

## THE CASE AGAINST POLICE MILITARIZATION

*Eliav Lieblich\* & Adam Shinar\*\**

*In the past decades, police forces have become increasingly militarized. As evident from the public outcry concerning the march of militarized police through Ferguson, many find militarization alarming and disconcerting, yet surprisingly few have offered a principled explanation just why this is so. While some have offered instrumental arguments, a closer look reveals their contingent nature. On final analysis, instrumental arguments against police militarization prove unsatisfying.*

*In stark contrast to the extant literature, this Article develops the first comprehensive and principled argument against police militarization that is not strictly instrumental. Contrary to arguments that are preoccupied with the consequences of militarization, we argue that militarization undermines our basic understanding of the nature of the liberal state. Consequently, the real problem with police militarization is not that it brings about more violence or abuse of authority – though that may very well happen – but that it is based on a presumption of the citizen as a threat, while the liberal order is based on precisely the opposite presumption. A presumption of threat, we argue, assumes that citizens, usually from marginalized communities, pose a threat of such caliber that might require the use of extreme violence.*

*Viewed through the prism of the presumption of threat, the problem of police militarization becomes apparent. Perceived as threatening, the policed community is subjected to militarized forces, and thus effectively marked as an enemy. This mark, in turn, leads to the policed community's exclusion from the body politic. Crucially, the pervasiveness of police militarization has led to its normalization, thus exacerbating its exclusionary effect. Indeed, whereas the domestic deployment of militaries has always been reserved for exceptional times, the process of police militarization has normalized what was once exceptional.*

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\* Assistant professor, Faculty of Law, Tel Aviv University.

\*\* Assistant professor, Radzyner Law School, Interdisciplinary Center (IDC) Herzliya. We thank Faisal Bhabha, Alon Harel, Christof Heyns, Peter Ramsay, Samuel Rascoff, Anat Rosenberg, Galia Schneebaum and Kenneth Watkin for the helpful comments and suggestions. We also thank the participants in the International Society of Public Law (ICON.S) Conferences in Berlin and Jerusalem and the “Half-Baked forum” at Radzyner Law School.

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## INTRODUCTION

On December 31, 2014, residents of St Louis briefly occupied the local police department. Before being forced out, they posted a sardonic “eviction notice” on the department’s walls, informing “that the police department is scheduled to be reclaimed by its citizens today,” among other reasons, for “transforming the police into a militarized occupying force.”<sup>1</sup> The Ferguson protesters were pointing out a long process known as “police militarization,” whereby police forces come to look and operate like military forces. Indeed, in recent years, the police – in the U.S. as well as globally – has increasingly adopted military models. Police has acquired military weapons and equipment; it set up paramilitary units, often with the assistance of the military or former soldiers; and has overall embraced a militaristic mode of operation far removed from the antiquated police officer “walking the beat.”

That the police should not be an “occupying force” is pretty much intuitive, and many take offense in encountering police that are too reminiscent of armed forces. However, the basis of this intuition remains largely unexplored. Why do we find militarized police offensive, yet have no special problem with the deployment of uniformed National Guard troops in various civilian settings?<sup>2</sup> Why does it seem acceptable that military be deployed to counter insurrection,<sup>3</sup> but not militarized police for the purpose of quelling riots? This Article seeks an answer to these questions, aiming to present the core case against police militarization.

Various instrumental arguments against police militarization have been advanced in recent years. Specifically, critics have argued that police militarization is ineffective in fighting crime, that it constitutes an inefficient allocation of resources, and that it incentivizes police brutality at the expense of constitutional rights.<sup>4</sup> However, would it be sufficient to counter these arguments by

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<sup>1</sup> Jessica Chasmar, *Ferguson Protesters Storm Police Headquarters in Downtown St. Louis*, THE WASHINGTON TIMES (Dec. 31, 2014), available at <http://www.washingtontimes.com/news/2014/dec/31/ferguson-protesters-storm-police-headquarters-in-d/>

<sup>2</sup> NATIONAL GUARD, ABOUT THE ARMY NATIONAL GUARD, <http://www.nationalguard.mil/AbouttheGuard/ArmyNationalGuard.aspx> (last visited June 30, 2016)

<sup>3</sup> For instance, in the Civil War; see generally STEPHEN C. NEFF, JUSTICE IN BLUE AND GRAY: A LEGAL HISTORY OF THE CIVIL WAR (2010).

<sup>4</sup> See *infra* part III.

envisioning a well-trained, well-supervised, professional militarized police that does not cause these adverse consequences? Is the problem with militarized police only rooted in its immediate results? We believe there is something else at work here. As this Article argues, the core case against police militarization is different. Extant arguments against police militarization, correct though they may be, do not fully grasp the true nature of the problem.

The problem of police militarization is part of a wider trend, identified by leading thinkers as one in which exceptional measures –traditionally reserved for extreme emergencies – are becoming the norm.<sup>5</sup> Militarization of police is but one, undeclared, manifestation of this process. Originally established in the 1960s to ostensibly counter extreme threats, militarization was empowered in recent decades through the “war” discourse. From the “war on drugs” to the “war on terror,” militarization saw a process of normalization that culminated in the camouflaged police-troops and armored personnel carriers that deployed in the streets of Ferguson in 2014.

This Article identifies the key problem of police militarization in its *normalization*. But invoking normalization is not enough. What exactly is being normalized? It is in this context that the Article makes a novel contribution, by suggesting that what is normalized is a presumption that the policed community is *threatening*. In other words, militarization is wrong because it is based on a *presumption of threat*, while the liberal order is based on precisely the opposite. The assumption that others are threatening, in essence, reduces the liberal order to a Hobbesian state of nature, in which preventive action is justified. The real case against police militarization, then, does not lie with its immediate consequences, but rather its implicit reversal of one foundational aspect of the liberal order.

In our view, police militarization implies a presumption of threat because it exhibits two salient characteristics. First, it is primarily preventive rather than strictly reactive: deployment of militarized police reflects the *anticipation* of extreme violence, of the type that would (ostensibly) require a forcible response. Second, it is collective: since it is not (always) aimed at specific individuals, it tends to rely on collective assumptions of violent potential. When militarization becomes normalized, the presumption of threat becomes normalized as well. This capacity for normalization is

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<sup>5</sup> See generally GIORGIO AGAMBEN, *HOMO SACER* (1995); PETER RAMSAY, *THE INSECURITY STATE: VULNERABLE AUTONOMY AND THE RIGHT TO SECURITY IN THE CRIMINAL LAW* (2012).

enhanced when it is specifically *police* that becomes militarized, since police – *contra* the military – are elements of the normal, rather than exceptional, legal order.

Importantly, we do not argue that militarized forces *actually* fight the civilian population, like militaries fight. Rather, we claim that the essential effect of the presumption of threat – manifested in militarization – is symbolic or *expressive*. Actual combat is not needed: the mere deployment of militarized police carries the symbolic power to exclude the policed community from the political collective. This is because what is perceived as military is generally understood to operate outside the polity. We demonstrate this excluding effect by relying on Carl Schmitt’s famous distinction that *possibility of combat* – which militarization implies – creates a friend-enemy distinction which constitutes (and delineates) the political collective.

The Argument proceeds as follows. Part I offers a definition of police militarization as a *process* in which police adopt the appearance and behavior that symbolizes military in a given political culture. It then distinguishes between *exceptional* and *normalizing* militarization, the latter reflecting the process in which the exception becomes normalized, a process that underlies the analysis throughout the Article.

Part II examines the history of police, with a specific emphasis on the ever-present tension concerning the location of the police on the civilian-military spectrum. We demonstrate that concerns about police power often stemmed from the fear of militarization, but that nevertheless, in recent decades, police militarization has been normalized mainly through the adoption of the “war” discourse, which serves to erode boundaries across the board. It ends by surveying the recent Federal backlash against militarization following the Occupy and Ferguson protests, but notes that attempts to curtail militarization are neither principled nor sufficient.

Part III discusses some of the prevalent instrumental arguments against police militarization, namely that militarization generates more violence. For instance, it is commonly claimed that when the police adopt militaristic tendencies a shift of consciousness occurs, which generates excessive use of force. While we are sympathetic to these arguments, they suffer from a shortcoming common to consequentialist arguments: it is possible to counter them with slight adjustments of our factual assumptions. We therefore argue that the question of police militarization must be

discussed on the non-instrumental, principled level.

Part IV presents the core of the case against police militarization. It first lays down the argument that police militarization correlates with a presumption of threat, through its preventive and collective attributions. It thereafter claims that the liberal order is based on the presumption of non-threat, which is directly challenged by militarization. When a state assumes that its citizens are threatening, it undermines its own authority and in fact moves closer to totalitarianism. We then move to demonstrate that the presumption of threat, manifested in the militarization of police, implies the exclusion of the policed community from the body politic. Merely by virtue of its *symbolic* power, militarization generates an excluding friend/enemy distinction. Significantly, when the distinction is carried out by *police* forces, the exclusion is more forcibly normalized, since the police are part of the normal, rather than exceptional order, which is the domain of the military.

Part V addresses several possible challenges to our theory. In general, these objections can argue that perhaps, some of militarization's ostensible benefits might justify the exclusion that it creates. For instance, militarization might contribute to officers' protection; it might deter unlawful acts and increase the public's sense of security. However, we claim that these challenges are unconvincing, both empirically and on the principled level.

## I. DEFINING MILITARIZATION

This Part defines the phenomenon of police militarization for the purpose of this Article. It thereafter differentiates between exceptional and normalizing militarization.

### *A. Militarization as a Symbolic Process*

Militarization is the process by which an organization adopts the operation mode of a military or embraces military values and culture.<sup>6</sup> Accordingly, its primary problem solving tools are borrowed from the military: the exercise of military power, equipment, organizational and operational style, and technology. According to Peter Kraska, “[t]o militarize means adopting and

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<sup>6</sup> Peter B. Kraska, *Enjoying Militarism Political/personal Dilemmas in Studying U.S. Police Paramilitary Units*, 13 JUSTICE QTLY. 405, 407 (1996) (hereinafter Kraska, *Enjoying Militarism*).

applying the central elements of the military model to an organization or particular situation. Police militarization, therefore, is simply the process whereby civilian police increasingly draw from, and pattern themselves around, the tenets of militarism and the military model.”<sup>7</sup>

The word *process* is key. While the police, since their inception, have always been militarized to an extent, the phenomenon we wish to draw attention to is the *increasing militarization* of the police. Meaning, we mainly focus on the *process* in which otherwise civilian law enforcement agencies come to resemble militarized forces, and the symbolic effect ushered by this transition. It is through this process that what was once exceptional gradually becomes normalized.

Police militarization is usually viewed through the lens of four parameters:<sup>8</sup> material, cultural, organizational, and operational. The material lens focuses on the types of weapons, uniform, technology, and equipment police use. The cultural lens examines the type of language, style, appearance and values used by the police. The organizational lens views the way the police choose to organize itself in terms of hierarchy, special units and forces. Finally, the operational lens looks at the patterns of police action in the various areas of its operation.

To be clear, we do not claim that police militarization amounts to a wholesale importation of the military paradigm to law enforcement. To the best of our knowledge, no police department has yet altered its rules of engagement to reflect those of fighting military units. To us, however, militarization rests less on the actual adoption of military-style shoot-to-kill rules of engagement, but rather on the cultural message it projects. From the point of view of the citizen, what matters is not only what militarized forces actually do, but also what they symbolize. This is why our definition of militarization is not contingent upon the actual adoption of military operational approaches across the board.

For this reason, when we discuss militarization, we generally refrain from suggesting an essentialist checklist for defining the exact point in which a police force becomes militarized. It is possible to engage in arguments, for instance, why a blue-clad policewoman carrying a handgun would not be considered militarized, while the same policewoman wearing black and

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<sup>7</sup> Peter B. Kraska, *Militarization and Policing – Its Relevance to 21<sup>st</sup> Century Police*, 1 POLICING 501,504, 507 (2007).

<sup>8</sup> As developed in *id.* at 507.

carrying an assault weapon would. But in our eyes, such an argument is overly technical and contingent. Our analysis thus treats militarization more as a cultural phenomenon, in which certain attributes are generally perceived by the public as reflecting militarization. In sum, we address militarization as a *symbolic process*.

This is why, when we consider the four parameters that characterize militarization, we focus here on their observable external dimensions, that can be collectively looked upon as an aggregate of characteristics that are perceived as militarized in a specific culture. The paradigmatic example, of course, is the now ubiquitous SWAT unit. Like military units, SWAT teams are equipped with separate uniforms (urban tactical gear), full body armor and Kevlar helmets and armed with automatic weapons, commonly in use in the military,<sup>9</sup> as well as other technologies such as sound suppressors, laser sights, and semi-automatic and automatic shotguns. Some police units have acquired armored personnel carriers, and “tactical cruisers.”<sup>10</sup> All of these were once the exclusive domain of the military, but are now routinely part of police equipment. SWAT teams adopted military style governance and discipline, and their tactics, language and training differ from the ordinary police officer.<sup>11</sup> Their operation looks more like, and indeed is, of a paramilitary nature.<sup>12</sup>

### *B. Exceptional and Normalizing Militarization*

A further distinction that must be made is between the exception and the norm. We might accept that in exceptional and well defined situations of emergency, some special police units are needed. For instance, such cases can arise when a terrorist attack is

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<sup>9</sup> For example, the MP5 sub machine gun, which was used in Operation Desert Storm and by navy SEALs, began to be marketed to police forces, SWAT teams especially, for the war on drugs. Kraska, *Enjoying Militarism*, *supra* note 6, at 412. In an ad for the MP5, the company wrote "From the Gulf War to the Drug War... Winning the war against drugs requires some very special weapons. Weapons that law enforcement professionals can stake their lives on. The MP5 Navy model submachine gun was developed especially for one of America's elite special operations units. Battle proven in the Gulf War, this model is now available for sale to the police at a special low price."

<sup>10</sup> Peter B. Kraska, Victor E. Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, 44 *SOCIAL PROBLEMS* 1, 3 (1997) (hereinafter Kraska & Kappeler, *Militarizing American Police*).

<sup>11</sup> *Id.* at 4.

<sup>12</sup> *Id.*



ongoing, hostages are taken, or that otherwise a widespread and imminent threat to life requires decisive action beyond the capabilities of simple police. When militarized forces are utilized in such situations, it can be labeled as *exceptional militarization*. This type of militarization traces the classic distinction in political theory between the normal state of affairs, and the exceptional or the emergency – the state of exception – in which extreme measures are seemingly required.<sup>13</sup> While exceptional militarization can be abused – indeed, as we show later on, the mere availability of such capabilities and the incentive to acquire more of them results in a tendency to use them even when not actually required – in well-defined emergencies, it could be agreed upon that such forces might be required.

However, another type of militarization is *normalizing militarization*. As a factual phenomenon, this occurs when militarized forces are increasingly deployed in settings that are by no means exceptional, as the term is commonly understood. Here there is a wide spectrum: militarized forces can be used in day-to-day traditional police activities, such as to serve search and arrest warrants, in drug raids, and in patrolling the streets of certain neighborhoods, often wearing full battle dress uniforms and carrying automatic weapons.<sup>14</sup> They might also be deployed for “public order” purposes in political demonstrations such as in anti-globalization protests or more recently, in the context of the Occupy Movement.<sup>15</sup>

While exceptional militarization raises a host of difficult questions, we are concerned here with *normalizing militarization*. This is because a central claim of this Article, which we develop later on, is that the key problem of militarization lays in its power to

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<sup>13</sup> For a classic statement see CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5-15 (2005).

<sup>14</sup> Kraska, *Enjoying Militarism*, *supra* note 6, at 417; Peter B. Kraska, *Militarizing Criminal Justice: Exploring the Possibilities*, 27 J. POL. & MIL. SOC. 205, 212 (1999) (hereinafter Kraska, *Militarizing Criminal Justice*). According to a comprehensive report by the ACLU, 79% of SWAT deployments are for serving warrants, an activity far removed from their original purpose of handling terrorism, hostages, and barricaded suspects. See AMERICAN CIVIL LIBERTIES UNION, *WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING* 5 (2014) <https://www.aclu.org/sites/default/files/assets/jus14-warcomeshome-report-webrell.pdf>.

<sup>15</sup> Norm Stamper, *Paramilitary Policing from Seattle to Occupy Wall Street*, *THE NATION* (November 9, 2011) available at <http://www.thenation.com/article/paramilitary-policing-seattle-occupy-wall-street/>.

exclude the policed community from the political collective. If this is true, then it becomes clear that when militarization is normalized, so is the exclusion.

In this regard, it is necessary to situate the process of normalizing militarization in the context of a wider phenomenon identified by leading theorists as one in which “states of exception,” or emergencies, are becoming the rule.<sup>16</sup> If, in the past, a clean-cut distinction between the exceptional and the normal was possible, nowadays it becomes muddled.<sup>17</sup> Terrorism, never-ending wars,<sup>18</sup> wide-ranging national emergency measures,<sup>19</sup> as well as ongoing refugee influx countered by extraordinary international reactions<sup>20</sup> are only some current aspects of this phenomenon. Indeed, normalization of exceptional measures is dangerous because as it proceeds, we lose sight of the fact that it existed as an exception to begin with: measures that were once extreme become the new normal. As the process moves on, new, even more extreme “exceptions” arise, and our standards become lower and lower.<sup>21</sup>

An underlying theme of our analysis is that police militarization squarely belongs within this general process, as a quintessential example of the exception being normalized. It is helpful to demonstrate this by focusing on militarization’s potential for extreme *physical* violence, as an ultimate manifestation of the state of exception. Indeed, when we normally think about police, we intuitively think about the maintenance of law and order. We usually do not think about police in terms of a capacity to kill. Giorgio Agamben famously connected between the increasing capacity (or decision) to kill and the erosion of the distinction between the normal and the exceptional, between those who are protected by the

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<sup>16</sup> For a leading account see AGAMBEN, *supra* note 5, at 8–12.

<sup>17</sup> See e.g. *Id.* at 9–12.

<sup>18</sup> See Samuel Moyn, *Civil Liberties and Endless War*, DISSENT (2015), <https://www.dissentmagazine.org/article/civil-liberties-and-endless-war>.

<sup>19</sup> See Bénédicte Jeannerod, Human Rights Watch Dispatches: France’s Renewed Emergency Law a Recipe for Abuse (Feb. 22, 2016), <https://www.hrw.org/news/2016/02/22/dispatches-frances-renewed-emergency-law-recipe-abuse>

<sup>20</sup> See S.C. Res 2240, U.N. Doc. S/RES/2240 (Oct. 9, 2015) (U.N. Security Council authorizing states to board, in international waters, migrant vessels suspected of people smuggling)

<sup>21</sup> See, e.g., Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L. J. 1023 (1999); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L. J. 1385 (1989); but see Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605 (2003).

legal order and those excluded from it. In his penetrating analysis, states of exception were once distinct points in which sovereignty moved from the regulation of law and politics into the regulation of mere physical existence, or “bare life.”<sup>22</sup> To Agamben, as the borders between the normal and exceptional become blurred, the regulation of bare life (and death) moves from the margins of the political realm to the fore.<sup>23</sup> In our context, while traditional police could be seen as instruments to regulate human behavior, normalizing militarization – by virtue of its capability to employ extreme deadly force – is an instance in which policing moves to regulate, at least in potential, bare life itself.<sup>24</sup> When police assumes this role, “exclusion and inclusion, outside and inside... enter a zone of irreducible indistinction.”<sup>25</sup> Further down the line – for reasons we develop later on – the distinction between democracy and totalitarianism also dissolves.<sup>26</sup>

## II. THE HISTORY OF POLICE ON THE CIVILIAN-MILITARY SPECTRUM

To understand where we are now, it is essential to trace how we got here. This Part presents a historical survey of the development of police, demonstrating that the tension between police and military as agents of state coercion underlined this process from its beginnings. Questions of inclusion, exclusion, and normalization constantly intermingled. This Part highlights these dilemmas while also presenting the current status of police militarization in the United States.

### *A. Roman and British Origins: The Police-Military Tension and the Police as a Force of Status Normalization*

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<sup>22</sup> Bare life as mere biological existence. AGAMBEN, *supra* note 5, at 11-12. Agamben writes against the backdrop of Carl Schmitt’s theory of sovereignty as power to decide upon the exception. To Agamben, this theory loses its practical pull once the exception becomes the norm, AGAMBEN, *id.* at 12. To Agamben, bare life was traditionally included in the political order only through the exception, meaning, through its exclusion. AGAMBEN, *id.* at 11.

<sup>23</sup> *Id.* at 9

<sup>24</sup> *Id.* at 174 (describing situations in which police become the temporary sovereign, in the sense that the decision to kill or not merely depends on “the civility and the ethical sense of the police.”)

<sup>25</sup> *Id.* at 9

<sup>26</sup> *Id.* at 10 (Noting an “inner solidarity between democracy and totalitarianism” in the form of increasing regulation of bare life).

To understand how militarization became normalized, we must go back to the roots of the modern police.<sup>27</sup> Specifically, we need to recount just how it came to be that the modern state exhibits two distinct organs of coercion – the police and the military. A simple response could be that armies are organs of coercion concerning the state’s external relations, while police act internally.<sup>28</sup> However, this geographical distinction does not capture the acute difference between these bodies in political theory. Crucially and perhaps counter to our intuition, modern police, at least in the Anglo-American world, were not forces carved out of the state’s military in order to preserve internal order; rather, police forces grew from within the citizenry, and a proper distinction between military and police was a constant worry. As we shall detail below, establishment of police forces was constantly accompanied by the fear that they will militarize. This fear did not only concern what these forces will *do*, but also what militarization signifies.

While it is hard to imagine a police-less state, the police as we know it today are a rather recent innovation, dating to the 18<sup>th</sup> and 19<sup>th</sup> centuries. Even the elaborate bureaucracy of the Roman Republic and then Empire did not possess an institutionalized police force.<sup>29</sup> However, this does not mean that policing was undertaken by the military. In ancient Rome crime prevention was generally left to the citizenry itself.<sup>30</sup> As we elaborate later on, even when Roman law provided for some rudimentary measures of centralized law enforcement, it drew a clear distinction between the type of weaponry permitted within the city’s “pacified sphere” and externally. A violation of these rules was viewed as tyrannical.<sup>31</sup>

The same tensions lingered on to modern times. A prominent case in point is the development of the British police, which is the

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<sup>27</sup> See generally, A TREATISE ON THE POLICE OF THE METROPOLIS, EXPLAINING THE VARIOUS CRIMES AND MISDEMEANORS WHICH AT PRESENT ARE FELT AS PREFFURE UPON THE COMMUNITY; AND SUGGESTING REMEDIES FOR THEIR PREVENTION (2<sup>nd</sup> ed., 1796); David Philips, ‘A New Engine of Power and Authority’: *The Institutionalization of Law-Enforcement in England 1780-1830*, in CRIME AND THE LAW: THE SOCIAL HISTORY OF CRIME IN WESTERN EUROPE SINCE 1500 155 (V.A.C. Gatrell, Bruce Lenman, Geoffrey Parker, eds., 1980), cited in WILFRIED NIPPEL, PUBLIC ORDER IN ANCIENT ROME 138 (1995).

<sup>28</sup> *Id.* at 1

<sup>29</sup> *Id.* at 2 but see CHRISTOPHER J. FUHRMANN, POLICING THE ROMAN EMPIRE (2014) (Challenging this common perception).

<sup>30</sup> NIPPEL, *supra* note 27, at 2. Maintenance of public order was privatized in the sense, for instance, that organized of public games were required to ensure proper conduct. *Id.* at 22.

<sup>31</sup> *Id.* at 15

origin of the American police. Indeed, the historiography of early police is contested between orthodox-liberal and revisionist-Marxist accounts.<sup>32</sup> The orthodox view puts a progressive gloss on the advent of a professional, bureaucratic and efficient form of state power. The revisionist view, however, which was developed mostly by Marxists starting in the 1970s, views the rise of the professional police as a response to capitalist demands and shifts in the social order brought about by the industrial revolution. Nonetheless, both share a common intuition concerning the possible excesses of centralized state power.

The orthodox view tells the tale of the police as a natural response to the pressure of rising urbanism, crime, and industrialization.<sup>33</sup> Indeed, the idea that domestic security could be borne by a non-professional state institution dedicated to that task persisted for many centuries. In Britain, up until the 19<sup>th</sup> century localities employed paid constables who answered to a magistrate, a justice of the peace.<sup>34</sup> In England and Wales, the police became compulsory in every county in 1856,<sup>35</sup> as a result of societal changes, namely the rise in crime, the advent of the industrial revolution, and the concomitant demand by industrialists for a police

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<sup>32</sup> The orthodox/revisionist distinction is from ROBERT REINER, *THE POLITICS OF THE POLICE* 39-66 (2010).

<sup>33</sup> *Id.* at 40. An important contemporaneous example for such thought is a 1796 treatise by British magistrate Patrick Colquhoun, urging the general reform of the criminal system, including by the formation of organized police. Colquhoun viewed the need for a centralized police force as going hand in hand with the massive growth of commerce and industry in London at the time, which accounted for a “vast aggregation of floating wealth” exposed to crime. *See* PATRICK COLQUHOUN, *A TREATISE ON THE POLICE OF THE METROPOLIS* vi (2<sup>ND</sup> ed., 1796). Indeed, the old policing system was comprised of constables who were viewed as “contemptible, dissolute, and drunken buffoons who shuffled along the darkened streets after sunset... calling out the time and the state of the weather, and thus warned the criminal of their approach.” THOMAS ALAN CRITCHLEY, *A HISTORY OF POLICE IN ENGLAND AND WALES* 30 (1978), cited by REINER, *supra* note 32, at 41.

<sup>34</sup> In an 1819 dissertation, the Reverend Robert Burns discusses the establishment of the police, noting that up until the eighteenth century the town was made secure by a town guard, accountable to the local magistrate, consisting of thirteen householders who chose their own captain, and only operating at night. ROBERT BURNS, *HISTORICAL DISSERTATIONS ON THE LAW AND PRACTICE OF GREAT BRITAIN, AND PARTICULARLY OF SCOTLAND, WITH REGARD TO THE POOR; ON THE MODES OF CHARITY; AND ON THE MEANS OF PROMOTING THE IMPROVEMENT OF THE PEOPLE* 188 (1819).

<sup>35</sup> The County and Borough Police Act 1856 (19 & 20 Vict c 69).

force able to quell unruly workers.<sup>36</sup> The old constable system was portrayed as an antiquated force, ill equipped to deal with these rapid societal transformations.<sup>37</sup>

Yet, it was clear that the police should be distinguished from the military. For instance, in his 1819 dissertation on the Scottish town of Paisley, Reverend Robert Burns noted that when an early force of special constables was established in Paisley, it did not gain legitimacy because “the parade, the dress, and the music of the military associations, threw [them] into the back ground.”<sup>38</sup> Only when it became clear that they can “command peace *without military execution*” they became accepted.<sup>39</sup> Indeed, Burns praised the Paisley police, that even though it encountered early opposition,<sup>40</sup> its conduct was “completely constitutional. There are no weapons of war brought into operation.”<sup>41</sup> We see, then, that already during the formative years of modern police, commentators gauged this new force in relation to its possible militarization.

The Police Act in 1829<sup>42</sup> put an end to the partially voluntary and loosely organized system of night watches and constables in Britain. In London, largely responsible for the transformation of the police was Home Secretary Sir Robert Peel.<sup>43</sup> Peel, it is important to note, was acutely aware of the police-military tension. He relied on his military experience in Ireland to create the new police, an organization he saw as something between a military and a civilian force.<sup>44</sup> It is therefore telling that it was Peel, a military man, who emphasized that police should be distinguished from the military, *inter alia* by uniforms that had a civilian appearance. The famous

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<sup>36</sup>See generally REINER, *supra* note 32.

<sup>37</sup> The growth of cities also resulted in more crime, as government-released statistics in 1810 indicated, though it remains unclear whether the spike was real, or instead was a result of easing prosecutions. Robert Peel, who would later establish the first metropolitan police, relied on these figures to support his cause of creating the first professional police force. REINER, *supra* note 32, at 41.

<sup>38</sup> BURNS, *supra* note 34, at 189–190.

<sup>39</sup> *Id.* at 190

<sup>40</sup> Burns conceded that the introduction of the police did not happen smoothly. At its commencement, he writes, there were “many violent struggles between the more irregular part of the community and the police officers.” *Id.* at 189.

<sup>41</sup> *Id.* at 190.

<sup>42</sup> Craig D. Uchida, *The Development of American Police: An Historical Overview*, in CRITICAL ISSUES IN POLICING: CONTEMPORARY READINGS 11 (Geoffrey P. Alpert, Roger G. Dunham, eds. 2015).

<sup>43</sup> Eric H. Monkkonen, *History of Urban Police*, 15 CRIME AND JUSTICE 547 (1992).

<sup>44</sup> *Id.* at 549.

British “bobbies” who were severely restricted in the weapons they carried were the result of a purposive move to distinguish them from armed soldiers.<sup>45</sup> The reason for this shift, as some suggest, was in the growing concept of citizenship. With the flourishing of civil and political rights came the notion that the state cannot exercise force against its citizens in the same manner that it exercises force against foreign non-citizens.<sup>46</sup>

However, the attempts by Peel and others to distinguish the police from the military did not alleviate the fear of those who thought that the newly created police would be too similar to the military.<sup>47</sup> The concerns stemmed from an aversion to standing armies and the political uses that could be made of such a force: the police could be exploited by the sovereign in a way similar to its use of the military. This was evidenced by calls to “Abolish the New Police.” An 1830 poster, for instance, warned that the new police are tantamount to a military, and that “the sword of justice placed in the hands of a military man,”<sup>48</sup> implying that there is an inherent problem when the pursuit of justice is undertaken by what is in fact a militarized force. Indeed, the ultimate challenge to police legitimacy was phrased in the argument that beneath the appearance and rhetoric, the new police was essentially an internal military force.<sup>49</sup>

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<sup>45</sup> P. A. J. Waddington, *Swatting Police Paramilitarism: A Comment on Kraska and Paulsen*, 9 POLICING AND SOCIETY 125, 132-133 (1999). In the U.S., police uniforms were designed not only to distinguish them from civilians, but also to distinguish them from military soldiers. Peter B. Kraska, *Questioning the Militarization of U.S. Police: Critical versus Advocacy Scholarship*, 9 POLICING AND SOCIETY 141, 152 (1999) [hereinafter Kraska, *Questioning Militarization*]. Though it might seem strange today, in the U.S., the introduction of uniforms was resisted for a long time by police officers, who believed that as Americans, they had the right to wear what they wanted. Indeed, until then the only people who wore uniforms were servants, and, crucially, soldiers. Uniforms, a sign of military service, were deemed degrading and violative of the freedom people have to wear what they wish to their place of employment. See Monkkonen, *supra* note 43, at 551.

<sup>46</sup> Waddington, *supra* note 45, at 132.

<sup>47</sup> For opposition to CALQUHOUN, see NIPPEL, *supra* note 27, at 1.

<sup>48</sup> THE NATIONAL ARCHIVES, CRIME AND PUNISHMENT: SIR ROBERT PEEL AND THE METROPOLITAN POLICE, <http://www.nationalarchives.gov.uk/education/candp/prevention/g08/g08cs2s3.htm>

<sup>49</sup> As one working class leader wrote, police were “really soldiers; it was no matter whether they were clothed in blue or red. [...] They were a set of blood-seeking vermin [...]. They must exercise their strength to put down this blue-bottle force, or this country will soon be like Venice, governed by a little band of tyrants. [...]

Nonetheless, the orthodox view, much in line with the Weberian conception of bureaucracy,<sup>50</sup> sought to alleviate these concerns by constructing the police as a bureaucratic organization of professionals, rationally administering a policy designed to deter crime and establish public order, thus helping all segments of British society.<sup>51</sup> Importantly, within this conception, the communal element of policing was central in countering the fear from militarization. For instance, early British police comprised a coordinated national network, but lacked the central direction that would be perceived as incompatible with traditional British liberties.<sup>52</sup> According to Reiner, this allowed the system to link itself to the traditional constabulary that was deemed to be operating with the approval of the people in order to create the impression that the new police was continuing the *communal* tradition of self-policing.<sup>53</sup> This emphasis on localism and community, too, runs directly counter to the central command that is a hallmark of militarized control. In sum, orthodox histories of police acknowledged the tension between police and military as agents of state coercion, and sought to alleviate them through physical distinctions and communal outlooks.

Naturally, revisionist views of police history are much more skeptical about the rise of police power. For revisionists, the police were founded as an instrument of the bourgeoisie against the proletariat. Revisionists emphasized the timing of the new police power, in conjunction with industrialization and urbanization, and thus within a particular capitalist framework.<sup>54</sup> Industrialization and urbanization generated more social fragmentation and segregation. True, poor areas were also sites of more crime, but that crime cannot be viewed in isolation from the social conditions in which it transpired. Industrialization thus brought about a rise in the urban poor, which were deemed a dangerous class by the capitalists who

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Was it not shameful [...] that they must be watched. [...] A man could not talk to his neighbor without one of these blue devils listening." Poor Man's Guardian, April 7, 1832, cited in Robert D. Storch, *The Plague of the Blue Locusts: Police Reform and Popular Resistance in Northern England 1840-1857*, 20 INT'L REV. SOC. HIST. 61, 66 n. 4 (1975).

<sup>50</sup> See generally MAX WEBER, *ECONOMY AND SOCIETY* (1978).

<sup>51</sup> Even though crime was thought to be emanating mostly from the poor. REINER, *supra* note 32, at 43-45.

<sup>52</sup> *Id.* at 43.

<sup>53</sup> *Id.* at 44.

<sup>54</sup> *Id.* at 48.



controlled the means of production.<sup>55</sup>

Thus it is no coincidence that demands to quell down workers came from factory owners and industrialists that wanted tighter disciplining of their workers. Stability is essential to capitalism, and cracks in the social order had to be addressed by state power. Thus, in a departure from centuries of practice, payment in kind became illegal and replaced with a cash economy. Work itself became more regimented in order to fit factory schedules. This resulted, as Reiner discusses, in the criminalization of behavior that was formerly legal and led to the redefinition of the role of the police officer: from a member of the community to an officer in charge of public propriety.<sup>56</sup>

To us, the revisionist outlook is helpful less in its general Marxist approach but more in its emphasis of the normalizing potential of police. Beyond the class outlook, an underlying argument of the revisionists is that the police possess the power to consolidate societal status and perceptions. To revisionists, the police was therefore a force to constitute and normalize a *status quo* generated by the new industrial economic structure.<sup>57</sup> This should be

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<sup>55</sup> Chiefly, the fear from the urban poor was manifested in the new urgency in quelling riots, which invigorated the establishment of police. The historian Eric Hobsbawm, for example, discussed the phenomenon of riots, which were one of the triggers for the new police. Riots were not a new thing in Britain, but prior to the twin development of industrialization and urbanization, were viewed much more favorably. Riots (and mobs) were actually an accepted practice through which politically disempowered groups “communicated grievances to the ruling elite”. ERIC HOBSBAWM, *PRIMITIVE REBELS* 116 (1959), cited in REINER, *supra* note 32, at 48. Along the same lines, E.P. Thompson argued, when discussing the food riots in eighteenth century England: “[i]t is possible to detect in almost every eighteenth-century crowd action some legitimizing notion... [T]he men and women in the crowd were informed by the belief that they were defending traditional rights or customs; and, in general, that they were supported by the wider consensus of the community. On occasion this popular consensus was endorsed by some measure of licence afforded by the authorities. More commonly, the consensus was so strong that it overrode motives of fear or deference.” E.P. Thompson, *The Moral Economy of the English Crowd in the Eighteenth Century*, 50 *PAST AND PRESENT* 76, 78 (1971). Only with the advent of industrial capitalism in the nineteenth century, the perception of riots underwent a transformation. Instead of an exercise of democratic rights, they came to be viewed as a threat to the social and political order, namely, the capitalist social order. See REINER, *supra* note 32, at 48.

<sup>56</sup> *Id.* at 48.

<sup>57</sup> To revisionists, the institutionalization of police was not meant to counter the “inefficiencies” of the previous loose network of law enforcement, but to neutralize police sympathies with their own communities, often comprised of working class people. This made police unreliable in the eyes of middle and upper

borne in mind, later on, when we consider the normalizing power of police militarization, and the societal distinctions it creates and reaffirms.

The status-normalizing potential of police permeated the early objections to the institutionalization of police. Surprisingly, this potential was recognized throughout the British class spectrum. For instance, part of the upper class opposed the police since they had privately financed security. They were concerned that the new police will erode the deference they had traditionally received by other groups in society, and thereby rearrange the societal status quo.<sup>58</sup> Upper class opposition to the police only dwindled when the working class demanded suffrage and other voting associated rights in a movement known as “Chartism,” after the 1832 Reform Act enfranchised only propertied men.<sup>59</sup> In other words, it was precisely when the upper class realized that at the end of the day, the status normalizing potential of police serves to benefit it, that its opposition ceased.<sup>60</sup> Thereafter, core opposition to the police thus remained with the working class.<sup>61</sup> The latter’s opposition, in turn, mirrored the upper class’ initial concerns regarding status normalization. This is because the new police’s main task was to police working-class districts, thus reinforcing and normalizing their inhabitant’s status.<sup>62</sup>

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class industrialists, who wanted them replaced with a new, more dependable, force. *Id.* at 7, 50.

<sup>58</sup> *Id.* at 51 (and sources cited there).

<sup>59</sup> See generally MARGOT C. FINN, AFTER CHARTISM: CLASS AND NATION IN ENGLISH RADICAL POLITICS 1848-1874 (2003).

<sup>60</sup> The orthodox view associated opposition to the police with criminals, but, as revisionists argued, resistance to the police came from working-class communities that were the target of police activity, referring to them as the ‘plague of the blue locusts’. Storch, *supra* note 49.

<sup>61</sup> As Robert Storch explains, by the 1830s and into the 1840s there was fear, even hysteria, among the propertied class, that the “dangerous classes” (read working class) would take over the social order through brute force. *Id.* Interestingly, neither the military nor constables were deemed to be adequate to deal with this threat. Only a strong police force securely lodged in working class neighborhoods could secure the property of every industrious member of society. *Id.* at 62.

As per the revisionist view, capitalism achieved the total control of the worker’s time while at work, but now the concern was with what happened after the worker left the factory gates and went to his or her working class enclave. Before the rise of capitalism, workers lived near their employers, but urban segregation meant that someone else had to take the role once occupied by the employer, strong social ties, and payment in kind, which was now replaced by an impersonal moral economy based on money. The police was to fill this role. REINER, *supra* note 32, at 47-51.

Historians writing after the revisionist turn have shown that neither the orthodox camp nor the revisionists were entirely in the right. The police were resisted, but for a variety of reasons. The working class did oppose the police, but it too came around to endorse it and rely on it for their own needs. The police also recruited officers from the working class, facilitating its acceptance. Subsequent opposition to the police, then, did not attack its legitimacy in principle, but focused on particular problems in its functioning.<sup>63</sup> Be that as it may, our point is slightly different. All along, the police was conceived with the military in mind. Resemblance to the military generated much of the resistance to the new police according to the orthodox view, while revisionists noted the potential of police as stratifying and normalizing the new industrial social structure. Both of these realizations solidify our analysis later on, which emphasizes the dual power of militarized police to simultaneously exclude and normalize.

### *B. The Creation of the Modern American Police and the Ghost of Foreign Domination*

The establishment of a professional and bureaucratized police force in the United States was accompanied by similar concerns. However, a salient feature of the American discourse was the interaction between these concerns and the collective memory of foreign domination. Indeed, the American discourse on police was shaped against the backdrop of the experience of British rule. Significantly, the American experience demonstrates that the fear of militarization, connected in American discourse with foreign rule, interrelates with notions of exclusion.

Like in Britain, the modern police was a relative newcomer on the scene of American criminal justice.<sup>64</sup> The police was not mentioned in the Constitution or in early city charters. To be sure, “policing” the citizenry by giving power to the government to maintain law and order was an accepted feature of American constitutional law and practice, but police as a specialized institution was not.<sup>65</sup>

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<sup>63</sup> REINER, *supra* note 32, at 55-66.

<sup>64</sup> See generally SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE (1997).

<sup>65</sup> See MARKUS DIRK DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT (2005); Christopher Tomlins, *The*

Although the establishment of police in the U.S. generally traces the process that took place in Britain, a special feature of the early American resistance to the police stemmed from the colonial fear of standing armies and quartering. Standing armies were banned in Britain in 1689 in the English Bill of Rights, but, unsurprisingly, the British veneration of rights was less pronounced in the colonies they controlled.<sup>66</sup> Indeed, the British deployed troops among the citizenry in colonial America, also in private establishments.<sup>67</sup> This practice accelerated the already present tensions between the colonies and the British, as the former saw them as a violation of their liberty and property rights.<sup>68</sup>

Dissatisfaction from quartering, of course, was the background for the Third Amendment, prohibiting the quartering of troops in peacetime, and requiring the approval of the legislature during wartime.<sup>69</sup> Subsequent congressional acts, most famously the Posse Comitatus Act of 1878,<sup>70</sup> placed further restraints on domestic law enforcement, prohibiting the use of the military except under the authorization of Constitution or the act of Congress. Read together with the Insurrection Act of 1807<sup>71</sup> and the series of Militia Acts, the President may use the army in domestic affairs only in times of

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*Supreme Sovereignty of the State: A Genealogy of Police in American Constitutional Law, from the Founding Era to Lochner*, in POLICE AND THE LIBERAL STATE 33 (Markus D. Dubber and Mariana Valverde, eds., 2008). Like their British counterparts, cities had local residents serve as night watchmen; courts had constables working for them, who received payment from private citizens for serving warrants and making arrests. Individuals who committed crimes were prosecuted by other private citizens. Monkkonen, *supra* note 43, at 549.

<sup>66</sup> RADLEY BALKO, RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES 13 (2014).

<sup>67</sup>Britain enacted the Quartering Act in 1765 ("An act [5 Geo. III, cap. 33] to amend and render more effectual, in his Majesty's dominions in America"), ordering that British troops be supplied with provisions by the colonists and housed in American public houses. A second Quartering Act, passed in 1774 (14 Geo. III, cap. 54), extended the accommodations to private establishments. See also Don R. Gerlach, *A Note on the Quartering Act of 1774*, 39 NEW ENG. QTLY 80 (1966).

<sup>68</sup>The "Boston Massacre" of 1770 can be attributed to the practice of standing armies, as the friction grew between Americans and the British soldiers, trained for warfare, who were forcibly living among them. See generally, RICHARD ARCHER, AS IF AN ENEMY'S COUNTRY: THE BRITISH OCCUPATION OF BOSTON AND THE ORIGINS OF REVOLUTION (2010).

<sup>69</sup> U.S. CONST. amend. III.

<sup>70</sup> 18 U.S.C. §1385.

<sup>71</sup> 10 U.S.C. §§331-335.

insurrection or invasion or similar internal crises.<sup>72</sup> That colonial practice shaped the Constitution and later provisions is unquestionable. Nonetheless, it is equally obvious that the experience of the American Revolution formed a principled objection to forces that are reminiscent of *foreign* forces, since these imply the creation of an internal enemy.

Beyond this special aspect in the history of American police, other concerns regarding potential militarization – quite similar to those in Britain – accompanied its development. Although the practice of quartering was resisted, growing dissatisfaction with the night watchmen and the court controlled constable system, coupled with the growth of the United States, ushered the modern police force, which, along the lines of the development in Britain, was dramatically different from the previous system.<sup>73</sup> Indeed, the central inspiration for the modern American police force came from the organization of the London Metropolitan Police in 1829. The American process took a bit longer, however. A centrally governed police force was established in New York in 1845. Initially it was unarmed and without uniforms,<sup>74</sup> becoming uniformed only in 1853.<sup>75</sup> The new police model, which began in cities like New York, Boston and Philadelphia, spread to most American cities between 1850 and 1880 and is the one in place until the present day.<sup>76</sup>

The staunch distinction between police and military was manifested in the very different functions of the police in its early days, which saw it acting in relation to issues far removed from state

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<sup>72</sup> See Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 YALE L. J. 149 (2004).

<sup>73</sup> See Monkkonen, *supra* note 43, at 549 –550. In general, there is no scholarly consensus on the exact reasons for the establishment of the modern American police. As in Britain, several factors are usually mentioned: rising crime, industrial strife between labor and capital, and tensions brought about by increased immigration. Riots in many cities in 1834, for example, generated greater intolerance on the part of industry and capital, which in turn led to a call for a centrally organized and professional police force, like its British counterpart. Some scholars point to the growth in size of American cities as the main reason a city chose to abandon its constable system and move to the professional conception of the police. *Id.* at 553. Like with regard to British police, Marxists contend that rapid capitalist industrialization and the resultant class struggle was the central force that gave rise to the modern police, in the service of capital against labor. See Sidney Harring, *The Development of the Police Institution in the United States*, 5 CRIM. AND SOC. JUST. 54 (1976).

<sup>74</sup> BALKO, *supra* note 66, at 30.

<sup>75</sup> Wilbur R. Miller, *Police Authority in London and New York City 1830-1870*, 8 J. SOC. HIST. 81 (1975).

<sup>76</sup> Uchida, *supra* note 42, at 17.

coercion. With their distinct uniforms and street presence, the police were to act as general servants of the city and of their communities, not only as crime fighters but also as “street-level” bureaucrats.<sup>77</sup> Alongside their role as preventing crime, the police performed a wide spectrum of functions, from shooting stray dogs to rudimentary welfare.<sup>78</sup>

This narrative, which we have just described above, pits the police as a force that developed in contradistinction to the military. However, the looming presence of militarization, and its attendant fears, was constant.<sup>79</sup> For instance, the police, even if informally, grew out of the military, a fact that police scholars tend to overlook.<sup>80</sup> As detailed below, former military soldiers and militia members often became police officers, bringing with them the culture, values, and techniques of the military.<sup>81</sup>

In sum, the American police developed in the shadow of British rule, which through its practice of quartering, cemented the idea of domestic militarized presence as a form of exclusion from the body politic. Nonetheless, although the common narrative emphasizes the counter-military nature of early American police, some measure of militarization could be found in the police from its beginnings. In the next section we describe how this process which intensified exponentially in recent decades.

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<sup>77</sup> See MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* (1980).

<sup>78</sup> Police engaged in returning lost children, inspecting factories, enforcing sanitation laws, shooting stray dogs, and even took national censuses. Monkkonen, *supra* note 43, at 554. Police also assumed the role of welfare agents, a task that was largely neglected by state and county governments, and wholly non-existent at the federal level until the twentieth century. Most of the welfare work consisted of housing “lodgers”, i.e. homeless persons, at the police station. By the late nineteenth and early twentieth century, such lodging facilities were dismantled and cleared the way both for “professional” welfare work separate from the police, Monkkonen, *id.* at 555.

<sup>79</sup> Peter B. Kraska & Louis J. Cubellis, *Militarizing Mayberry and Beyond: Making Sense of American Paramilitary Policing*, 14 *JUST. QTYL.* 607, 608 (1997).

<sup>80</sup> Kraska & Kappeler, *supra* note 10, at 2; Kraska, *Militarizing Criminal Justice*, *supra* note 14, at 206 (noting that criminologists have “neglected the deep influence the war/military paradigm has... on state crime control organization and activities”).

<sup>81</sup> See *infra* part C.

### C. *The Process of American Police Militarization*

#### 1. The Power of the “War” Discourse

Despite the early proximity between military and police, accelerated police militarization is a fairly recent phenomenon with its roots in the late 1960s, constantly intensifying since the Cold War drew to a close. As the key inter-state threat gradually disappeared – policymakers turned their sights on domestic problems such as crime and poverty, and, what would prove to be the key to police militarization – drugs.<sup>82</sup> No longer was there a drug “problem” or a crime “problem.” Those problems became the “war on drugs”, the “war on poverty”, and the “war on crime.”<sup>83</sup>

War, of course, is the quintessential military concept, packing almost mythical powers as the ultimate state of exception.<sup>84</sup> Indeed, giving problems the name of “war” conveys their seriousness, urgency, heft, and clout.<sup>85</sup> Once problems are reframed as “wars” hard-line policy initiatives could garner more support. When the term is used by the higher political echelons, it permeates street-level discourse as well. Indeed, one of the hallmarks of normalizing militarization is the infiltration of military language into

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<sup>82</sup> ETHAN A. NADELMANN, COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT 475 (1993) (“where once anti-communists represented the principal moral imperative of U.S. foreign policy, drug enforcement and other criminal justice objective have emerged as the new moral imperatives” (cited in Kraska, *Militarizing Criminal Justice*, *supra* note 14, at 206). Although anti-drug activity is not the exclusive domain of the police, this article focuses on the police for various reasons. First, most of the “War on Drugs” is performed by the police. Second, drug activity is but one aspect of police militarization, the phenomenon examined here. For a discussion on militarization of other law enforcement agencies, for example the Border Patrol, which is the enforcement arm of ICE, see Timothy J. Dunn, *Border Militarization Via Drug and Immigration Enforcement: Human Rights Implications*, 28 SOC. JUST. 7 (2001).

<sup>83</sup> See, e.g., William N. Elwood, *Declaring War on the Home Front: Metaphor, Presidents, and the War on Drugs*, 10 METAPHOR & SYMBOLIC ACTIVITY 93 (1995); Susan Stuart, *War as Metaphor and the Rule of Law in Crisis: The Lessons We Should Have Learned from the War on Drugs*, 36 S. ILL. U. L. J. 1 (2011).

<sup>84</sup> See GIORGIO AGAMBEN, STATE OF EXCEPTION 3 (2005) [hereinafter AGAMBEN, STATE OF EXCEPTION] (“war is the opposite of normal conditions”). This is precisely the intuition behind Cicero’s famous quote that *Silent enim leges inter arma*: war is excluded from the normal order as an exception.

<sup>85</sup> See *Generally* BALKO, *supra* note 66.

ordinary day-to-life.<sup>86</sup> Accordingly, sometimes police go as far as to describe city streets as a “war zone”, borrowing directly from military language.<sup>87</sup>

The rhetorical tool of “war” facilitated, indeed incentivized, police militarization. In terms of political discourse, it served to elevate certain categories of crime to existential national security threats, certain types of criminals to *enemies*, and thus certain types of situations to exceptional. However, since these exceptional situations are not well defined in time or space, they are perpetuated and therefore normalized.<sup>88</sup>

In the context of the “war against terror,” for instance, the war-discourse serves to justify continuous and global forcible action against ambiguous terrorist networks,<sup>89</sup> which – since it implies a general erosion of boundaries – affects the way states approach external *and* internal threats.<sup>90</sup> Police militarization should therefore be viewed as part of a global process in which war becomes closer to law enforcement,<sup>91</sup> and law enforcement becomes closer to war,

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<sup>86</sup> See STEPHEN GRAHAM, *CITIES UNDER SIEGE: THE NEW MILITARY URBANISM* xiii-xiv (2011) (“Fundamental to the new military urbanism is the paradigmatic shift that renders cities’ communal and private spaces, as well as their infrastructure - along with their civilian populations - a source of targets and threats. This is manifest in the widespread use of war as the dominant metaphor in describing the perpetual and boundless condition of urban societies ... . This development incorporates the stealthy militarization of a wide range of policy debates, urban landscapes, and circuits of urban infrastructure, as well as whole realms of popular and urban culture ... Together, once again, these work to bring essentially military ideas of the prosecution of, and preparation for, war into the heart of ordinary, day- to- day city life.”).

<sup>87</sup> *Id.* describing a statement by the Fresno Police Department in a policing magazine.

<sup>88</sup> See RAMSAY, *supra* note 5, at 213; Rens Van Munster, *The War on Terrorism: When the Exception Becomes the Rule*, 17 INT’L J. FOR THE SEMIOTICS OF L. 141 (2004).

<sup>89</sup> See Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in The Age of Terror*, 153 U. PENN. L. REV. 675, 715–729 (2004).

<sup>90</sup> See, e.g., Human Rights Watch, *France: New Emergency Powers Threaten Rights* (Nov. 24, 2015), <https://www.hrw.org/news/2015/11/24/france-new-emergency-powers-threaten-rights>; cf. Matthew Waxman, *Police and National Security: American Local Law Enforcement and Counter-Terrorism after 9/11*, 3 J. NAT’L SEC. L. & POL. 377 (2009).

<sup>91</sup> War becomes closer to law enforcement through the process of “individualization” of warfare, namely reflected in targeted killings, and the move from status-based to function-based targeting. See e.g., Gabriella Blum, *The Individualization of War: From War to Policing in the Regulation of Armed Conflicts*, in *LAW AND WAR* 48 (Austin Sarat et al. eds., 2014); Cf. Samuel Moyn,



creating a significant overlap between the two.

Importantly, once a certain situation is described as “war” – and therefore exceptional – the executive’s margin of discretion is widened.<sup>92</sup> This elevation of threat could partially account for the erosion of judicial review of militarized police action. Judicial oversight in this context became minimal, with many claiming that the “war” rhetoric helped erode constitutional protections guaranteed by the Fourth, Sixth, Eighth, and Fourteenth Amendments.<sup>93</sup>

As this Section shows, the militarization of American police is part and parcel of the embrace of the “war” discourse. From the “war on drugs” to the “war on terror” police militarization has been normalized.

## 2. The War on Drugs and the Shift from Exceptional to Normalizing Militarization

There was a time when there was crime without a war on crime; a drug problem without a war on drugs. The war metaphor came about in the wake of World War II when leaders sought to rally public support for solving social problems. The “war on crime” was coined by President Johnson in 1966, whereas the “war on drugs” was declared in a press conference in 1971 by President Nixon.<sup>94</sup> President Reagan took it to another level, declaring drugs

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*Towards a History of Clean and Endless War*, JUST SECURITY (Oct. 9, 2015, 9:45 AM), <https://www.justsecurity.org/26697/sanitizing-war-endlessness/>.

<sup>92</sup> See, e.g., Liam Barber, *Korematsu’s Ghost: A Post-September 11<sup>th</sup> Analysis of Race and National Security*, 47 VILL. L. REV. 451, 467-68 (2002). On the enhanced power of the executive in “exceptional” emergencies see CARL SCHMITT, LEGALITY AND LEGITIMACY 32 (2004) (Schmitt contends that during emergencies the executive enjoys a threefold power premium: in defining emergency and necessary measures; in a presumption of the legality of its measures; and in its ability to act quickly, before judicial review can be effective). See also AGAMBEN, STATE OF EXCEPTION, *supra* note 84, at 21 (noting the relation between the war discourse and executive power in the United States).

<sup>93</sup> See, e.g., David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEG. F. 237, 240 (1994) (“The Court’s decisions on Fourth Amendment issues have been sharply one-sided. The Court has deferred to virtually every police and prosecutorial demand to limit Fourth Amendment rights and to eliminate or ease judicial oversight of searches, seizures, and arrests. The net effect of these cases is to withdraw from Fourth Amendment coverage a broad range of police activity ... .”); Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389 (1993); Steven Wisotsky, *Crackdown: The Emerging “Drug Exception” to the Bill of Rights*, 38 HASTINGS L. J. 889 (1987).

<sup>94</sup> Kraska, *Militarizing Criminal Justice*, *supra* note 14, at 209.

to be a national security threat, a sentiment echoed by Presidents Bush and Clinton.<sup>95</sup> Prior to the war on drugs, police had paramilitary units at their disposal, but those were limited to exceptional situations of hostages and barricaded suspects.<sup>96</sup> Those, of course, were rare.

The war on drugs changed all that.<sup>97</sup> It not only prioritized drug offences, but led to a proliferation in police paramilitary units – namely SWAT units – and a change in their character. SWAT (which stands for Special Weapons and Tactics) teams are a relatively new creation. First established in Philadelphia in 1964, they spread as a result of the Watts Riots in 1965 and were perfected by would be LAPD chief, Daryl Gates. Whether in response to the police’s inadequate performance during the riots – or as a product of racially charged moral panic –<sup>98</sup> Gates became convinced that the police must familiarize itself with Guerilla warfare, so he asked the military, the Marines in particular, for help, and they obliged.<sup>99</sup> The connection between SWAT and the military was tight from the beginning. Not only were SWAT teams trained by the military, they adopted military behavior and norms. Even the name SWAT had, at first, a military orientation. Initially, Gates wanted SWAT to stand for “Special Weapons Attack Teams”. The idea was rebuffed by his supervisor, precisely because of the military connotation, so the acronym stayed and the meaning changed. Police do not attack, they respond. They are not meant to use preventive violence. Thus the word “attack” was replaced with “and tactics”.<sup>100</sup>

In line with the “war” discourse, SWAT teams were established in most American cities.<sup>101</sup> Importantly, proliferation of

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<sup>95</sup> *Id.*, at 210.

<sup>96</sup> Kraska, *Enjoying Militarism*, *supra* note 6, at 414.

<sup>97</sup> Jimmy J. Williams and David Westall, *SWAT and non-SWAT Police Officers and the Use of Force*, 31 J. CRIM. JUSTICE 469 (2003).

<sup>98</sup> It is striking in this context that the neighborhood of Watts, which ushered the militarization of police in the U.S., was also found to be the epicenter of “spatial fear” in Los Angeles, a fear enhanced by media representations. See Sorin Adam Matei & Sandra Ball-Rokeach, *Watts, the 1956 Los Angeles Riots, and The Communicative Construction of the Fear Epicenter of Los Angeles*, 72 COMMUNICATION MONOGRAPHS 301 (2005).

<sup>99</sup> BALKO, *supra* note 66, at 53, 60.

<sup>100</sup> *Id.* at 62 (citing Gates’s autobiography DARYL F. GATES WITH DIANE K. SHAH, CHIEF: MY LIFE IN THE LAPD 131 (1993)).

<sup>101</sup> By 2008, over 90% of American cities with a population over 50,000 had SWAT teams. 75% of cities under 50,000 people had SWAT teams. See John Paul and Michael A. Birzer, M, *The Militarization of the American Police Force: A Critical Assessment*, 1 CRIT. ISSUES IN JUST. AND POL. 15, 18 (2008). A

militarization was also a product of various material incentives. Federal funds incentivized police to purchase military hardware, whether to establish SWAT teams or to expand existing ones. Federal funds also skewed police incentives, leading them to focus on drug offenses at the expense of other crimes. For example, the Comprehensive Crime Act of 1984<sup>102</sup> allowed the police to keep the proceeds of assets forfeited as a result of drug enforcement activities, thus generating additional revenue.<sup>103</sup> The money obtained through this activity often went toward the expansion and armament of paramilitary units.<sup>104</sup> Significantly, the Military Cooperation with Law Enforcement Act of 1981,<sup>105</sup> allowed the military a foothold in domestic affairs in the war on drugs, by authorizing it to offer the police equipment, information, research facilities, and access to military bases, all free of charge; it could furthermore assist the police in preventing drugs from entering the country.<sup>106</sup>

Indeed, once a unit is in place, it will be used. Initially, SWAT teams were limited to what we have described as exceptional militarization – meaning, the occasional hostage situation, barricaded suspect, or the rare act of terrorism. Over time, however, SWAT teams have expanded their scope of activity. Now, whenever

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comprehensive survey of 548 police agencies in 1996 discovered that 89.4% had a police paramilitary unit, and 20% of those that did not have one were thinking or planning on creating one. The police agencies surveyed all served communities of more than 50,000 people. Kraska & Kappeler, *supra* note 10, at 5. It should be noted, however, that similar trends exist in police agencies in smaller localities. See Kraska & Cubellis, *supra* note 79.

<sup>102</sup> Pub.L. 98-473, S. 1762, 98 Stat. 1976 (1984).

<sup>103</sup> Bruce L. Benson, David W. Rasmussen and David L. Sollars, *Police Bureaucracies, Their Incentives, and the War on Drugs*, 83 PUBLIC CHOICE 21 (1995).

<sup>104</sup> BALKO, *supra* note 66, at 154, 244, 249.

<sup>105</sup> 10 U.S.C §§371-374.

<sup>106</sup> As is readily apparent, by attaching the word “drugs” which are often related to criminal activity more generally, the military can influence much, if not all, police activity, even if only loosely related, or not related at all, to drug activity. For example, the federal government relied on the drug exception in the Posse Comitatus Act to procure military support for the BATF’s raid of the Branch Davidian complex in Waco, Texas, despite any evidence of drugs against the group. Interestingly, the military initially refused to intervene precisely because of an absence of a drug connection, unless the government was willing to pay. Only then did the BATF tell the military that David Koresh was running a methamphetamine lab, which was a guise. David B. Kopel & Paul M. Blackman, *Can Soldiers Be Peace Officers? The Waco Disaster and the Militarization of American Law Enforcement*, 30 AKRON L. REV. 619, 624-625 (1997).

there is “high risk” police activity, a term which itself has been expanded, these units are summoned.<sup>107</sup> Since the mid-1980s militarized units have been therefore used in a wide spectrum of *normalizing* day to day police activity. Most SWAT “call outs,” in this period, had nothing to do with terrorism or hostages, but rather with serving warrants or drug raids, which were redefined as high risk activities.<sup>108</sup> Indeed, As Peter Kraska observed, twenty percent of paramilitary units were used for routine patrol work.<sup>109</sup> As a 2014 ACLU report states, seventy nine percent of police paramilitary activity is now devoted to serving warrants, one of the more routine types of police deployment.<sup>110</sup> The availability of military hardware led Police to use helicopters, camouflage, and battering rams, even when the suspicion amounted to little more than the growing of marijuana.<sup>111</sup> For example, in order to search for marijuana in California, the federal government sent U-2 spy planes, after which it sent helicopters.<sup>112</sup> Two recent appellate decisions have criticized police departments that used SWAT teams even for regulatory inspections of barbershops and nightclubs.<sup>113</sup> The legacy of the war

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<sup>107</sup>Kraska & Kappeler, *supra* note 10, at 4.

<sup>108</sup> Since the 1980’s the rate of SWAT “call-out”, i.e. the number of times they were dispatched, grew dramatically. The numbers grew from an average of 13 call outs in 1983, per agency, to 59 call outs in 1995. When researchers looked at agencies that had paramilitary units prior to 1980 and who also submitted full data, the number of call outs rose to a whopping 83 in 1995. In small town police agencies, where one would expect fewer paramilitary units, the trend was much the same. In a similar survey of small town police agencies, the survey yielded 2,284 deployments in 1980, which walloped to 29,962 deployments in 1995, an increase of 939 percent. Kraska & Cubellis, *supra* note 79, at 620. See also Kraska, *Enjoying Militarism*, *supra* note 6, at 417; Kraska, *Militarizing Criminal Justice*, *supra* note 14, at 212.

<sup>109</sup> Kraska & Kappeler, *supra* note 10, at 9.

<sup>110</sup> See AMERICAN CIVIL LIBERTIES UNION, *supra* note 14, at 5. Although data isn’t available for every state, evidence suggests that many such deployments are for serving warrants for nonviolent crimes. Cadman Robb Kiker III, *From Mayberry to Ferguson: The Militarization of American Policing Equipment, Culture, and Mission*, 71 WASH. & LEE. L. REV. ONLINE 282, 288 (2015) (describing the situation in Maryland where 60% of the warrants administered by SWAT teams were for nonviolent crimes).

<sup>111</sup> BALKO, *supra* note 66, at 136.

<sup>112</sup> Explaining the rationale behind using helicopters against U.S. citizens in California, a DEA official in charge of the operation stated that “[t]he helicopters have provided us with a sense of superiority that has in fact established a paranoia in the growers’ minds... When you come in with a helicopter there’s no way they’re going to stop and fight; by and large they head for the hills.” BALKO, *supra* note 66, at 148.

<sup>113</sup> *Berry v. Leslie*, No. 13-14092 (11th Cir. 2014); *Club Retro, LLC. v. Hilton*,

on drugs can thus be phrased as a key moment in which the shift from exceptional to normalizing police gained ground.

### 3. Normalizing Militarization and Physical Transformation: Personnel and Equipment

The proliferation of militarization was accompanied and enhanced by the increasing interaction between police and the military in training, personnel and equipment. Military training and the increasing number of ex-military personnel in the ranks of the police augments the process of normalizing militarization, while the acquisition and deployment of military hardware affects the symbolic representation of policing.

A useful point of departure is, again, the establishment of SWAT in Los Angeles. As aforementioned, the initial SWAT was the result of cooperation with the marines, and was inspired by guerrilla warfare in the Vietnam War.<sup>114</sup> Soon thereafter, elite military units such as SEALs and rangers began to train police officers throughout the country.<sup>115</sup> This training normalizes militarization not only directly through SWAT units, but also indirectly because “ordinary” police units are trained by their SWAT colleagues.<sup>116</sup>

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568 F.3d 181, 214 (5th Cir. 2009).

<sup>114</sup> Karan R. Singh, *Treading the Thin Blue Line: Military Special-Operations Trained Police SWAT Teams and the Constitution*, 9 WM. & MARY BILL OF RIGHTS J. 673, 676 (2001). Prior to setting up SWAT, when he was in charge of the Metro division, Gates already began to think of police in militaristic terms. He organized Metro into units of ten officers, each headed by a sergeant. As Gates himself explained in his autobiography, some in the LAPD upper echelons frowned upon his embrace of military structure. The common reaction, Gates recounts, was that “the LAPD is supposed to be a civil police force .... [t]heir job is to *relate* to the community, not put on combat boots and helmets and *assault* the community.” *Id.* at 677, citing GATES & SHAH, *supra* note 100, at 116.

<sup>115</sup> Kraska, *Enjoying Militarism*, *supra* note 6, at 420. In one survey, Kraska found that 43% of SWAT teams polls reported receiving training from active duty military special operations unit; Singh, *id.* at 687, n. 105.

<sup>116</sup> Kraska found that 63% of police paramilitary units train other police agencies, indicating that military style tactics are permeating ordinary police units. Kraska & Kappeler, *supra* note 10, at 11. This training in effect circumvent the limits prescribed by the Posse Comitatus Act, which prohibits the military from engaging in domestic law enforcement, unless authorized by the constitution or an act of congress. 18 U.S.C. §1385 (1994) (“Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.”). Yet while the he Act prohibits the direct use of military

Not only does the military train the police, many veterans have joined the police after their discharge. Although this might have happened anyway, the federal government encourages veterans to do so. The Community Oriented Policing Services (COPS) in the Department of Justice, a program “advancing the practice of community policing,”<sup>117</sup> allocates millions of dollars every year (\$14 billion since 1994) in grants that are used to defray the costs of police officers.<sup>118</sup> In 2012, the program restricted the hiring of non-military personnel. The restriction was repealed a year later, but it indicates an underlying sentiment that the police can benefit from a military mindset by having veterans serve among its ranks, thus infusing the police with a military culture.<sup>119</sup> “Community policing,” for which veterans are hired by the police, is a vague term.<sup>120</sup> It is perhaps unsurprising that ultimately, much of the COPS money went into establishing SWAT teams.<sup>121</sup> Sustaining militarization

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personnel and equipment, but does not prohibit their *indirect* assistance. The Posse Comitatus Act was watered down further in 1981 with the aforementioned Military Cooperation with Law Enforcement Act of 1981, which expressly allowed indirect military involvement in the context of the war on drugs. *See* 10 U.S.C §§371-374. Beyond supplying the hardware, and allowing for military assistance, the Act authorized the military to train the police on how to use the equipment it made available. For details, see Singh, *supra* note \_\_\_, at 689.

<sup>117</sup>U.S. DEPARTMENT OF JUSTICE, COMMUNITY ORIENTED POLICING SERVICES, <http://www.cops.usdoj.gov/about>. To be sure, there is a tension between community policing and the approach undergirding the military. The military, one could think, is not about instilling community values, as militaries are ordinarily deployed in hostile areas that are not part of the community from which they hail.

<sup>118</sup>*Id.*

<sup>119</sup>Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N. Y. U. L. REV. 870, 928 (2015). Since 2012, the program privileges veterans and the law enforcement agencies that seek to hire them. According to COPS, “Military veterans have demonstrated a strong work ethic, and the ability to work in teams and in challenging situations. These skills make many veterans ideal candidates for police work.” <http://www.cops.usdoj.gov/Default.asp?Item=2630>. During the Clinton Administration, Congress passed “Troops to cops” legislation, which gave police departments up to \$25,000 for every ex military soldier they hired. The program is no longer in operation. *See* U.S. DEPARTMENT OF JUSTICE, COMMUNITY ORIENTED POLICING SERVICES, TROOPS TO COPS <http://www.cops.usdoj.gov/default.asp?Item=76>

<sup>120</sup>*See generally* STEVE HERBERT, CITIZENS, COPS, AND POWER: RECOGNIZING THE LIMITS OF COMMUNITY (2006).

<sup>121</sup>In Wisconsin, for example, more than half of the state's SWAT teams were created since COPS began, and many of those teams had sprung up in small towns, some of which with under 10,000 residents, where military style policing was probably unneeded. BALKO, *supra* note 66, at 221.

through ex-military personnel, and military training that eventually permeates to “ordinary” police units has a strong, systemic, normalizing function.

Normalizing militarization led to the physical transformation of police forces throughout the country. As aforementioned, after the Cold War, the military began selling (or donating) weaponry, surplus, and technology to the police, for example armored personnel carriers, M16s rifles, and night vision technology.<sup>122</sup>

The requirement to pay the military usually discouraged police departments from spending exorbitant sums on equipment they probably did not need.<sup>123</sup> However, two federal programs operated by the DOD, program 1122<sup>124</sup> and program 1033,<sup>125</sup> make such acquisitions easier. Program 1122 allows local law enforcement agencies to purchase military equipment at subsidized rates. The program often serves to purchase weapons and surveillance equipment. Program 1033 is the more ambitious of the two. Passed by Congress in 1997 and named after the code section in which it was enacted, it is a program run by the U.S. Defense Logistics Agency Disposition Services.<sup>126</sup> The program allows for surplus weapons and gear to be transferred to local law enforcement agencies, free of charge. Although this made things easier for the police, the maintenance costs still made the transaction cost for some agencies prohibitive.

Still, in its first three years Program 1033 handled 3.4 million orders for military gear from 11,000 police agencies. In 2005 the number of police agencies participating in the program climbed to 17,000.<sup>127</sup> Since its inception the program has disbursed \$5.4 billion worth of military equipment. As the United States began to withdraw from Iraq and Afghanistan, transfers to local police

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<sup>122</sup> Kraska, *Questioning Militarization*, *supra* note \_\_\_\_, at 143.

<sup>123</sup> Kopel and Blackman, *supra* note 106, at 624.

<sup>124</sup> S. 1122 of the National Defense Authorization Act of 1994 (P.L. 103-160).

<sup>125</sup> S. 1033 of the National Defense Authorization Act of 1997 (P.L. 104-201).

<sup>126</sup> The precursor to Program 1033 was Program 1028. Derived from section 1208 of the National Defense Authorization Act of 1990, Program 1028 also transferred equipment to federal and state agencies, but it focused on equipment needed in the “war on drugs”. Program 1033 expanded the transfer of equipment to all police activities. However, Program 1033 still privileges requests related to anti-drug counter-terrorism activities. See Taylor Wofford, *How America’s Police Became an Army: The 1033 Program*, NEWSWEEK (August 13, 2014) available at <http://europe.newsweek.com/how-americas-police-became-army-1033-program-264537?rm=eu>.

<sup>127</sup> BALKO, *supra* note 66, at 210

increased significantly.<sup>128</sup> In 2014 alone, local law enforcement agencies have received \$980 million worth of military equipment.<sup>129</sup> Importantly, most of the applications come from small and medium sized police agencies, which are not as well funded as larger agencies, which presumably already possess such equipment.<sup>130</sup>

The possibility of free military equipment created an arms race, so to speak, among police agencies. Small agencies saw that larger agencies are arming themselves and did not want to be left behind. Thus the explosion in paramilitary teams in small departments is not necessarily attributable to a rise in narcotics or terrorism activity, but was simply the result of wanting to be on par with other agencies in the vicinity.<sup>131</sup> The massive availability of military equipment led to a change in the physical appearance of police, which necessarily leads to a *symbolic* change: from a policing force involved in law enforcement to a militarized force standing ready for the possibility of combat.

#### 4. The “War on Terror” and Crowd Control as the Epitome of Normalization

The terrorist attacks on September 11, 2001, brought both continuity and change. Continuity, because in many ways militarization increased, and, in certain respects, became more normalized. Change, because in recent years there is also a realization, at least among some, that there is something deeply troubling about this process.

As was discussed above, police militarization was tied to the

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<sup>128</sup> Five percent of this equipment is weapons, including assault rifles, machine guns, ammunition, armored personnel carriers, tanks, drones, bayonets, helicopters, flash bang grenades, grenade launchers, bulletproof helmets and night vision goggles. See Geoffrey Coleman Wickes, Demystifying “Militarization”: A Partial Analysis of the Impact of the U.S. Department of Defense’s “1033” Equipment Transfer Program on Police Office Safety Outcomes 11-12 (2015) (unpublished Master’s Thesis, Georgetown University) available at [https://repository.library.georgetown.edu/bitstream/handle/10822/760998/Wickes\\_georgetown\\_0076M\\_12930.pdf?sequence=1](https://repository.library.georgetown.edu/bitstream/handle/10822/760998/Wickes_georgetown_0076M_12930.pdf?sequence=1)

<sup>129</sup> See DEFENSE LOGISTICS AGENCY, LAW ENFORCEMENT SUPPORT OFFICE, <http://www.dispositionservices.dla.mil/leso/pages/default.aspx>.

<sup>130</sup> See Paulina Firozi, *Police forces pick up surplus military supplies*, USA TODAY (June 17, 2014), <http://www.usatoday.com/story/news/nation/2014/06/15/local-law-enforcement-agencies-surplus-military-equipment/10286485/>.

<sup>131</sup> BALKO, *supra* note 66, at 210.



“war on drugs” and then permeated many other aspects of policing. This process intensified after 9/11.<sup>132</sup> Militarization could no longer be contained, so it expanded. As part of the “Global War on Terror” virtually every law enforcement agency was enlisted in the war effort. The establishment of the Department of Homeland Security (DHS) was one major consequence of the terrorist attacks. The DHS, with its \$61 billion budget for the fiscal year 2015,<sup>133</sup> spends much of that money in the form of grants to local law enforcement agencies that in turn serve to procure military equipment.<sup>134</sup>

DHS grants dwarf other funding programs. Through various federal programs, billions of dollars are transferred from the federal government to the local police level, mostly by the DHS.<sup>135</sup> Between 2001 and 2011 the DHS gave \$34 billion in anti-terror grants, many of which went to unlikely places such as Fargo, North Dakota or Canyon County, Idaho, undoubtedly prime terrorist targets.<sup>136</sup> Many of these places, unsurprisingly, chose to buy military equipment.<sup>137</sup> It did not take long for militarized police, ostensibly meant to counter grave security threats, to pop up in a quintessential democratic setting: political demonstrations. Those were now subject to militarized crowd control, perhaps the epitome of normalizing militarization.

Even before 9/11, militarized police, together with the National Guard, were sent to quell the demonstrations in Seattle surrounding the 1999 WTO ministerial conference as part of the anti-globalization campaign, sparking what became infamously known as the “Battle in Seattle.”<sup>138</sup> The police changed to full riot

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<sup>132</sup> Kiker, *supra* note 110, at 287

<sup>133</sup> U.S. DEPARTMENT OF HOMELAND SECURITY, BUDGET-IN-BRIEF, FISCAL YEAR 2015 3 (2015), <http://www.dhs.gov/sites/default/files/publications/FY15BIB.pdf>

<sup>134</sup> Kiker, *supra* note 110, at 288.

<sup>135</sup> To be sure, not all of the money goes toward police militarization. Some of it goes toward hiring personnel and improving interstate coordination, among other things. See Harmon, *supra* note 119, at 884-885.

<sup>136</sup> BALKO, *supra* note 66, at 254.

<sup>137</sup> For example, the small town of Keene, New Hampshire, chose to buy a Bearcat vehicle, which is an armored personnel carrier used by the military. Some residents resisted. One resident told investigative journalist Radley Balko that “the police are already brutal. The last thing they need is this big piece of military equipment to make them think they’re soldiers.” The city went ahead anyway. *Id.* at 254.

<sup>138</sup> The “Battle in Seattle,” a military term, has become the accepted name to describe the events during the WTO conference. A movie called “Battle in Seattle” was released in 2007 (BATTLE IN SEATTLE (Redwood Palm Pictures 2007)), and the former Seattle police chief has referred to it in this militaristic

gear with helmets, arming themselves with pepper and tear gas and stun grenades, and even rubber bullets.<sup>139</sup> An internal investigation by Seattle police commended its performance, referring, *inter alia*, to police officers as operating on the “front line.”<sup>140</sup> Others, however, thought differently. Norm Stamper, the Seattle Chief of police, resigned over the handling of the demonstrations, referring to his performance as “disastrous.”<sup>141</sup>

Smaller scale demonstrations happened in the 2009 Pittsburgh G-20 summit. In Pittsburgh, like Seattle, police used tear gas (even firing them into dorm rooms), sound canons, bean bags and rubber bullets.<sup>142</sup> Moreover, police in Pittsburgh wore military greens with camouflage pants, and combat boots. This is hardly the gear required for urban settings, where camouflage uniforms stand out more than conceal.<sup>143</sup> This gives rise to the suspicion that such gear is meant to signify, rather than to serve an operational function.

All in all, when facing large events with the possibility of protests, militarized police became the norm.<sup>144</sup> To us, most

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terms. See Former Seattle Police Chief Norm Stamper on Paramilitary Policing From WTO to Occupy Wall Street, Democracy Now! (NOVEMBER 17, 2011), [http://www.democracynow.org/2011/11/17/paramilitary\\_policing\\_of\\_occupy\\_wall\\_street](http://www.democracynow.org/2011/11/17/paramilitary_policing_of_occupy_wall_street). Besides the police, the mayor also declared a state of Emergency. See SEATTLE MUNICIPAL ARCHIVES, <http://www.seattle.gov/cityarchives/exhibits-and-education/digital-document-libraries/world-trade-organization-protests-in-seattle>.

<sup>139</sup> Patrick F. Gillham, *Complexity & Irony in Policing and Protesting: The World Trade Organization in Seattle*, 27 SOC. JUST. 212 (2000).

<sup>140</sup>The investigation found that overall “the Seattle Police Department and its allied agency (mutual aid) partners performed commendably during the WTO Conference. The professionalism and restraint displayed by the police officers... was nothing short of outstanding.” The Seattle Police Department After Action Report: World Trade Organization Ministerial Conference, Seattle, Washington, November 29-December 3, 1999 3 (April 4, 2000), available at [http://www.seattle.gov/police/publications/wto/wto\\_aar.pdf](http://www.seattle.gov/police/publications/wto/wto_aar.pdf).

<sup>141</sup> Stamper, *supra* note 15. During the course of the protests Seattle Police arrested around 200 protestors, arrests which were later found to have violated the protestors’ Fourth Amendment rights because they were made without probable cause. See *Jury says Seattle violated rights of WTO protesters*, SEATTLE TIMES, January 31, 2007 available at <http://www.seattletimes.com/seattle-news/jury-says-seattle-violated-rights-of-wto-protesters/>.

<sup>142</sup> BALKO, *supra* note 66, at 294.

<sup>143</sup> *Id.* at 293.

<sup>144</sup> For example, this is how journalist Glenn Greenwald described the 2008 GOP Convention in St. Paul: “St. Paul was the most militarized I have ever seen an American city be, even more so than Manhattan in the week of 9/11 — with troops of federal, state and local law enforcement agents marching around with riot gear, machine guns, and tear gas cannisters, shouting military chants and marching in military formations. Humvees and law enforcement officers with

important is that the appearance of militarized police for crowd control signifies the epitome of normalizing militarization. Originally conceived to operate in states of exception, militarized forces now appear in the most fundamental of democratic activities. Indeed, the general scope of militarization of police described above made it practically inevitable.

#### 5. The Occupy-Ferguson Backlash and the Dallas Reaction

The public outcry following the heavily militarized police reaction to the 2011 Occupy protests and the 2014 Ferguson demonstrations provoked the official acknowledgement of the problems of unchecked militarization. However, as we argue below, the preliminary steps taken are unlikely to adequately address the problem.

Militarized police were on full display during the Occupy movement. Reflecting on police militarization during Occupy Wall Street, former Seattle Chief Stamper wrote:

[T]he police response to the Occupy movement, most disturbingly visible in Oakland—where scenes resembled a war zone... brings into sharp relief the acute and chronic problems of American law enforcement. Seattle might have served as a cautionary tale, but instead, US police forces have become increasingly militarized, and it's showing in cities everywhere: the NYPD "white shirt" coating innocent people with pepper spray, the arrests of two student journalists at Occupy Atlanta, the declaration of public property as off-limits and the arrests of protesters for "trespassing." The paramilitary bureaucracy and the culture it engenders... Such agencies inevitably view protesters as the enemy. And young people, poor people and people of color will forever

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rifles were posted on various buildings and balconies. Numerous protesters and observers were tear gassed and injured." Glenn Greenwald, Scenes from St. Paul – Democracy Now's Amy Goodman Arrested, SALON (September 2, 2008), [http://www.salon.com/2008/09/01/protests\\_3/](http://www.salon.com/2008/09/01/protests_3/).

experience the institution as an abusive, militaristic force—not just during demonstrations but every day, in neighborhoods across the country.<sup>145</sup>

Stamper was not alone. Others have equated police response to protestors as militarized or paramilitary, tracing it to the war on drugs and funding programs like COPS and Program 1033.<sup>146</sup>

Recently, the images from Ferguson brought police militarization to every home. Battle ready police, in combat uniforms, with weapons pointed at citizens and armored personnel carriers, alarmed many observers.<sup>147</sup> While disconcerting, Ferguson also signaled a potential for change.<sup>148</sup> After Ferguson, both state and federal governments seem to have started to recognize the potential harms of the process.

A 2015 report submitted by the government-appointed Ferguson Commission<sup>149</sup> criticized the police response and gear as

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<sup>145</sup> Stamper, *supra* note 15.

<sup>146</sup> Radley Balko, *A Decade After 9/11, Police Departments are Increasingly Militarized*, HUFFINGTON POST (September 12, 2011), [http://www.huffingtonpost.com/2011/09/12/police-militarization-9-11-september-11\\_n\\_955508.html](http://www.huffingtonpost.com/2011/09/12/police-militarization-9-11-september-11_n_955508.html); Militarization: Legacy of 911 or Occupy Wall Street? DAILY KOS (August 18, 2014), <http://www.dailykos.com/story/2014/8/18/1322649/-Militarization-Legacy-of-911-Or-Occupy-Wall-Street>; Erik Kain, *Police Militarization in the Decade Following 9/11*, FORBES (September 12, 2011), <http://www.forbes.com/sites/erikkain/2011/09/12/police-militarization-in-the-decade-following-911/#48ecc7eb4934>; GRAHAM, *supra* note 86; Glenn Greenwald, *The Militarization of U.S. Police: Finally Dragged into the Light by the Horrors of Ferguson*, THE INTERCEPT (August 14, 2014), <https://theintercept.com/2014/08/14/militarization-u-s-police-dragged-light-horrors-ferguson/>.

<sup>147</sup> See, e.g., Rand Paul, *We Must Demilitarize the Police*, TIME, August 14, 2014, <http://time.com/3111474/rand-paul-ferguson-police/>; Stephanie Condon, *What Can Washington Do About Militarized Police Forces?* CBS NEWS, August 15, 2014, <http://www.cbsnews.com/news/after-missouri-what-can-washington-do-about-militarized-police-forces/>; Paul D. Shinkman, *Ferguson and the Militarization of Police*, U.S. NEWS & WORLD REPORT, August 14, 2014, <http://www.usnews.com/news/articles/2014/08/14/ferguson-and-the-shocking-nature-of-us-police-militarization>.

<sup>148</sup> Although obviously different in scope, origins, and harms, this, in the end, was the effect of television stations broadcasting police violence against African American demonstrators in the South to viewers in the North who, up until then, were removed from much of Jim Crow policies. See MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004).

<sup>149</sup> Missouri Governor Jay Nixon appointed the Commission to conduct a

“military-style,” recommending that “St. Louis law enforcement agencies should aim to have a more human, non-militarized, proportional response to future protest or demonstration activity in the region.”<sup>150</sup> It further issued a call to “[d]irect the state to cease providing, and local departments to cease using, militarized weaponry that does not align with a use of force continuum that authorizes only the minimal amount of force necessary.”<sup>151</sup>

The Ferguson Commission Report was preceded by a Department of Justice Investigation into the police response in Ferguson.<sup>152</sup> Essentially calling to halt normalizing militarization, the DOJ report found, that the

“use of military weapons and sniper deployment atop military vehicles was inappropriate, inflamed tensions, and created fear among demonstrators. Agencies possessing military-type equipment or weaponry should restrict its deployment to limited situations in which the use of the equipment or weapons is clearly justified ... The equipment and weapons should be kept out of sight and not be used routinely or in the absence of special circumstances.”<sup>153</sup>

The Report stated that “[f]or persons who would have seen the SWAT teams arrive, the action would have resembled that of “soldiers arriving at a war zone.”<sup>154</sup> For example, whereas the police use an armored personnel carrier, ostensibly to protect police

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“thorough, wide-ranging and unflinching study of the social and economic conditions that impede progress, equality and safety in the St. Louis region.” *See* Miss. Exec. Order No. 14-15 (Nov. 18, 2014), <https://governor.mo.gov/news/executive-orders/executive-order-14-15>.

<sup>150</sup> THE FERGUSON COMMISSION, FORWARD THROUGH FERGUSON: A PATH TOWARD RACIAL EQUITY 30 (2015), [http://3680or2khmk3bzkp33juica1.wpengine.netdna-cdn.com/wp-content/uploads/2015/09/101415\\_FergusonCommissionReport.pdf](http://3680or2khmk3bzkp33juica1.wpengine.netdna-cdn.com/wp-content/uploads/2015/09/101415_FergusonCommissionReport.pdf).

<sup>151</sup> *Id.* at 65.

<sup>152</sup> *See* U.S. DEPARTMENT OF JUSTICE, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES CRITICAL RESPONSE INITIATIVE, AFTER-ACTION ASSESSMENT OF THE POLICE RESPONSE TO THE AUGUST 2014 DEMONSTRATIONS IN FERGUSON, MISSOURI, 43-49 (2015), <http://ric-zai-inc.com/Publications/cops-p317-pub.pdf> (hereinafter DOJ Report).

<sup>153</sup> *Id.* at xvi.

<sup>154</sup> *Id.* at 57. One the interviewees said that “[i]t feels like we are fighting a war.”

officers, members of the community often referred to them as tanks, thus contributing to the perception of the police as a military.<sup>155</sup> The importance of these observations, as we note later on, is precisely in its recognition of the effect of militarization on the *perception* of police by the policed community.

The DOJ recommendations did not go unheeded. On January 16, 2015, President Obama issued Executive Order 13688 titled "Federal Support for Local Law Enforcement Equipment Acquisition."<sup>156</sup> Acknowledging the contribution of federal funds to keeping "the American people safe", the Order notes that the government "must ensure that careful attention is paid to standardizing procedures" regarding the provision of military equipment, and that more must be done to ensure that law enforcement agencies are aware of the civil rights concerns resulting from militarization.<sup>157</sup> To that end, the Order established an inter-agency working group tasked with, among others, compiling a list of controlled equipment that could be given to the police, but with additional oversight on the allocation, use and training of agencies that receive controlled equipment.

Pursuant to the Executive Order, the Law Enforcement Equipment Working Group submitted its recommendations in May 2015.<sup>158</sup> The working group recommended, among others, that law enforcement agencies be prohibited from acquiring certain equipment, chosen both because of its propensity for overuse or misuse, and because its militaristic nature undermines community trust in the police.<sup>159</sup> The acquisition of other equipment will be

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<sup>155</sup> *Id.* at 55 ("One community member said, "[t]he tanks looked like the police were invading." Another stated that the vehicles were "embarrassing and an incredible overreaction by the police." And another citizen stated, "To see a tank riding down West Florissant was heartbreaking; it was heartbreaking that they had to respond to us that way.").

<sup>156</sup> Exec. Order No. 13688 80 F.R. 3451 (January 16, 2015).

<sup>157</sup> As per the Order, agencies must receive proper training, "including training on the protection of civil rights and civil liberties, and are aware of their obligations under Federal non-discrimination laws when accepting such equipment." *Id.*

<sup>158</sup> RECOMMENDATIONS PURSUANT TO EXECUTIVE ORDER 13688 FEDERAL SUPPORT FOR LOCAL LAW ENFORCEMENT EQUIPMENT ACQUISITION (2015), [https://www.whitehouse.gov/sites/default/files/docs/le\\_equipment\\_wg\\_final\\_report\\_final.pdf](https://www.whitehouse.gov/sites/default/files/docs/le_equipment_wg_final_report_final.pdf).

<sup>159</sup> *Id.* at 12-13. The working group's recommendations, which into effect on October 1, 2015, placed the following equipment on the list of prohibited equipment: tracked armored vehicles, weaponized aircraft, vessels, and vehicles of any kind, firearms of .50 caliber and higher, ammunition of .50 caliber and higher, grenade launchers, bayonets, and certain camouflage uniforms.

controlled, meaning that agencies may acquire them, subject to further oversight, assurances, and certification. Moreover, agencies must employ protocols on the use, supervision, evaluation, accountability, transparency, and operation of the equipment.<sup>160</sup>

While the Order limits militarization to an extent, police can still purchase the prohibited equipment or bypass the extra oversight provided for controlled equipment, if the acquisition is not made through federal programs or federal funds. Moreover, the Executive Order has sparked criticism from both the House of Representatives and police sheriffs, which demonstrates that the argument on militarization is far from over.<sup>161</sup> Indeed, following the shootings of police officers in Dallas, the White House is planning to revisit the Order, which could result in changes to the equipment that is now banned or reviewed before transferred to police. In a meeting between law enforcement officials and President Obama, the former have urged the President to reinstate the transfer of helmets, grenade launchers, and tracked armored vehicles. Although there has not been any change to date, this demonstrates the tentativeness of the Order, which can be changed relatively easily.<sup>162</sup>

In the next parts we move to discuss the objections to police militarization. We first address some of the instrumental objections; however, as these fail to advance a principled argument on the issue,

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<sup>160</sup> Manned aircraft, unmanned aerial vehicles, wheeled armored and tactical vehicles, certain firearms and ammunition, explosives, battering rams, riot batons, and helmets, are now on the controlled list, meaning that more oversight will be instituted. An important limitation on controlled equipment is that agencies will have to justify their request, explaining the need and how the equipment will be used. *Id.* at 14-15, 26.

<sup>161</sup> The House of Representatives passed a resolution disapproving of the Order, stating that the terrorist attack in San Bernardino shows that stripping police of military equipment will leave communities vulnerable to acts of terrorism and similar events. H.R. 559 Disapproving of Executive Order 13688 (regarding Federal support for local law enforcement equipment acquisition) issued by President Obama on January 16, 2015, <https://www.govtrack.us/congress/bills/114/hres559/text>. Similarly, police sheriffs have criticized the Order, saying that much of the equipment is defensive in nature, and that without federal funds they will not be able to purchase the necessary equipment to protect their communities. Adam Shaw, *Outrage as military vehicles, equipment taken from officers in wake of Obama order*, FOX NEWS, November 23, 2015, <http://www.foxnews.com/politics/2015/11/23/outrage-as-military-vehicles-equipment-taken-from-officers-in-wake-obama-order.html>.

<sup>162</sup> Julia Edwards, *White House to Review Ban on Military Gear for Police – Police Leaders*, REUTERS, (July. 21, 2016), <http://www.reuters.com/article/us-usa-police-gear-exclusive-idUSKCN1012KW>.

we then move to set forth the core case against police militarization.

### III. KEY INSTRUMENTAL ARGUMENTS AGAINST POLICE MILITARIZATION

Until now we have described the history and process of police militarization. We showed that the establishment of the police was fraught with concerns over militarization, standing armies, and the potential for abuse of state power. Moreover, we demonstrated how, over time, many of these concerns came true as police, with the aid of the federal government, embarked on a militarization spree since the 1960s, ushering a move from exceptional to normalizing militarization. Still, it is possible to claim that militarization, on its own, should not bother us too much if it is done effectively. Put differently, if militarized police are supervised and disciplined not to use excessive force, and overall perform efficiently, prevent crime, and keep communities safe, this is all that matters.

As discussed later on, we argue that even if militarized police could achieve these goals, militarization is inherently problematic. Nonetheless, in this part we detail numerous *instrumental* arguments that have been made against police militarization. To be clear, we do not believe that these arguments fail. In fact, we (generally) agree with them. However, since the prevalent arguments against militarization are instrumental in nature, it is possible to imagine a world where the instrumental concerns are met satisfactorily. In that world, once instrumental arguments against militarization have fallen by the wayside, our argument, that militarization is inherently problematic, becomes central. Indeed, we believe it is the core argument against police militarization. Therefore, in this Section we elaborate on the instrumental arguments against militarization both to complete the picture but also to underscore, in general, why a principled, normative argument is also required.

#### *A. Militarization Undermines Trust and does not Reduce Violence*

The first major instrumental argument against police militarization is that it is inefficient since it only increases violence or undermines police legitimacy. When citizens believe the police will respond with violence there could be an escalation. A display of force could catalyze both sides and increase the level of violence.



For instance, the “war on drugs” ultimately exemplifies how normalized militarization is in its essence a cycle of violence. A heavy handed approach to narcotics crimes led to more turf wars among drug dealers, which led to more violence, leading to public pressure on police to get even tougher, leading to police wanting more authority and equipment, and consequently to use even more force.<sup>163</sup> At the same time, the war on drugs showed poor results, with scholars, judges, police officers, and policymakers hailing it a failure, given the billions of dollars spent, the lives lost, the devastating effects on minorities, and the rise in incarceration, without a discernible improvement in limiting access to drugs or drug use.<sup>164</sup>

Militarization can thus create conflict instead of defusing it, which would also lead to loss of trust in the police.<sup>165</sup> Trust can be replaced by fear or hatred,<sup>166</sup> which in turn decreases the legitimacy of police.<sup>167</sup> For instance, the DOJ report stated that militarization often brings about “unintended consequences” that galvanize a negative reaction and aggravate community concerns about the police and the justice system.<sup>168</sup> While a voluminous literature examines police legitimacy and its relationship with compliance,<sup>169</sup> scant attention is devoted, if at all, to examine how militarization generates fear among the population, which in turn affects the legitimacy of the police. As Rachel Harmon argues, fear of the police has substantial costs that are rarely, if ever, factored into the

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<sup>163</sup> BALKO, *supra* note 66, at 97.

<sup>164</sup> *See, e.g.*, DAN BAUM, *SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE* (1997); CLARENCE LUSAN, *PIPE DREAM BLUES: RACISM AND THE WAR ON DRUGS* (1999); JAMES P. GRAY, *WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS* (2001); LAWRENCE D. BOBO AND VICTOR THOMPSON, *Unfair by Design: The War on Drugs, Race, and the Legitimacy of the Criminal Justice System*, 73 SOC. RES. 445 (2006); LISA D. MOORE AND AMY ELKAVICH, *Who's Using and Who's Doing Time: Incarceration, the War on Drugs, and Public Health*, 98 AM. J. PUB. HEALTH 782 (2008).

<sup>165</sup> Paul & Birzer, *supra* note 101, at 23.

<sup>166</sup> *Id.*

<sup>167</sup> Harmon, *supra* note 119, at 921.

<sup>168</sup> DOJ report, *supra* note 152, at 53.

<sup>169</sup> *See, e.g.*, Tom R. Tyler, *Enhancing Police Legitimacy*, 593 ANNALS AM. ACAD. PO. SOC. SCI. 84 (2004); Jason Sunshine and Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 L. & SOC. REV. 513 (2003); Mengyan Daim James Frank, Ivan Sun, *Procedural Justice During Police-Citizen Encounters: The Effects of Process-Based Policing on Citizen Compliance and Demeanor*, 39 J. CRIM. JUST. 159 (2011).

cost-benefit equation.<sup>170</sup> When the police patrol the streets with armored personnel carriers, some of which are mine-resistant; when the police use military weapons, helicopters, bayonets, or disperse riots with various grenades; when SWAT teams cover themselves with masks to conceal their identity (perhaps in anticipation of Section 1983 suits or perhaps to intimidate suspects), they create a shock and awe effect that is designed to create a menacing presence.<sup>171</sup>

A possible reply is that the use of military equipment and military weapons could decrease the overall level of force exercised by police in that the mere display of power will discourage resistance. We address this specific argument from deterrence later on.<sup>172</sup> For now, it suffices to point out that there will be times where the presence of the equipment and weapons will increase the severity of force.<sup>173</sup> For example, military weapons will be used for operations that in the past relied on less powerful weapons. An example is the increasing reliance on SWAT teams to execute warrants that in the past were executed by ordinary units, or the use of armored military vehicles where none were used in the past.

Militarization creep also contributes to these adverse effects. Once you start using militarized police for one thing, for example drugs, you start using it for other things, for example counter-terrorism, and ultimately for day-to-day policing.<sup>174</sup> Once military means are available, more initiatives using those means will be undertaken.<sup>175</sup> We pointed this out in the context of call out rates.<sup>176</sup> Over time, paramilitary police units were increasingly dispatched, whereas the rise in violent crime could not, in itself, explain the increased deployments.<sup>177</sup> Thus the rise of police militarization cannot be explained as a “rational” response to increased crime rates. Once the equipment is there, police will want to use it. This is

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<sup>170</sup> Harmon, *supra* note 119, at 922-932.

<sup>171</sup> *Id.* at 924.

<sup>172</sup> *See infra* Part V.

<sup>173</sup> Harmon, *supra* note 119, at 920.

<sup>174</sup> Al Baker, When the Police Go Military, N.Y. TIMES, December 4, 2011, at SR6 (“... the problem is, if you have those kinds of specialized units, that you hunt for appropriate settings to use them and, in some of the smaller police departments, notions of the appropriate settings to use them are questionable.”).

<sup>175</sup> Daniel M. Stewart, D & Willard M. Oliver, *The Adoption of Homeland Security Initiatives in Texas Police Departments: A Contextual Perspective*, CRIM. JUST. REV. (September 22, 2014 doi: 10.1177/0734016814551603).

<sup>176</sup> *See supra* Part C.

<sup>177</sup> Kraska & Cubellis, *supra* note 79, at 621-622 (finding that only 6.63% of the variance in call out data was explained by violent crime composites).

of course inefficient economically, and also contributes to heightened tensions.

A further problem, which might also generate more violence, relates to the changed self-perception of the militarized police officer. As Campbell and Campbell argue, the roles of an infantryman and a patrol officer are very different from one another. When the police officer's job is framed in military terms, discretion about arrests and the appropriate level of force give way to aggressive intimidation rather than to the delicate problem solving required from the police officer.<sup>178</sup>

Similarly, as Benjamin Beede argued, the military is usually ill equipped for tasks other than war, such as civilian law enforcement.<sup>179</sup> When law enforcement is militarized, it might become clumsy and inefficient because of vastly different training. Consequently, some argue that soldiers are generally less flexible than civilian police and are prone to overreaction when dealing with the public.<sup>180</sup> This is also why military commanders tend to resist police assignments.<sup>181</sup> Soldiers are perceived, also by themselves, as "warriors", whereas police officers are in the business of law enforcement.<sup>182</sup> Conflating the two thus invites a heightened risk of police violence, which now behave in a military or quasi-military fashion.

Paul Chevigny neatly summarized the concerns expressed here, both in relation to militarization's effects on public trust, and on self-perception and excessive force:

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<sup>178</sup> Donald J. Campbell & Kathleen M. Campbell, *Soldiers as Police Officers/Police Officers as Soldiers: Role Evolution and Revolution in the United States*, 36 *ARMED FORCES & SOC'Y*. 327, 341-342 (2010). A caveat must be inserted here: while the traditional perception indeed views soldiering (as a profession) as differing substantially from policing, nowadays – in the age of asymmetric conflict and in instances of prolonged occupation – professional soldiering requires also delicate policing proficiencies. *See generally*, U.S. ARMY & U.S. MARINE CORPS, *COUNTERINSURGENCY*, USA FM 3-24/MCWP 3-33.5 (2006). This realization highlights our general argument that such instrumental arguments cannot be the final word on police militarization.

<sup>179</sup> Rachel Bronson, *When Soldiers Become Cops*, 81 *FOREIGN AFFAIRS* 122, 123 (2002) (discussing the need to change from a wartime paradigm to a spectrum containing local law enforcement, when the military is an occupier).

<sup>180</sup> Benjamin R. Beede, *The Roles of Paramilitary and Militarized Police*, 36 *J. POL. & MIL. SOC.* 53, 54 (2008).

<sup>181</sup> Beede, *Id.* at 54.

<sup>182</sup> *Id.* at 58.

Armies are organized and trained for killing an enemy ... and not for service and law-enforcement among a civilian population to which they themselves belong, in situations for which they have to make fine-grained legal and social distinctions about what action is required.... [T]he results of ["war on crime" rhetoric] distort and poison police relations with citizens. The police think of themselves as an occupying army, and the public comes to think the same. The police lose the connection with the public which is a principal advantage to local policing, and their job becomes progressively more difficult, while they become more unpopular.<sup>183</sup>

To sum up these concerns, the increased likelihood of using force, the tendency to frame social problems as wars, the addition of manpower through federal budgets that goes toward increased militarization, and the transfer of military equipment, has led observers to argue that militarization has caused police to become more aggressive and violent, often with dramatic consequences to policed communities. At the individual level, militarization has led to hyper-violent raids, botched operations, mistakes in identifying target residences, and casualties on both sides.<sup>184</sup> At the collective level, militarization can affect entire communities, since militarized forces are usually deployed in marginalized communities.<sup>185</sup> If policing depends on receiving the cooperation of the policed community and maintaining good relations with the community, then in communities that feel targeted by militarization, police will naturally be approached with suspicion or not approached at all, thus

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<sup>183</sup> PAUL CHEVIGNY, *EDGE OF THE KNIFE: POLICE VIOLENCE IN THE AMERICAS* 124 (1995) (cited in Kopel & Blackman, *supra* note 106, at 655).

<sup>184</sup> See generally BALKO, *supra* note 66; *Cops or Soldiers?* THE ECONOMIST, March 22, 2014, <http://www.economist.com/news/united-states/21599349-americas-police-have-become-too-militarised-cops-or-soldiers> ("Often these no-knock raids take place at night ... They can go horribly wrong: Mr Balko has found more than 50 examples of innocent people who have died as a result of botched SWAT raids. Officers can get jumpy and shoot unnecessarily, or accidentally").

<sup>185</sup> See, e.g., Dunn, *supra* note 82.

undermining its effectiveness.

### *B. Reduced Localism*

A further instrumental argument against militarized policing has to do with federalism. In the United States, almost all law enforcement activity is local, determined by states and local governments. Except for the relatively small number of federal crimes, policing is a local affair. The rationales for this institutional choice are historical, but also stem from a conception of democratic policing that is politically accountable. Citizens who are displeased with law enforcement in their community can seek change through democratic elections and pressure on local officials. Variations among localities (in terms of crime levels, demographics, community needs, and priorities) mean that each police agency will ideally be tailored to the particular problems its residents want resolved.<sup>186</sup>

Militarization skews these incentives, because it is largely a centralized affair. For example, much of the militarization entails equipping police with military gear and training. The military, of course, is the responsibility of the federal government. The grant programs such as program 1033 and COPS grants are determined by the federal government, which is less responsive to local concerns.<sup>187</sup> Consequently, local police work becomes much more tailored to federal concerns, with the added concern of concentrating more power in the federal government when in the past it was more diffused, thus also undermining the values inherent in the separation of powers.<sup>188</sup>

Taking all of these arguments into account sheds a different light on the security-rights tradeoff. Militarization is often promoted vis-à-vis a law and order paradigm by asserting that although rights

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<sup>186</sup> See, e.g., LARRY K. GAINES AND VICTOR E. KAPPELER, *POLICING IN AMERICA* 7-8 (7<sup>th</sup> ed., 2011); William J. Stuntz, *Terrorism, Federalism, and Police Misconduct*, 25 HARV. J.L. & PUB. POL'Y 665 (2002); Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 34-38 (2009); Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUSTICE 377 (2006); Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519 (2011); John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 TEMPLE L. REV. 673 (1999). See also *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>187</sup> Campbell & Campbell, *supra* note 178, at 336.

<sup>188</sup> *Id.*; Harmon, *supra* note 119.

are important, personal and community safety and getting rid of crime can and should override the rights of criminals.<sup>189</sup> But if militarization makes us less safe, because it tramples on the individual rights of many, because it generates fear and alienation between the community and the police, because it leads citizens to distrust their police, and because in some cases it is ineffectual in reducing crime, then the security-rights tradeoff is false.

Nevertheless, as much as these arguments are compelling, they do not offer a principled objection. This is because theoretically, instrumental arguments can be met with counterarguments that invoke the option of tightening secondary norms. Responding to instrumentalist concerns, the problem of militarization can presumably be solved with better regulation and supervision.<sup>190</sup> If we just make slight adjustments, the problems might be fixed. Non-reduction of violence and undermining of trust can be dealt with through more training, discipline and enhanced police-public relations. Self-perception of police can be controlled through education, and in any case is not a salient issue since soldiers also engage nowadays in policing in various operational settings.<sup>191</sup> Even the problem of reduced localism can be addressed by ensuring that local authorities have the last word.

There seems, then, to be something else, not-strictly-instrumental, that underlies the genuine objection to police militarization.<sup>192</sup> This is why we need a principled discussion of the issue, to which we now turn.

#### IV. THE CASE AGAINST POLICE MILITARIZATION

Until now, we have discussed several instrumental arguments against militarized police. But what if we envision a professional, well supervised militarized police force, which behaves immaculately, scrupulously abiding by the rules of engagement and constitutional norms accepted in best police practices? If our objection was only purely instrumental, we would have to concede that there would be nothing wrong with militarized

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<sup>189</sup> See BALKO, *supra* note 66, *passim*.

<sup>190</sup> This is perhaps reminiscent of arguments for privatization. See Avihay Dorfman & Alon Harel, *Against Privatisation As Such*, 36 OXFORD J. LEG. STUD. 400 (2016).

<sup>191</sup> See generally U.S. ARMY & U.S. MARINE CORPS, *supra* note 178.

<sup>192</sup> Alon Harel identifies this need as stemming from the “insincerity or inauthenticity” of the traditional structure of instrumental arguments in political/legal contexts. ALON HAREL, *WHY LAW MATTERS* 4 (2014).

police.

In this Part, we propose a principled objection to militarization, which is non-instrumental in the immediate sense. *First*, we demonstrate that militarization entails a presumption that the policed community and individuals are threatening. Thereafter, we argue that the liberal order is based on precisely the opposite presumption: that of non-threat. Indeed, we argue that the prevalence of the presumption of non-threat is a key difference between liberal states and totalitarian ones.

*Second*, we argue that the presumption of threat, manifested in militarization, triggers the exclusion of the policed community, through the symbolic power of police. Importantly, this exclusion emanates from the *cultural* perception of militarization rather than from a particular instance of use of force by militarized police. Furthermore, when this distinction is created by militarized *police* – rather than, perhaps, by locally deployed military forces during emergencies – the potential for exclusion is more significant due to the normalizing effect of police.

#### *A. Militarization as a Presumption of Threat*

Imagine that you participate in a political demonstration in your city. The police – entrusted with preserving order – appear militarized: an armed personnel carrier is deployed, and personnel wear armor, helmets and carry assault rifles. The message must be that the state views you, and other participants, as posing a level of threat of the type that can only be properly countered by deploying, in advance, forces capable of using extreme violence. Militarization thus entails a presumption that the policed community poses a certain level of threat, a level so intense that it requires the availability of combat-ready forces. To this state of mind and its effects we refer as *the presumption of threat*.<sup>193</sup>

The presumption of threat is a product of two interrelated yet distinct characteristics of militarization. First, when militarization

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<sup>193</sup> Ramsay suggests a related concept, according to which the “right to security” is increasingly understood, through the proliferation of preventive and collective legislation, as amounting to “the obligation not to fail to reassure others of your good intentions.” Normal relations between human beings are thus presumed to be exceptional, while a possible threat becomes the norm. RAMSAY, *supra* note 5, at 214–215. To an extent, the notion of the presumption of threat correlates with the idea of “risk societies.” See Nicholas S. Bolduc, *Global Insecurity: How Risk Theory Gave Rise to Police Militarization*, 23 IND. J. GLOB. LEG. ST. 267, 269–271 (2016).

becomes normalized, it also becomes collective, in the sense that its reference point is not specifically threatening individuals in specific circumstances, but rather an unspecified group of people – the *policed community*.<sup>194</sup> Second, militarization is preventive, in the sense that it is not based upon an actual, imminent and grave threat, but rather on the *assumption* that such threat is present, whether emanating from society at large or (perhaps more often) from certain groups within society, or from certain individuals *inter alia* by virtue of their belonging to specific groups.

To clarify how militarization implies a presumption of threat, it is helpful to draw from the distinction made in international law between law enforcement operations, undertaken in peacetime, versus hostilities, conducted during armed conflicts. Indeed, this distinction is largely relevant to gauge the differences between the requirements of international human rights law and international humanitarian law,<sup>195</sup> but its gist is also relevant for our purposes. In absence of an armed conflict, law enforcement operations are conducted under the presumption that unless circumstances absolutely prove otherwise, individuals do not pose a threat of the scope and level that must be confronted with severe, possibly lethal violence. This view is behind the use-of-force continuums required by international law in law enforcement operations,<sup>196</sup> and also in the practice of many police departments.<sup>197</sup> The upshot is of course that threat must be individually determined, and must be imminent.

Traditional military operations, conversely, operate under the exact opposite presumption: certain *categories* of individuals are *a priori* threats, and therefore can be collectively neutralized – including by premeditated, proactive use of lethal force.<sup>198</sup> The

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<sup>194</sup> We use the term “policed community” here rather loosely. A policed community here is a group constituted as such even if by virtue of the mere fact that it is perceived as requiring the deployment of militarized forces. In other words, the deployment of militarized forces in a specific instance constitutes a policed community for our purposes, defined precisely by its subjection to such forces.

<sup>195</sup> See e.g. Eliav Lieblch, *Quasi-Hostile Acts: The Limits on Forcible Disruption Operations under International Law*, 32 B.U. INT’L L. J. 101, 110–116 (2014)

<sup>196</sup> Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, art. 9, U.N. Doc. A/CONF.144/28/Rev.1 (Sept. 7, 1990).

<sup>197</sup> See Joel H. Garner & Christopher D. Maxwell, *Measuring the Amount of Force Used By and Against the Police in Six Jurisdictions*, in USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA 25, 37–38, available at <https://www.ncjrs.gov/pdffiles1/nij/176330-2.pdf>.

<sup>198</sup> See e.g. GORIA GAGGIOLI, INT’L COMM. RED CROSS, EXPERT MEETING: THE USE OF FORCE IN ARMED CONFLICTS: INTERPLAY BETWEEN THE CONDUCT OF



hostilities paradigm is thus collective, since a person becomes targetable on account of formal status. It is also preventive in the sense that status implies threat, even if the individual combatant was not threatening, in the strict sense, at the time of attack.<sup>199</sup> In short, armed conflict entails the *reversal* of the presumption of non-threat precisely on these two levels. Due to this reversal, international law is clear that the switch between the law enforcement paradigm and that of hostilities requires the factual existence of organized armed violence.<sup>200</sup>

An example of how militarization can reflect a presumption of threat can be found in the infamous use by the LAPD, during the 1980s “war against drugs,” of battering rams attached to armored vehicles for the purpose of rapidly tearing down doors and walls and forcibly breaking into suspected crack houses.<sup>201</sup> This choice of tactic exhibited both elements of militarization: a complete use-of-force continuum is not envisioned due to a predetermination of severe threat,<sup>202</sup> and the threat is attached to categories of persons

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HOSTILITIES AND LAW ENFORCEMENT PARADIGMS 8 –9 (2013); *see also see also* Jens David Ohlin, *Acting as Sovereign Versus Acting as a Belligerent*, in THEORETICAL BOUNDARIES OF ARMED CONFLICT AND HUMAN RIGHTS 15 –16 (Jens David Ohlin ed., forthcoming) (Cornell Legal Studies Research Paper, No. 14-21, 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2456754/](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2456754/). At least when individuals are part of state’s armed forces, or (according to some) are members of organized armed groups, they are targetable on the basis of their status. *See* NILS MELZER, INT’L COMM. RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 30 –32 (2009). A possible exception is individuals directly participating in hostilities, which are targetable in accordance with individual function. *Id.* at 43–45.

<sup>199</sup> *See e.g.* DAVID RODIN, WAR & SELF DEFENSE 127 (2002) (pointing out that “the liberties enjoyed by soldiers [during what is perceived as war] ... extend well beyond what could be justified in terms of the personal right to self-defense alone”). We set aside here some recent calls to individualize warfare by requiring that combatants too be targeted in light of individual threat. *See e.g.* Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EUR. J. INT’L L. (2013); Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEG. ANALYSIS 115 (2010).

<sup>200</sup> *But see* Eliav Lieblich, *Internal Jus ad Bellum*, 67 HAST. L. J. 687, 729 –740 (2016) (critiquing the notion that the switch between law enforcement and hostilities can be based on strictly factual rather than normative considerations).

<sup>201</sup> *See* Donna Murch, *Crack in Los Angeles: Crisis, Militarization, and Black Responses to the Late Twentieth-Century War on Drugs*, 102 J. AM. HIST. 162 (2015).

<sup>202</sup> *See* Philip Hager, *ACLU Asks Court to Bar LAPD’s Battering Ram*, L.A. TIMES (May 13, 1986), available at [http://articles.latimes.com/1986-05-13/local/me-5949\\_1\\_drug-dealers](http://articles.latimes.com/1986-05-13/local/me-5949_1_drug-dealers).

rather than individuals – in this example residents in neighborhoods predominantly inhabited by minorities, albeit suspected of drug offenses.<sup>203</sup> Indeed, the choice of theaters in which such units are deployed implies that like in military operations, levels of threat are at least partially determined in relation to categories of individuals. In other words, militarization of police – just like “proper” military operations – inherently assumes a heightened level of threat, usually from a group of people, rather than from individuals. It thus transforms law enforcement activity from an individual-based action to one which assumes some collective threat.

This reversal seems to permeate the discourse of militarized police personnel. Consider, for instance, SWAT units. Recall, that initially, LAPD chief Daryl Gates envisioned SWAT as “Special Weapons Attack Teams.” As aforementioned, the word “attack” – which connotes proactive acts of violence against an enemy,<sup>204</sup> was replaced by “tactics” in order to better place SWAT units within the ethos of policing.<sup>205</sup> Police Chiefs have also reported that outfitting police in battle uniforms creates a mindset that “you’re a soldier at war.”<sup>206</sup> In a sense, the presumption of threat is a necessary byproduct of military training of police.<sup>207</sup>

However, a possible counterargument is that during hostilities, militaries *actually* target individuals in line with the presumption of threat. Militarized police, conversely, while adopting certain military attributions, have not adopted the military targeting paradigm. Thus, it could be argued, that in actuality, since they still operate within the traditional law enforcement notions of individual threat and strictly reactive lethal force, they do not really operate

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<sup>203</sup> Murch, *supra* note 201, at 164 (noting that militarization predominantly affected African American and Latino neighborhoods in South Central Los Angeles).

<sup>204</sup> See, e.g., the international legal definition of “attack” as comprising “acts of violence against the adversary.” Protocol Additional to the Geneva Conventions of 12 August 1949, and relation to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, art. 49, 1125 U.N.T.S. 3.

<sup>205</sup> GATES & SHAH, *supra* note 100, at 131 (1993) (cited in BALKO, *supra* note 66, at 62).

<sup>206</sup> *Id.* at 191.

<sup>207</sup> See Campbell & Campbell, *supra* note 178, at 5 (noting that military training is oriented toward the “elimination of an enemy threat”). Likewise, Army Lt. General Thomas Kelley, Director of Operations for the Joints Chiefs of Staff, said in front of the House Committee on the Armed Services: “When you deal with police officers, they think in terms of going to court and we don’t. We’re sort of like a special operations soldier who is taught to clear a room by killing the bad guys and not touching the hostages...” (cited in Dunn, *supra* note 82, at 9-10).

under a presumption of threat. Our claim, however, is more nuanced. To us, the mere deployment of combat ready police *conveys* to the community that it must be threatening; otherwise such forces would have not been needed to begin with. Meaning, the point of assessment of the action is already in time of deployment, which must be understood as collective preventative action. Indeed, as we detail later on, once this *possibility* of combat is performed and asserted, the presumption of threat is already established.

A presumption of threat is a factual mode of operation. However, as we argue, a foundational principle of the liberal order requires just the opposite: that the state does not act upon the presumption that its citizens are threatening. When threat is presumed, there is a strong push towards *preventive* action. As aforementioned, this is precisely military logic. Moreover, since there is no knowledge of a concrete threat, such actions will mostly be collective. They will almost certainly be based on circumstantial evidence at best or discriminatory profiling at worst.

#### *B. The Presumption of Non-Threat as a Principle of the Liberal Order*

The liberal legitimization of the state is traditionally grounded on it being essential for the achievement of the triumvirate of “life, liberty and the pursuit of happiness.”<sup>208</sup> Other, more progressive versions, advance justice, fairness and welfare based justifications.<sup>209</sup> Common to all these visions is an amalgamation of the ideas that the individual must be the end of all political action<sup>210</sup> and that freedom can only be restricted when its use harms others (the harm principle).<sup>211</sup> As we have shown, instrumental arguments against police militarization claim that it adversely affects these basic rights and principles.

However, in our eyes, the liberal order is based on another foundational principle, one that captures the salient, principled problem of militarized police. To an extent, it is derived from the Hobbesian idea of *security* as a basic end of the commonwealth.<sup>212</sup>

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<sup>208</sup> THE DECLARATION OF INDEPENDENCE (U.S. 1776).

<sup>209</sup> See e.g. JOHN RAWLS, A THEORY OF JUSTICE (1999 ed.)

<sup>210</sup> See, e.g., DECLARATION OF THE RIGHTS OF MAN art. 2 (France, 1789)

<sup>211</sup> *Id.* art. 4; JOHN STUART MILL, ON LIBERTY 23 (2<sup>nd</sup> ed., 1863).

<sup>212</sup> THOMAS HOBBS, LEVIATHAN 117 (Richard Tuck ed., 1996) (1651); see generally Liora Lazarus, *The Right to Security*, in PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS 423 (Rowan Cruft et al eds., 2015).

However, it differs from the basic Hobbesian idea since it does not focus the on the individual as a potential *victim* in the absence of security.<sup>213</sup> Nor does our account afford absolute primacy to the concept of security, as Hobbes suggested.<sup>214</sup> Rather, we focus on the exclusionary effect when the state perceives the individual as a potential *threat*. As we argue, the liberal order cannot presume that citizens impose a threat absent a clear, individually determined factual basis, without unravelling. Therefore, the liberal order cannot be preserved unless operating under a presumption of non-threat.

The main upshot of the presumption of non-threat is that threat must always be determined individually, and accordingly that violent or coercive action can be only reactive or preemptive. When threat is presumed, state action becomes collective and preventative.<sup>215</sup> A presumption of threat is behind policies such as mass preventative internment,<sup>216</sup> counter-terrorism policies that hinge on group belonging;<sup>217</sup> racial profiling;<sup>218</sup> barriers to citizenship based on ethnic grounds for ostensible “security” reasons;<sup>219</sup> or mass surveillance, in itself a concept centered on preventative law enforcement.<sup>220</sup> More generally, the institution of a presumption of threat is a key element of the exception becoming normalized.

Conversely, we argue that the presumption of non-threat

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<sup>213</sup> *Id.* at 423.

<sup>214</sup> *Id.* at 425 (noting that it is possible to agree with Hobbes’ view of the centrality of the need for security without adopting his view on the primacy of security and unlimited sovereign power)

<sup>215</sup> Compare RAMSAY, *supra* note 5, at 213, 230.

<sup>216</sup> Perhaps it is unsurprising then that the infamous preventive mass internment of Japanese Americans during World War II was based on military orders. See Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court’s Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175, 175–177 (1945)/

<sup>217</sup> See Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1417 (2002).

<sup>218</sup> See *id.* at 1415. An example for preventative and collective reasoning can be found in a 2016 statement from GOP Presidential Candidate Ted Cruz, that “[w]e need to empower law enforcement to patrol and secure Muslim neighborhoods [collectiveness] before they become radicalized [preventative]. Jeremy Diamond, *Ted Cruz: Police Need to ‘Patrol and Secure’ Muslim Neighborhoods*, C.N.N. (Mar. 23, 2016), <http://edition.cnn.com/2016/03/22/politics/ted-cruz-muslim-neighborhoods/index.html>.

<sup>219</sup> See, e.g. H CJ 466/07 *Gal-On v. Attorney General* [2012] (ISR), available at <http://versa.cardozo.yu.edu/opinions/gal-v-attorney-general-summary>.

<sup>220</sup> Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 4 (2008); see also Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1933 (2013)

complements and is entangled with traditional justifications for liberal rights. For instance, the presumption of innocence, as well as due process rights in general, are usually justified as necessary for the protection of freedom and autonomy.<sup>221</sup> However, they can just as well be understood as protecting a freedom from being considered a threat to the state and others.

Essentially, we can say that one key difference between liberal and totalitarian states is that in the former citizens are presumed non-threatening, while in the latter, the entire state apparatus is structured in anticipation of internal threats.<sup>222</sup> Indeed, even a hardnosed realist such as Carl Schmitt conceded that “[n]o democracy exists without the presupposition that the people are good” and thus their will is valid,<sup>223</sup> while absolutism invokes the axiom that humans are naturally evil, and therefore strong authority is justified.<sup>224</sup> In terms of political theory, the relation of a presumption of threat to authoritarianism can be traced to Hobbes’s particular view of the pre-state society – the “state of nature” – as a state of war. Indeed, the centrality of the presumption of non-threat in the construction of the liberal state is related to the deeply engrained view in social contractarian thought that anarchy breeds a security dilemma.<sup>225</sup> While theorists differ on the morality of violence under anarchy, most agree that an organized political community – a state – is a solution to insecurity under the state of

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<sup>221</sup> See, e.g., Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L. J. 724 727–737 (2011).

<sup>222</sup> See for instance Arendt’s famous description of the Soviet elaborate system of compartmentalized cross-spying. HANNA ARENDT, *THE ORIGINS OF TOTALITARIANISM* 403 (1951). It has also been said that Stalinist “justice” was built around a presumption of guilt, under which persons could be assumed dangerous to society, and thus punished severely on account of *expected* threat. See, e.g., LÁSZLÓ BORHI, *HUNGARY IN THE COLD WAR, 1945–1956: BETWEEN THE UNITED STATES AND THE SOVIET UNION* 212 (2004). For similar reasons, in totalitarian states, the most elite fighting units report directly to the dictator, and are chiefly meant to protect the stability of the regime against internal threats, for instance from the army. See, e.g., *Iraq’s Republican Guard*, *THE IRAQ WAR ENCYCLOPEDIA* 343 (Thomas R. Mockaitis ed., 2013).

<sup>223</sup> CARL SCHMITT, *LEGALITY AND LEGITIMACY* 24 (Jeffery Seitzer ed., trans., 2004) (1932).

<sup>224</sup> CARL SCHMITT, *DICTATORSHIP* 6 (Michael Hoelzl & Graham Ward trans., 2014) (1921).

<sup>225</sup> For a basic explanation of the security dilemma, albeit in international anarchy, see Robert Jervis, *Cooperation Under the Security Dilemma*, 30 *WORLD POL.* 167, 167–170 (1978); in domestic settings see Barry R. Posen, *The Security Dilemma and Ethnic Conflict*, 35 *GLOB. POL. & STRATEGY* 27 (1993).

nature.<sup>226</sup> However, these theories largely follow two archetypical models – for our purposes, the Hobbesian and Lockean – which precisely differ on the scope of power in the hands of the sovereign, and consequently on the extent to which the sovereign can assume the citizen/subject is threatening. Simply put, while the Hobbesian model leads to a sovereign that can act in accordance with such an assumption, the Lockean model does not.<sup>227</sup>

To Hobbes, the state of nature is an unavoidable condition of war because of the natural inclinations of individuals, their possession of the “the right to everything,” and their equal powers to harm one another.<sup>228</sup> Under such conditions, individuals are always mutually threatening, and therefore preventative action is always necessary and justified.<sup>229</sup> In other words, *Hobbes’s state of nature is defined precisely in that individuals are presumed to be mutually threatening*. It is this condition that drives individuals, by virtue of “a spark of reason”,<sup>230</sup> to enter into a reciprocal agreement with others for mutual security.<sup>231</sup> War is terminated when persons, through a mutual agreement, divest themselves from the right of all things – including the right to act preventatively – and leave that power only in the hands of the sovereign.<sup>232</sup> In essence, therefore, individuals abdicate their right to act preventatively – meaning to presume that others are threatening, while retaining the right to act in self-defense only when actually assaulted.<sup>233</sup>

Hobbes’s idea of the commonwealth famously envisioned an absolute sovereign, a “moral God” that imposes peace through fear.<sup>234</sup> Arguably, a Hobbesian sovereign could presume that its subjects are threatening by nature. This is evident in the fact that a “visible power to keep them [the subjects] in awe” is needed in

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<sup>226</sup> Lazarus, *supra* note 212, at 424-429.

<sup>227</sup> This is not to say that Hobbes was not a liberal, since his thought is indeed individualist. However, the nature of the commonwealth that Hobbes envisioned – the result of his analysis – cannot be reconciled with the liberal state. We thank Alon Harel for this point.

<sup>228</sup> HOBBS, *supra* note 212, at 86–87.

<sup>229</sup> *Id.* Ch. 13, 134-139; *see also* RAMSAY, *supra* note 5, at 1.

<sup>230</sup> CARL SCHMITT, *THE LEVIATHAN IN THE STATE THEORY OF THOMAS HOBBS: MEANING AND FAILURE OF A POLITICAL SYMBOL* 31 (George Schwab & Erna Hilfstein trans., 1996) (1938).

<sup>231</sup> HOBBS, *supra* note 212, Chs. 14, 17.

<sup>232</sup> *Id.* at 92, 120, 214. Indeed, Hobbes expressly argued that the sovereign is authorized to act “beforehand” to prevent discord and to maintain peace. *Id.* at 124.

<sup>233</sup> *Id.* at 93.

<sup>234</sup> *Id.* at 120.

order to keep their natural passions at bay.<sup>235</sup> Returning to our context – it is conceivable that such a sovereign could deploy militarized forces to instill fear to counter this presumed threat.<sup>236</sup> It is exactly on this point that Hobbesian social-contractarianism differs from liberal-democratic states. While we might agree (or not) that in a hypothetical state of nature individuals can presume that others threaten them, we can hardly retain a liberal view of the state if we argue that such powers remain in the hand of the sovereign. Even if we adopt the Hobbesian view of the state of nature, we contend that the establishment of political society must at least entail a shift in the perception of individuals, from mutually threatening to non-threatening. Otherwise, the state doesn't differ substantially from the state of nature it is meant to avert.<sup>237</sup>

Locke shared with Hobbes the position that the purpose of the state is “security.”<sup>238</sup> In his state of nature, too, persons enjoy “perfect freedom” and equality.<sup>239</sup> However, contrary to Hobbes, equality does not provide for preventive violence but precisely the opposite: a prohibition on harming one another, unless in imminent self-defense or as punishment.<sup>240</sup> To Locke, therefore, a state of nature is not necessarily a state of war, but rather a condition in which war is both more likely and potentially more destructive. This leads individuals to form a political society.<sup>241</sup>

Thus, for Locke, even in the state of nature individuals cannot presume and act on the basis that others are threatening. Now, the Lockean sovereign derives its power from the transfer of “executive power” of the law of nature from individuals to the public.<sup>242</sup> This *a priori* means that it cannot assume a presumption of threat that is unavailable to individuals in the state of nature.<sup>243</sup>

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<sup>235</sup> *Id.* at 117.

<sup>236</sup> Paradoxically, however, this can also signify the very ruin of the same Leviathan. See RAMSAY, *supra* note 5, at 3–4 (claiming that the Hobbesian model cannot operate under such assumptions without undermining its authority, since it will recreate the fears of the state of nature). Indeed, it is obvious at least that the sovereign cannot in fact *act* upon these threats in a way that would revert society to a state of nature, since this would make the social contract redundant.

<sup>237</sup> Locke criticized the Hobbesian position precisely on this point. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT AND LETTER CONCERNING TOLERATION 47 (Mark Goldie ed., 2016) (1690).

<sup>238</sup> Lazarus, *supra* note 212, at 425

<sup>239</sup> LOCKE, *supra* note 237, at 4.

<sup>240</sup> *Id.* at 4–6, 64.

<sup>241</sup> *Id.* at 12–13, 63–64.

<sup>242</sup> *Id.* at 45, 65.

<sup>243</sup> As Locke contends, the sovereign cannot be “arbitrary over the lives and the

To argue otherwise would be to mythicize the state as collectively possessing rights persons cannot hold as individuals.<sup>244</sup> Put differently, individuals cannot give to the state something they themselves do not possess. It follows that when acting under a presumption of threat, we are precisely following the Hobbesian logic concerning the powers of government.

Indeed, the notion of security is central both to Hobbes' absolutist view and to Locke's balanced approach, in which security is but one value within the ends of "peace, safety, and public good of the people."<sup>245</sup> While it is beyond this Article to develop a theory of a liberal right to security – a contested issue in political theory –<sup>246</sup> it is sufficient, for our purposes, to argue that any proper understanding of "security" cannot be convincingly reconciled with the presumption of threat. In a sense, a normalized presumption of threat is tantamount to a normalized state of emergency, in which the Hobbesian logic of the state of nature as constant threat prevails. An individual thus cannot enjoy security when she is presumed to be a threat, since being perceived as such implies exclusion from the same order ostensibly charged with maintaining security and protecting her: it implies that she is in a Hobbesian state of nature in relation to the state, even as she is situated within the state.<sup>247</sup>

Until now we only implied a connection between the presumption of threat and the notion of exclusion. In the next section, we expand on the concept of militarization and exclusion by

fortunes of the peoples... for nobody can transfer to another more power than he has in himself," and individuals do not possess such arbitrary powers *Id.* at 67.

<sup>244</sup> McMahan, in another context, labeled this type of thinking as unacceptable "moral alchemy." See JEFF MCMAHAN, *KILLING IN WAR* 82 (2009).

<sup>245</sup> LOCKE, *supra* note 237, at 65; for a comparison between Hobbesian and Lockean notions of security see Lazarus, *supra* note 212.

<sup>246</sup> As Lazarus notes, current literature on the right to security identifies narrow and wide approaches. Narrow approaches consider security as consisting namely as freedom from physical harm See HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* 20 (2<sup>nd</sup> ed., 1996). Wider approaches view the concept of security as including "enabling" capabilities. See SANDRA FELDMAN, *The Positive Right to Security*, in *SECURITY AND HUMAN RIGHTS* 307 (BJ Goold & L. Lazarus eds., 2007). For these sources and others see Lazarus, *supra* note 212, at 429-434. Some note (and criticize) that the understanding of security has evolved to encompass subjective elements. See RAMSEY, *supra* note 5, Ch. 10.

<sup>247</sup> Agamben formulated the relation between state of exception, the state of nature and the notion of exclusion: "The state of nature and the state of exception are nothing but two sides ... in which what was presupposed as external (the state of nature) now reappears ... in the inside (as state of exception)." AGAMBEN, *supra* note 5, at 37.



demonstrating that militarized police possess the symbolic power to mark the policed community as the enemy, to exclude it from the political collective, and to thereby ultimately normalize this exclusion.

*C. The Symbolic Power of Police, Exclusion, and the Normalization of the Exclusion*

1. The Symbolic and Exclusionary Power of Militarization

Both police and military are organs of state coercion. Functionally, one can argue that they are interchangeable if necessity dictates.<sup>248</sup> If we adopt a simplistic perception of state power as violence, the police, in descriptive terms, are simply an agency that applies coercive force for the purpose of imposing a legally justified end within a given society. In Weberian terms, it is merely one arm through which the state's monopoly on force is carried out.<sup>249</sup> All other conditions being equal, if the police doesn't bare an additional – even symbolic – meaning, it shouldn't matter whether coercion is conducted by police or military forces, and consequently, by traditional or militarized police forces.

However, when looking at the constitutional practice of states, it is clear that deployment of military forces within state boundaries packs explosive political meaning. It was famously cited in the Declaration of Independence as part of the “long train of abuses and usurpations” that justified the secession of the thirteen colonies from Great Britain.<sup>250</sup> Similarly, in modern constitutional law of many states, the role of armed forces is generally restricted to the defense of the state, while their deployment internally is permitted only during emergencies or when special national security concerns require so.<sup>251</sup> While these restrictions could be partly explained on account of the historically abusive tendencies of standing armies located in proximity to civilians (and specifically

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<sup>248</sup> Indeed, occupying armed forces frequently engage in policing and law enforcement. See, generally, Kenneth Watkin, *Use of Force During Occupation: Law Enforcement and Conduct of Hostilities*, 94 INT'L REV. RED CROSS 267 (2012).

<sup>249</sup> Max Weber, *Politics as Vocation*, in MAX WEBER: THE VOCATION LECTURES 32 (Rodney Livingstone et al. eds., 2004) (1919); see Jan Terpstra, *Two Theories on the Police – The Relevance of Max Weber and Emile Durkheim to the Study of the Police*, 39 INT'L J. L, CRIME & JUST. 1, 4 (2011).

<sup>250</sup> THE DECLARATION OF INDEPENDENCE (U.S. 1776).

<sup>251</sup> See, e.g. German Constitution Art. 87a; US Constitutions Art. 8(15).

the practice of quartering),<sup>252</sup> the objection to standing armies is, at bottom, a principled one, relating to their military character rather than their actual abuses.<sup>253</sup>

Indeed, the distinction between different forms of state coercion is as old as the state itself. For instance, although the most important precursor to the modern administrative state – the Roman Republic and then Empire – did not possess a specialized police force,<sup>254</sup> there was some distinction between the military and other agents of coercion. Roman Magistrates were always accompanied by *lictors* carrying fasces, but ax-blades would be fixed only when leaving city limits.<sup>255</sup> Since magistrates held dual civil and military roles, the presence of *lictors* – rather than soldiers – symbolized their *civilian* function. For this reason, when Mark Antony was accompanied by soldiers rather than by *lictors*, this was condemned as a tyrannical act.<sup>256</sup>

Why, then, do societies generally distinguish between different agents of coercion? The basis for this distinction is all about drawing boundaries. In Ancient Rome, a fundamental constitutional principle distinguished between the city as a “pacified sphere” (*pomerium*), surrounded by a “sacred boundary,” from which military power was excluded.<sup>257</sup> As discussed above, this idea can also be found in traditional liberal social contractarian thought, in which the state represents a realm of peace, distinguished from the state of nature – and possibly war – lurking outside.<sup>258</sup>

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<sup>252</sup>And indeed this problem prompted the enactment of the Third Amendment – William S. Fields & David T. Hardy, *The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History*, 35 AM. J. LEG. HIST. 393, 394-395 (1991) (arguing that the grievance which the amendment sought to address was the abuses of persons and property resulting from quartering of British soldiers).

<sup>253</sup> *Id.* at 395, 415–420 (connecting the specific problem of quartering to the larger political issue of keeping standing armies in peacetime).

<sup>254</sup> WILFRIED NIPPEL, *PUBLIC ORDER IN ANCIENT ROME 2* (1995); *but see* CHRISTOPHER J. FUHRMANN, *POLICING THE ROMAN EMPIRE* (2014) (Challenging this common perception).

<sup>255</sup> NIPPEL, *supra* note 27, at 13

<sup>256</sup> *Id.* at 15

<sup>257</sup> *Id.* at 4.

<sup>258</sup> To Hobbes, once a state is formed a stark division is established between the state of peace within the commonwealth, and the state of nature – and thus war – between the commonwealth and external elements. HOBBS, *supra* note 212, at 138–139. While Locke did not necessarily view the relations between the community and those outside as a state of war, he too saw the state as a tool to provide “a greater security against any that are not of it.” LOCKE, *supra* note 237, at 49. This notion is by no means a Western construction. A parallel concept can

Militaries are thus perceived as forces of external coercion, supposedly operating in the anarchic state of nature, and acting under a presumption of threat emanating from the enemy. They are meant to protect the social contract from outside threats – that is, to keep the state of nature out. Police, on the other hand, are an agent in charge of enforcing the social contract internally. Phrased in this manner, we can already understand the exclusionary power of militaries or militarized forces. Police are perceived as a coercive power acting within the community, within and part of the social contract; militaries act against those outside.<sup>259</sup> Police act as trustees, militaries act as adversaries.<sup>260</sup> When the military or militarized police are deployed internally, they exclude the policed communities from the body politic.

In our view, the root of the police/military distinction cannot be captured only by referring to the historical problem of standing armies, or by functional or instrumental grounds such as the fear of excessive force.<sup>261</sup> Rather, the root lies in the *symbolism* of the perception of “police” and “military” in a given society; and specifically, in their respective perceptions as inclusionary versus exclusionary forces.

To understand how militarization excludes we must first understand the power of symbols. Symbols are spoken or visual forms that convey a collective meaning, whether directly or implicitly.<sup>262</sup> They can serve as powerful political signifiers, possessing the capacity to “preserve or to transform objective principles of union and separation ... of association and dissociation.”<sup>263</sup> Those who possess symbolic power – for instance,

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be viewed in traditional Islamic thought, which distinguishes between Muslim territory (Dar al-Islam) and “territories of war” (Dar al-Harb) beyond the borders. See THE OXFORD DICTIONARY OF ISLAM 62 (John L. Esposito ed., 2003).

<sup>259</sup> Compare John Kleinig, *What’s All the Fuss with Police Militarization?* THE CRITIQUE (Mar. 17, 2015), <http://www.thecritique.com/articles/whats-all-the-fuss-with-police-militarization/>.

<sup>260</sup> For a concise recent summary of the perception of public power as a representing fiduciary relations see Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L. J. 1820, 1825–1828 (2016); for an expansion of the fiduciary perception of sovereignty to the international level see Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 Am. J. Int’l L. 295, 295–301 (2013); EVAN J. CRIDDLE & EVAN FOX-DECENT, *FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY* 1-43 (2016).

<sup>261</sup> See *supra*, Sec. II.A.

<sup>262</sup> Paul & Birzer, *supra* note 101, at 121.

<sup>263</sup> Pierre Bourdieu, *Social Space and Symbolic Power*, 7 SOC. THEORY 14, 23

those who act upon state authority –<sup>264</sup> have the “power to make groups” and to make “visible and explicit social divisions.”<sup>265</sup> In the context of police, theorists describe its “symbolic power” as a source of “powerful, efficacious collective representations about community, order, the distinction between good and evil, and about security and protection.”<sup>266</sup> Those who are served by the police are thus part of a *de facto* community.

However, when symbols build on representations that tap into cultural associations that inspire (and normalize) fear and subservience – even without exercising direct violence – symbolic power turns into symbolic violence.<sup>267</sup> This is precisely the transformation that occurs when police are militarized. Militarized police – *qua* police –retains its symbolic power to “make groups” and to make collective representations about community. This power turns exclusionary as the symbolism becomes increasingly violent. As we demonstrate below, the potential for an especially intense type of violence – that amounting to the possibility of combat – is a strong signifier of exclusion.

The power of symbols has not been overlooked by legal thinkers. Expressive theorists<sup>268</sup> of law argue, much in line with the idea of symbolic power, that “[t]he expressive dimension of governmental action plays a central role ... in constitutional law,”<sup>269</sup> and that governments cannot act in ways that convey that certain “social impressions” override all traditionally relevant competing values, since these cause *expressive harms*.<sup>270</sup> For instance, in their work on voting rights and district redistribution, Pildes and Niemi argued that redistribution (gerrymandering) can be unconstitutional even without causing material harm (such as by vote dilution), precisely because it conveys the social impression that “race consciousness” is an overriding consideration.<sup>271</sup> Applying these

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(1989).

<sup>264</sup> *Id.* at 24.

<sup>265</sup> *Id.* at 23.

<sup>266</sup> Terpstra, *supra* note 249, at 7.

<sup>267</sup> Paul & Birzer, *supra* note 101, at 122.

<sup>268</sup> For a helpful (critical) survey of expressive theories see Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PENN. L. REV. 1363 (2000).

<sup>269</sup> Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEG. STUD. 725, 760 (1998).

<sup>270</sup> Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances after Shaw v. Reno*, 92 MICH. L. REV. 483, 526–538 (1993).

<sup>271</sup> *Id.* at 526–527.

terms in our context, militarization, and the presumption of threat that underlies it, packs symbolic power that can generate the expression of exclusion.

When this process is pervasive, as is the case with normalized militarization, it can solidify and reify this exclusion in the public eye. Indeed, some theorists argue that the expressive power of law (in the broad sense) is reflected, *inter alia*, in its ability to convey information.<sup>272</sup> Law in general, police action included, signals attitudes and information that affect behavior and public beliefs.<sup>273</sup> Arguably, the practice of police militarization – especially in an era in which media coverage is ubiquitous –<sup>274</sup> can affect the perception of the general population concerning the position of the policed community as particularly threatening. As images of militarized police marching in the streets of Ferguson were transmitted into every screen, a certain image of the local residents was also transmitted.

As discussed above, the deployment of militarized police in a given arena is laden with exclusionary potential. However, does this remain true even if these forces do not actually engage in combat, but are only present in this or that community? In the next section, we turn to explore the notion that the mere deployment of militarized forces indicates the *possibility* of combat, and that this in itself results in exclusion from the political community.

## 2. Deployment of Militarized Forces as a Friend-Enemy Distinction

To better understand the exclusion generated by the symbolic power of militarization, a helpful point of departure is Carl Schmitt's famous view of "the political" – and the concept of the state itself – as based on the friend/enemy distinction.<sup>275</sup> Particularly relevant is the central meaning Schmitt attributes to the *act* of distinction, marked by the performance of the *possibility* of combat.

To Schmitt, a people's collective political existence hinges on a distinction between friend and enemy.<sup>276</sup> Now, not every disagreement results in such a distinction, but only one which

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<sup>272</sup> RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* 5–7 (2015).

<sup>273</sup> *Id.* at 136–137, 170–175.

<sup>274</sup> *Id.* at 183.

<sup>275</sup> SCHMITT, *supra* note 13, at 19.

<sup>276</sup> *Id.* at 26.

exhibits “the utmost degree of intensity of a union or separation, of an association or dissociation.”<sup>277</sup> Meaning, the distinction results in the inclusion in or exclusion from the political collective,<sup>278</sup> simultaneously recognizing and constituting the enemy as “the other, the stranger.”<sup>279</sup> In a sense, it can even be said that inclusion/exclusion is the “fundamental categorical pair” of politics, the friend/enemy distinction being merely an instrument to establish it.<sup>280</sup>

Importantly, the degree of intensity, which implies political dissociation, is achieved only when the *possibility* of violent conflict is recognized.<sup>281</sup> To Schmitt, “[a]n enemy exists only when, at least potentially, one fighting collectivity of people confronts a similar collectivity.”<sup>282</sup> Note that the focus on *collectivity* corresponds with our earlier description of the presumption of threat and militarization as connoting a collective element. The enemy concept, thus, hinges on “the ever present possibility of combat.”<sup>283</sup> Combat here is not a metaphor: rather, the potential of real war and killing must exist. Otherwise, at hand is only a local, non-excluding, dispute *within* members of the community. Now, it is important to stress that for a friend/enemy distinction to be made, combat does not have to actually take place, but must be present as a *possibility*.<sup>284</sup> The political, in sum, is the “mode of behavior” which follows the possibility of combat.<sup>285</sup>

Schmitt thought the friend and enemy distinction essential for the viability of a nation.<sup>286</sup> He critiqued liberal states for

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<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 27

<sup>279</sup> *Id.*

<sup>280</sup> AGAMBEN *supra* note 5, at 8.

<sup>281</sup> SCHMITT, *supra* note 13, at 27.

<sup>282</sup> *Id.* at 28.

<sup>283</sup> *Id.* at 32.

<sup>284</sup> *Id.* at 34-35. The notion of possibility of combat as a political distinction correlates with the common argument that the mere *possibility* of arbitrary power already diminishes freedom. See Martin Krygier, *The Rule of Law: Pasts, Presents, and Two Possible Futures* 12 ANN. REV. L. & SOC. SCI. 5 (forthcoming, 2016, on file with authors). To Harel, the subjection to arbitrary decision places one “at the mercy” of another, which is in itself a deprivation of freedom. HAREL, *supra* note 192, at 174. Agamben too noted that the “potentiality” of action as a defining characteristic of sovereignty. Meaning, sovereignty is not only generated by the power to act but also by the power to-not act. In this sense, what is important is the power of the militarized force to decide to use its force or to refrain from it. AGAMBEN, *supra* note 5, at 46.

<sup>285</sup> SCHMITT, *supra* note 13, at 37.

<sup>286</sup> *Id.* at 68.

“depoliticizing” by failing to distinguish between friend and enemy, which would lead to their decline or to their being overtaken by more adamant political groups.<sup>287</sup> Arguably, therefore, the sovereign must homogenize the community by establishing a clear distinction.<sup>288</sup> We certainly do not have to accept Schmitt’s normative conclusion in order to appreciate the exclusionary power of the friend/enemy distinction.<sup>289</sup>

How does this reflect on police militarization? It must be emphasized that to Schmitt, the possibility of physical killing must be present for a political distinction. In this context, the concept of the weapon – and more so, of the type of weapon culturally perceived as fit for combat – is central.<sup>290</sup> The appearance of such weapons may be the ultimate signifier of a friend enemy/distinction, and correspondingly, of the exclusion of the subject from the political collective. The same can be said concerning military-style battle dress fatigues or combat helmets, as representations with clear cultural connotations: these can effectively symbolize the declaration of a “domestic enemy.”<sup>291</sup>

In sum, when the police, whether due to their weapons, equipment or uniform, take the form of a militarized force – meaning, that through their cultural representations they are perceived as equipped for the possibility of combat – essentially a new friend/enemy distinction emerges, whereby the policed community is excluded from the political collective. The fact that these weapons are not always used, but rather are displayed, does not alter this effect, since it is the *possibility* of combat, coupled with the power to decide that lethal force should be used,<sup>292</sup> that

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<sup>287</sup> *Id.* at 51–52.

<sup>288</sup> See Lars Vinx, *Carl Schmitt*, STAN. ENCYCLOPEDIA OF PHIL. (Oct. 1, 2014), <http://plato.stanford.edu/entries/schmitt/#ConPolCriLib>.

<sup>289</sup> This problem is common to many readings of Carl Schmitt, in which he makes astute observations that lead to questionable normative conclusions. See Tracy B. Strong, *Introduction*, in CARL SCHMITT, *THE LEVIATHAN IN THE STATE THEORY OF THOMAS HOBBS* viii–ix (2008 edn.).

<sup>290</sup> SCHMITT, *supra* note 13, at 32–33.

<sup>291</sup> See *id.* at 46–47. As former Seattle Police Chief Stamper noted, “The counterproductive response to 9/11, in which the federal government began providing military equipment and training even to some of the smallest rural departments, has fueled the militarization of police forces. Everyday policing is characterized by a SWAT mentality, every other 911 call a military mission. What emerges is a picture of a vital public-safety institution perpetually at war with its own people.” Stamper, *supra* note 15.

<sup>292</sup> SCHMITT, *supra* note 13, at 35 (“What always matters is the possibility of the extreme case taking place, the real war, and the decision whether this situation has

generates the exclusionary power of militarized police.

We are now in a better position to understand the complaint by Ferguson demonstrators of being under “occupation.”<sup>293</sup> This labeling, in fact, captures a remarkably precise distinction, reflecting exactly the exclusionary power of militarization. While a state might conceivably impose within its territory martial law, in extraordinary circumstances and subject to constitutional mechanisms,<sup>294</sup> it by definition cannot “occupy” its own sovereign territory. Occupation, as commonly understood, is a factual situation in which a state gains control over *external*, hostile territory, territory over which the state has no sovereign title and is not indebted politically to the local population.<sup>295</sup> Historically, the population of occupied territory was even considered part and parcel of the “enemy.”<sup>296</sup> Importantly, occupation implies both spatial and personal exclusion. When protestors complain of “occupation” they are noting the effect of being marked as an enemy and thus placed in a zone of exclusion within their own state, where “outside and inside” become intermingled.<sup>297</sup>

This effect is all the more significant when the policed community is comprised primarily of minorities. Indeed, the exclusionary result of the friend/enemy distinction is amplified when aimed at historically marginalized communities, as it could reify already prevailing notions of exclusion and alienation.<sup>298</sup>

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or has not arrived”).

<sup>293</sup> See Chasmar, *supra* note 1.

<sup>294</sup> See, e.g., STEPHEN C. NEFF, JUSTICE IN BLUE AND GRAY: A LEGAL HISTORY OF THE CIVIL WAR 40–44 (2010)

<sup>295</sup> Convention (IV) Respecting the Laws and Customs of War on Land its Annex: Regulations Concerning the Laws and Customs of War on Land art. 42, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631; EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 43, 68–106 (2<sup>nd</sup> ed., 2012).

<sup>296</sup> At least in the Anglo-American world. See War Department, Instructions for the Government of Armies of the United States in the Field (entered into force 24 April 1863), art. 21 (“The citizen or native of a hostile country is thus an enemy... .”)

<sup>297</sup> AGAMBEN, *supra* note 5, at 37. The flipside is that when establishing such a zone of exclusion, the state effectively admits that its own sovereign authority in the area is questionable. We thank Peter Ramsay for pointing this out.

<sup>298</sup> Ta-Nehisi Coates argues that the distinction between authority (relations of consent/inclusion) and power (relations of force/exclusion) can be applied to the relations between police and African American communities, which he views as under the *power* of police rather than its authority. The distinction between authority and power is remarkably similar to the distinction between sovereignty and occupation. See Ta-Nehisi Coates, *The Myth of Police Reform*, THE ATLANTIC (Apr. 15, 2015), <http://www.theatlantic.com/politics/archive/2015/04/the-myth-of->



Experience shows that militarized police forces have been historically deployed more in African American and other minority communities.<sup>299</sup> This realization highlights a further troubling aspect of *police* militarization: its potential not only to exclude, but also to *normalize* the exclusion in a way that disparately impacts those are already wielders of inferior social power.

### 3. Militarized Police and the Normalization of the Exclusion

In previous sections, we claimed that police possess the symbolic power to exclude, when it bears the cultural hallmarks of militarization. It is arguable, however, that as long as state coercion is conducted by forces *formally* belonging to the police, the symbolic distinction between police and military remains. If this were true, the mere fact that militarized police maintain their formal definition as “police” and retain some symbolic distinction, such as badges or insignia, would alleviate our concerns. If you will, the inclusionary power of police would “cancel out,” the exclusionary power of combat-ready appearances. Indeed, it seems that practice implies this intuition. The Posse Comitatus Act prohibits the “use” of “any part of the Army or Air Force” for policing, but the Secretary of Defense may authorize the use of military equipment by the police.<sup>300</sup> However, the usual procedure is that military markings are removed or covered in such cases.<sup>301</sup>

Here, however, we must point out a key paradox: the same inclusionary symbolic power of police also breeds its especially harmful potential. Since police are an organ of the “normal” legal order, constantly present and unrestricted to extreme emergencies, its transformation can lead to a normalization of a certain type of distinction.<sup>302</sup> In other words, since police symbolizes inclusion within a political system, it can be a vehicle through which exclusion can become internalized as part of the norm, as part of the system.<sup>303</sup> When it is the *police* – in contrast, say, to armed forces deployed in “true” extreme emergencies such as civil wars – that carries out the friend/enemy distinction, the message is all the more

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police-reform/390057/.

<sup>299</sup> See e.g. AMERICAN CIVIL LIBERTIES UNION, *supra* note 14, at 5.

<sup>300</sup> 18 U.S.C. §1385; 10 U.S.C. §372.

<sup>301</sup> Kopel & Blackman, *supra* note 106, at 623.

<sup>302</sup> See Kraska & Kappeler, *supra* note 10, at 1.

<sup>303</sup> Giorgio Agamben’s famous concept of *homo sacer* is helpful here, as it conceptualizes the paradox of simultaneous inclusion and exclusion in the legal order. See AGAMBEN, *supra* note 5, at 8–12, 17–18.

powerful: the enemy status becomes part of the regular political life of the community.

Critical thinkers have long noted the salient harmful potential of the police as a normalizer of state violence. Hannah Arendt, for instance, pointed out that totalitarian regimes tend to disproportionately strengthen the police, since it is more efficient as a force of oppression than the military. To Arendt, the protective military ethos results in that “even under totalitarian conditions they [members of the military] find it difficult to regard their own people with the eyes of a foreign occupier.”<sup>304</sup> Indeed, this seems to ring true, at least in states where the military is by and large representative of a relatively homogenous society.<sup>305</sup> Already in the nineteenth century, Britons complained, at times of social unrest, that the military forces they encountered “know how to behave themselves, but the police don’t.”<sup>306</sup> Recently, during the 2011 revolutions in Egypt and Tunisia, the military refused to act against demonstrators, as opposed to the police and internal security apparatuses.<sup>307</sup>

Walter Benjamin, too, pointed out this nature of police violence, manifested precisely in its norm-setting potential. Benjamin characterized all “legal” (contra “pure”) violence as serving either a lawmaking or law preserving function.<sup>308</sup> To Benjamin, the military serves a “lawmaking” function vis-à-vis a vanquished enemy,<sup>309</sup> while serving a “law preserving” function vis-à-vis the state’s citizenry through general conscription.<sup>310</sup> The police, conversely, combine these two functions. In obvious cases, the police employ coercion to preserve law; however, since the police operate in the vanishing point of written law’s coercive power, it necessarily operates in ambiguous situations, “where no

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<sup>304</sup> ARENDT, *supra* note 222, at 420.

<sup>305</sup> The conclusion might be different in heterogeneous societies. For instance, the Syrian Army is dominated by Alawites, loyal to President Assad, arguably accounting for its loyalty in internal strife. See LEON GOLDSMITH, *CYCLE OF FEAR: SYRIA’S ALAWITES IN WAR AND PEACE* (2015).

<sup>306</sup> Storch, *supra* note 49, at 81

<sup>307</sup> See, e.g., Sharon Erickson Nepstad, *Nonviolent Resistance in the Arab Spring: The Critical Role of Military-Opposition Alliances*, 17 SWISS POL. SCI. REV. 485 (2011).

<sup>308</sup> Walter Benjamin, *Critique of Violence*, in REFLECTIONS: ESSAYS, APHORISMS, AUTOBIOGRAPHICAL WRITINGS 277, 283 –284 (Peter Demetz ed., Edmund Jephcott trans., 1986).

<sup>309</sup> In his view, a post-war peace treaty is essentially an occurrence of law creation through violence. *Id.*

<sup>310</sup> *Id.* at 284.

clear legal situation exists,” thus effectively creating new law.<sup>311</sup> In other words, the creation of new law by police action is essentially the creation of the new normal.

The normalizing aspect of police also clarifies the impact of the friend-enemy distinction described above. For this distinction to hold, the possibility of combat must be *normalized*: it must “remain a real possibility for as long as the concept of the enemy remains valid.”<sup>312</sup> It is obvious, therefore, that as much as militarization becomes normalized and open-ended, and as more traditional police units exhibit militarization, their excluding effect becomes more and more entrenched. Conversely, deploying special units *for specific* tasks, for a limited time in exceptional conditions, might result only in a temporary effect.

In sum, the key difference between police and military can be described by reference to the inclusionary versus exclusionary symbolic power of these two organs of state coercion. The military symbolism implies a friend/enemy distinction; and when militarization specifically affects the police, the danger of normalization of the distinction is amplified. It is in this sense that militarization of police normalizes the exception.

## V. POSSIBLE OBJECTIONS

In this Part, we address several possible objections to our theoretical case against militarization. The first objection is factual and comparative: it points out that in fact, militarized police forces of various types have been acceptable in some of the world’s most well-established democracies. The three other objections are instrumental: these claim that whatever its merits, our principled argument is trumped by the benefits reaped by militarization: namely, protection of police officers, deterrence of criminals and increasing the sense of security of the public at large. However, to us, these objections ultimately fail.

### *A. Established Democracies in fact have “Hybrid” Militarized Forces*

A possible challenge to our theory emanates from the existence of two types of “hybrid” forces.<sup>313</sup> The first is the (mainly)

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<sup>311</sup>*Id.* at 286-287.

<sup>312</sup> SCHMITT, *supra* note 13, at 33.

<sup>313</sup> See generally Derek Lutterbeck, *Between Police and Military: The New*

Continental European phenomenon of units formally belonging to the military, but charged with wide policing duties. The most famous examples of such units are the French *National Gendarmerie*<sup>314</sup> and the Italian *Royal Carabinieri*,<sup>315</sup> or the Spanish *Guardia Civil*.<sup>316</sup> Such forces act as law enforcement agencies, but can also be deployed externally, in some form, during armed conflict.<sup>317</sup> They are therefore doubly affiliated with ministries of defense and of interior.<sup>318</sup> If established democracies use such forces for public order, does our theory of militarization and exclusion still stand?

Four reasons lead us to answer in the negative. First, historically, these forces are remnants of old authoritarian regimes – both in form and in attitudes to policing – and therefore cannot be celebrated as particularly democratic institutions.<sup>319</sup> Second, and more importantly, both the *Gendarmerie* and the *Carabinieri* for instance, predate the modern French and Italian states – the former established in 1720 and the latter in 1814.<sup>320</sup> As troubling as that may be in theoretical terms, in our view, the focus should be less on the historical existence of grandfathered paramilitary police forces in various countries, but rather on the *process* of militarization of

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*Security Agenda and the Rise of Gendarmeries*, 29 COOPERATION & CONF.45 (2004).

<sup>314</sup> See French National Gendarmerie, FIEP: ASSOCIATION OF EUROPEAN AND MEDITERRANEAN GENDARMERIES AND POLICE FORCES WITH MILITARY STATUS, <http://www.fiep.org/member-forces/french-national-gendarmerie/>.

<sup>315</sup> Carabinieri, FIEP: ASSOCIATION OF EUROPEAN AND MEDITERRANEAN GENDARMERIES AND POLICE FORCES WITH MILITARY STATUS, <http://www.fiep.org/member-forces/italian-carabinieri/>; see also Lutterbeck, *supra* note 313, at 47–48.

<sup>316</sup> See <http://www.guardiacivil.es/en/index.html>.

<sup>317</sup> Lutterbeck, *supra* note 313, at 47; see also Bolduc, *supra* note 193, at 283–285.

<sup>318</sup> Lutterbeck, *supra* note 313, at 47.

<sup>319</sup> Indeed, the traditional approach to Police in the Continent has been dubbed “classic Continental authoritarian policing,” shaping continental policing from the Napoleonic wars until deep in the 20<sup>th</sup> century. One of the characteristics of such police was “a strong association with military or military derived models of organization and operations. See JOSE RAYMUND CANOY, THE DISCREET CHARM OF THE POLICE STATE: THE LANDPOLIZEI AND THE TRANSFORMATION OF BAVARIA 1945-1965 4-5 (2007); cf. Lutterbeck, *supra* note 313, at 50–51. In this context, Schmitt argued that in contrast to Britain, continental states, to a large degree, adopted Hobbesian authoritarianism. See SCHMITT, *supra* note 231, at 79–80.

<sup>320</sup> See FIEP, *supra* note 313; FIEP, *supra* note 313.

previously “civilian” forces.<sup>321</sup> In other words, the exclusionary power of militarization is more considerable where civilian police are *becoming* militarized, rather than where certain police functions are historically performed by paramilitary forces – where the cultural acceptance of such forces could dilute their excluding symbolic power. Third, it should be noted that in any case, even formally military police, in actuality, don more “traditional” police appearance when acting for public order.<sup>322</sup> Fourth, it seems that there is some tendency in Continental Europe to (at least formally) civilianize paramilitary police.<sup>323</sup> Thus, Germany, for instance, gradually civilianized its cold-war era paramilitary Federal Border Guard (now Federal Police).<sup>324</sup> Greece disbanded the Hellenic Gendarmerie after the fall of the dictatorship.<sup>325</sup> Belgium demilitarized its gendarmerie in 1992,<sup>326</sup> and Austria did so in 2005.<sup>327</sup>

The second hybrid force is “border police” or border guards, which are forces charged with national border control.<sup>328</sup> Sometimes these agencies formally belong to the police or other civilian agency.<sup>329</sup> Especially in non-peaceful borders, these forces are

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<sup>321</sup> Of course, such forces do effect society. *See, e.g.*, Renée Zauberman, *The French Gendarmerie: Crossing Sociological and Historical Perspectives*, 5 CRIME, HIST. & SOC. 149 (2001).

<sup>322</sup> It should be added, that although the Gendarmerie and Carabinieri, for instance, are military forces, many times, their troops don traditional police appearance. *See* Gendarmerie Mobile, <http://www.gendarmerie.interieur.gouv.fr/Medias-ou-outils/Galleries/Videos/Gendarmerie-mobile/Gendarmerie-mobile>.

<sup>323</sup> Gorazd Meško et al., *Policing in Central And Eastern Europe: Past, Present and Future Prospects*, in THE OXFORD HANDBOOK OF POLICE AND POLICING 606, 612 (Michael D. Reisig & Robert J. Kane eds., 2014); Lutterbeck, *supra* note 313, at 47 (noting that over time, all of these forces have undergone a process of “demilitarization”). It should be conceded that formal civilianization does not necessarily mean that these forces are no longer “militarized” in the substantive sense, and thus it can certainly give rise to the normalization problem noted above.

<sup>324</sup> *See* KIM EDUARAD LIOE, ARMED FORCES IN LAW ENFORCEMENT OPERATIONS: THE GERMAN AND EUROPEAN PERSPECTIVE 20 -22 (2011).

<sup>325</sup> Law 1481/1 October 1984, Official Journal of the Hellenic Republic, A-152.

<sup>326</sup> Marleen Easton, *Reconsidering the Process of Demilitarization: The Case of the Belgian Gendarmerie*, 4 ASIAN POLICING 19 (2006).

<sup>327</sup> Meško et al, *supra* note 322, at 612

<sup>328</sup> *See* Lutterbeck, *supra* note 313, at 51–60.

<sup>329</sup> Such as the case of Israel’s “Border Police.” *See* Tal Misgav, *Israel’s Border Police*, 17 INNOVATION EXCHANGE 20 (2014), *available at* [http://mops.gov.il/Documents/Publications/InformationCenter/Innovation%20Exchange/Innovation%20Exchange%2017/Innovation\\_Exchange\\_17.pdf](http://mops.gov.il/Documents/Publications/InformationCenter/Innovation%20Exchange/Innovation%20Exchange%2017/Innovation_Exchange_17.pdf).

characterized by their heightened militarization.<sup>330</sup> Arguably, the prevalence of such forces challenges our distinction between military and police action and symbolism. However, upon close look, militarized border police actually *strengthen* our argument. This is because they are acting on the border: their “target” is external to begin with. Meaning, their militarization signifies the exclusion of those beyond the border.<sup>331</sup>

### *B. Self-Protection of Police Officers*

A second objection argues that militarization makes police safer, as they are better able to protect themselves.<sup>332</sup> Indeed, advocates of militarization might claim that militarization makes officers safer; that military equipment, such as armored personnel carriers, are only used to defend and not attack; and that despite the potential to inflict violence, police act with the utmost discretion to minimize the use of force.

To this two responses are available. First, at bottom this is an empirical argument. Whether in general, militarization makes police safer, is a matter of dispute. For instance, while militarization allows police to respond more forcefully to violence, it is just as likely that militarization might provoke graver violent resistance to begin with. As we pointed out earlier, this “arms race,” if you will, characterized the “war on drugs.”<sup>333</sup> The deployment of militarized police might incentivize criminals to organize and arm themselves in a manner that will allow them to counter militarized forces. Thus the instrumental argument does not seem determinative.

A second response is principled. Even if militarization did make police safer (which we dispute), one can argue that as a point of departure, police can only make itself safer to a certain extent. Police assume a special role in society, which requires them to take

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<sup>330</sup> *Id.* at 21–22.

<sup>331</sup> Interestingly, this is concretely reflected in Israel’s border police. These wear green berets to physically symbolize the border, known as the “green line.” *Id.* at 21. For these and other reasons, it seems the German Constitution, for instance, limits the internal use of Federal Border Police only to particular cases of necessity. GRUNDGESETZ [GG] [BASIC LAW] Arts. 35(2); 91, 115f, *translation at* [https://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html](https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html).

<sup>332</sup> For instance, in the Orlando shooting of June 2016, a Kevlar helmet was said to save one officer’s life. *See* Lizette Alvarez & Richard Pérez-Peña. *Orlando Gunman Attacks Gay Nightclub, Leaving 50 Dead*, N.Y. TIMES (June 12, 2016), *available at* <http://www.nytimes.com/2016/06/13/us/orlando-nightclub-shooting.html>.

<sup>333</sup> *See supra*, Section II.C.2.

some form of risk. Indeed, if police were not required to take any risk, they would have not been required use force only in last resort, but could act preventively. As David Luban points out, “[s]ome professions [such as police] include risk taking in their vocational core.”<sup>334</sup> This role-based requirement for risk-taking ascends from their consent to become police officers but also descends as an inherent part of their professionalism.<sup>335</sup> This is precisely the substance of the common police motto, “to protect and to serve.” Protection inherently means assuming risk for the sake of another, or for a greater good. It follows that police cannot follow “zero-risk” policy, but rather, the question is one of proper balance.<sup>336</sup> We can therefore legitimately ask whether militarization, to the extent that it reduces some risk to police, can be justifiable in light of the significant costs detailed above.

### *C. Militarized Police Deters Unlawful Acts*

A further argument for militarization concerns deterrence. Indeed, some proponents of militarization may argue that militarized police forces can deter criminal activity, including terrorists.<sup>337</sup> However, this claim is also unconvincing, both on the instrumental and principled levels. First it is empirically unclear whether militarization deters crime. Indeed, it seems that criminals that would be willing to use the type of violence that militarization wishes to deter – for instance terrorists – are unlikely to be deterred from such forces to begin with.

Moreover, the problem with arguments from deterrence is that they are inherently vague, are impossible to validate, and as such can be used to justify almost everything.<sup>338</sup> The same forces

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<sup>334</sup> David Luban, *Risk Taking and Force Protection*, in READING WALZER 277, 286 (Yitzhak Benbaji & Naomi Sussmann eds., 2014).

<sup>335</sup>*Id.* at 286.

<sup>336</sup> In this sense, it is generally agreed that even soldiers at war cannot fight in a “zero-casualty” mode, and that some risk-taking is required also when fighting wars – the question is only the *level* of risk. *Id.* at 286–287.

<sup>337</sup> For instance, one commentator argued that militarization “shows that we are strong; we can respond to attacks on a new scale. And we can react to situations at several crime scenes simultaneously. We can respond by using pervasive weapons and better equipment. That is the symbolic effect.” See Volker Wagener, *Germany’s New Anti-Terror Units: A Paramilitary Excess?* DW (Jan. 28, 2016), available at <http://www.dw.com/en/germanys-new-anti-terror-units-a-paramilitary-excess/a-19010175>.

<sup>338</sup> See, in another context, Eliav Lieblich, *House Demolitions 2.0*, JUST SECURITY (Dec. 18. 2015), <https://www.justsecurity.org/28415/house-demolitions-2-0/>.

that might deter criminals can easily also be used in practice to deter legitimate dissent through pretext.<sup>339</sup> Even if such abuse does not take place, a “chilling effect” might occur, as “[t]he very essence of a chilling effect is an act of deterrence.<sup>340</sup> Therefore, the mere presence of intimidating militarized forces, originally meant to deter criminals, might effectively deter individuals that seek to engage in legitimate activities.

However, to us, the key problem with the argument from deterrence in the context of militarization is a principled one. We should ask those who invoke deterrence, what is the “or what?” that underlies the presence of militarized forces? In other words, what is the stick with which the potential perpetrator is threatened by such forces? In the context of war, it is clear that the threat is death and destruction.<sup>341</sup> In such cases, demonstration of military capacity might be understandable.<sup>342</sup> However, in the context of law enforcement, the stick of deterrence is in the form of *justice*, meaning, arrest, trial and punishment in line with due process.<sup>343</sup> Deterrence by militarized police conflates the two: it applies to law enforcement deterrence the logic of war deterrence. It conveys to the policed community not the message that if you commit a crime, justice will be meted out; but rather, that if you transgress, you might encounter extreme, possibly deadly violence. It becomes clear that such perception of deterrence is unacceptable in a rule of law society.

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<sup>339</sup> See Glenn Greenwald, *The Militarization of U.S. Police: Finally Dragged into the Light by the Horrors of Ferguson* THE INTERCEPT (Apr. 14., 2014), available at <https://theintercept.com/2014/08/14/militarization-u-s-police-dragged-light-horrors-ferguson/>.

<sup>340</sup> Frederick Schauer, *Fear, Risk and the First Amendment: Unravelling the Chilling Effect*, 58 B.U. L. REV. 685, 689 (1978).

<sup>341</sup> ANDREW HEYWOOD, KEY CONCEPTS IN POLITICS AND INTERNATIONAL RELATIONS 53 (2<sup>nd</sup> ed., 2015).

<sup>342</sup> However, it should be added that even during armed conflict deterrence in the form of a threat-to-kill is recognizable as a valid objective versus armed enemies; it cannot be aimed at the civilian population. See Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV) art. 33, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (“all measures of intimidation [against protected persons]... are prohibited”).

<sup>343</sup> See generally GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 30 – 31 (1998); but see Samuel J. Rascoff, *Counterterrorism and New Deterrence*, 89 N.Y.U. L. REV. 830 (2014) (pointing out the role of “new deterrence” in light of contemporary counter-terrorism measures).



*D. Increasing the Sense of Security*

A further objection could be that even if all else fails, militarization enhances the “sense of security” of the public. The public sees militarized forces and is reassured that the state is strong and able to protect it, and thus the system’s legitimacy is strengthened.

This argument fails for several reasons. Key among them is the fallacy found at the basis of broad policies which aim to achieve a *subjective* sense of security through preventive actions. Indeed, when a state adopts policies based on the presumption that its civilians are threatening, it actually defeats itself. Peter Ramsay convincingly identified an ongoing process in which states attempt to ensure not only the physical security of their citizenry, but also their subjective *sense* of security. However, to Ramsay, when doing so, the state admits its inability to provide a sense of security normally; thus, paradoxically, the state becomes an *insecurity* state.<sup>344</sup> In Ramsay’s words, such actions are nothing but “an authoritative statement of law’s lack of authority.”<sup>345</sup> In our context, deploying militarized forces on account of a presumption of threat amounts to an admission by the state of law’s general inefficacy, of the general anxiety of the citizenry, and the state’s own authority deficit.<sup>346</sup> When militarizing police, the state essentially concedes that its citizens – and even, perhaps, its *police* – are insecure within their own polity. This of course only generates *more* subjective insecurity:<sup>347</sup> when the presumption of threat constructs some citizens as threatening-if-not-proven-otherwise, it simultaneously constructs others as potential victims.<sup>348</sup>

Even if we would assume militarization could instill some

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<sup>344</sup> RAMSAY, *supra* note 5, at 5-6, 215-219, 226-227.

<sup>345</sup> *Id.* at 217.

<sup>346</sup> In Ramsay’s terms, “hollow sovereignty.” *Id.* 215-219.

<sup>347</sup> *Id.* at 226 (“there is bound to be an element of self-fulfilling prophecy when it is the organs of the state that doubt their own authority.”).

<sup>348</sup> *Cf. id.* at 229, 232 (arguing that “post-democratic” politics “constructs citizens as either vulnerable to predatory threats or as the source of those threats, as if they were the subjects of the state of nature;” and that under the “insecurity state,” [e]ither we are potential crime victims marked by our vulnerability or we are threats ...

or conceivably we are both”). In a sense, the presumption of threat internalizes the logic of terrorism: terrorist tactics – say, the use of suicide bombers in public transportation – aim to instill a presumption that fellow individuals are threatening. When states respond in-kind by adopting preventive and collective measures, they adopt this logic preciselu.

sense of security among certain (privileged) segments of society, this would hardly change our conclusion. As we established earlier, normalizing militarization assumes threat, implies a friend/enemy distinction and therefore excludes the policed community. Now, assuming that militarized police are not deployed everywhere but selectively,<sup>349</sup> the “sense of security” of community X must be achieved at the expense of the exclusion of community Y.<sup>350</sup> The only way to counter this problem would be to deploy militarized police always and everywhere. In such an attempt to uphold formal equality, the state would exclude everybody and will finally complete the merger between democracy and totalitarianism, norm and exception.

#### CONCLUSION

Like other situations in which measures that were once designed for the exceptional case become normalized, the discussion of police militarization is preoccupied with instrumental arguments. When engaged in such arguments, we frequently lose sight of the larger, principled issue at hand.

As this Article demonstrates, the principled problem of police militarization is not found in its actual use of military-style violence, but rather, the in the presumption of threat that it implies. The presumption of threat, manifested symbolically through the tacit acknowledgment that the possibility of combat is constantly present, carves out a domestic enemy, one which is excluded from the political order. Since this distinction is carried out by the police, which is an organ of the normal, rather than the exceptional, legal regime, the distinction has an especially powerful potential to normalize and solidify this exclusion. This, we believe, is what underlies the strong objections to such forces among policed communities.

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<sup>349</sup> Compare Bill Ong Hing, *From Ferguson to Palestine: Disrupting Race-Based Policing*, 59 HOWARD L. J. (forthcoming, 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2763939](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2763939); AMERICAN CIVIL LIBERTIES UNION, *supra* note 14, at 5.

<sup>350</sup> See AGAMBEN, *supra* note 5, at 17–18.