ANNUAL REVIEWS

Annual Review of Law and Social Science

Police Go to Court: Police Officers as Witnesses/Defendants

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Annu. Rev. Law Soc. Sci. 2023. 19:93–107

First published as a Review in Advance on June 7, 2023

The *Annual Review of Law and Social Science* is online at lawsocsci.annualreviews.org

https://doi.org/10.1146/annurev-lawsocsci-113022-111914

Keywords

police, police accountability, law enforcement, perjury, Brady evidence, qualified immunity

Abstract

Police officers regularly serve as government witnesses in criminal cases. In recent years, they have also increasingly found themselves as defendants facing criminal charges, civil lawsuits, or both. This article surveys scholarly literature on police officers as both witnesses and defendants, with a focus on sociological and legal barriers to understanding officer deception, assessing officer testimony, and holding officers accountable for misconduct. With respect to officers as witnesses, these barriers include the prevalence of police officer perjury, judicial deference to officers' testimony, and laws and policies that prevent defendants from learning about or exposing officer misconduct and unreliability. Charging and suing officers present additional logistical and substantive questions. These questions include who should be responsible for investigating and deciding whether to prosecute police, what protocols should guide those investigations, whether police prosecutions meaningfully improve policing or ensure accountability, and what role the civil legal system should play in addressing police misconduct.

1. INTRODUCTION

The topic of police officers as witnesses and defendants is important for nearly anyone interested in understanding and addressing police officer misconduct. In Chicago, where I began my legal career in the mid-2000s, police officer deception has contributed to the wrongful conviction of hundreds of people, including verified claims that police officers lied and tortured Black men into confessing to crimes they did not commit (Chicago Torture Justice Mem. 2022). But Chicago is far from alone in grappling with issues related to police officer credibility and criminality. Minneapolis, Memphis, Los Angeles, Baltimore, and nearly every major city in the country could identify police misconduct as one of the pressing concerns facing their city. In each of those cities, judges, scholars, and civilians are wrestling with questions about how to understand police misconduct as a social phenomenon and hold police officers accountable for wrongdoing.

This article reviews scholarly literature addressing police officers as both witnesses and defendants in criminal and civil proceedings. The article encompasses legal and sociological perspectives, predominantly from scholars studying law enforcement behaviors and rules in the United States.

Section 2 reviews scholarly literature related to police officers as witnesses. These topics include the prevalence of police officer bias and perjury and legal strategies for challenging police perjury; judicial deference to police officers as witnesses; and laws and policies governing collection and use of evidence about misconduct by officer-witnesses. Section 3 discusses scholarly literature pertaining to police officers as criminal defendants. This literature explores protocols for investigating police officers accused of crimes, questions about who should be responsible for prosecuting police, and debates about whether criminal prosecutions are effective tools for addressing officer misconduct. Lastly, Section 4 reviews literature regarding police officers as civil defendants. This section addresses barriers the US legal system has erected to protect officers from civil lawsuits, whether those barriers accomplish their intended goals, and suggestions for legal reforms.

2. POLICE OFFICERS AS WITNESSES

2.1. Police Officer Bias and Perjury

Scholars have long warned about dishonesty by police officer witnesses. Skolnick (1982) wrote one of the earlier articles to address police officer deception, positing that perjury by police officers was an accepted cultural norm. Skolnick relied on a study in New York courts that analyzed police officers' testimony before and after New York adopted the federal exclusionary rule, meaning that the government could no longer use evidence police officers obtained in violation of the Fourth Amendment against criminal defendants at trial. The study concluded that, rather than changing their behavior to comply with the Fourth Amendment, officers simply changed their testimony about that behavior. Skolnick theorized that police culture embraced testimonial lying because the ends justify the means; i.e., lying is acceptable when it helps ensure conviction of people police officers believe are guilty. According to Skolnick (1982, p. 43), police lying was "a routine way. . .to compensate for what [officers view] as limitations the courts have placed on [their] capacity to deal with criminals."

Ten years later, Orfield (1992, p. 82) conducted a survey of police, prosecutors, defense attorneys, and judges in Chicago and found the participants believed police perjury was "pervasive." Much like the New York study, the Chicago survey concluded that officers lied frequently to prevent judges from suppressing evidence the officers obtained illegally. Respondents reported "systemic" fabrication of evidence to support search warrants and surmised that police officers committed perjury in as often as half of the times they testified about Fourth Amendment–related issues (p. 83). They also reported that judges and prosecutors knowingly ignored this perjury,

both because it helped prosecutors' cases and relationships with police and because judges feared adverse publicity for suppressing evidence.

In another prominent article addressing police officers' credibility as witnesses, Slobogin (1996) reiterated that police officers have long viewed lying—particularly lying to evade judicial scrutiny about ways they gathered evidence—as an acceptable strategy to help convict people they believe are guilty. Slobogin (1996, p. 1040) noted that the practice of police lying to avoid exclusion of evidence was so common that police officers coined their own phrase, "testilying," as shorthand. Testilying is now common parlance in scholarly literature (Capers 2008, Chin & Wells 1998, Dorfman 1998, Moran 2018, Simon-Kerr 2015, Trivedi & Gonzalez Van Cleve 2020, Zeidman 2005). Slobogin warned that testilying—and prosecutors' and judges' acceptance of it—presented many systemic concerns, including damaged public trust in the fairness, legitimacy, and accuracy of the criminal justice system. [Perhaps proving Slobogin's point, many scholars and practitioners have intentionally stopped using the term justice system because they believe it too unjust to merit that label (see Levin 2023).]

Building on Slobogin's article, Capers (2008) applied social psychology literature on legitimacy theory to the context of police testilying. Capers reasoned that, if perceptions of legitimacy impact compliance, testilying has the particularly problematic effect of making people less likely to perceive police as legitimate, and therefore less likely to respect the law. Capers warned that testilying erodes respect not only for law enforcement but for all those who tolerate it, including prosecutors and judges. Simon-Kerr (2015, p. 2229) similarly expressed concern that judicial tolerance of testilying "sends a message not only about the importance of truth but also about fairness and the procedural protections that are crucial to our system of justice."

Although Skolnick and Slobogin reasoned that police officers commit perjury primarily to evade the exclusionary rule, another explanation lies in police training and socialization. Alpert & Noble (2009) noted that police officers are trained to use deception in many parts of their job—for example, when inducing a suspect to confess by claiming that other people have already implicated him, even if untrue—and the legal system condones police deception in many contexts outside of testimony. Citing literature on social cognition, they concluded that, where police officers are trained to equate deception with success, they may transfer that perception to other areas of work where deception is supposedly unacceptable, such as testifying in court.

Deception also thrives in insular cultures. Chappell & Lanza-Kaduce (2010), as well as McCartney & Parent (2015), have studied the insular cultures of many police departments, explaining that most officers are both trained and socialized to perceive their jobs as highly dangerous, which creates a strong sense of internal solidarity and isolation from civilians. This solidarity can be positive when encouraging police officers to work together but negative when it discourages officers from calling each other out for unethical or illegal behavior. Chappell & Lanza-Kaduce (2010) observed hours of police academy training and noted that trainers provided conflicting messages about recruits' obligations to obey the law, sometimes suggesting that police are above the law and particularly discouraging recruits from reporting misconduct by other officers. Paoline (2003) concluded that group loyalty is one of the most distinctive traits of policing culture, consistently reinforcing the notion that officers must protect each other against the hostilities of the civilian or legal world. Sierra-Areévalo (2021, p. 73) noted that, although loyalty and solidarity have many positive effects, they can also manifest themselves in "decidedly problematic" ways, like the code of silence that encourages officers to deceive or stonewall those trying to investigate police misconduct.

While some of the earlier literature established that police perjury is pervasive, authors have also proposed many strategies for combatting police bias and perjury. Alpert & Noble (2009) stressed the importance of training officers on the continuum of acceptable and unacceptable

deception and argued that police departmental cultures must discourage deception via testimonial perjury. Hunt & Manning (1991) suggested that culture is more important than training. They noted that although rookie police officers are regularly told in training that they cannot lie in court, their beliefs about the acceptability of lying change after they start work, particularly as they see other officers employ deception to cover for illegal searches and improper arrests.

Many others have offered legal solutions, among which Capers's (2008) is perhaps the simplest: prosecuting police officers for perjury when they lie in court. This is a process and punishment already available in criminal law but rarely used against officers. Chin & Wells (1998, p. 289) urged defense attorneys to impeach police officers with evidence of bias or motivation to lie and argued that the Rules of Evidence permit defense attorneys to impeach officers with evidence that many police departments use a "code of silence" to retaliate against officers who report their colleagues' misconduct. Dorfman (1998) proposed that judges provide adverse inference instructions to juries when police officers testify about facts not in their police reports, effectively telling jurors that the absence of these facts from officers' reports allows the jurors to infer that the officer's testimony is likely untrue. Dorfman also suggested expanding criminal discovery rules to include officers' reports authored in similar cases, allowing defense attorneys to assess whether particular officer-witnesses routinely make similar suspicious claims (for example, that they noticed drugs in plain view in a suspect's car).

Zeidman (2005) called on judges to take police perjury more seriously, arguing that they should scrutinize officers' stated justifications for charges early in criminal proceedings rather than waiting until trial. Wilson (2010) suggested modifying the Fourth Amendment exclusionary rule to focus on whether police obtained evidence by intentional deception or honest mistake, even if that mistake violated the Constitution. In Wilson's proposal, judges would exclude evidence obtained by intentional deception, regardless of whether police lied in court, in police reports, or in informal communications with witnesses. In contrast, judges would decline to suppress evidence obtained by honest mistake.

Johnson (2017) recommended that courts instruct jurors that they may consider police officers' interest in the outcome of a case when judging the officers' credibility as witnesses. Courts routinely provide similar instructions when criminal defendants testify, instructing jurors that they may consider defendants' interests in the outcome of a case when assessing their testimony. In contrast, courts typically instruct jurors to treat police officer testimony like that of any other witness. Johnson argued that police officers have a special interest in case outcomes, specifically guilty verdicts, and courts should instruct jurors accordingly.

Johnson (2019) also identified that some police officers are biased because of not only their interest in case outcomes but their racist beliefs or ties to white supremacist organizations. Johnson pointed to racism-related scandals in more than 100 police departments, as well as FBI warnings of widespread white supremacist efforts to infiltrate police departments. Johnson (2019, p. 213) labeled racial bias a "serious problem within police departments" and called on prosecutors to treat evidence of officer bias as exculpatory material that prosecutors must disclose to defendants in criminal cases where those officers may testify.

Many scholars have attempted to tackle the problem of police bias and perjury and have offered a variety of innovative solutions encompassing both sociological and legal perspectives. (**Figure 1**). Unfortunately, the problem persists. Many police departmental cultures still indoctrinate their officers in the isolationist mentalities that foster deception and discourage officers from admitting or reporting misconduct. Most states still tell jurors to assess the credibility of police officers like that of any other witness, and judges routinely exclude jurors who express skepticism about officer-witnesses. Courts also rarely dismiss cases based on officer deception.

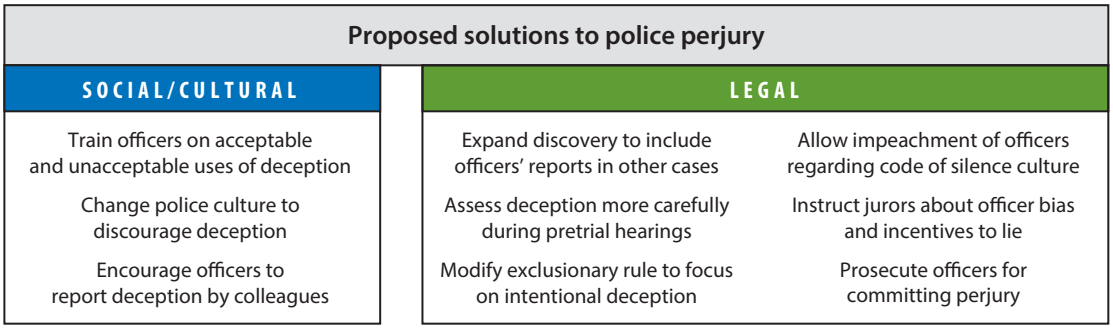

Figure 1

Proposed solutions to police perjury.

The following section discusses literature addressing judges' reluctance to disbelieve officers, which may contribute to their hesitation to embrace the reforms scholars have proposed.

2.2. Judicial Deference to Police Witnesses

Despite evidence that police officers routinely lie, judges still tend to trust police witnesses. They also defer to officers' testimony on many topics. Lvovsky (2017, p. 2004) traced what she refers to as the "presumption of police expertise" to the police professionalization movement of the 1950s, which arose in response to societal perceptions that police departments were "bastions of corruption and incompetence." Many police departments in the mid-twentieth century created specialized squads like drug or vice units and marketed these units as uniquely skilled in crime fighting. Police officers also began vocally criticizing judges whom they perceived as restricting officers' ability to fight crime.

According to Lvovsky, their tactics worked. By the late 1960s, judicial decisions increasingly recognized police officers as professionals to whom courts should defer on issues like whether police had authority to stop or arrest someone. They also began to credit police officers as experts on topics ranging from physical symptoms suggesting someone is under the influence of substances to language that is slang for criminal activity.

Friedman (2017) offered another explanation for judicial deference to police: The legal system prevents judges from seeing the full picture of police behavior, because cases get to court only when police have ostensibly uncovered evidence of crime and located the perpetrator. Judges do not see "all the instances in which the police searched, seized, interrogated, or worse, and came up emptyhanded—the false positives. Yet if judges saw this entire picture of policing, it would become clear that judicial deference to police expertise is greatly overblown" (Friedman 2017, p. 330).

I also have written about the deference and trust judges afford to police officers (Moran 2017). Like Lvovsky, I traced the roots of this deference to the late 1960s, particularly Richard Nixon's War on Drugs, which continues in some form to this day. Over a 10-year period from the early 1980s to the early 1990s, the Supreme Court heard 30 cases involving questions about whether police officers had illegally stopped or seized people or evidence. The court ruled in the officers' favor in 90% of those cases and repeatedly emphasized that, because police officers are experts in their field, judges should view their actions and testimony with deference.

Most recently, Lvovsky (2021) explored how deference to police witnesses, and assumptions about their expertise in combatting and investigating crime, can backfire on police when defense attorneys paint that expertise in a sinister light. Lvovsky used the example of defense counsel

depicting a seasoned detective trained in the art of obtaining confessions, who knows exactly what lies to use to induce false confessions from naïve suspects.

What stands out in the scholarly literature on police officers as witnesses is the ubiquity of agreement that police lie, and that they do so regularly: not just to suspects but to lawyers and judges as well. Judges have known about this open secret for decades and done little to address it, which suggests that they either underestimate the ways police training and culture encourage deceit or are simply ambivalent about its harms. But addressing police officer perjury is not the purview of judges alone. The following section describes extrajudicial barriers to collecting information about dishonesty or other misconduct by police officer-witnesses.

2.3. Laws and Policies for Collecting and Using Impeachment Information about Police Officers

In a recent study of police corruption, Singh (2022, p. 5) noted that lack of accountability is a "central cause of police corruption." Several scholars have highlighted challenges to accountability through studies of laws and policies governing collection and use of information that could impact the credibility of officer-witnesses. Abel (2015) explained how the Supreme Court decision *Brady v. Maryland* (1963), which imposed on prosecutors an obligation to provide exculpatory evidence to defendants in criminal cases, is routinely ignored in the context of police personnel records that might contain information about officers with histories of dishonesty or other misconduct. Although *Brady* and its progeny established a due process requirement that prosecutors provide defendants with impeachment information about officers involved in their cases, prosecutors often do not collect that information, and sometimes cannot because personnel records are confidential in many states. Abel bemoaned the lack of law guiding how prosecutors should gather and disclose impeachment information in police personnel records and criticized laws that favor officer confidentiality over defendants' constitutional rights to exculpatory information.

One of my own pieces (Moran 2018) discussed the challenges criminal defendants face when attempting to dispute the credibility of officer-witnesses. Many states make complaints about or sustained findings of officer misconduct presumptively confidential and inaccessible even to defendants in criminal cases, unless the defendants can prove what misconduct information exists and why it is relevant to their case. I offered a model statute that would allow defense attorneys presumptive access to information about officer misconduct and place the burden on officers to explain why that information is not relevant.

In a follow-up article (Moran 2019), I examined police misconduct records from a privacy law perspective, analyzing whether officer misconduct records contain the type of information the law generally deems private. I concluded that officers have minimal privacy interests in most misconduct records, with a few exceptions such as records involving mental health or substance abuse concerns. I also argued that criminal defendants' rights to impeachment evidence should nearly always trump officers' limited privacy interests in misconduct records. Levenson (2021) recently sounded a similar note. In an article analyzing the California Supreme Court's effort to balance law enforcement privacy interests in personnel records against criminal defendants' rights to exculpatory evidence, Levenson (2021, p. 497) reasoned that favoring officers' privacy interests over criminal defendants' right to a fair trial would be "fundamentally unjust."

Several states have passed recent laws requiring greater transparency in information about police misconduct. The balance, however, still favors confidentiality. According to Cox & Spielvogel (2022), as of early 2022, 19 states allowed public access to most police misconduct records, and the remaining 31 restricted access to many or all such records.

The challenges of balancing privacy interests with public accountability are not limited to law enforcement. Levin (2007) criticized the legal profession for lack of transparency about attorney

misconduct. Levin argued that lack of public access to information about attorney misconduct harms both prospective clients and the profession, particularly where public confidence in lawyers is often low and lack of transparency leaves unanswered questions about the discipline process. Levin ultimately concluded that most attorney disciplinary information should be publicly accessible. Horowitz (2013) wrote about similar challenges in the context of disciplinary processes for medical professionals. The medical profession has increased public access to disciplinary proceedings, including inviting members of the public to sit on disciplinary boards and opening disciplinary hearings to the public. Horowitz (2013, p. 167) concluded that transparency about disciplinary information is "critical" to trust in the medical profession but also noted that privacy is important and doctors may justifiably draw limitations on what types of information the public can access.

Although doctors, lawyers, and police officers represent different professions, they are all powerful actors who hold significant sway over laws and policies governing access to misconduct information. Sociologists have long understood the legal system as primarily protecting the rights of powerful people (Galanter 1974, Seron & Munger 1996), and scholars studying access to police misconduct information would do well to take this institutional imbalance into account when crafting remedies for lack of access.

Some scholars have argued that people in power—especially, in the legal system, prosecutors—bear special responsibility to proactively collect and disclose misconduct information to defendants. Hendricks (2021) built on previous literature by Abel and me to argue that prosecutors should disclose information about misconduct by police witnesses early in pretrial proceedings, preferably as soon as a case is initiated. Because only a small percentage of criminal cases advance to trial, defendants should be able to make crucial decisions about whether to plead guilty with clear understanding of the credibility of the government's witnesses. Judges too should have access to information about credibility of police witnesses, as early as the first court appearance.

In his most recent article, Abel (2022, p. 108) theorized that an "officer whose corruption comes out in one case will likely have corrupted other cases." Based on this premise, Abel argued that, once government officials recognize that an officer engaged in serious misconduct, they must have systems to identify and reinvestigate other cases that officer was involved in. Abel proposed that prosecutors create lists of other cases the officer was involved in and share them with the defense bar and defendants whom the officer helped prosecute.

In one of my own articles (Moran 2022), I explored the prosecutorial practice of keeping "*Brady* lists," common parlance for lists of officers with histories of misconduct that could impact their credibility in criminal cases. I examined the near-complete absence of law governing prosecutors' practices for tracking, collecting, and disclosing misconduct information about police officers. I then described the concerns that persist without clear legal guidance: Many prosecutors do not keep *Brady* lists at all, and those that do often have no reliable method for collecting information about police misconduct, or collect far less than they should. While the article proposes some legal solutions, it also acknowledges that *Brady* lists are not a "stand-alone solution" (Moran 2022, p. 726) to pervasive concerns regarding prosecutorial and police apathy in collecting and disclosing exculpatory evidence.

Much of the earlier literature on police misconduct and deception—including work by Slobogin (1996) and Capers (2008)—warned that persistent misconduct and deception would inevitably create skepticism about the legitimacy of law enforcement departments. This has proven sadly true. In Chicago, the chief prosecutor has acknowledged that many crime victims are unwilling to speak with police or testify in court because they do not trust police to treat them with dignity or truthfully convey their information. Prosecutors frequently bemoan this reality but have few answers to satisfy the concerns of reluctant witnesses. Today a growing abolitionist movement

questions whether the police should exist at all, and abolitionist critiques frequently note the untrustworthiness of officers (e.g., Schrader 2021). Police officers themselves voice resentment over community distrust of their work but too rarely acknowledge the role they have played in fostering that distrust. Until police officers, lawyers, and judges treat police deception and bias much more seriously, people impacted by that deception have little reason to change their perceptions.

3. POLICE OFFICERS AS CRIMINAL DEFENDANTS

3.1. Who Should Be Responsible for Prosecuting Police?

Communities of color have raised concerns about unlawful policing for decades, and social scientists have extensively documented police officers' unlawful uses of force against people of color (Dukes & Kahn 2017, Skogan & Meares 2004). But prosecutors historically have been extremely reluctant to charge police officers with crimes, and criminal prosecutions of police officers did not receive consistent scholarly attention until the last decade. One prominent article preceding this period came from Jacobi (2000), who sought to apply lessons learned from the international human rights movement to police brutality in the United States. Jacobi attributed illicit police violence in the United States to local government apathy for prosecuting police, which resulted in almost complete impunity for officers. He then drew lessons from the International Criminal Court, which exists to prosecute human rights abuses where the nation-state in which the abuses occurred is "unwilling or unable genuinely to carry out the investigation or prosecution" (p. 840). Jacobi proposed a similar federal–state compromise in the United States: a new federal statute that permits federal prosecutors to prosecute police officers who commit serious misconduct, if local prosecutors fail to act. Although one such statute (18 U.S.C. § 242) already exists, Jacobi's proposed statute would expand federal prosecutors' ability to intervene by omitting Section 242's requirement that the officers must have intended to deprive their victims of civil rights, and instead permit prosecutions when officers intentionally or recklessly cause serious harm to civilians.

Although Jacobi's proposed reform has been cited extensively in other scholarly literature, Congress has not enacted such a law. However, scholarly dedication to the topic of police prosecutions grew in the wake of the 2014 and 2015 police killings of Michael Brown, Eric Garner, Tamir Rice, and Walter Scott. Chavis Simmons (2015) explored possible conflicts of interest for prosecutors tasked with deciding whether to charge officers accused of crimes. She argued that most prosecutors rely on close working relationships with police to successfully prosecute cases, and expecting those prosecutors to make unbiased decisions about whether officers committed crimes is naïve and unrealistic. Criminal prosecutions of police officers are extremely rare, and Chavis Simmons concluded that failure to prosecute officers severely damages public confidence in police. She proposed that, when someone dies in police custody, state law mandate an independent investigation by a special prosecutor from another jurisdiction.

Levine (2016c) published "Who Shouldn't Prosecute the Police," which also used conflict-of-interest laws as a framework for assessing whether local prosecutors should be responsible for charging and prosecuting police officers who commit alleged crimes in their jurisdiction. Levine concluded that local prosecutors have both actual and apparent conflicts when deciding whether to charge officers. Like Chavis Simmons, Levine considered that prosecutors rely on positive relationships with police to prosecute many of their cases. Levine explored how prosecutors' careers are affected by high-profile decisions about whether to prosecute police officers, using the example of St. Louis District Attorney Robert McCulloch, who received extensive criticism for his handling of the criminal investigation of Ferguson police officer Darren Wilson for killing Michael Brown. Levine (2016c, p. 1477) concluded that local prosecutors have an "unwaivable" conflict of interest in cases involving police suspects and suggested outsourcing police

prosecutions to state or federal prosecutors, or even tasking outsiders like civilian review boards with prosecuting police.

Green & Roiphe (2017) disagreed with Levine, arguing that her assumptions about the close relationship between prosecutors and police may not be accurate, and that even if prosecutors have some bias favoring police officers, that may not disqualify them from deciding whether to prosecute police. They pointed out that prosecutors routinely shift alliances and gave the example of prosecutors who offer a cooperating witness leniency in one case and then prosecute that person later if the person is charged with a new crime.

While Green & Roiphe (2017) do not agree that prosecutors necessarily have conflicts in deciding whether to charge police officers, the most interesting aspect of their article is their argument that, if prosecutors do have conflicts in these cases, similar conflicts probably extend to many others as well. The same bias that may lead them to favor police likely impacts how prosecutors assess the credibility of police reports and testimony in cases not involving police defendants, and their inability to assess police in an unbiased way likely taints those cases too. Rather than espousing a broad rule conflicting local prosecutors out of prosecutions against police officers, the authors proposed using the philosophical theory of experimentalism, a pragmatic approach that allows "local actors to experiment with how best to implement broader, communal norms in local settings" (Green & Roiphe 2017, p. 516). Experimentalism, as applied to the question of whether prosecutors should prosecute police officers in their jurisdiction, would discourage fixed approaches and instead allow groups of people closest to the situation to experiment with solutions and, over time, track the efficacy of those solutions and make changes where needed. One example would be forming a committee within a prosecutor's office that meets immediately after a police killing, thoroughly discusses whether they should be conflicted out of that particular investigation, and votes on whether to recuse itself from the investigation.

Most recently, Trivedi & Gonzalez Van Cleve (2020), a lawyer and sociologist, coauthored an article providing a sociolegal history of ways prosecutors have enabled police misconduct. The authors used the same narrative that impacted my own early career: that of Jon Burge, the Chicago police lieutenant who presided over the group of officers who tortured more than 100 Black men in Chicago between the 1970s and early 1990s. Although Burge and his colleagues were racist and sadistic, they could not have gotten away with their crimes for so long were it not for prosecutors turning a blind eye to, or even encouraging, their abuse. Using interviews with prosecutors from the Cook County Attorney's Office, the authors unpacked a culture where supervisors shamed lower-level prosecutors who questioned police officers' stories and threatened them with career demise if the prosecutors reported police misconduct. Prosecutors described an indoctrination process where they were taught to put "blinders on" (Trivedi & Gonzalez Van Cleve 2020, p. 908) when assessing cases and to ignore evidence of police misconduct. One of the many harms of this culture was a near-total failure to prosecute crimes by police officers. Given the culture of complicity between prosecutors and local police, the authors—like Levine and Chavis Simmons—concluded that prosecutors should be conflicted out of any investigations or prosecutions of police in their jurisdiction.

3.2. Protocols for Investigating Potential Crimes by Police

In addition to her article addressing who should prosecute police officers, Levine also published two pieces examining protocols for investigating and charging police officers suspected of crimes. The first, "How We Prosecute the Police" (Levine 2016a), explained that police officers suspected of crimes typically receive more procedural protections than ordinary suspects. Levine highlighted two processes that prosecutors have at their disposal in every case but rarely use except when

investigating police officers: thorough precharge investigations and presentation of exculpatory evidence to grand juries. Levine traced the historical use of grand juries, which once regularly declined to indict people but now serve largely as rubber stamps for prosecutors seeking indictments. Because defense attorneys have no right to be present or cross-examine witnesses during grand jury proceedings and prosecutors are not required to alert grand juries to exculpatory evidence, very few grand juries decline to indict, and prosecutors rarely conduct thorough investigations before presenting their cases to grand juries. In contrast, when prosecutors are tasked with investigating police suspects, they often conduct more thorough investigations and present all angles, including exculpatory evidence, to grand juries. Rather than decry the favorable treatment that police officers receive during decisions whether to file charges, Levine endorsed these protections and argued that prosecutors should afford them to all criminal defendants.

In "Police Suspects," Levine (2016b) identified another form of procedural favoritism officers receive during the criminal investigation process: special protections during interrogations that do not apply to ordinary civilians. These protections, typically negotiated by police unions or codified by state legislatures, give officers the right to review evidence before they are interrogated, allow officers to insist that interrogations happen only during certain hours, limit the number of interrogators and length of questioning, and prevent interrogators from using threats or lies during questioning. Much like her other article, Levine closed not by condemning this favorable treatment for officers but instead by urging that the law afford these protections to ordinary civilians.

Hogan (2020) also proposed a protocol for investigations of police homicides, similar to Levine's: that precharge investigations of police homicides be automatically assigned to an independent law enforcement agency. Hogan, a former prosecutor, expressed concern that in many jurisdictions the police department that employs the officer under investigation for killing a civilian still leads the investigation into that killing. To avoid actual or apparent bias, police departments should not investigate their own officers, particularly when serious crimes are involved. Hogan recommended a "vertical prosecution" model for investigations of police crimes, in which prosecutors work with law enforcement from the inception of the investigation. This model is time and resource intensive, but it offers a more thorough and legally informed perspective into the complicated legal issues that can accompany homicides by officers. Although vertical prosecution may not be feasible for the high number of cases most prosecutor offices handle, Hogan reasoned that officer homicides are rare enough that prosecutors can get involved from the earliest stage.

3.3. Appropriateness of Criminal Prosecutions as a Response to Police Misconduct

Predictably, increased public focus on police prosecutions has led to concerns from scholars who question the use of criminal prosecutions as a tool for addressing misconduct. Levine (2021, p. 997), who five years earlier authored one of the seminal articles advocating for appointment of independent prosecutors to prosecute crimes by police officers, has since sounded a "cautionary note" about relying on prosecutions to address police violence. One concern is that criminal prosecutions distract from systemic change by focusing on individual officers as bad actors, rather than illuminating the systemic ways society empowers police departments and prosecutors to criminalize and subdue people of color. Social science research may support this concern. A recent study of police misconduct data between 1971 and 2018 (Jain et al. 2022) revealed that most police misconduct happens in groups. Even criminal behavior is rarely the result of a single bad officer but instead the product of group dynamics and policing culture that tolerates or even encourages routine misconduct (see also Wood et al. 2019).

Hoag (2021) questioned the efficacy of asking a criminal system that regularly harms Black people—and authorizes police to inflict many of those harms—to achieve justice for Black victims

of police violence. Using a historical framework, Hoag traced the history of civil rights laws from the Reconstruction Era onward, demonstrating that the criminal system has routinely failed to provide justice for Black victims of government-enabled violence. Rather than relying on criminal prosecutions to hold police accountable, Hoag urged her readers to imagine more holistic solutions that focus on preventing harm and offered divestment from police, reinvestment in community resources, and reparations as possible answers.

Chin (2017) used the prosecution of Peter Liang, an Asian American police officer who shot and killed Black New York City resident Akai Gurley, as a case study to analyze how criminal prosecutions can obscure real causes of harm and needed solutions. Chin argued that the most significant contributors to Mr. Gurley's tragic death were poorly maintained public housing—Liang unintentionally shot him while patrolling an unlit stairwell within a public housing building—the use of police to patrol public housing instead of providing safe environments for residents, police department firearms policies that allowed the department to issue guns with no external safety devices, and inadequate training for rookie officers. According to Chin, the intense media focus on the criminal charges against Liang may have distracted people from questioning the environmental and policy decisions that enabled this tragedy.

Armacost (2019) too cautioned that holding individual officers criminally accountable for killing civilians should not take the place of examining systemic factors that created the civilian–police encounter. Although Armacost stopped short of saying that prosecutors should not charge police officers, she urged her audience to learn from other industries like the power plant and aviation industries that apply a holistic approach to preventing tragedies. Using former Cleveland police officer Timothy Loehmann's killing of 12-year-old Tamir Rice as an example, Armacost pointed out the numerous people, policies, and decisions that contributed to Tamir's death, including a 911 dispatcher inaccurately describing the initial 911 call in her report to police and the police car driver's decision to stop very close to Tamir rather than speak to him from a distance (and, I add, the police department's decision to hire Loehmann, who had previously been terminated from another nearby police department for emotional instability and poor performance with firearms). Regardless of whether the Cuyahoga County prosecutor should have filed criminal charges against Loehmann, a holistic systems-focused review of the tragedy could lead to more change than a criminal prosecution alone.

Other scholars continue to favor criminal prosecutions as an important means of holding police officers accountable. Hendricks notes that police misconduct disproportionately victimizes people of color and that many Black survivors of police misconduct want to see officers held criminally accountable (A. Hendricks, manuscript forthcoming). Rather than limiting police prosecutions, Hendricks calls for expanding them by abolishing statutes of limitations for crimes committed by public officers, so that officers can be charged with crimes they committed years earlier but concealed for many years (e.g., assaults and perjuries that contributed to wrongful convictions).

4. POLICE AS CIVIL DEFENDANTS

4.1. Suing the Police: Barriers, Defenses, and Proposals for Change

Legal scholars disagree about whether civil lawsuits have historically served as a reliable means for civilians to pursue remedies against government actors (Fallon 2019, Woolhandler 1987). They do, however, agree that the US Supreme Court has since the 1980s significantly narrowed opportunities for civilians to pursue civil relief against government actors, especially law enforcement officers (Baude 2018; Fallon 2019; Schwartz 2014, 2017).

The most heavily critiqued barrier to civilians suing police is the legal doctrine of qualified immunity. Qualified immunity applies to lawsuits filed under 42 U.S.C. § 1983 (colloquially known

as Section 1983), seeking monetary damages for misconduct by government actors. Section 1983 was originally passed as part of the Ku Klux Klan Act, enacted during the Reconstruction Era in response to southern states' unwillingness to vindicate Black litigants against government officials who were violating their newly recognized constitutional rights. Section 1983 created a civil cause of action for people claiming to have suffered violations of legal rights at the hands of government actors. Qualified immunity is a Supreme Court–made doctrine that operates as a defense to these lawsuits: It makes police officers and other government actors immune from Section 1983 lawsuits unless the plaintiff can show that the government actors violated clearly established legal rights that a reasonable person would have known about.

Though many scholars have written about qualified immunity, none is more prolific and respected in this area than Joanna Schwartz. In "Police Indemnification" (Schwartz 2014) and "How Qualified Immunity Fails" (Schwartz 2017), Schwartz traced the history and original intentions of the qualified immunity doctrine, which the court said it adopted to protect government officials from financial liability for mistakes they make in good faith. Schwartz then conducted empirical analyses of hundreds of lawsuits against law enforcement officers and found that qualified immunity rarely accomplishes either of the two major policy goals that the court asserted as bases for embracing the doctrine: It does not actually shield police officers from individual financial liability (because other doctrines like indemnification already protect officers from personal financial liability), and it rarely protects government agencies from costs associated with civil lawsuits. One data point is especially striking: Schwartz's (2014) analysis of 9,225 civil lawsuits revealed that police officers did not personally pay any portion of the judgment in more than 99.5% of the lawsuits. Schwartz's (2017, p. 11) study concluded the courts apply qualified immunity in a manner "overly protective of government officials who act unconstitutionally and in bad faith."

In "The Case Against Qualified Immunity," Schwartz (2018) then argued that while qualified immunity does not achieve its intended policy goals, it may hamper development of constitutional law by allowing courts to dismiss cases without addressing the underlying claim of constitutional violations. It also sends a message that police officers can freely break the law without consequence. Schwartz reasoned that, because the doctrine protects even officers acting in bad faith while achieving none of its intended policy goals, the doctrine is no longer defensible.

Other than Schwartz, very few scholars have collected significant data measuring the efficacy of qualified immunity. Even those discussing the doctrine on purely normative terms have only rarely attempted persuasive defenses of qualified immunity. One of the most-cited qualified immunity scholars other than Schwartz is Baude (2018), who argued that the qualified immunity doctrine is not even legal. Baude analyzed qualified immunity's historical passage and use and concluded that it has no ground in either statutory text or common law and is inconsistent with the intended purpose of Section 1983. Of the few scholars to defend the doctrine, Nielson & Walker (2018) are perhaps the most prominent. Even theirs is a half-hearted defense: They concluded that qualified immunity is a lawful exercise of the Supreme Court's supervisory authority over lower courts and argued that Schwartz's claims that the doctrine is ineffective are important but based on insufficient evidence. Because in their view the evidence is insufficient to assess whether qualified immunity reduces frivolous litigation, they called for further empirical research before reassessing the doctrine. They also agreed that the doctrine discourages clarity in developing constitutional law and urged courts to first decide whether officers violated constitutional rights before addressing whether those officers are immune from civil lawsuit. Fallon (2019) also defended qualified immunity in part, arguing that it can serve as a valuable tool for discouraging frivolous lawsuits but agreeing that it discourages some valid lawsuits against police and other government actors and thereby frustrates accountability.

Other scholars have addressed obstacles to police lawsuits outside the qualified immunity context. Most recently, Ravenell (2022) addressed a logistical barrier to successful Section 1983 lawsuits against police: identifying the specific police officers who committed constitutional violations. Ravenell described a hypothetical but common scenario in which someone was arrested by a group of officers, one of whom used excessive force during the arrest. Regardless of whether defenses like qualified immunity are available, the arrestee's lawsuit will fail if they cannot identify which officer used the improper force. Ravenell noted that the blue wall of silence contributes to this challenge, because police officers' reluctance to speak up about colleagues' misconduct means that people who have suffered harm will rarely receive any assistance from other police officers in proving that the harm occurred or identifying the officers involved. To combat the blue wall of silence, Ravenell proposed shifting the burden of proof, so that if a plaintiff can identify that any officer was present for and committed the constitutional violation, the burden should then shift to the officers sued to prove they did not commit the offense.

Qualified immunity insulates government actors only from lawsuits seeking monetary damages. Accordingly, scholars like Patel (2020) have focused on lawsuits seeking equitable relief against police officers or departments. Many of these lawsuits seek structural reform, challenging systemic practices like stop-and-frisk policies rather than claiming misconduct by a single officer. Patel described the hurdles the Supreme Court has erected against plaintiffs seeking structural policing reform, including a narrow view of who has standing to sue, high evidentiary standards for proving that the plaintiffs' harm resulted from specific policies rather than individual actions, and difficult standards for certifying a class of plaintiffs who allege similar harms. Patel then used several case studies involving successful lawsuits against police departments, including *Floyd v. City of New York* (2013), which successfully alleged that the New York Police Department engaged in racially discriminatory stops and frisks of Black and Latino people. Patel stressed the importance of gathering extensive evidence, including statistical data, testimony from impacted people, and information about longstanding policies and practices, to overcome the legal hurdles the court has imposed.

Although abolition-minded scholars have written numerous articles critiquing the efficacy of criminal prosecutions of police officers, few have tried to assess how abolitionist thinking should impact civil lawsuits against police. One obvious explanation for this gap is that much of the abolitionist conversation today centers around the criminal legal system, so understandably most scholarship likely does as well. But that explanation is not completely satisfying; abolitionist ideas and critiques about the usefulness of the legal system in addressing police misconduct surely apply to our civil system as well. I expect to see more abolitionist writing applied to the topic of civil lawsuits against police in coming years, and perhaps more questions about what meaningful role civil suits play in addressing the existence and effect of police misconduct.

5. CONCLUSION

Although societal attention to issues regarding police officer misconduct and officers' reliability as witnesses has increased dramatically in the past decade, these concerns have been present for decades. As this literature review demonstrates, many scholars have studied systemic problems in our police accountability systems and wrestled with creative solutions for addressing those problems. However, more work remains. In particular, very little data exist on two topics discussed in this review: whether increased transparency in and public access to police misconduct records reduce police misconduct (see Section 2.3) and whether criminal prosecutions of police officers have a deterrent effect on police misconduct (see Section 3.1). Future studies in these areas could be of great benefit.

From a normative standpoint, whereas scholars do not always agree on methods for improving police accountability and addressing police misconduct, they tend to agree on the fundamental premise behind most policing research: that our social and legal systems should strive to ensure safe and equitable enforcement of laws for all communities. That is a goal most police departments should be able to endorse as well. We are, as a society, far from reaching that point, and some have understandably abandoned hope that we can ever achieve it. But scholarship can play an important role in both raising awareness about problems and providing potential solutions. My hope is that this body of literature on police officers as witnesses and defendants continues to grow, and that scholars continue to grapple with best practices for creating safe communities where all can flourish.

DISCLOSURE STATEMENT

The author is not aware of any affiliations, memberships, funding, or financial holdings that might be perceived as affecting the objectivity of this review.

LITERATURE CITED

Abel J. 2015. *Brady*'s blind spot: impeachment information in police personnel files and the battle splitting the prosecution team. *Stanford Law Rev*. 67:743–808

Abel J. 2022. Cop tracing. *Cornell Law Rev.* 107:102–86

Alpert GP, Noble JJ. 2009. Lies, true lies, and conscious deception. *Police Q.* 12:237–54

Armacost BE. 2019. Police shootings: Is accountability the enemy of prevention? *Ohio State Law J.* 80:907–86

Baude W. 2018. Is qualified immunity unlawful? *Calif. Law Rev.* 106:45–88

Brady v. Maryland, 373 U.S. 83 (1963)

Capers B. 2008. Crime, legitimacy and testilying. *Indiana Law J.* 83:835–80

Chappell AT, Lanza-Kaduce L. 2010. Police academy socialization: understanding the lessons learned in a paramilitary-bureaucratic organization. *J. Contemp. Ethnogr.* 39:187–214

Chavis Simmons K. 2015. Increasing police accountability: restoring trust and legitimacy through the appointment of independent prosecutors. *Wash. Univ. J. Law Policy* 49:137–58

Chicago Torture Justice Mem. 2022. *The Burge case*. **https://chicagotorture.org/reparations/history/**

Chin GJ. 2017. The problematic prosecution of an Asian American police officer: notes from a participant in *People v. Peter Liang*. *Georgia Law Rev*. 51:1023–45

Chin GJ, Wells SC. 1998. The "blue wall of silence" as evidence of bias and motive to lie: a new approach to police perjury. *Univ. Pittsburgh Law Rev.* 59:233–99

Cox K, Spielvogel W. 2022. Police misconduct records secret, difficult to access. *Associated Press*, Jan. 24. **https://pulitzercenter.org/stories/police-misconduct-records-secret-difficult-access**

Dorfman DN. 1998. Proving the lie: litigating police credibility. *Am. J. Crim. Law* 26:455–503

Dukes K, Kahn K. 2017. What social science research says about police violence against racial and ethnic minorities: understanding the antecedents and consequences. *J. Soc. Issues* 73:690–700

Fallon RH Jr. 2019. Bidding farewell to constitutional torts. *Calif. Law Rev.* 107:933–97

Floyd v. City of New York, 959 F. Supp. 2d 540 (SDNY 2013)

Friedman B. 2017. Why do courts defer to cops. *Harvard Law Rev. Forum* 130:323–32

Galanter M. 1974. Why the "haves" come out ahead: speculations on the limits of legal change. *Law Soc. Rev.* 9(1):95–160

Green BA, Roiphe R. 2017. Rethinking prosecutors' conflicts of interest. *Boston Coll. Law Rev.* 58:463–538

Hendricks A. 2021. Exposing police misconduct in pre-trial criminal proceedings. *NYU J. Legis. Public Policy* 24:177–246

Hoag A. 2021. Abolition as the solution: redress for victims of police excessive force. *Fordham Urban Law J.* 48:721–43

Hogan T. 2020. Officer-involved shooting investigations demystified: slashing through the Gordian knot. *Drexel Law Rev.* 13:1–85

Horowitz R. 2013. *In the Public Interest: Medical Licensing and the Disciplinary Process*. New Brunswick, NJ: Rutgers Univ. Press
Hunt J, Manning PK. 1991. The social context of police lying. *Symb. Interact.* 14:51–70
Jacobi J. 2000. Prosecuting police misconduct. *Wis. Law Rev.* 2000:789–853
Jain A, Sinclair R, Papachristos AV. 2022. Identifying misconduct-committing officer crews in the Chicago Police Department. *PLOS ONE* 17(5):e0267217
Johnson VB. 2017. Bias in blue: instructing jurors to consider the testimony of police officer witnesses with caution. *Pepperdine Law Rev*. 44:245–304
Johnson VB. 2019. KKK in the PD: white supremacist police and what to do about it. *Lewis Clark Law Rev*. 23:205–43
Levenson L. 2021. Whose rights matter more: Police privacy or a defendant's right to a fair trial? *Loyola Law Rev*. 54:495–513
Levin B. 2023. After the criminal justice system. *Wash. Law Rev.* In press
Levin LC. 2007. The case for less secrecy in lawyer discipline. *Georgetown J. Legal Ethics* 20:1–50
Levine K. 2016a. How we prosecute the police. *Georgetown Law J.* 104:745–76
Levine K. 2016b. Police suspects. *Columbia Law Rev.* 116:1197–258
Levine K. 2016c. Who shouldn't prosecute the police. *Iowa Law Rev*. 101:1447–96
Levine K. 2021. Police prosecutions and punitive instincts. *Wash. Univ. Law Rev.* 98:997–1057
Lvovsky A. 2017. The judicial presumption of police expertise. *Harvard Law Rev*. 130:1995–2081
Lvovsky A. 2021. Rethinking police expertise. *Yale Law J.* 131:475–572
McCartney S, Parent R. 2015. *Ethics in Law Enforcement*. Victoria, Can.: BCcampus. **http://opentextbc.ca/ethicsinlawenforcement/**
Moran R. 2017. In police we trust. *Villanova Law Rev.* 62:953–1003
Moran R. 2018. Contesting police credibility. *Wash. Law Rev.* 93:1339–96
Moran R. 2019. Police privacy. *Univ. Calif.-Irvine Law Rev*. 10:153–98
Moran R. 2022. *Brady* lists. *Minn. Law Rev*. 107:657–733
Nielson AL, Walker CJ. 2018. A qualified defense of qualified immunity. *Notre Dame Law Rev*. 93:1853–85
Orfield MW Jr. 1992. Deterrence, perjury, and the heater factor: an exclusionary rule in the Chicago criminal courts. *Colo. Law Rev.* 63:75–161
Paoline E III. 2003. Taking stock: toward a richer understanding of police culture. *J. Crim. Justice* 31:199–214
Patel S. 2020. Jumping hurdles to sue the police. *Minn. Law Rev.* 104:2257–374
Ravenell T. 2022. Unidentified police officials. *Tex. Law Rev.* 100:891–939
Schrader S. 2021. The lies cops tell and the lies we tell about cops. *The New Republic*, May 27. **https://newrepublic.com/article/162510/cops-lie-public-safety-defund-the-police**
Schwartz JC. 2014. Police indemnification. *NYU Law Rev.* 89:885–1001
Schwartz JC. 2017. How qualified immunity fails. *Yale Law J.* 127:2–76
Schwartz JC. 2018. The case against qualified immunity. *Notre Dame Law Rev*. 93:1797–840
Seron C, Munger F. 1996. Law and inequality: race, gender. . .and, of course, class. *Annu. Rev. Sociol.* 22:187–212
Sierra-Areévalo M. 2021. American policing and the danger imperative. *Law Soc. Rev.* 55(1):70–103
Simon-Kerr J. 2015. Systemic lying. *William Mary Law Rev*. 56:2175–233
Singh D. 2022. The causes of police corruption and working towards prevention in conflict-stricken states. *Laws* 11(5):69
Skogan WG, Meares TL. 2004. Lawful policing. *Ann. Am. Acad. Political Soc. Sci.* 593:66–83
Skolnick JH. 1982. Deception by police. *Crim. Justice Ethics* 1(2):40–54
Slobogin C. 1996. Testilying: police perjury and what to do about it. *Colo. Law Rev.* 67:1037–60
Trivedi S, Gonzalez Van Cleve N. 2020. To serve and protect each other: how police-prosecutor codependence enables police misconduct. *Boston Univ. Law Rev.* 100:895–933
Wilson M. 2010. An exclusionary rule for police lies. *Am. Crim. Law Rev.* 47:1–55
Wood G, Roithmayr D, Papachristos AV. 2019. The network structure of police misconduct. *Socius* 5. **https://doi.org/10.1177/2378023119879798**
Woolhandler A. 1987. Patterns of official immunity and accountability. *Case Western Reserve Law Rev*. 37:396–483
Zeidman S. 2005. Policing the police: the role of the courts and the prosecution. *Fordham Urban Law J.* 32:315–53