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## ARTICLE

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### DISAGGREGATING THE POLICING FUNCTION

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*Policing imposes serious and extensive harms, from shootings and nonlethal uses of force, to stops, searches, arrests, and incarceration. And many of these harms*

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*involve pervasive racial disparities. Scholars and advocates tend to see these harms as collateral to policing and seek to address them with “harm-regulating” tools such as civil rights suits, prosecution of police officers, elimination of qualified immunity, more Department of Justice investigations, civilian review boards, and the like.*

*Harm-regulation techniques are unlikely to be successful, however, as we see all too well in practice. Harm is not collateral to policing, it is innate to it. We call police “crimefighters,” we train them in using force and enforcing the law, and we deploy them to do this. So, it should come as no surprise that what we get is force, and law enforcement. And that this approach does little to address the sorts of social problems—from homelessness to substance abuse to mental illness—that police confront every day.*

*This Article takes an entirely different approach to the harms of policing, looking to the very core of the policing function itself. It disaggregates what police officers are called upon to do daily into their constituent functions, asking in each instance: are force and law the appropriate responses, and if not, what are? What would be a better response to the needs of the public? Crimefighting actually is a very small part of what police do every day, and the actual work they are called upon to do daily requires an entirely different range of skills, among them: mediation skills to address conflict, social work skills to get people the long-term solutions they need, interviewing and investigative skills to really solve crimes, and victim-assistance. Yet, police are barely trained in any of this, so it is no surprise harm is the result.*

*This Article suggests a range of solutions designed not to reduce harm collaterally, but to reduce altogether the footprint of force and law. We either need to change fundamentally the nature of the policing agency workforce, or move police to the background, bringing in other agencies of government to address the actual problems police face on a day-to-day basis. At the end, this Article proposes a totally novel idea for a whole new system of generalist first responders, to replace much of policing as we know it. And it argues that we must reduce criminalization. In short, to reduce the harms of policing, we need to reimagine public safety from the ground up.*

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## INTRODUCTION

The last few years have seen sustained attention to the harms of policing, and with good reason. Almost one thousand people are shot and killed by the police each year.<sup>1</sup> Countless more are subjected to lesser uses of force.<sup>2</sup> The police conduct countless pedestrian and traffic stops annually; far too many of the stops are pretextual or outright unconstitutional, and most are unproductive.<sup>3</sup> Policing imposes severe racial disparities, often an inevitable result of the tactics the police adopt.<sup>4</sup> One could go on.

Over the last decade or more, the primary response from advocates and scholars has been to seek to minimize or eliminate these harms. That is to say, tighten up the constitutional rules of police search and seizure, so fewer of them occur.<sup>5</sup> Loosen the fetters of qualified immunity, so cops can be sued for

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<sup>1</sup> See John Sullivan, Liz Weber, Julie Tate & Jennifer Jenkins, *Four Years in a Row, Police Nationwide Shoot Nearly 1,000 People*, WASH. POST (Feb. 12, 2019, 11:26 AM), [https://www.washingtonpost.com/investigations/four-years-in-a-row-police-nationwide-fatally-shoot-nearly-1000-people/2019/02/07/0cb3b098-020f-11e9-9122-82e98f91ee6f\\_story.html?utm\\_term=.e9a7ea16d070](https://www.washingtonpost.com/investigations/four-years-in-a-row-police-nationwide-fatally-shoot-nearly-1000-people/2019/02/07/0cb3b098-020f-11e9-9122-82e98f91ee6f_story.html?utm_term=.e9a7ea16d070) [<https://perma.cc/Q6DC-K6N8>] (“[I]n each of the past four years police nationwide have shot and killed almost the same number of people—nearly 1,000.”).

<sup>2</sup> See ELIZABETH DAVIS, ANTHONY WHYDE & LYNN LANGTON, U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., *CONTACTS BETWEEN POLICE AND THE PUBLIC*, 2015, at 1 (2018) (“In 2015 . . . about 53.5 million persons . . . had experienced some type of contact with the police during the prior 12 months.”).

<sup>3</sup> See Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736, 736 (2020), <https://doi.org/10.1038/s41562-020-0858-1> [<https://perma.cc/R3AB-YV58>] (“We assessed racial disparities in policing in the United States by compiling and analysing a dataset detailing nearly 100 million traffic stops . . . . Our results indicate that police stops and search decisions suffer from persistent racial bias . . . .”); POLICING PROJECT, N.Y.U. SCH. OF L., *AN ASSESSMENT OF TRAFFIC STOPS AND POLICING STRATEGIES IN NASHVILLE* 3 (2018), <https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/5bf2d18d562fa74554f6bo/1542640014294/Policing+Project+Nashville+Report.pdf> [<https://perma.cc/3J8Y-GZ83>] (finding that the Nashville Police Department conducted an above-average number of stops that produced racial disparities but did not reduce crime rates); Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. (forthcoming Apr. 2021) (manuscript at 57) (on file with author) (“[O]ur analysis suggests that rules granting police discretion in traffic stops may lead to more traffic stops of drivers of color . . .”).

<sup>4</sup> See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 23-26 (2010); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 427 (1997) (exploring the “discretionary nature of pretextual stops and their discriminatory effect on African-Americans and Latinos”); David A. Harris, Essay, *“Driving While Black” and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 546 (1997) (describing the pervasiveness of “driving while black”).

<sup>5</sup> See *infra* Section I.A (noting that “in the wake of police protests in 2020, many reform efforts have been directed primarily at harm reduction, such as proposals to ban chokeholds or eliminate qualified immunity for police officers from damage awards”).

misconduct.<sup>6</sup> Favor criminal prosecutions of cops.<sup>7</sup> Have more Department of Justice investigations.<sup>8</sup> All are urged with the goal of ensuring that there are fewer stops, searches, uses of force, and arrests.

This Article takes a distinctly different approach. Rather than focus on regulating the harms that follow from policing, it urges us to dig deeper, to examine critically the policing function itself. To look not only at the symptoms, serious though they unquestionably are, but at the underlying problem or problems that generate them.

Until we look through the harms, to the core of policing, the best we can expect is incremental change. That is because harm is innate to policing.<sup>9</sup> Tightening up the rules on things like stops and arrests is not going to make them go away; at best it will reduce them. Nor is tightening up those rules going to be easy: because courts are loath to second-guess the decisions of officers, constitutional law affords the police enormous leeway.<sup>10</sup>

More centrally, when we focus primarily on the collateral harms of policing, we take our eyes off what ought to be the ultimate goal of society: public safety. Policing agencies like to say they are in the business of public safety.<sup>11</sup> The question we need to be asking is whether public safety is what

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<sup>6</sup> See, e.g., Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 27 (2017) (explaining when qualified immunity cannot be invoked); Stephen R. Reinhardt, Essay, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1246 (2015) (describing the Supreme Court's holding in *Hope v. Pelzer* that "an official actor is not protected by qualified immunity simply because 'the very action in question has [not] previously been held unlawful'" (footnote omitted) (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002))); Brief of Cato Inst. as Amici Curiae Supporting Petitioners at 22, *I.B. v. Woodard*, 2019 WL 1116409 (2019)(No. 18-1173) (arguing that the Supreme Court should reconsider qualified immunity because it has "the effect of abetting constitutional violations").

<sup>7</sup> See, e.g., Christopher E. Stone, *Introduction to VERA INST. OF JUST., PROSECUTING POLICE MISCONDUCT: REFLECTIONS ON THE ROLE OF THE U.S. CIVIL RIGHTS DIVISION* 3 (1998), [https://www.vera.org/downloads/Publications/prosecuting-police-misconduct-reflections-on-the-role-of-the-u-s-civil-rights-movement/legacy\\_downloads/misconduct.pdf](https://www.vera.org/downloads/Publications/prosecuting-police-misconduct-reflections-on-the-role-of-the-u-s-civil-rights-movement/legacy_downloads/misconduct.pdf) [<https://perma.cc/8PHS-LGCT>] ("[W]hen police themselves violate the criminal law, someone must prosecute them.").

<sup>8</sup> See Sunita Patel, *Toward Democratic Police Reform: A Vision for "Community Engagement" Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793, 797 (2016) ("[I]n the wake of ongoing fatal interactions between Black Americans and police, the DOJ, advocates, and city officials are under pressure to finalize the terms of various consent decrees and settlement agreements.").

<sup>9</sup> See EGON BITTNER, *THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY* 39 (1970) ("[T]he police are nothing else than a mechanism for the distribution of situationally justified force in society."); Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 762 (2012) ("Police officers are granted immense authority by the state to impose harm.").

<sup>10</sup> See BARRY FRIEDMAN, *UNWARRANTED: POLICING WITHOUT PERMISSION* 73 (2017) (citing numerous examples of judicial permissiveness to police and explaining why); see also *infra* note 40 (arguing that courts show deference to police decisions because of a lack of both data and certainty to conclude differently).

<sup>11</sup> See, e.g., *About NYPD*, N.Y.C. POLICE DEP'T, <https://www1.nyc.gov/site/nypd/about/about-nypd/about-nypd-landing.page> [<https://perma.cc/9F97-6KTB>] ("The NYPD . . . is responsible

we are getting. To be sure, at the least public safety must mean ensuring the safety of individuals *from* government.<sup>12</sup> But it *also* means things like being able to get to school during the day without worrying about gunfire, and having a secure place to sleep at night. It means being able to distinguish between a public health problem, and one that immediately and necessarily implicates the criminal law; mental illness, homelessness, and substance abuse are the former, not the latter. It includes having some confidence that when the police respond to a serious crime, they will not increase the trauma, will investigate it competently, and in some respectable number of cases actually will locate the perpetrator.<sup>13</sup> The broader goal of public safety is not going to be furthered by a strategy aimed primarily or solely on minimizing the collateral harms of policing.

Finally, if public safety is our aim—as it assuredly should be—then it is imperiled as much by the things the police *fail* to do, as by the things they do (properly or otherwise); acts of omission, rather than commission. A strategy of regulating and minimizing harm may get at the latter, but rarely at the former. Failing to protect certain individuals or neighborhoods is a problem equal in scope to over-policing, and it is addressed glancingly at best by harm reduction strategies.<sup>14</sup>

If we truly want to achieve public safety, we need to look beyond minimizing the harms of policing and focus on what it is exactly the police do daily, asking whether the police are the institution best suited to the panoply of societal needs they confront regularly. Policing in the United States tends to be a one-size-fits-all endeavor that puts primacy on what is unique about the police—using force and law—to achieve “public safety.” Force and law, though, are an odd match, at best, for the actual problems the police are called out daily to address. The police themselves recognize this. Former Dallas Police Chief (and current Superintendent of the Chicago Police) David Brown put it this way:

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for . . . performing a wide variety of public safety, law enforcement, traffic management, counterterror, and emergency response roles.”); *Inside the LAPD*, L.A. POLICE DEP’T, [http://www.lapdonline.org/inside\\_the\\_lapd](http://www.lapdonline.org/inside_the_lapd) [<https://perma.cc/XV6M-GFK2>] (“It is the mission of the Los Angeles Police Department to safeguard the lives and property of the people we serve, to reduce the incidence and fear of crime, and to enhance public safety while working with the diverse communities to improve their quality of life.”).

<sup>12</sup> Cf. THE FEDERALIST NO. 51 (Alexander Hamilton) (“You must first enable the government to control the governed; and in the next place, oblige it to control itself.”).

<sup>13</sup> I develop a broader conception of public safety, and explore the reasons why we have not pursued it, in Barry Friedman, *What Is Public Safety?* (unpublished manuscript) (on file with author).

<sup>14</sup> See Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1719 (2006) (“Over- and underenforcement are twin symptoms of a deeper democratic weakness of the criminal system: its non-responsiveness to the needs of the poor, racial minorities, and the otherwise politically vulnerable.”).

We're asking cops to do too much in this country. . . . We are. Every societal failure, we put it off on the cops to solve. Not enough mental health funding, let the cops handle it. . . . Here in Dallas we got a loose dog problem; let's have the cops chase loose dogs. Schools fail, let's give it to the cops. . . . That's too much to ask. Policing was never meant to solve all those problems.<sup>15</sup>

Where Brown, and other police, get it wrong, though, is that these sorts of social problems are and always have been what police are called upon to do every day.<sup>16</sup> The question we need to explore is whether policing as presently conceived is up to it, or if some other approach would be better.

To figure out how best to achieve public safety in today's world, and to structure the role of police accordingly, we need to *disaggregate the policing function*. We have to take apart and look critically at the various pieces of what cops actually are called to do on a daily basis and ask in each instance what skill set is necessary to perform that function well. Even the core function of responding to crime involves other tasks—from victim counseling to collecting forensic evidence—for which patrol officers are not necessarily suited.<sup>17</sup>

In disaggregating the policing function, we need to keep asking three questions—all similar in appearance, but each emphasizing different things we need to know to best utilize (or not utilize) the police to achieve public safety:

*What is a cop DOING here?* What is it exactly that the police are being asked to do in any given situation? Have officers been trained adequately to do it?

*What is a COP doing here?* Are the police even the correct societal actor to be responding to this problem? Is having the police respond to this problem—as opposed to some other actor—making things better or worse?

*What is a cop doing HERE?* Finally, we need to look at and understand the situational aspects of what a police officer confronts. Cops get tossed into all kinds of rotten circumstances, regularly encountering people at their worst moment.<sup>18</sup> They patrol some of the toughest and poorest neighborhoods in the nation. We should be asking what gave rise to the underlying situations the police encounter and questioning whether those circumstances are something society could or should be addressing in some way other than with the police.

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<sup>15</sup> 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, 10:56 PM), <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/RNY5-7BJV>].

<sup>16</sup> See JAMES Q. WILSON, *VARIETIES OF POLICE BEHAVIOR* 120 (1968) (describing how cops dealt with “drunks” in the 1800s and administrators often referred to “drunkenness” as a “social or medical problem”); see also *infra* Part II (exploring how police officers spend their time).

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

<sup>18</sup> See Carma Hassan, *California Police Buy Walk-to-Work Teen a Bicycle*, CNN (Oct. 1, 2016, 11:54 PM), <https://www.cnn.com/2016/10/01/us/california-police-bike-teen-trnd/index.html> [<https://perma.cc/8SY9-HKQK>] (“We meet people on their worst day—that’s just the nature of our business.”).

If public safety truly is our goal, we need to look for better ways to get there than relying so heavily on the purveyors of force and law. To be sure, many situations that are not solved by force and law still may require the presence of force or the threat of punishment to get them under control. Force and law are the “or else” of society, and they have their place.<sup>19</sup> But if optimal outcomes are our goal, we need to look for other approaches. That is the task here: to look at the problems police confront daily, and ask if better outcomes would result from addressing them in some way other than simply with policing agencies as presently constituted.

Between the time this article was written, and the time it came into print, the questions it asks reached the very top of the national agenda. In March of 2020, Breonna Taylor was killed in her apartment in Louisville, Kentucky, by a SWAT raid gone very bad; in May of that year, George Floyd died at the hands of the Minneapolis police. They were just two of many Black people killed by the police, but following George Floyd’s death in particular, protests broke out throughout the country that have not died down fully yet some four months later. One of the primary reforms demanded by activists and protestors was to “defund” the police, which is to say take financial resources from the police and devote them to the real needs of struggling communities.<sup>20</sup> Since that time, activists, but also advocates, government officials, funders, and many more have begun to explore reducing the footprint of the police, on precisely the grounds offered here.<sup>21</sup> This Article, seemingly a pipe dream of sorts at the time it

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<sup>19</sup> See BITTNER, *supra* note 9, at 42–44 (“[T]he role of the police is to address all sorts of human problems when and insofar as their solutions do or may possibly require the use of force at the point of their occurrence.”).

<sup>20</sup> The defund movement includes among it police abolitionists, but many leaders seeking transformation of policing in the United States do not take “defund” literally to mean eliminating the police entirely. They share in common the belief that police are ill-equipped to address many of the problems they are called upon to solve, and that other solutions that do not involve force or the enforcement of the law are overdue. See Sam Levin, *What Does ‘Defund the Police’ Mean? The Rallying Cry Sweeping the US—Explained*, GUARDIAN (June 6, 2020, 1:00 AM), <https://www.theguardian.com/us-news/2020/jun/05/defunding-the-police-us-what-does-it-mean> [https://perma.cc/7C4X-SJNR] (explaining what defunding the police means); Christy E. Lopez, *Defund the Police? Here’s What That Really Means*, WASH. POST (June 7, 2020, 6:37 PM), <https://www.washingtonpost.com/opinions/2020/06/07/defund-police-heres-what-that-really-means> [https://perma.cc/R7QY-BEVZ] (same); Scottie Andrew, *There’s a Growing Call to Defund the Police. Here’s What It Means*, CNN (June 17, 2020, 10:32 AM), <https://www.cnn.com/2020/06/06/us/what-is-defund-police-trnd/index.html> [https://perma.cc/KY9Q-S2AF] (same).

<sup>21</sup> See, e.g., Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [https://perma.cc/9U5B-ET6U] (“We should redirect the billions that now go to police departments toward providing health care, housing, education and good jobs.”); Interview by Chuck Todd with Alicia Garza, Co-Founder, Black Lives Matter, NBC: MEET THE PRESS (June 7, 2020, 12:23 PM), <https://www.nbcnews.com/meet-the-press/meet-press-june-7-2020-n1226966> [https://perma.cc/L3BT-C2MP] (“When we talk about defunding the police, what we’re saying is invest in the resources that our communities need. . . . [W]hat we do need is increased funding for housing, we need increased



originally was written, now provides a theoretical and empirical basis for change that many people believe is urgently needed.

Part I of this Article explores the *full* breadth of harm caused by policing. Section I.A focuses on the sorts of harms—the stops, the searches, the arrests—that give rise to harm-reduction strategies. Section I.B then goes on to describe an entirely different and additional set of harms caused by our over-reliance on the police: the failure to resolve chronic social problems like homelessness, substance addiction, and mental illness. Finally, Section I.C looks at the harms of what often is referred to as *under*policing, the many things we don’t address effectively—from serious gun violence to domestic violence to sexual abuse—simply because the police are overwhelmed or undertrained to tackle these issues. The constant theme in Part I is that familiar harm-reduction strategies simply will not suffice to address this range of problems.

Part II turns to disaggregating the policing function, in order to show how one-size-fits-all policing fails to further public safety. Section II.A explains that police primarily are conceived of, and trained to be, purveyors of force and law. Yet, in reality they spend their day dealing with a host of social problems and requests for assistance to which force and law are inapposite. Section II.B then disaggregates the policing function, skill by skill, tool by tool, to ask what the various situations the police encounter actually require for successful resolution.

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funding for education, we need increased funding quality of life of communities who are over-policed and over surveilled.”); MPD 150, ENOUGH IS ENOUGH: A 150 YEAR PERFORMANCE REVIEW OF THE MINNEAPOLIS POLICE DEPARTMENT 3 (2017), [https://www.mpd150.com/wp-content/themes/mpd150/assets/mpd150\\_report.pdf](https://www.mpd150.com/wp-content/themes/mpd150/assets/mpd150_report.pdf) [<https://perma.cc/K9UP-KF9Z>] (calling for the “transfer of resources from the police to projects, programs, and grassroots initiatives that meet people’s emergency and long-term needs”); Alondra Cano, *My Minneapolis Colleagues and I Are on Our Way to Ending Police System, Healing the Community*, USA TODAY (June 16, 2020 10:41 AM), <https://www.usatoday.com/story/opinion/policing/2020/06/12/after-floyd-video-changed-police-reformist-abolitionist/3177414001> [<https://perma.cc/46MG-BLB9>] (distinguishing between “a policing system” and “community safety,” and calling for a “new model of public safety” that encompasses non-protective safety functions, such as housing, schooling, employment access and healthcare). See generally ALEX S. VITALE, *THE END OF POLICING* (2017) (arguing for alternatives to policing to make society safe); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. (forthcoming 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3731173](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3731173) (noting that calls for police reform reflect concerns that a focus on policing denies people their collective input into what safety should mean); Barry Friedman, *Amid Calls to ‘Defund,’ How to Rethink Policing*, WALL ST. J. (June 13, 2020, 12:01 AM), <https://www.wsj.com/articles/amid-calls-to-defund-how-to-rethink-policing-11592020861> [<https://perma.cc/G6P7-MX2M>] (discussing altering the policing function); Roge Karma, *We Train Police to be Warriors—and Then Send Them Out to be Social Workers*, VOX (July 31, 2020, 7:30 AM), <https://www.vox.com/2020/7/31/21334190/what-police-do-defund-abolish-police-reform-training> [<https://perma.cc/AYK5-YH9M>] (same); Ayelet Waldman, *Should I Help Incarcerate the Man Who Tried to Sexually Assault Me?*, ATLANTIC (Sept. 29, 2020), <https://www.theatlantic.com/politics/archive/2020/09/should-i-want-man-who-tried-sexually-assault-me-behind-bars/616514> [<https://perma.cc/J8WF-6FGX>] (same).

Part III explores alternatives to one-size-fits-all policing, in order to achieve a better set of solutions to society's problems. There is, of course, more and better training for cops, to help them deal with what they encounter in ways that improve outcomes—and concomitantly reduce harms. It is unlikely today, though, to believe that this alone will address the grave problems identified here or satisfy those who are calling for fundamental change. Somewhat better is the idea of “civilianizing” the police, i.e., bringing under the policing umbrella individuals who are not “sworn” officers dedicated to force and law, but who possess other skills necessary for what the police encounter on the street. Finding a more interested audience today are “co-response” models being trialed by various government agencies, such as sending skilled mental health professionals out on calls requiring that expertise, so that police remain the purveyors of force and law but take a distinct backseat to other approaches that will work better in the long run. The biggest idea here, though, and perhaps the most consequential, is the notion of one set of super-trained generalist first responders—whether the police or something else entirely—who, much like emergency medical technicians or emergency room doctors, have a broad enough set of skills to triage and address what they are asked to do until longer-term solutions can be put in place.

We have been approaching public safety primarily from the perspective of force and law for so long that changing course now (despite enthusiasm in several quarters) will be a big pivot. But it turns out that the way we have constructed policing agencies is neither fair to the police—because they cannot hope to succeed in their task—nor optimal for society. It is high time we took a different approach.

### I. THE HARM OF THE ONE-SIZE-FITS-ALL COP

Everyone wants to be safe—so much so that many people listen, almost with a sense of wonder, to modern proponents of “defunding” the police, as well as “abolition,” the movement to get rid of the police altogether.<sup>22</sup> Yet,

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<sup>22</sup> See, e.g., Zeeshan Aleem, *Democrats are Grappling with Calls to “Defund the Police”*, VOX (June 14, 2020, 6:30 PM) <https://www.vox.com/2020/6/14/21290877/democrats-defund-police-omar-clyburn> [<https://perma.cc/432Z-93TS>] (explaining that the majority of Americans were confused by and opposed the phrase “defund the police”); Maya Dukmasova, *Abolish the Police? Organizers Say It’s Less Crazy Than It Sounds*, CHI. READER (Aug. 25, 2016), <https://www.chicagoreader.com/chicago/police-abolitionist-movement-alternatives-cops-chicago/Content?oid=23289710> [<https://perma.cc/N8KC-5R4R>] (describing how police abolition, “an idea that still strikes many if not most in the mainstream as absurd,” has gained traction among activists and “even within the world of criminal justice”); Jeffery C. Mays, *Who Opposes Defunding the N.Y.P.D.? These Black Lawmakers*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/2020/08/10/nyregion/defund-police-nyc-council.html> [<https://perma.cc/6LTG-YRAG>] (explaining that many lawmakers in New York were worried that defunding the police would disproportionately hurt high crime neighborhoods). For an excellent overview of the abolitionist movement, and what it suggests for “reform” (as well as a comprehensive accounting of the abolitionist

Tracey Meares, a deeply accomplished scholar of policing, who also is a practitioner in the space and counts many police among her colleagues and friends, writes “[p]olicing as we know it must be abolished before it can be transformed.”<sup>23</sup> She understands that to skeptical ears “it is nonsensical for residents of high-crime neighborhoods to say that they want less policing, as this is tantamount to saying that they wish violence would befall them.”<sup>24</sup> Still, Meares explains, being safe also means “security from government overreach and oppression,” and in this the police have failed so badly that doing without the police seems preferable to some.<sup>25</sup>

It bespeaks how badly things have become in many communities, how serious the harms of policing, for people to opt in any serious way for abolition over an alternative that keeps the police on the streets. Yet, the question is whether harm reduction strategies—even one as dramatic as abolishing the police—are likely to be successful in ameliorating the full range of harms surrounding policing today. The problem, as this Part makes clear, is that the range of harms attendant policing is much broader than what harm reduction strategies can hope to address. Ultimately something different is needed.

#### A. *The Direct Harms of Policing*

The direct harms of policing—the stops, the searches, the use of force, the arrests, the resultant incarceration—are well known, and still are notable in their volume and their racial bias. Police conduct untold millions of pedestrian and traffic stops a year.<sup>26</sup> In Nashville, with a population of just under 650,000, police conducted nearly 450,000 traffic stops in 2012.<sup>27</sup> In 2011, in New York City, police made 700,000 pedestrian stops.<sup>28</sup> A voluminous literature establishes the racial disparity of police stops, which certainly was

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literature), see generally Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108. CALIF. L. REV. 1781 (2020).

<sup>23</sup> Tracey L. Meares & Vesla M. Weaver, *Abolish the Police?*, BOS. REV. (Aug. 1, 2017), <http://bostonreview.net/podcast-law-justice/tracey-l-meares-vesla-m-weaver-abolish-police> [https://perma.cc/ZZD4-ZJF4].

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

<sup>25</sup> *Id.*

<sup>26</sup> See generally Pierson et al., *supra* note 3, at 736 (“More than 20 million Americans are stopped each year for traffic violations . . .”).

<sup>27</sup> POLICING PROJECT, *supra* note 3, at 7; *Nashville Population 2012*, GOOGLE, <https://www.google.com/search?client=firefox-b-1-d&q=nashville+population+2012> [https://perma.cc/VLF6-Z2NB].

<sup>28</sup> CHRISTOPHER DUNN & MICHELLE SHAMES, N.Y. C.L. UNION, STOP-AND-FRISK IN THE DE BLASIO ERA 1 (2019), [https://www.nyclu.org/sites/default/files/field\\_documents/20190314\\_nyclu\\_stopfrisk\\_singles.pdf](https://www.nyclu.org/sites/default/files/field_documents/20190314_nyclu_stopfrisk_singles.pdf) [https://perma.cc/DRQ2-WAVX] [hereinafter NYCLU, STOP AND FRISK].

true in both those places.<sup>29</sup> Police shoot nearly one thousand people a year, many of them unarmed.<sup>30</sup> In 2015, the Bureau of Justice Statistics reported that nearly one million people a year experience lesser threats or uses of force—and the federal government notoriously undercounts these experiences.<sup>31</sup> In twelve agencies studied by the Center for Policing Equity, force was used almost four times as often against blacks as whites.<sup>32</sup> Police arrest roughly twelve million people a year—the Chicago Police made just over eighty thousand arrests in 2017, more than seventy percent of which were of African-Americans (and most of which were men).<sup>33</sup>

As a result of these tactics, the United States tops the list of countries that are part of the Organization for Economic Co-operation and Development (OECD) with an incarceration rate of 655 per 100,000 people; number two is Turkey at 344, while England and Wales have 134.<sup>34</sup> Fully 4.9 million people cycle through American jails each year; at any given moment the population stands at about 600,000.<sup>35</sup> The Bureau of Justice Statistics found that in 2016 “Black males ages 18 to 19 were 11.8 times more likely to be imprisoned than white males of the same age.”<sup>36</sup>

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29 See, e.g., Pierson et al., *supra* note 3, at 736 (“[T]he bar for searching [B]lack and Hispanic drivers [is still] lower than that for searching white drivers.”); NYCLU, STOP AND FRISK, *supra* note 28, at 9 (showing racial disparities in police stops in New York City from 2014 to 2017); POLICING PROJECT, *supra* note 3, at 7 (“Over the course of many years, black drivers have been stopped at a higher rate than white drivers relative to their percentage of Nashville’s population.”).

30 See Sullivan et al., *supra* note 1 and accompanying text.

31 DAVIS ET AL., *supra* note 2, at 16; German Lopez, *The FBI Is Finally Taking Steps to Better Track Police Use of Force Across the US*, VOX (Oct. 14, 2016, 11:00 AM), <https://www.vox.com/policy-and-politics/2016/10/14/13280906/police-force-data-fbi> [<https://perma.cc/4WPX-7437>] (stating that more than a quarter of civilian deaths caused by police are not reported as such by the FBI nor BJS).

32 PHILLIP ATIBA GOFF, TRACEY LLOYD, AMANDA GELLER, STEVEN RAPHAEL & JACK GLASER, CTR. FOR POLICING EQUITY, THE SCIENCE OF JUSTICE: RACE, ARRESTS, AND POLICE USE OF FORCE 10, 25 (2016), [https://policingequity.org/images/pdfs-doc/CPE\\_SoJ\\_Race-Arrests-UoF\\_2016-07-08-1130.pdf](https://policingequity.org/images/pdfs-doc/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf) [<https://perma.cc/CH2V-AMSF>].

33 CHI. POLICE DEP’T, ANNUAL REPORT 2017, at 15, 82, 86 (2018), <https://home.chicagopolice.org/wp-content/uploads/2019/03/Chicago-Police-Department-Annual-Report-2017.pdf> [<https://perma.cc/N2UP-2CDS>]; *Arrest Trends by Offense, Age, and Race*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, [https://www.ojjdp.gov/ojstatbb/crime/ucr\\_trend.asp?table\\_in=2](https://www.ojjdp.gov/ojstatbb/crime/ucr_trend.asp?table_in=2) [<https://perma.cc/7BFF-Q3U5>].

34 *Incarceration Rates in OECD Countries As of May 2020*, STATISTA, <https://www.statista.com/statistics/300986/incarceration-rates-in-oecd-countries> [<https://perma.cc/J7FL-7ZB8>].

35 ALEXI JONES & WENDY SAWYER, PRISON POL’Y INITIATIVE, ARREST, RELEASE, REPEAT: HOW POLICE AND JAILS ARE MISUSED TO RESPOND TO SOCIAL PROBLEMS (2019), <https://www.prisonpolicy.org/reports/repeatarrests.html> [<https://perma.cc/S3A8-HHBA>]; WENDY SAWYER & PETER WAGNER, PRISON POL’Y INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2020 (2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/R4LY-DDQE>].

36 E. ANN CARSON, BUREAU OF JUST. STAT., PRISONERS IN 2016, at 13 (2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf> [<https://perma.cc/E3KX-TM4K>].

One reason for these staggering numbers is that police in the United States have adopted proactive strategies of aggressive police enforcement,<sup>37</sup> the logic and success of which are deeply dubious. The theory of proactive policing is that frequent stops of low-level offenders will reduce violent crime.<sup>38</sup> An exhaustive study by the National Academy of Science said the evidence to support this theory was at best mixed—with the exception of “hot spot” approaches we will discuss much later.<sup>39</sup>

But these strategies continue to be used with impunity because the law governing these harm-inducing policing strategies is notoriously vague and generous to the police, fashioned by judges who are loathe to rein police in or judge their conduct.<sup>40</sup> *Terry v. Ohio* requires only reasonable suspicion to stop someone.<sup>41</sup> *Graham v. Connor* requires only that the use of force be objectively reasonable, measured through the cops’ eyes at the time the use of force occurs, caring not even about whether its use could have been avoided if the police had used some other tactic before that point.<sup>42</sup> *Atwater v. City of Lago Vista* allows the police to arrest for any offense, even if the arrest makes no sense from the perspective of avoiding harm or ensuring a suspect does not flee.<sup>43</sup> And so on.

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<sup>37</sup> See NAT’L ACADS. OF SCIS., ENG’G, MED., PROACTIVE POLICING: EFFECTS ON CRIME AND COMMUNITIES 16 (David Weisburd & Malay K. Majmundar eds., 2018) [hereinafter PROACTIVE POLICING: EFFECTS] (describing police departments’ shift in focus from the traditional “obligations of the police to respond to the occurrence of crime and to investigate and bring offenders to justice” to proactive “policing approaches that [would result] in crime prevention”).

<sup>38</sup> See George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465> [<https://perma.cc/2WJL-NM92>] (“If the neighborhood cannot keep a bothersome panhandler from annoying passersby, the thief may reason, it is even less likely to call the police to identify a potential mugger or to interfere if the mugging actually takes place.”).

<sup>39</sup> See PROACTIVE POLICING: EFFECTS, *supra* note 37, at 170 tbl.4-1; Anthony A. Braga, Brandon C. Welsh & Cory Schnell, *Can Policing Disorder Reduce Crime? A Systematic Review and Meta-Analysis*, 52 J. RSCH. CRIME & DELINQ. 567, 581 (2015) (concluding, based on a meta-analysis, that “[a]ggressive order maintenance strategies that target individual disorderly behaviors do not generate significant crime reductions”).

<sup>40</sup> See Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1891 (2015) (“Courts defer to policing decisions in part because they lack the data or confidence to second-guess them.”); Clark Neily, *Race, Traffic Stops, and Whren vs. United States*, CATO UNBOUND (Apr. 10, 2019), <https://www.cato-unbound.org/2019/04/10/clark-neily/race-traffic-stops-whren-vs-united-states> [<https://perma.cc/Y9UQ-R6JX>] (pointing to the Court’s decision in *Whren v. United States* as a “vivid manifestation of the ‘deferential standard’ that has spread like a disease throughout the Court’s constitutional jurisprudence”).

<sup>41</sup> *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

<sup>42</sup> *Graham v. Connor*, 490 U.S. 386, 396 (1989) (“The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” (citing *Terry*, 392 U.S. at 20-22)).

<sup>43</sup> See *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001) (“Atwater’s claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise . . . But we have

Even if strategies to reduce these harms can and have had some degree of success, it is important to be aware of their limits.<sup>44</sup> All the more so because in the wake of police protests in 2020, many reform efforts have been directed primarily at harm reduction, such as proposals to ban chokeholds or eliminate qualified immunity of police officers from damage awards.<sup>45</sup> Harm reduction is important, but at best it is only part of a solution, and at worst addressing these essential but very specific matters creates an illusion that the problem of policing is fixed when it is not.<sup>46</sup> Perhaps no city has tried harder than New York City to reduce these harms, where a combination of judicial decree, federal monitoring, a City Council that ordered change, a Mayor's Office committed to it, and a police department that itself has joined in the endeavor, have reduced the number of stops and arrests substantially.<sup>47</sup> Even

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traditionally recognized that a responsible Fourth Amendment balance is not well served by . . . case-by-case determinations . . .”).

<sup>44</sup> See, e.g., NYCLU, STOP AND FRISK, *supra* note 28, at 4 (noting that the number of reported stops in New York City has dropped from almost 700,000 in 2011 to under 12,000 in 2017 because of reform measures); SEATTLE POLICE MONITOR, NINTH SYSTEMIC ASSESSMENT: USE OF FORCE 33-34 (2017), <https://static1.squarespace.com/static/5425b9foe4bod66352331e0e/t/58e6a753ff7c50ebbad126f8/149151113066/Ninth+Systemic+Assessment--Use+of+Force--FINAL.pdf> [<https://perma.cc/39EQ-PNED>] (stating that the Seattle Police Department's use of force had steadily dropped after implementing new use of force monitoring procedures and guidelines).

<sup>45</sup> See, e.g., Hailey Fuchs, *Qualified Immunity Protection for Police Emerges as Flash Point Amid Protests*, N.Y. TIMES (July 20, 2020), <https://www.nytimes.com/2020/06/23/us/politics/qualified-immunity.html> [<https://perma.cc/N9NE-8V2G>] (contending that qualified immunity has become a center point for many police reform efforts); Jon Kamp & Scott Calbert, *More Cities Ban Chokeholds, Similar Restraints in Wake of George Floyd Protests*, WALL ST. J. (June 10, 2020, 6:37 PM), <https://www.wsj.com/articles/more-cities-ban-chokeholds-similar-restraints-in-wake-of-george-floyd-protests-11591821021> [<https://perma.cc/8Y7A-WM68>] (discussing how many cities have focused on chokehold bans in response to recent protests); Tyler Kendall, *Qualified Immunity Is at the Forefront of the Debate on Policing*, CBS NEWS (July 7, 2020, 1:12 PM), <https://www.cbsnews.com/news/qualified-immunity-policing-debate> [<https://perma.cc/NP8P-V75X>] (discussing how qualified immunity has become a “focal point” for criminal justice reformers).

<sup>46</sup> See Sam Levin, *“It’s Not About Bad Apples:” How US Police Reforms Have Failed to Stop Brutality and Violence*, GUARDIAN (June 16, 2020, 6:00 AM), <https://www.theguardian.com/us-news/2020/jun/16/its-not-about-bad-apples-how-us-police-reforms-have-failed-to-stop-brutality-and-violence> [<https://perma.cc/8MVN-PLDN>] (arguing that a variety of harm reduction techniques in policing have failed); Joel Rubin, *LAPD Violence Against George Floyd Protests Erode a Decade of Reform*, L.A. TIMES (June 14, 2020, 8:00 AM), <https://www.latimes.com/california/story/2020-06-14/lapd-protest-history-criticism-heavy-tactics> [<https://perma.cc/3FTQ-W5PH>] (describing the constant cycle of reform on erosion of reform with the LA police department); Aylin Woodward & Michelle Mark, *Research Shows There Are at Least 6 Proven Ways to Reduce Police Brutality—and 2 Strategies That Don’t Work*, BUS. INSIDER (June 3, 2020, 1:36 PM), <https://www.businessinsider.com/research-based-methods-of-reducing-police-violence-2020-6> [<https://perma.cc/9FBV-QZLQ>] (arguing that the evidence may not support that harm reduction techniques like chokehold bans help decrease police violence).

<sup>47</sup> See generally ELIZABETH GLAZER, NYC MAYOR’S OFF. OF CRIM. JUST., STRATEGIC PLAN FISCAL YEARS 2019–2021, <http://criminaljustice.cityofnewyork.us/wp-content/uploads/2018/156171511/Strategic-Plan-2019-2021.pdf> [<https://perma.cc/W43F-RANB>] (describing four priorities and the accompanying strategies to “reduce growing jail and prison populations while keeping crime low”).

yet, the NYPD made nearly 230,000 arrests in 2017.<sup>48</sup> The Nashville police, which apparently also determined to lower the number of traffic stops, nonetheless made 250,000 in 2017.<sup>49</sup> In 2010, long after these harms of policing were of concern, there still were 80% more arrests for drug possession than in 1990.<sup>50</sup>

### B. Unaddressed Chronic Social Harms

The deeper difficulty with a harm reduction strategy, however, is that much of policing is not proactive, but reactive, and we won't ameliorate policing's harms until we address the underlying social issues that cause people to call the police in the first place. Police are called, again and again, to handle situations that involve domestic violence, substance abuse, mental illness, homelessness, and much more. People call 911 because they sense trouble or feel threatened. Some of the calls are makeweight—as a society, we've been treated to one example after another of the police being called on someone simply for living while black.<sup>51</sup> Still, many are driven by real problems that policing exacerbates, but for which there often is no alternative at present.

Domestic violence presents just this sort of chronic problem. At least fifteen and possibly more than fifty percent of calls to police departments are about domestic violence; they comprise the single largest category of calls that police departments receive.<sup>52</sup> These calls hardly can be ignored—indeed, as we will see, a frequent complaint about police is that they do not respond. And in many jurisdictions, arrest is not merely an option; it is mandated by law.<sup>53</sup> Yet although police departments have stepped up enforcement of

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<sup>48</sup> *Adult Arrests 18 and Older: 2010–2019*, N.Y. STATE DIV. CRIM. JUST. SERVS., <https://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/nyc.pdf> [<https://perma.cc/84BJ-TYP8>].

<sup>49</sup> POLICING PROJECT, *supra* note 3, at 7.

<sup>50</sup> HOWARD N. SNYDER, BUREAU OF JUST. STAT., ARREST IN THE UNITED STATES, 1990–2010, at 1 (2012), <https://www.bjs.gov/content/pub/pdf/aus9010.pdf> [<https://perma.cc/67V5-R896>]; *id.* at 12 (“State and local law enforcement agencies made an estimated 1,336,500 arrests for drug possession or use in 2010.”).

<sup>51</sup> See Henry Grabar & Mark Joseph Stern, *The Privilege of 911*, SLATE (May 10, 2018, 7:10 PM), <https://slate.com/news-and-politics/2018/05/in-america-calling-911-is-still-a-privilege-of-being-white.html> [<https://perma.cc/ADK6-5BVC>] (“In Philadelphia, it was Starbucks while black. In Rialto, California, Airbnb while black. And in New Haven, Connecticut, trying to pull an all-nighter while black.”).

<sup>52</sup> ANDREW R. KLEIN, NAT'L INST. JUST., PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES 1 (2009), <https://www.ncjrs.gov/pdffiles1/nij/225722.pdf> [<https://perma.cc/DKH9-USV6>].

<sup>53</sup> See G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 239 n.2 (2005) (listing state mandatory arrest laws); Radha Iyengar, *Does the Certainty of Arrest Reduce Domestic Violence? Evidence from Mandatory and Recommended Arrest Laws*, 93 J. PUB. ECON. 85, 86 tbl.1 (2009) (providing an overview of state mandatory arrest laws).

domestic violence, arrest has not been shown to have a statistically significant deterrent effect.<sup>54</sup>

Mental illness displays a similar cycle of call, arrest, release, and repeat. About one in ten calls for service the police receive are generated by individuals with mental disabilities or difficulties.<sup>55</sup> Because police response does not address the underlying problems, those who are diagnosed with mental illness are prone to re-arrest, re-conviction, and re-incarceration.<sup>56</sup> In Los Angeles, sixty-seven people with mental illness accounted for 536 calls for service in eight months in 2004.<sup>57</sup> In Lexington, Kentucky, police came to many locations of people struggling with mental illness three or more times a year.<sup>58</sup> Of 148 similar incidents in Honolulu, police “recognized the person on sight” ninety-four of those times.<sup>59</sup>

Homelessness is yet another problem to which police are called constantly. Studies suggest between one-fifth and two-thirds of homeless people have been arrested one or more times in their adult lives.<sup>60</sup> In Portland, Oregon, in 2017, homeless individuals constituted fifty-two percent of arrests, though they are less than three percent of the city’s population.<sup>61</sup> Homeless individuals account for a significant percentage of those drawn into the criminal justice system by other means as well. Denver police issued over 20,000 tickets in a four-year period under a variety of anti-homeless

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<sup>54</sup> See Richard B. Felson, Jeffrey M. Ackerman & Catherine Gallagher, *Police Intervention and the Repeat of Domestic Assault* 18 (June 2005), <https://www.ncjrs.gov/pdffiles1/nij/grants/210301.pdf> [<https://perma.cc/X2H8-CU5E>] (finding that arrests have a small and statistically insignificant effect on the likelihood of reoffending in domestic violence cases); Iyengar, *supra* note 53, at 97 (finding mandatory arrest policies may increase intimate-partner homicide).

<sup>55</sup> DORRIS A. FULLER, H. RICHARD LAMB, MICHAEL BIASOTTI & JOHN SNOOK, *TREATMENT ADVOC. CTR., OVERLOOKED IN THE UNDERCOUNTED: THE ROLE OF MENTAL ILLNESS IN FATAL LAW ENFORCEMENT ENCOUNTERS* 1 (2015), <https://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf> [<https://perma.cc/26XL-TW2R>].

<sup>56</sup> See generally William D. Bales, Melissa Nadel, Chemika Reed & Thomas G. Blomberg, *Recidivism and Inmate Mental Illness*, 6 INT’L J. CRIMINOLOGY & SOCIO. 40 (2017) (discussing the relationship between severity of mental illness and recidivism).

<sup>57</sup> MELISSA REULAND, MATTHEW SCHWARZFELD & LAURA DRAPER, COUNCIL STATE GOV’TS JUST. CTR., *LAW ENFORCEMENT RESPONSE TO PEOPLE WITH MENTAL ILLNESSES* 7 (2009).

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

<sup>59</sup> *Id.*

<sup>60</sup> Pamela J. Fischer, Alan Ross & William R. Breakey, *Correlates of Arrest in a Baltimore Homeless Population*, 20 CONTEMP. DRUG PROBS. 385, 386 (1993); Margot B. Kushel, Judith A. Hahn, Jennifer L. Evans, David R. Bangsberg & Andrew R. Moss, *Revolving Doors: Imprisonment Among the Homeless and Marginally Housed Populations*, 95 AM. J. PUB. HEALTH 1747, 1748-49 (2005).

<sup>61</sup> Rebecca Woolington & Melissa Lewis, *Portland Homeless Accounted for Majority of Police Arrests in 2017, Analysis Finds*, OREGONIAN (Jan. 30, 2019), [https://www.oregonlive.com/portland/2018/06/portland\\_homeless\\_accounted\\_fo.html](https://www.oregonlive.com/portland/2018/06/portland_homeless_accounted_fo.html) [<https://perma.cc/DHB4-7XYL>].



ordinances.<sup>62</sup> As a result, jails and prisons are full of people who were homeless prior to their incarceration.<sup>63</sup> And yet, this cycle of response, arrest, and incarceration seems to get us nowhere. In Denver a group of just 250 longtime homeless people racked up a collective average of 1,500 arrests and 14,000 days in jail per year; the 20,000 summonses went to 4,000 people.<sup>64</sup> In Seattle, over 1,300 people had four or more bookings a year, of which fifty-nine percent were homeless.<sup>65</sup>

Substance abuse and dependence also are prominent problems at which we throw police and the criminal justice system, often unsuccessfully. In 2017 the leading basis of arrests was for drug abuse violations or driving under the influence—a total of about 1.6 million arrests.<sup>66</sup> Of the 2.3 million people behind bars in 2006, 84.8% of these inmates, over 1.9 million in total, were substance involved.<sup>67</sup> Here, too, people cycle in and out of the criminal justice system without addressing the underlying problem. Substance-involved inmates have, on average, 5.3 past arrests while their non-substance involved peers report an average of only 2.5 past arrests.<sup>68</sup>

We won't ameliorate the harms caused or exacerbated by policing unless and until we get at the underlying problems themselves. A report in San Francisco found that "the City spent \$20.6 million in calendar year 2015 for

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62 ARIEL SCHREIBER & BECCA BUTLER-DINES, UNIVERSITY OF DENVER HOMELESS ADVOCACY POLICY PROJECT, *TOO HIGH A PRICE: WHAT CRIMINALIZING HOMELESSNESS COSTS COLORADO* 1 (2016), <https://www.law.du.edu/documents/homeless-advocacy-policy-project/Denver-Spotlight.pdf> [<https://perma.cc/8X5C-3AU4>]; *see also id.* at 2 ("Despite constituting less than one percent of Denver's population, over the last five years, from 40% to 72% of citations under [panhandling, curfews and closures] ordinances have been issued to homeless individuals.").

63 *See* Dale E. McNiel, Renée L. Binder & Jo C. Robinson, *Incarceration Associated with Homelessness, Mental Disorder, and Co-Occurring Substance Abuse*, 56 *PSYCHIATRIC SERVS.* 840, 842 (2005) (finding that around sixteen percent of admittees to San Francisco County Jail in a six-month-long study were homeless); Greg A. Greenberg & Robert A. Rosenheck, *Jail Incarceration, Homelessness, and Mental Health: A National Study*, 59 *PSYCHIATRIC SERVS.* 170, 173 (2008) ("[T]he rate of homelessness among jail inmates was approximately 7.5 to 11.3 times the annual rate of homelessness in the general population.").

64 Liz Gelardi, *Denver Apartment for Homeless Will House 250*, *THE DENVER CHANNEL* (Jan. 28, 2016, 1:17 AM), <https://www.thedenverchannel.com/news/local-news/denver-using-86m-loan-to-build-apartments-for-chronically-homeless-people> [<https://perma.cc/49ZE-YB6Y>]; SCHREIBER & BUTLER-DINES, *supra* note 62, at 1.

65 Marc Stiles & Coral Garnick, *The Price of Homelessness: The Seattle Area Spends More than \$1 Billion a Year on This Humanitarian Crisis*, *PUGET SOUND BUS. J.* (Nov. 22, 2017, 2:47 PM), <https://www.bizjournals.com/seattle/news/2017/11/16/price-of-homelessness-seattle-king-county-costs.html> [<https://perma.cc/6CZ6-V8DG>].

66 *Estimated Number of Arrests: United States, 2017*, FBI: UCR, <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/table-29> [<https://perma.cc/XVS8-ZNAF>].

67 NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE, COLUMBIA UNIV., *BEHIND BARS II: SUBSTANCE ABUSE AND AMERICA'S PRISON POPULATION* 9-10 (2010), <https://drugfree.org/reports/behind-bars-ii-substance-abuse-and-americas-prison-population> [<https://perma.cc/8LLS-P7JJ>].

68 *Id.* at 20.

sanctioning homeless individuals for violating quality of life laws,” of which \$18.5 million was attributable to police involvement, even though “enforcement had no impact on the incidence of homelessness.”<sup>69</sup> These folks need social services they often are not receiving.

In short, people are subjected to criminal enforcement because the police are called upon to tackle persistent social problems. Yet criminal enforcement does little if anything to address the underlying difficulty, and likely exacerbates it. Even if we could reduce arrests and other interactions with the criminal justice system, that will not solve these underlying chronic problems.

### C. *The Harms of Underpolicing*

The one thing that a strategy of harm reduction from policing certainly won’t address is the harm caused by what typically is referred to as *underpolicing*, which is to say, where the police already are not responding. Alexandra Natapoff explains that underenforcement “takes various forms, including unsolved homicides, permitted open-air drug markets, slow or nonexistent 911 responses, and tolerance of pervasive, low levels of violence, property crimes, and public disorder.”<sup>70</sup> Yet, underpolicing runs well beyond troubled neighborhoods: there are entire categories of crime and victimization the police fail to address sufficiently, among them domestic violence and sexual assault.<sup>71</sup>

The reasons for underpolicing are varied. Some of this is because of limited resources. If the police are doing one thing, they cannot be doing another. “We’ve abandoned the people and the neighborhoods,” lamented former Dallas Police Chief David Kunkle.<sup>72</sup> But it also is because the police have not proven themselves the most apt at dealing with certain problems, like sexual assault and domestic violence.<sup>73</sup> If the problem is lack of police capability, it is not clear that insisting the police do *more* will solve it, as

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<sup>69</sup> S.F. BUDGET & LEGIS. ANALYST’S OFF., PERFORMANCE AUDIT OF THE SAN FRANCISCO POLICE DEPARTMENT 10-11 (2018), [https://sfbos.org/sites/default/files/BA\\_Report\\_PA\\_of\\_San\\_Francisco\\_Police\\_Department\\_061218.pdf](https://sfbos.org/sites/default/files/BA_Report_PA_of_San_Francisco_Police_Department_061218.pdf) [<https://perma.cc/X94J-UZ53>].

<sup>70</sup> Natapoff, *supra* note 14, at 1723.

<sup>71</sup> See CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 5 (1987) (“Rape, battery, sexual harassment, sexual abuse of children, prostitution, and pornography . . . These abuses are as allowed de facto as they are prohibited de jure.”); Natapoff, *supra* note 14, at 1740 (“Even in the face of stepped-up enforcement, intimate violence against women remains pervasive . . .”).

<sup>72</sup> Natapoff, *supra* note 14, at 1726.

<sup>73</sup> Victims often report reluctance to go to the police and many report that interacting with the police is additionally traumatizing. See Rebecca Campbell, *Rape Survivors’ Experiences with the Legal and Medical Systems: Do Rape Victim Advocates Make a Difference?*, 12 VIOLENCE AGAINST WOMEN 30, 31, 37 (2006) (finding that sexual assault victims frequently report re-traumatization resulting from police interactions).

opposed to doing better. For example, many jurisdictions sought to address domestic violence by adopting mandatory arrest policies, but in some sense those policies backfired, either because victims became less willing to call the police for help, or because victims themselves ended up arrested.<sup>74</sup>

The problem of underpolicing is particularly acute in African-American neighborhoods, but the perverse irony is that efforts to address this problem actually may increase the direct coercive harms of policing. People in troubled communities both need the police for crimefighting reasons, and yet fear calling them because of the consequences for loved ones.<sup>75</sup> Rachel Barkow explains the conundrum: an aggressive approach to criminogenic “hot spots” means more policing in neighborhoods of color and more racially disparate outcomes as a result; less policing “would be a form of discrimination because victims of colour would get less favourable treatment.”<sup>76</sup> Monica Bell vividly portrays the plight of African-American women who “depend upon police assistance in times of trouble, crises, and indecision.”<sup>77</sup> They call about domestic violence, they call about out of control youth. They are well aware that the result may be incarceration of young African-American men, and so—as Bell documents—they rely on a variety of justifications to explain both their antipathy for the police and their reliance on them nonetheless.<sup>78</sup>

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The combination of over- and under-protection in affected communities comes with a final harm, which is the loss of trust in the police, to such a degree that people stop calling the police, or cooperating with them, and ultimately take law into their own hands. Numerous scholars have documented how community members who continually are harassed by, or

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<sup>74</sup> Alisa Smith, *It's My Decision, Isn't It? A Research Note on Battered Women's Perceptions of Mandatory Intervention Laws*, 6 VIOLENCE AGAINST WOMEN, 1384, 1384 (2000) (finding that some victims of domestic violence report that mandatory arrest policies would make them less likely to report a future attack); Meghan A. Novisky & Robert L. Peralta, *When Women Tell: Intimate Partner Violence and the Factors Related to Police Notification*, 21 VIOLENCE AGAINST WOMEN 65, 65 (2015) (suggesting that mandatory arrest policies may be deterring reporting among women who do not support the policy).

<sup>75</sup> See Monica C. Bell, *Situational Trust: How Disadvantaged Mothers Reconceive Legal Cynicism*, 50 LAW & SOC'Y REV. 314, 316 (2016) (“Although contacting the police does not usually lead to arrest, it sometimes does, with unpredictable consequences for intimates and family members.”); Tracey L. Meares, *Charting Race and Class Differences in Attitudes Toward Drug Legalization and Law Enforcement: Lessons for Federal Criminal Law*, 1 BUFFALO CRIM. L. REV. 137, 140 (1997) (“Many in the African American community must mediate the ‘dual frustration’ of living with problems associated with illegal drug use and marketing and problems associated with tough drug-law enforcement.” (footnote omitted)).

<sup>76</sup> Rachel E. Barkow, *Law Versus Politics*, 63 U. TORONTO L.J. 138, 150 (2013).

<sup>77</sup> Bell, *supra* note 75, at 315 (quoting ALBERT J. REISS, JR., *THE POLICE AND THE PUBLIC* 63 (1972)).

<sup>78</sup> See generally Bell, *supra* note 75.

let down by, the police, become alienated from them—and from government more generally.<sup>79</sup> The results are tragic, resulting in a “vicious cycle”—more like a death spiral—in which alienated communities choose to, or are forced to, police themselves. Jill Leovy, the vivid chronicler of policing’s failures in Los Angeles, quotes a gang member who explained that when most people need help they call the police, but where he lives “[w]e pick up the phone and call our homeboys.”<sup>80</sup> The result often is violence. Paul Ryan, former Speaker of the House of Representatives, wrote about how he met a man in Detroit, a shooting victim who refused to tell the police anything about the perpetrator. Ryan called it a tragedy “that shouldn’t happen in America.”<sup>81</sup> In truth, it is all too common.

In short, policing is surrounded by, and perpetuates, deep rivers of harm. Focusing on strategies to reduce stops, searches, force, and arrests is not going to address chronic social problems, nor alleviate the harms of under-policing. Achieving real public safety requires a deeper understanding of the role police play, and how we can alter the response to these harms.

## II. DISAGGREGATING THE POLICING FUNCTION

When police are called to the scene they bring with them what they have been trained to do: deploy force and law. Yet, these are often the wrong responses to what a situation requires. To achieve real public safety, we need to dissect what cops actually do during their workday: what problems they confront and what tools are needed for the task. We need to ask over and over, what are the *police* doing here, what are the police *doing* here, and what are the police doing *here*. Section II.A describes the mismatch between how we have constructed the police, and what we ask them to do. Section II.B then discusses the many roles a police officer is forced to play, breaking down police responses into their constituent parts, and asking as to each what skillset or approach is most likely to yield a positive outcome—to achieve public safety.

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<sup>79</sup> See e.g., Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2072 (2017) (“African Americans, particularly those who are poor or who live in high-poverty or predominately African American communities, tend to have less trust not only in police, but also in other governmental institutions . . . .”); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 295 (2003) (“[M]inority group members are less likely to accept decisions [made by the police] because they feel unfairly treated.”); Corazon R. Lafuente & Patricia L. Lane, *The Lived Experiences of Homeless Men*, 12 J. CMTY. HEALTH NURSING 211, 214 (1995) (noting, from interviews with homeless individuals, that “strategies of the homeless men included staying alone to avoid trouble with the police”).

<sup>80</sup> JILL LEOVY, *GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA* 79 (2015).

<sup>81</sup> PAUL RYAN, *THE WAY FORWARD: RENEWING THE AMERICAN IDEA* (2014).

### A. *The Mismatch Between the Constructed Cop and the Real Cop*

#### 1. The “Constructed” Cop of Force and Law

##### a. *Cops as Crimefighters*

Turn on a cop show; what do you see? Cops are *crimefighters*. They are bringing the villain to justice, or cracking a big case. They use fast cars and weapons and cool tech. Or, they might be bumbling and cynical and a bit woe begotten. Whichever, crime is what cops are about.

This certainly is what our political leaders valorize cops for doing. Here’s Richard Nixon: “As J. Edgar Hoover often used to tell me, it is our local police forces who are the real frontline soldiers in the war against crime.”<sup>82</sup> Bill Clinton, looking to pass a crime bill to put 100,000 more police on the street put it similarly: “This bill puts government on the side of . . . the brave men and women who put their lives on the line for us every day, not the criminals or those who would turn away from law enforcement.”<sup>83</sup> And that’s how Donald Trump saw it too: “Every day, our police officers race into darkened allies [sic] and deserted streets, and onto the doorsteps of the most hardened criminals . . .”<sup>84</sup>

Little surprise then, that this is how cops see themselves, touting their crimefighting role. Ronal Serpas, the former superintendent of the New Orleans Police Department, wrote: “I became a cop because I care about the safety of my community and have spent decades on the front lines of America’s fight against serious and violent crime.”<sup>85</sup> So too former NYPD Commissioner O’Neill: “We never stop trying to drive down crime and quell disorder; I’m going to do it in lock step with the people we’re dedicated to protect. It is, after all, what we do now.”<sup>86</sup> It’s the reason police complain, volubly, about the work they are forced to do, as opposed to what they are supposed to be doing.

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<sup>82</sup> Radio Address on Crime and Drug Abuse, PUB. PAPERS 981 (Oct. 15, 1972).

<sup>83</sup> Houston Chronicle, *Clinton Signs Crime Bill, Plans Public Forums*, SUN-SENTINEL (Sept. 14, 1994), <https://www.sun-sentinel.com/news/fl-xpm-1994-09-14-9409130486-story.html> [<https://perma.cc/5AGT-9HJ9>].

<sup>84</sup> Donald J. Trump, President of the U.S., Remarks by President Trump at International Association of Chiefs of Police (Oct. 8, 2018), <https://perma.cc/D6SM-UQEE>.

<sup>85</sup> Ronal Serpas, *Former New Orleans Police Supt.: Nation Should Take Louisiana’s Lead on Justice Reform*, ADVOC. (Aug. 28, 2018, 6:00 PM), [https://www.theadvocate.com/baton\\_rouge/opinion/article\\_171cfd0e-aadb-11e8-b0af-47bd6e7de4e5.html](https://www.theadvocate.com/baton_rouge/opinion/article_171cfd0e-aadb-11e8-b0af-47bd6e7de4e5.html) [<https://perma.cc/JQK5-Y8Q3>].

<sup>86</sup> J. David Goodman & Al Baker, *William Bratton, New York’s Influential Police Commissioner, Is Stepping Down*, N.Y. TIMES (Aug. 2, 2016), <https://www.nytimes.com/2016/08/03/nyregion/bill-bratton-nypd-commissioner.html> [<https://perma.cc/8LJP-MC6Z>].

b. *Cops as Force*

Although for the most part the policing profession is constructed as *crimefighters*, cops actually are recruited, trained and equipped to do something in addition—deploy force. As the sociologist James Q. Wilson put it long ago, “[t]he patrolman’s role is defined more by his responsibility for *maintaining order* than by his responsibility for enforcing the law.”<sup>87</sup> Egon Bittner, one of history’s most apt scholars of policing, referred to “The Capacity [t]o Use Force” as the “Core [o]f [t]he Police Role.”<sup>88</sup>

c. *Recruiting Cops*

Videos and materials used to recruit police officers reinforce this image of the police as force and law. Police drive in fast cars, or helicopters, firing weapons, wearing military-like fatigues—whether fighting crime or otherwise.<sup>89</sup> To be sure, some jurisdictions stress the service function, depicting cops surrounded by smiling community members.<sup>90</sup> But police recruiting materials frequently display the virtues of soldier-like discipline, and the mission of using force to keep the community safe.<sup>91</sup>

d. *Training Cops*

Police training is where the rubber meets the road; it constructs the cop. The training police cadets receive confirms that deploying force and enforcing the law are what we expect out of cops.

Police training varies state to state and department to department. The curriculum at the state level typically is set by something like a Police Officer

<sup>87</sup> WILSON, *supra* note 16, at 16; *see also* REISS, *supra* note 77, at 17 (“Though superficially their role is to preserve the peace by coping with any individuals in the large aggregation who violate laws, they must be prepared to restore order as well.”).

<sup>88</sup> BITTNER, *supra* note 9, at 36.

<sup>89</sup> *See* Radley Balko, *The Disturbing Message in Police Recruiting Videos*, WASH. POST (Apr. 16, 2014, 5:45 PM), <https://www.washingtonpost.com/news/the-watch/wp/2014/04/16/the-disturbing-messages-in-police-recruiting-videos> [<https://perma.cc/6TQQ-BS4M>] (collecting examples of police recruiting videos demonstrating a “general move toward more aggressive, militarized police forces”).

<sup>90</sup> Join Calaveras CSO, *Deputy Sheriff Jobs in California | Calaveras County Law Enforcement Careers*, YOUTUBE (Aug. 14, 2019), [https://www.youtube.com/watch?v=DKa7pgTs\\_o](https://www.youtube.com/watch?v=DKa7pgTs_o) [<https://perma.cc/3HZT-XHRE>].

<sup>91</sup> *Cf.* Balko, *supra* note 89 (“Note, too, what’s missing from the recruiting video: Public service. Cops walking beats. Community policing. Helping people.”). In the aftermath of the George Floyd killing, a journalist in Kentucky contacted me about contrasting recruiting videos for Louisville (militarized) and Lexington (more public interest-oriented). Since that coverage, Louisville has taken down its video. Andrew Wolfson, *Louisville Police Recruiting Video Lures ‘Action-Movie Heroes,’ Not Guardians, Experts Say*, LOUISVILLE COURIER J. (Jan. 22, 2021, 8:53 PM) <https://amp.courier-journal.com/amp/5390736002> [<https://perma.cc/9QDX-DFN4>] (noting that the Louisville Metro Police Department took down a recruitment video that “portray[ed] police as warriors rather than public servants”).

Standards and Training (POST) board.<sup>92</sup> These requirements are minima; departments often demand that their officers exceed POST requirements.<sup>93</sup>

Pre-service training is not, of course, all the training officers receive. Before being left on the street on their own, most departments place new officers in some sort of field training.<sup>94</sup> It's commonly said that field training officers (FTOs) are prone to tell recruits "forget all that stuff they just taught you, this is how it is really done."<sup>95</sup> Then there are in-service training requirements, as well as opportunities for additional training that arise from time to time, whether it is to be a detective or participate on a tactical (e.g., SWAT) team.<sup>96</sup>

Still, recruit training says a lot about how we "construct" cops. Most cops take the streets with only this training, plus whatever field training they get. It's hardly encouraging to hear that FTOs might suggest the initial training should be ignored: whatever happens afterward is then necessarily idiosyncratic, the product of what an individual FTO tells an individual cadet. All of us learn on the job, but POSTs and department requirements lay out what they believe police need to know.

With help from a number of cooperative agencies, some law students and I obtained the training curricula for POSTs and some of the country's departments. We broke the course requirements into five categories: use of force, training in law, mediation and social work, emergent non-law enforcement instruction (things like medical skills), and basic workplace skills (interviewing, report writing; the administrative know-how of a department).

Those training materials reveal something altogether telling. This graphic shows a not-atypical breakdown of police training at the POST and department level, from Nashville and from Tennessee.<sup>97</sup> The Tennessee

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<sup>92</sup> See BRIAN A. REAVES, BUREAU OF JUST. STAT., STATE AND LOCAL LAW ENFORCEMENT TRAINING ACADEMIES, 2013, at 8 (2016), <https://www.bjs.gov/content/pub/pdf/slleta13.pdf> [<https://perma.cc/S5Y7-FMPZ>] [hereinafter REAVES, ACADEMIES 2013] (stating that ninety-three percent of all police academies "developed content for their basic training program in response to mandates from a state POST or other state-level agency or commission").

<sup>93</sup> See *infra* Appendix A (comparing Tennessee POST and department requirements).

<sup>94</sup> See REAVES, ACADEMIES 2013, *supra* note 92, at 4 (reporting that more than ninety percent of police academies include a mandatory field training program).

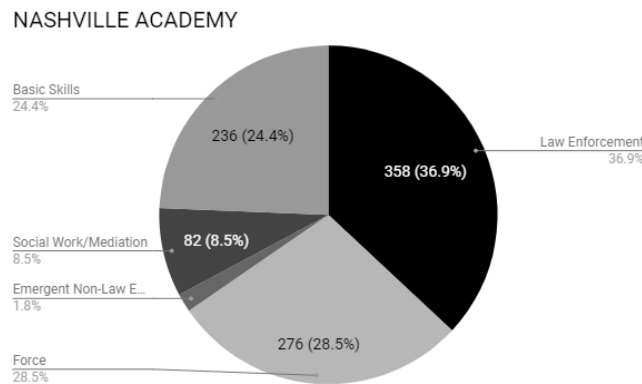
<sup>95</sup> See Raymond E. Foster, *Forget Everything You Learned in the Academy*, POLICE WRITERS, [http://www.police-writers.com/articles/forget\\_everything\\_you\\_learned\\_in\\_the\\_academy.html](http://www.police-writers.com/articles/forget_everything_you_learned_in_the_academy.html) [<https://perma.cc/R59L-M3MJ>] (lamenting the fact that "[n]early every new cop has heard a field training officer or senior partner utter the phrase, 'Forget everything you learned in the academy.'").

<sup>96</sup> See BRIAN A. REAVES, BUREAU OF JUST. STAT., STATE AND LOCAL LAW ENFORCEMENT TRAINING ACADEMIES, 2006, at 1 (2009), <https://www.bjs.gov/content/pub/pdf/slleta06.pdf> [<https://perma.cc/9BQS-ARD4>] [hereinafter REAVES, ACADEMIES 2006] ("87% of [police] academies provided in-service training for active-duty officers and for officers in specialized units such as K-9 or special weapons and tactics (SWAT) units.").

<sup>97</sup> In Appendix A you can see a full breakdown of the Nashville, Tennessee training regime and the set of POST requirements for the State of Tennessee.

POST requires 480 hours of training for new officers, but Nashville requires considerably more.

Figure 1: Nashville Training Breakdown



What is glaringly obvious is that officers are trained primarily on how to use force and engage in law enforcement. There's also, as with any job, a big dollop of basic policing administrative protocol. Where they get the least training by far is in the categories of mediation and social work, and in dealing with non-law enforcement emergent situations.

#### e. *Equipping Cops*

Finally, we equip our police to enforce the law and use force as well. They are outfitted with a variety of weapons.<sup>98</sup> They have handcuffs to take people into custody. They carry summons books.

That equipment doesn't tell us everything, of course. It's not clear any tools are needed if mediating disputes is the primary police function; you just need training, a brain, and a mouth. Still, what we give them says a lot about who they are.

### 2. The Actual Cop

The problem being, this image of cops primarily as crimefighters is not really true. Not remotely.

<sup>98</sup> Carly Garcia, *Police Equipment: Contents of a Utility Belt*, W. VA. ST. UNIV. (Feb. 22, 2018), <https://online.wvstateu.edu/news/criminal-justice/police-equipment-police-duty-belt> [https://perma.cc/RX7M-4ZXQ] (stating that police officers often carry knives, tasers, mace, batons, and guns).



Several decades ago, social scientists—particularly sociologists—became interested in the question of whether cops really were the crimefighters they were touted as being. Researchers looked through duty logs and dispatch records, went on ride-alongs in police cars, made lists, and kept count.<sup>99</sup> This decades-long project had a serious shortcoming: scholars often “collapse[d] the activities conducted into fewer general categories.”<sup>100</sup> Still, what we did learn about policing is eye-opening.

Cops do remarkably little crime-fighting. “A major theme of the earliest studies concerning urban officer workload involved dispelling the popular myth that police spend most of their time protecting the ‘thin blue line’ between law and order.”<sup>101</sup> In Baltimore, in 1999, “the most violent, the most addicted and the most abandoned city in [A]merica,” according to then-Mayor Martin O’Malley, regular patrol officers spent about eleven percent of their time dealing with crime.<sup>102</sup> Even that was split about fifty-fifty between serious crime and things like disorderly conduct, drug possession, drunkenness, and loitering.<sup>103</sup> In smaller places the volume of time spent on crime, defined comprehensively, can be way lower: 0.7 to 2.2% of a cop’s shift.<sup>104</sup> A more recent report on activity in three jurisdictions in the Hudson Valley showed that 0.55% of calls to police addressed in the highest violent

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<sup>99</sup> See, e.g., Theresa Ervin Conover & John Liederbach, *Policing on Demand: An Observational Study of Mobilization and Citizen Encounters Across Communities*, 17 INT’L J. POLICE SCI. & MGMT. 170, 171 (2015) (utilizing direct systematic social observation of officers to compare police behavior between communities); Christine N. Famega, *Proactive Policing by Post and Community Officers*, 55 CRIME & DELINQ. 78, 86 (2009) [hereinafter Famega, *Proactive Policing*] (using notes collected by trained observers who accompanied officers during their shifts and recorded their behavior); Brian K. Payne, Bruce L. Berg & Ivan Y. Sun, *Policing in Small Town America: Dogs, Drunks, Disorder, and Dysfunction*, 33 J. CRIM. JUST. 31, 34, 38 (2005) (analyzing two years of cases in a small-town crime reporter to understand what residents thought required law enforcement action); Christine N. Famega, *Variation in Officer Downtime: A Review of the Research*, 28 POLICING: INT’L J. POLICE STRATEGIES & MGMT. 388, 390 (2005) (reviewing dispatch records and conducting field observations of police officers on patrol); John Liederbach, *Addressing the “Elephant in the Living Room”: An Observational Study of the Work of Suburban Police*, 28 POLICING: INT’L J. POLICE STRATEGIES & MGMT. 415, 419 (2005) (conducting direct observations of interactions between police officers and citizens, among other patrol activities); John Liederbach & James Frank, *Policing Mayberry: The Work Routines of Small-Town and Rural Officers*, 28 AM. J. CRIM. JUST. 53, 59-60 (2003) (analyzing over one thousand hours of observation data of small-town and rural officers); Brad W. Smith, Kenneth J. Novak & James Frank, *Community Policing and the Work Routines of Street-Level Officers*, 26 CRIM. JUST. REV. 17, 22-23 (2001) (using systematic social observation to understand the activities of community police officers during their normal workdays).

<sup>100</sup> Famega, *Proactive Policing*, *supra* note 99, at 85.

<sup>101</sup> Liederbach, *supra* note 99, at 417 (citations omitted).

<sup>102</sup> Michelle Ye Hee Lee, *O’Malley’s Claim About Crime Rates in Baltimore*, WASH. POST (Apr. 28, 2015, 3:00 AM), <https://www.washingtonpost.com/news/fact-checker/wp/2015/04/28/omalley-s-claim-about-crime-rates-in-baltimore/> [https://perma.cc/8ARD-TG59]; Famega, *Proactive Policing*, *supra* note 99, at 92.

<sup>103</sup> See Famega, *Proactive Policing*, *supra* note 99, at 91 tbl.2.

<sup>104</sup> Liederbach & Frank, *supra* note 99, at 63 tbl.1; see also Smith et al., *supra* note 99, at 26 tbl.1 (finding that officers spent a majority of their time performing motorized patrols and administrative duties).

crime jurisdiction of the three; the highest on overall crime was 7.2%, most of that being property crime.<sup>105</sup> A number of news articles in the course of protests in the spring of 2020 underscored the conclusions of these earlier studies; relying on an analysis of data from calls for service, journalists showed how very little of what cops are called to do is respond to crime, particularly violent crime.<sup>106</sup>

Much of many cops' time is unproductive altogether. When not filling out reports or taking personal time, a lot of an officer's working time—easily upwards of thirty percent—is spent on patrol.<sup>107</sup> In most places, this is motorized patrol.<sup>108</sup> This itself is remarkable, because it's long been accepted that not much is accomplished by random motorized patrol.<sup>109</sup>

While on patrol, cops run from one “call for service” to another (i.e., dispatched to respond to 911 calls), often dealing with minor disturbances.<sup>110</sup> There's a lot of time spent on traffic and motor vehicle issues, on false burglar alarms, on noise complaints, and on problems with animals.<sup>111</sup> Rural and small town officers “perform[] a wide-array of tasks not commonly associated with

<sup>105</sup> HUDSON VALLEY PATTERN FOR PROGRESS, POLICE SERVICES STUDY: CITY OF BEACON, TOWN OF FISHKILL, VILLAGE OF FISHKILL 28 (2015).

<sup>106</sup> See Joel Rubin & Ben Poston, *LAPD Responds to a Million 911 Calls a Year, but Relatively Few for Violent Crimes*, L.A. TIMES (July 5, 2020, 9:47 AM), <https://www.latimes.com/california/story/2020-07-05/lapd-911-calls-reimagining-police> [<https://perma.cc/AG4U-SM9G>] (finding that less than eight percent of calls were for violent crime; most were for traffic accidents and “minor disturbances”); Thomas Breen, *95.6% of Cops' Calls Don't Involve Violence*, NEW HAVEN INDEP. (June 19, 2020, 3:56 PM), [https://www.newhavenindependent.org/index.php/archives/entry/police\\_dispatch\\_stats](https://www.newhavenindependent.org/index.php/archives/entry/police_dispatch_stats) [<https://perma.cc/T445-9UT4>] (reporting that fewer than 4.4% of dispatches were for “assault, gunfire, robbery, rape, stabbing, murder, or person shot”).

<sup>107</sup> See Liederbach, *supra* note 99, at 424 tbl.II (finding that between 24.2 and 42.8% of officers' time was spent on motor patrol); Liederbach & Frank, *supra* note 99, at 63 tbl.1 (finding that, on average, officers in five Ohio towns spent 36.9% of their time on motor patrol).

<sup>108</sup> See Conover & Liederbach, *supra* note 99, at 171 (noting that motorized patrol was a core activity for most study sites); Liederbach, *supra* note 99, at 424 tbl.II (finding that police in certain Cincinnati suburbs spend between 24.2 and 42.8% of their shifts on motorized patrol); Smith et al., *supra* note 99, at 26 tbl.1 (observing that Cincinnati police officers spent an average of 26% of their shifts on motorized patrol).

<sup>109</sup> See GEORGE L. KELLING, TONY PATE, DUANE DIECKMAN & CHARLES E. BROWN, POLICE FOUND., THE KANSAS CITY PREVENTATIVE PATROL EXPERIMENT vii (1974) (“[R]outine preventive patrol in marked police cars has little value in preventing crime or making citizens feel safe.”); see also Barry Friedman & Elizabeth G. Janszky, *Policing's Information Problem* 8 & n.31 (N.Y.U. Sch. of L. Pub. L. & Legal Theory Rsch. Paper Series, Working Paper No. 19-39, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3452242](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3452242) (“[A]lthough the methodology of the Kansas City experiment has been the subject of sharp challenge, its results generally are taken as correct . . .”).

<sup>110</sup> See Payne et al., *supra* note 99, at 32 (summarizing other research indicating that officers spend a significant amount of their time “dealing with minor disturbances and service calls”).

<sup>111</sup> See, e.g., Conover & Liederbach, *supra* note 99, at 176 tbl.3 (reporting that between 11.54 and 54.17% of Cincinnati police departments' time was spent on traffic issues); Payne et al., *supra* note 99, at 34 (“The most common single type of case described in the police report involved animals.”).

the work of urban police, including situations involving utility problems, performing house checks for citizens on vacation, and clearing cows blocking vehicular traffic.”<sup>112</sup>

Below is some data from a study of suburban policing in Hamilton County, Ohio between April 1999 and May 2000. The data was collected by systematic social observation (SSO) of officers in fourteen agencies.<sup>113</sup> There were over 3,500 hours of observation, or the equivalent of 442 eight-hour shifts. The agencies worked in communities that varied widely in socioeconomic, land use, and racial demographics. The communities ranged from working class urbanized, to a variety of middle-income residential, to a couple exclusive upper-income communities. The white population in the communities ran from 36.1 to 98.2%. Median income was from just over \$28,000 to just over \$95,500. In terms of land use, the range was from 38–97% residential. A real mix.

In the original study the data were collapsed into some sixteen categories and five primary functions: motorized patrol, administrative tasks (mostly report writing), personal, travel, and traffic enforcement. But here, it is reverse engineered to display the type and frequency of problems with which the police dealt. In the data there were 1,250 specific problem types resulting from dispatched calls.

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<sup>112</sup> Liederbach, *supra* note 99, at 419.

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

This is the list of problems that had a frequency in double digits:

**Table 1: Frequency of Police Problems**

Type of Problem	Frequency
Disabled vehicle	108
Traffic accident, property damage only	77
Domestic argument	65
Alarm (not fire)	57
Medical assistance	57
Meet complainant	28
Animal problem	26
Traffic accident	24
Emergency—nature unspecified	22
Discovery of missing or stolen property	20
Domestic fight	20
Vehicle violation	18
Warrant to be served	18
Harassment/stalking	17
Traffic accident, personal injury	17
Theft from commercial	16
Juvenile problem/disturbance	16
Moving violation	15
General request for service	15
Suspicious person	14
Suspicious circumstance	14
Shoplifting	14
Leaving the scene (property damage)	14
Fight (physical)	13
Family trouble	12
Noise disturbance	11
Motor vehicle theft	11
Theft from motor vehicle	11
Driving under the influence	11
Disorderly	10
Theft from residence	10
Parking violation	10
Excess speed	10

As one can see, these data readily confirm the general story that crime-fighting is a small amount of what policing involves for most officers. Things

like robbery, attempted rape, and weapons issues all had a frequency of “1.” One has to run pretty far down the list to get to most serious crimes.

Equally instructive are the offenses for which there was some sort of charge. Out of the 3,330 face-to-face encounters, there were some 885 charges. Here are the offenses for which there were five or more charges:

Table 2: Charges

Type of Offense Charge	Frequency of Offense Charge
Exceeding speed limit	141
Exceeding speed limit—infraction	129
Other traffic regulation—infraction	91
Motor vehicle equipment violations	47
Other traffic regulation	42
Registration, license plate, driver's license	35
Traffic infraction	33
Registration, license plate, driver's license— infraction	32
Exceeding speed limit—misdemeanor	24
Domestic violence—misdemeanor	17
Traffic	15
Operating a vehicle while intoxicated	15
Other traffic regulation—misdemeanor	14
Disorderly conduct—misdemeanor	13
Traffic—misdemeanor	10
Possession of narcotic, dangerous drug, look-alike substance, or marijuana	9
Registration, license plate, driver's license— misdemeanor	8
Operating a vehicle while intoxicated - misdemeanor	7
Assault and related offenses—misdemeanor	6
Theft and conversion—misdemeanor	6
Alcoholic beverage offenses	5
Possession of narcotic, dangerous drug, look-alike substance, or marijuana—felony	5
Criminal trespass—misdemeanor	5
Theft and conversion	5
Offenses against public order—inducing panic	5
Other traffic regulation—unauthorized use of a motor vehicle	5

Again, the vast majority of these are traffic violations. Trailing those are domestic violence misdemeanors, disorderly conduct misdemeanors, and a variety of narcotics issues, mostly around possession. There are very few felonies of any sort.

In short, most of what cops do is not crime fighting, even though that is primarily what they train for. That doesn't mean force and law lack value—we'll get to that in a moment. It just means there's a mismatch between what we intend cops to do and what they actually do.

To be clear, times change. Just as these studies were concluding, police in some urban areas turned to the sorts of "proactive" tactics that may well indicate higher numbers of enforcement actions, and perhaps around more serious crime.<sup>114</sup> We'll take a look at this switch to proactive policing in just a bit, disaggregating it along with everything else. Yet, in many places in America—in fact in most neighborhoods in cities—policing still likely looks very much like what you see above. A lot of varied tasks, not so many of them fighting crime.

### B. *Disaggregating the Policing Function*

If the goal is to reduce harm, and improve outcomes in police encounters, it is not enough simply to identify the broad sorts of problems cops confront daily. We then need to ask what dealing with those types of problems entails exactly. To consider what a cop actually is *doing* in any situation—what precise function are they serving? To think about what skill set is needed, and whether someone other than a police officer, with different skills, might address the problem better.

#### 1. The First Responder

Although the police like to conceive of themselves primarily as crime fighters, what they are called upon most often to be are first responders. As Albert Reiss put it some time ago: "Police regard it as their duty to find criminals and prevent or solve crimes. The public considers it the duty of the police to respond to its calls and crises . . . ."<sup>115</sup> Indeed, it often is explained that the police are society's only 24-hour general purpose responder.<sup>116</sup>

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<sup>114</sup> See *infra* notes 218–21 and accompanying text.

<sup>115</sup> REISS, *supra* note 77, at 70.

<sup>116</sup> CHARLES W. DEAN ET AL., SOCIAL WORK AND LAW ENFORCEMENT PARTNERSHIPS: A SUMMONS TO THE VILLAGE 12 (2000); Tommy Landau, *Policing and Security in Four Remote Aboriginal Communities: A Challenge to Coercive Models of Police Work*, 38 CANADIAN J. CRIMINOLOGY 1, 5 (1996); Sylvester Amara Lamin & Consoler Teboh, *Police Social Work and Community Policing*, COGENT SOC. SCI., July 25, 2016, at 1, 9.

Cops respond frequently to calls from poorer neighborhoods—and as a result from communities of color or marginalized communities. Calls come because the problems people face in those communities are more acute, and because the residents often lack the capacity or resources to deal with the problems in other ways.<sup>117</sup> They have less access to the sort of professionals that can help middle- and upper-income folks: doctors, clergy, and mental health professionals.<sup>118</sup> Lower income individuals “use the police more as troubleshooters in the case of interpersonal conflicts.”<sup>119</sup> The tragedy, as we’ve seen, is that where cops go, law and force follow. Thus, more calls may lead to more enforcement without the underlying problems necessarily being solved.

The entire notion of the police as society’s emergency first responders *because* they are the only ones available 24/7 is problematic. Police aren’t actually the only 24-hour responder: we don’t call upon the police to put out fires or respond to a heart attack.<sup>120</sup> Just as there are firefighters and EMS, presumably there could be other sorts of rapid responders on call around the clock to deal with, say, substance abuse. Calls don’t always come at night: if some other responder is more appropriate during the day, that is who should come. And, in fact, cops often arrive after the emergency is over. Calls get stacked up, so much so that the response hardly is always rapid.<sup>121</sup>

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<sup>117</sup> See BITTNER, *supra* note 9, at 43 (explaining that non-enforcement police work “consist[s] of addressing situations in which people simply do not seem to be able to manage their own lives adequately”).

<sup>118</sup> See Landau, *supra* note 116, at 6 (noting this phenomenon); Elaine Cumming, Ian Cumming & Laura Edell, *Policeman as Philosopher, Guide and Friend*, 12 SOC. PROBS. 276, 285 (1965) (“[P]oor, uneducated people appear to use the police in the way that middle-class people use family doctors and clergymen—that is, as the first port of call in time of trouble.”).

<sup>119</sup> CLIFFORD D. SHEARING, CTR. OF CRIMINOLOGY, UNIV. OF TORONTO, DIAL-A-COP: A STUDY OF POLICE MOBILISATION 60 (1984); see also Bell, *supra* note 75, at 329 (“Police are deemed fairly efficacious in escorting away violent partners, finding runaway children, or quieting disruptive neighbors.”).

<sup>120</sup> Cf. Landau, *supra* note 116, at 5 (“Conceptually, this [fact that police departments are open 24-hours a day] does not place them apart from all-night gas stations or diners.”).

<sup>121</sup> See, e.g., Natapoff, *supra* note 14, at 1723 (describing “slow or nonexistent 911 responses” as one form of “urban underenforcement”); Complaint at 1, Cent. Austin Neighborhood Ass’n v City of Chicago, No. 11CH37299 (Ill. Cir. Ct. Nov. 13, 2013), available at [https://www.aclu-il.org/sites/default/files/field\\_documents/complaint.pdf](https://www.aclu-il.org/sites/default/files/field_documents/complaint.pdf) [<https://perma.cc/CB9F-B5JT>] (alleging that the City of Chicago’s method of deploying police services “utilizes criteria that result in a greater frequency of delays in dispatching police officers to respond to 911 calls for service in neighborhoods that are predominantly African American and Hispanic . . . than in predominantly white neighborhoods”); Angus Loten, *911 Response Times Are Getting Faster Thanks to Data Integration*, WALL ST. J. (June 13, 2019, 7:32 PM), <https://www.wsj.com/articles/911-response-times-are-getting-faster-thanks-to-data-integration-11560468747> [<https://perma.cc/WB9J-JHPR>] (“[911] [r]esponse times vary widely by location and the severity of the emergency.”); Editorial, *Slow Dallas Police Response Times Hurt Community Support*, DALL. MORNING NEWS (Feb. 5, 2019, 8:00 AM), <https://www.dallasnews.com/opinion/editorials/2019/02/05/slow-dallas-police-response-times-hurt-community-support/> [<https://perma.cc/6EMF-LDER>] (taking note of delayed response times and explaining “how quickly an officer arrives shapes [residents’] confidence.”).

In any event, “first responder” does not necessarily mean responding to calls that require force and law. Just because the police are the first responder does not mean they are the right responder. As we saw above, people call the police for a wide range of problems: vehicle problems, noise complaints, animal problems, medical assistance, lost belongings, fights, disabled vehicles, and alcohol-driven problems. Some, such as theft, violence, and sexual attacks, plainly are law enforcement issues—though even here, as we are about to see, the appropriate skill set requires yet finer parsing than simply to say “crimefighter.” And others may require the presence of force, though that force perhaps should be at the background. But many do not require force or law, and most require very different skills either in addition or altogether.

## 2. The Purveyors of Force and Law

Even the idea of the “police of force and law” needs to be disaggregated, however. The two need not necessarily travel hand in hand. One may be required at times, but not the other. And we undoubtedly overuse both.

### a. *The Use of Force*

Long ago, sociologists studying the police came to the realization that force (and not law) is the primary reason we call upon the police.<sup>122</sup> Society requires order, and the police provide it.<sup>123</sup> No one recognized this point more clearly than Egon Bittner, who repeatedly emphasized that “the police are nothing else than a mechanism for the distribution of situationally justified force in society.”<sup>124</sup> This, he explained, is what “lends homogeneity” to the raft of very different activities we call upon the police to perform, such as “catching a criminal, driving the mayor to the airport, evicting a drunken person from a bar, directing traffic, crowd control,” and much more.<sup>125</sup>

The fact that force, and not law, is our primary use of the police is evident from the many situations in which criminal law is deployed, but we’d never consider the police necessary; or where law is violated, but the police ignore it altogether and we think this entirely appropriate. As to the first, we use the criminal law against tax evaders and securities fraud, but no one thinks to call

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<sup>122</sup> See BITTNER, *supra* note 9, at 40; (“[E]very conceivable police intervention projects the message that force may be, and may have to be, used to achieve a desired objective.”); Megan Quattlebaum & Tom Tyler, *Beyond the Law: An Agenda for Policing Reform*, 100 B.U. L. REV. 1017, 1026 (2020) (“It remains the case that police officers are generalists, primarily trained in and capable of deploying a variety of levels of force.”).

<sup>123</sup> See WILSON, *supra* note 16, at 31 (“Police officers were originally ‘watchmen’ whose task it was to walk their rounds and maintain order in the streets.”); REISS, *supra* note 77, at 17 (arguing that the police role is to “preserve the peace” and they “must be prepared to restore order”).

<sup>124</sup> BITTNER, *supra* note 9, at 39.

<sup>125</sup> *Id.* at 44.



the police—because there is no need for force. As to the second, except when the government is using a “zero tolerance” approach, the police do not walk down the street, like codes enforcers, ticketing people for every single violation they see.<sup>126</sup>

We call upon the police not only when force actually is needed, but when it *may* be. Bittner deemed this a point of “extraordinary importance.”<sup>127</sup> If a situation could turn ugly, we need the cops nearby, even though ultimately it may not. Once, at a convening on police reform I attended, someone was being derisive about the police being called to deal with noise from a party. The point being made was that it was “just noise,” some people were having fun, why did that require the police to show up or get involved? But as Bittner pointed out, “it is not the volume of the noise that creates hazards for life, limb, property, and the public order, but that the people involved say and otherwise show that the problem has reached a critical stage in which something-had-better-be-done-about-it.”<sup>128</sup>

Still, our goal should be to minimize the situations in which force is used. Force has a dehumanizing and traumatic impact on people against whom it is used.<sup>129</sup> Although the presence of force has the potential to calm things down and bring order, at times the use of force, or even its presence, can be downright counterproductive. For those who are suffering from cognitive difficulties, for example, even the inkling of force can exacerbate a situation.<sup>130</sup>

For this reason, at least our *formal* preference is for less use of force, not more. Police are taught in various ways about a force continuum, in which

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<sup>126</sup> See KENNETH CULP DAVIS, POLICE DISCRETION 98-120 (1975) (describing how discretion at the officer level leads to differences in the enforcement of rules and policy and advocating for a formalized system of rules and rule creation); Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 NW. U. L. REV. 1, 11 (2019) (“Officers decide where to patrol and whom to stop, whether to issue a warning for a broken taillight or write a ticket, and whether to throw a joint in the gutter, issue a summons, or make an arrest.”).

<sup>127</sup> Egon Bittner, *Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police*, in THE POTENTIAL FOR REFORM OF CRIMINAL JUSTICE 34-35 (Herbert Jacob ed., 1974).

<sup>128</sup> *Id.* at 32.

<sup>129</sup> See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 557 (S.D.N.Y. 2013) (“It is important to recognize the human toll of unconstitutional stops. . . . [E]ach stop is . . . a demeaning and humiliating experience. No one should live in fear of being stopped whenever he leaves his home to go about the activities of daily life.”).

<sup>130</sup> See Amy C. Watson & Anjali J. Fulambarker, *The Crisis Intervention Team Model of Police Response to Mental Health Crises: A Primer for Mental Health Practitioners*, 8 BEST PRACS. MENTAL HEALTH 71, 77 (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3769782/pdf> [<https://perma.cc/RA3F-5V3U>] (“[Mental health] [p]roviders felt that police officers lacked understanding of mental illness and would often exacerbate crisis situations.”); Erica Goode, *For Police, a Playbook for Conflicts Involving Mental Illness*, N.Y. TIMES (Apr. 25, 2016), <https://www.nytimes.com/2016/04/26/health/police-mental-illness-crisis-intervention.html> [<https://perma.cc/G2B9-68WE>] (“[R]outine police actions aimed at control—placing a hand on a person’s shoulder, for example—can backfire with someone with a severe mental illness.”).

they are to use no more force than necessary to accomplish necessary aims.<sup>131</sup> When force is used, the police must report it; the more serious the force, the more elaborate the reporting and investigation.<sup>132</sup>

To be fair, while it is easy to speak of minimizing force, it is not a simple proposition. The people the police encounter on the street daily frequently are troubled, recalcitrant, uncooperative, in need of aid or disturbing others, and yet unwilling to be helped.<sup>133</sup> Sometimes we ask of the police superhuman patience and control.

Yet, given the import of the use of force by the state, and the fact that force often is a prelude to law, we need to think about how to use force more judiciously, and how to design first response to ensure this happens.

First, if the use of force may be required, but not necessarily is, then perhaps force ought to remain in the background. The very point of being the “or else” of society is that other options often should be explored first. Consider again the list of problems encountered in the Cincinnati suburbs. One of the most frequent—not uncommonly so—was “domestic argument.” Domestic arguments can turn very serious—for the cop or the participants—in the blink of an eye, with disastrous consequences.<sup>134</sup> We may well want force on the scene. But might we get further in the long run if someone with other skills—in social work or mediation—actually handled the incident?

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<sup>131</sup> See Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 211 (2017) (“[M]any agencies train officers to respond to threats according to a force ‘continuum’ that does not provide hard-edged rules for when or how police can use force or deadly force.”); *The Use-of-Force Continuum*, NAT’L INST. JUST. (Aug. 3, 2009), <https://nij.ojp.gov/topics/articles/use-force-continuum> [<https://perma.cc/AL7G-2VXY>] (providing an example of a use-of-force continuum).

<sup>132</sup> See Garrett & Stoughton, *supra* note 131, at 286 (“[W]hile the vast majority [of police agencies] make clear in written policies that supervisory review of uses of force and reporting of uses of force is mandatory, the policies do differ on the categories of force that must be reported, and on what procedures are followed next.”).

<sup>133</sup> See DEAN ET AL., *supra* note 116, at 17 (“Officers must deal with individuals who are not just mentally ill but also abuse alcohol and participate in illegal drug activity. They are often homeless, resistant to treatment, violent and aggressive and likely to resist officers’ actions because they view these actions as unfair and their cooperation is involuntary.”).

<sup>134</sup> See Janet M. Blair, Katherine A. Fowler, Carter J. Betz & Jason L. Baumgardner, *Occupational Homicides of Law Enforcement Officers, 2003–2013*, 51 AM. J. PREVENTATIVE MED. S188, S191 (2016) (finding that, between 2003 and 2013, 14.1% of law enforcement officer homicides in the United States were in the course of responding to a domestic disturbance); Emiko Petrosky, Janet M. Blair, Carter J. Betz, Katherine A. Fowler, Shane P.D. Jack & Bridget H. Lyons, *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence—United States, 2003–2014*, 66 MORBIDITY & MORTALITY WEEKLY REP. 741, 745 (2017) (finding that over half of all female homicides are intimate-partner violence-related, and that in nearly one third of those cases, an argument immediately preceded homicide); Jamiles Lartey, *Police Officers Most Likely to Die Responding to Domestic Disputes*, GUARDIAN (July 31, 2016, 6:30 AM), <https://www.theguardian.com/us-news/2016/jul/31/police-officer-fatalities-department-of-justice-report> [<https://perma.cc/P4UX-D6G2>] (reporting on a DOJ investigation finding that from 2010 to 2014, more officers were killed responding to domestic disturbances than to any other type of call).

There are plenty of situations, such as a noise complaint or a call about a mentally troubled person, in which another problem solver with a different tool might come to a more effective resolution, and without ever needing force. The point frequently can get lost when the only responder present is a cop.

Second, and related, we should calibrate the presence of force (and law) to the situation. In the domestic disturbance situation, we might want the presence of force standing side-by-side with another skill set such as mediation. Mediation tries to resolve the situation; the presence of force (and law) conveys the message that if mediation fails, “or else” is the alternative. But in other situations, such as in calls about the mentally ill, we may need force on the scene but entirely out of the immediate frame, so as not to exacerbate the situation.

Finally, we need to do a better job of deciding whether any given situation ultimately justifies the use of force. Force is used not only to calm situations, but to obtain compliance. Compliance with what, though? Although we want people to comply with lawful demands, sometimes it may be better to walk away and rethink the approach entirely, which is not always the judgment if force and law are out front. Police come to expect absolute compliance, but the commands of the police must be judicious, and the use of force must match the gravity of the situation. Deadly force was used on Eric Garner either for selling “loosies” on the street, or—as is often the case—for failing to adhere to the commands of officers who were determined to arrest him for it.<sup>135</sup> But did the underlying set of facts justify the state’s escalating response? Was there some other way to tackle the problem besides arresting Garner with force? It is fair to ask in every exercise of the use of force whether the imposition was necessary, and worth it.

#### b. *Enforcing the Law*

As we’ve seen, law enforcement is a relatively small part of what police do every day.<sup>136</sup> But rather than thinking they should do more, in truth they probably should do less. Enforcement, after all, is not a net plus for society,

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<sup>135</sup> Ashely Southall, *Police Investigators Determined Officer Choked Eric Garner*, N.Y. TIMES (May 13, 2019), <https://www.nytimes.com/2019/05/13/nyregion/eric-garner-death-daniel-pantaleo-trial-chokehold.html> [<https://perma.cc/FDC6-3GAB>].

<sup>136</sup> See Jack R. Greene & Carl B. Klockars, *What Police Do*, in THINKING ABOUT POLICE: CONTEMPORARY READINGS 273, 275 (Carl B. Klockars & Stephen D. Mastrofski eds., 1991) (summarizing police workload studies that found that crimefighting accounts for a small proportion of police work); see also *supra* text accompanying note 102 (discussing the small percentage that crimefighting plays in a police officer’s daily schedule, through the example of Baltimore).

it is a minus. A well-functioning society deters or otherwise reduces the need for the law to intervene.<sup>137</sup>

When it comes to policing, the law enforcement power of the officer often is simply the excuse for having force present, or for using it. Because force without a legal basis is thuggery, the ultimate mandate to enforce the law is what gives the use of force by the police its legitimacy.<sup>138</sup> This is so even though force can solve many problems in which law proves utterly unnecessary, such as when police break up a fight but charge no one. Restoring order may require some force, even handcuffing, but law need not follow. Even when the ultimate result is an arrest, that too may simply be a legal veneer for what was believed necessary by the police to bring the situation under control.

By the same token, as noted above, law can be brought to bear without force anywhere nearby. In many jurisdictions, parking tickets—legal summons—are handed out by people who have no tools with which to impose force.<sup>139</sup> Summons also often are issued for moving violations, or even for low-level misdemeanors such as drinking or smoking marijuana in public, and served with no force necessary.<sup>140</sup> Sometimes we get legal summons in the mail after a camera snapped a picture of us violating the law, such as from a red-light camera.<sup>141</sup>

The question that needs to be asked much more frequently than we do is whether utilizing the law in particular circumstances achieves the aims of public safety, and whether it does so in a productive or counterproductive way.<sup>142</sup>

Police hand out criminal summons and or arrest people in many circumstances in which it is doubtful either that there is the sort of culpability

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<sup>137</sup> See Friedman & Janszky, *supra* note 109 (examining the lack of benefit-cost analysis in policing); *id.* at 6-7, 40-61 (discussing the current level of optimality regarding policing in the United States and suggesting possible remedies to the situation).

<sup>138</sup> Cf. Bittner, *supra* note 127, at 36 ("It is *not* that policemen are entitled to use force because they must deal with nasty criminals. Instead, the duty of handling nasty criminals devolves on them *because* they have the more general authority to use force *as needed* to bring about desired objectives.").

<sup>139</sup> See Christine Hauser, *The Traffic Agents' Lament: Uniforms, but Little Respect*, N.Y. TIMES (July 25, 2008), <https://www.nytimes.com/2008/07/25/nyregion/25traffic.html> [<https://perma.cc/5HP2-EMDF>] (noting that traffic cops in New York City are civilian employees of the New York Police Department and do not carry guns).

<sup>140</sup> See Ashley Southall, *Summonses, Not Arrests, for Small Crimes in Manhattan*, N.Y. TIMES (Mar. 1, 2016), <https://www.nytimes.com/2016/03/02/nyregion/summonses-not-arrests-for-small-crimes-in-manhattan.html> [<https://perma.cc/5BVL-9STH>] (reporting on the New York Police Department's use of summonses for low-level offenses).

<sup>141</sup> See Joe Sharkey, *The Collision over Traffic Cameras*, N.Y. TIMES (July 4, 2011), <https://www.nytimes.com/2011/07/05/business/05road.html> [<https://perma.cc/XJ2K-KSHL>] (describing people "who one day open the mail and see their face on a ticket, say for a red-light violation they had no idea they committed, in a place they drove through months ago").

<sup>142</sup> See *generally* Friedman & Janszky, *supra* note 109 (examining the lack of benefit-cost analysis in policing).

that typically justifies the criminal law, or that utilizing the criminal law will avoid the underlying harm. As we saw in Part I, we impose legal sanctions regularly against the mentally ill, or the homeless, and little changes. Not only may these individuals be lacking in culpability, but they also may not have the capability to take responsibility for the situation that brought the police there.

Even with something as simple as a ticket for driving with a headlight out, what precisely are we accomplishing by invoking enforcement mechanisms? Lights are mechanical devices; burning out is what they do. Sometimes they go out and we do not know—later model cars may inform us about the problem; older cars (driven typically by less-well-off folks) may not. And when the lights go out, there may not be a vendor immediately available to remedy the situation. Why do we even think imposing criminal sanctions is the right answer to problems such as these? Deterrence is dubious in many circumstances as well. Drivers are not trained to walk around their cars conducting safety checks like airline pilots on their aircraft.

Think also of public urination, a frequently charged misdemeanor.<sup>143</sup> It's one thing, perhaps, when a bunch of rowdy, drunken college students decide the street is a more convenient urinal than finding a bathroom. It's quite another when people live on the street—or even are tourists—and we don't provide public facilities to meet their basic human needs.<sup>144</sup> People need to pee, and not all circumstances in which they do so are deterrable or culpable.

Calling law, and having law show up, triggers a host of trouble that as a society we would best avoid if the underlying problems could be dealt with differently. Bringing criminal charges creates a “record” that people often cannot come out from under.<sup>145</sup> It affects the lives of the defendants and their ability to earn a living, both for themselves individually and for their dependents.<sup>146</sup> Why use this awesome and harm-inducing tool if there is

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<sup>143</sup> See Matt Flegenheimer & J. David Goodman, *Public Urination in New York Becomes Test Case for Policing*, N.Y. TIMES (July 15, 2015), <https://www.nytimes.com/2015/07/16/nyregion/public-urination-in-new-york-becomes-test-case-for-policing.html> [<https://perma.cc/LVQ6-LzZJ>] (reporting that 28,609 people were cited for public urination in 2014 in New York City).

<sup>144</sup> See Daniel Denvir, *Peeing Is Not a Crime*, CITYLAB (July 21, 2015, 3:20 PM), <https://www.citylab.com/equity/2015/07/peeing-is-not-a-crime/399068/> [<https://perma.cc/RM2T-DP5M>] (“Citing people for public urination criminalizes someone for doing something that society, the state and the market effectively encourages by making public restrooms scarce.”).

<sup>145</sup> See James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 387 (2006) (“The more people who are arrested, prosecuted, convicted, and especially incarcerated, the larger is the criminally stigmatized underclass screened out of legitimate opportunities, steered toward criminal careers and further incarceration.” (footnote omitted)); Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOCIO. 937, 937 (2003) (“A criminal record presents a major barrier to employment, with important implications for racial disparities.”).

<sup>146</sup> See REBECCA VALLAS, MELISSA BOTEACH, RACHEL WEST & JACKIE ODUM, CTR. FOR AM. PROGRESS, REMOVING BARRIERS TO OPPORTUNITY FOR PARENTS WITH CRIMINAL RECORDS AND THEIR CHILDREN 3-14 (2015), <https://cdn.americanprogress.org/wp-content/>

another way to get from A to Z, to make sure automobile taillights are lit, and people are not urinating all over the place?

In addition, the mere availability of legal sanctions grants police officers enormous discretion, and all too often that discretion is misused.<sup>147</sup> That, after all, is the nature of discretion. William Bratton has said that police use the law to “control behavior,” treating the law “as a proxy for the behavioral standards that legislatures have agreed upon and judges have upheld.”<sup>148</sup> This radically overstates things. Legislatures criminalize conduct by the bucketful, and hardly expect each violation will result in legal sanction.<sup>149</sup> Such overcriminalization allows cops to pick and choose when they will bring the law to bear.<sup>150</sup> Yet, how sensitive and fine-tuned is each individual cop to knowing in each circumstance when law enforcement is appropriate and when it is not? At the least, the application of law can be highly idiosyncratic.<sup>151</sup> We know all too well it is also deeply biased, particularly against people of color and poorer people.<sup>152</sup>

Finally, and ironically, labeling problems as ones of law has the effect of undermining the morale of cops, who are told they are law enforcement crimefighters, when it is apparent that their job mostly involves anything but.<sup>153</sup> We mislead cops when we hire them, train them, and send them out on the street to be crimefighters. No wonder many express dismay at how ill-suited they are to the task. As one police officer explained in response to a question about police responsibility for homelessness, “We are not trained or equipped to ‘help’ these people. We are the police, tasked with dealing with the ‘crimes,’ not social disorders that no one else seems to be able to deal with. Quite frankly, it’s not our job.”<sup>154</sup>

Often when police are called, the real issue is dealing with social disorder. Police come wrapped in the veneer of the law when law enforcement may be

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uploads/2015/12/09060720/CriminalRecords-report2.pdf [https://perma.cc/L9BA-8J5E] (discussing the effects of criminal records on families).

<sup>147</sup> See DAVIS, *supra* note 126, at 98-120.

<sup>148</sup> WILLIAM J. BRATTON, N.Y.C. POLICE DEP’T, BROKEN WINDOWS AND QUALITY-OF-LIFE POLICING IN NEW YORK CITY 6 (2015), [http://www.nyc.gov/html/nypd/downloads/pdf/analysis\\_and\\_planning/qol.pdf](http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/qol.pdf) [https://perma.cc/2F3L-MDGN].

<sup>149</sup> See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 532 (2001) (“[L]egislatures tend to create new crimes not to solve the problem, but to give the voters the sense that they are doing something about it.”).

<sup>150</sup> See *id.* at 509 (“As criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors; law enforcers, not the law, determine who goes to prison and for how long.”).

<sup>151</sup> DAVIS, *supra* note 126, at 98-120.

<sup>152</sup> See *supra* Section I.A (discussing the “direct harms of policing”).

<sup>153</sup> See BITTNER, *supra* note 9, at 42 (“[T]he view that crime control is the only serious, important, and necessary part of police work has deleterious effects on the morale of those police officers in the uniformed patrol who spend most of their time with other matters.”).

<sup>154</sup> Robert Hartmann McNamara, Charles Crawford & Ronald Burns, *Policing the Homeless: Policy, Practice, and Perceptions*, 36 POLICING: AN INT’L J. POLICE STRATEGIES & MGMT. 357, 367 (2013).

counterproductive. Some of the problems they face may require the presence, if not the deployment, of force. But many require another set of skills entirely, the sorts of skills we turn to next.

### 3. The Mediator Cop

As should be obvious by this point, a lot of problems to which people call the cops involve disputes. Domestic disputes, noise disputes, neighbor trouble, people on other people's property. People sitting on stoops, being raucous on corners. People complaining about things they observe and wanting the cops to put a stop to it.

Gentrifying neighborhoods are a particular situs of these sorts of disputes. One group of people has used a neighborhood for a long time a certain way. Another group of people move in. They have different values and expectations. *A different conception of order.*<sup>155</sup> 911 calls are frequent from gentrifying areas, asking someone to "police" the boundaries of acceptable behavior.<sup>156</sup> As though there is one clear answer.

Race also is a pervasive issue in calls to the police. We've been treated repeatedly to viral videos of people calling the police on people of color selling water, barbecuing, moving into apartments, selling real estate. Making a call from a hotel lobby where they are a paying guest.<sup>157</sup> Ultimately, cops are forced to arbitrate. To try to calm down a domestic dispute. To tell one side to turn its music down or move along. To put an end to a party. Or to send a neighbor back to bed, unhappy about the turmoil.

At the end of these disputes there are sometimes enforcement actions. Enforcement often occurs simply because mediation fails. Because disputes escalate despite the presence (or because of the presence) of the police. And when mediation fails and enforcement occurs, society again faces the panoply of harms that result from enforcement actions.

There's no particular reason to believe the people who become police are particularly good at this sort of dispute resolution. They might be, but then

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<sup>155</sup> See ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 183 (2018) ("A group of young people standing on the street corner might be perceived as disorderly and threatening, but they could also be seen as vivacious friends, children of the community, or just plain neighborly, depending on who is doing the perceiving and where.").

<sup>156</sup> See Abdallah Fayyad, *The Criminalization of Gentrifying Neighborhoods*, ATLANTIC (Dec. 20, 2017), <https://www.theatlantic.com/politics/archive/2017/12/the-criminalization-of-gentrifying-neighborhoods/548837> [<https://perma.cc/UBK6-5R2Z>] ("[A]s demographics shift, activity that was previously considered normal becomes suspicious, and newcomers—many of whom are white—are more inclined to get law enforcement involved.").

<sup>157</sup> See, e.g., Molly Harbarger, *Portland Hotel Calls Cops on Black Guest in Lobby*, OREGONIAN (Dec. 29, 2018), <https://www.oregonlive.com/business/2018/12/portland-hotel-calls-cops-on-black-guest-in-lobby.html> [<https://perma.cc/G2A5-SFBE>].

again, they may not. Some officers undoubtedly are better than others. We don't test for it. We don't do much to train for it. Many learn on the job.

The question, though, is how often enforcement actions that are taken could have been avoided if there were trained mediators available. The idea is not farfetched. In France, local governments employ *agents de médiation*, who occupy public spaces and troubled neighborhoods precisely for the purpose of helping people work out their disputes.<sup>158</sup> There are questions about how well trained they are, or how well they perform, but no matter how effective that particular example is, the concept is worthy: one could strive to do it well.<sup>159</sup> To substitute mediation and dispute resolution for enforcement.

A video of a mother at the Human Resources Administration office in New York, waiting to get benefits for her and her young infant, and having her infant pried out of her arms after the police were called because she was complaining about her wait, went viral on social media.<sup>160</sup> This is a classic example where we should ask why the police were there, and what they should be doing. It turns out incidents like this at HRA offices are not infrequent.<sup>161</sup> Perhaps what is needed is better service at those offices, and staff trained to deal with people who are forced to wait long periods of time, who understandably become impatient as they juggle the need for benefits with the need to hold down a job, to care for a child. It's hard to believe law enforcement is the answer, in all but the most extreme situations.

When dispute resolution is called for, we may well want force and law in the background. As we've discussed, disputes can go sour. A domestic fight can turn into domestic violence; a barroom dispute can get ugly. How in the background may depend on whether the presence of the police would exacerbate things, or quell them.

But the one inescapable conclusion is that we would do well to put mediating disputes out front, effectively. It is hard to believe the benefits of doing so don't hugely outweigh the costs. In current practice we try—cops

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<sup>158</sup> See, e.g., François Bonnet, Jacques de Maillard & Sebastian Roché, *Plural Policing of Public Places in France. Between Private and Local Policing*, 2 EUR. J. POLICING STUD. 285, 290-91 (2015) (describing the origin and function of mediation agents in France).

<sup>159</sup> See *id.* at 293-94 (discussing the challenges mediators face).

<sup>160</sup> See Monae, FACEBOOK (Dec. 7, 2018), <https://www.facebook.com/nyashia.ferguson/videos/2165023130216850> [<https://perma.cc/N6UL-H86W>] (displaying an aggressive interaction with police officers); see also Ashley Southall, 'Appalling' Video Shows the Police Yanking 1-Year-Old from His Mother's Arms, N.Y. TIMES (Dec. 9, 2018), <https://www.nytimes.com/2018/12/09/nyregion/nypd-jazmine-headley-baby-video.html> [<https://perma.cc/6EzT-7ZME>] (describing the incident).

<sup>161</sup> See Ashley Southall & Nikita Stewart, *They Grabbed Her Baby and Arrested Her. Now Jazmine Headley Is Speaking Out*, N.Y. TIMES (Dec. 16, 2018), <https://www.nytimes.com/2018/12/16/nyregion/jazmine-headley-arrest.html> [<https://perma.cc/G749-P5WB>] (describing how the mother whose child was taken from her at the HRA office "has become a cause célèbre for New Yorkers who depend on food stamps and cash public assistance and who say they are often met with hostility and are sometimes threatened with arrest at city benefits offices").



rarely rush in and start arresting people; they talk through it, learn, try to solve the situation. It's just that we don't put formal resources into making these initial steps effective, and we should.

#### 4. The Social Worker Cop

A lot of what cops are asked to do in response to calls is be social workers. Cops are forced to play "veterinary surgeon, mental welfare officer, marriage guidance counselor, home-help to the infirm, welfare worker friend and confid[an]t."<sup>162</sup> Cops are asked to deal with problems within families and other relationships: domestic violence, marital disputes, and the like.<sup>163</sup> There is mental illness, homelessness, substance abuse.

The ratio of problems that require social work solutions as opposed to other types of responses, such as force or law, is unclear. There's a saying in the social work profession that cops are called upon eighty–twenty to do social work over crime fighting, but they are trained twenty–eighty on social work versus their other functions.<sup>164</sup> Yet, a 1987 study showed a range of from fifty to ninety percent of a cop's time is spent on social work functions.<sup>165</sup> Another study, of non-dispatched calls to a seven-digit emergency line, indicated that cops are called upon twenty-six percent of the time for general advice, and twenty-two percent of the time for victim's needs.<sup>166</sup> For one department in California in 2016, over thirty percent of the calls for service were for homeless people alone.<sup>167</sup>

What is clear is that these are not the things for which cops are trained. "These problems do not usually involve criminal action and rarely require arrest, prosecution, trial and punishment."<sup>168</sup> Responding to the opioid crisis, the Newton, Ohio chief said that "[l]aw enforcement has been forced to take the lead on this, and we probably are not the best profession to be doing this

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<sup>162</sup> Lamin & Teboh, *supra* note 116, at 6.

<sup>163</sup> See Rhoda A. Michaels & Harvey Treger, *Social Work in Police Departments*, SOC. WORK, Sept. 1973, at 67, 67 ("Problems of marriage, the family, mental health, and personal assistance make up the majority of the situations in which policemen are called upon to intervene.").

<sup>164</sup> George T. Patterson, *Police Social Work: A Unique Area of Practice Arising from Law Enforcement Functions*, NAT'L ASS'N SOC. WORKERS (July 2008), <https://www.naswnyc.org/page/77/Police-Social-Work.htm> [<https://perma.cc/6VRE-XNEX>]; see also John A. Webster, *Police Task and Time Study*, 61 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 94, 100 (1970) ("The police do perform social work. In fact, they perform more social work than they perform law enforcement.").

<sup>165</sup> See Harvey Treger, *Police Social Work*, in *ENCYCLOPEDIA OF SOCIAL WORK* (20th ed. 2008).

<sup>166</sup> Katherine Hooper Briar, *Emergency Calls to Police: Implications for Social Work Intervention*, 59 SOC. SERV. REV. 593, 596-99 (1985).

<sup>167</sup> *CHPD: Over 30% of Calls to Police Dept. Are Homeless-Related*, CITRUS HEIGHTS SENTINEL (Cal., July 21, 2016, 7:11 PM), <https://citrusheightssentinel.com/2016/07/20/police-30-calls-chpd-homeless-related> [<https://perma.cc/U34U-DUAF>].

<sup>168</sup> Michaels & Treger, *supra* note 163, at 67-68.

because our job really is to enforce laws.”<sup>169</sup> His compatriot, the sheriff in Essex County, Massachusetts, says that when he came out of the academy policing was about fighting crime, but “[n]ow police officers have to be generalists. You have to enforce the law, you have to be social-service workers and almost mental-health workers.”<sup>170</sup> Yet, we’ve seen how little police training goes to the social work function.

Nor do cops really want to deal with these problems, either because they don’t like doing so, or perhaps they just feel ill-suited. A chief superintendent in London says that dealing with the homeless “tie[s] up” resources and that you find yourself picking them up only to have them back out on the street after a fine.<sup>171</sup> In a 2013 study of police departments, officers being interviewed commonly said that “it should not be the responsibility of the police” to deal with the homeless population.<sup>172</sup>

Domestic calls provide one of the most vivid examples of how our reliance on traditional policing alone may be misplaced. These calls are often more frequent than all the other calls about violent crime combined, and they certainly top the list of situations in which force *potentially* is needed.<sup>173</sup> But, they also take more time than other calls, precisely because they involve “tasks required beyond routine law enforcement duties.”<sup>174</sup> Besides mediation, domestic disputes require a fair amount of dealing with victimization, the classic functions of the social worker or psychologist.<sup>175</sup>

Because it is the job and training of cops to enforce the law, law is the response we often apply to many problems better suited to social work. Take

<sup>169</sup> Katie Zezima, *As Opioid Overdoses Rise, Police Officers Become Counselors, Doctors and Social Workers*, WASH. POST (Mar. 12, 2017), [https://www.washingtonpost.com/national/as-opioid-overdoses-rise-police-officers-become-counselors-doctors-and-social-workers/2017/03/12/85a99ba6-fa9c-11e6-be05-1a3817ac21a5\\_story.html?noredirect=on&utm\\_term=.c90af58eec2d](https://www.washingtonpost.com/national/as-opioid-overdoses-rise-police-officers-become-counselors-doctors-and-social-workers/2017/03/12/85a99ba6-fa9c-11e6-be05-1a3817ac21a5_story.html?noredirect=on&utm_term=.c90af58eec2d) [<https://perma.cc/P3C4-P42P>].

<sup>170</sup> *Id.*

<sup>171</sup> Donald Saelinger, Note, *Nowhere to Go: The Impacts of City Ordinances Criminalizing Homelessness*, 13 GEO. J. ON POVERTY L. & POL’Y 545, 562 (2006).

<sup>172</sup> McNamara et al., *supra* note 154, at 367.

<sup>173</sup> See KLEIN, *supra* note 52, at 1 (“Domestic-violence-related police calls have been found to constitute the single largest category of calls received by police, accounting for 15 to more than 50 percent of all calls.”).

<sup>174</sup> Jacqueline Corcoran, Margaret Stephenson, Derrelyn Perryman & Shannon Allen, *Perceptions and Utilization of a Police—Social Work Crisis Intervention Approach to Domestic Violence*, 82 FAMS. IN SOC’Y 393, 393 (2001).

<sup>175</sup> See DEAN ET AL., *supra* note 116, at 17 (“The resolution of domestic violence is not primarily a law enforcement problem . . . [It] requires an immediate, coordinated response where victim, batterer and other family members are referred to a range of services . . .”). See generally, Aya Gruber, *How Police Became the Go-to Response to Domestic Violence*, SLATE (July 7, 2020, 4:03 PM), <https://slate.com/news-and-politics/2020/07/policing-domestic-violence-history.html> [<https://perma.cc/9XRY-8L7B>] (describing the feminist push to involve police in domestic disputes in the 1970s, and thinking about alternatives to police involvement today).

the homeless. We've criminalized most aspects of their very being, from sleeping on streets to trespass laws to laws aimed at performing personal functions in public.<sup>176</sup> We use nuisance laws to deal with them.<sup>177</sup> A student of homelessness and alternatives to enforcement explained that "[o]ne of the consistent messages from my conversations is that decision-makers often turn to enforcement because of a perceived lack of alternatives."<sup>178</sup>

Yet, we've also seen how these problems are chronic, and are not being solved by the application of force or law. How police are called to the same location, or to deal with the same person time and again. How people in need of social work services cycle in and out of jails, how the police perform a revolving door law enforcement function that is of dubious value. In the 1960s and 1970s we went through massive deinstitutionalization of the mentally ill.<sup>179</sup> Over time we've simply substituted one institution (the criminal law and its jails) for another (hospitals). One doubts the former is making us better off.

What is needed for these calls is some sort of social work function. A way of determining the underlying problems that brought police to the location or person in the first place and directing resources there. If not, the problem simply is destined to repeat itself.

## 5. The Traffic Cop

There are more than 20 million police encounters each year with motorists. For many officers, traffic enforcement is their most frequent contact with the public they serve.<sup>180</sup> Cops patrolling the streets, cops by the side of the road (hidden or not)—these are familiar sights.

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<sup>176</sup> See, e.g., Michael Bishop, Bridget DuPey, Nicole Jones, Ashley Kline, Joshua Mitson & Darren O'Connor, *Too High a Price 2: Move On to Where?* 3 (Univ. of Denver Sturm Coll. of L. Legal Rsch. Paper Series, Working Paper No. 18-14, 2018) ("[T]he unfortunate reality of too many homeless individuals is that they are criminalized for simple life-sustaining activities and 'moved on' for being visibly poor."); Maria Foscarinis, Kelly Cunningham-Bowers & Kristen E. Brown, *Out of Sight—Out of Mind?: The Continuing Trend Toward the Criminalization of Homelessness*, 6 GEO. J. ON POVERTY L. & POL'Y 145, 146-47 (1999) (noting that, instead of getting to the root causes of homelessness and actively assisting people experiencing homelessness, we have used the criminal justice system to remove them from the streets).

<sup>177</sup> See, e.g., Bishop et al., *supra* note 176, at 3 (describing how Colorado cities criminalize essential human functions using "move-on" orders, ticketing and jail).

<sup>178</sup> LUCY ADAMS, IN THE PUBLIC EYE: ADDRESSING THE NEGATIVE IMPACT OF LAWS REGULATING PUBLIC SPACE ON PEOPLE EXPERIENCING HOMELESSNESS 7 (2014).

<sup>179</sup> Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 OHIO ST. J. CRIM. L. 53, 54 (2011) ("All in all, from 1955 to 1980, the number of persons institutionalized in mental health facilities declined by 75%.").

<sup>180</sup> Pierson et al., *supra* note 3, at 736; see also Conover & Liederbach, *supra* note 99, at 175-76 tbl.3 (breaking down how many police interactions with members of the public are because of traffic related issues).

The traffic cop function—how many of us experience the police—is itself deeply in need of disaggregation. Traffic cops help stranded motorists with broken down cars, they take reports in motor vehicle accidents, they direct traffic around serious incidents in which other responders are needed. They set and staff speed “traps.” They stop and question those in violation of traffic laws—sometimes to enforce those laws, sometimes pretextually in a (usually failed) effort to ferret out other crime.<sup>181</sup> These are all, on reflection, very different things.

Other than the fact that we’re used to it, many if not most of these “traffic” functions don’t require sworn officers trained in force and law at all, and some of the ones that do—pretextual stops—may be causing more harm than good.<sup>182</sup> A stranded motorist needs AAA more than the state patrol.<sup>183</sup> It’s true that police write up reports of automobile accidents, but a good question is why. Ever have a cop take a report from you? There is every reason to believe trained report-takers chosen for a skillset more adept at report-writing might do better. New Orleans recently endorsed NOPD hiring third-party report-takers for accidents in which there is no injury and no concern about a driver under the influence, in order to free up cops for where they are needed most.<sup>184</sup> The idea seems so obvious one wonders why (union opposition aside) we did not do it long ago.

Even traffic enforcement doesn’t necessarily require officers. Berkeley, California is experimenting with unarmed public employees who are not police for traffic stops.<sup>185</sup> Many tickets for running red lights are issued administratively after red light cameras capture the violation.<sup>186</sup> More of this could occur. Speed guns and cameras could catch violators of speed limits.

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<sup>181</sup> *Utah v. Strieff*, 136 S. Ct. 2056, 2069 (2016) (Sotomayor, J., dissenting) (lamenting that the Supreme Court has approved most traffic stops “so long as [an officer] can point to a pretextual justification after the fact”); *Whren v. United States*, 517 U.S. 806, 813 (1996) (upholding pretextual stops); Harris, *supra* note 4, at 559.

<sup>182</sup> See POLICING PROJECT, *supra* note 3, at 7-10 (finding that traffic stops in Nashville, Tennessee, resulted in racial disparities and failed to reduce crime); Pierson et al., *supra* note 3; Rushin & Edwards, *supra* note 3, at 41-48, 58-60 (noting the harmful consequences of discretionary police stops).

<sup>183</sup> See AAA Fact Sheet, AAA NEWSROOM, <https://perma.cc/7ZEN-AGVC> for the availability of AAA roadside services to help motorists with disabled vehicles.

<sup>184</sup> Beau Evans, *Civilians Could Investigate Your Next Fender-Bender, After City Green-Lights Plan*, NEW ORLEANS TIMES-PICAYUNE (July 22, 2019, 1:56 PM), [https://www.nola.com/news/traffic/article\\_8df201da-d3b4-5e64-b8fb-a373e7de8c87.html](https://www.nola.com/news/traffic/article_8df201da-d3b4-5e64-b8fb-a373e7de8c87.html) [<https://perma.cc/7ZSC-7L79>].

<sup>185</sup> ASSOCIATED PRESS, *Berkeley Moves Toward Removing Police From Traffic Stops*, ABC NEWS (July 15, 2020, 11:28 AM), <https://abcnews.go.com/US/wireStory/berkeley-moves-removing-police-traffic-stops-71796720> [<https://perma.cc/G54N-PTJJ>].

<sup>186</sup> See *supra* note 141 and accompanying text.

License plate readers could identify those whose registration has expired and send notices by mail.<sup>187</sup>

There's plenty of reason to question whether we actually want this sort of Big Brother automated traffic enforcement. Too many jurisdictions use traffic enforcement as a source of income.<sup>188</sup> It's not clear why this is appropriate—doubts about that cause cities and departments to deny there are quotas, even as officers and their unions suggest otherwise.<sup>189</sup> This form of income raising is highly discretionary and deeply raced.<sup>190</sup>

But the central point is that we need to stop and think about whether we want to use people trained primarily in force and law to do this work. Not only are cops a limited resource, but harm flows when we use cops for traffic enforcement. The task is highly discretionary, and by now it is clear beyond any question that traffic enforcement is deeply tilted against minorities.<sup>191</sup> Every police stop is another opportunity for something to go badly, for the cop or the person stopped. Sandra Bland was stopped for failure to signal a

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<sup>187</sup> See Allison Klein & Josh White, *License Plate Readers: A Useful Tool for Police Comes with Privacy Concerns*, WASH. POST (Nov. 19, 2011), [https://www.washingtonpost.com/local/license-plate-readers-a-useful-tool-for-police-comes-with-privacy-concerns/2011/11/18/gIQAuEApcN\\_story.html](https://www.washingtonpost.com/local/license-plate-readers-a-useful-tool-for-police-comes-with-privacy-concerns/2011/11/18/gIQAuEApcN_story.html) [https://perma.cc/B6DX-CEY6] (exploring the enforcement benefits and privacy costs of license plate readers).

<sup>188</sup> See Mike Maciag, *Addicted to Fines: A Special Report*, GOVERNING (Aug. 21, 2019), <https://www.governing.com/topics/finance/fine-fee-revenues-special-report.html> [https://perma.cc/7W8E-VTUH] (investigating how cities and towns rely on speeding tickets, parking citations, and other traffic fines and fees to fund their budgets); Jeffrey Fagan & Elliot Ash, *New Policing, New Segregation: From Ferguson to New York*, 106 GEO. L.J. ONLINE 33, 46-52 (2017) (providing an overview of numerous different forms of fines and fees); U.S. DEP'T OF JUST. C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015) ("The City [of Ferguson] budgets for sizeable increases in municipal fines and fees each year, exhorts police and court staff to deliver those revenue increases, and closely monitors whether those increases are achieved.").

<sup>189</sup> See, e.g., Joel Rubin & Catherine Saillant, *LAPD to Pay \$10 Million in Traffic Ticket Quota Controversy*, L.A. TIMES (Dec. 10, 2013, 3:00 AM), <https://www.latimes.com/local/lanow/la-xpm-2013-dec-10-la-me-ln-ticket-quota-20131210-story.html> [https://perma.cc/ZQN6-ZLSW] (reporting the Los Angeles City Council's decision to "pay nearly \$6 million to a group of police officers who accused their superiors of imposing a secret traffic ticket quota system" despite those superior officers' denials).

<sup>190</sup> See U.S. COMM'N ON C.R., TARGETED FINES AND FEES AGAINST LOW-INCOME COMMUNITIES OF COLOR: CIVIL RIGHTS AND CONSTITUTIONAL IMPLICATIONS 3 (2017) (finding that the impacts of fines and fees "have been borne by communities of color, along with the poor," and that municipalities that rely heavily on revenue from fines and fees have a higher than average percentage of minority populations).

<sup>191</sup> See Pierson et al., *supra* note 3, at 736 ("In both state patrol and municipal police stops, we find . . . discrimination in stop decisions."); David A. Moran, *The New Fourth Amendment Vehicle Doctrine: Stop and Search Any Car at Any Time*, 47 VILL. L. REV. 815, 831 (2002) (cataloguing the shift to invasive traffic stops); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 958 (1999) (noting that certain police actions, including traffic stops, are racially discriminatory); Harris, *supra* note 4, at 546 (describing phenomenon of "driving while black").

lane change.<sup>192</sup> The incident escalated and she was arrested; she committed suicide three days later, the county paid a \$1.9 million dollar judgment, and the officer was indicted on perjury charges that were settled after he promised to leave law enforcement forever.<sup>193</sup> Were we net better off for that discretionary stop? For having a cop in that place at that time, doing what he did?

The ultimate question is how much of the traffic cop role we need altogether, and how much of that role needs to be performed by armed individuals trained in law enforcement. Sure, it's possible that even the helping hand for the stranded motorist could turn ugly. Then again, AAA helps lots of stranded motorists daily without armed assistance ever proving necessary. What we may need instead are cadres of report takers, and political decisions about how much to automate traffic enforcement. The enforcement universe might look a lot different, with far better outcomes, if we did those things.

## 6. The Crime-Fighting, Law Enforcement Cop

Ironically, the same might be said of what is thought of as the core function of police: crime-fighting and law enforcement. If anything seems quintessentially what cops should do, this is it. Yet, even here, the pieces of crime-fighting need to be taken apart and considered separately.

Looking at data from Wilmington, Delaware in 1985–86, a couple of scholars pushed back on what was becoming the common wisdom that cops spent little of their time fighting crime.<sup>194</sup> Greene and Klockars looked not just at patrol officers, but also other units like detectives and community policing officers. They noted that even though many calls prove unfounded, officers can't know for sure until they get there, and also that a fair amount of what some call "order maintenance" really is dealing with crime. By their calculation, once they eliminated "personal" and "clear" time (i.e. on patrol but not dispatched), some half of the duties officers perform are crime-related.<sup>195</sup>

Still, even Greene and Klockars recognized that although one could characterize a much higher volume of what officers do as "crime-fighting," ultimately the *activities* in which cops were engaged consisted mostly of after-the-fact report writing and other administrative or investigatory tasks.<sup>196</sup> Disaggregation here is important. Cops were "determining whether or not what was reported as a crime was or should be reported as one, interviewing witnesses,

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<sup>192</sup> Brian Collister, *Sandra Bland Recorded Her Own Arrest. Watch Her Cellphone Video from the 2015 Traffic Stop*, WFAA (May 7, 2019, 7:26 AM), <https://www.wfaa.com/article/news/investigations/sandra-bland-recorded-her-own-arrest-watch-her-cellphone-video-from-the-2015-traffic-stop/287-44ff2f5b-f481-48c3-a5ca-fad15296d979> [https://perma.cc/QVN7-TMBH].

<sup>193</sup> *Id.*

<sup>194</sup> Greene & Klockars, *supra* note 136.

<sup>195</sup> *Id.* at 281 tbl.3 & 4.

<sup>196</sup> *Id.* at 279 tbl.1.

gathering evidence, advising victims, writing reports, and otherwise assisting in the management of the aftermath of victimizations.”<sup>197</sup> In short, they too agreed that the “findings in no way lend support to the headline news vision of police work as a violent running battle between police and criminals.”<sup>198</sup>

There is something to be said, of course, for rapid response by force- and law-trained individuals to emergent situations involving serious criminal activity, even if the activity only is speculative. This means sending officers out to innumerable calls for “suspicious persons” or residential and business alarms going off, or reports of “crime in progress” even when the result is a false alarm. Even here, though, we also need to realize that far too many of these calls are made by overly snoop or paranoid people, and that some not insubstantial portion of those are driven by racial bias, conscious or unconscious.

But what data and anecdote tell us is that cops mostly *don’t* arrive while things are in progress, when force is most likely to be needed.<sup>199</sup> Callers sometimes wait until criminal incidents are over, or rapid response is only so rapid. It turns out to be relatively rare that officers come upon a culprit in the act, or even catch up with one in the immediate aftermath. When it came to actually responding to crimes in progress, Greene and Klockars found that “the average police officer spent about 1 hour per week” on that task.<sup>200</sup> Technology may (or may not) be improving upon this.<sup>201</sup>

The aftermath of a call about criminal activity is another thing entirely; here the need for officers whose main skills and abilities are to deploy force and effect arrests is extremely dubious. Those functions could be broken down into three separate things: interviewing witnesses and gathering evidence, helping victims and those suffering from trauma, and post hoc investigation to clear crimes.<sup>202</sup>

It’s certainly possible to charge officers with the first function, evidence gathering and report writing, but the question remains whether they are the best at it. They receive training for it, no doubt.<sup>203</sup> Still, for the more serious

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<sup>197</sup> *Id.* at 283.

<sup>198</sup> *Id.*

<sup>199</sup> See PETER MOSKOS, *COP IN THE HOOD: MY YEAR POLICING BALTIMORE’S EASTERN DISTRICT 96* (2008) (“[T]he vast majority of the time most 911 callers . . . wait until the suspect is gone before reporting a crime. . . . And if police do not arrive within one minute of a crime, rapid police response has virtually no effect.”).

<sup>200</sup> Greene & Klockars, *supra* note 136, at 283.

<sup>201</sup> See NANCY G. LA VIGNE, PAIGE S. THOMPSON, DANIEL S. LAWRENCE & MARGARET GOFF, *URB. INST., IMPLEMENTING GUNSHOT DETECTION TECHNOLOGY* 8-10 (2019), [https://www.urban.org/sites/default/files/publication/101161/implementing\\_gunshot\\_detection\\_technology\\_recommendations\\_for\\_law\\_enforcement\\_and\\_municipal\\_partners.pdf](https://www.urban.org/sites/default/files/publication/101161/implementing_gunshot_detection_technology_recommendations_for_law_enforcement_and_municipal_partners.pdf) [<https://perma.cc/L99F-F3UY>] (discussing the effective implementation of gunshot detection technology, including to arrive at the scene of shots more rapidly).

<sup>202</sup> See Greene & Klockars, *supra* note 136, at 283.

<sup>203</sup> See REAVES, *ACADEMIES* 2013, *supra* note 92, at 5 (finding that police recruits received an average of twenty-five hours of training on report writing and forty-two hours on investigations).

of crimes, like homicide, we displace patrol officers very quickly and bring in specialized units. Gathering forensic evidence is a particular skill, one that takes great care and attention to detail.<sup>204</sup> Recent breakthroughs in forensic science suggest we need way less police and much more dispassionate evidence collection and evaluation to get things right.<sup>205</sup> Interviewing witnesses requires a certain combination of skepticism and emotional intelligence: getting people to feel comfortable enough to open up, and probing to make sure stories hang together.<sup>206</sup> Cops may be good at one and not necessarily at the other. Then there is the writing of reports so that there is an accurate record. As we saw with traffic accident reports, it is not clear that this is what officers are best-suited to.

As for helping victims, this is something police officers seem notoriously bad at, and understandably so. Officers are barely trained at this.<sup>207</sup> Certainly for crimes involving sexual violation, many victims report on how the system did not treat them humanely, how it often felt like the initial crime was compounded.<sup>208</sup> Others in society are trained far better.<sup>209</sup> Why we would deploy police rather than social workers in this instance is a mystery.

Even for the post hoc detective function, there's every reason to believe some set of individuals with specialized training would outperform those we charge with this task. It is not obvious that the best people for the job are

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<sup>204</sup> Although the necessary qualifications to be a forensics expert vary, the experience and accuracy of the expert's past conclusions are key. Brandon L. Garrett & Gregory Mitchell, *The Proficiency of Experts*, 166 U. PA. L. REV. 901, 908 (2018).

<sup>205</sup> See Erin Murphy, *The Mismatch Between Twenty-First-Century Forensic Evidence and Our Antiquated Criminal Justice System*, 87 S. CAL. L. REV. 633, 641-42 (2014) (lamenting that "evidence collection and preservation continues to be left almost entirely to the discretion of police" and suggesting that "as a result, the rate of collection, submission, and analysis of crime scene evidence is abysmally low"); Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 34 (2009) (finding that "[a]lmost all of the analysts testifying in" 137 trials that resulted in wrongful convictions "worked for police laboratories").

<sup>206</sup> See Greene & Klockars, *supra* note 136, at 283 (arguing that police should be trained "to guard against the insensitivity that can come from dealing routinely with people in crises").

<sup>207</sup> See REAVES, ACADEMIES 2013, *supra* note 92, at 7 (reporting that police recruits received an average of five hours of victim response training); Helen M. Eigenberg, Victor E. Kappeler & Karen McGuffee, *Confronting the Complexities of Domestic Violence: A Social Prescription for Rethinking Police Training*, 12 J. POLICE CRISIS NEGOTS. 122, 135 (2012) (suggesting that police training on domestic violence focuses on officer safety over victim services); Scott W. Peters, Heather C. Trepal, Sabina M. de Vries, Sally W. Day & Christopher Leeth, *Victims of Domestic Violence and Front-Line Workers: A Helping Paradigm*, 36 MICH. J. COUNSELING 8, 9 (2009) (explaining that when police officers receive only basic domestic violence training, the training usually does not focus on addressing victim needs).

<sup>208</sup> See, e.g., Campbell, *supra* note 73, at 30-31, 37 (noting that most rape victims in the study experienced secondary victimization during their contact with police, and that this re-victimization can have serious consequences including depression and reluctance to seek further help).

<sup>209</sup> See *id.* at 38 (finding that victims who are assisted by a rape victim advocate report more positive experiences with legal and medical systems).



those who were once patrol officers, did well at that job for a while, and then passed a test for more training as a detective.<sup>210</sup> Nor do statistics give much support for the fact that cop-detectives are the best at this job. Clearance rates for homicides alone are a disappointment (to say the least) in communities most afflicted with crime.<sup>211</sup> People whose property is stolen don't expect really to get it back, and are surprised when they do.<sup>212</sup>

The bottom line is that even the crime-fighting function can be disaggregated, and it should be. In order to achieve optimal outcomes in all aspects of crime—dealing with emergent situations, collecting evidence, handling witness trauma, writing reports, investigating and identifying culprits—we need to match skills to the task. We are not doing this at present.

## 7. The Proactive Cop

There's one particular aspect of "crime fighting"—what goes by the name of "proactive policing"—that needs a closer look and its own disaggregation. Beginning in the 1980s there was a sense that the police should be more proactive in fighting crime.<sup>213</sup> Broken windows, quality of life, zero tolerance, hot spot policing; all of these have been used to describe what are at times interrelated proactive approaches to the policing function that involve stepped up enforcement in ways not directly responsive to a call for service.<sup>214</sup> As with the rest of policing, proactive policing needs to be taken apart to determine whether and what police officers should be doing.

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<sup>210</sup> See, e.g., *Career Ladders*, LAPD CAREERS, <https://www.joinlapd.com/career-ladders> [<https://perma.cc/MR8A-CUSG>] (explaining how to become a detective with the Los Angeles Police Department); CHI. POLICE, CHICAGO POLICE DEPARTMENT DETECTIVE SELECTION PROCESS (2016), [https://www.chicago.gov/content/dam/city/depts/dhr/general/Detective\\_Candidate\\_Preparation\\_Guide-FINAL2-10-16.pdf](https://www.chicago.gov/content/dam/city/depts/dhr/general/Detective_Candidate_Preparation_Guide-FINAL2-10-16.pdf) [<https://perma.cc/YLN8-8EC3>] (describing how to become a detective with the Chicago Police Department).

<sup>211</sup> See Wash. Post Investigative Team, *Murder with Impunity*, WASH. POST (Jan. 7, 2019), <https://www.washingtonpost.com/graphics/2018/national/murder-with-impunity/> [<https://perma.cc/D29N-RQSA>] ("In the past decade, nearly 26,000 murders have gone without an arrest in major American cities. Of those, more than 18,600 of the victims—almost three-quarters—were black."); Sarah Ryley, Jeremy Singer-Vine & Sean Campbell, *5 Things to Know about Cities' Failure to Arrest Shooters*, TRACE (Jan. 24, 2019), <https://www.thetrace.org/2019/01/gun-murder-solve-rate-understaffed-police-data-analysis/> [<https://perma.cc/P7JM-UMH8>] ("[D]etectives are failing to make arrests in all but a fraction of murders and assaults committed with guns . . . Arrest rates are lower when the victim is black or Hispanic.").

<sup>212</sup> See John Gramlich, *Most Violent and Property Crimes in the U.S. Go Unsolved*, PEW RSCH. CTR. (Mar. 1, 2017), <https://www.pewresearch.org/fact-tank/2017/03/01/most-violent-and-property-crimes-in-the-u-s-go-unsolved/> [<https://perma.cc/Y2Q8-S3NQ>] ("Only about half of the violent crimes and a third of the property crimes that occur in the United States each year are reported to police. And most of the crimes that are reported don't result in the arrest, charging and prosecution of a suspect . . .").

<sup>213</sup> See PROACTIVE POLICING: EFFECTS, *supra* note 37, at 16 (recounting this historical shift).

<sup>214</sup> See *id.* at 2 tbl.S-1 (categorizing forms of proactive policing).

In considering proactive policing, some conflate enforcement efforts with collaborative work between police and communities—what often is called “community policing.”<sup>215</sup> In terms of achieving public safety in optimal ways, that’s a mistake. Enforcement-driven proactive policing, and community policing efforts, are two very different things, like mixing apples and carburetors. Herman Goldstein, a social scientist who spent years with the Chicago Police Department, and is the parent of problem-oriented policing, put it pithily:

[A] department could not long tolerate a situation in which officers in a residential area go out of their way to demonstrate that they are caring, service-oriented individuals, while other officers assigned to a roving task force make wholesale sweeps of loitering juveniles in that community. Such activities greatly diminish the credibility of officers who have invested heavily in developing rapport.<sup>216</sup>

Officers in a study in the United Kingdom about an intensive community policing effort that seemed to be paying dividends, recognized there was a conflict between their buddying up to young folks and the fact that if things went badly enforcement would follow—and thus “I have got to keep that distance professionally.”<sup>217</sup> Community policing simply is a different thing, which we will return to later.

In proactive law enforcement, whatever the terminology used to describe it, there are really two different things going on. One relates to quality of life, the other to crime-fighting. They are not the same and need to be treated differently.

Proactive policing for crime control purposes has for the most part been discredited, except when used under a “hot spot” model.<sup>218</sup> It turns out going around town jacking everyone up for everything doesn’t do much to fight serious crime.<sup>219</sup> It’s all too diffuse to deter individuals bent on serious

<sup>215</sup> See *infra* note 234 and accompanying text (defining community policing).

<sup>216</sup> Herman Goldstein, *Toward Community-Oriented Policing: Potential, Basic Requirements, and Threshold Questions*, 33 CRIME & DELINQ. 6, 12-13 (1987).

<sup>217</sup> DANIEL MCCARTHY, “SOFT” POLICING: THE COLLABORATIVE CONTROL OF ANTI-SOCIAL BEHAVIOUR 144 (2014).

<sup>218</sup> See generally Justin McCrary & Deepak Premkumar, *Why We Need Police*, in THE CAMBRIDGE HANDBOOK OF POLICING IN THE UNITED STATES 65, 79 (Tamara Rice Lave & Eric J. Miller eds., 2019) (“[W]e illustrate that there is limited to no evidence to suggest that disorder or proactive policing is an effective means to deter crime, but there are evaluations which support the use of hot-spots . . .”).

<sup>219</sup> See ALEX CHOHLAS-WOOD, SHARAD GOEL, AMY SHOEMAKER & RAVI SHROFF, AN ANALYSIS OF THE METROPOLITAN NASHVILLE POLICE DEPARTMENT’S TRAFFIC STOP PRACTICES 8 (2018) (finding that traffic stops had no effect on serious crime rates); PROACTIVE POLICING: EFFECTS, *supra* note 37, at 227 (finding that there is not strong enough evidence to draw a conclusion on the impact of “broken windows policing on fear of crime or on collective efficacy”); JAMES CULLEN & AMES GRAWERT, BRENNAN CTR. FOR JUST., FACT SHEET: STOP AND FRISK’S EFFECT ON CRIME IN NEW YORK CITY 2 (2016) (“Statistically, no relationship between stop-and-frisk and crime seems apparent.”).

offending. Hot spot policing, on the other hand, involves intensive effort directed at small criminogenic areas, often but a few blocks, in order to reduce crime.<sup>220</sup> In study after study, hot spot policing has been shown to lower crime, without displacing it to surrounding areas, although the degree to which it does so also varies from study to study and in some of the most careful studies the effects can be small.<sup>221</sup>

But even if heavy enforcement of misdemeanors made no sense for fighting crime, there still would be the quality-of-life aspect of the work. The utility of quality-of-life enforcement to enhance quality of life itself is undeniable as a causal matter (whatever one thinks of the collateral harms). The sorts of conduct that challenge quality of life can range widely, from noise complaints to “squeegee men” to public drinking and smoking of marijuana to public urination. Both Bill Bratton (the former Chief or Commissioner in Boston, Los Angeles, and New York) and George Kelling (the sociologist and co-author of the original work on Broken Windows policing) stress that calls to deal with this sort of problem come frequently from low-income and minority neighborhoods.<sup>222</sup> Kelling explained that the whole broken windows approach derived from his spending time in challenged neighborhoods; when people were asked to identify their five most serious concerns, “at least three, but more likely four, would be ‘minor problems:’ graffiti, youths drinking in parks, ‘homeless’ peeing on their stoops, prostitutes attempting to hustle fathers in front of their children . . . and so on.”<sup>223</sup> If acts like public urination are a problem in a neighborhood or unwelcome by residents, then enforcing against it will indeed alleviate the problem itself.

What ties both quality of life and crime-fighting aims together, however, is the question of whether there are ways to achieve the same ends with less harm. Force and law enforcement may not be the order of the day, if there are alternatives.

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<sup>220</sup> See Anthony A. Braga, Andrew V. Papachristos & David M. Hureau, *The Effects of Hot Spots Policing on Crime: An Updated Systematic Review and Meta-Analysis*, 31 JUST. Q. 633, 635-37 (2014) (defining hot spots policing).

<sup>221</sup> See *id.* at 658 (“[H]ot spots policing programs generate modest crime control gains and are likely to produce a diffusion of crime control benefits into areas immediately surrounding targeted high-activity crime places.”); Lawrence W. Sherman & David Wiesburd, *General Deterrent Effects of Police Patrol in Crime “Hot Spots”: A Randomized, Controlled Trial*, 12 JUST. Q. 625, 643 (1995) (finding twenty-five percent less disorder in areas where police doubled the number of patrols with no displacement to surrounding areas).

<sup>222</sup> See George Kelling, *Don’t Blame My ‘Broken Windows’ Theory for Poor Policing*, POLITICO MAG. (Aug. 11, 2015), <https://www.politico.com/magazine/story/2015/08/broken-windows-theory-poor-policing-ferguson-kelling-121268> [perma.cc/KK5S-3MF9]; see also BRATTON, *supra* note 148, at 7 (reporting that African-Americans supported broken windows by thirty-seven to fifty-six percent in the aftermath of the shooting of Eric Garner).

<sup>223</sup> Kelling, *supra* note 222.

For example, a couple studies have disaggregated activities at hot spots, and concluded that though law enforcement has its place, the most effective approaches are “situational,” such as actually fixing broken windows.<sup>224</sup> This is yet another example of wondering what cops are doing *here*. The most interesting study along these lines was conducted by Anthony Braga and Brenda Bond in Lowell, Massachusetts, where they randomized hot spots and then applied four very different treatments, attempting to tease out the effects.<sup>225</sup> Part of the effort was indeed “aggressive order maintenance interventions” such as stepped up police patrols, stop-and-frisk, and more misdemeanor arrests.<sup>226</sup> But there also were social services interventions, such as providing social workers to those with mental health issues or working to get homeless individuals into local shelters.<sup>227</sup> Finally, there were “situational” approaches, such as knocking down abandoned buildings and cleaning vacant lots, or improving street lighting and adding video surveillance.<sup>228</sup> The dependent variable was calls for service, chosen because it rests entirely out of the hands of the police.<sup>229</sup> Notably, in the Braga and Bond study, the most successful intervention was not misdemeanor enforcement, but the “situational” strategy, i.e., actually fixing “broken windows.”<sup>230</sup> The authors speculated that “[t]he presence of abandoned buildings . . . attracts offenders to places,” and that “[c]hanges in the physical environment may discourage potential offenders from frequenting an area by altering criminal opportunities at a place.”<sup>231</sup>

If fixing situational circumstances in troubled neighborhoods is a plus, and conducting arrests to the point that they defeat community trust is a negative, then this has serious implications for the role of the police, even in the most crime-ridden of places. Braga and Bond recommended that police departments should shy away from “zero tolerance” approaches that remove

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<sup>224</sup> See Braga et al., *supra* note 220, at 633 (“Our analyses find that problem-oriented policing interventions generate larger mean effect sizes when compared to interventions that simply increase levels of traditional police actions in crime hot spots.”); Anthony A. Braga & Brenda J. Bond, *Policing Crime and Disorder Hot Spots: A Randomized Controlled Trial*, 46 CRIMINOLOGY 577, 578 (2008) (“[T]he strongest crime-prevention gains were generated by situational prevention strategies rather than by misdemeanor arrests or social service strategies.”).

<sup>225</sup> Braga & Bond, *supra* note 224.

<sup>226</sup> *Id.* at 585.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 598.

<sup>230</sup> *Id.* at 599. Calls for service dropped across all ranges of crimes, from robbery to assault; the only strategy that did not show an effect was the social services strategy. Even it, the authors concluded, might have long term effects, which did not show up during the relatively short run of the experiment. Even if not, this social services strategy “could generate desirable side benefits for the police such as improved relationships with community members.” *Id.* at 600.

<sup>231</sup> *Id.* at 599.

those guilty of incivilities “from the street via arrest.”<sup>232</sup> They concede that misdemeanor arrests play a role. But relying on a high number of arrests to combat serious crime may “undermine relationships in low-income, urban minority communities” where what is “most needed” is working with communities to eliminate distrust and co-produce public safety.<sup>233</sup>

The same might be said for quality of life policing itself. People in all neighborhoods deserve a good quality of life, and to be free of nuisances, be they loud noise, public drunkenness, urination. And sometimes force and law are required. But as we have seen repeatedly, the question is whether we can adopt situational—public restrooms, anyone?—and other approaches that, together with some modicum of force and law, achieve better overall outcomes, rather than thinking one-size-fits-all is our best approach.

## 8. “Community” Police

Policing leadership understands the importance of relationships with the community to fight crime. Since the 1970s there has been an emphasis on “community policing,” an approach that has come to have many meanings.<sup>234</sup> The studies on what police actually do, however, suggest that this involved a lot more talk than action.<sup>235</sup> Of late, the discussion has shifted to the “co-production” of public safety, by which is meant that the police need to work with community members (and not alienate them) to secure neighborhoods.<sup>236</sup> If there is a difference between the two, it is in giving communities more voice in how their neighborhoods are policed.

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<sup>232</sup> *Id.* at 600.

<sup>233</sup> *Id.*

<sup>234</sup> See FRIEDMAN, *supra* note 10, at 41-45; see also BRIAN A. REAVES, BUREAU OF JUST. STAT., LOCAL POLICE DEPARTMENTS, 2013: PERSONNEL, POLICIES, AND PRACTICES 8 (2015), <https://www.bjs.gov/content/pub/pdf/lpd13ppp.pdf> [<https://perma.cc/848W-MU5V>] (“In 2013, about 7 in 10 local police departments . . . had a mission statement that included a community policing component.”).

<sup>235</sup> In several of the “what do cops do” studies, the differences in behavior between patrol cops and community policing officers are small. See, e.g., Famega, *Proactive Policing*, *supra* note 99, at 89 tbl.1; Smith et al., *supra* note 99, at 26 tbl.1; Liederbach & Frank, *supra* note 99, at 65 tbl.2. Even one study that claimed that community policing efforts “differ substantially from the activities of beat officers” still indicated precious little crime fighting on the part of beat cops and surprisingly little community service by the community police. James Frank, Steven G. Brandl & R. Cory Watkins, *The Content of Community Policing: A Comparison of the Daily Activities of Community and “Beat” Officers*, 20 POLICING 716, 723-26 (1997).

<sup>236</sup> See PRESIDENT’S TASKFORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 46 (2015), [https://cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf) [<https://perma.cc/W638-Y4U6>] [hereinafter PRESIDENT’S TASKFORCE] (“Members of communities are key partners in creating public safety, so communities and police need mechanisms to engage with each other in consistent and meaningful ways.”); Tracie Keese, *How Police and the Public Can Create Safer Neighborhoods Together*, TED, [https://www.ted.com/talks/tracie\\_keese\\_how\\_police\\_and\\_the\\_public\\_can\\_create\\_safer\\_neighborhoods\\_to](https://www.ted.com/talks/tracie_keese_how_police_and_the_public_can_create_safer_neighborhoods_to)

It's possible to break down community policing into very different functions; disaggregation works here too. Some of it is focused on relationship-building, be it through ice cream socials, or "coffee with a cop," an attempt to forge ties and alliances in a community.<sup>237</sup> Some of it is about reorganizing patrol; getting cops out of cars and onto foot or bicycles, to get to know a community and its conditions and residents better, rather than just cruising through or conducting "jump outs."<sup>238</sup> Some of it is about actually hearing the community's voice on how it wants to be policed.<sup>239</sup>

There is a real question about some of the jobs we are asking police to do in this space, and why we think folks trained in force and law are right for them. For a long while D.A.R.E.—Drug Abuse Resistance Education—a course taught by cops in schools, was all the rage.<sup>240</sup> Studies showed that at best it had no effect and at worst was counter-productive, though new versions of the curriculum may be more effective.<sup>241</sup> But why, if kids need to be taught about drugs, would we think police necessarily are the best suited to the task? Perhaps they might be able to tell tales about scaring kids straight—though the whole scared straight concept is dubious on its own merits.<sup>242</sup> Even if we accept that police know a lot about drug abuse because they encounter it often, it is not evident that they are more knowledgeable than some others, such as addiction therapists and social workers. If it is education, one might think educators would be best.

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gether/transcript?language=en [https://perma.cc/L385-75KE] (describing the coproduction of public safety in New York).

<sup>237</sup> See, e.g., *Background*, COFFEE WITH A COP, <https://coffeewithacop.com/about> [https://perma.cc/4AVD-YB3X] (describing the Coffee with A Cop initiative in Hawthorne, California, as a way for the police department to interact more successfully with the citizens it serves); *Who We Are*, POLICE ATHLETIC LEAGUE NYC, <https://www.palnc.org/who-we-are> [https://perma.cc/JE7Y-VADB] (describing the Police Athletic League in New York).

<sup>238</sup> See Gary Fields & John R. Emshwiller, *Putting Police Officers Back on the Beat*, WALL ST. J. (Mar. 12, 2015, 7:54 PM), <https://www.wsj.com/articles/putting-police-officers-back-on-the-beat-1426201176> [https://perma.cc/KBZ4-G5V8] (reporting police departments' commitment to having officers walk the beat).

<sup>239</sup> See PRESIDENT'S TASKFORCE, *supra* note 236, at 45 ("Community policing emphasizes working with neighborhood residents to co-produce public safety.").

<sup>240</sup> See Christopher Ingraham, *A Brief History of DARE, the Anti-Drug Program Jeff Sessions Wants to Revive*, WASH. POST (July 12, 2017, 3:25 PM), <https://www.washingtonpost.com/news/wonk/wp/2017/07/12/a-brief-history-of-d-a-r-e-the-anti-drug-program-jeff-sessions-wants-to-revive> [https://perma.cc/K5UK-HLRB] (explaining that D.A.R.E. drew bipartisan praise and spread like wildfire).

<sup>241</sup> *Id.*

<sup>242</sup> See *Frequently Asked Questions*, D.A.R.E. N.H., <https://www.nh.gov/safety/dare/faq.html#answer4> [https://perma.cc/HM99-S9XB] ("A police officer deals directly with the people in the area and he/she can draw from real life examples of how drugs can ruin a life."); *Drug Abuse Resistance Education (D.A.R.E.)*, LANCASTER, OHIO, <https://www.ci.lancaster.oh.us/204/DARE> [https://perma.cc/4R4C-LPV2] ("Police officers are accepted as authorities on drug abuse, as they deal with drug abuse and its consequences on a daily basis.").

Another example is using the police to build “collective efficacy” in challenged neighborhoods. Theory suggests that social norms break down in poorer communities because the residents, stretched to the max with life’s challenges, lack the resources and wherewithal to act as a common unit in enforcing basic rules.<sup>243</sup> There are programs funded by the DOJ to use the police to help develop this sort of efficacy in communities.<sup>244</sup> One can see why cops might have a role; especially in unsafe places, they can offer some background protection as the community comes together. But it also might be the case that this work would be better performed by community organizers, or other professionals.

In short, although there is most definitely something to be said for the softer touch of community policing, still one has to wonder what precisely we are doing asking the police to befriend the community, and whether the police have the right skillset or are the right people for all these varying functions. Getting to know people, so they will be open and candid about problems and their causes, sure. But the police are not social workers: not only are they inadequately trained for the role, but ultimately they do arrest individuals who commit crimes. With community policing, as with much else, we have to be more specific about what we are asking of cops and compare that to what we train them to do.

### III. REIMAGINING PUBLIC SAFETY

If public safety is the goal, it must be clear by now that some change is called for in our societal response to the problems police encounter. The police have not—in truth *we* have not—adequately differentiated the functions that police officers are asked to perform. Much harm occurs because we send armed

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<sup>243</sup> See ROBERT J. SAMPSON, *GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT* (2012); WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 20-24 (1996) (discussing the relationship between joblessness, social organizations, and crime); Brian R. Higgins & Joel Hunt, *Collective Efficacy: Taking Action to Improve Neighborhoods*, NAT’L INST. JUST. J., Sept. 2016, at 19, 19 (“Collective efficacy . . . helps explain why some communities fight crime and disorder and others do not.”); cf. BRUCE WESTERN, *HOMEWARD: LIFE IN THE YEAR AFTER PRISON* 181 (2018) (“It is not police, courts, and the threat of punishment that create public safety, but rather the bonds of community produced by a raft of social institutions—families, schools, employers, churches, and neighborhoods groups.”).

<sup>244</sup> See, e.g., Press Release, U.S. Dep’t Just., Justice Department Awards \$7 Million to Improve Responses to Violence, Including Officer Shootings (Oct. 6, 2016), <https://www.justice.gov/opa/pr/justice-department-awards-7-million-improve-responses-violence-including-officer-shootings> [https://perma.cc/7HRA-KJDW] (describing a program designed to implement responsive trauma-informed interventions in communities that have experienced trauma); *Reducing Crime Through Collective Efficacy: Identifying Social Control and Social Cohesion in Miami Neighborhoods*, NAT’L INST. JUST., <https://nij.ojp.gov/funding/awards/2009-ij-cx-0039> [https://perma.cc/T98Z-QJ7A] (explaining an initiative to study neighborhoods, crime, and collective efficacy in Miami).

people—who are trained and see their mission as force and law—to deal with myriad problems not particularly susceptible to this solution.

Complaints today about policing have at their heart this belief that we are over-funding police, who are not apt to dealing with social problems, and at the same time failing to support very real community social needs. The criticism is two-fold. Many want to shift resources dramatically away from policing to address deeply needed social services. But inherent in that, and equally important, is a deep critique of how police—acting as first responders—do their job.<sup>245</sup>

We need to reimagine the “public safety” function from the ground up. Society has specialized, but still relies on one-size-fits-all responders. We have come to see many of the problems the police confront as public health concerns, and yet we still meet them with the same response. But the problem extends far beyond that. As Part II made clear, the police as presently trained and constituted simply are not the best response to the myriad situations to which they are called, even such things as crime scenes and traffic enforcement. We need an approach that differentiates functions and meets social problems and challenges with the sets of skills that can address them adequately.

This Part turns to reimagining how we can provide public safety by ensuring social problems are addressed in effective and non-harm-producing ways. It begins (in Section III.A) by looking at how we can develop and provide the required skills within policing agencies. It then steps outside those agencies (in Section III.B) to find specialized responses from the rest of government. Finally, the argument turns, ironically, to reconsider (in Section III.C) whether specialization is the answer, or whether what we really need is a whole new type of better-trained generalist first responders. It concludes (in Section III.D) by considering how we pay for all this, suggesting that one answer is less criminalization.

#### A. *What Are the Police Doing Here? Rethinking the Policing Agency*

Let’s assume, for the moment—and many, rightfully, are challenging this assumption today—that when trouble calls, it is the police who will continue to respond. But let’s also recognize that the status quo of responding to a host of varied issues with armed officers trained primarily in force and law simply is unacceptable. What might a better set of responses, more effective at solving problems, and less apt to cause harm, look like?

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<sup>245</sup> See Andrew, *supra* note 20 (claiming that police violence and the failures of police reform leads many to think defunding them is worthwhile); Karma, *supra* note 21 (arguing that police culture is too prone to violence and that a reallocation of resources from police to social services is desirable); Lopez, *supra* note 20 (contending that police “do too much” and that we need to create an inherently less violent response force).



### 1. Training and Specialization

If anything must cry out from the foregoing discussion it is the need to train the police differently, perhaps dramatically so. If you train for force and law, force and law is what you get.<sup>246</sup> If you need other skills, then officers need to be prepared with them.

The kinds of training that need to be ramped up in policing agencies should by now be apparent. George T. Patterson, an authority on social work around policing, points to the “communications skills, referrals, mediation, and conflict resolution” that cops need to handle the problems they encounter.<sup>247</sup> Problem-solving approaches to community problems require a very different set of skills than crime fighting.<sup>248</sup> Training officers to deal with mental health issues—what often is referred to as critical incident, or CIT, training—means getting cops to break fundamental patterns of thought, beginning with the obvious (but seemingly elusive) point that “mental illness is not a crime; it’s a disease.”<sup>249</sup> All officers need a better understanding of available social services and how to access them.

Even the basic “crime-fighting” task requires rethinking and differentiated training. Once Greene and Klockars broke the crime-fighting function into its actual components, they were led to conclude that “[p]olice training and supervision should give emphasis” to the activities cops actually pursue.<sup>250</sup> More work is needed on report writing, on interviewing witnesses, on dealing with people who have been victimized. Training should “help police to guard against the insensitivity that can come from dealing routinely with people in crises and stress those ways in which police can assist in situations after victimizations have occurred and when there is no real prospect that the perpetrator will be found.”<sup>251</sup>

Of course, no single human being can be all this—forceful crime-fighter, empathic interviewer and assister of victims, collaborator with communities and social service agencies, solver of crimes. There’s a serious need to specialize within policing agencies, which simply is not the norm at present. The ranked system currently in place in policing agencies moves people from patrol up through other responsibilities.<sup>252</sup> But does one really have to be a

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<sup>246</sup> See Tony Cheng, Policing and the Illusion of Public Input 28 (unpublished manuscript) (on file with author) (describing how when residents complain about motorcycles, response of police to complaints is always to think about enforcement, rather than other alternatives).

<sup>247</sup> Patterson, *supra* note 164.

<sup>248</sup> See Lamin & Teboh, *supra* note 116, at 3, 6-7.

<sup>249</sup> DEAN ET AL., *supra* note 116, at 40.

<sup>250</sup> Greene & Klockars, *supra* note 136, at 283.

<sup>251</sup> *Id.*

<sup>252</sup> See *Career Ladders*, *supra* note 210 (explaining how a patrol officer becomes a detective).

patrol officer for years before taking up a specialty in data-driven crime analytics? Or even in being a detective? These are very different jobs.

One huge cultural problem is that today within policing agencies, those who perform the force and law function—“real” policing—are seen as core, while those who do softer things are marginalized.<sup>253</sup> This long has been debilitating to community policing, treated as a sideshow to the real work. Given the realities of what the police do daily, this culture needs to change somehow.

It's not at all clear why, from the start, new police officers cannot choose one of a variety of tracks or directions. Some can be patrol officers, or even force and law officers. Some can be mediation and community facing experts. Some can be trained in new technologies and data analytics.

This would be a fundamental shift; retraining cops—and agencies—is not going to be easy. Police in many European countries have much longer training paths.<sup>254</sup> They often are required to go through two- or three-year programs to become officers. To be clear, many of those programs still train people as one-size-fits all cops, but it makes the point how skimpy we are here in the United States, where the average officer is on the street after a course of several weeks.<sup>255</sup> The highly effective Memphis Model of critical incident training to deal with calls about people in behavioral crisis alone requires roughly forty hours; it is startling that a survey of the states found that most require eight hours or less of schooling in how to deal with those who may be suffering from mental incapacity.<sup>256</sup>

## 2. “Civilianization” and Specialization

There's another obvious answer, which is that instead of taking officers trained in force and law and asking them to become other things, policing agencies simply could hire trained specialists to perform these other roles.

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<sup>253</sup> See Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 518 (2004).

<sup>254</sup> See Paul Hirschfield, *Why Do American Cops Kill So Many Compared to European Cops?*, CONVERSATION (Nov. 25, 2015, 12:05 AM), <https://theconversation.com/why-do-american-cops-kill-so-many-compared-to-european-cops-49696> [<https://perma.cc/WEJ9-WZJM>] (“The Netherlands, Norway and Finland, for example, require police to attend a national academy—a college for cops—for three years. In Norway, over 5,000 applicants recently competed for the 700 annual spots.”).

<sup>255</sup> REAVES, ACADEMIES 2013, *supra* note 92, at 1 (“Excluding field training, basic training programs lasted an average of about 840 hours, or 21 weeks [in 2013].”).

<sup>256</sup> MICHAEL S. WOODY, THE ART OF DE-ESCALATION 58 (2005), <http://www.olytac.com/wp-content/uploads/2013/12/Woody.-2005.-The-Art-of-De-Escalation-.pdf> [<https://perma.cc/GUV5-WMUY>] (describing the training); Megan Pauly, *How Police Officers Are (or Aren't) Trained in Mental Health*, ATLANTIC (Oct. 11, 2013), <https://www.theatlantic.com/health/archive/2013/10/how-police-officers-are-or-aren-t-trained-in-mental-health/280485> [<https://perma.cc/WFY3-6DZV>] (noting that most states require police officers to undertake an average of eight hours or less of mental health training).

This commonly is referred to as “civilianizing,” a word that is meant to sit in opposition to “sworn” officers—those who have completed basic police training and have lawful authority to effect arrests, as well as special protections from the law when they exercise force.<sup>257</sup> We should deplore the use of the word “civilian” in this context, because it reifies a military understanding of the police, and “others” the people the police serve. But we should consider the value of an approach that relies on fewer sworn officers, and more specialists.

As of 2006, non-sworn employees constituted roughly 30% of the police workforce, up from 7.5% in the 1950s.<sup>258</sup> Non-sworn personnel are notably cheaper than sworn officers; they earn less, training costs less, and they have less in the way of fringe benefits.<sup>259</sup> Some old data, from New York, put the cost of non-sworn officials at one-third to one-half of sworn personnel.<sup>260</sup> At present non-sworn personnel perform a variety of functions, from dispatch to administrative, to property crime investigations, and even to command.<sup>261</sup>

Time and technology are turning the required skills of the police on their heads in terms of what is foreground and what is background, anyway. The folks who are recruited into the patrol core, and trained to perform that job, may well lack the aptitude for what is needed or what is coming. The prime example of this is the increased use of non-sworn personnel on crime analytics and fighting cybercrime—itself the greatest growing threat that we face.<sup>262</sup> Why these tasks should be seen as outside the main mission of policing, or subsidiary, is only a vestige of policing’s path dependence.

A prime example of what a reimagined policing agency leaning heavily on specialists might look like is the social work function. There’s a long history of the relationship between policing and social work. In the early 1900s, as

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<sup>257</sup> See ROBERT C. DAVIS, MARY E. LOMBARDO, DANIEL J. WOODS, CHRISTOPHER KOPER & CARL HAWKINS, CIVILIAN STAFF IN POLICING: AN ASSESSMENT OF THE 2009 BYRNE CIVILIAN HIRING PROGRAM 3 (2014), <https://www.ncjrs.gov/pdffiles1/nij/grants/246952.pdf> [<https://perma.cc/2KCM-UWGA>] (“Civilian police employees are non-sworn personnel who do not take an oath and are not empowered to make arrests.”).

<sup>258</sup> *Id.* at 3.

<sup>259</sup> *Id.* at 11.

<sup>260</sup> Sid Harring, *Taylorization of Police Work: Prospects for the 1980s*, 11 CRITICAL SOCIO. 25, 27 (1981); see also CITY OF BERKELEY, CAL., POLICE STAFFING AUDIT 3 (2002), [https://www.cityofberkeley.info/uploadedFiles/Auditor/Level\\_3\\_-\\_General/PoliceStaffingFinalRpt.pdf](https://www.cityofberkeley.info/uploadedFiles/Auditor/Level_3_-_General/PoliceStaffingFinalRpt.pdf) [<https://perma.cc/LUL2-QK4J>] (finding that, in 2002, “[t]he cost of a patrol officer [was] nearly twice the cost of a [civilian community service officer]”).

<sup>261</sup> DAVIS ET AL., *supra* note 257, at 9-10.

<sup>262</sup> *Id.* at 23-24 (finding that twelve percent of police departments assign “[c]rime analysis/crime mapping/intelligence” solely to civilians and nineteen percent assign those responsibilities to both civilians and sworn officers).

women came into policing, it was through a social work door.<sup>263</sup> Mina van Winkle was a well-to-do suffragist who directed the Women's Bureau in the Metropolitan D.C. police department in the 1920s.<sup>264</sup> She said, presciently, that "[p]olice work is social work, and until it is included in social service we shall continue to pass delinquents from one agency to another, and then from reformatory to jail, workhouse, and prison."<sup>265</sup>

Policing agencies can be resistant to embedding social workers—the NYPD had no social worker on staff as of 2008—but there have been notable successes.<sup>266</sup> An extensive investigation conducted by a number of North Carolina entities—governmental, policing, academic—pointed to several policing agencies that had experimented and obtained positive results with having social workers on staff.<sup>267</sup> In Lumberton, North Carolina, the Lumberton Police Department found that “intervention by social workers has virtually eliminated repeat calls from chronic problem homes” even enabling them to move on to treatment for crime victims.<sup>268</sup> Chapel Hill housed Crisis Intervention Counselors in the PD precisely because “the police are the entity that receives the initial call for service around the clock and provides 24-hour assistance.”<sup>269</sup> In 1998 that unit responded to over 8,000 calls.<sup>270</sup> Many were emergencies, ranging from sexual assault to death notifications to hostage situations to domestic violence.<sup>271</sup> Less emergent calls involved domestic disputes, child abuse, dealing with the elderly, or repeat medical calls.<sup>272</sup> Chapel Hill reported eventually fully integrating its social services. Said the Chief: “If we lost one Crisis Intervention Counselor, I would have to hire two police officers with less of an effect.”<sup>273</sup> Despite the payoff, the idea of combining policing and social work still encounters resistance, as no doubt it does with other specialties. This needs to change.

Indeed, perhaps the time has come to reconceive policing agencies entirely, such that those who exercise force and law—what we think of today as the backbone of policing—are just one specialization. At present there are about 700,000 sworn officers in the United States, trained primarily in force

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<sup>263</sup> See Albert R. Roberts, *Police Social Workers: A History*, 21 SOC. WORK 294, 294-95 (1976) (tracing the “police social worker movement” back to the creation of women's bureaus within police departments starting in 1910).

<sup>264</sup> *Id.* at 295.

<sup>265</sup> *Id.* at 296.

<sup>266</sup> See Patterson, *supra* note 164 (finding no positions for civilian social workers within the NYPD).

<sup>267</sup> DEAN ET AL., *supra* note 116, at 22-38.

<sup>268</sup> *Id.* at 24.

<sup>269</sup> *Id.* at 28.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 29.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 28.

and law.<sup>274</sup> What would it mean to turn the use of force and law—but particularly force—from a generalist function to a specialist one?

Would having some police specialize in the use of force be a good or bad idea? One could argue it both ways, and in truth there is both a need for, and room for, experimentation. In the military, some of the deadliest units also are the most disciplined.<sup>275</sup> They have a job to do and do it surgically. On the other hand, we're unlikely to get that same quality in a dispersed set of units in 18,000 agencies—or even just the larger ones. Having police force specialists might create a uniquely dangerous set of individuals who still believe the real work of policing is force.

Given technological advances, there's even an interesting question of whether police officers on the ground should necessarily decide when to use force. The whole focus of force training now is to slow things down. If force is moved from foreground to background, so that its use presumably is less frequent, and if things are slowed down, might supervisors—using streaming body camera footage and with audio contact with officers—give advice on when force is appropriate? This would permit someone less caught up in the heat of the moment, and presumably more experienced, to offer guidance—recognizing that might not always be possible in the spur of the moment. Yet, slowing down the use of force is one of the key goals of “de-escalation.”

#### B. *What Are the Police Doing Here? Rethinking Government's Response to Social Problems*

Although the very concept of a policing agency clearly needs rethinking, there's reason to wonder whether that solution itself is too partial. It neglects the fact that the problems the police encounter are not going to be solved by the police alone, or even by the police at all. What is needed, at the least, is co-response by the police and other agencies, as well as inter-agency coordination. And in many situations it might be best to remove the police altogether. “[A] reimagined criminal justice,” states Bruce Western, “will concede some jurisdiction over the policy task of public safety to other agencies—departments of housing, child services, public health, education,

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<sup>274</sup> SHELLEY S. HYLAND & ELIZABETH DAVIS, BUREAU OF JUST. STAT., LOCAL POLICE DEPARTMENTS, 2016: PERSONNEL 1 (2019), <https://www.bjs.gov/content/pub/pdf/lpd16p.pdf> [<https://perma.cc/ZV4E-ZZQ4>].

<sup>275</sup> Clyde Haberman, *Special Ops Forces: How Elite Forces Became Military Muscle*, N.Y. TIMES (Sept. 25, 2017), <https://www.nytimes.com/2017/09/25/us/special-ops-retro.html> [<https://perma.cc/9YMR-GYR8>] (exploring America's reliance on a “well-trained, disciplined force of special operators groomed for counterterrorism, hostage rescue and other demanding missions”).

and labor.”<sup>276</sup> Some of what is required even may best be privatized, such as violence interruption.<sup>277</sup>

The police themselves realize all too well that they are at best a band-aid on the chronic social problems they encounter. When responding to calls for service, one might think in terms of “response,” “stabilization,” and “prevention.”<sup>278</sup> The police can do the first, and help with the second, but that is when their capabilities run out—unless they have social workers on staff.<sup>279</sup> Even if they do, though, police officials are not going to provide the long-term attention needed to address a complicated situation. The very nature of the policing function is that the police come, they do their thing, and they leave. Discussing domestic violence, one police leader said, “[p]olice intervention in the battering of women is like using aspirin for severe infections. I can give immediate help, perhaps stop the violence, pick him up and arrest him” but that is not going to address the long-term situation.<sup>280</sup>

The need for inter-agency cooperation seems apparent, yet “[t]raditionally, law enforcement and human service agencies share the most difficult portion of the others’ client caseloads but there has been little interagency communication or cooperation.”<sup>281</sup> In an extended experiment in the United Kingdom, the police partnered with government agencies to address the panoply of issues faced by a number of troubled communities.<sup>282</sup> A Chief Superintendent who came to view the work in progress left impressed with the way they were dealing with problems “at the root cause level rather than just dealing with the symptoms.”<sup>283</sup> He stressed the need “to problem-solve with other agencies, not just to go ‘all guns blazing’ and pretend they could fix all the problems alone.”<sup>284</sup> Commenting on CIT training around mental illness, one officer in the United States said, “The training is great, but it’s not magic . . . . The thing that actually transforms the way the system works is when everyone gets together.”<sup>285</sup>

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<sup>276</sup> WESTERN, *supra* note 243, at 183.

<sup>277</sup> See Peter Hermann, *He Used to Sell Drugs on D.C. Streets. Now He’s Paid to Make Them Safer*, WASH. POST (Dec. 14, 2018, 6:00 AM), [https://www.washingtonpost.com/local/public-safety/he-used-to-sell-drugs-on-dc-streets-now-hes-paid-to-make-them-safer/2018/12/13/eea91b66-e12e-11e8-ab2c-b31dcd53ca6b\\_story.html](https://www.washingtonpost.com/local/public-safety/he-used-to-sell-drugs-on-dc-streets-now-hes-paid-to-make-them-safer/2018/12/13/eea91b66-e12e-11e8-ab2c-b31dcd53ca6b_story.html) [https://perma.cc/AHD9-RG2S] (describing violence interruption).

<sup>278</sup> See DEAN ET AL., *supra* note 116, at 12 (identifying these three stages).

<sup>279</sup> See *id.* at 14–15 (“With area wide, twenty-four hour coverage, only police can provide immediate response and stabilization. But police calls without follow up services are little more than band-aids.”).

<sup>280</sup> Eli Buchbinder & Zvi Eisikovits, *Collaborative Discourse: The Case of Police and Social Work Relationships in Intimate Violence Intervention in Israel*, 34 J. SOC. SERV. RSCH., Oct. 2008, at 1, 4.

<sup>281</sup> DEAN ET AL., *supra* note 116, at 5.

<sup>282</sup> MCCARTHY, *supra* note 217, at 138–39.

<sup>283</sup> *Id.* at 139.

<sup>284</sup> *Id.*

<sup>285</sup> Goode, *supra* note 130.

Without ultimately judging whether it is best to involve or remove police—again, experimentation is needed—there are promising collaborative inter-agency projects occurring throughout the country. Many places in the United States are experimenting with co-responder models, in which police join with mental health or social work colleagues from outside the problem to address persistent issues for which force and law are inapt responses. NYPD’s program to put police and social workers together in the subway began in 2014; in its first few months it put 388 people in shelters, compared with 63 the previous year.<sup>286</sup> Mayor Bill de Blasio announced a program to centralize mental health services and coordinate them better in an effort to avoid enforcement; as a report on the program explained, “[f]or people who are sick, we will offer healthcare, not handcuffs.”<sup>287</sup> Today there are many variants of the Memphis Model of critical incident response—primarily dealing with calls involving people in behavioral crisis—in which police and mental health professionals tackle problems from a public health and non-enforcement perspective.<sup>288</sup> Another prominent example is homeless outreach teams, such as those deployed in Sarasota or Houston, in which the goal is to provide needed services to people who lack housing.<sup>289</sup> HELP Honolulu is a program to pair up social workers and police to deal with homelessness.<sup>290</sup> The police put on street clothes, and get a better perspective on “what the social service side is doing . . . . Now they can understand the issues and address the larger problems rather than just saying, ‘[m]ove it along.’”<sup>291</sup> Simple solutions emerge, such as police offering rides to shelters

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<sup>286</sup> BRATTON, *supra* note 148, at 4.

<sup>287</sup> *Id.* at 5.

<sup>288</sup> See, e.g., Alayna Alvarez, *Denver’s Police Co-Responder Program Renewed for Another Year*, COLO. POLITICS (Feb. 6, 2020), [https://www.coloradopolitics.com/denver/denver-police-s-co-responder-program-renewed-for-another-year/article\\_5bc47676-41ca-11ea-bf2e-2363816fe0cb.html](https://www.coloradopolitics.com/denver/denver-police-s-co-responder-program-renewed-for-another-year/article_5bc47676-41ca-11ea-bf2e-2363816fe0cb.html) [<https://perma.cc/Y4M8-KPJ9>] (reporting on Denver’s decision to extend its partnership between police and mental health professionals); *Tucson Police Mental Health Support Team*, CITY OF TUCSON, <https://www.tucsonaz.gov/police/mental-health-support-team-mhst> [<https://perma.cc/LQ7N-MQ42>] (describing the duties of the city’s new mental health response team); Jocelyn Wiener, *Rethinking 911: New California Efforts Seek to Shift Mental-Health Calls Away from Police*, DESERT SUN (July 5, 2020, 12:38 PM), [https://www.desertsun.com/story/news/crime\\_courts/2020/07/05/efforts-grow-rethink-911-find-alternative-mental-health-crises/5380206002](https://www.desertsun.com/story/news/crime_courts/2020/07/05/efforts-grow-rethink-911-find-alternative-mental-health-crises/5380206002) [<https://perma.cc/H9W9-U855>] (explaining that the local government increased access to emergency mental health services).

<sup>289</sup> *Homeless Outreach Team (HOT)*, HOUS. POLICE DEP’T, <https://www.houstoncit.org/hot> [<https://perma.cc/FZ37-5AHX>]; *Homeless Outreach Team*, SARASOTA POLICE, <https://www.sarasotapd.org/about-us/homeless-outreach-team> [<https://perma.cc/PTP9-3KJ3>]; see also *Homeless Services: Who to Call*, CITY OF SAN DIEGO, <https://www.sandiego.gov/homeless-services/call> [<https://perma.cc/Z2YW-CKSQ>] (describing San Diego’s homeless outreach team).

<sup>290</sup> See Dan Nakaso, *Social Service Workers and Police Join Forces to Aid Homeless*, STAR ADVERTISER (Aug. 11, 2017), <https://www.staradvertiser.com/2017/08/11/hawaii-news/social-service-workers-and-police-join-forces-to-aid-homeless> [<https://perma.cc/XN37-C3W6>] (explaining the H.E.L.P. Honolulu program that pairs social workers and police to help the homeless).

<sup>291</sup> *Id.*

rather than having to wait for the issuance of vouchers for cabs. The Martinsburg (W. Va.) Initiative pairs police, mental health, and substance abuse professionals to reach out to kids whose parents are struggling with addiction; the idea is to offer a whole suite of services to help the kids now and avoid another generation of addiction and drug abuse down the line.<sup>292</sup> The Community Connection Center in Salt Lake City, Utah relies on police, social workers, and homeless advocates working together to triage short-term intervention.<sup>293</sup>

When inter-agency approaches are adopted at present, they sometimes neglect some of the agencies that are needed most. It's not uncommon to bring together a variety of agencies in collaborative ways, especially when dealing with troubled youth.<sup>294</sup> Prosecutors, cops, judges, some community groups, parks and recreation, maybe the schools. But too rarely do these inter-agency teams include professionals that deal with health, with employment, with social services.

A particularly pressing question is whether, for many calls for assistance, the police are needed at all. When the police are involved, enforcement always is a possibility; without them there, it is much less so (though the police always can be called, of course). As Monica Bell points out, "routing rehabilitation and social services through the police could perversely widen the carceral net and reify the 'culture of control.'"<sup>295</sup> Police, by their nature, "may be more punitive or less empathetic than the average civil servant."<sup>296</sup> On the other hand, involving the police paradoxically might well add a benefit that often is overlooked: their capacity to get other agencies to do their job. In Lumberton, the police found they were dealing with people who had exhausted the patience or resources of other agencies.<sup>297</sup> But it turned out the police both could convince recalcitrant repeat callers to be more cooperative with government, and persuade the agencies to step back in to help.<sup>298</sup>

Today, some jurisdictions are experimenting with eliminating the police entirely from certain categories of calls. Perhaps the most well-known is Crisis Assistance Helping Out on the Streets, or CAHOOTS, run by the White Bird Clinic and operating out of Eugene and Springfield, Oregon. CAHOOTS responds to a totally different phone number from 911, though it runs out of Eugene's central dispatch. It provides a raft of services without police

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<sup>292</sup> *The Martinsburg Initiative*, MARTINSBURG POLICE, <http://www.martinsburgpd.org/martinsburg-initiative> [https://perma.cc/TW9Y-GEDL].

<sup>293</sup> *Community Connection Center*, SALT LAKE CITY POLICE DEP'T, <http://www.slcpd.com/resources/cc> [https://perma.cc/67X8-VXYG].

<sup>294</sup> See generally SARAH S. PEARSON & SONIA JURICH, PRISON POLICY INITIATIVE, YOUTH COURT: A COMMUNITY SOLUTION FOR EMBRACING AT-RISK YOUTH (2005), [https://www.prisonpolicy.org/scans/aypf/youth\\_court\\_community\\_solutions.pdf](https://www.prisonpolicy.org/scans/aypf/youth_court_community_solutions.pdf) [https://perma.cc/T4HD-2A74].

<sup>295</sup> Bell, *supra* note 79, at 2147 (quoting DAVID GARLAND, *THE CULTURE OF CONTROL* (2001)).

<sup>296</sup> *Id.* at 2148.

<sup>297</sup> DEAN ET AL., *supra* note 116, at 9.

<sup>298</sup> *Id.* at 44.



responders, including addressing conflict resolution, substance abuse and crisis counseling, and dealing with those facing housing crises.<sup>299</sup> Police can be called if needed, but apparently this has been in relatively few cases overall.<sup>300</sup> Berkeley, California recently announced it was dispensing with police for traffic enforcement, using unarmed Department of Transportation officials instead.<sup>301</sup> San Francisco similarly has decided to no longer have police respond to “non-criminal” matters like neighbor disputes, school discipline issues, and calls about homeless individuals, opting instead for unarmed professionals.<sup>302</sup> Albuquerque is adding a whole new third sort of first-responder—like CAHOOTS but with municipal employees—to its dispatch services.<sup>303</sup>

Nor is it clear why the trope about the police being the only ones to respond 24/7 should remain true. Even where force, and thus a police response, is needed, having other resources immediately available can be crucial. Family and relationship problems, mental health issues—these are situations that “respond far better to social and psychological remedies” than they do to force and law approaches.<sup>304</sup> And these sorts of matters do not arise only during “working hours.”

Making these programs work will require attention to one of the more neglected, but essential, aspects of municipal services: dispatch. It’s impossible to get the help to people that need it without some sort of centralized dispatch, and in most places, dispatch is tied to police, fire, and emergency medical, but not all these other responses. Here too, though, there is progress being made. Houston, Texas, has established a 911 Crisis Call Diversion (“CCD”) program, by which dispatchers identify and refer qualifying nonemergency mental health-related calls for immediate

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<sup>299</sup> CAHOOTS, WHITE BIRD CLINIC, <https://whitebirdclinic.org/cahoots> [https://perma.cc/CW57-CPWC].

<sup>300</sup> See Scottie Andrew, *This Town of 170,000 Replaced Some Cops with Medics and Mental Health Workers. It’s Worked for over 30 Years*, CNN (July 5, 2020, 10:10 PM), <https://www.cnn.com/2020/07/05/us/cahoots-replace-police-mental-health-trnd/index.html> [https://perma.cc/D25K-MDML] (“Per self-reported data, CAHOOTS workers responded to 24,000 calls in 2019—about 20% of total dispatches. About 150 of those required police backup.”).

<sup>301</sup> Kea Wilson, *Berkeley to Become the First US City to De-Cop Traffic Enforcement*, STREETS BLOG USA (July 16, 2020), <https://usa.streetsblog.org/2020/07/16/berkeley-to-become-the-first-us-city-to-de-cop-traffic-enforcement> [https://perma.cc/FU8S-Y96D].

<sup>302</sup> Olga R. Rodriguez, *San Francisco Police Won’t Respond to Non-Criminal Calls*, NBC (June 12, 2020, 10:11 AM), <https://www.nbcbayarea.com/news/local/san-francisco-police-wont-respond-to-non-criminal-calls/2307892> [https://perma.cc/3LRR-PY4A].

<sup>303</sup> Mayor Tim Keller to Refocus Millions in Public Safety Resources with First-of-its-Kind Civilian Response Department, CITY OF ALBUQUERQUE (June 15, 2020), <https://www.cabq.gov/mayor/news/mayor-tim-keller-to-refocus-millions-in-public-safety-resources-with-first-of-its-kind-civilian-response-department> [https://perma.cc/96AP-PHH6].

<sup>304</sup> Michaels & Treger, *supra* note 163, at 67-68.

connection to a phone counselor.<sup>305</sup> Washington, D.C. similarly has adopted a dispatch model in which emergency room triage nurses sit alongside 911 dispatchers and can set up medical appointments and arrange rides for nonemergency calls (such as for sprained ankles or coughs).<sup>306</sup> The Tucson Police Department has yet another alternative call response model to address lower-level calls, including using non-sworn personnel to handle calls over the phone (such as for ongoing neighborhood concerns), creating an internet reporting tool, and creating a Collision Reporting Center for reports of property damage.<sup>307</sup> One of the pressing questions is how dispatchers assess risk—can calls be handled without force present, or with it in the background. Minneapolis is one city trying to work through these questions.<sup>308</sup> More study, though, is urgently needed.

City planners also must start to think in terms of constructing places that meet the needs of those whose conduct ends up being criminalized. This is true even if, or especially if, the activities of those individuals are seen as “incivilities.” Urban design is used to drive the homeless away, but they need a place to go.<sup>309</sup> They need bathrooms. If we don’t want folks drinking out on the street, maybe we need to construct places for this to happen: those of us who can afford it go to bars or party in our homes. A model here is the long-running war between skateboarders and members of the public who believe they create some sort of danger, and the efforts to make civic spaces inhospitable to them. One answer has been ensuring there are skateparks for those who want to use them.<sup>310</sup>

Finally, what may well be required is an entirely new form of central coordination to deal with chronic public health and public safety issues. In many mayors’ offices there is some high-level official charged with dealing with

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<sup>305</sup> *Crisis Call Diversion Program (CCD)*, HOUS. POLICE DEP’T, MENTAL HEALTH DIV., <https://www.houstoncit.org/ccd> [<https://perma.cc/BN34-RMJ2>] (reporting that, in 2017, the program resulted in 2,151 diversions away from responses by patrol officers).

<sup>306</sup> Selena Simmons-Duffin, *Can Triage Nurses Help Prevent 911 Overload?*, NPR (Apr. 19, 2018, 5:00 AM), <https://www.npr.org/sections/health-shots/2018/04/19/601987914/can-triage-nurses-help-prevent-911-overload> [<https://perma.cc/QU2R-QMZW>].

<sup>307</sup> Chris Magnus, *Chris Magnus: Tucson Police Department Meeting the Challenges of a Growing Call Load*, TUCSON.COM (Aug. 10, 2018), [https://tucson.com/opinion/local/chris-magnus-tucson-police-department-meeting-the-challenges-of-a/article\\_fadd501a-aa91-5db7-b939-7bb9f12d41bb.html](https://tucson.com/opinion/local/chris-magnus-tucson-police-department-meeting-the-challenges-of-a/article_fadd501a-aa91-5db7-b939-7bb9f12d41bb.html) [<https://perma.cc/89PT-LD26>].

<sup>308</sup> See CITY OF MINNEAPOLIS, 911/MPD WORKGROUP RECOMENDATIONS 1, 4 (2019), <https://lms.minneapolismn.gov/Download/File/3043/MPD%20911%20Workgroup%20Recommendations%20Presentation.pdf> [<https://perma.cc/2UNF-6GH6>].

<sup>309</sup> See Robert Rosenberger, *How Cities Use Design to Drive Homeless People Away*, ATLANTIC (June 19, 2014), <https://www.theatlantic.com/business/archive/2014/06/how-cities-use-design-to-drive-homeless-people-away/373067> [<https://perma.cc/QH6K-85BK>] (describing how urban planning and design deliberately prevents homeless people from sleeping in public spaces).

<sup>310</sup> *Id.*

“public safety,” but this typically means crime and police.<sup>311</sup> Why is there not a deputy mayor for public safety whose job is coordinating agencies to tackle what plainly are interdisciplinary problems? There are ongoing experiments with merging police and health data to identify frequent users of these services who need a new response.<sup>312</sup> We should be doing this from the top down.

Although the good news is that many jurisdictions are experimenting with new alternatives, there looks to be far too little rigorous study of them. Too much is happening within city silos, without careful evaluation to determine whether the program works. There will be enthusiasm to export some of these ideas to different places, but how will we know which are worthy of replicating, and which are not?

### C. Policing as Triage and Emergency Medicine

So far, the discussion has focused on specialization to address the myriad circumstances police presently confront on the street, but there is one sense in which specialization may be looking in the wrong direction. At bottom, police are first responders, called to the scene by 911 operators. The difficulty is that when they respond, they encounter a host of problems for which they are ill-trained. In the midst of much conversation about reducing the footprint of policing, however, there is insufficient recognition of the fact that when all is said and done, first responders will remain essential.

What we need, perhaps, are generalist-trained dispatch and responder teams who can better handle the first moments of a problem, ultimately handing it off to other social service or (if necessary) criminal justice agencies. Imagine emergency vehicles racing around a city with the words “First” emblazoned on the side, rather than “police.” And imagine a response that is focused not on force and law—though those will be available when needed—but optimizing outcomes in both the short and long term.

We have available an analogy, which is the way we currently handle medical emergencies and hospital emergency room intake. Many of the calls to 911 are for medical emergencies to which emergency medical technicians (“EMTs”), but not necessarily police, are dispatched. Emergency rooms often are the dumping ground for social ills, the next stop for many folks the police

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<sup>311</sup> See, e.g., *Mayor's Office of Public Safety*, L.A. MAYOR, <https://www.lamayor.org/mayors-office-public-safety> [<https://perma.cc/KH54-SQHM>] (“The Mayor’s Office of Public Safety . . . oversees initiatives . . . [ranging] from improving cybersecurity, securing our ports and airports, and countering violent extremism to reducing gun violence, improving resilience, combating human trafficking, and halting the scourge of domestic violence.”).

<sup>312</sup> See *Anne Milgram*, CTR. FOR POLICING EQUITY, <https://policingequity.org/component/k2/amilgram?highlight=WyJpbmRpYW5hcG9saXMiXQ> [<https://perma.cc/W64Y-4X9F>] (describing one such experiment in Indianapolis).

or EMTs pick up, and the destination of plenty who get there on their own.<sup>313</sup> The medical emergency system does two things we should ask of 911 dispatchers and first responders. First, they triage problems. They have intricate systems of scoring need and immediacy of attention to handle the flow through their doors.<sup>314</sup> Then, callers to 911 and ER patients are treated by personnel—EMTs and emergency medicine physicians—whose specialty really is being a generalist. They go through extensive training to be able to deal with a wide host of complicated problems, at least well enough to stabilize patients until they can be seen by someone else.<sup>315</sup>

The place to start is with dispatch, which needs to be re-designed to work with first responders to triage the calls police receive. Over 200 million calls are made to 911 each year.<sup>316</sup> A high percentage of these are not emergencies, and cities are trying to teach callers to use 311 as an alternative.<sup>317</sup> What desperately is needed for 911, though, is to direct the right responders to the situation, and provide the correct information to them. The responder need not, and perhaps should not, be a cop. Just as we don't dispatch the police to put out fires or treat people having heart attacks, it is not clear that we should do so for the mentally ill or those experiencing drug overdoses either. If necessary, we might co-dispatch. Force may be needed in the background, but it should be kept there when other professionals could do better dealing immediately with the situation.

Emergency medical services (“EMS”) providers provide an analogy to how we ought to handle more calls to 911. EMS professionals often do not

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<sup>313</sup> See Daniel Aexelson, Matthew J. Stull & Wendy C. Coates, *Social Determinants of Health: A Missing Link in Emergency Medicine Training*, 2 ACAD. EMERGENCY MED. EDUC. & TRAINING 66, 66 (2017) (discussing the need to train emergency medicine physicians to recognize and treat “social determinants of health”).

<sup>314</sup> See NICKI GILBOY, PAULA TANABE, DEBBIE TRAVERS & ALEXANDER M. ROSENAU, AGENCY FOR HEALTHCARE RSCH. & QUALITY, EMERGENCY SEVERITY INDEX (ESI): A TRIAGE TOOL FOR EMERGENCY DEPARTMENT CARE 2 (2011), [https://emscimprovement.center/documents/107/ESI\\_Handbook2125.pdf](https://emscimprovement.center/documents/107/ESI_Handbook2125.pdf) [<https://perma.cc/47QC-6LE4>] [hereinafter EMERGENCY SEVERITY INDEX] (describing how the medical emergency response system at emergency departments triages problems as they arise).

<sup>315</sup> See *Emergency Medicine*, AM. MED. ASS'N, <https://freida.ama-assn.org/specialty/emergency-medicine> [<https://perma.cc/GL8G-XX5V>] (describing the responsibilities of emergency medicine physicians); *EMR vs. EMT*, STAN. MED. EMT PROGRAM, <https://med.stanford.edu/emt/what-is-an-emt.html> [<https://perma.cc/3M8V-9FD6>] (describing the duties of EMTs).

<sup>316</sup> 911.GOV, NATIONAL 911 PROGRESS REPORT 11 (2019), <https://www.911.gov/pdf/National-911-Program-Profile-Database-Progress-Report-2019.pdf> [<https://perma.cc/47CT-DPZN>].

<sup>317</sup> See, e.g., *Make the Right Call—When to Call 911 or 311*, CHI311 (Dec. 16, 2018), <https://311.chicago.gov/s/article/Make-the-right-call-when-to-call-911-or-311> [<https://perma.cc/R8NF-L2H5>] (instructing residents to “[c]all 3-1-1 to request City Services and to report situations not requiring a police response”).

really know what they are getting into until they show up on scene.<sup>318</sup> EMS workers triage problems, ascertaining the immediate needs of the patient and ensuring an individual patient is transported to a facility best equipped to manage their specific injuries.<sup>319</sup> They sometimes must sort among patients and prioritize care in mass casualty incidents or other instances with insufficient resources.<sup>320</sup> EMS workers are required to know how to treat everything from cardiac arrest, to a broken femur, to emergency childbirth.<sup>321</sup>

The same is true of emergency room triage and emergency room doctors. Emergency room triage has an intricate system for scoring need and directing resources to those who need them most immediately.<sup>322</sup> Patients in the ER then are seen by doctors who essentially specialize in being generalists. Emergency physicians are trained and certified to evaluate a patient's circumstances, stabilize the situation, and then address it either through immediate care, or through admission to a facility. They deal with a wide range of medical issues, from relatively simple injuries to caring for chronically ill or critically injured people.<sup>323</sup> Emergency physicians often are able to treat and discharge patients without resorting to hospital admission.<sup>324</sup>

A really groundbreaking solution might be to replace our traditional notion of police with a set of highly-trained first responders who have the

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<sup>318</sup> See, e.g., Nicole Lurie, Gregg S. Margolis & Kristin L. Rising, *The US Emergency Care System: Meeting Everyday Acute Care Needs While Being Ready for Disasters*, 32 HEALTH AFFS. 2166, 2168 (2013), <https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2013.0771> [<https://perma.cc/X2XQ-Z5EW>].

<sup>319</sup> See Ctrs. for Disease Control and Prevention, *Guidelines for Field Triage of Injured Patients: Recommendations of the National Expert Panel on Field Triage*, MORBIDITY & MORTALITY WKLY. REP. RECOMMENDATIONS & REPS., Jan. 23, 2009, at 1, <https://www.cdc.gov/mmwr/PDF/rr/rr5801.pdf> [<https://perma.cc/R3Q6-F9X3>] (describing the EMS decision scheme for “field triage”); Ctrs. for Disease Control and Prevention, *Guidelines for Field Triage of Injured Patients: Recommendations of the National Expert Panel on Field Triage, 2011*, MORBIDITY & MORTALITY WKLY. REP. RECOMMENDATIONS & REPS., Jan. 13, 2012, at 1, <https://www.cdc.gov/mmwr/preview/mmwrhtml/rr6101a1.htm> [<https://perma.cc/2RAB-4C7Z>].

<sup>320</sup> NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., MODEL UNIFORM CORE CRITERIA FOR MASS CASUALTY INCIDENT TRIAGE (2017), [https://www.ems.gov/pdf/education/National-EMS-Education-Standards-and-Instructional-Guidelines/MUCC\\_Addendum\\_Paramedic.pdf](https://www.ems.gov/pdf/education/National-EMS-Education-Standards-and-Instructional-Guidelines/MUCC_Addendum_Paramedic.pdf) [<https://perma.cc/JHG7-FMYU>]; see also EMERGENCY SEVERITY INDEX, *supra* note 314.

<sup>321</sup> See NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., 2018 NATIONAL EMS SCOPE OF PRACTICE MODEL 32-38 (2018), <https://nasemso.org/wp-content/uploads/Prepublication-Display-Copy-2018-National-EMS-Scope-of-Practice-Model-20180929.pdf> [<https://perma.cc/Z687-6HGH>] (listing necessary skills for EMS workers).

<sup>322</sup> EMERGENCY SEVERITY INDEX, *supra* note 314.

<sup>323</sup> See *Emergency Medicine*, AM. BD. MED. SPECIALTIES, <https://www.abms.org/member-boards/contact-an-abms-member-board/american-board-of-emergency-medicine> [<https://perma.cc/7FKS-AHU7>]; KRISTY GONZALEZ MORGANTI, SEBASTIAN BAUHOFF, JANICE C. BLANCHARD, MAHSHID ABIR, NEEMA IYER, ALEXANDRIA C. SMITH, JOSEPH V. VESELY, EDWARD N. OKEKE & ARTHUR L. KELLERMAN, RAND CORP., THE EVOLVING ROLE OF EMERGENCY DEPARTMENTS IN THE UNITED STATES 1-2 (2013), [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR200/RR280/RAND\\_RR280.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR200/RR280/RAND_RR280.pdf) [<https://perma.cc/VSC9-KEAZ>].

<sup>324</sup> *Id.* at 11, 24.

capacity to address all the sorts of social problems police today face, from domestic violence to substance abuse to noise complaints.<sup>325</sup> These individuals would go through intensive training—one could imagine a four-year degree, in fact. They would learn basic medical care for physical and mental illness. They would learn dispute resolution, how to diagnose social problems from a social work perspective, and about the availability of social services in the jurisdictions in which they serve. They also would be trained in the use of force, and in law. They would exercise the latter skills if absolutely necessary. But they would be rewarded for stabilizing situations and solving problems without resort to force or law. That would be their point of pride. And they would have the capacity to call in other agencies as a follow-up to address on a longer-term basis the precise problem they encountered. With this sort of system, we may find we can achieve optimal, long-term solutions to problems that evade resolution today.

#### D. Cost and Criminalization

Changes of the sort discussed here may well be expensive. If so, it is fair to ask where the resources would come from to provide for all the additional training, the specialization, the reorganization. But the answer may be—and we lack the data to know for sure—far less elusive than it seems.

In this country, we criminalize like crazy.<sup>326</sup> The books are full of laws that make perfectly ordinary conduct illegal.<sup>327</sup> New York City's administrative code is a wonder of prohibitions, from putting on street shows from the window of your apartment to selling laser pointers to children under eighteen.<sup>328</sup> Some of the laws exist because of accretion. We add things and don't subtract.<sup>329</sup> (Street juggling is banned; apparently juggling was a serious concern in the early 1800s.)<sup>330</sup> Some criminal laws exist because they are a cheap way to play to public sensibilities in response to a problem or some

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<sup>325</sup> Friedman, *supra* note 21.

<sup>326</sup> See generally DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW (2008); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005); *Overcriminalization*, HERITAGE FOUND., <https://www.heritage.org/crime-and-justice/heritage-explains/overcriminalization> [<https://perma.cc/H7J3-RCU9>].

<sup>327</sup> See, e.g., Stuntz, *supra* note 149, at 515-16 (collecting examples of unusual state criminal offenses).

<sup>328</sup> N.Y.C. ADMIN. CODE § 10-114(b) (street shows); N.Y.C. ADMIN. CODE § 10-134.2(b) (laser pointers).

<sup>329</sup> See Stuntz, *supra* note 149, at 592 (noting that legislative inertia results in “the statute books contain[ing] a host of crimes that are not crimes at all in terms of popular understandings”).

<sup>330</sup> See *id.* at 556 (“Though it sounds odd to twenty-first century ears, in mid- to late-nineteenth century cities, juggling was associated with fraud and street disorder.”).

salient event.<sup>331</sup> Others exist because prosecutors and police lobby for them, to give them more muscle when they want it.<sup>332</sup>

Criminalization causes us to deploy police resources in poor ways. If the police are busy chasing after fairly minor things, in part because someone up the food chain has mandated doing so, they aren't doing something more productive, like keeping the streets safe. The number of arrests for marijuana possession in New York has been staggering to behold. And to what good end precisely, other than to paste Black and Brown people with records that are not attaching themselves to the many people who—if my nose serves correct—are smoking marijuana in my neighborhood?<sup>333</sup>

Criminalization also keeps us from looking at more efficacious and cost-effective solutions. Criminalization is the “cheap” way out. Cheap is in scare quotes because it is only seemingly cheap, the instant solution to every social problem. Compared with alternative ways of dealing with difficulties, criminalization has proven extremely expensive to us as a society.<sup>334</sup>

We have seen some notable successes in innovation around public safety, which achieve non-criminal outcomes and at lower costs. The Memphis Model of “critical incident training,” mentioned above, for dealing with the mentally ill is one such innovation. A cost-benefit analysis in Louisville, Kentucky showed over \$1 million savings annually, without even taking into account nonmonetary benefits and the saved costs of injuries to police and others.<sup>335</sup> Elsewhere, evaluations of CIT training show hugely positive outcomes: fewer injuries, less use of force, and a greater willingness to call

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331 See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 751-52 (2005) (describing how politicians enact criminal prohibitions and harsh sentences in response to the public perception of crime rates).

332 See *id.* at 728 (“Prosecutors have an incentive to lobby for harsher sentences because longer sentences make it easier for them to obtain convictions through plea bargaining.”); Stuntz, *supra* note 149, at 533-39 (describing the incentives for police and prosecutors to seek expanded criminal codes in order to reduce the cost of arresting and prosecuting criminal defendants).

333 See Benjamin Mueller, Robert Gebeloff & Sahil Chinoy, *Surest Way to Face Marijuana Charges in New York: Be Black or Hispanic*, N.Y. TIMES (May 13, 2018), <https://www.nytimes.com/2018/05/13/nyregion/marijuana-arrests-nyc-race.html> [<https://perma.cc/4WBU-U34Q>] (“There are many ways to be arrested on marijuana charges, but one pattern has remained true through years of piecemeal policy changes in New York: The primary targets are black and Hispanic people.”).

334 See Barack Obama, Commentary, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 818 (2017) (“If one includes the cost of jail and prison at the state and local level, the total U.S. budget for incarceration rises to a staggering \$81 billion, enough to fund transformative initiatives like universal preschool for every three- and four-year-old in America . . .” (footnote omitted)); John Pfaff, *The Incalculable Costs of Mass Incarceration*, APPEAL (Sept. 20, 2018), <https://theappeal.org/the-incalculable-costs-of-mass-incarceration> [<https://perma.cc/7W4Q-ZEDP>] (arguing that the cost of incarceration is underestimated because standard measures do not account for the social costs of incarceration).

335 See Peggy L. El-Mallakh, Kranti Kiran & Rif S. El-Mallakh, *Costs and Savings Associated with Implementation of a Police Crisis Intervention Team*, 107 S. MED. J. 391, 394 (2014) (citing an annual cost savings of \$1,024,897).

the police for help.<sup>336</sup> In Central Florida, the arrest rate after CIT implementation was found to be very low and even declined across time, providing evidence that CIT programs may indeed be useful in reducing discretionary arrests, specifically among persons with mental illnesses.<sup>337</sup>

Similarly, Seattle has had remarkable success with its LEAD (Law Enforcement Assisted Diversion) approach to drug offenses, which—for nonviolent and non-predatory behavior—substitutes social work for criminal penalties.<sup>338</sup> Studies show that at least for some portion of the homeless population in this country—the chronically homeless, or those suffering from mental illness—permanent supportive housing programs actually are cheaper than cycling repeatedly through the criminal justice system.<sup>339</sup>

As Bruce Western says, “[c]riminal justice is a poor instrument for social policy because at its core, it is a blaming institution.”<sup>340</sup> It is not clear that the homeless, the mentally ill, and those addicted to drugs and alcohol, are

<sup>336</sup> See DAVE MCCLURE ET AL., URB. INST., PAY FOR SUCCESS AND THE CRISIS INTERVENTION TEAM MODEL 22 fig.2 (2017) (listing examples of measurable positive outcomes of CIT training); Henry J. Steadman, Martha Williams Deane, Randy Borum & Joseph P. Morrissey, *Comparing Outcomes of Major Models of Police Responses to Mental Health Emergencies*, 51 PSYCHIATRIC SERVS. 645, 645 (2000) (“Our data strongly suggest that collaborations between the criminal justice system, the mental health system, and the advocacy community plus essential services reduce the inappropriate use of U.S. jails to house persons with acute symptoms of mental illness.”).

<sup>337</sup> Stephanie Franz & Randy Borum, *Crisis Intervention Teams May Prevent Arrests of People with Mental Illness*, 12 POLICE PRAC. & RSCH. 265, 269 (2011).

<sup>338</sup> See SEEMA L. CLIFASEFI, HEATHER S. LONCZAK & SUSAN E. COLLINS, UNIV. OF WASH. HARBORVIEW MED. CTR., LEAD PROGRAM EVALUATION: THE IMPACT OF LEAD ON HOUSING, EMPLOYMENT AND INCOME/BENEFITS 2-3 (2016), [http://static1.1.sqspcdn.com/static/f/1185392/27047605/1464389327667/housing\\_employment\\_evaluation\\_final.PDF?token=J65k05f8n7Js86G5r6lsPgUjOog%3D](http://static1.1.sqspcdn.com/static/f/1185392/27047605/1464389327667/housing_employment_evaluation_final.PDF?token=J65k05f8n7Js86G5r6lsPgUjOog%3D) [<http://perma.cc/XVA8-DH68>] (finding that participants were significantly more likely to obtain housing, employment, and legitimate income subsequent to their LEAD referral compared to the month prior to their referral); POLICE EXEC. RSCH. F., CRITICAL ISSUES IN POLICING SERIES: NEW CHALLENGES FOR POLICE: A HEROIN EPIDEMIC AND CHANGING ATTITUDES TOWARD MARIJUANA 24 (2014), [https://www.policeforum.org/assets/docs/Critical\\_Issues\\_Series\\_2/a%20heroin%20epidemic%20and%20changing%20attitudes%20toward%20marijuana.pdf](https://www.policeforum.org/assets/docs/Critical_Issues_Series_2/a%20heroin%20epidemic%20and%20changing%20attitudes%20toward%20marijuana.pdf) [<https://perma.cc/3QX9-33BP>] (noting the numerous social services offered to qualifying offenders in lieu of arrest, and the benefits obtained by the police department in the form of both time and money).

<sup>339</sup> See, e.g., DANIEL FLAMING, HALIL TOROS & PATRICK BURNS, ECON. ROUNDTABLE, HOME NOT FOUND: THE COST OF HOMELESSNESS IN SILICON VALLEY 2 (2015), [https://economicrt.org/wp-content/uploads/2015/05/Home\\_Not\\_Found\\_2015.pdf](https://economicrt.org/wp-content/uploads/2015/05/Home_Not_Found_2015.pdf) [<https://perma.cc/N7Z4-HZ54>] (“By prioritizing housing opportunities for the group of 2,800 persistently homeless individuals with the highest costs, it is possible to obtain savings that more than offset the cost of housing.”); Dennis P. Culhane & Thomas Byrne, Ending Chronic Homelessness: Cost-Effective Opportunities for Interagency Collaboration 21 (Mar. 1, 2020) (Working Paper, Univ. of Penn. Sch. of Soc. Pol’y & Prac.), [https://repository.upenn.edu/cgi/viewcontent.cgi?article=1151&context=spp\\_papers](https://repository.upenn.edu/cgi/viewcontent.cgi?article=1151&context=spp_papers) [<https://perma.cc/NT3Z-U7E5>] (“The collective evidence from academic research as well as practice-based studies demonstrates that placing selected, heaviest service using, and therefore most costly, chronically homeless individuals in permanent housing can yield cost savings, as service reductions more than offset housing costs.”).

<sup>340</sup> WESTERN, *supra* note 243, at 185.



blameworthy in any classic sense. And though we may want to use the criminal law to deter behaviors, to send a message, the question is whether what we are doing is effective. Or are we cutting off our noses to spite our faces, by deploying a costly criminal justice system in a way that does not deter or solve the problem, but instead leaves us with a bigger mess that we then need to try to sweep under the rug. Part I made apparent that deploying the criminal law is not solving these costly problems; it is just cycling the same people through the system.

To be clear, these are serious problems, and they often seem intractable. One homeless advocate explains that we criminalize so much because of “compassion fatigue” and a seeming lack of alternatives.<sup>341</sup> But often some creativity and inter-agency cooperation can lead to innovations that work and—once again—we need a more deliberate and sustained way of discovering them and putting them in place. Because what we are doing now is not working, and not working in a costly way.

#### CONCLUSION

Too much of what we treat through the criminal law and agencies of law enforcement are really problems of public health and social welfare. For various reasons, it has become our default to address them with the police power, literally, in the name of “public safety.” But it is not at all clear we are achieving that safety, and certainly not in optimal ways. We can and must do better.<sup>342</sup>

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<sup>341</sup> See Saelinger, *supra* note 171, at 554 (exploring how “compassion fatigue” led policymakers to “endors[e] and pass[] anti-nuisance ordinances”).

<sup>342</sup> See Barry Friedman, *Taking Public Safety Seriously* (unpublished manuscript) (on file with author).

## APPENDIX A: NASHVILLE CURRICULUM SUMMARY (RAW DATA)

BLOCK OF INSTRUCTION	POST REQUIRED HOURS	2017 MNP REQUIRED HOURS
Firearms	48	99
Emergency Medical Training	10	17
Patrol Procedures	120	236
Interpersonal Communications	25	29
Professional and Ethical Conduct	3	6
Physical Defense Tactics	48	177
Criminal and Constitutional Law and Procedures	50	102
Written Communications	10	11
Human Relations	30	53
Criminal Justice System	11	20
Law Enforcement Stress	9	24
Administration	68	146.5

Emergency Vehicle Operation	48	48.5
National Safety Council Defensive Driving Course	N/A	N/A
TOTAL	480	969

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