

# THE PROSECUTOR-ORIENTED EXCLUSIONARY RULE

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# THE PROSECUTOR-ORIENTED EXCLUSIONARY RULE

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**Abstract:** The exclusionary rule has long been misunderstood. Scholars and judges perceive it as addressing police officers, warning them that evidence obtained in an unconstitutional search or seizure may be inadmissible in court. But officers typically care little about the ultimate conviction of suspects (as opposed to their arrest) and are therefore minimally deterred by possible suppression of evidence. Even when officers want to prevent suppression, they often do not know the complicated search and seizure rules and do not receive adequate training about them. This Article argues that the exclusionary rule's deterrent benefits can be better appreciated and realized when understanding the rule as directed primarily to prosecutors, not to police officers. As prosecutor-oriented, the rule promotes lawful policing indirectly, by stimulating prosecutors to proactively encourage local police to adhere to the law. Unlike police officers, prosecutors do fear for the fate of their criminal cases and are therefore motivated to prevent police wrongdoing that could jeopardize them. Prosecutors are also experts on the rules governing searches and seizures in their jurisdiction and know best how to avoid triggering the exclusionary rule. Finally, prosecutors can (and do) positively influence police behavior, despite their lack of formal authority over them. Although many prosecutors around the country have employed various methods to promote lawful policing, others have remained passive. To realize the full deterrent potential of the prosecutor-oriented exclusionary rule, this Article proposes a three-pronged approach consisting of measures grounded in doctrine, politics, and legal ethics.

## INTRODUCTION

The exclusionary rule is puzzling. For more than half a century, it has served as the criminal justice system's main deterrent to unconstitutional

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searches and seizures.<sup>1</sup> Yet scholars and judges doubt that it fulfills its desired purpose.<sup>2</sup> In theory, the rule is supposed to deter police officers from violating the Fourth Amendment, by warning them that the evidence they obtain may be inadmissible in court.<sup>3</sup> But in reality, police officers typically care little about the ultimate conviction of suspects (as opposed to their arrest) and therefore are often barely deterred by the possibility of suppression of evidence.<sup>4</sup> And even when officers do want to prevent suppression, they often do not know the very complicated rules governing searches and seizures, and do not receive proper training about them.<sup>5</sup> Distrusting the exclusionary rule's asserted deter-

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<sup>1</sup> See, e.g., *Utah v. Strieff*, 579 U.S. 232, 237 (2016) ("In the 20th century . . . the exclusionary rule . . . became the principal judicial remedy to deter Fourth Amendment violations."); Thomas P. Crocker, *The Fourth Amendment and the Problem of Social Cost*, 117 NW. U. L. REV. 473, 475–76 (2022) (describing the exclusionary rule as "the primary remedy for violations of the Fourth Amendment" since the 1960s).

<sup>2</sup> See *infra* notes 84–107 and accompanying text (discussing critiques of the exclusionary rule's asserted deterrent effect).

<sup>3</sup> See, e.g., *Elkins v. United States*, 364 U.S. 206, 217 (1960) (explaining that the exclusionary rule's "purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it"); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 349 (2006) ("We exclude the fruits of unreasonable searches on the theory that without a strong deterrent, the constraints of the Fourth Amendment might be too easily disregarded by law enforcement." (citing *Elkins*, 364 U.S. at 217)).

<sup>4</sup> See, e.g., Jonathan Abel, Essay, *Cops and Pleas: Police Officers' Influence on Plea Bargaining*, 126 YALE L.J. 1730, 1779 (2017) (arguing that "officers act on the street without considering what those actions will do to their cases in court," and that therefore "the threat of excluding evidence in the case is no threat at all"); Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1625 (2012) ("Police care about arrests, not convictions."); Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 600–07 (2011) (contending that the ultimate result of a criminal case is often not police officers' top priority and that therefore the exclusionary rule is unlikely to deter them); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 377–78 (arguing that "the objective of police who conduct searches is, first and foremost, evidence to support an arrest, not a conviction"); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 220 (2011) ("[S]uppression of illegally seized evidence is a particularly poor sanction to apply to the police, because police officers lose nothing when evidence is excluded at defendants' trials."); cf. Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 795 (2012) (claiming that "[t]he exclusionary rule cannot work if officers do not care about securing convictions"). As scholars have explained, the professional performance of police tends to be measured by their success in arresting suspects and ignores the question of whether the suspects were ultimately convicted. See, e.g., Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 792–93 (1970); Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 877–78 (2014).

<sup>5</sup> See, e.g., *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 417 (1971) (Burger, C.J., dissenting) (explaining that the exclusionary rule is unlikely to have a significant positive effect on police conduct because "[p]olicemen do not have the time, inclination, or training to read and grasp the nuances of the appellate opinions that ultimately define the standards of conduct they are to follow"); Jacobi, *supra* note 4, at 600–01 (claiming that the exclusionary rule's deterrent potential is highly limited because police officers do not understand the complicated search and seizure rules); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 731 (1970) ("At the very least it can be said that in terms of the complexity of the rules,

rent benefits, the U.S. Supreme Court has gradually restricted its application,<sup>6</sup> and some Justices have even signaled that the rule should be reconsidered altogether.<sup>7</sup> Notably, the Court has contrasted the questionable deterrent benefits of the exclusionary rule in various situations with its considerable costs to society, particularly the possible release of factually guilty (and sometimes dangerous) criminal defendants.<sup>8</sup>

This Article argues that the exclusionary rule has long been misunderstood. Both scholars and judges generally perceive the exclusionary rule as addressing the police, threatening them directly with suppression of the fruits of their wrongdoing.<sup>9</sup> Yet the rule's deterrent benefits can be better appreciated and realized when understanding the rule as addressed primarily to prosecutors, not to police officers. As prosecutor-oriented, the exclusionary rule promotes lawful policing indirectly, by prompting prosecutors to step in and pro-

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the area of arrest and search and seizure is not a favorable one for a deterrent sanction to be effective.”).

<sup>6</sup> See, e.g., Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2505–27 (1996) (describing the gradual curtailment of the exclusionary rule by the Supreme Court); ERWIN CHEMERINSKY, *PRESUMED GUILTY: HOW THE SUPREME COURT EMPOWERED THE POLICE AND SUBVERTED CIVIL RIGHTS* 184–90, 243–48 (2021) (same).

<sup>7</sup> In 2018, Justice Thomas shared his “serious doubts about th[e] Court’s authority to impose [the exclusionary] rule on the States.” *Collins v. Virginia*, 584 U.S. 586, 601 (2018) (Thomas, J., concurring). He also mentioned “the lack of evidence supporting [the rule’s] deterrent effect.” *Id.* at 609 n.6. Some scholars argue that the Supreme Court may revoke the exclusionary rule in the very near future. See, e.g., Kent Roach, *A World Rich in Rights but Poor in Remedies*, 19 J.L. & EQUAL. 71, 77 (2022) (book review) (arguing that “[t]he United States Supreme Court is likely in the next decade to abolish the exclusionary rule”); Scott W. Howe, *A Sixth Amendment Inclusionary Rule for Fourth Amendment Violations*, 54 CONN. L. REV. 613, 622–23 (2022) (contending that the Supreme Court’s “six-Justice majority appointed by conservative presidents . . . might well be prepared to abolish the exclusionary rule entirely”).

<sup>8</sup> See, e.g., *United States v. Janis*, 428 U.S. 433, 446–54 (1976); *Hudson v. Michigan*, 547 U.S. 586, 591, 594–99 (2006); *Davis v. United States*, 564 U.S. 229, 237–38 (2011); *Collins*, 584 U.S. at 606 n.4, 609 n.6 (Thomas, J., concurring).

<sup>9</sup> See, e.g., *Illinois v. Krull*, 480 U.S. 340, 348 (1987) (“[T]he purpose of the exclusionary rule is to deter police officers from violating the Fourth Amendment . . . .”); *Stone v. Powell*, 428 U.S. 465, 492 (1976) (explaining that “[d]espite the absence of supportive empirical evidence,” the Supreme Court’s assumption has been “that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment”); *Bivens*, 403 U.S. at 413 (Burger, C.J., dissenting) (“The [exclusionary] rule has rested on a theory that suppression of evidence . . . was imperative to deter law enforcement authorities from using improper methods to obtain evidence.”); *Linkletter v. Walker*, 381 U.S. 618, 648–49 (1965) (Black, J., dissenting) (“[The Court states] that the purpose of that rule is to deter sheriffs, policemen, and other law officers from making unlawful searches and seizures.”); Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 52 (explaining that the exclusionary rule is hailed by scholars and judges as being “the only sanction that will deter the police from violating the Fourth Amendment”); Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1083 (2011) (describing the prevalent perception of the exclusionary rule as addressed to police officers).

actively encourage local police to adhere to the law.<sup>10</sup> Unlike police officers, prosecutors do fear for the fate of their criminal cases and are therefore motivated to prevent police wrongdoing that could jeopardize the admissibility of incriminating evidence.<sup>11</sup> Prosecutors are also equipped with unique expertise on the rules governing searches and seizures in their jurisdiction and know best how to avoid triggering the exclusionary rule.<sup>12</sup> These unique qualities place prosecutors in a prime position to counter constitutional violations by local police.

To propose that the exclusionary rule's true power lies in its appeal to prosecutors is to challenge the thrust of the rich literature about the rule.<sup>13</sup> Yet this basic insight can surprisingly be traced back several decades. Justice Murphy's dissent in the 1949 Supreme Court decision in *Wolf v. Colorado*<sup>14</sup> explained that the exclusionary rule is an effective deterrent precisely because it motivates *prosecutors* to fight police wrongdoing.<sup>15</sup>

But Justice Murphy's historic account of the exclusionary rule as prosecutor-oriented has long been overlooked.<sup>16</sup> Instead, some of the country's leading scholars and judges have insisted that prosecutors are incapable of bringing about a positive change in police behavior. According to them, prosecutors have no authority over the conduct of police officers, and therefore their efforts to prevent police wrongdoing are doomed to fail.<sup>17</sup> Prosecutors themselves are

<sup>10</sup> See *infra* notes 270–319 and accompanying text (discussing methods that prosecutors can use to influence police behavior).

<sup>11</sup> See *infra* notes 222–247 and accompanying text (describing prosecutors' motivation to prevent the suppression of unlawfully obtained evidence).

<sup>12</sup> See *infra* notes 248–261 and accompanying text (discussing prosecutors' expertise on the rules governing searches and seizures).

<sup>13</sup> The very few scholars who suggested that the exclusionary rule's deterrent benefits are achieved primarily through prosecutorial influence did so in passing. See, e.g., Yale Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories,"* 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 171, 179 (1962) (noting that although police officers may not be concerned over the possibility of suppression of evidence, "there are jurisdictions where *somebody up there*—the attorney general or the district attorney or the chief of police—cares enough to make the average policeman care too"); DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 246–47 (1977) (suggesting that prosecutors who dismiss cases due to their fear of judicial suppression of evidence can most effectively promote lawful policing by clarifying to the relevant officers their reasons for dismissing said cases).

<sup>14</sup> 338 U.S. 25 (1949), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>15</sup> *Id.* at 44 (Murphy, J., dissenting); see also *infra* notes 167–184 and accompanying text (discussing Justice Murphy's dissent at length).

<sup>16</sup> To the best of my knowledge, for more than forty years neither the Supreme Court nor lower courts have addressed Justice Murphy's description of the exclusionary rule as prosecutor-oriented.

<sup>17</sup> Chief Justice Burger was perhaps the most prominent promoter of the argument that the independent functioning of prosecutors and the police prevents prosecutors from helping to curb police misconduct. See Warren E. Burger, *Who Will Watch the Watchman?*, 14 AM. U. L. REV. 1, 12–13 (1964); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 417 (1971) (Burger, C.J., dissenting). Other commentators have agreed. See, e.g., Oaks, *supra* note 5, at 726 (noting that prosecutors cannot promote lawful policing effectively because they have no authority over police officers); Michael Katz, *The Supreme Court and the States: An Inquiry into Mapp v. Ohio in*

also oftentimes skeptical about their ability to tackle police misconduct without formal authority.<sup>18</sup> For instance, addressing his responsibility for the New York Police Department's years-long practice of unconstitutional stops and frisks,<sup>19</sup> Brooklyn District Attorney Charles Hynes suggested that there was not much he could do.<sup>20</sup> He argued that even as the district attorney, "you have no control over police policy."<sup>21</sup> District attorneys of other boroughs in New York City took a similarly hands-off approach.<sup>22</sup>

That the police operate independently of and separately from state and local prosecutors' offices is indeed an attribute of the American criminal justice system.<sup>23</sup> As Chief Justice Burger commented, "[p]rosecutors do not run the police department any more than the police control the prosecution of cases."<sup>24</sup> This

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*North Carolina. The Model, the Study and the Implications*, 45 N.C. L. REV. 119, 141 (1966) (same); L. Timothy Perrin, H. Mitchell Caldwell, Carol A. Chase & Ronald W. Fagan, *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule: A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule*, 83 IOWA L. REV. 669, 675–76 (1998) (same); see also *infra* notes 185–218 and accompanying text (discussing the critique that prosecutors cannot bring about positive change in police behavior); cf. Bar-Gill & Friedman, *supra* note 4, at 1626 (arguing that prosecutors are unlikely to attempt to prevent police misconduct, as "police and prosecutors often behave as though they work for different entities, rather than being the obvious assembly line from street to prison that they are").

<sup>18</sup> See, e.g., *Myths vs. Facts*, OR. DIST. ATT'YS ASS'N, <https://www.oregonda.org/myths-vs-facts-long> [<https://perma.cc/9BMZ-LNTF>] ("While [prosecutors] prosecute violations of the law, they do not control the police . . ."); Gordon P. McLaughlin: *Larimer County District Attorney*, LARIMER CNTY., <https://www.larimer.gov/elected-officials/district-attorney> [<https://perma.cc/P4WN-WAXN>] (stating that the district attorney cannot "tell the police . . . what to do" because of the lack of official control over them); *Letters to the Editor—Richard Miles Act, County Lines, Voting Rights, Democracy, Post Office*, DALL. MORNING NEWS (Oct. 22, 2021), <https://www.dallasnews.com/opinion/letters-to-the-editor/2021/10/22/letters-to-the-editor-richard-miles-act-county-lines-voting-rights-democracy-post-office> [<https://perma.cc/6FLY-9NHZ>] (asserting that "prosecutors, contrary to popular belief, have no authority over police").

<sup>19</sup> See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 658, 660 (S.D.N.Y. 2013) (ruling that the New York Police Department engaged in a years-long practice of racially discriminatory and unconstitutional stops and frisks).

<sup>20</sup> See Charisma L. Miller, *Hynes, Thompson Square Off in Debate at St. Francis College*, BROOKLYN DAILY EAGLE (Aug. 15, 2013), <https://brooklyneagle.com/articles/2013/08/15/hynes-thompson-square-off-in-debate-at-st-francis-college> [<https://perma.cc/4ZKV-JD2L>].

<sup>21</sup> *Id.*

<sup>22</sup> See, e.g., Bruce Green, Essay, *Urban Policing and Public Policy—The Prosecutor's Role*, 51 GA. L. REV. 1179, 1180 (2017) (describing the public silence from most of New York City's district attorneys regarding the police's unconstitutional stop and frisk practice).

<sup>23</sup> See, e.g., *id.* at 1191; David A. Harris, *The Interaction and Relationship Between Prosecutors and Police Officers in the United States, and How This Affects Police Reform Efforts*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* 54, 54–57 (Erik Luna & Marianne L. Wade eds., 2012); Daniel C. Richman, *Law Enforcement Organization Relationships with Prosecutors*, in *THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION* 291, 292 (Ronald F. Wright, Kay L. Levine & Russell M. Gold eds., 2021).

<sup>24</sup> Burger, *supra* note 17, at 13. The independence of prosecutors and law enforcement agencies from each other is also common in the federal system. As Daniel Richman explained, "[e]ven within

Article argues, however, that formal prosecutorial control is not necessary for effective prevention of police misconduct. Through the development of personal and institutional collaboration and mutual trust, prosecutors around the country have successfully promoted lawful policing in their jurisdictions.<sup>25</sup> They have done so, for example, by training police officers on search and seizure law, providing legal counseling and advice to local police, bringing attention to illegal practices or problematic officers, and explaining judicial suppression rulings or prosecutorial dismissal decisions to the officers who caused them.<sup>26</sup>

Although some prosecutors' offices have proactively encouraged police compliance with the Constitution, other offices have not.<sup>27</sup> This reluctance can be explained by a number of factors: funding and personnel shortages, the concern over losing absolute prosecutorial immunity, fear of compromising the relationship with local police, and the perception that tackling police wrongdoing is simply beyond a prosecutor's job description.<sup>28</sup>

In examining potential solutions for prevalent prosecutorial passivity, this Article rules out budget increases and broadening absolute immunity, as neither is helpful or advisable.<sup>29</sup> It proposes instead a three-pronged approach consisting of measures grounded in doctrine, politics, and legal ethics. First, the Supreme Court should modify the good faith exception to the exclusionary rule, such that its application would be conditioned upon prosecutors' proactivity in their relationship with the police. Under current doctrine, evidence obtained by police in good faith reliance on a search warrant will not be suppressed even if the warrant is subsequently invalidated (for example, because the warrant application submitted by the police turned out to be lacking).<sup>30</sup> Instead, shielding such evidence from suppression should depend on prior efforts made by prosecutors to ensure that police complied with the law.<sup>31</sup>

Second, as most district attorneys in the United States are elected,<sup>32</sup> their constituents should use their political leverage to inquire into the local prose-

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the Justice Department, special agents . . . report not to prosecutors, but to other agency officials, with only the Attorney General and Deputy Attorney General exercising (or at least possessing) hierarchical authority over them." Daniel C. Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 756 (2003).

<sup>25</sup> See *infra* notes 262–269 and accompanying text (arguing that prosecutors can positively influence police conduct).

<sup>26</sup> See *infra* notes 270–319 and accompanying text.

<sup>27</sup> See *infra* notes 320–335 and accompanying text.

<sup>28</sup> See *infra* notes 329–335 and accompanying text.

<sup>29</sup> See *infra* notes 342–360 and accompanying text.

<sup>30</sup> See *United States v. Leon*, 468 U.S. 897, 913 (1984).

<sup>31</sup> See *infra* notes 365–385 and accompanying text.

<sup>32</sup> See, e.g., ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 166 (2007) ("At the county and municipal level, more than 95 percent of the chief prosecutors are elected.").

cutor's office's efforts to promote lawful policing and call for more action if necessary. Voters with divergent views and values can have a shared interest in reducing police misconduct, whether as an end in itself or as a means to minimize the risk to criminal prosecutions. By signaling to their district attorney that this issue is important to them and that it could be a factor in their electoral decision, voters can effectively influence the prosecutor's office's policy.<sup>33</sup>

Third, district attorneys should be ethically required to inform the public periodically about the steps taken by their offices to promote lawful policing. Such a requirement would not only increase transparency, but also provide an opportunity for district attorneys to monitor their offices' progress on this matter.<sup>34</sup>

Together and apart, these three proposed measures can be expected to create a strong incentive for district attorneys and their prosecutors to proactively prevent police misconduct.

The Article proceeds in three parts. Part I describes the common perception of the exclusionary rule as directed to the police and presents arguments against this view.<sup>35</sup> Part II recounts the forgotten narrative of the exclusionary rule as prosecutor-oriented and explains why the rule indeed places prosecutors in the best position to encourage lawful policing.<sup>36</sup> Part III discusses possible ways to bolster the deterrent benefits of the prosecutor-oriented exclusionary rule in order to realize its full potential.<sup>37</sup>

## I. SUPPRESSING EVIDENCE TO DETER POLICE MISCONDUCT: EVOLUTION AND CRITIQUE

This Part briefly introduces the case law and debate concerning the exclusionary rule's deterrent effect. Section A discusses how the Supreme Court has continuously held that the exclusionary rule serves no purpose beyond deterring constitutional violations by the police.<sup>38</sup> Section B discusses grave doubts surrounding the rule's asserted deterrent benefits.<sup>39</sup> Section C describes how these doubts have led the Court to gradually restrict the rule's application and to even question its necessity altogether.<sup>40</sup>

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<sup>33</sup> See *infra* notes 386–400 and accompanying text.

<sup>34</sup> See *infra* notes 401–419 and accompanying text.

<sup>35</sup> See *infra* notes 38–147 and accompanying text.

<sup>36</sup> See *infra* notes 148–335 and accompanying text.

<sup>37</sup> See *infra* notes 336–419 and accompanying text.

<sup>38</sup> See *infra* notes 41–72 and accompanying text.

<sup>39</sup> See *infra* notes 73–107 and accompanying text.

<sup>40</sup> See *infra* notes 108–147 and accompanying text.

### A. Deterrence of Police Misconduct as the Exclusionary Rule's Lone Justification

Deterrence of police misconduct has long been the focal point of the Fourth Amendment exclusionary rule.<sup>41</sup> The logic of the rule, according to the Supreme Court, is simple: police officers are more likely to avoid unconstitutional searches and seizures if the evidence they obtain may be inadmissible in court.<sup>42</sup> As the Court noted in 2006 in *Sanchez-Llamas v. Oregon*, “[w]e exclude the fruits of unreasonable searches on the theory that without a strong deterrent, the constraints of the Fourth Amendment might be too easily disregarded by law enforcement.”<sup>43</sup>

The Court views deterrence of police wrongdoing as so central to the exclusionary rule that it now considers it to be the rule’s “sole purpose.”<sup>44</sup> But it has not always been this way. In fact, deterrence of police misconduct did not play any role (at least not formally) in the creation of the exclusionary rule by the Supreme Court, or in its application over the following thirty-five years.<sup>45</sup> In 1914, when the Court first decided that evidence obtained by federal officials in violation of the Fourth Amendment was inadmissible in federal courts,<sup>46</sup> it did so because it viewed this as a necessary step to provide meaning to the Fourth Amendment.<sup>47</sup> In the words of the Court, “[i]f letters and private documents can . . . be seized and held and used in evidence against a citizen

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<sup>41</sup> See, e.g., *United States v. Calandra*, 414 U.S. 338, 347–48 (1974) (“[T]he rule’s prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.” (citing *Elkins v. United States*, 364 U.S. 206, 217 (1960))); *United States v. Leon*, 468 U.S. 897, 906 (1984) (quoting *Calandra*, 414 U.S. at 348) (discussing the exclusionary rule’s deterrent purpose); *Arizona v. Evans*, 514 U.S. 1, 10–11 (1995) (“The exclusionary rule operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule’s general deterrent effect.” (first citing *Leon*, 468 U.S. at 906; and then citing *Calandra*, 414 U.S. at 348)); *Herring v. United States*, 555 U.S. 135, 141 (2009) (“[W]e have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future.” (first citing *Calandra*, 414 U.S. at 347–55; and then citing *Stone v. Powell*, 428 U.S. 465, 486 (1976))).

<sup>42</sup> See, e.g., *Elkins*, 364 U.S. at 217 (stating that the exclusionary rule’s “purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it”).

<sup>43</sup> 548 U.S. 331, 349 (2006) (citing *Elkins*, 364 U.S. at 217).

<sup>44</sup> *Davis v. United States*, 564 U.S. 229, 236–37 (2011); see also *Lange v. California*, 141 S. Ct. 2011, 2027 (2021) (Thomas, J., concurring in part and concurring in the judgment) (“[W]e have said time and again that the *sole* factor courts can consider is ‘deter[ring] misconduct by law enforcement.’” (quoting *Davis*, 564 U.S. at 246)).

<sup>45</sup> See, e.g., Yale Kamisar, Mapp v. Ohio: *The First Shot Fired in the Warren Court’s Criminal Procedure “Revolution,”* in *CRIMINAL PROCEDURE STORIES* 45, 54–55 (Carol S. Steiker ed., 2006) (discussing the absence of the deterrence rationale from the early history of the exclusionary rule).

<sup>46</sup> *Weeks v. United States*, 232 U.S. 383 (1914), overruled in part by *Elkins*, 364 U.S. 206.

<sup>47</sup> See, e.g., TRACEY MACLIN, *THE SUPREME COURT AND THE FOURTH AMENDMENT’S EXCLUSIONARY RULE* 12–13 (2012).

accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value."<sup>48</sup> Unlawfully obtained evidence was therefore suppressed not to discourage Fourth Amendment violations, but rather because the Fourth Amendment was perceived to inherently include and justify protection from criminal convictions based on such evidence.<sup>49</sup>

It was not until 1949 that the Supreme Court, in *Wolf v. Colorado* (now-overturned),<sup>50</sup> first took the opportunity to invoke deterrence of police misconduct as a purpose of the exclusionary rule.<sup>51</sup> In *Wolf*, the Court famously decided that unlike federal courts, state courts are not constitutionally required to suppress evidence seized in an unconstitutional search or seizure.<sup>52</sup> States, the Court explained, are free to choose other remedies that can deter police officers from conducting unlawful searches and seizures.<sup>53</sup> Civil suits or disciplinary sanctions against the police officers who violated the Constitution, for example, could be proven to be at least as effective as suppression of evidence.<sup>54</sup> Either way, the Court concluded, the Constitution does not require that states deter unlawful searches and seizures specifically by suppressing their fruits.<sup>55</sup> As scholars noted, *Wolf* was the first to "inject[] deterrence into the calculus" for the decision whether unlawfully obtained evidence should be suppressed in court.<sup>56</sup> From that point on, deterrence of police misconduct and the exclusionary rule became almost synonymous.

The Supreme Court emphasized the centrality of the deterrence rationale more explicitly in 1960 in *Elkins v. United States*, when it declared that the exclusionary rule's "purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."<sup>57</sup> In 1961, at the beginning of its "criminal procedure revolution,"<sup>58</sup> the Supreme Court in *Mapp v. Ohio*<sup>59</sup> finally overturned *Wolf* and

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<sup>48</sup> *Weeks*, 232 U.S. at 393.

<sup>49</sup> See, e.g., James Boyd White, *Forgotten Points in the "Exclusionary Rule" Debate*, 81 MICH. L. REV. 1273, 1277–78 (1983) (explaining that the Court considered suppression to be integral to the constitutional protection afforded by the Fourth Amendment).

<sup>50</sup> 338 U.S. 25 (1949), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>51</sup> *Id.* at 31–32.

<sup>52</sup> *Id.* at 33.

<sup>53</sup> *Id.* at 31–32.

<sup>54</sup> *Id.* at 30–32.

<sup>55</sup> *Id.* at 33.

<sup>56</sup> MACLIN, *supra* note 47, at 40–42; see also Robert B. McKay, *Mapp v. Ohio, the Exclusionary Rule and the Right of Privacy*, 15 ARIZ. L. REV. 327, 330 (1973) ("*Wolf* introduced the notion of deterrence of official illegality to the debate concerning the wisdom of the exclusionary rule.").

<sup>57</sup> 364 U.S. 206, 217 (1960).

<sup>58</sup> See, e.g., Kamisar, *supra* note 45, at 45 (asserting that *Mapp* "is generally regarded as having launched the so-called criminal procedure revolution").

<sup>59</sup> 367 U.S. 643 (1961).

extended the exclusionary rule to the states.<sup>60</sup> In this historic decision, the Court stressed again the importance of the exclusionary rule as a deterrent,<sup>61</sup> while reasoning that alternative remedies were proven in some states to “have been worthless and futile.”<sup>62</sup>

To bolster the preeminence of the deterrence rationale, the Court has rejected other possible purposes or justifications over the years.<sup>63</sup> Most importantly, the Court rejected the contention that suppression of unconstitutionally obtained evidence is justified as a form of compensation for those harmed by police misconduct.<sup>64</sup> It also denied that suppression is required to protect courts from being accused of tolerating unlawful searches and seizures by admitting their fruits.<sup>65</sup> Today, as mentioned above, the Court views the exclusionary rule as serving no other purpose but deterrence.<sup>66</sup>

The Court has also emphasized that the exclusionary rule’s deterrent effect is solely directed at law enforcement officers<sup>67</sup> or individuals “adjunct[] to the law enforcement team.”<sup>68</sup> According to the Court, the rule is therefore not meant to deter mistakes or wrongdoing by professionals who do not fall into these categories.<sup>69</sup> For instance, the rule is not supposed to discourage court clerks from making recordkeeping mistakes or magistrates from erroneously issuing insufficiently supported search warrants.<sup>70</sup> This is the case despite the potential for such mistakes to result in unlawful searches or seizures by police. These professionals, per the Court, “have no stake in the outcome of particular criminal prosecutions,” unlike law enforcement officers and their adjuncts.<sup>71</sup> Therefore, ac-

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<sup>60</sup> *Id.* at 655 (holding that “all evidence obtained by searches and seizures in violation of the Constitution is [also] inadmissible in a state court”).

<sup>61</sup> *Id.* at 656.

<sup>62</sup> *Id.* at 652.

<sup>63</sup> See *infra* notes 64–65 and accompanying text (discussing these justifications in turn).

<sup>64</sup> See, e.g., *Elkins v. United States*, 364 U.S. 206, 217 (1960) (“The [exclusionary] rule is calculated to prevent, not to repair.”); *United States v. Calandra*, 414 U.S. 338, 347 (1974) (“The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim.” (citing *Linkletter v. Walker*, 381 U.S. 618, 637 (1965))); *Stone v. Powell*, 428 U.S. 465, 486 (1976) (“[The exclusionary rule] is not calculated to redress the injury to the privacy of the victim of the search or seizure, for any ‘[r]eparation comes too late.’” (quoting *Linkletter*, 381 U.S. at 637))).

<sup>65</sup> See, e.g., *Stone*, 428 U.S. at 485; *United States v. Leon*, 468 U.S. 897, 921 n.22 (1984).

<sup>66</sup> See *supra* note 44 and accompanying text (discussing the Supreme Court’s view of deterrence as the exclusionary rule’s lone justification).

<sup>67</sup> See sources cited *supra* note 9.

<sup>68</sup> *Arizona v. Evans*, 514 U.S. 1, 15 (1995).

<sup>69</sup> See, e.g., *Illinois v. Krull*, 480 U.S. 340, 350 (1987) (“[T]he exclusionary rule was aimed at deterring police misconduct. Thus, legislators, like judicial officers, are not the focus of the rule.” (citation omitted)).

<sup>70</sup> See *Evans*, 514 U.S. at 15 (declining to apply the exclusionary rule to deter court clerks from making recordkeeping mistakes); *Leon*, 468 U.S. at 915–17 (declining to apply the exclusionary rule to deter magistrates from issuing insufficiently supported search warrants).

<sup>71</sup> *Evans*, 514 U.S. at 15; *Leon*, 468 U.S. at 917.

cording to the Court, the possibility of suppression of unlawfully obtained evidence is unlikely to affect their motivation to comply with the Constitution.<sup>72</sup>

### *B. Critiques of the Exclusionary Rule's Asserted Deterrent Effect*

Hardly anyone thinks that the exclusionary rule is perfect. After all, suppression of unconstitutionally seized evidence can result in the release of factually guilty (and sometimes dangerous) criminal defendants.<sup>73</sup> As many scholars have noted, this social cost is oftentimes disproportionately higher than the harm entailed by police misconduct.<sup>74</sup> The windfall for criminal defendants—namely, their possible impunity—is often viewed as excessive.<sup>75</sup> Much of the disagreement over the exclusionary rule, since its inception, has therefore addressed whether vindication of Fourth Amendment rights justifies the rule's significant social toll.<sup>76</sup>

The Supreme Court's growing insistence on deterrence of police misconduct as the bedrock of the exclusionary rule has inevitably pivoted this debate.<sup>77</sup> Like the Court, legal scholars have increasingly evaluated the rule's justifiability and desirability primarily based on its success in deterring police misconduct.<sup>78</sup> A main point of disagreement has therefore centered around a

<sup>72</sup> See, e.g., *Evans*, 514 U.S. at 15.

<sup>73</sup> See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) ("The exclusionary rule generates 'substantial social costs,' which sometimes include setting the guilty free and the dangerous at large." (citation omitted)); *Davis v. United States*, 564 U.S. 229, 237 (2011) (explaining that the exclusionary rule's "bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment").

<sup>74</sup> See, e.g., Francis A. Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 36; Posner, *supra* note 9, at 56.

<sup>75</sup> See, e.g., Posner, *supra* note 9, at 70; William A. Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L.J. 1361, 1384–85 (1981); John Stanfield Buford, Note, *When the Heck Does This Claim Accrue?: Heck v. Humphrey's Footnote Seven and § 1983 Damages Suits for Illegal Search and Seizure*, 58 WASH. & LEE L. REV. 1493, 1501 (2001). But see Guy Rubinstein, *The Influence of Proportionality in Private Law on Remedies in American Constitutional Criminal Procedure* (claiming that deterrents alternative to the exclusionary rule, such as monetary damages or sentence reduction, would also oftentimes result in an excessive windfall for victims of Fourth Amendment violations), in PROPORTIONALITY IN PRIVATE LAW 201, 217 (Franz Bauer & Ben Köhler eds., 2023).

<sup>76</sup> See, e.g., HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 167–68, 177–78 (1968) (describing two contradictory approaches concerning the question of whether the exclusionary rule's social toll is justified to vindicate individual rights).

<sup>77</sup> See, e.g., MACLIN, *supra* note 47, at 40 ("By separating the exclusionary rule and the Fourth Amendment, doubting the rule's legitimacy, and declaring deterrence as the purpose for the rule, [Justice] Frankfurter set the terms for future debate on the merits of the rule.").

<sup>78</sup> See, e.g., Stoughton, *supra* note 4, at 876 (describing the rich scholarship debating the productiveness of the exclusionary rule as a deterrent); Bryan D. Lammon, Note, *The Practical Mandates of the Fourth Amendment: A Behavioral Argument for the Exclusionary Rule and Warrant Preference*, 85 WASH. U. L. REV. 1101, 1113 (2007) (noting that "[t]he merit of the exclusionary rule has been at the center of much of the Fourth Amendment debate, with deterrence often the focus").

basic question: how effective is the exclusionary rule as a disincentive for police wrongdoing?<sup>79</sup>

The two sides of the debate are not equally enthusiastic. Even the greatest proponents of the exclusionary rule agree that the rule is, at most, “the best we can realistically do” to deter unlawful searches and seizures.<sup>80</sup> Conversely, the criticism against the exclusionary rule as an effective deterrent is fierce. Critics of the exclusionary rule contend, in essence, that it does not and cannot effectively deter police officers from violating the Fourth Amendment.<sup>81</sup> This Section discusses two repeatedly raised arguments. Subsection 1 first examines the argument that the exclusionary rule does not affect police officers’ behavior because officers often care little about suppression of evidence.<sup>82</sup> Subsection 2 discusses the argument that the rules pertaining to searches and seizures are so complex that police officers cannot reasonably be expected to learn them on their own.<sup>83</sup>

### 1. Police Officers Often Care Little About Suppression of Evidence

Critics argue that contrary to the exclusionary rule’s underlying assumption,<sup>84</sup> police officers do not usually conduct searches or seizures—lawful or not—to obtain incriminating evidence that would lead to convictions.<sup>85</sup> Rather, they normally have other goals in mind.<sup>86</sup> For example, it is often claimed that police officers’ most important goal and the standard by which their professional performance is evaluated is their success in securing the arrest of a sus-

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<sup>79</sup> See, e.g., Stoughton, *supra* note 4, at 876 (arguing that an “intense” scholarship “has contested that the suppression of evidence and the corresponding elimination or reduction of the possibility of conviction can deter police misconduct” (citing Kenneth W. Starr & Audrey L. Maness, *Reasonable Remedies and (or?) the Exclusionary Rule*, 43 TEX. TECH L. REV. 373, 379–80 (2010))).

<sup>80</sup> Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 848 (1994); see also Darryl K. Brown, *The Warren Court, Criminal Procedure Reform, and Retributive Punishment*, 59 WASH. & LEE L. REV. 1411, 1426 (2002) (“*Mapp*’s exclusionary rule is far from an effective (or even consistently enforced) deterrent of [f] illegal searches, but the ensuing four decades have not yielded strong arguments for a better alternative.”).

<sup>81</sup> See *infra* notes 84–107 and accompanying text.

<sup>82</sup> See *infra* notes 84–99 and accompanying text.

<sup>83</sup> See *infra* notes 100–107 and accompanying text.

<sup>84</sup> See *supra* notes 3, 42–43 and accompanying text.

<sup>85</sup> See, e.g., Abel, *supra* note 4, at 1779; Bar-Gill & Friedman, *supra* note 4, at 1625; Jacobi, *supra* note 4, at 600–07; Slobogin, *supra* note 4, at 377–78; Stoughton, *supra* note 4, at 877–82; Michael D. Cicchini, *An Economics Perspective on the Exclusionary Rule and Deterrence*, 75 MO. L. REV. 459, 479 (2010).

<sup>86</sup> Of course, some police officers, in some cases (especially those involving very serious crimes), do care more about convictions. See, e.g., Stoughton, *supra* note 4, at 878 (“[I]nvestigators and detectives, particularly those in high-profile units like homicide or sex crimes or in heavily publicized cases, may follow postarrest dispositions more closely than uniformed patrol officers.” (footnote omitted)). However, “[t]his observation does little to support the general deterrent value of the exclusionary rule.” *Id.*

pect—not the conviction.<sup>87</sup> The literature recognized as early as in 1970 that “police departments almost invariably measure their own efficiency in terms of ‘clearances by arrest,’” rather than conviction.<sup>88</sup> More recent literature demonstrates that this observation still holds water today.<sup>89</sup>

Other goals police officers may have are protecting public safety by impounding illegal weapons or drugs,<sup>90</sup> temporarily incapacitating dangerous individuals (such as drunk drivers) and others they consider unwelcome (such as sex workers),<sup>91</sup> and demonstrating “aggressive policing” in order to scare off potential offenders.<sup>92</sup> Harassing individuals may also be a goal of some officers, whether because they believe it serves a concrete law enforcement purpose or because they wrongly enjoy it.<sup>93</sup>

Police officers are systematically encouraged by their departments to fight crime without regard to whether or not suspects are ultimately convicted. As former police officer and current scholar Seth Stoughton found, “[o]fficer evaluation forms used by both large and small police departments do not mention, let alone put weight on, convictions, though most include some evaluation of arrests.”<sup>94</sup> Many officers are even advised by peers not to keep track of cases they were involved in, and that their work ends when the arrest is complete.<sup>95</sup> The exclusionary rule, critics convincingly argue, would not help deter police violations conducted for reasons that are unrelated to the conviction of criminal defendants.<sup>96</sup> Notably, even Chief Justice Warren—the champion of the criminal procedure revolution—was responsive to this claim toward the end of his tenure on the bench.<sup>97</sup> In 1968, in *Terry v. Ohio*,<sup>98</sup> the Chief Justice conceded that the exclusionary rule fails as a deterrent “where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.”<sup>99</sup>

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<sup>87</sup> See, e.g., Abel, *supra* note 4, at 1781; Bar-Gill & Friedman, *supra* note 4, at 1625; Jacobi, *supra* note 4, at 600–05; Slobogin, *supra* note 4, at 377–78.

<sup>88</sup> Amsterdam, *supra* note 4, at 793.

<sup>89</sup> See, e.g., Stoughton, *supra* note 4, at 877–82 (describing police departments’ and officers’ limited interest in convictions and greater interest in arrests).

<sup>90</sup> See, e.g., Oaks, *supra* note 5, at 721–22; Jacobi, *supra* note 4, at 603, 605.

<sup>91</sup> See, e.g., Oaks, *supra* note 5, at 721–22.

<sup>92</sup> See, e.g., Jacobi, *supra* note 4, at 602.

<sup>93</sup> See, e.g., *id.* at 602–06.

<sup>94</sup> Stoughton, *supra* note 4, at 877.

<sup>95</sup> *Id.* at 879–81.

<sup>96</sup> See, e.g., Harmon, *supra* note 4, at 795; Posner, *supra* note 9, at 54; Oaks, *supra* note 5, at 720–22; Bar-Gill & Friedman, *supra* note 4, at 1625; Jacobi, *supra* note 4, at 600–07; Stoughton, *supra* note 4, at 882; Cicchini, *supra* note 85, at 479; Tracey Maclin, *Terry v. Ohio’s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN’S L. REV. 1271, 1313 (1998).

<sup>97</sup> See *Terry v. Ohio*, 392 U.S. 1, 13–14 (1968).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

## 2. Police Officers Do Not Fully Understand Search and Seizure Law

Critics claim that police officers are neither well-versed in the highly intricate law that they must follow to avoid suppression, nor can they be expected to learn it on their own.<sup>100</sup> This line of critique was summarized in 1971 by Chief Justice Burger in his famous dissent in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*:

Whatever educational effect the [exclusionary] rule conceivably might have in theory is greatly diminished in fact by the realities of law enforcement work. Policemen do not have the time, inclination, or training to read and grasp the nuances of the appellate opinions that ultimately define the standards of conduct they are to follow. The issues that these decisions resolve often admit of neither easy nor obvious answers, as sharply divided courts on what is or is not ‘reasonable’ amply demonstrate. Nor can judges, in all candor, forget that opinions sometimes lack helpful clarity.<sup>101</sup>

The law governing searches and seizures is indeed “notoriously complex.”<sup>102</sup> In his classic article about the Fourth Amendment, Professor Anthony Amsterdam diplomatically referred to the law as “not the Supreme Court’s most successful product” when considering its comprehensibility.<sup>103</sup> Meanwhile, in an equally classic Fourth Amendment article, Professor Akhil Amar bluntly called the law “a vast jumble of judicial pronouncements that is not merely complex and contradictory, but often perverse.”<sup>104</sup> Several empirical studies confirm the fear that officers’ understanding of search and seizure law is severely lacking, and suggest that such misapprehension may translate into poor decision-making on the ground.<sup>105</sup> Only a small portion of state and local law enforcement basic training is devoted to criminal or constitutional law, and it is unclear how much of this training includes the teaching of search and sei-

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<sup>100</sup> See, e.g., Jacobi, *supra* note 4, at 600–01; Oaks, *supra* note 5, at 731.

<sup>101</sup> 403 U.S. 388, 417 (1971) (Burger, C.J., dissenting) (footnote omitted); see also Burger, *supra* note 17, at 11 (voicing a similar critique).

<sup>102</sup> Oaks, *supra* note 5, at 731.

<sup>103</sup> Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 349 (1974).

<sup>104</sup> Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 758 (1994).

<sup>105</sup> See, e.g., Perrin et al., *supra* note 17, at 727–28 (finding that law enforcement officers who participated in the study answered Fourth Amendment-related hypotheticals correctly about half of the time (52–53.6%), slightly less than first-year law students (who answered correctly 55% of the time)); James A. Purdon, Henry F. Fradella, Christopher D. Totten & Gang Lee, *Police Officers’ Knowledge of Gant*, 24 NEW CRIM. L. REV. 468, 485–86 (2021) (finding that about two-thirds of police officers who participated in the study applied the wrong search and seizure law in the hypothetical presented to them).

zure law.<sup>106</sup> Even less known is the amount of continuing education on Fourth Amendment law that officers around the country receive throughout their service, after the conclusion of their basic training.

If police officers do not understand a significant share of search and seizure rules and do not receive adequate training, critics wonder, then what deterrent benefits could be gained from threatening to suppress evidence derived by violating them?<sup>107</sup>

### C. *The Gradual Curtailment of the Exclusionary Rule*

The harsh critique of the exclusionary rule as an effective deterrent to police misconduct has led to significant changes in the case law. Primarily since the 1970s, the Supreme Court has consistently relied on this critique to narrow the scope of the rule.<sup>108</sup> The rule reached its peak in 1961, when the Supreme Court in *Mapp v. Ohio* held that both federal and state courts must suppress “all evidence obtained by searches and seizures in violation of the Constitution.”<sup>109</sup> The *Mapp* version of the exclusionary rule was very broad, but also short-lived.

For adherents of crime control values, the extension of the exclusionary rule to the states meant that its broad application was unsustainable. Impunity for a larger number of guilty criminal defendants—the result of mandating states to suppress unlawfully obtained evidence—was perceived as a cost that society should not bear.<sup>110</sup> To “law and order” supporters, *Mapp*, like other symbols of the Warren Court’s criminal procedure revolution (primarily *Miranda v. Arizona*),<sup>111</sup> was too quick to compromise effective law enforcement under the banner of protection of individual rights.<sup>112</sup>

Under the more conservative Chief Justices succeeding Warren—Burger, Rehnquist, and Roberts—the Court has alleviated some of the perceived ramifications of *Mapp*. It has done so mostly by limiting and narrowing the appli-

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<sup>106</sup> See EMILY D. BUEHLER, U.S. DEP’T OF JUST., NCJ 255915, STATE AND LOCAL LAW ENFORCEMENT TRAINING ACADEMIES, 2018—STATISTICAL TABLES 2–3 (2021), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/slleta18st.pdf> [<https://perma.cc/FB65-AUME>] (stating that on average, in 2018, 51 instruction hours, out of a total of 833 hours of police basic training, were devoted to criminal or constitutional law).

<sup>107</sup> See *supra* notes 100–106 and accompanying text.

<sup>108</sup> See, e.g., Steiker, *supra* note 6, at 2511 (describing the exceptions that the Supreme Court created to the exclusionary rule based on the deterrence rationale).

<sup>109</sup> 367 U.S. 643, 655 (1961).

<sup>110</sup> See, e.g., CHEMERINSKY, *supra* note 6, at 185 (“Conservatives regard the exclusionary rule as undesirable because it keeps crucial evidence from being heard and allows guilty people to go free.”).

<sup>111</sup> 384 U.S. 436 (1966).

<sup>112</sup> See, e.g., Steiker, *supra* note 6, at 2466.

cation of the exclusionary rule.<sup>113</sup> The Court used the arguments against the rule's asserted deterrent benefits to justify many of the exceptions it carved out.<sup>114</sup> The broad application of the rule under *Mapp* assumed that suppression of unconstitutionally obtained evidence would help to discourage police officers from abusing their power.<sup>115</sup> But the Burger, Rehnquist, and Roberts Courts doubted this premise. They concluded instead that in numerous situations, the rule's deterrent benefits were so low that they were "either negligible or outweighed by the substantial costs to society" stemming from exclusion.<sup>116</sup> Where this was the case, the Court ruled, the exclusionary rule generally should not apply.<sup>117</sup>

For example, in 1984, in *United States v. Leon*,<sup>118</sup> the Court created a good faith exception to the exclusionary rule.<sup>119</sup> The police in *Leon* obtained incriminating evidence in a search conducted pursuant to a search warrant that was later found to be invalid.<sup>120</sup> As it turned out, the magistrate who granted the police's application for a search warrant based his decision on an officer's affidavit that was "insufficient to establish probable cause."<sup>121</sup> The lower courts concluded that the search conducted on the basis of the invalid warrant was therefore unconstitutional.<sup>122</sup> The Supreme Court, however, held that where the police officers who conducted the search were "acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate," the exclusionary rule should not apply.<sup>123</sup> The Court reasoned that "as neutral judicial officers," magistrates and judges "have no stake in the outcome of particu-

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<sup>113</sup> *Id.* at 2740 ("[T]he Burger and Rehnquist Courts have accepted to a significant extent the Warren Court's definitions of constitutional 'rights' while waging counter-revolutionary war against the Warren Court's constitutional 'remedies' of evidentiary exclusion and its federal review and reversal of convictions."); CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 233–34 (2016) (describing the continuous efforts of the Roberts Court to limit and narrow the application of the exclusionary rule); Guy Rubinstein, *Selective Prosecution, Selective Enforcement, and Remedial Vagueness*, 2022 WIS. L. REV. 825, 882–83 (discussing the same issue); see also Ayesha I. Ahsan, Note, "My *Mirandas* Don't Stand a Chance, with *Cops*": The United States Supreme Court's Impending Destruction of *Miranda* Rights Under the Pretense of *Prophylaxis* in *Vega v. Tekoh*, 65 B.C. L. REV. 1445, 1464–74 (2024) (discussing how the Roberts Court has weakened the civil remedies for *Miranda* violations).

<sup>114</sup> See Steiker, *supra* note 6, at 2511.

<sup>115</sup> See, e.g., CHEMERINSKY, *supra* note 6, at 185 ("The Warren Court believed that police would be less likely to violate the Constitution, such as by carrying out illegal searches, if they knew that the fruits of their misconduct could not be used as evidence against a criminal defendant.").

<sup>116</sup> Steiker, *supra* note 6, at 2511.

<sup>117</sup> *Id.*

<sup>118</sup> 468 U.S. 897 (1984).

<sup>119</sup> *Id.* at 913.

<sup>120</sup> *Id.* at 903.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 903–05.

<sup>123</sup> *Id.* at 900, 922–23.

lar criminal prosecutions,” and therefore, warning them that their mistakes may result in suppression of evidence would be both unnecessary and ineffective.<sup>124</sup> The Court also denied that suppression in such circumstances could be beneficial for deterring police officers from acting negligently or dishonestly when applying for or executing a search warrant.<sup>125</sup> To support these conclusions, the Court noted that “[n]o empirical researcher, proponent or opponent of the [exclusionary] rule, has yet been able to establish with any assurance whether the rule has a deterrent effect,” suggesting that it is unclear whether the rule can even serve as an effective deterrent to police wrongdoing more generally.<sup>126</sup>

Over time, the Court has expanded the good faith exception to include many other scenarios.<sup>127</sup> For instance, the exclusionary rule no longer applies when police officers conducted a search or seizure in accordance with a subsequently invalidated statute<sup>128</sup> or overruled precedent.<sup>129</sup> Furthermore, evidence will not be suppressed where the police officers who conducted the search were negligently misled into thinking that an outstanding arrest warrant permitted them to do so, due to faulty police records resulting from mistakes made by court clerks<sup>130</sup> or police personnel.<sup>131</sup> As Justice Breyer warned, there is a risk that further expansion of the good faith exception would result in the exception “swallow[ing] the exclusionary rule” and rendering it defunct.<sup>132</sup>

In 2006, the Supreme Court provided another illuminating example in *Hudson v. Michigan*,<sup>133</sup> when it established the “knock-and-announce” exception.<sup>134</sup> The Fourth Amendment mandates police officers who are about to search one’s home to “announce their presence and provide residents an opportunity to open the door,”<sup>135</sup> unless they have reasonable suspicion that incriminating evidence may be destroyed or that life may be put at risk.<sup>136</sup> But the Court decided that even when officers violated this constitutional demand, the seized evidence would still be admissible in court.<sup>137</sup> Writing for the majority, Justice Scalia questioned the effectiveness of the exclusionary rule as a deter-

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<sup>124</sup> *Id.* at 916–17.

<sup>125</sup> *Id.* at 918.

<sup>126</sup> *Id.* (quoting *United States v. Janis*, 428 U.S. 433, 452 n.22 (1976)).

<sup>127</sup> See generally Nadia Banteka, *Police Ignorance and (Un)Reasonable Fourth Amendment Exclusion*, 75 VAND. L. REV. 365, 378–81 (2022) (describing the evolution of the good faith exception).

<sup>128</sup> *Illinois v. Krull*, 480 U.S. 340, 349–55 (1987).

<sup>129</sup> *Davis v. United States*, 564 U.S. 229, 232 (2011).

<sup>130</sup> *Arizona v. Evans*, 514 U.S. 1, 3–4 (1995).

<sup>131</sup> *Herring v. United States*, 555 U.S. 135, 136–37 (2009).

<sup>132</sup> *Davis*, 564 U.S. at 258 (Breyer, J., dissenting).

<sup>133</sup> 547 U.S. 586 (2006).

<sup>134</sup> *Id.* at 599.

<sup>135</sup> *Id.* at 589.

<sup>136</sup> *Id.* at 596.

<sup>137</sup> *Id.* at 599.

rent to police misconduct in the context of knock-and-announce infringements.<sup>138</sup> Officers who violate the knock-and-announce rule, Justice Scalia reasoned, are not trying to obtain evidence that may be lost (a purpose that would “suspend” this demand in the first place).<sup>139</sup> Therefore, per Justice Scalia, officers would not be deterred by the threat of suppression of evidence.<sup>140</sup> Justice Scalia also pointed to other existing remedies that the Court found more valuable than suppression, including monetary damages and disciplinary sanctions.<sup>141</sup>

Scholars have asserted that *Hudson*’s significance may exceed the exclusionary rule’s application to knock-and-announce violations. It may symbolize the fate that awaits the exclusionary rule, or even “the future of constitutional judicial review of searches and seizures” more generally.<sup>142</sup>

Nowadays, not much is left of the once formidable, all-encompassing exclusionary rule.<sup>143</sup> Academic pieces or symposia questioning whether the rule is de facto “obsolete,”<sup>144</sup> “on its way out,”<sup>145</sup> or “dead”<sup>146</sup> are now routine. The recent calls by some Supreme Court Justices to reconsider the necessity or desirability of the exclusionary rule ensure that legal scholars will continue to ask similar questions.<sup>147</sup>

## II. HOW CAN (AND DO) PROSECUTORS HELP PREVENT POLICE MISCONDUCT?

The Supreme Court has consistently stated that the only justification for the exclusionary rule’s existence is to deter police officers from conducting unlawful searches and seizures.<sup>148</sup> In other words, besides deterrence, there is no other basis to support the rule. As former federal judge and prominent legal scholar Richard Posner once commented, given that “deterrence is the *raison d’être* of the rule,” a failure to do so would necessarily require its dissolu-

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<sup>138</sup> *Id.* at 596.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 596–99.

<sup>142</sup> Morgan Cloud, *Rights Without Remedies: The Court That Cried “Wolf,”* 77 MISS. L.J. 467, 468 (2007).

<sup>143</sup> See, e.g., Slobogin, *supra* note 4, at 375 (“[T]oday’s swiss cheese exclusionary rule is a mere shadow of what it could be.”).

<sup>144</sup> See generally David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567 (2008).

<sup>145</sup> See generally Christopher Slobogin, *The Exclusionary Rule: Is It on Its Way Out? Should It Be?*, 10 OHIO ST. J. CRIM. L. 341 (2013).

<sup>146</sup> See generally Craig M. Bradley, *Is the Exclusionary Rule Dead?*, 102 J. CRIM. L. & CRIMINOLOGY 1 (2012).

<sup>147</sup> See *supra* note 7 and accompanying text (discussing Justice Thomas’s reservations about the application of the exclusionary rule to the states).

<sup>148</sup> See *supra* notes 41–72 and accompanying text.

tion.<sup>149</sup> According to the critics, the rule can successfully deter police officers only if officers wish to avoid jeopardizing convictions and if they know how to do so.<sup>150</sup> But if they care little about the possible suppression of evidence or do not know the intricate search and seizure law, then the rule can have no significant deterrent effect on them.

A conclusion that the exclusionary rule cannot bring about a positive change in police behavior, however, would be premature. This Part explains that the rule's deterrent effect can be better appreciated and realized if it is understood to be addressed primarily to prosecutors, not to police officers. Prosecutors have an incentive to prevent the suppression of evidence.<sup>151</sup> Furthermore, they are equipped with relevant Fourth Amendment expertise and can influence the conduct of police officers.<sup>152</sup> The exclusionary rule is, therefore, more promising as an indirect deterrent to police misconduct (by encouraging prosecutors to intervene) than it is as a direct deterrent (aimed at the police officers themselves).<sup>153</sup>

The very first Justice of the Supreme Court to promote the exclusionary rule as a deterrent to police misconduct had a similar insight. Justice Murphy understood that the exclusionary rule can be effective when targeted at prosecutors, who can in turn influence police behavior.<sup>154</sup> This nearly forgotten narrative of the exclusionary rule is discussed in Section A of this Part, as is the story of its quick demise.<sup>155</sup> This Section also walks through the counternarrative, advanced by some of the country's most notable judges and scholars, that prosecutors cannot effectively influence police behavior because they lack any authority over them.<sup>156</sup>

Section B of this Part argues that despite their lack of official control over the police, prosecutors do have the ability (as well as the incentive and expertise) to guide and shape police officers' conduct and to encourage them to avoid constitutional violations.<sup>157</sup>

Section C of this Part describes four methods that prosecutors around the country—specifically because of the exclusionary rule—have employed to

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<sup>149</sup> Posner, *supra* note 9, at 54.

<sup>150</sup> See *supra* notes 73–107 and accompanying text.

<sup>151</sup> See *infra* notes 222–247 and accompanying text.

<sup>152</sup> See *infra* notes 248–269 and accompanying text.

<sup>153</sup> See generally Bar-Gill & Friedman, *supra* note 4, at 1625–26 (describing the (allegedly unfilled) potential of the exclusionary rule to serve as either a direct or indirect deterrent).

<sup>154</sup> *Wolf v. Colorado*, 338 U.S. 25, 44 (1949) (Murphy, J., dissenting), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>155</sup> See *infra* notes 167–218 and accompanying text.

<sup>156</sup> See *infra* notes 185–218 and accompanying text.

<sup>157</sup> See *infra* notes 219–269 and accompanying text.

successfully promote lawful policing.<sup>158</sup> Prosecutors have: 1) trained local police on Fourth Amendment law, 2) provided advice and counseling on legal questions raised by the police, 3) alerted police departments of unlawful practices or particularly problematic officers, and 4) educated police officers on the meaning and implications of judicial suppression decisions or prosecutorial dismissals of cases.

Section D of this Part explains that although some prosecutors' offices have made great efforts to promote lawful policing, others have not.<sup>159</sup> This prosecutorial passivity can be attributed to offices' scarce resources, concerns over losing absolute prosecutorial immunity, fears of sabotaging the relationship with local police, and the perception that encouragement of lawful policing is simply not the responsibility of prosecutors.

### *A. The Exclusionary Rule as Addressed to Prosecutors: An Almost Forgotten History*

What is the role of prosecutors in the deterrence mechanism of the exclusionary rule? In his dissent in *Wolf v. Colorado* in 1949,<sup>160</sup> Justice Murphy suggested that prosecutors are essential to discouraging police misconduct.<sup>161</sup> This account has been criticized and ultimately nearly forgotten.<sup>162</sup> Subsection 1 discusses Justice Murphy's dissent in *Wolf*.<sup>163</sup> Subsection 2 considers Justice Burger's critique of this dissent in 1971 in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,<sup>164</sup> and his claim that prosecutors cannot effectively affect police behavior.<sup>165</sup> Subsection 3 details the scholarly criticism of the view that prosecutors are central to the exclusionary rule's deterrence mechanism.<sup>166</sup>

#### 1. Justice Murphy's Dissent in *Wolf*

The Supreme Court in *Wolf* first tied the exclusionary rule's scope and contours to the purpose of deterring police misconduct.<sup>167</sup> Justice Frankfurter, who delivered the Court's opinion, declined to extend the application of the exclusionary rule to the states partly because he believed that the deterrence

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<sup>158</sup> See *infra* notes 270–319 and accompanying text.

<sup>159</sup> See *infra* notes 320–335 and accompanying text.

<sup>160</sup> 338 U.S. 25 (1949), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>161</sup> See *infra* notes 167–184 and accompanying text.

<sup>162</sup> See *infra* notes 185–218 and accompanying text.

<sup>163</sup> See *infra* notes 167–184 and accompanying text.

<sup>164</sup> 403 U.S. 388 (1971).

<sup>165</sup> See *infra* notes 185–207 and accompanying text.

<sup>166</sup> See *infra* notes 208–218 and accompanying text.

<sup>167</sup> See *supra* notes 50–56 and accompanying text.

goal could be served as effectively by other means.<sup>168</sup> Although Justice Frankfurter acknowledged “that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches,” he stated that “it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State’s reliance upon other methods which, if consistently enforced, would be equally effective.”<sup>169</sup>

But Justice Murphy in his dissent—one of three dissents in *Wolf*—reached a different conclusion. Unlike the majority, he ruled out the possibility that potential alternative deterrents—particularly criminal prosecutions or civil suits against police officers—could be nearly as effective as suppression of evidence.<sup>170</sup> Simply put, Justice Murphy was skeptical that prosecutors would be willing to bring criminal charges against those conducting unlawful searches or seizures,<sup>171</sup> and that civil suits would result in damages awards that would be significant enough to deter future violations.<sup>172</sup>

Mocking criminal sanctions and monetary damages as “a lofty ideal” and “an illusory remedy,” respectively,<sup>173</sup> Justice Murphy determined that the exclusionary rule was the only device that could possibly help discourage unconstitutional searches and seizures.<sup>174</sup> With this conclusion, Justice Murphy became the first Justice of the Supreme Court to frame the exclusionary rule as crucial for deterring police misconduct. Nevertheless, he conceptualized the rule’s deterrence mechanism very differently from the depictions more common in academic writing and judicial decisions.<sup>175</sup> Scholars and judges have assumed that the exclusionary rule is supposed to deter police officers from conducting unconstitutional searches and seizures by threatening them directly with suppression of

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<sup>168</sup> *Wolf v. Colorado*, 338 U.S. 25, 30–32 (1949), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>169</sup> *Id.* at 31.

<sup>170</sup> *Id.* at 41–44 (Murphy, J., dissenting).

<sup>171</sup> *Id.* at 42. Notably, the state officials who were accused of having conducted an unlawful search and seizure were “[r]epresentatives of the district attorney’s office” who were operating as de facto law enforcement officers. *Wolf v. People*, 187 P.2d 926, 927 (Colo. 1947) (en banc), *aff’d*, *Wolf*, 338 U.S. 25. For this reason, Justice Murphy, when ruling out criminal prosecution as an effective alternative to the exclusionary rule, discussed only his skepticism that “a District Attorney [would] prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered.” *Wolf*, 338 U.S. at 42 (Murphy, J., dissenting). Justice Murphy did not discuss criminal charges brought against law enforcement officers outside the prosecutor’s office.

<sup>172</sup> *Wolf*, 338 U.S. at 42–44 (Murphy, J., dissenting).

<sup>173</sup> *Id.* at 42–43.

<sup>174</sup> *Id.* at 44.

<sup>175</sup> Compare *id.* (suggesting that the exclusionary rule serves as an indirect deterrent to police misconduct by encouraging prosecutors to intervene), with sources cited *supra* notes 3, 9, 42–43 (suggesting that the exclusionary rule is a direct deterrent aimed at the police officers themselves).

the fruits of their misconduct.<sup>176</sup> But according to Justice Murphy, the exclusionary rule would help prevent Fourth Amendment violations not (necessarily) by appealing to police officers, but by appealing to prosecutors.<sup>177</sup>

Justice Murphy observed that prosecutors fear the possibility of forfeiting convictions of criminal defendants.<sup>178</sup> Thus, the exclusionary rule, if extended to the states, would create an incentive for prosecutors to prevent police violations that could trigger suppression of evidence.<sup>179</sup> According to Justice Murphy, prosecutors would do so by educating police officers to conduct lawful searches and seizures.<sup>180</sup> In the words of Justice Murphy, “[o]nly by exclusion can we impress upon the zealous prosecutor that violation of the Constitution will do him no good. And only when that point is driven home can the prosecutor be expected to emphasize the importance of observing constitutional demands in his instructions to the police.”<sup>181</sup>

Justice Murphy’s dissent in *Wolf* is considered to be one of his most impressive opinions.<sup>182</sup> His sharp observations on the work of the criminal justice system and the conclusions he drew from them were grounded in his long experience as an assistant United States attorney, a criminal court judge, and the United States Attorney General.<sup>183</sup> Unfortunately, Justice Murphy never had an opportunity to develop and expand upon his unique perception of the deterrence mechanism of the exclusionary rule, as he passed away suddenly and prematurely, less than a month after the publication of *Wolf*.<sup>184</sup>

## 2. Chief Justice Burger’s Critique in *Bivens*

Justice Murphy was the first Supreme Court Justice to argue that the exclusionary rule is, first and foremost, an effective deterrent to police miscon-

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<sup>176</sup> See *supra* notes 3, 9, 42–43 and accompanying text.

<sup>177</sup> *Wolf*, 338 U.S. at 44 (Murphy, J., dissenting).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> See, e.g., John P. Frank, *Justice Murphy: The Goals Attempted*, 59 YALE L.J. 1, 20 (1949) (describing Justice Murphy’s dissent in *Wolf* as “one of the half-dozen outstanding opinions written by him in the full course of his career”); Albon P. Man, Jr., *Mr. Justice Murphy and the Supreme Court*, 36 VA. L. REV. 889, 893 (1950) (“[Justice Murphy] knew well how prosecutors sometimes operated, and from such knowledge came the typical horse sense of his masterful dissent in *Wolf v. Colorado*.”); James R. Kerr, *The Neglected Opinions of Mr. Justice Murphy*, 1977 DET. COLL. L. REV. 7, 33 (describing Justice Murphy’s opinion in *Wolf* as “one of his most memorable dissents”).

<sup>183</sup> See Man, *supra* note 182, at 892–907 (describing Justice Murphy’s professional experience in the U.S. criminal justice system).

<sup>184</sup> See Frank, *supra* note 182, at 20 (referring to Justice Murphy’s dissent in *Wolf* as his “last search and seizure opinion” before his death).

duct.<sup>185</sup> Yet, despite the rule's deterrent function increasingly occupying generations of Supreme Court Justices, Justice Murphy's understanding of this function has been largely ignored and forgotten. Almost five years after the *Wolf* decision, in 1954, Justice Douglas, in his dissent in *Irvine v. California*,<sup>186</sup> quoted Justice Murphy with approval.<sup>187</sup> In that opinion, Justice Douglas tried (unsuccessfully) to convince the Court to extend the exclusionary rule to the states.<sup>188</sup> But in 1961, when the Supreme Court in *Mapp v. Ohio*<sup>189</sup> finally extended it, the majority made no mention of Justice Murphy's dissent in *Wolf* or of the role of prosecutors as key to preventing unlawful searches and seizures.<sup>190</sup>

Not until 1971 did another Justice of the Court address the role of prosecutors in the exclusionary rule's application and effectiveness. This time, it was Chief Justice Burger, in *Bivens*, who famously dissented.<sup>191</sup> Chief Justice Burger, however, did not agree with Justice Murphy. Instead, he criticized him harshly.<sup>192</sup>

The question *Bivens* dealt with was not directly related to the exclusionary rule. Rather, it asked whether federal agents, as individuals, could be sued for monetary damages for violating the Fourth Amendment.<sup>193</sup> For the first time, the Court answered this question affirmatively.<sup>194</sup> In his dissent, Chief Justice Burger not only criticized the majority's decision, but also—in fact, mostly—expressed his opposition to the Court's long-standing reliance on the exclusionary rule as a deterrent to police misconduct.<sup>195</sup> Like other critics of the rule, he argued that police officers' decisions to conduct unconstitutional searches and seizures were not usually affected by the possibility of failure to convict, and therefore, suppression of evidence could hardly deter them.<sup>196</sup> And, as mentioned above, Chief Justice Burger further argued that search and seizure law is too complicated for busy officers to learn.<sup>197</sup> Thus, he concluded

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<sup>185</sup> *Wolf*, 338 U.S. at 44 (Murphy, J., dissenting).

<sup>186</sup> 347 U.S. 128 (1954).

<sup>187</sup> *Id.* at 151 (Douglas, J., dissenting) (quoting *Wolf*, 338 U.S. at 44 (Murphy, J., dissenting)).

<sup>188</sup> *Id.*

<sup>189</sup> 367 U.S. 643 (1961).

<sup>190</sup> See Kerr, *supra* note 182, at 34 (discussing the absence of Justice Murphy's dissent in *Wolf* from the Warren Court's constitutional criminal procedure decisions).

<sup>191</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 411–24 (1971) (Burger, C.J., dissenting).

<sup>192</sup> *Id.* at 416–18.

<sup>193</sup> *Id.* at 389 (majority opinion).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 411–24 (Burger, C.J., dissenting). Chief Justice Burger had already voiced much of this critique in a lecture he gave in 1964 at American University, which was also adapted that year to a law review article. See Burger, *supra* note 17, at 10–14.

<sup>196</sup> *Bivens*, 403 U.S. at 416–18 (Burger, C.J., dissenting).

<sup>197</sup> See *supra* note 101 and accompanying text.

that the exclusionary rule likely fails to encourage police officers to comply with the Constitution.<sup>198</sup>

Unlike most critics of the rule, however, the Chief Justice revisited Justice Murphy's discussion of the role of prosecutors as key to the functioning of the rule.<sup>199</sup> Chief Justice Burger implicitly agreed with Justice Murphy that, in theory, it makes more sense to think of the exclusionary rule as addressed to prosecutors and not to police officers.<sup>200</sup> The reason, he suggested, is that the rule's "immediate sanction"—that is, the suppression of evidence—is "visited upon the prosecutor whose case against a criminal is either weakened or destroyed."<sup>201</sup> Police officers, in contrast, care little about the failure to convict criminal defendants and therefore do not suffer significant negative consequences.<sup>202</sup>

Although Chief Justice Burger agreed that the exclusionary rule is, in theory, prosecutor-oriented, not police-oriented, he strongly disagreed with Justice Murphy's claim that prosecutors can generate an actual change in police behavior.<sup>203</sup> According to him, Justice Murphy based his dissent in *Wolf* on the false assumption that prosecutors and police officers are part of the same chain of command, and that "law enforcement is a monolithic governmental enterprise."<sup>204</sup> But in reality, prosecutors are not the commanders of the police, and therefore, to the Chief Justice, the idea that prosecutors can somehow guide or shape police behavior was absurd:

[T]he prosecutor who loses his case because of police misconduct is not an official in the police department; he can rarely set in motion any corrective action or administrative penalties. Moreover, he does not have control or direction over police procedures or police actions that lead to the exclusion of evidence. It is the rare exception when a prosecutor takes part in arrests, searches, or seizures so that he can guide police action.<sup>205</sup>

In an earlier academic article, Chief Justice Burger commented sarcastically that "[p]rosecutors do not run the police department any more than the

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<sup>198</sup> *Bivens*, 403 U.S. at 416 (Burger, C.J., dissenting).

<sup>199</sup> *Id.* at 416–17.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 416.

<sup>202</sup> *Id.* at 416–17.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*; see also Burger, *supra* note 17, at 12–13 (mentioning that there are "many instances of a bland assumption by judges, especially appellate judges, that law enforcement is a monolithic governmental unity, from the policeman on the beat who makes the arrest or search to the prosecutor who argues the case in the appellate court").

<sup>205</sup> *Bivens*, 403 U.S. at 417 (Burger, C.J., dissenting).

police control the prosecution of cases.”<sup>206</sup> Given the lack of formal prosecutorial control over the police, he implied, the hope that prosecutors might help improve police behavior was baseless.<sup>207</sup>

### 3. Scholarly Critique

To date, Chief Justice Burger’s dissent in *Bivens* has been the only critical reference by a member of the Court to Justice Murphy’s understanding of the exclusionary rule as prosecutor-oriented. Lower courts—federal and state—have also ignored this perception.<sup>208</sup> But a line of critiques similar to Chief Justice Burger’s has surfaced in the academic literature. Critics—some of whom number among the top criminal procedure scholars in the country—have suggested that prosecutors cannot influence police conduct as they have no formal control over them.<sup>209</sup>

The most elaborate critique was that of legal scholar Dallin Oaks,<sup>210</sup> in what then-Justice Rehnquist suggested could be “[t]he most comprehensive study on the exclusionary rule.”<sup>211</sup> Oaks’ article, which preceded *Bivens* by a couple of years, was cited in Chief Justice Burger’s dissent and likely significantly impacted its key conclusions and tone.<sup>212</sup> Oaks reiterated the notion that suppression of evidence is a punishment unhelpfully imposed on prosecutors, who, given their lack of authority over the police, cannot guide their actions successfully.<sup>213</sup> Oaks relied in large part on a long and influential report on the police in the United States, issued in 1967 by the President’s Commission on

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<sup>206</sup> Burger, *supra* note 17, at 13.

<sup>207</sup> *Id.*

<sup>208</sup> There are rare exceptions. *See, e.g.*, Taylor v. State, 399 So. 2d 881, 888 (Ala. 1981) (agreeing that the exclusionary rule is prosecutor-oriented in theory, but suggesting that prosecutors cannot successfully influence police behavior because they do not have authority over them (first citing *Bivens*, 403 U.S. at 416 (Burger, C.J., dissenting); and then citing Oaks, *supra* note 5, at 726)), *rev’d*, 457 U.S. 687 (1982), and *abrogated by* Horton v. California, 496 U.S. 128 (1990).

<sup>209</sup> *See, e.g.*, Francis A. Gilligan, *The Federal Tort Claims Act—An Alternative to the Exclusionary Rule?*, 66 J. CRIM. L. & CRIMINOLOGY 1, 4 (1975); Perrin et al., *supra* note 17, at 675–76; Katz, *supra* note 17, at 141; William Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives*, 1975 WASH. U. L.Q. 621, 668–69; Schroeder, *supra* note 75, at 1381.

<sup>210</sup> *See generally* Oaks, *supra* note 5.

<sup>211</sup> California v. Minjares, 443 U.S. 916, 926 (1979) (mem.) (Rehnquist, J., dissenting from denial of stay).

<sup>212</sup> *See Bivens*, 403 U.S. at 416–18 (Burger, C.J., dissenting) (citing Oaks, *supra* note 5, at 667, 720–24). The influence was actually mutual, as Oaks too cited an earlier academic article of Chief Justice Burger (*supra* note 17) several times. Oaks, *supra* note 5, at 677 n.56, 725 n.175, 726 n.178, 739 n.220, 743 n.231, 753 n.260, 756 n.265.

<sup>213</sup> Oaks, *supra* note 5, at 726–27.

Law Enforcement and Administration of Justice.<sup>214</sup> Instituted by President Lyndon B. Johnson in 1965, this Commission included senior scholars, practitioners, and administrators, and was asked to recommend “how federal, state and local governments can make law enforcement and the administration of justice more effective and fair.”<sup>215</sup> Oaks quoted extensive parts of the Commission’s report to show that neither prosecutors, police officers, nor the general public consider guiding or overseeing police conduct to be among the duties of prosecutors.<sup>216</sup> Thus, Oaks suggested, there is no basis for the hope that the exclusionary rule would successfully encourage prosecutors to assist in preventing police misconduct.<sup>217</sup> Oaks also found—partly based on his own experience as a prosecutor—that prosecutors did not usually think that they were supposed to explain courts’ decisions to suppress evidence to police officers or to educate them on how to avoid triggering similar decisions in the future.<sup>218</sup>

*B. Prosecutors as Instrumental to the Prevention of Police Misconduct: Incentive, Expertise, and Influence*

Nowadays, the exclusionary rule is only rarely, if ever, thought of as prosecutor-oriented. But as this Section shows, the exclusionary rule does in fact place prosecutors in a strong position to help reduce constitutional violations by police officers. Subsection 1 considers the powerful incentive of prosecutors to prevent loss of convictions.<sup>219</sup> Subsection 2 then discusses prosecutors’ unique expertise on the rules governing searches and seizures in their respective jurisdictions.<sup>220</sup> Finally, Subsection 3 examines prosecutors’ ability to influence police behavior.<sup>221</sup> Even without formal control over the police, prosecutors can be key to promoting lawful policing.

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<sup>214</sup> See generally PRESIDENT’S COMM’N ON L. ENF’T & ADMIN. OF JUST., TASK FORCE REPORT: THE POLICE (1967), <https://www.ojp.gov/pdffiles1/Digitization/147374NCJRS.pdf> [<https://perma.cc/364M-BCL2>].

<sup>215</sup> James Vorenberg, *The President’s Commission on Law Enforcement and Administration of Justice: Organization and Goals*, 4 AM. CRIM. L.Q. 118, 118 (1966).

<sup>216</sup> Oaks, *supra* note 5, at 726 & n.178 (quoting PRESIDENT’S COMM’N ON L. ENF’T & ADMIN. OF JUST., *supra* note 214, at 30–31).

<sup>217</sup> *Id.* at 726.

<sup>218</sup> *Id.* at 730–31 (quoting Wayne R. LaFare & Frank J. Remington, *Controlling the Police: The Judge’s Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 1005 (1965)).

<sup>219</sup> See *infra* notes 222–247 and accompanying text.

<sup>220</sup> See *infra* notes 248–261 and accompanying text.

<sup>221</sup> See *infra* notes 262–269 and accompanying text.

## 1. Incentive

What do prosecutors want?<sup>222</sup> Most scholars agree that a primary goal of prosecutors is “to prosecute and convict the guilty,”<sup>223</sup> especially of crimes that are of public or social concern.<sup>224</sup> Granted, prosecutors have various personal and professional motivations that they may prioritize differently, depending on their character, values, rank, or position.<sup>225</sup> Such motivations include, for instance, preventing crime, achieving justice for victims of crimes, improving work efficiency, gaining political standing, or strengthening their professional reputation.<sup>226</sup> But both the elected leaders of prosecutors’ offices and line prosecutors ultimately benefit from prosecuting and convicting those accused of socially condemned crimes.<sup>227</sup>

The vast majority of district attorneys (and other chief prosecutors) in the United States are elected by voters in their jurisdiction.<sup>228</sup> For many of them, the need to fight crime and obtain convictions goes beyond their own personal aspirations for law and order.<sup>229</sup> Rather, to a large extent, it is also the consequence of their political ambitions. District attorneys who wish to be reelected or to run for another public office benefit when crime rates decrease, when factually guilty offenders are convicted in court, and when offenders receive punishment that is publicly perceived as adequate.<sup>230</sup> As legal scholar William

<sup>222</sup> This question has received surprisingly limited attention in legal scholarship. See, e.g., Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509, 1522 (2009) (“No existing literature gives a comprehensive account of prosecutors’ various incentives.”); Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. REV. 762, 777 (2016) (“[N]o complete theory of prosecutorial motivation is yet on offer.”).

<sup>223</sup> Oaks, *supra* note 5, at 726.

<sup>224</sup> See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 534 (2001) (“[I]t seems reasonable to begin with the hypothesis that prosecutors wish (1) to prosecute the range of cases the public wants prosecuted, and (2) to win the cases they bring.”).

<sup>225</sup> See, e.g., Richman, *supra* note 24, at 758 (suggesting that “every prosecutor . . . is impelled by a broad variety of motives, personal and institutional, and that the salience of each motivation to each actor varies greatly”).

<sup>226</sup> See, e.g., Starr, *supra* note 222, at 1524–32 (listing various incentives that may affect prosecutors’ conduct); Epps, *supra* note 222, at 776 (“[P]rosecutors are motivated by political incentives; by professional norms; by their own conceptions of duty and justice; and by other personal motivations that are best understood as agency costs.”).

<sup>227</sup> See, e.g., Daniel C. Richman, Essay, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 967 (1997) (arguing that “the need to maximize convictions [is] an inescapable environmental constraint” for both line prosecutors and their elected supervisors).

<sup>228</sup> See DAVIS, *supra* note 32, at 166 (“At the county and municipal level, more than 95 percent of the chief prosecutors are elected.”).

<sup>229</sup> See, e.g., Starr, *supra* note 222, at 1524–25 (“[I]t is probably safe to say that [detering crime] is indeed a significant part of many prosecutors’ motivations. Prosecutors, after all, have chosen careers in law enforcement, usually over higher-paying private-sector jobs.” (footnote omitted)).

<sup>230</sup> See, e.g., *id.* at 1529 (describing elected prosecutors’ focus on crime rates and convictions); Rachel E. Barkow, *Organizational Guidelines for the Prosecutor’s Office*, 31 CARDOZO L. REV.

Stuntz noted, “more prosecutions and convictions are, from voters’ standpoint, a good thing,” and are therefore also desirable in the eyes of district attorneys.<sup>231</sup> Voters, as the literature suggests, may generally be more content with convictions obtained through trials than through plea agreements.<sup>232</sup> Accordingly, district attorney races tend to revolve around the incumbent’s performance in relation to these expectations.<sup>233</sup> Losing cases, refraining from bringing charges, excessively disposing of cases through plea agreements, failing to secure adequate punishments, or being perceived as responsible for high crime rates can only be harmful for district attorneys.<sup>234</sup> Unfavorable statistics in these areas are very often utilized by political rivals and the media to criticize incumbents and their policies.<sup>235</sup> In addition, district attorneys sometimes employ favorable conviction rates under their leadership as “leverage in budget negotiations” with the government, “trumpeting their records of success to support demands for greater resources” for their office.<sup>236</sup> District attorneys’ concern over these statistics is therefore natural.<sup>237</sup>

Like elected district attorneys, line prosecutors are often guided by a personal goal of fighting crime within their jurisdiction.<sup>238</sup> Line prosecutors are also encouraged to secure convictions (and avoid losses) in order to show their professionalism and value for their office.<sup>239</sup> As legal scholar Rachel Barkow

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2089, 2091–92 (2010) (describing elected prosecutors’ focus on convictions); Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 950 (1983) (“[T]he prosecutor’s office attempts to obtain the public credit for obtaining convictions and usually succeeds in the attempt. It also gets the blame for failing to convict.”).

<sup>231</sup> Stuntz, *supra* note 224, at 537; *see also* Carissa Byrne Hessick, *Prosecutors and Voters* (describing the common assumption in the literature that prosecutors are valued by voters for maximizing convictions), in *THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION*, *supra* note 23, at 399, 403.

<sup>232</sup> *See, e.g.*, Hessick, *supra* note 231, at 403 (discussing the literature on voters’ preferences as to disposition of cases).

<sup>233</sup> *See, e.g.*, Richman, *supra* note 227, at 967 (describing district attorney elections as “often fought on an incumbent’s win-loss record”).

<sup>234</sup> *See, e.g.*, Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 985–86 (2009) (describing prevalent criticism toward elected prosecutors who systematically fail to prosecute, to obtain convictions, or to reduce crime rates, and toward those who excessively dispose of cases through plea agreements instead of taking them to trial); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 723 (2005) (“[D]istrict attorneys are not reelected for dismissing cases or shrugging off acquittals.”).

<sup>235</sup> *See* Bibas, *supra* note 234, at 985–86.

<sup>236</sup> Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 135 (2004).

<sup>237</sup> According to some scholars, district attorneys’ constant political concern over their conviction rate may be exaggerated, as its actual influence on voters is not proven. *See, e.g.*, Bibas, *supra* note 234, at 987 (“Though they are a staple of campaign rhetoric . . . conviction statistics have no demonstrable effect on electoral outcomes.”).

<sup>238</sup> *See, e.g.*, Starr, *supra* note 222, at 1524–25.

<sup>239</sup> *See, e.g.*, Barkow, *supra* note 230, at 2091.

explained, “convictions are the lodestar by which prosecutors tend to be judged,” and prosecutors therefore “often feel pressure” to deliver results.<sup>240</sup> In addition, line prosecutors may adhere to their elected leaders’ law enforcement views and policies, and strive to do what would be most beneficial for them.<sup>241</sup> That could mean, for instance, that line prosecutors would be especially motivated to prosecute (and win) those cases that their district attorneys have a particular interest in. It could also mean that they would generally be wary of dismissing too many cases or extending too many favorable plea offers to criminal defendants in lieu of taking cases to trial.<sup>242</sup>

This discussion suggests that prosecutors have a clear incentive to minimize incidents of police misconduct that could result in suppression of evidence, case dismissals, or overly lenient plea agreements.<sup>243</sup> District attorneys, perhaps more than anyone else, have an especially strong incentive to ensure that local police comply with the Constitution and refrain from impeding prosecutorial work. After all, police wrongdoing that results in unfavorable statistics for the prosecutor’s office creates a major problem for its district attorney, who will be publicly (and perhaps electorally) held accountable. But, as explained, line prosecutors too can be harmed by the consequences of unlawful searches and seizures, and they are therefore motivated to discourage them. As Justice Murphy succinctly remarked in *Wolf*, the exclusionary rule can do “no good” to prosecutors, and they consequently would likely do their best to avoid triggering it.<sup>244</sup>

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<sup>240</sup> *Id.* (citing Susan Bandes, Essay, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 484 (2006)); see also Medwed, *supra* note 236, at 134–35 (“Prosecutors with the highest conviction rates (and, thus, reputations as the best performers) stand the greatest chance for advancement internally.”).

<sup>241</sup> See, e.g., Richman, *supra* note 227, at 967 & n.96 (describing the influence that elected prosecutors’ professional aspirations frequently have on line prosecutors within their office (citing Leonard R. Mellon, Joan E. Jacoby & Marion A. Brewer, *The Prosecutor Constrained by His Environment: A New Look at Discretionary Justice in the United States*, 72 J. CRIM. L. & CRIMINOLOGY 52, 59, 79 (1981))); Stuntz, *supra* note 224, at 535 (same); Starr, *supra* note 222, at 1525 (same).

<sup>242</sup> Of course, that does not mean that line prosecutors would always submit to their district attorneys’ wishes. See, e.g., Stuntz, *supra* note 224, at 535 (describing how line prosecutors’ desire “to reduce or limit their workload where possible” can lead them to act in ways that are not necessarily favorable to their elected leaders).

<sup>243</sup> See, e.g., Silas Wasserstrom & William J. Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?*, 22 AM. CRIM. L. REV. 85, 114 (1984) (“Prosecutors obviously want to assure that evidence seized by the police will be admissible at trial.”); MARIANNE F.H. HIRSCH BALLIN, *ANTICIPATIVE CRIMINAL INVESTIGATION: THEORY AND COUNTERTERRORISM PRACTICE IN THE NETHERLANDS AND THE UNITED STATES* 330 (2012) (“[I]n general it is in the interest of prosecutors to make sure that the police act in observance of the Fourth Amendment to avoid that the evidence obtained will be excluded as a consequence of a Fourth Amendment violation.”).

<sup>244</sup> *Wolf v. Colorado*, 338 U.S. 25, 44 (1949) (Murphy, J., dissenting), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

This point seems to be uncontroversial, even among critics of the exclusionary rule. They, too, agree that prosecutors who lose their cases are the ones harmed most directly and considerably by a court's decision to suppress unlawfully obtained evidence,<sup>245</sup> and that they are therefore the ones most "deterred" by it.<sup>246</sup> In fact, critics of the exclusionary rule often use exactly this point to demonstrate that the exclusionary rule's deterrent effect is "misplaced": instead of focusing on police officers, the rule's deterrent effect focuses on prosecutors.<sup>247</sup> But, as this Article shows, this focus is not misplaced at all.

## 2. Expertise

Prosecutors' expertise on the search and seizure law in their respective jurisdictions is almost unparalleled. That is not to say that all prosecutors always know everything about the extremely complicated, judicially developed Fourth Amendment rules.<sup>248</sup> But, as lawyers and repeat players in the criminal process who very often respond to Fourth Amendment claims,<sup>249</sup> they are in a particularly favorable position to develop familiarity with the relevant law.<sup>250</sup> Prosecutors' mastery of search and seizure law is also commonly recognized and valued by local police, who see them as a credible source of knowledge.<sup>251</sup>

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<sup>245</sup> See, e.g., *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting) ("The immediate sanction triggered by the application of the rule is visited upon the prosecutor whose case against a criminal is either weakened or destroyed."); *Slobogin*, *supra* note 4, at 372 ("[T]hose who oppose the rule can point out that its most direct consequence is imposed on the prosecutor rather than the cop . . ."); *Oaks*, *supra* note 5, at 726 ("The immediate impact of the exclusionary rule falls not upon the police but upon the prosecutor who is attempting to obtain a conviction."); *Gilligan*, *supra* note 209, at 4 ("The rule does not, in effect, operate directly against the police officer, but rather against the prosecutor . . ."); *Perrin et al.*, *supra* note 17, at 675–76 ("[T]he 'punishment' of exclusion of evidence does not fall upon the shoulders of the police officer, whose conduct is to be deterred, but rather, it falls most directly on the prosecutor who must weather the in-court rigors of exclusion and who has little control over police officer conduct."); cf. Christine M. D'Elia, Comment, *The Exclusionary Rule: Who Does It Punish?*, 5 SETON HALL CONST. L.J. 563, 586–87 (1995) (arguing that the exclusionary rule's "impact . . . is felt by prosecutors, the justice system, and society as a whole," but not by the police).

<sup>246</sup> See, e.g., *Oaks*, *supra* note 5, at 726 ("[T]he exclusionary rule is well tailored to deter the prosecutor from illegal conduct.").

<sup>247</sup> *Id.*

<sup>248</sup> See, e.g., Stephen L. Wasby, *The Communication of the Supreme Court's Criminal Procedure Decisions: A Preliminary Mapping*, 18 VILL. L. REV. 1086, 1093 (1973) (describing legal expertise gaps among prosecutors).

<sup>249</sup> Cf. *MACLIN*, *supra* note 47, at xi (noting that "[t]he Fourth Amendment . . . is the most litigated constitutional provision in the nation's courts").

<sup>250</sup> See, e.g., Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor's Role*, 47 U.C. DAVIS L. REV. 1591, 1641 (2014) ("Law-trained prosecutors understand the intricacies of Fourth Amendment jurisprudence as police officers cannot.").

<sup>251</sup> See, e.g., *Middlesex District Attorney Marian Ryan Hosts Officer Training on Search Warrants*, MIDDLESEX CNTY. DIST. ATT'YS OFF. (Sept. 25, 2013), <https://www.middlesexda.com/press-releases/news/middlesex-district-attorney-marian-ryan-hosts-officer-training-search-warrants> [https://

Notably, prosecutors' familiarity with the Fourth Amendment is not limited to the "law in the books" (in this context, mostly decisions of appellate courts), but also extends to the "law in action" that actually regulates searches and seizures.<sup>252</sup> Prosecutors spend considerable parts of their work week in local courts and are therefore constantly exposed to the manner in which local judges handle suppression motions and Fourth Amendment claims.<sup>253</sup> They have special access not only to local courts' unpublished suppression decisions, which may not be publicly accessible,<sup>254</sup> but also to the "real" decisions that are sometimes masked by laconic opinions that do not reveal what really took place in the courtroom.<sup>255</sup> As such, beyond being experts on the Fourth Amendment, they are also (and particularly) experts on the Fourth Amendment as applied in their respective jurisdictions. To be sure, wealthier police departments, especially in big cities, can often retain the services of legal advisors who can help them learn search and seizure rules or provide legal consultation.<sup>256</sup> But even the most professional, experienced, and skilled legal advisors would rarely be able to compete with prosecutors' distinctive knowledge of the most up-to-date law in action in their jurisdiction. The American Bar Association's Advisory Committee on the Prosecution and Defense Functions correctly

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perma.cc/R87Y-K7HP] (quoting a local police chief who stated that "[t]he training from the Middlesex District Attorney's Office provides an important foundation for our street officers on the search warrant process," and that the prosecutors working for the Office "are experts on this issue and we know we are getting the most accurate and valuable information").

<sup>252</sup> Roscoe Pound famously contrasted the "law in the books" ("the rules that purport to govern the relations of man and man") with the "law in action" (the rules "that in fact govern them"). See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15 (1910).

<sup>253</sup> See STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 2.7 cmt. b (AM. BAR ASS'N, Tentative Draft 1970).

<sup>254</sup> See generally Andrew T. Solomon, *Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice?*, 26 MISS. COLL. L. REV. 185, 222 (2007) (discussing the prevalence of state courts' unpublished opinions that are not publicly accessible); cf. Rachel Brown et al., *Is Unpublished Unequal? An Empirical Examination of the 87% Nonpublication Rate in Federal Appeals*, 107 CORNELL L. REV. 1, 4 (2021) (stating that numerous unpublished federal opinions "are not accessible on commercial databases"). It is reasonable to assume that the rate of opinions that are not accessible online in many states is higher than in the federal system.

<sup>255</sup> Cf. Alexandra Natapoff, *The Penal Pyramid* ("[S]ome misdemeanor courts produce no transcripts, and the overall lack of adversarial litigation ensures that records remain thin."), in THE NEW CRIMINAL JUSTICE THINKING 71, 90 (Sharon Dolovich & Alexandra Natapoff eds., 2017).

<sup>256</sup> See, e.g., Carol A. Archbold, *Police Legal Advisors in the USA: Past, Present, and Future*, 7 POLICE PRAC. & RSCH. 61, 69–71 (2006) (describing the role and tasks of police legal advisors); Michael J. Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 TEX. L. REV. 939, 940 (1966) (describing the practice of "[m]any of the larger police departments" of using the services of "skilled legal advisors within their own framework"). Legal advisors aiding and training the police can be either public employees or part of specialized private companies. See, e.g., Emily Ayn Ward, Note, *From Pen to Patrol: How Arizona Law Enforcement Applied Carrillo v. Houser*, 53 ARIZ. L. REV. 345, 353–54 (2011) (describing various kinds of legal advisors to law enforcement agencies in Arizona).

held that prosecutors, “who live[] with the judicial response to police action on a day-to-day basis,” are likely unrivaled in their capacity to provide legal education to police officers.<sup>257</sup>

Prosecutors’ relevant expertise does not stop at the law. Rather, prosecutors are also experts on their local police agencies. Prosecutors and police officers continuously interact, work, and develop strong professional connections with each other.<sup>258</sup> These connections, in turn, help prosecutors improve their knowledge of the culture, operation, and jargon of local police.<sup>259</sup> But more importantly, prosecutors can become deeply familiar with prevailing problematic police practices in their jurisdiction. Prosecutors are usually “gatekeepers for all criminal charges,” enjoying “a monopoly on their being brought.”<sup>260</sup> As such, they can identify patterns of misconduct by local police, whether because they notice them on their own, while processing cases, or through allegations brought to them by criminal defendants or other stakeholders (such as concerned citizens and nonprofits). Prosecutors can thus identify burning issues that require immediate systemic treatment, especially if relevant observations and allegations are recorded and preserved on an institutional level.<sup>261</sup>

### 3. Influence

Can prosecutors encourage police officers to comply with the Fourth Amendment? Although few would question the incentive that the exclusionary rule creates for prosecutors to help deter police misconduct or dispute prosecutors’ expertise, the ability of prosecutors to bring about a change in police behavior is heavily contested. The prevailing narrative, as mentioned previously, is that without prosecutorial authority over the police, prosecutors cannot successfully guide their actions.<sup>262</sup> But, as this Article argues, even without formal authority, prosecutors can have a tremendous positive influence on police behavior and can promote lawful policing.

Granted, prosecutors are not police chiefs, and their relationship with officers can be “complicated,” to say the least.<sup>263</sup> As explained by legal scholar

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<sup>257</sup> STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 2.7 cmt. b (AM. BAR ASS’N, Tentative Draft 1970).

<sup>258</sup> See, e.g., Harris, *supra* note 23, at 62 (describing the professional ties between prosecutors and police officers).

<sup>259</sup> Cf. David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 503–04 (2016) (describing the familiarity of prosecutors with police culture).

<sup>260</sup> Richman, *supra* note 23, at 293.

<sup>261</sup> See generally Adam M. Gershowitz, Essay, *Prosecutorial Dismissals as Teachable Moments (and Databases) for the Police*, 86 GEO. WASH. L. REV. 1525, 1542–46 (2018) (describing how a digital database of prosecutorial case dismissals can help promote lawful policing).

<sup>262</sup> See *supra* notes 185–218 and accompanying text.

<sup>263</sup> Harris, *supra* note 23, at 57.

David Harris, “[t]he differences in their respective roles and functions, as well as the disparities in social class, educational levels, and the like, can produce real divergences of opinions over particular cases, as well as personal and professional wariness.”<sup>264</sup> Nevertheless, prosecutors who manage to facilitate institutional dialogue and collaboration with the police, and to gain officers’ trust in the sincerity of their law enforcement goals and motivations, can become a “sympathetic ally” in the eyes of the police.<sup>265</sup>

Indeed, the highly influential report from the President’s Commission on Law Enforcement and Administration of Justice, released in 1967, found that “[i]n general, instructions or guidelines issued by the prosecutor relating to procedures for the prosecution of criminal cases will be accepted and followed by the police, particularly if the prosecutor is viewed by the police as seriously interested in the effective presentation of the case in court.”<sup>266</sup> Notable scholars have reached a similar conclusion: when police officers perceive that the law enforcement values that local prosecutors hold resemble their own, their motivation to follow prosecutorial guidance and advice (and therefore to comply with the Constitution) increases.<sup>267</sup> This positive influence that prosecutors can have on the behavior of police officers does not depend on any formal prosecutorial control. Rather, it is the product of mutual trust between prosecutors and police officers, and of officers’ understanding that prosecutors push compliance with the Constitution because they truly care about the fate of their criminal prosecutions.<sup>268</sup>

The reality is that prosecutors not only can promote lawful policing, but have in fact done so for decades.<sup>269</sup> And this reality is a direct outcome of the exclusionary rule. The next Section explains how.

### *C. Prosecutors’ Methods to Promote Lawful Policing*

The practical experience of more than six decades demonstrates that the exclusionary rule has indeed spurred prosecutors to employ their expertise and influence to reduce police misconduct. From the moment the Supreme Court

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<sup>264</sup> *Id.* at 56–57.

<sup>265</sup> JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 203 (2d ed. 1975).

<sup>266</sup> PRESIDENT’S COMM’N ON L. ENF’T & ADMIN. OF JUST., *supra* note 214, at 31.

<sup>267</sup> *See, e.g.*, HOROWITZ, *supra* note 13, at 246–47; SKOLNICK, *supra* note 265, at 199–203; Gold, *supra* note 250, at 1656; Isidore Silver, Comment, *Restraining the Police*, 11 MASS. REV. 587, 597–98 (1970); *cf.* Sklansky, *supra* note 259, at 503–04 (“Prosecutors . . . explain and legitimize the law to the police, and—in varying degrees—supervise the police to ensure they comply with the law. They are envoys—‘culture-brokers’—between the realm of the judges and the domain of law enforcement, between the courtroom and the squad room.” (footnotes omitted)).

<sup>268</sup> *See, e.g.*, HOROWITZ, *supra* note 13, at 246–47; SKOLNICK, *supra* note 265, at 203.

<sup>269</sup> *See infra* notes 270–319 and accompanying text.

extended the exclusionary rule to the states in *Mapp*, prosecutors started to fear for the fate of their cases where Fourth Amendment violations were involved.<sup>270</sup> To avoid triggering the exclusionary rule and possible loss of convictions, prosecutors have developed various methods to encourage local police to comply with the Fourth Amendment.<sup>271</sup> This Section discusses several of these methods. Subsection 1 addresses police training by local prosecutors.<sup>272</sup> Subsection 2 discusses providing legal counseling and advice to officers.<sup>273</sup> Subsection 3 explains how prosecutors have highlighted illegal practices or problematic officers.<sup>274</sup> Subsection 4 details steps prosecutors have taken to explain suppression or dismissal decisions to officers.<sup>275</sup> All of these methods can succeed in promoting lawful policing to some extent, despite the absence of formal prosecutorial authority over the police. It should be noted, however, that there is little data on the frequency with which prosecutors around the country implement these methods. A key takeaway of this Section, therefore, is the need for more empirical research on this important issue.

## 1. Police Training

There are at least two ways in which prosecutors have contributed to the education of local police on the rules pertaining to search and seizure and on the consequences of violating them. First, prosecutors have been urging the police to establish their own search and seizure education programs.<sup>276</sup> In New

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<sup>270</sup> See, e.g., Yale Kamisar, *Remembering the "Old World" of Criminal Procedure: A Reply to Professor Grano*, 23 U. MICH. J.L. REFORM 537, 557 n.65 (1990) (suggesting that many prosecutors in New York State were "unfamiliar with and uninterested in the law of search and seizure prior to *Mapp*," and only after *Mapp* changed their attitude (quoting H. Richard Uviller, *The Acquisition of Evidence for Criminal Prosecution: Some Constitutional Premises and Practices in Transition*, 35 VAND. L. REV. 501, 502 (1982))); Chris Blair, *Hudson v. Michigan: The Supreme Court Knocks and Announces the Demise of the Exclusionary Rule*, 42 TULSA L. REV. 751, 759 (2007) (arguing that prior to *Mapp*, "the police and prosecutors had simply been ignoring the requirements of the Fourth Amendment").

<sup>271</sup> See, e.g., Stephen H. Sachs, *The Exclusionary Rule: A Prosecutor's Defense*, 1 CRIM. JUST. ETHICS 28, 30 (1982) (describing, as the Attorney General of Maryland, how the threat of suppression of unconstitutionally obtained evidence has led prosecutors to develop various ways to encourage police compliance with the Fourth Amendment); Myron W. Orfield, Jr., Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1026 & n.50 (1987) (describing how the exclusionary rule encouraged the prosecution and the police in Chicago to collaborate to prevent police misconduct).

<sup>272</sup> See *infra* notes 276–289 and accompanying text.

<sup>273</sup> See *infra* notes 290–299 and accompanying text.

<sup>274</sup> See *infra* notes 300–309 and accompanying text.

<sup>275</sup> See *infra* notes 310–319 and accompanying text.

<sup>276</sup> See, e.g., Adina Schwartz, *"Just Take Away Their Guns": The Hidden Racism of Terry v. Ohio*, 23 FORDHAM URB. L.J. 317, 356 (1996) (citing Kamisar, *supra* note 270, at 557).

York City, for instance, such programs have reportedly improved police compliance with the Constitution.<sup>277</sup>

More significantly, prosecutors have utilized their legal expertise to develop and run training programs or to offer pertinent written guidance to the police.<sup>278</sup> Training on searches and seizures has been conducted, for example, by the Cook County State's Attorney's Office in Illinois,<sup>279</sup> the 22nd Judicial District Attorney's Office in Louisiana,<sup>280</sup> and the Williamson County District Attorney's Office in Texas.<sup>281</sup> Sometimes police officers themselves are the ones asking local prosecutors to train them on certain issues, demonstrating their internalization of the practical need to comply with the Fourth Amendment.<sup>282</sup>

In some jurisdictions, prosecutor-led training has become even more institutionalized. For instance, in Middlesex County, Massachusetts, the District Attorney's Office has employed a team of prosecutors whose job it is to train local police on search and seizure law and other important issues.<sup>283</sup> This team regularly adapts its training material to include the latest developments in the law and distributes a periodically updated manual with relevant guidance to local police.<sup>284</sup> Oftentimes, the prosecutorial team that is in charge of training prosecutors within its office also chooses to devote time to training local police. That is the situation, for example, in the Erie County District Attorney's Office in New York.<sup>285</sup>

The importance of prosecutor-led police training to promoting officers' compliance with the Constitution cannot be overstated. Empirical studies confirm that continuous police training on the Fourth Amendment is crucial for

<sup>277</sup> *Id.*

<sup>278</sup> See, e.g., Ronald F. Wright, *Prosecutor Institutions and Incentives*, 18 CRIMINOLOGY CRIM. JUST. L. & SOC'Y 85, 87 (2017) ("Many [prosecutors'] offices take an active role in training and advising police departments in their districts."); JUDY HAILS, CRIMINAL EVIDENCE 10 (8th ed. 2014) ("Some prosecutors provide training bulletins and seminars to help train the local police."); BALLIN, *supra* note 243, at 330 ("[P]rosecutors often train the police to search and seize in observance of Fourth Amendment requirements.").

<sup>279</sup> Orfield, *supra* note 271, at 1027.

<sup>280</sup> *District Attorney's Office Holds Training for Criminal Justice Professionals*, WARREN MONTGOMERY 22ND JUD. DIST. ATT'Y (Nov. 12, 2018), <https://damontgomery.org/district-attorneys-office-holds-training-criminal-justice-professionals> [<https://perma.cc/Q9HL-43WE>].

<sup>281</sup> Chris Herndon, *Officer Training*, TEX. DIST. & CNTY. ATT'YS ASS'N, <https://www.tdcaa.com/journal/officer-training> [<https://perma.cc/UG3U-MDKE>].

<sup>282</sup> See, e.g., Orfield, *supra* note 271, at 1027 n.52 (mentioning that, per an Illinois Assistant State's Attorney, prosecutor-led training "occur[s] generally at the request of the police department and [is] usually related to problem areas identified by the police or the state's attorney's office").

<sup>283</sup> *Appeals & Training Bureau*, MIDDLESEX CNTY. DIST. ATT'YS OFF., <https://www.middlesexda.com/appeals-training-bureau> [<https://perma.cc/8SBH-MM7J>].

<sup>284</sup> *Id.*

<sup>285</sup> *Community Prosecution and Training*, ERIE CNTY. DIST. ATT'YS OFF., <https://www4.erie.gov/da/community-prosecution-and-training-bureau> [<https://perma.cc/A8ZK-EAY8>].

officers' comprehension of the intricate governing rules they must follow.<sup>286</sup> But not just any training will do. For police training to be fruitful, it must be of a high enough quality to ensure that the complicated law is explained clearly and correctly.<sup>287</sup> Given prosecutors' unique expertise, the Fourth Amendment education they provide can meet this demanding standard.

The positive effects the exclusionary rule can have on the involvement of prosecutors in police training was even recognized by U.S. Supreme Court Justice Brennan.<sup>288</sup> In his dissent from the Court's 1984 decision in *United States v. Leon*, he stated that "the testimony of those actually involved in law enforcement suggests that, at the very least, the *Mapp* decision had the effect of increasing police awareness of Fourth Amendment requirements and of prompting prosecutors and police commanders to work towards educating rank-and-file officers."<sup>289</sup>

## 2. Legal Counseling and Advice

Prosecutors have encouraged lawful policing by making themselves accessible and available—to varying degrees—to address police officers' legal questions or concerns pertaining to searches.<sup>290</sup> As early as 1982, for instance, Maryland's Attorney General reported that, thanks to the exclusionary rule, "police-prosecutor consultation is customary" where searches or seizures are

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<sup>286</sup> See, e.g., William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311, 338 (1991) (finding that "the amount of in-service training in search and seizure law was the most significant of the background characteristics influencing police knowledge of the law"); Perrin et al., *supra* note 17, at 735 (finding that "training and education contribute to [police officers'] better understanding of the law").

<sup>287</sup> See, e.g., Purdon et al., *supra* note 105, at 492–93 (finding that police officers who participated in their study and who were recently trained on a certain Fourth Amendment issue applied the wrong law more often than those without recent prior training, and suggesting that this result may reflect "the [poor] quality of the training and education officers receive").

<sup>288</sup> *United States v. Leon*, 468 U.S. 897, 954 n.13 (1984) (Brennan, J., dissenting).

<sup>289</sup> *Id.* (citing Murphy, *supra* note 256, at 941).

<sup>290</sup> See, e.g., Green, *supra* note 22, at 1201 ("In some jurisdictions, prosecutors serve as legal advisors to the police."); Harris, *supra* note 23, at 54–55 (stating that in some jurisdictions, and especially informally, "[p]rosecutors may consult with police in ongoing cases; for example, police may seek advice on how to conduct a legally thorny search or seizure"); Wright, *supra* note 278, at 87 ("Many [prosecutors'] offices take an active role in training and advising police departments in their districts."); *id.* at 88 (stating that in some jurisdictions, "[i]ndividual prosecutors advise police officers at key points in the investigation, such as a search warrant application"); Robert L. Misner, *Limiting Leon: A Mistake of Law Analogy*, 77 J. CRIM. L. & CRIMINOLOGY 507, 537 (1986) ("[A] prosecutor is often the legal advisor to the police department and is in some ways responsible for the 'administration or enforcement' of the fourth amendment . . . ." (footnote omitted)).

involved.<sup>291</sup> Similar consultation has been reported to be routine in other jurisdictions, such as Chicago, Illinois.<sup>292</sup>

The exclusionary rule has also prompted prosecutors in numerous jurisdictions to employ “hotlines” dedicated to urgent concerns or questions raised by police officers.<sup>293</sup> Returning to Maryland, more than forty years ago, some local prosecutors’ offices in the state were available around the clock to answer “search and seizure questions” asked by local police.<sup>294</sup> A recent large-scale study found that similar hotlines (or “a rotating prosecutor on call” system) were employed by prosecutors’ offices in many other jurisdictions, though not necessarily on a 24/7 basis.<sup>295</sup> Prosecutors reported that police officers called them to ask questions about searches or arrests that officers perceived as legally complex, or when the case involved severe offenses or was “high profile” or otherwise special.<sup>296</sup>

Over time, a growing number of affluent police departments around the country have retained the services of legal advisors, who can be much more available than local prosecutors, to provide guidance to officers.<sup>297</sup> Poorer or smaller police departments cannot afford such services, and they must, therefore, rely on the professional help of local prosecutors.<sup>298</sup> Although prosecutors likely have less time to address officers’ Fourth Amendment questions and concerns, the help they provide may be more valuable in terms of quality than that of retained legal advisors. This is because ultimately, prosecutors, who spend a vast amount of their time in local courts, enjoy inside knowledge about the judicial handling of Fourth Amendment claims, which outside legal advisors cannot necessarily obtain.<sup>299</sup>

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<sup>291</sup> Sachs, *supra* note 271, at 30.

<sup>292</sup> See, e.g., Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 94 (1992).

<sup>293</sup> See generally Adam M. Gershowitz, *Justice on the Line: Prosecutorial Screening Before Arrest*, 2019 U. ILL. L. REV. 833, 836 (stating that “many prosecutors’ offices operate hotlines so that police can call with questions”).

<sup>294</sup> Sachs, *supra* note 271, at 30.

<sup>295</sup> Gershowitz, *supra* note 293, at 839, 842–48.

<sup>296</sup> *Id.* at 842–47. Nonetheless, “[i]n most jurisdictions . . . phone calls from the police are the exception, not the rule.” *Id.* at 839.

<sup>297</sup> See *supra* note 256 and accompanying text.

<sup>298</sup> See, e.g., Murphy, *supra* note 256, at 940 (describing the reliance of small police departments on the professional aid of local prosecutors); Carl McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659, 667 (1972) (stating that the police in the United States have a “practice of relying on the prosecutor’s office for legal advice,” and that “[e]xcept in the more rural and less populous parts of the country, this tradition is changing”).

<sup>299</sup> See *supra* notes 248–261 and accompanying text.

### 3. Highlighting Illegal Practices or Problematic Officers

Given that they review a large volume of cases presented to them by local police, prosecutors' offices can identify with relative ease patterns of police misconduct that require immediate systemic treatment. For example, a prosecutor's office may identify that certain police officers or the police department as a whole conduct many unlawful investigative traffic stops, where there is not enough evidence to support reasonable suspicion.<sup>300</sup> Prosecutors can bring attention to such unlawful practices by raising them to senior officers within the local police department—who may not be aware of such a pattern or its illegality.<sup>301</sup> In Montgomery County, Texas, for instance, prosecutors who identify particularly problematic police officers may alert their supervisors within the police department.<sup>302</sup>

Prosecutors often succeed in convincing police departments to take some sort of internal or disciplinary steps against problematic officers.<sup>303</sup> They manage to do so, for example, by refusing to collaborate with officers whose conduct a court has deemed unconstitutional or untrustworthy.<sup>304</sup> Numerous prosecutors' offices have maintained lists of local errant officers,<sup>305</sup> knowing that they may be constitutionally required to disclose such information to the defense in cases where these officers were involved.<sup>306</sup> By communicating this risk to the officers' supervisors, prosecutors have effectively encouraged them to intervene.<sup>307</sup> Officers included on these lists know that their professional assignments may be harmed or that they may “find themselves fast-tracked for

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<sup>300</sup> “[B]rief investigative [traffic] stops” are constitutional only “when a law enforcement officer has ‘a particularized and objective basis for suspecting the particular person stopped of criminal activity.’” *Navarette v. California*, 572 U.S. 393, 396–97 (2014) (quoting *United States v. Cortez*, 449 U.S. 411, 417–18 (1981)) (citing *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968)).

<sup>301</sup> See, e.g., Green, *supra* note 22, at 1201 (“[A]t the very least, a district attorney who concludes that stop-and-frisk practices are illegal, biased, or simply unwise, should express this view privately to representatives of the police department.”).

<sup>302</sup> See Gershowitz, *supra* note 261, at 1543 (quoting a senior prosecutor from the Montgomery County District Attorney’s Office).

<sup>303</sup> See, e.g., Harmon, *supra* note 4, at 805 (describing fruitful efforts of prosecutors to persuade police departments to reassign problematic officers who have “accumulate[d] accusations of dishonesty or bias that would have to be disclosed” to criminal defendants).

<sup>304</sup> See, e.g., Joanna C. Schwartz, Essay, *Who Can Police the Police?*, 2016 U. CHI. LEGAL F. 437, 456.

<sup>305</sup> See *id.* (explaining that “[i]n some jurisdictions, prosecutors keep track of courts’ decisions to suppress evidence or dismiss cases as a result of officers’ dishonesty or unconstitutional behavior”); Jonathan Abel, Brady’s *Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 780–81 (2015) (describing “Brady lists” as “the mechanism by which prosecutors within an office alert each other to an officer’s credibility problems”).

<sup>306</sup> See, e.g., Schwartz, *supra* note 304, at 456.

<sup>307</sup> *Id.*

termination and hard-pressed to find future work,”<sup>308</sup> and consequently are more likely to conduct lawful searches and seizures.<sup>309</sup>

#### 4. Interpretation of Suppression or Dismissal Decisions

Prosecutors can render “every suppression decision . . . a teaching moment” for police, by explaining judicial suppression decisions to the officers involved.<sup>310</sup> At least in some jurisdictions, prosecutors have been reported to do just that. For example, prosecutors from the Cook County State’s Attorney’s Office in Illinois occasionally help senior police officers “go over the suppression of evidence in a case in painstaking detail with the officers responsible.”<sup>311</sup>

Prosecutors have often refused to prosecute cases that are tainted with illegality because of the concern that a court would suppress evidence obtained unlawfully.<sup>312</sup> Such prosecutorial dismissals, when properly communicated and explained to police officers, can also help to educate them about the limits of their power.<sup>313</sup> And indeed, in many prosecutors’ offices around the country, including in Kentucky, California, and Texas, prosecutors have been routinely explaining to police officers why they decided not to take a case to trial, either in person, by email, or by other forms of communication.<sup>314</sup> Several prosecutors’ offices explicitly stated that the goal of explaining their dismissal decisions where police misconduct was involved was to ensure that officers avoid repeating similar unlawful behavior.<sup>315</sup> Some referred to this practice as a “training mechanism”<sup>316</sup> or a “teachable moment[]” for officers.<sup>317</sup> Scholars have argued that this type of direct communication between prosecutors and police officers is particularly beneficial for promoting police compliance with the Fourth Amendment. Legal scholar Donald Horowitz, for instance, commented that “the exact grounds of the decision not to prosecute are likely to be explained to police officers by prosecutors somewhat more often, more fully,

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<sup>308</sup> Abel, *supra* note 305, at 781.

<sup>309</sup> See, e.g., Schwartz, *supra* note 304, at 456 (arguing that where prosecutors maintain *Brady* lists, “the threat of a suppression decision may pressure officers not to behave dishonestly or unconstitutionally”).

<sup>310</sup> Richman, *supra* note 23, at 299.

<sup>311</sup> Orfield, *supra* note 271, at 1034–35.

<sup>312</sup> See, e.g., Gershowitz, *supra* note 261, at 1527 (“Although specific numbers are hard to come by, we know that prosecutors dismiss cases because of clear police error.”).

<sup>313</sup> *Id.* at 1535–36.

<sup>314</sup> *Id.* at 1535–40.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* at 1538 (quoting a prosecutor from the New Haven State’s Attorney’s Office).

<sup>317</sup> *Id.* at 1536 (quoting a prosecutor from the Louisville Office of the Commonwealth’s Attorney).

more informally, and in more understandable terms than they are by judges granting [suppression] motions and dismissing indictments.”<sup>318</sup> Therefore, Horowitz concluded, “there is some reason for thinking that prosecutorial screening may be the most effective way of enforcing the *Mapp* rule.”<sup>319</sup>

#### *D. Despite the Success: Prevalent Prosecutorial Passivity*

Prosecutors have an incentive to help prevent police misconduct, as well as the proper expertise and the ability to influence police behavior.<sup>320</sup> Prosecutors have also developed a variety of methods to accomplish this goal.<sup>321</sup> One could therefore reasonably expect that all prosecutors’ offices around the country would be invested in promoting lawful policing. Yet, although some prosecutors’ offices are active in their efforts to deter police misconduct, others are much more passive. Some prosecutors’ offices offer training on the Fourth Amendment, but others do not.<sup>322</sup> Some prosecutors’ offices function as de facto legal advisors to local police,<sup>323</sup> but some offer very limited counseling or none at all.<sup>324</sup> Some prosecutors’ offices alert police departments of illegal practices or particularly problematic officers,<sup>325</sup> but some refrain from doing so.<sup>326</sup> Some prosecutors’ offices make every effort to explain to police officers why a court suppressed the evidence they obtained unlawfully or why a prosecutor dismissed a case,<sup>327</sup> but others offer only very limited information or do not even bother to talk with the police on the matter.<sup>328</sup>

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<sup>318</sup> HOROWITZ, *supra* note 13, at 247; *see also* Sklansky, *supra* note 259, at 504 (“[B]ecause their work requires them to travel back and forth between the world of the policing and the world of the courtroom, talking on a daily basis with officers and with judges, they serve to explain the occupants of each world to those of the other, bridging a cultural divide . . . . They are translators and organizational intermediaries.”).

<sup>319</sup> HOROWITZ, *supra* note 13, at 246–47.

<sup>320</sup> *See supra* notes 219–269 and accompanying text.

<sup>321</sup> *See supra* notes 270–319 and accompanying text.

<sup>322</sup> *See supra* notes 276–289 and accompanying text.

<sup>323</sup> *See supra* notes 290–299 and accompanying text.

<sup>324</sup> *See, e.g.,* Murphy, *supra* note 256, at 940 (“Many [smaller police departments] have to depend upon prosecutors, who sometimes are not able to take on the task of interpreting and instructing police, and still others are left completely to their own devices with no real guidance available.”); Gershowitz, *supra* note 293, at 839–42 (listing prosecutors’ offices without hotlines for police officers’ questions).

<sup>325</sup> *See supra* notes 300–309 and accompanying text.

<sup>326</sup> *Cf. Harris, supra* note 23, at 57 (discussing prosecutors’ fear of commenting on the police’s work due to their concern of sabotaging their relationship with them).

<sup>327</sup> *See supra* notes 310–319 and accompanying text.

<sup>328</sup> *See, e.g.,* Slobogin, *supra* note 4, at 376 (stating that “exclusion often . . . is never communicated to the offending [police officer]”); Schwartz, *supra* note 304, at 456 (arguing that some prosecutors’ offices “do not inform individual law enforcement officers and agencies when courts suppress evidence or dismiss cases as a result of officers’ unconstitutional behavior”); Gershowitz, *supra* note

Why would many prosecutors' offices remain passive in their efforts to prevent police misconduct, despite their clear incentive to encourage lawful searches and seizures? The answer, of course, depends on the exact office and its personnel. The literature suggests four possible reasons.

First, prosecutors' offices—particularly smaller or poorer ones—do not always have the funds or time to provide these services, as they are overloaded with their routine prosecutorial tasks.<sup>329</sup>

Second, particularly when it comes to giving legal advice to police officers, prosecutors are afraid of being civilly sued for providing bad advice that results in police officers' violating the Constitution.<sup>330</sup> Prosecutors usually enjoy absolute immunity from suits for monetary damages under § 1983 (42 U.S.C. § 1983).<sup>331</sup> But, per the Supreme Court, prosecutors who provide legal advice to police officers are only protected by qualified immunity.<sup>332</sup>

Third, prosecutors are concerned that any involvement on their behalf in police work or any attempt at promoting lawful policing may sabotage their delicate relationship with local police.<sup>333</sup>

Fourth, many prosecutors simply do not consider encouragement of lawful police practices to be part of their job description.<sup>334</sup> The prosecutor's duty, ac-

261, at 1537–40 (listing prosecutors' offices that offer limited information to the police on cases they dismissed or that do not even inform them at all).

<sup>329</sup> See, e.g., Murphy, *supra* note 256, at 940; Gershowitz, *supra* note 293, at 848–49; Gershowitz, *supra* note 261, at 1540–41.

<sup>330</sup> See, e.g., Gershowitz, *supra* note 293, at 848–49.

<sup>331</sup> *Id.* According to § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983.

<sup>332</sup> The Court explained that absolute immunity is given only “for [prosecutors’] conduct in ‘initiating a prosecution and in presenting the State’s case,’ insofar as that conduct is ‘intimately associated with the judicial phase of the criminal process.’” *Burns v. Reed*, 500 U.S. 478, 486 (1991) (citations omitted) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430–31 (1976)). The Court held that “advising the police in the investigative phase of a criminal case is [not] so ‘intimately associated with the judicial phase of the criminal process,’ that it qualifies for absolute immunity.” *Id.* at 493 (citation omitted) (quoting *Imbler*, 424 U.S. at 430).

<sup>333</sup> See, e.g., Harris, *supra* note 23, at 57 (“[P]rosecutors may reject any inclination to insist on . . . better police practices overall, as this might adversely affect their effort to get along with police in the short term.”); Gershowitz, *supra* note 261, at 1541 (“[B]ecause dismissals may upset some police officers, prosecutors have further incentive to avoid these difficult conversations.”).

<sup>334</sup> See, e.g., LaFave & Remington, *supra* note 218, at 1005 (“[T]he prosecutor assigned to the case rarely assumes it to be his duty to inform the police department of the meaning of the [suppression] decision or of its intended impact upon current police practice.”).

according to this line of thought, does not include the “overall responsibility for the supervision of the police,” nor does it extend to educating or advising them.<sup>335</sup>

### III. REALIZING THE FULL POTENTIAL OF THE PROSECUTOR-ORIENTED EXCLUSIONARY RULE

The exclusionary rule may be more effective as an indirect deterrent to police misconduct, aimed at prosecutors, than it is as a direct deterrent, aimed at the police officers themselves.<sup>336</sup> But even as an indirect deterrent, its effect is still limited.<sup>337</sup> What can be done to help realize the full potential of the prosecutor-oriented exclusionary rule? How can we encourage prosecutors around the country to be more active in their relationship with the police despite the strong disincentives?

This Part attempts to answer these questions. Section A first addresses two predictable solutions: increasing prosecutors’ offices’ budgets and extending absolute immunity to prosecutors’ advice to police officers.<sup>338</sup> Although these solutions are theoretically promising, they are not likely to be particularly helpful in practice and may even be counterproductive. Section B proposes instead three alternative measures, which together and apart can be expected to increase prosecutors’ motivation to act.<sup>339</sup>

#### *A. Possible (but Likely Unhelpful) Solutions*

The most intuitive solutions to the problem of prosecutorial passivity are also the least promising. First, Subsection 1 discusses how merely increasing prosecutorial resources would likely fail to address the problem.<sup>340</sup> Then, Subsection 2 argues against the idea that extending absolute immunity to prosecutors’ advice to police would strengthen prosecutorial promotion of lawful policing.<sup>341</sup>

#### 1. Increasing Prosecutors’ Offices’ Funds and Workforce

Training, counseling, and educating the police requires money and personnel. Prosecutors’ offices that are chronically underfunded, overworked, and

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<sup>335</sup> PRESIDENT’S COMM’N ON L. ENF’T & ADMIN. OF JUST., *supra* note 214, at 30; Oaks, *supra* note 5, at 726.

<sup>336</sup> See *supra* notes 219–319 and accompanying text.

<sup>337</sup> See *supra* notes 320–335 and accompanying text.

<sup>338</sup> See *infra* notes 340–360 and accompanying text.

<sup>339</sup> See *infra* notes 361–419 and accompanying text.

<sup>340</sup> See *infra* notes 342–351 and accompanying text.

<sup>341</sup> See *infra* notes 352–360 and accompanying text.

short-staffed (as is frequently the case around the country)<sup>342</sup> understandably decline to take responsibility for tasks exceeding their immediate routine duty.<sup>343</sup> Some proponents of expanded prosecutorial involvement in police work and legal education assume that prosecutors' offices can somehow find the resources to do this. For example, the American Bar Association's Advisory Committee on the Prosecution and Defense Functions, which recommended that prosecutors help train the police on the Fourth Amendment, stressed that "[t]he importance of this function of the prosecutor is of such high level that allowance must be made in his budget for whatever personnel is required to perform the function effectively and on a professional teaching basis."<sup>344</sup> The common response of prosecutors' offices, however, is that they simply cannot afford it.<sup>345</sup>

Increasing the budget of prosecutors' offices therefore seems to be the natural solution. There are, however, compelling arguments against this. First, allocating additional funds to prosecutors' offices is not necessarily society's top priority. There are units and departments within the criminal justice system in more desperate need of additional public funding (like public defender offices),<sup>346</sup> not to mention crucial causes outside the criminal justice system.<sup>347</sup>

<sup>342</sup> See, e.g., Adam M. Gershowitz & Laura R. Killinger, Essay, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 266–79 (2011) (describing the massive workload of many prosecutors' offices in the United States).

<sup>343</sup> See, e.g., Gershowitz, *supra* note 261, at 1540–41 (describing how prosecutors often dodge nonobligatory tasks); cf. Irene Oritseweyinmi Joe, *Regulating Mass Prosecution*, 53 U.C. DAVIS L. REV. 1175, 1196 (2020) (explaining how busy prosecutors may be tempted to afford more deference to decisions made by the police); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2474 (2004) (describing how prosecutors' workload pushes them to extend generous plea offers to defendants in order to dispose of cases quickly).

<sup>344</sup> STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 2.7 cmt. b (AM. BAR ASS'N, Tentative Draft 1970).

<sup>345</sup> See, e.g., Gershowitz, *supra* note 293, at 842 ("[T]he Montgomery County, Maryland State's Attorney's Office believes the cost of hiring prosecutors to communicate with police at the time of arrest would be prohibitively expensive." (citing an interview with the Deputy State's Attorney)).

<sup>346</sup> See, e.g., Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1783–84 (2016) (describing some acute problems stemming from the underfunding of public defender offices).

<sup>347</sup> See, e.g., Barack Obama, Commentary, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 829 (2017) ("We should all be able to agree that our resources are better put toward underfunded schools than overfilled jails . . ."). Abolitionist approaches to criminal justice, in particular, support redirecting much of the budget that finances the criminal justice system toward welfare, education, and other important social goals. See, e.g., Dorothy E. Roberts, *The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 44–45 (2019) ("Abolitionists address the root causes of harm by investing in people's basic needs and addressing the causes of interpersonal violence."); Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 229 (2022) ("Public funding currently spent on prosecution should instead be invested in societal supports, such as housing, childcare, and mental health and substance abuse treatment care, that address the root causes of crime, including violent crime."). Penal

Second, prosecutors' offices may choose not to use the additional funds to promote lawful policing due to disincentives, such as fear of detrimentally affecting relationships with local police.<sup>348</sup> It would also be difficult to guarantee that the extra funding would be spent on promoting lawful policing and not on other unrelated goals.

Third, prosecutors' offices can take a more proactive role in promoting lawful policing even without a budget increase. For instance, prosecutors do not need to design a whole police training program from scratch. Rather, they can update existing training programs that bigger or wealthier prosecutors' offices within their state have already developed, and adapt them to their own jurisdiction. In addition, some better-funded nonprofit organizations, such as Fair and Just Prosecution, as well as academic research institutes and law clinics, could assist in building and designing training programs.<sup>349</sup>

Fourth, many efforts to reduce police misconduct are a worthwhile investment in the future that will eventually pay off, in terms of budget and personnel constraints. For example, in three counties in Texas, local prosecutors' offices prescreen and examine each and every warrantless arrest that police officers wish to make.<sup>350</sup> This expensive policy has paid off, as the large number of cases screened out by prosecutors has resulted in these counties "actually saving money" in the long term.<sup>351</sup> Therefore, it may make financial sense for prosecutors' offices to promote lawful policing even if some of their resources would initially have to be shifted toward that goal.

Thus, although increasing prosecutors' offices budgets may seem like an obvious solution at first glance, it may be neither helpful nor required in practice.

## 2. Extending Absolute Immunity to Prosecutors' Advice to Police

Prosecutors typically need not fear that their professional mistakes will result in a civil suit for monetary damages against them. The Supreme Court has long held that they enjoy absolute immunity from such suits under § 1983 (42 U.S.C. § 1983) for actions related to "initiating a prosecution and . . . pre-

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minimalists, who support states' utilizing their penal authority only when it is their last resort, would also advocate for an increased investment in such crucial social objectives. *See generally* Yoav Sapir & Guy Rubinstein, *Minimalist Criminal Courts*, 101 WASH. U. L. REV. (forthcoming 2024), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4727301](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4727301) [<https://perma.cc/L4SU-YDVD>] (describing penal minimalism).

<sup>348</sup> *See supra* note 333 and accompanying text.

<sup>349</sup> *See, e.g., About FJP/Our Work and Vision*, FAIR & JUST PROSECUTION, <https://fairandjustprosecution.org/about-fjp/our-work-and-vision> [<https://perma.cc/L3N4-R4HL>] (stating that the organization aids reform-oriented district attorneys "as they develop, implement, and champion effective changes to policies and practices in the criminal justice system").

<sup>350</sup> Gershowitz, *supra* note 293, at 859–69.

<sup>351</sup> *Id.* at 866.

senting the State's case," at least as long as they are "intimately associated with the judicial phase of the criminal process."<sup>352</sup> The main rationale is that these important prosecutorial tasks will be handled more professionally and impartially if prosecutors are not constantly concerned about potential suits against them.<sup>353</sup>

But absolute immunity, the Court decided, does not apply where prosecutors are sued for the legal advice they gave to police officers.<sup>354</sup> Instead, the only type of immunity prosecutors may enjoy in this scenario is qualified immunity.<sup>355</sup> The implication for prosecutors is clear: prosecutors cannot be sure that they will be shielded from suits stemming from legal advice they provided to the police. This, in turn, can explain prosecutors' frequent reluctance to engage in such activity, despite its potential to help reduce police misconduct that can compromise prosecutions.<sup>356</sup>

In theory, extending absolute immunity to prosecutors' advice to police would serve the goal of promoting lawful policing. But there are also good reasons to be skeptical. First, qualified immunity, albeit weaker than absolute immunity, still serves as a powerful shield from civil suits.<sup>357</sup> As the Supreme Court noted, qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law."<sup>358</sup> For the vast majority of prosecutors—especially those who mean well and truly want to help police operate lawfully—upgrading qualified immunity to absolute immunity would add little, if any, protection.

Second, and perhaps more importantly, absolute immunity could negatively impact the quality of legal advice given by prosecutors to police officers. Prosecutors who know that their legal advice can result in no civil liability for them may, over time, become less attentive to the quality of their advice. Then, consequently—intentionally or unintentionally—these prosecutors may mislead the police regarding the lawfulness of their actions. Qualified immunity, although protective of prosecutors, still encourages them to watch the quality and accuracy of their legal counseling.<sup>359</sup> The Court, therefore, correctly commented that "[a]lthough the absence of absolute immunity . . . may cause prosecutors to consider their advice more carefully, '[w]here an official could be

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<sup>352</sup> *Burns v. Reed*, 500 U.S. 478, 486 (1991) (citations omitted) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430–31 (1976)).

<sup>353</sup> *Imbler*, 424 U.S. at 424–28.

<sup>354</sup> *See Burns*, 500 U.S. at 493.

<sup>355</sup> *Id.*

<sup>356</sup> *See, e.g., Gershowitz*, *supra* note 293, at 848–49.

<sup>357</sup> *Burns*, 500 U.S. at 494–95.

<sup>358</sup> *Id.* (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

<sup>359</sup> *Id.*

expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate.”<sup>360</sup>

### *B. Strengthening Prosecutors' Incentive to Act*

The discussion thus far has suggested that prosecutors need neither an increased budget nor broader absolute immunity to become more proactive in promoting lawful policing. Yet prosecutors may still choose not to use the resources currently at their disposal to promote this goal, for fear of sabotaging their relationship with local police or simply because they do not consider it to be their responsibility at all.<sup>361</sup> What else can be done to encourage prosecutors to act?

This Section proposes three possible steps that would motivate prosecutors to reduce police misconduct. These steps are not mutually exclusive. Rather, they tackle the problem of prosecutorial passivity from three different complementary angles: doctrinal, political, and ethical. Subsection 1 suggests that the Supreme Court should condition the application of the good faith exception to the exclusionary rule upon prosecutors' proactivity in their relationship with the police.<sup>362</sup> Subsection 2 argues that voters should use their political leverage to inquire into their district attorneys' efforts to promote lawful policing and call for more action if necessary.<sup>363</sup> Subsection 3 claims that district attorneys should be ethically required to inform the public periodically about the steps taken by their offices to counter police misconduct.<sup>364</sup>

#### 1. Modifying the Good Faith Exception

Bolstering the prosecutor-oriented exclusionary rule can be achieved by conditioning the application of the good faith exception upon prosecutors' proactivity in their relationship with the police.

As mentioned earlier, the Supreme Court created the good faith exception to the exclusionary rule in 1984, in *United States v. Leon*.<sup>365</sup> The Court decided that evidence obtained by the police in good faith reliance on a search warrant will not be suppressed even if the warrant is subsequently invalidated (for example, because the warrant application submitted by the police turned out to be lacking).<sup>366</sup> The Court reasoned that this decision was not expected to nega-

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<sup>360</sup> *Id.* (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985)).

<sup>361</sup> See *supra* notes 333–335 and accompanying text.

<sup>362</sup> See *infra* notes 365–385 and accompanying text.

<sup>363</sup> See *infra* notes 386–400 and accompanying text.

<sup>364</sup> See *infra* notes 401–419 and accompanying text.

<sup>365</sup> 468 U.S. 897, 913 (1984).

<sup>366</sup> See *supra* notes 118–123 and accompanying text.

tively influence the conduct of police officers applying for search warrants or of magistrates deciding whether to grant them.<sup>367</sup> Still, it disregarded the expected effects on prosecutors.<sup>368</sup>

Until *Leon*, prosecutors routinely provided valuable assistance to police officers applying to magistrates for search warrants.<sup>369</sup> They used to make significant efforts to ensure that such applications conformed to constitutional requirements, hoping to minimize the risk that a reviewing court would later deem a warrant issued by a magistrate invalid for reason of faulty application, thereby possibly rendering any evidence obtained inadmissible.<sup>370</sup> Examination of search warrant applications by prosecutors can “catch some problems—deficiencies in probable cause, lack of specificity, or overbreadth—that the magistrate or judge might overlook.”<sup>371</sup> The Court’s decision in *Leon* considerably weakened prosecutors’ motivation to help police officers.<sup>372</sup> Though some prosecutors’ offices still offer to review applications,<sup>373</sup> it is understandable why others would choose to forgo this tedious process, despite its benefits.<sup>374</sup>

Over the years, scholars and judges have raised concerns about the quality of post-*Leon* search warrant applications and the reliability of the resulting warrants.<sup>375</sup> According to their warnings, without meaningful prosecutorial review, the police may more often submit baseless or faulty warrant applications that otherwise would have been screened out, but that busy magistrates may nevertheless grant.<sup>376</sup> One solution proposed by legal scholar Donald

<sup>367</sup> See *supra* notes 124–126 and accompanying text.

<sup>368</sup> See, e.g., Wasserstrom & Mertens, *supra* note 243, at 114 (arguing that the *Leon* Court did not consider the good faith exception’s influence on the work of prosecutors).

<sup>369</sup> *Id.*

<sup>370</sup> *Id.*

<sup>371</sup> David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1257 (2002); see also Gold, *supra* note 250, at 1622 (“Involving prosecutors as a second, serial layer of the warrant review process should improve accuracy.”).

<sup>372</sup> See, e.g., Wasserstrom & Mertens, *supra* note 243, at 114–15.

<sup>373</sup> See, e.g., Gershowitz, *supra* note 293, at 840 n.44, 843, 847 (listing some prosecutors’ offices that aid local police in the warrant application process); Gold, *supra* note 250, at 1642 & n.290 (listing “some jurisdictions [that] require prosecutor approval of warrant applications”).

<sup>374</sup> See Sklansky, *supra* note 371, at 1257–58 (discussing the costs associated with prosecutorial examination of search warrant applications).

<sup>375</sup> See, e.g., *United States v. Leon*, 468 U.S. 897, 974 (1984) (Stevens, J., concurring in part and dissenting in part); Donald Dripps, *Living with Leon*, 95 YALE L.J. 906, 930–32 (1986); Gold, *supra* note 250, at 1650–51.

<sup>376</sup> See, e.g., Dripps, *supra* note 375, at 930–31; Gold, *supra* note 250, at 1650–51; cf. *Leon*, 468 U.S. at 974 (Stevens, J., concurring in part and dissenting in part) (“Under the majority’s new rule, even when the police know their warrant application is probably insufficient, they retain an incentive to submit it to a magistrate, on the chance that he may take the bait. No longer must they hesitate and seek additional evidence in doubtful cases.”). Nowadays, magistrates usually devote just a couple of minutes to the review of every application. Laurent Sacharoff, *The Broken Fourth Amendment Oath*, 74 STAN. L. REV. 603, 612 (2022).

Dripps was to limit the application of the good faith exception to situations where a meaningful prosecutorial (or equivalently professional) prescreening of the warrant application preceded its submission to the magistrate.<sup>377</sup> According to the proposal, where such prescreening had not taken place, the reviewing court would refrain from applying the good faith exception and instead suppress evidence obtained in a search conducted without probable cause.<sup>378</sup> As suggested by Dripps, his proposal would stimulate meaningful prescreening of warrant applications by prosecutors and thus reduce the risk of the submission of flawed applications.<sup>379</sup>

But conditioning the application of the good faith exception upon prosecutorial prescreening promises more than just better search warrant applications. Police officers apply for thousands of search warrants on a daily basis.<sup>380</sup> If prosecutors were to aid officers in the application process, each application could become an opportunity for productive interaction. Police officers could be expected to be more receptive to prosecutors' guidance on warrant requirements, knowing that it is the direct result of their wish to guarantee the admissibility of incriminating evidence. Over time, this frequent engagement could help prosecutors and police officers develop mutual trust and personal and institutional collaboration, which could, in turn, open the gate to more fruitful efforts to encourage lawful policing.<sup>381</sup> In an improved environment of cooperation, prosecutors would feel more comfortable offering their support on matters relating to compliance with the law, and officers would feel more comfortable sharing their preferences and needs.

The proposed doctrinal change would also strengthen the perception that prosecutors are responsible for encouraging lawful police practices. Prosecutors would no longer be able to suggest that this is not their job or that their hands are tied in the absence of authority over the police.<sup>382</sup> By directly rewarding prosecutorial proactivity and punishing prosecutorial passivity, this change would send the message—to prosecutors and to society as a whole—that prosecutors' promotion of lawful policing is both important and desired.

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<sup>377</sup> Dripps, *supra* note 375, at 930–31, 941–43.

<sup>378</sup> *Id.* at 941–43.

<sup>379</sup> *Id.*

<sup>380</sup> See, e.g., James Sanders, Note, *Reconsidering Missouri's Warrant Suppression Standard*, 84 MO. L. REV. 581, 581 n.3 (2019) (stating that "Missouri circuit courts alone issued 216,579 warrants in fiscal year 2017, an average of nearly 600 warrants per day").

<sup>381</sup> See *supra* notes 262–269 and accompanying text (arguing that mutual trust and collaboration between prosecutors and police officers can help prosecutors encourage lawful policing); see also Gold, *supra* note 250, at 1644 ("[G]reater [police-prosecution] communication would enhance prosecutors' role checking police within the executive branch and promote more constitutionally-informed citizen-police interactions.").

<sup>382</sup> See *supra* notes 334–335 and accompanying text.

Finally, implementing this proposal would not be expected to require the allocation of additional funds to prosecutors. As suggested above, one result of routine prosecutorial review of search warrant applications is the screening out of baseless or faulty applications that should not be submitted, despite the possibility that a magistrate would grant them.<sup>383</sup> In addition, due to the burden associated with seeking prosecutors' preapproval, police officers themselves would, over time, limit the number of warrants they sought by prioritizing the most meritorious applications.<sup>384</sup> Mandatory prosecutorial preapproval of warrantless arrests has resulted in fewer arrests and in jurisdictions cutting costs in the long term.<sup>385</sup> Here, too, there is reason to be optimistic that mandatory prosecutorial review of search warrant applications would result in fewer applications (and warrants), and would therefore not require increasing prosecutors' offices' budgets.

## 2. Holding District Attorneys Publicly Accountable

The public can use its political power to demand that prosecutors counter police misconduct even without any further doctrinal changes. Ultimately, as legal scholar Carissa Byrne Hessick explained, "elected chief prosecutors are answerable only to their local voters,"<sup>386</sup> who can impact their policies.<sup>387</sup>

In a world where constitutional violations by the police can result in suppression of incriminating evidence, voters with opposing views and values can have a mutual interest in reducing police misconduct, albeit for different reasons. For voters who prioritize individual rights and liberties or oppose government overreach, police wrongdoing is inherently undesired and should, therefore, be resisted.<sup>388</sup> Law and order proponents, meanwhile, may support police adherence to the law not in its own right, but for its potential to prevent negative ramifications for the effective prosecution or conviction of suspected offenders.<sup>389</sup> Granted, voters supporting strong crime control may disfavor—even despise—the exclusionary rule, for its potential costs for law enforcement and public safety.<sup>390</sup> Yet they would simultaneously want to prevent the rule

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<sup>383</sup> See *supra* notes 376, 379 and accompanying text.

<sup>384</sup> As Dripps explained, "the cost of the screening process will ensure that it is undertaken only in cases of substantial suspicion." Dripps, *supra* note 375, at 933.

<sup>385</sup> See *supra* notes 350–351 and accompanying text.

<sup>386</sup> Hessick, *supra* note 231, at 401.

<sup>387</sup> *Id.* at 403.

<sup>388</sup> See, e.g., PACKER, *supra* note 76, at 165–70 (describing the insistence of due process supporters on police adherence to the law, even at the cost of compromising law enforcement efforts).

<sup>389</sup> See *supra* notes 73–75 and accompanying text.

<sup>390</sup> See, e.g., PACKER, *supra* note 76, at 167–68 (describing the hostility of crime control supporters toward the exclusionary rule); Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 111 (2003) (arguing that "[t]o conservatives, it is an absurd rule through which manifestly

from being triggered, especially where allegedly dangerous individuals are involved.

Regardless of their reasons for supporting lawful policing, voters who appreciate that prosecutors can be engines of positive change in police conduct can (and should) demand that their district attorneys act accordingly. With the assistance of local media outlets or relevant nonprofit or grassroots organizations, voters could inquire into their local prosecutor's office's efforts to promote police compliance with the Constitution and call for more action if deemed necessary. In a jurisdiction where constituents learn to value the benefits of prosecutorial promotion of lawful policing, the poor performance of the incumbent district attorney on this matter could potentially harm their chances of reelection, especially where challengers promise to do better.<sup>391</sup>

Ousting a district attorney for failure to fight police misconduct would possibly not be unprecedented. In the case of Brooklyn District Attorney Charles Hynes, who led his office for almost twenty-four years, this issue may have cost him his job.<sup>392</sup> Hynes had long been accused by his political rivals of not doing enough to curb the New York Police Department's notorious practice of racially discriminatory stops and frisks.<sup>393</sup> A federal court's official finding that this practice was indeed unconstitutional, just months before the election, put this issue at the forefront of the race.<sup>394</sup> Though Hynes argued that he had no authority over the police, suggesting that he could not effectively influence their behavior,<sup>395</sup> his challenger Kenneth Thompson promised that as a district attorney, he would proactively fight police misconduct.<sup>396</sup> Thompson ended up beating Hynes in the Democratic primary and again in the general election (where Hynes ran on the Republican ticket),<sup>397</sup> becoming the first African

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dangerous criminals are let out because the courts prefer technicalities to truth" (citing Daniel E. Lungen, *Victims and the Exclusionary Rule*, 19 HARV. J.L. & PUB. POL'Y 695, 695–97 (1996))).

<sup>391</sup> As Stephanos Bibas suggested, new information to which voters are exposed about the incumbent district attorney's poor performance can transform even a formerly unnoticed topic into a "salient campaign issue." Bibas, *supra* note 234, at 989.

<sup>392</sup> See Vivian Yee, *Thompson Defeats Hynes, Again, for Brooklyn District Attorney*, N.Y. TIMES (Nov. 6, 2013), <https://www.nytimes.com/2013/11/06/nyregion/thompson-claims-victory-over-hynes-again-for-brooklyn-district-attorney.html> [<https://perma.cc/JCD7-JQEX>] (arguing that Hynes's challenger "had positioned himself as a reformer, criticizing Mr. Hynes for what he said was passivity on issues, like the Police Department's stop-and-frisk tactics, that affected young minorities").

<sup>393</sup> E.g., Green, *supra* note 22, at 1186 n.30.

<sup>394</sup> See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 658, 660 (S.D.N.Y. 2013) (ruling that the New York Police Department's stop-and-frisk practice was unconstitutional and racially discriminatory).

<sup>395</sup> See *supra* notes 20–21 and accompanying text.

<sup>396</sup> See Miller, *supra* note 20.

<sup>397</sup> Yee, *supra* note 392.

American leader of the Brooklyn District Attorney's Office<sup>398</sup> and a champion of police accountability.<sup>399</sup>

Hynes's defeat by Thompson demonstrates that voters may value proactive promotion of lawful policing by prosecutors. But that does not mean that they must wait for egregious constitutional violations before they inquire into their district attorney's efforts to counter police misconduct. Voters have the power to demand, at any moment, that their district attorney inform them of prosecutors' efforts to reduce police wrongdoing and redouble those efforts if necessary. By signaling to their district attorney that this issue is important to them and could be a factor in their electoral decision, voters can effectively impact the prosecutor's office's policy.<sup>400</sup>

### 3. Amending Professional Conduct Rules

The demand that district attorneys inform the public about their offices' efforts to promote lawful policing should not come only from constituents. Rather, such reporting should be required of district attorneys as a matter of ethical duty.

In many jurisdictions, especially smaller or rural ones, incumbent district attorneys have led their office for many years without being challenged by other candidates.<sup>401</sup> In the absence of challengers, it is likely that voters are much less inclined to show interest in or question the performance of their local prosecutor's office.<sup>402</sup> The media, too, cannot always be relied upon to inquire into this issue, particularly where media outlets are weak or where voters lack interest.<sup>403</sup> If neither the public nor the media seeks out relevant information, it never sees the light of day. In other words, voters cannot be aware of potential

<sup>398</sup> Sean Gardiner, *Hynes Out as Brooklyn D.A.*, WALL ST. J. (Nov. 6, 2013), <https://www.wsj.com/articles/SB10001424052702304391204579179873869561610> [<https://perma.cc/GDL7-ZJET>].

<sup>399</sup> See Mia Hall, *Four Times Brooklyn DA Ken Thompson Showed That Black Lives Matter*, NBC NEWS, <https://www.nbcnews.com/news/nbcblk/four-times-brooklyn-da-ken-thompson-showed-black-lives-matter-n666561> [<https://perma.cc/BEU4-7MNQ>] (Oct. 15, 2016) (discussing how Thompson promoted police accountability).

<sup>400</sup> See Hessick, *supra* note 231, at 403 (discussing the impact that voters can have on prosecutors' offices' policy).

<sup>401</sup> See, e.g., Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 592–94 (2009); Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1545 (2020).

<sup>402</sup> See, e.g., Wright, *supra* note 401, at 582 (“Uncontested elections short-circuit the opportunities for voters to learn about the incumbent’s performance in office and to make an informed judgment about the quality of criminal enforcement in their district.”).

<sup>403</sup> In addition, the media tends to “focus[] on the candidates’ individual qualifications, rather than the performance of the [prosecutor’s] office.” Hessick, *supra* note 231, at 402 (citing Wright, *supra* note 401, at 600–02).

problems or effectively hold their district attorneys accountable.<sup>404</sup> The readiness of district attorneys to give an account of their offices' measures to prevent police misconduct must not, therefore, be left purely at the mercy of public pressure. Adopting a periodic reporting requirement as district attorneys' ethical duty would help ensure that more of them become transparent about their performance.

The American Bar Association's (ABA) highly influential *Model Rules of Professional Conduct*,<sup>405</sup> on which all jurisdictions around the country have based their binding ethics rules (to varying degrees), do not include such a requirement.<sup>406</sup> In fact, Model Rule 3.8, which addresses the "[s]pecial [r]esponsibilities of a [p]rosecutor," is completely silent on the issue of promoting police adherence to the Fourth Amendment.<sup>407</sup>

The ABA has also periodically issued *Criminal Justice Standards for the Prosecution Function*.<sup>408</sup> As their drafters explained, these Standards are at best "aspirational or describe 'best practices,' and are not intended to serve as the basis for the imposition of professional discipline."<sup>409</sup> Like the ABA's Model Rules of Professional Conduct, these Standards do not call for chief prosecutors to release information about their offices' efforts to reduce police misconduct. They do, however, encourage prosecutorial promotion of lawful policing, at least to some extent.<sup>410</sup> In particular, Standard 3-3.2, which is devoted to prosecutor-law enforcement relations, lists some general steps that prosecutors can take in this direction.<sup>411</sup> It recommends that prosecutors "promote compliance by law enforcement personnel with applicable legal rules," especially by ascertaining their awareness of pertinent up-to-date law and policy.<sup>412</sup> It also recommends that prosecutors provide legal training to law en-

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<sup>404</sup> See, e.g., DAVIS, *supra* note 32, at 169 ("Unless the public is consistently informed of prosecutors' performance during their tenure in office, the electoral process will remain ineffective.").

<sup>405</sup> MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2020).

<sup>406</sup> See generally Bruce A. Green, *Bar Authorities and Prosecutors* (discussing the ABA Model Rules of Professional Conduct), in THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION, *supra* note 23, at 309, 310–11.

<sup>407</sup> See MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N 2020).

<sup>408</sup> CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION (AM. BAR ASS'N 2017).

<sup>409</sup> *Id.* § 3-1.1(b); see also Green, *supra* note 406, at 311 (explaining that these Standards "express[] normative expectations for prosecutors that are not necessarily meant to be judicially enforced"); Ellen S. Podgor, Essay, *The Role of the Prosecution and Defense Function Standards: Stagnant or Progressive?*, 62 HASTINGS L.J. 1159, 1163 (2011) (stating that "the Standards do not reach a level of being disciplinary rules").

<sup>410</sup> See Gold, *supra* note 250, at 1641 (arguing that some of the Standards' "provisions regarding police-prosecutor interactions point to a broader prosecutorial duty to serve as a constitutional check on police to protect constituents' rights").

<sup>411</sup> CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-3.2 (AM. BAR ASS'N 2017).

<sup>412</sup> *Id.* § 3-3.2(c).

forcement officers or help them devise their own training solutions,<sup>413</sup> and states that prosecutors “may provide independent legal advice to law enforcement about actions in specific criminal matters and about law enforcement practices in general.”<sup>414</sup>

The ABA’s current efforts to call for prosecutorial promotion of lawful policing are well-intentioned, but also quite ineffective. The Criminal Justice Standards for the Prosecution Function, as mentioned above, are explicitly non-binding, and their practical influence on the behavior of prosecutors is often described as negligible.<sup>415</sup> But even if Standard 3-3.2’s recommendations were to be adopted by jurisdictions as binding ethics rules, their expected effect would be limited. Granted, they may help instill in prosecutors a sense of responsibility for proper police conduct. However, the Standards “provide little structure,”<sup>416</sup> and their guidance to prosecutors is general and vague. As a result, prosecutors would likely struggle to know what would satisfy their requirements, and disciplinary authorities would hesitate to enforce them and penalize prosecutors for their violation.<sup>417</sup> At the same time, jurisdictions may understandably resist adopting more precise rules telling prosecutors’ offices exactly how they should promote lawful policing. The level of proper prosecutorial proactivity largely depends on the individual prosecutor’s office and the local police department. Moreover, state courts are usually those in charge of the “adoption of professional conduct rules and the[] enforcement of these rules through disciplinary processes,”<sup>418</sup> and they may want to avoid interfering excessively with the work of local prosecutors as a matter of separation of powers.<sup>419</sup>

Requiring chief prosecutors to provide periodic accounts of the steps taken by their office to promote lawful policing would be less invasive and more enforceable. As a procedural requirement that does not necessitate any substantive evaluation of prosecutors’ offices’ operation, it would not raise significant

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<sup>413</sup> *Id.* § 3-3.2(d).

<sup>414</sup> *Id.* § 3-3.2(b).

<sup>415</sup> *See, e.g.*, Podgor, *supra* note 409, at 1175 (suggesting that “the Standards serve no effective role and have no enforcement”).

<sup>416</sup> Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 324 (2017).

<sup>417</sup> Even where professional conduct rules are not vague, disciplinary authorities only rarely hold prosecutors accountable for violating them. *See, e.g.*, Green, *supra* note 406, at 314.

<sup>418</sup> *Id.* at 309; *see also* Stephen Gillers, *Because They Are Lawyers First and Foremost: Ethics Rules and Other Strategies to Protect the Justice Department from a Faithless President*, 57 GA. L. REV. 163, 173 (2022) (“State and federal courts adopt professional conduct rules to govern the lawyers they license or who appear before them.”).

<sup>419</sup> *See, e.g.*, Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 761 (2001) (discussing separation of powers concerns associated with the enforcement of professional conduct rules by state courts where prosecutors are involved).

separation of powers concerns. And, as a simple, bright line rule that is easy to understand and implement, its observation and enforcement would be much more likely.

A periodic reporting requirement would have benefits beyond informing constituents about their local prosecutor's office's efforts to reduce police wrongdoing. Naturally, this requirement could be expected to create a strong incentive for district attorneys to be more proactive in promoting lawful policing, so that they would be able to show interested voters that this issue is important to them. The process of gathering relevant information for periodic reporting would also give district attorneys an opportunity to systematically learn about their office's endeavors. This, in turn, may not only encourage district attorneys to do more to tackle police misconduct, but may also assist them in understanding which aspects of their work with the police need to be strengthened or attended to. Some district attorneys, for instance, may learn for the first time that many prosecutors in their office do not regularly inform the police of judicial suppression rulings or prosecutorial dismissal decisions. Others may discover that a training program that they assumed their office had been offering to local police was discontinued long ago. Furthermore, line prosecutors who know that they will be asked to inform their district attorney about their own efforts to encourage lawful policing can also be expected to work harder in this direction.

Public release of this information could also be useful for other prosecutors' offices, which would be able to gather ideas about possible measures for curbing police wrongdoing and even reach out to, and consult with, offices who have gained experience employing certain methods. Moreover, offices could save costs and increase efficiency by sharing training curricula and other relevant materials amongst themselves.

## CONCLUSION

Over the last few years, some of the more conservative Justices of the Supreme Court, who have been critical of the exclusionary rule, have become nostalgic about *Wolf v. Colorado*. Just recently, Justice Thomas, in his concurrence to the 2018 Supreme Court's opinion in *Collins v. Virginia*, suggested that perhaps the time has come to overrule *Mapp v. Ohio*, and return instead to the days of *Wolf*, when the exclusionary rule applied only to the federal government and not to the states.

This Article suggests that defenders of the exclusionary rule may also have cause to revisit *Wolf*, albeit for different reasons. Justice Murphy's dissent in *Wolf* promises real hope for the deterrent effect of the exclusionary rule. By understanding the rule as addressed primarily to prosecutors, not to police officers, we can learn how to improve its deterrent value and prevent police mis-

conduct more effectively. Prosecutors already have the incentive, the expertise, and the power to encourage the police to comply with the Fourth Amendment. They will use this power more if courts and the public reward them when they do so, condemn them when they do not, and consistently remind them that promoting lawful policing largely depends on them.