

9-1-2016

When More is Less—SWAT and Procedural Justice

Timothy C. MacDonnell

Washington and Lee University School of Law, macdonnell@wlu.edu

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/crsj>



Part of the [Civil Rights and Discrimination Commons](#), and the [Human Rights Law Commons](#)

Recommended Citation

Timothy C. MacDonnell, *When More is Less—SWAT and Procedural Justice*, 23 Wash. & Lee J. Civ. Rts. & Soc. Just. 135 (2016).

Available at: <https://scholarlycommons.law.wlu.edu/crsj/vol23/iss1/4>

This Article is brought to you for free and open access by the Washington and Lee Journal of Civil Rights and Social Justice at Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Journal of Civil Rights and Social Justice by an authorized editor of Washington & Lee University School of Law Scholarly Commons. For more information, please contact lawref@wlu.edu.

When More is Less—SWAT and Procedural Justice

Timothy C. MacDonnell*

Abstract

*Since the “war on drugs” began in the early 1970s the use of Special Weapons and Tactics units has increased exponentially. These units, originally designed to address unique policing situations like riots or a barricaded gun man, are now deploying approximately 60,000 times a year. Over half of those deployments are for search warrants. Because SWAT units deploy assuming that they are going to a situation with a high likelihood of violence, their tactics reflect that assumption. SWAT means and methods emphasize the decisive use of force to resolve conflicts. These means and methods do not encourage communication between police and citizens, only compliance. At the same time that SWAT units were becoming more common, two professors published the highly influential book *Procedural Justice*. In that book the authors sought to understand how procedure in the resolution of legal disputes connected to justice. Since then, scholars, most notably Professor Tom Tyler, have empirically examined the connection between procedure and individual perceptions of justice. Much of that research has noted a powerful connection between an individual’s perception of justice and whether they believed they “have had their say” in the resolution of a dispute. This research has also asserted connections between procedural justice and the public’s perceptions of police legitimacy and the further connection between police legitimacy and law abiding behavior. Despite the growing recognition that police legitimacy and procedural justice walk hand in hand, the growth of SWAT has continued. This article examines the rise of SWAT and*

* Clinical Professor of Law; Director, Advanced Administrative Litigation Clinic (Black Lung), Washington and Lee University School of Law.

procedural justice, and discusses how the overuse of SWAT units is harmful to procedural justice and the public's perception of police legitimacy. Finally, the article suggests that use of SWAT assets during the execution of a search warrant should be at the discretion of judges rather than police. Additionally, the article suggests that command and control over SWAT units should be centralized at the state and federal levels to ensure proper use and training.

Table of Contents

I. Introduction	136
II. Procedural Justice and the Language and Equipment of War.....	143
A. Procedural Justice	144
B. SWAT.....	147
C. SWAT Tactics and Techniques.....	153
1. Mission.....	153
2. SWAT Appearance.....	156
a. Uniforms	156
b. Equipment	158
3. Tactics	159
a. Police.....	160
b. SWAT.....	161
D. Procedural Justice/SWAT Conflict.....	162
III. The Fourth Amendment and SWAT	166
IV. Solutions	171
A. Judicial Approval of SWAT Deployments.....	172
B. Centralizing Control over SWAT	175
V. Conclusion.....	179

I. Introduction

At 6 a.m. on January 5, 2014, police officers, clad in body armor and black uniforms, allegedly broke down the door to the apartment rented by Tabatha Werkmeister and Grinage Dion

Wilson in Pittsburgh Pennsylvania.¹ Next, the officers deployed a smoke grenade and quickly detained all the residents in the home.² Those residents included Ms. Werkmeister, Mr. Wilson, and their four children, ages two through nine.³ The family was taken from their home barefoot in their nightclothes and placed in an unheated police van where an officer stood guard with an assault style rifle.⁴ The temperature outside was approximately 20 degrees Fahrenheit.⁵ After police searched for around 25 minutes the family was led back into their home, given a card to apply for reimbursement for the broken door, and told that they should have their apartment number affixed to their front door.⁶ In other words, the police got the wrong house.

In an interview after the incident, Ms. Werkmeister stated she did not understand what was going on when the police broke down her door or why the police were in her home.⁷ In the lawsuit that has been filed, Ms. Werkmeister and her boyfriend, Mr. Wilson, allege that police offered no explanation for the detention or search or an apology.⁸ The lawsuit further alleges that the couple's children are now frightened of police to such a degree that they will not spend time with their grandmother, a lieutenant in the Pittsburgh police, if she is wearing her uniform.⁹

The manner in which police entered the Werkmeister/Wilson home is called a "dynamic entry" and is a technique commonly used by the Special Weapons and Tactics (SWAT) Community to secure

1. See *City of Pittsburg Named in Lawsuit Stemming from Armed Raid of Family's Home*, WPXI (Aug. 13, 2015, 10:30 AM), www.wpxi.com/news/local/city-pittsburgh-named-lawsuit-temming-armed-raid-/32186989 (discussing a civil complaint filed in the United States District Court for the Western District of Pennsylvania, Case 2:15-cv-01069-MRH, filed August 13, 2015) (on file with author). A spokesperson for the police claimed the Werkmeister/Wilson family was removed from the apartment for safety reasons. *Id.*

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Complaint in Civil Action at 1, *Werkmeister v. City of Pittsburgh*, No. 2:15cv1069 (W.D. Pa. Aug. 13, 2015).

9. *Id.* at 7.

a location.¹⁰ When using this technique officers employ surprise, speed, and overwhelming force to secure the target.¹¹ The term used by some SWAT literature is to “dominate” a target.¹² To achieve this result SWAT teams will usually enter a structure via two “breach” locations or points of entry.¹³ When “breaching,” tools like battering rams and modified crowbars are often used.¹⁴ Next, a diversionary device is commonly employed—these include smoke and “flash-bang” grenades.¹⁵ To ensure adequate force, some SWAT units assign two officers to each “problem.”¹⁶ Problems include rooms and people.¹⁷ Thus, overwhelming force is used to converge at a decisive point while maximizing speed and surprise to the advantage of the SWAT team.¹⁸

These techniques all appear to be appropriate when SWAT teams are facing a hostage situation or barricaded gunman, but in

10. See Karena Rahall, *The Green Blue Pipeline: Defense Contractors and the Police Industrial Complex*, 36 CARDOZO L. REV. 1785, 1817 (2015) (“Dynamic entry raids have become an integral part of SWAT tactics, even when police have no information to conclude that officers might be in danger.”).

11. Glenn French, *Dynamic Entry Versus Deliberate Entry*, POLICEONE.COM (Aug. 3, 2010), <http://www.policeone.com/SWAT/articles/2154851-Dynamic-entry-versus-deliberate-entry/> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

12. *Moore v. Weekly*, 159 F. Supp. 3d 784, 790–91 (E.D.N.Y. 2016); see also French, *supra* note 11 (stating that the standard across the country for dynamic entries is to “use . . . an overwhelming amount of dominating force.”).

13. See *Terebesi v. Torres*, 764 F.3d 217, 225 (2d Cir. 2014) (discussing a common dynamic entry where a SWAT team threw stun grenades into a rear window and threw another into the front door followed by breaching the door (citing Karan R. Singh, *Treading the Thin Blue Line: Military Special-Operations Trained Police SWAT Teams and the Constitution*, 9 WM. & MARY BILL OF RTS. J. 673, 682–83 (2001)); see also BURLINGTON POLICE DEP’T, AFTER ACTION TRAINING REPORT 16 (2012), [acluofnorthcarolina.org/files/militarization%20docs/Burlington%20PD%20\(11\).pdf](http://acluofnorthcarolina.org/files/militarization%20docs/Burlington%20PD%20(11).pdf) (“plan to breach two entry points.”).

14. See, e.g., BURLINGTON POLICE DEP’T, *supra* note 13, at 9 (providing examples of how SWAT breaches a structure).

15. See Rahall, *supra* note 10, at 1812 n.197 (“Flash-Bangs are used by special units during hostage rescue and high-risk warrants.”).

16. See French, *supra* note 11 (discussing that usually two operators enter a room together, sometimes three or more depending upon the size of the room).

17. See *id.* (emphasizing that the goal is to go room to room, clearing “areas of responsibilities.”).

18. See *id.* (explaining the use of overwhelming force with critical speed to the point “you can effectively engage your adversary” in order to surprise them, giving you an “opportunity to neutralize your threat before he engages you.”).

the vast majority of cases where SWAT teams are used they are not facing such formidable opposition. Of the approximately 60,000 SWAT deployments a year,¹⁹ over half are to execute drug search warrants, usually in homes.²⁰

The experience described by individuals who have been present during a dynamic entry often includes words like frightening or terrifying.²¹ These emotional responses are by design.²² As mentioned above, the dynamic entry technique is meant to dominate a target by being frightening and disorienting, thereby preventing individuals from mounting a coherent forceful response.²³ But with SWAT teams being deployed as much as 60,000 times in a year,²⁴ with approximately 62% of those

19. Ilya Shapiro & Randal John Meyer, *When the SWAT Team Calls, the Constitution Goes Out the Window*, NEWSWEEK (Sept. 18, 2015, 11:03 AM), <http://www.newsweek.com/when-swat-team-calls-constitution-goes-out-window-373663> (on file with author). *But see* Peter B. Kraska, *Militarization and Policing—Its Relevance to 21st Century Policing*, 1 POLICING 501, 506 (Dec. 13, 2007), <http://cjmasters.eku.edu/sites/cjmasters.eku.edu/files/21stmilitarization.pdf> (estimating the rate of SWAT deployments to be at 45,000 in 2006); *see also* Radley Balko, *Shedding Light on the Use of SWAT Teams*, WASH. POST (Feb. 17, 2014), https://www.washingtonpost.com/news/the-watch/wp/2014/02/17/shedding-light-on-the-use-of-swat-teams/?utm_term=.3537d973d24d (“The criminologist Peter Kraska has estimated that there are somewhere between 50,000 and 80,000 SWAT raids per year now in America, and that number is likely growing”) (on file with author).

20. *See* Shapiro & Meyer, *supra* note 19 (“Today . . . extreme situations account for only a small fraction of SWAT deployments; they’re used primarily to serve low-level drug-search warrants.”); Radley Balko, *New ACLU Report Takes a Snapshot of Police Militarization in the United States*, WASH. POST (June 24, 2014), https://www.washingtonpost.com/news/the-watch/wp/2014/06/24/new-aclu-report-takes-a-snapshot-of-police-militarization-in-the-united-states/?utm_term=.eec64d715fc5 (noting over half of SWAT actions were in private homes) (on file with author).

21. *See* Astead W. Herndon, *Residents Rip Police After Lengthy SWAT Standoff*, BOSTON GLOBE (Oct. 16, 2016), <https://www.bostonglobe.com/metro/2016/10/16/revere-standoff-with-swat-team-ends-peacefully/UgaCM7RXNCeradQSiNgS4M/story.html> (describing the fear the family felt after being recipients of a SWAT raid) (on file with author).

22. *See* Rahall, *supra* note 10 (discussing that raids are terrifying); *see also* French, *supra* note 11 (describing that when SWAT members tactfully enter rooms, it is for the purpose of disorienting and confusing adversaries).

23. French, *supra* note 11.

24. Shapiro & Meyer, *supra* note 19; *see* Balko, *supra* note 19 (saying that SWAT raids are somewhere between 50,000 and 80,000 per year).

deployments being used to execute drug search warrants,²⁵ what else is being achieved in a dynamic entry? What impact does this SWAT technique and other SWAT methods have on the public's perception of police legitimacy? Further, why, in the absence of some express authority from a court, should police be permitted to use such techniques? These questions are the focus of this Article.

Section Two of this Article focuses on the impact of police military-style tactics and equipment on public perception of police legitimacy.²⁶ The expectation that professional police forces should be distinct from the military is embedded in Anglo-American law and the policing traditions of England and the United States.²⁷ A number of important differences support this bright line, but recent scholarship regarding the public's perception of fairness, justice, and why individuals "obey the law," provides even more compelling justification for a bright line distinction between military and police. Beginning in the mid-1970s with the influential book *Procedural Justice: A Psychological Analysis*²⁸ and continuing today with the scholarship of Professor Tom Tyler,²⁹ an argument has been made that the impact of procedural justice on the public's acceptance of police authority, and the rule of law in general, is powerful.³⁰ This section will examine the creation and

25. *Id.* But see AM. CIVIL LIBERTIES UNION, WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING 2 (2014), [hereinafter ACLU, WAR COMES HOME] https://www.aclu.org/sites/default/files/field_document/jus14-warcomeshome-text-rell.pdf (saying that 62% of SWAT deployments were for drug search warrants) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

26. See *infra* Section II ("Procedural Justice and the Language and Equipment of War.").

27. See *Principles of Good Policing*, CIVITAS, <http://civitas.org.uk/research/crime/facts-comments/principles-of-good-policing/> (last visited Oct. 10, 2016) (listing Sir Robert Peel's "Nine Principles of Policing," which, along with the passage of the "Bill for Improving the Police in and near the Metropolis" in 1829, were influential in modernizing the urban police force).

28. See generally JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975).

29. See generally E.A. LIND & T.R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); T.R. TYLER & S. BLADER, COOPERATION IN GROUPS: PROCEDURAL JUSTICE, SOCIAL IDENTITY, AND BEHAVIORAL ENGAGEMENT (2000); T.R. TYLER, WHY PEOPLE COOPERATE (2011).

30. See *infra* Section II.A ("Procedural Justice") (discussing how procedural justice is critically linked to the public's acceptance of aspects of police, such as their legitimacy and authority).

rise of SWAT, and how SWAT means and methods impact the core elements of procedural justice.³¹

Section Three of this Article discusses the current rules that govern SWAT execution of search warrants.³² SWAT units possess no greater authority than any other police units and are thus subject to the same limitations. Although the manner in which a search warrant is executed is usually left to police that does not mean police discretion is unfettered.³³ The Fourth Amendment governs the manner in which search warrants are executed and the United States Supreme Court has provided guidance on the subject.³⁴ Although there are no Supreme Court cases that explicitly state SWAT operations are subject to the same limitations as any other police activity, there are no cases where the Court has suggested that SWAT operates under different rules.³⁵

Section Four discusses measures designed to ensure that when SWAT forces are deployed there are adequate justifications for their use and for the particular tactics they employ.³⁶ Terrorist attacks, hostage situations, and criminals equipped with weapons that can outmatch standard police issue are all threats that support the need for some type of SWAT capability.³⁷ Who determines under what circumstances a SWAT deployment occurs

31. *Infra* Section II.B (“SWAT”).

32. *Infra* Section III (“Fourth Amendment and SWAT”).

33. *See* L.A. Cty. v. Rettele, 550 U.S. 609, 614 (2007) (executing a search warrant, an officer “may take reasonable action to secure the premises and to ensure their own safety.”); *see also* Groh v. Ramirez, 540 U.S. 551, 563 (2004) (“It is incumbent on the officer executing a search warrant to ensure the search is lawfully authorized and lawfully conducted.”); *United States v. Banks*, 540 U.S. 31 (2003) (saying that police have the ability to execute warrants without knocking first when they garner reasonable suspicion of exigent circumstances); *Dalia v. United States*, 441 U.S. 238 (1979) (“[T]he manner in which a warrant is executed is subject to later judicial review as to its reasonableness.”).

34. U.S. CONST. amend. IV.

35. *Holland v. Harrington*, 268 F.3d 1179, 1194 (10th Cir. 2001) (“Outfitting sheriff’s deputies in hooded combat fatigues, arming them with laser-sighted weapons and ordering them to conduct the ‘dynamic entry’ of a private home does not exempt their conduct from Fourth Amendment standards of reasonableness.”).

36. *Infra* Section IV (“Solutions”).

37. *See* Rahall, *supra* note 10, at 1818 (saying that the “original purpose of SWAT was to respond to active shooter, barricaded suspects, and hostage situations.”).

and what techniques are authorized, however, is variable.³⁸ In some jurisdictions, it is a police decision.³⁹ Some states have passed statutes that require police to seek authorization to execute a “no knock” search warrant.⁴⁰ I will suggest a system that limits SWAT use for executing warrants (arrest and search) to circumstances where a magistrate finds articulable facts that support the deployment of SWAT and the specific techniques to be applied.⁴¹ Further, in circumstances where police could have secured a warrant prior to taking action that authorized SWAT means and methods but did not, claims of exigent circumstances should be looked at more closely.⁴² Additionally, I will suggest that the many disparate SWAT units fall under centralized state and federal chains of command.⁴³ It is essential to effective SWAT operations that SWAT officers are highly trained and used only when necessary. Most police departments with SWAT units do not have the resources to permit their SWAT officers to be dedicated exclusively to conducting SWAT training and operations.⁴⁴ Thus, most SWAT officers are, in effect, part time SWAT—with their duties being divided between other policing responsibilities and SWAT.⁴⁵ By centralizing and consolidating SWAT resources at the

38. See Ian Evans, *Who Watches the Stormtroopers? Judicial Oversight as a Remedy for Excessive Deployment of Battlefield Technology in Search Warrant Execution*, 20 TEMP. POL. & CIV. RTS. L. REV. 109, 128 (2016) (promoting the requirement that SWAT deployment be through magistrate approval).

39. See *Holland*, 268 F.3d at 1183 (discussing a case in Colorado in which a search warrant was obtained but the Sheriff decided to use a SWAT team); *Smith v. Marasco*, 318 F.3d 497, 501 (3d Cir. 2003) (noting that the police in Pennsylvania instigated the SWAT involvement).

40. See, e.g., UTAH CODE ANN. § 77-23-210 (LexisNexis 2016) (exemplifying state statutes prohibiting no-knock forced entries without a warrant unless certain specified exigencies exist).

41. *Infra* Section IV.A. (“Judicial Approval of SWAT Deployments”).

42. *Id.*

43. *Infra* Section IV.B.. (“Centralizing Control over SWAT”).

44. INT’L ASS’N OF CHIEFS OF POLICE & NAT’L TACTICAL OFFICERS ASS’N, NATIONAL SPECIAL WEAPONS AND TACTICS (SWAT) STUDY: A NATIONAL ASSESSMENT OF CRITICAL TRENDS AND ISSUES FROM 2009 TO 2013 8 (2013), [hereinafter SWAT STUDY] <https://ntoa.org/ntoa-swat-study> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

45. See *id.* at 9 (discussing that 89.9% of agencies have SWAT members on a part-time basis).

state and federal levels, SWAT units will have the opportunity to train fully for the mission that SWAT is best suited to.

II. Procedural Justice and the Language and Equipment of War

Two seemingly contradictory movements began or gained momentum in the 1970s and have continued to today. The first movement was the creation and proliferation of SWAT units. As early as 1967 a formal SWAT unit was part of the Los Angeles Police Department (LAPD)⁴⁶ and since then the number of SWAT units nationwide have increased exponentially.⁴⁷ The second movement was pioneered by a social psychologist and a law professor who co-authored the influential book *Procedural Justice: A Psychological Analysis* in 1975.⁴⁸ The book examined the critical societal questions of what procedures are used by individuals and groups to resolve conflicts and why.⁴⁹ From this work has come research that has asked why individuals and groups follow the law.⁵⁰ Several studies have suggested that procedural justice plays an important role in an individual's willingness to follow the law.⁵¹ Central to whether individuals believe procedural justice exists is the degree to which they believe a process is fair, neutral, and permits them a voice in the resolution of the conflict.⁵² This theory

46. See Rahall, *supra* note 10, at 1789 (“The first SWAT unit was formed in 1967 by Los Angeles Police Inspector Daryl Gates . . .”).

47. See *id.* (“Between 1980 and 2000, there was a 1400% increase in SWAT deployments.”). But see *The Rise of SWAT Teams*, PBS: INDEP. LENS, <http://www.pbs.org/independentlens/videos/the-rise-of-swat-teams/> (last visited Nov. 21, 2016) (saying that SWAT has increased 15,000% from the late 1970s to today) (on file with author).

48. See generally JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975).

49. *Id.* at 1.

50. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 3 (1990) (introducing the various perspectives on reasons why people choose to obey the law).

51. See LIND & TYLER, *supra* note 29, at 3 (looking at “justice judgments based on norms of social process.”); TYLER & BLADER, *supra* note 29, at 142 (“[M]embers react strongly to the message about quality of treatment that is contained within formal rules and procedures, there would seem to be much for groups to gain by developing the type of statements of rights and entitlements that characterize the law.”); TYLER, *supra* note 50, at 12 (“[S]eeking to understand the factors shaping cooperation with law and legal authorities.”).

52. See TYLER, *supra* note 50, at 128 (discussing in depth the three factors

of why individuals follow the law has been one of the arguments favoring the movement to community policing.⁵³ The focus of this section is on explaining the core components of procedural justice, the rise of SWAT, some common equipment and tactics of SWAT units, and the impact of SWAT means and methods on procedural justice.⁵⁴

A. Procedural Justice

The term procedural justice is a relatively new expression. It was popularized in the 1970s in the work of two professors entitled *Procedural Justice: A Psychological Analysis*.⁵⁵ In it, Professor Thibaut and Professor Walker examined the methods and procedures that are used to resolve conflicts between individuals and groups.⁵⁶ They arrived at the conclusion that “the main finding of the body of our research, . . . [is] that for litigation the class of procedures commonly called ‘adversarial’ is clearly superior.”⁵⁷ The author’s theorized that at least part of why individuals favored the adversarial process was the high degree of control individuals had in the process.⁵⁸

The work of Professors Thibaut and Walker has been expanded and further developed by a number of researchers, but of particular note is Law Professor Tom Tyler. Professor Tyler has authored and co-authored several books and articles on different

affecting whether individuals believe procedural justice exists).

53. See Rachel Martin, *Procedural Justice: Taking The Ego Out of Policing*, NPR (June 7, 2015), <http://www.npr.org/2015/06/07/412633564/procedural-justice-taking-the-ego-out-of-policing> (describing Oakland, California’s efforts to build trust between police and the community) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); POLICE EXEC. RESEARCH FORUM, LEGITIMACY AND PROCEDURAL JUSTICE: A NEW ELEMENT OF POLICE LEADERSHIP, 1 (Craig Fischer ed. 2014), http://www.policeforum.org/assets/docs/Free_Online_Documents/Leadership/legitimacy%20and%20procedural%20justice%20-%20a%20new%20element%20of%20police%20leadership.pdf (reporting that individuals view police with more legitimacy in a system of community policing).

54. *Infra* Section II.A (“Procedural Justice”).

55. See THIBAUT & WALKER, *supra* note 48, at 13–14, 117–24 (looking at fairness and control).

56. See *id.* at 72–77 (noting adversarial and inquisitorial procedures).

57. *Id.* at 118.

58. *Id.* at 119.

aspects of procedural justice.⁵⁹ In his book *Why People Obey the Law*, Professor Tyler focuses particularly on the connections between procedural justice, legitimacy, and compliance.⁶⁰ Through empirical research, Professor Tyler asserts a connection between individuals' sense of whether police were providing procedural justice and whether they believed the police authority was legitimate.⁶¹ This question is not merely a matter of whether the public thinks favorably about the police. Professor Tyler asserts that those who felt police were not legitimate were less likely to comply with police direction or aid police in general.⁶² Thus, where there is a sense of procedural justice, there is more compliance with the law and compliance with law officers.

The work of Professor Tyler and others also revealed factors that were linked to whether individuals felt they had received procedural justice.⁶³ Significant to a sense of procedural justice, found in both Professor Tyler and Professors Thibaut and Walker's work, was the degree of control individuals were able to bring to bear on the situation.⁶⁴ Professor Tyler found that control over process was an important factor in determining whether individuals felt they had received procedural justice—and a powerful factor in whether an individual felt they had process control was whether individuals felt that what they were saying had been considered in resolving a situation.⁶⁵ Other factors that were considered and found to have an influence on an individual's sense of procedural justice were: whether their experiences with police were consistent; whether the officials were impartial; was the decision of the official accurate or of high quality; was there an agency or official individuals could complain to; was the official polite and concerned with the citizen's rights; and did the official

59. See generally sources cited *supra* note 29; TYLER, *supra* note 50 (introducing the various perspectives on reasons why people choose to obey the law).

60. TYLER, *supra* note 50, at 106.

61. *Id.*

62. *Id.* at 31, 33, 58, 108.

63. *Id.* at 125–57.

64. See *id.* at 134 (“[T]he distribution of control when a person is dealing with legal authority influences the person’s assessment of whether procedural justice has occurred.”).

65. *Id.* at 130.

seek to be fair.⁶⁶ Thus, procedural justice is, as Professor Tyler wrote, “complex and multifaceted.”⁶⁷

Some of the factors affecting procedural justice are out of the hands of police—for example, an individual’s sense of consistency, which builds off of past knowledge and experience, is out of police hands.⁶⁸ Also, whether there is “correctability,” which asks whether there is an agency or individual a citizen can complain to and whether such a complaint will matter, is not controlled by police on the scene.⁶⁹ However, most factors are within the control of officer.⁷⁰ If an officer is polite, seeks to get all the information necessary to making a good decision, gives an individual the opportunity to have her say and have her say matter, this positively impacts a sense of procedural justice.⁷¹

The importance of procedural justice is even more potentially striking when several other aspects are considered. First, as mentioned above, procedural justice is linked to legitimacy.⁷² Legitimacy is arguably linked to whether individuals feel personally committed to following the directions of police or assisting police.⁷³ Thus, procedural justice is potentially critical to law enforcement. Second, an individual’s sense of whether she or her friends and family received procedural justice are powerful factors—more important than race—in determining legitimacy.⁷⁴

66. *Id.* at 128–30, 135–37.

67. *Id.* at 137.

68. *See id.* at 10 (“[E]very day experiences with the police . . . influence citizens.”).

69. *Id.* at 136.

70. *See id.* at 154 (discussing that the officer can control his behavior, his apparent honesty, and overall ethicality of his actions).

71. *See id.* (discussing that, citizens, when they “lack the information needed to rely on consistency,” they rely on information directly in front of them—the police officer).

72. *See id.* at 31 (“[T]hose who view authority as legitimate are more likely to comply with legal authority.”).

73. *See id.* (“[T]hose who view authority as legitimate are more likely to comply with legal authority.”); *Id.* at 56 (discussing that obedience to the law is “strongly linked to people’s morality” and that there is a “general feeling” that “law breaking is morally wrong.”).

74. *Id.* at 90, 63, 227; *see also* Jake Horowitz, *Making Every Encounter Count: Building Trust and Confidence in the Police*, 256 NAT’L INST. OF JUST., 8 (2007), <https://www.ncjrs.gov/pdffiles1/nij/jr000256c.pdf>.

NIJ recently funded five studies exploring factors that influence satisfaction

So attitudes are not set and police have the opportunity to shape the public's perception of them in every interaction they have with the public.

B. SWAT

The rise of SWAT units in the United States has been well documented by numerous sources, but few as comprehensively as author Radley Balko in *Rise of the Warrior Cop: The Militarization of America's Police Forces*.⁷⁵ Balko discusses the historic resistance to the use of the military for policing and the dangers that arise when the military is used for domestic policing.⁷⁶ He also discusses the seemingly contradictory willingness to permit the police to become more militarized.⁷⁷ Balko explains how the vision of SWAT came together starting in the late 1960s and early 1970s.⁷⁸

The belief that police needed an enhanced quasi-military capability can be traced to a number of events in the 1960s, but two incidents—the Watts Riots and the University of Texas bell tower shooting—are particularly illustrative.⁷⁹

with the police. The research suggests that satisfaction is shaped by demographic variables, neighborhood crime conditions, and experiences with the police—whether first hand or indirect. Race was not found to directly determine level of satisfaction. Instead, researchers concluded that race, due to its correlation with other demographic variables, neighborhood crime rates, and experiences with police, was an indirect influence on the level of satisfaction with the police.

Id.

75. See RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES* (2013) (tracing the growth of the American police force with an emphasis on the period from 1960 to the 2000s); see also generally PETER B. KRASKA, *MILITARIZING THE AMERICAN CRIMINAL JUSTICE SYSTEM: THE CHANGING ROLE OF THE ARMED FORCES AND POLICE*, 1–13 (2001).

76. BALKO, *supra* note 75, at 11–26, 35–40.

77. *Id.* at 43–80.

78. *Id.* at 43–137.

79. See DAVID A. KLINGER & JEFF ROJEK, *A MULTI-METHOD STUDY OF SPECIAL WEAPONS & TACTICS TEAMS 1* (2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/223855.pdf> (explaining how these events demonstrated the ineffectiveness of local police forces, which led to further development of SWAT forces in the 1960s).

In the summer of 1965, the county of Watts, a part of the Los Angeles metropolitan area, exploded in six days of rioting.⁸⁰ The riots caused thirty-four deaths, over one thousand injuries, more than three thousand arrests, and approximately forty million dollars of property damage.⁸¹ It also exposed deep anger among members of the African American community in the county of Watts and the police's inability to maintain law and order when faced with a large scale riot.⁸²

In 1966 Charles Whitman killed eleven people and wounded over thirty others by firing a number of hunting rifles from the top of a bell tower in Austin, Texas.⁸³ After killing his mother and wife, Whitman barricaded himself in the bell tower on the campus of the University of Texas.⁸⁴ The tower was approximately 230 feet high.⁸⁵ When Austin police attempted to return fire on Whitman, their weapons did not have the range to hit him.⁸⁶

These two events illustrated two common arguments for SWAT units. First, there are some circumstances involving widespread civil unrest which normal police units are incapable of effectively responding.⁸⁷ Second, there are occasions where criminals will be more heavily armed than the average officer.⁸⁸

The Watts Riot was only one of several in the 1960s.⁸⁹ Riots in Detroit, Michigan, and Newark, New Jersey, also caused numerous deaths and millions of dollars in property damage.⁹⁰ In

80. *Watts Riots*, NPR, http://www.pbs.org/hueypnewton/times/times_watts.html (last visited Oct. 10, 2016) (on file with Washington and Lee Journal of Civil Rights and Social Justice).

81. *Id.*

82. BALKO, *supra* note 75, at 51–53.

83. *Id.* at 56–58.

84. *Id.*

85. *Id.*

86. *Id.*

87. See KLINGER & ROJEK, *supra* note 79 (describing that certain violent episodes can “easily outstrip the capacity” of normal law enforcement officers).

88. See *id.* (applying the same line of reasoning for weapons as well).

89. *Urban Decay in the 1960's*, PBS, <http://www.pbs.org/johngardner/chapters/5b.html> (last visited Oct. 10, 2016) [hereinafter *Urban Decay*] (on file with Washington and Lee Journal of Civil Rights and Social Justice).

90. See Virginia Postrel, *The Consequences of the 1960's Race Riots Come into View*, N.Y. TIMES (Dec. 30, 2004), http://www.nytimes.com/2004/12/30/business/the-consequences-of-the-1960s-race-riots-come-into-view.html?_r=0 (last updated Jan. 3, 2005) (saying that in Detroit alone there was about \$50

Watts, Detroit, and Newark, National Guard troops had to be called to put an end to the riots.⁹¹ In 1967–68 police forces in California, Florida, and New Jersey took steps toward a more militarized police force.⁹²

What started with a few major metropolitan police forces in the late 1960s has now evolved into virtually every major police force (those serving over 50,000 residents) having its own SWAT.⁹³ Many other smaller police forces also have their own SWAT units.⁹⁴ Additionally, federal agencies, some not even involved in law enforcement—like the Department of Agriculture, or the Tennessee Valley Authority—have been alleged to have SWAT-like units.⁹⁵

million in property damage) (on file with author); *Newark Riot* (1967), BLACKPAST.ORG, <http://www.blackpast.org/aah/newark-riot-1967> (last visited Nov. 21, 2016) (“Property damage exceeded \$10 million”) (on file with author); see also Glenn C. Frese, *The Riot Curfew*, 57 CAL. L. REV. 450, 450 (1969) (analyzing the constitutionality of riot curfews).

91. See BALKO, *supra* note 75, at 42 (“By the 1960s, the civil rights, counterculture, and antiwar movements would be in full swing, leading the government to call repeatedly on the National Guard and occasionally on US troops to keep order in urban areas.”).

92. *Id.* at 62.

93. See *Oversight of Federal Programs for Equipping State and Local Law Enforcement: Hearing on D927 Before the Subcomm. On Homeland Security and Governmental Affairs*, 113th Cong. 1–8 (2014) [hereinafter *Hearing*] (testimony of Peter Kraska, Professor, School of Justice Studies, University of Eastern Kentucky) <http://www.hsgac.senate.gov/hearings/oversight-of-federal-programs-for-equipping-state-and-local-law-enforcement> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

As of the late 1990s, 89 percent of American police departments serving populations of fifty thousand people or more had a PPU, almost double of what existed in the mid-1980s. Their growth in smaller jurisdictions (agencies serving between 25 and 50,000 people) was even more pronounced. Currently, about 80 percent of small town agencies have a PPU; in the mid-1980s only 20 percent had them.

Id.

94. *Id.*

95. See John Fund, *The United States of SWAT?*, NAT'L REV. (Apr. 14, 2014, 4:00 AM), <http://www.nationalreview.com/article/376053/united-states-swat-john-fund> (“Dozens of federal agencies now have Special Weapons and Tactics (SWAT) teams to further an expanding definition of their missions . . . the Department of Agriculture, the Railroad Retirement Board . . . [all] of these have their own SWAT units and are part of a worrying trend towards the militarization of federal agencies . . .”) (on file with Washington and Lee Journal of Civil Rights and Social Justice). *But see* Michelle Ye Hee Lee, *Rand Paul’s Grand, Inaccurate Retelling of ‘Federal SWAT Team’ Raids*, WASH. POST (Sept. 1,

Most researchers who have studied the rise of SWAT units have connected their proliferation with the war on drugs.⁹⁶ At roughly the same time as many major cities were considering SWAT units,⁹⁷ Richard Nixon was ramping up his anti-drug initiative.⁹⁸ In June 1971, President Nixon addressed Congress about the drug problem in the United States, asking for substantial funding to fight the threat posed by illegal drugs.⁹⁹ In his address, President Nixon famously declared that drugs were “public enemy number one” and “in order to fight and defeat this enemy it is necessary to wage a new all-out offense.”¹⁰⁰ Nixon went further, and as part of that offense the Drug Enforcement Agency

2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/09/01/rand-pauls-grand-inaccurate-retelling-of-federal-swat-team-raids/> (discussing that Steve Lenkart, Executive Director of the Federal Law Enforcement Officers Association, said that the only federal agency that has an actual SWAT team is the FBI) (on file with author).

96. See *Hearing*, *supra* note 93 (detailing the correlation between the war on drugs and the quasi-militarization of police forces); KRASKA *supra* note 75, at 7 (same); BALKO, *supra* note 75, at 125 (same); Cadman Robb Kiker III, *From Mayberry to Ferguson: The Militarization of American Policing Equipment, Culture, and Mission*, 71 WASH & LEE L. REV. ONLINE 282, 286–87 (2015) (“The number of specialty police units—and the frequency of their use—expanded in the 1980s to meet the needs of the war on drugs. Today, seventy-nine percent of SWAT team deployments are used for execution of a warrant, most commonly in drug investigations.”); Peter B. Kraska & Victor E. Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, 44 SOC. PROBS. 1, 9 (1997) (discussing how the war on drugs has been transformed into “tangible militarized action” and an increase in police paramilitary units). See generally 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, 651–53 (1997).

97. See Richard Fairburn, *Police Militarization and the Evolution of SWAT: Requiring a Minimum Police Population of 100 Officers to Establish a SWAT Team Helps to Keep Standards High and Overuse Low*, POLICEONE.COM (Aug. 13, 2013), <https://www.policeone.com/swat/articles/6384874-Police-militarization-and-the-evolution-of-SWAT/> (noting that in the 1970s only major cities could elect to have SWAT units) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

98. BALKO, *supra* note 75, at 125.

99. See Richard Nixon, Former U.S. President, Address to Congress (June 17, 1971), <http://www.presidency.ucsb.edu/ws/?pid=3048> (addressing the issue of increasing incidents of death caused by narcotics and declaring a war on drugs) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

100. *Id.*

was created in 1973.¹⁰¹ The war continued after President Nixon's resignation.¹⁰²

Over the course of the next forty plus years, the growth of SWAT could be described as a tale of incentive and consequence. Money was funneled to both federal and state law enforcement agencies to support the war on drugs.¹⁰³ More and more of that money was used to fund SWAT teams and to use them in anti-drug actions.¹⁰⁴ Laws were passed that permitted local law enforcement and state governments to receive funding through drug civil forfeiture actions.¹⁰⁵ Finally, after the September 11, 2001 attacks, a new funding source was created for SWAT units through the Department of Homeland Security.¹⁰⁶ By 2010, the Department of Homeland Security—an organization that only came into existence

101. See *DEA History*, DRUG ENF'T AGENCY, <https://www.dea.gov/about/history.shtml> (last visited Oct. 10, 2016) (outlining the history of the Drug Enforcement Agency and explaining Nixon's establishment of the DEA through a July 1973 Executive Order) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

102. See *id.* ("Today, the DEA has nearly 5,000 special agents and a budget of \$2.03 billion.").

103. See Radley Balko, *How did America's Police Become a Military Force on the Streets*, ABA J. (July 1, 2013, 10:10 AM), http://www.abajournal.com/magazine/article/how_did_americas_police_become_a_military_force_on_the_streets (noting how the Byrne Formula Grant Program provided greater money for drug related law enforcement activity) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

104. See *id.* (noting the disparity in funding between other units, such as the sex crime unit, and SWAT and drug units, with one officer stating, "the SWAT team, the drug guys, they always [have] money.").

105. See Robert O'Harrow Jr. & Steven Rich, *D.C. Police Plan for Future Seizure Proceeds Years in Advance in City Budget Documents*, WASH. POST (Nov. 15, 2014), https://www.washingtonpost.com/investigations/dc-police-plan-for-future-seizure-proceeds-years-in-advance-in-city-budget-documents/2014/11/15/7025edd2-6b76-11e4-b053-65cea7903f2e_story.html (explaining the plans D.C. police made in anticipation of "proceeds from future civil seizures of cash and property" resulting from drug seizures) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); see also DEPT OF JUST. GUIDE TO EQUITABLE SHARING FOR STATE & LOCAL L. ENF'T AGENCIES (Apr. 2009), <https://www.justice.gov/criminal-afmls/file/794696/download> (noting in the foreword that as of 2009, "the Department of Justice has shared over \$4.5 billion in forfeited assets with more than 8,000 state and local law enforcement agencies.").

106. Fund, *supra* note 95.

in November 2002—had given out 34 billion dollars in anti-terror grants.¹⁰⁷

Today it is estimated that 90% of large city (over 50,000 citizens) and 80% of small city (25,000–50,000) police forces in the United States have SWAT units.¹⁰⁸ In 2014, one of the leading experts on SWAT in the United States testified before a Senate Subcommittee that, conservatively, 60,000 SWAT deployments occur every year.¹⁰⁹ According to a study conducted by the American Civil Liberties Union, of the SWAT deployments in the United States, approximately 62% were to execute search warrants related to drugs¹¹⁰ and, of those deployments, SWAT used dynamic entry techniques over half the time.¹¹¹ Beyond drug searches, SWAT units have been used to “patrol” high crime neighborhoods (in full SWAT battle gear) to make INS detentions, and in at least one instance, to allegedly break up an unauthorized barber shop.¹¹²

107. SHAWN REESE, CONG. RESEARCH SERV., R40246, DEPARTMENT OF HOMELAND SECURITY ASSISTANCE TO STATES AND LOCALITIES: A SUMMARY AND ISSUES FOR THE 111TH CONGRESS 20 (2009).

108. See *The Rise of SWAT: Sources*, PBS (Mar. 16, 2016), <http://www.pbs.org/independentlens/content/the-rise-of-swat-sources/> (listing SWAT statistics pulled from a variety of sources) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

109. *Hearing*, *supra* note 93. *But see* PBS, *supra* note 108 (listing varying statistics).

110. See ACLU, *WAR COMES HOME*, *supra* note 25, at 31 (explaining that the primary use of SWAT teams has shifted from dealing with hostage or barricade situations to responding to execute search warrants in drug investigations).

111. *Id.*; see Balko, *supra* note 20 (noting over half of SWAT actions were in private homes and used some form of forced entry) (on file with author).

112. See Radley Balko, *Federal appeals court: Stop using SWAT-style raids for regulatory inspections*, WASH. POST (Sept. 19, 2014), www.washingtonpost.com/news/the-watch/wp/2014/09/19/federal-appeals-court-stop-using-swat-style-raids-for-regulatory-inspections (describing the increased choice of regulatory agencies and police departments to deploy increased police force to enforce seemingly minor offenses) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *Cops or Soldiers?*, ECONOMIST (Mar. 22, 2014), <http://www.economist.com/news/united-states/21599349-americas-police-have-become-too-militarised-cops-or-soldiers> (describing that “some cities use [SWAT] for routine patrols in high-crime areas,” and also referencing that a SWAT team ended up being used for stopping individuals from “barbering without a license.”).

The growth of SWAT units within the United States,¹¹³ coupled with the use of SWAT units for more diverse policing,¹¹⁴ means SWAT teams have—and will—come into more contact with citizens.

C. SWAT Tactics and Techniques

With SWAT deployments as frequent as described above,¹¹⁵ it is important to identify how SWAT teams operate differently than the usual police team. These distinctions include a specialized mission,¹¹⁶ tactics,¹¹⁷ equipment,¹¹⁸ and uniforms.¹¹⁹ Each of these distinctions are important to understanding how the increasing use of SWAT impacts the broader question of the public's perception of police legitimacy.¹²⁰

1. Mission

The SWAT mission is intended to be unique when compared to other policing. This can be seen when comparing the definition of SWAT provided by the National Tactical Officers Association¹²¹

113. See Rahall, *supra* note 10, at 1789 (“Between 1980 and 2000, there was a 1400% increase in SWAT deployments.”). *But see The Rise of SWAT Teams*, *supra* note 47 (saying that SWAT has increased 15,000% from the late 1970s to today) (on file with author).

114. See *id.* (describing that this expansion has “increased primarily in response to the ‘wars’ on drugs and terrorism.”).

115. *Supra* Section II.B.

116. *Infra* Section II.C.1.

117. *Infra* Section II.C.3.

118. *Infra* Section II.C.2.b.

119. *Infra* Section II.C.2.a.

120. See TYLER, *supra* note 50, at 38 (discussing police legitimacy pursuant to an individual's obedience to the law).

121. NAT'L TACTICAL OFFICERS ASS'N, SWAT STANDARDS FOR LAW ENFORCEMENT AGENCIES 2 (2008), <https://ntoa.org/massemail/swatstandards.pdf> [hereinafter NTOA] (“[A] designated law enforcement team whose members are recruited, selected, trained, equipped and assigned to resolve critical incidents involving threat to public safety which would otherwise exceed the capabilities of traditional law enforcement first responders and/or investigative units”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

to the mission statements of the Boston,¹²² Los Angeles,¹²³ New York City,¹²⁴ and Dallas¹²⁵ police departments.

The mission statements for Boston, Los Angeles, New York City, and Dallas police departments include a commitment to creating a safer environment and working in partnership with the community.¹²⁶ The above mission statements often include a promise to treat citizens with respect.¹²⁷ Implicit in each statement is an assumption that citizens are the constituents or if the police department were a business, the citizens are the customers.¹²⁸

122. *Mission Statement*, BOSTON POLICE DEP'T, <http://bpdnews.com/mission-and-objectives/> (last visited Oct. 10, 2016) [hereinafter *Boston Mission Statement*] (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

123. *Mission Statement*, LOS ANGELES POLICE DEP'T, http://www.lapd.org/inside_the_lapd (last visited Oct. 10, 2016) [hereinafter *Los Angeles Mission Statement*] (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

124. *Mission*, NEW YORK CITY POLICE DEP'T, <http://www.nyc.gov/html/nypd/html/administration/mission.shtml> (last visited Oct. 10, 2016) [hereinafter *New York Mission Statement*] (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

125. *Mission Statement*, DALLAS POLICE DEP'T, <http://www.dallaspolice.net/abouts/missionstatement> (last visited Oct. 10, 2016) [hereinafter *Dallas Mission Statement*] (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

126. *See Boston Mission Statement*, *supra* note 122 (indicating a commitment to community safety through their mission statement); *Los Angeles Mission Statement*, *supra* note 123; (outlining the goals of the Los Angeles Police Department and their commitment to safety); *New York Mission Statement*, *supra* note 124 (“The mission of the New York City Police Department is to enhance the quality of life in New York City by working in partnership with the community to enforce the law, preserve peace, reduce fear, and maintain order.”); *Dallas Mission Statement*, *supra* note 125 (outlining the goals of the police department to serve the people of Dallas, including methods of community cooperation).

127. *See Boston Mission Statement*, *supra* note 122 (“[W]orking in partnership with the community”); *Los Angeles Mission Statement*, *supra* note 123 (“[C]onducting ourselves with the highest ethical standard to maintain public confidence.”); *New York Mission Statement*, *supra* note 124 (“The department is committed to accomplishing its mission . . . by treating every citizen with . . . respect”); *Dallas Mission Statement*, *supra* note 125 (“Dallas Police Department will conduct themselves in an ethical manner. They will respect and protect the rights of citizens as determined by law”).

128. *See Boston Mission Statement*, *supra* note 122 (“[W]orking in partnership with the community”); *Los Angeles Mission Statement*, *supra* note 123 (emphasizing that police will “work with” the communities); *New York Mission Statement*, *supra* note 124 (“[W]orking in partnership with the community”); *Dallas Mission Statement*, *supra* note 125 (“[G]oal is to help people and provide

SWAT mission statements are harder to come by—of the four police departments mentioned above, only the Los Angeles Police Department had a mission statement on its webpage for the Metro Division that includes the LAPD SWAT unit.¹²⁹ The mission statement echoes the LAPD commitment to “community policing,”¹³⁰ but suggests SWAT will assist in achieving effective community policing by reducing the public’s fear of crime.¹³¹ The Metro Division describes itself in the following way:

Today, the primary responsibility of Metro is to provide support to the Department’s community-based policing efforts by deploying additional crime suppression resources throughout the City. Assignments include uniformed crime suppression details, as well as responding to high-risk barricaded situations, stakeouts, security details, warrant service, and assisting investigators in solving major crimes.¹³²

The National Tactical Officers Association describes the purpose of SWAT as the following:

The primary characteristic of SWAT that distinguishes it from other units is the focus of effort. SWAT teams are focused on tactical solutions, as opposed to other functions, such as investigation. The purpose of SWAT is to increase the likelihood of safely resolving critical incidents.¹³³

What appears to be a key difference between the police and the SWAT mindset/mission is the SWAT assumption that there is a “critical incident” or “high risk” situation. Thus, when a SWAT officer is deployed someone has already determined that the target

assistance at every opportunity.”).

129. See *Metropolitan Division*, LOS ANGELES POLICE DEP’T, http://www.lapdonline.org/metropolitan_division (last visited Oct. 10, 2016) [hereinafter *LA Metro Mission Statement*] (“Since 1967, the Los Angeles Police Department’s Special Weapons and Tactics Team (SWAT) has provided a ready response to situations that were beyond the capabilities of normally equipped and trained Department personnel”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

130. *Los Angeles Mission Statement*, *supra* note 123.

131. *LA Metro Mission Statement*, *supra* note 129.

132. *Id.*

133. See NTOA, *supra* note 121 (outlining the tactical response and operation standards for the organization’s member agencies, including concepts to standardize tactical law enforcement services).

of the investigation is at least dangerous and probably guilty.¹³⁴ This is distinct from the broader policing mission, which seems to assume the individuals police encounter are the very people they are intended to protect.¹³⁵

2. SWAT Appearance

The SWAT mindset described above permeates every aspect of a SWAT team, as surely as form follows function. This is reflected as much in a SWAT officer's appearance as in any other aspect. The SWAT uniform is not a standard police uniform. Nor is SWAT equipment the same as the standard equipment of a police officer. Finally, things as simple as haircuts and eye wear mark the distinction between the SWAT officer and the beat cop.

a. Uniforms

Although police uniforms can vary widely, most include a nearly business-like appearance. Officers often wear a dark blue trouser and shirt.¹³⁶ The color blue is so often chosen that police are sometimes referred to as “the boys in blue”¹³⁷ and it is often said that police officers bleed blue.¹³⁸ The shirt is usually button

134. See Shapiro & Meyer, *supra* note 19 (describing that SWAT are supposed to be used for “high-risk situations, such as terrorist attacks and hostage crises,” and, recently, risk search warrants that may yield dangerous consequences to police).

135. Compare NTOA, *supra* note 121 (“SWAT teams are focused on tactical solutions . . . [And] resolving critical incidents”), with *New York Mission Statement*, *supra* note 124 (“The mission of the New York City Police Department is to enhance the quality of life in New York City by working in partnership with the community to enforce the law, preserve peace, reduce fear, and maintain order.”).

136. Aarian Marshal, *A History of Police Uniforms—and Why They Matter* (Aug. 18, 2014), <http://www.citylab.com/crime/2014/08/a-history-of-police-uniforms-and-why-they-matter/378660/> (on file with author).

137. See *Boys in Blue*, CAMBRIDGE DICTIONARY (4th ed. 2016) (“A humorous name for the police.”).

138. The term “bleeding blue” is used as a term of solidarity to police and what they do. If an officer is told he, or she, “bleeds blue” it means they are deemed to have significant respect for not only their duty as public officers, but other police officers as well. See generally NR Staff, *Bleeding Blue: Honoring our Police*, NAT'L REV. (Sept. 22, 2015), <http://www.nationalreview.com/corner/424449/bleeding->

down with two breast pockets, a collar, and, depending on the weather, either long or short sleeves.¹³⁹ Virtually all police officers wear a name tape on their uniform shirt above one of the breast pockets.¹⁴⁰ The shirt and pants are capable of being pressed and often are.¹⁴¹ Many officers wear a tie and business style shoes.¹⁴² Some officers wear a hat which looks much like a military dress uniform hat, circular with a leather brim.¹⁴³

The SWAT uniform is usually some derivative of the military “battle dress uniform” (BDU).¹⁴⁴ The uniform includes baggy pants with large cargo pockets at the thighs and normal pockets higher up. The BDU blouse is also baggy, button down, with cargo pockets at the breast and below. SWAT officers sometimes do not have name tapes on their BDU blouse. SWAT officers usually wear boots rather than shoes.¹⁴⁵ Some SWAT officers also wear a balaclava,

blue-honoring-our-police-video (on file with author); *Women ‘Bleed Blue’ in Support of Fallen Police Officer*, WBTv.COM, <http://www.wbtv.com/story/20377555/women-bleed-blue-in-support-of-fallen-police-officer> (last visited Nov. 13, 2016) (on file with author).

139. See Richard R. Johnson, *The Psychological Influence of the Police Uniform*, POLICEONE.COM (Mar. 4, 2005), <https://www.policeone.com/police-products/apparel/undergear/articles/99417-The-psychological-influence-of-the-police-uni-form/> (describing typical police attire) (on file with author); see also *Uniform Regulations*, PEORIA POLICE DEPT 512 (July 8, 2013), https://www.peoriaaz.gov/uploadedfiles/newpeoriaaz/city_departments/police_department/administration/policies/policy_1046_uniform_regulations.pdf (describing the purpose and the use of having such regulations) (on file with author); *Personal Appearance, Uniform/Citizen’s Dress and Equipment*, CHI. POLICE DEPT 3–5 (Oct. 26, 2016), <http://directives.chicagopolice.org/directives/data/a7a57b9b-1562d157-70d15-62d1-a0e04429f1379599.pdf?hl=true> (describing the uniform specifications and appearance requirements) (on file with author); *Uniforms and Equipment*, PHILA. POLICE DEPT 2–9 (Apr. 15, 2011), <https://www.phillypolice.com/assets/directives/D6.7-UniformsAndEquipment.pdf> (last updated Sept. 11, 2014) (describing the prescribed uniform) (on file with author).

140. See generally sources cited *supra* note 139.

141. *Id.*

142. *Id.*

143. *Id.*

144. See *BDU–Battle Dress Uniforms*, FAS: MIL. ANALYSIS NETWORK, <http://fas.org/man/dod-101/sys/land/bdu.htm> (last visited Nov. 13, 2016) (describing that BDUs are military, combat uniforms “not intended to be worn as all-purpose uniforms.”).

145. See *FBI SWAT Graphic*, UNIF. CRIME REPORTING (Nov. 19, 2010), <https://ucr.fbi.gov/capabilities/fbi-swat-graphic> [hereinafter UNIFORM CRIME REPORTING] (discussing SWAT gear) (on file with the Washington and Lee Journal

which is headgear that covers the entire head, neck, and face of the officer, often leaving only the eyes uncovered.¹⁴⁶ One author referred to the SWAT balaclava as a “ninja style hood.”¹⁴⁷ Finally, SWAT officers wear Kevlar helmets—the most common of these are either similar or identical to the helmets worn by United States service members during military exercises or in combat zones.

b. Equipment

A police officer’s standard equipment usually includes a personal radio, a pistol, pen and paper, handcuffs, a flashlight, a baton of some sort (there are a number of different size and configurations), a cargo belt, and sometimes pepper spray or a Taser.¹⁴⁸ Although the above list seems substantial, much of the tools of force (for example, pistol, baton, handcuffs, Taser, pepper spray) are often partially concealed in the cargo belt of the officer. Some older style holsters that clip to the cargo belt cover the top of the pistol handle. Even the officer’s radio is usually attached to the belt with a hand set sometimes attached at the officer’s shoulder. This arrangement allows the officer to have his or her hands free. With hands free, and weapons partially concealed and stowed, the officer can appear less threatening and is able to use her hands to communicate.

An individual SWAT officer’s equipment, as described on the Federal Bureau of Investigations webpage, is substantial.¹⁴⁹

of Civil Rights and Social Justice).

146. See Pat Novesky, *A Simple Cold Weather Survival Kit for Cops*, POLICEONE (Feb. 8, 2011), <https://www.policeone.com/Officer-Safety/articles/3329798-A-simple-cold-weather-survival-kit-for-cops/> (stating that police balaclava covers most of an officer’s face) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); LAPG: LA POLICE GEAR, <http://www.lapolicygear.com/balaclavas.html> (providing visual examples of balaclavas) (on file with author).

147. JIM FISHER, *SWAT MADNESS AND THE MILITARIZATION OF AMERICAN POLICE: A NATIONAL DILEMMA* 13 (2010).

148. See *generally* OAKLAND POLICE DEP’T, DEPARTMENTAL GENERAL ORDER REGARDING SAFETY EQUIPMENT (Apr. 24, 2014), <http://www2.oaklandnet.com/oakcal/groups/police/documents/webcontent/oak057728.pdf> [hereinafter OAKLAND POLICE EQUIPMENT] (examining the police equipment required for the Oakland police department as an example) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

149. See UNIFORM CRIME REPORTING, *supra* note 145 (describing how an

Described on the webpage are the following standard equipment: Kevlar helmet, goggles, bullet proof vest with modular lightweight equipment weave, pouches for additional magazines of ammunition, MP5 submachine gun with 30-round clip, medic pack and flex handcuffs, waist belt with thigh harness for a pistol, pistol (FBI recommended .45 caliber with 8 round capacity), gloves, knee pads, gas mask, and additional tools for breaching (could include, collapsible sledge hammer, modified crow bar, and battering ram).¹⁵⁰ When observing the FBI SWAT officer in full personal equipment, images of dystopic fiction come to mind.¹⁵¹ The officer's eyes are completely obscured by the goggles which, as depicted on the FBI webpage, are tinted.¹⁵² Virtually all of the officer's body is concealed.¹⁵³ The officer has two weapons loaded with 38 rounds of ammunition in magazines and the capacity for much more ammunition and extra magazines in pouches attached to the officer's bullet proof vest.¹⁵⁴ The officer is wearing a military style Kevlar helmet and bullet proof vest with groin protection, giving the unmistakable appearance of a soldier in a combat situation.¹⁵⁵

3. Tactics

The tactics employed by police officers on a day in, day out basis are as varied as the circumstances the police encounter. However, because the focus of this article is on the impact of SWAT means and methods, and the majority of SWAT deployments are for the execution of search warrants,¹⁵⁶ the techniques used by

assaulter may be outfitted for a mission).

150. *See id.* (outlining and illustrating the standard equipment used by SWAT officers).

151. *See generally* EQUILIBRIUM (Dimension Films & Blue Tulip Productions 2002); ULTRAVIOLET (Screen Gems & Ultravi Productions 2006) (showing specific examples of police in movies).

152. *See* UNIFORM CRIME REPORTING, *supra* note 145 (displaying a visual of SWAT goggles and describing their capacity to withstand blasts and stop debris).

153. *Id.*

154. *See id.* (explaining the amount of ammunition a SWAT officer carries for a mission).

155. *Id.*

156. Shapiro & Meyer, *supra* note 19.

police or SWAT during the execution of a search warrant will be the focus of this discussion of tactics.

a. Police

The manner in which police execute a search warrant is significantly impacted by the circumstances.¹⁵⁷ But an officer's default position is important. By way of example this article will use the standard operating procedures (SOP) for executing search warrants employed by the Fairfax County, Virginia Police Department.¹⁵⁸ After the officer in charge of the search has reviewed all the information relevant to the search (site characteristics, items to be searched for, individuals likely to be present during the search, etc.)¹⁵⁹ and positioned his search team,¹⁶⁰ he or she shall:

[N]otify persons inside the search site of the team's presence, and shall announce, in a voice loud enough to be heard inside the search site, that they are the Fairfax County Police and they have a warrant to search the premises and they demand admission to the premises at once.¹⁶¹

According to the SOP, after notification officers should wait at least twenty to sixty seconds before entering the place to be

157. See *Dalia v. United States*, 441 U.S. 238, 255–58 (1979) (discussing that a police officer's actions are subject to the standard of reasonability under the circumstances).

158. See FAIRFAX CTY. POLICE DEP'T, POLICE DEPARTMENT REGULATIONS AND GENERAL ORDERS VOLUME I—ADMINISTRATION, <https://docs.google.com/viewer?url=http%3A%2F%2Fwww.fairfaxcounty.gov%2Fpolice%2Finside-fcpd%2Fpdf%2Fgeneralordersvolumeiiprint.pdf> (last visited Oct. 10, 2016) (explaining the responsibilities and standards of the Fairfax County Police Department) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

159. See FAIRFAX CTY. POLICE DEP'T, POLICE DEPARTMENT REGULATIONS AND GENERAL ORDERS VOLUME II—OPERATIONS, 463–72, <http://www.fairfaxcounty.gov/police/inside-fcpd/pdf/generalordersvolumeiiprint.pdf> (last visited Nov. 21, 2016) (discussing the Fairfax County Police Department's search warrant procedures) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

160. See *id.* at 467 (discussing where the Fairfax County Police Department should position itself in various situations).

161. *Id.* at 467–68.

searched.¹⁶² The guide further notes that “[w]henever possible, premises shall be entered in a courteous and non-destructive manner. No force shall be initiated unless resistance is made by a person in the premises, or factors identified in Section V, D, are present.”¹⁶³ Finally, the SOP notes that persons at the search location are to “be treated with as much restraint and courtesy as possible under the circumstances”¹⁶⁴ and police may not arrest, search, or frisk persons present merely because they are present.¹⁶⁵ The SOP does note that persons present during a search may have their movement restricted, and the United States Supreme Court has held that individuals present during a search authorized by a warrant may be detained until the search is completed.¹⁶⁶

b. SWAT

The police search protocols described above are significantly different from the SWAT methods commonly employed. Although SWAT teams do not possess any greater legal authority than police when executing a search warrant, because SWAT has been chosen, someone—usually through the use of a threat matrix—has concluded there is an enhanced risk.¹⁶⁷ Thus, SWAT deployments

162. *Id.* at 468.

163. *See id.* (noting the factors incorporated by reference as including “[f]irm indication that an occupant of the premises is armed . . . information that an occupant has a history of violence . . . knowledge that an occupant would intend to frustrate searches . . . [and] knowledge that some occupants would be endangered.”).

164. *Id.* at 470.

165. *Id.* at 470–71.

166. *Id.* at 470. *See generally* *Michigan v. Summers*, 452 U.S. 692, 705 (1981).

167. *See Special Weapons and Tactics (SWAT)*, CITY OF TUCSON, <https://www.tucsonaz.gov/police/swat> (last visited Oct. 10, 2016) [hereinafter CITY OF TUCSON] (“S.W.A.T. Team is to provide the department with the capability to safely resolve high-risk situations”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *see, e.g.*, Jack Ryan, *Special Operations*, GEO. U. L. CTR. CONTINUING LEGAL EDUC. 10 (Apr. 17, 2008) (“Risk assessment is based on facts and circumstances stated in the affidavit for the arrest or search warrant, knowledge of the target location and the criminal history of the suspect(s). A copy of the warrant should be attached to the Risk Assessment Matrix.”).

begin with a conclusion that the usual rules that apply to executing a search warrant do not apply.

SWAT teams use several methods to enter a home. Two common methods include: dynamic entry and deliberate entry.¹⁶⁸ Dynamic entries have been considered the primary method of entering and have been described in some detail earlier in this Article so it will not be rehashed here.¹⁶⁹

Deliberate entry has some of the same characteristics as a dynamic entry, but does not have the same “blitzkrieg” approach.¹⁷⁰ A deliberate entry focuses on a slow, methodical application of force.¹⁷¹ During such an entry, the target is breached but not in a rush.¹⁷² Police secure an entry point and then use mirrors and a slow deployment of officers to move from room to room.¹⁷³ Rather than every officer shouting orders, a single officer with an amplifier announces the police’s presence and gives orders to the individuals inside the target house.¹⁷⁴

D. Procedural Justice/SWAT Conflict

A significant number of elements important to procedural justice are clearly at odds with SWAT. From mission, to appearance, to equipment, to tactics, SWAT is, in some ways, the antithesis of procedural justice. As mentioned above, procedural justice is impacted by factors that are within the immediate control of police as well as factors that are beyond the officer’s influence in the moment.¹⁷⁵ The focus of this discussion is on those factors within police control.

168. See French, *supra* note 11 (discussing the two different types of SWAT team entrances when responding to a warrant).

169. See Rahall, *supra* note 10, at 1817 (describing dynamic entries and how integral they are in SWAT tactics).

170. French, *supra* note 11.

171. See *id.* (discussing the advantages and differences between a dynamic entry and a deliberate entry).

172. *Id.*

173. *Id.*

174. *Id.*

175. See TYLER, *supra* note 50, at 154 (discussing that the officer can control his behavior, his apparent honesty, and overall ethicality of his actions).

Beginning with Professors Thibaut and Walker's work, through Professor Tyler's, is the observation that having a say¹⁷⁶ in the resolution of an encounter with police *is* critical to a perception of procedural justice. There is nothing about a SWAT deployment that suggests to a citizen or a suspect that they have any say in what is occurring.¹⁷⁷

Before discussing tactics, a few words about SWAT appearance and equipment is in order. Experts in the field of communication have found that communication is at least 50% non-verbal—thus we take at least 50% of whatever message we receive in a situation from non-verbal cues.¹⁷⁸ Simply the appearance and the type of equipment that SWAT officers often go into the field with are counter to encouraging communication.¹⁷⁹ This is both subtle and overt. Beginning with the SWAT attire, it seems clear that a fair degree of consideration is given to the uniform an officer wears. The non-SWAT police duty uniform conveys approachable professionalism. It sometimes includes entirely superfluous components, like a tie. Arguably the sole purpose of a tie in a police uniform is to make police seem like any other professionals in our society. The battle dress uniform of the SWAT marks the wearer as a soldier.¹⁸⁰ Soldiers do not seek to blend in with civilian society. The military is a distinct, mostly closed, subculture within our society.¹⁸¹ Further, where we are

176. See *id.* at 116–17 (discussing the impact of not only allowing individuals an opportunity to speak, but creating a perception that the officer is considering what is being said in resolving the dispute).

177. See French, *supra* note 11 (describing the purpose of SWAT dynamic entries is to execute with maximum speed and force); see also Rahall, *supra* note 10, at 1826–27 (describing that SWAT entries and deployments resemble that of military tactics that induce terrifying effects).

178. See generally Fred C. Lunenburg, *Louder Than Words: The Hidden Power of Nonverbal Communication in the Workplace*, 12 INT'L J. SCHOLARLY ACAD. INTELL. DIVERSITY 1 (2010).

179. UNIFORM CRIME REPORTING, *supra* note 145.

180. *Id.*

181. See Josh Rothman, *America's New Military Culture*, BOSTON.COM (Sept. 14, 2011, 6:30 AM), http://archive.boston.com/bostonglobe/ideas/brainiac/2011/09/americas_new_mi.html (“Today's military is very different. The link between civilian and military culture is gone; instead, the military has a culture of its own, to which soldiers eagerly adapt”) (on file with author); see also Thomas E. Ricks, *The Widening Gap Between Military and Society*, ATLANTIC (July, 1997), <http://www.theatlantic.com/magazine/archive/1997/07/the-widening-gap-between-military-and-society/306158/> (“[O]ver the next twenty years the U.S.

taught from early in our lives that we can approach a police officer for help—no such messaging regarding soldiers/service members exists.¹⁸²

Aggravating the distinction between a uniform meant to convey inclusion versus exclusion, is the equipment of SWAT. The combination of Kevlar helmet, tinted goggles, and occasionally, the balaclava and gas mask, effectively removes any ability to see the eyes or face of a SWAT officer. This obscuring of the officer from the neck up cuts off eye contact and facial expressions—two major methods of non-verbal communication.¹⁸³ Next, many SWAT officers deploy with two weapons, a rifle and a handgun.¹⁸⁴ As noted above, police officers normally have just one weapon, a pistol, when on patrol.¹⁸⁵ The two weapons, one being an assault rifle, conveys an extremely aggressive posture. This is exaggerated by the fact that, in a deployed setting, the rifles are carried “at the ready,” which is to say, in both hands with a finger near the trigger of the weapon. Further, even the holster for the pistol is different for the SWAT officer.¹⁸⁶ Rather than a pistol on an equipment belt, the SWAT pistol holster is slung low on the thigh, giving the unmistakable appearance of an old west gunslinger.¹⁸⁷

Additionally, the overt (visible on the outside of the shirt) flak vest, elbow and knee pads, and pouches of additional ammunition, all convey the message of a soldier at war,¹⁸⁸ and rarely do people feel encouraged to talk with a soldier at war. The collective effect of police in military attire is to signal in an immediate way to a citizen that this is an emergency police situation that involves the potential use of immediate deadly force.

military will revert to a kind of garrison status, largely self-contained and increasingly distinct as a society and subculture”) (on file with author).

182. See *What to Teach Kids About Strangers*, NAT'L CRIME PREVENTION COUNS., <http://www.ncpc.org/topics/violent-crime-and-personal-safety/strangers> (last visited Nov. 21, 2016) (saying that a police officer is a “very recognizable safe” stranger whom parents should teach to their children that they are okay to trust) (on file with author).

183. Lunenburg, *supra* note 178.

184. UNIFORM CRIME REPORTING, *supra* note 145.

185. See OAKLAND POLICE EQUIPMENT, *supra* note 148 (describing the Oakland Police Department’s required equipment).

186. UNIFORM CRIME REPORTING, *supra* note 145.

187. *Id.*

188. *Id.*

More important than equipment and attire to the discussion of SWAT and procedural justice are SWAT tactics. Since most of SWAT deployments today are in the context of serving warrants,¹⁸⁹ it will be in that context that this discussion focuses. Neither of the two primary methods that SWAT use to execute warrants is conducive to communication—the essence of any of these tactics is to gain compliance.¹⁹⁰ Although neither support or encourage a sense of procedural justice—one seems worse than the other. Particularly adverse to the core elements that determine whether an individual feels they have been treated fairly¹⁹¹ is the dynamic entry tactic. In stories in the media and in research, this technique is discussed again and again.¹⁹² From a communication perspective, the dynamic entry is weak in two ways. First, and most importantly for procedural justice, there is clearly no opportunity for individuals being searched to have input in the immediate resolution of events.¹⁹³ The officers assume the occupants of the home are armed and dangerous—they seek to “dominate” the home with speed and a degree of violence.¹⁹⁴ Clearly there is no opportunity for the occupants to have input, but there is also a reduced degree of communication from the officers to the occupants.¹⁹⁵ When executing a dynamic entry, often all officers entering the home are shouting “Police. Search warrant”¹⁹⁶—this adds to the dominating and shocking effect of the

189. Shapiro & Meyer, *supra* note 19; French, *supra* note 11.

190. *Id.*

191. Tyler, *supra* note 50, at 128–30, 135–37.

192. See generally Rex M. Shannon III, *Nightmare on Your Street: Moving Towards Justice for Innocent Victims of Wrong-Premises SWAT Raids*, 77 *Miss. L.J.* 669 (2007); Jessica M. Weitzman, *They Won't Come Knocking No More: Hudson v. Michigan and the Demise of the Knock-and-Announce Rule*, 73 *Brook. L. Rev.* 1209 (2008); Radley Balko, “Dynamic Entry” Raids are Still Dangerous for Cops, Too, *WASH. POST* (Oct. 29, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/10/29/dynamic-entry-raids-are-still-dangerous-for-cops-too/> (on file with Washington and Lee Journal of Civil Rights and Social Justice).

193. See FRENCH, *supra* note 11 (describing how SWAT teams enter the premises, go room-to-room “clearing” threats with overwhelming force).

194. See *id.* (stating that “Dynamic Entry’ is a tactic where surprise, speed, and domination are key.”).

195. See Rahall, *supra* note 10, at 1822 (describing incidents where SWAT teams accidentally raided innocent homes, and did not realize it was the wrong home until after considerable amounts of damage and fear had been dealt).

196. See Brian Patrick Schaefer, *Knocking on the Door: Police Decision Points*

entry. With multiple individuals shouting, it can be very difficult to hear or understand any one person. Hearing directions from police are made worse by the use of smoke or flash bang grenades—which are used to disorient.¹⁹⁷ When smoke is used, officers sometimes wear protective gas masks, thus making it even more difficult to understand what is being said.¹⁹⁸

Other elements of procedural justice are obviously going to suffer in most dynamic entries as well. Whether the officer was ethical is one of the seven components Professor Tyler incorporates in his discussion of the components of procedural justice.¹⁹⁹ Ethics in this context includes whether the officer was polite and concerned with the rights of the individuals involved.²⁰⁰ Officers conducting a dynamic entry clearly are not concerned with politeness, but the degree of force used—often including threats and sometimes profane language²⁰¹—makes this tactic particularly harmful to a sense of procedural justice. The employment of force without regard to actions on the part of the occupants—breaking down doors, using grenades, etc.—would also call into question the officers’ concern for individual rights.

III. The Fourth Amendment and SWAT

When reading accounts of SWAT teams executing search warrants by smashing in doors in the middle of the night without warning, throwing smoke and flash-bang grenades into a house, and then detaining all the residents at the end of a drawn assault

in Executing Search Warrants, 127 U. LOUISVILLE ELECTRONIC THESES DISSERTATIONS (2015), <http://ir.library.louisville.edu/cgi/viewcontent.cgi?article=3029&context=etd> (describing the scene when officers yell “Police, Search Warrant.”).

197. See Rahall, *supra* note 10, at 1819 (stating that flash-bangs are “intended to distract and startle the residents.”).

198. UNIFORM CRIME REPORTING, *supra* note 145.

199. TYLER, *supra* note 50, at 163.

200. *Id.* at 138.

201. See Brian S. Batterton, *Profanity and the Use of Force*, LEGAL LIABILITY & RISK MGMT. INST. (Feb. 24, 2010), http://www.llrmi.com/articles/legal_questions/4-feb10.shtml (describing a case when a SWAT team deployed and issued profanity-laced commands) (on file with author).

rifles,²⁰² the natural question to ask is, how is this legal? What protection does the Constitution provide against such police action? The answer is some. The potential conflict between SWAT means and methods and the protections provided to citizens by the Fourth Amendment is obvious,²⁰³ but the inherently dangerous and variable circumstances in which police operate demands flexibility in the use of force. Although much of the Supreme Court's Fourth Amendment jurisprudence centers on when police may conduct a search and for what, several cases also focus on how police may search—particularly focusing on how police are permitted to enter a home. Should the police unreasonably violate a clearly established constitutional right, they are subject to civil suit.²⁰⁴ The line of cases the Supreme Court has decided that are most relevant to SWAT activity have dealt with the issues involving the “knock and announce” rule.

Since at least 1603, Anglo-American law has contained a requirement that when police serve a search warrant they must usually knock and announce themselves.²⁰⁵ Further, in most circumstances police must give the occupant in the home the opportunity to open the door²⁰⁶ before the door is forced open. The Fourth Amendment itself is clearly broad enough to capture the how of a search, as well as the what and when. The Amendment protects:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.²⁰⁷

202. ACLU, *WAR COMES HOME*, *supra* note 25, at 9.

203. U.S. CONST. amend. IV.

204. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

205. *Semayne's Case*, 77 Eng. Rep. 194 (K.B. 1603).

206. The opportunity to open the door is somewhat variable. In cases involving drugs, police generally must knock and announce themselves and wait a “reasonable period of time,” which is not tied to how long it would take to answer the door. *See United States v. Pelayo-Landero*, 285 F.3d 491, 498 (6th Cir. 2002) (stating that a reasonable period of time for an officer to wait after knocking on a door may depend on the circumstances of the situation).

207. U.S. CONST. amend. IV.

In *Wilson v. Arkansas*²⁰⁸ the Supreme Court first announced that the protections provided by the Fourth Amendment included the “knock and announce” rule.²⁰⁹ Justice Thomas, writing for the majority, traced the long history of the doctrine to the *Semayne*²¹⁰ case.²¹¹ In *Semayne* the judge concluded that before breaking down a door to serve a warrant, a sheriff ought to knock and announce his authority to enter.²¹² The judge in *Semayne* also noted:

For the law without a default in the owner abhors the destruction or breaking of any home (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party, when no default is in him, for perhaps he did not know of the process, of which, if he had notice, it is to be presumed that he would obey it.²¹³

Based on *Semayne*, a host of other founding era sources,²¹⁴ and a 1958 United States Supreme Court decision, *Miller v. United States*,²¹⁵ a unanimous Court found that

Given the longstanding common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer’s entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure. Contrary to the decision below, we hold that in some circumstances an officer’s unannounced entry into a home might be unreasonable under the Fourth Amendment.²¹⁶

208. *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995).

209. *See id.* at 929 (holding that the court considers if officers “knocked and announced” regarding whether a search was reasonable).

210. *Semayne*, 77 Eng. Rep.

211. *Wilson*, 514 U.S. at 931.

212. *Semayne’s Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K. B. 1603); *see* Robert J. Driscoll, *Unannounced Police Entries and Destruction of Evidence after Wilson v. Arkansas*, 29 COLUM. J.L. & SOC. PROBS. 1, 7 (1995) (saying that the “sheriff was required to announce his authority and purpose.”).

213. *Id.* at 196.

214. *Wilson v. Arkansas*, 514 U.S. 927, 931–32 (1995).

215. 357 U.S. 301 (1958).

216. *Wilson*, 514 U.S. at 934 (1995). The Supreme Court noted in *Dalia v. United States*, 441 U.S. 238, 257 (1979):

[That] nothing in the language of the Constitution or in this Court’s decisions interpreting that language suggests that, in addition to the three requirements discussed above, search warrants also must include a specification of the precise manner in which they are to be

Even when dealing with drug cases the Supreme Court has concluded the “knock and announce” rule applies, absent exigent circumstances. In *Richards v. Wisconsin*,²¹⁷ the Wisconsin Supreme Court sought to maintain a blanket rule authorizing police to conduct no knock entries whenever a search warrant involved drugs.²¹⁸ The Supreme Court struck down the blanket rule and announced that

In order to justify a “no-knock” entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.²¹⁹

The Court in *Wilson* and *Richards* noted that there are exceptions to the basic knock and announce rule. In *Wilson*, the Court stated that the knock and announce rule could give way “under circumstances presenting a threat of physical violence,” or “[when] police officers have reason to believe that evidence would likely be destroyed if advance notice were given.”²²⁰ Another exception to the knock and announce rule includes situations where such an action would be futile.²²¹

One final case, *Hudson v. Michigan*,²²² regarding the “knock and announce” rule, needs to be discussed.²²³ The question in *Hudson* was whether application of the exclusionary rule was appropriate when addressing a knock and announce violation.²²⁴ A

executed. On the contrary, it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant—subject of course to the general Fourth Amendment protection against unreasonable searches and seizures.

217. 520 U.S. 385 (1997).

218. *Id.* at 388.

219. *Id.* at 394.

220. *Wilson v. Arkansas*, 514 U.S. 927, 936 (1995); *see also* *Ker v. State of Cal.*, 374 U.S. 23, 40–41 (1963) (discussing how certain codifications of the common law may not require compliance if the officer is exposed to danger).

221. *Wilson*, 514 U.S. at 936.

222. 547 U.S. 586 (2006).

223. *See id.* (discussing whether evidence should be excluded in light of a violation of the knock and announce rule).

224. *Id.* at 590.

divided Court concluded that it was not.²²⁵ Justice Scalia, writing for the majority, concluded that the interests protected by the knock and announce rule were human life, dignity, and property; not shielding evidence from the government.²²⁶ Thus, the exclusionary rule would not apply where the government's only violation of the Fourth Amendment involved the knock and announce rule.²²⁷ Justice Scalia also asserted that there were other methods of redress, specifically through a civil suit for damages, that were adequate.²²⁸

The cases dealing with the knock and announce rule make clear that Fourth Amendment reasonableness includes how a search is conducted as well as when and what police may search for or seize.²²⁹ Although *Hudson* has limited the impact of violating the knock and announce rule in criminal trials, it clarifies the important interests that are protected by the Fourth Amendment beyond privacy.²³⁰ Thus, when individuals bring suit for unreasonable violations of the Fourth Amendment the interests at stake are even more clear.²³¹

The standard for bringing a civil suit for a violation of the Fourth Amendment is high: plaintiffs must establish an unreasonable violation of a clearly established rule.²³² However, the fact that the Court has clarified the knock and announce rule does make a civil suit more plausible. The United States Supreme Court has not addressed a case whose focus is on civil liability for SWAT style techniques, but several of the Circuit Courts of Appeals have. With greater frequency, these courts have found the

225. *Id.* at 594

226. *Id.*

227. *Id.*

228. *Id.* at 596–99.

229. *See supra* notes 208–228 (discussing cases dealing with the knock and announce rule); *infra* notes 230–32 (citing cases evaluating the knock and announce rule).

230. *See Hudson v. Michigan.*, 547 U.S. 586, 594 (protecting human life and limb).

231. *See id.* (clarifying what interests the Fourth Amendment and the knock and announce requirement does, and does not protect).

232. *See Saucer v. Katz*, 533 U.S. 194, 201 (2001) (discussing elements plaintiff must prove to win a civil suit for a Fourth Amendment violation).

use of SWAT techniques, particularly the use of flash bang grenades, to provide a proper basis for civil liability.²³³

IV. Solutions

It seems three facts are clear. First, SWAT deployments have become excessive.²³⁴ Not every drug search is one that is inherently dangerous or requires the militarized methods employed by SWAT teams.²³⁵ Further, SWAT techniques are contrary to several of the elements that impact procedural justice.²³⁶ Because SWAT units operate under an assumption that there is an imminent threat to life, limb, or evidence—there is no opportunity for discussion. Third, SWAT teams are necessary to confront the situations where normal police methods and weapons are inadequate.²³⁷ A barricaded assailant, hostage situations, or assailants armed with military grade weaponry must be responded to in a timely manner. It is not realistic to rely on either the non-SWAT police or the military. Further, to have a truly effective SWAT unit requires a great deal of specialized training and equipment.²³⁸ The logical conclusion to be derived from these facts is that a coherent SWAT policy must reduce police discretion when SWAT deployments occur while still retaining the flexibility to use SWAT when necessary. The natural body to carry out this function is the judiciary. Further, more centralized control over the use of SWAT

233. See generally *Milan v. Bolon*, 795 F.3d 726 (7th Cir. 2015); *Edwards v. Byrd*, 750 F.3d 728 (8th Cir. 2014); *Escobado v. Bender*, 600 F.3d 770 (7th Cir. 2010).

234. See Rahall, *supra* note 10, at 1789 (“Between 1980 and 2000, there was a 1400% increase in SWAT deployments.”). But see *The Rise of SWAT Teams*, *supra* note 47 (saying that SWAT has increased 15,000% from the late 1970’s to today) (on file with author)

235. ACLU, *WAR COMES HOME*, *supra* note 25, at 34.

236. But see PETER B. KRASKA, *Community Policing in Battle Garb: A Paradox or Coherent Strategy?*, in *MILITARIZING THE AMERICAN CRIMINAL JUSTICE SYSTEM: THE CHANGING ROLES OF THE ARMED FORCES AND THE POLICE*, 82 (2001) (discussing why some members of the law enforcement community argue that the rise of SWAT and community policing work together and not against one another).

237. See KLINGER & ROJEK *supra* note 79, at 2 (describing that certain violent episodes can “easily outstrip the capacity” of normal law enforcement officers).

238. See *infra* Section IV.B (discussing some of the current training standards for SWAT members).

units is necessary. Thus, states and the federal government should create centralized organizations that unify policy and ensure a high degree of training and readiness.

A. Judicial Approval of SWAT Deployments

Numerous legislatures have, from time to time, passed statutes that authorize judges or magistrates to issue “no knock” warrants. In 1970, Congress passed the comprehensive Drug Abuse Prevention and Control Act which expressly authorized federal judges and magistrates to issue “no knock” warrants.²³⁹ Four years later that express authority was repealed,²⁴⁰ although the Supreme Court has found that the authority to execute a no knock entry still exists as part of the exigent circumstances exception.²⁴¹ Legislatures could enact statutes that authorized judges and magistrates to issue SWAT warrants. Under such a regime, police who wish to use SWAT units as part of executing a search warrant would have to provide specific articulable facts that justify the use of SWAT and the specific SWAT means or methods to be used. Such warrants would authorize or deny: active use of SWAT officers to execute a warrant; types of weapons authorized; whether diversionary devices like smoke or flash bang grenades were justified; and whether a knock and announce requirement could be suspended.

By statute, several states allow magistrates to issue “no knock” warrants based upon a proper showing by police.²⁴² The showing necessary to secure a “no knock” warrant varies. Some states require that “the affiant [have] good cause to believe that there is a risk of serious physical harm to the law enforcement

239. Drug Abuse Prevention and Control Act, 21 U.S.C. § 879(b) (1970).

240. Pub. L. 93-481, § 3, Oct. 26, 1974, 88 Stat. 1455.

241. See *United States v. Banks*, 540 U.S. 31, 36–37 (2003) (“When a warrant applicant gives reasonable grounds to expect futility or to suspect that one or another such exigency already exists or will arise instantly upon knocking, a magistrate judge is acting within the Constitution to authorize a ‘no-knock’ entry.”).

242. OHIO REV. CODE ANN. § 2935.12(A) (West 2010); § 2933.231(B); 725 ILL. COMP. STAT., 108-8 / § 5 (1992); NEB. REV. STAT. § 29-411 (1995); OKLA. STAT., tit. 22, § 1228 (Supp. 1997); S. D. CODIFIED LAWS § 23A-35-9 (1988); UTAH CODE ANN. § 77-23-210 (West 1995).

officers”²⁴³ if they adhere to the normal announcement rules, or “a showing of specific facts . . . that the officer reasonably believes that if notice were given a weapon would be used [or] . . . evidence will be destroyed.”²⁴⁴

The statutes above, and others like them, provide a ground work for a more expansive statute that addresses other SWAT techniques. A law that requires an affiant to provide specific articulable facts, and the source of those facts that justify SWAT use, would require the force associated with a SWAT deployment be necessary rather than a “just in case” use of force. Further, even if a SWAT warrant was sought and not granted, police could have SWAT units pre-deployed at the scene of the search and held in reserve. Such a pre-deployment would permit police to have SWAT teams in vehicles and at the ready if their previously unsupported concerns became a reality.

The above proposed solution, like most compromises, can be criticized as having either gone too far or not far enough. Traditionally, the manner in which a search warrant is executed is left to the judgement of the police, with the caveat that they must do so reasonably.²⁴⁵ Such an arrangement gives law enforcement front end discretion and thereby greater freedom of action.²⁴⁶ Those who favor this arrangement will likely argue that police, and not judges, are in the best position to assess threats and determine what force is appropriate to a given situation. Those most concerned with SWAT deployments will likely argue that judges are an inadequate barrier to the abuse of SWAT, especially if the standard for the use of SWAT is reasonable suspicion rather than probable cause. Further, if police are permitted to preposition SWAT teams, those inclined to abuse SWAT resources will exaggerate claims of exigent circumstances in order to use SWAT even when not authorized by a judge.

243. OHIO REV. CODE ANN. § 2933.231(B) (West 2010).

244. 725 ILL. COMP. STAT., 108-8 / § 5 (1992).

245. See *Dalia v. United States*, 441 U.S. 238, 239 (1979) (“[T]he manner in which a warrant is executed is subject to later judicial review as to its reasonableness.”).

246. See *L.A. Cty. v. Rettele*, 550 U.S. 609, 614 (2007) (saying that the standard is of reasonableness because there are circumstances where, *inter alia*, safety for others and the officers themselves is needed).

Although all of the above criticisms raise valid concerns, restraint and flexibility are required in determining when SWAT is appropriate for serving warrants. The claim by police that judges are ill equipped to determine when SWAT is needed can be remedied by police affidavits thoroughly describing why a particular situation requires SWAT methods. The Supreme Court has already articulated “reasonable suspicion” as the floor for such determinations, at least with regard to “no knock” warrants.²⁴⁷ If this were adopted as the standard for other SWAT methods, it would be very hard to argue this bar is too high. For those who argue that judges will simply become rubber stamps and be overly deferential to police, this would seem an indictment of the entire search warrant system. It could be argued that matters of safety are different than matters of legal authority to search. No judge wants to deny a search warrant authorizing SWAT, only to have police officers or members of the public harmed from dangerous criminals that would have been stopped had SWAT been deployed. But, of course, no judge wants to authorize the use of flash-bang grenades in a search and have a 71-year-old grandmother suffer a heart attack²⁴⁸ or have an officer shot by an innocent home owner who responded with force when their home was stormed by armed officers who did not announce themselves. In short, judges will have to do what they always do: weigh evidence and make a determination based on an application of the law to the facts.

The advantages of judge issued SWAT authorizations are several. The requirement to go outside of the law enforcement community to receive authorization for SWAT and specific SWAT techniques will likely reduce the number of SWAT deployments, or at least result in a more universally thoughtful process in determining when to deploy and what methods to use. By having a neutral and detached magistrate examining the evidence to support the use of SWAT and specific methods, law enforcement’s capacity to engage in post hoc justification of SWAT use would be reduced. The new default position would be to present all the

247. *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997) (comparing a “reasonable suspicion” standard with a “probable cause” standard).

248. Lucy Steigerwald, *Wrong Door and Flash-Bang Grenade Heart Attack Provoke Lawsuits*, REASON (Oct. 13, 2011, 12:28 PM), <http://reason.com/blog/2011/10/13/wrong-door-raid-and-flash-bang> (on file with author).

evidence relevant to why SWAT was necessary to the magistrate—if the deployment is authorized, so be it. If it is not authorized and SWAT is used nonetheless, only circumstances that became known after the search warrant was sought would be relevant. Officers who used SWAT without a warrant could face a greater likelihood of civil law suit—since the clearly established rule would be to secure a SWAT warrant ahead of executing the warrant. Because police could still use SWAT if true exigent circumstances arose, SWAT would be put more properly in the “break in case of emergency” box that it belongs in.

B. Centralizing Control over SWAT

As mentioned above, eighty percent of police departments in small cities (25,000–50,000) and virtually all larger police departments have SWAT teams.²⁴⁹ Additionally, numerous federal agencies allegedly have SWAT or SWAT-like capabilities.²⁵⁰ Many of these federal agencies are the sort that clearly should have a SWAT capability—the FBI and Secret Service for example. However, other organizations like the Department of Education, Department of Agriculture, and the Consumer Product Safety Commission, would seem to have little need for SWAT—but they nonetheless are alleged to have teams with SWAT capabilities.²⁵¹

249. PBS, *supra* note 108.

250. See Rand Paul, *Rand Paul: We Must Demilitarize the Police*, TIME (Aug. 14, 2014), <http://time.com/3111474/rand-paul-ferguson-police/> (saying that “federal agencies of all stripes . . . come equipped with SWAT teams and heavy artillery.”). But see Michelle Ye Hee Lee, *Rand Paul’s Grand, Inaccurate Retelling of “Federal SWAT Team” Raids*, WASH. POST (Sept. 1, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/09/01/rand-pauls-grand-inaccurate-retelling-of-federal-swat-team-raids/> (discussing that Steve Lenkart, Executive Director of the Federal Law Enforcement Officers Association, said that the only federal agency that has an actual SWAT team is the FBI) (on file with author).

251. Fund, *supra* note 95.

Dozens of federal agencies now have Special Weapons and Tactics (SWAT) teams to further an expanding definition of their missions . . . the Department of Agriculture, the Railroad Retirement Board . . . [all of these have their own SWAT units and are part of a worrying trend towards the militarization of federal agencies].

Id.

Most officers who are members of a SWAT team perform their SWAT duties part time. In a recent study done by the National Tactical Officers Association, 90% of the departments and agencies surveyed reported that their SWAT officers were part time, meaning that the officers were participating in SWAT activities as part of their police work rather than all the time.²⁵² In that same survey, most officers responding claimed the policies and procedures for their SWAT units were derived from their own agency.²⁵³ However, it is necessary to note that the results of this question on the study are confusing. Officers and agencies were asked about the sources for their unit's training and policies.²⁵⁴ The results were the following: 85.4% stated the source was their own agency; 41.6% stated the source was state/regional tactical officers associations; 35.5% stated the source was municipal or county law enforcement agencies; 7.3% claimed the source was private vendors; 10.6% claimed state law enforcement agency; 7.1% stated the U.S. military; 5.1% stated federal law enforcement agency; and 4.7% stated other.²⁵⁵ In order for these percentages to be correct, respondents to the survey must have listed multiple sources. Based on the above information, SWAT units are part time, spread across county, city, and state police departments, or a wide range of federal agencies, some of which would appear to have little need for SWAT capabilities. Such a diffuse distribution of assets is arguably wasteful and, likely to result in misuse of SWAT assets.

Maintaining a SWAT unit is resource intensive, even on a part-time basis. The current recommended guidelines from the National Tactical Officers Associations for part-time SWAT officers are substantial. The minimum recommended standards are the following: prerequisite, forty hours basic SWAT course; monthly, sixteen hours critical skills maintenance; specialty

252. See SWAT STUDY, *supra* note 44, at 9 (noting the varying composition of SWAT units, ranging from being staffed by exclusively-full time personnel, to units staffed by exclusively part-time personnel) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

253. See *id.* at 11 (discussing apparent discrepancies in survey answers when officers were asked what sources their agencies relied on to create training procedures and policies).

254. *Id.*

255. *Id.*

assignments, an additional eight hours per month (i.e., long rifle, tactical emergency medical support, etc.); annual, forty hours in-service full team training.²⁵⁶

Even assuming that police departments are following minimum standards for their part-time SWAT units such training is likely inadequate for the SWAT mission. This conclusion is based on the National Tactical Officers Association guidelines for full time SWAT units.²⁵⁷ The recommended minimum amount of training time for full time SWAT units is 25% of a duty month.²⁵⁸ Thus, to meet minimum recommended standards, officers should be training one in four days.²⁵⁹ If the two-days-a-month minimum suggested for part-time SWAT units was enough, then there would be no reason to require more for full time units.

Centralizing command and control over state SWAT units and federal units would also lead to greater standardization of procedure. Currently, SWAT standards appear to come from multiple sources, including state agencies, federal agencies, the United States military, local and regional law enforcement agencies, commercial sources, and others.²⁶⁰

By creating full time SWAT units under a single command in a given state or the federal government, policies and procedures could be standardized across the state or federal government. Such a system would remove unnecessary and unhelpful administrative redundancies and streamline changes that create more effective SWAT deployments. A system of top down review of SWAT actions would include all SWAT units, not just those departments that choose to be reflective about SWAT activity. Finally, centralizing

256. See NTOA, *supra* note 121, at 7 (discussing the minimum recommended training standards for part-time SWAT officers).

257. *Id.*

258. *Id.*

259. *Id.*

260. See SWAT STUDY, *supra* note 44, at 11, tbl.9 (identifying sources of SWAT procedures). According to Mark Lomax, Executive Director for the NTOA, SWAT standards and procedures are governed intra-departmentally. Meaning, each police agency, whether that be state, local, or county, have complete autonomy pursuant to its SWAT control, independent of the other agencies. Though independent associations, like the NTOA, IACP, and the Commission for Law Enforcement Agencies (CALEA) have strong influence over what standards there should be, they are merely recommendations. Telephone Interview by Brett Lawrence with Mark Lomax, Exec. Dir., Nat'l Tactical Officers Ass'n (2016).

control for SWAT units at the state or federal level could create a SWAT system that is more responsive to public concerns about overuse of SWAT. It can be difficult to find the “responsible individual” in the current system. Who decides to deploy SWAT and when can be different depending on the town, or state, or federal agency.²⁶¹ The NTOA study discussed above observed that currently the authority to deploy SWAT assets can reside in any of the following depending on the jurisdiction: the first officer at the scene; the field supervisor; the watch commander; the SWAT commander; the Mayor; a county executive; or other.²⁶² With a single chain of command that ultimately leads to a governor or the President it is easier to find with whom the buck stops. One of the several factors that enhances a sense of procedural justice observed by Professor Tyler is the sense of knowing who a complaint can be brought to and a mechanism for accountability.²⁶³ Centralizing the chain of command for SWAT units can thereby enhance a sense of procedural justice.

Of course there are a number of arguments that can be raised against centralizing the SWAT chain of command. Two in particular deserve discussion. First, that consolidating SWAT assets to a state or federal chain of command and limiting it to full-time SWAT officers will make SWAT less responsive to time sensitive events. Second, that the proposal is financially untenable—currently 90% of SWAT units are part-time.²⁶⁴ By requiring SWAT units to be full time the state or federal government would have to significantly, if not massively, expand the number of its law enforcement officers.

Response time for SWAT units is a valid concern. Any program that seeks to centralize control over SWAT assets would have to include response time concerns into whatever calculus they use to determine where SWAT assets should be prepositioned. Additionally, law enforcement communication systems would have to be streamlined to ensure that police departments which did not

261. SWAT STUDY, *supra* note 44.

262. See SWAT STUDY, *supra* note 44, at 15, tbl. 16 (identifying sources of authority to deploy SWAT assets in a survey of various law enforcement groups that contain SWAT assets).

263. See LIND & TYLER, *supra* note 29 (discussing aspects of procedural justice).

264. SWAT STUDY, *supra* note 44, at 7.

have SWAT units collocated with them could rapidly request a SWAT deployment if the need arose. Although SWAT responsiveness is an appropriate concern, most SWAT deployments are thoroughly planned and deliberately executed. Currently most SWAT operations are not like deploying firefighters; SWAT officials usually know hours or more that the unit is going to deploy.²⁶⁵

Next is a question of personnel and funding. It could be argued that if state and federal executives required that SWAT units be staffed by full time officers our nation's police forces must grow dramatically. This is not the case. Although the statistics on this question are somewhat unclear, some police forces and agencies already have full time SWAT officers.²⁶⁶ Additionally, officers who were conducting part-time SWAT duties would now be available to either be a full-time SWAT officer or full-time police officer performing traditional law enforcement duties. This division would alleviate some of the personnel pressure a full-time consolidated SWAT organization would create. Finally, funding for SWAT units or assets that have little justification, like the Department of Agriculture's, could be redirected and more efficiently used. Finally, if SWAT units are used as originally intended, to address hostage situations, riots, and other circumstances beyond the capabilities of normal police assets, less officers will be needed because the number of deployments will be reduced.

V. Conclusion

Overuse of SWAT means and methods is contrary to the essential elements of procedural justice, just as overuse of martial law is contrary to civil liberty. However, SWAT, like martial law, is a necessary executive tool to protect the public under certain limited circumstances. By interjecting prior judicial authorization to SWAT deployments for search warrants and by requiring magistrates to authorize specific means and methods (use of

265. Ed Grabianowski, *How SWAT Teams Work*, CULTURE, <http://people.howstuffworks.com/swat-team3.htm> (last visited Nov. 17, 2016) (on file with author).

266. SWAT STUDY, *supra* note 44, at 9.

battering rams, flash bang grenades, dynamic entry), an important check would be placed on the overuse of this law enforcement resource. Further, by requiring a prior judicial process before the use of such force, the public can more effectively challenge decisions to use SWAT. In states that elect their judges, magistrates that are too quick or lax in issuing SWAT search warrants can be voted out of office. Further, when police elect to use SWAT in the absence of prior judicial authorization, a civil suit would have a greater likelihood of success. Finally, by consolidating SWAT resources and chains of command, SWAT can be returned to its proper use, in circumstances where standard police resources are inadequate.