The Green to Blue Pipeline: Defense Contractors and the Police Industrial Complex

Karena Rahall

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

Karena Rahall

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

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

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INTRODUCTION

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

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

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

3 See id.
5 See infra Parts I, III.
8 See Peter B. Kraska, Militarization and Policing—Its Relevance to 21st Century Police, 1 POLICING: J. POL’Y & PRAC. 501 (2007). Paramilitary police deployments increased 1400% between 1980 and 2000. Id. In the 1980s, there was an average of 3000 deployments per year; and by the year 2000, that number escalated to an average of 45,000 deployments per year. Id.
9 See BearCat Variants, LENCO ARMOR, http://www.lencoarmor.com/law-enforcement/bearcat-variants (last visited Mar. 28, 2015). Marketed to law enforcement, the BearCat touts its urban tactics capability and weighs approximately 17,000 pounds, with a rotating roof hatch and multiple side gun ports.
10 See Bosman & Apuzzo, supra note 2 (depicting a BearCat).
While the public is becoming more aware of the presence of military equipment and the kinds of military tactics employed by police departments, such awareness is insufficient to craft meaningful reform unless one also understands the forces and incentives that have impelled its rapid growth and that make it so challenging to stop. This Article fills two gaps in legal scholarship by offering both the first detailed examination of the phenomenon of police militarization, and the first analysis of the factors—historical, legal, and financial—that permit and foster it.

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

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


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

I. How Did Smallville Get an MRAP?

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

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

14 See BALKO, supra note 7, at 61–63.

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

16 See BALKO, supra note 7, at 96.

17 See Kraska, supra note 8, at 6.

18 See id. at 5–6.

19 See id. at 6.

20 Id.

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

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

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

25 See infra Part II.A.1–2.
26 See BALKO, supra note 7, at 202–03.
will consider what, if any, oversight exists to ensure that these weapons are properly deployed in the context of public service rather than war.

1. Department of Defense Programs

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

a. 1033 Program: Transfer of Equipment

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

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29 The original section pertaining to surplus military equipment transfer in NDAA 1997 was 1033.
30 See The 1033 Program, JUST.NET, https://www.justnet.org/other/1033_program.html (last visited Mar. 29, 2015). Local law enforcement agencies apply to participate in the 1033 Program through their State Point of Contact (SPOC) and, if approved, the application is sent to the DOD’s Law Enforcement Support Office (LESO), which is run by the Defense Logistics Agency. See id.
32 See DLA Disposition Services Site Locator Tool, DISPOSITION SERVICES, DEF. LOGISTICS AGENCY, http://www.dispositionservices.dla.mil/drmo/Pages/default.aspx (last visited Mar. 29, 2015) (LESO website page for interactive location search for stored equipment; aircraft, tactical vehicles, and weapons, however, are not listed in the online database).
property valued at more than $5.1 billion, including $450 million in 2013 alone. According to the DOD, over 11,500 domestic law enforcement agencies take part in the 1033 Program.

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

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

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

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

37 See id. at 4.

38 Id.

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

40 Id. at 83–89.

41 See id. at 16.
military vehicles and armaments. For example, Roanoke Rapids, North Carolina, has a population of less than 16,000 but acquired both Humvees and a Mine-Resistant, Ambush-Protected (MRAP) vehicle in 2013. Merrillville, Indiana, with 35,000 residents, got an MRAP for their SWAT team in 2013. Even Ohio State University got one. Small towns like Neenah, Wisconsin; Currituck, North Carolina; Washington, Iowa; and Watertown, Connecticut all applied for and received free MRAPs. Approximately 500 police departments have received MRAPs so far. They all must put them to use in some way within a year of acquisition and this requirement gives rise to an increasing number of SWAT team formations and deployments.

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


45 Id. 46 Id.


49 See ACLU Report, supra note 22, at 5.


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


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

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


\textsuperscript{56} See Franceschi-Bicchierai, \textit{supra} note 52.

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

\textsuperscript{58} See ACLU Report, \textit{supra} note 22, at 30.


\textsuperscript{60} See AP IMPACT, \textit{supra} note 6.

\textsuperscript{61} Id.


\textsuperscript{64} See ACLU Report, \textit{supra} note 22, at 80 (citing responses to written questions posed by Congressman Hank Johnson to the DOD and Defense Logistics Agency).
these items are used by police departments and whether they are necessary, effective or dangerous.

b. 1122 Program: Purchase of New Equipment

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

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

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

69 1122 Program, supra note 65.

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

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

2. Department of Justice Programs

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

a. Byrne Justice Assistance Grants

In 1968, Congress created a $100 million grant program to provide states and municipalities with funding to research the social causes of criminal activity, provide alternative sanctions for juveniles, and combat street crime.78 Edward Byrne Memorial Justice Assistance (Byrne JAG)
grants—named for a New York City Police officer killed by drug dealers in 1988—are the present-day method by which these grants are allocated.79 Byrne JAG grants have awarded over $5 billion since 2005 alone.80 The DOJ is permitted to allocate over $1 billion per year in Byrne JAG grants.81 However, the funding averaged $500 million a year until 2009 when the program experienced a windfall $2 billion infusion through the American Recovery and Reinvestment Act of 2009.82 The funding covers a broad swath of criminal justice areas and the amount of funding can be increased based on crime statistics within the state or locality.83 Therefore, if crime goes up, funding follows.

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

79 See BJA JAG Fact Sheet, supra note 75; About Officer Byrne, BUREAU JUST. ASSISTANCE, U.S. DEPT’ JUSTICE, https://www.bja.gov/Programs/OfficerByrne.html (last visited Mar. 29, 2015). The Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, 118 Stat. 2809 (2004), merged a discretionary grant program (originally part of the 1988 Anti-Drug Abuse Act) with a formula-based block grant program called Local Law Enforcement Block Grant program (LLEBG). BJA JAG Fact Sheet, supra note 75. Currently, grants are awarded based on the population of the state and its share of violent crime statistics with 60% allocated to the state and 40% discretionary funding to local governments deemed eligible. Id. The grants cover the following program areas: (1) law enforcement; (2) prosecution and courts; (3) corrections and community corrections; (4) drug treatment; and (5) planning, evaluation, and technology improvement. Id.
80 Id.
84 See Byrne Grant Technical Report, supra note 77.
86 Id. at 2-5.
87 Id. at 2.
88 See id. at 6, 10. Almost a quarter of all Byrne JAG funding goes to joint task forces that focus on drug arrests, gang arrests, and firearm seizures. See id. at 6. These task forces combine
State and local police agencies have come to depend on the largesse of Byrne JAG funding, which rewards police for combatting drug crimes and incentivizes the types of military deployments that are increasingly used in anti-drug enforcement. Police agencies use that funding for hiring, overtime, and equipment; in turn, they make as many drug and other arrests as necessary to qualify for further funding. The number of drug raids and arrests is thus tied to federal funding and federal priorities, rather than defined by local policies that might determine whether such raids are a net benefit to the community. Illustrative of this point is the response by law enforcement when Byrne JAG funding was threatened with a 67% reduction in 2007. Police departments and joint drug task forces across the country staged "Operation Byrne Blitz," in which they spent twenty-four hours in a nonstop effort to demonstrate the value of the work the grants fund, arresting hundreds of people and seizing large—and, in some cases, quite small—quantities of drugs. The funding was restored in 2009, with a one-time infusion
of $2 billion, and continues as of 2014.95 Whether the “blitz” garnered more drug kingpins than low level offenders is unknown, but the point of the exercise was to show a large quantity of arrests and seizures, and measured by that standard it appears to have been a success. Becoming dependent on such funding and tying it to arrest and conviction statistics is dangerous, foments corruption, and has led to numerous illegal arrests and prosecutions carried out by Byrne JAG grant recipients.96 Coupled with the kind of military hardware, weaponry, and training available through other federal funding, this program raises serious concerns about the semi-federalized policing standards in operation across the United States.

b. Community Oriented Policing Services Grants

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

99 See 42 U.S.C. § 3796dd(g).
100 See JAMES, supra note 98, at 4.
101 Id.
another administrator and the budget for 2014 is a much lower—but still significant—$200 million. With these funds, even small towns were able to muster enough troops to start their own SWAT teams, and by keeping arrests high, even small departments can justify the continued flow of gear and money.

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

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102 Id.
103 See Balko, supra note 7, at 207. COPS, Byrne, and other block grants were awarded to departments based entirely on the number of drug arrests made by each department and drug arrests skyrocketed as a result. Steven Elbow, Military Muscle Comes to Mayberry U.S. Donates Gear, Grenade Launchers, CAP. TIMES, Aug. 18, 2001, http://www.mapinc.org/drugnews/v01/n1519/a06.html. The resulting funding followed suit and small towns in Wisconsin were able to start their own SWAT teams and qualify for military armaments under the 1033 Program. Id.
104 See Kraska, supra note 8, at 8–10.
105 Id. at 9.
108 Id.
3. Department of Homeland Security Grants

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

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

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


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

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

118 See COBURN, supra note 115, at 42.
120 See COBURN, supra note 115, at 31–47 (citing numerous examples of cities that have no counterterrorism use for armored vehicles and drones but received them with DHS grants, including Clovis, California, where the city acquired a BearCat but paraded it to the local Easter egg hunt, and a town in Washington that used its BearCat to pull over drunk drivers).
121 See generally Coburn, supra note 115.
122 See OFFICE OF INSPECTOR GEN., supra note 111, at 4.
123 Id.
124 Id.
125 Id.
126 See COBURN, supra note 115, at 53.
B. Private Defense Contractors and Domestic Profits

The military equipment being used by domestic police departments, received through federal grants like those discussed in Part I.A, is manufactured by defense industry companies with a vested interest in expanding into new markets.\textsuperscript{127} As the wars in Iraq and Afghanistan are winding down, some military armaments are being destroyed to prevent their use by antigovernment forces.\textsuperscript{128} Others are brought back to the United States and either used by the military or transferred as surplus through the 1033 Program.\textsuperscript{129} The private defense industry\textsuperscript{130} stands to lose significant profits as government contracts to fill orders decrease for wars, so the domestic market represents a new profit frontier. Additionally, defense contractors reach out to domestic police departments directly to sell their military equipment, whether the departments pay with their own funds or those secured through federal grants. Finally, police have their own lobbyists through groups like the National Tactical Officers Association (NTOA), who work to secure government funding to purchase the vehicles, weapons, and gear necessary to outfit SWAT teams. The cadre of financial stakeholders has become a powerful force that continues to steer money and gear through the green to blue pipeline.

1. Lobbying Congress

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

\begin{itemize}
\item \textsuperscript{129} See supra Part I.A.1.a.
\item \textsuperscript{130} The term covers a wide range of companies that manufacture, supply, and maintain military materiel primarily for the federal government, but also for international and private sources.
\end{itemize}
the 2012 campaign cycle. Over 900 lobbyists represented 266 defense companies working to ensure that their clients' interests were represented in Congress. The money spent to influence Congressional Senate and House members is focused primarily on retaining and securing government contracts that culminate in more profit for those companies. Whether those contracts achieve profits through primary markets like the military and police, or in the secondary market through maintenance, the priority is to fill orders for the materiel they produce.

Defense industry companies lobby, contribute to PACs, and give money directly to political campaigns; the largest recipients are those politicians who sit on committees responsible for defense funding and oversight. For example, Congressman Buck McKeon, the Chairman of the House Armed Services Committee, received $567,000 from the defense industry in the 2012 campaign cycle. Dick Durbin, who chairs the Senate Subcommittee on Defense, was the third biggest recipient of defense industry money in 2014, receiving $307,899. Funding for the 1033 and DHS grant programs supplies a steady flow of orders for manufacturers of military equipment destined for American police departments. In order to secure those orders, Congress must appropriate the funding, and relies on subcommittees to make recommendations and handle oversight. Of course, there is no guarantee that a lawmaker will vote a particular way just because they receive hefty donations, but evidence suggests that the spending pays off for the industry. The Abrams tank is a case in point; when the Pentagon insisted that it no longer needed or wanted General Dynamics' tank, Congress appropriated half a billion dollars for it anyway in 2013. More recently in June 2014, when Congressman Alan Grayson introduced legislation to limit the transfer of certain weapons—like

133 Defense: Background, supra note 131.
134 Id.
135 Id.
136 Id.
137 Id.
138 See id.
139 See id.
142 See supra Part I.A.
tanks, missiles, grenade launchers, and toxicological agents—through the 1033 Program, it was soundly defeated. 145 Members who voted against the amendment received 70% more money in campaign contributions in the previous two years than those who voted for it. 146 With more than 900 lobbyists deployed to influence Congress, and millions spent on donations, the industry remains a powerful force.

Companies that make MRAPs, a favorite of the 1033 Program, have spent handsomely to secure contracts. Textron, Inc., for example, is one maker of the MRAP and spent more than $680,000 in 2014 alone on contributions to PACs and members of Congress; it also spent nearly $4.6 million more on lobbying efforts. 147 General Dynamics, one of the largest defense contractors in the United States, makes an MRAP and spent more than $12 million on combined lobbying and contributions in 2014. 148 BAE Systems also makes their own version of the MRAP and spent over $5 million on contributions and lobbying in 2014. 149 The amount spent is not tied solely to the investment return these companies expect to gain in the domestic market; they are lobbying for overall funding, which includes equipment destined for foreign deployment. 150 However, the domestic homeland security market

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

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


150 Political spending is not broken down by issue or Congressional bill. Information is available for specific candidates, PACs, and overall lobbying.
represents approximately $20 billion in overall value. The money spent on politicians underscores the high stakes involved in procuring government contracts and the willingness of the industry to spend freely to secure them.

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

2. Lobbying Police Departments

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

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153 See About NAPO, supra note 152.
abound.\textsuperscript{157} To further help market their wares, some companies help police departments navigate the complicated landscape of available federal grants. Lenco, which makes the BearCat APC, assists police departments in drafting their grant proposals.\textsuperscript{158} Several other companies hoping to benefit from federal grants to police departments sponsor a website that also helps police agencies find, track, and write grants for equipment offered by DHS and 1033 Program grants.\textsuperscript{159} Once police departments find the gear they want, the companies then guide them through every step of the process, making it as easy as possible to attain military hardware. Given that the equipment is free—or heavily discounted depending on the grant—police departments are highly incentivized to apply for federal grants, with the help of the manufacturers.

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

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

II. THE LIMITATIONS OF LEGAL REMEDIES

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

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

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


168 See Urban Shield Vendors, supra note 165.


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

171 See Becker & Schulz, supra note 151.
designed to deter police from violating citizens’ civil rights and yet both fail to adequately address the increasingly violent and militarized nature of police encounters.

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

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

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

174 See Harlow, 457 U.S. at 806.
175 See generally Nancy Leong, Making Rights, 92 B.U. L. REV. 405 (2012) (noting that when courts find that a law was not clearly established before addressing whether a constitutional violation occurred, the law never becomes clearly established because precedent is never made regarding a particular action).
176 But see Monell v. Dep’t of Soc. Servs., 436 U.S. 658, 694 (1978) (“[I]t is when execution of a government’s policy or custom, whether made by its lawmakers or those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.”).
and have been addressed exhaustively by scholars.\textsuperscript{177} It is not within the purview of this Article to cover the same ground or suggest a better methodology for courts to apply. Instead, the focus here is to demonstrate how the law, as currently constructed and applied, fails to properly analyze and remedy excessive force claims in the context of military police tactics, particularly as applied to SWAT raids. This Section situates and highlights the problem in order to demonstrate the current inability of the justice system to address the increased aggressive and excessive force used in those kinds of paramilitary raids.

Because courts are permitted to find qualified immunity before considering the merits of an excessive force claim, it has become difficult to create precedent. When a plaintiff brings a tort claim under the Fourth Amendment against state or federal officers, two issues come into play: (1) the merits of the plaintiff’s constitutional claim; and (2) the defendant’s right to invoke qualified immunity.\textsuperscript{178} In order to overcome a claim to qualified immunity, a plaintiff must show that the defendant’s actions were inconsistent with those of an objectively reasonable officer under the circumstances, and were in abrogation of clearly established law.\textsuperscript{179} Qualified immunity provides an opportunity to avoid trial on the merits. Therefore, the possibility that qualified immunity is found at the summary judgment stage—based on a lack of clearly established law of which a reasonable officer would be aware—creates an obstacle for plaintiffs hoping to rely on precedent.\textsuperscript{180} If the law must be clearly established in order for the case to be heard on the merits, creating precedent for future cases becomes far more difficult.\textsuperscript{181}

In \textit{Saucier v. Katz},\textsuperscript{182} the Supreme Court attempted to address that problem by requiring a two-step procedure in which the merits of the constitutional claim are considered first, before reaching the qualified immunity question.\textsuperscript{183} It held that if a court then found a constitutional violation, the court should consider whether qualified immunity applied.\textsuperscript{184} In doing so, the Court hoped to provide some ground on which precedents could be developed for future clarity.\textsuperscript{185} However, the requirements laid out in \textit{Saucier} have since been rescinded and the two-

\begin{itemize}
\item \textsuperscript{177} See generally Rachel A. Harmon, \textit{The Problem of Policing}, 110 MICH. L. REV. 761 (2012); John C. Jeffries, Jr., \textit{Reversing the Order of Battle in Constitutional Torts}, 2009 SUP. CT. REV. 115; Leong, supra note 175.
\item \textsuperscript{178} See Anderson v. Creighton, 483 U.S. 635 (1987); Harlow, 457 U.S. at 802–03.
\item \textsuperscript{179} See Harlow, 457 U.S. at 801.
\item \textsuperscript{180} See Jeffries, supra note 177, at 120; Leong, supra note 175.
\item \textsuperscript{181} See Jeffries, supra note 177, at 120; Leong, supra note 175, at 411.
\item \textsuperscript{182} 533 U.S. 194 (2001).
\item \textsuperscript{183} See id.
\item \textsuperscript{184} See id. at 201.
\item \textsuperscript{185} See id.
\end{itemize}
step process made discretionary.\textsuperscript{186} So once again, courts may not reach the merits of a claim before finding qualified immunity applies, making it difficult for plaintiffs to demonstrate that the law violated was clearly established.\textsuperscript{187}

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

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

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

\begin{footnotes}
\textsuperscript{186} See Pearson v. Callahan, 555 U.S. 223 (2009) (recognizing the importance of developing precedent, the Court nonetheless held that precedent would be created in the criminal context, thus feeding the civil one).
\textsuperscript{187} See id. at 224–25 (suggesting criminal realm would provide precedent).
\textsuperscript{188} But see Daniel K. Siegel, Clearly Established Enough: The Fourth Circuit’s New Approach to Qualified Immunity in Bellotte v. Edwards, 90 N.C. L. REV. 1241 (2012) (analogizing to cases that were distinguishable from the case at bar in order to deny qualified immunity and find clearly established law).
\textsuperscript{189} See Hudson v. Michigan, 547 U.S. 586 (2006); United States v. Ankeny, 502 F.3d 829 (9th Cir. 2007), cert. denied, 553 U.S. 1034 (2008); United States v. Jones, 214 F.3d 836 (7th Cir. 2000); see also supra Part I.B.2.
\textsuperscript{190} See Leong, supra note 175, at 411–12.
\textsuperscript{192} See Scott v. Harris, 550 U.S. 372 (2007); see also Leong, supra note 175, at 446 (noting that the Court distinguished \textit{Garner} and failed to apply the factors in \textit{Graham}, which included a list of actions constituting excessive force; instead, the Court applied a general balancing test weighing public safety against the individual).
\textsuperscript{193} See Diana Hassel, Excessive Reasonableness, 43 IND. L. REV. 117, 118 (2009); Leong, supra note 175, at 448–49.
\textsuperscript{194} See Leong, supra note 175, at 447.
\end{footnotes}
injury. If the court can furnish only two remedies—money or suppression of evidence—this may leave the individual victim of excessive force without remedy and further fails to regulate or deter uses of force. For example, the use of a flash-bang grenade during the execution of a raid might be extremely unpleasant—it might even damage the carpet or the furniture—but for the plaintiff seeking a Section 1983 remedy, the monetary value might be quite small. Prevailing in such a situation would be difficult even if the plaintiff could show that the officers behaved unreasonably in using a flash-bang and that using it violated clearly established law, since there is no remedy to extract from the officers. Plaintiffs could bring the action against the municipality, but there they have to prove the police acted within established policy or custom. Plaintiffs in search of precedent might then turn to the criminal realm where a similar case might have been adjudicated under the exclusionary rule, but there, the obstacle is the likely presence of contraband; in such cases it is far more likely that the use of a flash-bang would be considered reasonable after the application of the reasonableness test. Thus, a gap exists in constitutional tort law in terms of providing proper remedies and deterrents where police officers use excessive force.

B. Fourth Amendment Challenges Under the Exclusionary Rule

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

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

196 See infra Part III.A for examples.

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


200 See United States v. Jones, 214 F.3d 836, 837 (7th Cir. 2000) (finding use of flash-bang device unreasonable).
obtained. Like Section 1983 claims, Fourth Amendment motions to suppress now depend almost entirely on a general balancing test with reasonableness as a guiding principle. Probable cause is generally still required for search warrants, but given that search warrants make up only approximately 1% of all searches, most searches are subject only to the general balancing test. Even so, there is no longer a bright separation between cases in which warrants were obtained and those that do not involve a warrant. The analysis is now the same and deals only with whether the search was reasonable, balancing the interests of the individual against that of the government. This is so whether the court is analyzing a violation involving the manner in which the search was undertaken, or one in which a violation of the scope of the search is claimed. In other words, courts will look at what was searched and the manner in which the search was conducted, determining the reasonableness of each, depending on the requested relief. If a scope violation occurs, exclusion is a possible remedy. However, if a manner violation is found, the only remedy available is a civil action under Section 1983. As discussed above, the deterrent effects of qualified immunity and lack of precedent to show clearly established law violations make remedies for manner violations extremely difficult to obtain.

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

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

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

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212 *Id.* at 600–02.
213 *Id.* at 603–08.
215 Kamin & Marceau, supra note 211, at 606.
218 See *Hudson*, 547 U.S. at 608–09; *Ankeny*, 502 F.3d at 842–43.
219 See *Nix v. Williams*, 467 U.S. 431, 444 (1984) (establishing the doctrine of inevitable discovery in which the exclusionary rule does not apply to cases in which constitutional violations are found if police would have discovered the evidence absent the violation in any event).
221 See *Hudson*, 547 U.S. at 586; *Ankeny*, 502 F.3d at 829.
identify themselves as such before breaching the door to serve a warrant—since it would only prevent the obtainment of evidence and jeopardize the safety of officers. Finding that civil tort claims were the proper remedy for such violations, Scalia conceded that the Court is unaware of whether violations of the “knock-and-announce” rule have been successful in the civil context but cited to a few cases pending before federal courts to show that such suits are possible, and stated that given the lack of evidence, the Court can assume such suits will be given their proper due process in civil courts. The majority did not address the problem of creating “clearly established” law as it did in Pearson v. Callahan, when it suggested that criminal cases would provide the ground on which Section 1983 cases could stand to find precedent. However, the dissenters in Hudson argued that not only could suppression be a deterrent in a case involving violation of the “knock-and-announce” rule, but also that despite Scalia’s assertion that such violations do not represent systemic problems, the evidence is just the opposite. Violations, they found, “are legion.” Further, the dissenters argued that the lack of monetary damages should lead the Court to conclude that suppression is the only remedy.

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

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225 See Hudson, 547 U.S. at 596.
226 See id. at 598.
228 See id. at 242.
229 Hudson, 547 U.S. at 610.
230 See id. at 611 (“To argue that there may be few civil suits because violations may produce nothing more than nominal injury is to confirm, not to deny, the inability of civil suits to deter violations.” (internal quotation marks omitted)).
232 See Leong, supra note 175, at 440–41 (citing numerous instances in which force is not addressed in analysis while focus placed entirely on scope of search).
233 See United States v. Jones, 214 F.3d 836, 837–38 (7th Cir. 2000). Despite the Court’s assertion that “police cannot automatically throw bombs into drug dealers’ houses, even if the bomb goes by the euphemism ‘flash-bang device,’” the Court did not rule that exclusion was the proper remedy because it had no effect on the inevitable discovery of the evidence obtained. Id.
fear that led to the use of the force, there is no remedy at all, even if someone is killed during a poker raid, for example.234 The very lack of definition given to “reasonableness” in Fourth Amendment analysis means that other solutions must be sought if the rising incidents of force are to be curbed. In many instances, force is not addressed at all.235 Even where courts find excessive force problematically related to a search, the prevailing law does not provide for exclusion as long as the scope of the search is found to have been reasonable.236

III. THE CONSEQUENCES OF MILITARIZATION AND POSSIBLE REMEDIES

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

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

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

234 See Scott v. Harris, 550 U.S. 372 (2007). Because the Court uses a general balancing test rather than a list that includes officer safety as one of a number of factors, officer safety weighs more heavily in favor of government interest against individual interest. Id.
235 See, e.g., United States v. Ramirez, 523 U.S. 65 (1998) (holding that the only matter in issue was whether forcible entry was justified but not the manner in which it was effectuated).
237 See ACLU Report, supra note 22, at 29 (citing the areas covered by the DOJ and the Bureau of Justice Statistics).
238 See supra Part I.A.
looks beyond the justice system, at the ongoing efforts to demilitarize the police in several federal, state, and local jurisdictions around the country. It offers insight into the struggle to reverse the trend of arming the police with military weaponry, and to craft policy solutions to address the military tactics increasingly being employed by police officers.

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

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

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


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


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

1. SWAT Raids

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

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244 See Kraska, supra note 8, at 8.
245 See ACLU Report, supra note 22, at 5, 38.
246 Id.
247 See Kraska, supra note 8, at 8.
249 See Rachel Cox, Man Accused of Killing Veteran SWAT Officer Returns to Court, KWTX NEWS 10 (June 19, 2014), http://www.kwtx.com/home/headlines/Killeen-Man-Charged-In-Veteran-SWAT-Officers-Shooting-Death-263742841.html (stating that Detective Charles Dinwiddie was killed executing a “no-knock” warrant when the homeowner shot him as he climbed through the window); see also Radley Balko, Some Justice in Texas: The Raid on Henry Magee, WASH. POST, Feb. 10, 2014, http://www.washingtonpost.com/news/opinions/wp/2014/02/10/some-justice-in-texas-the-raid-on-henry-magee (where informant told police that they would find ten to twelve large marijuana plants, stolen guns, and a vicious dog at the residence;
are used routinely in SWAT raids in many jurisdictions. Rolling tank-like vehicles through neighborhoods at night to execute search warrants for nonviolent offenses has proven unnecessary in most instances, given the number of deployments in which they were not used for anything other than transport.

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

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

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

See id.

See Kraska, supra note 8, at 7.

See ACLU Report, supra note 22, at 33.

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

See Stevens, supra note 198.

Id.

Id.

See Alecia Phonesavanh, A Swat Team Blew a Hole in My 2-Year-Old Son, SALON (June 24, 2014, 7:45 AM), http://www.salon.com/2014/06/24/a_swat_team_blew_a_hole_in_my_2_year_ old_son.


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

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

261 See supra Part II.A for an explanation of the standard for qualified immunity.
262 See Hudson v. Michigan, 547 U.S. 586 (2006). The police waited three to five seconds and the Court held that there should be no time limit but that cases should be decided based on the totality of the circumstances. See id. at 588.
264 Id.
266 Echavarri, supra note 265.
267 See id. Police originally claimed he fired on them until an investigation revealed the safety was engaged and no shots were fired. See id.
268 Id.
269 See id.; Myers, supra note 265.
case. It subsequently came to light that investigating officers knew little about Guerena or that he had a regular work schedule; the warrant claimed surveillance had been done and that Guerena never went to work, which militated in favor of the assumption that he was dealing drugs with his brother. Even when surveillance is done and the information obtained is reliable, night raids on unsuspecting civilians are highly dangerous and yet often such raids—and the warrants that facilitate them—are based on shoddy information and lead to the deaths of innocents.

Even raids that do not end with the death of a person can cause great emotional harm that the justice system does not remedy because of the expansive discretion afforded police in how they carry out searches. When a SWAT team in Columbia, Missouri—wearing BDUs and ballistic helmets, and armed with assault weapons—executed a nighttime raid on Jonathon Whitworth’s home to look for marijuana, they first shot the family dog as Whitworth opened the door, and then held his wife and seven-year-old son at gunpoint while they searched for large marijuana plants and guns. The entire entry was video-recorded by the police. Whitworth was charged with possession of drug paraphernalia and fined $300. His Section 1983 case was dismissed.

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

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

272 See supra Part II.A.


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

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

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

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

277 Id. at *6.
278 Id. at *2, *5.
279 Id. at *3.
280 Id. at *1, *5.
281 Id. at *7 (citing Brockinton v. City of Sherwood, 503 F.3d 667, 674 (8th Cir. 2007)) (holding that individual liability must attach before municipal liability may be considered).
282 For more examples of wrong-address raids, see Wrong Address, POLICE STATE USA, http://www.policestateusa.com/tag/wrong-address (last visited Feb. 8, 2015).
283 See Kris, supra note 8.
285 See id.
paramilitary SWAT raids becoming a routine manner in which to serve search warrants in suspected drug cases.\textsuperscript{287}

2. Escalation and Violent Encounters

When police are trained to view themselves as soldiers, it is unsurprising that they sometimes treat encounters with suspects as an engagement with the enemy.\textsuperscript{288} The “war on drugs” has influenced training and deployment tactics by defining the landscape as a war and police officers as fighters in it.\textsuperscript{289} Similarly, the “war on terrorism” has created yet another domestic warfront in which trainers encourage police officers to fight as soldiers on a battlefield.\textsuperscript{290} Within a culture of battle, war, and combat, police are trained to engage with the communities they serve and face adversity the same way a soldier might.\textsuperscript{291} Police officers are trained using a stress-based military curriculum in the academy,\textsuperscript{292} and they also sometimes train with the military directly.\textsuperscript{293} The fear-based mentality that stress-based training encourages can lead to escalation during police-citizen encounters that innocents; No-Knock Raid, POLICE STATE USA, http://www.policestateusa.com/tag/no-knock-raid (last visited Mar. 5, 2015); SWAT Narcotics Raid, Columbia, supra note 273.

\textsuperscript{287} See Kraska, supra note 8.

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

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

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

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

\textsuperscript{292} See ACLU Report, supra note 22, at 18.

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

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

See ACLU Report, supra note 22, at 23.
See supra Part II.A for an explanation of the standard for reasonable conduct on the part of
police.
See Kelley Bouchard, Across Nation, Unsettling Acceptance when Mentally Ill in Crisis Are
Killed, PORTLAND PRESS HERALD (Dec. 9, 2012), http://www.pressherald.com/2012/12/09/shoot-
across-nation-a-grim-acceptance-when-mentally-ill-shot-down; Brian Hamacher, Man with
20353.html; Tux Turkel, David Hench & Kelley Bouchard, Deadly Force: Police & the Mentally Ill,
PORTLAND PRESS HERALD (Dec. 8–11, 2012), http://www.pressherald.com/interactive/maine
police Deadly Force Series Day 1.
See, e.g., Chris McKee, APD: Officer Involved Shooting Was Justified, KRQE NEWS 13 (Oct.
17, 2014, 1:05 PM), http://krqe.com/2014/03/21/apd-officer-involved-shooting-was-justified.
See id.
See id.
See Sebastian Murdock, Police Shoot Homeless Man During Camping Arrest, HUFFINGTON
POST (Mar. 25, 2014, 1:59 PM), http://www.huffingtonpost.com/2014/03/24/james-boyd-killed-
by-cops_n_5021117.html.
See id.
See Cindy Carcamo, Tensions over Albuquerque Police Shootings Intensify Despite Talks,
story.html.
practice of excessive and deadly force in violation of the Fourth Amendment and other laws. The police department is currently working on training reforms. In addition, despite the position taken by the Albuquerque Police Department, two of the officers who shot Boyd were charged with murder ten months after the incident. This incident underscores the need for police to engage people who have a mental illness with some patience and consider nonlethal force when there is no clear and present danger to officers. Given that Boyd was not a public safety threat out in the foothills—and was charged only with camping—the response was extreme; had the officers employed a less aggressive strategy he might still be alive.

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

306 See Terry v. Ohio, 392 U.S. 1 (1968) (holding that a person may be stopped and frisked on the street absent probable cause if police have reasonable suspicion that the person has committed, is committing, or is about to commit a crime).
307 See Hamacher, supra note 296.
310 See id. ( picturing Powell’s injuries).
311 See id.
encountered Powell, Villa had served on the city’s SWAT team; he was on street patrol when the incident transpired because he had been transferred following a controversial sting operation in which four people were killed, including the undercover informant who was shot while trying to surrender as he lay on the ground.\footnote{See Interoffice Memorandum from Staffing/Review Team, Office of the State Att’y, Eleventh Judicial Circuit, to Katherine Fernandez Rundle, State Att’y (Mar. 13, 2014), available at https://cbsmiami.files.wordpress.com/2014/03/redlandcloseout.pdf.} Incidents like the one involving Powell are escalating with alarming frequency as a result of officers trained to react with soldier mentalities to a public that is usually not aware of being engaged in a war, even if the public is one that is unencumbered by a mental disability.\footnote{See, e.g., Travis Gettys, Jury Can’t Decide if Cop Who Destroyed Woman’s Eyeballs with Pepper Spray Should Go to Prison, RAW STORY (May 20, 2014, 9:41 AM), http://www.rawstory.com/rs/2014/05/20/jury-cant-decide-if-cop-who-destroyed-womans-eyeballs-with-pepper-spray-should-go-to-prison (woman blinded when officer sprayed JPX pepper gel at 400 miles per hour directly into her face slicing through both eyeballs after she squirmed while being handcuffed); Jessica Glenza, Cleveland Medical Examiners Rule Death of Tamir Rice a Homicide, GUARDIAN (Dec. 12, 2014, 1:24 PM), http://www.theguardian.com/us-news/2014/dec/12/death-black-child-ruled-homicide (responding to call of a juvenile with a possible toy gun, officers are seen on video quickly approaching in their police car, jumping out, and shooting twelve-year-old Tamir Rice in about two seconds; the officers, however, did not face charges); Michael Kinney, Case Closed in Rodriguez Death, NORMAN TRANSCRIPT (Oct. 13, 2014, 1:19 PM), http://www.normantranscript.com/news/local_news/article_7598b088-c853-5eee-8713-6d1bdce4f49.html (officers’ actions found reasonable in case of man beaten to death outside movie theater when police respond to fight between man’s wife and daughter and believe him to be threat when he folds arms and attempts to walk around officer after being asked for identification); Phil Trexler, Deputy Pries Open Woman's Mouth After She Takes Tylenol, AKRON BEACON J. (May 15, 2014, 1:09 PM), http://www.ohio.com/news/break-news/deputy-pries-open-woman-s-mouth-after-she-takes-tylenol-1-488137 (woman in courthouse waiting room took two Tylenol and sheriff’s deputy demanded she spit them out but she had already swallowed, so deputy threw her to ground and attempted to pry them from her mouth causing bleeding and pulling out her hair, then charged her with resisting arrest); Justin Warmoth, Daytona Beach Police Officer Resigns After Body Camera Turned Off During Arrest, CLICK ORLANDO (May 15, 2014, 6:02 PM), http://www.clickorlando.com/news/daytona-beach-police-officer-fired-after-body-camera-turned-off-during-arrest/25982532 (woman slammed to ground and flashlight jammed into her mouth when officers thought she swallowed cocaine resulting in several broken teeth); see also Adam Ferrise, Cleveland Officer Who Shot Tamir Rice Had 'Dismal' Handgun Performance for Independence Police, PLAIN DEALER (Dec. 4, 2014, 7:28 AM), http://www.cleveland.com/metro/index.ssf/2014/12/cleveland_police_officer_who_s_h.html (officer who killed Tamir Rice fired from another department before joining Cleveland Police Department because he could not follow simple instructions or handle his weapon properly).} Training for war has sometimes led police to react too quickly—before properly assessing real potential risks—with disastrous results. In one such instance, a police officer pulled behind a car in a convenience store and as the driver got out to enter the store, asked him to produce a driver’s license.\footnote{See Tony Santaella & Steven Dial, Trooper on Shooting: 'He Kept Coming Towards Me,' WLTX 19 (Sept. 27, 2014, 1:55 AM), http://www.wltx.com/story/news/local/2014/09/26/sean-groubert-gives-his-account-of-shooting-levar-jones/16295527.} When the driver turned back toward his car and reached in for his wallet, the officer almost immediately began firing at
him, striking him in the hip.316 The officer was fired and faces charges in the incident, but what is conspicuous about the video recording of the incident is how clear it appears that the officer was truly terrified.317 Notably, the officer was white and the victim was black, so how and whether race played a role in the officer’s snap decision to begin firing—without provocation—is more than a little concerning, given the fear-based training that officers undergo. Similarly, in Beavercreek, Ohio, John Crawford was killed by police while walking around a Walmart carrying an air rifle he picked up from a store shelf.318 Video of that incident shows the officer approached the far end of the aisle where Crawford was talking on his phone, holding the rifle downward, and immediately shooting him dead.319 The officer was not indicted despite the fact that Ohio is an “open carry” state—so had it been a real, loaded gun, Crawford’s actions would have been perfectly legal.320 The white officer (who shot that black victim) had, some days earlier, attended a training on active shooter scenarios in which slides of the shooting aftermath at Sandy Hook Elementary School were shown, with the caption, “If not you, then who?”321 When police training mirrors military training, and fear becomes the primary motivator, bad outcomes are hardly surprising.

3. SWAT and Nonemergency Deployments

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

317 See id.
319 See id.
322 See BALKO, supra note 7, at 191–92.
323 See ACLU Report, supra note 22, at 3.
324 See Natasha Lennard, Arkansas Town’s Martial Law Plan, SALON (Jan. 29, 2013, 5:08 PM), http://www.salon.com/2013/01/29/arkansas_town_enacts_martial_law. In 2013, the police chief
armed police using military weapons and armor to carry out nonemergency tasks contributes to the sense that the line between the police and the military is becoming very thin.

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

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

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

B. Efforts to Curb the Escalating Militarization of Police

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

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

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

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

Only a handful of state legislatures have addressed militarized policing policies so far. In 2010, Maryland passed legislation requiring police to track and record all SWAT team raids. That law expired in 2014, although lawmakers intend to reintroduce it in 2015. The law required police to generate a report every six months that included information about each deployment, including the purpose, the type of warrant used, the arrests made, and the property seized. The results of that transparency were striking, since such data is usually not made public, if it is tracked at all. The Maryland data covering 2012 showed that SWAT teams were used 4.5 times each day, with one county responsible for over 500 deployments. About two-thirds of SWAT raids used dynamic entries and almost 90% were to execute search warrants, half of those for drugs. In a third of the raids, no arrests were made, and in 15% of them, no contraband was seized. The results from 2014 showed a 2.4% increase in SWAT deployments, with 93% for the purpose of carrying out search warrants. The other statistics remained relatively unchanged. Utah passed a similar bill in 2014 requiring police to track information and report annually on all tactical deployments. It includes requiring information on all injuries, including those to pets. Utah is also considering one of the boldest initiatives in the country to address state law governing any forcible entry. The bill would ban “no-knock” raids for the preservation of evidence and require the suppression of evidence obtained in violation of the “knock-and-announce” requirement. The Utah law would


349 See id.

350 See id.


352 See id.


354 See id.


356 See id.


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

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

361 Barnes v. Indiana, 946 N.E.2d 572, 574 (Ind. 2011).
363 *See supra* Part II; *see also* Pearson v. Callahan, 555 U.S. 223 (2009).
364 See Plumhoff v. Rickard, 134 S. Ct. 2012 (2014) (finding that numerous shots fired at fleeing vehicle was not violation of Fourth Amendment although qualified immunity would have foreclosed § 1983 suit because no clearly established law existed at time of incident regarding whether such force was reasonable).
365 *See supra* Part II.B for discussion of dissents in *Ankeny* and *Hudson* calling for exclusionary rule application to excessive force claims.
Citizens have come together to slow the militarization trends in their own cities and towns with limited success.\textsuperscript{367} In Keene, New Hampshire, where there is an active libertarian population, the public outcry over the city council’s proposal to take possession of a free BearCat from the 1033 Program stopped the acquisition for a time.\textsuperscript{368} Lenco’s sales manager predicted that Keene would eventually get one, saying: “We have Bearcats in 90 percent of the 100 or so largest cities in America. . . . This is going to happen. It has already happened. To resist now would be like saying police officers should scrap the Glock and go back to the revolver. It’s a fantasy.”\textsuperscript{369} He was right: Keene now has one.\textsuperscript{370} The citizens of Concord, New Hampshire, also fought against getting a BearCat and lost.\textsuperscript{371} The city’s application actually named the libertarians as a reason for needing one.\textsuperscript{372} While these attempts ultimately failed, they did raise awareness about the federal programs providing them and prompted dialogue about militarization. Additionally, the images broadcast from the Ferguson protests—showing tanks and snipers trained against civilians there—prompted citizens in two California towns to insist that their police departments return the MRAPs they received from the federal government.\textsuperscript{373} Such efforts should continue as more information becomes available about the ways in which police departments use such equipment.

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


\textsuperscript{368} See id.

\textsuperscript{369} Id. (internal quotation marks omitted).

\textsuperscript{370} See Cantú, supra note 11.


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


\textsuperscript{374} See ACLU Report, supra note 22, at 2.
enforcement and mandatory minimum sentences for drug felonies; efforts that should be expanded. Maryland and Utah are using transparency as a method to at least track SWAT raids, and it may prove effective; certainly, other states should follow suit. On the federal level, Hank Johnson’s bill may finally succeed, given the anger and awareness brought about by events in Ferguson, Missouri. However, while Johnson seeks only to limit the weapons provided by the 1033 Program, this Article makes the case that the 1033 Program is wholly unnecessary and primarily serves only to fuel militarization. DHS grants are similarly problematic and should be curtailed or ended. Moreover, those federal grants that tie funding to arrest statistics, like Byrne JAG grants, are unethical and dangerous and should also be ended. However, one of the most obstinate problems facing those who wish to demilitarize police is the corporate money flowing into Congress, as discussed in Part I.A. There are few regulations limiting campaign contributions because of recent Supreme Court decisions which leaves citizens vulnerable to the defense industry that can spend lavishly on contributions and lobbyists to ensure military gear keeps flowing to police departments through federal grants.

CONCLUSION

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


376 See Palmer & Sherman, supra note 337.

377 See Bosman & Williams, supra note 1.


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

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