

THE CONSTITUTION PROJECT



Safeguarding Liberty, Justice & the Rule of Law



Demilitarizing America's Police: *A CONSTITUTIONAL ANALYSIS*

**Demilitarizing
America's Police:**
A CONSTITUTIONAL ANALYSIS

**A Report of
The Constitution Project®
Committee on Policing Reforms**

August 2016

The Constitution Project® sponsors independent, bipartisan committees to address a variety of important constitutional issues and to produce consensus reports and recommendations. The views and conclusions expressed in Constitution Project reports, statements, and other material do not necessarily reflect the views of members of its Board of Directors or Board of Advisors.

Copyright © 2016 by The Constitution Project®. All rights reserved. No part may be reproduced, stored in a retrieval system, or transmitted, in any form, or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior permission of The Constitution Project.

For information about this report, or any other work of The Constitution Project, please visit our website at www.constitutionproject.org or e-mail us at info@constitutionproject.org.

Cover photograph: AFP Photo / Michael B. Thomas

THE CONSTITUTION PROJECT

COMMITTEE ON POLICING REFORMS

SIGNATORIES TO THE REPORT

Kami Chavis, Co-Chair

Professor of Law and Director of the Criminal Justice Program, Wake Forest University School of Law

James Trainum, Co-Chair

Criminal Case Review & Consulting; Detective, Metropolitan Police Department of DC, 1983-2010

Jeffrey Vagle, Co-Chair

Lecturer in Law and Executive Director, Center for Technology, Innovation and Competition, University of Pennsylvania Law School; Affiliate Scholar, Stanford Law School Center for Internet and Society

Stephen E. Abraham (LTC, USAR (Ret.))

Attorney, private practice; Lieutenant Colonel, Military Intelligence, United States Army Reserve (Ret.)

Azizah al-Hibri

Professor Emerita, The T.C. Williams School of Law, University of Richmond; Founder and Member, Board of Directors, KARAMAH: Muslim Women Lawyers for Human Rights

David E. Birenbaum

Of Counsel, Fried, Frank, Harris, Shriver & Jacobson LLP; Senior Scholar, Woodrow Wilson International Center for Scholars (2003-2010); US Ambassador to the UN for UN Management and Reform, 1994-1996; Assistant General Counsel to the National Advisory Commission on Civil Disorders, 1968

Chey M. Calvo

Chief Growth and Community Engagement Officer with Rocketship Education; Mayor, Berwyn Heights, MD (2004-2015)

Catherine Crump

Assistant Clinical Professor, Berkeley Law School; Associate Director, Samuelson Law, Technology & Public Policy Clinic

Sharon L. Davies

Gregory H. Williams Chair in Civil Rights and Civil Liberties and Director of the Kirwan Institute for the Study of Race and Ethnicity, The Ohio State University Moritz College of Law

Monique Dixon

Deputy Director of Policy and Senior Counsel, NAACP Legal Defense and Educational Fund

Michael German

Special Agent, Federal Bureau of Investigation, 1988-2004

Philip M. Giraldi

Contributing Editor for *The American Conservative Magazine*, *antiwar.com*, and *Campaign for Liberty*; Fellow, American Conservative Defense Alliance; former operations officer specializing in counter-terrorism, Central Intelligence Agency, 1975-1992; United States Army Intelligence

David A. Harris

Distinguished Faculty Scholar and Professor of Law, University of Pittsburgh School of Law

Kendra R. Howard

Immediate Past President, Mound City Bar Association, St. Louis, MO

Peter B. Kraska

Professor and Chair, School of Justice Studies, Eastern Kentucky University

Major General William L. Nash (U.S. Army, Ret.)

Visiting Lecturer in Public Affairs, Woodrow Wilson School of Public and International Affairs, Princeton University

Jamie Raskin

Professor of Law, American University Washington College of Law; Maryland State Senator and Senate Majority Whip

L. Song Richardson

Professor of Law, University of California, Irvine School of Law

William S. Sessions

Holland & Knight, LLP; former Director, Federal Bureau of Investigation; former Chief Judge, United States District Court for the Western District of Texas

Harry Shorstein

Shorstein & Lasnetski, LLC; Former State Attorney for the 4th Judicial Circuit of Florida

Neal R. Sonnett

Member, ABA Board of Governors, 2009-2012; Chair, ABA Section of Criminal Justice, 1993, and ABA Section of Individual Rights and Responsibilities, 2008-2009; President, American Judicature Society, 2006-2007; President, National Association of Criminal Defense Lawyers, 1989-1990; Assistant United States Attorney and Chief, Criminal Division, Southern District of Florida, 1967-1972

Norm Stamper

Chief, Seattle Police Department, 1994-2000; Executive Assistant Chief of Police, San Diego Police Department, 1966-1994

Geoffrey R. Stone

Harry Kalven, Jr., Distinguished Service Professor of Law, University of Chicago

John K. Van de Kamp

Counsel, Mayer Brown LLP; Former California Attorney General, 1983-1991; Former Los Angeles County District Attorney, 1975-1983; Federal Public Defender, Los Angeles, 1971-1975

Colby C. Vokey, Lt Col USMC (Ret.)

Attorney, Law Firm of Colby Vokey PC; U.S. Marine Corps., 1987-2008; Lieutenant Colonel; Lead Counsel for Guantanamo detainee Omar Khadr at Military Commissions, 2005-2007

John W. Whitehead

President and Founder, The Rutherford Institute; constitutional attorney; author of "Battlefield America: The War on the American People," the follow-up to his award-winning 2013 book, "A Government of Wolves: The Emerging American Police State."

Lawrence B. Wilkerson, Col, USA (Ret)

Distinguished Visiting Professor of Government and Public Policy at the College of William and Mary; former Chief of Staff to Secretary of State Colin Powell and special assistant to chairman of the Joint Chiefs of Staff, General Colin Powell

Hubert Williams

Past President, Police Foundation; former New Jersey Police Director; former Special Advisor to the Los Angeles Police Commission

Michael A. Wolff

Dean and Professor of Law, Saint Louis University School of Law; former Judge and Chief Justice of Supreme Court of Missouri

THE CONSTITUTION PROJECT STAFF

Larry Akey
Director of Communications

Jake Laperruque
Privacy Fellow

Lisa Banks
Vice-President,
Operations and Development

Scott Roehm
Vice-President,
Programs and Policy

Madhuri S. Grewal
Senior Counsel

Virginia E. Sloan
President

Katherine Hawkins
Senior Counsel

Sarah E. Turberville
Director, Justice Programs

David Janovsky
Program Assistant

Brian Yourish
Director of Administration

Table of Contents

Committee on Policing Reforms.....	iii
The Constitution Project Staff.....	v
A Note From The Constitution Project.....	2
Introduction.....	4
Background.....	5
Importance of Community-Oriented Policing to Solve and Prevent Crime.....	5
An Increasingly Militarized Police Culture Threatens Community-Oriented Policing.....	7
Federal Provision of Military Equipment.....	9
The Rise of Specialized Weapons and Tactics Teams (SWAT).....	11
The Impact of Militarization on Constitutional Rights and Protections.....	13
First Amendment Concerns.....	14
Fourth Amendment Concerns.....	16
Fourteenth Amendment Concerns.....	18
Recent Federal Reviews of Military Equipment Acquisition Programs.....	21
Conclusions and Recommendations.....	24

A NOTE FROM THE CONSTITUTION PROJECT

Bounkham “Bou Bou” Phonesavanh: 19 months old when a flashbang grenade was thrown into his crib.

Aiyana Stanley-Jones: 7 years old when she was killed by a SWAT team raid on the wrong home.

Annie Rae Dixon: 84-year-old bedridden paraplegic woman who was shot in the chest and killed during a police raid on the wrong home.

Michael Brown, Rekia Boyd, Eric Garner, Tamir Rice, and John Crawford: unarmed black children, men, and women killed by law enforcement.

The individuals listed above are just a small handful of those killed or severely wounded in high-profile encounters with law enforcement. In the last two years, communities across the country have engaged in demonstrations, debates, and discussions regarding the use of military equipment and tactics and use of force by state and local law enforcement. Today, our nation is paying special attention to our criminal justice system and the relationships between local communities—in particular, communities of color—and law enforcement.

In truth, this debate has been ongoing for some time. In the last decade, high-profile, paramilitary-style raids—during which children, the elderly, and innocent bystanders were killed—jarred our conscience. Although the spotlight has often been on Special Weapons and Tactics (SWAT) teams, additional concerns have arisen with the high use of military-grade equipment, especially during political protests.

Federal programs, such as the Department of Defense's 1033 program, have long made military-grade equipment available to local law enforcement. Such programs—currently undergoing critical reforms, as detailed further in this report—have led to a deeply troubling approach to policing: law enforcement officers often respond to protestors and unarmed individuals with escalated, military-style tactics and overuse of force.

In order to identify and address the constitutional, legal, and policy concerns implicated by these trends in American policing, The Constitution Project (TCP) convened a bipartisan Committee on Policing Reforms, comprising over thirty former and current law enforcement and military personnel, community members, legal scholars, and former judges, prosecutors, and defense attorneys. The wide range of the Committee's expertise ensures that the Committee's final, consensus-based recommendations can provide practical assistance to

policymakers and law enforcement agencies as they are revising federal, state, and local policies to emphasize building trust and strengthening the relationship between communities and police.

This report begins with a discussion on the current state of policing and the use of military equipment and tactics by state and local law enforcement. It focuses on the impact of militarization, not just on community policing, but also on constitutional rights and protections—with a focus on the First, Fourth, and Fourteenth Amendments. The Committee also addresses the impact of federal initiatives, from President Obama's Task Force on 21st Century Policing to the interagency Law Enforcement Equipment Working Group assigned to examine the federal government's military equipment acquisition programs.

The Committee and The Constitution Project owe extraordinary thanks to a number of individuals who helped make this report possible. First, we are so grateful to the law firm of Latham & Watkins LLP for its incredible support for this project. Notably, we thank attorneys Cameron Krieger and Catherine Sullivan, who were the primary legal and policy analysts for the report, and Michael Faris, who provided additional support. We also thank the following individuals, who provided support and feedback as the Committee researched, deliberated, and finalized its recommendations: Kayla Haran, Aisha Rahman, Louis Michael Seidman, Kanya Bennett, Jaspal Bhatia, Vincent Southerland, and former TCP interns Esha Kamboj, Rachel Brunswig, Yanbing Chu, Dylan Cowit, Paula Kates, John Myers, Stefan Ducich, Tessa Burman, and Benya Kraus.

We recognize that policing is not simply about crime; it is also about keeping the peace. This is why police officers are often also called “peace officers.” Policing is about building trust and legitimacy, and is tied to our perceptions of the criminal justice system, race and discrimination, and to our notions of fairness and due process. The Committee could not tackle all of these components in its report, but the discussion and recommendations touch upon these overarching themes. It is our hope that this report and its 25 recommendations will inform and guide federal, state, and local policymakers, law enforcement agencies, and legal and community advocates in building trust between communities and their law enforcement officers.

Sincerely,



Virginia E. Sloan
President
The Constitution Project
August 2016

INTRODUCTION

Our military's core function is to fight and deter foreign enemies, which often requires speed, surprise, and the use of specialized weapons and heavy artillery. Civilian police, in contrast, are meant to keep the peace and to protect local communities while safeguarding civil liberties. Regrettably, and to a dangerous degree, those lines are blurring.¹

High-profile encounters—many deadly—between law enforcement and community members in Ferguson, Baltimore, New York, Chicago, North Charleston, and elsewhere have renewed a public discussion around policing reforms and the troubling trend of police militarization. This trend has serious constitutional and public policy implications. An over-militarized police culture threatens our constitutional guarantees of free speech and freedom from unreasonable search and seizure. The use of military equipment often begets unnecessarily aggressive tactics and over-enforcement, which are more prevalent in communities of color and poor neighborhoods, and raises serious concerns about disparate treatment and constitutional deprivations in those communities in particular.²

From a policy perspective, the use of military equipment and tactics by law enforcement risks eroding public trust and poisoning the crucial, but often precarious, relationship between communities and local law enforcement. Indeed, militarization breeds an ethos of adventure over service; encourages the use of force over innovative and collaborative problem-solving; and inhibits the development of meaningful, sustainable partnerships between police and the people they serve.

The Constitution Project Committee on Policing Reforms believes that we must take steps to reverse this trend. While there are a variety of factors that contribute to police militarization, federal programs providing military equipment to state and local law enforcement greatly exacerbate the problem. Such programs—to the extent they provide military equipment or facilitate its acquisition³—must be severely curtailed due to those programs' corrosive impact on constitutional and community policing.

To its credit—as discussed in further detail in Section IV—the Obama administration has reviewed several federal programs that provide state and local governments with military equipment or facilitate its acquisition.⁴ The administration also conducted a review of effective policing strategies and has pushed for law enforcement agencies to commit to community policing models. In early 2015, a task force appointed by the President held several nationwide listening sessions and issued a report aimed at strengthening the relationship between local law enforcement and the communities that they serve.⁵ The Department of Justice (“DOJ”) has also published practical guidance in implementing

¹ See RADLEY BALKO, CATO INST., *OVERKILL: THE RISE OF PARAMILITARY POLICE RAIDS IN AMERICA* 15 (2006), http://object.cato.org/sites/cato.org/files/pubs/pdf/balko_whitepaper_2006.pdf.

² See Kami Chavis Simmons, *Future of the Fourth Amendment: The Problem with Privacy, Poverty and Policing*, 14 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 240, 257–58 (2015) (reporting that “aggressive tactics are typically reserved for traditionally disadvantaged or marginalized members of society, and there is an overwhelming consensus that minorities experience a greater rate of police brutality and misconduct”); see also Amelia L. Diedrich, *Secure in Their Yards? Curtilage, Technology, and the Aggravation of the Poverty Exception to the Fourth Amendment*, 39 HASTINGS CONST. L.Q. 297, 317 (2011), <http://www.hastingsconstlawquarterly.org/archives/V39/11/Diedrich.pdf>; Brett G. Stoudt et al., *Growing Up Policed in the Age of Aggressive Policing Policies*, 56 N.Y.L. SCH. L. REV. 1331, 1347–48 (2011–12), http://www.nyslawreview.com/wp-content/uploads/sites/16/2012/04/56-4_Growing-up-Policed-in-the-Age-of-Aggressive-Policing-Policies.Stoudt-Fine-Fox.pdf.

³ See 10 U.S.C. § 2576a (1996) (amended 2015). The 1033 Excess Property Program also permits the transfer of other types of equipment, such as standard office supplies, routine administrative items, and the like. This report takes no position on the provision of such items through the program.

⁴ EXEC. OFFICE OF THE PRESIDENT, REVIEW: FEDERAL SUPPORT FOR LOCAL LAW ENFORCEMENT EQUIPMENT ACQUISITION 2 (2014), https://www.whitehouse.gov/sites/default/files/docs/federal_support_for_local_law_enforcement_equipment_acquisition.pdf [hereinafter FEDERAL REVIEW].

⁵ See PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING (2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf [hereinafter FINAL TASK FORCE REPORT].

the task force's recommendations.⁶ The administration's efforts have resulted in a number of recommendations for reform that we applaud.⁷ However, we believe that more must be done to address the substantial constitutional and public policy concerns described in this report, which stem from the use of military equipment and tactics in local communities.

BACKGROUND

Importance of Community-Oriented Policing to Solve and Prevent Crime

Community policing is a holistic approach to policing that emphasizes partnerships between law enforcement and the communities they serve in order to address problems that jeopardize public safety.⁸ The community policing approach developed in the late 1960s and 1970s in response to the then-dominant mode of policing, which focused on rapid responses to calls and randomized patrol patterns that frayed the relationship between the police and the public.⁹ Throughout the 1970s and into the 1980s, a series of empirical studies in jurisdictions across the country highlighted the weaknesses of this model and showed that new practices, such as giving officers the chance to know their beat, often by patrolling on foot, and focusing on problem-solving rather than reaction, enhanced police-community relationships and reduced citizens' fear of crime.¹⁰

Broad consensus around the community policing model solidified in 1994 with the creation of the DOJ's Office of Community Oriented Policing Services ("COPS Office"), which provides state and local police departments with funding, training, and technical assistance.¹¹ Community policing continues to be advanced as a best practice for the field. As currently defined by the COPS Office, community policing has three central components. The first is "community partnerships," which emphasizes that law enforcement must work with stakeholders, including individuals, community groups, private sector and non-profit organizations, and the media.¹² The second component, "organizational transformation," seeks to institutionalize the community policing approach through the structure and management of

⁶ PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, IMPLEMENTATION GUIDE 5–7 (2015), http://www.cops.usdoj.gov/pdf/taskforce/Implementation_Guide.pdf [hereinafter IMPLEMENTATION GUIDE].

⁷ See *id.* at 6; LAW ENF'T EQUIP. WORKING GRP., RECOMMENDATIONS PURSUANT TO EXECUTIVE ORDER 13688 FEDERAL SUPPORT FOR LOCAL LAW ENFORCEMENT EQUIPMENT ACQUISITION (2015), https://www.bja.gov/publications/LEEWG_Report_Final.pdf [hereinafter WORKING GROUP REPORT].

⁸ See OFFICE OF CMTY. ORIENTED POLICING SERVS., DOJ, COMMUNITY POLICING DEFINED 1 (2014), <http://ric-zai-inc.com/Publications/cops-p157-pub.pdf>.

⁹ See BUREAU OF JUST. ASSISTANCE, DOJ, UNDERSTANDING COMMUNITY POLICING: A FRAMEWORK FOR ACTION 6 (1994), <https://www.ncjrs.gov/pdffiles/commpp.pdf>. Note that many of the issues we are currently facing—nor the commissions convened and reports studying these issues—are not new in the United States. For example, in 1967, President Lyndon B. Johnson established by Executive Order the National Advisory Commission on Civil Disorders (commonly known as the "Kerner Commission"). The Commission was established in the wake of race riots in Detroit, Newark, Chicago, Los Angeles (known as the Watts riots), and elsewhere. The Commission's extensive report, published as a book, highlighted segregation, poverty, and a "double standard" of justice and protection by law enforcement in black communities. The Commission's report and recommendations were premised on one basic conclusion: "Our Nation is moving toward two societies, one black, one white – separate and unequal." See REPORT OF THE NAT'L ADVISORY COMM'N (1968).

¹⁰ *Id.* at 8–11 (citing JOHN E. BOYDSTUN & MICHAEL E. SHERRY, WASH., D.C.: POLICE FOUND., SAN DIEGO COMMUNITY PROFILE: FINAL REPORT 83 (1975); JOHN E. ECK & WILLIAM SPELMAN, WASH., D.C.: POLICE EXEC. RESEARCH FORUM., PROBLEM SOLVING: PROBLEM-ORIENTED POLICING IN NEWPORT NEWS 81, 99 (1987); GEORGE L. KELLING, WASH., D.C. POLICE FOUND., THE NEWARK FOOT PATROL EXPERIMENT 94–96 (1981)); see also Tom R. Tyler et al., *The Impact of Psychological Science on Policing in the United States*, 16 PSYCHOL. SCI. PUB. INT. 75 (2015), <http://psi.sagepub.com/content/16/3/75.full?ijkey=K4TMB6I54mRKU&keytype=ref&siteid=spps> (finding that increasing legitimacy of police, through opportunities for community involvement in policing policies and receiving respectful implementation of those policies, has an impact on reducing crime).

¹¹ OFFICE OF CMTY. ORIENTED POLICING SERVS., <http://www.cops.usdoj.gov/default.asp?Item=35> (last visited Feb. 3, 2016).

¹² See COMMUNITY POLICING DEFINED, *supra* note 8, at 2–3.

police agencies.¹³ The idea of organizational transformation emphasizes several components directly relevant to this report. For instance, successful organizational transformation requires: a “climate and culture” that promotes “problem solving and partnerships;” transparency so that the community can be fully engaged in decision-making; recruitment that focuses on service rather than on adventure; and training that reinforces the community policing approach.¹⁴ Finally, the third component of community policing, “problem solving,” emphasizes analysis and innovative thinking to address underlying problems, rather than overreliance on arrests as a tool to promote public safety.¹⁵

In December of 2014, President Obama issued an executive order appointing an 11-member Task Force on 21st Century Policing (“Task Force”) to “identify best policing practices and offer recommendations on how those practices can promote effective crime reduction while building public trust.”¹⁶ The Task Force issued its final report in May 2015, setting forth 59 recommendations and 92 action items. In the report, the Task Force features community policing as one of six “pillars” and calls for community policing principles to inform police policies, organization, and partnerships.¹⁷ In July 2015, the White House and the DOJ convened a Forum on Community Policing for representatives from jurisdictions across the country to review plans for implementation of the Task Force’s recommendations. Participants in the forum requested guidance on implementing the recommendations and suggestions for immediate and concrete action. In October of that year, the DOJ then issued an Implementation Guide to help communities, law enforcement, and local governments implement recommendations from the final report. The DOJ subsequently announced a six-city tour to highlight jurisdictions that had begun implementing the Task Force report recommendations.¹⁸ Most recently, the DOJ created an online interactive map that “features implementation efforts of stakeholders across the country that are turning Task Force recommendations into action.”¹⁹

The Task Force makes clear that law enforcement agencies should “shift from a warrior to a guardian culture of policing” and emphasize community policing.²⁰ We agree with the Task Force that “community policing not only improves public safety but also enhances social connectivity and economic strength, which increases community resilience to crime” and “improves job satisfaction for line officers.”²¹

¹³ *Id.* at 4.

¹⁴ *Id.* at 5–8.

¹⁵ *Id.* at 10.

¹⁶ FINAL TASK FORCE REPORT, *supra* note 5, at iii.

¹⁷ *Id.* at 43–46. Notably, the report has only one major recommendation (Recommendation 2.7) expressly on the use of military equipment and tactics; this recommendation focuses on policing and de-escalation techniques during mass demonstrations. *See id.* at 25.

¹⁸ *See* IMPLEMENTATION GUIDE, *supra* note 7; *see also* Press Release, Office of Cmty. Oriented Policing Servs., Department of Justice Announces New Guidebook on 21st Century Policing (Oct. 27, 2015), <http://www.cops.usdoj.gov/Default.asp?Item=2828>.

¹⁹ *See Task Force Recommendations Implementation Map*, OFFICE OF CMTY. ORIENTED POLICING SERVS., <http://www.cops.usdoj.gov/Default.asp?Item=2827> (last visited Feb. 3, 2016). Shortly before this report was final, the Task Force released a one-year report with updates regarding its implementations. *See* PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, ONE-YEAR PROGRESS REPORT (2016), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf. [hereinafter PROGRESS REPORT].

²⁰ IMPLEMENTATION GUIDE, *supra* note 7, at 24.

²¹ FINAL TASK FORCE REPORT, *supra* note 5, at 41. In accordance with the Task Force recommendations, training initiatives to overcome officer bias have been implemented in police departments across the country to promote community policing, such as in New Orleans, Los Angeles, and Seattle. Though departments are “generally supportive” of the training, it is not universally endorsed. One officer noted that the bias training “ran counter to their academy training,” during which officers are told to “not talk to people unless they called you” rather than have “positive interactions with people to help overcome bias.” Matt Zapotsky, *In Push to Reform Police Work, Officers Examine Their Own Biases*, WASH. POST (Jan. 6, 2015), https://www.washingtonpost.com/local/public-safety/in-push-to-reform-police-work-officers-examine-their-own-biases/2016/01/06/b196ab66-a361-11e5-9c4e-be37f66848bb_story.html.

An Increasingly Militarized Police Culture Threatens Community-Oriented Policing

The framers of the Constitution understood well the importance of maintaining separation of the military and civilians. Indeed, in the Declaration of Independence Thomas Jefferson lamented that the English military in the colonies had become “independent of and Superior to the Civil Power,” which served as a cornerstone of the indictment against the English crown.²² Article I of the Constitution details the primacy of legislative control over military spending, organization, and discipline. Article II clearly subordinates the military to a civilian Commander in Chief. Finally, the Third Amendment to the Constitution—which prohibits the quartering of troops in private residences during times of peace and war—reflects the framers’ aversion to a standing army and their intent to guard against abuses that professional soldiers could perpetrate.²³ “Soldiers are apt to consider themselves as a Body distinct from the rest of the Citizens,” Samuel Adams said.²⁴ “Men who have been long subject to military Laws and inured to military Customs and Habits, may lose the Spirit and Feeling of Citizens.”²⁵

The militarization of police today presents these same risks.²⁶ Law enforcement officers’ ability to perform their jobs effectively depends in large measure on the degree of trust they develop and the extent and nature of their communication with the communities they serve. The more that military equipment, tactics, and culture infiltrate police departments, the more officers risk developing a combat mindset and the harder community-based policing becomes.

Unfortunately, but not surprisingly, police militarization is a slippery slope. Police might have a legitimate need to use some military equipment and tactics in truly exceptional circumstances to keep the peace and protect the public. For example, the use of a Specialized Weapons

[T]raining police like military personnel contributes to the ethos that. . . communities they are meant to protect are war zones.

²² The Declaration of Independence para. 14 (U.S. 1776).

²³ The Posse Comitatus Act reflects a similar concern. Enacted in 1878, it establishes a presumption that members of the military will not engage in law enforcement. See Posse Comitatus Act, ch. 236, § 15, 20 Stat. 145, 152 (1878) (current version at 18 U.S.C. § 1385 (2012)). However, since the 1980s, a series of laws, orders, and directives from Congress and the White House has overcome the presumption embedded in the Act, allowing indirect assistance to local law enforcement through the sharing of information, equipment, and training. See, e.g., Military Support for Civilian Law Enforcement Agencies, 10 U.S.C. §§ 371–74 (2012) (authorizing the military to assist civilian police by making available military equipment and research facilities and providing training on their use); see also EXEC. OFFICE OF THE PRESIDENT, NAT’L SEC. DECISION DIRECTIVE, NARCOTICS AND NATIONAL SECURITY (1986) (wherein President Reagan declared drugs a threat to U.S. “national security” and issued a directive to allow for more cooperation between law enforcement agencies and the military); National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100–456, 102 Stat. 1918 (1988) (ordering the National Guard to assist law enforcement agencies in drug enforcement efforts, contributing to the militarization of law enforcement agencies).

²⁴ Letter from Samuel Adams to James Warren, General, Massachusetts Militia (1776), <http://www.samuel-adams-heritage.com/documents/samuel-adams-to-james-warren-1776.html>.

²⁵ *Id.*

²⁶ Although we focus in this report on federal programs providing military equipment to state and local law enforcement, those programs are not the only source of militarization. For example, a study conducted by criminologist Peter Kraska revealed that 46 percent of the paramilitary police units he surveyed in the 1990s were trained by current or former members of a military Special Forces unit. Peter B. Kraska & V. E. Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, 44 Soc. PROBS. 1, 11 (1997); see also Peter B. Kraska & Louis J. Cubellis, *Militarizing Mayberry and Beyond: Making Sense of American Paramilitary Policing*, 14 JUST. Q. 607 (1997). Often, local law enforcement recruiters heavily employ images of SWAT or other tactical units in a military-like setting rather than focusing on the day-to-day aspects of community policing. See Matthew Harwood, *How Did America’s Police Get So Heavily Militarized?*, MOTHER JONES (Aug. 14, 2014), <http://www.motherjones.com/politics/2014/08/america-police-military-swat-ferguson-westcott-tampa> (noting that police recruiting videos “actively play up not the community angle but militarization as a way of attracting young men with the promise of Army-style adventure and high-tech toys. Policing, according to recruiting videos like these, isn’t about calmly solving problems; it’s about you and your boys breaking down doors in the middle of the night.”). Even police uniforms seem to reflect a more militarized approach; many non-tactical police officers now wear tactical equipment and weapons attached to their uniforms.

and Tactics (“SWAT”) team or military-grade vehicles might be appropriate in response to an active shooter.²⁷

However, in practice, military tactics and equipment have permeated everyday police work to an alarming degree. Often acquired on the basis of a claim that it is necessary to safeguard against terrorism and threats to national security, the military equipment flowing through federal programs is far more often used by local law enforcement to serve routine search warrants or to police First Amendment-protected protests. This trend is furthered by “[f]ederal grants, surplus equipment handed out by the military and seizure laws that allow police departments to keep much of what their special units take in raids, . . . even in the face of plummeting crime figures.”²⁸

While the justification for these programs is that they better allow police officers to do their jobs, some law enforcement personnel recognize that donning military-grade gear and using military vehicles to carry out their duties in local communities and homes might have the opposite effect.²⁹ According to a former police chief, outfitting officers with military equipment while emphasizing the combative nature of the job “feeds a mindset that you’re not a police officer serving a community, you’re a soldier at war.”³⁰ Officers acknowledge the likelihood that equipping and training police like military personnel contributes to the ethos that the very communities they are meant to protect are “war zone[s].”³¹

This adversarial mentality is inconsistent with the intended purpose of local police work.

Take, for example, the story of Hope Harper, a resident of Albuquerque, New Mexico, who called the Albuquerque police one night to help find her husband Larry Harper. Mr. Harper had recently relapsed from his drug treatment and had left the house with a gun after telling his family that life was no longer worth living. In response to Mrs. Harper’s call, the Albuquerque police deployed a paramilitary unit comprising nine men in camouflage armed with automatic rifles and stun grenades. The last words Mrs. Harper heard the SWAT team say as they began their search were, “Let’s go get the bad guy.” That night, officers chased Mr. Harper through the woods, found him cowering behind a tree, and shot him to death from 43 feet away.

²⁷ Julie Turkewitz & Jack Healy, 3 Are Dead in Colorado Springs Shootout at Planned Parenthood Center, N.Y. TIMES (Nov. 27, 2015), http://www.nytimes.com/2015/11/28/us/colorado-planned-parenthood-shooting.html?_r=0 (noting that a BearCat armored vehicle was used by law enforcement to rescue those trapped inside a building during the mass shooting).

²⁸ Timothy Egan, *Soldiers of the Drug War Remain on Duty*, N.Y. TIMES (Mar. 1, 1999), <http://www.nytimes.com/1999/03/01/us/soldiers-of-the-drug-war-remain-on-duty.html?pagewanted=all>.

²⁹ Balko, *supra* note 1, at 16 (noting one police chief expressing a common fear that military gear and training “paints civilians as the enemy in the eyes of police officers”); see also *id.* at 14 (“We’ve had teams of Navy SEALs come here and teach us everything. We just have to use our own judgment and exclude the information like: ‘at this point we bring in the mortars and blow the place up.’”); see also Morgan True, *Burlington Police Commissioner Disturbed by Masks on Officers*, VTDIGGER (Jan. 27, 2016), <https://vtdigger.org/2016/01/27/burlington-police-commissioner-disturbed-by-masks-on-officers/> (Burlington, Vermont Police Commissioner stating that the new trend of police officers wearing military-grade balaclavas “sends the wrong message”).

³⁰ Balko, *supra* note 1, at 16.

³¹ *Id.*; see also Anna Stolley Persky, *Policing the Police*, WASH. LAW., (Jan. 2016), <https://www.dcb.org/bar-resources/publications/washington-lawyer/articles/january-2016-reviewing-law-enforcement.cfm> (discussing the rise of militarization during the war on drugs).

Federal Provision of Military Equipment

For years, the federal government has directly and indirectly provided state, local, and tribal law enforcement with military equipment and the funding to acquire it.³² Several federal agencies administer such programs, including the Departments of Defense (“DOD”), Justice, Treasury, Homeland Security (“DHS”), and the Office of National Drug Control Policy. For example, the DOD’s 1033 program—named after the section of the 1997 legislation that authorized it—permits the Defense Secretary to transfer excess military-grade equipment to local law enforcement at no cost to the recipients.³³ The DOJ’s Edward Byrne Memorial Justice Assistance Grant (“Byrne-JAG”) Program—which was originally focused on drug policing—provides federal money to local law enforcement, a portion of which is used to purchase SWAT-related items and explosive devices.³⁴ Other programs, such as the DOJ’s Equitable Sharing Program and the Department of Treasury’s Forfeiture Fund’s Equitable Sharing Program, permit the transfer of forfeited assets and funds to local law enforcement agencies, allowing law enforcement an additional means to purchase firearms, vehicles, and other equipment.³⁵

Between 2009 and 2014, the federal government supported these equipment and purchasing programs to the tune of \$18 billion.³⁶ As a result, state and local law enforcement agencies have acquired a wide range of military-grade weapons and vehicles, including airplanes, armored Humvees, and automatic assault rifles.³⁷

The DOD’s 1033 program is one of the leading examples of such federal programs that—until 2015³⁸—operated virtually unchecked. As of March 2014, the DOD reported that, since the 1033 program’s inception, it had distributed over \$4.2 billion in excess property, including equipment such as Mine-Resistant Ambush Protected Vehicles (“MRAPs”), Humvees, and firearms.³⁹ Equipment has found its way into kindergarten through grade 12 (“K-12”) schools and universities nationwide: some school districts have received M-16 rifles, MRAPs, and other military equipment and supplies through the 1033 program.⁴⁰ The state of Arizona has received 29 armored personnel carriers, nine military helicopters, nearly 800 M-16 automatic rifles, more than 400 bayonets, and more than 700 pairs of night-vision goggles.⁴¹ The small town of Morven, Georgia—a mere 1.7 square miles—has also amassed enough

³² WORKING GROUP REPORT, *supra* note 6, at 6. According to the Working Group, the equipment available through the programs ranges from standard office supplies and administrative items (e.g., desks or computers) to weapons and military or “military-style” equipment (e.g., firearms, ammunition, and tactical vehicles); see also 10 U.S.C. 2576a (1996) (amended 2015).

³³ For purposes of this report, the focus will be on weapons, vehicles, and other tactical military equipment that is allocated to local law enforcement. Surplus equipment provided under the 1033 program also includes items like electrical wire, office supplies, and clothing. See Lindsey Cook, *Most Popular Items in the Defense Department’s 1033 Program*, U.S. NEWS & WORLD REP. (Aug. 21, 2014), <http://www.usnews.com/news/blogs/data-mine/2014/08/21/most-popular-items-in-the-defense-departments-1033-program>; see also WORKING GROUP REPORT, *supra* note 6, at 48.

³⁴ WORKING GROUP REPORT, *supra* note 6, at 48–49. Recipients of Byrne-JAG grants are required to provide performance metrics, which some critics have argued place pressure on local police to increase arrest volumes at the expense of community policing. See Spencer Woodman, *Shocking Police Overreach Haunts Southern City*, SALON (Apr. 10, 2014), http://www.salon.com/2014/04/10/shocking_police_overreach_haunts_southern_city_racial_profiling_quotas_and_secret_%E2%80%9Cconviction_bonuses%E2%80%9D/.

³⁵ WORKING GROUP REPORT, *supra* note 6, at 48–49.

³⁶ FEDERAL REVIEW, *supra* note 4, at 3.

³⁷ See Matt Apuzzo, *War Gear Flows to Police Departments*, N.Y. TIMES (June 9, 2014), <http://www.nytimes.com/2014/06/09/us/war-gear-flows-to-police-departments.html>.

³⁸ See discussion *infra* Section IV.

³⁹ DEF. LOGISTICS AGENCY, FISCAL YEAR 2015 BUDGET ESTIMATES 5 (Mar. 2014), http://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2015/budget_justification/pdfs/01_Operation_and_Maintenance/O_M_VOL_1_PART_1/DLA_PB15.pdf.

⁴⁰ Nate Carlisle, *Granite District Using Military M-16s to Defend Schools*, SALT LAKE TR., (Feb. 23, 2014), <http://www.sltrib.com/sltrib/mobilemobileopinion/57563036-82/police-johnson-rifles-granite.html.csp>.

⁴¹ Camaron Stevenson, *Arizona Has More Military Gear than Some Small Countries*, ARIZ. CAPITOL TIMES (Sept. 30, 2014), <http://azcapitoltimes.com/news/2014/09/30/arizona-military-equipment-more-than-some-small-countries/>.

military equipment to garner national attention. With a population of fewer than 600 people, Morven had received over \$4 million worth of military equipment by 2013, despite having very little crime. The police chief formed a SWAT team with the surplus equipment, which included a Humvee, an armored personnel carrier, and a shipment of bayonets. The town also acquired boats and scuba gear to form a dive team, despite the fact that Morven is not near a body of water deep enough to use such gear. The Morven police chief stated that with the equipment the town has received through the 1033 program, he could “shut this town down” and “completely control everything.”⁴²

And yet, recipients of such equipment—even in massive quantities—have historically been subject to little federal oversight. Under the 1033 program, law enforcement agencies submit requests for equipment through state coordinators designated by the governor.⁴³ There is no federal requirement for state or local lawmakers to approve transfers,⁴⁴ although—as detailed in Section IV—recent policy changes encourage approval from the jurisdiction’s civilian governing body, such as the city council or mayor.⁴⁵ Moreover, until recently, recipients needed only conduct an annual equipment inventory and report back through their state coordinators to the DOD.⁴⁶ According to a White House review from December 2014, “because [the] DOD does not have expertise in civilian law enforcement operations and cannot assess how equipment is used in the mission of an individual [law enforcement agency (LEA)], [the] DOD relies upon State Coordinators . . . to review and approve the particular types of equipment requested by LEAs, and upon LEAs to determine the appropriate use for that equipment.”⁴⁷

The 1033 program state coordinators are often local police officers charged with reviewing the applications of their peers, which can lead to those applications being accepted at face value. For example, Arizona employed a police detective as a state coordinator who has stated that he relies on the applying local agencies to “self-report.”⁴⁸ In Keene, New Hampshire, a town of less than 24,000 people, the local police department received funds through the DHS grant program to purchase an armored personnel carrier by stating the vehicle was necessary to protect against potential acts of terror. A Keene city councilperson said the application mentioned terrorism because “that’s just something you put in the grant application to get the money. What red-blooded American cop isn’t going to be excited about getting a toy like this?”⁴⁹

Officials in many states have openly acknowledged the ease with which local law enforcement agencies have been able to acquire military equipment, even in small towns like Morven, Georgia or Keene, New Hampshire where the need for such equipment may be unclear. An increasing number of state and local law enforcement officials are concerned that the detrimental effects military weapons and

⁴² *AP Impact: Little Restraint in Military Giveaways*, ASSOCIATED PRESS (July 31, 2013), <http://www.npr.org/templates/story/story.php?storyId=207340981>.

⁴³ FEDERAL REVIEW, *supra* note 4, at 7.

⁴⁴ Jake Grovum, *Can States Slow the Flow of Military Equipment to Police*, STATELINE (Mar. 24, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/3/24/can-states-slow-the-flow-of-military-equipment-to-police>.

⁴⁵ See WORKING GROUP REPORT, *supra* note 6, at 26 (Recommendation 3.1); see also LAW ENF’T EQUIP. WORKING GRP., IMPLEMENTATION OF RECOMMENDATIONS: FEDERAL SUPPORT FOR LOCAL LAW ENFORCEMENT ACQUISITION 3 (2015), http://www.nccpsafety.org/assets/files/library/LEEWG_ExecOrder13688_ImplementationPlan_Oct2015.pdf.

⁴⁶ WORKING GROUP REPORT, *supra* note 6, at 7.

⁴⁷ *Id.*

⁴⁸ Sarah Ruf, *ACLU Knocks PSCO on Surplus Use*, COPA MONITOR (June 27, 2014), http://www.copamonitor.com/news/local/article_c95a12be-fe27-11e3-9714-0019bb2963f4.html.

⁴⁹ AM. CIVIL LIBERTIES UNION, WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING 26 (2014), <https://www.aclu.org/sites/default/files/assets/jus14-warcomeshome-report-web-rel1.pdf> [hereinafter ACLU REPORT].

tactics have on community policing outweigh the benefits of federal equipment programs.⁵⁰ One state legislator referred to media images of a militarized police force confronting community members as “pictures that just shock the conscience.”⁵¹ In an effort to rein in the militarization of state and local law enforcement, the federal government and lawmakers in several states are attempting to impose oversight and limit the scope of such programs, as discussed in further detail in Section IV.⁵²

The Rise of Specialized Weapons and Tactics Teams (SWAT)

The increased development and deployment of SWAT teams is a manifestation of the influence of military ideology on local policing.⁵³ SWAT teams were originally conceived with a narrow purpose: to address serious violent emergency situations such as hostage taking, bank robberies, and acts of terrorism.⁵⁴ However, when money and equipment became increasingly available to support these teams, their use spread quickly. As the “War on Drugs” escalated in the 1980s, the number of SWAT teams ballooned.⁵⁵ By the late 1990s, 90% of all cities with populations over 50,000 and 65% of cities with 25,000–50,000 residents had a SWAT team.⁵⁶ Today, towns with just a few thousand people boast SWAT teams.⁵⁷ As the number of SWAT teams grew, so did their workload—the use of SWAT teams from 1980 to 2000 increased by approximately 1,400%.⁵⁸ Unfortunately, these decades-old survey data are the best available because no government agencies collect comprehensive data on the proliferation of SWAT teams nationwide.⁵⁹

As SWAT teams became ubiquitous, their role in police work changed. They were used less in the emergency or “high risk” scenarios for which they were intended and employed instead for routine police work like executing search warrants, particularly in search of drugs. According to a recent study canvassing law enforcement agencies in more than 25 states, 79% of SWAT deployments in 2011 and 2012 were “for the purpose of executing a search warrant, most commonly in drug investigations.”⁶⁰ Only 7% of SWAT deployments were for hostage, barricade, or active shooter situations.⁶¹ Federal anti-drug funding facilitated this shift.

...the use of SWAT teams from 1980 to 2000 increased by approximately 1,400%

⁵⁰ Grovum, *supra* note 49.

⁵¹ *Id.*

⁵² *Id.*

⁵³ See Kraska & Cubellis, *supra* note 26, at 619.

⁵⁴ Radley Balko, *Our Militarized Police Departments*, REASON (July 2, 2007), <https://reason.com/archives/2007/07/02/our-militarized-police-departm/>.

⁵⁵ Karl Bickel, *Will the Growing Militarization of Our Police Doom Community Policing?*, CMTY. POLICING DISPATCH (Dec. 2013), http://cops.usdoj.gov/html/dispatch/12-2013/will_the_growing_militarization_of_our_police_doom_community_policing.asp (noting that SWAT teams proliferated in the 1960s in Los Angeles, California as part of the law enforcement response to the Watts riots).

⁵⁶ Balko, *supra* note 1, at 9.

⁵⁷ *Id.*

⁵⁸ Peter Kraska, *Militarization and Policing—Its Relevance to 21st Century Police*, 1 POLICING 501, 506 (2007).

⁵⁹ ACLU REPORT, *supra* note 54, at 29.

⁶⁰ *Id.* at 5.

⁶¹ *Id.*

An investigation by the Madison Capital Times found, for example, that the federal government provided money to Wisconsin for drug control, a portion of which the state's Office of Justice Assistance then dispersed on the basis of each department's number of drug arrests, which incentivized the mobilization of SWAT resources to conduct routine drug searches.⁶²

The normalization of the use of SWAT teams in everyday policing has been accommodated by a lack of oversight of local law enforcement. A recent study that uncovered SWAT teams' inappropriate and excessive use attributed the trend in part to a "lack of clear and legitimate standards" for what constitutes a "high-risk" scenario.⁶³ While there may be search warrant situations that merit the use of military equipment and tactics, the basis for classifying warrants as high-risk in many cases appears unsupported. Often, warrants can be issued on the minimally corroborated word of anonymous informants.⁶⁴ The aforementioned study found that guns were located in only a third of the searches in which police officers claimed the presence of guns warranted SWAT.⁶⁵ In the absence of clear guidance from the courts, the decision to send SWAT to execute a warrant is often at the unfettered discretion of local law enforcement,⁶⁶ which risks resulting in unnecessary and unwarranted deployments.

Even with numerous policy changes at the federal and state level, **the ubiquity and lack of oversight of SWAT teams continue to be exploited.** Take, for example, the phenomenon of "SWATting"—a potentially deadly hoax in which an individual falsely reports a murder or violent attack to dispatch a SWAT team to a target's home. According to one FBI agent tracking this phenomenon, SWATters mimic their targeted victim, with the goal being to "incite fear and intimidation into the person that they're SWATting."⁶⁷ SWATting can be traced back to 2002 and continues to be a problem for law enforcement and communities, though the FBI does not keep statistics on SWATting and has not yet determined which division of the Bureau has jurisdiction over the crime.⁶⁸ One detective describes the potentially

“Guys are thinking: This is it. This is what we’ve been trained for This is why we get this tactical equipment. This is why we have a BearCat [and] armor and rifles.”

⁶² Steven Elbow, *Hooked on SWAT: Fueled with Drug Enforcement Money, Military-Style Police Teams Are Exploding in the Backwoods of Wisconsin*, MADISON CAP. TIMES (Aug. 18, 2001), http://host.madison.com/ct/news/local/writers/steven_elbow/hooked-on-swat/article_f1bc13e6-b29b-5ab0-a7cf-ba46b1b3860c.html.

⁶³ ACLU REPORT, *supra* note 52, at 32.

⁶⁴ See Peter F. Mullaney, *Finding Probable Cause in an Informant's Tip*, 68 MARQ. L. REV. 314, 314 (1985); see also *United States v. Ritter*, 416 F.3d 256, 263 (3rd Cir. 2005) (information supplied by an anonymous tipster was held to be enough to establish probable cause, as defined in *Illinois v. Gates*, 462 U.S. 213, 236 (1983), because the officer had "previous experience with the property in question," even though he "made no attempt to verify the informant's allegations through further independent investigation"). *But see United States v. Wilhelm*, 80 F.3d 116, 121–22 (4th Cir.1996) (affidavit based solely on uncorroborated anonymous tipster's word was not enough for probable cause); *United States v. Weaver*, 99 F.3d 1372, 1380 (6th Cir.1996) (officer's lack of personal knowledge of unlawful activity, failure to conduct visual reconnaissance of the area, and possession only of third-party hearsay was not enough for probable cause).

⁶⁵ ACLU REPORT, *supra* note 54, at 33 (weapons found in only 35% of searches where police had predicted weapons would be found).

⁶⁶ Balko, *supra* note 1, at 35 (virtually all no-knock warrants issued in a seven-month period in Denver were issued based only on a police assertion that the search could be dangerous; some judges issued no-knock warrants even though police asked for a regular warrant).

⁶⁷ Simone Wilson, *SWATting, a Deadly Political Game*, L.A. WEEKLY (Nov. 8, 2012), <http://www.laweekly.com/news/swatting-a-deadly-political-game-2612022>.

⁶⁸ Jason Fagone, *The Serial Swatter*, N. Y. TIMES MAG. (Nov. 24, 2015), <http://www.nytimes.com/2015/11/29/magazine/the-serial-swatter.html>.

deadly prank as an easy exploitation of the overuse of military equipment and tactics by many law enforcement agencies, stating, “Guys are thinking: This is it. This is what we’ve been trained for . . . This is why we get this tactical equipment. This is why we have a BearCat [and] . . . armor and rifles.”⁶⁹

The dangers associated with over-deployment of SWAT teams are exacerbated by SWAT teams’ use of “no-knock” warrants—warrants issued by a judge or magistrate that allow entry into a home by law enforcement officers without notice prior to entry—which themselves lack clear standards. When they operate this way, SWAT teams can actually increase the danger to law enforcement and community members, rather than decrease it.⁷⁰ No-knock warrants are typically executed at times when people are likely to be asleep, and police too often use devices such as flash bang grenades and battering rams to increase the element of surprise.⁷¹ These tactics can confuse and frighten the inhabitants of a home, who are awakened by a storm of what appear to be heavily armed soldiers. **Today, 85% of SWAT operations target private homes⁷² and result in a significant number of tragic deaths and injuries of both law enforcement officers and community members, including infants and young children.⁷³**

THE IMPACT OF MILITARIZATION ON CONSTITUTIONAL RIGHTS AND PROTECTIONS

In September 2015, the DOJ published the findings of its investigation into the police response to the protests that followed the shooting death of Michael Brown in Ferguson, Missouri. The DOJ report highlights deep concerns about the military equipment, materiel (the term for military technology and supplies), and tactics used by police in Ferguson, specifically the conspicuous use of armored vehicles⁷⁴ and the soldier-like appearance of many of the police on the ground.⁷⁵ The indiscriminate and unmodulated use of quasi-military force against protesters, the report found, antagonized the public, escalated tension between protesters and police, and, at times, may have infringed on protesters’ constitutional rights.⁷⁶

⁶⁹ *Id.*

⁷⁰ *Id.* at 19.

⁷¹ See *infra* notes 106–113 and accompanying text.

⁷² Sam Brodey, *SWAT Teams Keep Killing Innocent People in Their Homes*, MOTHER JONES (Oct. 23, 2014), <http://www.motherjones.com/politics/2014/10/swat-raid-casualties>.

⁷³ *Id.*; Balko, *supra* note 1, at 43 (Appendix of Case Studies); see also Brad Petrishen, *After Inquiry into Worcester Raid, State Police Say Regs Followed but Vow to Change Process*, TELEGRAM (Jan. 16, 2016), <http://www.telegram.com/article/20160115/NEWS/160119388> (Worcester Police implemented changes, including obtaining authorization for no-knock warrants from judges instead of clerk magistrates, following a SWAT raid based on a no-knock warrant in which a family alleged police broke into their home on faulty intelligence and mistreated them.).

⁷⁴ OFFICE OF CMTY. ORIENTED POLICING SERVS., DOJ, AFTER-ACTION ASSESSMENT OF THE POLICE RESPONSE TO THE AUGUST 2014 DEMONSTRATIONS IN FERGUSON, MISSOURI 59 (2015), <http://ric-zai-inc.com/Publications/cops-p317-pub.pdf> [hereinafter COPS REPORT]. In the hours and days immediately following Michael Brown’s death, police deployed and staged armored Lenco BEARs or BearCats near crowds of protesters. Later, after those tactics worsened relations with the public, police staged armored vehicles away from public view until they were needed. *Id.* at 52.

⁷⁵ *Id.* at 57. St. Louis County tactical officers in Ferguson looked very much like soldiers. They wore camouflage-patterned uniforms, heavy vests, ballistic helmets and goggles, and carried a variety of lethal and less-lethal weapons.

⁷⁶ *Id.* at xiv, 59–60. The DOJ’s report found that the Ferguson Police Department engaged in a pattern and practice of violating the constitutional rights of its citizens; African-Americans, for example, were disproportionately stopped and arrested by police. Recently, the City of Ferguson and the DOJ have released a 127-page proposed agreement that creates guidelines for training police officers on when they should use force and requires the selection and appointment of an independent monitor. Eydar Peralta, *Ferguson, Justice Unveil Draft of Negotiated Consent Decree*, NPR (Jan. 27, 2016), <http://www.npr.org/sections/thetwo-way/2016/01/27/464610005/ferguson-justice-unveil-draft-of-negotiated-consent-decree>.

The DOJ report's findings are troubling, but not surprising. The use of military equipment and tactics by law enforcement has clear—and serious—constitutional implications, particularly with respect to First and Fourth Amendment rights. Militarization also raises concerns under the Fourteenth Amendment, which guarantees all persons equal protection under the law.⁷⁷ While the policies that govern the use of military equipment and tactics by local police appear facially non-discriminatory, the historically troubled relationship between law enforcement and many communities of color indicates that militarization disproportionately impacts those communities and further damages their relationship with law enforcement.⁷⁸

First Amendment Concerns

The freedom of expression protected by the First Amendment is a fundamental civil liberty that the government is obliged to uphold by, among other things, preventing the chilling of free speech.⁷⁹ The First Amendment's broad grant of freedom of speech, press, and peaceable assembly arose in response to restrictions on those rights under English law during the time preceding the American Revolution and it remains a centerpiece of American law and culture.⁸⁰

Indeed, protecting people who are exercising their First Amendment rights—ensuring that those people are able to do so free from violence—is a core function of law enforcement.

Of course, if a protest turns violent, law enforcement officers may possess the appropriate tools to protect themselves and the public and to keep the peace. Moreover, the right to free speech by the public is not unlimited. The government may regulate the “time, place, and manner of expression” in a public forum if the restriction is content-neutral,⁸¹ narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication.⁸² For example, police may require anti-abortion activists to protest elsewhere in the interest of public safety when activists block a pedestrian walkway.⁸³

When police deploy military-grade weapons and tactics in response to demonstrations outside truly exceptional circumstances, they risk infringing on the very same First Amendment rights that police are supposed to protect.

⁷⁷ See U.S. CONST. amend. XIV.

⁷⁸ ACLU REPORT, *supra* note 54, at 35. One significant limitation of this data is that many jurisdictions do not record information on the race or ethnicity of individuals affected by SWAT deployment, or do not record such data in a systematic fashion. In more than one-third of the incidents studied by the ACLU, the race of the individuals impacted was not clear from the incident report.

⁷⁹ U.S. CONST. amend. I. (“Congress shall make no law . . . abridging the freedom of speech, or of the press; or of the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.”).

⁸⁰ See Leon R. Yankwich, *The Background of the American Bill of Rights*, 37 Geo. L.J. 1, 9 (1948–1949).

⁸¹ In general, if government regulation of speech is not content-neutral, it must meet a higher burden—strict scrutiny. Under this standard, content-based government restriction on speech must be necessary to “promote a compelling interest” and must be the “least restrictive means to further the articulated interest.” *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). For example, a regulation restricting anti-abortion protests in general would fail to meet the “least restrictive means” test if the purpose of the regulation was to silence those protesters. This standard would apply if the use of military equipment and tactics by law enforcement were intended simply to silence protesters.

⁸² *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983).

⁸³ *McTernan v. City of York*, 564 F.3d 636, 652–53 (3d Cir. 2009). *But see McCullen v. Coakley*, 134 S. Ct. 2518 (2014) (invalidating statute that made it a crime for person to stand on a public way or sidewalk within 35 feet of an abortion clinic).

However, police action may only burden free speech in pursuit of other ends provided that no less restrictive alternative is available.⁸⁴ When police deploy military-grade weapons and tactics in response to demonstrations outside truly exceptional circumstances, they risk infringing on the very same First Amendment rights that police are supposed to protect.

The use of military equipment and tactics can chill constitutionally protected speech and expression in several ways. For example, the threat or expectation of an aggressive police response can be a deterrent for potential protesters.⁸⁵ This threat or expectation operates similarly to more traditional “preemptive” policing methods—like shutting down organizational meeting places and confiscating literature—that burgeoned in the 1990s.⁸⁶ Public training drills that showcase militarization and televised depictions of the use of military weapons and tactics exacerbate the problem.⁸⁷ The deterrent effect can even become self-perpetuating: if militarization results in fewer protests and fewer protesters, police might consider it to be a positive development in terms of reducing the likelihood of violent confrontation. Of course, the constitutional consequences of that cycle are deeply troubling.

Militarization can also have a chilling effect on those who do attend protests, rallies, and similar public gatherings. For example, local law enforcement used Long Range Acoustic Devices (“LRADs”) in protests in New York City after a grand jury decided not to indict the police officer who killed Eric Garner.⁸⁸ LRADs were developed in response to the October 2000 bombing of the USS Cole.⁸⁹ The purpose of an LRAD is to emit an extremely loud noise reaching as high as 149 decibels in an effort to deter unwanted aggressors.⁹⁰ An LRAD can cause headaches, earaches, and permanent hearing damage by exceeding the 130-decibel threshold for possible hearing loss by nearly 20 points.⁹¹ Its use can quite literally silence protesters. Relatedly, protesters may be less likely to object to illegitimate police requests because they fear police retaliation and physical harm from military-grade weapons.⁹²

In Ferguson, law enforcement officers’ show of force created an environment hostile to the exercise of First Amendment rights. Many residents of Ferguson saw the extensive use of armored vehicles, for example, as an “[act] of aggression” intended to intimidate demonstrators.⁹³ A report from PEN American Center found numerous violations of press freedom in Ferguson, which it attributed to “the decision by local and state authorities to deploy a heavily militarized police response” which fostered

⁸⁴ See, e.g., Alan O. Sykes, *The Least Restrictive Means*, 70 U. CHI. L. REV. 403, 403–04 (2003) (noting in the regulatory context “when an alternative [method] unquestionably achieves a clearly stipulated [] objective at equal or lower cost [] while imposing a lesser burden on [free speech], the alternative is ‘less restrictive’”).

⁸⁵ Jennifer Earl & Sarah A. Soule, *The Impacts of Repression: The Effect of Police Presence and Action on Subsequent Protest Rates*, 30 RES. IN SOC. MOVEMENTS, CONFLICTS & CHANGE 75, 100 (2010).

⁸⁶ Heidi Boghosian, NAT’L LAWYERS GUILD, *THE ASSAULT ON FREE SPEECH, PUBLIC ASSEMBLY, AND DISSENT* 19 (2004).

⁸⁷ Gan Golan, *Closing the Gateways of Democracy* 37 (2005) (unpublished Master’s thesis, Massachusetts Institute of Technology) (on file with the Massachusetts Institute of Technology library).

⁸⁸ See, e.g., Colin Moynihan, *Concerns Raised Over Shriill Device New York Police Used During Garner Protests*, N.Y. TIMES (Dec. 12, 2014), <http://www.nytimes.com/2014/12/13/nyregion/lawyers-raise-concerns-over-shriill-device-used-by-police-during-garner-protests.html>.

⁸⁹ Lily Hay Newman, *This is the Sound Cannon Used Against Protesters in Ferguson*, SLATE (Aug. 14, 2014), http://www.slate.com/blogs/future_tense/2014/08/14/lrad_long_range_acoustic_device_sound_cannons_were_used_for_crowd_control.html.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Moreover, as seen in the DOJ’s report on Ferguson, the presence and use of tactical weapons against protesters “produced a negative public reaction” and aggravated already existing tensions between police and the community. COPS REPORT, *supra* note 76, at 59.

⁹³ *Id.* at 55. The Task Force on 21st Century Policing—which was created following the mass demonstrations in Ferguson after Michael Brown’s death—indicates in its one-year progress report that it convened “police chiefs and advocates to discuss mass demonstrations and how the nature of civil protests and the shifting philosophies that motivate protesters have changed” and what reforms should be implemented as a result. A report that summarizes the convening and the group’s recommendations is forthcoming. See PROGRESS REPORT, *supra* note 19, at 14.

a war zone mentality among the police.⁹⁴ This was evidenced by the local police's enforcement of an ad hoc "keep moving" order—more commonly known as the "five-second rule": protesters caught standing still for longer than five seconds were subject to arrest under an unlawful assembly statute.⁹⁵ A federal judge in Missouri subsequently found this practice to violate the First Amendment.⁹⁶

Fourth Amendment Concerns⁹⁷

The Fourth Amendment guarantees the "right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."⁹⁸ It requires that warrants be issued based on sufficient cause and specify the person, place, and thing subject to search and seizure. Warrantless searches, unless they fall within an exception authorized by the Supreme Court, are presumptively invalid.⁹⁹ A seizure is unreasonable under the Fourth Amendment if law enforcement uses excessive force; that is, police officers may only use such force as is objectively reasonable under the circumstances.¹⁰⁰ Courts heavily rely on the facts of a given situation and law enforcement officers' contemporaneous perceptions in making this determination.¹⁰¹

When serving a search warrant, law enforcement officials generally must "knock and announce" their presence.¹⁰² No-knock warrants are permissible in exigent circumstances—i.e., if knocking and announcing would threaten someone's safety, or if the warning would defeat the point of the search by giving the suspect enough time to discard any evidence—but are otherwise unreasonable.¹⁰³ The boundaries of these exceptions, however, are left largely to the discretion of individual police officers

⁹⁴ PEN AM. CTR., PRESS FREEDOM UNDER FIRE IN FERGUSON 17 (2014), http://www.pen.org/sites/default/files/PEN_Press-Freedom-Under-Fire-In-Ferguson.pdf. The report cites 52 press freedom violations in Ferguson, including 21 arrests of journalists, 11 incidents of obstructed access, and 7 instances of journalists physically harmed by use of crowd control measures.

⁹⁵ COPS REPORT, *supra* note 78, at 63; see also Wesley Lowery, *Federal Judges Tosses '5 Second Rule' Being Used to Police Ferguson Protests*, WASH. POST (Oct. 6, 2014), <https://www.washingtonpost.com/news/post-nation/wp/2014/10/06/federal-judges-tosses-5-second-rule-being-used-to-police-ferguson-protests/>.

⁹⁶ *Abdullah v. County of St. Louis, Mo.*, 52 F. Supp. 3d 936, 945–48 (E.D. Mo. 2014) (preliminary injunction granted in lawsuit regarding the enforcement of the five-second rule against protesters in Ferguson, Missouri and finding that the rule was so vague and enforced so arbitrarily with unfettered discretion that it violated due process and the First Amendment right to assemble); see also COPS REPORT, *supra* note 78, at 27, 61–64.

⁹⁷ The rapid growth of advanced surveillance technology and tactics over the last several years raises very serious Fourth Amendment concerns. We do not address those issues here because they are not unique to, or especially implicated by, militarization, and because they warrant an in-depth discussion of their own.

⁹⁸ U.S. CONST. amend. IV.

⁹⁹ To qualify as a search under the Fourth Amendment, a government official must violate an individual's subjective expectation of privacy, and that expectation of privacy must be an objectively reasonable one. Information that individuals reveal to other people or hold out to the public has traditionally not been subject to a reasonable expectation of privacy. See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

¹⁰⁰ See *Graham v. Connor*, 490 U.S. 386, 394–95 (1989).

¹⁰¹ *Id.* at 396 (noting that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight"); see also *Walker v. City of Wilmington*, 360 F. App'x 305, 313 (3d Cir. 2010) (holding that officers' use of an armed SWAT team during a no-knock raid, including use of a battering ram, during execution of a search warrant was objectively reasonable when viewed "from the perspective of a reasonable officer on the scene"); *Commonwealth v. Garner*, 672 N.E.2d 510, 515–16 (Mass. 1996) (holding that officers did not unreasonably execute warrant when officer broke window and dropped flashbang device into bedroom in which four-year-old child was present, even though the officer failed to look inside bedroom first as required by departmental policy). *But see Mullenix v. Luna*, 136 S. Ct. 305, 313 (Sotomayor, J., dissenting) (emphasizing the problematic "culture [of the police department in question] this Court's decision supports when it calls it reasonable—or even reasonably reasonable—to use deadly force for no discernible gain and over a supervisor's express order to 'stand by.' By sanctioning a 'shoot first, think later' approach to policing, the Court renders the protections of the Fourth Amendment hollow.").

¹⁰² See *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995) (holding that announcement is a factor to be considered in determining reasonableness of a search and that unannounced entry may be constitutionally defective absent countervailing law enforcement interest, such as officer safety).

¹⁰³ See, e.g., *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997); see also *Bishop v. Arcuri*, 674 F.3d 456, 467 (5th Cir. 2012) (holding that an officer's no-knock entry of individuals' home based on "generalized concerns about evidence preservation and officer safety" was unreasonable and violated those individuals' Fourth Amendment rights).

and judges.¹⁰⁴ For example, an investigation that followed the shooting of a man during a no-knock raid in Denver led to the discovery that “nearly all no-knock warrant requests over the past seven months—most of which involved narcotics cases—were approved merely on police assertions that a regular search could be dangerous for them or that the drugs they were seeking could be destroyed.”¹⁰⁵ That same investigation revealed that “no-knock search warrants appear to be approved so routinely that some Denver judges have issued them even though police asked only for a regular warrant.”¹⁰⁶ Of 163 affidavits for no-knock warrants, only seven had specific allegations that the suspect had been seen with a gun, and nearly all of the warrants were granted solely on the basis of an anonymous tip and an officer’s claim, with no supporting evidence, that weapons would be present at the scene or that the suspect would likely dispose of evidence.¹⁰⁷

The absence of clear guidance and oversight for using no-knock warrants, coupled with the rise of SWAT teams and the increasing use of military-style equipment—particularly in the execution of routine search warrants—raises serious Fourth Amendment concerns.¹⁰⁸ For example, in May 2014, Georgia officers executing a no-knock warrant at 3 a.m. threw a flash bang grenade in the playpen of a sleeping 18-month-old, resulting in severe burns to the infant’s face and body and a collapsed lung.¹⁰⁹ A flash bang grenade is an “explosive device” that produces “an extremely bright flash of light that . . . causes temporary blindness” and is intended to distract the occupants of a building or home while a SWAT team attempts to secure the scene.¹¹⁰ The no-knock warrant was issued against the toddler’s cousin who did not live at the home and was suspected of making a \$50 drug sale, based on a single confidential informant’s statement. The officers found no drugs or weapons in the raided home.¹¹¹ The officers found no drugs or weapons in the raided home,

In May 2014, Georgia officers executing a no-knock warrant at 3 a.m. threw a flash bang grenade in the playpen of a sleeping 18-month-old, resulting in severe burns to the infant’s face and body and a collapsed lung. A flash bang grenade is an “explosive device” that produces “an extremely bright flash of light that . . . causes temporary blindness” and is intended to distract the occupants of a building or home while a SWAT team attempts to secure the scene. The no-knock warrant was issued against the toddler’s cousin who did not live at the home and was suspected of making a \$50 drug sale, based on a single confidential informant’s statement. The officers found no drugs or weapons in the raided home.

¹⁰⁴ Balko, *supra* note 1, at 30. *But see* Johnson v. United States, 333 U.S. 10, 13–14 (1948) (emphasizing the importance of judicial oversight of no-knock warrants: “[t]he point of the Fourth Amendment . . . is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.”).

¹⁰⁵ Balko, *supra* note 1, at 35.

¹⁰⁶ *Id.* at 24.

¹⁰⁷ *Id.* at 25.

¹⁰⁸ This is especially true because the exclusionary rule does not apply to no-knock violations, which means that evidence obtained as the result of an illegal no-knock search need not be suppressed. *See* Hudson v. Michigan, 547 U.S. 586, 599 (2006).

¹⁰⁹ Elliot C. McLaughlin et al., *Swat Team Threatened after Grenade Injures Toddler in Drug Raid*, CNN (May 31, 2014), <http://www.cnn.com/2014/05/30/us/georgia-toddler-injured-stun-grenade-drug-raid/>; Alison Lynn and Matt Gutman, *Family of Toddler Injured by SWAT ‘Grenade’ Faces \$1M in Medical Bills*, ABC NEWS (Dec. 18, 2014), <http://abcnews.go.com/US/family-toddler-injured-swat-grenade-faces-1m-medical/story?id=27671521>.

¹¹⁰ ACLU REPORT, *supra* note 54, at 21.

¹¹¹ McLaughlin, *supra* note 114. For an extensive set of cases of mistaken identity in no-knock raids, *see* Balko, *supra* note 1, at 43 (Appendix of Case Studies).

and the real suspect was later arrested without incident at another location with a small amount of drugs on him.¹¹²

Battering rams are another tool acquired through federal equipment programs and used routinely during the execution of search warrants.¹¹³ Designed to “hit and break through walls and doors,” battering rams can take many forms, ranging from hand-held devices to armored tanks specially equipped with a 14-foot horizontal steel pole capped with a steel plate.¹¹⁴ The method of police entry into a home is merely a factor in assessing the reasonableness of a search, so the use of a battering ram is not per se constitutionally problematic. In barricade and hostage situations, the use of a battering ram may very well reflect the level of necessary force. That is far less likely to be so when this equipment is used in the execution of warrants for routine police work. Indeed, according to a 2013 study, SWAT teams forced entry into a person’s home using a battering ram or breaching device in 65% of drug searches.¹¹⁵ Unfortunately, such examples are far from rare; because of the military-style raids that occur when SWAT teams are used to execute everyday warrants, communities have witnessed armored vehicles driving through suburban streets, houses burned to the ground through the misuse of military equipment, and the unnecessary death and injury of dozens of community members and police officers.¹¹⁶ These highly-charged situations have led to a breakdown in trust between law enforcement and communities, a critical relationship that ensures police officers serve their communities and keep the peace.

Fourteenth Amendment Concerns

Equal protection under the law is also a key tenet of the American legal system. Enshrined in the Fourteenth Amendment, this constitutional right was originally intended to combat racial inequality in the wake of the Civil War, though its scope has broadened in the intervening years. Increased police militarization, which disproportionately affects communities of color, has serious Fourteenth Amendment implications.

The consequences of aggressive policing fall disproportionately on minority groups. For example, during the protests in Baltimore, Ferguson and New York, some commentators pointed out that the militarized response of local law enforcement in those protests, which involved mainly people of color, was far different than the response to demonstrations in which the majority of participants were white.¹¹⁷ For example, at a recent 250-person anti-Muslim protest outside an Islamic community center in Phoenix, Arizona, although some anti-Islam protesters were openly armed, police officers did not employ heavy weapons or tactics. No arrests were made; instead, officers simply stood between the protesters and

¹¹² Elliott C. McLaughlin, *No Indictment for Georgia SWAT Team*, CNN (Oct. 7, 2014), <http://www.cnn.com/2014/10/07/us/georgia-toddler-stun-grenade-no-indictment/>.

¹¹³ ACLU REPORT, *supra* note 54, at 21.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 3.

¹¹⁶ *Id.* at 21.

¹¹⁷ See, e.g., Sally Kohn, *When White People Riot*, CNN (Nov. 20, 2014) <http://www.cnn.com/2014/11/20/opinion/kohn-ferguson-protests/>; Todd Robberson, *White Bikers, Black Rioters and a Disparity in Response*, DALL. MORNING NEWS (May 19, 2015), <http://dallasmorningviewsblog.dallasnews.com/2015/05/white-bikers-can-text-and-chat-in-waco-but-black-rioters-elsewhere-see-much-harsher-treatment.html>; Emanuella Grinberg, *Why Pumpkin Fest Riots Are Not Like Ferguson*, CNN (Oct. 21, 2014), <http://www.cnn.com/2014/10/21/living/keene-pumpkinfest-riot-ferguson/>.

counter-protesters to keep them apart.¹¹⁸ More recently, during the 41-day occupation of the Malheur National Wildlife Refuge headquarters by anti-government protesters over federal land management—better known as the “Oregon Standoff”—local law enforcement and the FBI did not use immediate force or storm the refuge site to end the illegal occupation of federal lands, despite the fact that the occupiers were known to be heavily armed.¹¹⁹ Rather, law enforcement agents encouraged the all-white members of the militia to leave peacefully and negotiated with them repeatedly on the terms of their departure.¹²⁰

Indeed, studies of racial disparities in policing demonstrate that “police are more likely to engage in force when dealing with members of outgroups (those who are poor or minority or gender non-conforming) than when dealing with members of ingroups.”¹²¹ In New York City between 2010 and 2014, more than 80% of complainants in use-of-force cases involving the police were Black or Hispanic, despite those groups making up only about half the city’s population.¹²² Aggressive search tactics also have outsized effects on people of color. Black and Hispanic New Yorkers have been subjected to stop-and-frisk at a similarly disproportionate rate, despite evidence that nearly 90% of individuals stopped under that policy are completely innocent.¹²³ Even after a 2003 settlement of a landmark case requiring the New York Police Department (“NYPD”) to maintain a written racial profiling policy,¹²⁴ an analysis of the since-acquired data revealed that the NYPD had continued to practice racially motivated stop-and-frisks, despite the newly introduced policy changes. This data prompted a federal class action law suit against the City of New York in 2013 to challenge such discriminatory practices.¹²⁵ A federal judge subsequently found the NYPD liable for a pattern and practice of racial profiling and unconstitutional stops and ordered a joint remedial process, which included appointing an independent monitor to oversee the development and implementation of a series of reforms to policing policy and record updates on the progress.¹²⁶ Nationally, between 2010 and 2012, more than 1,200 people were killed by the police; in that sample, **black male teenagers between the ages of 15-19 were 21 times more likely to be killed by police than their white counterparts.**¹²⁷ These practices continue in large part because the impacted communities often lack the political or economic influence necessary to change policies.¹²⁸ Where militarization begets police aggression, racial inequality follows.

¹¹⁸ Esther Yu-Hsi Lee, *Armed Protesters Stage Anti-Muslim Demonstration in Phoenix*, THINKPROGRESS (May 30, 2015), <http://thinkprogress.org/justice/2015/05/30/3664337/armed-protesters-stage-anti-muslim-demonstration-phoenix/>.

¹¹⁹ *Oregon Standoff Timeline: How the Occupation Unfolded*, THE OREGONIAN: OREGONLIVE (last updated Mar. 12, 2016), http://www.oregonlive.com/oregon-standoff/2016/03/oregon_standoff_timeline_how_t.html.

¹²⁰ *Id.*

¹²¹ I. Bennet Capers, *Crime, Surveillance, and Communities*, 40 *FORDHAM URB. L.J.* 959, 982 (2013).

¹²² N.Y. CITY DEP’T OF INVESTIGATION, *POLICE USE OF FORCE IN NEW YORK CITY: FINDINGS AND RECOMMENDATIONS ON NYPD’S POLICIES AND PRACTICES* 18 (2015), http://www.nyc.gov/html/oignypd/assets/downloads/pdf/oig_nypd_use_of_force_report_-_oct_1_2015.pdf.

¹²³ *Stop and Frisk Data*, N.Y. CIVIL LIBERTIES UNION, [HTTP://WWW.NYCLU.ORG/CONTENT/STOP-AND-FRISK-DATA](http://www.nyclu.org/content/stop-and-frisk-data) (last visited February 25, 2016).

¹²⁴ See *Daniels v. City of New York*, 2003 WL 22510379 (S.D.N.Y. Nov. 5, 2003).

¹²⁵ *Daniels, et. al. v. the City of New York*, CTR. FOR CONSTITUTIONAL RIGHTS, <http://ccrjustice.org/home/what-we-do/our-cases/daniels-et-al-v-city-new-york> (last modified Oct. 1, 2012).

¹²⁶ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 667 (S.D.N.Y. 2013).

¹²⁷ Ryan Gabrielson, et. al, *Deadly Force, in Black and White*, *PROPUBLICA* (Oct. 10, 2014), <https://www.propublica.org/article/deadly-force-in-black-and-white>.

¹²⁸ It is worth noting that this is not a new phenomenon. In the mid-1960s, the Presidential Commission on Law Enforcement issued a major report that released research findings regarding the differential law enforcement practices and attitudes toward law enforcement in white suburban communities as compared with urban communities of color. The report highlighted findings indicating a broken relationship and set forth recommendations to build trust between law enforcement and communities of color. See THE PRESIDENT’S COMM’N ON L. ENF’T & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN SOCIETY*, 99–103 (1967), <https://www.ncjrs.gov/pdffiles1/nij/42.pdf>.

The evidence of disparate racial impact in militarized policing is perhaps clearest in the statistics on the use of SWAT. When the number and race of the people affected by SWAT deployments were recorded, 39% were Black, 11% were Latino, and 20% were white.¹²⁹ Compounding this disparity, SWAT teams are now more regularly employed to execute search warrants in drug investigations, a phenomenon which heavily affects communities of color.¹³⁰ Nearly 70% of SWAT deployments involving people of color were for executing warrants in drug cases, while only 38% of SWAT deployments involving white suspects were for drug warrants.¹³¹ These statistics suggest that SWAT is deployed to execute search warrants—a questionable use of SWAT in most cases—disproportionally against people of color.

There are significant barriers to relief in equal protection lawsuits built primarily on disparate impact statistics.¹³² If the policies in question are facially race-neutral, demonstrating a violation of equal protection requires evidence of a disparate, negative impact on minority groups and a showing of a discriminatory purpose underlying the policy.¹³³ To show discriminatory purpose, one must demonstrate that law enforcement enforced a policy “because of” and not merely “in spite of” its discriminatory impact.¹³⁴

While the Supreme Court seems to have left the door open to finding discriminatory purpose in facially-neutral policies in jurisdictions with long histories of racial discrimination, courts have nevertheless been loath to find equal protection violations in the absence of explicit discriminatory purpose.¹³⁵ As such, courts allow the perverse result that conscious and unconscious racial biases may perpetuate through the law so long as government officials keep explicit racial animus off the books. The lack of an effective remedy undermines law enforcement’s ability to build trust with affected communities, and ultimately makes meaningful community policing more difficult.

¹²⁹ ACLU REPORT, *supra* note 54, at 35. The race of the remaining impacted individuals was unknown.

¹³⁰ *Id.* at 31.

¹³¹ *Id.* at 35.

¹³² See *McCleskey v. Kemp*, 481 U.S. 279, 287 (1987) (no violation of equal protection without discriminatory purpose where defendants who killed whites 4.3 times more likely to get death penalty than defendants who killed African-Americans); see also *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 270 (1979) (no violation of equal protection without discriminatory purpose where facially-neutral employment preference for veterans who were 98 percent male led to discriminatory effect against women). For a disparate impact claim to succeed on statistical evidence alone, the statistics must foreclose all plausible explanations other than racial bias. See *Yick Wo v. Hopkins*, 118 U.S. 356, 358 (1886) (violation of equal protection without explicit discriminatory purpose where city denied hundreds of building waivers to applicants of Chinese ancestry, but denied only one waiver to non-Chinese applicants).

¹³³ See *Washington v. Davis*, 426 U.S. 229, 239 (1976).

¹³⁴ *Feeney*, 442 U.S. at 279.

¹³⁵ See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) (evidence of disparate impact may be supplemented with evidence of history of discriminatory action by relevant actor to prove discriminatory purpose). This detail may have implications for disparate impact claims in cities like Ferguson, where a DOJ investigation uncovered a long pattern of racially biased conduct in local government and law enforcement. See CIVIL RIGHTS DIV., DOJ., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 1 (2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

RECENT FEDERAL REVIEWS OF MILITARY EQUIPMENT ACQUISITION PROGRAMS

In an effort to address increasing national concerns about the use of military equipment and tactics by law enforcement, a number of state legislators and the federal government are introducing policy changes and increasing oversight and accountability of federal equipment programs.

Lawmakers in several states have introduced legislation that would limit the scope of the 1033 program; for example, Minnesota has proposed legislation that would prohibit local law enforcement from accepting equipment that has a primarily “military purpose or offensive capability.”¹³⁶ Other state lawmakers view the 1033 program as a valuable resource for potentially life-saving gear and supplies—particularly in times when budgets are tight—but recognize the need for additional transparency and training requirements. Proposed state-level solutions range from requiring local authorities to notify the public of any request for equipment to limiting the types of weapons that law enforcement can receive through the 1033 program.¹³⁷

In August 2014, the Obama administration ordered a review of the federal programs that provide funding, equipment, and tactical resources to state and local law enforcement agencies.¹³⁸ According to that review—published in a December 2014 report—the federal government provided nearly \$18 billion worth of equipment toward such programs over the previous five years.¹³⁹ The report also highlighted a number of significant flaws with the programs, including the lack of institutionalized training, coordination, and oversight.¹⁴⁰ Concurrently, Congress held a number of hearings regarding the federal programs.¹⁴¹

On January 16, 2015, President Obama issued an executive order establishing an interagency Law Enforcement Equipment Working Group (“Working Group”)—co-chaired by the Secretary of Defense, Attorney General, and Secretary of Homeland Security—tasked with examining the military equipment acquisition programs.¹⁴² The Working Group’s report was published in May 2015 and made a number of recommendations for reform, discussed in greater detail at the end of this section.¹⁴³ On October 1, 2015, the recommendations went into effect and now govern state and local law enforcement use of military weapons and equipment when procured through federal resources.

¹³⁶ Grovum, *supra* note 49.

¹³⁷ *Id.*

¹³⁸ FEDERAL REVIEW, *supra* note 4, at 3.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 2, 4 (highlighting that “[m]embers of law enforcement cited the specific concern that police chiefs and those responsible for authorizing the deployment of military-style equipment often lack proper training to understand when and how controlled equipment is most appropriately deployed”).

¹⁴¹ See e.g., *Oversight of Federal Programs for Equipping State and Local Law Enforcement: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs* 113th Cong. (2014); *The Department of Defense Excess Property Program in Support of U.S. Law Enforcement Agencies: An Overview of DOD Authorities, Roles, Responsibilities, and Implementation of Section 1033 of the 1997 National Defense Authorization Act: Hearing Before the H. Armed Services Comm.* 113th Cong. (2014).

¹⁴² Exec. Order No. 13,688, 80 Fed. Reg. 3451 (2015), <http://www.gpo.gov/fdsys/pkg/FR-2015-01-22/pdf/2015-01255.pdf>.

¹⁴³ WORKING GROUP REPORT, *supra* note 6, at 5.

The Working Group recommended the immediate implementation of a federal government-wide prohibited equipment list, identifying categories of equipment that local law enforcement agencies cannot acquire from federal agencies, nor purchase with the use of federal funding.¹⁴⁵ Permitted weapons and equipment, subject to some restrictions, are designated on a “controlled equipment list.”¹⁴⁶ Beginning October 1, 2015, the DOD—the only federal agency with the authority to recall material currently in the hands of law enforcement agencies¹⁴⁷—began recalling prohibited items. The recall process was intended to be complete by April 2016.¹⁴⁸ However, agencies other than the DOD also transferred now-prohibited equipment to law enforcement agencies; consequently, even when the DOD’s recall process is complete, some prohibited equipment will remain with state and local law enforcement agencies.

From October 1, 2015 to April 1, 2016, law enforcement agencies were required to transition into compliance with the new training and acquisition policy requirements.¹⁴⁹ Within the transition window, LEAs could apply for controlled equipment, but could not use the equipment outside of training until the compliance deadline.¹⁵⁰ To implement these recommendations, the DOJ’s Bureau of Justice Assistance released standards for local law enforcement, drafted by the International Association of Chiefs of Police, the Commission on Accreditation for Law Enforcement Agencies, and the National Tactical Officers Association.¹⁵¹ To monitor changes within the government, a permanent working group has been established and meets quarterly to review implementation, examine the newly formed federal acquisition database, and review applications for controlled materials to ensure that government agencies are properly and uniformly evaluating requests for controlled equipment.¹⁵²

[N]o comprehensive tally exists of equipment that has already been transferred or purchased [and] no federal agency other than the DOD has the authority to recall equipment currently in the hands of law enforcement.

¹⁴⁵ *Id.* at 12–13 (prohibiting the acquisition of the following items: tracked armored vehicles; weaponized aircraft, vessels, and vehicles of any kind; firearms and ammunition of .50 caliber or higher; grenade launchers; bayonets; and some camouflage uniforms).

¹⁴⁶ *Id.* at 14–16.

¹⁴⁷ *Id.* at 5.

¹⁴⁸ LAW ENF’T EQUIP. WORKING GRP., *supra* note 48, at 2.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ See INT’L ASS’N OF CHIEFS OF POLICE, COMM’N ON ACCREDITATION FOR LAW ENF’T AGENCIES & NAT’L TACTICAL OFFICERS ASS’N, STANDARDS FOR STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT AGENCIES FOR THE ACQUISITION OF CONTROLLED EQUIPMENT WITH FEDERAL RESOURCES 1 (2015), <https://www.bja.gov/programs/Controlled-Equipment-Standards.pdf>.

¹⁵² LAW ENF’T EQUIP. WORKING GRP., *supra* note 50, at 3.

These changes may lead to some greater oversight, transparency, and accountability.¹⁵³ However, experts and stakeholders have raised concerns that the Working Group's recommendations do not go far enough.¹⁵⁴ As a threshold matter, the recommendations are not retroactive, which creates a significant accountability gap regarding the use of thousands of weapons already distributed among local police agencies across the country. Even prospectively, though, the Working Group did not recommend sufficient limitations on the acquisition or use of military equipment by local law enforcement.

Additionally, the list of prohibited equipment is extremely short; law enforcement agencies can continue to acquire armored vehicles such as MRAPs and other tactical vehicles; explosives, including flash bang grenades; and a host of other equipment that the report admits can "be seen as militaristic in nature" but is treated as "controlled equipment" under the recommendations.¹⁵⁵

Law enforcement agencies may continue to acquire "controlled equipment," but must take additional steps, including "submission of a detailed justification outlining their need [for the equipment]" and certifying that controls, such as training and policies, are in place to prevent misuse.¹⁵⁶ The Working Group includes detailed recommendations for application requirements prior to approval of a request for controlled equipment¹⁵⁷ and guidelines for oversight, compliance, and sanctions for violations.¹⁵⁸ These are important steps in establishing some oversight and accountability for the use of such equipment. However, state and local law enforcement agencies that have already received prohibited or controlled

Data collection is only required when law enforcement's use of the military equipment involves a "Significant Incident" . . . [Thus] a great deal of information . . . will remain in the hands of local law enforcement and out of sight from the public.

¹⁵³ Despite this, many police departments are vehemently opposed to the recent recall of military equipment on the grounds that such equipment "gives law enforcement the upper hand" in threatening situations such as "mass shootings" and "barricaded gunman." For example, Oakland County Sheriff Michael Bouchard claims that the government is "actually taking away a proven asset from law enforcement all over the country, destroying on many levels our ability to handle a very big situation . . . like Paris." However, research shows that military tactics and weapons are more often used in "routine matters as serving search warrants," rather than life-threatening situations, leading at times to horrific incidents. For example, in 2012 Aiyana Stanley-Jones, 7, was killed when "struck by a bullet from an officer's gun as she slept on a couch during a Detroit police raid" for the arrest of a murder suspect, who was found in the upper level and "surrendered without incident." Christina Hall & L.L. Brasier, *Michigan Cops Fume over Loss of U.S. Military Vehicles*, DETROIT FREE PRESS (December 3, 2015), <http://www.freep.com/story/news/local/michigan/2015/12/02/federal-military-surplus-return/76605640/>.

¹⁵⁴ Taylor Wofford, *Tanks for Nothing: Why Obama's Plan to End Police Militarization May be Dead in the Water*, NEWSWEEK (June 9, 2015), <http://www.newsweek.com/2015/06/19/battle-get-americas-police-part-their-military-gear-340949.html> (arguing that the recommendations will slow the acquisition of new equipment but will not demilitarize law enforcement agencies for several reasons, including the fact that recall of equipment would only apply to equipment on the prohibited list and not items on the controlled list); see also Max Ehrenfreund, *The Biggest Question About Police Militarization Obama Hasn't Answered*, WASH. POST (May 21, 2015), <http://www.washingtonpost.com/news/wonkblog/wp/2015/05/21/the-biggest-question-about-police-militarization-obama-hasnt-answered/> (explaining that there must be more accountability and that withholding federal funds for general purposes may be necessary if law enforcement agencies do not meet the new requirements); Eyder Peralta & David Eads, *White House Ban on Militarized Gear for Police May Mean Little*, NPR (May 21, 2015), <http://www.npr.org/sections/thetwo-way/2015/05/21/407958035/white-house-ban-on-militarized-gear-for-police-may-mean-little> (addressing the problem that law enforcement agencies can still use their own funds to buy militarized gear).

¹⁵⁵ WORKING GROUP REPORT, *supra* note 6, at 14–15.

¹⁵⁶ *Id.* at 14.

¹⁵⁷ *Id.* at 26–28 (Recommendation 3.1).

¹⁵⁸ *Id.* at 31–35 (Recommendation 5.2).

equipment might still use such material free from enhanced reporting and training requirements; the report notes that no comprehensive tally exists of equipment that has already been transferred or purchased.¹⁵⁹ Again, no federal agency other than the DOD has the authority to recall equipment currently in the hands of law enforcement agencies.¹⁶⁰

With respect to equipment acquired under and subject to the recommended rules, efforts to increase public accountability also do not go far enough. The Working Group's recommendation concerning enhanced record-keeping for the deployment of federally-acquired military equipment, for example, falls short because data collection is only required when law enforcement's use of the military equipment involves a "Significant Incident."¹⁶¹ This requirement effectively ignores the routine deployment of military equipment by police and thus does little to disincentivize such frequent use. Further, the recommended record-keeping rules concerning development of protocols, training, and use of controlled equipment require that law enforcement agencies submit their reports to the federal government only upon request.¹⁶² This system all but ensures that a great deal of information regarding the use of military equipment by police will remain in the hands of local law enforcement and out of sight from the public.

The gaps identified in this report—and the recommendations set forth below—should be considered by the Permanent Working Group as it evaluates existing federal, state and local practices.

CONCLUSIONS AND RECOMMENDATIONS

The President's Task Force on 21st Century Policing and its Implementation Guide are laudable and important steps forward in strengthening the relationship between communities and law enforcement. Indeed, many of our recommendations mirror those of the Task Force. However, given the severity of the constitutional and public policy concerns raised by law enforcement's use of military equipment and aggressive tactics—including the impact on community policing—we are disappointed that the federal interagency Law Enforcement Equipment Working Group did not make stronger recommendations in its final report and implementation plan. In fact, the Working Group's final recommendations might even hinder some of the President's Task Force's recommendations and goals, particularly with respect to building trust and legitimacy between law enforcement and communities.

We believe that, if the federal government hopes for a true culture shift in law enforcement—to effectively restore a focus on community policing and trust building—it must impose stronger and more severe limitations on programs that provide, or facilitate the purchase of, tactical military equipment by states and localities. We offer our recommendations below.

¹⁵⁹ WORKING GROUP REPORT quickly addressed this issue in a footnote, stating, "A Government-wide assessment is currently being conducted to identify the LEAs that have acquired the types of equipment identified on the recommended prohibited equipment list and determine whether individual agency authorities authorize a recall of the equipment." The note makes clear that the federal government is not sure what equipment local law may possess and whether it even has the authority to recall that equipment based on the report's new guidelines. *Id.* at 13 n.22.

¹⁶⁰ *Id.* at 30.

¹⁶¹ *Id.* at 22 (Recommendation 2.3). A "Significant Incident" is defined as police action that involves a violent encounter involving civilians, a use-of-force causing death or serious injury, a public demonstration, or a large public event.

¹⁶² *Id.* at 38–39 (Recommendations 2.1–2.3).

Recommendations at the Federal Level

Community Involvement and Role Clarification

- 1) The role of local police as “guardian” must be effectuated and reinforced through law enforcement training, policy, and culture.¹⁶³ As part of this effort, the federal government should continue to reiterate the peacekeeping role of police officers, as distinct from military personnel.¹⁶⁴ The COPS Office should work with stakeholders—including law enforcement groups, civil rights and civil liberties organizations, and communities—to develop best practices on de-escalation techniques for use by state and local law enforcement. Although de-escalation is emphasized in the final report of the Task Force,¹⁶⁵ the federal government can do more to provide law enforcement agencies with the tools and practical guidance to best implement de-escalation techniques. While the Task Force’s Implementation Guide is an important first step, the COPS Office can issue more detailed guidance modeled after the comprehensive research and guidelines for implementation that it has developed for law enforcement agencies on the use of body-worn cameras.¹⁶⁶ Additionally, we urge the COPS Office to release a complete and detailed report regarding any updates on implementation of the Task Force recommendations that have occurred thus far across the country.¹⁶⁷

Transparency and Oversight

- 2) To protect the rights of community members, as well as to promote constitutional policing by law enforcement agencies, the federal government must ensure that, prior to any state or local law enforcement agencies’ use or acquisition of military and tactical equipment, the agencies adopt and adhere to specific, written policies and protocols on training, deployment, use, data-keeping, and reporting regarding the equipment. The policies endorsed by this Committee—many of which are supported by the President’s Working Group (Recommendations 2, 3, and 4)—should address the following areas:
 - a) Appropriate use of equipment, understanding that misuse may undermine the legitimacy of law enforcement within the community;
 - b) Supervision of use of equipment;
 - c) Recordation of instances in which the equipment is deployed, including evaluation of the effectiveness of the equipment; and
 - d) Training on use of equipment.

¹⁶³ The importance of law enforcement’s adoption of a “guardian” mindset as the central component to building trust and legitimacy is the first pillar of the of the final report of the President’s Task Force on 21st Century Policing; specifically, the report states that “[b]uilding trust and nurturing legitimacy on both sides of the police/citizen divide is the foundational principle underlying the nature of relations between law enforcement agencies and the communities they serve.” FINAL TASK FORCE REPORT, *supra* note 5, at 1.

¹⁶⁴ *Id.* at 11 (“Law enforcement culture should embrace a guardian—rather than a warrior—mindset to build public trust and legitimacy . . .”).

¹⁶⁵ The Implementation Guide suggests that agencies can “[u]ndertake trainings and organizational change that address procedural justice, implicit bias, and de-escalation/use of force” as an immediate action. IMPLEMENTATION GUIDE, *supra* note 7, at 20.

¹⁶⁶ See e.g., U.S. Department of Justice, Office of Justice Programs, National Institute of Justice. *A Primer on Body-Worn Cameras for Law Enforcement* (Washington, DC, Sept. 2012).

¹⁶⁷ The COPS Office 21st Century Policing Blog lists a few of the notable successes in the past year following the release of the Task Force report. For example, recently, the DOJ announced the appointment of a veteran law enforcement executive to lead a new Policing Practices and Accountability Initiative, which will “assist in the field in implementing task force recommendations.” See Press Release, Office of Cmty. Oriented Policing Servs., Department of Justice Appoints Veteran Law Enforcement Executive to Lead New Policing Practices and Accountability Initiative (Dec. 16, 2015), <http://www.cops.usdoj.gov/Default.asp?Item=2833>.

- 3) With regard to recording and reporting on deployment of military equipment on the controlled equipment list, the Working Group recommends collection and retention of such data only if law enforcement experiences a “Significant Incident.”¹⁶⁸ However, because this equipment is intended for use only in emergency or other special circumstances, any time this equipment is deployed for tactical or training purposes, there should be a record.¹⁶⁹ Data should include information regarding if and how the equipment was used and, to the extent possible and where observable, information about those who were affected by its use, including their race, religion, ethnicity, sex, and sexual orientation, with redactions to protect community members’ identities.¹⁷⁰
- 4) Transparency and an understanding of how tactical military equipment is being used are necessary for building trust between law enforcement and communities, as well as to ensure that the constitutional rights of those affected by deployment of such equipment are protected. Accordingly:
 - a) All data collected pursuant to Working Group Recommendations 2 and 3—including the related policies and procedures themselves¹⁷¹—should be annually transmitted to the federal agency from which the equipment was procured, as well as to the Working Group.¹⁷² The federal government can ease the burden of any reporting requirements by creating a uniform reporting form for law enforcement agencies to complete following the use of tactical military equipment.
 - b) All federal agencies that provide for the transfer of or funding for tactical military equipment should make these data, policies and procedures publicly available, as should the Working Group.¹⁷³
- 5) The federal government should also require that law enforcement agencies that have already acquired equipment now on the “controlled” list be required to comply with the above recommendations. Agencies should not be permitted to use existing equipment unless they adhere to the policy adoption, data collection and reporting requirements above.

¹⁶⁸ WORKING GROUP REPORT, *supra* note 6, at 22–23 (defining “Significant Incident” as: “Any law enforcement operation or action that involves (a) a violent encounter among civilians or between civilians and the police; (b) a use-of-force that causes death or serious bodily injury; (c) a demonstration or other public exercise of First Amendment rights; or (d) an event that draws, or could be reasonably expected to draw, a large number of attendees or participants, such as those where advanced planning is needed.”).

¹⁶⁹ While not specific to tactical equipment, the Implementation Guide suggests LEAs: “1. Review and update policies, training, and data collection on use of force. Emphasize de-escalation and alternatives to arrest or summons in situations where appropriate . . . [and] 2. Increase transparency by collecting and making data, policies, and procedures publicly available in multiple languages relevant to the local community.” IMPLEMENTATION GUIDE, *supra* note 7, at 11.

¹⁷⁰ The Implementation Guide suggests that LEAs “[c]ollect and analyze demographic data on all stops, searches, and seizures,” and “[c]ollect and analyze data on law enforcement treatment of vulnerable populations.” *Id.* at 19; Task Force Recommendation 2.6 calls for collection of demographic data on all detentions, but not all uses of tactical equipment. FINAL TASK FORCE REPORT, *supra* note 5, at 24.

¹⁷¹ Policies and procedures that have previously been submitted and not subsequently revised need not be resubmitted.

¹⁷² See Task Force Action Item 2.2.4: “Policies on use of force should also require agencies to collect, maintain, and report data to the Federal Government on all officer-involved shootings, whether fatal or nonfatal, as well as any in-custody death.” FINAL TASK FORCE REPORT, *supra* note 5, at 21.

¹⁷³ This recommendation is broader than that set forth by the Working Group, which would only require submission of reports on use of acquired equipment upon request. See *id.* at 19–23. Following the Working Group’s recommendation, the statute covering the DOD’s 1033 Program was recently amended, effective November 25, 2015. That statute provides for increased transparency. See 10 U.S.C. § 2576a (1996) (amended 2015) (“(e) Publicly accessible website.—(1) The Secretary shall create and maintain a publicly available Internet website that provides information on the controlled property transferred under this section and the recipients of such property. (2) The contents of the Internet website required under paragraph (1) shall include all publicly accessible unclassified information pertaining to the request, transfer, denial, and repossession of controlled property under this section, including—(A) a current inventory of all controlled property transferred to Federal and State agencies under this section, listed by the name of the recipient and the year of the transfer; (B) all pending requests for transfers of controlled property under this section, including the information submitted by the Federal and State agencies requesting such transfers; and (C) all reports required to be submitted to the Secretary under this section by Federal and State agencies that receive controlled property under this section.”). However, it is not clear that all statutes applicable to government transfer programs were similarly amended, and so, the Committee has elected to keep this recommendation.

- 6) Widespread and general training of police officers directly by military personnel should be prohibited. If elements of the government's counterterrorism strategy, operations or tactics must be communicated to law enforcement agencies, a highly-qualified law enforcement team should be trained and then become the trainers for the wider law enforcement community. This "train the trainers" approach will ensure that military training is adapted cautiously and appropriately to the peacekeeping and public safety mission of law enforcement.
- 7) Many police departments around the country contend that they do not have the proper funding to record and produce adequate data. We recommend that the DOJ condition a portion of federal grants given to law enforcement for data collection rather than for the purchase of more military equipment.

Procurement and Use of Equipment

- 8) The Committee endorses the designation of the list of equipment and weapons categorized "prohibited" by the Working Group. We agree with the Working Group that a prohibition is "appropriate because the substantial risk of misusing or overusing these items, which are seen as militaristic in nature, could significantly undermine community trust and may encourage tactics and behaviors that are inconsistent with the premise of civilian law enforcement."¹⁷⁴ The prohibited items include:
 - a) Tracked armored vehicles;
 - b) Armed aircraft of any kind;
 - c) Firearms of .50 caliber or more;
 - d) Ammunition of .50 caliber or more;
 - e) Grenade launchers;
 - f) Bayonets; and
 - g) Camouflage uniforms.¹⁷⁵
- 9) The Committee recommends that many of the other forms of tactical and military equipment presently available to law enforcement agencies on the Working Group's "controlled equipment list"—a list that subjects applicants to a more rigorous screening process before an agency may obtain certain items—either be prohibited altogether or available only for agencies seeking the explicit use of such equipment for emergency, humanitarian purposes. The tactical equipment described below, much of which is presently on the controlled list, is not necessary for state and local law enforcement to successfully ensure public safety and its use is generally antithetical to building strong community policing models. Specifically:
 - a) Because many of the incidents described throughout this report involve the use of explosives and pyrotechnics—such as flash bang grenades—and because there are other equipment less prone to misuse, the Committee recommends these items be placed on the "prohibited equipment list."

¹⁷⁴ WORKING GROUP REPORT, *supra* note 6, at 13.

¹⁷⁵ THE WORKING GROUP notes that "[c]ertain types of camouflage patterns may be required for specific law enforcement missions conducted within a specific physical terrain and environment," but that "acquisition of camouflaged-patterned uniforms is not authorized where it will be used in environments, including urban settings, where they do not actually camouflage the wearer." WORKING GROUP REPORT, *supra* note 6, at 12–13.

- b) LRADs should be placed on the “prohibited equipment list.”
- c) Armored vehicles and tactical vehicles should not be available to agencies unless they agree to operate the equipment for emergency rescue purposes only. Law enforcement agencies seeking to acquire armored and tactical vehicles must have in place policies and procedures that circumscribe the instances these vehicles may be deployed to specified emergencies and humanitarian disasters.¹⁷⁶

10) The Committee endorses the Working Group’s designation of the following items as “controlled equipment” that can be acquired through federal programs subject to the safeguards described throughout these recommendations. These items include:

- a) Manned Aircraft, Fixed and Rotary Wing;
- b) Unmanned Aerial Vehicles;
- c) Command and Control Vehicles;
- d) Breaching Apparatus (e.g. battering ram or similar entry device);
- e) Riot Batons (excluding service-issued telescopic or fixed-length straight batons);
- f) Riot Helmets; and
- g) Riot Shields.

The working group also designated as controlled equipment “Specialized Firearms and Ammunition Under .50-Caliber (exclud[ing] firearms and ammunition for service-issued weapons).”¹⁷⁷ We believe that jurisdictions seeking to acquire such equipment should additionally be required to demonstrate with specificity that its use is reasonably likely to reduce the chance of harm to police, suspects, and bystanders during an incident.

11) The federal government must not lend or transfer *any* tactical or military equipment, including weapons, to *any* law enforcement agencies working exclusively in K-12 schools. In addition, all law enforcement agencies—whether or not the agency exclusively serves a K-12 school¹⁷⁸—that have acquired any tactical or military equipment should be prohibited from using, storing, or displaying such equipment in K-12 schools, with the following narrow emergency exception:

- a) If there exists an imminent risk of death or serious bodily harm, such as an active shooter or hostage situation in a K-12 school, law enforcement may use or display:
 - i) Tactical or military equipment on the “controlled” list (see Recommendation 10), but only such equipment, and
 - ii) Only when equipment ordinarily available to law enforcement - i.e., non-tactical non-military equipment - would be insufficient to address the emergency.

¹⁷⁶ For example, the Working Group notes that University of Texas System Police policy specifies that its armored vehicles are for the “exclusive operational purpose” of enhancing the physical protection of its occupants and that it is prohibited to deploy the vehicles in response to “exercises of the First Amendment right to free speech” or as a part of “any public demonstration or display of police resources.” The policy also requires that each vehicle clearly display the words “Emergency Rescue” so that its purpose is clear to the community. *Id.* at 17.

¹⁷⁷ *Id.* at 15.

¹⁷⁸ Note that many school districts receive policing services from their city or county police departments, which would still have access—for use outside of K-12 schools—to tactical or military equipment.

- b) At any time, should law enforcement use or display such equipment in a K-12 school, within 48 hours law enforcement agents must demonstrate, in writing, that each element of the emergency exception was met. These written reports must be publicly available.
- 12) The federal government should require all law enforcement agencies to provide evidence of approval from their civilian governing body (e.g. city council, mayor) prior to any application for controlled equipment from the federal government. Merely providing written notice to the governing body—even if the law enforcement agency chief executive, such as a sheriff, is an elected official—is not sufficient.
- 13) The federal government should support state-level legislation that requires notification to the public when weapons are acquired through federal equipment programs and that limits the types of weapons that state and local agencies may acquire through such programs.
- 14) Law enforcement agencies that wish or are required to return military equipment received through federal programs should be able to apply for assistance with shipping or transportation costs incurred for return of the equipment.

Recommendations at the State and Local Levels

Community Involvement and Role Clarification

- 15) Local law enforcement agencies should engage in more community outreach, focusing on getting to know the members of the communities they serve and protect.¹⁷⁹ For example, officers may want to engage in “know your rights” presentations at community centers or schools, either with local activist groups or by themselves.
- 16) Recruiting efforts by local law enforcement agencies should emphasize crime prevention, peacekeeping and public safety, rather than the tactical use of firearms and military experience as key factors in successful policing.¹⁸⁰ Law enforcement agencies need not ignore the value of technical and firearms experience of applicants, but the focus on military experience in recruiting may undervalue other important skills that are necessary for a community-based policing model.
- 17) Training required of state and local law enforcement candidates and officers must be augmented to entrench a “guardian” mindset among peace officers. Training at the local level should:
- a) Include a component to help officers identify, confront, and discard biases that affect the way they interact with community members;¹⁸¹ and
 - b) Emphasize communication and interpersonal skills, such as interviewing, investigation, and professionalism, as much as firearms training and other tactical, weapons-focused skills.

¹⁷⁹ The Implementation Guide suggests that LEAs “[b]uild relationships through nonenforcement interactions between officers, youth, and other community members”; “[c]onduct community surveys, forums, and town hall meetings on a regular basis”; “[e]ncourage regular office participation in neighborhood or school meetings”; “[f]orm community advisory groups”; and “[m]easure and reward nonenforcement community contracts.” IMPLEMENTATION GUIDE, *supra* note 7, at 17–18.

¹⁸⁰ The Implementation Guide recommends that LEAs “[e]xamine hiring practices to better involve the community in recruiting and screening of recruits.” *Id.* at 12.

¹⁸¹ The Implementation Guide recommends that LEAs “[u]ndertake training and organizational change that address procedural justice, implicit bias, and de-escalation/use of force.” *Id.* at 20.

18) Performance evaluations should include factors other than the number of arrests an officer makes and the amount of inventory obtained;¹⁸² these metrics incentivize “pre-emptive” policing and devalue the intangible skills that make for effective community policing. Evaluations should emphasize metrics that indicate the legitimization of police in communities, like the extent to which officers exercised discretion to divert community members away from the criminal justice system.

Special Concerns Related to SWAT and Execution of Search Warrants

The current rate of SWAT deployments across the country poorly supports the public safety needs of law enforcement and communities, increases tensions between the police and those they serve, and is also fiscally irresponsible. Accordingly, the use of SWAT must be properly circumscribed.

- 19) States should work to create standards for law enforcement regarding the deployment and training of SWAT teams and other tactical teams. Any such standards, at a minimum, should include the following:
- a) Policies limiting the use of SWAT and other tactical teams to situations in which there is a serious threat to the lives of community members or police, requiring corroborating evidence other than, or in addition to, an anonymous source in making that determination.
 - b) Prior to any deployment, written plans setting forth the reasons for the use of SWAT or other tactical team, including a description of the operation. This includes any circumstance in which SWAT may be used to execute a search warrant.
 - i) In emergency circumstances involving an imminent risk of death or serious bodily injury, such that development of a pre-deployment written plan is not feasible, law enforcement must—within 48 hours after deployment—describe the deployment in detail in writing. This description must include a specific explanation of the facts and circumstances that made development of a pre-deployment written plan infeasible.
 - c) Policies requiring SWAT teams to include trained crisis negotiators.
- 20) States and/or law enforcement agencies should create standards for application and issuance of no-knock warrants. It may be helpful to set forth various factors that may be considered—such as the confirmed presence of weapons at the location to be searched and corroborating evidence other than, or in addition to, an anonymous source—and require documentation of these criteria and supervisory approval prior to requesting a no-knock warrant from a judicial officer.
- 21) States should enact laws that would prevent the use in legal proceedings of evidence that was obtained in violation of the traditional rule that police should knock and announce their presence, unless such evidence was properly obtained with a no-knock warrant.

¹⁸² The Implementation Guide suggests that LEAs should “[m]easure and reward nonenforcement community contacts.” *Id.* at 18.

Transparency and Oversight

Attorney General Loretta Lynch spoke recently of the need for consistent data on law enforcement interactions with the communities they serve, particularly data on the use of force.¹⁸³ We agree with Attorney General Lynch and we are encouraged by the Police Data Initiative, a program launched by the White House to support 21 jurisdictions nationwide that are developing innovative ways to implement the Task Force recommendations in the area of data and technology.¹⁸⁴ We also support the Public Safety Data Portal, a recent initiative created to “serve as a central clearinghouse for accessing” datasets from agencies across the nation participating in the Police Data Initiative.¹⁸⁵ In addition, states should:

- 22) Enact laws that require law enforcement agencies to report data regarding the use of SWAT teams. A non-exhaustive list of important content to be captured in these data include when SWAT teams were deployed, where they were deployed, the circumstances of the deployment and compliance with the applicable deployment standard, what equipment was used, whether any people or animals sustained injury or were killed, the demographics of community members affected, and whether any drugs, weapons or other contraband were recovered. These data should be reported on a regular and uniform basis and be publicly accessible, with redactions to protect community members' identities.
- 23) Enact the same reporting requirements for the issuance of no-knock warrants. The data concerning the deployment of SWAT teams should also include details regarding race, gender, and age of the police officer deployed and civilians investigated.
- 24) Enact laws that require law enforcement agencies to report data regarding uses of deadly force, excessive force, and other circumstances involving potential constitutional violations.¹⁸⁶ Data should include information regarding the victim's race, religion, and other protected classes. States should also collect information, such as witness statements as well as figures regarding settlements and awards paid in litigation for police misconduct and wrongful death lawsuits. Data should be publicly available with redactions to protect community members' identities.
- 25) Ensure that there is an independent agency or civilian review board that monitors SWAT deployments, no-knock warrants, and use of other military equipment by law enforcement and that the agency or board has the ability to address complaints from community members as well as recommend or implement reform. Such bodies should be empowered to evaluate trends and address patterns that emerge, rather than merely review individual cases as they arise.

¹⁸³ See Press Release, Office of Pub. Affairs, DOJ., Attorney General Lynch: Use-of-Force Data is Vital for Transparency and Accountability (Oct. 5, 2015), <http://www.justice.gov/opa/pr/attorney-general-lynch-use-force-data-vital-transparency-and-accountability>.

¹⁸⁴ See Megan Smith & Roy L. Austin, Jr., *Launching the Police Data Initiative*, THE WHITE HOUSE: BLOG (May 18, 2015), <https://www.whitehouse.gov/blog/2015/05/18/launching-police-data-initiative>.

¹⁸⁵ See *Public Safety Data Portal*, THE POLICE FOUND., <http://publicsafetydataportal.org/> (last visited Feb. 29, 2016). The portal makes select data open and available to the public, demonstrating a commitment to transparency and accountability.

¹⁸⁶ According to FBI Director James Comey, the federal government does not currently have accurate data even on police-involved shootings See Aaron C. Davis & Wesley Lowery, *FBI Director Calls Lack of Data on Police Shootings 'Ridiculous,' 'Embarrassing.'* WASH. POST (OCT. 7, 2015), https://www.washingtonpost.com/national/fbi-director-calls-lack-of-data-on-police-shootings-ridiculous-embarrassing/2015/10/07/c0ebaf7a-6d16-11e5-b31c-d80d62b53e28_story.html. The FBI Criminal Justice Information Services (CJIS) Advisory Policy Board recently approved recommendations for the FBI to collect and report information on use of force by a law enforcement office resulting in death or serious bodily injury, as well as other important data on use of force. See PROGRESS REPORT, *supra* note 19, at 11. However, these recommendations fairly limited in scope. For example, the recommendations do not include collecting data related to SWAT deployments, police use of military-grade equipment in use of force incidents, or the much of the data in Recommendation 24.

THE CONSTITUTION PROJECT



Safeguarding Liberty, Justice & the Rule of Law

The Constitution Project®

1200 18th Street NW, Suite 1000

Washington, D.C. 20036

Web: www.constitutionproject.org

Email: info@constitutionproject.org

Phone: 202.580.6920