

Tolling Justice

ANJELICA HENDRICKS*

Police officers commit crimes. All too often, however, they are not prosecuted. For decades, the conventional explanation has been that unprosecuted police crimes are the product of human choices: prosecutors who shield the police, unions that immunize their members from accountability, and police themselves for refusing to condemn their colleagues. Though these explanations play a role in the phenomenon, they are incomplete.

This Article shows that there is another reason why police officers frequently escape criminal accountability: statutes of limitations. Using a hand-built, original dataset of 838 likely police crimes, I find that statutes of limitations prevented prosecutors from bringing charges based on 642 of those crimes—a rate of 76.6%. These crimes were not minor offenses: in many instances, officers tortured suspects, committed perjury, tampered with evidence, and sexually abused witnesses. Shockingly, after committing these offenses, many unprosecuted officers remain in positions of power, as leaders of police agencies and even judges.

After presenting this evidence, the Article grapples with the question whether statutes of limitation should shield police in this way. Although statutes of limitation are reasonably understood to protect certain fairness and legitimacy values associated with procedural justice, I argue that those very values should counsel against applying statutes of limitation to insulate police wrongdoing.

Furthermore, society has developed criminal law to address what we believe to be particularly egregious acts. When police commit crimes, there is expressive value in treating them as such. Fortunately, although statutes of limitations currently work to shield the police, they are amendable. They exist at the mercy of legislatures who have seen fit to amend statutes of limitations previously in the interests of justice. The

* Assistant Professor of Law, University of Pennsylvania Carey Law School. I am immensely grateful to Aaron Tang, Bocar Ba, Guy Charles, Paul Heaton, Sandra Mayson, Benjamin Levin, and John Rappaport for their comments at different stages of this project. This Article received significant feedback at Crimfest 2022, the 2022 Lutie A. Lytle Black Women Law Faculty Workshop, the ABA/AALS Academy for Justice Workshop, the Spring 2023 W&L Faculty Workshop, and the 2023 Culp Colloquium. I am extremely grateful for the research support of Chelsea Rader and Claire Fondrie-Teitler, and to the editors of the *Ohio State Law Journal* for their work in bringing this article to print. Errors are my own.

Article accordingly concludes by describing the political economy of reform.

TABLE OF CONTENTS

I. INTRODUCTION	473
II. THE PROBLEM—UNPROSECUTED POLICE CRIMES.....	476
A. <i>Examples of Police Crimes</i>	477
B. <i>The Prevalence of Unprosecuted Police Crimes</i>	480
III. WHY ARE THESE CRIMES NOT PROSECUTED?.....	488
A. <i>Prosecutors Shield Police</i>	488
B. <i>Police Officer Suspects Benefit from Special Procedural Protections</i>	493
C. <i>The Blue Wall of Silence</i>	495
IV. STATUTES OF LIMITATIONS AS A BARRIER TO POLICE PROSECUTION	496
A. <i>Methodology</i>	497
1. <i>A Typical Case: Perjury, Obstruction, and Tampering by an Arkansas Police Officer</i>	498
2. <i>Jurisdictions That Apply the Discovery Accrual Rule: Police Crimes in California</i>	500
3. <i>Crimes Without Statutes of Limitations: Police Felony Offenses in Kentucky</i>	503
4. <i>Crimes Without Statutes of Limitations: Offenses on the Felony / Misdemeanor Border in West Virginia</i>	504
5. <i>Changing Statute of Limitations Periods: Sexual Misconduct Offenses in Kansas</i>	505
6. <i>Tolling the Statute of Limitations Due to a Defendant's Physical Absence: The Zain Case</i>	507
7. <i>Tolling the Statute of Limitations Due to a Police Defendant's Status as a Public Official: Police Crimes in Pennsylvania</i>	508
B. <i>Findings</i>	510
V. SHOULD STATUTES OF LIMITATION INSULATE POLICE FROM CRIMINAL LIABILITY?.....	512
A. <i>Benefits of Removing Statutes of Limitations for Police Crimes</i>	512
1. <i>The Expressive Value of Prosecuting Police Crimes</i>	513
2. <i>Identify More Victims of Police Crimes</i>	516
3. <i>Preclusion from Law Enforcement Employment</i>	517
4. <i>Loss of Pension Benefits</i>	519
B. <i>Counterarguments</i>	520

1. <i>In Defense of Police Statutes of Limitation?</i>	520
2. <i>Responses</i>	522
3. <i>The Political Economy of Reform</i>	524
VI. CONCLUSION.....	526

I. INTRODUCTION

Between 1972 and 1992, Chicago Police Detective Jon Burge electrocuted, mutilated, beat, and otherwise tortured more than one hundred people.¹ Worse yet, many of his victims were innocent: dozens of them were sent to jail for years before eventually having their wrongful convictions overturned.² Burge himself, however, was never charged—much less convicted—for his crimes.³

The Burge example is egregious. But it is not isolated: police officers commit crimes with striking frequency while often avoiding criminal consequences.⁴ This Article grapples with this phenomenon.

Scholars have offered an array of reasons why police so frequently avoid criminal culpability when they violate the law.⁵ The existing narrative is that these cases largely are non-existent due to prosecutors being unwilling to bring criminal charges against their colleagues, the strong union protections provided officers, and the “blue wall of silence” that officers use to protect one another.⁶

This Article argues that these explanations are incomplete. Using an original dataset comprising 838 instances of likely police crimes observed in a national registry of wrongful convictions, I find that prosecutors actually *do* charge police officers with some frequency in red and blue states alike. More specifically, prosecutors brought charges against police in 143 of the 196 cases in my dataset in which they were legally permitted to do so, a rate of 72%.⁷

¹ Kelly Hayes, *Chicago Police Torture: Explained*, APPEAL (Dec. 5, 2019), <https://theappeal.org/the-lab/explainers/chicago-police-torture-explained/> [https://perma.cc/77PQ-FUS6].

² *Id.*

³ See Press Release, Off. of Public Affs., U.S. Dep’t of Just., Former Chicago Police Officer Jon Burge Sentenced for Lying About Police Torture (Jan. 21, 2011), <https://www.justice.gov/opa/pr/former-chicago-police-officer-jon-burge-sentenced-lying-about-police-torture> [https://perma.cc/HKV2-HHMX]. He was, however, charged and convicted of perjury for lying about his actions during a civil deposition. *Id.*

⁴ See *infra* Part IV.

⁵ See, e.g., Rolando V. del Carmen, *An Overview of Civil and Criminal Liabilities of Police Officers and Departments*, 9 AM. J. CRIM. L. 33, 47 (1981) (noting police officers often invoke defenses of “good faith” and “probable cause” when faced with liability); Arthur H. Garrison, *Criminal Culpability, Civil Liability, and Police Created Danger: Why and How the Fourth Amendment Provides Very Limited Protection from Police Use of Deadly Force*, 28 GEO. MASON U. CIV. RTS. L.J. 241, 249 (2018) (discussing the Fourth Amendment’s protection of police actions deemed unreasonable).

⁶ See *infra* Part III.

⁷ See *infra* Part IV.B.

The problem is that in 642 of the cases in my dataset, prosecutors were not legally permitted to bring charges in the first place. The reason? Statutes of limitation. In other words, in 76.6% of cases (642/838), police were able to evade criminal culpability not because of friendly prosecutors, but rather because prosecutors' hands were tied by arcane procedural rules governing the timing of prosecutions.

Thankfully, there is nothing inevitable about this state of affairs. Statutes of limitations are procedural devices that exist at the will of lawmakers.⁸ When the interests of justice do not support their application, lawmakers have seen fit to amend them before.⁹ And there is good reason to think they are worthy of modification in the context of police crimes—or so I will argue.

In arguing that states should consider eliminating statutes of limitations for police crimes so as to permit greater prosecution of police officers, I am deeply aware that my position is in tension with the current wave of decarceration and overcriminalization scholarship.¹⁰ I am certainly open to the view that society ought to be decriminalizing broad swaths of conduct—and if that were to occur, it could well be that certain types of police crimes should be included in that movement. But that is not yet the world we have. Until it is, it seems unjust to incarcerate huge numbers of people who suffer from mental health challenges, food and housing insecurity, generational trauma, and educational inequality all while letting police officers walk free despite torturing, abusing, and falsely testifying against the people they are sworn to protect.¹¹

Furthermore, I understand that we cannot prosecute our way out of a world tainted with police transgressions. Scholars are justifiably grappling with the future of policing in America in response to centuries of abuse.¹² Professor Brandon Hasbrouck has argued that modern policing is akin to “badges and incidents of slavery” that should be abolished under the Thirteenth Amendment

⁸CHARLES DOYLE, CONG. RSCH. SERV., RL31253, STATUTE OF LIMITATION IN FEDERAL CRIMINAL CASES: AN OVERVIEW 3–4 (2017).

⁹*Id.*

¹⁰See Jessica M. Eaglin, *The Categorical Imperative as a Decarceral Agenda*, 104 MINN. L. REV. 2715, 2715–16 (2020) (“[R]eforms focused on identifying categories of offenders for diversion from prison sentences may undermine the call to decarcerate by obscuring the ways that policymakers continue to use the carceral state as the preferred method to respond to sociopolitical problems in society.”); see also Rachel Moran, *Doing Away With Disorderly Conduct*, 63 B.C. L. REV. 65, 68–69 (2022) (“Scholars, practitioners, and even politicians increasingly agree that the United States suffers from an ‘overcriminalization’ problem in that it punishes criminal conduct too severely, resulting in excessive prison terms and the highest incarceration rate per capita in the world. But overcriminalization is not limited to excessive sentences: it also involves labeling too much conduct as criminal.”); DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008) (the “most pressing problem with the criminal law today is that we have too much of it”).

¹¹See, e.g., Hayes, *supra* note 1.

¹²See, e.g., Jessica M. Eaglin, *To “Defund” the Police*, 73 STAN. L. REV. ONLINE 120, 127 (2021).

and replaced with true racial equality and justice.¹³ Professor Amna Akbar has unpacked failures of reforming police and how fighting mass criminalization requires a “transformation of state and society” to a place which no longer relies on police.¹⁴ And some argue that police abolition would also require the abolition of contemporary prosecutors.¹⁵

Though this Article does not advance abolition principles, it does expose procedural barriers that shield problematic police behaviors and reinforce a state of police violence. Although abolitionists and reformers may be at odds, there should be consensus on at least one point: victims of police crimes deserve an acknowledgement that they were brutally harmed by government actors.¹⁶ This Article reflects just one way society can begin offering those acknowledgements within the criminal legal system—a path worth considering given the many roadblocks victims face within the civil system.¹⁷

The Article proceeds in four parts. Part II will explore the prevalence of unprosecuted policing crimes. Although anecdotal evidence of unprosecuted police crimes is commonplace, there is no publicly reported data indicating how widespread a problem this is. While public databases do show that police officers are charged for criminal wrongdoing with some frequency,¹⁸ what is missing is a sense of how often officers commit crimes *without* facing charges. Part II accordingly describes the results of an original empirical investigation in which I coded police misconduct cases in a national wrongful convictions database as either satisfying the elements of state criminal offenses or not. I then examined how frequently cases that rose to the level of likely police crimes were prosecuted. Alarming, my findings reveal that likely police crimes are

¹³ Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 UCLA L. REV. 1108, 1124 (2020).

¹⁴ Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1785 (2020).

¹⁵ Note, *Prosecuting in the Police-Less City: Police Abolition’s Impact on Local Prosecutors*, 134 HARV. L. REV. 1859, 1868–69 (2021).

¹⁶ I understand that this argument may appear to align with victims’ right scholarship. However, this article does not argue that police victims should determine the punishment of their abusers. This Article does not address theories of punishment, on the contrary, this Article is narrowly tailored to address the thus far failure of states to acknowledge the victimhood of large groups of people—victims of police crimes whereby statutes of limitations preclude police prosecutions.

¹⁷ See Joanna C. Schwartz, *Qualified Immunity’s Boldest Lie*, 88 U. CHI. L. REV. 605, 610 (2021); see also *infra* note 282 and accompanying text (discussing qualified immunity and other barriers to civil remedies); I. Bennett Capers, *Still Against Prosecutors*, 13 CALIF. L. REV. ONLINE 95, 106 (2022) (arguing that victims should be given more options for justice not fewer, be it by criminal prosecution, restorative justice, or another pathway, what matters most is that the victim “chart their own course”).

¹⁸ See Phillip M. Stinson, *About Henry A. Wallace*, HENRY A. WALLACE POLICE CRIME DATABASE, <https://policecrime.bgsu.edu/Home/About> [<https://perma.cc/JD8E-G5UT>].

routinely unprosecuted: prosecutors brought charges in just 143 of the 838 likely police crimes in my dataset, or 17% of all crimes.¹⁹

Part III will examine *why* these crimes go unprosecuted. The conventional wisdom is that police are shielded by their prosecutorial colleagues, their unions (which negotiate for their members to receive extraordinary procedural protections),²⁰ and their fellow officers (who treat the blue wall of silence as paramount to their profession)²¹. Although these explanations play an important role in preventing the prosecution of police crimes, they are incomplete.

Part IV turns to consider an additional barrier to police prosecution—statutes of limitations. To show how statutes of limitations serve as a barrier in the prosecution of police, Part IV utilizes the dataset developed in Part II: the set of 838 likely police crimes identified through a national wrongful convictions database. It first explains the method by which I coded each of the 838 cases as falling either within the applicable statute of limitations or outside of it.

Part IV then reports my findings: by the time the 838 police crimes were acknowledged such that prosecutors were able to bring charges, the relevant state statute of limitations had expired in 642 cases, or 76.6% of the time. Put simply, the conventional explanations for why prosecutors rarely charge police may well insulate police officers in a meaningful number of cases—officers did not face criminal charges in approximately 27% of the 196 cases in which the statute of limitations had not expired. But the more significant problem was that in most cases, police prosecutions were never possible in the first place due to lapsed statutes of limitations.

Part V pivots from the descriptive to the normative. It considers whether states should amend their statutes of limitation to permit greater prosecution of police criminal wrongdoing. After presenting arguments for why that would be a desirable step, Part VI considers several counterarguments. A conclusion follows.

II. THE PROBLEM—UNPROSECUTED POLICE CRIMES

Police officers commit a range of criminal activity.²² Though the general media focuses on viral violent police criminal acts,²³ police are also committing egregious acts in the normal course of their investigations.²⁴ In subpart A, I offer

¹⁹ See *infra* Part II.B.

²⁰ See *infra* Part III.A.

²¹ See *infra* Part III.C.

²² See generally Philip M. Stinson, *Police Crime: The Criminal Behavior of Sworn Law Enforcement Officers*, 9 SOCIO. COMPASS 1 (2015).

²³ See Elliott C. McLaughlin, *We're Not Seeing More Police Shootings, Just More News Coverage*, CNN (Apr. 21, 2015), <https://www.cnn.com/2015/04/20/us/police-brutality-video-social-media-attitudes/index.html> [<https://perma.cc/L6YG-SSS4>].

²⁴ See generally Stinson, *supra* note 22.

a pair of prominent examples of police criminal activity. Subpart B shows that such police crimes occur with great frequency, yet all too often go unprosecuted.

A. *Examples of Police Crimes*

Fifty years ago, Jon Burge was promoted to Detective at the Chicago Police Department.²⁵ His promotion in 1972 launched one of the largest domestic torture scandals in the nation,²⁶ comparable to the Jim Crow era false confession police brutality cases.²⁷ Across two decades, Burge and his co-conspirators within the Chicago Police Department tortured several people using techniques comparable to war crimes.²⁸ The over one hundred victims, mostly Black people, survived electrocution, genital mutilation, and other forms of violence that would shock the conscience of any reasonable person.²⁹ Unfortunately, neither Burge nor his co-conspirators were ever criminally prosecuted for their monstrous acts,³⁰ leading to the wrongful conviction of dozens and contributing to Chicago's designation as the capital of wrongful convictions.³¹ Most alarming of these crimes is the fact that Burge and his colleagues strategically mutilated people on body parts invisible to the public—a technique that Burge

²⁵ Hayes, *supra* note 1.

²⁶ *Id.*

²⁷ See, e.g., *Chambers v. Florida*, 309 U.S. 227, 231 (1940) (Petitioners alleged that they were “continually threatened and physically mistreated” by law enforcement until they agreed to confess “in hopeless desperation and fear of their lives.”); *Brown v. Mississippi*, 297 U.S. 278, 281 (1936) (Upon Petitioner’s denial that he committed the murder, a deputy sheriff and others “hanged him by a rope to the limb of a tree, and having let him down, they hung him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped, and still declining to accede to the demands that he confess, he was finally released and he returned with some difficulty to his home, suffering intense pain and agony.”); *White v. Texas*, 310 U.S. 530, 532 (1940) (Petitioner testified that “armed Texas Rangers on several successive nights took him handcuffed from the jail ‘up in the woods somewhere,’ whipped him, asked him each time about a confession and warned him not to speak to anyone about the nightly trips.”).

²⁸ Hayes, *supra* note 1. The torture deployed by Burge and his crew included “mock executions, genital electrocution, and racialized psychological abuse.” *Id.*

²⁹ *Id.* The acts “were perpetrated against over 100 Black men and women.” *Id.*

³⁰ See Press Release, Off. of Public Affs., U.S. Dep’t of Just., Former Chicago Police Officer Jon Burge Sentenced for Lying About Police Torture (Jan. 21, 2011), <https://www.justice.gov/opa/pr/former-chicago-police-officer-jon-burge-sentenced-lying-about-police-torture> [<https://perma.cc/HKV2-HHMX>]. Jon Burge was eventually federally indicted for lying in a civil deposition regarding the torture, but never indicted directly for the torture. *Id.*

³¹ Eric Ferkenhoff, ‘I Feel Free’: Chicago Teen Framed for 1985 Murder Becomes 3,000th Person Exonerated in US, USA TODAY (Mar. 9, 2022), <https://www.usatoday.com/story/news/nation/2022/03/09/national-registry-exonerations-chicago-case-reynaldo-munoz/9428361002/> [<https://perma.cc/SZ35-8ALL>].

learned while participating in the torture of Vietnamese civilians and soldiers during the Vietnam War.³²

With the help of these wartime torture tactics, the physical abuse of Black Chicagoans was inflicted for decades. One of Burge's victims included Darrell Cannon, who was wrongfully convicted of murder and served 24 years in prison.³³ When Cannon was taken into custody by Burge's unit in 1983, Cannon was coerced to confess to a murder after "detectives played a sadistic, terrifying game of Russian roulette."³⁴

Another infamous case involved the 1982 torture of the Wilson brothers—Jackie and Andrew—during the Chicago Police Department's largest manhunt in Chicago history.³⁵ Following the 1982 killing of Chicago officers William Fahey and Richard O'Brien, hundreds of police officers conducted a search for suspects which included a coordinated block-by-block raid in Chicago's predominately African-American South Side where officers knocked down residential doors, indiscriminately beat people,³⁶ and detained several for prolonged hours.³⁷ Once detained, these individuals had bags placed over their heads—an international torture mechanism known as "dry submarino."³⁸ As Jon Burge moved between holding cells, screams were heard shortly before a few individuals identified the Wilson brothers as the murderers.³⁹ The Wilson brothers were then tortured, denied their right to an attorney,⁴⁰ and forced to confess to killing the officers after Burge threatened to break their fingers.⁴¹ After the conviction, Jackie was subsequently declared innocent in 2020 after

³² FLINT TAYLOR, *THE TORTURE MACHINE: RACISM AND POLICE VIOLENCE IN CHICAGO* 108 (2019) ("Nobody makes up that anybody shocks them on their genitals. These men haven't ever been in any wars. They don't know anything about torture. Burge is the one that has all the experience with the war in Vietnam. He is the one that knows about those kinds of things.").

³³ Amanda Rivkin & Jeremy Borden, *Darrel Cannon*, CHI. POLICE TORTURE ARCHIVE, <https://chicagopolicetorturearchive.com/darrell-cannon> [https://perma.cc/Q5GR-P7VQ] (Tortured by police in 1983 and served 24 years in prison before agreeing to an Alford plea).

³⁴ *Id.* (explaining that officers would place shotgun shells into a gun, shove the gun into Cannon's mouth and forced Cannon to pull the trigger).

³⁵ Maurice Possley, *Jackie Wilson*, NAT'L REGISTRY OF EXONERATIONS (Oct. 16, 2020), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5818> [https://perma.cc/B6Z7-VVD6].

³⁶ Winston Williams, *2 Arrested in Chicago's Search for Killers of Police*, N.Y. TIMES (Feb. 15, 1982), <https://www.nytimes.com/1982/02/15/us/2-arrested-in-chicago-s-search-for-killers-of-police.html> [https://perma.cc/H5CB-HBAT].

³⁷ *See* TAYLOR, *supra* note 32, at 35.

³⁸ *Id.*

³⁹ *Id.* at 37.

⁴⁰ *Id.* at 40 (Jackie "asked to speak with his lawyer and refused to talk, which resulted in his being repeatedly hit on the head with a telephone book, kicked and poked in the chest and ribs, slapped, and kicked in the testicles.").

⁴¹ *Id.* at 41.

36 years of incarceration.⁴² Yet Burge never faced criminal liability for these wrongs.⁴³

Burge's wrongdoing entailed violent physical crimes. Several types of police crimes, however, are more subtle—and just as problematic. One infamous example involved police forensic analyst Fred Zain, who fabricated evidence, falsely testified to his qualifications as an expert witness, and single-handedly led to the wrongful conviction of at least 134 individuals across West Virginia and Texas.⁴⁴ Zain frequently “overstated the strength of his results, misreported the frequency of genetic matches on pieces of evidence, reported inconclusive tests as conclusive,”⁴⁵ and even fabricated test results for analyses he never conducted.⁴⁶

Zain engaged in this pattern of criminal activity to secure wrongful convictions. Perhaps the most notable involved that of Gilbert Alejandro. In Uvalde County, Texas in April 1990, a woman was brutally assaulted and informed police that a Hispanic man was the perpetrator.⁴⁷ Relying on that solitary description, law enforcement placed Alejandro in a sketch lineup in which the witness identified him after several failed attempts at photo lineups.⁴⁸ Even though there was no reliable evidence against Alejandro, and his identification during the lineup suggested uncertainty, Alejandro was convicted at trial largely due to the testimony of police analyst Fred Zain.⁴⁹ Zain testified that Alejandro's DNA conclusively matched the DNA found on the evidence collected.⁵⁰ Several years later, it was revealed that Zain not only committed perjury, but he failed to adequately carry out his responsibilities to test the

⁴² See Possley, *supra* note 35.

⁴³ *Prosecutors Drop Charges Against Jackie Wilson Near End of 3rd Trial for 1982 Murder of CPD Officer*, CBS NEWS (Oct. 2, 2020), <https://www.cbsnews.com/chicago/news/prosecutors-drop-charges-against-jackie-wilson-near-end-of-3rd-trial-for-1982-murder-of-cpd-officer/> [https://perma.cc/D73U-DRX4] (“Burge has never faced criminal charges for abuse.”).

⁴⁴ See *In re W. Va. State Police Crime Lab'y, Serology Div.*, 438 S.E.2d 501, 511–16 (1993); Sau Chan, *Scores of Convictions Reviewed as Chemist . . .*, L.A. TIMES (Aug. 21, 1994), <https://www.latimes.com/archives/la-xpm-1994-08-21-mn-29449-story.html> [https://perma.cc/4R2R-G95K].

⁴⁵ See *A Trail of Misconduct and the Need for Reform*, INNOCENCE PROJECT (May 7, 2010), <https://innocenceproject.org/news/a-trail-of-misconduct-and-the-need-for-reform/> [https://perma.cc/CVK9-YXT8].

⁴⁶ See *W. Va. State Police Crime Lab'y*, 438 S.E.2d at 516.

⁴⁷ *Gilbert Alejandro*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=2988> [https://perma.cc/R4CK-VNWF] (Apr. 24, 2017).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

evidence which ultimately showed that Alejandro was excluded as a source.⁵¹ Yet Zain ultimately evaded criminal liability for all of his wrongdoing.⁵²

Unfortunately, as the next subpart shows, the Jon Burge and Fred Zain cases are just a few examples of this widespread problem.

B. *The Prevalence of Unprosecuted Police Crimes*

To many, the fact that many police officers commit crimes may be unsurprising. The data bear this out: the leading authority that tracks police criminal wrongdoing, the Henry A. Wallace Police Crime Database, found that between 2005 and 2018, more than 16,000 police officers were charged with crimes.⁵³ This suggests that in any given year, almost one thousand police officers are charged with crimes.⁵⁴

Based on this data, one may be tempted to conclude that the cases described above, where officers like Burge and Zain avoided criminal consequences, are the exception rather than the norm. But that would be too quick a conclusion. The number of *recorded police prosecutions* is only the numerator. What is missing from the Wallace Police Crime Database is the denominator: the total number of police crimes that occur, whether prosecuted or not.⁵⁵ Only by identifying that number would we be able to develop a sense of how often police crimes occur without criminal liability. Scholars have an intuition that this number is high,⁵⁶ but I am aware of no empirical data showing as much. So, the question is in need of an answer: just how often do police officers commit crimes and yet evade prosecution?

To gain insight into this question, I examined an existing dataset collected and managed by the National Registry of Exonerations (NRE). The NRE is a publicly accessible website which provides a variety of ways to search wrongful

⁵¹ *Id.*

⁵² *See Court Invalidates a Decade of Blood Test Results in Criminal Cases*, N.Y. TIMES (Nov. 12, 1993), <https://www.nytimes.com/1993/11/12/us/court-invalidates-a-decade-of-blood-test-results-in-criminal-cases.html> [<https://perma.cc/64EB-N297>].

⁵³ *See* Stinson, *supra* note 18.

⁵⁴ *See* Phillip M. Stinson, *How We Built the Henry A. Wallace Police Crime Database*, HENRY A. WALLACE POLICE CRIME DATABASE, <https://policecrime.bgsu.edu/Home/Methods> [<https://perma.cc/3556-QJDD>] (“Stinson and colleagues continue to collect data on the criminal arrests of sworn law enforcement officers at state and local law enforcement agencies across the United States at a rate of approximately 1,100 new arrest cases involving approximately 800–950 sworn law enforcement officers arrested annually.”).

⁵⁵ *Id.* (“Data for the Henry A. Wallace Police Crime Public Database were collected as part of a larger project that began in 2004 designed to locate cases in which sworn law enforcement officers had been arrested for any type of criminal offense(s).”).

⁵⁶ *See* Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 763 (2016).

conviction cases.⁵⁷ Users of the dataset can search cases by case type, factors contributing to the wrongful conviction, exoneree name, and other search fields.⁵⁸ However, to conduct an original search exercise, users must make an official request to access the raw dataset spreadsheet subject to a few conditions.⁵⁹

I chose the NRE dataset for several reasons. First, the NRE researchers are meticulous. The NRE database includes thorough descriptions of a substantial number of wrongful convictions.⁶⁰ Significantly, NRE does not rely on subjective beliefs in the classification of a wrongful conviction. The researchers apply a narrow definition of exoneration.⁶¹ Thus, the records contained within the dataset are extremely accurate.

Second, the NRE had already conducted the critical task of coding cases in which misconduct was committed by police officers; those cases were tagged with “OM” for “official misconduct.”⁶² The existence of this field enabled me to focus my attention on known cases in which police misconduct occurred. This, in turn, enabled a determination of whether such misconduct rose to the

⁵⁷ See *Our Mission*, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/mission.aspx> [<https://perma.cc/Q9T3-UNB4>].

⁵⁸ See NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> [<https://perma.cc/8T9L-AN59>].

⁵⁹ See *Spread Sheet Request Form*, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Spread-Sheet-Request-Form.aspx> [<https://perma.cc/A5QK-6Y8N>].

⁶⁰ NAT’L REGISTRY OF EXONERATIONS, *supra* note 58.

⁶¹ *Glossary*, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx> [<https://perma.cc/ZN4G-BKHA>] (“A person has been exonerated if he or she was convicted of a crime and, following a post-conviction re-examination of the evidence in the case, was relieved of all the consequences of the criminal conviction, and either: (1) was declared to be factually innocent by a government official or agency with the authority to make that declaration; or (2) received (i) a complete pardon by a governor or other competent authority, whether or not the pardon is designated as based on innocence, or (ii) an acquittal of all charges factually related to the crime for which the person was originally convicted, in a court of the jurisdiction in which the person was convicted, or (iii) a dismissal of all charges related to the crime for which the person was originally convicted, by a court or by a prosecutor with the authority to enter that dismissal. The pardon, acquittal, or dismissal must have occurred after evidence of innocence became available that either (i) was not presented at the trial at which the person was convicted; or (ii) if the person pled guilty, was not known by the defendant and the defense attorney at the time the plea was entered. The evidence of innocence need not be an explicit basis for the official act that exonerated the person. A person who otherwise qualifies has not been exonerated if there is unexplained physical evidence of that person’s guilt.”).

⁶² *Id.* (Official misconduct is when “[p]olice, prosecutors, or other government officials significantly abused their authority or the judicial process in a manner that contributed to the exoneree’s conviction.”).

level of criminal wrongdoing that I could ultimately code as either giving rise to a prosecution or not.

Third, I chose the NRE dataset because it offers a conservative estimate of the problem of unprosecuted police crimes. For one thing, the NRE is conservative in its designation of police misconduct being a contributing factor to a wrongful conviction.⁶³ The consequence is that police may well have committed more misconduct than is captured by the NRE database—a problem that, if anything, leads to my results underestimating the prevalence of unprosecuted police crimes.

For another thing, the NRE likely overestimates the rate at which police crimes are prosecuted. That is because wrongful conviction cases are among the most glaring of errors in our criminal justice system—consider the gruesome acts of torture that Detective Jon Burge committed against innocent victims in Chicago.⁶⁴ One would accordingly expect that prosecutors are *especially* likely

⁶³ I witnessed this conservative approach firsthand. While reviewing the dataset, I originally believed I came across an error: a four co-defendant wrongful conviction in which the NRE recorded only three of the co-defendants' cases as involving police misconduct as a contributing factor. See Rob Warden, *Terrill Swift*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3845> [https://perma.cc/Q27Q-2TPC] (Jan. 25, 2019) (explaining that Terrill Swift was wrongfully convicted of murder, the listed contributing factors for the wrongful conviction were false confession, perjury or false accusation). *But see* Rob Warden, *Harold Richardson*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3847> [https://perma.cc/VBF8] (Jan. 25, 2019) (noting that the Codefendant listed contributing factors include false confession, perjury or false accusation, and official misconduct). When I brought this inconsistency to the NRE's attention, an NRE researcher replied as follows:

Anjelica: Hello. I am a researcher at the Registry. We received your inquiry about Terrill Swift's case

Thank you for writing. I went back into our source documents on these cases and also reviewed our internal coding on the four defendants. It appears that the official misconduct for the other three defendants is tied to misconduct during their interrogations. Specifically: for Saunders, he was slapped by the police; for Thames, he was handcuffed to the wall; for Richardson, the police threatened to kill him. Based on the available documents I have, Swift's interrogation was not marked by these issues. This is -- of course -- not to say his interrogation was without problems, such as being questioned without his parents, or being lied to by the police. It clearly produced a false confession, but our coding errs on the side of being conservative and tries to draw a distinction between behavior by official actors that is problematic and that which we consider to be misconduct.

I hope this is helpful. Again, thank you for writing and for your observations. My guess is that most people would not have noticed the coding differences.

(on file with author).

⁶⁴ See *supra* Part II.A.

to bring charges against police officers when their crimes lead to innocent people serving wrongful prison sentences. Thus, identifying the percentages of police crimes that went unprosecuted in the NRE database would seem to understate the prevalence of the problem. After all, one could reasonably expect prosecutors to more frequently refrain from bringing charges against police officers whose crimes do not result in such horrifying consequences for their victims.⁶⁵

I received the raw dataset from the NRE in November 2021 and began excavating misconduct cases—at the time the NRE had identified 1,431 wrongful conviction cases involving official misconduct. With these cases in hand, I then examined state criminal codes for crimes frequently observed across police activity. Some of these crimes include assault when police physically beat an exoneree to wrongfully confess to a crime that they didn't commit; perjury when police testify untruthfully; tampering with evidence when police conceal favorable evidence from the defense or prosecution; intimidation of a witness when police coerce witnesses to falsely accuse an exoneree; obstruction of justice when police unlawful actions taint an investigation as to preclude the prosecution from properly seeking justice; and official misconduct, when police, with corrupt intent, conduct unlawful behavior in their official capacity for a benefit.⁶⁶

After identifying these crimes, I then proceeded to identify the specific elements required to establish the various crimes across respective states. This was not a straightforward task. For example, in some states perjury is merely the act of lying under oath, whereas other states are more specific in their definition and follow the “two witness rule”; they may require more than one piece of evidence which shows that an individual knowingly and intentionally lied under oath.⁶⁷ Other examples include the crime of intimidation where some states may require the use or threat of force, whereas others may liberally define intimidation as any attempt to coerce a witness into giving false testimony,

⁶⁵It bears mentioning that one downside to using the NRE database is that the NRE does not contain case facts for non-wrongful conviction cases. *See* NAT'L REGISTRY OF EXONERATIONS, *supra* note 58. Therefore, my review could not capture a wide range of likely police crimes that are committed outside of wrongful conviction cases. These cases include police crimes where a defendant may be acquitted or their charges dismissed, police crimes where a defendant was convicted but has not yet been identified as a wrongfully convicted individual, police crimes that are kept as internal investigations due to domestic brutality and harassment, police crimes that do not result in a defendant's arrest, and police crimes in which their victims did not survive.

⁶⁶*See infra* Part IV.

⁶⁷*Compare* 720 ILL. COMP. STAT. 5/32-2 (2012) (In Illinois, “[a] person commits perjury when, under oath or affirmation, in a proceeding or in any other matter where by law the oath or affirmation is required, he or she makes a false statement, material to the issue or point in question, knowing the statement is false.”), *with* 18 PA. STAT. AND CONS. STAT. ANN. § 4902 (West 2023) (In Pennsylvania, “falsity of a statement may not be established by the uncorroborated testimony of a single witness.”).

regardless of if a threat of force was used.⁶⁸ And most of the cases required a *mens rea* showing; i.e., just because an officer failed to disclose exculpatory documents does not necessarily mean they had the necessary *mens rea* for the crime of tampering with evidence.⁶⁹ After determining the elements of each state law offense, I carefully applied those elements to the facts of all 1,431 cases to determine if a police agent likely committed a crime.

To be sure, the ultimate determination of whether a crime occurred in many cases was not always an easy call. For that reason, it is important to be clear that the most accurate description I can use for the offenses I coded as police crimes in my dataset is that they were *likely* criminal. The ultimate standard I applied was to ask whether a reasonable prosecutor presented with these case facts would believe that the charges are supported by probable cause, that there was enough evidence for a fact finder to find the officer guilty beyond a reasonable doubt, and that the decision to charge was in the interests of justice.⁷⁰

In completing this exercise for the 1,431 police misconduct cases in the dataset, I made a designation that a crime occurred conservatively. For example, in several cases, police failed to disclose exculpatory evidence. These cases were not *per se* criminal since there was insufficient information which could show if the failure to disclose was purposeful. And so even though many of them may have actually involved criminal wrongdoing, I coded them as not likely police crimes in my data set.

Ultimately, after comparing the NRE's reported facts concerning police misconduct against the applicable state criminal offenses, I determined that a total of 838 likely police crimes were committed across 482 of the 1,431 cases that the NRE coded as involving police misconduct.

As these figures suggest, one notable finding is that police often committed multiple crimes within a single case. In the Burge torture cases, for example, the conduct described across several wrongful conviction cases aligned with the criminal elements of multiple offenses: assault, obstruction of justice, intimidation, perjury, and other related offenses.⁷¹ Similarly, in the Zain cases,

⁶⁸ Compare N.C. GEN. STAT. ANN. § 14-226 (West 2023) (In North Carolina, intimidation occurs “[i]f any person shall by threats, menaces or in any other manner intimidate or attempt to intimidate any person who is summoned or acting as a witness in any of the courts of this State, or prevent or deter, or attempt to prevent or deter any person summoned or acting as such witness from attendance upon such court”), with MASS. GEN. LAWS ANN. ch. 268, § 13B (West 2023) (Intimidation is broadly defined in Massachusetts, it includes “[w]hoever willfully, either directly or indirectly: (i) threatens, attempts or causes physical, emotional or economic injury or property damage to; (ii) conveys a gift, offer or promise of anything of value to; or (iii) misleads, intimidates or harasses another person.”).

⁶⁹ See, e.g., 18 PA. STAT. AND CONS. STAT. ANN. § 4910 (West 2023).

⁷⁰ *Criminal Justice Standards for the Prosecution Function*, AM. BAR ASSOC., https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/ [<https://perma.cc/J5HY-4NRG>] (American Bar Association Standard 3-4.3 Minimum Requirements for Filing and Maintaining Criminal Charges).

⁷¹ See *supra* Part II.A.

the officer's pattern of wrongdoing aligned with the crimes of perjury and tampering with evidence/fabrication.⁷²

Significantly, the NRE database observed police criminal activity in older cases as well as more recent ones. The Burge and Zain cases are examples of older crimes.⁷³ One example of a newer crime that the NRE reported involves a Florida sheriff, Steven O'Leary, who falsely arrested over two dozen individuals he stopped during traffic stops during 2018, claiming that he discovered all of them to be in possession of controlled substances when the substances were contrarily harmless substances such as detergent or mint.⁷⁴ His conduct was only discovered after prosecutors noticed that lab tests on the alleged controlled substances were coming back negative, contrary to the sheriff's report that the substances received positive results.⁷⁵ O'Leary was subsequently convicted of 50 felonies including official misconduct, falsifying arrest records, false imprisonment, and tampering with evidence, and sentenced to 13 years in prison.⁷⁶

Having determined the prevalence of likely police criminal activity in the dataset (i.e., the 838 instances of likely police crimes), I then sought to ascertain whether the involved officers were criminally prosecuted. To answer that I sought officer employment details, searched for criminal cases related to the involved officers, and reviewed subsequent § 1983 litigation filings to ascertain references to subsequent police accountability measures.

For example, in 2013 Brandon Lewis was wrongfully convicted in Arizona of assaulting officers and a felony for damaging their police vehicle.⁷⁷ At trial, Payson Police Sergeant Donny Garvin testified that the damage to the vehicle was \$1,200, which "exceeded the \$1,000 threshold for the charge to become a

⁷² See *supra* Part II.A.

⁷³ See *supra* Part II.A.

⁷⁴ Meghan McRoberts, *Steven O'Leary: Former Martin County Deputy Sentenced to Prison for Falsifying Dozens of Drug Arrests*, WPTV (Dec. 2, 2021), <https://www.wptv.com/news/region-martin-county/steven-oleary-former-martin-county-deputy-sentenced-to-prison-for-falsifying-dozens-of-drug-arrests> [<https://perma.cc/Z7SJ-2EMX>]; Maurice Possley, *Melissa Morales*, NAT'L REGISTRY OF EXONERATIONS (May 11, 2020), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5532> [<https://perma.cc/4B42-X8AS>].

⁷⁵ Possley, *supra* note 74.

⁷⁶ Mauricio La Plante, *Martin County Sheriff and Former Deputy Steven O'Leary Face Federal Civil Rights Violation Lawsuit*, TC PALM (Dec. 8, 2021), <https://www.tcpalm.com/story/news/crime/martin-county/2021/12/08/civil-rights-lawsuit-filed-against-former-martin-deputy-steven-oleary/6431297001/> [<https://perma.cc/DNS7-KREM>].

⁷⁷ Maurice Possley, *Brandon Lewis*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4450> [<https://perma.cc/XT3R-N25K>] (June 1, 2017) (explaining that Lewis argued that the officers grabbed him by his hair and slammed his face into the hood of their vehicle, however, Payson police officer Ortiz reported that Lewis slammed his own face into the police vehicle).

felony.”⁷⁸ After his conviction, the defense became aware that the actual invoice for the repair to the vehicle was under \$1,000, totaling \$719.04, which would have made the crime a misdemeanor.⁷⁹ They also learned that Garvin was on the prosecutor’s list of officers with credibility concerns.⁸⁰ Lewis was exonerated in 2014,⁸¹ and I then sought to uncover what happened to Garvin. A simple Google search revealed that, after his retirement, Garvin was appointed as a justice of the peace for the Payson Justice Court.⁸² He was never prosecuted for the likely perjury.⁸³

In another case, a Washington state deputy, James Schrimpsheer, claimed—likely falsely—that James Simmons confessed to selling drugs in 2007.⁸⁴ Simmons stated that he never confessed, and that the deputy planted the drugs on him to implicate him.⁸⁵ Shortly after Simmons’ conviction, the deputy was fired from the department for giving false statements;⁸⁶ Schrimpsheer had previously left a department in Missouri under suspicious reasons before joining the department in Washington.⁸⁷ However, even with these transgressions, Schrimpsheer found another job within law enforcement, chief of police in

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See Teresa McQuerrey, *Garvin Appointed Justice of the Peace Pro Tempore*, PAYSON ROUNDUP (Mar. 19, 2019), https://www.paysonroundup.com/government/gila_county/garvin-appointed-justice-of-the-peace-pro-tempore/article_1c0163af-5ed9-5f8d-965e-113e08d56275.html [<https://perma.cc/BUP3-5M37>].

⁸³ See Possley, *supra* note 77.

⁸⁴ Maurice Possley, *James Simmons*, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3638> [<https://perma.cc/9JM6-PFFJ>] (July 9, 2015).

⁸⁵ *Id.*

⁸⁶ Memorandum from King Cnty. Sheriff Susan Rahr to Deputy James Schrimpsheer on Loudermill Hearing Results 2 (Dec. 4, 2007), <https://crosscut.com/sites/default/files/files/schrimpsheer-king-county-iu.pdf> [<https://perma.cc/8MS4-CDZU>].

⁸⁷ See Levi Pulkkinen, *Seattle Man Left Homeless After Crack Bust by Cop Later Fired for Dishonesty Wants State to Pay Up*, SEATTLE PI (Oct. 3, 2013), <https://www.seattlepi.com/seattlenews/article/Seattle-man-left-homeless-after-crack-bust-by-cop-4864362.php> [<https://perma.cc/X4VB-S7EU>] (“Then a detective with the Phelps County Sheriff’s Department, Schrimpsheer was alleged to have miraculously recovered evidence—a small baggie of cocaine—the day before a trial after the drugs had gone missing for nearly four years” in response, Schrimpsheer “said his name was simply mentioned in an court case filed in Missouri, and that he was not accused of any wrongdoing related to the evidence handling. The detective said he left that department in good standing before going to work for a federal law enforcement agency.”).

Alguna.⁸⁸ When asked about his past employment he admitted that he was on a bad path.⁸⁹

Some officers who likely committed crimes simply went on to retire from their department;⁹⁰ Chicago Police Detective Reynaldo Guevara has likely committed several crimes across a dozen wrongful convictions⁹¹ but was never prosecuted, and now lives in Texas where he has collected more than \$1 million in pension payments.⁹² Determining where these officers are now was typically readily available online.

And my findings were alarming, if unsurprising. Of the 838 likely police crimes, prosecutors brought charges in just 146 of them. For example, evidence of the crimes Jon Burge and his unit committed was in abundance, however, special prosecutors within the Justice Department did not prosecute him for his acts.⁹³ Instead, they settled for a conviction of obstruction of justice and perjury from Burge lying in a civil case regarding his actions within the Chicago Police Department's Area Two.⁹⁴ During a deposition, Burge denied ever using, or being aware of his colleagues, using coercion, physical abuse, or torture on suspects in custody.⁹⁵

This finding bears repeating. Of the 838 likely police crimes that contributed to wrongful convictions in the NRE dataset—crimes that were as egregious as involving torture, fabrication of evidence, and perjury—prosecutors brought charges in only 146 cases, or just 17% of the time. The next section considers why.

⁸⁸ Melissa Santos, *Despite Credibility Issues, WA Cops Find Police Jobs Elsewhere*, CROSSCUT (Aug. 10, 2021), <https://crosscut.com/politics/2021/08/despote-credibility-issues-wa-cops-find-police-jobs-elsewhere> [<https://perma.cc/YZZ6-NYNR>].

⁸⁹ *Id.*

⁹⁰ See, e.g., Cornelius Frolik, *Officers Dispute List Meant to Keep Cops Honest*, DAYTON DAILY NEWS (Jan. 10, 2021), <https://www.daytondailynews.com/news/officers-dispute-list-meant-to-keep-cops-honest/> [<https://perma.cc/TR7V-5QSU>].

⁹¹ *11 Exonerated Men Sue City After Targeted by Disgraced Ex-CPD Detective Reynaldo Guevara*, CBS NEWS (Mar. 21, 2023), <https://www.cbsnews.com/chicago/news/exonerated-sue-city-reynaldo-guevara/> [<https://perma.cc/XKW9-4PEJ>].

⁹² Brónagh Tumulty, *New Lawsuits Filed Against Former Chicago Cop Bring Old Allegations to Light*, WGN 9 (Mar. 29, 2023), <https://wgntv.com/news/chicago-news/new-lawsuits-filed-against-former-chicago-cop-bring-old-allegations-to-light> [<https://perma.cc/C6VJ-ZS93>].

⁹³ See *supra* Part II.A.

⁹⁴ See *supra* Part II.A.

⁹⁵ Press Release, Off. of Public Affs., U.S. Dep't of Just., *supra* note 30. His conviction stemmed from false answers in a 2003 civil case, “[i]n those answers, Burge denied ever using, or being aware of other officers using, any type of improper coercion, physical abuse or torture with suspects who were in custody at Chicago Police Department’s Area Two.” *Id.* “However, evidence at trial showed that Burge abused multiple victims in Area Two, suffocating them with plastic bags; shocking them with electrical devices; and placing a loaded gun to their heads.” *Id.*

III. WHY ARE THESE CRIMES NOT PROSECUTED?

Scholars have offered various explanations for this phenomenon, and this part will offer a review of that literature. Subpart A will present the theory that prosecutors shield police and exercise their discretion to not pursue charges against their colleagues. Subpart B will describe procedural norms, structured by prosecutors and police unions alike, that offer police more investigative latitude than the typical criminal defendant. Subpart C will explore the possibility that officers are shielded thanks in large part to their fellow officers who abide by the blue wall of silence. These theories certainly explain some of the problem. But as Part IV will show, another barrier plays a critical role in the failure to prosecute police.

A. *Prosecutors Shield Police*

Prosecutors frequently exercise their discretion not to prosecute crimes appropriately. The prosecutor could be faced with limited resources, including staffing shortages; the prosecutor could reasonably believe that they will be unsuccessful at convincing a fact finder beyond a reasonable doubt; the prosecutor could worry that their jurisdiction's political climate may lead to nullification; and the prosecutor may justifiably decide not to prosecute in the interests of justice.⁹⁶ All of these explanations may very well manifest in decisions not to prosecute police, and prosecutors may be transparent about their legitimate reasons not to prosecute crimes in a declination statement.⁹⁷ However, the conventional wisdom is that prosecutors exercise their discretion to not prosecute police for a variety of nefarious reasons.

Most notably, Professor Kate Levine argues that the prosecutor-police relationship is so intertwined that conflict-of-interest law requires local prosecutors to remove themselves from these investigations.⁹⁸ By using a conflict-of-interest law framework, Levine paints a straightforward picture: how are prosecutors expected to be dependent on police for the overwhelming majority of their prosecutions but ostensibly appear neutral when those prosecutions involve police suspects?⁹⁹ Indeed, police supply prosecutors with

⁹⁶ See Jessica A. Roth, *Prosecutorial Declination Statements*, 110 J. CRIM. L. & CRIMINOLOGY 477, 485 (2020). Declination statements serve several functions. It forces prosecutors to articulate their reasoning for declining to prosecute a case; it helps the public hold prosecutors accountable for their decisions by ensuring that their decisions are not based on the suspect's wealth, status, or relationship with the prosecutor; and it reveals the prosecutors' interpretation of the law. *Id.*

⁹⁷ *Id.*

⁹⁸ See Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1479, 1487 (2016). Levine also suggests that even when their relationship is not so intertwined, the simple appearance of bias is reason enough to preclude the local prosecutor from prosecuting their colleagues.

⁹⁹ *Id.* at 1470.

the ammunition they need to pursue charges against a suspect. It is the police who decide which crimes will be policed, which evidence will be seized, and whether incriminating statements will be elicited from suspects. Further adding to this apparent conflict, Levine highlights how local prosecutors also attempt to sanitize their officer's disciplinary history to secure a conviction.¹⁰⁰

In addition to the general conflict of interest, there may also exist a personal conflict of interest. Levine posits that in many cases, the police suspect may be someone the prosecutor knows and is friendly with.¹⁰¹ Or, even if the prosecutor does not know the officer personally, the prosecutor may believe that prosecuting a police suspect may harm their professional career.¹⁰² For all of these reasons, local prosecutors often shield their police colleagues from criminal consequences, whether intentionally or subconsciously.¹⁰³ Professor Levine nevertheless argues that we should resist the urge to look to the criminal legal system to stem the tide of police violence and instead focus our efforts on reducing our reliance on police in the first place.¹⁰⁴

In addition to shielding police from criminal charges, prosecutors also have self-interested incentives to shield police witnesses who may aid in their ability to secure convictions. After all, when police engage in criminal behavior during the course of police investigations, it is the local prosecutor who will defend these acts at motions to suppress and other defense requests for judicial intervention. This phenomenon was recently examined by ACLU attorneys who posited that prosecutors are not simply protecting police, but police are also protecting prosecutors.¹⁰⁵ Thus, whereas Levine argues that prosecutors shield police misconduct, Trivedi and Gonzalez Van Cleve argue that police misconduct would not exist but for the role of the prosecutor.¹⁰⁶ It is the prosecutor who offers a stamp of approval on police behavior, by either facilitating their misconduct,¹⁰⁷ blindly deferring to their recollection of facts

¹⁰⁰ *Id.* at 1469.

¹⁰¹ *Id.* at 1470 (particularly true in small jurisdictions).

¹⁰² *Id.* at 1476–77 (“A district attorney, who can decline to prosecute police in secret, with no judicial review and little public scrutiny, must contend with the real possibility that she will not be reelected if she crosses the powerful police unions.”).

¹⁰³ *Id.* at 1485–86.

¹⁰⁴ See Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV. 997, 1009 (2021).

¹⁰⁵ See 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, 898, 900 (2020).

¹⁰⁶ *Id.* at 900; Levine, *supra* note 104, at 1010.

¹⁰⁷ Trivedi & Gonzalez Van Cleve, *supra* note 105, at 908–09. After interviewing several prosecutors, the authors found that prosecutors developed a practice to provide absolute deference to police: “For instance, one prosecutor discussed how she treated the questioning of police partners in cases. She would allow partners to sit in a room together, leave the file on the table, then go get coffee so the officers had time to refresh their memory. This was the signal for officers to align their narrative so it was consistent between the officers and with the case file. This move was viewed as a respectful courtesy towards

surrounding an incident,¹⁰⁸ or by failing to curtail the actions with a criminal prosecution.¹⁰⁹ As they argue, the prosecutorial power that drives mass incarceration is the same power that encourages police misconduct.¹¹⁰

Regrettably, the close relationship between prosecutors and police has benefited police greatly. Professor Tamara Rice Lave suggests that this codependence ensures that police maintain their appearance of good character, and a lack of criminal history, even when their disciplinary history reveals the contrary.¹¹¹ Even in the rare cases that police are tried, many elect to be tried by a judge rather than a jury due to the fact that several judges are former prosecutors themselves and police hope to continue seeking their favor and deference.¹¹²

Collectively, these arguments display the enormous ability prosecutors possess in shielding their colleagues. Several examples support this explanation. For example, an investigation into the Jon Burge torture cases discovered that prosecutors and city leaders alike willfully ignored the violence inflicted on dozens of people.¹¹³ Unfortunately, the same pattern can be observed across several wrongful convictions.¹¹⁴ For the Chicago torture cases, prosecutors

officers. Prosecutors who did not accommodate officers in such a way or who interviewed partners separately were accused of not being team players.” *Id.*

¹⁰⁸ *Id.* at 911 (explaining that, on the police killing of Laquan McDonald, prosecutors believed Officer Jason Van Dyke so much that it took prosecutors over 400 days to charge him).

¹⁰⁹ *Id.* at 913 (“The most recognizable way that prosecutors fail to stem violence and misconduct by the police is by failing to prosecute and convict them for it.”).

¹¹⁰ *Id.* at 912.

¹¹¹ Tamara Rice Lave, *Blame the Victim: How Mistreatment by the State Is Used to Legitimize Police Violence*, 87 BROOK. L. REV. 1161, 1190 (2022) (“The fact that Chauvin (or any other officer) had no prior criminal history does not mean that he had not committed any crimes. We know that Chauvin was the subject of at least thirty-two complaints, five of which were sustained and resulted in a formal reprimand.”).

¹¹² *See id.* at 1189.

¹¹³ Hayes, *supra* note 1; Jason Meisner, *Daley Slated to Give Deposition Next Month in Burge-Related Lawsuit*, CHI. TRIB. (Dec. 20, 2016), <https://www.chicagotribune.com/news/breaking/ct-mayor-daley-deposition-jon-burge-met-20161219-story.html> [<https://perma.cc/J4E5-8EUZ>].

¹¹⁴ I also recorded instances of prosecutors committing crimes alongside their police colleagues. *See, e.g.*, Maurice Possley, *Reginald Adams*, NAT’L REGISTRY OF EXONERATIONS (July 11, 2017), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4430> [<https://perma.cc/E2Y9-P6M7>]. Adams was wrongfully convicted in 1983 of murder in New Orleans, Louisiana, largely because the detective and prosecutor on the case “deliberately concealed critical information that pointed to other suspects who had no connection to Adams.” On appeal, the Judge said “the prosecutors’ handling of the case was ‘shameful’.” *Id.* Not only did their intentional acts harm Reginald Adams, who was wrongfully incarcerated for more than three decades, but also it “denied this community any opportunity to hold the real perpetrator criminal responsible for this violent crime.” *Id.* Even though the prosecutor, Ronald Bodenheimer, was elected judge in 1999, “In 2003, he pled guilty to federal corruption charges and was sentenced to 46 months in prison.” *Id.*

routinely turned a blind eye to the violence officers used to secure a conviction,¹¹⁵ and at times persuaded police to continue their behavior until they received a confession.¹¹⁶ The Felony Review Unit, Cook County state’s attorney unit which was tasked with verifying the authenticity of a confession, was typically called after a torture incident to record the confession—probably because nothing “seals a guilty verdict tighter than a confession taken by a lawyer and a court reporter.”¹¹⁷

Coincidentally, prosecutors left an interrogation room moments before torture began, appeared shortly after its infliction, and never asked a suspect if they had been physically abused, mistreated, or inquired into mysterious injuries.¹¹⁸ Trivedi and Gonzalez Van Cleve succinctly sum up this paradigm as it relates to the relationship Jon Burge had with the prosecutors in Chicago:

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

¹¹⁵ TAYLOR, *supra* note 32, at 45–46. Most telling is a 1982 memorandum authored by Chicago Police Superintendent Richard Brzeczek to then State Attorney Richard Daley in response to receiving credible evidence of torture being conducted within the department and opening an administrative investigation into the allegations. Brzeczek wrote “I have publicly stated that we will scrupulously investigate every allegation of police misconduct brought to our attention. However, in pursuing this posture, I also do not want to jeopardize the prosecution’s case in any way. I will forbear from taking any steps other than the one previously mentioned in connection with these allegations until I hear from you or one of your assistants.” *Id.* Daley neither replied to this memorandum nor initiated criminal charges against Lieutenant Burge. *Id.*

¹¹⁶ *Id.* at 39–40. (When Andrew was instructed to confess in front of Assistant State’s Attorney Larry Hyman, “Andrew said, in the presence of several of his torturers, ‘You expect me to make a statement after all of them tortured me?’ Hyman asked, ‘What?’ But Andrew, intimidated by all of the detectives in the room, said no more. Hyman then angrily told the detectives to ‘get the jagoff out of here.’”).

¹¹⁷ John Conroy, *Deaf to the Screams*, CHI. READER (July 31, 2003), <https://chicagoreader.com/news-politics/deaf-to-the-screams/> [https://perma.cc/9P4Q-WCE8].

¹¹⁸ *Wilson v. Est. of Burge*, No. 21-CV-03487, 2023 WL 2750946, at *3 (N.D. Ill. Mar. 31, 2023).

clout in the State's Attorney's Office—the type of clout that earned prosecutors their promotions.¹¹⁹

Unfortunately, examples of this prosecutor-police codependence were found outside of the Burge torture cases. In 2011, Brandon Lewis was falsely arrested for assaulting three Payson, Arizona officers and damaging their patrol vehicle.¹²⁰ During trial, the officers made inconsistent statements and lied regarding the extent of the damages to the vehicle, ensuring that the Brandon Lewis would be found guilty of felony criminal damage and not the lower tier misdemeanor criminal damage.¹²¹

At his exoneration, it was discovered that not only did officers provide false testimony, but prosecutors attempted to shield the Payson Police Department from liability by failing to disclose necessary information related to the case and withdrawing their plea proposal after discovery of a civil rights litigation against the police department.¹²² The judge held that “[t]he state’s conduct was not the result of legal error, mere negligence, mistake, or insignificant impropriety Instead, it amounts to intentional conduct which prosecutors and police knew was improper and prejudicial, a pattern of indifference to their obligation to obtain and disclose evidence.”¹²³

In another Arizona wrongful conviction, Frances Salazar was wrongfully convicted of drug possession when Phoenix Police Officer Anthony Armour Jr. falsely testified that Frances Salazar admitted to possessing narcotics.¹²⁴ Salazar served two of the six-year sentence before he and his attorney filed a motion for a new trial upon discovering that the prosecutors were aware that Officer Armour had credibility issues—previously lying and falsifying police reports.¹²⁵ At a motion to vacate Salazar’s conviction, the judge ruled that the prosecutors failed to disclose evidence related to Officer Armour’s false statements.¹²⁶ Not only did the prosecutors fail to notify Salazar and the defense team, but the Phoenix Police Department also failed to disclose the discipline to the Arizona Peace Officers Standards and Training Board, the state agency that has the power to revoke the officer’s license.¹²⁷

¹¹⁹ Trivedi & Gonzalez Van Cleve, *supra* note 105, at 897–98.

¹²⁰ Possley, *supra* note 77.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Maurice Possley, *Frances Salazar*, NAT’L REGISTRY OF EXONERATIONS (Sept. 7, 2020), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5803> [<https://perma.cc/D6WW-EZGV>].

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Dave Biscobing, *Grandmother Convicted as a Phoenix Officer’s Lies Are Kept Secret*, ABC15 ARIZ. (Nov. 19, 2020), <https://www.abc15.com/news/local-news/investigations/a-grandmother-convicted-as-a-phoenix-officers-lies-are-kept-secret> [<https://perma.cc/MB85-J43J>].

B. *Police Officer Suspects Benefit from Special Procedural Protections*

A second theory for why police are so infrequently prosecuted is that they are the beneficiaries of enhanced investigation procedures that frequently result in their favor, including grand jury decisions not to indict when prosecutors are aware of police bad acts,¹²⁸ and police departmental procedures that withhold evidence of police crimes from further investigation.¹²⁹

Describing the different prosecutorial treatment that officer suspects receive in comparison to non-officer suspects, Professor Kate Levine forcefully argues that “[i]f you are an ordinary criminal suspect, arrested for a misdemeanor, a prosecutor charges you reflexively, without investigation into the facts and circumstances of your case.”¹³⁰ By contrast, “[i]f you are police officer accused of a crime, your case is thoroughly investigated precharge. Prosecutors speak to any witness they can, review all the evidence, and think seriously about the charges and defenses to those charges.”¹³¹ The disparity continues even if a prosecutor decides to bring the officer’s case to a grand jury. Unlike the non-officer defendant, whom “a grand jury indicts . . . based on a quick, curated, and prosecutor-dominated process,” an officer whose case is brought to a grand jury will benefit from a jury that “spend[s] weeks considering the charges in [their] case,” after which their “chance of facing no charges is dramatically increased.”¹³²

Grand juries’ inability to indict on policing crimes have even led for calls for grand juries to be precluded from hearing cases where a police officer is the subject of the investigation.¹³³ These calls were made in 2020 after a Kentucky grand jury failed to return homicide charges against three white police officers who killed Breonna Taylor, in 2015 when a grand jury in Missouri failed to bring charges against Darren Wilson for killing Michael Brown,¹³⁴ and overall, for most homicides when the killer is a police officer, grand juries are reluctant to act.¹³⁵

¹²⁸ See Levine, *supra* note 56, at 763–67.

¹²⁹ See generally Anjelica Hendricks, *Exposing Police Misconduct in Pre-Trial Criminal Proceedings*, 24 N.Y.U. J. LEGIS. & PUB. POL’Y 177 (2021); Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191 (2017) (describing how police union contracts provide officers with numerous procedural protections during internal investigations).

¹³⁰ Levine, *supra* note 56, at 775.

¹³¹ *Id.*

¹³² *Id.*

¹³³ Kaeleigh Williams, Note, *Grand Juries Should Not Hear Police Misconduct Cases: Grand Juries Will Indict Anything, But a Police Officer*, 79 ST. LOUIS U. L.J. ONLINE (2021), <https://scholarship.law.slu.edu/lawjournalonline/79> [<https://perma.cc/3AMK-Q6RF>].

¹³⁴ Bill Hutchinson, *Breonna Taylor Case Sparks Renewed Scrutiny of Grand Juries in Police Misconduct Cases*, ABC NEWS (Oct. 9, 2020), <https://abcnews.go.com/US/breonna-taylor-case-sparks-renewed-scrutiny-grand-juries/story?id=73438566> [<https://perma.cc/V4SF-YFWA>].

¹³⁵ See James C. McKinley Jr. & Al Baker, *Grand Jury System, with Exceptions, Favors Police in Fatalities*, N.Y. TIMES (Dec. 7, 2014),

Scholars have also examined procedural protections offered by police departments. Across several articles, Professor Stephen Rushin has shown how police union bargaining power has guaranteed that officers under investigation receive favorable treatment.¹³⁶ After creating an original dataset of 178 police union contracts, Rushin found that these contracts significantly limit officer interrogations, mandate the destruction of disciplinary records, limit the length of internal investigations, and ban civilian oversight.¹³⁷ For example, several cities delay officer interrogations anywhere from a few hours to several days after suspected misconduct.¹³⁸ Before those interrogations, some protections ensure that officers must receive all evidence against them,¹³⁹ providing officers ample time and opportunity to craft the story that places them in the best light.¹⁴⁰ After expanding his original dataset from 178 to 657 union contracts, Rushin and Atticus DeProspero discovered that around 21% of agencies delay disciplinary interrogations of officers after misconduct, and 28% must turn over incriminating evidence the officers they wish to question.¹⁴¹ Overall, Rushin uncovered several procedural protections which delay police departments from investigating their own.¹⁴²

Other scholars have explored the next step in these investigations: police departments sharing their investigatory records with others.¹⁴³ I have argued that by the time these documents are disclosed, if at all, it is usually too late for defendants who are most susceptible to egregious police behavior to utilize these records during their litigation;¹⁴⁴ leaving defendants forced to litigate cases unaware of an officer's troublesome record. Police departments take the first stab at determining which type of misconduct is relevant to share with prosecutors and the courts, whether their officers have violated the relevant

<https://www.nytimes.com/2014/12/08/nyregion/grand-juries-seldom-charge-police-officers-in-fatal-actions.html> [<https://perma.cc/MUZ2-G5X9>].

¹³⁶ Rushin, *supra* note 129, at 1195–96.

¹³⁷ *Id.* at 1198.

¹³⁸ *Id.* at 1227.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 1228 (“By delaying interrogations, and in some cases providing officers with full access to all evidence against them, these contracts provide officers with ample time to coordinate stories in a way that shifts blame away from the police.”).

¹⁴¹ Stephen Rushin & Atticus DeProspero, *Interrogating Police Officers*, 87 GEO. WASH. L. REV. 646, 651 (2019).

¹⁴² *Id.* at 692–93.

¹⁴³ See Rachel Moran, *Contesting Police Credibility*, 93 WASH. L. REV. 1339, 1368–69 (2018) (“In contrast to the general process for subpoenaing records pertaining to lay witnesses in criminal cases, the vast majority of jurisdictions have laws that protect the confidentiality of police personnel records, and many of these states either prohibit or make it extremely difficult for defense counsel to access these confidential records. These laws are expressions of both doctrinal and political reluctance.”).

¹⁴⁴ See Hendricks, *supra* note 129, at 180–83 (arguing that to ensure defendants are truly given a presumption of innocence they should have access to an officer's misconduct records in pre-trial contexts such as during the charging stage, bail stage, and pre-trial stage).

rules, and when those records should be revealed.¹⁴⁵ Thus, for an officer to even be on the radar for a prosecutorial investigation, it is the police department itself that usually must agree that the officer is a suspect, that the department is incapable of resolving the issue administratively, and that its casefiles should be shared with prosecutors.¹⁴⁶

Professor Jonathan Abel has posited another theory about the inability to obtain records which tend to show police crimes: it is the result of antiquated recordkeeping that renders meaningful review impractical.¹⁴⁷ Moreover, Abel questions the motivation to uncover these records. He argues, if it is difficult to engage in a systemic review of past cases after an officer has engaged in egregious misconduct, then what are the chances of a systemic review occurring for less serious infractions?¹⁴⁸ These logistical barriers thereby operate to shield police from being identified and investigated.¹⁴⁹ Without these barriers, and when cop tracing is conducted,¹⁵⁰ evidence shows that prosecutors may uncover evidence of criminal activity which may lead to criminal charges.¹⁵¹

C. *The Blue Wall of Silence*

A third explanation is that police suspects are shielded by their police colleagues, making an investigation into problematic officers extremely difficult due to the lack of cooperation by those with relevant information. This phenomenon, known as the Blue Wall of Silence,¹⁵² has a chilling effect which pressures officers from turning in their colleagues due to a supposed sense of loyalty and even fear of retribution.¹⁵³

Professors Jack Chin and Scott Wells argue that the Blue Wall of Silence is so resounding that it is a significant impediment to the discovery of police perjury.¹⁵⁴ Beginning as early as their attendance in the police academy, the code of silence follows an officer through their career and becomes deeply

¹⁴⁵ *Id.* at 214–15.

¹⁴⁶ *See id.*

¹⁴⁷ Jonathan Abel, *Cop Tracing*, 107 CORNELL L. REV. 927, 931–33, 956 (2022).

¹⁴⁸ *Id.* at 934.

¹⁴⁹ *See id.* at 955–56.

¹⁵⁰ *Id.* at 939 (“The term ‘cop tracing’ is meant to evoke the now-too-familiar epidemiological concept of ‘contact tracing.’ When an officer is discredited beyond a certain threshold, cop tracing would require a process for looking backward to identify the old cases that were handled by the officer.”).

¹⁵¹ *See id.* at 941–45 (detailing examples where this has been the case).

¹⁵² 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, 237 (1998) (defining the Blue Wall of Silence as an “unwritten code in many departments which prohibits disclosing perjury or other misconduct by fellow officers, or even testifying truthfully if the facts would implicate the conduct of a fellow officer”).

¹⁵³ *Id.* at 240.

¹⁵⁴ *Id.* at 241.

rooted within officer mentality.¹⁵⁵ Usually, this silence can be seen when an officer offers boilerplate testimony to police to conceal misconduct by themselves or others.¹⁵⁶ Most troubling is that officers may engage in this behavior *sua sponte*, without the request of another.¹⁵⁷

Jennifer Koepke also shared how difficult police litigation can be when police witnesses refuse to cooperate even though being offered immunity for any role they may have had.¹⁵⁸ Thus, due to the strength of the code of silence, prosecutors may be unwilling to bring charges against officers when the prosecution relies on other police witnesses who stand behind their colleagues.¹⁵⁹

Professor Teresa Ravenell argues that this code of silence does more than simply protect bad actors temporarily, it ensures that they are never identified at all.¹⁶⁰ Ravenell posits that many Section 1983 plaintiffs who have been injured by police face an evidentiary problem because the blue wall of silence prevents the discovery of which officer participated in their injury and how.¹⁶¹ Ravenell argues that the personal responsibility requirement for Section 1983 litigation, which forbids a general claim of police injury, makes it essential for plaintiffs to discover which police officers specifically caused the defendant's deprivation of rights.¹⁶² Yet that very requirement creates incentives for officers to hide their colleagues' identities.

IV. STATUTES OF LIMITATIONS AS A BARRIER TO POLICE PROSECUTION

Collectively, these theories reveal several difficulties in prosecuting police. However, my research reveals that this conventional wisdom is incomplete—there exists another, more straightforward, reason why police are infrequently prosecuted. In a great many cases, statutes of limitations afford police what amounts to a complete bar to prosecution. Contrary to popular belief that prosecutors are exercising their discretion to protect police, my research reveals

¹⁵⁵ *Id.* at 253.

¹⁵⁶ *Id.* at 254.

¹⁵⁷ *Id.* at 256.

¹⁵⁸ Jennifer E. Koepke, Note, *The Failure to Breach the Blue Wall of Silence: The Circling of the Wagons to Protect Police Perjury*, 39 WASHBURN L.J. 211, 216 (2000) (recounting that after 100 officers were offered limited immunity, “only two would testify as to their knowledge” of another’s torture inflicted on others).

¹⁵⁹ *See id.* at 216–17.

¹⁶⁰ *See* Teresa Ravenell, *Unidentified Police Officials*, 100 TEX. L. REV. 891, 893 (2022).

¹⁶¹ *Id.* at 891 (“Unfortunately, plaintiffs often are not positioned to know what happened, and police officials have strong incentives to stay silent. Not only do police norms, like the ‘blue wall of silence,’ prevent police officials from ‘ratting out’ their fellow officers, but § 1983 jurisprudence incentivizes silence—if all officers stay silent, they can all avoid liability.”).

¹⁶² *Id.* at 892 (“[P]laintiffs must prove that not only were they deprived of a constitutional right and that that *specific defendant* caused the deprivation.”).

that in most cases, prosecutors had no discretion whatsoever because any effort to prosecute would have been barred by the passage of time.

This Part demonstrates the significant role that statutes of limitations play in preventing police prosecutions. Subpart A begins by describing the method I used to determine whether the applicable statute of limitations had expired by the time prosecutors were able to bring charges in the 838 likely police crimes identified in the NRE dataset. Subpart B presents my results and describes the payoff: the existing theories for the infrequency of police prosecutions are incomplete because they do not account for the role played by statutes of limitation.

A. Methodology

To determine how frequently prosecutors were time-barred from bringing charges against police officers across the 838 likely police crimes observed in the NRE dataset required several steps.

First, for each police crime, I determined the initial date on which the statute of limitations began to run. For most crimes in most states, discerning this start date was as simple as identifying the date one which the last element of the criminal offense was completed, as the majority rule for calculating the commencement of a statute of limitations is when the offense is completed.¹⁶³ In a few instances, however, the relevant state law did not commence the limitations period until the crime was discovered.¹⁶⁴

Second, I identified the applicable statute of limitation period at the time of commission. This was a straightforward process that involved searching on Westlaw for the relevant state limitations period that corresponded to the police crime at hand. Notable, in a small number of jurisdictions, particular forms of crimes did not have a limitations period at all.¹⁶⁵

Third, I needed to decide whether any circumstances existed for tolling the relevant statute of limitation.¹⁶⁶ This process was especially complex, as

¹⁶³ 21 AM. JUR. 2D *Criminal Law* § 247 (2023).

¹⁶⁴ See generally Jodi Leibowitz, *Criminal Statutes of Limitations: An Obstacle to the Prosecution and Punishment of Child Sexual Abuse*, 25 CARDOZO L. REV. 907, 915 (2003) (“Another mechanism for delaying the statute of limitations period is the discovery rule. The discovery rule, although more widely applied to civil statutes of limitations, results in the limitation period commencing when the crime is discovered as opposed to when the offense was committed.”).

¹⁶⁵ See, e.g., N.Y. CRIM. PROC. LAW § 30.10 (McKinney 2022) (“[A] prosecution for a ‘class A felony . . . may be commenced at any time.’ In 1971, when the Criminal Procedure Law became effective, only murder (presently, in the second degree) and kidnapping in the first degree were class A felonies. Since then, other offenses have been classified as class A felonies and thereby subject to prosecution ‘at any time.’”).

¹⁶⁶ See generally 25 ILL. LAW AND PRAC. LIMITATIONS OF ACTIONS § 71 (2023) (“As a general rule, a statute of limitations continues to run unless tolling is authorized by statute. ‘Tolling’ refers to suspending or stopping the running of a statute of limitations; it is

numerous grounds for tolling limitations periods were potentially implicated, including tolling rules for public officials and concealment.¹⁶⁷

Finally, I needed to identify the date by which prosecutors were able to bring charges. For consistency, I generally chose the dates on which the wrongfully accused were exonerated because that was the date on which state actors were forced to acknowledge that an error occurred—an acknowledgment that itself frequently triggered investigations into the underlying police crimes.¹⁶⁸

With all of this data in hand, I was finally able to compare this last date against the amount of time that had lapsed from the initial date to make a judgment as to whether the statute of limitations had expired.

What follows is several examples of actual cases that I coded in the dataset. By walking through the process I used to calculate whether the limitations period expired for these cases, my hope is two-fold: to show some different approaches that states apply to statutes of limitations, and to illustrate the process by which each police crime was coded as either time-barred or not.

1. *A Typical Case: Perjury, Obstruction, and Tampering by an Arkansas Police Officer*

In March 1994, Rodney Bragg of Arkansas was arrested for selling a controlled substance to an undercover agent in March 1993, Keith Ray, for the South Central Drug Task Force.¹⁶⁹ Although Bragg had no prior convictions, he was convicted in January 1996 and sentenced to life when Agent Ray testified that Bragg sold several rocks of crack cocaine.¹⁷⁰ In a civil suit to recover his seized vehicle, Bragg received previously undisclosed investigative notes created by Ray which tended to show Ray falsifying the entire ordeal.¹⁷¹ Most critical was Ray's notes in which he recorded the license plate number, make, and model of the vehicle owned by the individual who sold him the crack in

analogous to a clock stopping and then restarting. Tolling may either temporarily suspend the running of the limitations period or delay the start of the limitations period.”)

¹⁶⁷ See, e.g., CAL. PENAL CODE §§ 801, 803 (West 2023); 720 ILL. COMP. STAT. 5/3-6 (2012).

¹⁶⁸ See *In re Renewed Investigation of State Police Crime Lab'y, Serology Div.*, 633 S.E.2d 762, 764 (W. Va. 2006). Following wrongful convictions “[i]n 1993, this Court appointed a special judge to supervise an investigation into allegations that Fred Zain . . . gave false testimony in criminal prosecutions. In his report to this Court, the special judge found that Zain intentionally and systemically gave inaccurate, invalid, or false testimony or reports. The special judge concluded that Zain’s misconduct was so egregious that it should be considered newly discovered evidence in any criminal prosecutions in which Zain offered evidence.” *Id.* Additionally, West Virginia courts were so alarmed by Zain’s conduct that extended its investigation to the entire Police Crime Lab. *Id.*

¹⁶⁹ Stephanie Denzel, *Rodney L. Bragg*, NAT’L REGISTRY OF EXONERATIONS (2012), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3042> [<https://perma.cc/2A2H-429C>].

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

March 1993—allegedly belonging to Bragg.¹⁷² However, Bragg did not purchase the vehicle until March 1994, a full year after Agent Ray testified that he saw Bragg in the vehicle and that Bragg was using the vehicle to distribute crack.¹⁷³ During a post-conviction hearing on the newly discovered evidence in December 2000, Agent Ray admitted to lying and falsifying the encounter.¹⁷⁴

From these sets of events, I coded the likely crimes committed by Agent Ray to include perjury,¹⁷⁵ tampering with evidence,¹⁷⁶ and obstructing governmental operations.¹⁷⁷ Moreover, I used state law to determine specific burdens of proof for offenses. For example, perjury in Arkansas may not be established solely through contradiction by the uncorroborated testimony of a lone witness.¹⁷⁸ Thus, Agent Ray likely committed perjury since physical evidence exists which disproves his testimony that Bragg used a vehicle purchased in 1994 to sell narcotics in 1993.¹⁷⁹ This evidence is corroborated. Ray also likely committed tampering with evidence since he altered his notes from his 1993 investigation to include information to falsely implicate Bragg, an act that also obstructed governmental functions.¹⁸⁰

I then coded the commission date of the perjury to include the date of Bragg's trial in January 1996, the other two charges were coded to have been committed on or about March 1994, when the Agent falsified the documents.

With these likely crimes identified, I then reviewed the statutes of limitations for these offenses in the state of its commission, Arkansas, which imposes a six-year limitation period on class Y and class A felonies, a three-year limitation period for class B, C, D, and unclassified felonies, and a one year limitation period for misdemeanors.¹⁸¹ Thus, using these limitation periods, the

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*; *Arkadelphia Man Awarded \$460,000 for Wrongful Conviction*, FORT SMITH TIMES RECORD (Dec. 17, 2013), <https://www.swtimes.com/story/news/state/2013/12/17/arkadelphia-man-awarded-460-000/26288985007/> [<https://perma.cc/6HZB-8ZRY>].

¹⁷⁵ ARK. CODE ANN. § 5-53-102 (West 2023) (“A person commits perjury if in an official proceeding he or she knowingly: (1) makes a false material statement under an oath[.]”).

¹⁷⁶ *Id.* § 5-53-111 (“A person commits the offense of tampering with physical evidence if he or she alters, destroys, suppresses, removes, or conceals any record, document, or thing with the purpose of impairing its verity, legibility, or availability in any official proceeding or investigation.”).

¹⁷⁷ *Id.* § 5-54-102 (“A person commits the offense of obstructing governmental operations if the person: (1) knowingly obstructs, impairs, or hinders the performance of any governmental function[.]”).

¹⁷⁸ *Id.* § 5-53-107 (“Except for a prosecution based upon inconsistent statements, in any prosecution for perjury or false swearing falsity of a statement may not be established solely through contradiction by the uncorroborated testimony of a single witness.”).

¹⁷⁹ See Denzel, *supra* note 169.

¹⁸⁰ *Id.*

¹⁸¹ ARK. CODE ANN. § 5-1-109(b) (West 2023).

state of Arkansas has three years to prosecute perjury offenses,¹⁸² three years to prosecute tampering with evidence offenses,¹⁸³ and merely one year to prosecute obstruction offenses.¹⁸⁴ Armed with these dates, I concluded that the last possible date Arkansas could have prosecuted Agent Ray for his perjury crime was on or around January 1999, which is three years after Bragg's trial. With respect to the tampering and obstruction offenses, I coded the statutes of limitation as expiring in March 1997 and March 1995, respectively.

I then turned to consider whether those limitations periods could be tolled under Arkansas law. Arkansas tolls the statute of limitations for crimes committed by public officials if they concealed their criminal activity, turning the accrual from the commission date to the discovery date.¹⁸⁵ However, the conduct committed by Agent Ray did not align with Arkansas' interpretation of concealment.¹⁸⁶ Indeed, Ray lied, created fake evidence, and caused Bragg's wrongful conviction, but Ray did not conceal these acts. Contrarily, when Bragg requested Ray's investigative documents the deceit was clearly discoverable within the documents—still existing and available for discovery. Overall, I determined that the tolling provision did not apply for Ray's act and that by time his crimes were discovered in December 2020, the statute of limitations for all three offenses had lapsed. Indeed, the last date Arkansas could have prosecuted Ray for perjury was January 1999, a time when Bragg was still incarcerated serving a life sentence based on Ray's perjurious testimony.

2. Jurisdictions That Apply the Discovery Accrual Rule: Police Crimes in California

However, uncovering the date on which a statute of limitations begins was not always so convenient as the example above. Some states or offenses required additional work to ascertain when the crimes were discovered. For example,

¹⁸² *Id.* § 5-53-102 (“Perjury is a Class C felony.”).

¹⁸³ *Id.* § 5-53-111(b)(1) (“Tampering with physical evidence is a Class D felony if the person impairs or obstructs the prosecution or defense of a felony.”).

¹⁸⁴ *Id.* § 5-54-102(b).

¹⁸⁵ *Id.* § 5-1-109(c)(2)(A) (“Any offense that is concealed involving felonious conduct in office by a public servant at any time within five (5) years after he or she leaves public office or employment or within five (5) years after the offense is discovered or should reasonably have been discovered, whichever is sooner.”).

¹⁸⁶ *See* *Bushnell v. State*, 614 S.W.3d 476, 478, 482–83 (Ark. Ct. App. 2020). The Bookkeeper of a business was charged with embezzling money between December 2013 and September 2017, but the crime was not discovered until August 2018 and an arrest warrant was not issued until January 2019. *Id.* at 478. Bushnell argued that it occurred outside the three-year limitations period and asserted that the restitution can only be related back to January 2016. *Id.* However, the state argued that the statute of limitations was tolled since Bushnell took active steps to conceal his crime. *Id.* The court agreed with the state and held that the evidence showed that Bushnell wrote checks to himself over several years and concealed it and refused other employees' access to the financial records. *Id.* at 482–83.

California applies a discovery rule for crimes committed by public officials.¹⁸⁷ Prosecutors are required to bring criminal charges for most offenses within three years after its commission;¹⁸⁸ however, offenses based on fraud, breach of fiduciary duty, and misconduct in a public office shall be commenced within four years after their discovery.¹⁸⁹

For example, on July 19, 1996, Los Angeles Police Officer Michael Buchanan stated that Raul Munoz and Cesar Natividad hit the officer with Munoz's pickup truck.¹⁹⁰ Both individuals were arrested and charged with assaulting an officer and using a deadly and dangerous weapon.¹⁹¹ With just the word of the officer against the two men at an August 22, 1996 hearing, they both pled guilty on December 17, 1996; Munoz was sentenced to three years in prison and Natividad received 227 days in jail.¹⁹² However, law enforcement became aware on November 17, 1999, that Buchanan lied regarding the incident and was never struck by a vehicle.¹⁹³ Shortly after, prosecutors filed writs of habeas corpus for Munoz and Natividad on February 17, 2000, which were granted that day.¹⁹⁴ Shortly after, in July 2000, Buchanan was arrested for helping to frame the innocent men.¹⁹⁵

Buchanan's actions most likely aligned with the crimes of perjury¹⁹⁶ and filing a false police report (a form of unsworn statement).¹⁹⁷ When Buchanan falsely testified at the August 22, 1996 hearing that the defendants hit him with a vehicle, he committed perjury. Additionally, the officer making those accusations in his July 1996 paperwork was sufficient for the crime of filing a false police report. If these crimes were committed in a state with an accrual rule that begins at the commission of the crime, the statute of limitations would have begun to run for filing a false police report in July 1996 and expired in July 1999.¹⁹⁸ The perjury crime would have accrued on August 22, 1996, when the

¹⁸⁷ CAL. PENAL CODE § 803(c) (West 2023).

¹⁸⁸ See *id.* § 801; see also 720 ILL. COMP. STAT. 5/3-6(b) (2012). Illinois also has a discovery rule for specific offenses; it has an extended statute of limitations for crimes committed by public officers and the extension is only one year after the proper prosecuting officer discovers the offense.

¹⁸⁹ See CAL. PENAL CODE § 801.5 (West 2023); *id.* § 803(c).

¹⁹⁰ Ken Otterbourg, *Raul Munoz*, NAT'L REGISTRY OF EXONERATIONS (Sept. 20, 2021), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5825> [<https://perma.cc/6FEF-7FHF>].

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Scott Glover & Matt Lait, *4th Officer Is Charged in Corruption Scandal*, L.A. TIMES (July 11, 2000), <https://www.latimes.com/archives/la-xpm-2000-jul-11-me-50812-story.html> [<https://perma.cc/8YW4-V5WL>].

¹⁹⁶ See *id.*; CAL. PENAL CODE § 118 (West 2023).

¹⁹⁷ See Otterbourg, *supra* note 190; CAL. PENAL CODE § 148.5 (West 2023).

¹⁹⁸ See CAL. PENAL CODE § 801 (West 2023) (stating the statute of limitations is three years in California); Otterbourg, *supra* note 190.

officer falsely testified, and the statute of limitations would have lapsed August 22, 1999.¹⁹⁹ Thus, under this rule, prosecutors would have been barred from prosecuting Buchanan because by the time prosecutors became aware of his crimes in November 1999, the limitations periods would have lapsed.

Due to California's discovery rule, however, the statute of limitations did not accrue until the crime was discovered in November 1999.²⁰⁰ This meant that Buchanan could be prosecuted. And indeed, in November 2000, the officer was convicted of filing a false report and perjury,²⁰¹ though his conviction was overturned shortly thereafter due to insufficient evidence presented at trial.²⁰²

This example represents merely one of the infamous Rampart scandal cases in which Los Angeles prosecutors sought to convict over 70 corrupt officers.²⁰³ These prosecutors successfully convicted a handful, were unsuccessful with a couple, but overall were restricted from bringing forth criminal charges since many of the cases had lapsed statutes of limitations.²⁰⁴

In short, discovery rules were designed to provide law enforcement with more time to identify and prosecute crimes, yet they do not always succeed in this aim. Because any government awareness to the crime initiates the clock,²⁰⁵ I found in coding the cases that a statute of limitations often lapsed even under the discovery rule if the government was aware of the police crime and simply ignored it.

Colorado, for instance, applies the discovery rule for perjury offenses.²⁰⁶ But that rule has proven ineffective at holding officers accountable largely due to disputes concerning when prosecutors were made aware that perjured testimony occurred. For example, in 1999, Timothy Masters was falsely

¹⁹⁹ See Otterbourg, *supra* note 190; see also CAL. PENAL CODE § 801 (West 2023).

²⁰⁰ See CAL. PENAL CODE § 801.5 (West 2023); *id.* § 803(c).

²⁰¹ *Three Rampart Officers Convicted*, ABC NEWS (Nov. 9, 2000), <https://abcnews.go.com/US/story?id=95008&page=1> [<https://perma.cc/4WQF-EEFK>].

²⁰² *Judge Overturns Rampart Convictions*, ABC NEWS (Dec. 23, 2000), <https://abcnews.go.com/US/story?id=94614&page=1> [<https://perma.cc/CWE9-QBVM>]. To be sure, the fact that Buchanan was later acquitted on appeal does suggest that even when statutes of limitations do not apply to protect police, there is no guarantee that the prosecution will secure a conviction. For present purposes, however, the key point is that prosecutors possessed enough evidence to charge Buchanan—and that, due to California's discovery rule, that prosecution was able to proceed.

²⁰³ Matt Lait & Scott Glover, *Rampart Scandal Expected to Take a Continuing Toll*, L.A. TIMES (Dec. 29, 2000), <https://www.latimes.com/archives/la-xpm-2000-dec-29-me-5954-story.html> [<https://perma.cc/K54M-86DU>].

²⁰⁴ *Id.* (“In fact, many of the 70 officers who have been under investigation may never be charged with a crime because there is insufficient evidence, or because statutory deadlines have expired . . .”).

²⁰⁵ See *United States v. Gomez*, 38 F.3d 1031, 1037 (8th Cir. 1994) (finding that “[w]here the government is in possession of all necessary information and means,” the discovery rule “governing the accrual of a cause of action for the purpose of commencing the statute of limitations” should apply).

²⁰⁶ COLO. REV. STAT. ANN. § 16-5-401 (West 2023).

convicted of brutally killing and sexually assaulting a 37 year old woman.²⁰⁷ Even though the trial lacked physical evidence, Masters was largely convicted due to false statements made by the lead detective in the investigation, James Broderick.²⁰⁸ After DNA subsequently exonerated Masters in 2008, a 2010 special prosecutor in Colorado indicted Broderick on eight counts of perjury,²⁰⁹ which has a statute of limitations of three years.²¹⁰ Though the indictment form clearly spelled out every occurrence of perjury committed by Broderick between 1992 and 1999, the charges were dismissed due to lapsed statutes of limitations;²¹¹ the indictment failed to say when the perjury was discovered.²¹²

Still motivated to prosecute the detective, prosecutors again re-indicted Broderick with a cured indictment.²¹³ However, that indictment too was dismissed, and the case was halted when the state supreme court refused to review the trial court's decision to dismiss the indictment.²¹⁴ In total, Denver spent nearly \$500,000 during the investigation and failed prosecution of Broderick.²¹⁵

3. *Crimes Without Statutes of Limitations: Police Felony Offenses in Kentucky*

Convenient for the methodology was the review of cases in which the state had no statutes of limitations. Kentucky, for example, has no statutes of

²⁰⁷ Maurice Possley, *Timothy Masters*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3412> [https://perma.cc/H36L-GMCS] (May 2, 2022).

²⁰⁸ *Id.*; see Elliott C. McLaughlin, *Murder Conviction Built on Cop's Lies, Indictment Says*, CNN (July 30, 2010), <http://www.cnn.com/2010/CRIME/07/29/tim.masters.police.perjury/index.html> [https://perma.cc/9JXP-4L9X].

²⁰⁹ McLaughlin, *supra* note 208.

²¹⁰ See COLO. REV. STAT. ANN. § 18-8-502 (West 2023) (perjury in the first degree is a class 4 felony); *id.* § 16-5-401 (felonies have a three-year statute of limitations).

²¹¹ *Charges Against Masters' Investigator Dismissed*, CBS COLO. (May 9, 2011), <https://www.cbsnews.com/colorado/news/charges-against-masters-investigator-dismissed/> [https://perma.cc/9NEZ-UHTX].

²¹² See generally *Indictment, People v. Broderick*, No. 11CA2623 (D. Colo. June 30, 2010), <http://i.cdn.turner.com/cnn/2010/images/07/29/indictment.broderick.pdf> [https://perma.cc/8GTE-VH99].

²¹³ *Officer in Botched Murder Probe Re-Indicted*, CBS COLO. (July 28, 2011), <https://www.cbsnews.com/colorado/news/officer-in-botched-murder-probe-re-indicted/> [https://perma.cc/B3LL-VHGD].

²¹⁴ Will C. Holden, *Charges Dropped Against Detective Accused of Lying in Tim Masters Wrongful Conviction Case*, FOX 31 (Jan. 18, 2013), <https://kdvr.com/news/detective-accused-of-perjury-in-tim-masters-wrongful-conviction-case-gets-charges-dropped/> [https://perma.cc/ZQ7V-E3PK].

²¹⁵ Ed Krayewski, *Ft. Collins, Colorado Spent Nearly \$500,000 on Officer Accused of Perjury in Murder Trial*, REASON (Feb. 4, 2013), <https://reason.com/2013/02/04/ft-collins-colorado-spent-nearly-500000/> [https://perma.cc/GHK7-PV7E].

limitations for felony offenses.²¹⁶ Thus, when reviewing that Detective Mark Handy committed perjury during the trial against Edwin Chandler,²¹⁷ I coded the commission date as the date of Chandler's trial, January 1995, and that police were not time-barred from prosecuting Handy on the date of Chandler's eventual exoneration in October 2009.²¹⁸

However, it wasn't until Handy continued his criminal offenses in other exoneration cases when the Louisville Metro Council adopted a resolution requesting the state Attorney General to appoint a special prosecutor to investigate Handy.²¹⁹ Since Kentucky had no statute of limitations, there were no procedural barriers when a grand jury indicted Detective Mark Handy in 2018 for his role in the wrongful conviction of Edwin Chandler in 1995.²²⁰ Mark Handy subsequently pled guilty to committing perjury during the trial of Edwin Chandler 25 years prior;²²¹ Handy was also indicted for tampering with physical evidence in a murder case against Keith West.²²²

4. *Crimes Without Statutes of Limitations: Offenses on the Felony / Misdemeanor Border in West Virginia*

What proved more difficult for some states, however, was arguing that the police officer's conduct aligned with a felony offense, ensuring that the prosecution was not time barred, rather than the act aligning with a misdemeanor offense, which could be time barred. For example, West Virginia has no statute of limitations for felony offenses,²²³ a three-year limitation period for perjury, and merely a one-year limitation period for misdemeanors.²²⁴ Therefore, misdemeanor crimes—such as altering, concealing or destroying records,²²⁵ and

²¹⁶ KY. REV. STAT. ANN. § 500.050 (West 2023).

²¹⁷ Maurice Possley, *Edwin Chandler*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3098> [https://perma.cc/5Q2T-LUU6] (May 25, 2022) ("The detectives denied coercing or threatening Chandler or any witnesses, and denied offering any incentives."). Perjury in the first degree is a Class D felony. KY. REV. STAT. ANN. § 523.020 (West 2023).

²¹⁸ Possley, *supra* note 217.

²¹⁹ *Id.*

²²⁰ *See id.*

²²¹ Andrew Wolfson, *Former Louisville Detective Who Sent 3 Innocent Men to Prison Pleads Guilty to Perjury*, LOUISVILLE COURIER J. (June 3, 2020), <https://www.courier-journal.com/story/news/crime/2020/06/03/former-cop-sent-3-innocent-men-prison-pleads-guilty-perjury/3129621001/> [https://perma.cc/R5RV-R4TR].

²²² *Id.* ("Called as a witness last year in a hearing on West's motion, Handy invoked his right against self-incrimination hundreds of times when he was grilled about framing defendants for murders by concealing and fabricating evidence."); Tampering with physical evidence is a Class D felony. KY. REV. STAT. ANN. § 524.100 (West 2023).

²²³ W. VA. CODE ANN. § 61-11-9 (West 2023).

²²⁴ *Id.*

²²⁵ *Id.* § 61-5-22.

making false statements,²²⁶—can only be prosecuted within one year of their commission in West Virginia.

Thus, when Fred Zain committed these crimes to wrongfully convict hundreds, West Virginia was barred from prosecuting him on these misdemeanor offenses and had to strategically craft a prosecution that was not time barred.²²⁷ Their answer was to indict Zain on fraud charges, a felony offense.²²⁸ The only task West Virginia had to do to be successful with Zain’s indictment was prove to the Supreme Court of Appeals of West Virginia that the State was in fact a person that could be defrauded, an argument with which the court ultimately agreed.²²⁹

5. *Changing Statute of Limitations Periods: Sexual Misconduct Offenses in Kansas*

Another consideration that I was careful to take into account when coding the cases is whether the state statute of limitations period changed after the commission of the police crime, such that the modern limitations period was inapposite. For example, Kansas only recently amended its statute of limitations to abolish the five-year statutes of limitations period for certain new offenses.²³⁰ Previously, the only crimes that had no statutes of limitations were murder, terrorism, and illegal use of weapons of mass destruction.²³¹ But in 2013, Kansas added rape and aggravated criminal sodomy to the exclusive list.²³² This amendment, however, did not apply retroactively to offenses committed prior to 2013.²³³

²²⁶ *Id.* § 61-5-17.

²²⁷ *Court Invalidates a Decade of Blood Test Results in Criminal Cases*, N.Y. TIMES (Nov. 12, 1993), <https://www.nytimes.com/1993/11/12/us/court-invalidates-a-decade-of-blood-test-results-in-criminal-cases.html> [<https://perma.cc/64EB-N297>] (“Local law-enforcement officials say they have not yet decided whether to pursue criminal charges against Mr. Zain. The one-year statute of limitations on the misdemeanor count of false swearing has already expired since his last testimony in a West Virginia court. Other options include charging him with perjury, a felony, or pursuing a Federal charge of violating defendants’ civil rights.”).

²²⁸ *State v. Zain*, 528 S.E.2d 748, 750–51 (W. Va. 1999).

²²⁹ *Id.* at 759.

²³⁰ Diana Reese, *New Kansas Law Ends Statute of Limitations for Rape Cases*, WASH. POST (Apr. 2, 2013), <https://www.washingtonpost.com/blogs/she-the-people/wp/2013/04/02/new-kansas-law-ends-statute-of-limitations-for-rape-cases/> [<https://perma.cc/4V9E-ZCBV>] (“Gov. Sam Brownback signed a bill into law Monday that eliminates the five-year statute of limitations on rape and aggravated sodomy.”).

²³¹ S.B. 307, 2012 Reg. Sess. of Leg. (Kan. 2012).

²³² H.B. 2252, 2013 Reg. Sess. of Leg. (Kan. 2013).

²³³ *Ex-Kansas Detective Accused of Preying on Black Women and Girls for Decades Ordered Released from Jail Pending Sex Abuse Trial*, CBS NEWS (Sept. 20, 2022), <https://www.cbsnews.com/news/roger-golubski-kansas-officer-accused-serial-sexual->

As a result, Kansas's amended statute of limitations law did not permit the state to bring charges against Detective Roger Golubski, who committed his crimes before the 2013 amendment.²³⁴ More specifically, Golubski committed a series of sexual abuse offenses including attempted rape across the 1980s and 1990s, with the last allegation occurring in 1999.²³⁵ Included in those crimes was a particularly egregious act in which Golubski sexually intimidated and solicited witnesses to falsely identify Lamonte McIntyre for committing a 1994 murder.²³⁶ Sadly, prosecutors were not prepared to bring charges against Golubski in the McIntyre incident until his exoneration in 2017, a point at which the five-year statute of limitations had long since expired.²³⁷

A similar conclusion applied to Golubski's other crimes. Indeed, after an extensive 2019 investigation by the Kansas Bureau of Investigation, the bureau found no evidence of Kansas law violations that were still within the criminal statute of limitations.²³⁸ Put simply, even when state law on its face suggested that a police crime might not be insulated by a statute of limitations, my process for coding the case revealed the contrary—then-existing statutes of limitations were still a bar to prosecution.

There is a small consolation in the Golubski case, at least. Aware of the state's statutory inability, federal prosecutors indicted Golubski on federal offenses of sexual abuse, assault, and kidnapping, while acting under color of

abuse-ordered-released-from-jail-pending-trial/ [https://perma.cc/G3FP-263E] (“Kansas no longer has a statute of limitations for rape, but that doesn’t apply retroactively . . .”).

²³⁴ *Id.*

²³⁵ *Abuse Allegations Against Ex-KCK Cop Roger Golubski Go Back Decades. Here's the Timeline*, KAN. CITY STAR (Nov. 1, 2022), <https://www.kansascity.com/news/local/article265861346.html> [https://perma.cc/V3RY-UVKB] (“Some of the questions he wouldn’t answer were: Did he have a sideline in selling drugs and ‘facilitating prostitution’ while he was a police detective? Ever get charges dismissed in return for sex? Ever rape a minor in his cop car? Or threaten to harm a woman if she turned him in? And this: ‘Throughout the 1980s and 1990s, you used your network of women on the streets to provide false information to close your cases, correct?’”); see KAN. STAT. ANN. § 21-5503 (West 2023) (defining rape); *id.* § 21-5301 (defining attempt).

²³⁶ *Abuse Allegations Against Ex-KCK Cop Roger Golubski Go Back Decades. Here's the Timeline*, *supra* note 235 (“Lamonte McIntyre’s mother, Rose McIntyre, said Golubski threatened to arrest her and her boyfriend if she did not comply with his sexual demands. Golubski allegedly sexually assaulted her at KCKPD and then harassed her for weeks, saying he would pay her for a long-term sexual agreement.”).

²³⁷ See *id.* Golubski’s last alleged crime occurred in 1999. Therefore, the five-year statute of limitation for the offense was expired in 2017. See Dan Margolies, *Here's Why Former KCKPD Detective Roger Golubski Is Facing Federal Civil Rights Charges*, KCUR (Sept. 19, 2022), <https://www.kcur.org/news/2022-09-19/heres-why-former-kckpd-detective-roger-golubski-is-facing-federal-civil-rights-charges> [https://perma.cc/L9NE-463Y].

²³⁸ See *Abuse Allegations Against Ex-KCK Cop Roger Golubski Go Back Decades. Here's the Timeline*, *supra* note 235.

law²³⁹—all civil rights violations which carry no statute of limitations.²⁴⁰ Most revealing was a federal prosecutor’s reason for indicting Golubski. When asked, U.S. Attorney Stephen McAllister said, “[t]he case is being tried in federal court, rather than state court, because federal law does not have a statute of limitations for civil rights violations.”²⁴¹

6. Tolling the Statute of Limitations Due to a Defendant’s Physical Absence: The Zain Case

My method for coding the cases also required an examination of state tolling provisions. For example, during the prosecution of Fred Zain, Texas attempted to argue that its three-year statute of limitations had yet to expire due to the application of its tolling rules.²⁴² In particular, Texas argued that state law required the clock to stop when the accused is absent from the state, including the pendency of an indictment, information, or complaint.²⁴³ Thus, even though the 1994 indictment against Zain for perjury allege that the crime was committed in December 1990, the state argued that the statute of limitation was tolled because Zain had been absent from the State of Texas since November 1993,²⁴⁴ thereby making the indictment timely when it was brought on July 26, 1994.²⁴⁵

In rejecting the Texas’ argument, the Court of Appeals argued that since Texas has invoked the tolling rule, it had the burden to prove that Zain was accused of these crimes *prior* to his departure; a burden that the court found Texas did not meet.²⁴⁶ Overall, my review found states rarely utilized this tolling provision to stop their statutes of limitations from expiring in police prosecutions.

²³⁹ Press Release, Off. of Pub. Affs., U.S. Dep’t of Just., Former Kansas City, Kansas, Police Department Detective Indicted for Sexual Assaults (Sept. 15, 2022), <https://www.justice.gov/opa/pr/former-kansas-city-kansas-police-department-detective-indicted-sexual-assaults> [<https://perma.cc/5N9K-E9R9>].

²⁴⁰ See Margolies, *supra* note 237 (“One possible reason may be the statute of limitations for sexual assault in Kansas. Golubski is accused of sexually assaulting the two women in question more than 20 years ago, when Kansas had a five-year statute of limitations for rape and aggravated sodomy.”).

²⁴¹ See *Ex-Kansas Detective Accused of Preying on Black Women and Girls for Decades Ordered Released from Jail Pending Sex Abuse Trial*, *supra* note 233.

²⁴² *Ex parte Zain*, 940 S.W.2d 253, 254 (Tex. App. 1997).

²⁴³ *Id.*; see TEX. CODE CRIM. PROC. ANN. art. 12.05 (West 2023).

²⁴⁴ *Zain*, 940 S.W.2d at 253.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 254 (“There is no evidence in the record on appeal that Zain became an accused prior to the time he was indicted, nor is there any evidence suggesting that Zain was charged with these offenses until after limitations had expired. The indictments were thus barred by the applicable statute of limitations.”).

7. *Tolling the Statute of Limitations Due to a Police Defendant's Status as a Public Official: Police Crimes in Pennsylvania*

One tolling circumstance that arose in a significant number of cases included the tolling provision for public officials. Pennsylvania's tolling statute offers a good illustration. Under it, an otherwise time-barred prosecution may proceed for

[a]ny offense committed by a public officer or employee in the course of or in connection with his office or employment at any time when the defendant is in public office or employment or within five years thereafter, but in no case shall this paragraph extend the period of limitation otherwise applicable by more than eight years.²⁴⁷

When a public official tolling provision applied, I extended the relevant timeframe for purposes of calculating whether the applicable statutes of limitations had expired. For example, Detective James Pitts has contributed to the wrongful conviction of several individuals in Pennsylvania, including Hassan Bennett, Obina Onyiah, and Dwayne Thorpe, all wrongfully convicted of murders.²⁴⁸ During Pitts' investigation into these cases, he engaged in a common pattern of criminal conduct: he fabricated witness statements, physically assaulted witnesses, threatened to make their lives difficult if they didn't comply with his demands, and perjured himself at trials when he denied these actions.²⁴⁹ Altogether his acts likely constituted the criminal offenses of

²⁴⁷ See 42 PA. STAT. AND CONS. STAT. ANN. § 5552(c)(2) (West 2023); see also, e.g., FLA. STAT. ANN. § 775.15(12)(b) (West 2023) (Florida allows "any offense based upon misconduct in office by a public officer or employee at any time when the defendant is in public office or employment, within 2 years from the time he or she leaves public office or employment, or during any time permitted by any other part of this section, whichever time is greater."); N.Y. CRIM. PROC. LAW § 30.10(3)(b) (McKinney 2023) (In New York "a prosecution for any offense involving misconduct in public office by a public servant . . . may be commenced against a public servant, or any other person acting in concert with such public servant at any time during such public servant's service in such office or within five years after the termination of such service; provided however, that in no event shall the period of limitation be extended by more than five years beyond the period otherwise applicable under subdivision two of this section.").

²⁴⁸ See Ken Otterbourg, *Hassan Bennett*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5562> [https://perma.cc/A38C-CJNJ] (Mar. 9, 2022); Ken Otterbourg, *Obina Onyiah*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5961> [https://perma.cc/K583-J36M] (Sept. 8, 2023); Maurice Possley, *Dwayne Thorpe*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5560> [https://perma.cc/N353-FYJE] (Mar. 9, 2022).

²⁴⁹ See Possley, *supra* note 248.

assault,²⁵⁰ official oppression,²⁵¹ obstructing administration of law,²⁵² intimidation,²⁵³ perjury,²⁵⁴ and tampering.²⁵⁵ The statute of limitations for these offenses ranges from 2 years to 5 years.²⁵⁶ However, Pennsylvania's tolling provision allows for an additional 8 years of time for crimes committed by public officials.²⁵⁷ Therefore, I calculated the last possible date for Pitts' prosecution to be thirteen years²⁵⁸ from the commission of the criminal offense for three of the offenses; the others were barred after ten years from its commission.

To illustrate how this tolling provision applied, consider the example of Hassan Bennett. In 2006, Bennett was falsely arrested and later convicted in 2008 for a murder, largely based on the false testimony of a witness who later admitted that Detective Pitts coerced his statement, and that Pitts assaulted him.²⁵⁹ I used the date of the witnesses' interview with Pitts, September 2006, as the commission offense date.²⁶⁰ Applying the now thirteen-year timeframe to prosecute Pitts for these acts, I determined that the last moment to prosecute Pitts would have been September 2019. As Bennett was exonerated in April 2019, I determined that the statute of limitations to prosecute Pitts had not yet expired; the state had a mere five months to prosecute Pitts, although the state did not do so.

In 2008, Dwayne Thorpe was falsely arrested for murder based on the coerced statement of a witness who later shared that Detective Pitts threatened him to make the statement.²⁶¹ Pitts denied mistreating or threatening the witness during the December 2009 trial.²⁶² Using these facts, I calculated the statute of limitations to end on or about December 2022. By Thorpe's exoneration in March 2019, the state had three years to prosecute Detective Pitts.

Similarly, in November 2010, Obina Onyiah was falsely arrested for murder.²⁶³ During the course of the investigation, Onyiah's attorney argued that Pitts had beaten Onyiah while he was in custody to get him to sign a

²⁵⁰ See 18 PA. STAT. AND CONS. STAT. ANN. § 2701 (West 2023).

²⁵¹ See *id.* § 5301.

²⁵² See *id.* § 5101.

²⁵³ See *id.* § 4952.

²⁵⁴ See *id.* § 4902.

²⁵⁵ See *id.* § 4910.

²⁵⁶ 42 PA. STAT. AND CONS. STAT. ANN. § 5552 (West 2023) (Offenses of perjury, intimidation, and obstruction may be commenced within 5 years after its commission. Offenses of assault, official oppression, and tampering may be commenced within 2 years after its commission.).

²⁵⁷ *Id.* § 5552(c)(2).

²⁵⁸ 5 years from the original statute of limitations expiration, plus 8 years due to the tolling provision, totaling 13 years.

²⁵⁹ See Otterbourg, *Hassan Bennett*, *supra* note 248.

²⁶⁰ *Id.*

²⁶¹ See Possley, *supra* note 248.

²⁶² *Id.*

²⁶³ See Otterbourg, *Obina Onyiah*, *supra* note 248.

statement.²⁶⁴ Pitts also denied these acts during Onyiah's May 2013 trial.²⁶⁵ Using these facts, and applying the public official extension, I determined that the state could prosecute the assault crime up until November 2020, and the other offenses up until May 2026. As Onyiah was exonerated in May 2021, the state had several years to prepare for Pitts' prosecution. And indeed, Pitts was indicted in February 2022²⁶⁶—nine months after Onyiah's exoneration.

Significantly, although the grand jury indicted Detective Pitts for obstructing the administration of justice and two counts of perjury committed while testifying at Onyiah's motion to suppress and subsequent trial, the grand jurors found that they were time-barred from indicting Detective Pitts for the crime of assault specifically.²⁶⁷

B. Findings

After following the above steps to code whether the statutes of limitation had expired in each of the 838 likely police crimes identified in the NRE data set, the data showed that the statute of limitations had expired in 642 crimes. In other words, 76.61% of all of the likely police crimes identified in the data set were ones for which no criminal prosecution was possible to the governing statutes of limitation. Tragically, in many of these cases, the statutes of limitations lapsed for the underlying police crimes even while the wrongfully convicted person was still serving their sentence—in some cases it would be many years until their exoneration.

The data also show that statutes of limitation play a substantial role in the incidence of police prosecutions in another way. In the cases where police criminal behavior was identified before the applicable statutes of limitations lapsed, prosecutors routinely initiated criminal charges. Indeed, of the 196 crimes where the statute of limitation had not expired, prosecutors brought charges in 143 of them. Put another way, when the statute of limitations did not block them from acting, prosecutors brought charges against police officers in 72% of crimes.

For example, out of seven wrongful conviction cases involving police crimes in Kentucky, five were cases in which the primary officer was charged and convicted.²⁶⁸ Florida, which allows prosecutions of current public officials

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ Order Accepting Presentment No. 2 at 1, *In re Thirty First County Investigating Grand Jury*, No. 0001458-2021 (Ct. Com. Pl. of Phila. Cnty. Feb. 28, 2022).

²⁶⁷ Presentment No. 2 at 3, *In re Thirty First County Investigating Grand Jury*, No. 0001458-2021 (Ct. Com. Pl. of Phila. Cnty. Feb. 28, 2022).

²⁶⁸ See Possley, *supra* note 217 (explaining that the exonerations of Edwin Chandler, Jeffrey Clark, Garr Keith Hardin, and Keith West all involved criminal conduct committed by detective Mark Handy who was subsequently prosecuted and convicted); Wolfson, *supra* note 221 (explaining that Johnetta Carr was exonerated due to the lead officer being prosecuted for misconduct on an unrelated matter).

while they are still employed,²⁶⁹ frequently charges police for their involvement in wrongful convictions, or assist in the federal prosecution of the conduct.²⁷⁰ Former Sheriff Deputy Steven O’Leary was convicted for falsifying dozens of drug arrests.²⁷¹ In these crimes, O’Leary would falsely arrest innocent people under the ruse that they were in possession of controlled substances, with subsequent drug tests disproving O’Leary’s allegations.²⁷² Similar to O’Leary’s conduct, Florida also successfully prosecuted former Deputy Zachary Wester for fabricating evidence, perjury, and other related charges, for planting narcotics on motorists²⁷³—leading to wrongful convictions.²⁷⁴

The upshot of these findings is straightforward: statutes of limitations are a significant barrier to the prosecution of police crimes. More than three-quarters of the likely police crimes that I identified in the NRE dataset were ones for which prosecutors had no ability to initiate charges due to the governing limitations periods.

This finding complicates the conventional explanation for the infrequency of police prosecutions. That story, after all, turns largely on the view that prosecutors are exercising their discretion to protect police from facing criminal charges, whether through a bare desire not to prosecute or heightened procedural safeguards.²⁷⁵ But this conventional explanation misses a crucial point: prosecutors did not even have the ability to exercise their discretion at all where limitations periods had expired.

The fact that prosecutors routinely charged police officers in the cases where limitations periods had *not* expired only underscores this point. The problem, in other words, is not simply that prosecutors are too friendly with the police officers they ought to be charging. In many cases, the problem is that statutes of limitation render police untouchable well before prosecutors even have a chance to act.

Nevertheless, the hurdles described in Part III elevate the problem of statutes of limitations. Though prosecutors may routinely shield police, it is the

²⁶⁹ FLA. STAT. ANN. § 775.15 (West 2023).

²⁷⁰ Meghan McRoberts, *Steven O’Leary: Former Martin County Deputy Sentenced to Prison for Falsifying Dozens of Drug Arrests*, WPTV (Dec. 3, 2021), <https://www.wptv.com/news/region-martin-county/steven-oleary-former-martin-county-deputy-sentenced-to-prison-for-falsifying-dozens-of-drug-arrests> [<https://perma.cc/2CN9-B78U>]; Karl Eters, *Former Deputy Zachary Wester Sentenced to More Than 12 Years in Prison for Drug Planting*, TALLAHASSEE DEMOCRAT (July 15, 2021), <https://www.tallahassee.com/story/news/2021/07/13/zachary-wester-sentenced-former-florida-deputy-drug-planting/7951871002/> [<https://perma.cc/CM55-HW4V>].

²⁷¹ McRoberts, *supra* note 270.

²⁷² *Id.* (“[D]uring O’Leary’s 11 months with the agency, he made upwards of 89 drug-related arrests. Investigators said in at least two dozen cases, substances O’Leary claimed to find in victims’ vehicles that he submitted into evidence as illegal drugs turned out to be things like detergent, mints, powder from a broken figurine or legal headache medicine.”).

²⁷³ Eters, *supra* note 270.

²⁷⁴ *Id.*

²⁷⁵ See *supra* Part III.

statute of limitations which ensures that the delay is solidified indefinitely, precluding subsequent prosecutors from correcting the ills of their predecessors. The lengthy pre-charging investigations affords police agencies the power to immunize their officers with one of the strongest protections within the criminal legal system: an outright bar to prosecution provided by the statute of limitations.

Additionally, as seemingly neutral legal rules, limitations periods offer prosecutors who are otherwise predisposed against pursuing police officers a convenient excuse. Even in close cases, in other words, the bare possibility of a statute of limitations defense might lead a prosecutor not to bring charges. If those limitations periods no longer existed, neither would the excuse. Prosecutors in that circumstance might face even greater pressure to charge officers for their wrongdoing.

All of this leads to a normative question that I consider in the next section: Should we allow statutes of limitations to block the prosecution of police crimes?

V. SHOULD STATUTES OF LIMITATION INSULATE POLICE FROM CRIMINAL LIABILITY?

In this section, I explore the arguments on both sides of the question whether to eliminate statutes of limitation for police crimes. Subpart A examines arguments in favor of doing so, pointing to various benefits that would be obtained by removing statutes of limitations for policing crimes. Subpart B considers counterarguments.

A. *Benefits of Removing Statutes of Limitations for Police Crimes*

Removing statutes of limitations for police crimes would further at least four important public purposes. First, allowing prosecutors to obtain criminal convictions for police wrongdoing is essential to mark out the boundaries of what is and is not acceptable in a civilized society—a kind of victim-centered marking process that milder remedies such as department separation do not accomplish. Second, permitting police prosecutions would facilitate the identification of other victims of police wrongdoing, in particular those who have been wrongfully convicted due to police perjury, fabrication of evidence, and so on. Third, permitting criminal prosecutions for officers can be helpful to solve what Professors Ben Grunwald and John Rappaport have called the “wandering officer” problem: one way to stop the revolving door by which bad actors find employment in new police departments where they can resume their wrongdoing is to convict them of crimes. Finally, permitting more police

prosecutions would save taxpayer dollars insofar as police pension benefits often turn on a retiree's lawful conduct.²⁷⁶

1. *The Expressive Value of Prosecuting Police Crimes*

Criminal law represents what we, as a society, consider “beyond the pale.”²⁷⁷ There is, in other words, a difference between labeling police criminal wrongdoing as mere “police misconduct” and actively prosecuting it as a crime.²⁷⁸ If we think police officers lying and fabricating evidence to put innocent people in jail for years is the moral equivalent of an officer falling asleep on the job—such that both trigger the same consequence of the officer being fired—then there is nothing wrong with letting officers off the hook based on expired statutes of limitation. But if we think those two things are different—and that sending an innocent person to years of incarceration, separating them from their families and loved ones—is different in kind and morally reprehensible, then criminal law is how we should express it.

And in fact, communities that are victimized by police are telling us that they care about the expressive value of marking police crimes as crimes. Not only is this observed following incidents of police killings where communities take to the streets demanding the arrest of involved officers (or their frustration with the officers' release),²⁷⁹ but we also witness this when the victims of police crimes are finally exonerated and demand their police abusers' arrest.²⁸⁰ Even

²⁷⁶ To be sure, the arguments in favor of eliminating statutes of limitations for police officers could well apply to other public officials guilty of wrongdoing. Given the data on police crimes described in Part III, however, this Article focuses on arguments for amending statutes of limitation as applied to police officers. *See supra* Part III.A.

²⁷⁷ Kandice K. Johnson, *Crime or Punishment: The Parental Corporal Punishment Defense—Reasonable and Necessary, or Excused Abuse?*, 1998 U. ILL. L. REV. 413, 470 (1998) (noting that criminal laws are not designed to respond to simple lapses in judgment but are there to respond to gross conduct which destabilizes society).

²⁷⁸ *See generally* Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133, 1185–86 (2013) (concluding that “police misconduct can, and does, result in wrongful convictions,” without going further to acknowledge that the wrongfully convicted were victimized by their police abusers).

²⁷⁹ *See* Elliott C. McLaughlin & Brad Parks, *Protesters Take to Streets Following Release on Bond of Former Officer Charged in George Floyd's Killing*, CNN (Oct. 8, 2020), <https://www.cnn.com/2020/10/07/us/derek-chauvin-george-floyd-bail/index.html> [<https://perma.cc/9D59-CULW>].

²⁸⁰ *See, e.g.*, Darcy Costello, *Woman Pardoned by Former Gov. Matt Bevin Says Louisville Police Framed Her in Murder*, LOUISVILLE COURIER J. (Dec. 8, 2020), <https://www.courier-journal.com/story/news/local/2020/12/08/bevin-pardons-lawsuit-says-lmpd-framed-johnetta-carr-murder-planes-adolphe/6491464002/> [<https://perma.cc/D3DC-CU7Q>]; *see also, e.g.*, Sean Piccoli, *A Former Detective Accused of Framing 8 People for Murder Is Confronted in Court*, N.Y. TIMES (Apr. 1, 2019), <https://www.nytimes.com/2019/04/01/nyregion/nypd-detective-louis-scarcella.html> [<https://perma.cc/6AKU-2PWU>]; *I Want My Life Back'; Framed for 1993 Murder, Robert Bouto Sues City, Disgraced Former CPD Detective Reynaldo Guevara*, CBS NEWS CHI.

beyond the calls for justice from individuals, communities have gone so far as to plea to international tribunals to acknowledge what their own government has failed to acknowledge: that a grave injustice occurred and its nature is criminal.²⁸¹

A similar answer responds to arguments that police criminal prosecutions are unnecessary in light of alternative remedies such as civil damages actions against officers who violate victims' constitutional rights. The literature is, of course, replete with ways in which qualified immunity and other devices impede such damages remedies on their own terms.²⁸² Indeed, statutes of limitations also work to protect police in civil litigation.²⁸³ But even if civil actions against guilty officers were widely available, that would not accomplish what only a

(Apr. 11, 2019), <https://www.cbsnews.com/chicago/news/robert-bouto-wrongful-conviction-lawsuit-former-detective-reynaldo-guevara/> [<https://perma.cc/4EVB-K7P3>].

²⁸¹ See Comm. Against Torture, Off. of the U.N. High Comm'r on Hum. Rts., Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture, U.N. Doc. CAT/C/USA/CO/2, at 7 (July 25, 2006), <https://digitallibrary.un.org/record/580893?ln=en> [<https://perma.cc/3EJK-MTDJ>] (“The Committee is concerned at allegations of impunity of some of the State party’s law-enforcement personnel in respect of acts of torture or cruel, inhuman or degrading treatment or punishment. The Committee notes the limited investigation and lack of prosecution in respect of the allegations of torture perpetrated in areas 2 and 3 of the Chicago Police Department.”); see also Noah Berlatsky, *At the United Nations, Chicago Activists Protest Police Brutality*, ATLANTIC (Nov. 17, 2014), <https://www.theatlantic.com/national/archive/2014/11/we-charge-genocide-movement-chicago-un/382843/> [<https://perma.cc/484J-BEMQ>] (detailing how activists from Chicago called upon the United Nations to declare acts committed by Chicago Police Department as torture).

²⁸² See, e.g., Schwartz, *supra* note 17, at 610 (“[O]fficers are not regularly or reliably informed about court decisions interpreting [qualified immunity] decisions in different factual scenarios—the very types of decisions that are necessary to clearly establish the law about the constitutionality of uses of force.”).

²⁸³ See Lauren Bonds, *How Long Do You Have to Report Police Brutality? Why One Year Is Hardly Enough*, USA TODAY (Apr. 19, 2023), <https://www.usatoday.com/story/opinion/2023/04/19/statute-limitations-police-misconduct-victims-lose/11642578002/> [<https://perma.cc/NZK6-HQPU>] (“Most victims of police misconduct do not fare as well. One-year deadlines block thousands of people who are abused by the police from pursuing justice in their states. This deadline creates an insurmountable barrier for many people harmed by police violence . . . In states with a one-year statute of limitations, police deploy tactics to run out the clock knowing full well that a delay will keep victims and their families from being able to file a case against them.”); see also Jennifer L. Mercer & William C. Elwell, *Prisoner’s Rights*, 88 GEO. L.J. 1715, 1772 (2000) (statutes of limitations expiring bars a section 1983 claim); Keri E. McCrary, *Taking a Toll on the Equities: Governing the Effect of the PLRA’s Exhaustion Requirement on State Statutes of Limitations*, 47 GA. L. REV. 1321, 1335–36 (2013) (identifying how, similar to the application of state criminal statutes of limitations, even though 1983 claims are federal in nature, the applicable statutes of limitations, and relevant tolling rules, are dependent upon state law).

criminal conviction can accomplish: an expression that the polity will not stand for the most egregious of police wrongdoing.

Relatedly, framing the kinds of police wrongdoing described in this paper as mere police misconduct rather than police crimes also erases the experience of victims. Misconduct implies that some policy or practice was violated, whereas a criminal activity implies that the action harmed an individual and/or the community overall.

The very act of prosecuting an officer serves as an acknowledgement to the pain and hardship endured by the victims. Statutes of limitations must be amended to provide a pathway for these prosecutions.

Indeed, victims themselves are talking about the problem of statutes of limitations. In response to the Chicago Police Torture scandal by former Chicago Police Commander Jon Burge, and detectives under his command, a committee of concerned organizations authored a report criticizing prosecutors' roles.²⁸⁴ The relevant portion stated:

Although the United States has the obligation to provide reparation for the harm suffered by 100+ torture victims, including efforts to restore the liberty of those still languishing in prisons, it has done nothing! In fact, as outlined above, it has failed in its obligation to investigate and prosecute those responsible for the violations. It has allowed the Statute of Limitations to expire on the more serious crimes, i.e., torture, battery, attempted murder, criminal conspiracy, as well as the less serious crimes, i.e., lying on interrogatories or in depositions in civil cases.²⁸⁵

The report goes on to list several crimes committed by Chicago Police detectives that prosecutors failed to act upon within the statute of limitations.²⁸⁶ Policing crimes were acknowledged within the Chicago Police Office of Professional Standards investigation, within federal habeas corpus opinions, and the Illinois Governor pardon findings.²⁸⁷ The committee, made up of over 70 victims and survivors of police torture, as well as several supporting community groups, went on to advocate for a statute of limitations carve out for gross crimes such as those committed by members of the Chicago Police Department,²⁸⁸ to allow for their prosecutions indefinitely. The message from these stakeholder groups is unequivocal: there is value to marking police crimes as *crimes*.

²⁸⁴ See NAT'L CONF. OF BLACK LAWS. (NCBL) & BLACK PEOPLE AGAINST POLICE TORTURE (BPAPT), TORTURE IN THE HOMELAND: FAILURE OF THE UNITED STATES TO IMPLEMENT THE INTERNATIONAL CONVENTION AGAINST TORTURE TO PROTECT THE HUMAN RIGHTS OF AFRICAN-AMERICAN BOYS AND AFRICAN AMERICAN MEN IN CHICAGO, ILLINOIS 1–2 (2014) (on file with author).

²⁸⁵ *Id.* at 6.

²⁸⁶ *Id.* at 4.

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 1.

2. Identify More Victims of Police Crimes

Another reason to eliminate police statutes of limitations is the virtuous spillover effects of police prosecutions: such actions often benefit numerous victims beyond the immediate victim in the case at hand.

To see how, start with the following fact: after a guilty finding, wrongfully convicted individuals may appeal for a new trial due to several reasons, including newly discovered evidence.²⁸⁹ Other victims of policing crimes, after becoming aware of the prosecution of that officer, may then use the prosecution in their appeal, in turn avoiding their own wrongful convictions.

A recent example shows this dynamic in play. After the February 2019 arrest of Philadelphia homicide detective Philip Nordo for his role in various wrongful convictions, other impacted individuals were able to obtain their freedom due to the enhanced attention generated by Nordo's arrest. Indeed, after Nordo's arrest, the Philadelphia Conviction Integrity Unit began reviewing several cases connected to Nordo.²⁹⁰ As of this writing, the criminal investigation into Nordo has led to the exonerations of Jamaal Simmons, James Frazier, Sherman McCoy, Arkel Garcia, Rafiq Dixon, and several others.²⁹¹ In June 2022, Nordo was convicted of rape, official oppression, stalking, and theft, with at least twenty convictions that he participated in under review.²⁹²

In fact, the additional exonerations generated by police criminal prosecutions can be so large that at times they take place during "group exonerations."²⁹³ Police prosecutions have led to over 170 exonerations in the

²⁸⁹ FED. R. CRIM. P. 33(b)(1).

²⁹⁰ Chris Palmer, *Former Philly Homicide Detective Charged with Rape and Intimidation in the Course of His Investigations*, PHILA. INQUIRER (Feb. 19, 2019), <https://www.inquirer.com/news/philip-nordo-philadelphia-detective-arrested-rape-krasner-20190219.html> [<https://perma.cc/2QSW-V5GP>].

²⁹¹ *Id.*; Maurice Possley, *Sherman McCoy*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5563> [<https://perma.cc/G2GZ-423D>] (May 22, 2022); Maurice Possley, *Arkel Garcia*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5985> [<https://perma.cc/V7K7-ZS2A>] (July 16, 2021); Maurice Possley, *James Frazier*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5545> [<https://perma.cc/KT4V-JHCS>] (Apr. 26, 2019); Maurice Possley, *Rafiq Dixon*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6229> [<https://perma.cc/G4B2-Q9JR>] (Apr. 27, 2022).

²⁹² Samantha Melamed, *A Philly Homicide Detective Was Convicted of Raping Witnesses. What Happens to Those He Locked Up?*, PHILA. INQUIRER (June 1, 2022), <https://www.inquirer.com/news/philadelphia-homicide-detective-phillip-nordo-cases-exonerations-20220601.html> [<https://perma.cc/M6GF-HJZ4>].

²⁹³ *What Will You Find in the Groups Registry*, NAT'L REGISTRY OF EXONERATIONS, <https://exonerations.newkirkcenter.uci.edu/groups/narrative/what-will-you-find-groups-registry> [<https://perma.cc/9SU8-4EWH>] ("Groups' range in size from those with just a

1999 Rampart scandal,²⁹⁴ 75 exonerations in the Riders scandal in the Oakland police department,²⁹⁵ over 100 exonerations related to the arrest of Sgt. Ronald Watts in Chicago,²⁹⁶ and over a thousand exonerations in Philadelphia following the arrest of officers within the Narcotics Field Unit.²⁹⁷ Currently, several incarcerated persons are awaiting the outcome of pending prosecutions against police officers—with hopes that their convictions could lead to the exoneration of several others.²⁹⁸

Amending statutes of limitations to allow the prosecution of policing crimes is thus not just about justice for the direct victims of those crimes. It is a step that can help identify other cases connected to the convicted officers,²⁹⁹ helping secure justice in hundreds or more additional cases.

3. Preclusion from Law Enforcement Employment

A third reason to eliminate police statutes of limitations can be thought of from the frame of specific deterrence. When a police officer is convicted, one possible consequence is the immediate termination of involved officers. Importantly, unlike administrative terminations that may not be criminal in origin, criminal prosecutions often have the effect of precluding officers from seeking employment in neighboring jurisdictions.³⁰⁰ Some of these preclusions

handful of defendants to others with tens of thousands of defendants. As with persons who are in the main Registry, the defendants listed here also had their convictions vacated and charges dismissed, based at least in part on new evidence of innocence.”).

²⁹⁴ Ken Otterbourg, *California 1999*, NAT’L REGISTRY OF EXONERATIONS (Mar. 25, 2020), <https://exonerations.newkirkcenter.uci.edu/groups/group-exonerations/california-1999> [https://perma.cc/FEH7-6GJX].

²⁹⁵ Ken Otterbourg, *California 2000*, NAT’L REGISTRY OF EXONERATIONS (Apr. 3, 2020), <https://exonerations.newkirkcenter.uci.edu/groups/group-exonerations/california-2000> [https://perma.cc/FB6W-4DYL].

²⁹⁶ Ken Otterbourg, *Illinois 2016*, NAT’L REGISTRY OF EXONERATIONS (Aug. 29, 2022), <https://exonerations.newkirkcenter.uci.edu/groups/group-exonerations/illinois-2016-1> [https://perma.cc/4ZNM-ZKHC].

²⁹⁷ Ken Otterbourg, *Pennsylvania 2013*, NAT’L REGISTRY OF EXONERATIONS (Feb. 19, 2020), <https://exonerations.newkirkcenter.uci.edu/groups/group-exonerations/pennsylvania-2013> [https://perma.cc/T7FM-HYHN].

²⁹⁸ Samantha Melamed, *Ex-Philly Detective James Pitts Is Charged with Perjury, Alleging He Lied About a Coerced Confession*, PHILA. INQUIRER (Mar. 3, 2022), <https://www.inquirer.com/news/philadelphia-homicide-detective-james-pitts-perjury-20220303.html> [https://perma.cc/7C9B-7LSY].

²⁹⁹ See Rushin, *supra* note 129, at 1230–32.

³⁰⁰ However, at times convicted officers are rehired elsewhere due to perfunctory background examinations. See, e.g., Timothy Williams, *Cast-Out Police Officers Are Often Hired in Other Cities*, NY TIMES (Sept. 10, 2016), <https://www.nytimes.com/2016/09/11/us/whereabouts-of-cast-out-police-officers-other-cities-often-hire-them.html> [https://perma.cc/S344-L6WR] (“As a police officer in a small Oregon town in 2004, Sean Sullivan was caught kissing a 10-year-old girl on the mouth. Mr. Sullivan’s sentence barred him from taking another job as a police officer. But three months

are established by state law,³⁰¹ and some are contained within municipal rules. Indeed, in forty-five states, the same governmental body that certifies officers can also decertify officers for failing to meet necessary qualifications.³⁰²

Amending statutes of limitations to permit more officer prosecutions can help, in other words, to alleviate what Professors Ben Grunwald and John Rappaport have called the wandering officer problem, in which officers who are terminated for misconduct in the absence of criminal charges often relocate to small agencies with communities that have higher proportions of people of color, where they offend again.³⁰³ Grunwald and Rappaport found that these under-resourced departments may have hired these officers in part because they failed to conduct a thorough background investigation of the reasons behind the officer's original separation, or because the officer concealed their administrative sanctions during their previous employment.³⁰⁴

More specifically, Grunwald and Rappaport reviewed hiring and separation records in Florida between 1996 and 2016,³⁰⁵ and found that wandering officers not only receive more complaints in general, but complaints that are criminal in nature.³⁰⁶ Even though the study could not identify if these officers were originally employed by a Florida agency or an out of state agency,³⁰⁷ it is likely that there exists some barrier to addressing the criminal behavior of these officers.

Amending statutes of limitation to permit more police prosecutions could help preclude these officers from gaining employment in other law enforcement positions. That is because the prosecution, and possible conviction, may be more

later, in August 2005, Mr. Sullivan was hired, after a cursory check, not just as a police officer on another force but as the police chief. As the head of the department in Cedar Vale, Kan., according to court records and law enforcement officials, he was again investigated for a suspected sexual relationship with a girl and eventually convicted on charges that included burglary and criminal conspiracy.”).

³⁰¹ See, e.g., FLA. STAT. ANN. § 943.13(4) (West 2023) (laying out Florida Officers' minimum qualifications for employment or appointment; officers may “not have been convicted of any felony or of a misdemeanor involving perjury or a false statement, or have received a dishonorable discharge from any of the Armed Forces of the United States”); see also 53 PA. STAT. AND CONS. STAT. ANN. § 2164(1) (West 2023) (granting the Pennsylvania Municipal Police Education and Training Commission powers including the ability to “revoke an officer's certification when an officer fails to comply with the basic and in-service training requirements or is convicted of a criminal offense or the commission determines that the officer is physically or mentally unfit to perform the duties of his office”).

³⁰² Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 YALE L.J. 1676, 1694 (2020).

³⁰³ *Id.* at 1747.

³⁰⁴ *Id.* at 1688.

³⁰⁵ *Id.* at 1728.

³⁰⁶ *Id.* at 1687 (specifically about violent and sexual misconduct).

³⁰⁷ *Id.* at 1711 (noting how the study could not “observe officers who were fired out of state and then obtained law-enforcement work in Florida”).

likely to be revealed on a background investigation than a mere administrative sanction.

4. *Loss of Pension Benefits*

A final benefit that justifies the elimination of police statutes of limitations is financial. Unfortunately, many victims of police crimes continue to contribute to the pension benefits of their abusers.³⁰⁸ Nationally, hundreds of convicted officers continue to collect millions in pension after their termination or retirement,³⁰⁹ leading some to believe that enhanced forfeiture rules of these benefits may discourage police to commit crimes.³¹⁰ Even Derek Chauvin, convicted of murdering George Floyd, will be entitled to his full pension benefit.³¹¹

Some states, however, have attempted to enhance public trust by stopping public employees from receiving pension benefits following a conviction.³¹² Following the announcement that Jon Burge would continue to receive his \$4,000 a month pension, the Illinois Governor signed a state law in 2014 empowering the Attorney General to cease pension payments from public officials who are convicted of crimes in the future.³¹³ In 2019, the Pennsylvania Governor enacted a law that will stop the collection of benefits for job-related felonies.³¹⁴ Yet these states are in the minority. As of 2020, only 15 states will revoke or garnish a pension benefit following a felony conviction.³¹⁵

Fortunately, there are ways to protect the public even short of amending state law. Some police departments have linked participation in their municipal

³⁰⁸ See, e.g., Austin Berg, *Chicago Brutality Victims Pay Their Torturer's Pension*, ILL. POL'Y (Apr. 22, 2015), <https://www.illinoispolicy.org/chicago-brutality-victims-pay-their-torturers-pension/> [<https://perma.cc/272S-ETRQ>].

³⁰⁹ Blake Ellis & Melanie Hicken, *Police Officers Convicted of Rape, Murder, and Other Serious Crimes Are Collecting Tens of Millions of Dollars During Retirement*, CNN (Sept. 29, 2021), <https://www.cnn.com/interactive/2021/09/us/police-pensions-invs/> [<https://perma.cc/J5K3-NBVX>].

³¹⁰ *Id.*

³¹¹ Ryan Frost, *What Happens to Taxpayer-Funded Pensions When Public Officials Are Convicted of Crimes?*, REASON FOUND. (July 30, 2020), <https://reason.org/data-visualization/what-happens-to-taxpayer-funded-pensions-when-public-officials-are-convicted-of-crimes/> [<https://perma.cc/A5UD-6KU9>]; see also Richard A. Oppel Jr., *Ex-Officer Accused of Murdering Floyd Could Get \$50,000 Annual Pension*, N.Y. TIMES (June 13, 2020), <https://www.nytimes.com/2020/06/13/us/chauvin-pension-conviction-floyd.html> [<https://perma.cc/UF8C-BMW4>].

³¹² Frost, *supra* note 311.

³¹³ Berg, *supra* note 308.

³¹⁴ Jan Murphy, *Pa. Toughens Pension Forfeiture Law for Public Officials, Employees Convicted of Job-Related Crimes*, PENN LIVE (Mar. 28, 2019), <https://www.pennlive.com/news/2019/03/pa-toughens-pension-forfeiture-law-for-public-officials-employees-convicted-of-job-related-crimes.html> [<https://perma.cc/3GC8-WBDS>].

³¹⁵ Frost, *supra* note 311.

pension funds to a record of lawful behavior.³¹⁶ In Philadelphia, for instance, the Office of the Inspector General is tasked with identifying and disqualifying city employees convicted of felonies from receiving a pension.³¹⁷ As of 2019, the pension disqualification program has saved over \$33 million in Philadelphia.³¹⁸ Extending the time that policing crimes can be prosecuted can thus save valuable public resources.

B. Counterarguments

This subpart considers objections to the removal of police statutes of limitation. It begins with a full-throated defense of why we might enact such limitation periods in the first place, before considering potential responses. I then consider several counterarguments rooted in the political economy of reform.

1. *In Defense of Police Statutes of Limitation?*

Statutes of limitations serve several purposes in our criminal justice system.³¹⁹ As a general matter, they are thought to further the efficacy of criminal law administration.³²⁰ On the prosecution's side, the longer the state delays a prosecution, the more likely the evidence necessary for a conviction degrades. Witnesses may fail to recall crucial details of the event, or may be outright unavailable due to death, infirmity, or unexplained absence. Physical evidence may degrade, be misplaced, moved so frequently that the chain of custody is spoiled, or be inadvertently destroyed.³²¹

Similar concerns exist on the defendant's side as well. Evidence that may outright acquit the defendant may have been lost, and circumstances that may justify or mitigate the crime may fade with the passage of time.³²² Thus, statutes of limitations can often serve as an instrument for justice and fairness from *both* perspectives in criminal cases.

³¹⁶ PHILA. OFF. OF THE INSPECTOR GEN., 2017 ANNUAL REPORT (2017), <https://www.phila.gov/media/20181127102540/OIG-annual-report-2017.pdf> [<https://perma.cc/ZG8J-J8HT>].

³¹⁷ *Id.*

³¹⁸ Max Marin, *Convicted Ex-Sheriff Won't Get a Pension, Saving Taxpayers \$1.6 Million*, BILLY PENN (June 20, 2019), <https://billypenn.com/2019/06/20/convicted-ex-sheriff-wont-get-a-pension-saving-taxpayers-1-6-million/> [<https://perma.cc/3ZAZ-VEFC>].

³¹⁹ Statutes of limitation also operate in the civil context, *see, e.g.*, Mercer & Elwell, *supra* note 283, at 1772, but the rationale for such periods lies outside the scope of this article.

³²⁰ Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. PA. L. REV. 630, 632 (1954).

³²¹ Meredith A. Bieber, *Meeting the Statute or Beating It: Using John Doe Indictments Based on DNA to Meet the Statutes of Limitations*, 150 U. PA. L. REV. 1079, 1088 (2002).

³²² *See* Note, *supra* note 320, at 651.

Indeed, in an ordinary criminal case, statutes of limitations can serve as an important check against the unfettered discretion of a prosecutor. A hypothetical may be useful to show the point. Imagine a seventeen-year-old teenager accused of shoplifting in California in a jurisdiction where the prosecutor had deprioritized the prosecution of minor shoplifting offenses, resulting in the teenager never being charged. Now suppose that many years later, campaigning on a tough on crime platform, a new prosecutor revitalizes the prosecution of minor shoplifting offenses. Should the new prosecutor be allowed to bring charges against the seventeen-year-old based on conduct that took place long ago? Any attempt to prosecute the teenager would not only rely on stale evidence but would also hinder the teenager's ability to form an effective mitigation strategy. In this sense, statutes of limitations provide finality and protect individuals from the politicized nature of prosecutorial offices.

Statutes of limitations also serve as a check against idle law enforcement. For example, in many jurisdictions a police officer may issue a court summons instead of an arrest for someone who they believe has committed a misdemeanor crime, only for the person to appear at court and be notified that the paperwork for the offense has not yet been finalized. Statutes of limitations thus encourage law enforcement agencies to be efficient in investigating and prosecuting crimes.³²³ By barring prosecution after a specific time, limitations periods exact a fair consequence when law enforcement agencies act inefficiently.³²⁴

The fairness values served by statutes of limitation are reflected in their ancient roots: legislatures have been using criminal statutes of limitations for centuries. They have been enshrined in colonial America since the 1600s,³²⁵ and were later incorporated into the first laws passed by state legislatures and the country's First Congress.³²⁶ Since that time, federal and state legislatures, as well as courts, have worked to weigh the virtues of statutes of limitations against the risk that their use will lead to unresolved prosecutions.³²⁷

One way of understanding the values served by statutes of limitations is to connect them to the widely embraced view of procedural justice, or the idea that the public's perception of the law's legitimacy is not based on legal outcomes, but instead its perception that the criminal justice process was fair and aligned with necessary values.³²⁸ For the reasons just explained, the *ex ante* announcement of a clear timeframe within which the prosecution must bring

³²³ Rinat Kitai-Sangero, *Between Due Process and Forgiveness: Revisiting Criminal Statutes of Limitations*, 61 DRAKE L. REV. 423, 429 (2013).

³²⁴ *Id.* at 430.

³²⁵ Paul D. Swanson, Note, *Limitless Limitations: How War Overwhelms Criminal Statutes of Limitations*, 97 CORNELL L. REV. 1557, 1562 (2012).

³²⁶ *Id.*

³²⁷ See generally *United States v. Marion*, 404 U.S. 307, 322 (1971) ("Such statutes represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice; they 'are made for the repose of society'").

³²⁸ See Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 284 (2003).

charges (or else forego them altogether) fosters a sense of fairness on both sides of the criminal justice system.

What is more, courts have routinely understood the fair and evenhanded enforcement of these rules to be more important than what the public might perceive as the “correct” outcome of any individual case—a signal quality of procedural justice. Thus, for example, the Supreme Court upheld the application of a statute of limitations in the case of *Toussie v. United States* even though the particular outcome may have been unpopular.³²⁹ The case involved the 1967 prosecution of Robert Toussie for failing to register for the military draft.³³⁰ Even though Toussie was required to register for the draft within 5 days of his eighteenth birthday, he failed to do so and was indicted eight years later for failing to register.³³¹ When Toussie appealed his conviction to the Supreme Court, the Court held that the federal government’s five year statute of limitation barred his prosecution.³³² In reversing Toussie’s conviction, the Court weighed whether the reversal would hinder the government’s ability to call armies or tamper with the law’s ability to deter people from violating the act;³³³ and the Court found that it was the legislature’s intent to bar these prosecutions even though some might feel that the outcome was an injustice in a society based on full and equal application of the law.³³⁴

Put simply, then, applying statutes of limitation to police crimes arguably furthers procedural justice because even when a statute of limitations produces substantive outcomes that may seem undesirable, the public might still support the use of a limitation period due to the concern for a fair process.

2. Responses

But the procedural justice defense of statutes of limitation is susceptible to powerful responses. As an initial matter, applying statutes of limitations to police officers is self-defeating in view of the very aim that procedural justice seeks to fulfill. The goal of procedural justice is to enhance public trust in our criminal justice system. When people believe the system is fair and legitimate, they will be more likely to extend deference to, and voluntarily cooperate with, legal authorities.³³⁵

But trust in the criminal justice system can only extend so far as trust in that system’s actors. People trust police because they believe the police will protect

³²⁹ *Toussie v. United States*, 397 U.S. 112, 123 (1970) (“There is some cause to feel that dismissal of the indictment in such a case is an injustice in a society based on full and equal application of the laws. But while Congress has said that failure to register is a crime, it has also made prosecution subject to the statute of limitations.”).

³³⁰ *Id.* at 112.

³³¹ *Id.*

³³² *Id.* at 113.

³³³ *Id.* at 123.

³³⁴ *Id.*

³³⁵ See Tyler, *supra* note 328, at 284–85.

the innocent from harm. And that is why the procedural justice defense is self-defeating: applying statutes of limitation to insulate police officers who have victimized innocent people is far more likely to break the public's trust than build it. Any fairness value we might obtain from applying the limitations period is thus radically outweighed by the cost of the perception that police are above the law. When officers commit these offenses and go criminally unscathed, it delegitimizes the criminal legal system. The public then sees that not only are police above the law but that the crimes they committed, and the victims of those crimes, are undeserving of justice.

Allowing statutes of limitations to bar the prosecution of police officers will impede legal authorities attempt to gain the public's cooperation and deference in another way. History has shown that when legal authorities fail to prosecute police, the public may seek the assistance of alternative systems,³³⁶ legal or otherwise, to adjudicate the issue, such as publicly led commissions,³³⁷ and community courts, or they may outright resist collaborating with the system.³³⁸

For those who reject the theory of procedural justice, there are especially good reasons to reject statute of limitations for police crimes. For one, the procedural justice framework ignores much of the public's deeply-held suspicions around the criminal legal system. From the mass criminalization and convict leasing of freedmen following the American Civil War,³³⁹ to states creating racialized crimes, "Black Codes," and Jim Crow laws,³⁴⁰ and to the move toward mass incarceration and the current prison industrial complex that has perpetuated for decades,³⁴¹ the American people—and particularly

³³⁶ Berlatsky, *supra* note 281.

³³⁷ See generally 775 ILL. COMP. STAT. ANN. 40/15 (2009) ("The Illinois Torture Inquiry and Relief Commission shall be an independent commission under the Illinois Human Rights Commission for administrative purposes.").

³³⁸ See, e.g., Maria Cramer, *What Happened When a Brooklyn Neighborhood Policed Itself for Five Days*, N.Y. TIMES (June 4, 2023), <https://www.nytimes.com/2023/06/04/nyregion/brooklyn-brownsville-no-police.html> [<https://perma.cc/3XG6-YE8H>].

³³⁹ Margie Mason & Robin McDowell, *Locked Up: The Prison Labor That Built Business Empires*, ASSOCIATED PRESS (Sept. 22, 2022), <https://apnews.com/article/ap-investigation-convict-leasing-reveal-podcast-71bcdbeff840ff4bfbbca48ea50a1cb5> [<https://perma.cc/2B4T-R98V>].

³⁴⁰ See *Black Codes*, HIST., <https://www.history.com/topics/black-history/black-codes> [<https://perma.cc/W27P-8TWY>] (Mar. 29, 2023) ("Under black codes, many states required Black people to sign yearly labor contracts; if they refused, they risked being arrested, fined and forced into unpaid labor."); see also *Jim Crow Laws*, HIST., <https://www.history.com/topics/early-20th-century-us/jim-crow-laws> [<https://perma.cc/JD4A-MT34>] (Sept. 11, 2023) ("Jim Crow laws were a collection of state and local statutes that legalizes racial segregation . . . Those who attempted to defy Jim Crow laws often faced arrest, fines, jail sentences, violence and death.").

³⁴¹ See Eric Schlosser, *The Prison-Industrial Complex*, ATLANTIC (Dec. 1998), <https://www.theatlantic.com/magazine/archive/1998/12/the-prison-industrial-complex/304669/> [<https://perma.cc/8EUV-K52H>].

communities of color—have an abundance of reasons to suspect that the criminal justice system is not legitimate.

Attempting to paper over this dark legacy with a concern for fair procedural rules like statutes of limitation misses is woefully insufficient because focusing on the quality of decision making and the quality of interpersonal treatment does little to address these past institutional transgressions. The reality that statutes of limitations serve as an absolute bar to the prosecution of so many police crimes is but another stain on the criminal legal system. Indeed, the fact that a few police offenders have been successfully prosecuted makes little, if any, contribution to the overall legitimacy of the system.³⁴² Instead, the prosecution of a few officers may in fact be perceived as an attempt to pacify the public.

Finally, one might object to the procedural justice framework on the ground that outcomes do in fact matter to the public’s perception of our criminal justice system—indeed, they may sometimes matter much more than process.³⁴³ In other words, one very powerful reason to reject a procedural justice model is that no system, however procedurally fair on paper, can be worthy of our approbation if it results in so many innocent Americans continuing to serve time in jail. For example, 2022 recorded the highest number of exonerations to date representing 233 exonerations in which individuals lost an average of 9.6 years to wrongful imprisonment for crimes they did not commit—amounting to 2,245 years in total.³⁴⁴ One could reasonably react to this startling fact by setting aside otherwise “fair” procedures that insulate police defendants from liability.

3. *The Political Economy of Reform*

A final set of objections to eliminating police statute of limitations is practical rather than theoretical: is such a step politically feasible?

Given the power possessed by police unions, this concern is certainly legitimate. However, several prominent police reforms suggest that political barriers to statute of limitations reform may be less onerous than imagined. For example, recent reforms have emerged which seek to hold police accountable for their misconduct, as well as their criminal activity.³⁴⁵ Civilian police

³⁴² *But see* Levine, *supra* note 104, at 1033 (noting how police prosecutions perpetuate the same problems that we see within the system, especially the prosecution of marginalized people).

³⁴³ *See generally* Laura I Appleman, *A Tragedy of Errors: Blackstone, Procedural Asymmetry, and Criminal Justice*, 128 HARV. L. REV. F. 91 (2015).

³⁴⁴ NAT’L REGISTRY OF EXONERATIONS, 2022 ANNUAL REPORT 6 (May 2023), <https://www.law.umich.edu/special/exoneration/Documents/NRE%20Annual%20Report%202022.pdf> [<https://perma.cc/38LS-56SR>].

³⁴⁵ *See* Curtis Jones, Jr., *City Announces Nominees Selected for the Citizens Police Oversight Commission*, PHILA. CITY COUNCIL (Jan. 31, 2022), <https://phlcouncil.com/city-announces-nominees-selected-for-the-citizens-police-oversight-commission/> [<https://perma.cc/R8XA-RT5T>].

oversight boards,³⁴⁶ Conviction Integrity Units,³⁴⁷ special prosecutors, and new bureaus to investigate police crimes have all expanded.³⁴⁸ If the political appetite exists to pursue these kinds of interventions, perhaps changing police statutes of limitation is plausible.

Moreover, as Part III.B revealed, prosecutors across the political aisle—in states as varied as Florida and Illinois—have interests in prosecuting these cases, with charges brought in roughly 72% of police crimes where the statute of limitations had not expired. Political actors are, in other words, interested in putting police officers behind bars for their egregious crimes. Any narrative that holding police officers accountable is a progressive-only position is thus sorely misguided.

One might object that amending state limitations periods in a way that only increases exposure for policing crimes may be interpreted as singling out police behavior for a less favorable criminal justice process. But that is to miss the forest for the trees. The reality is that even without a statute of limitations defense, police suspects will continue to have ample ability to contest their charges. There exist several pre-trial rules of criminal procedure that prosecutors must also survive which includes motions to dismiss due to the state's pre-arrest delay,³⁴⁹ speedy trial violations, and other substantive reasons to dismiss the prosecution related to due process violations.³⁵⁰

What is more, merely permitting a prosecution based on long-ago police conduct is not a guarantee of a conviction. For example, in 1996, DuPage County Sheriff Dennis Kurzawa was indicted for his role in the 1985 wrongful conviction and death sentence of Alejandro Hernandez.³⁵¹ The indictment charged the sheriff, and others, with concealing evidence that would have freed

³⁴⁶ *See id.*

³⁴⁷ *See* Press Release, U.S. Att'ys Off. for the So. Dist. of N.Y., United States Attorney Damian Williams Announces the Formation of New Conviction Integrity Committee (Oct. 17, 2022), <https://www.justice.gov/usao-sdny/pr/united-states-attorney-damian-williams-announces-formation-new-conviction-integrity> [<https://perma.cc/B3UQ-2U8V>].

³⁴⁸ One might argue that the mere existence of these alternative reforms renders police criminal prosecutions (and elimination of statutes of limitation) unnecessary. That would be a mistake. These expanded reforms may unfortunately operate in a silo, focusing on their respective missions. Reforming statute of limitations will empower all agencies to bring forward evidence of policing crimes—no matter how old. *See supra* Part II.B. And for the agencies that do have a specific function to weed out and investigate policing crimes, expanding their jurisdiction could be futile without reforming statute of limitations. *See supra* Part II.B. This especially holds true for the jurisdictions with very limited statute of limitations and no tolling circumstances for public officials. *See supra* Part II.B. Without this correction, these investigative bodies will be empowered to merely hold law enforcement accountable for very recent incidents of abuse and corruption. *See supra* Part II.B.

³⁴⁹ *United States v. Marion*, 404 U.S. 307, 324 (1971).

³⁵⁰ *See, e.g., Ross v. United States*, 910 F.2d 1422, 1425 (7th Cir. 1990).

³⁵¹ *Murder Trial Evidence False, Grand Jury Says*, L.A. TIMES (Dec. 14, 1996), <https://www.latimes.com/archives/la-xpm-1996-12-14-mn-8888-story.html> [<https://perma.cc/9YL8-ARC6>].

Hernandez, and conspiring to frame Hernandez for a murder he didn't commit.³⁵² The trial, which took place almost 15 years after the original conviction, resulted in Kurzawa's acquittal,³⁵³ showing that a mere initiation of prosecution is not a guarantee that an officer will be convicted.

Additionally, police in general have historically waived rights that ordinary citizens usually maintain. Police may be compelled to give a statement against their will, have limited privacy, and be refrained from striking.³⁵⁴ Indeed, it is common for police professionals to surrender ordinary safeguards in exchange for the enormous employment protections they are afforded.

VI. CONCLUSION

For decades policing crimes have been referred to as examples of police misconduct. These narratives erase the thousands of victims that have been harmed and oppressed by their actions. The truth is simple: police officers commit crimes with distressing frequency, and those crimes are all too often unprosecuted.

I have argued that one significant source of the lack of police prosecutions is a seemingly neutral procedural rule that exists across the range of criminal jurisdictions: statutes of limitation. In more than three-quarters of the likely police crimes identified in a national database, the statute of limitations foreclosed any effort to prosecute officers for their wrongdoing. That is the bad news.

The good news is that statutes of limitations are completely at the mercy of legislators. These legislators have seen fit to carve out exceptions to the statutes of limitations for gruesome crimes including murder, sexual offenses, and crimes where children are victimized.³⁵⁵ Police crimes, especially those that contribute to wrongful convictions, are likewise heinous. The victims are usually the most marginalized, ignored, and cast out. And the statutes of limitations ensure that their abusers will largely go free. Lawmakers should act to fix this problem.

³⁵² *Id.*

³⁵³ Andrew Bluth, *5 Law Officers Acquitted of Plotting to Frame Man in Killing*, N.Y. TIMES (June 6, 1999), <https://www.nytimes.com/1999/06/06/us/5-law-officers-acquitted-of-plotting-to-frame-man-in-killing.html> [<https://perma.cc/L6XH-Z8GV>].

³⁵⁴ See, e.g., Steven D. Clymer, *Compelled Statements from Police Officers and Garrity Immunity*, 76 N.Y.U. L. REV. 1309, 1382 (2001); Rachel Moran, *Police Privacy*, 10 U.C. IRVINE L. REV. 153, 198 (2019); OHIO REV. CODE ANN. § 4117.15(A) (West 2023).

³⁵⁵ See generally MO. ANN. STAT. § 556.036(1) (West 2023) (In Missouri, “[a] prosecution for murder, rape in the first degree, forcible rape, attempted rape in the first degree, attempted forcible rape, sodomy in the first degree, forcible sodomy, attempted sodomy in the first degree, attempted forcible sodomy, or any Class A felony may be commenced at any time.”).

To be sure, I do not argue that this change will completely overhaul the system.³⁵⁶ There will always be police who commit egregious crimes,³⁵⁷ and similarly, there will always be prosecutors who will refuse to charge police for their crimes. However, there are some prosecutors who have tried and were unsuccessful due to statutes of limitations. Removing statute of limitations in this limited capacity not only enhances methods for criminal prosecution, but it could also be used as a tool to leverage the resignation or termination of officers—when all other methods to separate an officer from their department have failed. In short, we must equip prosecuting authorities with as much time as needed to adequately identify policing crimes and prepare for their prosecution. Until we do so, time will not be on our side.

³⁵⁶ See Trivedi & Gonzalez Van Cleve, *supra* note 105 at 914–15 (“There is no reason to believe that prosecution and incarceration will work better on police than on the general public without addressing the underlying causes of police misconduct. However, to the extent that prosecution of police misconduct—without reference to incarceration as the remedy—creates the public goods of legal accountability and community trust, prosecutors have failed to deliver those goods at an acceptable rate.”).

³⁵⁷ See Levine, *supra* note 104, at 1046 (arguing that prosecuting police will not deter police violence because police violence is systemic).

