
YALE LAW & POLICY REVIEW

Police Power and the Scaring of America: A Personal Journey

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INTRODUCTION

In America today, nearly 900,000 men and women are granted general arrest powers.¹ These officers are increasingly militarized, possessed of automatic weapons and armored vehicles, their departments sporting their own helicopters and boats—amounting to a small air force and navy tasked with domestic law enforcement.² This vast army of law enforcement officers arrested over twelve million Americans in 2012³ and stopped (and often summonsed)

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1. *Law Enforcement Facts*, NAT'L LAW ENF'T OFFICERS MEM'L FUND, <http://www.nleomf.org/facts/enforcement/> (last visited Feb. 15, 2016).
2. *1033 MOU and Annual Inventory Form (New York)*, N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., <https://www.muckrock.com/foi/new-york-16/1033-mou-and-annual-inventory-form-new-york-13013/> (last visited Feb. 15, 2016) (links at bottom of page). See also Shawn Musgrave, *New York Releases Complete List of Law Enforcement Agencies' Military Gear*, MUCKROCK (Oct. 14, 2014) <https://www.muckrock.com/news/archives/2014/oct/14/new-york-police-departments-large-and-small-gain-m/> (“Since enrolling in the 1033 Program in 1995, the NYPD has obtained four armored trucks valued at \$65,000 each and two former artillery vehicles known as mortar carriers valued at more than \$200,000 each.”).
3. *Crime in the United States 2012*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/persons-arrested/persons-arrested> (last visited Feb. 15, 2016) (“Nationwide, law enforcement made an estimated 12,196,959 arrests in 2012.”).

approximately 30 million more.⁴ In New York City alone, there were more than half a million summonses issued in 2012.⁵ The ever-increasing reach and power of this vast law enforcement network represents the single biggest threat to freedom, liberty, law, and order in America today. This threat is one not only of size, but also of how police power is asserted. This nation's policing strategy targets low-income communities, particularly low-income communities of color, by arresting millions of people for low-level disorder crimes that occur in all communities, but are only policed in some. This fundamentally unfair and racially disparate system of policing disrupts the fragile bond of trust central to the compact between citizens and those that monitor them. When that trust breaks, what results is a system of crushing repression and profound disorder.

For over thirty years, I have worked in the criminal justice world, representing people in several of America's poorest congressional districts. As the Founder and Executive Director of The Bronx Defenders, a holistic public defender office in the South Bronx that serves over 30,000 of the lowest-income residents in America every year, I thought I had a clear view of over-policing and the rapidly fraying bond between police and the poor communities of color they patrol. I didn't.

Last year, I became embroiled in a controversy that both deepened my own understanding of the problem and inexorably brought me closer to those my office represents. The controversy concerned my office's participation in a hip-hop video that became a flashpoint in the conversation about policing and racial justice. My experience at the center of the ensuing maelstrom taught me several valuable lessons: about the power of the "hero cop" narrative that pervades the United States today, about the fragility of the defense function, and about the profound racial fears that still suffuse the American experiment. And just as importantly, after more than thirty years in the criminal justice system, the experience gave me a long-overdue taste of what it might feel like to be a client—targeted by the raw, angry power of the New York City Police Department.

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4. Press Release, Bureau of Justice Statistics, Study Finds Some Racial Differences in Perceptions of Police Behavior During Contact With the Public (Sept. 24, 2013), <http://www.bjs.gov/content/pub/press/pbtss11rpa11pr.cfm> ("An estimated 62.9 million U.S. residents age 16 or older, or about 26 percent of the population, had one or more contacts with police in 2011, the Justice Department's Bureau of Justice Statistics (BJS) announced today. Contact between police and the public was equally likely to be initiated by residents as by police. About half (51 percent) of police contacts occurred when persons requested police assistance, while the other half (49 percent) were police initiated, such as when police pulled over drivers during traffic stops or stopped persons in public places but not a moving vehicle (i.e., street stops).").
 5. PREETI CHAUHAN, MEGAN WELSH, ADAM G. FERA & ERVIN BALAZON, MISDEMEANOR JUSTICE PROJECT, THE SUMMONS REPORT: TRENDS IN ISSUANCE AND DISPOSITIONS OF SUMMONSES IN NEW YORK CITY, 2003-2013, at 9 fig. 1 http://www.jjay.cuny.edu/sites/default/files/news/Summons_Report_DRAFT_4_24_2015_v8.pdf.

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This paper will argue two things: first, that until we begin to challenge and ultimately unravel the false narrative of heroic police officers engaged in a dangerous war against its own citizenry, specifically men of color, we will never be able to substantially advance the causes of social and racial justice in this country; and second, that the nature of holistic defense profoundly deepens attorney-client relationships, fundamentally entangling lawyers in the struggles of client communities. Challenging the hero cop narrative can come at great cost. It is a profoundly powerful worldview, and threats to it are met with extraordinary hostility.

I. THE NARRATIVE OF THE HERO COP

There has always been an appreciation for the value and sacrifice of those who protect and serve us. But particularly since 9/11, there has been an unprecedented focus on first responders and police as national heroes. This viewpoint has not just been pushed but lovingly burnished by the law enforcement community, leading to the dramatic proliferation of the hero cop narrative.⁶ More than any other group, the police have managed to portray themselves as indispensable heroes in a deadly and dangerous war. Although there are real dangers present in the daily lives of law enforcement, there are also real harms in the proliferation of this narrative. The reflexive defense of police and thereby almost every police action makes it virtually impossible to question police tactics, object to the use of force, or challenge the lack of accountability in law enforcement without receiving massive blowback.⁷ Most insidiously of all, however, the hero-cop narrative lends itself to an “us-versus them” mentality, pitting law enforcement against men of color in an ongoing war. This view, now inherent to contemporary big-city policing, bleeds over into the criminal justice system and causes systemic imbalances that chronically favor the police over civilians. Unfortunately, in America today the “hero cop”

6. See, e.g., Josh King, *10 Heroic Police Officers Who Gave Their Lives on 9/11*, LISTVERSE (June 29, 2013), <http://listverse.com/2013/06/29/top-10-heroic-police-officers-killed-in-the-911-attacks/>.

7. Police unions are quick to speak out against any criticism of police behavior, contributing to the “hero cop” narrative of police who are under siege. Recently, Hollywood director Quentin Tarantino came under fire from police unions across the country for his role in an anti-police brutality protest. Craig Lally, President of the Los Angeles Police Protective League, remarked, “[h]ateful rhetoric dehumanizes police and encourages attacks on us And questioning everything we do threatens public safety by discouraging officers from putting themselves in positions where their legitimate actions could be falsely portrayed as thuggery.” Joe Tacopino, *Cops Across the Nation Join NYPD in Tarantino Boycott*, N.Y. POST (Oct. 30, 2015), <http://nypost.com/2015/10/30/cops-across-the-nation-join-nypd-in-tarantino-boycott/>. Lally is a member of one of many police unions across the nation who vowed to boycott Tarantino’s upcoming film, *The Hateful Eight*, for Tarantino’s views on police brutality. *Id.*

narrative is so powerful and so pervasive that merely questioning police behavior is decried as un-American, disloyal, and even dangerous.

I learned that the hard way. Last December, I emerged from the subway to see the marble pillars of the Federal Courthouse and thousands of marchers holding up signs and posters crying “Black Lives Matter,” “No Justice, No Peace,” and “I Can’t Breathe.” Change was in the air. As we walked, we chanted what was to become one of the most powerful messages of the protests—perfect in its simplicity, moving in its performance. It is a single gesture that deftly transformed a sign of complete surrender into a powerful, but peaceful, challenge to the status quo: “Hands Up, Don’t Shoot.” Walking that night, I believed that the long arc of history might finally be bending towards real, meaningful justice.

When I returned home that night, flush from the heady connectedness of collective action, I saw that a reporter from the *New York Daily News* had emailed me, asking for comment on a video by artists Uncle Murda and Maino called “Hands Up” that the police unions were upset about.⁸ I knew that on a recent Sunday afternoon, part of a video was shot at The Bronx Defenders office in our community space. I also knew that two of our most dedicated and passionate Bronx Defenders lawyers had agreed to appear briefly in the video doing what we at The Bronx Defenders do best—defend, counsel, and support members of the community.

What I saw when I clicked the link that night and watched “Hands Up” for the first time was a juxtaposition of a revenge fantasy in which young black men, reversing the power relationship with the police, hold guns to the heads of white police officers. Footage of actual police brutality rolls while the haunting refrain, “Hands Up, They Don’t Understand Us” plays in the background. It seemed to me an affecting and powerful portrayal of police brutality. Yes, there were provocative images but the overall message of the video seemed clear: Stop police brutality.

8. WorldStarHipHop, *Uncle Murda & Maino “Hands Up” (Eric Garner Tribute) (WSHH Premiere - Official Music Video)*, YOUTUBE (Dec. 3, 2014) https://www.youtube.com/watch?v=BV_FizTlxM4. The “Hands Up” video was supposed to raise public awareness about the epidemic of police brutality in low-income communities of color. Hip hop artists Maino and Uncle Murda wrote the song, and the producers assured us that any profits would go to the families of Sean Bell and Eric Garner, both of whom were unarmed, black, and killed by the NYPD. Sean Bell was twenty-three years old when he was killed on his wedding day in 2006, after five undercover police officers fired more than fifty shots at his car. Eric Garner was killed in 2014 after being placed into a banned chokehold by an NYPD officer, following an attempted arrest for selling loose cigarettes. Garner’s last words, “I can’t breathe,” became an important mantra of the anti-police brutality movement that grew out of highly publicized police killings like Sean Bell, Eric Garner, and Michael Brown. See Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner’s Death*, N.Y. TIMES (June 13, 2015), <http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html>.

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The office had been promised a pre-release review of the final video and the right to edit any offensive content. Unfortunately, that promise was not honored, and the video was posted in the middle of the night. Precisely because the message of “Hands Up” was so vulnerable to misinterpretation, our office should have insisted on a written legal agreement that would have afforded us, at least in writing, the legal right to edit out those portions of the video that threatened even imagined violence against the police. Not because they are not legitimate avenues of expression, but because we should have known that in today’s climate those images would tragically distract from the issue and the client experiences that we were trying to shine a light on. Our role in the justice system and our ability to help push forward systemic change requires us to maintain communication with every player in the system. Because of those scenes, “Hands Up” failed to encourage meaningful conversation. Instead, it created a duality that thwarted any intelligent, rational dialogue about the issue of police brutality.

Even that night, it was clear to me that “Hands Up” was an artistic statement about race, revenge, and pain. I saw a video that at its core was a parable about what happens when a marginalized community simply can’t take it anymore.⁹ The police didn’t see what I saw—the images of people of color being brutalized by law enforcement, their cries of surrender and the tears of their grieving mothers. Instead, what the police clung to were anti-police lyrics and the single image from the video: two black men holding guns to a white police officer’s head. To them, that is what “Hands Up” was about. And so, using decontextualized fragments, the police created a different story about the video—one that played perfectly into the hero cop narrative—that repeated the story of heroism, grounded in a simplistic moral dichotomy between good guys (the police) and bad guys (those they arrest). The extraordinary appeal of their false and incendiary police story about “Hands Up” exposed the narrative hegemony that so pervasively dominates the discourse around policing and race in this country.

II. THE NATURE OF HOLISTIC DEFENSE

The reporter who called me that night patiently explained that New York City’s police union¹⁰ was “understandably furious” that two lawyers in my

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9. It is important to note that throughout the “Hands Up” controversy, no one other than the police union ever suggested that Uncle Murda and Maino might be guilty of actual incitement. Indeed, it was tacitly understood by all parties that the video was well within the ambit of protected First Amendment speech because they never planned to take violent action. This understanding is reflected in the recent Supreme Court case *Elonis v. United States*, 135 S.Ct. 2001, 2012 (2015) (“Federal criminal liability generally does not turn solely on the results of an act without considering the defendant’s mental state.”).
 10. In New York City, several unions represent police officers. The largest and most powerful of these is known as the Patrolman’s Benevolent Association, or PBA. *See*

office had appeared in the video. “After all,” he said, “you all play for the same team.” There is a common and deep-seated perception in this country and among the media that despite the criminal justice system being “adversarial,” all the players in that system are bound together as pieces of a larger machine. The theory is that we are all beholden to an objective, idealized notion of justice and that while we play different roles, we are unified in our goal. At its core, there is a grain of truth to this notion. We are all, including defenders, key players in “the administration of justice.” After all, without defense lawyers, the system couldn’t function.

As a consequence, client-centered defense attorneys are always confronted by the complicated moral question: Even if you maintain an unquestionable loyalty to your clients, their families and their communities, is it ethical to participate in the criminal justice system as it currently functions? At The Bronx Defenders, we have struggled with that very question and have taken seriously the complex and compromising truth that we are both officers of the court—bound by its rules, cannons and proscriptions—and officers in the army of the disenfranchised who are guided, educated and inspired by our clients’ experiences.

Our solution to this quandary, indeed, the core belief that animates our work as holistic public defenders, is the very reason that the “Hands Up” controversy became so toxic and damaging. Because at its very core, the question of advocating for client communities is not something much of the world considers within the ambit of public defender work. But we do, and this is precisely the reason that we have worked for the past eighteen years to develop a disruptive concept of public defense lawyering known as holistic defense.

Holistic defense as developed and practiced at The Bronx Defenders is designed to serve clients better. At its core, however, there is something more—the promise of truly walking arm and arm with clients, not only through the doors of the courthouse, but in the streets of their own communities and down that broad boulevard to a more just and equal world. Holistic defense aims to create a culture that inculcates in every lawyer an alliance with clients and their experiences in ways that are fundamentally different than more traditional defender models.

By locating the defender office in the client community, the holistic defender office says, “We are here with *you*, not there with them.” By having a hotline to serve the community twenty-four hours a day, seven days a week, the holistic defender office says, “We are here for *you*, not for them.” By broadening the scope of services to include civil legal services, family defense, immigration and social service support—things that clients really need—the holistic defender office says “We are alive to *your* needs, not theirs.” And by engaging in

Rachel L. Swarns, *Once Behind the Scenes, A Police Union Official Works to Topple His Boss*, N.Y. TIMES (Feb. 15, 2015), <http://www.nytimes.com/2015/02/16/nyregion/in-the-nypd-brian-fusco-works-to-topple-patrick-lynch.html>.

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community organizing, outreach and systemic change to advance the needs of clients, the holistic defender office says “We march with *you*, not with them.”

When that culture takes hold—in that transformative process—each individual holistic defender begins to immerse herself in the client community, amplifying client voices and internalizing client struggles. A holistic defender cannot help but begin to see the police through her clients’ eyes: as an entity capable of destroying them, their families and their communities. A holistic defender can no longer repress the dawning awareness that the vast regime of enmeshed penalties and fines and fees and probation and prison is nothing more than the systemic expropriation of the little that her clients have left.

When a holistic defender finally begins to deeply grasp their client’s experiences, her worldview is changed forever. There is no choice but to defiantly step beyond the constricting role of the traditional defense attorney and into a new form of advocacy that inexorably leads to places that might seem strange to traditionalists, but brings with it a new kind of wisdom, strength and credibility. Creating that perspective and that sensitivity is what the culture of The Bronx Defenders aims to do. Unfortunately, there are real dangers in seeing the system through a client’s eyes, and championing their views of the system. One of them is that all of a sudden, their enemies and their enmities become your own.

III. THE FALLOUT AND THE FAILURE OF THE DEFENDER COMMUNITY

The day after the reporter called me, *The New York Post* ran a piece under the headline “Public Defenders Appear in ‘Kill Cops’ Rap Video.”¹¹ The reaction from both the public and the legal establishment was swift and unmistakable. The temperature in the courthouse began to rise. Judges scolded our lawyers, court officers put up signs declaring “Cops Lives Matter,” and questions were raised about whether or not Bronx Defenders attorneys were now security risks in the courthouse. The clear anti-police brutality message of the video was utterly subsumed by the story the police unions peddled: public defenders want to kill cops. Fox News and the Murdoch papers latched onto this version of the story, holding the hero cop narrative aloft.¹²

Within hours, news trucks were camped out outside our office, and, in a rank display of intimidation, police cars with lights flashing and sirens blaring drove menacingly around our office over and over again. All of a sudden, we were under siege, and in what was to be the first of many terrifying lessons about the long arm of police power, two men in suits from the New York City

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11. Kirstan Conley, Susan Edelman & Josh Saul, *Public Defenders Appear in “Kill Cops” Rap Video*, N.Y. POST (Dec. 12, 2014), <http://nypost.com/2014/12/12/public-defenders-appear-in-kill-cops-rap-video/>.
 12. See, e.g. Bronx Defenders Tag Page, N.Y. POST, <http://nypost.com/tag/bronx-defenders/> (last visited Feb. 15, 2016).

Department of Investigations¹³ showed up at our reception area just after dark, flashed their badges, and demanded to speak to me. They had been sent to investigate us based on a complaint filed by the Patrolman's Benevolent Association.¹⁴ All of a sudden, my office and I were the targets of an official law enforcement investigation.

Faced with an official investigation, my newly hired attorney and I searched for what we might have done to trigger it. Not a single cent of public money was used for "Hands Up." The video was shot in our office on a Sunday when the office was closed. No clients were present, no files visible, no confidentiality violations. We didn't write, produce or pay for the video and the two attorneys who appeared in the video were merely seen counseling an actress portraying a grieving woman from the community.

The entire process of the investigation led me to understand that this "scandal" wasn't about fraud, misuse of public funds or criminality. The Department of Investigations was there because the police were deeply offended by the content of the video and actually believed that we were advocating the murder of police officers.¹⁵ This is why they declined to review our finances,

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13. The New York City Department of Investigation describes itself as one of the oldest law enforcement agencies in the country, and is designed to be an independent, non-partisan watchdog. Its job is to root out corruption and, as their website says, "[g]et[] the worms out of the Big Apple." *Getting the Worms Out of the Big Apple: 2000 - present*, CITY OF NEW YORK DEP'T OF INVESTIGATION, http://www.nyc.gov/html/doi/html/about/history_worms.shtml (last visited Feb. 15, 2016). As far as I knew, they investigated agencies for fraud, misuse of public funds and criminality and issued reports about things like falsifying safety records at New York City construction sites, widespread pension fraud and, recently, systemic failures, and violence on Rikers Island.
 14. Press Release, Patrolmen's Benevolent Ass'n, PBA Says Halt Funding to Bronx Defenders During Investigation of Participation In Cop-Killer Video (Jan. 25, 2015), <https://www.nycpba.org/archive/releases/15/pr150125-bronx.html>. See also Wendy Joan Biddlecombe, *PBA Takes Aim at Bronx Defenders*, METRO (Jan. 25, 2015), <http://www.metro.us/new-york/pba-takes-aim-at-bronx-defenders/zsJoay--uyk5rglThlxTs/>.
 15. Rather than actually advocating the murder of police, "Hands Up" joined a long history of dissenters who use music and other forms of art to express their frustration with social and political conditions. Art has always offered a home to dissent. One need only look at Ai Wei Wei, a Chinese artist and activist who was beaten, arrested and jailed in China because his art threatened the authority of the Chinese government; Jafar Panahi, an Iranian filmmaker who was imprisoned for criticizing the Iranian government; or Owen Maseko, an artist from Zimbabwe who was arrested for painting violent images of government-sponsored massacres. See Keith B. Richburg, *Chinese Artist Ai Weiwei Arrested in Ongoing Government Crackdown*, WASH. POST (Apr. 3, 2011), https://www.washingtonpost.com/world/chinese-artist-ai-wei-wei-arrested-in-latest-government-crackdown/2011/04/03/AFHB5PVC_story.html; Saeed Kamali Dehghan, *Iran Jails Direction Jafar Panahi and Stops Him Making Films for 20 Years*, GUARDIAN (Dec. 20, 2010), <http://www.theguardian.com/world/2010/dec/20/iran-jails-jafar-panahi-films>; Alex Duval

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why they chose not to speak to Uncle Murda and Maino to verify our agreement with them, why they ignored the cease and desist letter we served on the music producer's attorney, and why they refused to give our lawyers even a brief extension to comply with the broad subpoenas they had issued. Unlike their usual investigations that are broad, deep, meticulous and time-consuming, this one was timed to the news cycle—a foregone conclusion rooted in anger at the content of the video.

Why were the police so outraged about this particular video? The controversy surrounding “Hands Up” really flared because of something that is even less amenable to rational discussion than police brutality: race. What made “Hands Up” so scary, so unacceptable—and my office's association with it so inflammatory—is that it depicts black men threatening to use imagined power against white police officers. Despite the fact that the bulk of the video consisted of footage of actual people being brutalized by actual police officers, the image that dominated every media story was this imagined power inversion. While we as a society tend to doubt and downplay the role of race, it is undeniable that race—in this case, the all-too-prevalent stereotype of the rageful black man—

Smith, *Zimbabwe Artist Defies Robert Mugabe*, *GUARDIAN* (Apr. 2, 2010), <http://www.theguardian.com/world/2010/apr/04/zimbabwe-artist-arrest-mugabe-censorship>. Pain, fury, and fantasies of retaliation are regularly found in the art of the oppressed. American rap and hip-hop was created by some of the most overly policed and incarcerated people in the world, and stories about police encounters and the criminal justice system have been fodder for rap and hip-hop since the genre was born. Some of the most celebrated icons in rap and hip-hop today express themes of police brutality, violence, and terror in their music, including Jay-Z, Kendrick Lamar, Eminem, Nas, and Dr. Dre. See JAY Z, *A Billi* (Roc Nation 2008) (single); KENDRICK LAMAR, *I, on TO PIMP A BUTTERFLY* (Top Dawg Entertainment 2015); EMINEM FEAT. NATE DOGG, *Till I Collapse*, on *THE EMINEM SHOW* (Shady Records 2002); NAS, *Shootouts*, on *IT WAS WRITTEN* (Columbia Records 1996); N.W.A., *Fuck tha Police*, on *STRAIGHT OUTTA COMPTON* (Priority Records/Ruthless Records 1988). These artists continue the legacy of hip-hop stars whose characters spit murderous lyrics about the police and who, far from ostracized, are embraced by the masses. Building on the popular appeal of hip-hop music and its ability to help marginalized communities express frustration with the status quo, educators across the country have embraced hip-hop therapy as an expressive tool for young people. Hip-hop therapy is an innovative technique that uses hip-hop music to reach teenagers, particularly in poor communities of color, and encourages them to give voice to their experiences. At New Visions Charter High School for Advanced Math and Science II in the Bronx, students in an after-school hip-hop club recently recorded an album of songs about social justice, entitled “Hoodies Up,” in response to police killings of black men. Winnie Hu, *Bronx School Embraces a New Tool in Counseling: Hip-Hop*, *N.Y. TIMES* (Jan. 19, 2016), <http://www.nytimes.com/2016/01/20/nyregion/bronx-school-embraces-a-new-tool-in-counseling-hip-hop.html>. As communities of color have embraced hip-hop music as a tool to cope with marginalization and to express anger at police brutality, it is clear that “Hands Up” was not at all unique in its tone, but rather a clear continuation of mainstream hip-hop's trajectory.

was at the very heart of the “Hands Up” controversy. Race itself explains why the fear engendered by the power inversion in “Hands Up” was so explosive and irresistible to the media: “black male” and “criminal” have become synonymous in the minds of so many Americans.¹⁶

The fear and outrage that followed “Hands Up” fostered a months-long media frenzy, during which I was called a liar and a disgrace on major news networks, with one commentator even suggesting that I should be dealt with like a snake who needs to be decapitated.¹⁷ It led to a methodical assault on our funding by the police union, who sought to leverage “Hands Up” to undermine our political support.¹⁸ The attention also spawned a deluge of hatred directed at me personally: voice messages, emails and a pile of handwritten letters. It was then, for the first time in my career, that I understood what it feels like to be the target of the police: helpless in the face of a power capable of changing my life forever; fearful for my safety and that of the people that I love; frustrated at having my words twisted until they heard what they wanted and until it fulfilled their narrative of my guilt.

For a short time I imagined that the social justice world and public defender community would coalesce in our defense, but the silence was deafening.¹⁹ Many lawyers in New York and beyond were so afraid of being tarnished by their association with us that their fear got the best of them. And

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16. See Mary Beth Oliver, *African American Men as “Criminal and Dangerous”: Implications of Media Portrayals of Crime on the “Criminalization” of African American Men*, 7(2) J. AFRICAN AM. STUDIES 3, 3-4 (2003) (“The way in which the media (and particularly the news media) depict race and crime plays an important role in the stereotyping of black men as violent and dangerous . . . Whites assume greater guilt of African American criminal suspects accused of crimes than of white criminal suspects accused of the same offenses.”). See generally TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* (2015); Galen Bodenhausen, *Second Guessing the Jury: Stereotypic and Hindsight Biases in Perceptions of Court Cases*, 20 J. APPLIED SOC. PSYCHOLOGY 1112 (1990); Galen Bodenhausen, *Stereotypic Biases in Social Decision Making and Memory: Testing Process Models of Stereotype Use*, 55 J. PERSONALITY & SOC. PSYCHOLOGY 726 (1988).
 17. *On the Record with Greta Van Susteren* (FOX television broadcast Febr. 19, 2015).
 18. Union members called every one of our pro-bono partners decrying their association with “cop killers.” They urged every law firm that had supported us in the past to disavow any association with us. They called our funders at the court system, the city and the U.S. Department of Justice to pressure them to defund not just our criminal work but the work we did to prevent evictions, deportations and keep families together. The PBA put so much pressure on Chase Manhattan Bank that they dispatched a senior vice president to the office to determine whether they could continue to provide us with for-profit banking services. While our government funding went undisturbed, Chase did decide that we were too toxic to associate with and advised us to find a new bank.
 19. There were, of course, some notable exceptions: Jonathan Gradess, Steve Greenfield, Jeffery Robinson, Paul Butler, Jonathan Oberman, Abbe Smith, Ron Sullivan, and others who stood up in our defense.

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that, in turn, exposed the true power of the system that the police represent. Their silence exposed the uncomfortable reality that no matter how powerful and independent we think we are as defenders, we are all ultimately vulnerable to the government and to an angry police union.

The hurt and outrage about “Hands Up” is entirely understandable. Police officers get up every morning, put on their uniforms, holster their guns and go out into communities that they typically don’t come from in order to thwart crime and protect people. I have no doubt that when they kiss their loved ones goodbye in the morning, there is always the fear that they might not ever come home again. I believe that it is possible to recognize the sacrifices law enforcement make while also accepting that there is real hurt and outrage in the low-income communities of color. These communities have borne the brunt of an ever-increasing and over-militarized police force that targets them, abuses them and criminalizes them. When a mother in the South Bronx kisses her teenage son goodbye in the morning, she also fears that he might never come home again. In fact, it is important to note that statistically speaking, it is far safer to be an NYPD officer than an average black man in Baltimore or St. Louis.²⁰ That simple truth—that both sides are *actually* frightened—is one of the many things that I wish had come out of “Hands Up.”²¹

The fear and anger in low income communities of color is grounded in the accumulated slights and indignities constantly experienced by our clients: being stopped, searched, arrested and dragged through the criminal justice system—each encounter steeped in humiliation and anguish.²² Being treated unjustly, being reduced to a stereotype, being bullied and humiliated and treated with contempt, breeds resentment. That resentment, the potent cocktail of fear and

20. David Feige, *The Myth of the Hero Cop*, SLATE (May 25, 2015), http://www.slate.com/articles/news_and_politics/politics/2015/05/the_myth_of_the_hero_cop_police_unions_have_spread_a_dangerous_message_about.html (“In fact, if you compare the murder rate among police officers with the murder rate in several American cities, you find that it is far safer to be a NYPD officer than an average black man in Baltimore or St. Louis.”) (citing *Causes of Law Enforcement Deaths*, NAT’L LAW ENF’T OFFICERS MEMORIAL FUND, <http://www.nleomf.org/facts/officer-fatalities-data/causes.html> (last updated Sept. 15, 2015)).

21. Instead, two good lawyers lost their jobs, I was suspended without pay for sixty days, and the funding stream for the organization that we had so painstakingly built was threatened.

22. COATES, *supra* note 16, at 9 (“I am writing you because this was the year you saw Eric Garner choked to death for selling cigarettes; because you know now that Renisha McBride was shot for seeking help, that John Crawford was shot down for browsing in a department store And you know now, if you did not before, that the police departments of your country have been endowed with the authority to destroy your body And destruction is merely the superlative form of a dominion whose prerogatives include friskings, detainings, beatings, and humiliations. All of this is common to black people. All of this is old for black people.”).

anger, leads to only one place—fury. But fury is not violence. Fury expresses itself in many different ways—in marches, in slogans, in defiant harsh words, and of course, in art and music.

IV. THE LESSONS OF “HANDS UP”

I have traveled the roads of the criminal justice system for more than three decades looking for a better place, a more complete understanding of our clients and their struggles. I have tried for years to hear their voices and to be responsive to their needs. But it has only been in the terrifying and wild experience of being a target myself that I have more fully understood the depths of client need, the paralyzing stress of daily fear, and the abject loneliness that comes from being silenced and intentionally misunderstood by those with power over you. My own experiences with the fallout of “Hands Up” have deepened my belief that we must end the racist and fundamentally unfair policing and over-incarceration of low-income communities of color in this country.

In order to push forward real change for these communities, we must challenge the dangerous and dominant narratives about policing, race, and justice in our society. We must reject the notion of the “hero cop” engaged in a dangerous struggle against its own citizenry. We must tell the truth about the status of our criminal justice system, which is so backlogged with minor offenses that our courtrooms and jails have been stretched to a breaking point. And we must pursue systemic reforms in policing and criminal justice that will seek to ease the burdens of centuries of unjust policies on these communities. All this is necessary if we wish to advance the cause of racial and social justice in this country.

To challenge the narrative of the “hero cop” is not to suggest that there are not excellent police officers, or that these are not difficult jobs. Rather, we must put aside the “hero cop” narrative because by painting all law enforcement as good, we abdicate our moral responsibility to examine their behavior, and thus make policies that could curb their excesses. It is simply not enough for traditional public defenders to challenge the specific actions of individual officers in ways that might affect a legal motion or suppression hearing—rather, as holistic defenders, we must also oppose the entire regime of zero-tolerance, broken windows, and over-militarized policing that has laid waste to the poor communities and communities of color that we serve.

While fighting to dismantle the “hero cop” narrative, we must also acknowledge that our society’s treatment of low-income communities of color is a problem that extends far beyond individual police officers or even law enforcement as a whole. While it can be tempting to lay the blame at the feet of the police, it’s also crucial to recognize that police actions do not exist in a vacuum—rather, they are a reflection of our society’s attitudes about race and poverty. As Ta-Nehisi Coates states so eloquently in his recent book *Between the World and Me*, “You may have heard the talk of diversity, sensitivity training, and body cameras. These are all fine and applicable, but they understate the task

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and allow the citizens of this country to pretend that there is real distance between their own attitudes and those of the ones appointed to protect them. The truth is that the police reflect America in all of its will and fear.”²³ Reforming our broken policing and criminal justice system will take a larger reckoning about race in this country.

This reckoning starts with fearlessly telling the truth about the reality of the criminal justice system today. Policing and prisons have become defining features of American government, and mass incarceration has removed so many black men from society that it has become the literal extension of American segregation.²⁴ Despite what is portrayed in the media, our courts and jails are not filled with a seemingly endless supply of psychotic serial killers, gratuitously violent rapists or unrepentant pedophiles. Instead, we are using our collective resources to arrest and charge a heartbreaking parade of poor people with astonishingly minor offenses.²⁵

While violent crime continues to fall, we have compensated by arresting millions of Americans for ever more minor crimes.²⁶ According to the FBI,

23. *Id.* at 74.

24. See MICHELLE ALEXANDER, *THE NEW JIM CROW* 4-6 (2010). Alexander argues that mass incarceration is simply the modern iteration of legalized racial subjugation of black Americans. As it is no longer acceptable to explicitly use race to discriminate against specific groups in society, mass incarceration subversively achieves the same goals as Jim Crow-era laws by labeling men of color as criminals, thus legalizing and legitimizing their exclusion from society. Largely fueled by the War on Drugs, mass incarceration has “emerged as a stunningly comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow. . . . The racial dimension of mass incarceration is its most striking feature. No other country in the world imprisons so many of its racial or ethnic minorities. . . . These young men are part of a growing undercaste, permanently locked up and locked out of mainstream society.” *Id.* at 4, 6-7.

25. See Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1090-92 (2013) (“There is a misdemeanor crisis in the United States A 2010 analysis of seventeen state courts revealed that misdemeanors comprised 77.5% of the total criminal caseload Prosecutors have largely failed to exercise discretion and seek justice in sorting through the huge number of misdemeanor cases that the police send them, instead churning high volumes through the overburdened lower courts.”).

26. See HOWARD N. SNYDER, U.S. DEP’T OF JUSTICE, *PATTERNS & TRENDS: ARREST IN THE UNITED STATES 1990-2010*, at 1 (2012). (“The number of murder arrests in the U.S. fell by half between 1990 and 2010. The adult and juvenile arrest rates dropped substantially in the 1990s, while both continued to fall about 20% between 2000 and 2010, reaching their lowest levels since at least 1990. The forcible rape arrest rate fell 59% between 1990 and 2010, relatively consistently across the period. While the aggravated assault arrest rate fell 31% between 1990 and 2010 the simple assault arrest rate remained essentially unchanged over the period There were 80% more arrests for drug possession or use in 2010 than in 1990.”). See also Roberts,

excluding traffic infractions and summons, we arrested 11,302,102 people in 2013.²⁷ Of those arrests, only four percent were arrests for violent crimes.²⁸ That number doesn't include the millions of summons for minor offenses issued all across this country every year²⁹—or the 500,000 handed out in New York City alone last year.³⁰ We need to admit that we are engaged in the criminal justice equivalent of ecosystem destruction—working our way from top predators down to the abundant, omnipresent krill of what now passes for criminality—public intoxication, trespassing, driving with a suspended license, driving with a broken tail light, and possession of marijuana.³¹

We need to acknowledge that the police can find these universal behaviors wherever they look, but only look in poor communities and poor communities of color.³² Criminalizing behavior in one neighborhood while ignoring it in

supra note 26, at 1091 (“Legislators have added misdemeanor after misdemeanor (and many local ordinances) to the criminal law books.”).

27. *Crime in the United States 2012*, *supra* note 4 (“Nationwide, law enforcement made an estimated 11,302,102 arrests in 2013. Of these arrests, 480,360 were for violent crimes . . .”).

28. *Id.*

29. Although most jurisdictions do not make data about summonses publicly available, it is fair to assume that millions of summonses are given out each year in the United States, based on the 500,000 given out in New York City alone. See CHAUHAN ET AL., *supra* note 5, at 23.

30. *Id.*

31. See Table 29, *Estimated Number of Arrests, United States, 2013*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-29/table_29_estimated_number_of_arrests_united_states_2013.xls (last visited Feb. 15, 2016) (showing that law enforcement in 2013 made 201,168 arrests for vandalism, 354,872 for violating liquor laws, 443,527 arrests for drunkenness, and 467,993 for disorderly conduct). See also BRONX DEFENDERS, *THE HIDDEN TAX: ECONOMIC COSTS OF MARIJUANA ENFORCEMENT IN THE BRONX AND NEW YORK CITY* (2014), <http://www.bronxdefenders.org/wp-content/uploads/2014/12/The-Hidden-Tax-A-Bronx-Defenders-Report-Dec2014.pdf>.

32. See AM. CIVIL LIBERTIES UNION, *THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS* 9 (2013), <https://www.aclu.org/report/war-marijuana-black-and-white?redirect=criminal-law-reform/war-marijuana-black-and-white> (“Despite the fact that marijuana is used at comparable rates by whites and Blacks, state and local governments have aggressively enforced marijuana laws selectively against Black people and communities. In 2010, the Black arrest rate for marijuana possession was 716 per 100,000, while the white arrest rate was 192 per 100,000. Stated another way, a Black person was 3.73 times more likely to be arrested for marijuana possession than a white person — a disparity that increased 32.7% between 2001 and 2010.”); SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN., *RESULTS FROM THE 2010 NATIONAL SURVEY ON DRUG USE AND HEALTH* tbls. 1.19B & 1.24B (2011), <http://archive.samhsa.gov/data/NSDUH/2k10NSDUH/tabs/SectipeTabsito46.htm> (last

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another is unfair, unjust and creates enormous and legitimate anger and resentment.³³ We need to acknowledge that with our plea bargain-based system of justice, our courthouses and courtrooms no longer exist as serious places to adjudicate constitutional rights, critique police conduct or challenge governmental authority.³⁴ It is not easy to say what is true about of criminal justice system: that it has become little more than a processing plant designed to shovel poor people and poor people of color into jail, prison, probation or

visited Dec. 4, 2015) (using data from 2010 to show similar rates of drug usage among racial groups, with 45.9% of White non-Hispanic American respondents over the age of 12 reporting to have used marijuana, as compared to 40.6% of Black non-Hispanic American respondents, and 50.9% of White respondents reporting to have used illicit drugs, compared to 45.1% of Black respondents).

33. Robert D. Crutchfield, Martie L. Skinner, Kevin P. Haggerty, Anne McGlynn & Richard F. Catalano, *Racial Disparity in Police Contacts*, 2 RACE & JUSTICE 179, 181 (2012) (“If they are not treated fairly, or if they perceive that they are not treated fairly, their future behavior and interactions with law enforcement might be negatively affected. The question of the propriety of the behavior of police and other justice actors is also important to communities of color. When communities observe differences that cannot be explained, it potentially gives credence to an injustice narrative that harms community-police relations.”); see also Bureau of Justice Statistics, *supra* note 4 (“White drivers involved in traffic stops were searched at lower rates than black and Hispanic drivers. During both traffic and street stops, the majority of persons who were searched or frisked did not believe the police had a legitimate reason for the search.”).
34. More than ninety percent of criminal defendants in the United States plead guilty rather than go to trial. See *Criminal Cases*, U.S. COURTS, <http://www.uscourts.gov/about-federal-courts/types-cases/criminal-cases> (last visited Feb. 15, 2016). Many criminal defendants feel compelled to accept a plea bargain rather than fight their case at trial because of extreme court delays, which can stretch misdemeanor cases over long periods of time before seeing a conclusion. Of fifty-four cases studied in The Bronx Defenders’ Marijuana Arrest Project, the average case lasted 240 days before conclusion. BRONX DEFENDERS, NO DAY IN COURT: MARIJUANA POSSESSION CASES AND THE FAILURE OF THE BRONX CRIMINAL COURTS 6 tbl. 1 (May 2013). See also GREG BERMAN & JOHN FEINBLATT, PROBLEM SOLVING COURTS: A BRIEF PRIMER 7 (2001), http://www.courtinnovation.org/pdf/prob_solv_courts.pdf (“Many state court judges have reported that the pressure of processing hundreds of cases each day has transformed their courtrooms into ‘plea bargain mills,’ which place the highest value on disposing of the maximum number of cases in the minimum amount of time”) (citing Judith S. Kaye, *Making the Case for Hands-on Courts*, NEWSWEEK (Oct. 11, 1999), <http://www.newsweek.com/making-case-hands-courts-168134>); William Glaberson, *In Misdemeanor Cases, Long Waits for Elusive Trials*, N.Y. TIMES (Apr. 30, 2013), <http://www.nytimes.com/2013/05/01/nyregion/justice-denied-for-misdemeanor-cases-trials-are-elusive.html> (“That trend [plea-bargaining] is . . . creating such profound disincentives to fighting a case that the accused are effectively treated as if they are presumed guilty rather than innocent. In New York, critics have long said the city’s Criminal Courts have so abdicated their function that it is a stretch to call them courts at all.”).

parole, using bail, fines and fees to expropriate the last remaining shred of their economic and personal independence.³⁵

V. WHERE DO WE GO FROM HERE?

Real change to the basic structures of our criminal justice system is long overdue. And where that change begins is simple: in the streets, with police-citizen interactions. But it is critical to understand that the rift between the police and the policed will only begin to narrow when we finally and permanently end broken windows policing, create genuine accountability within the police force and from outside it, and demilitarize our police force.

Broken windows policing must end. On an individual level, quality-of-life policing functions as a gateway into the criminal justice system that places employment, housing, financial aid, public benefits, immigration status, and child custody in jeopardy for millions of people each year. On a community level, quality-of-life policing erodes trust between local residents and the police, a far more dangerous result than any minor episode of disorderly behavior. Indeed, these strategies likely lead to increased violence between civilians and police because broken windows encourages police officers to treat “disorderly” behavior like more serious crime. Thus it should come as no surprise that when people merely demand an explanation for why they are being confronted by the police for minor conduct, police officers engaged in quality-of-life policing are far more likely to escalate these interactions than address them with calm

35. A recent report from the Brennan Center for Justice determined that “[e]very stage of the criminal justice process, it seems, has become ripe for a surcharge.” ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 4 (2010), <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf>. Cash-strapped states have increasingly turned to onerous fees to fund their criminal justice systems and to make up for budgetary shortfalls. States across the country are now charging criminal defendants fees for a myriad of “services,” ranging from probation supervision and jail stays to the use of a constitutionally required public defender. These fees, often totaling thousands of dollars, trap poor criminal defendants in an ongoing cycle of debt and significantly hinder a person’s chances of successful reentry after incarceration. *Id.* at 1-2. Local law enforcement agencies, seeking to make up for budgetary shortfalls, are also culpable of trapping low-income people in cycles of debt. One glaring example of law enforcement’s overreliance on fines and fees is found in the Department of Justice’s recent report on the Ferguson, Missouri police department. *See* U.S. DEP’T OF JUSTICE, CIV. RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 10 (2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (“City, police, and court officials for years have worked in concert to maximize revenue at every stage of the enforcement process, beginning with how fines and fine enforcement processes are established.”).

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discretion. One need only watch the video of the strangulation of Eric Garner by the NYPD on a Staten Island street corner to understand this reality.³⁶

Tragically, the increased violence between citizens and police in turn calcifies two dramatically opposing world views: on the one hand, the us-versus-them mentality, so common in police departments, which undergirds the sense of police officers as heroic warriors sent in to pacify violent and dangerous communities; and on the other hand, the perception of people in those very neighborhoods that the police are an occupying force with no regard for their essential humanity. Finally, because quality of life crimes exist everywhere but are enforced only in low-income communities (and disproportionately communities of color), we create and perpetuate a racially biased criminal justice system that erodes any notion of fairness. It is high time to recognize that the mechanisms of quality of life enforcement should be dismantled and community “disorder” can be solved without the use of handcuffs, police cars and jail cells.

When violent confrontations between police and community residents do occur, we must ensure that there are mechanisms in place to hold law enforcement officers accountable. Oversight must come in two forms: external and internal. An obvious but controversial form of external oversight is requiring officers to wear body cameras and mounting cameras on their patrol car dashboards. When used effectively, this technology can be an important tool for ensuring police accountability. Recent police killings of black men like Samuel DuBose and Tamir Rice, captured on dashboard and body cameras, have helped to educate the public about the terrifying reality of police brutality.³⁷ Most recently (and only after a court order), the Chicago police department released dashboard camera footage showing officer Jason Van Dyke shooting 17-year-old Laquan McDonald sixteen times.³⁸ Van Dyke is currently being charged with first-degree murder for McDonald’s death.³⁹ In this case and many others, public access to body camera and dash camera footage is crucial to holding individual officers responsible for their actions, especially in cases like

36. N.Y. Daily News, *Eric Garner Video, Unedited Version*, YOUTUBE (July 12, 2015), <https://www.youtube.com/watch?v=JpGxagKOkv8>.

37. *Samuel DuBose: Body-Camera Video Shows 360-Degree View of Police Killing*, GUARDIAN (Jul. 30, 2015), <http://www.theguardian.com/us-news/video/2015/jul/30/body-cameras-officers-samuel-dubose-shooting-video>; *Tamir Rice: Police Release Video of 12-Year-Old’s Fatal Shooting*, GUARDIAN (Nov. 26, 2014), <http://www.theguardian.com/us-news/video/2014/nov/26/cleveland-video-tamir-rice-shooting-police>.

38. *Chicago Police Officer Accused of Laquan McDonald Killing Released on Bond*, GUARDIAN (Nov. 30, 2015), <http://www.theguardian.com/us-news/2015/nov/30/jason-van-dyke-laquan-mcdonald-killing-released-on-bond-chicago-police-officer>.

39. *Id.*

McDonald's where police departments attempt to cover up the truth.⁴⁰ As the debate around body cameras continues, questions about privacy have arisen for both individual officers and for the many citizens with whom they interact each day.⁴¹ However, with the proper tools and technology in place, including public disclosure of cameras, good technological controls, and limited police control over recording devices, cameras can be a powerful check against the abuse of power by law enforcement officers by capturing police-civilian encounters.⁴² In a recent study conducted in California, shifts where police officers did not wear body cameras saw twice as many use-of-force incidents as shifts where officers did wear cameras.⁴³ There was also an overall reduction in civilian complaints against officers during the trial period when officers wore body cameras.⁴⁴ While more research into the effectiveness of body cameras must be conducted, early studies show encouraging signs about the ability of body cameras to enhance police accountability and improve police-civilian relations.

Another powerful tool for external oversight lies in increasing the use of special prosecutors in police misconduct investigations—housed in attorney general's offices to provide insulation from local law enforcement. The state attorney general's office or another district attorney can be appointed to serve as a "special district attorney," whose authority would supersede that of a local prosecutor's office in special circumstances like police killings of unarmed citizens⁴⁵ Allowing a special prosecutor to review to civilian deaths would

40. See Conor Freidersdorf, *The Corrupt System that Killed Laquan McDonald*, ATLANTIC (Nov. 27, 2015), <http://www.theatlantic.com/politics/archive/2015/11/prottesting-the-corrupt-system-that-killed-laquan-mcdonald/417723/>.

41. Advocates have raised concerns about the privacy implications of body cameras for both civilians and officers. For civilians, body cameras would inevitably capture footage inside private homes after either consensual or non-consensual entry by police, meaning that instances of innocent and everyday behavior would be recorded. Such cameras could also result in mass surveillance of civilians, particularly in urban areas as police walk the beat, passing by hundreds or thousands of people each day. In terms of police privacy, body cameras might capture private conversations police officers have with one another, which could feel oppressive and create a culture of fear or mistrust within a police department. See generally JAY STANLEY, AM. CIVIL LIBERTIES UNION, POLICE BODY-MOUNTED CAMERAS: WITH RIGHT POLICY IN PLACE, A WIN FOR ALL (Oct. 2013), https://www.aclu.org/files/assets/police_body-mounted_cameras.pdf.

42. *Id.*

43. TONY FARRAR, SELF-AWARENESS TO BEING WATCHED AND SOCIALLY-DESIRABLE BEHAVIOR: A FIELD EXPERIMENT ON THE EFFECT OF BODY-WORN CAMERAS ON POLICE USE-OF-FORCE 8 (2013), <https://www.bja.gov/bwc/pdfs/130767873-Self-awareness-to-being-watched-and-socially-desirable-behavior-A-field-experiment-on-the-effect-of-body-worn-cameras-on-police-use-of-force.pdf>.

44. *Id.*

45. In a letter from New York State District Attorney Eric Schneiderman to Governor Andrew Cuomo, Schneiderman formally requested an interim executive order

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address real or perceived conflicts of interest, as the co-dependent relationship of local prosecutors and police departments make investigating and prosecuting individual police officers for excessive force complicated and ultimately untrustworthy. As Joshua Deahl of the District of Columbia Public Defender Service suggests, a special prosecutor's responsibilities could "be limited to the oversight, investigation and prosecution of police or public official misconduct, keeping them independent from other policing functions."⁴⁶ It's also imperative to implement better and more easily accessible tools for civilians to lodge complaints about police interactions.⁴⁷ Creating civilian complaint authorities like New York City's Civilian Complaint Review Board is a positive first step, but only if these authorities have the appropriate funding, personnel, and independent accountability to investigate and act upon claims filed against specific officers.⁴⁸

"directing the Office of the Attorney General to investigate and, if necessary, prosecute cases involving unarmed civilians killed by police officers . . . Subdivision two of Executive Law section 63 currently authorizes you to supersede any local District Attorney on any criminal matter as you deem appropriate by appointing the Attorney General to investigate and prosecute the case." Press Release, N.Y. State Office of the Att'y Gen., A.G. Schneiderman Requests Executive Order to Restore Public Confidence in Criminal Justice System (Dec. 8, 2014), <http://www.ag.ny.gov/press-release/ag-schneiderman-requests-executive-order-restore-public-confidence-criminal-justice> (quoting Letter from Eric T. Schneiderman, Att'y Gen. of N.Y. State, to the Hon. Gov. Andrew M. Cuomo, Gov. of N.Y. State (Dec. 8, 2014), <http://www.ag.ny.gov/pdfs/Schneiderman-to-Cuomo-12-08-14.pdf>).

46. Joshua Deahl, *Police Killings Call for New Kind of Prosecutor*, BLOOMBERG VIEW (Dec. 4, 2014, 4:55 PM EST), <http://www.bloombergview.com/articles/2014-12-04/police-killings-call-for-new-kind-of-prosecutor>; see also MICHELE JAWANDO & CHELSEA PARSONS, CTR. FOR AM. PROGRESS, 4 IDEAS THAT COULD BEGIN TO REFORM THE CRIMINAL JUSTICE SYSTEM 4 (2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/12/CriminalJustice-brief.pdf>.
47. Cincinnati, Ohio has been held up as a model of policing reform for a number of measures instituted in the last two decades, including the establishment of a Citizen Complaint Authority with investigative and subpoena powers over police. An independent monitor is tasked with checking in with the Citizen Complaint Authority to review police progress. Alana Semuels, *How to Fix a Broken Police Department*, ATLANTIC (May 28, 2015), <http://www.theatlantic.com/politics/archive/2015/05/cincinnati-police-reform/393797/> ("Between 1999 and 2014, Cincinnati saw a 69 percent reduction in police use-of-force incidents, a 42 percent reduction in citizen complaints and a 56 percent reduction in citizen injuries during encounters with police.").
48. Donna Lieberman, the Executive Director of the New York Civil Liberties Union, testified before the New York City Council Committee on ways to reform the Civilian Complaint Review Board. Her recommendations included appointing an independent commission on police accountability, establishing units in every borough that are open to the community during night and weekend hours, creating a unit dedicated to analyzing police misconduct, and create an effective

While external oversight is vital to ensuring police accountability, police departments will also need to make significant *internal* changes if real reform is to be successful. Departments should create incentive systems that reward officers for quality, rather than quantity of arrests,⁴⁹ and for effectively de-escalating conflicts without the use of lethal force.⁵⁰ Without changing the metrics of success by which individual officers are measured, the race to fill arrest quotas will continue to negatively impact communities of color. There are significant barriers to such reforms within police departments, precisely because of the pervasiveness of the “hero cop” narrative. In one stark example, the Los Angeles Police Department announced in November 2015 that they would begin giving out the “Preservation of Life” award to officers who show restraint and put themselves at risk to resolve a dangerous situation without resorting to lethal force.⁵¹ Just two days later, the president of the police union in Los Angeles published a blog calling the award a “terrible idea” and warning that, “[a] lot of these shootings and situations that officers are put in happen within a millisecond and it’s over with . . . If they hesitate, they’re dead.”⁵² This award, like other reforms that would seek to reduce police use of lethal force, profoundly disrupts what Radley Balko calls the “Cop of the Year Syndrome.” “This is the tendency for police agencies and organizations to not only excuse questionable incidents of lethal force, but to honor them, as a way of dispelling

public education program. *The Civilian Complaint Review Board and Civilian Oversight of Policing: Testimony Before the New York City Council Comm. on Public Safety & the Comm. on Civil Rights Regarding the Civilian Complaint Review Board & Civilian Oversight of Policing* (Mar. 9, 2007), <http://www.nyclu.org/content/civilian-complaint-review-board-and-civilian-oversight-of-policing> (testimony of Donna Lieberman, Exec. Dir., N.Y. Civil Liberties Union).

49. See Inimai Chettiar & Lauren-Brooke Eisen, *Justice Department Takes Steps to Reform Grant Initiatives*, BRENNAN CTR. FOR JUSTICE, (Nov. 18, 2014), <http://www.brennancenter.org/blog/justice-department-takes-steps-reform-grant-program-incentives> (“Using total number of arrests as a measure of performance can give police an incentive to arrest more people for low-level violations, an ineffective and often counterintuitive crime-reduction strategy. In a marked shift, DOJ has now removed “number of arrests” from its list of “accountability measures.”).
50. See Timothy Williams, *Long Taught to Use Force, Police Warily Learn to De-Escalate*, N.Y. TIMES (June 27, 2015), <http://www.nytimes.com/2015/06/28/us/long-taught-to-use-force-police-warily-learn-to-de-escalate.html> (“Officials say that given the combination of lower crime and elevated public mistrust of the police, defusing heated situations is simply better policing.”).
51. Amanda Lee Myers, *Los Angeles Police Union Blasts “Preservation of Life” Award*, ASSOCIATED PRESS (Nov. 13, 2015), <http://bigstory.ap.org/article/9de719f6433e4378aeb4f6ff60418762/los-angeles-police-union-blasts-preservation-life-award>.
52. Radley Balko, *Reforming Police Culture is a Daunting Challenge*, WASH. POST (Nov. 19, 2015), <https://www.washingtonpost.com/news/the-watch/wp/2015/11/19/reforming-police-culture-is-a-daunting-challenge/>.

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critics. But such honors, of course, only reinforce the notion that police officers should assume zero risk—that at even the slightest hint of danger, citizens' lives are expendable."⁵³ Police departments will need to seriously reckon with the idea that elevating police lives at the expense of the lives of others, particularly men of color, is unacceptable and destroys not just individual lives, but also community-police relations.

Meaningful police reform must also consist of the demilitarization of local police departments. Since 1997, local law enforcement agencies across the country have been able to obtain \$727 million worth of military equipment from the Department of Defense through a federal program, known as the 1033 Program, which authorizes the transfer of excess military equipment to civilian law enforcement.⁵⁴ The equipment that local police receive—including tanks and military-grade weapons—is far beyond what is necessary for their jobs to protect communities⁵⁵ and contributes to the perception of police officers engaged in a dangerous war against their own citizenry. Demilitarization of local police can happen in a variety of ways, and some states are currently experimenting with restrictions on police access to military-style equipment. New Jersey is the first state to pass a law providing a democratic check on the distribution of federal military equipment. The new law requires local, democratic approval before law enforcement agencies can receive surplus military equipment from the Department of Defense.⁵⁶ Other states and jurisdictions should follow in New Jersey's footsteps and impose limits and restrictions on local police action to unnecessary military-grade equipment.

Although these kinds of targeted and specific policy changes are desperately needed to address the enormous discrepancies in the policing and criminal justice systems that continuously disadvantage poor and minority communities, they alone will not solve the crises that we are facing. The first step to change is telling the truth to anyone who will listen, no matter the danger or the discomfort that it may cause. The disproportionate impact of policing in low-income communities of color is *the* civil rights issue of this generation. How can we do that? It won't be enough to protest, though taking to the streets is critical. It won't happen through powerful lawsuits demanding systemic change, though lawyers will play a crucial role. Devoted armies of community organizers won't make it happen, though engaging clients and their communities in this struggle is essential. It won't happen because of strong legislators, brilliant academics, progressive prosecutors or fearless holistic public defenders, but change cannot

53. *Id.*

54. See *Policy 13: Demilitarize Local Police Forces*, JUSTICE IN POLICING, <http://www.justiceinpolicing.com/policy-reforms/independent-oversight/policy-13-demilitarize-local-police-forces/> (last visited Feb. 15, 2016).

55. See *Police Militarization*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/issues/criminal-law-reform/reforming-police-practices/police-militarization> (last visited Feb. 15, 2016).

56. See *Policy 13: Demilitarize Local Police Forces*, *supra* note 54.

happen without them. And the artists, poets, singers and performers won't make it happen, though we will need their voices. Instead, it will be the potent combination of all of us that will bring the long-overdue change in the criminal justice system.

CONCLUSION

My experience with “Hands Up” has been many things—trying, painful, scary, and profoundly instructive. Being publicly vilified created powerful polarities and, like a magnet, it quickly separated those with the courage to stand with us at The Bronx Defenders from those too frightened to be associated with us. People I knew well—good people I'd worked alongside for decades—were cowed into silence by the terrifying narrative propounded by the police union. Throughout it all, I kept wondering how it was possible that a police union could have such reach. How after more than thirty years in the criminal justice system, my own reputation could be so quickly shattered by assertions that would seem, in the warm light of rationality, only slightly shy of absurd. “Hands Up” taught me about power, about the intersection of media and politics, and about the profound fragility of so much of what I used to take for granted.

I wish I could tell you that finally grasping the tenuousness of my own reputation was liberating—it was not. I didn't reach any Zen place of peace. Instead I got angry—at the bullying nature of the police, their utter disdain for dissent, their contempt for freedom of expression, and their reflexive resort to intimidation to squelch anyone that might oppose them. It was from that anger that I finally began to truly understand the experience of being marginalized and bullied, and the consequences of utterly losing faith in the institutions of government. In short, I understood my clients' experiences in ways I never had before, even after three decades of practice. This was a visceral, not an emotional or intellectual, understanding, and that insight has changed me. It has solidified my belief that the “us vs. them” mentality that suffuses urban police departments is the biggest threat to our liberty today, that until a thousand Eric Garners and Tamir Rices put the lie to the hero cop narrative, we will never attain real justice in poor communities of color, and we will never break the genocidal cycle of crime and incarceration that has already laid waste to generations of our urban poor.

The experience of “Hands Up” also reinforced the ways in which practicing holistic defense inexorably brings advocates closer to their clients and communities. At the heart of our work is a promise to deeply engage with our clients, which means taking on their fight as our own. When we do that, we have no choice but to look beyond the injustices inflicted on our individual clients, and instead engage in the larger struggle that they face—the enmeshed social, political, and economic forces that create the conditions under which injustice flourishes. If we are to fight for justice, we must be cognizant of those larger forces and what feeds them—the false narratives about heroic police officers engaged in a war against “dangerous” men of color and their entire

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communities. Unless we can dismantle these terribly damaging narratives, we will be forever condemned to treat the symptoms of injustice rather than the disease itself.

In the end, for me at least, the very hardest part of the experience was the sense of isolation it engendered. For a time, it seemed that everywhere I turned, I found people too frightened to help. That left me feeling not only cast out, but also alone. But being cast out into the wilderness—far from familiar signs and signifiers—being exiled to an unfamiliar place can also be liberating. Indeed I have come to believe that it is *only* by being cast out, *only* by being made a pariah, *only* by being dropped in that wilderness of scary sounds and threatening shadows, that one can, finally, blaze a trail to a new and better place.⁵⁷ Forward to a world where holistic defense empowers clients, to a place where the voices of marginalized communities are amplified by collective action and to a future where police power is deployed fairly, without bias or malice, a future in which we are all committed—more than ever—to speaking truth to power on behalf of those that need it most. So let us go forward on that trail together—as a community of truth tellers with a unified vision, an unbending will, and an open heart. Together we will speak out, stand tall, and always keep our “Hands Up.”

57. In the midst of the “Hands Up” controversy, after an earlier invitation I had received to be honored at Harvard Law School as part of the International Women’s Day Exhibit had been rescinded, Professor Ron Sullivan and his students in the Criminal Justice Institute invited me to deliver the first inaugural “Trailblazer Lecture” at Harvard Law School. This lecture gave me an invaluable platform to speak out about the lessons of “Hands Up.” I am eternally grateful to Ron and his students for their display of immense courage and their fearlessness in the face of external pressure in extending this invitation to me.