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The Legal and Insurance Ramifications of the Militarization of Police Departments

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Introduction

The deaths of African-Americans by local police officers dominated the American social consciousness in the latter half of 2014. Americans of all races took to the streets in protest. Some of these protests were peaceful while some became violent. Law enforcement response to these demonstrations brought to the forefront issues related to the militarization of local police departments.

I. The Department of Defense Excess Property Program ("1033 Program")

The Department of Defense Excess Property Program, better known as the 1033 Program, was created by the National Defense Authorization Act of Fiscal Year 1997 and is managed through the Defense Logistics Agency's Law Enforcement Support Office. The 1033 Program provides authority to the Department of Defense ("DOD") to transfer military equipment to federal and state agencies for use in law enforcement, particularly counter-drug and counter-terrorism activities.

As of 2014, 8,000 local enforcement agencies participated in the reutilization program that has transferred over $5 billion in military hardware from the DOD to local law enforcement agencies since 1997. Police departments have obtained surplus aircraft, tactical armored vehicles, weapons, and watercraft. It was not until media coverage of the militarized police during the August 2014 unrest in Ferguson that the program drew nationwide public attention. Whether the use of militarized equipment and tactics is an appropriate response by law enforcement in such circumstances became an issue of public debate following the events in Ferguson and those in New York City.

II. The Use of Noise Flash Diversionary Devices

What is a Noise Flash Diversionary Device ("NFDD")

The nomenclature for the device changes depending on the context. The National Tactical Officers Association ("NTOA") is the largest and most well-recognized enforcement training organization in the United States and utilizes the term Sound Flash Diversionary Device ("SFDD") interchangeably with the terminology used by the Bureau of Alcohol, Tobacco,

Firearms, and Explosives, as NFDD. While the case history is rich with demonstrative terminology such as bomb, grenade, or stun grenade, these terms do not accurately depict the design or the intended use of the device. They are designed to be a less than lethal tool to distract and disorient persons for a short duration without sustaining bodily injury. They support the task of protecting lives, specifically during high-risk entries to buildings by police officers. While unintentional injuries and deaths have occurred from the use of these devices, the probability that they do so is low compared to the number of deployments where no injury is sustained. Using terminology other than the intended purpose of the device is used to inaccurately describe it and to sensationalize an event where a person is injured unintentionally. A commonly accepted colloquial term for NFDDs is "flash bang". Flash bang is found interchanged in the literature and most police practitioners know the slang term as the same as the authoritative term.

By design the devices are not grenades. Anti-personnel fragmentation grenades are weapons that are designed to disperse lethal fragments upon detonation. Modern NFDDs are made specifically not to fragment or expel deadly payload. The by-products of the deflagration process inside the steal body of the device are heat, light and acoustic sound pressure wave; none of which are intended to cause serious injury or death. Professional law enforcement personnel and trainers refer to these devices by the term in which they were designed. Any attribution to a term or description otherwise is gratuitous and intentionally misleading.

These devices have been used for decades to assist tactical operations. In their earliest iterations, explosive devices were used to develop the distraction device concept. In the late 1960's, police were more consistently encountering violent suspects often related to illicit drug activity. Early models consisted of rather crude designs with pyrotechnic fuses and charges that created tremendous over pressure. While fundamentally adequate for military simulators, it was recognized that the devices were not safe or reliable enough to be used as a distraction device for law enforcement operations. The NFDDs used today are numerous iterations from the original design. Early in the 1970's military artillery simulators were used by law enforcement officers experimenting with them as a distraction device. The early devices carried too much explosive charge and created a great risk of injury due to the over pressure. As law enforcement refined the various configurations of explosive charge mixtures and body composition, the devices used today are far safer and more effective.

Over 40 years these NFDDs have gone through many design changes, from the amount and type of explosive used to the more reliable fuse to initiate the deflagration process. NFDDs are commonly used as a tactical distraction tool in the United States. Of course, with their use has come the inevitable accidental injury and subsequent injury claims and litigation.

Nationwide litigation involving NFDD usage:
Over the last 25 years, the body of case law related to NFDD usage has been ever evolving. Understandably, the vast majority of NFDD-related case law focuses on Fourth Amendment law and questions regarding qualified immunity. By no means is the following an exhaustive list, but these cases are good examples of the findings made in NFDD cases nationwide:

- U.S. v. Ankeny, 502 F.3d 829 (9th Cir. 2007): Use of NFDD held to be unreasonable in light of circumstances – Officers knew exactly where suspected violent perpetrator was,

yet deployed the NFDD near him (in fact, while he was being instructed to get down on the ground by another officer).

- Boyd v. Benton County, 374 F.3d 773 (9th Cir. 2004): Ninth Circuit affirmed a Fourth Amendment violation when officers using an NFDD to execute a search warrant and injured a woman sleeping in the apartment. Key to the holding was that the officers deployed the device without warning the occupants or looking inside the apartment when they knew up to eight people could be sleeping in the apartment.
- U.S. v. Boulanger, 444 F.3d 76 (1st Cir. 2006): First Circuit validated the tossing of an NFDD into an apartment when yelling "police officers" and "search warrant" when confronted with a situation involving a man with a history of violent crimes who was a suspect in an armed robbery, was suspected of selling drugs out of the residence to be searched, and who likely possessed what an informant who was not an expert described as a "fake gun" and that "the police planned the search after determining that there were no children or elderly people in the apartment."
- U.S. v. Dawkins, 83 Fed. Appx. 48 (6th Cir. 2003): NFDD use was objectively reasonable when the suspect possessed an assault rifle and had a previous conviction for a crime of violence. Damage to property does not create a Fourth Amendment violation.
- U.S. v. Meyers, 106 F.3d 936 (10th Cir. 1997): Determining the use of a "flash bang" device in a house where innocent and unsuspecting children sleep" gave the court "great pause," the information known to the officers about the residence being a marijuana "grow house," the defendant having prior convictions for burglary, theft, and cocaine trafficking, and as a juvenile having been involved in the firebombing of a jail or police vehicle and had been convicted of possession of an unregistered firearm and possession of a firebomb, combined with the officers announcement of their presence and waiting ten seconds before battering down the door and deploying the NFDD was not unreasonable.
- Commonwealth v. Garner, 423 Mass. 735 (1996): Even though the officers broke one of the apartment windows where an adult was believed to be sleeping and tossed an NFDD in through the broken window without looking and injured a four-year-old child who was sleeping in the bedroom, the actions of the officers were reasonable under the circumstances since the officers had strong grounds to believe the occupants of the apartment were armed and vicious.
- Langford v. Superior Court, 43 Val 3d 21, 729 P.2d 822 (Cal. 1987): NFDDs did not pose an unacceptable threat to property and persons after officers had seen fully into targeted room.

Fatalities/Significant injuries involving NFDD usage:
Although NFDDs are designed and intended to be used as less-than-lethal force, there have been a number of high-profile, significant injuries and deaths which have occurred as a result of the use of these devices. Just because an injury occurred, however, does not mean that the device was improperly used:

- In 1989, police in Minneapolis, Minnesota, executed a warrant as part of a drug arrest at the home of an elderly couple. The NFDDs used were believed to have set the home on fire. The elderly couple died of smoke inhalation.
- In August 1996, a couple in Pittsburg County, Oklahoma were burned when an SRT officer broke a window and deployed an NFDD into the bedroom, not knowing the

couple had moved their bed directly under the window and were sleeping on it at the time. The NFDD set fire to the bed and burned both occupants

- In May 2003, a woman died from a heart attack after police detonated an NFDD in her Harlem, New York apartment after the officers were told a drug dealer was there (despite the drug dealer already being in police custody).
- In February 2010, 18 Minneapolis, Minnesota police officers executed a search warrant at an apartment by ramming down the door and deploying an NFDD burning the legs of a female occupant. After the event, it was determined the officers had applied for the no-knock warrant but actually never received it.
- In July 2010, in Jonesboro, Georgia, Clayton County SWAT officers were accused of breaking out a bedroom window of an apartment and blindly tossing an NFDD through the window which landed on a bed igniting the covers and burning a female occupant. The officers were executing a no-knock warrant to arrest a known, armed drug dealer. The officers denied plaintiff's version of the events and said that the female was actually burned when she fled the room following the "break and rake" of the window as a distraction and she unfortunately came into contact with the NFDD that had been properly deployed in the apartment hallway.
- In January 2011, a man died of smoke inhalation after a California SWAT team tried to allegedly "scare" an unarmed man into surrendering after driving a military-like vehicle to his residence and tossing an NFDD into his home.
- In February 2011, a North Carolina SWAT police officer was injured at his home, and later died from his injuries, when a stun grenade accidentally detonated while he was attempting to secure his equipment.
- In May 2014, in Habersham County, Georgia, a 19-month-old baby's face and chest were severely burned when multi-jurisdictional drug task force and SRT officers executing a no-knock warrant regarding a known, armed drug dealer (who had previously assaulted officers with an assault rifle) after the officers announced themselves and forced entry into the house where drugs were sold earlier that day. The officers' operational plan called for the deployment of the NFDD because the information provided by the informant affirmed there were no children present.

Standard for determining reasonableness of the use of NFDDs

Courts considering the question of the reasonableness of the use of NFDDs have found that Fourth Amendment principles governing police use of force apply with "obvious clarity," United States v. Lanier*,* 520 U.S. 259, 271, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997), to the deployment of an explosive device in the home. See, e.g. , Terebsi v. Torreso, 764 F.3d 217 (2nd Cir. 2014); Taylor v. City of Middletown*,* 436 F. Supp. 2d 377, 386 (D.Conn. 2006). Recognizing the requirements of Graham v. Connor, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989), the question, then, is whether the use of stun grenades was reasonable under the particular circumstances alleged in each case. See Estate of Escobedo v. Bender*,* 600 F.3d 770, 784–86 (7th Cir.) (finding law on stun grenades clearly established before 2005 incident); Bing v. City of Whitehall*,* 456 F.3d 555, 569–71 (6th Cir. 2006) (analyzing use of stun grenades under *Graham,* but finding that the officers had qualified immunity in light of the unusual circumstances surrounding the incident); Boyd v. Benton County*,* 374 F.3d 773, 778–84 (applying Fourth Amendment reasonableness test to find use of stun grenades unreasonable, but finding qualified immunity in light of, *inter alia,* the dangerousness of the suspect involved); United States v.

Myers, 106 F.3d 936, 940 (10th Cir.) (finding that a "military-style assault," involving stun grenades, "c[a]me dangerously close to a Fourth Amendment violation," but was not objectively unreasonable in light of the suspect's sometimes violent criminal history).

The factors that courts have considered in assessing whether a particular use of an NFDD was reasonable are no different from those that apply to other forms of force, lethal or non-lethal. Courts have found it important to determine whether the officers first confirmed that they were tossing the stun grenade into an empty room or open space. See United States v. Morris, 349 F.3d 1009, 1012 (7th Cir. 2003) (warning that the use of NFDDs in "close proximity to persons" may not be reasonable); Boyd, 374 F.3d at 779 ("[I]t cannot be a reasonable use of force under the Fourth Amendment to throw [an NFDD] 'blind' into a room occupied by innocent bystanders absent a strong governmental interest, careful consideration of alternatives and appropriate measures to reduce the risk of injury."); Taylor, 436 F.Supp.2d at 386–87 ("The court cannot conceive of a set of circumstances that would permit an officer ... to throw a flash-bang device directly at a person.").

Using an NFDD will more likely be considered reasonable if the subject of the search or arrest is known to pose a high risk of violent confrontation. See, e.g., Boulanger, 444 F.3d 76, 85 (1st Cir. 2006) (suspect had a history of violent crimes); Boyd, 374 F.3d at 783 (constitutional violation not clearly established where officers had reason to believe suspect was armed and layout of dwelling made entry particularly dangerous); Molina ex rel. Molina v. Cooper, 325 F.3d 963, 973 (7th Cir. 2003) (suspect had record of aggravated assault and access to weapons); *cf.* Graham, 490 U.S. at 396, 109 S. Ct. 1865 (considering, among other factors, "whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight").

It should be noted that courts do not like the "routine" use of NFDDs in the execution of warrants. See, e.g., Myers, 106 F.3d at 940 ("Certainly, we could not countenance the use of [NFDDs] as a routine matter."); Boyd, 374 F.3d at 782 (quoting Myers); Escobedo, 600 F.3d at 785–86 (plaintiff "was not considered to be a violent, dangerous individual, he was not the subject of an arrest and he did not pose an immediate threat to the police or others"); Molina, 325 F.3d at 973 (observing that the use of NFDDs is not appropriate in "most cases"). The take-away is obvious: the use of NFDDs must be justified by the particular risk posed in the execution of the warrant.

Changes to the allowance of no-knock warrants

As a result of the recent spate of NFDD-related injuries, and the high profile Habersham County matter, there have been significant discussions regarding the use of no-knock search warrants and NFDDs. While it is unlikely that NFDDs as a whole will be banned, and the usage of same depends entirely on the information known to the officers as well as the dynamics of the situations they encounter, one idea that is starting to get traction has to do with the restriction of no-knock search warrants. Typically, these warrants are issued by magistrates who are available at all hours of the day and night. The public, in an attempt to have accountability for the issuance of these controversial warrants, is finding more and more support for the idea that no-knock warrants should be legislatively restricted to be issued only by elected judges. It is expected that

in the 2015 legislative sessions, several different states will see bills introduced to codify this idea.

III. Lessons of the Ferguson Experience

The City of Ferguson is a Charter City located within St. Louis County. The official city motto is "Proud Past, Promising Future." Founded in 1855, Ferguson began as land deeded for a Wabash Railroad depot. It was incorporated as a city in 1894. In the 2010 census the City had a population of 21,203. The racial makeup is 67% African-American, 29% white. The median age of all residents is 33 years; 28% of residents are under age 18.

The Ferguson Police Department has 53 commissioned police officers. Of this number, 50 are white and 3 are African-American. The Mayor of Ferguson, James Knowles III, is a white male, as are Police Chief Tom Jackson, and 5 of 6 members of the City Council. The voter turnout at the last municipal election was approximately 12% of all eligible voters.
On August 8, 2014, an 18 year old African-American, Michael Brown, was shot and killed by Ferguson Police Officer Darren Wilson. Due to conflicting reports of the circumstances of the shooting, exactly what transpired between Brown and Wilson that led to the shooting remains unclear. Several nights of protests and rioting followed this incident. Dozens of witnesses testified before the St. Louis County Grand Jury, which ultimately voted not to indict Officer Wilson for any criminal offense in connection with the shooting. More protests and rioting followed this announcement, both in Ferguson and in hundreds of cities over the world. In Ferguson alone, during the 12 days of protests and rioting following the death of Michael Brown, 172 people were arrested, 132 of whom were charged only with refusal to disperse. Dozens of businesses were looted and burned, and millions of dollars in property was damaged.

Hands Up, Don't Shoot!

"Hands up, Don't Shoot!" is a saying and gesture that originated from the Michael Brown shooting. While witness accounts differ as to whether Michael Brown actually had his hands up or said the words "don't shoot" before the fatal encounter, the saying and accompanying gesture has taken on an independent symbolic meaning as a means of expressing opposition to police violence. The saying "Black Lives Matter" has also been adopted by protesters as a metaphor for alleged race discrimination on behalf of all victims of police violence. Five African-American members of the St. Louis Rams football team entered the field of their November 30, 2014 NFL home game with their hands raised. On December 1, 2014, several African-American congressmen made the gesture on the floor of the House of Representatives and praised the Rams players. The "Hands Up" gesture has become a rallying cry for protesters in Ferguson and beyond, as a symbol of powerlessness and inequality. The death of Michael Brown has taken on symbolic meaning far beyond the facts of his individual case.

Ferguson Lawsuits

The Ferguson protests have led to litigation of three distinct types. First are the public interest suits by the ACLU of Missouri to clarify and enforce the rights of protesters to assemble on public sidewalks and to record the police. Court orders have been obtained to enjoin police officers from "enforcing a policy or custom of interfering with individuals who are

photographing or recording in public places but who are not threatening the safety of others or physically interfering with the ability of law enforcement to perform their duties."
Another suit successfully challenged a police practice of forcing protesters to keep moving and not stand on sidewalks. An injunction was requested against police enforcing what protesters called the "five second rule" which claimed it violated their free speech rights. In its order, the court wrote that "citizens who wish to gather in the wake of Michael Brown's tragic death have a constitutional right to do so, but they do not have the right to endanger the lives of police officers or other citizens." The ACLU called the ruling a "huge win for peaceful protesters and the rule of law. The order did not limit the ability of officers to enforce the state's refusal to disperse law, which makes it a Class C Misdemeanor for a person to refuse the lawful command of a law enforcement officer to leave the scene of an unlawful assembly or riot.

Also, in another case, a TRO was entered requiring Missouri law enforcement officers to give protesters a reasonable opportunity to disperse before using tear gas. This suit arose from the police use of tear gas when Ferguson protests turned unruly and violent. The court order now requires police to warn crowds of the impending use of tear gas or other chemical agents and allow a reasonable time to allow people to disperse before tear gas is deployed. The order also prohibits the use of chemical agents on "non-criminal" protesters to "frighten them or punish them for exercising their constitutional rights."

Other suits have been brought by individual protesters and journalists for alleged civil rights violations. One federal lawsuit filed by attorneys for five protesters seeks $41.5 Million in damages for plaintiffs who say they were falsely arrested, beaten, tear-gassed or shot with rubber bullets. One internet journalist has sued over his alleged false arrest on November 22, 2014 while covering protests. The suit claims his rights were violated when he was arrested as he was standing on the sidewalk outside Ferguson police headquarters. The journalist alleges that as he recorded attempts by officers to clear protesters from the street, a police officer pointed at him and said "And lock him up." In addition to his claim for false arrest, he alleges that the arresting officers publicly defamed him by disclosing false information about him and harming his professional reputation. These suits remain pending. As of the date of this submission, there has been no suit filed by the Brown family.

Finally, a St. Louis County Grand Juror who heard the evidence in the Michael Brown case has filed suit in federal court asking the court to remove a lifetime order that prevents the unnamed juror from ever discussing the case. The suit argues that the decision by the St. Louis County Prosecuting Attorney to release all the transcripts and documentary evidence waives the need for confidentiality. The justification or basis for this request is not disclosed in the Complaint.

Beyond Ferguson
In addition to the Michael Brown case, other recent examples of alleged unnecessary violence by police against African-Americans have gained widespread attention, such as the deaths of Eric Garner in New York and Tamir Rice in Cleveland. Each has been cited as examples of improper police responses that unfairly target African-Americans, as well as reflecting broader concerns over what is perceived to be a flawed and biased system of justice. Speaking after the Grand Jury announcement, President Barack Obama said: "We need to recognize that the situation in Ferguson speaks to broader challenges that we still face as a nation."

The head of the Southern Poverty Law Center has also cited the Michael Brown case as an example of "how wide the gulf is between the police and those who are policed in so many communities around the country." Richard Cohen stated this gulf has been formed "by the history of discrimination in this country, a gulf that has been deepened by the systemic biases in our current criminal justice system, and undermines the very legitimacy of our system of justice."

Clearly, independent of the facts of the Michael Brown case, the anger and unrest over the grand jury decision not to indict Officer Wilson illustrates the uneasy state of American justice and race relations, particularly with regard to the way law enforcement deals with minorities. The long term influence and effect of these protests on civil rights litigation against police officers is unclear. Likewise, issues involving insurance coverage for the possible liability of police officers and police agencies for alleged civil rights violations will remain challenging and complex, particularly with regard to issues of race and the public perception of police.

IV. The Impact of Imagery and Perception

Images have a strong impact on the perceptions of the general public and on a smaller scale, juries in both criminal and civil trials. Studies have shown that when used in a controlled manner, pictures of horrific injuries and crime scenes can impact jury verdicts and damage awards.[1] Other studies have shown that the defendant's attractiveness and attire influences verdicts and conviction rates.[2] Pre-trial publicity has long been a concern for lawyers and defendants and has resulted in motions to change venue, in an attempt to find a jury pool less impacted by both the media coverage and its corresponding visual images.

Similarly, the images of local police officers responding to the Ferguson riots have likely impacted the public's perception and opinions of whether military surplus equipment should be used by local law enforcement and the appropriate situations to use the equipment. The most prominent image from the Ferguson riots is one of local law enforcement dressed in camouflage-fatigues with an armored military vehicle in the backdrop. There are certainly other images of Ferguson officers dressed in traditional "blues" responding to the riots; however, those are not the images prominently displayed in the mainstream media. The fact that there was little national debate over the last decade over the 1033 Program with thousands of participating local governments, until the images of Ferguson brought the issue front and center on every American's large-screen television, appears indicative of the power of these visual images. It is therefore not surprising that post-Ferguson public opinion has expressed disfavor for the increased use of military equipment by local law enforcement.[3]

Additionally, recent images of fallen officers, always officially dressed in their "blues" and their images of grieving families have added to the debate. The recent ambush-style killings of

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[1] *See generally, The Impact of Graphic Injury Photographs on Liability Verdicts and Non-Economic Damage Awards*, 21:5 The Jury Expert – The Art and Science of Litigation Advocacy/American Society of Trial Consultations, (Sept. 2009), at http://www.thejuryexpert.com/2009/09/the-impact-of-graphic-injury-photographs-on-liability-verdicts-and-non-economic-damage-awards/.

[2] *See generally*, Kateri Schafter, *The Effect of Defendant's Courtroom Attire on Jurors' Verdicts*, (unpublished manuscript, on file at http://course1.winona.edu/CFried/journal/Papers%202009/Kateri%20formatted.pdf)

[3] Emily Swanson, *Americans Oppose Police Militarization, Poll Finds*, Huffington Post, (Aug. 21, 2014), *at* http://www.huffingtonpost.com/2014/08/21/police-militarization-poll_n_5697852.html.

officers in New York also has brought to light the danger that officers face on a daily basis while in the line of duty.

The power of the visual image of the police uniform, both in style and color, likely has initial and lasting impressions on the public. Researchers have extensively studied the role of uniforms and the impact on public perception of the occupation. This includes several studies specifically focused on law enforcement dress. Studies have found that traditional, formal "dark blue" police uniforms elicit a positive image of an officer. A study by Ernest Nickels, a professor of criminal justice at SUNY Oswego showed participants two photographs of officers, digitally changing the uniform color worn.[4] Most interesting that was regardless of the participants' prior interactions with law enforcement, participants uniformly ranked those officers in traditional dark blue uniforms as "friendlier and more honest."

After the negative images of police and civilian interactions during protests in the 1960's-1970's, some departments attempted to re-brand in the hope of changing the image of their departments. Burnsville, Wisconsin officers shed the "blues" for a navy blazer, blue trousers and name tags.[5] In Madison, Wisconsin, officers were encouraged to remove their hats while walking a beat, removing sunglasses while making a traffic stop and greeting pedestrians while walking their beats. Although some jurisdictions reported success with the change, in other jurisdictions, the change may have been taken too far. From 1969-1977, the City of Menlo Park, California altered its uniform to more casual attire (forest green), hoping to improve community relations; however, it did not have the intended results, with an increase in assaults on police officers, perhaps attributable to the lack of respect for the too-casual appearance.[6] Assaults dropped significantly when the "blues" were back in place.

Further, studies have shown that in addition to the formal/informal role of uniforms, color also impacts how an officer is perceived. A 2001 FBI Law Enforcement Bulletin summarized the research, noting that black uniforms may subconsciously send negative signals to citizens and encourage perceptions of the officers as aggressive.[7] In contrast, the traditional blue uniform elicited feelings of honesty, helpfulness and competence. The color blue is regularly associated with feelings of security and comfort, while the color black elicits feelings of power and strength.

Safeguards to Provide Transparency

Pre-Ferguson, the primary critics of the military surplus equipment programs focused on the deployment of Special Weapons and Tactics (SWAT) teams, the use of no-knock warrants and deployment of NFDD's (Nose Flash Diversionary Devices). Criticism has been led by researchers Peter Kraska (professor of criminal justice at Eastern Kentucky University) and

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[4] Ernest Nickels, *Good Guys Wear Black: Uniform Color and Citizen Impressions of Police*, 31:1 Policing (2008), 77-92.

[5] Aarian Marshall, *A History of Police Uniforms – and Why they Matter, Uniforms have influenced interactions between cops and citizens since the Start of American policing*, Citylab (August 18, 2014), *at*: http://www.citylab.com/crime/2014/08/a-history-of-police-uniformsand-why-they-matter/378660/

[6] *Id*.

[7] Richard R. Johnson, *The Psychological Influence of the Police Uniform, 70:3* FBI Law Enforcement Bulletin, (March 2001), *at* http://leb.fbi.gov/2001-pdfs/leb-march-2001

Victor Kappeler in their 1997 study and more recently by the American Civil Liberties Union (ACLU). The ACLU summarized its criticisms in a lengthy report issued in June 2014, two months before the death of Michael Brown and several months prior to the rioting in Ferguson. The creation and deployment of SWAT teams at the local level has steadily increased according to the ACLU findings.[8] Additionally, officer deaths in the line of duty have remained high, with an increase from 2013 to 2014. The Officer Down Memorial Page just released data for 2014 regarding law enforcement fatalities, showing a total of 118 deaths of law enforcement officers, 47 of those deaths by gunfire.[9] This is an increase from the total deaths in 2013 of 105 officers, but a decrease from prior years (2012 -128 deaths, 2011-180 deaths, 2010-177 deaths).

The ACLU conducted its own investigation into the basis for SWAT deployments, finding that from 2011-2012, 79% of the deployments were to issue a search warrant and of those deployments, 62% involved warrants related to drug searches.[10]

Access to Information

At least some of the criticism by the ACLU has arisen due to the lack of tracking by state and local governments on the SWAT team deployments. The ACLU also complained that it made public records requests to more than 255 law enforcement agencies and 114 denied the request in full or in part. Some of the reasons for the denial were that the request was overbroad and voluminous, costs associated with the production, the documents either did not constitute public records, contained trade secrets or could jeopardize law enforcement effectiveness.

One of the most effective ways to provide transparency is to make the information readily available to the public. When information is available for public viewing, there should be less mistrust. Debates can ensue once all have access to the information. Basic information regarding the number of deployments of SWAT teams, whether NFDD's were used, the number of officers involved, the number of people at the home where the raid occurred (including children present), the type of offense or reason or the deployment, and the result of the search could be documented and accessible. Maryland was the first state to enact legislation requiring tracking of SWAT teams.[11] Utah recently passed legislation requiring all state police agencies with a SWAT team to report how often and for what purpose.[12]

Use of Body Cameras

One technological advance in providing transparency is the increased use of Body Worn Cameras (BWC's). The first use of the BWC's was by the City of Rialto Police Department in

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[8] *War Comes Home, The Excessive Militarization of American Policing*, American Civil Liberties Union (June 2014) *available https://www.aclu.org/criminal-law-reform/war-comes-home-excessive-militarization-american-police-report*

[9] *Officer Down Memorial Page, Remembering Law Enforcement Heroes, at* http://www.odmp.org/search/year?year=2014

[10] *War Comes Home, The Excessive Militarization of American Policing*, American Civil Liberties Union (June 2014) *available https://www.aclu.org/criminal-law-reform/war-comes-home-excessive-militarization-american-police-report*

[11] SWAT Team Activation and Reporting Act, Act No. 543 (House Bill 1267), *at* http://mlis.state.md.us/2009rs/chapters_noln/Ch_543_hb1267T.pdf

[12] American Civil Liberties Union of Utah, *at* http://www.acluutah.org/legislation/legislative-reports/item/846-2014-legislative-victories

Southern California. The department found the use of BWC's reduced the use-of-force incidents by 59% and reduced citizen complaints by 87.5 percent.[13] Despite these results, a 2013 Police Executive Reach Forum survey found that only 25% of law enforcement agencies were using BWC's. These statistics may have influenced a set-aside in President Obama's post-Fergusson plan specifically for the purchase of BWC's. The ACLU and others have raised the need for policies and procedures as well, so that the privacy rights of citizens and officers can be protected. Due to these privacy concerns, it is not practicable for officers to wear the BWC's during an entire shift and must turn them on and off. One potential solution is to have the recording devices triggered by certain actions, such as deploying a taser.[14]

Training

Critics' complaints related to training are two-fold: local police departments have received inadequate training on the use of the military surplus equipment and the type of training provided to local police had moved to mirror military-style mindset and tactics.

One of the keys to training is the need for use of simulations involving realistic-type situations that officers may face. After Colombine, many local law enforcements, in partnership with local schools have jointly engaged in drills so that they are better prepared in the event of other active-shooter situations. In much the same way, local law enforcement would benefit from increased use of simulations providing a variety of situational examples in which they must evaluate the best type of tactic to use to control the situation.

Policies and Procedures; Federal Oversight

There is also a push for increased or standardized policies and procedures with respect to the deployment of SWAT teams and the use of armored vehicles and military-dress by local law enforcement.

President Obama recently announced heightened regulations regarding the distribution of the military surplus equipment. He unveiled a three-year, $263 million plan to assist community policing and training, including $75 million devoted to 50,000 new body cameras. The proposal also includes the coordination and consistent standards among different federal departments that supply surplus equipment to local law enforcement. Additionally, it included the creation of a "Task Force on 21st Century Policing" to improve community relations. The task force will be chaired by Charles H. Ramsey, the police commissioner of Philadelphia.

Response to Riots

There are several different ways and means that local law enforcement can, and has responded to riots. First, officers typically will change dress in response to the situation. This was the scene not only in Ferguson, but also in the more recent "Pumpkin Riots" in Keene, New Hampshire. The change of dress can include military fatigues or black uniforms with full riot gear protective equipment—helmets, batons, and shields. Second, some law enforcement agencies will use military-type vehicles, such as the BearCat used by Ferguson police. Keene Police owned a

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[13] Eugene P. Ramirez, *A Report on Body Worn Cameras*, *at* http://www.parsac.org/parsac-www/pdf/Bulletins/14-005_Report_BODY_WORN_CAMERAS.pdf

[14] Cyrus Farivar, *LAPD orders over 3,000 Tasers to go with its body cameras (updated*), ARS Technica (Jan. 7, 2015), at http://arstechnica.com/tech-policy/2015/01/lapd-orders-over-3000-tasers-that-will-turn-on-body-cameras-when-fired/

BearCat (and have stated publicly that it was primarily for riot situations arising from the Pumpkin Festival), but did not employ the vehicle in response to the riot. Third, law enforcement agencies that have mounted patrol may use horses to assist in keeping the peace during demonstrations. Mounted patrol are prevalent in some cities, such as New York; however, other cities have retired units.[15] Even the mounted patrols have critics. A mounted officer is somewhat limited in his or her ability to respond to emergency calls. Horses also come with liabilities, and have injured or trampled protestors during riots. There is also always the risk of a horse throwing its riding officer. Fourth, police will set up physical barriers to corrall the protestors and force the protest into more controllable areas. Fifth, officers may use available controls, such as Tasers on individual protestors. Sixth, additional showing of manpower can be employed. This can include the deployment of SWAT teams, additional officer presence from neighboring jurisdictions, or assistance from the National Guard. Last, police will use specialized tactics to disperse the crowd. These tactics can include tear gas, pepper spray, rubber/plastic/wood/bean bag bullets.

V. Issues related to Police Departments.

Hiring and Employment

Hiring has always been a challenge for police departments. Being a police officer requires a unique skill set and disposition. A generation ago, there was a recognition that educated police officers were better police officers, however due to challenges in recruiting, some previous education requirements for prospective officers have been rolled back, sometimes replaced with military experience. Incidentally, a large number of military veterans have been seeking jobs as police officers after leaving the service. The current numbers of military retirees entering the police force has not been seen since the end of the Vietnam War in the mid 1970's.

Many best practices or recommendations by policing experts suggest that police forces reflect the racial, gender and ethnic composition of the communities they serve, however many selection standards have a disparate impact upon ethnic and racial minorities. In a number of urban environments, this is not the case. This can also create a more adversarial relationship between the police and the community they are charged to protect and serve.

Post-Traumatic Stress Disorder

Post-Traumatic Stress Disorder ("PTSD") is a significant issue that many police departments and officers face. While it is becoming better recognized, and more socially acceptable to discuss, it is clear that more individual police officers are dealing with PTSD as a result of their daily occupational activities. Additionally, for a large number of officers who have not only served in the military, but also served in Iraq, Afghanistan, or other active combat arenas, PTSD can become a significant impediment to an officer's ability to do their job successfully. It also becomes a challenge for the department, when it leads to additional stress placed on an affected officer's colleagues, results in absenteeism, substance abuse, and potential liability for wrongful or negligent actions.

Substance Abuse

Alcohol abuse among police officers is a serious and widespread problem. Some studies have estimated that it afflicts 25% of all police officers. Alcohol consumption by police tends to be both cultural, in terms of social drinking, but also for stress relief. This is exacerbated by the

[15] Michael Cooper, *Police Horses are Diminished in Number, but Not Presence,* N.Y. Times (Feb. 15, 2011) *at* http://cityroom.blogs.nytimes.com/2011/02/15/in-new-york-fewer-police-horses-but-still-a-strong-force/?_r=0

stressors that are unique to police work. The police are unique in that they face "burst stress" – long periods of relative calm and boredom, suddenly interrupted by periods of high stress and activity.

There have been multiple instances of steroid use by some police officers reported in the media. Policing is an obviously dangerous, intensely physical occupation. Most officers are required to periodically demonstrate they are physically capable of performing their job. This has led some officers to utilize anabolic steroids, or other Performance Enhancing Drugs ("PEDs"). Philip J. Sweitzer has called this the "not so quiet little secret of state and city police departments." The effects of steroids and/or other PEDs taken by officers can manifest in myriad ways – over aggression by an officer in dealing with the public, quicker temper, reduced or impaired judgment and a propensity to escalate, instead of deescalate a situation.

Litigation Climate

With the recent events of unarmed, primarily African-American males, losing their lives after confrontations with the police, excessive force cases are potentially becoming more challenging to defend. With the advent of the "Reptile Strategy" used by members of the plaintiff's bar, in some situations plaintiff's attorneys are trying to tie their case, no matter how factually distinct, to those that have been in the news, such as Michael Brown, Eric Garner, and John Crawford. Adding to the challenge of defending excessive force cases, often times is dealing with poor interviews or public statements made by other police officers or the chief of the department in the immediate aftermath of a reported incident.

The public's perception of the police is tricky. Different articles and studies illustrate that many police officers feel that the populations they serve have primarily negative perceptions of them. Many feel distrusted and underappreciated – this has become prominent in the media recently, with the police unions' responses to comments made by the Mayor of New York City, in describing how he cautioned his son to deal with the police. Race also plays a significant role in how police are perceived. For example, in a recent poll conducted by the Pew Research Center and USA Today, 74% of whites, compared to 36% of blacks have a great deal or fair amount of confidence in police officers in their communities to not use excessive force on suspects. The perception of a local police department becomes a significant issue in defending and trying excessive force cases.

VI. Conclusion

The proliferation of military style equipment and tactics has had a ripple effect which is now being seen in the world of litigation. The role that it plays in the public consciousness is something that both defense attorneys and claims representatives alike must be aware of as claims and cases are presented that are a result of the use of these equipment and tactics or at least as plaintiffs' counsels try to tie their cases to this currently-demonized aspect of local law enforcement.