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Karan R. Singh

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TREADING THE THIN BLUE LINE: MILITARY SPECIAL-OPERATIONS TRAINED POLICE SWAT TEAMS AND THE CONSTITUTION

The increasing use of SWAT teams and paramilitary force by local law enforcement has been the focus of a growing concern regarding the heavy-handed exercise of police power. Critics question the constitutionality of joint-training between the military and civilian police, as well as the Fourth Amendment considerations raised by SWAT tactics. This Note examines the history, mission, and continuing need for police SWAT teams, addressing the constitutional issues raised concerning training and tactics. It explains how SWAT joint-training with the military is authorized by federal law and concludes that SWAT tactics are constitutionally acceptable in a majority of situations. Though these tactics are legal and constitutionally authorized, this Note acknowledges the valid fears critics have regarding the abuse of such police authority, and the limitations of constitutional tort jurisprudence in adequately redressing resulting injuries.

* * *

INTRODUCTION

Americans awoke on the morning of April 23, 2000 to news images seemingly taken from popular counterterrorist adventure movies. U.S. Border Patrol agents with submachine guns and military-style jumpsuits had just rescued Elian Gonzalez from the home of his Miami relatives during a pre-dawn raid.¹ The images were shocking to many Americans, and Republican lawmakers who had opposed the raid called for Congressional hearings into what they deemed an excessive use of police force.² Many law enforcement officials were surprised by this call for Congressional review of what they deemed a *routine*, “by-the-book” operation.³ The Immigration and Naturalization Service defended its use of the Border Patrol Tactical Unit by pointing to an increased threat of violence due to the tense situation,⁴ but seasoned critics were wary of such aggressive governmental actions

¹ See Karen DeYoung, *Raid Reunites Elian and Father*, WASH. POST, Apr. 23, 2000, at A01 (detailing the raid events timeline).

² See *id.*

³ See David Kidwell, *Domestic News*, MIAMI HERALD, May 2, 2000, at 1 (“Law enforcement experts agree that what appears to lay people as a bunch of out-of-control agents on testosterone overload is in truth a tactic taught at every SWAT and police training facility.”).

⁴ See Karen DeYoung, *INS Says It Feared Violence in Raid; U.S. Claims Many Close to Elian’s Miami Kin Were Armed, Set to Fight*, WASH. POST, Apr. 28, 2000, at A01.

due to their scandalous history.⁵

The early 1990s incidents at Ruby Ridge, Idaho, and Waco, Texas, first brought the images of paramilitary law enforcement home to American television sets. The sight of law enforcement officers dressed in black and carrying submachine guns, laying siege to American residences, was seen by many individuals as per se police abuse.⁶ As the investigations into the aftermath of these incidents unfolded, and the truth concerning the mismanagement of these situations became known, many people believed the abuse of power they had witnessed was indicative of a general trend of heavy-handedness in a law enforcement community relying heavily on paramilitarism as police policy.⁷

The discussion about paramilitary police units is ongoing.⁸ For example, in 1999, the Cato Institute issued a briefing paper entitled *Warrior Cops: The Ominous Growth of Paramilitarism in American Police Departments*.⁹ Ms. Weber made several alarmist assertions concerning the increasing number of local law enforcement departments maintaining Special Weapons and Tactics (SWAT) teams. Among the concerns she raised were the relationships fostered between these teams and the Department of Defense (DOD) through joint training exercises; the alleged “military mindset” that is instilled in civilian units through this training; the incompatibility of this “military mindset” with civilian law enforcement’s mission; the allegation that these SWAT units are being overdeployed for “routine” policing; and the inference that the totality of these circumstances indicates a standing violation of constitutional rights.¹⁰

Such rhetoric makes great copy but does nothing to explain or resolve the underlying legal issues inherent in the discussion. What this Note attempts to do is to cut through the emotional rhetoric and provide an objective legal analysis of the issue of SWAT team policing.

SWAT training with the military, and the use of that training, while an

⁵ James Bovard, Commentary, *Help Promote Fewer Guns—For the Feds; After Seeing “The Photo,” Who Doesn’t Fear That Lawmen Might Smash Through Their Doors at Night?*, L.A. TIMES, May 3, 2000, at B9.

⁶ See MORRIS DEES, *GATHERING STORM*, 69-78 (1996).

⁷ See DAVID KOPEL & PAUL BLACKMAN, *NO MORE WACOS* (1997) (analyzing alleged errors in those ill-fated standoffs while recommending policy changes aimed at restricting use of paramilitary-type police units in federal law enforcement agencies).

⁸ See Megan Twohey, *SWATs Under Fire*, NAT’L L. J., Jan. 1, 2000, at 37; Jennifer Autrey, *Military Ties with Police Get Scrutiny*, FT. WORTH STAR-TELEGRAM, Oct. 24, 1999, at A1; William Booth, *Exploding Number of SWATs Sets Off Alarms*, WASH. POST, June 17, 1997, at A1; Rowan Scarborough, *Military Training of Civilian Police Steadily Expands*, WASH. TIMES, Sept. 9, 1999, at A1.

⁹ Diane Cecilia Weber, *Warrior Cops: The Ominous Growth of Paramilitarism in American Police Departments* (Cato Institute Briefing Paper No. 50, Aug. 26, 1999), available at <http://www.cato.org/pubs/briefs/bp-050es.html>.

¹⁰ See *id.* at 1.

emotional issue, is constitutionally valid. To support this assertion, this Note discusses the history, mission, and continuing need for police SWAT teams. Specifically, this Note examines the types of training SWAT teams receive, especially from the Department of Defense, and explains how joint training with the military is authorized under federal law, and furthers the SWAT mission. After a review of the constitutional restraints on police activities, this Note demonstrates that SWAT use of military tactics may be constitutionally acceptable in a majority of situations. This Note concludes by illustrating how the fears of critics, rightly concerned with the potential these tactics have for constitutional violations, may be valid, not because of any outright illegality of the SWAT tactics, but because of the limitations of constitutional tort jurisprudence in redressing injuries.

II. NEW AGE THINKING FOR NEW AGE CRIMES

A. *The Birth of a Doctrine*

The 1960s was an era of upheaval in American society. Emerging from this mix of social and political turmoil was a new crime wave characterized by an increased use of firearms coupled with ideological zealotry.¹¹ Sometimes there was no apparent motive behind a rampage.¹² For example, Charles Whitman, an emotionally-imbalanced veteran, climbed to the top of the University of Texas clock tower and wounded forty-six people below with sniper fire, killing fifteen.¹³ The Austin police, working without a coordinated anti-sniper plan, took over ninety minutes to storm the observation deck and kill Whitman.¹⁴ Many police departments viewed the Whitman incident as an omen of the future, showing the need for new approaches to police work. Former Los Angeles Police Chief Daryl Gates, at that time a patrol area commander with the LAPD,¹⁵ is credited with forming the first police unit specially trained to handle these high-risk situations.¹⁶

Gates' experiences during the Watts riots of 1966 started his quest to develop new police tactics to help control this changing face of crime. The Watts riots found Gates and other LAPD officers in a guerrilla warfare situation, under fire from random snipers and pelted with various objects.¹⁷ Traditional police tactics, such as merely having officers present as a deterrent, were ineffective against the

¹¹ See DARYL GATES, CHIEF 110 (1992); ROBERT L. SNOW, SWAT TEAMS 6-7 (1996).

¹² See GATES, *supra* note 11, at 109; SNOW, *supra* note 11, at 6.

¹³ See SNOW, *supra* note 11, at 1-7.

¹⁴ See *id.* at 7; Autrey, *supra* note 8.

¹⁵ See GATES, *supra* note 11, at 88, 113.

¹⁶ See Weber, *supra* note 9, at 6 (crediting the LAPD with forming the first Special Weapons and Tactics Team); GATES, *supra* note 11, at 114 (acknowledging his reputation as "the Father of SWAT").

¹⁷ See GATES, *supra* note 11, at 95.

disorganized rioting.¹⁸ Gates also found that traditional riot-control techniques were equally useless due to the decentralized nature of the mobs they faced. Similarly, the snipers that the LAPD encountered were equally beyond their capabilities. Gates describes the established method of dealing with Watts snipers as little more than indiscriminate shooting by the police.¹⁹ Shortly after the end of the Watts riots, Gates faced another serious situation that challenged his reliance on traditional police tactics.

The Surry Street shootings were the final straw for Gates. Officers responding to reports of a disturbance were ambushed by Jack Ray Hoxsie, who then barricaded himself inside his home and began shooting at anyone outside.²⁰ Hoxsie, having used a shotgun and a rifle on the officers, apparently had an arsenal stashed inside.²¹ The response of other officers to this situation was to shoot back wildly, hoping to strike Hoxsie.²² Because this plan was not working, Gates decided to change his strategy. Two officers volunteered to run up and throw tear gas into the house. They donned the clumsy metal body armor of the era, which Gates describes as "Knights of the Round Table stuff,"²³ and lurched toward the house. After lobbing tear gas grenades into a broken window, the volunteers stormed the house, located the wounded Hoxsie lying in a hallway, and shot him as he reached for a nearby handgun. Hoxsie survived, to be convicted later of attempted murder.²⁴ The final toll was four wounded: three officers and a citizen who attempted to help them. Reflecting on the episode, Gates decided that a new, organized, approach was needed to handle snipers or barricaded criminals.²⁵

Gates and several other supervisors in the LAPD began studying guerrilla warfare tactics with the goal of forming anti-sniper teams.²⁶ The war in Vietnam, ongoing at this time, was a source of guerrilla warfare information that soon led Gates to the U.S. Marine unit at a nearby naval armory. The Marines shared their knowledge of counterinsurgency operations and guerrilla warfare with the Gates team.²⁷ Gates took this knowledge and used it to train several selected officers, in their off-time, in rudimentary anti-sniper techniques. These officers were not organized into any special teams, remaining in their regular police units. This lack of cohesion was one of the first things Gates attempted to remedy.

¹⁸ *See id.*

¹⁹ *See id.* at 102.

²⁰ *See id.* at 108.

²¹ *See id.*

²² *See id.*

²³ *Id.* at 109.

²⁴ *See id.*

²⁵ *See id.*

²⁶ Gates and these supervisors initiated this project without official authorization from the LAPD command. *See id.*

²⁷ *See id.*

As part of his duties, Gates was in charge of the Metro Division. Metro was a floating police unit formed to deal with unusual criminal activity anywhere in the city, such as a series of bus robberies that were plaguing Los Angeles at the time. Eventually Gates was able to have the sixty volunteer officers in his anti-sniper program transferred to the Metro division. These anti-sniper officers became known as the Special Weapons and Tactics (SWAT) unit.²⁸

Gates already had bucked LAPD tradition by organizing Metro into ten-officer squads, each headed by a sergeant.²⁹ Organizing police officers into military-style teams was considered offensive by some LAPD higher-ups. The typical reaction to this restructuring was the comment that “the LAPD is supposed to be a civil police force . . . [t]heir job is to *relate* to the community, not put on combat boots and helmets and *assault* the community.”³⁰ Despite the criticism, Gates believed that changes to policing methods were needed to keep up with the changing times.³¹

In contrast to Metro’s regular ten-officer squads, SWAT’s squads were divided further into two five-officer teams. This small-team concept was a result of the extensive research done by the anti-sniper leaders. Gates had concluded “the most effective way to stop a sniper or apprehend a barricaded individual was with a small team of highly disciplined officers using specialized weapons and tactics.”³² In the LAPD, these teams were the basic SWAT units, comprised of a team leader, a sniper, an observer, a scout, and a rear guard.³³

B. *The New Police at Work*

Since Daryl Gates christened his Special Weapons and Tactics unit in the late 1960s, police departments across the country have formed their own special units to handle high-risk situations.³⁴ The rationale for maintaining these teams is generally the same:

[W]hile average police officers, in their traditional role as peace keepers, are trained and equipped to handle any number of aberrant human behaviors, they are simply not trained and equipped to handle incidents

²⁸ This name was adopted after the LAPD deputy chief rejected the original moniker of “Special Weapons Attack Teams.” *Id.* at 114.

²⁹ *See id.*

³⁰ *Id.* at 116.

³¹ *See id.* at 114-15.

³² *Id.* at 114.

³³ *See id.*

³⁴ “There are now an estimated 3,000 SWAT units throughout the nation.” Janice Morse, *SWAT Teams Sharpen Skills*, CINCINNATI ENQUIRER, May 6, 1999, at B3; *see also* Twohey, *supra* note 8, at 41 (“Thirty years [after the Whitman incident], not only the number, but the size and scope of SWAT teams have grown significantly.”).

in which people with high-destruction weapons have taken hostages and are holed up in a fortified location. Nor are they trained and equipped to handle incidents in which the slightest slip could cost many lives.³⁵

There has been no shortage of need for these special police units.³⁶

1. Daryl Gates' SWAT in action

The first major use of a SWAT team was the LAPD team's deployment in 1969 against a local group of Black Panthers.³⁷ The Black Panthers were a nationally known radical activist group that dabbled in 1960s-era leftist revolutionary politics.³⁸ The Black Panthers were distinguished from other radical groups by their advocacy of the black community's armed self-defense. Black Panthers were known to be armed and often dangerous.³⁹

SWAT's mission was to serve an arrest warrant against two Black Panthers. High-risk warrant service is a typical SWAT mission.⁴⁰ The Panthers in question were sought for using a shotgun and a forty-five caliber pistol to threaten a police officer called to the area by neighbors complaining of a disturbance. The arrest plan called for a SWAT team to conduct an initial pre-dawn building entry, followed by police officers, who would assist in securing the premises.⁴¹ SWAT was relying on the element of surprise to keep the Panthers at a disadvantage. SWAT's job was to make the initial entry into the building in order to quickly take

³⁵ SNOW, *supra* note 11, at 16. This concept of the SWAT mission has been cited by police departments across the U.S. *See, e.g.*, Booth, *supra* note 8, at A1 ("Fresno Police Chief Ed Winchester says that a highly armed and more violent criminal class requires an extreme response."); Lt. Dennis Fortunado, *Fond du Lac, WI, Police Department SWAT Team Home Page*, at <http://www.fdlpolice.com/swat.htm> ("The SWAT team is utilized when our department is required to resolve a 'high risk incident' in which there is a threat of a weapon . . .");

³⁶ *See* SNOW, *supra* note 11, at 249 ("[P]olice SWAT teams have met with hundreds of successes and saved countless lives."); Megan Twohey, *Five Communities, Five Stories*, NAT'L J., Jan. 1, 2000, at 38 (describing several geographically-diverse police department SWAT units, including the number of times each SWAT team is deployed each year).

³⁷ Gates cites this as the LAPD's first mission. *See* GATES, *supra* note 11, at 119.

³⁸ *See id.* at 117.

³⁹ *See id.* at 118.

⁴⁰ *See* SNOW, *supra* note 11, at 10-11.

⁴¹ This plan did not work as expected. The SWAT team's element of surprise was lost due to the Black Panthers' lookouts forewarning them of the SWAT team's approach. The result was a firefight between the Black Panthers and the SWAT team before the team could even enter the Panthers' house. The Black Panthers eventually surrendered after hours of negotiation. The final casualty figures were six arrests, three wounded arrestees, and three wounded police officers. Gates does not indicate if any of the wounded officers were SWAT members. *See* GATES, *supra* note 11, at 119-23.

control of the situation, thereby providing the follow-on force with a safe environment in which to perform their arrest duties.

The next high-profile LAPD SWAT mission was the 1974 operation against the Symbionese Liberation Army (SLA). The SLA was a leftist revolutionary organization operating in the United States. Though having a political ideology similar to that of the Black Panthers, the SLA differed by focusing less on racial politics; instead, expressly advocating class warfare in the United States.⁴² The SLA committed a string of crimes, including a bank robbery, an assassination, and the kidnapping of Patty Hearst, heiress to the Hearst publishing fortune, as their "campaign" continued across the U.S.⁴³

Six months after the Patty Hearst kidnapping, several SLA members were discovered in the Los Angeles area. They gained the LAPD's attention after they tried submachine-gunning a store clerk who attempted to prevent two SLA members from shoplifting socks. The discovery of the SLA in Los Angeles resulted in a combined effort of local and federal law enforcement to arrest the SLA members. Due to the SLA's violence and fanaticism, this was considered to be the type of high-risk arrest mission that required SWAT's expertise.⁴⁴

The SLA mission involved the services of both the LAPD and local FBI office SWAT teams.⁴⁵ After FBI and LAPD teams surrounded the suspected SLA hideout, the scene commander in charge of the operation ordered the SLA members to surrender and come out of the house. The SLA refused to surrender or negotiate with the SWAT teams. At this point a tear gas grenade was fired into the house in an attempt to flush out the SLA members. Instead of surrendering, the SLA members started shooting at the teams. Both sides fired over nine thousand rounds of ammunition during this shootout. The small wood-frame house in which the six SLA members were hiding suddenly caught fire. Firefighters on the scene refused to approach the house due to the continuing shootout. The SLA members refused to stop firing or to surrender, eventually perishing in the fire that burned the house to the ground. The operation was a terrible disappointment; SWAT's mission was to get everyone out alive.⁴⁶

⁴² See *id.* at 131.

⁴³ See *id.* In a bizarre twist, Hearst joined the SLA after being kidnapped, helping them rob a San Francisco bank. See *id.*

⁴⁴ See *id.*

⁴⁵ Each FBI field office has its own SWAT teams for high-risk arrest missions. There are nine additional "enhanced SWAT" teams at FBI field offices in major metropolitan areas. See C.F. TOMAJCZYK, U.S. ELITE COUNTER-TERRORIST FORCES 68 (1997).

⁴⁶ See GATES, *supra* note 11, at 115 ("If anybody gets killed or injured, the operation's a failure . . .").

III. SWAT MISSION TYPES

A. *The Basic Premise*

Though their names may differ—Special Weapons and Tactics (SWAT), Special Response Team (SRT), Emergency Response Team (ERT), Special Emergency Response Teams (SERT), Emergency Services Unit (ESU)—police special units share the same goal: resolving the incident without innocent parties being seriously injured or killed.⁴⁷

In the years since the LAPD SWAT team was formed, the majority of police departments either have formed their own special response teams or have access to special response services.⁴⁸ Eighty-nine percent of departments serving communities of 50,000 or more have SWAT units supporting them.⁴⁹ Practically every federal law enforcement agency has a special response team, the first being the U.S. Marshal Service's Special Operations Group, formed in 1971.⁵⁰ Reflecting the diversity of jurisdictions, the types of situations that may call for a SWAT-type mission vary.

Due to the absence of national guidelines, local police departments decide for themselves when to utilize a SWAT team.⁵¹ "However, since police SWAT teams are trained and equipped to handle high-risk incidents, and therefore often carry high-destruction weaponry, their use is usually, but not always tightly controlled."⁵² Federal agencies often have directives or internal restrictions on when they can deploy their tactical units.⁵³ Despite this wide discretion in usage, most SWAT missions share similar profiles.⁵⁴

B. *SWAT Mission Profiles*

The majority of SWAT missions are high-risk search or arrest warrant services,

⁴⁷ See GATES, *supra* note 11, at 115, 116 ("The goal is always the same: Get everyone out safely."); SNOW, *supra* note 11, at 286; Morse, *supra* note 34 ("[W]e're not a bunch of overaggressive officers with too much testosterone. . . . We're a team that's trained to rescue people and save lives.") (quoting a Hamilton, Ohio, SWAT officer).

⁴⁸ See Twohey, *supra* note 8 (citing researchers both critical and supportive of this rise in number). The acronym "SWAT" is used in this Note to refer to any of these special units.

⁴⁹ *Id.*

⁵⁰ See TOMAJCZYK, *supra* note 45, at 71.

⁵¹ SNOW, *supra* note 11, at 10.

⁵² See SNOW, *supra* note 11, at 11.

⁵³ See TOMAJCZYK, *supra* note 45, at 68-69, 81 (describing the bureaucratic protocol necessary before the FBI's Hostage Rescue Team (HRT) and the U.S. Marshall Service Special Operations Group (SOG) may be deployed).

⁵⁴ See SNOW, *supra* note 11, at 10.

hostage situations, or barricaded armed-person incidents.⁵⁵ Other missions may include vehicle hijacking response, anti-sniper operations, or stakeouts for high-risk arrest scenarios, such as an expected bank robbery or gang fight.⁵⁶ All of these operations share an enhanced risk to public safety requiring a specialized response.

Municipal SWAT units, like their federal counterparts, do not participate in missions on their own initiative—they become involved only after a request for their assistance has been made.⁵⁷ This request may come either in the midst of a crisis or in the planning stages of an impending police action. In a typical crisis situation, the police officer in charge on the scene assesses the situation and decides whether SWAT services are needed.⁵⁸ If so, the SWAT team will arrive on the scene and, depending on the police department's operating procedures, either take over the situation⁵⁹ or develop a plan that must be approved by the officer in charge.⁶⁰ In other situations, such as warrant service or stakeouts, the request for SWAT assistance can come early in the planning stages of the operation.

In any case, SWAT commanders undertake extensive mission planning before entering a tactical situation.⁶¹ Such planning involves deciding how best to approach a given situation based on the information available. This information includes, for example, building layouts, structural hazards such as barricaded doors or booby traps, the number of hostages or suspects involved, what types of weapons are involved.⁶² This level of detail is required to ensure that the proposed operation will have a high probability of success. If the planning is flawed, tragedies such as hostage deaths or team casualties may be the consequences.⁶³

⁵⁵ See *id.* at 157, 203, 219.

⁵⁶ See *id.* at 10.

⁵⁷ See GATES, *supra* note 11, at 116; TOMAJCZYK, *supra* note 45, at 81 (describing the deployment requirements for the U.S. Marshal Service SOG).

⁵⁸ See GATES, *supra* note 11, at 116 ("At that point we call SWAT."); SNOW, *supra* note 11, at 146 (discussing that the first police officer on the scene of a Portland, Oregon, bank robbery requested assistance from the Portland SERT team). Local SWAT teams themselves may determine that a hostage situation is beyond their capabilities and call on the FBI's Hostage Rescue Team. TOMAJCZYK, *supra* note 45, at 68.

⁵⁹ See SNOW, *supra* note 11, at 146-47 (describing how the Portland, Oregon, SWAT team took control of a crisis bank robbery-turned-hostage situation from the on-scene patrol officers).

⁶⁰ See GATES, *supra* note 11, at 116.

⁶¹ See SNOW, *supra* note 11, at 55-56.

⁶² See TOMAJCZYK, *supra* note 45, at 114-15 (emphasizing the importance of planning).

⁶³ See, e.g., Steve Visser & Brad Schrade, *The SWAT Team: Report: Raid Plan Flawed*, ATLANTA J. & CONST., Feb. 9, 2000, at C1 (describing how poor planning and bad tactics contributed to the deaths of two SWAT team officers during a failed hostage rescue attempt).

C. *The Bulk of the Work: Missions and Tactics*

1. High-Risk Warrant Service

High-risk warrant service makes up the largest number of SWAT operations.⁶⁴ SWAT teams execute both search and arrest warrants whenever the police department is worried about a violent reaction from the warrant target. SWAT typically performs the initial entry into the premises in order to secure it safely before the officers tasked with the actual search or arrest enter. Entry into the place of service can be accomplished in varying ways.

The obvious and safest method of entry is to knock on the door and announce the police presence and purpose for being there. However, most high-risk warrant service is done in situations that unreasonably would place police officers in danger by announcing their presence.⁶⁵ In other situations the person on the other side of the door refuses to let the officers in, as witnessed in the LAPD's Black Panthers and SLA incidents.⁶⁶ In these cases a "dynamic entry" is conducted—so called due to the violence and swiftness it entails.

Dynamic entries can be accomplished either by breaching a door or window or by creating an entrance through a wall.⁶⁷ The most common entry method is by door, but in some situations, such as when the doors may be barricaded or tactical considerations may warrant, entry may be made by other means, for example, through a wall or the roof.⁶⁸ Entry can be accomplished by a combination of mechanical, explosive, or ammunition-based methods.

Doors can be breached mechanically using "hooligan tools," battering rams, or by chaining the door to a tow truck that then pulls the door off. Battering rams are most often a steel tube with handles, carried by several SWAT members and used to bash a door in.⁶⁹ "Hooligan tools" are special pickax-like devices used to pry open doors. Reinforced doorways are removed by the "chaining-to-the-vehicle" method. Due to the danger resulting from flying debris, SWAT teams avoid

⁶⁴ See SNOW, *supra* note 11, at 221; Autrey, *supra* note 8, at A1 ("[R]esearch determined that about 85 percent of SWAT teams are eventually used for no-knock drug raids on private residences.").

⁶⁵ See Twohey, *supra* note 8 at 42 ("SWAT teams should step in to deliver warrants if 1) The suspect has a propensity toward violence; 2) the police know that a high number of weapons or particularly lethal weapons are present; or 3) the location is heavily fortified.").

⁶⁶ See *supra* text accompanying notes 37-46.

⁶⁷ See TOMAJCZYK, *supra* note 45, at 115.

⁶⁸ See *id.*

⁶⁹ Robert Snow points out that the LAPD once used mechanical battering rams but were forced to abandon their use after damage and injury caused by its extreme force prompted lawsuits against the city. SNOW, *supra* note 11, at 104.

explosive-assisted entries in favor of the mechanical methods detailed.⁷⁰ However, some tactical situations may leave no other choice but to use explosives.

Explosives can be used either to blow a door completely down or cut a small "mouse hole" through the door or a wall.⁷¹ Explosives used by police SWAT teams include plastic explosives; shaped charges, so called because they are designed and shaped to focus the detonation energy in one direction; a caulk-like explosive that is applied with a caulk gun; "Foamex," which is applied with a spray can; and "linear flex shaped charges," originally used by the construction industry to cut steel beams and very efficient at breaching reinforced steel doors.⁷²

Ammunition-based methods use firearms to help gain entrance. This can be accomplished by using regular submachine gun, pistol, or shotgun ammunition to damage or destroy locks or windows by simply firing at them.⁷³ A special shotgun round called a Shock-Lock round, containing plaster and metal dust, can be used to safely destroy a lock without injuring a person standing on the other side of the door.⁷⁴ The plaster and dust disintegrate on impact, transferring the kinetic energy into the lock or hinge without penetrating beyond the door.⁷⁵ Such a round will produce a hole in one side of a metal oil drum without penetrating the other side.⁷⁶

High risk warrant service, unlike many other SWAT missions, typically allows for a considerable amount of preparation time before an operation because SWAT commanders usually are involved in operational planning from the early stages.⁷⁷ This large preparation time is possible due to the fact that these situations are usually known ahead of time, allowing for a high level of cooperation between the SWAT teams and the requesting police unit. Planning and preparation for a warrant service may include researching the background of the target, identifying the reasons for classifying the service a "high-risk" event, studying building blueprints, gathering intelligence on the targeted structure (e.g., movement or sleep patterns of occupants, identifying potential cover and concealment areas for the SWAT members approaching the structure), planning and rehearsing the building entry and security plan, and securing the assistance of support personnel such as medics or negotiators.⁷⁸

⁷⁰ See *id.* at 103.

⁷¹ See TOMAJCZYK, *supra* note 45, at 116.

⁷² See SNOW, *supra* note 11, at 103-05.

⁷³ See *id.* at 105.

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ See GATES, *supra* note 11, at 119 (noting SWAT had a week to plan the Black Panthers arrest); SNOW, *supra* note 11, at 223 (explaining how Indianapolis narcotics officers asked for SWAT assistance as soon as they obtained a search warrant for an illegal drug manufacturing site).

⁷⁸ See TOMAJCZYK, *supra* note 45, at 114-15.

2. Hostage Situations/Barricaded Individuals

Confronting hostage situations and armed individuals are usually the images conjured up when people are asked what SWAT teams do. These situations, however, make up a comparatively small number of missions when compared to the warrant-service operations.⁷⁹ SWAT teams are used in these situations to provide specialized skills designed to approach high-stress, high-risk situations with a coordinated plan that ensures the smallest possible risk to life.⁸⁰

SWAT teams constantly are improving their techniques and strategies in order to arrive at the best plan for a given situation. Robert L. Snow states that this progressive improvement has resulted in the following five steps for handling a hostage or barricaded armed individual situation:

1. Contain and isolate the suspect; then attempt to negotiate a surrender.
2. If unsuccessful, demand that the suspect surrender.
3. If unsuccessful, use chemical weapons [i.e., tear gas] to force the suspect to surrender.
4. If unsuccessful, use snipers to neutralize the suspect.
5. If unsuccessful, order a SWAT assault [using applicable warrant service techniques].⁸¹

Snow states that the SWAT commander always must start at step one and work his/her way down to step four or five: "The guiding principle is that before using Step 4 or 5, all possibilities of resolving the incident peacefully must first be investigated and attempted."⁸² The FBI Hostage Rescue Team, though a federal unit, is under a similar last-resort policy.⁸³ This policy emphasis on the use of force as a last resort conflicts with the perception by some that SWAT teams approach situations with their guns blazing, itching to show off their firepower and training.⁸⁴ The use of force as a last resort is heavily emphasized in police training.⁸⁵ SWAT

⁷⁹ See Booth, *supra* note 8, at A1 (citing research showing that only seventeen percent of SWAT missions involved these situations, while seventy-five percent involved high-risk warrant service).

⁸⁰ See Twohey, *supra* note 8 ("[A] SWAT team's overwhelming show of force often ensures that no shots are fired.").

⁸¹ See SNOW, *supra* note 11, at 76.

⁸² See *id.* at 76.

⁸³ See TOMAJCZYK, *supra* note 45, at 68-69 (quoting a senior FBI official stating that "[t]he HRT was never intended to be used as a first strike capability.").

⁸⁴ See Autrey, *supra* note 8 ("[Critics worry] that even the best of officers might use more force than necessary in the desire to apply the skills and weapons they have acquired.").

⁸⁵ See Beth Dove, *Keeping Up With Modern Crooks*, SALT LAKE TRIB., June 28, 1999, at B2 ("On an ascending scale of deadlines, the [force] levels begin with the mere presence

training, which builds off of these basic police principles, has even been described as shifting emphasis from firepower to negotiation and the use of less-than-lethal force.⁸⁶

IV. SWAT TRAINING

A. *Officer Selection*

The selection process of most SWAT units is extremely demanding. The situations SWAT officers may find themselves facing require firearms proficiency, extreme discipline, physical fitness, emotional stability, the ability to work with others as a team, and above average intelligence/aptitude for critical thinking to resolve them successfully.⁸⁷ Candidates for such a position are subject to rigid scrutiny to ensure they have these qualities.

SWAT members are typically volunteers from the regular force.⁸⁸ For example, the LAPD requires its SWAT candidates to have a minimum of four years regular police duty with the LAPD.⁸⁹ Admission to a department's SWAT team comes after a lengthy selection process.⁹⁰ Robert L. Snow has conducted a study of over thirty U.S. municipal SWAT team selection processes.⁹¹ Snow reports that SWAT selection typically entails a series of written, oral, and physical tests.⁹² Many departments also include a background investigation and psychological screening of candidates.⁹³ Some departments also require firearms proficiency tests.⁹⁴

of an officer, progressing to verbal commands, aerosol defensive tools, hands-on-force, and—finally—deadly force.”).

⁸⁶ See Morse, *supra* note 34 (“SWAT training is focusing increasingly on communication skills and using less-than-lethal force.”) (quoting SWAT consultant Al Preciado, who was interviewed during training involving Cincinnati, Ohio, area departments).

⁸⁷ See SNOW, *supra* note 11, at 26, 28.

⁸⁸ See GATES, *supra* note 11, at 114 (describing the recruitment and selection of the first SWAT candidates); SNOW, *supra* note 11, at 28; TOMAJCZYK, *supra* note 45, at 54 (describing the FBI's HRT application/selection process), 74 (describing the U.S. Marshall Service's Special Operation Group's selection process).

⁸⁹ See Twohey, *supra* note 8 (“[LAPD SWAT applicants] must have at least four years with the department before applying.”).

⁹⁰ See *id.* (describing the training requirements for several different police departments' SWAT teams).

⁹¹ See *id.*

⁹² See *id.*

⁹³ See *id.*

⁹⁴ See *id.*

B. *Close Quarters Battle Skills*

SWAT teams, by their mission, are confronted with situations necessitating the potential tactical assault of a crisis site.⁹⁵ These sites are typically building structures. This fact does not change regardless of the mission: warrant service and confronting barricaded individuals both require knowledge of site assault techniques. The armed assault of such a closely-confined area, for the purpose of protecting life with the least amount of force necessary, requires the proficient use of highly specialized skills known as Close Quarters Battle (CQB) skills.⁹⁶

CQB training consists of entry/breaching tactics, tactical movement once inside buildings, room assault tactics, and techniques in confronting hostage takers.⁹⁷ "Officers must know how to enter a room as a team, and how to enter a room without running into each other, without being caught in crossfire, and without being shot by the perpetrator."⁹⁸ This training, which may mean the difference between the life and death of hostages or the SWAT members,⁹⁹ must be as realistic and intense as possible to ensure proficiency among the SWAT members.¹⁰⁰ SWAT teams receive CQB training from national police organizations, firearms companies, and from private consulting groups.¹⁰¹ In the search for the most realistic, beneficial, and intensive CQB training possible, many SWAT units have coordinated training with U.S. military counter-terrorist forces.¹⁰²

C. *SWAT Training with the Department of Defense*

The history of joint military/SWAT training can be traced to Daryl Gates' affiliation with local Marine units stationed near Los Angeles.¹⁰³ Gates sought the Marines' expertise in dealing with snipers, guerrilla warfare, and small unit

⁹⁵ See *supra* text accompanying notes 55-86 (discussing SWAT mission profiles, such as high-risk warrant service and hostage situations, and accompanying tactics).

⁹⁶ For a good description of these types of tactics, see TOMAJCZYK, *supra* note 45, at 114-18.

⁹⁷ See SNOW, *supra* note 11, at 134; TOMAJCZYK, *supra* note 45, at 114-18.

⁹⁸ See SNOW, *supra* note 11, at 136.

⁹⁹ See *id.* at 131 ("It has been found in SWAT incidents that the majority of injuries and deaths to both police officers and hostages occur during assaults and hostage-rescue attempts.").

¹⁰⁰ See *id.*

¹⁰¹ See, e.g., Twohey, *supra* note 8.

¹⁰² See David B. Kopel & Paul M. Blackman, *Can Soldiers Be Peace Officers? The Waco Disaster and the Militarization of American Law Enforcement*, 30 AKRON L. REV. 619, 651 (1997) ("The Navy SEALs and Army Rangers both conduct extensive training of paramilitary units such as local police SWAT teams.").

¹⁰³ See GATES, *supra* note 11, at 109.

tactics.¹⁰⁴ Modern SWAT teams have a similar rationale for continuing this training.¹⁰⁵

The U.S. military's counter-terrorist forces tasked to handle overseas hostage rescue missions are Delta Force and the Navy SEALs.¹⁰⁶ These units receive and develop specialized training in hostage rescue tactics involving CQB.¹⁰⁷ Local SWAT teams looking to improve their own training programs gladly cross-train with these units to acquire skills relevant to their mission.¹⁰⁸

This cross-training is a controversial aspect of SWAT policing due to the constitutional implications arising from the use of military tactics against civilians.¹⁰⁹ The question that should be asked is what *type* of training is being used, not whether *any* military tactics are being used. CQB skills honed by the military would help to further a SWAT team's mission of saving lives by enhancing their ability to safely conduct site assaults. Shooting discipline, drills compelling instant recognition of friends or foes, small unit movement, and breaching techniques all play a part in ensuring a SWAT team reacts cogently and intelligently to a situation.¹¹⁰ The reason civilian SWAT teams require this training and do not

¹⁰⁴ See *id.* at 109, 110, 115 ("Regularly, we sent squads to train at Camp Pendleton, trading expertise with the Marines."). The FBI's Hostage Rescue Team is the primary federal domestic hostage rescue force. The military units are prohibited by the Posse Comitatus Act from operating within the U.S. without express presidential authorization.

¹⁰⁵ According to one study, forty-three percent of the SWAT teams polled received training from active-duty military special-operations units. See Autrey, *supra* note 8 at A1.

¹⁰⁶ See SUSAN L. MARQUIS, UNCONVENTIONAL WARFARE, 63-65 (describing the formation of Delta Force from existing U.S. Army Special Forces (AKA "Green Beret") personnel); TOMAJCZYK, *supra* note 45, at 43 (explaining that though all SEAL teams are trained in counter-terrorist tactics, one team known as Seal Team Six or "Development Group/DevGroup", has counter-terrorism as its primary mission.).

¹⁰⁷ See TOMAJCZYK, *supra* note 45, at 43.

¹⁰⁸ See Autrey, *supra* note 8 at A1 ("Since SWAT teams were formed, special-forces units such as the Army's Delta Force and the Navy SEALs have been involved in training police in the use of military techniques and equipment.").

Weber concedes that the training received by civilian SWAT teams is tempered by the restrictions of civilian police work. She quotes one recipient of this training as stating: "We just have to use our judgment and exclude information like: 'at this point we bring in the mortars and blow the place up.'" Weber, *supra* note 9, at 9 (quoting Peter Kraska and Victor Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, 44 SOC. PROBLEMS 5-6 (1997)). According to the Arlington, Texas, SWAT commander, "[the military] teach[es] us tactics. They don't teach us how to do our business." Autrey, *supra* note 8 at A1. The military also restricts such training to those skills it deems relevant to the civilian law enforcement mission. See *id.* ("Military spokesmen said that training offered to police is limited to what the armed services deem acceptable.").

¹⁰⁹ The Fourth Amendment of the Constitution prohibits the use of "unreasonable" force against U.S. residents. See U.S. CONST. amend. IV.

¹¹⁰ See TOMAJCZYK, *supra* note 45, at 114-17.

simply allow the military to perform these missions is a legal one: the skills that the military has developed cannot be used by the military to resolve a domestic law enforcement matter because the military is ordinarily precluded from assisting in domestic law enforcement activities by the Posse Comitatus Act.¹¹¹

1. The Posse Comitatus Act

The Posse Comitatus Act was passed shortly after the Civil War as a response to Southern anger over Union troops' occupation of the South.¹¹² The Act bars any federal military unit from participating in domestic law enforcement activities without express Presidential decree.¹¹³ Though the Act is still in effect, its weight has been reduced by the 1981 Military Cooperation with Law Enforcement Act, 10 U.S.C. §§ 371-74. Weber summarizes the effect of this law:

That law amended the Posse Comitatus Act insofar as it authorized the military to "assist" civilian police in the enforcement of drug laws. The act encouraged the military to (a) make available equipment, military bases, and research facilities to federal, state, and local police; (b) train and advise civilian police on the use of the equipment; and (c) assist law enforcement personnel in keeping drugs from entering the country. *The act also authorized the military to share information acquired during military operations with civilian law enforcement agencies.*¹¹⁴

The basis for this controversial law authorizing such training generally is regarded as a policy decision stemming from the government's response to the drug trade.¹¹⁵ This loophole allows the Department of Defense to share practically any information and equipment with civilian law enforcement agencies as long as the rubric of "fighting the drug war" is applicable.¹¹⁶ Such a rationale could extend to virtually any police operation because the drug trade has become pervasive.¹¹⁷

¹¹¹ 18 U.S.C. § 1385 (1994).

¹¹² Major Kirk L. Davies, *The Imposition of Martial Law in the United States*, 49 A.F. L. REV. 67, 79 (2000).

¹¹³ *See id.* at 79-80.

¹¹⁴ Weber, *supra* note 9, at 4 (emphasis added).

¹¹⁵ *See* Kopel & Blackman, *supra* note 102, at 652.

¹¹⁶ *See id.* at 653-54.

¹¹⁷ *See* Dove, *supra* note 85, at B2 ("[O]fficers themselves see the terrain [of modern-day crime] as a volatile mix of violent gangs, drugs that feed aggression, and guns and more guns in the wrong hands.").

2. Types of training given by the military

Many different military units are involved in training civilian SWAT units, from local bases to Special Forces units, to the U.S. Army Military Police School.¹¹⁸ “Every region of the United States now has a Joint Task Force staff in charge of coordinating military involvement in domestic law enforcement.”¹¹⁹ Joint Task Force Six (JTF-6), based in Fort Bliss, Texas, and organized in 1991, is the Pentagon’s single largest organization dedicated to civilian law enforcement. It coordinates the military’s most systematic training for domestic law enforcement agencies.¹²⁰ JTF-6 has a permanent staff of 170, but can request additional manpower as training needs arise. JTF-6 “tapped 3,000 military persons for the war on drugs and trained 2,700 law enforcement officers in 1999.”¹²¹ Special operations personnel attached to JTF-6 teach civilian law enforcement such skills as camouflage techniques, individual and team tactical movement, booby trap removal, combat shooting techniques, urban warfare tactics, first aid, and mission planning.¹²² Other JTF-6 military trainers teach drug raid techniques, nighttime shooting skills, and the use of night-vision devices.¹²³ The Army M.P. School teaches field tactical police operations, courses in the phenomena of narco-terrorism, and special-reaction-team training.¹²⁴

The sharing of military information concerning “tactical operations” ostensibly includes information involving CQB training.¹²⁵ Once these CQB tactics are learned, they can be applied to any CQB situation, not just incidents involving drug arrests. Unfortunately, the need for SWAT’s CQB skills is not limited to incidents involving the drug trade.

¹¹⁸ See Autrey, *supra* note 8 at A1; Twohey, *supra* note 8.

¹¹⁹ KOPEL & BLACKMAN, *supra* note 7, at 341.

¹²⁰ See Scarborough, *supra* note 8; Twohey, *supra* note 8.

¹²¹ Scarborough, *supra* note 8.

¹²² See *id.*

¹²³ See *id.*

¹²⁴ See Twohey, *supra* note 8.

¹²⁵ The author bases this assertion on his own military experience, which included training in basic CQB skills under the rubric of “tactical operations.”

Knowledge gained through CQB training may also include information derived from studying the reactions of opponents to different tactics. Robert L. Snow includes such information in his book, *SWAT Teams*: “Research by the U.S. Army’s Operation Counter-Terrorist Unit has found that, when surprised, a person generally needs five seconds to regain the ability to react.” SNOW, *supra* note 11, at 186.

V. THE CONTINUING NEED FOR SWAT UNITS

A. *Introduction*

Law enforcement agencies in America are faced with a cavalcade of high-risk threats to public safety requiring a SWAT team's expertise. In addition to the drug trade targeted by the Military Cooperation with Law Enforcement Act,¹²⁶ police are faced with a host of public threats, including religious zealots (of many faiths), racist ideologues, the so-called "militia movement," foreign and domestic terrorist groups, and gangs. These threats are not confined to urban areas; rural police face many of the same social deviants the larger cities face, as well as other concerns unique to rural policing.

B. *The Drug Trade*

The violence and social costs resulting from the presence of illegal drugs in America is a subject that surpasses the scope of this Note. The topic is relevant in so far as it helps to illustrate the motivation behind government's allowing cooperative training between SWAT teams and special operations forces.¹²⁷ Drug dealers in American society have been portrayed (rightfully) as a serious threat to public safety, necessitating a heavy-handed law enforcement response.¹²⁸ Police Captain Robert L. Snow describes the effect drugs have had on law enforcement:

[C]riminals now know that, if they are arrested and convicted of drug dealing, they face long prison sentences These dealers [also] have the money to purchase high-tech assault weapons, often better weapons than the average police officer has. And because these criminals know they face long sentences if arrested and convicted of drug dealing, they have begun resisting arrest with increased vigor and deadliness Therefore, the danger involved in serving arrest and search warrants, particularly against drug dealers and drug locations, has become so great in many communities that the police departments now use their SWAT teams almost exclusively to serve these high-risk warrants, and particularly to serve them at fortified locations¹²⁹

¹²⁶ See Kopel & Blackman, *supra* note 102, at 652 ("The major cause of the militarization of American law enforcement has been the 'drug war.'" (continuing on to describe the purpose of the Military Cooperation with Law Enforcement Act)).

¹²⁷ See, e.g., *id.* (criticizing the "Drug War" approach to law enforcement).

¹²⁸ See SNOW, *supra* note 11, at 223 ("[T]he use of much of a police SWAT team's time serving high-risk warrants has come about because drug dealers have so increased their affinity for violence.").

¹²⁹ See *id.* at 221-22.

With no end in sight to stopping the flow of illegal drugs into America's streets, SWAT units' deployments to deal with situations spawned by the drug trade certainly will continue.

C. *Gangs and Organized Crime*

According to the FBI, "[o]ne of the most disturbing crime trends facing our country is the increase of violent street gangs"¹³⁰ U.S. Department of Justice statistics indicate that "law enforcement agencies in the United States are confronted with the presence of more than 4,800 gangs and 250,000 gang members."¹³¹ Unlike the Sharks and the Jets in *West Side Story*, these modern gangs are "[h]eavily armed with sophisticated weapons [and] are involved in drug trafficking, murder, witness intimidation, robbery, extortion, and turf battles."¹³² Daryl Gates reports that gang members in Los Angeles murdered over seven hundred people in 1991.¹³³ Gates also gives an example of the sort of mentality found in the ranks of gang membership:

Charlotte Austin stood in court Friday and looked right at the five gang members who fired 11 bullets into the body of her 13-year-old daughter.

"You took my child and shot her like she was an animal!" she shouted "Your souls are going to hell." But as she spoke, two of the men laughed. Later, as convicted killer Deautri Denard stood to leave, he announced with a smirk, "Gangsterism continues," and flashed [his gang's trademark hand signal].¹³⁴

Gang-related, and to a lesser extent organized crime, violence is present in American communities of every size, from large cities to small ones, rural areas, and even suburbs.¹³⁵ Gangs are even a problem in the state of Utah, where an

¹³⁰ U.S. DEPT. OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, ENSURING PUBLIC SAFETY AND NATIONAL SECURITY UNDER THE RULE OF LAW: A REPORT TO THE AMERICAN PEOPLE ON THE WORK OF THE FBI 1993-1998, 48 (1999).

¹³¹ U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, URBAN STREET GANG ENFORCEMENT, at xiii (1997) [hereinafter DOJ/GANGS].

¹³² *Id.* at iii.

¹³³ See GATES, *supra* note 11, at 298.

¹³⁴ *Id.* at 289.

¹³⁵ See DOJ/GANGS, *supra* note 131, at iii ("Gangs now operate in cities of all sizes, as well as suburban communities throughout the United States; gang violence is no longer limited to major cities."); National Institute for Justice Research Report, CRIME AND POLICING IN RURAL AND SMALL-TOWN AMERICA 37-40 (1995) [hereinafter NIJ] (discussing the factors behind gang activity in rural areas). The NIJ report mentions the interesting phenomena of the gang "franchise" or "branch office" established in rural communities by juvenile urban transplants. *Id.* at 39. As if gangs weren't enough: "there is good reason to

estimated 200 to 300 gangs are estimated to have 4000 to 5000 members in the state.¹³⁶ Many gangs are organized along ethnic groups, bringing a new dimension to the phenomena:

As the ethnic makeup of the country has changed, so has the face of organized crime. A new generation of immigrants has been following patterns of criminal activity remarkably similar to those first established by Irish, Italian, and Jewish immigrants. . . . [I]llegal narcotics . . . has made it possible for organized crime groups to thrive in a number of ways, including the constant armed robberies, home invasions, violent extortions, and other assorted crimes¹³⁷

As the U.S. becomes a more heterogeneous society due to immigration and demographic trends, the threat posed by these ethnic gangs will increase.¹³⁸ Regular police strategies may help combat this problem,¹³⁹ but these will have to be backed up by SWAT's ability to respond to high-risk threats to the public.¹⁴⁰

D. *Religious Zealots*

The Establishment Clause of the U.S. Constitution ensures U.S. residents'

believe that vice and organized crime are features of the rural environment." *Id.* at 43 (citing Gary Potter and Larry K. Gaines, *The Organizing of Crime in Appalachia*, Paper presented to the Academy of Criminal Justice Sciences (Denver, Colo. 1990)).

¹³⁶ See Dove, *supra* note 85 at B2.

¹³⁷ T.J. ENGLISH, *BORN TO KILL* 287 (1995). *Born to Kill* is an excellent documentary of the joint Bureau of Alcohol, Tobacco, and Firearms (ATF) and FBI investigation of a notorious Vietnamese gang named "Born to Kill" that operated in New York City and elsewhere in America.

¹³⁸ See *id.* at 289 ("Only recently . . . has the issue of Asian organized crime been labeled a significant national problem."); GATES, *supra* note 11, at 293. Gates states:

Hispanic gangs [in L.A.] claim more than 18,000 followers, and Hispanic gang activity now accounts for 50 percent of the city's gang violence. The 37 Asian gangs have roughly 2,000 members; the various offshoots of the Bloods and Crips number about 15,000 members. Altogether, [the LAPD has] identified 474 different gangs with a total membership of 35,000.

Id.

¹³⁹ The LAPD implemented "Operation Hammer" in 1988 to help combat the L.A. gangs. This task required as many as a thousand officers, resulting in monumental overtime costs that eventually caused the operation to halt as the department ran out of money. See GATES, *supra* note 11, at 293-94.

¹⁴⁰ In a bizarre twist to the organized crime threat, Coast Guard officials report an escalating threat of violent confrontations with immigrant smugglers. See Robert Suro, *Smuggling Patrols Face Violence at Sea*, WASH. POST, Jan. 27, 2000, at A1.

freedom to follow their individual religious beliefs.¹⁴¹ This legal protection of religion allows many smaller, more obscure sects and cults to flourish in America. While the majority of these groups are benign,¹⁴² several are characterized by racist ideologies, conspiracy theories, or apocalyptic beliefs. The FBI went so far as to warn of the violent potential posed by these latter religious groups in its 1999 *Project Meggiddo* report.¹⁴³

The most recent manifestation of American religious zealotry can be seen in the violent wing of the anti-reproductive-choice movement, especially in the central anti-abortion organization known as “The Army of God,” which has declared armed holy war against abortion providers.¹⁴⁴ Army of God members have been either convicted or indicted for a string of shootings, bombings, and robberies in furtherance of their cause,¹⁴⁵ and two members have been placed on the FBI’s Ten Most Wanted list.¹⁴⁶ One other Army of God member escaped from an Illinois state prison in February, 2001,¹⁴⁷ and several suspected Army of God members were arrested that same month in Oregon after a SWAT raid by local sheriffs’ departments yielded bomb-making materials similar to those used in the 1995 Oklahoma City bombing, plastic explosives, machine guns, and undescribed “timing devices,” ostensibly for explosives.¹⁴⁸

The Ninth Circuit Court of Appeals has recently ruled that the anti-reproductive-choice website known as “The Nuremburg Files,”¹⁴⁹ which lists the names and addresses of reproductive health care workers and their families while calling them “baby butchers,”¹⁵⁰ is protected by the First Amendment from being labeled a “threat” against reproductive health care workers and their affiliates.¹⁵¹

¹⁴¹ U.S. CONST. amend. I.

¹⁴² FEDERAL BUREAU OF INVESTIGATION, PROJECT MEGGIDDO 28 (1999), available at <http://www.fbi.gov/library/megiddo/publicmegiddo.pdf> (“Of the nearly 1000 cults operating in the [U.S.], very few present credible threats for millennial violence.”).

¹⁴³ See *id.* at 8-10, 26-29.

¹⁴⁴ Dennis Roddy, *Escapee Ready to Do God’s Will at Gunpoint*, PITTSBURGH POST-GAZETTE, Feb. 24, 2001, at D-1.

¹⁴⁵ See Henry Weinstein, *Free-Speech Ruling Boon For Abortion Foes*, L.A. TIMES, Mar. 29, 2001, at A1.

¹⁴⁶ See <http://www.fbi.gov/mostwant/topten/fugitives/fugitives.htm> (listing James Charles Kopp, arrested in France on Mar. 29, 2001, and Eric Robert Rudolph, still at large).

¹⁴⁷ See Roddy, *supra* note 144, at D-1 (“Waagner said that God had spoken to him, called on him to shoot abortionists[,] and suspected [that God] was mightily disappointed that Waagner [hadn’t done so yet].”).

¹⁴⁸ See David Siders, *Officers Pore Over Items from Sandy Raid*, OREGONIAN, Feb. 13, 2001, at B02.

¹⁴⁹ See Nuremburg Files, *The Nuremburg Files*, at <http://www.christiangallery.com/atrocity> (exhorting followers to “Starve Satan: Stop Abortion”).

¹⁵⁰ *Id.*

¹⁵¹ See *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 244 F.3d 1007, 2001 WL 293260 (9th Cir. Mar. 28, 2001); Rene Sanchez,

The Nuremburg Files web site lists several law enforcement officers by name, referring to them as "LAW ENFORCEMENT: their [abortion providers'] bloodhounds."¹⁵² Although the Nuremburg Files web site claims that its lists are being compiled as evidence for an anticipated "crimes against humanity" trial of reproductive health care workers and anyone assisting them,¹⁵³ the main "feature" of the website is that names of listed people receive a strike-through whenever they are killed.¹⁵⁴ Many reproductive health care workers are expecting a resurgence of violence now that the Ninth Circuit has allowed the Nuremburg Files to continue publishing its lists.¹⁵⁵ The fact that heavily armed political extremists are actively identifying and targeting law enforcement officers and members of the public as enemies in their "holy war" is one example of a continuing public safety need for SWAT training and tactics.

E. *Racist Ideologies*

Xenophobia and prejudice have existed in the U.S. in one form or another since its colonial days.¹⁵⁶ Present day manifestations of this sociological event include gangs, political groups, and religious organizations bent on promoting the superiority of their ethnic group above others.¹⁵⁷ Racist messages are disseminated by these groups to a wide audience through emerging Internet technology and "hate rock."¹⁵⁸ Violence by these factions unfortunately is not uncommon,¹⁵⁹ and the

Antiabortion Web Site Handed A Win; Court Says Threatening Content on Doctors is Protected Free Speech, WASH. POST, Mar. 29, 2001, at A01.

¹⁵² See Nuremburg Files, *Alleged Abortionists & Their Accomplices*, at <http://www.christiangallery.com/atrocity/aborts.html>.

¹⁵³ See Nuremburg Files, *The Nuremburg Files*, *supra* note 149.

¹⁵⁴ See Nuremburg Files, *Alleged Abortionists & Their Accomplices*, *supra* note 152 (including the names of one Alabama law enforcement officer and one retired U.S. Air Force Lieutenant Colonel killed in abortion clinic violence).

¹⁵⁵ See Weinstein, *supra* note 145, at A1 ("This decision is clearly a green light to the most violent and radical anti-abortion fanatics in the country that they can get away with it and not worry.") (quoting a Boulder, Colorado doctor). The National Abortion Federation website reports that there were 2,540 violent incidents against reproductive health care facilities and their workers since 1977, including murders, attempted murders, assaults, acid attacks, and bombings. See National Abortion Federation, *Incidents of Violence and Disruption Against Abortion Providers*, at <http://www.prochoice.org/default7.htm>. Seven murders and seventeen attempted murders related to anti-abortion activities have taken place within the last ten years. See *id.*

¹⁵⁶ See CATHERINE MCNICOL STOCK, *RURAL RADICALS* 45 (1996) ("[18th Century Trans-Appalachian] [s]ettlers ardently believed . . . in their racial superiority to native peoples.").

¹⁵⁷ See Greg Barrett, *Fear, Pride, Cynicism: The Building Blocks for a Society of Hate*, SALT LAKE TRIB., Jul. 19, 1999, at A1, available at 1999 WL 3370554.

¹⁵⁸ *The Internet: Downloading Hate*, ECONOMIST, Nov. 13, 1999, available at 1999 WL 29811474 (describing Internet hate sites); Mariyam Joyce-Hasham, *Web Offense*, WORLD

recent linkage of racism and religious doctrine by groups such as the World Church of the Creator and the Nation of Yahweh makes them extremely dangerous.¹⁶⁰ Membership in these types of organizations is widespread and actually growing, affecting communities across the country.¹⁶¹ Many of these extremists are affiliated with the militia/patriot movement, presenting an even more serious challenge to law enforcement authorities.¹⁶²

F. *The Militia/Patriot Movement*

An emerging social phenomena in America has been the rise of private

TODAY, Mar. 1, 2000, available at 2000 WL 10833684 (same). The Anti-Defamation League estimates that at least 1,600 racist Web sites exist. See *The Anti-Defamation League Homepage* at <http://www.adl.org>.

The rise of the "hate rock" movement has been boosted by the purchase of the largest American hate-rock record label by the author of *The Turner Diaries*, the fictional book describing a "race war" in America where whites annihilate all other ethnic groups that was the inspiration for Oklahoma City bomber Timothy McVeigh. See Kim Murphy, *Behind All the Noise of Hate Music*, L.A. TIMES, Mar. 30, 2000, at A1.

¹⁵⁹ See DEES, *supra* note 6, at 142-44 (describing the mid-1980s rampage of the neo-Nazi group "The Order," which left a string of armed robberies, murder, and counterfeiting, including a \$3.8 million dollar armored car robbery, before its leader was killed in a shootout with the FBI). Of the money obtained through these robberies for the purpose of financing racist activities, "[o]nly \$600,000 of the nearly \$4.3 million stolen in the robberies has ever been recovered. Authorities believe . . . the remaining millions [were distributed] to a host of white supremacist leaders, including [Aryan Nations 'official'] Louis Beam and [Aryan Nations founder] Richard Butler." *Id.* at 143. Beam was a Ku Klux Klan leader who organized an armed mob to threaten Vietnamese-American fishermen in Texas from competing with whites. Beam is currently involved in militia organizing within the white supremacist movement.

¹⁶⁰ Two high profile mass shootings in 1999 involved individuals affiliated with or connected to racist religions. See Nicholas Geranios, *Police in U.S. Gearing Up for New Year's Eve: Hate Group Eruption Feared*, ARIZ. REPUBLIC, Dec. 12, 1999, at A12. One of the individuals involved in the shooting sprees was also a former resident of the Aryan Nations headquarters compound in Hayden Lake, Idaho. See Frank Gibney, Jr., *The Kids Got in the Way*, TIME, Aug. 23, 1999, at 24. The World Church of the Creator is the latest organized incarnation of the Christian Identity cult, which teaches that Northern Europeans are the chosen people of God, while Jewish people are the descendants of Satan and non-whites are "sub-human mud people." See Crocker Stephenson, *Missionaries of Hate*, MILWAUKEE J. & SENTINEL, Mar. 19, 2000, at 1L, available at 2000 WL 3839078.

¹⁶¹ See, e.g., Elaine Porterfield, *I-5 Corridor Now Has Most Hate Groups in Region*, SEATTLE POST-INTELLIGENCER, Feb. 29, 2000, at B1, available at 2000 WL 5289701 (describing rise in hate groups in the geographic region between Portland, Oregon, and Seattle, Washington); Joan Treadway, *Race Lines Harden as Hate Groups' Membership Rises*, NEW ORLEANS TIMES-PICAYUNE, Mar. 25, 2000, at B8, available at 2000 WL 6549679 (describing the increase in hate group membership).

¹⁶² See DEES, *supra* note 6, at 200, 202.

paramilitary groups collectively known as “militias.”¹⁶³ One source asserts that the movement may number between five and twelve million members.¹⁶⁴ Militia groups have been formed in urban as well as rural areas.¹⁶⁵ Militias are the latest incarnation of American vigilante groups, which were typically organized to right a perceived wrong or to prepare for an anticipated wrong.¹⁶⁶ Some of the reasons given for forming or joining a militia include resistance to United Nations world domination conspiracies, a perceived lack of federal and local government accountability, opposition to environmentalism, opposition to taxation, vigilantism and crime control, and racist and religious ideologies.¹⁶⁷ One unifying theme among all militias is the belief that present American society is in need of social or political reform in order to return to a “correct” operational existence, hence the concurrent title of “patriot” movement.¹⁶⁸ The existence of militias has even concerned the U.S. Congress, which held hearings in 1994 to determine the extent and validity of the threat to civil order posed by militia groups.¹⁶⁹ Though the majority of militias are considered “defensive” or “reactionary” in nature,¹⁷⁰ the mentality evidenced by

¹⁶³ See *id.* at 199. Dees also states: “Between 1994 and 1996 there were at least 441 militia units across the country. Every state had at least one within its borders. . . . In addition[,] . . . 368 allied Patriot groups promoted the formation of militias, provided information and materials to them, or espoused ideas . . . that are common in militia circles.” *Id.* Dees adds that 137 of these groups had ties to the racist right. *Id.* at 200.

¹⁶⁴ See RICHARD ABANES, *AMERICAN MILITIAS 2* (1996) (citing Daniel Junas, *Angry White Guys with Guns: The Rise of the Militias*, 52 *COVERT ACTION QUARTERLY* 21 (Spring 1995) and Jill Smolowe, *Enemies of the State*, *TIME*, May 8, 1995, at 61).

¹⁶⁵ See *Southern Poverty Law Center Homepage* at <http://www.splcenter.org>; Edward Levine, *NYC Has Hatemongers, Too*, *N.Y. DAILY NEWS*, Aug. 22, 1999, at 28.

¹⁶⁶ See MCNICOLSTOCK, *supra* note 156, at 143-76 (describing the modern militia/patriot movement and comparing it to early rural American vigilantism).

¹⁶⁷ See DEES, *supra* note 6, at 86-90; Allen D. Sapp, Richard D. Holden & Michael E. Wiggins, *Value & Belief Systems of Right-Wing Extremists: Rationale and Motivation for Bias-Motivated Crimes*, in *BIAS CRIME: AMERICAN LAW ENFORCEMENT & LEGAL RESPONSES* 105-32 (Robert J. Kelly, ed. 1993).

¹⁶⁸ See ABANES, *supra* note 164, at 2. Abanes states:

The glue binding [the militia/patriot movement] together is a noxious compound of four ingredients: (1) an obsessive suspicion of the government; (2) belief in anti-government conspiracy theories; (3) a deep-seated hatred of government officials; and (4) a feeling that the United States Constitution, for all intents and purposes, has been discarded by Washington [D.C.] bureaucrats.

Id. (emphasis added).

¹⁶⁹ See DEES, *supra* note 6, at 86-90. These hearings were probably motivated more because of the Oklahoma City bombing rather than the mere presence of militias in the U.S.

¹⁷⁰ See PROJECT MEGGIDDO, *supra* note 142, at 22. (“Law enforcement should be aware that the majority of militias are reactive as opposed to proactive.”) *Project Meggido* was an official FBI strategic assessment of the potential for violence in the U.S. associated with the new millennium.

the following statements, combined with the presence of massive amounts of weaponry, indicates a continuing threat to law enforcement:¹⁷¹ "We will destroy targets such as telephone relay centers, bridges, fuel storage tanks, communications towers, radio stations, airports, et cetera . . . Human targets will be engaged when it is beneficial to the cause to eliminate particular individuals who oppose us like troops, *police*, political figures, snitches, et cetera."¹⁷² "They called cops 'punks in badges' and said the next time one of them was stopped, they'd shoot the cop."¹⁷³ These statements reflect just one of the threats faced by local law enforcement departments. The continuing threat of aspiring militia saboteurs,¹⁷⁴ and of extremists sufficiently armed and emboldened enough to shoot down a police helicopter,¹⁷⁵ indicates that the danger posed by these elements has not abated.

G. *Foreign and Domestic Terrorists*

Terrorist acts inside the continental U.S. are nothing new. During the period from 1970-1998, there were 3,150 terrorist incidents in the U.S. attributable to

¹⁷¹ At least one militia group was arrested before it could carry out a millennial mischief plan to blow up a California propane gas plant, underscoring the statement that not all militias are "reactionary." See Lance Williams, *FBI Says Arrests Broke Up Y2K Plot*, S. F. EXAMINER, Dec. 26, 1999, at A1.

New York City Police also recently raided the Queens apartment of a previously convicted bomb-maker who was on probation, yielding an assault rifle with 300 rounds of ammunition, a bomb making manual, and white supremacist materials. See Sean Gardiner & Michael Arena, *Cops: Arsenal in Man's Home*, NEWSDAY, Mar. 31, 2000, at A6.

¹⁷² ABANES, *supra* note 164, at 26 (emphasis added). The statement was found on a computer disk during a federal investigation of the Virginia based "Blue Ridge Hunt Club," charged with illegally stockpiling machine guns and planning to raid a National Guard armory. See *id.* at 26.

¹⁷³ Statement by Gary Krause, Fowlerville, Michigan, police chief, after officers stopped what had appeared to be a drunk driver. DEES, *supra* note 6, at 131. The car contained three men with camouflage uniforms and face paint who identified themselves as Michigan Militia members, along with three 9 mm pistols, a .357 magnum revolver, an AK-47, an M-1 rifle, an M-14 rifle, 700 rounds of ammunition, three gas masks, night-vision equipment, and notes indicating they were spying on local police departments. *Id.*

¹⁷⁴ See, e.g., *supra* note 171; Ron Martz, *Militia Member Faces Gun Charges*, ATLANTA J. & CONST., Dec. 11, 1999, at 4G (describing a Florida militia groups' millennial mischief plan to destroy electrical transmission lines).

¹⁷⁵ See Michael Vigh, *Idaho Pair Arrested After Tense Standoff and Gunfights in Death Valley*, SALT LAKE TRIB., Mar. 25, 2000, at D5 (reporting the downing of a California Highway Patrol helicopter by fugitive extremists using unidentified high-powered rifles).

political or extremist groups based both inside the U.S. and overseas.¹⁷⁶ While several of these incidents can be attributed to any of the aforementioned public safety threats, many of these incidents were perpetrated by foreign nationals attempting to further foreign political goals.¹⁷⁷ Some examples of these types of incidents include Taiwanese radical attacks on People's Republic of China officials,¹⁷⁸ the 1980 and 1982 assassinations of two Turkish Consuls General,¹⁷⁹ over sixteen terrorist acts by Sikh separatists including murders, kidnapping, and bombings,¹⁸⁰ a 1994 machine gun attack on Jewish students in Manhattan by a Lebanese cabdriver,¹⁸¹ and the 1997 New York City Police Department raid of a Palestinian bomb-making factory in Brooklyn.¹⁸²

According to Louis Mizell, Jr., a former Special Agent and Intelligence Officer with the U.S. State Department Diplomatic Security Section, many terrorist incidents that occur in the U.S. are attributed to ordinary crime patterns, thus hiding the true amount of terrorist activity in the country.¹⁸³ American law enforcement is thus caught smack in the middle of this situation because they are the primary method of crime control in this country. For example, at least eighty-eight domestic and international terrorists were encountered by police making routine traffic stops between 1977 and 1997, resulting in sixteen killed or wounded officers.¹⁸⁴ The potential for violent encounters with such individuals makes SWAT training and deployment essential for public safety.

VI. LEGAL RESTRAINTS ON POLICE CONDUCT

A. *An Introduction*

SWAT teams in service throughout the country are subject to the existing constitutional constraints imposed on law enforcement. These restraints are

¹⁷⁶ See LOUIS MIZELL, JR., *TARGET USA: THE INSIDE STORY OF THE NEW TERRORIST WAR* 179 (1998). Mizell also includes short descriptions of selected incidents, including assassinations, bombings, kidnappings, sabotage, attacks on police, hostage incidents, bank/armored car robberies, and armory raids. *Id.* at 179-200.

¹⁷⁷ *See id.*

¹⁷⁸ *See id.* at 179.

¹⁷⁹ *See id.* at 183.

¹⁸⁰ *See id.* at 188.

¹⁸¹ *See id.* at 194.

¹⁸² *See id.* at 198.

¹⁸³ *See id.* at 12. Mizell states that at least one street gang has worked as paid mercenaries for a foreign government. *See id.* at 25 (describing the connection between Chicago's Blackstone Rangers a.k.a. El Rukn and the Libyan government of Moammar Qaddafi). This link inevitably leads to interesting conclusions about the sources of arms and money used by American gangs.

¹⁸⁴ *See id.* at 145.

typically those articulated by the Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution. The Fourth Amendment protects against unreasonable search and/or seizure of one's "persons, houses, papers, and effects;"¹⁸⁵ the Fifth Amendment prohibits compelling the accused to make incriminating statements against himself; and the Fourteenth Amendment makes these restraints applicable to the state governments.¹⁸⁶ Of these, the Fourth Amendment is the constraint most applicable to the SWAT mission.¹⁸⁷

The Fourth Amendment protections conferred on U.S. residents prohibit "unreasonable" police conduct during the course of searches and seizures of people and property.¹⁸⁸ The Fourth Amendment's warrant clause adds additional protection from government intrusion by requiring a showing of "probable cause" to justify a belief that either the warrant target has committed a crime¹⁸⁹ or that evidence of a crime will be found in a certain place,¹⁹⁰ before judicial approval of a search or arrest warrant is given.¹⁹¹ The Supreme Court's interpretation of the Fourth Amendment helps illustrate the boundaries of these protections.

B. Searches

The Supreme Court has ruled that police may not search people or property unless certain conditions have been met. These conditions can be divided into those requiring "reasonable suspicion" and those requiring "probable cause."¹⁹²

1. Searches based on reasonable suspicion

Reasonable suspicion is a "particularized and objective basis" for suspecting a person of criminal activity. It is a "less demanding standard than probable cause": "reasonable suspicion can be established with information that is different in quality or content than that required to establish probable cause, . . . (and) reasonable suspicion can arise from information that is less reliable than that required to show

¹⁸⁵ U.S. CONST. amend. IV.

¹⁸⁶ See U.S. CONST. amend. IV, V, & XIV.

¹⁸⁷ The Supreme Court has stated that Fourth Amendment "reasonableness standard," and not substantive due process analysis, should be utilized when examining police use of force during "the course of an arrest, investigatory stop, or other 'seizure.'" *Graham v. Connor*, 490 U.S. 386, 395 (1989).

¹⁸⁸ See U.S. CONST. amend. IV.

¹⁸⁹ See Kathryn R. Urbonya, *Selected Fourth Amendment Issues in Section 1983 Litigation*, 596 PLI/Lit 65, 75-76 (1998) [hereinafter Urbonya (*Issues*)].

¹⁹⁰ See *id.* at 75.

¹⁹¹ See U.S. CONST. amend. IV.

¹⁹² See Urbonya (*Issues*), *supra* note 189, at 74-78.

probable cause.”¹⁹³

The Supreme Court first articulated the reasonable suspicion standard in the case of *Terry v. Ohio*.¹⁹⁴ *Terry* held that police may stop a person if they have an articulable basis for suspecting that the person has or is about to commit a crime.¹⁹⁵ Reasonable suspicion is not enough basis for an arrest, but it is enough for the police to stop and briefly detain the person.¹⁹⁶ After stopping the person, the police may make a limited frisk of the person for weapons if they have a further reasonable suspicion that the person is armed and presently dangerous.¹⁹⁷ The reasonable suspicion for the stop is independent from the reasonable suspicion for the frisk.¹⁹⁸ Probable cause is a higher standard of suspicion that must be shown before an arrest or more invasive search is carried out.

2. Searches based on probable cause

The Supreme Court has defined a “search” as occurring when “an act violate(s) the privacy upon which (one) justifiably rely(s).”¹⁹⁹ This privacy finding is based on a bifurcated analysis: “[F]irst, that a person have [sic] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable.”²⁰⁰ The Supreme Court has assured the respect of this expectation of privacy by interpreting the Fourth Amendment as requiring a warrant to be issued before most searches may take place.²⁰¹

¹⁹³ *Id.* at 77 (citing *Ornelas v. United States*, 517 U.S. 690, 695-6 (1996); *Alabama v. White*, 496 U.S. 325, 330 (1990)).

¹⁹⁴ 392 U.S. 1 (1976).

¹⁹⁵ *See id.*

¹⁹⁶ *See id.*

¹⁹⁷ *See Urbonya (Issues)*, *supra* note 189, at 78.

¹⁹⁸ *See id.* at 78.

¹⁹⁹ *Id.* at 71-72 (quoting *Katz v. United States*, 389 U.S. 347, 353 (1967)).

²⁰⁰ *Id.* at 72 (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

²⁰¹ Six exceptions have been made to the warrant requirement, but each requires either consent or the presence of some level of articulable suspicion to search. The exceptions are: search of a suspect’s general area during a lawful arrest (*United States v. Robinson*, 414 U.S. 218 (1973)); search of automobiles (*Carroll v. United States*, 267 U.S. 132 (1925)); objects in plain view (*Horton v. California*, 496 U.S. 128 (1990)); consent of the searched (*Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)); a stop-and-frisk search based on reasonable suspicion (*Terry v. Ohio*, 392 U.S. 1 (1968)); and when exigent circumstances either render the warrant procurement process impractical due to the danger to the public (*Warden v. Hayes*, 387 U.S. 294 (1967)) or may allow the destruction of evidence to take place (*Schmerber v. California*, 384 U.S. 757 (1966)).

a. *Search warrants*

A search warrant is a pre-authorized judicial authorization to conduct a search. Once a warrant is required, it must be issued before a search takes place in order for the search to be legally valid.²⁰² To obtain a warrant, the requesting officer must explain to the judge or magistrate both the particular description of the place to be searched²⁰³ and the particular description of the things to be seized,²⁰⁴ and must also persuade the judge or magistrate that probable cause exists.²⁰⁵ The judge or magistrate will issue the warrant if he/she is satisfied that these elements have been met.

C. *Seizures*

The Supreme Court has defined the seizure of property as “some meaningful interference with an individual’s possessory interests in that property.”²⁰⁶ Seizure of a person was held to generally occur in three different ways:

1. Whether the officer, by means of a physical force or show of authority has in some way restrained the liberty of a citizen.
2. Whether a reasonable person would have believed that he was not free to leave, and the person in fact submitted to the assertion of authority.
3. Whether there was a governmental termination of freedom of movement through means intentionally applied.

These definitions focus on the assertion of authority and the use of physical force.²⁰⁷

Seizures were also found to occur when deadly force is used to apprehend a suspect.²⁰⁸ Seizures of people can be either brief stops for questioning or actual

²⁰² See *Katz*, 389 U.S. at 347.

²⁰³ See *Maryland v. Garrison*, 480 U.S. 79 (1987).

²⁰⁴ See *Andresen v. Maryland*, 427 U.S. 463 (1976).

²⁰⁵ See *United States v. Ventresca*, 380 U.S. 102, 106 (1965).

²⁰⁶ *Urbonya (Issues)*, *supra* note 189, at 74 (quoting *Soldal v. Cook County*, 506 U.S. 56, 61 (1992) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984))).

²⁰⁷ *Urbonya (Issues)*, *supra* note 189, at 72-73 (citing *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1976) (liberty restrained); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (Stewart, J.) (believed to be not free to leave); *I.N.S. v. Delgado*, 466 U.S. 210, 215 (1984) (same); *California v. Hodari D.*, 499 U.S. 621, 628 (1991) (submission to authority); *Brower v. County of Inyo*, 489 U.S. 593, 597 (1989) (government intent required)).

²⁰⁸ See *Tennessee v. Garner*, 471 U.S. 1, 7 (1985).

arrests.²⁰⁹ Seizure of a person by a brief stop may occur on the basis of reasonable suspicion alone.²¹⁰ A full-blown arrest may only be based on probable cause, with or without an arrest warrant if the arrest takes place in a public place,²¹¹ or (generally) with a warrant if the arrest is at the suspect's home.²¹² A brief detention is also acceptable when the person detained is present during a police search of a premises when the search is conducted under the authority of a search warrant.²¹³

1. Stopping a person based on reasonable suspicion

Police may detain briefly a person for questioning if they have reasonable suspicion that the suspect is "engag[ing] in criminal activity,"²¹⁴ or that the individual "was involved in or is wanted in connection with a completed felony."²¹⁵

2. Arrests based on probable cause

a. *Arrest without an arrest warrant*

An arrest is the "taking of a person into [extended] custody [for the purpose of officially] charg[ing them] with a crime."²¹⁶ Police may arrest a person in public without a warrant²¹⁷ when certain conditions have been met. "A police officer has probable cause to arrest when 'the facts and circumstances within his knowledge and of which he has reasonably trustworthy information are sufficient to warrant a prudent person in believing that the suspect has committed or was committing an offense.'"²¹⁸ This standard allows such an arrest, supported by probable cause, to take place as long as it happens in a public area. This level of protection has been extended further by the Supreme Court's decision in *Payton v. New York*, regarding the need for arrest warrants if the arrest takes place in the suspect's home.²¹⁹

²⁰⁹ See *Terry*, 392 U.S. at 30.

²¹⁰ See *id.*

²¹¹ See *United States v. Watson*, 423 U.S. 411, 418 (1976).

²¹² See *Payton v. New York*, 445 U.S. 573, 576 (1980).

²¹³ See *Michigan v. Summers*, 452 U.S. 692, 705 (1981).

²¹⁴ *Alabama v. White*, 496 U.S. 325, 331 (1990).

²¹⁵ *United States v. Hensley*, 469 U.S. 221, 229 (1985).

²¹⁶ JOSEPH G. COOK & PAUL MARCUS, *CRIMINAL PROCEDURE* 3 (4th ed. 1997).

²¹⁷ See *United States v. Watson*, 423 U.S. 411 (1976).

²¹⁸ *Urbonya (Issues)*, *supra* note 189, at 75-76 (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)).

²¹⁹ 445 U.S. 573 (1980).

b. *Arrests with an arrest warrant*

The Court in *Payton* held that police generally need to secure an arrest warrant before entering a suspect's home to arrest him/her.²²⁰ No search warrant is needed if the home to be entered is the suspect's,²²¹ but the Supreme Court has held that entry into a third party's home to execute an arrest warrant will first require a search warrant to be issued.²²² Exceptions to this general rule exist and are discussed later in this Note.

In addition to the foundational requirements needed before a search or seizure may take place, the Supreme Court has placed further restraints on how the police carry out these searches and seizures.

D. *Manner of Searching and Seizing*

The Fourth Amendment stipulates that Americans shall have the right to be free from "unreasonable" searches and seizures.²²³ The Supreme Court has applied this principle to police conduct during the execution of searches and seizures and has arrived at a fairly murky set of standards with which to judge police actions.

1. "Reasonableness"

Courts have the authority to examine the reasonableness of the level of force used to arrest an individual,²²⁴ including the use of deadly force,²²⁵ as well as the actions taken to execute a search warrant.²²⁶ The police conduct at issue is not subject to a rigid standard of reasonableness.²²⁷ Under *Graham v. Connor*, "[d]etermining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the

²²⁰ See *id.* at 576.

²²¹ See *id.*

²²² See *Steagald v. United States*, 451 U.S. 204, 222 (1981).

²²³ See U.S. CONST. amend. IV.

²²⁴ See *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989) ("A seizure triggering the Fourth Amendment's protections occurs . . . when government actors have . . . in some way restrained the liberty of a citizen.").

²²⁵ See *Maravilla v. United States*, 60 F.3d 1230, 1233 (7th Cir. 1995) ("Under the Fourth Amendment the inquiry is whether the officer's decision to use deadly force was *objectively* reasonable.") (citing *Graham*, 490 U.S. at 396-97).

²²⁶ See *Dalia v. United States*, 441 U.S. 238, 258 (1979).

²²⁷ See *Graham*, 490 U.S. at 396 ("The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application.") (quoting *Bell v. Wolfish*, 441 U.S. 520, 529 (1979)).

countervailing governmental interests at stake.”²²⁸ “The ‘reasonableness’ inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them.”²²⁹ Thus, the Fourth Amendment’s “proper application requires careful attention to the facts and circumstances of each particular case.”²³⁰ These facts to be considered “includ[e] the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight.”²³¹

The Supreme Court’s interpretation of the Fourth Amendment restraints on the use of deadly force are especially important to police. Supreme Court rulings on deadly force have held that

where an officer has probable cause to believe that a person poses a threat of serious physical harm, either to the officer or others, or where an officer has been threatened with a weapon, it is not constitutionally unreasonable to use deadly force where necessary to prevent the person from harming others.²³²

This holding gives clear standards for when deadly force may be utilized by police, ensuring the proper application of such police authority.

The Supreme Court has clarified Fourth Amendment analysis methodology by stating in *Whren v. United States*²³³ that, if probable cause existed, courts would only engage in a Fourth Amendment “reasonableness” balancing analysis if “extraordinary circumstances” were also present.²³⁴ These circumstances were identified as “seizure by deadly force, unannounced entry into a home, entry into a home without a warrant, and physical penetration of the body.”²³⁵ The Supreme Court has also clarified the Fourth Amendment restraints on the types of warrantless

²²⁸ *Id.* at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983))).

²²⁹ *Id.* at 397.

²³⁰ *Id.* at 396.

²³¹ *Id.*

²³² *Williams*, 804 F. Supp. at 1570 n.5 (citing *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)).

²³³ 517 U.S. 806 (1996).

²³⁴ See Kathryn R. Urbonya, *Fourth Amendment Issues in Section 1983 Litigation*, 15 TOURO L. REV. 1623, 1624 (citing *Whren*, 517 U.S. at 817) [hereinafter *Urbonya (4th Amend.)*].

²³⁵ *Whren*, 517 U.S. at 818 (citations omitted). The effect of this ruling is that courts will give deference to police actions not falling within one of the “extraordinary areas” because “the presence of probable cause itself generally signifies that the challenged [police] action was reasonable.” *Urbonya (4th Amend.)*, *supra* note 234, at 1624.

and unannounced entries commonly justified under the “exigent circumstances” principle.

2. Exigent Circumstances

Warrantless and unannounced police entries into private homes have been frowned upon by American jurisprudence since before the Bill of Rights even existed.²³⁶ Even so, Supreme Court rulings on the issue have carved out a definitive set of standards which allow them to occur.

a. *The Knock and Announce Rule*

The Supreme Court, through the trilogy of *Wilson v. Arkansas*,²³⁷ *Richards v. Wisconsin*,²³⁸ and *United States v. Ramirez*,²³⁹ has defined the scope of the Fourth Amendment’s “knock and announce” doctrine.²⁴⁰ In *Wilson*, the Court stated that the Fourth Amendment had incorporated the common law rule that police must knock and announce their presence and purpose before entering a home to execute a search or arrest warrant.²⁴¹ The *Richards*’ ruling held that states could not legislate a blanket exception to the knock-and-announce requirement.²⁴² *Ramirez* involved the interpretation of 18 U.S.C. § 3109, a federal statute that codified the knock-and-announce requirement and is applicable to federal law enforcement officers.²⁴³ Each of these knock-and-announce cases held that the rule had an “exigent circumstances” exception that would allow police to bypass knocking and enter a home unannounced.

b. *The exigent circumstances exception*

The exigent circumstance exception is probably one of the more controversial legal principles of Fourth Amendment law. The general principle allows entry without knocking or announcing if “the police . . . have reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous [to their or others’ safety] or futile, or that it would inhibit the

²³⁶ See G. Robert Blakey, *The Rule of Announcement and Unlawful Entry*, 112 U. PA. L. REV. 499 (1964).

²³⁷ 514 U.S. 927 (1995).

²³⁸ 520 U.S. 385 (1997).

²³⁹ 523 U.S. 65 (1998).

²⁴⁰ See *Urbonya (4th Amend.)*, *supra* note 234, at 1636.

²⁴¹ See *id.* at 1637 (citing *Wilson*, 514 U.S. at 934-35).

²⁴² See *Richards*, 520 U.S. at 388.

²⁴³ See 18 U.S.C. § 3109; *Miller v. United States*, 357 U.S. 301, 313 (1958) (noting that § 3109 “codif[ed] a tradition embedded in Anglo-American law”).

effective investigation of the crime by, for example, allowing the destruction of evidence."²⁴⁴ "The most common applications of the exception are where the officers believe they may be in danger because the defendant possesses a firearm, where there is a likelihood that the defendant may escape, or where it is likely that evidence may be destroyed before it can be recovered."²⁴⁵

Richards v. Wisconsin added another twist to the exigent circumstances exception by approving the practice of, and clarifying the standard for, police obtaining warrants pre-approving no-knock entries. The Court stated that "[t]he practice of allowing magistrates to issue no-knock warrants [is] entirely reasonable *when sufficient cause to do so can be demonstrated ahead of time.*"²⁴⁶ This means that as long as police can convince a magistrate of the reasonable suspicion that exigent circumstances will exist at the time of arrest, they may get judicial authorization to conduct a no-knock entry. *Richards* also stated that if the magistrate refuses to grant the no-knock provisions of the warrant, the police are not precluded from declaring exigent circumstances exist at the scene and conducting a lawful no-knock entry anyway.²⁴⁷

Another aspect of the no-knock entries is the question of "whether the[ir] lawfulness . . . depends on whether property is damaged in the course of the entry."²⁴⁸ The Court in *Ramirez v. United States* stated that "[e]xcessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search are not subject to suppression."²⁴⁹ The Court held that as long as the *Richards* exigent circumstances standards²⁵⁰ for justifying a no-knock entry were met, resulting property damage would only be scrutinized under the Fourth Amendment "objective reasonableness" standard.²⁵¹

²⁴⁴ *Richards*, 520 U.S. at 394. Included under the exigent circumstances umbrella is the "hot pursuit" doctrine, which allows police to pursue suspects into their homes without a search warrant as long as there is an "immediate and continuous pursuit." See *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984).

²⁴⁵ Edward X. Clinton, Jr., "Open Up! It's the Police!," CRIM. JUST., Spring 1997, at 18, 21.

²⁴⁶ *Richards*, 520 U.S. at 396 n.7 (emphasis added).

²⁴⁷ See *id.* ("[A] magistrate's decision not to authorize a no-knock entry should not be interpreted to remove the officer's authority to exercise independent judgment concerning the wisdom of a no-knock entry at the time the warrant is being executed."); Urbonya (*4th Amend.*), *supra* note 234, at 1638. The police actions are still subject to court review after the fact, if challenged.

²⁴⁸ *Ramirez v. United States*, 523 U.S. 65, 70 (1998).

²⁴⁹ *Id.* at 71.

²⁵⁰ See text accompanying note 248.

²⁵¹ See *Ramirez*, 523 U.S. at 71-72 ("As for the manner in which entry was accomplished . . . [t]heir conduct was clearly reasonable." *Id.* at 72.).

D. *Summary of Legal Restraints on Police Conduct*

The Supreme Court's Fourth Amendment jurisprudence has given police much leeway in the execution of their duties by promulgating the "objective reasonableness standard" as the Fourth Amendment test. What this standard emphasizes is that the actions of the police must be reviewed according to the particular facts and circumstances of each case. Such a standard is fair and workable, and allows SWAT teams to utilize their training as circumstances dictate in order to resolve the situation facing them as quickly and safely as possible.

V. LEGAL IMPLICATIONS OF SWAT TEAM ACTIVITY

By their nature, SWAT teams tread a thin line between reasonable and illegal police conduct.²⁵² The Fourth Amendment requires that the actions of police be reasonable, especially in cases utilizing deadly force or no-knock entries.²⁵³ SWAT training with the Department of Defense teaches SWAT teams how to perform actions that may be perceived to be outside the "reasonableness" boundary of the Fourth Amendment.²⁵⁴

A. *SWAT Warrant Service Utilizing DOD Training*

The most controversial aspect of SWAT team deployment is their increasingly primary duty of executing search and arrest warrants.²⁵⁵ SWAT teams trained in special operations-developed tactical entry methods are at the edge of the Fourth Amendment.²⁵⁶ Courts are required to give their decisions some level of deference

²⁵² See *Tennessee v. Garner*, 471 U.S. 1, 7 (1985) (stating that force likely to cause death or serious injury is subject to Fourth Amendment scrutiny); text accompanying notes 65-86 (describing SWAT tactics, including explosive-assisted building entries and specialized firearms training).

²⁵³ See text accompanying notes 185-251.

²⁵⁴ See, e.g., *Weber*, *supra* note 9, at 3 (criticizing this training as having "threaten[ed] civil liberties[] [and] constitutional norms").

²⁵⁵ See *Booth*, *supra* note 8, at A1 ("Between 1980 and 1995, for example, [Peter] Kraska found that SWAT units were employed in their traditional roles only for a minority of call-outs . . . [b]ut 75 percent of their mission is now devoted to serving high-risk warrants, mostly drug raids.").

The hostility to SWAT teams generally has been justified by criticism of the FBI Hostage Rescue Team's actions at Waco. See KOPEL & BLACKMAN, *supra* note 7 (literally making a "federal case" out of the Waco incident (no pun intended)); *Weber*, *supra* note 9, at 10 (bemoaning "the loss of innocent life at Waco" as an example of the danger of having SWAT teams).

²⁵⁶ See *Graham v. Connor*, 490 U.S. 386, 396-97 (1989) ("The calculus of [Fourth Amendment] reasonableness must embody allowance for the fact that police officers are

since “[t]he ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”²⁵⁷

SWAT entry methods such as using tow trucks to remove doors, the use of flash-bangs, no-knock “dynamic entries,” explosive-assisted entries, and hastened entries after knocking have all been challenged under the Fourth Amendment as being unreasonable.²⁵⁸ The majority of these cases have found that the challenged actions have met the “objective reasonableness” standard, despite the extremity of the police conduct.²⁵⁹

B. *Measuring “Reasonable” Entry Standards*

The Fourth Amendment requires an objective balancing of all facts when determining if the police actions are constitutionally reasonable.²⁶⁰ This indicates that as long as the “totality of circumstances” test is used to decide the reasonableness of a SWAT team’s actions, such actions will continue to be found constitutional as long as they can be justified by the courts as reasonable under the circumstances. For example, the Third Circuit refused to find an “unreasonable” seizure where a SWAT team forced home occupants to lie face down in dirt outside their home at gunpoint, while continuously cursing at them for several minutes,

often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”). SWAT teams are utilized specifically to deal with these sorts of situations facing police departments.

²⁵⁷ *Id.* at 396.

²⁵⁸ See *United States v. Dice*, No. 98-3092, 2000 U.S. App. LEXIS 74 (6th Cir. Jan. 6, 2000) (no-knock entry); *United States v. Spikes*, 158 F.3d 913 (6th Cir. 1998) (hasty timing between knocking and entering); *Tracas v. Denney*, No. 96-16769, 1997 U.S. App. WL 730271 (9th Cir. Nov. 24, 1997) (no-knock entry); *United States v. Hawkins*, 102 F.3d 973 (8th Cir. 1996) (no-knock entry); *Jenkins v. Wood*, 81 F.3d 988 (10th Cir. 1996) (no-knock entry, severely criticized in concurring opinion); *United States v. Carter*, 999 F.2d 182 (7th Cir. 1993) (no-knock warrant, but knock without announcement at entry); *United States v. Kingsley*, No. 97-40095-01-RDR 1998 U.S. Dist. LEXIS 8310 (D. Kan. May 21, 1998) (flash-bangs); *United States v. Simpson*, No. CRIM.A.95-524-02, 1997 U.S. Dist. WL 56923, at *3-4 (E.D. Pa. Feb. 10, 1997) (tow truck use); *United States v. Myers*, No.94-20013-01-EEO, 1994 U.S. Dist. WL 324582 at *10 (D. Kan. June 15, 1994) (flash-bangs); *Bates v. City of Fort Wayne, Indiana*, 591 F. Supp. 711 (N.D. Ind. 1983) (use of explosives to breach steel door).

²⁵⁹ See *id.* The Tenth Circuit concurring opinion in *Jenkins v. Wood* suggested that the § 1983 plaintiffs pursue state tort action due to the “egregious . . . commando approach” taken by police. *Jenkins*, 81 F.3d at 996-977 (Henry, Circuit J., concurring). Otherwise, the plaintiffs were unable to prevail due to the fact they could not identify the actual SWAT team members involved. *Id.* at 995-96.

²⁶⁰ See *Graham v. Conner*, 490 U.S. 386, 396-99 (1989).

during the course of a warrantless domestic violence arrest, because the court was “reluctant to establish a precedent that would subject every police arrest of a group of possible violent offenders to compliance with Marquis of Queensberry Rules of fair play.”²⁶¹ In another example, one court used rational basis scrutiny to reject the assertion that the mere deployment of a SWAT team was unreasonable.²⁶² These decisions illustrate that Fourth Amendment analysis tends to favor police decision-making in highly stressful, rapidly evolving situations. While this may be considered a positive legal principle from the perspective of law enforcement, valid policy arguments may be made against such police practices.²⁶³ Among these policy arguments is the heightened risk of a constitutional violation actually occurring.²⁶⁴

C. *Redressing Constitutional Violations by SWAT Teams*

Though the “objective reasonableness” standard validates many SWAT actions, not all have been able to meet that requirement. A constitutional violation may mean huge damages levied against officers and the municipality for which they work, or the exclusion of crucial evidence, allowing violent criminals to be released from the criminal justice process. In one example, the farm city of Dinuba, California, reportedly lost a \$12.5 million wrongful death suit brought by the family of a sixty-four year-old man who was killed by SWAT team members during the course of a no-knock raid.²⁶⁵ Other less spectacular rulings deal with evidentiary suppression²⁶⁶ or § 1983 litigation.²⁶⁷ Some disturbing trends evidenced in the

²⁶¹ *Sharrar v. Felsing*, 128 F.3d 810, 822 (3d Cir. 1997).

²⁶² See *Williams v. Richmond County*, 804 F. Supp. 1561, 1569-70 (S.D. Ga. 1992), *aff'd*, 19 F.3d 36 (11th Cir. 1994), *cert. denied*, 513 U.S. 818 (1994) (distinguishing between constitutional violations and “ordinary errors of judgment”). The district court based this decision on the Supreme Court ruling in *Whitley v. Albers*, 475 U.S. 312 (1986), in which prison officials’ decision to shoot at inmates during a prison riot hostage rescue attempt was found not to violate a wounded prisoner’s Eighth Amendment rights as long as the officials had not acted with “obduracy and wantonness.” *Whitley*, 475 U.S. at 319, 322-26.

²⁶³ See Peter B. Kraska & Victor Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, 44 SOC. PROBS. 1 (1997) (arguing that the rise in SWAT teams is a symptom of an erroneous approach to effective policing strategy); Diane C. Weber, *Are SWAT Teams Paramilitary?*, WORLD & I, Jan. 1, 2000, at 78 available at 2000 WL 9050671 [hereinafter *Weber (Paramilitary)*] (asking whether “machine guns and flash-bang grenades have a place in civil society”); Weber, *supra* note 9.

²⁶⁴ See *Weber (Paramilitary)*, *supra* note 263 (describing several tragic incidents arguably precipitated by aggressive SWAT team actions).

²⁶⁵ See Mark Arax, *Small Farm Town’s SWAT Team Leaves Costly Legacy*, L.A. TIMES, Apr. 5, 1999, at A1 available at 1999 WL 2145825. Though the litigation in this case was reported to have taken place in the Fresno, California, Federal District Court, there appears to be no record of a jury verdict or court opinion.

²⁶⁶ See *United States v. Dice*, No. 98-3092, 2000 U.S. App. LEXIS 74 (6th Cir. Jan. 6, 2000) (no-knock entry was unreasonable); *United States v. Maez*, 872 F.2d 1444 (10th Cir.

caselaw indicate that § 1983 principles may hinder plaintiffs' attempts to redress wrongs committed by SWAT units.

1. § 1983 issues

"42 U.S.C. § 1983 provides a cause of action for persons whose rights, privileges, or immunities secured by the Constitution or laws of the United have been deprived 'under color of any statute, ordinance, regulation, custom, or usage, of any State.'"²⁶⁸ Though this statute sounds as though it allows effective redress, the Supreme Court has carved out the affirmative defense of "qualified immunity" which "provides police officers with immunity from paying damage awards if they did not violate 'clearly established' constitutional law 'of which a reasonable person should have known.'"²⁶⁹ As one court plainly stated, "[o]ur society does not want its police officers to worry about potential litigation; it wants them to concentrate on maintaining law and order in our cities and towns."²⁷⁰

a. "Qualified immunity"

Qualified immunity involves a two-part analysis: "(1) Has the plaintiff stated a violation of a constitutional right? and (2) If so, was that right *clearly established*, that is, were the 'contours of the right sufficiently clear that a reasonable official would understand what he (or she) is doing violates that right?'"²⁷¹ "If reasonable minds would differ as to whether the official's conduct was clearly illegal, then immunity should attach."²⁷²

The first step of stating a constitutional violation may sound easy, but is not in

1989) *cert denied*, 498 U.S. 1104 (1991) (finding that SWAT team's order, from outside a house, for occupants to leave house at gunpoint was in effect a warrantless nonconsensual search of premises for a suspect); *United States v. Curzi*, 867 F.2d 36 (1st Cir. 1989) (same); *United States v. Dupras*, 980 F. Supp. 344 (D. Mont. 1997) (insufficient evidence to justify no-knock entry).

²⁶⁷ *Alexander v. City & County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994), *cert. denied sub nom. Lennon v. Alexander*, 513 U.S. 1083 (1995) (SWAT entry without an arrest warrant, despite having an administrative plumbing inspection warrant, was unreasonable due to the attempted arrest being the actual purpose for entering).

²⁶⁸ *Williams v. Richmond County*, 804 F. Supp. 1561, 1565 (S.D. Ga. 1992), *aff'd*, 19 F.3d 36 (11th Cir. 1994), *cert. denied*, 513 U.S. 818 (1994) (citing 42 U.S.C. § 1983).

²⁶⁹ *Urbonya (Issues)*, *supra* note 189, at 101 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 812 (1982)).

²⁷⁰ *Liebenstein v. Crowe*, 826 F. Supp. 1174, 1184 (E.D. Wisc. 1992) (granting summary judgment).

²⁷¹ *Urbonya (Issues)*, *supra* note 189, at 101 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

²⁷² *Liebenstein*, 826 F. Supp. at 1184 (citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

light of the “objective reasonableness” standard. A plaintiff must state what constitutional violation has taken place.²⁷³ The second step of the analysis is much harder, though especially important in the context of evaluating SWAT tactics learned from the Department of Defense. All that is required for qualified immunity on this second prong is the raising of a “legitimate question” as to the legality of the conduct.²⁷⁴ This low threshold has been met in numerous cases on precisely this question of “arguable legality.”²⁷⁵ Due to the recent acquisition of DOD training²⁷⁶ there is a lack of legal authority defining the Fourth Amendment’s control of the use of such tactics. The result is the predictable granting of qualified immunity, as lower courts have already done.²⁷⁷

b. *The “personally engage” requirement*

Another important factor in § 1983 SWAT litigation concerns the requirement that the plaintiff show that the defendant personally engaged in the alleged violation.²⁷⁸ Critics have documented thoroughly the practice of SWAT members

²⁷³ See *Crosby v. Paulk*, 187 F.3d 1339 (11th Cir. 1999) (finding that plaintiff failed to state a violation of a constitutional right); *Williams*, 804 F. Supp. at 1569-71 (finding no constitutional violation, therefore analysis ends).

²⁷⁴ *Urbonya (Issues)*, *supra* note 189, at 103.

²⁷⁵ One disturbing case where the defendants prevailed under qualified immunity involved the Philadelphia police department’s aerial bombing of a home, resulting in massive property damage when the whole block burned down. See *In re City of Philadelphia Litig.*, 49 F.3d 945 (3rd Cir. 1995) (plurality opinion), *cert. denied* 516 U.S. 863 (1995). For another example, see *Sharrar v. Felsing*, 128 F.3d 810, 822 (3rd Cir. 1997):

While the language and method used to effect the arrests appear to be more akin to the Rambo-type behavior associated with police in overdramatized B movies or TV shows than the police conduct ordinarily expected in a quiet, family seaside town, we are reluctant to establish a precedent that would subject every police arrest of a group of possible violent offenders to compliance with Marquis of Queensberry Rules of fair play.

In one strange case, a sheriff was granted qualified immunity after being sued for *not* using a SWAT team. See *Salas v. Carpenter*, 980 F.2d 299 (5th Cir. 1992).

²⁷⁶ See *supra* text accompanying notes 118-25 (describing the recent growth of such training in only the past ten years).

²⁷⁷ See *supra* note 256 (citing only one federal district court case addressing the issue of explosive-assisted entries in the past twenty years). One case involving the shooting death of a hostage taker explicitly used this second prong to reason that a lack of jurisprudence, namely lawsuits brought by dead hostage-takers concerning “unreasonable” deadly force, was enough to find qualified immunity for the officers. See *Malignaggi v. County of Gloucester*, 855 F. Supp. 74, 79-81 (D.N.J. 1994).

²⁷⁸ See, e.g., *Jenkins v. Wood*, 81 F.3d 988 (10th Cir. 1996) (dismissing § 1983 suit against SWAT supervisors on this very issue). “Team liability” is barred under this principle. See *Chuman v. Wright*, 76 F.3d 292, 294-95 (9th Cir. 1996).

concealing their identities with masks, goggles, or balaclavas.²⁷⁹ Court opinions also mention the wearing of masks by SWAT members.²⁸⁰ The result of this use of masks is that injured parties cannot identify the persons “personally engaging” in the violation of their constitutional rights.²⁸¹ Critics of SWAT teams are quick to pick up on this fact: “[Masks] prevent identification of rogue officers so that they cannot be sued later for criminal acts.”²⁸² The apparent justification for the masks is the psychological intimidation of suspects.²⁸³ If this is the only rationale, a policy argument concerning the ability of wrongly treated citizens to seek redress through § 1983 litigation seems a compelling justification for doing away with the use of masks. Not only would this allow the proper identification of guilty parties, but it would help the public image of SWAT members.²⁸⁴

c. *Municipal liability under § 1983: “policy or custom”*

To establish municipal liability under § 1983, a plaintiff must be able to show that the alleged constitutional violation was the result of an official policy or custom

²⁷⁹ See Weber (*Paramilitary*), *supra* note 263 (describing teams as wearing “ninja hoods”); KOPEL & BLACKMAN, *supra* note 7, at 344 (“Law enforcement use of masks in the service of search or arrest warrants should be prohibited, except when specifically authorized by a court when granting the warrant, based on compelling [governmental interests].”).

²⁸⁰ See Swint v. City of Wadley, 51 F.3d 988, 993 (11th Cir. 1995) (“[A]t least some of the [SWAT] members wore ski masks to conceal their identities.”); Renalde v. County of Denver, 807 F. Supp. 668, 670 (D. Colo. 1992) (“The SWAT team [was] wearing masks and wielding submachine guns . . .”).

The inference in *Jenkins* is that the SWAT team was wearing masks: “The defense [case] rests on the fact that neither [plaintiff] could identify the officer or officers responsible for the egregious conduct that occurred in their home in the middle of the night.” *Jenkins*, 81 F.3d at 996 (Henry, J., concurring).

²⁸¹ See *Jenkins*, 81 F.3d at 994-96.

²⁸² KOPEL & BLACKMAN, *supra* note 7, at 344.

²⁸³ See Amy Joi Bryson, *SWAT: Highly Trained Teams Ready For Any Situation*, DESERET NEWS, Apr. 25, 1999, at A1, available at 1999 WL 15642329 (“When they see the SWAT team moving around in camouflage, carrying automatics and guns that may be superior to [theirs], we found it was much easier to negotiate someone out of a tense situation.”) (quoting Weber County, Utah, Sheriff’s Chief Deputy A.K. Greenwood).

²⁸⁴ See KOPEL & BLACKMAN, *supra* note 7, at 344 (“Masks . . . make peace officers look inappropriately terrifying. . .”).

of the municipality.²⁸⁵ “The plaintiff must also demonstrate that there is a direct causal link between the municipal policy [or custom] and the constitutional deprivation.”²⁸⁶

i. Municipal “policy”

A municipal policy may be shown in three ways: a decision maker’s deliberate choice, made among various alternatives; actions of a decision maker possessing final authority to establish municipal policy with respect to the complained action (not including the discretionary actions of low-level officials); or by the showing of a failure to take official action in some area, such as providing adequate police training.²⁸⁷ A city’s failure to provide adequate training can only be such a “policy” if that failure

[E]vidences a “deliberate indifference” to the rights of persons whom the police come in contact It may happen that . . . the need for enhanced training is so obvious, and the inadequacy of training is so likely to result in the violation of constitutional rights, that a jury could reasonably attribute to the policymakers a deliberate indifference to those training needs. In such a case, the failure to offer proper training constitutes a policy for which a city is liable when improper training actually imposes injury.²⁸⁸

But, “a single incident of unconstitutional activity is not sufficient to impose liability unless proof of the incident includes proof that it was caused by an existing, (unconstitutional municipal policy) . . . attributed to a (municipal policymaker).”²⁸⁹ The Supreme Court has defined “policymaker” as the “final policymaker[s]. . . for the local government in a particular area, or on a particular issue.”²⁹⁰ This question may be a matter of state law, especially law enforcement powers delegated under state constitutions. For example, in *McMillan v. Monroe County*²⁹¹ the Supreme

²⁸⁵ See *Tapia v. City of Greenwood*, 965 F.2d 336, 338 (7th Cir. 1992) (citing *Pembaur v. Cincinnati*, 475 U.S. 469, 479-80 (1986)). Although the Supreme Court has clearly defined the “policy” aspect, it has not addressed the “custom” aspect of municipal liability. See Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering “Custom” in § 1983 Municipal Liability*, 80 B.U. L. REV. 17, 49 (2000) (claiming that § 1983 “custom” scrutiny has been “forgotten” by the Supreme Court).

²⁸⁶ *Tapia*, 965 F.2d at 338 (citing *Canton v. Harris*, 489 U.S. 378, 385 (1989)).

²⁸⁷ See Gilles, *supra* note 285, at 35-37, 41-47.

²⁸⁸ *Tapia*, 965 F.2d at 338-39 (citations omitted).

²⁸⁹ *Id.* at 339-40 (citing *Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985)).

²⁹⁰ *McMillan v. Monroe County*, 520 U.S. 781, 785 (1997).

²⁹¹ *Id.*

Court held that a county sheriff was not a § 1983 policymaker for purposes of municipal liability because Alabama law dictated that law enforcement authority was vested at the state level, and not the county level.²⁹² In another, a plaintiff's claims were dismissed when she was able to "cite neither facts nor law showing that a San Francisco [SWAT] commander is an authorized decision maker for the City and County of San Francisco."²⁹³

This "policy" standard allows municipalities to immunize themselves from § 1983 liability by ensuring that they have some sort of constitutionally-sound basic training program, regardless of whether officers adhere to it during a certain operation.²⁹⁴ Because SWAT officers are typically drawn from the rank-and-file of the police force,²⁹⁵ "no distinction should be drawn between basic law enforcement training and SWAT Team training with regard to . . . procedures [common to both duties, such as executing search warrants]." ²⁹⁶ The predicted result of SWAT litigation under this standard is that municipalities will prevail as a matter of law concerning the use of DOD-trained tactics because their "official" policy will be shown to be constitutionally sound. For plaintiffs, this leaves pleading a "custom" as a basis for municipal liability.

ii. Municipal "custom"

The issue of pleading a § 1983 "custom" in terms of an unwritten policy of SWAT teams using unconstitutional methods learned from the DOD is an open-ended question.²⁹⁷ To show custom, a plaintiff must "be able to prove the existence of a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a 'custom or usage' with the force of law."²⁹⁸ Just what evidence is required to have such a

²⁹² See *id.* at 786-96.

²⁹³ *Alexander v. City & County of San Francisco*, 29 F.3d 1355, 1368 (9th Cir. 1994) *cert. denied*, 513 U.S. 1083 (1995).

²⁹⁴ See *Tapia*, 965 F.2d at 339-40 (holding that illegal SWAT entry could not be attributed to an official municipal policy under the "failure to train" principle, because the mere existence of basic police training adhering to the minimum standards established and governed by state law negated the assertion that "the need for enhanced training was so obvious, and the inadequacy of training was so likely to result in a constitutional violation . . . [that] deliberate indifference . . ." was evident. *Id.* at 338.).

²⁹⁵ See *supra* text accompanying notes 87-94 (explaining the SWAT member selection process).

²⁹⁶ *Tapia*, 965 F.2d at 339 n.2.

²⁹⁷ See *Gilles*, *supra* note 285, at 72-92 (claiming that although the Supreme Court has "forgotten" about this area of § 1983 jurisprudence, the possibility of utilizing it is still there).

²⁹⁸ *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (citations omitted).

showing of “custom” has not been defined by the Supreme Court,²⁹⁹ although a few police-related cases have successfully used this approach³⁰⁰ by “point[ing] to the unwritten practices adhered to by rank-and-file municipal officials as the basis for establishing [a] municipal [custom].”³⁰¹

To show a SWAT “custom” under this standard a plaintiff will have to show widespread, permanent, and settled use of specific tactics by a SWAT team.³⁰² This custom must also be shown to have a direct causal link to the constitutional violation.³⁰³ This will be extremely difficult due to the nature of SWAT tactics being dependent on fact-specific situations.³⁰⁴ For example, the practice of having tow trucks pull off reinforced doors may not be used in every occasion, which undermines the argument that such a practice is a “permanent” one.³⁰⁵ Unless the plaintiff can show a consistently used practice, one that is applied regardless of situation, municipal liability will not attach.³⁰⁶

d. *Summary of SWAT injury redress issues*

Plaintiffs injured by SWAT tactics learned from the DOD will find it hard to succeed under § 1983 litigation against both individual SWAT officers and the municipalities that employ them. The principles of qualified immunity, “personally engage,” and “policy or custom” for municipal liability, act as barriers to those seeking legal redress through the federal system.

Though the route of federal constitutional relief may be foreclosed, state and

²⁹⁹ See Gilles, *supra* note 285, at 49.

³⁰⁰ See *id.* at 61-62 (citing Mathias v. Bingley, 906 F.2d 1047 (5th Cir. 1990); Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1988); Garza v. City of Omaha, 814 F.2d 553 (8th Cir. 1987)). Gilles also explains the how each case probably would have failed if the “policy” approach was used. *Id.* at 60-63.

³⁰¹ *Id.* at 62.

³⁰² See *Praprotnik*, 485 U.S. at 127.

³⁰³ See *Tapia v. City of Greenwood*, 965 F.2d 336, 338 (7th Cir. 1992) (citing *Canton v. Harris*, 489 U.S. 378, 385 (1989)).

³⁰⁴ See *supra* text accompanying notes 55-63 (describing the role mission-specific planning plays in SWAT operations).

³⁰⁵ See, e.g., *Jones*, 856 F.2d at 985 (finding that the police practice of keeping “secret files” was a “custom” for municipal liability purposes).

³⁰⁶ See *Gorio v. Block*, No.87-6334, 972 F.2d 1339 (Table), 1992 WL 185429, **3 (9th Cir. Aug. 5, 1992) (“[P]roof of random acts or isolated events are insufficient to establish custom”) (citing *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1444 (9th Cir. 1989)).

common law tort claims remain available.³⁰⁷ Victims may still prevail under such doctrines as assault, battery, false arrest or imprisonment, negligence, and intentional infliction of emotional distress. SWAT actions may also violate state constitutions, opening another possible avenue of redress.³⁰⁸

CONCLUSIONS

As was seen glaringly in Waco, guns and heavy-handedness may not always be the best response to tense situations involving unstable, armed suspects. At the same time, law enforcement must be allowed to respond to the changing face of crime in order to maintain the level of safety Americans want to take for granted.³⁰⁹ Few would argue against training police officers to better protect their communities.³¹⁰ The introduction of emotion and rhetoric, focused on the source of that training, only clouds the issue of whether the training benefits the communities those police serve.

SWAT training with the DOD and the use of military techniques, although an emotional issue, is constitutionally valid. The Fourth Amendment allows an objectively reasonable police response to societal threats, to be judged on the basis of the particular facts at issue. SWAT tactics learned from the DOD will meet this "reasonableness" test in the majority of situations. However, this fact does not assure that police using these tactics may never infringe civil liberties.

The danger of using this training becomes evident when victims attempt to

³⁰⁷ See *Jenkins v. Wood*, 81 F.3d 988, 998 (10th Cir. 1996) (Henry, J., concurring) ("[T]hese plaintiffs, possibly wronged, may not rely on a constitutional tort for solace. Common law or state tort relief is the normal recourse for actions making as little sense as these."); *Ting v. United States*, 927 F.2d 1504, 1513-15 (9th Cir. 1991) (analyzing California tort law claims against FBI SWAT agents, allowed under the Federal Tort Claims Act).

³⁰⁸ For examples of state supreme court rulings on the legality of no-knock entries under state constitutions, see *Poole v. United States*, 630 A.2d 1109 (D.C. 1993) *cert. denied*, 513 U.S. 855; *State v. Bamber*, 630 So.2d 1048 (Fla. 1994); *State v. Attaway*, 870 P.2d 103 (N.M. 1994); *State v. Schultz*, 819 P.2d 762 (Or. 1991).

³⁰⁹ The SWAT officers that responded to the 2000 Columbine High School shootings have been criticized for not acting aggressively enough, and several lawsuits are pending against team members for this perceived lack of aggression. See Peggy Lowe, *SWAT Member Won't Testify With Threat of Lawsuits By Victims' Families, City Advises Him Not to Speak to Columbine Commission*, DENVER ROCKY MOUNTAIN NEWS, June 23, 2000, at 7A.

³¹⁰ As a response to the criticism of the SWAT tactics at Columbine High School, police departments nationwide are training regular-duty officers to conduct tactical entries and CQB-based building searches in an effort to be more "proactive" when confronted by a similar situation. See Josh White, *New Tactics Built on Tragic Lessons; County Police Taught Ways to Intervene in Violent Cases*, WASH. POST, May 24, 2000, at Prince William Extra 1; Jane Prendergast, *Police Adopting New Approach to Shootings*, CINCINNATI ENQUIRER, Aug. 29, 2000, at A01.

redress any resulting constitutional injuries. The exclusionary rule will bar evidence found to be unreasonably obtained by SWAT teams, but this “reasonableness” test is often hard for police to fail. Litigation under § 1983 presents a substantial barrier to injured people seeking compensation from SWAT officers or the municipalities that field them. Jurisprudence in this area gives substantial deference to police officer decisions, and effectively insulates municipalities from liability.

The Constitution has stood as a barrier between governmental abuse and American civil liberties. Police departments, the thin blue line between lawlessness and the rule of law, serve as the guardians of those liberties. Those SWAT members who have sworn to follow this tradition must take care not to fall on the wrong side of that thin blue line.

KARAN R. SINGH