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## Policing the Danger Narrative

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# CRIMINAL LAW

## POLICING THE DANGER NARRATIVE

AVLANA K. EISENBERG\*

*The clamor for police reform in the United States has reached a fever pitch. The current debate has mainly centered around questions of police function: What functions should police perform, and how should they perform them to avoid injustice and unnecessary harm? This Article, in contrast, focuses on a central aspect of police culture—namely, how police envision their relationship to those policed. It exposes the vast reach of a deeply engrained “danger narrative” and demonstrates the disastrous consequences that this narrative has helped to bring about. Reinforced by police training, codified by courts, and broadly deployed, the danger narrative is an “us-versus-them” ideology that envisions “them”—all persons whom police are observing, investigating, detaining—as a lethal danger to “us”—law enforcement personnel. Structural and functional reforms have little hope of succeeding unless this toxic narrative can be displaced.*

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\* Associate Professor of Law and Dean’s Distinguished Scholar, Boston College Law School. I am grateful to David Ball, Gabriella Blum, Michael Buchhandler-Raphael, Courtney Cahill, Andrew Crespo, Ronald Eisenberg, Andrew Ferguson, Chad Flanders, Barry Friedman, John Goldberg, Rachel Harmon, Danielle Jefferis, Thea Johnson, Kay Levine, Cortney Lollar, Robert Meisner, Bernadette Meyler, Martha Minow, Rachel Moran, Daphna Renan, Chris Robertson, Laura Rosenbury, Emily Satterthwaite, Ric Simmons, David Sklansky, Sonja Starr, Carol Steiker, Seth Stoughton, Bob Weisberg, Kate Weisburd, Sam Wiseman, Andrew Woods, Jonathan Zittrain, and workshop participants at UCLA Law School, Harvard Law School, Boston College Law School, Northeastern University School of Law, University of Connecticut School of Law, Florida State University College of Law, The Law of the Police Conference, CrimFest, Criminal Law & Procedure Faculty Conference, and the ABA/AALS Workshop for Research on the Criminal Legal System for helpful comments and conversations; to Catherine Bauman, Margaret Clark, Elizabeth Clifford, Kathryn Crandall, Mary McCormick, Barbara Kaplan, and Katie Miller for excellent research assistance; and to the editors of the *Journal of Criminal Law & Criminology* for terrific editorial assistance.

*The Article first explains the content of the danger narrative and its centrality both to policing and the law of policing. It then scrutinizes the narrative, finding that its core claims about the perils of policing are substantially exaggerated. The Article further explains how, ironically, these exaggerated claims actually create danger that could otherwise be avoided, and thus serve as an illegitimate “bootstrapping” argument for uses of excessive force. More troublingly still, the purportedly empirical danger narrative embeds a previously unexamined and entirely untenable normative proposition: Namely, that it is better for scores of suspects to be unjustifiably injured or killed by police than for any police officer to be injured.*

*The Article concludes with a call for a new narrative frame to address both the empirical and normative pitfalls of the danger narrative and to permit meaningful police reform to take root. Drawing on insights from communitarian theory, and from such fields as medicine and aviation, it proposes institutional reforms that would promote core values of professionalism, including the adoption of data-driven, evidence-based practices, while also undermining the danger narrative’s pernicious us-versus-them ideology by cultivating empathy and reimagining police-community partnerships. Ultimately, the prospect of better and safer policing hinges on the adoption of these and other measures to inculcate in police departments a more accurate depiction of the real risks of in-the-line-of-duty violence.*

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#### INTRODUCTION

Police rhetoric about danger has become hyperbolic. While the notion that policing is dangerous is not new, in recent years, police and police advocates have cast officers as under siege—victims of a “war on cops.”

According to this “danger narrative,”<sup>1</sup> policing is inherently dangerous, and officers are under constant threat of grave physical harm at the hands of those whom they police.

This Article exposes the vast influence of this narrative and its dire consequences for public safety, police accountability, and prospects for meaningful reform. Whereas existing accounts of danger in policing focus predominantly on the perspective of civilians who envision police as a threat,<sup>2</sup> this Article inverts that lens, scrutinizing the police perspective that views those policed as threatening.

In so doing, this Article reveals the centrality of police culture to the project of police reform. Legal scholars concerned with the harms of policing tend to focus on developing a functional account of policing<sup>3</sup> or assessing the efficacy of harm-regulation techniques.<sup>4</sup> Yet, both approaches ignore the

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<sup>1</sup> For a discussion of the power of narrative across legal institutions, see Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983) (“No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.”).

<sup>2</sup> This rich body of literature includes discussions of such related problems as legal estrangement, vicarious marginalization, cultural alienation, and legitimacy deficit, each of which focuses on the perspective of those policed and the fear, distrust, and alienation experienced by them. See, e.g., Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2054 (2017) (using the lens of legal estrangement to account for the civilian experience of police as threatening); RONALD WEITZER & STEVEN A. TUCH, RACE AND POLICING IN AMERICA 183–84 (2006) (discussing cultural alienation among Black civilians towards police); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 290–91 (2003) (discussing the lack of trust and legitimacy experienced by civilians towards police). But see Michael Sierra-Arevalo, *American Policing and the Danger Imperative*, 55 LAW & SOC’Y REV. 70, 89–90 (2021) (discussing officers’ preoccupation with violence in the context of how such preoccupation leads to policy-deviant behaviors—such as high-speed driving without seatbelts—that threaten officer safety).

<sup>3</sup> See, e.g., Barry Friedman, *Disaggregating the Police Function*, 169 U. PA. L. REV. 925, 935 (2021) (addressing the harms of policing by looking to the core of police function); Shima Baradaran Baughman, *Crime and the Mythology of Police*, 99 WASH. U. L. REV. 65, 117 (2021) (examining how misunderstandings about police function hinder effective police reform).

<sup>4</sup> See, e.g., Elias R. Feldman, *Strict Tort Liability for Police Misconduct*, 53 COLUM. J.L. & SOC. PROBS. 89, 109 (2019) (advocating a strict tort liability rule to address police misconduct); Seth Stoughton, *Police Body-Worn Cameras*, 96 N.C. L. REV. 1363, 1368 (2018); Julian R. Murphy, *Is It Recording? – Racial Bias, Police Accountability, and the Body-Worn Camera Activation Policies of the Ten Largest Metropolitan Police Departments in the USA*, 9 COLUM. J. RACE & L. 141, 144 (2018) (examining the benefits and limitations of police body cameras); Julian R. Murphy, *Is It Recording? – Racial Bias, Police Accountability, and the Body-Worn Camera Activation Policies of the Ten Largest Metropolitan Police Departments in the USA*, 9 COLUM. J. RACE & L. 141, 144 (2018) (examining the role of police body camera activation policies on police behavior). Activists also tend to focus on harm-

threshold issue of police culture, which suffuses all police functions—and influences legislative and judicial decisions—thereby limiting the viability of any proposed harm-regulation techniques. While some have examined isolated aspects of danger in police culture,<sup>5</sup> these piecemeal analyses fail to capture the scope and impact of this narrative, as well as how its vast reach stymies prospects for meaningful reform.<sup>6</sup>

This Article begins to fill this gap, centering the danger narrative in police culture and police culture in the project of police reform.<sup>7</sup> The

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regulation techniques, calling for a broad array of reforms to address police-induced harms that include banning police chokeholds, requiring body cameras, and prohibiting the use of tear gas and rubber pellets. *See, e.g.,* Farnoush Amiri, Colleen Slevin & Camille Fassett, *In Year Since George Floyd's Death, Some States Ban or Limit Chokeholds*, L.A. TIMES (May 24, 2021, 4:00 AM) <https://www.latimes.com/world-nation/story/2021-05-24/george-floyd-killing-states-limit-ban-chokeholds> [<https://perma.cc/GE2D-XK3J>] (discussing chokehold bans); Harmeet Kaur, *There's a Renewed Call for Police Body Cameras. Here's Why That May Not Be the Right Solution*, CNN (June 30, 2020, 3:05 PM) <https://www.cnn.com/2020/06/30/us/body-cameras-police-reform-challenges-trnd/index.html> [<https://perma.cc/PN84-6J7A>] (assessing the use of police body cameras); Lindsey Van Ness, *Tear Gas Bans: A Policing Change Not Gaining Traction*, PEW TRUSTS, STATELINE (Aug. 4, 2020) <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/08/04/tear-gas-bans-a-policing-change-not-gaining-traction> [<https://perma.cc/J9Q5-9864>] (discussing proposals to prohibit the use of tear gas and rubber pellets). The call to defund the police can be framed, at once, as a harm-regulation technique and a functional critique. *See, e.g.,* Jessica Eaglin, *To "Defund" the Police*, 73 STAN. L. REV. ONLINE 120, 128 (2021) (describing proposed legislation in Chicago that would reappropriate funding from the Chicago Police Department to the Chicago Department of Public Health).

<sup>5</sup> *See, e.g.,* Jordan Blair Woods, *Policing, Danger Narratives, and Routine Traffic Stops*, 117 MICH. L. REV. 635, 669 (2019) (focusing on the context of traffic stops); Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas*, 107 CALIF. L. REV. 345, 383 (2019) (focusing on police designation of areas as “high crime”). *But see* Seth Stoughton, *Principled Policing: Warrior Cops and Guardian Officers*, 51 WAKE FOREST L. REV. 611, 666–67 (2016) (arguing for a shift in mindset from police-as-warrior to police-as-guardian).

<sup>6</sup> This Article does not dispute that there are situations in which it is entirely reasonable for police officers to fear for their lives. Yet such situations have been treated as far more representative of what day-to-day policing entails than is the case, and this miscalculation has dire consequences. Officers who are in a state of chronic fear are more likely to make bad decisions in the moment—e.g., mistaking cell phones for weapons, reaching for guns too quickly. They will also experience higher stress levels and be prone to mental health issues, which have adverse effects on both them and those they police. Moreover, efforts to get officers to change their behavior—e.g., to minimize their use of force—are likely to fail so long as police officers on the beat are perpetually in fear.

<sup>7</sup> Culture is notoriously difficult to pin down, and is subject, of course, to countless variations. This Article relies on a range of sources, including extant historical and social-scientific literatures, police training and other primary source materials, as well as original interviews with police personnel, to identify, in broad strokes, a longstanding, widespread, and highly problematic feature of professional culture among police. While these sources

Article's main contributions are threefold: It exposes the scope of the "danger narrative" in police culture and its role in shaping the development of law and policy. It critically examines this narrative, revealing both its lack of empirical support and its dire consequences. And it proposes reforms that would address both the empirical and normative shortcomings of this dominant narrative while improving public safety, police accountability, and police-civilian relations.

The danger narrative dominates police self-image and professional protocols and has been codified and reinforced by courts. Recruitment videos glamorize crime-fighting and the victorious protector-warrior, and police union materials routinely describe the job of policing as "tough beats," owing to the threat of danger "every time we respond to a call."<sup>8</sup>

The danger narrative is core to police training, including such pedagogies as "killology,"<sup>9</sup> which is part of the curriculum at many law enforcement academies and teaches that it is the responsibility of the police to defeat a perceived enemy through violence.<sup>10</sup> Increasingly, police have relied on the danger narrative to claim the status of "victim," supplanting the image of an all-powerful, militarized police force capable of subduing the criminal element with a vision of officers in need of state protection.<sup>11</sup> For example, proponents of "Blue Lives Matter" and "Back the Blue" laws have grounded their justification for these laws on the danger narrative by casting police as vulnerable victims in need of legal protection.<sup>12</sup>

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hardly offer a complete account (whatever "complete" might mean in this context), they provide the best information currently available of how, in general, police tend to view certain aspects of their work, and particularly their view of the risks of physical harm associated with policing. Difficult though it may be to do well, obtaining insight into police officers' self-understanding is crucial to diagnosing the source of, and taking effective steps to ameliorate, familiar policing pathologies.

This Article extends its discussion of the danger narrative's stronghold in police culture to examine crucial and far-reaching legal and policy implications—how the danger narrative plays out in the context of law, how judicial endorsement reifies the police account of danger, and how this narrative impedes the success of police reform movements.

<sup>8</sup> See *infra* Section I.A.

<sup>9</sup> For example, retired Army lieutenant colonel David Grossman, founder of the Killology Research Group, offers training seminars to law enforcement officers across the county centered on "killology," defined as "the scholarly study of the destructive act, just as sexology is the scholarly study of the procreative act." Justin Peters, *I Learned to Think Like a "Warrior Cop"*, SLATE (Aug. 28, 2020), <https://slate.com/news-and-politics/2020/08/warrior-cop-class-dave-grossman-killology.html>; see also *About the Colonel*, GROSSMAN ACADEMY, <https://www.grossmanacademy.com/about-the-colonel> [https://perma.cc/HRS2-FV8Q].

<sup>10</sup> See *infra* Section I.B.

<sup>11</sup> See *infra* Section I.C.

<sup>12</sup> See *infra* Section I.D.

Courts, by adopting the “reasonable officer” standard when assessing excessive force and other police misconduct claims,<sup>13</sup> provide a judicial imprimatur for the sweeping claims of the danger narrative. Since the reasonable officer is understood to be a product of departmental training practices, so long as officers comply with departmental expectations—which are infused with exaggerated notions of danger—those officers tend not to be judicially sanctioned.<sup>14</sup> Jurors also tend to defer to police, believing officers who claim they felt threatened, even in highly questionable cases.<sup>15</sup> Owing to widespread beliefs about the dangers inherent to policing, “I feared for my life” functions as a credible catchphrase for officers.<sup>16</sup> Moreover, for an officer (or juror) who believes that there is a “war on cops,” virtually any interaction might reasonably make an officer fear for his life.

Yet, despite its dominance, this danger narrative is deeply flawed in at least four respects. First, this narrative is empirically unsubstantiated. Existing empirical data about danger in policing belie claims that the job of policing is pervasively and increasingly dangerous, as well as the claim, core to the “war on cops” thesis, that attacks targeting police have increased.<sup>17</sup> Empirical research demonstrates that, over time, both the overall number and per capita rate of assaults and killings of officers nationally have decreased.<sup>18</sup> Research findings also suggest that policing is not pervasively dangerous, but rather that risk, unsurprisingly, varies significantly with context.<sup>19</sup>

Second, and ironically, exaggerated claims about danger in policing may themselves contribute to an increase in the risk of violence associated with policing.<sup>20</sup> Officers who have internalized the lesson that they should anticipate the worst may unnecessarily escalate a situation that need not have been confrontational or violent.<sup>21</sup> Such hypervigilance also primes officers to

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<sup>13</sup> *Graham v. Connor*, 490 U.S. 386, 386–87 (1989) (holding that “[a]ll claims that law enforcement officials have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen are properly analyzed under the Fourth Amendment’s ‘objective reasonableness’ standard” and that “[t]he ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene.”).

<sup>14</sup> See *infra* Section I.E.

<sup>15</sup> See *infra* Section I.E.2.

<sup>16</sup> Martel A. Pipkins, “*I Feared for My Life*”: *Law Enforcement’s Appeal to Murderous Empathy*, 9 RACE & JUST. 180, 181 (2019) (noting that, in response to police killings, law enforcement often relies on a “master narrative”—“I feared for my life”—which “works as a strategy to reinforce racially driven fear, avoid blame, and invoke empathy”).

<sup>17</sup> See *infra* Section II.A.

<sup>18</sup> See *infra* Section II.A.1.

<sup>19</sup> See *infra* Section II.A.2.

<sup>20</sup> See *infra* Section II.B.

<sup>21</sup> See *infra* Section II.B.1.



mistake disobedience (whether intentional or not) for danger, which increases the risk of a violent confrontation.<sup>22</sup> These pathologies are exacerbated when overlaid with racial anxieties.<sup>23</sup> Much as disobedience is often used as a proxy for danger, so too is race, with Black men being perceived—solely based on their race—as more dangerous.<sup>24</sup> This racist perception leads to heightened suspicion by officers and a higher likelihood of escalation.<sup>25</sup> An officer who believes himself to be perpetually under threat—because identifiable as an officer—may be even more suspicious and, ultimately, aggressive, further exacerbating the effects of hypervigilance inculcated through routine police training.<sup>26</sup>

Third, this escalation can help to reinforce the danger narrative, worsening a vicious cycle. If an officer's initial escalatory response creates a dangerous situation where none had existed, the new danger created will seem to justify the officer's fears, both in the officer's own mind and in the mind of juries, courts, and the public.<sup>27</sup> An officer who later testifies "I killed X because I was endangered" may be seen as credible because, at the very moment of the shooting, the officer was in danger. And because of the prevalent danger narrative, the audience for that claim may not look closely at whose actions gave rise to the dangerous situation in the first place. When courts and juries accept police accounts of pervasive danger, they reinforce these exaggerated claims, presenting a missed opportunity for correction and for holding police accountable.<sup>28</sup>

Fourth, when stripped of exaggerations and self-fulfilling prophecies, the case for current police practices concerning the use of force boils down to the unstated-but-undeniable normative proposition that it is preferable for many suspects to be unjustifiably injured or killed by police than for any police officer to be injured.<sup>29</sup> Current norms, conveyed through academy pedagogies, police union materials, and advocates of such legislation as "Back the Blue" laws, are consistent with the belief that officers have a right to do to suspects whatever is required to get as close as possible to a zero-

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<sup>22</sup> See *infra* Section II.B.2.

<sup>23</sup> See *infra* Section II.B.3.

<sup>24</sup> *Id.*

<sup>25</sup> See *infra* Section II.B.4.

<sup>26</sup> See *infra* Section II.B.

<sup>27</sup> The danger narrative thus may serve as an illegitimate 'bootstrapping' argument for uses of what would otherwise be considered excessive force. Bootstrapping is "a suspicious form of reasoning that verifies a source's reliability by checking the source against itself." Jonathan Weisberg, *The Bootstrapping Problem*, 7 PHIL. COMPASS 597, 597 (2012).

<sup>28</sup> See *infra* Section II.C.

<sup>29</sup> See *infra* Section II.D.

risk environment. This belief is consistent with an us-versus-them ideology that casts those policed as potential enemy combatants.<sup>30</sup>

Meaningful reform will require supplanting this deeply flawed danger narrative with a new policing frame—what this Article terms “communitarian policing”—that emphasizes values of professionalism, as well as the shared interests among individuals in a polity and the importance of their interactions. This approach draws on communitarian themes to identify the types of interventions that would help to dispel the assumptions and claims about policing consistent with the us-versus-them ideology and to inculcate in police departments a more accurate depiction of the risks of in-the-line-of-duty violence.<sup>31</sup> Crucially, pernicious us-versus-them dynamics render a turn to professionalism<sup>32</sup>—and the embrace of data-driven, evidence-based approaches—necessary but not sufficient; indeed, a professional policing model could still maintain norms consistent with a zero-sum, militaristic approach.

Notably, “communitarian policing” as introduced by this Article is distinct from “community policing.”<sup>33</sup> Many scholars have lamented the ambiguity associated with “community policing,”<sup>34</sup> as well as its use to

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<sup>30</sup> Ultimately, this us-versus-them ideology is an amalgam of mutually reinforcing claims that, when pulled apart for sustained scrutiny, is exposed as both empirically and normatively implausible.

<sup>31</sup> The danger narrative in policing and an us-versus-them orientation are mutually reinforcing. Abstracted notions about danger, and specifically about policing as inherently and pervasively dangerous, reinforce the idea that the police role is to fight the enemy and to subdue dangerous criminals, and that officers must be hypervigilant because “they”—the enemy—could be anywhere. Once a group—or an archetype—is envisioned as “them,” they easily may be regarded as a threat. See *infra* notes 219–21 and accompanying text.

<sup>32</sup> While courts widely regard police as professionals, often citing their expertise as a reason for granting them discretion, police embrace of the sweeping, undifferentiated, and empirically unsubstantiated danger narrative belies such characterization. For a rich historical account of police professionalism and the judiciary, see Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 2003 (2017).

<sup>33</sup> See generally Dennis P. Rosenbaum & Arthur J. Lurigio, *An Inside Look at Community Policing Reform: Definitions, Organizational Changes, and Evaluation Findings*, 40 CRIME & DELINQ. 299, 301–02 (1994) (defining community policing as a theory of police practice that gained popularity in the 1980s and 1990s and promoted increased police-citizen engagement, a broader definition of police work, decentralization of the police bureaucracy, and proactive police problem solving).

<sup>34</sup> See, e.g., Stephen Mastrofski, *Community Policing: A Skeptical View*, in POLICE INNOVATION: CONTRASTING PERSPECTIVES 44, 59 (David Weisburd & Anthony A. Braga eds., 2006) (asserting that, in practice, community policing is a mere rebrand of existing policing tactics); Ralph H. Saunders, *The Politics and Practice of Community Policing in Boston*, 20 URB. GEOGRAPHY 461, 479 (1999) (observing a stark distinction between the rhetoric of community policing, used to enhance the department’s public image, and the tactics used by

describe a wide array of “pro-active” policing approaches, including “[s]treet sweeps, occupation-like control of neighborhoods, SWAT raids, and aggressive anti-gang policies.”<sup>35</sup> By contrast, “communitarian policing” is neither proactive nor reactive but rather grounded in a vision—rejecting an us-versus-them mindset—of police and those policed as coexisting in a shared community. Further, “community policing” has been used widely to describe an era (and as such is understood as a reaction to the historical and sociopolitical events of that time), as well as to delineate distinct order-maintenance strategies designed to make communities safer.<sup>36</sup> Communitarian policing, by contrast, represents a broader orientation and philosophy that extends beyond the instrumental goals of harm-prevention and order-maintenance.

The Article outlines three core communitarian policing principles and identifies techniques and framings, consistent with these principles, that would help to shift officers’ conceptions of danger in policing. First, communitarian policing would require the rejection of the sweeping danger narrative in favor of an evidence-based risk continuum.<sup>37</sup> Drawing on insights from such fields as medicine and aviation, this approach would require the collection and analysis of granular data about contextual factors that increase or decrease risk, and about the role of police in creating and mitigating risk.

Second, core to communitarian policing is the cultivation of empathy—officers’ ability to imagine a shared vulnerability between themselves and those policed. This approach would focus both on the needs and past traumas of those policed, humanizing individuals who might otherwise be categorized

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the department, which remained focused on order maintenance); GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* 158 (1996) (noting that “community policing has come to mean all things to all people”); *see also* Mark E. Correia, *The Conceptual Ambiguity of Community in Community Policing*, 23 *POLICING INT’L J. STRATEGIES & MGMT.* 218, 218 (discussing the ambiguity of “community” as it relates to community policing).

<sup>35</sup> RADLEY BALKO, *RISE OF THE WARRIOR COP* 218 (2013); *see also* Rosenbaum & Lurigio, *supra* note 33, at 302; Delores D. Jones-Brown, *Debunking the Myth of Officer Friendly: How African American Males Experience Community Policing*, 16 *J. CONTEMP. CRIM. JUST.* 209, 224 (2000) (“By merely increasing the police presence for the purpose of carrying out draconian repressive approaches to the crime problem, community policing becomes its own problem.”).

<sup>36</sup> *See* Willard M. Oliver & Elaine Bartgis, *Community Policing: A Conceptual Framework*, 21 *POLICING INT’L J. STRATEGIES & MGMT.* 490, 497–503 (1998) (detailing social, cultural, and political factors contributing to the development of community policing).

<sup>37</sup> *See infra* Section III.A.1.

as “them,”<sup>38</sup> and on officers’ past experiences of trauma and associated mental health needs.

Third, communitarian policing would give priority to police collaborations with nonpolice experts who focus on such issues as mental illness, domestic abuse, and gang violence.<sup>39</sup> This vision of policing transcends the popular “Warrior–Guardian” binary frame that isolates police from the community, either by pitting police against members of the community or by placing them on a pedestal,<sup>40</sup> instead shifting attention to the range of possible collaborations with non-police organizations that can best address needs of community members.

In the absence of courts pushing back against the false danger narrative,<sup>41</sup> the best chance for meaningful reform will come from those who are captive to the us-versus-them ideology: police. Officers will need a different understanding of, and more information about, those individuals and groups that they easily regard as “them.”<sup>42</sup> Law enforcement is notoriously resistant to change, and any proposed reforms requiring a cultural shift surely will encounter resistance.<sup>43</sup> However, it is simply not the case that all police departments will resist such changes or that initial demonstrations of resistance are insurmountable. In fact, some departments

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<sup>38</sup> See *infra* Section III.A.2.

<sup>39</sup> See *infra* Section III.A.3.

<sup>40</sup> This Article builds on scholarship examining the “warrior cop” paradigm by Seth Stoughton, among others, while exposing the limitations of the Warrior-Guardian binary. See, e.g., Stoughton, *supra* note 5, at 617; Seth Stoughton, *Law Enforcement’s “Warrior” Problem*, 128 HARV. L. REV. F. 225, 230 (2015) (advocating the Guardian paradigm as a solution to the Warrior problem in policing).

<sup>41</sup> Despite the conventional understanding of criminal procedure that courts regulate the police, in practice, courts have tended to expand deference to police over time by carving out exceptions that limit restraints on them. See, e.g., Heather A. Jackson, *Arizona v. Evans: Expanding Exclusionary Rule Exceptions and Contracting Fourth Amendment Protection*, 86 J. CRIM. L. & CRIMINOLOGY 1201, 1204 (1996) (describing, in the exclusionary rule context, how the Supreme Court has continued to carve out exceptions, expanding police deference); Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 622 (1996) (describing how “[the] Supreme Court’s confession decisions since 1966 have steadily chipped away at both the letter and the spirit of *Miranda*”).

<sup>42</sup> While this Article advocates an increased use of data to give police the ability to interact with those policed based on better information and hence more accurate assumptions about the situations they are facing, ultimately, an accompanying normative change that accounts for the dignitary interests of those policed would also be necessary to produce meaningful reform. See *infra* Section III.A.2.

<sup>43</sup> See, e.g., Jaganmohan Rao Lingamneni, *Resistance to Change in Police Organizations: The Diffusion Paradigm*, 4 CRIM. JUST. REV. 17, 17 (1979) (describing officers as resistant to change). But see William L. Tafoya, *Understanding Resistance to Change: Implications for the Future of Police*, 9 AM. J. POLICE 183, 183 (1990) (challenging the assertion that just because police have resisted change in the past, they will do so in the future).

have already taken significant steps to dismantle deep-seated aspects of police culture—such as the infamous “thin blue line”<sup>44</sup>—suggesting that, while challenging, this may also be a moment ripe for police-instigated institutional reform.

The Article proceeds as follows. Part I introduces the danger narrative, revealing how it pervades police culture and ripples through legislative and judicial proceedings. Part II criticizes this dominant narrative, exposing its empirical flaws and dire consequences for public safety, police accountability, and police–civilian relations. Part III proposes a new communitarian frame that would address both the empirical and normative pitfalls of the sweeping danger narrative while enabling meaningful police reforms to take root and flourish.

### I. THE DANGER NARRATIVE AS POLICE CULTURE

Narratives shape our views of the world and our actions.<sup>45</sup> Stories told about the dangers of policing—*by* officers and *to* officers—pervade police self-image and departmental culture. This Part reveals the vast scope of the danger narrative—how it not only pervades police culture but also ripples through legislative and judicial proceedings, shaping the development of law and policy.

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<sup>44</sup> Shaila Dewan, *A New Message for Police: If You See Something, Say Something*, N.Y. TIMES (Feb. 27, 2022) <https://www.nytimes.com/2022/02/27/us/police-intervention-minneapolis-george-floyd.html> (describing “active bystander training,” which is routinely used by hospitals and the airline industry and has been piloted recently by a few police departments).

<sup>45</sup> See Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983); CATHERINE KOHLER RIESSMAN, *NARRATIVE ANALYSIS* 4 (1993) (identifying narrative analysis as the analytic methodology of choice for worldview theorists because narratives are a “primary way individuals make sense of experience”); see also ROBERT SHILLER, *NARRATIVE ECONOMICS: HOW STORIES GO VIRAL AND DRIVE MAJOR ECONOMIC EVENTS* xv, 49 (2019) (claiming the primacy of stories over statistics in the context of economic decision making); Elizabeth A. Shanahan, Michael D. Jones, Mark K. McBeth & Ross R. Lane, *An Angel on the Wind: How Heroic Policy Narratives Shape Policy Realities*, 41 POL’Y STUD. J. 453, 457–61 (2013) (asserting the role of policy narratives in policy creation); Rachel M. Goldberg, *How Our Worldviews Shape Our Practice*, 26 CONFLICT RESOL. Q. 405, 427–29 (2009) (examining the significant impact of worldviews and narratives on practice in the field of conflict resolution); Dino-Ray Ramos, *Michael B. Jordan, Jamie Foxx, Destin Daniel Cretton, and ‘Just Mercy’ Author Bryan Stevenson Talk Narrative Influence on Social Change, WB’s Film Adaptation*, DEADLINE (June 25, 2019), <https://deadline.com/2019/06/bryan-stevenson-just-mercy-michael-b-jordan-jamie-foxx-destin-daniel-cretton-social-change-warner-brothers-1202637817> (“We often misunderstand topics. . . . Underneath these topics are narratives—and narratives are what we need to change.”) (quoting Bryan Stevenson)).

## A. OFFICER SELF-IMAGE

Police departments cultivate the mindset, consistent with the danger narrative, that officers are “soldiers going to war against their fellow citizens.”<sup>46</sup> In many cases, this begins with the police department’s recruitment video. A study of recruitment videos from the 200 largest U.S. police departments found that about half of these videos included the “display of drawn firearms” and that active paramilitary policing deployment occurred in about one-third of the videos.<sup>47</sup> One such video, featuring car chases, military-like drills and weaponry, street fighting, and multiple instances of civilian encounters ending with gunfire, poses the challenge: “Do you have what it takes?”<sup>48</sup> Another features images of camouflage-clad officers with assault rifles in armored vehicles breaking down a door with a battering ram to rescue a young girl who has been kidnapped, along with the voiceover text: “We train to protect this city, but prepare for the worst.”<sup>49</sup> SWAT recruitment videos are particularly militaristic, featuring footage of police “practicing with assault rifles, throwing grenades, traveling in armored vehicles, training as snipers.”<sup>50</sup> One such video begins: “The rules of engagement of SWAT are simple: Defeat the enemy . . . any way you can.”<sup>51</sup>

Police unions and their representatives further propagate the danger narrative. Police union materials—including those disseminated by the 365,000-member National Fraternal Order of the Police (FOP)—cast policing as pervasively dangerous and describe officers as patrolling the

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<sup>46</sup> Trevor Burrus, *How Militarized Police Can Attract the Wrong Officers*, CATO INST. (June 24, 2020), <https://www.cato.org/commentary/how-militarized-police-can-attract-wrong-officers> [<https://perma.cc/MZR5-PF27>].

<sup>47</sup> Wendy M. Koslicki, *Recruiting Warriors or Guardians? A Content Analysis of Police Recruitment Videos*, 31 POLICING & SOC’Y 702, 711 (2021). Sampled videos included such statements as “it’s a war out there,” and “the more you sweat when you train, the less you bleed on the street.” *Id.* at 709.

<sup>48</sup> NBPD43, *Newport Beach Police Department - Are You Qualified?*, YOUTUBE (Nov. 14, 2008), [https://www.youtube.com/watch?v=w\\_rKA6ROAVk](https://www.youtube.com/watch?v=w_rKA6ROAVk) [<https://perma.cc/HC8A-JTNK>].

<sup>49</sup> Andrew Wolfson, *Louisville Police Recruiting Video Lures “Action-Movie Heroes,” Not Guardians, Experts Say*, LOUISVILLE COURIER J. (Jan. 22, 2021), <https://www.courier-journal.com/story/news/local/2020/07/14/impd-recruiting-video-seeks-warriors-not-guardians-experts-warn/5390736002> [<https://perma.cc/ZJM6-ES9J>].

<sup>50</sup> Burrus, *supra* note 46. Some recruitment videos have been so widely criticized that police departments have been pressured to re-shoot them. *See, e.g.*, Allison Levitsky, *Police to Re-Shoot Recruitment Video That Was Seen as Too Militaristic*, PALO ALTO DAILY POST (Feb. 20, 2018), <https://padailypost.com/2018/02/20/police-re-shoot-recruitment-video-seen-militaristic> [<https://perma.cc/87RY-6URX>] (quoting the Palo Alto Police Chief as acknowledging that, in light of criticism that the recruitment video was like “something out of Cops . . . We’re in the process of making it a little more community-friendly.”).

<sup>51</sup> Burrus, *supra* note 46.

“toughest beats.”<sup>52</sup> *Law Officer*, a popular website and media company that provides news, editorials, books, and media for the law enforcement community, also focuses on the pervasiveness of danger “every single time we respond to a call.”<sup>53</sup>

Police union leaders have drawn an explicit connection between the personal danger faced by officers doing their jobs and broader public safety concerns,<sup>54</sup> sounding alarms about adverse effects on public safety when threatened by legislative reforms that would reduce officer protections. For example, when objecting to use-of-force bills passed in Maryland’s 2021 session, the President of Maryland’s Fraternal Order of Police asserted: “Right now the criminal element knows that the police are now playing touch football as opposed to tackle football . . . People are just going around, holding guns and using guns without fear because they know they face no serious consequence.”<sup>55</sup> When Maryland’s Law Enforcement Officer Bill of Rights was repealed in this same session, one FOP leader posted a public

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<sup>52</sup> E.g., *FOP National President Issues Alert to Officers: Be Vigilant*, NAT’L FRATERNAL ORD. OF THE POLICE (Sept. 15, 2020), <https://fop.net/2020/09/fop-national-president-issues-alert-to-officers-be-vigilant>; *New PBA Radio Ad, Stop the Pro-Criminal Agenda*, POLICE BENEVOLENT ASS’N OF N.Y.C. (Mar. 9, 2020), <https://www.nycpba.org/press-releases/2020/stop-the-pro-criminal-agenda> [<https://perma.cc/N2WZ-LMNJ>]; *National President Yoes’ Statement to Our Nation’s Law Enforcement Officers: Our Country Is Counting on Us to Keep Holding the Line*, NAT’L FRATERNAL ORD. OF THE POLICE (Nov. 4, 2020), <https://fop.net/2020/11/national-president-yoes-statement-to-our-nations-law-enforcement-officers-our-country-is-counting-on-us-to-keep-holding-the-line> [<https://perma.cc/Z84U-7N7C>].

<sup>53</sup> *National FOP Highlights Grim Reminders of Dangers in Law Enforcement*, LAW OFFICER (Mar. 1, 2021), <https://www.lawofficer.com/national-fop-highlights-grim-reminders-of-dangers-in-law-enforcement> [<https://perma.cc/JD6A-9ARD>]; Scott Medlin, *Training a Little Bit Harder—to Work a Whole Lot Smarter*, LAW OFFICER (Apr. 17, 2021), <https://www.lawofficer.com/you-are-not-in-control> [<https://perma.cc/WR8R-TWTG>].

<sup>54</sup> See, e.g., *National FOP President Reflects on Dangers Law Enforcement Faced in 2021*, NAT’L FRATERNAL ORD. OF POLICE (Jan. 5, 2022), <https://fop.net/2022/01/national-fop-president-reflects-on-dangers-law-enforcement-faced-in-2021> [<https://perma.cc/MZT9-BR66>] (“The recent erosion of respect for law enforcement coupled with public figures spewing anti-police rhetoric have fueled more aggression towards police officers than what has been seen in previous years—undoubtedly emboldening violent criminals to commit brazen acts of violence against law enforcement. . . . If these violent criminals are willing to commit brazen acts of violence against the men and women of law enforcement, we can’t begin to fathom what heinous acts they are willing to commit against law-abiding citizens.”).

<sup>55</sup> Alexa Ashwell, *MD FOP President Fears Reform Bill Will Not Reduce Crime, Impact Officer Retention*, FOX BALT. (Apr. 12, 2021), <https://foxbaltimore.com/news/local/md-fop-president-fears-reform-bills-will-not-reduce-crime-impact-officer-retention> [<https://perma.cc/L5VR-WHKE>]; Bryan Stole & Pamela Wood, *Maryland Legislators Pass Landmark Police Reform Law, Overriding Gov. Hogan’s Vetoes*, BALT. SUN (Apr. 10, 2021), <https://www.baltimoresun.com/politics/bs-md-pol-saturday-session-20210410-eyfrbxrlvhrvohrm43lbntvyq-story.html> [<https://perma.cc/8LM7-7DKB>].

statement maintaining that this reform would “endanger every Marylander.”<sup>56</sup> In California, a police union seeking additional funding for recruitment submitted a statement to the City Council highlighting the recent rise in crime and lamenting, “The hope for a safer Fresno in 2021 has all but disappeared.”<sup>57</sup> The letter stressed that additional funding allocation was critical to “restore our police ranks, and in doing so, restore safety, security, and peace to our dear citizens.”<sup>58</sup>

## B. DANGER-NARRATIVE PEDAGOGIES

Police training materials inculcate and reinforce the danger narrative.<sup>59</sup> New recruits in some departments are taught that “[e]verybody wants to murder you.”<sup>60</sup> Gruesome video footage is shown to recruits, such as the 1998 murder of Deputy Kyle Dinkheller after a traffic stop in rural Georgia.<sup>61</sup> More than twenty years later, this video continues to be shown as part of departmental trainings across the country.<sup>62</sup> Simulation games teach recruits that survival is predicated on the “preoccupation with violence and constant consideration of the worst possible outcome of interactions.”<sup>63</sup>

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<sup>56</sup> Allegany Sheriff’s FOP Lodge 144, *Urgent*, FACEBOOK (Feb. 14, 2021), <https://business.facebook.com/FOP144/photos/pcb.6948664565159363/6948664288492724/?type=3&theater>.

<sup>57</sup> *Letter to the Councilmembers and City Staff*, FRESNO POLICE OFFICERS ASS’N (May 7, 2021), <https://assets.documentcloud.org/documents/20700837/letter-to-councilmembers-and-city-staff.pdf> [<https://perma.cc/W522-U8WM>].

<sup>58</sup> *Id.*

<sup>59</sup> See, e.g., DAVE GROSSMAN & JIM GLENNON, *THE BULLETPROOF WARRIOR* (2014), <https://www.unicornriot.ninja/wp-content/uploads/2018/05/The-BulletProof-Warrior-Training-Manual-2014.pdf> [<https://perma.cc/4X5E-FHUL>].

<sup>60</sup> Sierra-Arevalo, *supra* note 2, at 16 (recounting the author’s interview with an officer about training protocols at the Academy); see also ROSA BROOKS, *TANGLED UP IN BLUE 3* (2021) (describing the author’s first night on patrol in D.C. when a veteran officer relayed, “Everyone you meet here would be happy to kill you”).

<sup>61</sup> Calibre Press, *Kyle Dinkheller Murdered in Officer Involved Shooting*, YOUTUBE (Apr. 10, 2013), <https://www.youtube.com/watch?v=mssNOhv1UMc> [[https://perma.cc/TS\\_X4-EHML](https://perma.cc/TS_X4-EHML)] (“The murder of Deputy Kyle Dinkheller (Georgia) with the captions as shown in Calibre Press Seminars”). As of August 2023, this YouTube video was viewed more than 800,000 times.

<sup>62</sup> Michael Sierra-Arevalo, *Police, Culture, and Inequality*, 48 AM. SOCIO. ASS’N FOOTNOTES, July–Aug. 2020, at 5.

<sup>63</sup> See, e.g., *LEO Armed Tactical Survival and Vehicle Operations*, REAL WORLD TACTICAL, <https://www.realworld-tactical.com/leo-armed-tactical-survival-and-vehicle-operations> [<https://perma.cc/5B7F-P7JC>] (Feb. 3, 2022) (describing the “real life focused firearms training” derived from a philosophy centered on “Survival of Urban Chaos through Armed Tactical Solutions”); Sierra-Arevalo, *supra* note 2, at 61.



“Killology” is a popular danger-narrative pedagogy that revolves around the metaphor of police as sheepdogs and essentializes forces of “good” (sheepdogs) and “evil” (wolves).<sup>64</sup> Just as sheep are always under threat by wolves, so too are law-abiding citizens understood to be under perpetual threat of criminal attack.<sup>65</sup> David Grossman, retired Army officer and Director of the Killology Research Group, describes killology as “the scholarly study of the destructive act”;<sup>66</sup> in a world where “the wolves feed on the sheep without mercy,” the sheepdog “live[s] to protect the flock and confront the wolf.”<sup>67</sup> Grossman has conducted trainings for officers in all fifty states, every federal law enforcement agency, and every branch of the armed forces, and his book, *On Killing*,<sup>68</sup> has been required reading at many law enforcement academies including the FBI Academy.<sup>69</sup>

Officers are trained to be hypervigilant, and the compliance tactics of police departments presuppose that an officer is under constant threat of attack. For example, officers are taught to touch the trunk of a car when approaching during a traffic stop to make sure the trunk is closed, ensuring that a gunman is not lying in wait to attack the officer.<sup>70</sup> Officers are trained to expect the “worst-case scenario . . . [to] expect someone to have a gun, to

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<sup>64</sup> See Dave Grossman, *On Sheep, Wolves and Sheepdogs*, in *ON COMBAT: THE PSYCHOLOGY AND PHYSIOLOGY OF DEADLY CONFLICT IN WAR AND PEACE*, 171, 181 (2d ed. 2007). This metaphor has been adopted widely, with *Law Enforcement Today* even publishing a quiz for officers to determine “What kind of sheepdog are you?” Jim McNeff, *What Kind of Sheepdog Are You?*, *L. ENF’T TODAY* (Mar. 3, 2019), <https://www.lawenforcementtoday.com/kind-sheepdog> [<https://perma.cc/9NS6-JRCE>].

<sup>65</sup> Of course, not all agree. See, e.g., Andrew Eppich, *Wolf at the Door: Issues of Place and Race in the Use of the “Knock and Talk” Policing Technique*, 32 *B.C. J.L. & SOC. JUST.* 119, 134 (2012) (casting police officers as the wolves).

<sup>66</sup> James David Dickson, *Michigan Association of Chiefs of Police Cancels Training over Controversial Speaker*, *DETROIT NEWS* (Apr. 27, 2021), <https://www.detroitnews.com/story/news/local/oakland-county/2021/04/27/michigan-association-chiefs-police-lt-col-dave-grossman-killology-research-group/4855812001> [<https://perma.cc/FU2Z-DZAL>].

<sup>67</sup> Grossman, *supra* note 64, at 181.

<sup>68</sup> DAVE GROSSMAN, *ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY* (2009).

<sup>69</sup> Isabella Murray, *How Iowa’s Police Officers Are Trained in ‘Killology,’* *IOWA STARTING LINE* (July 2, 2020), <https://iowastartingline.com/2020/07/02/how-iowa-police-officers-are-being-trained-in-killology> [<https://perma.cc/ND6S-B7SK>]. Grossman’s reach extends far beyond his training for law enforcement agencies. He trains community members about killology and writes children’s books, including the popular *Sheepdogs: Meet Our Nation’s Warriors*. DAVE GROSSMAN, *SHEEPDOGS: MEET OUR NATION’S WARRIORS* (2013).

<sup>70</sup> Sierra-Arevalo, *supra* note 2, at 20–21.

try and hurt us.”<sup>71</sup> Popular danger narrative pedagogies also emphasize the importance of hypervigilance. For example, “Seconds 2 Survive” is described as a “practical/tactical training seminar [that] helps law enforcement officers recognize and dispel complacency . . . [and] become more aware of various ‘pre-incident’ indicators to avoid—and survive—all kinds of threats.”<sup>72</sup>

### C. “WAR ON COPS” RHETORIC

In recent years, the danger narrative frame has become hyperbolic, with police and police advocates decrying a “war on cops.”<sup>73</sup> This rhetoric casts officers as under siege.<sup>74</sup> According to this frame, officers are highly susceptible to victimization by any nonofficer. Police work, the argument runs, is pervasively dangerous not only because of the constant threat of criminality, but because even “noncriminals” have turned on police. As elaborated in MacDonald’s 2016 book, *The War on Cops*, police are “embattled warriors doing terribly dangerous work on behalf of an unappreciative public.”<sup>75</sup>

According to Patrick Lynch, President of the 24,000-member Police Benevolent Association of the City of New York, “We as professionals are

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<sup>71</sup> *Id.* Officers are also taught to touch the car trunk for another reason consistent with the danger narrative: doing so imparts the officer’s fingerprints on the car and should the worst happen, that detail could be used to solve the crime. *Id.* at 21.

<sup>72</sup> *Seconds 2 Survive*, SAFETAC, <https://www.lawofficer.com/training> [<https://perma.cc/3KES-LWB6>].

<sup>73</sup> HEATHER MACDONALD, *THE WAR ON COPS: HOW THE NEW ATTACK ON LAW AND ORDER MAKES EVERYONE LESS SAFE* 4 (2016). Others have referred to the “Ferguson effect,” a term coined by St. Louis Police Chief Doyle Sam Dotson III, to describe an increase in violence against police after the 2014 shooting of Michael Brown. Dara Lind, *The “Ferguson Effect,” a Theory That’s Warping the American Crime Debate, Explained*, VOX (May 18, 2016), <https://www.vox.com/2016/5/18/11683594/ferguson-effect-crime-police> [<https://perma.cc/LL6U-P36F>].

<sup>74</sup> See, e.g., *Statement from National FOP President Patrick Yoes on Violent Crime Crisis*, NAT’L FRATERNAL ORDER OF POLICE (Jan. 27, 2022), <https://fop.net/2022/01/tatement-from-national-fop-president-patrick-yoes-on-violent-crime-crisis> [<https://perma.cc/7GBN-7HTS>] (“The alarming rise in violent crime and violence targeting law enforcement officers must be addressed now, not only at all levels of government but also by society, as we will all suffer the consequences if they go unaddressed.”).

<sup>75</sup> Justin Fox, Opinion, *How Dangerous Is Police Work?*, BLOOMBERG (June 23, 2020), <https://www.bloomberg.com/opinion/articles/2020-06-23/how-dangerous-is-police-work#xj4y7vzkg> [<https://perma.cc/Z8ES-53ET>]; see also Bianca Padro Ocasio, *Police Group Director: Obama Caused a “War on Cops”*, POLITICO (July 8, 2016), <https://www.politico.com/story/2016/07/obama-war-on-cops-police-advocacy-group-225291> [<https://perma.cc/PP75-RUQH>].

under assault.”<sup>76</sup> The Maryland FOP President echoed this sentiment in a 2020 letter to union members: “As you are well aware, law enforcement officers across the country are under attack. Here, in Maryland, many politicians are fueling a narrative of division; one that demonizes law enforcement officers and categorizes us as ‘the enemy.’”<sup>77</sup> Recent *Law Officer* op-eds have reinforced this idea, asserting that “[i]t’s open season on law enforcement,”<sup>78</sup> and posing the rhetorical question, “Who wants to be a police officer—in the era of media manipulation?”<sup>79</sup>

Police, according to this account, are victimized not only by ambush attacks but also by progressive ideology.<sup>80</sup> One FOP leader described a growing anti-police mindset as a politically driven, “new ‘hip’ progressive thing to do,” emphasizing that it is “as wrong and unfair as racial profiling and slavery.”<sup>81</sup> Police advocates have further claimed that the “war on cops” is being fought both on the nation’s streets and in the country’s legislative houses, with one union leader asserting that the “fight for our lives . . . [is] this upcoming legislative session.”<sup>82</sup>

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<sup>76</sup> Alana Abramson, “*We as Professionals Are Under Assault.*” *How the George Floyd Protests Are Shifting Power Away from Police Unions*, TIME (June 11, 2020), <https://time.com/5851499/police-unions-protests> [<https://perma.cc/FMP5-FFTG>].

<sup>77</sup> Clyde Boatwright, *Letter to MD FOP Membership*, MD. FRATERNAL ORD. OF POLICE (Nov. 25, 2020), <https://mdstatefop.org/wp-content/uploads/2020/11/letter-to-membership-11-25-2020.pdf> [<https://perma.cc/7TVH-447V>].

<sup>78</sup> Leonard Snipes, *It’s Open Season on Law Enforcement . . .*, L. OFFICER (April 26, 2021), <https://www.lawofficer.com/its-open-season-on-law-enforcement-is-it-time-to-leave> [<https://perma.cc/K4XG-KA8K>].

<sup>79</sup> Larry Casey, *Who Wants to Be a Police Officer—In the Era of Media Manipulation*, L. OFFICER (April 28, 2021), <https://www.lawofficer.com/who-wants-to-be-a-police-officer-in-the-era-of-media-manipulation> [<https://perma.cc/E73U-W7BW>]. In an article ruminating on the author’s sons declining to join the Chicago Police Department, a decision the author ultimately supports despite a 100-year family legacy with that department, the author criticizes media representation of policing and laments changes to the profession that mean “words will get you fired. Jokes will earn you a civil suit. Honest police work will cost you your job.” *Id.*

<sup>80</sup> Police leaders have also decried the policies of so-called progressive prosecutors, referring to them as “rogue prosecutors” and accusing them as threatening the safety of officers, and by extension, of the public at large. *See, e.g.*, National Fraternal Order of Police (@GLFOP), TWITTER (Feb. 1, 2022, 12:27 PM), <https://twitter.com/GLFOP/status/1488564637872361478> (“Violence against the police continues, with no end in sight. As long as rogue prosecutors are in office, no one is safe—not law-abiding citizens, not police officers.”).

<sup>81</sup> Allegany Sheriff’s FOP Lodge 144, *supra* note 56.

<sup>82</sup> Boatwright, *supra* note 77; *see also National FOP President Reflects on Dangers Law Enforcement Faced in 2021*, *supra* note 54 (“America’s law enforcement is under attack—physically, professionally, rhetorically.”).

D. LEGISLATING POLICE DANGER AND THE EMERGENCE OF  
“WARRIOR–VICTIMS”

Predictably, law enforcement leaders have used the danger narrative as leverage when justifying their higher salaries and pensions compared with other public employees and opposing any cuts to officer benefits.<sup>83</sup> In recent legislative sessions, however, a new trend has emerged: police advocates have begun wielding the danger narrative to seek legal protections for police by claiming their status as “victims,” explicitly identifying officers as members of a vulnerable group.

1. “Blue Lives Matter” Laws

The Blue Lives Matter movement has attempted to flip the script on the foundational rhetoric of the Movement for Black Lives. Instead of the narrative of Black vulnerability in the face of police violence, this movement asserts the narrative of police vulnerability in the face of the “war on cops.”<sup>84</sup>

Police advocates rely on the danger narrative to justify passage of Blue Lives Matter laws, which seek to include law enforcement as a protected category in hate crime laws, alongside such categories as race, religion, and sexual identity.<sup>85</sup> These laws provide an increased criminal penalty for crimes against officers that are motivated by prejudice.<sup>86</sup> Since 2016, nearly fifty Blue Lives Matter hate crime laws have been introduced in twenty states and in Congress.<sup>87</sup> In May 2016, Louisiana became the first state to pass a Blue Lives Matter law.<sup>88</sup> Governors in Kentucky, Mississippi, and Texas also have

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<sup>83</sup> Andrew Ford, Agnes Chang, Jeff Kao & Agnel Philip, *How the Police Bank Millions Through Their Union Contracts*, PROPUBLICA (Feb. 8, 2021, 5:00 AM), <https://www.propublica.org/article/new-jersey-police-contracts> [https://perma.cc/6BZX-GMHY] (noting that advocates for police have provided similar justifications for high payouts to retired officers—“the dangers and challenges of police work justify the price”).

<sup>84</sup> In doing so, police advocates endeavor to divert the focus from incidents of police killings to that of police being killed or seriously injured.

<sup>85</sup> See generally Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 868 (2014). For a comparison of state hate crime statutes, see *id.* at 921–26.

<sup>86</sup> Notably, all fifty states already mandate more severe punishment for attacks on officers such that blue lives matter hate crime laws do not add practical protections. Thus, the sole purpose of these laws is symbolic. For example, in Louisiana, “The state automatically classifies cop-killing as first-degree murder—a charge that could result in the death penalty if convicted—even when it’s not premeditated. Assaulting or battering a police officer also comes with a harsher charge.” Julia Craven, *Louisiana’s New “Blue Lives Matter” Law on Cop Killers Is Actually Pretty Redundant*, HUFFPOST (May 27, 2016), <https://www.huffpost.com/entry/louisiana-hate-crime-police> [https://perma.cc/PZ3V-YPAS].

<sup>87</sup> Gail Mason, *Blue Lives Matter and Hate Crime Law*, 12 RACE & JUST. 411, 415 (2020).

<sup>88</sup> LA. STAT. ANN. § 14:107.2 (2016).

signed Blue Lives Matter laws,<sup>89</sup> and these laws are pending in numerous other states.<sup>90</sup>

Proponents of Blue Lives Matter laws deploy “war on cops” rhetoric, stressing that officers are threatened not only by the inherent danger of their jobs but also because of their identity as officers. Chuck Canterbury, national president of the Fraternal Order of Police, has described “[t]he vitriol, the hateful screeds and statements of those we are sworn to protect and defend, as well as public calls to kill and injure police officers,” warning of “a very real and very deliberate campaign to terrorize our nation’s law enforcement officers.”<sup>91</sup>

Legislative testimony in support of Blue Lives Matter laws cast officers as identity group members who are clearly identifiable and subject to group-based animus. Rep. Alex Monsour, the sponsor of Mississippi’s bill explained, “We are living in a day where law enforcement, who used to be so respected, it seems many of them have a target on their back.”<sup>92</sup> Public testimony on behalf of California’s Coalition of Law Enforcement Associations further illustrates:

In the past where there has been violence against police officers, that violence is transactional, it arises out of an attempt to make an arrest. But what you are seeing now

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<sup>89</sup> KY. REV. STAT. ANN. § 532.031 (West 2017); MISS. CODE ANN. § 99-19-305 (2018); TEX. CODE CRIM. PROC. ANN. art. 42.014 (West 2017). In 2019, Utah strengthened its hate crimes law (which, until then, did not specify any protected classes) to cover various protected classes, including law enforcement; however, the legislation was not referred to as a Blue Lives Matter bill, nor did it receive attention as such. See UTAH ANN. CODE § 76-3-203.14 (West 2019); Bob Bernick, *Herbert Signs Hate Crimes Bill*, UTAH POL’Y (May 4, 2021), <https://utahpolicy.com/archive/19971-herbert-signs-hate-crimes-bill> [<https://perma.cc/7F35-VDQE>].

<sup>90</sup> Max Kutner, *Texas Made Attacking Cops a Hate Crime; These States Could Be Next*, NEWSWEEK (June 21, 2017), <https://www.newsweek.com/police-hate-crime-laws-blue-lives-matter-texas-627736> [<https://perma.cc/5J49-KPVJ>].

<sup>91</sup> Chuck Canterbury, *Statement of Fop President Chuck Canterbury on Recent Violence Targeting Law Enforcement Officers*, FRATERNAL ORD. OF POLICE, [https://www.fopohio.org/index.cfm?zone=/unionactive/view\\_article.cfm&HomeID=517022](https://www.fopohio.org/index.cfm?zone=/unionactive/view_article.cfm&HomeID=517022). Chuck Canterbury emphasized in his letter to President Obama that “Americans who choose to be law enforcement officers, who choose to serve their communities and put their lives on the line for their fellow citizens, find themselves hunted and targeted just because of the uniform they wear.” Kutner, *supra* note 90 (quoting Chuck Canterbury, Letter from National FOP President Canterbury to President Obama (Feb. 12, 2016)).

<sup>92</sup> Mason, *supra* note 87, at 419; see Geoff Pender, *‘Blue Lives Matter’ Bill Sent to Governor*, CLARION-LEDGER (Mar. 16, 2017, 2:09 PM), <https://www.clarionledger.com/story/news/politics/2017/03/16/blue-lives-matter/99253428> [<https://perma.cc/UB5S-64ND>] (“The original measure, House Bill 645, authored by Rep. Alex Monsour, R-Vicksburg, would have tripled penalties for any violent crimes against first responders.”).

is categorical violence against officers, where officers are ambushed . . . simply because of the category of the group they're in.<sup>93</sup>

## 2. “Back the Blue” Laws

In response to the protests following the police killing of George Floyd, police advocates, relying on the danger narrative, began introducing “Back the Blue” laws, also known as “anti-riot” laws.<sup>94</sup> These laws are grounded in claims that existing protections are insufficient to protect police from the dangers they encounter during “riots.” Police are cast as victims, endangered by “rioters,” and thus in need of protection. Many of these laws are also direct responses to calls to defund police departments, and their supporters further deploy the danger narrative to preempt local municipalities from trying to cut police budgets.<sup>95</sup>

Back the Blue bills have been introduced in forty-five states and, to date, thirty-one have been signed into law.<sup>96</sup> For example, Florida’s 2021 “Back the Blue” law<sup>97</sup> created a new offense of “mob intimidation”—defined as when three or more people act “with a common intent, to compel or induce, or attempt to compel or induce, another person by force, or threat of force, to do any act or to assume or abandon a particular viewpoint.”<sup>98</sup> Supporters emphasized that this law would protect the “brave men and women in law

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<sup>93</sup> Mason, *supra* note 87, at 418.

<sup>94</sup> E.g., Stephen Owsinsk, *Florida Enacts Anti-Riot Bill, Backing the Blue and Bolstering Public Safety Principles*, NAT’L POLICE ASS’N (Apr. 21, 2021), <https://nationalpolice.org/florida-enacts-anti-riot-bill-backing-the-blue-and-bolstering-public-safety-principles> [<https://perma.cc/A2VG-3XWM>]. Critics argue that these laws would be more aptly termed “anti-protest” laws and serve mainly to make it easier for police to arrest peaceful protesters. Rob Boshart, *Reynolds Signs ‘Back the Blue’ Law to Support Police, Increase Punishments for Protest Crimes*, GAZETTE (June 17, 2021), <https://www.thegazette.com/state-government/reynolds-signs-back-the-blue-law-to-support-police-increase-punishments-for-protest-crime>; *ACLU of Florida Condemns Passage of HB1, the Anti-Protest Bill, in the Full Senate*, ACLU FLA. (Apr. 15, 2021), <https://www.aclufi.org/en/press-releases/aclu-florida-condemns-passage-hb1-anti-protest-bill-full-senate> [<https://perma.cc/5YKH-LL5U>].

<sup>95</sup> See, e.g., An Act Relating to Combatting Public Disorder, H.B. No. 1, 2021 Fla. Sess. L. Serv., Ch. 2021-6, 27th Leg., 1st Reg. Sess. (2021) (allowing “specified elected officials to file an appeal to the Administration Commission if the governing body of a municipality makes a specified reduction to the operating budget of the municipal law enforcement agency”).

<sup>96</sup> *U.S. Protest Law Tracker*, INT’L CTR. FOR NOT-FOR-PROFIT L., <https://www.icnl.org/usprotestlawtracker> [<https://perma.cc/KJ54-LULB>].

<sup>97</sup> Boshart, *supra* note 94.

<sup>98</sup> FLA. STAT. § 784.0495(1) (2021).

enforcement”<sup>99</sup> with one state senator explaining that enacting it was “the least we could do to have [law enforcement’s] back during these challenging times.”<sup>100</sup>

Florida’s law provides additional penalties for crimes occurring during a “riot” and against law enforcement officers. As an example, it makes battery of a law enforcement officer “in furtherance of a riot or aggravated riot” punishable by a mandatory minimum of six months in prison.<sup>101</sup> The law defines a riot as when a person willfully participates in a violent public disturbance involving three or more people “acting with a common intent to assist each other in violent and disorderly conduct” that results in injury to another, damage to property, or imminent danger of injury to another person or property.<sup>102</sup>

As another example, Iowa’s 2021 “Back the Blue” law reclassifies rioting from a misdemeanor to a felony and increases penalties for blocking streets and highways and destroying public property.<sup>103</sup> Iowa’s law also explicitly criminalizes shining lasers at police and makes drivers who hit protestors immune from civil liability.<sup>104</sup> In support of enacting this legislation, Iowa’s Governor Reynolds explained:

I made it clear in my Condition of the State Address that Iowa’s law enforcement will always have my respect, and I will always have their back . . . . Today’s bill embodies that commitment in a historic way. The public peace is too important, and the safety of our officers too precious, to tolerate destructive behavior.<sup>105</sup>

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<sup>99</sup> Michael Levenson, *As Protests Against Police Violence Surge, Florida Passes a Bill to Combat ‘Public Disorder,’* N.Y. TIMES (April 15, 2021), <https://www.nytimes.com/2021/04/15/us/politics/florida-public-disorder-bill-police.html>.

<sup>100</sup> A.G. Gancarski, *Gov. DeSantis Signs Florida’s Anti-Riot Bill, Cites Chauvin Trial*, FLA. POLS. (Apr. 19, 2021), <https://floridapolitics.com/archives/421571-antiriot> [https://perma.cc/2UXK-FV4F].

<sup>101</sup> FLA. STAT. ANN. § 784.07(2)(b) (2021).

<sup>102</sup> *Id.* § 870.01 (2021).

<sup>103</sup> Act of June 17, 2021, S.F. 342, 89th Gen. Assemb. (Iowa 2021) (codified at IOWA CODA § 321.366A(2) (2021)).

<sup>104</sup> *Id.* § 40 (codified at IOWA CODE § 708.3A(1) (2021)); *id.* § 51 (codified at IOWA CODE § 321.366A(2) (2021)). Like Blue Lives Matter laws, this law is largely symbolic. It applies only to drivers who hit protestors while driving with due care, yet a driver driving with due care would not face any liability in the first place.

<sup>105</sup> *Flanked by Iowa Law Enforcement, Gov. Reynolds signs “Back the Blue Act” into law*, OFF. OF THE GOV. OF IOWA (June 17, 2021), <https://governor.iowa.gov/press-release/flanked-by-iowa-law-enforcement-gov-reynolds-signs-”back-the-blue-act”-into-law> [https://perma.cc/XBQ5-9ULT].

### 3. *Marsy's Laws*

Police have also asserted their status as “victims” to benefit from the legal protection afforded by Marsy’s Laws.<sup>106</sup> These laws, named after Marsy Nicholas, a University of California senior who was murdered by her ex-boyfriend in 1983, “prevent[] the disclosure of information or records that could be used to locate or harass the victim or the victim’s family, or which could disclose confidential or privileged information of the victim.”<sup>107</sup>

In recent years, some police officers have invoked these laws to prevent the release of their names and identifying information in use-of-force cases. These officers claim that they were threatened—thus rendered victims—and that their use of force was in self-defense.<sup>108</sup> When invoking a state’s Marsy’s Law, officers have referenced both the threat they face from criminals and the threat they experience because of the “war on cops.”<sup>109</sup>

Some police departments regularly use Marsy’s Law to avoid naming officers in “routine” incidents—such as a suspect “walking aggressively or reaching into a pocket.”<sup>110</sup> Police departments also invoke Marsy’s Law to

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<sup>106</sup> *Marsy’s Story*, MARSY’S LAW, [https://www.marsyslaw.us/marsys\\_story](https://www.marsyslaw.us/marsys_story) [https://perma.cc/DU9D-GZDT].

<sup>107</sup> *See, e.g.*, FLA CONST. art. 1, § 16(b)(5) (2018). As of 2023, these laws had been enacted in Iowa, Idaho, Florida, Georgia, Kentucky, Maine, Mississippi, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, and Wisconsin; Marsy’s Law for All, LLC, is among the groups working to include this legislation in each state’s constitution. *Marsy’s Story*, *supra* note 106. California billionaire Henry Nicholas (Marsy’s brother) has pursued a nationwide effort to enact victims’ rights legislation, for example, contributing more than \$2 million to pass such legislation in South Dakota. Seth Tupper, *Marsy’s Law Shields Name of Deputy Who Shot Suspect*, RAPID CITY J. (Dec. 7, 2018), <https://rapidcityjournal.com/news/local/marsys-law-shields-name-of-deputy-who-shot-suspect/article> [https://perma.cc/7GTR-8PV2].

<sup>108</sup> *See, e.g.*, Fla. Police Benevolent Ass’n v. Tallahassee, 314 So. 3d 796, 796 (Fla. Dist. Ct. App. 2021). While the use of Marsy’s Law to protect the anonymity of officers in use-of-force cases has been met with substantial controversy, none of the twelve states with Marsy’s Laws exempts on-duty police officers from the protection of these laws. Kenny Jacoby & Ryan Gabrielson, *How Cops Who Use Force and Even Kill Can Hide from the Public*, PROPUBLICA (Oct. 29, 2020), <https://www.propublica.org/article/how-cops-who-use-force-and-even-kill-can-hide-their-names-from-the-public> [https://perma.cc/MQ65-XBYZ].

<sup>109</sup> Fla. Police Benevolent Ass’n, 314 So. 3d at 796.

<sup>110</sup> *Id.* (documenting the use of Marsy’s Law by police departments in Florida and South Dakota). A ProPublica investigation found that, among other uses, Marsy’s Law had been invoked “where an officer was hit on the shoulder by the wire of a suspect’s pulse monitor while restrained in a hospital bed” and “in a 2020 case involving two Palm Beach County Sheriff’s Office deputies who shot a twenty-year-old man who was armed with a knife, saying the officers were victims of assault from the man they fatally shot.” Angie DiMichele, *Marsy’s Law Is Meant to Protect Crime Victims. So Why Is It Being Used to Shield the Name of a Boynton Officer Who Chased a Thirteen-Year-Old Boy Who Died?*, S. FLA. SUN SENTINEL



prevent the disclosure of officer names in cases of police shootings. In Florida, at least seven police agencies have withheld the names of officers who killed civilians.<sup>111</sup>

In a 2020 case involving the police shooting of Tony McDade, a Black transgender man, the Florida Police Benevolent Association invoked Marsy's Law to prevent the release of the names of the two officers involved and their identifying information.<sup>112</sup> The Association maintained that the officers shot McDade in self-defense, arguing that Marsy's Law applied in this case since the officers were threatened with deadly force and thus rendered crime victims.<sup>113</sup> The Association's court filing asserted further that it was necessary to shield the identities of the officers in this case since they reasonably feared for their safety owing to the mounting public outcry over police violence following the killing of George Floyd.<sup>114</sup>

In another high-profile Florida case, a police officer invoked Marsy's Law after the thirteen-year-old boy he was chasing crashed his dirt bike and died.<sup>115</sup> The Boynton police department announced on December 29, 2021—three days after the boy's death—that the officer had received threats since the crash and that Marsy's Law applied in this case:

The department has taken the time to consult with the City Attorney's Office, and based on their advice, Marsy's Law does apply to this officer in both the threats case and Sunday's crash . . . . Therefore, in order to comply with the law, the department will not be releasing the name of the officer involved in the crash.<sup>116</sup>

In South Dakota, Marsy's Law has been used to withhold the names of law enforcement officers who allege they were attacked before shooting a

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(Jan. 26, 2022), <https://www.sun-sentinel.com/local/palm-beach/boynton-beach/fl-ne-boynton-beach-police-marsys-law-20220126-nec25sefyzgapjkr2lczrljv4-story.html>.

<sup>111</sup> Jacoby & Gabrielson, *supra* note 108 (including police agencies in Broward, Sarasota, Manatee, Charlotte, Hernando, Tampa, and Tallahassee). At least fifteen of Florida's thirty largest police departments have invoked Marsy's Law to hide names of on-duty officers. Kenny Jacoby & Ryan Gabrielson, *Marsy's Law Was Meant to Protect Crime Victims. It Now Hides the Identities of Cops Who Use Force.*, USA TODAY (Oct. 29, 2020), <https://www.usatoday.com/in-depth/news/investigations/2020/10/29/police-hide-their-identities-using-victims-rights-bill-marsys-law/3734042001> [https://perma.cc/Q9LM-VKHH]. The question of whether Marsy's Law can be used to protect officers acting in their official capacity is currently pending before the Florida Supreme Court after a Leon County circuit judge's 2020 ruling that Marsy's Law did not apply in such cases was overruled in 2021 by a Florida appeals court. DiMichele, *supra* note 110.

<sup>112</sup> *Id.* (claiming that, because the police officer was the victim of assault, the officer was entitled to invoke the privacy privilege provided by Marsy's Law).

<sup>113</sup> *Id.*

<sup>114</sup> Jacoby & Gabrielson, *supra* note 108.

<sup>115</sup> DiMichele, *supra* note 110.

<sup>116</sup> *Id.*

suspect. For example, in 2018, the Pennington Sheriff's office issued a statement explaining that the name of the deputy sheriff who shot and killed a suspect would not be released.<sup>117</sup> In another incident that same year, a South Dakota highway patrol trooper shot and wounded a man after he allegedly "disobeyed the trooper's commands" and "tackled" the trooper.<sup>118</sup> The trooper invoked Marsy's Law and his name was not released.<sup>119</sup> One month later, the Attorney General's Office announced that the shooting was justified and cleared the trooper of any wrongdoing.<sup>120</sup>

## E. DANGER-NARRATIVE JURISPRUDENCE

### 1. *Judicial Deference to the "Reasonable Officer"*

The Supreme Court has explicitly endorsed the danger narrative. The Court has referred to certain kinds of officer-civilian interactions as inherently threatening to officers. For example, the Court understands traffic stops to be "especially fraught with danger to police officers."<sup>121</sup> This is why an officer may require a driver, and by extension any passenger, to exit a stopped vehicle.<sup>122</sup> In weighing the interests at stake, the Court has given priority to the government's "'legitimate and weighty' interest in officer safety," finding this interest to outweigh the "*de minimus*' additional intrusion of requiring a driver, already lawfully stopped, to exit the vehicle."<sup>123</sup> Other aspects of policing that the Court has identified as

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<sup>117</sup> Tupper, *supra* note 107; *see also* Jeanne Hruska, *In South Dakota, Police Officers Involved in Shootings Are Claiming They Have a Right to Privacy as Crime Victims*, ACLU (Dec. 27, 2018), <https://www.aclu.org/blog/criminal-law-reform/reforming-police/south-dakota-police-officers-involved-shootings-are> [https://perma.cc/277E-E465].

<sup>118</sup> Danielle Ferguson, *Union County Officer-Involved Shooting Ruled as Justified, AG Says*, ARGUS LEADER (Oct. 16, 2018), <https://www.argusleader.com/story/news/crime/2018/10/16/union-county-officer-involved-shooting-ruled-justified-ag-says/1659876002> [https://perma.cc/72QG-RWV2].

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Arizona v. Johnson*, 555 U.S. 323, 330 (2009) (quoting *Michigan v. Long*, 463 U.S. 1032 (1983)).

<sup>122</sup> *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) (holding that an officer may require a driver to exit a stopped vehicle); *Maryland v. Wilson*, 519 U.S. 408 (1997) (holding that the *Mimms* rule applied to passengers as well as to drivers).

<sup>123</sup> *Johnson*, 555 U.S. at 311 (quoting *Mimms*, 434 U.S. at 110, 111 (accepting the State's argument that "this practice was adopted as a precautionary measure to afford a degree of protection to the officer and that it may be justified on that ground"))).

especially dangerous include investigative detentions,<sup>124</sup> approaching stopped vehicles,<sup>125</sup> and entering homes unannounced.<sup>126</sup>

In *Graham v. Connor*,<sup>127</sup> the most cited criminal procedure case in U.S. history, the Court observed that “police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain and rapidly evolving—about the amount of force that is necessary in a particular situation.”<sup>128</sup> The *Graham* Court admonished lower courts not to second-guess officers’ judgments with the benefit of hindsight, establishing the “objective reasonableness standard” for considering claims against officers for excessive force.<sup>129</sup> The “reasonable officer” standard incorporates professional police norms and departmental training practices.<sup>130</sup> Since police training is infused with danger-narrative pedagogies,<sup>131</sup> the danger narrative infuses understandings of the reasonable officer. Judges, in adopting the reasonableness barometer from police, also adopt the sweeping danger narrative.

This standard largely precludes judicial interrogation of police practices, as well as any judicially imposed mandate for police to revise departmental protocols and training requirements in the wake of an adverse event.<sup>132</sup> For example, in *Plumhoff v. Rickard*, the Court considered whether use of force was reasonable when officers shot and killed a fleeing suspect who had been pulled over for a damaged headlight.<sup>133</sup> Citing the *Graham*

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<sup>124</sup> *Michigan v. Long*, 463 U.S. 1032, 1047 (1983).

<sup>125</sup> *Mimms*, 434 U.S. at 110.

<sup>126</sup> *Hudson v. Michigan*, 547 U.S. 586, 594 (2006). Courts do not make assumptions about danger solely in the criminal investigation context. *See, e.g.*, *Caniglia v. Strom*, 953 F.3d 112, 123 (2020) (quoting *United States v. Rodriguez-Morales*, 929 F.2d 780, 785 (1st Cir. 1991)) (justifying the court’s expansion of the community caretaking exception as necessary to give police officers “elbow room to take appropriate action when unforeseen circumstances present some transient hazard that requires immediate attention”).

<sup>127</sup> *Graham v. Connor*, 490 U.S. 386 (1989).

<sup>128</sup> *Id.* at 386; *see also* *Roberts v. Louisiana*, 431 U.S. 633, 636 (1977) (“We recognize that the life of a police officer is a dangerous one.”).

<sup>129</sup> *Graham*, 490 U.S. at 396–97.

<sup>130</sup> Hoang Pham, *What Is the Reasonable Officer Standard for Police Use of Force?*, STAN. CTR. FOR RACIAL JUST. (Apr. 21, 2022), <https://law.stanford.edu/2022/04/21/democratizing-knowledge-what-is-the-reasonable-officer-standard-for-police-use-of-force> [<https://perma.cc/S2KW-VSQD>].

<sup>131</sup> *See supra* Section I.B.

<sup>132</sup> For discussion of how the *Garner* dissent laid the groundwork for the Court’s highly deferential decision in *Graham*, see Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 228–32 (2017).

<sup>133</sup> *Plumhoff v. Rickard*, 572 U.S. 765, 765 (2014).

language above, the Court concluded that the officers behaved reasonably.<sup>134</sup> As a general principle, so long as officers comply with departmental expectations, those officers will not be sanctioned. A 2019 study found that “when people file lawsuits alleging that police used excessive force, federal courts often reference or defer to police departments’ use-of-force policies as the appropriate legal interpretation of ‘reasonable.’”<sup>135</sup>

## 2. *Danger, Reasonableness, and the Jury*

Jurors also tend to internalize the danger narrative and to use the officer’s vantage point as the baseline for a reasonableness judgment.<sup>136</sup> Studies have found that jurors believe officers who claim they felt threatened and that “if they felt threatened, their actions must have been reasonable.”<sup>137</sup> According to one account:

In numerous cases, videos of cops shooting suspects who seem to be complying, who are not resisting, who are running away, fail to convince triers of fact that the police conduct was unreasonable. The officers, though unreasonably, may well have actually feared for their own lives. And jurors in excessive force cases reported that, videos or no videos, “they had been swayed most of all by officers’ [own] assertions that they feared for their lives.”<sup>138</sup>

Popular media portrayals of police–civilian interactions may cultivate and reinforce this deferential standard.<sup>139</sup> For example, research findings have demonstrated that viewers of crime dramas are more likely to believe that the police only use force when necessary.<sup>140</sup>

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<sup>134</sup> *Id.* at 775.

<sup>135</sup> Osagie K. Obasogie & Zachary Newman, *The Endogenous Fourth Amendment: An Empirical Assessment of How Police Understandings of Excessive Force Become Constitutional Law*, 104 CORNELL L. REV. 1281 (2019) (describing findings of study examining use-of-force policies in the seventy-five largest U.S. cities).

<sup>136</sup> *See, e.g.*, Cynthia Lee, *The Path Forward*, GEO. WASH. L. REV. SYMP. (2020) (discussing the inconsistencies of use-of-force statutes across states and explaining that, regardless of a statute’s wording, jurors tend to find officers’ decisions reasonable so long as the officer claimed to feel threatened).

<sup>137</sup> Susan Bandes, *Video, Popular Culture, and Police Excessive Force: The Elusive Narrative of Over-Policing*, 2018 U. CHI. L.F. 1, 12 (2019).

<sup>138</sup> *Id.* at 11.

<sup>139</sup> *See, e.g.*, Alyssa Rosenberg, *In Pop Culture, There Are No Bad Police Shootings*, WASH. POST (Oct. 26, 2016), (arguing that TV and movie portrayals of police shootings have reinforced a notion that “there’s almost no such thing as a bad shooting by a police officer”).

<sup>140</sup> Kathleen M. Donovan & Charles F. Klahm, *The Role of Entertainment Media in Perceptions of Police Use of Force*, 42 CRIM. JUST. & BEHAV. 1261, 1261 (2015).

## II. DANGER NARRATIVE PATHOLOGIES

Despite its dominance, the danger narrative is deeply flawed. This Part critically examines this narrative, revealing its lack of empirical support and its normative failings—specifically, how it threatens public safety, impedes police accountability, and casts police in opposition to those policed, undermining prospects for effective reforms.

### A. EMPIRICAL FLAWS

#### 1. *False Claims of Increased Danger*

Empirics do not support the “war on cops” thesis, which posits that an increasingly widespread hatred of police among members of the public has led to more hazardous working conditions for officers. Instead, empirical findings demonstrate that policing has become substantially less dangerous over time.<sup>141</sup> From 1970 to 2016, there has been a nationwide decrease in both the overall number and per capita rate of assaults and killings of officers.<sup>142</sup>

Examining police officer line-of-duty deaths over almost half a century, researchers found that “the number of line-of-duty deaths has declined dramatically over the last five decades.”<sup>143</sup> This study considered both

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<sup>141</sup> There has been a spate of recent news stories about an increase in felonious killings of officers in 2021. *E.g.*, Emma Tucker & Priya Krishnakumar, *Intentional Killing of Police Officers Reach 20-Year High*, CNN (Jan. 13, 2022), <https://www.cnn.com/2022/01/13/us/police-officers-line-of-duty-deaths/index.html> [<https://perma.cc/329B-5XNS>]. The numbers, however, are still small, and they represent a significantly smaller number of police deaths than those caused by COVID-19 during this time. *Id.* Salience bias, which is the “tendency to focus on items or information that are more noteworthy while ignoring those that do not grab our attention,” helps to explain how, even though the number of felonious killings of police has remained relatively low, exposure to news of this violence is salient and can make one feel more vulnerable. *Why Do We Focus on Items or Information That Are More Prominent and Ignore Those That Are Not?*, DECISION LAB, <https://thedecisionlab.com/reference-guide/psychology/salience> [<https://perma.cc/LR2E-RNMC>] (citing leading behavioral economist, Richard Thaler, who has explained that vivid and easily imagined causes of death (for example, tornadoes) often receive inflated estimates of probability, and less vivid causes (for example, asthma attacks) receive low estimates, even if they occur with a far greater frequency (here, by a factor of twenty)).

<sup>142</sup> John Shjarback & Edward Maguire, *Extending Research on the “War on Cops”: The Effects of Ferguson on Nonfatal Assaults Against U.S. Police Officers*, 67 CRIME & DELINQ. 1, 3 (2021). This trend is consistent with the decline of violence in society overall. STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* xxi (2011).

<sup>143</sup> Michael White, Lisa Dario & John Shjarback, *Assessing Dangerousness in Policing: An Analysis of Officer Deaths in the United States, 1970–2016*, 18 CRIMINOLOGY & PUB. POL’Y 11, 11 (2019). It still bears mention, however, that police in the aggregate face a higher

felonious and non-felonious deaths, and it found that there was an overall decline of 75% during this period, “from a high of 81 per 100,000 officers in 1970 to 18–20 per 100,000 the last 5 years (2012–2016).”<sup>144</sup> During this time, both felonious and non-felonious deaths dropped significantly, with the rate of felonious deaths dropping by 80% and the rate of non-felonious deaths dropping by 69%.<sup>145</sup> Notably, this dramatic decline was unaffected by the national rate of violent crime. From 1970 through the mid-1990s, “the violent crime rate increased steadily and significantly,” while during this same time, “the number of officer deaths declined significantly.”<sup>146</sup>

Empirics also do not support claims—core to the “war on cops” thesis—of a drastically increased threat of ambush by citizens who seek vengeance in response to police killings they believe were wrongful. Indeed, data from 1970 to 2018 revealed that “the annual rates of ambush killings of police have declined by more than 90% since 1970.”<sup>147</sup> Whereas police leaders, including the national president of FOP, have relied on MacDonald’s claims of a spike in violence against officers—pointing to an increase in the killing of police officers from 2013 to 2014 (from 27 to 51 killings) as “proof” of a “war on cops”—such claims are based on a manipulation of these statistics.<sup>148</sup> A closer look reveals that the 27 officers killed in 2013 marked a 35-year low, and that the average over the past decade of feloniously killed officers was 51, the same number of officers killed in 2014.<sup>149</sup>

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risk of danger in their jobs than non-police officers. Shjarback & Maguire, *supra* note 142, at 8 (noting that, compared to the averages for the general U.S. workforce, police officers’ occupational fatality statistics are higher—13.7 job-related fatalities per 100,000 full-time workers compared to 3.5 fatalities for the U.S. workforce as a whole and 0.7 fatalities for professional and related occupations).

<sup>144</sup> White, Dario & Shjarback, *supra* note 143, at 23.

<sup>145</sup> *Id.* Felonious deaths dropped from 52 per 100,000 in 1970 to an average of 10 per 100,000 from 2011 through 2016, while non-felonious deaths dropped from 29 per 100,000 in 1970 to an average of 9 per 100,000 from 2011 through 2016. *Id.*

<sup>146</sup> *Id.* at 28.

<sup>147</sup> Michael White, *Ambush Killings of the Police, 1970–2018: A Longitudinal Examination of the “War on Cops” Debate*, 23 POLICE Q. 451, 451 (finding that, despite a spike in ambushes in 2016 and 2018, “interrupted time series analysis indicates no statistically significant increase post-2013”); see also Michael Sierra-Arevalo & Justin Nix, *Gun Victimization in the Line of Duty: Fatal and Nonfatal Assaults on Police Officers in the United States, 2014–2019*, 19 CRIMINOLOGY & PUB. POL’Y 1041, 1042 (2020) (finding no compelling evidence of a substantial increase in firearm assaults on police in recent years).

<sup>148</sup> Shjarback & Maguire, *supra* note 142, at 7.

<sup>149</sup> *Id.*

## 2. *False Claims of Pervasive Danger*

Existing data also fail to substantiate claims that policing is pervasively dangerous. Rather, these data show that risks in policing are contextual and contingent.

### a. Traffic Enforcement

Recent empirical findings about traffic stops undercut the danger narrative. This context is crucially important as “traffic stops are the most common way that civilians come into contact with the police.”<sup>150</sup> As part of their police academy training, trainees are shown “videos of the most extreme cases of violence against officers during routine traffic stops in order to stress that everyday police work can quickly turn into a deadly situation if they become complacent or hesitate to use force.”<sup>151</sup> However, while officers are trained to believe that “there is no such thing as a routine traffic stop,” recent data from the most comprehensive study on violence and traffic stops do not support the account that all traffic stops are potentially deadly encounters.<sup>152</sup>

Jordan Woods’ 2019 study found that, in every 6.5 million stops, one officer was feloniously killed, and that for each 361,111 stops, one officer was assaulted resulting in serious injury.<sup>153</sup> This study found further that, on the rare occasion when these stops resulted in injuries to officers, they were characterized by certain contextual factors—specifically, when officers order the driver or passengers out of the car, when the officer touches a driver or passenger, and when the officer searches the driver or passenger.<sup>154</sup>

### b. “High-Crime” Areas

Recent empirical findings also cast doubt on claims of pervasive danger based on police designation of “high-crime areas.” Officers classify certain areas as high crime, claiming that they (and others) are more likely to face danger in such areas. Courts, in turn, grant officers more discretion to arrest a person if the officer observes that person behaving “suspiciously” in a designated high-crime area.<sup>155</sup> Yet, a recent study by Ben Grunwald and Jeffrey Fagan found that police designations of high-crime areas are arbitrary

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<sup>150</sup> Jordan Blair Woods, *Autonomous Vehicles and Police De-Escalation*, 114 NW. L. REV. ONLINE 74, 76 (2019) (citing ELIZABETH DAVIS & LYNN LANGTON, U.S. DEP’T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2015 1 (Oct. 2018)).

<sup>151</sup> Woods, *supra* note 5, at 695.

<sup>152</sup> *Id.* at 637.

<sup>153</sup> *Id.* at 640 (basing these figures on a conservative estimate).

<sup>154</sup> *Id.* at 694.

<sup>155</sup> *Illinois v. Wardlaw*, 528 U.S. 119, 124 (2000) (noting that location in a high-crime area was a relevant factor to determine reasonable suspicion for a *Terry* stop).

and empirically unsupported, and that police substantially exaggerate the danger they face, claiming pervasive danger where such claims are unsubstantiated by the crime rate.<sup>156</sup>

Findings from this 2019 study revealed that police designations of high-crime areas are extremely broad and, in many cases, officers call nearly all blocks in a given city high crime.<sup>157</sup> The findings showed virtually no correlation between the actual crime rate and whether an area is designated high crime.<sup>158</sup> The “racial composition of the area” was more predictive than the crime rate as to whether an area was designated by police as high crime.<sup>159</sup> As for the presence of contraband when an officer refers to “high-crime area” as the rationale for a stop, such stops are “less or as likely to result in the detection of contraband.”<sup>160</sup> As the authors concluded, the designation of high-crime area, despite its endorsement by courts, is “haphazard at best and discriminatory at worst.”<sup>161</sup>

### c. Stops and Frisks

Empirical findings about “stop-and-frisk” practices also undercut police claims of pervasive danger. The law of “stop and frisk” is predicated on the danger narrative and concern for officer safety.<sup>162</sup> In *Terry v. Ohio*,<sup>163</sup> the Supreme Court rejected the probable cause standard for street stops in favor

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<sup>156</sup> Grunwald & Fagan, *supra* note 5, at 345 (conducting “the first empirical analysis of [Illinois v.] *Wardlow* by examining data on over two million investigative stops conducted by the New York Police Department from 2007 to 2012”).

<sup>157</sup> *Id.* at 350.

<sup>158</sup> *Id.*; see also Andrew Guthrie Ferguson & Damien Bernache, *The “High Crime Area” Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 AM. U. L. REV. 1587, 1590–91 (2008) (noting the lack of “objective, verifiable, or empirical data” to support the designation of high-crime area and that, instead, this designation serves as “magic words” that, when invoked by officers, yield the judicial finding of reasonable suspicion).

<sup>159</sup> Grunwald & Fagan, *supra* note 5, at 352; see also Robert J. Sampson & Stephen W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of ‘Broken Windows’*, 67 SOC. PSYCH. Q. 319, 332, 336 (2004) (finding that perceptions of disorder increase when a community is majority Black instead of majority white, even when the neighborhoods are otherwise similarly situated).

<sup>160</sup> Grunwald & Fagan, *supra* note 5, at 345.

<sup>161</sup> *Id.* (concluding that “*Wardlow* may have been wrongly decided”).

<sup>162</sup> At a time when crime was skyrocketing and “there was a major outbreak of rioting in many cities, including Washington D.C., in the wake of the assassination of Dr. Martin Luther King, Jr.,” the Court framed its stop-and-frisk jurisprudence through the danger-narrative lens, with a specific focus on danger facing officers patrolling the nation’s streets. See Earl C. Dudley, Jr., *Terry v. Ohio, The Warren Court, and the Fourth Amendment: A Law Clerk’s Perspective*, 72 ST. JOHN’S L. REV. 891, 892 (1998).

<sup>163</sup> 392 U.S. 1 (1968).



of the more police-deferential “reasonable suspicion” test, explaining that the “sole justification” for this shift was “the protection of the police officer and others nearby.”<sup>164</sup> The Court insisted that the officer’s ability to stop and frisk must be “reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.”<sup>165</sup>

Yet empirical studies of police stops have revealed an exceedingly high false positive rate. Research using 2008–2012 New York Police Department (NYPD) data revealed that in “43% of the approximately 300,000 [Criminal Possession of a Weapon] stops between 2011 and 2012, there was at most 1% chance of finding a weapon on the suspect.”<sup>166</sup> While officers flagged a “suspicious bulge” as the reason for about 10% of stops, guns were found in only 0.15% of all stops.<sup>167</sup> Indeed, “[f]or every sixty-nine stops that police officers justified specifically on the basis of a suspicious bulge, they found one gun.”<sup>168</sup> NYPD data dating back to 1968 also revealed an extremely high false positive rate: “out of the 4.4 million stops conducted in New York City since *Terry v. Ohio* was decided in 1968, no weapons were found in 98% of cases.”<sup>169</sup>

Data used in the Floyd litigation,<sup>170</sup> which challenged the constitutionality of NYPD’s stop-and-frisk practices, revealed that 88% of those individuals stopped ultimately were not charged with any crime.<sup>171</sup> A federal court found that the NYPD’s stop-and-frisk practices violated suspects’ Fourth and Fourteenth Amendment rights, noting that, “according to their own records and judgment, officers’ ‘suspicions’ were wrong nearly nine times out of ten.”<sup>172</sup> These stops had extremely low odds of finding criminal wrongdoing, but a highly racialized impact: “49% of the stops of

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<sup>164</sup> *Id.* at 33.

<sup>165</sup> *Id.*

<sup>166</sup> Sharad Goel, Justin M. Rao & Ravi Shroff, *Precinct or Prejudice? Understanding Racial Disparities in New York City’s Stop-and-Frisk Policy*, 10 ANNALS APPLIED STAT. 365, 366 (2016); see W. David Ball, *The Plausible and The Possible: A Bayesian Approach to the Analysis of Reasonable Suspicion*, 55 AM. CRIM. L. REV. 511, 513 (2017) (noting that this discrepancy is because “[w]hile [a] behavior [may be] consistent with criminal activity, it is also consistent with non-criminal activity”).

<sup>167</sup> *Floyd v. City of New York*, 283 F.R.D. 153, 168 (S.D.N.Y. 2012).

<sup>168</sup> *Id.*

<sup>169</sup> Josh Keyser, *Symposium 2020 Race, Class, Policing, and the Constitution*, GEO. WASH. L. REV. (OCT. 23, 2020), <https://www.gwlr.org/symposium-2020-race-class-policing-and-the-constitution> [<https://perma.cc/UR7S-QF89>] (summarizing Professor Julian Cook’s presentation in the symposium); see *Floyd v. City of New York*, 959 F. Supp. 2d 540 (2013) (scrutinizing NYPD data in the court’s 198-page opinion).

<sup>170</sup> *Floyd*, 959 F. Supp. 2d.

<sup>171</sup> *Id.* at 559.

<sup>172</sup> *Id.*

blacks fell below the 1% probability threshold, as did 34% of the stops of Hispanics, compared with only 19% of the stops of whites.”<sup>173</sup>

Statistics from the years following the Floyd litigation belied claims of a relationship between crime and stop-and-frisk.<sup>174</sup> In New York during this time, both violent crime and property crime fell consistently, while the number of stops both increased and decreased during the same time period.<sup>175</sup> While these data exposed the lack of relationship between crime and stop-and-frisk, they have further confirmed the relationship between race and stop-and-frisk. The racial disparity in stops has remained “stark”—in 2020, for example, New Yorkers of color made up “91% of those stopped.”<sup>176</sup>

## B. INCREASED RISK OF VIOLENCE

### 1. *Self-Fulfilling Danger Prophecies*

When officers are primed to anticipate dangerous situations—to “expect the worse”—they are more likely to perceive their circumstances as dangerous, even if they are not actually at risk. An overemphasis on danger generates increased risk of harm, both to police and to the persons they police.<sup>177</sup> Expectation bias—one among many cognitive biases relevant to policing—helps to explain this rift between the actual and perceived risks of policing. Also called the “observer-expectancy effect,” this phenomenon explains the human tendency to perceive what we expect to perceive,<sup>178</sup> often

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<sup>173</sup> Sharad Goel, Maya Perelman, Ravi Shroff & David Alan Sklansky, *Combatting Police Discrimination in the Age of Big Data*, 20 NEW CRIM. L. REV., 181, 188 (2017).

<sup>174</sup> *Crime Falls as New York Abandons Stop-and-Frisk*, EQUAL JUST. INITIATIVE (Jan. 19, 2018), <https://eji.org/news/new-york-crime-falls-as-police-end-stop-and-frisk> [<https://perma.cc/AH99-ZGPW>].

<sup>175</sup> *Id.*; James Cullen, *Ending New York’s Stop-and-Frisk Did Not Increase Crime*, BRENNAN CTR. FOR JUST. (Apr. 11, 2016), <https://www.brennancenter.org/our-work/analysis-opinion/ending-new-yorks-stop-and-frisk-did-not-increase-crime> [<https://perma.cc/S7HD-5NK2>].

<sup>176</sup> Alice Speri, *The NYPD Is Still Stopping and Frisking Black People at Disproportionate Rates*, THE INTERCEPT (June 10, 2021), <https://theintercept.com/2021/06/10/stop-and-frisk-new-york-police-racial-disparity/> [<https://perma.cc/M7YT-2JTN>].

<sup>177</sup> See, e.g., Woods, *supra* note 5; Melody S. Sadler, Joshua Correll, Bernadette Park & Charles M. Judd, *The World Is Not Black and White: Racial Bias in the Decision to Shoot in a Multiethnic Context*, 68 J. SOC. ISSUES 286, 286, 288 (2012).

<sup>178</sup> For a related discussion of “motivated cognition” and its impact on law and legal decisionmakers, see Dan Kahan, David Hoffman, Donald Braman, Danieli Evans, & Jeffrey J. Rachlinski, *“They Saw a Protest”: Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 853 (2012).

putting in motion a set of events that were not at all inevitable and originated with a mistaken perception.<sup>179</sup>

In the policing context, studies have shown that, in cases that are not inherently high risk, “[m]ere expectation that a suspect will be violent may engender a self-fulfilling prophecy: the officer may behave in such a way to elicit aggressive behavior from the suspect resulting in an escalation of the situation.”<sup>180</sup> A retired officer describes this phenomenon in the context of pretextual stops:

When officers walk up to a stopped car, we hold our breath just waiting for a gun to come out. We don’t know if drivers will suddenly hit the gas pedal, endangering us, bystanders or other motorists. While these situations are rare, we are trained to expect the worst-case-scenario and approach every stop in a state of hypervigilance, which contributes to the escalation of minor infractions into violence.<sup>181</sup>

Self-fulfilling danger prophecies—including police training approaches that inculcate hypervigilance—also contribute to the broader phenomenon of police trauma, which can make policing more dangerous to officers and those policed. There is a documented link between officers’ fears of physical danger and their mental health.<sup>182</sup> Officers are at a high risk of suffering from mental health problems, including post-traumatic stress disorder (PTSD) and suicide,<sup>183</sup> and this risk is further exacerbated when officers are primed to

<sup>179</sup> Expectation bias has been documented in many contexts, including aviation where it is defined as “[h]aving a strong belief or mindset towards a particular outcome.” *What We Hear: Expectation Bias*, FAA SAFETY TEAM (Sept. 28, 2012), <https://www.faa.gov/SPANS/noticeView.aspx?nid=4214> (citing an analysis of runway incursion data, confirmed by data from the Air Traffic Safety Action Program, showing that “expectation bias is one of the most common causal factors for pilot deviations”).

<sup>180</sup> Sadler et al., *supra* note 177, at 308.

<sup>181</sup> Diane Goldstein, Opinion, *Retired Police Officer Writes: Stop the Car Stops*, MINNESOTA REFORMER (May 17, 2021), <https://minnesotareformer.com/2021/05/17/former-police-officer-writes-stop-the-car-stops-opinion> [<https://perma.cc/XXR2-C8MT>].

<sup>182</sup> See, e.g., Mark Walton, *Why Police Officers Fall off the ‘Hypervigilance Cliff’ and How to Avoid It*, POLICE1.COM (July 26, 2022), <https://www.police1.com/health-wellness/articles/why-police-officers-fall-off-the-hypervigilance-cliff-and-how-to-avoid-it> [<https://perma.cc/3K6Z-3X77>] (“Officers often suffer from adrenal exhaustion and fatigue, a byproduct of daily hypervigilance, which can create dysregulation of cortisol – the stress hormone. . . . Over time, this hormonal dysregulation can predispose officers to many physical and mental ailments.”).

<sup>183</sup> See, e.g., Amaury Murgado, *How to Spot PTSD in Yourself*, POLICE MAG. (June 19, 2019) (noting that officers suffer disproportionately from PTSD, with studies finding that “[m]ore than 50% of law enforcement officers experience a psychological trauma from a highly stressful event . . . [s]ome studies suggest that 19% to 34% of sworn officers currently struggle with PTSD”); see also Emerson Lehmann, *Police More Likely to Die by Suicide Than in Line of Duty*, WSAW (July 22, 2020), <https://www.wsaw.com/2020/07/23/study-police->

expect the worst-case scenario.<sup>184</sup> The unresolved trauma experienced by many officers also affects their perceptions of physical danger, making them less circumspect, more reactive, and ultimately more likely to increase the danger to themselves and others.<sup>185</sup> As one policing expert observed, “police departments often ignore stress levels on the force, endangering the officers, their families, and all those who come in contact with police.”<sup>186</sup>

## 2. *Disobedience as Proxy for Danger*

Police are trained to “establish their authority” in every encounter with a civilian, and they are accustomed to having their commands heeded.<sup>187</sup> When officers perceive that their authority is being questioned, they may perceive such disobedience as threatening.<sup>188</sup> When police, because of a perceived inability to establish their authority, feel threatened by a civilian, they may increase their efforts to dominate, resulting in a response by the civilian that is perceived as even more defiant.

This feedback loop—referred to in the sociological literature as “asymmetric status norms”—can easily inflame an otherwise non-dangerous situation.<sup>189</sup> Officers “expect civilians to acknowledge their inferior status

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more-likely-to-die-by-suicide-than-in-line-of-duty [<https://perma.cc/R3MQ-VBVG>]. Suicide rates for officers are higher than police line of duty deaths and “three times higher . . . than among other municipal workers.” David Brooks, Opinion, *The Cop Mind*, N.Y. TIMES (Dec. 8, 2014) <https://www.nytimes.com/2014/12/09/opinion/the-cop-mind.html>. Military veterans, who comprise 20% of police officers, “are more vulnerable to self-destructive behavior.” Simone Weichselbaum & Beth Schwartzappel, *When Warriors Put on the Badge*, MARSHALL PROJECT (Mar. 30, 2017), <https://www.themarshallproject.org/2017/03/30/when-warriors-put-on-the-badge> [<https://perma.cc/CUY2-U84L>].

<sup>184</sup> In the context of police trauma, the danger narrative invokes the legend of the “Sword of Damocles” where, for Damocles, each moment was precarious because of the sword hanging over his head. CICERO, TUSCULAN DISPUTATIONS BOOK V (John Edward King trans., Harvard University Press 1927).

<sup>185</sup> See, e.g., John Violanti, *PTSD Among Police Officers: Impact on Critical Decision Making*, U.S. DEP’T OF JUST., COPS (May 2018), <https://cops.usdoj.gov/html/dispatch/05-2018/PTSD.html> [<https://perma.cc/Z2BP-X9HA>] (describing study to determine the effects of PTSD on police decision-making that used electroencephalography to measure brain function).

<sup>186</sup> J. Brian Charles, *How a Newark Program Is Pushing Police and Community Members to Heal Old Wounds Together*, TRACE (Jan. 18, 2022), <https://www.thetrace.org/2022/01/trauma-to-trust-newark-police-department-reform> [<https://perma.cc/CW4R-6VWC>] (imploping police departments, “Don’t put an officer who was traumatized this morning out on another call immediately” and “Don’t put an officer who was just shot at [right back] on the street”).

<sup>187</sup> Stoughton, *supra* note 40, at 225, 229–30.

<sup>188</sup> *Id.*

<sup>189</sup> RICHARD SYKES & EDWARD BRENT, *POLICING: A SOCIAL BEHAVIORIST PERSPECTIVE* 101 (1983).

and defer accordingly,” yet civilians “perceive the officer’s expectation of deference as an entitled, unnecessary display of dominance, a sign of disrespect from the officer.”<sup>190</sup> When, in such situations, the actors’ behaviors defy expectations, “the defiance between them escalates” and they continue exchanging “roles as threatening and threatened.”<sup>191</sup> In turn, this exchange increases the risk of violence to both police and those policed.

### 3. *Race as Proxy for Danger*

The increased danger resulting from expectation bias is not distributed evenly across populations; rather, the gulf between actual and perceived risks of policing is even wider when examined through the lens of race. Research findings suggest that Black individuals are perceived (solely on the basis of their skin color) as more threatening and more violent, making them more susceptible to police violence.<sup>192</sup> Accordingly, the impact of the danger narrative is borne by those most generally afflicted by the criminal legal system—minority, and especially Black, men.

Empirical findings demonstrate that individuals—across racial lines—associate Blackness with criminality.<sup>193</sup> For example, “brain scans reveal that the amygdala, a section of the brain associated with fear, responds more when people view Black male faces as opposed to White male faces.”<sup>194</sup> A 2004 study found that participants more quickly identified crime-related objects

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<sup>190</sup> *Id.*

<sup>191</sup> Stoughton, *supra* note 5, at 655; *see also id.* (citing U.S. DEP’T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 34–35 (Mar. 4, 2015) (“Force at times appeared to be used as punishment for non-compliance with an order that lacked legal authority.”)).

<sup>192</sup> For a historical overview, see N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1321–22 (2004) (documenting the history of racial stereotyping and myth associated with Black men and violence and danger); *see also* L. Song Richardson, *Implicit Racial Bias and Racial Anxiety: Implications for Stops and Frisks*, 15 OHIO ST. J. CRIM. L. 73, 75 (2017) (“Research in the field of social psychology over the past four decades repeatedly demonstrates that most individuals of all races have implicit, i.e. unconscious, racial biases linking Blacks with criminality and Whites with innocence.”).

<sup>193</sup> Cultural stereotypes affect police officers and civilians. Richardson, *supra* note 192, at 77 (“Police officers are not immune from the influence of implicit racial biases on their perceptions. For instance, the unconscious association between Blacks and crime influences how quickly officers identify weapons. In computer simulations, officers are quicker to determine that individuals are armed when they are Black as opposed to White.”) (citing Joshua Correll, Bernadette Park, Charles M. Judd, Bernd Wittenbrink, Melody S. Sadler & Tracie Keesee, *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCH. 1006, 1013–15 (2007)).

<sup>194</sup> *Id.* at 76.

after being subliminally primed with Black faces (compared to being primed with white faces).<sup>195</sup>

Studies of police officer attitudes about Black criminality are consistent with findings from studies of the general population. For example, when officers were asked, “who looks more criminal?,” they chose Black faces more than white faces and were more likely to respond that the person was criminal when the face was more “stereotypically black.”<sup>196</sup> Black officers demonstrated similar biases as other officers.<sup>197</sup>

A study testing “attentional bias” among officers found that “unconscious biases associating Blacks with dangerousness caused officers’ attention to be drawn to Black faces over White faces . . . [and that] once their attention was captured, Black faces held their attention longer than White faces did.”<sup>198</sup> Further exacerbating the effects of racial profiling and selection bias, “negative stereotypes associating Blacks with criminality and danger can cause people of all races, including Blacks, to evaluate ambiguous behaviors as more threatening and suspicious when engaged in by Black individuals versus White individuals.”<sup>199</sup>

This phenomenon of race serving as a proxy for danger has yielded tragic results for Black individuals of all ages. A study by the American Psychological Association (APA) revealed that, while children generally are perceived to be innocent and non-dangerous, Blackness serves as a proxy for culpability, even with respect to children.<sup>200</sup> According to the APA’s findings, “Black boys as young as 10 may not be viewed in the same light of childhood innocence as their white peers, but are instead more likely to be mistaken as older, be perceived as guilty and face police violence if accused

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<sup>195</sup> See Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876, 878 (2004).

<sup>196</sup> *Id.*

<sup>197</sup> See, e.g., James Doubek, *Police Researcher: Officers Have Similar Biases Regardless of Race*, NPR (June 22, 2020), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/22/881643215/police-researcher-officers-have-similar-biases-regardless-of-race> [<https://perma.cc/H76C-23JK>] (describing research by Rashawn Ray et al. finding that officers, regardless of race, have similar biases against Black people).

<sup>198</sup> Richardson, *supra* note 192, at 76 & n.15 (citation omitted).

<sup>199</sup> *Id.* at 76; Various studies have demonstrated this effect, including where an ambiguous bump in the hallway (by either an adult or student) was deemed more aggressive or dangerous when performed by a Black person versus a white person, and where “identical expressions [were] evaluated as more hostile on a Black face than on a White face.” *Id.* at 76–77.

<sup>200</sup> Phillip Atiba Goff, Matthew Christian Jackson, Brooke Allison Lewis Di Leone, Carmen Marie Culotta & Natalie Ann DiTomasso, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526, 529, 532 (2014).

of a crime.”<sup>201</sup> Black boys are, on average, estimated to be more than four-and-a-half years older than their actual age; “Black children may be viewed as adults as soon as 13.”<sup>202</sup> As one example, the officer who killed Tamir Rice, a 12-year-old Black boy holding a toy gun, thought Tamir was about 20 years old.<sup>203</sup>

#### 4. *The Racial Anxiety Feedback Loop*

Both police and Black men are primed to experience “racial anxiety” in their interactions, increasing the likelihood of a violent encounter. Studies have shown that Black men anticipate the threat of being stereotyped in encounters with police officers more than white men, and that this difference in anticipation translates into differences in levels of anxiety, self-regulatory efforts, and conduct commonly perceived as suspicious by police officers.<sup>204</sup> Song Richardson elaborates:

For Black individuals, racial anxiety is experienced as the fear of being victimized by police racism. These concerns may influence their behaviors and judgments, as well as the attributions they make about an officer’s conduct during an interaction, creating expectations of harsh or discriminatory treatment, including the use of lethal force. These worries may result in Black individuals approaching police interactions with heightened suspicion and anxiety. . . . Because of their anxieties, individuals may fidget and avoid eye contact.<sup>205</sup>

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<sup>201</sup> *Black Boys Viewed as Older, Less Innocent Than Whites, Research Finds*, Am. Psych. Ass’n (2014), <https://www.apa.org/news/press/releases/2014/03/black-boys-older>. See Goff et al., *supra* note 200, at 540 (“[P]erceptions of the essential nature of children can be affected by race, and for Black children, this can mean they lose the protection afforded by assumed childhood innocence well before they become adults”); see also *id.* at 526–27.

<sup>202</sup> Am. Psych. Ass’n, *supra* note 201. Research also suggests that Black youth are disproportionately tried in adult court. JEREE THOMAS & MEL WILSON, NAT’L ASS’N OF SOCIAL WORKERS, *THE COLOR OF JUVENILE TRANSFER: POLICY & PRACTICE RECOMMENDATIONS 1* (2017) (“Black youth are approximately 14% of the total youth population, but 47.3% of the youth who are transferred to adult court.”).

<sup>203</sup> Shaila Dewan & Richard Opiel, Jr., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One*, N.Y. TIMES (Jan. 22, 2015), <https://www.nytimes.com/2015/01/23/us/in-tamir-rice-shooting-in-cleveland-many-errors-by-police-then-a-fatal-one.html>. Studies have also found that white people “superhumanize” Black people, believing that they have higher pain thresholds and are less vulnerable to harm and force. See, e.g., Adam Waytz, Kelly Marie Hoffman & Sofie Trawalter, *A Superhumanization Bias in Whites’ Perceptions of Blacks*, 6 SOCIAL PSYCH. & PERSONALITY SCI. 352, 357 (2015). These misperceptions are mutually reinforcing.

<sup>204</sup> See, e.g., Cynthia J. Najdowski, Bette L. Bottoms & Phillip Atiba Goff, *Stereotype Threat and Racial Differences in Citizens’ Experiences of Police Encounters*, 39 L. & HUM. BEHAV. 463, 465–66 (2015).

<sup>205</sup> Richardson, *supra* note 192, at 80.

Officers, meanwhile, are trained to interpret these self-regulatory behaviors as suspicious.

Further, because of their own racial anxiety, police “worry that they will be perceived as racist by the civilians they encounter. This concern can influence officers, regardless of their race, affecting their perceptions and judgments as well as how safe they feel during an interaction.”<sup>206</sup> If an officer believes that a civilian regards him or her as racist, that officer is likely to assume that the civilian will not respect the officer’s authority, which “increases the likelihood that [the] officers will feel unsafe.”<sup>207</sup>

These racial dynamics compound the phenomenon of asymmetric status norms, further increasing risk to both police and those policed. When these two proxies for danger—disobedience and race—are overlaid, they may work in tandem to result in violence. For example, while an officer’s perception of disobedience may be construed as a proxy for danger regardless of race, when the officer encounters a Black man who the officer perceives to be insufficiently submissive to his authority, this cognitive bias may be compounded by what might be termed the “racial anxiety feedback loop”—a layering on that magnifies the risk of violence to police and those policed.

Empirical findings have documented the tragic effects of this racial anxiety feedback loop for Black men, with a recent study finding that “the experience of racial anxiety predicted uses of force against Black men.”<sup>208</sup> An officer enacting “command presence”—attempting to establish control of a situation through dominance—may be interpreted as aggressive by a Black individual experiencing racial anxiety, owing to narratives shared by generations of Black Americans about their negative interactions with police.<sup>209</sup> At the same time, “police also experience fear . . . they are taught to believe that there is a ‘war’ out there, that police officers are at risk of being killed in every encounter with every civilian”<sup>210</sup>—and this training is overlaid on wide-ranging associations of Blackness and criminality.

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<sup>206</sup> *Id.* at 79.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 81; *see also id.* at 80 (“During their interaction, these mutual anxieties increase the risk that officers will conduct a frisk and that force will be used unnecessarily.”).

<sup>209</sup> Miranda Hernandez, *Symposium 2020 Encountering the Police*, GEO. WASH. L. REV. SYMP. (2020) (summarizing Professor David Harris’s presentation in the symposium titled “Two Poisons: How Race and Fear Increase the Danger of Police Encounters.”) (“Black Americans hear stories told by their grandparents, parents, and siblings of their negative encounters with police, which reinforce this intergenerational fear. Black Americans believe this could be a mortal moment for them or their children when encountering the police.”).

<sup>210</sup> *Id.*



### 5. *Militarization Creep*

Claims of pervasive danger in policing have resulted in a one-way ratchet towards the development of an increasingly militarized police force.<sup>211</sup> Police have sought to militarize based on claims that crime rates are increasing and in the wake of particularly traumatic incidents involving violence against officers.<sup>212</sup> At such times, danger (or the perception of danger) has served as the impetus for a more militarized approach to policing. While individual steps towards militarization have been justified by exigency, over time, features of a militarized approach have become “entrenched and normalized,”<sup>213</sup> even when no longer directly connected to exigency.

The origin story of the Special Weapons and Tactics (SWAT) team illustrates this development of militarization in American police forces. Introduced to fulfill a discrete (and exceedingly rare) role,<sup>214</sup> the function and reach of SWAT teams has expanded dramatically. Initially intended solely for “truly perilous situations — hostage-takings, high-powered shootouts and the like,” the typical usage of these teams now includes “execut[ing] routine warrants in ‘no-knock’ drug raids.”<sup>215</sup> The number of such raids has skyrocketed in recent decades, “from a few thousand a year in the early 1980s to tens of thousands [by 2014].”<sup>216</sup> Owing to the widespread presumption of pervasive danger in policing, there has been little internal oversight serving

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<sup>211</sup> For a complementary illustration in the criminal law context, see William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001) (describing a one-way ratchet toward expanding the reach of criminal law and increasing prosecutorial discretion).

<sup>212</sup> See, e.g., *History of SWAT*, PAULDING CNTY., <https://www.paulding.gov/519/History-of-SWAT> [<https://perma.cc/BQG6-6J8Z>] (describing this phenomenon in the context of SWAT).

<sup>213</sup> See, e.g., Daniele Jefferis, *Battlefield Borders, Threat Rhetoric, and The Militarization of State and Local Law Enforcement*, 3 NAT’L SEC. L. BR. 37, 64 (2012); Justin Elliott, *How the Feds Fueled the Militarization of Police*, SALON (Dec. 24, 2011), [https://www.salon.com/2011/12/24/how\\_the\\_feds\\_fueled\\_the\\_militarization\\_of\\_police](https://www.salon.com/2011/12/24/how_the_feds_fueled_the_militarization_of_police) [<https://perma.cc/D7FY-FT83>].

<sup>214</sup> *Special Weapons and Tactics S.W.A.T.*, L.A. POLICE DEP’T, <https://www.lapdonline.org/office-of-the-chief-of-police/office-of-special-operations/metropolitan-division/swat> [<https://perma.cc/QGY6-G23J>].

<sup>215</sup> Clyde Haberman, *The Rise of the SWAT Team in American Policing*, N.Y. TIMES (Sept. 7, 2014), <https://www.nytimes.com/2014/09/08/us/the-rise-of-the-swat-team-in-american-policing.html>.

<sup>216</sup> *Id.* (describing findings by the ACLU of a substantial racial disparity regarding the target of these raids: “[B]lack and Latinos [are] more likely than whites to be targets”).

as a buffer against overuse of military equipment by police in the domestic context.<sup>217</sup>

The proliferation of SWAT teams, as well as police use of grenade launchers, armored vehicles, and bayonets,<sup>218</sup> has further entrenched perceptions by police that they are at war and perceptions by those policed that they are under siege, escalating tensions between these groups and increasing the risk of violent encounters between them. The importation of a war paradigm into domestic activities,<sup>219</sup> epitomized by the police possession and use of military-grade equipment such as machine guns and armored vehicles, may itself increase the risk of violent encounters between police and civilians.<sup>220</sup> As the Seattle Police Department's former chief explained, "What emerges is a picture of a vital public-safety institution perpetually at war with its own people."<sup>221</sup>

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<sup>217</sup> *Id.* Jefferis *supra* note 213, at 67–68. *But see* Press Release, Office of the Mayor, Burlington Police Department Severs Ties with Department of Defense (Sept. 28, 2015), <https://www.burlingtonvt.gov/Press/burlington-police-department-severs-ties-with-department-of-defense> (quoting Chief Brandon del Pozo, who explained his decision to sever ties with the Department of Defense and lamented, "The militarization of local police departments is a genuine concern in our nation.").

<sup>218</sup> The 1033 Program provides surplus military equipment to local law enforcement agencies and has been the subject of significant controversy. *See, e.g.*, Casey Delehanty, Jack Mewhirter, Ryan Welch & Jason Wilks, *Militarization and Police Violence: The Case of the 1033 Program*, RSCH. & POLS. 1, 1 (2017) (finding a "positive and statistically significant relationship between 1033 transfers and fatalities from officer-involved shootings"); Kelsey Wright, *Voters Don't Want Police Departments to Have Military Equipment*, DATA FOR PROGRESS (July 1, 2020), <https://www.dataforprogress.org/blog/2020/7/1/voters-dont-want-police-departments-to-have-military-equipment> (finding that, when polled, voters supported "a proposal to make it illegal for federal government agencies to transfer military weapons intended for modern warfare . . . to civilian police departments"). *But see* Barry Friedman & Jessica Gillooly, *Police Militarization: A 1033 Program Analysis*, NYU SCH. OF L. POLICING PROJECT (Dec. 20, 2021), <https://www.dataforprogress.org/blog/2020/7/1/voters-dont-want-police-departments-to-have-military-equipment> (examining the costs and benefits of the 1033 Program, while demonstrating the range of ways in which police agencies obtain military equipment, ultimately suggesting that, even were this Program discontinued, police militarization would persist).

<sup>219</sup> *See* Danielle C. Jefferis, *Battlefield Borders, Threat Rhetoric, and the Militarization of State and Local Law Enforcement*, 3 NAT'L SEC. L. BRIEF 37, 50 (2012).

<sup>220</sup> *See, e.g.*, Nick Baumann, *When Police View Citizens as Enemies*, ATL. (May 31, 2020), <https://www.theatlantic.com/politics/archive/2020/05/george-floyd-protests-minnesota-urban-warfare/612421> [<https://perma.cc/KP2C-S5MA>] ("In cities large and small, police departments are now outfitted like military units. When you're driving an armored vehicle down Main Street, civilians can begin to look like insurgents.").

<sup>221</sup> Norm Stamper, *Paramilitary Policing from Seattle to Occupy Wall Street*, NATION (Nov. 9, 2011), <https://www.thenation.com/article/archive/paramilitary-policing-seattle-occupy-wall-street> [<https://perma.cc/65UR-F7VH>]. Instead of police safety as public safety,

## C. ACCOUNTABILITY DEFICIT

1. *Danger as Vicious Cycle*

Owing to the broad adoption of the danger narrative by police, courts, and juries, there is a notable lack of internal and external checks, resulting in a void in police accountability. This is in part because of a vicious cycle whereby police both assert danger, and they respond to a given situation as though they were endangered. When this response escalates the situation, making it more dangerous than it needed to be, police are, in essence, creating a self-fulfilling prophecy, and using the danger they created to support the initial claim that policing is dangerous.

An officer who escalates the situation in this way may still prevail on an excessive force claim because able to credibly argue that, at the precise moment of the shooting, the officer was responding to a dangerous situation. Courts and juries are reluctant to question an officer's claim of perceived danger,<sup>222</sup> and by uncritically accepting police accounts of pervasive danger, they reinforce these exaggerated claims, at the same time forsaking the opportunity to hold police accountable or to play a role in reshaping police practices.

2. *Danger as Excuse*

When courts defer to police based on assumptions about danger, they are, in effect, accepting danger as an excuse or accommodation. There is a striking doctrinal connection between policing and other circumstances where, because an actor is in a stressful, unpredictable, or otherwise fraught situation, the law provides an allowance for that actor's otherwise unacceptable behavior. Examples of this phenomenon include various self-defense doctrines, as well as the common law's provocation defense and its Model Penal Code corollary, the extreme emotional disturbance doctrine.<sup>223</sup> In such cases, the law either mitigates a person's punishment based on the circumstances or excuses the behavior altogether. Sometimes the actor's stress may be due to a misunderstanding, while at other times, it may be

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this picture suggests a zero-sum approach to policing that pits police against those policed. See *infra* Part II.D.

<sup>222</sup> See *supra* Section I.E.

<sup>223</sup> Many have written about the differences—doctrinally, philosophically, and morally—between excusing and justifying conduct that falls below acceptable behavior. See, e.g., Aya Gruber, *A Provocative Defense*, 103 CALIF. L. REV. 273, 281–82 (2015); Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter as Partial Justification and Partial Excuse*, 52 WM. & MARY L. REV. 1027, 1036 (2011); JEREMY HORDER, *PROVOCATION AND RESPONSIBILITY* 24 (1992).

because of a split-second judgment that was reactive—either motivated by anger or fear. The law excuses, or grants accommodations, sending a message that one could not expect a reasonable person in that person’s shoes to have done any differently.<sup>224</sup>

Jurisprudence pertaining to mitigating circumstances and excuses is directly relevant to how allegations of police misconduct are assessed under the law.<sup>225</sup> When courts rely on the “reasonable officer” standard, which is infused with the danger narrative, courts grant deference to officers because of beliefs about the pervasive dangers of policing. In practice, courts often find that the reasonableness test serves to justify an officer’s behavior in use-of-force cases, providing a full defense.<sup>226</sup> Prosecutors, relying on this reasonable-officer jurisprudence, have declined to charge officers in instances where they killed unarmed individuals, mistaking objects, such as a pink and white cell phone, for a gun.<sup>227</sup>

#### D. US-VERSUS-THEM POLICING AND THE ZERO-RISK NORM

Current norms, conveyed through training,<sup>228</sup> police union materials,<sup>229</sup> and advocates of legislation that casts police as victims,<sup>230</sup> are consistent with the belief that officers have a right to do whatever is required to get as close as possible to a zero-risk environment. In other words, that the proper cost-benefit tradeoff, normatively, is that many innocent suspects should be mistreated, injured, or even killed, if it will bring about any reduction in the rate of suspects’ attacks on police—even a minuscule marginal decrease of an already minuscule risk. Paradoxically, police maintain this approach, akin to a zero-tolerance idea, while continuing to demand wage-premiums and a special level of deference for doing “dangerous” work.<sup>231</sup>

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<sup>224</sup> See, e.g., Avlana K. Eisenberg, *Discontinuities in Criminal Law*, 22 THEORETICAL INQUIRIES L. 137, 152 (2021).

<sup>225</sup> For a related argument that the law holds police to a “lower standard,” see JAY R. SCHWEIKERT, CATO INST. POL’Y ANALYSIS, QUALIFIED IMMUNITY: A LEGAL, PRACTICAL, AND MORAL FAILURE 17 (Sept. 14, 2020).

<sup>226</sup> See, e.g., *Peterson v. City of Fort Worth*, 2008 WL 440301, at \*10 (N.D. Tex. Feb. 19, 2008); *Neiswonger v. Hennessey*, 89 F. Supp. 2d 766, 774 (W. Va. 2004).

<sup>227</sup> See, e.g., Sam Stanton, Tony Bizjak, Dale Kasler, Molly Sullivan & Ryan Sabalow, *Sacramento Police Officers Won’t Be Charged in Shooting of Stephon Clark, DA Says*, SACRAMENTO BEE (Mar. 2, 2019), [www.sacbee.com/news/local/crime/article227026334.html](http://www.sacbee.com/news/local/crime/article227026334.html).

<sup>228</sup> See *supra*, Section I.B.

<sup>229</sup> See *supra*, Section I.A.

<sup>230</sup> See *supra*, Section I.D.

<sup>231</sup> See, e.g., Ford et al., *supra* note 83.

This approach is normatively untenable,<sup>232</sup> and it is also descriptively misleading. The zero-risk norm in policing flows directly from a descriptive understanding of policing as zero-sum: that there is either risk to the officer or risk to the suspect, and that these two must be traded off. However, this zero-sum approach is demonstrably false. As illustrated above,<sup>233</sup> risk is contingent and contextual, and police through their actions can, in many instances, either increase or reduce risk to *both* themselves and suspects.

This understanding of policing as zero-sum is especially pernicious because it is consistent with an us-versus-them ideology that casts those policed as potential enemy combatants. The us-versus-them ideology in policing dates back to colonial times when the threatening “them” was explicitly racialized, cast alternately as Native Americans or Black slaves.<sup>234</sup> Modern-day police departments and those who ally themselves with police overwhelmingly continue to conceive of policing on adversarial and even confrontational terms: to be a police officer is to be joined in the battle of the cops versus the “bad guys.”<sup>235</sup> Unsurprisingly, since battles are physical contests, this way of thinking about policing is consistent with and reinforced by the danger narrative. The spaces in which policing takes place are understood as akin to battlefields, filled with imminent danger to life and limb.

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<sup>232</sup> Underlying this claim is the indefensible belief that the life of an officer is worth more than that of a non-officer. While a comprehensive discussion of how to appropriately assess tradeoffs regarding risks in policing is beyond the scope of this Article, the appropriate question is how such tradeoffs should be assessed and not whether there are tradeoffs to be made. Further, a zero-sum approach to risk is overly reductive; oftentimes, risks, instead of trading off between police and those policed, can be reduced to both police and those policed. *See infra* Section III.A.1.

<sup>233</sup> *See supra* Section II.A.

<sup>234</sup> *See, e.g.,* SALLEY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* 6-7 (2001) (describing that, from the vantage point of the white slaveowners, the threat of a slave uprising was a very real existential and economic threat); Jill Lepore, *The Invention of the Police*, *NEW YORKER* (July 13, 2020), <https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police> (“In Philadelphia, in 1705, the governor expressed the view that the militia could make the city safer than the watch, but militias weren’t supposed to police the king’s subjects; they were supposed to serve the common defense—waging wars against the French, fighting Native peoples who were trying to hold on to their lands, or suppressing slave rebellions.”)

<sup>235</sup> *See supra* Section I.A; *see also* PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 3, 48–49 (2018) (observing that police continue to serve a social control function—maintaining a particular social order by controlling communities of color).

Inherent in an us-versus-them frame is an oppositional relationship in which “we” (the in-group) are threatened by “them” (the out-group).<sup>236</sup> Whether this perceived threat is physical or existential, it essentializes both “us” and “them.” Psychological experiments suggest that this us-versus-them frame can be further strengthened by professional roles and instruction.<sup>237</sup> When one group expects to have control over another or to dominate the hierarchy, and that expectation is challenged (or perceived to be challenged), this may trigger a violent response.<sup>238</sup>

Ultimately, us-versus-them policing negatively impacts individuals cast as “them,” as well as those cast as “us.” This oppositional approach to policing is itself a self-fulfilling prophecy: it destroys trust, precludes relationship building, and increases the risk of violence to police and those policed.

### III. COMMUNITARIAN REFORMS

Part III calls for a new policing narrative that would address both the empirical and normative pitfalls of the sweeping danger narrative. Drawing on insights from communitarian theory,<sup>239</sup> as well as from such fields as medicine and aviation, it proposes institutional reforms that would at once promote core values of professionalism, including data-driven, evidence-based approaches, and undermine the pernicious us-versus-them ideology by cultivating empathy and reimagining police–community partnerships.

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<sup>236</sup> Charles Betzler, *The Neuroscience of Hate*, SAPULPA TIMES (Feb. 15, 2021), <https://sapulpa Herald.com/the-neuroscience-of-hate> [<https://perma.cc/4J9M-TR2Y>] (explaining that, when one sees or thinks about members of an out-group, this “can . . . attenuate activity in the medial prefrontal cortex, an area associated with social cognition and empathy. This decreased activity gives rise to feelings of dehumanization.”).

<sup>237</sup> See, e.g., Kathleen O’Toole, *The Stanford Prison Experiment: Still Powerful After All These Years*, Stanford News (Jan. 8, 1997).

<sup>238</sup> See, e.g., Michael Fortino, *The 1971 Stanford Prison Experiment Showing Authoritarian Abuse Still Relevant Today*, CRIM. LEGAL NEWS (Oct. 15, 2020), <https://www.criminallegalnews.org/news/2020/oct/15/1971-stanford-prison-experiment-showing-authoritarian-abuse-still-relevant-today> [<https://perma.cc/Y252-39B6>].

<sup>239</sup> This Article draws on theoretical work by Anthony Duff and others that seeks to understand human behavior by examining social context and communal relationships. See, e.g., R.A. DUFF, PUNISHMENT, COMMUNICATION AND COMMUNITY 181 (2001) (arguing for a communicative theory of justice); SHLOMO AVINERI & AVNER DE-SHALIT, *Introduction to COMMUNITARIANISM AND INDIVIDUALISM* 2 (1992). It also builds on the author’s prior work applying communitarian theory to criminal justice reform. See Avlana K. Eisenberg, *The Prisoner and the Polity*, 95 N.Y.U. L. REV. 1, 47–56 (2020).

## A. PRINCIPLES OF COMMUNITARIAN POLICING

1. *Reconsidering Risk*

First, communitarian policing would require a shift towards professionalism—replacing the unfounded, exaggerated danger narrative with an empirically grounded understanding of risk as contingent and contextual.<sup>240</sup> The “risk continuum” acknowledges that police can play a decisive role both in creating and reducing risk, and that distinct factors are correlated with how risky a situation is (or could be).

A data-driven approach, focusing on concrete factors that are likely to either increase or reduce risk, would transcend the “compliance-disobedience binary.” Instead of automatically assuming that disobedience signals danger, officers would be taught to distinguish among reasons why a person might appear to be non-compliant and to identify scenarios that, unless escalated by police, are unlikely to pose a significant threat to the officer. It would also provide officers with tools to diagnose in real time what sort of behavior they are being confronted with—for example, simple cues to look for, or simple questions to ask that would give them a sense of whether the person with whom they are interacting is genuinely noncompliant or instead acting without any such intention.

An increased reliance on data, however, would not in and of itself suffice to shift policing away from an us-versus-them orientation. Rather, in addition to the enhanced use of data, which would enable police to interact with those policed based on better information and more accurate assumptions about the situations they are facing, communitarian policing requires a dismantling of the oppositional us-them frame through empathy, dialogue, and partnership.

2. *Humanizing “Them” and “Us”*

Core to communitarian policing is the cultivation of empathy, which would enable police to imagine a shared vulnerability between themselves and those policed.<sup>241</sup> If police viewed themselves and those policed as

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<sup>240</sup> Risk and danger are often used synonymously in policing discourse. Sierra-Arevalo, *supra* note 2, at 73–74. Yet, disaggregating these terms—and their broader implications—is crucial, especially in training contexts. Danger is fear-based and disconnected from rational thought or inquiry; accordingly, the danger narrative is imprecise and uncalibrated. By contrast, risk is on a continuum and can fluctuate, depending on contextual factors, from higher to lower.

<sup>241</sup> See, e.g., Olga M. Klimecki, *The Role of Empathy and Compassion in Conflict Resolution*, 11 EMOTION REV. 310, 314 (2019); Bobby K. Cheon, Vani A. Mathur & Joan Y.

members of the same community, rather than seeing those policed as a threatening “them,” they would give priority to assessing the needs of those policed, and would be less prone to exaggerate the risk of death or serious harm that attends ordinary interactions.<sup>242</sup> A focus on (and curiosity about) the needs and past traumas of those policed would also humanize individuals who might otherwise be categorized as “them.” This fundamental shift would require consistent messaging, both vertically (from top to bottom within departmental hierarchies) and horizontally (from the time of recruitment throughout an officer’s employment).

Addressing the mental health needs of officers could play a role in mitigating adverse policing outcomes, and a communitarian approach to policing also would be attuned to officers’ past experiences of trauma and associated mental health needs.<sup>243</sup> By acknowledging the vulnerability of both police and those policed, this approach has the potential to better address the needs and traumas of both groups, as well as to reduce violent encounters between them.

### 3. *Reimagining Service*

A shift to communitarian policing would also require the reconceptualization of relationships between law enforcement and other social service organizations. Police would be reimagined as part of a “service team” geared towards identifying and addressing the needs of community members.<sup>244</sup> Such professional partnerships hold great promise by bringing police into collaboration with non-police experts (e.g., mental health

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Chiao, *Empathy as Cultural Process: Insights from the Cultural Neuroscience of Empathy*, WORLD CULTURAL PSYCH. RSCH. REV. 32, 39 (2010).

<sup>242</sup> A failure to consider the needs of those policed can have especially stark ramifications for populations like the mentally ill. See, e.g., DORIS FULLER & RICHARD LAMB, TREATMENT ADVOC. CTR., OVERLOOKED IN THE UNDERCOUNTED: THE ROLE OF MENTAL ILLNESS IN FATAL LAW ENFORCEMENT ENCOUNTERS 1 (Dec. 2015) (finding that “the risk of being killed during a police incident is 16 times greater for individuals with untreated mental illness than for other civilians approached or stopped by officers”).

<sup>243</sup> Instead of focusing exclusively on physical risk—which is the limited domain of the danger narrative—this approach would also draw attention to the prevalence of emotional trauma among those who work in law enforcement. See *infra* Section III.C.1.

<sup>244</sup> A focus on service is often associated with work by August Vollmer, a leader in policing reform in the early 1900s, who promoted social work as a core component of policing. See Gene Carte, Vollmer Historical Project ix/PDF 33 (1972) (noting that Vollmer advocated for police recruits to study management, sociology, social work, and psychology, and for officers to take a more active role in casework for social agencies). This Article draws on Vollmer’s work; however, instead of focusing exclusively on the role of police and on broadening police expertise, it focuses on opportunities for police officers to partner with experts in other agencies and organizations.



providers), thus expanding the range of skills and expertise available to address the needs of community members.

This approach, which would envision police as one among (and in collaboration with) a range of service providers,<sup>245</sup> would transcend the “Warrior–Guardian” binary, which sets police *apart* from the community. While there are long-observed problems associated with the Warrior mindset in policing,<sup>246</sup> the concept of Guardian, while preferable in many ways, is not without its concerns.<sup>247</sup> Although some conceptions of the Guardian are consistent with community partnership, shared responsibility, and deference to experts, others place police on a pedestal and stress the “nobility of police” as “guardians of democracy,” which cuts against a vision of police as community partners.<sup>248</sup> This notion of the Guardian is incompatible with communitarian policing both because it fails to confront the origins and history of us-versus-them policing and because it sets the police apart from the community.

#### B. THE ACADEMY

In a prototypically hierarchical institution like law enforcement, the tone set by leadership—from recruitment onwards—is extremely influential and will reverberate throughout the department. The orientation of a police department’s chief or commissioner is thus of utmost importance in establishing the culture of that department and setting pedagogical priorities for the Academy.<sup>249</sup>

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<sup>245</sup> Police, however, would not be assumed to be in the driver’s seat in these partnerships. *See infra* Section III.D.2.

<sup>246</sup> *See, e.g.,* Stoughton, *supra* note 5, at 651 (describing its promotion of “an adversarial style of policing that estranges the public and contributes to unnecessary conflict and violence”).

<sup>247</sup> This Article interrogates this binary, which has been embraced by leading academics and practitioners. *E.g., id.* at 666 (“If the Warrior is a problem, as I believe it is, then the Guardian may be a suitable replacement.”); U.S. DEP’T OF JUSTICE, OFF. OF CMTY. ORIENTED POLICING SERVS., FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 11–12 (2015); Ashley Blacerzak & Julie Tate, *Creating Guardians, Calming Warriors*, WASH. POST (Dec. 10, 2015), <http://www.washingtonpost.com/sf/investigative/2015/12/10/new-style-of-police-training-aims-to-produce-guardians-not-warriors>.

<sup>248</sup> Franklin Covey, *Nobility of Policing: Guardians of Democracy*, BLUE COURAGE, <https://www.bluecourage.com/blue-courage-llc-store-nobility-of-policing-guardians-of-democracy-hardback>.

<sup>249</sup> *See infra*, notes 286–289 and accompanying text.

### 1. Recruitment

The messaging of police recruitment materials should reflect the values of communitarian policing. If policing were represented differently in recruitment materials, this shift would influence which individuals are drawn to careers in law enforcement. Representations of communitarian policing would attract recruits who envision the role of an officer as community partner and those policed as fellow community members. The recruitment video for a department intending to cultivate a communitarian approach to policing might feature images of officers assisting a vulnerable individual or having a positive interaction with an adult or juvenile, instead of military equipment, street fighting, and car chases.<sup>250</sup>

Ideally, applicants who already identify overtly with an us-versus-them orientation should be screened out in the interview process.<sup>251</sup> Consistent with this approach, one former police commissioner of a major U.S. city explained that he began each interview by asking, “Why do you want to be an officer?” Any recruit who answered with some version of “to get the bad guys” was excluded from consideration.<sup>252</sup> An approach to recruitment that rejects the us-versus-them frame is crucial to transforming a police department’s culture.

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<sup>250</sup> This shift would be more consistent with how police actually spend the majority of their time. Jeff Asher & Ben Horwitz, *How Do the Police Actually Spend Their Time*, N.Y. TIMES (Nov. 8, 2021), <https://www.nytimes.com/2020/06/19/upshot/unrest-police-time-violent-crime.html> (finding, based on publicly available data from Sacramento (CA), New Orleans (LA), as well as Montgomery County (MD), that these police departments spend only about four percent of their time handling violent crime).

<sup>251</sup> There are, however, practical limitations that must be considered. While it would be preferable to admit only those applicants who approach policing with a communitarian orientation, this may be impossible. Especially as fewer people are applying to be officers, departments may need to admit some who demonstrate an us-versus-them mindset, with the goal of educating these recruits in communitarian principles through training and exposure. See Colin Tiernan, *Applicants Scarce for Open Law Enforcement Positions*, SPOKESMAN REV. (Apr. 24, 2021), <https://www.spokesman.com/stories/2021/apr/24/officers-down-applicants-scarce-for-open-law-enfor> [<https://perma.cc/E56A-HBWA>] (describing a “national cop shortage”).

<sup>252</sup> Telephone Interview with Bill Evans, Former Comm’r, Bos. Police Dep’t (June 23, 2021). Excluding a recruit from consideration for one stray comment may seem overly harsh; however, this example, even if not taken literally, demonstrates a concerted effort to screen for a set of characteristics that are aligned with us-versus-them policing.

## 2. Pedagogy

### a. Historically Informed Policing

To contextualize the police role in society, as well as the us-versus-them dynamics that continue to plague some modern-day police-civilian interactions, recruits should learn about the history of U.S. policing. Exposure to this historical background would align policing with professional studies programs, such as in law and medicine, which teach students about the origins and development of their chosen professions. For example, students of American law learn the British origins of the U.S. legal system and how doctrines have evolved over time.<sup>253</sup> Medical students learn about key scientific advancements—e.g., the advent of vaccines, x-ray technology, and cardiac transplantation—that have radically shifted the practice of medicine.<sup>254</sup> Such instruction not only would provide important historical context for modern-day policing, but also would increase the capacity of recruits to understand and to empathize with the perspectives of those policed.

For example, teaching about the racialized origins of us-versus-them policing would ground recruits' understanding of why many Black Americans, along with members of other minority communities, feel threatened by police because of a combination of their lived experience and intergenerational memory.<sup>255</sup> It would be difficult to appreciate the resistance

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<sup>253</sup> Increasingly, in modern legal education, law students also learn about the failings of the American legal system, including its implication in the maintenance of racist systems and practices, so that they better understand not only the promise but also the pitfalls for their clients, themselves, and the general public, of practicing law. *See, e.g., Preparation for Practice*, B.C. OF L., <https://www.bc.edu/bc-web/schools/law/academics-faculty/curriculum.html> [<https://perma.cc/KF5A-XEC5>] (describing a required one-credit course at Boston College Law School which introduces “a core set of critical perspectives [intended to] give [first-year students] the basic skills to begin to think deeply about the role of race, gender, identity, wealth, and power”).

<sup>254</sup> *See generally* Lucien Cardinal & Alan Kaell, *The Role of Medical Education in the Development of the Scientific Practice of Medicine*, 7 J. CMTY. HOSP. INTERNAL MED. PERSPS. 58, 58 (2017) (detailing the development of American medical education over the last 100 years to produce physicians “with the capacity to study scientific advances”).

<sup>255</sup> This Article maintains that teaching recruits about the racialized origins of U.S. policing is crucial to providing context and cultivating empathy. However, it also acknowledges that, at a time when teaching Critical Race Theory has become a flashpoint, one should expect substantial resistance, especially in states where politicians have already made this issue a key part of their platforms. *See, e.g.,* Stephen Kearse, *GOP Lawmakers Intensify Effort to Ban Critical Race Theory in Schools*, PEW CHARITABLE TRS. (June 14, 2021, 12:00 AM), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/06/14/gop-lawmakers-intensify-effort-to-ban-critical-race-theory-in-schools> [<https://perma.cc/TLE3-7L9Q>].

in Black communities to the COVID-19 vaccine without understanding the deep-seated mistrust of a health care system that was responsible for the Tuskegee experiments as well as inequitable treatment of Black Americans through the present day.<sup>256</sup> So too, without knowledge of the racialized origins and history of policing in the United States, it is impossible to understand the feelings of alienation from (and distrust towards) police that are pervasive in Black and other minority communities.<sup>257</sup>

b. Trauma-Informed Policing

A trauma-informed approach would acknowledge and address the medical and psychological needs of both the police and those policed, benefiting both groups of individuals.<sup>258</sup> At the core of trauma-informed policing is an awareness of the vast array of needs that an individual may demonstrate and of the importance of looking past surface-level interpersonal dynamics between officer and civilian to access these underlying needs. Instead of approaching each situation with the insular goal of “establishing control,” an officer trained in a trauma-informed approach would be better able to distinguish between situations presenting high levels of risk and those where a subject may appear non-compliant but is also non-dangerous. For example, an officer trained to identify signs of a person suffering from a serious mental health issue may be less likely to jump to the conclusion that

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<sup>256</sup> See, e.g., Khiara Bridges, *Racial Disparities in Maternal Mortality*, 95 N.Y.U. L. REV. 1229, 1232 (2020); Khiara Bridges, Terence Keel & Osagie K Obasogie, *Critical Race Theory and the Health Sciences: Introduction*, 43 AM. J.L. & MED. 179, 181 (2017).

<sup>257</sup> For an in-depth discussion of legal estrangement and alienation, see Bell, *supra* note 2, at 2054 (“Legal estrangement is a theory of detachment and eventual alienation from the law’s enforcers, and it reflects the intuition among many people in poor communities of color that the law operates to exclude them from society.”).

<sup>258</sup> Policing can be traumatic for both police and those policed, and a trauma-informed approach, to be maximally effective, should address the experiences of both groups. Nonetheless, some prominent proponents that use “trauma-informed” terminology focus exclusively on trauma to those policed. See, e.g., Altovise Love-Craighead, *Building Trust Through Trauma-Informed Policing*, VERA INST. OF JUST. (Mar. 20, 2015), <https://www.vera.org/news/police-perspectives/building-trust-through-trauma-informed-policing> [<https://perma.cc/GG48-SHB9>] (focusing exclusively on the trauma of victims and witnesses). For a contrasting example, see Task Force on Policing, *The Path to Progress: Five Priorities for Police Reform*, COUNCIL ON CRIM. JUST. (2021), <https://counciloncj.foleon.com/policing/assessing-the-evidence/five-priorities> [<https://perma.cc/U5SC-SCEX>] (suggesting that officers also need a better “awareness of their own exposure to stress and trauma”).

an individual who fails to immediately comply with the officer's requests necessarily presents a safety threat.<sup>259</sup>

Police should also be taught about the cognitive biases and psychological triggers that may affect their own behaviors and result in the needless escalation of an otherwise non-dangerous civilian encounter. Such training would increase officers' self-awareness, enabling them to observe their own reactions with enhanced clarity and circumspection. Trauma-informed training would include instruction about the "racial anxiety feedback loop" between police and those policed, paying special attention to the anxieties on both sides of the interaction. Such training would provide helpful context and perspective for officers as they interpret their encounters with civilians, many of whom may have a deep-seated fear of police.<sup>260</sup> For example, instead of automatically viewing as suspicious certain reactions to police presence—e.g., running away, nervous gestures, and "furtive movements"—police would be made aware of a broader range of possible reasons for these common reactions.

Additionally, officers should be provided with resources to address their own mental health needs. The few existing initiatives that address officer mental health tend to focus only on the period after an officer experiences a traumatic incident.<sup>261</sup> A preferable, more holistic approach would provide tools and resources to recruits from the beginning of their training through their careers in law enforcement, including in such areas as mindfulness,

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<sup>259</sup> Police training about mental illness would also disabuse officers of the common myth that equates mental health problems and violence. *Mental Health Myths and Facts*, MENTALHEALTH.GOV, <https://www.mentalhealth.gov/basics/mental-health-myths-facts> ("Most people with mental illness are not violent and only 3%–5% of violent acts can be attributed to individuals living with a serious mental illness.).

<sup>260</sup> See, e.g., Bell, *supra* note 2, at 2068 (describing the deep-seated alienation that Black communities feel toward police).

<sup>261</sup> E.g., *Officer Wellness Training*, FRATERNAL ORD. OF POLICE, <https://fop.net/officer-wellness/training> [<https://perma.cc/2LB4-7SFL>]; *Peer Support*, THAT PEER SUPPORT GRP., <https://cathyandjavi.com> [<https://perma.cc/8P9M-PLRR>]. In many cases, however, even such after-the-fact resources are lacking. For example, an officer recounted the time he arrived to answer a call from a young mother whose infant was unconscious:

[He] tried to administer CPR, but it was too late. "The baby died in my arms," he said. The incident occurred in the morning, just as his day began. When he got to the police station, there were no counselors waiting to talk about his grief. No one suggested or even mentioned that [he] might take the day off; he was sent right back into the field. In fact, outside of the report he filed, [the officer] didn't mention the baby's death at work at all. "I went home and talked to my wife about it, that's it," the officer told the group.

Charles, *supra* note 186.

stress management, and suicide education and prevention.<sup>262</sup> In addition to saving lives and improving wellness,<sup>263</sup> such preventative reforms also could be cost-effective.<sup>264</sup> The state should also provide resources for officers to process and heal from prior traumatic experiences.<sup>265</sup>

c. Learning Through Exposure

Within a controlled educational setting, exposing officers to the perspectives of individuals from traditionally marginalized groups is a crucial component to disrupting an us-them frame. Humans are prone to adopting in-group/out-group categorizations and, if coupled with negative stereotypes, to associate the out-group with feelings of fear and dehumanization.<sup>266</sup> Affirmative steps are thus necessary to counter these stereotypes and to humanize those who may otherwise be categorized by police as “them.” Research findings suggest that exposure to members of an “out-group” who do not fit group-based stereotypes may help to reduce bias.<sup>267</sup> Moreover, exposure—through personal narrative—makes it easier to identify with another person’s hopes, dreams, and pain, thereby reducing one’s ability to essentialize that person based on negative stereotypes.<sup>268</sup>

Representatives of groups historically alienated from police should be invited to speak to recruits as guest instructors, to educate officers by sharing

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<sup>262</sup> For discussion of the high rates of PTSD and suicide among officers, see *supra* notes 183–186 and accompanying text.

<sup>263</sup> Daniel W. Grupe, Jonah L. Stoller, Carmen Alonso, Chad McGehee, Chris Smith, Jeanette A. Mumford, Melissa A. Rosenkranz & Richard J. Davidson, *The Impact of Mindfulness Training on Police Officer Stress, Mental Health, and Salivary Cortisol Levels*, 12 FRONTIERS IN PSYCH. 1, 8 (2021) (reporting clinical trial findings that “police-specific, 8-week MBI [mindfulness-based intervention] led to improvements in psychological distress, mental health, and subjective sleep quality”).

<sup>264</sup> *Costs & Predicted ROI*, SIGMA, <https://iamsigma.com/program>.

<sup>265</sup> See, e.g., Meret Hofer & Shanon Savell, *There Was No Plan in Place to Get Us Help: Strategies for Improving Mental Health Service Utilization Among Law Enforcement*, 36 J. CRIM. PSYCH. 543, 543 (2021) (finding, through officer interviews, that officers “perceived the need for a cultural shift emphasizing comprehensive, incentivized, preventative mental health services”).

<sup>266</sup> Betzler, *supra* note 236.

<sup>267</sup> Katherine Spencer, Amanda Charbonneau & Jack Glaser, *Implicit Bias and Policing*, 10 SOC. & PERSONALITY PSYCH. COMPASS 50, 56 (2016).

<sup>268</sup> For examples in the prison context, see Eisenberg, *The Prisoner and the Polity*, *supra* note 239 at 53–54. In the medical context, courses in “narrative medicine” aim to humanize patients through the use of personal narratives and thus to improve relationships between staff and patients. Michael Valenti & Lewis Mehl-Madrona, *Humanizing Patients through Narrative Approaches: The Case of Murphy, the “Motor-Mouth”*, 14 PERM. J. 47, 47 (2010).

their perspectives on policing based on their lived experience.<sup>269</sup> Invited guests might include leaders in the Black community, who could address the fear felt by many Black Americans toward police, and individuals who suffer from a medical condition—like Tourette Syndrome—who easily could be mistaken as making “furtive movements” because of their (involuntary) physical conditions.<sup>270</sup> Other guests might address the special needs of mentally ill individuals and of those who may find themselves in a crisis situation (that may appear at first blush as “non-compliance”) because they suffer from such conditions as epilepsy or low blood sugar.<sup>271</sup>

Nonofficers should also be exposed to the traumas that officers routinely face as part of their jobs. The Trauma to Trust program, piloted in Newark, New Jersey, provides a rare example of a model that brings officers and non-officers together for this purpose.<sup>272</sup> Founded in 2016, this program, which trains residents and officers over the course of two full days, teaches “how physical abuse, sexual abuse, and poverty—which is pretty common in Newark—add up and create a basis of trauma early in life that can contribute to depression, addiction, or struggles with self-regulation in adults.”<sup>273</sup> The training includes “critical race theory, including lessons on the implicit biases embedded in the legal system” and information about “how common it is for law enforcement officers to struggle with depression and anxiety, and the prevalence of suicide among their ranks.”<sup>274</sup>

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<sup>269</sup> Telephone Interview with Bill Evans, Former Comm’r, Bos. Police Dep’t (June 23, 2021) (describing the importance of such exposure and recounting the powerful effect on recruits when a woman whose son was killed by police was invited to share her experience as part of a training session). As a second-best approach, recruits could be assigned to read firsthand accounts or to watch videos.

<sup>270</sup> For a firsthand account by a man with Tourette’s Syndrome, see ABC News, *NYPD’s Stop-and-Frisk: Racial Profiling or Proactive Policing?*, YOUTUBE (May 2, 2013), <https://www.youtube.com/watch?v=8jqXeW5C324> (“I have Tourette’s Syndrome, so all I do is make furtive movements . . . so I could be stopped every time I come out of my house”).

<sup>271</sup> These examples are not theoretical. See *Graham v. Connor*, 490 U.S. 386, 397 (1989); *infra* note 290.

<sup>272</sup> This program is scheduled to expand to a second location in Baton Rouge in Spring 2022. Charles, *supra* note 169.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* This approach requires tremendous perseverance and will invariably face obstacles. At the start of the Trauma to Trust training in Newark, for example, the us-versus-them dynamic was palpable as “[t]he cops and the residents sat at tables on opposite ends of the room, facing each other across the distance.” *Id.* Nonetheless, by the second day of training, after a “word association activity to prompt the two groups to sit with each other” where the “small, mixed groups used one word to describe a traumatic experience,” some of the officers and residents remained sitting near each other. *Id.* The facilitator took this to be a huge step forward, exhibiting that members of these groups were capable of seeing past their divisions

## C. PROFESSIONALISM

1. *Investment in Empirical Research*

Preliminary academic research has shown that risks in policing are contextual and contingent, and that police training, orientation, and behavior contribute to the level of risk. However, far more research is needed to gain a more granular, comprehensive sense of the risks of policing in a broad array of contexts.

Importantly, these risks include both the risk of violent assault, as well as a host of other risks that are often downplayed by officers but may, statistically, present a far higher risk to officers.<sup>275</sup> For example, the leading cause of death for officers in both 2020 and 2021 was not felonious assault, but COVID-19.<sup>276</sup> Yet police departments and unions across the country opposed vaccine mandates and filed lawsuits challenging them.<sup>277</sup> As another example, police officers are more likely to die by suicide than in the line of duty.<sup>278</sup> Yet, as one law enforcement officer lamented, “Police reform and the stigma of mental health care in law enforcement are two ideas that are rarely spoken about in the same conversations.”<sup>279</sup> Ironically, at the same time that the danger narrative is overblown—with police overestimating the fear of violent assault—police underestimate some risks that statistically may be more likely to cause them harm.

When discussing any risk to officers, including the risk of violent assault, context is key to understanding data. For example, a reference to “number of officers killed” provides little information without the denominator—i.e., total number of officers.<sup>280</sup> As demonstrated by the

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and engaging productively with each other. *Id.*; see also Telephone Interview with Barbara Premeah, Program Facilitator, Trauma to Trust (Feb. 14, 2022).

<sup>275</sup> Officers, like all of us, are subject to salience bias. See DECISION LAB, *supra* note 141.

<sup>276</sup> See, e.g., Rachel Treisman, *COVID Was Again the Leading Cause of Death Among U.S. Law Enforcement in 2021*, NPR (Jan. 12, 2022, 10:22 AM), <https://www.npr.org/2022/01/12/1072411820/law-enforcement-deaths-2021-covid> [<https://perma.cc/SM8S-5A52>]; see also Sierra-Arevalo, *supra* note 2, at 2 (discussing police downplaying risk of not wearing seatbelts).

<sup>277</sup> Treisman, *supra* note 276.

<sup>278</sup> Lehmann, *supra* note 183 (citing 2020 findings that the number of officers who committed suicide was substantially higher than the number of those killed while in the line of duty, and that the number of suicides had increased over time); Weichselbaum & Schwartzappel, *supra* note 183.

<sup>279</sup> Cathy Bustos & Javier Bustos, *What If?*, LAW OFFICER (Feb. 26, 2021), <https://www.lawofficer.com/what-if-2> [<https://perma.cc/4G4H-4UB9>].

<sup>280</sup> See Justin Nix, Tara N. Richards, Gillian M. Pinchevsky & Emily M. Wright, *Are Domestic Incidents Really More Dangerous to Police? Findings from the 2016 National*



limited sample of existing studies about the risks of policing, data are only useful when coupled with contextual information.<sup>281</sup>

Police departments should make risk-related data available, and these data should be collected and assessed with the goal of better understanding the risk continuum in policing.<sup>282</sup> Such an investment in empirical research would undergird the development of an evidence-based taxonomy of risks in policing.<sup>283</sup> By contrast, and in the current absence of such a taxonomy,<sup>284</sup> risks are collapsed into each other, yielding the undifferentiated danger narrative that conceives of all policing as dangerous—a decidedly unscientific, anti-professional approach.

Instead, policing should be guided according to professional norms in such fields as medicine and aviation where, while there are many factual differences among scenarios, there also are distinct templates for addressing potential risks.<sup>285</sup> Just as physicians make it a practice to incorporate new empirical findings into medical protocols,<sup>286</sup> law enforcement protocols also should continue evolving in response to empirical findings about risk. As such research is updated, it should be incorporated as part of both training for recruits and continuing education for officers, who would be required to keep informed of best practices.

## 2. Peer Learning

Further drawing on the examples of the medical and aviation professions, police should adopt a peer learning approach. This would

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*Incident Based Reporting System*, 38 JUST. Q. 1405, 1406 (2021) (noting a “denominator problem” that may skew data in research on danger to police).

<sup>281</sup> Woods, *supra* note 5.

<sup>282</sup> Others have also lamented that policing data remains largely unavailable. *E.g.*, Rachel Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 MARQ. L. REV. 1119, 1121 (2013).

<sup>283</sup> Collaborations with academics in criminology, law, and other social sciences may be particularly promising. Once a better understanding of the risks associated with different policing contexts and contingencies is achieved, there will be policy decisions to make about who should bear those risks. On the margins, consensus about how to navigate these tradeoffs is unlikely, yet in many cases, understanding the scope of risk based on contextual factors may yield broad agreement about policies that would make policing safer for both police and those policed.

<sup>284</sup> *See, e.g.*, DAVID WEISBURD & PETER NEYROUD, NAT’L INST. OF JUST. & HARV. UNIV., POLICE SCIENCE: TOWARD A NEW PARADIGM 2–3 (Jan. 2011) (lamenting the lack of evidence-based policing models and the “fundamental disconnect” between science and policing).

<sup>285</sup> *See, e.g.*, Narinder Kapur, Anam Parand, Tayana Soukup, Tom Reader & Nick Sevdalis, *Aviation and Healthcare: A Comparative Review with Implications for Patient Safety*, J. ROYAL SOC’Y. MED. OPEN 1, 4–5 (2016).

<sup>286</sup> *See, e.g.*, Bruce Thyer, *What Is Evidence-Based Practice?*, 4 BRIEF TREATMENT & CRISIS INTERVENTION 167, 168 (2004).

involve examining case studies where there was an adverse event, serving as a teaching tool to consider how those cases, or similar future cases, could better be addressed.<sup>287</sup> This innovation would promote knowledge production in policing and help to substantiate claims of police professionalism.<sup>288</sup>

While the Supreme Court has prohibited the use of 20/20 hindsight for imposing liability on officers,<sup>289</sup> *liability* for police should be viewed separately from the *learning* that police could derive from approaching cases with the benefit of hindsight. Contrary to the Court's assertion in *Graham* that policing is inherently dangerous and unpredictable, as more is learned about policing—using hindsight as a guide—what may have seemed unpredictable may begin to look very predictable (and even preventable).<sup>290</sup> Indeed, in a use-of-force context, it is often the case that the police officer *could* have acted differently, thus avoiding a bad outcome.<sup>291</sup>

The sentinel event review (SER) approach, pioneered by British researcher James Reason,<sup>292</sup> is one method for analyzing “human error and organizational processes” and may be useful in the policing context. The theory behind SERs, which have been used in such fields as medicine, aviation, and financial services, is that “when a bad outcome occurs in a complex social system . . . it is rarely the result of one person's mistake. Rather, multiple small errors combine and are exacerbated by underlying

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<sup>287</sup> See generally Thomas Maddox & John Rumsfeld, *Adverse Clinical Event Peer Review Must Evolve to Be Relevant to Quality Improvement*, 7 CIRCULATION: CARDIOVASCULAR QUALITY & OUTCOMES 807, 807–08 (Nov. 1, 2014).

<sup>288</sup> See generally Lvovsky, *supra* note 31 (discussing claims of police expertise); Stoughton, *supra* note 5, at 649 (chronicling judicial decisions that defer to police based on claims of professional expertise).

<sup>289</sup> *Graham v. Connor*, 490 U.S. 386, 397 (1989).

<sup>290</sup> The facts of *Graham* illustrate the importance of using cases with bad outcomes as teaching tools. Officer Connor observed Dethorne Graham, who had traveled to a store to purchase orange juice to counteract an insulin reaction he was experiencing, leave the store quickly and drive away. The officer found this behavior suspicious and pulled over the car, ignoring Graham's attempts to explain his medical condition and using force against him. *Id.*

<sup>291</sup> The *Graham* Court's reference to “split-second judgments” should be scrutinized, with a special focus on time-framing, i.e., when did the encounter actually begin, and what might the officer have done to avoid that split-second moment? A medical analogue illustrates the problem created when this focus on a “split-second” ignores everything that happened before: Consider the snapshot of a patient in dire condition. We would not ask whether, from that moment, the doctor behaved reasonably, while ignoring that the only reason the crisis arose was because of the doctor's gross negligence.

<sup>292</sup> Reason is best known for his “Swiss cheese model,” a graphical representation where “each slice of cheese represents a safety barrier or precaution relevant to a particular hazard” and the holes represent organizational vulnerabilities. *Swiss Cheese Model* PATIENT SAFETY NETWORK, <https://psnet.ahrq.gov/taxonomy/term/3460>; JAMES REASON, *MANAGING THE RISKS OF ORGANIZATIONAL ACCIDENTS* 9 (1997).

weaknesses in the system.”<sup>293</sup> As Dr. Reason explains, “We cannot change the human condition, but we can change the conditions in which humans operate.”<sup>294</sup> SER’s focus on the “underlying weaknesses in [the] system” may be particularly germane to the policing context since, instead of attempting to address police misconduct and restore public trust by ferreting out individual “bad apples,”<sup>295</sup> the focus of an SER approach would be systemic institutional change.<sup>296</sup>

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<sup>293</sup> Nancy Ritter, *Testing a Concept and Beyond: Can the Criminal Justice System Adopt a Nonblaming Practice?*, 276 NAT’L INST. JUST. J. 38, 39 (Dec. 1, 2015) (explaining that “a ‘sentinel event’ . . . signals underlying weaknesses in a system or process; is likely the result of compound errors; [and] may, if properly understood, provide important keys to strengthening the system and preventing similar adverse outcomes in the future”). Crucially, this approach “involves all stakeholders; refrains from making blame-placing a primary goal; and adopts an ongoing, forward-leaning, system-improving framework for surfacing, analyzing, and resolving sentinel events when they occur.” NAT’L INST. OF JUST., U.S. DEP’T OF JUST., THE SENTINEL EVENT INITIATIVE: PROCEEDINGS FROM AN EXPERT ROUNDTABLE 1 (May 21, 2013).

<sup>294</sup> Ritter, *supra* note 293, at 38.

<sup>295</sup> This approach—and others proposed by this Article—is consistent with calls to address systemic problems in policing and with critiques of the so-called “bad apples” approach to police reform. For examples of this critique, see PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 6 (2017) (“The problem is not bad apple cops. The problem is police work itself.”); Rashawn Ray, *Bad Apples Come from Rotten Trees in Policing*, BROOKINGS INST. (May 30, 2020), <https://www.brookings.edu/blog/how-we-rise/2020/05/30/bad-apples-come-from-rotten-trees-in-policing> [<https://perma.cc/B4YR-246A>]. A recent study and policy simulation using data from the Chicago Police Department determined that removal of “bad apples” has relatively minimal impact on reduction in use of force incidents. Aaron Chalfin & Jacob Kaplan, *How Many Complaints Against Police Officers Can Be Abated by Incapacitating a Few “Bad Apples?”*, 20 CRIMINOLOGY & PUB. POL’Y 351, 363 (2021).

<sup>296</sup> The SER approach has not been widely used in the policing context, but recent research by Hollway and Grunwald of “the first SERs conducted in an American police department—the review of the Lex Street Massacre investigation and prosecution, which resulted in the wrongful incarceration of four innocent men for eighteen months” provides helpful insights into its prospects and limitations. John F. Hollway & Ben Grunwald, *Applying Sentinel Event Reviews to Policing*, 18 CRIMINOLOGY & PUB. POL’Y 705, 718 (2019). The authors conclude that “SERs will likely experience greater participation and candor from participants when reviewing cases that raise fewer liability issues or cases, like Lex Street, where liability issues have already been resolved.” *Id.* at 725 (positing that “the biggest hurdle is agencies’ concern that a review may expose them to civil liability” since “without some legal protection, departments that conduct SERs may be required to disclose through discovery their findings, documents, data, and statements arising from the review.”). More recently, the Quattrone Center for the Fair Administration of Justice has conducted SER analyses in cities including Madison, Philadelphia, San Francisco, and Minneapolis as part of the Bureau of Justice Assistance’s Sentinel Events Initiative National Demonstration Collaboration grant. *Quattrone Center Releases Sentinel Event Review Analysis of the Madison Police Department’s Response to the George Floyd Protests*, UNIV. OF PA. CAREY L. SCH. (Nov. 17, 2021), <https://www.law.upenn.edu/live/news/14210-quattrone-center-releases-sentinel-event-review> [<https://perma.cc/2NTE-GRRY>].

#### D. COLLABORATIONS

Implementing a range of police partnerships and community collaborations would help to improve service provision. Sustained scrutiny of these different models also reveals areas where police should—and might even prefer to—defer entirely to other community organizations.<sup>297</sup>

##### *1. Macropartnerships*

These partnerships would address broad, systemic issues, bringing police into dialogue with those in other departments, with policing experts across a range of disciplines, and with community leaders and identity group members. Such partnerships would build relationships and promote the sharing of best practices. They could either be inter-community (i.e., involving multiple police departments) or intra-community (i.e., focused on bringing together law enforcement and community group leaders from the same jurisdiction).

An inter-community macropartnership could create opportunities for police leaders across departments to engage with policing experts about their research. In the mental health context, for example, the Council of State Governments Justice Center and the U.S. Department of Justice's Bureau of Justice Assistance are collaborators in a pilot program that includes a team of national experts and nine selected law enforcement agencies that serve as national "Law Enforcement–Mental Health Learning Sites."<sup>298</sup> These sites are focused on improving the responses of law enforcement to individuals with mental health needs.<sup>299</sup> In the words of Michael Sauschuck, Commissioner of the Maine Department of Public Safety, "The learning site project creates a forum for policing officials to learn from one another on

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<sup>297</sup> As more data about the efficacy of existing police protocols are analyzed, questions about what functions are best suited for police—and what functions would be better performed either in collaboration with other professionals or without police involvement—will be easier to resolve. Such data would also provide insights about which routine police practices may be having an adverse effect, and they would aid stakeholders in making informed decisions about risk tradeoffs and personnel allocation. For example, findings that a police presence may be unnecessary (or perhaps even counterproductive) in certain situations could free up officers who would otherwise respond to such situations to report instead to locations that could benefit from additional officers.

<sup>298</sup> *Law Enforcement–Mental Health Learning Sites*, JUST. CTR., COUNCIL OF STATE GOV'TS, <https://csgjusticecenter.org/projects/police-mental-health-collaboration-pmhc/law-enforcement-mental-health-learning-sites> [https://perma.cc/46GK-27M3]. In 2010, six learning sites were selected including police departments in Houston, TX; Los Angeles, CA; Madison, WI; Portland, ME; Salt Lake City, UT; and the University of Florida. Three sites were subsequently added: Arlington, MA; Madison County, TN; and Tucson, AZ. *Id.*

<sup>299</sup> *Id.*

how to adapt responses to people with mental illnesses, ensuring officers are better able to connect them to needed services, while increasing public safety, reducing arrests, and saving vital agency resources.”<sup>300</sup>

An intra-community macropartnership could bring law enforcement into dialogue with leaders of local organizations as part of a community-wide task force.<sup>301</sup> Such a convening might serve as a sounding board for police leaders to solicit constructive feedback about police protocols and reform initiatives, and to discuss possible responses and reforms related to adverse events. For example, before it was disbanded in 2018 following the appointment of a new commissioner, Boston’s Social Justice Task Force included command staff from the Boston Police Department, representatives from the NAACP and the ACLU, public defenders, and clergy members, among other community leaders.<sup>302</sup> During this time, a central focus of the Department was how to structure its body camera program, and this issue was discussed in monthly Task Force meetings for more than a year with the feedback of community leaders directly affecting decisions about how to deploy this pilot.<sup>303</sup>

However, as this example also illustrates, the frequent turnover in top police jobs presents substantial challenges to building and sustaining relationships between law enforcement and community groups over time. Even where a police commissioner or chief adopts reforms consistent with a communitarian approach, there is no guarantee that this person’s successor will continue working towards the same goal. Rather, any such reforms can be easily dismantled. In this instance, a police commissioner gave priority to cultivating relationships with community groups by developing a community-wide task force, yet his successor disbanded the task force and

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<sup>300</sup> *Id.*

<sup>301</sup> Such curated, purposeful, and mutual “contacts” with community leaders are distinct from the “non-enforcement contacts” that some policing scholars have recommended as a strategy to improve police-community relations. *See, e.g.*, Stoughton, *supra* note 40, at 231–32 (suggesting that “to encourage officers to connect with community members, law enforcement agencies should require would-be officers to initiate non-enforcement contacts with members of their community . . . rookie officers should have to spend a certain set amount of time . . . approaching civilians just to have meaningful conversations”). While intergroup exposure is crucial to combatting stereotypes, random, spontaneous, and uninvited contacts with officers may feel coercive to some community members and could create more fear and mistrust.

<sup>302</sup> Telephone Interview with Jack McDevitt, former Co-Chair, Soc. Just. Task Force (Aug. 18, 2021) (noting that the Task Force, which met at the Boston Police Department headquarters, was co-chaired by McDevitt, an academic, and a Black minister).

<sup>303</sup> *Id.* (noting that feedback from community members influenced many details of the roll out including decisions about number of body cameras used and the neighborhoods selected to be part of the pilot).

chose to invest in other priorities.<sup>304</sup> Since most police chiefs and commissioners are appointed by the city's mayor (or other city officials), local elections have a substantial impact on the ethos of a city's police department<sup>305</sup> and should be afforded special attention by reformers, as well as by those who would favor continuity in police-community collaborations.

## 2. *Micropartnerships*

While macropartnerships involve multiple organizations, of which law enforcement is one, a micropartnership is between a single police department and a social service agency. The structure of these relationships can vary widely, as illustrated by the following examples in the mental health context.

### a. Embedded Social Workers

A police department might embed one or more mental health clinicians in the department. Advocates of this approach stress that the crisis-intervention training received by officers—often lasting just one week—is minimal compared to the expertise of someone with several years of training—such as social workers and those pursuing a master's or doctorate in social work.<sup>306</sup> As one police leader observed, “Conceptually, MSW students would be better educated and better informed and better positioned and prepared to actually intervene in a crisis. . . . We can't arrest our way through that, especially when you have mental health challenges.”<sup>307</sup> Financially, this approach also may be advantageous. As one advocate explained, “while a new officer would cost the department around \$100,000 up front, adding a new social worker—who does not need to be equipped with a weapon or kitted-out cruiser—costs about half of that.”<sup>308</sup>

A few cities have piloted this model. For example, in Alexandria, Kentucky, when the police chief recognized that “two-thirds of the calls police responded to were not criminal [but] mental health crises and

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<sup>304</sup> *Id.*

<sup>305</sup> See Gaby Del Valle, *The Police We Vote For: How Americans Can Shape Criminal Justice with a Ballot*, *GUARDIAN* (June 26, 2020), <https://www.theguardian.com/us-news/2020/jun/26/us-police-americans-polls-criminal-justice> [<https://perma.cc/8XV6-QU38>].

<sup>306</sup> Adam Rogan, *Social Workers Could Be Embedded with Racine Police Department*, *JOURNAL TIMES* (Apr. 15, 2021), [https://journaltimes.com/news/local/social-workers-could-be-embedded-with-racine-police-department/article\\_f9bed213-3fe2-5856-952e-63a72e9c1500.html](https://journaltimes.com/news/local/social-workers-could-be-embedded-with-racine-police-department/article_f9bed213-3fe2-5856-952e-63a72e9c1500.html) [<https://perma.cc/LMN9-582J>].

<sup>307</sup> *Id.*

<sup>308</sup> Josh Wood, *The U.S. Police Department That Decided to Hire Social Workers*, *GUARDIAN* (Sept. 19, 2020), <https://www.theguardian.com/us-news/2020/sep/19/alexandria-kentucky-police-social-workers> [<https://perma.cc/ZH2X-MZAP>].

arguments resulting from long-brewing interpersonal conflicts,”<sup>309</sup> he convinced the city to hire a social worker.<sup>310</sup> As for the initial reaction to this idea, Chief Ward noted, “To an officer, they all thought I was batshit crazy.”<sup>311</sup> However, the city complied with his request and even the current police chief, who at the time was a staunch opponent, now sees the program as “indispensable.”<sup>312</sup>

Other examples include the police department in Madison, Wisconsin, which has a “dedicated mental health unit staffed by specific officers and embedded social workers.”<sup>313</sup> Also in Wisconsin, Aurora’s police department has hired college students as social workers-in-training to assist officers in resolving domestic disputes through mediation and de-escalation, rather than by making arrests.<sup>314</sup>

#### b. Mobile Crisis Units

Mobile crisis units “deploy trained professionals to respond to people experiencing a mental health crisis” and are geared towards curbing the number of fatal police encounters related to mental health and substance abuse.<sup>315</sup> According to a 2016 study, approximately “22% of fatal police encounters followed calls about an individual’s ‘disruptive behavior’ directly due to mental illness or substance abuse.”<sup>316</sup> Many mobile crisis units follow a “co-responder model, in which mental health workers are dispatched

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<sup>309</sup> However, this may not always be an easy line to draw, especially where there are firearms involved. *See, e.g.*, Mark Morales, *An NYPD Officer Was Killed and Another Seriously Injured in a Shooting While Responding to a Domestic Incident*, CNN (Jan. 22, 2022), <https://www.cnn.com/2022/01/21/us/nypd-officers-shot/index.html> [<https://perma.cc/978U-2LCG>] (“A woman called 911 and reported she was having a dispute with one of her sons inside her apartment, NYPD Chief of Detectives James Essig said in a news conference late Friday at Harlem Hospital. Shortly after, three NYPD officers arrived at the apartment and met the mother and another son. They both directed two of the officers to a room in the back of the apartment, where her other son—the suspect—was waiting, Essig said. ‘The door swings open and numerous shots are fired, striking both officers . . .’”).

<sup>310</sup> Wood, *supra* note 308.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> Rogan, *supra* note 306.

<sup>314</sup> *Id.*

<sup>315</sup> Juliet Isselbacher, *As Mobile Mental Health Teams Work to De-Escalate Crises, Some Warn Their Models Still Rely on Police Partnerships*, STAT NEWS (July 29, 2020), <https://www.statnews.com/2020/07/29/mobile-crisis-mental-health-police> [<https://perma.cc/HA8B-FSUE>].

<sup>316</sup> Sarah DeGue, Katherine Fowler & Cynthia Calkins, *Deaths Due to Use of Lethal Force by Law Enforcement*, 51 AM. J. PREVENTATIVE MED. 173, 173 (2016).

straight from the police station alongside officers.”<sup>317</sup> These units are generally composed of pairs, though a department might send larger co-responder teams, such as one including a paramedic, a social worker, and a police officer.<sup>318</sup> Advantages of this approach include “faster response times and built-in backup,” which enable “looping highly trained health professions to situations that are considered particularly high-risk or potentially violent, which the police otherwise might respond to on their own.”<sup>319</sup>

The mobile crisis unit program in Marion County, Oregon, was piloted in 2013 and is one of the oldest of its kind.<sup>320</sup> A police officer is paired with a mental health expert to respond to calls that likely involve a person suffering from mental illness. Law enforcement leaders have explained that the goal of this program is “to slow people and the situation down,” and that the program allows the mobile crisis unit team to spend up to ninety minutes with a person in distress, substantially more time than otherwise would be possible.<sup>321</sup> The Marion County Undersheriff Troy Clausen explained further, “The end goal is to decriminalize this population.”<sup>322</sup> This program has yielded impressive results as “nearly half of the incidents end without the mobile crisis teams needing to take people into custody or somewhere else other than back home.”<sup>323</sup> One law enforcement leader reflected, “It’s a much more thoughtful process of law enforcement.”<sup>324</sup>

### c. Police as Backup

Another model involves collaboration between police and mental health professionals, but police play more of a supporting role—as backup to non-

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<sup>317</sup> Isselbacher, *supra* note 315.

<sup>318</sup> Wood, *supra* note 308.

<sup>319</sup> Isselbacher, *supra* note 315.

<sup>320</sup> Chris Gray, *Marion County Response to Mental Health Incidents to be State Model*, LUND REP. (Nov. 4, 2015), <https://www.thelundreport.org/content/marion-county-response-mental-health-incidents-be-state-model> [<https://perma.cc/ER25-L8ST>].

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> *Id.* (noting that, in 2015, out of 500 calls, “about 40 were taken to the county’s psychiatric crisis center, 80 were brought to the Salem Hospital while in custody and only 23 were taken to jail”). In recent years, Marion County’s mobile crisis unit has responded to an average of 630 calls per year. *County Officials Point to Crisis Response Services, Crisis Center as City Tables Plans for Non-Police Program*, SALEM REP. (Oct. 13, 2021), <https://www.salemreporter.com/posts/5182/county-officials-point-to-crisis-response-services-crisis-center-as-city-tables-plans-for-non-police-program> [<https://perma.cc/334C-VYZT>].

<sup>324</sup> Gray, *supra* note 320 (noting that “these people often pose a much greater risk to themselves than others, and said it was common for them to talk people down from suicidal situations”).



law enforcement first responders. For example, the CAHOOTS program in Eugene, Oregon, launched in 1989, sends out “two-person teams consisting of a medic (a nurse, paramedic, or EMT) and a crisis worker who has substantial training and experience in the mental health field,” with the agreement that these teams can request police backup if necessary.<sup>325</sup> In 2019, “Out of a total of roughly 24,000 CAHOOTS calls, police backup was requested only 150 times.”<sup>326</sup> This model has also been piloted in other cities. For example, Denver’s STAR (Support Team Assisted Response) program, modeled on the CAHOOTS program, was championed by Denver’s police chief and launched on June 1, 2020.<sup>327</sup>

While some reformers would prefer police to play no role at all in conjunction with these programs, many mental health leaders prefer a collaborative model. As one noted, “I have appreciated the CAHOOTS program being woven into public safety so directly, specifically with the police, because I feel like that’s really given us access to a lot of calls and to a lot of individuals that we would otherwise not have gotten access to.”<sup>328</sup> Another noted, “If we’re in a situation and we develop a sense that this is a situation that’s spinning out of control and is extremely dangerous, and we get on the phone and we say the police, we need you here now—they’re there now,” further observing, “I think that only happens when you have these kind of relationships.”<sup>329</sup>

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<sup>325</sup> *CAHOOTS and the Police Departments*, WHITE BIRD CLINIC (Oct. 29, 2020), <https://whitebirdclinic.org/what-is-cahoots> [<https://perma.cc/F2RR-YVXG>]. CAHOOTS is short for Crisis Assistance Helping out on the Streets. Ben Brubaker, director at White Bird Clinic explained the choice of name: “CAHOOTS was pretty entertaining, tongue-in-cheek . . . We’re kind of working with the cops, but we’re not the cops.” Isselbacher, *supra* note 315.

<sup>326</sup> *CAHOOTS and the Police Departments*, *supra* note 325.

<sup>327</sup> David Sachs, *6-Month Experiment Replacing Denver Police with Mental Health Teams Dubbed a Success*, NPR (Mar. 8, 2021), WellPower, Support Team Assisted Response (STAR), <https://www.wellpower.org/star-program>.

<sup>328</sup> Isselbacher, *supra* note 315 (noting further that “[w]ithout requests patched through from the police, or a dedicated hotline that the public knows to call, it’s exceedingly difficult for mobile crisis units to get the word out about their services . . . [since] adults are so used to when they’re in crisis either calling 911 or showing up at their ER”).

<sup>329</sup> *Id.* There may be additional reasons to prefer a collaborative model that includes at least some involvement by law enforcement. First, whereas 911 calls come in throughout the day and night, social workers generally are not on call 24/7. Second, there is the concern that people at the scene may be armed and that this may not be apparent during the 911 call. However, even in the presence of armed police officers, an unexpected confrontation with an armed civilian may lead to tragic consequences. *See, e.g.*, Jonathan Dienst & Myles Miller, *‘He’s Fighting Hard’: NYPD Cop Hangs on to Life, Another Dies as Anti-Gov’t Conspiracist Opens Fire*, NBC N.Y. (Jan. 23, 2022, 11:58 PM), <https://www.nbcnewyork.com/news/local/>

## E. REVISITING POLICE FUNCTION

Beyond the many opportunities for collaboration with social service organizations, there is a growing consensus—including among police—that the scope of policing is too vast. Some have argued that some 911 calls should be rerouted, and that many adverse incidents could be prevented through early intervention by trained community members.<sup>330</sup> A few cities have recently proposed or adopted alternative models that would shift responsibilities from police to other community groups. For example, Minneapolis has launched a “civilian crisis response corps” to address some mental health emergencies without police.<sup>331</sup> New York City recently introduced a new initiative making “Mental Health Teams of health professionals and crisis workers from FDNY Emergency Medical Services” the default response to mental health emergencies in two “high-need precincts.”<sup>332</sup>

Some cities are pursuing proactive measures, enlisting “violence interrupters”<sup>333</sup> who are focused on community-building to patrol

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two-nypd-officers-shot-in-harlem-while-responding-to-domestic-violence-call-police-official [<https://perma.cc/QQJ2-9NMH>] (describing an incident in the Bronx that resulted in the fatal shooting of two officers after they responded to a call about a domestic disturbance, where the caller made no mention of any weapons).

<sup>330</sup> See, e.g., Sarah Betancourt, *Should There Be a Separate 911 System for Mental Health Crises?*, GBH NEWS (Feb. 23, 2022), <https://www.wgbh.org/news/local-news/2022/02/23/should-there-be-a-separate-911-system-for-mental-health-crises> [<https://perma.cc/8UG6-XKU7>].

<sup>331</sup> Libor Jany, *Minneapolis to Start Sending Civil Response Teams, Not Police, to Some Mental Health Calls*, STAR TRIB. (July 16, 2021), <https://www.startribune.com/minneapolis-to-start-sending-civil-response-teams-not-police-to-some-mental-health-calls/600078792> [<https://perma.cc/SEE8-DAUE>] (noting that this pilot program is operated by Canopy Mental Health & Consulting, a majority Black-owned firm that focuses on “centering the experiences and mental health needs of BIPOC [Black, Indigenous, people of color] and other marginalized communities”).

<sup>332</sup> Press Release, New York City Announces New Mental Health Teams to Respond to Mental Health Crises, NYC.gov (Nov. 10, 2020), <https://www.nyc.gov/office-of-the-mayor/news/773-20/new-york-city-new-mental-health-teams-respond-mental-health-crises>.

<sup>333</sup> *About Violence Interrupters*, VIOLENCE INTERRUPTERS, <https://www.violenceinterrupters.org/about-us> [<https://perma.cc/5V38-DMHY>]; see also *Job Description: Violence Interrupter*, YOUTH ALIVE, <https://www.youthalive.org/wp-content/uploads/2015/07/Violence-Interrupter-Job-Description-2018.pdf> [<https://perma.cc/7WTK-QNES>] (advertising the Oakland job as follows: “Violence Interrupters operate in areas where violence and poverty are the norm. Interrupters leverage their individual reputation and street credibility to disrupt the cycle of violence in Oakland communities. Interrupters are connected to the streets of the toughest neighborhoods with the unique ability to identify and intervene in individual, group and gang-related conflicts before they intensify. If a shooting has occurred, they seek out the victim’s friends and relatives and try to prevent a retaliatory shooting. Violence Interrupters

neighborhoods instead of police, with the goal of diffusing potential conflicts before they erupt into violent situations. In Minneapolis, the city's Office of Violence Prevention has hired violence interrupters, mostly Black men, who live in the communities they serve and who are "able to approach tense situations because of personal connections they already have with the community."<sup>334</sup> In the words of one participant, "the brothers and sisters doing violence interruption work have an aversion to holding a firearm. . . . That's because it's not war for us. It's peacekeeping."<sup>335</sup>

Some municipalities have experimented with non-police alternatives to traffic enforcement. For example, hundreds of municipalities across more than twenty states enforce traffic laws using red-light or speed cameras.<sup>336</sup> While these localities tend to rely on police agencies to operate these automated programs, making final decisions after third-party vendors have completed an initial review of the data amassed from these cameras,<sup>337</sup> one could imagine this function delegated entirely to trained traffic agencies that are independent of law enforcement.<sup>338</sup>

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are expert conflict mediators utilizing problem-solving skills to address safety risks and to end conflict. This individual will be an integral part of reducing the shootings and homicides in the City of Oakland.").

<sup>334</sup> Nina Moini, *Meet the Minneapolis 'Violence Interrupters,'* MPR NEWS (Oct. 14, 2020), <https://www.mprnews.org/story/2020/10/14/meet-the-minneapolis-violence-interrupters> [<https://perma.cc/4AGZ-YM58>] (explaining that Minneapolis "modeled the group after similar efforts in New York City and Philadelphia").

<sup>335</sup> Champe Barton, *Police, Power, and the Specter of Guns*, TRACE (June 13, 2020), <https://www.thetrace.org/2020/06/police-power-guns-george-floyd> [<https://perma.cc/6UX4-QMND>].

<sup>336</sup> *Speed and Red Light Cameras*, GOVERNOR'S HIGHWAY SAFETY ASS'N, <https://www.ghsa.org/state-laws/issues/speed> [<https://perma.cc/Y295-UJMX>]; *U.S. Red Light Camera Communities*, IIHS-HLDI, <https://www.iihs.org/topics/red-light-running/red-light-camera-communities> [<https://perma.cc/8TDP-XKXC>]. For an in-depth examination of traffic enforcement and policing, see Jordan Blair Woods, *Traffic Without the Police*, 73 STAN. L. REV. 1471, 1503 (2021).

<sup>337</sup> Woods, *supra* note 336, at 1503.

<sup>338</sup> *Id.* While Woods (among others) have lauded this approach for its "race-neutrality," recent data from Chicago find significant racialized effects. Emily Hopkins & Melissa Sanchez, *Chicago's "Race-Neutral" Traffic Cameras Ticket Black and Latino Drivers the Most*, PROPUBLICA (Jan. 11, 2021), <https://www.propublica.org/article/chicagos-race-neutral-traffic-cameras-ticket-black-and-latino-drivers-the-most> [<https://perma.cc/SJ4D-ZXQ7>]. While Chicago has tried to remedy this problem by adopting policies to counteract the financial effects, they have yet to address the disproportionate ticketing of Black and Latino drivers. See, e.g., Melissa Sanchez & Elliott Ramos, *Chicago City Council Approves Ticket and Debt Collection Reforms to Help Low-Income and Minority Motorists*, PROPUBLICA (Sept. 18, 2019, 1:20 PM), <https://www.propublica.org/article/chicago-city-council-approves-ticket-and-debt-collection-reforms>.

In many instances, the police would themselves prefer to limit the scope of policing.<sup>339</sup> For example, a 2021 survey of police employees in Brookline, MA, suggested “separating out some 911 calls that can be handled outside the police department.”<sup>340</sup> About 73% of respondents (representing more than half of the department) agreed that “there were some calls that would be better handled by another agency, particularly quality-of-life issues such as leaf blowers, snow shoveling, scooters, turkeys and noise complaints.”<sup>341</sup> Officers reported dissatisfaction that “year after year we get assigned new work . . . taking on work other agencies aren’t doing”—such as enforcing a leaf blower by-law and noise ordinances—“we never get more money or bodies to do the work.”<sup>342</sup>

Police and nonpolice would benefit from a shift from “911 as catch-all” to a more thoughtful and fine-grained analysis of what functions could best be performed by officers in collaboration with others, how such collaborations optimally would be structured, and which functions might be better attended to by those outside the police department. The communitarian lens reimagines the role of police officer as neither Warrior nor Guardian, but instead, as community partner, taking charge in some situations, playing a supporting role in others, and sometimes, deferring entirely. Merely redefining police function, however, would not yield meaningful change. Culture transcends function, and cultivating the fluidity, adaptability, and responsiveness that are core to communitarian policing will require no less than a cultural shift.

#### CONCLUSION

This Article’s focus on the role of the danger narrative supplements—and complicates—existing accounts of fraught police-civilian relations. By highlighting the centrality of exaggerated claims of danger to police culture, the law of policing, and contemporary policy debates over police practices,

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<sup>339</sup> This has been a longstanding issue. See, e.g., Brady Dennis, Mark Berman & Elahe Izadi, *Dallas Police Chief Says ‘We’re Asking Cops To Do Too Much in This Country,’* WASH. POST (July 11, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/07/11/grief-and-anger-continue-after-dallas-attacks-and-police-shootings-as-debate-rages-over-policing> [<https://perma.cc/MF73-MT6A>]; Egon Bittner, *Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police*, in *THE POTENTIAL FOR REFORM OF CRIMINAL JUSTICE* 17 (Herbert Jacob ed., 1974).

<sup>340</sup> Abby Patkin, ‘*Why Would Any Officer Want to Stay Here? Brookline Police Say Morale Is at a New Low*,’ WICKEDLOCAL (May 3, 2021), <https://www.wickedlocal.com/story/brookline-tab/2021/04/30/brookline-ma-committee-on-policing-reforms-police-department-officers-morale-all-time-low/7411455002> [<https://perma.cc/YFY5-4G7D>].

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

it explains why the displacement of this narrative is crucial to meaningful police reform.

Changing professional culture is of course no simple matter. The appointment of reform-minded police leaders, the adoption of new training practices, and the fostering of community partnerships are not magic potions: they will not instantly transform the perspectives of rank-and-file officers or of those who experience law enforcement as illegitimate or alienating. However, such measures can serve as meaningful signals of a willingness to reform and as entry points to conversations with critics who may be prepared to come to the table to begin the difficult conversations necessary to build a constructive relationship between police and historically marginalized communities. Ultimately, dismantling the danger narrative is an indispensable first step towards breaking down us-versus-them dynamics, recasting police narratives, and reimagining policing roles and relationships.