

REIMAGINING JUSTICE: *PEOPLE V. CHARLES* AND THE MYTH OF JUSTICE WITHOUT POLICE ACCOUNTABILITY IN NEW YORK CITY

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ABSTRACT

Police play an integral role in the criminal judicial system; they start the process through searches and seizures and are often involved in other parts of the process, including evidentiary hearings and trials. Thus, it is imperative that police officers do their jobs ethically and responsibly. This Article examines how police officers in New York City frequently engage in misconduct related to the administration of criminal justice, including conducting illegal searches and seizures, planting and doctoring evidence, assaulting civilians, falsifying paperwork, and testifying. The Article also explores how police unions, prosecutors, judges, and the city government regularly shield police officers from accountability for their misconduct. It concludes that New York City's response leads to the perversion of criminal justice. Finally, the Article suggests solutions to address police misconduct, including imposing civil liabilities on officers, preventing the tampering of body camera footage, filing ethics complaint against prosecutors that knowingly prosecute bad cases, empowering the Civilian Complaint Review Board, and prosecuting officers for criminal conduct.

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I.

INTRODUCTION

One night in the spring of 2017, Ronald Charles¹ left his Bronx apartment and headed to a corner store a few blocks away to buy some snacks.² He walked a block and half before turning left to go up the street.³ While he was walking up

1. The client’s name has been changed. References to case documents have been changed to protect the client’s anonymity.

2. Interview with Ronald Charles (Oct. 30, 2017) [hereinafter October 2017 Charles Interview].

3. *Id.*

the block, an unmarked police car pulled up nearby.⁴ Two police officers, Nicholas Santomero and Sergeant Edward Lenis, exited the car, ran up to Mr. Charles from behind, and grabbed him.⁵ A third officer, Edwin Vega, the driver of the unmarked car, ran up to assist his partners and forced Mr. Charles to the ground.⁶ They punched him, kicked him, and stepped on his back.⁷ They then handcuffed him and took him to the precinct.⁸ By the time he arrived at the precinct, Mr. Charles suffered two broken bones, a dislocated limb, and a host of other injuries.⁹ It was only at Mr. Charles' insistence that the officers finally had him taken to the hospital.¹⁰

What happened later was the beginning of a torturous journey experienced by many Black and Brown people in New York City: Mr. Charles was falsely charged with a number of crimes and prosecuted.¹¹ The officers who arrested him falsified police paperwork claiming that he committed a number of drug-related felonies and violently resisted the officers' attempts to lawfully apprehend him.¹² They found drugs from somewhere and vouchered it as arrest evidence allegedly recovered from Mr. Charles.¹³ The arresting officer later signed a criminal court complaint accusing Mr. Charles of only three misdemeanors.¹⁴ Almost a year and a half later, the arresting officer came into court and lied under oath in both the hearing and the trial.¹⁵ That officer's lies were exposed in open court, and Mr.

4. *Id.*; IAB Video, No. 2017BX0XXXXX, N.Y. Police Dep't (May 10, 2017) (on file with author) [hereinafter Charles IAB Video].

5. October 2017 Charles Interview, *supra* note 2; Charles IAB Video, *supra* note 4; Nicholas Santomero IAB Hearing Transcript at 8, N.Y. Police Dep't (Dec. 22, 2017) (on file with author) [hereinafter Santomero IAB Hearing Transcript].

6. October 2017 Charles Interview, *supra* note 2; Charles IAB Video, *supra* note 4; Edwin Vega IAB Hearing Transcript at 8–9, N.Y. Police Dep't (Dec. 21, 2017) (on file with author) [hereinafter Vega IAB Hearing Transcript].

7. October 2017 Charles Interview, *supra* note 2; Edward Lenis TRI Report, N.Y. Police Dep't (May 10, 2017) (on file with author) [hereinafter Lenis TRI Report]; Nicholas Santomero TRI Report, N.Y. Police Dep't (May 10, 2017) (on file with author) [hereinafter Santomero TRI Report]; Edwin Vega TRI Report, N.Y. Police Dep't (May 10, 2017) (on file with author) [hereinafter Vega TRI Report].

8. October 2017 Charles Interview, *supra* note 2.

9. *Id.*; Ronald Charles Hospital Records (May 11, 2017) (on file with author).

10. October 2017 Charles Interview, *supra* note 2; Edward Lenis IAB Hearing Transcript at 18, N.Y. Police Dep't (Dec. 21, 2017) (on file with author) [hereinafter Lenis IAB Hearing Transcript].

11. October 2017 Charles Interview, *supra* note 2; Arrest Report, N.Y. Police Dep't (May 11, 2017) (on file with author) [hereinafter Charles Arrest Report]; Complaint Report, N.Y. Police Dep't (May 11, 2017) (on file with author) [hereinafter Charles Complaint Report].

12. October 2017 Charles Interview, *supra* note 2; Charles Arrest Report, *supra* note 11; Charles Complaint Report, *supra* note 11.

13. October 2017 Charles Interview, *supra* note 2; compare Nicholas Santomero, Memobook Entry, N.Y. Police Dep't (May 11, 2017) [hereinafter Santomero Memobook] (on file with author) (stating "voucher crack cocaine 1.3 grams # 2000653983"), with Laboratory Report, N.Y. Police Dep't (Feb. 13, 2018) (on file with author) (stating "cocaine 0.227g").

14. Charles Complaint Report, *supra* note 11.

15. See *infra* notes 264–70 and accompanying text.

Charles was acquitted.¹⁶ However, the injuries Mr. Charles sustained in the police attack continued to plague him after the case ended.¹⁷ Meanwhile, the officers who committed the misconduct that led to Mr. Charles' injuries and harrowing experiences in the judicial system have moved on with impunity.¹⁸

Something is wrong with a judicial system that does not punish police officers for abusing and wrongfully arresting innocent persons. Officers who lie under oath, assault civilians, falsify police paperwork, and commit other types of misconduct not only go unpunished, but are often guarded by judges and prosecutors, protected by the city, and even promoted within the department. The great hesitance by the state to hold police officers accountable makes a mockery of any legitimate notion of justice and serves to erode public confidence in the criminal legal system. This Article argues that justice for innocent defendants requires the state to penalize police officers who commit case-related misconduct¹⁹ and then lie about it in court. This Article focuses on unchecked case-related police misconduct in New York City. Mr. Charles' case will be used as an exemplar of the injustice that often comes with cases involving disreputable police witnesses.

It is difficult to measure the severity of unchecked police misconduct in the NYPD or any other police department in America, because there is little data on how many police officers perjure themselves or how often evidence gets planted.²⁰ Part of this stems from the fact that the records and any proof of misconduct that might have come out during official court proceedings get sealed and hidden from public view in cases that get dismissed.²¹ Another reason is because police

16. Transcript of Verdict at 4–5, *People v. Charles*, No. 2017BXXXXXXX (N.Y. Crim. Ct. Oct. 16, 2018) (on file with author) [hereinafter *Charles Verdict Transcript*].

17. Interview with Ronald Charles (Jan. 27, 2020) [hereinafter *January 2020 Charles Interview*] (on file with author).

18. See *infra* notes 297–300 and accompanying text.

19. The author uses the term “case-related police misconduct” to refer to misconduct that is related to and/or leads to the initiation of a criminal case.

20. Joseph Goldstein, *‘Testilying’ by Police: A Stubborn Problem*, N.Y. TIMES (Mar. 18, 2018), <https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html> [https://perma.cc/2RCN-9MW2] [hereinafter Goldstein, *Testilying by Police*] (noting that the 25 known cases between January 2015 and March 2018 where a police officer gave testimony that was “probably untrue” in material part “are almost certainly only a fraction of those in which officers have come under suspicion for lying in the past three years”); see also PHILIP MATTHEW STINSON, SR., JOHN LIEDERBACH, STEVEN P. LAB, & STEVEN L. BREWER, JR., *POLICE INTEGRITY LOST: A STUDY OF LAW ENFORCEMENT OFFICERS ARRESTED, OFF. JUST. PROGRAMS 1* (2016), <https://www.ojp.gov/pdffiles1/nij/grants/249850.pdf> [https://perma.cc/B2A6-Y7PE] (“There are no comprehensive statistics available on problems with police integrity, and no government entity collects data on all criminal arrests of law enforcement officers in the United States.”).

21. Goldstein, *Testilying by Police*, *supra* note 20 (“[I]n the rare cases when an officer does testify in court — and a judge finds the testimony suspicious, leading to the dismissal of the case — the proceedings are often sealed afterward.”).

departments do not adequately and accurately report instances of police misconduct;²² and, specifically in New York City, any existing reports have for too long been shielded from public view by state law.²³ Additionally, because the overwhelming majority of cases in New York City are resolved before hearings and trial, case-related police misconduct often evades exposure.²⁴

That said, the realities of American policing suggest that case-related police misconduct is far from rare. Nicknames for dirty police practices like “testilying” and “flaking” have been around for years,²⁵ indicating that said practices are not uncommon. Many incidents of police misconduct have been discovered over the past few years because of increased video surveillance and cell phone recordings.²⁶ Further, because misconduct within the NYPD is not punished anywhere near as much as it should be, police officers believe they can get away with their sins; such a belief naturally emboldens officers to commit even flagrant wrongdoings without fear of reprisal.²⁷ While the author doesn’t insinuate that *all* officers engage in some form of case-related police misconduct, enough of them do to

22. Rachel Moran, *Contesting Police Credibility*, 93 WASH. L. REV. 1339, 1362–64 (2018) (noting that “[m]any police departments do not keep records pertaining to basic issues”; arguing that police departments provide few incentives for police officers to comply with regulations, that police officers are historically unwilling to report misconduct by fellow officers, and that some departments actively refuse to collect data).

23. See N.Y. CIV. RIGHTS LAW § 50-a(2) (repealed Jun. 12, 2020); Ryan Tarinelli, *Cuomo Signs Bill Banning Chokeholds, Repealing Police Secrecy Law*, N.Y.L.J. (June 12, 2020, 2:32 PM), <https://www.law.com/newyorklawjournal/2020/06/12/cuomo-signs-bills-banning-chokeholds-repealing-police-secrecy-law/> [<https://perma.cc/547T-TH42>].

24. Goldstein, *Testilying by Police*, *supra* note 18 (“[A] vast majority of cases end in plea deals before an officer is ever required to take the witness stand in open court, meaning the possibility that an officer lied is seldom aired in public.”).

25. Al Baker, *Flaking, Cooping and Likely: A Brief Lexicon of the Police*, N.Y. TIMES (Mar. 5, 2010), <https://archive.nytimes.com/query.nytimes.com/gst/fullpage-9D00EEDB123FF936A35750C0A9669D8B63.html> [<https://perma.cc/QAC9-2DPA>]; Joe Sexton, *New York Police Often Lie Under Oath, Report Says*, N.Y. TIMES (Apr. 22, 1994), <https://www.nytimes.com/1994/04/22/us/new-york-police-often-lie-under-oath-report-says.html?pagewanted=all> [<https://perma.cc/E77R-FXW6>] (“The practice—by officers either legitimately interested in clearing the streets of criminals or simply eager to inflate statistics—has at times been condoned by superiors, the report says. And it is prevalent enough in the department that it has its own nickname: ‘testilying.’”).

26. Joseph Goldstein, *Promotions, Not Punishments, for Officers Accused of Lying*, N.Y. TIMES (Mar. 19, 2018) [hereinafter Goldstein, *Promotions, Not Punishments*], <https://www.nytimes.com/2018/03/19/nyregion/new-york-police-perjury-promotions.html> [<https://perma.cc/6L9W-L3EC>] (noting that the Civilian Complaint Review Board of New York City has documented instances of suspected officer perjury, which often involve video recordings that contradict with officers’ accounts); Laura Ly, *Can Cell Phones Stop Police Brutality?*, CNN (Nov. 19, 2014, 5:31 PM), <https://www.cnn.com/2014/11/18/us/police-cell-phone-videos/index.html> [<https://perma.cc/JF38-8DGR>]; see also Kendal Harden, *Exposure to Police Brutality Allows for Transparency and Accountability of Law Enforcement*, 33 J. MARSHALL J. INFO. TECH. & PRIVACY L. 75, 86–87 (2017) (discussing the role of images on social media platforms in exposing police brutality).

27. Frank Serpico, *The Police Are Still out of Control*, POLITICO MAG. (Oct. 23, 2014), <https://www.politico.com/magazine/story/2014/10/the-police-are-still-out-of-control-112160> [<https://perma.cc/YZ6J-57V8>] (offering the account of a former police officer that “[m]ost cops today can pull out their weapons and fire without fear that anything will happen to them, even if they shoot someone wrongfully”).

warrant a forceful response from the state. Plus, the culture within the NYPD discourages honest officers from speaking out against unscrupulous colleagues, forcing them to be complicit when they witness flagrant wrongdoings.²⁸

Unchecked police misconduct is a pressing criminal justice issue in New York, especially in light of the other reforms the state passed in March 2019.²⁹ Unpunished police misconduct requires urgent attention because of the immense power police officers have: the power to “use force, to summarily deprive a citizen of freedom, [and] to even use deadly force”³⁰ Any person granted this incredible amount of power must be held to the highest standards and penalized severely when they deviate from those standards.

Unabated police misbehavior is also a pressing racial justice issue, as it implicates longstanding bastions of racism in America: policing and the criminal judicial system. It is beyond argument that the primary victims of police abuse have been Black and Brown people. Black and Brown people make up most unarmed persons killed by the police; they are overrepresented in arrest statistics;³¹ and they are systematically profiled and targeted by the police in all walks of life.³² Black and Brown people have always been overrepresented in the jail and prison populations; Black people have always been prosecuted more vigorously than Whites and they have always been subject to harsher sentences for similar offenses.³³ The overrepresentation of Black and Brown people and the prevalence of police misconduct means Black and Brown people are disproportionately subjected to police abuses throughout the criminal legal process. Thus, unpunished

28. *See id.* (“Police . . . have their own moral code of behavior, an ‘us against them’ attitude, enforced by a Blue Wall of Silence.”); *see also* Kendall Taggart, *The Blue Wall: This NYPD Officer Reported Sexual Harassment. Then She Was Forced into Rehab*, BUZZFEED NEWS (Jul 8, 2018), <https://www.buzzfeednews.com/article/kendalltaggart/this-nypd-officer-reported-sexual-harassment-then-she-was#.auyqRQ9gN> [<https://perma.cc/3LTE-X7XA>] (discussing the “blue wall,” where police officers are discouraged from making complaints that “bring the outside in”); Joseph Goldstein, *Officers, Exhorted to Report Corruption, Still Fear Retribution*, N.Y. TIMES (Jun. 24, 2012), https://www.nytimes.com/2012/06/25/nyregion/new-york-police-officers-face-retaliation-for-reporting-corruption.html?pagewanted=1&_r=1&ref=nyregion [<https://perma.cc/Z6DV-BD35>].

29. Reforms include the replacement of Article 240 of the New York Criminal Procedural Law with Article 245, as well as changes to the existing bail and speedy trial statutes. *See* Zamir Bendant, *When True Colors Come out*, 64 HOW. L.J. 83, 88–107 (2020). Discovery reform can help to challenge police misconduct after-the-fact; but it cannot prevent the officer from committing misconduct in a given arrest in the first place. Nor will it help when, even with proof of officer wrongdoing, the state does not penalize the officer.

30. David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 462 (1999).

31. THE SENT’G PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM (2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> [<https://perma.cc/W6F5-MTZC>].

32. *See, e.g.*, Radley Balko, Opinion, *There’s Overwhelming Evidence that the Criminal Justice System Is Racist. Here’s the Proof*, WASH. POST (June 10, 2020), <https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/> [<https://perma.cc/QCQ7-JMFF>].

33. *Id.*

police misconduct promotes continued racial injustice in American society and hinders efforts to bring about racial healing. The eruption of protests in the summer of 2020 made this reality crystal clear for America to see.

This article is divided into five parts, with Part I being the introduction. Part II defines the term “justice” and discusses what criminal justice should look like in a judicial system. It further examines policing as a racial justice issue, discussing recent developments in American policing before narrowing down to law enforcement practices in New York City. Part III shows how New York City police officers routinely engage in misconduct in the arrest and prosecution of innocent persons, and highlights the ways in which the state—be it the NYPD, the prosecution, the judiciary or the city government—shields officers from accountability for their misconduct. This part also discusses the effects of the state’s failure to censure police misconduct on officers, on innocent defendants, and on society at large. Part IV proposes solutions to the problem as it exists in New York City and refute counterarguments against promoting real officer accountability. Part V will conclude the article.

II.

POLICING AND “JUSTICE”

A. Policing as a Criminal Justice Issue

What is justice? Common themes in dictionary definitions of “justice” and “just” are ideas of morality, of rightness and righteousness, and of fairness.³⁴ A criminal legal system can be considered just “when no arbitrary distinctions are made between persons in the assigning of basic rights and duties and when the rules determine a proper balance between competing claims to the advantages of social life.”³⁵

Putting aside the contradictions between the founding fathers’ professed ideals and the system of oppression they sanctioned, we can still view the federal constitution as designed to establish a system that embodied righteousness and

34. *E.g.*, *Justice*, AM. HERITAGE DICTIONARY, <https://www.ahdictionary.com/word/search.html?q=justice> [<https://perma.cc/VZ8Y-5LXS>] (last visited June 28, 2021); *Justice*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/justice> [<https://perma.cc/LS9W-9XAP>] (last visited June 28, 2021); *Justice*, OXFORD DICTIONARY, <https://www.lexico.com/definition/justice> [<https://perma.cc/KD6F-DZQP>] (last visited June 28, 2021); *Just*, AMERICAN HERITAGE DICTIONARY, <https://www.ahdictionary.com/word/search.html?q=just> [<https://perma.cc/WA9E-56UJ>] (last visited June 28, 2021); *Just*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/just#h1> [<https://perma.cc/98BF-PLML>] (last visited June 28, 2021); *Just*, OXFORD DICTIONARY, <https://www.lexico.com/definition/just> [<https://perma.cc/JYR8-DGVU>] (last visited June 28, 2021).

35. JOHN RAWLS, *THE THEORY OF JUSTICE* 5 (Rev. Ed. 1999), http://www.consiglio.regione.campania.it/cms/CM_PORTALE_CRC/servlet/Docs?dir=docs_biblio&file=BiblioContenuto_3641.pdf [<https://perma.cc/ND8A-273A>].

fairness, with a focus on constraining the powers of government.³⁶ The Fourth, Fifth, Sixth, and Eighth Amendments are evidence of the Framers' intent for criminal justice: a fair process for the accused, and protection of citizens from the tyranny of government.³⁷ These rights apply to the citizens of the state of New York,³⁸ in addition to additional legal protections guaranteed by New York's constitution.³⁹ Case-related police misconduct—illegal searches, flaking, testilying—is inconsistent with the conception of justice in both federal and state constitutions. The state's knowing reliance on false evidence, including false or perjured testimony⁴⁰ and coerced confessions,⁴¹ to convict a person of a crime is unconstitutional.⁴² The actions of police are integral to the proper administration of justice as conceived by the drafters of the Constitution, which is invariably corrupted when the police act improperly. To allow police misconduct to go unchecked undermines the Constitution's promise of a just criminal legal system.

A bedrock American principle in line with the framers' conception of justice is that all persons accused of crimes are innocent until proven guilty.⁴³ Further, because of the drastic consequences that a criminal conviction can bring, the drafters set the standard for proving guilt at a very high level: proof beyond a reasonable doubt.⁴⁴ These principles are in place because, as Justice Harlan declared, "it

36. See generally Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045 (1994) (examining the separation-of-powers implications of the Incompatibility Clause and the unwritten incompatibility traditions).

37. See U.S. CONST. amend. IV. (limiting intrusions by the government into the persons, homes, and properties of its citizens); U.S. CONST. amend. V. (establishing a right for persons to be heard when the government seeks to deprive them of the life, freedom, or property); U.S. CONST. amend. VI. (conferring upon citizens charged with crimes a host of rights, including the right to counsel in criminal prosecutions); U.S. CONST. amend. VIII. (imposing limitations on bail for accused persons, and on punishment for convicted persons).

38. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 492–95 (1977) (discussing the Court's extension of the enforcement of the Bill of Rights to protect against state action).

39. For example, New York's constitutional right to counsel is broader than the federal right to counsel, NY CONST. art. 1, § 6, as are its protections against illegal searches and seizures, see, e.g., *People v. McIntosh*, 755 N.E.2d 329 (N.Y. 2001) (suppressing evidence seized by police while boarding a bus without a specific reason); cf., *Florida v. Bostick*, 501 U.S. 429, 439–40 (1991) (rejecting a *pro se* rule created by the Florida Supreme Court that every police encounter in a bus is a seizure).

40. *Napue v. People of State of Illinois*, 360 U.S. 264, 269 (1959) ("The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction . . . does not cease to apply merely because the false testimony goes only to the credibility of the witness.").

41. *Payne v. State of Arkansas*, 356 U.S. 560, 561 (1958) ("The use in a state criminal trial of a defendant's confession obtained by coercion—whether physical or mental—is forbidden by the Fourteenth Amendment.").

42. *Miller v. Pate*, 386 U.S. 1, 7 (1967) (upholding the principle that the "Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence").

43. *Clark v. Arizona*, 548 U.S. 735, 766 (2006).

44. *Patterson v. New York*, 432 U.S. 197, 208 (1977) (quoting *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)).

is far worse to convict an innocent man than to let a guilty man go free.”⁴⁵ Case-related police misconduct increases the likelihood of wrongful convictions of innocent persons.

Allowing police officers to commit case-related police misconduct with impunity erodes the interests of criminal justice on all sides. Punishing and preventing police misconduct would make firm the constitutional protections accorded to citizens on both the federal and state level. It would allow for the fair administration of justice and serve the interests of advocates for both theories of punishment. Criminal justice without police accountability is not justice.

B. Policing as a Racial Justice Issue

Much has been written about the racial origins of mass incarceration⁴⁶ and the history of the police as an institution primarily designed to repress undesirable social groups.⁴⁷ Rather than rehash that history, this Article will start with the less-explored history of the National Advisory Commission on Civil Disorders, also known as the Kerner Commission. Throughout the 1950s and 1960s, America was rocked by a wave of protests and demonstrations for civil rights and equality, as well as by the violence and hostility of those who opposed racial justice and equity.⁴⁸ Black people were engaged in a massive struggle against racial discrimination; and the frustrations of the conditions that they had been relegated to led to rebellions in cities across America.⁴⁹ Following rebellions in Newark, New Jersey and Detroit, Michigan in 1967, President Johnson put together a commission to study the causes of said rebellions and determine what could be done to prevent future occurrences.⁵⁰ The commission hired investigators to visit cities impacted

45. *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

46. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW*, 40–58 (2010) (discussing the link between the opposition to civil rights and the campaign for law and order); CAROL ANDERSON, *WHITE RAGE: THE UNSPOKEN TRUTH OF OUR RACIAL DIVIDE*, 123–136 (2016) (discussing the racial impact of the war on drugs).

47. See, e.g., Nirej Sekhon, *Police and the Limit of the Law*, 119 COLUM. L. REV. 1711, 1730–37 (2019) (analyzing the evolution of municipal police forces as mechanisms of social control wielded against underprivileged and marginalized social classes).

48. See *Civil Rights Movement*, HISTORY (Jan. 18, 2022), <https://www.history.com/topics/black-history/civil-rights-movement> [<https://perma.cc/CG59-TB3Z>] (recounting the civil rights movement in the 1950s and 1960s); EYES ON THE PRIZE (PBS 1987), <https://www.pbs.org/wgbh/americanexperience/films/eyesontheprize/> [<https://perma.cc/RYT2-9DKW>] (examining the protests, demonstrations, and revolts during the 1950s and 1960s).

49. *Civil Rights Movement*, *supra* note 48; EYES ON THE PRIZE, *supra* note 48; THE FBI’S WAR ON BLACK AMERICA (Deb Ellis & Denis Mueller dir., 1990).

50. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, NCJ 08073, 1 (1967) [hereinafter NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS], <https://www.ncjrs.gov/pdffiles1/Digitization/8073NCJRS.pdf> [<https://perma.cc/9K3U-HSVH>] (explaining that the report was commissioned by President Johnson in response to the civil rights movement).

by the rebellions and to talk to people on the ground.⁵¹ The commission then released their findings in March 1968, determining that the cause of the rebellions was severe and unaddressed racial injustice and inequity throughout the country.⁵²

The report detailed the role of the police in perpetrating and perpetuating racial injustice. The report asserted that the “abrasive relationship” between the police and communities of color “has been a major—and explosive—source of grievance, tension and disorder.”⁵³ This assertion was undoubtedly true; incidents of police misconduct triggered most of the urban rebellions that occurred.⁵⁴ The report also noted that tensions between the police and communities of color “have been further aggravated by the lack of effective mechanisms for handling complaints against the police.”⁵⁵ Of the 12 enumerated “deeply held grievances” of rioters in the 23 cities surveyed, police practices ranked first, above unemployment, inadequate education, and the discriminatory administration of justice.⁵⁶ The report further noted that the main response of several cities was not to actually address racial injustice, but to militarize the police.⁵⁷

John Lindsay, an American politician who was the mayor of New York City at the time, was active and influential on the committee.⁵⁸ As a commissioner, he advocated for the committee to go deeper than simply recommending how police departments should respond inner-city rebellions; he wanted an analysis of the true causes of racial unrest throughout the country.⁵⁹ As mayor of New York, Lindsay attempted to address the racial inequity in New York City. During his first term as mayor, he made efforts to address racial inequalities within the city, for example through low-income housing and public school access; such endeavors were met with fierce resistance by the white middle class.⁶⁰

The final report, endorsed by all 11 of the commissioners, was firmly rejected by President Johnson, who had wanted a report that would align with his own

51. Steven M. Gillon, *This Government Report Showed How Racism Was Dividing America 50 Years Ago. Its Prediction Is Haunting*, TIME (Mar. 1, 2018), <https://time.com/5180266/kerner-commission-report-anniversary/> [<https://perma.cc/KPR2-TB32>] [hereinafter Gillon, *Report Showed Racism Diving America*].

52. NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, *supra* note 50, at 1.

53. *Id.* at 8.

54. Steven M. Gillon, *Why a 1967 Federal Report on Urban Riots Suppressed Its Own Expert Findings*, HISTORY CHANNEL (Jan. 31, 2019), <https://www.history.com/news/race-riots-kerner-commission-findings-suppressed-lbj> [<https://perma.cc/B6SN-EU6U>].

55. NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, *supra* note 50, at 8.

56. *Id.* at 4.

57. *Id.* at 8.

58. Brandon Tensley, *The Prescient Warnings of the Kerner Commission*, PACIFIC STANDARD (Apr. 6, 2018), <https://psmag.com/social-justice/the-prescient-warnings-of-the-kerner-commission> [<https://perma.cc/5EBC-DN4Q>].

59. *Id.*

60. Robert McFadden, *John V. Lindsay, Mayor and Maverick, Dies at 79*, N.Y. TIMES (Dec. 21, 2000), <https://www.nytimes.com/2000/12/21/nyregion/john-v-lindsay-mayor-and-maverick-dies-at-79.html> [<https://perma.cc/ZV4B-U4J9>].

personal agenda.⁶¹ Johnson had wanted the report to put the blame for the rebellions on “outside agitators.”⁶² When it became clear within a few weeks of the commission’s formation that the report would not be accommodating of his agenda, Johnson attempted to undermine the commission’s work.⁶³ Johnson took great issue with Mayor Lindsay, venting in a private phone call with Chicago Mayor Richard J. Daley that he “didn’t realize when I appointed Kerner that this son-of-a-bitch from New York, [Lindsay], would take charge. He did take charge and he recommended I hire two-and-a-half million people on federal payroll.”⁶⁴ As a result of Johnson’s disregard of the report, there was no effort at the federal level to put the solutions from the report into place.⁶⁵ Instead, in the decades to follow, deindustrialization played a role in increasing crime⁶⁶ while police militarization and federal funding created an “intensified enforcement effort,”⁶⁷ increasing contact between the police and Black people, and increasing tolerance for police misconduct.

New York City is no exception. For the past 40 years, broken windows policing has remained a popular philosophy of policing within the city, despite the fact that Black and Brown people have been disproportionately targeted and victimized by it. Michael Stewart,⁶⁸ Anthony Baez,⁶⁹ Patrick Dorismond,⁷⁰ and Eric Garner⁷¹ are high-profile examples of people killed during police interactions in New York City where the offense in question was minor. Aggressive NYPD tactics have also been predominantly used on communities of color, from the “war on

61. Gillon, *Report Showed Racism Dividing America*, *supra* note 51.

62. Alice George, *The 1968 Kerner Commission Got It Right, but Nobody Listened*, SMITHSONIAN MAG. (Mar. 1, 2018), <https://www.smithsonianmag.com/smithsonian-institution/1968-kerner-commission-got-it-right-nobody-listened-180968318/> [<https://perma.cc/NS7H-YE7V>].

63. Gillon, *Report Showed Racism Dividing America*, *supra* note 51.

64. Lester Graham, *The Kerner Commission and Why Its Recommendations Were Ignored*, MICHIGAN RADIO NPR (Jul. 28, 2017), <https://www.michiganradio.org/post/kerner-commission-and-why-its-recommendations-were-ignored> [<https://perma.cc/4MZ6-3KX2>].

65. *See id.* (discussing how President Johnson “barely acknowledged” the report).

66. *See* ALEXANDER, *supra* note 46, at 51.

67. *Id.* at 77.

68. Erik Nielson, ‘It Could Have Been Me’: The 1983 Death of a NYC Graffiti Artist, NPR: CODE SWITCH (Sep. 16, 2013, 7:12 PM), <https://www.npr.org/sections/codeswitch/2013/09/16/221821224/it-could-have-been-me-the-1983-death-of-a-nyc-graffiti-artist> [<https://perma.cc/TGC5-SUSZ>].

69. Delores Jones-Brown, *There’s Little Evidence That ‘Broken Windows’ Policing Works*, N.Y. TIMES (Dec. 4, 2014, 9:15 AM), <https://www.nytimes.com/roomfordebate/2014/07/27/is-broken-windows-a-broken-policy-for-police/theres-little-evidence-that-broken-windows-policing-works> [<https://perma.cc/55JM-JCZH>]; Clifford Krauss, *Clash over a Football Ends with a Death in Police Custody*, N.Y. TIMES (Dec. 30, 1994), <https://www.nytimes.com/1994/12/30/nyregion/clash-over-a-football-ends-with-a-death-in-police-custody.html> [<https://perma.cc/UA66-JZSF>].

70. Wesley Lowery, ‘I Can’t Breathe’: Five Years After Eric Garner Died in Struggle with New York Police, Resolution Still Elusive, WASH. POST (June 13, 2019) https://www.washingtonpost.com/national/i-cant-breathe-five-years-after-eric-garner-died-in-struggle-with-new-york-police-resolution-still-elusive/2019/06/13/23d7fad8-78f5-11e9-bd25-c989555e7766_story.html [<https://perma.cc/F2NY-SVNG>].

71. *Id.*

graffiti”⁷² of the 1970s and 80s to the swelling of the Street Crimes Unit in the 1990s⁷³ to the stop-and-frisk program of the 2000s.⁷⁴ Furthermore, the starkly racist gang policing practices⁷⁵ contribute to disparate and hyper-aggressive policing of Black and Brown neighborhoods⁷⁶ and therefore increased contact between the police and Black and Brown people.

The NYPD’s practices are a reflection of itself; racism pervades the department. Many police officers have primitive thoughts about people of color. From the appointment of the first Black NYPD officer in 1911 until the present, police officers of color have been consistently discriminated against, maligned, and

72. Forrest Wickman, *Ed Koch’s Legacy in Hip-Hop*, SLATE: BROW BEAT (Feb. 1, 2013, 7:25 PM), <https://slate.com/culture/2013/02/ed-kochs-legacy-in-hip-hop-how-the-new-york-city-mayor-will-be-remembered-in-rhyme.html> [<https://perma.cc/YWP8-65MX>] (describing anti-graffiti efforts under New York City Mayors John Lindsay, Abraham Beame, and Ed Koch).

73. David Kocieniewski, *Success of Elite Police Unit Exact a Toll on the Streets*, N.Y. TIMES, Feb. 15, 1999, at A1; William K. Rashbaum & Al Baker, *Police Commissioner Closing Controversial Street Crimes Unit*, N.Y. TIMES (Apr. 10, 2002), <https://www.nytimes.com/2002/04/10/nyregion/police-commissioner-closing-controversial-street-crime-unit.html> [<https://perma.cc/LD9H-8XLG>].

74. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 589 (S.D.N.Y. 2013) (finding that “the NYPD carries out more stops in areas with more black and Hispanic residents, even when other relevant variables are held constant”).

75. Police departments across the country, including the NYPD, maintain secretive databases in which thousands of people have been classified as “gang members” under criteria so unreasonably broad and vague that many people in the database are not gang members at all. K. Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-Trial Detention*, 23 ST. THOMAS L. REV. 620, 621, 624, 652 (2011). The overwhelming majority of people currently in the database, and the overwhelming majority of new people added to the database between 2003 and 2013, have been Black and Brown people. JOSMAR TRUJILLO & ALEX S. VITALE, *GANG TAKEDOWNS IN THE DE BLASIO ERA: THE DANGERS OF ‘PRECISION POLICING’* 6 (2019).

76. TRUJILLO & VITALE, *supra* note 75, at 13–15. NYPD “gang raids” have been executed exclusively in Black and Brown neighborhoods; and two thirds of the people swept up in one raid were not even involved in violent activity. *Id.* at 4–6. Meanwhile, the NYPD does not include members of the white nationalist group Proud Boys in the database, *id.* at 10, despite the fact that they have committed violence in New York City, *see, e.g.*, Colin Moynihan, *2 Proud Boys Sentenced to 4 Years in Brawl with Anti-Fascists at Republican Club*, N.Y. TIMES (Oct. 22, 2019), <https://www.nytimes.com/2019/10/22/nyregion/proud-boys-antifa-sentence.html> [<https://perma.cc/SXA4-RS28>]; Jane Coaston, *The Proud Boys, Explained*, VOX (Oct. 1, 2020, 10:12 AM), <https://www.vox.com/2018/10/15/17978358/proud-boys-gavin-mcinnis-manhattan-gop-violence> [<https://perma.cc/F3AH-FY72>]. The mafia is still active in New York City, evidenced by raids and prosecutions at the federal level, Nicole Hong, *The Gossiping, Power-Hungry Gambino Crime Family: A Rare Look Inside*, N.Y. TIMES (Dec. 16, 2019), <https://www.nytimes.com/2019/12/14/nyregion/gambino-crime-family.html> [<https://perma.cc/8TDF-JUD6>]; Frank Donnelly, *‘La Cosa Nostra Alive,’ Official Says, as 5 Staten Islanders Charged in Massive Luchese Bust*, SILIVE.COM (May. 31, 2017), https://www.silive.com/news/2017/05/la_cosa_nostra_alive_official.html [<https://perma.cc/R4CC-W8XA>], but there have been no large-scale raids of the mafia by the NYPD, and the NYPD will not even disclose whether the database includes traditional mafia organizations or its members, TRUJILLO & VITALE, *supra* note 75, at 10 (noting that the NYPD refuses “to acknowledge whether traditional Mafia organizations are included”).

mistreated by both their fellow officers and by police leadership.⁷⁷ Several Black and Brown NYPD current and former officers have discussed how they dealt with racial bias on the force.⁷⁸ Racism within the NYPD is no secret to anyone, including the department itself: in February 2021, commissioner Dermot Shea acknowledged and apologized for the existence of systemic racism within the department and claimed that it was being addressed.⁷⁹ In March 2021, Mayor Bill de Blasio introduced a plan allegedly designed to deal with structural racism within the department.⁸⁰ With such admissions, there can be no denying that the NYPD remains a racist police department.

The NYPD's unions are no better. For example, the Police Benevolent Association (PBA), representing 24,000 officers in the city, endorsed Donald J. Trump for president of the United States during the 2020 election cycle, which union leadership suggested was the first endorsement of a presidential candidate in its history.⁸¹ The PBA broke with tradition to side with the most explicit symbol of

77. Nicole Johnson, *The History of Racism Inside the NYPD: Wearing the Blue Uniform as an Officer of Color*, PIX 11 (Feb. 24, 2021, 5:58 PM), <https://pix11.com/news/created-equal/the-history-of-racism-inside-the-nypd-wearing-the-blue-uniform-as-an-officer-of-color/> [https://perma.cc/8S92-6EEB] (“The first Black officer, Samuel Battle, joined the department in 1911. After that, cops targeted not just Black members of the community, but officers of color in their own ranks.”).

78. Conor Friedersdorf, *The NYPD Officers Who See Racial Bias in the NYPD*, ATLANTIC (Jan. 7, 2015), <https://www.theatlantic.com/national/archive/2015/01/the-nypd-officers-who-see-racial-bias-in-the-nypd/384106/> [https://perma.cc/P9GN-Q3E2].

79. Dean Meminger, *Commissioner Dermot Shea Apologizes for Systemic Racism in the NYPD*, SPECTRUM NEWS NY1 (Feb. 24, 2021, 6:20 PM), <https://www.ny1.com/nyc/manhattan/public-safety/2021/02/24/commissioner-shea-apologizes-for-systemic-racism-in-the-nypd> [https://perma.cc/9UJU-9ZPB].

80. Henry Goldman, *NYC Sets out Police-Reform Plan, Vows to Strip Racism from NYPD*, BLOOMBERG (Mar. 12, 2021, 11:59 AM), <https://www.bloomberg.com/news/articles/2021-03-12/nyc-sets-out-police-reform-plan-vows-to-strip-racism-from-nypd> [https://perma.cc/P7PY-8XLZ].

81. *Police Benevolent Association Breaks with Tradition, Endorses President Trump's Re-Election Campaign*, CBS N.Y. (Aug. 15, 2020, 11:30 PM), <https://newyork.cbslocal.com/2020/08/15/nypd-police-benevolent-association-endorses-president-trump/> [https://perma.cc/AWG2-G4VM].

white supremacy to have entered the White House in decades.⁸² The leader of a fraternal organization representing 1,100 Black officers voiced concerns that the PBA's endorsement undermined their work, citing President Trump's divisive language and stoking of racial divisions.⁸³ In August 2019, Ed Mullins, president of the Sergeants Benevolent Association (SBA), circulated amongst thousands of police sergeants a video that the conservative-leaning New York Post described as being overtly racist.⁸⁴ After the video went public, he offered a halfhearted apology, claiming he had not heard the video in full before sending it out,⁸⁵ a claim undermined by his original email where he wrote, "Pay close attention to every word. You will hear what goes through the mind of real policemen every single day on the job. This is the best video I've ever seen telling the public the absolute truth."⁸⁶ This is not a situation of individual officers acting out or being racist; departmental practices are racist because the department itself is racist—as are their unions, as exemplified by Mullins and the PBA.

Since the murder of George Floyd in May 2020, there have growing calls for abolishing and defunding the police.⁸⁷ Until that happens, however, penalizing officers who engage in case-related misconduct is currently necessary for the achievement of racial justice in New York City and, perhaps eventually, in the United States as a whole. Consistent penalization of rotten police officers will

82. See, e.g., Sarah McCammon, *From Debate Stage, Trump Declines to Denounce White Supremacy*, NPR (Sept. 30, 2020, 12:37 AM), <https://www.npr.org/2020/09/30/918483794/from-debate-stage-trump-declines-to-denounce-white-supremacy> [<https://perma.cc/US3P-68L2>] (detailing President Trump's failure to condemn the "white supremacist" group the Proud Boys); Katie Rogers & Nicholas Fandos, *Fanning Flames, Trump Unleashes a Taunt: 'Go Back'*, N.Y. TIMES, Jul. 14, 2019, at A1 (recounting how President Trump employed a racist trope in telling four non-white Congresswomen that they should "go back" to the countries from which they came); Leonard Pitts, Jr., Opinion, *A Year Ago, Trump Defended a Supremacists Rally. Sad.*, MIAMI HERALD, Aug. 12, 2018, at C5 (describing President Trump's statement that there were "very fine people on both sides" of the violent white supremacist rally in Charlottesville as "an act of moral equivocation that will forever soil his presidency"); Amber Phillips, *'They're Rapists.' President Trump's Campaign Launch Speech Two Years Later, Annotated*, WASH. POST: THE FIX (Jun. 16, 2017, 1:43 PM), <https://www.washingtonpost.com/news/the-fix/wp/2017/06/16/theyre-rapists-presidents-trump-campaign-launch-speech-two-years-later-annotated/> [<https://perma.cc/5DSY-8PCK>] (annotating then-presidential candidate Donald Trump's speech announcing his bid for the White House, in which he made a number of hateful claims, including that Mexicans entering the country are "rapists").

83. *Police Benevolent Association Breaks with Tradition, Endorses President Trump's Re-Election Campaign*, *supra* note 81.

84. Tina Moore & Craig McCarthy, *NYPD Union Boss Sent Members Overtly Racist Video in Email*, N.Y. POST (Aug. 13, 2019, 4:52 PM), <https://nypost.com/2019/08/13/nypd-union-boss-sent-members-overtly-racist-video-in-email/> [<https://perma.cc/9MLU-X8WR>] (describing an "unidentified narrator bemoan[ing] 'Section 8 scam artists and welfare queens'").

85. Jake Offenhartz, *NYPD Police Union Boss: Sorry for Sharing Racist Video, 'I Have Black Friends'*, GOTHAMIST (Aug. 14, 2019, 12:58 PM), <https://gothamist.com/news/nypd-police-union-boss-sorry-for-sharing-racist-video-i-have-black-friends> [<https://perma.cc/VT7A-CA3C>].

86. *Id.*

87. Sean Illing, *The "Abolish the Police" Movement, Explained by 7 Scholars and Activists*, VOX (June 12, 2020, 11:00 AM), <https://www.vox.com/policy-and-politics/2020/6/12/21283813/george-floyd-blm-abolish-the-police-8cantwait-minneapolis> [<https://perma.cc/C2GB-F2XZ>].

serve as a warning to others that police abuse will no longer be tolerated, which in turn will help reduce disparate victimization of Black and Brown people by law enforcement. It may force police officers to think twice about oppressing innocent persons based upon the color of their skin and may hopefully encourage bad officers to quit the force. Racial justice and racial healing cannot happen without real officer accountability.

III.

PRESENT-DAY STATE-SANCTIONED POLICE MISCONDUCT AGAINST INNOCENT PERSONS IN NEW YORK CITY

Too many innocent people are arrested and charged with crimes in New York City. In many criminal cases where police officers are critical witnesses, their misconduct leads to the commencement of a case against innocent individuals. Officers then lie about their behavior and other material facts in departmental documents and in live testimony during official proceedings. When the misbehavior is brought to light and the innocent person vindicated, the officers involved are almost never penalized. They are not meaningfully disciplined within the department; they are not prosecuted for their crimes; and they are never personally liable in any subsequent lawsuit. New York City happily picks up the tab and pays millions of dollars to settle dozens of lawsuits every year. The NYPD and police unions habitually go to bat for their officers even when those officers are plainly in the wrong; and prosecutors and judges bend over backwards to preserve the integrity and honor of officers who have neither.

Part III discusses such misconduct and lack of accountability. It is divided into three sections. The first section will examine recent NYPD misconduct, referencing the feature case while drawing on examples within the last decade. The second section will show how the police department, prosecutors, judges, and the city government condone and ultimately encourage police misconduct by shielding police from accountability. The third section will discuss the consequences of unchecked police misconduct.

A. NYPD Misconduct

Officer misconduct in cases involving innocent defendants is two-fold: the officer first engages in illegal behavior in their interactions with the defendants. These interactions take place both in the home and in the street, be they with pedestrians, motorists, or passengers in vehicles. The officer then, after the commencement of the case, falsifies paperwork, lies in sworn complaints, and fabricates testimony during official proceedings. The officer does so to maintain the constitutional legitimacy of their behavior where legally relevant: to cover for their own misdeeds, and to get the defendant convicted of the crime charged. This section will examine each layer in turn.

1. *Misconduct Outside of Court*

For many innocent defendants, their forays into the criminal judicial system begin with unfortunate encounters with unscrupulous police officers. These interactions often, at a minimum, lead to these persons being falsely charged with crimes and immediately deprived of their liberty. Those who are not as lucky may wind up being physically harmed or even killed. This section explores three types of police misconduct on the street and in the home: a) illegal searches and seizures; b) the planting and doctoring of evidence; and c) police assaults on civilians. This section also examines other types of police misconduct as well.

a. *Illegal Searches and Seizures*

The Fourth Amendment of the United States Constitution bars the government from conducting unreasonable searches and seizures on private citizens and requires warrants to be issued only when based upon probable cause.⁸⁸ New York's state constitution codifies the same right to be free from unreasonable search and seizure.⁸⁹ If the police fail to adhere to rules regarding searches and seizures of citizens, evidence that officers obtain as a result of said interactions could be thrown out. That is to say, the state would not be able to use that evidence against the person charged with the offense.⁹⁰

Constitutionally impermissible conduct by police officers can have far-ranging consequences in New York: illegal searches and seizures can lead not only to physical evidence itself being suppressed,⁹¹ but to subsequent statements,⁹² identification procedures,⁹³ and even *observations*⁹⁴ being suppressed as well. A ruling that evidence should be suppressed because it was obtained in violation of constitutional principles could reflect poorly on an officer, as such a ruling is a judicial rebuke of the officer's conduct. From a prosecutor's perspective, suppressed evidence could be fatal to their case, and could let a defendant who did engage in the illegal activities they were accused of escape criminal punishment.

In response to *Mapp*, officers who illegally search and seize people started manufacturing post-hoc rationales for the search that were designed to meet constitutional standards.⁹⁵ Over time, NYPD officers have learned certain catch phrases to use when testifying in suppression hearings. Some of the boilerplate

88. U.S. CONST. amend. IV.

89. N.Y. CONST. art. 1, § 12.

90. *Mapp v. Ohio*, 367 U.S. 643, 654–55 (1961).

91. *People v. Levan*, 464 N.E.2d 469 (N.Y. 1984).

92. *People v. Harris*, 570 N.E.2d 1051 (N.Y. 1991); *People v. Johnson*, 488 N.E.2d 439 (N.Y. 1985).

93. *People v. Gethers*, 654 N.E.2d 102 (N.Y. 1995) (suppressing the ID that came from illegal arrest); *People v. Dodt*, 462 N.E.2d 1159 (N.Y. 1984) (same).

94. *People v. Rossi*, 650 N.E.2d 359 (N.Y. 1992) (suppressing some officer testimony after deeming the search illegal); *People v. Young*, 434 N.E.2d 1068 (N.Y. 1982) (same).

95. *People v. McMurty*, 314 N.Y.S.2d 194, 196–97 (1970).

testimonies officers would give include claiming that they smelled marijuana in the vehicle the defendant was in,⁹⁶ or that they noticed a suspicious bulge in the defendant's waistband or on his person,⁹⁷ or that they noticed questionable behavior in a "high crime neighborhood."⁹⁸ Taken as true, as they usually are by courts,⁹⁹ claims like these legally allow for more intrusion by police officers into the persons, vehicles and personal effects of the civilians they are interacting with.

Video evidence has revealed the truth under police lies related to illegal searches and seizures. In 2019, Officer Sean Kern approached a gentleman in East Harlem on a bicycle on the corner of the street, allegedly stopping him for riding on the sidewalk, illegally frisked and searched him, and recovered a gun.¹⁰⁰ When Officer Kern took the stand in November 2019, he described the young man who had just been sitting on the bicycle as a) "us[ing] his right hand to adjust a 'heavy object' underneath his shirt";¹⁰¹ and b) "appear[ing] nervous and . . . breathing heavily."¹⁰² Because the officer's testimony was clearly contradicted by the video surveillance, the search was invalidated.¹⁰³ In 2017, Officer Nector Martinez responded to a shooting in the Bronx and wanted to search a nearby apartment.¹⁰⁴ Rather than getting a warrant or proper consent, he and other officers questioned the apartment owner, Kimberly Thomas and then entered her apartment, searched it illegally and recovered a firearm.¹⁰⁵ When he took the stand in October 2017, his narrative evolved: he alleged that Ms. Thomas was carrying a laundry bag that contained the firearm, which he so happened to have discovered when he was moving it to enter Ms. Thomas' apartment.¹⁰⁶ He also alleged that Ms. Thomas herself had now granted him permission to enter the apartment.¹⁰⁷ Were it not for video surveillance that captured what occurred, "Officer Martinez's testimony might well have sent [Ms. Thomas] to prison."¹⁰⁸

96. Joseph Goldstein, *Officers Said They Smelled Pot. The Judge Called Them Liars*. N.Y. TIMES (Sep. 2, 2019), <https://www.nytimes.com/2019/09/12/nyregion/police-searches-smelling-marijuana.html> [<https://perma.cc/MZY3-Z29G>].

97. Darius Charney, *Requiem for a Suspicious Bulge*, CTR. FOR CONST. RTS. (Mar. 23, 2016), <https://ccrjustice.org/home/blog/2016/03/23/requiem-suspicious-bulge> [<https://perma.cc/Z8ZY-JL GU>].

98. *Illinois v. Wardlow*, 528 U.S. 119, 124–26 (2000); Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High Crime Areas*, 107 CALIF. L. REV. 345 (2019).

99. Dorfman, *supra* note 30, at 469–74.

100. *People v. Green*, Ind. No. 2373-19 at 2 (N.Y. Sup. Ct. 2019). The search was illegal; New York law prohibits frisking a person who is only committing a traffic infraction. *People v. Coleman*, 250 N.E.2d 237, 238 (N.Y. 1969) (citing *People v. Marsh*, 228 N.E.2d 783 (N.Y. 1967)).

101. *Green*, Ind. No. 2373-19 at 1.

102. *Id.*

103. *Id.* at 2–3.

104. Goldstein, *Testifying by Police*, *supra* note 20.

105. *Id.* This search is unconstitutional considering rights-protective interpretations of the Fourth Amendment applied to persons in their homes. *See, e.g., Welsh v. Wisconsin*, 466 U.S. 740, 741 (1984); *Payton v. New York*, 445 U.S. 573, 576 (1980).

106. Goldstein, *Testifying by Police*, *supra* note 20.

107. *Id.*

108. *Id.*

A past example of widespread NYPD flouting of constitutional search and seizure protections was its notorious stop-and-frisk program.¹⁰⁹ Between 2004 and 2012, city police officers conducted over four million stop-and-frisks, and the majority of the stops were of Black and Brown people.¹¹⁰ Most of the stops yielded no contraband,¹¹¹ and in the few cases where they did, various rationales would often be used to justify the stop, be they truthful or not. Proffered explanations included that the person who was “fit the description” of someone allegedly wanted for a crime;¹¹² that the person had a “suspicious bulge” that made the officer suspect a firearm;¹¹³ that the person made “furtive movements”;¹¹⁴ and that the person was in a high crime area.¹¹⁵ The program did not just violate citizens’ Fourth Amendment rights; sufficient evidence demonstrated that it was racially discriminatory as well.¹¹⁶ After the program was successfully challenged in a federal lawsuit in 2013, the annual tally of stop-and-frisks fell drastically.¹¹⁷ At the very least, the number of *recorded* stops dropped; whether or not actual stops have declined may be another question.¹¹⁸

In the feature case, the officers testified at both the IAB hearings and the evidentiary hearing in court to “facts” that made the arrest legally justifiable. They claimed that they observed Mr. Charles commit a narcotics offense while driving in an unmarked vehicle.¹¹⁹ They claimed that Mr. Charles acted in concert with several other persons,¹²⁰ none of whom were arrested that night.¹²¹ The relevance of this claim is that, if true, it gives the officers the right to pursue and arrest Mr. Charles, because an officer who observes the commission of a crime has probable

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

110. *Id.* at 556.

111. *Id.* at 558 (noting that only 8% of stops resulted in a search, and only 9% of searches produced a weapon and 14% produced contraband of any kind).

112. *Id.* at 633–34, 636, 643.

113. *Id.* at 630–32, 634–35, 640–42.

114. *Id.* 580–81.

115. *Id.* at 581–82.

116. *Id.* at 562–63.

117. See Azi Paybarah, Brendan Cheney & Colby Hamilton, *De Blasio on Stop and Frisk: ‘We Changed It Intensely,’* POLITICO N.Y. (Dec. 8, 2016), <https://www.politico.com/states/new-york/city-hall/story/2016/12/de-blasio-on-stop-and-frisk-we-changed-it-intensely-107886> [<https://perma.cc/59UB-WY7Z>] (describing “a series of big drops” in the use of stop-and-frisk after the federal judge case granted the plaintiffs class status).

118. See Al Baker, *City Police Officers Are Not Reporting All Street Stops, Monitor Says*, N.Y. TIMES (Dec. 13, 2017), <https://www.nytimes.com/2017/12/13/nyregion/nypd-stop-and-frisk-monitor.html> [<https://perma.cc/S9YY-635V>] (reporting that a court-appointed monitor found some officers were failing to document encounters as required).

119. Lenis IAB Hearing Transcript, *supra* note 10, at 7; Santomero IAB Hearing Transcript, *supra* note 5, at 6–7; Vega IAB Hearing Transcript, *supra* note 6, at 7–8.

120. Lenis IAB Hearing Transcript, *supra* note 10, at 7–8; Santomero IAB Hearing Transcript, *supra* note 5, at 6–7; Vega IAB Hearing Transcript, *supra* note 6, at 7–8.

121. Transcript of Suppression Hearing at 53–55, *People v. Charles* (Crim. Ct. 2018) (No. 2017BXXXXXXX) (on file with author) [hereinafter *Charles Suppression Hearing Transcript*]; Lenis IAB Hearing Transcript, *supra* note 10, at 8.

cause to arrest the perpetrator.¹²² The officers then claimed that when they drove up to Mr. Charles a few times to try and talk to him, he sped away on foot.¹²³ Flight from law enforcement can elevate the level of suspicion an officer has, thereby permitting greater intrusion by the officer into the civilian's person.¹²⁴ Then, when the officers exited their vehicle—either to grab Mr. Charles¹²⁵ or to make cordial contact with him¹²⁶—they allege that he violently attacked the officers, tried to destroy the narcotics he had in his hand, and was so strong that he needed to be physically wrestled to the ground and subdued by all three officers.¹²⁷ In the eyes of an unquestioning criminal court judge, the officers clearly acted in a constitutionally appropriate manner in approaching and apprehending Mr. Charles.

In actuality, however, the testimony of the police officers regarding what led to the apprehension of Mr. Charles was inconsistent with their own documentation and other evidence. The officers charged Mr. Charles with a drug sale, claiming that he sold narcotics to the three unapprehended persons.¹²⁸ However, in Internal Affairs Bureau (IAB) hearings held in December 2017, the officers claimed that they observed Mr. Charles *buying* drugs from the unapprehended persons, not selling.¹²⁹ They were not consistent in the IAB hearings as to where Mr. Charles bought drugs: Sergeant Lenis claimed it happened on 213th Street and Laconia,¹³⁰ while Officer Santomero testified that it happened on 219th and Laconia.¹³¹ They claimed that Mr. Charles was walking quickly and even jogging away before they exited their vehicles and made physical contact,¹³² but video footage obtained by IAB showed Mr. Charles walking at a regular pace and perhaps even slowing down before the officers made contact.¹³³

Another false claim the police made in Mr. Charles' case was that they had witnessed him drop drugs upon approach. Officer Santomero filled out a "Stop Report" in which he claimed that, when the officers approached Mr. Charles, he

122. N.Y. C.P.L. § 140.10(1)(b).

123. Lenis IAB Hearing Transcript, *supra* note 10, at 8–9; Santomero IAB Hearing Transcript, *supra* note 5, at 7–8, 11, 13–21; Vega IAB Hearing Transcript, *supra* note 6, at 8–9.

124. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (“[N]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion.”).

125. Lenis IAB Hearing Transcript, *supra* note 10, at 9–10; Santomero IAB Hearing Transcript, *supra* note 5, at 8.

126. Vega IAB Hearing Transcript, *supra* note 6, at 9.

127. Lenis IAB Hearing Transcript, *supra* note 10, at 10–12, 15–16; Santomero IAB Hearing Transcript, *supra* note 5, at 8–10; Vega IAB Hearing Transcript, *supra* note 6, at 9–10.

128. Charles Arrest Report, *supra* note 11; Charles Complaint Report, *supra* note 11.

129. Lenis IAB Hearing Transcript, *supra* note 10, at 8; Santomero IAB Hearing Transcript, *supra* note 5, at 11; Vega IAB Hearing Transcript, *supra* note 6, at 8.

130. Lenis IAB Hearing Transcript, *supra* note 10, at 7.

131. Santomero IAB Hearing Transcript, *supra* note 5, at 7.

132. Lenis IAB Hearing Transcript, *supra* note 10, at 8–9; Santomero IAB Hearing Transcript, *supra* note 5, at 7–8; Vega IAB Hearing Transcript, *supra* note 6, at 7–8.

133. Charles IAB Video, *supra* note 4.

dropped the drugs in their sight.¹³⁴ Dropsy cases sprang up in the 1960s following the United States Supreme Court's decision in *Mapp v. Ohio*; officers often revised their testimony and began claiming in hundreds of subsequent cases that the defendant dropped the contraband upon their approach.¹³⁵ This became a dominant rationale for police officers to justify otherwise unlawful arrests.¹³⁶ Interestingly enough, the stop report in which the dropsy allegations were made was subsequently voided;¹³⁷ and Officer Santomero testified in court that Mr. Charles did not drop any crack cocaine upon approach.¹³⁸

Police officers in New York City consistently violate the state and federal constitutions in illegally searching and seizing its citizens. In many instances, this illegal conduct leads to the commencement of criminal cases against these citizens. Then the protections endowed by both constitutions are potentially rendered meaningless when said officers manufacture legal justifications for their actions. That there is no real consequence for NYPD officers that knowingly violate the constitutional rights of citizens is unfair, immoral, and unjust.

b. Planting and Doctoring of Evidence

In shameful instances, disreputable police officers plant evidence on civilians or their effects.¹³⁹ Sometimes, officers plant weapons on people to justify having shot the person. A classic example of this occurred in North Charleston, South Carolina, when former police officer Michael Slager shot Walter Scott in the back, and then dropped his taser next to Mr. Scott's dead body likely to make it seem as if Mr. Scott grabbed his taser and thereby endangered his life.¹⁴⁰ In New York City, former NYPD Sergeant Richard Blake shot a civilian during a verbal dispute, and then planted his knife near the bleeding victim.¹⁴¹ Both officers likely did so because they felt a need to provide an acceptable rationale for shootings they feared would otherwise be deemed unjustifiable. One group of officers in Baltimore went as far as to carry toy guns to plant on unarmed individuals they shot.¹⁴²

134. Stop Report, No. STP-2017-XXX-XXXXXX, N.Y. Police Dep't (May 10, 2017) (on file with author) [hereinafter Charles Stop Report].

135. *People v. McMurty*, 314 N.Y.S.2d 194, 196–97 (1970).

136. *Id.*

137. Charles Stop Report, *supra* note 134.

138. Charles Suppression Hearing Transcript, *supra* note 121, at 74.

139. Jessica S. Henry, *Smoke but No Fire: When Innocent People Are Wrongly Convicted of Crimes That Never Happened*, 55 AM. CRIM. L. REV. 665, 671 (2018).

140. Alan Binder, *White Officer Who Shot Black Man in the Back Is Sentenced to 20 Years*, N.Y. TIMES (Dec. 8, 2017), <https://www.nytimes.com/2017/12/07/us/michael-slager-sentence-walter-scott.html> [<https://perma.cc/U3MT-GAY6>].

141. Catherina Gioino & Leonard Greene, *Ex-NYPD Cop Who Shot Romantic Rival in the Face Sentenced to Probation*, N.Y. DAILY NEWS (Oct. 11, 2019, 6:04 PM), <https://www.nydailynews.com/new-york/ny-blake-cop-shooting-sentenced-20191011-tfw6amr57zelnniwwsteywnlhe-story.html> [<https://perma.cc/NW39-DK96>].

142. Michael Harriot, *Baltimore Cops Kept Toy Guns to Plant Just in Case They Shot an Unarmed Person*, THE ROOT (Jan. 30, 2018, 9:59 AM), <https://www.theroot.com/baltimore-cops-kept-toy-guns-to-plant-just-in-case-they-1822546984> [<https://perma.cc/KAN7-EXA2>].

Officers also plant evidence on civilians for the purpose of making arrests and thereby boosting numbers. In New York City, this practice occurs with enough frequency to have merited its own term in NYPD circles: “flaking.”¹⁴³ At least one former NYPD officer has publicly admitted that flaking is a common practice used to boost arrest numbers and make quotas.¹⁴⁴ No contraband charge is too low to be unworthy of NYPD flaking. In Brooklyn, for instance, cell phone footage showed an NYPD officer throwing a pill bottle containing marijuana into a man’s car before arresting that man and his friend for drug possession.¹⁴⁵ Charges against both were later dismissed.¹⁴⁶ Also in Brooklyn, officers from the 67th precinct seemingly planted a gun on a Mr. Jeffrey Herring (among many others)¹⁴⁷ and charged him with weapons possession.¹⁴⁸ The case fell apart when the judge ordered the prosecution to produce the “confidential police informant” who provided police with the information.¹⁴⁹

Planting of evidence can take various forms. In some cases, police officers actually find contraband somewhere else and then pin it on a person who was not in possession of the contraband. This was what Officer Nector Martinez did in the Bronx with Kimberly Thomas: he created a narrative that not only justified officer entry into her home, but also depicted Ms. Thomas to be the gun owner when in actuality, there was “little to link [the gun] to the woman”¹⁵⁰ In other cases, officers physically place contraband on a person or in their personal effects before arresting and charging the person. This is what NYPD Officer Carlo Cassata did during a car stop in Brooklyn: his own body camera showed him planting a stun gun in a Mr. Omar Prescott’s car.¹⁵¹ That planted evidence served as the basis of an illegal weapons charge that was later dismissed.¹⁵²

143. Trymaine Lee, *Stephen Anderson, Ex NYPD Cop: We Planted Evidence, Framed Innocent People to Reach Quotas*, HUFFPOST (Oct. 13, 2011, 5:55 PM), https://www.huffpost.com/entry/ex-nypd-cop-we-planted-ev_n_1009754 [<https://perma.cc/XC62-PB8A>].

144. *Id.*

145. Trevor Boyer, *Video Shows NYPD Officer Awkwardly Tossing Weed into Brooklyn Man’s Car*, GOTHAMIST (Oct. 18, 2019, 9:49 AM), <https://gothamist.com/news/video-shows-nypd-officer-awkwardly-tossing-weed-into-brooklyn-mans-car> [<https://perma.cc/92RG-76EE>].

146. *Id.*

147. Nick Pinto, *The Incredibles: Judges Said These Cops Can’t Be Trusted, so Why Does the D.A. Rely on Them?*, VILL. VOICE (Nov. 1, 2016), <https://www.villagevoice.com/2016/11/01/the-incredibles-judges-said-these-cops-cant-be-trusted-so-why-does-the-d-a-rely-on-them/> [<https://perma.cc/7XRE-UBWE>].

148. Josh Saul, *Case Dismissed After NYPD Fails to Produce Mystery ‘Informant,’* N.Y. POST (Jan. 15, 2015, 12:21 PM), <https://nypost.com/2015/01/15/judge-dismisses-case-after-nypd-fails-to-produce-mystery-informant/> [<https://perma.cc/99WK-XF9G>].

149. *Id.*

150. Goldstein, *Testifying by Police*, *supra* note 20.

151. Vincent Barone & Andrew Denney, *NYPD Cop Caught Planting Stun Gun in Car by His Own Body Cam: Lawsuit*, N.Y. POST (Jan. 3, 2020, 10:14 PM), <https://nypost.com/2020/01/03/nypd-cop-caught-planting-stun-gun-in-car-by-his-own-bodycam-lawsuit/> [<https://perma.cc/V7AJ-L9DY>].

152. *Id.*

One case of evidence planting that went viral occurred in Staten Island in February 2018. Two NYPD officers, Elmer Pastran and Kyle Erickson, stopped Lasou Kutayeh for allegedly committing traffic infractions.¹⁵³ The officers allegedly smelled the odor of marijuana upon having stopped the car and ordered the four young Black males out of the car.¹⁵⁴ The body camera footage showed the officers searching the car and finding nothing.¹⁵⁵ Officer Erickson then said, “We have to find something . . . [y]ou know what I mean?”¹⁵⁶ Officer Erickson’s camera then strangely went off.¹⁵⁷ Officer Pastran’s body camera remained rolling, however, and showed that the floor of the car behind the rear driver’s side had no contraband.¹⁵⁸ Soon, Mr. Kutayeh accused the officer of putting something in his car.¹⁵⁹ The officers then arrested him for obstruction of governmental administration.¹⁶⁰ Soon after that, Officer Erickson’s camera came back on, and he had now discovered a marijuana cigarette joint on the floor behind the driver’s seat, *the same spot where Officer Pastran’s camera showed to have had no contraband*.¹⁶¹ The absence of any plausible explanation for the appearance of the marijuana cigarette was so stark in this case that during the suppression hearing, the judge actually stopped the proceedings and advised Erickson to get an attorney in the middle of his testimony; the prosecution dismissed the case shortly thereafter.¹⁶²

In the feature case, the narcotics the police officers claimed to have recovered from Mr. Charles were different from the narcotics admitted as evidence in Mr. Charles’ trial. The night of Mr. Charles’ arrest in the spring of 2017, the officers charged him with a number of narcotics felonies.¹⁶³ Officer Santomero claimed that he recovered a quarter-sized rock of crack cocaine from him.¹⁶⁴ The crack rock he allegedly recovered was enclosed in a clear plastic twist and weighed 1.3 grams.¹⁶⁵ Officer Santomero averred that he in no way tampered with the drug or its packaging, and that he submitted the crack rock as evidence in the same

153. Joseph Goldstein, *Teenager Claims Body-Cams Show the Police Framed Him. What Do You See?*, N.Y. TIMES (Nov. 19, 2018), <https://www.nytimes.com/2018/11/19/nyregion/body-cameras-police-marijuana-arrest.html> [<https://perma.cc/6ZR8-8YK2>] [hereinafter Goldstein, *Teenager Framed*].

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. Jake Offenhartz, *Report: Staten Island Cops Accused of Planting Drugs on Black Teen Have History of Racial Profiling*, GOTHAMIST (Dec. 4, 2018, 1:16 PM) [hereinafter *Staten Island Cops Racial Profiling*], <https://gothamist.com/news/report-staten-island-cops-accused-of-planting-drugs-on-black-teen-have-history-of-racial-profiling> [<https://perma.cc/HGS4-EDWB>].

163. Charles Arrest Report, *supra* note 11; Charles Complaint Report, *supra* note 11.

164. Charles Suppression Hearing Transcript *supra* note 121, at 19–20.

165. *Id.* at 20, 83; Santomero Memobook, *supra* note 13 (stating “voucher crack cocaine 1.3 grams # 2000653983”); NYPD PETS Property Clerk Invoice, No. 2000XXXXXX (May 11, 2017).

condition he found it.¹⁶⁶ That evidence remained in storage until February 2018, when the evidence was sent to the NYPD narcotics lab for testing.¹⁶⁷ The item number of the drugs the NYPD lab technician received was the same item number under which Officer Santomero submitted the drugs.¹⁶⁸ However, the narcotics received by the lab technician consisted of three white opaque twists contained in a larger white opaque twist; and each of the three smaller white opaque twists contained a crack rock.¹⁶⁹ Those three crack rocks, when weighed inside of their individual opaque twists, weighed approximately 0.853 grams; without the packaging, the three crack rocks had an estimated weight of 0.681 grams.¹⁷⁰

This inconsistency goes far beyond simple evidence contamination: the evidence Officer Santomero claimed to have submitted was completely different from the evidence the lab technician received and tested. This striking discrepancy must mean that either the evidence submitted initially or the evidence tested by the lab technician—or both—was not recovered from the arrest as claimed by the officers.

There are too many NYPD officers who stoop to low levels and flake civilians. On paper, there are serious risks to individual officers that do this, but in practice, officers do it because it allows them to get more arrests, which benefits their job; and they think they can get away with it, and rightly so. That officers are rarely punished for planting evidence on innocent persons is immoral, unfair, and unjust.

c. *Police Assaults on Civilians*

Police shootings of unarmed individuals have gotten a lot of press over the past few years.¹⁷¹ A more pervasive problem that has received less attention is police assaults on civilians. Officers often arrest civilians for “contempt of cop” when civilians talk back, try to stand up for themselves, or are otherwise not deferential.¹⁷² An essential element of cases like these is a narrative which portrays the civilian as a monster through over-emphasis on their alleged actions or a past

166. Charles Suppression Hearing Transcript, *supra* note 121, at 83.

167. Laboratory Report, N.Y. Police Dep’t (Feb. 13, 2018) (on file with author).

168. *Id.*; PETS Property Clerk Invoice, N.Y. Police Dep’t (May 11, 2017) (on file with author).

169. Laboratory Report, *supra* note 167.

170. *Id.*

171. See Brentin Mock, *What New Research Says About Race and Policing Shootings*, NATURE (Aug. 6, 2019), <https://www.citylab.com/equity/2019/08/police-officer-shootings-gun-violence-racial-bias-crime-data/595528/> [<https://perma.cc/M8Z7-7UJR>] (discussing studies of “media-generated police shootings data”); Cheryl W. Thompson, *Fatal Police Shootings of Unarmed Black People Reveal Troubling Patterns*, NPR (Jan. 25, 2021, 5:00 AM), <https://www.npr.org/2021/01/25/956177021/fatal-police-shootings-of-unarmed-black-people-reveal-troubling-patterns> [<https://perma.cc/J292-QBWS>] (“The deadly shootings of unarmed Black men and women by police officers in the U.S. have increasingly garnered worldwide attention over the last few years.”).

172. CHRISTY LOPEZ & AM. CONST. SOC’Y, DISORDERLY (MIS)CONDUCT: THE PROBLEM WITH “CONTEMPT OF COP” ARRESTS (2010), https://live-acslaw.pantheonsite.io/wp-content/uploads/2018/04/Lopez_Contempt_of_Cop.pdf [<https://perma.cc/TUP4-CG68>].

criminal record, if one exists; often officers demonize civilians simply because of their physical appearance. In the case of Marcus Jeter, police made false charges to justify the beating they gave him at a traffic stop.¹⁷³ Mr. Jeter refused to exit his police vehicle when officers pulled him over and drew their firearms without valid cause; the officers then rammed one of their vehicles into Mr. Jeter's car, breaking his car window, drew firearms and physically assaulted him while yelling, "stop resisting arrest" and "stop trying to grab my gun," yanked him out of the car and arrested him.¹⁷⁴ Despite the police's own dashboard cameras showing that Mr. Jeter had his arms raised in surrender position during the police assault, the police charged him with resisting arrest and assault on an officer.¹⁷⁵

In cases where officers get physical with civilians, and especially when said civilians get injured, a common police practice is to charge the arrestee at a minimum with resisting arrest, regardless of actual resistance.¹⁷⁶ Charging civilians with this "contempt of cop"¹⁷⁷ charge plays into the narrative that the civilian is a monster or criminal to justify harming the individual: that person interfered with and/or fought with the police when the officers were simply trying to do their jobs. An example of this would be the case of Johanna Pagan-Alomar, a Bronx resident who was criminally charged after being beaten so violently by an NYPD officer that she lost her left eye.¹⁷⁸ Ms. Pagan-Alomar was charged with obstruction of governmental administration, a common "contempt of cop" charge, in addition to assault and harassment.¹⁷⁹ The state's narrative was that Ms. Pagan-Alomar interfered with the lawful arrest of her friend and then attacked the arresting officer.¹⁸⁰ These allegations serve to justify the officer's barbarity—namely that Ms. Pagan-Alomar's injuries were not the product of police brutality, but were brought about by her own "criminal" behavior. Or take the case of Tyjuan Hill, a 22-year-old, 140-pound Black man who was pinned down by five officers and shot in the back

173. Hot 97, *Police Brutality Caught on Tape and Victim Wins*, YOUTUBE (Feb. 26, 2014), <https://www.youtube.com/watch?v=nl-zdHxTFjc> [<https://perma.cc/ZST6-X8TG>].

174. *Id.*

175. *Id.*

176. Dorfman, *supra* note 30, at 476.

177. Bonnie Kristian, *The Obstruction Conversation We Should Be Having*, WEEK (Mar. 26, 2019), <https://theweek.com/articles/831182/obstruction-conversation-should-having> [<https://perma.cc/M2QJ-RZ5T>] (defining common "contempt of cop" charges to include offenses like "resisting arrest, disorderly conduct, failure to obey a police order, fleeing police, and obstruction of justice").

178. See Rocco Parascandola, *Graphic Content—A Lost Eye, a Cut Lip: Two Pictures Tell the Story of a Bronx Police Encounter*, N.Y. DAILY NEWS (May 8, 2019, 7:41 PM), <https://www.nydailynews.com/new-york/nyc-crime/ny-blinded-woman-injured-officer-and-pics-showing-their-injuries-20190508-mkbfps7ubglrkg55ovsu6xtbq-story.html> [<https://perma.cc/VF5M-XCYH>] [hereinafter Parascandola, *A Lost Eye, a Cut Lip*].

179. See Erin Laviola, *Johanna Pagan-Alomar: 5 Fast Facts You Need to Know*, HEAVY. (Mar. 25, 2019, 10:50 AM), <https://heavy.com/news/2019/03/johanna-pagan-alomar/> [<https://perma.cc/N6J5-ZKC5>].

180. See Parascandola, *A Lost Eye, a Cut Lip*, *supra* note 178.

of the head by a sixth.¹⁸¹ The narrative was that he was somehow able to defy the force and strength of five officers and point a gun at the officer who ultimately killed him.¹⁸² If the victim is properly vilified, then any actions taken against him are deemed justified.

In the feature case, the three police officers grabbed Mr. Charles, forced him to the ground, and punched and kicked him several times. In so doing, they broke two of his ribs, dislocated his right shoulder, and caused a host of other minor injuries.¹⁸³ In this case, the officers lied about their role (or the absence of a role) in the assault, concocted a “monster” narrative justifying the assault, and charged Mr. Charles with contempt of cop offenses. Despite documenting the physical altercation and admitting to striking Mr. Charles in Threats, Resistance, and Injury reports (T.R.I. reports),¹⁸⁴ the officers denied assaulting Mr. Charles at their subsequent IAB hearings.¹⁸⁵

The officers made Mr. Charles out to be a monster and a savage to justify the use of force. According to them, Mr. Charles started swinging at them when they tried to make peaceful contact with him.¹⁸⁶ At trial, Santomero used the term “exploded” to describe how Mr. Charles allegedly reacted.¹⁸⁷ While standing and while on the ground, Mr. Charles allegedly tried to bite at least one of the officers.¹⁸⁸ The officers also characterize subduing Mr. Charles as a strenuous task, because Mr. Charles was just so strong.¹⁸⁹ All three of them marked that Mr. Charles was pushing and shoving, and wrestling and grappling; and Sergeant Lenis marked that Mr. Charles struck him with an object.¹⁹⁰ Santomero noted in his

181. Denis Hamill, *Five Cops Held Down Tyjuan Hill, a Sixth Shot Him in the Back of the Head*, DAILY BEAST (Apr. 13, 2017, 3:08 PM), <https://www.thedailybeast.com/five-cops-held-down-tyjuan-hill-a-sixth-shot-him-in-the-back-of-the-head> [<https://perma.cc/WD25-QAZD>].

182. *Id.* (quoting the attorney for the family stating, “A toxicology report later determined that Hill had no drugs or alcohol in his system. And yet the cops would have you believe Hill had the super human strength to fight off these five cops who sprayed him two or three times with pepper spray.”).

183. Ronald Charles Hospital Records (May 11, 2017) (on file with author); October 2017 Charles Interview, *supra* note 2.

184. Lenis TRI Report, *supra* note 7, at 2; Santomero TRI Report, *supra* note 7, at 2; Vega TRI Report, *supra* note 7, at 2.

185. Lenis IAB Hearing Transcript, *supra* note 10, at 12–13; Santomero IAB Hearing Transcript, *supra* note 5, at 14–15; Vega IAB Hearing Transcript, *supra* note 6, at 12–13, 17. In their subsequent IAB hearings, the officers all claimed that their TRI notations were erroneously completed due to lack of training. Lenis IAB Hearing Transcript, *supra* note 10, at 13–15; Santomero IAB Hearing Transcript, *supra* note 5, at 15–18; Vega IAB Hearing Transcript, *supra* note 6, at 18–20.

186. *See* Santomero IAB Hearing Transcript, *supra* note 5, at 8; Lenis IAB Hearing Transcript, *supra* note 10, at 10–11; Vega IAB Hearing Transcript, *supra* note 6, at 9.

187. Charles Suppression Hearing Transcript, *supra* note 121, at 14.

188. *See* Santomero IAB Hearing Transcript, *supra* note 5, at 9; Vega IAB Hearing Transcript, *supra* note 6, at 9, 14–15, 23–24.

189. *See* Santomero IAB Hearing Transcript, *supra* note 5, at 12–13; Vega IAB Hearing Transcript, *supra* note 6, at 10, 14.

190. Lenis TRI Report, *supra* note 7, at 2; Santomero TRI Report, *supra* note 7, at 2; Vega TRI Report, *supra* note 7, at 2.

TRI report that Mr. Charles was armed with a weapon.¹⁹¹ Despite all the aggressive and violent behavior by Mr. Charles, the officers managed to sustain no injuries.¹⁹²

The police and charged Mr. Charles with resisting arrest;¹⁹³ the criminal court complaint alleged that Mr. Charles flailed his arms and shoved the officers, refusing to be handcuffed.¹⁹⁴ Both the police and the prosecution also charged Mr. Charles with criminal mischief because Officer Vega's watch broke while he was assaulting Mr. Charles, though the charge did not allege that Mr. Charles broke the watch, only that it broke during the arrest.¹⁹⁵

Police officers in New York City brutalize civilians too often. The brutality is often legitimized through the filing of criminal charges against the victims. That officers are allowed to assault people with impunity is immoral and unjust, and out of alignment with constitutional notions of criminal justice.

d. Other Kinds of Misconduct

There are other types of misconduct police officers engage in. Within the context of taking statements, officers sometimes commit misconduct by failing to properly provide Miranda warnings before questioning individuals suspected of a crime.¹⁹⁶ Far worse, however, is when officers coerce individuals to admit to crimes they may not have committed. There are multiple examples in New York City alone. Louis Scarcella, a retired detective, is a "master" at obtaining confessions on murder cases; now, over 14 guilty verdicts that he played a role in securing have been thrown out, and other cases he has worked on have been under

191. Santomero TRI Report, *supra* note 7, at 2. Santomero's report is internally inconsistent on this fact. *Id.* In the section titled "Force against MOS [Member of Service]," Santomero marked "No" for "Menacing/Brandishing Weapon." *Id.* In the section titled "Reason MOS Used Force," Santomero marked "Yes" for "Subject Armed with Weapon." *Id.*

192. Lenis TRI Report, *supra* note 7, at 2; Santomero TRI Report, *supra* note 7, at 2; Vega TRI Report, *supra* note 7, at 2.

193. Charles Arrest Report, *supra* note 11; Charles Complaint Report, *supra* note 11. Criminal Court Complaint, *People v. Charles* (Crim. Ct. 2017) (No. 2017BXxxxxxxx) (on file with author) [hereinafter Criminal Court Complaint].

194. Criminal Court Complaint, *supra* note 193.

195. Charles Arrest Report, *supra* note 11; Charles Complaint Report, *supra* note 11; Criminal Court Complaint, *supra* note 193. Under the subsection of criminal mischief that Mr. Charles was charged with, a person must intentionally damage property to be guilty of the offense. N.Y. PENAL LAW § 145.00(1) (Consol. 2008).

196. *See, e.g.,* *People v. Dorvil*, 108 N.Y.S.3d 43, 45–46 (2019) (suppressing defendant's videotaped interrogation because the detective administered *Miranda* warnings after asking questions); *People v. Sedunova*, 922 N.Y.S.2d 134, 136 (2011) (suppressing defendant's videotaped statement made after the administration of *Miranda* warnings because there was no "pronounced break in questioning sufficient to return the defendant to the status of one who is not under the influence of questioning").

review.¹⁹⁷ In the Bronx, Sergeant Frank Viggiano and Detective Stanley Schiffman coerced confessions out of at least four people who wound up spending years in prison before being released and/or exonerated.¹⁹⁸ Most infamously, there is the Central Park Jogger case, in which five teenagers were forced to confess to a rape they did not commit.¹⁹⁹ There are no recent, publicized examples of NYPD officers obtaining false confessions, perhaps due to a state law passed in April 2017 that requires police to videotape custodial interrogations for certain crimes.²⁰⁰ Time will tell as to how effective that law is at preventing coerced confessions.

Within the context of eyewitness identification procedures, officers can conduct the procedure in an unduly suggestive manner;²⁰¹ or fabricate the results to make it seem as if the complainant picked out the person of their choice.²⁰² Either act is dangerous, because erroneous identifications by witnesses have been a leading cause of wrongful convictions.²⁰³ As an example of the latter, former Brooklyn police detective Michael Foder doctored photo arrays to make it seem as if a complainant positively identified two people he suspected were involved in a 2015 carjacking.²⁰⁴ The prosecutor discovered the lie, realizing that the photos allegedly used in the photo arrays had not yet been taken at the time Foder claimed to have done the arrays.²⁰⁵ As another example of the latter, Officer Chedanan Naurang falsely claimed that the complainant in a 2016 Brooklyn mugging positively identified four accused persons in the precinct, before changing his story to say

197. Sean Piccoli, *A Former Detective Accused of Framing 8 People for Murder Is Confronted in Court*, N.Y. TIMES (Apr. 1, 2019), <https://www.nytimes.com/2019/04/01/nyregion/nypd-detective-louis-scarcella.html> [https://perma.cc/L4XJ-HWLC]; Georgett Roberts & Tamar Lapin, *Disgraced Detective Louis Scarcella Lashes out in Court*, N.Y. POST (Jun. 19, 2019, 8:14 PM), <https://nypost.com/2019/06/19/disgraced-detective-louis-scarcella-lashes-out-in-court/> [https://perma.cc/CYF2-VS9V].

198. Kevin Deutsch, *Exclusive: Detectives Linked to 3 False Confessions Drew Scrutiny in Other Bronx Cases*, BRONX JUST. NEWS (Feb. 18, 2019), <http://bronxjusticenews.com/exclusive-detectives-linked-to-3-false-confessions-drew-scrutiny-in-other-bronx-cases/> [https://perma.cc/97SX-XKQY].

199. THE CENTRAL PARK FIVE (PBS 2012).

200. N.Y. C.P.L. § 60.45. The law applies only to serious felonies and only to interrogations that occur in a “detention facility” such as a police station or jail. *Id.* Interrogations need not be videotaped if there is no video equipment, the equipment malfunctions, or other inadvertent errors prevent recording. *Id.* Judges continue to have the discretion to admit non-videotaped confessions even if there is no statutory excuse for the failure to record. *Id.*

201. Joseph Goldstein, *Are Police Lineups Always Fair? See for Yourself*, N.Y. TIMES (Jan. 29, 2019), <https://www.nytimes.com/2019/01/29/nyregion/police-lineups-fair-unfair.html> [https://perma.cc/4MQF-PE6E].

202. Goldstein, *Testifying by Police*, *supra* note 20 (noting two cases where NYPD “officers appear to have given false accounts about witness identifications”).

203. *Eyewitness Identification Reform*, INNOCENCE PROJECT, <https://www.innocenceproject.org/eyewitness-identification-reform/> [https://perma.cc/4AJ4-P3V4] (last visited Apr. 27, 2021) (“Mistaken eyewitness identifications contributed to approximately 69% of the more than 375 wrongful convictions in the United States overturned by post-conviction DNA evidence.”).

204. Goldstein, *Testifying by Police*, *supra* note 20.

205. *Id.*

that the positive identification took place on the street.²⁰⁶ The prosecution ultimately dropped the mugging charge.²⁰⁷

NYPD officers are also in the practice of “creat[ing] crime,” or engaging in sting operations designed to entrap civilians and rack up arrests.²⁰⁸ In these operations, undercover officers assume various roles and make contact with civilians for the purpose of getting them arrested for a crime.²⁰⁹ Notwithstanding the morality or fairness of these policing practices, officers’ dishonesty in *how* they carry out the sting operations is clearly unjust. For example, in many alcohol violation stings, the “underage” undercover officer used is almost certainly not actually a minor.²¹⁰ In other such operations, the undercover officer throws money on the counter and briskly walk out of the establishment, so that the owner—or a cashier who is employed in the store—has no chance to ascertain what the officer bought or whether the officer was of appropriate age.²¹¹ Thus, people are getting arrested without knowledge of the criminal conduct they allegedly engaged in.

In addition to charging people with “contempt of cop” offenses to justify police violence, officers slam civilians with “contempt of cop” charges even when the encounter does not escalate to the level of brutal violence.²¹² This happened to Greg Allen in November 2012: he was falsely arrested by two Brooklyn NYPD officers and charged with obstructing governmental administration and disorderly conduct.²¹³ He appeared *pro se* and won an acquittal, in no small part because the cop’s own video evidence disproved the charges against him.²¹⁴ In March 2016, Latisha Bellamy-Maldonado was playing chess with neighbors in Brooklyn when she was violently arrested by NYPD officers and charged with a host of contempt of cop charges.²¹⁵ A month later, a grand jury threw out the charges against her.²¹⁶

206. *Id.*

207. *Id.*

208. Sarah Lustbader, *The Right to an Attorney is Not Enough: Steps to Rid the Criminal Justice System of Its Poverty Tax*, 44 FORDHAM URB. L.J. 1407, 1421 (2017).

209. *Id.*

210. Sarah Ryley, *The NYPD Is Running Stings Against Immigrant-Owned Shops, then Pushing for Warrantless Searches*, PROPUBLICA (Apr. 22, 2016), <https://www.propublica.org/article/nypd-nuisance-abatement-shop-stings-warrantless-searches> [https://perma.cc/U2VY-TF52] (noting that NYPD claimed undercover auxiliary officer was 21 to 22 years old, but shop owners said the officer looked to be in their 30s and “‘big’ ‘burly’ ‘with a beard’ and ‘look[ing] like a construction worker’”).

211. *Id.*

212. See LOPEZ, *supra* note 172.

213. Nick Malinowski, *Testilying: Cops Are Liars Who Get Away with Perjury*, VICE (Feb. 3, 2013, 9:27 AM), https://www.vice.com/en_us/article/jmv94x/testilying-cops-are-liars-who-get-away-with-perjury [https://perma.cc/7NXM-5NZ5].

214. *Id.*

215. Sarah Crean, *Two Drastically Different Stories Regarding Flatbush Arrest Last Week*, BKLYNER. (Mar. 29, 2016, 5:11 PM), <https://bklyner.com/latisha-bellamy-maldonado-ditmas-park/> [https://perma.cc/7G88-LW8R].

216. Sarah Crean, *Charges to Be Dropped Against Area Woman Arrested for Assaulting Police Officer*, BKLYNER. (Apr. 28, 2016, 3:38 PM), <https://bklyner.com/charges-will-dropped-area-woman-charged-assaulting-police-officer-ditmas-park/> [https://perma.cc/635G-ATCM].

In June 2016, Ryan Coleman, a maintenance man in the Bronx, was arrested and charged with obstruction of governmental administration and disorderly conduct for daring to film a police encounter involving the infamous Detective David Terrell.²¹⁷ His case was ultimately dismissed as well.²¹⁸

Too many NYPD officers behave unethically, violate departmental rules, and even break the law in the course of charging people with crimes. To not hold these officers accountable is unfair, immoral, and unjust. It becomes even more unjust when officers lie to cover up their misdeeds and justify the false arrests of innocent persons, as the next subsection explores.

1. *Misconduct in the Judicial Process*

When a civilian's arrest is the product of police misconduct, the officer has little incentive to admit that they acted improperly, because doing so can lead to a host of negative consequences. With illegal searches and seizures, evidence could get suppressed; with other kinds of misconduct, the officer could theoretically be disciplined internally or criminally charged. The officer could receive bad press from the news media, particularly with serious allegations of misconduct. Hence, police officers are incentivized to cover up their misconduct by lying about relevant facts and details, from fabricating the bases of searches and seizures to denying allegations of physical abuse. The lies start when the arrest is processed and, in cases that are neither dismissed before trial or resolved with a plea, extend to the hearing and trial stages.

a. *Falsifying Paperwork*

When a person is arrested for a crime in New York City, the arresting officer fills out paperwork associated with the arrest.²¹⁹ A complaint report and an arrest report are completed.²²⁰ Other documentation is completed for specific types of

217. Shaun King, *Soul Snatchers :: Part Two :: The Bronx Terrorist – Detective David Terrell*, MEDIUM (Aug. 23, 2017) [hereinafter *Soul Snatchers: Part Two*], <https://medium.com/@ShaunKing/soul-snatchers-part-two-the-bronx-terrorist-detective-david-terrell-38be8bc35995> [https://perma.cc/T5FD-8JVJ]. The author recognizes the controversies surrounding Mr. King over the years. See, e.g., *Tamir Rice's Mom Blasts Shaun King, Calls Him 'a White Man Acting Black,'* NEWSONE (June 23, 2021), <https://newsone.com/4167002/samaria-rice-slams-shaun-king/> [https://perma.cc/2NWX-KVME]. However, these particular pieces are cited because there is clear proof embedded in the article for the factual assertions made.

218. *Soul Snatchers, Part Two, supra* note 217.

219. N.Y.C. POLICE DEP'T, PATROL GUIDE § 208-15 (2013) [hereinafter PATROL GUIDE], <https://keegan.nyc/wp-content/uploads/2016/04/NYPD-Patrol-Guide.pdf> [https://perma.cc/CA7S-GBL2].

220. *Id.* The complaint report includes information regarding when the incident occurred, when it was reported and how, the name of the complaining witness, and the name or description of the alleged perpetrator. Charles Complaint Report, *supra* note 11. The arrest report includes the arrest charges, the name and description of the arrestee, and the clothing the arrestee was wearing at the time of arrest. Charles Arrest Report, *supra* note 11. Both reports include a narrative section that describes the basis for the report, i.e., the reasons for the arrest. *Id.*; Charles Complaint Report, *supra* note 11.

cases or circumstances.²²¹ Officers have a departmental duty to fill out paperwork accurately; falsifying paperwork can be grounds for discipline, up to and including dismissal from the department.²²²

When officers falsely arrest people, they have a strong incentive to lie to make themselves look honorable and the case viable, and they too often do. Officers fabricate narratives that make an unconstitutional search into a constitutional one, they accuse the people they arrest of crimes which were not committed, they lie about material facts, and they omit their own wrongdoings.²²³ These officers then have their paperwork reviewed and approved by a supervisor,²²⁴ even when that supervisor observed or even participated in the arrest and knows the information to be false.

In the feature case, the three officers involved lied in their paperwork about the circumstances that led to the search and seizure,²²⁵ accused Mr. Charles of crimes they knew he did not commit,²²⁶ and submitted entirely different evidence for lab testing than that which was originally recovered from the arrest.²²⁷ In addition, Mr. Charles was charged with possession of phencyclidine, or PCP, weighing 50 milligrams or more,²²⁸ though no PCP was ever vouchered and Officer Santomero later admitted under oath that Mr. Charles possessed no PCP at the time of his arrest.²²⁹

Comparing the claims in the officers' paperwork to their testimony at the subsequent IAB hearings further illustrates their falsification of paperwork. The officers charged Mr. Charles with four drug felonies, including a sale charge and two charges for possession with intent to sell, as documented in the arrest report and complaint report.²³⁰ In their IAB hearings, however, all three of them claimed to see Mr. Charles buy drugs, not sell drugs.²³¹ Officer Santomero filled out a stop report claiming that Mr. Charles dropped the drugs upon the officer's approach,²³² but none of the officers gave an account consistent with that claim at the IAB

221. For example, officers complete invoice to document contraband recovered, PATROL GUIDE, *supra* note 219, at §§ 218-24, 218-25, Intoxicated Driver Testing Unit paperwork for drunk driving cases, *id.* at § 208-40, and ballistics reports for cases involving firearms, *id.* at § 208-49.

222. *Id.* at § 203-08.

223. Stanley Fisher, "Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports, 28 NEW ENG. L. REV. 1, 8-12 (1993).

224. PATROL GUIDE, *supra* note 219, at § 203-08.

225. See *supra* notes 128-38 and accompanying text.

226. See *supra* notes 128-29, 163-70 and accompanying text.

227. See *supra* notes 164-70 and accompanying text.

228. Charles Arrest Report, *supra* note 11; NYPD Complaint Report, *supra* note 11; N.Y. PENAL LAW § 220.06(3) (Consol. 2003).

229. Charles Suppression Hearing Transcript, *supra* note 121, at 83-84.

230. Charles Arrest Report, *supra* note 11; NYPD Complaint Report, *supra* note 11.

231. Lenis IAB Hearing Transcript, *supra* note 10, at 8; Santomero IAB Hearing Transcript, *supra* note 5, at 10; Vega IAB Hearing Transcript, *supra* note 6, at 8.

232. Charles Stop Report, *supra* note 134.

hearings.²³³ Officer Santomero notated in his memo book that Mr. Charles spat narcotics out of his mouth;²³⁴ in his IAB hearing testimony, he claimed that Mr. Charles *tried to swallow* the drugs, and that the officers had to pry his hands open to recover the narcotics.²³⁵ These inconsistencies reveal at least that false information was either documented in the paperwork or discussed in IAB hearings. If the falsification happened in the paperwork, not only did Officer Santomero lie, but his supervisor also signed off on false documentation.²³⁶ That Sergeant Lenis did so is suggestive of another possible problem: NYPD supervisors encourage and sometimes even force their subordinates to engage in unconstitutional, immoral, and even criminal behavior just to make a case. And the dishonesty does not stop there.

b. Testilying

Within the criminal legal system, the judicial process has mechanisms designed to ensure that the truth prevails. One such mechanism is the requirement that witnesses against defendants swear to the truthfulness of their testimony.²³⁷ There are penalties in place for witnesses who knowingly make false accusations under oath. In New York, a person can be prosecuted for offenses like falsely reporting an incident,²³⁸ making an apparently false sworn statement,²³⁹ and perjury.²⁴⁰ These offenses exist to discourage knowing dishonesty in the criminal judicial process;²⁴¹ accused persons should not be subject to criminal culpability and possible losses of liberty based on false or unreliable testimony.

When a person is arrested and charged with a crime in New York City, the court process begins with filing a criminal court complaint. Lying in a criminal court complaint is a crime.²⁴² With felony cases in New York City, the prosecution

233. Lenis IAB Hearing Transcript, *supra* note 10, at 6–10 (claiming that, upon approach by officers, Mr. Charles started walking fast, then started jogging, and began fighting when grabbed by police); Santomero IAB Hearing Transcript, *supra* note 5, at 6–8 (claiming that, upon approach, by officers, Mr. Charles started walking fast and “exploded” when the police grabbed him); Vega IAB Hearing Transcript, *supra* note 6, at 7–9 (claiming that, upon approach by officers, Mr. Charles started swinging his fists at the police).

234. Santomero Memobook, *supra* note 13 (stating “voucher crack cocaine 1.3 grams # 2000653983”).

235. Santomero IAB Hearing Transcript, *supra* note 5, at 8–10, 25–26.

236. Trial Record at 29–31, *People v. Charles* (Crim. Ct. 2018) (No. 2017BXXXXXXX) (on file with author) [hereinafter *Charles Trial Record*] (providing an example of the inconsistent nature of Officer Santomero’s story).

237. *People v. Parks*, 359 N.E.2d 358, 366 (N.Y. 1976).

238. N.Y. PENAL LAW §§ 240.50 (Consol. 2013), 240.55 (Consol. 2001), 240.60 (Consol. 2001).

239. §§ 210.35 (1965), 210.40.

240. §§ 210.05, 210.10, 210.15.

241. *Parks*, 359 N.E.2d at 366.

242. N.Y. PENAL LAW § 210.45 (Consol. 1965).

generally must obtain an indictment in order to proceed to trial.²⁴³ To do that, the prosecution convenes a grand jury.²⁴⁴ A witness who knowingly testifies falsely in a grand jury hearing can be validly charged with perjury.²⁴⁵ Misdemeanor and felony cases that do not resolve in pleas or dismissals are tried. A witness who knowingly testifies falsely in either a suppression hearing or a criminal trial can also be validly charged with perjury.²⁴⁶

In cases involving police misconduct, reports have found that police officers routinely lie in warrant applications before judges, in criminal court complaints, in grand jury proceedings, and in court during evidentiary hearings and trials.²⁴⁷ It is so routine, in fact, that police officers themselves coined a term years ago for giving false testimony in court: “testilying.”²⁴⁸ Officers lie on warrant applications by adding facts to establish probable cause where none exists, they lie in court documents to make out false charges against a defendant, they lie in pre-trial suppression hearings to nullify constitutional objections, and they lie in trials to convict civilians and cover up any relevant misconduct they may have committed.²⁴⁹

Testilying is not a new problem in New York City; it has existed for decades. The Mollen Commission, established by Mayor David Dinkins in 1992,²⁵⁰ noted in 1994 that police perjury was a widespread problem.²⁵¹ After the release of that report, attorney and scholar Alan Dershowitz penned an op-ed in the New York Times about the pervasiveness of testilying and the tacit acceptance of the practice by judges and prosecutors.²⁵² Five days later, the New York Times reported that an NYPD officer named John Rossi was convicted of perjury; it was noted in the article that testilying was “the most widespread form of police misconduct facing the criminal justice system” and “is rarely prosecuted, often condoned by superiors

243. N.Y. CRIM. PROC. LAW § 180.10 (Consol. 2017); *cf.* N.Y. CRIM. PROC. LAW § 195.10 (Consol. 2017) (describing when a defendant may waive indictment).

244. *Id.* at § 190.05.

245. *People v. Ortiz*, 836 N.Y.S.2d 73, 74 (App. Div. 2007); *People v. Tempera*, 462 N.Y.S.2d 512, 513 (App. Div. 1983).

246. *See, e.g., People v. Taylor*, 845 N.Y.S.2d 140, 143 (App. Div. 2007) (finding defendant guilty of perjury for lying during testimony); *Altieri v. Holden*, 663 N.Y.S.2d 602, 605 (App. Div. 1997) (explaining why immunity from grand jury testimony does not extend to perjury during said testimony); *People v. Perino*, 907 N.Y.S.2d 173 (App. Div. 2010) (finding defendant guilty of perjury during cross-examination).

247. Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1042–46 (1996) (describing common pre-trial circumstances in which police officers lie).

248. *Id.* at 1040.

249. Dorfman, *supra* note 30, at 460–62 (describing common police practices involving lying); Slobogin, *supra* note 247, at 1043.

250. COMM’N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCS. OF THE POLICE DEP’T, ANATOMY OF FAILURE: A PATH FOR SUCCESS (1994).

251. Slobogin, *supra* note 247, at 1042 (describing the findings of the Mollen report).

252. Alan M. Dershowitz, Opinion, *Accomplices to Perjury*, N.Y. TIMES, May 2, 1994, at A17.

and [is] an intrinsic part of the police culture.”²⁵³ That same year, the 30th precinct rocked the city with one of the largest testilying and flaking scandals in New York’s history: it led to 125 criminal convictions against 98 civilians being tossed, millions of dollars being paid to settle lawsuits, and a review of 2,000 cases where the officers of concern had any involvement.²⁵⁴ The NYPD is aware of the persistence of testilying, even at the very top: in 1995, then-police commissioner William Bratton publicly acknowledged that testilying was a problem and announced that all officers would be trained on “how to give accurate testimony in court” following a number of testilying scandals where 24 officers were charged and/or convicted of either falsifying charges or lying under oath in the two-and-a-half preceding years.²⁵⁵

Prosecutors and judges also often know that cops routinely lie in court, or they are at least willing to apply lesser scrutiny to police testimony.²⁵⁶ Upon Bratton’s announcement of how-to-tell-the-truth trainings for NYPD officers, New York City prosecutors reportedly “welcomed Mr. Bratton’s plan as a necessary effort to improve officer credibility in the courtroom.”²⁵⁷ Of course, for city prosecutors to deem such trainings *necessary*, there had to be recognition on their part that testilying was an existing problem. Criminal court judge Irving Younger also recognized as much in a 1967 piece he wrote for *The Nation*:

Police[officers] see themselves as fighting a two-front war—against criminals in the street and against ‘liberal’ rules of law in court. All’s fair in this war, including the use of perjury to subvert ‘liberal’ rules of law that might free those who ‘ought’ to be jailed. . . . It is a peculiarity of our legal system that the police have unique opportunities (and unique temptations) to give false testimony. . . . The difficulty arises when one stands back from the particular case and looks at a series of cases. It then becomes apparent that police[officers] are committing perjury at least in some of them, and perhaps in nearly all of them.²⁵⁸

Dershowitz also said as much in his op-ed, averring that testilying “has long been an open secret among prosecutors, defense attorneys and judges.”²⁵⁹ When he was chief of police in San Jose, Joseph McNamara affirmed Dershowitz’ op-ed,

253. Joe Sexton, ‘Testilying’; *Investigations Bring an Old Police Practice New Scrutiny*, N.Y. TIMES, May 7, 1994, at A25.

254. David Kocieniewski, *New York Pays a High Price for Police Lies*, N.Y. TIMES, Jan. 5, 1997, at A1.

255. Clifford Krauss, *Bratton Announces Plan to Train Officers to Testify*, N.Y. TIMES, Nov. 15, 1995, at B3.

256. Dorfman, *supra* note 30, at 472–74, 476–77 (describing the reasons judges often relax scrutiny of police testimony, including that common acceptable police conduct outside of the courtroom involves lying; describing “prosecutorial nonchalance towards police perjury”); Slobogin, *supra* note 247, at 1045–48 (arguing that many prosecutors and judges both believe that police lying is systematic and suspect it is occurring in individual cases without acting).

257. Krauss, *supra* note 255.

258. Irving Younger, *The Perjury Routine*, 204 NATION 596, 596 (1967).

259. Dershowitz, *supra* note 252.

asserting, “As someone who spent 35 years wearing a police uniform, I’ve come to believe that hundreds of thousands of law-enforcement officers commit felony perjury every year testifying about drug arrests.”²⁶⁰

Testilying often and most famously happens around constitutional constraints—in order to get evidence admitted that the Fourth Amendment would not otherwise allow—but it also happens in several contexts unrelated to those constitutional concerns about getting evidence through.²⁶¹ John Rossi’s case exemplifies the latter circumstance: the initial search was not the problem, as he and three other officers had arrested four people for possessing a firearm.²⁶² However, when officers discovered an unexplained second firearm in Rossi’s car, Rossi filed a false police report, used physical force to coerce one of the arrestees to admit possession of that gun, and then lied to a grand jury about the circumstances surrounding the recovery of the gun.²⁶³ Rossi was ultimately prosecuted and convicted, but this was not and is not the norm in New York City. “Prosecuting people for perjury is unusual. Prosecuting police officers for it is even rarer.”²⁶⁴

In the feature case, Officer Santomero was the only officer of the three to testify at Mr. Charles’ trial.²⁶⁵ Officer Santomero lied during both the suppression hearing and the criminal trial.²⁶⁶ The most central lie was that Mr. Charles was in possession of narcotics, but it was far from the only fabrication.²⁶⁷ All in all, the officer lied about Mr. Charles’ conduct, the circumstances that led to Mr. Charles’ arrest, the officers’ actions that caused Mr. Charles injury, and everything else related to the case.²⁶⁸ No detail was too small to embellish. For example, at the suppression hearing, Santomero claimed he was seated in the rear passenger seat, thereby being able to view Mr. Charles buying drugs on his right-hand side.²⁶⁹ The IAB video, however, shows Officer Santomero, the only officer seated in the back of the vehicle,²⁷⁰ exiting the unmarked police car on the driver’s side.²⁷¹

260. Joseph D. McNamara, Opinion, *Law Enforcement: Has the Drug War Created an Officer Liars’ Club?*, L.A. TIMES (Feb. 11, 1996, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1996-02-11-op-34758-story.html> [<https://perma.cc/B72X-BQA9>].

261. Dorfman, *supra* note 30, at 482–83 (describing circumstances in which police lie outside of pre-trial suppression hearings).

262. Sexton, *supra* note 253.

263. *Id.* (“Prosecutors, who have never offered a theory about where the second gun actually came from, asserted that Mr. Rossi had several motives for lying. One, it meant another arrest and possibly overtime pay. Two, it would cover up a procedural lapse by Mr. Rossi and his partner—all officers are required to check their patrol cars for contraband after transporting prisoners and at the conclusion of a tour—that might have resulted in disciplinary action.”).

264. *Id.*

265. See Charles Verdict Transcript, *supra* note 16, at 4–5.

266. See *id.* (describing consistent inconsistencies in Santomero’s description of the arrest).

267. *Id.* (finding defendant not guilty of possession of drugs).

268. *Id.*

269. See Charles Suppression Hearing Transcript, *supra* note 121, at 8–9, 35–40.

270. Charles IAB Video, *supra* note 4.

271. *Id.*

Testilying will remain a persistent problem as long as police officers engage in misconduct. Testilying generally does not happen in a vacuum; it accompanies other wrongdoings by the officer. Officers lie to cover up their sins and to secure convictions. That this is allowed to occur unabated is unfair, immoral, and unjust. Police officers risk engaging in misconduct and subsequently lying under oath about it because they think they can get away with it, and unfortunately, they generally can.

B. Shielding Bad Police from Proper Accountability

Worse than the problem of police committing acts of misconduct is that, far more often than not, officers are shielded from accountability and not penalized for their wrongdoings. Given both the power that officers wield and the weight that the word of police officers carries, there ought to be swift and severe punishment every time officers engage in misconduct serious enough to warrant dismissal from the force and the filing of criminal charges. However, the NYPD (and their unions), prosecutors' offices, judges, and the government of the City of New York go to great lengths to protect bad cops.

1. The New York City Police Department

The NYPD protects law enforcement officers who engage in misconduct in several ways. For example, they retain officers who act egregiously on the force. The NYPD retains bad police officers even when, for example, the Civilian Complaint Review Board (CCRB) finds that said officers committed misconduct;²⁷² said officers are the subject of bad publicity and bad press;²⁷³ judges and prosecutors find said officers not credible;²⁷⁴ and those officers cost New York City hundreds of thousands of dollars in lawsuits.²⁷⁵ In some cases, the NYPD has even promoted officers with such sketchy behaviors in their past.²⁷⁶ Finally, the police department and the police unions resist the call for transparency and unconditionally defend the honor of officers who behave dishonorably.

The NYPD's internal process for investigating officers that engage in misconduct is negligible. The Internal Affairs Bureau (IAB) is in charge of investigating whether or not officers violate department rules and procedures.²⁷⁷ However, internal affairs units across the country have generally amounted to nothing more than police officers investigating police officers, leading investigations that

272. See *infra* notes 318–19 and accompanying text.

273. See, e.g., *infra* note 325 and accompanying text (discussing Daniel Pantaleo, who killed Eric Garner and was kept on the police force for five years).

274. See *infra* notes 386–400 and accompanying text.

275. See *infra* note 414 and accompanying text.

276. See *infra* note 315–19 and accompanying text.

277. *Internal Affairs*, N.Y.C., <https://www1.nyc.gov/site/nypd/bureaus/investigative/internal-affairs.page> [<https://perma.cc/GTK8-HPNT>] (last visited Aug. 13, 2021).

are neither independent nor free from bias.²⁷⁸ Police officers often try to deter civilians from filing complaints, or they will simply refuse to take complaints when civilians try to file them.²⁷⁹ The NYPD is no different: officers are not held accountable internally for their misconduct.²⁸⁰ Within the context of case-related officer misconduct, the IAB often finds no wrongdoing, even when there is clear evidence of it. For example, the officer in Staten Island who planted evidence in Mr. Kutayeh's car²⁸¹ was cleared of wrongdoing by the IAB despite inculpatory body cam footage.²⁸² Officer Theresa Lustica, the cop who beat Ms. Johanna Pagan-Alomar viciously enough to cause her to lose an eye,²⁸³ was cleared of wrongdoing after an internal investigation.²⁸⁴ If the IAB finds no wrongdoing in cases like these, then there is virtually no chance of IAB finding misconduct where it is just the word of the civilian versus the word of the police. And even in the rare cases where the IAB does find wrongdoing, officers are given light reprimands.²⁸⁵

In the feature case, the IAB's investigation was woefully inadequate. Sergeant Lenis notified the IAB of Mr. Charles' violent arrest pursuant to NYPD policy regarding forcible arrests,²⁸⁶ and IAB investigators did interview Mr. Charles at the hospital.²⁸⁷ However, Mr. Charles holds that there was little to no meaningful follow-up.²⁸⁸ When IAB officers contacted Mr. Charles again, Mr. Charles informed the officers that he was facing criminal charges and thus wanted his attorney present at any subsequent meetings they had with him.²⁸⁹ Mr. Charles reports that that was the last time he had heard from them.²⁹⁰ The IAB is likely to dispute Mr. Charles' account and claim that he simply became uncooperative, a nearly impossible claim to refute with evidence in the circumstances.

278. See Rachel Moran, *Ending the Internal Affairs Farce*, 64 BUFF. L. REV. 837, 853–68 (2016) (describing police resistance to accepting civilian complaints about their coworkers).

279. *Id.* at 854–56.

280. See, e.g., *Floyd v. City of New York*, 959 F. Supp. 2d 540, 617 (S.D.N.Y. 2013) (“Moreover, when confronted with evidence of unconstitutional stops, the NYPD routinely denies the accuracy of the evidence, refuses to impose meaningful discipline, and fails to effectively monitor the responsible officers for future misconduct.”).

281. See *supra* notes 153–61 and accompanying text.

282. Kia Morgan-Smith, *NYPD Allows Cop Who Was Filmed Planting Drugs in Black Teen's Car to Keep His Job*, GRIO (Nov. 21, 2018), <https://thegrio.com/2018/11/21/nypd-allows-cop-who-filmed-planting-drugs-in-black-teens-car-to-keep-his-job/> [<https://perma.cc/A2RN-CK4N>].

283. See *supra* note 178 and accompanying text.

284. Darius Miles, *Woman Who Had Eye Gouged in NYPD Arrest in Bronx Wants Charges Dropped*, WABC (May 10, 2019), <https://abc7ny.com/5294901/> [<https://perma.cc/GF92-VXKB>].

285. Kendall Taggart & Mike Hayes, *Secret NYPD Files: Officers Who Lie and Brutally Beat People Can Keep Their Jobs*, BUZZFEED NEWS (Mar. 5, 2018, 5:58 AM), <https://www.buzzfeednews.com/article/kendalltaggart/secret-nypd-files-hundreds-of-officers-committed-serious> [<https://perma.cc/R2NK-4SPK>] (describing multiple egregious offenses by officers; noting that *at least* 319 NYPD employees who had been found guilty of fireable offenses were allowed to keep their jobs).

286. Charles Stop Report, *supra* note 134.

287. October 2017 Charles Interview, *supra* note 2.

288. *Id.*

289. *Id.*

290. *Id.*

The IAB could and should have done more even without Mr. Charles' cooperation. The hearing officials may have, for example, done more to question the officers' narratives: during IAB hearings, they let the officers explain away obvious discrepancies in their TRI reports without pushback, and otherwise failed to investigate the stories further.²⁹¹ The hearing officials did not confront any of the officers with the video surveillance, which contradicted their testimony about Mr. Charles either speeding up or starting to jog.²⁹² Nor did they confront any of the officers with the inconsistencies from the arrest paperwork: all three officers said that Mr. Charles was buying drugs,²⁹³ even though the arrest paperwork accused Mr. Charles of selling drugs.²⁹⁴ In a rare moment near the end of Officer Santomero's testimony, one of the hearing officials did confront him for falsely noting in his memobook that Mr. Charles spat drugs out of his mouth.²⁹⁵ The main hearing official, however, immediately interrupted by asking if the false entry was "a mistake"; the official and Officer Santomero's attorney proceeded to ask a series of questions that, step by step, built a brief narrative that emphasized that it was a "mistake."²⁹⁶

In the end, the IAB only found a minor procedural violation, related to the manner in which the officers filled out their TRI forms.²⁹⁷ No real punishment was recommended or imposed: none of the officers were docked pay or vacation time, let alone terminated.²⁹⁸ All three officers remain on the force.²⁹⁹ Already another New Yorker has been harmed: approximately two months after Mr. Charles' trial concluded, Officer Santomero shot and injured a Bronx resident.³⁰⁰

291. Lenis IAB Hearing Transcript, *supra* note 10, at 12–15; Santomero IAB Hearing Transcript, *supra* note 5, at 15–18; Vega IAB Hearing Transcript, *supra* note 6, at 18–21 (demonstrating IAB investigators' ready acceptance of officer narratives).

292. There is no mention of video footage at any of the three hearings. *See* Lenis IAB Hearing Transcript, *supra* note 10; Santomero IAB Hearing Transcript, *supra* note 5; Vega IAB Hearing Transcript, *supra* note 6.

293. *See supra* text accompanying note 129.

294. *See supra* text accompanying note 128.

295. Santomero IAB Hearing Transcript, *supra* note 5, at 25–27.

296. *Id.* at 27–31.

297. Police Notification of Disposition – Internal Investigation, Case No. 2017-XXX, N.Y. Police Dep't (Feb. 2, 2018) (on file with author).

298. Supervisor's Complaint and Command Discipline Election Report, Case No. 2018-XXX-XXX, N.Y. Police Dep't (Feb. 2, 2018) (on file with author).

299. *Edward Lenis*, 50-A.ORG, <https://www.50-a.org/officer/54978> [<https://perma.cc/VAW7-TYDB>] (last visited Aug. 13, 2021); *Nicholas Santomero*, 50-A.ORG, <https://www.50-a.org/officer/11121> [<https://perma.cc/XTX2-2WSE>] (last visited Aug. 13, 2021); *Edwin Vega*, 50-A.ORG, <https://www.50-a.org/officer/10717> [<https://perma.cc/7T7M-B525>] (last visited Aug. 13, 2021).

300. *NYPD: Suspect Shot by Cop After Wounding Man in Grocery Beef*, AP NEWS (Dec. 13, 2018), <https://apnews.com/01bc13b6865c42efa3fa902d77667f01> [<https://perma.cc/CD6E-ZTFL>]. The police narrative as told by the press was that the injured person possessed a firearm and, in the course of fleeing from the police, allegedly turned and pointed that firearm at the police. Graham Rayman, *Grocery Store Confrontation Triggers Events That Led Cop to Shoot Gunman; Cops Then Save His Life*, N.Y. DAILY NEWS (Dec. 13, 2018, 7:00 PM), <https://www.nydailynews.com/new-york/ny-metro-bronx-detail-police-involved-shooting-20181213-story.html> [<https://perma.cc/DZ48-W2RM>].

External investigations don't fare much better. The CCRB is an independent agency with no punitive powers; once they have conducted an investigation, they may make recommendations, no more, to the NYPD regarding what actions should be taken.³⁰¹ In the great majority of cases where the CCRB has made findings of misconduct and has actually been notified of the NYPD's response, the NYPD has rejected the CCRB's findings:³⁰² the NYPD either concludes that nothing was done wrong, or finds that the officer committed minor violations and imposes meaningless punishment.³⁰³

Even in cases where the CCRB has recommended a sanction other than termination or suspension, the NYPD often rejects that recommendation and either implements a less-severe sanction or imposes no punishment at all.³⁰⁴ Case in point: Brooklyn police sergeant David Grieco had a CCRB-substantiated abuse of authority complaint against him arising out of a raid of a Brownsville apartment that led to criminal charges being filed and dismissed.³⁰⁵ The CCRB recommended that the officer undergo "formalized training,"³⁰⁶ a rather light punishment for an officer who had been sued numerous times and cost the city over \$500,000 in settlement payments.³⁰⁷ The NYPD, however, rejected even that decision and instead imposed a requirement that he get a warning from the precinct commanding officer, known as "instructions."³⁰⁸

The biggest apologists for NYPD misconduct are the police unions. When John Rossi was convicted of perjury for lying to a grand jury about the recovery of a gun, the union saw the prosecution as "wrongheaded and overzealous."³⁰⁹ When Commissioner James O'Neill fired Daniel Pantaleo after a departmental trial and a recommendation of termination, the union heads were livid and actively encouraged a work slowdown.³¹⁰ The union bosses complained about the "bad

301. Goldstein, *Promotions, Not Punishments*, *supra* note 26 ("But the civilian board has no power to mete out discipline in such cases; it refers them to the Police Department for further investigation and possible action.").

302. *Id.*

303. Ashley Southall, Ali Watkins, & Blacki Migliozi, *N.Y.P.D. Thwarts Watchdog Agency, Data Shows*, N.Y. TIMES, Nov. 15, 2020, at A1 (describing various incidents of serious misconduct resulting in little or no discipline).

304. *Id.*

305. Rocco Parascandola, *Much-Sued NYPD Sergeant Gets Slap on the Wrist After Abuse of Authority Complaint Substantiated: Sources*, N.Y. DAILY NEWS (Dec. 2, 2019, 12:01 AM), <https://www.nydailynews.com/new-york/nyc-crime/ny-bullethead-nypd-light-discipline-20191202-2ohsi5eqkjflbi7qpjq5mig54-story.html> [<https://perma.cc/DN6G-TSHR>].

306. *Id.*

307. *Id.*

308. *Id.*

309. Sexton, *supra* note 253.

310. *NYPD Reports Plunge in Arrests Since Pantaleo Firing, Sparking Police Slowdown Concerns*, CBS NEW YORK (Sept. 4, 2019, 11:15 PM) [hereinafter *NYPD Reports Plunge in Arrests*], <https://newyork.cbslocal.com/2019/09/04/nypd-arrests-plunge-slowdown/> [<https://perma.cc/C2DQ-6XGB>]; Sarah Lustbader, *What's Not to Love About the NYPD Slowdown?*, THE APPEAL (Sept. 3, 2019), <https://theappeal.org/whats-not-to-love-about-the-nypd-slowdown/> [<https://perma.cc/YPL9-2UNW>].

cop lists”³¹¹ released by the district attorney offices throughout the city in 2019.³¹² For example, in response to the Brooklyn DA’s release of its bad cop list, Sergeants Benevolent Association (SBA) president Ed Mullins remarked, “The Brooklyn DA has a long history of bad prosecutions What are they going to do about that? It’s hypocritical.”³¹³ Patrolman’s Benevolent Association head Patrick Lynch had equally harsh words for the Brooklyn DA and claimed that “truthful police testimony gets thrown out every day in our courts, often based on a judge’s whims and biases.”³¹⁴

Most shamefully, many officers who have committed misconduct and lied about it have gotten promoted within the NYPD. Officer Nector Martinez, who lied about the whereabouts of a firearm to try to convict an innocent woman, was promoted to detective.³¹⁵ Officer Sean Kinane of the 52nd precinct, who committed perjury in a drug case, was promoted to detective in 2017.³¹⁶ Christopher McCormack, who committed perjury in a gun case, was made deputy chief.³¹⁷ In fact, it seems like bad cops routinely get promoted in New York City: of the 420 NYPD officers that have obtained a rank above captain, 86 have at least one substantiated CCRB complaint against them; and many more have had CCRB complaints filed against them or have otherwise been accused of misconduct.³¹⁸ One of those 86 are Police Assistant Chief Christopher McCormack, who amassed a whopping 16 *substantiated* CCRB allegations contained in six complaints.³¹⁹ With NYPD officers that commit misconduct being promoted within the

311. George Joseph & WNYC Staff, *New York City’s DAs Keep Secret Lists of Cops with Questionable Credibility*, GOTHAMIST (Apr. 22, 2019, 10:59 PM), <https://gothamist.com/news/new-york-citys-das-keep-secret-lists-of-cops-with-questionable-credibility> [<https://perma.cc/2Q33-CDYL>].

312. See George Joseph, *Manhattan DA Releases New List of NYPD Officers Whose Honesty Has Been Challenged by Judges*, GOTHAMIST (Dec. 13, 2019, 6:49 PM), <https://gothamist.com/news/manhattan-da-police-cops-list> [<https://perma.cc/3Q22-JPT8>]; George Joseph, *Exclusive: Brooklyn DA Releases Secret Lists of Cops They Don’t Trust*, GOTHAMIST (Nov. 6, 2019, 11:00 PM) [hereinafter Joseph, *Brooklyn DA Secret List of Cops*], <https://gothamist.com/news/exclusive-brooklyn-da-releases-secret-lists-cops-they-dont-trust> [<https://perma.cc/J8CU-4J9X>]; George Joseph, *Bronx Prosecutors Release Secret Records on Dishonest Cops*, GOTHAMIST (Oct. 7, 2019, 4:07 PM), <https://gothamist.com/news/bronx-prosecutors-release-secret-records-dishonest-cops> [<https://perma.cc/9BY5-R54K>]; George Joseph, *Queens DA Releases Secret List of 65 Officers with Questionable Credibility*, GOTHAMIST (Nov. 27, 2019, 11:18 PM), <https://gothamist.com/news/queens-da-releases-secret-list-65-officers-questionable-credibility> [<https://perma.cc/9BJ3-N8N4>].

313. Joseph, *Brooklyn DA Secret List of Cops*, *supra* note 312.

314. *Id.*

315. Goldstein, *Promotions, Not Punishments*, *supra* note 26.

316. *Id.*

317. *Id.*

318. Joaquin Sapien, Tophers Sanders, & Nate Schweber, *Over a Dozen Black and Latino Men Accused a Cop of Humiliating, Invasive Strip Searches. The NYPD Kept Promoting Him.*, PROPUBLICA (Sept. 10, 2020, 5:00 AM), <https://www.propublica.org/article/over-a-dozen-black-and-latino-men-accused-a-cop-of-humiliating-invasive-strip-searches-the-nypd-kept-promoting-him> [<https://perma.cc/YT9Q-GHDT>].

319. *Id.*

department, it should surprise no one that police officers feel emboldened to misbehave and violate the law.

2. Prosecutors

Prosecutors also actively shield police officers from accountability. Prosecutors have a symbiotic relationship with the police department that affects how they do their jobs.³²⁰ At a minimum, district attorney offices almost never prosecute police officers for any crimes they commit in the course of an arrest. Prosecutors often accept whatever narratives police officers proffer without question, potentially because prosecutors, like police officers, presume defendants to be guilty.³²¹ Prosecutors also generally seem unwilling to publicly acknowledge the wrongdoings of officers in relation to a case they are handling.³²² In situations where the officer misconduct is too flagrant and obvious to ignore, the prosecutors' approach may or may not change. Some prosecutors defend the honor of the officer and pursue a conviction even despite evidence of misconduct.³²³ Other prosecutors offer "favorable" plea deals with the hopes of salvaging their case; in other instances, prosecutors dismiss the case outright.³²⁴ Regardless of the approach, however, the integrity of the officer appears to have higher value to prosecutors than the truth.

Prosecutors almost never pursue charges against police officers for criminal offenses they commit in the course of arresting an innocent person. Eric Garner's case is the perhaps all-too-easy example of this in New York City: Officer Daniel Pantaleo was seen on video choking Mr. Garner to death during an arrest, and yet was not even indicted for assault.³²⁵ Perhaps more relevant to the instant topic, Bronx prosecutors have never gone after David Terrell and Daniel Brady of the 42nd Precinct despite multiple people coming forward to disclose their misdeeds.³²⁶ Prosecutors also resist calls to hold officers who commit misconduct accountable. For example, the Legal Aid Society and the Association of Legal Aid Attorneys called upon the Staten Island District Attorney to hold Officers Pastran and Erickson accountable for planting drugs in Mr. Kutayeh's car, as described above.³²⁷ In response, a spokesperson for the office announced that the allegations

320. See *infra*, note 367 and accompanying text.

321. See *infra*, notes 359–64 and accompanying text.

322. *Id.*

323. *Id.*

324. See, e.g., *infra*, notes 436–39 and accompanying text.

325. J. David Goodman & Al Baker, *New York Officer Facing No Charges in Chokehold Case*, N.Y. TIMES, Dec. 4, 2014, at A1.

326. King, *Soul Snatchers: Part Two*, *supra* note 217 (describing the Bronx' widespread knowledge of Terrell and his partner, Brady's reign of terror, and noting the existence of 30–40 CCRB complaints); Shaun King, *Soul Snatchers: Countering the State Sponsored Conspiracy to Destroy Pedro Hernandez (Part 3)*, MEDIUM (Aug. 28, 2017) [hereinafter *Soul Snatchers: Part Three*], <https://medium.com/@ShaunKing/soul-snatchers-countering-the-state-sponsored-conspiracy-to-destroy-pedro-hernandez-part-3-1b6307828eb6> [https://perma.cc/LQK2-JB9C].

327. Offenhartz, *Staten Island Cops Racial Profiling*, *supra* note 162.

against those officers “were determined to be unfounded.”³²⁸ When judges repeatedly found “that testimony was so unlikely and so inconsistent that . . . [the] officers couldn’t be believed,” the Brooklyn DA conducted an investigation—and quietly found no wrongdoing.³²⁹

Even though New York State and City have passed new legislation in the aftermath of the infamous killing of George Floyd at the hand of Minneapolis police officers in May 2020,³³⁰ prosecutors are unwilling to use these new tools to hold police accountable. In response to the growing pressure and civil unrest, the state enacted an anti-chokehold bill the following month that made a police officer’s use of the maneuver a felony punishable by up to 15 years in prison.³³¹ At the city level, a new law made it a city misdemeanor to restrain an individual

in a manner that restricts the flow of air or blood by compressing the windpipe or the carotid arteries on each side of the neck, or sitting, kneeling, or standing on the chest or back in a manner that compresses the diaphragm, in the course of effecting or attempting to effect an arrest.³³²

Politicians at both the state and the local level acted as if the passage of these new laws signaled great progress.³³³

However, enacting even necessary legislation—which neither of these laws were³³⁴—means nothing if district attorneys refuse to prosecute when cops violate. The willful failure of prosecutors to pursue charges against bad cops is a central reason why police officers get away with criminal misconduct. Reacting to the new diaphragm law enacted by the city, Staten Island District Attorney Michael McMahon has publicly professed that he will not seek charges in cases where the

328. *Id.*

329. Pinto, *supra* note 147.

330. See, e.g., Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis, & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Jan. 24, 2022), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [<https://perma.cc/52YD-A8QR>] (describing how George Floyd was killed).

331. Cassie Maas, *New York State Assembly Approves Eric Garner Anti-Chokehold Act*, JURIST (June 9, 2020, 1:05 PM), <https://www.jurist.org/news/2020/06/new-york-state-assembly-approves-eric-garner-anti-chokehold-act/> [<https://perma.cc/XH8R-65DD>].

332. N.Y.C., N.Y., Local Law No. 66 (July 15, 2020); Julia Marsh & Isabelle Friedberg, *De Blasio Signs Anti-Chokehold Bill and Other Reforms While Noting NYPD Concerns*, N.Y. POST (July 15, 2020, 5:00 PM), <https://nypost.com/2020/07/15/bill-de-blasio-signs-police-reform-bills-while-noting-nypd-concerns/> [<https://perma.cc/7GRA-4T8L>].

333. Press Release, Carl E. Heastie, Speaker, N.Y. Assembly, Assembly Passes Eric Garner Anti-Chokehold Act (June 8, 2020), <https://nyassembly.gov/Press/files/20200608a.php> [<https://perma.cc/XJ86-6ZCK>] (quoting New York Assembly Speaker Carl Heastie as saying that, “[t]he NYPD ban on chokeholds was not enough to protect Eric Garner, and it is not enough today. This legislation will put an end to the practice across the state.”); Tarinelli, *supra* note 23; Marsh & Friedberg, *supra* note 332.

334. If prosecutors were committed to holding police officers accountable for criminal misconduct, there were enough laws at their disposal prior to the passage of new legislation. Prosecutors can charge cops that kill unlawfully with any number of homicide charges, N.Y. PENAL LAW § 125 (Consol. 2021); and they can level appropriate assault charges at cops that unjustifiably cause physical injury. § 120.

officer “accidentally” violated the law.³³⁵ Terrence Monahan, the NYPD’s Chief of the Department, claimed that the department “got every D.A. [to] come out and say they are not going to charge” cops with violating the law.³³⁶ If prosecutors are not going to enforce the law when it comes to police officers, then the law is useless for purposes of police accountability.

In the feature case, none of the officers involved in Mr. Charles’ arrest were prosecuted despite the fact that there are several plausible charges prosecutors could have brought against the officers who engaged in misconduct during and after Mr. Charles’ arrest. A person who “knowingly makes, devises or prepares false physical evidence, or . . . produces or offers such evidence at a proceeding knowing it to be false” while intending for that evidence to be used in a trial is guilty of tampering with physical evidence, which is a class E felony.³³⁷ Here, these three officers vouchered contraband they did not recover from Mr. Charles as evidence against him;³³⁸ and they did so with the intent that the contraband be introduced against Mr. Charles in a later trial, which in fact it was.³³⁹

Additionally, the officers’ actions against Mr. Charles arguably satisfy the elements of several assault offenses. A person may be found guilty of misdemeanor assault when they intentionally or recklessly cause physical injury to another person.³⁴⁰ Here, the three officers caused physical injury to Mr. Charles; he suffered two broken ribs and an injured shoulder.³⁴¹ Further, the acts of grabbing Mr. Charles, forcing him to the ground, and striking him with their hands and feet³⁴² demonstrate intent to cause physical injury. Given that two others aided Officer Santomero when he caused physical injury, all three of them could have been convicted of gang assault in the second degree, which is a class C felony.³⁴³ If the injuries Mr. Charles sustained rise to the level of being serious—and there

335. Thomas Tracy, *Staten Island DA Says He Won’t Prosecute Cops Who Unintentionally Violate New Diaphragm Law While Making Arrests*, N.Y. DAILY NEWS (July 24, 2020, 11:51 AM), <https://www.nydailynews.com/new-york/nyc-crime/ny-si-da-wound-not-prosecute-under-diaphragm-law-20200724-5aasezy4izhspnyr7pwba3iv7a-story.html> [https://perma.cc/8HNP-UDBY].

336. Stephen Rex Brown, Rocco Parascandola, & John Annese, *Top NYPD Chief Says Cops ‘Shouldn’t be Afraid’ of Accidentally Breaking City’s Anti-Chokehold Law Because NYC District Attorneys Won’t Prosecute*, N.Y. DAILY NEWS (July 23, 2020, 8:20 PM), <https://www.nydailynews.com/new-york/nyc-crime/ny-nypd-chief-blows-up-says-cops-shouldnt-be-afraid-of-diaphragm-law-20200724-tu5pnvxggbftpceny2447k7hpi-story.html> [https://perma.cc/Z3F5-QLX5]. No district attorneys have contradicted Chief Monahan on the record. *Id.*

337. N.Y. PENAL LAW § 215.40 (Consol. 1965).

338. See Lenis IAB hearing transcript, *supra* note 10, at 15.

339. See Charles Trial Record, *supra* note 236 and accompanying text.

340. N.Y. PENAL LAW § 120.00(1)–(2) (Consol. 1965). Physical injury requires substantial pain or an impairment of physical condition. § 10.00(9) (Consol. 2019).

341. Ronald Charles Hospital Records (May 11, 2017) (on file with author).

342. See *supra* note 184 and accompanying text.

343. N.Y. PENAL LAW § 120.06 (Consol. 1996).

is a viable argument that he did in fact sustain serious physical injury³⁴⁴—the officers could have been convicted of assault in the second degree and gang assault in the first degree, a class D and class B felony, respectively.³⁴⁵ There is no legitimate argument for justification:³⁴⁶ the officers had no reason to approach Mr. Charles in the first place; and the video footage IAB recovered shows that they made contact with Mr. Charles first, running up to him from behind and then grabbing and forcing him to the ground.³⁴⁷ Hence, they were the initial aggressors, and remained so during the encounter.³⁴⁸

Finally, Officer Santomero specifically committed offenses related to honesty in the judicial process. In signing the complaint, he attested to the accuracy of a written statement containing allegations he knew to be false. This would make him guilty of making a punishable false written statement, a class A misdemeanor.³⁴⁹ Further, Officer Santomero perjured himself throughout the suppression hearing and the trial. The testimony he gave was contradicted by video, which does not lie; and it was contradicted by the physical evidence, as the drugs offered in evidence was completely different from the drugs he claims to have recovered from Mr. Charles. He swore falsely, his false statements consisted of testimony, and his false statements were material to the issues in both the suppression hearing and the trial. Officer Santomero's conduct makes him guilty of perjury in the first degree, a class D felony.³⁵⁰

The officers involved in Mr. Charles' arrest committed a plethora of crimes, both felonies and misdemeanors. Yet, not only did the Bronx District Attorney's Office not prosecute any of the officers for their misconduct, the office doubled down and defended the honor of their officers to the very end. By contrast, the assigned Assistant District Attorney in this case, Sonja Jamelo,³⁵¹ prosecuted Mr. Charles to the fullest extent despite sizeable holes in her case. During the trial, she tried hard to resolve glaring inconsistencies that were brought out during the evidentiary hearing. She tried to elicit answers from Officer Santomero that adequately explained why he charged Mr. Charles with selling drugs, and was then in

344. *See, e.g.*, *People v. Mohammed*, 557 N.Y.S.2d 35, 35–36 (App. Div. 1990) (finding serious physical injury where complainant suffered broken arm requiring several weeks of mobilization); *but cf.* *People v. Jerreld*, 852 N.Y.S.2d 833, 836 (County Ct. 2008) (“Proof of a fracture, without more, does not satisfy [the serious physical injury] element of the crime.”).

345. N.Y. PENAL LAW §§ 120.05(1) (Consol. 2016), 120.07 (Consol. 1996).

346. *Id.* § 35.10 (Consol. 2004) (describing possible justifications for use of physical force as parent or guardian maintaining discipline, warden or authorized official providing discipline as authorized by corrections law, persons responsible for maintaining order using physical force specifically to maintain order, person acting to prevent self-harm by another, physician providing approved treatment, and individual engaging in self-defense).

347. Charles IAB Video, *supra* note 4.

348. *Id.*

349. N.Y. PENAL LAW § 210.45 (Consol. 1965).

350. *Id.* § 210.15 (Consol. 1965).

351. Charles Verdict Transcript, *supra* note 265, at 1.

court claiming that he bought drugs;³⁵² why he pursued Mr. Charles instead of the three people he saw selling drugs, even though he was an anti-crime officer tasked with making felony arrests;³⁵³ why he charged Mr. Charles with PCP possession when no PCP was recovered;³⁵⁴ and why he noted on the TRI form that Mr. Charles had a weapon when he knew Mr. Charles did not have one at the time he filled it out.³⁵⁵ Thus, even if ADA Jamelo could legitimately feign ignorance before the trial, her lines of questioning during the trial itself show that she knew the case contained plenty of reasons to doubt the veracity of the officers' claims. She proceeded nonetheless.

Even facing clear case-related police misconduct, prosecutors still seek to preserve the integrity of their officers. At a minimum, they inadequately document instances of police misconduct and perjury.³⁵⁶ One former Bronx ADA said, "If it's something that can be swept under the rug, then you know dismiss the case, and move forward . . ." ³⁵⁷ In one extreme example, a civil lawsuit against Bronx Officer Valdrin Niqki threatened the release of statements the officer had made to the grand jury—statements the plaintiff believed would demonstrate dishonesty when compared against video surveillance of his arrest. The general counsel to the Bronx District Attorney filed a non-party motion to oppose the release of the grand jury statements, attempting to prevent their public exposure.³⁵⁸

As noted earlier, prosecutors are aware of police perjury and dishonesty being a persistent problem in New York City. Nonetheless, prosecutors implicitly condone testilying and police misconduct. As explained above, prosecutors generally do not prosecute officers for perjury or other crimes. Assistant district attorneys continue to prosecute cases using officers that judges have deemed incredible.³⁵⁹ Worse, prosecutors rely on and even suborn false police testimony to meet their burden at a suppression hearing.³⁶⁰ In the most shameful of situations, prosecutors

352. Charles Trial Record, *supra* note 236, at 16.

353. *Id.* at 6–7.

354. *Id.* at 15.

355. *Id.* at 17–18.

356. George Joseph & Ali Winston, *When Prosecutors Bury NYPD Officers' Lies*, GOTHAMIST (Sept. 17, 2019, 7:00 AM), <https://gothamist.com/news/when-prosecutors-bury-nypd-officers-lies> [<https://perma.cc/TH72-PSZV>] ("A Gothamist/WNYC investigation in partnership with The Appeal has found that prosecutors in all five boroughs consistently fail to document similar signs of officer dishonesty.").

357. *Id.*

358. *Id.* (describing the civil lawsuit against Officer Niqki).

359. Pinto, *supra* note 147 (describing how the Brooklyn District Attorney's office continued to work with three officers on gun cases after judges found them incredible and after the office launched an investigation into the three of them).

360. Malinowski, *supra* note 213 ("The district attorneys do whatever they can to keep you as an officer sticking with your story. If you start changing it up, the district attorney will get you back in line, according to Berkley.").

actively encourage police misconduct.³⁶¹ As one example, Bronx DAs and detectives alike were reported to have intimidated and threatened civilians into serving as false witnesses in the attempted murder case against Pedro Hernandez, telling witnesses they would be physically assaulted by officers from the 42nd precinct and prosecutors would pursue charges against them.³⁶² Several civilians have made such allegations against Bronx ADA Slott.³⁶³ Despite all that, the Bronx District Attorney insisted that she had enough *reliable* evidence to be ready for trial on this case.³⁶⁴ Months later, in September 2017, that same case was dismissed.³⁶⁵ As of October 2019, Slott was still employed at the Bronx D.A.’s Office.³⁶⁶

Prosecutors put up with testilying and police dishonesty for a number of reasons. Perhaps the biggest reason is how much prosecutors rely on the police to make their cases.³⁶⁷ Because of that reliance, prosecutors seek to foster good relationships with the police, and the addressing police misconduct could threaten to undermine these relationships.³⁶⁸ Within the search and seizure context at least, testilying for prosecutors is also a means that is justified by the end—denial of suppression or a conviction.³⁶⁹ Given this reality, cops have little reason to fear prosecutorial consequences from their misconduct.

3. Judges

The New York City judiciary also shields police officers from accountability for their wrongdoings. Judges know that police perjury and officer dishonesty are

361. Henry, *supra* note 139, at 675 (“Prosecutors also may engage in more deliberate misconduct that turns the trajectory of the case against the defendant, including, quite frequently, failing to turn over exculpatory evidence, providing informants with non-public information to make their testimony appear more accurate and authentic, failing to disclose incentives offered to informants, and ‘tacitly acquiescing or actively participating in the presentation of false evidence by police.’”).

362. King, *Soul Snatchers: Part Three*, *supra* note 326.

363. *Id.*

364. *Id.*

365. James Ford, *Charges Dropped Against Pedro Hernandez, as Investigation Opens into Wrongdoing Against Him*, PIX 11 (Sept. 6, 2017, 7:57 PM), <https://pix11.com/2017/09/06/charges-dropped-against-pedro-hernandez-as-investigation-opens-into-wrongdoing-against-him/> [<https://perma.cc/P3QK-6AXB>].

366. Off. of the District Attorney of Bronx Cnty., Staff Directory (Oct. 9, 2019) (unpublished directory) (on file with author).

367. See Joseph & WNYC Staff, *supra* note 311 (describing the prosecutor’s desire to build and maintain relationships with police).

368. Dorfman, *supra* note 30, at 476–77 (discussing the prosecutor’s need to maintain good relationships with police, and that need’s tendency to lead prosecutors to overlook misconduct).

369. *Id.* at 476 (attributing “prosecutorial nonchalance towards police perjury, particularly in regards to the tailoring of police testimony in pre-trial suppression hearings,” in part to the fact that “a prosecutor may be at least as invested in the conviction of a defendant as the arresting police officer”); Slobogin, *supra* note 247, at 1047 (stating that prosecutors tolerate police perjury because “at bottom, they probably agree with the police that the end justifies the means.”). The importance of convictions in assessing a prosecutor’s performance and chances for promotion is also a contributing factor. *Id.*

persistent problems and have been for decades.³⁷⁰ Yet, judges also condone the misbehavior by unconditionally crediting police testimony in cases of misconduct resulting in denying suppression and convicting defendants. Judges have pro-police bias, anti-defendant bias, and are afraid of being seen as soft on crime. For elected judges, going after police officers may jeopardize their political careers.³⁷¹

Of course, judicial bias towards police is not limited to New York City, or even to New York State; it is a national problem. The Supreme Court of the United States has been very biased in favor of the police over the last few decades, rendering decisions that have obliterated much of the constitutional protections against illegal searches and seizures.³⁷² In fact, the Supreme Court has severely limited Fourth, Fifth, Sixth and Fourteenth Amendment protections, greatly expanding the bounds of permissible police conduct.³⁷³ State and federal courts across the nation, with the Supreme Court leading the charge, have often declined to find constitutional violations even when said violations are obvious;³⁷⁴ created exceptions that excuse the actions of the state where courts must recognize that a violation took place;³⁷⁵ and denied accused persons any remedy even when courts find an inexcusable violation.³⁷⁶ The Supreme Court in particular has granted law enforcement wide discretion and power, and has venerated cops to a dangerous

370. See *supra* notes 237–64 and accompanying text.

371. Dorfman, *supra* note 30, at 473 (discussing judicial fear of being viewed as “soft on crime”).

372. ALEXANDER, *supra* note 46, at 62 (“In the years [from 1982 to 1991], the Court has heard argument in 30 Fourth Amendment cases involving narcotics. In all but one, the government was the petitioner. All save two involved a search or seizure without a warrant or with a defective warrant. And, in all except three, the Court upheld the constitutionality of the search or seizure.” (quoting *California v. Acevedo*, 500 U.S. 565 (1991) (Stevens, J., dissenting))).

373. *Id.* at 63–69 (citing *Terry v. Ohio*, 392 U.S. 1 (1968), *Florida v. Bostick*, 501 U.S. 429 (1991), *Ohio v. Robinette*, 519 U.S. 33 (1996), *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001)). Michael D. Cicchini also discusses the collapse of constitutional protections and identifies several Supreme Court dissenting opinions that acknowledge this collapse. Michael D. Cicchini, *The Collapsing Constitution*, 42 HOFSTRA L. REV. 731 (2014). For example, in *Herring v. United States*, 555 U.S. 135, 157 (2009) (Ginsburg, J. dissenting), Justice Ginsberg critiques the majority’s decision as turning the Fourth Amendment’s privacy protection into a “chimera”; in *Berghuis v. Thompkins*, 560 U.S. 370, 412 (2010) (Sotomayor, J., dissenting), four justices dissented because the majority’s decision turned “upside down” the Fifth Amendment’s right against self-incrimination; in *Michigan v. Bryant*, 562 U.S. 344, 380 (2011) (Scalia, J., dissenting), Justice Scalia claimed that the majority’s decision left the Sixth Amendment’s right of confrontation in “a shambles”; and in *Maryland v. King*, 569 U.S. 435, 466 (2013) (Scalia, J., dissenting), Justice Scalia argued that the majority directly violated “the very heart of the Fourth Amendment.” Cicchini, *supra* at 731–32.

374. Cicchini, *supra* note 373, at 732–34 (describing circumstances in which jurisprudence ignores seemingly clear examples of rights violations, particularly as related to *Miranda* rights).

375. *Id.* at 735–37 (describing exceptions to the warrant requirement).

376. *Id.* at 737–41 (explaining how criminal defendants are left without remedy for violations of their right to privacy).

extreme.³⁷⁷ At the same time, the Court has greatly limited the means by which persons harmed by police can get redress in court.³⁷⁸ Given the tone set by America's highest court, it is only natural that courts across America do the same.

Pro-police bias in New York City's judiciary is demonstrated by the way judges treat police officers charged with killing unarmed civilians, particularly Black and Brown civilians. Judges actively seek ways to either absolve officers of criminal culpability or minimize any penalties to be imposed if an officer is actually convicted of a crime. In 2012, for example, a Bronx grand jury indicted Officer Richard Haste on manslaughter charges in the shooting death of 18-year-old Ramarley Graham.³⁷⁹ The judge presiding over the case, however, threw out the indictment, claiming that the prosecution misled the grand jury in the instructions they gave.³⁸⁰ Based on an excerpt of the prosecution's instructions contained in the judge's decision—specifically the *two lines* the judge took issue with out of the entire set of instructions³⁸¹—it seemed like the judge was minded to throw out the case. That particular judge is not known to be as forgiving of civilian defendants, especially Black and Brown defendants. It was that very same judge, for example, who set prohibitively high bail on Pedro Hernandez, the young man falsely accused of attempted murder several times by the same detectives.³⁸²

Nationally, since 2005, only three homicide cases where the shooters were police officers on duty resulted in murder convictions; only 34 cases even made it

377. See Robin K. Magee, *The Myth of the Good Cop and the Inadequacy of Fourth Amendment Remedies for Black Men: Contrasting Presumptions of Innocence and Guilt*, 23 CAP. U. L. REV. 151, 157 (1994) (“Despite these and similar incidents of police brutality and extreme misconduct, the Supreme Court has adopted and inscribed into Fourth Amendment jurisprudence a ‘good cop paradigm.’ The paradigm has given birth to a good cop myth which falsely portrays officers as necessarily law-abiding and chiefly motivated by law enforcement interests.”).

378. See Brianna Hathaway, *A Necessary Expansion of State Power: A “Pattern or Practice” of Failed Accountability*, 44 N.Y.U. REV. L. & SOC. CHANGE 61, 69–72 (2019) (describing several rights and how courts have severely limited them); ALEXANDER, *supra* note 46, at 105–16.

379. Jeff Mays, *Judge May Throw out Indictment of Officer Who Shot Ramarley Graham*, DNAINFO (May 7, 2013, 2:30 PM), <https://www.dnainfo.com/new-york/20130507/concourse-village/judge-ramarley-graham-case-orders-arguments-over-grand-jury-instructions/> [<https://perma.cc/RP6B-V2TE>].

380. Ryan Devereaux, *Judge Tosses out Manslaughter Charges Against NYPD Officer Who Killed Teen*, GUARDIAN (May 15, 2013, 2:00 PM), <https://www.theguardian.com/world/2013/may/15/nypd-officer-teenager-bronx-ramarley-graham> [<https://perma.cc/6V48-BT7H>].

381. The judge took issue with the prosecutor's statements, “What controls here is not the reasonableness of the belief of other officers or their communications to Police Officer Haste. What controls on the issue of justification is the reasonableness of Police Officer Haste's conduct at the time of the shooting.” *People v. Haste*, 966 N.Y.S.2d 660, 661 (Sup. Ct. 2013). According to the judge, the first statement “was error; the communications to Police Officer Haste were clearly relevant,” and the second statement “was unequivocally true, [but] painted an incomplete picture of what needed to be conveyed.” *Id.* at 662–63.

382. King, *Soul Snatchers: Part Three*, *supra* note 326. Judge Steven Barrett dismissed the charges against Officer Haste in 2013, Devereaux, *supra* note 380, and set “unusually high bail” for Mr. Hernandez, James C. McKinley, Jr., *Prosecutors Drop Charges Against a Bronx Teenager*, N.Y. TIMES (Sept. 6, 2017), at A20.

to trial.³⁸³ In three notable examples where officers actually went to trial in New York City, the pro-police bias of city judges was on display. In 2008, three of the five officers that shot and killed Sean Bell in a fusillade of bullets in Queens went to trial, opting for a bench trial instead of a jury.³⁸⁴ The presiding trial judge acquitted the officers, finding that the prosecution failed to disprove that the officers were justified, despite the fact that 50 bullets were fired at three unarmed people—31 bullets coming from one officer.³⁸⁵ In 2015, Officer Peter Liang was indicted for manslaughter and other charges in the shooting death of Akai Gurley in Brooklyn.³⁸⁶ After a jury convicted Officer Liang of manslaughter, the presiding judge in the case took it upon himself to *downgrade the conviction* to a negligent homicide charge, allowing him to impose a non-incarceratory sentence.³⁸⁷ Finally, in 2016, Sergeant Hugh Barry was charged with murder, manslaughter and negligent homicide for the shooting death of 66-year-old Deborah Danner in the Bronx.³⁸⁸ Despite Sgt. Barry being publicly censured by both the mayor and the police commissioner for not following proper protocols, the presiding trial judge in that case acquitted Sgt. Barry of all charges, finding nothing improper with his conduct.³⁸⁹ It would be hard to argue that the defendants in these three cases would have gotten the same result had they been civilians rather than officers.

Judges also tolerate police wrongdoings because there have been instances where they, like prosecutors and police officers, have presumed accused persons to be guilty of the crimes charged.³⁹⁰ The anti-defendant bias is egregious and obvious. Many judges call up attorneys to the bench and take those off-the-record

383. Janell Ross, *Police Officers Convicted for Shootings Are the Exception, Not the Rule*, NBC NEWS (Mar. 14, 2019, 7:56 AM), <https://www.nbcnews.com/news/nbcblk/police-officers-convicted-fatal-shootings-are-exception-not-rule-n982741> [https://perma.cc/YX66-ME9T] (“Only three officers have been convicted of murder during this period and seen their convictions stand. Another 22 officers were acquitted in a jury trial and nine were acquitted during a bench trial decided by a judge.”). Of 98 police officers who have been “arrested in connection with fatal, on-duty shootings, . . . only 35 of these officers have been convicted of a crime, often a lesser offense such as manslaughter or negligent homicide, rather than murder.” *Id.*

384. Michael Wilson, *Veteran Judge in Bell Shooting Trial Has Seen It All Before*, N.Y. TIMES, Feb. 18, 2008, at B1.

385. Michael Wilson, *Judge Acquits Detectives in 50-Shot Killing of Bell*, N.Y. TIMES, Apr. 26, 2008, at A1.

386. Carolina Leid, *Rookie NYPD Officer Pleads Not Guilty in Shooting Death of Akai Gurley*, WABC (Feb. 12, 2015), <https://abc7ny.com/news/nypd-officer-pleads-not-guilty-in-shooting-death-of-akai-gurley/511839/> [https://perma.cc/67H9-U3XJ].

387. Matt Hansen & Matt Pearce, *No Prison Time for Ex-NYPD Officer Peter Liang in Fatal Shooting of Akai Gurley*, L.A. TIMES (Apr. 19, 2016, 7:46 PM), <https://www.latimes.com/nation/lana-liang-sentencing-20160419-story.html> [https://perma.cc/M5DU-DGZC] (“[Liang’s] attorneys . . . requested the manslaughter charge be downgraded, saying prosecutors hadn’t proved Liang intentionally created a risk. Chun agreed, reducing the charge to criminally negligent homicide.”).

388. Joseph Goldstein & James C. McKinley, Jr., *Judge Acquits Sergeant in Killing*, N.Y. TIMES, Feb. 16, 2018, at A25.

389. *Id.*

390. Dorfman, *supra* note 30, at 472.

opportunities to express their belief in the accused person's guilt.³⁹¹ Some judges admonish clients on the record for committing the crimes they are *alleged*, but not proven, to have committed.³⁹² The author recalls witnessing one profound example of a judge demonstrating this bias: during a bail application on a homicide case in the Bronx, a judge chided a public defender for daring to say that her client was innocent, declaring that the public defender couldn't say that because she wasn't at the scene of the crime at the time. When this same judge worked arraignments the week prior, he never chided the prosecution in similar fashion when they accused defendants of guilt while asking for bail. This bias, though not directly connected to police misconduct, explains why judges are often so eager to overlook misconduct to ensure a conviction of a defendant they assume is guilty.

In criminal cases where the officer's misconduct is so obvious that it clearly compromises the prosecution's case, many judges *still* seek to protect the integrity of the officer.³⁹³ Judges will usually not bluntly or harshly criticize the police.³⁹⁴ Even when it is plainly evident that a police officer has lied, judges will not call police officers liars; and they seek to minimize any representations on the record that place the officer in a bad light. In one case, where video evidence thoroughly contradicted an officer's testimony, the judge characterized the officer as "very confused" instead of saying that she lied.³⁹⁵ In the extreme case of Mr. Kutayeh,³⁹⁶ a judge atypically interrupted the officer's testimony³⁹⁷ and called the attorneys for both sides up for an off-the-record sidebar conference.³⁹⁸ Soon after, the prosecution dismissed the charges against Mr. Kutayeh.³⁹⁹ When Mr. Kutayeh's attorney tried to make a record stating the obvious—that the evidence would show that Officer Erickson planted drugs and was lying about it in open court—the judge cut her off, saying that he would not allow his courtroom "to become a political place where these things are brought up."⁴⁰⁰ By cutting off

391. E-mail from Tamina Daruvala, Staff Att'y, Legal Aid Soc'y, to author (Jan. 15, 2020, 3:05 PM EST) (on file with author); e-mail from Sade Stephenson, Staff Att'y, Legal Aid Soc'y, to author (Jan. 13, 2020, 12:24 PM EST) (on file with author). Making such comments off the record insulates the judge from potential rebuke later on; and practitioners who dare try to make a record of such comments risk retribution by the judge.

392. E-mail from Alexandra H. Smith, Staff Att'y, Legal Aid Soc'y, to author (Jan. 13, 2020, 3:10 PM EST) (on file with author); e-mail from Ebette Fortune, Staff Att'y, Legal Aid Soc'y, to author (Jan. 10, 2020, 5:38 PM EST) (on file with author).

393. Dorfman, *supra* note 30, at 470–71 (describing judges finding police misconduct to be negligent or technical violations, rather than true misconduct).

394. *Id.*

395. Rocco Parascandola, *Cleared by Bronx DA's Probe, Cops in 52nd Precinct Are Criticized for Tactics in Weapons Cases*, N.Y. DAILY NEWS (Apr. 2, 2019, 6:00 AM) [hereinafter *Cops Criticized for Tactics in Weapons Cases*], <https://www.nydailynews.com/news/crime/ny-bronx-cops-52nd-precinct-criticized-gun-cases-da-20190402-jkoh2knyfnh3zlbqo6dhncczsu-story.html> [<https://perma.cc/M6J8-722X>].

396. *See supra* notes 153–62 and accompanying text.

397. Offenhardt, *Staten Island Cops Racial Profiling*, *supra* note 162.

398. Goldstein, *Teenager Framed*, *supra* note 153.

399. *Id.*

400. *Id.*

testimony, the judge effectively minimized any record evidence of officer wrongdoing.

In the feature case, Judge Marc Whiten denied suppression of evidence from the initial search,⁴⁰¹ finding that Officer Santomero's testimony justified the intrusions that occurred despite the incredible number of contradictions between his testimony, initial reports of the incident, and supporting paperwork.⁴⁰² Even when Judge Whiten acquitted Mr. Charles,⁴⁰³ he declined to sanction the officers for their misconduct. The verdict stated that the judge would not "opine on any claims of improper behavior by the police officers here involved."⁴⁰⁴ Instead, the judge offered the excuse that Officer Santomero was "the most junior" of the three officers involved.⁴⁰⁵ Officer Santomero had been on the force for over four years at the time the hearings and trial commenced (three years at the time of Mr. Charles' arrest) and had made at least 50 arrests.⁴⁰⁶ Furthermore, it is nonsensical that inexperience should excuse planting drugs on a person, beating him up to the point of having broken bones, and then lying about it under oath. In this case, Judge Whiten had an opportunity to condemn the serious police misconduct that occurred in the case, but instead he chose to protect the integrity of the officers involved.

Criminal law judges in New York City generally give much deference to the word of police officers when they take the stand. Many judges tolerate police misconduct out of bias towards the police, bias against criminal defendants, or both. And even when it becomes clear that a particular police officer's actions are too reprehensible to be ignored, judges bend over backwards to protect the officer's integrity and are delicate in how they characterize the officer's flagrant misdeeds. This failure of accountability emboldens the police to continue the cycle of misconduct, both in and out of court.

4. *Government of the City of New York*

Finally, the City of New York also shields officers from accountability. The City Council has generally been reluctant to pass meaningful legislation to curtail police misconduct in any context, let alone case-related police misconduct. In the wake of George Floyd's killing and the aftermath that ensued, the city's legislative branch passed a host of mostly hollow bills supposedly aimed at increasing

401. The evidence in question—narcotics—was introduced at trial (*see* Charles Trial Record, *supra* note 236, at 22–24), a clear indication that it was not suppressed.

402. *See supra* notes 119–37 and accompanying text.

403. Charles Verdict Transcript, *supra* note 265, at 4.

404. *Id.* at 2.

405. *Id.* at 4.

406. Santomero IAB Hearing Transcript, *supra* note 5, at 28.

transparency and accountability of the police.⁴⁰⁷ When it comes to taking strong stands against the NYPD, the City Council has a relatively poor track record.

In the executive branch, Michael Bloomberg was the mayor from 2002 to 2013, succeeded by Bill de Blasio.⁴⁰⁸ By and large, both mayors were almost unequivocal apologists and defenders of the police. Mayor Bloomberg was a staunch supporter of New York City’s racially discriminatory stop-and-frisk program and fought to preserve it beyond his last day in office.⁴⁰⁹ Mayor de Blasio became a faithful apologist for the police after being rebuked by the city’s law enforcement lobby.⁴¹⁰ So loyal to the police he has been, in fact, that over two hundred of his own former and current staffers wrote an open letter during the George Floyd protests, calling him out for firmly aligning himself with law enforcement throughout his mayorship while falling far short of the change and reform he promised to bring during his 2013 campaign.⁴¹¹ During those very protests, de Blasio instituted a curfew for protestors while claiming that police officers “acted

407. For a general description of the bills, see Marsh & Friedberg, *supra* note 332. For example, the bill “affirm[s] the right to record police activities,” Press Release, New York City Council, Council Votes on Six Bills to Reform NYPD (June 18, 2020) [hereinafter New York City Council Press Release], <https://council.nyc.gov/press/2020/06/18/1990/> [<https://perma.cc/SA4S-HMH2>], which does nothing useful; New Yorkers had the right to record law enforcement in action, Teri Weaver, ‘*Right to Record*’ Police is Now the Law, SYRACUSE.COM (June 14, 2020, 6:39 PM), <https://www.syracuse.com/news/2020/06/right-to-record-police-is-now-the-law-in-ny.html> [<https://perma.cc/QRC5-WKEQ>]; Steve Silverman, 7 Rules for Recording Police, REASON (Apr. 5, 2012, 1:30 PM), <https://reason.com/2012/04/05/7-rules-for-recording-police/> [<https://perma.cc/3AJ7-N8BU>] (“The law in 38 states plainly allows citizens to record police, as long as you don’t physically interfere with their work. Police might still unfairly harass you, detain you, or confiscate your camera. They might even arrest you for some catchall misdemeanor such as obstruction of justice or disorderly conduct. But you will not be charged for illegally recording police.”). Despite passing a chokehold law that goes further than New York State’s anti-chokehold legislation, city legislators are backtracking following complaints from police and police unions. New York City Council Press Release, *supra*; Shant Shahrigan, *NYC Council to Consider Change to Chokehold Ban; More Police Accountability Bills Set to Pass*, N.Y. DAILY NEWS (Aug. 26, 2020, 5:20 PM), <https://www.nydailynews.com/news/politics/ny-chokehold-ban-revisions-city-council-20200826-npgs7gd32zdk5k22ize-luypwai-story.html> [<https://perma.cc/L4XK-4HTF>].

408. *Mayors of the City of New York*, N.Y.C., <https://www1.nyc.gov/site/dcas/about/greenbook-mayors-of-the-city-of-new-york.page> [<https://perma.cc/5Q2B-8RGG>] (last visited Oct. 15, 2021).

409. See Joel Rose, *Mike Bloomberg Can’t Shake the Legacy of Stop-and-Frisk Policing in New York*, NPR (Feb. 26, 2020, 4:18 PM), <https://www.npr.org/2020/02/25/809368292/the-legacy-of-stop-and-frisk-policing-in-michael-bloombergs-new-york> [<https://perma.cc/2T3U-AVTE>]; Bobby Allyn, ‘*Throw Them Against the Wall and Frisk Them*’: Bloomberg’s 2015 Race Talk Stirs Debate, NPR (Feb. 11, 2020, 11:52 AM), <https://www.npr.org/2020/02/11/804795405/throw-them-against-the-wall-and-frisk-them-bloomberg-s-2015-race-talk-stirs-deba> [<https://perma.cc/4AGX-X46J>].

410. See Zamir Ben-Dan, *Law and Order Without Justice: A Case Study of Gravity Knife Legislation in New York City*, 21 CUNY L. REV. 177, 214–18 (2018) (describing the police response to Mayor de Blasio’s comments about police brutality).

411. Shant Shahrigan, *De Blasio Staffers Demand ‘Radical Change from Mayor’ in Open Letter: Read Full Text*, N.Y. DAILY NEWS (June 3, 2020, 5:35 PM), <https://www.nydailynews.com/news/politics/ny-bill-de-blasio-staff-letter-protests-20200603-yfwudscokozarl7bugqefchmge-story.html> [<https://perma.cc/ZL7G-DJTJ>].

appropriately,” despite plenty of video footage depicting brutal violence at the hands of local law enforcement.⁴¹² History shows that the NYPD has always had a friend in City Hall, despite contrary claims from the police unions. New mayor Eric Adams is likely to be no exception; the former cop has already aligned himself with the NYPD with his assessment that lawlessness “is the norm” in New York City.⁴¹³

Additionally, while prosecutors shield police officers from criminal culpability, the city government shields them from civil—and financial—liability. New York City taxpayers paid a whopping \$1.378 *billion* over the last six fiscal years to settle lawsuits against the police.⁴¹⁴ When defendants sue the city for false arrest, malicious prosecution and other related claims, the city government picks up the tab.⁴¹⁵ Thus, there is no financial incentive for officers to behave properly when settlements come not from their pockets, but from the pockets of city taxpayers.⁴¹⁶ Officers that have individually cost the city tens of thousands of dollars remain on the force, with no pressure from the government to resign.⁴¹⁷ It is telling that the city government would rather have taxpayers shell out millions of dollars annually than implement changes within the NYPD and get rid of bad cops.

412. *Id.*

413. Jackie Salo, *Eric Adams Says NYC Has Become a City Where ‘Lawlessness is the Norm’*, N.Y. POST (July 19, 2021, 12:38 PM), <https://nypost.com/2021/07/19/eric-adams-lawlessness-is-the-norm-in-nyc/> [<https://perma.cc/YY3T-79SY>].

414. In the last six years, New York City paid out approximately \$154.1 million to settle lawsuits against the NYPD in fiscal year 2014, Bob Hennelly, *NYPD Payouts Up, but New Lawsuits Down*, CITY & STATE N.Y. (Mar. 7, 2016), <https://www.cityandstateny.com/articles/politics/new-york-city/nypd-payouts-up%2C-but-new-lawsuits-down.html> [<https://perma.cc/H5LV-DWBC>], \$202.6 million in fiscal year 2015, *id.*, \$228.5 million in fiscal year 2016, Nathan Tempey, *NYC Paid \$228 Million for Police Misconduct in the Last Fiscal Year*, GOTHAMIST (Sept. 21, 2016, 7:38 PM), <https://gothamist.com/news/nyc-paid-228-million-for-police-misconduct-in-the-last-fiscal-year> [<https://perma.cc/MUP6-H49G>], \$335.5 million in fiscal year 2017, OFF. OF THE N.Y.C. COMPTROLLER, CLAIMS REPORT: FISCAL YEAR 2018 at 2 (2019), <https://comptroller.nyc.gov/wp-content/uploads/documents/Claims-Report-FY-2018.pdf> [<https://perma.cc/S5PZ-7QYR>], \$237.4 million in fiscal year 2018, OFF. OF THE N.Y.C. COMPTROLLER, CLAIMS REPORT: FISCAL YEAR 2019 at 3 (2020), <https://comptroller.nyc.gov/wp-content/uploads/documents/Claims-Report-FY-2019.pdf> [<https://perma.cc/AYW5-MVV3>], and \$220.1 million in fiscal year 2019, *id.*

415. See Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URB. L.J. 587, 588 (2000) (explaining that cities generally indemnify police officers in civil lawsuits).

416. *Id.* at 590.

417. Jake Offenhartz, *Here Are NYC’s Most Sued Cops Who Are Still on the Job, According to New Public Database*, GOTHAMIST (Mar. 13, 2019, 5:34 PM), <https://gothamist.com/news/here-are-nycs-most-sued-cops-who-are-still-on-the-job-according-to-new-public-database> [<https://perma.cc/38EU-2WVU>].

Up until June 2020, the city government also actively shielded officers from accountability through the use of Civil Rights Law section 50-a.⁴¹⁸ On its face, the law barred the review or release of personnel records of several classes of civil servants unless the party seeking the records obtained either the express permission of the subject civil servant or a court order,⁴¹⁹ and the law required that subpoenas put forth “some factual predicate which would make it reasonably likely that the file will bear such fruit,” the fruit being “information that carries a potential for establishing the unreliability of either the criminal charge or of a witness upon whose testimony it depends.”⁴²⁰ Section 50-a was emblematic of a clear double standard between police witnesses and civilian witnesses in criminal trials.⁴²¹ With civilian witnesses, a defendant is entitled to any and all material information regarding prior bad acts that the witnesses may have engaged in.⁴²² But there were special precautions taken when it came to police officers; their prior bad acts were not automatically—or easily—attainable.⁴²³ Unless a defendant either found evidence of prior officer misconduct on their own or obtained a court order granting inspection of personnel records *and* received records after such inspection, an officer could count on not being confronted with their prior bad acts in court.

In the feature case, Mr. Charles sought the disciplinary records of two of the officers involved in the arrest through the filing of a *Gissendanner* motion.⁴²⁴ Although the motion put forward facts that suggested that both Officers Santomero and Vega may have behaved improperly in the past,⁴²⁵ the judge denied Mr. Charles’ request for an inspection of their records.⁴²⁶

418. For years, efforts to repeal Civil Rights Law Section 50-a were stalled. Jake Bittle, *The State Legislature May Repeal 50-a. Here’s What That Means.*, QUEENS DAILY EAGLE (June 4, 2020), <https://queenseagle.com/all/50a-repeal-new-york-police-records-queens> [https://perma.cc/72ZL-M4UR]. In the aftermath of George Floyd’s killing in May 2020, New York finally parted ways with the statute in June 2020 when the state government repealed the law. Tarinelli, *supra* note 23. Transparency in this regard is certainly a step in the right direction, but it will not help if it does not lead to more discipline and termination by the department, more prosecutions by district attorneys, and more rebuke from the judiciary.

419. N.Y. CIV. RIGHTS LAW § 50-a(1) (repealed 2020).

420. *People v. Gissendanner*, 399 N.E.2d 924, 928 (N.Y. 1979).

421. *See Moran*, *supra* note 22, at 1345–55, 1368–79.

422. *See People v. Giuca*, 128 N.E.3d 655, 662 (N.Y. 2019) (stating that material affecting credibility of witnesses must be given to defendants); *People v. Sandoval*, 314 N.E.2d 413, 415 (N.Y. 1974) (arguing that witnesses should be able to be cross-examined on prior “immoral” conduct).

423. *Moran*, *supra* note 22, at 1370–71 (describing the difficulty of obtaining evidence relating to past police misconduct).

424. Application for Issuance of a Subpoena, *People v. Charles*, No. 2017BXXXXXXX (N.Y. Crim. Ct. Oct. 9, 2017) (on file with author). Generally, a *Gissendanner* motion is a defense counsel’s request to access police records. *See Gissendanner*, 399 N.E.2d 924.

425. Application for Issuance of a Subpoena, *People v. Charles*, No. 2017BXXXXXXX, at 5–7.

426. Decision and Order on Application for Issuance of a Subpoena, *People v. Charles*, No. 2017BXXXXXXX (N.Y. Crim. Ct. Jan. 4, 2018) (on file with author).

The NYPD and its unions, city prosecutors, the city's judiciary and the city government all play an active role in shielding officers from police misconduct. As a result, flagrant police misbehavior routinely goes unpunished. The next subsection examines the consequences of unpunished case-related police misconduct.

C. Consequences

Unchecked police misconduct can have serious repercussions. Civilians can be needlessly injured or killed, as Eric Garner was back in July 2014. Mr. Garner's death was a consequence of case-related police misconduct; he was killed in the course of an arrest with a maneuver prohibited by the NYPD.⁴²⁷ In terms of injuries, Mary Pagan-Alomar will forever be without her left eye as a result of Officer Lustica's actions.⁴²⁸ In the feature case, Mr. Charles suffered a shoulder injury, broken ribs and pain in his arm and back.⁴²⁹ Some victims of case-related police misconduct have to live the rest of their lives with physical reminders of the brutality inflicted against them.

The combination of case-related police misconduct and pre-trial detention can lead to people being jailed—and subjected to all the traumas of imprisonment⁴³⁰—before conviction. Mr. Kutayeh, whose case was ultimately dismissed,⁴³¹ spent two weeks in jail on \$1,000 bail.⁴³² The risk of being jailed during a pending case is increased if the person has a prior record, or if the person has been arbitrarily added to the NYPD's gang database.⁴³³

Unchecked police misbehavior can lead to wrongful convictions, both after trial and after plea deals. In a national study conducted by the National Registry of Exonerations, it was found that police committed relevant misconduct in 35% of the 2,400 wrongful post-trial convictions examined.⁴³⁴ Prosecutor misconduct played a relevant role in 30% of such convictions; and together, official misconduct played a role in 54% of wrongful convictions.⁴³⁵ While this data is not limited

427. Lowery, *supra* note 70.

428. *See supra* note 178 and accompanying text.

429. Ronald Charles Hospital Records (May 11, 2017) (on file with author); Court Complaint, *supra* note 193.

430. *See generally* Mika'il DeVeaux, *The Trauma of the Incarceration Experience*, 48 HARV. C.R.-C.L. L. REV. 257 (2013).

431. *See supra* note 399 and accompanying text.

432. Offenhardt, *Staten Island Cops Racial Profiling*, *supra* note 162.

433. Alice Speri, *NYPD Gang Database Can Turn Unsuspecting New Yorkers into Instant Felons*, THE INTERCEPT (Dec. 5, 2018, 12:16 PM), <https://theintercept.com/2018/12/05/nypd-gang-database/> [<https://perma.cc/4ZQM-CPEG>] (describing New York City's gang database and its consequences).

434. SAMUEL R. GROSS, MAURICE J. POSSLEY, KAITLIN JACKSON ROLL, KLARA HUBER STEPHENS, & NAT'L REGISTRY OF EXONERATIONS, GOVERNMENT MISCONDUCT AND CONVICTING THE INNOCENT: THE ROLE OF PROSECUTORS, POLICE AND OTHER LAW ENFORCEMENT 12 (2020), https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf [<https://perma.cc/H6WF-VYS9>].

435. *Id.*

to New York City, it is fair to say that NYPD misconduct has led to false convictions of innocent civilians after trial.

Most wrongful convictions occur when civilians plead guilty to a charge for reasons other than guilt or innocence. Defendants who might otherwise have successfully defended charges because of police misconduct are compelled to take pleas for all kinds of reasons. Maxwell Forrest, a plumber who lived in the Bronx, was the victim of an illegal search and waived his right to challenge the search by entering into a plea agreement.⁴³⁶ In February 2017, officers from the 52nd precinct invaded his home without a warrant, arrested him on a firearms charge, and then tricked his girlfriend into signing a form consenting to the search.⁴³⁷ The officers then claimed that the consent form was signed when they arrived at the apartment, but video surveillance showed that to be false.⁴³⁸ When the prosecution refused to dismiss the charges, and Mr. Forrest faced charges from another arrest, he plead guilty to resolve both cases.⁴³⁹ The arrest adversely impacted his life after the case was over,⁴⁴⁰ as it does for many people who plead guilty under similar circumstances.

One of the biggest effects of unpunished police misconduct is the loss of trust in the judicial system and the government. For some people, there is a constant fear of police. Jeremy Turnbull, the person illegally arrested by Officer Valdrin Niqki for gun possession, admitted that he fears walking outside and desperately hopes that any police officers he might see do not bother him.⁴⁴¹ For Black and Brown people, the fear is widespread, even amongst lawyers.⁴⁴² Mr. Kutayeh reported being routinely harassed by officers since his arrest and stated, “Sometimes I can’t sleep. I can’t drive my car. I just keep thinking: if he can put me behind bars for two weeks, if he can direct another officer to arrest me, then what else can he do to me?”⁴⁴³

Mr. Charles rarely leaves his house now for fear that police might rough him up again for no valid reason.⁴⁴⁴ Like many Black and Brown residents of New York City, he rightly believes that the police do not exist to protect people like

436. Parascandola, *Cops Criticized for Tactics in Weapons Cases*, *supra* note 395.

437. *Id.*

438. *Id.* (recounting how Forrest’s girlfriend believed she was signing an already-issued warrant).

439. *Id.*

440. *Id.*

441. Joseph & Winston, *supra* note 356.

442. See David Ourlicht as told to Margo Snipe, *I’m 31. I’m a Lawyer. And I’m Still Getting Stopped by the Police.*, MARSHALL PROJECT (July 11, 2019, 10:00 PM), <https://www.themarshallproject.org/2019/07/11/i-m-31-i-m-a-lawyer-and-i-m-still-getting-stopped-by-the-police> [<https://perma.cc/MB2S-JGDT>].

443. Jake Offenhartz, *Video Allegedly Shows Staten Island Cop Planting Joint in Teen’s Car*, GOTHAMIST (Nov. 21, 2018, 1:44 AM), <https://gothamist.com/news/video-allegedly-shows-staten-island-cop-planting-joint-in-teens-car> [<https://perma.cc/F4LZ-V4LS>].

444. January 2020 Charles Interview, *supra* note 17.

him.⁴⁴⁵ He had very little faith in the judicial system, and the verdict came as a shock to both him and defense counsel.⁴⁴⁶ That an innocent person could be shocked that a court did the right thing and acquitted him is beyond disturbing. The evidence of police misconduct was overwhelming in his case, and yet neither he nor defense counsel could say with certainty before the verdict that Judge Whiten would not ignore it and convict him anyway, based on the word of a cop.⁴⁴⁷

Some become so jaded by the system that they take matters into their own hands and commit violence against police officers. Christopher Dorner⁴⁴⁸ and Micah Xavier Johnson,⁴⁴⁹ both notorious for targeting and killing police officers, were two such people. In New York City, Ishmael Brinsley was another such person: he killed two NYPD officers a few weeks after a Staten Island grand jury declined to indict Pantaleo for the death of Eric Garner.⁴⁵⁰ It is easy to condemn their actions, but it is important to understand that tragedies like these are likely to occur when there is no recourse for persistent police abuse. Around the nation, shootings of police officers have increased; and 2018 marked the first time in a long time in which more police officers were killed in shootings than they were in traffic accidents across the country.⁴⁵¹ This is another consequence of case-related police misconduct: anti-police sentiments increase to levels extreme enough where people are willing to hurt and kill officers. Put another way, unchecked police misconduct endangers the lives of police officers.

The most obvious consequence of unabated police misconduct is that the misconduct pervades and continues. It is a vicious cycle: bad behavior that goes unaddressed not only persists, but spreads. So too with the NYPD: they continue to

445. *Id.*

446. *Id.*

447. *Id.*

448. See Christopher Goffard, Joel Rubin, & Kurt Streeter, *The Manhunt for Christopher Dorner*, L.A. TIMES (Dec. 8, 2013), <https://graphics.latimes.com/christopher-dorner-manhunt/#chapter-one> [<https://perma.cc/EMR4-E6RX>].

449. See Will Weissert, Reese Dunklin, & Mitch Weiss, *Dallas Sniper Was Loner; Army Sent Him Home from Afghanistan*, AP NEWS (July 9, 2016), <https://apnews.com/article/c729e6812af54ace96fc8927a7204bf0> [<https://perma.cc/3GSP-FDJX>].

450. Elisha Fieldstadt, *Gunman Ismaaiyl Brinsley Told Bystanders to 'Watch What I'm Going to Do': Cops*, NBC NEWS (Dec. 21, 2014, 6:43 PM), <https://www.nbcnews.com/news/us-news/gunman-ismaaiyl-brinsley-told-bystanders-watch-what-im-going-do-n272796> [<https://perma.cc/Y733-PCVC>].

451. Bill Chappell, *More Police Officers Died from Gunfire than Traffic Incidents in 2018, Report Finds*, NPR (Dec. 27, 2018; 10:25 AM), <https://www.npr.org/2018/12/27/680410169/more-police-officers-died-from-gunfire-than-traffic-incidents-in-2018-report-say> [<https://perma.cc/P9UM-DS9D>] (describing a general upward trend of police getting shot). See also *Honoring Officers Killed in 2019*, OFFICER DOWN MEM'L PAGE, <https://www.odmp.org/search/year/2019> [<https://perma.cc/RE9G-NP8Q>] (last visited Aug. 15, 2021); Press Release, FBI, FBI Releases 2019 Statistics on Law Enforcement Officers Killed in the Line of Duty (May 4, 2020), <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2019-statistics-on-law-enforcement-officers-killed-in-the-line-of-duty> [<https://perma.cc/4XKU-Z9CZ>] (showing that the trend continued in 2019).

commit wrongs because they are rarely punished for it. Case in point: the officers that planted marijuana in Mr. Katuyeh's car were later implicated in planting marijuana in at least one other motorist's car a month later.⁴⁵² There is no incentive for officers to act properly and obey the law if they are rarely punished for misbehaving and disobeying. There is no reason for officers to do their jobs professionally when any civil damages that arise from their actions are borne by the city and never by them. There is no incentive for police officers to ethically and morally perform their duties when unscrupulous officers have not only kept their jobs but have frequently gotten promoted.

The cumulative consequence of unchecked case-related police misconduct is the perversion of justice in New York City. Neither criminal justice nor racial justice can be realized without real officer accountability. Unchecked police misconduct places law enforcement officers above the law, allowing them to escape accountability for actions that would not be tolerated if performed by civilians. Any system that regularly punishes civilians for breaking the law, but irregularly punishes police officers for the same, is neither fair, nor just, nor moral, nor right.

IV.

VIABLE SOLUTIONS

In this part, the author sets forth a number of proposals that New York State and/or New York City should implement to reduce case-related police misconduct. These can be done through the enactment of new statutes or ordinances or the amendment of existing ones. These proposals are not mutually exclusive; in fact they should be implemented simultaneously. Nor should this be considered an exhaustive list of proposals.⁴⁵³

A. Stop Shielding NYPD Officers From Civil Liability

Since New York City abolished qualified immunity for NYPD officers,⁴⁵⁴ the city government should no longer indemnify police officers that are sued for reckless, intentional, or even criminal acts. The department and/or the city can provide legal representation to officers that are sued if it so chooses; but the city should no longer foot the bill that comes from either a settlement or a trial judgment. If a police officer knows that they can be held personally liable for their misconduct,

452. Sydney Pereira, *Staten Island NYPD Officers Accused of Planting Marijuana on Suspect Also Seen with Weed in Patrol Car. Lawyers Say*, GOTHAMIST (June 25, 2020, 7:47 PM), <https://gothamist.com/news/staten-island-nypd-officers-accused-planting-marijuana-suspect-also-seen-weed-patrol-car-lawyers-say> [<https://perma.cc/R885-7QKS>].

453. See, e.g., Hathaway, *supra* note 378, at 83–95 (proposing that states pass their equivalent of 42 U.S.C. § 14141 and grant state attorneys general the ability to conduct pattern-or-practice investigations into law enforcement agencies with the potentiality of a lawsuit).

454. Nick Sibilla, *New York City Bans Qualified Immunity for Cops Who Use Excessive Force*, FORBES (Apr. 29, 2021, 10:55 AM), <https://www.forbes.com/sites/nicksibilla/2021/04/29/new-york-city-limits-qualified-immunity-makes-it-easier-to-sue-cops-who-use-excessive-force/?sh=1e18ee6867e9> [<https://perma.cc/PD2W-GTMZ>].

they are more likely to watch their behavior and follow both the law and proper departmental procedures. Potential civil liability would also help to deter wrongdoing by other officers. New York City could put the tens of millions of dollars it normally budgets for settling police lawsuits to other worthwhile uses.

Within the context of Fourth Amendment violations, a civil suit should be a consequence along with the exclusionary rule, not a replacement for the latter. Some have argued that civil damages should replace the exclusionary rule as the official remedy for Fourth Amendment violations, claiming that the rule gives rise to most instances of testilying.⁴⁵⁵ This claim depends upon the idea that satisfying the mandates of the Fourth Amendment is unreasonably difficult.⁴⁵⁶ The Fourth Amendment has been gutted in recent years to the point where the exceptions swallow the rule,⁴⁵⁷ so that fighting crime while abiding by the Fourth Amendment is not as difficult as some might claim. Further, other remedies have historically been futile in discouraging constitutional violations.⁴⁵⁸ Additionally, winning lawsuits based upon police misconduct is difficult.⁴⁵⁹ As a result, if a civil suit is unsuccessful then there is no penalty for having violated the state and federal constitutions. Standing alone, civil damages are not an effective deterrent of Fourth Amendment violations by law enforcement.

B. Put in Place Solutions to Curtail Officers' Ability to Tamper with or Lose Body Camera Footage

In the wake of several police killings of unarmed Black and Brown people, police departments across America began requiring their officers to wear body cams on their uniforms to record interactions with civilians.⁴⁶⁰ Since that time, there have been countless incidents of cameras being turned off or deactivated, or footage going missing or being lost.⁴⁶¹ Officers would either not turn on their body cams at all, or they would turn them off until after the event in question—be it the search, the seizure, or the alleged crime—took place.⁴⁶² For example, when

455. Slobogin, *supra* note 247, at 1057–59 (proposing abolishing the exclusionary rule because it makes securing conviction more difficult, thus disincentivizing prosecutors and judges from acknowledging police perjury).

456. *Id.* at 1055–56.

457. Cicchini, *supra* note 373, at 735–37 (describing the good faith exception, various judicially-created exceptions, and the DNA-collection exception to the Fourth Amendment's warrant requirement).

458. See *Mapp v. Ohio*, 367 U.S. 643, 651–53 (1961) (recognizing the difficulty of compelling compliance with constitutional provisions with remedies other than the exclusionary rule experienced by California as well as several other states).

459. Hathaway, *supra* note 378, at 69–72 (arguing that Supreme Court precedents on the use of force shield police from accountability in criminal prosecutions, and that civil remedies under 42 U.S.C. § 1983 are also difficult to obtain because of the socio-economic barriers victims face).

460. Mary D. Fan, *Missing Police Body Camera Videos: Remedies, Evidentiary Fairness, and Automatic Activation*, 52 GA. L. REV. 57, 67–68 (2017).

461. See, e.g., *id.* at 65.

462. *Id.* at 61, 69–74.

Officer Erickson in Staten Island decided to plant a marijuana joint in Mr. Kutayeh's car, his body cam was deactivated shortly before he planted the evidence inside the car; and then was reactivated after he was done.⁴⁶³ Or when Officer Kern illegally searched a young man in East Harlem, his body camera remained off until after he allegedly recovered a firearm.⁴⁶⁴

A recent report published by the federal monitor overseeing the NYPD showed that body cams “did not reduce use of force during arrests or produce any changes in policing activity.”⁴⁶⁵ The following two strategies can increase the efficacy of body cams in addressing police misconduct.

First, prosecutors should not benefit from police manipulation of body cam footage by using video where only portions of the police-citizen encounter can be seen. This policy would disincentivize police from turning off body cams part-way through an incident. In cases where there is no body camera footage, courts in this city should be required to give an inference positive to the defendant, stating that “the missing video could have information that supports the defense.”⁴⁶⁶ Further, if an accused person has reason to believe that missing video footage is not a product of technology woes or any other valid circumstance, courts should be required to hold a special hearing to determine whether missing video footage was a product of technological malfunction, some other valid circumstance, or police tampering. Finally, any case-related misconduct by the officer, as well as any past examples of that officer's body cams having “malfunctioned,” should be considered and given appropriate weight in such hearings.

Second, the NYPD should invest in automated recording—body cams that automatically turn on upon “pre-determined triggers such as motion, sounds, physiological indicators, or activation of sirens.”⁴⁶⁷ Doing so will reduce the chances of body cam footage being legitimately lost.

C. Consistently File Ethics Complaints Against Prosecutors That Knowingly Prosecute Bad Cases

Perhaps even more so than police, prosecutors routinely engage in misconduct in the fulfillment of their duties.⁴⁶⁸ This is because, as demonstrated above,

463. Goldstein, *Teenager Framed*, *supra* note 153.

464. *People v. Green*, Ind. No. 2373-19 at 2 (N.Y. Sup. Ct. 2019) (explaining how the officers' body cams were not turned on while they stopped and frisked the defendant, and that video surveillance obtained from a nearby housing project showed that the interaction between the police and the defendant significantly contradicted the police officers' testimony).

465. PETER L. ZIMROTH, TWELFTH REPORT OF THE INDEPENDENT MONITOR THE DEPLOYMENT OF BODY WORN CAMERAS ON NEW YORK CITY POLICE DEPARTMENT (NYPD) OFFICERS 8 (2020), <http://nypdmonitor.org/wp-content/uploads/2020/12/12th-Report.pdf> [<https://perma.cc/P5Z-54UQ>].

466. Fan, *supra* note 460, at 100–03.

467. *Id.* at 105–06.

468. Anthony C. Thompson, *Retooling and Coordinating the Approach to Prosecutorial Misconduct*, 69 RUTGERS U. L. REV. 623, 642 (2017).

many prosecutors prioritize winning a conviction above doing justice.⁴⁶⁹ Further, more so than police officers, it is next to impossible to hold prosecutors accountable for this misconduct.⁴⁷⁰

Rule 3.8 of the New York Rules of Professional Conduct forbids prosecutors from prosecuting charges that they know or have reason to know are not supported by probable cause.⁴⁷¹ The rules also require prosecutors to turn over evidence favorable to the accused in a timely manner.⁴⁷² Thus, when prosecutors hide exculpatory material, they are engaging in unethical behavior. Further, where a prosecutor goes after a person based upon charges that are obviously false, or charges they know to be meritless, that prosecutor is also violating their ethical duties. Accountability to these rules is necessary to rebalance prosecutorial incentives; now, a prosecutor has no reason to put ethics over convictions. In addition to holding prosecutors accountable to the existing rules, Rule 3.8 should be expanded to include all of the prosecutors' "unique set of responsibilities" so that *any* misconduct they engage in can be subject to review.⁴⁷³

The difficulty with this proposal, however, is that a defense attorney who chooses to file a bar complaint does so with significant risk.⁴⁷⁴ Prosecutors have significant power in the judicial system, as they can decide what to charge and what types of offers to make.⁴⁷⁵ Defense attorneys are frequently dependent upon prosecutors to favorably resolve cases for their clients, giving prosecutors incredible leverage in their dealings with defense attorneys.⁴⁷⁶ With public defenders especially, prosecutors can retaliate by refusing to plea bargain with attorneys who dare to complain.⁴⁷⁷ Thus, defense attorneys are justifiably apprehensive about filing ethical complaints for fear of retribution.

The State Attorney General's office should fill this role. Where a defense attorney, a judge, a civilian, or even a fellow prosecutor believes that an assistant district attorney engaged in misconduct, the party should be able to contact the State Attorney General's office anonymously and report the unethical behavior. The office will then be responsible for conducting a thorough investigation with a standard should be akin to that of legal sufficiency: if the office finds, in examining the evidence in the light most favorable to the reporting party, that an ethical violation occurred, the office would be required to file a complaint to the state bar association against the particular prosecutor who was reported. The ethical complaint would then be adjudicated accordingly. Additionally, any allegations of

469. *Id.*

470. *Id.* at 650–79.

471. N.Y. RULES OF PRO. CONDUCT 3.8(a) (2017).

472. *Id.* at 3.8(b).

473. Thompson, *supra* note 468, at 651 (noting that professional rules are not tailored to prosecutors).

474. *Id.* (describing the risk to defense lawyers of filing a complaint against prosecutors).

475. Henry, *supra* note 139, at 674; ALEXANDER, *supra* note 46, at 112–13.

476. Thompson, *supra* note 468, at 651.

477. *Id.*

retaliation by individual prosecutors against defense attorneys or their clients should also be reported, seriously examined, and punished if substantiated.

In addition to ethical accountability, there must be a national grassroots campaign to eradicate the insurmountable legal protections given to prosecutors. Prosecutors have absolute immunity from civil liability when it comes to decisions made in the course of initiating a prosecution and serving as an advocate.⁴⁷⁸ Citizens should be allowed to sue prosecutors when they engage in knowing misconduct in the performance of their duties. Additionally, despite statutes that could theoretically hold prosecutors criminally liable for their misconduct, assistant district attorneys have never been prosecuted under these statutes for committing flagrant wrongdoings, even when such misdeeds lead to wrongful convictions and ruin lives.⁴⁷⁹ The existing disciplinary mechanisms for lawyers are not enough to deter willful prosecutorial misconduct.⁴⁸⁰

D. Greatly Revamp and Empower the Civilian Complaint Review Board

The Civilian Complaint Review Board (CCRB) was established in 1953 as an internal NYPD unit,⁴⁸¹ but is now an independent organization.⁴⁸² The board's jurisdiction to investigate complaints is limited to four areas: abuse of police authority, the use of excessive force, discourtesy and the use of offensive language.⁴⁸³ While the board is empowered to make recommendations to the commissioner regarding whether or not discipline should be imposed, it has no power to impose discipline or to initiate civil prosecutions of police officers; that power lies in the hands of the police commissioner.⁴⁸⁴ Nor is the CCRB adequately empowered to do NYPD policy review or the review of incidents that led either to awards and settlements in civil suits or evidence suppression in criminal cases.⁴⁸⁵

478. *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976); *cf.* *Buckley v. Fitzsimmons*, 509 U.S. 259, 272–73 (1993) (reiterating *Imbler's* holding without foreclosing all of plaintiff's claims against the prosecutor).

479. *See, e.g.*, Thompson, *supra* note 468, at 682 (discussing how federal and local obstruction of justice statutes could provide “an effective tool for curbing the behavior of prosecutors who intentionally subvert the rights of the accused,” but that there are no reported cases of punishing prosecutors for violating defendants' rights under these statutes (quoting Shelby A.D. Moore, *Who is Keeping the Gate? What Do We Do When Prosecutors Breach the Ethical Responsibilities They Have Sworn to Uphold?*, 47 S. TEX. L. REV. 801, 810 (2006))).

480. Thompson, *supra* note 468, at 649–69; INNOCENCE PROJECT, PROSECUTORIAL OVERSIGHT: A NATIONAL DIALOGUE IN THE WAKE OF *CONNICK V. THOMPSON* 11–17 (2016), https://www.innocenceproject.org/wp-content/uploads/2016/04/IP-Prosecutorial-Oversight-Report_09.pdf [https://perma.cc/Z3B4-884Q] (detailing the failures of current efforts at prosecutorial oversight).

481. Stephen Clarke, *Arrested Oversight: A Comparative Analysis and Case Study of How Civilian Oversight of the Police Should Function and How It Fails*, 43 COLUM. J.L. & SOC. PROBS. 1, 20 (2009).

482. *Id.* at 21.

483. N.Y.C., N.Y., CHARTER ch. 18-A, § 440(c)(1) (1993).

484. Goldstein, *Testifying by Police*, *supra* note 20.

485. Clarke, *supra* note 481, at 23–24 (delving into the ways in which the CCRB lacks power).

These limitations, as well as resource constraints, have weakened the CCRB's effectiveness and made the process an overall failure.⁴⁸⁶

New York City should greatly revamp the CCRB and expand its powers. First, instead of consisting of just one board of 13 members,⁴⁸⁷ there should be at least one "sub-board" in each of the five boroughs, with each sub-board in charge of reviewing complaints that arise in its respective borough. The money the city has been budgeting for the purpose of settling lawsuits against cops can be used to properly fund this expanded CCRB. In fact, should adequate funding exist, there could be a sub-board established in four or five geographic zones established in each borough in New York City. Each borough is unique; hence, the reviewing of complaints and allegations of misconduct should be done by an entity that is based in the boroughs and neighborhoods where they arise. Each sub-board will be a subsidiary of the board for the entire city; and each sub-board will therefore be answerable to the citywide board. Each sub-board should have 15 members, as the CCRB currently does; and each sub-board should be properly resourced with adequate numbers of civilian investigators and attorneys.

Second, the responsibilities and jurisdiction of the CCRB and its subordinates should be expanded. The CCRB and its subordinates should be allowed to review *all* allegations of police misconduct, especially police behavior that leads to either the suppression of evidence or the filing of a successful civil suit. The four categories specified in the charter should not be exhaustive. The citywide CCRB in particular should be expressly invited to review departmental policy, report patterns of misconduct, and recommend changes where appropriate. These reports made by the citywide CCRB should be made public.

Third, membership of the CCRB, and especially the sub-boards, should be determined by election and not by appointment. Given the enormous influence that the law enforcement lobby has in city politics, it is very likely that any given city council and any given mayor can sabotage efforts at increased transparency by appointing individuals with no interest in meaningfully holding police officers accountable.⁴⁸⁸ This concern is more pronounced when speaking about the police commissioner's appointees. With the sub-boards, the residents of each borough should be the ones to determine who should sit on the board; this is consistent with the ideals of democracy. Of the 15 members who sit on each sub-board, no more

486. *Id.* at 23 ("Consequently, the structure of both the CCRB's legal powers and its legal obligations ensures that, like other external investigative agencies, the CCRB has a strong incentive to forgo policy review and cut back on outreach when its investigative workload increases and agency resources are stretched thin.").

487. N.Y.C., N.Y., CHARTER ch. 18-A, § 440(b)(1) (1993).

488. See, e.g., Roshan Abraham, *Maya Wiley Pledges to Transform Policing. But Her Work in NYPD Oversight Left Some Disappointed*, CITY LIMITS (Jun. 7, 2021), <https://citylimits.org/2021/06/07/as-maya-wiley-pledges-to-transform-policing-a-look-back-at-her-tenure-at-nypd-oversight-board/> [<https://perma.cc/37DP-K2N9>]; Nicole Napolitano, *New York Should Completely Rebuild, Not Just Patch, Its Police Oversight System; Here's How*, GOTHAM GAZETTE (Apr. 9, 2021), <https://www.gothamgazette.com/opinion/10351-new-york-city-rebuild-not-patch-police-oversight-system> [<https://perma.cc/HFX2-E5UA>].

than three could be law enforcement professionals; and the term “law enforcement professional” should be defined more broadly than it is in the city charter and should include probation or parole officers, correction officers, court officers, and prosecutors, former or current. The board and sub-board members would serve five-year terms with a two-term limit. All of the members must live in the borough where they serve, and they must have lived in that borough for at least two years prior to running. This is designed to give greater control to the respective communities and increase their ability to hold officers accountable.

Fourth, the CCRB’s sub-boards should have the power to investigate and impose sanctions upon officers for misconduct, up to and including dismissal from the force. If a sub-board finds sufficient evidence that an NYPD officer committed case-related misconduct, they would be empowered to conduct an investigation and adjudication. Attorneys who investigate and adjudicate these cases should not have prior law enforcement experience, as defined in the prior paragraph. The subject officer would be required to submit to the hearing; willful absence would result in a default finding against the officer, as well as imposition of the maximum punishment available for the offense. Further, officers who testify falsely in defense of the subject officer would be subject to their own CCRB investigations. If the hearing officer finds the officer to have violated department regulations or the law, the hearing officer would have the authority to discipline or terminate that officer. All findings would be made available to the public. Officers can have a right of appeal to the citywide board on narrow grounds for appeal, including that the decision was arbitrary or capricious and not based on the facts established during the trial.

The new-and-improved CCRB should not displace the NYPD’s own disciplinary processes. Empowering the CCRB sub-boards to civilly prosecute and punish guilty officers is an appropriate additional pathway because it provides a real opportunity for community control of the police. Police officers should be answerable to the communities they serve; if they harm the community, the community should have a say in what penalty should be imposed, or what future the subject officer should have in the department. NYPD officers are less likely to act improperly if the communities they purport to serve have real authority to hold them accountable.

E. Consistently Prosecute NYPD Officers That Commit Criminal Misconduct

After George Floyd’s murder last year, there have been growing calls for abolishing police and the criminal legal system.⁴⁸⁹ The premise behind abolition, which the author firmly stands behind, is that the system is fundamentally racist

489. Illing, *supra* note 87.

and unjust and cannot simply be reformed.⁴⁹⁰ That said, until the system is abolished and as long as the judicial system exists in its current form, New York State should prosecute NYPD officers that commit crimes in the course of or for the purpose of making arrests. Officers that plant or doctor evidence should be prosecuted for evidence tampering. Officers that recklessly or intentionally physically injure civilians during the effectuation of an unauthorized arrest should be prosecuted for misdemeanor assault. Officers that sign criminal court complaints making accusations they know to be false should be prosecuted for filing a false written statement. And officers who lie in court to cover up for their misbehavior or that of fellow officers to get a person convicted of a crime, or to make unconstitutional searches and seizures seem constitutionally legitimate, should be prosecuted for perjury.

Because the borough district attorney offices cannot be trusted to consistently prosecute bad cops,⁴⁹¹ the State Attorney General's office should handle these types of prosecutions. The State Attorney General does not normally prosecute cases in the city, but the law grants them the authority to prosecute crimes in the state.⁴⁹² The State Attorney General should form a unit of prosecutors solely tasked with going after NYPD officers that commit crimes within this context; the unit should be able to prosecute NYPD officers effectively, because they are unlikely to have the symbiotic relationships with city officers that the borough district attorney offices have.⁴⁹³

Criminal law practitioners should be encouraged to refer bad officers to this unit for investigation and possible prosecution. Defense attorneys should be especially active in this regard, because judges and prosecutors in New York City would be far less likely to give police officers up for prosecution.⁴⁹⁴ This unit should conduct a thorough and earnest investigation of every complaint it receives and, if the evidence acquired during the investigation provides probable cause that the subject officers did commit criminal misconduct, the unit should prosecute those officers to the fullest extent of the law.

490. *See id.* ("Administrative and procedural changes do not address the inequality and systemic racism that got us to this point and may actually legitimize fundamentally unjust practices and institutions.").

491. *See supra* Part III.B.2.

492. Isaac G. Lara, *Shielded from Justice: How State Attorneys General Can Provide Structural Remedies to the Criminal Prosecutions of Police Officers*, 50 COLUM. J.L. & SOC. PROBS. 551, 569 (2017) (noting that "common law in New York already confers upon the New York Attorney General authority to bring charges against criminal defendants or intervene in criminal proceedings" and that the power generally has been interpreted to extend to all types of state crimes).

493. *See id.* at 555 (noting that District Attorneys frequently depend on law enforcement agencies for evidence and testimony, and that prosecutors tend to have very close personal relationships with police officers as a result); *see also* Hathaway, *supra* note 378, at 63 (noting that state attorneys general are likely to be more independent from, and therefore more effective at prosecuting, police).

494. *See supra* Parts III.B.2 and III.B.3.

V.
CONCLUSION

Too many NYPD officers engage in various wrongdoings in the course of arresting innocent persons. This is the most pressing criminal justice issue in New York City because the actions of police officers bear directly upon whether or not justice is administered, as conceived by the founders of this nation. It is also the most pressing racial justice issue, given how discriminatory both policing and the judicial system have historically been and still are. Thus, case-related police misconduct needs to be vigorously reined in if the interests of justice are to be fulfilled. Unfortunately, the opposite has occurred: the police department, the prosecution, the judiciary and the city government have all worked to shield NYPD officers from being held responsible for their wrongdoings.

Allowing case-related police misconduct to go unpunished makes a mockery of the American conception of justice in several ways. It can lead to the conviction of persons who did not actually commit the crimes they were charged with. Persons arrested falsely can have their liberty rights curtailed. Case-related police conduct can cause people to lose trust in the judicial system and possibly even turn to vigilantism as a means of providing justice for themselves. Unchecked police misconduct is antithetical to the aims of having an orderly and just society. Therefore, the State and City of New York must take firm action to tackle the problem.