

From Dropsy to Testilying: Prosecutorial Apathy, Ennui, or Complicity?

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“To meet his constitutional and ethical obligations, a prosecutor should . . . approach the preparation of a case with a healthy skepticism . . . He should not assume his witnesses are telling the truth . . .”¹

“The often close relationship between prosecutors and police make detection of police fabrication unlikely.”²

“[Manhattan District Attorney] Vance’s efforts to make prosecutors smarter . . . depend on what he calls ‘extreme collaboration’ with the Police Department . . . working hand in glove with the investigators from the police . . .”³

The prosecutor’s constitutional and ethical duty to truth is central to many of Bennett Gershman’s illuminating and trenchant articles about the role of the prosecutor.⁴ And while ruminating about that obligation conjures up the need for systematic and aggressive investigation while a criminal case is pending, in this essay I argue that nowhere is that duty more critical than at the very moment when a decision is made whether to file charges.⁵ Specifically, I argue that to meaningfully actualize their duty to truth, prosecutors must extricate themselves from their extant close relationships with the police by adopting a deliberately confrontational approach to police witnesses. Moreover, once a case is charged, they must overcome their longstanding reluctance to liberal disclosure by immediately providing defense counsel with all available discovery.

Scholars have written about the complicated relationship between prosecutors

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¹ Bennett L. Gershman, *The Prosecutor’s Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 342 (2001).

² *Id.* at 348 n.212.

³ Chip Brown, *Cyrus Vance Jr.’s ‘Moneyball’ Approach to Crime*, N.Y. TIMES, Dec. 3, 2014.

⁴ See Gershman, *supra* note 1.

⁵ To be clear, I am referring to “street crime” cases where a police officer makes an arrest and a prosecutor is called upon very soon thereafter to make a decision regarding filing charges, as opposed to cases involving lengthy investigations prior to an arrest.

and police officers in various macro contexts.⁶ My focus is specifically on the prosecutor's role in ferreting out police perjury, or put more kindly, ensuring that police accounts of what happened—what they did and why they did it—are truthful.⁷

While the police decide who to arrest, it is the prosecutor who then decides what to do with that arrest—whether to prosecute and what charges to file.⁸ At that moment in time, the primary function of the prosecutor must be to serve as a robust and steadfast gatekeeper,⁹ to ensure that the police fully respected the accused's constitutional rights and that there is sufficient evidence to warrant filing charges.¹⁰ Yet even amid a documented history of police corruption in the form of perjury¹¹—lying in reports and lying on the witness stand—prosecutors regularly abdicate this vital function and perfunctorily file charges based on the unexamined word of the arresting officer.¹²

Most criminal courts concentrate on, and expend significant resources at, the accused's arraignment or initial appearance before a judge. At that time, very little is known about the facts of the case, the accused, any victim, any witnesses, the arresting officer, and any other police involved in the case. Yet in many busy urban criminal courts, like in New York City, approximately half of all cases will end at the accused's very first appearance.¹³ And the moment charges are filed, let alone resolved by any kind of guilty plea, the defendant will be saddled with a host of

⁶ See, e.g., Irene Oritseweyinmi Joe, *The Prosecutor's Client Problem*, 98 B.U. L. REV. 885, 899 n.65 (2018) ("The relationship between prosecutors and police is complicated."); Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS, 301, 312 (2017); Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745 (2016).

⁷ Despite the title of this essay, I approach this subject presupposing a genuine interest and legitimate commitment on the part of prosecutors to eradicate police perjury, and I focus on how it can best be quickly identified.

⁸ Not to mention other critical decisions such as what bail to recommend and what plea offer to make.

⁹ Griffin & Yaroshefsky, *supra* note 6, at 312 ("It is also important to recognize that the prosecutor is the gatekeeper of the system, uniquely positioned to mediate between the police and the judiciary . . ."); David Neubauer, *After the Arrest: The Charging Decision in Prairie City*, 8 L. & SOC'Y REV. 495, 497 (1974) (whoever controls the charging decision is the gatekeeper and regulates inputs into the court).

¹⁰ There is much disagreement regarding just how sure a prosecutor should be of the accused's guilt before filing and thereafter prosecuting criminal charges. See, e.g., Gershman, *supra* note 1, at 353–54 (prosecutor should be personally convinced of guilt beyond a reasonable doubt before pursuing charges); Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 497 (2009) ("The charging decision calls for some gatekeeping to avoid prosecuting innocent individuals, but there is no agreement on how much."); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1547 (1981). See generally MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2012) ("The prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.").

¹¹ See *infra* notes 16–38 and accompanying text.

¹² Levine, *supra* note 6, at 758 (prosecutors file charges without checking the evidence presented by the police); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 101, 116 (2012) ("Prosecutors fail to screen and instead charge arrestees based solely on allegations in police reports.").

¹³ JUSTIN BARRY, OFFICE OF THE CHIEF CLERK OF N.Y. CITY CRIM. CT., CRIMINAL COURT OF THE CITY OF NEW YORK ANNUAL REPORT 2011 29 (2012).

debilitating consequences.¹⁴ Even if the charges are ultimately dismissed, the fact that charges were filed may follow that person in perpetuity.¹⁵ It is for these reasons that it is critical that prosecutors do all that is possible to ensure the truth and constitutionality of the charges before any formal accusatory instrument is filed in court.

Since in many cases the assessment of truth begins and ends with the narrative provided by the arresting police officer, how can, and should, prosecutors evaluate the veracity of what police officers tell them? That fundamental and critical question must be examined against the indisputable historical backdrop of prevalent police perjury. Commentators, scholars, and practitioners—judges and prosecutors, as well as defense attorneys—have long acknowledged that police perjury is an ever-present reality.¹⁶

In New York City, it has become commonplace in the past decade for whoever is the Mayor to hold a press conference announcing that the crime rate is at a new low.¹⁷ During that same time period, a federal judge found that the New York City Police Department's stop-and-frisk practices violated the Equal Protection Clause and the Fourth Amendment's commandment against unreasonable search and seizure.¹⁸ Broken Windows policing ensnared and criminalized hundreds of thousands of men of color.¹⁹ Police killings of unarmed Black men spawned the

¹⁴ See, e.g., Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 B.U. L. REV. 953 (2018); Jenny Roberts, *Informed Misdemeanor Sentencing*, 46 HOFSTRA L. REV. 171 (2017); Joe, *supra* note 6; *The Prosecutor's Client Problem*, 98 B.U. L. REV. 885 (2018); Shaila Dewan, *The Collateral Victims of Criminal Justice*, N.Y. TIMES, Sept. 5, 2015.

¹⁵ See, e.g., *Martin v. Hearst Corporation*, 777 F.3d 546 (2d Cir. 2015) (local newspaper not liable for continuing to run story on its website of plaintiff's arrest even after charges dismissed and arrest records erased pursuant to state statute); *Smith v. Sandusky Newspapers, Inc.*, Case No. 3:17 CV1135, 2018 U.S. Dist. LEXIS 103245 (N.D. Ohio June 20, 2018).

¹⁶ Former Ninth Circuit federal judge Alex Kozinski was quoted as saying that “[i]t is an open secret long shared by prosecutors, defense lawyers, and judges that perjury is widespread among law enforcement officers.” Stuart Taylor, Jr., *For the Record*, AM. LAW., Oct. 1995, at 71. See also Stephen W. Gard, *Bearing False Witness: Perjured Affidavits and the Fourth Amendment*, 41 SUFFOLK U. L. REV. 445, 448 (2008) (“substantial evidence demonstrates that police perjury is so common that scholars describe it as a ‘subcultural norm rather than an individual aberration.’”); I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 870 (2008) (former prosecutors describe police lies as “commonplace” and “prevalent”); Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1311–12 (1994) (“Judges, prosecutors, defense lawyers, and repeat offenders all know that police officers lie under oath. The empirical studies on the subject suggest that perjured testimony is common . . .”); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037 (1996); Myron W. Orfield, Jr., *Deterrence, Perjury and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 95–99 (1996) (prosecutors admit that police perjury is a reality).

¹⁷ See, e.g., J. David Goodman, *New York Crime Rate Keeps Falling, Mayor de Blasio Says; Cites Years of ‘Momentum’*, N.Y. TIMES, Dec. 2, 2014; Jen Chung, *NYC Hits Record Low Murder Rate in 2012, Bloomberg and Kelly Start Bragging*, GOTHAMIST (Dec. 28, 2012), http://gothamist.com/2012/12/28/nyc_hits_record_low_murder_rate_in.php.

¹⁸ *Floyd v. City of New York*, 959 F. Supp.2d 540, 658–60 (S.D.N.Y. 2013).

¹⁹ See K. Babe Howell, *Broken Lives From Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 291 (2009); NEW YORK ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS, *THE CIVIL RIGHTS IMPLICATIONS OF “BROKEN WINDOWS” POLICING IN*

Black Lives Matter movement calling for, *inter alia*, greater oversight and accountability of law enforcement.²⁰ Prosecutorial approaches to police perjury must also be considered in light of this present condition of decreasing crime and increasing calls for police accountability.²¹

Discussions of police perjury in New York usually begin with reference to *People v. McMurty*.²² In that case, criminal court Judge Irving Younger wrote about the emergence of “dropsy” testimony after the Supreme Court decided in *Mapp v. Ohio*²³ that the exclusionary rule—the suppression of evidence remedy for unlawful searches and seizures—applied to the states.²⁴ Post-*Mapp*, police officers began to testify that the defendant dropped contraband to the ground as the police officer approached. The logic behind dropsy testimony is simple—if the defendant abandoned the illegal items before the police engaged with him, there was no search to litigate. One study of pre- and post-*Mapp* cases concluded bluntly: “police are lying about the circumstances of such arrests so that the contraband . . . will be admissible.”²⁵

Given the seemingly irrefutable proof that police officers were committing perjury and had lied about their cases from the very inception, what changes or reforms, if any, were enacted by the offices of the District Attorney to detect, confront, and eradicate police perjury?

The only publicly known proposed remedy for the perjury problem was actually suggested by the defense. In *People v. Berrios*,²⁶ the defense argued that to alleviate the possibility of perjured testimony in dropsy cases, the prosecution should bear the ultimate burden at pretrial suppression hearings of proving the legality of the search and seizure, rather than the extant rule that required the defense to bear the burden of showing inadmissibility. In a move that unequivocally signaled the seriousness of the perjury problem, the Manhattan District Attorney sided with the defense:

However, the District Attorney of New York County informs us, in the

NYC AND GENERAL NYPD ACCOUNTABILITY TO THE PUBLIC (2018).

²⁰ For discussion of the genesis, focus, and principles of the movement, *see, e.g.*, Julius Bailey & David J. Leonard, *Black Lives Matter: Post-Nihilistic Freedom Dreams*, 5 J. CONTEMP. RHETORIC 67–69 (2015).

²¹ New York City provides one lens through which to view the problem of police perjury and accountability. Many other cities have experienced similar issues. *See, e.g.*, Peter J. Boyer, *Bad Cops*, THE NEW YORKER, May 21, 2001 (the Rampart Division scandal in the Los Angeles Police Department); Emily DePrang, *Houston Police Dept. Plagued by Fresh Scandal, Old Denial*, TEXAS OBSERVER, Sept. 26, 2014; Jason Meisner, *Cook County Prosecutors Bar 10 Chicago Cops from Testifying Because of Ties to Corrupt Ex-Sgt. Ronald Watts*, CHICAGO TRIBUNE, Apr. 24, 2018; Matt Rocheleau & Danny McDonald, *Former Public Safety Secretary to Consult with Scandal-Plagued State Police*, BOSTON GLOBE, July 18, 2018.

²² 314 N.Y.S.2d 194 (Crim. Ct. 1970).

²³ 367 U.S. 643 (1961).

²⁴ *McMurty*, 314 N.Y.S.2d at 196.

²⁵ Sarah Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960–62*, 4 CRIM. L. BULLETIN 549, 549–50 (1968).

²⁶ 270 N.E.2d 709, 712 (1971).

brief submitted on these appeals, that “For the last ten years participants in the system of justice—judges, prosecutors, defense attorneys and police officials—have privately and publicly expressed the belief that in some substantial but indeterminable percentage of dropsy cases, the testimony (that a defendant dropped narcotics or gambling slips to the ground as a police officer approached him) is tailored to meet the requirements of search-and-seizure rulings” and “it is very difficult in many (such) cases to distinguish between fact and fiction.”²⁷

The offered remedy was in fact the proverbial drop in the bucket. Pretrial suppression hearings are few and far between,²⁸ and this change in the burden of proof would likely have had little to no impact on the prosecutor’s initial decision to file charges. Nevertheless, the appellate court declined to adopt the new rule suggested by the defense.

Even with the public recognition of substantial police perjury, New York City’s District Attorneys failed to take any effective, affirmative steps to address and eradicate the problem, and twenty years later the existence of widespread police perjury was again exposed.

In 1992, then-New York City Mayor David N. Dinkins assembled the Mollen Commission in response to numerous and spreading allegations of drug dealing and corruption in several police precincts.²⁹ The Commission’s charge was “to investigate the nature and extent of corruption in the Department; to evaluate the Department’s procedures for preventing and detecting corruption; and to recommend changes and improvements in those procedures.”³⁰

The Mollen Commission’s final report discussed at great length what it called “falsifications,”³¹ and broke down this form of corruption into three categories: testimonial perjury, documentary perjury, and falsification of police records.³² To highlight the extent of the problem, the Commission noted that the practice of falsification was so prevalent that in some police precincts it had its own term—

²⁷ *Id.* at 714 (Fuld, C.J., dissenting).

²⁸ Steven Zeidman, *Policing the Police: The Role of the Courts and Prosecution*, 32 *FORDHAM URB. L.J.* 315, 321 (2005).

²⁹ See, e.g., James C. McKinley, Jr., *Dinkins Names Police Corruption Panel and Urges Civilian Police Review*, *N.Y. TIMES*, June 26, 1992, at A1, B2 (reporting on Dinkins’s appointment of a five-member anti-corruption panel, headed by former Deputy Mayor for Public Safety, Milton Mollen).

³⁰ MILTON MOLLEN, *CITY OF NEW YORK, COMM’N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP’T*, COMMISSION REPORT 1 (1994), at 1 [hereinafter “MOLLEN REPORT”].

³¹ *Id.* at 36.

³² *Id.*; See Joe Sexton, *New York Police Lie Under Oath, Report Says*, *N.Y. TIMES*, April 22, 1994, at A1 (“New York City police officers often make false arrests, tamper with evidence and commit perjury on the witness stand, according to a draft report of the mayoral commission investigating police corruption.”); Joe Sexton, *Types of Perjury Common Among Police Officers are Detailed*, *N.Y. TIMES*, April 23, 1994, at 27 [hereinafter Sexton, *Types of Perjury*].

“testilying”³³—and concluded that falsifications were “probably the most common form of police corruption facing the criminal justice system.”³⁴

The Commission’s report occasioned much hand wringing,³⁵ finger pointing, and promises of police reform, but there was little, if any, attention paid to the culpability of the prosecutors who, at best, had the wool pulled over their eyes and who, at worst, turned a blind eye to perjury.³⁶

Again, the critical question looms—confronted with evidence of substantial police perjury, what steps did New York City’s District Attorneys take to make sure their line prosecutors readily discerned it from the start and declined to initiate criminal charges? There is yet again ample evidence that police perjury is alive and well.³⁷ Recent concerns about perjury even caused a federal judge to take the bold and unprecedented step of holding a hearing to ascertain the prevalence of lying by New York City police officers.³⁸

As advocates call for a reexamination of the close relationship between prosecutors and police officers, some District Attorneys actually seek to strengthen those ties. In a wide-ranging interview for *New York Times Magazine*, the Manhattan District Attorney emphasized the need to develop and maintain especially close working relationships with the police. He referred to “extreme collaboration” between prosecutors and police, leading the reporter to note the symbiotic “hand-in-glove” relationship the District Attorney wished to foster.³⁹

Myriad explanations have been offered as to why prosecutors have been unable to stem the tide of police perjury. Some accounts focus on the failure to detect perjury. In the context of whether prosecutorial conviction review units should be managed by independent entities or current prosecutors from the office under review, Barry Scheck points to cognitive biases that limit our ability to be self-

³³ MOLLEN REPORT, *supra* note 30, at 36.

³⁴ *Id.*

³⁵ Sexton, *Types of Perjury*, *supra* note 32, at 27–28 (the Brooklyn District Attorney called the Mollen Commission report “significant” and his counterpart in Queens called it “terribly troublesome”).

³⁶ Similar omissions were discovered in the inquiry into the Rampart Division scandal in the Los Angeles police department. *See, e.g.*, Erwin Chemerinsky, *The Role of Prosecutors in Dealing With Police Abuse: The Lessons of Los Angeles*, 8 VA. J. SOC. POL’Y & L. 305, 308 (2001) (asking what the Los Angeles prosecutors’ offices could have done to uncover the police department’s Rampart Division scandal, and noting that there was no inquiry or post-mortem of any kind directed at the prosecutors’ offices).

³⁷ *See, e.g.*, Michelle Alexander, *Why Police Lie Under Oath*, N.Y. TIMES, Feb. 2, 2013; Joseph Goldstein, *‘Testilying’ by Police: A Stubborn Problem*, N.Y. TIMES, Mar. 18, 2018, in BLUE LIES, A SERIES OF STORIES EXAMINING THE ENTRENCHED CULTURE OF ‘TESTILYING’ IN THE NEW YORK POLICE DEPARTMENT; Joseph Goldstein, *He Excelled as a Detective, Until Prosecutors Stopped Believing Him*, N.Y. TIMES, Oct. 10, 2017; Olivia Bensimon & Emily Saul, *Ex-NYPD Detective Facing 5 Years in Jail After Pleading Guilty to Perjury*, N.Y. POST, Aug. 3, 2018.

³⁸ *Cordero v. The City of New York*, 282 F.Supp.3d 549, 557 (E.D.N.Y. 2017); Joseph Goldstein, *Brooklyn Judge Seeks to Examine Prevalence of Police Lying*, N.Y. TIMES, Oct. 17, 2017.

³⁹ Brown, *supra* note 3.

critical; that we are, to a great degree, blinded by our extant relationships.⁴⁰ “Groupthink,” a term coined by social psychologist Irving Janis, occurs when a group makes flawed decisions because group pressures lead to a deterioration of “mental efficiency, reality testing, and moral judgment.”⁴¹ Rather than think critically, let alone skeptically, about what the group is doing, the group members ignore alternatives and coalesce quickly around decisions.

The same concerns arise to the extent that a prosecutor has a sense of being on the same “side” as the police; that they are both part of the law enforcement apparatus.⁴² The more they feel that way the less likely they are to second-guess a “teammate.”

However, most analyses of police perjury focus on the ways prosecutors deliberately overlook, or ignore, falsifications. Many scholars highlight the prosecutor’s need to maintain a close working relationship with police officers for investigative and testimonial purposes, and suggest that reality might blind them to perjury or lead them to discount or disregard it.⁴³ Raising an accusation of perjury would obviously impact the prosecutor’s relationship with that specific police officer, and could have a ripple effect with other police officers in the same department.

In spite of well-worn admonitions from the Model Rules of Professional Conduct⁴⁴ and the Supreme Court⁴⁵ that prosecutors should be concerned with

⁴⁰ Barry Scheck, *Conviction Integrity Units Revisited*, 14 OHIO ST. J. CRIM. L. 705, 739 (2017).

⁴¹ IRVING L. JANIS, *VICTIMS OF GROUPTHINK: A PSYCHOLOGICAL STUDY OF FOREIGN POLICY DECISIONS AND FIASCOS* 9, (1972).

⁴² See, e.g., Jonathan Abel, *Cops and Pleas: Police Officers’ Influence on Plea Bargaining*, 126 YALE L. J. 1730, 1733 (2017) (referring to the “working group of prosecutors and police, commonly known as the ‘prosecution team’”); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 141 (referring to “mutual orientation toward ‘getting the bad guys’”).

⁴³ Michael Goldsmith, *Reforming the Civil Rights Act of 1871: The Problem of Police Perjury*, 80 NOTRE DAME L. REV. 1259, 1268 (2005) (“To function effectively, prosecutors depend on the police to investigate crime. The police, in turn, rely upon prosecutors to obtain convictions through the judicial system. These mutually dependent and supporting roles inevitably require prosecutors and police to work closely together on a regular basis. A prosecutor who files perjury charges against a police officer risks jeopardizing this vital relationship with his law enforcement team.”); Asit. S. Panwala, *Law Enforcement and Criminal Offenders: The Failure of Local and Federal Prosecutors to Curb Police Brutality*, 30 FORDHAM URB. L. J. 639, 651 (2003); Jay Sterling Silver, *Truth, Justice, and the American Way: The Case Against the Client Perjury Rules*, 47 VAND. L. REV. 339, 358 n.75 (1994) (discussing the need for “smooth working relations”); Griffin & Yaroshefsky, *supra* note 6, at 326 (“prosecutors work with and rely on police in the long term”).

⁴⁴ MODEL RULES OF PROF’L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS’N 1998) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”). See also STANDARDS FOR CRIMINAL JUSTICE § 3-1.2 cmt. (c) (AM. BAR ASS’N 1993) (“The duty of the prosecutor is to seek justice, not merely to convict.”).

⁴⁵ *Berger v. United States*, 295 U.S. 78, 88 (1935) (“[The prosecutor’s] interest, therefore in a criminal prosecution is not that it shall win a case, but that justice shall be done.”). The New York Court of Appeals put it this way: “It is not enough for [a district attorney] to be intent on the prosecution of his case. Granted that his paramount obligation is to the public, he must never lose sight of the fact that a defendant, as an integral member of the body politic, is entitled to a full measure of fairness. Put another way, his mission is not so much to convict

seeking justice as opposed to winning cases, many prosecutors might ignore falsifications because they are focused on obtaining convictions, a mindset Gershman refers to as the “conviction mentality.”⁴⁶ As the Mollen Commission report concluded: “[S]everal former and current prosecutors acknowledged—‘off the record’—that perjury and falsifications are serious problems in law enforcement that, though not condoned, are ignored.”⁴⁷ Other commentators ascribe more direct culpability to prosecutors, and suggest a degree of complicity in permitting, if not encouraging, perjury.⁴⁸

There are also the affective or attitudinal rationales. Some prosecutors might be less than concerned about perjury because they believe most defendants are guilty anyway and that the means justify the ends.⁴⁹ Others might have just simply given in to the seemingly inevitable and intractable nature of police falsifications.⁵⁰ Commentators have also suggested that prosecutors shy away from acknowledging police perjury because it is ultimately difficult to prove given the notorious Blue Wall of Silence.⁵¹

Bennett Gershman argues forcefully that to actualize the “duty to truth,” prosecutors should maintain professional distance and independence from the police. Gershman observes that, “[c]uriously, despite extensive documentation of erroneous convictions, widespread prosecutorial abuses that contribute to wrongful convictions, and a plethora of academic literature on the ethical responsibilities of prosecutors, there has been little discussion of the prosecutor’s legal and ethical duty to truth.”⁵² He argues that those duties derive from several sources, including the

as to achieve a just result.” *People v. Zimmer*, 51 N.Y.2d 390, 393 (1980).

⁴⁶ Gershman, *supra* note 1, at 353. See also PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 116 (2009) (“We all like to win. For prosecutors, that means getting tough sentences and defeating defendants’ claims that the police violated their constitutional rights.”).

⁴⁷ MOLLEN REPORT, *supra* note 30, at 42; Sexton, *Types of Perjury*, *supra* note 32 (“perjury for the sake of an arrest is accepted”).

⁴⁸ See, e.g., Rosanna Cavallaro, *Police and Thieves*, 96 MICH. L. REV. 1435, 1448 (1998) (prosecutors who worked with corrupt officers “demonstrated a level of knowledge that amounts to complicity”).

⁴⁹ Gershman, *supra* note 1, at 353; Gabriel J. Chin & Scott C. Wells, *The “Blue Wall” of Silence as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 263 (1998) (“it is possible that some prosecutors may actually approve of police perjury, at least when it leads to the ‘correct’ result”); Slobogin, *supra* note 16, at 1058 (prosecutors and judges winking at lying).

⁵⁰ Darlene Ricker, *Behind the Silence: Does Society Condone Police Brutality in Exchange for Getting Criminals Off the Streets?*, A.B.A. J., July 1991, at 46 (“Prosecutors shrug when police officers offer less than credible testimony; judges sigh and turn their heads.”); Slobogin, *supra*, note 16, at 1046 (referring to a study finding “stunning evidence of prosecutorial and judicial nonchalance”).

⁵¹ Chin & Wells, *supra* note 57, at 261–62; Jennifer E. Koepke, *The Failure to Breach the Blue Wall of Silence: The Circling of the Wagons to Protect Police Perjury*, 39 WASHBURN L.J. 211, 221–222 (2000); Lisa C. Harris, Note, *Perjury Defeats Justice*, 42 WAYNE L. REV. 1755, 1774 (1996) (asserting that prosecutors will often not pursue perjury charges because of difficulty of prevailing due to lack of physical evidence and evidentiary burdens).

⁵² Gershman, *supra* note 1, at 313.

constitutional obligation not to use false evidence,⁵³ and he emphasizes the prosecutor's duty to prejudge the truth by "making an informal adjudication of the defendant's guilt and the credibility of witnesses."⁵⁴ In order to make this "informal adjudication," he urges prosecutors to "examin[e] facts skeptically" and to take an "aggressive commitment" to truth rather than an "agnostic approach."⁵⁵

A central theme runs through Gershman's duty to truth—prosecutors should evaluate the proof with a "healthy skepticism."⁵⁶ More specifically, the prosecutor "should not assume that his witnesses are telling the truth."⁵⁷ Gershman singles out dropsy scenarios and advises prosecutors to be "suspicious," "rigorously test the hypothesis of guilt,"⁵⁸ and assume an active role in "investigating contradictory evidence of innocence."⁵⁹

Gershman argues essentially that a culture shift—an ethically and constitutionally mandated transformation—is necessary to overcome the impediments to the duty to truth outlined above. In an earlier piece, he wrote with concern about the ingrained ethos of "overzealous prosecutorial advocacy,"⁶⁰ and he addresses that concern by urging prosecutors to adopt a skeptical and suspicious attitude toward the evidence and statements of witnesses. In similar fashion, Erwin Chemerinsky, writing about the Los Angeles Police Department's infamous Rampart Division disgrace, noted that prosecutors failed to "challenge" and were reluctant or unwilling to "press" police officers about the truth of their narratives.⁶¹ He recommended that prosecutors should aggressively investigate and evaluate the credibility of police witnesses.⁶²

However, if past is prologue, suspicious and skeptical attitudes toward police witnesses will not be sufficient to tackle the entrenched problem of police perjury. Cultural shifts can only occur if there are institutional changes. Instead, prosecutors must adopt a purposely confrontational stance marked by combative adversarial

⁵³ *Id.* at 314.

⁵⁴ *Id.* at 316.

⁵⁵ *Id.*

⁵⁶ *Id.* at 342.

⁵⁷ *Id.*

⁵⁸ *Id.* at 347.

⁵⁹ *Id.* at 348. Even the standards of professional behavior recommend against too close a working relationship between prosecutors and police officers. ABA Standard 3-3.2, "Relationships with Law Enforcement," advises prosecutors, *inter alia*, to "maintain respectful yet independent judgment when interacting with law enforcement personnel." 2015 CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION, § 3-3.2(b) (AM. BAR ASS'N 2015).

⁶⁰ Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 458 (1992). While some scholars urged that prosecutors respond to accusations of zealotry by adopting a more neutral posture, others found the notion of neutrality to be unhelpful. *See, e.g.*, Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 840 (calling the idea of prosecutorial neutrality "unenlightening" in that it "encompasses a range of norms, each of which is itself uncertain in meaning.").

⁶¹ Chemerinsky, *supra* note 36, at 310.

⁶² *Id.* at 316.

testing of police officer narratives.

The suggestion of adversarialness is not so farfetched. Although we purport to have an adversarial system of criminal justice, few would argue that most criminal courts, dominated by rapid guilty pleas as opposed to trials, are actually adversarial in practice.⁶³ Given that reality, it would be beneficial to actually insert a measure of adversarialness into the process.⁶⁴

It is also the case that the wave of recently elected self-styled progressive prosecutors presents a propitious time to re-examine the relationship between police and prosecutors.⁶⁵ These prosecutors ran on platforms promising to end mass incarceration by ending tough-on-crime policies and transforming longstanding prosecutorial practices.⁶⁶ In St. Louis, prosecutor Kim Gardner, elected in 2016, recently issued a written statement proclaiming that her office would no longer accept cases brought by twenty-eight specified police officers, a so-called “exclusion list,” due to concerns about their credibility and veracity.⁶⁷

⁶³ See, e.g., Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2118 (1998); William T. Pizzi, *The American “Adversary System”?*, 100 *W. VA. L. REV.* 847 (1998); Zeidman, *supra* note 28, at 339 (“Although the Criminal Court has been fraught with problems, an overabundance of adversarialness is not one of them.”).

⁶⁴ In fact, the relationship between prosecutors and police may already be antagonistic or adversarial if viewed from the vantage point of the police. Recently in New York City, the Manhattan District Attorney has publicly lamented his inability to get police personnel files from the Police Department, and the ways that frustrates and harms prosecutors’ abilities to effectively and fairly perform their jobs. Mike Hayes & Kendall Taggart, *The District Attorney Says the NYPD Isn’t Telling Prosecutors Which Cops Have a History of Lying*, *BUZZFEED* (June 2, 2018), <https://www.buzzfeednews.com/article/mikehayes/nypd-cops-lying-discipline-disrict-attorneys-prosecutors>. While much has been written about how prosecutors see their relationship with police officers, there is a dearth of scholarly legal literature analyzing the same relationship from the point of view of police officers.

⁶⁵ See Justin Miller, *The New Reformer DAs*, *AMERICAN PROSPECT*, (Jan. 2, 2018), <http://prospect.org/article/new-reformer-das> (referring to grassroots advocacy by organizations like Color of Change, with funding from, among others, George Soros’s Open Society Foundation, to elect progressive District Attorneys in several places across the country).

⁶⁶ *Id.*

⁶⁷ Christine Byers, *St. Louis Prosecutor Says She Will No Longer Accept Cases from 28 City Police Officers*, *ST. LOUIS POST-DISPATCH* (Aug. 31, 2018), https://www.stltoday.com/news/local/crime-and-courts/st-louis-prosecutor-says-she-will-no-longer-accept-cases/article_6d8def16-d08d-5e9a-80ba-f5f5446b7b6a.html (The prosecutor’s statement observed trenchantly that “Police officers play an important role in the criminal justice system, and the credibility of officers is one of the most important attributes of the job,” and further that “[a] police officer’s word, and the complete veracity of that word, is fundamentally necessary to doing the job. Therefore, any breach in trust must be approached with deep concern.”). Still, whether self-proclaimed progressive prosecutors can make meaningful change remains to be seen. In Philadelphia, the police union has openly rebuked Larry Krasner, the reform-minded prosecutor. Joe Trinacria, *Philly FOP President Blasts DA Krasner in Letter to Police Cadets*, *PHILA. MAG.*, Mar. 2, 2018. And as with every aspect of the criminal legal system, race is front and center. In St. Louis, staff prosecutors moved to unionize with police officers soon after African-American lawyer Wesley Bell took over for long-time prosecutor, Bob McCulloch, a white man who failed to indict Police Officer Darren Wilson for killing 18-year-old Michael Brown. Akela Lacy, *Before Criminal Justice Reformer is Even Sworn in, St. Louis Prosecutors Have Joined a Police Union*, *THE INTERCEPT*, Dec. 20, 2018. For some, the problems inherent with vast prosecutorial power mean that any reforms will ultimately have little meaningful impact on the criminal legal system. Note, *The Paradox of “Progressive Prosecution,”* 132 *HARV. L. REV.* 748 (2018).

While asking prosecutors to take a confrontational or adversarial stance toward police officer witnesses might on its face seem extreme, consider the cycles of perjury revelations in New York alone. Consider the hundreds of thousands of illegal stops-and-frisks that went undetected by local prosecutors until a federal judge intervened.⁶⁸ Consider that multiple homicide convictions were thrown out in Brooklyn after wrongly convicted people served decades behind bars based on testimony from a key detective that turned out to be, putting it mildly, less than credible.⁶⁹

Perhaps, given the inherently interwoven nature of the prosecutor/police officer relationship, the best approach is to cede the initial interview for pre-charge screening purposes to an independent group or organization comprised of, among others, members of the affected community, or to establish and enable such an entity to regularly review prosecutorial charging practices. As two eminent prosecutorial ethics scholars observed:

Maintaining independence from the police is difficult as a practical matter. Whether or not prosecutors work hand-in-glove with police in the investigative stage, prosecutors are dependent on the police. . . . At a minimum, prosecutors and police officers deal with each other professionally on a daily basis, and must treat each other as colleagues. They may become friends, and identify, with their counterparts.⁷⁰

A direct role for civilian community members in matters of policing surfaced as a result of the federal stop-and-frisk class action in New York City.⁷¹ After finding that the City of New York was liable for violating the Fourth and Fourteenth Amendment rights of the plaintiff class, Judge Shira Scheindlin turned her attention to fashioning remedies, and detailed the importance of giving the affected community a seat at the table:

[C]ommunity input is perhaps an even more vital part of a sustainable remedy in this case. The communities most affected by the NYPD's use of stop and frisk have a distinct perspective that is highly relevant to crafting effective reforms. No amount of legal or policing expertise can replace a

⁶⁸ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 660 (S.D.N.Y. 2013).

⁶⁹ Chelsea Rose Marcius & James Fanelli, *Dirty Detective Louis Scarcella Insists, 'I've Done Nothing Wrong,' Despite Sending 13 Wrongfully Convicted People to Jail*, N.Y. DAILY NEWS, May 20, 2018 (referring to “shady investigations involving tainted evidence, misleading testimony or forced confessions” in nearly a dozen homicide cases that resulted in 13 people being wrongfully convicted).

⁷⁰ Green & Zacharias, *supra* note 60, at n.95. See also Sally Kohn, *First Mike Brown, Then Eric Garner: Prosecutors Can't Be Trusted to Try Cops*, DAILY BEAST, Dec. 3, 2014, <https://www.thedailybeast.com/first-mike-brown-then-eric-garner-prosecutors-cant-be-trusted-to-try-cops> (“Attorneys who usually work hand-in-hand with the police in pursuing other criminal cases can’t honestly be expected to be impartial and aggressive in then prosecuting those same officers.”).

⁷¹ *Floyd*, 965 F. Supp. 2d 540 at 620–21. (S.D.N.Y. 2013).

community's understanding of the likely practical consequences of reforms in terms of both liberty and safety.⁷²

Judge Scheindlin created a Joint Remedial Process and specified that it should include, *inter alia*, members of the communities where stops most often take place; representatives of religious, advocacy, and grassroots organizations; representatives of groups concerned with public schooling, public housing, and other local institutions; local community leaders; and Communities United for Police Reform.⁷³

In similar fashion, community members most impacted by police and prosecutorial practices should play a role in whether arrests proceed to criminal charges.⁷⁴

There is, of course, no sure-fire way to detect with certainty if someone is lying. Even if it were feasible for prosecutors to administer some kind of lie detector test to police officers at the initial interview, there is general agreement that the results of such examinations are of limited utility.⁷⁵ Similarly, while there is a plethora of books and articles that proclaim to be able to teach people how to spot when someone is lying,⁷⁶ those purported techniques have been subject to much criticism.⁷⁷

⁷² *Id.* at 686.

⁷³ *Id.*

⁷⁴ See, e.g., Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1623 (2017) (“There is reason to think that if those most likely to be arrested and incarcerated were given truly equal influence over policy, and if policymaking happened more locally, then the criminal justice system would be less rather than more punitive.”); Note, *The Paradox of “Progressive Prosecution,”* 132 HARV. L. REV. 748, 759 (2018) (“the prosecuted should be integral to the process of crafting these reforms.”).

⁷⁵ See, e.g., Jennifer Vogel & Madeleine Baran, *Inconclusive: The Truth About Lie Detector Tests*, AMERICAN PUBLIC MEDIA, Sept. 20, 2016, <https://www.apmreports.org/story/2016/09/20/inconclusive-lie-detector-tests>; Nigel Barber, *Do Lie Detectors Work?*, PSYCHOLOGY TODAY, March 7, 2013, <https://www.psychologytoday.com/us/blog/the-human-beast/201303/do-lie-detectors-work>. While law enforcement agencies continue to use various forms of lie detector, or polygraph, tests for hiring, security clearance and other purposes, courts vary as to whether results may be used for any reason at trial. Polygraph results are generally viewed as unreliable and inadmissible for any purpose in New York. *People v Angelo*, 666 N.E.2d 1333, 1335 (N.Y. 1996); *People v. Shedrick*, 489 N.E.2d 1290, 1292 (N.Y.1985).

⁷⁶ See, e.g., Rachel Gillett & Samantha Lee, *You Can Tell Someone's Lying to You by Watching their Face*, BUSINESS INSIDER (Apr. 24, 2018), <https://www.businessinsider.sg/how-to-tell-someones-lying-by-watching-their-face-2016-1> (discussing book by former FBI agent Mark Bouton, “How to Spot Lies Like the FBI,” that suggests analyzing facial expressions and associated reactions); Ellen Hendriksen, *How to Tell if Someone is Lying*, SCI. AM. (Jan. 27, 2018), <https://www.scientificamerican.com/article/how-to-tell-if-someone-is-lying1> (suggesting focus on physiological reactions such as gestures and facial expressions, and then listening for various cues like whether the narrative is too chronologically pat or full of linguistic convolution).

⁷⁷ Still, however, serious efforts at how best to detect lying are ongoing and merit study and analysis. See, e.g., Jacqueline R. Evans et al., *Validating a New Assessment Method for Deception Detection: Introducing a Psychologically Based Credibility Assessment Tool*, J. OF APPLIED RESEARCH IN MEMORY & COGNITION, Mar. 2013, at 33, <https://doi.org/10.1016/j.jarmac.2013.02.002> (testing a new credibility assessment tool, the Psychologically Based Credibility Assessment Tool (PBCAT), and concluding that results indicate that it is capable of improving deception detection performance, even with minimally trained, nonexpert observers).

Most people would, however, likely agree about one feature of our ability to detect lying—we are more likely to be successful if we are talking to someone face-to-face as opposed to over the phone or via some kind of video conference.⁷⁸ Yet in New York City, a decision was made several years ago that the arresting officer no longer had to meet face-to-face with a prosecutor to enable her to decide on charges and to draw up a criminal complaint.⁷⁹ Instead, the arresting officer can, and does, literally phone it in.⁸⁰ The logic behind the change in practice was twofold: crime was high and police officers needed to be on the street rather than waiting in line to be interviewed in the prosecutor's office, and it was cost effective—often, the waiting to be interviewed led to overtime.⁸¹

Presently, however, New York is in the midst of a heralded and unprecedented decrease in crime.⁸² Further, the police department has moved some measure away from its zero tolerance application of Broken Windows, or quality-of-life, policing that insisted on massive arrests for minor crimes and offenses.⁸³ Less crime and fewer directives to make arrests for minor offenses means that police officers can, and should, be available to meet face-to-face with a prosecutor for each arrest they make.

The initial interview between arresting officer and prosecutor is the moment of truth for the prosecutor's duty to truth. That face-to-face interview must be radically reconceived if there is a bona fide commitment to rooting out perjury.

The interview must be adversarial in every sense of the word. For starters, the interview should be videotaped to prevent police officers from conforming future testimony to meet constitutional objections or to fill holes in the prosecution's case. The police officer should be subject to rigorous cross-examination, under oath and subject to perjury, by a cadre of prosecutors specifically trained to take on this

⁷⁸ A New York Daily News analysis found that most parole interviews in New York State are now conducted via video-link as opposed to in-person, and highlighted the challenges that presents for parole board members when trying to assess the interviewee's veracity and authenticity. See Stephen Rex Brown, Trevor Boyer & Reuven Blau, *N.Y. Parole commissioners travel the state to conduct video hearings and rarely step inside prisons*, N.Y. DAILY NEWS, Jan. 20, 2019.

⁷⁹ Chuck Sudetic, *Plan Streamlines Booking in 14 Brooklyn Precincts*, N.Y. TIMES, Aug. 14, 1995 (“[w]e all used to think you had to see a police officer and a victim sitting across a table,” quoting an assistant district attorney).

⁸⁰ See Zeidman, *supra* note 28, at 349–50; Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Really Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1361–62 (1997).

⁸¹ Joseph P. Fried, *TV Speeds Cases from Police to Prosecutor*, N.Y. TIMES, Mar. 28, 1995 (“[v]ideo teleconferencing is about efficiency, processing arrests and returning police officers to the street as quickly as possible,” quoting then Police Commissioner William J. Bratton).

⁸² Tina Moore, *NYC Crime Continues to Plummet in 2018*, N.Y. POST (Feb. 6, 2018), <https://nypost.com/2018/02/06/nyc-crime-continues-to-plummet-in-2018>.

⁸³ Benjamin Mueller, *New York City Will End Marijuana Arrests for Most People*, N.Y. TIMES (June 19, 2018), <https://www.nytimes.com/2018/06/19/nyregion/nypd-marijuana-arrests-new-york-city.html>; David Colon, *Manhattan DA Will End Criminal Prosecution of Fare Beaters this Fall*, GOTHAMIST, June 30, 2017, http://gothamist.com/2017/06/30/manhattan_da_fare_evasion.php.

crucial task and who embrace their role as adversaries.⁸⁴

The police officer should be required to bring all paper work to the interview, including anything filled out by any other police officers. The prosecutor should demand to see all forms of potential corroboration from other police officers or witnesses, and all 911 and related radio calls and tape from any police or private video cameras.

The prosecutors must monitor and track suspicion of perjury against individual officers so that suspicions are confirmed and repeat offenders are caught.⁸⁵ In addition, prosecutors' offices must maintain and regularly analyze detailed data about each officer—the number of arrests that day, week, month year; what were the arrest charges; what were the salient facts alleged by the officer; all available allegations of misconduct; etc.⁸⁶ We live in an era of data compilation and analysis. The New York City Police Department regularly lauds its “CompStat” program that reflects a data-driven approach to policing.⁸⁷ The Manhattan District Attorney's Office has similarly embraced data collection: “It's the ‘Moneyball’ approach to crime . . . The tool is data; the benefit, public safety and justice . . . Some of the defendants are often surprised we know so much about them.”⁸⁸ Prosecutors should similarly know “so much” about police officers.

In New York, the law requires that complaints allege “facts of an evidentiary character,”⁸⁹ providing reasonable cause to believe that the accused committed the crime charged.⁹⁰ New York's highest court has emphasized the need for specific factual allegations as opposed to conclusory, generic statements.⁹¹ And yet, the Court's call for factually rich and specific complaints has yielded a set of templates.⁹² To ensure they stand up to scrutiny, prosecutors should draft detailed accusatory instruments that support the crimes charged as well as the

⁸⁴ This is in stark contrast to the ways that New York City District Attorneys have typically staffed the “complaint room.” Usually, it has been used as a training ground for new prosecutors. In Brooklyn, the District Attorney at one point used per diem non-lawyers to handle the initial interview and to draft the charges.

⁸⁵ Chemerinsky, *supra* note 36, at 312.

⁸⁶ It was owing to hearing repeated “drosy” narratives that a judge was able to recognize and identify a pattern of potential perjury in *McMurty*, 314 N.Y.S.2d at 195–97. In similar fashion, a judge took the rare step of granting a subpoena for a Police Officer's personnel files and Civilian Complaint and Review Board records after defense counsel produced several complaints where the officer gave the same drosy story. *People v. Parnell*, 789 N.Y.S.2d 827 (N.Y. 2004).

⁸⁷ For an introduction to Compstat, *see generally* BUREAU OF JUSTICE ASSISTANCE, POLICE EXEC. RESEARCH FORUM, *COMPSTAT: ITS ORIGINS, EVOLUTION, AND FUTURE IN LAW ENFORCEMENT AGENCIES* (2013); Chris Smith, *The Controversial Crime-Fighting Program That Changed Big-City Policing Forever*, NEW YORK MAGAZINE, Mar. 2, 2018.

⁸⁸ Brown, *supra* note 3.

⁸⁹ N.Y. Crim. Proc. Law §100.15 (McKinney 2005).

⁹⁰ *People v. Dumas*, 497 N.E.2d 686 (N.Y. 1986).

⁹¹ *People v. Alejandro*, 511 N.E.2d 71 (1987).

⁹² Zeidman, *supra* note 28, at 345.

constitutionality of the search and seizure.⁹³

And if prosecutors fully embrace the duty to truth, they must reconsider their extant approach to disclosure. Subject to any necessary redactions out of valid concerns for safety of a victim or witness, the tape of the initial interview should be immediately turned over to the defense for the arraignment or initial appearance. All paperwork should be turned over to the defense.⁹⁴ All radio calls or videotapes should be turned over to the defense. And so too should all data regarding the arresting officer be turned over to the defense.⁹⁵

This liberal approach to discovery obviously requires a seismic cultural change. As it is, criminal appeals reflect persistent turmoil spanning more than half a century regarding exculpatory evidence the prosecution is required to turn over to the defense pursuant to *Brady v. Maryland*.⁹⁶ In New York, annual efforts to reform the state's strict discovery laws are vigorously and successfully opposed by the New York State District Attorney's Association.⁹⁷ Yet the well-documented existence of phenomena like implicit bias, confirmation bias, and tunnel vision dictate that prosecutors should include defense perspectives in the analysis of a police officer's narrative.⁹⁸ This degree of openness also accords with the increasingly loud calls for prosecutorial transparency and accountability.⁹⁹

⁹³ Although facts establishing probable cause are not required by statute, the decision in *Floyd v. City of New York*, 959 F. Supp.2d 540 (S.D.N.Y. 2013), finding rampant Fourth Amendment and Equal Protection violations, should serve as a clarion call for proof of the lawfulness of the arrest to be clearly reflected in the criminal court complaint.

⁹⁴ See, e.g., Jodi Nafzger, *Leveling Felony Charges at Prosecutors for Withholding Evidence*, 66 DRAKE L. REV. 307, 349 (2018) (discussing "open-file" discovery, whereby the prosecution turns over its entire file to the defense, to enhance transparency); Daniel S. McConkie, *Structuring Pre-Plea Criminal Discovery*, 107 J. CRIM. L. & CRIMINOLOGY 1 (2017). Several states have already moved toward more robust discovery. See, e.g., Janet Moore, *Democracy and Criminal Discovery Reform After Connick and Garcetti*, 77 BROOKLYN L. REV. 1329, 1332, 1371–72 (2012) (noting that the Supreme Court has acknowledged the benefits of liberal discovery, and arguing that open file discovery increases "fairness, finality, and efficiency of criminal adjudications").

⁹⁵ Chemerinsky, *supra* note 36, at 320.

⁹⁶ 373 U.S. 83 (1963) (establishing the prosecution's obligation to provide the defense with evidence that might exonerate the accused or mitigate punishment). See, e.g., Ellen Yaroshefsky, *Why Do Brady Violations Happen? Cognitive Bias and Beyond*, 37 CHAMPION 12 (2013) (discussing the myriad reasons—negligence, cognitive bias, mistakes, office culture and policy—that Brady issues persist); Ellen Yaroshefsky, *Foreword: New Perspectives on Brady and Other Disclosure Obligations: What Really Works*, 31 CARDOZO L. REV. 1943 (2010).

⁹⁷ Jake Offenhartz, *Movement to Reform New York's Discovery Statute Faces a Familiar Foe: Prosecutors*, THE APPEAL (Mar. 6, 2018), <https://theappeal.org/movement-to-reform-new-yorks-discovery-statute-faces-a-familiar-foe-prosecutors-4b2bd2f8ac/>.

⁹⁸ Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1603 (2006) (re prosecutorial confirmation bias); Mark D. White, *Tunnel Vision in the Criminal Justice System*, PSYCH. TODAY (May 25, 2010), <https://www.psychologytoday.com/us/blog/maybe-its-just-me/201005/tunnel-vision-in-the-criminal-justice-system>; Scheck, *supra* note 47 (cognitive biases dictate that conviction review units should be helmed by, or at a minimum include, defense attorneys).

⁹⁹ Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Accountability*, 92 NOTRE DAME L. REV. 51 (2016) (discussing the mounting pressure to hold prosecutors accountable); Dan M. Clark, *New DAASNY President Urges Cuomo to Reject Bill to Create Misconduct Board*, N.Y.L.J., July 5, 2018 (regarding bipartisan legislation to

And when perjury is discovered, prosecutors must prosecute.¹⁰⁰ Historically, prosecutors are loath to charge police officers with perjury, and so it is unlikely that fear of prosecution deters police falsifications.¹⁰¹ While the oft-stated rationale for the exclusionary rule is that it would serve to deter police from violating the constitution,¹⁰² many have opined that officers would more likely be deterred if they felt a more personal sting, such as suspension from work and/or docked pay.¹⁰³ In similar fashion, it seems inherently logical to imagine that subjecting officers to criminal sanctions would have a salutary effect on perjury.

Finally, there are considerations aimed at the prosecutors—should evaluations of their performance be based to any extent on their efforts to stamp out police perjury?¹⁰⁴ Scholars urge that performance standards should value examination of decisions not to prosecute in addition to the ever-present focus on convictions.¹⁰⁵ Always lurking is the question of liability—can, or should, a prosecutor ever be liable criminally, civilly, or ethically? Currently, despite wielding vast power, prosecutors are effectively shielded from any meaningful legal accountability by rules of absolute and qualified immunity.¹⁰⁶ It is similarly exceedingly rare for prosecutors to be professionally disciplined by external committees that investigate

establish a prosecutorial oversight commission).

¹⁰⁰ Peter Walkingshaw, *Prior Judicial Findings of Police Perjury: When Hearsay Presented as Character Evidence Might Not Be Such a Bad Thing*, 47 COLUM. J.L. & SOC. PROBS. 1, 6 (2013) (the most obvious mechanism for deterring police perjury is probably criminal prosecution of the officers who commit it).

¹⁰¹ Chin & Wells, *supra* note 57, at 261 (“Police criminality, including police perjury, even where guilt is clear, has not traditionally been dealt with aggressively by prosecutors.”); Cloud, *supra* note 16, at 1313 (rarely are police officers prosecuted, let alone punished, for perjury); Hon. Sonia Sotomayor & Nicole A. Gordon, *Returning Majesty to the Law and Politics: A Modern Approach*, 30 SUFFOLK U. L. REV. 35, 47 n.52 (1996) (“Perjury cases are not often pursued, and perhaps should be given greater consideration by prosecuting attorneys as a means of enhancing the credibility of the trial system generally.”).

¹⁰² *Mapp v. Ohio*, 367 U.S. 643 (1961); *United States v. Calandra*, 414 U.S. 338, 347 (1974); Daniel S. Schneider, *The Future of the Exclusionary Rule and the Development of State Constitutional Law*, 1987 WIS. L. REV. 377, 384 (1987). Former Chief Justice Burger opined that law enforcement would indeed be deterred if evidence “is suppressed often enough.” *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 415 (Burger, C.J., dissenting).

¹⁰³ See, e.g., Donald A. Dripps, *The “New” Exclusionary Rule Debate: From “Still Preoccupied with 1985” to “Virtual Deterrence,”* 37 FORDHAM URB. L. J. 743 (2010); Nicole Haas, *The Remedy of Last Resort*, 23 WIDENER L. REV. 115 (2017).

¹⁰⁴ Green & Yaroshefsky, *supra* note 97.

¹⁰⁵ Chemerinsky, *supra* note 36, at 320–21 (prosecutor performance is tied to conviction rates); Medwed, *supra* note 50, at 172. Professor Tracey Meares suggests providing financial incentives for prosecutors to accurately charge defendants. Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851 (1995). More generally, Professor Jason Kreag recommends using data analytics to measure prosecutorial performance. Jason Kreag, *Prosecutorial Analytics*, 94 WASH. U. L. REV. 771 (2017).

¹⁰⁶ See, e.g., *Taylor v. Kavanagh*, 640 F.2d 450 (2d Cir. 1981) (“because a prosecutor is acting as an advocate in a judicial proceeding . . . the introduction of illegally-seized evidence at trial does not create liability in damages”); Frederic Block, *Let’s Put an End to Prosecutorial Immunity*, The Marshall Project, Mar. 13, 2018.

wrongdoing by lawyers or by their superiors in the District Attorney's Office.¹⁰⁷ There is, however, a burgeoning movement to discard prosecutorial impunity in the face of growing discontent and dissatisfaction with the status quo.¹⁰⁸ No doubt that was part of the reason why New York Governor Andrew Cuomo signed a bill establishing a first of its kind statewide commission to investigate allegations of prosecutorial misconduct, despite vociferous objection from the New York State District Attorney's Association.¹⁰⁹ And while many believe these are drastic measures, the truth is that entrenched policies and attitudes have to change if the duty to truth is ever to become paramount and consequential.

¹⁰⁷ Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143 (2016); Thomas P. Sullivan & Maurice Possley, *The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform*, 105 J. CRIM. L. AND CRIMINOLOGY 881 (2015); Radley Balko, *Another Study Finds Few Consequences for Prosecutor Misconduct*, WASHINGTON POST, Mar. 8, 2017; Zeidman, *supra* note 28, at n.208; Andrea Elliott & Benjamin Weiser, *When Prosecutors Err, Others Pay the Price*, N.Y. TIMES, Mar. 21, 2004.

¹⁰⁸ See, e.g., Slobogin, *supra* note 16, at 1058 (proposing a liquidated damages remedy); H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 CATH. U. L. REV. 51 (2014) ("To deter further misconduct and abuse of power, prosecutors must be punished more severely than attorneys who hold less distinguished and privileged positions. For example, prosecutors guilty of misconduct could be punished as willful perjurers, which can carry a heavy penalty."); Shaun King, *A Historic Bill in New York Could Create First-of-Its-Kind Accountability for Prosecutors—If Andrew Cuomo Doesn't Veto It*, THE INTERCEPT, June 22, 2018.

¹⁰⁹ See Leonard Greene, *Cuomo Signs Prosecutorial Misconduct Bill in Bid to End Wrongful Convictions*, N.Y. DAILY NEWS, Aug.20, 2018.