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PROSECUTORS AND POLICE: AN UNHOLY UNION

Maybell Romero *

*“Prosecutors work with police day in, day out, and typically they’re reluctant to criticise them or investigate them.”*¹

INTRODUCTION

In June of 1989 John Buchanan, with the National Institute of Justice, observed what was then a persistent problem: a “frequent and characteristic want of cooperation between the investigating and prosecuting agencies in the same locality.”² The same bulletin notes, however, that investigating officers and prosecutors started breaking “new ground” at the time, “work[ing] closely together every step of the way, focusing on the same goal—conviction.”³

Those who follow the present-day relationships between police and prosecutors, not merely in the enforcement of criminal codes but also in the political realm, may feel some surprise that there was such a disconnect between the two camps. Prosecutors often seem unwilling to initiate prosecutions against police officers who employ excessive force, even when that force sometimes leads to

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1. Jon Swaine, Oliver Laughland, Jamiles Lartey & Ciara McCarthy, *Ties That Bind: How the Bond Between Police and Prosecutors Impedes Justice*, GUARDIAN (Dec. 31, 2015, 8:00 AM), <https://www.theguardian.com/us-news/2015/dec/31/ties-that-bind-conflicts-of-interest-police-killings> (quoting a statement made by Professor Samuel Walker of the University of Nebraska) [<https://perma.cc/6UFB-GGHT>].

2. John Buchanan, *Police-Prosecutor Teams: Innovations in Several Jurisdictions*, NAT'L INST. JUST. REP., May–June 1989, at 2, 2 (quoting NAT'L COMM'N ON LAW OBSERVANCE & ENF'T, REPORT ON PROSECUTION 17 (1931)).

3. *Id.*

death.⁴ Some prosecutors dole out rewards for meeting a minimum yearly conviction rate, introducing perverse incentives for prosecutors to cooperate closely with police, even if investigators engage in misconduct, and to opt to take easy, rather than deserving, cases to trial.⁵

A police and prosecutor divide is popularly depicted in television and movies with perhaps the best known example being *Law & Order*, whose opening lines depict a system in which the two camps seldom, if ever, meet.⁶ In contravention of this understanding, however, police have been shown to exert a great deal of power not just in how a prosecutor prepares for trial, but also how prosecutors engage in plea bargaining.⁷ There is no uniform system or standard by which the prosecutor-police relationship is regulated throughout the country, leading to a pastiche of policies that not only differ from state to state on the federal level, but also county to county and town to town on a local level.⁸

This close cooperation between prosecutors and police, however, has started to extend beyond just plea bargaining and trial preparation. In some cities, police and prosecutors have begun to work together to influence policy and flummox criminal justice reform.

4. See Swaine et al., *supra* note 1.

5. In an infamous example, former Colorado Eighteenth Judicial District Attorney Carol Chambers awarded felony prosecutors bonuses for achieving a seventy percent minimum conviction rate in at least five trials per year. While Chambers correctly explained that “it is hard to find performance standards by which to measure trial attorneys,” her assertion that using a minimum conviction rate standard “best meets the need to have a performance standard” is grossly misguided at best. See Jessica Fender, *DA Chambers Offers Bonuses for Prosecutors Who Hit Conviction Targets*, DENV. POST (May 4, 2016, 5:58 AM), <https://www.denverpost.com/2011/03/23/da-chambers-offers-bonuses-for-prosecutors-who-hit-conviction-targets/> [<https://perma.cc/5B6Q-497D>].

6. For readers unfamiliar with the show, it attempts to explain that the criminal justice system is divided in two: “the people are represented by two separate but equally important groups: The police who investigate crime, and the district attorneys, who prosecute the offenders.” These lines, of course, present a gross oversimplification of a much more complex system with many more moving parts such as defense attorneys, judges, juries, and probation agencies. While this may seem of little import, it should be acknowledged that such media influences what the public “believe[s] about criminal justice and what we think ought to be done about crime are based on content that has been parsed, filtered, recast, and refined through electronic, digital, visually dominated, multimedia entities” such as television and movie studios. See Ray Surette, *Media, Criminology, and Criminal Justice*, in OXFORD RESEARCH ENCYCLOPEDIA OF CRIMINOLOGY (2018).

7. See generally Jonathan Abel, *Cops and Pleas: Police Officers’ Influence on Plea Bargaining*, 126 YALE L.J. 1730 (2017).

8. *Id.* at 1733, 1743.

Before Wesley Bell was recently sworn in as St. Louis County Prosecutor after defeating an incumbent, assistant prosecutors and their investigators took the extraordinary step of voting privately to join the St. Louis Police Officers Association.⁹ Bell took drastically different positions than his predecessor while campaigning for office, expressing a commitment to “oppose[] the death penalty, back[] treatment instead of jail for people accused of minor drug crimes, pledge[] to reform the cash bail system, . . . promise[] to set up” a conviction integrity unit, and “pledge[] to hold police officers accountable for wrongful acts.”¹⁰

Prosecutors unionizing with police, of course, present a host of ethical conflicts of interest, not just for both groups, but for the union as its own entity, especially when conflicts between police and prosecutors arise. Prosecutors joining police unions would also likely bolster the view that prosecutors collude with the police to prevent criminal justice reform from taking root even with reformist elected prosecutors in office and that such offices are usually systemically racist.

Police unions, along with other public employee unions, have been viewed with suspicion by those along the entire length of the political spectrum, with conservatives often arguing that allowing collective bargaining for such unions increases the costs of providing services, while those on the left argue that such unions can slow reform.¹¹ In their article *Police Unions*, Professors Catherine Fisk and L. Song Richardson explain that the view that unions obstruct reform is understandable given that “past [Department of Justice] civil rights interventions and consent decrees have encountered [police] unions as obstacles to implementation of reform.”¹²

9. Akela Lacy, *Before Criminal Justice Reformer is Even Sworn In, St. Louis Prosecutors Have Joined a Police Union*, INTERCEPT (Dec. 20, 2018, 3:42 PM), <https://theintercept.com/2018/12/20/wesley-bell-st-louis-prosecutor-police-union/> [https://perma.cc/Z35S-DT MP].

10. Debra Cassens Weiss, *Conflict Questions Raised About Prosecutors' Vote to Join Police Union*, A.B.A. J. (Dec. 21, 2018, 11:28 AM), <http://www.abajournal.com/news/article/conflict-questions-raised-about-st.-louis-county-prosecutors-vote-to-join-police-union> [https://perma.cc/YUJ6-WMHB].

11. Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 716–17 (2017).

12. *Id.* at 716.

Police officers and prosecutors often enjoy much more robust protections in their employment than workers in the private sector.¹³ They enjoy greater freedoms in exercising First Amendment rights and are more shielded from the retaliation that may follow in the workplace.¹⁴ They also are entitled to due process before termination of employment, unlike most private sector employees who work on an “at will” basis.¹⁵ Police are also very frequently unionized, and these unions often advocate for specific legislation benefitting law enforcement and influencing criminal justice policy.¹⁶ In considering the relationship between police, police unions, and prosecutors, this Article will employ a similar approach in adopting a broader definition of “union” than would usually be discussed in labor law; the term “union” is used “more loosely to capture the full range of police labor organizations,” given that many law enforcement groups that identify themselves as unions are not affiliated with organized labor otherwise or “may or may not be certified as the exclusive representative of the officers on whose behalf they negotiate.”¹⁷

Apart from the ethical conflicts that face prosecutors through working too closely with police and their unions, the formation of generalized law enforcement unions runs counter to the original goals addressed by the first formalized labor unions in the United States. If anything, law enforcement and those who would be identified as working class today were often at odds during the colonial period in which the rudimentary criminal justice system of each of the colonies punished idleness, forcing able-bodied men to work.¹⁸ The early 1800s saw workers who attempted, if informally, to unionize and strike and picket for better wages successfully charged

13. *Id.* at 718.

14. *Id.*

15. *Id.* at 715, 748.

16. For example, the website of the International Union of Police Associations describes itself like so: “While I.U.P.A.’s officers, active and retired law enforcement officers, fight to improve the lives of their brothers and sisters in law enforcement, I.U.P.A. works to improve legislation that protects and affects public safety officers, as well as representing the needs of law enforcement officers and support personnel, whether that be for better equipment, more staff or a fair wage.” *Our Mission*, INT’L UNION POLICE ASS’NS, <https://iupa.org/our-mission/> [https://perma.cc/TM4Z-9GX7].

17. Fisk & Richardson, *supra* note 11, at 733–34 (citing DAVID ALAN SKLANSKY, *DEMOCRACY AND THE POLICE* 181, 183 (2008)).

18. *See, e.g.*, THE LAW AND LIBERTIES OF MASSACHUSETTS 25 (Hunting Library 1998) (1648) (“[No one] shall spend his time idly or unprofitably [sic] under pain of such punishment as the Court of Assistants or County Court shall think meet to inflict.”).

and prosecuted for conspiracy.¹⁹ After Reconstruction, prosecutors and police worked together to undermine the gains made by formerly enslaved Blacks, including “lien laws for landlords, vagrancy laws,” laws criminalizing luring workers from current employment with the promise of better wages and conditions, as well as laws criminalizing walking off the job.²⁰ The late 1800s saw labor frequently conflict with management, law enforcement, and the courts. The alignment between the courts, attorneys, and law enforcement as a larger group of middle-class professionals against working class and poor laborers was only solidified with the start of professional licensing and more formalized characterizing of some forms of work as skilled versus unskilled.²¹

Policing and its American origins can largely be traced back to the institution and enforced brutalization of Blacks through slavery, with the Carolina colony forming its own slave patrol in 1704 and other slave patrols and night watches often evolving into the modern police departments that are now familiar.²² Such law enforcement mechanisms were developed through the oppression of other vulnerable groups as well. Private police and private prosecution were popular in the 1800s, so popular that some state laws authorizing private prosecution still persist on the books.²³ The authorization of private police forces, while still currently popular,²⁴

19. See, e.g., *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111 (1842).

20. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 505 (2d ed. 1985).

21. See Lawrence M. Friedman, *Freedom of Contract and Occupational Licensing 1890–1910: A Legal and Social Study*, 53 CAL. L. REV. 487, 489, 493–94, 503, 526–29 (1965).

22. Olivia B. Waxman, *How the U.S. Got Its Police Force*, TIME (May 18, 2017, 9:45 AM) <https://www.time.com/4779112/police-history-origins> [<https://perma.cc/9HFP-3XVS>]. This Article does not claim, however, that American policing only originates with slave patrols nor does it attempt to give a complete history of policing in the United States; a number of factors and functions gave rise to what we know as the police today. These include night watchmen, English constabulary, and child welfare and protection functions.

23. See, e.g., Bennett L. Gershman, *Prosecutorial Ethics and Victims’ Rights: The Prosecutor’s Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 564–65 (2005); Michael Edmund O’Neill, *Private Vengeance and the Public Good*, 12 U. PA. J. CONST. L. 659, 659–60 (2010); Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 423 (2009) (first citing Joan Meier, *The “Right” to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 WASH. U. L.Q. 85, 103–07 (1992); then citing Thomas J. Robinson, Jr., *Private Prosecution in Criminal Cases*, 4 WAKE FOREST INTRAMURAL L. REV. 300 (1968); and then citing Andrew Sidman, Comment, *The Outmoded Concept of Private Prosecution*, 25 AM. U. L. REV. 754 (1976)).

24. A number of private colleges and universities employ their own police forces that have either similar or identical powers as other public police forces. See Eliza Gray, *Why Universities Have Their Own Armed Police Forces*, TIME (July 30, 2015), <https://time.com/3979288/cincinnati-shooting-university-police-forces/> [<https://perma.cc/92LH-A7JW>]. Some

proliferated with the rapid industrialization of the nation. For example, within a year of authorizing railroad companies to employ police forces in Pennsylvania, “collier[ies], furnace[s] or rolling-mill[s]” were also given the authority to form their own private police forces with the aim of strikebreaking and antagonizing organized labor.²⁵ The history that undergirds law enforcement, both police and prosecutors, can be troubling to those who may align themselves with pro-labor causes when the purpose of police and prosecutor unions are often antithetical to pro-labor values.

Nowadays, police unions and prosecutor groups such as the National District Attorneys Association (“NDAA”) attempt to operate under the guise of more traditional labor unions and organizations when they are anything but. They instead often work to exert political influence and clout in their own best interests, rather than those that are prioritized by formalized ethical guidelines, such as the American Bar Association (“ABA”) Standards for the Prosecution Function.

The consolidation of power between prosecutors and police, however, can be even outside the context of formalized unions that are joined by members of both camps. A recent and prominent example can be observed in the continued struggle over California’s felony murder rule, which once classified homicides committed during a set of enumerated felonies as first-degree murders, even if the homicide in question was unintended.²⁶ California Senate Bill 1437

of these police forces have even met opposition of late. Jeremy Bauer-Wolf, *Full Shutdown*, INSIDE HIGHER ED (May 8, 2019), <https://www.insidehighered.com/news/2019/05/08/johns-hopkins-students-escalate-sit-over-proposed-campus-police-force> [https://perma.cc/64KQ-96A2]; *Public Safety Initiatives: Frequently Asked Questions*, JOHNS HOPKINS UNIV. (Apr. 18, 2019) <https://publicsafetyinitiatives.jhu.edu/faq/#what-is-the-status-of-the-proposal-from-last-spring-seeking-state-authority-to-establish-a-university-based-police-department-at-johns-hopkins> [https://perma.cc/SH5A-6LCX].

25. J.P. SHALLOO, PRIVATE POLICE: WITH SPECIAL REFERENCE TO PENNSYLVANIA 59–60, 88 (1933).

26. See CAL. PENAL CODE § 189 (West 2017). These potential felony murders include homicides committed “in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking,” and a number of other predicate crimes. *Id.* The felony murder rule originated in the early 1700s through caselaw and treatise in England. Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 413–14 (2011) (first citing *Rex v. Plummer* (1701) 84 Eng. Rep. 1103, 1104; then citing WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 86–87 (photo. reprint. 1978) (1716); and then citing Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 88–92 (2004)).

“S.B. 1437”), signed by former Governor Jerry Brown and intended to go into effect on January 1, 2019, rankled both police and prosecutors in California alike.²⁷ The California State Sheriffs’ Association, California Police Chiefs Association, and California District Attorneys Association were each opposed to the elimination of the felony murder rule, with each group attempting to lobby the state legislature against S.B. 1437.²⁸

This Article argues that, with the once-unheard-of step of prosecutors and police unionizing together in St. Louis, and with relationships between prosecutors and police trending toward growing closer all the time, government at all levels—federal, state, and local—should consider the potential risks of such relationships. Part I explores different types of relationships that go beyond what was once the traditional working relationship between police and prosecutors, including formalized labor unions, employee association groups, friendships, and even marriages. Part II discusses the varying conflicts and deleterious effects that such close relationships cause, unduly influencing investigation priorities and other policies. Part III theorizes as to different steps that may be taken to alleviate the risks inherent in overly cozy relationships between police and prosecutors.

I. DANGEROUS LIAISONS

The following Part explores and provides examples not only of the formalized joining in labor unions of police and prosecutors—though those relationships merit an entire article of their own and will be the subject of the next article in this series—but also informal relationships between the two, of which both the public and legal academics may not be entirely cognizant. These include associations that have not been granted collective bargaining powers,

27. S. 1437, 2018 Leg., 2017–2018 Sess. (Cal. 2018); Artie Ojeda, *Changes in California’s Felony Murder Law Could Set Hundreds Free*, NBC SAN DIEGO (Oct. 9, 2018, 9:27 PM), <https://nbcсандiego.com/news/local/change-in-califs-felony-murder-law-could-set-hundreds-free/50478/> [https://perma.cc/UW3B-3VBS]; Dan Walters, *Walters: California’s Felony Law Repealed? Maybe Not?*, MERCURY NEWS (Feb. 19, 2019, 11:40 AM), <https://www.mercurynews.com/2019/02/19/walters-californias-felony-law-repealed-maybe-not/> [https://perma.cc/M6B6-APJJ].

28. Jordan Smith, *Landmark California Law Bars Prosecutors from Pursuing Murder Charges Against People Who Didn’t Commit Murder*, INTERCEPT (Nov. 23, 2018, 11:30 AM), <https://theintercept.com/2018/11/23/california-felony-murder-rule/> [https://perma.cc/6HXX-RU8W].

such as the NDAA and a number of police associations, as well as friendships and even romantic and sexual relationships.

A. *American Police and Public Safety Unions*

Though private sector labor unions have been suffering a loss of influence due to a number of factors, such as the proliferation of “right to work” laws and the pervasiveness of moonlighting jobs commonly known as “side hustles,” police unions and other public sector unions have flourished.²⁹ There has been a shocking dearth of scholarship investigating the specific role of police unions and their negative effects on moving criminal justice reform forward until recently, particularly after Robert McCulloch failed to secure a grand jury indictment against Darren Wilson after the shooting death of Michael Brown in Ferguson, Missouri.³⁰

Public sector unions have found themselves situated quite differently from private sector unions. While private sector unions developed in the United States in some rudimentary form starting in the 1800s, public sector unions were only acknowledged by federal and state governments starting in the 1960s.³¹ Public sector unions have come to represent public employees from all levels of government—local, federal, and state—and from a wide range of jobs, such as postal workers, teachers and professors, and firefighters.

Police, along with prosecutors, however, embody unique roles and powers far beyond those that other public employees are granted. Both members of the executive branch, police have the power to use physical force against the public in the course of their

29. Benjamin Levin, *What's Wrong with Police Unions?*, 120 COLUM. L. REV. 1333, 1335 (2020).

30. *See id.* at 1336 (first citing Fisk & Richardson, *supra* note 11, at 713–22; then citing Aziz Z. Huq & Richard H. McAdams, *Litigating the Blue Wall of Silence: How to Challenge the Police Privilege to Delay Investigation*, 2016 U. CHI. LEGAL F. 213, 238–39; then citing Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197, 1222 (2016); then citing Marcia L. McCormick, *Our Uneasiness with Police Unions: Power and Voice for the Powerful?*, 35 ST. LOUIS U. PUB. L. REV. 47, 54–63 (2015); then citing Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1122–39 (2017); and then citing Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1404–05 (2015)).

31. McCormick, *supra* note 30, at 52 (first citing *Collective Bargaining in the Public Sector*, 97 HARV. L. REV. 1676, 1676–77 (1984); and then citing Joseph Slater, *The Strangely Unsettled State of Public-Sector Labor in the Past Thirty Years*, 30 HOFSTRA LAB. & EMP. L.J. 511, 516–19 (2013)).

duties,³² while the prosecutor wields immense discretion in who to charge with a crime, what to charge, and the ability to dispossess individuals, in some cases, of the inalienable rights of “Life, Liberty, and the pursuit of Happiness.”³³ Both roles are also unique in that, rather than providing a service, like public works or utility employees with customers or clients, prosecutors and police have no discernable client in a conventional sense apart from an amorphous one to be found in federal, state, or local governments themselves.³⁴

To a large extent police and prosecutors came into their roles roughly contemporaneously. By 1877 every state had adopted the formalized structure of employing elected prosecutors at one level of government or another, and these prosecutors began to consolidate their power in the face of organized crime in the early 1900s.³⁵ Police, on the other hand, gained power as the definition of “public order” evolved over time. With the rise of private sector unions and greater rates of immigration from countries like Ireland, Italy, and Germany, management in the late 1800s relied on police to engage in strikebreaking and harassment of immigrants and the working class in a most contradictory fashion given that many of them were working class themselves.³⁶

The development of public sector and public safety unions, however, was completely derailed by the Boston Police Strike of 1919. Police at the time had an understandably long list of grievances, including exceptionally long work hours, low pay, and restrictions

32. HOWARD S. COHEN & MICHAEL FELDBERG, *POWER AND RESTRAINT: THE MORAL DIMENSION OF POLICE WORK* 56 (1991).

33. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

34. Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 463, 465 (2017) (“Prosecutors’ clients are sovereignties, abstract public entities whose interests are hard to define.” (citing *Berger v. United States*, 295 U.S. 78, 88 (1935) (“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”))).

35. Maybell Romero, *Profit-Driven Prosecution and the Competitive Bidding Process*, 107 J. CRIM. L. & CRIMINOLOGY 161, 171, 175 (2017) (first citing Michael J. Elis, Note, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1530 (2012); and then citing Allen Steinberg, *The “Lawman” in New York: William Travers Jerome and the Origins of the Modern District Attorney in Turn-of-the-Century New York*, 34 U. TOL. L. REV. 753, 753 (2003)).

36. See Waxman, *supra* note 22.

on their freedom of movement during what we would now call “personal time off.”³⁷ In response to these conditions, the police officers attempted to join the American Federation of Labor after rejecting a number of offers from then Massachusetts Governor Calvin Coolidge.³⁸ On September 9, 1919, the officers went on strike, with seventy-two percent of them not reporting for work.³⁹ Though there was an observable increase in petty crime such as looting, most of the city remained peaceful even with the dramatic decrease in police officers patrolling streets.⁴⁰ Coolidge disparaged the strikers, labeling them “traitors.”⁴¹

The national reaction to the strike was less than sanguine. Newspapers reviled the strike, labeling it as “Bolshevism”; the *New York Times* argued that police should not have the power to unionize at all, especially given that “one of [an officer’s] duties is the maintenance of order in the case of strike violence.”⁴² This type of public sentiment set police officers back on a path of working against the working class and members of other unions. The United States would not see a police officer strike again until July 1974 in Baltimore.⁴³ It was also not until the late 1960s and early 1970s that police officers attempted and began to form their own unions.⁴⁴ Prosecutors, on the other hand, have only recently begun to start formally unionizing. While they have long had federations

37. FRANCIS RUSSELL, *A CITY IN TERROR: CALVIN COOLIDGE AND THE 1919 BOSTON POLICE STRIKE* 48 (1930).

38. Joseph Slater, *Labor and the Boston Police Strike of 1919*, in *THE ENCYCLOPEDIA OF STRIKES IN AMERICAN HISTORY* 239–51 (Aaron Brenner, Benjamin Day & Immanuel Ness eds., 2009). “The basic issue was the right of the police to form a labor union in affiliation with the American Federation of Labor. Should a body of workers be denied the privilege of organizing a union because of the peculiar nature of their occupation?” Richard L. Lyons, *The Boston Police Strike of 1919*, 20 *NEW ENG. Q.* 147, 147 (1947).

39. ROBERT K. MURRAY, *RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1919–1920*, at 126 (1955).

40. *Boston Police Force Out on Strike; Mobs Smash Windows and Loot Stores; Steel Workers Confer on Strike Plan*, *N.Y. TIMES*, Sept. 10, 1919.

41. PHILIP S. FONER, *HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES* 98 (1988). Coolidge conveniently used the strike as a stepping stone to greater national renown and to, of course, the presidency.

42. *The Boston Police Strike*, *N.Y. TIMES*, Sept. 10, 1919.

43. Ben A. Franklin, *Baltimore Ends Its 15-Day Strike*, *N.Y. TIMES*, July 16, 1974, at 1, 22.

44. Fisk & Richardson, *supra* note 11, at 736.

and other affiliate groups such as the NDAA and other state prosecutors associations, those groups will be considered *infra* section I.B.

St. Louis County has been ground zero for the unionization of local prosecutors, which, as of the publication of this Article, is headed by elected district attorney Wesley Bell.⁴⁵ Bell has said that prosecutors' actions in unionizing are "troubling": "Not only does it create conflict, but when we're trying to build trust with the community, law enforcement and the prosecutor's office, it's simply unacceptable and I for one will not tolerate it."⁴⁶ While prosecutors have not unionized in Kim Gardner's Circuit Attorney's Office, the St. Louis Police Officers Association has demonized Gardner as "a menace to society" in the wake of the decision to prosecute former Missouri Governor Eric Greitens.⁴⁷

B. *Labor Federations and Affiliate Groups*

Formalized labor unions, however, are not the only mechanisms by which prosecutors and police form unacceptably close working relationships. Both law enforcement and prosecutor federations and associations have been exploiting their political and financial clout in efforts to influence elections (often in each other's races) and lawmaking. A particularly jarring example can be found in some of the most recent district attorney races in the Bay Area, specifically those in the East Bay. Pamela Price, an Oakland civil rights attorney, decided to challenge incumbent Alameda District

45. *A Vision for Justice*, ST. LOUIS COUNTY PROSECUTING ATT'Y, <https://stlouiscounty-prosecutingattorney.com/wesleybell> [<https://perma.cc/F46K-8KY8>]; David Hunn, *St. Louis County Prosecutors Vote to Unionize*, ST. LOUIS POST-DISPATCH (Dec. 18, 2018), https://www.stltoday.com/news/local/crime-and-courts/st-louis-county-prosecutors-vote-to-unionize/article_e8422a8f-0fbb-584c-96b6-ff4391b6c6b0.html [<https://perma.cc/4ASW-3BXB>].

46. Danny Wicentowski, *Prosecutors Wesley Bell and Kim Gardner Take Shots at Police Union During Panel*, RIVERFRONT TIMES (Jan. 25, 2019, 11:54 AM), <https://www.riverfronttimes.com/newsblog/2019/01/25/prosecutors-wesley-bell-and-kim-gardner-take-shots-at-police-union-during-panel> [<https://perma.cc/7AKR-DPCD>].

47. Rebecca Rivas, *Gardner Files Federal Suit via Ku Klux Klan Act*, ST. LOUIS AM. (Jan. 13, 2020), http://www.stlamerican.com/news/local_news/gardner-files-federal-suit-via-ku-klux-klanact/article_aa7041ca-3652-11ea-b34c-efa0bee99ee0.html [<https://perma.cc/SN Q6-TKFZ>].

Attorney Nancy O'Malley, running on a "progressive"⁴⁸ platform.⁴⁹ Police associations throughout Alameda County—Berkeley, Oakland, and Fremont, among others—started giving a string of contributions to the O'Malley campaign.⁵⁰ Price, the challenger, however, received a large donation from the California Justice & Safety PAC, totaling \$416,000.⁵¹ In response, police associations far afield from Alameda County, including those in San Jose and Los Angeles, made significant donations of their own; O'Malley received \$317,000 in donations from police associations alone.⁵² In neighboring Contra Costa County, police associations donated \$54,699 to Paul Graves, who was then challenging incumbent district attorney Diana Becton, along with spending \$147,329 on pro-Graves campaign mailers.⁵³

Prosecutors' associations, too, are involved in significant lobbying efforts. In a ruling addressing life insurance for a deceased district attorney's family, District Court Judge Dee D. Drell acknowledged that, while the NDAA, headquartered in Alexandria, Virginia, does not deal with employers as a collective bargaining agent, it does "engage[] in policy-driven lobbying efforts, particularly at the national level."⁵⁴ As Professor Bruce Green has explained, the NDAA views itself as a group entirely apart from other attorneys and attorney associations, including the ABA.⁵⁵ The NDAA has often found itself in conflict with the ABA and its efforts to promulgate ethical rules related to the prosecutorial function.⁵⁶ The NDAA has, additionally, characterized the ABA as a "left-wing lobbying group" incapable of representing some separate, special

48. It is debatable whether a prosecutor can truly be progressive given that nature of the job. This Article, however, accepts the generally mainstream use of the term "progressive" in signaling a platform, candidate, or prosecutor whose stated aim is to reform some aspect of the criminal justice system, such as mass incarceration.

49. Darwin Bond Graham, *Police Union Money Flooded the East Bay's District Attorneys' Races*, EAST BAY EXPRESS (June 6, 2018), <https://www.eastbayexpress.com/oakland/police-union-money-flooded-the-east-bays-district-attorneys-races/Content?oid=16716753> [<https://perma.cc/J6NB-64TC>].

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Papale v. Reliance Standard Life Ins. Co.*, No. 1:09-cv-01405, 2010 WL 2195294, at *3 (W.D. La. May 26, 2010).

55. See Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873, 886 (2012).

56. *Id.*

interest of prosecutors.⁵⁷ The NDAA has also, for example, lobbied for a tougher juvenile justice system,⁵⁸ as well as employed lobbying firms to advocate for prosecutors on obtaining special student loan forgiveness programming and funding.⁵⁹ Troublingly, the NDAA has also prioritized closer relationships with police. An NDAA president explained that it “needs to reach out to and work more closely with other groups, such as the International Chiefs of Police (IACP), the FOP, National Sheriffs’ Association, National Association of Drug Court Professionals (NADCP), and victims’ rights groups, etc.”⁶⁰

Local prosecutors’ associations have also done their part to slow the progress of reformist efforts. As noted by journalist Jessica Pishko, prosecutors’ associations “do not just ‘enforce’ the law; in fact, they help to *make* it.”⁶¹ A recent effort to institute bail reform in New York State stalled after the District Attorneys Association of the State of New York (“DAASNY”) intervened.⁶² The DAASNY has long made its intention to influence the drafting of legislation clear; with its formation in 1909 it explained, “While the intentions of the legislators are of the best, they oftentimes enact laws . . . which embarrass the prosecuting attorneys of the state.”⁶³

Recently, United States Attorney General William Barr spoke at the Grand Lodge Fraternal Order of Police’s conference on August 12, 2019.⁶⁴ During this speech he excoriated fellow prosecutors attempting to follow more progressive policies. His speech characterized reformer prosecutors as being “anti-law enforcement” and “anti-police,” with responsibility for “fanning disrespect for the

57. *Id.* (quoting Brief for National District Attorneys Ass’n as Amici Curiae Supporting Petitioner, *Smith v. Cain*, 565 U.S. 73 (2012) (No. 10-8145)).

58. James D. Polley, IV, *Capital Perspective*, PROSECUTOR, Jan./Feb. 1999, at 14.

59. John Kaye, Letter to the Editor, *Student Loans*, FLA. B. NEWS, Nov. 1, 2003, at 3.

60. Christopher D. Chiles, *Goals of NDAA’s New President*, PROSECUTOR, July/Aug./Sept. 2009, at 4, 10.

61. Jessica Pishko, *Prosecutors Are Banding Together to Prevent Criminal-Justice Reform*, NATION (Oct. 18, 2017), <https://www.thenation.com/article/prosecutors-are-banding-together-to-prevent-criminal-justice-reform/> [https://perma.cc/97XS-WRJK].

62. Josie Duffy Rice, *Prosecutors Aren’t Just Enforcing the Law—They’re Making It*, APPEAL (Apr. 20, 2018), <https://theappeal.org/prosecutors-arent-just-enforcing-the-law-they-re-making-it-d83e6e59f97a/> [https://perma.cc/78YC-NYQC].

63. *Id.*

64. *Attorney General William P. Barr Delivers Remarks at the Grand Lodge Fraternal Order of Police’s 64th National Biennial Conference*, U.S. DEP’T JUST. (Aug. 12, 2019), <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-grand-lodge-fraternal-order-polices-64th> [https://perma.cc/7T6A-W8TC].

law.”⁶⁵ His speech was jarring in its open pandering to police officers, in which he stressed the convenience and safety of police rather than the constitutional rights of civilians or improving the policing function, explaining that:

We need to get back to basics. We need public voices, in the media and elsewhere, to underscore the need to “Comply first, and, if warranted, complain later.” This will make everyone safe—the police, suspects, and the community at large. And those who resist must be prosecuted for that crime. We must have zero tolerance for resisting police. This will save lives.⁶⁶

C. *Personal Relationships*

It should not be discounted that close personal relationships such as friendships and even romantic attachments develop between police and prosecutors, as can be expected in just about any workplace setting. Given the power of both police and prosecutors, however, these personal affinities can lead to poor and potentially dangerous decisions that affect the lives of innocent bystanders. This becomes clear when examining yet another example from St. Louis.

On August 13, 2019, the Missouri Supreme Court suspended the licenses of two former assistant St. Louis circuit attorneys, Ambry Nichole Schuessler and Katherine Anne Dierdorf.⁶⁷ Both attorneys

65. *Id.*

66. *Id.* The term “zero tolerance” has its own complicated history and a rigid law enforcement system where all violations of rules are enforced against alleged suspects, as well as a lack of prosecutorial discretion and mandatory minimum punishments. See Sheldon Wein, *Exploring the Virtues (and Vices) of Zero Tolerance Arguments* 3–4 (Univ. of Windsor Ont. Soc’y for the Study of Argumentation, 2013), <https://scholar.uwindsor.ca/cgi/viewcontent.cgi?article=2141&context=ossaarchive> [<https://perma.cc/Y7CY-4ELZ>].

There has been some controversy worldwide with regard to the concept of zero-tolerance policing. The International Association of Chiefs of Police states that the duties of police consist of “serving the community, safeguarding lives and property, protecting the innocent, keeping the peace, and ensuring the rights of all to liberty, equality and justice.” MATTHEW B. ROBINSON, *JUSTICE BLIND? IDEALS AND REALITIES OF AMERICAN CRIMINAL JUSTICE* 176 (3d ed. 2009). Zero-tolerance policing, however, runs counter to those objectives, as

[t]o whatever degree street sweeps are viewed by citizens as brutal, suspect, militaristic, or the biased efforts of “outsiders,” citizens will be discouraged from taking active roles in community-building activities and crime prevention initiatives in conjunction with the police. Perhaps this is why the communities that most need neighborhood watch programs are least likely to be populated by residents who take active roles in them.

Id. at 194.

67. See *In re Schuessler* 578 S.W.3d 762, 776 (Mo. 2019).

were dishonest in covering up an assault of a suspect by police that resulted in charges against the suspect being filed by a mutual friend of both attorneys, an assistant circuit attorney herself.

On July 22, 2014 the suspect, Michael Waller, was severely beaten while handcuffed by St. Louis police officer Thomas Carroll. Carroll allegedly beat Waller for possessing his daughter's stolen credit card, which Waller said he had found.⁶⁸ Bliss Barber Worrell, a friend of Officer Carroll who also happened to be another circuit attorney, told Dierdorf about the beating, who then failed to advise supervisors.⁶⁹ Officer Carroll described how he beat Michael Waller on a conference call with Schuessler and Worrell; when the officer described inserting his gun in Waller's mouth, Schuessler responded by making a homophobic joke.⁷⁰ Both Schuessler and Dierdorf withheld this information from supervisors, even after Waller was falsely charged with a felony for fleeing custody.⁷¹ At one point, when attempting to coordinate their responses to any questions, Dierdorf told Schuessler, "I told them I don't know anything. You don't tell them you know anything either."⁷² While Schuessler told supervisors that Dierdorf told her that Worrell filed false charges, she never revealed that she heard Carroll describe the beating during the conference call.⁷³

The circuit attorney manual provided to all assistant circuit attorneys explained that "being a good public servant means knowing how to handle the demands of your work with character and discipline" and that circuit attorneys should refuse "to let official actions be influenced by personal relationships."⁷⁴ Dierdorf, Schuessler, and Worrell were all good friends who spent time together outside of work. Worrell and Officer Carroll were also close friends; "[t]hey talked frequently on the telephone," and spent significant time together, including time training for a marathon.⁷⁵

68. Jennifer S. Mann, *St. Louis Police Detective Accused of Beating Suspect Leaves Job as Questions Mount*, ST. LOUIS POST-DISPATCH (Sept. 27, 2014), https://www.stltoday.com/news/local/crime-and-courts/st-louis-police-detective-accused-of-beating-suspect-leaves-job/article_b5fd3343-b6c9-5b9c-9c69-4a57a7605967.html [<https://perma.cc/C7E5-7EJ5>].

69. *See In re Schuessler*, 578 S.W.3d at 765–66.

70. *Id.* at 766.

71. *Id.* at 766–67.

72. *Id.* at 767.

73. *Id.*

74. *Id.* at 773.

75. *Id.* at 766.

The Missouri Supreme Court concluded that Dierdorf was repeatedly dishonest, not just in an effort to protect herself, but to protect her circuit attorney friends as well.⁷⁶ The court also concluded that Schuessler acted with the same motivations: she neither wanted to expose or hurt her friends and stated she felt additional pressure to lie given that she was Dierdorf's roommate.⁷⁷

II. QUANDARIES ARISING THROUGH CLOSE PROSECUTOR AND POLICE RELATIONSHIPS

The variety of relationships in which prosecutors and police engage present a number of dangers, the most serious of which this Part intends to explore. Fraternalization between police and prosecutors creates a risk of conflicts of interest both in the unionization context as well as in the administration of justice. These conflicts, importantly, obstruct the role that prosecutors are to serve as ministers of justice. These conflicts can manifest in financial (creating more work for oneself), political, and personal ways. Greater unity between prosecutors and police implicates a number of challenges when they, essentially, comprise a unified function; oftentimes prosecutors are elected while police chiefs are appointed. This consolidation of power not only presents a risk of usurping the political will of those in a jurisdiction who elected a district attorney, but also introduces many of the same types of challenges that arise in vertical monopolies. An additional danger of unionization and greater closeness between police and prosecutors is increasing opacity in the criminal justice system, with police protecting prosecutors and prosecutors protecting police, slamming a hard break on burgeoning criminal justice reform.

In *Berger v. United States*, the United States Supreme Court explained the ethical duties incumbent upon prosecutors:

[The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with

76. *Id.* at 775.

77. *Id.*

earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.⁷⁸

While *Berger* appears to clearly set forth what prosecutors should do—as well as what they should not do—in the name of prosecuting vigorously, the Supreme Court’s jurisprudence since then has become wholly inadequate to address or prevent prosecutorial misconduct. Prosecutors are consistently protected from real scrutiny or transparency when the Court has so narrowly defined those situations under which the harmless error doctrine will not apply.⁷⁹ The Supreme Court has also offered precious little in the way of ethical guidance for prosecutors, at one point abdicating any responsibility for doing so by asserting that “[t]he Due Process Clause is not a code of ethics for prosecutors.”⁸⁰ As Professor Angela J. Davis has noted, such standards that prosecutors know are permissive and lax can at least explain in part why prosecutorial misconduct has become as common as it has in recent years.⁸¹

The ABA also purports to provide some guidance to prosecutors with respect to their duties through its Model Rules of Professional Conduct (“Model Rules”), which have been adopted by every state to some extent,⁸² as well as through its Criminal Justice Standards for the Prosecution Function (“ABA Prosecution Standards”).⁸³ The Model Rules, however, are rules that apply to lawyers who represent distinct and easily definable clients and are not tailored to the unique obligations that might be found in the prosecutorial role at all.⁸⁴ The question of whom the prosecutor represents and what his or her duties are to such a client can lead to greater abstraction than there would be for other attorneys. While it seems clear that

78. 295 U.S. 78, 88 (1935).

79. ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 127 (2007).

80. *Mabry v. Johnson*, 467 U.S. 504, 511 (1984).

81. DAVIS, *supra* note 79, at 127 (explaining that the harmless error rule “permits, perhaps even unintentionally encourages, prosecutors to engage in misconduct during trial with the assurance that so long as the evidence of the defendant’s guilt is clear, the conviction will be affirmed.”); Angela J. Davis, *The Legal Profession’s Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 280–81 (2007).

82. Romero, *supra* note 35, at 166–67.

83. *Id.* at 166.

84. *See generally* MODEL RULES OF PROF’L CONDUCT (AM. BAR ASS’N 2020).

prosecutors represent “the people” rather than individual clients,⁸⁵ and that their duty is to “seek justice”⁸⁶ rather than focus solely on the needs of one individual, these definitions are so very nebulous that they provide very little guidance or limitation upon prosecutors in practice.⁸⁷ While prosecutors’ offices may attempt to formulate their own internal regulations and guidelines, “an institutional reluctance to unduly restrict their own discretion makes it even more unlikely that prosecutors would promulgate overly specific guidelines” by which to abide.⁸⁸

This Part proceeds as follows. Section II.A explains the lack of ethical oversight and remedies against misconduct by both prosecutors and police that have been established by Supreme Court jurisprudence under the Fourth Amendment and § 1983. Section II.B orients the reader to characteristics of the ideal prosecutor. Sections II.C–D review some of the dangers inherent in overly close working relationships between police and prosecutors, including potential conflicts of interest and usurpation of the prosecutorial role.

A. *Supreme Court Treatment of Prosecutorial and Police Misconduct*

1. Prosecutorial Misconduct

The Warren Court ushered in a period of greater expansion and recognition of defendants’ rights in its criminal procedure jurisprudence. *Mapp v. Ohio* prohibited prosecutors from using illegally seized evidence.⁸⁹ *Gideon v. Wainwright* established the right to counsel for defendants charged with felonies in state courts.⁹⁰ *Brady v. Maryland* had the effect of mandating prosecutors to turn

85. Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1577 (2003).

86. *Id.*

87. See Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 900–01.

88. Bennett L. Gershman, *A Moral Standard for the Prosecutor’s Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513, 519–20 (1993).

89. See 367 U.S. 643, 655 (1961).

90. See 372 U.S. 335, 344 (1963).

over exculpatory evidence to the defense.⁹¹ Under *Miranda v. Arizona*, Fifth Amendment protections against self-incrimination were extended to police interrogation, resulting in the famous *Miranda* warning being formulated that would serve as the standard right to silence warning given by police in the United States.⁹² These seminal criminal procedure cases were all decided over the course of only three years.

In 1967, however, the Court in *Chapman v. California* held that some constitutional errors were minor enough that they could be categorized as being harmless, and that judgments should not be reversed for such errors.⁹³

The institution of the harmless error rule in resolving constitutional questions drastically narrowed the opportunity afforded to appellants arguing for reversals and new trials based on constitutional violations committed by prosecutors; it allowed judges to substitute their own judgments as to the harmlessness of an error rather than leaving such a question to a jury.⁹⁴ Even with the institution of the harmless error rule, it is, arguably, impossible for a judge to determine with any certainty whether a jury would find an error harmless or not.

91. See 373 U.S. 83, 87 (1963).

92. See 384 U.S. 436, 478–79 (1966).

93. See 386 U.S. 18, 22 (1967).

94. By its very nature, harmless error review would seem to allow the appellate court, in varying degrees, to encroach on these interests by making factual assessments about the impact of a constitutional error upon the jury's fact-finding process. Indeed, some have argued that "[t]he greatest cost of the harmless constitutional error rule is its usurpation of the jury function." Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 *FORDHAM L. REV.* 2027, 2056 (2008) (quoting Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 *J. CRIM. L. & CRIMINOLOGY* 421, 430 (1980)).

Professor Gershman has characterized the drawbacks of the harmless error rule and its requirement of a showing of prejudice as a "fiasco," explaining that it

modifies prosecutorial behavior in the most pernicious fashion: it tacitly informs prosecutors that they can weigh the commission of evidentiary or procedural violations not against a legal or ethical standard of appropriate conduct, but rather, against an increasingly accurate prediction that the appellate courts will ignore the misconduct when sufficient evidence exists to prove the defendant's guilt.

Bennett L. Gershman, *The New Prosecutors*, 53 *U. PITT. L. REV.* 393, 425 (1992).

The Burger Court's criminal procedure jurisprudence began a long period of constriction of defendants' rights, particularly in relation to prosecutorial misconduct.⁹⁵ The Burger Court's decisions, according to Professor Bennett L. Gershman, "evinced a consistent, unyielding philosophy of judicial permissiveness toward prosecutorial excesses."⁹⁶ Decisions such as *United States v. Valenzuela-Bernal*⁹⁷ and *California v. Trombetta*⁹⁸ made it much more difficult to assert the rights that had been previously expanded under the Warren Court: *Valenzuela-Bernal* required a showing by the defense that evidence lost by the government was both material and exculpatory (which is extraordinarily difficult when the evidence has been lost),⁹⁹ while *Trombetta* required defendants to show that evidence not preserved by the government had a readily apparent exculpatory value before destruction and that comparable evidence was unobtainable.¹⁰⁰ In *Mabry v. Johnson*, the Burger Court also further constricted the rights of defendants attempting to enter plea bargains, holding that acceptance of a prosecutor's offer created no constitutional right to its enforcement.¹⁰¹

The development and direction of Supreme Court jurisprudence in the area of prosecutorial misconduct and criminal procedure, as explained above, creates incentives for prosecutors not only to misbehave in an effort to get a competitive edge on their opponents, but also to approach their jobs in a lackadaisical fashion. Given the high hurdles established by the Court mandating showing the existence of such misconduct in conjunction with the harmless error rule, reversals of convictions and personal discipline of prosecutors are exceedingly rare.¹⁰² As explained by Professor Ellen Yaroshefky, the harmless error rule "dilutes appellate supervision of disclosure obligations. Without uniform oversight of prosecutors' disclosure decisions, it is difficult to know how many violations actually occur."¹⁰³

95. Bennett L. Gershman, *The Burger Court and Prosecutorial Misconduct*, 21 CRIM. L. BULL. 217, 217 (1985).

96. *Id.* at 218.

97. 458 U.S. 858 (1982).

98. 467 U.S. 479 (1984).

99. *Valenzuela-Bernal*, 458 U.S. at 872–73.

100. *Trombetta*, 467 U.S. at 489.

101. 467 U.S. 504, 510 (1984).

102. Gershman, *supra* note 95, at 224–25.

103. Ellen Yaroshefky, *New Orleans Prosecutorial Disclosure in Practice After Connick*

John Thompson was exonerated of a 1985 robbery and murder that occurred in New Orleans after eighteen years in prison, with fourteen of those spent on death row.¹⁰⁴ Just a month before his scheduled execution date, an investigator working with Thompson's attorneys found undisclosed exculpatory evidence consisting of a blood swatch taken from a victim's pants stained with the robber's blood.¹⁰⁵ The swatch was sent to a crime lab, which determined that the blood was type B.¹⁰⁶ Prosecutors never had Thompson's blood typed and were not aware of what blood type he had.¹⁰⁷ Prosecutors did not mention the swatch nor the lab report produced after testing at the trial. They also never disclosed the existence of either the swatch or report to Thompson's defense counsel in either the trial for the robbery or the murder.¹⁰⁸

Thompson's investigator found the lab report fourteen years later in the New Orleans Police Crime Laboratory's files.¹⁰⁹ Thompson's blood was tested, revealing that it was type O rather than the type B blood found on the swatch.¹¹⁰ After this information was presented to the prosecuting attorneys, they moved to stay Thompson's execution and vacate the robbery conviction.¹¹¹ Though the Louisiana Court of Appeals, based on Fifth Amendment grounds, reversed Thompson's murder conviction, the district attorney retried Thompson for murder in 2003 with the jury finding him not guilty.¹¹²

Understandably, Thompson sued the city of New Orleans under § 1983 for causing him (1) to be wrongfully convicted, (2) to be incarcerated for eighteen years, and (3) to almost be executed several times over.¹¹³ Two theories of liability were alleged: (1) a *Brady* violation that occurred when information regarding the blood swatch was not shared with the defense and was "caused by an

v. Thompson, 25 GEO. J. LEGAL ETHICS 913, 917–18 (citing *United States v. Jones*, 620 F. Supp. 2d 163, 172 (D. Mass. 2009)).

104. *Connick v. Thompson*, 563 U.S. 51, 54 (2011).

105. *Id.* at 54–56.

106. *Id.* at 55.

107. *Id.*

108. *Id.*

109. *Id.* at 56.

110. *Id.* at 55–56.

111. *Id.* at 56.

112. *Id.*

113. *Id.*

unconstitutional policy of the district attorney's office," and (2) a *Brady* violation that occurred due to Connick—the lead prosecutor—failing to train subordinates on how to avoid such violations.¹¹⁴ A jury awarded Thompson \$14 million in damages based on his second theory of liability but rejected the first.¹¹⁵ The city, however, appealed, and argued that without a showing that Connick was aware of similar *Brady* violations, he could not have been “deliberately indifferent to an obvious need for more or different *Brady* training.”¹¹⁶

The Supreme Court agreed with the city, holding that a district attorney's office cannot be held liable under § 1983 for failing to provide training for prosecutors based on one *Brady* violation alone; the Court agreed that without a pattern of *Brady* violations, Connick could not be aware of, and therefore could not be indifferent regarding, a need for training.¹¹⁷ A prosecutor plainly violating and ignoring their duties to disclose exculpatory evidence was now not enough for Thompson to recover. In essence, any route by which Thompson could seek to recover was blocked; individual prosecutors already enjoyed absolute immunity and now the city would not be held liable without a showing that its internal policies were unconstitutional in and of themselves.

While *Connick* may seem to address a narrow and very fact-specific issue, it serves as a barometer as to how the Supreme Court will regard future cases in which the wrongfully convicted may attempt to recover civilly. The Court has seemed to make its sympathies known, and they do not appear to lie with victims of prosecutorial misconduct.

2. Police Misconduct

The effort to secure some sort of legal remedy in the fight against police misconduct and brutality has been as unavailing as that against prosecutorial misconduct. The standards for prevailing on a § 1983 claim arising from police misconduct have been lifted unreachably high.¹¹⁸ The burden to meet in obtaining any injunctive

114. *Id.* at 57.

115. *Id.*

116. *Id.* at 57–58.

117. *Id.* at 71–72.

118. Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV.

relief against police departments is similarly prohibitive, often requiring a showing not only of a pattern of misbehavior, but also that of a deliberate, purposeful policy on the part of police.¹¹⁹

The Court's Fourth Amendment jurisprudence has, unfortunately, greatly expanded the situations in which the use of force can be found "justified," while a similarly expansive qualified immunity doctrine allows for police to practically operate however they wish as long as they cannot be shown to be "plainly incompetent or those who knowingly violate the law."¹²⁰ The Court's most recent § 1983 opinions have also left that law defanged, with the Court insisting that "clearly established law must be 'particularized' to the facts of the case" such that "the rule of qualified immunity . . . [not be converted] into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights."¹²¹ While holding prosecutors responsible for their misconduct may seem daunting, given the protections afforded to law enforcement by the Court, neutralizing the negative effects of problematic relationships between police and prosecutors will best be approached by intervention and change on the prosecutorial front first.

B. *Prosecutorial Culture and Ethical Duties*

The ABA's Model Rules have been adopted throughout the country, with each state largely adopting the rules as their own guides.¹²² The NDAA has also promulgated its own standards for prosecutors. No state, however, has adopted them, leaving the decision to use them up to prosecution offices and perhaps individual prosecutors.¹²³ The NDAA's efforts may be seen as rather laudable given that the Model Rules, in large part, only address issues faced by attorneys who represent discernable clients.¹²⁴ Similarly, the

1773, 1776–77 (2016) (first citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 130 (1988); and then citing *Connick*, 563 U.S. at 68).

119. *Id.* at 1776 (first citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983); and then citing *Rizzo v. Goode*, 423 U.S. 362, 372 (1976)).

120. *Id.* at 1777 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

121. *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (citations omitted) (quoting *Anderson v. Creighton*, 483 U.S. 635, 639–40 (1987)).

122. Romero, *supra* note 35, at 178.

123. Davis, *supra* note 81, at 285.

124. *Id.* at 282.

ABA has also adopted its own ABA Prosecution Standards.¹²⁵ These standards, however, are entirely aspirational and are unenforceable.¹²⁶

Most of the Model Rules are interpreted as being as applicable to prosecutors as they are to other attorneys.¹²⁷ Only one rule was written specifically with prosecutors in mind—Rule 3.8, which covers surprisingly little of what prosecutors actually do day by day¹²⁸ and also “does not specifically prohibit prosecutorial practices that produce clear injustices in the process.”¹²⁹ While many have advocated for further Model Rules to be drafted specific to the prosecution function and with more rigorous standards, the likelihood of the ABA taking on such a project is miniscule. Any such effort would likely face vociferous opposition from prosecutors¹³⁰ who would bristle at any new rules that might place limits on their conduct and increase their exposure to disciplinary action.¹³¹

In an address to an audience at the University of Washington School of Law’s symposium on “The Prosecutorial Ethic: A Tribute to King County Prosecutor Norm Maleng,” Patrick J. Fitzgerald, then the United States Attorney for the Northern District of Illinois and current partner at Skadden, shared his thoughts regarding the building of an ethical prosecutor’s office.¹³² Early in his address Fitzgerald shared an observation: “We see in life that culture can affect how people behave.”¹³³

125. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION (AM. BAR ASS’N 2017).

126. Bruce A. Green, *Prosecutorial Ethics in Retrospect*, 30 GEO. J. LEGAL ETHICS 461, 474 (2017).

127. *Id.* at 469.

128. Interestingly, “a comment to Rule 3.8 cautions that prosecutors cannot be tagged with misconduct when they make a ‘good faith’ but erroneous judgment that new exculpatory evidence need not be disclosed or investigated . . . [P]rosecutors are virtually the only lawyers who benefit from a good faith exception in the ethics rules.” *Id.* at 479 (citing MODEL RULES OF PROF’L CONDUCT r. 3.8 cmt. 9) (AM. BAR ASS’N 2020).

129. Davis, *supra* note 81, at 288.

130. “The thirty-year review of prosecutorial ethics is largely a story about federal prosecutors’ obstruction of ethics regulation at every turn . . .” Green, *supra* note 126, at 480.

131. *Id.* at 483.

132. Patrick J. Fitzgerald, *Thoughts on the Ethical Culture of a Prosecutor’s Office*, 84 WASH. L. REV. 11, 11 (2009); *Professionals: Patrick Fitzgerald*, SKADDEN, <https://www.skadden.com/professionals/f/fitzgerald-patrick> [<https://perma.cc/6TPU-2F4L>].

133. Fitzgerald, *supra* note 132, at 14.

What sort of culture should prosecutors' offices strive to inculcate? In his article *The Prosecutor's Duty to Truth*, Professor Bennett L. Gershman highlights a rather poetic statement by Justice Robert H. Jackson as to what the prosecutor should be:

The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.¹³⁴

How a prosecutor may be able to share such an ideal if those who need to have it explained to them would not comprehend may be a bit of a mystery, however. In many ways it is easier to specify what a good prosecutor should not be. Most, if not all, scholars of prosecutorial ethics would agree that a good prosecutor should not be motivated by conviction rates or personal gain; these are the types of motivations that inspire the type of wrongdoing that results in prosecutorial misconduct and error.

Many concerned with prosecutorial ethics would likely agree that the main duty of a "prosecutor is to seek justice . . . , not merely to convict."¹³⁵ Popular culture has frequently lauded fictitious prosecutors as heroes, depicting them as principled guardians of freedom and public welfare, a sort of bulwark against a lapping tide of criminality and deviant behavior.¹³⁶ Mandates upon prosecutors to seek justice as well as to be ministers of justice elevate the job to a "grand and noble vocation, unlike any other."¹³⁷ A great emphasis on the uniqueness, power, and importance of the prosecutorial role

134. Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS, 309, 351 (2001) (quoting Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 6 (1940)).

135. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(b) (AM. BAR ASS'N 2017).

136. Romero, *supra* note 35, at 175–76.

137. Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 377 (2001) (first citing Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 224–45 (2000); then citing Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991); and then citing H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145 (1973)).

may have the effect of rendering prosecutors detrimentally both self-righteous and self-important.

At this juncture of this Article, it is important to note that not all prosecutors suffer from overinflated senses of themselves on the job. Rather, this Article should be thought of as highlighting the risks that go along with a certain prosecutorial culture as well as suggesting methods to counter the development of such culture before its formation. It is also important, however, to remember that when discussing the abstract points regarding the prosecutorial role, prosecutors are still people with their own personal motivations that do not necessarily vanish when being told that they should only seek justice. These motivations, such as “[p]ersonal beliefs, predispositions, preferences, and the desire for peer approval” most certainly affect a prosecutor’s performance.¹³⁸ Prosecutors, understandably, want to think they are actualizing good in their communities and that what they do is just and right.¹³⁹ This can lead to an un-nuanced and overly simplified view of the world and the defendants against whom they initiate cases.¹⁴⁰ With such a worldview, a prosecutor’s goals may also become much simpler, such as caring about winning cases over anything else.¹⁴¹

Winning and other personal motivations are not what should influence a prosecutor’s decision making in the least. While the vagaries of Model Rule 3.8 have been discussed above, the rule opens

138. Katie M. True, Note, *Restricting Prosecutors’ Powers: Increasing Oversight to Reinstate Corporate Interests*, 92 IOWA L. REV. 1523, 1533 (2007) (first citing WILLIAM T. GORMLEY, JR. & STEVEN J. BALLA, BUREAUCRACY AND DEMOCRACY: ACCOUNTABILITY AND PERFORMANCE 37 (2004); then citing MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 111–14 (1978); then citing Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2470–71 (2004); and then citing Catherine Ferguson-Gilbert, Comment, *It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CALIF. W. L. REV. 283, 289–92 (2001)).

139. Smith, *supra* note 137, at 378–79.

140. *Id.* at 380.

141. “[P]rosecutors care more about winning their cases than serving as neutral ministers of justice. Rather than ensure that convictions are obtained fairly and the innocent protected, prosecutors place undue emphasis on their win-loss ratios and ‘keep personal tallies’ of their conviction rates to advance their own careers.” Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2127 (2010) (quoting Kenneth Bresler, *“I Never Lost a Trial”*: *When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537, 541 (1996)).

by stating, “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”¹⁴² As ministers of justice, prosecutors should, ideally, be actively involved in criminal justice reform efforts and in finding ways to redefine their roles in relation to the communities they serve with the goal to make them better. Prosecutors can work to end mass incarceration,¹⁴³ promote sentencing reform,¹⁴⁴ end the death penalty,¹⁴⁵ or advocate economic reforms to raise individuals and families out of poverty rather than focus on the encompassing need to win cases or chase after personal gain that may provide motive to intentionally commit some forms of misconduct. Prosecutors can and should be most interested in the proverbial health of their communities.

C. Conflicts of Interest

1. Prosecutorial Conflicts

Nearly every state in the nation has adopted, to one extent or another, the ABA’s Model Rules.¹⁴⁶ The ABA, in an effort to provide additional guidance to government attorneys, has also promoted its ABA Prosecution Standards.¹⁴⁷ While the ABA Prosecution Standards have not been widely adopted like their Model Rules counterparts, and are meant to serve as aspirational guidance,

142. MODEL RULES OF PROF’L CONDUCT r. 3.8 (AM. BAR ASS’N 2020).

143. See Angela J. Davis, *The Prosecutor’s Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 1063, 1064 (2016).

144. See R. Michael Cassidy, *(Ad)ministering Justice: A Prosecutor’s Ethical Duty to Support Sentencing Reform*, 45 LOY. U. CHI. L.J. 981, 996–97 (2014).

145. Aramis D. Ayala, state’s attorney for Florida’s Ninth Judicial Circuit, made a principled decision shortly after taking office in early 2017, announcing that her office would not seek the death penalty in the future. She has faced significant backlash from law enforcement and Governor Rick Scott, who removed Ms. Ayala from potential capital cases. Frances Robles & Alan Blinder, *Florida Prosecutor Takes a Bold Stand Against Death Penalty*, N.Y. TIMES (Mar. 16, 2017), https://www.nytimes.com/2017/03/16/us/orlando-prosecutor-or-will-no-longer-seek-death-penalty.html?_r=0 [<https://perma.cc/R74X-X2CM>].

146. See *Alphabetical List of Jurisdictions Adopting Model Rules*, A.B.A., https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/ (last updated Mar. 28, 2018) [<https://perma.cc/C425-XSWF>].

147. Romero, *supra* note 35, at 179. The ABA has also issued standards for criminal defense, with both sets of standards together comprising the ABA Standards for Criminal Justice.

Justice Stevens explained that the Supreme Court “frequently finds [the Standards] helpful.”¹⁴⁸

The prosecutor’s role is unique in that there is not an individual, identifiable client, such as in criminal defense or even private practice. The Prosecution Standards explain that

[t]he prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim. When investigating or prosecuting a criminal matter, the prosecutor does not represent law enforcement personnel who have worked on the matter and such law enforcement personnel are not the prosecutor’s clients. The public’s interests and views are should be [sic] determined by the chief prosecutor and designated assistants in the jurisdiction.¹⁴⁹

It appears that the Prosecution Standards have long envisioned that there may be a conflict of interest that could arise and develop when prosecutors and police work too closely, as they also warn that prosecutors “should maintain respectful yet independent judgment when interacting with law enforcement personnel.”¹⁵⁰

Given its distrust of the ABA, the NDAA has drafted its own set of prosecution standards. Unsurprisingly, the NDAA’s standards are not only longer than the ABA’s Prosecution Standards but also less stringent, holding prosecutors to a more relaxed code of conduct.¹⁵¹ Under Standard 1-3.3(d) addressing “Special Conflicts,” the NDAA recommends that prosecutors should excuse themselves “from any investigation, prosecution, or other matter where personal interests of the prosecutor would cause a fair-minded, objective observer to conclude that the prosecutor’s neutrality, judgment, or ability to administer the law in an objective manner may be compromised.”¹⁵²

In marked contrast from the ABA Prosecution Standards, the NDAA standards specifically address immunity. Rather than serv-

148. *Moran v. Burbine*, 475 U.S. 412, 440–41 (1986) (Stevens, J., dissenting).

149. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.3 (AM. BAR ASS’N 2017).

150. *Id.* § 3-3.2.

151. *See generally* NAT’L PROSECUTION STANDARDS (NAT’L DIST. ATTORNEYS ASS’N 2009).

152. *Id.* § 1-3.3(d).

ing as a rule of conduct, Standard 1-6.1 reads as a policy recommendation to legislators to expand prosecutorial immunity, exhorting that

[w]hen acting within the scope of his or her prosecutorial duties, a prosecutor should enjoy the fullest extent of immunity from civil liability. The chief prosecutor should take steps to see that all costs, including attorneys' fees and judgments, associated with suits claiming civil liability against any prosecutor within the office arising from the performance of their duties should be borne by the prosecutor's funding entity.¹⁵³

The NDAA standards also depart wildly from the ABA in their recommendations regarding working with law enforcement. Rather than the respectful distance called for by the ABA, the NDAA tells chief prosecutors to "actively seek to improve communications between" prosecutors' offices and police, even advocating for uniform information sharing systems.¹⁵⁴ The NDAA standards also encourage keeping law enforcement abreast of progress on cases, cooperating and assisting with law enforcement training, and having a "liaison officer" from each law enforcement agency within a prosecutor's jurisdiction assigned to work with prosecutors, with the liaison officer informing other officers of developments in the cases they investigated.¹⁵⁵ The commentary accompanying these rules attempts to reason that a close relationship between prosecutors and police is necessary for a functioning criminal justice system, again in marked contrast to recommendations by the ABA.¹⁵⁶

153. *Id.* § 1-6.1.

154. *Id.* § 2-5.1.

155. *Id.* §§ 2-5.2 to 2-5.5.

156. *Id.* § 2-5 cmt. The drafters of the NDAA standards appear to have taken pains to explain why fostering extremely close relationships with law enforcement is necessary and to identify strongly with law enforcement as a whole. The commentary addressing "relations with law enforcement" explains that

[t]he maintenance of good relations between the prosecuting attorney and the law enforcement agencies within the community is essential for the smooth functioning of the criminal justice system. Both parties have the burden of fostering, maintaining, and improving their working relationship and developing an atmosphere conducive to a positive exchange of ideas and information.

Id. It seems that the drafters of the NDAA rules only envision a conflict of interest arising from the interrelation of police and prosecutors when prosecutors take the drastic step of functioning as law enforcement in-house counsel, warning prosecutors against providing advice "on civil or personal matters." *Id.*

2. Conflicts Among Union Members and Capture

A unique potential conflict of interest arises when considering the potential for conflict between prosecutors and police in the context of formalized labor unions. While police and prosecutors have enjoyed closer relationships of late, what is to become of police and prosecutors who have unionized formally when there is a work-related conflict between the two? The doctrine of exclusivity features prominently in labor law, and “provides that a union has the exclusive right to speak for its members in bargaining with an employer over wages, hours and conditions of the workplace.”¹⁵⁷ A union and its representative would, necessarily, encounter a clear conflict of interest if a prosecutor were to file a grievance against a police officer in a case of, for example, excessive use of force. Formalized labor unions between police and prosecutors would introduce yet another institutionalized barrier to reporting and uncovering misconduct on both sides.

D. *Usurpation of Roles and Duties*

The prototypical American chief prosecutor enjoys a rather unique position in the greater world of criminal justice systems: “The United States is the only country in the world where citizens elect prosecutors.”¹⁵⁸ When prosecutors are elected they are “usually elected by the voters of the county or district which they represent.”¹⁵⁹ The unique role of the American elected prosecutor arose during the Jeffersonian era, when a “commitment to popular sovereignty,” at least for a select segment of the population, drove

157. Adrienne L. Saldaña, Note, *Conflicting Interests in Union Representation: Should Exclusivity Be Abolished?*, 6 GEO. J. LEGAL ETHICS 133, 133 (1992); see, e.g., *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

158. Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1530 (2012). The election of prosecutors, allowing local, community control of government—and not just prosecutors—was unique in the 1830s: “[T]he organization of towns and counties in the United States is everywhere based on the same idea, namely, that each is the best judge of what pertains only to itself,” while the “first consequence of this doctrine was to have all the administrators of towns and counties chosen by the residents themselves.” *Id.* at 1558 (footnote omitted) (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 91–92 (Arthur Goldhammer trans., 2004) (1835)). It is important to note, however, that not all chief prosecutors in the United States are elected and that there are a variety of ways chief prosecutors are hired for their jobs. See Romero, *supra* note 35, at 171.

159. 63C AM. JUR. 2D *Prosecuting Attorneys* § 9 (2018) (citing *Attorney Gen. v. Tufts*, 131 N.E. 573, 573–74 (Mass. 1921)).

the formation of some of the institutions seen in the United States today.¹⁶⁰ This new and unique prosecutorial role was just one of many such roles that arose out of the early Republic's new and novel form of government in which both federal and state governments were organized around three branches: legislative, executive, and judicial.¹⁶¹ This form of government, however, and its reliance on the concept of separation of powers introduced a new type of concern not only in the study of government but in government's practical function: separation of powers.

Prosecutors are members of the executive branch and serve, to some extent, as "the executive's agents, charged with enforcing the law."¹⁶² There has, understandably, been great attention given to separation of powers problems that arise when judges attempt to interfere with the prosecution function or even usurp the prosecutor's role through, for example, getting deeply involved with plea bargaining,¹⁶³ or even being granted the power to terminate prosecutions from the bench "in the interest of public justice."¹⁶⁴

While close relationships the types of which have been discussed above occur exclusively between what might be viewed as leaves of the same executive branch, such relationships introduce some of the same concerns as may be seen in violations of the separation of

160. LAURA J. SCALIA, *AMERICA'S JEFFERSONIAN EXPERIMENT: REMAKING STATE CONSTITUTIONS, 1820–1850*, at 6–8 (1999).

161. The notion of "separation of powers" was first articulated by political philosopher Charles-Louis de Secondat, more commonly known as Montesquieu, who proposed and promoted a model of political authority in which power is divided among the (now) traditional three branches: legislative, executive, and judicial. He also argued that the three separate branches were required to act independently of each other to promote liberty most effectively. See 1 BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS*, bk. XI, ch. V, at 182 (Thomas Nugent trans., D. Appleton & Co. 1900) (1748).

162. Shima Baradaran Baughman, *Subconstitutional Checks*, 92 *NOTRE DAME L. REV.* 1071, 1085 (2017).

163. See Rishi Raj Batra, *Judicial Participation in Plea Bargaining: A Dispute Resolution Perspective*, 76 *OHIO ST. L.J.* 565, 583–84 (2015).

164. See John P. Zanini & Jeremy Bucci, "The Interests of Public Justice" and the Judicial Decision to Terminate Criminal Prosecutions: *Silencing the Voice of the People*, 26 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 163, 163–64 (2000) (arguing that allowing for judicial terminations of prosecutors amounts to a separation of powers violation depriving the electorate of their opportunity to direct prosecution priorities).

Professor Valena Beety recently examined judicial involvement in prosecutions given that twelve states currently allow judges to dismiss cases in the interest of justice. She argues that such dismissals can be used to hold actors such as prosecutors and police responsible and accountable for their misdeeds and advocates for more states adopting statutes to enable their judges to do so. See Valena E. Beety, *Judicial Dismissal in the Interest of Justice*, 80 *MO. L. REV.* 629, 642–43 (2015).

powers. While most chief prosecutors, be they district attorneys, county attorneys, or city attorneys, are elected, police chiefs are appointed, usually by a mayor or city council.¹⁶⁵ The further comingling of both prosecutorial and police roles undercuts the meaning and purpose of how both roles are filled, particularly the popular election of prosecutors who should maintain some professional distance from their police chief counterparts.

This same problem may be understood better by employing the administrative framework of capture. In the regulatory context, “[c]apture refers to an extremely close relationship between regulators and industry.”¹⁶⁶ Some definitions emphasize the process by which capture occurs while others, such as that advanced by Professor Paul Quirk, focus on the end results of capture: a regulatory agency that has been captured “persistently serv[es] the interests of regulated industries to the neglect or harm of more general, or ‘public,’ interests.”¹⁶⁷ While capture theory was once fairly limited in its application to regulatory agencies, leading to “robust judicial review of agency action” starting in the 1980s,¹⁶⁸ “capture theory’s pessimism about the performance of administrative agencies has been generalized to include all political institutions.”¹⁶⁹ Just as in private industry, both political and economic forces influence police, prosecutors, and the manners in which they relate and work together. Police have an interest in capturing the prosecutorial function: they may enjoy greater cover from public scrutiny if protected by prosecutors, such as in lethal force investigations and

165. David N. Falcone & L. Edward Wells, *The County Sheriff as a Distinctive Policing Modality*, 14 AM. J. POLICE 123, 127 (1995). The role of police chief is often dramatically different than that of a county sheriff. County sheriffs usually have a much broader set of duties to fulfill, “including serving process and maintaining the county jails, but [they] may not have law enforcement authority,” while police chiefs “are generally limited to law enforcement and patrol.” James Tomberlin, Note, “Don’t Elect Me”: *Sheriffs and the Need for Reform in County Law Enforcement*, 104 VA. L. REV. 113, 123 (2018) (citing Falcone & Wells, *supra*, at 130–33).

166. Dorit Rubinstein Reiss, *The Benefits of Capture*, 47 WAKE FOREST L. REV. 569, 570 (2012).

167. PAUL J. QUIRK, *INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES* 4 (1981).

168. MAXWELL L. STEARNS & TODD J. ZYWICKI, *PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW* 378 (2009).

169. Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1053 (1997).

prosecutions, as well as benefit financially from certain prosecutions, such as those that might be lucrative given the potential for civil asset forfeiture.

III. INTERVENTIONS

A. *New (to Prosecutors) Public Health Approaches to Cultural Change*

While arguing that prosecutors should refocus their priorities to helping realize criminal justice reform may sound fine and well, getting prosecutors invested in doing so is a different and seemingly impossible matter. Other industries, however, have been faced with analogous problems and have begun to work toward solutions that may be useful in the context of prosecutorial ethics and misconduct. Physicians, in particular, have also been known to be self-important and self-righteous like prosecutors, potentially leading to poor judgment calls as well as error and misconduct.¹⁷⁰ Once a taboo topic among physicians, “One of the great achievements of the last [nearly twenty] years is that medical error and patient harm are now acknowledged and discussed publicly by healthcare professionals, politicians and the general public.”¹⁷¹ The same should happen with prosecutorial error and misconduct, including ethical missteps arising from problematic relationships with police.

1. The Normalization of Deviance

One may wonder whether prosecution and the practice of medicine are similar enough to even consider turning to public health models in an effort to minimize prosecutorial misconduct and error. Prosecution, being a subset of law enforcement, carries out “hazardous activities . . . in large, complex organizations, by, for the most part, dedicated and highly trained people.”¹⁷² In much the same way that medical malpractice and error may seriously harm

170. See Allan S. Berger, *Arrogance Among Physicians*, 77 ACAD. MED. 145, 145–77 (2002). Dr. Berger exhorts his fellow physicians that “[W]e are but instruments of healing and not its source. We should not exaggerate our own importance.” *Id.* at 147.

171. See CHARLES VINCENT, PATIENT SAFETY 14 (2d ed. 2010).

172. See *id.* at 123.

patients, potentially exposing them to loss of livelihoods, injury, pain, and in severe instances, death, prosecutors also have the power and ability to deprive the accused of “normal” lives in which they can maintain jobs, family relationships, community connections, and other hallmarks of a normal and productive life through incarceration and other punishments such as probation. When improperly wielded, the prosecution function presents a serious danger not only affecting individual defendants, but also their families and other groups who may rely upon them. In this sense, prosecution may even be viewed analogously to other dangerous industries that have the potential for devastating impact upon individuals and communities such as aviation or nuclear power; an accident in either of these industries could have devastating human consequences. Rampant prosecutorial misconduct may also have the effect of seriously eroding public trust, not only in the criminal justice system but also in other government functions or provided services.

The Challenger Space Shuttle launch and accident, in particular, has served as an important touchstone in organizational culture literature.¹⁷³ A massive independent investigation revealed that one of the “O-ring” seals on a rocket booster split open during liftoff due to the usually chilly temperatures at Cape Canaveral in Florida on the morning of launch.¹⁷⁴ In her work on the accident, Professor Diane Vaughan found that, rather than the accident being primarily attributable to the wrongdoing of one person alone, the organizational characteristics and culture of NASA were what really facilitated the conditions for potential failures.¹⁷⁵ These included an unmanageable contractor structure that made it difficult to discuss potential problems with the O-rings, and, perhaps more significantly for purposes of this Article, a culture focused on success and a “can do” approach that likely influenced that decision to move forward with the launch rather than postponing, as well as systemic regulatory ineffectiveness allowing safety to be deprioritized.¹⁷⁶

173. See, e.g., DIANE VAUGHAN, *THE CHALLENGER LAUNCH DECISION: RISKY TECHNOLOGY, CULTURE, AND DEVIANCE AT NASA* (1997).

174. *Id.* at xi.

175. *Id.* at 34.

176. *Id.*

Vaughan's study was also revolutionary in introducing the concept of the normalization of deviance in organizations. The Challenger accident did not occur due to the intentional wrongdoing of one person but rather was caused by a group of people working together with a lack of attention to the consequences of their actions.¹⁷⁷ It was also caused by incremental change from the usual organization norms of prioritizing safety rather than being able to launch on a target date.¹⁷⁸ Such normalization of deviance does not involve any overt intent to do wrong. However, just as in the Challenger accident, such normalization may still lead to "disastrous consequences [that] can emerge from the banality of organizational life."¹⁷⁹

Both prosecutorial and physician culture are reminiscent of the organizational culture that Vaughan noted in NASA. Prosecutors are generally very "success oriented" in much the same way as NASA, but rather than focusing on launch dates, their focus is on winning.¹⁸⁰ As detailed *supra* in Part I, incremental change in the normative boundaries of prosecutorial ethics has been accomplished through Supreme Court jurisprudence, which has offered stronger and more vigorous protections for prosecutors who have committed misconduct over time.

The prosecution function has even more in common with the healthcare industry than with aerospace, however.¹⁸¹ Just as with

177. *Id.* at 409.

178. *Id.*

179. *Id.* at 410.

180. See Bresler, *supra* note 141, at 541–43; Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 *FORDHAM L. REV.* 851, 882 (1995) (discussing "prosecutorial culture centered on winning"). Paul Butler has evocatively related his personal experience with a winning-centered prosecutorial culture:

What prosecutors have in common with most other lawyers is that they are competitive and ambitious. We all like to win. For prosecutors, that means getting tough sentences and defeating defendants' claims that the police violated their constitutional rights. Getting promoted, and maintaining the professional regard of your peers, requires keeping your eye on the prize.

PAUL BUTLER, *LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE* 116 (2009).

181. Professor Bruce Green has examined medical and prosecutorial analogues in connection with disclosure obligations under *Brady*. He argues that medical analogies are not well applied to the prosecutorial role, focusing on medical error review and error avoidance. Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn from Their Lawyers' Mistakes?*, 31 *CARDOZO L. REV.* 2161, 2171–72 (2010). He reasons that there are a number of reasons why prosecutors would not wish to systemically review cases where there may have been a lack of compliance with disclosure

having to see the doctor, most if not all individuals would rather not be in the predicament of being prosecuted and interacting with a district or state's attorney. Much as with healthcare, the prosecution function is necessary and operates constantly in an effort to control and eliminate crime, which has been likened to a moral and societal disease.¹⁸² Ideally, criminal prosecutors practice preventive care in their communities and advocate for social, economic, and legal change while looking for other ways to prevent the conditions that lead to crime before it is ever committed. Prosecutors, just as physicians, should endeavor to "first do no harm,"¹⁸³ and if failures such as malpractice occur, to investigate why they occurred "with a view to preventing similar failures in the future."¹⁸⁴

Traditional medical approaches to misconduct and error were similar to that found today not just with prosecutors, but the legal

obligations but that it is likely useful for medical professionals when "[d]one right" and potentially helpful in creating a culture where doctors can learn from mistakes. *Id.*

Professor Green highlights a "key difference between learning from medical error and learning from prosecutors' disclosure error is the nature of the mistakes in question and their relationship to the respective professionals' perceived mission." *Id.* at 2172. He argues that the "doctor's role is to heal the sick, not make them worse. When doctors make mistakes that kill or otherwise harm clients, they achieve the very opposite of what they are fundamentally seeking to accomplish. This is not the case when prosecutors withhold discovery." *Id.*

Some of this analysis, however, glosses over some of the nuances of a physician's role as well as that of the prosecutor. If abiding by the Hippocratic Oath of "do no harm," doctors may find themselves duty bound not necessarily to treat illness, but to provide palliative care to patients who would rather not go through painful treatments and cures. In some circumstances, it may be possible to provide a patient a good outcome but a poor experience outweighing the good outcome and causing harm overall. In this sense, the physician's goal to "do no harm" is very fact dependent upon the patient in question just as the prosecutor's role to "seek justice" is fact dependent upon the case at hand.

Professor Green's analysis also accepts some traditional assumptions of what the prosecutor's role is or should be. If an individual prosecutor decides to withhold evidence, they do the opposite of what they should be accomplishing, which is seeking justice. A review of disclosure procedures and mistakes may go beyond what is traditionally conceived of as "error," including mistakes in which prosecutors may have neglected to provide exculpatory evidence to defense counsel or "near misses" in which such disclosure is made in such a way that is disadvantageous to a defendant but does not rise to the level of a *Brady* violation. In any event, this Article's focus goes beyond the application of public health and medical models to *Brady* and disclosure obligations. It rather looks to such models as examples of how to change prosecutors' perceptions of their selves, their roles, and to the larger issue of improving prosecutorial culture.

182. L.L. Stanley, *Disease and Crime*, 14 J. AM. INST. CRIM. L. & CRIMINOLOGY 103, 103 (1923).

183. This phrase is a modernized interpretation of the Hippocratic oath. VIRGINIA SHARPE & ALAN I. FADEN, *MEDICAL HARM: HISTORICAL, CONCEPTUAL, AND ETHICAL DIMENSIONS OF IATROGENIC ILLNESS* 6-7, 81 (1998).

184. *Id.* at 29.

profession as a whole. Such efforts focused on achieving what has been termed the “perfectibility model,” which espouses the view that if physicians have proper training and were sufficiently motivated, that they would make no mistakes.¹⁸⁵ These goals were pursued largely through tools already familiar to the legal profession: (1) training, such as that received in medical or law school; and (2) punishment, in which one person is singled out as the blameworthy actor and cause of some type of improper performance.¹⁸⁶ Both the traditional medical and legal responses to misconduct are entirely reactive.¹⁸⁷ The medical and public health fields, however, have been undergoing drastic changes in the way medical error has been perceived and managed, and this Article argues that it is time prosecutors follow their lead.¹⁸⁸

2. Disrupting an Entrenched Culture: A Medical Example

On November 22, 2013, three-year-old Nora Boström died in a hospital room in the Lucile Packard Children’s Hospital in Palo Alto, California.¹⁸⁹ She was four and a half months premature when she was born on December 11, 2009.¹⁹⁰ After being released from the hospital where she had stayed for 129 days in a Neonatal Intensive Care Unit, Nora was diagnosed with pulmonary hypertension.¹⁹¹ Pulmonary hypertension is characterized by high blood pressure in the arteries leading to the lungs and causes “the blood vessels that carry blood from [the] heart to [the] lungs [to] become hard and narrow,” necessitating the heart to pump harder to continue circulating blood.¹⁹²

185. Lucian L. Leape, *Error in Medicine*, 272 J. AM. MED. ASS’N 1851, 1852 (1994).

186. *Id.*

187. *See id.*

188. A deeper exploration of how aerospace and other dangerous industries manage the normalization of deviance and how that should bear on prosecutorial ethics will be offered in a subsequent Article tentatively titled “Zero Tolerance Prosecutorial Ethics.”

189. Sarah Kliff, *Do No Harm*, VOX (July 9, 2015, 7:00 AM), <http://www.vox.com/2015/7/9/8905959/medical-harm-infection-prevention> [<https://perma.cc/V47N-N4FL>].

190. Claire McCormack, *Nora Boström*, PATIENT SAFETY MOVEMENT, <https://patientsafetymovement.org/advocacy/patients-and-families/patient-stories/nora-bostrom/> [<https://perma.cc/UZ7K-684Z>].

191. *Id.*

192. *Pulmonary Hypertension*, U.S. NAT’L LIBR. MED. MEDLINEPLUS, <https://medlineplus.gov/pulmonaryhypertension.html> [<https://perma.cc/Q3N6-EZBZ>].

Roughly a year before her death, Nora had a central line catheter placed through her chest.¹⁹³ Central line catheters run directly to the heart, allowing for quick access to the major venous system, making such catheters particularly effective in quickly administering medications.¹⁹⁴ Conversely, the use of central line catheters is a major risk factor for bloodstream infections.¹⁹⁵ From the time that Nora's central line was placed to her death, she had suffered four central line infections, with each infection leaving her in a more weakened and precarious state than the last.¹⁹⁶ A "presumed central line infection" likely led to the septic shock that caused Nora's death.¹⁹⁷ After sending an intent to sue notice to the Packard Children's Hospital as required to initiate medical malpractice claims in California, Nora's parents received a reply from the hospital's risk manager, stating that, "Unfortunately, the placement of central lines is associated with a risk of infection. . . . There is a risk of infection—in the best of circumstances—which can never entirely be eliminated."¹⁹⁸

Central line bloodstream infections are not a rarity, however, but rather a "major cause of healthcare-associated morbidity and mortality."¹⁹⁹ What was to be done about the proliferation of such serious hospital-borne blood stream infections? Since the use of central line catheters starting in the 1950s, "[w]e told ourselves this story, at the time, that these infections were inevitable and

193. Kliff, *supra* note 189.

194. E. Jedd Roe, III, *Central Venous Access via Infraclavicular (Subclavian/Subclavicular) Subclavian Approach to Subclavian Vein*, MEDSCAPE (Aug. 7, 2018), <http://emedicine.medscape.com/article/80336-overview> [<https://perma.cc/VA3A-RPPE>]; Kliff, *supra* note 189.

195. R. Monina Klevens, Jonathan R. Edwards, Chesley L. Richards, Teresa C. Horan, Robert P. Gaynes, Daniel A. Pollock & Denise M. Cardo, *Estimating Health Care-Associated Infections and Deaths in U.S. Hospitals, 2002*, 122 PUB. HEALTH REPS. 160, 160–64 (2007); Didier Pittet, Debra Tarara & Richard P. Wenzel, *Nosocomial Bloodstream Infection in Critically Ill Patients: Excess Length of Stay, Extra Costs, and Attributable Mortality*, 271 J. AM. MED. ASS'N 1598, 1598–1601 (1994).

196. Kliff, *supra* note 189.

197. *Id.*

198. *Id.*

199. *Central Line-Associated Blood Stream Infections*, IOWA DEP'T PUB. HEALTH, <https://idph.iowa.gov/hai-prevention/information/clamsi> [<https://perma.cc/ZLT4-KLEJ>]; Klevens et al., *supra* note 195, at 161; Pittet et al., *supra* note 195; see also John P. Burke, *Infection Control—A Problem for Patient Safety*, 348 NEW ENG. J. MED. 651 (2003); Leonard A. Mermel, *Prevention of Intravascular Catheter-Related Infections*, 132 ANNALS INTERNAL MED. 391, 391 (2000).

that if you get an infection, it is what it is.”²⁰⁰ This is a fatalism that may be familiar to those who study prosecutorial misconduct, as misconduct and error by prosecutors is often presumed to be inevitable.

A 2006 study in the *New England Journal of Medicine*, *An Intervention to Decrease Catheter-Related Bloodstream Infections in the ICU*, was among the first to start upending the dangerous acceptance of supposed inevitability of such infections.²⁰¹ A physician participating in the study admitted, “When I got involved in the project, I had some skepticism. The mindset by most people prior to 2004 was that infection was just an accepted risk for having one of these catheters placed.”²⁰² The results of the study, however, showed otherwise: after implementing reforms from instituting checklists and strengthening the “safety culture” of the 103 participating hospitals during the eighteen-month study period, incidences of catheter-related bloodstream infections plummeted by sixty-six percent.²⁰³ This study, however, is only part of a trend seen in infection control and public health emphasizing prevention of hospital-acquired infections as a whole, with a target for “zero tolerance” of such incidence being greatly emphasized as a way not only to improve patient safety and outcomes, but also in helping hospitals’ bottom lines.²⁰⁴

Prosecutors would be much more amenable to cultural change and reform, including providing the more distanced assessment of police action and misconduct, if “inclusive rhetoric that recognizes that even virtuous prosecutors who strive to do justice might inadvertently err” was employed.²⁰⁵ While the assignation of blame would still have a place in those cases in which a prosecutor intentionally and maliciously misbehaves to the detriment of a defendant, the use of no-fault language and discourse when a prosecutor’s

200. Kliff, *supra* note 189 (quoting Dr. Peter Pronovost, director of the Armstrong Institute for Patient Safety and Quality at Johns Hopkins University).

201. Peter Pronovost, Dale Needham, Sean Berenholtz, David Sinopoli, Haitao Chu, Sara Cosgrove, Bryan Sexton, Robert Hyzy, Robert Welsh, Gary Roth, Joseph Bander, John Kepros & Christine Goeschel, *An Intervention to Decrease Catheter-Related Bloodstream Infections in the ICU*, 355 *NEW ENG. J. OF MED.* 2725, 2725–30 (2006).

202. Kliff, *supra* note 189.

203. Pronovost et al., *supra* note 201, at 2726–27, 2731.

204. See Kathy Warye & Jerome Granato, *Target: Zero Hospital-Acquired Infections*, *HEALTHCARE FIN. MGMT.*, Jan. 2009, at 86, 86–87, 91.

205. Burke, *supra* note 141, at 2131.

office is seeking to learn from prior mistakes “would avoid alienating prosecutors and instead invite them to contribute, individually and collectively, to the prevention of wrongful convictions”²⁰⁶ and other harms that might otherwise not be considered in court due to the harmless error rule.

3. Military Anti-Fraternization Policies as Paradigm

A number of studies have highlighted the many similarities that military and police cultures share, and some have even noted that the two functions have begun to coalesce such that they can be difficult to tease out from one another.²⁰⁷ The increased militarization of police, both in structure and use of equipment usually made available to the armed forces, has also served to often blur the line between domestic policing and other forms of militarism.²⁰⁸ Today’s police officers are often fighting in several wars at once: the War on Drugs, the War on Terror, and others. Police are often perceived even as occupying and invading forces among differing communities throughout the United States, particularly those that are poor, majority-minority, or rural.²⁰⁹

The military, however, is substantially different from modern police forces in that there are stronger norms against fraternization, formally backed by the Uniform Code of Military Justice, which defines a number of disciplinary offenses even beyond fraternization.²¹⁰ While each of the services traditionally maintained their own unique definition of fraternization, uniform standards were adopted across the services in 1999 in a recognition that sep-

206. *Id.*

207. See Charles J. Dunlap, Jr., *The Thick Green Line: The Growing Involvement of Military Forces in Domestic Law Enforcement*, in *MILITARIZING THE AMERICAN CRIMINAL JUSTICE SYSTEM* 29, 29–32, 34–35 (Peter B. Kraska ed., 2001).

208. See Peter B. Kraska, *Crime Control as Warfare: Language Matters*, in *MILITARIZING THE AMERICAN CRIMINAL JUSTICE SYSTEM*, *supra* note 207, at 14, 15–16, 24; Peter B. Kraska & Victor E. Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, 44 *SOC. PROBS.* 1, 1–5 (1997).

209. Danny Sjursen, *The Disturbing Parallels Between US Policing at Home and Military Tactics Abroad*, *NATION* (Oct. 12, 2017), <https://www.thenation.com/article/archive/the-disturbing-parallels-between-us-policing-at-home-and-military-tactics-abroad/> [https://perma.cc/GT4M-S6CW].

210. Margaret A. McDevitt, Note, *Wrongful Fraternization as an Offense Under the Uniform Code of Military Justice*, 33 *CLEV. ST. L. REV.* 547, 547–50 (1984–85).

arate policies were “corrosive to morale, particularly as [the services] move[d] toward an increasingly joint environment.”²¹¹ Fraternalization has not been clearly defined precisely because it is difficult to define, just as are the problematic relationships that are the subject of this Article:

[Fraternalization] is not a concept susceptible to precise and narrow definition. Depending on the circumstances, fraternalization may span the entire spectrum of amicable human social interaction, ranging from a passing greeting on the street to intimate sexual activity. The permutations of possible circumstances necessarily complicate any definition, and there is no easy line drawn separating essential professional interaction from impressible fraternalization.²¹²

The concept and crime of fraternalization has a long and complicated history. Such behavior has been recognized as a crime throughout the world and at varying periods for thousands of years,²¹³ and originally attempted to regulate, if not prevent, financial intermingling by way of loans and gambling between officers and the enlisted.²¹⁴ Women joining the military in large numbers starting in the 1980s then expanded what was the usual, financially based definition of “fraternalization” to a larger array of interpersonal relationships.²¹⁵ And while certain relationships seem like they should be found easily improper under usual anti-fraternalization norms, just as in relationships among police and prosecutors, people may “form normal, healthy relationships that often ripen into romance, love, and eventually marriage.”²¹⁶

While any regulation of human behavior, be it criminal or not, will always be flawed and never prevent all misbehavior (however that may be defined), that does not necessarily mean that attempting to regulate such conduct is not an endeavor worth pursuing. Acknowledging that normal relationships may arise in the context of serving, the military has attempted to “walk[] a tight line trying

211. *Web Site Outlines Fraternalization Changes*, U.S. DEPT OF DEF. (May 3, 1999), <https://archive.defense.gov/news/newsarticle.aspx?id=43034> [<https://perma.cc/AW8Q-NCCH>].

212. WALTER B. HUFFMAN & RICHARD D. ROSEN, *MILITARY LAW: CRIMINAL JUSTICE & ADMINISTRATIVE PROCESS* § 3:329 (2018).

213. Walter T. Cox, III, *Consensual Sex Crimes in the Armed Forces: A Primer for the Uninformed*, 14 DUKE J. GENDER L. & POL'Y 791, 792–93 (2007).

214. *Id.* at 793.

215. *Id.*

216. *Id.* at 795.

to come up with a fair and progressive approach to the issues surrounding fraternization.”²¹⁷

CONCLUSION

Though police and prosecutors, through the nature of their jobs, are required to work together often and closely, both actors should not be permitted to allow their respective roles to become so intertwined and mingled that the independent purposes of their jobs are lost. This is a risk that becomes very real not only with the advent of prosecutors joining police in formal labor unions that can engage in collective bargaining but also with the proliferation of relationships that are built in employment associations and through other personal connections.

As the ABA exhorts, prosecutors should keep a respectful professional distance from police, not only to avoid the types of problematic relationships explored in this Article but also to avoid the appearance of impropriety and bad judgment. Rather than identifying so closely with the police function, prosecutors should instead work on changing their organizational cultures such that they work more stridently toward ensuring the health of their respective communities.

217. *Id.*