
ARTICLE

WHOM DO PROSECUTORS PROTECT?

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ABSTRACT

Prosecutors regard themselves as public servants who fight crime and increase community safety on behalf of their constituents. But prosecutors do not only seek to protect those they are supposed to serve. Instead, prosecutors often trade community safety, privacy, and even the constitutional rights of the general public to enlarge police power. Prosecutors routinely advocate for weaker public rights, shield police from public accountability, and fail to prosecute police when they break the law.

This Article will show how prosecutors often protect police at the expense of the public. This Article suggests a novel theory of evaluating the conduct of traditional prosecutors, not just as actors seeking to protect the community, but also as advocates for heightened police and governmental power.

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INTRODUCTION

Prosecutors tell us that they fight crime and increase public safety.¹ Prosecutors say that they, as government lawyers, bring criminal prosecutions and the force of the state against those they believe have violated the law.² Prosecutors decide who to prosecute, what to charge, whether to offer plea agreements, and the sentences to request.³

Some are elected, others appointed, but in both instances, prosecutors are meant to represent their communities.⁴ They even refer to themselves in writing and in public hearings as “the people,”⁵ “the state,”⁶ “the city,”⁷ “the government,” and for federal prosecutors, as “the United States.”⁸

But despite this purported role of government official in service to the community,⁹ prosecutors consistently promote the interests of police officers over the rights and safety of the broader citizenry, including those completely outside of the criminal legal system and those uninvolved with the particulars of any specific case. Indeed, many litigation and policy choices made by traditional prosecutors are best viewed through a lens of police protection.

Unlike defense attorneys, prosecutors famously have an ethical duty to do “justice”¹⁰ as opposed to winning at all costs. Importantly, prosecutors are required to use their vast discretion and power to serve the public at large.¹¹

¹ See Barry Friedman, *What Is Public Safety?*, 102 B.U. L. REV. 725, 728 (2022) (“Public safety is the first duty of government.”).

² See CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(a) (AM. BAR ASS’N 2017).

³ See *The Power of Prosecutors*, ACLU, <https://www.aclu.org/issues/smart-justice/prosecutorial-reform/power-prosecutors> [<https://perma.cc/Z75N-XD9R>] (last visited Feb. 29, 2024).

⁴ See *id.*

⁵ For a critique of this practice by prosecutors, see Jocelyn Simonson, *The Place of “the People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 250 n.1 (2019).

⁶ *Id.* at 250 n.1 (describing different case captions across jurisdictions).

⁷ *Id.*

⁸ See *Mission*, U.S. DEP’T OF JUST., <https://www.justice.gov/usao/mission> [<https://perma.cc/SP7B-68P4>] (last updated Sept. 22, 2016), (discussing role of federal prosecutors); see also Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 379 n.159 (2001) (describing incident where federal prosecutor told author “[i]t was [her] obligation to protect the people of the United States of America”).

⁹ While no community is a monolith, in this Article I use the term “community” to mean the people police and prosecutors serve. I also will employ terms like “civilians,” “individuals,” and “Americans” to mean these non-law enforcement members of the general population.

¹⁰ See K. Babe Howell, *Prosecutorial Discretion and the Duty To Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 305-07 (2014) (opining on origins and justifications for prosecutors’ “special duty to seek justice, not merely to serve as advocates”).

¹¹ ABA Prosecutor Standards, *supra* note 2, at § 3-1.2(b) (“The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.”). Justice

Moreover, a significant scholarly literature describes how prosecutors' legal and ethical duties shape their relationship with police officers.¹² Despite such duties, scholars have also made the important point that prosecutors routinely protect police, or that police are infrequently prosecuted.¹³

This Article's novel contribution is that prosecutors protect police *at the expense of* the public's rights and safety even though they are sworn to uphold the same. It shows how collateral consequences of police protection by prosecutors are underappreciated by scholars and policy makers. Furthermore, this Article suggests a new theory of evaluating the conduct of traditional

Robert Jackson was specifically speaking to—and about—federal prosecutors, when he said “[y]our positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done.” Robert H. Jackson, Att’y Gen. of U.S., Address at The Second Annual Conference of United States Attorneys: The Federal Prosecutor 3 (Apr. 1, 1940) (available at <https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf> [<https://perma.cc/T4MT-DVE6>]). But in the nearly ninety years since Justice Jackson delivered his speech to a conference of U.S. Attorneys in 1940, time and time again prosecutors at all levels of government, not just federal, have claimed to be guided by his exhortation that “the citizen’s safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.” *Id.* at 7. Thus, in a speech at Hillsdale College, former Attorney General William P. Barr, who claimed that reform prosecutors pose a danger to the public, nonetheless used Justice Jackson’s words to warn against the “juggernaut” of the criminal justice system. General William P. Barr, Att’y Gen. of U.S., Remarks at Hillsdale College Constitution Day Event (Sept. 16, 2020) (available at <https://www.justice.gov/opa/speech/remarks-attorney-general-william-p-barr-hillsdale-college-constitution-day-event> [<https://perma.cc/PL5K-LMLZ>]); see Allan Smith, *These Prosecutors Want Radical Criminal Justice Change. Barr Is Fighting To Stop Them*, NBC NEWS (FEB. 17, 2020, 8:07 PM), <https://www.nbcnews.com/politics/justice-department/these-prosecutors-want-radical-criminal-justice-change-barr-fighting-stop-n1126986> [<https://perma.cc/2CG4-QMHN>]; . Former Attorney General Edwin Meese, who once urged all fifty states to restore the death penalty, wrote an entire law review article, praising Justice Jackson’s statement that “the prosecutor at his best is one of the most beneficent forces in our society.” See Ronald J. Ostrow, *Attorney General Wants Executions for Federal Crimes Also: Meese Urges All States to Adopt Death Penalty*, L.A. TIMES (Apr. 30, 1985, 12 AM PT), <https://www.latimes.com/archives/la-xpm-1985-04-30-mn-19892-story.html> [<https://perma.cc/JU56-JPCE>]; Edwin Meese III, *Robert H. Jackson, Public Servant*, 68 ALBANY L. REV. 777, 779 (2005) (quoting Robert H. Jackson, *supra*, at 1). Whether Justice Jackson’s description of the prosecutor’s rule was ever true back when he spoke it, my point in this Article is to show it is not true now and has not been true for quite some time.

¹² See discussion *infra* Section I.

¹³ See, e.g., Somil Trivedi & Nicole Gonzalez Van Cleve, *To Serve and Protect Each Other: How Police-Prosecutor Codependence Enables Police Misconduct*, 100 B.U. L. REV. 895, 911–28 (2020); Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 745 (2016); see also I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1565–72 (2020) (critiquing prosecutors’ current role as enabling societal injustice through criminal justice system).

prosecutors not as actors seeking to protect the community, but instead first and foremost as advocates for police and government power.

To begin, the Article highlights one underappreciated way in which prosecutors contribute to the degradation of public rights: by advocating to remove constitutional protections for those both inside and outside the legal system. For example, in the Fourth Amendment context, by pursuing “wins” in particular criminal cases, prosecutors contribute to diminishing the civil rights of all Americans. Millions of innocent Americans are now forced to interact with police against their will in stop and frisk encounters because of erosions in Fourth Amendment protections. While some prosecutors might not intend to produce these broad-based effects, they nonetheless might not appreciate how their advocacy in favor of police power impacts the greater community or who they actually represent.¹⁴

Some might argue that prosecutors are simply playing a role in an adversarial system in which both sides are represented and courts are a check on prosecutorial power.¹⁵ The argument is that legislatures and judges create and apply the laws, and prosecutors merely enforce them.

But such arguments cannot explain why prosecutors often protect police outside the context of litigation in a particular case. For example, some prosecutors act as amici in other jurisdictions’ cases to support reducing individual privacy and civil rights in other parts of the country.¹⁶ Others lobby legislatures to make changes in the criminal law.¹⁷

Still other prosecutors regularly seek to limit the public’s access to and use of police officer disciplinary records.¹⁸ In doing so prosecutors shield officers from public scrutiny. Information about police officers’ biases, thefts from the community, violence against the public, untruths, and other wrongdoings are shielded by prosecutors in many jurisdictions.¹⁹

By pushing for more police power outside the context of their traditional prosecutorial roles, prosecutors place some of their constituents and the public at large at risk of serious physical, financial, and emotional harm by these

¹⁴ See ELIE MYSTAL, *Stop Frisking Me, in ALLOW ME TO RETORT: A BLACK GUY’S GUIDE TO THE CONSTITUTION* 41, 41-50 (2022).

¹⁵ See Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U L. REV. 171, 187-203 (2019) (arguing that charges of prosecutorial preeminence in criminal legal system are incorrect).

¹⁶ See Bruce A. Green, *Gideon’s Amici: Why Do Prosecutors So Rarely Defend the Rights of the Accused?*, 122 YALE L.J. 2336, 2344-54 (2013) (discussing rationales for why prosecutors may decline to file amici supporting criminal defendants in cases concerning procedural fairness).

¹⁷ See generally, Carissa Byrne Hessick, Ronald F. Wright & Jessica Pishko, *The Prosecutor Lobby*, 80 WASH. & LEE L. REV. 143 (2023).

¹⁸ Trivedi & Gonzalez Van Cleve, *supra* note 13, at 920-22 (discussing prosecutor failure to disclose police misconduct materials).

¹⁹ See *id.* at 922 (citing examples of “prosecutors protecting police by suppressing required disclosures of misconduct”).

powerful state actors.²⁰ These actions are often defended by public safety arguments, but really, they protect police power.

Still, some might argue that prosecutors' robust support of police power is counteracted by defense attorneys' zealous advocacy for their clients. This argument imagines that defense counsel will put up roadblocks to state power and that courts will keep prosecutors from going too far.

This view overlooks a number of critical and obvious differences in the roles of defender and prosecutor. Defense attorneys are famously under-resourced²¹ while police and prosecutors almost never face budget cuts in our tough-on-crime culture.²² Thus, the field of play is not level. In addition, the view of prosecutors as gamesman ignores the prosecutors' unique obligations to the community as a whole, including the defendant, not just an obligation to satisfy a victim or score a victory.

Putting aside these real impacts on individual citizens' safety, the decision to privilege police over the general public interest is also financially costly.²³ City payouts due to police behavior routinely cost taxpayers billions of dollars.²⁴ In addition to payouts for wrongdoing, police are legally allowed to seize money from community members through civil asset forfeiture without even making an

²⁰ *Id.* at 912 (arguing that by protecting police misconduct, prosecutors “reduce official accountability, which undermines community trust and thereby *harms* public safety” (emphasis omitted)).

²¹ Udi Ofer, *Defunding Prosecutors and Reinvesting in Communities: The Case for Reducing the Power and Budgets of Prosecutors To Help End Mass Incarceration*, 2 *Hastings J. Crime & Punishment* 31, 60 (2021) (“While prosecutorial budgets grew, indigent defense spending went down . . .” (citing Olive Roeder, *Just Facts: A Different Kind of Defense Spending*, BRENNAN CTR. FOR JUST. (July 25, 2014), <https://www.brennancenter.org/our-work/analysis-opinion/just-facts-different-kind-defense-spending> [https://perma.cc/CJB3-ZCQ2%5D])).

²² *Id.* at 32 (“Prosecutor offices have grown dramatically during the era of mass incarceration.”).

²³ See Elizabeth Tang, *Sexual Assault by Police Is a Systemic Problem That Demands a Systemic Remedy*, NAT'L WOMEN'S L. CTR. (Oct. 15, 2021), <https://nwlc.org/sexual-assault-by-police-is-a-systemic-problem-that-demands-a-systemic-remedy/> [https://perma.cc/3NPD-SFZR].

²⁴ See Keith L. Alexander, Steven Rich & Hannah Thacker, *The Hidden Billion-Dollar Cost of Repeated Police Misconduct*, WASH. POST (Mar. 9, 2022), <https://www.washingtonpost.com/investigations/interactive/2022/police-misconduct-repeated-settlements/> (summarizing investigative findings regarding national trends in payout settlements for police misconduct).

arrest.²⁵ These actions, which are costly to the individual constituents and taxpayers, but directly benefit police, are also defended by prosecutors.²⁶

Finally, prosecutors directly protect police over citizens by not prosecuting police when they break the law.²⁷ Scholars have documented the massive social and financial costs of mass prosecution and incarceration²⁸, but prosecutions of police still are relatively rare.²⁹ Prosecuting police would remove rule-breaking officers from police departments that are usually disinclined to fire their own. Prosecuting police would take the public out of harm's way from violent or untrustworthy law enforcement officers. But prosecutors typically choose to protect individual dangerous police officers rather than protect the public from them.³⁰

²⁵ See *Learn About the Impact of Civil Asset Forfeiture.*, NPAP, <https://www.nlg-npap.org/civil-asset-forfeiture/> [<https://perma.cc/GN73-ASHG>] (last visited Feb. 29, 2024) (noting, in context of traffic violations, that drivers are “not even issued a ticket, let alone charged,” but nevertheless have their property seized by law enforcement); *Why Civil Asset Forfeiture Is Legalized Theft*, LEADERSHIP CONF. ON CIV. & HUM. RTS. (July 23, 2015), <https://civilrights.org/resource/why-civil-asset-forfeiture-is-legalized-theft/> [<https://perma.cc/L4XS-YYK>] (“Police do not have to file charges or even establish guilt in these cases before seizing and keeping property and there is no limit to what police can seize.”); Andrew Crawford, *Civil Asset Forfeiture in Massachusetts: A Flawed Incentive Structure and Its Impact on Indigent Property Owners*, 35 B.C. J.L. & SOC. JUST. 257, 260-65 (2015) (outlining history and criticism of civil asset forfeiture).

²⁶ See MONEY LAUNDERING AND ASSET RECOVERY SECTION, CRIM. DIV., DOJ, *Civil Asset Forfeiture: Purposes, Protections, and Prosecutors*, 67 D.O.J. J. FED L. & PRAC. 3, 5 (2019) (characterizing civil asset forfeiture as “entirely legitimate and vitally important” to law enforcement).

²⁷ See Kami Chavis Simmons, *Increasing Police Accountability: Restoring Trust and Legitimacy Through the Appointment of Independent Prosecutors*, 49 WASH. U. J.L. & POL’Y 137, 146-47 (2015) (discussing statistical evidence of failure to prosecute officers who engage in excessive force and negative implications on criminal punishment rationale); Devan Byrd, Note, *Challenging Excessive Force: Why Police Officers Disproportionately Exercise Excessive Force Towards Blacks and Why This Systemic Problem Must End*, 8 ALA. C.R. & C.L. L. REV. 93, 116 (2017) (arguing, in context of excessive force cases, “problem is a justice system that rarely prosecutes or convicts police officers”).

²⁸ See *Social and Economic Harm*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/end-mass-incarceration/social-economic-harm#> [<https://perma.cc/ET4A-5HMM>] (last visited Feb. 29, 2024) (“The United States spends about \$270 billion annually on our criminal justice system, with the vast majority of those costs borne by taxpayers.”); see also, Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1281-95 (2004) (explaining extent to which mass incarceration inflicts community level harms that are neither fiscally nor morally sustainable); Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL’Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html> [<https://perma.cc/547S-NCL3>].

²⁹ Simmons, *supra* note 27, at 144-45 (arguing conflicts of interest between prosecutors and law enforcement lead to failure to prosecute police misconduct). While some prosecutors have brought more cases since the murder of George Floyd, they remain the exception.

³⁰ *Id.*

Some might argue that shielding police officers from public scrutiny and prosecution is necessary to protect broader public interests. But those arguments ignore the myriad ways in which problem officers pose a danger to the community.³¹ Moreover, supporters of such a view provide no evidence that the purported benefits of protecting police outweigh the definite harms suffered at the hands of problem officers enabled by prosecutors' conduct.

This Article asks questions that prosecutors seem to ignore: Can a system of prosecution that professes to protect the community be legitimate when it damages the rights of the very community it is to protect? Can a system of prosecution justly withhold information from the public? Can a system of prosecution have any legitimacy when it prosecutes its own constituents while rarely holding police accountable when officers break the law?

The Article will proceed in several parts. Section I will discuss the role of the prosecutor and prosecutors' ethical obligations. Section II will examine how prosecutorial advocacy has weakened constitutional rights on the basis of community safety grounds, but for the benefit of police and at the expense of the public. Section III will tackle how prosecutors limit the public's knowledge about police misconduct with no community-safety justifications for this transgression against the community. Section IV will explore how rarely prosecutors prosecute police officers who violate the law. This Article will also examine resistance met by progressive prosecutors who have not held police rights above community interests.

I. HOW PROSECUTORS ARE DIFFERENT: ETHICS, ASYMMETRIC ADVANTAGES, AND LAW ENFORCEMENT CULTURE

The following Section first lays out the aspirational ethical obligations for prosecutors that, in theory, should lead them to protect their constituents' interests. It then describes how those obligations are poorly understood and ineffective in practice. By canvassing the scholarly literature on prosecutors and law enforcement, I show how financial incentives, asymmetric advantages for prosecutors, and a distinct law-enforcement culture that influences prosecutor outlooks can tip prosecutor interests away from the general public interest and toward enlarged police power.

A. *Ethical Obligations*

The duties and responsibilities of prosecutors differ from those of any other type of attorney in the legal system, whether criminal or civil. Most fundamentally, a prosecutor should "serve[] the public interest . . . to increase public safety both by pursuing appropriate criminal charges . . . and by exercising discretion

³¹ See discussion *infra* Section II.A (arguing prosecutor concealment of police misconduct poses harm to public safety).

to not pursue criminal charges.³² While judges are supposed to be neutral,³³ and defense lawyers have a duty to zealously advocate on behalf of their clients,³⁴ the role of the prosecutor is supposed to be distinct from both. The client of a prosecutor is not supposed to be the police or even a person who claims victimhood, but society writ large.³⁵

A prosecutor's job is to "seek justice,"³⁶ a requirement of the profession which courts³⁷ and legal experts³⁸ have reiterated. The Supreme Court has said of federal prosecutors:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.³⁹

In addition, prosecutors are often held to a different standard than defense attorneys. When a witness makes a misrepresentation while testifying, due process requires prosecutors, not defense attorneys, to correct the record.⁴⁰ Similarly, prosecutors may not forbid a witness from speaking with defense counsel.⁴¹ When they have evidence favorable to their opposing party, the law says prosecutors must make it available to their adversary, though the same is not true for the defense.⁴²

Despite these legal and ethical obligations, in practice, there is no enforcement mechanism to ensure that prosecutors do in fact, serve justice. Unlike defense lawyers or even police, prosecutors cannot be successfully sued because they enjoy almost total immunity.⁴³ Other than state bar disciplinary boards,

³² CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(b) (AM. BAR ASS'N 2017)..

³³ U.S. CTS., CODE OF CONDUCT FOR UNITED STATES JUDGES 3 (2019).

³⁴ MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR. ASS'N 2013).

³⁵ See Irene Oritseyeyinmi Joe, *The Prosecutor's Client Problem*, 98 B.U. L. REV. 885, 888 (2018).

³⁶ CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2b (AM. BAR ASS'N 2017).

³⁷ *Calhoun v. United States*, 568 U.S. 1206, 1208-09 (2013).

³⁸ See Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 190 (2022) ("They are the only category of attorneys with their own ethical mandate: to be 'ministers of justice.'"); see also Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J 607, 609, 633-37 (1999).

³⁹ *Berger v. United States*, 295 U.S. 78, 88 (1935). The Court has continued to reiterate this point over the ensuing decades. See, e.g., *United States v. Agurs*, 427 U.S. 97, 110-11 (1976); *Connick v. Thompson*, 563 U.S. 51, 71 (2011).

⁴⁰ See *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

⁴¹ See *Gregory v. United States*, 369 F.2d 185, 187-89 (D.C. Cir. 1966).

⁴² See *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963).

⁴³ See *Connick* 563 U.S. at 71.

which are anemic when it comes to disciplining prosecutors,⁴⁴ prosecutors are typically left to monitor themselves.⁴⁵

The unprecedented autonomy that prosecutors enjoy extends to their discretion to pursue cases. Prosecutors may decide not to bring cases where, in their sole determination, prosecution does not serve justice. With the permission of a judge, they may dismiss cases already brought if they determine that is in the interest of justice. And prosecutors in fact have no duty to prosecute at all—a freedom they frequently take advantage of when police violate the law.⁴⁶

B. *Asymmetric Financial Position*

Not only do prosecutors have unique obligations compared to others in the legal system, but their partnership with very well-funded police departments that aid them in their law enforcement work is also unique. Police departments in American cities often have budgets of hundreds of millions of dollars—with several that exceed a billion dollars.⁴⁷ Prosecutors rely on police not only to bring them their cases, but also to investigate, subpoena and transport witnesses, and to participate as eyewitnesses themselves. This close relationship between prosecutors and law enforcement gives prosecutors a significant advantage over the average defense lawyer, especially those that represent the indigent.

To be sure, private defense counsel and some indigent defenders like public defender offices may have access to support staff like defense investigators, interpreters, and social workers to assist them in their work. But the salaries for those support roles come from the same source—either the client or the public defender budget. In contrast prosecutors can direct investigations by a separately funded government agency with significant resources.

This financial asymmetry has a real impact. Since public defenders are notoriously poorly resourced, most of their cases go uninvestigated.⁴⁸ It is a rare

⁴⁴ David Keenan, Deborah Jane Cooper, David Lebowitz & Tamar Lerer, *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 205 (2011).

⁴⁵ Of course some prosecutors are elected and thus might not be reelected by voters. I discuss the limitations of this enforcement mechanism in Section VI *infra*, in the context of progressive prosecutors.

⁴⁶ Rebecca Roiphe, *The Duty To Charge in Police Use of Excessive Force Cases*, 65 CLEV. ST. L. REV. 503, 506 (2017) (“There is no legal or ethical duty to prosecute.”).

⁴⁷ *What Policing Costs: A Look at Spending in America’s Biggest Cities*, VERA INST. OF JUST., <https://www.vera.org/publications/what-policing-costs-in-americas-biggest-cities> [<https://perma.cc/T7PM-J5KQ>] (last visited Feb. 29, 2024) (listing New York City, Los Angeles, and Chicago with the largest police budgets in 2020).

⁴⁸ Richard A. Oppel Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html>; AM. BAR ASS’N, THE OREGON PROJECT: AN ANALYSIS OF THE OREGON PUBLIC DEFENSE SYSTEM AND ATTORNEY WORKLOAD STANDARDS 3 (2022) (“Overwhelming caseloads force even excellent public defenders to cut corners. . . . They cannot conduct full investigations . . .”).

luxury for a poor person accused of a crime to have a defense investigator interview witnesses or issue subpoenas. Moreover, even though many jurisdictions give defense attorneys the ability to access body-worn camera footage, in reality, most defense attorneys do not have the resources to actually do so. Prosecutors, by contrast, can be guided by police to the exact portion of body-worn camera footage that might be most relevant to their case.⁴⁹

The ability to have their cases investigated and developed by well-resourced police departments puts prosecutors in a uniquely privileged position in our legal system.⁵⁰ This fact complicates the prosecution's obligation to seek justice—because the police in many instances have an interest in the outcome of their cases.⁵¹ Adding to this complex relationship is the fact that prosecutors rely on the police and rarely prosecute a case without their help. Both police and prosecutors are beholden to the other.

C. Law Enforcement Ties

Much has been written on the topic of the unique relationship between police and prosecutors. One scholar has written about how prosecutors in St. Louis joined the police union.⁵² Others have pointed out a conflict of interest in the close relationship.⁵³ Another pointed out the influence police have on plea bargaining.⁵⁴ It is hard to imagine another similarly close relationship in the legal system. The power dynamic highlights the special importance of the prosecutorial admonition to seek justice.

Legal observers have noted that police officers are often more coworkers than constituents to many prosecutors. In many large cities police do not live in the

⁴⁹ Police often have access to their body-worn camera footage.

⁵⁰ Unlike judges in inquisitorial legal systems like France, Germany, or the Netherlands, in which the fact-finders investigate and assess evidence neutrally themselves, American judges and jurors have the cases presented to and argued by the interested parties. Chrisje Brants, *Wrongful Convictions and Inquisitorial Process: The Case of the Netherlands*, 80 U. CIN. L. REV. 1069, 1076 (2013) (describing criminal legal system in Netherlands as one in which defense has ability to suggest avenues of investigation that judge has an “actively investigative function”). With the help of the police, prosecutors are able to be the only players with access to witnesses (other than the accused person). So there is little to no judicial oversight of the fairness of the investigation by the government.

⁵¹ Vida B. Johnson, *Bias in Blue: Instructing Jurors To Consider the Testimony of Police Officer Witnesses with Caution*, 44 PEPP. L. REV. 245, 249 (2017).

⁵² Maybell Romero, *Prosecutors and Police: An Unholy Union*, 54 U. RICH. L. REV. 1097, 1103-12 (2020).

⁵³ Kate Levine, *Who Shouldn't Prosecute Police*, 101 IOWA L. REV. 1447, 1483 (2016); Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 463, 468-84 (2017); Caleb J. Robertson, *Restoring Public Confidence in the Criminal Justice System: Policing Prosecutions When Prosecutors Prosecute Police*, 67 EMORY L.J. 853, 860-69 (2018).

⁵⁴ See generally Jonathan Abel, *Cops and Pleas: Police officers' Influence on Plea Bargaining*, 126 YALE L.J. 1730 (2017).

communities they serve.⁵⁵ Even in cities with residency requirements for police, these requirements are often ignored or weakly enforced.⁵⁶ A fifth of Pittsburgh police officers do not live in Pittsburgh.⁵⁷ Not only do most Los Angeles Police Department officers not reside in Los Angeles,⁵⁸ but some do not even live in California—with some officers living in Arizona, Idaho, Nevada and Texas.⁵⁹

While concerns exist that officers who do not live in the same cities or neighborhoods that they police cannot understand or relate to those communities or the people in them,⁶⁰ for the purposes of this Article the issue is that prosecutors may work closely with police, but in many instances the terms of their employment do not include serving those officers. Prosecutors should be in service of the communities who employ them, not the police they partner with to bring cases.

Moreover, when a police officer who does not live in the prosecutor's jurisdiction is not the prosecutor's constituent, prosecutors still have obligations to enforce laws that the officer violates while in the jurisdiction. If a police officer commits a crime against a member of the public while in that community, it would be the prosecutor who decides what, if any, consequences the officers might face. Yet prosecutions of police officers are rare, as will be discussed in a subsequent section.

⁵⁵ See Nate Silver, *Most Police Don't Live in the Cities They Serve*, FIVETHIRTYEIGHT (Aug. 20, 2014, 4:14 PM), <https://fivethirtyeight.com/features/most-police-dont-live-in-the-cities-they-serve/> [<https://perma.cc/XNM3-QWTT>] (“In about two-thirds of the U.S. cities with the largest police forces, the majority of police officers commute to work from another town.”).

⁵⁶ See *Report Finds Many Violate City's Residency Rule*, BOS. 25 NEWS (July 6, 2014, 11:12 AM), <https://www.boston25news.com/news/report-finds-many-violate-citys-residency-rule/142047648/> [<https://perma.cc/9RR3-NQWD>] (“13 of 22 of the Boston Police Department's top leaders are living in the suburbs.”).

⁵⁷ See An-Li Herring & Chris Potter, *A Year After Pittsburgh Eased Residency Rule, One-Fifth of Police Force Lives Outside City*, WESA (May 8, 2018, 7:10 AM), <https://www.wesa.fm/politics-government/2018-05-08/a-year-after-pittsburgh-eased-residency-rule-one-fifth-of-police-force-lives-outside-city> [<https://perma.cc/N29L-DWK8>] (“More than one in five Pittsburgh police officers reside beyond the Pittsburgh city limits, just a year after gaining the right to live outside the city.”).

⁵⁸ See Emily Alpert Reyes & Doug Smith, *Most L.A. City Employees Don't Live in L.A., Times Analysis Finds*, L.A. TIMES (June 7, 2014, 6:01 PM PT), <https://www.latimes.com/local/la-me-out-of-towners-20140608-story.html>.

⁵⁹ See Lexis-Olivier Ray, *At Least Two Dozen L.A.P.D. Officers 'Live' Out of State, Yet L.A. Taxpayers Pay Their Salaries*, L.A. TACO (Sept. 17, 2021, 12:28 PM PDT), <https://www.lataco.com/lapd-officers-living-out-of-state/> [<https://perma.cc/Y6ZZ-LKNU>] (reporting at “at least two dozen police officers live outside California,” including in Arizona, Idaho, Nevada, and Texas).

⁶⁰ See John Eligon & Kay Nolan, *When Police Don't Live in the City They Serve*, N.Y. TIMES (Aug. 18, 2016), <https://www.nytimes.com/2016/08/19/us/when-police-dont-live-in-the-city-they-serve.html> (noting recent police criticism has largely stemmed from “whether officers know the communities they patrol and understand the culture of the people who live in them”).

Professor Stephanos Bibas has shown that prosecutors also want to win and rely on police to achieve that goal.⁶¹ Many prosecutors are motivated to build their reputation, which requires a strong win-loss record in terms of convictions, because most district attorneys are elected and some may eventually seek out future political careers.⁶²

For prosecutors, winning at trial requires police.⁶³ Police investigate prosecutors' cases and then testify at their preliminary hearings, grand juries, motions hearings, and trials. In some cases, police may be the only witnesses for the prosecution.⁶⁴ For example, in drug cases, prostitution stings, gun possession cases, assault on police officer cases, and trespass cases, police officers may be the only eye-witnesses for the government. Even in other types of cases, police officers are usually called to testify about the accused's arrest, the chain of custody for a piece of evidence, or some other detail. Thus, in most instances, prosecutors cannot succeed at trial without police. As Erwin Chemerinsky put it, "prosecutors are reluctant to alienate the very officers that they must work with and rely on in their cases."⁶⁵

If winning requires police, then winning also involves making sure not to alienate police unions. Police unions are not just a powerful labor advocate for police, but also a powerful political force.⁶⁶ Prosecutors have yet another reason to advocate for police power in light of the power of police unions.

⁶¹ See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2471 (2004) (asserting prosecutors want to boost their win-loss records for variety of reasons, including boosted egos, esteem, praise, and prospects for promotion and career advancement).

⁶² See *id.* at 2471-72 (arguing prosecutors are particularly concerned about their reputations because they are politically ambitious). Bibas argues that, as a group, prosecutors are ambitious and worry about their reputation; he argues that in addition to urging guilty pleas, prosecutors push trials in strong cases where they are likely to win and thereby build their reputations as skilled trial attorneys. See *id.* at 2471-73.

⁶³ See Daniel Denvir, *Perjury USA: Rampant Police Lying Taints Criminal Justice System Nationwide*, SALON (Jan. 6, 2016, 4:57 PM), http://www.salon.com/2016/01/06/perjury_usa_rampant_police_lying_taints_criminal_justice_system_nationwide/ [<https://perma.cc/627K-JKTD>] ("[N]ot only do prosecutors ignore perjury [by Chicago police], they also depend on it to win prized convictions."). See generally Felice F. Guerrieri, *Law & Order: Redefining the Relationship Between Prosecutors and Police*, 25 S. ILL. U. L.J. 353, 353 (2001) (discussing misconduct of both police officers and prosecutors and suggesting society "reevaluate this partnership").

⁶⁴ See Sa'id Wekili & Hyacinth E. Leus, *Police Brutality: Problems of Excessive Force Litigation*, 25 PAC. L.J. 171, 189 (1994) (noting police officers receive expert witness training and are often only witness).

⁶⁵ Erwin Chemerinsky, *The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles*, 8 VA. J. SOC. POL'Y & L. 305, 305 (2001).

⁶⁶ See Benjamin Levin, *What's Wrong with Police Unions?*, 120 COLUM. L. REV. 1333, 1337 (2020).

Losing at trial can have professional and reputational costs for prosecutors.⁶⁷ Raises, office advancement, and bragging rights all come with criminal convictions whether via trial or plea.⁶⁸ In addition, prosecutors who want to become judges or have ambitions for political office need to be tough on crime bona fides, which come with conviction rates.⁶⁹ So, winning or losing a case can impact not just their current job, but their future career aspirations as well. Prosecutors get none of those things without police.

D. *Shared Culture and Other Affinities*

Despite purporting to represent the people, many prosecutors have few interactions with the general public.⁷⁰ As one scholar has pointed out, prosecutors may not see much need to interact with the public after their election outside of rare town hall meetings.⁷¹ Moreover, these interactions might not always be positive encounters. Citizens sometimes use public forums and social media to air their criticisms of prosecutors and police, arguably putting prosecutors in a self-protective or even defensive position toward the people they serve.⁷²

By contrast, prosecutors and police typically enjoy a much more cozy relationship. These two groups work closely with one another on a daily basis in enforcing laws and preparing cases. Like many others who work closely and see one another frequently, they may become friends. Affinity can come from working day in and day out together.⁷³

⁶⁷ See Bibas, *supra* note 61, at 2476 (asserting prosecutors prefer to avoid losing cases at trial because it can harm their reputation).

⁶⁸ See Jessica Fender, *DA Chambers Offers Bonuses for Prosecutors Who Hit Conviction Targets*, DENVER POST (May 4, 2016, 5:58 AM), <https://www.denverpost.com/2011/03/23/da-chambers-offers-bonuses-for-prosecutors-who-hit-conviction-targets/> [<https://perma.cc/J5KW-RJGK>] (discussing Colorado DA who created bonus incentive for prosecutors to achieve predetermined standard for conviction rates).

⁶⁹ For a discussion on the tough-on-crime judge, see Keith Swisher, *Pro-Prosecution Judges: "Tough on Crime," Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317, 317 (2010) (discussing electoral motivations for judges and aspiring judges to take "tough on crime" stances).

⁷⁰ Laurie L. Levenson, *Do Prosecutors Really Represent the People? A New Proposal for Civilian Oversight of Prosecutors*, 58 DUQ. L. REV. 279, 281 (2020).

⁷¹ *Id.*

⁷² See Roberts, *supra* note 28, at 1295-96 (highlighting police's defense of racial profiling as useful tool despite unjust victimization and increased distrust of criminal justice system).

⁷³ In addition, romantic relationships happen between prosecutors and police. See Andrew Wolfson, *Sexual Relationships Between Prosecutors and Cops Could Derail Kentucky Murder Trials*, COURIER J. (July 17, 2017, 5:25 PM), <https://www.courier-journal.com/story/news/crime/2017/07/17/workplace-romances-complicate-murder-prosecutions/478774001/> [<https://perma.cc/B8C6-9RS4>] (describing two Kentucky murder cases where prosecutors had undisclosed relationships with investigative detectives in same case); Martha Neil, *Prosecutor's Relationship with Cop Gets Her Suspended*, ABA J. (July 16, 2008, 6:14 PM CDT),

Because of this close working relationship, police and prosecutors have shared experiences that can bond them to one another, such as enduring a stressful trial, attending the same training, or riding together to a witness's home.⁷⁴ These close relationships may cause prosecutors to give officers they like the benefit of the doubt.

At the same time, the differences between prosecutors and their constituents, along with their shared experiences with police, can create an "us against them" mentality where law enforcement, including the prosecution team, feels it is under siege by the communities that employ them.⁷⁵ By seeing the community as an enemy and police as a reliable ally may cause prosecutors to favor police over their actual constituents.

Not only do shared professional interests exist between police and prosecutors, but they also share demographic characteristics. A 2020 study shows that 95% of prosecutors are white.⁷⁶ In racially and economically diverse communities, engaged in a variety of types of employment, prosecutors and the rest of the public simply have less in common. White people are similarly overrepresented on police forces.⁷⁷

https://www.abajournal.com/news/article/prosecutors_relationship_with_cop_gets_her_suspended [<https://perma.cc/VU9B-SAG6>] (noting Chicago prosecutor's suspension due to undisclosed relationship with police officer who testified in six of their cases).

⁷⁴ Simmons, *supra* note 27, at 151-52 (describing prosecutors' close collaborations with and reliance on police officers for investigations as reasons for conflict of interest when prosecuting police).

⁷⁵ See Johnson, *supra* note 51, at 291-92 (exploring "us against them" mentality in law enforcement).

⁷⁶ See Dawn R. Wolfe, *Racial Disparity Among Prosecutors and Trial Judges Translates to Unequal Justice, Activists Say*, APPEAL (July 24, 2020), <https://theappeal.org/racial-disparity-among-prosecutors-and-trial-judges-translates-to-unequal-justice-activists-say/> [<https://perma.cc/DG8B-3F3M>].

⁷⁷ Jeremy Ashkenas & Haeyoun Park, *The Race Gap in America's Police Departments*, N.Y. TIMES (Apr. 8, 2015), <https://www.nytimes.com/interactive/2014/09/03/us/the-race-gap-in-americas-police-departments.html> ("In hundreds of police departments across the country, the percentage of whites on the force is more than 30 percentage points higher than in the communities they serve, according to an analysis of a government survey of police departments."); see also Dan Keating & Kevin Uhrmacher, *In Urban Areas, Police Are Consistently Much Whiter than the Communities They Serve*, WASH. POST (June 4, 2020), <https://www.washingtonpost.com/nation/2020/06/04/urban-areas-police-are-consistently-much-whiter-than-people-they-serve/> (discussing that despite decades of reform, many major police forces are still much whiter than communities where they work because reforms have not kept up with changing demographics of country); Rich Morin, *Exploring Racial Bias Among Biracial and Single Race Adults: The IAT*, PEW RSCH. CTR. (Aug. 19, 2015), <https://www.pewresearch.org/social-trends/2015/08/19/exploring-racial-bias-among-biracial-and-single-race-adults-the-iat/> [<https://perma.cc/6R36-YGV7>] (discussing Pew research study showing white people are most likely to hold implicit racial biases against other racial groups).

There is no question that some prosecutors have expressed racial bias in their prosecutions of people of color.⁷⁸ I have previously written about the problem of police officers and explicit racial bias.⁷⁹ While this is undoubtedly not universally true for prosecutors, some individual prosecutors and some individual police officers may share the explicit and implicit racial biases against those they work together to incarcerate.

As scholar Brandon Hasbrouck said, “policing in America has always been about controlling the Black body.”⁸⁰ Likewise, Professor Darren Hutchinson has come to a similar conclusion that our criminal legal system is based on racism, writing, “racism is inextricably connected with punishment.”⁸¹ And Professor I. India Thusi writes in her article, *The Pathological Whiteness of Prosecution*, “[w]hiteness is pervasive in the criminal legal system and may be facilitating punitiveness by allowing White actors to benefit from favorable implicit biases that carry a presumption of competence.”⁸²

These commonalities between police and prosecutors arguably influence how prosecutors perform their duties, and the practical ways in which their ethical obligations to the general public are mediated by their on-the-ground loyalties to their law enforcement partners.

II. PROSECUTORS’ ROLE IN SOCIETY’S DIMINISHED CONSTITUTIONAL RIGHTS

This Section lays out one of the most significant ways in which prosecutors have traded community safety for police power. Prosecutors’ roles in the

⁷⁸ See Alex B. Long, *Of Prosecutors and Prejudice (or “Do Prosecutors Have an Ethical Obligation Not To Say Racist Stuff on Social Media?”)*, 55 U.C. DAVIS L. REV. 1717, 1719-21 (2022) (discussing numerous incidents of explicit incidents of prosecutorial racism and racial bias); William Peacock, *Prosecutor Facing Discipline for “Our White World” Closing Statements*, FINDLAW (Mar. 21, 2019), <https://www.findlaw.com/legalblogs/strategist/prosecutor-facing-discipline-for-our-white-world-closing-statements/> [<https://perma.cc/PCP7-T28U>] (detailing prosecutor’s closing argument in which he contrasted “black community” with “our white world” to all white jury).

⁷⁹ See Vida B. Johnson, *KKK in the PD: White Supremacist Police and What To Do About It*, 23 LEWIS & CLARK L. REV. 205, 210-11(2019) (discussing problem of white supremacy in police departments).

⁸⁰ See Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 UCLA L. REV. 1108, 1113-21 (2020) (arguing U.S. police system is rooted in slavery and discussing impact of these white supremacist roots today).

⁸¹ See Darren Lenard Hutchinson, *“With All the Majesty of the Law”: Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 CALIF. L. REV. 371, 371 (2022) (asserting although justice system no longer explicitly discriminates based on race, it still “remains a powerful instrument of racial subordination”).

⁸² See I. India Thusi, *The Pathological Whiteness of Prosecution*, 110 CALIF. L. REV. 795, 870 (2022) (arguing scholarship should more thoroughly consider role white supremacy plays in driving racial bias in criminal justice system).

perpetuation of mass incarceration is now well-documented.⁸³ But prosecutors have not been held responsible for their role in weakening Americans' constitutional rights. This Section will explore how prosecutors have diminished individuals' Fourth, Fifth, and Sixth Amendment rights.⁸⁴ Many rulings in American courts that have sought to limit citizens' individual protections have been at the urging and insistence of prosecutors. While judges decide the law, prosecutors are the ones who press for regressive and restrictive change in trial and appellate forums.

A. *Fourth Amendment*

Scholars have focused on the role of courts in the paring down of the Fourth Amendment. But behind every such decision, a prosecutor made a request to a judge. These decisions impact more than the single case in which prosecutors were advocating. They impact the rights of all Americans. Dwindling Fourth Amendment rights can be attributed to requests by prosecutors in almost every instance.⁸⁵ People are less secure from governmental intrusions than ever before because prosecutors have repeatedly asked judges to give individual law-enforcement officers passes when they have crossed previously drawn constitutional lines.⁸⁶ Numerous Fourth Amendment cases have taken away protections afforded by the amendment itself.⁸⁷ Every time the law changed to

⁸³ See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 97-124 (2012) (discussing role of prosecutors in War on Drugs and mass incarceration); Godsoe, *supra* note 38, at 175-78 (2022) (describing how “fundamental nature of the prosecutor’s role, which is to convict and punish people” contributes to structural racism and mass incarceration); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 869-70 (2009) (arguing prosecutorial powers combining adjudicative and enforcement functions make effective checks of those powers difficult). See generally JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2017) (arguing prosecutorial discretion is significant factor in rise of mass incarceration).

⁸⁴ The same can be said to a lesser extent for the Second Amendment as well. Notably, the public-safety calculus is different in a Second Amendment context compared to other rights, and urban prosecutors historically prosecute people of color for gun possession more so than their rural counterparts.

⁸⁵ See Renée McDonald Hutchins, *Policing the Prosecutor: Race, the Fourth Amendment, and the Prosecution of Criminal Cases*, AM. BAR ASS'N (2018), https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2018/fall/policing-prosecutor/.

⁸⁶ *Id.* (discussing expansive carve-outs made to Fourth Amendment protections through recent jurisprudence).

⁸⁷ See, e.g., *Terry v. Ohio*, 392 U.S. 1, 8 (1968) (affirming admission of evidence acquired during “stop and frisk” search, despite officer’s lack of probable cause, under weaker “reasonable suspicion” standard); *Whren v. United States*, 517 U.S. 806, 811-12 (1996) (finding search and seizure without probable cause was constitutional for “purpose of inventory or administrative regulation”); *Illinois v. Wardlow*, 528 U.S. 119, 125-26 (2000) (affirming *Terry* stop as constitutional because reasonable suspicion standard “accepts the risk that officers may stop innocent people”).

diminish the community's safety from government intrusion, whether it was *Illinois v. Wardlow*⁸⁸ or *Whren v. United States*,⁸⁹ it was because a prosecutor brought the case delivered to them by a police officer rather than employ their discretion to dismiss that case. Then prosecutors justified it at the trial and appellate levels over the objection of the accused. There is a clear line, beginning from the Supreme Court's decision in *Terry v. Ohio* in 1968,⁹⁰ to some communities of color being overpoliced.⁹¹ And while judges bear some of the responsibility for the erosion of our constitutional rights, each case began with a prosecutor who chose to protect police power over the civil liberties of their constituents.

The loss of freedom is real for Americans. Before the Supreme Court's ruling in *Terry*, police needed to have probable cause that a crime had occurred and probable cause that the person the police stopped was suspected of the crime.⁹² This often meant that police took steps to get a warrant before stopping or searching a person.⁹³ But *Terry* allowed police to stop individuals with less suspicion.⁹⁴ While arguing for this rule of diminished suspicion in their briefing to the Supreme Court, prosecutors conceded that police had no real information to inform their suspicion.⁹⁵

Indeed, prosecutors in this case argued explicitly in favor of police power:

While the *Mapp* case and numerous decisions recently handed down by the United States Supreme Court clearly establish that under state and federal procedure citizens are entitled to uniform protection from unreasonable searches and seizures, we do not understand that these decisions have gone so far as to require or suggest that state police officers follow precise procedures in making arrests, searches and seizures.⁹⁶

The scale of what *Terry* unleashed on Americans is enormous. In New York City, police have stopped innocent people from doing their everyday activities

⁸⁸ 528 U.S. at 122-23 (discussing procedural history of prosecutors' evidentiary arguments).

⁸⁹ 517 U.S. at 809 (discussing same).

⁹⁰ 392 U.S. at 8-9.

⁹¹ Renée McDonald Hutchins, *Stop Terry: Reasonable Suspicion, Race, and a Proposal To Limit Terry Stops*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 883, 885 (2013) ("The authority to stop and frisk citizens on nothing more than reasonable suspicion has produced too many examples of police abuses that do not advance legitimate law enforcement goals and that disproportionately impact poor people of color.").

⁹² *Terry*, 392 U.S. at 25-27 (rejecting requirement of probable cause for search and seizure when officer can argue reasonable belief individual is "armed and dangerous").

⁹³ The Fourth Amendment requires that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV, § 1.

⁹⁴ *Id.*

⁹⁵ See Brief for Respondent on Writ of Certiorari to the Supreme Court of Ohio, *Terry v. Ohio*, 392 U.S. 1 (1968) (No. 67), 1967 WL 113685, at *30.

⁹⁶ *Id.*

over five million times since 2002.⁹⁷ In 2011, 685,724 people were stopped in New York City in a single year.⁹⁸ In California, 1.8 million people were stopped in 2018 alone.⁹⁹ Black people were most likely to be stopped and violence was used more frequently against them than other racial groups.¹⁰⁰ These unwanted interactions that state actors subject citizens to are degrading, stressful, and sometimes violent.¹⁰¹ While a stop or frisk may seem innocuous and brief, it realistically means that a person is stopped from engaging in their activities and subjected to having their bodies touched by a police officer, often in public. That is a genuine and nontrivial loss of privacy and freedom to a member of our society.

Prosecutors have also made it easier for police to enter an individual's home without a warrant. In *Kentucky v. King*,¹⁰² the Supreme Court upheld warrantless police entries into private homes due to exigent circumstances created by an officer, as long as police did not create the exigence by violating the Fourth Amendment.¹⁰³

Prosecutors from thirty-four states signed on as amicus for the State of Kentucky in support of warrantless residential searches.¹⁰⁴ They argued that courts should not “inquire as to the subjective motives of police, or the foreseeability of the exigent circumstances that police action supposedly precipitated, when examining whether a warrantless search is reasonable.”¹⁰⁵ Not only did prosecutors advocate for police power, but they argued that courts

⁹⁷ See *Stop-and-Frisk Data*, NYCLU: ACLU OF N.Y., <https://www.nyclu.org/en/stop-and-frisk-data> [<https://perma.cc/92EN-D5N3>] (last visited Feb. 29, 2024) (analyzing annual stop-and-frisk data provided by NYPD between 2002 and 2022 and noting “overwhelming majority of people stopped by the NYPD have been innocent”).

⁹⁸ *Id.*

⁹⁹ See Darwin BondGraham, *Black People in California Are Stopped Far More Often by Police, Major Study Proves*, GUARDIAN (Jan. 3, 2020, 1:00 AM), <https://www.theguardian.com/us-news/2020/jan/02/california-police-black-stops-force> [<https://perma.cc/B4R5-RS8Z>] (summarizing statistical findings).

¹⁰⁰ *Id.* (“[B]lack people are much more likely to have firearms pointed at them by police officers. “They also are more likely to be detained, handcuffed and searched.”).

¹⁰¹ See Amanda Geller, Jeffrey Fagan & Bruce G. Link, *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321, 2321 (2014) (“Recent studies suggest that *Terry* stops are often harsh encounters in which physical violence, racial/ethnic degradation, and homophobia are commonplace . . .”).

¹⁰² 563 U.S. 452 (2011).

¹⁰³ *Id.* at 462 (holding warrantless search to prevent destruction of evidence was reasonable, and thus constitutional, because “police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment”).

¹⁰⁴ See Brief of the States of Indiana et al. as Amici Curiae in Support of Petitioner at 1, *Kentucky v. King*, 563 U.S. 452 (2010) (No. 09-1272), 2010 WL 4803139, at *1 (arguing exception to warrant requirement was “very important for successful police work and criminal prosecution”).

¹⁰⁵ *Id.* at 2-3.

should not be able to question police motives in their creation of the exigencies that allow the warrantless search of a home.¹⁰⁶

Even when police do get a warrant to search someone's premises, prosecutors won the ability for police to use no-knock warrants.¹⁰⁷ This tactic, where police enter a home without announcing themselves as law enforcement, is one of the most dangerous interactions between police and civilians, as individuals may be unaware of police presence and assume their home is being invaded. Expecting this reaction, police come to these encounters primed for violence.¹⁰⁸ No-knock warrants are therefore extremely dangerous, as Breonna Taylor's death in 2020 illustrated,¹⁰⁹ and have serious consequences not only for the target of the warrant, but for innocent occupants and neighbors as well. This is an instance of prosecutors trading civilian safety for bolstered police power in drug cases.

Prosecutors scored another victory for police power in *Illinois v. Wardlow*.¹¹⁰ In that case, prosecutors explicitly argued for police power over individuals' civil rights: "[T]he Government's interest in fostering good police work and facilitating the prevention and detection of crime outweighs a person's privacy interest."¹¹¹

In *Wardlow*, the Supreme Court further expanded the impact of *Terry* by sanctioning police stopping a person based only on flight from police when coupled with presence in a "high crime" neighborhood.¹¹² This was a departure from previous doctrine that allowed citizens to terminate encounters with police without creating suspicion that would legally justify a seizure.¹¹³ Prosecutors argued for a rule that would allow police to stop anyone who fled, unprovoked, from police, but offered a fallback solution that would allow police to do so solely in "high crime" neighborhoods.¹¹⁴ Prosecutors wanted to diminish the

¹⁰⁶ *Id.*

¹⁰⁷ See *Richards v. Wisconsin*, 520 U.S. 385, 395-96 (1997) (upholding no-knock warrants and forcible entry as constitutional after finding adequate reasonable suspicion).

¹⁰⁸ See Nicole Dungca & Jenn Abelson, *No-Knock Raids Have Led to Fatal Encounters and Small Drug Seizures*, WASH. POST (Apr. 15, 2022), <https://www.washingtonpost.com/investigations/interactive/2022/no-knock-warrants-judges/> (describing no-knock warrant and citing multiple encounters where "survivors of raids have said they feared that intruders were breaking into their homes").

¹⁰⁹ See Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What To Know About Breonna Taylor's Death*, N.Y. TIMES (Dec. 13, 2023), <https://www.nytimes.com/article/breonna-taylor-police.html> (explaining events leading up to and following Louisville police officers shooting Breonna Taylor).

¹¹⁰ 528 U.S. 119 (2000).

¹¹¹ Brief for Petitioner at 7, *Wardlow*, 528 U.S. 119 (No. 98-1036), 1999 WL 451857, at *6 (discussing police rationale for *Terry* stops).

¹¹² *Wardlow*, 528 U.S. at 124.

¹¹³ See *Florida v. Royer*, 460 U.S. 491, 498 (1983) (noting suspects stopped by police "need not answer any question put to him . . . [and] may decline to listen to the questions [by police] at all and may go on his way").

¹¹⁴ "Finally, even if it is determined that unprovoked flight can never alone justify a *Terry* stop, the fact that the flight occurs in a high crime location provides a sufficient amalgam of

rights of everyone in their state but were content to just impose their will on people who lived in poorer neighborhoods. In addition to the State of Illinois as the solicitor party to the case, the Solicitor General for the United States¹¹⁵ and an additional seventeen state attorneys general signed on as amicus in support of this expanded police power to apprehend people who choose not to speak to police.¹¹⁶

Because law enforcement may choose to overpolice and overarrest communities of color, and because Black people and Latino people are much more likely to reside in communities that can be considered “high crime” by police,¹¹⁷ the impact of this decision was enormous. These communities’ presence in “high crime” neighborhoods is typically not a choice, but a result of poverty, structural racism, and other public-policy decisions.¹¹⁸ The impact of *Wardlow* is that police can justify apprehending persons of color fleeing police without additional reason beyond presence in a neighborhood that police have deemed to have above-average crime, in spite of the long history of police committing violence in these communities.

While prosecutors’ advocacy to allow additional governmental encroachment into our privacy impacts everyone, this subtraction of constitutional rights is borne most by communities of color,¹¹⁹ the poor, the mentally ill, and those addicted to substances. Intrusions into one’s home usually require a judge-signed warrant, while unhoused people can be stopped and frisked without a warrant and have no way to escape these types of intrusions.¹²⁰ Flight from

facts to support the temporary investigative stop.” Brief for Petitioner at 7, *Wardlow*, 528 U.S. 119 (No. 98-1036), 1999 WL 451857, at *6.

¹¹⁵ See generally Brief for the United States as Amicus Curiae Supporting Petitioner, *Wardlow*, 528 U.S. 119 (No. 98-1036), 1999 WL 446420, at *7-21 (arguing unprovoked flight alone is sufficient basis for *Terry* stop).

¹¹⁶ See Brief of Amici Curiae States of Ohio et al. in Support of Petitioner, *Wardlow*, 528 U.S. 119 (No. 98-1036), 1999 WL 513832, at *2 (contending “there is nothing unreasonable about stopping a person who runs from the police, especially in a neighborhood known for its criminal activities”).

¹¹⁷ See Reshaad Shirazi, *It’s High Time To Dump the High-Crime Area Factor*, 21 BERKELEY J. CRIM. L. 76, 77 (2016) (“[H]igh-crime areas have disproportionately high African American populations.”).

¹¹⁸ See Margery Austin Turner & Solomon Greene, *Causes and Consequences of Separate and Unequal Neighborhoods*, URB. INST., <https://www.urban.org/racial-equity-analytics-lab/structural-racism-explainer-collection/causes-and-consequences-separate-and-unequal-neighborhoods> [<https://perma.cc/3Y6K-QXBG>] (last visited Feb. 29, 2024) (outlining historical development of racial segregation of neighborhoods).

¹¹⁹ See generally Ekow N. Yankah, *Pretext and Justification: Republicanism, Policing, and Race*, 40 CARDOZO L. REV. 1543 (2019) (identifying racial inequity in policing and adjudicating); Hutchins, *supra* note 91, (discussing racial implications of *Terry* decision); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999) (discussing racial implications of Fourth Amendment Supreme Court jurisprudence).

¹²⁰ See JOHN RUBIN, PHILLIP R. DIXON & ALYSON A. GRINE, *14.2 Warrants and Illegal Searches and Seizures*, in UNC SCH. OF GOV. INDIGENT DEF. MANUAL SERIES (Apr. 2021),

police in poor high-crime areas justifies a seizure, while it does not in wealthy areas.¹²¹ Police practices that disproportionately impact Black people and other people of color are tolerated so long as there is no smoking gun proving the police policy is directed at people of color because of their race.¹²²

Race and racism are not explicitly discussed in *Terry* or even *Wardlow*, but prosecutors have explicitly argued in favor of racism in policing in *United States v. Brignoni-Ponce*.¹²³ Prosecutors argued for a standard of not only less than probable cause but less than reasonable articulable suspicion within the U.S. border zone:

Because of the unique conditions and difficult law enforcement problems in the Mexican border areas, it may be reasonable to stop a vehicle to ask the occupants about their right to be or remain in this country even though the officers lack an articulable suspicion that the particular vehicle to be stopped contains illegal aliens.¹²⁴

Thus the Court's decision allowed law enforcement to use a persons' ethnic appearance as a part of the basis for a Fourth Amendment seizure: "The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens."¹²⁵ Because of prosecutors, American citizens can be stopped by the state because of their appearance so long as they appear foreign to law enforcement.¹²⁶

In *Whren*, the Supreme Court allowed police to stop a person based on their race or any other basis as long as there was some other legal basis for the stop, even if the stop was in fact a pretextual one.¹²⁷ The federal prosecutors defended the use of pretextual stops by law enforcement against American citizens.¹²⁸ In *Whren*, plainclothes police made a traffic stop that violated the police department's own procedures dictating that only uniformed officers should make such stops.¹²⁹ Although the stop was justified because of a traffic offense,

<https://defendermanuals.sog.unc.edu/pretrial/142-warrants-and-illegal-searches-and-seizures> [<https://perma.cc/8NSW-TFSP>] (discussing legality of searches by law enforcement).

¹²¹ See *Wardlow*, 528 U.S. at 121 (deeming flight in high-crime area sufficient to justify search).

¹²² See *Whren v. United States*, 517 U.S. 806, 813 (1996) (holding officers had reasonable cause to conduct stop despite racial implications).

¹²³ 422 U.S. 873 (1975).

¹²⁴ Brief for the United States at 9-10, *Brignoni-Ponce*, 422 U.S. 873 (No. 74-114), 1974 WL 187424, at *6.

¹²⁵ *Brignoni-Ponce*, 422 U.S. at 886-87.

¹²⁶ *Id.*

¹²⁷ *Whren*, 517 U.S. at 813 (holding subjective motivations of officers irrelevant as long as some reasonable basis for stop exists).

¹²⁸ Transcript of Oral Argument at 40, *Whren*, 517 U.S. 806 (No. 95-5841), 1996 WL 195296, at *14-15 (responding "[t]hat's correct" when asked whether accurate to say "[s]o long as [officer] has a proper reason to stop, pretextual or not, [you] don't care").

¹²⁹ *Whren*, 517 U.S. at 808 (describing events preceding arrest).

the officer claimed he believed drug activity might be taking place.¹³⁰ Prosecutors argued that despite the police officer's violation of his own police department's policies, the stop was reasonable.¹³¹

In *Terry*, prosecutors argued that individual civil rights did not trump police policies,¹³² but in *Whren* prosecutors argued that privacy could be trumped even when officers violated their own procedures.¹³³ Whether they advocate for the authority of rogue police officers or for departmental decision making, what is consistent is that prosecutors argue in favor of police power.

Whren opened the door to pretextual stops at prosecutors' requests. That decision allows police to stop and search people based on their race as long as there is a legal excuse, or as long as police will be believed after the fact about having one.¹³⁴ These carte blanche police powers that embolden police and terrorize certain communities are brought to us not just by police and courts, but by prosecutors. The role of the prosecutor to do justice and protect the community has simply been abandoned in exchange for police power. And it has changed the everyday lives of Americans in significant ways. Police contact with the average American has become commonplace. Sixty million adults come into contact with police each year.¹³⁵ These interactions are not simply police responding to calls for help; they demand Americans stop what they are doing and submit to a public frisk, or otherwise interfere with their ability to live their lives without invasions into formerly private time and space. This causes alienation from police and fear of calling on law enforcement for assistance as well as trauma and anxiety in daily life.¹³⁶ In her transformative 2017 article, *Police Reform and the Dismantling of Legal Estrangement*, Scholar Monica Bell describes the type of harm visited on communities of color through repeated nonconsensual police encounters as a societal harm she called legal

¹³⁰ *Id.*

¹³¹ Transcript of Oral Argument at 34, *Whren*, 517 U.S. 806 (No. 95-5841), 1996 WL 195296, at *14 (asserting “reasonableness inquiry under the Fourth Amendment turns on . . . the balance between society’s interest in enforcing the laws and . . . an individual’s expectation of privacy” rather than “particular practices of a police department”).

¹³² Brief for Respondent on Writ of Certiorari to the Supreme Court of Ohio, *Terry v. Ohio*, 392 U.S. 1 (1968) (No. 67), 1967 WL 113685, at *12 (“Personal rights must yield in the public interest to the valid exercise of the police power of the state.”).

¹³³ Brief for the United States, *Whren*, 517 U.S. 806 (No. 95-5841), 1996 WL 115816, at *13 (“Where A Search Or Seizure Is Supported By Probable Cause Or Reasonable Suspicion, There Is No Basis For Inquiring Whether The Decision To Undertake The Search Conformed to Internal Police Practices.”).

¹³⁴ *Whren*, 517 U.S. at 813.

¹³⁵ “In 2018, about 61.5 million persons age[d] 16 or older had at least one contact in the prior 12 months with police.” ERIKA HARRELL & ELIZABETH DAVIS, DOJ, BUREAU OF JUST. STAT., CONTACTS BETWEEN POLICE AND THE PUBLIC, 2018 – STATISTICAL TABLES, (2023)(reporting findings from Bureau of Justice Statistics’ Police-Public Contact Survey).

¹³⁶ See Geller et al., *supra* note 101, at 2321-27 (assessing impact of police contact on physical and mental health).

estrangement.¹³⁷ Legal estrangement causes people of color and others in high poverty neighborhoods to feel like less than full citizens.¹³⁸ Prosecutors contribute to this alienation when they justify police detentions and searches in court.

B. *Fifth Amendment*

But it is not merely privacy and Fourth Amendment protections that prosecutors have sought to restrict. Fifth Amendment rights have been undermined by prosecutors since *Miranda v. Arizona*.¹³⁹ Police officers interrogate citizens without counsel when they are suspected of a crime, despite the Fifth Amendment right against self-incrimination. Years after the Supreme Court held that individuals have a right to remain silent, in the 2010 case *Berghuis v. Thompkins*,¹⁴⁰ the right to remain silent became limited to those who have the savvy to invoke that right.¹⁴¹ Simply remaining silent is no longer enough to satisfy police about this right.¹⁴² Prosecutors urged a rule change requiring an individual to speak to invoke the right to silence, further eroding the strength of *Miranda* protections.¹⁴³

The Court also diminished the right to silence in a police station in *Salinas v. Texas*¹⁴⁴ based on prosecutors' arguments. At trial, the prosecutor elicited that the defendant did not answer some questions posed by police during a noncustodial interview.¹⁴⁵ During closing arguments in this murder case, the prosecutor argued to the jury, over the defense's objection, that the accused's silence was evidence of his guilt.¹⁴⁶ The Supreme Court found that unless one specifically invokes the right to silence at the time of questioning, prosecutors

¹³⁷ Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 *YALE L.J.* 2054, 2066 (2017).

¹³⁸ *Id.*

¹³⁹ 384 U.S. 436 (1966).

¹⁴⁰ 560 U.S. 370 (2010).

¹⁴¹ *Id.* at 382 (requiring accused to affirmatively invoke right for *Miranda* to apply).

¹⁴² *Id.* (holding remaining silent for first several hours of police interrogation insufficient to invoke *Miranda* rights).

¹⁴³ Brief for Petitioner at 43, *Berghuis*, 560 U.S. 370 (No. 08-1470), 2009 WL 4693841, at *43 ("Even if interpreted as an equivocal assertion, there was no obligation for the police to cease questioning.").

¹⁴⁴ 570 U.S. 178, 181 (2013) (holding "[p]etitioner's Fifth Amendment claim fails because he did not expressly invoke the privilege against self-incrimination in response to the officer's question").

¹⁴⁵ *Id.* at 182.

¹⁴⁶ *Id.* at 193 (Breyer, J., dissenting) (discussing prosecutor's closing arguments).

can argue at trial that silence is indicative of guilt.¹⁴⁷ They did so as a direct result of the prosecutors' advocacy at trial and on appeal.¹⁴⁸

In 2013, the Court found in *Kansas v. Cheever*¹⁴⁹ that prosecutors could use statements made during a court-ordered mental examination in criminal trials.¹⁵⁰ Americans' right to be free from police interrogation tactics has been minimized and abrogated by judges at the request of prosecutors.

Interrogation tactics by the police not only impact the guilty, but the innocent as well. False confessions by the innocent are one of the main causes of wrongful convictions, especially of the young and those with intellectual disabilities.¹⁵¹

The right against self-incrimination is one of the few rights that is not self-executing.¹⁵² It must be invoked to benefit from it.¹⁵³ Prosecutors have made even the invocation of the right more difficult. At least one legal scholar has said that protections offered by *Miranda* are dead.¹⁵⁴ The Fifth Amendment is yet another area in which civilians have seen their rights shortchanged to benefit law enforcement goals because of prosecutor advocacy.

C. Sixth Amendment

Litigation by prosecutors has also resulted in the erosion of the Sixth Amendment right to counsel. In the ineffective assistance of counsel realm, prosecutors have argued for senselessly low standards for defense attorneys. Lawyers who fail to investigate their clients' cases¹⁵⁵ or who sleep during

¹⁴⁷ *Id.* at 191 (majority opinion) ("Before petitioner could rely on the privilege against self-incrimination, he was required to invoke it.").

¹⁴⁸ Brief for the United States as Amicus Curiae Supporting Respondent at 9, *Salinas*, 570 U.S. 178 (No. 12-246), 2013 WL 1308806, at *9 ("Because petitioner did not affirmatively invoke his Fifth Amendment privilege against compelled self-incrimination, his silence . . . was properly admitted as substantive evidence of his guilt at trial.").

¹⁴⁹ 571 U.S. 87 (2013).

¹⁵⁰ *Id.* at 98 ("We hold that where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit a crime, the prosecution may offer evidence from a court-ordered psychological examination for the limited purpose of rebutting the defendant's evidence.").

¹⁵¹ See *False Confessions/Admissions*, INNOCENCE PROJECT NEW ORLEANS, <https://ip-no.org/what-we-do/advocate-for-change/shoddy-evidence/false-confessions-admissions/> [<https://perma.cc/L6PJ-34P9>] (last visited Feb. 29, 2024) ("Over 60% of the first 66 confessions proven false by post-conviction DNA testing were given by juveniles or the mentally disabled.").

¹⁵² See *Salinas*, 570 U.S. at 181.

¹⁵³ *Id.*

¹⁵⁴ See Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519, 1592 (2008) ("As a prophylactic device to protect suspects' privilege against self-incrimination, I believe that *Miranda* is largely dead.").

¹⁵⁵ See *McFarland v. Scott*, 512 U.S. 1256, 1259 (1994) (Blackmun, J., dissenting from the denial of certiorari) ("Capital defendants have been sentenced to death when represented by counsel who never bothered to read the state death penalty statute . . ."); Sanjay K. Chhablani, *Chronically Stricken: A Continuing Legacy of Ineffective Assistance of Counsel*,

testimony¹⁵⁶ have been held to be constitutionally sufficient at the urging of prosecutors.

In *Shinn v. Ramirez*,¹⁵⁷ for example, Arizona prosecutors defended the behavior of defense counsel who failed to conduct any mitigation investigation on behalf of the accused in a capital case.¹⁵⁸ The result was that the Supreme Court limited federal courts' ability to consider new evidence in deciding ineffective assistance of counsel cases initially litigated in state courts.¹⁵⁹ In the cases considered by the Court, trial counsel failed to conduct mitigation investigations, a clear violation of effective assistance of counsel.¹⁶⁰ Appellate defense counsel, who was also deficient, waived the issue by not arguing it on appeal.¹⁶¹ Lower courts granted new trials, but federal prosecutors in Arizona appealed those decisions, resulting in the technicality that evidence of inadequate trial counsel cannot be raised for the first time at the federal habeas stage.¹⁶² Prosecutors argued that an attorney who fails to raise a "meritorious" claim does not constitute an "extreme malfunction" for which federal habeas is a remedy.¹⁶³ It is certainly possible that under this ruling an innocent person with deficient counsel at the trial and appellate stages could die in jail or be executed by the state. Once again prosecutors successfully advocated for the Supreme Court to gut a constitutional right of the people they are meant to serve—here the Sixth Amendment right to effective assistance of counsel.

As a result of low standards for defense attorneys advocated by prosecutors and set by courts, public defenders have crushing caseloads and police face less grueling and probing cross-examinations at trials, preliminary hearings, and motions hearings.¹⁶⁴ It is the clients of these indigent defenders—innocent and

28 ST. LOUIS U. PUB. L. REV 351, 383-89 (2009) (discussing ineffective counsel due to insufficient training or experience, crushing caseloads, and lacking legal resources).

¹⁵⁶ See, e.g., *Muniz v. Smith*, 647 F.3d 619, 623 (6th Cir. 2011).

¹⁵⁷ 142 S. Ct. 1718 (2022).

¹⁵⁸ *Id.* at 1728-29 (outlining procedural history of ineffective counsel claim).

¹⁵⁹ *Id.* at 1736 (disagreeing with respondents' expanded view of ineffective assistance of state postconviction counsel).

¹⁶⁰ *Id.* at 1728.

¹⁶¹ *Id.* at 1741 (Sotomayor, J., dissenting) (discussing waiver).

¹⁶² *Id.* at 1729-30 (majority opinion).

¹⁶³

Reply Brief for the Petitioners at 15, *Shinn*, 142 S. Ct. 1718 (No. 20-1009), 2021 WL 4845766, at *7 (citations omitted) ("Equally unpersuasive is Respondents' position . . . that relaxing § 2254(e)(2) in the Martinez context is necessary to guard against extreme malfunctions in the state-court systems. This Court 'will not lightly conclude that a State's criminal justice system has experienced the extreme malfunction for which federal habeas relief is the remedy,' and this Court has never concluded that procedurally defaulting a claim—even a potentially meritorious one—constitutes an extreme malfunction." (quoting *Burt v. Titlow*, 571 U.S. 12, 20 (2013))).

¹⁶⁴ "Lawyers may often be stymied in their efforts to resolve the ethical dilemma of how to deliver competent representation in the face of unreasonable caseloads and few resources. Still, their efforts are further undermined by the case law surrounding ineffective assistance

guilty—who suffer as a result. The right to counsel not only protects people who have committed crimes, but it protects the innocent as well. Lowered standards for the defense rewards law enforcement and hurts the greater communities in which we live.

Diminished Sixth Amendment rights further allow police to question represented people without their lawyers' presence or knowledge as a result of prosecutors' advocacy in *Montejo v. Louisiana*.¹⁶⁵ Prior to that decision, the Sixth Amendment barred police from speaking to an accused person once counsel was appointed. The *Montejo* decision requires that the accused explicitly request counsel to assert Sixth Amendment rights; the court appointing counsel does not trigger protection alone.¹⁶⁶ Without that explicit request from the accused themselves, police can question a person without their lawyer's knowledge or permission.¹⁶⁷

Rather than declining to bring cases brought by police officers who have crossed over previously drawn constitutional lines and pushing back against police power over its constituents' rights, prosecutors have instead advocated in court for these enhanced police powers. They put time, energy, creativity, and innovation into police might.

Police face less grueling cross-examination by a defense bar who is overworked and underpaid and can barely muster the time to think through advanced cross-examinations at preliminary hearings, motions hearings, and at trial due to their crushing caseloads. And while public defender budgets shrink,¹⁶⁸ police departments' soar, even after the death of George Floyd and the rise of the defund police movements.¹⁶⁹ So while government power grows, our ability to protect ourselves from such power also evaporates because of prosecutors.

Increasing police power and weakening individual rights give police and other government actors a larger role in the lives of everyday citizens. As a result,

of counsel claims.” Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1087 (2006).

¹⁶⁵ 556 U.S. 778, 792 (2009) (“[I]t would be completely unjustified to presume that a defendant’s consent to police-initiated interrogation was involuntary or coerced simply because he had previously been appointed a lawyer.”).

¹⁶⁶ *Id.* at 783 (holding defendant must affirmatively request counsel to be protected).

¹⁶⁷ *Id.* at 789 (declaring represented defendants can never “be approached by the State and asked to consent to interrogation” to be incorrect).

¹⁶⁸ See Teresa Wiltz, *Public Defenders Fight Back Against Budget Cuts, Growing Caseloads*, STATELINE (Nov. 21, 2017, 12:00 AM), <https://stateline.org/2017/11/21/public-defenders-fight-back-against-budget-cuts-growing-caseloads/> [<https://perma.cc/XKU3-EPHG>] (listing examples of protests and legal actions against public defense budget shortfalls in Massachusetts, Cook County, New Orleans, Missouri, Washington, and Idaho).

¹⁶⁹ See Char Adams, *Cities Vowed in 2020 To Cut Police Funding—but Budgets Expanded in 2021*, NBC NEWS (Dec. 28, 2021, 6:33 PM), <https://www.nbcnews.com/news/nbcblk/cities-vowed-2020-cut-police-funding-budgets-expanded-2021-rcna9864> [<https://perma.cc/FA68-PW4T>] (explaining “many cities have restored” police funding to preprotest levels).

police have more discretion to stop citizens on the street without probable cause. They have increased authority to interrogate people and an expanded category of people whose statements can be used against them to build criminal cases.

The state has a larger role in everyday citizens' lives because of advocacy by prosecutors who have pushed toward a more authoritarian and powerful role of police in society. Prosecutors may focus their requests for police to be allowed to cross new lines in individual cases, but once a constitutional bar has been lowered, it is lowered for everyone.

Law enforcement claim that these intrusions are justified to get contraband and dangerous people off of the streets.¹⁷⁰ According to them, without frequent but unexpected stops and frisks this contraband would go undetected.¹⁷¹ According to them, the erosion of Fourth, Fifth, and Sixth Amendment rights may be justified on community safety grounds because exclusionary rules prohibit the introduction of items seized or statements made because of police actions.¹⁷² The argument would be that without changing Fourth and Fifth amendment case law at the request of prosecutors, judges would suppress valuable evidence of guilt on legal technicalities.¹⁷³

Prosecutors might also argue that these changes in our collective rights are not their fault because those decisions ultimately rest with judges. It is certainly true that judges are the ones who make the legal rulings. But ignoring that every change started with a request from a prosecutor ignores their admonition to seek justice. Prosecutors likewise tout the adversarial process knowing full well that the other side, the defense, is comparatively under-resourced.

Professor Bruce Green pointed out in his Yale Law Review article, *Gideon's Amici: Why Do District Attorneys So Rarely Defend the Rights of the Accused*,¹⁷⁴ that while twenty-three District Attorney's Offices signed on as amici for Gideon in *Gideon v. Wainwright*, because defendants won the right to counsel

¹⁷⁰ See *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (justifying warrantless search for weapons because "it was necessary for the protection of [the officer] and others to take swift measures to discover the true facts and neutralize the threat of harm if it materialized").

¹⁷¹ See Michael R. Bloomberg, Opinion, 'Stop and Frisk' Is Not Racial Profiling, WASH. POST (Aug. 18, 2013, 7:27 PM), https://www.washingtonpost.com/opinions/michael-bloomberg-stop-and-frisk-keeps-new-york-safe/2013/08/18/8d4cd8c4-06cf-11e3-9259-e2aaf5a5f84_story.html (arguing stop and frisk protected New Yorkers' "right to walk down the street without getting mugged or killed").

¹⁷² See *Terry*, 392 U.S. at 15 ("[R]igid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime.").

¹⁷³ For an interesting paper about this in the *Miranda* context, see Ryan T. Williams, *Stop Taking the Bait: Diluting the Miranda Doctrine Does Not Make America Safer from Terrorism*, 56 LOY. L. REV. 907, 909 (2010) (introducing Supreme Court decisions following attempted terror attacks in 2009 that weakened *Miranda* protections "to allow for greater flexibility when questioning suspected criminals").

¹⁷⁴ See Green, *supra* note 16, at 2336 (noting rarity of government lawyers supporting defendants' procedural rights, especially en masse, because twenty-three state attorneys general joined amicus brief for Gideon).

prosecutors have rarely publicly advocated for defendants' rights even as they purport to seek justice.¹⁷⁵ Prosecutors enjoy a reputation as advocates for justice, but do not collectively seek justice to benefit the accused.

Instead, prosecutors organize to write amicus briefs in support of other prosecutors' offices' requests to curtail constitutional rights of the communities they serve to broaden their own powers and those of the police.¹⁷⁶ If the courts change the law, then prosecutors expand their powers and the power of police in the ways described above. Prosecutors' advocacy through their amicus practice is organized, strategic, and effective.¹⁷⁷

III. BLOCKING PUBLIC ACCESS TO POLICE MISCONDUCT INFORMATION

Prosecutors advocate to limit more than the just the rights of their constituents. Thirty-two states shield police officer discipline from public view.¹⁷⁸ Previous scholarly treatment of this phenomenon has focused on police and unions keeping the public in the dark about police misconduct.¹⁷⁹ I will show that the role of prosecutors in hiding this information is underappreciated.

While some prosecutors have begun sharing police misconduct and resulting discipline with the defense, other prosecutors play a role in making sure that this

¹⁷⁵ See Brief for the State Government Amici Curiae Supporting Petitioner at 1, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (No. 62-155), 1962 WL 115122, at *1 (aiming to “[e]nsure that every indigent person accused of any felony in a state court is guaranteed right to counsel”).

¹⁷⁶ A group of prosecutors from Illinois, Alabama, Arizona, Colorado, Delaware, Florida, Hawai'i, Idaho, Indiana, Kansas, Kentucky, Maine, Michigan, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Wisconsin, and Wyoming submitted a brief in *Salinas*. Brief of Amici Curiae State of Illinois et al. in Support of Respondent at 1, *Salinas v. Texas*, 570 U.S. 178 (2013) (No. 12-246), 2013 WL 1326958, at *1 (supporting admission of silence as evidence of guilt). Prosecutors from New Mexico, Alabama, Colorado, Delaware, Florida, Kansas, Pennsylvania, Utah, Washington, and Wyoming filed a brief in support of the government in support of Louisiana in *Montejo*. Brief for States of New Mexico et al. as Amici Curiae in Support of Respondent at 1, *Montejo v. Louisiana*, 556 U.S. 778 (2009) (No. 07-1529), 2008 WL 5417429, at *1 (arguing for law enforcement's ability to ask defendants to answer questions without counsel present after having requested counsel).

¹⁷⁷ See Tyler Yeagain, *Prosecutorial Disassociation*, 47 AM. J. CRIM. L. 85, 110, 112 (2020) (describing involvement of prosecutors' associations in amicus practice, including occasionally advancing positions reducing prosecutorial power “in service of larger ideological goals, like commitment to the death penalty”).

¹⁷⁸ See Kallie Cox & William Freivogel, *Police Misconduct Records Secret, Difficult To Access*, PULITZER CTR. (Jan. 24, 2022), <https://pulitzercenter.org/stories/police-misconduct-records-secret-difficult-access> [<https://perma.cc/9SLP-CYFH>] (noting “misconduct records are either secret or difficult to access” in thirty-two states including Washington, D.C.).

¹⁷⁹ See Katherine J. Bies, Note, *Let the Sunshine in: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 STAN. L. & POL'Y REV. 109, 112 (2017) (noting police unions commonly oppose reforms “which increase transparency and accountability in both the processes and outcomes of misconduct investigations”).

information is not shared with the general public.¹⁸⁰ “*Brady* lists” are compilations of officers who are deemed untrustworthy, usually due to complaints, civil judgments, or prior dishonesty.¹⁸¹ Some prosecutors’ offices do not keep “*Brady* lists” at all,¹⁸² and arguably remain uninformed about the credibility of the officers on whom they rely to make criminal convictions. Their ignorance on the topic means that information about police credibility remains solely within police departments and unions.

Other prosecutors’ offices may keep track of police officer discipline and noncredibility findings but may not turn the information over to anyone outside of their office, including the defense.¹⁸³ Prosecutors may then rely on this information to assess case strength or decide which officers to call at trial, even though defense counsel, judges, and the public never learn what the prosecutors and police already know about the particular officer or officers.

Some United States Attorney’s Offices, which are composed of prosecutors who handle federal prosecutions across the country, provide police officer discipline information to defense counsel only under the condition of a protective order.¹⁸⁴ These orders prohibit defense counsel from sharing the material with anyone outside of the defense team in that particular case.¹⁸⁵ The defense may not share it with the media or put it on a platform that would allow the public to access that information. Attorneys who possess the information cannot even share it with their other clients.

Unless the defense attorney uses the material in court by going to trial and cross-examining an officer about the information *and* the case happens to get the attention of the public or the press, the community never learns about the police officers’ misconduct. As one legal observer has argued, with so few cases going

¹⁸⁰ In addition to prosecutors and police unions, at least one scholar has called for more privacy when it comes to these important records. See Kate Levine, *Discipline and Policing*, 68 DUKE L.J. 839, 846 (2019) (arguing universally publicizing police disciplinary records does little to combat structural sources of police violence while further discouraging officers from reporting misconduct).

¹⁸¹ See Rachel Moran, *Brady Lists*, 107 MINN. L. REV. 657, 658 (2022) (“*Brady* lists, named after the Supreme Court decision *Brady v. Maryland*, are lists some prosecutors maintain of law enforcement officers with histories of misconduct that could impact the officers’ credibility in criminal cases.”).

¹⁸² *Id.* at 660 (noting no federal laws and few state laws require prosecutors to maintain *Brady* lists, and most prosecutors do not maintain *Brady* lists).

¹⁸³ *Id.* at 661 (stating some prosecutors refuse to provide their *Brady* lists to anyone outside their office).

¹⁸⁴ See U.S. DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, SUBPOENA TO PRODUCE STATE LAW ENFORCEMENT PERSONNEL OR COMPLAINT RECORDS IN A CRIMINAL CASE (CAND-89C) (2017), <https://www.cand.uscourts.gov/wp-content/uploads/forms/criminal-forms/Subpoena-CAND-89C.pdf> [https://perma.cc/PC25-7VXN] (template subpoena and protective order in appendix). *But see* Moran, *supra* note 181, at 683 (indicating Department of Justice does not require federal prosecutors to maintain *Brady* lists).

¹⁸⁵ *Id.*

to trial, prosecutors should review and turn over officer disciplinary records before requesting bail and before the preliminary hearings.¹⁸⁶ However, they do not.¹⁸⁷

Despite police and prosecutors' roles as public servants, both sometimes obstruct the public's access to information about the job performance of police. Police misconduct is an area where prosecutors and other government attorneys seek to limit the rights of those not ensnared in the criminal legal system.¹⁸⁸ Although prosecutors' advocacy in other arenas focuses on the criminally accused, with little regard for the effects on everyone in the community when their success changes the law, efforts to hinder access to police misconduct information focus on the greater public and the press.

Police, prosecutors, and even some scholars have advanced the privacy interests of police to justify not making this information public.¹⁸⁹ Indeed, this is the basis of the confidentiality statutes that are on the books in many jurisdictions.¹⁹⁰ However, this argument fails to adequately acknowledge the privacy trade-offs that police make when choosing a life of public service. An individual has a choice when choosing a career. When one chooses a career in public interest, public accountability comes with that role.

Lack of privacy for employment records is not the only way in which police officers are different than private sector employees. Like other public servants, police cannot make political statements while at work.¹⁹¹ Making their performance records available to the community should be just another aspect of their special role in our society. Prosecutors shielding police discipline from

¹⁸⁶ See Anjelica Hendricks, *Exposing Police Misconduct in Pre-trial Criminal Proceedings*, 24 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 182 (2021) (describing possibility that without access to *Brady* lists at bail stage, judges "may detain someone pre-trial with never becoming aware that the officer that alleged criminal activity had a pattern of wrongful arrests").

¹⁸⁷ See *id.* at 183 ("[R]elying on prosecutors to collect and disclose this information has not been successful, even in jurisdictions with the most progressive prosecutors.").

¹⁸⁸ To see how a federal court limits the press from gaining access to police discipline, see *Bond v. Off. of Pro. Standards*, 585 F.3d 1061, 1065 (7th Cir. 2009) (holding journalist lacked standing to intervene in police misconduct lawsuit and challenge protective order after plaintiff settled with city).

¹⁸⁹ See Levine, *supra* note 184, at 843, 857 (indicating police and their unions have fought for privacy in collective bargaining contracts, and arguing this desire for privacy is legitimate in itself and parallels and amplifies "years of scholarship critiquing the many problems with criminal record transparency").

¹⁹⁰ See *id.* at 843 (maintaining police unions advocating for privacy had "won it in the form of state statutes").

¹⁹¹ See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 569 (1968) (weighing interest of public employees speaking as citizens on matters of public concern against interest of government in performing public services most efficiently); *Garcetti v. Ceballos*, 547 U.S. 410, 411 (2006) (holding public employees speaking pursuant to official duties "are not speaking as citizens for First Amendment purposes"); *Graziosi v. City of Greenville*, 775 F.3d 731, 737 (5th Cir. 2015) (applying *Pickering* and *Graziosi* standards to police officer's Facebook posts about mayor).

public scrutiny is contrary to the public's very legitimate interests in the job performance of public servants and cannot be justified by safety arguments. While tasked with keeping the community safe, police can inflict harm on the communities they are supposed to protect.¹⁹²

Indeed, addressing the problem of dangerous and reckless law enforcement officers is absolutely a community-safety issue. Death at the hands of police is a leading cause of death for young Black men.¹⁹³ Rather than protect, this kind of excessive force harms individuals and communities, and erodes trust between groups and in institutions. The public, who both police and prosecutors serve, are entitled to the information about disciplinary remedies that hold these community representatives accountable. When prosecutors keep information about dangerous police officers from the public, they are choosing police power over public safety.

A. *Police Complaints and Prosecutor Behavior*

When prosecutors take steps to shield police discipline from the public this has a significant impact on the safety of the community because some complaints made against police are not trivial. Not adequately disciplining an officer and keeping them on the force can have dire consequences for the community.

Indeed, in many high-profile police killings of an unarmed Black person, the police officer had previous complaints for which they had been disciplined. The officer who killed George Floyd had eighteen complaints against him and was disciplined for two.¹⁹⁴ The NYPD officer who was responsible for Eric

¹⁹² Angelica Delgado, *Police Brutality: Impacts on Latino and African American Lives and Communities*, SANTA CLARA UNIV., Winter 2016, at 1, 14 (2016) (quoting interview participant saddened by fact "someone who's suppose[ed] to protect us *harms* the Latino and African American communities"); Desmond Ang, *Wider Effects of Police Killings in Minority Neighborhoods*, ECONOFACT (June 24, 2020), <https://econofact.org/wider-effects-of-police-killings-in-minority-neighborhoods> [<https://perma.cc/8J89-V72T>] (describing negative effects on Black and Hispanic students' educational performance after police kill member of minority group).

¹⁹³ It is the sixth leading cause of death for all young men. See Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, PNAS (Aug. 5, 2019), <https://www.pnas.org/doi/10.1073/pnas.1821204116> (noting police violence follows accidents, suicide, other homicides, heart disease, and cancer as leading causes of death in men aged twenty-five to twenty-nine years). About 100 in 100,000 Black men and boys will be killed by police, while 39 white men and boys per 100,000 are killed by police. See *id.*

¹⁹⁴ See Dakin Andone, Hollie Silverman & Melissa Alonso, *The Minneapolis Police Officer Who Knelt on George Floyd's Neck Had 18 Previous Complaints Against Him, Police Department Says*, CNN (May 29, 2020, 5:39 PM), <https://www.cnn.com/2020/05/28/us/minneapolis-officer-complaints-george-floyd/index.html> [<https://perma.cc/84LD-VX6C>].

Gardner's death had seven misconduct complaints at the time.¹⁹⁵ A Little Rock, Arkansas police officer had a significant number of complaints against him before he killed an unarmed child.¹⁹⁶ Tamir Rice's murderer was in the process of being fired for a "lack of maturity" when he was hired by the Cleveland police department where he killed the twelve year old.¹⁹⁷ He was then rehired by a Pennsylvania police department.¹⁹⁸ The officer who shot Walter Scott in the back on videotape had previously been in trouble with his department for tasing an unarmed person.¹⁹⁹ The officers who killed Alton Sterling in Louisiana also had a history of excessive-force complaints.²⁰⁰ The police chief who hired the officer apologized and admitted he never should have been hired or kept on the force as a result of his treatment of others he had arrested and personal interactions he had had with other officers.²⁰¹

The amount of discipline police officers face is not insignificant. The Cato Institute has found that approximately 1% of police officers face reports of

¹⁹⁵ See Leonard Greene, *Repeal of Shield Law Reveals Sordid Past of Cop Whose Chokehold Led to Eric Garner's Death*, N.Y. DAILY NEWS (June 22, 2020, 9:45 PM), <https://www.nydailynews.com/new-york/ny-pantaleo-shield-law-misconduct-20200622-jnubthyherhuhewa7xy6wjpmxy-story.html>.

¹⁹⁶ See Radley Balko, Opinion, *'If You Don't Get at That Rot, You Just Get More Officers Like Josh Hastings'*, WASH. POST (Nov. 2, 2018), <https://www.washingtonpost.com/news/opinions/wp/2018/11/02/feature/if-you-dont-get-at-that-rot-you-just-get-more-officers-like-josh-hastings/> (describing Josh Hastings' "astonishing disciplinary record" prior to killing fifteen-year-old).

¹⁹⁷ See Christine Mai-Duc, *Cleveland Officer Who Killed Tamir Rice Had Been Deemed Unfit for Duty*, L.A. TIMES (Dec. 3, 2014, 5:48 PM), <https://www.latimes.com/nation/nationnow/la-na-nn-cleveland-tamir-rice-timothy-loehmann-20141203-story.html> [<https://perma.cc/8YZT-9DG6>] (describing Timothy Loehmann's disciplinary issues at previous department prior to killing Tamir Rice).

¹⁹⁸ See James Bikales, *Pa. Town Broke Law in Recent Hiring of Tamir Rice's Killer, A.G. Says*, WASH. POST (July 11, 2022, 9:15 PM), <https://www.washingtonpost.com/nation/2022/07/11/tioga-background-check/> (noting Tioga, Pennsylvania hired Loehmann as town's only police officer several years after Tamir Rice's death).

¹⁹⁹ See Mitch Weiss & Michael Biesecker, *Walter Scott Shooting: Michael Slager Subject of Prior Excessive Force Complaint*, CBC (Apr. 9, 2015, 8:32 AM), <https://www.cbc.ca/news/world/walter-scott-shooting-michael-slager-subject-of-prior-excessive-force-complaint-1.3026054> [<https://perma.cc/3ZRQ-USKB>] (describing incident in which Slager tased man in stomach before ultimately releasing him without charges).

²⁰⁰ See Mike Kunzelman, Melinda Deslatte & Cain Burdeau, *In Baton Rouge, Past Complaints Cited Use of Force*, ARK. DEMOCRAT-GAZETTE (July 8, 2016, 2:55 AM), <https://www.arkansasonline.com/news/2016/jul/08/in-baton-rouge-past-complaints-cited-us-1/> [<https://perma.cc/G8JY-3JFP>] (noting officers implicated in Alton Sterling's death were subject to four prior excessive force complaints).

²⁰¹ See Eric Levenson, *Baton Rouge Police Chief Apologizes for Hiring the Officer Who Killed Alton Sterling*, CNN (Aug. 1, 2019, 4:20 PM), <https://www.cnn.com/2019/08/01/us/alton-sterling-baton-rouge-police/index.html> [<https://perma.cc/NY4C-N3ES>] (reporting police chief apologized for hiring officer who killed Alton Sterling due to history of unprofessional behavior within department).

misconduct every year.²⁰² Of course, not all complaints result in discipline against the accused officer. But just because an officer does not receive a disciplinary sanction does not mean it was not warranted. Discipline is not always meted out even when it is called for. Sometimes the person fears retribution and does not go forward with their complaint.²⁰³ Other times union rules make it difficult to impose sanctions.²⁰⁴ A *New York Times* study found that the New York Police Department did not enforce discipline recommendations from the oversight review board.²⁰⁵

Because complaints are infrequently taken seriously and officers do not consistently get appropriate consequences for poor behavior, public knowledge about the complaints is one of society's few ways to take protective actions against problem police officers. If these problem officers are going to remain on the force without corrective measures, then shining a light on these officers is even more important. Community members can avoid these officers, organize to highlight the misbehavior, advocate for the officers to have roles where they do not come into contact with the community, or pressure prosecutors to put them on do not call lists. But without information as to which officers are dangerous, the public has no way to protect themselves against these law enforcement officers.

Information about police complaints and discipline (or lack of discipline) is surely a matter of public concern about public safety. Prosecutors serve the public and have very few legitimate justifications for keeping this information

²⁰² See CATO INST., NAT'L POLICE MISCONDUCT REPORTING PROJECT, 2010 ANNUAL REPORT (2010) (finding "estimated 977.98 officers per 100,000 officers" are involved in reported misconduct allegations).

²⁰³ See Michelle Conlin, *Insight - Off Duty, Black Cops in New York Feel Threat From Fellow Police*, REUTERS (Dec. 23, 2014, 12:08 PM), <https://www.reuters.com/article/uk-usa-police-nypd-race-insight/insight-off-duty-black-cops-in-new-york-feel-threat-from-fellow-police-idUKKBN0K11F520141223> [<https://perma.cc/K9GV-H444>] (reporting two-thirds of Black officers interviewed refrained from complaining about racial profiling "because they feared retribution or because they saw racial profiling as part of the system"); Britt Lofaso, *Abbeville Family Fears Police Retaliation While Attempting To File a Complaint Against Officer*, KLFY NEWS 10 (June 2, 2022, 9:47 AM CDT), <https://www.klfy.com/local/vermilion-parish/abbeville-family-fears-police-retaliation-while-attempting-to-file-a-complaint-against-officer/> [<https://perma.cc/5HUA-QAF6>] (describing family choosing not to file complaint for excessive force after offending officer visited home of victim after incident).

²⁰⁴ See Kim Barker, Michael H. Keller & Steve Eder, *How Cities Lost Control of Police Discipline*, N.Y. TIMES (Mar. 10, 2021), <https://www.nytimes.com/2020/12/22/us/police-misconduct-discipline.html> (noting union arbitrators "reinstate about half of fired officers whose appeals they consider").

²⁰⁵ See Ashley Southall, Ali Watkins & Blacki Migliozi, *A Watchdog Accused Officers of Serious Misconduct. Few Were Punished*, N.Y. TIMES (Nov. 15, 2020), <https://www.nytimes.com/2020/11/15/nyregion/ccrb-nyc-police-misconduct.html> (chronicling instances in which N.Y.P.D. reduced or rejected recommended discipline in misconduct cases).

from their constituents. The justification that animates prosecutors' desire to keep this information from us is their relationship with police.

B. *Other Reasons for Public Disclosure*

There are reasons beyond public safety that the public deserves access to disciplinary information about police. Police department budgets are enormous. In some jurisdictions it is the single most costly item for a city.²⁰⁶ In major cities, police expenditures comprise an average 14% of the city's budget.²⁰⁷ These monies could certainly have different allocations. Spending those funds on social programs, rather than on the police, could have also a more significant public safety benefit.²⁰⁸ That, of course, is the argument for the defund the police movement.²⁰⁹

Because public funds pay police officers' salaries, the public should get to know when police officers are not performing their jobs well. Whether it be officers who are discourteous to the community they are meant to serve, fail to come to court when called, fake a disability, or take excess overtime pay, these are all matters of public concern because they cost taxpayers resources.

Citizens have every right to know how their tax monies are being spent. Concerns about how police are allocating their budgetary resources are also relevant. Officers who, for example, have prioritized undercover visits to brothels, may not align with public-safety goals.²¹⁰ Complaints by sex workers

²⁰⁶ See Mandi Cai & Juan Pablo Garnham, *Texas' Largest Cities Spend More on Police than Anything Else. Activists Want More of Those Funds Spent on the Social Safety Net Instead.*, TEX. TRIB. (Aug. 14, 2020, 5:00 AM CT), <https://www.texastribune.org/2020/08/14/texas-police-budgets-austin-dallas-houston-san-antonio/> [<https://perma.cc/D8RT-BLYD>] (indicating police budgets were largest share of general funds in Texas' four largest cities).

²⁰⁷ See Deidre McPhilips, *How Much America's 10 Largest Cities Spend on Police*, U.S. NEWS (June 11, 2020, 2:33 PM), <https://www.usnews.com/news/cities/articles/2020-06-11/how-much-the-10-largest-us-cities-spend-on-police> ("In fiscal year 2020, police departments accounted for about 14% of total budget allocations in the 10 largest cities on average . . .").

²⁰⁸ See Lisa Deaderick, *Defunding Police To Build Stronger Social Services in Communities*, SAN DIEGO UNION TRIB. (June 21, 2020, 6:00 AM PT), <https://www.sandiegouniontribune.com/columnists/story/2020-06-21/defunding-police-to-build-stronger-social-services-in-communities> (discussing ways in which reallocating police funds to social services could address root causes of crime).

²⁰⁹ Rashawn Ray, *What Does 'Defund the Police' Mean and Does It Have Merit?*, BROOKINGS (June 19, 2020), <https://www.brookings.edu/blog/fixgov/2020/06/19/what-does-defund-the-police-mean-and-does-it-have-merit/> [<https://perma.cc/E465-D27P>] (defining "defund the police" as "reallocating or redirecting funding away from the police department to other government agencies").

²¹⁰ See Sirin Kale, *Police Are Allegedly Sleeping with Sex Workers Before Arresting Them*, VICE (May 13, 2017, 8:30 AM), <https://www.vice.com/en/article/59mbkx/police-are-allegedly-sleeping-with-sex-workers-before-arresting-them> [<https://perma.cc/2ZWT-F3A5>] (discussing frequency of police sexual misconduct against sex workers and legislative efforts to prevent officers from engaging in sex acts during investigations).

who were raped by undercover police exposed not only criminal misbehavior and violence by these officers but a questionable use of departmental resources in Alaska.²¹¹ Several municipalities have had issues with police overtime abuse.²¹² In Baltimore, Maryland, for instance, officers took overtime pay and leave simultaneously.²¹³ Shielding police misconduct records from the public who pays their salaries prevents community members from reducing excess police expenditures.

Community members may also be concerned about the police officers in their community being rude or discourteous. Complaints about officers on these grounds may be of great interest to community members, who wonder why an officer who has been disciplined after multiple complaints continues to be on the force or even why the officer has been promoted within the force.

There are also financial reasons for why the community should be entitled to the information in police complaints. Police misconduct not only incurs substantial costs for taxpayers, amounting to billions of dollars, but a significant portion of these payouts results from the actions of officers who have repeatedly faced complaints without being removed from the force.²¹⁴ Damages as a result of civilian lawsuits tend to be about \$10,000 more when the officer has had multiple claims against him or her.²¹⁵

²¹¹ See *id.* (reporting Anchorage Police Department officers had sex with sex workers before arresting them, motivating legislative proposal to criminalize such activity).

²¹² See Kavahn Mansouri, *Huge Overtime Hours for Independence Police Prompt Questions About Safety, Oversight*, NPR (Apr. 15, 2022, 2:00 AM CDT), <https://www.kcur.org/news/2022-04-15/huge-overtime-hours-for-independence-police-prompt-questions-about-safety-oversight> [https://perma.cc/PE4Q-GD7K] (describing excessive police overtime in Independence, Missouri, including one officer who reported 2,800 hours of overtime in 2021 alone); Mark Reutter & Fern Shen, “House Cats” and “G-Days”: A Look at the Overtime Culture at the Baltimore Police Department, *BALT. BREW* (Feb. 20, 2018, 2:19 PM), <https://baltimorebrew.com/2018/02/20/house-cats-and-g-days-a-look-at-overtime-culture-at-the-baltimore-police-department/> [https://perma.cc/7ZXX-AQRG] (reporting 66% increase in police overtime over five years); Matt Stout, *State Police Troopers May Have Inflated Hours They Worked in Hundreds of Details, Inspector General Finds*, *BOS. GLOBE* (Mar. 3, 2022, 6:19 PM), <https://www.bostonglobe.com/2022/03/03/metro/state-police-troopers-may-have-inflated-hours-they-worked-hundreds-details-inspector-general-finds/> (describing investigation into overtime fraud spanning more than 800 details).

²¹³ See Fern Shen, *Baltimore IG: Police Officers Allowed To Take Paid Leave and Overtime Simultaneously*, *BALT. BREW* (July 7, 2021, 2:17 PM), <https://baltimorebrew.com/2021/07/07/baltimore-ig-police-officers-allowed-to-take-paid-leave-and-overtime-simultaneously/> [https://perma.cc/B5L9-2Y4H] (noting this is true “even if the hours overlap”).

²¹⁴ See Alexander et al., *supra* note 24 (stating 40,000 payments at 25 departments totaled \$3.2 billion).

²¹⁵ *Id.* (“[T]he typical payout for cases involving officers with multiple claims—ranging from illegal search and seizure to use of excessive force—was \$10,000 higher than those involving other officers.”).

Prosecutors harm their own constituency when they shield this kind of information from public view and allow police misconduct to continue. If there were public pressure or exposure, these problematic officers would ordinarily be terminated. Few employers allow employees to violate rules repeatedly without termination, but law enforcement is an exception, partly due to the protection provided by prosecutors who align with their interests and shield them from public scrutiny.

C. *Protecting Police Through Guilty Pleas and Dismissals*

In addition to protective orders and privacy statutes, another way that police are protected is by prosecutors (and police) avoiding trial.

Cross-examination of a police officer about his conduct by defense counsel in a public courtroom can air information about police misconduct to the court staff, the public watching the trial, other lawyers, and media. By offering an accused person a generous plea offer, diversion, or even dismissing their case, the accused person's lawyer never has the opportunity to cross-examine the police officer nor learn of the officer's prior conduct. Prosecutors keep information from the defense and public through generous guilty pleas, diversion offers, and dismissals.

With more than 90% of cases resolving via guilty plea,²¹⁶ litigants may not even question why they were offered a generous plea offer because plea agreements are the norm. The criminal defense attorney may not want to look a gift horse in the mouth and may not even inquire into the specific reasons for a generous plea offer.

Of course, prosecutors offer plea offers largely because of high caseloads and to avoid expensive, time-consuming trials.²¹⁷ But a lesser-known reason for generous plea offers is so that prosecutors can avoid turning over *Brady* material,

²¹⁶ See *Trials Are Rare in the Federal Criminal Justice System, and When They Happen, Most End in Convictions*, PEW RSCH. CTR. (June 10, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/ft_19-06-11_trialsandguiltypleas-pic-2/ [<https://perma.cc/VR68-SNX8>]; LINDSEY DEVERS, BUREAU OF JUST. ASSISTANCE, RESEARCH SUMMARY: PLEA AND CHARGE BARGAINING 1 (Jan. 24, 2011), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf> [<https://perma.cc/5R32-A3XG>] (explaining plea bargaining is “defining . . . feature of the federal criminal justice system”).

²¹⁷ *Brady v. United States*, 397 U.S. 742, 750 (1970) (“The State to some degree encourages pleas of guilty at every important step in the criminal process.”); *Id.* at 752 (“For the State there are also advantages—the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant’s guilt or in which there is substantial doubt that the State can sustain its burden of proof.”); see also *Santobello v. New York*, 404 U.S. 257, 260 (1971) (mentioning “enormous increase in the workload of the often understaffed prosecutor’s offices”).

or other information favorable to the defense.²¹⁸ In a 2002 case, *United States v. Ruiz*,²¹⁹ the Supreme Court held that prosecutors are not required to turn over impeachment evidence to the defense if a case is resolved by plea.²²⁰ Making a person a plea offer that they are inclined to take, particularly because they are detained pretrial, can conceal disciplinary information—which could be used for impeachment purposes—from the defense and a public trial.²²¹ The prosecutor is thereby able to protect their officer from embarrassment, cross-examination, and public outcry.

With guilty pleas to shield police misconduct, the defense is none the wiser; the police officer will not endure any humiliating questions about complaints about themselves and the resulting consequences; the department does not have to worry about reduced public opinion; and the prosecutor gets a conviction for their stats.²²² Prosecutors even dismiss cases against people to avoid turning over

²¹⁸ See Vida B. Johnson, *Federal Criminal Defendants Out of the Frying Pan and Into the Fire? Brady and the United States Attorney's Office*, 67 CATH. U. L. REV. 321, 322 (2018) (making it virtually impossible for defendants to access key exculpatory evidence, violating their Due Process rights); see also Andrew P. O'Brien, *Reconcilable Differences: The Supreme Court Should Allow the Marriage of Brady and Plea Bargaining*, 78 IND. L.J. 899, 901 (2003) (contending fairness and integrity demand marriage of *Brady* and plea bargaining). See generally Letter from Avis E. Buchanan, Dir., Pub. Def. Serv. & Sandra K. Levick, Chief Special Litig. Div., Pub. Def. Serv., to The Honorable Richard C. Tallman, Chair, Judicial Conference Advisory Committee (July 6, 2010) [hereinafter Letter from Buchanan] (available at <https://www.pdsdc.org/docs/default-source/default-library/pds-letter-to-judge-tallman-chair-judicial-conference-advisory-committee-on-amending-rule-16d8d2f4c3c02264be8d48ff00007f1dad.pdf> [<https://perma.cc/L8BK-GLVB>]) (arguing under Federal Rules of Criminal Procedures all information favorable to defense must be provided by prosecution).

²¹⁹ 536 U.S. 622 (2002).

²²⁰ *Id.* at 624-25 (holding Constitution does not require such disclosure of impeachment information prior to entering plea bargain because guilty plea is voluntary and implicates Sixth Amendment rights to jury and to confront one's accuser, as well as fact that impeachment information is special because it relates to fairness *at trial*).

²²¹ See O'Brien, *supra* note 226, at 907 (arguing allowing prosecution to offer plea deal while sitting on mountain of exculpatory evidence is fundamentally unfair). See generally Letter from Buchanan, *supra* note 218 (arguing mandating early disclosure would preserve criminal trial as preferred format and prevent enormous waste of judicial resources and serious injustice).

²²² In some instances, the public gets a glance at this type of prosecutorial decision making. Keith L. Alexander, *D.C. Judges Question Prosecutors' Roles in Criminal Cases Resulting in Mistrials, Dismissals*, WASH. POST (Oct. 16, 2011, 8:35 PM), https://www.washingtonpost.com/local/dc-judges-question-prosecutors-roles-in-criminal-cases-resulting-in-mistrials-dismissals/2011/10/07/gIQAffuypl_story.html (reporting repeated and blatant *Brady* violations and disclosure delays); Keith L. Alexander, *Prosecutors to Drop Dozens of Cases Amid Probe of D.C. Violent Crime Squad*, WASH. POST (Nov. 1, 2022, 2:56 PM) [hereinafter Alexander, *Prosecutors Drop Cases*], <https://www.washingtonpost.com/dc-md-va/2022/11/01/cases-dismissed-seventh-district-investigation/> (finding charges were being dropped as visibility of police misconduct became more available).

this type of information.²²³ An issue with the approach of generous plea offers or even dismissals to protect police is that a problem officer avoids the scrutiny of those outside of law enforcement. Convictions gained by plea deals to avoid turning over impeachment of government witnesses are a victory for police and prosecutors, but not for the public.

Another reason prosecutors may dismiss cases against accused people is to avoid police civil liability. In *Newton v. Rumery*,²²⁴ the Supreme Court sanctioned a prosecutor's dismissal of criminal cases *in exchange for* the accused person not bringing a § 1983 action against their town for wrongful arrest.²²⁵ Prosecutors can dismiss criminal charges even in cases where there is a victim. These agreements encourage perverse outcomes like prosecutors bringing frivolous criminal cases to avoid civil suits against police and allowing government attorneys to dismiss meritorious criminal cases. The coercive nature of these agreements results in civilians giving up their ability to bring meritorious lawsuits that might help make them whole. Further, these concededly meritorious lawsuits could allow law enforcement and the public to learn valuable lessons about police misconduct.²²⁶ Prosecutors and police did not hide these motives from the Court in *Rumery*. Indeed, in an amicus brief filed jointly by the International Association of Chiefs of Police and the National District Attorneys Association, they argued that if the tool of release-dismissal were eliminated “there will be a likelihood that many cases which otherwise would have been dismissed will be prosecuted.”²²⁷ Given a prosecutor's duty to do justice, and their belief in incarceration as a deterrent, dismissing a criminal case against a factually-guilty person would seem to be inconsistent with prosecutors' views of public safety. The practice of dismissing meritorious criminal cases to avoid civil lawsuits against police is yet another example of prosecutors trading civilians' interests to benefit police.

Plea bargaining, generally, may be a way that prosecutors enlarge police power. Scholar Jonathan Abel argued in a 2017 article that police have an outsized role in plea bargaining, a domain most think of as reserved for prosecutors and defense attorneys.²²⁸ In making this point, Abel points out that a robust jury trial system was once a check on police and prosecutor power but has all but disappeared in our system of pleas.²²⁹ As he puts it, “in our system of

²²³ See Alexander, *supra* note 222; Alexander, *Prosecutors Drop Cases*, *supra* note 222.

²²⁴ 480 U.S. 386 (1987) (holding no per se rule against release-dismissal deals, rather they should be decided on case-by-case basis).

²²⁵ *Id.* at 398 (“There is no evidence of prosecutorial misconduct.”).

²²⁶ See generally Peter A. Joy & Kevin C. McMunigal, *Police Misconduct and Release-Dissmissal Agreements*, 33 CRIM. JUST. 31 (Fall 2018) (arguing ethical and legal problems with release-dismissal agreements are significant).

²²⁷ Brief Amici Curiae of Ams. for Effective L. Enf't, Inc., Joined by the Int'l Ass'n of Chiefs of Police, Inc., and the Nat'l Dist. Att'ys Ass'n, Inc., in Support of the Petitioners, *Newton v. Rumery*, 475 U.S. 1118 (1986) (No. 85-1449), 1986 WL 728029, at *5.

²²⁸ See generally Abel, *supra* note 54.

²²⁹ *Id.* at 1734.

ubiquitous pleas, no neutral third party reviews the prosecution team's decisions about what plea to offer and these offers essentially determine the defendant's guilt."²³⁰ With police bringing prosecutors their cases, police and prosecutors alone determine the legal and carceral fate of millions of Americans. In addition, as Abel puts it, "Bad Arrests Become Bad Pleas,"²³¹ so a system of pleas by prosecutors not only enlarges police power but can lead to unjust convictions.

IV. WHEN POLICE VIOLATE THE LAW

Prosecutors wield enormous power over who gets prosecuted and for what. They are the only ones that can bring the weight of the community against an individual and hold that individual criminally accountable for a crime. Thus, the prosecutors' office is the only institution that can bring criminal charges against the police.

In most jurisdictions, if a prosecutor does not bring criminal charges, charges will not be brought.²³² Despite the enormous number of prosecutions brought annually, and despite it being their full-time job to hold people accountable, prosecutors only very infrequently prosecute the most powerful: police.²³³

For example, three police officers in Massachusetts were accused of having sex with an underage girl beginning when she was fifteen years old and while she was in the department's young explorers program.²³⁴ She is thought to have killed herself after finding out she was impregnated by one of the officers.²³⁵ None of the officers have been charged by prosecutors.²³⁶ In Fairfax, Virginia,

²³⁰ *Id.*

²³¹ *Id.* at 1770.

²³² See Charles P. Bubany & Frank F. Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 473, 476-77 (1976) (noting prosecutors' uncontrolled decision-making power in charging crimes).

²³³ 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/policeshootings-killings-prosecutions-court> [<https://perma.cc/5KCB-JRW6>] (noting only one-third of police charged with misconduct are convicted); see, e.g., Uriel J. Garcia & Bree Burkitt, *Every 5 Days, an Arizona Officer Shoots Someone, a Republic Analysis Finds*, AZCENTRAL (Jan. 30, 2020, 8:51 PM), <https://www.azcentral.com/in-depth/news/local/arizona-investigations/2019/06/19/arizona-phoenix-police-shootings-officers-record-levels/3029860002/> (finding only 1 out of 600 police shootings in Arizona over seven-year period resulted in prosecutors bringing charges, with that single prosecution resulting in acquittal).

²³⁴ See Laura Crimaldi & Dugan Arnett, *Three Stoughton Police Officers Had Inappropriate Relationships with Young Woman Who Later Killed Herself, Town Report Finds*, BOS. GLOBE (Sept. 22, 2022, 11:59 PM), <https://www.bostonglobe.com/2022/09/22/metro/three-stoughton-police-officers-had-inappropriate-relationships-with-young-woman-who-came-them-mentoring-town-report-finds/> (stating at time of her death she was telling friends she was pregnant with officer's baby).

²³⁵ *Id.*

²³⁶ *Id.*

prosecutors dismissed 400 criminal cases after the officer involved in those cases was “accused of stealing drugs from the police property room, [to] plant[] on innocent people.”²³⁷ Despite the enormity of the officer’s untruths, prosecutors have failed to prosecute him.²³⁸ And although charges were brought against two Buffalo police officers who were captured on video pushing an elderly man to the ground—causing him to hit his head on concrete—during a protest in the summer of 2020, prosecutors dismissed those charges after a grand jury returned a “no bill” verdict.²³⁹

We have little knowledge of the scope of the problem of police crime. The Department of Justice acknowledges that no government agency tracks the issue of crime by police officers.²⁴⁰ Even when police officers use deadly force against American citizens, prosecutors rarely prosecute them.²⁴¹ Police shoot and kill roughly 1,000 people each year,²⁴² and are charged in less than 2% of shootings.²⁴³ Could it be that more than 98% of police shootings of civilians are justified, or could it be that prosecutors are reluctant to investigate and prosecute police even when they take a person’s life?

Although police are arrested about 1,000 times a year²⁴⁴ for all crimes, it is impossible to know whether this number is just the tip of the iceberg. Because no agency is responsible for reporting information about police misconduct, to

²³⁷ Tom Jackman, *Fairfax Seeks To Dismiss 400 Convictions in Cases Brought by One Officer*, WASH. POST (Apr. 16, 2021, 5:18 PM), <https://www.washingtonpost.com/dc-md-va/2021/04/16/convictions-dismiss-jonathan-freitag-fairfax/> (quoting prosecutor saying, “[t]he conviction and sentence in this matter were unjustly obtained and if left uncorrected will undermine confidence in our system of justice”).

²³⁸ *Id.* (stressing ongoing investigation into officer, but calling officer’s actions “disgrace of monumental proportions”).

²³⁹ See Meredith Deliso, *Assault Charges Dropped Against Buffalo Police Officers Seen Pushing Protestor*, ABC NEWS (Feb. 12, 2021, 6:13 PM), <https://abcnews.go.com/US/assault-charges-dropped-buffalo-police-officers-pushing-protester> [<https://perma.cc/MP3T-L2G7>] (asserting prosecutor believed filing charges was proper and provided all relevant evidence to grand jury, whose proceedings are sealed).

²⁴⁰ See PHILIP MATTHEW STINSON, SR., JOHN LIEDERBACH, SETEVEN P. LAB & STEVEN L. BREWER, JR., NAT’L INST. OF JUST., *POLICE INTEGRITY LOST: A STUDY OF LAW ENFORCEMENT OFFICERS ARRESTED 2* (2016) (surveying Google News search engine because government-controlled, central database did not exist).

²⁴¹ See Somil Trivedi, *Why Prosecutors Keep Letting Police Get Away with Murder*, ACLU (June 26, 2020), <https://www.aclu.org/news/criminal-law-reform/why-prosecutors-keep-letting-police-get-away-with-murder> [<https://perma.cc/2XZ7-KSGX>].

²⁴² *Fatal Force*, WASH. POST (Dec. 5, 2022), [https://www.washingtonpost.com/graphics/investigations/police-shootings-database/\(tracing-fatal-police-shootings-since-2015\)](https://www.washingtonpost.com/graphics/investigations/police-shootings-database/(tracing-fatal-police-shootings-since-2015)).

²⁴³ German Lopez, *Police Officers Are Prosecuted for Murder in Less Than 2 Percent of Fatal Shootings*, VOX (Apr. 2, 2021, 11:30 AM), <https://www.vox.com/21497089/derek-chauvin-george-floyd-trial-police-prosecutions-black-lives-matter> [<https://perma.cc/F2YS-4T9L>] (describing cases when charges are filed as major outliers).

²⁴⁴ See STINSON SR. ET AL., *supra* note 240 (finding nationwide arrest rate of 0.72 per 1,000 officers).

the extent this information is tracked, it is kept by journalists²⁴⁵ and academics.²⁴⁶ In the instances where police are prosecuted, they rarely receive jail time.²⁴⁷

Because of their broad discretion, prosecutors can choose not to prosecute any case.²⁴⁸ But prosecutors can employ grand juries to serve as proxies for their own decision making. At first glance it might appear that doing so makes good sense to allow unbiased members of the community, rather than biased coworkers, to decide whether to charge a police officer. Unfortunately, the practice of using grand juries for investigations of police officers actually protects police more often than not.²⁴⁹ Grand juries are secret, as is the grand jury selection process.²⁵⁰ No judge and no defense attorney or other lawyer can be present. Media and community members are not allowed access. Along with the witnesses, prosecutors and the grand jurors who have been empaneled are the only ones allowed at a grand jury proceeding. The prosecutors prepare the witnesses to testify and are the ones instructing the jurors on the law. One scholar has written, “police are rarely indicted for killing people. In fact, ‘the failure to indict is an anomaly for normal cases, but a routine outcome for police cases.’”²⁵¹ By employing grand juries in police officer investigations, prosecutors insulate themselves from public scrutiny when the grand jury fails to indict despite the enormous role that prosecutors play in the opaque process.²⁵²

²⁴⁵ See Alexander, *Prosecutors Drop Cases*, *supra* note 222 (reporting on dozens of cases dropped for police misconduct).

²⁴⁶ See Philip Matthew Stinson, *The Henry A. Wallace Police Crime Database*, BGSU, <https://policecrime.bgsu.edu/> (last visited Feb. 29, 2024).

²⁴⁷ Andrew Ford, *How Criminal Cops Often Avoid Jail*, PROPUBLICA (Sept. 23, 2020, 5:00 AM), <https://www.propublica.org/article/new-jersey-law-says-criminal-cops-should-go-to-jail-records-reveal-they-often-dont> (discussing programs such as pretrial intervention and resignation as alternatives to jail for police misconduct).

²⁴⁸ See Howell, *supra* note 10, at 286 (describing this discretion as “unfettered”).

²⁴⁹ James C. McKinley Jr., & Al Baker, *Grand Jury System, with Exceptions, Favors the Police in Fatalities*, N.Y. TIMES (Dec. 7, 2014), <https://www.nytimes.com/2014/12/08/nyregion/grand-juries-seldom-charge-police-officers-in-fatal-actions.html> (criticizing special treatment police officers receive in law and grand jury proceedings).

²⁵⁰ *Id.* (citing arguments for wholesale reform of grand jury system).

²⁵¹ Jasmine Gonzales Rose, *Racial Character Evidence in Police Killing Cases*, 2018 WIS. L. REV. 369, 377-78 (quoting Colin Taylor Ross, Note, *Policing Pontius Pilate: Police Violence, Local Prosecutors, and Legitimacy*, 53 HARV. J. ON LEGIS. 755, 764 (2016)) (crediting grand jury’s implicit trust in police and prosecutor’s lenient treatment as reasons for this double standard).

²⁵² *Id.* at 377-82 (discussing prosecutors as reluctant to charge and grand juries as failing to indict).

Even when police are prosecuted, they are convicted less frequently than civilians.²⁵³ The law favors police when it comes to their use of force, which helps them prevail at trial. Police often waive jury trials when they do go to trial.²⁵⁴ They do so because they know judges are less likely to convict them. Choosing bench trials is yet another way that police avoid public accountability. In the wake of the racial reckoning that took place in 2020, at least one prosecutor admitted he should have prosecuted more police officers.²⁵⁵

Some have argued that even when prosecutors charge police officers, it only adds to the entrenched view that mass incarceration within the criminal legal system is a legitimate solution to society's problems.²⁵⁶ Professor Kate Levine has additionally argued that the few prosecutions of law enforcement officers may prevent more systemic change because the community believes that prosecution is a sufficient deterrent for other police when that has almost never stopped the problem.²⁵⁷ Prosecutors' harshness toward the general public while exhibiting leniency towards police perfectly illustrates who prosecutors actually protect despite what they claim.

V. TRADING SAFETY FOR POLICE POWER: PROSECUTION OF MISDEMEANORS

An additional way that prosecutors trade civilian security for police power is by proceeding with prosecutions of cases brought to them by police but unconnected with public safety. There are minor, attention-grabbing cases like the prosecution of an elderly woman feeding stray cats.²⁵⁸ Prosecutors easily

²⁵³ *Id.* at 383 (stating only twenty-six of fifty-four officers tried were convicted); Mark Berman, *When Police Kill People, They Are Rarely Prosecuted and Hard To Convict*, WASH. POST (Apr. 4, 2021), <https://www.washingtonpost.com/nation/2021/04/04/when-police-kill-people-they-are-rarely-prosecuted-hard-convict/> (contrasting 60% civilian defendant conviction rate with less than 50% police defendant conviction rate).

²⁵⁴ Daniel Epps, Opinion, *Police Officers Are Bypassing Juries To Face Judges*, WASH. POST (Sept. 21, 2017, 8:16 PM), https://www.washingtonpost.com/opinions/police-officers-are-bypassing-juries-to-face-judges/2017/09/20/93f21856-9e29-11e7-9c8d-cf053ff30921_story.html (discussing how one legal elite may not be as skeptical of police misconduct as those from community in which alleged offense occurred).

²⁵⁵ Kristy Parker, *Prosecute the Police*, ATLANTIC (June 13, 2020, 1:50 PM), <https://www.theatlantic.com/ideas/archive/2020/06/prosecutors-need-to-do-their-part/612997/> (“I prosecuted police for misconduct at the Justice Department for 15 years, until 2017, and while my colleagues and I won many difficult convictions, the shamelessness of these recent events has driven home to me that we—and our state and local counterparts—should have tried to win many more . . .”).

²⁵⁶ Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV. 997, 1003 (2021) (discussing paradox of demanding police accountability, inevitably through convictions and prison sentences, while advocating to reduce prison footprint).

²⁵⁷ *Id.* at 1008.

²⁵⁸ See Maham Javaid, *85-Year-Old Convicted of Disorderly Conduct After Feeding Feral Cats*, WASH. POST (Dec. 16, 2022, 3:55 PM), <https://www.washingtonpost.com/nation/2022/12/16/85-year-old-convicted-disorderly-conduct-after-feeding-feral-cats/> (discussing arrest, prosecution, and conviction of eighty-

could have dismissed the case but chose to pursue it, despite its disconnection to public-safety goals. In Virginia, a woman was sentenced to community service for drawing on rocks with her four-year-old daughter in a park.²⁵⁹ A woman feeding homeless people in a park in Arizona was arrested by police.²⁶⁰ Other mundane examples of petty prosecutions exist throughout the country.

Whether it is drug possession, trespass, or shoplifting, prosecutions of nonviolent misdemeanors comprise a significant percentage of prosecutions and police work. It was estimated in 2018 that there were more than thirteen million misdemeanor cases brought per year in the United States.²⁶¹ Approximately 80% of criminal prosecutions are misdemeanor offenses rather than more serious felonies.²⁶² Prosecuting people for crimes of poverty, addiction, and subsistence does not cure those ails and often exacerbates them. And those prosecutions do not increase safety.

Not only do prosecutions of nonviolent misdemeanors fail to increase community safety,²⁶³ but these types of prosecutions may increase recidivism rates, particularly with respect to first-time offenders and young people.²⁶⁴ In fact, declining to prosecute nonviolent misdemeanor offenses leads to “a 60% reduction in the number of new criminal complaints over the next two years.”²⁶⁵ It is opined that these public safety gains result from the individual alleged to have committed a petty offense avoiding a physically and psychologically

five-year-old Beverly Roberts on charges of criminal trespassing and disorderly conduct for feeding stray cats).

²⁵⁹ More than fifty people have been arrested for drawing with chalk. See Josh Harkinson, *Chalk a Sidewalk, Go to Jail*, MOTHER JONES (Aug. 14, 2012), <https://www.motherjones.com/politics/2012/08/war-chalk-arrests/> [https://perma.cc/26U6-5B5F] (discussing Susan Mortenson’s arrest for allowing her four-year-old daughter to draw on rocks at local park with sidewalk chalk).

²⁶⁰ See Jonathan Edwards, *A Retiree Served Food to the Homeless for Years. Then It Got Her Arrested*, WASH. POST (Oct. 26, 2022, 5:00 AM), <https://www.washingtonpost.com/nation/2022/10/26/bullhead-city-homeless-feeding-lawsuit/> (discussing Norma Thornton’s arrest for violating city’s new ordinance outlawing people serving prepared food in public parks for charitable purposes).

²⁶¹ See Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 747 (2018) (discussing data showing thirteen million misdemeanor cases in 2018).

²⁶² See *id.* at 746 (finding “misdemeanors represented seventy-four to eighty-three percent of total caseloads”).

²⁶³ The evidence is far from clear that prosecuting felonies increases public safety either.

²⁶⁴ See Amanda Y. Agan, Jennifer L. Doleac & Anna Harvey, *Misdemeanor Prosecution*, 183 Q.J. ECON. 1453, 1454-59 (2023) (presenting data showing “prosecuting defendants for nonviolent misdemeanor offenses has substantial costs for those individuals without any evidence of public safety benefits (and suggestive evidence of public safety costs)” and may “increase the likelihood of post-arraignment criminal behavior”).

²⁶⁵ See *id.* at 1453-55 (“[T]he marginal non-prosecuted misdemeanor defendant is 29 percentage points less likely to be issued a new criminal complaint (53% less than the mean for ‘complier’ defendants who are prosecuted) and is issued 1.7 fewer complaints (60% fewer) within two years post-arraignment.”).

violent carceral system and its punitive direct and collateral downstream consequences.²⁶⁶ Yet some police and prosecutors persist in these arrests and prosecutions.²⁶⁷

In addition to increased recidivism rates (with no benefits for community safety), these prosecutions have financial costs. In addition to the police officers, prosecutors, defense attorneys, courtroom clerks, court reporters, interpreters, investigators, and court security are required to bring these cases to court and must be paid to keep this system going. Taxpayers then foot the bill for this system that not only fails to provide public security, but diminishes it.²⁶⁸

VI. THE DANGERS OF POLICE PROTECTION

Protecting police officers instead of the public has many serious downsides. Protected bad actors stay on the force. This not only allows them to continue to interact with the public and continue their misdeeds, but it also sends three very negative messages to other officers with whom they work. First, bad behavior is tolerated on the force. Second, poor, and even illegal, behavior has no or limited consequences. Third, and perhaps worst, it discourages other officers from reporting corrupt and illegal behavior because of its futility and exposes officers to professional and personal safety risks.

Poorly behaved police officers commit deeds that have serious consequences for others. Police officers lie, cheat, steal, and abuse.²⁶⁹ Approximately 1,000 Americans are killed by police every year.²⁷⁰ This number has stayed constant for years.²⁷¹ Black people are killed at more than twice the rate as white people by police.²⁷² Prosecutors failing to charge violent police fails to protect the public and this choice fails to treat everyone equally as well.

In addition to violence, police misconduct results in wrongful convictions. Provably deliberate police misconduct has resulted in over 1,000 American exonerations since 1989.²⁷³ The types of misconduct include police failing to

²⁶⁶ See *id.* at 1492 (“Misdemeanor prosecution does appear to lead to behavioral changes by marginal first-time nonviolent misdemeanor defendants.”).

²⁶⁷ See *id.* at 1455 (asserting some district attorneys “continue to advance all misdemeanor arrests to prosecution” in face of policy debates).

²⁶⁸ See *id.* at 1453 (arguing misdemeanor prosecutions do not incur public safety benefits and may instead incur public safety costs).

²⁶⁹ See Johnson, *supra* note 51, at 266 (citing one thousand exonerated cases where police lied as witnesses).

²⁷⁰ See Berman, *supra* note 253, at 2 (“Police shoot and kill about 1,000 people a year, according to The Washington Post’s database tracking such cases.”).

²⁷¹ See *Fatal Force*, *supra* note 242.

²⁷² *Id.* (noting Black Americans are killed at much higher rate than white Americans).

²⁷³ Elizabeth Tharakan, *Police Misconduct Biggest Single Cause of 2,900 Wrongful Convictions*, GATEWAY JOURNALISM REV. (Feb. 24, 2022), <https://gatewayjr.org/police-misconduct-biggest-single-cause-of-2900-wrongful-convictions/> [<https://perma.cc/P635-PG2M>] (describing statistics of exonerations relating to police misconduct); Dale Chappell, *Report Shows Official Misconduct Responsible for More than Half of Exonerations*, PRISON

disclose evidence that could help the defense and pressuring witnesses to lie or add details they do not clearly remember.²⁷⁴

Some wrongful convictions stem from no crime at all.²⁷⁵ Evidence planted by police, police fabrication, or false arrests because of aggressive police priorities send innocent people to prisons.²⁷⁶ Close to one-third of exonerations since 1989 have been “no crime convictions.”²⁷⁷

Arresting, prosecuting, and convicting a person for a crime that never took place serves “no criminological or societal interest.”²⁷⁸ Similarly, sending the wrong people to prison takes a huge toll on the victims who feel unprotected because their participation in the legal system resulted in an injustice.

Wrongful convictions are also financially costly. They can result in years of lost wages and wealth building for the individual, as well as posttrial litigation costs for the prosecutor, defense, and judiciary in an already overburdened legal system. And there is a significant financial cost to the penal system associated with incarcerating an innocent person for years or even decades.²⁷⁹

In addition to those exonerations, there are 1,900 group exonerations not included on the National Registry of Exonerations because they are categorized by group rather than individual.²⁸⁰ These mass exonerations are systemic in nature and therefore not counted as exonerations, but nevertheless mean that convictions are overturned. These postconviction dismissals after an officer scandal also have enormous costs as well.

In addition to the financial cost, police misconduct also ruins lives. An individual loses their reputation and years of their life to traumatic incarceration.

LEGAL NEWS (Aug. 1, 2021), <https://www.prisonlegalnews.org/news/2021/aug/1/report-shows-official-misconduct-responsible-more-half-exonerations/> [<https://perma.cc/3MDM-HEVB>] (detailing 2020 annual report by National Registry of Exonerations, including leading states, types of cases, and reasons for exonerations).

²⁷⁴ *Id.*

²⁷⁵ Jessica S. Henry, *Smoke But No Fire: When Innocent People Are Wrongly Convicted of Crimes That Never Happened*, 55 AM. CRIM. L. REV. 665, 666 (2018) (distinguishing “real crime, wrong perpetrator” crimes from so-called “no-crime” convictions, which make up one third of all exonerations since 1989).

²⁷⁶ *Id.* at 669 (listing leading causes of exonerations); *see also* Johnson, *supra* note 51, at 268-72.

²⁷⁷ *See* Henry, *supra* note 275, at 666 (suggesting this is low estimate because it represents only those that have been “uncovered, remedied, and counted”).

²⁷⁸ *Id.* at 667 (arguing despite arrest serving no purpose, prosecution and conviction of these no-crime arrests happen frequently).

²⁷⁹ *How Much Do States Spend on Prisons?*, USA FACTS (Mar. 28, 2023), <https://usafacts.org/articles/how-much-do-states-spend-on-prisons> [<https://perma.cc/CF56-9WYU>] (collecting numerous sources to describe economic footprint of prisons, including national average of \$45,771 per prisoner per year).

²⁸⁰ *See* SAMUEL R. GROSS, MAURICE POSSLEY & KLARA STEPHENS, NAT’L REGISTRY OF EXONERATIONS, NEWKIRK CTR. FOR SCI. & SOC’Y, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 20 (2017) (defining group exonerations as “exoneration of a group of defendants who were falsely convicted of crimes as a result of a large-scale pattern of police perjury and corruption”).

But everyone suffers, including taxpayers. Officers who violate laws and cross lines get their departments sued. A 2022 estimate found that \$3.2 billion was paid in settlements in the twenty-five largest police and sheriff departments over a decade.²⁸¹ This is on top of the already staggering percentage of local budgets devoted to law enforcement.²⁸²

Prosecutors not only protect police misbehavior, but they also enable police misconduct. By failing to prosecute police officers who violate the law and shielding their misconduct, other police officers may become emboldened to cross lines themselves. As Somil Trivedi and Nicole Gonzales Van Cleve argue, “police misconduct *needs* prosecutors to enable it.”²⁸³

When an officer commits violence against an unarmed person, it is disruptive and terrifying for the community in which it occurred. Civil unrest in that community, and sometimes across the country, may result. Some have even called for this type of police brutality to be classified as torture.²⁸⁴ The entire nation experienced civil unrest in 2020 after the murder of George Floyd. Other high-profile killings of people like Eric Gardner, Michael Brown, and Breonna Taylor also inspired demonstrations and then clashes with police and far-right militia.²⁸⁵

But it is not just misconduct at the hands of police that puts people in jeopardy. Police behave within departments’ objectives and policies and still do harm to citizens with the imprimatur of prosecutors.

Occupations of certain communities and overpolicing of certain demographics harm our communities even when no illegal behavior by police is involved. For example, police lawfully take wealth from communities.²⁸⁶ Indeed, in 2014, the value of assets law enforcement seized through federal civil asset forfeiture was larger than the value of assets stolen by burglars.²⁸⁷ This

²⁸¹ See Alexander et al., *supra* note 24 (citing 7,600 officers with repeat infractions resulting in settlements).

²⁸² See Adams, *supra* note 169 (citing hypocrisy in New York City, where mayor promised \$1 billion budget cut but increased it by \$200 million one year later).

²⁸³ See Trivedi & Gonzalez Van Cleve, *supra* note 13, at 900 (arguing police and prosecutors share culture, norms, resources, and goals that do not align with public).

²⁸⁴ Professor Nadia Banteka has argued that some police brutality can and should be classified as torture by a public official. See generally Nadia Banteka, *Police Brutality as Torture*, 70 UCLA L. REV. 470, 475 (2023) (“I propose a model criminal statute specific to this violence, classified as torture committed by public officials.”).

²⁸⁵ See Robert Klemko, *Behind the Armor: Men Seek ‘Purpose’ in Protecting Property Despite Charges of Racism*, WASH. POST (Oct. 5, 2020, 7:45 AM), https://www.washingtonpost.com/national/behind-the-armor-men-seek-purpose-in-protecting-property-despite-charges-of-racism/2020/10/05/b8496fec-001e-11eb-9ceb-061d646d9c67_story.html.

²⁸⁶ See *Types of Federal Forfeiture*, U.S. DEP’T OF JUST. (Oct. 11, 2023), <https://www.justice.gov/afms/types-federal-forfeiture> [https://perma.cc/4YM2-LATS] (describing asset forfeiture as allowing police to seize individuals’ property).

²⁸⁷ See Martin Armstrong, *Police Civil Asset Forfeitures Exceed All Burglaries in 2014*, ARMSTRONG ECON. (Nov. 17, 2015), <https://www.armstrongeconomics.com/international->

trend has continued for years, according to data that spans until 2019.²⁸⁸ This involuntary transfer of wealth to law enforcement from citizens does not deter crime.²⁸⁹ And the practice of civil asset forfeiture is advocated for and justified by prosecutors.²⁹⁰

Abuse of police power erodes public trust.²⁹¹ A police-violence incident against a community member in Milwaukee resulted in a loss of approximately 22,200 police-related 911 calls throughout the next year.²⁹² In 2020, confidence in police dipped below 50% of the population.²⁹³ The fact that a majority of Americans do not trust police is an indictment of our entire criminal legal system. Because police enforce our laws, bad police erode public trust not just in the criminal legal system but in our country as a place of laws. Prosecutors support, justify, and lend credibility to police power.

news/north_america/americas-current-economy/police-civil-asset-forfeitures-exceed-all-burglaries-in-2014/ [https://perma.cc/4JM6-G8NR] (noting in 2014, U.S. attorneys seized estimated \$4.5 billion in assets, while total amount of assets stolen by burglars amounted to estimated \$3.9 billion); see also Christopher Ingraham, *Law Enforcement Took More Stuff from People than Burglars Did Last Year*, WASH. POST (Nov. 23, 2015, 6:00 AM), https://www.washingtonpost.com/news/wonk/wp/2015/11/23/cops-took-more-stuff-from-people-than-burglars-did-last-year/ (noting in 2014 Treasury and Justice departments deposited more than \$5 billion into their asset forfeiture funds, while FBI reported burglary losses topped out at \$3.5 billion).

²⁸⁸ See Christopher Ingraham, *Cops Still Take More Stuff from People than Burglars Do*, WHY AXIS (Dec. 8, 2021), https://thewhyaxis.substack.com/p/cops-still-take-more-stuff-from-people [https://perma.cc/597X-EA4K] (reporting “cops still take more stuff from people than burglars do” based on data up to 2019).

²⁸⁹ See J. Justin Wilson, *New Report Finds Civil Forfeiture Rakes in Billions Each Year, Does Not Fight Crime*, INST. FOR JUST. (Dec. 15, 2020), https://ij.org/press-release/new-report-finds-civil-forfeiture-rakes-in-billions-each-year-does-not-fight-crime-2/ [https://perma.cc/8PXE-WXG9] (finding no rise in crime after New Mexico eliminated civil forfeiture).

²⁹⁰ Louis S. Rulli, *Prosecuting Civil Asset Forfeiture on Contingency Fees: Looking for Profit in All the Wrong Places*, 72 ALA. L. REV. 531, 536 (2021).

²⁹¹ See Jacqueline Varas, *Accountability for Bad Apples: Police Reforms to Restore Faith in Institutions*, U.S. CONG. JOINT ECON. COMM. (Mar. 22, 2021), https://www.jec.senate.gov/public/index.cfm/republicans/2021/3/accountability-for-bad-apples-police-reforms-to-restore-faith-in-institutions [https://perma.cc/JZ85-B7LK] (“There is, however, a long history of breaches of the public trust by officers who did not live up to their calling.”).

²⁹² See Matthew Desmond, Andrew V. Papachristos & David S. Kirk, *Police Violence and Citizen Crime Reporting in the Black Community*, 81 AM. SOCIO. J. 857, 857 (2016) (“[W]e find that residents of Milwaukee’s neighborhoods, especially residents of black neighborhoods, were far less likely to report crime after Jude’s beating was broadcast. The effect lasted for over a year and resulted in a total net loss of approximately 22,200 calls for service.”).

²⁹³ Aimee Ortiz, *Confidence in Police Is at Record Low, Gallup Survey Finds*, N.Y. TIMES (Aug. 12, 2020), https://www.nytimes.com/2020/08/12/us/gallup-poll-police.html (noting 2020 “survey, conducted by Gallup from early June to mid-July, found that confidence in the police had fallen five points, to 48 percent”).

VII. PROGRESSIVE PROSECUTORS

While most traditional prosecutors protect police at almost all costs, some “progressive prosecutors” have run on platforms of police accountability and other reformist goals. “Progressive prosecutor” is the phrase given to prosecutors who claim not to be part of the criminal legal system’s business as usual.²⁹⁴ As Professor Paul Butler wrote, “Progressive prosecutors push for reform from within the criminal legal system, including by making commitments to reduce incarceration, hold police officers accountable, and reallocate funds to public services.”²⁹⁵

That these prosecutors win elections in cities across the country illustrates that American citizens want to see changes in our criminal legal system. Some of the cities that have elected progressive prosecutors are not surprising—San Francisco, Los Angeles, Austin, New York, and Philadelphia have elected prosecutors describing themselves that way.²⁹⁶ But the movement has been seen all over the United States with progressive prosecutors elected in St. Louis, Orlando, New Orleans, and Houston too.²⁹⁷

²⁹⁴ See Hana Yamahiro & Luna Garzón-Montano, *A Mirage Not a Movement: The Misguided Enterprise of Progressive Prosecution*, 46 *HARBINGER* 130, 135 (2022) (listing Benjamin Levin’s four kinds of “progressive prosecutor” depending on political and prosecutorial ideologies).

²⁹⁵ See Paul Butler, *Progressive Prosecutors Are Not Trying to Dismantle the Master’s House, and the Master Wouldn’t Let Them Anyway*, 90 *FORDHAM L. REV.* 1983, 1988-89 (2022).

²⁹⁶ See Michael Barajas, *José Garza Redefines ‘Progressive Prosecutor’*, *TEX. OBSERVER* (Nov. 2, 2020, 6:00 AM CST), <https://www.texasobserver.org/jose-garza-redefines-progressive-prosecutor/> [<https://perma.cc/N3Q7-GWUA>] (noting new district attorney appointment in Austin as “part of a new wave of progressive DA candidates in Texas”); Emily Bazelon & Jennifer Medina, *He’s Remaking Criminal Justice in L.A. But How Far Is Too Far?*, *N.Y. TIMES MAG.* (Dec. 3, 2021), <https://www.nytimes.com/2021/11/17/magazine/george-gascon-los-angeles.html> (describing Los Angeles county district attorney’s progressive inaugural speech); Rebecca Davis O’Brien, *How This ‘Progressive Prosecutor’ Balances Politics and Public Safety*, *N.Y. TIMES* (Feb. 26, 2022), <https://www.nytimes.com/2022/02/26/nyregion/eric-gonzalez-brooklyn-politics.html> (highlighting Brooklyn’s district attorney’s pledge “to bring a modern, progressive approach” upon election); Allison Young, *The Facts on Progressive Prosecutors*, *CAP* (Apr. 23, 2020), <https://www.americanprogress.org/article/progressive-prosecutors-reforming-criminal-justice/> [<https://perma.cc/C3GD-AFZZ>] (commenting progressive district attorneys from San Francisco and Philadelphia decided to decrease sentences).

²⁹⁷ See Young, *supra* note 296 (describing Orlando’s state attorney’s and St. Louis’s chief prosecutor’s progressive agendas facing resistance from government and police); Michael Barajas, *Reform Candidates Are Trying To Change the Definition of a ‘Progressive Prosecutor’ in Texas*, *TEX. OBSERVER* (Feb. 7, 2020, 4:27 PM CST), <https://www.texasobserver.org/kim-ogg-progressive-prosecutor-harris-county/> [<https://perma.cc/2BEU-PNRK>] (describing Houston’s slow progress towards electing more progressive prosecutors); Oliver Laughland & Ramon Antonio Vargas, *Jury Acquits New Orleans’ Progressive District Attorney of Tax Fraud Charges*, *GUARDIAN* (July 28, 2022, 6:12 PM), <https://www.theguardian.com/us-news/2022/jul/28/new-orleans-district-attorney-acquitted-tax-fraud> [<https://perma.cc/5DW3-PZJN>] (reporting acquittal of New Orleans’s

Some progressive prosecutors have made big changes to the status quo. In St. Louis, Kim Gardner stopped prosecuting cases brought to her office by police officers with credibility issues and created a *Brady* list.²⁹⁸ Philadelphia has seen a 30% reduction in imprisonment since the election of its progressive district attorney.²⁹⁹ Unlike the practice of the Office of the United States Attorney described earlier,³⁰⁰ in Philadelphia, a list of police officers with questionable character was also shared with the public.³⁰¹ Marijuana possession cases are no longer prosecuted in two northern Virginia counties due to the election of progressive prosecutors in those jurisdictions.³⁰² Several are prosecuting police for misconduct even for cases previously closed by their predecessors.³⁰³

Despite the relatively bold efforts of some progressive prosecutors, those who have tried to limit police power have faced serious criticism and opposition by the police, their unions, and others threatened by change and aligned with police.³⁰⁴

In St. Louis, Missouri, popularly elected Circuit Attorney Kim Gardner met so much resistance she was forced to file a lawsuit against the local police union because of its efforts to thwart reforms like making police officer discipline public.³⁰⁵

progressive prosecutor as significant contribution to national movement of criminal justice reform).

²⁹⁸ See Young, *supra* note 296.

²⁹⁹ *Id.* (attributing Philadelphia's reduced incarceration to district attorney's support for police accountability, less cash bail use, and lower sentences).

³⁰⁰ See discussion *supra* Part II.

³⁰¹ See Mark Fazlollah, Craig R. McCoy & Julie Shaw, *DA Discloses Officers on 'Do Not Call' List*, PHILA. INQUIRER, Mar. 7, 2018, at A01 (reporting Philadelphia District Attorney's Office released list of current and former police officers prohibited from testifying as witnesses due to history of misconduct).

³⁰² See Justin Jouvenal & Rachel Weiner, *Prosecutors Won't Pursue Marijuana Possession Charges in 2 Northern Va. Counties*, WASH. POST (Jan. 2, 2020, 7:30 PM), https://www.washingtonpost.com/local/public-safety/new-fairfax-county-prosecutor-says-office-wont-prosecute-marijuana-possession/2020/01/02/ab0363a4-2d76-11ea-9b60-817cc18cf173_story.html (suggesting two recently elected progressive district attorneys pushed for marijuana possession to not be prosecuted in Fairfax and Arlington).

³⁰³ See Steve Eder & David D. Kirkpatrick, *The Police Killings Were Years Ago. New Prosecutors Are Reopening Cases.*, N.Y. TIMES (Nov. 30, 2021), <https://www.nytimes.com/2021/11/30/us/prosecutors-investigating-police-killings.html> (reporting various progressive prosecutors decided to reexamine old police misconduct investigations to hold actors accountable).

³⁰⁴ See Yamahiro & Garzón-Montano, *supra* note 294, at 141 (quoting Philadelphia district attorney, Larry Krasner, reflecting on heated reactions to his progressive agenda).

³⁰⁵ See Emily Hoerner, *St. Louis Prosecutor's Lawsuit: City, Police Union, Thwarting Justice*, INJUSTICE WATCH (Jan. 14, 2020), <https://www.injusticewatch.org/news/2020/st-louis-prosecutors-lawsuit-city-police-union-thwarting-justice/> [<https://perma.cc/4ASA-DM92>] (explaining Gardner's lawsuit against local police union and police officers due to multiple public offensive statements against Gardner).

In Philadelphia, Larry Krasner, an attorney who sued the Philadelphia police department seventy-five times before becoming the District Attorney, faced vehement opposition from local police when he ran (successfully) for reelection.³⁰⁶ He was impeached in 2022 by the Pennsylvania House of Representatives after winning the popular election in Philadelphia twice by significant margins.³⁰⁷

In Tampa, Florida, the twice-elected prosecutor was removed from office by Governor Ron DeSantis, who disagreed with the prosecutor's position on choosing not to prosecute women for abortions.³⁰⁸ In Orlando, Florida, a different progressive prosecutor was reassigned from a case by the governor when the prosecutor announced she would not seek the death penalty against a man accused of killing a police officer.³⁰⁹ She ultimately gave up her position and did not seek reelection.³¹⁰ Six years later Governor DeSantis suspended a different progressive state attorney in the Orlando area.³¹¹

³⁰⁶ See John Nichols, *The Police Union Failed Miserably in Its Attempt To Beat Philadelphia DA Larry Krasner*, NATION (May 19, 2021), <https://www.thenation.com/article/politics/larry-krasner-carlos-vega-win/> [<https://perma.cc/AZ77-VG9Y>] (describing Philadelphia police union's futile attempts to raise campaign against Krasner's reelection as district attorney); *Who Is Larry Krasner?*, PHILA. CITIZEN (Mar. 4, 2022), <https://thephiladelphiacitizen.org/larry-krasner/> [<https://perma.cc/F3E6-7UYR>].

³⁰⁷ See Shaila Dewan, *Philadelphia Prosecutor Is Found in Contempt by State Representatives*, N.Y. TIMES (Sept. 13, 2022), <https://www.nytimes.com/2022/09/13/us/larry-krasner-contempt-impeachment.html> (reporting on state legislature's attempts to impeach Philadelphia District Attorney Larry Krasner for increased gun violence despite Krasner's popular support).

³⁰⁸ See Lori Rozsa, *DeSantis Suspends Elected Democratic Prosecutor Who Signed Pledge on Abortion Cases*, WASH. POST (Aug. 4, 2022, 8:09 PM), <https://www.washingtonpost.com/nation/2022/08/04/desantis-suspends-democratic-elected-prosecutor-who-signed-pledge-abortion-transgender-cases/> (describing Florida governor's suspension of state attorney for pledging to not criminalize women receiving abortions or people receiving gender-affirming care).

³⁰⁹ See Peter Szekely & Letitia Stein, *Florida Governor Replaces Anti-death Penalty Prosecutor*, REUTERS (Mar. 17, 2017, 4:42 PM), <https://www.reuters.com/article/florida-prosecutor/florida-governor-replaces-anti-death-penalty-prosecutor-idUSL2N1GU1S1> [<https://perma.cc/7G2F-K4RE>] (reporting on Florida governor's decision to reassign state attorney when she promised to not seek death penalty against alleged murderer of police officer).

³¹⁰ See Jeff Weiner & Monivette Cordeiro, *Aramis Ayala Won't Seek Re-election as Orange-Osceola State Attorney; Belvin Perry May Enter Race*, ORLANDO SENTINEL (May 28, 2019, 10:04 PM), <https://www.orlandosentinel.com/2019/05/28/aramis-ayala-wont-seek-re-election-as-orange-osceola-state-attorney-belvin-perry-may-enter-race/> (describing Florida's first Black state attorney's decision to not run for reelection).

³¹¹ Lori Rozsa & Tim Craig, *Florida Gov. Ron DeSantis Suspends Another Democratic State Attorney*, WASH. POST (Aug. 9, 2023, 12:45 PM), <https://www.washingtonpost.com/nation/2023/08/09/desantis-suspends-state-attorney/> (reporting Governor DeSantis's removal of another progressive prosecutor for being "soft on crime").

San Francisco's progressive prosecutor, Chesa Boudin, was recalled and lost his seat in 2022 amid complaints about a rise in crime.³¹² He had been successful at eliminating cash bail and reducing the number of those sent to prison.³¹³ Despite his ousting, the more conservative prosecutor who replaced him has been ineffective at reducing crime.³¹⁴

Georgia created an oversight committee with power over prosecutors as a response to the election of a progressive prosecutor in Athens, Georgia.³¹⁵

When the newly elected progressive prosecutor for Arlington County, Virginia started dismissing cases, judges stood in the way.³¹⁶ Despite the discretion that prosecutors enjoy, the judges required the prosecutor to file motions explaining the dismissals, which was not previously required because it is normally the prosecutor who decides which cases to prosecute and which to dismiss.³¹⁷

With progressive prosecutors being cowed into resigning and facing recall attempts,³¹⁸ impeachment proceedings,³¹⁹ judicial obstruction, and other opposition, it is hard to see how this progressive prosecutor movement will make significant changes to the status quo in law enforcement. Between police and their unions, judicial hurdles, and vast state political opposition, sustained progress has been difficult in the few cities where it has been attempted. The police's vehement opposition to popularly elected progressive prosecutors demonstrates how reform of the institution of policing may be very difficult to

³¹² See Thomas Fuller, *Voters in San Francisco Topple the City's Progressive District Attorney, Chesa Boudin*, N.Y. TIMES (June 8, 2022), <https://www.nytimes.com/2022/06/07/us/politics/chesa-boudin-recall-san-francisco.html> (pointing out coalition of voters who blamed Boudin for increased property crimes and open drug use in San Francisco).

³¹³ *Id.* (highlighting Boudin's successes and work to reduce mass incarceration).

³¹⁴ See Eric Ting, *San Francisco Crime Is Not Getting Better, Data Says*, SF GATE (Oct. 4, 2022, 9:25 AM), <https://www.sfgate.com/bayarea/article/san-francisco-crime-not-improving-17478702.php> [<https://perma.cc/9F7X-E5Z3>] (reporting San Francisco's increase in violent crime by 3.1% and property crime by 4-5% since 2021).

³¹⁵ See Keri Blakinger, *Prosecutors Who Want To Curb Mass Incarceration Hit a Roadblock: Tough-on-Crime Lawmakers*, MARSHALL PROJECT (Feb. 3, 2022, 6:00 AM), <https://www.themarshallproject.org/2022/02/03/prosecutors-who-want-to-curb-mass-incarceration-hit-a-roadblock-tough-on-crime-lawmakers> [<https://perma.cc/4K72-TYN2>] (explaining Georgia governor and Republican legislators' attempt to cancel progressive prosecutor's election, push to redraw, and support for bill creating committee to oversee prosecutors).

³¹⁶ See Tom Jackman, *Arlington Prosecutor Goes to Va. Supreme Court Against Judges Who Challenge Her New Policies*, WASH. POST (Aug. 28, 2020, 8:37 AM), <https://www.washingtonpost.com/dc-md-va/2020/08/28/arlington-prosecutor-goes-va-supreme-court-against-judges-who-challenge-her-new-policies/> (noting Arlington judges' demand that prosecutors provide reasons for dismissing charges after progressive prosecutor moved to dismiss marijuana possession charge).

³¹⁷ *Id.*

³¹⁸ See Fuller, *supra* note 312.

³¹⁹ See Dewan, *supra* note 307.

achieve by progressive prosecutors.³²⁰ And of course, most jurisdictions do not have progressive prosecutors encouraging internal reform to keep prosecutors from choosing police power over that of their constituents.³²¹

Although progressive prosecutors often promise to reduce spending on law enforcement and jails and to increase spending on programs that would reduce crime and poverty, such as substance abuse treatment, mental health treatment, and housing, few, if any, progressive prosecutors have actually reduced their own budgets.³²² Seema Gajwani and Max Lesser worry that progressive prosecutors may become less progressive over time.³²³ Even if the progressive prosecutor movement were to catch hold across the nation, it may only result in tinkering at the edges with no serious overhauls.³²⁴

Nevertheless, progressive prosecutors continue to be elected, meaning voters in those jurisdictions support changes to the criminal legal system's status quo.³²⁵ This illustrates that law enforcement goals and community goals may not

³²⁰ See Marco della Cava, *New, More Progressive Prosecutors Are Angering Police, Who Warn Approach Will Lead to Chaos*, USA TODAY (Feb. 10, 2020, 11:50 AM), <https://www.usatoday.com/story/news/nation/2020/02/08/criminal-justice-police-progressive-prosecutors-battle-over-reform/4660796002/> [<https://perma.cc/GL3M-JMWM>] (expecting increased friction between police unions and new prosecutors over progressive crime tactics).

³²¹ See Amy Ashworth et al., *Opinion, Letter to the Editor: Virginia Progressive Prosecutors Call for Criminal Justice Reforms*, ALEXANDRIA GAZETTE PACKET (Jan. 7, 2021), <http://www.alexandriagazette.com/news/2021/jan/07/opinion-letter-editor-virginia-progressive-prosecu/> [<https://perma.cc/23JW-C2FY>] (suggesting proposed legislation to minimize incarceration, unfair punishment, and consequences of criminal justice system).

³²² See Michael D'Onofrio, *Krasner Fights Impending \$8.7M Budget Cut to DA's Office*, PA. CAP.-STAR (June 9, 2020, 7:36 AM), <https://www.penncapital-star.com/criminal-justice/krasner-fights-impending-8-7m-budget-cut-to-das-office> [<https://perma.cc/PY66-8UV2>] (mentioning Philadelphia District Attorney Larry Krasner's request to City Council to "reject a 14% reduction to his office's budget"); Benjamin Schneider, *Is San Francisco Re-funding the Police?*, SF WKLY. (June 16, 2021), https://www.sfweekly.com/archives/is-san-francisco-re-funding-the-police/article_f7f50019-0eaf-51b0-bc84-585a8889e77a.html [<https://perma.cc/XB3R-4HC3>] (noting \$6 million budget increase in 2021-2022 fiscal year for office of San Francisco District Attorney Chesa Boudin).

³²³ See Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement's Promise*, 64 N.Y.L. SCH. L. REV. 69, 71 (2019-2020) ("[Progressive] prosecutors across the country [have] become increasingly punitive over time, [and] changing prosecutorial culture may be harder than simply hiring and training progressive assistant district attorneys.").

³²⁴ Yamahiro & Garzón-Montano, *supra* note 294, at 135-39 (elaborating on structural and political barriers to successful, long-term progressive prosecution).

³²⁵ See Eva McKend & Brandon Tensley, *What Critics of Progressive Prosecution Get Wrong About Crime Spikes and the Reform Movement*, CNN (Nov. 6, 2022, 4:05 AM), <https://www.cnn.com/2022/11/06/us/progressive-prosecution-midterms-reaj/index.html> [<https://perma.cc/S5YK-XSZQ>] (referencing recent elections, reelections, and failures of recall of progressive prosecutors across country).

be aligned in many instances.³²⁶ Even without the success of the progressive prosecutor movement, the wave of progressive prosecutors may be proof that not everyone supports the current relationship between police and prosecutors, and some seek a system that safeguards the citizenry, not simply state power.

CONCLUSION

Prosecutors no doubt see themselves as protectors of the people of their communities. They likely see their use of the police, courts, and incarceration as good-faith attempts at deterrence and for incapacitation of dangerous people.³²⁷ And undoubtedly, these points might hold true in certain specific circumstances. But they are not the rule.

No matter what they call themselves and whom they claim to represent, prosecutors do not consistently represent the interests of the people.³²⁸ They represent the government.³²⁹ As Professor Jocelyn Simonson put in in her essay, *The Place of “the People” in Criminal Procedure*, “the decisions of ‘the People’ are often not responsive to the interests of the poor populations of color most likely to come into contact with the criminal process as arrestees, defendants, or victims.”³³⁰ Although charged with protecting public safety, governmental power comes at the expense of public freedoms.³³¹ Citizens should not have to cede their constitutional and other rights in exchange for protection from police and prosecutors.³³² Indeed, public safety and privacy are both imperiled by prosecutors’ decisions to protect the police instead of those they swear to protect.³³³

In their day to day pursuit of convictions, prosecutors make decisions to enlarge police power in ways that do not serve the community they are charged to protect.³³⁴ Whether it is shielding officers from prosecution even when they

³²⁶ See *id.* (recognizing progressive prosecutor movement continues with increased support for criminal legal system reform).

³²⁷ Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1218 (2020).

³²⁸ Yamahiro & Garzón-Montano, *supra* note 294, at 166 (“[P]rosecutors are not victims’ lawyers . . .”).

³²⁹ *Id.* (“The prosecutor’s client is the government, not the victim.” (quoting Paul Bulter, *How Can You Prosecute Those People?*, in *HOW CAN YOU REPRESENT THOSE PEOPLE?* 15, 20 (Abbe Smith & Monroe H. Freeman eds. 2013))).

³³⁰ Simonson, *supra* note 5, at 254.

³³¹ See I. Bennet Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 672-73 (2018) (discussing how courts adopt law enforcement and government’s perspectives and interests to be balanced with individual rights).

³³² For thoughtful ruminations on the topic of citizenship and protection, please see *id.*

³³³ See Yamahiro & Garzón-Montano, *supra* note 294, at 149 (recounting Los Angeles District Attorney George Gascón’s misguided attempt at community building by strengthening prosecutor-police relationships).

³³⁴ See *supra* Section II (outlining how prosecutors help police officers at citizens’ expenses).

commit violence against our friends and neighbors,³³⁵ making plea offers to protect officers' reputations,³³⁶ failing to share police misdeeds with the public,³³⁷ dismissing criminal cases to keep civilians from suing police,³³⁸ shrinking the citizenry's rights to be free from governmental power and control, and signing on as amici to do the same across the country,³³⁹ prosecutors make the average citizen less safe while claiming to be a representative of the people.

As a result of prosecutor's actions, police are more empowered to commit injustices against their communities. When police behave violently, unethically, or corruptly, everyday citizens are harmed.³⁴⁰ Often when police are disciplined by their superiors, this information is kept from the public.³⁴¹ Thus, communities are not able to avoid problematic officers or adequately organize to make changes in police departments.³⁴² Rather than protect the public from the excesses of policing, they compound the problem with their consistent defense of police power.

Even when law enforcement officers behave lawfully, police still do substantial harm. More than two million people sit in American prisons with millions more under various forms of intrusive monitoring by pretrial agencies, probation departments, and supervised release and parole programs.³⁴³ This system of mass incarceration created and protected by police and prosecutors has ended innocent lives, destroyed wealth for generations, and betrayed, humiliated, and traumatized so many.³⁴⁴ Police are permitted to seize money, harass, traumatize, and discriminate against innocent victims and are even defended by prosecutors in court every day across America even though such defense hurt the prosecutors' constituents.³⁴⁵

³³⁵ See Trivedi & Gonzalez Van Cleve, *supra* note 13, at 920-22.

³³⁶ See *supra* Section II.C.

³³⁷ See *supra* Section II.A.

³³⁸ See *supra* Section II.C.

³³⁹ See Green, *supra* note 16, at 2336.

³⁴⁰ See Johnson, *supra* note 51, at 253 (“[P]olice officers are guilty of all manner of misconduct—planting evidence, creating false charges, perjury, hiding evidence of innocence, and police brutality.”).

³⁴¹ See Cox & Freivogel, *supra* note 178 (reporting police misconduct record is shielded from public in thirty-two states).

³⁴² See *supra* Section II.A (describing fatal consequences of shielding police misconduct from public).

³⁴³ See generally Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147 (2022) (highlighting intrusive surveillance of people at all stages of criminal legal system).

³⁴⁴ See Simonson, *supra* note 5, at 253.

³⁴⁵ See Shaun Ossei-Owusu, *Police Quotas*, 96 N.Y.U. L. REV. 529, 556-57 (2021) (describing people of color stopped by police due to racial bias and “quota-based policing”); Crawford, *supra* note 25, at 260-65 (describing police's use of, and prosecutor's support for, civil asset forfeiture to seize property).

Indeed, most traditional prosecutors' choices can be viewed as protection of police and governmental power.³⁴⁶ Prosecutors almost never advocate to diminish the role of police in our society but do everything to enlarge police's roles in our everyday lives.³⁴⁷

Many scholars and others have advocated for changes and reforms that are simply insufficient to tackle this vehicle of incarceration that prosecutors have set in motion.³⁴⁸

Because of the entrenched motivations of prosecutors, the only real solutions to prosecutors protecting police include system-wide overhauls. These may include police abolition,³⁴⁹ which would shrink the size of both police and prosecutors' offices and budgets so they can do less harm, involvement of well-funded independent prosecutors who devote themselves exclusively to prosecuting police when they cross the line,³⁵⁰ or a return to private prosecution of crime.³⁵¹ Otherwise, police power will continue to increase while the average American's power and freedom decreases.

Once it is recognized that at least one function of traditional prosecutors seems to be to increase state power, especially police power, rather than enhance community safety, it is easy to see that reflected in many traditional prosecutor's decisions. Prosecutors rarely investigate or prosecute police, but do prosecute low-level crimes even when doing so only increases recidivism, prosecute aggressively even when it harms communities, and withhold information from the public. So, to answer the question of whom do prosecutors actually protect: the answer is the police.

³⁴⁶ See *supra* Section VI.A-C (asserting prosecutors have motives to protect their own power and support police).

³⁴⁷ Compare *supra* Sections II-III (elaborating on lack of access to police misconduct records and low prosecution rate of police officers), with Section VI.D (highlighting valiant efforts of progressive prosecutors to hold police officers accountable).

³⁴⁸ Campbell Robertson, *Crime Is Down, Yet U.S. Incarceration Rates Are Still Among the Highest in the World*, N.Y. TIMES (Apr. 25, 2019), <https://www.nytimes.com/2019/04/25/us/us-mass-incarceration-rate.html> (quoting Rachel Barkow saying, "[i]f we keep working on the kinds of criminal justice reforms that we're doing right now, it's going to take us 75 years to reduce the [prison] population by half").

³⁴⁹ See generally Anna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781 (2020) (recognizing full societal transformation requires police abolition); Samuel Dunkle, Note, *"The Air Was Blue with Perjury": Police Lies and the Case for Abolition*, 96 N.Y.U. L. REV. 2048 (2021) (using prevalence of police perjury as another reason for police abolition); Brandon Hasbrouck, *Reimagining Public Safety*, 117 NW. U. L. REV. 685 (2022) (discussing public safety in context of abolition democracy).

³⁵⁰ See Simmons, *supra* note 27, at 153-54 (describing independent prosecutor model to avoid conflict of interest of local prosecutors).

³⁵¹ See Bennett Capers, *supra* note 13, at 1573-75 (recalling private prosecution in pre-1900 England when "[f]or everyday matters, 'crime' was handled through private actors, the aggrieved against the alleged offender").