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THE "WAR" AGAINST CRIME: FERGUSON, POLICE MILITARIZATION AND THE THIRD AMENDMENT

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THE “WAR” AGAINST CRIME: FERGUSON, POLICE
MILITARIZATION AND THE
THIRD AMENDMENT

ELIZABETH PRICE FOLEY*

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I. INTRODUCTION

The shooting death of eighteen-year-old Michael Brown by Ferguson, Missouri police officer Darren Wilson has sparked a renewed national conversation about the militarization of police. While Officer Wilson’s deadly encounter with Brown did not involve militarized force, subsequent protests, looting, and riots have triggered the display and use of armored vehicles, M4 assault rifles, Humvees, Kevlar vests, grenades, camouflage, and other military-style equipment by state and local police.¹ U.S. Attorney General Eric Holder criticized the police response, asserting, “At a time when we must seek to rebuild trust between law enforcement and the local community, I am deeply concerned that the deployment of military equipment and vehicles sends a conflicting message.”² Holder’s comment—and the civil unrest in Ferguson—evinces a broader societal concern about the changing role and increasing firepower of police.

In an era when police seem to be “at war” with drugs and crime generally, are they essentially becoming local “soldiers”? This question, in turn, raises interesting questions about the applicability of the Third Amendment that declares, “No soldier shall, in time of

* Professor of Law, Florida International University College of Law.
1. See Niraj Chokshi, *Militarized Police in Ferguson Unsettles Some; Pentagon Gives Cities Equipment*, WASH. POST, Aug. 14, 2014, available at http://www.washingtonpost.com/politics/militarized-police-in-ferguson-unsettles-some-pentagon-gives-cities-equipment/2014/08/14/4651f670-2401-11e4-86ca-6f03cbd15c1a_story.html; see also Janelle Bouie, *The Militarization of the Police*, SLATE (Aug. 13, 2014), available at http://www.slate.com/articles/news_and_politics/politics/2014/08/police_in_ferguson_military_weapons_threaten_protesters.html.
2. Josh Levs, *Ferguson Violence: Critics Rip Police Tactics, Use of Military Equipment*, CNN.COM (Aug. 15, 2014), available at <http://www.cnn.com/2014/08/14/us/missouri-ferguson-police-tactics/>.

peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”³

Depending on whom one asks, the Third Amendment is either the most or least successful portion of the Bill of Rights. As Professor Glenn Reynolds put it recently, “I often tell my constitutional law students that the Third Amendment is the only part of the Bill of Rights that really works—because there are almost no cases of troop-quartering.”⁴ But as Reynolds also acknowledges, the paucity of Third Amendment litigation likely belies workability, reflecting instead a deep uncertainty about the scope and meaning of the amendment itself.⁵

Part I of this article will examine the nature and extent of police militarization, and why such militarization likely plays a role in minority communities’ protests—such as those in Ferguson, Missouri—about the excessive use of force by state and local police. It will also examine a couple of recent cases that suggest that the Third Amendment may have relevant application to civil rights lawsuits involving militarized force. Part II will explore whether the Third Amendment is binding on the States as well as the federal government. Finally, Part III will consider the meaning of the word “soldier” and its potential application to state and local police.

II. WHEN DID POLICE START ACTING LIKE SOLDIERS?

The genesis of the warrior-cop phenomenon lies with the so called “War on Drugs,” which began in earnest in the 1980s. In the 1989 National Defense Authorization Act, Congress created a program that allowed the U.S. Department of Defense to transfer military equipment to local and state police departments to aid in their counterdrug efforts.⁶ By 1996, the program—renamed the 1033 Program—was expanded to allow for the sale of military equipment to aid in counterterrorism efforts as well.⁷

3. U.S. CONST. amend. III.

4. Glenn Harland Reynolds, *Uphold the Third Amendment*, USA TODAY, July 7, 2013, available at <http://www.usatoday.com/story/opinion/2013/07/07/third-amendment-henderson-nevada-police-column/2496689/>.

5. *Id.*

6. Am. Civil Liberties Union, WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING 16 (June 2014) (hereinafter WAR COMES HOME), available at <https://www.aclu.org/sites/default/files/assets/jus14-warcomes-home-report-web-rel1.pdf>.

7. *Id.*; see also 10 U.S.C. § 2576a (2012).

The equipment is given to state and local police for free, though they do have to pay for any costs of the transfer itself.⁸ Any equipment "excess to the needs of the Department of Defense" may be transferred,⁹ and thirty-six percent of the property transferred under the 1033 Program is new.¹⁰ The program to date has transferred over \$4.3 billion worth of military equipment to state and local police since its inception.¹¹

The military equipment transferred under the 1033 Program is used principally by Special Weapons and Tactics (SWAT) teams for drug interdiction. Indeed, a recent study by the American Civil Liberties Union (ACLU) found that sixty-two percent of SWAT deployments for which it had obtained data were for drugs searches,¹² and sixty-one percent of all drug-related SWAT raids impacted minorities.¹³

The 1033 Program, in addition to several post 9/11 grant programs designed to combat the "War on Terror,"¹⁴ have, in the words of Senator Rand Paul, "incentivized the militarization of local police" by helping them "build what are essentially small armies . . ." ¹⁵ The militarized police response to the Ferguson protests and riots triggered congressional hearings and bipartisan concerns,¹⁶ as well as the formation of an executive branch "Task Force on 21st Century Policing" to ascertain whether these federal programs need reform.¹⁷ The task force's goal, in President Obama's words, is "to make sure that we're not building a militarized culture inside our local law enforcement."¹⁸

The concerns about police militarization are substantial. Police are charged with keeping communities safe and arresting criminals that pose a risk to others, consistent with individuals' constitutional

8. 10 U.S.C. § 2576a(b)(4)-(c) (2012).

9. 10 U.S.C. § 2576a(a)(1)(B) (2012).

10. WAR COMES HOME, *supra* note 6, at 24.

11. *Id.*

12. *Id.* at 2, 31.

13. *Id.* at 36.

14. *See id.* at 16–17 (describing the Justice Assistance Grant Program and the Homeland Security Grant Program).

15. Rand Paul, *We Must Demilitarize the Police*, TIME, Aug. 14, 2014, available at <http://time.com/3111474/rand-paul-ferguson-police/>.

16. *See* Tim Devaney, *Senators Blast DOD Program that "Militarized Police,"* THEHILL.COM (Sept. 9, 2014), available at <http://thehill.com/regulation/217136-senators-blast-dod-program-to-militarize-police>.

17. *See* David Jackson, *Obama Team Calls for New Rules on Police Equipment*, USATODAY.COM (Dec. 1, 2014), available at <http://www.usatoday.com/story/news/nation/2014/12/01/obama-ferguson-police-equipment/19736081/>.

18. *Id.*

rights. Soldiers on a battlefield are not restrained by these same constitutional norms; their mission is to capture or kill the enemy. Samuel Adams, objecting to quartering of British soldiers in Boston to enforce the laws, explained the danger:

It is moreover to be observ'd that military government and civil, are so different from each other, if not opposite, that they cannot long subsist together. Soldiers are not govern'd properly by the laws of their country, but by a law made *for them only*: This may in time make them look upon themselves as a body of men *different* from the rest of the people; and as they and they only have *the sword* in their hands, they may sooner or later begin to look upon themselves as the LORDS and not the SERVANTS of the people: Instead of enforcing the execution of law, which by the way is far from being the original intent of soldiers, they may *refuse to obey* it themselves: Nay, they may even *make laws for themselves*, and enforce them by the *power of the sword*.¹⁹

Using military personnel to enforce ordinary laws is incompatible with civil government, in Adams' view, because of two factors: (1) the sheer power they possess—the “power of the sword”; and (2) their status as warriors normally unmoored from ordinary law—subject only to the distinct “law of war.” These two characteristics increase the potential for tyranny and convinced Adams that the use of military forces to enforce law was inappropriate.

If police begin to view their job as “war,” it transforms ordinary criminals, such as drug dealers or users, into “enemies,” encouraging and even necessitating a degree of force that may be excessive for ordinary law enforcement purposes. This, in turn, exacerbates tensions in high-crime communities where such tactics are most often used, amplifying the perception of such communities as “war zones” and an attitude of “us” versus “them.”

A few examples will help illustrate this growing phenomenon. In May 2014, in the predawn hours, a Habersham County, Georgia Sheriff's SWAT team executed a “no knock” warrant on a home, battering down the door and throwing a disorienting “flash-bang” grenade into the room.²⁰ The grenade landed in the crib of a

19. Samuel Adams, BOSTON GAZETTE, Oct. 17, 1768, *reprinted in* 5 THE FOUNDERS' CONSTITUTION (Philip B. Kurland and Ralph Lerner eds., 1987), available at <http://press-pubs.uchicago.edu/founders/documents/amendIII2.html>.

20. See David Beasley, *Deputies Who Flashbanged Toddler Bounkham Phonesavanh Avoid Charges*, HUFFINGTONPOST.COM (Oct. 6, 2014), available at

nineteen-month-old boy, exploded in his face, and severely burned him as a result.²¹ The search warrant was designed to look for evidence of methamphetamines allegedly sold by the toddler's cousin, who no longer lived at the home.²² The search yielded no drugs or arrests.²³ The family had no health insurance,²⁴ and the boy's hospitalization cost an estimated \$800,000.²⁵ A grand jury refused to indict the officers on any criminal charges, but it issued a fifteen-page report recommending that SWAT teams' raids of homes be used only when absolutely necessary, when other methods of arrest cannot be effected.²⁶ If the "war on drugs" was not viewed as a "war," would such excessive, military-style tactics have been employed in the attempt to arrest a single drug dealer?

Consider also the case of seventy-five year-old Roger Hoepfner, whose multi-year zoning battle with the town of Stettin, Wisconsin, resulted in the town levying an \$80,000 civil judgment against him.²⁷ To collect the judgment, the town dispatched twenty-four police officers and an armored military truck to Hoepfner's home.²⁸ When asked by reporters why military force was used to collect money from an elderly man, a Sheriff's spokesman stated that while Hoepfner was not believed to be dangerous, he had been "argumentative" and refused to exit his home.²⁹ The spokesman glibly stated that the armored truck was a useful show of force and that "[p]eople may not always understand why, but an armored

http://www.huffingtonpost.com/2014/10/06/flashbanged-toddler-bounkham-phone-savanh_n_5943098.html.

21. *Id.*

22. See Tina Chen, *Baby in Coma After Police "Grenade" Dropped in Crib During Drug Raid*, ABCNEWS.COM (May 30, 2014), available at <http://abcnews.go.com/blogs/headlines/2014/05/baby-in-coma-after-police-grenade-dropped-in-crib-during-drug-raid/>; see also WAR COMES HOME, *supra* note 6, at 14.

23. WAR COMES HOME, *supra* note 6, at 14.

24. See Chen, *supra* note 22.

25. See Beasley, *supra* note 20.

26. See Jacob Sullum, *Georgia Grand Jury Rejects Criminal Charges Against Drug Warriors Who Burned and Mutilated a Toddler*, REASON.COM (Oct. 6, 2014), available at <http://reason.com/blog/2014/10/06/georgia-grand-jury-rejects-criminal-char>.

27. See Robby Soave, *24 Armed Cops and a Military Truck Dispatched to Take Money from an Old Man*, REASON.COM (Oct. 24, 2014), available at <http://reason.com/blog/2014/10/27/24-armed-officers-and-a-military-truck-d>.

28. *Id.*

29. See Bruce Vielmetti, *Armored Vehicle Helps Collect Judgment in Small Town*, MILWAUKEE JOURNAL-SENTINEL, Oct. 25, 2014, available at <http://www.jsonline.com/news/wisconsin/armored-vehicle-helps-collect-civil-judgment-in-small-town-b99376798z1-280427872.html>.

vehicle is almost a necessity now.”³⁰ This statement reveals that the police in a Wisconsin small town see a “necessity” for military-style force that ordinary people—us versus them—cannot understand.

Similar excessive militarization was displayed in Kenosha, Wisconsin, in the summer of 2013, when nine state Department of Natural Resources (DNR) officers and four deputy sheriffs—all “armed to the teeth . . . like a SWAT team”—descended upon a no-kill animal shelter.³¹ What was the crime that warranted such a show of force? Possessing a baby deer, whom the shelter volunteers had named Giggles.³²

When a reporter inquired why the DNR did not simply call the shelter and ask them to turn over the fawn, the DNR spokesperson arrogantly responded, “If a sheriff’s department is going in to do a search warrant on a drug bust, they don’t call them and ask them to voluntarily surrender their marijuana or whatever drug that they have before they show up.”³³ The attitude revealed by this statement is patent: police must always use force, not seek cooperation, to do their job of law enforcement.

Cases such as these show that local and state law enforcement officers, armed with military force, too often use force first, and think later. This should not be surprising: If taxpayers, through various federal programs such as the 1003 Program, give state and local police shiny, powerful military-grade “toys,” they will naturally want to use them, sometimes inappropriately. These overkill situations sometimes result in federal civil rights lawsuits against the officers involved, usually asserting a Fourth Amendment claim that the search or seizure was unreasonable.³⁴ But beyond the Fourth Amendment, some recent situations suggest that militarized police tactics might also raise viable Third Amendment claims under the right circumstances.

For example, in February 2014, Deborah Franz of Jacksonville, Florida was told to leave her home by a SWAT team that was responding to a domestic violence situation in a mobile home across

30. *Id.*

31. See Jessica Chasmer, *13 Wisconsin Officials Raid Animal Shelter to Kill Baby Deer Named Giggles*, WASH. TIMES, Aug. 1, 2013, available at <http://www.washingtontimes.com/news/2013/aug/1/13-wisconsin-officials-raid-animal-shelter-kill-ba/>.

32. *Id.* Wisconsin law makes possession of wildlife unlawful. *Id.*

33. *Id.*

34. See Radley Balko, “*Why Did You Shoot Me? I Was Reading A Book: The New Warrior Cop is Out of Control*,” SALON.COM (July 7, 2013), available at http://www.salon.com/2013/07/07/%E2%80%9Cwhy_did_you_shoot_me_i_was_reading_a_book_the_new_warrior_cop_is_out_of_control/.

the street.³⁵ Frantz left her home for six hours, returning to find her belongings had been tampered with and drapes pulled down.³⁶ She called the Jacksonville Sheriff's Office to complain and was told that SWAT officers had indeed entered her home without her permission, as a "tactical approach" to quell the nearby domestic disturbance.³⁷

Similarly, in July 2011, an officer of the police department in Henderson, Nevada, phoned Anthony Mitchell, informing him that police needed to occupy Mitchell's home to gain a "tactical advantage" in observing a domestic violence situation involving a neighbor.³⁸ Mitchell refused, saying he did not want to get involved, but officers came to his home anyway, without a warrant, banging on Mitchell's door and ordering him to open. An alarmed Mitchell decided to call his mother, but seconds later, officers broke down his door with a battering ram, told Mitchell to lie face down, and called him an "asshole."³⁹ Officers then fired several pepperball rounds at Mitchell and his dog, handcuffed Mitchell, and arrested him for "obstructing a police officer."⁴⁰ Officers searched Mitchell's home and occupied his house to surveil his neighbor.⁴¹ Mitchell subsequently brought a federal civil rights lawsuit, alleging violations of his Third and Fourth Amendment rights.⁴²

The Frantz and Mitchell cases indicate that state and local police, using military-style tactics and weaponry, may raise not only the more obvious Fourth Amendment claims but also potentially Third Amendment claims for "quartering" of "soldiers" in peacetime without the consent of premises' owners. The viability of such Third Amendment claims, however, rests principally on two legal questions: (1) Does the Third Amendment bind the States?; and (2) If so, does the amendment's reference to "soldier" encompass police?

35. See *SWAT Team Took Over Innocent Woman's House Without Permission to Investigate Neighbor*, POLICESTATEUSA.COM (Feb. 9, 2014), available at <http://www.policestateusa.com/2014/swat-team-took-innocent-womans-house-without-permission/>.

36. *Id.*

37. See *Homeowner Says SWAT Came in Her Home Without Permission*, ACTIONNEWSJAX.COM (Feb. 4, 2014), available at <http://www.actionnewsjax.com/videos/news/homeowner-says-swat-came-in-her-home-without/vCP8C8/>.

38. See Jacob Gershman, "Forgotten" Third Amendment Surfaces in Nevada Case, WALL ST. J. LAW BLOG (July 5, 2013), available at <http://blogs.wsj.com/law/2013/07/05/forgotten-third-amendment-surfaces-in-nevada-case/>.

39. See Complaint ¶¶ 20–25, *Mitchell v. City of Henderson*, No. 2:13-cv-01154-APG-CWH, 2015 WL 427835 (D. Nev. 2015).

40. *Id.* ¶¶ 27–34.

41. *Id.* ¶¶ 35–36.

42. *Id.* ¶ 1.

III. DOES THE THIRD AMENDMENT BIND THE STATES?

The Supreme Court has used a "selective incorporation" approach to the Bill of Rights, deciding on a clause-by-clause basis whether the Bill's guarantees are binding on state (and municipal) governments via the Due Process Clause of the Fourteenth Amendment.⁴³ While this process of incorporation has made the bulk of the Bill of Rights binding on the States, it has not made all of them so, and provisions such as the Fifth Amendment's right to indictment by grand jury⁴⁴ and the Seventh Amendment's right to a civil jury trial⁴⁵ have been denied incorporation. The Supreme Court, however, has never ruled on the incorporation of the Third Amendment.

Only one lower federal court has ruled on the Third Amendment's incorporation. Specifically, in *Engblom v. Carey*, a Second Circuit panel unanimously agreed with the district court judge that the Third Amendment was binding on the States.⁴⁶ At issue in *Engblom* was the constitutional propriety of the forcible eviction of state prison guards from their on-site residence during a union strike, and subsequent quartering of National Guard troops therein.⁴⁷ The court noted that "except perhaps when 'federalized' by unit under [federal statutes]," the National Guardsmen were "state employees under the control of the Governor," thus necessitating a ruling as to whether such state-controlled Guardsmen were subject to the Third Amendment—in other words, whether the amendment was incorporated to the States.⁴⁸

The *Engblom* court reasoned that because the amendment was "designed to secure a fundamental right to privacy"—and was, indeed, one of the amendments that formed the "penumbras" and "emanations" of the right to privacy recognized in *Griswold v. Connecticut*⁴⁹—it qualified as an integral component of due process

43. *McDonald v. City of Chicago*, 561 U.S. 742, 763 (2010).

44. *Hurtado v. California*, 110 U.S. 516 (1884).

45. *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916).

46. 677 F.2d 957, 961 (2d Cir. 1982). The *Engblom* decision was 2-1, but Judge Kaufman's separate opinion made clear that he agreed that the Third Amendment should be incorporated. *Id.* at 967 (Kaufman, J., concurring in part and dissenting in part) ("I do not disagree with the majority that the Third Amendment should be incorporated into the Fourteenth for application to the states.").

47. *Id.* at 960.

48. *Id.* at 961.

49. *See id.* at 962 (citing *Griswold* and stating, "The Third Amendment was designed to ensure a fundamental right to privacy."); *see also* *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) ("The Third Amendment, in its prohibition

and was accordingly binding on the States pursuant to the Fourteenth Amendment Due Process Clause.⁵⁰

The *Engblom* court's analytical framework for ascertaining whether a provision of the Bill of Rights qualifies for incorporation was subsequently endorsed by the Supreme Court in *McDonald v. City of Chicago*.⁵¹ Specifically, in *McDonald*, the Court stated that the question of incorporation hinges upon "whether a particular Bill of Rights guarantee is fundamental to our scheme of ordered liberty and system of justice"⁵² because the right is "deeply rooted in this Nation's history and tradition."⁵³ In holding that the Second Amendment's right to keep and bear arms qualified for incorporation, the *McDonald* Court reasoned that the right to self-defense had long been considered by both Englishmen and American colonists as a basic liberty, essential to preventing tyranny.⁵⁴

The history of the Third Amendment reveals that it is deeply rooted in our nation's history and tradition. The Quartering Acts of 1765 and 1774, enacted by the British Parliament, required American colonists to quarter British soldiers in various places such as inns, taverns, stables and private homes when necessary,⁵⁵ and even furnish them "with diet, and small beer, cyder, or rum mixed with water, by the owners of the inns, livery stables, alehouses, victualing houses, and other houses in which they are allowed to be quartered and billeted by this act . . ."⁵⁶

These acts proved so objectionable that, among the grievances against King George III catalogued in the Declaration of Independence was that he "has kept among us, in times of peace, Standing Armies without the Consent of our legislatures" and "[q]uartering large bodies of armed troops among us."⁵⁷ The Third

against the quartering of soldiers 'in any house' in time of peace without the consent of the owner, is another facet of that privacy.").

50. See, e.g., *id.* at 968 (Kaufman, J., concurring in part and dissenting in part) ("Judge Sweet properly concluded that the Third Amendment is incorporated into the Due Process Clause of the Fourteenth Amendment as one of the 'fundamental' rights 'rooted in the tradition and conscience of our people' and thus 'implicit in the concept of ordered liberty.'").

51. 561 U.S. 742 (2010).

52. *Id.* at 764 (emphasis in original); see also *id.* at 767 (emphasis in original).

53. *Id.* at 767.

54. *Id.* at 767-70.

55. See *Engblom*, 677 F.2d at 967 (Kaufman, J., concurring in part and dissenting in part).

56. The Quartering Act of 1765, available at <http://www.ushistory.org/declaration/related/quartering.htm>; see also The Quartering Act of 1774, available at <http://www.ushistory.org/declaration/related/q74.htm>.

57. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

Amendment was designed to prevent such atrocities in the newly formed United States, securing, in Joseph Story's words, "that great right of the common law, that a man's house shall be his own castle, privileged against all civil and military intrusion."⁵⁸

Given this long and important history of the Third Amendment, it would seem that its protections against nonconsensual quartering in times of peace—or quartering without legislative consent in wartime—would qualify for incorporation, and thus bar such quartering of state "soldiers," such as the National guardsmen in *Engblom*.

IV. WHAT DOES "SOLDIER" MEAN?

Even assuming *Engblom* was correct that the Third Amendment is binding upon the States, the question still remains: Other than National Guard troops, what state actors should be considered "soldiers" within the meaning of the amendment? Unfortunately, there is no obvious answer to this question.

The most obvious meaning of the word "soldier" is someone who serves as a member of the military or militia, such as the Army or National Guard. Founding era dictionaries suggest a potentially broader definition of soldier, encompassing any sort of "warrior" who is part of a hierarchical group of fighting men, which could presumably include members of a police force. For example, Samuel Johnson's 1785 *Dictionary of the English Language* defined soldier as "a fighting man; a warrior [sic]" and noted "it is generally used of the common men, as distinct from the commanders."⁵⁹

Yet when one looks up the definition of "warriour"—a word derived from the word "war"—it becomes clear it was understood to be restricted to members of the military. Johnson's 1785 dictionary defines warriour as "a soldier; a military man."⁶⁰ It seems reasonable

58. JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION § 1893 (1833).

59. SAMUEL JOHNSON, 2 A DICTIONARY OF THE ENGLISH LANGUAGE 682 (6th ed. 1785), available at <https://archive.org/stream/dictionaryofengl02johnuoft#page/n681/mode/2up>; accord THOMAS SHERIDAN, 2 DICTIONARY OF THE ENGLISH LANGUAGE BOTH WITH REGARD TO SOUND AND MEANING 399 (4th ed. 1797), available at <https://archive.org/stream/completedictiona02sheriala#page/n399/mode/2up>; see also NOAH WEBSTER, AM. DICTIONARY OF THE ENGLISH LANGUAGE (1828), available at <http://webstersdictionary1828.com/>.

60. 2 JOHNSON'S DICTIONARY, *supra* note 59, at 1031, available at <https://archive.org/stream/dictionaryofengl02johnuoft#page/n1031/mode/2up>; accord 2 SHERIDAN'S DICTIONARY, *supra* note 59, at 566, available at <https://archive.org/stream/completedictiona02sheriala#page/n565/mode/2up>.

to conclude, therefore, that at the time of the Third Amendment's ratification, the term "soldier" denoted a member of the military.

One potential weakness of this line of argument is that police were unknown at the time of the Third Amendment's ratification in 1791. Formal police departments did not exist in the U.S. until the mid-1800s, when several large cities such as New York, Chicago, and Los Angeles formed unified police forces.⁶¹ Because the Third Amendment's applicability to the States would occur, if at all, via incorporation grounded in the Fourteenth Amendment's Due Process Clause, the salient moment in time for ascertaining the meaning of the word "soldier"—as applied to the States—would arguably be 1868, not 1791.

If this is the case, it is conceivable that the word "soldier" could encompass the state and local police. By 1868, when the Fourteenth Amendment was ratified, formalized police forces were in place in most major American cities, and like members of the military or militia at the time, these police possessed the basic characteristics of "warriors" or "soldiers": They wore uniforms, carried revolvers, and were organized in a hierarchical fashion.⁶²

While there is ample evidence that those who wrote and ratified the Fourteenth Amendment believed the amendment would make the Bill of Rights—including the Third Amendment—binding on the States,⁶³ there is no evidence regarding what they believed the word "soldier" might mean, in the specific context of state law enforcement. The question for an originalist, therefore, would be whether the fact that police officers shared basic characteristics with military "soldiers"—carrying weapons, wearing uniforms, hierarchical organizational structure—is sufficient to consider them "soldiers" within the meaning of the Third Amendment.

The answer would appear to be "no." The raw power of police—the "power of the sword" as Samuel Adams put it⁶⁴—was not really comparable in 1868 to the raw power of the military. While police in 1868 had clubs and revolvers, they did not have cannons and other heavy military artillery. While police today undoubtedly have military-style weaponry, this would not be salient to an originalist interpretation of the Third Amendment, though it admittedly would be salient to a living constitutionalist.

61. See CAROL A. ARCHBOLD, *POLICING: A TEXT/READER* 5 (Sage Publications, 2013).

62. *Id.* at 5–6.

63. See *McDonald v. City of Chicago*, 561 U.S. 742, 826–38 (2010) (Thomas, J., concurring in part and concurring in the judgment) (cataloguing the original public meaning of the Fourteenth Amendment's Privileges or Immunities Clause).

64. See Adams, *supra* note 19.

Moreover, the other concern noted by Samuel Adams—namely, the fact that soldiers are “not govern’d properly by the laws of their country, but by a law made for them only”⁶⁵—i.e., the law of war—is also not a concern that is applicable to state and local police. Unlike the military, police are subject to ordinary laws, including the Constitution. They are not “outside” or “above” the ordinary law. Police who violate laws or the Constitution can find themselves criminal or civil defendants, accountable pursuant to normal legal principles. In this sense, the risk of tyranny perceived by Adams—his motivation for objecting to the quartering of British soldiers—is not as high from police as it is from the military.

While there are compelling normative arguments for making state and local police accountable through the Third Amendment, an originalist would be hard-pressed to justify such a result, given that the word “soldier” undoubtedly denoted a member of the military, who possessed unique power and legal insularity that police did not possess in either 1791 or 1868. If the problems posed by increasing police militarization are going to be effectively addressed, therefore, they will need to be addressed by either a constitutional amendment or, more likely, statutory and regulatory reform.

V. CONCLUSION

State and local police are becoming increasingly militarized. Providing billions of dollars’ worth of military equipment to police is encouraging them to adopt increasingly aggressive methods of dealing with ordinary crimes, creating a potentially counterproductive, war-like atmosphere in many high-crime communities. While this is undoubtedly a problem in need of a solution, stretching the meaning of the Third Amendment—particularly its use of the word “soldier”—to include police should not be an attractive option for constitutional originalists. This does not mean, however, that the American people are powerless to stop the trend of police militarization and excessive force; quite the contrary. It simply means that, if the problem is going to be addressed, it should be addressed through other constitutional provisions such as the Fourth Amendment, or normal republican processes such as statutory reform.

65. *Id.*