TO SERVE AND PROTECT EACH OTHER: HOW POLICE-PROSECUTOR CODEPENDENCE ENABLES POLICE MISCONDUCT

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ABSTRACT

Most Americans are rightly enraged when police shoot unarmed civilians, use excessive force, or engage in unethical practices like planting evidence. However, there is little popular understanding and scholarly attention as to why prosecutors fail to charge or otherwise hold officers accountable. This Article offers a novel contribution to the study of police misconduct by examining how prosecutors nationwide enable police misconduct on an institutional level. Through both social-scientific and legal analysis, we consider the codependent relationship between prosecutors and police that prevents accountability for police violence and misconduct against the public. Specifically, we analyze (1) the cultural norms created between police and prosecutors that allow police to influence prosecutorial discretion over police accountability and (2) the legal and extralegal tools that prosecutors wield to protect their police benefactors—and themselves in the process. In contrast to other scholarship on police misconduct, we show how adjacent criminal justice institutions—police and prosecutors—enable persistent patterns of practice that operate within the boundaries of legality, but often to deadly and unethical ends. We end with potential solutions to better equip conscientious prosecutors, lawmakers, and the public to combat this codependent dynamic that has left so many communities—particularly those on the margins—afraid of the very law enforcement actors that are supposed to protect them.

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INTRODUCTION

Jon Burge was a serial racist and sadist who tortured over 120 Black men in Chicago in the 1980s and '90s.[1] He placed bags over their heads, burned them with cattle prods, and shouted the n-word while electrocuting them.[2] But Burge was also a commander in the Chicago Police Department who was torturing these men to extract confessions to alleged crimes.[3] And because of the latter, he was never charged for the former. The Cook County State's Attorney's Office—the prosecutors who had the ability and duty to charge Burge and his associates with crimes—failed to hold him accountable for "what reads like three decades of wartime atrocities in an American city,"[4] atrocities that were widely known within poor communities around the Cook County Court House.[5]

In fact, far from charging Burge and protecting his victims, line Chicago prosecutors continued taking his cases forward without disclosing the torture that would have unraveled them.[6] In so doing, prosecutors displayed a willful institutional blindness that all but encouraged the police violence to continue. In fact, by proceeding with these cases—many of which were won based on the illegally extracted confessions—prosecutors validated a formalized process through which police could operate with nearly unchecked oversight and prosecutors could reap the "benefits" of high conviction rates and long sentences. These benefits were both political and structural. High conviction rates on such violent cases gave the political veneer of being tough on crime. Convictions, especially those won at trial with police testimony, also gave one

[1] *See* NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT 144 (2016).

[2] *See id.*

[3] *See id.*

[4] *Id.* at 145.

[5] *See* Natalie Y. Moore, *Payback*, MARSHALL PROJECT (Oct. 30, 2018, 6:00 AM), https://www.themarshallproject.org/2018/10/30/payback [https://perma.cc/JGL6-Z9HV]. In 2008, years after the statute of limitations had run on the torture itself, the U.S. Attorney's Office for the Northern District of Illinois charged Burge with obstruction of justice and perjury related to Burge's testimony in a civil lawsuit brought by one of his victims, and Burge was convicted and sentenced to 4.5 years in prison. *See* Annie Sweeney, *Burge Given 4½ Years in Prison*, CHI. TRIB. (Jan. 21, 2011), https://www.chicagotribune.com/news/ct-xpm-2011-01-21-ct-met-burge-sentencing-0122-20110121-story.html; *Jon Burge and Chicago's Legacy of Police Torture*, CHI. TRIB. (Sept. 19, 2018, 12:22 PM), https://www.chicagotribune.com/news/ct-jon-burge-chicago-police-torture-timeline-20180919-htmlstory.html (providing detailed timeline starting in 1970, when Burge joined Chicago Police Department, through present convictions).

[6] VAN CLEVE, *supra* note 1, at 150 (describing how police leverage over prosecutors could explain why "most prosecutors remained silent and dutifully pursued the cases that came their way").

clout in the State's Attorney's Office—the type of clout that earned prosecutors their promotions.[7]

There is no statute or common law that describes these rules of engagement. However, these institutional norms of practice and incentives were so entrenched that they enabled police misconduct with near impunity. Perhaps it is no surprise that it took a half a century—and a Herculean lawsuit to expose the Laquan McDonald dashcam video—in order to charge and convict a police officer for an on-duty shooting.[8]

Like police power in the streets, prosecutorial power in the formal criminal legal system has deep historical roots and is nearly unchecked. In 1940, then-Attorney General (and later Supreme Court Justice) Robert Jackson said, "The Prosecutor has more control over life, liberty and reputation than any other person in America."[9] Indeed, the law imbues prosecutors with vast discretion to commence or discontinue public prosecutions when "the ends of justice are satisfied."[10] Yet ample evidence indicates that when police are the ones committing the crimes, prosecutors deploy their immense discretion to cover for and effectively encourage the criminality rather than to combat it and seek justice. The seemingly unending list of young Black people killed by police without local criminal repercussions—Michael Brown, Philando Castile, Stephon Clark, Eric Garner, Tamir Rice, Alton Sterling, and more—speaks to this phenomenon and its national scope. However, prosecutors get the police's

[7] A study of two prosecutors' offices that evaluated their goals, objectives, and performance measures found that, "[a]t best, across the country, prosecutors maintain and track only the most elementary data . . . . More often, even these data are incomplete and must be tabulated manually." M. ELAINE NUGENT-BORAKOVE, LISA M. BUDZILOWICZ & GERARD RAINVILLE, AM. PROSECUTORS RESEARCH INST., EXPLORING THE FEASIBILITY AND EFFICACY OF PERFORMANCE MEASURES IN PROSECUTION AND THEIR APPLICATION TO COMMUNITY PROSECUTION, at xiii (2009), https://www.ncjrs.gov/pdffiles1/nij/grants/227668.pdf [https://perma.cc/A8J4-QSVN]. The study further found that, despite the fact that "prosecutors have balked at the notion that conviction rates and recidivism rates are appropriate measures of their performance[,] . . . such rates do in fact appear to be valid measures of their performance." *Id.*

[8] Nicole Gonzalez Van Cleve, *The Chicago Culture That Created Jason Van Dyke*, THE ATLANTIC (Oct. 9, 2018), https://www.theatlantic.com/ideas/archive/2018/10/laquan-mcdonalds-death-almost-didnt-come-light/572476/. For more on the scope of Chicago Police Department misconduct and citizen complaints, see *An Introduction to the Citizens Police Data Project*, INVISIBLE INST., http://invisible.institute/police-data [https://perma.cc/Z3QS-7KYW] (last visited Mar. 30, 2020); and *Chicago 1988-2020*, CITIZENS POLICE DATA PROJECT, https://cpdp.co/ [https://perma.cc/5RSX-TTQ4] (last visited Mar. 30, 2020).

[9] VAN CLEVE, *supra* note 1, at 85 (quoting Robert H. Jackson, Address at the Conference of United States Attorneys: The Federal Prosecutor (Apr. 1, 1940), *in* 24 J. AM. JUDICATURE SOC'Y 18 (1940)).

[10] *Id.* (quoting People v. Wabash, St. Louis & Pac. Ry. Co., 12 Ill. App. 263, 265 (1882)).

backs in less obvious ways, which include influencing practice norms within the criminal prosecution system.[11]

Prosecutors who resist the status quo do not fare well. St. Louis's experience since the Ferguson protests is telling. After police officer Darren Wilson killed Michael Brown in 2015, local and national groups pressured St. Louis County Attorney Bob McCulloch to charge Wilson.[12] McCulloch, at the time a twenty-seven-year incumbent with a tough-on-crime pedigree and close ties to the police, did not want to prosecute Wilson.[13] His now-infamous work-around was to submit the matter to a grand jury, presenting such a weak case for murder that the grand jury declined to indict Wilson.[14] In McCulloch's calculation, this allowed him to avoid blame from either side.

McCulloch's stratagem lasted until the next election, when Wesley Bell, a Democrat and a Black city council member, upset him.[15] Wilson's nonindictment, as well as racial inequality in policing more generally, played a central role in the election.[16] Bell, though a longtime prosecutor himself, ran as a reformer, promising among other things to address police misconduct.[17] Upon election, he was immediately punished for this transgression. In a stunning, almost literal demonstration of the lack of independence between police and prosecutors, dozens of assistant county attorneys in Bell's office joined the police union to protest Bell.[18]

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[11] *See, e.g.*, Nicole Martorano Van Cleve, *Reinterpreting the Zealous Advocate: Multiple Intermediary Roles of the Criminal Defense Attorney*, *in* LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 293, 293-316 (Leslie C. Levin & Lynn Mather eds., 2012); Sarah Almukhtar et al., *Black Lives Upended by Policing: The Raw Videos Sparking Outrage*, N.Y. TIMES (Apr. 19, 2018), https://www.nytimes.com/interactive/2017/08/19/us/police-videos-race.html.

[12] Josh Sanburn, *Ferguson Decision Thrusts St. Louis Prosecutor into National Spotlight*, TIME (Nov. 25, 2014), https://time.com/3605802/bob-mcculloch-ferguson-grand-jury-prosecutor/ [https://perma.cc/SA8Z-M4MT].

[13] *Id.*

[14] *Id.*

[15] Cleve R. Wootson Jr., *Voters Oust Prosecutor Accused of Favoring Ferguson Officer Who Killed Michael Brown*, WASH. POST (Aug. 8, 2018, 5:03 PM), https://www.washingtonpost.com/news/post-nation/wp/2018/08/08/voters-oust-prosecutor-accused-of-favoring-ferguson-officer-who-killed-michael-brown/.

[16] *Id.*

[17] *Id.*

[18] Tony Messenger, *St. Louis County Prosecutors Seek to Join Police Union Before Wesley Bell Takes Over*, ST. LOUIS POST-DISPATCH (Dec. 16, 2018), https://www.stltoday.com/news/local/columns/tony-messenger/messenger-st-louis-county-prosecutors-seek-to-join-police-union/article_f489d57d-a6a2-5a95-a4c2-44dab7d73767.html [https://perma.cc/R95U-D8NQ]. Notably, the City of St. Louis—a separate jurisdiction from St. Louis County but served by some of the same police—also elected a reform-minded prosecutor, Kimberly Gardner, in 2016. *See* Cassandra Maas, *St. Louis' First Black Prosecutor Sues City, Police*

This Article, through the lens of both social-scientific analysis and legal analysis, considers the codependent relationship between prosecutors and police that prevents accountability for police violence and misconduct against the public. In particular, this Article exposes (1) the cultural norms created *between* police and prosecutors that allow police to influence prosecutorial discretion over police accountability and (2) the legal and extralegal tools that prosecutors wield to protect their police benefactors—and themselves in the process.

In contrast to other scholarship on police misconduct, we offer a novel intervention to this literature by showing how adjacent criminal justice institutions—police and prosecutors—enable persistent patterns of interaction.[19] As we describe, police misconduct *needs* prosecutors to enable it. As such, to understand its prevalence and persistence on a national scale, one must examine how police and prosecutors are interdependent institutions that share culture,

Union, Five Others for 'Racist Effort' to Block Reform Agenda, JURIST (Jan. 15, 2020, 3:43 PM), https://www.jurist.org/news/2020/01/st-louis-first-black-prosecutor-sues-city-police-union-five-others-for-racist-effort-to-block-reform-agenda/ [https://perma.cc/M7TF-TRFT].

Gardner made a concerted effort to combat police violence and misconduct, including by criminally investigating some of that misconduct. *Id.* She also placed dozens of officers on a so-called exclusion list, whereby her office would categorically reject cases they brought in. *See* Jim Salter, *Prosecutor Adds 22 St. Louis Officers To Exclusion List*, AP NEWS (June 19, 2019), https://apnews.com/f31560afcbbb4f9e86ede7b3835576fe [https://perma.cc/UK5L-LRR9]. The police backlash against these reforms has been swift and vicious as well. Richard A. Oppel Jr., *Prosecutor Who Tried to Change the System Finds It's Fighting Back*, N.Y. TIMES, June 15, 2019, at A17 (describing Gardner's subjection to scrutiny by special prosecutor).

Other reform-oriented prosecutors have faced significant resistance once those reforms are aimed at curbing police misconduct or police influence over the court system. For instance, Larry Krasner in Philadelphia created a "no call" list of police officers who had perjured themselves, and it was met with significant push-back from police. *See* Mensah M. Dean & Mark Fazlollah, *FOP Sues Kenney, Krasner, Ross over Police 'Do-Not-Call' List*, PHILA. INQUIRER (Nov. 13, 2018, 12:42 PM), https://www.inquirer.com/philly/news/breaking/fop-lawsuit-kenney-krasner-ross-police-do-not-call-list-philadelphia-20181113.html. In addition, Cook County Prosecutor Kim Foxx was met by protests from police when she dropped the charges for first-time offender and *Empire* star Jussie Smollett. *See* Javonte Anderson, *Dueling Protests Monday in Response to Kim Foxx and Jussie Smollett*, CHI. TRIB. (Apr. 2, 2019, 5:40 PM), https://www.chicagotribune.com/news/breaking/ct-met-kim-foxx-police-dueling-protests-20190401-story.html. Much of the protest was based on the fact that Foxx did not defer to police as a professional "courtesy" or act of deference before dropping the charges. *See* Daniel Tucker, *Smollett Decision a Bold Move for State's Attorney's Office*, WBEZ (Apr. 2, 2019), https://www.wbez.org/shows/morning-shift/smollett-decision-a-bold-move-for-states-attorneys-office/a7e6306a-9944-45a9-8837-832981263ce4 [https://perma.cc/QD9Z-DWN6].

[19] *See generally* Armando Lara-Millán & Nicole Gonzalez Van Cleve, *Interorganizational Utility of Welfare Stigma in the Criminal Justice System*, 55 CRIMINOLOGY 59 (2017).

norms, resources, and goals. And, to put it bluntly, those goals are not always shared with the public.

Part I describes how police extend the so-called "thin blue line" of silence to the prosecutors who take their cases, effectively nullifying prosecutors' ability to hold police accountable. This Part uses Chicago as an illustrative example, but it describes practices, cultures, and perceptions—including the myth of the "bad apple cop"—that are national in scope. Part II describes how prosecutors, cowed by this culture of compliance and unwilling to jeopardize the flow of criminal cases and helpful testimony that police officers provide, proactively deploy their legal discretion and extralegal power to cover for police. Among other methods, this occurs via strategic plea bargaining and charge manipulation, withholding evidence of misconduct (both legally and illegally), and lobbying against police reform in state legislatures. Part III offers potential solutions to better equip conscientious prosecutors, lawmakers, and the public to combat this codependent dynamic that has left so many communities—particularly those on the margins—afraid of the very law enforcement actors that are supposed to protect them.

I. HOW POLICE PREVENT PROSECUTORS FROM HOLDING THEM ACCOUNTABLE

A. *The Bad-Apple Narrative*

After most police-involved shootings occur, many local city and police officials try to squelch public outrage. There is a common public relations "spin" after the incident. The local mayor's office, the police chief, and perhaps even a spokesperson for the Fraternal Order of the Police put forth a narrative to explain the death of the suspect.[20] The tone is always somber, and the narrative is always patterned and consistent. In most cases, officers and their representatives insist that the offending officer(s) feared for their lives, knowing that those magic words often excuse them from legal liability.[21]

[20] The Fraternal Order of Police is the preeminent police union nationwide, with over 330,000 members. *About the Fraternal Order of Police*, FRATERNAL ORD. POLICE, https://www.fop.net/CmsPage.aspx?id=223 [https://perma.cc/SA5W-8J4V] (last visited Mar. 31, 2020). Some cities may have other unions that take the lead on spin. *See, e.g.*, Press Release, Patrick J. Lynch, President, Police Benevolent Ass'n of the City of N.Y. Inc., Garner Autopsy Proves Police Officer Pantaleo Did Not Choke Eric Garner to Death (Dec. 6, 2018), https://www.nycpba.org/press-releases/2018/autopsy-proves-po-pantaleo-did-not-choke-garner-to-death/ [https://perma.cc/DW2L-VACJ] (blaming Mr. Garner's death on poor health instead of officer actions and claiming that "Mr. Garner's health was so poor that it is highly likely that if he had decided to flee police instead of fighting them, the end result would have been the same").

[21] *See* Graham v. Connor, 490 U.S. 386, 396 (1989). *See generally* Scott v. Harris, 550 U.S. 372 (2007).

In those egregious cases where that approach does not end the outcry, officials then claim, somewhat contradictorily, that the death is the fault of a lone or rogue officer and does not reflect the ethos of the entirety of the police department. In the same or other cases, victims are painted as the aggressor who gave the individual officer no other choice but to use deadly force.[22] Even if the police's narrative does not match witness accounts or video footage (as in the case of the death of Laquan McDonald in Chicago), it is accepted as infallible and the victim is stigmatized as having "deserved" deadly force.[23]

These common public relations tactics portray police misconduct as limited to an individual—the "bad apple"—rather than as a set of practices representative of police culture as a whole. In addition, policing is viewed in a myopic manner, isolated from other institutional actors like judges and prosecutors.

In this Part, we dispel the individual "bad apple" narrative of policing and show how the shared culture between police and prosecutors emboldens police misconduct. Specifically, we discuss this culture as one of silence and violence, where police actions in the streets are expected to be concealed or at least ignored by organizational actors in the criminal legal system. This expectation is supported by norms and practices within the prosecutor's office. Informal, unwritten practices—rather than training manuals or case law—dictate how prosecutors should interact with police. The culture is reinforced through social and professional sanctions for prosecutors who deviate from or question local norms, as well as social and professional promotion for those prosecutors who go along to get along.

[22] For example, in the Walter Scott case in Charleston, South Carolina, Officer Michael Slager shot Walter Scott during a routine traffic stop. Slager fired eight shots and killed Scott. Officer Slager claimed that Scott took control over his taser, but cell phone video footage of the incident showed otherwise. *See* Matthew Vann & Erik Ortiz, *Walter Scott Shooting: Michael Slager, Ex-officer, Sentenced to 20 Years in Prison*, NBC NEWS (Dec. 7, 2017, 12:28 PM), https://www.nbcnews.com/storyline/walter-scott-shooting/walter-scott-shooting-michael-slager-ex-officer-sentenced-20-years-n825006 [https://perma.cc/M859-5M7V]. Similarly, in the shooting death of Laquan McDonald in Chicago, officers claimed that McDonald lunged at officers when the dashcam video showed otherwise. *The Latest: Witness: Cop Said Teen Lunged Before Shooting*, AP NEWS (Nov. 27, 2018), https://apnews.com/0de4bebdbe0b4f468653d369c692d361.

[23] *See* Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1326-27 (1999); Susan Bandes, *"It Is an Open Secret Long Shared by Prosecutors, Defense Lawyers, and Judges that Perjury Is Widespread Among Law Enforcement Officers": Why Judges So Rarely Second-Guess Police Testimony*, SALON (Dec. 16, 2015, 5:57 PM), https://www.salon.com/2015/12/16/it_is_an_open_secret_long_shared_by_prosecutors_defense_lawyers_and_judges_that_perjury_is_widespread_among_law_enforcement_officers_why_judges_so_rarely_second_guess_police_testimony/ [https://perma.cc/2ACT-KDXY] ("In the swearing contest between cop and alleged victim, the cop is sure to win nearly every time.").

In describing this culture, we rely on the findings of a decade-long study of Chicago's criminal court system, published in the book *Crook County: Racism and Injustice in America's Largest Criminal Court* and discussed in a recent article in *Criminology*.[24] We examine how these cultural and organizational arrangements reflect broader patterns that transcend this one jurisdiction.[25] While the "criminal justice system" is actually a web of autonomous jurisdictions that each have varying laws and organization, police misconduct has common features across jurisdictions, especially with regard to prosecutorial discretion on that misconduct.[26]

B. *Chicago's Culture of Silence and Violence*

On October 20, 2014, Chicago police officers surrounded a teenager named Laquan McDonald on the street.[27] McDonald paced erratically with a shiny object in his hand.[28] Some officers presumed it was a knife.[29] Guns were drawn as all the officers held their fire.[30] Officer Jason Van Dyke was the last officer to the scene. From the dashcam video, one can see him race through the city streets, stop at the scene, and, within seconds, unload sixteen bullets into Laquan

[24] *See generally* VAN CLEVE, *supra* note 1; Lara-Millán & Van Cleve, *supra* note 19.

[25] This is the first study in forty years to take a system-wide approach to understanding pretrial punishment in terms of courts' processes as a product of culture, discretion, and racial stigma. The research is based on more than eight years studying Chicago's court system, including one year of observations in both the Office of the Illinois State's Attorney and the Office of the Public Defender. Professor Van Cleve used a multimethod approach to incorporate multiple vantage points on the same field site over an extended period of time. In addition to ethnography, Van Cleve interviewed 104 attorneys (prosecutors, public and private defenders, and judges). Overall, Van Cleve collected more than 1000 hours of observations of all twenty-five courtrooms in Chicago's main courthouse. Research assistants were from varying racial backgrounds and dressed in "plain clothes" (rather than professional attire) in order to blend in with the general public while they observed the courts. These "court watchers" collected observational data in a semistructured manner using The National Center for State Courts and the Bureau of Justice Assistance's "Trial Court Performance Standards" regarding "access to justice."

[26] John Hagan, John D. Hewitt & Duane F. Alwin, *Ceremonial Justice: Crime and Punishment in a Loosely Coupled System*, 58 SOC. FORCES 506, 514 (1979) (arguing that "the system of justice involves a loosely coupled set of subsystems—the judge, the prosecutor and the probation department").

[27] Kori Rumore & Chad Yoder, *Minute by Minute: How Jason Van Dyke Shot Laquan McDonald*, CHI. TRIB. (Jan. 18, 2019, 7:32 PM), https://www.chicagotribune.com/news/laquan-mcdonald/ct-jason-vandyke-laquan-mcdonald-timeline-htmlstory.html.

[28] *Id.*

[29] *Id.*

[30] *Id.*

McDonald's body.[31] The dashcam video confirmed that McDonald's body was literally smoking from the shots.[32]

The Chicago Police Department created an "official" account of the incident. They claimed that McDonald had a knife and tried to lunge at Van Dyke.[33] The other officers at the scene—and even up the chain of command—were willing to vouch for that description.[34] While the dashcam video had captured something else entirely, it took a court order and thirteen months to expose the truth: McDonald was walking away and was killed without provocation.[35] State's Attorney Anita Alvarez, Chicago's top prosecutor, waited until after the video's public release—over 400 days—to charge Van Dyke.[36] Without the video's public release, the narrative from the police department likely would have held and Jason Van Dyke might still be walking the beat. Alvarez may never have charged him. Indeed, the case was supposed to vanish in the police files—the back of the cabinet, perhaps. Numerous officers stood ready to "shade" the case in Van Dyke's favor.[37] In a 2016 report by Chicago's Inspector General, as many as sixteen police personnel were involved in covering up McDonald's death—a secret that lasted for nearly three years.[38]

These aspects of the McDonald tragedy are well covered.[39] However, less explored is the prevailing narrative around Van Dyke as a single rogue officer—a bad apple. But interview data from Chicago attorneys and judges reveals otherwise: Van Dyke was shaped by a culture of silence and violence that was

[31] *See id.*; *see also* Almukhtar et al., *supra* note 11 (providing dashcam footage).

[32] *See* Almukhtar et al., *supra* note 11.

[33] *See Biggest Takeaways from the Inspector General's Report on Laquan McDonald's Fatal Shooting*, NBC CHI. (Oct. 9, 2019, 1:58 PM), https://www.nbcchicago.com/news/local/laquan-mcdonald-jason-van-dyke-inspector-general-report/1969886/ [https://perma.cc/9Z5R-77MY].

[34] *See id.*

[35] *Id.*

[36] Van Cleve, *supra* note 8.

[37] Chip Mitchell, *4 Chicago Police Officers Fired in Alleged Cover-Up for Jason Van Dyke*, NPR (July 19, 2019), https://www.npr.org/local/309/2019/07/19/743412353/4-chicago-police-officers-fired-in-alleged-cover-up-for-jason-van-dyke [https://perma.cc/3JJK-5YXC].

[38] Safia Samee Ali, *Inspector General Report Shows at Least 16 Officers Involved in Cover-Up of Laquan McDonald Shooting*, NBC NEWS (Oct. 9, 2019, 5:22 PM), https://www.nbcnews.com/news/us-news/inspector-general-report-shows-least-16-officers-involved-cover-laquan-n1064401 [https://perma.cc/28TY-XRWV]. For a full summary of the Inspector General's report, see *Read the Inspector General Reports on the Fatal Police Shooting of Laquan McDonald, Including Transcripts of Officer Interviews*, CBS CHI. (Oct. 9, 2019, 5:34 PM), https://chicago.cbslocal.com/2019/10/09/laquan-mcdonald-documents-inspector-general-joseph-ferguson-investigation-jason-van-dyke/ [https://perma.cc/242M-2EE6].

[39] *See* sources cited *supra* note 38.

created by police and extended to prosecutors and to the entire Cook County criminal court system.

Attorneys, including prosecutors and defense counsel, described an elaborate culture where police created cases for prosecutors who in turn were expected to defer to officers as a professional courtesy—even if a suspect was dead. In one interview that sounded hauntingly similar to the case of Laquan McDonald, a prosecutor described the following incident:

> A police officer killed a guy and they said he was shooting at them at the time. I could tell that didn't make much sense, but I put the blinders on. (I got conflicting stories from police officers who came in at two different times.) I told my supervisor, and he asked why I had had them come in separately (I hadn't, they just came in that way) and told me that I should have them get together and straighten it out. He got mad at me. (I went up the chain of command with the complaint, and didn't get a response.) One supervisor told me, "You're a prosecutor, not a defense attorney." One supervisor got so mad that he threw an ashtray against the wall and broke it. They wouldn't let me see Daley about it. They took the case from me and gave it to another lawyer.[40]

As this interview reveals, part of what it meant to be a prosecutor was to align with the police at all costs—even when there were egregious errors in cases. Prosecutors were intimidated and taunted for being "defense" attorneys if fellow prosecutors saw them deviating from these persistent norms of practice. Those who bucked these expectations could expect to have their cases taken away from them, as described above.[41] Fear was instilled in fellow prosecutors so that they were socialized to comply, and whistleblowers were made to be examples by marginalization in the office. The same was true of police. In the 2017 Department of Justice ("DOJ") report investigating the Chicago Police Department, one sergeant sums up the tacit threat of challenging the cultural expectations of silence: "If someone comes forward as a whistleblower in the Department, they are dead on the street."[42] For prosecutors, breaking step with police or questioning their framing of events was tantamount to being dead in the office. They could expect their career to be halted along with any possibility of promotion.[43]

Given the socialization and the intimidation within the office, it may not be surprising that police perjury was normalized and treated like an open secret during anonymous interviews. "Twelve of twenty-seven prosecutors said that

[40] VAN CLEVE, *supra* note 1, at 154.

[41] *See id.*

[42] U.S. DOJ CIVIL RIGHTS DIV. & U.S. ATTORNEY'S OFFICE N. DIST. OF ILL., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 75 (2017) [hereinafter INVESTIGATION OF CHICAGO POLICE], https://www.justice.gov/opa/file/925846/download [https://perma.cc/D26J-KFPN].

[43] VAN CLEVE, *supra* note 1, at 150-55.

police perjury sometimes occurred, seven did not directly respond, and eight said that it did not."[44] "Not surprisingly, all twenty-four public defenders responded that perjury occurred."[45] And "[t]wenty of twenty-seven judges said that [police] perjury occurred, six did not directly respond, and only one said that it did not occur."[46]

What was unclear from these findings was whether silence or denial from a few judges and prosecutors was due to fear of retaliation from within for talking to interviewers or whether lying was so normalized that interviewees rationalized police perjury as part of the mundane way that the system kept its momentum. For instance, a defense attorney spoke about the insular nature of policing culture:

> You talk to them [the police] in a bar and they'll admit . . . they'll swarm the neighborhood and make all the guys line up on a fence and they'll search all of them, and they can get away with that in Englewood; 80 percent of them do it, not huge fudges.[47]

Despite the attorney's surface-level outrage over the ways police manufacture cases and profile entire Black neighborhoods (even admitting to its widespread prevalence), the attorney then minimizes these practices as "not huge fudges." In this culture, such "small" acts of misconduct are dismissed as less serious—a normal part of the everyday practice of criminal law.

Because lying was so internalized in this court culture, prosecutors, defense attorneys, and judges had their own lingo for explaining perjury. Words like "testilying" (combination of testifying and lying), "fudging," and "shading" were prevalent colloquialisms within the courts.[48] "'[S]hading' was the most widely used to describe how officers frame information in reports or testimony to make a case more convincing" and, in turn, more likely to end in a conviction for the State.[49]

Shading could include altering the amount of drugs seized at the scene, modifying the weight or height of a suspect on a police report, or blatantly misrepresenting how evidence was obtained.[50] These practices, at best, stacked the deck in favor of the State. At worst, they violated the law—both state and constitutional.[51]

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[44] *Id.* at 146.

[45] *Id.*

[46] *Id.*

[47] *Id.* at 147 (alteration and omission in original).

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] For discussions of shading and testilying from other cities around the country, see generally I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835 (2008); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037 (1996); Joseph Goldstein, *'Testilying' by Police as Cameras Capture Truth*, N.Y.

One prosecutor contended that police shading or lying was universal and shifted the blame from prosecutors to the judges who did little to stop the practice: "100 percent, maybe more so now, apparently it is now acceptable and judges don't have the guts to say anything."[52]

One particularly candid former prosecutor described "shading" as not just law bending but lawbreaking that could jeopardize his law license: "They lie, they cheat, they steal. It's not all, or most, but there are people I didn't trust. I'm not going to lay my license on the line for a lie."[53]

Beyond the data presented here, the DOJ has offered definitive evidence against the "bad apple" narrative with its overwhelming findings of the Chicago Police Department's civil rights violations. In its 2017 report, the DOJ described patterns of "excessive use of force, including shooting unarmed citizens who did not pose a threat and using Tasers (even on children) to stun people for mouthing off."[54] These techniques were disproportionately used against people of color, and officers were rarely disciplined. In addition, the Chicago Police Department used a coordinated effort to "coach and conceal" misconduct. Officers altered their "statements with the help of their legal representatives."[55]

Whistleblowers were systematically silenced. The harassment of whistleblowers was violent and persistent, with little help from supervising officers.[56] Police have assaulted whistleblowers and also shifted them to the most dangerous beats for midnight patrol shifts. Some officers have sued for such illegal retaliation and cities pay a substantial cost when held liable for such behavior. In Chicago, the city paid over $4.5 million in one case where an officer was verbally assaulted, "made to feel physically threatened," and transferred to a midnight patrol shift after violating the code of silence.[57] But these cases are few and far between. Further, it should not be incumbent on individual officers

TIMES, Mar. 19, 2018, at A1; Michael Powell, *Shades of the Truth from the Police*, N.Y. TIMES, July 22, 2013, at A14.

[52] VAN CLEVE, *supra* note 1, at 149.

[53] *Id.*

[54] Van Cleve, *supra* note 8; *see also* INVESTIGATION OF CHICAGO POLICE, *supra* note 42, at 32-35.

[55] Van Cleve, *supra* note 8.

[56] Jamie Kalven, *Operation Smoke and Mirrors*, THE INTERCEPT (Oct. 6, 2016, 9:00 AM), https://theintercept.com/2016/10/06/in-the-chicago-police-department-if-the-bosses-say-it-didnt-happen-it-didnt-happen/ [https://perma.cc/8VLT-C8L9].

[57] Patrick Smith, *Legal Miscalculation in Police Code of Silence Case Costs Chicago $4.5 Million*, NPR (Sept. 13, 2019), https://www.npr.org/local/309/2019/09/13/760485985/legal-miscalculation-in-police-code-of-silence-case-costs-chicago-4-5-million [https://perma.cc/HPG4-KEPG]; *see* Lolly Bowean, *Former Chicago Police Spokeswoman Alleges Assault, Retaliation*, CHI. TRIB. (Feb. 20, 2014), https://www.chicagotribune.com/news/ct-xpm-2014-02-20-ct-chicago-police-lawsuit-met-0220-20140220-story.html.

to sue after the fact because, as mentioned above, "If someone comes forward as a whistleblower in the Department, they are dead on the street."[58]

The DOJ report also showed that officers were rarely (and inconsistently) reprimanded for their abuse of power. In fact, between 1988 and 2020, there have been 247,150 citizen allegations of misconduct and only 7% of the officers have been disciplined.[59] Of more than 400 police shootings since 2007, the Independent Police Review Authority (the supposedly impartial review board for police oversight) only found claims of wrongdoing in two cases.[60]

C. *Prosecutors Putting the Blinders On*

Despite knowing the existence and inappropriateness of these practices, the culture exerted an enormous amount of pressure to socialize new attorneys and teach them to normalize this behavior. Prosecutors described this indoctrination and socialization as "prosecuting with blinders on."[61] Putting "blinders on" meant that prosecutors were forced to abandon many of the principles learned in law school (about the ethical ways to seek justice or comply with *Brady*, for instance) and instead to give nearly complete deference to officers and ignore any miscarriages of justice. This meant prosecutors were required to neither "see" nor "say" that abuse occurred and to actively work to avoid questioning it or documenting it.[62]

One prosecutor reflected on the pressure to put the blinders on and show police officers "good faith."[63] He described a culture of shading and lying as an implicit standard or expectation in the relationship between officers and prosecutors.[64] While he acknowledged that he used his prosecutorial discretion

[58] INVESTIGATION OF CHICAGO POLICE, *supra* note 42, at 75.

[59] *Chicago 1988-2020*, *supra* note 8.

[60] Monica Davey & Timothy Williams, *Chicago Pays, While Few Officers Do, in Killings*, N.Y. TIMES, Dec. 18, 2015, at A1. Beyond the costs to life, rights, and basic dignity, the city pays, quite literally, for misconduct. In the last fifteen years in Chicago, legal fees for civil rights cases amounted to $213 million. Dan Hinkel, *A Hidden Cost of Chicago Police Misconduct: $213 Million to Private Lawyers Since 2004*, CHI. TRIB. (Sept. 12, 2019, 5:00 AM), https://www.chicagotribune.com/investigations/ct-met-chicago-legal-spending-20190912-sky5euto4jbcdenjfi4datpnki-story.html. In 2018 alone, the city of Chicago spent $30.1 million—which is twice the amount allocated to the agency that investigates police misconduct. *Id.* What is clear is that the city is paying for this level of violence on a grand scale; it pays in human lives, human dignity, and an enormous burden to taxpayers.

[61] VAN CLEVE, *supra* note 1, at 153-55.

[62] We are cognizant that police and prosecutors' norms of practice also implicate their respective ethical obligations. This Article does not explore that issue but we encourage scholars to do so.

[63] VAN CLEVE, *supra* note 1, at 153.

[64] *Id.*

to drop cases when police were obviously lying, he admitted to often going along with the police's side:[65]

> Sometimes the Chicago police detective doesn't like to hear a negative response . . . [.] And there's the whole culture thing that I was telling you about [police regularly bending the truth]. A couple of times, I dismissed cases when it was clear that they were lying, but I was also younger, I didn't have perspective, and I was working on their side, so I'd let them look at their police reports for ten minutes before [questioning them about a case].[66]

Prosecutors like this one developed an intricate set of practices to perform their deference to police and show they were on their "side." For instance, one prosecutor discussed how she treated the questioning of police partners in cases.[67] She would allow partners to sit in a room together, leave the file on the table, then go get coffee so the officers had time to "refresh their memory."[68] This was the signal for officers to align their narrative so it was consistent between the officers and with the case file. This move was viewed as a respectful courtesy towards officers. Prosecutors who did not accommodate officers in such a way or who interviewed partners separately were accused of not being "team players"—a label that had consequences for their career. As discussed, they could be reprimanded by superiors or marginalized in the office so that cases could be taken from them and given to other prosecutors willing to work cooperatively with police.[69]

In addition to these informal practices, prosecutors were also expected to blindly defer to officers' accounts of the facts. Questioning the preparation or details of police reports was considered an affront to police and a breach of trust and respect. Such an action was met with severe hostility or consequences, which intimidated prosecutors into compliance.[70] One prosecutor described: "I was on a case and spoke with the defendants who confessed and what they confessed to was different than what the police were telling me. When I approached the officer he had a problem with me questioning him."[71]

From a structural standpoint, police officers are prosecutors' star witnesses, central to the prosecutors' ability to earn the convictions that are so essential to their conception of public safety (and professional success, including internal promotion). Paradoxically, prosecutors may be depending on law enforcement witnesses who are breaking the law and eroding community trust, thereby

[65] *Id.*

[66] *Id.* (omission and second and third alterations in original).

[67] *Id.*

[68] *Id.*

[69] *See supra* note 40 and accompanying text.

[70] VAN CLEVE, *supra* note 1, at 151-55 (describing how police exerted influence on prosecutors by complicating case investigation).

[71] *Id.* at 152.

undermining the very public safety they believe they are promoting. Instead of community trust, *police* trust becomes paramount. As one prosecutor described it:

> Getting the reports is a big pain; it should take a month, but it takes six to eight in big cases; on the other hand, I've had some outstanding experiences with police officers, [who have gone out of their way] to help your case go smoother; [they'll stop by, make phone calls to the right people for you]; it's so much easier, once they trust you with their case, because it is their case first.[72]

Hence, there were important rewards for compliance that could streamline cases. However, the punishments were more severe. Police attacked attorneys' professional reputations. In addition, officers could engage in a silent strike against a prosecutor perceived as disrespectfully questioning an officer. Overall, they could ruin cases and reputations.

Consider this example of police attacking a judge in the judge's own courtroom.[73] This judge had a reputation among police of scrutinizing drug cases or even allowing "shaded" drug cases to go to trial.[74] With the judge on the bench and other attorneys within earshot, the police showed how they could ruin reputations within the court. One officer leaned over and began talking about the judge on the bench: "He's such a fucking liberal," he said. "We bust our ass . . . he flushes our work down the toilet with the crap." A second officer joined in, "He used to be the State's Attorney here." The first officer responded, "Waste of our time."[75]

While this particular judge seemed comfortable siding against police despite the attacks—once he was protected by his robes—imagine the reputational cost to a junior prosecutor. A junior prosecutor is reliant on the testimony of police to earn the bench and jury trial convictions necessary for promotion. Perhaps the police officers on their cases begin "forgetting" their appearance dates.[76] Perhaps the junior prosecutor starts hearing rumors through management that they are difficult to work with. Perhaps cases start moving off their desk and onto the desks of other prosecutors more willing to play nice with police.[77] In time, these prosecutors who would not step in line would ultimately be marginalized or pushed out of the office entirely.

Over time, the reproduction of this culture of silence and violence rewarded and therefore selected prosecutors willing to put the "blinders" on for police. Prosecuting with blinders on allowed for both subtle and egregious abuses of

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[72] *Id.* (alterations in original).

[73] Van Cleve conducted field observations in all felony courtrooms in the main courthouse in Cook County. She sat in the jury box of a local judge's courtroom.

[74] These were the types of cases where the police may have altered the weight of the drugs seized at the scene in order for the defendant to be charged with a felony.

[75] VAN CLEVE, *supra* note 1, at 151.

[76] *Id.* at 150.

[77] *See supra* note 40 and accompanying text.

power and the law. This is a prime example of police acting in concert, via norms of practice, to *undermine* public safety and community trust while ostensibly trying to bolster them. Prosecutor-specific examples are contained in Part II below.

In addition, powerful structural incentives within the promotion of prosecutors all but dictated that prosecutors comply with the culture of silence and violence in order to be promoted and successful in the office—a system that weeded out prosecutors who were unwilling to participate and discouraged whistleblowing on this behavior. The organizational structure of prosecutors' offices also tacitly allowed police to wield control over the types of prosecutors that succeeded in the office, where winning cases was a currency and prosecutors depended on police to win. In a sense, police controlled the cases created on the streets, controlled the narrative created in the courts, and tacitly handpicked the type of prosecutors that allowed this system to flourish.

In light of the above, it is no surprise that it took Anita Alvarez over 400 days to charge Officer Jason Van Dyke. An entire cultural infrastructure, including prosecutorial blinders, allowed (if not forced) her to see McDonald's death as "nothing special," where the death of another young black teen was part of the ordinary administration of justice in the prosecutor's office. While Van Dyke was ultimately convicted of murder, he was the first Chicago Police Officer to receive such a verdict in over fifty years.[78] Moreover, the three officers who went to trial for the cover-up of the murder were found not guilty by Judge (and former prosecutor) Domenica Stephenson—a seasoned insider raised in the silence-and-violence tradition.[79]

These persistent police practices are not unique to Chicago; indeed, Chicago is "ordinary in its dysfunction."[80] These ubiquitous practices also come at a clear cost to human dignity, rights, and the people's perception of justice. However, rarely do we consider how "coach and conceal," "shading," and other police techniques on the streets migrate into the courts and *are enabled by* police's partners—the prosecutors. Below we engage in that analysis.

II. HOW PROSECUTORS PROTECT POLICE . . . AND THEMSELVES

As outlined above, police are able to cover up their misconduct in part by intimidating prosecutors who threaten to expose them. Accordingly, police exert significant control over the cultural norms of practice in the criminal courts system as a whole, including over prosecutors who might hold them

[78] Mitch Smith & Julie Bosman, *Jason Van Dyke Sentenced to Nearly 7 Years for Murdering Laquan McDonald*, N.Y. TIMES, Jan. 18, 2019, at A1.

[79] Patrick Smith & Michael Lansu, *Chicago Cops Found Not Guilty of Cover-Up in Laquan McDonald Shooting Case*, NPR (Jan. 17, 2019, 6:00 AM), https://www.npr.org/2019/01/17/686097601/verdict-expected-for-chicago-cops-charged-in-cover-up-of-laquan-mcdonald-shootin [https://perma.cc/46FE-AD7Y].

[80] VAN CLEVE, *supra* note 1, at 22.

accountable. However, prosecutors are not mere bystanders. Indeed, there is growing awareness that prosecutors are likely the most powerful players in the U.S. criminal justice system.[81] Specifically, prosecutors possess vast discretion to make consequential choices about criminal cases, including decisions about whom to charge, what to charge, and how heavily to charge, among others.[82] They also possess outsized legislative and political power.[83] Accordingly, their role in the country's decades-long mass incarceration crisis is now rightly the subject of deep scholarly and even popular interest.[84]

The same discretion that allows prosecutors to drive mass incarceration also allows them to whitewash if not encourage police misconduct. As noted above, prosecutors do this both out of fear of being retaliated against and marginalized and out of self-interest, to keep cases coming in the door and officers from being impeached on the stand. This Part describes in more detail the mechanisms by which some prosecutors fail to stem police misconduct and violence. It also highlights the fundamental contradiction at the center of the codependent police-prosecutor relationship: that prosecutors ostensibly protect police so that police can bring in and help convict more cases, thereby—theoretically—increasing public safety. Yet that very prosecutorial protection *reduces* official accountability, which undermines community trust and thereby *harms* public safety.

As long as prosecutors are unwilling to address this contradiction and take steps to overcome the types of short-term, police-placative incentives described above in favor of long-term, pro-accountability reforms (as listed below in Part III), lawmakers and reformers must act on their—and the people's—behalf.

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[81] *See It's Time to Transform What It Means to Be a Prosecutor*, ACLU (Feb. 18, 2020), https://www.aclu.org/news/smart-justice/our-vision-to-transform-what-it-means-to-be-a-prosecutor/ [https://perma.cc/LS3M-3H68].

[82] *See generally* Angela J. Davis, *The Power and Discretion of the American Prosecutor*, 49 DROIT ET CULTURES 55 (2005).

[83] John Pfaff, *The Perverse Power of the Prosecutor*, DEMOCRACY (Feb. 22, 2018, 5:53 PM), https://democracyjournal.org/arguments/the-perverse-power-of-the-prosecutor/ [https://perma.cc/E3SV-J9GJ].

[84] *See generally* EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2019); Mark Osler & Mark W. Bennett, *A "Holocaust in Slow Motion?" America's Mass Incarceration and the Role of Discretion*, 7 DEPAUL J. FOR SOC. JUST. 117, 145-149 (2016) (describing Congress's power shift to prosecutors by removing second-chance mechanisms, establishing mandatory minimums, and creating sentencing guidelines); Paul Butler, *Prosecutors' Role in Causing—and Solving—the Problem of Mass Incarceration*, WASH. POST (Apr. 19, 2019, 5:38 PM) (reviewing BAZELON, *supra*), https://www.washingtonpost.com/outlook/prosecutors-role-in-causing—and-solving—the-problem-of-mass-incarceration/2019/04/19/d370d844-5c93-11e9-a00e-050dc7b82693_story.html.

A. *The Failure to Prosecute*

The most recognizable way that prosecutors fail to stem violence and misconduct by the police is by failing to prosecute and convict them for it. And they almost always fail.[85] In a 2010 study, researchers identified over 8300 misconduct accusations involving almost 11,000 officers.[86] Only 3238 of those accusations resulted in legal action of any kind, and only 33% of those charged were convicted.[87] Compare that to the general population of felony defendants, who are convicted 68% of the time.[88] Of course, the gap in convictions is partially explained by grand and petit jurors who can be hesitant to hold police officers accountable even when prosecutors make the case.[89] But these citizen institutions take their cues from and are often "captives of" the prosecution.[90] Moreover, prosecutors cannot take credit for high conviction rates generally without also accounting for this shortfall.

The prosecutorial accountability gap between police and the rest of us has consequences for public trust. Studies show that communities are less trustful of law enforcement when it is unwilling to hold its own accountable.[91] We know this both empirically and from the now-routine protests that erupt when yet another officer is not charged in a fatal shooting.[92] Forward-looking prosecutors understand that this lack of trust harms public safety because law enforcement relies on a trusting public to come forward with information, cooperate with investigations, and testify without fear of reprisal and with confidence that

[85] *See* German Lopez, *Cops Are Almost Never Prosecuted and Convicted for Use of Force*, VOX (Nov. 14, 2018, 4:12 PM), https://www.vox.com/identities/2016/8/13/17938234/police-shootings-killings-prosecutions-court [https://perma.cc/5KCB-JRW6] (citing study finding that only one-third of police charged with misconduct are convicted and only 36% of those convicted actually serve time, much lower than rates for the general public).

[86] Reuben Fischer-Baum, *Allegations of Police Misconduct Rarely Result in Charges*, FIVETHIRTYEIGHT (Nov. 25, 2014, 9:45 AM), https://fivethirtyeight.com/features/allegations-of-police-misconduct-rarely-result-in-charges/ [https://perma.cc/HQR3-NQXV].

[87] *Id.*

[88] *Id.*

[89] *See* Mark Curnutte, *Why Juries Have a Hard Time Convicting Cops*, CINCINNATI.COM (July 24, 2017, 7:49 AM), https://www.cincinnati.com/story/news/2017/07/24/possible-convict-police-officer-because-whites-reluctance-do-so/492380001/ (describing how implicit and explicit biases affect juries).

[90] Roger A. Fairfax Jr., *The Grand Jury's Role in the Prosecution of Unjustified Police Killings – Challenges and Solutions*, 52 HARV. C.R.-C.L. L. REV. 397, 397-400 (2017).

[91] *See, e.g.*, Jeffery M. Jones, *In U.S., Confidence in Police Lowest in 22 Years*, GALLUP (June 19, 2015), https://news.gallup.com/poll/183704/confidence-police-lowest-years.aspx [https://perma.cc/R85E-J3QB] (suggesting that "recent incidents in which black men were killed at the hands of white police officers" may have affected the way some view police).

[92] *See, e.g.*, Monica Davey & Julie Bosman, *Grand Jury Declines to Indict Police Officer in Ferguson Killing*, N.Y. TIMES, Nov. 25, 2014, at A1; J. David Goodman & Al Baker, *New York Officer Facing No Charges in Chokehold Case*, N.Y. TIMES, Dec. 4, 2014, at A1.

justice will be done.[93] Even police themselves say—at least anonymously—that they want this accountability. According to a 2017 Pew Research Center survey of more than 8000 sworn police officers, an astonishing 72% disagreed with the statement that "officers in their department who consistently do a poor job are held accountable."[94]

To be clear, sending police to prison for violence and misconduct is not a panacea. Data show that prosecution and particularly incarceration are ultimately ineffective tools to deter bad behavior in the population at large.[95] Indeed, incarceration may even be criminogenic—in other words, it may make people more prone to future crime by separating them from support structures; subjecting them to violence and trauma inside; and failing to address underlying issues, like mental health disabilities, addiction, and poverty.[96] There is no reason to believe that prosecution and incarceration will work better on police than on the general public without addressing the underlying causes of police

[93] *See* FAIR & JUST PROSECUTION, PROMOTING INDEPENDENT POLICE ACCOUNTABILITY MECHANISMS 2 (2017), https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJP Brief.Police-Accountability.9.25.pdf [https://perma.cc/4SX4-CDTZ].

[94] RICH MORIN ET AL., PEW RESEARCH CTR., BEHIND THE BADGE 40 (2017), https://assets.pewresearch.org/wp-content/uploads/sites/3/2017/01/06171402/Police-Report_FINAL_web.pdf [https://perma.cc/NT74-UEX4]; *see also* TASK FORCE ON 21ST CENTURY POLICING, INT'L ASS'N OF CHIEFS OF POLICE, TESTIMONY OF THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE 2 (2015), https://www.theiacp.org/sites/default/files/2018-08/IACPTestimonyListeningSessionPolicyandOversight.pdf [https://perma.cc/GT55-F25A] (expressing need for more systems for increased and effective accountability among police departments).

[95] *See, e.g.*, David Roodman, *Reasonable Doubt: A New Look at Whether Prison Growth Cuts Crime*, OPEN PHILANTHROPY (Sept. 25, 2017), https://www.openphilanthropy.org/blog/reasonable-doubt-new-look-whether-prison-growth-cuts-crime [https://perma.cc/2KTE-DCKK] ("The crux of the matter is that tougher sentences hardly deter crime, and that while imprisoning people temporarily stops them from committing crime outside prison walls, it also tends to increase their criminality *after* release." (citing DAVID ROODMAN, OPEN PHILANTHROPY PROJECT, THE IMPACTS OF INCARCERATION ON CRIME (2017), https://www.openphilanthropy.org/files/Focus_Areas/Criminal_Justice_Reform/The_impacts_of_incarceration_on_crime_10.pdf [https://perma.cc/7ZEV-N7W9])).

[96] *See generally, e.g.*, DON STEMEN, VERA INST. OF JUSTICE, THE PRISON PARADOX: MORE INCARCERATION WILL NOT MAKE US SAFER (2017), https://ecommons.luc.edu/cgi/viewcontent.cgi?article=1027&context=criminaljustice_facpubs [https://perma.cc/C929-6T9W] (explaining myriad reasons why incarceration may increase crime); Lynne M. Vieraitis, Tomislav V. Kovandzic & Thomas B. Marvell, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data, 1974-2002*, 6 CRIMINOLOGY & PUB. POL'Y 589, 589-622 (2007) ("[W]e attribute the apparent positive influences on crime that seem to follow prison releases to the criminogenic effects of prison.").

misconduct (including those addressed above).[97] However, to the extent that prosecution of police misconduct—without reference to incarceration as the remedy—creates the public goods of legal accountability and community trust, prosecutors have failed to deliver those goods at an acceptable rate.

B. *Strategic Plea Bargaining and Charge Manipulation*

Plea bargaining—the process by which prosecutors and defendants negotiate a "settlement" to a criminal case rather than going to trial—has fundamentally reshaped the American criminal justice system, largely for the worse.[98] Prosecutors are using an ever-expanding set of tools like pretrial detention, withheld discovery, and mandatory minimum sentences to push unfavorable deals on vulnerable—and even innocent—defendants.[99] Fearful defendants and under-resourced defense counsel are pleading out in over 90% of cases ending in conviction.[100] This has virtually eradicated the American jury trial and the corresponding citizen check on government that juries are supposed to provide.[101] Plea bargaining also happens largely behind closed doors, with very

[97] *See, e.g.*, Zak Cheney-Rice, *15 Things Your City Can Do Right Now to End Police Brutality*, MIC (July 1, 2015), https://www.mic.com/articles/121572/15-things-your-city-can-do-right-now-to-end-police-brutality [https://perma.cc/74E8-2P8B].

[98] H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 92-96 (2011) (suggesting solutions to plea bargain problems, such as subjecting DA offices to audits and granting State Attorney General oversight over prosecutors); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1979 (1992) ("Constitutional and doctrinal objections aside, plea bargaining seriously impairs the public interest in effective punishment of crime and in accurate separation of the guilty from the innocent."); Emily Yoffe, *Innocence Is Irrelevant*, THE ATLANTIC (Sept. 2017), https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/ ("[P]lea bargains make it easy for prosecutors to convict defendants who may not be guilty, who don't present a danger to society, or whose 'crime' may primarily be a matter of suffering from poverty, mental illness, or addiction. And plea bargains are intrinsically tied up with race, of course, especially in our era of mass incarceration.").

[99] *See generally* NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 17 (2018), https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf [https://perma.cc/N6N2-KR39] (discussing how innocent defendants may be coerced into pleading guilty by fear of long sentences).

[100] Suja A. Thomas, *What Happened to the American Jury?*, LITIG., Spring 2017, at 25, 27.

[101] Missouri v. Frye, 566 U.S. 134, 144 (2012) (pronouncing that plea bargaining is not "some adjunct to the criminal justice system; it *is* the criminal justice system" (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992))); Thomas, *supra* note 100, at 28 ("[P]lea bargaining—which could be described as coercive—did not exist in the English system on which our jury was supposed to be based.").

few jurisdictions requiring disclosure of how prosecutors applied their tools or whether they did so constitutionally.[102]

But one underreported consequence of plea bargaining is its tendency to whitewash police misconduct. This is because ending cases via plea—rather than via trial and the attendant appeal process—virtually forecloses the defendant's ability to challenge the misconduct.[103] Hence, it is far more beneficial to prosecutors' codependent relationship with police to sweep the wrongdoing under the rug via a favorable plea offer than to expose that police wrongdoing to judicial and public scrutiny.[104]

Professor Jonathan Abel wrote:

> [P]olice want to avoid the discovery process because it would reveal instances of police misconduct and cases in which departments may not want their officers cross-examined, for fear of what the cross-examination would bring to light. These cases of diverging interests [between prosecutors and police] might also include times when the police want to lock down a guilty plea, rather than take their chance at trial, because the guilty plea would prevent the defendant from bringing a civil rights suit later on.[105]

Abel is certainly correct that plea bargains have the effect of preventing police misconduct from coming to light. However, we respectfully disagree with the characterization that police and prosecutors have "diverging interests" in cases involving police misconduct. Given the above-described evidence of codependence, it seems clear that prosecutors view the shrouding of police misconduct as in their own long-term interests, even if that results in a couple fewer trials.[106]

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[102] NICOLE ZAYAS FORTIER, ACLU SMART JUSTICE, UNLOCKING THE BLACK BOX: HOW THE PROSECUTORIAL TRANSPARENCY ACT WILL EMPOWER COMMUNITIES AND HELP END MASS INCARCERATION 8-11 (2019), https://www.aclu.org/sites/default/files/field_document/aclu_smart_justice_prosecutor_transparency_report.pdf [https://perma.cc/HC4M-VGRT] (describing lack of data collected in prosecutors office and difficulty accessing existing data).

[103] Jenia I. Turner, *Plea Bargaining*, *in* ACAD. FOR JUSTICE, 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 73, 76 (Erik Luna ed., 2017), https://law.asu.edu/sites/default/files/pdf/academy_for_justice/Reforming-Criminal-Justice_Vol_3.pdf [https://perma.cc/DE2G-KPEP] ("When defendants plead guilty, they waive most procedural protections associated with a trial and opt for a non-transparent process with limited judicial review and little to no adversarial testing. The lack of transparency in plea bargaining impairs the legitimacy of the process in the eyes of not only defendants, but also victims and the general public.").

[104] *See generally* Jonathan Abel, *Cops and Pleas: Police Officers' Influence on Plea Bargaining*, 126 YALE. L.J. 1730 (2017) (addressing formal and informal systems of police influence and impacts of police involvement in plea bargaining).

[105] *Id.* at 1770.

[106] *See supra* Section I.C.

Mechanically, the plea process erases police misconduct via charge bargaining, appeal waivers, and *Heck* preclusion, among other strategies. First, charge bargaining is when prosecutors offer to drop one or more charges (or in rare instances, drop the case entirely) in order to induce a plea.[107] This tactic is made possible because of a related practice called "charge stacking," whereby prosecutors include multiple counts or charges related to the same conduct in order to (1) ratchet up the potential exposure at trial in order to induce a plea and (2) bargain certain charges away while leaving enough on the table to achieve a sufficiently punitive result.[108] In other words, when a charging document contains charges to spare, it is easy enough to drop certain ones that may be tainted by police misconduct without materially impacting the case as a whole.

Even if the misconduct could undermine the entire case, it is still in prosecutors' self-interest to drop the whole thing (or offer diversion or some other alternative to trial) rather than risk a trial and possible judicial ruling adverse to their law enforcement partners—particularly if the prosecutors themselves could be implicated. In a world of overflowing criminal justice dockets and virtually unreviewable prosecutorial discretion, no single dropped case is likely to raise eyebrows.

Even more confounding, dropped or bargained-down cases are generally *good for individual defendants*, even if they are bad for this particular aspect of the system. This creates a collective action problem. As Professors Oren Bar-Gill and Omri Ben-Shahar describe it:

> If defendants could bargain collectively—if they were to stonewall and as a group refuse to accept harsh plea bargains—they would all be better off. The prosecutor would take only a few defendants to trial or, more likely, would offer much more lenient plea bargains, reflecting the small trial risk that each defendant effectively faces. But defendants do not bargain collectively. Each defendant bargains individually with the prosecutor. And the prosecutor can take advantage of this lack of coordination.[109]

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[107] *See, e.g.*, Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935, 1977 (2006) (finding that "charge bargaining over the offense seriousness is one of the central ways that cases are resolved" and that "these charge reductions have substantial effects on the severity of sentences imposed").

[108] *See* Mark Godsey, *Prosecutors, Charge Stacking, and Plea Deals*, WRONGFUL CONVICTIONS BLOG (June 12, 2015), https://wrongfulconvictionsblog.org/2015/06/12/prosecutors-charge-stacking-and-plea-deals/ [https://perma.cc/7EHH-JN6U] ("This has become absolutely standard practice. The prosecutor will 'stack' charges to build such a scary potential sentence, that even actually innocent people will be intimidated into pleading guilty, rather than face what's called the 'trial penalty' – that very scary long sentence if they should somehow be convicted at trial.").

[109] Oren Bar-Gill & Omri Ben-Shahar, *The Prisoners' (Plea Bargain) Dilemma*, 1 J. LEGAL ANALYSIS 737, 740 (2010) (footnote omitted).

Public defenders also have ethical duties to seek their individual clients' best interests.[110] Those duties require seriously considering—and often taking—a favorable deal even if, in an ideal world, the defendant and/or the lawyer would like to take on the police and vindicate constitutional rights.[111] Again, this amounts to a high-stakes collective action problem: unless a critical mass of defendants in a given jurisdiction are willing to accept potential additional years in jail by rejecting favorable offers en masse, prosecutors will still be able to effectively erase police misconduct in individual cases by dropping questionable charges and creating offers that defenders "can't refuse."[112]

If prosecutors do not want to drop offending charges, they can also require express appeal waivers as part of the plea contract.[113] Most courts have blessed these increasingly common provisions,[114] assuming that they are made knowingly, voluntarily, and with consideration.[115] Even without an express written waiver in the contract, the Supreme Court has held that a guilty plea necessarily forecloses appeal of most constitutional challenges related to state

[110] *See* CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION § 4-6.1(a) (AM. BAR. ASS'N, 4th ed. 2017) ("Defense counsel should be open, at every stage of a criminal matter and after consultation with the client, to discussions with the prosecutor concerning disposition of charges by guilty plea or other negotiated disposition."). *But see id.* § 4-1.2(e) ("Defense counsel should seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to defense counsel's attention, counsel should stimulate and support efforts for remedial action.").

[111] *See, e.g.*, Alexandra W. Reimelt, Note, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 B.C. L. REV. 871, 872 (2010) (describing case in which defendant pursued and lost suppression motion and then was offered and accepted less favorable plea).

[112] THE GODFATHER (Paramount Pictures 1972).

[113] *See, e.g.*, United States v. Mezzanatto, 513 U.S. 196, 201 (1995) (explaining that defendants may knowingly waive constitutional and statutory protections); People v. Olson, 264 Cal. Rptr. 817, 819 (Ct. App. 1989) (noting that appellate waivers in plea bargains are "powerful tool" in limiting undeserving appeals); People v. Burk, 586 N.Y.S.2d 140, 141 (App. Div. 1992) (quoting N.Y. Supreme Court judge who stated that his court normally insists on such waivers in plea bargains).

[114] *See* Alan Ellis & Todd Bussert, *Federal Sentencing: Stemming the Tide of Post-conviction Waivers*, ALANELLIS, https://alanellis.com/federal-sentencing-stemming-the-tide-of-post-conviction-waivers/ [https://perma.cc/XWA6-NSZ7] (last visited Mar. 31, 2020) ("Over the last several years, waiver of a defendant's appellate and postconviction rights has become a standard feature of plea agreements in federal cases.").

[115] *See* United States v. Ruiz, 536 U.S. 622, 629 (2002) ("[T]he Constitution insists, among other things, that the defendant enter a guilty plea that is 'voluntary' and that the defendant must make related waivers 'knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences.'" (second, third, and fourth alterations in original) (quoting Brady v. United States, 397 U.S. 742, 748 (1970))); United States v. Lutchman, 910 F.3d 33, 37 (2d Cir. 2018) (holding appeal waiver invalid as unsupported by consideration because defendant "received no benefit from his plea beyond what he would have gotten by pleading guilty without an agreement").

misconduct that occurred prior to the plea.[116] And finally, *Heck v. Humphrey*[117] precludes a follow-on § 1983 action to challenge underlying police violence and misconduct because the guilty plea is a conviction that, by definition, defendants do not want undermined.[118] The precise application of waiver and preclusion law to guilty pleas that mask police misconduct is complex and not the focus of this Article. It is also not entirely clear how front-of-mind this doctrinal reality is for prosecutors and police, though there is some evidence that they have internalized it.[119] For now, suffice it to say that criminal defendants seeking simultaneously to admit guilt and to hold police accountable face an uphill doctrinal battle, and the public suffers as a result.

[116] *See* Class v. United States, 138 S. Ct. 798, 805 (2018) (reaffirming holding in *Haring v. Prosise*, 462 U.S. 306, 322 (1983), that guilty plea extinguishes Fourth Amendment claims at habeas stage); McMann v. Richardson, 397 U.S. 759, 771 (1970) ("We hold, therefore, that a defendant who alleges that he pleaded guilty because of a prior coerced confession is not, without more, entitled to a hearing on his petition for habeas corpus.").

[117] 512 U.S. 477 (1994).

[118] *Id.* at 486-87 ("We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254." (footnote omitted)). Whether *Heck* bars § 1983 suits for particular kinds of police misconduct where defendants take guilty pleas seems to be a case-by-case and court-by-court assessment. *Compare* Dyer v. Lee, 488 F.3d 876, 881 (11th Cir. 2007) (allowing use-of-force claim to proceed despite *Heck* even where use of force might have been affirmative defense to resisting arrest charge), *with* Hainze v. Richards, 207 F.3d 795, 798 (5th Cir. 2000) ("[A]n excessive force claim under section 1983 is barred as a matter of law if brought by an individual convicted of aggravated assault related to the same events.").

[119] *See, e.g.*, Angela Roberts, *Plea Deals Punish the Innocent in Baltimore Police Scandal*, AP NEWS (June 7, 2018), https://apnews.com/889693b1a5d74bcbbeb2d98e6743416b [https://perma.cc/337F-N9QA] ("An investigation by Capital News Service and Injustice Watch, as part of a nationwide examination of plea bargaining, found that Baltimore's heavy reliance on plea deals and pre-trial detention led innocent defendants to plead guilty and enabled police corruption."); *see also* Joel Burgess, *Does a Resisting Arrest Charge Keep Police from Getting Sued Later?*, CITIZEN TIMES (Jan. 22, 2019, 12:30 PM), https://www.citizen-times.com/story/news/local/2019/01/22/debate-over-resisting-arrest-charges-includes-supreme-court-decision-heck-humphrey-johnnie-rush/2606301002/ ("Holmes said a 1994 Supreme Court decision, Heck v. Humphrey, said a person can't sue over alleged police brutality if a court victory would undermine a prior criminal conviction. 'So, if someone ends up getting convicted of that resist charge. That immunizes police from getting sued later,' he said.").

C. *Failure to Disclose* Brady *Material*

Disposing of a tainted charge via plea bargaining is not the only way a prosecutor may effectively bury police violence. A prosecutor can also drop the case entirely (*nolle prosequi*),[120] negotiate a diversion program,[121] or find some other alternative to traditional criminal proceedings. The remaining, relatively small percentage of cases will proceed to a point at which formal criminal discovery is owed—whether because the case has reached trial and *Brady* has finally kicked in[122] or because the state justice system, the individual prosecutor, or their office has decided to provide discovery earlier than constitutionally required. This does not guarantee, however, that the discovery will include impeachment information regarding police misconduct because prosecutors and police control discovery. If those actors do not want the defense to see something, the defense almost certainly will not see it.

Of course, most prosecutors do not and would not intentionally suppress information. Yet *Brady* violations are still far too common[123] despite the constitutional, ethical, and professional guidance urging prosecutors to err on the side of production—even if harmful to their case and/or their relationship with the police.[124]

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[120] *See* Commonwealth v. Webber, No. SJ-2019-0366, 2019 WL 4263308, at *3 (Mass. Sept. 9, 2019) (upholding district attorney's longstanding authority to drop charges).

[121] *Compare* IND. CODE § 33-39-1-8 (2019), *with* MASS. GEN. LAWS ch. 276A, § 3 (2018) (allowing judge to exercise discretion and find that a defendant initially found to be ineligible for diversion is eligible).

[122] United States v. Ruiz, 536 U.S. 622, 625 (2002) (holding that federal prosecutors need not disclose impeachment information prior to entering into plea bargains); Alvarez v. City of Brownsville, 860 F.3d 799, 803 (5th Cir. 2017) ("Under *Ruiz*, Alvarez did not have a constitutional right to impeachment evidence when he pleaded guilty. Likewise, under this court's interpretation of *Ruiz* in *Conroy*, Alvarez did not have a constitutional right to exculpatory evidence when he pleaded guilty. Accordingly, Alvarez's guilty plea precludes him from asserting a *Brady* claim under § 1983."), *rev'd en banc*, 904 F.3d 382 (5th Cir. 2018).

[123] In 2018, nearly 71% of wrongfully convicted, later exonerated individuals were convicted because of some police or prosecutorial misconduct. *See* NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2018, at 2 (2019), https://www.law.umich.edu/special/exoneration/Documents/Exonerations%20in%202018.pdf [https://perma.cc/6DKR-UDXB].

[124] *See, e.g.*, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION 3-5.6(f) (AM. BAR ASS'N, 4th ed. 2017) ("Before entering into a disposition agreement, the prosecutor should disclose to the defense a factual basis sufficient to support the charges in the proposed agreement, and information currently known to the prosecutor that tends to negate guilt, mitigates the offense or is likely to reduce punishment."); U.S. ATTORNEY'S MANUAL § 9-5.001(D) (U.S. DEP'T OF JUSTICE 2020) ("Due process requires that disclosure of exculpatory and impeachment evidence material to guilt or innocence be made in sufficient time to permit the defendant to make effective use of that information at trial." (first citing Weatherford v.

Surely the defendant in a given case would almost certainly know that police used force on them personally.[125] However, the defendant may not know of violence or intimidation against other witnesses and/or codefendants or of other types of police misconduct, such as evidence tampering,[126] selective enforcement,[127] and the like. Further, even if the impeachable officer does not testify, *Kyles v. Whitley*[128] and its progeny indicate that misconduct should still be disclosed as impeaching the overall investigation.[129] And while it is undisputed that police and other nonprosecutorial law enforcement agents who participate in the investigation of a criminal case have independent disclosure obligations and therefore should not be let off the hook for disclosure failures,[130] it is prosecutors who typically gather information from those agents and make

Bursey, 429 U.S. 545, 559 (1997); and then citing United States v. Farley, 2 F.3d 645, 654 (6th Cir. 1993))).

[125] *But see* Mitchell v. Wisconsin, 139 S. Ct. 2525, 2531 (2019) (holding that police do not need warrant to draw blood from unconscious defendant suspected of DUI where other exigent circumstances could exist).

[126] *See, e.g.*, Jacey Fortin, *Baltimore Police Officer Charged with Fabricating Evidence in Drug Case*, N.Y. TIMES (Jan. 24, 2018), https://www.nytimes.com/2018/01/24/us/baltimore-officer-video-drugs.html (discussing how Baltimore police officer Richard Pinheiro planted and "found" drugs that subsequently led to wrongful arrest and charging). Pinheiro was later found guilty of tampering with evidence in a bench trial. *See* Kevin Rector, *Baltimore Police Officer Found Guilty of Fabricating Evidence in Case Where His Own Body Camera Captured the Act*, BALT. SUN (Nov. 9, 2018, 12:00 PM), https://www.baltimoresun.com/news/crime/bs-md-ci-pinheiro-ruling-20181109-story.html [https://perma.cc/8AXD-H5Y5].

[127] *See, e.g.*, First Amended Complaint & Demand for Jury Trial at 3-5, Cross v. City & Cty. of San Francisco, 386 F. Supp. 3d 1132 (N.D. Cal. 2019) (No. 3:18-cv-06097) (alleging that Drug Enforcement Administration ("DEA"), United States Attorney's Office ("USAO"), and San Francisco Police Department acted together to selectively enforce certain drug laws against Black people in the Tenderloin neighborhood of San Francisco). All thirty-seven individuals arrested as a result of this collective action by the DEA, USAO, and Police Department were Black, despite Black individuals making up only about half of the individuals who sell drugs in the Tenderloin. *Id.* at 14.

[128] 514 U.S. 419 (1995).

[129] *Id.* at 445 ("Damage to the prosecution's case would not have been confined to evidence of the eyewitnesses, for [the informant's] various statements would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well.").

[130] *See id.* at 421 (explaining that prosecutors have burden to determine whether cumulative effect of suppressed evidence obligates state to overturn such evidence); Brady v. Maryland, 373 U.S. 83, 87 (1963) (establishing requirement that prosecution turn over evidence material to guilt or innocence whether suppressed in good faith or bad faith).

the critical decisions about whether the information is material enough to disclose.[131]

Of course, prosecutors make difficult materiality calls with respect to all types of potential *Brady* impeachment information. However, there is an obvious, yet critical, difference between a prosecutor's suppression of, for example, a prior inconsistent statement by a lay witness and that of a police officer. Both suppressions are unacceptable, but the latter involves significant conflicts of interest that make them more likely to happen, and therefore they cry out for heightened attention and regulation.

Sadly, but predictably, examples abound of prosecutors protecting police by suppressing required disclosures of misconduct. For example, the Orange County District Attorney's Office covered for and participated in an illegal jailhouse informant scheme for over thirty years (and may still be going on).[132] In the scheme, the Orange County Sheriff's Department—which runs the jails—cultivated jailhouse informants by promising them perks, cash payments, and time off their sentences in exchange for useful information.[133] The Department then strategically placed the informants in close proximity to "target" defendants who were still awaiting trial or sentencing. The informant then extracted whatever information he could, often through threats of violence,[134] despite the fact that the targets should not have been interrogated without their lawyers present[135] and that coercion of this nature violates due process.[136] Finally, the Sheriffs passed the unconstitutionally extracted information to Orange County prosecutors, who used it at trial or in plea negotiations without disclosing to the defense how it was obtained, despite the constitutional duty to disclose such impeachment information under *Brady*.[137]

[131] Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985) (plurality opinion); *see also Kyles*, 514 U.S. at 434-37 (describing "[f]our aspects of materiality under *Bagley*").

[132] Dahlia Lithwick, *You're All Out*, SLATE (May 28, 2015, 1:38 PM), https://slate.com/news-and-politics/2015/05/orange-county-prosecutor-misconduct-judge-goethals-takes-district-attorney-office-off-scott-dekraai-case.html [https://perma.cc/6C9D-GQQU] (detailing "amazing" manner in which prosecutor's office and police department worked together to implement and carry out scheme).

[133] *See* First Amended Complaint for Declaratory and Injunctive Relief and Verified Petition for Writ of Mandate at 7-9, People for the Ethical Operation of Prosecutors & Law Enf't v. Rackauckas, No. 30-2018-00983799-CU-CR-CXC (Cal. Super. Ct. Orange Cty. Apr. 4, 2016).

[134] *See id.*

[135] *See* Massiah v. United States, 377 U.S. 201, 206 (1964).

[136] *See* Arizona v. Fulminante, 499 U.S. 279, 287 (1991).

[137] *See* Brady v. Maryland, 373 U.S. 83, 87 (1963); *see also* Giglio v. United States, 405 U.S. 150, 153-55 (1972) (reaffirming *Brady*).

There has been no shortage of proposed and attempted solutions to the problem of police and prosecutors circumventing *Brady* protections: eliminating absolute immunity for violations;[138] addressing the "harmless error" appellate standard;[139] increasing bar referrals and strengthening enforcement for ethical violations;[140] and establishing standing court orders that hold prosecutors in contempt for disclosure failures,[141] to name a few. Each one would help, yet none directly addresses the underlying conflicts of interest between prosecutors and police that lead to suppression of police violence and misconduct.

One reform that attempts to do so is the so-called *Brady* list.[142] These are typically lists of police officers and other agents who have committed some form of misconduct—use of force, lying on the stand, etc.—that qualifies as impeachment evidence, plus the conduct or testimony that landed them there. Prosecutors usually maintain the lists and either disclose them to defense counsel as part of criminal discovery[143] or, in the boldest version of the reform, make them public.[144] Some prosecutors' offices have always maintained these lists, and line prosecutors routinely search them for the testifying officers in every case and disclose those entries. Many, however, do not, and there is little to no

[138] *See infra* note 178.

[139] *See* Gabe Newland, *Harmless Error: Explained*, THE APPEAL (Nov. 11, 2019), https://theappeal.org/harmless-error-explained/ [https://perma.cc/W3BL-39DG] (proposing five ways to undo harms of harmless error standard, including rigorously applying *Chapman*'s reasonable doubt standard for determining error's effect and stopping defending unconstitutional prosecutions). For an explanation of the harmless error standard and its outer limits, see Chapman v. California, 386 U.S. 18, 22-24 (1967) (recognizing that harmless error standards "can work very unfair and mischievous results" but still affirming California's use of harmless error standard).

[140] *But see* John Simerman, *Prosecutor Spared Discipline in Key Louisiana Supreme Court Decision over Withheld Evidence*, NEW ORLEANS ADVOC. (Oct. 19, 2017, 5:20 PM), https://www.nola.com/news/courts/article_c145fcd5-9069-5935-84e1-4aa629d84f63.html [https://perma.cc/V64B-QXPV] (discussing Louisiana case that concluded state prosecutorial ethics rules cannot supersede *Brady*).

[141] Press Release, N.Y. State Unified Court Sys., Chief Judge DiFiore Announces Implementation of New Measure Aimed at Enhancing the Delivery of Justice in Criminal Cases (Nov. 8, 2017), http://ww2.nycourts.gov/sites/default/files/document/files/2018-05/PR17_17.pdf [https://perma.cc/UYM7-ZQJS].

[142] *See* Jonathan Abel, Brady*'s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 780-81 (2015).

[143] *See* IACP NAT'L LAW ENF'T POLICY CTR., *BRADY* DISCLOSURE REQUIREMENTS 4-6 (2008), https://www.theiacp.org/sites/default/files/all/b/BradyPaper.pdf [https://perma.cc/P9CL-VART].

[144] George Joseph, *Bronx Prosecutors Release Secret Records on Dishonest Cops*, GOTHAMIST (Oct. 7, 2019, 12:07 PM), https://gothamist.com/news/bronx-prosecutors-release-secret-records-dishonest-cops [https://perma.cc/2AHW-TZ6D] (explaining Bronx District Attorney's Office's effort to increase public trust and police conduct by publicizing *Brady* list).

uniformity across the country as to how law enforcement decides who gets on the list, for what conduct, for how long, etc.[145] In Orange County, following a public outcry, a civil rights lawsuit, and a federal DOJ investigation, District Attorney Todd Spitzer finally placed four sheriff's deputies on a *Brady* list for their involvement in and their lies related to the illegal informant scandal mentioned above.[146] But that list and its contents are not public, and Mr. Spitzer has not explained why certain individuals were included or excluded.

At their most basic level, *Brady* lists are not reforms at all, given that they simply collect information that the Constitution requires to be disclosed anyway. However, as noted above, the depth and breadth of scandals involving nondisclosure of required information is staggering enough to count this formalized process as a reform of sorts.[147] Moreover, some jurisdictions have gone beyond mere *Brady* lists and established "Do-Not-Call" lists, which collect the officers whom prosecutors simply will not call to testify anymore based on their past misconduct. These lists are far more laudable than *Brady* lists—and somewhat more controversial,[148] since they eliminate factfinders' opportunity to credit lying and/or abusive officers despite their histories having been disclosed as they would be able to if the officers were called. Accordingly, Do-Not-Call lists appropriately shift the burden of police reform to the police themselves rather than forcing already vulnerable defendants and their already overburdened counsel to use the *Brady* list in court and simply hope that the cumulative effect of impeachments over multiple cases will eventually convince police departments and prosecutors' offices to stop using unreliable police witnesses.

Perhaps most importantly, the increased use of both *Brady* lists and Do-Not-Call lists is a signal to both law enforcement and the community that prosecutors will not be bullied into burying police misconduct and ignoring their own constitutional and ethical obligations.[149] Particularly in the case of Do-Not-Call

[145] *See* Abel, *supra* note 142, at 780.

[146] Tony Saavedra, *Orange County DA Todd Spitzer Brands 4 Deputies as Dishonest in Outgrowth of Snitch Scandal*, ORANGE COUNTY REG. (July 24, 2019, 6:35 PM), https://www.ocregister.com/2019/07/24/orange-county-da-todd-spitzer-brands-4-deputies-as-dishonest-in-outgrowth-of-snitch-scandal/ [https://perma.cc/W53C-Z7RJ].

[147] *See supra* notes 120-31 and accompanying text (providing myriad examples of nondisclosure problems).

[148] Henry Gass, *When DA Doesn't Consider an Officer Reliable, Should Public Know?*, CHRISTIAN SCI. MONITOR (Sept. 3, 2019), https://www.csmonitor.com/USA/Justice/2019/0903/When-DA-doesn-t-consider-an-officer-reliable-should-public-know (discussing police unions' objections to Do-Not-Call lists, including unsuccessful lawsuits brought by police in California and Philadelphia).

[149] Justin George & Eli Hager, *One Way to Deal with Cops Who Lie? Blacklist Them, Some DAs Say*, MARSHALL PROJECT (Jan. 17, 2019, 6:00 AM), https://www.themarshallproject.org/2019/01/17/one-way-to-deal-with-cops-who-lie-blacklist-them-some-das-say [https://perma.cc/9MAS-2JBZ].

lists, increased use of such lists also achieves the exposure and professional discipline of offending officers where decades of internal and external attempts have failed.

D. *Lobbying to Prevent Reform*

"I don't make the law, I just enforce it." Prosecutors are fond of this balls-and-strikes, value-neutral characterization of their work, but it is misleading in many ways.[150] First, as noted above, prosecutors effectively make criminal law by deciding which crimes to charge and which ones to bargain away.[151] These discretionary decisions are virtually unreviewable, which means they amount to a kind of "prosecutor's veto" of the legislature and the people.[152]

Second, prosecutors directly engage in the legislative process by lobbying for the laws they will later enforce (or not). Whether individually or, more commonly, as part of local District Attorney's associations, prosecutors are often the most powerful voice on criminal-justice-related legislation in the states.[153] Unsurprisingly, they often support tough-on-crime measures like new categories of crimes and mandatory minimum sentences that arrogate power to themselves, and they routinely oppose reform measures that strip that power away.[154]

There does not seem to be a comprehensive study of the impact of prosecutors and their unions on criminal justice legislation—particularly legislation that

[150] *See* Sarah Leonard (@sarahrlnrd), TWITTER (Nov. 19, 2018, 8:01 AM), https://twitter.com/sarahrlnrd/status/1064503952799162370 [https://perma.cc/HVS6-4AMR] (citing Chris Palmer, *Philly DA Larry Krasner Withdraws Office From Statewide Prosecutors Group*, PHILA. INQUIRER (Nov. 16, 2018, 2:32 PM), https://www.inquirer.com/philly/news/crime/philadelphia-da-district-attorney-larry-krasner-withdraws-pdaa-20181116.html) (criticizing "I don't make the law, I just enforce it" mantra).

[151] They also come very close to making law on pretrial detention and sentencing, because their recommendations in those two arenas are often rubber stamped.

[152] Davis, *supra* note 83 ("The prosecutor's charging and plea-bargaining decisions are totally discretionary and virtually unreviewable."); *see also* Commonwealth v. Webber, No. SJ-2019-0366, 2019 WL 4263308, at *3 (Mass. Sept. 9, 2019).

[153] *See* Maria Polletta, *Reformers Seeking Changes in Arizona's Justice System See Roadblock in Bill Montgomery*, AZ. CENT. (Mar. 25, 2019, 6:00 AM), https://www.azcentral.com/story/news/politics/arizona/2019/03/25/bill-montgomery-blocks-efforts-change-arizonas-justice-system-attorneys-say/3207978002/ (explaining Maricopa County DA Bill Montgomery's attempts to undermine criminal justice reform in state legislature).

[154] *See* Daniel Nichanian, *What Pennsylvania's DA Association Stands for, Spotlight on Disenfranchisement in Nevada, and More*, THE APPEAL (Dec. 20, 2018), https://theappeal.org/what-pennsylvanias-da-association-stands-for-spotlight-on-disenfranchisement-in-nevada-and-more/ [https://perma.cc/433P-6B3T] (explaining lobbying role Pennsylvania's DA Association took to heighten punishments for certain crimes and to oppose bills facilitating postconviction relief and eliminating capital punishment).

would protect and/or empower their codependent police partners.[155] However, a few recent instances are telling. In Alabama in 2017, lawmakers of both parties supported reforming the state's draconian asset forfeiture laws to require a criminal conviction prior to depriving individuals of their own property.[156] Sheriffs and prosecutors sprang to oppose the bill, penning a joint op-ed predicting that without the "incentive" of preconviction loot to "cover their costs," police and sheriffs would simply fail to enforce the law or, paradoxically, lock up more people "for lesser crimes" in order to guarantee the bounty.[157] The perversities of these arguments, which admit no tie to public safety or fealty to the Constitution, have been discussed in other scholarship.[158] For this Article's purposes, the point is that police, sheriffs, and prosecutors in Alabama worked hand-in-glove to oppose a bipartisan reform that would have reduced their collective power, implying if not threatening retaliation and public harm if opposed. Not surprisingly, the bill failed.[159]

[155] A study of this nature is forthcoming from the University of North Carolina School of Law's Prosecutors and Politics Project. *See Prosecutors and Politics Project: Research*, U.N.C. SCH. L., https://law.unc.edu/academics/centers-and-programs/prosecutors-and-politics-project/research/ [https://perma.cc/RJ8P-WNY6] (last visited Mar. 31, 2020) (noting forthcoming study on "The Unknown Influence of Prosecutor Associations in Criminal Justice Policy").

[156] Nick Sibilla, *New Alabama Bill Would Abolish Civil Forfeiture, Require Convictions to Confiscate Property*, FORBES (Jan. 24, 2018, 9:30 AM), https://www.forbes.com/sites/instituteforjustice/2018/01/24/new-alabama-bill-would-abolish-civil-forfeiture-require-convictions-to-confiscate-property/#561ca82c3856 [https://perma.cc/63TZ-X7PA].

[157] Opinion, *Civil Asset Forfeiture: An Alabama Sheriff and County District Attorney's View*, YELLOWHAMMER, https://yellowhammernews.com/civil-asset-forfeiture-alabama-sheriff-county-district-attorneys-view/ [https://perma.cc/QBE5-9NLY] (last visited Mar. 31, 2020).

[158] *See, e.g.*, Adam Crepelle, *Probable Cause to Plunder: Civil Asset Forfeiture and the Problems It Creates*, 7 WAKE FOREST J.L. & POL'Y 315, 337 (2017) (arguing that civil asset forfeiture creates dichotomy where law enforcement can either pursue "profit or public safety").

[159] In 2019, the Alabama DA's Association conceded to a voluntary transparency program regarding forfeiture. *See* Jeremy Beaman, *Alabama's Civil Asset Forfeiture Reform Effort Takes a Turn Towards Creating a Public Database on Property Seizures*, YELLOWHAMMER, https://yellowhammernews.com/alabamas-civil-asset-forfeiture-reform-effort-takes-a-turn-towards-creating-a-public-database-on-property-seizures/ [https://perma.cc/T9ZE-9LGS] (last visited Mar. 31, 2020). This reform, while welcome, fell far short of outlawing the practice without a conviction and only came after a wave of asset forfeiture reform between 2017 and 2019 that made absolute intransigence less tenable. *See* Anne Teigen & Lucia Bragg, *Evolving Civil Asset Forfeiture Laws*, NAT'L CONF. ST. LEGISLATURES (Feb. 2018), http://www.ncsl.org/research/civil-and-criminal-justice/evolving-civil-asset-forfeiture-laws.aspx [https://perma.cc/XK8J-3PBL] ("In 2017, over 100 bills related to civil asset forfeiture were introduced in all 50 states. Many looked to adjust the standard of proof, or the degree of evidence necessary for law enforcement to establish proof that the property seized

An even more direct example of prosecutors lobbying to shroud police violence occurred in Louisiana in 2018. After prosecutors refused to charge the officers who shot and killed Alton Sterling in Baton Rouge[160]—and as an extension of the state's largely successful Justice Reinvestment Initiative[161]—legislators introduced a bill to require grand jury review of all police shootings resulting in injury or death.[162] However, the bill was pulled just eight days after introduction, under opposition from the Louisiana Fraternal Order of Police;[163] the Baton Rouge District Attorney, Hillar Moore, who was recused from the Sterling case; and the head of the Louisiana District Attorney's Association.[164]

Finally, California provides an example of what can happen when the local prosecutors' association is neutralized. There, following the abhorrent shooting death of Stephon Clark in Sacramento, grassroots activists pushed for and placed a bill to raise the legal standard for use of force by the police.[165] In this instance,

is related to a crime in order to win the forfeiture case."); *Civil Forfeiture Reforms on the State Level*, INST. FOR JUST., https://ij.org/activism/legislation/civil-forfeiture-legislative-highlights/ [https://perma.cc/QS9Y-E347] (last visited Mar. 31, 2020) (discussing nationwide popularity of civil enforcement reform).

[160] *See* Jamiles Lartey, *Alton Sterling Shooting: Two Police Officers Will Not Be Charged with Any Crime*, THE GUARDIAN (Mar. 27, 2018, 1:41 PM), https://www.theguardian.com/us-news/2018/mar/27/alton-sterling-shooting-two-police-officers-will-not-be-charged-with-any [https://perma.cc/AN8D-8J7W].

[161] *See* Grace Toohey, *Louisiana Sees Rise in Savings, Further Drop in Prison Population from 2nd Year of Justice Reforms*, THE ADVOCATE (July 19, 2019, 5:20 PM), https://www.theadvocate.com/baton_rouge/news/crime_police/article_7759e8a6-aa73-11e9-ad85-470066e75115.html.

[162] Ryan Noonan & Devon Sanders, *Proposed Bill Would Require Grand Juries in All Shootings by Police*, DAILY ADVERTISER (Apr. 3, 2018, 7:32 PM), https://www.theadvertiser.com/story/news/local/louisiana/2018/04/03/proposed-bill-would-require-grand-juries-all-shootings-police/484221002/ (detailing bill proposal and noting support from both parties and opposition from National Rifle Association).

[163] LA. FRATERNAL ORDER OF POLICE, 2018 LEGISLATIVE BULLETIN 15 (2018), https://simplebooklet.com/embed.php?wpKey=3lOGAccFiTS9SCh4kCvs8h&source=embed#page=0.

[164] Grace Toohey, *Following Alton Sterling Decision, Louisiana Lawmaker Proposes Law to Bring Such Cases Before Grand Jury*, THE ADVOCATE (Apr. 4, 2018, 6:55 PM), https://www.theadvocate.com/baton_rouge/news/alton_sterling/article_28c85c02-377b-11e8-aa67-4b4f6b4b1563.html [https://perma.cc/LEY7-EKYE] ("Moore and Pete Adams, the executive director of the Louisiana District Attorneys Association, both said they were concerned the bill directly contradicts district attorneys' jurisdiction as protected by the Louisiana Constitution, by allowing the district court to assign an officer-involved shooting directly to the attorney general.").

[165] *See* Julian Mark, *The Battle over California's Police Use-of-Force Bill Heats Up*, MISSION LOCAL (Aug. 30, 2018), https://missionlocal.org/2018/08/the-battle-over-californias-police-use-of-force-bill-heats-up/ [https://perma.cc/BGQ3-EBL8] ("AB 931 would change the law so that cops can use deadly force only when absolutely 'necessary,'

law enforcement groups initially opposed the bill but ultimately withdrew their opposition (although these groups did not state their reason for doing so).[166] Though California prosecutors had successfully torpedoed other criminal justice reforms in prior legislative sessions, their absence from this fight helped allow the bill to pass. Indeed, the tide may be shifting even more in the state; this year, prominent Republican District Attorney Tori Salazar of San Joaquin County joined prominent Democratic reform prosecutors nationwide and left the California District Attorneys' Association, calling it "out of touch" in its opposition to commonsense reform measures.[167]

III. THE CASE FOR REFORMS

Reforming police misconduct must be undertaken with attention to how police and prosecutors play a shared role in that misconduct. Thus far, problems in policing have mostly been viewed in a myopic manner—as though misconduct emanates from within policing and from within policing alone. However, a compelling empirical and legal case can be made that prosecutors (and the court system more broadly) have enabled misconduct in both overt and covert ways. Accordingly, reform must begin by taking an interorganizational view of these institutions and examining the culture and structures shared between policing and prosecution.

As we show, prosecutors play that role as institutionally adjacent actors sharing culture and practices with police officers. They actively learn how to prosecute with "blinders on" in order not to "see" and "say" the abuses hiding

meaning only when an officer has exhausted all 'reasonable alternatives,' such as de-escalation and less-lethal options, such as pepper spray."). AB 931 was subsequently codified in the California Penal Code. *See* CAL. PENAL CODE § 196 (2019) (justifying homicide by police officer where officer's use of force is compliant with § 835a); *id.* § 835a (describing evaluation police officer should make before finding it necessary to employ deadly force).

[166] Associated Press, *Major Law Enforcement Groups Drop Opposition to CA Bill to Restrict Police Use of Deadly Force*, KTLA5 (May 23, 2019, 4:44 PM), https://ktla.com/2019/05/23/major-law-enforcement-groups-drop-opposition-to-ca-bill-to-restrict-police-use-of-deadly-force/ [https://perma.cc/NV48-PQ7D] (discussing amendments to AB 931, including deletion of explicit definition of "necessary" and removal of "specific requirement that officers try to de-escalate confrontations before using deadly force but allow the courts to consider officers' actions leading up to fatal shootings" that occurred before law enforcement groups withdrew opposition (quoting Peter Bibring, police practices director for American Civil Liberties Union of California)).

[167] Evan Sernoffsky, *Central California DA Quits State Association over Its Opposition to Criminal Justice Reforms*, S.F. CHRON. (Jan. 16, 2020, 7:58 PM), https://www.sfchronicle.com/crime/article/Central-California-DA-quits-state-association-14981879.php; *see also* Daniel Nichanian, *Larry Krasner Quit Pennsylvania's DA Association. What Does Group Stand for?*, THE APPEAL (Dec. 20, 2018), https://theappeal.org/politicalreport/spotlight-pdaa/ [https://perma.cc/E3GM-NYU4].

in plain sight.[168] They then deploy legal discretion and extra-legal power to support and cover for police to the detriment of defendants and communities. Hence, one must wonder: Would America's current level of police violence and misconduct exist if prosecutors instead used their discretion and power to exert basic oversight upon law enforcement? Any discussion of policy must begin with the realization that prosecutors already possess the necessary proximity, discretion, and power to create institutional change. The question is only one of will—and of the support of reformers, legislators, and citizens fed up with the status quo.

Ultimately, we can consider the system "reformed" only when the codependent police-prosecutor culture is changed permanently and fundamentally from within. Many have noted how difficult (though not impossible) a task this will be.[169] That said, this Article has also identified discrete legal and structural elements that prop up the system—and changes to those discrete elements can go a long way. A nonexclusive, nonexhaustive list is provided below. While each suggestion could merit its own paper, the purpose is not to draw a fully formed blueprint but to spur further discussion among the relevant actors regarding the way forward.

Increased Oversight. Many have written about the promise and peril of independent citizen oversight of the police.[170] A nascent, though halting,

[168] *See supra* Section I.C.

[169] CATHERINE M. COLES & GEORGE L. KELLING, PROSECUTION IN THE COMMUNITY: A STUDY OF EMERGENT STRATEGIES 59-60 (1998), https://www.innovations.harvard.edu/sites/default/files/cross-site.pdf [https://perma.cc/A654-A9EP] ("The task is made more difficult because [prosecutors] . . . are fighting an image of prosecution and prosecutors that is present not just in their own offices but in law schools, in the mind of the public, and even among judges and others in criminal justice . . . ."); Ryan Cohen, *The Force and the Resistance: Why Changing the Police Force Is Neither Inevitable, Nor Impossible*, 20 U. PA. J.L. & SOC. CHANGE 105, 112-15 (2017) (addressing failed attempts to change police departments and advocating for organizational psychology as potential solution); Barbara Armacost, *The Organizational Reasons Police Departments Don't Change*, HARV. BUS. REV. (Aug. 19, 2016), https://hbr.org/2016/08/the-organizational-reasons-police-departments-dont-change; Radley Balko, Opinion, *Reforming Police Culture Is a Daunting Challenge*, WASH. POST (Nov. 19, 2015, 1:11 PM), https://www.washingtonpost.com/news/the-watch/wp/2015/11/19/reforming-police-culture-is-a-daunting-challenge/; John Terzano, *Changing the "Convict at All Costs" Culture of Prosecutor's Offices*, HUFFPOST (Mar. 18, 2010, 5:12 AM), https://www.huffpost.com/entry/changing-the-convict-at-a_b_367864 [https://perma.cc/EQ9M-CGS2].

[170] Olugbenga Ajilore, *How Civilian Review Boards Can Further Police Accountability and Improve Community Relations*, SCHOLARS STRATEGY NETWORK (June 25, 2018), https://scholars.org/brief/how-civilian-review-boards-can-further-police-accountability-and-improve-community-relations [https://perma.cc/4L4R-FN3M]; Deonna Anderson, *Chicago's Civilian Review Board: Will the New One Be Better?*, MARSHALL PROJECT (Aug. 16, 2016, 10:00 PM), https://www.themarshallproject.org/2016/08/16/chicago-s-civilian-review-board-will-the-new-one-be-better [https://perma.cc/K8X4-ZAZP]; Priyanka Boghani, *Is*

movement for similar oversight of prosecutors has begun as well.[171] However, it is unclear whether the two reforms have been considered in tandem (or even in combination with other actors like judges), and they should be. Some aspects of such a joint approach to reform will be clear. For example, in cases where criminal prosecution of police officers for violence or other misconduct is appropriate, prosecutors should voluntarily—or be forced by law to—submit cases to independent counsel from outside the jurisdiction to cure the local conflict of interest this Article delineates.[172] Legislators should also lower the legal standard for recusal of the local prosecutor's office from *any* criminal case in which line prosecutors are credibly accused of manipulating the criminal legal system to shroud police violence and misconduct.[173] Judges and fellow prosecutors should also be given clearer guidance on and better incentives to refer prosecutors to bar counsel for consideration of ethical violations when they manipulate the criminal legal system to shroud police misconduct.[174] At the federal level, presidents and attorneys general must embrace the DOJ's Civil Rights Division's use of consent decrees and use them against both police who

Civilian Oversight the Answer to Distrust of Police?, PBS: FRONTLINE (July 13, 2016), https://www.pbs.org/wgbh/frontline/article/is-civilian-oversight-the-answer-to-distrust-of-police/ [https://perma.cc/5JHK-VVC8].

[171] *See* Deanna Paul, *New York Court Rules Prosecutorial Misconduct Commission Unconstitutional*, WALL STREET J. (Jan. 28, 2020, 11:58 PM), https://www.wsj.com/articles/new-york-court-rules-prosecutorial-misconduct-commission-unconstitutional-11580273906. For the complete opinion, see Soares v. New York, No. 906409-18, slip op. (N.Y. App. Div. Jan. 28, 2020).

[172] *See, e.g.*, Caleb J. Robertson, Comment, *Restoring Public Confidence in the Criminal Justice System: Policing Prosecutions when Prosecutors Prosecute Police*, 67 EMORY L.J. 853, 857-79 (2018); *id.* at 857 ("Local prosecutors handling criminal cases against their local law enforcement counterparts fails to satisfy the appearance of justice. Perceived conflicts of interest, disparate process afforded to police-suspects, and significant racial issues undermine the public's faith in local prosecutors' objectivity in cases against police."); Press Release, Kimberly M. Foxx, Cook Cty. State's Attorney, State's Attorney Foxx Announces Special Prosecutor Legislation (Apr. 27, 2017), https://www.cookcountystatesattorney.org/news/state-s-attorney-foxx-announces-special-prosecutor-legislation [https://perma.cc/J2SA-JCA3] (promoting legislation to allow Special Prosecutor to review investigations of police shootings that local prosecutors decided not to charge).

[173] *See, e.g.*, People v. Dekraai, 210 Cal. Rptr. 3d 523, 527 (Ct. App.), *modified*, No. G051696, 2016 Cal. App. LEXIS 1089 (Dec. 14, 2016) (affirming trial court order to recuse entire Orange County District Attorney's Office from murder case in which prosecutors displayed "disqualifying conflict of interest" with Sheriff's Department because they worked together on illegal informant scheme).

[174] Walter W. Steele Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965, 966 (1984); News Release, State Bar of Cal., State Bar Will Implement New Ethics Rule Addressing Prosecutor Misconduct (Nov. 2, 2017), http://www.calbar.ca.gov/About-Us/News/News-Releases/state-bar-will-implement-new-ethics-rule-addressing-prosecutor-misconduct [https://perma.cc/H5LP-5Y4A].

commit misconduct *and* prosecutors' offices that systemically sweep it under the rug.[175] Lastly, requiring vastly greater transparency from both police and prosecutors will allow all of us to better assess how prosecutors are using tools like plea bargaining to cover for their police partners.[176] These are low-hanging fruit.

Other elements of oversight reform, such as the particular makeup of any commission and its power to address underlying codependence culture, or even the creation of independent tribunals or legal proceedings to adjudicate police violence that cannot be extinguished by plea bargains and are not subject to *Heck* and other procedural hurdles,[177] will require more nuance and jurisdiction-by-jurisdiction consideration. But these difficulties should not deter us from trying.

Better Incentives. City mayors, county commissioners, state legislators, and other local officials must push the costs of legal fees in misconduct cases (and/or violation of whistleblower protection laws) back on police and prosecutors. Shifting such responsibility may put pressure on police union leaders and district attorney associations' bottom lines. In the same vein, legal reformers, courts, and legislators must push for the abolition or curtailing of absolute and qualified immunity.[178] These doctrines shield police (qualified immunity) and prosecutors (both qualified and absolute immunity) from civil rights lawsuits that would test police misconduct and prosecutors' shielding thereof. Forcing police and prosecutors to have more monetary skin in the game should incentivize better behavior.[179] Finally, whistleblower protections for both police and prosecutors (and potentially others) must also be strengthened and expanded to recognize

[175] *See* Consent Decree at 71-78, United States v. City of Ferguson, No. 4:16-cv-00180 (E.D. Mo. Mar. 17, 2016) (contemplating training from prosecutors to Ferguson Police Department, but not subjecting prosecutors to training themselves).

[176] FORTIER, *supra* note 102, at 4-5.

[177] *Cf.* Clark Neily, *Let's Create Constitutional Small Claims Courts*, CATO INST.: CATO LIBERTY (Dec. 20, 2019, 4:30 PM), https://www.cato.org/blog/constitutional-small-claims-court [https://perma.cc/CPT5-E46T] (arguing in favor of "constitutional small claims courts" to adjudicate small-scale violations of constitutional rights by police).

[178] For discussions on limiting the availability of qualified immunity as a defense, see, for example, Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 48-51 (2017); C.J. Ciaramella, *Qualified Immunity Is an Unqualified Disgrace*, REASON, July 2019, at 17, 17; Alan Feuer, *Diverse Group Pushes for Review of Immunity for Officials*, N.Y. TIMES, July 13, 2018, at A19. For discussions regarding limiting the availability of absolute immunity as a defense, see Stephen Beale, *Who Is Policing the Prosecutors?*, AM. CONSERVATIVE (Feb. 19, 2019, 12:01 AM), https://www.theamericanconservative.com/articles/who-is-policing-the-prosecutors/ [https://perma.cc/5U7U-AKPH]; Bidish Sarma, *Private: After 40 Years, Is It Time to Reconsider Absolute Immunity for Prosecutors?*, AM. CONST. SOC. (July 19, 2016), https://www.acslaw.org/expertforum/after-40-years-is-it-time-to-reconsider-absolute-immunity-for-prosecutors/ [https://perma.cc/9HNR-LHT7].

[179] *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 954-55 (2014) (requiring officers to pay a small portion of settlement to help deter future misconduct).

the codependence problem and create better incentives for conscientious police and prosecutors to come forward and change the culture from within.

Democratic Engagement. This Article outlines deeply ingrained cultural, legal, and nonlegal norms and practices that will require a multifaceted reform strategy. However, none of it will matter if democracy is not trained on the problem. Voters, legislators, the media, and others must recognize and contend with police-prosecutor codependence and act accordingly. Specifically, voters must elect prosecutors who: (1) root out police violence and misconduct and train their line attorneys to expose it, not bury it via procedural tricks; and (2) lobby in favor of police reform, even if it could lower conviction rates and therefore their own professional advancement and even if such efforts might run contrary to positions taken by the local district attorneys association. They must also elect and pressure mayors who demand similar reforms in the police. Further, legislators must expand their myopic understanding of "police reform" to embrace prosecutors as well, despite the political power that prosecutors currently wield. Finally, the media must reverse decades of trumpeting tough-on-crime narratives from their comfortable contacts in police departments and prosecutors' offices.[180] Only then will prevailing narratives like "bad apple" policing and the infallibility of prosecutorial discretion begin to wither and die, which they must. Our communities depend on it.

CONCLUSION

In 1980s Chicago, Jon Burge operated a cabal of police torturers across hundreds of criminal cases and faced no consequences from Cook County prosecutors. In 2019, Jason Van Dyke almost got away with the murder of Laquan McDonald, with a pliant Cook County State Attorney refusing to charge him until public pressure forced damning evidence into the light. Beyond these cases, overwhelming evidence from Cook County, coupled with a targeted analysis of prosecutorial power as it relates to police accountability, exposes what seems to be a national concern: the persistent, codependent relationship between police and prosecutors exacerbates police misconduct and violence and

[180] Steven Chermak, *Image Control: How Police Affect the Presentation of Crime News*, 14 AM. J. POLICE, no. 2, 1995, at 21, 26 (describing significant police control over media's selection and production of crime incident stories); Steven Jerome H. Skolnick & Candace McCoy, *Police Accountability and the Media*, 1984 AM. B. FOUND. RES. J. 521, 554 (describing how reliance on police public relations professionals shapes crime reporting and limits police accountability); Alexandria Neason, *"Officials Say . . . ,"* COLUM. JOURNALISM REV. (2019), https://www.cjr.org/special_report/officials-say-chicago-police-joshua-beal.php [https://perma.cc/GV6K-7E3A] ("The demands that newsrooms place on crime reporters . . . make it too tempting to rely solely on police communications officers instead of building sources in neighborhoods where crime happens."); Adam H. Johnson, *Media Frame: A 'War on Cops' Narrative Without Evidence*, THE APPEAL (July 2, 2019), https://theappeal.org/media-frame-a-war-on-cops-narrative-without-evidence/ [https://perma.cc/7467-ST8X] (pointing to lack of verifiable data for media reports of trends of increased violence against police).

is aided by prosecutors in both legal and extralegal ways. This expanded view of the underlying causes and catalysts of police misconduct should spur correspondingly expanded research and reform approaches. These approaches cannot be put off. We must undertake them for the sake of citizens nationwide who want nothing more than to feel safe under law enforcement—and to feel safe *from* law enforcement as well.