


2-15-2017

## Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution

Vida B. Johnson

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### Recommended Citation

Vida B. Johnson *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 Pepp. L. Rev. 245 (2017)

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# **Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution**

Vida B. Johnson\*

## *Abstract*

*Jurors in criminal trials are instructed by the judge that they are to treat the testimony of a police officer just like the testimony of any other witness. Fact-finders are told that they should not give police officer testimony greater or lesser weight than any other witness they will hear from at trial. Jurors are to accept that police are no more believable or less believable than anyone else.*

*Jury instructions regarding police officer testimony stand in contrast to the instructions given to jurors when a witness with a legally recognized interest in the outcome of the case has testified. In cases where witnesses have received financial assistance or plea deals for their testimony, a special instruction is given. For example, when a witness with a cooperation agreement testifies, the trial court will tell the jury that while the witness has the same obligation to tell the truth as other witnesses, the jury can consider whether the witness has an interest different from other types of witnesses and that her testimony should be considered with caution. In many jurisdictions, when a criminal defendant testifies, the jurors are told, despite the presumption of innocence, that he has a “vital” interest in*

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*the outcome of the case and that jurors can give his testimony less weight. Courts have routinely and almost universally refused to allow similar instructions for police officer testimony.*

*Instructions highlighting that officers may be biased or have an interest in the outcome of the case are almost never given in a criminal trial. To the contrary, jurors are effectively told they must not consider the police officer's status as a police officer when considering her testimony.*

*In many cases, however, police officers are not disinterested parties. They work hand-in-hand with prosecutors in building a case against a defendant. In undercover buy-bust stings, search warrant cases, and assault on police officers cases, police officers are not only the sole witnesses to the alleged offense, they are also invested in the outcome of the case. These cases would not exist without the police officer's involvement. These crimes—sometimes police-manufactured—are often the result of departmental interests. For example, police go out and act in an undercover capacity and claim to buy drugs or purchase sex because of the agendas that they themselves or their offices have set. Later, they may have to justify decisions they made about the selective use of limited departmental resources with arrests and convictions. Law enforcement may also be motivated by the money at stake in the civil forfeiture related to a criminal case. Recent events in Chicago, Baltimore, Cincinnati, Ferguson, Staten Island, South Carolina, and other locations have created a public dialogue on police credibility.*

*Despite the strong interests of law enforcement, the law has treated law enforcement as impartial when, in reality, officers are in many instances "biased advocates." This Article calls for jury instructions that reflect the reality of these police officer interests.*

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## I. INTRODUCTION

In jurisdictions all across America, jurors in criminal trials are instructed by the judge that they are to treat the testimony of a police officer just like the testimony of any other witness.<sup>1</sup> The instructions were designed, at least in part, to correct for potential juror bias in favor of police officer testimony, but instead serve to preclude fair consideration of police officers' inherent motives to fabricate or shade testimony to obtain a conviction.<sup>2</sup> Fact-finders are told that they should not give police officers' testimony any greater or lesser weight than that of other witnesses they will hear from at trial.<sup>3</sup> They are to accept that police are no more or less believable than anyone else.<sup>4</sup>

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1. See, e.g., *United States v. Martinez*, 981 F.2d 867, 870–71 (6th Cir. 1992) (“People who are involved in law enforcement . . . [are] evaluated and judged by the same standard as anyone else . . . .”); *United States v. Nash*, 910 F.2d 749, 755 (11th Cir. 1990) (“The testimony of government agents is to be . . . given the same consideration as that of any other witness. No more and no less weight is to be given their testimony . . . .”); *People v. Lopez*, 190 A.D.2d 866, 866 (N.Y. App. Div. 1993) (“The court improperly and inexplicably refused to instruct the jury that the testimony of a police officer, in and of itself, is entitled to no greater weight than that of an ordinary citizen. This is a basic and well established precept that is routinely included in trial judges’ instructions to juries.”); *People v. Williams*, 593 N.E.2d 968, 984 (Ill. App. Ct. 1992) (“This court has recited the general principle that a police officer’s testimony is to be evaluated in the same manner as that of any witness.”).

2. See Thomas G. Hooper, *United States v. Lancaster: The Fourth Circuit Reverses Course on Jury Voir Dire in “Swearing Contest” Cases*, 76 N.C. L. REV. 233, 233 (1997).

3. See, e.g., *Martinez*, 981 F.2d at 870–71; *Nash*, 910 F.2d at 755; *Williams*, 593 N.E.2d at 984; *Lopez*, 190 A.D.2d at 866.

4. See, e.g., *United States v. Lawes*, 292 F.3d 123, 131 (2d Cir. 2002) (“[T]he jurors were instructed at the end of the trial that they were not to view the credibility of law-enforcement witnesses more favorably than other witnesses because of the officials’ occupation.”); *United States v. Cornett*, 232 F.3d 570, 573 (7th Cir. 2000) (“[T]he court instructed the jury that they are the sole judges of the witnesses’ credibility, and that a law enforcement officer’s testimony is neither more nor less entitled to belief than any other witness.”); *State v. Morales*, 10 P.3d 630, 634 (Ariz. Ct. App. 2000) (“[T]he trial court instructed the jurors . . . that they were the sole triers of witness credibility and that a police officer’s testimony ‘is not entitled to any greater or lesser weight or believability merely because of the fact that he is a police officer.’”); *State v. Marcisz*, 913 A.2d 436, 442 (Conn. App. Ct. 2007) (Flynn, J., dissenting) (“Connecticut courts routinely instruct juries that they should evaluate the credibility of a police officer in the same way that they evaluate the testimony of any other witness, and that the jury should ‘neither believe nor disbelieve the testimony of a police official just because he is a police official.’”); *People v. Valdez*, 53 A.D.3d 172, 179 (N.Y. App. Div. 2008) (Andrias, J., concurring) (“[T]he court gave the jury the standard instruction that the lieutenant’s testimony was to be given no more credence than that of any other witness simply because he was a police officer.”); *State v. Clark*, 655 N.E.2d 795, 817 (Ohio Ct. App. 1995) (“It has been held that a jury should be given such instruction, when warranted, to the effect that a police officer is not, by virtue of that status, deemed to be more credible than any other witness, but, instead, his credibility and the weight to be given his testimony are to be judged upon the same standard as other witnesses’.”).

Jury instructions regarding police officer testimony stand in contrast to the instructions given to jurors where a witness with a legally recognized interest in the outcome of the case has testified.<sup>5</sup> In cases where witnesses have received financial assistance or plea deals for their testimony, a special instruction is given.<sup>6</sup> For example, when a witness with a cooperation agreement testifies, the trial court will tell the jury that while the witness has the same obligation to tell the truth as other witnesses, the jury can consider whether the witness “has an interest different from other types of witnesses”<sup>7</sup> and that her testimony should “be considered with caution.”<sup>8</sup> In many jurisdictions, when a criminal defendant testifies, the jurors are told, despite the presumption of innocence, that he has a “vital” interest in the outcome of the case and that jurors can give his testimony less weight.<sup>9</sup> Courts have

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5. See, e.g., *Martinez*, 981 F.2d at 870–71; *Nash*, 910 F.2d at 755; *Williams*, 593 N.E.2d at 984; *Lopez*, 190 A.D.2d at 866.

6. See Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 290–91 (1998).

7. See, e.g., BARBARA BERGMAN, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA 2.203 (5th ed. 2015) (“[Y]ou may consider whether a witness who has entered into such an agreement has an interest different from other types of witnesses.”).

8. Compare *United States v. Austin*, 215 F.3d 750, 752 (7th Cir. 2000) (“Although the judge thought an addict-informant instruction inadvisable, he did give an informant instruction, drawn from Instruction 3.13 of the *Pattern Criminal Federal Jury Instructions for the Seventh Circuit* (1998), telling the jury that the testimony of any cooperating witness should be ‘considered with caution and great care.’”), and *United States v. Dunson*, 142 F.3d 1213, 1214 (10th Cir. 1998) (“While instructing the jury, the district court told them an informant’s or immunized witness’ testimony should be considered with caution.”), with *Lawes*, 292 F.3d at 131 (“[T]he jurors were instructed at the end of the trial that they were not to view the credibility of law-enforcement witnesses more favorably than other witnesses because of the officials’ occupation.”); *Cornett*, 232 F.3d at 576 (“[T]he court instructed the jury that they were the ‘sole judges of the credibility of the witnesses’ and that a police officer’s testimony ‘is neither more nor less entitled to belief than any other witness.’”); *Morales*, 10 P.3d at 634 (“[T]he trial court instructed the jurors . . . that they were the sole triers of witness credibility and that a police officer’s testimony ‘is not entitled to any greater or lesser weight or believability merely because of the fact that he is a police officer.’”); *Marcisz*, 913 A.2d at 442 (Flynn, J., dissenting) (“Connecticut courts routinely instruct juries that they should evaluate the credibility of a police officer in the same way that they evaluate the testimony of any other witness, and that the jury should ‘neither believe nor disbelieve the testimony of a police official just because he is a police official.’”); *Valdez*, 53 A.D.3d at 179 (“[T]he court gave the jury the standard instruction that the lieutenant’s testimony was to be given no more credence than that of any other witness simply because he was a police officer.”); *Clark*, 655 N.E.2d at 817 (“It has been held that a jury should be given such instruction, when warranted, to the effect that a police officer is not, by virtue of that status, deemed to be more credible than any other witness, but, instead, his credibility and the weight to be given his testimony are to be judged upon the same standard as other witnesses’.”).

9. See *United States v. Suriel*, 335 F. App’x 136, 138–39 (2d Cir. 2009) (unpublished opinion) (finding no error “affecting [the defendant’s] substantial rights” where a jury instruction warned in

routinely and almost universally refused to allow similar instructions for police officer testimony.<sup>10</sup> Instructions highlighting that officers may be biased or have an interest in the outcome of the case are almost never given in a criminal trial.<sup>11</sup> To the contrary, jurors are effectively told they must not consider the police officer's status as a police officer when considering the police officer's testimony.<sup>12</sup>

In many cases, however, police officers are not disinterested parties.<sup>13</sup> In undercover buy-bust stings, search warrant cases, and cases of assault on police officers, police officers are not only usually the sole witnesses to the

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part that the testifying defendant "has a deep personal interest in the outcome of the prosecution" which "creates a motive for false testimony"); *Walker v. United States*, 982 A.2d 723, 740 (D.C. 2009) (rejecting the defendant's argument that "when the court instructed the jury that they could weigh [the defendant's] testimony in light of his 'interest in the outcome' of the case, the court erred by singling him out").

10. See *United States v. Davis*, 779 F.3d 1305, 1311 (11th Cir.) (holding that "there was no need for a separate instruction on officer credibility," and the circuit consequently has no standard for such instructions), *cert. denied*, 136 S. Ct. 97 (2015); *United States v. Ouimette*, 798 F.2d 47, 49–50 (2d Cir. 1986) (holding that "it is inappropriate to charge that police officers testifying at trial are especially interested in the outcome of the case."); *People v. Liebert*, 211 A.D.2d 510, 511 (N.Y. App. Div. 1995) (finding "the defendant's testimony that he was coerced into making a written confession . . . provided no basis for singling [police officers] out as interested witnesses as a matter of law."); *People v. Melvin*, 128 A.D.2d 647, 648 (N.Y. App. Div. 1987) ("Nor is a police officer an interested witness as a matter of law."); *State v. Hunt*, 483 S.E.2d 417, 421 (N.C. 1997) ("A party to a criminal case is not entitled to an instruction on witness credibility which focuses on law enforcement officers as a class."); *State v. Sowden*, 269 S.E.2d 274, 277 (N.C. Ct. App. 1980) (holding that a police officer is not an interested witness as a matter of law); *Commonwealth v. Gibson*, 720 A.2d 473, 481 (Pa. 1998) (holding that the trial court did not abuse its discretion in declining to allow jury instructions that specifically referred to the interest of police officers); *Commonwealth v. Clark*, 512 A.2d 1282, 1285 (Pa. 1986) (finding the trial court's refusal to give instructions describing police officers as interested witnesses to be appropriate); see also *Braxton v. United States*, 852 A.2d 941, 944 (D.C. 2004) (indicating that the jurors were instructed to "give neither more weight nor less weight to the testimony of a witness simply because that witness is a police officer"); *State v. Bauer*, No. 1 CA-CR 14-0866, 2015 WL 8925164, at \*3 (Ariz. Ct. App. Dec. 15, 2015) (stating that the jury was instructed to "consider the officer's testimony the same as they would any other witness"); *State v. Jones*, 128 A.3d 431, 443 (Conn. 2015) (stating that the trial court instructed the jury to treat the police official's testimony as they would the testimony of any other witness); *People v. McCloud*, 121 A.D.3d 1286, 1291 (N.Y. App. Div. 2014) (stating that the jurors were told to "scrutinize the testimony of police officers as they would the testimony of any other witness").

11. See, e.g., *Davis*, 779 F.3d at 1311; *Ouimette*, 798 F.2d at 49–50; see also David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 498 (1998) (explaining that police witnesses enjoy a "silent presumption of reliability," which puts the defendant at a distinct advantage).

12. See *supra* note 1 and accompanying text.

13. See *Chin & Wells*, *supra* note 6, at 291 (noting police officers' incentive to avoid harming the organization for which they work in police testimony).

alleged offense, but they are also invested in the outcome of the case.<sup>14</sup> These cases would not exist without the police officer's involvement.<sup>15</sup> The crimes—sometimes police-manufactured—are often the result of departmental interests.<sup>16</sup> For example, police go out and act in an undercover capacity and claim to buy drugs or purchase sex because of the agendas that they themselves or their office have set.<sup>17</sup> Later, they may have to justify decisions made about the selective use of limited departmental resources with arrests and convictions.<sup>18</sup> An officer also may have to justify the decision to arrest a particular person and the use of force or intrusion into a person's privacy.<sup>19</sup>

Sting operations are often tied to police department budgets,<sup>20</sup> and individual departments often need to keep their arrest numbers up to justify their budgets.<sup>21</sup> Thus, officers go out to make arrests to meet these numbers.<sup>22</sup> Millions of dollars recovered in certain types of cases can be seized by the police department and used for the department that recovered the funds.<sup>23</sup> Individual officers' jobs may depend on the existence of a

14. See Sa'id Wekili & Hacinth E. Leus, *Police Brutality: Problems of Excessive Force Litigation*, 25 PAC. L. J. 171, 189 (1994) (noting that police officers receive expert witness training and are often the only witness); see also Dorfman, *supra* note 11, at 460–61 (explaining how police officers can be incentivized to commit perjury).

15. See *infra* Part IV (discussing the departmental and financial incentives to secure arrests).

16. See *infra* Part IV.

17. See *infra* note 20 and accompanying text.

18. See *infra* note 20 and accompanying text.

19. See *infra* Part IV.

20. See, e.g., Jim Borden, *Prostitution Stings to Fund Police Budget*, KALAMAZOO GAZETTE, (Oct. 4, 2007, 4:35 PM), [http://blog.mlive.com/kzgazette/2007/10/prostitution\\_stings\\_to\\_fund\\_po.html](http://blog.mlive.com/kzgazette/2007/10/prostitution_stings_to_fund_po.html) (“The Genesee County sheriff is turning to prostitutes and their customers to help him balance the budget.”); Hector Castro, *Glitches Hurt Effort to Fight Prostitution: Clerking Error Misdirected Money*, SEATTLE POST-INTELLIGENCER (July 7, 2005, 10:00 PM), <http://www.seattlepi.com/local/article/Glitches-hurt-effort-to-fight-prostitution-1177881.php> (“It’s been almost three years since Seattle city leaders created a plan to have those caught hiring prostitutes pay to help them.”); Lisa Getter & Mary Ann Esquivel, *Some Cuts in Police Budget Restored*, MIAMI HERALD, Sept. 23, 1987, at 1B; Matt Gutman, Erin Brady, Seni Tienabeso, & Candace Smith, *How Undercover Cops in a Florida City Make Millions Selling Cocaine*, ABC NEWS (Oct. 9, 2013), <http://abcnews.go.com/US/undercover-cops-florida-city-make-millions-selling-cocaine/story?id=20523714> (“Police in a Southern Florida community . . . have been using a controversial tactic to conduct cocaine sting operations and have been raking in millions of dollars in the process.”).

21. See *infra* Part IV.

22. See *infra* Part IV.

23. Michael Sallah et al., *Stop and Seize: Aggressive Police Take Hundreds of Millions of Dollars from Motorists Not Charged with Crimes*, WASH. POST (Sept. 6, 2014), <http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/>.

department or operation.<sup>24</sup> In addition to budgetary interests and crime creation, there are professional rewards for officers who make not only arrests, but arrests that result in convictions.<sup>25</sup> These issues are just some of the pressures that drive the operations of a police department.

In addition to conscious biases that police may hold because of pressures to make arrests—such as the money at stake in the criminal justice system or the professional interests involved in a specific operation—police may hold other biases as well.<sup>26</sup> Unconscious racial or socio-economic biases may impact an officer's views towards defendants, and those biases may have motivated some to become police officers in the first place.<sup>27</sup> Institutional or group pressures also impact law enforcement officers.<sup>28</sup> Any of these biases—conscious or not—can impact the veracity of an officer's testimony.

What is at stake in the individual criminal trial is not trivial.<sup>29</sup> The defendant faces the loss of his freedom and livelihood, and a host of other collateral consequences, should he receive a conviction.<sup>30</sup> With mandatory minimum sentences, three-strikes laws, and the death penalty, the risks are obviously significant. Indeed, police and prosecutor misconduct is the second leading cause of exonerations in the United States.<sup>31</sup>

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24. See *infra* Part IV.

25. See *infra* Part IV (discussing the financial incentives of arrests and convictions, as well as the incentive for individual officers to perform).

26. See *infra* Part IV.

27. Lorie A. Fridell, *Racially Biased Policing: The Law Enforcement Response to the Implicit Black-Crime Association*, in *RACIAL DIVIDE: RACIAL AND ETHNIC BIAS IN THE CRIMINAL JUSTICE SYSTEM* 39, 49–50 (Michael J. Luch, E. Britt Patterson, & Kristina K. Childs eds., 2008); Robert J. Smith, *Reducing Racially Disparate Policing Outcomes: Is Implicit Bias Training the Answer?*, 37 *U. HAW. L. REV.* 295, 297–300 (2015); L. Song Richardson, *Police Racial Violence: Lessons from Social Psychology*, 83 *FORDHAM L. REV.* 2961, 2963 (2015); L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 *ARIZ. ST. L.J.* 267, 278–86 (2012).

28. See Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 *GEO. WASH. L. REV.* 453, 493–507 (2004); see also Michael Motto, *Training to Overcome Institutional Racial Bias in Policing*, *TAMPA BAY TIMES* (May 12, 2012, 4:30 AM), <http://www.tampabay.com/news/perspective/training-to-overcome-institutional-racial-bias-in-policing/1229421> (“The problem is that [law enforcement] need[s] new tools, better strategies and more effective training programs to identify and eliminate institutional bias from their departments.”).

29. See *infra* Part IV (discussing the repercussions of false convictions on defendants, their families, and their communities).

30. See *Padilla v. Kentucky*, 559 U.S. 356, 376 (2010) (Alito, J., concurring) (citing Gabriel J. & Richard W. Holmes Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 *CORNELL L. REV.* 697, 705–06 (2002)).

31. See *% Exonerations by Contributing Factor*, NAT'L REGISTRY EXONERATIONS, <http://www.>

The standing of the particular department, reputation of specific officers, public relations with the community, money seized in civil forfeiture, and officers' careers sometimes depend on the officer's credibility at trial.<sup>32</sup>

Some police officers have acted in response to institutional pressures and personal motivations.<sup>33</sup> As a result, police officers are guilty of all manner of misconduct—planting evidence, creating false charges, perjury, hiding evidence of innocence, and police brutality.<sup>34</sup> Events in Chicago, Baltimore, Cincinnati, Ferguson, Texas, Staten Island, South Carolina, and elsewhere have shown that police officers are not always truthful.<sup>35</sup> For example, video footage in the police shooting of an unarmed man in South Carolina was in direct contrast to the police report written by the officer who shot the man.<sup>36</sup> In Cincinnati, police officers were heard on tape agreeing to facts that did not take place to support an officer who had just shot and killed an unarmed civilian.<sup>37</sup> In Chicago, there was evidence that police officers tried to suppress a video of officers shooting an unarmed teen, though the police officers disputed it.<sup>38</sup> Issues of police brutality, planting evidence, and dishonesty are becoming part of a national discussion, not just relegated to complaints in poor communities and amongst defense attorneys.<sup>39</sup> While there are certainly honest and well-meaning police officers in every police

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law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx# (last visited Oct. 14, 2016) [hereinafter Registry of Exonerations].

32. See *infra* Part IV.

33. See *infra* Part III.

34. See *infra* Part III.

35. See *infra* Part III.

36. See Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer is Charged with Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), [http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html?\\_r=0](http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html?_r=0). The officer claimed that he shot the man because he feared for his life after the man had taken his taser. *Id.* A video of the incident taken surreptitiously by a bystander showed that Walter Scott, the victim, was shot while running away from the officer, with the officer firing eight shots. *Id.*

37. See Amber Hunt, *Criminologist: UC Officer Could Be Charged with Lying*, CINCINNATI ENQUIRER (July 31, 2015, 8:38 AM), <http://www.cincinnati.com/story/news/2015/07/31/criminologist-uc-officer-charged-lying/30890861/>. Officers agreed that they had seen the victim drag the police officer with his car even though a video shows that it never took place. *Id.* Officers then lied in a police report about it. *Id.* In a statement, the Fraternal Order of Police asked citizens “not to jump to conclusions in the case.” *Id.*

38. See Jason Meisner, *Burger King Manager Told Grand Jury of Gap in Laquan McDonald Video*, CHI. TRIB. (Nov. 28, 2015, 5:33 PM), <http://www.chicagotribune.com/news/ct-chicago-cop-shooting-laquan-mcdonald-met-20151127-story.html>.

39. See *infra* Part V (discussing how the public perception of police has changed in recent years as officer misconduct has received increasing coverage in the media).

department, even those officers often stay silent about the conduct of others and promote a “blue wall of silence.”<sup>40</sup>

Recent events have demonstrated that police departments and police unions not only take a unified stand on certain issues, but also wield a tremendous amount of power in the criminal justice system when one of their own is accused of misconduct.<sup>41</sup> The lack of indictments for the officer involved in the killing of a teenager in Ferguson, Missouri and the officers involved in the choking death of a man in Staten Island, which was captured on videotape, are demonstrations of that power.<sup>42</sup> Prosecutors depend on the police to bring cases and therefore have a powerful disincentive to aggressively prosecute police officers.<sup>43</sup>

The Ferguson and Staten Island cases also reveal another way in which jury instructions that treat police officers as “any other witness” blink reality.<sup>44</sup> Police officers and prosecutors work hand-in-hand.<sup>45</sup> The police are the investigators who build the case for the prosecutors and help the prosecutors bring the case to trial.<sup>46</sup> When a prosecutor is happy with a police officer’s work on a particular case, that officer’s career can benefit in both formal and informal ways.<sup>47</sup> Prosecutors routinely award police with commendations and other honors, and they can also, more casually, offer

40. Chin & Wells, *supra* note 6, at 237; Rick Bragg, *Blue Wall of Silence: Graft Shield Behind Old Code*, N.Y. TIMES (Apr. 26, 1994), <http://www.nytimes.com/1994/04/26/nyregion/blue-wall-of-silence-graft-shielded-behind-old-code.html?pagewanted=all>.

41. *See infra* Part VI; Conor Friedersdorf, *How Police Unions and Arbitrators Keep Abusive Cops on the Street*, ATLANTIC (Dec. 2, 2014), <http://www.theatlantic.com/politics/archive/2014/12/how-police-unions-keep-abusive-cops-on-the-street/383258/>.

42. *See infra* Parts III, VI; Ben Kesling & Mark Peters, *Ferguson Police Officer Not Charged in Black Teen’s Shooting*, WALL STREET J. (Nov. 25, 2014, 1:23 AM), <http://www.wsj.com/articles/ferguson-police-officer-not-charged-in-black-teens-shooting-1416882438>.

43. *See infra* Part IV (discussing the close relationship between the prosecutor’s office and the police, and the potential conflict of interest it creates).

44. *See infra* Part II.

45. *See infra* Part IV.

46. *See infra* Part IV.

47. *See* Mitchell Byars, *Boulder Detective Arrested, Accused of Tipping Off Suspect in Internet Sex Sting*, DAILY CAMERA (Sept. 26, 2014, 9:28 AM), [http://www.dailycamera.com/news/boulder/ci\\_26611062/jack-gardner-boulder-police-detective-arrested?source=pkg](http://www.dailycamera.com/news/boulder/ci_26611062/jack-gardner-boulder-police-detective-arrested?source=pkg) (mentioning award given to officer from the district attorney’s office); *Clayton Detective Wins New Award*, NEWS & OBSERVER (Aug. 2, 2013, 4:15 PM), <http://www.newsobserver.com/news/local/community/smithfield-herald/article10277150.html>; Eric Owens, *Prosecutor Finds No Police Misconduct in Princeton Professor’s Racism Claim*, DAILY CALLER (Feb. 17, 2016, 9:06 AM), <http://dailycaller.com/2016/02/17/prosecutor-finds-no-police-misconduct-in-princeton-professors-racism-claim/>.

praise of a police officer's work to his or her superiors.<sup>48</sup> When a police officer does something that disappoints, frustrates, or angers a prosecutor—something that makes obtaining a conviction more difficult for a prosecutor—then the prosecutor's negative feelings are also likely to be communicated to the officer's superiors.<sup>49</sup>

Despite the strong interests of law enforcement, the law has treated law enforcement as impartial when in reality, officers are often what one legal scholar has called "biased advocates."<sup>50</sup> This Article explores whether the current criminal jury instructions and current voir dire practices regarding police officer credibility are fair in all contexts.<sup>51</sup> This piece questions whether police officer credibility instructions interfere with the ability of a defendant to get a fair trial and are thus at odds with the realities of the criminal justice system.<sup>52</sup> This Article further examines whether in certain cases, especially those where police officer credibility is the central issue, an alternative instruction might be more appropriate.<sup>53</sup> The Article will begin with the discussion of the witness credibility instructions and voir dire on the topic.<sup>54</sup> Part II is an exploration of police officer bias and interest.<sup>55</sup> Part III considers police credibility realities.<sup>56</sup> Part IV explores the motivations of some officers to behave outside the law.<sup>57</sup> Part V discusses the impact of police corruption on society.<sup>58</sup> The Article concludes with suggestions for jury instructions regarding police officers that allow jurors to consider reality.<sup>59</sup>

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48. *See infra* Part IV.

49. *See* ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 22–25 (Oxford Univ. Press ed., 1st ed. 2007).

50. Melanie Wilson, *An Exclusionary Rule for Police Lies*, 47 *AM. CRIM. L. REV.* 1, 3 (2010).

51. *See infra* Parts II–V.

52. *See infra* Parts II–V.

53. *See infra* Part VIII.

54. *See infra* Part II.

55. *See infra* Part II.

56. *See infra* Part III.

57. *See infra* Part IV.

58. *See infra* Part V.

59. *See infra* Part VIII.



## II. WITNESS CREDIBILITY AND JURY INSTRUCTIONS

A. *Police Officers' Credibility and the Law*

Jury instructions on evaluating the credibility of witnesses are the way that trial judges tell jurors what to make of the witnesses who have testified.<sup>60</sup> Jury instructions are given prior to deliberations.<sup>61</sup> Most jurisdictions instruct jurors that police officers are not any more or less credible than other witnesses.<sup>62</sup> In some jurisdictions, these instructions protect defendants from the popular view that police officers are more credible than civilian witnesses.<sup>63</sup> On the other hand, these instructions may result in jurors giving police officer testimony more weight than it fairly deserves when a trial judge specifically tells them not to give the testimony of a police officer any less weight simply because the witness is a police officer.<sup>64</sup> The instructions communicate to jurors that police officers are neutral witnesses with nothing to lose and no interest in the outcome of the case.<sup>65</sup>

The issue of police officers' credibility was raised as early as 1915.<sup>66</sup> The Supreme Court of Kansas rejected arguments on appeal that an instruction should have been given about detectives who had testified at a murder trial.<sup>67</sup> Jurors had been given a single general instruction about the evaluation of witnesses, though nothing specific about police officer witnesses.<sup>68</sup> In speaking about the detectives, the court wrote: “[N]o sound reason can be suggested why their testimony should be singled out as deserving of less credence than the evidence of witnesses in general. Their credibility may be subjected to strict cross-examination and counsel for the

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60. See, e.g., 75A AM. JUR. 2D *Trial* § 1179, Westlaw (2016) (“If there is a conflict in the evidence, a trial court may give instructions concerning witness credibility.”); MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DIST. COURTS OF THE NINTH CIRCUIT §1.7 (2010).

61. See FED. R. CRIM. P. 30(c) (providing that the court “may instruct the jury before or after the arguments are completed, or at both times”).

62. See *supra* note 1 and accompanying text.

63. See Dorfman, *supra* note 11, at 498 (noting the “silent presumption of reliability” police witnesses enjoy, particularly in comparison to defendants).

64. See *id.* (recognizing the ways in which police officers are, in fact, “interested” witnesses, though they are not considered as such).

65. See *id.*

66. See *State v. Roberts*, 147 P. 828, 835 (Kan. 1915).

67. See *id.*

68. See *id.*

defense may comment freely upon their testimony . . . .”<sup>69</sup>

Courts have long been resistant to instructions that contemplate the possibility that police officers may be motivated to lie or shade their testimony in favor of the prosecution.<sup>70</sup> These decisions seem to reflect an unrealistic Norman Rockwell-like image of American police officers. Almost fifty years ago, the D.C. Circuit addressed the issue of whether to give a defense-requested instruction to view uncorroborated police testimony with suspicion.<sup>71</sup> In *Bush v. United States*, the government had one witness to a drug transaction—a police officer.<sup>72</sup> At trial, the defense asked for an instruction that an officer’s testimony be viewed with suspicion and acted upon with caution.<sup>73</sup> The D.C. Circuit rejected the argument and held that it would be “anomalous” to single out police officer testimony that way.<sup>74</sup> The court acknowledged similar instructions regarding accomplice testimony and the testimony of cooperating witnesses<sup>75</sup> but concluded, “it would be a dismal reflection on society to say that when the guardians of its security are called to testify in court under oath their testimony must be viewed with suspicion.”<sup>76</sup> Other jurisdictions followed the D.C. Circuit in rejecting instructions regarding police officer bias.<sup>77</sup>

The Second Circuit also denied a similar request in a 1955 case.<sup>78</sup> In 1966, the Eighth Circuit found that an instruction that a police officer’s testimony “should be received with caution” might be appropriate in some circumstances, but nevertheless sanctioned the trial court’s refusal to give it.<sup>79</sup> In 1954, the Nebraska Supreme Court rejected a requested instruction

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69. *Id.*

70. *See, e.g.*, *United States v. Martinez*, 981 F.2d 867, 870–71 (6th Cir. 1992); *United States v. Nash*, 910 F.2d 749, 755 (11th Cir. 1990); *People v. Williams*, 593 N.E.2d 968, 984 (Ill. App. Ct. 1992); *People v. Lopez*, 190 A.D.2d 866, 866 (N.Y. App. Div. 1993); *see also* Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 110 (1992) (describing how prosecutors may “steer police testimony”).

71. *Bush v. United States*, 375 F.2d 602, 603 (D.C. Cir. 1967).

72. *See id.*

73. *See id.* at 604.

74. *Id.*

75. *See id.*

76. *Id.*

77. *See, e.g.*, *State v. Brunori*, 578 A.2d 139, 142 n.6 (Conn. App. Ct. 1990); *State v. Gambrel*, 894 P.2d 235, 237 (Kan. Ct. App. 1995); *State v. McQueen*, 639 S.E.2d 131, 133 (N.C. Ct. App. 2007); *State v. Berrios*, 270 N.E.2d 709, 713 (N.Y. 1971).

78. *See United States v. Paccione*, 224 F.2d 801, 803 (6th Cir. 1955).

79. *Golliher v. United States*, 362 F.2d 594, 604 (8th Cir. 1966).

that would have told jurors evaluating officer testimony to “exercise greater care than in weighing the testimony of other witnesses” because of the officers’ “material bias, prejudice and preconceived opinions of guilt.”<sup>80</sup> In 1993, the Supreme Court of North Carolina sanctioned a trial judge’s refusal to give an instruction about police credibility and found that a general instruction about witness credibility was sufficient, citing the D.C. Circuit Court’s language in *Bush* that to single out officers would be a “dismal reflection on society.”<sup>81</sup>

While courts have resisted instructing jurors about the potential bias of police officers, virtually every jurisdiction has created an instruction that does just the opposite: jurors are told to treat police officer testimony like the testimony of any other witness.<sup>82</sup> Thus, jurors are not told that police officers carry biases inherent to their position in law enforcement, and they are affirmatively told to ignore the connection between officers and the prosecution.<sup>83</sup>

Many trial courts not only instruct jurors about police credibility, but also allow voir dire on the topic of police credibility.<sup>84</sup> The Fourth Circuit found that a trial court erred when it failed to ask whether any prospective jurors might “give special credence and weight to the word of a law enforcement officer simply because of the fact that he occupies that position.”<sup>85</sup> The Ninth Circuit also has repeatedly found error when a trial judge fails to ask members of the jury pool (when requested by the defense) whether they would hold the word of police officers in higher regard because of the fact that they are police officers.<sup>86</sup> As a result of voir dire on the topic of police credibility, jurors are not only instructed that officers suffer from no known biases when they receive their legal instructions at the end of the trial, but this supposed lack of bias is discussed during jury selection before the trial even begins.<sup>87</sup> Thus, jurors are primed early on to

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80. *Lovings v. State*, 62 N.W.2d 672, 676 (Neb. 1954).

81. *State v. Williams*, 430 S.E.2d 888, 895 (N.C. 1993) (quoting *Bush*, 375 F.2d at 604).

82. *See supra* notes 1–4 and accompanying text.

83. *See supra* notes 1–4 and accompanying text.

84. *See, e.g.*, *Dingle v. State*, 759 A.2d 819, 837–38 (Md. 2000) (noting that, where applicable, police officer credibility is one of few topics for which voir dire is mandatory).

85. *United States v. Lancaster*, 96 F.3d 734, 740 (4th Cir. 1996) (citing *United States v. Evans*, 917 F.2d 800, 806 (4th Cir. 1990)).

86. *See, e.g.*, *United States v. Contreras-Castro*, 825 F.2d 185, 187 (9th Cir. 1987); *United States v. Washington*, 819 F.2d 221, 225 (9th Cir. 1987); *United States v. Baldwin*, 607 F.2d 1295, 1298 (9th Cir. 1979).

87. *See supra* notes 84–86 and accompanying text.

believe that police officers do not have any special bias.<sup>88</sup>

The standard instructions that a police officer's status as a police officer should not be considered and the courts' refusal to provide instructions regarding police officers' inherent biases prevent jurors from considering reality when determining their verdicts in criminal cases.<sup>89</sup> Courts need to accept that while instructions that account for police officer bias may constitute a "dismal reflection on society,"<sup>90</sup> they are nonetheless an accurate reflection.<sup>91</sup> In order for criminal defendants to have fair trials, courts can no longer continue to be willfully blind to the sometimes "dismal" truths about law enforcement.<sup>92</sup>

### B. Defendants' Credibility

Courts, as a general matter, recognize the bias at play in situations that do not include law enforcement officials.<sup>93</sup> The jury instructions for testifying police officers differ starkly from those of testifying defendants.<sup>94</sup> In many jurisdictions, when a defendant testifies, the jury is told that he has an interest in the outcome of the case.<sup>95</sup> This is despite and at odds with instructions about the defendant's presumed innocence.<sup>96</sup> For example, a criminal jury instruction in the District of Columbia reads in part, "you may consider the fact that the defendant has [a vital] interest in the outcome of

88. See *supra* Section II.A; see also Chin & Wells, *supra* note 6, at 262 ("Even where there is no evidence of defendant misconduct, . . . judges and juries may often retain pro-police biases.").

89. See *supra* notes 64–65 and accompanying text.

90. *Bush v. United States*, 375 F.2d 602, 604 (D.C. Cir. 1967).

91. See generally Chin & Wells, *supra* note 6.

92. See *id.* at 299 ("Historical reluctance to view police testimony with suspicion is the cornerstone to many court decisions which place roadblocks along the way towards establishing police veracity on the witness stand."); cf. *Bush*, 375 F.2d at 604 (lamenting the "dismal reflection on society to say that when the guardians of its security are called to testify in court under oath, their testimony must be viewed with suspicion").

93. Chin & Wells, *supra* note 6, at 290 ("Many general pattern credibility instructions include a provision indicating to the jury that they should consider a witness's bias or prejudice . . .").

94. See *supra* notes 5–10 and accompanying text.

95. See Alexander Goldenberg, *Interested, but Presumed Innocent: Rethinking Instructions on the Credibility of Testifying Defendants*, 62 N.Y.U. ANN. SURV. AM. L. 745, 746 (2007) ("[A]t the end of the trial, the judge offered a caution about the testimony of the defendant, warning of his 'deep personal interest in the result of his prosecution,' which 'creates a motive for false testimony.'").

96. See *id.* at 776 (noting the inconsistency between the presumption of innocence and instructions related to defendants' self-interests).

his trial.”<sup>97</sup> In contrast, the police officer testimony instruction reads, “[a] police officer’s testimony should be evaluated by you just as any other evidence in the case . . . . In no event should you give either greater or lesser weight to the testimony of any witness merely because s/he is a police officer.”<sup>98</sup>

In 1895, the United States Supreme Court sanctioned an instruction that singled out the testimony of the accused.<sup>99</sup> In a 1972 district court case in the District of Columbia, the trial judge gave an instruction telling the jurors that the defendants had a “vital interest in the outcome of the case.”<sup>100</sup> On appeal, the D.C. Circuit found no problem with the instruction.<sup>101</sup> Similarly, the Ninth Circuit approved an instruction that directed the jury to consider “any interest the defendant may have in the outcome of the case, his hopes and his fears and what he has to gain or lose as a result of [the jury’s] verdict.”<sup>102</sup> The Fifth Circuit also approved an instruction that read, in part, “you are entitled to take into consideration the fact that he is the defendant and the very keen personal interest that he has in the result of your verdict.”<sup>103</sup>

This undoubtedly creates confusion on the part of jurors.<sup>104</sup> Jurors are instructed that the defendant is presumed innocent and then instructed that his testimony deserves careful scrutiny, because he is a defendant.<sup>105</sup> Jurors are essentially told that they should presume the defendant innocent but doubt him when he says so.

Not every court allows special instructions that comment on the interests of the defendant.<sup>106</sup> The Third Circuit instructs jurors to treat the testimony just like that of any other witness.<sup>107</sup> The Tenth Circuit has a similar model

97. See Bergman, *supra* note 7, at Criminal Jury Instruction 2.209.

98. See *id.* at Criminal Jury Instruction 2.207.

99. Reagan v. United States, 157 U.S. 301, 311 (1895).

100. United States v. Jones, 459 F.2d 1225, 1226 (D.C. Cir. 1972).

101. See *id.* at 1227.

102. Louie v. United States, 426 F.2d 1398, 1402 (9th Cir. 1970).

103. Nelson v. United States, 415 F.2d 483, 487 (5th Cir. 1969).

104. See Goldenberg, *supra* note 95, at 779–80 (noting juror confusion while determining what standards to apply in assessing credibility of testifying defendants).

105. See *supra* notes 95–96, 99–103 and accompanying text.

106. See, e.g., COMM. ON MODEL CRIMINAL JURY INSTRUCTIONS THIRD CIRCUIT, MODEL CRIMINAL JURY INSTRUCTION 4.28 (Oct. 2012), <http://www.ca3.uscourts.gov/sites/ca3/files/2014%20Chapter%204%20final.pdf>.

107. *Id.* (instructing the jury to “examine and evaluate [the defendant’s] testimony just as [it] would the testimony of any witness”).

instruction.<sup>108</sup> Such instructions are, however, relatively commonplace in state trial courts.<sup>109</sup>

The justification for an instruction highlighting the defendant's testimony as different from other witnesses' is the reality that the defendant does have an interest in the outcome of the case.<sup>110</sup> One might say that an instruction suggesting a defendant may lie simply because he is the defendant stems from a "dismal reflection" on a society that purports to adhere to a presumption of innocence in criminal trials.<sup>111</sup>

### C. Cooperating Witnesses' and Other Interested Witnesses' Credibility

In addition to the testimony of the defendants, there are other occasions in which trial courts give special instructions about the credibility of witnesses.<sup>112</sup> For example, when a witness receives a benefit for his testimony, such as a witness who has received a reduced charge in exchange for his testimony, a jury instruction about that bias is given to the jury.<sup>113</sup>

108. See CRIMINAL PATTERN JURY INSTRUCTION COMM. OF THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT, CRIMINAL PATTERN JURY INSTRUCTIONS 1.08 (2011), <https://www.ca10.uscourts.gov/sites/default/files/clerk/Jury%20Instructions%20Update%202015.pdf>.

109. See, e.g., *State v. Medrano*, 65 A.3d 503, 518 (Conn. 2013) ("[T]he jury was to evaluate the defendant's testimony in the same fashion as the testimony of the other witnesses."); *Givens v. State*, 751 S.E.2d 778, 781 (Ga. 2013); *United States v. Patel*, No. 06-60006, 2009 WL 1579526, at \*16 (W.D. La. June 3, 2009) (recognizing "general instructions given to the jury which state, 'The testimony of the defendant *should be weighed and his credibility evaluated in the same way as that of any other witness*'"); *Castro v. United States*, No. 04 CR. 664-2 TPG, 2013 WL 6508816, at \*2 (S.D.N.Y. Dec. 11, 2013) ("The defendant did not need to testify. But he did, and, now that he has testified, you will judge his credibility in the way that you judged the credibility of any witness."); *State v. Kittell*, 847 A.2d 845, 850 (R.I. 2004); *State v. King*, 897 A.2d 543, 549 (Vt. 2006) (quoting *State v. Camley*, 438 A.2d 1131, 1134 (Vt. 1981)) ("The jury has the right to believe all, part, or none of the testimony of any witness, and this rule applies to the defendant as well as any other witness."); see also *State v. Clemmons*, 639 S.E.2d 110, 118 (N.C. Ct. App. 2007).

110. See *United States v. Suriel*, 335 F. App'x 136, 138-39 (2d Cir. 2009) (unpublished opinion) (finding no error "affecting [the defendant's] substantial rights" where a jury instruction warned in part that the testifying defendant "has a deep personal interest in the outcome of the prosecution" which "creates a motive for false testimony"); *Walker v. United States*, 982 A.2d 723, 740 (D.C. 2009) (rejecting the defendant's argument that "when the court instructed the jury that they could weigh [the defendant's] testimony in light of his 'interest in the outcome' of the case, the court erred by singling him out").

111. Cf. *Bush v. United States*, 375 F.2d 602, 604 (D.C. Cir. 1967); see generally *Goldenberg*, *supra* note 95 (exploring the conflict between instructions regarding the defendant's self-interest and the general presumption of the defendant's innocence).

112. See, e.g., *infra* notes 113 and 122 and accompanying text.

113. See, e.g., *United States v. Austin*, 215 F.3d 750, 752 (7th Cir. 2000) ("Although the judge thought an addict-informant instruction inadvisable, he did give an informant instruction, drawn

Trial courts also recognize the danger of witness testimony even when no official agreement exists.<sup>114</sup> Jurors often get special instruction about the credibility of witnesses with pending cases, or those who are on probation or parole at the time of their testimony.<sup>115</sup> Jurors are told by the judge that the testimony of those witnesses should be received “with caution.”<sup>116</sup>

Courts often recognize that the testimony of cooperating witnesses, accomplices, co-defendants, witnesses with plea agreements, witnesses with pending cases, and witnesses who are on probation, parole, or supervised release merit special attention and instructions.<sup>117</sup> The acknowledgement that these witnesses have an interest other than the truth is due to their recognized bias.<sup>118</sup> Witnesses who might avoid prosecution—as in the case of the accomplice who is getting the benefit of a generous plea offer—and those who are on probation or parole all have a special motive to curry favor with the government because of their status.<sup>119</sup> Thus, they have different motivations than the typical witness, such as an innocent bystander eyewitness who does not know any of the players in a criminal prosecution and has no special motives other than the truth.<sup>120</sup>

In 1952, the Supreme Court wrote:

The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are ‘dirty business’ may raise serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to prove credibility by cross-examination and to have the issues submitted to the jury with careful

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from Instruction 3.13 of the *Pattern Criminal Federal Jury Instructions for the Seventh Circuit* (1998), telling the jury that the testimony of any cooperating witness should be ‘considered with caution and great care.’’); *United States v. Dunson*, 142 F.3d 1213, 1214 (10th Cir. 1998) (“While instructing the jury, the district court told them an informant’s or immunized witness’ testimony should be considered with caution.”).

114. See generally R. Michael Cassidy, “Soft Words of Hope”: *Giglio, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 NW. U. L. REV. 1129 (2004).

115. See *id.* at 1143, 1163 (discussing the roles of parole and probation as incentives for accomplice testimony).

116. *Dunson*, 142 F. 3d at 1214.

117. See *supra* notes 7–10 and accompanying text (discussing jury instructions for those considered to be interested witnesses).

118. See *supra* notes 5–9 and accompanying text.

119. See generally Cassidy, *supra* note 114 and accompanying text.

120. See *infra* notes 121–23 and accompanying text.

instructions.<sup>121</sup>

It is from that language that many lower courts have drawn the rights to give special charges to the jury in informer cases.<sup>122</sup>

Defendants may also request a special instruction for witnesses with financial interest in a case.<sup>123</sup> Reward money and relocation money purportedly for witness protection often comes from police or prosecutors.<sup>124</sup> Some witnesses are paid directly by the police or prosecutors and these “special employees” are paid in exchange for information and assistance.<sup>125</sup> Money can be a significant motivator for witnesses.<sup>126</sup> As Justice Blackmun wrote in *United States v. Bagley* about an informant who was promised money, the “possibility of a [financial] reward” gave the witnesses “a direct, personal stake in respondent’s conviction,” and the “fact that the stake was not guaranteed . . . but was expressly contingent on the Government’s satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction.”<sup>127</sup>

Police officers are also interested parties; the motivations to lie, shade

121. On *Lee v. United States*, 343 U.S. 747, 757 (1952).

122. *Territory of Guam v. McGravey*, 14 F.3d 1344, 1353 (9th Cir. 1994); *People v. Guiuan*, 957 P.2d 928, 936 (Cal. 1998) (“The testimony of an in-custody informant should be viewed with caution and close scrutiny.”); *State v. Patterson*, 886 A.2d 777, 789 (Conn. 2005); *Pitchford v. State*, 45 So.3d 216, 239 (Miss. 2010) (“The Court instructs the jury that the law looks with great suspicion and distrust on the testimony of an alleged accomplice or informant. The law requires the jury weigh the testimony of an alleged accomplice or informant with great care, caution and suspicion.”); *Dodd v. State*, 993 P.2d 778, 784 (Ok. Ct. App. 2000) (“The testimony of an informer who provides evidence against a defendant must be examined and weighed by you with greater care than the testimony of an ordinary witness.”); see also *United States v. Luck*, 611 F.3d 183, 187 (4th Cir. 2010).

123. See, e.g., *United States v. Gambler*, 662 F.2d 834, 847 (D.C. Cir. 1981) (“The trial court instructed the jury that this theory did make sense legally, and that, ‘[a]ccordingly, he does have a financial interest in the outcome and you may consider that fact in your consideration and weighing of his testimony just as you consider any interest anybody else may have in the outcome of this case weighing their testimony.’”).

124. E.g., *United States v. Marino*, 658 F.2d 1120, 1122 (6th Cir. 1981) (“The DEA gave [one witness] a \$5,000 reward for his cooperation. In addition, pursuant to the Witness Protection Program, the government granted [another witness] assistance of approximately \$815 a month for relocation expenses until she found other employment.”).

125. Athelia Knight & Benjamin L. Weiser, *Pushing Behind the Crowds*, WASH. POST (July 16, 1982), <https://www.washingtonpost.com/archive/politics/1982/07/16/pushing-behind-the-crowds/6323bb0e-bc72-40aa-a361-ea22c0707952/>.

126. Vida B. Johnson, *When the Government Holds the Purse Strings, but Not the Purse*, 38 N.Y.U. REV. LAW. SOC. CHANGE 491, 495 (2014).

127. *United States v. Bagley*, 473 U.S. 667, 683 (1985).



the truth, and protect colleagues exist.<sup>128</sup> Just like a witness seeking a reward or a witness with some other interest in the case, police officers often have financial, career, ideological, or institutional interests at play, particularly in certain types of cases.<sup>129</sup> Although it may reveal a “dismal” side of our criminal justice system to acknowledge these biases, ignoring police officer bias does not make it go away.

Few would dispute that police officers in undercover stings are more interested in the outcome of the case than the innocent bystander eyewitness, yet the testimony of each—the police officer and the bystander—is treated exactly the same by trial courts.<sup>130</sup> While the reality of the defendant’s interest and cooperating witnesses’ interests has been used to justify an instruction that singles out their testimony, the reality of police officers’ interests, however, has not led to a similar instruction on police credibility.<sup>131</sup>

### III. THE REALITY OF POLICE CREDIBILITY

Although the events in Chicago, Baltimore, Cincinnati, Ferguson, Staten Island, and South Carolina, are twenty-first century headlines, tensions between police and the communities they are sworn to serve is not a new phenomenon.<sup>132</sup> The Rodney King riots,<sup>133</sup> the murder of Amadou Diallou,<sup>134</sup> and the Abner Louima<sup>135</sup> rape took place twenty years ago in the

128. See Chin & Wells, *supra* note 6, at 237 (noting the “blue wall of silence” that encourages protection of fellow officers).

129. See *infra* Part IV (discussing the various motives behind police officer misconduct).

130. See *supra* notes 1–4 and accompanying text.

131. See *supra* notes 9–11 and accompanying text.

132. See, e.g., James Pilcher, *Cincinnati Reaction Not Like ‘Ferguson . . . Baltimore,’* USA TODAY (Sept. 9, 2015), <http://www.usatoday.com/story/news/nation/2015/07/31/cincinnati-reaction-not-like-ferguson-baltimore/30924365/>; Dan Sewall, *Trials for Killings of Blacks by Police Unfold in 2 Cities*, GOUPSTATE.COM (Nov. 3, 2016), <http://www.goupstate.com/news/20161103/trials-for-killings-of-blacks-by-police-unfold-in-2-cities>; see *infra* notes 133–138 and accompanying text.

133. See Hector Tobar & Leslie Berger, *Tape of L.A. Police Beating Suspect Stirs Public Furor*, L.A. TIMES (Mar. 6, 1991), [http://articles.latimes.com/1991-03-06/news/mn-274\\_1\\_police-department-investigation](http://articles.latimes.com/1991-03-06/news/mn-274_1_police-department-investigation); Amy Wallace & David Ferrell, *Verdicts Greeted with Outrage and Disbelief*, L.A. TIMES (Apr. 30, 1992), [http://articles.latimes.com/1992-04-30/news/mn-1888\\_1\\_los-angeles](http://articles.latimes.com/1992-04-30/news/mn-1888_1_los-angeles).

134. See Michael Cooper, *Officers in Bronx Fire 41 Shots, and an Unarmed Man Is Killed*, N.Y. TIMES (Feb. 5, 1999), <http://www.nytimes.com/1999/02/05/nyregion/officers-in-bronx-fire-41-shots-and-an-unarmed-man-is-killed.html>.

135. See Joseph P. Fried, *‘Depraved’ Night Detailed at Close of Louima Trial*, N.Y. TIMES (June 3, 1999), <http://www.nytimes.com/1999/06/03/nyregion/depraved-night-detailed-at-close-of-louima>.

mid-1990s.<sup>136</sup> Those scandals revolved around police brutality.<sup>137</sup> The Rampart scandal of the Los Angeles Police Department broke in the late 1990s and the Tulia, Texas scandal took place in 1999.<sup>138</sup> Both scandals showed the extent of police corruption's wide-ranging impact.<sup>139</sup> In the Tulia case, forty-six people were falsely accused and thirty-five people were found guilty based on the perjury of a single police officer witness.<sup>140</sup> In the Rampart case, 156 convictions were overturned or dismissed because of the planting of evidence, perjury, and other misdeeds, as well as the subsequent cover up by police.<sup>141</sup> As opposed to the brutality scandals of the 1990s, the Tulia and Rampart scandals involved police credibility more directly.<sup>142</sup> Misconduct in Philadelphia led to 500 cases being dismissed.<sup>143</sup> These are not the only large-scale police scandals that have cost innocent people their liberty; other scandals in New Jersey, New York, Dallas, and Louisiana have cost many their freedom as well.<sup>144</sup>

Police corruption is a significant problem in our criminal justice system that has led to thousands of wrongful convictions.<sup>145</sup> There are more than 1600 people who have been exonerated in this country.<sup>146</sup> Many more have been wrongfully convicted but are still in prison or jail.<sup>147</sup> Police

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trial.html.

136. *Id.*

137. *See supra* notes 133–35 and accompanying text.

138. Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133, 1137 (2013).

139. *Id.* at 1143 (recognizing that Rampart and Tulia were part of large-scale police misconduct that is a “disturbingly common feature of the criminal justice system”).

140. *See* Betsy Blaney, *Figure in Bogus Tulia Drug Arrests Faces Prison: Jury Says Ex-Agent Perjured Himself*, HOUS. CHRON. (Jan. 15, 2005, 6:30 AM), <http://www.chron.com/news/houston-texas/article/Figure-in-bogus-Tulia-drug-arrests-faces-prison-1640062.php>.

141. *Id.*

142. *See* Covey, *supra* note 138, at 1145 (noting that Rampart and Tulia involved a kind of police misconduct that may not be easily detectable).

143. Aubrey Whelan & Mark Fazlollah, *Two Philly Cops Charged with Brutality; Video Shows Man Being Struck, Beaten*, PHILA. INQUIRER (Feb. 7, 2015), [http://articles.philly.com/2015-02-07/news/58881522\\_1\\_two-officers-fairhill-ramsey](http://articles.philly.com/2015-02-07/news/58881522_1_two-officers-fairhill-ramsey).

144. Covey, *supra* note 138, at 1141–42.

145. *Id.* at 1185.

146. *See* Samuel Gross, *The Staggering Number of Wrongful Convictions in America*, WASH. POST (July 24, 2015), [https://www.washingtonpost.com/opinions/the-cost-of-convicting-the-innocent/2015/07/24/260fc3a2-1aae-11e5-93b7-5eddc056ad8a\\_story.html?utm\\_term=.999481a33f13](https://www.washingtonpost.com/opinions/the-cost-of-convicting-the-innocent/2015/07/24/260fc3a2-1aae-11e5-93b7-5eddc056ad8a_story.html?utm_term=.999481a33f13).

147. *Id.*

misconduct has played a role in an untold number of those cases.<sup>148</sup>

One estimate put the number of provable exonerated persons who were victims of purposeful police lies and cover-ups at *over a thousand*.<sup>149</sup> Many others have been victims of willful police misconduct but cannot prove it.<sup>150</sup> Many exonerations come from DNA or other forensic evidence being examined or reexamined.<sup>151</sup> But in most criminal prosecution there is no forensic evidence, or at least none that can conclusively prove innocence.<sup>152</sup> Additional instances of police corruption did not end in conviction.<sup>153</sup> Still others are the victims of unconscious biases by the police resulting in unreliable evidence presented at trial.<sup>154</sup> The number of those who have suffered as a result of police misdeeds cannot be quantified but is likely in the tens or hundreds of thousands.<sup>155</sup>

In some instances, as will be explored in more detail below, police have suppressed information that could have exonerated a defendant: they have fabricated confessions, fabricated evidence, influenced eyewitnesses to make false identifications, and falsely claimed to have observed criminal acts.<sup>156</sup>

Whether police violence and dishonesty are relatively new phenomena of the past few decades, as a result of pressures due to the war on drugs,<sup>157</sup> or whether they have always existed and are just more easily documented as a result of the proliferation of recording devices and citizens less willing to trust police, the issues with police brutality and credibility are disturbing, to

148. See Covey, *supra* note 138, at 1143.

149. See *id.* at 1142.

150. See *id.* at 1153, 1170.

151. See Registry of Exonerations, *supra* note 34.

152. See Ed Timms, *Travis Completing DNA Review: Wrongful Convictions Prompted Inquiry, Unprecedented in Texas*, DALL. MORNING NEWS, Mar. 24, 2002, at 45A; *A Question of Innocence*, ACLU, <https://www.aclu.org/question-innocence> (last visited Oct. 16, 2016) (“In many cases, there is no physical evidence to test.”).

153. See Chin & Wells, *supra* note 6, at 250 (recognizing that police misconduct may have contributed to juror suspicion of police testimony and a rise in acquittals).

154. See Section III.A (discussing instances of police fabricating evidence to secure arrests and convictions).

155. See Covey, *supra* note 138, at 1135, 1185 (noting that “[h]undreds of thousands, perhaps millions, of people have been convicted of such crimes” due to police misconduct, though the information available is “too limited to permit any accurate generalizations” about conviction frequency).

156. See *infra* Sections III.A–D (discussing specific instances of police misconduct).

157. See Bill Trine, *The Genesis of Increasing Incidents of Police Brutality: The War on Drugs*, PRISON LEGAL NEWS (June 3, 2015), <https://www.prisonlegalnews.org/news/2015/jun/3/genesis-increasing-incidents-police-brutality-war-drugs/>.

say the least.<sup>158</sup>

It is important to remember that the stories in this Article regarding police credibility and violence are very likely the tip of the iceberg.<sup>159</sup> Police officers are probably involved in far more misconduct and corruption than has been unearthed.<sup>160</sup> Many believe that both a “loyalty ethic” and a “blue wall of silence” exist and keep much misconduct covered from public scrutiny.<sup>161</sup> Police officers protect one another even when they misbehave.<sup>162</sup> Even honest officers fail to report misconduct by other corrupt officers.<sup>163</sup> Those who fail to keep the secrets of other officers face ostracism by their colleagues or even risk being placed in harm’s way in dangerous situations.<sup>164</sup>

That there is a term for the phenomenon—“the blue wall of silence”—is troubling as well.<sup>165</sup> Though few doubt that this “blue wall” exists,<sup>166</sup> some legal observers believe that it begins in the police academy.<sup>167</sup> The 2015 police shooting of an unarmed black man caught on video in South Carolina may never have become a news story without the video footage created by a brave bystander.<sup>168</sup> For every act of police corruption caught on video, there

158. See Nicole Flatow, *What Has Actually Changed About Police Brutality in America, from Rodney King to Michael Brown*, THINKPROGRESS (Sept. 11, 2014), <https://thinkprogress.org/what-has-changed-about-police-brutality-in-america-from-rodney-king-to-michael-brown-e6b29a2feff8#pn1waag21> (analyzing the timeline of police brutality from the 1991 Rodney King beatings to the 2014 Ferguson shooting); Natasha Bach, *Police Violence Has Been Going on Forever*, HUFFINGTON POST (Aug. 28, 2014, 12:00 PM), [http://www.huffingtonpost.com/2014/08/23/police-brutality-michael-brown\\_n\\_5700970.html](http://www.huffingtonpost.com/2014/08/23/police-brutality-michael-brown_n_5700970.html) (noting the ease with which police brutality may be “caught on camera” today).

159. See *infra* Section III.C.

160. See George Joseph, *Leaked Police Files Contain Guarantees Disciplinary Records Will Be Kept Secret*, GUARDIAN (Feb. 7, 2016, 7:00 AM), <https://www.theguardian.com/us-news/2016/feb/07/leaked-police-files-contain-guarantees-disciplinary-records-will-be-kept-secret> (reporting that many disciplinary records and complaints against police officers are kept secret or destroyed).

161. Chin & Wells, *supra* note 6, at 251–55.

162. See *id.* at 251.

163. See *id.*

164. See *id.* at 254.

165. *Id.*

166. See *id.* at 237–40 nn.16–18.

167. See *id.* at 253 n.75.

168. See Mark Berman, *‘Look for Justice’: A Shooting in South Carolina and the Power of Video*, WASH. POST (Apr. 9, 2015), [https://www.washingtonpost.com/news/post-nation/wp/2015/04/09/look-for-justice-a-shooting-in-south-carolina-and-the-power-of-video/?tid=a\\_inl&utm\\_term=.20b4827bc772](https://www.washingtonpost.com/news/post-nation/wp/2015/04/09/look-for-justice-a-shooting-in-south-carolina-and-the-power-of-video/?tid=a_inl&utm_term=.20b4827bc772).

are likely many more that are not.<sup>169</sup>

Misconduct that undermines trust in the police takes many shapes: brutality, perjury, hiding exculpatory evidence, and fabricating and planting evidence.<sup>170</sup> Many times these phenomena are related.<sup>171</sup> Once an officer crosses one of these lines, it is possible he will cross another to cover up other misconduct.<sup>172</sup> It is not hard to imagine an officer who is willing to go outside the law to assault a citizen would then go outside the law to lie about the brutality in the face of a civilian complaint.<sup>173</sup> Similarly, an officer who plants evidence has no choice but to lie about it if the case goes to trial in order to not reveal his initial transgression.<sup>174</sup> Brutality, the planting of evidence, and the prosecution of the innocent are all interrelated.<sup>175</sup>

#### A. *Trumped-Up Charges*

Unfortunately, fabricating evidence is something that has taken place all around the country.<sup>176</sup> Of course, this behavior results in innocent people being convicted of crimes they did not commit.<sup>177</sup> This reality should be reflected in jury instructions.<sup>178</sup>

In 2011, a police officer in New York City admitted to framing innocent citizens to bolster arrest statistics.<sup>179</sup> His testimony came in the trial against another officer who was convicted of planting evidence.<sup>180</sup> The detective testified under oath that planting drugs on innocent people is common within the New York City Police Department.<sup>181</sup> This was a stunning admission

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169. *See id.* (noting how Justice Department investigations revealed that one police department “failed to properly record these episodes [of police use of force]”).

170. *See Covey, supra* note 138, at 1137–38.

171. *See id.*

172. *See Chin & Wells, supra* note 6, at 255.

173. *See id.* at 254.

174. *See Covey, supra* note 138, at 1154.

175. *See supra* notes 170–74 and accompanying text.

176. Covey, *supra* note 138, at 1137–42.

177. *See id.*

178. *See Chin & Wells, supra* note 6, at 289.

179. *See* Tim Stelloh, *Detective Is Found Guilty of Planting Drugs*, N.Y. TIMES (Nov. 1, 2011), <http://www.nytimes.com/2011/11/02/nyregion/brooklyn-detective-convicted-of-planting-drugs-on-innocent-people.html>.

180. *See id.*

181. *See id.*

impacting numerous innocent victims in New York.<sup>182</sup>

A large-scale scandal stunned the Philadelphia Police Department as well.<sup>183</sup> Six police officers in Philadelphia faced racketeering conspiracy charges in federal court for robbing citizens of more than \$400,000 in cash, drugs, and property.<sup>184</sup> In addition to those serious cases, the officers were accused of planting evidence and lying on police paperwork to cover up their misdeeds.<sup>185</sup> They were acquitted, while a seventh officer pleaded guilty to corruption charges.<sup>186</sup> Despite the acquittals of the officers, over 500 convictions involving the officers' work have been vacated.<sup>187</sup>

In a suburb of Detroit, Michigan, video footage from a police cruiser's dashboard camera appeared to show a police officer planting drugs after beating and tasing an unarmed man.<sup>188</sup> One of the officers involved had previously been tried by federal prosecutors for planting evidence while with the Detroit Police Department and had been the subject of twelve federal lawsuits.<sup>189</sup>

Corruption is not limited simply to urban places like New York and Detroit; police officers in small towns plant evidence as well.<sup>190</sup> In 2015, a police officer in Kenosha, Wisconsin admitted to planting evidence in a murder case.<sup>191</sup> In order to connect the suspect to a crime, he placed an

182. See Mike McPhate, *Record Number of False Convictions Overturned in 2015*, N.Y. TIMES (Feb. 3, 2016), [http://www.nytimes.com/2016/02/04/us/record-number-of-false-convictions-overturned-in-2015.html?\\_r=0](http://www.nytimes.com/2016/02/04/us/record-number-of-false-convictions-overturned-in-2015.html?_r=0); see also Murray Weiss, *New York City Arrests Rose to Record Levels During Bloomberg Era, NYPD Stats Show*, HUFFINGTON POST (Dec. 21, 2012, 9:02 AM), [http://www.huffingtonpost.com/2012/12/21/new-york-city-arrests-record-levels-bloomberg-era-nypd\\_n\\_2345085.html](http://www.huffingtonpost.com/2012/12/21/new-york-city-arrests-record-levels-bloomberg-era-nypd_n_2345085.html).

183. See *infra* notes 184–87 and accompanying text.

184. See Jeremy Roebuck, *Testimony Begins in Philadelphia Narcotics Officers' Trial*, PHILA. INQUIRER (Apr. 2, 2015), [http://articles.philly.com/2015-04-02/news/60724441\\_1\\_drug-suspects-narcotics-officers-john-speiser](http://articles.philly.com/2015-04-02/news/60724441_1_drug-suspects-narcotics-officers-john-speiser).

185. See Joseph A. Slobozian & Mark Fazlollah, *Phila. Judge Overturns 158 Convictions Tied to Rogue Narcotics Cops*, PHILA. INQUIRER (Aug. 9, 2015), [http://articles.philly.com/2015-08-09/news/65354633\\_1\\_narcotics-officers-perry-betts-convictions](http://articles.philly.com/2015-08-09/news/65354633_1_narcotics-officers-perry-betts-convictions).

186. See *id.*

187. See *id.*

188. See Robert Allen & L.L. Braiser, *Lawsuits Against Inkster Cop in Beating Go Back for Years*, DETROIT FREE PRESS (Mar. 27, 2015, 12:28 AM), <http://www.freep.com/story/news/local/michigan/wayne/2015/03/26/inkster-police-floyd-dent-beating-video-william-melendez-federal-lawsuit/70519854/>.

189. See *id.*

190. See *infra* notes 191–93 and accompanying text.

191. See Janine Anderson, *Charges Filed Against Former Kenosha Officer*, KENOSHA NEWS (Mar. 12, 2015), <http://www.kenoshanews.com/news/chargesFiledAgainstKenoshaOfficer>

identification card in a backpack in a home searched during the investigation in order to implicate the police's primary suspect.<sup>192</sup> The result of the officer's misdeeds was a strong case for the prosecution.<sup>193</sup>

In Santa Clara, California, police officers planted drugs after finding no contraband when searching a woman's home.<sup>194</sup> Audio from the dashboard camera captured the officers planning to do it.<sup>195</sup> The woman was arrested for a bogus charge, but prosecutors threw out the case once the audio came to light.<sup>196</sup>

A police officer in Durham, North Carolina seems to have accidentally shot himself after pulling over a motorist in 2012.<sup>197</sup> While radio transmissions, documents filled out by the officer, and even gunshot residue testing from the day of the incident made it clear that the officer shot himself, the police and prosecutors later prosecuted the motorist for shooting the officer.<sup>198</sup> The officer testified at trial that the motorist shot him, but the motorist was ultimately acquitted by the jury at the trial.<sup>199</sup>

In Los Angeles, California, police officers accused a grocery store worker of possessing cocaine.<sup>200</sup> The case relied exclusively on the word of the two officers.<sup>201</sup> After the officers testified under oath on direct examination at trial about the manner of the man's arrest, the defense attorney produced a videotape that "sharply contradicted" the officers' accounts.<sup>202</sup> While officers testified that they located the drugs after

482631565.php; see also Katie DeLong, *Former Kenosha Police Officer Who Admitted to Planting Evidence in Murder Case Has Now Been Charged*, FOX 6 NOW (May 14, 2015, 6:02 PM), <http://fox6now.com/2015/05/14/former-kenosha-police-officer-who-admitted-to-planting-evidence-in-murder-case-has-now-been-charged/>.

192. See *id.*

193. See *id.*

194. See Radley Balko, *Lawsuit: Audio Depicts Another Police Conspiracy to Plant Drug Evidence*, WASH. POST (Apr. 23, 2014), [https://www.washingtonpost.com/news/the-watch/wp/2014/04/23/lawsuit-audio-depicts-another-police-conspiracy-to-plant-drug-evidence/?utm\\_term=.6aa68a4b154d](https://www.washingtonpost.com/news/the-watch/wp/2014/04/23/lawsuit-audio-depicts-another-police-conspiracy-to-plant-drug-evidence/?utm_term=.6aa68a4b154d).

195. See *id.*

196. See *id.*

197. See Mark Joseph Stern, *"I Shot Fired by Officer,"* SLATE (Aug. 19, 2015, 4:47 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2015/08/cop\\_shot\\_himself\\_and\\_bla\\_med\\_a\\_black\\_driver\\_police\\_officer\\_kelly\\_stewart.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2015/08/cop_shot_himself_and_bla_med_a_black_driver_police_officer_kelly_stewart.html).

198. See *id.*

199. See *id.*

200. Jack Leonard, *Surprise Video Puts an End to Drug Trial*, L.A. TIMES (July 1, 2008), <http://articles.latimes.com/2008/jul/01/local/me-video1>.

201. *Id.*

202. *Id.*

watching the man throw them a few feet away, the video showed the officers searching for more than twenty minutes for something.<sup>203</sup> Then, one officer is heard telling another officer to be “creative in your writing,” apparently referring to the police reports.<sup>204</sup> Prosecutors moved to dismiss the case after reviewing the tape.<sup>205</sup>

One of the most egregious and infamous cases, discussed earlier, took place in Tulia, Texas.<sup>206</sup> One police officer framed forty-six people, almost all black, of selling drugs.<sup>207</sup> About twenty percent of the town’s adult black population were accused of being drug dealers.<sup>208</sup> Despite the fact that there was nothing to corroborate the police officer’s word—no recordings of transactions, no fingerprints, no other witnesses—over the course of eighteen months, his word was sufficient to end the liberty of many.<sup>209</sup> Only after proof that one of the accused was in another state at the time she was described to have been selling drugs did the officer’s accusations come unraveled.<sup>210</sup>

There is little reason to believe that these cases—from every corner of the country—are isolated incidents.<sup>211</sup> Police body cameras and dashboard cameras, as well as cell phone cameras, are still relatively new technology.<sup>212</sup> While far more police activity is now captured on video than ever before, most still remains unrecorded.<sup>213</sup> Furthermore, it is not

203. *See id.*

204. *Id.*

205. *See id.*

206. *See infra* notes 207–10.

207. Adam Liptak, *\$5 million Settlement Ends Case of Tainted Texas Sting*, N.Y. TIMES (Mar. 11, 2004), [http://www.nytimes.com/2004/03/11/us/5-million-settlement-ends-case-of-tainted-texas-sting.html?\\_r=0](http://www.nytimes.com/2004/03/11/us/5-million-settlement-ends-case-of-tainted-texas-sting.html?_r=0).

208. Kevin Johnson, *Taking the “Garbage Out” in Tulia, Texas: The Taboo on Black–White Romance and Racial Profiling in the “War on Drugs,”* 2007 WIS. L. REV. 283, 286 (2007).

209. *See id.* at 287.

210. *See generally* Liptak, *supra* note 207.

211. *See supra* notes 160–64 and accompanying text.

212. *See, e.g.,* Monica Davey, *Chicago to Expand Use of Police Body Cameras*, N.Y. TIMES (Nov. 29, 2015), <http://www.nytimes.com/2015/11/30/us/chicago-police-body-cameras.html>; Pervaiz Shallwani, Ana Campoy, & Valerie Bauerlein, *Prevalence of Video Puts Police Under the Lens*, WALL STREET J. (Apr. 10, 2015, 7:20 PM), <http://www.wsj.com/articles/prevalence-of-video-puts-police-under-the-lens-1428708033>; *5 Major Moments in Cellphone History*, CBC NEWS (Apr. 3, 2013), <http://www.cbc.ca/news/technology/5-major-moments-in-cellphone-history-1.1407352> (“In 2002, the first phones with built-in cameras became publicly available . . .”).

213. *See* Radley Balko, *A New Report Shows the Limits of Police Body Camera*, WASH. POST (Feb. 5, 2016), [https://www.washingtonpost.com/news/the-watch/wp/2016/02/05/a-new-report-shows-the-limits-of-police-body-cameras/?utm\\_term=.9fba7939aaf9](https://www.washingtonpost.com/news/the-watch/wp/2016/02/05/a-new-report-shows-the-limits-of-police-body-cameras/?utm_term=.9fba7939aaf9) (discussing issues of public



unreasonable to assume that the police are aware of the increasing scrutiny of their conduct and the proliferation of video footage, and in most instances are sophisticated enough to avoid having their malfeasance captured on video.<sup>214</sup>

### B. Perjury and Other Lies

The police officer at the heart of the Tulia case was ultimately found guilty of perjury.<sup>215</sup> While his lies captured national attention because of the scope and extent of perjury, lying under oath is not uncommon.<sup>216</sup> It is so common that there is even a name for it—“testilying.”<sup>217</sup>

Testilying is not a new phenomenon either.<sup>218</sup> In 1996, a former Los Angeles police officer pleaded “no contest” to perjury for his testimony in the high profile O.J. Simpson criminal murder trial, after denying he had used the word “nigger” when describing black people.<sup>219</sup> During trial testimony, he denied having used the word in the last ten years when, in fact, there existed an audio recording of him using the word forty-one times and bragging about terrorizing black suspects of crimes.<sup>220</sup>

Police officer credibility has been an issue for more than fifty years.<sup>221</sup> In a study of misdemeanor drug cases in New York in the 1960s, before and

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access, review, storage, tampering, and implementation of police footage that hinder recording); Kimberly Kindy et al., *A Year of Reckoning: Police Fatally Shoot Nearly 1,000*, WASH. POST (Dec. 26, 2015), <http://www.washingtonpost.com/sf/investigative/2015/12/26/a-year-of-reckoning-police-fatally-shoot-nearly-1000/> (reporting that only six percent of police killings of civilians were captured by body cameras); Jay Stanley, *Police Body-Mounted Cameras: With Right Policies in Place, a Win for All*, ACLU, [https://www.aclu.org/sites/default/files/assets/police\\_body-mounted\\_cameras-v2.pdf](https://www.aclu.org/sites/default/files/assets/police_body-mounted_cameras-v2.pdf) (last updated Mar. 2016) (noting that “[h]istorically, there was no documentary evidence of most encounters between police officers and the public”).

214. See Hamed Aleaziz, *Increased Use of Police Cameras Raises New Questions*, S.F. CHRON. (July 25, 2015, 9:59 PM), <http://www.sfchronicle.com/crime/article/Increased-use-of-police-cameras-raises-new-6405687.php> (describing how officers can “essentially choose what to put on the camera and what not to put on the camera” in certain circumstances).

215. Johnson, *supra* note 208, at 287.

216. See *id.* at 306.

217. See *id.*

218. See *infra* notes 219–20 and accompanying text.

219. James Sterngold, *Detective in Simpson Case Pleads No Contest to Perjury Count*, N.Y. TIMES (Oct. 3, 1996), <http://www.nytimes.com/1996/10/03/us/detective-in-simpson-case-pleads-no-contest-to-perjury-count.html>.

220. See *id.*

221. See *infra* notes 222–25 and accompanying text.

after *Mapp v. Ohio*,<sup>222</sup> the landmark decision that brought the exclusionary rule to the states, showed the number of cases where officers claimed that suspects had dropped the drugs—making the drug less likely to be suppressed—went up, suggesting that police were lying.<sup>223</sup> This discovery showed that officers falsely claimed that citizens dropped drugs to get around the exclusionary rule, rather than admit that they had been stopped and searched them without cause.<sup>224</sup> In speaking about suppression testimony after the study’s results were released, Judge Irving Younger wrote in a published opinion that, “policemen are committing perjury.”<sup>225</sup>

Indeed, the Mollen Commission, an agency created in 1992 to investigate police misconduct within the New York City Police Department, found that perjury “is widely tolerated by corrupt and honest officers alike, as well as their supervisors.”<sup>226</sup> The commission was created by then-mayor David Dinkins.<sup>227</sup> That the commission was created at all speaks volumes.<sup>228</sup>

More recently in New York, prosecutors have had to review the cases of more than fifty people convicted of murder where there was involvement by a single detective who used the same witness over and over.<sup>229</sup> The witness falsely claimed to have heard a number of confessions.<sup>230</sup> So far, eleven convictions have been vacated as a result of this detective’s corruption.<sup>231</sup> The detective claimed in multiple cases that defendants had confessed to crimes by saying “[y]ou know what happened, you have it all.”<sup>232</sup> These

222. 367 U.S. 643 (1961).

223. See Sarah Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960–1962*, 4 CRIM. L. BULL. 549, 549–50 (1968).

224. *Id.*

225. *People v. McMurty*, 314 N.Y.S.2d 194, 196 (N.Y. Crim. Ct. 1970).

226. MILTON MOLLEN ET AL., COMM’N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP’T, N.Y., ANATOMY OF FAILURE: A PATH FOR SUCCESS 40 (1994).

227. See *id.* at 1.

228. See Selwyn Raab, *New York’s Police Allow Corruption, Mollen Panel Says*, N.Y. TIMES (Dec. 29, 1993), <http://www.nytimes.com/1993/12/29/nyregion/new-york-s-police-allow-corruption-mollen-panel-says.html?pagewanted=all>.

229. Frances Robles & N.R. Kleinfield, *Review of 50 Brooklyn Murder Cases Ordered*, N.Y. TIMES (May 11, 2013), <http://www.nytimes.com/2013/05/12/nyregion/doubts-about-detective-haunt-50-murder-cases.html>.

230. See *id.*

231. See Registry of Exonerations, *supra* note 34; see also Albert Samaha, *Jonathan Fleming Released by Brooklyn D.A. 24 Years After Wrongful Conviction*, VILLAGE VOICE (Apr. 8, 2014, 2:30 PM), <http://www.villagevoice.com/news/jonathan-fleming-released-by-brooklyn-da-24-years-after-wrongful-conviction-6709608>.

232. Oren Yaniv, *Retired NYPD Detective Louis Scarcella Gets Confronted About ‘Fake’*

“confessions” were unsigned and unrecorded.<sup>233</sup> Of course, by claiming to have witnessed these dubious confessions to murder, the detective was able to make himself appear to be a better detective and seal cases that might have been weaker or nonexistent without those confessions.<sup>234</sup>

New York is not the only jurisdiction in which police lie frequently.<sup>235</sup> In Atlanta in 2007, police officers “regularly lied to obtain search warrants and fabricated documentation of drug purchases.”<sup>236</sup> Their conduct was revealed after police executed an illegally obtained warrant on the home of an elderly woman who lived alone.<sup>237</sup> The warrant was a “no-knock” warrant because officers had falsely claimed that the home was outfitted with security cameras.<sup>238</sup> The officers removed the security bars and entered the home, without announcing that they were police officers.<sup>239</sup> The woman fired a single shot at the intruders and was then shot and killed by officers.<sup>240</sup> After shooting her, the officers handcuffed the elderly woman and searched her home for drugs.<sup>241</sup> When none turned up, they planted marijuana to justify the search of the house.<sup>242</sup> The investigation of this horrific crime and cover-up resulted in prosecutors learning that corruption was widespread, particularly within the vice unit of the Atlanta police department.<sup>243</sup>

In 2011, a Tulsa, Oklahoma police officer was convicted of perjury for claiming in a search warrant affidavit that a man, Ronald Crawford, was at home during the execution of a search warrant.<sup>244</sup> However, Mr. Crawford

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*Confession in Brooklyn Courtroom*, N.Y. DAILY NEWS (Dec. 5, 2014, 7:34 AM), <http://www.nydailynews.com/new-york/nyc-crime/ex-cop-confronted-fake-confession-article-1.2034432>.

233. *Id.*

234. *See id.* (“N.Y.P.D. and prosecutors thought he was one of the best homicide detectives. The only problem was he never followed the rules.”); *see also* Michelle Alexander, *Why Police Lie Under Oath*, N.Y. TIMES (Feb. 2, 2013), <http://www.nytimes.com/2013/02/03/opinion/sunday/why-police-officers-lie-under-oath.html> (revealing the ways in which police departments are rewarded for high numbers of arrests).

235. *See infra* notes 236–51 and accompanying text.

236. Shaila Dewan & Brenda Goodman, *Prosecutors Say Corruption in Atlanta Police Dept. Is Widespread*, N.Y. TIMES (Apr. 27, 2007), <http://www.nytimes.com/2007/04/27/us/27atlanta.html>.

237. *See id.*

238. *See id.*

239. *See id.*

240. *See id.*

241. *See id.*

242. *See id.*

243. *See id.*

244. Omer Gillham et al., *Tulsa Police Trial: One Officer Convicted on 8 Counts; Second Officer Acquitted*, TULSA WORLD (Oct. 2, 2013, 6:30 PM), <http://www.tulsaworld.com/news/local/tulsa->

had proof that he was in Texas at the time that the warrant was served.<sup>245</sup> The officer's lie that Mr. Crawford was at home during the search was in effort to tie the man to the contraband that the officer claimed he had found.<sup>246</sup>

In Cincinnati, Ohio, an officer falsely accused a juvenile of a crime in order to pressure his mother to cooperate with a police investigation.<sup>247</sup> The officer knowingly accused the child of six robberies and imprisoned him for nine days in order to get the mother to cooperate in the officer's investigation of the robberies.<sup>248</sup> The officer admitted to the prosecutor that he knew the child had nothing to do with the offenses.<sup>249</sup> The officer was convicted of abduction of the child and intimidation of a witness.<sup>250</sup>

A large scandal took place in Dallas, Texas, involving police credibility from 2001 to 2002.<sup>251</sup> Officers accused scores of civilians of possessing cocaine.<sup>252</sup> Forensic drug tests conducted at a laboratory showed that the substance was actually sheetrock.<sup>253</sup> In each case, the police had claimed in reports that the substances had tested positive on the scene for cocaine.<sup>254</sup> Most of the arrests were made by the same two officers.<sup>255</sup> Lawyers for the arrestees questioned how the substance could have tested positive for cocaine if there was no cocaine present, suggesting the officers had been "trumping up" cases against these defendants.<sup>256</sup> Unfortunately, some of the defendants pleaded guilty without testing the drugs.<sup>257</sup> One man was

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police-trial-one-officer-convicted-on-counts-second-officer/article\_cce9830a-9451-5b3a-93e4-904b3916a0aa.html.

245. *See id.*

246. *See id.*

247. *Ohio v. Steele*, 3 N.E.3d 135 (Ohio 2013); *see also* Dennis Whalen, *Supreme Court Upholds Police Officer's Conviction for Witness Intimidation, Reinstates Conviction for Abduction*, CT. NEWS OHIO (June 17, 2013), [http://www.courtnewsOhio.gov/cases/2013/SCO/0618/112075\\_112178.asp#.V8X-2ZMrJo4](http://www.courtnewsOhio.gov/cases/2013/SCO/0618/112075_112178.asp#.V8X-2ZMrJo4).

248. *See Steele*, 3 N.E.3d at 137.

249. *See id.* at 143.

250. *See id.* at 143–44.

251. *See* Paul Duggan, '*Sheetrock Scandal*' Hits Dallas Police, WASH. POST (Jan. 18, 2002), <https://www.washingtonpost.com/archive/politics/2002/01/18/sheetrock-scandal-hits-dallas-police/b1aec8f-dc34-4294-b192-b496a448dd70/>.

252. *See id.*

253. *See id.*

254. *See id.*

255. *See id.*

256. *Id.*

257. *See id.*

actually deported as a result of his guilty plea.<sup>258</sup> Others spent time locked away in jail awaiting trial.<sup>259</sup> Almost everyone accused—in what later became known as the Dallas Sheetrock scandal—was Latino.<sup>260</sup> Officers blamed the mistake on a longtime informant, who earned \$210,000.<sup>261</sup> While it was unclear whether the officers were involved in the framing of the innocent individuals, many of whom were blue-collar immigrants, in each instance, police claimed that they had conducted testing at the scene, which evidence suggested may be false.<sup>262</sup> Other signs pointed to the police being in on the frame-up.<sup>263</sup> Despite the size of the alleged buys, Dallas police never involved the Drug Enforcement Administration.<sup>264</sup> In addition, no cash or weapons were ever seized with the drugs, which should have seemed out of the ordinary to the officers.<sup>265</sup> The Dallas District Attorney ultimately dismissed almost seventy cases as a result of the troubling evidence.<sup>266</sup>

Many legal observers have noted that police are most likely to commit perjury in justifying the detention and search of citizens that produces evidence of guilt.<sup>267</sup> Since judges, rather than jurors, decide the legality of a Fourth Amendment seizure or search, one might argue that that reality does not justify or support an instruction at trial about police officer bias.<sup>268</sup> This argument, however, overlooks the distressing problem of police perjury and fails to acknowledge that the police bias at play in justifying Fourth Amendment contacts goes to police reliability and credibility in general.<sup>269</sup> An officer who willingly lies to support his search or seizure is likely

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258. *See id.*

259. *See id.*

260. Mark Donald, *Dirty or Duped?*, DALL. OBSERVER, (May 2, 2002, 4:00 AM), <http://www.dallasobserver.com/news/dirty-or-duped-6394643>.

261. *See id.*

262. *See id.*

263. *See id.*

264. *See id.*

265. *See id.*

266. *See id.* It is also worth noting that the prosecutors enabled this scandal by not turning over the information about the informant or revealing that police had used an informant. *See id.* Prosecutors had a duty to disclose this information. *See id.*

267. *See* Covey, *supra* note 138, at 1177–83; Julia Simon-Kerr, *Systemic Lying*, 56 WM. & MARY L. REV. 2175, 2202–05 (2015); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1044 (1996).

268. *See* Chin & Wells, *supra* note 6, at 264; Dorfman, *supra* note 11, at 473.

269. *See* Mollen et al., *supra* note 226, at 36.

untrustworthy in other instances.<sup>270</sup> It also illustrates how invested officers become in justifying their actions and arrests.<sup>271</sup> This is just another example of how police officer testimony is more like the testimony of other witnesses who have an interest in the outcome of the case.<sup>272</sup>

These cases illustrate that some police officers will lie to make their own investigations appear stronger or advance their careers.<sup>273</sup> They will do so even when their lies could result in the imprisonment of the innocent.<sup>274</sup> The scale of the scandals makes it clear that these are not isolated incidents but have affected hundreds of innocent victims.<sup>275</sup>

### C. Police Violence

A police officer in South Carolina killed an unarmed man who was running away from him by shooting him eight times in the back.<sup>276</sup> By chance, a man walking to work captured the incident using his cell phone's video camera.<sup>277</sup> Once the video footage of the murder surfaced, the officer was immediately arrested and charged with murder.<sup>278</sup> The videotape of the incident proved that officer's initial reports about the shooting were false and sought to justify the killing.<sup>279</sup>

The killing of Michael Brown, an unarmed teenager, in Ferguson, Missouri, and the chokehold killing of Eric Garner in Staten Island, New York, made national headlines in 2014, because the officers would not be prosecuted.<sup>280</sup> The cases prompted protests all around the United States and

270. *See id.* at 43.

271. *See generally* Chin & Wells, *supra* note 6, at 16 (discussing many examples of why police officers become invested in the outcomes of trials).

272. *See id.*

273. *See also* Alexander, *supra* note 234 (noting the incentive for police officers to meet stop or arrest quotas to "prove their 'productivity'").

274. *See, e.g.*, Donald, *supra* note 260.

275. *See* Mollen et al., *supra* note 226, at 36.

276. Michael Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged with Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), <http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html>.

277. James Queally, *Ex-South Carolina Officer Indicted in Deadly Shooting that Was Caught on Video*, L.A. TIMES (June 8, 2015, 10:58 AM), <http://www.latimes.com/nation/nationnow/la-michael-slager-indicted-20150608-story.html>.

278. *See id.*

279. *See id.*

280. *See* Erik Eckholm & Matt Apuzzo, *Darren Wilson Is Cleared of Rights Violations in Ferguson Shooting*, N.Y. TIMES (Mar. 4, 2015), <http://www.nytimes.com/2015/03/05/us/darren-wilson-is-cleared-of-rights-violations-in-ferguson-shooting.html>.

the issue of police brutality has once again come to the front and center of national dialogue.<sup>281</sup>

Unfortunately, since those tragic deaths, there have been other high-profile killings of unarmed civilians by police.<sup>282</sup> Police officers in Baltimore and Cincinnati have been charged in high-profile killings of other unarmed men.<sup>283</sup> Police killings of civilians are so common and numbers of the dead are so high that the Washington Post now maintains a database to keep track.<sup>284</sup> Police killed 965 civilians in 2015, although not all of these citizens were unarmed.<sup>285</sup>

While police killings of unarmed civilians have recently received more media attention, police violence is nothing new.<sup>286</sup> The Chicago police department, for example, has been marred by a legacy of secret torture of suspects.<sup>287</sup> For almost twenty years, between 1972 and 1991, over one hundred black men were “shocked with cattle prods, beaten with telephone books and suffocated with plastic bags.”<sup>288</sup> One man had a shotgun placed

wilson-is-cleared-of-rights-violations-in-ferguson-shooting.html; J. David Goodman & Al Baker, *Wave of Protest After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), <http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html#>.

281. See Soraya Nadia McDonald, *Protesters Across the Country React to Grand Jury's Decision Not to Indict Darren Wilson*, WASH. POST (Nov. 25, 2014), <https://www.washingtonpost.com/news/morning-mix/wp/2014/11/25/protesters-across-the-country-react-to-grand-jurys-decision-not-to-indict-darren-wilson/>; Ashley Southall, *Protesters Fill Streets Across U.S. over Decision in Garner Case*, N.Y. TIMES (Dec. 4, 2014), <http://www.nytimes.com/2014/12/05/nyregion/protests-continue-after-grand-jury-decision-in-eric-garner-case.html>.

282. See Kimberly Kindy et al., *A Year of Reckoning: Police Fatally Shoot Nearly 1,000*, WASH. POST (Dec. 26, 2015), <http://www.washingtonpost.com/sf/investigative/2015/12/26/a-year-of-reckoning-police-fatally-shoot-nearly-1000/> (explaining that the federal government's “failure to track the use of deadly force by police” sparked the launch of the Washington Post's database).

283. See Richard Pérez-Peña, *University of Cincinnati Officer Indicted in Shooting Death of Samuel Dubose*, N.Y. TIMES (July 29, 2015), <http://www.nytimes.com/2015/07/30/us/university-of-cincinnati-officer-indicted-in-shooting-death-of-motorist.html>; Pamela Wood & Jessica Anderson, *Unarmed Man Shot, Killed by Baltimore County Officers in Owings Mills*, BALTIMORE SUN (June 25, 2015, 8:34 AM), <http://www.baltimoresun.com/news/maryland/crime/bs-md-co-police-involved-shooting-20150625-story.html>.

284. See Kindy et al., *supra* note 282.

285. See *id.*

286. See David Rudovsky, *Police Abuse: Can the Violence be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465, 465–72 (“After three decades and much constitutional litigation, the [police] abuses continue, in many ways unabated.”).

287. *The Violent Legacy of Chicago's Police*, N.Y. TIMES (Apr. 21, 2015), <http://www.nytimes.com/2015/04/21/opinion/the-violent-legacy-of-chicagos-police.html>.

288. See *id.*

in his mouth and a cattle prod attached to his genitals until he confessed.<sup>289</sup> Others had plastic bags placed over their heads until they nearly suffocated.<sup>290</sup> Police Commander Jon Burge, who oversaw the secret torture chamber, served only four and a half years in prison for his role.<sup>291</sup> Sometimes the torture was to extract confessions from suspects—casting doubt on the veracity of those “admissions.”<sup>292</sup> Not only did officers engage in horrible brutality, they also omitted any information about the illegal tactics in testimony and reports.<sup>293</sup> This information was never turned over to the defense, obviously implicating police credibility and suppression of exculpatory evidence.<sup>294</sup> A number of convictions were overturned as a result of these horrors becoming exposed.<sup>295</sup> This torture shows that the police may not simply be neutral fact-gatherers but may, in fact, be biased witnesses.<sup>296</sup>

In 1999, police in New York fired forty-one shots into an unarmed black man, Amadou Diallo, who had not committed a crime.<sup>297</sup> Three of the officers had been involved in shootings previously.<sup>298</sup> The case captured national attention because of the volume of shots fired and the apparent lack of reason for the shooting.<sup>299</sup> While the officers were prosecuted, all were

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289. See Don Babwin, *Chicago Offers Reparations Package to Police Torture Victims*, NWI TIMES (Apr. 14, 2015), [http://www.nwitimes.com/news/local/illinois/chicago-offers-reparations-package-to-police-torture-victims/article\\_71b8be26-7104-5063-bbbb-ee4bb771acb5.html](http://www.nwitimes.com/news/local/illinois/chicago-offers-reparations-package-to-police-torture-victims/article_71b8be26-7104-5063-bbbb-ee4bb771acb5.html); Aamer Madhani, *Chicago to Pay Reparations to Police Torture Victims*, USA TODAY (Apr. 15, 2015, 2:29 PM), <http://www.usatoday.com/story/news/2015/04/14/chicago-to-pay-reparations-jon-burge-police-torture-victims/25766531/>.

290. See Michael E. Miller, *Cop Accused of Brutally Torturing Black Suspects Costs Chicago \$5.5 Million*, WASH. POST (Apr. 15, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/04/15/closing-the-book-on-jon-burge-chicago-cop-accused-of-brutally-torturing-african-american-suspects/>.

291. See *id.*

292. See *id.*

293. See Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1289, 1294 (1999) (noting how officers did not keep record of what occurred, with internal audits leading to accusations of losing files and failing to interview witnesses).

294. See *id.*

295. See *Burge Gets Booked*, CHI. TRIB. (Oct. 22, 2008), [http://articles.chicagotribune.com/2008-10-22/news/0810210270\\_1\\_jon-burge-torture-death-row-inmate](http://articles.chicagotribune.com/2008-10-22/news/0810210270_1_jon-burge-torture-death-row-inmate); see also G. Flint Taylor, *The Chicago Police Torture Scandal: A Legal and Political History*, 17 CUNY L. REV. 329, 352, 365 (2014).

296. See Chin & Wells, *supra* note 6, at 264.

297. See Cooper, *supra* note 134.

298. See *id.*

299. See Jane Fritsch, *The Diallo Verdict: The Overview; 4 Officers in Diallo Shooting Are Acquitted of All Charges*, N.Y. TIMES (Feb. 26, 2000), <http://www.nytimes.com/2000/02/26/>



acquitted after prosecutors allowed the defense to move the trial out of New York City to a more police-friendly venue in upstate New York.<sup>300</sup> For some, this shooting demonstrated that police did not see themselves as protectors of poor communities of color, but rather at war with them.<sup>301</sup>

New Orleans police officers shot six unarmed citizens on the Danziger Bridge who were trying to escape hurricane Katrina flooding in 2005, killing two men and wounding four others.<sup>302</sup> The men were shot with an unauthorized AK-47 assault rifle.<sup>303</sup> After the shooting, officers fabricated evidence in an effort to justify the shooting, claiming that the “victims had guns and traded fire with the officers.”<sup>304</sup> One officer pleaded guilty to helping cover up the shootings,<sup>305</sup> and five were convicted after a trial in 2011.<sup>306</sup> However, due to misconduct by the federal prosecutors, the five officers will have new trials.<sup>307</sup>

In what became a high-profile case, New York City officers in 1997 sodomized Abner Louima with a broomstick.<sup>308</sup> The rape was committed with such force that Mr. Louima suffered a torn rectum, a lacerated bladder, and broken teeth.<sup>309</sup> This horrendous brutality was committed because an officer mistakenly believed that Mr. Louima had struck him in a bar.<sup>310</sup> While one officer was convicted of the offense, another was convicted of

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nyregion/diallo-verdict-overview-4-officers-diallo-shooting-are-acquitted-all-charges.html.

300. *See id.*

301. See Fred Mazelis, *Trial in Amadou Diallo Killing Is Moved out of New York City*, WORLD SOCIALIST (Dec. 23, 1999), <https://www.wsws.org/en/articles/1999/12/nyc-d23.html>.

302. See Beth Ethier, *Appeals Court Orders New Trial for Officers Convicted of Bridge Shootings After Katrina*, SLATE (Aug. 19, 2013, 5:30 PM), [http://www.slate.com/blogs/the\\_slatest/2015/08/19/danziger\\_bridge\\_police\\_trial\\_appeals\\_court\\_panel\\_says\\_new\\_orleans\\_federal.html](http://www.slate.com/blogs/the_slatest/2015/08/19/danziger_bridge_police_trial_appeals_court_panel_says_new_orleans_federal.html).

303. *See id.*

304. *Id.*

305. See *Ex-Cop Pleads Guilty in Katrina Bridge Shooting Cover-Up*, CNN (Feb. 10, 2010, 10:58 PM), <http://www.cnn.com/2010/CRIME/02/24/katrina.cop.charges/>.

306. See *Danziger Bridge Jury Form Details Charges Against 5 Guilty NOPD Officers*, TIMES-PICAYUNE (Aug. 5, 2011, 2:57 AM), [http://www.nola.com/crime/index.ssf/2011/08/danziger\\_bridge\\_verdict\\_sheet.html](http://www.nola.com/crime/index.ssf/2011/08/danziger_bridge_verdict_sheet.html).

307. Andy Grimm, *5 NOPD Officers Will Get New Trial in Danziger Bridge Case, Appeals Court Rules*, TIMES-PICAYUNE (Aug. 18, 2015, 7:52 AM), [http://www.nola.com/crime/index.ssf/2015/08/5\\_nopd\\_officers\\_will\\_get\\_new\\_t.html](http://www.nola.com/crime/index.ssf/2015/08/5_nopd_officers_will_get_new_t.html).

308. Sewell Chan, *The Abner Louima Case, Ten Years Later*, N.Y. TIMES (Aug. 9, 2007), <http://cityroom.blogs.nytimes.com/2007/08/09/the-abner-louima-case-10-years-later/>.

309. *See id.*; Leonard Greene, *Louima's Haunted High Life 10 Years Later*, N.Y. POST (July 30, 2007, 9:00 AM), <http://nypost.com/2007/07/30/louimas-haunted-high-life-10-years-later/>.

310. *See Chan, supra* note 308.

perjury for lying about the case.<sup>311</sup> The perjury was the result of the police officer's desire to cover up his misconduct.<sup>312</sup>

In addition to police officer rapes and the shootings of unarmed civilians, more run-of-the-mill assaults of civilians by police have also been documented.<sup>313</sup> In 2015, a police officer in a Texas suburb assaulted a teenage girl wearing a bikini bathing suit at a pool party by throwing her to the ground face-down and pointing a gun at her and others.<sup>314</sup> In 2008, a New York Police Department officer assaulted a bike activist by knocking him off his bike in the middle of Times Square.<sup>315</sup> The officer then arrested and charged the victim with attempted assault, disorderly conduct, and resisting arrest.<sup>316</sup> However, because the entire incident was captured by a bystander on video and uploaded to YouTube,<sup>317</sup> the charges against the cyclist were dropped.<sup>318</sup> The video shows the officer shove one bicyclist out of many at a bike-riding event, seemingly on a whim.<sup>319</sup> The officer was convicted, not of the assault, but of lying on the police report.<sup>320</sup>

As the bike rider's case illustrates, when police brutality results in injuries, police sometimes explain these injuries in a way that casts blame on the victim in order to justify the violence to supervisors or to the court, or to insulate themselves from civil liability.<sup>321</sup> Police are aware that they enjoy higher credibility than civilians in many instances—especially when compared to a criminal defendant.<sup>322</sup> Sometimes police may write in a

311. *See id.*

312. *See id.*

313. *See, e.g., infra* notes 314–20 and accompanying text.

314. *See* Carol Cole-Frowe & Richard Fausset, *Jarring Image of Police's Use of Force at Texas Pool Party*, N.Y. TIMES (June 8, 2015), <http://www.nytimes.com/2015/06/09/us/mckinney-tex-pool-party-dispute-leads-to-police-officer-suspension.html>.

315. *See* John Eligon, *Ex-Officer Convicted of Lying About Confrontation with Cyclist*, N.Y. TIMES (Apr. 29, 2010), <http://www.nytimes.com/2010/04/30/nyregion/30pogan.html>.

316. *See id.*

317. The Viral World, *NYC Cop Slams a Cyclist*, YOUTUBE (Apr. 19, 2010), <https://www.youtube.com/watch?v=EUaok48ZYDw>.

318. *See* Eligon, *supra* note 315.

319. *See NYC Cop Slams Cyclist, supra* note 317.

320. *See New York Police Officer Escapes Prison for Pushing Cyclist off Bike*, TELEGRAPH (July 15 2010, 11:10 AM), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/7891847/New-York-police-officer-escapes-prison-for-pushing-cyclist-off-bike.html>.

321. *See id.*; Dorfman, *supra* note 11, at 476; Stanley Z. Fisher, "Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports, 28 NEW ENG. L. REV. 1, 15 (1993).

322. *See* Dorfman, *supra* note 11, at 465 (suggesting that police lie because "judges allow them to get away with it").

report that the suspect fell after fleeing from police or, in other instances, depending on the injuries, police will allege that the citizen assaulted the officer first and the resulting injuries on the civilian were caused in self-defense or in an effort to subdue the person.<sup>323</sup> To make the story more convincing, police may then charge the citizen with assault on a police officer.<sup>324</sup> Assault on a police officer and resisting arrest are often “cover charges” that hide police violence.<sup>325</sup>

Evidence that these charges are merely cover charges to hide police brutality comes from the Superior Court of the District of Columbia.<sup>326</sup> An examination of 2,000 arrests for assault-on-a-police-officer charges in the District of Columbia found that one in four arrestees “required medical attention after their arrest.”<sup>327</sup> Medical attention suggests something more than a fat lip or a punch to the back.<sup>328</sup> This was a higher proportion than the number of officers who reported *any injury at all*, which was one in five.<sup>329</sup> Curiously, two-thirds of those charged with assault on a police officer had no other charges, which raises the question as to why the officers were interacting with these citizens to begin with.<sup>330</sup> Prosecutors in the District of Columbia may also distrust the accusations of the officers, because they have declined to prosecute assault-on-a-police-officer cases *more than 40 percent* of the time.<sup>331</sup>

Police brutality is a serious concern that has persisted largely undeterred for decades.<sup>332</sup> Only after protests in Ferguson and Staten Island—after those jurisdictions failed to prosecute—did we see prosecutions go forward

323. See Dorfman, *supra* note 11, at 476.

324. See Fisher, *supra* note 321, at 15.

325. Dorfman, *supra* note 11, at 476.

326. Christina Davidson & Patrick Madden, *In DC, Wiggling While Handcuffed Counts as Assaulting an Officer*, REVEAL NEWS (May 9, 2015), <https://www.revealnews.org/article/dcs-assaulting-an-officer-charge-could-hide-police-abuse-critics-say/>.

327. *Id.*

328. See *Gonzalez v. Lusardi*, 930 F. Supp. 2d 840, 855 (E.D. Ky. 2013) (holding that a “black, swollen eye” was not the type of injury that “a layperson would readily discern as requiring prompt medical attention”); *Ford v. Davis*, 878 F. Supp. 1124, 1130 (N.D. Ill. 1995) (holding that a swollen face, black eyes, bruised ribs, and a bruised back were not sufficiently serious for a reasonable officer to discern a need for immediate medical attention).

329. See Davidson, *supra* note 326.

330. See *id.*

331. See *id.*

332. See Bandes, *supra* note 293, at 1280 (suggesting that treating police brutality cases as a series of isolated incidents has masked the problem of systematic police brutality and enabled the problem to persist unimpeded).

in South Carolina, Baltimore, and Cincinnati.<sup>333</sup> There should be no question that officers who assault the citizens they are sworn to protect have issues with credibility.<sup>334</sup> The assault-on-police-officer cover charges are proof of that.<sup>335</sup> There is a clear connection between unauthorized police violence and credibility.<sup>336</sup> Subsequent falsehoods are all but required to cover up the brutality.<sup>337</sup>

#### *D. Hiding Evidence of Innocence*

The United States Supreme Court has long said it is unconstitutional to withhold “material evidence favorable to an accused upon request.”<sup>338</sup> This requirement includes not just evidence of actual innocence, but information that might discredit a witness.<sup>339</sup> Unfortunately, hiding evidence of innocence takes place over and over again.<sup>340</sup> The Innocence Project has found the suppression of exculpatory evidence to be a common cause of wrongful convictions in the DNA exonerations that it has documented.<sup>341</sup> The University of Michigan Law School’s National Registry of Exonerations lists “official misconduct” as the second most common contributing factor to convictions of innocent people, finding that it is a contributing factor in over half of all cases that have ultimately resulted in exoneration.<sup>342</sup>

While the suppression of evidence of innocence is often the result of ambitious prosecutors’ actions, police are guilty of this unconscionable act

333. The Ferguson and Staten Island protests occurred in November and December 2014, respectively. See McDonald, *supra* note 281; Southall, *supra* note 281. Charges were filed against the officers involved in the South Carolina, Baltimore, and Cincinnati incidents in April through July of 2015. See Pérez-Peña, *supra* note 283; Schmidt & Apuzzo, *supra* note 36; Wood & Anderson, *supra* note 283.

334. See *supra* notes 321–25 and accompanying text.

335. See *supra* notes 326–31 and accompanying text.

336. See *supra* notes 323–25 and accompanying text.

337. See *supra* note 324 and accompanying text.

338. Brady v. Maryland, 373 U.S. 83, 87 (1963).

339. Giglio v. United States, 405 U.S. 150, 154–55 (1972).

340. See James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 75 TEX. L. REV. 1839, 1850 (2000) (reporting that in a study examining 5,177 capital sentences reviewed, sixteen percent of post-conviction reversals involved wrongful suppression of exculpatory evidence).

341. See *Government Misconduct*, INNOCENCE PROJECT, <http://www.innocenceproject.org/causes-wrongful-conviction/government-misconduct> (last visited Oct. 14, 2016).

342. See Registry of Exonerations, *supra* note 34.

as well.<sup>343</sup> Obviously, where police fabricate or plant evidence, they violate their obligations under *Brady v. Maryland*,<sup>344</sup> as seen in the torture scandal in Chicago, where officers did not admit to forcing the confessions of so many arrestees.<sup>345</sup> Unfortunately, police routinely fail to come forward with information that helps the defense because it undermines their own achievements.<sup>346</sup>

A New York man served twenty-five years in prison for murder, despite the fact that a detective had obtained evidence that showed he was in Orlando, Florida, at Walt Disney World at the time of the offense.<sup>347</sup> The man presented witnesses at trial, but jurors discredited them because they were family members of the accused and were perceived as untrustworthy due to their bias in favor of the defendant.<sup>348</sup> Yet all along, there existed a receipt from the Orlando Quality Inn that was never disclosed.<sup>349</sup> The information was in the detective's file.<sup>350</sup> He shared it with no one.<sup>351</sup>

In 1995, in *Kyles v. Whitley*, the Supreme Court reversed a first-degree murder conviction in a case where the detective withheld information from prosecutors to make the case against the defendant appear stronger.<sup>352</sup> In the opinion, the Court wrote, "no one doubts that police investigators sometimes fail to inform a prosecutor of all they know."<sup>353</sup> The suppression of

343. See *Jones v. City of Chicago*, 865 F.2d 985 (7th Cir. 1988) (affirming a finding of conspiracy where police falsified an evidentiary report that would almost certainly have required prosecutors to drop charges against the defendant); Fisher, *supra* note 321, at 15–17 (suggesting that police lie to remove obstacles that they perceive as unjustly impeding the prosecutor's conviction of the defendant).

344. See *Brady v. Maryland*, 373 U.S. 83, 86–88 (1963); *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("[T]he individual prosecutor has a duty to learn of any foreseeable evidence known to the others acting on the government's behalf in the case, including the police.").

345. Carlos Sadovi & Bob Sexter, *Report: Cops Used Torture*, CHI. TRIB. (July 20, 2006), [http://articles.chicagotribune.com/2006-07-20/news/0607200264\\_1\\_burge-and-detectives-jon-burge-richard-brzeczek](http://articles.chicagotribune.com/2006-07-20/news/0607200264_1_burge-and-detectives-jon-burge-richard-brzeczek).

346. See Fisher, *supra* note 321, at 13 (suggesting that lying may be perceived as a necessary "survival tactic" that is used for self-protection as well as in "deference to the code of loyalty" that pervades law enforcement subculture).

347. Stephanie Clifford, *Man Wrongfully Convicted in 1989 Brooklyn Murder Is Set Free*, N.Y. TIMES (Apr. 8, 2014), [http://www.nytimes.com/2014/04/09/nyregion/brooklyn-district-attorney-overturms-conviction-in-1989-murder.html?\\_r=0](http://www.nytimes.com/2014/04/09/nyregion/brooklyn-district-attorney-overturms-conviction-in-1989-murder.html?_r=0).

348. See *id.*

349. See *id.*

350. See *id.*

351. See *id.*

352. *Kyles v. Whitley*, 514 U.S. 419, 421–22, 429 (1995).

353. *Id.* at 438.

exculpatory evidence by police is somewhat commonplace.<sup>354</sup> Legal scholars have explored it,<sup>355</sup> the Supreme Court has written about it,<sup>356</sup> and yet the problem persists.<sup>357</sup>

A crime lab in North Carolina withheld exculpatory evidence in a number of cases.<sup>358</sup> As a matter of *written* policy, the lab withheld exculpatory information from the defense.<sup>359</sup> This took place over sixteen years and affected at least 230 criminal cases.<sup>360</sup> Analysts failed to report evidence that was inconsistent with the government's theory.<sup>361</sup> In one case, an analyst failed to inform the parties that a substance tested was not blood.<sup>362</sup> An analyst from the lab later testified at an innocence hearing that they were told to ignore later, more sophisticated tests if they contradicted the test results from the crime scene.<sup>363</sup> Three defendants whose cases were worked on by the lab have been executed already.<sup>364</sup>

The FBI's microscopic hair comparison unit gave "flawed testimony" at almost every trial in which their twenty-eight experts testified.<sup>365</sup> The

354. See, e.g., Fisher, *supra* note 321, at 31 (suggesting that exclusion of exculpatory evidence from police reports is commonplace because the police focus primarily on their own needs, engaging in a pattern of behavior that is "hostile to the inclusion of exculpatory evidence").

355. See generally Michael Avery, *Paying for Silence: The Liability of Police Officers Under Section 1983 for Suppressing Exculpatory Evidence*, 13 TEMP. POL. & CIV. RTS. L. REV. 1 (2003) (arguing that police suppression of exculpatory evidence is a due process violation, justifying a remedy under 42 U.S.C. § 1983 for deprivations of liberty that occur before a trial has commenced, as well as in cases of wrongful conviction); Fisher, *supra* note 321 (examining the causes of false and misleading police reports, the impact of such reports on the criminal justice process, and remedies for police failure to report exculpatory evidence).

356. See, e.g., *Kyles*, 514 U.S. at 438 (acknowledging that police sometimes fail to provide exculpatory information to prosecutors).

357. See *supra* note 354 and accompanying text.

358. Mandy Locke et al., *Scathing SBI Audit Says 230 Cases Tainted by Shoddy Investigations*, RALEIGH NEWS & OBSERVER (Aug. 19, 2010, 2:00 AM), <http://www.newsobserver.com/news/special-reports/article10365422.html>.

359. See *id.*; see also Radley Balko, *How to Reform Forensics*, WASH. POST (May 5, 2015), [https://www.washingtonpost.com/news/the-watch/wp/2015/05/05/how-to-reform-forensics/?utm\\_term=.973e02ebf187](https://www.washingtonpost.com/news/the-watch/wp/2015/05/05/how-to-reform-forensics/?utm_term=.973e02ebf187).

360. See Locke et al., *supra* note 358.

361. See *id.*

362. See *id.*

363. Radley Balko, *North Carolina's Corrupted Crime Lab*, REASON.COM (Aug. 23, 2010), <http://reason.com/archives/2010/08/23/north-carolinas-corrupted-crim>.

364. See *id.*

365. See Spencer S. Hsu, *FBI Admits Flaws in Hair Analysis over Decades*, WASH. POST (Apr. 18, 2015), [https://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-early-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcfab310\\_story.html](https://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-early-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcfab310_story.html).

experts' testimony "exceed[ed] the limits of science in about [ninety] percent" of the cases.<sup>366</sup> In each instance, the testimony favored prosecution theory.<sup>367</sup> This false and misleading testimony took place over three decades and has likely impacted over 2,500 cases.<sup>368</sup> Thirty-two men were sentenced to death as a result of this testimony, fourteen of whom have been executed or died in prison.<sup>369</sup> While it is unclear whether the experts knew the testimony was false or misleading at the time they gave it, the FBI was apparently aware that this information was used to convict the innocent years before notifying defendants.<sup>370</sup> The exonerations occurred only after the Washington Post reported the problem.<sup>371</sup>

In addition to Massachusetts, North Carolina, and within the FBI, there have been serious scandals in Minnesota, Colorado, Michigan, and Texas that have undermined the integrity of those crime labs.<sup>372</sup> The scandals have involved everything from blood-alcohol testing to DNA results.<sup>373</sup>

#### IV. MOTIVATIONS

The causes of police problems with credibility are varied.<sup>374</sup> For example, a drug analyst in Massachusetts faked results in thousands of cases, because she wanted to advance her career and appear to be a good worker.<sup>375</sup> She filed false test results and lied under oath, reportedly out of an interest in improving her "work performance."<sup>376</sup> Convictions were vacated and the

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366. *Id.*

367. *See id.*

368. *See id.*

369. *See id.*

370. *See* Spencer S. Hsu, *Justice Dept., FBI to Review Use of Forensic Evidence in Thousands of Cases*, WASH. POST (July 10, 2012), [https://www.washingtonpost.com/local/crime/justice-dept-fbi-to-review-use-of-forensic-evidence-in-thousands-of-cases/2012/07/10/gIQAT6DlbW\\_story.html](https://www.washingtonpost.com/local/crime/justice-dept-fbi-to-review-use-of-forensic-evidence-in-thousands-of-cases/2012/07/10/gIQAT6DlbW_story.html).

371. *See* Spencer S. Hsu, *Convicted Defendants Left Uninformed of Forensic Flaws Found by Justice Dept.*, WASH. POST (Apr. 16, 2012), [https://www.washingtonpost.com/local/crime/convicted-defendants-left-uninformed-of-forensic-flaws-found-by-justice-dept/2012/04/16/gIQAWTcgMT\\_story.html](https://www.washingtonpost.com/local/crime/convicted-defendants-left-uninformed-of-forensic-flaws-found-by-justice-dept/2012/04/16/gIQAWTcgMT_story.html).

372. *See* Conor Friedersdorf, *CSI Is a Lie*, ATLANTIC (Apr. 20, 2015), <http://www.theatlantic.com/politics/archive/2015/04/csi-is-a-lie/390897/>.

373. *See id.*

374. *See infra* notes 375–78 and accompanying text.

375. *See* Milton J. Valencia & John R. Ellement, *Annie Dookhan Pleads Guilty in Drug Lab Scandal*, BOS. GLOBE (Nov. 22, 2013), <https://www.bostonglobe.com/metro/2013/11/22/annie-dookhan-former-state-chemist-who-mishandled-drug-evidence-agrees-plead-guilty/7UU3hfZUof4DFJGoNUFXGO/story.html>.

376. *Id.*

analyst at the heart of the scandal pleaded guilty and was sentenced to three to five years in prison.<sup>377</sup> A desire to please those with whom one works is a natural inclination that has serious consequences for police working with prosecutors.<sup>378</sup>

The North Carolina scandal was directly tied to pressure from prosecutors to produce results that would get convictions.<sup>379</sup> That pressure resulted in bogus evidence, perjury, and other lies.<sup>380</sup> As a result of the handful of scandals, hundreds of people were convicted on false testimony or evidence, some were convicted of crimes they did not commit, and at least two people were executed.<sup>381</sup>

Radley Balko, an investigative journalist, said the following about uncovering problems in forensic science:

One major barrier to improving forensic evidence in criminal trials is . . . [that c]rime labs analysts and medical examiners [are] typically work[ing] for the government and are generally seen as part of the prosecution's 'team' . . . . A scientist whose job performance is evaluated by a senior official in the district attorney[']s office] . . . may feel subtle pressure to return results that produce convictions.<sup>382</sup>

The sheer number of crime lab scandals illustrates that individuals and organizations working in law enforcement face pressure to help prosecutors get convictions.<sup>383</sup>

The pressure to deliver results undoubtedly exists with police officers and prosecutors just as much as with forensic scientists and prosecutors.<sup>384</sup>

377. *See id.*

378. *See infra* notes 379–91 and accompanying text.

379. *See* Friedersdorf, *supra* note 372.

380. *See id.*

381. *See id.*

382. Radley Balko & Roger Koppl, *C.S.Oy*, SLATE (Aug. 12, 2008, 12:43 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2008/08/csoy.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2008/08/csoy.html).

383. *See* Letitia James, *Prosecutors and the Police: The Inherent Conflict in Our Courts*, MSNBC (Sept. 16, 2016, 10:46 AM), <http://www.msnbc.com/msnbc/prosecutors-police-inherent-conflict-our-courts>; *see also* *Crime Lab & Forensic Scandals*, NAT'L ASS'N CRIM. DEF. LAW., <https://www.nacdl.org/criminaldefense.aspx?id=28286> (last visited Oct. 15, 2016).

384. *See* Alexander, *supra* note 234. *See generally* Felice F. Guerrieri, *Law & Order: Redefining the Relationship Between Prosecutors and Police*, 25 S. ILL. U. L.J. 353, 353 (discussing misconduct of both police officers and prosecutors and suggesting society "reevaluate this partnership" between the two entities).



This is particularly true amongst officers and prosecutors who have repeated interactions with one another on cases.<sup>385</sup> Prosecutors simply cannot win cases without the help and cooperation of the police.<sup>386</sup> Police are the investigative arm of the prosecutor in most cases.<sup>387</sup> Similarly, police need to maintain a good relationship with the prosecutor's office in order for the cases they bring to be vindicated.<sup>388</sup> Thus, police may face pressure from the prosecutors and need to satisfy prosecutors so that the officer's interests are pursued.<sup>389</sup> Because of this special relationship between police and prosecutors in building cases, it is not hard to see how police would want to please prosecutors and help them win cases.<sup>390</sup> This affiliation between police and prosecutors makes police officers very different from other witnesses.<sup>391</sup>

Most departments claim that there are no specific number of arrests required of an officer.<sup>392</sup> However, officers in Whittier, California, sued the city after they faced retaliation for complaining about ticket and arrest quotas.<sup>393</sup> After complaining, the officers were transferred to assignments they did not want, were forced to participate in counseling sessions, and were placed on supervisory review and a performance plan.<sup>394</sup>

In Sacramento, California Highway Patrol officers assaulted a seventy-eight-year old man during a traffic stop.<sup>395</sup> Evidence at trial showed that the

385. See Covey, *supra* note 138, at 1171.

386. See Daniel Denvir, *Perjury USA: Rampant Police Lying Taints Criminal Justice System Nationwide*, SALON (Jan. 6, 2016, 8:57 AM), [http://www.salon.com/2016/01/06/perjury\\_usa\\_rampant\\_police\\_lying\\_taints\\_criminal\\_justice\\_system\\_nationwide/](http://www.salon.com/2016/01/06/perjury_usa_rampant_police_lying_taints_criminal_justice_system_nationwide/) (“[N]ot only do prosecutors ignore perjury [by Chicago police], they also depend on it to win prized convictions.”).

387. See *id.* See generally Guerrieri, *supra* note 384 (discussing the close relationship between police officers and prosecutors).

388. See Slobogin, *supra* note 267, at 1047 (recognizing the importance of a “good working relationship” between prosecutors and police officers).

389. See *id.*

390. See Denvir, *supra* note 386.

391. See *id.*

392. See Alexander, *supra* note 234 (noting that denials of the existence of arrest quotas in New York City are mandatory for police departments, because quotas are illegal under state law).

393. See Veronica Rocha, *Whittier Police Officers Sue, Say They Were Forced to Meet Quotas*, L.A. TIMES (Mar. 4, 2015, 4:40 PM), <http://www.latimes.com/local/lanow/la-me-ln-whittier-ticket-quotas-20150304-story.html>.

394. See *id.*

395. See Saki Knafo, *How Aggressive Policing Affects Police Officers Themselves*, ATLANTIC (Jul. 13, 2015), <http://www.theatlantic.com/business/archive/2015/07/aggressive-policing-quotas/398165/>.

officers involved in the incident had previously been disciplined for making too few contacts with motorists.<sup>396</sup> One officer was told that his average of five stops a day was too few and that a goal of 100 per month should be met.<sup>397</sup> According to one New York City officer, the NYPD has an “unwritten rule” of “20 and one”—twenty tickets and one arrest each month.<sup>398</sup> Officers who do not meet these goals face reassignment, denial of leave, and little hope of promotion.<sup>399</sup> Even where no actual quotas exist, police culture drives officers to make as many arrests as possible.<sup>400</sup> The drive to meet departmental expectations could manifest in trumped-up charges.<sup>401</sup>

Police departments have financial incentives to make arrests, in addition to the other motivations they may have.<sup>402</sup> This pressure for numbers and capital was certainly seen in Ferguson, MO, where officers saw the community they were supposed to protect as a source of revenue.<sup>403</sup> Facing a tax revenue shortfall, the city of Ferguson looked to the police chief to generate more revenue.<sup>404</sup> Ten percent of the city’s general fund came from fines and fees generated by the criminal justice system and approximately another twenty percent came from the court.<sup>405</sup> This focus on generating income for the city and pay for city employees resulted in aggressive enforcement of the city’s municipal code, according to the Department of Justice report on Ferguson.<sup>406</sup>

The money at stake in civil and criminal forfeiture is significant.<sup>407</sup>

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396. *See id.*

397. *See* Denny Walsh & Sam Stanton, *Court Case Hinges on Claim of Illegal CHP Ticket Quotas*, SACRAMENTO BEE (June 15, 2015, 6:53 PM), <http://www.sacbee.com/news/local/transportation/article24540853.html>.

398. Joel Rose, *Despite Laws and Lawsuits, Quota-Based Policing Lingers*, NPR (Apr. 4, 2015, 4:47 AM), <http://www.npr.org/2015/04/04/395061810/despite-laws-and-lawsuits-quota-based-policing-lingers>.

399. *See* Knafo, *supra* note 395.

400. *See* Rose, *supra* note 398.

401. *See supra* Section III.A.

402. *See infra* notes 403–15 and accompanying text.

403. *See* U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 9–15 (Mar. 4, 2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

404. *See id.*

405. *See id.*

406. *See id.*

407. *See infra* notes 408–15 and accompanying text.

Criminal forfeiture takes place after a criminal conviction is obtained.<sup>408</sup> Civil forfeiture allows police to seize money from an individual and can take place without a criminal conviction.<sup>409</sup> In 2001, the Department of Justice reported that \$400 million had been recovered in civil forfeiture funds.<sup>410</sup> Much of that money goes to the department that recovered the funds.<sup>411</sup> In fact, some departments rely on those monies.<sup>412</sup> Given that the police simply need to accuse a person of a crime to recover their money and use it for departmental purposes, police may be motivated to falsely accuse a person of a crime.<sup>413</sup> Professional accolades may follow for officers who are able to bring resources that benefit the unit.<sup>414</sup> Generating this revenue and the career advantages that may follow further distinguish police witnesses from other witnesses.<sup>415</sup>

The war on drugs is an additional reason that officers face pressure.<sup>416</sup> Departments compete for grant money for drug arrests.<sup>417</sup> Institutional issues within a particular police department create both an incentive for officers to act outside the law and for supervisors to overlook the transgressions.<sup>418</sup> In discussing the Texas Sheetrock scandal, one observer wrote: “[C]onsider the slack supervision of these undercover officers, their push for numbers, their willingness to cut corners . . . . What happened was inevitable.”<sup>419</sup>

Officers also have an interest in the outcome of the case in much of their

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408. See Marian R. Williams, *Civil Asset Forfeiture: Where Does the Money Go?*, 27 CRIM. JUST. REV. 321, 321 (2002).

409. See *id.* at 322.

410. See *id.* at 323.

411. See *id.*

412. See John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. CRIM. JUST. 171, 178 tbl.1 (2001).

413. See Williams, *supra* note 408, at 322.

414. See Sallah et al., *supra* note 23.

415. See *supra* notes 407–14 and accompanying text.

416. See *infra* notes 417–19 and accompanying text.

417. See Alexander, *supra* note 234; see also Karena Rahall, *The Green to Blue Pipeline: Defense Contractors and the Police Industrial Complex*, 36 CARDOZO L. REV. 1785, 1835 n.103 (2015) (citing RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA’S POLICE FORCES* 207 (2013)) (“COPS, Byrne, and other block grants were awarded to departments based entirely on the number of drug arrests made by each department and drug arrests skyrocketed as a result.”).

418. See Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 65 (1998); Sallah et al., *supra* note 23.

419. Donald, *supra* note 260.

undercover work.<sup>420</sup> When a department devotes its limited resources to drug busts, prostitution stings, or other undercover assignments, results are expected.<sup>421</sup> Similarly, search warrant cases, where police seek out a search warrant for drugs or guns, are brought because of a particular interest of law enforcement.<sup>422</sup> In those cases, police cannot be said to be simply disinterested, neutral witnesses.<sup>423</sup>

In certain high-profile cases, or in jurisdictions where public sentiment is fairly intolerant of unsolved crime, police departments may face certain pressures to “close cases” or solve previously unsolved crimes.<sup>424</sup> This pressure can create an incentive to manufacture evidence against individuals to get the charges to “stick.”<sup>425</sup> Claiming to have heard a confession or an out-of-context condemning statement, recovering weapons or other evidence planted in a particular location, obscuring evidence that points to someone else, or hiding evidence of the suspect’s innocence can make a case stronger than it was previously.<sup>426</sup> Officers who “solve” crimes, particularly serious ones, are congratulated and heralded as heroes.<sup>427</sup>

Amongst some officers, there also exists an “us against them” mentality, which causes officers to see themselves not as public servants, but as outside or above the community they police.<sup>428</sup> In the Commonwealth of Virginia, police have asked lawmakers to allow them to withhold their identities from the public.<sup>429</sup> The justification advanced by the police is that police are at risk from the public and that it is too dangerous for members of the community to know the names of the police officers in their community.<sup>430</sup>

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420. See *infra* notes 421–22 and accompanying text.

421. See Donald, *supra* note 260.

422. See *id.*

423. See Alexander, *supra* note 234.

424. See Mike Maciag, *Case Closed? How ‘Solved’ Murder Stats Are Misleading*, GOVERNING (Apr. 2015), <http://www.governing.com/topics/public-justice-safety/gov-murder-clearance-rates-misleading.html>; Santiago O’Donnell, *A Crack Squad Gets Tough Cases*, WASH. POST (June 27, 1993), <https://www.washingtonpost.com/archive/local/1993/06/27/a-crack-squad-gets-tough-cases/4e128ec9-ea61-4edc-a432-21f330083536/>.

425. See Slobogin, *supra* note 267, at 1044–47.

426. See *id.*

427. See Alexander, *supra* note 234.

428. Mollen et al., *supra* note 226.

429. See Tom Jackman, *Secret Police? Virginia Considers Bill to Withhold All Officers’ Names*, WASH. POST (Feb. 24, 2016), <https://www.washingtonpost.com/news/true-crime/wp/2016/02/24/secret-police-virginia-considers-bill-to-withhold-all-officers-names/>.

430. See *id.*

This “us against them” mentality is further evidenced by the hundreds of thousands of dollars raised for police officer Darren Wilson after he killed an unarmed man; another example of this blue code.<sup>431</sup> Websites and social media sites exist that foster this view.<sup>432</sup>

As a result of the view that the police are under assault by the community they are meant to serve, officers are prone to group polarization.<sup>433</sup> This is an unconscious phenomenon caused by the limited viewpoints to which law enforcement is exposed.<sup>434</sup> The officers talk about their cases largely among themselves, confirming one another’s beliefs.<sup>435</sup> Group polarization causes police to become more extreme in their views of those they are policing.<sup>436</sup> Adding to this phenomenon, the police also work closely with the victims, which may result in an officer becoming overly invested in the alleged victim’s account<sup>437</sup> as opposed to other witnesses, and cause an officer to want “justice” for the victim.<sup>438</sup>

Involvement in the investigation and the investigative institution—the police department—may lead to tunnel vision and confirmation bias as well.<sup>439</sup> As a result, police may become convinced of a subject’s guilt simply because he is the suspect and because they are only exposed to one side of the story until the trial.<sup>440</sup> This belief in the defendant’s guilt can lead to the stretching of the truth in order to secure a conviction and ensure that a person an officer believes is guilty goes behind bars, even when there

431. See Matt Pearce, *Fundraising Web Pages for Ferguson Cop Still Closed; It’s Unclear Why*, L.A. TIMES (Sept. 1, 2014, 5:41 PM), <http://www.latimes.com/nation/nationnow/la-na-nn-ferguson-officer-fundraisers-20140831-story.html> (“‘Support Officer Darren Wilson’ and ‘Support Officer Wilson’—two separate [online fundraising] pages with similar names raised \$235,750 and \$197,620, respectively, for the Ferguson police officer who shot Michael Brown on Aug. 9.”).

432. See, e.g., OFFICER.COM, <http://www.officer.com/> (last visited Oct. 15, 2016); UNIFORM STORIES, <http://uniformstories.com/> (last visited Oct. 15, 2016).

433. See Andrew Taslitz, *Trying Not to Be Like Sisyphus: Can Defense Counsel Overcome Pervasive Status Quo Bias in the Criminal Justice System?*, 45 TEX. TECH. L. REV. 315, 364 (2012).

434. See *id.*

435. See *id.* (“This polarization occurs partly because of the limited number of arguments raised, the growing confidence in the original belief spurred by that limited discussion, and the peer feedback from offering ever-more-enthusiastic defenses of the original position.”).

436. See *id.*

437. See *id.* at 361.

438. See *id.* (showing police and prosecutors often disregard pertinent evidence when it conflicts with their preferred narrative of events); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292 (2006).

439. See Taslitz, *supra* note 433, at 316, 319.

440. See *id.* at 359, 361.

is evidence to the contrary.<sup>441</sup> Tunnel vision will cause police to ignore and disregard exculpatory evidence.<sup>442</sup> These unconscious phenomena—polarization biases, tunnel vision, and confirmation biases—are all caused by the officer’s profession as part of law enforcement and differentiate police officers from other witnesses without those biases.<sup>443</sup>

A hard-to-prove motive for police misconduct may be racial animus or unconscious bias against people of color.<sup>444</sup> We know that police officers choose to over-police neighborhoods in black and brown communities and stop and arrest people of color at much higher rates than they do whites.<sup>445</sup> This is even true when one accounts for crimes like marijuana possession that occur at the same rates across the races.<sup>446</sup> Black men are twenty-one times more likely to be shot dead by police than white men.<sup>447</sup> There seems to be little doubt that the majority of those wrongfully convicted are persons of color.<sup>448</sup> According to the National Registry of Exonerations, African Americans are disproportionately represented in these cases compared to the population as a whole; in fact, most exoneration cases involve African-

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441. *See id.* (“Data supporting the decision becomes overvalued, while data challenging the status quo is discounted.”).

442. *See id.* at 361.

443. *See id.* at 316, 361, 364; Findley, *supra* note 438.

444. *See* Kia Makarechi, *What the Data Really Says About Police and Racial Bias*, VANITY FAIR (July 14, 2016, 3:09 PM), <http://www.vanityfair.com/news/2016/07/data-police-racial-bias>; Taslitz, *supra* note 433, at 354 (“Criminal prosecutions today are overwhelmingly instituted against African-Americans and other racial minorities—usually against young men.”).

445. *See New NYPD Data for 2009 Shows Significant Rise in Stop-and-Frisks: More than Half Million New Yorkers Stopped Last Year*, CTR. FOR CONST. RTS. (Feb. 17, 2010), <http://ccrjustice.org/newsroom/press-releases/new-nypd-data-2009-shows-significant-rise-stop-and-frisks%3A-more-half-million>. A half-million people were stopped by the police in New York City—87% of them were African American or Latino (“only 1.3[%] of the year’s stops resulted in the discovery of a weapon, and only 6% resulted in arrests”), whereas only 53% of the population of New York City is African American or Latino. *Id.* African Americans in Los Angeles were three times as likely to be stopped as whites, and they were 127% more likely to be frisked; but African Americans who were frisked and searched (and Latinos, who were also more likely to be stopped and searched) were less likely to have weapons, drugs, or other incriminating evidence on their persons. *See, e.g.*, IAN AYRES & JONATHAN BOROWSKY, *A STUDY OF RACIALLY DISPARATE OUTCOMES IN THE LOS ANGELES POLICE DEPARTMENT* 6, 25–26 (2008).

446. *New ACLU Report Finds Overwhelming Racial Bias in Marijuana Arrests*, ACLU (June 4, 2013), <https://www.aclu.org/news/new-aclu-report-finds-overwhelming-racial-bias-marijuana-arrests>.

447. *See* Ryan Gabrielson et al., *Deadly Force, in Black and White*, PROPUBLICA (Oct. 10, 2014, 11:07 AM), <http://www.propublica.org/article/deadly-force-in-black-and-white>.

448. *See* Covey, *supra* note 138, at 1144.

American defendants.<sup>449</sup> It may be that some police officers' misconduct is driven out of racial hatred or bias.<sup>450</sup>

Unfortunately, as the above accounting of misdeeds by police and crime labs alike shows, law enforcement officers acting outside the law is not rare.<sup>451</sup> It is not just a handful of rogue officers; it is a pervasive, nationwide problem.<sup>452</sup> Those of us outside of law enforcement may never know what drives individual officers to act outside the law.<sup>453</sup> Likely, many police officers may be driven by a number of pressures.<sup>454</sup> Arrest statistics and the ambition to ascend the department's ranks may result in a disregard for the citizens the officers are supposed to protect, and motivate officers to act illegally.<sup>455</sup> Whether caused by racial animus, the war on drugs, or other pressures, police corruption is widespread and absolutely implicates officer credibility.

## V. PUBLIC VIEW OF POLICE

Perceptions of police officers are varied.<sup>456</sup> From the depictions of the "Blue Knight" and "Officer Friendly" to much more sinister portrayals in popular media, attitudes about police officers differ.<sup>457</sup>

New realities and the proliferation of cell phone, dashboard, and body cameras have affected public perception of police in the past few decades.<sup>458</sup>

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449. See Registry of Exonerations, *supra* note 34.

450. See Makarechi, *supra* note 444.

451. See Jonathan Blanks et al., *National Police Misconduct Reporting Project*, CATO INSTITUTE, <http://www.policemisconduct.net/> (last visited Oct. 17, 2016).

452. See *id.*

453. See Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L. J. 677, 690 (1996) (noting that "the causes of police violence are not only individually based, but also stem from our society and culture").

454. See *id.* ("At the same time, the causes of brutality, including, inter alia, police culture, job stress and racism, are social problems that cannot be eliminated merely by firing or incarcerating a few bad cops.").

455. See Nathaniel Bronstein, *Police Management and Quotas: Governance in the Compstat Era*, 48 COLUM. J.L. & SOC. PROBS. 543, 550 (2015).

456. See *infra* notes 457–61 and accompanying text.

457. See Anthony C. Thompson, *From Sound Bites to Sound Policy: Reclaiming the High Ground in Criminal Justice Policy-Making*, 38 FORDHAM URB. L.J. 775, 788–89 (2011). Compare THE BLUE KNIGHT (Lorimar Productions 1973), with *infra* note 460.

458. See Hannah Parry, *FBI Director Says Cellphone Cameras Are to Blame for Rise in Hostile Relationship Between Police and Public as Cops Are Frequently Taunted for the Sake of Getting a Viral Video*, DAILY MAIL (Oct. 25, 2015), <http://www.dailymail.co.uk/news/article-3288732/FBI-director-says-cellphone-cameras-blame-rise-hostile-relationship-police-public-cops-frequently-taunt>

A 2015 poll by Reuters found that thirty-one percent of Americans believe that police routinely lie.<sup>459</sup> Movies and television shows over the last several decades show police beating suspects, planting evidence, and lying under oath.<sup>460</sup> The idea has permeated our social sphere: websites, Twitter, and Facebook groups have become virtual meeting places for people concerned with police corruption.<sup>461</sup>

While individuals know that officers may lie, that does not always translate into individual jurors doubting individual officers in the courtroom.<sup>462</sup> White jurors are less likely to have experienced or know those who have experienced police officer corruption and are therefore more likely to believe police officers.<sup>463</sup> For example, as Brooklyn, New York has gentrified, jurors have in turn been more likely to convict defendants than when Brooklyn was more diverse.<sup>464</sup> This phenomenon has been referred to

ed-sake-getting-viral-video.html; Richard Pérez-Peña & Timothy Williams, *Glare of Video is Shifting Public's View of Police*, N.Y. TIMES (July 30, 2015), [http://www.nytimes.com/2015/07/31/us/through-lens-of-video-a-transformed-view-of-police.html?\\_r=0](http://www.nytimes.com/2015/07/31/us/through-lens-of-video-a-transformed-view-of-police.html?_r=0); Aaron Sankin, *How Police Body Cameras Change Our Perception of Right and Wrong*, DAILY DOT (Sept. 1, 2014, 9:05 AM), <http://www.dailydot.com/layer8/police-body-camera-perspective-bias/>.

459. See Bill Schneider, *One Third of Americans Believe Police Lie Routinely*, REUTERS (Jan. 15, 2015, 5:30 PM), <http://in.reuters.com/article/2015/01/15/usa-police-idINL1N0UU01J20150115>.

460. See, e.g., *BAD LIEUTENANT* (Aries Films 1992); *COP LAND* (Miramax 1997); *DO THE RIGHT THING* (40 Acres & A Mule Filmworks 1989); *INTERNAL AFFAIRS* (Paramount Pictures 1990); *LA CONFIDENTIAL* (Warner Brothers 1997); *NARC* (Paramount Pictures 2002); *SERPICO* (Paramount Pictures 1973); *SHADES OF BLUE* (NBC television broadcast); *THE DEPARTED* (Warner Brothers Pictures 2006); *TRAINING DAY* (Warner Brothers Pictures 2001).

461. See Black Lives Matter, FACEBOOK, <https://www.facebook.com/BlackLivesMatter?fref=ts> (last visited Oct. 14, 2016); see also Freeman, *supra* note 453, at 679–80 (noting that “media commentators, academicians, and politicians across the country are discussing police brutality and other police wrongdoing”).

462. E.g., Penelope McMillan, *Juries Find Police Credibility Still High*, L.A. TIMES (Mar. 2, 1993), [http://articles.latimes.com/1993-03-02/local/me-181\\_1\\_police-officers](http://articles.latimes.com/1993-03-02/local/me-181_1_police-officers); Josh Saul, *When Brooklyn Juries Gentrify, Defendants Lose*, N.Y. POST (June 16, 2014, 4:53 AM) <http://nypost.com/2014/06/16/brooklyn-gentrification-is-changing-juries-who-decide-cases/> (suggesting that those from more well-off, educated communities are more trusting of the police).

463. See Ariel Edwards-Levy, *Most White People Are Really Confident Their Local Police Treat Races Equally*, HUFFINGTON POST (Dec. 11, 2014, 3:23 PM), [http://www.huffingtonpost.com/2014/12/10/white-police-poll\\_n\\_6302614.html](http://www.huffingtonpost.com/2014/12/10/white-police-poll_n_6302614.html) (reporting that fifty-two percent of white Americans have “great confidence” in the police, whereas only twelve percent of black Americans do); M.S., *The Ferguson Verdict: In Black and White*, ECONOMIST (Nov. 25, 2014, 7:45 PM), <http://www.economist.com/blogs/democracyinamerica/2014/11/ferguson-verdict-0> (noting an instance where white jurors were more likely to trust the uncorroborated testimony of a police officer than black jurors were).

464. See Saul, *supra* note 462.



as the “Williamsburg Effect.”<sup>465</sup> Because white people are less likely to have been involved in the criminal justice system, they are less inclined to see it as corrupt than those who have experienced it.<sup>466</sup> They are more likely to have had positive interactions with police officers and, as a result, think more favorably of them.<sup>467</sup> A 2004 analysis of juror decision-making in criminal trials found that most jurors believed police testimony.<sup>468</sup> The study included jurors from jurisdictions in California, Arizona, New York, and the District of Columbia.<sup>469</sup>

Jury instructions at odds with the reality of police bias allow the phenomenon of giving undue weight to police officer testimony to continue.<sup>470</sup> Jurors are instructed that an officer is just like anyone else, rather than instructed to consider the bias inherent in the officer’s position as an aide to the prosecution with an interest in the case’s outcome.<sup>471</sup>

## VI. CHANGE IS NECESSARY

The current jury instructions about police credibility do not reflect reality and, as a result, the government benefits unfairly and the criminal defendant is disadvantaged at trial.<sup>472</sup> An eyewitness or bystander who does not know the parties has entirely different motivations when she testifies than might the police officer with an interest in the outcome of the case.<sup>473</sup> For judges to instruct jurors otherwise is misleading and inaccurate.

Despite the thousands of instances of police corruption, the criminal justice system churns on, and in many instances, convicts people based on police testimony alone.<sup>474</sup> Sometimes, police officer testimony is the only

465. *Id.*

466. *See id.* (“People who can afford to live in Brooklyn now don’t have the experience of police officers throwing them against cars and searching them. A person who just moves here from Wisconsin or Wyoming, they can’t relate to [that]. It doesn’t sound credible to them.”); *see also* M.S., *supra* note 463.

467. *See* Saul, *supra* note 462.

468. *See* Stephen Garvey et al., *Juror First Votes in Criminal Trials*, 1 J. EMPIRICAL LEGAL STUD. 371, 396 (2004).

469. *See id.* at 375.

470. *See* Chin & Wells, *supra* note 6, at 264–73.

471. *See id.*

472. *See generally* Taslitz, *supra* note 433.

473. *See id.*

474. *See* Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 107 (1992) (reporting a survey of prosecutors, defense attorneys, and judges indicating a belief that, on average, perjury occurs twenty

evidence against a person facing substantial prison time.<sup>475</sup> In undercover narcotics cases or other stings, there is no other witness to the alleged offense.<sup>476</sup> While drug possession, drug dealing, and prostitution charges are non-violent offenses, the sentences are not trivial.<sup>477</sup> In some jurisdictions, these crimes are felonies, and many offenses carry mandatory minimum sentences.<sup>478</sup> In many instances, the sentences can be for life.<sup>479</sup> A conviction carries a host of other collateral consequences as well.<sup>480</sup>

With respect to other types of offenses, police officers may be the only witnesses to an alleged confession or evidence seized as a result of a search warrant.<sup>481</sup> Because of the hundreds of wrongful convictions that have been overturned in the United States, police corruption is a significant factor in a number of those cases.<sup>482</sup>

The cost of an innocent person being framed for a crime he did not commit cannot be measured.<sup>483</sup> To the individual, there is the loss of liberty,

percent of the time, with defense attorneys estimating that it occurs fifty-three percent of the time in connection with Fourth Amendment issues).

475. See Wekili & Leus, *supra* note 14, at 189 (noting that police officers receive expert witness training and are often the only witness); *Manson v. Brathwaite*, 432 U.S. 98, 114–17 (holding an undercover police officer’s suggestive and unnecessary identification procedure of an alleged drug dealer was sufficient, so long as the overall identification was reliable).

476. See *People v. Cona*, 399 N.E.2d 1167, 1169–70 (affirming the reversal of two convictions based solely on an undercover police officer’s uncorroborated testimony); Joseph Goldstein, *Undercover Officers Ask Addicts to Buy Drugs, Snaring Them but Not the Dealers*, N.Y. TIMES (Apr. 4, 2016), <http://www.nytimes.com/2016/04/05/nyregion/undercover-officers-ask-addicts-to-buy-drugs-snaring-them-but-not-dealers.html>.

477. See *infra* notes 478–80 and accompanying text.

478. See Ind. Code Ann. § 35-45-4-2 (West 2015) (“[Prostitution] is a Level 6 felony if the person has two (2) prior [prostitution] convictions.”); *People v. Thompson*, 633 N.E.2d 1074, 1075 (N.Y. 1994) (finding a fifteen-year mandatory minimum for class A-1 felony sale of cocaine was not “cruel and unusual punishment”). See also *Quick Facts: Drug Offenders*, FAMILIES AGAINST MANDATORY MINIMUMS, <http://famm.org/the-facts-with-sources/#3> (last visited Oct. 16, 2016) (“Each year, about 60% of all federal drug offenders are subject to a mandatory minimum sentence.”).

479. See *A Living Death: Life Without Parole for Non-Violent Offenders*, ACLU (Nov. 2013), <https://www.aclu.org/files/assets/111813-lwop-complete-report.pdf#page=4>.

480. See Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790 (2012); Margaret Colgate Love, *The Collateral Consequences of Padilla v. Kentucky: Is Forgiveness Now Constitutionally Required?*, 160 U. PA. L. REV. PENNUMBRA 113, 117 (2011); Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 635–36 (2006).

481. See Covey, *supra* note 138, at 1185.

482. See *id.*

483. See Janet Roberts & Elizabeth Stanton, *A Long Road Back After Exoneration, and Justice Is*

home, career, and relationships with friends and family.<sup>484</sup> To the family of those convicted of a crime, there is the loss of a partner, parent, breadwinner, or caretaker.<sup>485</sup> The community of which that person was a part loses, too: the community loses a neighbor and a taxpayer, and may have to take on responsibilities that would have fallen to the individual, such as caring for any children, paying public benefits to the remaining family members, or providing therapy for the family.<sup>486</sup> The children left behind are more likely to commit crimes, suffer from depression, and live in poverty.<sup>487</sup> When the person who was falsely convicted emerges from prison, he will have fewer job prospects, may become homeless, and will be at a higher risk of committing a crime.<sup>488</sup>

In cases where police credibility is central, an instruction to jurors that the testimony of an officer is to be treated just like that of any other witness contradicts reality. The officer's testimony, in many instances, is not the same: often, the officer has an interest bias.<sup>489</sup>

When a defendant testifies, the jurors are instructed that he has an interest in the outcome of the case.<sup>490</sup> When a witness with a plea bargain testifies, the court tells the jurors that the witness's testimony should be received "with caution."<sup>491</sup> When courts give these instructions, they are recognizing the interests at play for the witnesses.<sup>492</sup> Not giving those instructions about police officer testimony when requested by the defense is unfair and contrary to reality.<sup>493</sup> This failure to take action on police credibility further suggests a bias within the justice system that is hard to

*Slow to Make Amends*, N.Y. TIMES (Nov. 25, 2007), <http://www.nytimes.com/2007/11/25/us/25dna.html>; Leslie Scott, "It Never Ends": *The Psychological Impact of Wrongful Conviction*, 5 AM. U. CRIM. L. BRIEF 10, 10 (2010).

484. See Scott, *supra* note 483, at 15.

485. See *id.* at 12; Adrian T. Grounds, *Understanding the Effects of Wrongful Imprisonment*, 32 CRIME & JUST. 1, 26–27 (2005).

486. See Scott, *supra* note 483, at 10.

487. See Anita Bernstein, *The Feminist Jurisprudence of Judge Jack B. Weinstein*, 64 DEPAUL L. REV. 341, 360 (2015); Nekima Levy-Pounds, *Can These Bones Live? A Look at the Impacts of the War on Drugs on Poor African-American Children and Families*, 7 HASTINGS RACE & POVERTY L. J. 353, 355 (2010).

488. See Heather Weigand, *Rebuilding A Life: The Wrongfully Convicted and Exonerated*, 18 B.U. PUB. INT. L.J. 427 (2009); see also Roberts & Stanton, *supra* note 483.

489. See generally Taslitz, *supra* note 433.

490. See *supra* Section II.B.

491. See *supra* Section II.C.

492. See *supra* Sections II.B–C.

493. See *supra* Section II.C.

justify and only compounds the issue.<sup>494</sup>

## VII. INVOLVEMENT OF OTHER PLAYERS

Courts and prosecutors likely have difficulty admitting that police misconduct is a significant problem for a number of reasons.<sup>495</sup> First, and perhaps most understandably, acknowledging the reality of police dishonesty, evidence-planting, and violence undermines public confidence in our system of justice.<sup>496</sup> That prosecutors and trial judges allow perjury by police officers calls their own integrity into question.<sup>497</sup> Police vice is hard to prove, and exposing it may come at a big political price for any one individual.<sup>498</sup> In addition, prosecutors rely on police both to make their cases and for investigation.<sup>499</sup> As a result, prosecutors have not taken on police corruption and deceit in an organized or hard-hitting way.<sup>500</sup>

A more troubling reason that this police officer corruption goes unchecked by prosecutors is that prosecutors benefit from police dishonesty.<sup>501</sup> The planting of evidence, extracting confessions by violence, and lying about observations are all phenomena that increase convictions for individual prosecutors.<sup>502</sup> Prosecutors who win convictions gain personal reward by getting promoted in their offices.<sup>503</sup> Innocent people plead guilty when confronted with police officer lies, and those who go to trial must face jurors inclined to believe police officers.<sup>504</sup> This means convictions for

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494. See *supra* Part III.

495. See *infra* notes 496–519 and accompanying text.

496. See Covey, *supra* note 138, at 1185.

497. Curt Guyette, *Circle of Lies*, DETROIT METRO TIMES (Apr. 20, 2011), <http://www.metrotimes.com/detroit/circle-of-lies/Content?oid=2147816>.

498. See Chin & Wells, *supra* note 6, at 237.

499. See *id.* at 263.

500. See *id.* at 262.

501. See *infra* notes 502–08 and accompanying text.

502. See *supra* Part III; Carrie Johnson, *Prosecutor Says a Desire to Win Led to Misconduct in Sen. Steven's Case*, NPR (Mar. 28, 2012, 4:15 PM), <http://www.npr.org/sections/thetwo-way/2012/03/28/149557117/prosecutor-says-a-desire-to-win-led-to-misconduct-in-sen-stevens-case>.

503. See Christoph Engel & Alicja Reuben, *The People's Hired Guns? Experimentally Testing the Motivating Force of a Legal Frame*, 43 INT'L REV. L. & ECON. 67, 67 (2015); see also Ken Armstrong & Maurice Possley, *Break Rules, Be Promoted*, CHI. TRIB. (Jan. 14, 1999), <http://www.chicagotribune.com/news/watchdog/chi-020103trial5-story.html>; James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2125 n.232 (2000).

504. Covey, *supra* note 138, at 1133; see also Part III (discussing the Rampart scandal and Tulia case as examples of innocents pleading guilty in the face of police lies).

individual prosecutors who may pride themselves on their win–loss ratio.<sup>505</sup> As an office, prosecutors benefit as well.<sup>506</sup> Prosecutors’ offices win when they can claim high conviction rates.<sup>507</sup> Public pressure from the community to stop crime can translate into significant funding for their office.<sup>508</sup> Prosecutors’ inaction to curb police misconduct is hardly a surprise in light of the benefits to them.<sup>509</sup>

Some legal experts believe that judges turn a blind-eye to the lies that are told under oath by police.<sup>510</sup> Police officer testimony is a part of almost every criminal trial, so to admit that the officers are biased or dishonest would expose a serious flaw in the criminal justice system.<sup>511</sup> For trial judges to expose issues with police credibility would further tarnish the system over which these judges preside in the eyes of the public.<sup>512</sup>

In addition, because judges preside over many trials, one judge may see the same police officers appear as witnesses over and over again.<sup>513</sup> This is particularly true of undercover officers who are often the only witness to an alleged crime.<sup>514</sup> Judges are aware that expressing concerns about a particular officer’s reliability or credibility may have ramifications far beyond a single trial.<sup>515</sup> It may be difficult for a judge to take on any beliefs

505. See *supra* notes 503–04 and accompanying text.

506. See *infra* notes 507–08 and accompanying text.

507. See M. ELAINE NUGENT-BORAKOVE & LISA M. BUDZILOWICZ, NAT’L DIST. ATTORNEY’S ASS’N, DO LOWER CONVICTION RATES MEAN PROSECUTORS’ OFFICES ARE PERFORMING POORLY? 1–3 (2007), [http://www.ndaa.org/pdf/do\\_lower\\_conviction\\_rates\\_07.pdf](http://www.ndaa.org/pdf/do_lower_conviction_rates_07.pdf).

508. See Matthew Mickle Werdegar, *Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs*, 51 STAN. L. REV. 409, 445 n.5 (1999); Jim McGee, *War on Crime Expands U.S. Prosecutors’ Powers*, WASH. POST (Jan. 10, 1993), <https://www.washingtonpost.com/archive/politics/1993/01/10/war-on-crime-expands-us-prosecutors-powers/867c0d8e-dc55-4918-9c8a-b3bb7ef7f7a4/>.

509. See *supra* notes 502–08 and accompanying text.

510. See Alan M. Dershowitz, *Controlling the Cops: Accomplices to Perjury*, N.Y. TIMES (May 2, 1994), <http://www.nytimes.com/1994/05/02/opinion/controlling-the-cops-accomplices-to-perjury.html>; see also Dorfman, *supra* note 11.

511. See *supra* Part III; see also Denvir, *supra* note 391.

512. See Bruce L. Benson, *An Institutional Explanation for Corruption of Criminal Justice Officials*, 8 CATO J. 139, 156 (1988).

513. See generally Karen Freeman et al., *Ethical Considerations for Judges and Attorneys in Drug Court*, NAT’L DRUG CT. INST. 5–9 (May 2001), <http://www.ndci.org/sites/default/files/nadcp/ethicalconsiderations.pdf> (noting that judges may be influenced by factors other than the case’s merits when continuing personal engagement with participants is involved).

514. See *supra* note 475 and accompanying text.

515. See Dershowitz, *supra* note 510 (noting that police perjury is an issue in at least some if not most search and seizure cases, but judges continue to turn a blind eye to perjury).

she may have about the officer's credibility without undermining the integrity of other cases before that particular judge or past convictions over which she has presided.<sup>516</sup> Judges may also lack proof of a particular officer's mendacity.<sup>517</sup>

Appellate judges do little on the issue of police credibility because of the deferential standard of review on appeal.<sup>518</sup> Because of this standard of review, appellate courts must accept trial judges' opinions of the believability of witnesses in coming to their decisions.<sup>519</sup>

The fact that judges and prosecutors do little on the issue of police corruption is particularly troubling, because they are the two groups of actors in the best position to deal with the problem.<sup>520</sup> Prosecutors have the ability to reject cases brought to them by untrustworthy officers or under concerning circumstances.<sup>521</sup> They also have the power to prosecute police who lie, fabricate evidence, and abuse civilians.<sup>522</sup> Aggressive investigation into police misconduct when it presents itself would likely have a deterrent effect on officer corruption.<sup>523</sup> Police officers would want to avoid disgrace and incarceration if prosecutors took corruption seriously.<sup>524</sup>

Judges, as gatekeepers for the introduction of evidence, have the ability to exclude evidence on Fourth and Fifth Amendment grounds.<sup>525</sup> They also have the ability to dismiss an indictment or take other action when evidence of innocence is suppressed.<sup>526</sup> While this may not have the same deterrent

516. See Dorfman, *supra* note 11, at 465 (explaining reasons why judges may allow police perjury, including being "politically hamstrung").

517. See Melanie D. Wilson, *Improbable Cause: A Case for Judging Police by a More Majestic Standard*, 15 BERKELEY J. CRIM. L. 259, 294 (2010).

518. See *United States v. Jordan*, 813 F.3d 442, 446 (1st Cir. 2016); *Caban v. United States*, 281 F.3d 778, 784 (8th Cir. 2002); *United States v. Kelly*, 14 F.3d 1169, 1177 (7th Cir. 1994); *State v. Stanley*, 622 S.E.2d 680, 684 (N.C. Ct. App. 2005).

519. See *Amadeo v. Zant*, 486 U.S. 214, 223 (1988).

520. See Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor's Role*, 47 U.C. DAVIS L. REV. 1591, 1594–96 (2014); Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315, 323–33, 349 (2005).

521. See Gold, *supra* note 520, at 1595.

522. See, e.g., Sabrina S. Worthy, Student Scholarship, *Failure to Prosecute Police Misconduct Breeds a Systematic Tolerance of Police*, SETON HALL U., 25–26 (2016), [http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1847&context=student\\_scholarship](http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1847&context=student_scholarship).

523. Worthy, *supra* note 522, at 25–26.

524. See Barry, *supra* note 524, at 39–40; Worthy, *supra* note 522, at 25–26.

525. See Gold, *supra* note 520, at 1594.

526. See *United States v. Chapman*, 524 F.3d 1073, 1086 (9th Cir. 2008); *Illinois v. Forsythe*, 406 N.E.2d 58, 60 (Ill. Ct. App. 1980) (acknowledging that a "trial judge had [the] authority to dismiss

effect as aggressive prosecutions might, citizens would at least have more faith in the integrity of the criminal justice system, and some innocent people would spend less time in jail.

### VIII. SOLUTIONS AND CONCLUSIONS

A number of affirmative steps have been taken in many jurisdictions that reflect a distrust of police.<sup>527</sup> Because of the significant number of wrongful convictions that have involved misidentifications by eyewitnesses, the use of detectives who are unaware of the identity of the suspect during photo identifications and lineups has become a way to avoid misidentification and is known as a best practice.<sup>528</sup> The reason this is considered a “best practice” is because it avoids purposeful or unconscious leading by police to the suspect that the police believe committed the offense rather than the true perpetrator.<sup>529</sup> Requiring the videotaping of confessions reflected the fear that police were fabricating suspects’ confessions or beating confessions out of them.<sup>530</sup> The documenting of police behavior has proliferated.<sup>531</sup> The use of dashboard cameras and body cameras for officers on foot patrol has increased.<sup>532</sup> All of these steps show a distrust of police

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the indictment as a sanction for the discovery violation”); *Massachusetts v. Douzanis*, 425 N.E.2d 326, 329 (Mass. 1981); *see also* FED. R. CRIM. P. 16(d)(2)(A)–(D); D.C. SUPER. CT. R. CRIM. P. 16(d)(2); N.Y. CRIM. PROC. LAW § 240.70 (McKinney 2016).

527. *See, e.g.*, Amy Klobuchar et al., *Improving Eyewitness Identifications: Hennepin County’s Blind Sequential Lineup Pilot Project*, 4 CARDOZO PUB. L. POL’Y & ETHICS J. 381, 382 (2006) (discussing new methods leading to more reliable eyewitness identification to avoid wrongful convictions).

528. *See* Klobuchar et al., *supra* note 527, at 389; Mark R. Phillips et al., *Double-Blind Photoarray Administration as a Safeguard Against Investigator Bias*, 84 J. APPLIED PSYCHOL. 940, 941 (1999); Sandra Guerra Thompson, *Judicial Gatekeeping of Police-Generated Witness Testimony*, 102 J. CRIM. L. & CRIMINOLOGY 329, 357 (2012); Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW AND HUMAN BEHAVIOR 603, 627–42 (1998).

529. Klobuchar, *supra* note 527, at 389; *see also* Phillips et al., *supra* note 528, at 941; Thompson, *supra* note 528, at 357; Wells et al., *supra* note 528, at 627–29.

530. *See* Steven A. Drizin & Beth A. Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogations Is the Solution to Illinois’ Problem of False Confessions*, 32 LOY. U. CHI. L.J. 337, 341–42 (2001); *see also* Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 687–88 (1996); Carrie Johnson, *New DOJ Policy Urges Agents to Videotape Interrogations*, NPR (May 21, 2014, 5:04 PM), <http://www.npr.org/sections/thetwo-way/2014/05/21/314616254/new-doj-policy-calls-for-videotaping-the-questioning-of-suspects>.

531. *See* Kimberly McCullough, *Changing the Culture of Unconstitutional Interference*, 18 LEWIS & CLARK L. REV. 543, 555 (2014); Parry, *supra* note 458.

532. *See* Aleaziz, *supra* note 220; *see also* Davey, *supra* note 218.

that has not yet been embodied in jury instructions.

Changes in criminal jury instructions would be another tool in the arsenal to level the gross power imbalance between police and defendants in the criminal system. This step should result in fairer verdicts.<sup>533</sup> An instruction pointing out that police officers often have an interest in the outcome of a particular case may be one way to limit the damages caused by police officer corruption. The instructions would educate jurors about the fact that officers are not simply impartial fact-gatherers.<sup>534</sup> At a minimum, the instruction would allow jurors to employ in their deliberations what they may already know.

Fairer instructions that better reflect the biases at play for police officers could also mean that defense attorneys would be more comfortable taking on police credibility at trial.<sup>535</sup> Eventually, the instructions might encourage more innocent people to take their chances at trial rather than plead guilty to avoid the severe penalties at stake.

One significant outcome could be fewer wrongful convictions.<sup>536</sup> Acknowledging the realities of the criminal justice system is a more honest approach than the approach that has persisted for decades.<sup>537</sup> A more candid criminal justice system—one with fewer wrongful convictions—can only benefit the country. The costs of wrongful convictions are huge to the individual as well as to society.<sup>538</sup> Public opinion about the criminal justice system may also improve.

Jury instructions on police credibility would not be appropriate in all cases. A significant number of cases may not involve police credibility: domestic violence or other assault cases where the parties know each other, cold-hit DNA, robberies, burglaries, even murder cases may be situations where police credibility may not be an issue at all. In some instances, defense attorneys may not request police credibility instructions for strategic reasons. However, in cities plagued by police scandals like New York, Dallas, Los Angeles, and Chicago, police credibility instructions might be

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533. *See supra* Part VI.

534. *See supra* Part VI.

535. *See supra* Part II. In the same way that jurors are instructed that the defendant or other parties may have an interest in the case's outcome, defense attorneys can argue in opening and/or closing arguments that jurors will hear from the judge that police officers often have an interest in the outcome of a criminal case. *See generally supra* Part II.

536. *See supra* Part VI.

537. *See supra* Part VII.

538. *See supra* notes 483–88 and accompanying text.



appropriate much more often.<sup>539</sup>

On the occasions where the defense implicates police credibility, trial judges should not ignore the realities of police bias but instead should give more appropriate instructions that recognize the uniqueness of the police officer's role in a criminal trial.<sup>540</sup> Nor should prosecutors object to them every time. Prosecutors have done very little to stem police misconduct; for prosecutors to then assert that credibility issues do not exist and argue against jury instructions is contrary to their ethical obligation to seek justice.<sup>541</sup> Arguing against the instructions also exacerbates the problem of police corruption, because officers have no incentive to refrain from lying or otherwise misbehaving when criminal penalties are at stake.<sup>542</sup>

Police credibility has been an issue in the United States for decades.<sup>543</sup> Yet, that reality has not been reflected in the instructions given to jurors about how they should evaluate the evidence they have heard.<sup>544</sup> The courtrooms where a person's life and liberty are on the line should recognize the truths about American law enforcement. To continue to turn a blind eye to the thousands of instances of misconduct hurts everyone involved.<sup>545</sup> Courtrooms should be a place where justice can be achieved, not where players sweep aside reality and let criminal defendants bear the burden of a system too broken to admit that it is.

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539. See *supra* Part III.

540. See *supra* Part II.

541. See Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1409 n.108 (2000); Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), <http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/>; see also MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt.1 (AM. BAR ASS'N 2013); *Berger v. United States*, 295 U.S. 78, 88 (1935).

542. See *supra* Part III; see also Dorfman, *supra* note 11, at 456–57.

543. See *supra* notes 222–28 and accompanying text (discussing police credibility issues that have arisen since the 1950s).

544. See *supra* Parts I, VI.

545. See *supra* Part VII.