

NOTES

US VS. THEM: THE MILITARIZATION OF AMERICAN LAW ENFORCEMENT AND THE PSYCHOLOGICAL EFFECT ON POLICE OFFICERS & CIVILIANS

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I. INTRODUCTION

American tradition and law have historically drawn a distinct line between civilian law enforcement and federal military forces.¹ Removing that line is to mistake the mission of each.² The mission of a soldier is to destroy the enemy, vowing to “never quit,” “never accept defeat,” and “always place the mission first.”³ The mission of a police officer is to “support and defend the Constitution of the United States,” and “to cultivate a spirit of fraternalism and mutual helpfulness among our members and the people we serve.”⁴ The oath of a police officer articulates a pledge to uphold our constitutional rights and to never betray the public: “On my honor, I will never betray my badge, my integrity, my character, or the public trust . . . I will always uphold the constitution, my community . . .”⁵ In the words of Sir Robert Peel, founder of the first metropolitan police force in 1829, the “key to effective policing” is that “the police are the people and the people are the police.”⁶

Yet recent images from protests following the police killings of unarmed African-American civilians show just how blurred, or even invisible, the line between domestic law enforcement and military forces has become, with local police confronting citizens engaged in civil disobedience in gas-masks and camouflage, with tear-gas and M16 assault rifles, as well as Mine-Resistant Ambush-Protected (MRAP) armored vehicles.⁷ What we are witnessing is a new, “militaristic breed” of civilian police that has national implications, as well as psychological, physical, economic, and even spiritual consequences.⁸ These consequences affect both the officers themselves, and the citizens they are sworn to serve.⁹

Public trust in civilian law enforcement to perform their responsibilities in accordance with their oath is essential to effective crime control and

¹ Al Baker, *When the Police Go Military*, N.Y. TIMES (Dec. 3, 2011), http://www.nytimes.com/2011/12/04/sunday-review/have-american-police-become-militarized.html?pagewanted=all&_r=0 (“The Posse Comitatus Act of 1878 generally bars the military from law enforcement activities within the United States”).

² *Id.*

³ *Warrior Ethos*, U.S. ARMY WARRIOR ETHOS, <http://www.army.mil/values/warrior.html> (last visited Nov. 11, 2015).

⁴ *Mission Statement*, FRATERNAL ORD. OF POLICE MISSION STATEMENT, <http://www.fop.net/about/mission/> (last visited Nov. 11, 2015).

⁵ *What is the Law Enforcement Oath of Honor?*, INT'L ASS'N OF CHIEFS OF POLICE, <http://www.theiacp.org/What-is-the-Law-Enforcement-Oath-of-Honor> (last visited Nov. 11, 2015).

⁶ *Power to the People*, THE ECONOMIST (Dec. 2, 2010), <http://www.economist.com/node/17633210>.

⁷ Elizabeth R. Beavers & Michael Shank, *Get the Military Off of Main Street*, N.Y. TIMES (Aug. 14, 2014), http://www.nytimes.com/2014/08/15/opinion/ferguson-shows-the-risks-of-militarized-policing.html?_r=0.

⁸ Baker, *supra* note 1; see Aaron B. O’Connell, *The Permanent Militarization of America*, N.Y. TIMES (Nov. 4, 2012), <http://www.nytimes.com/2012/11/05/opinion/the-permanent-militarization-of-america.html?pagewanted=all>.

⁹ See generally *What is the Law Enforcement Oath of Honor?*, *supra* note 5.

community policing.¹⁰ The more civilian law enforcement fails to defuse confrontations in accordance with their oath, and perhaps even escalates them—be it with their equipment, tactics, or behavior, the more trust is lost with members of their community.¹¹ The effect of this betrayal is a “loss of civility, and an erosion of constitutional rights,” rather than the cultivation of good will and fraternity.¹²

Where did we go wrong? How did we transform from a country created by protest against an occupying army that we were taxed to fund, to a country where civil disobedience by citizens is met by civilian police forces with flash grenades, assault rifles, armored vehicles, aircraft, and platoons of military-minded police officers that dress, equip, and behave like occupying soldiers in an enemy territory? To understand why modern civilian police response looks like a military invasion, this article provides clarity by illuminating the history behind the current impact of our government policies created in reaction to five decades of civil unrest, the motivations for creating Specialized Weapons and Tactical task forces (SWAT), and the incentives for government funding that established and continues to proliferate the militarization of civilian police forces through the War on Drugs and the War on Terror. Perhaps more importantly, this article engages us in the discussion of the psychological ramifications that the war on us, created by us, has on our great nation.

II. BRIEF HISTORY OF THE MILITARIZATION OF AMERICA’S DOMESTIC LAW ENFORCEMENT

There are two forms of militarization in domestic law enforcement: direct and indirect.¹³ Direct militarization is the use of federal military forces for civilian policing.¹⁴ Indirect militarization occurs when civilian police forces act like federal military forces.¹⁵ Both forms of militarization are related and are now difficult to distinguish.¹⁶

A. DIRECT MILITARIZATION

The Boston Massacre of March 5, 1770, in which occupying British soldiers killed five colonialists who were protesting the military’s enforcement of civilian law, was a catalyst for the American Revolution.¹⁷ After the American Revolution, the Declaration of Independence

¹⁰ *Ethics and Integrity*, U.S. DEP’T OF JUST., <http://www.cops.usdoj.gov/Default.asp?Item=2469> (last visited Nov. 11, 2015).

¹¹ Baker, *supra* note 1.

¹² *Id.*

¹³ RADLEY BALKO, RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA’S POLICE FORCES 35 (2013).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 35–36.

¹⁷ *The Boston Massacre*, U.S.HIST.ORG, <http://www.ushistory.org/declaration/related/massacre.htm> (last visited Nov. 11, 2015).

condemned George III, the king of Great Britain, for his offenses against liberty:

He has . . . sent hither swarms of Officers to harass our people, and eat out their substance . . .

He has affected to render the Military independent of and superior to the Civil power . . .

For Quartering large bodies of armed troops among us . . .

For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States . . .

He has abdicated Government here, by declaring us out of his Protection and waging War against us.¹⁸

From our country's inception, Americans have "demanded accountability and rejected military presence in our daily lives."¹⁹ Yet, for security purposes,²⁰ Congress enacted The Calling Forth Act of 1792 which gave the president unilateral authority to federalize, deploy, and command state militias "to execute the Laws of the Union, suppress Insurrections and repel Invasions."²¹ In 1794, President George Washington utilized the Calling Forth Act to order state militias to suppress the Whiskey Rebellion in Pennsylvania.²² With the expanded executive power, Washington made it clear that the government would not hesitate to use military force on its own citizens when confronted with a violent uprising.²³

In 1807, that power was further regulated by the Insurrection Act, which clarified that the president could deploy the military to suppress a rebellion only if requested by the state or upon a determination that the situation was "so dire that federal law could no longer be enforced, or if the basic rights of the state's citizens were being violated."²⁴ The regulation

¹⁸ THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776).

¹⁹ Dennis J. Kucinich, *Militarized Police and the Threat to Democracy*, HUFFINGTON POST BLOG (Aug. 18, 2014, 11:18 AM), http://www.huffingtonpost.com/dennis-j-kucinich/police-militarization_b_5687598.html.

²⁰ See generally *Shays' Rebellion*, U.S.HIST.ORG, <http://www.ushistory.org/us/15a.asp> (last visited Nov. 11, 2015).

²¹ U.S. CONST. art. I, § 8, cl. 15; "[W]henever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by ordinary course of judicial proceedings, or by the powers vested in the marshals . . . it shall be lawful for the President of the United States to call forth the militia of such state to suppress such combinations, and to cause the laws to be duly executed." Calling Forth Act of 1792 § 2.

²² Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 160 (2004).

²³ BALKO, *supra* note 13, at 18.

²⁴ 10 U.S.C. §§ 331-335 (2008) (Amended in 2007, the Act enables the President to deploy the military "to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it - (1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; [or] (2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws. In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution."); Danielle Crockett, *The Insurrection Act and Executive Power to Respond with Force to Natural Disasters*, <http://www.law.berkeley.edu/library/resources/disasters/Crockett.pdf> (last visited Nov. 11, 2015) ("The

required that the unilateral power of the president to deploy military forces domestically was to be utilized only as a last resort.²⁵ In 1851, to oppose civilians protesting the Fugitive Slave Act of 1850, a law that “forcibly compelled citizens to assist in the capture of runaway slaves,” the mayor of Boston called on President Franklin Pierce to deploy the US Army and Marines to quell the confrontation.²⁶ President Pierce consented, and the military descended on Boston, on several instances firing into the crowd and charging the protestors with bayonets.²⁷

Three years later, in response to the public backlash against the Fugitive Slave Act in Boston, and in an effort to strengthen the enforcement of the Act, US Attorney General Caleb Cushing issued an opinion known as the Cushing Doctrine.²⁸ This policy, which was merely the opinion of the attorney general, and not subjected to judicial or legislative review prior to its enunciation, allowed US Marshals to summon the military in order to enforce the law without authorization from the president.²⁹ Instead of calling on the military for the purposes of insurrection or rebellion, the doctrine provided a single US Marshal with the power to call on military troops if he determined that citizens were preventing him from performing his duties.³⁰ The opinion would be used to hunt down escaped slaves in northern states, enforce federal laws on the western frontier, and to suppress John Brown’s anti-slavery revolt of 1856 at Harper’s Ferry, West Virginia.³¹

During Reconstruction following the Civil War, the federal government stationed military troops throughout the South to enforce the Civil Rights Act of 1876, the Fourteenth and Fifteenth Amendments, and the Reconstruction Acts.³² The Force Acts, including the Klu Klux Klan Act of 1871, made the mass deployment of troops possible by granting the federal government broad authority to use military forces against groups suspected of conspiring against federal law.³³ The federal military presence served an important role in preventing state and local officials in former Confederate states from denying ex-slaves their civil rights and in reducing “race-related terror and violence.”³⁴ But in the disputed presidential election of

amended Act expands the language of the original Act to include natural disasters, epidemics, or other serious public health emergencies, terrorist attacks or incidents, or other conditions.”); BALKO, *supra* note 13, at 18.

25 *Id.*

26 *Fugitive Slave Acts*, HIST. CHANNEL, <http://www.history.com/topics/black-history/fugitive-slave-acts> (last visited Nov. 11, 2015); ROBERT W. COAKLEY, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1789–1878, at 134 (1996).

27 *Id* at 136–37.

28 BALKO, *supra* note 13, at 22.

29 *Id.*

30 *Id.*

31 *Id.*

32 See *Civil War and Reconstruction, 1861–1877*, LIBRARY OF CONGRESS, <http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/civilwar/recontwo/> (last visited Oct. 5, 2015).

33 BALKO, *supra* note 13, at 23.

34 *Id.*

1876, where neither Democratic candidate Samuel B. Tilden nor Republican candidate Rutherford B. Hayes won a majority of electoral votes, the parties struck a secret deal to allow Hayes to assume the presidency on the condition that the Republicans withdraw all federal troops from the South.³⁵ This arrangement, known as the Compromise of 1877, effectively ended the Reconstruction Era.³⁶ With the military removed, a new era of mob violence, systematic discrimination, segregation, and second-class status for African-Americans emerged, and would essentially remain until the Civil Rights Act of 1964.³⁷

In response to the use of military troops to execute federal laws in the South during Reconstruction, Congress enacted The Posse Comitatus Act of 1878.³⁸ The Posse Comitatus Act made it a crime to use the military to execute the laws of the United States.³⁹ Designed to limit the President's use of military forces in peacetime, the statute provided that: "[I]t shall not be lawful to employ any part of the Army of the United States ... for the purpose of executing the laws, except on such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by any act of Congress...."⁴⁰ The law effectively nullified the Cushing Doctrine by no longer allowing the US Marshals to summon the military to enforce federal law unless they obtained authorization from Congress or the President.⁴¹ Although Congress has authorized a substantial number of exceptions and has strengthened the Act with an additional proscription against use of military forces to make arrests or conduct searches and seizures, the law has remained largely unchanged since its enactment.⁴²

The most significant policy that pushed America towards direct militarization was the Militia Act of 1903, also known as the National

³⁵ *Compromise of 1877*, HISTORY.COM, <http://www.history.com/topics/us-presidents/compromise-of-1877> (last visited Oct 5, 2015).

³⁶ *Id.*

³⁷ BALKO, *supra* note 13, at 24.

³⁸ Jennifer Elsea, *The Posse Comitatus Act and Related Matters: A Sketch*, NAVY DEP'T LIBRARY, 1, 2 (June 6, 2005), <https://wwwfas.org/sgp/crs/natsec/RS20590.pdf>.

³⁹ Army Appropriations Act of 1878, 20 Stat. 152 (codified as amended at 18 U.S.C. § 1385 (2002)) ("Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.").

⁴⁰ ARMY NATIONAL GUARD, FISCAL YEAR 2001 POSTURE STATEMENT (2001), <http://arnng.ng.mil/resources/News/Publications/Documents/Posture-Statements/2001/appendix%20A.htm>.

⁴¹ BALKO, *supra* note 13, at 24.

⁴² Elsea, *supra* note 38, at 3 ("The Posse Comitatus Act does not apply where Congress has expressly authorized use of the military to execute the law. Congress has done so in three ways, by giving a branch of the armed forces civilian law enforcement authority, by establishing general rules for certain types of assistance, and by addressing individual cases and circumstances with more narrowly crafted legislation. Thus it has vested the Coast Guard, a branch of the armed forces, with broad law enforcement responsibilities. Second, over the years it has passed a fairly extensive array of particularized statutes, like those permitting the President to call out the armed forces in times of insurrection and domestic violence, 10 U.S.C. §§ 331-335. Finally, it has enacted general legislation authorizing the armed forces to share information and equipment with civilian law enforcement agencies, 10 U.S.C. §§ 371-382.").

Guard Act, or the Dick Act, which consolidated the remaining state militias and established the National Guard as the primary domestic military force.⁴³ It further provided that the National Guard be equipped through federal funds and be trained by US Army instructors.⁴⁴ In 1933, the National Guard Mobilization Act officially made the National Guard a component of the US Army.⁴⁵ The ensuing confrontations between the US Army and protest groups, including labor strikers, anti-war activists, and other civilian demonstrators, sowed ill will toward the US Army among some of the public and instilled certain contempt for civilian protestors among some in the military.⁴⁶

One of the most infamous confrontations between the US Army and civilians occurred during the Bonus March of 1932, when 40,000 World War I veterans set up shanty settlements in Washington, D.C. to demand the bonus payment that the government had promised them for their service, but had not delivered.⁴⁷ After two unarmed marching veterans were fatally shot by local police, President Herbert Hoover sent in the US Army.⁴⁸ Led by General Douglas MacArthur and Major George S. Patton, two regiments of infantry and cavalry, along with six tanks, moved in on the nation's capital.⁴⁹ The US Army forced the veterans to flee, and MacArthur ordered the shanty settlements to be burned.⁵⁰

Following the Bonus March, MacArthur denounced the veterans as “[a] mob” that was “animated by the essence of revolution,” whose goal was to overthrow the government in “a reign of terror” that would have caused “insurgency and insurrection” if not for the military intervention.⁵¹ The American public was outraged and bewildered by how the US Army “could treat veterans of the Great War with such disrespect.”⁵² The public was further outraged when the US Army made its Basic Field Manual available to the public in 1935, including a section on strategies for dealing with domestic disturbances such as firing into crowds with “shoot to kill orders” and instructions on the use of “chemical warfare, artillery, machine guns, mortars, grenades, tanks, and planes” against its own people.⁵³ The military justified its instructions and strategies by claiming that the manual did not

43 BALKO, *supra* note 13, at 36; William M. Donnelly, *The Root Reforms and the National Guard*, U.S. ARMY CTR. OF MIL. HIST. (May 3, 2011), <http://www.history.army.mil/documents/1901/Root-NG.htm>; see *Records of the Armed Services Committee and its Predecessors: Committee on the Militia, 1835-1911*, NAT'L ARCHIVES, <http://www.archives.gov/legislative/guide/house/chapter-04-militia.html> (last visited Nov. 11, 2015).

44 See BALKO, *supra* note 13, at 36.

45 ARMY NATIONAL GUARD, *supra* note 40.

46 CLAYTON D. LAURIE & RONALD H. COLE, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1877-1945, at 4 (1997).

47 BALKO, *supra* note 13, at 37.

48 *Id.*; *The Bonus March*, USHISTORY.ORG., <http://www.ushistory.org/us/48c.asp> (last visited Oct. 5, 2015).

49 *Id.*

50 *The Bonus March*, *supra* note 48.

51 LAURIE & COLE, *supra* note 46, at 367.

52 *The Bonus March*, *supra* note 48.

53 BALKO, *supra* note 13, at 39; LAURIE & COLE, *supra* note 46, at 364.

clarify under what circumstances these tactics should be implemented.⁵⁴ By 1941, the military had removed much of this language from the manual or replaced it with instructions that emphasized the use of nonlethal force in domestic affairs.⁵⁵

In 1954, the Supreme Court decision in *Brown v. Board of Education* made segregation in public schools unlawful.⁵⁶ In 1957, African-American students attempted to enroll at Central High School in Little Rock, Arkansas.⁵⁷ Arkansas Governor Orval Faubus sent in National Guard troops to prevent the students from entering the building.⁵⁸ President Dwight Eisenhower had previously opposed deploying federal troops to force integration, and he initially resisted sending them to Little Rock as well.⁵⁹ After a meeting between the president and the governor, Governor Faubus pulled the troops out, allowing a violent mob to physically force the students to withdraw.⁶⁰ President Eisenhower responded by sending in troops from the 101st Airborne Division of the US Army to escort the students to class (the troops were later replaced by the Arkansas National Guard which Eisenhower had federalized).⁶¹ By waiting to send in the military until such deployment was his last remaining option, President Eisenhower's actions remained in line with the protections built into the Insurrection Act.⁶²

Throughout the 1960s, the government repeatedly called upon the National Guard to keep order in cities across America.⁶³ During that decade, civil rights and anti-Vietnam War demonstrators often clashed with the military, culminating with the fatal shooting of four students in a confrontation with the National Guard at Kent State University in Ohio in 1970.⁶⁴ Despite these incidents, the principle of keeping the military separate from civilian law enforcement remained largely intact.⁶⁵

54 BALKO, *supra* note 13, at 39.

55 BALKO, *supra* note 13, at 39; LAURIE & COLE, *supra* note 46, at 365.

56 *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (holding that “in the field of public education, the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.”).

57 *Eisenhower and the Little Rock Crisis*, AM. LIBRARY, http://www.americaslibrary.gov/aa/eisenhower/aa_eisenhower_littlerock_1.html (last visited Nov. 11, 2015).

58 *Id.*

59 BALKO, *supra* note 13, at 40.

60 *Id.*

61 *Id* at 40–41.

62 *Id* at 41.; See 10 U.S.C. §§ 331–335 (2008).

63 BALKO, *supra* note 13, at 41.

64 John Kifner, *Four Kent State Students Killed By Troops*, N.Y. TIMES (May 4, 1970), <http://www.nytimes.com/learning/general/onthisday/big/0504.html#article>.

65 BALKO, *supra* note 13, at 41.

B. INDIRECT MILITARIZATION

Since the 1960s, the enactment of federal policies in response to the War on Drugs and the War on Terror has given civilian police forces across America the justification to acquire military technology, equipment, and tactical training for newly specialized units to be used against civilians in domestic law enforcement.⁶⁶ Beginning in the mid-1960s, an era of race riots, hostage takings, and barricaded shoot-outs, a Specialized Weapons and Tactics (“SWAT”) model of civilian law enforcement proliferated nationwide.⁶⁷ But after the civil unrest receded, SWAT remained and became increasingly integrated into day-to-day law enforcement, especially with respect to the War on Drugs.⁶⁸ This was phase one in the indirect militarization of American civilian law enforcement.⁶⁹ Phase two, in which the federal government began supplying civilian police departments with military weaponry, began in the mid-1990s and accelerated after the terrorist attacks in New York City and Washington, D.C. on September 11, 2001—under the premise that no American community was safe from Islamic terrorism and it might require a local police officer with a grenade launcher to protect us.⁷⁰

1. *Phase One: The Emergence of SWAT & the War on Drugs*

In the summer of 1965, racial tension in Watts, a predominately African-American Los Angeles neighborhood, reached its breaking point after two white police officers arrested an African-American motorist and two of his family members.⁷¹ A crowd of spectators grew angry at what was perceived to be “yet another incident of racially motivated abuse by police.”⁷² As the police drove off with the family members in custody, one of the spectators shouted, “[d]on’t worry, we’re going to burn this mother down.”⁷³ A riot ensued, eventually covering fifty-square miles of South Central Los Angeles in its five-day duration.⁷⁴ On the third night, 13,500 California National Guards were dispatched, who under the command of the Los Angeles Police Department (“LAPD”), faced off against looters, arsonists, and snipers.⁷⁵ By the time order was restored, 34 were left dead, 1032 injured, nearly 4000 arrested, and \$40 million in property was destroyed.⁷⁶

66 Baker, *supra* note 1.

67 See Ross Douthat, *Playing Soldier in the Suburbs*, N.Y. TIMES (Aug. 16, 2014), <http://www.nytimes.com/2014/08/17/opinion/sunday/ross-douthat-playing-soldier-in-the-suburbs.html?module=Search&mabReward=relbias%3Ar%2C%221%22%3A%22RI%3A7%22>.

68 *Id.*

69 *Id.*

70 Douthat, *supra* note 67.

71 BALKO, *supra* note 13, at 51.

72 *Watts Riot Begins*, HIST. CHANNEL, <http://www.history.com>this-day-in-history/watts-riot-begins> (last visited Nov. 11, 2015).

73 BALKO, *supra* note 13, at 51.

74 *Watts Riot Begins*, *supra* note 72.

75 BALKO, *supra* note 13, at 52.

76 *Watts Riot Begins*, *supra* note 72.

The Watts riot was the first major incident to push America toward militarized policing.⁷⁷ Middle America began to fear crime and civil disorder like never before, as Watts, along with subsequent race riots in Baltimore, Newark, Detroit, and Washington, D.C. signaled “a rising criminal class that was increasingly out of control.”⁷⁸ The Watts riot left LAPD Inspector Daryl Gates, the commanding officer during the confrontation, with the perception that civilian law enforcement training, equipment, and tactics were inadequate to address the threat posed by the “guerrilla warfare” he witnessed in Watts.⁷⁹ The US military was fighting against guerrilla warfare in Vietnam at the time, so Gates asked the military for guidance.⁸⁰ The military gave Gates the tactics and training to more effectively suppress subsequent rioting, which would change the appearance, mindset, and culture of civilian law enforcement for the foreseeable future—Gates created America’s first SWAT team.⁸¹

In 1967, in response to a clash between anti-war protestors and the LAPD in Culver City, California—where president Lyndon B. Johnson had been scheduled to speak—Los Angeles police chief Thomas Reddin created a new unit called Tactical Operations Planning.⁸² The unit’s mission was to plan for and respond to riots, protests, and visits from dignitaries.⁸³ Gates, who was put in command of the unit, broke the unit into sixteen “military type” squads.⁸⁴ A squad consisted of two five-man teams, each consisting of “a leader, a marksman, an observer, a scout, and a rear guard.”⁸⁵ The squads were then divided into two “platoons.”⁸⁶ Gates proposed renaming the unit “Special Weapons Attack Team” (“SWAT”), but after resistance from his deputy chief regarding the use of the word “attack,” settled with “Special Weapons and Tactics.”⁸⁷ This is how SWAT was born.⁸⁸

In response to criticism that the Johnson administration was not taking a strong enough stance on domestic crime, and frustrated by a losing war-effort in Vietnam, where drug use and addiction among US soldiers had gained national exposure, the federal government became more proactive in fighting the drug trade.⁸⁹ In this effort, President Johnson created a new agency called the Bureau of Narcotics and Dangerous Drugs (“BNDD”), which later became the Drug Enforcement Agency (“DEA”) that would operate under the Department of Justice.⁹⁰ Johnson also expanded the

77 BALKO, *supra* note 13, at 52.

78 *Id.* at 53.

79 DARYL GATES, CHIEF: MY LIFE IN THE LAPD 92, 104 (1992).

80 BALKO, *supra* note 13, at 53.

81 *Id.*

82 GATES, *supra* note 79, at 112.

83 *See id.*

84 *Id.* at 112–13.

85 *Id.* at 114.

86 *Id.*

87 *Id.*

88 *Id.*

89 BALKO, *supra* note 13, at 65.

90 *Id.*

Office of Law Enforcement Assistance into the Law Enforcement Assistance Administration (“LEAA”), which doled out federal funding, equipment, technology, and training directly to state and local law enforcement agencies.⁹¹ Though Johnson laid the groundwork for the “tremendous combination of police power, surveillance, and incarceration that today so dominates domestic politics,”⁹² his efforts did not quell his critics.⁹³ On April 4, 1968, Martin Luther King Jr. was assassinated in Memphis, Tennessee, which resulted in violent riots in over one-hundred American cities.⁹⁴ For many white middle-class Americans, the riots reinforced a sense that American cities were zones of lawlessness, and it was African Americans that were causing the violence.⁹⁵ Fear of violent African-American uprisings was a powerful political tool, and the Republican apparatus knew just how to use it, by implementing new policies and creating new departments that “set in motion an animosity between police officers and the public that may now be beyond repair.”⁹⁶

Leading up to the presidential election of 1968, Republican presidential candidate Richard Nixon and his advisors developed a campaign strategy based on law and order, as well as on a postulation that crime, race riots, the civil rights movement, African-American militancy, anti-war activism, the counterculture, and increasing drug use were connected.⁹⁷ Nixon and his strategists determined that drugs were the common denominator which linked these concerns.⁹⁸

Shortly before his election in 1968, Nixon called illicit drug use “the modern curse of the youth, just like the plagues and epidemics of former years. And they are decimating a generation of Americans.”⁹⁹ After Nixon won the presidential election, he made narcotics the high-profile target of his administration’s promised law and order effort.¹⁰⁰ Though he would not officially declare a War on Drugs until 1971, the modern drug war effectively began with Nixon’s inauguration in 1969.¹⁰¹

In July 1969, Nixon declared drugs a “national threat” and called for “special forces . . . [that] will have the capacity to reave quickly into any area in which intelligence indicates major criminal enterprises are engaged

91 *Id.*

92 CHRISTIAN PARENTI, *LOCKDOWN AMERICA: POLICE & PRISONS IN AN AGE OF CRISIS* 6 (2002).

93 BALKO, *supra* note 13, at 66.

94 *Id.* at 67.

95 *Id.*

96 *Id.* at 125.

97 *Id.* at 68.

98 *Id.* at 69.

99 Former Vice-President Richard Nixon, Remarks at the Republican National Convention, Miami Beach, accepting the nomination as Republican candidate for president of the United States (Aug. 8, 1968), <http://www.c-span.org/video/?4022-2/1968-richard-nixon-speech>.

100 BALKO, *supra* note 13, at 71.

101 *Id.* at 76.

in the narcotics traffic.”¹⁰² Drug trafficking was targeted as “public enemy number one,” and using drugs was cast as the culprit for the nation’s rising crime rate as addicts “turn[ed] to shoplifting, mugging, burglary, armed robbery, and so on to feed their habits.”¹⁰³

In December 1969, America’s first SWAT raid occurred at the Los Angeles headquarters of the Black Panther Party—an organization of Marxist, militant, African-American nationalists who had gained popularity in the counterculture movement.¹⁰⁴ For three hours, LAPD engaged in a shootout with the well-armed and well-fortified Black Panthers.¹⁰⁵ To resolve the situation, Daryl Gates proposed using a grenade launcher on the building, for which he was told that he would need permission from the Department of Defense.¹⁰⁶ While the Department of Defense authorized the use of the grenade launcher, it was never used.¹⁰⁷ In the end, the Black Panthers surrendered, leaving four Black Panthers and four LAPD officers wounded.¹⁰⁸ The Black Panthers were arrested and jailed, but SWAT’s surprise tactics gave the Black Panthers a plausible argument of self-defense: they awoke to men breaking down their door with guns drawn and firing bullets into their walls.¹⁰⁹ Paramilitary tactics in civilian law enforcement were unprecedented at the time, and a jury acquitted the Black Panthers.¹¹⁰

Although the Black Panthers were acquitted, this high-profile SWAT raid was a massive show of civilian police power against an organization that was feared by many politicians, law enforcement officials, and most middle-class Americans.¹¹¹ Although Civil Rights activists were outraged, the SWAT raid was a public relations triumph.¹¹² Within five years, SWAT expanded to major cities throughout America.¹¹³

In 1970, Congress passed the Controlled Substances Act (“CSA”) as part of the Comprehensive Drug Abuse Prevention and Control Act which created a classification system for illicit drugs and assigned those classifications to the Department of Justice to categorize drugs according to their medicinal value and potential for abuse and addiction.¹¹⁴ Marijuana was (and remains) classified as a Schedule I drug which is defined as “the

102 Richard Nixon, *Special Message to the Congress on Control of Narcotics and Dangerous Drugs*, THE AMERICAN PRESIDENCY PROJECT (July 14, 1969), www.presidency.ucsb.edu/ws/index.php?pid=2126.

103 PARENTI, *supra* note 92, at 9 (internal quotation marks omitted).

104 BALKO, *supra* note 13, at 76.

105 *Id* at 77.

106 *Id* at 78.

107 *See id* at 78–79.

108 *Id* at 79.

109 *Id*.

110 *Id*.

111 *Id*. at 79–80.

112 *Id*. at 80.

113 *Id*.

114 Controlled Substances Act of 1970, Pub. L. No. 91-513, Title II, § 101, 84 Stat. 1242 (Oct. 27, 1970).

most dangerous drugs of all the drug schedules with potentially severe psychological or physical dependence.¹¹⁵¹¹⁶ The CSA is the active federal US drug policy under which all “illegal importation, manufacture, distribution, and possession and improper use of controlled substances” is regulated by the federal government.¹¹⁶

That same year, Nixon signed into law the Organized Crime Control Bill, also known as the Racketeer Influenced and Corrupt Organizations Act (“RICO”).¹¹⁷ The law’s main objective was to prevent the infiltration of businesses by organized crime.¹¹⁸ This objective was accomplished by granting the government sweeping new powers aimed at seizing profits earned by organized crime, including the power to freeze a defendant’s assets at the time of indictment and confiscate them after conviction.¹¹⁹ By allowing the government to seize entire businesses connected with a defendant, RICO undermined the general principle of presuming innocence until a defendant is found guilty.¹²⁰ The Act also included a “no-knock raids” provision which allowed law enforcement agents to forcibly enter private homes without warning.¹²¹ After Nixon signed RICO into law, he told Attorney General John Mitchell and FBI Director J. Edgar Hoover, “I give you the tools. You do the job.”¹²² The New York Bar Association described the law as containing “the seeds of official repression.”¹²³ Senator Sam Ervin of North Carolina warned his colleagues that the “no-knock” measures “would be grossly abused by complaisant magistrates and over-zealous officers, and that in consequence, both householders and officers would suffer death, and law abiding people would be unnecessarily harassed by ‘no-knock’ raids upon their homes.”¹²⁴ In 1978, Congress broadened RICO to include drug violations.¹²⁵

Under the Organized Crime Control Bill, LEAA’s annual budget increased from \$75 million to \$500 million.¹²⁶ This massive injection of federal funds vastly expanded the agency’s ability to dole out grants for equipment, technology, and training directly to state and local law enforcement agencies.¹²⁷ But according to LEAA director Don Santarelli, state and local law enforcement agencies “didn’t value education or

115 DEA, DRUG SCHEDULING, <http://www.dea.gov/druginfo/ds.shtml> (last visited Jan. 17, 2016).

116 21 U.S.C. § 801 (2012).

117 Organized Crime Control Act of 1970, Pub. L. No. 91-452, Title IX, § 901(a), 84 Stat. 944 (Oct 15, 1970).

118 *Id.*

119 *Id.*

120 See William L. Anderson & Candice E. Jackson, *Law as a Weapon: How RICO Subverts Liberty and the True Purpose of Law*, 9 THE INDEP. REV. 85, 86—87 (2004).

121 PARENTI, *supra* note 92, at 10.

122 *Id.* at 11.

123 *Id.* at 12.

124 BALKO, *supra* note 13, at 96.

125 Radley Balko, *The Forfeiture Racket*, REASON, (Feb. 2010), <http://reason.com/archives/2010/01/26/the-forfeiture-racket>.

126 BALKO, *supra* note 13, at 96.

127 *Id.*

training ... they valued hardware.”¹²⁸ The city of Birmingham, Alabama, asked him for an armored personnel carrier, other police chiefs asked for tanks, and LAPD asked for a submarine.¹²⁹ Additionally, many police departments across the nation requested military equipment and training to start their own tactical task forces modeled after SWAT.¹³⁰ Santarelli was hesitant about the proliferation of SWAT teams throughout the country, recognizing that “[t]here were certain supervised, tightly controlled circumstances where that kind of force was appropriate. But law enforcement has never been good at self-discipline. Once they had that sort of capability, it would be difficult to limit it to those circumstances.”¹³¹

In 1971, Nixon emphasized to his Chief of Staff H.R. Haldeman that “the *whole* problem [was] really the blacks. The key [was] to devise a system that recognize[d] this while not appearing to.”¹³² The “system” was the War on Drugs.¹³³ It was in this vein that Nixon attempted to shift drug enforcement efforts from the higher levels of drug trafficking to lower level street dealing.¹³⁴ Nixon, by executive order, created a new drug-striking agency called the Office of Drug Abuse Law Enforcement (“ODALE”) that was directly accountable to the White House.¹³⁵ ODALE consisted of 300 commandos furnished with military equipment from LEAA funding and broad new RICO powers—including “no-knock” raids.¹³⁶ Mostly staffed by agents from the BNDD, and occasionally augmented with “cross-deputized” officers from local police departments, ODALE squads descended on lower class, predominately African-American communities in big cities across America.¹³⁷ From 1972 to 1973, ODALE squads conducted 1439 raids before public backlash resulted from newspaper reports of overzealous agents kicking in doors without warning, holding residents at gunpoint, and killing unarmed citizens in the pursuit of drugs.¹³⁸ Under a sunset provision, and with the crisis of Watergate looming, Nixon collapsed both BNDD and ODALE into a new agency: the Drug Enforcement Agency (“DEA”) in 1973.¹³⁹

In 1973, SWAT engaged in another high-profile shootout—this time with the Symbionese Liberation Army (“SLA”) who had kidnapped Patty Hearst, the granddaughter of newspaper mogul William Randolph Hearst, in an attempt to free two of its members from jail.¹⁴⁰ During the confrontation, Gates heard over the radio that the SWAT team was

128 *Id.*

129 *Id.*

130 *Id.*

131 *Id.*

132 H. R. HALDEMAN, THE HALDEMAN DIARIES: INSIDE THE NIXON WHITE HOUSE 53 (1994).

133 See PARENTI, *supra* note 92, at 12–13.

134 *Id.*

135 *Id.* at 13.

136 *Id.*

137 *Id.*

138 BALKO, *supra* note 13, at 108–121.

139 PARENTI, *supra* note 92, at 13.

140 BALKO, *supra* note 13, at 126.

requesting the use of fragmentation grenades.¹⁴¹ Gates rejected this request, noting decades later in his autobiography that “had [he] been able to see firsthand what was going on, maybe [he] would have called the military.... But instinctively, [he] didn’t like a civil police force using a weapon designed for the military.”¹⁴² After the shootout, LAPD received much praise from the public, with approval for SWAT in particular.¹⁴³ Gates recalled: “[t]hat night, SWAT became a household word throughout the world. They were intrepid ... their execution was flawless. Soon, other law enforcement agencies began mounting their own SWAT teams. The whole nation had watched the shootout—live on network TV.... Clearly, SWAT had arrived.”¹⁴⁴

By the mid-1970s, from small suburban communities to the largest cities, an estimated five-hundred SWAT teams emerged throughout America.¹⁴⁵ A 1975 *New York Times* investigation into the proliferation of SWAT teams produced mixed results.¹⁴⁶ On one hand, SWAT teams proved to be a “useful and effective” instrument of law enforcement, performing with “restraint and professional discipline.”¹⁴⁷ On the other hand, the report also found that the SWAT trend had “introduced a paramilitary mentality inside some departments,” where “some cops want[ed] to solve all society’s problems with an M-16.”¹⁴⁸ Some police officials feared that “some of these men ha[d] lost perspective of their role in society and [were] playing mental games with firearms.”¹⁴⁹ The report also found that the SWAT trend, especially in smaller agencies, was seen as “a dangerous extension of a ‘macho’ syndrome that exists partly as a result of the nature of police work and partly because of the nature of the men attracted to it as a career.”¹⁵⁰ One police chief in the report noted:

[W]hen properly trained in behavior psychology and other nonviolent techniques, such teams should be able to obtain most objectives without resorting to gunfire, which may kill not only dangerous individuals, but also innocent victims and fellow officers . . . however, too many police departments envision such techniques as a response not to civilian emergencies but to counter-insurgency actions against revolutionaries or militant minorities.¹⁵¹

141 GATES, *supra* note 79, at 135.

142 *Id.*

143 *Id.* at 139.

144 *Id.*

145 John Nordheimer, *Tough Elite Police Units Useful but Controversial*, N.Y. TIMES (July 13, 1975), <http://query.nytimes.com/mem/archive-free/pdf?res=9E04E3DF113CE034BC4C52DFB166838E669EDE>.

146 *See id.*

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.*

151 *Id.*

In large American cities, “SWAT teams were trained in paramilitary tactics and weapons, but that training was balanced by an emphasis on negotiation and deescalation and the use of violence only as a last possible option.”¹⁵² In many smaller agencies, however, officers often did not get this training, and “[SWAT] teams were staffed by part-timers, usually cops whose full-time jobs were more conventional police work.”¹⁵³ Under these circumstances, there was “a risk that an entire [civilian] police department could succumb to a culture of militarism.”¹⁵⁴

Faced with certain impeachment for obstruction of justice and abuse of power, Nixon resigned from the presidency in 1974.¹⁵⁵ The Watergate scandal subsequently hindered successor President Gerald Ford’s ability to apply “right-wing medicine … in the realm of domestic social control.”¹⁵⁶ The LEAA continued its War on Drugs effort, but as the economy drifted, public opinion shifted away from fear of crime and drugs and toward more pressing “economic concerns.”¹⁵⁷ During the next six years, significant progressive legislation under the Ford and Carter administrations, which was designed to curtail the power of civilian policing, passed at the federal level.¹⁵⁸ In 1974, the “no-knock” provision of the Drug Abuse Prevention and Control Act was repealed, which Senator Sam Ervin deemed “a victory for ‘the privacy of the individual and the sanctity of the home.’”¹⁵⁹

During the second-half of the 1970s, LEAA came under criticism for being “wasteful” and “uncoordinated.”¹⁶⁰ Furthermore, pressure from liberals allocated more LEAA funds towards “the softer side of criminal justice,” including “delinquency prevention programs and community-based alternatives to incarceration.”¹⁶¹ Under the Ford administration, the official “1976 Federal Drug Strategy” noted “poverty, unemployment, alienation, or lack of opportunity” as causes of addiction, and called for serious studying of the decriminalization of marijuana.¹⁶² When Jimmy Carter was elected president in 1976, he announced that he “support[ed] legislation amending federal law to eliminate all federal criminal penalties for the possession of up to one ounce of marihuana [sic].”¹⁶³ This new decriminalization ethos reigned in the LEAA’s War on Drugs approach to law enforcement, and directed much of its funds towards the infrastructure of the courts and community-oriented policing.¹⁶⁴ By 1978, the LEAA was

152 BALKO, *supra* note 13, at 133.

153 *Id.*

154 *Id.*

155 *Presidential Impeachment Proceedings*, THE HISTORY PLACE (2000), <http://www.historyplace.com/unitedstates/impeachments/nixon.htm>.

156 PARENTI, *supra* note 92, at 27.

157 *Id.*

158 *Id.*

159 BALKO, *supra* note 13, at 124.

160 PARENTI, *supra* note 92, at 27.

161 *Id.*

162 PARENTI, *supra* note 92, at 28.

163 *Id.*

164 *Id.*

funding some of the movements it initially worked to repress—including a \$100,000 grant to a youth program operated by the Black Panther Party.¹⁶⁵ Although the Ford and Carter administrations had made “a distinct departure from the ideological and legislative onslaught of the Nixon era,” SWAT independently gained momentum and would merge with a reinvigorated resurgence of the War on Drugs with the presidential election of Ronald Reagan in 1980.¹⁶⁶

In one of the first cabinet meetings of the Reagan administration, Reagan’s new attorney general William French Smith, declared: “[t]he Justice Department is not a domestic agency. It is the internal arm of the national defense.”¹⁶⁷ In the interest of national defense, Smith assigned his prosecutors with the task of surveying national law enforcement agencies to find a way to make the federal government more involved with fighting local crime.¹⁶⁸ Like Nixon, Reagan found his answer with the War on Drugs.¹⁶⁹ Reagan focused his efforts on marijuana, based on the theory that marijuana is a gateway to cocaine and heroin use, and users of cocaine and heroin were “too far gone” to save.¹⁷⁰ Underlying the focus on marijuana was a surge of cultural conservatism that linked marijuana with “a behavioral pattern that ... tagged along during the ... young-adult generation’s involvement in anti-military, anti-nuclear, anti-big business, and anti-authority demonstrations.”¹⁷¹ The Reagan administration recognized that “[p]eople engaged in this behavior” came from “a myriad of different racial, religious or other persuasions.”¹⁷² Thus, there could only be one remedy: “create a generation of drug-free Americans to purge society.”¹⁷³ Reagan’s new drug czar, Carlton Turner, made it clear that there would be little tolerance for dissent by purging psychiatrists from federal drug agencies, declaring: “[t]hey’re trained to treat ... [addiction], and treatment isn’t what we do.”¹⁷⁴

Reagan’s appeal to morality defined the greatest challenge to the era as “a struggle of good and evil” in a speech delivered to a convention of police chiefs in New Orleans in 1981: “[f]or all of our science and sophistication, for all of our justified pride in intellectual accomplishment, we must never forget the jungle is always there waiting to take us over ... [o]nly our deep moral values and our strong social institutions can hold back that jungle and restrain the darker impulses of human nature.”¹⁷⁵ In this effort to eliminate illicit drugs, Reagan pushed the 1981 Military

165 *Id.*

166 *Id.*; BALKO, *supra* note 13, at 125–26.

167 *Id.* at 139.

168 *Id.* at 139–140.

169 *Id.* at 40.

170 *Id.* at 141 (Another advantage of this strategy was that demonizing marijuana, the least harmful illicit drug, would curb discussions of decriminalizing any others).

171 *Id.* at 143.

172 *Id.*

173 *Id.*

174 *Id.*

175 *Id.* at 145.

Cooperation with Law Enforcement Act through Congress, giving the military a much larger role in the War on Drugs by allowing and encouraging the military to grant civilian law enforcement agencies access to military bases, research, and equipment.¹⁷⁶ The law permitted the military to work with civilian law enforcement in all aspects of drug interdiction with the exception of conducting searches and making arrests.¹⁷⁷ Like Nixon, Reagan planned to enlist state governors and legislators to pass laws that mirrored federal government policies by promising to create new commissions, training programs, and an intelligence sharing infrastructure that would merge the military and civilian law enforcement into “a single drug-fighting army.”¹⁷⁸

In 1983, Reagan launched the Campaign Against Marijuana Production (“CAMP”)—sending U2 spy planes, helicopters, National Guardsmen and civilian police officers armed with automatic weapons and machetes into Northern California in search of marijuana growers.¹⁷⁹ The plan was (and remains) “to eradicate the large scale illegal marijuana cultivations from public and private lands....”¹⁸⁰ In CAMP’s first year, the program conducted 524 raids, arrested 128 people, and seized 65,000 marijuana plants at a cost of \$1.5 million to taxpayers.¹⁸¹ In 1984, the program conducted 398 raids, arrested 218 people, and seized 160,000 marijuana plants at a cost of \$2.3 million.¹⁸² By CAMP’s second year, many of the larger plantations had been removed, and efforts increasingly targeted smaller growers.¹⁸³ The officials running the campaign considered the areas they were raiding to be war zones and occupied entire towns, acting like drug warriors by searching cars, homes, and structures “relatively close to a marijuana supply” at gunpoint.¹⁸⁴ By 1984, similar federal-state marijuana eradication programs launched throughout the nation conducting twenty-thousand raids, arresting five-thousand people, and seizing thirteen-million marijuana plants.¹⁸⁵ In 1985, Operation Delta-9, the largest armed law enforcement operation in American history, sent 2200 DEA agents on simultaneous marijuana eradication raids in nearly all fifty states in three days.¹⁸⁶

¹⁷⁶ Radley Balko, *A Decade After 9/11, Police Departments Are Increasingly Militarized*, HUFFINGTON POST (Sept. 12, 2011 8:12 AM), http://www.huffingtonpost.com/2011/09/12/police-militarization-9-11-september-11_n_955508.html.

¹⁷⁷ BALKO, *supra* note 13, at 145.

¹⁷⁸ *Id* at 147.

¹⁷⁹ *Id*.

¹⁸⁰ *Campaign Against Marijuana Planting (CAMP)*, STATE OF CAL. DEP’T OF JUST. OFF. OF THE ATT’Y GEN., <http://oag.ca.gov/bi/camp> (last visited Nov. 11, 2015).

¹⁸¹ BALKO, *supra* note 13, at 148.

¹⁸² *Id*.

¹⁸³ *Id*.

¹⁸⁴ *Id*.

¹⁸⁵ *Id*. at 149.

¹⁸⁶ United Press Int’l, *2,200 Federal Agents Deployed To Root Out Pot On U.S. Lands*, L.A. TIMES (Aug. 5, 1985), http://articles.latimes.com/1985-08-05/news/mn-3498_1_federal-lands; BALKO, *supra* note 13, at 149-50.

In 1984, the Comprehensive Crime Control Act established the Department of Justice Assets Forfeiture Fund (“the Fund”) “to receive the proceeds of forfeiture and to pay the costs associated with such forfeitures, including the costs of managing and disposing of property, satisfying valid liens, mortgages, and other innocent owner claims, and costs associated with accomplishing the legal forfeiture of the property.”¹⁸⁷ The civil asset forfeiture law allows civilian law enforcement agencies involved with federal drug investigations to share in any asset forfeiture revenue that seizures produce.¹⁸⁸ With drug investigations now a potential source of profit for state and local police departments, there was (and remains) a strong incentive to “find” a connection between valuable property (land, homes, cars, and cash) and drug activity.¹⁸⁹ Empowered by this financial incentive, drug policing quickly became a higher priority for police departments over investigations of other crimes such as rape and murder—of which there is no potential for financial gain.¹⁹⁰ Like RICO, civil asset forfeiture also erodes our traditional presumption of innocence. Put frankly by former DEA agent, Bill Ruzzamenti:

Anybody who is growing marijuana on their land, we’re going to take their land. It’s as simple as that. It’s done civilly through the federal system.... Basically, people have to prove that they weren’t involved and didn’t even know about it. Just the act of having marijuana grown on your land is enough to tie it up; then you have to turn around and prove you’re innocent.

It reverses the burden of proof.¹⁹¹

In 1986, the Fund took in \$93.7 million in proceeds from forfeited assets.¹⁹² By 2008, the Fund topped \$1 billion in net assets (forfeiture proceeds free-and-clear of debt obligations and now available for use by law enforcement).¹⁹³ Subsequent amendments dramatically expanded what law enforcement could do with these funds, including allowing their use for expenses such as military equipment.¹⁹⁴ In short, after the amendments were adopted, federal agencies were able to widely retain and spend forfeiture proceeds, subject only to very loose restrictions.¹⁹⁵ This gave the

¹⁸⁷ *THE FUND*, U.S. DEP’T OF JUSTICE, http://www.justice.gov/jmd/afp/02fundreport/02_2.html (last updated Mar. 16, 2015).

¹⁸⁸ *Id.*

¹⁸⁹ BALKO, *supra* note 13, at 153–54.

¹⁹⁰ *Id.*

¹⁹¹ RAY RAPHAEL, CASH CROP: AN AMERICAN DREAM 105 (1985).

¹⁹² Scott Bullock, *Policing For Profit*, INST. FOR JUST. (Mar. 2010), <http://ij.org/report/policing-for-profit/foreword/>.

¹⁹³ *Id.*

¹⁹⁴ See, e.g., Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II, § 201, 98 Stat. 2052 (Oct 12, 1984). “Some of these expenses included ‘equipping for law enforcement functions any Government-owned or leased vessel, vehicle, or aircraft’ and paying the ‘overtime salaries, travel, fuel, training, equipment, and other similar costs of State or local law enforcement officers that are incurred in a joint law enforcement operation with a Federal law enforcement agency ... participating in the Fund.’” Bullock, *supra* note 192.

¹⁹⁵ Bullock, *supra* note 192.

agencies a direct financial stake in generating forfeiture funds.¹⁹⁶ With these changes, the modern era of policing and prosecuting for profit had begun.¹⁹⁷ Over the next twenty years, many states attempted to correct these incentive problems by requiring that forfeiture funds be given to a general fund or to education instead of going back to police departments.¹⁹⁸ However, under a provision in the federal law called Equitable Sharing, state and local police departments could circumvent state law by enlisting the DEA and making the investigation federal.¹⁹⁹ The federal government then took its cut and gave the rest back to the state or local police department (sometimes as much as 80 percent).²⁰⁰ These forfeiture policies would soon help fund the expansion of SWAT teams across the country, fusing yet another strong bond between the War on Drugs and the militarization of America's civilian police forces.²⁰¹

In 1984, the LAPD obtained an Armed Personnel Carrier (APC) that had previously been used to guard nuclear power plants under the pretext that it would serve as a rescue vehicle for the Los Angeles Olympics.²⁰² However, Gates had no intention of using the APC as a rescue vehicle.²⁰³ His intention was to use it as a battering ram to punch a hole in the walls of fortified crack houses.²⁰⁴ In 1985, Gates unveiled LAPD's new weapon in the War on Drugs when he used the APC with a battering ram attached to punch a hole in the side of a house that was suspected of being a crack den in Pacoima, California.²⁰⁵ After the hole was punched, the SWAT team "pounced."²⁰⁶ They did not find any drugs.²⁰⁷ What they did find, however, were two traumatized women and three children eating ice cream.²⁰⁸ The ACLU sued the LAPD and the California Supreme Court held that use of the battering ram "exceeds constitutional limits, violating state and federal guarantees against unreasonable search and seizure," and that future uses of the battering ram would require special permission from a judge.²⁰⁹ In the same case, the Court also held, however, that LAPD did not need permission from a judge to use flashbang grenades.²¹⁰

In 1986, Ronald Reagan signed the National Security Decision Directive 221, which designated illicit drugs as an official threat to US

196 *Id.*

197 *Id.*

198 BALKO, *supra* note 13, at 154.

199 *Id.*

200 *Id.*

201 *Id.*

202 *Id.*

203 *Id.* at 155.

204 *Id.*

205 *Id.*

206 *Id.*

207 *Id.*

208 *Id.*

209 Philip Hager, *ACLU Asks Court to Bar LAPD's Battering Ram*, L.A. TIMES (May 13, 1986), http://articles.latimes.com/1986-05-13/local/me-5949_1_drug-dealers; Langford v. Sup. Ct., 233 Cal. Rptr. 387 (Cal. 1987).

210 Langford, 233 Cal. Rptr. at 392.

national security.²¹¹ The directive instructed the military “to support counter-narcotics efforts more actively,” by assisting civilian law enforcement agencies “in the planning and execution of large counter-narcotics operations,” and “participat[ing] in coordinated interdiction programs.”²¹² The directive also declared marijuana, cocaine, and heroin, “at nearly the same class of enemy as any nation whom the United States had fought a conventional war.”²¹³ In 1987, Congress ordered the secretary of defense and the attorney general to notify state and local law enforcement agencies every year regarding the availability of surplus military equipment that they could obtain for their departments. The United States Congress also established an office in the Pentagon specifically for the facilitation of military equipment transfers to civilian law enforcement.²¹⁴ By the end of the Reagan administration in 1988, Congress had officially authorized the transfer of military equipment designed for the battlefield against enemy combatants abroad to be used against American civilians at home.²¹⁵

In 1988, Reagan’s vice president, George H.W. Bush, was elected president.²¹⁶ Bush immediately proposed huge increases in funding to build new prisons and allocated three times as much funding for law enforcement efforts in the War on Drugs than for treatment.²¹⁷ Much of the law enforcement emphasis was put on casual drug users rather than smugglers and dealers.²¹⁸ That same year, Congress passed the 1988 Anti-Drug Abuse Act (ADAA-88), which created the “Byrne Grant Program” through the Justice Department’s Justice Assistance Grants Program (“JAG”), which made federal funding available to civilian law enforcement agencies “to help these agencies control violent and drug-related crime, improve operations, and build coordination and cooperation among the components of the criminal justice system.”²¹⁹ JAG grants can be used for law enforcement, courts, crime prevention and education, community corrections, drug treatment and enforcement, program planning, evaluation, and technology, as well as crime victim and witness programs.²²⁰ The majority of the JAG grants, however, are spent on law enforcement.²²¹ A

211 BALKO, *supra* note 13, at 157.

212 *Id.*

213 *Id.*

214 *Id.* at 158.

215 *Id.*

216 *Id.* at 163.

217 *Id.* at 66–67.

218 *Id.* at 67.

219 Terence Dunworth, Peter Haynes, & Aaron J. Saiger, *National Assessment of Byrne Formula Grant Program*, NAT’L INST. OF JUST. (June 1997), <http://www.ncja.org/sites/default/files/documents/byrne-jag-assessment.pdf>.

220 ACLU, *War Comes Home: The Excessive Militarization of American Policing*, ACLU 17 (June 2014), <https://www.aclu.org/sites/default/files/assets/jus14-warcomeshome-report-web-rev1.pdf>.

221 *Id.*

portion of the JAG grants were (and still are) used to purchase military equipment.²²²

By the late 1980s, “the policies, rhetoric, and mind-set” of the Nixon-Reagan-Bush War on Drugs had firmly been established in civilian police departments across the country.²²³ Nearly every American city with a population of 100,000 or more had a SWAT team, and tactics that were initially designed for the rare riot, hostage-taking, or barricaded shootout, were deployed daily across the nation.²²⁴ Most deployments were (and remain) on drug raids.²²⁵ In 1989, Federal Magistrate Judge Richard Matsch told the *USA Today*, “[m]y concern is that the real victim in the war on drugs might be the United States Constitution.”²²⁶ Furthermore, Federal Judge John Conway was concerned that “police practices of this nature raise the grim specter of a totalitarian state.”²²⁷

In 1990, faced with what it perceived as a worsening drug crisis, Congress enacted the National Defense Authorization Act (“NDAA”).²²⁸ Section 1208 of the NDAA allowed the transfer of Department of Defense property to state and local police agencies, including arms and ammunition that are suitable for use by such agencies in counter-drug activities; and excess to the needs of the Department of Defense.²²⁹ In 1996, Congress replaced Section 1208 with Section 1033.²³⁰ This military equipment transfer program is now referred to as the “1033 Program.”²³¹ The idea was that if the federal government wanted its police to act like drug soldiers, it should dress and equip them like warriors.²³² As of this writing, the amount in transferred military equipment exceeds \$5.4 billion.²³³ Additionally, 1033 procurements are not matters of public record and the Defense Logistics Agency (“DLA”), which coordinates distribution of military surplus, refuses to reveal the names of agencies requesting “tactical” items, like assault rifles and MRAPs.²³⁴ For security reasons, one can only trace “tactical” items as far as the county of the requesting agency.²³⁵ Moreover,

222 *Id.*

223 BALKO, *supra* note 13, at 168.

224 *Id.*

225 *Id.* at 188.

226 Tony Mauro, *The War On Drugs: Are Our Rights On the Line?*, USA TODAY (Nov. 15, 1989), quoted in BALKO *supra* note 13, at 168.

227 *Id.*

228 National Defense Authorization Act For Fiscal Year 1991, 1990, H.R. Res. 4739, 101st Cong. (1990) (enacted).

229 Taylor Wofford, *How America’s Police Became an Army: The 1033 Program*, NEWSWEEK (Aug. 15, 2014, 5:44 PM), <http://www.newsweek.com/how-americas-police-became-army-1033-program-264537>.

230 *Id.*

231 *Id.*

232 *Id.*

233 Defense Logistics Agency, *Law Enforcement Support Office*, <http://www.dla.mil/DispositionServices/Offers/Reutilization/LawEnforcement.aspx> (last visited Jan. 17, 2016).

234 Wofford, *supra* note 229.

235 *Id.*

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most transferred equipment through the program is contingent on its use within one calendar year.²³⁶

In 1991, in response to the Rodney King beating by LAPD in May of that year, Los Angeles Mayor Tom Bradley asked Warren Christopher to chair a commission to investigate the LAPD's use of excessive force.²³⁷ The Christopher Report found that "a small but significant group of police officers within the department regularly used excessive force," and that misconduct resulted in "light and often non-existent discipline."²³⁸ The commission also found that the LAPD did a poor job of screening applicants for violent backgrounds, and once in the field, the officers were advised to view the communities they patrolled from a "we/they" perspective—reflecting an "us vs. them" culture within the department.²³⁹

In 1993, Lt. Tom Gabor of the Culver City Police Department in California wrote in the *FBI Law Enforcement Bulletin* that although he did not challenge the need for SWAT teams, they were "becoming too ubiquitous and being used in ways that were inappropriate for police work."²⁴⁰ He further noted that "the massive rise in deployments of SWAT teams across the country was more about 'justifying the costs of maintaining [the] units' than about maintaining public safety."²⁴¹ Gabor also said that "in many organizations, patrol leaders [felt] pressured to call for SWAT assistance on borderline cases, even though field supervisors believ[ed] that patrol personnel could resolve the incident."²⁴² In 1996, Marquette County, Wisconsin, sheriff Rick Fullmer actually disbanded his SWAT team, concerned that his SWAT officers got "excited about dressing up in black and doing that kind of thing," and "[all] we're going to do [was] get [someone] hurt."²⁴³

In 1994, President Bill Clinton announced a new federal grant under the Justice Department called Community Oriented Policing Services ("COPS"), that advanced "the practice of community policing in the nation's state, local, territory, and tribal law enforcement agencies...."²⁴⁴ Clinton, Senator Joe Biden, and other politicians bolstered the program as "build[ing] bonds of understanding and trust between police and citizens."²⁴⁵ The majority of the COPS grants were given to hire more

²³⁶ Joe Coscarelli, *Why Cops in Ferguson Look Like Soldiers: The Insane Militarization of America's Police*, N.Y. MAG (Aug. 14, 2014), <http://nymag.com/daily/intelligencer/2014/08/insane-militarization-police-ferguson.html>.

²³⁷ BALKO, *supra* note 13, at 186.

²³⁸ *Id.* at 186–87.

²³⁹ *Id.* at 87.

²⁴⁰ *Id.* at 191.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ Steven Elbow, *Hooked On SWAT*, MADISON CAP. TIMES (Aug. 18, 2001, 7:00 AM), http://host.madison.com/news/local/writers/steven_elbow/hooked-on-swat/article_f1bc13e6-b29b-5ab0-a7cf-ba46b1b3860c.html.

²⁴⁴ *Community Policing Defined*, U.S. DEP'T OF JUST. <http://www.cops.usdoj.gov/pdf/vets-to-cops/e030917193-cp-defined.pdf> (last visited Nov. 11, 2014).

²⁴⁵ BALKO, *supra* note 13, at 219.

police officers, but with minimal to zero guidelines as to how those officers should be used, or what attitude they should carry while on patrol.²⁴⁶ In actuality, many police departments used (and remain to use) the COPS grants to create and fund SWAT teams and purchase military equipment.²⁴⁷ Shortly after the announcement of COPS, Clinton announced the “Troops To Cops” program that “offers policing agencies an experienced and dedicated talent pool of men and women who want to continue serving their country as peace officers.”²⁴⁸ Additionally, in 2012, under the COPS program, 629 of the eight-hundred police jobs funded for the next three years were to go to veterans who served at least 180 days active duty since the terrorist attacks in 2001.²⁴⁹ This was the first time that the eighteen-year-old COPS program has required cities and counties seeking grants to hire veterans exclusively.²⁵⁰

In 1997, criminologist Peter B. Kraska published a report on the systematic insurgence of militarism throughout American civilian law enforcement.²⁵¹ The report found that by 1995, seventy seven percent of American cities with a population over twenty-five thousand had SWAT teams.²⁵² The report also found that the annual aggregate of SWAT deployments had increased from three thousand in 1980 to nearly thirty thousand in 1995.²⁵³ Most alarming perhaps, was that SWAT teams and their paramilitary tactics were increasingly being used for regular patrols.²⁵⁴ Underlying these statistics, Kraska observed a “masculinity-based arms race” between police departments that often led to inferiority complexes at smaller departments.²⁵⁵ These smaller departments did not need a SWAT team to repress riots, hostage-takings, or barricaded shootouts, they simply wanted a SWAT team because larger departments had them and they wanted one too.²⁵⁶ And with federal funding from the JAG grants, the 1033 program, COPS grants, and revenue from civil asset forfeiture, any city or town that wanted a SWAT team could afford one.²⁵⁷ By the mid-2000s, SWAT teams would be found in towns with a population under five thousand.²⁵⁸ In an interview with Radley Balko, author of *Rise of the Warrior Cop*, Stephen Downing, a member of the LAPD patrol bureau,

246 *Id.*

247 *See Id.*

248 U.S. DEP’T OF DEFENSE, DEFENSE AND JUSTICE DEPARTMENTS ANNOUNCE “TROOPS TO COPS” CONVERSION PROGRAM (1995), <http://archive.defense.gov/Releases/Release.aspx?ReleaseID=475>.

249 Kevin Loria, *Military To Get Priority For Police Jobs Under COPS Grants*, CHRISTIAN SCIENCE MONITOR (June 25, 2012), <http://www.csmonitor.com/USA/2012/0625/Military-veterans-to-get-priority-for-police-jobs-under-COPS-grants>.

250 *Id.*

251 BALKO, *supra* note 13, at 207.

252 *Id.*

253 *Id.*

254 *Id.* at 209.

255 *Id.* at 10.

256 *Id.*

257 *Id.*

258 *Id.*

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explained how SWAT teams in smaller police departments can escalate danger in already dangerous situations:

You'd have this 'I want one too' phenomenon . . . so the SWAT teams get bigger, and they start to spread . . . [a]nd standards would start to drop. You have to be very careful about who you put on the SWAT team. The guys who want it most are the last ones who should be given a spot. At LAPD, you were choosing from a force of nine thousand strong. You're getting elite, disciplined officers, and the pool is big enough that you can screen them . . . [f]or fitness and marksmanship . . . but also for attitude and psychology. How do you even begin to select from twenty-eight people? And how do they find time to train? At LAPD, the SWAT team will spend at least half their on-duty time in training. In these smaller towns, the SWAT team is something these guys do on the side. They're patrol officers.

And so what happens is that they train by practicing on the people.²⁵⁹

Police militarization, SWAT proliferation, and deployments would accelerate in the 2000s, exacerbated in the first half of the decade by a new domestic (and global) war, the War on Terror, resulting in a lucrative source of funding and military equipment for civilian police departments across America: The Department of Homeland Security.²⁶⁰

2. *Phase Two: The War on Terror and the Department of Homeland Security*

In response to the terrorist attacks at the World Trade Center in New York City and the Pentagon in Washington, D.C., the federal government created the Department of Homeland Security ("DHS").²⁶¹ This new office set up a massive source of funding for civilian police departments across the nation to build up their arsenals and for small towns to start-up more SWAT teams for the purpose of fighting terror.²⁶² Since its creation, DHS has been providing "anti-terrorist" grants to civilian police departments in smaller towns for the purchase of military-grade armored vehicles, tanks, surveillance drones, machine guns, grenade launchers, armor, camouflage "battle-dress" uniforms, ammunition, and aircraft.²⁶³ In 2011, the Center for Investigative Reporting ("CIR") conducted a report on the DHS grants and found that since its inception, the DHS has provided civilian law enforcement with grants of \$34 billion.²⁶⁴ Whereas the Department of Defense provides civilian police departments with "surplus" military equipment left over from the wars in Iraq and Afghanistan directly through

259 *Id.* at 211.

260 *See id.* at 248–54.

261 *Creation of the Department of Homeland Security*, DEPT. OF HOMELAND SEC., <http://www.dhs.gov/creation-department-homeland-security> (last visited Nov. 11, 2015).

262 Alex Kane, *Not Just Ferguson: 11 Eye-Opening Facts About America's Militarized Police Forces*, BILL MOYERS & CO. (Aug. 13, 2014), <http://billmoyers.com/2014/08/13/not-just-ferguson-11-eye-opening-facts-about-americas-militarized-police-forces/>.

263 *Id.*

264 *Id.*

the 1033 program, DHS grants provide funds to purchase more military equipment through private weapons manufacturers such as Lenco, Lockheed Martin, and Blackhawk Industries.²⁶⁵ In addition to selling weapons, these manufacturers also sponsor training events for SWAT teams, like Urban Shield, a major arms expo held in California in 2013.²⁶⁶ These manufacturers, who had previously only served the Pentagon, have shifted their focus to civilian police departments, hoping to profit from the homeland security market.²⁶⁷ The argument made by civilian police departments is that the military equipment provided by the 1033 program and DHS grants are necessary ““just in case”” of a terrorist threat.²⁶⁸ But in the absence of actual terrorist attacks,²⁶⁹ the military equipment and weapons are used by SWAT teams in routine situations, such as low-level drug raids, the execution of search warrants, or to repress civilian protests such as the World Trade Organization protests in Seattle, Washington in 1999, the wave of Occupy Wall Street protests across America in 2011, and the 2014 protests sparked by the killing of unarmed African-Americans by white police officers in Ferguson, Missouri and Staten Island, New York.²⁷⁰ The result of the militarization of civilian police departments throughout the nation, as demonstrated at these events, has effectively turned civilian police officers who are sworn to protect and serve civilian communities, into a standing army against them.²⁷¹

By 2014, SWAT teams conducted up to eighty-thousand raids per year throughout all fifty states.²⁷² According to a 2014 ACLU report, a disproportionate number of the raids were aimed at minority communities (42 percent African-American, 12 percent Latino).²⁷³ The report also found that the majority of the raids that targeted minority communities were related to drugs, exposing the possibility that racism remains a motivation for the War on Drugs.²⁷⁴ For Americans of color, and those who wish to

265 *Id.*

266 *Id.*

267 BALKO, *supra* note 13, at 254.

268 *Id.*

269 Only a few confirmed terrorist attacks have succeeded on domestic soil since September 11, 2001: notably, the Fort Hood shooting, Nov. 5, 2009; the Boston Marathon bombing, Apr. 15, 2013; and the San Bernardino shooting, Dec. 2, 2015.

270 Radley Balko, *Was the Police Response to the Boston Bombing Really Appropriate?*, WASH. POST (Apr. 22, 2014), <http://www.washingtonpost.com/news/the-watch/wp/2014/04/22/the-police-response-to-the-boston-marathon-bombing/>; ACLU, *supra* note 220 at 3; John Vidal, *Real Battle For Seattle*, GUARDIAN (Dec. 4, 1999, 20.08 EST), <http://www.theguardian.com/world/1999/dec/05/wto.globalisation>;

271 Conor Friedersdorf, *Fourteen Specific Allegations of NYPD Brutality During Occupy Wall Street*, ATLANTIC (July 25, 2012), <http://www.theatlantic.com/politics/archive/2012/07/14-specific-allegations-of-nypd-brutality-during-occupy-wall-street/260295/>; “Enough is Enough”: Tens of Thousands March To Protest Police Violence, CBSNEWS (Dec. 13, 2014, 12:18 PM), <http://www.cbsnews.com/news/eric-garner-ferguson-missouri-protesters-converge-on-washington/>.

271 See Kane, *supra* note 262.

272 Hanqing Chen, *What Militarization Has Done to Our Police Departments*, MOTHER JONES (Aug. 21, 2014, 2:23 PM), <http://www.motherjones.com/politics/2014/08/best-reporting-federal-push-militarize-local-police>.

273 ACLU, *supra* note 220, at 5.

274 See *id.*

exercise their First Amendment right to free speech and assembly, the message was (and remains) clear: “you are the enemy.”²⁷⁵

On December 18, 2014, in response to the police killings of unarmed black men in Ferguson, Missouri and Staten Island, New York,²⁷⁶ President Barack Obama signed an Executive Order to create the Task Force on 21st Century Policing. “The Task Force is part of the Administration’s efforts to strengthen community policing and strengthen trust among law enforcement officers and the communities they serve.”²⁷⁷ In March 2015, the Task Force on 21st Century Policing produced a long list of reforms to civilian police.²⁷⁸ The recommendations included the consideration of “independent criminal investigations and independent prosecutors in cases where the use of force by police officers results in injury or death,” “adopting policies to address racial profiling,” “relaxing [the police’s] approach to mass demonstrations,” and “collecting more data on shootings and deaths by the police.”²⁷⁹ The report also called for the creation of “a federal initiative to diversify law enforcement agencies so they better reflect their communities’ demographic makeup,” and declared that “federal funding [would] be tied to those efforts.”²⁸⁰ President Obama noted, however, that “some of the recommendations, including requiring independent investigations when the police use lethal force, would be ‘controversial,’ and that others would be difficult to put into effect.”²⁸¹

Critics of the report note that although some of the recommendations, including independent police prosecutions and curtailing the role of police in schools, are true advancements, the administration’s reliance on procedural rather than substantive justice misses the mark by failing to address the functional role of police, the root causes of police misconduct, and the role of racial domination in the structuring of America’s criminal justice system.²⁸² In this failure to “directly address the ways in which the very nature of policing and the legal system [has] served to maintain and exacerbate racial inequality,” the report “fail[s] to appreciate that the basic nature of the police, since its earliest origins, is to be a tool for managing inequality and maintaining the status quo. Police reforms that fail to

²⁷⁵ Mark Thompson, *Why Ferguson Looks So Much Like Iraq*, TIME (Aug. 14, 2014), <http://time.com/3111455/ferguson-missouri-michael-brown-iraq/>.

²⁷⁶ Julie Hirschfeld Davis, *Obama Calls for Changes in Policing After Task Force Report*, N.Y. TIMES (Mar. 2, 2015), http://www.nytimes.com/2015/03/03/us/politics/obama-calls-for-changes-in-policing-after-task-force-report.html?_r=0.

²⁷⁷ Press Release, *Fact Sheet: Task Force on 21st Century Policing*, OFF. PRESS SECRETARY (Dec. 18, 2014), <https://www.whitehouse.gov/the-press-office/2014/12/18/fact-sheet-task-force-21st-century-policing>.

²⁷⁸ *Id.*

²⁷⁹ Davis, *supra* note 276.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² Alex S. Vitale, *Obama’s Police Reforms Ignore the Most Important Cause of Police Misconduct*, THE NATION (Mar. 6, 2015), <http://www.thenation.com/article/200409/obamas-police-reforms-ignore-most-important-cause-police-misconduct> (“Procedural justice deals with the ways in which the law is enforced, rather than substantive justness, which involves the actual outcomes of the functioning of the system.”).

directly address this reality are doomed to reproduce it.²⁸³ Although critics acknowledge that “[t]hese reforms may improve the efficiency of police bureaucracies and improve relations with those active in police community dialogues … [the reforms] will do little to address the dramatically expanded police role.”²⁸⁴ Critics suggest that a more effective way to address the reality of a militarized and racially discriminatory police force and its impact on the American public would not be to limit reforms to police procedures, but rather to “call into question why we have come to rely so heavily on the police to manage social problems in a time of growing racial and economic inequality.”²⁸⁵

III. THE PSYCHOLOGICAL EFFECT OF MILITARIZATION

It is clear that a growing “us vs. them” mentality has pervaded America’s civilian police departments and that these departments now behave like small armies occupying an enemy territory.²⁸⁶ What is less clear, however, is how the influx of military weapons and equipment provided to these departments has changed the psychological dynamics of policing and crowd control. A great deal of social-psychological research, as well as important anecdotal evidence from law-enforcement specialists, suggests that militarized policing can greatly escalate situations that might otherwise end peacefully.²⁸⁷ What psychologists Leonard Berkowitz and Anthony LePage have dubbed the “Weapons Effect” can partly explain the increasingly aggressive and violent responses toward civilians by police officers.²⁸⁸ As Berkowitz, Emeritus Professor of Psychology at the University of Wisconsin, explains: “Guns not only permit violence, they can stimulate it as well. The finger pulls the trigger, but the trigger may also be pulling the finger.”²⁸⁹ According to Bruce Bartholow, a social psychologist at the University of Missouri, the “[t]heory underlying the weapons effect or similar kinds of phenomena … suggest[s] that the more you fill the environment with stimuli that are associated with violence, the more likely violence is to occur.”²⁹⁰ Brad Bushman, a psychologist at Ohio State University, agreed: “I would expect a bigger effect if you see military weapons than if you see normal weapons.”²⁹¹

283 *Id.*

284 *Id.*

285 *Id.*

286 Norm Stamper, *Militarizing Ferguson Cops With Riot Gear Is A Huge Mistake*, TIME (Aug. 18, 2014), <http://time.com/3136586/militarizing-ferguson-cops-with-riot-gear-is-a-huge-mistake/>.

287 Jesse Singal, *How Militarizing Police Can Increase Violence*, N.Y. MAG. (Aug. 14, 2014, 11:53 AM), <http://nymag.com/scienceofus/2014/08/how-militarizing-police-can-increase-violence.html>.

288 Brad Bushman, *Get Psyched: The “Weapons Effect,”* PSYCHOL. TODAY (Jan. 18, 2013), <http://www.psychologytoday.com/blog/get-psyched/201301/the-weapons-effect>.

289 *Id.*

290 Singal, *supra* note 287.

291 *Id.*

However, there isn't just a link between visual stimuli, like military weapons and violence.²⁹² There is also a link between military weapons and the roles that both police officers and civilians adopt in the presence of them.²⁹³ According to Maria Haberfeld, a professor at the John Jay College of Criminal Justice, military weapons in the hands of civilian police officers can be particularly dangerous in the context of nonviolent protests like Ferguson.²⁹⁴ She noted that “[m]ilitary equipment is used against an enemy. So if you give the same equipment to local police, by default you create an environment in which the public is perceived as an enemy.”²⁹⁵ Haberfeld also explained how this affects civilians on the other side of the confrontation:

We live in a democratic country, and we believe that this is our right to go out and exercise the right to [free speech] . . . [a]nd when you go out there and exercise that right and suddenly you are faced with soldiers—even though these are not soldiers, but police officers looking like soldiers—then something is triggered, definitely.²⁹⁶

Bushman suggests that meeting nonviolent, civilian protestors with a military response is particularly “bad for . . . officers because they feel more powerful, more invincible, more militaristic, ready to attack.”²⁹⁷ He also noted that “it elicits a response from the observers that ‘hey, this is war,’ and people become defensive and they have a fight or flight response.”²⁹⁸ There is also the effect of masks worn by officers (and protestors) which creates what psychologists call deindividualization, which is an “immersion in a group to the point that one loses a sense of self-awareness and feels lessened responsibility for one’s actions.”²⁹⁹ Bartholow explains the negative effect of deindividualization: “There’s all kinds of evidence in social psychology that [deindividualization] will lead people[,] [both police officers and civilian protestors,] to do things that they wouldn’t do if they could be identified.”³⁰⁰ Gil Kerlikowske, the head of U.S. Customs and Border Protection and former police chief of Seattle, explained in an interview with NPR’s Steve Inskeep:

To tell you the truth it makes it pretty difficult when you’re talking from behind a face shield with a gas mask, to engage with the public and say,

292 *Id.*

293 *Id.*

294 *Id.*

295 *Id.*

296 *Id.*

297 *Id.*

298 *Id.*

299 Renée Grinnell, *Deindividuation*, PSYCHOL. CENT., <http://psychcentral.com/encyclopedia/2008/deindividuation/> (last visited Nov. 11, 2015).

300 See Singal, *supra* note 287.

look let's tone this down, let's calm things down . . . [i]t's pretty hard to engage in those discussions when you're hardened up.”³⁰¹

Psychologists, professors, and law enforcement officials have developed an intuitive understanding of the psychological effects of the militarization of America’s civilian police departments, but it may not matter because all of the military weapons and equipment transfers and funding to purchase more military weapons isn’t going anywhere.³⁰² \$450 million of it was distributed to civilian police departments in 2013 alone.³⁰³

“But all is not lost,” according to Norm Stamper, former chief of the Seattle Police Department from 1994 to 2000.³⁰⁴ Stamper recognized that the protests in Ferguson were caused by many events and phenomena:

The causes of the continuing unrest in Ferguson are many: the shooting death of an unarmed teenager . . . persistent racial bigotry and discrimination, crushing poverty, failing schools, [and] high unemployment . . . [B]ut it was the police department’s precipitous, militarized response . . . that transformed peaceful vigils and protests into a siege of proportions never before seen in [a] St. Louis suburb. That, and an abiding, preexisting condition of deep distrust of the city’s police officers.³⁰⁵

Stamper also notes that “[t]hroughout the nation, in neighborhoods that have been historically neglected or oppressed by their police, the military mentality has exacerbated an already dreadful relationship. And it has all but destroyed ‘community policing.’”³⁰⁶ According to Stamper, it’s not surprising that police officers respond to civilian protests with aggression and a military mind-set:

It’s what cops do. They are conditioned to believe they are in control and that they must maintain that control, at all costs. They come to ‘own’ the streets they patrol. The cop culture produces an attitude that, ‘We’re the police, and you’re not. We will decide what’s best for the community.’ Even if it means hitting the family home of a suspected low-level, nonviolent drug offender with maximum military might, or using dogs for crowd control, or violating the civil liberties and human rights of fellow citizens.³⁰⁷

Stamper recommends ways to make police more responsible to the communities they serve, including ending the War on Drugs that

³⁰¹ *Police Chief Lessons Gave Kerlikowske Insight Into Protestors*, NPR (June 18, 2014, 5:29 AM), <http://www.npr.org/2014/07/18/332498748/as-a-police-chief-kerlikowske-learns-how-to-handle-protesters>.

³⁰² Singal, *supra* note 287.

³⁰³ *Id.*

³⁰⁴ Stamper, *supra* note 286.

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

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disproportionately targets minorities, investing “in civilian review boards with investigative and subpoena powers that allow them real oversight,” and insisting “on meaningful community representation in all aspects of police policy-making, program development, priority setting and crisis management.”³⁰⁸ Most importantly, Stamper recommends the “encourage[ment] [of] good people to go into policing. They can reform things from the inside and provide living exemplars of what good policing can be.”³⁰⁹

IV. REFORM

A. REDUCTION OF SWAT DEPLOYMENTS

SWAT teams can be an effective law enforcement tool when deployed in response to their originally-intended initiatives to suppress race riots, hostage-takings, and barricaded shootouts.³¹⁰ However, SWAT teams today, are deployed 220 times every day in America³¹¹—using aggressive and violent paramilitary tactics to force entry into civilian homes predominately for warrant service, nonviolent crimes, and low-level drug investigations.³¹² Often, these raids result in injury, death, and property damage, and disproportionately target people of color.³¹³ Rather than leaving the decision to the police officers themselves to subjectively qualify a situation as high-risk enough to justify SWAT team deployments and the violent force that follows, law enforcement agencies should have clear standards that limit SWAT team deployments to scenarios that are truly high-risk and require extreme force.³¹⁴ Without such standards, SWAT teams will continue to be used in ways that are inappropriate for police work, and both police officers and civilians will continue to suffer often-deadly consequences.³¹⁵ Instead of deploying SWAT teams for purposes contrary to public safety, such as to merely justify the cost of maintaining the units or for practice, SWAT teams must be used only as a last resort—where patrol personnel cannot resolve an incident without them.³¹⁶ Warrant service, nonviolent crimes, and low-level drug investigations largely do not represent such a situation.³¹⁷ Furthermore, given the fact that SWAT teams can escalate rather than de-escalate potential violence, law enforcement

308 *Id.*

309 *Id.*

310 See *War Comes Home: The Excessive Militarization of American Policing*, *supra* note 220, at 6.

311 Hanging Chen, *What Militarization Has Done to Our Police Departments*, MOTHER JONES (Aug. 21, 2014, 2:23PM), <http://www.motherjones.com/politics/2014/08/best-reporting-federal-push-militarize-local-police>.

312 ACLU, *supra* note 220, at 5–6.

313 *Id.*

314 *Id.* at 6.

315 See *id.* at 6–7.

316 BALKO, *supra* note 13, at 191, 211; see *War Comes Home: The Excessive Militarization of American Policing*, *supra* note 220, at 5–7.

317 See *id.*

officials should use a high level of scrutiny in determining a high-risk scenario and avoid using paramilitary tactics and military-grade firepower upon the public as much as possible.³¹⁸ If these precautions are not taken, and SWAT team deployments are not restricted by high-scrutiny standards, public trust of civilian police and public safety will continue to be undermined.³¹⁹

B. REALLOCATION OF DHS GRANTS

Arguments in support of the militarization of America's civilian police forces justify the mass influx of funds and military equipment as necessary to protect American soil from acts of terrorism.³²⁰ One of the primary events that government officials note as evidence that the massive expense and distribution of military equipment is working, is the manhunt and capture of Dzhokhar Tsarnaev, one of the perpetrators of the Boston Marathon bombing in 2013.³²¹ Following the capture, Homeland Security officials credited DHS grants for the city's SWAT teams, armored vehicles, surveillance systems, and bomb-detection teams that "allowed [them] to take ... Tsarnaev into custody alive," and stressed the importance of continued funding of these programs to prevent future attacks.³²² Other officials noted, however, that the "lockdown" reaction was a violation of civil liberties, not to mention unsuccessful since Tsarnaev was not discovered by the use of SWAT teams, armored vehicles, or surveillance systems, but rather by a resident who noticed a trail of blood leading into her boat in her backyard after the lockdown had been lifted.³²³ Recounting the "[f]orced lockdown of a city, militarized police riding tanks in the streets, door-to-door armed searches without a warrant ... [and] families thrown out of their homes at gunpoint to be searched without probable cause," former Rep. Ron Paul expressed his concern regarding the response from law enforcement saying it was more frightening than the terrorist attack itself.³²⁴ As the *Atlantic* reported in 2013, America has not experienced a military occupation of a city since the Watts riots in 1965.³²⁵ It didn't happen in Oklahoma City after the federal building bombing in 1995, after the bombing at the 1996 Olympic games in Atlanta, nor during

318 See *id.*

319 See *id.*

320 *Id.* at 17.

321 FEMA, *Written Testimony of FEMA Assistant Administrator for Grant Programs Brian Kamoie for a Senate Committee on Homeland Security and Governmental Affairs Hearing Titled "Oversight of Federal Programs for Equipping State and Local Law Enforcement,"* DEPT OF HOMELAND SECURITY (Sept. 9, 2014), <http://www.dhs.gov/news/2014/09/09/written-testimony-fema-senate-committee-homeland-security-and-governmental-affairs>.

322 Balko, *supra* note 270.

323 Sabrina Siddiqui, *Ron Paul: Shutdown After Boston Bombings More Frightening Than the Attacks Itself,* HUFFINGTON POST (Apr. 29, 2013, 2:35 PM), http://www.huffingtonpost.com/2013/04/29/ron-paul-boston-bombings_n_3179489.html.

324 *Id.*

325 Balko, *supra* note 270.

the sniper attacks in Washington D.C. in 2002.³²⁶ In Boston, nineteen-thousand National Guards were deployed, tanks drove down residential streets, innocent people had guns drawn on them for peering out of their residence windows, not to quell riots or an insurrection, but to search for a single suspect.³²⁷ After the cost of \$34 billion in terrorist preparedness expenses, not to mention the estimated \$333 million that Boston lost during the daylong lockdown, the fact remains that all of that money, SWAT team start-ups and deployments, as well as military equipment distributions, did not prevent the attack from occurring.³²⁸ Accordingly, rethinking how our tax dollars are spent on anti-terrorism efforts seems appropriate. Perhaps, reallocating a portion of the DHS grants toward public education and creating community relations-based programs and jobs will give rising generations the resources and opportunities to develop effective anti-terrorism strategies that past and current ones have not adopted.

C. ELIMINATION OF THE 1033 PROGRAM

The 1033 program is operated by the Department of Defense through its Defense Logistics Agency's ("DLA") Law Enforcement Support Office ("LESO").³²⁹ The 1033 statute authorizes the transfer of Department of Defense "property that might otherwise be destroyed" to law enforcement agencies across America.³³⁰ The purpose of the transfer of military equipment is for use in counter-drug activities.³³¹ Transferred property includes MRAP vehicles, bomb-disarming robots (which can themselves be armed), and assault rifles.³³² LESO declares, "[n]o equipment is purchased for distribution."³³³ An investigation by the ACLU, however, found that 36 percent of the transferred property pursuant to the program was brand new.³³⁴ This suggests that the DLA is purchasing new weapons and equipment from weapons manufactures and transferring the property to law enforcement agencies rather than merely transferring "property that might otherwise be destroyed."³³⁵ Moreover, if the government is giving state and local police military equipment for its use in drug investigations, it increases the likelihood that police departments will use military weapons whenever there is a drug investigation.³³⁶ In fact, in most cases military equipment transferred through the 1033 program is contingent on its use

326 *Id.*

327 *Id.*

328 Kane, *supra* note 262; Henry Grabar, *How Much Will the Boston Lockdown Cost?*, CITYLAB (Apr. 19, 2013), <http://www.citylab.com/politics/2013/04/what-will-boston-lockdown-cost-city/5350/>.

329 Def. Logistics Agency Servs., *About the 1033 Program*, <http://www.dispositionservices.dla.mil/leso/pages/default.aspx> (last visited Oct. 1, 2015).

330 *Id.*

331 *Id.*

332 ACLU, *supra* note 220, at 24.

333 Def. Logistics Agency Servs., *About the 1033 Program*, <http://dispositionservices.dla.mil/leso/Pages/1033ProgramFAQs.aspx> (last visited Jan. 17, 2016).

334 ACLU, *supra* note 220, at 24.

335 See Def. Logistics Agency Servs., *supra* note 333; See ACLU, *supra* note 220, at 24.

336 ACLU, *supra* note 220, at 24-25.

within one calendar year.³³⁷ This “use it or lose it” condition guarantees that each item will be used if the police department wants to keep it.³³⁸ It is easy to see how this condition on weapons transfers can be dangerous for society, especially when the item is an MRAP mounted with a machine gun. Most concerning, perhaps, is that its use is aimed at us.

D. ELIMINATION OF JAG GRANTS

When applying for JAG grants, police departments are rewarded with funding based on statistics, including the number of overall arrests and drug seizures.³³⁹ With this statistics-based reward set up for JAG grants, police departments are incentivized to make as many easy arrests (low-level drug offenses) and seizures (regardless of size) as possible.³⁴⁰ When it comes to receiving JAG grants, whether any of the arrests or seizures actually reduce crime is irrelevant.³⁴¹ It’s all about the numbers.³⁴² In fact, actual crime reduction could hinder a department’s ability to receive federal money—if the crime rate isn’t high, police departments in those areas will not receive as much funding.³⁴³

The priority to make as many arrests and seizures as possible to receive federal money is then passed down to police officers themselves and is reflected in how each officer is evaluated, reviewed, and promoted.³⁴⁴ It is easy to see how this system increases public distrust of the police when arrests and seizures are not made for the safety of the community, but rather to increase a police department’s budget. It is also worth noting, as the ACLU reports, that these arrests and seizures are predominately made against minorities—which exacerbates racial tension and distrust of the police in communities of color.³⁴⁵ Moreover, JAG funding is being used to conduct unnecessarily aggressive, paramilitary tactics via task forces that routinely conduct drug investigations, making civilian policing more of a military operation rather than a community service.³⁴⁶ A 2004 classified DEA memo confirms the blurring of the line between domestic law enforcement and the military by calling the DEA “[t]he ‘Other’ Warfighter,” stating that the War on Drugs “has all the risks, excitement, and dangers of conventional warfare.”³⁴⁷ The militarization of civilian policing through JAG grants has created a police culture in America that encourages the perception that people are law enforcement’s enemies rather

³³⁷ Joe Coscarelli, *Why Cops in Ferguson Look Like Soldiers: The Insane Militarization of America’s Police*, N.Y. MAG. (Aug. 14, 2014, 12:29 PM), <http://nymag.com/daily/intelligencer/2014/08/insane-militarization-police-ferguson.html>.

³³⁸ *Id.*

³³⁹ BALKO, *supra* note 13, at 243.

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *See id.*

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ ACLU, *supra* note 220, at 5-7.

³⁴⁶ *Id.*

³⁴⁷ *Id.*

than citizens they are sworn to protect.³⁴⁸ By eliminating JAG grants and evolving beyond the failed War on Drugs,³⁴⁹ it is possible that police will change their perception of civilians from enemies to members of their community, and reflect behavior that is in accordance with their oath.³⁵⁰

E. REVERSING THE “US VS. THEM” MILITARY MENTALITY THROUGH COMMUNITY-BASED TRAINING & RECRUITMENT

Training that involves the development of a “warrior mentality” is pervasive throughout American civilian police departments, as well as in everyday interactions between police officers and civilians.³⁵¹ Teaching civilian police officers to develop a military mentality impacts how some police officers view the community, making a distinction between civilians and suspects; the latter being the enemy.³⁵² It must be acknowledged that one of the sacred principles in the American criminal justice system is that suspects are innocent until proven guilty.³⁵³ If police officers are making an assumption that suspects are enemies, and not civilians with a presumption of innocence, it is easy to see how officers are more likely to use violent force. If training civilian police officers to develop a military mentality is not reversed, civilian rights to life, liberty, and due process will continue to be undermined. Perhaps if police officers are offered more psychological training in community relations and dispute resolution, they would be encouraged to view all members of the community, suspects or not, as American civilians who are entitled to police protection. Furthermore, if reversing the military mentality is not possible due to impervious mental impressions incurred throughout the years, perhaps new efforts and approaches to civilian police recruitment is appropriate.

Encouraging good people to seek a profession in law enforcement is paramount to effective community based policing.³⁵⁴ But this is unlikely to happen if the emphasis in recruitment is placed on the aggressive and confrontational aspects of police work rather than on community service.³⁵⁵ By featuring images of police “tackling suspects, rappelling out of helicopters, shooting guns, [and] kicking down doors,” civilian police

348 See *id.* at 2.

349 *Time For Obama To Join the Debate Over the Failed War On Drugs*, GUARDIAN (Apr. 7, 2012, 4:50 PM), <http://www.theguardian.com/commentisfree/2012/apr/07/drugs-obama-latin-america>. Barack Obama recognized the war’s failings when he announced: “The war on drugs has been an utter failure. We need to rethink and decriminalize our marijuana laws … we need to rethink how we’re operating the drug war.” Bernd Debusmann, *Obama and the Failed War on Drugs: Bernd Debusmann*, REUTERS (Apr. 16, 2012, 1:54 PM), <http://www.reuters.com/article/2012/04/16/us-column-debusmann-drugs-idUSBRE83FOZR20120416>.

350 *What is the Law Enforcement Oath of Honor?*, INT’L ASS’N OF CHIEFS OF POLICE, <http://www.theiacp.org/What-is-the-Law-Enforcement-Oath-of-Honor> (last visited Nov. 11, 2015).

351 ACLU, *supra* note 220, at 23.

352 *Id.*

353 Legal Info. Inst., *Presumption of Innocence*, CORNELL U. L. SCH., https://www.law.cornell.edu/wex/presumption_of_innocence (last visited Nov. 11, 2015).

354 Stamper, *supra* note 286.

355 BALKO, *supra* note 14, at 306.

departments are appealing to people who are attracted to attacking people rather than protecting them.³⁵⁶ Perhaps by portraying police officers as members of the community by depicting them as participants in community meetings or volunteers at local schools, more people who will provide “living exemplars of what good policing can be” will want to become police officers.³⁵⁷ By reversing the “us vs. them” mentality through community-based training and recruitment, it may be possible to return to the original core values of American civilian policing: “We are the American people. You are us. We are you.”³⁵⁸

V. CONCLUSION

Be it due to the rhetoric and tactics of the War on Drugs and the War on Terror, to the military weaponry in the hands of civilian police officers, and/or the excessive use of force and mass deployments of SWAT teams, police officers view civilians as the enemy rather than members of their own community.³⁵⁹ This is a devastating consequence of the warrior mind-set that is pervasive in modern police culture.³⁶⁰ In turn, many civilians who are confronted with the “us vs. them” mentality react with distrust and resentment towards the police.³⁶¹ This can, and far too often does, escalate violence and disobedience.³⁶² We must recall that public trust in civilian law enforcement is “essential to effective crime control and community policing.”³⁶³ It is possible that by reducing the military weaponry in the hands of police officers, limiting SWAT team paramilitary tactics to emergency situations, and eliminating training and recruitment tactics that encourage an “us vs. them” military mentality in police culture, our nation can restore public trust and civility. This will be possible only through the cultivation of unity and fraternity: the key to effective policing.³⁶⁴

356 *Id.*

357 Stamper, *supra* note 286.

358 Doug Deaton, *Police Militarization and the Argument for Armored Vehicles*, POLICEONE (Aug. 22, 2013), <http://www.policeone.com/police-products/vehicles/specialty/articles/6401816-Police-militarization-and-the-argument-for-armored-vehicles/>.

359 See ACLU, *supra* note 220, at 3.

360 *Id.*

361 Andrew Grossman, *Senators Criticize Growing Militarization of Local Police Departments*, WALL STREET J. (Sep. 9, 2014, 7:38 PM), <http://www.wsj.com/articles/senators-criticize-militarization-of-local-police-departments-1410287125>.

362 Singal, *supra* note 287.

363 *Ethics and Integrity*, U.S. DEP’T OF JUST., <http://www.cops.usdoj.gov/Default.asp?Item=2469> (last visited Nov. 11, 2015).

364 *Power to the People*, ECONOMIST (Dec. 2, 2010), <http://www.economist.com/node/17633210> (“THE key to effective policing, according to Sir Robert Peel ... is that ‘the police are the people and the people are the police.’”)