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POLICE PROSECUTIONS AND PUNITIVE INSTINCTS

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ABSTRACT

This Article makes two contributions to the fields of policing and criminal legal scholarship. First, it sounds a cautionary note about the use of individual prosecutions to remedy police brutality. It argues that the calls for ways to ease the path to more police prosecutions from legal scholars, reformers, and advocates who, at the same time, advocate for a dramatic reduction of the criminal legal system's footprint, are deeply problematic. It shows that police prosecutions legitimize the criminal legal system while at the same time displaying the same racism and ineffectiveness that have been shown to pervade our prison-backed criminal machinery.

The Article looks at three recent trials and convictions of police officers of color, Peter Liang, Mohammed Noor, and Nouman Raja, in order to underscore the argument that the criminal legal system's race problems are

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playing themselves out predictably against police officers. The Article argues that we should take the recent swell of prison abolitionist scholarship to heart when we look at police prosecutions and adds to that literature by exploring this controversial set of defendants that are considered a third rail, even among most abolitionists.

Second, the Article argues that police prosecutions hamper large-scale changes to policing. By allowing law enforcement to claim that brutality is an aberration, solvable through use of the very system that encourages brutality in the first place, we re-inscribe the failures of policing and ignore the everyday systemic and destructive violence perpetrated by police on communities of color. In order to achieve racial justice and real police reform, we must reduce our reliance on the police, rather than looking to the criminal legal system to solve this crisis.

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INTRODUCTION



1

In August 2020, a summer marked by the largest protests against police brutality the country has ever seen,² Linda Sarsour, a prominent activist known for founding the Women’s March and supporting many progressive causes, including the Movement for Black Lives, took to Instagram to share a video. The still above is from this video. In it, Sarsour wears a sweatshirt with the words “PROGRESS NOT PRISONS” prominently displayed. In the same image, she posts one hashtag: #ArrestTheCops. It refers to the police officers who killed a young Black woman named Breonna Taylor during a “likely-illegal,” warrantless raid on the sleeping woman’s home.³ Sarsour’s post powerfully displays the tension that this paper seeks to address. In the very same moment that Sarsour advocates against prisons, she also advocates for the arrest, and, one must assume, eventual imprisonment of individual police officers.

In 2019, an academic center displayed the same tension between decarceration and punitiveness. Chicago police officer Jason Van Dyke was sentenced to eighty-one months (a little under seven years) in prison for the shooting death of Black teenager Laquan McDonald. The MacArthur Center for Justice, an organization that advocates for “the most vulnerable”

1. Linda Sarsour (@Isarsour), INSTAGRAM (Aug. 21, 2020), <https://www.instagram.com/p/CEI4CWWpUGA>.

2. Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/Q6PB-ZVC5>].

3. Radley Balko, Opinion, *The No-Knock Warrant for Breonna Taylor Was Illegal*, WASH. POST (June 3, 2020, 8:35 PM), <https://www.washingtonpost.com/opinions/2020/06/03/no-knock-warrant-breonna-taylor-was-illegal/> [<https://perma.cc/KP7L-FVM2>].

defendants in the criminal legal system,⁴ wrote a letter on behalf of numerous civil rights organizations, including Black Lives Matter Chicago, and clinics at two prominent law schools.⁵ The letter argues that the sentence was *illegally* light because the law demanded Van Dyke serve consecutive sentences: “[T]he minimum lawful sentence that could be imposed on Mr. Van Dyke would require him to serve a sentence of imprisonment [of at least 18 years].” The letter’s authors make clear that they do not believe “that mandatory consecutive sentences are, as a general matter, fair, just or good policy.” In fact, the signatories “abhor, as a general matter, the pain that extremely long terms of imprisonment inflict on the Black and Brown defendants who are the ones typically sentenced to draconian prison terms under this sentencing scheme—the result of the false premise that such sentences deter crime or make our neighborhoods safer.”⁶ Despite this abhorrence, however, the authors conclude that “Jason Van Dyke must be required to serve the sentence that Illinois law demands.”⁷

Laid bare in these examples from the worlds of activism, advocacy, and academia are two conflicting impulses that are driving scholarship, rhetoric, and policy-making among generally left-leaning criminal legal system critics. On the one hand is the recognition that our criminal legal system is out of control, racist, ineffective, and unworkable.⁸ On the other is a

4. A note on terms. I use the term “criminal legal system” for two reasons. One, it is simply more descriptive than its better known, “criminal justice system,” the term justice implies a value judgment. And second, as should be clear from this Article, I do not believe that our criminal legal system doles out justice in any sense of that word that I understand. Abolitionist, Mariame Kaba, calls it the “criminal punishment system,” which may be even more apt. *See, e.g.,* Mariame Kaba, *So You’re Thinking About Becoming an Abolitionist* (Oct. 30, 2020), <https://level.medium.com/so-youre-thinking-about-becoming-an-abolitionist-a436f8e31894> [<https://perma.cc/52MA-6SBD>].

5. Letter from Roderick & Solange MacArthur Justice Center, Nw. Pritzker Sch. of L., to Hon. Kwame Raoul, Att’y Gen., State of Ill., and Joseph McMahan (Jan. 29, 2019), <https://www.macarthurjustice.org/wp-content/uploads/2019/01/Letter-to-Raoul-McMahon.pdf> [<https://perma.cc/WD25-S4TQ>] [hereinafter MacArthur Letter].

6. *Id.*

7. *Id.* (“If . . . Laquan McDonald were to have been convicted of multiple counts of armed violence against a Chicago Police officer, the court would have found no difficulty in imposing consecutive sentences that would have sent him to the penitentiary for decades. Such extreme sentences are not uncommon.”). According to the letter, the only reason Van Dyke was sentenced so “lightly” is “because the defendant is a White police officer.” *Id.* It argues that his status as an officer “should have been considered as an aggravating factor at sentencing” and that “[i]f the prosecution of Mr. Van Dyke stands for anything, it is that no person, whatever his status or his authority, is above the law. The final act in this nationally important case cannot be the imposition of an unlawfully lenient sentence upon this convicted defendant.” *Id.*

8. *See, e.g.,* Chaz Arnett, *From Decarceration to E-Carceration*, 41 CARDOZO L. REV. 641, 646 (2019) (“It has become virtually impossible, and almost treacherous, to discuss the American criminal justice system without referencing mass incarceration as a central theme and problem.”); Daniel Farbman, *Resistance Lawyering*, 107 CAL. L. REV. 1877, 1941 (2019) (arguing that we have a “broadly broken criminal justice system that creates and perpetuates deep racial inequalities”); Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 310 (2018) (“[Much recent

renewed fervor for criminal legal solutions for the political left's most high-profile villains: police officers.⁹ The punitive impulses from progressives are also aimed at sexual offenders¹⁰ and privileged, cisgender, white, male bad actors,¹¹ all of whom are seen as “above the law[.]”¹² To be sure, these categories of people create vast societal problems, and attention to these problems is necessary.¹³ But the reliance on the criminal legal system, by those who would otherwise see it radically reduced, is a troubling reminder

scholarship] raises questions about all aspects of the criminal system and the political economy in which it is embedded. It sounds not in the language of small-bore solutions or narrow, pragmatic fixes, but in terms of sweeping systemic critique.”); Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1074 (2015) (“The U.S. criminal system is widely recognized as overly broad and spectacularly harsh, even by the people who run it.”).

9. See *infra* Part I.

10. See, e.g., Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1877 (2019) (“[C]riminal law has [not] protected sexual privacy as clearly or as comprehensively as it should.”); Margo Kaplan, *Rape Beyond Crime*, 66 DUKE L.J. 1045, 1049 (2017) (“The unwarranted assumption that rape law should be primarily criminal law has thus far dominated legal scholarship.”); see also Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U. L. REV. 1146, 1151, 1159 (2019) (arguing that because the criminal legal system does not adequately hold sexual assaulters accountable, “victims” have had to turn to alternative, “informal” accountability mechanisms); Darryl K. Brown, *Criminal Enforcement Redundancy: Oversight of Decisions Not to Prosecute*, 103 MINN. L. REV. 843, 849 (2018) (lamenting the criminal legal system’s “underenforcement” of sexual assault); Shawn E. Fields, *Debunking the Stranger-in-the-Bushes Myth: The Case for Sexual Assault Protection Orders*, 2017 WIS. L. REV. 429, 443 (2017) (arguing that criminal legal system’s “underenforcement” is a problem of bias).

11. See Matthew Goldstein & Steve Eder, *Jeffrey Epstein’s Mystery Bank Came Alive After His Death*, N.Y. TIMES (Feb. 4, 2020), <https://www.nytimes.com/2020/02/04/business/jeffrey-epstein-estate-bank.html> [<https://perma.cc/C9PS-HJRZ>]; Dan Mangan & Jim Forkin, *Bernie Madoff Asking Trump to Reduce His Prison Sentence for Massive Ponzi Scheme*, CNBC (July 24, 2019, 12:10 PM), <https://www.cnbc.com/2019/07/24/bernard-madoff-asks-trump-to-reduce-prison-sentence-for-ponzi-scheme.html> [<https://perma.cc/7AQ5-J52H>]; Marisa Fernandez, *All the Trump Associates Convicted or Sentenced in the Mueller Investigation*, AXIOS (Feb. 20, 2020), <https://www.axios.com/trump-associates-convicted-mueller-investigations-206295a1-5abc-4573-be25-4da19d9adcc9.html> [<https://perma.cc/RKA4-LAXN>].

12. See Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197, 1199 (2016) [hereinafter Levine, *Police Suspects*]; see also Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491, 526 (2019) (“[M]ens rea reform opponents from the (broadly conceived) political left appear to base their objections on a claim that the strict liability rules distribute better and that a move away from strict liability would simply represent a further upward redistribution of capital. Assuming there is some proper place for criminal law and criminal punishment, wealthy, privileged, or powerful defendants who harm the less powerful are deserving targets of prosecution and punishment.”); Mary Kreiner Ramirez, *Criminal Affirmance: Going Beyond the Deterrence Paradigm to Examine the Social Meaning of Declining Prosecution of Elite Crime*, 45 CONN. L. REV. 865, 910 (2013) (“When the richest and most powerful echelons of society enjoy affirmance of their crimes through non-prosecution, the rule of law erodes as all citizens face added temptation to skirt laws and regulations. After all, if the privileged are above the law, then the sway of the rule of law morally diminishes for all.”).

13. See, e.g., Levine, *Police Suspects*, *supra* note 12 at 1206 (talking about social harms from police violence); Elizabeth C. Tippet, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 234 (2018) (noting both that the MeToo movement started as a support network for the many people who had been sexually assaulted and how “[t]he MeToo movement also revealed the ways in which the law can be misused to enable and conceal harassment”).

of our societal addiction to criminal legal solutions and of how difficult it will be to dismantle this deeply unjust system.¹⁴

This Article argues that a project to increase the harshness of the criminal legal system against police officers will, far from its proponents' goals, legitimize and increase the footprint of our current criminal legal system. Such prosecutions may also lead to the continuation of the very policies and financial incentives that lead to police violence in the first place.¹⁵ The piece catalogues and describes the punitive procedural and substantive legal turns that scholars, civil rights groups, public defenders, and legislators have proposed or advocated to make it easier to prosecute the police.¹⁶ It argues that taken together, the legal proposals and rhetoric surrounding police prosecutions are familiar tactics that have been previously deployed in earlier eras by those in favor of "tough on crime" strategies to increase the number of people prosecuted for crimes, and the harshness with which they are punished.¹⁷ They are failed policies, not productive solutions.

Reforms designed to prosecute and imprison more police may achieve desired outcomes for those who see the criminal legal system as functional with flaws. From this perspective, police prosecutions should probably occur more often because the perceived bias of the criminal legal system in favor of the police undermines the legitimacy of criminal law.¹⁸ Dismay at the number of officers who are not held criminally accountable for violent acts is justifiable.¹⁹ And these believers understand there to be legally and theoretically valid reasons for pursuing police prosecutions. Some believe that it will deter future bad acts by police;²⁰ others believe that criminal punishment is morally just and necessary retribution for violent acts.²¹

14. MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 77 (2015) ("The carceral state is highly resilient and adaptable . . . [A] costly prison boom . . . occurred amidst a sharply anti-government, anti-tax turn in American politics.").

15. Barbara E. Armacost, *Police Shootings: Is Accountability the Enemy of Prevention?*, 80 OHIO ST. L.J. 907, 910 (2019) (arguing that individual blame solutions are illusory for true police reform).

16. *See infra* Part I.

17. *See generally* GOTTSCHALK, *supra* note 14; NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* (2014).

18. *See, e.g.*, Alvin Bragg, Opinion, *How to Hold Cops Legally Accountable for Killings*, CITY & ST. (May 15, 2019), <https://www.cityandstateny.com/articles/opinion/opinion/how-hold-cops-legally-accountable-for-killings.html> [<https://perma.cc/BCL5-SXBK>] (New York special prosecutor suggesting that local district attorneys should be removed and the substantive law should be changed to make it easier to convict police officers).

19. *Id.* ("For families who lose a son or a daughter, accountability for police conduct remains elusive. Criminal charges are rarely brought against the police officers involved Of the thousands of police shootings between 2005 and 2015, only 54 officers were charged. Very few cases end with a conviction.").

20. Rebecca Roiphe, *The Duty to Charge in Police Use of Excessive Force Cases*, 65 CLEV. ST. L. REV. 503, 517 (2017). ("[P]rosecut[ions] in police use-of-force cases [are] seen as animated by a desire to deter criminal acts").

21. *Id.* at 516 ("[V]ictims and activists seek retribution").

Perhaps most saliently, many see it as a form of racial justice for over-policed, over-incarcerated communities of color.²² For those who are comfortable with the outlines of the criminal legal system, it is not hard to see why police prosecutions are a logical and necessary part of a system that may not be humming along as ideally as it should but is doing the work it was set out to do. Through this lens, successful prosecutions may represent the system correcting itself by holding bad actors accountable, pursuing racial justice, and punishing those who abuse their position.²³

But these are not the only advocates of police prosecutions. Indeed, it is hard to find anyone, other than police advocates, and a few of the most dedicated prison abolitionists,²⁴ vocally opposing the prosecution of police.²⁵ Moreover, many of the loudest pro-prosecution voices are those who, in other contexts, almost uniformly critique the harshness of the

22. Bragg, *supra* note 18 (“[Changes to make prosecutions more likely] would . . . help restore at least some semblance of faith in the system, which for too many communities, has all but disappeared.”).

23. See, e.g., Bill Hutchinson, *Former Florida Officer Nouman Raja Sentenced to 25 Years for Killing Corey Jones*, ABC NEWS (APR. 25, 2019, 4:38 PM), <https://abcnews.go.com/US/florida-officer-nouman-raja-sentenced-25-years-killing/story?id=62626285> [<https://perma.cc/Y5V4-Z5NG>] (“Today we can tell many of those families that there is hope. There is hope for America because a jury in Palm Beach, Florida, looked at all the evidence and they said a black man killed by the police can get equal justice, can get fair administration of the law.”) (quoting Jones’ family attorney, Benjamin Crump). Cf. Jasmine B. Gonzales Rose, *Racial Character Evidence in Police Killing Cases*, 2018 WIS. L. REV. 369, 369 (2018) (“The United States is facing a twofold crisis: police killings of people of color and unaccountability for these killings in the criminal justice system.”); Nancy C. Marcus, *From Edward to Eric Garner and Beyond: The Importance of Constitutional Limitations on Lethal Use of Force in Police Reform*, 12 DUKE J. CONST. L. & PUB. POL’Y 53, 71–72, 76 (2016) (“[W]hile the ten 2014–15 police killings highlighted in this article might seem to indicate a trajectory toward greater police accountability, as a general matter, most police killings still do not result in indictments of police.”).

24. See, e.g., Andrea J. Ritchie, *Ending the War on Black Women: Building a World Where Breonna Taylor Could Live*, LEVEL (Oct. 27, 2020), <https://level.medium.com/building-a-world-where-breonna-taylor-could-live-279746b1e55c> [<https://perma.cc/684Q-BNEM>] ([C]alls for [police] prosecutions legitimize the criminal punishment system by promoting the idea that it can do justice in individual cases—against cops, a premise that directly undermines our wholesale challenges to its legitimacy on the grounds that it systematically defines justice as killing, maiming, raping, caging, and deporting Black people.”); Mariame Kaba & Andrea J. Ritchie, Opinion, *We Want More Justice for Breonna Taylor than the System that Killed Her Can Deliver*, ESSENCE (July 16, 2020), <https://www.essence.com/feature/breonna-taylor-justice-abolition/> [<https://perma.cc/7E5T-9BYM>] (arguing against calls for police prosecutions) (“Turning away from systems of policing and punishment doesn’t mean turning away from accountability. It just means we stop setting the value of a life by how much time another person does in a cage for violating or taking it”); see also Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1638–40 (2019) [hereinafter McLeod, *Abolition Democracy*].

25. But see Armacost, *supra* note 15, at 910 (arguing that the problem of police shootings is institutional not individual and so must be solved institutionally); McLeod, *Abolition Democracy*, *supra* note 24, at 1638–40 (arguing that prosecuting police does not redress the problem of police killing, solve the problem of police brutality, or offer recompense to victims).

system—public defenders,²⁶ reformist legal scholars,²⁷ activists,²⁸ and civil rights groups.²⁹ In reaction to officers not being charged, or not being convicted, many have turned to the techniques and tools that have been central to propping up mass incarceration: dehumanizing police defendants,³⁰ suggesting new and harsher substantive criminal laws,³¹ eschewing procedural rights that contribute to fewer convictions,³² lamenting too short sentences for those officers who are convicted,³³

26. See, e.g., Cynthia Conti-Cook, *Statement on Start of Administrative Trial Against NYPD Officer Daniel Pantaleo*, LEGAL AID SOC'Y (May 13, 2019), <https://rachel-asher-7wk8.squarespace.com/news/2019/5/13/statement-on-start-of-administrative-trial-against-nypd-officer-daniel-pantaleo> [https://perma.cc/F9AA-2JUJ] (“The Legal Aid Society has fought for more transparency around the NYPD and the Staten Island District Attorney’s failure to hold Pantaleo accountable despite City Hall’s continued political protection of both.”).

27. See *infra* Part I.

28. See, e.g., Kimberley Richards, *Activist on Jason Van Dyke Sentence in Laquan McDonald Murder: ‘Slap in the Face,’* HUFFPOST (Jan. 19, 2019, 2:57 PM), https://www.huffpost.com/entry/laquan-mcdonald-jason-van-dyke-sentencing-activist_n_5c435057e4b0a8dbe171dd71?guccounter=1 [https://perma.cc/5MW6-9JSA] (“William Calloway, a Chicago community organizer, told reporters on Friday that he and fellow community members were ‘devastated’ after learning about Van Dyke’s sentencing.”).

29. See *NAACP Calls for Justice in Stephon Clark Case*, NAACP (Mar. 5, 2019), <https://www.naacp.org/latest/naACP-calls-justice-stephon-clark-case> [https://perma.cc/FZ42-8R2D] (“The nation’s foremost civil rights organization joins its NAACP Sacramento Branch in condemning Sacramento District Attorney Marie Schubert’s decision to not charge Sacramento Police officers Terrence Mercadel and Jared Robinet with murder for the killing of 22 year old Stephon Clark—an unarmed father and husband.”); *ACLU, Advocates Urge Passage of State ‘Use of Force’ Bill*, ACLU OF S. CAL. (Feb. 6, 2019), <https://www.aclusocal.org/en/press-releases/families-people-killed-police-support-ab-392-california-act-save-lives> [https://perma.cc/H2K8-WEAX] (“‘AB392 sets a simple rule: that officers shouldn’t use deadly force unless it’s necessary to defend themselves or others,’ said Lizzie Buchen, legislative advocate with the ACLU of California. ‘Every day that goes by without meaningful reform is another day that a police officer may violently take another life, leading to mourning and outrage across our communities, particularly Black and Brown communities.’”).

30. See *infra* Part III.A.

31. Paul Savoy, *Reopening Ferguson and Rethinking Civil Rights Prosecutions*, 41 N.Y.U. REV. L. & SOC. CHANGE 277, 285 (2017) (proposing that Congress eliminate the “willfulness” requirement from federal criminal law that allows prosecutions of police for civil rights violations); Ben Adler, *In California, Agreement on New Rules for When Police Can Use Deadly Force*, NPR (May 24, 2019, 7:24 AM), <https://www.npr.org/2019/05/24/726500537/in-california-agreement-on-new-rules-for-when-police-can-use-deadly-force> [https://perma.cc/6W2P-3MBR] (change to substantive law to replace reasonableness requirement with a requirement that force be necessary for self-defense claim by police, noting that this change became the focus of civil rights groups after no charges were brought in the killing of Stephon Clark).

32. Roger A. Fairfax, Jr., *Should the American Grand Jury Survive Ferguson?*, 58 HOW. L.J. 825, 826 (2015) (noting that “[a]s a result of widespread outrage in the wake of . . . high-profile cases, politicians, pundits, scholars, and lawyers alike have renewed calls for an end to the grand jury in the United States”).

33. See, e.g., Jeffery Robinson, *Judges Prove Laquan McDonald’s Life Didn’t Matter Very Much to the System*, ACLU (Jan. 23, 2019, 5:15 PM), <https://www.aclu.org/blog/criminal-law-reform/reforming-police/judges-prove-laquan-mcdonalds-life-didnt-matter-very-much?redirect=blog/criminal-law-reform/reforming-police-practices/judges-prove-laquan-mcdonalds-life-didnt-matter> [https://perma.cc/ZZ9M-2KZM] (while acknowledging that “excessive sentences” are problematic, Robinson believes that “Van Dyke’s modest sentence for second-degree murder and the outright acquittals for Gaffney, Walsh,

lambasting prosecutors who are seen to excuse criminal behavior,³⁴ and insisting upon treating police as harshly as civilians are treated.³⁵ In many cases these strategies are ones which have been clearly and persuasively shown to increase mass incarceration and to prop up the criminal legal system.³⁶

While these reactions are, on the surface, understandable, they do not cohere with a more sustained vision of seeing the criminal legal system radically altered or even eliminated.³⁷ There is now renewed attention to and scholarship about prison abolition,³⁸ which critiques prison reform advocates as thinking too small,³⁹ and, in many instances, unintentionally worsening the most intractable problems with the criminal legal system.⁴⁰ Instead, prison abolition sees the criminal legal system as a bastion and perpetuator of white supremacy and social control over the poor.⁴¹ This Article enters this conversation by taking the police as its subject. A “prison abolitionist ethic”⁴² requires non-criminal solutions to our police brutality crisis.

In order to re-envision the criminal legal system, we must seek alternatives, even when fairness or racial justice appears to demand a criminal legal recourse. This holds true even for those who have historically been privileged by criminal law and procedure. Scholars have done, and are currently doing, this sort of criticism in terms of carceral feminism—the

and March sends a message to police—hang together and officers can walk away from almost anything without too much trouble, even if it’s on video”).

34. See *infra* Part I.

35. MacArthur Letter, *supra* note 4.

36. See *infra* Part II (arguing that all reforms that add to the criminal legal system will lead to the further incarceration of poor people of color).

37. GOTTSCHALK, *supra* note 14, at 276 (arguing that “national [civil rights organizations] will not lead the way out of the carceral state without pressure from a more radical flank”).

38. See, e.g., Collection of Articles on Prison Abolition, HARV. L. REV., <https://harvardlawreview.org/topics/prison-abolition> [<https://perma.cc/2BXM-7CF6>].

39. See generally ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003).

40. Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161–62 (2015) [hereinafter McLeod, *Prison Abolition*] (“When abolition is conceptualized . . . as a transformative goal of gradual decarceration and positive regulatory substitution wherein penal regulation is recognized as morally unsustainable—then inattention to abolition in criminal law scholarship and reformist discourses comes into focus as a more troubling absence.”).

41. GOTTSCHALK, *supra* note 14, at 22 (incarceration aids the neoliberal project of ignoring root causes of poverty).

42. McLeod, *Prison Abolition*, *supra* note 40, at 1161–62 (“By a ‘prison abolitionist ethic,’ I intend to invoke and build upon a moral orientation elaborated in an existing body of abolitionist writings and nascent social movement efforts, which are committed to ending the practice of confining people in cages and eliminating the control of human beings through imminently threatened police use of violent force.”).

impulse to increase punitiveness for domestic⁴³ and sexual violence,⁴⁴ and, in a more limited way, for wealthy defendants who are seen to take advantage of the poor, or to use their privilege to maintain their class supremacy.⁴⁵ But the police who commit violence against citizens remain, generally, a third rail.⁴⁶ This is particularly so as the nation continues to grapple with violence by police, violence that has existed for centuries but has gained dramatic prominence since the killing of George Floyd and the murder charges brought against the four officers involved⁴⁷ and the killing of Breonna Taylor and the outrage at the non-indictments in that case.⁴⁸

This Article concludes that police prosecutions do not align with either a prison abolitionist ethic or, less radically, a desire to see the criminal legal system treat people of color fairly.⁴⁹ While there may be certain short-term gains from showing that the criminal legal system will punish its own actors

43. See, e.g., Erin R. Collins, *The Evidentiary Rules of Engagement in the War Against Domestic Violence*, 90 N.Y.U. L. REV. 397, 402 (2015) (arguing that specialized evidence rules advocated for by feminists in domestic violence cases lead to draconian results for defendants and that “the manipulation of evidence rules works to the detriment of some complainants by overriding the explanations and experiences of those whose lived realities do not fit within the prevailing narrative of domestic violence or do not support the presumption that state-imposed separation is the only solution to domestic violence”); Leigh Goodmark, *Reframing Domestic Violence Law and Policy: An Anti-Essentialist Proposal*, 31 WASH. U. J.L. & POL’Y 39, 51 (2009) (“[T]here is no strong evidence that criminalization deters men who batter from committing further acts of violence, even for the small percentage of men who are incarcerated for any appreciable period of time.”); Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 750 (2007) (“Unfortunately, feminist criminal law reform, which began laudably with the goal of vindicating the autonomy and rights of women, has increasingly mirrored the victims’ rights movement and its criminalization goals. Many of the widespread domestic violence reforms are more about increasing the likelihood of defendants going to jail than about supporting the individual desires, welfare, and interests of victims.”).

44. See, e.g., Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 583 (2009) (critiquing the carceral turn taken by today’s feminists such that “many associate feminism more with efforts to expand the penal laws of rape and domestic violence than with calls for equal pay and abortion rights”).

45. See Ben Levin, *Rethinking Wage Theft Criminalization*, ONLABOR (Apr. 13, 2018), <https://onlabor.org/rethinking-wage-theft-criminalization> [<https://perma.cc/79U5-MRVF>] (arguing that progressives and workers’ rights activists might advance inequality and marginalization by attempting to criminalize financial abuses in the workplace).

46. Cf. McLeod, *Abolition Democracy*, *supra* note 24 at 1639–40. (arguing against use and harshness of criminal legal system even for police who commit violent acts).

47. See, e.g., Vera Bergengruen & Tessa Berenson, ‘It Was a Tinderbox.’ *How George Floyd’s Killing Highlighted America’s Police Reform Failures*, TIME (June 4, 2020, 1:22 PM), <https://time.com/5848368/george-floyd-police-reform-failures> [<https://perma.cc/VM97-8BCP>] (“With nationwide protests extending into a second week, it’s clear that many Americans . . . hope the tragedy of Floyd’s death may finally lead to long overdue reforms in Minneapolis and around the country— even in systems that so far have not been receptive to significant change.”).

48. Shaila Dewan, *Few Police Officers Who Cause Deaths Are Charged or Convicted*, N.Y. TIMES (Sept. 24, 2020), <https://www.nytimes.com/2020/09/24/us/police-killings-prosecution-charges.html> [<https://perma.cc/58QN-PRQG>].

49. See McLeod, *Abolition Democracy*, *supra* note 24 at 1640 (noting that assumptions of justice from incarcerating police “tak[e] for granted that the application of criminal sanctions offers meaningful redress without inquiring more deeply into what interests are actually served by such an outcome and of what the promised justice substantially consists”); DAVIS, *supra* note 39.

for racially biased violence, in the long-term, racial justice depends on the dramatic reduction of the criminal legal system. Indeed, anecdotal evidence suggests that, even in the short term, the system is playing out its racial pathologies in police prosecutions. The article explores the trials of Peter Liang,⁵⁰ Nouman Raja,⁵¹ and Mohammed Noor.⁵² In these trials, officers of color were convicted in high profile cases, all three in jurisdictions where, up to that point, on-duty killings by white officers had not led to charges or convictions.⁵³

Moreover, a focus on criminal punishment for “bad apple” individual officers is a problematic obstacle to police reform.⁵⁴ Allowing prosecutors and police departments to allege that individual shootings are the product of rogue or abnormal officers also allows them to claim that policing more generally is functioning well. It directs our attention away from the well-documented systemic and organizational issues that lead to violence by the police.⁵⁵ Moreover, it ignores the fact that most police violence is not just legal but accepted with little dissent. This ordinary violence is central to the subjugation of poor people of color and does tremendous aggregate harm to whole communities.⁵⁶

The Article has four Parts. Part I examines the many recent suggestions by scholars and advocates to ease the path to criminalization for police. There are myriad articles on how prosecutors can and should exercise harshness against the police, and ways to change criminal procedure and substance to yield more convictions of police officers. Part II looks at prison abolitionist literature and concludes that this literature compels us to take a much harder look at the problems with prosecuting our way to racial justice. Part III argues that using the criminal legal system against police who commit violence both legitimates and replays the racial pathologies of the criminal legal system. It looks at three recent trials and convictions of

50. Sarah Maslin Nir, *Officer Peter Liang Convicted in Fatal Shooting of Akai Gurley in Brooklyn*, N.Y. TIMES (Feb. 11, 2016), <https://www.nytimes.com/2016/02/12/nyregion/officer-peter-liang-convicted-in-fatal-shooting-of-akai-gurley-in-brooklyn.html> [<https://perma.cc/BK2E-CETM>].

51. Pilar Melendez, *Nouman Raja, Former Florida Cop, Found Guilty for Murdering Corey Jones*, DAILY BEAST (Mar. 7, 2019, 9:20 AM), <https://www.thedailybeast.com/nouman-rajda-former-florida-cop-found-guilty-for-murdering-corey-jones> [<https://perma.cc/U4TZ-WF8P>].

52. Joey Peters, *Former Minnesota Policeman Convicted in Fatal Shooting of Australian Woman*, REUTERS (Apr. 30, 2019, 3:33 PM), <https://www.reuters.com/article/us-minnesota-police/former-minnesota-policeman-convicted-in-fatal-shooting-of-australian-woman-idUSKCN1S62SY> [<https://perma.cc/C55L-63P5>].

53. This is obviously not an empirical point. But I am pointing out that to the extent advocates of prosecuting the police believe that it will move us toward reaching racial equality in the criminal legal system, the successful prosecutions of officers of color may suggest that the racial pathologies of the system are simply replaying themselves in these prosecutions.

54. See *Infra* Part III.

55. See generally Armacost, *supra* note 15, at 910 (arguing that individual lawsuits are insufficient to curb police violence).

56. *Id.*

officers of color to illustrate these systemic issues. Finally, Part IV highlights why police prosecutions do not aid in reducing police brutality because police violence is systemic and legal. It concludes by pointing to another way to reduce all forms of police violence: reduced reliance on the police.⁵⁷

Police brutality is a crisis that is intimately bound up with our criminal legal system writ large. This Article shows that using that system to resolve the crisis of police violence is both futile and counter to the larger goals of decarceration and racial justice.

I. “FIXING” THE PROBLEM OF POLICE PROSECUTIONS

The perceived lack of charges, convictions, and long sentences for police officers is seen by many as a fundamental challenge to the fairness and legitimacy of the criminal legal system. Failures to secure charges and convictions have led reform advocates to question whether prosecutors are living up to their duty as the “guardians of public safety,” to their duty to do justice, and to their ability to carry out their mandate to charge fairly.⁵⁸ Similarly, the bias of juries and judges in favor of police and the substantive law itself have come under fire for leading to too much leniency in a system that is otherwise almost uniformly critiqued as too harsh.

Scholars, legislatures, governors, civil rights advocates, and prosecutors themselves have responded by rushing to fill this confidence gap by proposing and implementing solutions for and promises to prosecute more police.⁵⁹ Meanwhile, public defenders, activists, and civil rights groups who decry the criminal legal system’s footprint turn to it as a first and seemingly legitimate solution to bad acts by police officers.⁶⁰ These calls for legislation and policymaking to make it easier to prosecute the police have grown exponentially in the wake of the killing of George Floyd. This is despite the fact that the officers in that case were arrested and have been charged with murder. The already-able Minnesota Attorney General Keith Ellison is

57. See Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CAL. L. REV. 1781 (2020) [hereinafter Akbar, *Abolitionist Horizon*].

58. Rachel Barkow, Opinion, *Prosecutors Need to Treat Police Shootings Like a Threat to Public Safety*, WASH. POST (Mar. 13, 2019, 12:07 PM), https://www.washingtonpost.com/opinions/2019/03/13/prosecutors-need-treat-police-shootings-like-threat-public-safety/?utm_term=.fbad692a3691 [<https://perma.cc/EUK6-7SMC>].

59. *Id.*

60. Chris O’Connor (@ChristopOConnor), TWITTER (Jan. 12, 2020, 8:46 PM), <https://twitter.com/ChristopOConnor/status/1216582358163345408> [<https://perma.cc/6AYD-WY3Q>].

being aided in this prosecution, pro bono, by Neal Katyal, one of the most prominent private lawyers in the country.⁶¹

This Part illustrates one area of the tension criminal justice reformers face when police commit violence against citizens. Scholars, advocates for reform, and self-styled “progressive prosecutors” speak at once about dramatic reduction of the criminal legal system’s footprint and, at the same time, invent strategies to increase prosecutions of police through prosecutorial discretion and procedural and substantive changes to our laws.

A. Putting Pressure on Prosecutors to Charge More Police and to Charge Police with More Serious Crimes

Prosecutors who do not bring charges or do not successfully indict police officers who harm civilians are critiqued on multiple fronts: their decisions to decline prosecution,⁶² the care and time they take to investigate officers,⁶³ and their seemingly defendant-friendly presentations to grand juries. Prosecutors are harshly criticized for the amount of care and consideration that they give to a case involving police before charging or bringing an officer before a grand jury.⁶⁴ When civilians are arrested, or a crime is brought to the attention of a prosecutor, charges are usually brought immediately and any mercy to the defendant comes, if ever, after charges are filed.⁶⁵ With police, prosecutors act much more deliberately, taking up to a year to make a charging decision, and investigating the allegations *before* they charge. Often the result in these cases is a prosecutorial declination to charge.⁶⁶ This care and consideration is seen as evidence of bias, unfairness, and a rigged system. Most who focus on this disparity want to see the police treated with the same reflexivity as ordinary suspects.⁶⁷

Prosecutorial mercy toward police, I have argued,⁶⁸ should be harnessed as a model for the way the criminal legal system should operate more generally. Yet again, most see prosecutorial mercy toward police as a

61. Kevin Featherly, *All-Star Lawyers Sign onto Floyd Murder Case*, MINN. LAW. (Jul 15, 2020), <https://minnlawyer.com/2020/07/15/all-star-lawyers-sign-onto-floyd-murder-case> [<https://perma.cc/SU7A-NHM9>].

62. Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447 (2016) [hereinafter Levine, *Who Shouldn't Prosecute*] (arguing that prosecutors have a conflict of interest when they are tasked with charging officers on whom they rely).

63. Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 764–65 (2016) [hereinafter Levine, *How We Prosecute*] (noting that prosecutors are criticized for the time and care put into decisions about whether to prosecute police).

64. *Id.*

65. *Id.* at 767.

66. *Id.* at 764–65.

67. *Id.* at 764–67.

68. *See id.*

problem that must be solved by leveling down the treatment of police.⁶⁹ Thus, suggestions to change the way the system treats police abound, including who prosecutes the police,⁷⁰ how prosecutors exercise their discretion when it comes to police suspects,⁷¹ and how much control outside authorities should have over prosecutors' decisions regarding police.⁷² The theme of all of these suggestions is that prosecutors are not charging police suspects enough when they harm civilians while on duty.⁷³

Indeed, despite the orientation of this Article, I too have contributed to the writing on ways to take the bias out of prosecuting the police in a way that tends toward harshness. In an earlier article, I wrote at some length about the inherent conflict of interest local district attorneys face when prosecuting the police.⁷⁴ While the article's aim was to uncover the conflict rather than to suggest what level of charging was appropriate when police became suspects, the motivation behind the article was the nonindictments of Darren Wilson for the shooting death of Michael Brown and Daniel Pantaleo for the choking death of Eric Garner.⁷⁵ The assumption underlying my recommendation to remove the charging decision from the hands of local prosecutors to an agency or entity less reliant on the local police force was that more prosecutions would be forthcoming if prosecutors did not have personal and professional conflicts on the line.⁷⁶ Over the past several years, my thinking has changed considerably on this topic for the reasons set forth in latter Parts of this Article.

Removing local district attorneys has been a popular political act since the specter of police violence has become a focus of the public and therefore, the legislative and executive branches of state government.⁷⁷ Recently, when the Hennepin County district attorney, who was perceived as not bringing serious enough charges against Derek Chauvin, the officer who choked George Floyd, and not bringing swift enough charges against

69. See, e.g., Vida B. Johnson, *KKK in the PD: White Supremacist Police and What to Do About It*, 23 LEWIS & CLARK L. REV. 205, 238–39 (2019) (“With so few prosecutions of police even in the wake of high profile murders of unarmed civilians, it is not hard to see that most prosecutors have failed to act vigorously to rid police departments of troubled officers. Few efforts to rid departments of problem officers, even in this moment of heightened scrutiny, have been seen.”).

70. Levine, *Who Shouldn't Prosecute*, *supra* note 62.

71. Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 463, 468 (2017) (suggesting that an “internal deliberative model will allow prosecutors' offices to learn from their mistakes and alter their approach in response [to police prosecutions]”).

72. Compare *id.* (arguing that district attorneys' offices should maintain control), with Levine, *Who Shouldn't Prosecute*, *supra* note 62, and Part IV (suggesting a number of alternatives to local district attorneys).

73. See Johnson, *supra* note 69.

74. Levine, *Who Shouldn't Prosecute*, *supra* note 62.

75. *Id.* at 449.

76. *Id.* at 1464–1477.

77. See sources cited *infra* notes 78–83.

the three officers who did not step in to stop him, the case was reassigned to Minnesota Attorney General Keith Ellison, who immediately charged all four with murder.⁷⁸ More wide-rangingly, in New York, Governor Cuomo signed an executive order, to much fanfare, removing all police shooting cases to a specially-created office in the Attorney General's office.⁷⁹ Special prosecutors have been assigned in other states,⁸⁰ and, in almost every police shooting case, there are now calls from advocates and community groups to remove the case from the hands of the local district attorney's office.⁸¹

Additionally, a new wave of "progressive prosecutors" has swept into offices throughout the country. Many of these new prosecutors ran on a promise to bring "accountability" to police by aggressively charging and prosecuting the "bad apples" who harm civilians or by promising special prosecutors in all police violence cases.⁸² For instance, Kim Foxx, the current Cook's County State's Attorney included the prosecution of Jason Van Dyke by an independent prosecutor as part of her successful campaign to oust the incumbent.⁸³ Former public defender Wesley Bell, who successfully ousted Robert McCulloch in St. Louis, made independent prosecutions of police part of his platform too.⁸⁴ Perhaps the most famous "progressive" prosecutor, Larry Krasner, filed charges against eight

78. Alex Johnson, *Minnesota Attorney General to Take Over Prosecutions in George Floyd's Death*, NBC NEWS (May 31, 2020, 5:40 PM), <https://www.nbcnews.com/news/us-news/minnesota-attorney-general-take-over-prosecutions-george-floyd-s-death-n1220636> [<https://perma.cc/XVG8-5SW4>].

79. Noah Remnick, *Cuomo to Appoint Special Prosecutor for Killings by Police*, N.Y. TIMES (July 7, 2015), <https://www.nytimes.com/2015/07/08/nyregion/cuomo-to-appoint-special-prosecutor-for-killings-by-police.html> [<https://perma.cc/L5PW-H22F>]; Dan M. Clark, *Cuomo Renews Push to Codify NY AG Role as Special Prosecutor in Police-Involved Deaths*, N.Y. L.J. (June 3, 2019, 5:45 PM), <https://www.law.com/newyorklawjournal/2019/06/03/cuomo-renews-push-to-codify-ny-ag-role-as-special-prosecutor-in-police-involved-deaths> [<https://perma.cc/QZ6Y-PFQR>].

80. Rachel Frazin, *Judge Appoints Special Prosecutor in South Bend Police-Involved Shooting*, THE HILL (July 3, 2019, 4:06 PM), <https://thehill.com/homenews/campaign/451611-judge-appoints-special-prosecutor-in-south-bend-police-involved-shooting> [<https://perma.cc/C96Z-ZXZ7>].

81. See, e.g., Megan Crepeau, *Judge Declines to Appoint Special Prosecutor in Chicago Police Shooting*, CHI. TRIB. (Oct. 31, 2017), <https://www.chicagotribune.com/news/breaking/ct-met-chicago-police-shooting-special-prosecutor-20171031-story.html> (request for special prosecutor in killing of Flint Farmer by Officer Gildardo Sierra).

82. Note, *The Paradox of "Progressive Prosecution"*, 132 HARV. L. REV. 748, 754–55 (2018) [hereinafter *Paradox*]; Rachael Rollins, *Rachael Rollins: Don't Ignore the Need for Progressive District Attorneys*, REWIRE NEWS GROUP (Aug. 31, 2018, 3:56 PM), <https://rewire.news/article/2018/08/31/rachael-rollins-dont-ignore-the-need-for-progressive-district-attorneys> [<https://perma.cc/4RY5-UXT2>]; James Queally, *George Gascon to Challenge Jackie Lacey for L.A. County Top Prosecutor, in Pivotal D.A. Race*, L.A. TIMES (Oct. 28, 2019, 3:44 PM), <https://www.latimes.com/california/story/2019-10-28/george-gascon-to-challenge-jackie-lacey-for-l-a-county-top-prosecutor-in-pivotal-d-a-race>; Real Justice, *Chesa Boudin Will Prosecute Officers Who Break the Law*, FACEBOOK (Oct. 26, 2019), <https://www.facebook.com/realjusticepac/videos/chesa-boudin-will-prosecute-officers-who-break-the-law/1443637169117138> [<https://perma.cc/2B4V-VN2M>].

83. *Paradox*, *supra* note 82.

84. Astead W. Herndon, *Can a Criminal Justice Advocate Unseat Ferguson's Lead Prosecutor? Wesley Bell Will Try*, N.Y. TIMES (Aug. 7, 2018), <https://www.nytimes.com/2018/08/07/us/politics/ferguson-bill-mcculloch-wesley-bell.html> [<https://perma.cc/AAC5-86H7>].

Philadelphia police officers, including two for an illegal stop-and-frisk.⁸⁵ These increased prosecutions are seen as an equally important “reform” as his reduction in prosecution of civilians.⁸⁶

And there is evidence, indeed, that pressure from racial justice activists⁸⁷ and groups like the Movement for Black Lives,⁸⁸ established legal reform groups,⁸⁹ celebrities,⁹⁰ and public sentiment more generally have led to more prosecutions of officers. As one author notes approvingly, “In 2015, eighteen police officers were charged in fatal on-duty shootings, more than three times the average yearly number over the preceding decade.”⁹¹ Prosecutors who decide to charge police officers make very public announcements, as was the case with the unsuccessful prosecution of the

85. Max Marin, *Philly DA Larry Krasner Is Going After Police Officers for Illegal Stop-and-Frisks*, BILLY PENN (Oct. 4, 2018, 8:30 AM), <https://billypenn.com/2018/10/04/philly-da-larry-krasner-is-going-after-police-officers-for-illegal-stop-and-frisks> [<https://perma.cc/3CF5-KGU3>].

86. *Id.*

87. PROSECUTE KILLER COPS, <https://prosecutekillercops.org> [<https://perma.cc/ZU3U-FWX4>] (calling for the prosecution of killer cops and listing all officers that should be prosecuted); Loopmaniac, *Tamika Mallory—The Most Powerful Speech of a Generation* at 1:38, YOUTUBE (May 30, 2020), <https://www.youtube.com/watch?v=m7-2qnaCQr4> (“There’s an easy way to stop this. Arrest the Cops. Charge the cops. Charge all the cops.”); Brittany Packnett Cunningham (@MsPackyetti), TWITTER (July 1, 2020, 6:23 AM), <https://twitter.com/MsPackyetti/status/1278318200648851456> (“Happy July! It’s a great day to arrest #BreonnaTaylor’s killers.”).

88. Although the Movement for Black Lives does not have police prosecutions as one of its central tenants, those associated with the movement have been among the loudest voices calling for prosecutions of individual police officers in high profile cases of police shootings. *See, e.g.*, Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1438 (2016) (“In Ferguson, for example, people allied with the Movement for Black Lives were among the strongest voices for prosecution of Officer Wilson and for the intervention of the U.S. Department of Justice in the police department.”).

89. *See An Update from NAACP: Our Demands*, NAACP (May 31, 2020), <https://www.naacp.org/latest/update-naACP-demands> [<https://perma.cc/6ZLZ-TG5E>] (calling for arresting, trying, and convicting police who kill civilians); PROSECUTE KILLER COPS, *supra* note 87.

90. *See e.g.*, Glenn Rowley, *Cardi B Wishes More Male Rappers Would Speak Out About the Murder of Breonna Taylor*, BILLBOARD (Aug. 11, 2020), <http://blbrd.cm/daKofsf> [<https://perma.cc/2MSL-ZYW6>] (“Why is the cop not in jail? Wasn’t what he did a crime?”) (quoting Cardi B); *Oprah Winfrey Demanding Justice for Breonna Taylor with Billboards*, PBS NEWS HOUR (Aug. 11, 2020, 3:10 PM), <https://www.pbs.org/newshour/nation/oprah-winfrey-demanding-justice-for-breonna-taylor-with-billboards> [<https://perma.cc/DW6W-92L9>] (explaining that Oprah Winfrey paid for twenty-six billboards that read: “Demand that the police involved in killing Breonna Taylor be arrested and charged”); Whitney Vasquez, *Machine Gun Kelly Marches Shirtless to ‘Prosecute Killer Cops’*, BLAST (June 2, 2020, 5:07 PM), <https://theblast.com/c/machine-gun-kelly-george-floyd-protest-photos-shirtless-tattoos-megan-fox> [<https://perma.cc/8X56-J4YC>]; Tommy Beer, *LeBron James Demands Justice for Breonna Taylor: ‘We Want the Cops Arrested’*, FORBES (July 24, 2020, 3:28 PM), <https://www.forbes.com/sites/tommybeer/2020/07/24/lebron-james-demands-justice-for-breonna-taylor-we-want-the-cops-arrested/#1d0fba9f469c> [<https://perma.cc/X6A2-HBA3>]; Jill Martin, *Lakers Wear Red MAGA-Like Hats but the Message Asks for Justice for Breonna Taylor*, CNN (Aug. 19, 2020, 1:17 AM), <https://www.cnn.com/2020/08/18/us/lakers-breonna-taylor-hats-spt-trnd/index.html> [<https://perma.cc/X6A2-HBA3>] (describing a movement by players of the Los Angeles Lakers, wearing hats that read: “MAKE AMERICA GREAT AGAIN ARREST THE COPS WHO KILLED BREONNA TAYLOR”).

91. Margalynne J. Armstrong, *Are We Nearing the End of Impunity for Taking Black Lives?*, 56 SANTA CLARA L. REV. 721, 760 (2016).

officers involved in the 2015 death of Freddie Gray in Baltimore.⁹² There, the prosecutor took to the steps of city hall to hold a press conference announcing charges against six officers. The criminal legal evidence against the officers was unclear from the start and none of the officers' prosecutions ended in convictions.⁹³ Yet, the decision to charge was met with much approbation from the public, including—perhaps especially—those who, in general, decry the state of mass incarceration, the conditions of incarceration, and the overcharging that leads to long sentences.⁹⁴

Anecdotally, this movement appears to be gaining even more steam now. Since the summer protests of 2020, charging police officers who kill or injure civilians, particularly civilians of color, seems to be ratcheting up.⁹⁵ The officers who killed George Floyd have been charged with murder, including three rookie officers through accomplice liability charges,⁹⁶ a type of felony murder charge that has been under attack from criminal law

92. Ian Duncan, *Prosecutors Take Credit for Restoring Order in Baltimore After Riot*, BALT. SUN (June 24, 2015), <https://www.baltimoresun.com/news/crime/bs-md-ci-mosby-reponse-misconduct-20150624-story.html> (noting that Mosby announced the charges “from the steps of Baltimore’s War Memorial”).

93. See, e.g., Leon Neyfakh, *No Convictions for the Officers in the Freddie Gray Case*, SLATE (July 27, 2016, 2:52 PM), <https://slate.com/news-and-politics/2016/07/why-prosecutors-failed-to-win-convictions-in-the-freddie-gray-cases.html> [<https://perma.cc/RW4G-L6Y9>] (“It has been clear for some time now—at least since the acquittal of police van driver Caesar Goodson, against whom the state arguably had the strongest case—that Mosby may have acted prematurely when, at an impassioned press conference following a period of destabilizing unrest in Baltimore, she declared her intention to prosecute the six officers.”).

94. Press Release, NAACP, *NAACP Statement on Charges Against Officers in Freddie Gray’s Death* (May 2, 2015), <https://www.naacp.org/latest/naacp-statement-on-charges-against-officers-in-freddie-grays-death> [<https://perma.cc/KY4Q-5ARD>] (“The NAACP applauds Maryland State Attorney Marilyn Mosby for taking this bold and important first step toward justice for Freddie Gray.”).

95. Michael Levenson & Marie Fazio, *3 Mississippi Police Officers Charged with Murder of Black Man*, N.Y. TIMES (Aug. 14, 2020), <https://www.nytimes.com/2020/08/14/us/jackson-mississippi-police-murder.html> [<https://perma.cc/372B-W9RP>]; Michael Levenson, *Washington Police Officer Charged with Murdering Man Outside Grocery Store*, N.Y. TIMES (Aug. 20, 2020), <https://www.nytimes.com/2020/08/20/us/jeffrey-nelson-auburn-washington-police-murder-charge.html> [<https://perma.cc/99M2-N4VB>]; Kate Brumback, *Officer Charged with Murder for Shooting Rayshard Brooks*, AP NEWS (June 17, 2020), <https://apnews.com/f3c3747e6d8c0bd63ba7c57c6d363868>; Timothy Bella, *Oklahoma Officers Charged with Murder After Using Tasers More Than 50 Times in Man’s Death, Investigators Say*, WASH. POST (July 3, 2020, 12:53 PM), <https://www.washingtonpost.com/nation/2020/07/03/police-oklahoma-murder-taser/>; *Former Las Cruces Police Officer Charged with Murder*, KRQE (July 16, 2020, 4:14 PM), <https://www.krqe.com/news/crime/former-las-cruces-police-officer-charged-with-murder> [<https://perma.cc/5VNE-2SNB>]; *San Leandro Police Officer Charged with Manslaughter in Fatal Shooting of Bat-Wielding Man Inside Walmart*, CBS SF BAY AREA (Sept. 2, 2020, 9:49 PM), <https://sanfrancisco.cbslocal.com/2020/09/02/san-leandro-police-officer-manslaughter-fatal-shooting-bat-wieldin-g-man-walmart> [<https://perma.cc/5VNE-2SNB>].

96. Tucker Higgins & Dan Mangan, *3 More Cops Charged in George Floyd Death, Other Officer’s Murder Charge Upgraded*, CNBC (June 3, 2020, 2:10 PM), <https://www.cnbc.com/2020/06/03/3-more-cops-charged-in-george-floyd-death-other-officers-murder-charge-upgraded.html> [<https://perma.cc/KR63-3LHB>].

reformers for decades as exceedingly harsh.⁹⁷ In Georgia, an officer has also been charged with murder in the killing of Rayshard Brooks, despite the fact that Mr. Brooks had taken a taser from another officer.⁹⁸ The murder charges against the three officers who did not step in to stop the killing of Mr. Floyd and the swift murder charge in the Brooks case, where a plausible self-defense justification exists, suggests that prosecutors have begun to employ the charge first, think later posture usually reserved for civilian defendants for police officers too.⁹⁹ From an equity stand point, this may be admirable; from a systemic change perspective, it is troubling.¹⁰⁰

These charges reflect a ramping up of the pressure that has already been exerted on prosecutors in the past few years. When prosecutors “fail” to bring justice through charging police officers, they are publicly lambasted, their ability is questioned,¹⁰¹ and their evidentiary decisions are scrutinized and undermined by media. For instance, following the shooting death of unarmed teenager Stephon Clark, the Sacramento District Attorney declined to charge the officers involved, saying, “[W]hen we look at the facts and the law, and we follow our ethical responsibilities, the answer to that question [whether they committed a crime] is no. And as a result, we will not charge these officers.”¹⁰² This decision set off waves of protests from the community, and second-guessing by the media and public.¹⁰³ The media, even in facially straightforward reporting, has sought to undermine the decision in the case. *The New York Times*, in an article quoting the District Attorney’s reasoning for her decision, noted that it had performed its own analysis of the evidence in the case and had found, contrary to the District

97. Jacob Gershman, *The Controversial Legal Doctrine at the Heart of the Floyd, Brooks, Arbery Cases*, WALL ST. J. (July 9, 2020, 7:52 AM), <https://www.wsj.com/articles/the-controversial-legal-doctrine-at-the-heart-of-the-floyd-brooks-arbery-cases-11594295529> [<https://perma.cc/W254-PGK5>].

98. Rick Rojas & Richard Fausset, *Former Atlanta Officer Is Charged with Murder in Shooting of Rayshard Brooks*, N.Y. TIMES (June 17, 2020), <https://www.nytimes.com/2020/06/17/us/garrett-rolfe-rayshard-brooks-atlanta.html> [<https://perma.cc/TY25-ALJR>].

99. Cf. Levine, *How We Prosecute*, *supra* note 63 (arguing that prosecutors should treat civilians more like they do police, rather than the impulse most seem to have that prosecutors should treat police as badly as they do civilians). On the other hand, the recent nonindictments in the killing of Breonna Taylor suggest that prosecutors are still being very careful when it comes to charging police officers with homicide, even in the face of massive political pressure. See Dewan, *supra* note 48.

100. See *infra* Parts III & IV.

101. Maybell Romero, *Profit-Driven Prosecution and the Competitive Bidding Process*, 107 J. CRIM. L. & CRIMINOLOGY 161, 176–77 (2017) (“Confidence in prosecutors has lately been shaken as well, with notable examples [of failed indictments] arising from the deaths of Michael Brown in Ferguson and Eric Garner in Staten Island.”).

102. Jose A. Del Real, *No Charges in Sacramento Police Shooting of Stephon Clark*, N.Y. TIMES (Mar. 2, 2019), <https://www.nytimes.com/2019/03/02/us/stephon-clark-police-shooting-sacramento.html> [<https://perma.cc/G3MX-7F3C>].

103. See, e.g., Gabe Schneider, *Why Sacramento Is Still Protesting Stephon Clark’s Death, One Year Later*, VOX (Mar. 9, 2019, 1:44 PM), <https://www.vox.com/identities/2019/3/9/18257685/stephon-clark-protests-sacramento-police-shooting> [<https://perma.cc/XJ8T-LT7J>] (noting that the decision not to charge led to a number of protests).

Attorney's statement, that the police were unreasonable in their fear of Clark because "gunfire continued after Mr. Clark had fallen to his hands and knees."¹⁰⁴ Indeed, the article notes that, "Six of the seven shots most likely hit Mr. Clark as he was falling or was already on the ground . . . Three minutes passed after the shooting before police officers identified themselves to Mr. Clark, and he did not receive medical attention for six minutes."¹⁰⁵ While the article did not explicitly say that the prosecutor was dishonest about the lack of probable cause to charge the case, the presumption was clear.¹⁰⁶

When the Staten Island District Attorney failed to get an indictment against officer Daniel Pantaleo, the local chapter of the NAACP brought suit to have the charges reinstated and a new grand jury impaneled. Their brief noted that such a result would "send [a] message" to prosecutors seen as not trying hard enough to indict officers like Pantaleo that "they, too, have to play by the rules that seek to ensure a measure of justice in the criminal justice system" and that if prosecutors did not more aggressively pursue charges against officers, they would be "subject to oversight by the bar."¹⁰⁷

The perception that more charges against police officers will bring more accountability and "justice" for overpoliced communities is shared by numerous scholars. These scholars look to law and politics to increase the likelihood that police officers can be charged. Some have suggested that a prosecutor's usual unfettered discretion be removed when it comes to declining to charge officers. One author has suggested that there is in fact a "duty to charge" police stating it is "an abuse of discretion not to charge the most culpable police officers, even when the evidence is imperfect or juries are unlikely to convict."¹⁰⁸ And another author has proposed a statute that *requires* the justice department to investigate every instance of lethal force by police.¹⁰⁹ Others have suggested that declinations by prosecutors or failed indictments by grand juries be made completely "transparent" so that these decisions can be scrutinized for error and bias "both by an

104. Del Real, *supra* note 102.

105. *Id.*

106. *See id.*

107. Brief of Petitioner at 20–21, *Staten Island Branch of NAACP v. N.Y. Grievance Comm. for the 2d, 11th, & 13th Jud. Dists.*, 31 N.Y.S.3d 782 (N.Y. App. Div. 2016) (No. 10913/15) (quoting Peter Joy, *Letter to the Editor*, N.Y. TIMES (Apr. 15, 2015)).

108. Roiphe, *supra* note 20, at 505; *see also* Howard M. Wasserman, *Police Misconduct, Video Recording, and Procedural Barriers to Rights Enforcement*, 96 N.C. L. REV. 1313, 1359–60 (2018).

109. Mitchell F. Crusto, *Right to Life: Interest-Convergence Policing*, 71 RUTGERS UNIV. L. REV. 63, 111 (2018) (explaining that the suggested statute would read, in part: "The Justice Department is hereby mandated to investigate each and every use of lethal force by local or state police officers, in non-custodial circumstances").

independent authority and the public.”¹¹⁰ Still others have argued that prosecutors abdicate their duty to the public if they do not lobby in favor of changing the substantive law to make it easier to convict police who claim to be in fear for their lives.¹¹¹

In short, there has been tremendous pressure placed on district attorneys to use their discretion to prosecute more police officers. This pressure is ratcheting up at a time when the general trend has been toward fewer prosecutions and more mercy toward criminal suspects.

B. Changing Criminal Procedure to Prosecute More Police

In addition to pressuring district attorneys to use their power to bring the criminal legal system to bear on the police, scholars have suggested ways to ease the path forward to prosecution and conviction by changing criminal procedure. This includes taking away police interrogation rights and changing the way grand juries operate.

A number of scholars and advocates want to change the way police are investigated when suspected of unjustified on-duty harm. For example, several states currently have statutory laws known as the Law Enforcement Officers’ Bill of Rights (LEOBOR).¹¹² Included in these statutes are certain rights that police officers have when they are being questioned by other officers.¹¹³ Such rights include: limitations on how long, and during what part of the day an officer can be questioned; notification about who will question the officer and limits on the number of interrogators; restrictions on the threats and inducements interrogators can use to get a confession; and a requirement that officers be able to sleep, eat, and use the restroom.¹¹⁴ I have argued that these rights dovetail with what scholars have suggested for years should be applied to all suspects.¹¹⁵ Instead of leveraging this disparity to fight for better protection for civilians suspects, however, most who consider LEOBORs favor their abolishment because they fear that

110. Colin Taylor Ross, Note, *Policing Pontius Pilate: Police Violence, Local Prosecutors, and Legitimacy*, 53 HARV. J. ON LEGIS. 755, 775 (2016).

111. Rachel Barkow, Opinion, *Prosecutors Need to Treat Police Shootings Like a Threat to Public Safety*, WASH. POST (Mar. 13, 2019, 2:07 PM), https://www.washingtonpost.com/opinions/2019/03/13/prosecutors-need-treat-police-shootings-like-threat-public-safety/?utm_term=.fbad692a3691 [<https://perma.cc/2SBN-4M3X>].

112. Levine, *Police Suspects*, *supra* note 12, at 1224–26.

113. *Id.*

114. *Id.*

115. *Id.* at 1234–58.

these rights are an obstacle to the successful investigation and prosecution of police officers.¹¹⁶

There have also been numerous suggestions about reforming or even abolishing the grand jury based on the nonindictments in the Darren Wilson and Daniel Pantaleo cases in particular.¹¹⁷ California passed a statute abolishing the grand jury in police cases, making all of them subject to a preliminary hearing in front of a judge, and in public.¹¹⁸ This statute was later determined to be unconstitutional.¹¹⁹

Scholars have suggested various modifications to the grand jury, including removing the longstanding secrecy requirement¹²⁰ and forcing the prosecutor to call the family members of the injured party.¹²¹ Another suggestion is to “institute enhanced court supervision” after the return of a nonindictment and, if a juror complains of racial bias, to consider empaneling a second grand jury.¹²² As Roger Fairfax details, the reaction to the nonindictments in Ferguson and Staten Island have led some to go so far as to suggest abolishing the grand jury for *all* defendants.¹²³ While many have critiqued aspects of the grand jury in the past, these critiques have been based almost entirely on the fact that grand juries indict too often. The thrust of these reform proposals is that, in police cases, grand juries do not indict *enough*.¹²⁴

116. See, e.g., Shaun King, *How the Brelo Verdict in Cleveland Proves Laws Protecting People from Police Are Broken*, DAILY KOS (May 26, 2015, 11:55 AM), <http://www.dailykos.com/story/2015/05/26/1387822/-How-the-Brelo-verdict-in-Cleveland-proves-laws-protecting-people-from-police-are-broken> [http://perma.cc/UXA4-CHTD] (noting Officer Michael Brelo was acquitted after bench trial for firing dozens of shots into car window and killing two people); Walter Olson, *Police Misconduct and 'Law Enforcement Officers' Bill of Rights' Laws*, CATO INST. (Apr. 24, 2015, 1:34 PM), <http://www.cato.org/blog/police-misconduct-law-enforcement-officers-bill-rights> [http://perma.cc/SUU5-4P43] (arguing these laws shield police from investigation); Danny Vinik, *Here's Why Ferguson Protesters Don't Accept the Michael Brown Decision*, NEW REPUBLIC (Nov. 24, 2014), <http://www.newrepublic.com/Article/120402/ferguson-protests-over-michael-brown-case-about-racist-justice-system> [https://perma.cc/JZB7-A256] (discussing failure to indict Officer Darren Wilson).

117. See, e.g., Fairfax, *supra* note 32, at 827.

118. Act of Aug. 11, 2015, ch. 175, 2015 Cal. Laws. 1871 (codified at CAL. PENAL CODE § 917); Allie Gross, *California Becomes First State to Ban Grand Juries in Police Shooting Cases*, MOTHER JONES (Aug. 13, 2015), <https://www.motherjones.com/politics/2015/08/california-becomes-first-state-ban-grand-juries-police-shooting-cases> [https://perma.cc/M9NT-SYDN].

119. CAL. PENAL CODE § 917, *invalidated by* People *ex rel.* Pierson v. Superior Ct., 212 Cal. Rptr. 3d 636 (Cal. Ct. App. 2017).

120. Claire P. Donohue, *Article 32 Hearings: A Road Map for Grand Jury Reform*, 59 HOW. L.J. 469, 478–79 (2016).

121. Federico S. Efron, *Argentina's Solution to the Michael Brown Tragedy: A Role for the Complainant Victim in Criminal Proceedings*, 24 SW. J. INT'L L. 73, 78 (2018) (arguing that Michael Brown's family should have testified to the grand jury).

122. Jasmine B. Gonzales Rose, *Racial Character Evidence in Police Killing Cases*, 2018 WIS. L. REV. 369, 424 (2018).

123. Fairfax, *supra* note 32, at 827.

124. See sources cited *supra* notes 117–123.

Police violence then is fueling advocacy to ramp up the procedural machine that leads to more criminal charges and convictions.

C. Changing Substantive Law to Prosecute More Police

Some scholars and advocates identify the problem not as the prosecutor's biased exercise of mercy or an excess of procedural rights but as a substantive law problem. Seeing the police "use of force" standard as too lenient, these commenters have made a number of suggestions to change both state and federal criminal law so as to smooth the way for prosecutors to charge, indict, and convict officers accused of on-duty crimes.¹²⁵

Since the killing of George Floyd, there have been numerous legislative moves to make it easier to prosecute police. Numerous state legislatures are also considering new laws to create new or more serious crimes for police, including making chokeholds a separate crime and creating a duty to intervene for officers who are witnesses to misconduct by their colleagues.¹²⁶ These new bills and the excitement behind them underscore the larger point of this Article, that the desire to see police imprisoned is contributing to the continual ballooning of our bloated criminal legal codes, particularly given that the incident that motivated them has been charged under existing law.

These new bills have successful precedent. After the killing of unarmed Stephon Clark, California changed its self-defense law for officers.¹²⁷ The

125. Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 639 ("Prosecutors may also be concerned about bringing charges when the chances of success are very small. Current law contributes to this concern by favoring the officer at almost every step of the way. My model statute tries to be more balanced than current law, giving prosecutors a better chance at securing a conviction in cases where a conviction is appropriate.").

126. See, e.g., A.B. 329, 2019–2020 Leg., Reg. Sess. (Cal. 2020) (proposed legislation that would revise the definition of a crime to include the use of excessive force by law enforcement regardless of whether the officer is charged with commission of a crime or public offense); A. 1601, 2019–2020 Leg., Reg. Sess. (N.Y. 2020) (establishing an office of special investigation within the department of law to investigate and prosecute any alleged criminal offense committed by an officer, concerning the death of any person as a result of any encounter with an officer); S. 8581, 2019–2020 Leg., Reg. Sess. (N.Y. 2020) (pending legislation that would create a duty to report unauthorized use of force by a police officer and provides that failure to report is a class B misdemeanor); S. 2636, 219th Leg. (N.J. 2020) (pending legislation that would create accomplice liability of law enforcement officers who fail to deescalate and intervene when another officer commits offense); H.B. 350, 150th Gen. Assemb. (Del. 2020) (proposed legislation that would create the crime of aggravated strangulation if the person is an officer, acting within their official capacity and knowingly or intentionally using a chokehold); H.B. 1187, Gen. Assemb. (Ga. 2020) (same); Eric Garner Anti-Chokehold Act, A. 6144 (N.Y. 2020) (same); George Floyd's Law, S. 2617, 219th Leg. (N.J. 2020) (same); H.B. 716, 133d Gen. Assemb., Reg. Sess. 2019–2020 (Ohio 2020) (same).

127. Anita Chabria, *Newsom Signs 'Stephon Clark's Law,' Setting New Rules on Police Use of Force*, L.A. TIMES (Aug. 19, 2019, 3:38 PM), <https://www.latimes.com/politics/la-pol-ca-california-police-use-of-force-law-signed-20190711-story.html>.

new statute, dubbed “The California Act to Save Lives,” opens officers up to criminal liability unless their use of force is deemed “necessary” to defend their own or another person’s life.¹²⁸ The change is small and seems logical. Some have maintained that the major change is to ensure that officers have used “de-escalation tactics” prior to using force.¹²⁹

Yet proponents of the bill, who know how small changes to language in criminal law can lead to many more charged cases with politically motivated prosecutors, championed the bill’s attendant increase in criminal liability as an important and momentous change. According to the ACLU, which vocally supported the bill, the change was “urgently needed because every day that goes by without addressing California’s epidemic of police violence is another day that a police officer may violently take another life.”¹³⁰ In other words, in this instance, the ACLU believes we must make it easier to prosecute and convict officers in order to stem the tide of police violence and to save lives.

Gavin Newsom—California’s criminal justice-reform oriented Governor¹³¹ who in 2019 put a moratorium on California’s death penalty, shutting down the country’s largest death row¹³²—celebrated his signing the statute into law and noted his hope and belief that “[a]s California goes, so does the rest of the United States of America.”¹³³ Some activists who had

128. CAL. PENAL CODE § 835a(c) (West 2019) (“[A] peace officer is justified in using deadly force upon another person only when the officer reasonably believes, based on the totality of the circumstances, that such force is necessary . . . [t]o defend against an imminent threat of death or serious bodily injury to the officer or to another person.”); Vivian Ho, *California Adopts Country’s Strictest Law to Curb Police Killings*, GUARDIAN (Aug. 19, 2019, 6:13 PM), <https://www.theguardian.com/us-news/2019/aug/19/california-use-of-force-law-stephon-clark> [<https://perma.cc/LH68-SXQZ>].

129. Chabria, *supra* note 127 (“Opening up those tactics to scrutiny, supporters believe, will encourage departments to train officers in deescalation and other strategies that could decrease the use of lethal force and provide a potential path to accountability when it is used.”).

130. Lizzie Buchen, *New Bill Limits When California Police Can Use Deadly Force*, ACLU (Feb. 8, 2019, 1:15 PM), <https://www.aclu.org/blog/criminal-law-reform/reforming-police-practices/new-bill-limits-when-california-police-can-use> [<https://perma.cc/4G28-K6LK>].

131. See, e.g., *Advocates Celebrate Governor Newsom’s Signature on SB 136, Dismantling a Cruel, Ineffective Sentence Enhancement*, ACLU S. CAL. (Oct. 9, 2019), <https://www.aclusocal.org/en/press-releases/advocates-celebrate-governor-newsoms-signature-sb-136-dismantling-cruel-ineffective> [<https://perma.cc/J84D-4J6B>]; Gabrielle Canon, *Once Known for ‘Three Strikes’ Law, California Is Now Bracing for Criminal Justice Reform*, USA TODAY (Sept. 18, 2019, 6:29 PM), <https://www.usatoday.com/story/news/politics/2019/09/18/about-californias-criminal-justice-reform-bills/2353853001> [<https://perma.cc/JWR7-DR2V>]; Andrea Castillo, *California Bans For-Profit Prisons and Immigrant Detention Centers*, L.A. TIMES (Oct. 11, 2019, 12:53 PM), <https://www.latimes.com/california/story/2019-10-11/california-bans-for-profit-prisons-and-immigrant-detention-facilities>; Jason Pohl & Ryan Gabrielson, *We Investigated the Crisis in California’s Jails. Now, the Governor Calls for More Oversight*, PROPUBLICA (Nov. 14, 2019, 8:30 AM), <https://www.propublica.org/article/we-investigated-the-crisis-in-californias-jails-now-the-governor-calls-for-more-oversight> [<https://perma.cc/KZJ7-EX38>].

132. Tim Arango, *California Death Penalty Suspended; 737 Inmates Get Stay of Execution*, N.Y. TIMES (Mar. 12, 2019), <https://www.nytimes.com/2019/03/12/us/california-death-penalty.html> [<https://perma.cc/V8B4-SNWF>].

133. Ho, *supra* note 128.

supported the bill initially voiced their dismay with the statute's final form as not criminalizing more activity. The Black Lives Matter Los Angeles Chapter leader, Melina Abdullah, told *The Guardian* newspaper "Unfortunately, in efforts to get law enforcement to lift their opposition, the bill was so significantly amended that it is no longer the kind of meaningful legislation we can support."¹³⁴

Legal scholars have also lent support to the bill as a way to increase legitimacy for the police¹³⁵ and as a way for prosecutors to ensure they remain "guardians of public safety."¹³⁶ Still other scholars believe states must change their laws because the constitutional reasonableness standard on which many states' laws are based is "an after-the-fact justification for the use of deadly force allowing officers to kill first then justify next"¹³⁷ rather than a legitimate legal defense. This author points to the released grand jury transcripts in the Darren Wilson case, stating that Wilson's narrative of the events "follow[s] Missouri's deadly force standard chapter and verse inculcating the necessary fear for life facts and describing how Mr. Brown potentially endangered Wilson's life or could inflict serious injury."¹³⁸ It bears noting that this is the strategy employed by any defense attorney whose client claims self-defense or justification in her case. To this end, and as this Article would predict, another author has already used these substantive changes to argue in favor of harsher standards for civilian defendants—expressing the hope that attention to the substantive standard for police self-defense will reinvigorate a discussion about a too lenient standard in "private violence."¹³⁹

The perception of a new problem of victims of color dying at the hands of white officers has also motivated scholars to suggest significant changes to the federal law. Currently, in order to prosecute a state police officer under federal law, the officer must "willfully" violate a person's civil

134. *Id.*

135. Rebecca Worby, *California Could Become the First State to Dramatically Restrict Police Use of Deadly Force*, PAC. STANDARD (June 22, 2018), <https://psmag.com/news/one-california-bill-could-make-a-big-change-in-polices-use-of-deadly-force> [<https://perma.cc/L7R7-YAAS>] ("The government's use of force against its own citizens is in tension with our most basic democratic notions of freedom, liberty, security, and autonomy. . . . The perception that police uses of force are appropriately regulated will, it is hoped, contribute to an increase in police legitimacy that can make officers safer and more effective.") (quoting Professor Seth W. Stoughton).

136. Barkow, *supra* note 111.

137. André Douglas Pond Cummings, "Lord Forgive Me, But He Tried to Kill Me": *Proposing Solutions to the United States' Most Vexing Racial Challenges*, 23 WASH. & LEE J. C.R. & SOC. JUST. 3, 26–27 (2016).

138. *Id.*

139. Addie C. Rolnick, *Defending White Space*, 40 CARDOZO L. REV. 1639, 1646–47 (2019) ("I hope [the attention to the self-defense standard for police] will draw renewed attention to the importance of state substantive criminal law as a site of racial subordination and a potential area for reform. More specifically, I aim to highlight the central role of self-defense doctrine in shielding, legalizing, and encouraging private racial violence.").

rights.¹⁴⁰ This high standard is, in part, a recognition that the federal government does not prosecute people for offenses, such as homicide, long considered in the province of state prosecutors and courts.¹⁴¹ But scholars are now using perceived leniency against police officers to suggest removing the willfulness provision from federal law and encouraging more federal prosecutions, particularly in cases where state grand juries do not indict or state juries do not convict.¹⁴² One author suggests that, if this change is too long in coming legislatively, the executive branch could use its power “to revise the law” in the interim, citing President Obama’s decision to disallow torture as precedent for such a move.¹⁴³ These suggestions have now gotten traction in Congress. A bill has been introduced to lower the intent standard to prosecute police for the violation of a person’s civil rights from willful to knowing or reckless.¹⁴⁴

Another scholar has suggested including “willful deprivation of rights under color of law” as an aggravating circumstance to the federal death penalty to ensure that police officers can be sentenced to death more easily in cases where they kill civilians.¹⁴⁵ Remarkably, the author states that “[t]he relationship of capital punishment to civil rights is not only possible but fully in force today through the federal criminal law of civil rights enforcement. Moreover, there are compelling reasons for maintaining, or even strengthening, those connections.”¹⁴⁶ Ensuring that more officers are sentenced to die might assure the public that “the death penalty is applied evenhandedly” and “inspire greater confidence that the death penalty can be consistent with the interests of groups that have historically been subjected

140. 18 U.S.C. § 242. Whoever, under color of any law . . . willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States [shall be guilty of a crime.]”

141. See PHYLLIS J. NEWTON, CANDACE M. JOHNSON & TIMOTHY M. MULCAHY, DEP’T OF JUST., INVESTIGATION AND PROSECUTION OF HOMICIDE CASES IN THE U.S.: THE PROCESS FOR FEDERAL INVOLVEMENT 5 (2006), <https://www.ncjrs.gov/pdffiles1/nij/grants/214753.pdf> [<https://perma.cc/4GNK-2RCR>] (noting that the majority of criminal cases against police are prosecuted by states rather than federal system).

142. Paul Savoy, *Reopening Ferguson and Rethinking Civil Rights Prosecutions*, 41 N.Y.U. REV. L. & SOC. CHANGE 277, 285 (2017).

143. *Id.* at 324.

144. George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong., at 8 (2020) (legislation introduced by Representative Karen Bass that would lower the criminal intent standard); see also Cynthia Lee, Opinion, *It’s Time to Judge Cops by Their Actions*, POLITICO (June 11, 2020, 4:06 PM), <https://www.politico.com/news/magazine/2020/06/11/prosecute-police-reasonable-fear-conduct-313833> [<https://perma.cc/ZZ7C-XMS3>] (calling for states to change their laws to get rid of the reasonable belief standard in favor of one that focuses on conduct); Zaid Jilani, *One Simple Change to the Law Could Make Prosecuting Killer Cops Easier*, INTERCEPT (July 7, 2016, 4:57 PM), <https://theintercept.com/2016/07/07/one-simple-change-to-the-law-could-make-prosecuting-killer-cops-easier> [<https://perma.cc/ZG7Z-PYHG>] (calling for a change to the willful intent standard).

145. J. Richard Broughton, *The Federal Death Penalty, Trumpism, and Civil Rights Enforcement*, 67 AM. U. L. REV. 1611, 1641 (2018).

146. *Id.* at 1631.

to both and state and private violence and that have not historically enjoyed political power.”¹⁴⁷

In short, in the past few years, scholars and advocates—most of whom desire to see a dramatic reduction in the footprint of the criminal legal system—have made numerous suggestions to increase the system’s efficiency and harshness regarding police officers. This suggests that, despite recent vocal calls for dramatic and radical change to the criminal legal system, many still see it as a necessary and effective way to combat systemic societal harm. In the next Parts, I will suggest that those who seek to radically reform the criminal legal system must view police prosecutions through the same lens they view ordinary prosecutions.

II. VIEWING POLICE PROSECUTIONS WITH AN ABOLITIONIST ETHIC

While scholars and advocates are attempting to ease the path to criminalization for police, most scholarship and advocacy is focused on dramatically reducing the criminal legal system.¹⁴⁸ In fact, prison abolition, the idea that the criminal legal system should be radically reduced, if not torn down in its entirety, has gained tremendous traction in legal, academic, and advocacy circles in the past several years.¹⁴⁹ The mainstream media too has begun to surface the voices of prison abolitionists.¹⁵⁰ There is an inherent tension between advocating for large scale reduction in the criminal legal footprint, while at the same time ratcheting up the system’s harshness toward the police. This Part will introduce the central theme of this Article: that this inherent tension is an obstacle to dramatic decarceration.

This Part will introduce the idea of an abolitionist ethic.¹⁵¹ It will engage with the work of Angela Y. Davis, Allegra McLeod, and others who have written about prison abolition generally¹⁵² and more tangentially as it applies to the police.¹⁵³ And it will put forth the main contribution of this

147. *Id.* at 1632.

148. *See* sources cited *supra* note 8.

149. *See e.g.*, Akbar, *Abolitionist Horizon*, *supra* note 57; Collection of Articles on Prison Abolition, *supra* note 38.

150. *See, e.g.*, Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES MAG. (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html> [<https://perma.cc/2WVT-ZBE8>]; *Why Is This Happening? with Chris Hayes*, MSNBC (Apr. 9, 2019), <https://www.stitcher.com/podcast/msnbc/why-is-this-happening/e/59927721> [<https://perma.cc/PG5T-Z7E3>] (interview with prison abolitionist, Mariame Kaba); Ephrat Livni, *Meet the Former Federal Prosecutor Who Wants to Abolish Prisons*, QUARTZ (Feb. 15, 2019), <https://qz.com/1549163/meet-the-ex-federal-prosecutor-who-wants-to-abolish-prisons> (interview with Professor Paul Butler).

151. McLeod, *Prison Abolition*, *supra* note 40, at 1161.

152. *Id.*; McLeod, *Abolition Democracy*, *supra* note 24; DAVIS, *supra* note 39; Akbar, *Abolitionist Horizon*, *supra* note 57.

153. McLeod, *Abolition Democracy*, *supra* note 24, at 1638–40.

Article: the contention that an abolitionist ethic demands a far more nuanced response to police violence from those who seek to radically reduce the prison industrial complex rather than simply calling for the prosecution and imprisonment of individual police officers.

Importantly, an abolitionist ethic applies not only to those who wish to see the criminal legal system abolished completely, but also to the many, many scholars and advocates who wish to see major decarceration without committing entirely to the more radical notion of abolition. The next Parts of the Article will show why a prison abolitionist ethic insists that we stop looking to the criminal legal system to stem the tide of police violence and turn instead to reducing of our reliance on police.

An “abolitionist ethic” is a term introduced by Allegra McLeod. It is a way of looking at criminal legal system reform with an eye toward diminishing its power and footprint rather than tinkering at the margins with cosmetic reforms that do little to change the inherently rotten structures in place. This abolitionist ethic is useful not just for those who wish to abolish prisons entirely, but also for those who seek to radically reduce the criminal legal system’s footprint, even if they cannot envision a world entirely free from prisons.¹⁵⁴ While important conversations are happening around how to define the scholarly concept of prison abolition,¹⁵⁵ this Article suggests that the precise contours of that discussion are not necessary to show that advocating criminal legal solutions to police violence is an obstacle to the reduction of the criminal legal system that *many* scholars and advocates claim to desire.

McLeod writes of her term “abolitionist ethic”:

If prison abolition is conceptualized as an immediate and indiscriminate opening of prison doors—that is, the imminent physical elimination of all structures of incarceration—rejection of abolition is perhaps warranted. But abolition may be understood instead as a gradual project of decarceration, in which radically different legal and institutional regulatory forms supplant criminal law enforcement.¹⁵⁶

An abolitionist ethic envisions “a transformative goal of gradual decarceration and positive regulatory substitution wherein penal regulation

154. See GOTTSCHALK, *supra* note 14, at 17 (noting that even those who call for the United States to look more like European countries are considered “idealistic”).

155. Compare DAVIS, *supra* note 39, at 9 (noting that many assume self-styled “antiprison activists” are merely “trying to ameliorate prison conditions or perhaps to reform the prison in more fundamental ways.”), with McLeod, *Prison Abolition*, *supra* note 40, at 1161 (noting that many incorrectly believe prison abolitionists want to immediately open the doors to all prisons).

156. McLeod, *Prison Abolition*, *supra* note 40, at 1161.

is recognized as morally unsustainable.”¹⁵⁷ Importantly, once abolition is viewed in these terms, “inattention to abolition in criminal law scholarship and reformist discourses comes into focus as a more troubling absence.”¹⁵⁸ In other words, the “reformist critiques” that many scholars engage in concern only the “peripheral excesses of imprisonment and prison-backed policing.”¹⁵⁹ Moreover, as this Article has argued, reformist critiques tend to go by the wayside when reformers are confronted by bad actors whom they see as particularly harmful.¹⁶⁰ Indeed, many are willing to return to increases in criminal law and pro-carceral changes in criminal procedure when a seemingly new problem arises.¹⁶¹

In order to understand why attempting to increase the number and harshness of police prosecutions will legitimize and prop up our current system without achieving accountability and systemic change for police departments, it is important to understand the ways in which all criminal law and prosecutions impede the larger goal of systemic reduction of harm. Several key tenets of prison abolitionist ethics are particularly germane in the police prosecution context. They can be split into two main categories. First is the inherent illegitimacy of our current prison-backed criminal legal system, and second is the space that a future without prisons gives us to imagine how we could truly invest in safety through education, welfare reform, restorative justice, and citizen-alternatives to law enforcement.

Perhaps the central tenet of a prison abolitionist ethic is the “rejection of the moral legitimacy of confining people in cages.”¹⁶² This notion views prisons, as currently constituted, as a form of torture, and the caging of human beings as a fundamentally problematic response to bad actions even if it functions to deter crime.¹⁶³ This is particularly so given the ordinary prison conditions in America.

The general public tends to be shielded from the realities of life inside prison.¹⁶⁴ Even when we do hear about the dehumanizing effects of prisons,

157. *Id.*

158. *Id.*

159. *Id.*

160. See sources and accompanying text, *supra* Introduction.

161. See *supra* Part I.

162. McLeod, *Prison Abolition*, *supra* note 40, at 1164.

163. See, e.g., JOSHUA DUBLER & VINCENT W. LLOYD, *BREAK EVERY YOKE: RELIGION, JUSTICE, AND THE ABOLITION OF PRISONS* 9 (2019) (“The prison, and the society that depends on the prison, is violent and cruel. Prisons break people. They ravage communities. They are brutal and unjust Our prison system is a moral abomination and it should be erased from this earth.”).

164. Cf. DAVIS, *supra* note 39, at 15 (“On the whole, people tend to take prisons for granted. It is difficult to imagine life without them. At the same time, there is a reluctance to face the realities hidden within them, a fear of thinking about what happens inside them.”).

it tends to be in contexts of extremes like solitary confinement.¹⁶⁵ These glimpses into particularly horrific prison practices allow us to assume that prison in general, while “unpleasant,”¹⁶⁶ is not unacceptable. As one incarcerated person-turned-author notes, “literature describing [ordinary] prison [conditions] as a site of trauma is . . . uncommon.”¹⁶⁷

A prison abolitionist ethic insists that we confront the ordinary trauma of prison, including experiencing or witnessing extreme violence, rape, verbal abuse, hypervigilance, PTSD, and degradation. Mika’il DeVeaux, who spent twenty-five years incarcerated, writes of witnessing a person’s skull smashed by a baseball bat, and another person stabbed in the back with an ice pick. He writes, “[v]iolence permeated the prison atmosphere. I lived in a constant state of paranoia. The rampant possibility of violence reminded me of a dark side I had previously thought only existed in nightmares and stories told to errant youth to frighten them into silence or obedience.”¹⁶⁸ DeVeaux writes that he was so afraid of being raped in prison that he yelled “‘nobody is going to fuck me,’ while brandishing two makeshift ice picks during a gathering in a common room.”¹⁶⁹ He recalls being called a N***** by guards.¹⁷⁰ Another former incarcerated person-turned-lawyer, Tarra Simmons notes other “ordinary” traumas of life inside a prison: “having to be strip-searched constantly, having to be dehumanized, and the trauma to . . . family and . . . children.”¹⁷¹

Every now and then, ordinary prison conditions make the news cycle. Parchman, a maximum-security prison in Mississippi that incarcerates

165. Michelle Chen, *The Growing Fight Against Solitary Confinement*, PROGRESSIVE (Jan. 13, 2020), <https://progressive.org/dispatches/the-growing-fight-against-solitary-confinement-chen-200113/> [<https://perma.cc/9ZMQ-CYNQ>] (noting that public awareness of solitary confinement has spurred a movement to reduce its use).

166. Numerous courts have taken up the notion that “unpleasant” conditions are acceptable and do not give rise to an Eighth Amendment claim by an incarcerated person. In doing so they have perpetuated the myth that prison life is merely “unpleasant.” See, e.g., *Howes v. Fields*, 565 U.S. 499, 511 (2012) (“For a person serving a term of incarceration . . . the ordinary restrictions of prison life, while no doubt unpleasant, are expected and familiar”); *Cardona v. Joyner*, No. 19-123-DLB, 2020 WL 214750, at *1 (E.D. Ky. Jan. 14, 2020) (“Ultimately, ‘the Constitution does not mandate comfortable prisons.’” (quoting *Rhodes v. Chapman*, 452 U.S. 337, 249 (1981))); *Payton v. Vaughn*, 798 F. Supp. 258, 261 (E.D. Pa. 1992) (“[U]npleasant prison conditions in and of themselves do not state a cognizable eighth amendment claim. All that a prison is required constitutionally to give an inmate is a minimal civilized measure of life’s necessities.” (citing *Rhodes*, 452 U.S. at 347)).

167. Mika’il DeVeaux, *The Trauma of the Incarceration Experience*, 48 HARV. C.R.-C.L. L. REV. 257, 257 (2013).

168. *Id.* at 266.

169. *Id.* at 267.

170. *Id.* at 266.

171. Grace Li, *Interview with Tarra Simmons: Forging the Way for Formerly Incarcerated Lawyers*, 43 HARBINGER 1, 7 (2018).

roughly 3,600¹⁷² men, has recently been scrutinized due to a number of deaths in the prison. In January 2020 alone, there were nine reported¹⁷³ deaths, one of which was by suicide, the rest killed by other incarcerated people.¹⁷⁴ The prison is now under scrutiny for its “unconstitutional and inhumane”¹⁷⁵ conditions. Photos¹⁷⁶ taken from inside the prison reveal its unacceptable conditions: moldy showers, exposed wires, clogged drains, holes in walls, broken toilets, rotten food, and many makeshift weapons.¹⁷⁷ In June 2019, the Department of Health released a report¹⁷⁸ documenting the substandard living conditions at Parchman,¹⁷⁹ which include: no power, no lights, no hot water, no cold water, no water at all, mold, no mattresses, rat infestation, no pillows, and bird nests in windows.¹⁸⁰ In another recent example, New Yorkers became aware of jail conditions in the winter of 2019, when the Metropolitan Detention Complex, a federal jail in Brooklyn, lost power. The 1,600 people inside were on lockdown in freezing, dark cells for weeks.¹⁸¹ At the other extreme, 80% of Texas’s 150,000 incarcerated people live without air conditioning in an area of the country that regularly sees temperatures exceed 100 degrees. Not surprisingly,

172. Elliott C. McLaughlin, *Mississippi Scrambles to Find Cells for 625 Violent Inmates After Parchman Prison Unit Deemed Unsafe*, CNN (Jan 15, 2020, 3:14 PM), <https://www.cnn.com/2020/01/15/us/mississippi-parchman-prison-unsafe-inmates-moved/index.html> [<https://perma.cc/VNK2-467S>].

173. Amanda Watts, *Ninth Inmate Dies at Mississippi’s Parchman Prison Since the Start of the Year*, CNN (Jan. 27, 2020, 3:15 PM), <https://www.cnn.com/2020/01/27/us/mississippi-parchman-ninth-death/index.html> [<https://perma.cc/9ZWX-UWJ5>].

174. Alissa Zhu, *Parchman Death: Inmate Found Hanging in Cell, Coroner Says*, CLARION LEDGER (Jan. 19, 2020, 2:51 PM), <https://www.clarionledger.com/story/news/2020/01/19/parchman-death-inmate-found-hanging-cell-coroner-says/4520805002> [<https://perma.cc/6C4U-DFB7>].

175. Rick Rojas, *More Slayings at Parchman as Mississippi Confronts Prison Crisis*, N.Y. TIMES (Jan. 21, 2020), <https://www.nytimes.com/2020/01/21/us/parchman-mississippi-prison-deaths.html> [<https://perma.cc/DZ9P-5MEN>].

176. Rick Rojas & Richard Fausset, *‘A Blood Bath’: 5 Dead as Gang Violence Rocks Mississippi Prison*, N.Y. TIMES (Jan. 9, 2020), <https://www.nytimes.com/2020/01/09/us/mississippi-prisons.html> [<https://perma.cc/4XNE-ZK8Q>]; see also Liliana Segura, *People Keep Dying in Mississippi Prisons, but the Governor Wants to Move On*, INTERCEPT (Feb. 1, 2020, 8:13 AM), <https://theintercept.com/2020/02/01/mississippi-state-prisons-parchman-incarceration-deaths/> [<https://perma.cc/4ZFU-4TJU>].

177. *Year Ends with Shakedown of Parchman’s Largest Unit*, MISS. DEP’T CORRECTIONS (Dec. 29, 2017), <https://www.mdoc.ms.gov/Pages/Year-Ends-with-Shakedown-of-Parchman's-Largest-Unit.aspx> [<https://perma.cc/AD9B-V5FN>]; *Items Seized from Inmates During Contraband Search at Parchman*, WTVA (May 1, 2018, 7:00 PM), <https://www.wtva.com/content/news/Multiple-items-seize-d-from-inmates-at-Parchman-481437651.html> [<https://perma.cc/A6N8-CAUP>].

178. McLaughlin, *supra* note 172.

179. *Id.*

180. Alissa Zhu, *Jay-Z, Yo Gotti Follow Through on Lawsuit over Mississippi Prisons. ‘Lives are in Peril.’* CLARION LEDGER (Jan. 14, 2020, 12:56 PM), <https://www.clarionledger.com/story/news/2020/01/14/jay-z-yo-gotti-sue-mississippi-prison-official-behalf-inmates/4469555002> [<https://perma.cc/D2LR-KK4P>].

181. Annie Correal, *No Heat for Days at a Jail in Brooklyn Where Hundreds of Inmates Are Sick and ‘Frantic.’* N.Y. TIMES (Feb. 1, 2019), <https://www.nytimes.com/2019/02/01/nyregion/mdc-brooklyn-jail-heat.html> [<https://perma.cc/KZF2-JW92>].

numerous deaths have been reported from these conditions.¹⁸² And, of course, Texas is not alone; many other states have been sued in wrongful death and other lawsuits due to extreme heat in their prisons. In 2012, a federal judge ordered a Louisiana facility to lower its temperature from 109 degrees to 88 degrees.¹⁸³

These are, of course, only a few examples of what an “ordinary” prison experience consists of. None of these inhumane experiences is considered in formulating punishments. Prison is still seen as simply a “term of years,”¹⁸⁴ meted out with no regard for the multitude of traumas inflicted on individuals by the experience.¹⁸⁵

Another way that the abolitionist ethic challenges our reliance on the criminal legal system is to argue that prison does nothing to recompense victims of crime. Speaking in the police context, McLeod notes that “the conviction and incarceration of police who have perpetrated violence do not offer tangible recompense to survivors and others who have been harmed.”¹⁸⁶ We can see how little the criminal legal system cares about complaining witnesses by looking at the way prosecutors treat people who desire less harshness. Indeed, prosecutors who tout their care for “victims”

182. Jolie McCullough, *A State Report Says a Texas Inmate Died from Heat Last Year. Prison Officials Contest that Finding*, TEX. TRIB. (Feb. 19, 2019, 1:00 PM), <https://www.texastribune.org/2019/02/19/texas-prison-heat-death> [<https://perma.cc/6AJH-ZBSV>]; Maurice Chammah, “Cooking Them to Death”: *The Lethal Toll of Hot Prisons*, MARSHALL PROJECT (Oct. 11, 2017, 7:00 AM), <https://www.the-marshallproject.org/2017/10/11/cooking-them-to-death-the-lethal-toll-of-hot-prisons> [<https://perma.cc/MLM3-QQG8>].

183. Chammah, *supra* note 182.

184. *Apprendi v. New Jersey*, 530 U.S. 466, 545 (2000) (O’Connor, J., dissenting) (“[Most] federal criminal statutes have stated only a maximum term of years and a maximum monetary fine”); *Miller v. Alabama*, 567 U.S. 460, 489 (2012) (“[A] judge or jury could choose, rather than a life-without-parole sentence, a lifetime prison term with the possibility of parole or a lengthy term of years.”).

185. *Cf. DeVeaux*, *supra* note 167, at 258 (“In contrast, a body of literature concludes that the psychological effect of incarceration is substantial, even among those experiencing relatively short-term confinement in a jail or refugee and detention incarceration.”).

186. McLeod, *Abolition Democracy*, *supra* note 24, at 1640; *see also* Kari Hong, *A New Mens Rea for Rape: More Convictions and Less Punishment*, 55 AM. CRIM. L. REV. 259, 325 (2018) (“If criminal law worked like contract law, every additional year a defendant served in prison would help the victim heal. But there is no such connection or capacity for the criminal law to do this.”).

routinely ignore those victims who desire mercy for defendants in their cases¹⁸⁷ or who may even prefer a non-criminal solution.¹⁸⁸

Further, prison fails to deter many crimes, particularly those that are a result of systemic factors.¹⁸⁹ Indeed, in many cases, prison exacerbates the harms that it aims to solve. Numerous studies over many years have shown that prison has a criminogenic effect on those who are incarcerated.¹⁹⁰ Whether this is because of the degradation prison inflicts,¹⁹¹ the lack of opportunity available to those who are released,¹⁹² the negative influences that incarcerated people have on each other,¹⁹³ or myriad other reasons, prison does not turn people into “law abiding citizens.”¹⁹⁴ Much lip service is paid to the notion that the criminal legal system is the best, if not the only, way to stop criminality. Yet this argument is belied time and again by the experiences and actions of those who have been released.

The demonstrated inefficacy of prison may well be tied to another facet of the prison abolitionist ethic: the criminal legal system replicates the racial

187. One of many examples is the case of Dzhokhar Tsarnaev, the “Boston Bomber.” In that case, prosecutors successfully sought the death penalty, despite public requests for mercy from family members of the victims. See Adam B. Lerner, *Boston Bomber Sentenced to Death*, POLITICO (May 15, 2015, 2:56 PM), <https://www.politico.com/story/2015/05/dzhokhar-tsarnaev-sentenced-117999> [<https://perma.cc/865D-YBGK>]; Bill Richard & Denise Richard, Opinion, *To End the Anguish, Drop the Death Penalty*, BOS. GLOBE (Apr. 16, 2015, 10:30 PM), <https://www.bostonglobe.com/metro/2015/04/16/end-anguish-drop-death-penalty/ocQLejp8H2vesDavItHIEN/story.html> (op-ed by parents of eight-year-old victim asking prosecutors to drop the death penalty); see also Andrew Cohen, *When Victims Speak Up in Court—In Defense of the Criminals*, ATL. (Jan. 28, 2014), <https://www.theatlantic.com/national/archive/2014/01/when-victims-speak-up-in-court-in-defense-of-the-criminals/283345/> (prosecutor files a motion “to block one couple’s efforts to speak out against the death penalty for the man who murdered their child.”).

188. See, e.g., Collins, *supra* note 43, at 409 (critiquing “[n]o-drop” policies, as their name implies, prohibit prosecutors from dismissing viable criminal charges, regardless of whether the complainant supports the prosecution and even—and most controversially—if the complainant wants the state to drop the charges”).

189. McLeod, *Abolition Democracy*, *supra* note 24, at 1640 (“[N]or do those responses work to prevent similar acts from occurring in the future.”).

190. Daniel S. Nagin, Francis T. Cullen & Cheryl Lero Jonson, *Imprisonment and Reoffending*, 38 CRIME & JUST. 115, 120 (2009) (“An initial reason to be skeptical of specific deterrence, as an empirical matter, is that reoffending among prison inmates is high, with rates of official recidivism often reaching 60 percent within 3 years.”).

191. Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1056–57 (2008) (discussing the effect that violence against prisoners by guards and other prisoners may have on recidivism).

192. See, e.g., Kate Levine, *Discipline and Policing*, 68 DUKE L.J. 839, 889–96 [hereinafter Levine, *Discipline and Policing*] (describing barriers to reintegration for those with a criminal record).

193. See Robert Weisberg, *Meanings and Measures of Recidivism*, 87 S. CAL. L. REV. 785, 794 (2014) (“There may truly be a modern manifestation of [the criminogenic effects of prison] with respect to drug crimes in the form of new inmates learning how to deal drugs more effectively, how to recognize informants, and so on.”).

194. See generally Pritikin, *supra* note 191.

pathologies and violence it aims to stem rather than solve.¹⁹⁵ The direct links from slavery to Jim Crow to incarceration have been well documented by many scholars.¹⁹⁶ Similarly, the obstacles to reintegrating into society after prison are well-known.¹⁹⁷ Importantly, however, it is key to understand that, because of the way the system is administered, *any* change to the criminal legal system that ratchets it up will fall most heavily on the shoulders of marginalized people of color.¹⁹⁸ For example, when self-styled feminists¹⁹⁹ successfully recalled Judge Aaron Persky,²⁰⁰ who was roundly criticized for giving too light a sentence to Brock Turner, the “Stanford Rapist” and a wealthy white man,²⁰¹ commentators noted that Persky had been known for sentencing all defendants more lightly.²⁰² In other words, Californians

195. McLeod, *Prison Abolition*, *supra* note 40, at 1197 (“The deep, structural, and both conscious and unconscious entanglement of racial degradation and criminal law enforcement presents a strong case for aspiring to abandon criminal regulatory frameworks in favor of other social regulatory projects, rather than aiming for more modest criminal law reform.”).

196. *See generally* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN AN AGE OF COLORBLINDNESS* (2020).

197. *See, e.g.*, Levine, *Discipline and Policing*, *supra* note 192, at 889–96 (describing barriers to reintegration for those with a criminal record); John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1063 (2009) (“The social and economic effects of having served time in prison can be extremely serious. As we outlined in Part I, prisoners often witness the breakups of their marriages and relationships while in prison and have greater difficulty forming other relationships (including friendships) upon their release. They experience greater rates of unemployment. Ex-prisoners also suffer from more debilitating health problems and far higher rates of incurable diseases than the general population. And as we describe above, unlike the loss of money—or even, to some degree, permanent physical injuries—these types of afflictions have severe long-term hedonic effects and are very difficult to adapt to. In particular, unemployment and the dissolution of social ties are two of the most reliable predictors of long-term unhappiness and anxiety.”).

198. *See, e.g.*, Law Professors’ Statement for the Independence of the Judiciary and Against the Recall of Santa Clara County Superior Court Judge Aaron Persky (Aug. 17, 2017), <https://www.paloaltoonline.com/news/reports/1503112952.pdf> [<https://perma.cc/N3K8-QPGT>] (“[H]istorically and empirically, recall actions push judges towards sharply ratcheting up sentences, especially against the poor and people of color . . .”); *Sexual Assault Law—Judicial Recall—California Judge Recalled for Sentence in Sexual Assault Case*, 132 HARV. L. REV. 1369, 1372 (2019) [hereinafter *Sexual Assault Law*] (noting that many law professors in California opposed the recall of Judge Aaron Persky).

199. *See Sexual Assault Law*, *supra* note 198, at 1372 (“[P]roponents of the recall viewed it as a vote against the normalization of rape culture.”); Robin Abcarian, *Recall Effort of Judge in Stanford Rape Case Gains Steam and Political Allies*, L.A. TIMES (July 8, 2016, 3:00 AM), <https://www.latimes.com/local/abcarian/la-me-abcarian-judge-recall-20160708-snap-story.html> [<https://perma.cc/R4VC-LVVG>] (“Feminist groups like the National Organization for Women and the Feminist Majority . . . signed on to the recall. ‘We are working with our supporters to mobilize in support, including raising funds, for the campaign,’ said Katherine Spillar of the Feminist Majority. ‘We are just getting started.’”).

200. Maggie Astor, *California Voters Remove Judge Aaron Persky, Who Gave a 6-Month Sentence for Sexual Assault*, N.Y. TIMES (June 6, 2018), <https://www.nytimes.com/2018/06/06/us/politics/judge-persky-brock-turner-recall.html> [<https://perma.cc/56R3-WG6S>].

201. Damon Young, *The Stanford Sexual Assault Case: A White Privilege Cake with Vanilla Frosting on Top*, GUARDIAN (June 9, 2016), <https://www.theguardian.com/society/2016/jun/09/standfor-d-rape-case-white-privilege-brock-turner> [<https://perma.cc/N9B3-XN3F>] (arguing colorfully that the sentence was “a . . . lesson plan for recognizing white privilege and rape culture”).

202. Lara Bazelon, *Put Away the Pitchforks Against Judge Persky*, POLITICO (Aug. 8, 2016), <https://www.politico.com/magazine/story/2016/08/recall-judge-persky-stanford-rapist-brock-turner-courts->

recalled a judge who would apply the law less harshly to the many poor people of color who came before him. In doing so, they also signaled to all judges that leniency but not harshness may jeopardize their positions on the bench.²⁰³

Similarly, harsh sentencing laws, often passed in the name of children who are the victims of abduction and murder,²⁰⁴ lead to thousands of longer sentences for people with numerous convictions.²⁰⁵ Of course, as the pipeline from arrest to prosecution to conviction is often racially determined, this means that those who are incarcerated for life because of “three-strikes” type laws are, again, poor people of color.²⁰⁶ A prison abolitionist ethic insists that we see all criminal legal ratcheting as perpetuating the already appalling racism built into our system.²⁰⁷

The above paragraphs detail the many reasons a prison abolitionist ethic counsels us to acknowledge the horrors and failures of prison. A second, and equally important, part of an abolitionist ethic, however, looks to a brighter future without prisons. Most people are unable to conceive of a world without prisons. As Angela Y. Davis writes: “The prison is considered so ‘natural’ that it is extremely hard to imagine life without it.”²⁰⁸ An imagined world where billions of dollars are not invested in incarcerating people gives us the chance to envision ways to promote the important values of safety and security without the pain and torture of prison.²⁰⁹ It shows us that when we free ourselves from seeing the criminal

214145 [<https://perma.cc/Z5FC-JHX3>] (“Sajid Khan, a San Jose deputy public defender wrote, ‘many colleagues in my office that appear before Judge Persky believe that a public defender client who wasn’t white or affluent’ would have been treated the same way.”).

203. Rachel Marshall, *The Recall of the Judge who Sentenced Brock Turner Will End Up Hurting Poor, Minority Defendants*, VOX (June 6, 2018, 2:20 PM), <https://www.vox.com/first-person/2018/6/6/17434694/persky-brock-turner-recall-california-stanford-rape-sentencing> [<https://perma.cc/V2GR-KG5S>] (“Given that the criminal justice system disproportionately targets and prosecutes the poor and people of color, the ones who suffer from judges feeling pressured to sentence harshly are not people with privilege like Turner, but those without privilege. Judges have always had more incentives to punish harshly than leniently, and [recalls] only increase these pressures.”).

204. See, e.g., Jane Gross, *Born of Grief, ‘Three Strikes’ Laws Are Being Rethought*, N.Y. TIMES (Dec. 2, 2013), <https://www.nytimes.com/2013/12/02/booming/born-of-grief-three-strikes-laws-are-being-rethought.html> (noting that California’s three strikes law was passed after the abduction and murder of twelve-year-old Polly Klaas).

205. See e.g., ALEXANDER, *supra* note 196, at 87–89 (discussing how the War on Drugs and harsh three strikes laws lead to long sentences for those convicted of relatively minor crimes).

206. See, e.g., GOTTSCHALK, *supra* note 14, at 124 (discussing how the biases of many different system actors at many different inflection points lead to major racial disparities in punishment).

207. Cf. McLeod, *Abolition Democracy*, *supra* note 24, at 1637 (“Conventional accounts of legal justice typically neglect the overwhelming discontinuity between the ideals of justice proclaimed and their deeply inadequate, often violent, racialized, and ultimately destructive realization.”).

208. DAVIS, *supra* note 39, at 10.

209. *Id.* Cf. Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 368 (2005) (“Community justice involves a conception of crime and punishment that is radically

legal system as the best, if not only, response to societal problems, we can reinvest in potentially more useful solutions.²¹⁰ As Davis writes:

An abolitionist approach . . . would require us to imagine a constellation of alternative strategies and institutions [including] . . . demilitarization of schools, revitalization of education at all levels, a health system that provides free physical and mental care to all, and a justice system based on reparation and reconciliation rather than retribution and vengeance.²¹¹

In other words, once we free ourselves from seeing the criminal legal system as the best or only solution to bad acts, we are able to envision other ways to ensure that basic societal needs for safety and security are met. As prison abolitionist Mariame Kaba has said, “Prison abolition is . . . the building up of new ways of . . . relating with each other.”²¹² And there are grassroots organizations that are already doing the work an abolitionist ethic allows us to imagine. They are proposing alternatives to police.²¹³ And they are imagining different forms of accountability in the form of transformative²¹⁴ and restorative justice.²¹⁵ These practices force people to reckon personally with those they have harmed.²¹⁶

Seeking alternatives to criminal prosecution and prisons is perhaps uniquely useful when it comes to police who cause harm. The next Parts will endeavor to explain why. But, in brief: police violence shows us that we cannot equate the criminal legal system with safety and security.²¹⁷

different from that of the traditional criminal justice process. The primary aim of the sanction is not to punish the offender based on retributive or deterrent principles, but to repair the harm caused by the crime and restore the victim, offender, and community.”)

210. DAVIS, *supra* note 39, at 107.

211. *Id.*

212. *Episode 29—Mariame Kaba*, AIRGO (Feb. 2, 2016), <https://airgoradio.com/airgo/2016/2/2/cpisode-29-mariame-kaba> [<https://perma.cc/CG2Y-E4KE>].

213. *See* Akbar, *Abolitionist Horizon*, *supra* note 57, at 107.

214. *See, e.g.*, GENERATIONFIVE, ENDING CHILD SEXUAL ABUSE: A TRANSFORMATIVE JUSTICE HANDBOOK 37, 39 (2017), <http://www.generationfive.org/wp-content/uploads/2018/08/g5-Transformative-Justice-Handbook.pdf> [<https://perma.cc/WT28-B3HN>] (laying out five dimensions of a transformative, abolitionist approach: social analysis and critique of systemic oppression, community education on the dynamics of violence, understanding of trauma and healing, community-based interventions, and community organizing).

215. Sujatha Baliga, *A Different Path for Confronting Sexual Assault*, VOX (Oct. 10, 2018, 8:10 AM), <https://www.vox.com/first-person/2018/10/10/17953016/what-is-restorative-justice-definition-questions-circle> (“The process invites truth-telling on all sides by replacing punitive approaches to wrongdoing in favor of collective healing and solutions. Rather than asking, ‘What law was broken, who broke it, and how should they be punished?’ restorative justice asks, ‘Who was harmed? What do they need? Whose obligation is it to meet those needs?’ At its best, restorative justice produces consensus-based plans through face-to-face dialogue that meets the needs of everyone impacted, beginning with the crime survivor.”).

216. *Id.*

217. *See infra* Part IV.

Police often *cause* violence in the name of safety and security.²¹⁸ This violence is often not due to an individual officer's personal evil. Indeed, the history, training, and practices of the police encourage violence, a violence that the criminal legal system relies upon for its continued operation.²¹⁹ Moreover, turning our violent system against individual police officers will not promote the safety and security of overpoliced citizens. Believing then, that we can prosecute our way out of this violence leads us into the same fallacy that insists we rely on the police and on prison to be safe in the first place. Those who wish to stem this cycle must face the fact that prosecuting individual police officers both legitimizes the criminal legal system and further clouds the causes of police violence.²²⁰

An abolitionist ethic facilitates our ability to see the problems with advocating for more criminal law and harsher procedure for police. The next Parts will more specifically address the particular ways in which these calls will be unlikely to resolve the problems of police violence against vulnerable citizens while perpetuating and legitimizing a system that has been shown time and again to be fundamentally flawed.

III. POLICE PROSECUTIONS AS LEGITIMATION AND MIRROR OF THE CRIMINAL LEGAL SYSTEM

This Part argues that the performance of trial and punishment of the few police officers who have been tried and convicted shows two very problematic signs. First, they show that the criminal legal system may be playing out the same racism in police trials that it does in its ordinary operations. Indeed, far from the hope that the law will mete out punishment in a way that advances racial justice, the recent trials and convictions of three officers of color, discussed at length below, suggest that police prosecutions may replay the worst racial pathologies of the criminal legal system.

Worse, perhaps, these racial pathologies play out against defendants whose convictions many see as legitimizing the system. These police trials allow defenders of the status quo to claim the system is working and comfort those who might critique the system by suggesting that it has the capacity to vindicate victims of color and to change the vast systemic problems associated with policing and police brutality.²²¹

218. *Id.*

219. *Id.*

220. *See infra* Part III.

221. *See infra* Part IV.A.

A. *Police Prosecutions Both Legitimate and Replay the Pathologies of the Criminal Legal System*

While scholarly lamentations focus on the ways in which the criminal legal system does not treat police defendants harshly enough, or as harshly as civilians, some recent trials of police officers have shown that in numerous ways the prosecution of police defendants mirrors some of the most problematic aspects of our criminal legal system. At the same time, prosecutors and other defenders of the status quo use successful police prosecutions as examples of how the system is working to reform itself, thus legitimizing and obfuscating the larger problems endemic to the system.²²² As one scholar puts it, “If the criminal justice system in America tends to tell the [problematic] story of dangerous Black men plaguing society with brutal crimes, the prosecution of the police can offer a new narrative, just as the innocence movement has.”²²³

Even prison abolitionists tend to miss some of the most problematic aspects of police prosecutions. McLeod specifically addresses the prosecution and incarceration of police officers. While she argues that incarceration of officers does not recompense its victims,²²⁴ misses the systemic nature of police violence,²²⁵ legitimates more ordinary types of police violence,²²⁶ and, at least in the case of a life sentence, is fundamentally torture,²²⁷ she does not discuss two important aspects of police prosecutions. McLeod never addresses the many calls for prosecution among the grassroots organizations she highlights for their work on alternatives to prison, nor does she anticipate the possibility for the criminal legal system to play its racist pathologies out during the prosecutions of police officers.

McLeod gives much credence to the important work done by grassroots organizations to promote alternatives to imprisonment even for the most violent and dangerous police officers.²²⁸ Yet, she ignores the many activists who do support incarcerating the police and the way these calls may be

222. See *infra* Part III.B.

223. Roiphe, *supra* note 20, at 517.

224. McLeod, *Abolition Democracy*, *supra* note 24, at 1640.

225. *Id.* at 1639 (“[C]riminal prosecutions of state violence—such as murders perpetrated by police—focus on individual culpability of particular officers, leaving unchanged the institutional and cultural dynamics responsible for the pervasive violence of policing and its concentration on particular bodies and in specific disenfranchised communities.”).

226. *Id.* at 1639–40.

227. *Id.* at 1641 (“[T]he sanction violates any principled conception of justice as it entails imposing on another human being—however vile his conduct—a life in a cage”) (referring to Daniel Holtzclaw, an officer convicted of multiple rapes and sentenced to 263 years in prison).

228. *Id.* at 1620–21, 1646–47 (discussing alternatives to incarceration that movement groups have created and supported).

contributing to racialized prosecutions of police.²²⁹ As this Article has already noted, activists and those who advocate for criminal defendants are often loud voices in favor of the prosecution and incarceration of police officers.²³⁰ More problematically, perhaps, left-leaning organizations like the ACLU and NAACP support these individual or grassroots calls for prosecution and incarceration,²³¹ thus prioritizing the criminal legal system as the best way to ameliorate police violence. This, in turn, bolsters conventional law and order arguments that insist we rely on the criminal legal system more generally.²³²

These calls from prominent civil rights advocates and activists make it easier for police departments to write accused officers off as bad apples. This is a problem I identify as “legitimation.” Legitimation works in two equally pernicious ways. First, as I will detail in the next section, it suggests to more casual onlookers that the criminal legal system is working out its own “kinks” by prosecuting the police who cause harm to marginalized citizens. If the system is seen as cleaning itself up through prosecution, the general public will be less likely to see the vast problems that still exist. Second, and relatedly, as I argue here, at least one of the biggest problems endemic to the system, racism, is playing itself out on the field of police prosecutions, with almost no notice from scholars or advocates.²³³

For instance, although McLeod discusses the racist effects of both policing and prison, she does not connect the way that racist pathologies play out *in the prosecution of police officers*. As the Article will discuss in detail here, the individual prosecutions of officers in the past few years suggest one major risk of increased police prosecutions is the increased prosecution of officers of color. The recent trials of three officers of color suggest, at least, that the racial pathologies of the criminal legal system replay themselves in the tropes and language employed against them. This is particularly important because much of the energy behind prosecuting police who harm civilians is justified by the criminal legal system’s ability to remedy some of the vast harms caused by the police to individuals of color.²³⁴ Yet, I show here through a series of vignettes that, far from healing racial inequities present in the system, we see racism and racial tropes

229. See *supra* Part I.

230. McLeod, *Abolition Democracy*, *supra* note 24, at 1620–21, 1646–47.

231. *Id.*

232. Cf. GOTTSCHALK, *supra* note 14 at 276 (arguing that “national [civil rights organizations] will not lead the way out of the carceral state without pressure from a more radical flank”).

233. See *infra* Part III.B.

234. See, e.g., Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157, 1228 (1999) (explaining that prosecutors who take on abusive police can be seen as “the heroic moral witness. On this construction, the prosecutor rises up as a historic witness to confront injustice [The idea urges a more expansive view of a prosecutor as a] heroic witness in the historical struggle for American racial dignity and equality.”).

abound in the prosecutions of and discussions surrounding police who harm civilians.

B. Three Case Studies

This section looks at the way racial tropes employed in police officer trials have largely been ignored. Instead, these trials have largely amplified the myth that the criminal legal system can achieve justice for those affected by police brutality. While no rigorous statistical studies have been done to suss out the racial components of charges and convictions against police officers, anecdotal evidence suggests that the racial pathologies of the criminal legal system are playing out on the field of this supposedly “different” group of suspects and defendants. While a few white officers—like Jason Van Dyke²³⁵ and Michael Slager,²³⁶ whose senseless brutality have been captured on camera—have been convicted²³⁷ or pled guilty²³⁸ to the killings of Black boys or men, some of the most “successful” prosecutions of officers have been of officers of color. Their trials raise serious questions for anyone who has faith that prosecuting police will right the racial harms imposed by the criminal legal system.²³⁹ While there is not enough information to draw conclusions about whether prosecutions are systematically racist, the following three vignettes illustrate that racial tropes and assumptions are alive and well in the criminal legal system’s response to police violence.

1. Peter Liang

In New York, much of the focus of the criminal legal system’s response to police brutality has been on the choking death of Eric Garner by Daniel Pantaleo.²⁴⁰ Pantaleo was not indicted by a Staten Island grand jury nor

235. CNN, *Dashcam Video Shows Graphic Chicago Shooting*, YOUTUBE (Nov. 25, 2015), <https://www.youtube.com/watch?v=4n83kqW7Os>.

236. *Video Shows Fatal Police Shooting*, N.Y. TIMES (Apr. 7, 2015), <https://www.nytimes.com/video/us/100000003615939/video-shows-fatal-police-shooting.html>.

237. Mitch Smith & Julie Bosman, *Jason Van Dyke Sentenced to Nearly 7 Years for Murdering Laquan McDonald*, N.Y. TIMES (Jan. 18, 2019), <https://www.nytimes.com/2019/01/18/us/jason-van-dyke-sentencing.html>.

238. Alan Blinder, *Ex-Officer Who Shot Walter Scott Pleads Guilty in Charleston*, N.Y. TIMES (May 2, 2017), <https://www.nytimes.com/2017/05/02/us/michael-slager-walter-scott-north-charleston-shooting.html> [<https://perma.cc/DK4X-F28X>] (Slager pled guilty after a jury was unable to come to a decision in a first trial).

239. *See supra* Part I.

240. *See, e.g.*, Ashley Southall, *Daniel Pantaleo, Officer Who Held Eric Garner in Chokehold, Is Fired*, N.Y. TIMES (Aug. 19, 2019), <https://www.nytimes.com/2019/08/19/nyregion/daniel-pantaleo-fired.html> [<https://perma.cc/5J5H-FAXK>] (noting that Garner’s death “galvanized the Black Lives Matter movement”).

charged federally.²⁴¹ A less notorious killing, however, did result in trial and conviction. In 2016, rookie police officer Peter Liang shot and killed Akai Gurley, an unarmed Black man. Officer Liang was subsequently indicted for Gurley's death, making him one of only three officers indicted over a span of fifteen years and 179 police-involved shootings in New York.²⁴²

Liang killed Gurley, unarmed Black man, whom Liang never saw, while patrolling a housing project in Brooklyn.²⁴³ Liang was sent to the building to do "floor checks," a technique where officers patrol the stairwell and each floor of a building looking for crime.²⁴⁴ Sometimes this technique is called "vertical patrol."²⁴⁵ These patrols are a good example of how poor communities of color are overpoliced—officers sent simply to look for crime in public housing,²⁴⁶ where people of color are overrepresented.²⁴⁷ As one author notes, these suspicionless searches are common: "more than 156,000 were conducted in New York City Housing Authority" in one year.²⁴⁸

Professor Gabriel J. Chin, who participated in Liang's appeal, writes of the scene:

Officers Liang and Landau went to the eighth floor, the top floor, of the building . . . [T]here were two stairwells. One was lit; in the other, the lights were broken, so the stairwell was completely black. The officers decided to check the dark stairwell. Officer Liang removed his pistol from his holster, as is authorized by NYPD policy, and held his flashlight in his other hand. He looked through a porthole

241. *Id.*

242. J. Weston Phippen, *Why Was Officer Peter Liang Convicted?*, ATL. (Mar. 3, 2016), <https://www.theatlantic.com/national/archive/2016/03/peter-liang-police-shooting/471687> [<https://perma.cc/6C6C-PW-8X3V>].

243. Alan Feuer, *Ex-New York Officer Gets 5 Years of Probation in Fatal Brooklyn Shooting*, N.Y. TIMES (Apr. 19, 2019), <https://www.nytimes.com/2016/04/20/nyregion/peter-liang-ex-new-york-police-officer-sentenced-akai-gurley-shooting-death-brooklyn.html>.

244. *Id.*

245. *Id.*; Michael Schwartz, *Public Housing Controls Can Mean Safety or Danger*, N.Y. TIMES (Nov. 21, 2014), <https://www.nytimes.com/2014/11/22/nyregion/housing-patrols-can-mean-safety-or-peril-to-residents.html> [<https://perma.cc/G6UW-8U3Y>] ("[In New York City,] vertical patrols [are] routine up-and-down inspections of stairwells and hallways [of public housing].").

246. Schwartz, *supra* note 245 ("[V]ertical patrols . . . are meant to keep criminals at bay in the city's 334 public housing developments."); Adam Carlis, Note, *The Illegality of Vertical Patrols*, 109 COLUM. L. REV. 2002, 2003 (2009) ("Vertical patrols consist of two or more police officers combing the interior of a public housing building—from roof to basement—in an attempt to locate and apprehend trespassers, drug dealers, and other criminals. As part of the patrol, the officers stop and systematically question whomever they encounter." (citations omitted)).

247. *Housing Conditions*, WHERE WE LIVE NYC, <https://wherewelive.cityofnewyork.us/explore-data/housing-conditions/> [<https://perma.cc/7K7C-RTDV>] ("Black and Hispanic households account for over 60% of households in all four categories of publicly supported housing in HUD-provided data; the share ranges from 61% in other HUD multifamily programs to 89% in public housing.").

248. Carlis, *supra* note 246, at 2003.

in the door but could not hear or see anything on the other side. He opened the door to the eighth floor stairwell with his shoulder, looking up the stairs toward the roof. He heard a noise from the seventh floor stairwell and involuntarily discharged his pistol, a 9mm Glock. His pistol was pointed downward, toward the ground, as he was trained. In a freak accident, the bullet travelled down the staircase between the seventh and eighth floors, hit and ricocheted off the wall of the stairway, and struck Mr. Gurley in the heart. The wound was immediately fatal.²⁴⁹

In these facts, we see numerous systemic problems of policing laid bare at the feet of one criminally-sanctioned officer. First is the policy: virtual sweeps in public housing are exactly the kind of police activity that is likely to trap people of color in the criminal legal system and put police officers in situations where, as evidenced by the killing of Mr. Gurley, a violent mistake may occur.²⁵⁰ And here the stage is set: a rookie officer, patrolling a public housing unit, not looking for any crime specifically,²⁵¹ in a dark stairwell, trained to see danger everywhere,²⁵² armed with a deadly weapon, makes a mistake. Instead of seeing this as a moment to grapple with why rookie police officers are doing vertical patrols of housing units while exhausted and trained to fear the residents, the public and politicians immediately turned to the criminal legal system to condemn Liang as an individual bad actor.²⁵³

249. Gabriel J. Chin, *The Problematic Prosecution of an Asian American Police Officer: Notes from A Participant in People v. Peter Liang*, 51 GA. L. REV. 1023, 1024–25 (2017).

250. M. Chris Fabricant, *Rethinking Criminal Defense Clinics in “Zero-Tolerance” Policing Regimes*, 36 N.Y.U. REV. L. & SOC. CHANGE 351, 362 (2012) (noting that in poor communities of color, like the South Bronx, one will daily witness “lines snaking around an entire city block of poor African-Americans and Latinos waiting for court dates, largely for meaningless offenses”).

251. Schwirtz, *supra* note 245 (“[In New York City,] “vertical patrols—routine up-and-down inspections of stairwells and hallways[—] . . . are meant to keep criminals at bay in the city’s 334 public housing developments.”).

252. See, e.g., Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1516 (2016) (“Police culture and training can lead to violence via the promulgation and instantiation of the idea that police officers need to assume that every police/lay person encounter has death as a potential entailment. The more police officers internalize the idea that their life is always already at risk, the more likely they are to perceive an encounter as one in which deadly force is necessary.”); Louis Hayes, *Police Like Me Are Taught to Fear Americans Instead of Protect Them. And People Will Die Because of It*, QUARTZ (Sept. 9, 2016), <https://qz.com/777195/war-on-cops-stats-s-how-american-police-are-safer-than-they-have-ever-been-but-the-fear-remains-strong> [<https://perma.cc/BB38-Z34Z>] (as a police officer describes it: “[A police trainee] watches countless dash-cam videos of police officers being murdered in front of their patrol cars. He learns to be skeptical of everyone. [He] participates in scenario drills in which old ladies and young kids ambush him. He is taught to expect the worst possible outcome . . .”).

253. See Jan Ransom & Rich Schapiro, *Hundreds of Protesters March in Brooklyn Demanding Justice for Akai Gurley*, DAILY NEWS (Dec. 27, 2014), <https://www.nydailynews.com/new-york/brooklyn/hundreds-march-brooklyn-demanding-justice-akai-gurley-article-1.2058434>.

Liang was charged with and convicted of second-degree manslaughter by a Brooklyn jury.²⁵⁴ Not only does this conviction raise questions about what role race plays in who is and is not convicted in the criminal legal system, but it also shows the legitimating function that even the conviction of non-white officers has played. As Chin notes, “[e]ven among academics, who have time and inclination to consider facts, Mr. Liang’s case is grouped indiscriminately with other killings which involved intentional applications of force by officers, who knew the race of the victim.”²⁵⁵ In fact, the case was called an example of “*white* police officers executing unarmed Black men, or meting out the death penalty.”²⁵⁶ Liang’s race was erased in the rush to criminally condemn a vision of white police brutality.

Members of Liang’s community in Chinatown attempted to raise the role that race was playing in his trial. But their voices were drowned out by the outrage over what was seen as Liang’s “light” sentence of probation and community service and the judge’s perceived bias in favor of a police officer.²⁵⁷

Meanwhile, the systemic problems with the NYPD that led to this tragic incident went unmentioned. Indeed, the prosecutor’s summation is worth quoting at some length to demonstrate the pains it took to distance Liang from the rest of the New York Police Department: “Peter Liang is not the same as the police officers who bravely keep us safe every day,” the prosecutor told the jury.²⁵⁸ “Convicting Peter Liang is not a conviction of the New York City Police Department.”²⁵⁹ He characterized the rest of the department as “proud, brave cops who go out every day and patrol every day and every night to keep us safe.”²⁶⁰ Lest the prosecution be seen as a condemnation of the NYPD more generally, the prosecutor continued, “[w]e honor those cops. We applaud those cops. But Peter Liang falls short of that. Peter Liang is *not one of those cops*.”²⁶¹ Liang’s conduct violated our basic social contract with police, the prosecutor informed the jury: “the police have a sacred trust that they fulfill, a sacred trust with each community. That trust is that the police department commits to thoroughly train its officers before arming them with deadly weapons and sending them into our communities.”²⁶² While this might lead one to think the prosecutor

254. See *supra* note 245.

255. Chin, *supra* note 249, at 1039.

256. *Id.* (emphasis added).

257. *Id.* at 1041.

258. Nick Pinto, *What Does Peter Liang’s Conviction Mean for the NYPD and Police Accountability?*, VILL. VOICE (Feb. 16, 2016), <https://www.villagevoice.com/2016/02/16/what-does-peter-liangs-conviction-mean-for-the-nypd-and-police-accountability> [<https://perma.cc/62AL-CX3V>].

259. *Id.*

260. *Id.*

261. *Id.* (emphasis added).

262. *Id.*

was questioning how well that training worked, he was clearly not: “police officers go through rigorous and thorough training.” Liang’s crime, the prosecutor said, was to “[intentionally] disregard that training.”²⁶³

It should come as no surprise then, that the NYPD did no soul searching and changed no policies with regard to its vertical patrols in housing projects.²⁶⁴ As the NYPD’s spokesperson noted after the conviction, “it was unlikely” the conviction would prompt changes in the way officers patrol.²⁶⁵ “The unique circumstances of this case cannot dictate specific policy because it was a very specific set of circumstances You must factor in the particular situation, perception and conditions of each case in order to make a fair critique.”²⁶⁶ In other words, the NYPD was with the assistance of the criminal legal system able to contextualize this as a result of one bad officer, not a bad set of policies.

2. *Mohammed Noor*

In Minnesota, another officer of color, Mohammed Noor, who had been a police officer for less than two years, faced a much more draconian sentence than Liang had for the killing of a white woman, Justine Damond.²⁶⁷ In 2015, Noor, a Somali-American officer responded late at night to a 911 call of a reported rape. When Damond approached the squad car, Noor shot and killed her. His attorney argued that he heard his partner say, “oh Jesus” and believed they were being “ambushed,” a situation that officers were trained to fear during their time in the police academy.²⁶⁸

Relevantly, this shooting came only two weeks after two police officers in New York were ambushed and killed in their squad car.²⁶⁹ That event was widely publicized by law enforcement and the media as a “war on cops,”

263. *Id.*

264. Jaeah Lee, *Why Was Peter Liang One of So Few Cops Convicted for Killing an Unarmed Man?*, MOTHER JONES (Apr. 8, 2016), <https://www.motherjones.com/politics/2016/04/peter-liang-police-conviction-nypd> [<https://perma.cc/9N3X-RSRM>] (“After Gurley’s shooting, Bratton . . . maintained that vertical patrols were ‘an essential part of policing.’”).

265. Michael Wilson, *Legacy of Officer Peter Liang’s Conviction Is Hard to Define*, N.Y. TIMES (Feb. 12, 2016), <https://www.nytimes.com/2016/02/13/nyregion/guilty-verdict-for-officer-peter-liang-adds-to-broader-debate-on-policing.html> [<https://perma.cc/VNP2-H2F6>].

266. *Id.*

267. *Cop Shot Woman Who Called 911 “Without Saying a Word,” Prosecutor Says*, CBS NEWS (Apr. 9, 2019, 5:33 PM), <https://www.cbsnews.com/news/mohamed-noor-trial-prosecutor-cop-shot-justine-damond-woman-who-called-911-without-saying-a-word> [<https://perma.cc/5G7Q-GK5A>].

268. *Id.*

269. *Id.*

allegedly perpetrated in response to heightened criticisms after the killings of Garner and Gurley in New York City.²⁷⁰

Noor was found guilty of intentional murder and manslaughter.²⁷¹ His conviction marked the first time a Minnesota police officer was convicted of killing someone in the line of duty out of 179 police-involved shootings in Minnesota since 2000.²⁷² The first officer *charged* since 2000 was Jeronimo Yanez, another non-white officer, who killed Philando Castile, a Black, legal gun owner whose death was captured on video. Yanez was acquitted in 2016.²⁷³ Notably, until 2020, and the killing of George Floyd, white officers who had killed unarmed Black men in the Twin Cities were never charged.²⁷⁴

At Noor's trial, racial tropes endemic to the criminal legal system played themselves out in unsurprising ways. Images of white, female innocence, a common theme in cross-racial crimes throughout history,²⁷⁵ played a noticeable role at Noor's trial. One observer noted that in questioning Noor about his claim that he feared for his life, the prosecutor repeated back to him his own description of the victim, stating, "[t]he whole blonde hair, pink T-shirt and all is a threat to you?"²⁷⁶ Prosecutors also described the mostly white neighborhood where the killing took place as "a quiet, safe place where homicides are rare."²⁷⁷ At least two witnesses testified that they were surprised that a "shooting would happen in the affluent southwest part of

270. Benjamin Mueller & Al Baker, *2 N.Y.P.D. Officers Killed in Brooklyn Ambush; Suspect Commits Suicide*, N.Y. TIMES (Dec 20, 2014), <https://www.nytimes.com/2014/12/21/nyregion/two-police-officers-shot-in-their-patrol-car-in-brooklyn.html> [<https://perma.cc/UE8D-9KUS>] (noting that the killing was seen as a response to recent police killings).

271. Jon Collins & Riham Feshir, *Did Race Color the Noor Verdict? Question Lingers for Some*, MPR NEWS (May 10, 2019, 9:00 AM), <https://www.mprnews.org/story/2019/05/10/police-trial-shooting-justine-damond-ruszczyk-australia-race-color-verdict> [<https://perma.cc/AN43-CCMA>].

272. Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. TIMES (June 16, 2017), <https://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html> [<https://perma.cc/VK58-6B4B>].

273. *Id.*

274. Collins & Feshir, *supra* note 271.

275. Priscilla A. Ocen, *(E)racing Childhood: Examining the Racialized Construction of Childhood and Innocence in the Treatment of Sexually Exploited Minors*, 62 UCLA L. REV. 1586, 1619 (2015) ("[Sex-trafficking victims associated with] innocence[] and sexual immaturity were gendered female and race white. . . . Black girls are excluded from constructs of the paradigmatic victim of child-sex trafficking despite the fact that they are disproportionately targeted by exploiters."); Gruber, *The Feminist War on Crime*, *supra* note 43, at 797 ("[D]omestic-abuse discourse and policy tended to assume a burning-bed-type stereotype of a meek, serially abused, non-poor, white woman."); Adele M. Morrison, *Changing the Domestic Violence (Dis)course: Moving from White Victim to Multi-Cultural Survivor*, 39 U.C. DAVIS L. REV. 1061, 1071 (2006) (arguing that "[domestic violence law] is raced white and . . . utilizes the white victim identity and empowerment continuum to underserve women of color").

276. Collins & Feshir, *supra* note 271.

277. *Id.*

the city, as opposed to the north side, which is heavily African-American.”²⁷⁸

While the Somali American Police Association charged that Noor was scapegoated because of his race,²⁷⁹ the larger police union accepted his conviction with equanimity—a very unusual stance for a police union.²⁸⁰ Police unions usually stand by their members, often issuing inflammatory statements whenever an officer is charged in a civilian’s death.²⁸¹ Here the Union simply stated that it respected the judicial process.²⁸² The Hennepin prosecutor’s office, rather than grapple with the fact that it has only charged officers of color in on-duty shootings, claimed that “[r]ace has never been a factor in any of my decisions, it never will be.”²⁸³ Thus, there is very little reason to believe that the outcome in this case will lead to soul searching on the part of any actors in the Minnesota criminal legal apparatus.

Activists and civil rights organizations were more critical of the conviction of a Black officer, but they too missed the forest for the trees. The local chapter of the NAACP did note that “the case was a ‘scapegoat’ against a man of color to fool residents into thinking ‘the police force is in tact.’”²⁸⁴ Yet the general tenor of such comments was that white officers were not being prosecuted rather than that the criminal legal system was not the field on which to remedy the systemic problems of policing. Another local activist noted that, “[t]here would have been no trial if Noor’s victim was African American or Native American, and I think the vast majority of people in our movement believe that.”²⁸⁵ In other words, even those critical of the decision saw it as a problem for the criminal legal system to work out.

278. *Id.*

279. *Id.* (“Haissan Hussein, a Metro Transit police officer and president of the 32-member Somali American Police Association, said he’s been fielding calls since the verdict from people baffled that Noor, who’ll be sentenced in June, was charged and then convicted of third-degree murder, even though he was a police officer. ‘The entire community is wondering why are we even continuing to be in this career if we are not given fair chances,’ Hussein said.”)

280. Jake Judd, *Police Union Makes Statement on Noor Verdict*, KNSI (May 1, 2019, 2:40 PM), <http://knsiradio.com/news/local-news/police-union-makes-statement-noor-verdict> [https://perma.cc/7FYE-8VQY] (“From the very onset this was an extremely unfortunate situation for all involved. The tragic loss of life; an officer convicted of murder charges while on duty. Our condolences go out to the family and friends of Justine Ruszczyk Damond. Our thoughts are with former Officer Noor. The Federation respects the legal process and the findings of the jury.”)

281. See Levine, *Who Shouldn’t Prosecute*, *supra* note 62, at 1445–47 (describing statements made and actions taken by unions to support members and obstruct efforts to discipline officers accused of violence).

282. Judd, *supra* note 280.

283. Collins & Feshir, *supra* note 271.

284. Rachel M. Cohen, *After a Black Cop Was Convicted of Killing a White Woman, Minnesota Activists Say Focus Should Be Police Reform*, INTERCEPT (May, 2, 2019, 1:59 PM), <https://theintercept.com/2019/05/02/minnesota-police-convicted-justine-damond> [https://perma.cc/NH7Y-HWB6].

285. *Id.*

The verdict was commented on not for its replaying of the racial harshness of the system toward Black defendants, but rather as sign that the system should vindicate the rights of Black victims. The ACLU noted the racial bias exhibited by the conviction of Officer Noor but chose to condemn the lack of convictions in cases where Black men had been killed rather than use the moment to remind its audience that the criminal legal system will not and cannot vindicate the rights of people of color, victim or defendant.²⁸⁶ This is a problematic, if not surprising, stance from an organization that rarely, if ever, encourages the use of the criminal legal system.²⁸⁷ It underscores once again the prominent role the criminal legal system is expected to play in righting societal wrongs, even in the minds of those who are generally aware of its brokenness.²⁸⁸

3. *Nouman Raja*

Finally, in South Florida, Nouman Raja, a Pakistani-American officer, was the first police officer charged in twenty-six years and the first convicted in thirty years for an on-duty killing in Florida.²⁸⁹ Raja, who was a probationary officer on the force for less than a year,²⁹⁰ was convicted of manslaughter for the killing of Corey Jones, a Black motorist who was stranded on the highway. Raja, who was not wearing his uniform, shot Jones, a legal gun owner, when Jones pulled out his weapon and attempted to run from the officer.²⁹¹ Raja was sentenced to twenty-five years in prison.²⁹²

286. Carl Takei & Paige Fernandez, *What Officer Noor's Conviction Says About Racism in America*, ACLU (May 3, 2019, 11:15 AM), <https://www.aclu.org/blog/criminal-law-reform/reforming-police/what-officer-noors-conviction-says-about-racism-america> [<https://perma.cc/TST3-CWFF>] (“The Noor verdict is appropriate, and just. But what did Philando Castile and Antwon Rose do that was less innocent than what Justine Damond did? And why did a jury believe Yanez’s fear of Castile and Rosfeld’s fear of Rose, but not Noor’s fear of Damond? The short answer: systemic and institutional racism. While we may express relief that a police officer was held accountable for wrongly taking a life, we cannot overlook the structural and implicit racism that was at play in this case, and that we know is at play in so many others across our nation.”).

287. *Criminal Law Reform*, ACLU, <https://www.aclu.org/issues/criminal-law-reform> [<https://perma.cc/58K9-EDN3>]; *Smart Justice*, ACLU, <https://www.aclu.org/issues/smart-justice> [<https://perma.cc/45HV-YH4M>].

288. See *supra* Part I.

289. *Florida Officer Using ‘Stand Your Ground’ Defense in Trial for Killing Black Motorist*, NBC NEWS (Feb. 26, 2019, 9:39 AM), <https://www.nbcnews.com/news/us-news/florida-officer-using-stand-your-ground-defense-trial-killing-black-n976066> [<https://perma.cc/3UEU-YVQY>] (“The last Florida officer tried for an on-duty killing was Miami’s William Lozano in 1989. The Hispanic officer fatally shot a black motorcycleist . . . [and] was convicted [of] manslaughter . . .”).

290. Jason Hanna & Javier De Diego, *Florida Police Fire Officer Who Killed Corey Jones*, CNN (Nov. 12, 2015, 4:20 PM), <https://www.cnn.com/2015/11/12/us/florida-corey-jones-shooting-death/index.html> [<https://perma.cc/6Y7A-AYSV>].

291. Hutchinson, *supra* note 23.

292. *Id.*

The government claimed that Raja's conviction would heal the victims and vindicate the legal system without tarnishing in any way the larger police system in Miami. The State's Attorney called Jones' death an "open wound in our community" and alleged that Raja's conviction could "heal" that wound.²⁹³ He made clear that Raja was an "aberration" whose actions should not reflect on other officers who worked "day and night to keep our community safe."²⁹⁴ For the prosecutor who tried the case, the verdict "signifie[d] that justice is blind and we really have a great system, [in which] justice can be served no matter who you are, no matter how much money you have."²⁹⁵ And that while "our criminal justice system can be slow . . . it is the best system we have."²⁹⁶

Prosecutors, however, were far from the only people commenting on the significance of the conviction and sentence. Benjamin Crump, the lawyer for a number of Black victims of police violence, "described the conviction and sentencing of Raja as a 'milestone for many Black Americans' who have lost loved ones in police shootings only to see the officers responsible for the deaths not face charges."²⁹⁷ He went further to say that, "[t]here is hope for America because a jury in Palm Beach, Florida, looked at all the evidence and they said a black man killed by the police can get equal justice, can get fair administration of the law."²⁹⁸

The ACLU of Florida also saw the verdict as a larger referendum on policing and believed that the verdict was the result of advocacy by community groups and would redound to their benefit.²⁹⁹ In a press release following the verdict, the long-time civil rights organization celebrated the "heartening" signal of greater use of the criminal legal system after "26 years [where no] officer was charged" for "an on-duty killing in Florida."³⁰⁰ The ACLU went on:

We hope that this step in the right direction keeps the wheels of justice turning. Because people marched, rallied and demanded that the criminal justice system hold Raja accountable for his actions, it

293. Greg Allen, *'Today We Have Justice'—Florida Police Officer Convicted in 2015 Shooting*, NPR (Mar. 7, 2019, 6:06 PM), <https://www.npr.org/2019/03/07/701266147/today-we-have-justice-florida-police-officer-convicted-in-2015-shooting> [https://perma.cc/L9YM-QZ5L].

294. *Id.*

295. Terri Parker, *Prosecutors Thankful for Jury's Conviction in Nouman Raja Police Shooting Trial*, WPBF (Mar. 7, 2019, 8:53 PM), <https://www.wpbf.com/article/nouman-raja-found-guilty-of-man-slaughter-attempted-murder/26714629> [https://perma.cc/XQA8-WLH4].

296. *Id.*

297. Hutchinson, *supra* note 23.

298. *Id.*

299. *ACLU of Florida Responds to the Verdict Against Nouman Raja in Corey Jones Shooting*, ACLU FLA. (Mar. 7, 2019), <https://www.acluf.org/en/press-releases/aclu-florida-responds-verdict-against-nouman-raja-corey-jones-shooting> [https://perma.cc/9HS4-KQWB].

300. *Id.*

could not look the other way. Together, we will continue to work with organizations and activists across the state to achieve real police reform and make changes in policing that will make more officers accountable for their actions, and end the epidemic of police violence in Black and brown communities.³⁰¹

No mention is made in any of these statements that the officer convicted in this case *was* a person of color. Only Raja's family seemed to take note of this. His brother told a newspaper that the conviction had to do with race "because we're not dark enough. As an American Muslim . . . we're not light enough, we're not dark enough."³⁰²

Along with the lack of reflection of how race played out in the charging and conviction of Raja, there was similarly no reflection on how holding this individual officer responsible could lead to changes in the way the police behave in Miami. This is troubling because the killing of Corey Jones was just a recent example of the brutality and racism exhibited by the department, which has been monitored since 2013 by the Department of Justice after scathing reports about its tendency to brutalize people of color.³⁰³ If one is to believe those involved in the Raja case, however, this conviction is all that was needed to stem the tide of violence in Miami. Indeed, the police department and the criminal legal system in Miami emerged from the trial propped up by their proponents and those who often critique these institutions.

These three vignettes should serve as a warning to those who believe the criminal legal system can hold police and their departments accountable for harm caused to people of color. If racial justice is a central reason for supporting police prosecutions, there is strong anecdotal evidence that a different response is required. As the next Part shows, there is no reason to believe that these prosecutions will reduce police brutality either. Indeed, they are instead a red herring, stealing our attention away from the systemic violence that is ongoing and unlikely to resolve without a fundamental shift in our reliance on police to address social problems.

301. *Id.*

302. Daphne Duret, *Nouman Raja Sentencing: Racism 'the Elephant in the Room,'* PALM BEACH POST (Apr. 26, 2019, 7:35 PM), <https://www.palmbeachpost.com/news/20190426/nouman-raja-sentencing-racism-the-elephant-in-room> [<https://perma.cc/TEW5-TG6S>].

303. Jerry Iannelli, *Here Are a Bunch of Other Recent Miami PD Brutality Cases*, MIA. NEW TIMES (May 6, 2018, 12:03 PM), <https://www.miaminewtimes.com/news/six-miami-police-brutality-cases-besides-the-kicking-video-10322438> [<https://perma.cc/RA47-22XV>].

IV. POLICE PROSECUTIONS ARE UNLIKELY TO REDUCE POLICE VIOLENCE

This Part suggests why prosecuting individual officers may not only be incapable of reducing police violence but may even exacerbate the problem by distracting our attention from the larger systemic forces that lead to excessive force by police. It argues that police prosecutions ignore the thousands of legal violences police perpetrate daily. It will conclude by suggesting that the best way to reduce police violence is to reduce our reliance on the police and will gesture to scholarship and activism that is already endeavoring to realize these alternatives.

A. Police Violence Is Systemic

As the last Part argued, prosecuting police both replays the racial pathologies of the criminal legal system and falsely promises that, by holding “bad apples” accountable through criminal prosecution, we can reduce problematic policing policies, including police violence.³⁰⁴ It showed how this bad-apple approach may exacerbate rather than ameliorate the racial pathologies that plague the criminal legal system. But another equally important reason that focusing on criminal liability is problematic in the policing context is that individual prosecutions will do little to reform policing.

This Part will argue that individual prosecutions will not reduce police violence because police violence is systemic. In fact, focusing on individual bad actors is likely to turn our attention away from where it is needed: on the systemic violence and racism inherent in policing organizations and structures.

A central tenet of prison abolition is to recognize that crime and violence are often systemic and cyclical, the product of deprivation, childhood trauma, and a racist, capital-driven society unwilling to invest in welfare, education, and other front-end solutions.³⁰⁵ Instead we invest millions in policing,³⁰⁶ prosecution, and prison at the back end.³⁰⁷ But this abolitionist ethic should also encourage us to look at police *crimes* as systemic rather than individual and similarly impossible to fix through criminal legal solutions.

304. See *supra* Part III.

305. See, e.g., DAVIS, *supra* note 39, at 16 (prisons allow us to ignore the societal problems created by racism and global capitalism); ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 4 (2016) (arguing that the war on crime started with the war on poverty, and that jails and prisons are the primary public solution to problems in low income neighborhoods).

306. See generally HINTON, *supra* note 305 (discussing money funneled to police organizations).

307. Akbar, *Abolitionist Horizon*, *supra* note 57, at 138.

As Barbara Armacost argues, “[T]he current accountability paradigm—targeting the officer who pulled the trigger—is actually hindering genuine progress in decreasing the numbers of these tragedies, including those motivated by racism.”³⁰⁸ Armacost views most police violence through the lens of “tragic organizational accidents.”³⁰⁹ Despite the hopes for reform that are on display when a bad-acting officer is prosecuted or convicted, the belief that such individual-targeting solutions will lead to change is one of the major obstacles to actually reducing police violence. “Ironically, the sense of order we get from blaming individual bad performance—the belief that blaming will bring change—is an illusion” when it comes to . . . “complex organizations” like police departments and policing policy more generally.³¹⁰

In complex organizations, the visible bad actor has “inherit[ed] [a] situation[] with latent failures and errors inherent in [it].”³¹¹ This kind of language strikes as a deep understatement when we consider modern American policing, with its roots firmly planted in white supremacy and violent domination of social underclasses.³¹² Moreover, policing’s well-documented development as a way to manage and control poor people and people of color is an extremely important factor to understanding why police prosecutions will not reduce police violence.³¹³

As Elizabeth Hinton describes it, both historically and currently, investment into police departments to manage poor and marginalized neighborhoods leads to violence by the police.³¹⁴ One vivid historical example from Hinton’s book is the “Stop the Robberies, Enjoy Safe Streets (STRESS)” program that received \$35,000 in 1971 as part of a \$7.6 million grant to Michigan from the federal government for law enforcement.³¹⁵ STRESS was designed to “patrol . . . low-income, mostly black neighborhoods” in Detroit.³¹⁶ This program was far from unique; it was based on other law enforcement operations in big cities throughout the country.³¹⁷

308. Armacost, *supra* note 15, at 910.

309. *Id.* at 910; *see also* Joanna C. Schwartz, *Systems Failures in Policing*, 51 SUFFOLK U. L. REV. 535, 538 (2018) (“[I]f the goal is to reduce the frequency of police killings (and other acts of violence and overreach), improved officer training, supervision, internal discipline, and legal sanctions are not enough. In addition, we need to view—and respond to—these events as *systems failures*.”).

310. Armacost, *supra* note 15, at 916.

311. *Id.*

312. DAVIS, *supra* note 39, at 28–29 (noting that racism and criminal law have been tied together since slavery was abolished).

313. HINTON, *supra* note 305, at 191.

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.* at 192.

Plainclothes STRESS officers placed themselves “in peril so as to invite robbery and other street crime,” to prove out their bosses’ predictions that such crimes were taking place in the neighborhoods they were funded to patrol.³¹⁸ Then, “when confronted by the very situations they sought to provoke . . . they . . . react[ed] with force.” In fifteen months, these officers “killed a young, black male roughly once a month.”³¹⁹ They also arrested 6,000 people in three years.³²⁰ They brought negative attention to themselves when an all-white STRESS force killed a Black law enforcement officer, and the unit was eventually disbanded.³²¹ But, as those who understand the organizational issues with policing might guess, STRESS was “considered an anomaly” by the “larger criminal justice community.”³²²

The inability or refusal to reflect within the law enforcement community, exemplified by its reaction to STRESS, is exactly the kind of problem exacerbated by targeting “bad apple” police officers who commit violence. They are seen as aberrant rather than reflective of a system prone to deadly error. Armacost provides valuable insight into how police departments operate as other complex systems do, such as airlines or universities.³²³ She highlights several ways in which the structure of policing organizations makes them particularly susceptible to fatal but unintentional error-making on the part of individual officers. Police organizations have the characteristics of the most problematic organizations from the perspective of error-making: they are both “complex” and “tightly coupled.”³²⁴

Police organizations are complex in that they have numerous non-linear goals. They have “many goals and tasks; for example, investigating crimes, preventing crimes, promoting public safety, enforcing traffic laws, responding to citizen reports and complaints, conducting public welfare checks, leading educational programs in schools and other institutions, and taking mentally ill people into protective custody.”³²⁵ Moreover, these tasks do not unfold predictably.³²⁶ In addition, police organizations are “tightly coupled,” which means that “whatever happens in one [part of the system]

318. *Id.* at 193–94.

319. *Id.* at 192.

320. *Id.*

321. *Id.* at 195.

322. *Id.* at 202.

323. Armacost, *supra* note 15, at 918.

324. *Id.* at 918–920; *see also* Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 958 (2004) (“[T]he goals of . . . policing . . . organizations are exceedingly complex, unpredictable, and uncertain.”).

325. Armacost, *supra* note 15, at 921.

326. *See id.*; *see also* Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 724 (2017) (“[P]recise rules cannot always be followed, [and] general rules do not provide meaningful guidance.”).

automatically and directly affects what happens in the other.”³²⁷ Such organizations cannot “tolerate delay” and have “very little flexibility.”³²⁸ In the officer/citizen encounter, this means that “actions police are able to take . . . will depend upon reflex actions, training, and discipline rather than reasoned intervention to address the particular system breakdown at hand.”³²⁹ Police organizations pressure officers to “move on” without questioning actions they have taken, and to “contain risk.”³³⁰ According to Armacost, these pressures “escalate[] [interactions] and reduce[] the possibilities for preventing harm.”³³¹ In other words, police organizations’ complexity and tight coupling means that they are particularly susceptible to system errors and that back-end, individual-blame solutions are particularly unlikely to prevent future errors from happening.³³² This is particularly true because such individual solutions prevent larger systemic reflection or review.³³³

Mining organizational literature, Armacost makes the point plainly: “The point is not that safety cannot be improved at the operator level, but that improving safety at that level will never solve the problem if latent defects and failures plague the entire system.”³³⁴ It ignores the multiple other actors and events that have led, sometimes inexorably, to a particular act of violence:

Many other actors may have contributed to the circumstances or increased the risks that led to the fatal moment; for example, the dispatcher who sent the officer to the scene, the supervisors who wrote the use-of-force policies, the managers who trained on those policies, the magistrate who signed an arrest warrant, or the legislature that set the terms of the officer’s arrest authority. Nonhuman factors, such as overtime or moon-lighting policies that promote overwork, unenforced discipline rules, patterns of repeated risk-taking behavior, pressure to effectuate quotas of arrests or stops, stop-and-frisk policies, laws that define crimes and regulate police powers, and cultural patterns that promote over-aggressive policing, may also have contributed to the officer’s actions.³³⁵

327. Armacost, *supra* note 15, at 920.

328. *Id.*

329. *Id.* at 922.

330. *Id.*

331. *Id.*

332. *See id.* at 924.

333. *See supra* Part III.A.

334. Armacost, *supra* note 15, at 918.

335. *Id.* at 911.

In other words, even if it is possible in limited circumstances to deter police violence through “bad apple” targeting, the “defects” systemic to policing will continue to go unrecognized and unsolved.

Where this Article differs from Armacost’s assessment is that she writes ahistorically of the police, believing that we can ameliorate deep structural racism and heteropatriarchy by treating police as modern organizations whose systemic flaws can be reduced by understanding the organizational flaws that lead to violence and correcting them.³³⁶ On the other hand, this Article, situated in abolitionist literature, argues that there is no “fix” to the flaws of policing other than drastically reducing our societal belief and investment in and reliance on the police.³³⁷ As Amna Akbar has argued, police “reform” has so far continued to promote investing money into police organizations.³³⁸ Armacost’s solutions would continue this trend rather than recognizing that divestment from the police and reinvestment in alternative projects to secure communities may be the best method of reform.³³⁹

Furthermore and connectedly, Armacost’s orientation is not “against” the criminal legal system.³⁴⁰ She does not situate the flawed organizational complexity of police departments within the larger “organization” of the criminal law enforcement machine: racially segregated policing,³⁴¹ legislators addicted to criminal statutes,³⁴² prosecutors who exercise their discretion in harsh, merciless, racist ways,³⁴³ prison officials who allow

336. Compare *id.* at 913 (“[W]hat is needed instead is a paradigm focused primarily on prevention. For it, we can borrow from lessons learned in the aviation and healthcare fields. In these sectors, investigations of tragic accidents employ Sentinel Event Review (SER), a systems-oriented approach utilizing analytic tools . . .”), with McLeod, *Abolition Democracy*, *supra* note 24, at 1637 (“[T]he very foundations of existing conceptions of legal justice are inadequate, compromised, limited in the ideas of justice exhorted, and corrupted by inescapably vicious and inegalitarian institutional histories and cultures.”).

337. See Akbar, *Abolitionist Horizon*, *supra* note 57, at 105.

338. *Id.* at 105–06.

339. See generally Armacost, *supra* note 15 at Part IV.

340. Armacost notes several times that her goal is to solve policing issues systemically *in addition* to individual criminal and civil lawsuits. See, e.g., *id.* at 916.

341. See Maha Ahmed, *A Hidden Factor in Police Shootings of Black Americans: Decades of Housing Segregation*, INTERCEPT (Mar. 10, 2018, 10:00 AM), <https://theintercept.com/2018/03/10/polic-e-shootings-public-health> [<https://perma.cc/GJW3-4NVE>].

342. See, e.g., Susan R. Klein, *The Discriminatory Application of Substantive Due Process: A Tale of Two Vehicles*, 1997 U. ILL. L. REV. 453, 487 (“legislators, whose subsidiary, if not primary, goal is their own reelection . . . [believe] that their constituents want harsher criminal laws”); cf. Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 55 (2010) (“[L]egislative officials are unlikely to pass multiple pieces of legislation designed to protect criminal defendants’ rights for fear of being labeled as soft on crime and not winning reelection.”).

343. See, e.g., Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 32 (1998) (“[P]rosecutors often make decisions that discriminate against African American victims and defendants.”); Data Show ‘Racial Double Standard’ in Drug Prosecutions, CRIME REP. (Dec. 5, 2019), <https://thecrimereport.org/2019/12/05/data-show-racial-double-standard-in-drug-p-rosecutions> [<https://perma.cc/XMC5-QTL7>] (“An examination of hundreds of thousands of arrest

brutal inhumane living conditions to persist,³⁴⁴ and private citizens who judge and discriminate against the formerly incarcerated.³⁴⁵ And, to make the circle complete, citizens who rely on the police for order maintenance without concern for the effect an arrest may have on another individual.³⁴⁶

B. Most Police Violence Is Legal

Many police shootings are ruled “justified.”³⁴⁷ This has led scholars to try to rewrite self-defense statutes for the police. As I argue above, this is exactly the kind of solution that will continue the dominance of the criminal legal system as our response to all social problems.³⁴⁸ But police commit violence against citizens every day, violence that does not result in death and usually does not come to the attention of the general public. This kind of violence ranges from obvious harm, like using extreme force to arrest suspects, and SWAT team raids that end in injury and death. But it is also more “minor” forms of violence: handcuffs that pinch and tear at skin, shoving someone against a wall for a stop and frisk, banging of a suspect’s head on a police car door, ignoring ill suspects’ requests for medication or to be taken to a hospital. These more micro-violences happen thousands of times a day and are basically ignored or encouraged by the courts and the public.³⁴⁹

Indeed, police violence is so common and so commonly accepted that it is considered by many to be a feature rather than a bug in the criminal legal system. As Paul Butler has noted with regard to police violence against people of color, these acts of violence are:

[F]eatures of policing and punishment in the United States. They are how the system is supposed to work. This is why some reform efforts are doomed. They are trying to fix a system that is not actually

records and federal drug convictions over 30 years found that most crack users were and still are white, but blacks were sent to federal prison nearly seven times more often for crack offenses from 1991 to 2016.”).

344. See *supra* Part II.

345. See Levine, *Discipline and Policing*, *supra* note 192, at 890–96 (discussing employers discriminating against the formerly incarcerated).

346. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 *YALE L.J.* 2054, 2061 (2017) (“[An] insidious function [of the criminal justice system] is the management and control of disfavored groups such as African Americans, Latin Americans, the poor, certain immigrant groups, and groups who exist at the intersection of those identities.”).

347. See generally Carbado, *supra* note 252.

348. See *supra* Part I.

349. BARRY FRIEDMAN, *UNWARRANTED: POLICING WITHOUT PERMISSION* 7–11 (2017) (noting that there are eight million searches annually conducted of pedestrians and motorists, along with routine use of force through use of guns, pepper spray, and tasers; and regular SWAT raids.).

broken. The most far-reaching racial subordination stems not from illegal police misconduct, but rather from legal police conduct.³⁵⁰

Most reform, including the prosecution of officers who commit the rare, potentially illegal violence, ignores the true aggregate harm of completely acceptable violence and subordination baked, historically and systemically, into policing in America.

The willful ignorance of acceptable forms of violence pervades all police reform that relies on the criminal legal system to ameliorate police brutality.³⁵¹ But it is especially problematic if we see prosecution as a form of racial justice. As Devon Carbado puts it, when we prosecute an individual police officer for visible violence, we continue the myth that “police killings of African Americans [are] aberrant and extraordinary, failing to see their connections to the routine, to the everyday, and to the ordinary.”³⁵²

The routine, the everyday, and the ordinary looks something like this: The Bureau of Justice Statistics lists more than 700,000 *reported* instances of threatened or actual non-fatal force by police between 2002 and 2011, including shouts, curses, threatened force, pushing or grabbing, hitting or kicking, using pepper spray, using an electroshock weapon, pointing a gun, or using other force.³⁵³ This is on top of the thousands of fatal interactions citizens have with the police.³⁵⁴ Thus, it is no exaggeration to state that, over time, millions of people have experienced perfectly legal and sanctioned violence by the police.

We ignore this legal and accepted violence at our peril. Scholars have shown that negative interactions with the police lead to vast societal harm.³⁵⁵

350. Butler, *supra* note 88, at 1425.

351. See Akbar, *Abolitionist Horizon*, *supra* note 57, at 132 (explaining the various ways law reform re-inscribes acceptable police violence); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 129 (2017) [hereinafter Carbado, *Stopping Black People*] (“The claim that the [Supreme] Court enables and sometimes expressly authorizes racial profiling might sound like hyperbole, but it is not.”).

352. Carbado, *Stopping Black People*, *supra* note 351, at 128.

353. SHELLEY HYLAND, LYNN LANGTON & ELIZABETH DAVIS, DEP’T OF JUST., POLICE USE OF NONFATAL FORCE, 2002–11 (2015), <https://www.bjs.gov/content/pub/pdf/punf0211.pdf> [<https://perma.cc/PGE4-G9M3>].

354. MAPPING POLICE VIOLENCE, <https://mappingpoliceviolence.org/> [<https://perma.cc/9JC9-EAAD>] (last updated Nov. 11, 2020) (more than a thousand people were killed by police in each of 2018 and 2019).

355. See, e.g., Monica C. Bell, *Safety, Friendship, and Dreams*, 54 HARV. C.R.-C.L. L. REV. 703, 706 (2019) (pointing to the “state failure to respect and protect three intertwined social entitlements—*safety*, *friendship*, and *dreams*—in many high-poverty African-American communities. One might envision these entitlements as part of a bundle of rights and privileges that constitute full membership in the American community.”); Bell, *supra* note 346, at 2066–67 (introducing “the concept of *legal estrangement* to capture both legal cynicism—the subjective ‘cultural orientation’ among groups ‘in which the law and the agents of its enforcement, such as the police and courts, are viewed as illegitimate, unresponsive, and ill equipped to ensure public safety’—and the objective structural conditions (including officer behaviors and the substantive criminal law) that give birth to this subjective orientation.”).

It is facile, if not dangerous, to pin our hopes for reforming the institution of policing by focusing on singular, high salience instances of violence. And we ignore the most hopeful solution, envisioning a world that does not rely on cages and violence to solve social problems, when we re-inscribe the problems of the criminal legal system by relying on it to solve or even to aid in police reform.

The crisis of police violence cannot be reduced to fatal violence, nor to criminal violence. Police violence is an everyday experience of brutality and degradation, falling mostly on the bodies of poor people of color. Years of scholarship, law reform, and investment in “better” policing has failed to even chip away at this reality. Similarly, focusing on high salience events and relying on the criminal legal system to do any work to stop the violence is at best an exercise in naivety and, at worst, serves as an obstacle to the needed structural reform. If, as Carbado suggests, police killings are intimately bound up with ordinary police activity and violence,³⁵⁶ it becomes even clearer that we must turn our attention toward ways to reduce our reliance on the police.

C. Reducing Our Reliance on the Police

Our reliance on the police is easily comparable to an addiction. Police make upwards of ten million arrests per year.³⁵⁷ They conduct over eight million searches of pedestrians and motorists.³⁵⁸ On one day in 2020, the commissioner of the NYPD touted that his force had responded to 29,000 calls to 911.³⁵⁹ This Article has endeavored to show that we cannot prosecute our way out of police violence. This Section will briefly sketch some of the new calls for reducing our reliance on the police and gesture to some of the grassroots organizations and scholars who have already turned their attention to alternatives to policing.³⁶⁰

Perhaps the one silver lining that has come out of the brutal killing of George Floyd is that the voices of activists and academics who advocate for

356. Carbado, *Stopping Black People*, *supra* note 351, at 128.

357. *Arrests*, VERA, <https://arresttrends.vera.org/arrests> [<https://perma.cc/8VYS-C2ZB>].

358. FRIEDMAN, *supra* note 349.

359. Commissioner Shea (@NYPDShea), TWITTER (Feb. 20, 2020, 2:53 PM), <https://twitter.com/NYPDShea/status/1230581138390994944> [<https://perma.cc/3WDL-Y5WW>].

360. This Article is concerned with exposing the fallacy of relying on the criminal legal system to reform policing. It is well beyond its scope to highlight all of the ways in which organizations and scholars are reimagining social safety networks and accountability that do not rely on the criminal legal system. This Section merely gestures to these myriad projects. Other scholars have taken this mantle up. *See generally* Akbar, *Abolitionist Horizon*, *supra* note 57; McLeod, *Abolition Democracy*, *supra* note 24 (discussing alternatives to prison and punishment envisioned by grassroots organizations in Chicago); Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 599 (2017) (“Community bail funds have become a powerful presence in local criminal courthouses . . .”).

and envision a world with a radically reduced police presence have been amplified.³⁶¹ Minneapolis listened to those voices when it decided to remove police from schools, and other jurisdictions followed suit.³⁶² Many cities have already begun referring mental health calls to centers specifically designed to handle such crises, rather than to the police.³⁶³ Defunding the police has gone from a conversation among a few activists and scholars to a widely known and legitimate policy proposal.³⁶⁴ Whether these important

361. See, e.g., Amna A. Akbar, Opinion, *The Left Is Remaking the World*, N.Y. TIMES (July 11, 2020), <https://www.nytimes.com/2020/07/11/opinion/sunday/defund-police-cancel-rent.html> [<https://perma.cc/G8D4-ZP6Q>] (linking police abolition to larger social movements); Derecka Purnell, *How I Became a Police Abolitionist*, ATL. (July 6, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/how-i-became-police-abolitionist/613540> [<https://perma.cc/FJ75-W7PM>] (discussing why defunding the police is the only way to systemic reform); Mariame Kaba, Opinion, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> (same); Kate Levine, *We Cannot Prosecute Our Way to Making Black Lives Matter*, LPE (June 10, 2020), <https://lpeproject.org/authors/kate-levine> [<https://perma.cc/Q6AZ-MN6H>] (suggesting that removing police from schools means that states are recognizing that black lives matter); Jocelyn Simonson, *Power over Policing*, BOS. REV. (June 8, 2020), <http://bostonreview.net/law-justice/jocelyn-simonson-power-over-policing> [<https://perma.cc/4FCW-5K V6>] (arguing that social movements are enacting a transfer of power from policymakers to people affected by policing).

362. Mary Retta, *Minneapolis Public Schools Abolished Their Police First*, NATION (June 19, 2020), <https://www.thenation.com/article/activism/minneapolis-public-schools> [<https://perma.cc/KC5A-8KEW>]; *Portland Will No Longer Use Police in School Following Protests*, KTVZ (June 4, 2020, 2:50 PM), <https://ktvz.com/news/oregon-northwest/2020/06/04/portland-will-no-longer-use-police-in-school-following-protests> [<https://perma.cc/KV8X-DPRB>]; Moriah Balingit, Valerie Strauss & Kim Bellware, *Fueled by Protests, Schools Districts Across the Country Cut Ties with Police*, WASH. POST (June 12, 2020, 10:06 AM), <https://www.washingtonpost.com/education/2020/06/12/schools-police-george-floyd-protests/>; Wesley Whistle, *Schools Cut Ties with Police Departments After Recent Killings*, FORBES (June 3, 2020, 9:30 AM), <https://www.forbes.com/sites/wesleywhistle/2020/06/03/schools-cut-ties-with-police-departments-after-recent-killings/#712c50dc5703> [<https://perma.cc/R6UE-PXZT>]; Valerie Strauss, *University of Minnesota Limits Ties to Minneapolis Police Department After Death of George Floyd*, WASH. POST (May 28, 2020, 5:44 AM), <https://www.washingtonpost.com/education/2020/05/28/university-minnesota-limits-ties-minneapolis-police-department-after-death-george-floyd/>.

363. Ryan Thornton, *Integral Care Set to Address Most Mental Health Emergency Calls Without Involving APD*, AUSTIN MONITOR (Aug. 18, 2020), <https://www.austinmonitor.com/stories/2020/08/integral-care-set-to-address-most-mental-health-emergency-calls-without-involving-apd/> [<https://perma.cc/MA8W-RVBC>] (describing a \$1.3 million budget to hire trained professionals to respond to 911 calls that do not present a threat to public safety); Marisa Demarco, *Keller Proposes New Department to Handle Mental Health Calls Instead of Police*, KUNM (June 15, 2020), <https://www.kunm.org/post/keller-proposes-new-department-handle-mental-health-calls-instead-police> [<https://perma.cc/4Y9W-YM5H>] (referring to Albuquerque Mayor Tim Keller); *Portland Program Sends Mental Health Professionals, Not Officers, to Some 911 Calls*, KATU (July 14, 2020), <https://katu.com/news/local/portland-program-sends-mental-health-professionals-not-officers-to-some-911-calls>; Christie Thompson, *This City Stopped Sending Police to Every 911 Call*, MARSHALL PROJECT (July 24, 2020, 5:00 AM), <https://www.themarshallproject.org/2020/07/24/crisisresponders> [<https://perma.cc/G545-X3U9>] (referring to Olympia, Washington); Leigh Tauss, *Raleigh Wants to Send Social Workers on Police Calls*, INDY WEEK (Aug. 26, 2020, 6:30 AM), <https://indyweek.com/news/wake/raleigh-police-mental-health-homeliness-unit> [<https://perma.cc/H7JN-3STZ>].

364. See Alex S. Vitale, *The Only Solution Is to Defund the Police*, NATION (May 31, 2020), <https://www.thenation.com/article/activism/defund-police-protest/> (“It is time for the federal government, major foundations, and local governments to stop trying to manage problems of poverty and racial discrimination by wasting millions of dollars on pointless and ineffective procedural reforms that merely

systemic changes actually are made is more dubious given white America's attention span to the harms of policing.³⁶⁵ But, if and when the public is ready, grassroots organizations have been working on how to manage public safety without brutality for years. We can see this in small-scale organizations throughout the country.

There are numerous small-scale organizations that are working to find a cure for our addiction to police.³⁶⁶ Until recently, they have been doing this work with almost no recognition from the larger police reform community, let alone policymakers and the public. Yet each of the following examples represents a model that can and should be scaled up to address public safety issues that are currently squarely in the hands of the police.

In New York, Critical Resistance NYC works on “fighting policing in working class communities of color, to community education projects, to grassroots campaigns to oppose prison and jail construction.”³⁶⁷ In Chicago, Chain Reaction supports conversations in communities about “alternatives to calling the police on young people” to encourage citizens to find other ways of resolving problems with children.³⁶⁸ Cure Violence identifies violence as a health crisis and addresses it by: (1) detecting and interrupting potentially violent conflicts; (2) identifying and treating the highest risk to individuals, including changing behaviors and educating about the

provide cover for the expanded use of policing. It's time for everyone to quit thinking that jailing one more killer cop will do anything to change the nature of American policing. We must move, instead, to significantly defund the police and redirect resources into community-based initiatives that can produce real safety and security without the violence and racism inherent in the criminal justice system.”); Dionne Searcey, *What Would Efforts to Defund or Disband Police Departments Really Mean?*, N.Y. TIMES (June 8, 2020), <https://www.nytimes.com/2020/06/08/us/what-does-defund-police-mean.html?searchResultPosition=121> (summarizing what is meant by the phrase “defund the police” and explaining where the funds would go instead); Nicholas Kristof, *When It Works to 'Defund the Police,'* N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/2020/06/10/opinion/defund-police-floyd-protests.html?searchResultPosition=98>; Gail Collins & Bret Stephens, *What Should Be Done About the Police*, N.Y. TIMES (June 16, 2020), <https://www.nytimes.com/2020/06/16/opinion/police-reform-floyd.html?searchResultPosition=87> (discussing reforms to improve policing); Keeanga-Yamahtta Taylor, *We Should Still Defund the Police*, NEW YORKER (Aug. 14, 2020), <https://www.newyorker.com/news/our-columnists/defund-the-police> (“Defunding the police is the first step in a longer process that may culminate in the end of policing in the United States.”).

365. Michael Tesler, *Support for Black Lives Matter Surged During Protests, but Is Waning Among White Americans*, FIVETHIRTYEIGHT (Aug. 19, 2020, 2:31 PM), <https://fivethirtyeight.com/features/support-for-black-lives-matter-surged-during-protests-but-is-waning-among-white-americans> [<https://perma.cc/9M9C-U4XV>].

366. While I gesture to such organizations here, it is far outside the scope of the Article to catalogue all of the incredible work being done by activists and grassroots organizers throughout the country. For more thorough academic treatment, see Akbar, *Abolitionist Horizon*, *supra* note 57; Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. (forthcoming 2021) (on file with author).

367. *CR Structure & Background*, CRITICAL RESISTANCE, <http://criticalresistance.org/about/cr-structure-background> [<https://perma.cc/B8YB-N7JV>].

368. *Chain Reaction: Alternatives to Calling Police*, CHAIN REACTION, <http://www.alternativestopolicing.com> [<https://perma.cc/W7SK-LJX5>].

consequences and use of violence; and (3) mobilizing the community to change social norms.³⁶⁹ The White Bird Clinic runs Crisis Assistance Helping Out on the Streets (CAHOOTS): a 24/7 “mobile-crisis-intervention service” in Eugene, Oregon that is dispatched by the police-fire-ambulance communications center. Each team consists of a medic and mental health crisis worker.³⁷⁰

Scaling these organizations requires investment and commitment from the public. Given the public’s fickle attention to policing issues, it is unlikely they will gain traction without backing from organizations that already have major infrastructure. One way to ensure validation and amplification for these missions is recognition by the powerful civil rights organizations that have the outreach and infrastructure to create change on a large scale. Currently, organizations like the ACLU and NAACP seem more focused on using our current, deeply problematic criminal legal system to sort out policing problems after they have become tragically visible. But these organizations could turn their attention and vast media platforms to advocating for alternatives to policing.

There are, of course, legitimate concerns about how well these ideas can be scaled. But there are louder, less legitimate concerns that reducing our reliance on the police will threaten safety and security. Indeed, it is this Article’s contention that falling back on the cycle of fear and violence that the criminal legal system relies on for its existence is exactly what hampers these new, more hopeful, and potentially more helpful reimaginings from receiving the attention they deserve.

CONCLUSION

The dominance of our criminal legal system, despite the overwhelming evidence of its disfunction is, at base, a political problem.³⁷¹ Law enforcement and their supporters in government, media, and scholarship have had a vice grip on messaging and politics for decades. Recent scholarship and advocacy has, however, begun to sound a new note. In particular, scholars who focus on prison abolition or mass decarceration are focused not only on the harms of our prison-backed criminal legal system, but also the potential alternatives that exist through reinvestment in alternative forms of safety and accountability.

Yet, many of those who dedicate themselves to reducing the criminal legal system continue to rely on it to solve the crisis of police brutality. Until

369. CURE VIOLENCE GLOBAL, <https://cvg.org> [<https://perma.cc/3ESP-XYGK>].

370. *Cahoots*, WHITE BIRD CLINIC, <https://whitebirdclinic.org/cahoots> [<https://perma.cc/Z8TC-XBAZ>].

371. GOTTSCHALK, *supra* note 14, at 15.

now, there has been no sustained work to explain why this way of thinking is an obstacle to the mass decarceration desired by many. This Article has endeavored to show why prison abolitionist scholars and decarceration advocates must reckon with the use of the criminal legal system against police officers if they are to realize their goals.