

4-27-2016

## Living Under the Boot: Militarization and Peaceful Protest

Charlotte Guerra

Seattle University School of Law, [guerrac@seattleu.edu](mailto:guerrac@seattleu.edu)  
Follow this and additional Works at: <https://digitalcommons.law.seattleu.edu/sjsj>



Part of the Administrative Law Commons, Agriculture Law Commons, Arts and Humanities Commons, Banking and Finance Law Commons, Civil Rights and Discrimination Commons, Commercial Law Commons, Comparative and Foreign Law Commons, Constitutional Law Commons, Consumer Protection Law Commons, Criminal Law Commons, Criminal Procedure Commons, Disability and Equity in Education Commons, Disability Law Commons, Educational Leadership Commons, Educational Methods Commons, Energy and Utilities Law Commons, Family Law Commons, Fourteenth Amendment Commons, Health Law and Policy Commons, Housing Law Commons, Human Rights Law Commons, Immigration Law Commons, Indigenous, Indian, and Aboriginal Law Commons, Insurance Law Commons, Intellectual Property Law Commons, International Trade Law Commons, Juvenile Law Commons, Labor and Employment Law Commons, Land Use Law Commons, Law and Gender Commons, Law and Psychology Commons, Legal Ethics and Professional Responsibility Commons, Legal History Commons, Legal Remedies Commons, Legislation Commons, Marketing Law Commons, National Security Law Commons, Natural Resources Law Commons, Other Education Commons, Other Law Commons, Privacy Law Commons, Property Law and Real Estate Commons, Secured Transactions Commons, Securities Law Commons, Sexuality and the Law Commons, Social and Behavioral Sciences Commons, Social and Philosophical Foundations of Education Commons, Social Welfare Law Commons, Transnational Law Commons, and the Water Law Commons

---

### Recommended Citation

Guerra, Charlotte (2016) "Living Under the Boot: Militarization and Peaceful Protest," *Seattle Journal for Social Justice*: Vol. 14: Iss. 2, Article 14.

Available at: <https://digitalcommons.law.seattleu.edu/sjsj/vol14/iss2/14>

This Article is brought to you for free and open access by the Student Publications and Programs at Seattle University School of Law Digital Commons. It has been accepted for inclusion in Seattle Journal for Social Justice by an authorized editor of Seattle University School of Law Digital Commons.

## **Living Under the Boot: Police Militarization and Peaceful Protest**

---

Charlotte Guerra\*

But always . . . always there will be the intoxication of power, constantly increasing and constantly growing subtler. Always, at every moment, there will be the thrill of victory, the sensation of trampling on an enemy who is helpless. If you want a picture of the future, imagine a boot stamping on a human face—forever.<sup>1</sup>

### I. INTRODUCTION: THE BOOT

In the modern era, it is almost taken for granted that our state and local police have increasingly taken on the appearance and mannerisms of an occupying force. According to the American Civil Liberties Union (ACLU), “American policing has become unnecessarily and dangerously militarized.”<sup>2</sup> Part of this increased militarization has been a combative attitude officers have extended towards citizens. Complaints about use of force have become almost a daily concern.<sup>3</sup> According to one report, between 2003 and 2008, internally-generated excessive force complaints had more than doubled (the number of citizen-generated complaints

---

\* Charlotte Guerra is a student at Seattle University School of Law, class of 2016. The author would like to thank all of her professors for their guidance and support and, in particular, Professors Brooke Coleman, Deirdre Bowen, Sara Rankin, and Dean Spade. Kathryn Barnhouse, Matt Geyman, and Judge John Erlick have also been wonderful mentors during the author’s legal career. They have all been positive role models for the profession and for social change. The author would also like to thank Professor Deborah Ahrens for consulting on this paper’s topic in its early stages.

<sup>1</sup> GEORGE ORWELL, 1984 155 (1949).

<sup>2</sup> AM. CIVIL LIBERTIES UNION, WAR COMES HOME: THE EXCESSIVE MILITARIZATION 2 (2014), available at <https://www.aclu.org/sites/default/files/assets/jus14-warcomeshome-report-web-rel1.pdf> [hereinafter ACLU].

<sup>3</sup> See, e.g., Bruce Taylor et al., *Changes In Officer Use of Force Over Time: A Descriptive Analysis of a National Survey*, 34 POLICING 211, 211–32 (2011).

remained stable),<sup>4</sup> although actual officer injuries remained fairly unchanged (still being only about half as common as suspect injuries).<sup>5</sup> This use of force is in excess of the appropriate courses of action afforded to a police force meant to protect citizens. The rights of citizens in both public and private spheres have been encroached by a police force that seems to care little about the erosion of civil liberties. As recent events in Ferguson, Missouri, and elsewhere have shown, in no other context is this quite as apparent as when direct confrontation occurs in the process of peaceful protest.

The erosion of civil liberty by police action in the context of protest should be a source of concern for all citizens. Dependability and trust are vested in the police force to uphold the laws and protect citizens. A certain level of force is seen as necessary to keep the peace and for officers to carry out their duties effectively. However, when police action impedes on civil liberties like the right to peaceful assembly and protest, and it is perceived that the trust placed in the police has been breached, the system does not work effectively. This is because lives, property, and the public peace might be threatened. The principle is especially important in the context of peaceful protest. When a crowd has already been incited to an agitated state to the point of constitutionally protected protest, police reaction and methodology may make the difference between a dialog and a riot. As President Kennedy stated, “Those who make peaceful revolution impossible will make violent revolution inevitable.”<sup>6</sup> As the recent protests that began in Ferguson have highlighted, the current script for a peaceful revolution is corrupted. If a state or locality can give a better alternative, American society as a whole stands to gain. To protect the integrity of the police

---

<sup>4</sup> *Id.* at 225–26 (there were also twice as many citizen-generated complaints as internally-generated complaints).

<sup>5</sup> *Id.*

<sup>6</sup> John F. Kennedy, President of the United States, Address on the First Anniversary of the Alliance for Progress (Mar. 13, 1962).

profession and to ensure the constitutional civil liberties of our citizens, reform is necessary.

In 2011, the Department of Justice (DOJ) found, after an extensive investigation, that the Seattle Police Department (SPD) “has engaged in a pattern or practice of excessive force that violates the Constitution and federal law”;<sup>7</sup> that the police force lacked adequate training for use of force; that supervisors failed to provide oversight on officers’ use of force; and that supervisors did not provide clear directions and expectations.<sup>8</sup> The DOJ and SPD reached a settlement agreement of terms on July 27, 2012.<sup>9</sup> As of mid-2015, the SPD had reportedly improved in several regards based on a Department of Justice assessment of police, although “significant work remains to be done.”<sup>10</sup> Nevertheless, an internal memorandum claimed that Seattle police are not using *enough* force as of late-2014, and over 100 Seattle police officers filed a federal lawsuit for their right to defend themselves.<sup>11</sup> These actions generate a question of sincerity and demonstrate that there might be a disconnect between the police department’s policies in compliance with the DOJ and the department’s actual practices.<sup>12</sup> In line with SPD’s stated dedication to change, and to better safeguard Seattle citizens’ civil liberties, this paper has several

---

<sup>7</sup> *Investigation Documents: Investigation of the Seattle Police Department*, U.S. DEP’T OF JUST., <http://www.justice.gov/crt/investigation-documents> (last visited Oct. 11, 2015).

<sup>8</sup> U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE SEATTLE POLICE DEPARTMENT 2–19 (Dec. 16, 2011), *available at* [http://www.justice.gov/sites/default/files/crt/legacy/2011/12/16/spd\\_findletter\\_12-16-11.pdf](http://www.justice.gov/sites/default/files/crt/legacy/2011/12/16/spd_findletter_12-16-11.pdf).

<sup>9</sup> *Investigation Documents*, *supra* note 7.

<sup>10</sup> SEATTLE POLICE MONITOR, FOURTH SEMIANNUAL REPORT 13 (2014), *available at* [http://www.justice.gov/sites/default/files/crt/legacy/2014/12/19/spd\\_fourthrpt\\_12-14.pdf](http://www.justice.gov/sites/default/files/crt/legacy/2014/12/19/spd_fourthrpt_12-14.pdf).

<sup>11</sup> Renee Lewis, *Seattle Police Aren’t Using Enough Force, Internal Memo Says*, ALJAZEERA AMERICA (Sept. 26, 2014), <http://america.aljazeera.com/articles/2014/9/26/seattle-police-force.html>.

<sup>12</sup> *See id.*

suggestions as to better effectuate that change and create a model police force to decrease the number of violent police interactions with the public.

The militarization of the police has had a unique interplay with this country's racial dynamics. According to the ACLU, the militarization of law enforcement agencies (LEAs) and the use of "paramilitary weapons and tactics" have primarily impacted minorities.<sup>13</sup> At the time of writing, a large component of the current protests concerned perceived racial inequalities and police interaction with minority groups, especially black citizens. Late-2014 alone had several high profile cases in which officers killed unarmed black citizens. Cleveland police officers killed Tamir Rice, a 12-year-old boy, within seconds of the police cruiser pulling into the park where the boy was playing with his toy, non-lethal airsoft gun.<sup>14</sup> John Crawford III was carrying an air rifle he had just picked up off of the shelf when police officers shot him in a Wal-Mart outside of Dayton, Ohio.<sup>15</sup> New York City police officers killed Eric Garner while he was being held in an illegal chokehold.<sup>16</sup> South Carolina Officer Michael T. Slager killed Walter Scott with multiple shots in the back as Mr. Scott fled, unarmed.<sup>17</sup>

---

<sup>13</sup> ACLU, *supra* note 2, at 5.

<sup>14</sup> *Tamir Rice Video Shows Cop Opening Fire on 12-year-old*, HUFFINGTON POST (Nov. 26, 2014), [http://www.huffingtonpost.com/2014/11/26/tamir-rice-video-shows-co\\_n\\_6227552.html](http://www.huffingtonpost.com/2014/11/26/tamir-rice-video-shows-co_n_6227552.html).

<sup>15</sup> Elahe Izadi, *Ohio Wal-Mart Surveillance Video Shows Police Shooting and Killing John Crawford III*, WASH. POST. (Sept. 25, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/09/25/ohio-wal-mart-surveillance-video-shows-police-shooting-and-killing-john-crawford-iii/>.

<sup>16</sup> Josh Sanburn, *Behind the Video of Eric Garner's Deadly Confrontation with New York Police*, TIME (July 22, 2014), <http://time.com/3016326/eric-garner-video-police-chokehold-death/>.

<sup>17</sup> Thomas Barrabi, *Walter Scott Shooting Video: Officer Michael Slager Arrested, Charged With Murder In South Carolina*, INT'L BUS. TIMES (Apr. 7, 2015, 7:55 PM EDT), <http://www.ibtimes.com/walter-scott-shooting-video-officer-michael-slager-arrested-charged-murder-south-1873345>.

These are not isolated incidents, and accusations of racial profiling, discriminatory practices, and racist policies persist across the nation.<sup>18</sup> Racial issues may also be especially prevalent in high-stress environments, such as those involving large groups of people who are currently protesting some aspect of government. In Seattle, the DOJ noted its investigation “raised serious concerns that some SPD policies and practices, particularly those related to pedestrian encounters, could result in discriminatory policing.”<sup>19</sup> For instance, a tort claim was supposedly filed for an incident involving Jesse Hagopian, a history teacher, who SPD allegedly pepper sprayed while he was speaking on his cell phone moments after giving a speech at an anti-police brutality rally on Martin Luther King, Jr. Day, 2015.<sup>20</sup> These types of incidents are indicative of a pervasive problem, both in Seattle and nationally, that touches on many aspects of both the right to protest and the increased militarization of the police, on nearly every level of application. However, race is a deep-seated and multi-dimensional issue, and it is beyond the scope of this paper to fully address the impact of race.

---

<sup>18</sup> See e.g., Redditt Hudson, *Being a Cop Showed Me Just How Racist and Violent the Police Are. There's Only One Fix*, WASH. POST (Dec. 6, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/12/06/i-was-a-st-louis-cop-my-peers-were-racist-and-violent-and-theres-only-one-fix/>.

<sup>19</sup> *Investigation Documents*, *supra* note 7.

<sup>20</sup> Ansel Herz, *Watch Seattle Police Pepper Spray Teacher Jesse Hagopian on MLK Day*, STRANGER (Jan. 28, 2015, 3:17 PST), <http://slog.thestranger.com/slog/archives/2015/01/28/watch-seattle-police-pepper-spray-teacher-jesse-hagopian-on-mlk-day>; see Ansel Herz, *Reprimand for Seattle Cop Who Pepper-Sprayed Jesse Hagopian*, STRANGER (Sept. 14, 2015, 2:16 PST), <http://www.thestranger.com/blogs/slog/2015/09/14/22858334/discipline-recommended-for-seattle-cop-who-pepper-sprayed-teacher-jesse-hagopian>; OFFICE OF PROF'L RESPONSIBILITY, CLOSED CASE SUMMARY: COMPLAINT NUMBER OPA#2015-0086 2-3 (2015), available at <http://www.seattle.gov/Documents/Departments/OPA/ClosedCaseSummaries/2015-0086cs09-11-15.pdf> (the officer's use of force was “not reasonable, necessary or proportional,” and the officer failed to direct force towards specific individuals posing a threat).

While police response to protest has become a national issue, actually addressing the problem needs to come from individual states and police departments. For the purposes of this paper, the emphasis will be placed on Washington State, and particularly on SPD. This paper will use SPD as an example of a police department that has a history of the use of excessive force in the context of protest; policies initiated in Seattle have had a ripple effect on police policy in reaction to protest nationwide, and SPD might be used as a model for change. In terms of remedy, this paper will focus on statewide and local statutory and regulatory change to return to Peelian Principles<sup>21</sup> of policing; alter police uniforms; create stricter sanctions for complaints of excessive use of force; require police officers to wear “body-cams” on their persons; require reliable reporting of how many citizens are harmed by police officers; ban or limit Washington police departments’ ownership of military-grade weapons; and limit the accepted methods of non-lethal crowd control.

This paper will first briefly address the historical progression of militarization of police departments and its interrelation with protest response. This section will address: (1) the World Trade Organization (WTO) protests in Seattle as an example and the model for future police-citizen contact during protest; (2) some of the sustaining governmental programs behind this increased police militarization, the kinds of military-grade equipment LEAs have been receiving, and how these agencies were eligible to receive this equipment; and (3) culminating events and current police response to peaceful protest, as in the example of the protests currently occurring in Ferguson, Missouri, and elsewhere at the time of this paper’s writing.

---

<sup>21</sup> *Sir Robert Peel’s Nine Principles of Policing*, N.Y. TIMES (Apr. 15, 2014), [http://www.nytimes.com/2014/04/16/nyregion/sir-robert-peels-nine-principles-of-policing.html?\\_r=1](http://www.nytimes.com/2014/04/16/nyregion/sir-robert-peels-nine-principles-of-policing.html?_r=1) [hereinafter N.Y. TIMES].

The second half of this paper will focus on remedies, which include statutory and regulatory change: (1) changing training methods on crowd control to emphasize citizens' rights of free speech and protest, decreasing the number of altercations between civilians and police, and finding alternative methods of resolution by returning to Peelian Principles of policing that emphasize community policing and using force as a last resort; (2) altering uniforms, such as through color changes, to decrease the risk of confrontation between officers and civilians; (3) creating more rigid enforcement—such as sanctions—when police officers face accusations of excessive force or assault while either on-duty or off-duty, including a point system that removes discretion from officers' superiors and ultimately results in termination if enough complaints are logged; (4) creating greater police accountability to the public, such as through the use of tamper-proof and reliable cameras worn on the officers' persons; (5) requiring reliable reporting on how many people are injured by police officers in both fatal and non-fatal ways during police interaction; (6) banning or limiting Washington police departments' ownership of assaultive military-grade weaponry; and (7) limiting the accepted methods of non-lethal crowd control, especially where chemical weapons are concerned.

## II. A BRIEF HISTORY: THE STAMPING

### *A. The World Trade Organization Conference Protests in Seattle: Setting the Tone*

In the present era, peaceful protest is subject to some limitations. Under current Supreme Court jurisprudence, a state may impose restrictions on the time, place, and manner of expression, whether it be oral, written, or through conduct.<sup>22</sup> Peaceful protest includes symbolic expression, like the

---

<sup>22</sup> Nick Suplina, *Crowd Control: The Troubling Mix of First Amendment Law, Political Demonstrations, and Terrorism*, 73 GEO. WASH. L. REV. 395, 397 (2005); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).



Ferguson-inspired protest “die-ins”—where protestors lay on the ground in public spaces as though they had been killed—to address police brutality and racial profiling.<sup>23</sup> The Supreme Court has articulated that First Amendment rights for free speech and peaceful assembly are protected, and states cannot restrict protest on the basis of the content of the speech (for instance, when the speech is criticizing the state and the restriction is targeted at silencing such criticism).<sup>24</sup> Otherwise, when the court weighs speech rights against state interests, the court gives the state deference.<sup>25</sup>

In the context of protest, this deference means that many symbolic forms of expression that would have had greater effect if delivered at a specific time, space, or manner, may be curtailed by the state if the rule was content-neutral.<sup>26</sup> To give a modern example, after Michael Brown’s death kick-started the Ferguson protests, demonstrations near his memorial and candlelit vigils in his honor held much more symbolic significance than if the protestors had congregated in, for example, a nearby parking lot. However, the Court will usually find “content-neutral” restrictions constitutional “provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information” they are trying to convey.<sup>27</sup> However, to be considered “narrowly tailored,” it need not be the least restrictive or intrusive means if the substantial government interest is still

---

<sup>23</sup> *Clark*, 468 U.S. at 294; *see also, e.g.*, Holly Yan, ‘Ferguson Is Everywhere’: More Crowds Demand Action as Obama Lays Out a Plan, CNN (Dec. 2, 2014), <http://www.cnn.com/2014/12/02/us/ferguson-aftermath/>.

<sup>24</sup> *See, e.g., Clark*, 468 U.S. at 293; Suplina, *supra* note 22, at 399.

<sup>25</sup> Suplina, *supra* note 22, at 399.

<sup>26</sup> *See id.* at 405–07.

<sup>27</sup> *Clark*, 468 U.S. at 293.

being met.<sup>28</sup> This was already the Supreme Court’s interpretation of expression rights going into the 1990s.

Towards the close of 1999, Seattle hosted the WTO Conference.<sup>29</sup> The widespread marches, protests, and the extreme police response—known as the “Battle in Seattle”—became a “landmark moment in how police handle protest in America,”<sup>30</sup> primarily by way of shutting it down. On November 30, 1999, nearly 40,000 globalization protestors held demonstrations in the streets and blocked many conference delegates from reaching the convention site.<sup>31</sup> Seattle had advance warning of the protestors’ intent, and, in fact, had weeks of training.<sup>32</sup> This was not a spontaneous event. Nonetheless, the city was apparently unprepared for the protests’ sheer size.<sup>33</sup> Although the “vast majority of protesters were peaceful, obeyed the police, and were not civilly disobedient,” the property damage, police altercations, and panic at the government level resulted in the issuance of three emergency orders that created daytime curfews and effective “no-protest” zones in the city, mandating the time, place, and manner of permitted protest.<sup>34</sup> Then-Mayor Paul Schell also criminalized personal possession of gas masks, “an order that almost certainly exceeded his authority and was probably unconstitutional.”<sup>35</sup> After the mayor issued the

---

<sup>28</sup> Suplina, *supra* note 22, at 402–03; *see also* Ward v. Rock Against Racism, 491 U.S. 781, 798–99 (1989).

<sup>29</sup> *World Trade Organization Protests in Seattle*, SEATTLE.GOV, <http://www.seattle.gov/cityarchives/exhibits-and-education/digital-document-libraries/world-trade-organization-protests-in-seattle> (last visited Sept. 20, 2015).

<sup>30</sup> Radley Balko, *After Ferguson, How Should Police Respond to Protests?*, WASH. POST (Aug. 14, 2014), <http://www.washingtonpost.com/news/the-watch/wp/2014/08/14/after-ferguson-how-should-police-respond-to-protests/>.

<sup>31</sup> Aaron Perrine, *The First Amendment Versus the World Trade Organization: Emergency Powers and the Battle in Seattle*, 76 WASH. L. REV. 635, 635–36 (2001).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*; RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA’S POLICE FORCES* 235 (2014).

<sup>34</sup> Perrine, *supra* note 31, at 637–38.

<sup>35</sup> BALKO, *supra* note 33.

emergency order, police from around the state and the National Guard were deployed, resulting in multiple altercations, mass arrests, and preemptive SWAT raids.<sup>36</sup> Police in full riot gear, rather than the more crowd-friendly standard police uniform, were on the front lines.<sup>37</sup>

The officers' actual actions may sound dishearteningly familiar at this point. Officers liberally used tear gas, pepper spray, and rubber and plastic bullets, apparently targeting both the press and the legal observers, while herding the crowd through the streets.<sup>38</sup> Observers noted that the police wore neither badges nor identifying nameplates, which some believe may have "emboldened" them through anonymity.<sup>39</sup> According to one eyewitness, the officers "offered no avenue of escape. It was an effort not to disperse, but to punish the crowds."<sup>40</sup> The city's actions were ultimately deemed a violation of more than 170 protestors' constitutional rights.<sup>41</sup> According to an ACLU special report, citizens' constitutionally protected rights to protest "paid a dear price for poor judgment calls made by public officials and police personnel every step of the way. The [c]ity must acknowledge what went wrong and take actions to avoid similar mistakes in the future."<sup>42</sup>

---

<sup>36</sup> Perrine, *supra* note 31, at 639–40; Balko, *supra* note 30.

<sup>37</sup> BALKO, *supra* note 33, at 234.

<sup>38</sup> Interview by Jim Compton with Joshua Alex, Law Student, in Seattle, Wash. (Aug. 9, 2000); telephone interview by Jim Compton with Tara Herivel, Legal Observer (Aug. 3, 2000); telephone interview by Jim Compton with Dick Burton, Philosophy Professor, at Seattle Central Community College (Aug. 3, 2000); interview by Jim Compton of Nicole Zimmer, Legal Observer, in Seattle, Wash. (Aug. 3, 2000).

<sup>39</sup> Interview by Jim Compton with Isak Bressler, Legal Observer, in Seattle, Wash. (Aug. 3, 2000).

<sup>40</sup> Telephone Interview by Jim Compton with Pavlovs Stavropolous, Computer Instructor (Aug. 8, 2000).

<sup>41</sup> BALKO, *supra* note 33, at 236.

<sup>42</sup> AM. CIVIL LIBERTIES UNION, OUT OF CONTROL: SEATTLE'S FLAWED RESPONSE TO PROTESTS AGAINST THE WORLD TRADE ORGANIZATION 3 (2000), *available at* <https://aclu-wa.org/sites/default/files/attachments/WTO%20Report%20Web.pdf>.

Seattle's response to protest set the tone across the nation for how the states would interact with protestors through use of their police force for years to come.<sup>43</sup> The primary concern for police during protests would be their own sense of control.<sup>44</sup> For instance, on November 18, 2011, on the University of California-Davis campus, protestors congregated as part of the Occupy movement to protest state education funding cuts.<sup>45</sup> Campus police descended in riot gear and then pepper sprayed the seated, non-violent protestors when they refused to disperse.<sup>46</sup> Former Seattle Police Chief, Norm Stamper, said:

[The WTO Protests in Seattle] set a number of precedents, most of them bad. And police departments across the country learned all the wrong lessons from us. That's disheartening. So disheartening. I mean, you look at what happened to those Occupy protesters at U.C. Davis, where the cop just sprays them down like he's watering a bed of flowers, and I think that we played a part in making that sort of thing so common—so easy to do now.<sup>47</sup>

Police are still grappling with the effects of these attitudes today, with increased police aggression during protest only being further amplified by policy and the increased presence of military-grade equipment.

---

<sup>43</sup> Balko, *supra* note 30.

<sup>44</sup> *Id.*

<sup>45</sup> Elliot Burr, *Los Altos Native Pepper-Sprayed at UC Davis Protests*, LOS ALTOS TOWN CRIER (Nov. 30, 2011), <http://www.losaltosonline.com/news/sections/news/215-news-briefs/13174-J41706>.

<sup>46</sup> *Id.*; Adam Gabbatt, *UC Davis Pepper Spray Police Officer Awarded \$38,000 Compensation*, GUARDIAN (Oct. 23, 2013), <http://www.theguardian.com/world/2013/oct/23/pepper-spray-cop-uc-davis-compensation>. John Pike, the officer who performed the pepper spraying, was subsequently awarded \$38,000 in worker's compensation for depression and anxiety over the death threats he received for his actions. *Id.*

<sup>47</sup> Balko, *supra* note 30.

*B. The Studied Increase in the Militarization of Police*

The events in Seattle did not happen in a vacuum. Some have pointed to the “unnecessarily and dangerously militarized” state of American police forces accounting for the increased civil liberties erosion when it comes to protest.<sup>48</sup> Excessive militarization of the American police force has resulted in officers viewing their jobs in an increasingly combative light that might make them seek out more aggressive tactics in the direct confrontation that protest generates.<sup>49</sup> Police training encourages officers to think of themselves as warriors and to see civilians as potential adversaries.<sup>50</sup> The emphasis has changed from protecting citizens and serving the community to protecting police and preserving order.<sup>51</sup> According to one Missouri police chief, Betty Taylor, oftentimes the “us-versus-them mentality takes over . . . [W]hen you get into that mentality, there are no innocent people. There’s us and there’s the enemy.”<sup>52</sup> The more we train and dress up local law enforcement officers as soldiers, the more they will begin to act like soldiers.

Part of the concern for police militarization relates to the ownership and use of military-grade equipment by state and local peacekeepers against US citizens. To scale back police militarization, the ACLU has looked to both the stockpiling of military-grade equipment and the police training that fosters a “warrior” mentality toward civilians.<sup>53</sup>

---

<sup>48</sup> ACLU, *supra* note 2.

<sup>49</sup> *See id.*

<sup>50</sup> *See id.* at 3.

<sup>51</sup> *See Balko, supra* note 30.

<sup>52</sup> BALKO, *supra* note 33, at 241.

<sup>53</sup> *See* ACLU, *supra* note 2, at 3.

### 1. Military-Grade Equipment: The Department of Homeland Security Grants and the 1033 Program

The military-grade weapons source for many LEAs in the United States comes from either grants from the Department of Homeland Security (DHS) or from the Department of Defense Excess Property Program (1033 Program).<sup>54</sup> LEAs were able to receive grants to fight against “terrorist threats” after September 11, 2001, when the government, responding to the World Trade Center attack, created the DHS.<sup>55</sup> In 2011 alone, the DHS gave \$2 billion in grants.<sup>56</sup> The department then “makes little effort to track how the grants are spent,” to track the equipment bought with the funds, or even to assess first whether the requesting agency may be facing any “tangible threat of terrorism.”<sup>57</sup> For instance, Fargo, North Dakota, has a population of less than 116,000 people, and the closest foreign nation, Canada, is a US ally.<sup>58</sup> Nevertheless, Fargo has received \$8 million in grants from DHS to purchase “assault rifles, Kevlar helmets, and an armored truck with a rotating turret.”<sup>59</sup> Presumably, Fargo could purchase a wood chipper if its police department could manufacture a use against local criminals. Ultimately, DHS has given out “at least \$34 billion in anti-terror grants since its inception.”<sup>60</sup>

---

<sup>54</sup> Linda Feldman, *Ferguson: How Pentagon's '1033 Program' Helped Militarize Small-Town Police*, CHRISTIAN SCI. MONITOR (Aug. 16, 2014), <http://www.csmonitor.com/USA/DC-Decoder/2014/0816/Ferguson-How-Pentagon-s-1033-program-helped-militarize-small-town-police-video>.

<sup>55</sup> *Id.*

<sup>56</sup> BALKO, *supra* note 33, at 255–56.

<sup>57</sup> Robert Balko, *Why is a SWAT Team Assaulting Me? I'm Just Dancing at a Rave*, SALON (Jul. 30, 2013), [http://www.salon.com/2013/07/30/why\\_is\\_a\\_swat\\_team\\_assaulting\\_me\\_im\\_just\\_dancing\\_at\\_a\\_rave/](http://www.salon.com/2013/07/30/why_is_a_swat_team_assaulting_me_im_just_dancing_at_a_rave/).

<sup>58</sup> *Fargo (city), North Dakota*, U. S. CENSUS BUREAU (July 8, 2014), <http://quickfacts.census.gov/qfd/states/38/3825700.html>.

<sup>59</sup> Balko, *supra* note 57.

<sup>60</sup> *Id.*

In terms of the 1033 Program, the National Defense Authorization Act (the “Act”) allows transfer of Department of Defense (DoD) property to federal, state, and local departments.<sup>61</sup> The program has been overseen through the Law Enforcement Support Office (LESO) within the Defense Logistics Agency (DLA) since 1995.<sup>62</sup> Initially, the program was only intended to assist against the War on Drugs, but as of 1997, any agency may request the property for “bona fide law enforcement purposes that assist in their arrest and apprehension mission,” with preference given for “counter-drug and counter-terrorism requests.”<sup>63</sup> To be eligible, states create a business relationship with the DLA through a Memorandum of Agreement, and then the state governor appoints a state coordinator to maintain property accountability records and investigate any alleged misuse.<sup>64</sup> Once the state coordinator and the LESO approve an LEA to participate in the 1033 Program, the LEA may appoint officials to obtain the equipment.<sup>65</sup> Nearly half a billion dollars worth of military equipment was given out in 2013 alone.<sup>66</sup> In total, over \$4.3 billion dollars worth of equipment has been transferred since the 1033 Program’s inception.<sup>67</sup>

---

<sup>61</sup> *Federal Surplus*, WASH. ST. DEP’T OF ENTERPRISE SERV. (Aug. 5, 2014) <http://www.des.wa.gov/services/Surplus/BuySurplus/Pages/FederalSurplus.aspx>; *1033 Program FAQs*, DEFENSE LOGISTICS AGENCY, <http://www.dla.mil/DispositionServices/Offers/Reutilization/LawEnforcement/ProgramFAQs.aspx> (last visited Feb. 20, 2016).

<sup>62</sup> *1033 Program FAQs*, *supra* note 61.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Christopher Ingraham, *The Pentagon Gave Nearly Half a Billion Dollars of Military Gear to Local Law Enforcement Last Year*, WASH. POST (Aug. 14, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/08/14/the-pentagon-gave-nearly-half-a-billion-dollars-of-military-gear-to-local-law-enforcement-last-year/>.

<sup>67</sup> *Id.*

## 2. The Equipment

The amount and kind of military-grade equipment making its way into local police departments' hands is fairly staggering. For instance, the police department in Maricopa County, Arizona, has over 21,000 types of military equipment, including a .50 caliber machine gun that fires "bullets powerful enough to blast through the buildings on multiple city blocks."<sup>68</sup> According to the ACLU, the 63 responding agencies had received over 15,054 "battle uniforms or personal protective equipment."<sup>69</sup> However, these responding agencies are only a small fraction of the total LEAs in the country. More than 8,000 LEAs have enrolled in the 1033 Program nationwide.<sup>70</sup> This figure does not include those who have otherwise received separate DHS grants. In total, approximately 500 towns have received Mine Resistant Ambush Protected (MRAP) vehicles.<sup>71</sup> Other equipment included bomb suits, night vision equipment, guns, rifles, surveillance and reconnaissance equipment, utility trucks, GPS devices, helicopters, flashbang grenades, and more.<sup>72</sup>

Washington State has not been immune to the siren call of sweet, sweet federal funding. Seattle Police Chief Kathleen O'Toole made publicly available a listing of the equipment received through the 1033 Program.<sup>73</sup> Between 2006 and 2015, Washington received equipment through the 1033 Program totaling \$20,945,358.57 in value.<sup>74</sup> The equipment Washington

---

<sup>68</sup> ACLU, *supra* note 2, at 13.

<sup>69</sup> *Id.* at 22.

<sup>70</sup> *1033 Program FAQs*, *supra* note 61.

<sup>71</sup> ACLU, *supra* note 2, at 22.

<sup>72</sup> *Id.* at 13–14.

<sup>73</sup> Kathleen O'Toole, Seattle Police Chief, Address at Seattle University School of Law: The Changing Role of Police in Our Community (Mar. 6, 2015).

<sup>74</sup> Memorandum from the DLA, Washington 1033 Program Compliance Review (Mar. 10, 2015), [http://www.des.wa.gov/SiteCollectionDocuments/Surplus/1033/DLA\\_Memo\\_PCR\\_2015.pdf](http://www.des.wa.gov/SiteCollectionDocuments/Surplus/1033/DLA_Memo_PCR_2015.pdf).



State has requisitioned ranges from utility trucks, night vision equipment, rifles, mine resistant vehicles, and more.<sup>75</sup> The King County Sheriff's Department has acquired over \$2 million in equipment, including helicopters, armored trucks, and night vision equipment, while SPD has acquired over \$250,000 in equipment over the same time period.<sup>76</sup>

### 3. Acquisition and Eligibility

The process for acquiring the DoD property is fairly simple. To be eligible to receive property, one needs to be a federal, state, or local LEA.<sup>77</sup> The LEA can either physically visit a Defense Reutilization and Marketing Office or review the inventory online through the Defense Reutilization and Marketing Service.<sup>78</sup> The weapon acquisition application differs depending on the LEA, but may consist of a single page.<sup>79</sup> The state coordinator approves the request based on two criteria: "(1) that the agency intends to use the equipment for a [']law enforcement purpose['] . . . , and (2) that the transfer would result in a [']fair and equitable distribution['] of property based on current inventory."<sup>80</sup> Additionally, the Memorandum of Agreement making LEAs eligible for the program also provides that the item issuance should be no more than one per officer in the requesting agency.<sup>81</sup> In the ACLU's two-year study, they did not discover a single

---

<sup>75</sup> *Complete Inventory of 1033 Property*, WASH. ST. DEP'T OF ENTERPRISE SERV. (Jul. 1, 2015) [www.des.wa.gov/SiteCollectionDocuments/Surplus/1033/1033PropertyBook.xlsx](http://www.des.wa.gov/SiteCollectionDocuments/Surplus/1033/1033PropertyBook.xlsx).

<sup>76</sup> *Id.*

<sup>77</sup> See *Federal Surplus*, *supra* note 61.

<sup>78</sup> *The 1033 Program*, JUSTNET, [https://www.justnet.org/other/1033\\_program.html](https://www.justnet.org/other/1033_program.html) (last visited Oct. 11, 2015) (the department then sends an application for the requested items to their State Point of Contact (SPOC); upon SPOC approval, the application goes on to the LESO).

<sup>79</sup> See *Law Enforcement Agency (LEA) Weapon Request*, TEX. DEP'T OF PUB. SAFETY, <https://www.txdps.state.tx.us/LawEnforcementSupport/documents/weaponRqst.pdf> (last visited Feb. 20, 2016).

<sup>80</sup> ACLU, *supra* note 2, at 29.

<sup>81</sup> *Id.*

denied equipment request.<sup>82</sup> After the property is in the agency's possession, the DLA conducts a Program Compliance Review once every two years.<sup>83</sup> During the review, 20 percent of a state's inventory is typically physically reviewed; at random, any one site may be forced to account for 100 percent of 1033 Program "weapons, aircraft, watercraft and tactical vehicles[,] and a minimum of 10 [percent] of all other controlled property."<sup>84</sup> However, the only significant responsibilities placed on the acquiring agencies are that they do not sell the equipment obtained and that they maintain accurate inventories.<sup>85</sup> Failure to conduct a required inventory may result in a suspension from the program, "but there are no consequences for overly aggressive use of equipment."<sup>86</sup>

#### *B. Culminating Events and Current Response to Protests*

Ultimately, many of these factors have worked to culminate in some of the widespread protests against police action that are currently underway at the time of writing, and the atmosphere in this country is trending towards mobilized political action in protest against what has been seen as oppressive police conduct. While much of the current furor centers on accusations of racial targeting, a widespread national discussion on police militarization was also kick-started when officers responded for over three months to primarily peaceful protest in Ferguson, Missouri, with tear gas, rubber bullets, and military-grade weapons acquired through the 1033

---

<sup>82</sup> *Id.* at 30.

<sup>83</sup> EXEC. OFFICE OF THE PRESIDENT, REVIEW: FEDERAL SUPPORT FOR LOCAL LAW ENFORCEMENT EQUIPMENT ACQUISITION 8 (Dec. 2014), *available at* [https://www.whitehouse.gov/sites/default/files/docs/federal\\_support\\_for\\_local\\_law\\_enforcement\\_equipment\\_acquisition.pdf](https://www.whitehouse.gov/sites/default/files/docs/federal_support_for_local_law_enforcement_equipment_acquisition.pdf).

<sup>84</sup> *Id.*

<sup>85</sup> ACLU, *supra* note 2, at 29.

<sup>86</sup> *Id.* at 30.

Program.<sup>87</sup> Accusations that police escalated matters, targeted media, and refused to wear required name tags<sup>88</sup>—much in the same manner as police during the WTO protests<sup>89</sup>—has resulted in a concurrent federal inquiry into events<sup>90</sup> and at least one public apology from Ferguson Police Chief Thomas Jackson.<sup>91</sup> Attorney General Eric Holder responded to the situation early on by emphasizing that police should be reducing tension, not heightening it, respecting the rights of those who peacefully gather, and that “journalists must not be harassed or prevented from covering a story that needs to be told.”<sup>92</sup> At the time of writing, the situation is still developing as a recent grand jury failed to indict the officer.<sup>93</sup> Citizens continue to voice

---

<sup>87</sup> See Amanda Terkel & Ryan J. Reilly, *Fire Tear Gas at Protestors Hours Before Curfew (UPDATE)*, HUFFINGTON POST (Aug. 18, 2014), [http://www.huffingtonpost.com/2014/08/17/ferguson-protests\\_n\\_5686601.html](http://www.huffingtonpost.com/2014/08/17/ferguson-protests_n_5686601.html); see also Paige Lavender, *Ferguson Protests Hit With Tear Gas*, HUFFINGTON POST (Nov. 25, 2014), [http://www.huffingtonpost.com/2014/11/25/ferguson-tear-gas\\_n\\_6218914.html](http://www.huffingtonpost.com/2014/11/25/ferguson-tear-gas_n_6218914.html); see also Mike Lillis, *Congress Mulls Response to Ferguson*, THE HILL (Aug. 7, 2014), <http://thehill.com/homenews/house/216863-congress-mulls-response-to-ferguson-tragedy>.

<sup>88</sup> See Letter from Christy E. Lopez, Deputy Chief, Civil Rights Div. of the Dep’t of Justice, to Thomas Jackson, Police Chief of Ferguson, Mo. (Sept. 23, 2014), <http://big.assets.huffingtonpost.com/DOJLetterOnNameplates.pdf>; see also *Ferguson Police Targeting Media With Arrests, Tear Gas, Bean Bags and Blackouts*, MINTPRESS NEWS (Aug. 14, 2014), <http://www.mintpressnews.com/ferguson-police-targeting-media-arrests-tear-gas-blackouts/195327/>.

<sup>89</sup> See interview by Jim Compton with Isak Bressler, *supra* note 39.

<sup>90</sup> Press Release, Statement by Attorney Gen. Holder on Recent Shooting Incident in Ferguson, Missouri (Aug. 11, 2014), *available at* <http://www.justice.gov/opa/pr/statement-attorney-general-holder-recent-shooting-incident-ferguson-missouri>.

<sup>91</sup> Elliott C. McLaughlin & Ana Cabrera, *Apology or Not, Ferguson Police Chief Tells CNN: I Will Not Step Down*, CNN (Sept. 29, 2014), <http://www.cnn.com/2014/09/25/us/ferguson-michael-brown-police-chief-apology/>.

<sup>92</sup> Press Release, Statement by Attorney General Eric Holder on Latest Developments in Ferguson, Missouri (Aug. 14, 2014), *available at* <http://www.justice.gov/opa/pr/statement-attorney-general-eric-holder-latest-developments-ferguson-missouri>.

<sup>93</sup> See Press Release, Nat’l Bar Assoc., The National Bar Association Responds to the Grand Jury’s Decision Not to Indict Police Officer Darren Wilson in the Shooting Death

accusations of corruption and mishandling the situation, and the current police response to peaceful protest is becoming a national debate.<sup>94</sup>

### III. REPAIRING THE DAMAGE: THE HUMAN FACE

#### A. Returning to Peelian Principles

In some ways, the militarization of police can be combated by very simple changes in how the police culture is cultivated. Rather than emphasizing police officers' roles as "warriors" and promoting an atmosphere that will lead to more clashes with police when large groups gather together in protest, society should be emphasizing police officers' roles as "guardians." Training should paint the police force in terms of its community and the protection of civilians rather than seeing citizens as an enemy or an obstruction.

Some have suggested a return to some of the principles of policing suggested by Sir Robert Peel in the 19th century to create an ethical police force.<sup>95</sup> Among these Peelian Principles is the concept that the "approval and trust of the public is vital in order for police to carry out their mission."<sup>96</sup> The police do not live as separate entities from their

---

of Michael Brown (Nov. 24, 2014), available at <http://us7.campaign-archive1.com/?u=b493e6c4d31beda32fdaf8e2d&id=73514e334b>.

<sup>94</sup> See Press Release, Dep't of Justice, Justice Department Announces Findings of Two Civil Rights Investigations in Ferguson, Missouri – Justice Department Finds a Pattern of Civil Rights Violations by the Ferguson Police Department (Mar. 4, 2015), available at <http://www.justice.gov/opa/pr/justice-department-announces-findings-two-civil-rights-investigations-ferguson-missouri> (the DOJ found civil rights violations in the Ferguson Police Department, including a pattern or practice of racial bias and violations of the First, Fourth, and Fourteenth Amendments).

<sup>95</sup> Timothy Roufa, *Guardians or Warriors? The Changing Role of Law Enforcement*, ABOUT.COM, [http://criminologycareers.about.com/od/Career\\_Trends/fl/Guardians-or-Warriors-The-Changing-Role-of-Law-Enforcement.htm](http://criminologycareers.about.com/od/Career_Trends/fl/Guardians-or-Warriors-The-Changing-Role-of-Law-Enforcement.htm) (last visited Oct. 29, 2014).

<sup>96</sup> *Id.*; N.Y. TIMES, *supra* note 21. There are nine chief principles including: (1) police exist to prevent crime and disorder; (2) public approval of police actions is required for police to fulfill their duties; (3) public cooperation to voluntarily observe the law is necessary for police to secure and maintain the public's respect; (4) greater cooperation

communities. They are a part of the communities they serve; therefore, they must adhere to the law like any other citizen, and force should only be used as a last resort and “not the first reaction.”<sup>97</sup> That mutual trust in compliance, and respect for both the citizens and the law, is necessary for the police to maintain order and prevent crime. Along those same lines, the police force functions best—and has achieved its ultimate goal—if the public is voluntarily complying with the law.<sup>98</sup> The mission should not be to put away as many people as possible, but to foster good citizenship and self-policing. The absence of crime is the ultimate measure for the effective police department.<sup>99</sup>

On the whole, many of these suggestions already comport with several LEAs’ stated policy goals. Using SPD as a model, the department has seven core principles related to their use of force, including looking to uphold citizens’ constitutional rights while minimizing the need for use of force.<sup>100</sup> “The community expects and SPD requires that officers use only the force necessary to perform their duties and that such force be proportional to the threat or resistance of the subject under the circumstances.”<sup>101</sup> Looking to proportionality, necessity, reasonableness, and de-escalation—policies the consent decree reemphasized for the SPD<sup>102</sup>—aligns with Peelian Principles that recognize the importance of the community’s expectations and the

---

requires less force; (5) public favor is garnered by impartial service to the law; (6) physical force is a last resort and only used to the extent necessary; (7) the police is a part of the public and the public is in the police; (8) police should direct their actions towards their functions and not usurp judiciary powers; and (9) police efficiency can be measured by the absence of crime.

<sup>97</sup> Roufa, *supra* note 95.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Use of Force Core Principles*, SEATTLE.GOV, [http://www.seattle.gov/police/publications/manual/08\\_000\\_Use\\_of\\_Force\\_Core\\_Principles.html](http://www.seattle.gov/police/publications/manual/08_000_Use_of_Force_Core_Principles.html) (last visited Nov. 24, 2014) [hereinafter *Use of Force*].

<sup>101</sup> *Id.*

<sup>102</sup> *See* SEATTLE POLICE MONITOR, *supra* note 10, at 16–18.

police force's respect.<sup>103</sup> However, the terminology still seems somewhat skewed, in practice. "Necessary," as defined by SPD, consists of "when no reasonably effective alternative appears to exist," where the reasonableness inquiry requires judgment, not by a reasonable person standard, but "from the perspective of a reasonable *officer* on the scene" (emphasis added).<sup>104</sup> Similarly, the proportionality analysis for the use of force follows the same reasonableness inquiry and looks to the "totality of the circumstances."<sup>105</sup> The manual very nearly quotes a 1989 Supreme Court decision to stress that these inquiries must "allow for the fact that police officers are often forced to make split-second decisions—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."<sup>106</sup> The inquiry is thus necessarily skewed towards what seems reasonable in the insulated judgment of officers.

Unfortunately, looking to what might have been reasonable for a police officer is still in line with several Supreme Court decisions and most trends across the country when it comes to evaluating police conduct. In 1985, the Supreme Court ruled in *Tennessee v. Garner*, using a Fourth Amendment "objective reasonableness" test, that "where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others," such as if the suspect is armed, "it is not constitutionally unreasonable to prevent escape by using deadly force."<sup>107</sup> This reasoning seems like it could be beneficial to unarmed citizens trying to claim the use of force was unreasonable if they are fired upon when attempting to escape. However, this "objective reasonableness" test was given further definition just four years later when the Supreme Court ruled

---

<sup>103</sup> See N.Y. TIMES, *supra* note 21.

<sup>104</sup> *Use of Force*, *supra* note 100.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* (although I could see no citation to indicate it was a quote); *Graham v. Connor*, 490 U.S. 386, 396–97 (1989).

<sup>107</sup> *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

that the reasonableness of the force used “must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”<sup>108</sup> In other words, the officer on the ground may have the benefit of the doubt based on his or her perspective, even with fleeing, unarmed citizens. The SPD Manual is thus in line with the Supreme Court decisions.

However, the Supreme Court sets the floor, not the ceiling, on what might be expected from officers in the line of duty. Local expectations could be set either by codifying the standard under a “reasonable person” rather than a “reasonable officer” standard,<sup>109</sup> or simply by changing training methods for police to instead emphasize the Peelian Principle that force is a last-resort option. The reasonable person, and not the reasonable officer, might create a more objective standard that does not inherently favor the police even by its phrasing. In any case, the law already would encompass an officer’s unique perspective and the totality of the circumstances under a plain reasonable person analysis. Using the standard of the “reasonable officer” confounds several Peelian Principles relating to seeing the police as part of the community and even the department’s own stated policy goals. It creates a division between what may seem reasonable to any random citizen in a community and what “cop-logic” may dictate. Police may agree on what force is reasonable, but that is not necessarily a reflection of the opinions of the communities they serve.

In practice, police often have very wide discretion in their use of force.<sup>109</sup> In 2010, after a four-second warning, an SPD officer killed Native American John T. Williams, a hearing-impaired woodcarver in Seattle, for walking around the city with a piece of wood and his three-inch pocket

---

<sup>108</sup> *Connor*, 490 U.S. at 396.

<sup>109</sup> Chase Madar, *Why It’s Impossible to Indict a Cop*, THE NATION (Nov. 24, 2014), <http://www.thenation.com/article/190937/why-its-impossible-indict-cop>.

knife.<sup>110</sup> Neither the King County prosecutor (precluded because malice could not be proven) nor the federal prosecutors (could not show beyond a reasonable doubt that the officer “acted willfully and with the deliberate and specific intent” to violate Williams’s civil rights) prosecuted the officer.<sup>111</sup> However, the city did eventually settle with the family for \$1.5 million.<sup>112</sup>

In terms of crowd control, the use of force becomes particularly problematic. In Washington, to prosecute either gross misdemeanor or felony riot requires a defendant—acting knowingly and unlawfully with three or more people—to use, threaten to use, or participate in the use of force against another person or property.<sup>113</sup> The misdemeanor of “failure to disperse” occurs when a person has been ordered to disperse by a police officer or public servant and when the person “congregates with a group of three or more other persons and there are acts of conduct within that group which create a *substantial* risk of causing injury to any person, or *substantial* harm to property” (emphasis added).<sup>114</sup> The SPD Manual instead frames dispersal in terms of “imminent” risk to a more amorphous concept of “public safety.”<sup>115</sup> In other words, there need not be a particular person or property at risk of harm. This framing again puts the discretion more in the

---

<sup>110</sup> Fern Renville, *The Shooting Death of John T. Williams*, INDIAN COUNTRY (Feb. 21, 2011), <http://indiancountrytodaymedianetwork.com/2011/02/21/shooting-death-john-t-williams-18538>.

<sup>111</sup> Mike Carter, *No Federal Civil-Rights Charges for Former SPD Officer Ian Birk*, SEATTLE TIMES (Jan. 13, 2012), [http://seattletimes.com/html/localnews/2017233847\\_birk14m.html](http://seattletimes.com/html/localnews/2017233847_birk14m.html).

<sup>112</sup> Casey McNeerthey, *Woodcarver’s Family To Get \$1.5 Million From City*, SEATTLEPI (Aug. 30, 2011), <http://www.seattlepi.com/local/article/Woodcarvers-family-to-get-1-5-million-from-city-1359018.php>.

<sup>113</sup> 11A WASH. PRAC., PATTERN JURY INSTR. CRIM. WPIC 126.02 (3d ed. 2014); 11A WASH. PRAC., PATTERN JURY INSTR. CRIM. WPIC 126.03 (3d ed. 2014).

<sup>114</sup> WASH. REV. CODE § 9A.84.020 (2011).

<sup>115</sup> *Demonstration Management*, SEATTLE.GOV, [http://www.seattle.gov/police/publications/manual/14\\_090\\_Demonstration\\_Management.html](http://www.seattle.gov/police/publications/manual/14_090_Demonstration_Management.html) (last visited Nov. 24, 2014).



officers' hands at the ground level, keeping in mind reasonableness of these actions will be evaluated by a "reasonable officer" standard.<sup>116</sup>

This problematic phrasing does not always seem to have resulted in much observable restraint. During the Occupy Seattle protests, SPD faced heavy criticism for their crowd control tactics and use of force.<sup>117</sup> On November 16, 2011, during a peaceful march that blocked downtown intersections, officers reportedly pepper sprayed the protesters in the face, among them a pregnant teenager who required hospitalization, a priest, and 84-year-old Dorli Rainey.<sup>118</sup> Then-Mayor Mike McGinn apologized for the incident mere hours after Dorli Rainey's photo garnered viral attention online.<sup>119</sup> Later, in the Seattle May Day 2013 and 2014 protests, the police claimed to have only taken action to arrest offenders after the crowd instigated either property damage or pelted the police with rocks, bottles, or other objects.<sup>120</sup> While some have commended SPD's recent restraint, historically, others have reported that once dispersion techniques begin, the police may indiscriminately use force on an otherwise peaceful crowd with a few

---

<sup>116</sup> *Use of Force*, *supra* note 100.

<sup>117</sup> *See, e.g., At Occupy Seattle, 84-Year-Old Activist, Pregnant Teen, Priest Among Those Pepper Sprayed*, HUFFINGTON POST (Nov. 17, 2011), [http://www.huffingtonpost.com/2011/11/16/pregnant-teen-elderly-wom\\_n\\_1096895.html](http://www.huffingtonpost.com/2011/11/16/pregnant-teen-elderly-wom_n_1096895.html) [hereinafter *At Occupy Seattle*].

<sup>118</sup> *Id.*

<sup>119</sup> Mike Lindblom & Lynn Thompson, *Pepper-Sprayed Woman Gets Mayor's Apology*, SEATTLE TIMES (Nov. 16, 2011), [http://seattletimes.com/html/localnews/2016784455\\_occupy17m.html](http://seattletimes.com/html/localnews/2016784455_occupy17m.html).

<sup>120</sup> Amanda Watts & Lindy Royce-Bartlett, *17 Arrested as Seattle May Day Protests Turn Violent*, CNN (May 2, 2013), <http://www.cnn.com/2013/05/01/us/seattle-may-day-protests/>; Manuel Valdes, *Protesters Pepper-Sprayed, Arrested During Seattle May Day March*, HUFFINGTON POST (May 2, 2014), [http://www.huffingtonpost.com/2014/05/02/seattle-may-day\\_n\\_5253707.html](http://www.huffingtonpost.com/2014/05/02/seattle-may-day_n_5253707.html).

unruly members,<sup>121</sup> or else the police unfairly target certain kinds of demonstrators such as legal observers or the press.<sup>122</sup>

This last accusation, relating to targeting the press or people trying to record police action, is especially challenging. The SPD Manual explicitly states that retaliation is prohibited.<sup>123</sup> Retaliation includes “discouragement, intimidation, coercion, or adverse action against any person” engaging in such lawful acts as exercising a constitutional right or recording incidents, so this almost certainly includes pepper spray.<sup>124</sup> Moreover, SPD has explicitly adopted a Use of Force Policy that calls for “minimal reliance upon the use of physical force” in all interactions with the public.<sup>125</sup> The measures exist, then, to try to prevent this kind of behavior. The more difficult aspect seems to be compliance. Perhaps stricter enforcement of the police’s own policies is required. Additionally, framing the use of force as a last resort (using Peelian terms), rather than encouraging police to exert force when the amorphous “public safety” is at risk, may result in fewer clashes and better preserve both police-community relations and citizens’ rights to free speech and peaceful protest.

#### *B. Uniform Changes to Create Uniform Change*

Another very simple but effective change could be made just in the police uniform. Currently, SPD’s standard uniform for officers consists of “French Blue” (darker blue) uniform shirts, the “Anti-Crime” and SWAT teams

---

<sup>121</sup> See *At Occupy Seattle*, *supra* note 117.

<sup>122</sup> See interview by Jim Compton with Joshua Alex, *supra* note 38; see also telephone interview by Jim Compton with Dick Burton, *supra* note 38; see also interview by Jim Compton of Nicole Zimmer, *supra* note 38.

<sup>123</sup> *Responsibilities of Employees Concerning Complaints of Possible Misconduct*, SEATTLE.GOV, [http://www.seattle.gov/police/publications/manual/05\\_002\\_Responsibilities\\_Employees\\_Concerning\\_Complaints\\_Possible\\_Misconduct.html](http://www.seattle.gov/police/publications/manual/05_002_Responsibilities_Employees_Concerning_Complaints_Possible_Misconduct.html) (last visited Feb. 13, 2016).

<sup>124</sup> *Id.*

<sup>125</sup> *Use of Force*, *supra* note 100.

wear black uniform shirts, and the bike teams wear black polo shirts.<sup>126</sup> Even the simple change from dark and intimidating to a softer, pale blue could have drastic positive effects on the police-community relationship. Appearances are important, especially in the context of protest. Color palette might be especially determinative. Some have suggested that “dark police uniform may be subconsciously encouraging citizens to perceive officers as aggressive[,] evil, or corrupt,” while “police officers in dark uniforms may be subconsciously influenced to act more aggressively.”<sup>127</sup> Increasingly, even in simple raids, police are dressing in “battle dress uniforms” (BDUs) originally designed by the United States Army.<sup>128</sup>

From a psychological standpoint, dressing in military-style regalia can have a clear effect on one’s attitude. “One tends to throw caution to the wind when wearing ‘commando-chic’ regalia, a bulletproof vest with the word ‘POLICE’ emblazoned on both sides, and when one is armed with high tech weaponry.”<sup>129</sup> This cuts both ways, as citizens are less likely to see battle-dressed officers as individuals and more as cogs in a clockwork government entity that cares little for whether the citizen is in the direct path of its machinations. According to Salt Lake City Police Chief, Chris Burbank:

Some say not using [riot gear] exposes my officers to a little bit more risk. That could be, but risk is part of the job. I’m just convinced that when we don riot gear, it says ‘throw rocks and bottles at us.’ It invites confrontation. Two-way communication

---

<sup>126</sup> SEATTLE POLICE DEP’T, 2013 UNIFORM REFERENCE CATALOG 14, 19, 21 (2014), available at

[http://www.seattle.gov/police/publications/manual/documents/09\\_020\\_URC.pdf](http://www.seattle.gov/police/publications/manual/documents/09_020_URC.pdf).

<sup>127</sup> Richard R. Johnson, *The Psychological Influence of the Police Uniform*, POLICEONE.COM (Mar. 4, 2005), <http://www.policeone.com/police-products/apparel/undergear/articles/99417-The-psychological-influence-of-the-police-uniform/>.

<sup>128</sup> ACLU, *supra* note 2, at 22.

<sup>129</sup> *Id.* (quoting retired police officer Bill Donnelly).

and cooperation are what's important. If one side overreacts, then it all falls apart.<sup>130</sup>

This is not a recent observation. In times of protest and civil unrest, it has not been uncommon for police chiefs to put the more heavily-armored riot control teams out of direct public sight, instead parked in buses and held in reserve as back-up to a less intimidating police front.<sup>131</sup> The theory is to put up a front that is not directly antagonizing and that might incite less violence from a crowd.<sup>132</sup> More extreme methods have been attempted, as when the Menlo Park Police Department in California changed their paramilitary navy uniform to a “forest green sport coat blazer worn over black slacks” in 1969.<sup>133</sup> While resultant changes were likely not solely due to the change of uniform, nonetheless, within 18 months of the uniform change, psychological tests indicated the presence of less authoritarian characteristics in the police force; “assaults on the Menlo Park police decreased by 30 [percent], and injuries to civilians by the police dropped 50 [percent].”<sup>134</sup>

These types of police uniform reforms has typically failed for a few reasons. One is that moving away from traditional uniforms could fail to command requisite respect for police to perform their duties. In the Menlo Park example, although there was an initial drop in civilian altercations, by the time the department reverted to the paramilitary uniforms again eight years later, assaults on the police were actually double what they had been before the change, prompting the return to typical police uniform.<sup>135</sup>

Another reason police uniform reform has failed has been due to pushback from police themselves. While the pseudo-military affectation is

---

<sup>130</sup> Balko, *supra* note 30.

<sup>131</sup> BALKO, *supra* note 33, at 99.

<sup>132</sup> *Id.*

<sup>133</sup> Johnson, *supra* note 127.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

problematic on many levels to citizens who do not wish to feel as though they are living in occupied territory, the feeling of authority that comes with these trappings can be very compelling. Power, once acquired, may not be relinquished; it instead creates a gnawing hunger for more of the like. “[E]xperience hath shewn, that even under the best forms, those entrusted with power have, in time, and by slow operations, perverted it into tyranny . . . .”<sup>136</sup> Our government was constructed partly with this maxim in mind, the better to guard against its seemingly inevitable end. But rather than trying to demand some form of respect through intimidation and increasingly brutal uniforms, respect might be generated through the officers’ actions. As peacekeepers and citizens themselves, police might have a care for the kind of country they are creating and whether they actually want to live in a nation where rural officers might walk around in full-body armor as if preparing for war. We are not citizens of a Detroit-dystopia. RoboCop looks cool, but we do not need him in our communities.

### *C. Reliable Reporting for Injuries and Deaths Related to Police Interaction*

There is still a significant problem with police departments keeping reliable records and reporting police use of force, both in Seattle and nationally.<sup>137</sup> Just having this kind of accountability might result in fewer incidences of abuse of force or death of citizens. However, currently, what amounts to “use of force” has no standard definition between one state and

---

<sup>136</sup> Thomas Jefferson, *Preamble to a Bill for the More General Diffusion of Knowledge*, in *THE FOUNDERS’ CONSTITUTION* (Philip B. Kurkland & Ralph Lerner eds., The Univ. of Chic. Press 2000) (1978), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch18s11.html>.

<sup>137</sup> See U.S. DEP’T OF JUSTICE, *supra* note 8, at 3, 15–16; see also Wesley Lowery, *How Many Police Shootings a Year? No One Knows*, WASH. POST (Sept. 8, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/09/08/how-many-police-shootings-a-year-no-one-knows>.

another.<sup>138</sup> Jurisdictions are also not required to keep records on how often use of force is implemented, or how many are shot or even die by police action.<sup>139</sup> Instead, LEAs self-report.<sup>140</sup> Of over 17,000 LEAs in the country, only around 750 (including Seattle) submit numbers, reporting approximately 400 “justifiable homicides” by police officers per year.<sup>141</sup> In this context, “justifiable homicide” means the “killing of a felon by a law enforcement officer in the line of duty.”<sup>142</sup> The term “justifiable homicide” is itself problematic as it presupposes first guilt and then conviction by referring to the deceased as a “felon.” This data set also does not include those killed who were not suspected felons and there is no listing for “unjustified homicide.”<sup>143</sup> Meanwhile, the DOJ estimated the number of arrest-related deaths (for both alleged felonies and misdemeanors) at around 800 or so per year, although the report ceased collecting data in 2009 because the numbers were regarded as unreliable.<sup>144</sup> In comparison, nationwide in 2013, felonious incidents resulted in the deaths of 27 police officers performing their duties; another 49 died through accidents, mainly

---

<sup>138</sup> *Police Use of Force*, NAT'L INST. OF JUSTICE (Apr. 13, 2015), <http://www.nij.gov/topics/law-enforcement/officer-safety/use-of-force/pages/welcome.aspx>; Charles A. Gruber & Wayne W. Schmidt, *Mandatory Nationwide Use of Force Reporting by Police and Correctional Agencies and Why This is an Important Issue*, 6 AELE MO. L. J. 501, 502–04 (2015).

<sup>139</sup> Gruber, *supra* note 138; *see also* AMNESTY INT'L, DEADLY FORCE: POLICE USE OF LETHAL FORCE IN THE UNITED STATES 1–4 (2015), [http://www.amnestyusa.org/sites/default/files/aiusa\\_deadlyforcereportjune2015.pdf](http://www.amnestyusa.org/sites/default/files/aiusa_deadlyforcereportjune2015.pdf).

<sup>140</sup> Lowery, *supra* note 137.

<sup>141</sup> FBI, JUSTIFIABLE HOMICIDE 1 (2013), *available at* [http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expanded-homicide/expanded\\_homicide\\_data\\_table\\_14\\_justifiable\\_homicide\\_by\\_weapon\\_law\\_enforcement\\_2009-2013.xls](http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_14_justifiable_homicide_by_weapon_law_enforcement_2009-2013.xls); Lowery, *supra* note 137.

<sup>142</sup> FBI, *supra* note 141; Lowery, *supra* note 137.

<sup>143</sup> AMNESTY INT'L, *supra* note 139 at 9.

<sup>144</sup> *See* Lowery, *supra* note 137; *see also* ANDREA M. BURCH, ARREST-RELATED DEATHS, 2003-2009 1 (2011), *available at* <http://www.bjs.gov/content/pub/pdf/ard0309st.pdf>.

owing to car crashes.<sup>145</sup> Those numbers, reported to the Federal Bureau of Investigation (FBI), are presumably fairly accurate because the data is collected from several sources, including

[c]ity, university and college, county, state, tribal, and federal law enforcement agencies participating in the Uniform Crime Reporting Program . . . [;] FBI field offices . . . [;] [and s]everal nonprofit organizations, such as the Concerns of Police Survivors and the National Law Enforcement Officers Memorial Fund, which provide various services to the families of fallen officers. . . . When the FBI receives notification of a line-of-duty death, the Law Enforcement Officers Killed and Assaulted (LEOKA) Program’s staff works with FBI field offices to contact the fallen officer’s employing agency and request additional details about the fatal incident. The LEOKA staff also obtains criminal history data from the FBI’s Interstate Identification Index about individuals who are identified in connection with line-of-duty felonious deaths.<sup>146</sup>

Essentially, the FBI seems go to some lengths to keep accurate reports on officer deaths, even with agencies that do not otherwise report.<sup>147</sup> For non-fatal police violence against citizens—or even narrowed strictly to how many people were shot by officers—no reliable or complete record exists.<sup>148</sup> The Center for Disease Control has stated that for the years 1999–2013, 6,338 people died due to “legal intervention,” but only 32 states participated.<sup>149</sup> Other rough estimates given by independent groups are

---

<sup>145</sup> FBI, OFFICERS FELONIOUSLY KILLED 1 (2013), *available at* [http://www.fbi.gov/about-us/cjis/ucr/leoka/2013/officers-feloniously-killed/felonious\\_topic\\_page\\_2013.pdf](http://www.fbi.gov/about-us/cjis/ucr/leoka/2013/officers-feloniously-killed/felonious_topic_page_2013.pdf); FBI, OFFICERS ACCIDENTALLY KILLED 1-2 (2013), *available at* [http://www.fbi.gov/about-us/cjis/ucr/leoka/2013/officers-accidentally-killed/accidental\\_topic\\_page\\_2013.pdf](http://www.fbi.gov/about-us/cjis/ucr/leoka/2013/officers-accidentally-killed/accidental_topic_page_2013.pdf).

<sup>146</sup> *Methodology: Law Enforcement Officers Killed*, FBI.GOV, [https://www.fbi.gov/about-us/cjis/ucr/leoka/2013/methodology\\_felonious\\_accidental/methodology\\_felonious\\_accidental\\_-2013](https://www.fbi.gov/about-us/cjis/ucr/leoka/2013/methodology_felonious_accidental/methodology_felonious_accidental_-2013) (last visited Sept. 20, 2015).

<sup>147</sup> *See id.*

<sup>148</sup> Lowery, *supra* note 137.

<sup>149</sup> AMNESTY INT’L, *supra* note 139 at 9.

startlingly high.<sup>150</sup> One source claims that in the first few months of 2015, police officers caused a death every eight hours, on average.<sup>151</sup> Recent events have encouraged people to question why there have not been reliable efforts by the government to compile numbers even on officer-related homicides.<sup>152</sup> This seems like a gross oversight and an enormous blind spot in our justice system that may contribute to the lack of police accountability.

However, Seattle has taken several steps that other jurisdictions might emulate. SPD now keeps track of its use of force—in 2014, for the first time, it collected standardized force data for a continuous six-month period<sup>153</sup>—and it has begun releasing periodic reports on both the kind of force required as well as the precipitating events requiring such force.<sup>154</sup> SPD's website has information available to citizens with internet access, including its police manual, several reports relating to its use of force, and an option for processing anonymous complaints online.<sup>155</sup> The Office of Accountability (OPA), headed by a mayor-appointed civilian who is confirmed by the city council, oversees the complaints process.<sup>156</sup> The OPA documents the complaints and classifies them either by whether a supervisor may address the complaint or whether a full misconduct

---

<sup>150</sup> See Cassandra Fairbanks, *Cops Have Killed Every 8 Hours in 2015, Sending At Least Three People to Early Graves Per Day*, THE FREE THOUGHT PROJECT (Feb. 16, 2015), <http://thefreethoughtproject.com/cops-killed-8-hours-2015-early-graves-day/>.

<sup>151</sup> *Id.*

<sup>152</sup> E.g., Michael Martinez, *Ferguson Case Raises Question: Where's the Data on Officer-Involved Killings?*, CNN (Nov. 15, 2014), <http://www.cnn.com/2014/11/14/us/ferguson-police-involved-shootings-killings-data/>.

<sup>153</sup> SEATTLE POLICE MONITOR, *supra* note 10, at 4.

<sup>154</sup> See SEATTLE POLICE DEP'T, USE OF FORCE BY SEATTLE POLICE DEPARTMENT OFFICERS IN 2010 1–15 (2010), available at <http://www.seattle.gov/police/publications/policy/UseofForceReport2010.pdf>.

<sup>155</sup> *Seattle Police Department*, SEATTLE.GOV, <http://www.seattle.gov/police/> (last visited Apr. 18, 2015).

<sup>156</sup> *About OPA Director Pierce Murphy*, SEATTLE.GOV, <http://www.seattle.gov/opa/about-the-opa-director> (last visited Apr. 18, 2015).



investigation is required.<sup>157</sup> If the findings are “not sustained,” the OPA categorizes them as unfounded, lawful and proper, inconclusive, requiring a training referral, or requiring management action.<sup>158</sup> Note that the final two categories still indicate that there was likely merit to the complaint.<sup>159</sup> When a training referral is required, the officer’s actions are not cause for discipline because “while there may have been a violation of policy, it was not a willful violation and/or the violation did not amount to misconduct,” so training will suffice.<sup>160</sup> When management action is required, no individual officer is considered at fault because something was deficient in SPD policy or procedure.<sup>161</sup> Only sustained findings of misconduct, based on a preponderance of the evidence, then go to the chief of police for disciplinary action of an individual officer.<sup>162</sup> The whole process takes 60–180 days.<sup>163</sup>

The transparency of the process and SPD’s inclusion of civilian oversight is a step in the right direction. SPD provides past OPA reports and encourages citizens filing complaints to disclose their identities so that they might receive notification regarding the status of the investigation as it unfolds.<sup>164</sup> Seattle’s current OPA director, Pierce Murphy, considers the purpose of the OPA to answer the question “*quis custodiet ipsos custodiet?*” or, “who guards the guardsman?”; he believes that the OPA functions as part of citizens’ First Amendment right to complain to the

---

<sup>157</sup> *OPA Complaint Process*, SEATTLE.GOV, <http://www.seattle.gov/opa/complaint-process> (last visited Sept. 20, 2015).

<sup>158</sup> *Id.*

<sup>159</sup> *See id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*; *File a Police Complaint*, SEATTLE.GOV, <http://www.seattle.gov/opa/file-a-police-complaint> (last visited Oct. 11, 2015).

government.<sup>165</sup> However, there are still some lingering problems. For one thing, in Seattle, except for the OPA director, the auditor, and a civilian deputy director, the majority of OPA staff are cops.<sup>166</sup> This can create something of both an image problem for complainants and a question of loyalties for the officers involved in any jurisdiction where this is true. Moreover, this process still seems to rely very heavily on internal police discretion after the OPA has made its determination.<sup>167</sup> If the complaint is only classified under requiring supervisor action, the complaint might effectively disappear into a black hole wherein a supervisor merely has a conversation with the officer against whom the complaint was raised.<sup>168</sup> The reporting process thus relies on both the discretion and the supervisory capacity of a superior who has already proved at least somewhat ineffective in managing subordinates, as evidenced by the fact the subordinate's actions warranted a complaint.<sup>169</sup> While it might prove effective in any individual instance and a supervisor could very well impress the seriousness of the situation on the officer, there is no systematic guarantee in the process.

Even if SPD conducts a full misconduct investigation and the complaint sustained, this is not necessarily the end of the matter. The chief of police is the only one who can discipline the offending officer.<sup>170</sup> Affording only the chief of police with disciplinary power might run into some of the same aforementioned issues.<sup>171</sup> Moreover, the chief of police may choose to change a sustained finding to a not sustained finding if he or she writes a letter to the mayor and city council explaining his or her reasoning.<sup>172</sup> The

---

<sup>165</sup> Pierce Murphy, Director, Seattle Office of Professional Accountability, Address at Seattle University School of Law Criminal Procedure class (Oct. 19, 2015).

<sup>166</sup> *Id.*

<sup>167</sup> *See OPA Complaint Process, supra* note 157.

<sup>168</sup> *See id.*

<sup>169</sup> *See id.*

<sup>170</sup> *Id.*

<sup>171</sup> *See id.*

<sup>172</sup> *Id.*

chief of police does not have to write any such letter of explanation if findings remain sustained but the chief of police chooses not to follow the OPA's recommended discipline.<sup>173</sup> While some might argue that the chief of police is entitled to deference in the management of the police department, the OPA's stated mission is to provide this kind of oversight and advance accountability and public awareness,<sup>174</sup> which could in turn help create a transparent system promoting public confidence. If the final disciplinary measures are still ultimately under internal control and discretion, there is no guarantee that police will reform their behavior adequately to suit the public need for police accountability.

Another wrinkle enters in when one considers the various protections in the system for the officer against whom a complaint was made. Before action is taken against an SPD officer on the basis of sustained findings, the officer in question is owed a due process hearing with the chief of police.<sup>175</sup> Even if the chief of police fully agrees with OPA's sustained findings and even its discipline recommendation, the chief's word is not necessarily final.<sup>176</sup> After a discipline determination, the officer is also owed an appeals process.<sup>177</sup> If appealed with the Discipline Review Board, the chief's decision is reviewed by a three-panel board consisting of a police management representative (typically a captain or assistant chief), a representative from one of the police guilds, and one neutral third-party arbitrator.<sup>178</sup> Essentially, the review comes from a board where the majority are cops.<sup>179</sup> This board then has the power to overturn the chief's discipline decision, reducing or eliminating it entirely, and it can even overturn the

---

<sup>173</sup> Murphy, *supra* note 165.

<sup>174</sup> Office of Professional Responsibility, SEATTLE.GOV, <http://www.seattle.gov/opa> (last visited Feb. 14, 2016).

<sup>175</sup> Murphy, *supra* note 165.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

original sustained findings.<sup>180</sup> The city can still appeal the review board's decision to the courts, but this option is often too costly to pursue.<sup>181</sup>

A few easy solutions on how to handle police complaints seem to present themselves. Seattle, and other cities like it, could change some elements of their OPA. For instance, chiefs of police could be forced to make an accounting for why they might refuse to follow OPA discipline recommendations, similar to how they might need to explain their reasoning for reversing a sustained finding. This increases accountability, helps ensure deviations from OPA discipline recommendation are only done for good reason, could create greater faith in the complaints system from citizens who feel that proper civilian oversight is present, and overall might encourage chiefs to follow civilian oversight directions in discipline matters. The Seattle OPA director has also indicated that he thinks having more civilians working in the OPA as investigators might improve accountability and trust in the system.<sup>182</sup> This could work in a few ways. While this might involve having to find money to pay for these new positions, they could possibly take the salaries currently paid to cops in the same position, or the department could enlist civilian volunteers. However, no matter the route taken, anyone allowed to work as an OPA investigator should probably be thoroughly vetted and qualified to hold the position. Moreover, it is likely unnecessary to eliminate officer presence in the OPA entirely, especially as they are likely to be both qualified and knowledgeable about various police procedures and can be a good source of information for the office. Other changes that might help the OPA process include overhauling the current discipline review process so that a police management representative and a police guild representative do not make up the majority of a three-panel board and thus effectively act as the

---

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

ultimate gatekeepers for police discipline. However, this might prove difficult if police guilds choose to resist the change.

Another solution would be for Washington and other states to implement laws that would force officers to publicly account for every bullet they fire. While SPD's use of force is now broadly documented, public access to records on when and how many shots are fired does not appear to be easily accessible.<sup>183</sup> Bullets are likely be easily countable by how many have been requested and issued to each officer. If one bullet is fired at—or ends up in—a citizen, it would seemingly be a very simple task to report it and have those numbers available to the public in a database the same way as tracking officers killed in the line of duty or other crime reports are generated.<sup>184</sup> While opponents might argue that a new database for bullets increases the amount of paperwork, much of the documentation is already required when officers write their incident reports. Adding a formal database just requires essentially generating a separate table. Moreover, a bullet inventory seems like a fairly important thing to keep track of.

Similarly, Washington could require officers to report when an encounter with an officer results in a death. Although some LEAs do report use of force, this is at the LEAs' discretion, not by state or federal mandate.<sup>185</sup> At the federal level, the current “justifiable homicide” measurement used by the FBI is similarly self-reported at the participating LEAs' discretion and still fails to account for deaths during the course of misdemeanors or accidental deaths.<sup>186</sup> While there may be some murky areas where the actual matter is unclear—as when a suspect has a heart attack while police are in pursuit, or if a suspect is shot but dies weeks later—for the most part, knowing the cause of death also seems like it could be a fairly simple matter

---

<sup>183</sup> See SEATTLE POLICE DEP'T, *supra* note 154.

<sup>184</sup> See *Crime Statistics 2014*, SEATTLE.GOV, <http://www.seattle.gov/police/crime/stats.htm> (last visited Apr. 18, 2015).

<sup>185</sup> *E.g.*, Lowery, *supra* note 137;

<sup>186</sup> *See id.*; *see also* FBI, *supra* note 141; *see also* AMNESTY INT'L, *supra* note 139 at 9.

involving a very basic understanding of causation. Requiring LEAs to report use of force, rather than permitting them to report at their discretion, seems like a reasonable step.

Additionally, Washington could require reporting whenever the use of force extends to tools such as pepper spray, nightsticks, and other non-lethal uses of force, again emulating SPD. Such regulations might require almost entirely self-reporting methods and cannot be as accurately measured as bullets discharged, but, primarily, society would have to trust officers to largely be truthful in their reports. Having this kind of statistic could be enormously useful for the public to measure police use of force.

There will still likely be some problems in reporting for all of these suggestions. If funding and public approval become tied to these numbers, LEAs might also feel pressure to be less accurate in their reporting. Even so, this would still produce more accurate numbers than we currently have. Moreover, it may influence some LEAs to use less force and have fewer fatal encounters to keep public opinion high. Given that SPD has already implemented many of these measures, it might be used as a model with a bit more reform, especially in how it implements discipline. The next section will address additional discipline concerns.

*D. Stricter Sanctions for Complaints of Excessive Force and Assault:  
Holding Officers Accountable for Public and Private Actions*

Police departments in general may also do a better job of “self-policing” when officers are faced with allegations of using excessive force against someone, either while on the job or in the offices’ private lives. SPD currently relies on a reporting process described in the last section that ultimately leaves the discretion of discipline in the hands of the chief of police.<sup>187</sup> Departments could issue sanctions, suspend officers, dock pay, initiate transfers, or simply fire the officers, which are options SPD already

---

<sup>187</sup> *OPA Complaint Process, supra* note 157.

has at its disposal.<sup>188</sup> However, these sanctions might need more rigorous enforcement and implementation by a body wholly outside the police force, possibly with a point system for more egregious complaints.

One suggestion for a disciplinary mechanism is relying on a point system. For instance, each officer could receive 10 points for the entirety of his or her career with the department. Successive sustained complaints could result in greater sanctions by a pre-determined guideline, with the end being termination of employment. The system could admittedly create some unjust results based on an officer's popularity, issues in the complaint process, or past mistakes. This new system might also suffer if it still relied on the current OPA complaint system to make a finding of a sustained complaint. There may be additional difficulties in implementation if the chief of police instead has discretion in this regard, as those in charge may want to protect their own. For this system to work, it may require eliminating discretion.

Relying on a point system may ultimately seem like a drastic measure, but it may have to come to this to root out those "bad apples." While one report stated that citizens felt that 9 out of 10 interactions with the police were proper, when force was used, the majority of respondents felt it was excessive.<sup>189</sup> The DOJ found there was in fact a pattern or practice of unnecessary or excessive use of force in the case of SPD.<sup>190</sup> It seems unlikely this policy change would result in much abuse from the public, as higher and unavoidable sanctions would likely impact police interactions with the public to cut down on the use of force altogether. Even now, with current use of force, less than seven complaints occur every year per 100

---

<sup>188</sup> See *Closed Case Summaries*, SEATTLE.GOV, <http://www.seattle.gov/opa/closed-case-summaries> (last visited Feb. 14, 2016).

<sup>189</sup> CHRISTINE EITH & MATTHEW R. DUROSE, BUREAU OF JUSTICE STATISTICS, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2008 1, 12 (2011), available at <http://www.bjs.gov/content/pub/pdf/cpp08.pdf>.

<sup>190</sup> U.S. DEP'T OF JUSTICE, *supra* note 8, at 8.

officers across the nation.<sup>191</sup> Whether or not officers used force in any individual instance to the degree that it would result in criminal conviction or civil penalty, the public perception of abuse of power should still be persuasive to a police department that intends to make changes for the better, as SPD has committed to do.

Accusations of use of force or assault should be taken just as seriously outside of the line of duty. The issue is not only the abuse of power while on the job, but also a pervasive problem with disregard to the rights and personal safety of others. Police departments should not employ officers who act in assaultive or aggressive ways in their private lives. Unfortunately, it seems that certain types of violence are common in the profession.<sup>192</sup> It should be noted that “violence” is a general term, only a few studies on the matter exist, and figures come largely by self-report and not from how many charges or complaints have actually been filed against the officer.<sup>193</sup> Accusations of violence in police officers’ private lives goes beyond the scope of this paper. However, violent tendencies as a whole are pertinent to the issue of excessive use of force while on duty. It seems it would be in a department’s best interest to use complaints of force and

---

<sup>191</sup> MATTHEW J. HICKMAN, BUREAU OF JUSTICE STATISTICS, CITIZEN COMPLAINTS ABOUT POLICE USE OF FORCE 1 (2006), *available at* <http://www.bjs.gov/content/pub/pdf/ccpuf.pdf>.

<sup>192</sup> See Diane Wetendorf, *The Impact of Police-Perpetrated Domestic Violence*, ABUSEOFPOWER.INFO (2000), [http://www.abuseofpower.info/Article\\_FBI.htm](http://www.abuseofpower.info/Article_FBI.htm); see also Diane Wetendorf, *Police Family Violence*, ABUSEOFPOWER.INFO (1998), [http://www.abuseofpower.info/Article\\_NCWP.htm](http://www.abuseofpower.info/Article_NCWP.htm); The Advocates for Human Rights, *Officer-Involved Domestic Violence*, STOP VIOLENCE AGAINST WOMEN, [http://www.stopvaw.org/officer-involved\\_domestic\\_violence](http://www.stopvaw.org/officer-involved_domestic_violence) (last updated May 11, 2009); Matt Agorist, *Cops Beat Their Wives & Girlfriends At Double The National Rate, Still Receive Promotions*, THE FREE THOUGHT PROJECT.COM (May 7, 2014), <http://thefreethoughtproject.com/cops-beat-wives-girlfriends-double-national-rate-receive-promotions/#2yIk7sYJbgTEQ4MI.99>; Feminist Majority Found.’s Nat’l Ctr. for Women & Policing, *Police Family Violence Fact Sheet*, NAT’L CTR. FOR WOMEN & POLICING, <http://womenandpolicing.com/violencefs.asp> (last visited Mar. 14, 2015) [hereinafter *Police Family Violence Fact Sheet*].

<sup>193</sup> See, e.g., *Police Family Violence Fact Sheet*, *supra* note 192.



assault while both on- and off-duty (as measured by whether it occurred in the context of the fulfilling job requirements) in their calculations when deciding to sanction or fire an officer. This may be of particular concern if an attitude of violence may be affecting decisions for official use of force.

*E. Body-Worn Videos: Watching the Watchmen*

Another strategy police could use to better protect citizens' rights is to implement the use of body-worn video devices (BWVs). Placed on the officer's clothing or sunglasses, these cameras provide both video and audio evidence of police-civilian interactions.<sup>194</sup> They may be especially useful in the context of a protest, when events may be prone to confusion, when tear gas may have driven away reporters and others with recording devices, and where the police would presumably have some of the best vantage points to see events unfold at the ground level. Moreover, having so many police in a single place, all wearing the same equipment, would make the events documentable from multiple angles, making for a firm record of events. According to the International Association of Chiefs of Police, jurisdictions that used BWVs "enhanced officer safety, improved agency accountability, and reduced agency liability" for the police department, while making officers more mindful of following protocols in line with citizens' constitutional rights.<sup>195</sup> Tamperproof BWVs worn on the officers' persons could create greater accountability to the public, cut down on spurious claims of excessive use of force, and be useful evidence in the case of legal action as documentation of the officers' procedures.<sup>196</sup>

---

<sup>194</sup> JAY STANLEY, ACLU, POLICE BODY-MOUNTED CAMERAS: WITH RIGHT POLICIES IN PLACE, A WIN FOR ALL 1 (2013), available at [https://www.aclu.org/files/assets/police\\_body-mounted\\_cameras.pdf](https://www.aclu.org/files/assets/police_body-mounted_cameras.pdf).

<sup>195</sup> David A. Harris, *Picture This: Body-Worn Video Devices (Head Cams) As Tools for Ensuring Fourth Amendment Compliance by Police*, 43 TEX. TECH L. REV. 357, 357–70 (2010).

<sup>196</sup> See *id.* at 365.

Police forces have already successfully used BWVs. For instance, in the United Kingdom, BWVs allowed officers to record accurate evidence in real time, let the officers make quick records to resolve cases more rapidly, and gave detailed records when the investigation called for reviewing the officer's actions.<sup>197</sup> Here in the United States, hundreds of police departments, including Cincinnati, Ohio, and San Diego, California, have also purchased and used BWVs to some success.<sup>198</sup> For the most part, the public seems in favor of the program, perhaps somewhat spurred by accusations of police brutality and excessive use of force.<sup>199</sup> For instance, in Birmingham, citizen complaints have dropped 71 percent while their police department's use of force has dropped 38 percent.<sup>200</sup> Moreover, even human rights groups and government watch-dog websites seem in favor of BWVs as a method of guarding against government abuse, so long as the BWVs do not become just another method for routine government surveillance.<sup>201</sup>

So far, SPD has issued around 12 BWVs to officers, and SPD is looking into how to blur the faces of those stored in its database to potentially protect the privacy of individuals.<sup>202</sup> Officers volunteered to participate in the BWV Pilot Program.<sup>203</sup> These volunteers completed SPD's BWV training received checklists on pre-shift function checks on the cameras,

---

<sup>197</sup> *Id.* at 361–62.

<sup>198</sup> *Id.* at 362; STANLEY, *supra* note 194.

<sup>199</sup> Hannah Finnie, *Beyond The Band-Aid: Finding Solutions In Ferguson, Missouri*, GENERATION PROGRESS (Sept. 24, 2014), <http://genprogress.org/voices/2014/09/24/31311/beyond-the-band-aid-finding-solutions-in-ferguson-missouri/>.

<sup>200</sup> Lucas Mearian, *As Police Move to Adopt Body Cams, Storage Costs Set to Skyrocket*, COMPUTERWORLD (Sept. 3, 2015), <http://www.computerworld.com/article/2979627/cloud-storage/as-police-move-to-adopt-body-cams-storage-costs-set-to-skyrocket.html>.

<sup>201</sup> STANLEY, *supra* note 194.

<sup>202</sup> O'Toole, *supra* note 73.

<sup>203</sup> *16.091 Body-Worn Video Pilot Program*, SEATTLE.GOV, <http://www.seattle.gov/police-manual/title-16---patrol-operations/16091---body-worn-video-pilot-program> (last visited Sept. 20, 2015).

police activities to record, and reasons for which they might review the body-worn video.<sup>204</sup> SPD also ordered them to continue recording until an event had concluded, to notify people they were being recorded “as soon as practical,” to document the existence of a video or lack thereof, to enter data for recorded events, and to upload the videos before the end of the shift.<sup>205</sup> Redacted videos recorded in phase 1 of the city’s plan are available online.<sup>206</sup> Seattle Police Chief Kathleen O’Toole has publicly stated that “the jury’s out” on whether SPD will issue BWVs to all of its officers.<sup>207</sup> However, some sources indicate Chief O’Toole has since expressed support for “deployment of body-worn video cameras on every one of Seattle’s 600+ patrol officers.”<sup>208</sup> Pre-Ferguson, SPD held a meeting concerning police accountability and SPD seemed willing to entertain the idea of using BWVs if the privacy concerns were also considered.<sup>209</sup> SPD has also voiced concerns about effective cost measurements and how to cope with the enormous amount of data from the cameras to be stored.<sup>210</sup> A full review on BWVs is expected sometime in the fall of 2015.<sup>211</sup>

For BWVs to be effective, police departments need to consider when and how the cameras would function. The recordings would have to be both dependable and tamperproof to ensure their usefulness.<sup>212</sup> One method for the recording procedure could be having officers turn on the cameras

---

<sup>204</sup> *Id.*

<sup>205</sup> O’Toole, *supra* note 73.

<sup>206</sup> *Videos Recorded in Phase 1 of the Seattle Police Body Worn Video Pilot*, DATA.SEATTLE.GOV, <https://data.seattle.gov/dataset/Videos-recorded-in-Phase-1-of-the-Seattle-Police-b/n6as-h2bj> (last visited Sept. 20, 2015).

<sup>207</sup> O’Toole, *supra* note 73.

<sup>208</sup> Bill Schrier, *The Future of Police Video: Inside the Seattle PD’s Workshop on Wearable Cameras*, GEEKWIRE (June 23, 2015), <http://www.geekwire.com/2015/the-future-of-police-video-inside-the-seattle-pds-workshop-on-wearable-cameras/>.

<sup>209</sup> O’Toole, *supra* note 73.

<sup>210</sup> *Id.*

<sup>211</sup> SEATTLE POLICE DEP’T, BODY WORN CAMERAS 6 (2014), *available at* [http://www.seattle.gov/police/publications/Presentations/SPD\\_Body\\_Worn.pdf](http://www.seattle.gov/police/publications/Presentations/SPD_Body_Worn.pdf).

<sup>212</sup> Harris, *supra* note 195, at 362–70.

whenever they interact with a civilian.<sup>213</sup> However, it seems like this method would face some problems. Sometimes an officer may forget to trigger the camera's use, either due to a memory lapse or in the heat of the moment. Valuable evidence—which could be used to prove or disprove a claim made regarding a police-citizen interaction—could be lost this way. An officer may also willfully refuse to turn on the BWV, despite regulations, and claim human error. Police departments may also claim the operator forgot to turn on the camera just to cover evidence if the video shows clearly erroneous conduct. While most police officers are law-abiding citizens who would never do such a thing, making the video dependent on the officers' initiation leaves the system open to these kinds of abuses.<sup>214</sup>

Another method could be that the camera would turn on whenever an officer's emergency equipment, such as lights or sirens, is activated, similar to how the camera on many TASER devices begins to record when it is released from its dock.<sup>215</sup> However, this method also has its failings. If the camera were tied to the activation of the police car's lights or sirens, there would be no recording in the case of a spontaneous emergency that begins outside the vehicle, as when an officer is having a face-to-face conversation with a person on the street. This system also fails to account for officers who do not have a police car.

A preferred method might simply be to have the cameras operating from the moment the police officer puts on his or her uniform, uploading every recording either remotely or at the end of the officer's shift in a main library at the department headquarters.<sup>216</sup> This method will produce significantly

---

<sup>213</sup> *Id.* at 365.

<sup>214</sup> STANLEY, *supra* note 194.

<sup>215</sup> *Id.*; Harris, *supra* note 195, at 366.

<sup>216</sup> STANLEY, *supra* note 194; Harris, *supra* note 195, at 366.

more data, but present technology seems capable of coping with the burden.<sup>217</sup>

Requiring police departments to use BWVs could face some problems in implementation. Police have shown some resistance to what they see as an intrusion on their privacy rights.<sup>218</sup> However, the benefits of BWVs seem to outweigh the costs. BWVs may help police-civilian interactions by increasing public trust in the legal system, giving an unbiased record of events to help support officers' claims, making officers more mindful of the constitutional rights of the citizens they are interacting with, and putting everyone on their best behavior for the camera.<sup>219</sup> According to one police chief, the "only officers who would have a problem with body cameras are bad officers."<sup>220</sup>

Opponents assert, however, that BWVs are simply not a good enough solution to the problem and that they might, at best, be considered a "Band-Aid."<sup>221</sup> Even when an entire interaction between police and citizens is being recorded, many claim that the officers are not deterred from excessive use of force.<sup>222</sup> On July 17, 2014, Eric Garner—an unarmed black man and a father of six—died while being held in a departmentally-prohibited chokehold by New York Police Department officers arresting him for allegedly selling "loose" (non-taxed) cigarettes.<sup>223</sup> Mr. Garner's last words,

---

<sup>217</sup> See Harris, *supra* note 195, at 360.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 357–70; STANLEY, *supra* note 194.

<sup>220</sup> Andres Jauregui, *Denver Police Chief: Only Bad Cops Fear Wearing Body Cams*, HUFFINGTON POST (Aug. 28, 2014), [http://www.huffingtonpost.com/2014/08/28/denver-police-body-cameras\\_n\\_5729208.html](http://www.huffingtonpost.com/2014/08/28/denver-police-body-cameras_n_5729208.html).

<sup>221</sup> Nia-Malika Henderson, *With Eric Garner, Obama's Body Camera Argument Just Took a Big Hit*, WASH. POST (Dec. 3, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/12/03/obamas-body-camera-argument-just-took-a-big-hit/>.

<sup>222</sup> See *id.*

<sup>223</sup> Josh Sanburn, *Behind the Video of Eric Garner's Deadly Confrontation with New York Police*, TIME (July 22, 2014), <http://time.com/3016326/eric-garner-video-police-chokehold-death/>.

repeated until his dying breath, were, “I can’t breathe. I can’t breathe.”<sup>224</sup> A bystander recorded the entire incident and his death received national attention, and yet, even with the video, none of the officers involved in Mr. Garner’s homicide were indicted.<sup>225</sup> The failure to even indict, while there is full video evidence of departmentally-prohibited conduct and a resultant death, gives credence to the argument that police behavior will not change just because they are being recorded. It indicates police might still be untouchable, and so there is no incentive to alter their behavior if they will never face punishment. As a counter to this, however, some of the officers involved might not have known they were being recorded. If officers had to wear BWVs and knew the camera was rolling, this still might be enough to convince at least some officers to scale back the use of force.

Fear of increased government surveillance may be another source of resistance for using BWVs. This issue might best develop through case law, where courts can determine specific examples of how and where the surveillance intrudes on privacy rights. While having running cameras mounted on officers who may be interacting with people during very stressful, intimidating, or painful moments of citizens’ lives does raise privacy concerns, the protection of civil liberties by recording police interactions might be worth this somewhat lesser invasion.<sup>226</sup> Moreover, the police need to interact with people while on duty, and BWVs are a way to keep an accurate record of that interaction. The privacy invasion could be minimized by limiting the cameras to uniformed police or have the police announce that their interaction is being recorded.<sup>227</sup> SPD is considering requiring consent to record while inside a private area, and it is looking into ways to redact certain images and information.<sup>228</sup> SPD has explored

---

<sup>224</sup> *Id.*

<sup>225</sup> Henderson, *supra* note 221.

<sup>226</sup> See STANLEY, *supra* note 194.

<sup>227</sup> *Id.*

<sup>228</sup> SEATTLE POLICE DEP’T, *supra* note 211, at 19–24.

redaction methods through blurring all of the images or using outlines.<sup>229</sup> While this may generate some censorship concerns, the primary interest seems to be in blurring or blocking faces to protect citizens' identities.<sup>230</sup> There have also been suggestions that, unless the data is flagged, it should be deleted within a few weeks.<sup>231</sup> There may be dangers associated with this proposal, however, as it might make it easier for police to fail to flag particularly incriminating evidence—as in the case of blatant brutality—and then claim there was an error. If anything, the sheer volume of data might be the best protection for citizens' privacy, as it is unlikely that anyone would have the time or inclination to go through all of that voluminous data. At minimum, police departments should consider using BWVs during protests, where the public format should at least resolve some privacy concerns as citizens have a lowered expectation for privacy in such a context. Ultimately, where BWVs have been implemented, the benefits have the potential to outweigh the costs, although it might take some time to decide whether any protocols need to be changed.<sup>232</sup>

Finally, some might argue the cost of implementing this plan is too large. The cost of a single BWV could range between \$300 and \$400, which could cause a large police department to go bankrupt.<sup>233</sup> Storage costs for the data collected could also be a major issue, with one police department citing over a million dollars in estimated storage expenses.<sup>234</sup> However, as noted previously, police departments have access to DoD equipment through very little effort, as well as large amounts of anti-terrorism funds through the Department of Homeland Security grants. Also, the unit cost of a single

---

<sup>229</sup> Schrier, *supra* note 208.

<sup>230</sup> SEATTLE POLICE DEP'T, *supra* note 211, at 20.

<sup>231</sup> STANLEY, *supra* note 194.

<sup>232</sup> *See id.*

<sup>233</sup> Christopher Mims, *What Happens When Police Officers Wear Body Cameras*, WALL ST. J. (Aug. 18, 2014), <http://online.wsj.com/articles/what-happens-when-police-officers-wear-body-cameras-1408320244>.

<sup>234</sup> Mearian, *supra* note 200.

M16 rifle, transferred from the DoD through the 1033 Program, is \$499, which the police department has nonetheless abundantly invested.<sup>235</sup> Moreover, the cost per camera might decrease if BWVs were more prevalent because they would have to be mass-produced, which would drive down the costs. Some of the storage expenses could also be alleviated by looking to other methods of storage or by developing a procedure for deleting unnecessary footage after some period. Alternatively, departments might alleviate some of the financial burden if only certain officers wore BWVs, or if officers only wore them during protests. Also, litigation costs might decrease with BWV evidence by spurring more settlements or simply dropping clearly spurious claims, so the money saved might account for the cameras' purchase.<sup>236</sup> Lastly, President Obama recently announced a plan to expend \$75 million to equip 50,000 police officers nationwide with BWVs, with the intention of creating a \$265 million three-year initiative focusing on police training and reform.<sup>237</sup> This program is supposed to be included in the 2015 budget, with an ultimate goal of providing a 50 percent federal match for any department buying BWVs.<sup>238</sup> Therefore, even if cost is an issue, LEAs that are unable or unwilling to equip themselves with BWVs may nonetheless be provided with the cameras.

*F. Banning or Limiting Washington Police Departments' Ownership of Assaultive Military-Grade Weaponry*

Washington State could also simply ban or severely limit LEA ownership of military-grade weaponry. One of the largest outcries against the current interaction between police and protesters has been police using military-

---

<sup>235</sup> See *Complete Inventory of 1033 Property*, *supra* note 75.

<sup>236</sup> See Harris, *supra* note 195, at 365.

<sup>237</sup> Zeeshan Aleem, *President Obama is Doing the One Thing That Will Prevent More Fergusons*, POLICY MIC (Dec. 1, 2014), <http://mic.com/articles/105450/obama-wants-75-million-to-outfit-50-000-police-officers-with-body-cameras>.

<sup>238</sup> *Id.*



grade weapons and equipment during protests, such as tanks, armored trucks, and full-body armor.<sup>239</sup> Reportedly, President Obama is currently working on an executive order addressing review and supervision standards for acquiring military-grade equipment.<sup>240</sup> The United States House of Representatives recently proposed the Stop Militarizing Law Enforcement Act, which would largely dismantle the current 1033 Program and decrease funding offered by Homeland Security, making it much more difficult for police departments to acquire military-grade weapons.<sup>241</sup> According to Raúl Labrador, who co-wrote the bill, “Our nation was founded on the principle of a clear line between the military and civilian policing . . . . The Pentagon’s current surplus property program blurs that line by introducing a military model of overwhelming force in our cities and towns.”<sup>242</sup> If successful, the Stop Militarizing Law Enforcement Act would require LEAs to certify that they have the personnel, technical capacity, and training to operate the property, that they will return the surplus property if the need for it has passed, that they will not transfer certain types of equipment from one federal or state agency to another, that they will maintain a website with a description of the transferred equipment, and that they will alert local communities to the property requests.<sup>243</sup> The act would also bar LEAs from using certain types of equipment, “including high-caliber weapons, sound cannons, grenades, grenade launchers and certain armored vehicles.”<sup>244</sup>

---

<sup>239</sup> Laura Mandaro, *Ferguson’s ‘Tank Man’ Sparks Comparison with Tiananmen*, USA TODAY (Nov. 25, 2014), <http://www.usatoday.com/story/news/nation-now/2014/11/25/ferguson-tank-man-tiananmen/70078046/>.

<sup>240</sup> Aleem, *supra* note 237.

<sup>241</sup> Stop Militarizing Law Enforcement Act, H.R. 5478, 113th Cong. 2<sup>nd</sup> Sess. (2014); Mike Lillis, *Lawyers Unveil Bill to Demilitarize Cops*, THE HILL (Sept. 16, 2014, 3:59 PM), <http://thehill.com/homenews/house/217906-lawmakers-unveil-bill-to-demilitarize-cops>, available at 2014 WL 4615468.

<sup>242</sup> Lillis, *supra* note 241.

<sup>243</sup> H.R.5478, *supra* note 241.

<sup>244</sup> Lillis, *supra* note 241.

While it seems unlikely the proposed bill will succeed in the House, after the events in Ferguson, Missouri, President Obama has still ordered a review of federal programs—like the 1033 Program—which provide LEAs with military-grade weapons.<sup>245</sup> The review, reportedly, will look not only to whether this type of equipment should be given to local law enforcement at all, but also look to whether the LEAs have been trained in the safety, use, and maintenance of the equipment.<sup>246</sup>

Washington could propose its own legislation to much the same effect. Like the proposed act, Washington could bar LEAs from requesting certain transfers from the DoD. For the most part, high-caliber weapons, armored vehicles, and all types of grenades seem largely excessive for local law enforcement. Washington could also put a monetary limit on how much funding local and state LEAs may accept from the federal government, capping it using an algorithm of need as based on the population the LEA serves. However, it should be noted that the 1033 Program is still a useful resource for local police with legitimate and helpful purposes. Its use should continue in a limited manner. For instance, it seems reasonable that LEAs continue to be able to requisition DoD property like computers, office supplies, BWVs, and other non-combat-related surplus equipment.<sup>247</sup> While police departments may need some combat equipment, it seems reasonable that the kind and expense of such possessions should be proportional to the particular agency's budget as determined by local taxes.

This proposal might face several critiques. Police departments will be loath to give up their federal money or military-grade equipment in any capacity, if the rampant stockpiling has been any indication.<sup>248</sup> Moreover, one could argue that the funding and equipment help the police perform

---

<sup>245</sup> Mario Trujillo, *Obama Orders Review of Military Equipment Supplied to Police*, THE HILL (Aug. 23, 2014, 5:30 PM), available at 2014 WL 4148733.

<sup>246</sup> *Id.*

<sup>247</sup> See *Complete Inventory of 1033 Property*, *supra* note 75.

<sup>248</sup> See ACLU, *supra* note 2, at 13.

their jobs more efficiently and safely without overburdening the citizens in their locality. The reduction of crime should be a priority, and police should have the funds to accomplish this task. However, it appears that the tie to federal funds or equipment might have nothing to do with protecting citizens from crime, “and in fact, successfully fighting crime could hurt a department’s ability to rake in federal money,” because grants are more likely to go to high-crime areas.<sup>249</sup> Ultimately, law enforcement is becoming a business where the end is to acquire more funding to hire more personnel, acquire better equipment, and conduct more raids and crack-downs for (usually minor or drug-related) offenses.<sup>250</sup> The protection of citizens seems to have very little to do with it. Sense seems to have very little to do with it.

#### *G. Limiting the Accepted Methods of Non-lethal Crowd Control*

Finally, police departments could limit the accepted methods of non-lethal crowd control altogether. SPD has taken steps in the right direction by clearly outlining specific policies for its force tools, such as beanbag shotguns and canine deployment, but reform is still necessary at both a local and national scale.<sup>251</sup> In particular, police departments should discontinue using chemical agents such as tear gas and pepper spray. Tear gas may contain either the chemical chlorobenzylidenemalononitrile (CS) or chloroacetophenone (CN, sometimes referred to as “mace”), while pepper spray often contains chili peppers mixed with corn oil.<sup>252</sup> Both tear gas and pepper spray are part of a class of chemical weapons in the category of lachrymatory agents, and in fact, the same company usually makes them

---

<sup>249</sup> BALKO, *supra* note 33, at 245.

<sup>250</sup> *Id.* at 244–46.

<sup>251</sup> *Use of Force Policy Manual: Force Tool—Specific Policies*, SEATTLE.GOV, [http://static1.squarespace.com/static/5425b9f0e4b0d66352331e0e/t/542ae0f0e4b007da15cb0f46/1412096240213/Use\\_of\\_Force\\_Policy\\_Manual—Force\\_Tool-Specific\\_Policies.pdf](http://static1.squarespace.com/static/5425b9f0e4b0d66352331e0e/t/542ae0f0e4b007da15cb0f46/1412096240213/Use_of_Force_Policy_Manual—Force_Tool-Specific_Policies.pdf) (last visited Apr. 18, 2015).

<sup>252</sup> *What Does Tear Gas Do?*, HOW STUFF WORKS, <http://science.howstuffworks.com/question340.htm> (last visited Nov. 29, 2014).

and sometimes even combines them into the same product.<sup>253</sup> The term “non-lethal” relates to the intent for use; tear gas is not meant to kill those afflicted with it as it is “generally considered to have only short term consequences.”<sup>254</sup> This does not mean that tear gas is incapable of killing.<sup>255</sup> Although the purpose of tear gas and pepper spray is only to activate pain-sensing nerves by irritating mucus membranes, the health effects of tear gas may be long-reaching and severe, including pulmonary concerns, as well as damage to the eyes, heart, and other organs, with some populations being more at risk than others.<sup>256</sup> In some cases, tear gas exposure causes miscarriages, and tear gas canister explosions result in amputations.<sup>257</sup> Moreover, the international community has largely condemned tear gas as inhumane, and the Chemical Weapons Convention has banned it during wartimes.<sup>258</sup>

Technological developments continue to provide more humane alternatives for non-lethal force. For instance, conductive energy devices (CEDs) such as TASERs have become more commonly used in the United States, with over 140,000 units issued across the country.<sup>259</sup> Although CEDs have also faced criticism for potential health risks due to fatalities, creators

---

<sup>253</sup> *What is Tear Gas?*, FACING TEAR GAS, <http://facingteargas.org/bp/36/what-tear-gas> (last visited Nov. 29, 2014).

<sup>254</sup> Tara Culp-Ressler, *What the Police's 'Non Lethal Weapons' Can Do to Human Bodies*, THINKPROGRESS (Aug. 18, 2014), <http://thinkprogress.org/health/2014/08/18/3472348/non-lethal-weapons-health-effects/>.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> Ben Winsor, *Tear Gas Can Cause Death, Amputations, and Miscarriages*, BUSINESS INSIDER (Aug. 19, 2014), <http://www.businessinsider.com/side-effects-of-ferguson-tear-gas-can-kill-2014-8>.

<sup>258</sup> *Id.*

<sup>259</sup> Philip Matthew Stinson, Bradford W. Reyns & John Liederbach, *Police Crime and Less-Than-Lethal Coercive Force: A Description of the Criminal Misuse of TASERs*, 14 INT'L J. OF POLICE SCI. & MGMT. 1, 1–3. Although there have also been complaints of criminal misuse for police abuse of CEDs, with Amnesty International reporting over 334 police-related deaths as the result of CED use. *Id.*

of this technology are still developing it and seeking safer non-lethal methods to subdue suspects.<sup>260</sup> Also, CEDs are more effective against single perpetrators and cannot be used by police officers to indiscriminately blanket a crowd. While officers may need to control crowds at times, CEDs could enable them to use force on a few unruly individuals early on without affecting peaceful protestors as well.

Opponents might argue that these aggressive forms of crowd control are necessary to keep order and make sure police officers are safe. However, police officers' jobs are actually already fairly safe and are getting safer.<sup>261</sup> The homicide rate for police officers in 2010 was 7.9 per 100,000 officers, and "2012 was the safest year for police officers since the 1950s."<sup>262</sup> Reportedly, 2013 saw the fewest officers killed by firearms since 1887, and was again the lowest year for police fatalities since 1959.<sup>263</sup> Also in 2013, the last year the FBI compiled data as of the time of this writing, 76 officers died in line-of-duty events, and only 27 of those deaths were the result of felonious acts; the rest were accidents.<sup>264</sup> For any given year, it is estimated that citizens will feloniously kill between 9 and 12 per 100,000 officers.<sup>265</sup> Admittedly, this national average is higher than the homicide rate of Seattle

---

<sup>260</sup> Erika Goode, *Tasers Pose Risks to Heart, a Study Warns*, N.Y. TIMES (Apr. 30, 2012), <http://www.nytimes.com/2012/05/01/health/research/taser-shot-to-the-chest-can-kill-a-study-warns.html>.

<sup>261</sup> BALKO, *supra* note 33, at 271.

<sup>262</sup> *Id.*

<sup>263</sup> NAT'L LAW ENFORCEMENT OFFICERS MEMORIAL FUND, LAW ENFORCEMENT FATALITIES DIP TO LOWEST LEVEL IN SIX DECADES 1 (2013), *available at* <http://www.nleomf.org/assets/pdfs/reports/2013-End-of-Year-Preliminary-Report.pdf>.

<sup>264</sup> See Press Release, FBI, FBI Releases 2013 Statistics on Law Enforcement Officers Killed and Assaulted (Nov. 24, 2014), *available at* <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2013-statistics-on-law-enforcement-officers-killed-and-assaulted>.

<sup>265</sup> Dara Lind, *What We Know About Attacks on Police*, VOX (June 13, 2015), <http://www.vox.com/2014/12/22/7430943/police-killed-statistics>.

in 2012 (2.3 per 100,000 people).<sup>266</sup> However, this is drastically lower than the homicide rate in 2010 for cities like St. Louis (40.5 per 100,000 people), Kansas City (21.1 per 100,000 people), or Atlanta (17.3 per 100,000 people).<sup>267</sup> A person is “more likely to be murdered just by living in these cities than the average American police officer is to be murdered on the job.”<sup>268</sup> In terms of professions, in 2014, loggers had a fatality rate of around 109.5 per 100,000 full-time workers, followed by fishers and related fish workers at 80.9 per 100,000 full-time workers, pilots and flight engineers at 63.2 per 100,000 full-time workers, and roofers are at 46.2 per 100,000 full-time workers.<sup>269</sup> Police officers did not even make the top-ten list.<sup>270</sup> It is unclear why this might be; although it is possible that police militarization itself may be why officers are safer; at this point, that is merely a correlation and pure speculation. In either case, currently there is little evidence indicating that police officers are justified in using this level of force indiscriminately against a crowd just to keep police safe.

Even if police officers still need access to non-lethal weapons usable against whole crowds at once, there are still alternatives to chemical warfare. Although the FBI reports that violent crime is the lowest it has been since the 1970s,<sup>271</sup> arguably there are times when a crowd requires dispersal not only for the officers’ safety, but also for the safety of citizens and property. In these instances, police might still use devices like the Long

---

<sup>266</sup> *Crime Rate in Seattle, Washington (WA)*, CITY-DATA, <http://www.city-data.com/crime/crime-Seattle-Washington.html#ixzz3ULm7imOo> (last visited Mar. 14, 2015).

<sup>267</sup> BALKO, *supra* note 33, at 271.

<sup>268</sup> *Id.*

<sup>269</sup> BUREAU OF LABOR STATISTICS, NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES IN 2014 (PRELIMINARY RESULTS) 4 (2015), *available at* <http://www.bls.gov/news.release/pdf/cfoi.pdf>.

<sup>270</sup> *Id.*

<sup>271</sup> Ian Simpson, *Violent U.S. Crime Drops Again, Reaches 1970s Level: FBI*, REUTERS (Nov. 10, 2014), <http://www.reuters.com/article/2014/11/10/us-usa-crime-fbi-idUSKCN0IU1UM20141110>.

Range Acoustic Device (LRAD) “sound cannon,” which broadcasts “deterrent” tones that can transmit 162 dB from five-and-a-half miles away.<sup>272</sup> For reference, humans experience discomfort in decibel ranges around 120 dB, with hearing loss possible around the 130 dB-level.<sup>273</sup> As such, sounds at this level can be painful and headache inducing, and with misuse or abuse, LRADs may cause permanent hearing loss.<sup>274</sup> Based on a few comments by Police Chief O’Toole, this is not currently a favored method for SPD.<sup>275</sup> The LRADs themselves can cost from \$5,000 to almost \$190,000 each.<sup>276</sup> Moreover, just based on their design, LRADs and their ilk are indiscriminate for use against both peaceful and rowdy protestors, potentially dissuading all forms of protest. However, it still might be preferable to assault protestors with sound waves than to damage life-sustaining organs, as occurs when one is affected by tear gas. A lifelong disability is a severe risk, and there may be a danger for abuse, but at least vital organs like the heart and lungs are not being specifically targeted. Devices like the LRAD “sound cannon” are still far from perfect, but they seem like a step in the right direction, and the development of better and safer technology in a similar vein would likely pick up by a ban on chemical agents.

---

<sup>272</sup> Roberto Baldwin, *What is the LRAD Sound Cannon?*, GIZMODO (Aug. 14, 2014), <http://gizmodo.com/what-is-the-lrad-sound-cannon-5860592>.

<sup>273</sup> Lily Newman, *This is the Sound Cannon Used Against Protestors in Ferguson*, SLATE (Aug. 14, 2014), [http://www.slate.com/blogs/future\\_tense/2014/08/14/lrad\\_long\\_range\\_acoustic\\_device\\_sound\\_cannons\\_were\\_used\\_for\\_crowd\\_control.html](http://www.slate.com/blogs/future_tense/2014/08/14/lrad_long_range_acoustic_device_sound_cannons_were_used_for_crowd_control.html).

<sup>274</sup> Baldwin, *supra* note 272.

<sup>275</sup> O’Toole, *supra* note 73.

<sup>276</sup> Daisy Sindelar, *Explainer: LRAD—What Is It And How Does It Work?*, RADIO FREE EUROPE RADIO LIBERTY (Mar. 13, 2013), <http://www.rferl.org/content/explainer-lrad-sound-cannon/24927845.html>.

#### IV. CONCLUSION

The extensive militarization of our local and state police forces poses a very real and cognizable threat to citizens' civil liberties. In the context of peaceful protest, police militarization primarily presents itself as overblown and unnecessary, while also showing just how easy abuse can be with this amount of power. The stress of a military-like scheme that puts the police force in the mind of "warriors," rather than as peacekeepers or guardians of the people, sets police and citizens as opponents and makes civilians into "the enemy." The ultra-authoritarian viewpoint polarizes police and civilians, and those attracted to police work in this climate begin to see any act or stand against the affiliated government as a threat to the officers' (citizen-granted) authority. As such, the climate for clashes and danger for abuse is never higher than during times of protest. Having taken the script from the WTO protests, the modern police force—and SPD as an example of both its problems and its possibility for reform—has chosen to take the path towards control rather than the path towards safeguarding the rights of protestors to gather peacefully in dramatic demonstrations against a government action, little realizing that "[t]here is no final one; revolutions are infinite."<sup>277</sup> Denied their rights to peacefully protest, a desperate people will still always find a way be heard, often not so peacefully.

This is a nation-wide issue, but change needs to initiate at a local level. If SPD has a real commitment to change, to eliminate accusations of patterns of abuse, and especially to protect the people's rights during protest, the police can make several changes relating to how they interact with the public, manage their own personnel, and increase accountability for their actions. With only a few changes, such as switching the uniform color, using BWVs, changing the discipline process, and banning tear gas, SPD

---

<sup>277</sup> YEVGENY ZAMYATIN, WE 152 (Mirra Ginsburg trans., 1972).



can once again be a model to the nation, this time for the proper way to manage a police force in answer to protest.

The right of the masses to speak in a public format to express their dissatisfaction is a critical liberty that requires safeguarding. It is a staple of our nation's political process, and a right rooted in the very start of our nation. The militarization of the police and the propagated policies that inevitably lead to clashes with these armored, battle-dressed pseudo-soldiers in city streets acts as a direct damper to that sentiment. The people have the right to a public voice to express political satisfaction, and by keeping that combat-boot firmly stamped on the faces of protestors, we risk the possibility of silencing that voice forever.