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# CAN ARMED DRONES HALT THE TREND OF INCREASING POLICE MILITARIZATION?

IAN THRESHER\*

## ABSTRACT

*Following presidential declarations of “war” on drugs and terror, domestic law enforcement agencies were saddled with difficult and dangerous new duties. They responded to the danger by becoming more dangerous themselves; increasingly adopting the training, tactics, and equipment of the United States military. This “militarization” of domestic police officers has, predictably, led to a breakdown in community policing, almost one thousand fatal shootings by police officers per year, and growing rifts between law enforcement agencies and the communities they are sworn to protect. In this essay, I examine whether police drones armed with non-deadly force might, perhaps paradoxically, help to curb police militarization and reduce the risk of direct, armed confrontation between civilians and police officers. I argue that while there are some drawbacks with the use of armed drones, their unique ability to keep police officers out of harm’s way, thereby negating the legal justification for the use of deadly force, would halt the need for further police militarization and dramatically reduce the number of fatal police shootings.*

## I. INTRODUCTION

Suppose that you are walking down a street, turn the corner, and see an armored vehicle lumbering towards you. Suppose further that you can see men on the top of the armored vehicle, but you cannot make out their faces because they are wearing gas masks and helmets. Their bulletproof vests, which partially cover their camouflage uniforms, give them a bulky appearance, and you can see, as the vehicle comes closer, that all of the men are carrying either shotguns or assault rifles. Now imagine that you see another, similar vehicle a little further away. The men on this vehicle are dressed and armed in exactly the same manner. Without any kind of landmarks to go by, where do you suppose you would be? You might be correct in believing that you are in Syria or Iraq, or perhaps in another part of the Middle East, but you would also be correct if you thought yourself in Middle America.

Following the death of Michael Brown on August 9th, 2014, this scene is precisely what greeted the citizens, visitors, and media in Fergu-

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son, Missouri.<sup>1</sup> But it was not just the equipment and uniforms themselves that were shocking. Equally troubling was the “us versus them” attitude that the police officers, no doubt themselves scared, exhibited.<sup>2</sup> The violence and destruction that ensued was both predictable and lamentable. The riots caused approximately \$4.6 million in property damage<sup>3</sup> and resulted in hundreds of arrests.<sup>4</sup> News media reported extensively on the military-esque behavior and equipment of the St. Louis area police departments. Paul Szoldra, a former U.S. Marine turned *Business Insider* reporter, wrote, “In Afghanistan, we patrolled in big, armored trucks. We wore uniforms that conveyed the message, ‘We are a military force, and we are in control right now.’ Many Afghans saw us as occupiers. And now we see some of our police officers in this same way.”<sup>5</sup>

President Obama responded to the outcry by calling for a review of the distribution of federal equipment to state and local law enforcement agencies.<sup>6</sup> Instead of effecting real change in federal programs that disperse this equipment, however, the review encouraged better training for officers and better data on where the equipment went.<sup>7</sup> Exactly how this was supposed to quell society’s fears that local police officers are looking and behaving increasingly like soldiers in a hostile land is unclear. What is clear is that Americans have long known of the danger posed by militarized police, even if that knowledge appears to be periodically forgotten.

Between 1768 and 1770, British soldiers occupied Boston in order to enforce “regulations and taxes intended to demonstrate British control over the colony.”<sup>8</sup> These regulations and taxes were deeply unpopular, and the presence of the British soldiers, who were there, like modern day police officers, to enforce the law, led to tensions on both sides. These tensions exploded on March 5, 1770, when a Boston mob formed around Private Hugh White, a British soldier on sentry duty,

1. Niraj Chokshi, *Militarized Police in Ferguson Unsettles Some; Pentagon Gives Cities Equipment*, WASH. POST (Aug. 14, 2014), [https://www.washingtonpost.com/politics/militarized-police-in-ferguson-unsettles-some-pentagon-gives-cities-equipment/2014/08/14/4651f670-2401-11e4-86ca-6f03cbd15c1a\\_story.html](https://www.washingtonpost.com/politics/militarized-police-in-ferguson-unsettles-some-pentagon-gives-cities-equipment/2014/08/14/4651f670-2401-11e4-86ca-6f03cbd15c1a_story.html).

2. In a confrontation between protestors and police officers caught on video by CNN, a police officer can be heard saying, “Bring it, all you fucking animals. Bring it!” *Ferguson Cop to Protesters “Bring it, all you fucking animals! Bring it!”*, YOUTUBE (Aug. 13, 2014), <https://www.youtube.com/watch?v=WUF-VPAnvE0>.

3. Ben Unglesbee, *Buildings Destroyed in Ferguson Riots Worth Millions*, ST. LOUIS BUS. J. (Dec. 4, 2014), <http://www.bizjournals.com/stlouis/news/2014/12/04/buildings-destroyed-in-ferguson-riots-worth.html>.

4. Ellen Wulforst et al., *More than 400 Arrested as Ferguson Protests Spread to Other U.S. Cities*, REUTERS (Nov. 26, 2014), <http://www.reuters.com/article/us-usa-missouri-shooting-idUSKCN0J80PR20141126>.

5. Paul Szoldra, *This is the Terrifying Result of the Militarization of Police*, BUS. INSIDER (Aug. 17, 2014), <http://www.businessinsider.com/police-militarization-ferguson-2014-8>.

6. Evan Perez, *Police Militarization: The Ferguson Issue that Wasn’t*, CNN (Dec. 1, 2014), <http://www.cnn.com/2014/12/01/politics/ferguson-police-militarization-white-house/>.

7. *Id.*

8. Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL’Y REV. 383, 389–90 (2003).

and began to threaten him and throw objects at him. After he called for assistance, eight more British troops arrived. These soldiers, surrounded by a boisterous crowd and confronted by a chaotic situation, fired into the crowd. The event would come to be known as the Boston Massacre.<sup>9</sup> Only two of the British soldiers were convicted of a crime, and they were convicted of manslaughter instead of murder because, the jury found, the soldiers *reasonably feared for their lives*. Just five years after this incident, Thomas Jefferson would include, as one of the colonists' grievances against King George, that the king had "quarter[ed] large bodies of armed troops among us."<sup>10</sup> The Framers of the Constitution thought that the risks posed by quartering "armed troops" with civilians was so great that they banned the practice in the Third Amendment to the U.S. Constitution.<sup>11</sup>

The Framers knew more than two hundred years ago what American society is being forced to re-learn today: law enforcement officers who are equipped and trained as a military force endanger the societies that they are tasked to protect. The Boston Massacre occurred because the soldiers felt threatened by the assembling Boston mob. The assembling mob, in turn, gathered because of the presence of the troops and their temperament towards the colonists. The causes and effects of police militarization are, therefore, a kind of self-reinforcing loop. Today, as in 1770, police militarization alienates the public and leaves its members distrustful of the officers' motivations and purpose. Instead of protecting the public, the paramilitary forces appear to be subduing it, and this leads to the same tensions that erupted in Boston more than two centuries ago. As long as confrontations exist between armed law enforcement officers and the public, and the officers perceive themselves to be in danger, there exists the threat of deadly force.

The reason lies in the use of force standards that constitutionally bind law enforcement agencies. In *Graham v. Connor*, the Supreme Court established the standard for an excessive force claim.<sup>12</sup> The Court ruled that, in assessing whether the use of deadly force was justified, the "question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."<sup>13</sup> Objective reasonableness "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, *whether the suspect poses an immediate threat to the safety of the officers or others*, and whether he is actively resisting arrest or attempting to evade arrest by flight."<sup>14</sup>

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9. *Id.*

10. THE DECLARATION OF INDEPENDENCE para. 16 (U.S. 1776).

11. The Third Amendment states, "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III.

12. *Graham* analyzed "excessive force in the course of making an arrest, investigatory stop, or other 'seizure' of [a] person." *Graham v. Connor*, 490 U.S. 386, 388 (1989).

13. *Id.* at 397.

14. *Id.* at 396 (emphasis added).

An analysis of fatal shootings by police reveals that the vast majority of such shootings occur when the police officers themselves feel threatened. According to a *Washington Post* database tracking fatal shootings, 991 people were killed by police officers in 2015.<sup>15</sup> Of those 991 people killed, 844 of them were killed because the officer perceived them to be a threat.<sup>16</sup> In only forty-two cases did the police officer shoot in order to protect another person who was in danger.<sup>17</sup> In the remaining 102 fatal shootings, it is unclear whether the police shot out of concern for their safety or for the safety of the public.<sup>18</sup> Regardless, the overwhelming majority of shootings occur because a police officer feels that his or her life is in danger.

These deadly confrontations will only continue with increased police militarization. Professor Cynthia Brown writes that the “expansion of militarization in America, particularly including normalizing the use of military-style tactics in mainstream police functions, undergirded by the theory of just war, is largely responsible for increases in unethical decision-making by police officers.”<sup>19</sup> Increasingly, officers derive their “appearance, tactics, operations, weaponry, and culture” from military units.<sup>20</sup> When combined with the increased burdens that society has placed on law enforcement agencies,<sup>21</sup> police officers are undertaking more dangerous operations and are more confrontational with suspects.<sup>22</sup> This, predictably, leads to more fatal police shootings and the attendant civilian unrest.

With this in mind, the announcement last August that police officers in North Dakota are legally permitted to use armed drones would seem to be a dangerous new development in the ongoing march of police militarization.<sup>23</sup> Indeed, a *Reason-Rupe* Poll found that 58% of

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15. Washington Post Database, *991 People Shot Dead by Police in 2015*, WASH. POST, <https://www.washingtonpost.com/graphics/national/police-shootings/>.

16. Author’s analysis from the description accompanying each shooting in the Washington Post database.

17. *Id.*

18. *Id.* Also included are accidental shootings.

19. Cynthia A. Brown, *Divided Loyalties: Ethical Challenges for America’s Law Enforcement in Post 9/11 America*, 43 CASE W. RES. J. INT’L L. 651, 652–53 (2011).

20. *Id.* at 673.

21. Cadman R. Kiker, *From Mayberry to Ferguson: The Militarization of American Policing Equipment, Culture, and Mission*, 71 WASH. & LEE L. REV. ONLINE 282, 285 (2014) (discussing how politicians have propagated “wars” on crime, drugs, and terrorism, and local law enforcement agencies are on the frontlines).

22. Kealy, *supra* note 8, at 421.

23. The North Dakota State Legislature passed House Bill 1328 on August 27, 2015, a little more than one year after the events in Ferguson. Laura Wagner, *North Dakota Legalizes Armed Police Drones*, NPR (Aug. 27, 2015), <http://www.npr.org/sections/thetwo-way/2015/08/27/435301160/north-dakota-legalizes-armed-police-drones>. At the time, one commentator derisively asserted that the bill was only passed because of a “pro-police lobbyist.” Justin Glawe, *First State Legalizes Taser Drones for Cops, Thanks to a Lobbyist*, DAILY BEAST (Aug. 26, 2015), <http://www.thedailybeast.com/articles/2015/08/26/first-state-legalizes-armed-drones-for-cops-thanks-to-a-lobbyist.html>.

Americans believe that police use of drones “goes too far.”<sup>24</sup> Although this sentiment, expressed by several commentators,<sup>25</sup> is tempting, it ignores the fundamental changes and promise that drones represent. Nowhere are these changes more apparent or important than in their impact on the use of force by police officers.

This Note will explore the negative aspects of using armed drones, but within the context of police militarization, I argue that drones, along with other new technologies,<sup>26</sup> have the potential to drastically reduce the number of incidents of police violence and, in turn, halt the need for further police militarization. The reason lies in the nature of a drone. Unlike an officer at the scene, a drone operator is not himself at any risk, and a drone armed with non-lethal armaments would not be justified in, or capable of, using deadly force. Although armed drones could obviously not replace police officers, I contend that drones would reduce the risk to officers by reducing the instances of confrontation. This, in turn, is one way of both preventing fatal police shootings and halting the perceived need of further police militarization.

This Note is divided into five sections. Section two takes a greater look at the problems and causes of police militarization. It discusses the riots in Baltimore and contrasts the lack of police action there with Ferguson. It then explains how and why police are becoming more militarized. The next part focuses on drone technology and clarifies what an armed police drone would actually look like. Section four analyzes the impact that drones will have on use of force guidelines and how this will serve the public good. I also consider various objections to police use of armed drones, and the danger that they will reinforce rather than limit the perception of police militarization. I conclude by offering ways that a lobby group might have success in changing the public’s attitude towards armed drones.

## II. POLICE MILITARIZATION AND CONFRONTATION

The protests that consumed Ferguson, Missouri, for a week in August 2014 had a profound impact on the way that police and civilians responded to fatal shootings and social unrest. On the one hand, there was widespread outrage at the behavior and appearance of the police officers in Ferguson. The officers resembled more of an occupying force than a community-funded agency tasked with providing “protec-

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24. Emily Ekins, *58 Percent Say Police Departments Using Drones, Military Weapons Goes Too Far, 60 Percent of Tea Partiers Agree*, REASON-RUPE POLL (Dec. 17, 2013), <https://reason.com/poll/2013/12/17/56-percent-say-police-departments-usin2>.

25. See, Glawe, *supra* note 23.

26. Body cameras are one of the most promising new tools in combating police violence and social unrest. The cameras operate as *ex ante* restraints on a police officer’s use of force because the officer knows that everything is being filmed and will therefore be prevented from testifying to facts that put him in a more flattering light. Additionally, the cameras will reduce social unrest following the shooting death of a civilian because the cameras will be able to show how the situation unfolded from the police officer’s point of view. Although it will not placate everyone, the videotape should help to avoid massive social disruption of the kind seen in Ferguson and elsewhere in those situations where the shooting is justified.

tion of life and property in Ferguson through the enforcement of laws and ordinances and assistance with emergency medical services.”<sup>27</sup> On the other hand, the militarized police, intimidating as they were, never used lethal force against any of the protestors. This meant that militarized police could, potentially, have been for the greater good because they effectively acted as a deterrent to violent conduct. The uncertainty surrounding whether or not heavily armed police benefitted or harmed society, an issue first raised at Ferguson, would come to plague officials less than one year later in Baltimore.

On April 12, 2015, Freddie Gray was arrested by Baltimore police and taken to a police station. By the time he arrived, he was unable to breathe or talk.<sup>28</sup> While in transit, Freddie Gray suffered a spinal cord injury that put him into a coma and resulted in his death one week later, on April 19th.<sup>29</sup> By April 25th, protests over his death at the hands of police began to turn violent.<sup>30</sup> Protestors broke a storefront window, threw rocks, and damaged police cruisers. Officers in riot gear broke up fights and made several arrests outside of Camden yards.<sup>31</sup> But these isolated outbreaks of violence soon gave way to one of the most destructive riots that America has faced in the 21st century. Following Freddie Gray’s funeral on April 27th, Baltimore quickly descended into a “war zone.”<sup>32</sup> Residents threw bottles, rocks, and chunks of concrete at officers in riot gear, injuring fifteen, and set fire to cars and looted buildings.<sup>33</sup> The total destruction amounted to around \$9 million in damage and largely involved businesses that had limited or no insurance coverage.<sup>34</sup>

The following day, the conundrum of Ferguson became apparent. On April 25th, the same day the protests initially turned violent, Baltimore Mayor Stephanie Rawlings-Blake said, “[w]hile we tried to make sure that (protestors) were protected from the cars and the other things that were going on, we also gave those who wished to destroy

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27. CITY OF FERGUSON: POLICE DEPARTMENT, <https://www.fergusoncity.com/92/Police-Department> (last visited Sep. 26, 2016).

28. David A. Graham, *The Mysterious Death of Freddie Gray*, ATLANTIC (Apr. 22, 2015), <http://www.theatlantic.com/politics/archive/2015/04/the-mysterious-death-of-freddie-gray/391119/>.

29. *Id.*

30. Sheryl G. Stolberg & Stephen Babcock, *Scenes of Chaos in Baltimore as Thousands Protest Freddie Gray’s Death*, N.Y. TIMES (Apr. 25, 2015), [http://www.nytimes.com/2015/04/26/us/baltimore-crowd-swells-in-protest-of-freddie-grays-death.html?\\_r=0](http://www.nytimes.com/2015/04/26/us/baltimore-crowd-swells-in-protest-of-freddie-grays-death.html?_r=0).

31. *Id.*

32. Dana Ford & Holly Yan, *Baltimore Riots: Looting, Fires Engulf City After Freddie Gray’s Funeral*, CNN (Apr. 28, 2015), <http://www.cnn.com/2015/04/27/us/baltimore-unrest/>.

33. Sheryl G. Stolberg, *Baltimore Enlists National Guard and a Curfew to Fight Riots and Looting*, N.Y. TIMES (Apr. 27, 2015), <http://www.nytimes.com/2015/04/28/us/baltimore-freddie-gray.html>.

34. Yvonne Wenger, *Damage to Businesses from Baltimore Rioting Estimated at about \$9 million*, WASH. POST (May 13, 2015), [https://www.washingtonpost.com/local/damage-to-businesses-from-baltimore-rioting-estimated-at-9-million/2015/05/13/5848c3fe-f9a8-11e4-a13c-193b1241d51a\\_story.html](https://www.washingtonpost.com/local/damage-to-businesses-from-baltimore-rioting-estimated-at-9-million/2015/05/13/5848c3fe-f9a8-11e4-a13c-193b1241d51a_story.html).

space to do that as well.”<sup>35</sup> This was seen by many, including Baltimore’s representative in the Maryland House of Delegates and a Baltimore City Councilman, to be a license to the protestors to cause trouble and a warning to police not to respond aggressively.<sup>36</sup> This was followed by claims from unnamed law enforcement officers who said that there was a direct order, despite Mayor Rawlings-Blake’s insinuations otherwise, to stand down even as the riots broke out.<sup>37</sup>

Regardless of whether or not Mayor Rawlings-Blake issued such an order to law enforcement,<sup>38</sup> the specter of Ferguson can be seen in the official response. With the growth of police militarization and the environment in which riot officers are often employed, public officials after Ferguson face a Hobson’s choice. They can either deploy police officers armed in full military gear and take the risk of violent confrontation and further alienation of the community, or they can take a more hands off approach, assuring that officers are not put in an overly dangerous environment but risking additional damage and civilian-on-civilian violence. The riots in Ferguson and Baltimore represent the two extremes and show the dangers of each. The answer to police militarization is, therefore, not to strip officers of all of their tools and force them to totally abandon their duties in the face of growing violence. But, as Ferguson and other experiences show, nor is the answer to further militarize the police,<sup>39</sup> which appears to be the ongoing trend and holds just as great a risk to society as officers who sit on the sidelines.

In order to understand how police militarization emerged, it is important to understand what the term means. “Militarization is the process of institutionalizing ‘a set of beliefs and values that stress the use of force and domination as appropriate means to solve problems

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35. Josh Levs, *Baltimore’s Handling of Riots Slammed as ‘Disaster’*, CNN (Apr. 28, 2015), <http://www.cnn.com/2015/04/28/us/baltimore-riots-authorities/>.

36. *Id.* (when asked whether she thought Mayor Rawlings-Blake was calling for police to hold back, Delegate Jill Carter replied, “[a]bsolutely,” and said that police acted “completely opposite to their normal behavior” of being “super aggressive”).

37. Leland Vittert, *Source: Baltimore Mayor Ordered Police to Stand Down*, FOX NEWS (Apr. 29, 2015), <http://www.foxnews.com/politics/2015/04/29/source-baltimore-mayor-ordered-police-to-stand-down.html>.

38. For an argument that the police in Baltimore may have responded over-aggressively and, in fact, partially caused the protests to become as violent and destructive as they did see Sam Brodey & Jenna McLaughlin, *Eyewitnesses: The Baltimore Riots Didn’t Start the Way You Think*, MOTHER JONES (Apr. 28, 2015), <http://www.motherjones.com/politics/2015/04/how-baltimore-riots-began-mondawmin-purge> (arguing that by shutting down bus routes, train stops, and keeping students from returning home immediately after school, Baltimore police actually made the rioting more likely and pervasive).

39. Despite their relatively passive response to rioters on April 27th, 2015, and official concerns over further militarizing the police force in Baltimore, by May 2015, Baltimore law enforcement had sought and received rifles, shotguns, sights, and even a bayonet as part of the Federal Government’s 1033 Program. See *Baltimore Receipts of Policing Equipment from U.S. Military Under the 1033 Program*, BALTIMORE SUN (May 20, 2015), <http://data.baltimoresun.com/from-cms/equipment-data/> (stating that despite their relatively passive response to rioters on April 27th, 2015, and official concerns over further militarizing the police force in Baltimore, by May 2015, Baltimore law enforcement had sought and received rifles, shotguns, sights, and even a bayonet as part of the Federal Government’s 1033 Program).



and gain political power, while glorifying the tools to accomplish this—military power, hardware, and technology.’”<sup>40</sup> The militarization of law enforcement began largely as a result of the war on drugs in the 1980s, but accelerated after the September 11, 2001 terrorist attacks.<sup>41</sup> “The concept of the ‘warrior cop’” emerged “as a response to the various ‘wars’ propagated by numerous politicians. There have been ‘wars’ on crime, drugs, and . . . terrorism.”<sup>42</sup> Terming these threats as “wars” marked an important turning point in law enforcement culture. While nobody expressly stated who was on the other side of these wars, the implication is that someone must have been. This changes the psychology from working to protect the public to being inherently suspicious of the public. The changing expectations for the police, and the corrosive effects that this had on the community, can be called “mission creep.”

“Mission creep” occurs when an independent agency is motivated or forced by external agents to change its purpose and conduct. After 9/11, the federal government tasked every law enforcement agency with being a part of the global “War on Terror.”<sup>43</sup> This new task came at a time when law enforcement agencies were already beginning to use SWAT teams for even routine purposes.<sup>44</sup> Nonetheless, the specter of a new “war” resulted in a changing approach and new military equipment, which “encourages police officers to focus on the warlike aspects of policing—aggressive crime fighting—and in turn leads to a ‘warlike’ approach to law enforcement.”<sup>45</sup> The result of this mission creep is predictable. It has resulted in increased deployment of SWAT teams for routine police activities and even led to non-violent offenders being subjected to violent assaults in their own homes.<sup>46</sup> As Sean Kealy succinctly writes, “[t]his ‘mission creep’ has led to the police looking and acting more like troops.”<sup>47</sup> This aggressive policing approach, in turn, puts officers in harm’s way and increases the likelihood of confronta-

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40. Bethany J. Peak, *Militarization of School Police: One Route on the School-to-Prison Pipeline*, 68 ARK. L. REV. 195,196 (2015-16) (citing Peter B. Kraska & Victor E. Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, 44 SOC. PROBS. 1 (1997)).

41. Brown, *supra* note 19, at 652–53, 675.

42. Kiker, *supra* note 21, at 285.

43. *Id.* at 287.

44. Peak, *supra* note 40, at 204. As early as 1995, almost 94% of all SWAT teams were being used to serve warrants, usually no-knock raids on private residences.

45. *Id.* at 205.

46. Jeffrey A. Endebak, *More Bang for Their Buck: How Federal Dollars are Militarizing American Law Enforcement*, 47 J. MARSHALL L. REV. 1479, 1498 (2013-14).

47. Kealy, *supra* note 8, at 432. The irony of this statement is that federal law prohibits any person from “willfully us[ing] any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws. . .” (18 U.S.C. § 1385). The statute essentially prohibits the Army and Air Force (though not the Navy) from aiding in law enforcement functions. This is why the National Guard, and not the Army, is often called in to respond to rioters. The issue is that modern SWAT teams are virtually indistinguishable from troops. So, while the letter of the Act is not violated by the growing use of SWAT teams and militarized police because those are still ostensibly members of law enforcement, such actions almost certainly violate the spirit of the Act.

tion.<sup>48</sup> In response to more confrontations, police officers become more militarized in their conduct and equipment.<sup>49</sup> This system, therefore, creates a self-reinforcing loop that simply increases tensions between police officers and the community they are supposed to serve. Nonetheless, this warlike approach to policing would be largely toothless if it were not for the fact that law enforcement officers receive the equipment to back it up.

In response to the “War on Drugs,” the Department of Defense created the “1033 Program,” which transferred “excess military property to state and local law enforcement agencies.”<sup>50</sup> The program was scaled up significantly following the September 11, 2001 terrorist attacks when it was determined that police officers lacked the equipment to combat a terrorist force.<sup>51</sup> A 2014 study conducted by NPR analyzed every military item sent to local, state and federal agencies from 2006 until April 23, 2014. The study found that during that time, the 1033 Program sent more than 600 mine-resistant, ambush-protected vehicles (MRAPs) to local law enforcement agencies.<sup>52</sup> It also supplied law enforcement officers with 79,288 assault rifles, 205 grenade launchers, 11,959 bayonets, \$3.6 million worth of camouflage gear, and a whopping \$124 million worth of night-vision equipment, including sniper scopes.<sup>53</sup> Where do local law enforcement communities get the money to buy military surplus equipment from the federal government? Oddly enough, from the federal government. Since the 9/11 terrorist attacks, the Department of Homeland security has given out \$34 billion in grants to state and local law enforcement, resulting in what one scholar called a “gear-buying spree.”<sup>54</sup>

The mere acquisition of this equipment is problematic because, as Bethany Peak has noted, “military weapons have symbolic value in society.”<sup>55</sup> Thus, even though rarely deployed, the fact that police departments request MRAPs, grenade launchers, and bayonets is a troubling fact in and of itself. One could fathom why police officers might need assault rifles, but it is difficult to envision a scenario in which society would ever want or expect law enforcement officers to confront American citizens while riding on top of an MRAP with bayonets fixed. The 1033 Program and other federal initiatives provide the necessary funds and equipment for the creation and proliferation of “paramilitary units

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48. Peak, *supra* note 40, at 205.

49. Brown, *supra* note 19, at 652–53.

50. Peak, *supra* note 40, at 199–200.

51. Kiker, *supra* note 21, at 287.

52. Arezou Rezvani et al., *MRAPs and Bayonets: What We Know About the Pentagon's 1033 Program*, NPR (Sept. 2, 2014), <http://www.npr.org/2014/09/02/342494225/mraps-and-bayonets-what-we-know-about-the-pentagons-1033-program> (Los Angeles County alone has nine of these vehicles).

53. *Id.*

54. Endebak, *supra* note 46, at 1490.

55. Peak, *supra* note 40, at 206.

that utilize military training and tactics.”<sup>56</sup> This, in turn, instills the “warrior mentality” that threatens local communities.<sup>57</sup>

All of this new military equipment, with its attendant dangers, raises a simple question. Why? Why is the federal government spending billions of dollars on equipment that is rarely used and, when it is, increases hostility and distrust towards the police officers? Is there really a problem that needs to be “solved?” This question is taken up within the context of school police by Bethany Peak in her article, *Militarization of School Police: One Route to the School-to-Prison Pipeline*.<sup>58</sup> Peak points out that if New York City’s public school safety division was a local police force, it would be the 5th largest police force in the country, and that many school systems now possess their “own military-grade weapons and equipment.”<sup>59</sup> She traces the rise of police in schools to fears over school shootings and crime, both of which are legitimate fears, but likely overblown.<sup>60</sup> She says,

Today, society blurs the concepts of an unsafe learning environment and distractions caused by behavioral problems. Much of the punishment and disciplinary actions imposed upon students do not result from violent behavior, such as physically harming a teacher or another student, but rather from behavior disruptive to the learning environment.<sup>61</sup>

School police are, in short, being used to solve a problem that does not need to be solved. At least, not solved by them.

The same could be said of militarized police in general. One argument for militarized police might be that it is better to have them and not need them, than to need them and not have them. But this argument rests on the assumption that these paramilitary units are, in fact, needed. Put another way, is the threat for which militarized police are supposed to be combating akin to the perceived threat of violence in schools? Taking the threat of terrorist attacks as the impetus for current police militarization,<sup>62</sup> an analysis of the casualties of terrorist attacks in the United States reveals that the risk posed is actually quite small, at least at the community level that state police departments operate. In the fifteen years since 9/11, ninety-four people have been killed by violent jihadist attacks, and another forty-eight have been killed by right wing terrorists.<sup>63</sup> By comparison, 987 people were fatally

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56. Endebak, *supra* note 46, at 1494.

57. *Id.*

58. See Peak, *supra* note 40.

59. *Id.* at 196.

60. *Id.* at 213. Peak states that several studies have shown that schools have gotten safer over the last few decades and that students are twice as likely to be victims of a crime outside of schools as they are inside.

61. *Id.*

62. See Kiker, *supra* note 21, at 287 (following the 9/11 attacks, “[s]uddenly, the federal government tasked every law enforcement agency in the United States—no matter the size—with being part of the ‘global war on terrorism.’”).

63. *Deadly Attacks Since 9/11*, INTERNATIONAL SECURITY, <http://securitydata.newamerica.net/extremists/deadly-attacks.html>.

shot by American law enforcement in 2015 alone.<sup>64</sup> If we are prepared to see a link between police militarization and increased confrontation and violence,<sup>65</sup> as I have argued, then it is possible that fears about terrorist attacks at the local level may be doing more harm than good. That is, as police gain access to equipment and training designed to combat a terrorist attack, they are similarly gaining access to equipment and training that they use during routine police work. As long as the threat of terrorist attacks continues to exercise an inordinate amount of control over citizens and the government, the march towards police militarization to combat this “threat” will continue, and the statistics show that this policy causes society’s very protectors to simultaneously be one of its biggest threats.

### III. POLICE DRONES: WHAT THEY ARE AND WHAT THEY ARE NOT

For the purposes of this Note, the word “drone” means “a powered, aerial vehicle that does not carry a human operator, uses aerodynamic forces to provide vehicle lift, can fly autonomously or be piloted remotely, can be expendable or recoverable, and can carry a lethal or nonlethal payload.”<sup>66</sup> Drones may perform a host of different functions, some of which are discussed below, but the focus will be on drones armed with non-lethal (pepper spray, taser, or bean bag gun) armaments.

It may also be helpful to explain what an armed police drone actually looks like. The armed drones that police operate are very different from the Predator drones that the United States military uses in its counter-terrorism operations. Using the ShadowHawk drone as a typical example of the type used by law enforcement, a police drone is significantly smaller, less complicated, and has a relatively limited range and operation time.<sup>67</sup> The ShadowHawk looks like a miniature helicopter, can fly for up to three hours at a time, and operates via mobile computer control.<sup>68</sup> The drone itself (without any additional equipment) weighs forty-nine pounds and is seven feet long.<sup>69</sup> Although it is marketed on its website as being able to carry high-intensity cameras,<sup>70</sup>

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64. WASH. POST, *supra* note 15.

65. See also Peak, *supra* note 40, at 205; Brown, *supra* note 19, at 670; Endebak, *supra* note 46, at 1494; Kealy, *supra* note 8, at 421.

66. UNMANNED AIRCRAFT SYSTEMS (DRONES) AND LAW 2 (Lydia de Beer ed., 2011).

67. See Heather Alexander, *\$250k Police Drones Crashes into Lake Conroe*, CHRON (Apr. 30, 2014), <http://www.chron.com/neighborhood/woodlands/article/250K-police-drone-crashes-into-Lake-Conroe-5435343.php>. The Montgomery Police Department in Texas was one of the first police departments to buy a ShadowHawk drone. It was able to afford the \$250,000 drone courtesy of a federal grant. Unfortunately, the drone was lost during a training exercise when it malfunctioned and crashed into a lake.

68. *Vanguard's Unmanned Applications*, VANGUARD DEFENSE INDUSTRIES, <http://unmanned.wix.com/vanguarddefense#!applications/galleryPage>.

69. *ShadowHawk Unmanned Aerial System*, VANGUARD DEF. INDUS., [http://media.wix.com/ugd/709bcc\\_afcf73d27be44c7e82d0029f04743c11.pdf](http://media.wix.com/ugd/709bcc_afcf73d27be44c7e82d0029f04743c11.pdf).

70. See *Vanguard's Unmanned Applications*, *supra* note 68 (describing that the ShadowHawk can carry an electro-optical camera with 32x zoom capabilities as well as a Forward Looking Infrared Camera for nighttime operations).

some models are capable of carrying shotguns and grenade launchers in addition to less lethal armaments.<sup>71</sup> At the moment, ShadowHawk drones are primarily used for their surveillance and recording capabilities.<sup>72</sup> Compare this to the United States Air Force's MQ-1B Predator Drone, which is 27 feet long, weighs 1,130 pounds, has a range of 770 miles, and can carry two laser-guided AGM-114 Hellfire missiles.<sup>73</sup> The size and limitations of the police drone are, of course, by design, but it should be clear that an armed police drone is very different from the types of drones being used for counter-terrorism operations in Afghanistan.

Given their prominence as part of American foreign policy, it might be surprising to learn that armed drones are a relatively new phenomenon. The first known use of an armed drone occurred in November 2001, when a Predator drone fired a Hellfire missile to kill Mohammad Atef, an al-Qaeda leader in Afghanistan.<sup>74</sup> Since 2001, the commitment to the development and use of weaponized drones by the American military "has significantly increased."<sup>75</sup> The total number of U.S. drone systems went from fifty in 2001 to more than 8,000 by 2013.<sup>76</sup> Law enforcement agencies have been slow to adopt the technology, partly because of expense, and as of 2012 only seventeen law enforcement agencies had asked for FAA approval to operate drones.<sup>77</sup> Still, if the armed drone program in North Dakota is successful, then law enforcement agencies will likely begin to adopt it in greater numbers.

It is important to recognize a potential political problem with the propagation of armed drones among law enforcement communities. While this Note focuses on armed drones, the vast majority of scholarship and public attention on drones has focused on their surveillance capabilities.<sup>78</sup> Legal scholars have pointed out that the government's use of drones for observation purposes could run afoul of the Supreme Court's ruling in *Kyllo v. United States*,<sup>79</sup> and have raised concerns about the more sinister Orwellian scenario of drones hovering outside of peo-

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71. *Vanguard Defense Industries ShadowHawk*, UAVGLOBAL, <http://www.uavglobal.com/shadowhawk/> (last updated 2016).

72. This is largely because few jurisdictions permit law enforcement to use armed drones. See Eric Brumfield, Comment, *Armed Drones for Law Enforcement: Why It Might Be Time to Re-Examine the Current Use of Force Standard*, 46 McGEORGE L. REV. 543, 547-49 (2014).

73. *MQ-1B Predator*, U.S. AIR FORCE (Sept. 23, 2015), <http://www.af.mil/AboutUs/FactSheets/Display/tabid/224/Article/104469/mq-1b-predator.aspx>.

74. DRONES AND THE FUTURE OF ARMED CONFLICT: ETHICAL, LEGAL, AND STRATEGIC IMPLICATIONS 2 (David Cortright et al. eds., 2015).

75. *Id.*

76. *Id.*

77. 2011-2012 FAA List of Drone License Applicants, ELECTRONIC FRONTIER FOUND. <https://www.eff.org/document/2012-faa-list-drone-applicants>.

78. Brumfield, *supra* note 72, at 547.

79. *Kyllo v. United States*, 533 U.S. 27 (2001).

ple's windows.<sup>80</sup> Hillary B. Farber articulated the concerns on police drone use this way:

Drones can provide police with the details of a person's daily routine, easily allowing them to create a profile of the person's associations, religious affiliation, health conditions, professional and recreational activities, and family and economic status. When all this information concerning hundreds, if not thousands, of people can be gathered from a distance of thousands of feet in the sky, it is hard to resist the claim that society has succumbed to an Orwellian vision far beyond George Orwell's imagination.<sup>81</sup>

This scenario has evidently occurred to state legislators as well. In 2013, forty-three states considered over 130 bills or resolutions on the subject of how drones ought to be regulated.<sup>82</sup> Eight states have formally regulated their use.<sup>83</sup> The question then emerges that if surveillance drones are in trouble, would not armed drones be doubly so? Or, put another way, even supposing that the concept of a drone armed with non-lethal force was palatable, wouldn't the mere fact that it carries a camera cause it to run afoul of constitutional protections?

There is an important distinction between armed drones, when put to that purpose, and purely surveillance drones. The picture that Farber paints in her article is one of an ever-present drone that has the capability of observing many people at the same time. I do not doubt that such a drone exists or that a drone like the ShadowHawk could be repurposed for such a mission.<sup>84</sup> An armed drone, though, is useful purely as crowd control or in responding to an emergency that might otherwise place a police officer in harm's way.<sup>85</sup> It might be helpful to characterize the drone as working in an offensive or a defensive capacity. An offensive capacity is when the drone actively seeks out criminal activity. A drone acting in a defensive capacity merely responds to the pre-existing presence of criminal activity. Critics of drone surveillance focus on the offensive capacity of drones to seek out and acquire information on citizens.<sup>86</sup> Although armed drones would inevitably survey a broad number of citizens if, for instance, they are employed for crowd control purposes, they are not performing any kind of investigatory function. An armed drone, therefore, does not represent the same kind of Fourth Amendment activity that Farber and others worry about. Drones armed with non-lethal munitions would not be able to operate effectively at a "distance of thousands of feet," and, even if they could,

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80. See Brian Stern & Matthias Rubekeil, *Coming Home to Roost—Domestic Use of Unmanned Aerial Vehicles*, 62 DEC. R.I. B.J. 5, 7–8 (2013).

81. Hillary B. Farber, *Eyes in the Sky: Constitutional and Regulatory Approaches to Domestic Drone Deployment*, 64 SYRACUSE L. REV. 1, 6 (2014).

82. *Id.* at 5.

83. *Id.*

84. Nor, in fact, do I doubt that this scenario would be tempting to state and federal law enforcement. As Farber points out, the National Security Agency's ability and willingness to obtain the phone records of millions of Americans shows that abuse of technology by the government is, at the very least, possible. See *Id.* at 6–7.

85. See Brumfield, *supra* note 72, at 556.

86. See Farber, *supra* note 77, at 6.

their deterrent value rests in people knowing that they are present. Additionally, armed drones, when deployed for defensive purposes, would only be concerned with threats. The daily routines of an individual would be unimportant to an armed drone operator. The surveillance function of an armed drone would be akin to a stationary surveillance camera, not a mobile spy plane of the sort envisioned by Farber. As a result, objections to surveillance drones should not automatically apply to armed drones.

#### IV. DRONES AND POLICE MILITARIZATION

Having identified the problems and existence of police militarization, and explained the nature and capabilities of armed drones for police purposes, the next issue is assessing what kind of impact, if any, the latter might have on curbing the former. As stated earlier, the effects of police militarization increase the instances and degree of aggressive confrontation between police and civilians.<sup>87</sup> This, in turn, fuels the perception that police officers need to gain access to increasingly modern, military equipment in order to protect their safety and to discourage civilians who might resist.<sup>88</sup> There are a number of ways to combat this problem, ranging from more training for police officers to discontinuing the 1033 Program. I believe, however, that the best way to eliminate both confrontations, which, in 2015 alone, resulted in almost one thousand fatal shootings by police officers<sup>89</sup> and riots across the country,<sup>90</sup> and the subsequent police militarization that follows, is to reduce the risk of armed confrontation in the first place. Drones represent one way, and perhaps the best way, of reducing these armed confrontations.

Understanding the reasons why requires understanding law enforcement's use of force guidelines. In *Tennessee v. Garner*, the Supreme Court first examined the use of deadly force by a police officer within the context of the Fourth Amendment.<sup>91</sup> The Court held that the "use of deadly force to prevent the escape of an apparently unarmed suspected felon" was unconstitutional.<sup>92</sup> In *Garner*, a police officer responding to a break-in shot and killed Garner as he sought to flee over a fence.<sup>93</sup> The officer claimed he shot Garner because he was "[c]onvinced that if Garner made it over the fence he would elude capture . . . ."<sup>94</sup> At the time, Tennessee law provided that, "if, after notice

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87. See Peak, *supra* note 40, at 205.

88. See Brown, *supra* note 19, at 670. See also Kiker, *supra* note 22, at 298.

89. *Investigation: People Shot and Killed by Police This Year*, *supra* note 15.

90. See Ed Payne & Ralph Ellis, *Marchers Supporting Baltimore Protests Take to the Streets Across U.S.*, CNN (Apr. 29, 2015), <http://www.cnn.com/2015/04/29/us/nationwide-freddie-gray-protests/>. Following the death of Freddie Gray, protestors took to the streets in Washington D.C., New York, Minneapolis, Boston, Houston and Denver. Although the protests were largely peaceful, protestors and police clashed in Denver, resulting in nine arrests.

91. *Tennessee v. Garner*, 471 U.S. 1 (1985).

92. *Id.* at 3.

93. *Id.* at 4.

94. *Id.*

of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest.”<sup>95</sup> In striking down this law as unconstitutional under the Fourth Amendment, the Court said, “[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.”<sup>96</sup> Thus, after *Garner*, the only justification for using deadly force was to prevent the suspect from seriously harming either the officer or another member of the public.

In a later case, *Scott v. Harris*, the Court clarified when an officer may use deadly force.<sup>97</sup> In *Scott*, a police officer attempted to stop a fleeing suspect using a “Precision Intervention Technique,” which, in theory, forces the fleeing vehicle to spin to a stop.<sup>98</sup> While attempting to execute the maneuver though, the police officer bumped the car, causing the suspect to lose control, run down an embankment, and then overturn his car.<sup>99</sup> The suspect was left a quadriplegic as a result of the injuries he sustained in the accident.<sup>100</sup> Looking at the facts through the lens of *Garner*, the Supreme Court stated, “*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer’s actions constitute ‘deadly force.’”<sup>101</sup> Rather, *Garner* “was simply an application of the Fourth Amendment’s ‘reasonableness’ test to the use of a particular type of force in a particular situation.”<sup>102</sup>

Turning to the question of whether the police officer’s use of force was “reasonable,” the Court stated that the two relevant inquiries were the “number of lives at risk” and the “relative culpability” of those lives.<sup>103</sup> So, although there was a smaller risk of injury to the public than there was to the suspect (if the police officer undertook the maneuver), the use of force was nonetheless reasonable because of the suspect’s culpability in creating the dangerous situation. Additionally, the Court held that just because the presence of police officers made the situation more dangerous, they were not obligated to call off the chase. The Court said, whereas the officer’s ramming of the suspect “was *certain* to eliminate the risk that respondent posed to the public, ceasing pursuit was not . . . we are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive so *recklessly* that they put other people’s lives in danger.”<sup>104</sup>

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95. *Id.* (citing Tenn.Code Ann. § 40-7-108 (1982)).

96. *Id.* at 11.

97. *Scott v. Harris*, 550 U.S. 372 (2007).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 382.

102. *Id.*

103. *Id.* at 384.

104. *Id.* at 385. Interestingly and worryingly, the *Scott* opinion here appears to prioritize making an arrest over concerns for public safety. Police officers are expected to catch the evildoer even if, in doing so, they resort to actions far outside the initial harm (the chase at issue in *Scott* began when a police officer clocked the suspect’s vehicle travel



Both *Garner* and *Scott* stand for the proposition that a police officer may only use deadly force when there is a risk of serious bodily harm, either to the officer or to a third party. *Scott* further refined *Garner* in saying that deadly force was not limited to those scenarios, but instead could be applied when its use was “reasonable.” Unfortunately, police officers in the United States opt to use deadly force with regularity.<sup>105</sup> They overwhelmingly use deadly force not to protect a third party, but instead to protect their own lives. There is, of course, nothing wrong with using force for this purpose, but determining when a police officer was reasonable in fearing for his or her life is a very difficult determination to make.<sup>106</sup> Police militarization has only increased the risk present in law enforcement and civilian encounters and, as I have stated before, contributes to a “loop” whereby officers behave aggressively, the community responds with increased hostility, and the officers then need more protection and exhibit more aggression. Ending this loop requires, at least in part and to the extent possible, the withdrawal of police officers from situations in which they might fear for their lives.

Armed drones are one solution to this problem. Although drones will never be substitutes for police officers, and police officers, by the very nature of their profession, can never be entirely out of harm’s way,<sup>107</sup> armed drones can help reduce the risk posed to police officers,<sup>108</sup> particularly in high profile settings when the risk of confrontation between officers and civilians is high. By reducing the number of confrontations between police officers and civilians, drones reduce the number of instances during which a police officer could reasonably fear for his or her life. A suspect cannot pose a threat of serious bodily injury to a drone operator and thus there is no reason that the drone operator would need to resort to deadly force under *Garner*.<sup>109</sup> After

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ling 73 miles per hour in a 55 mile per hour zone and attempted to pull him over. *Id.* at 374). This is analogous to the type of thinking that has caused police officers to become more militarized and less concerned with community policing. When the primary goal of police work becomes apprehending criminals, and when military tactics and equipment are used to serve that goal, it is little wonder that police militarization continues largely unabated. I point out the dicta in *Scott* to show that even Supreme Court Justices are not immune to the temptation of seeing police officers as frontline troops.

105. See generally WASH. POST, *supra* note 15.

106. Indeed, this is often the central point of contention between protestors and law enforcement after a fatal shooting. It is precisely what triggered the riots in Ferguson, MO and, although not involving a law enforcement officer, the mass outrage surrounding Trayvon Martin’s death at the hands of George Zimmerman in 2012.

107. While much of this Note is devoted to the dangers to civilians during police encounters, the dangers posed to law enforcement are hardly trivial. According to the Officer Down Memorial Page, 130 police officers died in the line of duty in 2015 alone. See *Honoring Officers Killed in 2015*, OFFICER DOWN MEMORIAL PAGE, <https://www.odmp.org/search/year/2015>.

108. See Buck Sexton, *Aerial ‘Shadowhawk’ Police Drones Can Now Deploy Tasers & Tear Gas*, THE BLAZE (Mar. 12, 2012), <http://www.theblaze.com/stories/2012/03/12/want-to-see-the-aerial-drone-police-could-soon-deploy-in-your-town/>. Randy McDaniel, the Chief Deputy of the Montgomery County, Texas Sheriff’s Office (the same office that would lose a drone in Lake Conroe, *supra* note 65) opined that the new ShadowHawk drone’s non-lethal munitions “could save lives”.

109. *Tennessee v. Garner*, 471 U.S. 1, 9 (1985).

all, a suspect could not struggle with a drone flying or hovering in the air and certainly could not reach for the drone's non-existent gun. The vague "reasonableness" inquiry in *Garner* and *Scott* could be largely done away with in situations involving drones because the situation could not escalate beyond the initial confrontation and application of non-lethal force. This, in turn, would reduce the heated arguments in the social, political, and judicial spheres over whether a police officer was justified in fearing for his or her life.

Perhaps most importantly within the context of this Note, armed drones, and their ability to keep police officers out of harm's way, could reduce the advance of police militarization. The drones could theoretically break the self-reinforcing loop of militarization because officers would no longer need to stand motionless and somehow passionless as thousands of people screamed and hurled objects at them. They would not need to send in a SWAT team armed with assault rifles and an MRAP to a residence to apprehend a suspect. The drastic changes in culture and execution, themselves the results of "mission creep,"<sup>110</sup> would become increasingly dated and unnecessary as drones armed with less than lethal force replaced them in dangerous scenarios like riots and armed standoffs. Although there may be occasions where specially trained and equipped law enforcement would be necessary, their deployment could be dramatically scaled back. This scale back, in turn, would reduce both the perception and actuality of police militarization. In *From Mayberry to Ferguson: The Militarization of American Policing Equipment, Culture, and Mission*, Cadman Kiker concludes his article by saying, "No longer can we allow the overarching concept of 'officer safety' to degrade justice and democracy. Rather, the paragon of a safe police officer is one that is protected by the community itself, not at war with it."<sup>111</sup> By protecting police officers through armed drones and not military fatigues and grenade launchers, and by reducing the instances of police confrontation with civilians, Kiker's vision of a less violent, more integrated society could become a reality.

In *Armed Drones for Law Enforcement: Why it Might be Time to Re-Examine the Current Use of Force Standard*, Eric Brumfield analyzes the impact that armed drones might have on use of force standards, and proposes what he sees as a model set of rules.<sup>112</sup> The rules he outlines are (1) that a drone operator must always follow FAA regulations, (2) that an officer must alert a supervisor when an armed drone has been deployed, (3) unless unreasonable, the supervisor must approve every request by an officer at the scene to use the armed drone against a suspect, (4) the officer at the scene should request the use of force in line with the *Graham* use of force policies, and (5) the drone operator may not use the drone to apply force on an individual unless he is either at the scene or directed to do so by another officer at the

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110. Kealy, *supra* note 8, at 432.

111. Kiker, *supra* note 21, at 298.

112. Brumfield, *supra* note 72, at 544-46, 569-70.

scene.<sup>113</sup> While these guidelines might be best practices, the requirement that a police officer be present at the scene (Rule 5) defeats the biggest advantage of deploying armed drones, namely, keeping officers out of harm's way.

The reason that Brumfield gives for requiring that a drone operator act only at the direction of a police officer on the scene is that the "question remains whether a court will expand the 'on the scene' reasonableness definition in [use of force] analysis to include specific instances where an officer can perceive just enough from the drone camera to qualify as 'on the scene' under the existing standard."<sup>114</sup> His analysis, then, is that, as a legal matter, an officer might need to be physically present. If true from a legal perspective, then the premise of using armed drones in certain inherently dangerous situations to protect police officers hits something of a roadblock. Yet, Brumfield misunderstands the law that he applies. The use of force standard as explained in *Graham*, which is the authority that Brumfield cites, is that "[t]he 'reasonableness' of a particular use of force" will be judged from "the perspective of a reasonable officer on the scene."<sup>115</sup> Here, the Court is talking about the actions of a hypothetical, objective law enforcement officer who, upon surveying the scene, decides whether or not to use force. It is not saying that a police officer needs to actually be on the scene. Put another way, it is the standard by which use of force will be judged, regardless of whether the use of force was actually applied by an officer on the scene. Adopting Brumfield's reading of *Graham* would be to eviscerate the test of its objectivity.

Instead of Brumfield's overly cautious and, I believe, legally unwarranted fifth rule, I would substitute two new rules, which deal with the technical side of armed drones. The first is that drones must, at all times, be under the control of a law enforcement officer. By "control" I do not mean to suggest I have some great concern that a drone will somehow "go rogue" and barrel into people or property. Rather, the rule is there to head off the inevitability of autonomous drones, which go much further than simply letting a police officer be present in a dangerous situation without, herself, being in danger.<sup>116</sup> The second rule is that armed drones must also be equipped with functioning communication equipment before they are deployed. By "functioning communication equipment," I mean some sort of loudspeaker that allows the officer controlling the drone to speak with civilians as well as a method for them to communicate back. In the absence of this equipment, a "fleeing" suspect might not know that he is fleeing at all. Addi-

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113. *Id.* at 570.

114. *Id.* at 571.

115. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

116. At the Consumer Electronic Show in January, 2016, a company called EHang showed off an autonomous drone that could transport a passenger from one place to another. See David Pierce, *That Crazy People-Carrying Drone is About to Start Testing*, WIRED (Jan. 6, 2016), <http://www.wired.com/2016/01/ehang-self-flying-drone-is-totally-crazy/>. Although a far cry from an armed drone being able to assess, on its own, a dangerous target, the future of advanced, autonomous drones is very quickly approaching.

tionally, the loudspeaker acts as an *ex ante* deterrent because evildoers are on notice of the drone's presence and the officers can give a warning before resorting to any use of force. These additional, common-sense rules would allow officers to operate armed drones in a responsible manner and give civilians the opportunity to respond to suspicions of wrongdoing and to comply with orders.

But these rules do not alleviate all of the concerns regarding armed drone use, particularly when it comes to concerns over police militarization. In fact, some articles cite the use of drones by law enforcement as evidence of *increasing* police militarization.<sup>117</sup> It is easy to see from where these concerns stem. Drones are, in some ways, the face of America's War on Terror.<sup>118</sup> The success of these drones is interspersed with their failure; as missiles inevitably go wayward, their victims are not limited to terrorists. This, combined with their seeming otherness, may explain why Americans are resistant to the idea of police-operated armed drones.<sup>119</sup> As I explained in Section IV, however, the drones that would be used by law enforcement are very different from those used by the American military. Drones like the ShadowHawk are a far cry from the Predator drones operated by the Air Force, and their weaponry, limited as it is to less-than-lethal force, would not be capable of the faceless destruction that people around the world see on the news.<sup>120</sup>

Nonetheless, there are still problems with the use of Predator drones that could also apply to smaller law enforcement drones. Scholars have advanced two theories as to why armed drones are more dangerous than piloted aircraft and why, as a result, their use should be eliminated or, at least, heavily curtailed. The first argument against the use of drone weapons is that their availability increases the propensity of political leaders to use force.<sup>121</sup> The argument suggests that if drones were not available, politicians would be more likely to opt for a diplomatic solution rather than risk lives. Applying this argument to law enforcement does not fit perfectly, but it is conceivable that state politicians, or even an elected law enforcement officer, would be more willing to sign off on certain operations if it meant that police lives were not in danger. For instance, instead of attempting to negotiate the surrender of armed robbers, officials might instead opt to use armed drones to attack the robbers. Indeed, the robbers might even know

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117. See Endebak, *supra* note 46, at 1490 (pointing out that, armed with post-9/11 federal funds, "local communities across all fifty states have been on a 'gear-buying spree,' purchasing everything from pilotless surveillance drones to ballistic helmets and bomb robots").

118. Jim Michaels, *Drones: The Face of the War on Terror*, USA TODAY (Mar. 19, 2015), <http://www.usatoday.com/story/news/world/2015/03/19/drones-pakistan-iraq/25033955/> (claiming that drones have killed more than 500 suspected terrorist leaders, so they may be more heavily linked with methods of assassination instead of protection among Americans).

119. See Ekins, *supra* note 24 (indicating that 58% of Americans believe that drone use by law enforcement would "[go] too far").

120. See *Vanguard Defense Industries ShadowHawk*, *supra* note 71.

121. CORTRIGHT, *supra* note 74, at 9.

that the drones would be on their way and so would fight any initial resistance that much more aggressively.

Although any use of force by the state on its citizens is cause for concern, it is important to consider the possible outcomes in this scenario. In the event that drones were not used, there would be two parties using deadly force. This increases the risk of confrontations and also the risk that less culpable lives will be endangered.<sup>122</sup> If drones were deployed, then only one party would be using deadly force. It is possible that, given time, the robbers would surrender, but it is not guaranteed. It may be better, as a policy matter, to deploy armed drones to shock or incapacitate the robbers even though a wholly non-violent solution might be possible. Additionally, while the would-be robbers might be motivated to fight recklessly in order to leave before the police drones arrived, it is also possible that the drones would dissuade them from committing the crime in the first place.<sup>123</sup>

The second argument advanced against the use of armed drones, which is related to the first, is that drones lower the psychological barriers to using force.<sup>124</sup> As one scholar notes about the use of Predator drones, "Drone systems partially remove the person from the emotional equation of war, creating a vast physical and psychological distance between the launching of a strike and its bloody impact."<sup>125</sup> Although police drones could not create the kind of devastation the author describes, the point is the same: namely, that a drone operator is more likely to use force in a situation than an officer on the ground might be. Proponents of this argument point out that psychology literature suggests that it is difficult for humans to kill others at close range.<sup>126</sup> They argue that since drones effectively do away with the effects of proximity, they "promote a change in perspective regarding the target of violence."<sup>127</sup> Viewed in this light, the use of armed drones would increase, not limit, police militarization and violence.

This is a difficult objection to overcome, but the use of force guidelines combined with the inherent limitations of the armed drones should alleviate concerns that a law enforcement officer will apply indiscriminate force against civilians. The use of force by a drone would still be limited to those scenarios where the force is "reasonable."<sup>128</sup> A police officer operating a drone could not indiscriminately attack civilians without any repercussions. Unlike a foreign war zone, the officer is beholden to the community in which he serves. Additionally, there is an important distinction between the use of lethal and non-lethal force. The decision to kill is different from the decision to incapacitate, and the consequences are far less permanent. Finally, the nature of police

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122. *Scott*, 550 U.S.at 384.

123. Think of a canine unit checking luggage at an airport to not only prevent, but discourage drug trafficking.

124. *CORTRIGHT*, *supra* note 74, at 9.

125. *Id.* at 10.

126. *Id.* at 43.

127. *Id.*

128. *Graham v. Connor*, 490 U.S. 386, 397 (1989). .

drones armed with non-lethal weapons means that they cannot operate very far from their target. In order to be effective, they must be close to the ground, giving an officer a good view of what is going on. There is, of course, always the potential for abuse, but “drones, as objects, are not inherently good or bad, nor are they fixed and determinate. Rather, the capacities, purposes, and dispositions of drones depend on the human network within which they are embedded.”<sup>129</sup> The focus, therefore, should not be on banning drones, but, after recognizing and appreciating their capabilities, ensuring that they are used responsibly and for the purpose of increasing safety.

## V. CONCLUSION

The repercussions of law enforcement’s march towards militarization are visible to anyone who takes the time to look for them. This militarization has real repercussions on the way police look and behave,<sup>130</sup> and raises tensions between the officers and civilians.<sup>131</sup> Tensions can lead to deadly confrontations, particularly when the police officer believes that his or her life is in danger.<sup>132</sup> Drones armed with non-lethal munitions offer the ability to halt militarization of police by decreasing the need for law enforcement officers to be present in inherently dangerous circumstances. As a result, both law enforcement and the public should embrace armed drones.

Unfortunately, this has not happened. While law enforcement agencies have expressed interest in armed drones, only one state, North Dakota, has permitted their use by statute.<sup>133</sup> The widespread adoption of armed drones is likely held back for two reasons. The first reason is that there has not been an adequate distinction in the minds of the public or politicians between a surveillance drone and a drone armed with non-lethal munitions. Instead, statutes passed by states limiting a law enforcement agency’s ability to use drones simply lump all drones into one category.<sup>134</sup> But a drone used for surveillance purposes raises privacy issues that are not necessarily raised by an armed drone.<sup>135</sup> These privacy issues are what the vast majority of commentators have focused on, much to the detriment of armed drones. To combat this, there must be better efforts by drone manufacturers and law enforcement agencies to educate legislators and the public on the enormous

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129. CORTRIGHT, *supra* note 74, at 24.

130. Brown, *supra* note 19, at 652-53.

131. *Id.* at 670.

132. *Graham*, 490 U.S. at 396.

133. *See generally* Wagner, *supra* note 23.

134. *See Virginia Poised to Become First State to Adopt Legislation Limiting the Use of Drones*, ACLU (Feb. 6, 2013), <https://www.aclu.org/news/virginia-house-delegates-and-senate-approve-two-year-moratorium-drones?redirect=criminal-law-reform/virginia-house-delegates-and-senate-approve-two-year-moratorium-drones> (discussing the Virginia approach, which calls for a two-year moratorium on the use of all unmanned aerial vehicles by law enforcement). *See also* Freedom from Unwarranted Surveillance Act, FLA. STAT. §934.50 (2013) (outlining the Florida approach, which prohibits law enforcement agencies from using “a drone to gather evidence or other information”).

135. *See* discussion in Section IV.

benefits of armed drones and what their role actually entails. This campaign must focus on armed drones as tools for crowd control or hostage situations and emphasize that, far from enabling police militarization, they are actually there to curb it. A successful media campaign might frame the drones the same way as the campaign for body cameras. The drones are not there as a new tool in the police officer's arsenal, rather they are examples of new technology that are there to de-escalate tense situations.

Additionally, an emphasis must be placed on the types of scenarios in which the drones will be employed. They are not cameras into homes, or spies in the sky. Armed drones are a response to police militarization in the United States and are deployed in those scenarios that would otherwise call for an armed response by law enforcement. Conveying this to legislators and highlighting these points will hopefully convince some legislators of the wisdom in, at the least, the establishment of pilot programs. These pilot programs would then help combat the second problem currently facing armed drones.

The second reason that drones have not attained widespread support is that they are still perceived as faceless weapons of war.<sup>136</sup> This is the inevitable result of fifteen years of an armed conflict in which powerful and seemingly ubiquitous drones have targeted and killed countless terrorist leaders.<sup>137</sup> But, while Predator drones are armed drones, not all armed drones are Predator drones. An armed police drone will, and ought to, look and behave very differently from a Predator drone.<sup>138</sup> Pilot programs should be established so that a community can grow accustomed to seeing drones accompany police forces. Similar to other outreach programs, police officers should be encouraged to interact with the community and show it what the drones look like and how they work. Armed police drones are built for their purpose, and their purpose is to ensure the safety of police officers and, by extension, the safety of civilians. Those interested in lobbying for law enforcement use of police drones have to dispel the image that fifteen years of war on terrorism have created. This is obviously a difficult task, but it need not be an impossible one. Demonstrations via a pilot program could show the capabilities of armed drones and how they work. Additionally, with the pilot programs in place, it will not take long for shooting deaths to decline. This alone ought to be enough to convince some, especially those in minority communities hit hard by police violence, of the efficacy of armed drones and their life-saving capabilities. Once it becomes clear that armed police drones exist to save lives, and not to extinguish them, society's concerns over their use should abate.

I personally believe that armed drones will one day become a part of the police officer's arsenal. My hope is that they are a part designed to ensure that officers are kept out of harm's way, and not as a weapon of surveillance and violence to be visited upon the unsuspecting. New

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136. See generally Michaels, *supra* note 118.

137. *Id.*

138. See discussion in Section IV.

technology has a unique opportunity to change society for the better, but it can also be easily abused. By following the rules outlined in this Note, and by halting and reversing the trend of police militarization, armed drones can help make America safer and less fractured.



