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## Policing the Poor and the Two Faces of the Justice Department

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# POLICING THE POOR AND THE TWO FACES OF THE JUSTICE DEPARTMENT

*David E. Patton\**

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## INTRODUCTION

When police misconduct reaches a boiling point in cities throughout the country, there is a common refrain: “call in the feds.” And “the feds” have often responded. During the Obama Administration, the Civil Rights Division of the Department of Justice issued reports and entered into consent decrees with several police departments, including Chicago, Baltimore, Ferguson, and New Orleans. The reports detailed widespread patterns and practices of unconstitutional stops, searches, seizures, stark racial discrimination, and lack of accountability for misconduct. The findings exposed and explained persistent problems with policing and highlighted how police misconduct disproportionately affects the poor and people of color.<sup>1</sup>

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\* Executive Director, Federal Defenders of New York. I owe many thanks to Sarah Lustbader and to Elizabeth Evans, Frank Kearn, Laura Bilder, and Becky Laitman at the *Fordham Urban Law Journal* for their thoughtful comments and edits.

1. In Baltimore, for example, the Civil Rights Division “identified troubling indications that [Baltimore Police Department] officers disproportionately use force during encounters with African Americans on Baltimore streets [and] found numerous examples of [Baltimore Police] officers using racial slurs or other statements that exhibit bias.” U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION, INVESTIGATION OF THE BALTIMORE POLICE DEPARTMENT 61 (2016) [hereinafter BALTIMORE REPORT]. In Ferguson, the Civil Rights Division found that among people arrested by Ferguson police only for an outstanding municipal warrant, 96% were African American. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 5 (2015) [hereinafter

But even during the Obama Administration, the work of the Justice Department failed to address another significant contributor to police misconduct: the Justice Department. The very same problems with policing identified by the Civil Rights Division were, and are, exacerbated by the daily work of federal prosecutors in U.S. Attorneys' Offices, offices overseen by the Criminal Division of the Justice Department.<sup>2</sup> This occurs because a significant number of federal criminal prosecutions now derive from local police arrests, and the prosecutors in those cases routinely obstruct efforts to examine the behavior of police officers. They do so by using the threat of more severe sentences to dissuade the accused from going to trial or from filing motions to suppress evidence alleging constitutional violations of the exact same variety cited by the Civil Rights Division, such as illegal stops, searches, seizures, and interrogations.<sup>3</sup>

Moreover, on the occasions when the accused risk those severe consequences by going to trial or filing motions to suppress, prosecutors fight defense efforts to access or use records showing prior misconduct by the officers whose conduct is at issue, and defend the officers to the hilt—sometimes even after a judge finds serious wrongdoing.<sup>4</sup> Indeed, in New York City alone, at least twenty police officers testifying in federal criminal cases have been found not

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FERGUSON REPORT]. “Nearly 90% of documented force used by [Ferguson Police Department] officers was used against African Americans. In every canine bite incident for which racial information is available, the person bitten was African American.” *Id.*

2. The Department of Justice, headed by the Attorney General, consists of many subject-specific divisions, including Antitrust, Civil, Civil Rights, Criminal, Environment and Natural Resources, and Tax. *See Organization, Mission and Functions Manual*, U.S. DEP'T OF JUSTICE (Aug. 1, 2017), <https://www.justice.gov/jmd/organization-mission-and-functions-manual> [https://perma.cc/94BQ-HKYT]. “The Criminal Division develops, enforces, and supervises the application of all federal criminal laws except those specifically assigned to other divisions.” *About the Criminal Division*, U.S. DEP'T OF JUSTICE (Jan. 18, 2017), <https://www.justice.gov/criminal/about-criminal-division> [https://perma.cc/7T8J-8Y24]. The United States Attorney serves as the chief federal prosecutor in each federal judicial district. *See* 28 U.S.C. § 519 (2012). The U.S. Attorney is appointed and subject to removal by the President, but her work is subject to the supervision of the Attorney General. *See id.*; *see also* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 3-2.110 (1997).

3. Evidence obtained in violation of the Fourth Amendment may be excluded from use at trial. *See Weeks v. United States*, 232 U.S. 383, 393 (1914) (barring the use in federal court of evidence obtained in violation of the Fourth Amendment); *see also Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (extending the exclusionary rule announced in *Weeks* to the States).

4. *See infra* notes 44–65 and accompanying text.

credible by federal judges, yet no adverse actions were ever taken against the officers by federal prosecutors (or by anyone else).<sup>5</sup> These actions by federal prosecutors are all the more significant because of the growth in joint local and federal investigations. Cases involving drugs, gun possession, and robbery that were once exclusively prosecuted in state court are now routinely brought by federal prosecutors for the purpose of imposing more severe sentences and, in many instances, affording defendants fewer procedural rights.<sup>6</sup> The prosecutions fall heavily on poor people of color: approximately eighty percent of all federal defendants are too poor to hire a lawyer and roughly three-quarters are non-white or Hispanic.<sup>7</sup> Federal prosecutors thus rely heavily on, and protect, local police officers whose misconduct might, under different circumstances, be exposed by a Civil Rights Division investigation.

When it comes to federal prosecutors' role in holding police officers accountable for illegal conduct, public debate often focuses on whether prosecutors should charge an officer for excessive force in a high profile death, such as the shooting of Michael Brown in Ferguson or the choking of Eric Garner in New York City.<sup>8</sup> Far less noticed is how federal prosecutors respond to allegations of police misconduct in the thousands of criminal cases they prosecute every year. Police misconduct is routinely discovered in criminal cases.

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5. See Benjamin Weiser, *Police in Gun Searches Face Disbelief in Court*, N.Y. TIMES (May 12, 2008), <http://www.nytimes.com/2008/05/12/nyregion/12guns.html> [<https://nyti.ms/2s0oNWY>].

6. See, e.g., David E. Patton, *Federal Public Defense in an Age of Inquisition*, 122 YALE L.J. 2578, 2590–97 (2013); Ellen S. Podgor, *The Tainted Federal Prosecutor in an Overcriminalized Justice System*, 67 WASH. & LEE L. REV. 1569, 1573 (2010); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 748–49 (2005).

7. MARK MOTIVANS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STAT., FEDERAL JUSTICE STATISTICS, 2013–14 at 1, 24 (2017), <https://www.bjs.gov/content/pub/pdf/fjs1314.pdf> [<https://perma.cc/35RR-ZZJ9>] (showing that 77% of federal defendants were represented by assigned counsel—38% by federal public defenders and 39% by privately appointed counsel—and 22.3% of all federal defendants were white and non-Hispanic/Latino).

8. See, e.g., Shaun King, *Shame on Feds for Treating Eric Garner Case Like It's a Hot Potato*, N.Y. DAILY NEWS (Oct. 25, 2016, 2:41 PM), <http://www.nydailynews.com/news/national/king-shame-feds-treating-eric-garner-case-hot-potato-article-1.2844567> [<https://perma.cc/9B66-TG79>]; John Surico, *Are the Feds Finally Going to Press Charges in the Eric Garner Case?*, VICE (Oct. 31, 2016, 10:59 AM), [https://www.vice.com/en\\_us/article/7bmw7d/are-the-feds-finally-going-to-press-charges-in-the-eric-garner-case](https://www.vice.com/en_us/article/7bmw7d/are-the-feds-finally-going-to-press-charges-in-the-eric-garner-case) [<https://perma.cc/CTZ9-KQ8Z>]; Joseph P. Williams, *Why Aren't Police Prosecuted?*, U.S. NEWS & WORLD REP. (July 13, 2016, 1:31 PM), <https://www.usnews.com/news/articles/2016-07-13/why-arent-police-held-accountable-for-shooting-black-men> [<http://perma.cc/LG9P-4TK9>].

This makes sense: part of a defense lawyer's job is to examine how the police engaged in an investigation. Did the police stop or search someone unlawfully? Did they conduct an illegal, coercive interrogation? Are they telling the truth about how they found evidence? But just because defense lawyers discover misconduct doesn't mean it ever gets revealed to a judge or jury, much less the public or policy makers. That is because prosecutors regularly block efforts to challenge any aspect of a case, including (and sometimes especially) claims about police misconduct.

In this symposium celebrating the work of David Caplovitz and the very literal ways that the poor pay more, I explore how the poor pay more in another respect: in time and freedom as a result of police misconduct. And I do so in the context of the federal criminal justice system, where the Justice Department's Criminal Division often contributes to the problems the Civil Rights Division identifies in its investigations of police misconduct. The troubling practices by the Criminal Division cut across administrations. These practices have existed in Democratic and Republican regimes. Although they have been more or less acute at times (for example, under President Obama's Attorney General, Eric Holder, concrete policies helped alleviate some of the problems while under President Trump's Attorney General, Jeff Sessions, new policies will exacerbate them<sup>9</sup>), these practices have ultimately proved to be persistent.

It is not hard to understand why the two faces of the Justice Department exist. The Civil Rights Division's investigations into police departments fit squarely within its stated mission and accords with its history and self-perception as a defender of constitutional rights against state and local government actors.<sup>10</sup> By design, federal authorities in those investigations are outsiders who can freely criticize police officers with whom they will not repeatedly work after the criticisms are leveled. Their involvement is, indeed, predicated on

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9. See, e.g., Memorandum from Jeff Sessions, Att'y Gen., on Department Charging and Sentencing Policy to All Federal Prosecutors (May 10, 2017), <https://www.justice.gov/opa/press-release/file/965896/download> [<https://perma.cc/Z58G-CZ3Q>]; Sari Horwitz & Matt Zapotosky, *Sessions Issues Sweeping New Criminal Charging Policy*, WASH. POST (May 12, 2017), [https://www.washingtonpost.com/world/national-security/sessions-issues-sweeping-new-criminal-charging-policy/2017/05/11/4752bd42-3697-11e7-b373-418f6849a004\\_story.html](https://www.washingtonpost.com/world/national-security/sessions-issues-sweeping-new-criminal-charging-policy/2017/05/11/4752bd42-3697-11e7-b373-418f6849a004_story.html) [<https://perma.cc/6DPU-BQVM>] (describing Sessions' repeal of a Holder Administration policy that had restricted the use of drug charges carrying mandatory minimum sentences); Adam Serwer, *Jeff Sessions's Blind Eye*, THE ATLANTIC (Apr. 5, 2017), <https://www.theatlantic.com/politics/archive/2017/04/jeff-sessions-blind-eye/521946/> [<https://perma.cc/8HSF-AZZ2>].

10. See *infra* notes 12–15 and accompanying text.

the unwillingness or inability of local prosecutors to hold their police forces accountable for misconduct.<sup>11</sup> But federal prosecutors have increasingly come to rely on those same state and local actors—namely, the police and district attorneys’ offices—to bring a large number of their cases. For federal prosecutors, criticizing those “partners” in law enforcement comes at a price. If the Justice Department has acknowledged this fact, it certainly has not done so publicly, nor has it implemented relevant reforms.

The incentives for federal prosecutors to shield police officers from claims of misconduct are especially problematic because of how much power federal prosecutors wield. They can and do erect high barriers to challenges to police behavior—barriers that overwhelmingly impact the poor and racial minorities. Scholars have written extensively about the problem of too much power in the hands of federal prosecutors, among them, overly severe sentences, diminished procedural rights, and wrongful convictions.<sup>12</sup> This Essay highlights yet another problem: impeding the cause of police reform, as advocated by the Justice Department itself.

## I. THE CIVIL RIGHTS DIVISION AND POLICING

The Justice Department has a well-deserved and storied reputation for its work advancing civil rights. The 1957 Civil Rights Act led to the creation of the Civil Rights Division, charged with enforcing all federal statutes affecting civil rights.<sup>13</sup> In its early years, the Division

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11. See, e.g., Frederick M. Lawrence, *The Evolving Federal Role in Bias Crime Law Enforcement and the Hate Crimes Prevention Act of 2007*, 19 STAN. L. & POL’Y REV. 251, 274 (2008); Kate Levine, *Who Shouldn’t Prosecute the Police*, 101 IOWA L. REV. 1447, 1449 n.7 (2016).

12. See, e.g., JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 72–77, 127 (2017) (discussing prosecutors’ role in contributing to historically high levels of incarceration); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 4, 300–01 (2011) (discussing how the vast increase in prosecutorial power has led to the collapse of the rule of law in criminal cases); Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/> [<https://perma.cc/7VE6-LTJV>] (“[T]he prosecutor-dictated plea bargain system, by creating such inordinate pressures to enter into plea bargains, appears to have led a significant number of defendants to plead guilty to crimes they never actually committed.”); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 132 (2005) (arguing that the federal sentencing guidelines shifted power from the judge to the prosecutor, thus encouraging the growth of guilty pleas).

13. The Civil Rights Act of 1957, Pub. L. 85-315, 71 Stat. 634; see also Wan J. Kim, Assistant Att’y Gen. for the Civil Rights Div., U.S. Dep’t of Justice, Speech at A Day with Justice, The Department of Justice’s Civil Rights Division: A Historical Perspective As the Division Nears 50, at 2 (Mar. 22, 2006),

focused on voting rights and school integration.<sup>14</sup> With the passage of the 1964 Civil Rights Act, it began to address a broad spectrum of public accommodation cases.<sup>15</sup> Over the ensuing decades, with additional statutory authority, the Division expanded to address all manner of civil rights violations relating to housing, employment, prisons, and disabled persons.<sup>16</sup>

Recently, the Division's most notable civil rights work has been its investigations into local police departments.<sup>17</sup> In the past two years, the Division issued three major reports on policing in Chicago, Baltimore, and Ferguson.<sup>18</sup> Earlier investigations scrutinized New Orleans and Cincinnati.<sup>19</sup> Although the reports varied in their emphasis, a few common themes emerged. Police in those cities routinely violated the constitutional rights of residents, did so in a racially discriminatory manner, and were rarely held accountable for their misconduct.

The report on Chicago focused on police officers' excessive use of force and the city's failure to appropriately investigate the cases.<sup>20</sup> The report uncovered numerous incidents in which the police "shot at suspects who presented no immediate threat" and used significant non-lethal force "against people who posed no threat" as well as "unreasonable retaliatory force and unreasonable force against children."<sup>21</sup> It found that the city failed to "investigate the majority

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[https://www.justice.gov/sites/default/files/crt/legacy/2008/10/21/historical\\_perspective.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2008/10/21/historical_perspective.pdf) [<https://perma.cc/PK9S-FVC2>].

14. See Kim, *supra* note 13, at 3–4.

15. See *id.* at 4–5.

16. See *id.* at 6–8.

17. These "pattern and practice" investigations began in earnest in response to the Rodney King beating, pursuant to congressional authorization of the Attorney General "to investigate and litigate cases involving 'a pattern or practice of conduct by law enforcement officers' that violates Constitutional or federal rights." U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, THE CIVIL RIGHTS DIVISION'S PATTERN AND PRACTICE POLICE REFORM WORK: 1994-PRESENT, at 3 (2017), <https://www.justice.gov/crt/file/922421/download> [<https://perma.cc/J26H-57SK>].

18. See *generally* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION & U.S. ATTORNEY'S OFF. N.D. ILL., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT (2017) [hereinafter CHICAGO REPORT]; BALTIMORE REPORT, *supra* note 1; FERGUSON REPORT, *supra* note 1.

19. See *generally* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT (2011); Memorandum of Agreement Between the U.S. Department of Justice and the City of Cincinnati, Ohio and the Cincinnati Police Department (Apr. 12, 2002), <http://www.cincinnati-oh.gov/police/linkservid/EA1A2C00-DCB5-4212-8628197B6C923141/showMeta/0/> [<https://perma.cc/F222-WV42>].

20. See *generally* CHICAGO REPORT, *supra* note 18.

21. *Id.* at 6.

of cases it is required by law to investigate.” And, in the cases the city did investigate, the report found that the investigations suffered from “serious flaws that obstruct objective fact-finding,” such as failing to interview key witnesses (including the officers’ themselves), promoting an environment of collusion among officers, and investigative interviewing techniques that “aimed at eliciting favorable statements justifying the officer’s actions rather than seeking the truth” by “failing to challenge inconsistencies and illogical officer explanations.”<sup>22</sup>

The Baltimore Report was sweeping in its criticism of police misconduct. Included among the findings were: (1) the Baltimore Police Department (“BPD”) routinely made unconstitutional stops, searches, and arrests; (2) BPD discriminated against African-Americans in its enforcement activities; (3) BPD regularly used unreasonable and excessive force, in particular against juveniles and those with mental illness; and (4) BPD unlawfully restricted protected speech by detaining, arresting, and retaliating with force against people who engaged in protected speech.<sup>23</sup> Like Chicago, the report detailed the department’s failure to properly train, supervise or hold police officers accountable for misconduct.<sup>24</sup>

The Ferguson Report described a broad array of unconstitutional police practices that roughly mirror the findings in Baltimore, including unlawful stops and searches, First Amendment violations, use of excessive force, and discrimination against Ferguson’s African-American residents.<sup>25</sup> The Ferguson Report also focused on the particular problem of Municipal Court where revenue generation from fines and fees “to advance the City’s financial interests” was supported by the overuse and discriminatory issuance of tickets by police officers, practices that violated the equal protection and due process requirements of the Fourteenth Amendment and imposed “unnecessary harm, overwhelmingly on African-American individuals.”<sup>26</sup> In a particularly telling exchange quoted in the report, the city Finance Director wrote to the City Manager: “Court fees are anticipated to rise about 7.5%. I did ask the Chief [of police] if he thought the PD could deliver 10% increase. He indicated they could try.”<sup>27</sup>

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22. *Id.* at 8.

23. BALTIMORE REPORT, *supra* note 1, at 3.

24. *Id.*

25. FERGUSON REPORT, *supra* note 1, at 2–3.

26. *Id.* at 3.

27. *Id.* at 2.



Racial bias in Ferguson was found to be rampant. After controlling for other factors, the report found that African-Americans were far more likely to be stopped, cited, and arrested than their white counterparts.<sup>28</sup> “African-Americans are more than twice as likely as white drivers to be searched during vehicle stops even after controlling for non-race based variables[.]”<sup>29</sup> Over a two year period, 95% of “Manner of Walking in Roadway” charges and 94% of all “Failure to Comply” charges were brought against African-Americans.<sup>30</sup> In sum, “Ferguson’s approach to law enforcement both reflects and reinforces racial bias, including stereotyping . . . and there is evidence that this is due in part to intentional discrimination on the basis of race.”<sup>31</sup>

The Ferguson Report recounted a specific incident quoted in full here because the next section imagines how a similar scenario might unfold in a hypothetical federal prosecution.

[I]n the summer of 2012, a 32-year-old African American man sat in his car cooling off after playing basketball in a Ferguson public park. An officer pulled up behind the man’s car, blocking him in, and demanded the man’s Social Security number and identification. Without any cause, the officer accused the man of being a pedophile, referring to the presence of children in the park, and ordered the man out of his car for a pat-down, although the officer had no reason to believe the man was armed. The officer also asked to search the man’s car. The man objected, citing his constitutional rights. In response, the officer arrested the man, reportedly at gunpoint, charging him with eight violations of Ferguson’s municipal code. One charge, Making a False Declaration, was for initially providing the short form of his first name (e.g., “Mike” instead of “Michael”), and an address which, although legitimate, was different from the one on his driver’s license. Another charge was for not wearing a seatbelt, even though he was seated in a parked car. The officer also charged the man both with having an expired operator’s license, and with having no operator’s license in his possession. The man told us that, because of these charges, he lost his job as a contractor with the federal government that he had held for years.<sup>32</sup>

Elsewhere, the report describes an officer who directed his police dog to bite an unarmed 14-year-old African American boy.<sup>33</sup> A third

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28. *Id.* at 4.

29. *Id.* at 4.

30. *Id.* at 4.

31. *Id.* at 4.

32. *Id.* at 3.

33. *Id.* at 31.

officer admitted to a clear pattern of Fourth Amendment violations: “when he conducts a traffic stop, he asks for identification from all passengers as a matter of course . . . [and if] any refuses, he considers that to be ‘furtive and aggressive’ conduct and cites—and typically arrests—the person for Failure to Comply.”<sup>34</sup> These accounts, and others, are emblematic of the sort of behavior that, according to all three reports, has led to the erosion of trust between the police and residents, especially African-American residents who are most often the victims of police misconduct.

The three reports are notable for their blunt appraisals of the problems with policing. They do not shy away from criticizing unconstitutional and discriminatory conduct. But the reports are silent on the role of prosecutors’ offices where police work lies at the heart of so many criminal cases. The reason for the omission is unclear. Perhaps consideration of local prosecutorial practice and its contribution to police misconduct was considered beyond the scope of the inquiry. Perhaps it was seen as too politically fraught. Or perhaps it was not considered at all. Whatever reasons the Justice Department has to not examine local prosecutors, however, should not apply to an examination of its own criminal prosecutors.

If federal prosecutors took seriously the reports of their colleagues in the Civil Rights Division, we might expect them to take seriously the claims of unlawful police conduct made by those accused of crimes in federal court. We might at least expect that federal prosecutors would not actively discourage the airing of allegations of police misconduct, or that when claims are aired, prosecutors would not automatically meet them with resistance and retaliation. Furthermore, when claims of misconduct are substantiated by federal judges and evidence is suppressed, we might expect that federal prosecutors would take action to discipline or possibly charge the offending police officers for their unlawful activity.

Sadly, with the rare exception of a prosecution for excessive force,<sup>35</sup> none of those expectations match the reality of current

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34. *Id.* at 21–22.

35. See Mark Berman & Matt Zapotosky, *Chicago Cop, Once Commended for a Fatal Shooting, Is Indicted on Civil Rights Charges*, WASH. POST (Sept. 16, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/09/16/chicago-cop-once-commended-for-a-fatal-shooting-indicted-on-federal-civil-rights-charges> [https://perma.cc/2UPL-PTSF] (exploring the prosecution of Officer Marco Proano). But see J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn’t Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), <https://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html> [https://nyti.ms/2jD5C4l]

practice. The next section discusses the various ways that federal prosecutors routinely contribute to the problem of police misconduct.

## II. THE UNITED STATES ATTORNEYS' OFFICES AND POLICING

Roughly eighty percent of federal criminal defendants nationwide are too poor to hire a lawyer and thus require assigned counsel.<sup>36</sup> Three-quarters of federal defendants are non-white or Hispanic.<sup>37</sup> The accused are sometimes arrested by local police, sometimes by federal agents, and sometimes by both when agencies work together in “joint task forces.”<sup>38</sup> Federal criminal charges range from minor offenses (such as low-level drug cases, benefits fraud, or immigration violations) to major ones (such as terrorism, organized crime, or large-scale drug conspiracies).<sup>39</sup>

No matter the offense, however, federal prosecutors often obstruct efforts to examine law enforcement misconduct. First, they do so in the plea bargaining process in which they use their considerable leverage to dissuade defendants from going to trial or filing pretrial suppression motions. In the federal system, less than three percent of defendants go to trial.<sup>40</sup> Thirty years ago, that number was closer to twenty percent.<sup>41</sup> In the intervening years, prosecutors have accumulated so much power (via mandatory minimum sentences which they can charge or not at their discretion) and leverage (via the sheer severity of those possible sentences), that jury trials have become nearly extinct.<sup>42</sup> The loss of this most direct form of democracy—twelve citizens sitting in public judgment of a case—results in a corrosive lack of transparency and accountability for the work of prosecutors and the police. Moreover, federal prosecutors

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(examining a failure to prosecute the police officer who choked Eric Garner to death).

36. See MOTIVANS, *supra* note 7, at 28.

37. *Id.* at 24.

38. See JOHN S. DEMPSEY & LINDA S. FORST, AN INTRODUCTION TO POLICING 63 (8th ed. 2014).

39. For a more expansive discussion of federal criminal practice from my perspective as a federal public defender, see Patton, *supra* note 6, at 2590–97.

40. See Hindelang Criminal Justice Research Ctr., Univ. at Albany, *Criminal defendants disposed of in U.S. District Courts, by type of disposition 1945-2010*, SOURCEBOOK CRIM. JUST. STAT. ONLINE (2010), <http://www.albany.edu/sourcebook/pdf/t5222010.pdf> [<https://perma.cc/8GM9-37AL>].

41. *Id.*

42. See, e.g., HUMAN RIGHTS WATCH, AN OFFER YOU CAN'T REFUSE: HOW U.S. FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY 1 (2013), <https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead> [<https://perma.cc/M6P8-CEC9>].

seek higher sentences for people who unsuccessfully bring motions alleging Fourth or Fifth Amendment violations that are rooted in police misconduct.<sup>43</sup> This means that defendants must take an enormous risk, even without going to trial, to allege police misconduct, and this risk deters many from doing so.

Second, even if a defendant is brave enough to go to trial or file a motion alleging police misconduct and risk additional years in prison, federal prosecutors often fight to prevent the disclosure of records showing prior instances of the officer's misdeeds.<sup>44</sup> And on the occasions when defense counsel successfully obtain the records, prosecutors often fight either to keep the records from being introduced into evidence or to prevent defense counsel from questioning the officers about those records.<sup>45</sup>

Third, when a judge affirmatively finds that an officer or agent was not credible, the U.S. Attorney's Office takes no action to see that the officer is disciplined, much less charged with a crime.<sup>46</sup> In 2008, the New York Times reported on the lack of consequences for police officers in New York City who were found to have lied in suppression hearings in federal court.<sup>47</sup> The article focused on federal prosecutions of so-called "felon-in-possession" cases where arrests by local police for illegal gun possession are charged in federal court.<sup>48</sup> In over twenty cases, "judges found police officers' testimony to be unreliable, inconsistent, twisting the truth, or just plain false."<sup>49</sup> The judges' take on the officers' testimony "was often withering: 'patently

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43. See, e.g., *United States v. Sanders*, 208 F. App'x 160, 163 (3d Cir. 2006) (finding that defendant was not entitled to the full acceptance of responsibility reduction because he "compelled the government to prepare and examine" a police officer and other witnesses in a suppression hearing); *United States v. Price*, 409 F.3d 436, 444 (D.C. Cir. 2005) (rejecting government's argument that defendant should not be eligible for the full acceptance of responsibility reduction because he filed a suppression motion); *United States v. Rogers*, 129 F.3d 76, 79 (2d Cir. 1997) (affirming the denial of a sentence reduction for acceptance of responsibility because the defendant pled guilty after a suppression hearing).

44. From conversations with my colleagues around the country, prosecutors' practices with respect to disciplinary records vary widely. In some districts, prosecutors fight subpoenas issued to police departments or civilian complaint boards. In others, prosecutors disclose records to the judge for an *ex parte* determination of whether it should be turned over. In still others, prosecutors turn over material to the defense but then move to preclude their use at a hearing or trial. In my own practice in New York City, I have seen variations on all three practices depending on the particular prosecutor.

45. See *id.*

46. See, e.g., Weiser, *supra* note 5.

47. See *id.*

48. *Id.*

49. *Id.*

incredible,’ ‘riddled with exaggerations,’ ‘unworthy of belief.’”<sup>50</sup> And yet despite those stark findings about police officers’ “testilying”<sup>51</sup> to cover up unconstitutional behavior, there were no consequences for the officers.<sup>52</sup> “With few exceptions, judges did not ask prosecutors to determine whether the officers had broken the law, and prosecutors did not notify police authorities about the judges’ findings.”<sup>53</sup> In fact, no adverse action was taken against any of the twenty-plus officers examined by the Times reporter who were found to have lied and engaged in unlawful stops, searches, and seizures.<sup>54</sup>

In some instances, federal prosecutors do worse than merely nothing about police officers who are found to have engaged in illegal conduct; they sometimes affirmatively attempt to shield the officers. In one case in the Southern District of New York, a judge found several police officers not credible in a suppression hearing in which an officer justified his stop and search of a pedestrian by claiming to see a “bulge” in the pedestrian’s clothes consistent with a gun.<sup>55</sup> The judge made numerous comments about the falsehoods of the officers involved, including this finding: “I give no credibility to [the police officer’s] statement that he saw a bulge.”<sup>56</sup> The judge went on to state: “a decision was made [by the police officers] to coordinate among all the witnesses not to tell the full truth . . . . [Investigators] created a different story to justify the stop . . . . That testimony was false.”<sup>57</sup> The motion was ultimately denied as moot after the defense accepted a plea to a reduced charge.<sup>58</sup> After the plea, rather than investigate the police officers’ false statements, the prosecutors wrote to the judge asking him to determine that no adverse credibility

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50. *Id.*

51. *Id.* (referencing the term popularized by the Mollen Commission).

52. *Id.*

53. *Id.*

54. *Id.*

55. Benjamin Weiser, *Judge Says Police and U.S. Agents Misled Court in Manhattan Gun Possession Case*, N.Y. TIMES (June 30, 2013), <http://www.nytimes.com/2013/07/01/nyregion/judge-says-police-and-us-agents-misled-court-in-manhattan-gun-possession-case.html> [<https://nyti.ms/2xS8XSN>]

56. *Id.*

57. *Id.*

58. *Id.*; Order Denying Motion to Suppress, *United States v. Tajuan Simmons*, No. 1:12-cr-00416 (S.D.N.Y. Jan. 18, 2013) (No. 27) (denying motion to suppress as moot in light of guilty plea).

findings against any of the three NYPD Officers were warranted.<sup>59</sup> The judge declined to reconsider and did not sanitize the record.<sup>60</sup>

In another recent Southern District of New York case, where a judge found that an officer repeatedly lied in a “constantly evolving” story about how the officer conducted identification procedures and engaged in a warrantless search, the federal prosecutors again wrote to the judge asking her to reconsider a “limited aspect” of her ruling: her adverse credibility determinations about the officer.<sup>61</sup> In their request, the prosecutors cited the “serious and lasting negative effects on a law enforcement officer’s career” of an adverse credibility determination,<sup>62</sup> despite the fact that the officer in question had years earlier been found not credible about a search by a different federal judge.<sup>63</sup> The judge denied the prosecutors’ request, finding that “the adverse credibility determination was necessary and central” to her earlier ruling.<sup>64</sup>

These practices by federal prosecutors are all the more troubling because of their choices about whom to prosecute. Federal prosecutors have enormous discretion in deciding which cases to handle, including cases that arise purely from local investigations. For the past twenty years, federal prosecutors around the country have exercised that discretion to prosecute far too many low-level cases that were once the sole province of local authorities.<sup>65</sup> Thus, poor people of color have been subject to the harshness of federal sentencing laws and procedures with far greater frequency. The federal prison population has exploded during the last twenty years, far outpacing the growth in state prisons.<sup>66</sup> And because of the

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59. See Weiser, *supra* note 55 (relaying the contents of the prosecutors’ letters to the judge).

60. Order Denying Motion to Reconsider, *United States v. Tajuan Simmons*, No. 1:12-cr-00416 (S.D.N.Y. Feb. 4, 2013) (No. 29).

61. Letter Motion at 2, *United States v. Chambers*, 113 F. Supp. 3d 729 (S.D.N.Y. Dec. 18, 2014) (No. 205).

62. *Id.* at 12.

63. Letter Response at 2, *United States v. Chambers*, 113 F. Supp. 3d 729 (S.D.N.Y. Feb. 25, 2015) (No. 232) (citing to the earlier adverse credibility finding against the same officer, Detective Ellis Deloren, in *United States v. Cooper*, 05 Cr. 1139 (S.D.N.Y.)).

64. *United States v. Chambers*, 113 F. Supp. 3d 729, 745 (S.D.N.Y. July 9, 2015).

65. See, e.g., Sun Beale, *supra* note 6; Daniel C. Richman, “*Project Exile*” and the Allocation of Federal Law Enforcement Authority, 43 ARIZ. L. REV. 369, 374–75 (2001); Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377, 397 (2006).

66. See, e.g., *Growth in Federal Prison System Exceeds States*, PEW CHARITABLE TRUSTS (Jan. 22, 2015), <http://www.pewtrusts.org/en/research-and-analysis/factsheets/2015/01/growth-in-federal-prison-system-exceeds-states>

vanishingly low trial rate, the people who enter those prisons are not doing so after public trials where police misconduct might be exposed.<sup>67</sup>

To illustrate how federal prosecutors can impede scrutiny of police conduct, imagine the example from the Ferguson report discussed above and change a few facts. Assume that the basic outline of the incident remains the same (a black man—we'll call him Mr. Jones—is sitting in his car cooling off after a basketball game and is approached by an inquiring police officer), but now the police officer 1) claims that he had a lawful basis for the stop and search because he could smell marijuana coming from the car, and 2) says he found thirty grams of crack cocaine in the glove compartment of the car.

Let's further assume that pursuant to collaboration between local and federal law enforcement authorities,<sup>68</sup> Mr. Jones is charged in federal court with a drug crime that carries a mandatory minimum of five years imprisonment. Mr. Jones tells his attorney that the officer could not have smelled marijuana because he never smokes marijuana and there wasn't any marijuana in the car. The attorney notes that the police reports say nothing about finding marijuana on Mr. Jones or in the car during the arrest. Based on Mr. Jones's account, which the attorney finds credible, and the lack of any marijuana present, the attorney believes that Mr. Jones has a viable claim that his Fourth Amendment rights were violated. The attorney explains to Mr. Jones that at a suppression hearing (pursuant to a motion to exclude evidence found in an illegal search), the main question will be whether the judge believes the officer or Mr. Jones about the smell.

The attorney will likely need to explain something else to Mr. Jones: in order to bring the suppression motion, Mr. Jones will have to risk additional time in prison. In some districts, the prosecutor might offer a plea to a drug charge that does not carry a mandatory minimum only if Mr. Jones does not challenge the lawfulness of his stop and search. In other districts, federal prosecutors may not condition a plea on whether Mr. Jones files the motion, but if he loses the motion, the prosecutors will seek a higher sentence based on

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[<https://perma.cc/GT8F-9VH6>] (showing the expansion of the federal prison population outpacing the states since at least 2003).

67. See Hindelang Criminal Justice Research Ctr., *supra* note 40.

68. Federal prosecutors might agree to take the case for any number of reasons: they think Mr. Jones has information to build a bigger case, as part of general law enforcement crackdown, or perhaps Mr. Jones has prior convictions that make him eligible for a particularly severe "Career Offender" sentence. See Patton, *supra* note 6.

some combination of Mr. Jones's failure to "accept responsibility" or his "obstruction of justice" by, what in their view would be, making false claims about the officer's conduct.<sup>69</sup> In either scenario, the prosecutors create a strong disincentive to file a suppression motion because the difference in Mr. Jones's sentence could be several years (for example, the difference between three and six years).<sup>70</sup>

The ultimate decision whether to file the motion will involve many factors, including Mr. Jones's risk tolerance and the attorney's advice about the chances of success. If Mr. Jones decides to risk it and files the motion, his attorney will likely seek to know if the police officer has a history of misconduct by requesting the officer's disciplinary record. In many districts, the prosecutor will oppose the request. If at the end of the hearing, the judge credits Mr. Jones's version and does not believe the officer to be truthful, Mr. Jones will win the hearing, and his case will likely be dismissed because the drugs, the fruit of the search, will be inadmissible at trial leaving the prosecutor without sufficient evidence. But even in that scenario, where a judge has found that the police officer lied and engaged in unlawful, unconstitutional conduct, the prosecutor will not likely take any steps to see that the officer is disciplined. In fact, as seen above, the prosecutor may affirmatively attempt to shield the officer from any adverse consequences.<sup>71</sup>

The above scenario shows that an officer, who in one context is found by the Civil Rights Division to have engaged in serious misconduct, may be defended and protected by federal prosecutors in another. Given the rarity of civil rights investigations into police departments and the frequency of federal criminal prosecutions that utilize local police, the latter context is surely the one receiving the most attention by local police officers. The end result is a Justice Department that on the whole is likely doing more to perpetuate police misconduct than to prevent it.

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69. *See supra* note 44.

70. A conviction for 30 grams of crack cocaine under the Sentencing Guidelines equates to a Base Offense Level of 24. *See* U.S. SENTENCING GUIDELINES § 2D1.1 (U.S. SENTENCING COMM'N 2017). If a defendant has no criminal history points and receives a reduction for "Acceptance of Responsibility," he will receive three points off his Offense Level with a corresponding sentencing range of 37–46 months. *Id.* If he does not receive the three-point reduction and receives an increase of two points for "Obstruction of Justice," his corresponding sentencing range will be 63–78 months. *Id.*

71. *See supra* notes 56–64 and accompanying text.



## CONCLUSION

There are two ways that the Justice Department can reconcile its contradictory positions on police misconduct. The Criminal Division can stop supporting it or the Civil Rights Division can stop criticizing it. Sadly, the current Justice Department seems to be following the latter path.<sup>72</sup> As a result, the poor will surely continue to pay more as they bear the brunt of unlawful police activity. However, the time will come when the Justice Department is headed by officials who state an interest in advancing police reform. When that time comes, what should be done to allow for greater scrutiny of police conduct in routine federal criminal cases?

The best solutions are legislative ones that have been discussed at length by other commentators for many sound reasons. Those reforms involve ridding the system of mandatory minimum sentences which allow for far too much leverage by prosecutors;<sup>73</sup> narrowing and modernizing the federal criminal code to avoid overlapping and vague charges that also lead to too much unchecked prosecutorial power;<sup>74</sup> and providing greater discovery so that defendants are not guessing about the accusations made against them and can reasonably evaluate the claims of police officers.<sup>75</sup> Each would better enable defendants to raise challenges to police misconduct.

But until those more sweeping and necessary changes come, the Justice Department can adopt policies that do not actively impede efforts at police reform. It can choose not to condition plea offers on the filing of suppression motions. It can choose not to seek higher sentences when motions are filed and fail. It can promptly disclose evidence of prior misconduct by police officers. And it can actively pursue and seek to discipline officers who are found by judges to have lied or engaged in other misconduct. To advance that last goal, it can refer those cases to the civil side of the U.S. Attorney's Office to assure a more disinterested review.

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72. See sources cited *supra* note 9; Sari Horwitz et al., *Sessions Orders Justice Department to Review All Police Reform Agreements*, WASH. POST (Apr. 3, 2017), [https://www.washingtonpost.com/world/national-security/sessions-orders-justice-department-to-review-all-police-reform-agreements/2017/04/03/ba934058-18bd-11e7-9887-1a5314b56a08\\_story.html](https://www.washingtonpost.com/world/national-security/sessions-orders-justice-department-to-review-all-police-reform-agreements/2017/04/03/ba934058-18bd-11e7-9887-1a5314b56a08_story.html) [<https://perma.cc/57R7-WG8Y>].

73. See, e.g., *United States v. Kupa*, 976 F. Supp. 2d 417, 419–20 (E.D.N.Y. 2013) (describing in detail how “the government abuses its power” by using the leverage of mandatory minimum sentencing provisions to coerce pleas and noting the many calls for repeal of mandatory minimums).

74. See sources cited *supra* note 6.

75. See generally R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429 (2011).

These reforms are not a panacea for all police misconduct, but they have the benefit of being entirely within the control of the Justice Department. They do not require federal officials to order anything of state and local actors. Indeed, they only require that the Justice Department listen to itself.