTR., *supra* note 347, at 3, 6.

³⁵⁴ *See id.*

³⁵⁵ See S.B. 185, 60th Leg., Gen. Sess. (Utah 2014), available at <http://le.utah.gov/~2014/bills/static/sb0185.html> (Law Enforcement Transparency).

³⁵⁶ *Id.*

³⁵⁷ S.B. 82, 61st Leg., Gen. Sess. (Utah 2015), available at <http://le.utah.gov/~2015/bills/static/SB0082.html> (Forcible Entry Amendments).

³⁵⁸ *Id.*

effectively override the Supreme Court's holding in *Hudson v. Michigan*.³⁵⁹ As the first state to include police officers in its self-defense law, Indiana approved a law in 2012 that permits a homeowner to use deadly force against police officers who enter a home unlawfully.³⁶⁰ The state legislature passed the law after a 2011 Indiana Supreme Court case held that "there is no right to reasonably resist unlawful entry by police officers."³⁶¹ Other states should look to Maryland, Utah, and Indiana for guidance in analyzing the ways in which SWAT teams are utilized so that they can make any necessary policy changes or amendments to existing laws.

The Supreme Court should consider revisiting caselaw addressing Fourth Amendment violations and qualified immunity in order to permit the establishment of precedents that will define the laws governing excessive force for future constitutional tort claims. As discussed in Part II, the Court overturned the rule in *Saucier* that required courts to address constitutional violations before turning to the issue of qualified immunity,³⁶² leaving it to the discretion of the courts to determine whether to follow that two-step analysis.³⁶³ Yet the Court itself has followed the two-step analysis in analyzing such claims,³⁶⁴ thus it certainly recognizes the efficacy of doing so, and should require all courts to follow suit. Therefore, the Court should reinstate the *Saucier* analysis for lower courts to follow so that clearly established laws can be created more readily. The Court should also revisit its decision to make constitutional tort claims the only remedy for excessive force violations and should apply the exclusionary rule in criminal cases where excessive force has occurred.³⁶⁵ This course is unlikely given its prevailing assumption that exclusion is unnecessary because police are better trained than they were when *Mapp v. Ohio* was decided.³⁶⁶ However, it behooves the Court to at least consider whether this belief is actually accurate. Given the number of violent encounters, and the militaristic training police officers undergo, the Court should reconsider such assumptions about the current state of police training.

³⁵⁹ 547 U.S. 586, 599 (2006).

³⁶⁰ IND. CODE § 35-41-3-2 (2012) (as amended by Self-Defense—Reasonable Force—Duty to Retreat, 2006 Ind. Legis. Serv. P.L. 189-2006 (West)).

³⁶¹ *Barnes v. Indiana*, 946 N.E.2d 572, 574 (Ind. 2011).

³⁶² See *Saucier v. Katz*, 533 U.S. 194 (2001).

³⁶³ See *supra* Part II; see also *Pearson v. Callahan*, 555 U.S. 223 (2009).

³⁶⁴ See *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014) (finding that numerous shots fired at fleeing vehicle was not violation of Fourth Amendment although qualified immunity would have foreclosed § 1983 suit because no clearly established law existed at time of incident regarding whether such force was reasonable).

³⁶⁵ See *supra* Part II.B for discussion of dissents in *Ankeny* and *Hudson* calling for exclusionary rule application to excessive force claims.

³⁶⁶ See *Hudson v. Michigan*, 547 U.S. 586, 599 (2006); *Mapp v. Ohio*, 367 U.S. 643 (1961).

Citizens have come together to slow the militarization trends in their own cities and towns with limited success.³⁶⁷ In Keene, New Hampshire, where there is an active libertarian population, the public outcry over the city council's proposal to take possession of a free BearCat from the 1033 Program stopped the acquisition for a time.³⁶⁸ Lenco's sales manager predicted that Keene would eventually get one, saying: "We have Bearcats in 90 percent of the 100 or so largest cities in America. . . . This is going to happen. It has already happened. To resist now would be like saying police officers should scrap the Glock and go back to the revolver. It's a fantasy."³⁶⁹ He was right: Keene now has one.³⁷⁰ The citizens of Concord, New Hampshire, also fought against getting a BearCat and lost.³⁷¹ The city's application actually named the libertarians as a reason for needing one.³⁷² While these attempts ultimately failed, they did raise awareness about the federal programs providing them and prompted dialogue about militarization. Additionally, the images broadcast from the Ferguson protests—showing tanks and snipers trained against civilians there—prompted citizens in two California towns to insist that their police departments return the MRAPs they received from the federal government.³⁷³ Such efforts should continue as more information becomes available about the ways in which police departments use such equipment.

There are worthwhile movements afoot to address the growing militarization of American police departments—from legislation to citizen resistance—but more must be done to effectively curb the growing trend. The "war on drugs" has incentivized the escalation of militarization and aggressive policing, and should be curtailed. Sixty-seven percent of Americans believe treatment should be the focus, rather than prosecution and incarceration.³⁷⁴ State and federal lawmakers have begun limited reforms in the area of drug crime

³⁶⁷ See Radley Balko, *Police 'Tank' Purchase Riles New Hampshire Town*, HUFFINGTON POST (Feb. 17, 2012, 10:49 AM), http://www.huffingtonpost.com/2012/02/16/police-tank-purchase-new-hampshire_n_1279983.html.

³⁶⁸ See *id.*

³⁶⁹ *Id.* (internal quotation marks omitted).

³⁷⁰ See Cantú, *supra* note 11.

³⁷¹ See Ryan Lessard, *Concord City Council Votes in Favor of BearCat*, N.H. PUB. RADIO (Sept. 10, 2013, 5:30 AM), <http://nhpr.org/post/concord-city-council-votes-favor-bearcat>.

³⁷² N.H. DEP'T OF SAFETY, GRANTS MANAGEMENT UNIT GRANT APPLICATION CFDA #97.067 (2012), available at http://freestateproject.org/sites/default/files/content_type_files/blogs/concord_bearcat_full.pdf. The application names a group called Free Staters, which is a libertarian group that opposed the acquisition of the BearCat, calling it a domestic threat. See *id.* The application also refers to Occupy New Hampshire as a domestic threat. See *id.*

³⁷³ See Alex Dobuzinskis, *Two California Cities to Give Up Military Vehicles, amid Local Unease*, REUTERS, Aug. 29, 2014, available at <http://www.reuters.com/article/2014/08/30/us-usa-police-vehicles-idUSKBN0GU01720140830>.

³⁷⁴ See ACLU Report, *supra* note 22, at 2.

enforcement and mandatory minimum sentences for drug felonies;³⁷⁵ efforts that should be expanded. Maryland and Utah are using transparency as a method to at least track SWAT raids, and it may prove effective; certainly, other states should follow suit. On the federal level, Hank Johnson's bill may finally succeed,³⁷⁶ given the anger and awareness brought about by events in Ferguson, Missouri.³⁷⁷ However, while Johnson seeks only to limit the weapons provided by the 1033 Program, this Article makes the case that the 1033 Program is wholly unnecessary and primarily serves only to fuel militarization. DHS grants are similarly problematic and should be curtailed or ended. Moreover, those federal grants that tie funding to arrest statistics, like Byrne JAG grants, are unethical and dangerous and should also be ended. However, one of the most obstinate problems facing those who wish to demilitarize police is the corporate money flowing into Congress, as discussed in Part I.A. There are few regulations limiting campaign contributions because of recent Supreme Court decisions,³⁷⁸ which leaves citizens vulnerable to the defense industry that can spend lavishly on contributions and lobbyists to ensure military gear keeps flowing to police departments through federal grants.³⁷⁹

CONCLUSION

The 1033 Program should be terminated. The DHS grant program should be regulated and oversight implemented to prevent militarizing police departments. Weapons like assault rifles, grenade launchers, and APCs that were designed and manufactured for use in war zones should not be used against American citizens. Federal grants to police departments should not be tied to arrest statistics, but should be

³⁷⁵ Press Release, U.S. Sentencing Comm'n, U.S. Sentencing Commission Selects Policy Priorities for 2014–2015 Guidelines Amendment Cycle (Aug. 14, 2014), available at http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140814_Press_Release_Revised.pdf (“The Commission once again set as its top priority continuing to work with Congress to implement the recommendations in its 2011 report on federal mandatory minimum penalties, which included recommendations that Congress reduce the severity and scope of some mandatory minimum penalties and consider expanding the ‘safety valve’ statute which exempts certain low-level non-violent offenders from mandatory minimum penalties.”); *Drug Law Changes*, N.Y. ST. DIVISION CRIM. JUST. SERVICES, <http://dcjs.ny.gov/drug-law-reform/index.html> (last visited Apr. 3, 2015).

³⁷⁶ See Palmer & Sherman, *supra* note 337.

³⁷⁷ See Bosman & Williams, *supra* note 1.

³⁷⁸ See *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (striking two-year aggregate limits but upholding base limits); *Citizens United v. FEC*, 558 U.S. 310 (2010) (holding that Congress may not limit independent spending by corporations or unions on “electioneering communications,” gutting McCain-Feingold).

³⁷⁹ See Karena Rahall, *The Siren Is Calling: Economic and Ideological Trends Toward Privatization of Public Police Forces*, 68 U. MIAMI L. REV. 633 (2014) (discussing campaign finance and police privatization efforts).

regulated through policies governing the appropriate use of the funds. Finally, courts should be required to analyze whether the police actions in excessive force claims violate the Fourth Amendment before determining whether qualified immunity is applicable.

The police chief of the small town of Neenah, Wisconsin responded to citizen concerns about the town acquiring an MRAP by declaring: “We’re not going to go out there as Officer Friendly with no body armor and just a handgun and say ‘Good enough.’”³⁸⁰ The question is: why not?

³⁸⁰ Matt Apuzzo, *War Gear Flows to Police Departments*, N.Y. TIMES, June 8, 2014, <http://www.nytimes.com/2014/06/09/us/war-gear-flows-to-police-departments.html>.

