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### Cop Tracing

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# COP TRACING

Jonathan Abel<sup>†</sup>

*What happens to an officer's old cases when that officer is exposed as corrupt? Often, the answer is nothing. This Article calls for "cop tracing": an effort to identify and investigate the past cases handled by dishonest cops. The Article first describes the existing action and inaction with respect to such tracing. Next, it examines the logistical and legal barriers to cop tracing. Finally, the Article considers the implications of cop tracing's absence. The failure to engage in cop tracing is symptomatic of the failure to see the misconduct of even a single bad officer in systemic terms.*

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INTRODUCTION

Detective Harry Bosch is behind the wheel, with his partner in the passenger seat. The Conviction Integrity Unit is digging into one of Bosch’s old cases, and the laconic detective seems worried. If the conviction is overturned, Bosch says, “every defense attorney worth their salt’s gonna be looking to overturn my convictions, every last one.”<sup>1</sup> It seems plausible enough as a plotline. Bosch is accused of planting evidence in a case that resulted in a conviction. If the allegation is true, there would naturally be concerns about his other cases. But Bosch’s fears of a domino effect on his old cases are the stuff of Hollywood, not reality. When a corrupt cop is discredited in one case, a constellation of doctrine, logistics, and politics forestalls any effort to track down and remedy the officer’s past cases.

A few examples illustrate the problem: Detective Roger Golubski served thirty years with the Kansas City Police Department. Following his retirement, allegations surfaced that Golubski had used his authority “to exploit sex from vulnerable black women,”<sup>2</sup> “threatened arrest and prosecution, fixed tickets, made warrants disappear and paid money and drugs” to those he targeted for sex, and “fixate[d] on particular women, harassing them continually for months or even years.”<sup>3</sup> He then pressed the women, known as “Golubski’s girls,” to testify falsely in his cases, according to the allegations levied against him in court filings.<sup>4</sup> Golubski was also accused of working for local drug dealers.<sup>5</sup> These allegations came out in 2017 in an innocence claim brought by Lamonte McIntyre,<sup>6</sup> a man who served 23 years in prison based on a double-murder conviction that Golubski investigated.<sup>7</sup> In McIntyre’s efforts to challenge

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<sup>1</sup> *Bosch: Pill Shills* (Amazon Studios Apr. 19, 2019).

<sup>2</sup> *McIntyre v. Unified Gov’t & Kan. City*, No. 18-2545-KHV, 2020 U.S. Dist. LEXIS 36174, at \*3 (D. Kan. Mar. 3, 2020) (quoting Second Amended Complaint).

<sup>3</sup> *Id.* at \*4.

<sup>4</sup> *Id.* at \*4, \*7.

<sup>5</sup> *Id.* at \*4.

<sup>6</sup> *Id.* at \*3; see also Maurice Possley, *Lamonte McIntyre*, NAT’L REGISTRY OF EXONERATIONS (Feb. 24, 2020), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5216> [<https://perma.cc/86G9-LVC8>] (noting exoneration in 2017).

<sup>7</sup> Roxana Hegeman, *Kansas Legislators Seek Investigation Into Former Detective*, ASSOCIATED PRESS (July 2, 2020), <https://apnews.com/article/religion-kan->

his wrongful conviction, he brought forward details about how Golubski had forced McIntyre's mother into sex acts and then stalked her so intensely that she had to change her address and phone number to escape.<sup>8</sup> According to McIntyre's attorneys, it was these spurned advances that led Detective Golubski to frame the woman's son—an allegation made more plausible by the shoddiness of Golubski's investigation. (Golubski arrested McIntyre less than six hours after the killings and without performing any meaningful investigation.<sup>9</sup>) In 2017, newly-elected District Attorney Mark Dupree declared McIntyre's case to be a "manifest injustice," and asked a state court to vacate the conviction.<sup>10</sup> Dupree followed up by asking the Kansas Bureau of Investigation to open a criminal investigation into Golubski's actions.<sup>11</sup>

It was a stinging indictment of Golubski, his work in the McIntyre case and, presumably, his entire career. But what would be done to investigate other cases that Golubski may have corrupted? "We need to look back at every doggone case as far back as we can," Dupree, the district attorney, said in an interview for this Article.<sup>12</sup> "I don't think it's okay to say to victims . . . of this officer that because this was twenty years [ago] you don't deserve any justice."<sup>13</sup> Yet Dupree said his office has been able to review only two dozen or so of Golubski's cases.<sup>14</sup> The rest, like tens of thousands of other cases handled by the prosecutor's office over the preceding decades, are

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sas-race-and-ethnicity-abuse-of-women-crime-4029e8e0d18a3af50c5b219afe7a0f41 [https://perma.cc/5VZA-D7YU]; *McIntyre*, 2020 U.S. Dist. LEXIS 36174, at \*8–9.

<sup>8</sup> *McIntyre*, 2020 U.S. Dist. LEXIS 36174, at \*5–6.

<sup>9</sup> Rick Tulskey, Shaila Dewan & Andrew Rossback, *23 Years for Murder. He Didn't Do It. What Went Wrong?*, N.Y. TIMES (Nov. 20, 2017), <https://www.nytimes.com/interactive/2017/11/20/us/innocent-murder-exoneration.html> [https://perma.cc/279V-EUSY] ("The detective may have had a revenge motive. Years before the murders, Lamonte's mother says, the detective, Roger Golubski, forced her to submit to oral sex, threatening to arrest her boyfriend if she refused. Afterward, she rebuffed his advances, finally moving and changing her number." "Police did not collect or analyze key evidence."); Dan Margolies & Peggy Lowe, *Judge Allows Wrongfully Convicted Lamonte McIntyre's Civil Case Against Wyandotte County to Proceed*, KCUR (Mar. 3, 2020), <https://www.kcur.org/news/2020-03-03/judge-allows-wrongfully-convicted-lamonte-mcintyres-civil-case-against-wyandotte-county-to-proceed> [https://perma.cc/YYQ7-K24Y] (noting shortcomings of investigation).

<sup>10</sup> Hegeman, *supra* note 7.

<sup>11</sup> *Id.*

<sup>12</sup> Telephone Interview with Mark Dupree, Dist. Att'y, Wyandotte Cnty., Kan. (Jan. 7, 2021) [hereinafter Dupree Interview].

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

stuck in paper form in the office archives.<sup>15</sup> They have not been indexed, much less scanned.<sup>16</sup> Dupree said it would take five to ten years to complete the indexing.<sup>17</sup> In the meantime, he has no ability to conduct a systemic review of the cases Golubski handled.<sup>18</sup> A wrongfully convicted man, a discredited officer, substantial allegations of a pattern of misconduct, a prosecutor who suspects the officer of criminal conduct—the circumstances in this case call out for cop tracing, for some effort to review the officer’s history of work on other cases. Yet these efforts cannot get off the ground.

Another example can be found in New Orleans. The U.S. Supreme Court in *Kyles v. Whitley* name-checked Detective John Dillman, among others, for withholding critical evidence about the star prosecution witness in a capital conviction.<sup>19</sup> The conviction and death sentence against Curtis Kyles were thrown out and *Kyles* came to be known as a major *Brady* decision, expanding the scope of a prosecutor’s constructive knowledge to include any favorable information known to any member of the prosecution team, “including the police.”<sup>20</sup> But this was not Detective Dillman’s only judicial admonishment. A district court found Dillman had extracted a false confession from John Floyd, a man with a 59 IQ, by plying Floyd with alcohol and repeatedly slapping him in an effort to get the confession.<sup>21</sup> Forensic evidence exonerated Floyd after two decades in prison.<sup>22</sup> Nor were these cases the only wrongful convictions involving the work of Detective Dillman.<sup>23</sup>

There has never been a review of the cases Dillman handled over his long career, but that may be about to change. In 2020, progressive Jason Williams was elected district attorney

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Kyles v. Whitley*, 514 U.S. 419, 428, 447, 449 (1995).

<sup>20</sup> *Id.* at 437–38.

<sup>21</sup> *Floyd v. Cain*, No. 11-2819, 2016 WL 6216141, at \*2, \*11 (E.D. La. Sept. 14, 2016); see also Ken Otterbourg, *John Floyd*, NAT’L REGISTRY OF EXONERATIONS (Aug. 24, 2021), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5454> [<https://perma.cc/MG3P-WK88>] (noting Floyd’s 59 IQ score).

<sup>22</sup> Otterbourg, *supra* note 21.

<sup>23</sup> *State v. Knapper*, 579 So.2d 956, 958–61 (La. 1991) (describing report by John Dillman that prosecution failed to disclose); see also Maurice Possley, *Issac Knapper*, NAT’L REGISTRY OF EXONERATIONS (before June 2012), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3358> [<https://perma.cc/6F7J-FGAF>].

in Orleans Parish, Louisiana.<sup>24</sup> His election led to the creation of a Civil Rights Division within the prosecutor's office. The chief of that division, Emily Maw, said that her office has been working to identify protocols and procedures for auditing the cases of problematic officers.<sup>25</sup> Detective Dillman is on the list of officers whose cases are of interest, said Maw, who formerly served as the director of the Innocence Project New Orleans.<sup>26</sup> In her interview for this Article, Maw said that there has never been an audit of Dillman's past cases, and "nowhere is there [even] a list of cases that Dillman worked on. We have to try to create the list."<sup>27</sup> Maw noted that there are officers on her list who are implicated in even more cases and with even more egregious misconduct than Dillman.<sup>28</sup> "We have police officers who have been convicted of killing people and covering it up and no government institution has felt that it was their responsibility to go back and assess the damage on the officer's previous cases."<sup>29</sup>

In the little over one year since the district attorney's office created the Civil Rights Division, Maw and her colleagues have been working on the question of "how do we go back and revisit or try to compile some kind of a database of cases that have been affected by officers who have criminal cases against them."<sup>30</sup> "The NOPD [New Orleans Police Department] has certainly never done any audit as far as we're aware," Maw said.<sup>31</sup> "There has been nothing that anyone in New Orleans is aware of indicating that the New Orleans Police Department has gone back to examine cases by officers who have been convicted of crimes"—even crimes that "would legitimately question the person's integrity or fitness to be a police officer: rape, murder, conspiracy, fraud."<sup>32</sup>

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<sup>24</sup> Emily Bazelon, *I Write About the Law. But Could I Really Help Free a Prisoner?*, N.Y. TIMES MAG. (Oct. 1, 2021), <https://www.nytimes.com/2021/06/30/magazine/yutico-briley.html> [<https://perma.cc/JDN4-67J3>] ("A month later, Williams won with a substantial majority, too. He announced a civil rights division, which would look at wrongful convictions . . . . It would be the heart of Williams's effort to right past wrongs. The chief of the new division would be Emily Maw, a previous director of the Innocence Project New Orleans.").

<sup>25</sup> Telephone Interview with Emily Maw, Chief, Civil Rights Div., Orleans Par. Dist. Att'y's Off. (Feb. 4, 2022) [hereinafter Maw Interview].

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

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

<sup>32</sup> *Id.*

On the defense side, the Innocence Project New Orleans has begun to take steps to carry out its own review, according to Jee Park, its executive director. Park said her lawyers and investigators kept seeing Dillman and a few colleagues pop up in innocence cases. “We always wanted to do a bigger dive into every single case that they have ever touched, either as a primary detective or before they became a detective,” she said, but the records did not allow for that tracing and the district attorney’s office was not interested in assisting.<sup>33</sup> Recently, Park’s organization won a grant to build a database that would track a cadre of detectives’ cases from 1990 to 2000. “Until now, no one has ever taken on the task of compiling a Louisiana-based . . . database and auditing the cases of officials who abuse their authority and commit deliberate misconduct,” the application observed.<sup>34</sup> The project is a commendable effort to facilitate cop tracing. At the same time, it highlights how difficult cop tracing is in the absence of such enterprising work. The simple task of identifying which cases an officer handled over the years is not simple at all.

The need for cop tracing can be seen in Tulsa, Oklahoma, where six officers and an ATF agent were federally prosecuted for falsifying information on search warrants, stealing drugs and money from drug dealers, and forcing arrestees to sell drugs to benefit the officers.<sup>35</sup> Roughly fifty cases were thrown out as a result, mostly pending prosecutions but also some convictions.<sup>36</sup> This was no small number, but neither did it

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<sup>33</sup> Telephone Interview with Jee Park, Exec. Dir., Innocence Project New Orleans (Aug. 13, 2020) [hereinafter Park Interview].

<sup>34</sup> Innocence Project New Orleans (IPNO), Grant Application for Police and Prosecutor Accountability for Community Trust (PPACT) Program (on file with author).

<sup>35</sup> Curtis Killman, *TPD Corruption Probe: Five Years Later, One Former Officer Still Seeking Release*, TULSA WORLD (Dec. 18, 2016), [https://tulsaworld.com/news/local/crime-and-courts/tpd-corruption-probe-five-years-later-one-former-officer-still-seeking-release/article\\_e420e5e1-3fa3-5cae-898b-f02882fc768f.html](https://tulsaworld.com/news/local/crime-and-courts/tpd-corruption-probe-five-years-later-one-former-officer-still-seeking-release/article_e420e5e1-3fa3-5cae-898b-f02882fc768f.html) [<https://perma.cc/47V4-E4T3>] (describing indictment and adjudication of officers); Jarrel Wade & Curtis Killman, *After 17 Years in Prison, a Man Walks Free When a Federal Judge Rules that Officers Manufactured Evidence*, TULSA WORLD (Aug. 31, 2020), [https://tulsaworld.com/news/local/crime-and-courts/after-17-years-in-prison-a-man-walks-free-when-a-federal-judge-rules-that/article\\_e93ce17d-06d0-57d3-af97-49a8579615f8.html](https://tulsaworld.com/news/local/crime-and-courts/after-17-years-in-prison-a-man-walks-free-when-a-federal-judge-rules-that/article_e93ce17d-06d0-57d3-af97-49a8579615f8.html) [<https://perma.cc/8RYN-7BYN>]; Jarrel Wade, *Law Firm’s Pro Bono Work Completed, Saves City Millions After Police Corruption*, TULSA WORLD (Aug. 31, 2020), [https://tulsaworld.com/news/local/crime-and-courts/law-firms-pro-bono-work-completed-saves-city-millions-after-police-corruption/article\\_720b191e-d5ef-558c-8dcf-7881506628ac.html](https://tulsaworld.com/news/local/crime-and-courts/law-firms-pro-bono-work-completed-saves-city-millions-after-police-corruption/article_720b191e-d5ef-558c-8dcf-7881506628ac.html) [<https://perma.cc/ZHR8-RHRU>].

<sup>36</sup> Killman, *supra* note 35; Wade & Killman, *supra* note 35; Wade, *supra* note 35.

approach a systemic accounting of the officers' impact. No one seems to know how many cases—much less which ones—these officers touched in their multi-year criminal enterprise. Federal prosecutors looked back through five years of the officers' cases to build the corruption indictment against the officers, but they did not look back further in time.<sup>37</sup> On the state side, state prosecutors relied on the local public defender to identify cases that should be reviewed.<sup>38</sup> Neither the state defense bar nor the federal defense bar was equipped to track the extent of the cases. According to William Widell, an assistant federal public defender, whenever federal defenders in his office thought they remembered a case involving one of the officers in the scandal, they checked through their records for discovery documents and police reports that might confirm whether the case involved one of the officers.<sup>39</sup> But there was no way to go the other direction—no way to start with the officer and uncover all the cases that each officer touched. “Unfortunately, we don’t have a database by officer,” Widell said.<sup>40</sup> Similarly, the Tulsa County Public Defender’s Office was unable to identify the past cases associated with the officers. According to Assistant Public Defender Brian Rayl, the county public defender’s office lacked a computerized case management system; old case files were kept in hard copy only, catalogued by index cards.<sup>41</sup> Someone could have scoured the files searching for the names of the indicted officers, Rayl acknowledged, but “we don’t have the staff for that.”<sup>42</sup> He added: “Thank goodness now we do have a case management system where that would not be very difficult at all to do today.”<sup>43</sup> To this day, there does not appear to have been a full accounting of the cases that were touched by these Tulsa officers.

These are just a few examples where cop tracing could provide a systemic remedy to the systemic problem of a serial

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<sup>37</sup> Telephone Interview with Jane Duke, Former Assistant U.S. Att’y (Sept. 24, 2021) [hereinafter Duke Interview] (explaining that, because of the statute of limitations on the officers’ crimes, federal prosecutors “decided, let’s go back five years and let’s find out what cases these officers would have been involved in,” and explaining that this amounted to roughly 1000 cases on which the officers and federal agent had worked); Telephone Interview with William Widell, Assistant Fed. Pub. Def., N.D. Okla. (Jan. 26, 2021) [hereinafter Widell Interview].

<sup>38</sup> Telephone Interview with Brian Rayl, Assistant Pub. Def., Tulsa Cnty. Pub. Def.’s Off. (Feb. 3, 2021) [hereinafter Rayl Interview].

<sup>39</sup> Widell Interview, *supra* note 37.

<sup>40</sup> *Id.*

<sup>41</sup> Rayl Interview, *supra* note 38

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*



witness's misconduct. If cases involving misconduct as extreme as these do not prompt systemic reviews, what chance is there that less visceral misconduct will prompt systemic investigations?

\* \* \*

An officer whose corruption comes out in one case will likely have corrupted other cases. That is the starting premise of this Article. Where that corruption is confirmed by an exoneration, by criminal charges against the officer, by internal affairs findings, or by the observation of a prosecutor or police official, there must be an effort to identify the other cases that the officer has touched. This simple proposition is what I call "cop tracing": a systematic and systemic effort to identify the universe of old cases handled by a now-discredited cop. The logic of cop tracing should not be controversial. Indeed, the rules of evidence and the due process doctrine themselves contemplate that prior bad acts of a witness in one case may be relevant to judging the witness's credibility in other cases.<sup>44</sup> But before any use can be made of an officer's old cases—either to reinvestigate the validity of the cases themselves or to mine those old cases for impeachment evidence in a current case—there must first be a way to identify the cases as being connected to the officer. That is where cop tracing becomes essential. It emphasizes the need to track the officer's involvement across the whole range of the officer's cases so that connections can be drawn from one case to the others.

Part I defines cop tracing and places it in the context of the innocence literature. Part II describes efforts to carry out cop tracing and, more often, the lack of such efforts. This Part highlights prosecutors' broad discretion in deciding how and whether to trace out a cop's prior cases. Part III presents the logistical barriers to identifying and investigating an officer's prior cases—barriers that persist, in part, because there is no doctrinal pressure to remove them. Part IV examines the ways in which existing legal doctrine undermines the concept of cop tracing, first, by preventing defendants from making connections among cases and, second, where those connections are nonetheless made, by minimizing the legal relevance of those

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<sup>44</sup> See, e.g., FED. R. EVID. 608(b) ("[T]he court may, on cross-examination, allow [prior instances of a witness's conduct] to be inquired into if they are probative of the character for truthfulness or untruthfulness of . . . the witness . . ."); *Giglio v. United States*, 405 U.S. 150, 154 (1972) (holding that a jury was entitled to know of evidence that would undermine a witness's credibility).

connections. Part V argues that the lack of cop tracing is symptomatic of a larger refusal to see the misconduct of a single officer in the systemic dimensions it deserves.

While the justice system sees the systemic threat from other types of serial witnesses—police informants, lab technicians, and forensic experts—that same attitude has not been applied to officers. Rather, a corrupt officer’s misconduct is presumed to be limited to the case in which it has been discovered, until proven otherwise. Because of that presumption, efforts to prove otherwise are often stymied. Ultimately, cop tracing is but one initiative needed in a broader effort to systematically address criminal justice problems. But it is an important one that deserves serious consideration. The failure to carry out cop tracing can be measured in the lives and liberty of the wrongfully convicted, in the missed opportunities to detect serial misconduct, and in the erosion of the justice system’s integrity.

## I

### COP TRACING DEFINED AND IN CONTEXT

When an officer’s credibility is destroyed in one case, it makes sense to wonder what other cases might be compromised. But no mechanism exists to force criminal justice actors—prosecutors, law enforcement agencies, judges, or defense attorneys—to examine or even identify the discredited officer’s other cases. This Part describes instances in which systemic reviews do and do not take place, with an emphasis on the discretion prosecutors enjoy in fashioning the scope and intensity of the reviews. But, first, it is necessary to set out a working definition of cop tracing and to situate it within the academic literature.

#### A. The Literature on Systemic Reviews

The innocence movement has longed discussed the need to carry out systemic reviews in the wake of exonerations.<sup>45</sup> But cop tracing’s concept of systemic reviews based on a particular officer’s misconduct is still evolving.

According to the innocence literature, when a wrongful conviction occurs, it is like an airplane crash or train derailment. Each of these “catastrophic” failures is a tragedy in its

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<sup>45</sup> Barry C. Scheck, *Conviction Integrity Units Revisited*, 14 OHIO ST. J. CRIM. L. 705, 711 (2017) (“Peter Neufeld, Jim Dwyer, and I began making these suggestions [about innocence commissions] in February of 2000 . . .”).

own right, but it is also an event that raises concerns about the safety of the larger system. In the field of transportation, these failures generate in-depth reviews by the National Transportation Safety Board and other regulatory agencies. As the innocence literature has described it, these reviews ask: “Was it system error or an individual’s mistake? . . . [W]hat can be done to correct the problem and prevent it from happening again?”<sup>46</sup> Medicine, too, has methods for deriving systemic causes from the circumstances of individual cases. Legal practitioners and academics have succeeded in importing into the literature many of the terms of art from other fields’ efforts to deal with systemic problems. “Root causes,” “sentinel events,” “systemic reviews,” “audits”—these are all part of the legal lexicon, thanks to the innocence movement.<sup>47</sup>

But the concept of “systemic review” actually encompasses two distinct types of “systemic” errors. The first way in which an error can be “systemic” is when it derives from a widespread behavior, practice, or method. Eyewitness misidentification is a systemic problem in wrongful convictions, in the sense that it causes errors across many cases. The problems caused by hair-match, bullet-lead, and other pseudoscientific forensic analyses are systemic because they are used in so many cases.

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<sup>46</sup> Barry C. Scheck & Peter J. Neufeld, *Toward the Formation of “Innocence Commissions” in America*, 86 JUDICATURE 98, 98 (2002) (“In the United States there are strict and immediate investigative measures taken when an airplane falls from the sky, a plane’s fuel tank explodes on a runway, or a train derailed. Serious inquiries are swiftly made by the National Transportation Safety Board (NTSB), an agency with subpoena power, great expertise, and real independence to answer the important and obvious questions: What went wrong? Was it system error or an individual’s mistake? Was there any official misconduct? And, most important of all, what can be done to correct the problem and prevent it from happening again?”).

<sup>47</sup> Barry C. Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215, 2247 (2010) (“In addition to this root cause analysis of the particular cases, there should be at least some spot auditing of other cases handled by the line prosecutor and the supervisor. If more problems are discovered in the spot audit, additional cases will have to be reviewed.”); Ellen Yaroshesky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 U.D.C. L. REV. 275, 285–86 (2004) (“At the very least, there should be an investigation of each instance of documented misconduct. In other institutions where a serious instance of misconduct is discovered that threatens life, health, or public welfare, an audit is conducted to determine whether that person engaged in similar misconduct in other cases. The audit includes examination of the supervisors, trainers and protocols. This is done to discover the weaknesses in the system and to take remedial action. Neither courts, prosecutors’ offices, nor any government agency has undertaken such an investigation in wrongful conviction cases based upon prosecutorial error or misconduct.”); Scheck, *supra* note 45, at 706 n.5, 722 (describing sentinel events and systemic reviews).

Faulty informant testimony, investigative “tunnel vision,” the fabrication of evidence, the suppression of exculpatory evidence—these are all systemic errors that appear in numerous cases. The actors are all different across the cases, but what makes the errors systemic is their recurrence. The solution for this type of systemic error is to identify and change widespread, problematic practices.

There is a second way in which an error can be systemic. An error can be systemic where the same individual or institution propagates the same type of error across numerous cases. These individual-based systemic errors can result from dishonest informants, corrupt lab technicians, crank forensic examiners, or any other type of serial witness. A corrupt police officer can also be a systemic source of error in this second sense, because the officer touches so many cases.

Systemic errors like these, based on an individual actor’s impact on numerous cases, are given less attention in the literature than the first type of systemic error, the methodological one. The reason may be that methodological errors—like the over-reliance on eyewitness identification—initially appear to have broader implications. For example, the problem of mistaken eyewitness identification has plagued cases all over the country.<sup>48</sup> A campaign to improve witness-identification practices could yield benefits in all fifty states. By contrast, errors that focus on a particular officer or other individual actor are limited to a particular jurisdiction and time, and these individual-based errors often seem too fact-bound and idiosyncratic to be worthy of systemic attention. Everyone can wrestle with the implications of faulty eyewitness identification; it takes a lot more context to think about the errors caused by, say, Detective Golubski. And, as will be described in detail below, it can be difficult to even detect the cases that the individual officer has touched, much less to remedy them.

The literature on wrongful convictions has taken time to accept the idea of individual-based systemic errors—the idea that an individual officer is a systemic problem. In recent years, the literature has begun to speak more about individual-based systemic errors and the “group” or “mass” exonerations these individuals cause. Barry Scheck, in an influential 2017 article, argued for systemic review of “rogue” cops and “rogue” units: “Once a homicide unit, detective, or a police department

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<sup>48</sup> See, e.g., Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451, 452 (2012) (addressing the “longstanding legal and scientific criticism” eyewitness identification faces).

'goes bad' . . . wrongful convictions are bound to result. . . . [C]ases from police units that 'go bad' should be systematically reviewed as soon as possible to see if there are miscarriages of justice . . . ."<sup>49</sup> Another example of the new attention to individual-based systemic errors can be seen in a symposium, "Mass Exoneration and Ethics," which took place at Villanova University's law school in 2018.<sup>50</sup> Panels examined the ways in which mass exonerations differ from individual exonerations in terms of how the wrongful convictions are discovered, how they are litigated, and, ultimately, how they are caused. These developments in the conversation around wrongful convictions have begun to take up the issue that is at the core of cop tracing: the systemic effect that even a single officer may have on hundreds of cases.

One sign of the growing interest in this issue can be seen in the decision by the National Registry of Exonerations to begin tracking "group exonerations." Up until 2021, the registry tracked only individual exonerations.<sup>51</sup> Group exonerations—those involving a number of defendants who were exonerated because of a common error or bad actor—had been put to the side as qualitatively and quantitatively different from the individual exonerations that made up the bulk of the registry's work. As the registry explained, group exonerations are:

fundamentally different from exonerations based on individual investigations . . . . The unit of observation for an individual exoneration is the defendant and his case. The investigations that lead to these exonerations produce a great deal of information about each case, and much of that information is publicly reported. Group exonerations are viewed through the prism of the corrupt officer or the police conspiracy. Once that basic picture comes into focus, exonerations may be handled summarily and receive little or no attention.<sup>52</sup>

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<sup>49</sup> Scheck, *supra* note 45, at 722.

<sup>50</sup> *Mass Exoneration and Ethics*, 4/9, VILL. UNIV. CHARLES WIDGER SCH. L. (April 9, 2018), <https://www1.villanova.edu/villanova/law/newsroom/webstories/2018/0205.html> [<https://perma.cc/V3J5-M7ED>] [hereinafter *Mass Exoneration and Ethics Symposium*].

<sup>51</sup> Samuel Gross, Michael Shaffer & Maurice Possley, *Group Exonerations, in EXONERATIONS IN THE UNITED STATES, 1989–2012: REPORT BY THE NATIONAL REGISTRY OF EXONERATIONS* 80, 87 (2012), <https://www.law.umich.edu/special/exoneration/Documents/Group%20Exons%202012%20Report.pdf> [<https://perma.cc/E4YJ-6SM5>] ("Nonetheless, we do not include group exonerations in our database because they are fundamentally different from exonerations based on individual investigations and cannot usefully be studied together.").

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

This long-held distinction between “individual” exonerations that get counted in the registry and “group” exonerations that do not is another indication of the challenges that even the innocence movement faces in conceiving of a single officer’s misconduct as a truly systemic problem.

The discussion of cop tracing focuses on these types of group exonerations where a cluster of wrongful convictions all have the same corrupt officer in common. Though the literature on wrongful convictions has long recognized danger from dishonest police work and the potential for one dishonest actor to taint multiple cases, cop tracing goes a step further. This Article argues for the need to routinely carry out systemic reviews of corrupt officers’ cases, and it explains why such reviews are often impossible under current conditions.

### B. Cop Tracing Defined: Thin and Thick Versions

The term “cop tracing” is meant to evoke the now-too-familiar epidemiological concept of “contact tracing.” When an officer is discredited beyond a certain threshold, cop tracing would require a process for looking backward to identify the old cases that were handled by the officer. This Article argues for making systemic review of a cop’s cases automatic, rather than ad hoc. When serious misconduct is detected, the presumption should be that it has affected others of the officer’s cases, rather than the current presumption that the corruption is one-off and limited to the case in which it is detected. The concept of cop tracing does not rely on any fixed definition of how serious the misconduct would have to be to trigger the review. Nor does it rely on any fixed definition of the scope and methods of the review. There could be more or less aggressive regimes for cop tracing, as described below. What cop tracing requires at a minimum is an ex-ante commitment to carrying out a review as a matter of routine, rather than as a matter of grace.

The thinnest form of cop tracing would require nothing more than an accounting of an officer’s case history: What cases did the officer investigate over the years? In which cases did the officer testify? Ideally, this list would be shared with the defense bar and would lead to the notification of former defendants that an officer who participated in their prosecutions has now been discredited. That’s the scope. The trigger for cop tracing could be any event in which an officer is discredited by: (1) being criminally prosecuted or convicted for some type of offense that reflects on the officer’s credibility, (2) being

identified in court proceedings as having contributed to a wrongful conviction through some type of misconduct, (3) being found civilly liable for violating a defendant's constitutional rights in a wrongful conviction, or (4) being suspended or terminated based on an internal affairs finding related to the officer's credibility or competency. These are some examples of events that could trigger cop tracing. And cop tracing could be more or less aggressively employed, depending on which triggers one chooses.

Some prosecutors' offices and police departments already have the ability to put together lists of an officer's cases, as described in Part II. The thin version of cop tracing would impose no additional costs on them; they would just be compiling and producing lists that already exist. Meanwhile, for those prosecutors that do not have the capacity to identify an officer's past cases, the requirement to identify what cases an officer has worked on would serve as a wake-up call to see the systemic dimension of even a single troubled officer's behavior. The production of these lists of an officer's cases could also provide a fulcrum for media and public pressure. The more cases that are identified, the harder it is for a prosecutor to say that an officer's misconduct is presumed to be limited to the case in which it was discovered.

Whereas the thin version of cop tracing involves merely compiling a list of the officer's case history, the thick version envisions identification of the cases *and* investigation of their merits. Cop tracing in its most muscular form would say that whenever an officer is thoroughly discredited, the prosecutor's office must identify the cases the officer has worked on, conduct an investigation of their merits, and make available to defense counsel the documents and other evidence that are needed to re-investigate the cases. This type of cop tracing would enlist conviction integrity units in the prosecutor's office and members of the defense bar in proactively finding and analyzing the officer's old cases. The proactive nature of cop tracing is critically important, and quite different from the current paradigm. At the moment, conviction integrity units wait for claims to come in and then individually investigate them.<sup>53</sup> Cop tracing would force them to start with the corrupt officer and trace backward to find the cases that may be affected. Likewise, cop tracing would allow the defense bar to take

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<sup>53</sup> Daniel Kroepsch, *Prosecutorial Best Practices Committees and Conviction Integrity Units: How Internal Programs Are Fulfilling the Prosecutor's Duty to Serve Justice*, 29 GEO. J. LEGAL ETHICS 1095, 1103 (2016).

proactive steps that it cannot do at the moment. When an officer is discredited, there is a danger that people convicted based on that officer's work will never learn that the officer's corruption has been exposed. Former defendants may have viable habeas claims based on the officer's actions, yet never know about them. Meanwhile, defense attorneys who are interested in helping and who know that the officer is discredited may not know which cases the officer handled over the years. Cop tracing could help connect clients with defense attorneys who could pursue their habeas claims.

These are the potential benefits of cop tracing. Unfortunately, logistics, doctrine, and institutional politics generally prevent cop tracing from taking place.

## II

### COP TRACING IN ACTION AND INACTION

Some prosecutors have embraced a form of cop tracing, albeit in an ad hoc manner. Others have refused to engage in cop tracing even when it is desperately needed. This Part discusses examples of such action and inaction.

#### A. Cop Tracing in Action

The most prominent example of cop tracing can be seen in Brooklyn, New York, where prosecutors initiated an inquiry into the homicide cases of former Detective Louis Scarcella.<sup>54</sup> In the 1980s and 1990s, Scarcella was a high-performing detective with a reputation for closing difficult cases. By 2013, his reputation was unraveling in public view. That year, David Ranta was exonerated of the murder of a prominent rabbi, and Scarcella's work as the lead detective on that case was a primary reason why.<sup>55</sup> According to accounts of the reinvestigation of Ranta's case, Scarcella engaged in many acts of misconduct, including "remov[ing] violent criminals from jail to let them smoke crack cocaine and visit prostitutes in exchange for incriminating Mr. Ranta" and telling a witness "who to choose in a lineup."<sup>56</sup> A searing investigation by *The New York*

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<sup>54</sup> Frances Robles, *In Review of Brooklyn Cases, So Many Obstacles*, N.Y. Times (May 23, 2013), <https://www.nytimes.com/2013/05/24/nyregion/logistics-complicate-review-of-cases-investigated-by-scarcella.html> [https://perma.cc/Q8LR-A3NJ] (noting that priority in the investigation would be given to cases that relied on a single witness and explaining that defendants whose cases are under review will be notified, but the full list of cases will not be made public).

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

<sup>56</sup> Frances Robles & N. R. Kleinfield, *Review of 50 Brooklyn Murder Cases Ordered*, N.Y. TIMES (May 11, 2013), <https://www.nytimes.com/2013/05/12/>



*Times* suggested a pattern of misconduct across Scarcella's other cases. After Ranta's exoneration, the Brooklyn district attorney announced a review of all of Scarcella's cases. What started off as an inquiry into approximately fifty cases grew into an investigation of more than seventy cases, as the full extent of Scarcella's case history was gradually uncovered.<sup>57</sup> To date, prosecutors have asked judges to vacate eight of Scarcella's homicide convictions, and judges have vacated a handful of others over prosecutors' objections.<sup>58</sup> In so doing, prosecutors and judges have expressed "grave doubts" about Scarcella's work,<sup>59</sup> noting that he "intentionally and improperly testified" on critical issues,<sup>60</sup> and possessed a "propensity to embellish or fabricate statements."<sup>61</sup>

Another high-profile example of cop tracing comes from Chicago, where Detective Reynaldo Guevara has now been linked to twenty wrongful convictions. Guevara was alleged to have framed defendants by coercing false testimony and planting false evidence.<sup>62</sup> In 2013, the city hired the law firm Sidley Austin LLP to investigate Guevara's cases.<sup>63</sup> This investigation

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nyregion/doubts-about-detective-haunt-50-murder-cases.html [https://perma.cc/C4AQ-NKP8].

<sup>57</sup> Stephanie Clifford, *14 More Brooklyn Convictions Linked to Scarcella Are Examined*, N.Y. TIMES (July 30, 2014), <https://www.nytimes.com/2014/07/31/nyregion/31scarcella.html> [https://perma.cc/9TK7-PX37]; Jan Ransom, *3 Detectives Obtained a False Murder Confession. Was It One of Dozens?*, N.Y. TIMES (Feb. 15, 2021), <https://www.nytimes.com/2021/02/15/nyregion/3-detectives-obtained-a-false-murder-confession-was-it-one-of-dozens.html> [https://perma.cc/3X7V-ZTEM].

<sup>58</sup> Sean Piccoli, *A Former Detective Accused of Framing 8 People for Murder is Confronted in Court*, N.Y. TIMES (April 1, 2019), <https://www.nytimes.com/2019/04/01/nyregion/nypd-detective-louis-scarcella.html> [https://perma.cc/EN4T-XSKN].

<sup>59</sup> Sarah Maslin Nir, *Woman Exonerated After Serving 10 Years for Manslaughter Conviction*, N.Y. TIMES (Feb. 23, 2016), <https://www.nytimes.com/2016/02/24/nyregion/womans-manslaughter-conviction-in-1991-death-to-be-vacated.html> [https://perma.cc/3QVC-W5GP].

<sup>60</sup> *People v. Moses*, No. 13565/1995, 2018 WL 1163796, at \*7 (N.Y. Sup. Ct. Jan. 11, 2018) (internal citations omitted).

<sup>61</sup> *Id.* (internal citations omitted).

<sup>62</sup> See Complaint at 17–18, *Iglesias v. Guevara*, No. 1:19-cv-06508 (N.D. Ill. Oct. 1, 2019); Andy Thayer, *19th Innocent Person Framed by Chicago Detective Reynaldo Guevara Sues City After 16 Years Behind Bars*, LOEVY & LOEVY (Oct. 1, 2019), <https://loevy.com/blog/19th-innocent-person-framed-by-chicago-detective-reynaldo-guevara-sues-city-after-16-years-behind-bars/> [https://perma.cc/7BU7-F6FU].

<sup>63</sup> Better Gov't Ass'n, *BGA Public Eye: City Hall Probe Didn't Look at 5 Who Say Ex-Chicago Cop Framed Them*, CHI. SUN-TIMES (Sept. 19, 2015), <https://chicago.suntimes.com/city-hall/2015/9/19/18595154/bga-public-eye-city-hall-probe-didn-t-look-at-5-who-say-ex-chicago-cop-framed-them> [https://perma.cc/L2RM-4TNW].

resulted in a recommendation that the prosecutor's office review a "handful" of Guevara's cases.<sup>64</sup> (An official clarified that this meant "six" cases.<sup>65</sup>) Although the full extent of the investigation remains unknown, the best public estimate is that more than seventy of Guevara's cases were examined by the Sidley Austin audit.<sup>66</sup> Separately, in March 2020, the Cook County State Attorney's Office announced a "comprehensive review" of Guevara's cases.<sup>67</sup>

The Brooklyn and Chicago examples provide two instances of cop tracing in murder cases. Cop tracing is also sometimes triggered in cases with less serious crimes. For example, an internal affairs investigation in Antioch, California, found that officer Santiago Castillo had passed along confidential information to an informant to help that informant avoid arrest. Investigative reporting by a local public radio station turned up information about this undisclosed misconduct, prompting the Contra Costa Public Defender's Office to ask the district attorney for a review of all the cases involving Castillo since the time of his inappropriate dealings with the informant. After reviewing hundreds of cases, the prosecutor's office moved to vacate three of them: each a misdemeanor in which Castillo was the sole witness.<sup>68</sup> Across the bay in San Francisco, a group of police officers were discovered to have sent racist, sexist, and xenophobic text messages to each other. The officers were disciplined, and the district attorney's office announced the review of three-thousand cases in which the officers were involved.<sup>69</sup>

The news media has covered other examples of cop tracing, though often without much detail about how far back the tracing goes or what methods it entails. An Illinois police officer,

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> See Better Gov't Ass'n, *At Ex-U.S. Attorney's Urging, 'Handful' of Ex-Chicago Cop's Cases Being Reviewed*, CHI. SUN-TIMES (June 24, 2016), <https://chicago.suntimes.com/2016/6/24/18433221/at-ex-u-s-attorney-s-urging-handful-of-ex-chicago-cop-s-cases-being-reviewed> [<https://perma.cc/YCS4-QF69>].

<sup>67</sup> Megan Crepeau, *'He Got That Moment Today': Prosecutors Drop Man's Murder Case Connected to Discredited Ex-Police Detective*, CHI. TRIB. (Apr. 25, 2022), <https://www.chicagotribune.com/news/criminal-justice/ct-reynaldo-guevara-conviction-dismissed-20220425-55wdb7a4crcfxdekj5p5pknc6be-story.html> [<https://perma.cc/WR32-JL49>].

<sup>68</sup> Sukey Lewis, *On Our Watch: The Brady Rule*, NPR, at 35:40 (July 2, 2021), <https://www.npr.org/2021/07/01/1012315429/on-our-watch-the-brady-rule> [<https://perma.cc/YH64-7Y4Y>] (transcript available at <https://www.npr.org/transcripts/1009488012> [<https://perma.cc/38VN-GSQR>]).

<sup>69</sup> See Joanna Walters, *Police Racism May Have Compromised 3,000 San Francisco Cases, Officials Say*, GUARDIAN (May 8, 2015), <https://www.theguardian.com/us-news/2015/may/08/san-francisco-police-racism-text-messages> [<https://perma.cc/862E-AGT8>].

under investigation for stealing money from a youth group, committed suicide and made the killing look like a murder, triggering a vow to review his old cases.<sup>70</sup> In West Texas, a deputy running for sheriff “claimed that he was a Navy Seal, a Green Beret, or an Airborne Ranger during a public forum, then later released a statement saying none of those claims are true.”<sup>71</sup> That, too, prompted a review.<sup>72</sup> In Broward County, Florida, a deputy was accused of detaining undocumented men and boys during traffic stops and coercing them into sexual acts in exchange for their release.<sup>73</sup> A review of the deputy’s cases was ordered.<sup>74</sup> More than thirty police officers in Prince George’s County, Maryland, were caught up in an investigation into whether they had cheated their way to perfect scores on police academy exams, thus leading to a review of their cases.<sup>75</sup> Other promises to review an officer’s past cases have been prompted by: the federal conviction of two California officers for assisting drug traffickers and selling drugs themselves;<sup>76</sup> suspicion that a Virginia officer was falsifying information on search warrants;<sup>77</sup> charges against New York and New Jersey officers for perjury, planting evidence, and other forms of mis-

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<sup>70</sup> Martha Neil, *Cases Under Review After ‘Hero’ Police Officer Was Found to Have Staged His Own Suicide*, ABA J. (Nov. 12, 2015), [https://www.abajournal.com/news/article/Cases\\_under\\_review\\_funds\\_frozen\\_after\\_death\\_of\\_hero\\_police\\_officer/](https://www.abajournal.com/news/article/Cases_under_review_funds_frozen_after_death_of_hero_police_officer/) [<https://perma.cc/YQL3-T8QC>].

<sup>71</sup> Erica Garner, *Some Cases Involving Callahan County Deputy Being Dismissed Due to ‘Lack of Credibility.’* BIG COUNTRY HOMEPAGE (Feb. 18, 2020), <https://www.bigcountryhomepage.com/news/your-local-election-hq/some-cases-involving-callahan-county-deputy-being-dismissed-due-to-lack-of-credibility/> [<https://perma.cc/8YWB-XP4X>].

<sup>72</sup> *Id.*

<sup>73</sup> See Ihosvani Rodriguez, Juan Ortega & Joel Marino, *Deputy’s Arrest Spurs Review of Many Cases*, SUN SENTINEL (Aug. 6, 2009), <https://www.sun-sentinel.com/news/fl-xpm-2009-08-06-0908050323-story.html> [<https://perma.cc/PXV4-6TJC>]; *Bleiweiss v. State*, 24 So.3d 1215, 1216 (Fla. Dist. Ct. App. 2009).

<sup>74</sup> Rodriguez, Ortega & Marino, *supra* note 73.

<sup>75</sup> Matt Zapotosky, *Probe Widens into Alleged Cheating by Pr. George’s Officers-in-Training*, WASH. POST (Oct. 5, 2010), <https://www.washingtonpost.com/wp-dyn/content/article/2010/10/05/AR2010100506340.html> [<https://perma.cc/W49G-976R>].

<sup>76</sup> Richard Winton, *Two Corrupt Cops Joined Forces with Drug Dealers. Now, Dozens of Criminal Cases Could Be in Jeopardy*, L.A. TIMES (Oct. 25, 2016), <https://www.latimes.com/local/lanow/la-me-ln-bakersfield-police-20161021-snap-story.html> [<https://perma.cc/N3RY-QQHD>].

<sup>77</sup> See Frank Green, *Special Prosecutor Declines Charges Against Former Richmond Detective, Citing Missing Documents*, RICH. TIMES-DISPATCH (June 11, 2020), [https://richmond.com/news/local/crime/special-prosecutor-declines-charges-against-former-richmond-detective-citing-missing-documents/article\\_5e29b79d-201f-52bf-9c1f-a88993effc2c.html](https://richmond.com/news/local/crime/special-prosecutor-declines-charges-against-former-richmond-detective-citing-missing-documents/article_5e29b79d-201f-52bf-9c1f-a88993effc2c.html) [<https://perma.cc/SLJ2-PBKE>]; *Terry v. Commonwealth*, No. 0361-16-2, 2017 BL 482664, at \*2 (Va. Ct. App. Feb. 27, 2017).

conduct;<sup>78</sup> and the indictment of three St. Louis police officers for beating an undercover officer at a racial justice protest.<sup>79</sup>

In Memphis, Tennessee, the elected district attorney responded to the news that a homicide investigator had sex with a defendant in a murder case by ordering a review of “every criminal case touched by” the officer.<sup>80</sup> In Clackamas County, Oregon, the district attorney put a troubled officer on the *Brady* list for sending and deleting homophobic and racist text messages.<sup>81</sup> The district attorney then promised to “dismiss[] any pending cases that solely relied on his testimony and . . . review about 500 closed cases [that the officer] helped investigate.”<sup>82</sup> This is just a sampling of the conduct that can trigger a promise to review an officer’s cases.

Unfortunately, there is very little transparency about the methods, scope, or results of these reviews. To put it bluntly, it is hard to determine whether the promised reviews actually took place, since the act of reviewing an officer’s cases will typically not generate any publicly available information. As noted by Samuel Gross, Michael Shaffer, and Maurice Possley,

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<sup>78</sup> See Matt Spillane, *DA’s Office to Review Cases of Yonkers Detective Accused of Perjury*, LOHUD (Dec. 27, 2019), <https://www.lohud.com/story/news/crime/2019/12/26/sean-fogarty-prosecutors-review-cases-yonkers-detective-perjury-probe/2749067001/> [https://perma.cc/LZW7-THUS] (“Westchester prosecutors are reviewing all cases involving a Yonkers detective who is expected to plead guilty in a perjury case.”); Joe Malinconico, *Paterson Braces for Legal Fallout from Convictions of Seven City Cops*, NORTHJERSEY.COM (Oct. 7, 2019), <https://www.northjersey.com/story/news/paterson-press/2019/10/07/paterson-facing-lawsuits-other-fallout-after-rogue-cop-convictions/3867612002/> [https://perma.cc/36H3-YRCB]; Joseph Goldstein, *He Excelled as a Detective, Until Prosecutors Stopped Believing Him*, N.Y. TIMES (Oct. 10, 2017), <https://www.nytimes.com/2017/10/10/nyregion/he-excelled-as-a-detective-until-prosecutors-stopped-believing-him.html> [https://perma.cc/CXC9-9Y48] (“[P]rosecutors have accused Detective Desormeau and his partner of making up crucial details when arresting people, even testifying about criminal activity that may never have occurred.”).

<sup>79</sup> Robert Patrick, *4 St. Louis Police Officers Indicted, Accused of Beating an Undercover Colleague During Stockley Protests*, ST. LOUIS POST-DISPATCH (Dec. 1, 2018), [https://www.stltoday.com/news/local/crime-and-courts/4-st-louis-police-officers-indicted-accused-of-beating-an-undercover-colleague-during-stockley-protests/article\\_4a82d209-b3cd-565e-9a97-309cf1c2a5af.html](https://www.stltoday.com/news/local/crime-and-courts/4-st-louis-police-officers-indicted-accused-of-beating-an-undercover-colleague-during-stockley-protests/article_4a82d209-b3cd-565e-9a97-309cf1c2a5af.html) [https://perma.cc/Q8D5-39RE].

<sup>80</sup> Daniel Connolly, *Why Officers Make This List; For Police, the Brady List is the Opposite of an Honor Roll. Here’s Who’s on It in Memphis.*, MEM. COM. APPEAL, Feb. 2, 2020, at 10A (emphasis omitted).

<sup>81</sup> Whitney Woodworth & Hannah Kanik, “*Brady Lists*” of Untruthful Oregon Police Officers Inconsistent County to County, STATESMAN J. (July 13, 2020), <https://www.statesmanjournal.com/story/news/2020/07/13/brady-list-oregon-police-misconduct-cases-prosecutors-disclosure-exculpatory-evidence/5011457002/> [https://perma.cc/L8K9-3E9K].

<sup>82</sup> *Id.*

experts on tracking exonerations at the National Registry of Exonerations:

Even when there is widespread attention to investigations of police corruption, identifying convictions that were dismissed as a result is often difficult. . . . [N]umerous police scandals have rocked the New York police department in the past decade, and there are reports of hundreds upon hundreds of cases being dismissed, but few indicate whether the dismissals occurred prior to or after conviction.<sup>83</sup>

Compounding the lack of transparency is the ambiguity about what a review entails. A prosecutor's public promise to review an officer's cases can mean many different things in practice. As soon as a prosecutor announces a review, the prosecutor faces a gauntlet of choices. The first is whether to look only at pending cases or also at past ones.<sup>84</sup> If the review will look at past cases (i.e., convictions), then it needs to establish a cut-off date for how far back to look. Some reviews look at convictions that have occurred since the officer's misconduct was first detected by investigators,<sup>85</sup> or since the first criminal act alleged

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<sup>83</sup> Gross, Shaffer & Possley, *supra* note 51, at 84 (footnotes omitted).

<sup>84</sup> See, e.g., Douglas Walker, *Muncie Police Officers' Arrests Could Impact Pending Cases*, STAR PRESS (Mar. 15, 2020), <https://www.thestarpress.com/story/news/crime/2020/03/14/muncie-police-officers-arrests-could-impact-pending-cases/5049096002/> [<https://perma.cc/7756-72TE>] (conducting a thorough review of past arrests); Bridget Murphy, *Nassau Defense Lawyers Call for Bigger Probe into Undercover Detective's Conduct*, NEWSDAY (Mar. 19, 2015), <https://www.newsday.com/long-island/nassau/nassau-defense-lawyers-call-for-bigger-probe-into-undercover-detective-michael-cipullo-s-conduct-1.10084773> [<https://perma.cc/4HLS-T8VQ>] (calling for a review of all cases going back at least five years); Kaylin E. Searles, *Kanawha County Prosecutor Orders Full Review of Cases Involving Lt. Shawn Williams*, WCHS TV (Oct. 2, 2014), <https://wchstv.com/news/local/kanawha-county-prosecutor-orders-full-review-of-cases-involving-lt-shawn-williams> [<https://perma.cc/NXS8-QSV5>] (ordering the review of all cases); Michael R. Shea, *A Cop in Handcuffs and Cases in Ruins?*, MODESTO BEE (Mar. 23, 2008), <https://www.modbee.com/news/local/article3103691.html> [<https://perma.cc/VX96-CUMQ>] (reviewing officer's work on a "case-by-case basis"); Heather Walker, *Prosecutor's Office Reviewing Cases Involving Hildebrand*, KIMA (June 26, 2012), <https://kimatv.com/news/local/prosecutors-office-reviewing-cases-involving-hildebrand> [<https://perma.cc/ZXH9-JGVD>] (reviewing open cases).

<sup>85</sup> See, e.g., Frank Donnelly, *Should Conviction Be Tossed in Controversial Arrest? Body-Cam Video Supports Him, Man Contends*, SILVE (Nov. 8, 2020), <https://www.silve.com/crime/2020/11/should-conviction-be-tossed-in-controversial-arrest-body-cam-video-supports-him-man-contends.html> [<https://perma.cc/8MRC-W8ZS>] (ordering review from time of identified misconduct); Malinconico, *supra* note 78 (expecting dismissal of pending criminal cases); Jeff Burlew, *As Ex-Deputy Accused of Planting Drugs Pleads Not Guilty, Prosecutors Drop More of His Cases*, TALLAHASSEE DEMOCRAT (July 25, 2019, 9:03 PM), <https://www.tallahassee.com/story/news/local/2019/07/24/prosecutors-dropping-more-cases-involving-ex-deputy-accused-planting-drugs/1799625001/> [<https://perma.cc/7UG2-ALH4>] (dropping previous charges); Press Release, Andrew H.

against the officer,<sup>86</sup> or since the start of the officer's career.<sup>87</sup> The farther back the review goes, the more challenging.

The next question is whether to review all of the officer's cases in a given time period,<sup>88</sup> or just those in which the officer played an integral role.<sup>89</sup> Sometimes prosecutors review only a

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Warren, State Att'y, Off. of the State Att'y 13th Jud. Cir., State Attorney's Office Vacates 17 Convictions Connected to Three Former Tampa Officers (June 19, 2019), <https://www.sao13th.com/2019/06/state-attorneys-office-vacates-17-convictions-connected-to-three-former-tampa-officers/> [https://perma.cc/Q47X-QCQ9] (vacating convictions related to fired officers); Ed Drantch, *I-TEAM: Buffalo Cop Forced off Patrol Duty Over Credibility Issues*, WKBW (May 2, 2019, 2:56 PM), <https://www.wkbw.com/news/i-team/i-team-buffalo-cop-forced-off-patrol-duty-over-credibility-issues> [https://perma.cc/H8FZ-RVND] (reviewing all cases); Joyce Orlando, *Investigation of Former Detective Could Jeopardize Cases*, SHELBY STAR (Nov. 15, 2017, 4:48 PM), <https://www.shelbystar.com/news/20171115/investigation-of-former-detective-could-jeopardize-cases> [https://perma.cc/RH55-BXKG] (assessing the potential fallout from an ethics violation by a detective); *15 Criminal Cases Dismissed Over Alleged Pittsburg Police Misconduct*, KPIX (Dec. 15, 2016, 4:55 PM), <https://sanfrancisco.cbslocal.com/2016/12/15/15-criminal-cases-dismissed-over-alleged-pittsburg-police-misconduct/> [https://perma.cc/6YFZ-3XMS] (reviewing previous cases).

<sup>86</sup> See, e.g., Telephone Interview with Bradley S. Bridge, Assistant Def., Def. Ass'n of Phila. (Jan. 7, 2021) [hereinafter Bridge Interview] (describing review process starting from date of alleged first bad act); Telephone Interview with Joshua Tepfer, Att'y, Exoneration Project, Chi., Ill. (Jul. 27, 2020) [hereinafter Tepfer Interview] (regarding Ben Baker case).

<sup>87</sup> See, e.g., Matthew Ormseth & Ben Poston, *Judge Dismisses 15 Cases Involving LAPD Officers Implicated in Gang-Framing Scandal*, L.A. TIMES (Dec. 4, 2020), <https://www.latimes.com/california/story/2020-12-04/lapd-gang-framing-charges> [https://perma.cc/QV74-7C6N] (stating that the L.A. City Attorney's Office has been reviewing felony cases from the start of the officers' careers); Kevin Rector, James Queally & Ben Poston, *Hundreds of Cases Involving LAPD Officers Accused of Corruption Now Under Review*, L.A. TIMES (July 28, 2020), <https://www.latimes.com/california/story/2020-07-28/lacey-flags-hundreds-of-cases-linked-to-charged-lapd-officers-for-possible-review> [https://perma.cc/3J2S-QDYJ] (stating that the L.A. County District Attorney Office is revisiting hundreds of cases involving three city officers charged with falsifying evidence); Alex Emslie & Sukey Lewis, *Contra Costa County DA to Dismiss Three Cases Involving Fired Antioch Detective*, KQED (Dec. 19, 2019), <https://www.kqed.org/news/11792317/contra-costa-county-da-to-dismiss-three-cases-involving-fired-antioch-detective> [https://perma.cc/2V3F-YH5Z] (stating that the county's conviction integrity unit undertook a review of numerous cases in which the officer had testified dating back to at least 2005); Stephen Betts, *DA to Review Cases Involving Former Rockland Officer*, COURIER-GAZETTE (July 25, 2018), <https://knox.villagesoup.com/2018/07/25/d-a-to-review-cases-involving-former-rockland-officer-1766741/> [https://perma.cc/8SGV-C2NM] (stating that the Knox County District Attorney's Office will review all current and closed cases in which former officer Jacob Shirey was involved).

<sup>88</sup> See, e.g., Robles, *supra* note 55 (reviewing all homicide investigations conducted by a discredited detective); Zapotosky, *supra* note 75 (reviewing all cases handled by a group of officers)

<sup>89</sup> See, e.g., Zack McDonald, *Over 250 Cases in Question After JCSO Deputy Fired for Planting Drug Evidence*, PAN. CITY NEWS HERALD (Sept. 20, 2018, 5:21 PM), <https://www.newsherald.com/news/20180920/over-250-cases-in-question-after-jcso-deputy-fired-for-planting-drug-evidence> [https://perma.cc/Q2K2-R63V]

certain type of case if the officer's misconduct is seen to have a particular *modus operandi*. Mark Rotert, the former head of the conviction integrity unit in Cook County, Illinois, explained this dynamic in terms of the case of Sergeant Ronald Watts, an officer convicted of federal corruption charges.<sup>90</sup> "Watts, we believe, had a proclivity for doing corrupt things when he was arresting groups of people in the projects for drugs," Rotert said, but there were other times when he was "functioning as a police officer," such as when he took a report at the scene of a sexual assault or homicide.<sup>91</sup> "We have no reason to believe that Watts ever tried to do anything inappropriate outside the context of [the drug arrests]," Rotert said.<sup>92</sup>

The prosecutor who decides to review an officer's old cases must also decide on the appropriate methods for the review. Some reviews ask the original prosecutor to reconsider the case in light of the officer's newly discovered corruption, essentially carrying out an on-paper review. Other reviews assign a new prosecutor to the review and collect additional evidence to re-analyze the case.<sup>93</sup> Last but not least, a prosecutor designing a review must decide what the end result will be. Is it merely to notify the affected defendants that an officer in their cases has been discredited? Is it to thoroughly investigate the cases and

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(stating that the JCSO has identified 263 cases in which the officer played a role "as the lead officer, backup or an essential witness"); Jayed Rahman, *Passaic County Prosecutor Reviewing Cases Involving Two Accused Paterson Cops*, PATERSON TIMES (Apr. 13, 2018), <https://patersontimes.com/2018/04/13/passaic-county-prosecutor-reviewing-cases-involving-two-accused-paterson-cops/> [<https://perma.cc/N38Y-52ZL>] (stating that the Passaic County prosecutor's office is conducting a review of cases where one or both of the accused officers "handled evidence, testified in court, or provided information"); Malinconico, *supra* note 78 (stating that criminal cases would be reviewed where officers signed complaints, handled evidence, testified in court, or provided material information); Patrick, *supra* note 79 (stating that cases would be reviewed "where the officers' testimony or involvement [was] fundamental"); Mike McPhee, *Longmont Police Veteran Caught in Sting*, DENVER POST (Nov. 13, 2009), <https://www.denverpost.com/2009/11/13/longmont-police-veteran-caught-in-sting/> [<https://perma.cc/892P-A5E9>] (stating that all convictions involving the officer's testimony would be reviewed); Christine Hauser, *In Brooklyn, Police Work Is Undone by Scandal*, N.Y. TIMES (Feb. 5, 2008), <https://www.nytimes.com/2008/02/05/nyregion/05drugs.html> [<https://perma.cc/7M8S-BYHZ>] (stating that convictions were vacated because the involved officers played a "significant role").

<sup>90</sup> See Telephone Interview with Mark Rotert, Former Dir., Conviction Integrity Unit, Cook Cnty. State's Atty's Off., Cook Cnty., Ill. (Sept. 9, 2020) [hereinafter Rotert Interview]. Rotert emphasized that his comments in the interview for this Article reflect his own personal opinion and are not made "on behalf of . . . the Cook County State's Attorney's Office or any other public agency."

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> See Dupree interview, *supra* note 12.

recommend that some of the convictions be vacated? Or, is it something in between those two extremes?<sup>94</sup>

It may seem pointless to talk about reviews when there are so many contingencies. It can sound like equivocation: *Some reviews do this, other reviews do that*. But that is one of the most important points about the current approach to reviewing a discredited officer's past cases. The decisions on whether or how to review the cases are completely within the discretion of the prosecution, and they are handled in an ad hoc manner without much in the way of doctrinal guidance. Promising to review an officer's cases is good public relations, to be sure, but the specifics of how the review takes place are concealed behind closed doors. Much like the decision whether to charge a case in the first place, prosecutors have enormous and unreviewable discretion whether to review the old cases of a discredited officer, and there is effectively no transparency about their decision-making process. Indeed, the prosecutor has so much discretion over the review that the prosecutor can decide to conduct no review at all.

Despite all the discretion and ad hoc decision-making discussed above, it is still possible to make a few generalizations about *when* prosecutors engage in some form of cop tracing. It appears that the convictions most likely to be reviewed en masse are those for gun and drug charges, rather than for murder or other crimes against people. In a drug or gun case,

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<sup>94</sup> See, e.g., Rector, Queally & Poston, *supra* note 87 (explaining that the district attorney sent letters to 750 defendants whose case involved three officers charged with fabricating gang database entries; letters asked defendants to contact the district attorney "if they feel the officers' involvement was prejudicial or merits further review"); Maya Lau & Ben Poston, *A Homicide Detective's Dishonesty Was Kept Secret for Years. Now It Could Upend Criminal Cases*, L.A. TIMES (Sept. 19, 2019), <https://www.latimes.com/california/story/2019-09-19/la-sheriffs-deputy-lying-murder-trial-testimony> [<https://perma.cc/UMC6-4UEH>] (noting that after Homicide Detective Daniel Morris's disciplinary suspension was uncovered by a newspaper, the district attorney's office "began sending notifications about the suspension to defense lawyers in more than 30 criminal cases, including some that resulted in convictions"); Ruth Brown, *Ex-Boise PD Officer May Have Lied Under Oath, Forcing Prosecutors to Notify Suspects*, IDAHO STATESMAN (July 17, 2019), <https://www.idahostatesman.com/news/local/crime/article232323492.html> [<https://perma.cc/J3E9-BBHB>] (notifying defendants in forty-seven cases in which an officer, accused by the department of dishonesty, was a witness); Rochelle Olson, *Hennepin County Attorney's Office Likely to Dismiss 32 Cases After Eden Prairie Detective Falsified Search Warrant*, STAR TRIB. (Oct. 12, 2018), <https://www.startribune.com/hennepin-county-attorney-s-office-to-address-police-officer-s-misconduct/497205231/> [<https://perma.cc/2HTB-EBV6>] (observing that after discovering misconduct, the district attorney notified defense attorneys in other cases that were open at the time of the misconduct).



the arresting officer is often a solo act: the officer observes the criminal conduct, makes the arrest, collects the evidence, and testifies as the sole witness at trial, if there is any trial at all. When that officer's credibility later falls apart, any conviction relying on the officer's credibility is in jeopardy. By contrast, investigations into homicides, robberies, and other violent crimes are more complex. They involve more investigators, more physical evidence and witness testimony, and, thus, more work on the part of a reviewer to determine whether the discredited officer's testimony was material to the conviction. As a result, even when an officer is thoroughly discredited, it may not automatically undermine the integrity of the violent-crime conviction in the way that it would with a drug- or gun-possession case.

Another critical difference between drug and gun cases, on the one hand, and violent crime cases on the other, is the role of victims. Gun and drug cases do not typically have victims to oppose efforts to vacate convictions, whereas violent-crime cases do.<sup>95</sup> More political capital is needed to vacate a violent-crime conviction, in the face of victims' resistance, than to throw out a gun possession case—or even hundreds of gun possession cases. As described by Bradley Bridge, a Philadelphia public defender whose work has led to the overturning of more than two-thousand convictions arising from police misconduct, the difference between vacating gun and drug cases and vacating homicide cases is like the difference between “removing a splinter and open-heart surgery.”<sup>96</sup>

## B. Cop Tracing Inaction

While prosecutors have many different types of reviews to choose from, they often choose to conduct no review at all. This is true even in egregious cases of police misconduct. This inaction is illustrated in the Golubski, Dillman, and Tulsa examples from this Article's Introduction, as well as in other cases

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<sup>95</sup> Lauren Lipscomb, the head of Baltimore's conviction integrity unit, said the cases her unit reviews “for the most part are all victim cases—they're all driven by civilian witnesses. The police weren't there.” Telephone Interview with Lauren Lipscomb, Chief, Conviction Integrity Unit, Off. of the State's Att'y for Balt. City, Md. (Sept. 16, 2020) [hereinafter Lipscomb Interview]. A different unit within the prosecutor's office reviews cases involving dishonest cops and drugs and guns. *Id.*

<sup>96</sup> Chris Palmer & Mark Fazlollah, *An Ex-Philly Homicide Detective's Fall From Star Investigator to Accused Rapist*, PHILA. INQUIRER (Feb. 22, 2019), <https://www.inquirer.com/news/philip-nordo-philadelphia-police-homicide-detective-rape-arrest-20190222.html> [<https://perma.cc/7P8V-7XGX>] (quoting Bridge).

that do not appear to have triggered reviews.<sup>97</sup> The apparent decision not to review cases can be striking, as in the case of Detective Mark Handy, formerly of the Louisville Metropolitan Police Department (LMPD). In 2018, Handy was charged with perjury and evidence tampering in connection with two homicide investigations.<sup>98</sup> He attempted to plead guilty to the perjury charge in 2020, only to have the judge reject the plea because it would have allowed Handy to avoid prison.<sup>99</sup> Subsequently, Handy pleaded guilty to perjury and tampering with evidence and was sentenced to one year in prison,<sup>100</sup> of which he served two weeks before being released to home confinement.<sup>101</sup> In one of the four wrongful convictions that have already been connected to his work, Handy allegedly coerced a confession from an innocent defendant and then erased portions of a surveillance video that could have shown the real killer. The erasure happened when Handy took the tape home and apparently taped over key portions with an episode of the *Late Show with David Letterman*.<sup>102</sup> In another case, Handy is

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<sup>97</sup> See, e.g., Elizabeth West, *State of LA. Drops Charge Against Local Business Owner Gregory Tate*, EVANGELINETODAY.COM (Oct. 30, 2017), <https://archive.evangelinetoday.com/local/state-la-drops-charge-against-local-business-owner-gregory-tate> [https://perma.cc/HH96-S9NA]; Harlan Kirgan, *West's World: All Hope for Justice Is Not Lost*, EUNICE NEWS (June 4, 2018), <https://www.eunicetoday.com/columns/west's-world-all-hope-justice-not-lost> [https://perma.cc/AP9P-DFHG]; Shelly Bradbury, *Ex-Pittsburgh Homicide Detective, Accused of Lying, Pleads No Contest to Hindering Apprehension*, PITTSBURGH POST-GAZETTE (Aug. 2, 2019), <https://www.post-gazette.com/news/crime-courts/2019/08/02/margaret-peg-sherwood-pittsburgh-police-homicide-detective-lying-plea-court-allegheeny-county/stories/201908020082> [https://perma.cc/9SVV-LAQY]; Andrew Wolfson, *Ex-Louisville Detective Mark Handy Is Sentenced to Prison for Putting Away Innocent Men*, LOUISVILLE COURIER J. (May 11, 2021), <https://www.courier-journal.com/story/news/crime/2021/05/11/louisville-detective-sent-prison-year-framing-innocent-men/5036358001> [https://perma.cc/UER7-Y3MA] (showing examples of when misconduct by police officers does not appear to prompt prosecutors to review the officers' old cases).

<sup>98</sup> Indictment at 1–2, *Kentucky v. Handy*, No. 18-cr-002871-6 (Ky. Cir. Ct. Sept. 2018) (listing charges as felony perjury and felony tampering with physical evidence).

<sup>99</sup> Andrew Wolfson, *Judge Rejects Probation for Notorious Detective Whose Lies Sent an Innocent Man to Prison*, COURIER-J. (Aug. 27, 2020), <https://www.courier-journal.com/story/news/crime/2020/08/27/judge-rejects-probation-former-detective-mark-handy/5644861002/> [https://perma.cc/R2PQ-W2AM].

<sup>100</sup> Wolfson, *supra* note 97.

<sup>101</sup> Andrew Wolfson, *After 2 Weeks Behind Bars, Corrupt Former Detective to Serve Rest of Sentence at Home*, COURIER-J. (May 28, 2021), <https://www.courier-journal.com/story/news/crime/2021/05/28/corrupt-detective-mark-handy-sent-home-after-2-weeks-behind-bars/5252569001/> [https://perma.cc/UPE6-Q45L].

<sup>102</sup> Letter from Mike O'Connell, Cnty. Att'y, Jefferson Cnty., Kan., to the Hon. Olu Stevens, Cnty. Judge, Jefferson Cnty., Kan. (July 21, 2020) (on file with

accused of taping over a statement from an eyewitness who told police that he could not identify the defendant as the shooter.<sup>103</sup> In still another case, this one involving a DNA exoneration,<sup>104</sup> Handy was alleged to have provided false testimony at trial about statements made by one of the defendants.<sup>105</sup>

Louisville has paid millions of dollars as a result of the civil rights suits connected to Handy's four exonerations—exonerations that have come to light even without cop tracing.<sup>106</sup> But, despite similar allegations of dishonesty across these cases and the potential for many more cases to be implicated, there does not appear to have been a comprehensive review of Handy's career.<sup>107</sup> According to Larry Simon, a civil rights attorney involved in the litigation against Handy, "LMPD's attitude has been: 'he's no longer with the Department—no duty to investigate old cases of his.'"<sup>108</sup> Simon wrote that the plaintiff in one of the suits recently "completed the deposition of the 1990s supervisor (now retired) of Handy's unit and asked him that question"—whether Handy's old cases had been traced out by anyone.<sup>109</sup> "He said that all cases in which Handy had a significant role (and particularly in cases in which he obtained a statement from a suspect or an important witness) should be examined."<sup>110</sup>

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author); Matthew Glowicki, Phillip M. Bailey & Andrew Wolfson, *Ex-Louisville Cop Who Sent Innocent Men to Prison Charged with Misconduct*, COURIER-J., (Sept. 26, 2018), <https://www.courier-journal.com/story/news/crime/2018/09/26/former-louisville-detective-mark-handy-indicted-misconduct/1433728002/> [<https://perma.cc/3DFK-UUVU>].

<sup>103</sup> Andrew Wolfson, *Special Prosecutor Named for Ex-Cop Who Helped Convict 3 Innocent Men*, COURIER J. (May 18, 2018), <https://www.courier-journal.com/story/news/2018/05/18/innocent-men-special-prosecutor-investigate-mark-handy/624213002/> [<https://perma.cc/AYU5-CZKY>]; Wolfson, *supra* note 97.

<sup>104</sup> Wolfson, *supra* note 101 (describing Handy's role in the wrongful conviction of Keith Hardin).

<sup>105</sup> Commonwealth v. Clark, 528 S.W.3d 342, 346 (Ky. 2017) (vacating Hardin's conviction).

<sup>106</sup> Wolfson, *supra* note 97.

<sup>107</sup> Telephone Interview with Larry Simon, Crim. Def. Att'y, Simon L. Off. (July 28, 2020) [hereinafter Simon Interview]; *Ex-Detective Indicted on Perjury, Evidence Charges*, MADISON COURIER (Sept. 27, 2018), [https://www.madisoncourier.com/archives/ex-detective-indicted-on-perjury-evidence-charges/article\\_e1b4029c-47c8-5410-a696-5179cda970ca.html](https://www.madisoncourier.com/archives/ex-detective-indicted-on-perjury-evidence-charges/article_e1b4029c-47c8-5410-a696-5179cda970ca.html) [<https://perma.cc/JM85-VTF7>]; *Former Louisville Detective Charged with Misconduct*, INNOCENCE PROJECT (Sept. 27, 2018), <https://innocenceproject.org/former-louisville-detective-charged-with-misconduct/> [<https://perma.cc/4HN5-TEGL>].

<sup>108</sup> Email from Larry Simon to author (Sept. 20, 2021) (on file with author).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* Between September 2021 and January 2022, I sent four e-mails to Jefferson County Commonwealth Attorney Thomas B. Wine and to First Assistant

A search of Handy's corpus of cases would seem possible. At my request, the office of the clerk of the court in Jefferson County, Kentucky, searched Mark Handy's name in its case database and returned a list of seventy-eight cases in which Handy was listed as the "complaining witness," the earliest of which was in 1993. A representative of the Jefferson County Office of the Circuit Court Clerk explained that this list was an undercount.<sup>111</sup> If three detectives worked on the case, but only one detective signed the charging instrument, this search would not pick up Handy's involvement. Also, if more than one officer's name is included on the charging document, the officer who is listed first is the only whose name would be picked up on a name-search of the database.

Another example of the lack of cop tracing may be seen in Chicago. There, a scandal involving police Sergeant Ronald Watts and his colleagues ballooned to include nearly two hundred wrongful convictions. Watts's case is notorious; he was involved in what one court called "a criminal enterprise right out of the movie 'Training Day.'"<sup>112</sup> According to accounts of the scandal, Watts and his police colleagues patrolled the Ida B. Wells housing projects in Chicago, demanding bribes, drugs, and information from residents, planting false evidence on, and fabricating charges against, those who resisted—a course of conduct that apparently lasted for years.<sup>113</sup> Eventually, Watts shook down an FBI informant, which led to his federal prosecution and conviction.<sup>114</sup> Even though Watts was federally convicted in 2014 for his on-the-job misconduct, and even though it was apparent that Watts touched many cases, there does not appear to have been a full accounting of the cases Watts tainted. As a 2018 feature in *The New Yorker* noted, "there does not appear to have been . . . an audit to find out how many

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Commonwealth Attorney Erwin Roberts, requesting to speak with them about any investigation of Mark Handy's cases. As of January 29, 2022, these e-mails had garnered no response.

<sup>111</sup> Email from Representative, Off. of the Cir. Ct. Clerk, Jefferson Cnty., Ky., to author (Oct. 29, 2021, 11:57 a.m.) (on file with author).

<sup>112</sup> Joshua Tepfer, *What About the City's Other Police Scandals?*, CHI. SUN-TIMES (Jan. 4, 2021), <https://chicago.suntimes.com/2021/1/4/22213597/ronald-watts-anjanette-young-lori-lightfoot-scandals-joshua-tepfer> [<https://perma.cc/BU4Z-J5ZB>] (quoting the Illinois Court of Claims "which decides how much compensation to give the state's wrongfully convicted").

<sup>113</sup> Megan Crepeau, *12 More Cases Tied to Corrupt Ex-Cop Are Dismissed*, CHI. TRIB., (Feb. 12, 2020), <https://www.chicagotribune.com/news/breaking/ct-ronald-watts-12-dropped-cases-20200211-11-ezv5cphmlbgg5nojac5qyflroq-story.html> [<https://perma.cc/CZ47-7DPL>] ("Some 75 people have had their Watts-related convictions tossed.").

<sup>114</sup> *Id.*

[people] were still in prison” because of cases Watts investigated nor was there “a push to reinvestigate their cases,”<sup>115</sup> although an effort to review these cases may now be underway.<sup>116</sup> The *New Yorker* article quotes Cook County State’s Attorney Kim Foxx acknowledging the unknown scope of Watts’s impact: “Any time I’m asked to sign off on the vacating of a conviction, there is that moment of thinking about what it means for the individual in that case. And then there is the pit in my stomach that is always, How many more are there? How many people are sitting in a cell? How many people are sitting at home with a conviction and can’t get a job based on a case that shouldn’t have been there?”<sup>117</sup>

At Watts’s sentencing hearing, the federal prosecutor asked for an increased punishment based on all Watts’s misconduct that was not charged. But the way the prosecutor made this request actually suggested how little the federal government had learned about the extent of Watts’s taint. “He did this twice with apparently no second thoughts,” the prosecutor said, referring to Watts’s tape-recorded statement of his plan to steal money from a drug courier, “which leads you to wonder how many times he might have done something similar when the government was not involved.”<sup>118</sup> Indeed, there is no indication that federal prosecutors did anything more than wonder when it comes to examining the full extent of the cases Watts may have tainted.

Likewise, Cook County prosecutors and the Chicago Police Department could have carried out a cop tracing of their own to find the cases Watts and his colleagues handled over their careers, but they did not. “No such organized review had been undertaken,” said Mark Rotert, the former head of the conviction integrity unit at the Cook County prosecutor’s office.<sup>119</sup> “It

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<sup>115</sup> Jennifer Gonnerman, *How One Woman’s Fight to Save Her Family Helped Lead to a Mass Exoneration*, NEW YORKER (May 21, 2018), <https://www.newyorker.com/magazine/2018/05/28/how-one-womans-fight-to-save-her-family-helped-lead-to-a-mass-exoneration> [<https://perma.cc/L4AS-C85L>].

<sup>116</sup> Transcript of Sentencing at 10, *United States v. Watts*, No. 1:12-cr-00087 (N.D. Ill. Oct. 9, 2013); Matthew Hendrickson, *5 More Cases Tied to Corrupt Former Police Sgt. Ronald Watts Dropped—Leaving 83 Others Still in Limbo*, CHI. SUN-TIMES (Nov. 4, 2021), <https://chicago.suntimes.com/crime/2021/11/4/22763390/ronald-watts-chicago-exonerations-cook-county-states-attorney-kim-foxx> [<https://perma.cc/PZ7B-5M8H>] (“The Cook County state’s attorney’s office has been steadily dropping cases tied to Watts as part of an ongoing review of convictions related to arrests made by Watts and other officers he supervised that has now spanned several years.”).

<sup>117</sup> Gonnerman, *supra* note 115.

<sup>118</sup> Transcript of Sentencing at 10, *Watts* (No. 1:12-cr-00087).

<sup>119</sup> Rotert Interview, *supra* note 90.

made our job much more difficult” that the police never identified all the Watts cases, Rotert said.<sup>120</sup> “It would have been in the best interest of the Chicago Police Department to clear that up as much as they could.”<sup>121</sup> Rotert noted that his comments referred to “the state of affairs” when he was involved with the conviction integrity unit from 2017 to 2019.<sup>122</sup>

At last count, 133 people have seen their convictions vacated in relation to the Watts scandal,<sup>123</sup> roughly 50 more have challenges pending to their convictions based on the work of Watts and his crew, and “two handfuls” of additional defendants’ cases were being examined by Tepfer.<sup>124</sup> But this does not mark the full universe of Watts’s misconduct. Rather, the nearly 200 people mentioned here represent just those victims of Watts and his colleagues who have identified themselves to the defense bar.<sup>125</sup> There has been no systemic way for the defense bar to identify victims who may not even know that they are entitled to relief.

The above are just some of the examples where cop tracing should be, but was not, employed. The next Parts consider the logistical, doctrinal, and other barriers that stand in the way of cop tracing.

### III

#### LOGISTICAL BARRIERS TO COP TRACING

The logistics of identifying an officer’s past cases should be a lot easier than they are. In some places, it really is easy to identify all the cases that an officer worked on over the years. But in other places, especially when it comes to older convictions, it can be difficult or impossible to identify which cases an officer has worked on.<sup>126</sup> Obviously, there is no hope of

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

<sup>121</sup> *Id.*; cf. Rummana Hussain, *State’s Attorney to Exam Ronald Watts Cases for Police Misconduct*, CHI. SUN-TIMES, (Feb. 27, 2017), <https://chicago.suntimes.com/2017/2/27/18334116/state-s-attorney-to-exam-ronald-watts-cases-for-police-misconduct> [<https://perma.cc/E2TB-LVBX>] (“The Conviction Integrity Unit is reviewing any cases of incarcerated individuals where Watts was substantively involved,” spokeswoman Tandra Simonton told the Chicago Sun-Times on Monday.”).

<sup>122</sup> Rotert Interview, *supra* note 90.

<sup>123</sup> E-mail from Josh Tepfer to Jonathan Abel, April 1, 2022 (on file with author) [hereinafter Tepfer E-mail].

<sup>124</sup> Fact Sheet, *Why Do the Chicago Police Officers that Framed 87 Black Men and Women Still Work for the City?* (on file with author).

<sup>125</sup> Tepfer E-mail, *supra* note 123.

<sup>126</sup> Telephone Interview with Shelley Thibodeau, Dir., Conviction Integrity Rev., 4th Jud. Cir. State Att’y’s Off., Fla. (Aug. 27, 2020) [hereinafter Thibodeau Interview].

reinvestigating or remedying an officer's past cases if they cannot even be identified. Unfortunately, the institutions that have the easiest access to an officer's past cases—prosecutors and police departments—have the least incentive to track this information, and there is little doctrinal pressure on them to do so. This Part discusses the logistics. The next Part discusses the doctrine.

#### A. Prosecutor and police records

Tracking down an officer's—or any witness's—old cases should not present the impediments that it does. For years, the National District Attorney's Association has recommended that its members use case management systems that allow for tracking cases by witness name.<sup>127</sup> But prosecutors do not always have this ability, especially when the cases are old. “You want to go back and, in an ideal world, you would have that type of system in place,” said Cynthia Garza, the Chief of the Conviction Integrity Unit in Dallas.<sup>128</sup> “In reality, I'm not sure that exists anywhere.”<sup>129</sup> Shelley Thibodeau, Director of Conviction Integrity Review for the prosecutorial district encompassing Jacksonville, Florida, said that it was “tricky” to “go back and look at all the cases” of an officer.<sup>130</sup> “I'm assuming all prosecutor offices across the country have the same problem,” Thibodeau said. “We were all paper. There wasn't a good mechanism while we were all paper to cross-reference the lead detectives. So, we were relying on institutional knowledge.”<sup>131</sup>

Other prosecutors confirm the difficulty of tracking officers into the not-so-distant past of paper records. Recall that pros-

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<sup>127</sup> LESLIE MOORE & DAVID J. ROBERTS, SEARCH (NAT'L CONSORTIUM FOR JUST. INFO. AND STAT.), PROSECUTOR CASE MANAGEMENT SYSTEM FUNCTIONAL REQUIREMENTS 62 (2018), <https://ndaa.org/wp-content/uploads/PCMS-Functional-Specifications.pdf> [<https://perma.cc/2VJ8-A69J>] (Case management systems “[m]ust allow the user to automatically search the PCMS for a pre-existing person record that can be used to identify and link together multiple cases related to the same individual.”); ROBERT H. CAIN & JOHN R. OURS, NAT'L CRIM. JUST. INFO. AND STAT. SERVS., U.S. Dep't of Just., PROMIS FOR THE NONAUTOMATED OR SEMIAUTOMATED OFFICE 50-51 (1976), <https://www.ncjrs.gov/pdffiles1/Digitization/36133NCJRS.pdf> [<https://perma.cc/4NJL-D6NC>] (Benefits of databases include “[m]aintaining an alphabetical index by names of witnesses, making it possible to identify quickly the case involved when inquiries are received, and to determine whether the same witness is involved in more than one pending case.”).

<sup>128</sup> Telephone Interview with Cynthia Garza, Chief, Conviction Integrity Unit, Dall. Cnty. Dist. Att'y's Off. (Sept. 9, 2020) [hereinafter Garza Interview].

<sup>129</sup> *Id.*

<sup>130</sup> Thibodeau Interview, *supra* note 126.

<sup>131</sup> *Id.*

ecutor Mark Dupree's efforts to examine all of Detective Golubski's cases foundered on the lack of an ability to identify which cases Golubski had handled.<sup>132</sup> In Brooklyn, where prosecutors set out to review "all" of Detective Scarcella's homicide cases, they initially thought that universe was fifty cases, only to see the number grow to seventy-plus as investigators searched through records using "different spellings of Mr. Scarcella's name" and searched records catalogued under the name of Scarcella's police partner.<sup>133</sup> In Chicago, civil litigation revealed that the police department misplaced and lost "Case Assignment Slips," which were "designed to document initial detective(s) assigned and conclusion status" for cases.<sup>134</sup> The litigation suggested that these are not centrally retained by the department—and had gone missing—despite a policy requiring their retention.<sup>135</sup> These are some of the examples that have surfaced, and they show that even prosecutors and police departments may not be able to identify an officer's old cases.

Another example of the difficulty in tracing officers' cases can be seen in New Orleans. Logistical problems abound, even for prosecutors. Emily Maw, chief of the Civil Rights Division within the Orleans Parish District Attorney's Office, said there is "no central list of bad cops" and "trying to figure out who they are and how we figure out what cases they are involved in has been a real challenge."<sup>136</sup> "We tried to do data mines, but our internal databases don't necessarily mention officers by their names," Maw said.<sup>137</sup> Her office attempted to use the sheriff's department's "docket master" database—a compilation of information drawn from court dockets.<sup>138</sup> But court dockets will often not contain the officer's name, even if the officer testified in that case, Maw explained; the entry may simply say "suppression motion" or some other procedural notation.<sup>139</sup> In an effort to identify the cases handled by problematic officers, Maw attempted to seek out lists of when a particular officer was subpoenaed, "but NOPD [New Orleans Police Department] records are never complete" and "people are only subpoenaed if there is a court hearing," Maw said.<sup>140</sup> "You can touch a case

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<sup>132</sup> Dupree Interview, *supra* note 12.

<sup>133</sup> Clifford, *supra* note 57.

<sup>134</sup> Report of Plaintiff's Expert—Michael D. Brasfield at 203, *Rivera v. Guevara*, No. 1:12-cv-04428 (N.D. Ill. Aug. 23, 2017), ECF No. 307-3.

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

<sup>136</sup> Maw Interview, *supra* note 25.

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

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

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

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



and not ever be subpoenaed. So it's hard to figure out what the universe is."<sup>141</sup> Maw's office is currently working on protocols and procedures to trace backward from an officer to all the officer's previous cases, and the office has recently applied for a grant to fund this endeavor.<sup>142</sup>

There is no data on how many prosecutors' offices or police departments have the capability to track an officer's past cases. However, Chris Graveline, Director of Professional Standards at the Detroit Police Department, notes that every department has the case management system needed to track an officer's past cases. "The case management system is: 'There's the filing cabinet,'" Graveline said.<sup>143</sup> His department is examining nearly 1,000 search warrants issued to its narcotics unit over the course of a decade—a review prompted by the federal conviction of a narcotics officer.<sup>144</sup> Because the department does not have a computerized index to catalog these warrants, the review is taking place by hand.<sup>145</sup>

The Tulsa police scandal mentioned in the Introduction provides another example of the logistical hurdles facing prosecutors, and how those logistics can sometimes be overcome. Recall that a federal agent and local police officers in Tulsa were implicated in falsifying search warrant affidavits and other illegal activity, including drug trafficking.<sup>146</sup> When the scandal came to light, federal prosecutors obtained lists of all of the cases that the discredited officers had worked on in the previous five years (the statute of limitations for the charges), according to lead prosecutor Jane Duke.<sup>147</sup> "We had processes available to us like a grand jury subpoena. So we could send grand jury subpoenas to the district attorney's office or the Tulsa Police Department and say, 'Give us all reports involving these officers in the last five years,'" Duke explained.<sup>148</sup> That effort netted roughly 1,000 cases.<sup>149</sup> Prosecutors then went

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> Telephone Interview with Chris Graveline, Dir., Pro. Standards, Detroit Police Dep't (Aug. 28, 2020) [hereinafter Graveline Interview].

<sup>144</sup> *Id.*; see also George Hunter, *Detroit Police Official: Drug Unit Probe Could Lead to Overturned Convictions*, DET. NEWS (Feb. 27, 2020), <https://www.detroitnews.com/story/news/local/detroit-city/2020/02/27/detroit-police-drug-unit-probe-could-endanger-convictions/4895329002/> [https://perma.cc/LJ9V-PUUZ].

<sup>145</sup> Graveline Interview, *supra* note 143.

<sup>146</sup> See *supra* notes 35-43 and accompanying text.

<sup>147</sup> Duke Interview, see *supra* note 37.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

about contacting the defendants in those old cases—along with the defendants’ attorneys—to ask whether “they had concerns that they would share with us” about the officers, Duke said.<sup>150</sup> The resulting claims of misconduct were then “triaged” down to roughly fifteen to twenty former defendants whose cases could be used as the basis for prosecuting the officers.<sup>151</sup>

While the federal prosecution went back only five years, Duke noted that some of the officers being prosecuted had been arresting people for more than twenty years.<sup>152</sup> “In theory,” explained Duke, it would be possible to trace back their cases to the beginning of their careers, but one would encounter the “records retention issues that any company or entity would have during that time period: ‘That one’s on microfiche in the basement,’ or ‘We had a fire and those records were destroyed,’ or ‘We lost some of that in a system conversion.’”<sup>153</sup> Duke added: “I can’t imagine there was anyone who got prosecuted by these individuals who wasn’t aware of what was going on and the officers that have gotten them thrown in jail.”<sup>154</sup> Those individuals with claims would have known to come forward after the officers’ misconduct was exposed, according to Duke.

Bradley Bridge, a Philadelphia public defender, described how he successfully used police records to locate old cases that had been touched by corrupt officers.<sup>155</sup> The first time he sought to unearth an officer’s past cases was in 1995, when several narcotics officers were federally prosecuted. Bridge went to the police station and took notes of the handwritten arrest ledgers that identified which officers made which arrests.<sup>156</sup> This process proved too slow, so the police agreed to bring the arrest ledgers to his office so that, under police supervision, photocopies could be made.<sup>157</sup> Even that process took

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150 *Id.*

151 *Id.*

152 *Id.*

153 *Id.*

154 *Id.*

155 For media coverage of Bridge’s work, see David Enscoe, *Hundreds of Drug Convictions Threatened*, UPI (June 21, 1995) (“Common Pleas Judge Legrome Davis has already reversed 27 convictions and Public Defender Bradley Bridge told United Press International as many as 1,000 more cases handled by the crooked officers between 1987 and 1994 could be dismissed. ‘Sadly, this is not even the tip of the iceberg,’ Bridge said. ‘Many, many more cases will follow.’”); Palmer & Fazlollah, *supra* note 96 (describing Bridge as “a public defender who has overseen the reversal of about 1,500 tainted narcotics cases in Philadelphia” and noting that “[i]n recent years, Bridge and the DA’s Office have developed a procedure for reviewing drug cases”).

156 Bridge Interview, *supra* note 86.

157 *Id.*

days, Bridge explained.<sup>158</sup> He went through the logs by hand, starting with the approximate date of the first bad act alleged in the officers' criminal indictments.<sup>159</sup> The efforts identified the universe of cases associated with the corrupt officers and then allowed for case-by-case negotiation with prosecutors about which cases they would agree to vacate and which cases would have to be litigated.<sup>160</sup>

## B. Defense Records

On the defense side, there are other logistical challenges and opportunities. First, the good news: Defense organizations have their own internal records that can be searched, even where police and prosecution records come up short. These defense-side records can be used to identify cases in which an officer has previously appeared as a witness. Large public defender offices in cities like Los Angeles<sup>161</sup> and New York<sup>162</sup> have the sophisticated case management systems needed to track cases by officer name. The New York State Defenders Association, for example, developed a case management system used by ninety-three public defense offices to track a range of information from case to case, including the names of the witnesses.<sup>163</sup>

Companies that sell computerized case management systems have also developed this functionality for defense organizations. Indeed, keeping track of the witnesses in each case is a core requirement of any effective case management program, according to Carl Richey, the founder and CEO of JusticeWorks, a software company that makes the popular defenderData™ case management system.<sup>164</sup> Public defenders need to run “conflict checks” on new clients to make sure that the clients were not witnesses or victims in previous clients’

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<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> See Stephanie Kanowitz, *How a Public Defender's Office Transformed Client Management Into a People-Centered Solution*, GCN (Mar. 9, 2022), <https://gcn.com/cloud-infrastructure/2022/03/how-public-defenders-office-transformed-client-management-people-centered-solution> [https://perma.cc/DS5X-XVGF].

<sup>162</sup> *NYSDA's Public Defense Case Management System (PDCMS): An Overview*, N.Y. STATE DEFENDERS ASSOC., <https://www.nysda.org/page/PDCMS> [https://perma.cc/W85G-ZXHM] (last visited Mar. 19, 2022).

<sup>163</sup> *Id.*

<sup>164</sup> Telephone Interview with Carl Richey, CEO, Just. Works (Jan. 29, 2021) [hereinafter Richey Interview]; see also DEFENDERDATA USER MANUAL-US-DSO 31, 42 (2014), [http://help.justiceworks.com/dd\\_us\\_ods/docs/manual.pdf](http://help.justiceworks.com/dd_us_ods/docs/manual.pdf) [https://perma.cc/DW7Z-37ZL].

cases.<sup>165</sup> Nonetheless, many offices still do not have a computerized case management system, Richey noted: “For lack of funding, they are still trying to do things with paper files.”<sup>166</sup>

Unfortunately, even offices that have such computerized case management systems may not be able to search them far enough back to carry out a full accounting of a corrupt cop’s cases. If an office has changed over from one system to another, the old data about witnesses may not have made the transition. Other public defender offices report additional challenges. Brendon Woods, the public defender for Alameda County, said his office has a system capable of tracking cases by officer name, but more staffing is needed—and is on the way—to input the names of witnesses.<sup>167</sup> The public defender’s office in Yolo County, California, does not have a case management system capable of searching cases by witness name.<sup>168</sup> In 2014, when police officer Sergio Alvarez was convicted of eighteen counts of sexual assault, kidnapping, and other offenses, the public defender’s office could not identify the prior cases he had worked on.<sup>169</sup> According to Tracie Olson, the head of the office: “[O]ur case management system was/is not sophisticated enough to help and even if we could have produced our own list, we’d have to manually go into the files to see how critical this officer’s testimony was to the case before deciding to litigate.”<sup>170</sup> The public defender’s office in Tulsa acquired a case management system years after the Tulsa police scandal, mentioned above, but never had the resources to input the old data, so lawyers remain unable to dig into all the old convictions of the officers discredited by that scandal.<sup>171</sup>

### C. Court Records

Another potential avenue for tracking an officer’s old cases is through publicly available court records. After all, the officer’s name could be on the docket, in the court filings, and in the transcripts of any case that went to trial—or even in many

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<sup>165</sup> Richey Interview, *supra* note 164.

<sup>166</sup> *Id.*

<sup>167</sup> Telephone Interview with Brendon Woods, Pub. Def., Alameda Cnty. Pub. Def. Off., Cal. (Aug. 20, 2020) [hereinafter Woods Interview].

<sup>168</sup> Telephone Interview with Tracie Olson, Pub. Def., Yolo Cnty. Pub. Def. Off., Cal. (Aug. 14, 2020) [hereinafter Olson Interview].

<sup>169</sup> *Id.*; see also *City Settles Over Rapes by Officer*, L.A. TIMES, Oct. 23, 2015, at B6.

<sup>170</sup> Olson Interview, *supra* note 168.

<sup>171</sup> Rayl Interview, *supra* note 38.

of the documents associated with pre-trial litigation. And all of these records should be open to public inspection.<sup>172</sup> The trouble with using court records, however, is that the records are often not indexed in a way that allows them to be searched by witness name.<sup>173</sup> Rather, court files are typically indexed by case number and defendant name only. If the defense attorney does not know which cases the officer appeared in, there is no way to find the useful impeachment material those case files might contain. The effect of this indexing feature is that an officer—or any serial witness—can be impeached in one case only to appear in ten more without the impeaching facts trailing him.<sup>174</sup> And, because of the way the records are indexed, there is often no way to go from the discovery of an officer's corruption backward to all the cases the officer has touched.

“Bad cop who has lied on three different occasions,” said Colorado defense attorney David Lane.<sup>175</sup> “There is not a database that I’m aware of that tells you the five hundred cases he has testified in in the past.”<sup>176</sup> “You cannot do that,” Jennifer Blagg, a Chicago defense attorney, said of efforts to search public records by officer name.<sup>177</sup> “In Cook County, you can’t even e-file.”<sup>178</sup> The refrain is the same in many parts of the country. The lack of a witness-indexing function prevents these valuable records from being used for tracing.

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<sup>172</sup> Granted, identifying the cases in which an officer testified would not give the full picture of an officer's history; there are lots of cases that resolve in plea agreements and thus never require the officer or anyone else to testify. But at least the court records would provide a start in identifying the cases that a corrupt officer touched.

<sup>173</sup> Clerks of court may have the records indexed by witness name, even if they are not publicly accessible. Richey Interview, *supra* note 164.

<sup>174</sup> See Joel Rubin, *This L.A. Sheriff's Deputy Was a Pariah in Federal Court. But His Secrets Were Safe with the State*, L.A. TIMES (Aug. 10, 2018), <https://www.latimes.com/local/lanow/la-me-police-misconduct-secrecy-federal-20180810-htmlstory.html> [<https://perma.cc/3L3D-A3QW>] (noting the difficulty in tracking an officer's misconduct across cases).

<sup>175</sup> Telephone Interview with David Lane, Def. Att'y, Killmer, Lane & Newman, LLP (Aug. 12, 2020) [hereinafter Lane Interview].

<sup>176</sup> *Id.*

<sup>177</sup> Telephone Interview with Jennifer Blagg, Att'y, Law Off. of Jennifer Blagg (Aug. 7, 2020) [hereinafter Blagg Interview].

<sup>178</sup> *Id.* Blagg noted that there are ongoing discussions about the plans to allow e-filing in Cook County, but, as of the time of the interview, they had not been implemented.

Except where it doesn't.<sup>179</sup> In some jurisdictions, cases *can* be searched by the officer's name.<sup>180</sup> There are 3,300 counties in the country, and each one may contain multiple tiers of courts. Clerks of court are generally free to choose their own methods for indexing the public court records.<sup>181</sup> And some of them allow the records to be searched by witness name. According to William Raftery, a senior analyst at the National Center for State Courts, there is no empirical data on how many court systems permit witness searching.<sup>182</sup> "[F]rom my own experience having looked at all the state-level docketing and court record systems witness searches are predominately NOT the norm," Raftery wrote in an e-mail.<sup>183</sup> PACER, the federal court system's online records portal, does not have this functionality.<sup>184</sup> Nor do court systems in California,<sup>185</sup> Pennsylvania,<sup>186</sup> New York,<sup>187</sup> Georgia,<sup>188</sup> Illinois,<sup>189</sup> Hawaii,<sup>190</sup> and other states. However, other states, including Ma-

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<sup>179</sup> Court records in many Florida counties are searchable by witness name, as are court records in Kentucky. However, even when the court records can be searched by witness name, the timeframe for this indexing may not be sufficient to capture all the cases on which a detective worked.

<sup>180</sup> See, e.g., *Maryland Judiciary Case Search Criteria*, MD. JUDICIARY, <https://casesearch.courts.state.md.us/casesearch/processDisclaimer.jis> [<https://perma.cc/64ZC-UJR8>] (last visited Nov. 20, 2021) (allowing for search by witness name); see *supra* note 179 and associated text (describing witness-search function in Kentucky); E-mail from Nicole Hooker, Bus. Analyst Lead, Info. & Tech. Servs., Admin. Off. of the Cts., Kentucky, to author (Nov. 1, 2021, 2:53 PM) (on file with author) ("This functionality is available in CourtNet 2.0, but is not included in public (guest) access.").

<sup>181</sup> E-mail from William T. Raftery, Ph.D., Senior KIS Analyst, Nat'l Ctr for State Cts., to author (Jan. 28, 2021, 10:42 AM) (on file with author).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* (emphasis in original).

<sup>184</sup> *PACER Case Locator*, PACER, <https://pcl.uscourts.gov/pcl/index.jsf> [<https://perma.cc/2KDH-SE6L>] (last visited Nov. 20, 2021).

<sup>185</sup> See *Criminal Index*, SUPERIOR CT. OF CAL.—CNTY. OF S.F., <https://webapps.sftc.org/crimindex/crimindex.dll?=&SessionID=37E233A8B8EB67F7A46638319566EF11AD7B5B54> [<https://perma.cc/VZ2A-WZ69>] (last visited Nov. 20, 2021) (allowing search by defendant name).

<sup>186</sup> E-mail from Kimberly Bathgate, Commc'ns Coordinator, Pa. Admin. Off. of Cts., to author (Nov. 22, 2021, 9:04 AM) (on file with author) ("Unfortunately, the web dockets aren't searchable by arresting officer or by witness.").

<sup>187</sup> *WebCriminal Frequently Asked Questions*, N.Y. STATE UNIFIED CT. SYS., [https://iapps.courts.state.ny.us/webcrim\\_attorney/AttorneyHelp](https://iapps.courts.state.ny.us/webcrim_attorney/AttorneyHelp) [<https://perma.cc/XS99-MFZR>] (last visited Nov. 20, 2021) (discussing limited search functions).

<sup>188</sup> E-mail from Misty Harry, Clerk and Customer Experience Expert, Green-Court Legal Tech., to author (Nov. 22, 2021, 4:23 AM) (on file with author) ("Unfortunately, our system is not set up to search by witnesses. Only parties are searchable.").

<sup>189</sup> See Blagg Interview, *supra* note 177.

<sup>190</sup> E-mail from Jan Kagehiro, Commc'ns and Cmty. Rels. Dir., Haw. State Judiciary, to author (Nov. 22, 2021, 12:44 PM) (on file with author) ("[O]ur Judici-

ryland and Kentucky, allow for some searching of cases by witness name.<sup>191</sup>

This simple functionality can mean the difference between a systemic response to an officer's misconduct and an isolated, episodic one. Just look at a recent scandal in Baltimore, Maryland. In 2017, eight Baltimore police officers on the department's Gun Trace Task Force were indicted on federal charges of racketeering, robbery, extortion, and drug dealing.<sup>192</sup> Public defenders were able to use court records to identify the thousands of cases the officers touched.<sup>193</sup> Natalie Finegar, an assistant public defender at the time, explained that her office was "able to scrub data from Case Search, the public database, about every case that the officer was involved with back to the time they were involved in the force."<sup>194</sup> With the list of all the officers' cases in hand, the public defender's office and the prosecutor's office identified which cases they would agree to vacate and which cases they would agree to litigate.<sup>195</sup> In all, the eight officers ended up touching between two thousand and three thousand cases.<sup>196</sup> In most jurisdictions, publicly available court records would not have allowed this systemic search, and the scope of the scandal might have been underestimated.<sup>197</sup>

Another illustration of the difficulties in tracing an officer's cases can be seen in Maricopa County, Arizona, with the case of Debra Milke. In 2013, the Ninth Circuit granted habeas relief to Milke, a woman who spent 22 years on Arizona's death row.<sup>198</sup> Milke was convicted of murdering her 4-year-old

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ary Information Management System does not have the capability to automatically search by name of witness. This would require a manual search.").

<sup>191</sup> See, e.g., *supra* note 180 (discussing Maryland's case search function); *supra* note 180 (discussing search functionality in Kentucky); *Obtaining Court Records*, N.C. JUD. BRANCH <https://www.nccourts.gov/help-topics/court-records/obtaining-court-records> [<https://perma.cc/95F7-GF7P>] ("Information about criminal cases in the North Carolina court system can be accessed by visiting a public, self-service terminal located at a clerk of court's office in any county. . . . You can use the terminal to search for cases by defendant name, case number, or victim or witness name.").

<sup>192</sup> *Gun Trace Task Force Investigation*, GTTFI, <https://www.gttfinvestigation.org/> [<https://perma.cc/A5L3-62E7>] (last visited Mar. 19, 2022).

<sup>193</sup> See Telephone Interview with Natalie A. Finegar, Law Off. of Natalie Finegar (April 19, 2021) [hereinafter Finegar Interview].

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

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> See Richey Interview, *supra* note 164; see also *supra* note 164 and accompanying text.

<sup>198</sup> *Milke v. Ryan*, 711 F.3d 998, 1001, 1019 (9th Cir. 2013).

son.<sup>199</sup> The key evidence against her was the testimony of Phoenix police Detective Armando Saldate.<sup>200</sup> In state post-conviction proceedings, a team of defense investigators sought out all the cases in which Saldate had testified.<sup>201</sup> There was no index listing the court records by witness name so the investigator did the search manually. The tracing effort was accomplished by “a team of approximately ten researchers” who “spent nearly 7000 hours sifting through court records” searching “for Saldate’s name in every criminal case file from 1982 to 1990,” according to the Ninth Circuit opinion.<sup>202</sup> Working “eight hours a day for three and a half months,” the researchers turned up “100 cases involving Saldate.”<sup>203</sup> Then, a researcher “spent a month reading motions and transcripts from those cases to find examples of Saldate’s misconduct.”<sup>204</sup> This exhausting method of searching was the only way to find Saldate’s old cases because the court records were not organized by witness name.<sup>205</sup> The tracing effort unearthed numerous instances where courts found that Saldate had lied.<sup>206</sup> Along with other information of Detective Saldate’s misconduct, these records led the Ninth Circuit to vacate Milke’s conviction and, ultimately, caused a state appeals court to bar retrial of Milke.<sup>207</sup> Notably, it is the rare defendant who can afford 7,000 hours of court searching. But such an enormous effort would not have been required if the records had been indexed by witness name.

#### D. Public Record Requests

Still another way to find an officer’s old cases is through public records requests to a prosecutor’s office or police department. Yet, these requests face resistance. For this Article, I requested a list of all cases that particular officers had been involved in over the years. The responses show a range in the ability and willingness of law enforcement and prosecutorial agencies to share information. I sent a request to the Louisville Metropolitan Police Department for records involving Detective

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<sup>199</sup> *Id.* at 1000.

<sup>200</sup> *Id.* at 1002.

<sup>201</sup> *Id.* at 1018.

<sup>202</sup> *Id.*

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

<sup>204</sup> *Id.*

<sup>205</sup> *See id.*

<sup>206</sup> *Id.* at 1020–22; *see also Milke v. Mroz*, 339 P.3d 659, 663 (Ariz. Ct. App. 2015).

<sup>207</sup> *Milke*, 339 P.3d at 668.



Mark Handy, and received a prompt response, which I quote in relevant part:

[A] list of all cases handled by a former LMPD employee, Mark Handy, is not how LMPD maintains case files. There is no standing list of case files for the mentioned officer or any past/current officer. Cases are not categorized or maintained by lead detective/officer, other officer involved or potential witness. There is no way I could perform a search for cases with just his name.<sup>208</sup>

A request to the New Orleans Police Department for a list of cases connected to Detective John Dillman was met with the following denial: “Unfortunately, we do not have access to reports before 1990. This is due to the December 13, 2019 Cyber Attack. Also, we can not [sic] access reports generated after 1990 without the NOPD Police report Item number to research.”<sup>209</sup> The officer’s name—the only thing I had—was apparently not enough to obtain information about the cases the officer worked on.

My request to the police department in Kansas City, Kansas, for Detective Roger Golubski’s case files was markedly more successful. For a fee of \$118.04, I received a cache of “Homicide Incident Reports,” each listing the names of the victims and suspects in a different one of the 176 cases that Detective Golubski investigated.<sup>210</sup> The cases—solved and unsolved murders—ranged from 1988 to 2001.<sup>211</sup> (I forwarded this information to prosecutor Mark Dupree to ask whether this information would make it easier to carry out a comprehensive review of Detective Golubski’s work.<sup>212</sup> Despite two follow-up inquiries, I have not heard a response as of publication of this Article.)

Los Angeles provides an interesting example of the hurdles these public records requests face, both logistical and legal. The Los Angeles County District Attorney’s Office maintains a database of every case in which an officer has been listed as a “potential witness.”<sup>213</sup> Presence on the potential witness list is

<sup>208</sup> E-mail from Samantha Childress, Paralegal, Open Recs. Div., Louisville Metro. Police Dep’t, to author (Jan. 6, 2021, 11:46 AM) (on file with author).

<sup>209</sup> Notification from Rayshawn Gremillion, New Orleans Police Dep’t, to author (Dec. 29, 2020) (on file with author).

<sup>210</sup> Kansas City Police Department Criminal Investigations Division, Homicide Incident Reports of Detective Roger Golubski (on file with author).

<sup>211</sup> Dupree Interview, *supra* note 12.

<sup>212</sup> *Id.*

<sup>213</sup> See Memorandum from Jackie Lacey, L.A. Cnty. Dist. Att’y, to All Dist. Att’y Pers. (Feb. 7, 2017), <https://da.lacounty.gov/sites/default/files/Revised%20Brady%20Policy.pdf> [<https://perma.cc/22S2-B85V>] (describing L.A. District

a proxy for an officer's involvement in the case. The list is filed in court, prior to the preliminary hearing, indicating the name of all witnesses who might potentially be called at trial. Even if no trial occurs, the potential witness list can be used to identify that a particular officer had some role in a case.<sup>214</sup> I requested all cases in which Braxton Shaw or Michael Coblentz were listed as potential witnesses. These two LAPD officers had been charged in connection with falsifying field interview cards and thereby falsely labeling people as gang members.<sup>215</sup> A deputy district attorney responded to my request, informing me that the California criminal code "prohibits release of the information that you requested unless the information is sought for scholarly or journalistic purpose and the release of the information would enhance public safety, the interest of justice, or the public's understanding of the justice system."<sup>216</sup> I confirmed that my request met those criteria, and received a list of hundreds of cases in which at least one of the officers was involved, some of them dating back nearly 20 years. But the list of cases came with a warning that I could be subject to criminal prosecution if I "knowingly furnish[ed]" this information "to a person who is not authorized by law to received [sic] the information"—a wide swath of the population that prevents me from publishing it as part of this Article or disclosing it to a research assistant or law review editor.<sup>217</sup> Notably, this section of the penal code that governs access to this information permits prosecutors, peace officers, probation officers, and parole officers to access this information when needed "in the course of their duties," without additional limitation,<sup>218</sup> but gives public defenders access to the information only in certain proceedings that do *not* include postconviction or habeas challenges.<sup>219</sup>

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Attorney's "Officer and Recurrent Witness Information Tracking System"); see also Rector, Queally & Poston, *supra* note 87.

<sup>214</sup> See, e.g., Memorandum from Jackie Lacey, *supra* note 213 (discussing a potential witness list).

<sup>215</sup> Ormseth & Poston, *supra* note 87.

<sup>216</sup> E-mail from Ruth Low, Deputy Dist. Att'y, L.A. Ctny. Dist. Att'y's Off., to author (Dec. 28, 2020, 2:48 PM) (on file with author). The *Los Angeles Times* routinely makes these requests. See L.A. Dist. Atty.'s Public Records Act Log, 2017-2019 (on file with author).

<sup>217</sup> Letter from Ruth Low, Deputy Dist. Att'y, L.A. Ctny. Dist. Att'y's Off., to author (Jan. 6, 2021) (on file with author) (internal citations omitted).

<sup>218</sup> Cal. Penal Code § 13300 (b)(2)-(7).

<sup>219</sup> Cal. Penal Code § 13300 (b)(9) (excluding postconviction or habeas corpus petitions).

It is also worth noting that a separate request I sent to the Los Angeles Police Department (LAPD) for the cases involving Officers Shaw and Coblentz resulted in a list of 871 arrests made by the officers, going back to 2003, with no restrictions on how the information could be disseminated.<sup>220</sup> In short, the District Attorney's Office disclosed information with very severe restrictions. Meanwhile, the LAPD disclosed very similar information with no restrictions.

#### IV

#### DOCTRINAL BARRIERS TO COP TRACING

The previous Part showed the logistical challenges to carrying out cop tracing. This Part discusses the doctrinal barriers to cop tracing. Unfortunately, the logistical and doctrinal barriers interact in a bad way. The logistical infrastructure for tracking an officer's cases over the years is often not present. And that makes it more difficult for litigants to get ahold of the information that would be needed to persuade a court that an officer's behavior in other cases is legally relevant. The lack of apparent legal relevance, in turn, takes the pressure off prosecutors and police departments to create the infrastructure needed to track this information. The logistical impediments, discussed above, and the doctrinal impediments, discussed below, form a vicious cycle.

The discussion in this Part examines several areas in which legal doctrine is either indifferent, or outright hostile, to the idea of cop tracing—to the notion that an officer's corruption in one case is relevant to the officer's behavior in other cases.

##### A. Case-to-Case Relevance

Cop tracing would require courts, prosecutors, and police departments to look beyond the one case in front of them to see the many other cases that involve the discredited officer, even when those cases do not have active litigation.<sup>221</sup> This global view is not how the criminal justice system typically works. Criminal and habeas proceedings assume that each litigant will know of and raise all viable legal claims. If there are issues common to multiple cases—such as the credibility of the lead officer—each defendant or habeas petitioner must raise those

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<sup>220</sup> See *Request #20-9032*, PUB. REC. REQUESTS CITY OF L.A., <https://lacity.nextrequest.com/requests/20-9032> [<https://perma.cc/2SSQ-RCXW>].

<sup>221</sup> See Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CAL. L. REV. 383, 385–86 (2007).

credibility problems on his own. Those litigants who never learn of the officer's problems will never know to bring claims based on those problems, and there is no outside mechanism to alert the litigants to the existence of facts that could merit legal relief. The prisoner who is unaware, even after the officer's corruption has been exposed elsewhere, will slip through the cracks.

The point of cop tracing is to systematize efforts to identify all former defendants who may have been affected by an officer's corruption. conceptualize an officer's corruption as a global issue that potentially affects all of that officer's cases. It is not enough to litigate an officer's corruption through a single case, be it a criminal trial, a habeas petition, or a civil rights lawsuit. There must be some mechanism that moves beyond the individual case to make connections with the other cases that have been touched by that officer. In this fundamental way, cop tracing is at odds with the typical approach to case-by-case adjudication.

Nonetheless, there are tools that would allow the legal system to remedy police corruption in a systemic way—if only there were the will to do so.<sup>222</sup> For example, where hundreds of people are imprisoned based on the work of a corrupt officer, a type of class action could be possible.<sup>223</sup> The more the cases have in common, the more the class action makes sense. Besides its efficiency, class action could have the advantage of including even those people in the class who were unaware that the officer who put them in prison has since been discredited—so long as someone could identify their cases as ones on which the officer worked.<sup>224</sup>

Certainly, there are reasons to worry about treating a swath of convicted defendants as a class, even if the same officer worked on all of their case. And habeas class actions are generally disfavored.<sup>225</sup> For example, it may be that the tainted officer was only tangentially involved in some of the cases or that only some of the defendants even purport to be innocent.

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<sup>222</sup> See, e.g., *infra* notes 223-231 and accompanying text.

<sup>223</sup> 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 11.4 (7th ed., 2021) (discussing limitations on class action in habeas corpus proceedings); Garrett, *supra* note 221 at 404–05.

<sup>224</sup> Class certification may cover everyone in the class. In this analogy, if there were a class of people defined as those whose convictions involved the testimony of a certain officer, then the class of people would all be entitled to relief, even if they did not know of their claims.

<sup>225</sup> HERTZ & LIEBMAN, *supra* note 223.

Yet courts have overcome these concerns in some types of criminal proceedings. In one of the most notable examples, the Supreme Judicial Court of Massachusetts effectively applied a class remedy to all defendants whose drug convictions involved the work of two crime lab analysts who were discredited for stealing drug samples and falsifying results.<sup>226</sup> These scandals led to the dismissal of nearly 40,000 drug convictions.<sup>227</sup> The Supreme Judicial Court even took the extraordinary step of requiring prosecutors to identify all the cases handled by the discredited technicians and to notify all the affected defendants.<sup>228</sup> The court was willing to dismiss thousands upon thousands of cases en masse, rather than subject each individual victim of the misconduct to case-by-case adjudication.<sup>229</sup> This response to two corrupt lab technicians could be employed in dealing with a corrupt police officer. But, as discussed below in subpart V.A, there is much more willingness to think of laboratory scandals as systemic problems than to think of an officer's corruption as a systemic problem.

Another approach, short of class action, is the use of a special master. A special master can be assigned to carry out any type of fact-finding, ranging from identifying the cases that the officer worked on to suggesting appropriate remedies for those cases.<sup>230</sup> Rather than requiring individual prisoners to learn of an officer's misconduct on their own, to process the legal significance of that misconduct for their habeas cases, and then to initiate habeas proceedings—for which there is no right to counsel<sup>231</sup>—the special master can take a proactive

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<sup>226</sup> See *Bridgeman v. Dist. Att'y for Suffolk Dist.*, 67 N.E.3d 673, 677, 694 (Mass. 2017); *Comm. for Pub. Couns. Servs. v. Att'y Gen.*, 108 N.E.3d 966, 989 (Mass. 2018).

<sup>227</sup> Shawn Musgrave & John R. Ellement, *SJC Orders Dismissal of Thousands More Drug Convictions*, BOSTON GLOBE (Oct. 11, 2018), <https://www.bostonglobe.com/metro/2018/10/11/sjc-orders-dismissal-thousands-more-drug-convictions/RvIPnFOZTDRPdjb2BG224H/story.html> [<https://perma.cc/82HD-QHH2>].

<sup>228</sup> See *Bridgeman*, 67 N.E.3d at 695–96; *Comm. for Pub. Couns. Servs.*, 108 N.E.3d at 989.

<sup>229</sup> See *Comm. for Pub. Couns. Servs.*, 108 N.E.3d at 989.

<sup>230</sup> See FED. R. CIV. P. 53; THOMAS E. WILLGING, LAURAL L. HOOPER, MARIE LEARY, DEAN MILETICH, ROBERT TIMOTHY REAGAN & JOHN SHAPARD, FED. JUD. CTR., SPECIAL MASTERS' INCIDENCE AND ACTIVITY 4 (2000), <https://www.uscourts.gov/sites/default/files/specmast.pdf> [<https://perma.cc/C9AF-5MUC>] (“Modern use of special masters . . . covered a full spectrum of civil case management and fact-finding . . . . Judges appointed special masters to quell discovery disputes, address technical issues of fact, provide accountings, manage routine Title VII cases, administer class settlements, and implement and monitor consent decrees . . .”).

<sup>231</sup> See *Review Proceedings*, 40 GEO. L.J. ANN. REV. CRIM. PRO. 863, 963 (2011); *Ellis v. United States*, 313 F.3d 636, 653 (1st Cir. 2002); *Harris v. United States*,

role in identifying the cases and fashioning appropriate relief.<sup>232</sup> In the Ronald Watts scandal in Chicago, attorney Joshua Tepfer requested the appointment of a special master to carry out those tasks.<sup>233</sup> This was after several convictions had already been vacated because of the corrupt behavior of Watts and his associates.<sup>234</sup> Tepfer recalls asking himself: “How many are there? There could be 500 people. There could be more. Who knows? Let’s fix them all.”<sup>235</sup> But, as a defense attorney, he did not have “access to the data” on the scope of cases that were affected by Watts.<sup>236</sup> A special master could have demanded such data and used it to identify and fix all the cases that Watts had corrupted.<sup>237</sup> In the Watts cases, the request for a special master was withdrawn, however, because of a lack of funding.<sup>238</sup> To date, Tepfer and other attorneys have identified nearly 200 people whose convictions were affected by the misconduct of Watts and his associates.<sup>239</sup> All of Tepfer’s clients have taken the initiative to seek legal assistance.<sup>240</sup> “The one thing that I did not do in the Watts cases is go out and seek out clients,” Tepfer said.<sup>241</sup> This means that there may be people who have viable claims for postconviction relief based on Watts’s misconduct but are simply unaware that Watts’s misconduct has been exposed. In the current regime, without cop tracing, someone who does not know of Watts’s fall from grace will not know to reach out to counsel and would not be included in the relief that comes from challenging Watts’s cases. And there is currently no way to start

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367 F.3d 74, 77 (2d Cir. 2004); *Reese v. Fulcomer*, 946 F.2d 247, 263 (3d Cir. 1991); *see also* *Pennsylvania v. Finley*, 481 U.S. 551, 555-56 (1987) (holding that individuals do not have a constitutional right to counsel in appeals that are discretionary).

<sup>232</sup> *See* Petition for Appointment of a Special Master at 37-46, *In re Kalven Appointment of a Special Master* (Ill. Cir. Ct. 2016) (on file with author).

<sup>233</sup> Steve Schmadeke, *Lawyers Ask for Outside Review of Corrupt Cop’s Cases*, CHI. TRIB. (Nov. 29, 2016), <https://www.chicagotribune.com/news/breaking/ct-corrupt-chicago-cop-special-master-sought-met-20161129-story.html> [<https://perma.cc/6KSH-TXH5>].

<sup>234</sup> Gonnerman, *supra* note 115

<sup>235</sup> Mass Exoneration and Ethics Symposium, *supra* note 50.

<sup>236</sup> *Id.*

<sup>237</sup> Petition for Appointment of a Special Master, *supra* note 232.

<sup>238</sup> Mass Exoneration and Ethics Symposium, *supra* note 50. Forty-two minutes and fifteen seconds into the panel discussion on “Litigating Mass Exonerations,” Cook County prosecutor Eric Sussman and Chicago defense attorney Joshua Tepfer are asked by Barry Scheck what happened to the special master motion. *Id.* They both say that they tried to do it but could not get funding. *Id.*

<sup>239</sup> Tepfer Interview, *supra* note 86.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

with the troubled officer and trace back to identify all the cases the officer has touched.

In some instances, judges have taken it upon themselves to order tracing of sorts, without appointing special masters. Indeed, courts' supervisory powers give them broad discretion over such issues.<sup>242</sup> When questions arose about the truthfulness of former F.B.I. attorney Kevin Clinesmith, who had been involved in the surveillance of the 2016 Trump campaign, the presiding judge of the FISA court "ordered the [D]epartment [of Justice] to identify any other FISA applications that Mr. Clinesmith may have worked on. If there are any others, [the judge] said, the department or F.B.I. must explain what steps it would take to ensure every fact in them was accurate."<sup>243</sup>

In federal court in Georgia, the U.S. Attorney learned that one of his line prosecutors was having an affair with an ATF agent.<sup>244</sup> The U.S. Attorney provided the court with a list of four cases in which the prosecutor and agent had worked together.<sup>245</sup> The judges in the district ordered the prosecutor to produce a "list of all cases (identified by style, number and defense counsel) in which [the prosecutor and agent] collaborated. Such list shall be docketed in this Miscellaneous action within 15 days."<sup>246</sup> In response to the judges' order, the prosecution identified 200 cases.<sup>247</sup> A trial judge in Maine learned of an officer's disciplinary record related to dishonesty and ordered a review of all cases involving that officer.<sup>248</sup> There is no

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<sup>242</sup> See Jeffrey C. Dobbins, *The Inherent and Supervisory Power*, 54 GA. L. REV. 411, 411 (2020) ("[The supervisory power of courts] is an almost pure expression of a court's exercise of discretion in that it gives courts the ability to do 'all things reasonably necessary' for the administration of justice.").

<sup>243</sup> Charlie Savage, *Surveillance Court Orders Review of Actions by Ex-F.B.I. Lawyer*, N.Y. TIMES (Dec. 20, 2019), <https://www.nytimes.com/2019/12/20/us/politics/surveillance-court-fisa.html> [<https://perma.cc/6NH7-B5TG>].

<sup>244</sup> *In re Ippolito*, No. 2:15-mc-00002-LGW, 2015 WL 424522, at \*2 (S.D. Ga. Jan. 30, 2015).

<sup>245</sup> *Id.* at \*3.

<sup>246</sup> *Id.* at \*1.

<sup>247</sup> Jan Skutch, *Feds ID More Than 200 Cases in Which Prosecutor Collaborated with Agent with Whom She Had Affair*, FLA. TIMES-UNION (Feb. 16, 2015), <https://www.jacksonville.com/story/news/2015/02/16/feds-id-more-200-cases-which-prosecutor-collaborated-agent-whom-she/15651143007/> [<https://perma.cc/4JAQ-BX8H>].

<sup>248</sup> Lauren Abbate, *Charge Dropped Against Maine Man After Judge Questions Cop's Honesty*, BANGOR DAILY NEWS (July 27, 2018), <https://bangordailynews.com/2018/07/26/news/charge-dropped-against-maine-man-after-judge-questions-cops-honesty/> [<https://perma.cc/8XCS-YQ4D>] ("The Knox County District Attorney's Office dismissed a 5-year-old drunken driving charge against a Union man after a judge recently raised questions about the former Rockland police officer who stopped him. The charge was dismissed against Edward J. Studley on Wednesday, the same day the district attorney's office said

obvious principle for why judges ordered an account of all an officer's cases in these instances but not in others. If more judges conceived of corrupt cops as systemic threats, perhaps more judges would take action to facilitate systemic reviews and cop tracing. But the default position of judges—and doctrine—is to treat misconduct as a one-off occurrence until, and even when, evidence comes forward to suggest the taint is systemic. This insistence on case-by-case adjudication is one significant impediment to cop tracing.

### B. *Brady v. Maryland*

Even within the framework of case-by-case adjudication, legal doctrine stands in the way of cop tracing. The *Brady* doctrine would seem to hold promise for identifying the scope of an officer's misconduct across cases. Under *Brady v. Maryland* and its progeny, prosecutors have a due process obligation to disclose to the defense any favorable, material evidence that is known to any member of the prosecution team, including the police.<sup>249</sup> Favorable evidence includes exculpatory evidence and impeachment evidence.<sup>250</sup> An officer's credibility problems clearly amount to favorable evidence, as they would be helpful in impeaching his testimony at trial.<sup>251</sup> And, where the officer's credibility is reasonably likely to make a difference to the outcome of the case, that evidence would be material. In short, the prosecutor must disclose evidence of an officer's corruption and other credibility problems.<sup>252</sup> If this information is

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it would be reviewing all active and closed cases involving former Rockland police officer Jacob Shirey." (emphasis omitted)).

<sup>249</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); *Giglio v. United States*, 405 U.S. 150, 154 (1972) ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule." (citation omitted)); *Kyles v. Whitley*, 514 U.S. 419, 437–38 (1995) ("But whether the prosecutor succeeds or fails in meeting this obligation . . . the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable").

<sup>250</sup> *Cf. Kyles*, 514 U.S. at 439 (holding that due process is violated by failure to disclose exculpatory or impeachment evidence).

<sup>251</sup> *E.g., In re Grand Jury Investigation*, 152 N.E.3d 65, 75–76 (Mass. 2020); *People v. Johnson*, 377 P.3d 847, 858–861 (Cal. 2015); *Milke v. Ryan*, 711 F.3d 998, 1018–19 (9th Cir. 2013); WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, *CRIM. PROC.* § 24.3(b) (4th ed. 2015) ("The prosecution's obligation under *Brady* extends to the files of those police agencies that were responsible for the primary investigation in the case.").

<sup>252</sup> *See Johnson*, 373 P.3d at 855 ("For *Brady* purposes, evidence is material if it is reasonably probable its disclosure would alter the outcome of trial.").



not disclosed, the conviction can be vacated as a violation of due process.<sup>253</sup>

But the trouble with using *Brady* for cop tracing is largely a matter of timing. For *Brady* to kick in, the favorable and material evidence must have been known to some member of the prosecution team at the time of trial.<sup>254</sup> If the evidence came to the attention of the prosecution after trial, it does not fit within the rubric of *Brady*.<sup>255</sup> This timing issue is particularly problematic for cop tracing because it means that there might be no *Brady* violation when a long-serving detective, like Golubski or Dillman or Scarcella, is discredited at the tail end of his career. The *Brady* analysis comes down to who knew what and when. For each defendant who was convicted based on that officer's testimony, there would be a *Brady* violation only if it could be shown that some member of the prosecution team knew of the officer's corruption *at the time of trial*.

There is some play in the joints when it comes to the timing of a *Brady* violation. The most aggressive position, from a defense perspective, maintains that the corrupt officer knew of his own corruption and, because he is a member of the prosecution team, his knowledge of his own misconduct must be imputed to the prosecutor. Even if the prosecutor lacks actual knowledge of the information, *Brady* still requires the prosecutor to learn of and disclose anything known to any member of the prosecution team, including the police. Any conviction that resulted after the officer's first corrupt act would, thus, be subject to *Brady* because of the officer's knowledge of his own

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<sup>253</sup> *Brady*, 373 U.S. at 87.

<sup>254</sup> *Kyles*, 514 U.S. at 437-38 (“[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.”).

<sup>255</sup> However, the Supreme Court left open the possibility that the suppression of such information could violate an as-yet-unspecified aspect of due process. Dist. Att’y’s Off. for Third Jud. Dist. v. Osborne, 557 U.S. 52, 68 (2009) (rejecting “Ninth Circuit precedent applying ‘*Brady* as a post-conviction right,’ . . . . Osborne does not claim that *Brady* controls this case and with good reason.” (internal citations omitted)). BRIAN R. MEANS, POSTCONVICTION REMEDIES § 36:5 (2021) (“The Supreme Court in *District Attorney’s Office for the Third Judicial District v. Osborne* ruled that *Brady* does not apply after the defendant is convicted and the case is closed. After this point, the petitioner must allege that he has a substantive right to postconviction relief under state law, and that the state’s postconviction relief procedures ‘are fundamentally inadequate to vindicate’ that right.” (internal citations omitted)). *But see* Scheck, *supra* note 45, at 749 (“In short, the *Osborne* decision has been mistakenly described by some as confirmation of the assumption that neither the *Brady* obligation to disclose exculpatory evidence, nor the prohibition in *Arizona v. Youngblood* not to destroy potentially exculpatory evidence in bad faith, nor even the ‘assumed’ right to prove actual innocence, survives at all after conviction.” (internal citations omitted)).

misconduct. This position is logical enough, but it has yet to be embraced by the handful of courts that have considered it.<sup>256</sup>

Other efforts to extend *Brady's* timing backward might look at when the corruption was first reported to internal affairs or when other colleagues knew about the misconduct. Under this interpretation of *Brady*, if the officer's first corrupt act was in 2000, and internal affairs first learned about it in 2005, then a defendant who is convicted in 2002 would not have a *Brady* claim—because the information was not known to a member of the prosecution team at the time of trial. But a defendant convicted in 2006 would have a *Brady* claim.

The narrowest view of *Brady's* timing requirement is that the *Brady* duty to disclose applies only to cases that were tried after there was an official finding regarding the officer's misconduct, be it from internal affairs, a criminal prosecution, or the grant of habeas to another prisoner. If internal affairs first began investigating the corruption in 2005 but did not conclude the investigation until 2007, then only defendants convicted in 2007 or after would be able to bring *Brady* claims about the information.

Under any of these interpretations, *Brady's* timing limitations can make it more difficult to carry out cop tracing. Even if all the officer's cases can be identified, many of them might be too old to trigger a *Brady* claim. No matter how concerning the officer's behavior, there cannot be a *Brady* violation if, at the time of trial, the misconduct had not yet occurred and had not yet been detected by the prosecution team.

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<sup>256</sup> See *United States v. Robinson*, 627 F.3d 941, 951–52 (4th Cir. 2010) (“Because the dismissed officers obviously knew about their own misconduct and because they were working on the government’s behalf, Robinson argues the prosecution violated its duty to disclose those improprieties even though no prosecutor actually knew about them. Whatever the proper scope of *Brady's* imputed knowledge doctrine, it cannot be this broad.”); *United States v. Robinson*, 809 F.3d 991, 996 (8th Cir. 2016) (“[W]hen the evidence at issue is misconduct by a government witness, and that misconduct is unrelated to the investigation or prosecution of the defendant, is known only to the witness himself, and could not have been discovered by the prosecutor through the exercise of reasonable diligence, we are reluctant to conclude that such evidence should be imputed to the prosecutor.”). But see *Robinson*, 809 F.3d at 1004 (Kelly, J., concurring in part and dissenting in part) (“That Detective Weaver might have to incriminate himself in order to satisfy *Brady* presents a dilemma for Detective Weaver. But the *Brady* regime is no-fault, and focuses on assur[ing] the defendant a fair trial, not on assessing the culpability of the prosecutor.” (alterations in original) (internal quotation marks and citations omitted)).

### C. New Evidence in Habeas Petitions

Rules governing second or successive petitions also stand to impede cop tracing. Second or successive petitions are post-conviction challenges that occur after the inmate has already lost a first round of habeas litigation. Sometimes, years after that initial round of habeas challenges, an inmate may learn of some new evidence that calls the conviction or sentence into question. Cop tracing might lead to exactly such a situation. In those situations in which it takes years or decades for an officer's corruption to come to light, there may be numerous prisoners who have already lost in their initial round of habeas litigation and, thus, must turn to second or successive petitions to raise claims related to the officer's role in their convictions. But, in many jurisdictions, the inmates would not even be allowed to file these successive petitions because of legal limitations on what counts as "new evidence." In many jurisdictions, including the federal system, a petitioner is not allowed to even file a successive habeas petition without first getting permission from the court.<sup>257</sup> One of the primary justifications for filing a second or successive petition is the discovery of "new evidence." But, in thirty states and the District of Columbia, "new evidence" is defined in a way that excludes evidence that is "merely . . . impeachment evidence."<sup>258</sup> In other words, if the evidence is "merely" impeaching—no matter how much it devalues the officer's credibility—it will not qualify as grounds for a second or successive habeas petition. By contrast, if the new evidence is a statement by a witness who claims to have seen someone else commit the crime or, if the new evidence is a change in the state of the forensic science that led to the conviction, those types of new evidence count as grounds for filing a second or successive habeas petition. This second-class status for "mere" impeachment evidence is one of the ways that doctrine serves to minimize the legal relevance of police misconduct. In other words, a detective's conviction for perjury or other corruption charges might be deemed "mere impeachment" evidence and, thus, not suitable grounds for filing a successive habeas petition, even if the inmate's convic-

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<sup>257</sup> See 28 U.S.C. § 2244(b)(3).

<sup>258</sup> See Justin Brooks, Alexander Simpson & Paige Kaneb, *If Hindsight Is 20/20, Our Justice System Should Not Be Blind to New Evidence of Innocence: A Survey of Post-Conviction New Evidence Statutes and a Proposed Model*, 79 ALB. L. REV. 1045, 1075–1077, 1089 (2016).

tion depended entirely on the credibility of the now-discredited officer.<sup>259</sup>

As with everything, there are exceptions. In Illinois, the police torture scandal involving former Chicago police commander Jon Burge led to an easing of the restrictions on new evidence.<sup>260</sup> A prisoner in Illinois can now bring a successive habeas petition based on newly discovered evidence of the officer's misconduct, if he can show that the officer engaged in a "pattern and practice" of such misconduct.<sup>261</sup> In New York, the egregiousness of Detective Scarcella's conduct and the resulting scandal led courts to ease the restrictions on new impeachment evidence.<sup>262</sup> The court found the statutory bar on using this type of impeachment evidence to be merely prudential, not jurisdictional.<sup>263</sup> In general, though, the law's approach to "new evidence" claims serves to minimize the legal relevance of police misconduct evidence. It is another way in which legal doctrine makes it harder to treat police misconduct systemically.

#### D. Protective Orders

Protective orders are still another example of the doctrinal impediments to cop tracing—to making connections among an officer's many cases. Cop tracing stands at the triple point of criminal law, habeas corpus, and civil rights litigation. As a result of these different procedural postures, litigants have an opportunity for a sort of discovery arbitrage. The same person

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<sup>259</sup> See *U.S. v. Isaacs*, 08-CR-011-GKF, 2010 BL 259406, at \*2 (N.D. Okla., Nov. 2, 2010) (noting in Tulsa case that "[§ 2255 motions] are typically unsuccessful when the only new evidence raised is impeachment evidence, and not evidence that goes directly to innocence or guilt"); *U.S. v. Ravellette*, No. 08-CR-119-GKF, 2010 BL 291056, at \*2 (N.D. Okla., Dec. 8, 2010) (same).

<sup>260</sup> *E.g.*, Sam Charles, *New 'Chicago Police Torture Archive' Details Acts of Jon Burge and Underlings*, CHI. SUN-TIMES, (Feb. 3, 2021), <https://chicago.suntimes.com/2021/2/3/22263444/new-chicago-police-torture-archive-details-acts-of-jon-burge-and-underlings> [<https://perma.cc/5WH6-627R>].

<sup>261</sup> *People v. Jackson*, 2021 IL 124818, ¶ 34 ("[T]he critical inquiry is simply whether there is sufficient similarity between the misconduct at issue in the present case and the misconduct shown in other cases, such that it may fairly be said the officers were acting in conformity with a pattern and practice of behavior."); *People v. Patterson*, 735 N.E.2d 616, 642–43 (Ill. 2000) ("[A] series of incidents spanning several years can be relevant to establishing a claim of a pattern and practice of torture.");

<sup>262</sup> *People v. Hargrove*, 75 N.Y.S.3d 551, 576 (N.Y. App. Div. 2018) ("[A] strict application of the not merely impeaching or contradicting criterion would subvert the overall purpose of the statute and render its remedial purpose illusory." (internal quotation marks and citations omitted and alterations adopted)); see *infra* subpart I.B (discussing Louis Scarcella scandal).

<sup>263</sup> *Hargrove*, 75 N.Y.S.3d at 576.

may wind up litigating an officer's corruption in all three procedural postures: first as a criminal defendant, then as a habeas petitioner, and, finally, as a civil rights plaintiff. Each procedural posture has different discovery rules. Litigants in federal civil rights suits can obtain far more information through discovery than litigants in criminal or habeas corpus proceedings can. Sometimes, what the civil litigant learns in one case can be extremely useful to criminal defendants or habeas corpus petitioners in other cases, especially where they all share the same police officer in common. There is, thus, the potential to use the strength of civil discovery in one case to offset the weakness of criminal and habeas discovery in other cases. Or, at least there could be an opportunity to make these case-to-case connections, if stringent protective orders did not stand in the way.

Protective orders severely limit the ability of civil litigants to share what they learn in discovery with criminal defendants and habeas petitioners whose cases depend on learning this information. This is more than a theoretical concern. When a prisoner is exonerated, that prisoner will often bring a civil rights lawsuit. In that suit, information is uncovered that could set other prisoners free—but not if those other prisoners are prevented from learning about it. What follows are a few illustrations where civil litigation in one case turned up information that led to the exoneration of others who shared officers in common. Protective orders in these cases nearly prevented exonerations from occurring.

Let's start in Philadelphia. In 2016, after more than two decades in prison, Anthony Wright was exonerated of the murder and rape of an elderly woman.<sup>264</sup> Wright filed a civil rights lawsuit alleging that Philadelphia police detectives Martin Devlin and Paul Worrell, among others, had fabricated incriminating evidence, suppressed exculpatory evidence, and carried out other illegal acts.<sup>265</sup> Wright sought discovery of the investiga-

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<sup>264</sup> Wright v. City of Phila., 229 F. Supp. 3d 322, 325 (E.D. Pa. 2017); Joseph A. Slobodzian & Tommy Rowan, *25 Years Later, Freed by DNA Evidence: It's the Greatest Day of My Life*, PHILA. INQUIRER, (Aug. 23, 2016), [https://www.inquirer.com/philly/news/20160824\\_Philly\\_jury\\_deliberating\\_in\\_retrial\\_of\\_91\\_rape\\_murder\\_of\\_Nicetown\\_woman\\_77.html](https://www.inquirer.com/philly/news/20160824_Philly_jury_deliberating_in_retrial_of_91_rape_murder_of_Nicetown_woman_77.html) [<https://perma.cc/3VW4-XQ2R>].

<sup>265</sup> Slobodzian & Rowan, *supra* note 264 ("Wright, who again testified in his defense, denied confessing to the rape and murder, and said he was berated by detectives for about four hours before he was told he could go home if he signed some documents. He said he did so without reading them."); Chris Palmer & Jeremy Roebuck, *Could One Philly Man's Exoneration Prompt Larry Krasner to Examine Other Decades-Old Murders?*, PHILA. INQUIRER (Feb. 16, 2018), <https://www.inquirer.com/philly/news/crime/conviction-review-philly-da-krasner->

tive files from eight other homicides that had been investigated at about the same time. He needed this material from other cases, he said, to determine whether there was a pattern or practice of failing to disclose *Brady* material.<sup>266</sup> In federal civil rights cases, a plaintiff can show that a municipality is liable for its agents' actions if the plaintiff shows a pattern or practice of misconduct.<sup>267</sup> To prove this *Monell* theory of liability, Wright's attorneys sought to compare what was turned over to them in civil discovery about these eight cases with what had been turned over to these eight defendants in their own respective criminal cases. If it turned out that there was important evidence in the civil discovery that was not disclosed to the other defendants in their criminal cases, Wright would be able to show a pattern or practice of *Brady* violations.

In response to Wright's discovery request, the City of Philadelphia turned over more than 10,000 pages of records.<sup>268</sup> Wright then shared that civil discovery with the habeas attorneys for the eight men whose cases were contained in the files. The justification for the sharing was that the attorneys for

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anthony-wright-patricia-cummings-20180216.html-2 [https://perma.cc/AFT7-6Y54].

<sup>266</sup> Similar discovery requests have been made in other civil rights cases, including exonerees Reginald Adams in New Orleans and Keith Cooper in Indiana. Plaintiff's Second Motion to Compel Discovery from Defendant Leon Cannizzaro, Jr. at 11 n.5, *Adams v. City of New Orleans*, No. 2:15-cv-01543-SM-DEK (E.D. La. Oct. 7, 2016) ("Produce all files and other documents in Your possession related to the investigation or prosecution of the cases identified in paragraphs 171-84, 203-06, 210-12 in the Amended Complaint and any documents in Your possession related to lawsuits, complaints, or reports identified in response to Interrogatory No. 4."); Plaintiff's Response to Non-Party's Motion to Quash at 5, *Cooper v. Elkhart*, No. 17-CV-834 (N.D. Ind. Oct. 4, 2018), 2018 WL 7458110 ("Plaintiff has the EPD files for the criminal investigations that led to each of the prosecutions identified in requests 14 through 17. Plaintiff sought the companion prosecutor's files so he can compare the two files and determine whether all of the police information and attendant documents were disclosed to the prosecutor. In short, whether there was a *Brady* violation committed in those cases—the exact requirement that *Connick* imposes on practice-related *Monell* claims."); cf. *Prince v. Kato*, No. C 2952, 2020 U.S. Dist. LEXIS 65981, at \*13 (N.D. Ill. Apr. 15, 2020) (discussing the need for and limits on *Monell* discovery related to hundreds of old homicide files: "[T]he City is concerned that the production of homicide files will open discovery on many or all of these homicides, which will involve documents being produced from the Cook County State's Attorney's Office, from former defense lawyers for those convicted defendants and other relevant parties, combined with depositions on these homicides to re-create events that occurred over 20 years ago, along with rebuttal discovery from the City to disprove Plaintiff's allegations of misconduct in those cases. While this exact issue is not presently before the Court, the Court will be reluctant to permit wide-ranging discovery into hundreds of old homicide cases.").

<sup>267</sup> See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978).

<sup>268</sup> *Palmer & Roebuck*, *supra* note 265.

these other defendants would be the ones best placed to know whether anything important was in the civil discovery that had not been turned over to the men at their respective trials. Using this newly disclosed information from Wright's civil case, three of these prisoners—Andrew Swainson, Willie Veasy, and Walter Ogrod—were able to file habeas petitions that led to their exonerations.<sup>269</sup> All of these cases involved detectives Devlin and Worrell. It was an example of how the act of unearthing records in one case could have a ripple effect on other cases handled by those same officers.

From one perspective, the Wright story is a successful application of cop tracing. Problematic officers were identified. Several of their other cases were examined. A cluster of exonerations emerged. Devlin and Worrell, the lead detectives, have now been linked to seven wrongful convictions across six different cases.<sup>270</sup> That is a lot in absolute terms, though it may be just the tip of the iceberg, considering that Devlin worked on more than 500 homicide cases in his time as a Philadelphia detective.<sup>271</sup> That's the optimistic perspective.

From another perspective, however, the Wright story is far less hopeful. Though Wright's civil discovery efforts led to the exonerations of three other men, the only reason that Wright was allowed to share the confidential homicide files was that the city's attorneys failed, when they turned them over in discovery, to mark the documents as confidential.<sup>272</sup> Had the attorneys marked the documents as confidential, the materials

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<sup>269</sup> See *id.*; Samantha Melamed & Chris Palmer, *Three Ex-Philly Homicide Detectives Charged with Perjury for Their Testimony During the Retrial of an Innocent Man*, PHILA. INQUIRER (Aug. 13, 2021), <https://www.inquirer.com/news/philadelphia-homicide-detectives-perjury-devlin-santiago-jastrzembski-20210813.html> [<https://perma.cc/75UV-L5ZG>].

<sup>270</sup> Complaint at 11–15, *Veasy v. City of Phila.*, No. 2:20-cv-05107-PBT (E.D. Pa. Oct. 15, 2020) (listing wrongfully convicted defendants in which Devlin or Worrell allegedly committed misconduct: Anthony Wright, Andrew Swainson, Walter Ogrod, Shaurn Thomas and Mustafa Thomas, Carlos Hernandez Tonez, Jackie Combs Jr., Percy St. George, and James Dennis).

<sup>271</sup> Deposition of Martin Devlin at 66, 103-05, *Thomas v. City of Phila.*, No. 2:17-cv-04196-GEKP (April 25, 2019) (noting his caseload in homicide unit and that he served in homicide unit from roughly 1987 through 1994); see Samantha Melamed, *The Case That Collapsed*, PHILA. INQUIRER (Oct. 15, 2021), <https://www.inquirer.com/news/a/anthony-wright-philadelphia-homicide-detective-murder-convictions-20211014.html> [<https://perma.cc/GV27-BVDA>] (“In depositions, Devlin, Santiago, and Jastrzembski each said they worked on around a thousand homicide investigations during their careers.”).

<sup>272</sup> *Wright v. City of Phila.*, No. 16-5020, 2017 U.S. Dist. LEXIS 134791, at \*3 (E.D. Pa. Aug. 21, 2017) (“Defendants, in consultation with the DAO, produced six of the requested files in March 2017. Defendants did not mark the produced Homicide Files confidential.”).

likely would have been subject to the strict protective order in the case, and that would have prevented them from being shared with anyone. Indeed, when the city learned of its error, it sought to retroactively designate the documents as confidential.<sup>273</sup> The Philadelphia District Attorney's Office intervened in the civil proceeding to demand that the judge order the other habeas petitioners to return the documents.<sup>274</sup> Prosecutors claimed that Wright and the habeas petitioners had used civil discovery to make an "end-run" around the strict limitations on discovery in postconviction cases.<sup>275</sup> These prisoners obtained records through the powers of civil discovery that they never could have received under the habeas discovery provisions, the prosecutors alleged. In the end, the judge overseeing Wright's civil case refused to claw back the information.<sup>276</sup> But it is sobering to think that the exonerations that came out of Wright's case might never have happened if only the city's attorneys had properly marked the documents confidential<sup>277</sup>

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<sup>273</sup> *Id.* at \*7.

<sup>274</sup> *Id.* at \*8.

<sup>275</sup> *Wright v. City of Phila.*, No. 16-5020, 2017 U.S. Dist. LEXIS 190994, at \*8 (E.D. Pa. Nov. 20, 2017) ("The defendants and the District Attorney's Office argue that disclosing the homicide files will allow groups like the Innocence Project to circumvent the strict discovery rules in the Pennsylvania Post Conviction Relief Act. They argue that this end-run usurps the Commonwealth's right to determine its own procedures for postconviction review." (internal quotation marks omitted)).

<sup>276</sup> *Id.* at \*17.

<sup>277</sup> A similar story played out in Chicago with the exoneration of Nathson Fields and the review of hundreds of "street files" from decades of murder convictions. Only after repeated efforts and a second trial were civil rights and habeas petitioners allowed access to the Brady-rich files being maintained in twenty-three filing cabinets in the basement of a Chicago police precinct. Rob Warden, *Nathson Edgar Fields*, NAT'L REGISTRY OF EXONERATIONS (Jan. 3, 2018), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3215> [https://perma.cc/FGC2-DD2C]; Jason Meisner, *Old Police 'Street Files' Raise Question: Did Chicago Cops Hide Evidence?*, CHI. TRIB. (Feb. 13, 2016), <https://www.chicagotribune.com/news/ct-chicago-police-street-files-met-20160212-story.html> [https://perma.cc/YL5B-K3Z4]; *People v. Banks*, 2020 IL App (1st) 180322-U, ¶ 7 ("Gorman wrote to the defendant and informed him of the existence of the street file. She could not share the file directly with the defendant because of a court order, so she asked the defendant for the contact information for his current or previous attorney with whom she could share the file."). Efforts were made to review other filing cabinets that were discovered in Chicago. Jason Meisner, *Attorneys Want to Take Part in Review of Old Homicide Files*, CAPITAL GAZETTE (June 26, 2014), <https://www.capitalgazette.com/chi-attorneys-want-to-take-part-in-review-of-old-homicide-files-20140626-story.html> [https://perma.cc/CQ29-NNC8] ("Rivera's attorney, Jon Loevy, has been trying to gain access to a dozen filing cabinets housed in a first-floor storage room at the detective headquarters at Grand and Central avenues. Earlier this year, Loevy asked U.S. Magistrate Judge Mary Rowland to order Area North detectives to leave the filing cabinets untouched until she can decide if he should be allowed to inventory



One thing more must be said about the ripples emanating outward from Wright's case. In August 2021, Devlin and two other detectives were charged with perjury in connection with Wright's prosecution.<sup>278</sup> But even those perjury charges did not prompt the district attorney's office to carry out a full tracing of Devlin's prior cases. According to a news account, the head of the Conviction Integrity Unit in the Philadelphia District Attorney's Office "said her office has not undertaken a complete review of all the three detectives' cases."<sup>279</sup> The news account added that "[i]t's not even clear how many more cases handled by the same detectives are fraught with similar allegations."<sup>280</sup> This is why cop tracing is needed. Without the imperative to carry out cop tracing, even a perjury charge is not enough to trigger a full accounting of the work of a detective who has already been connected to multiple wrongful convictions and is known to have handled more than 500 cases in the course of his career.

A chilling case from Chicago provides another illustration of how protective orders impede efforts to make connections among an officer's cases. Demetrius Johnson was charged with murder when he was just fifteen. He denied any involvement in the murder, and five alibi witnesses testified that he was at home watching the Chicago Bulls win the 1991 championship at the time of the murder.<sup>281</sup> But Detective Reynaldo

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them himself."). See Jason Meisner, *Inmate for 15 Years Freed After Conviction Tossed in Chicago Killing*, CHI. TRIB. (Oct. 4, 2016), <https://www.chicagotribune.com/news/breaking/ct-murder-charges-dropped-mcintosh-met-20161004-story.html> [<https://perma.cc/5BUD-G5VQ>] ("McIntosh's murder case was identified as one of hundreds of so-called 'street files' found in old filing cabinets in the basement of the Area Central police station, files that are now at the center of a federal lawsuit alleging police routinely buried information about homicide investigations that could have helped defense attorneys prepare for trial."); see also Maurice Possley, *Norman McIntosh*, NAT'L REGISTRY OF EXONERATIONS (July 24, 2019), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5002> [<https://perma.cc/43JA-XTZZ>] ("Blagg discovered that the detectives had been accused of similar manipulative lineup tactics in two other homicide cases and they had been sued for engaging in similar conduct in yet other cases. One of the detectives had since been fired after a photograph surfaced of the officer holding a shotgun while standing over a black suspect wearing antlers. Another detective in the case had since been sent to prison for killing two people while driving drunk.").

<sup>278</sup> Melamed & Palmer, *supra* note 269.

<sup>279</sup> Melamed, *supra* note 271.

<sup>280</sup> *Id.*

<sup>281</sup> Megan Crepeau & Elvia Malagón, *Prosecutors Drop Case Against Man Who Said Chicago Police Detective Framed Him for 1991 Murder. 'I'm Trying to Find My Mind Right Now,'* CHI. TRIB. (Dec. 20, 2019), <https://www.chicagotribune.com/news/ct-demetrius-johnson-reynaldo-guevara-chicago-20191220-fzqlq5oninepfcy7e6kqmzmqt4-story.html> [<https://perma.cc/U3BB-76ZD>].

Guevara—a detective now associated with twenty wrongful convictions—apparently pressured a witness to falsely identify Johnson as the shooter.<sup>282</sup> Johnson was convicted and sentenced to twenty-five years in prison. All the while, a police report existed that showed that an eyewitness excluded Johnson as the shooter. That critical piece of exculpatory information was discovered years after Johnson’s conviction in a civil suit brought by a different exoneree, Jacques Rivera, against Detective Guevara and the Chicago Police Department.<sup>283</sup> Rivera’s civil attorneys came across the police report in civil discovery, but they were prevented from sharing this evidence with Demetrius Johnson because the report was subject to a strict protective order. The exculpatory evidence became public only when Jacques Rivera’s case against Guevara went to trial and the document was put into evidence as an exhibit.<sup>284</sup> At that point, Rivera’s attorneys shared the evidence with Johnson, who quickly filed a successful petition vacating his wrongful conviction. Had the Rivera case settled rather than going to trial, Demetrius Johnson might never have learned about this exonerating information, because it would have still been subject to the strict protective order. Like the Wright case in Philadelphia, the Demetrius Johnson case in Chicago is an example of how discovery from one case can prove critically important to litigants in other cases. And, as with the Wright case, Johnson’s story provides an illustration of how protective orders stand in the way of critical efforts to make connections among cases—even when the evidence being protected from disclosure might show the actual innocence of a prisoner in another case.

Worse still, protective orders in civil rights cases create perverse incentives that prevent connections from being made across cases. A civil rights litigant may have little to gain personally from fighting a protective order. As long as the plaintiff

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<sup>282</sup> *Id.*

<sup>283</sup> Petition for Relief from Judgment Pursuant to 735 ILCS 5/2-1401 at 4, *People v. Johnson*, No. 91 CR 19833 (Ill. Cir. Ct. Sept. 11, 2019); see Stefano Esposito, *Man Wants His Name Cleared in Murder Case Involving Former CPD Det. Reynaldo Guevara*, CHI. SUN-TIMES (Sept. 18, 2019), <https://chicago.suntimes.com/news/2019/9/18/20872620/reynaldo-guevara-chicago-police-corruption-demetrius-johnson-wrongful-conviction> [https://perma.cc/2PQW-APYC].

<sup>284</sup> Petition for Relief from Judgment Pursuant to 735 ILCS 5/2-1401, *supra* note 283, at 4 n.3 (“The exhibit is marked ‘Confidential pursuant to protective order entered in 12 C 4428’ and remained under protective order for some time. However, it was made public when entered into evidence at Jacques Rivera’s trial as Pl. Ex. 154P. As of that date, it became a public document.”).

is getting the discovery he wants, it does not matter to *his* case whether he is allowed to share that discovery with others. As a result, there may be little incentive for an exoneree-turned-civil-litigant to push back on a restrictive protective order. By contrast, the protective order matters quite a lot to the state. By asking plaintiffs to sign restrictive protective orders, the state is preventing clusters of examinations from being discovered—the state is preventing another case like Anthony Wright’s from turning into multiple exonerations. This, in turn, limits the risk of upsetting the prosecution’s hard-fought convictions.

With a strong protective order in place, the only way the discovery will become public is if the case goes to trial. And, given the government’s incentives to settle, it may be that the cases with the most egregious police misconduct are the ones that are least likely to go to trial. In that way, the use of protective orders may be systematically impeding the dissemination of information about the most egregious examples of police abuse. This is yet another example of how the law operates to prevent connections from being made among a cop’s many cases.

The protective orders also serve the government’s financial interests. The more exonerations come to light, the more civil suits the city will face. And it is not just the number of suits. If an exoneration cluster emerges, it becomes easier for each plaintiff to allege a pattern or practice claim under *Monell*. This financial incentive can hardly be ignored in considering why the data needed for cop tracing is so hard to come by.

## V

### IMPLICATIONS

Cop tracing offers concrete benefits to the wrongfully convicted and to society at large. It also serves to illustrate some of the fundamental flaws in the way the criminal justice system conceives of police misconduct. This final Part explores the implications of cop tracing.

#### A. Conceptualizing Police Misconduct Systemically

Too often, the criminal justice system fails to recognize that even a single corrupt cop is a systemic problem. Each officer may work on hundreds, if not thousands, of cases over the course of a career. When an officer is discredited, there should be a presumption that the officer’s corruption has spread beyond the single case in which it was detected. At present, no

such presumption exists. Even where it is known that an officer has worked on hundreds of cases, the system presumes that any misconduct is episodic, limited to the case or two where it has been discovered. This presumption should be reversed. Indeed, the presumption that a corrupt cop's misconduct is episodic stands in sharp contrast to the assumptions made about the misconduct of other types of serial witnesses: paid informants, lab technicians, and forensic experts. When those types of serial witnesses are discovered to be corrupt, there are systemic efforts to identify the extent of their corruption. Quite simply, corrupt police officers should be treated like these other types of serial witnesses.

Like police officers, paid informants appear in lots of cases. Like police officers, paid informants are compensated for testifying. Unlike with officers, however, when an informant is discovered to be dishonest, there are mechanisms in place to seek out the other cases the informant has worked on.

Informant tracing has been instituted in a way that cop tracing has not. For example, seven states—Texas,<sup>285</sup> Florida,<sup>286</sup> Illinois,<sup>287</sup> Connecticut,<sup>288</sup> Maryland,<sup>289</sup> Oklahoma,<sup>290</sup> and Nebraska<sup>291</sup>—have passed legislation in recent years re-

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<sup>285</sup> TEX. CODE CRIM. PROC. ANN. art. 39.14 (West 2017) (requiring disclosure of “information concerning other criminal cases in which the person has testified, or offered to testify, against a defendant with whom the person was imprisoned or confined”).

<sup>286</sup> FLA. R. CRIM. P. 3.220(b)(1)(M)(i)-(v) (requiring disclosure of “the informant witness’ prior history of cooperation, in return for any benefit, as known to the prosecutor”).

<sup>287</sup> 725 ILL. COMP. STAT. ANN. 5/115-21(c)(6) (West 2019) (requiring disclosure of “other cases in which the informant testified, provided that the existence of such testimony can be ascertained through reasonable inquiry”).

<sup>288</sup> CONN. GEN. STAT. ANN. § 54-86o(a)(5) (West 2019) (“Information concerning any other criminal prosecution in which the jailhouse witness testified, or offered to testify, against a person suspected as the perpetrator of an offense or defendant with whom the jailhouse witness was imprisoned or otherwise confined, including any cooperation agreement with a prosecutorial official or any benefit provided or offered to such witness by a prosecutorial official.”).

<sup>289</sup> MD. CODE ANN., CTS. & JUD. PROC. § 10-924(d)(1)(iii) (West 2020) (“Other cases in which the in-custody witness testified, provided that the testimony can be ascertained through reasonable inquiry . . .”).

<sup>290</sup> OKLA. STAT. ANN. tit. 22, § 2002(A)(4) (West 2020) (requiring disclosure to defense of “all other filed cases in which the state intended to introduce the testimony of the jailhouse informant in connection with a deal, promise, inducement or benefit, the nature of the deal, promise, inducement or benefit, and whether the testimony was admitted in the case”).

<sup>291</sup> NEB. REV. STAT. ANN. § 29-4704(1)(d) (West 2021) (requiring disclosure of “[t]he case name and jurisdiction of any criminal case known to the prosecutor in which the jailhouse informant testified or a prosecutor intended to have the jailhouse informant testify about statements made by another suspect or criminal defendant that were disclosed to the jailhouse informant and whether the jail-

quiring prosecutors to disclose to the defense all cases in which the particular paid informant has participated over the years. Connecticut and Maryland have even created centralized databases to track informants' information across the entire state.<sup>292</sup> These efforts at informant tracing are what would be required in a cop tracing regime. The need for informant tracing arose from the realization that even a single dishonest informant can cause a systemic problem. In a number of high-profile cases, a corrupt informant has been linked to dozens or even hundreds of cases.<sup>293</sup> It, thus, became impossible for

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house informant requested, was offered, or received any benefit in exchange for or subsequent to such testimony”).

<sup>292</sup> See Dave Collins, *Lying Prisoners: New Laws Crack Down on Jailhouse Informants*, ASSOCIATED PRESS (Sept. 14, 2019), <https://apnews.com/article/9f8858ef3bf4965874d314ce41ec69c> [<https://perma.cc/NBY3-LXLR>]; MD. CODE ANN., CTS. & JUD. PROC. § 10-924(b)(1) (West 2020) (describing disclosure requirements regarding in-custody informants and creating centralized repository to store information).

<sup>293</sup> See, e.g., Josh Meyer, *An Undercover Informant Comes Under Suspicion*, L.A. TIMES (Mar. 5, 2000), <https://www.latimes.com/archives/la-xpm-2000-mar-05-mn-5611-story.html> [<https://perma.cc/97MF-2KHG>] (chronicling the Andrew Chambers cases); Pamela Colloff, *How This Con Man's Wild Testimony Sent Dozens to Jail, and 4 to Death Row*, N.Y. TIMES MAG. (Dec. 4, 2019), <https://www.nytimes.com/2019/12/04/magazine/jailhouse-informant.html> [<https://perma.cc/CD6T-K8H8>] (explaining the story of Paul Skalnik—a paid informant with benefits who convicted thirty-four defendants in unrelated cases—who was eventually tracked down by NYT/ProPublica and a capital habeas counsel, probably thanks to Florida's exceptional records laws; notice that there is no clean-up investigation and no task force to do contact tracing); Erik Lillquist, *Improving Accuracy in Criminal Cases*, 41 U. RICH. L. REV. 897, 922 (2007) (“An additional piece of information that should be disclosed is the informant’s testimonial history. As the case of Leslie Vernon White illustrates, the most doubt-inducing informants are those who have repeatedly been the recipients of confessions by other inmates. In a sense, the logic here is akin to the doctrine of chances in evidence; after a certain number of occasions, it becomes completely implausible that it is mere coincidence that the informant has been the recipient of a confession. It is, rather, more likely that the informant is doing something to help create those confessions. Therefore, disclosing such information and allowing defense counsel to use such information should hopefully have the effect of reducing the probative value of such testimony in the very case in which it is the least reliable—where the informant has testified before.” (internal citations omitted); Bob Herbert, *In America; Justice Confounded*, N.Y. TIMES (Dec. 31, 1998), <https://www.nytimes.com/1998/12/31/opinion/in-america-justice-confounded.html> [<https://perma.cc/H2E7-EDJR>] (describing the dishonest informant Dana Garner, who testified in two unrelated murder convictions a week apart); Jim Dwyer, *Ex-Officer Off Tough Beat Seeks to Free the Innocent*, N.Y. TIMES (June 10, 2001), <https://www.nytimes.com/2001/06/10/nyregion/ex-officer-off-tough-beat-seeks-to-free-the-innocent.html> [<https://perma.cc/49E7-9D2X>] (“In three separate cases, men were arrested and convicted on the word of an informant, Dana Garner, developed by Mr. Race in his police days. Two of those people have been exonerated and sent home from prison. All parties now accept that the informant fabricated his testimony; only the source of Mr. Garner’s knowledge of the cases is in dispute.”); Maurice Possley, *John Nolley*, NAT’L REGISTRY OF EXONERATIONS

some legislators to ignore systemic threat posed by even a single corrupt informant. Local authorities have also implemented informant tracing policies and databases to identify the universe of cases associated with paid informants.<sup>294</sup> These reforms are comparable to what would be required by cop tracing: a mechanism to track and investigate the taint of a single officer's actions on the entire court system.<sup>295</sup>

Crime lab technicians and forensic experts provide further examples of how the justice system is willing to treat some types of serial witnesses as systemic problems. When a lab technician or forensic expert is discovered to be corrupt, there seems to be a willingness to think about the systemic dimensions of this corruption. This is, again, in contrast to how a police officer's corruption is perceived. Public debate and discussion of a crime lab error will frequently employ the rhetoric of "scandal," that is, of a harm that goes beyond a single case.<sup>296</sup> When a lab technician is found to have stolen drugs

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(Jan. 30, 2020), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5386> [<https://perma.cc/3JZ9-YRWQ>] ("O'Brien also testified that he had never been an informant for the prosecution in any other case—indeed, that he had not even offered to act as an informant before. . . . The prosecution also discovered a trove of documents and records that had not been disclosed to Nolley's trial defense lawyer. The records showed that O'Brien had lied when he said he had never been an informant before—he had done so in another murder case. Moreover, the trial prosecutor, James Cook, knew of O'Brien's involvement and knew about favorable treatment conferred on O'Brien for his testimony.").

<sup>294</sup> See REPORT OF THE 1989-90 LOS ANGELES COUNTY GRAND JURY 149 ("The District Attorney's Office should maintain a central file which contains all relevant information regarding the informant. As a minimum, the file should include information regarding the number of times the informant has testified or offered information in the past and all benefits which have been obtained."); see also Stephanos Bibas, Jennifer Blasser, Keith A. Findley, Jennifer E. Laurin, Cookie Ridolfi & Ronald F. Wright, *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 1982 (2010) ("[T]he Los Angeles District Attorney's Office has a *Brady* compliance unit that maintains a database of problematic witnesses, such as jailhouse snitches and police officers who have committed perjury."); First Amended Complaint at 36–37, *P.E.O.P.L.E v. Rackauckas*, No. 30-2018-00983799-CU-CR-CXC (Cal. Super. Ct. Apr. 4, 2018) (describing ACLU of Southern California's request for information about informants).

<sup>295</sup> Similarly, the Federal Rules of Civil Procedure require experts to disclose all the cases on which they have worked in the previous four years. FED. R. CIV. P. 26(a)(2)(B)(v). This could be another model for police officer witnesses.

<sup>296</sup> Brief for Pamela R. Metzger et al. as Amici Curiae Supporting Petitioner at 14–19, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2007) (listing crime laboratory scandals in Baltimore, Boston, Chicago, Cleveland, Fort Worth, Houston, Western Texas, Los Angeles, Montana, Oklahoma City, Virginia, Washington, and West Virginia, as well as scandals involving FBI hair-match analysts, FBI bullet-lead match analysts, and the drug lab); Adam Wagner, *Wilmington Police Fire Forensic Chemist, Drug Cases Probed*, STARNEWS ONLINE (Feb. 1, 2019), <https://>

www.starnewsonline.com/story/news/courts/2019/02/01/wilmington-police-fire-forensic-chemist-drug-cases-probed/6136185007/ [https://perma.cc/5PX6-NJTR] (pointing out that the firing of a forensic chemist triggered review of laboratory's cases); Taylor Goldenstein, *DNA Lab Review Criticized—Lack of a Civil Rights Presence Draws Commissioner's Ire*, AUSTIN AM.-STATESMAN, Jul. 19, 2017, at B1 (describing advocates' concerns about "fallout from the faulty lab"); Dee J. Hall, *Innocent People Convicted from Flawed Hair Evidence*, POST-CRESCENT (Apr. 30, 2017), https://www.postcrescent.com/story/news/investigations/2017/04/30/innocent-people-convicted-flawed-evidence/100974186/ [https://perma.cc/YZ4Q-Y6XL] ("[T]he way the FBI used microscopic hair comparison has been discredited in hundreds of cases nationwide . . ."); Meagan Flynn, *Precinct 4 Deputy Accidentally Tossed Untold Amount of Drug Evidence*, HOUS. PRESS (Aug. 25, 2016), https://www.houstonpress.com/news/precinct-4-deputy-accidentally-tossed-untold-amount-of-drug-evidence-8699960 [https://perma.cc/3BYB-GTJF] ("Thanks to the error of one Harris County Precinct 4 deputy, an untold number of accused drug offenders might be off the hook."); Kelly Bleyer, *Deschutes County DA Continues Lab Review*, KBND (Aug. 17, 2016), https://kbnd.com/kbnd-news/local-news-feed/267434 [https://perma.cc/B2J8-ESAY] ("D.A. John Hummel says Larsen's crime means his office has to re-examine more than a thousand case files."); David Fritze, *More Okla. Wrongful Conviction Cases Could Emerge in FBI Review*, OKLA. WATCH (Oct. 28, 2019), https://oklahomawatch.org/2013/07/24/more-oklahoma-wrongful-death-cases-could-emerge-in-fbi-review/ [https://perma.cc/25W3-WEMB] ("Eleven Oklahoma inmates have been exonerated by DNA evidence over the past two decades, including four released from Death Row. That number could soon increase as the FBI looks at more than 2,000 cases nationwide involving potentially flawed forensic science evidence." (emphasis omitted)); *Defense Lawyers: Review Cases Involving Hayne*, DISPATCH (June 17, 2013), https://cdispatch.com/news/2013-06-17/defense-lawyers-review-cases-involving-hayne/ [https://perma.cc/L5FA-NP9B] ("Some defense lawyers are calling for an independent review of cases involving a pathologist whose testimony prompted the Mississippi Supreme Court to overturn two convictions."); Madeleine Baran, *Public Defenders Review 10,000 Cases from St. Paul Crime Lab*, MPR NEWS (Jan. 19, 2013), https://www.mprnews.org/story/2013/01/18/public-defenders-review-10000-cases-from-st-paul-crime-lab [https://perma.cc/LC4W-H663] ("Public defenders have launched a huge effort to review and potentially challenge thousands of drug convictions that relied on evidence from the troubled St. Paul police crime lab."); Karen Zraick, *Drunken Driving Conviction Voided for Crime Lab Errors*, N.Y. TIMES (Mar. 7, 2011), https://www.nytimes.com/2011/03/08/nyregion/08nassau.html [https://perma.cc/PJ74-8BSF] ("Continuing questions about the reliability of tests done in Nassau County's now-shuttered crime laboratory led a judge to overturn a drunken driving conviction on Monday."); *NC Prosecutor Checks Death Cases Involving SBI Lab*, OKLAHOMAN (Aug. 11, 2010), https://www.oklahoman.com/article/feed/180855/nc-prosecutor-checks-death-cases-involving-sbi-lab [https://perma.cc/XES8-DYM5] ("A prosecutor plans to scour all past homicide cases in his district for questionable work by the State Bureau of Investigations' crime lab."); Mary Pat Flaherty, *400 Drunken-Driving Convictions in D.C. Based on Flawed Test, Official Says*, WASH. POST, May 7, 2012, at A1 ("In 2010, District officials acknowledged that inaccuracies from miscalibrated equipment had overstated drivers' breath test readings in about 400 convictions dating to 2008."); Roma Khanna & Steve McVicker, *Troubling' Cases Seen in HPD Crime Lab Report*, HOUS. CHRON. (June 17, 2007), https://www.chron.com/news/houston-texas/article/Troubling-cases-seen-in-HPD-crime-lab-report-1616182.php [https://perma.cc/YQH3-E5ZT] ("Investigations in the 4 1/2 years since HPD's crime-lab woes first arose have highlighted the root causes of years of incompetence and uncovered hundreds of previously unidentified cases with potential problems."); Adam

from the crime lab, or misrepresented test results, or lied about testing the results of tests that were never conducted, no one would presume that the error was isolated to a single case. Yet that is exactly the presumption that occurs when a police officer's misconduct is discovered.

Notably, too, the remedies for crime lab misconduct take on a systemic dimension, while the remedies for police misconduct do not. Legislatures, law enforcement agencies, and courts have taken exceptional measures to identify the scope of laboratory and forensic problems and to provide global remedies. It is not just the Supreme Judicial Court of Massachusetts's decision to vacate 40,000 convictions related to two technicians.<sup>297</sup> Other laboratory scandals have resulted in mass exonerations.<sup>298</sup> In San Francisco back in 2010, a technician who stole drugs from the city's crime laboratory prompted the dismissal of more than 500 cases.<sup>299</sup> In November 2020, San Francisco District Attorney Chesa Boudin released a list of 822 convictions involving a crime lab analyst who was accused of dealing methamphetamine.<sup>300</sup> The publication of the case numbers was designed, according to Boudin's office, "to provide transparency and empower those

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Liptak, *2 States to Review Lab Work of Expert Who Erred on ID*, N.Y. TIMES (Dec. 19, 2002), <https://www.nytimes.com/2002/12/19/us/2-states-to-review-lab-work-of-expert-who-erred-on-id.html> [<https://perma.cc/VG35-BRSP>] ("State authorities in Montana and Washington will review the work of a forensic scientist whose testimony was questioned after DNA evidence cleared a Montana man who spent 15 years in prison after being convicted of raping an 8-year-old girl.).

<sup>297</sup> See Musgrave & Ellement, *supra* note 227.

<sup>298</sup> See *The Groups Registry*, NAT'L REGISTRY OF EXONERATIONS, <https://exonerations.newkirkcenter.uci.edu/groups/group-exonerations> [<https://perma.cc/3EAE-J3W6>] (last visited Sept. 18, 2021) (listing other examples).

<sup>299</sup> Jaxon Van Derbeken, *Drug Lab Scandal Jeopardizes Hundreds of Cases*, SFGATE (Mar. 28, 2010), <https://www.sfgate.com/news/article/Drug-lab-scandal-jeopardizes-hundreds-of-cases-3269092.php> [<https://perma.cc/8NWW-64VV>].

<sup>300</sup> Amy Graff, *SF DA Releases List of 822 Convictions that Involved Lab Analyst Now Accused of Dealing Meth*, SFGATE (Nov. 20, 2020), <https://www.sfgate.com/bayarea/article/Justin-Volk-San-Francisco-meth-prosecutions-list-15743821.php> [<https://perma.cc/7WPW-W9EW>]; Press Release, S.F. Dist. Att'y's Off., DA Boudin Announces Public Posting of Prosecutions that May Have Been Impacted by Office of Chief Medical Examiner Analyst Misconduct (Nov. 20, 2020), <https://sfdistrictattorney.org/press-release/da-boudin-announces-public-posting-of-prosecutions-impacted-by-ocme-misconduct/> [<https://perma.cc/5K3E-JL49>] ("Mr. Volk is estimated to have played a role in the testing, collection, and preservation of evidence in more than 2,500 law enforcement investigations including: 500 death investigations, 1,200 sexual-assault investigations, and 800 DUI investigations. In each of those investigations, the role of a laboratory analyst minimally involves receiving, logging, accessioning, storing, disposing, screening, and preparing biological and toxicological specimens for forensic purposes.").



whose cases may be affected to explore further.”<sup>301</sup> In other words, the prosecution realized that something affirmative had to be done to notify the people whose cases were potentially compromised by this lab analyst. This is the type of systemic response that is, unfortunately, not applied to the corrupt police officer.

In the context of junk science, the U.S. Department of Justice and many states engaged in systemic efforts to trace and remedy dubious forensic testimony. In the late 1990s, for example, the Department of Justice concluded that its experts on hair-match analysis had been testifying in a manner that far exceeded the bounds of scientific validity, thus leading to a slew of wrongful convictions.<sup>302</sup> After several wrongful convictions were traced back to the testimony of forensic expert Michael Malone and his colleagues, the Justice Department initiated a review of all cases in which these experts had testified—a review that went back two decades.<sup>303</sup> State investigators followed suit, launching their own comprehensive reviews of hair-match cases.<sup>304</sup> As with cop tracing, these forensic reviews faced significant difficulties in identifying and tracking down all of the analysts’ cases.<sup>305</sup> But that did not prevent the reviewers from trying to trace the experts’ cases. Similarly sweeping reviews have been conducted of other discredited forensic methods like bullet-lead analysis, albeit after much recalcitrance and many years of faulty testimony’s going uncorrected.<sup>306</sup> These efforts to trace problematic forensic tes-

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<sup>301</sup> Press Release, *supra* note 300.

<sup>302</sup> OFF. OF INSPECTOR GEN., U.S. DEP’T OF JUST., AN ASSESSMENT OF THE 1996 DEPARTMENT OF JUSTICE TASK FORCE REVIEW OF THE FBI LABORATORY 2 (2014), <https://oig.justice.gov/reports/2014/e1404.pdf> [<https://perma.cc/64H8-TB55>] (describing reexamination of files where questionable forensic testimony was material); see also Marie Albiges, *Flawed Testimony Helped Send People to Virginia Prisons. But the State Doesn’t Know How Many.*, DAILY PRESS (Nov. 17, 2018) <https://www.dailypress.com/virginia/dp-nw-microscopic-hair-review-20181112-story.html> [<https://perma.cc/CTA8-4E7X>] (describing logistical difficulty in Virginia review of one million criminal cases in search of hair-match analysis testimony).

<sup>303</sup> OFF. OF THE INSPECTOR GEN., *supra* note 302, at 2.

<sup>304</sup> See, e.g., Albiges, *supra* note 302.

<sup>305</sup> OFF. OF THE INSPECTOR GEN., *supra* note 302, at 73 (“We recognize that FBI Lab databases did not contain pre-1985 cases and that additional labor would have been required to review paper files to identify these cases, including those identified in the manual log of hair and fiber cases back to 1982.”); Albiges, *supra* note 302.

<sup>306</sup> Jeff Deskovic, *Looking Back: Bullet Lead Analysis: A Junk Science That Has Helped to Convict Thousands*, DAVIS VANGUARD (Aug. 30, 2020) <https://www.davisvanguard.org/2020/08/bullet-lead-analysis-a-junk-science-that-has-helped-to-convict-thousands/> [<https://perma.cc/N77B-2K2V>]; Paul C. Giannelli, *Forensic Science: Daubert’s Failure*, 68 Case W. Res. L. Rev. 869, 909 n.247

timony have gone far beyond what is done to trace corrupt officers' cases.

In the area of faulty forensic science, legislative action has also eased some of the procedural hurdles that might otherwise stand in the way of challenging serial errors. Significantly, these procedural changes have not been applied to efforts to challenge the credibility of discredited officers. If a prisoner was convicted based on forensic methods that are no longer supported by the scientific community, the prisoner can present the change in scientific methods as “new evidence” sufficient to file a new habeas petition.<sup>307</sup> This is decidedly not the case when the “new evidence” is the discovery of an officer’s corruption. As noted *supra* subpart IV.C, the discovery of an officer’s severe credibility may not count as “new evidence” because it is considered “merely” impeaching.<sup>308</sup>

The contrast between the treatment of police corruption and the treatment of other types of serial-witness problems can even be seen at the frontier of the due process doctrine. Courts have sometimes recognized due process violations when convictions relied on extremely unreliable evidence—even if the evidence was not known by the prosecution team at the time of trial to be false.<sup>309</sup> Unreliable evidence of this sort can include discredited scientific practices or lying informants. In principle, this theory of unreliability could be invoked by a prisoner who belatedly learns about the dishonesty of an officer who worked on his old case.<sup>310</sup> And this type of due process relia-

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(2018) (“The Innocence Network and the National Association of Criminal Defense Lawyers formed a task force and worked with the FBI to contact defense attorneys and convicts.”).

<sup>307</sup> *E.g.*, CAL. PENAL CODE § 1473(e)(1) (West 2021) (“For purposes of this section, ‘false evidence’ includes opinions of experts that have either been repudiated by the expert who originally provided the opinion at a hearing or trial or that have been undermined by later scientific research or technological advances.”).

<sup>308</sup> *E.g.*, CAL. PENAL CODE § 1473(b)(3)(B) (West 2021) (“For purposes of this section, ‘new evidence’ means evidence that has been discovered after trial, that could not have been discovered prior to trial by the exercise of due diligence, and is admissible and not merely cumulative, corroborative, collateral, or impeaching.”); *see supra* subpart IV.C.

<sup>309</sup> Vincent P. Iannece, Note, *Breaking Bad Science: Due Process as A Vehicle for Postconviction Relief When Convictions Are Based on Unreliable Scientific Evidence*, 89 ST. JOHN’S L. REV. 195, 217–18 (2015) (discussing due process attacks on unreliable evidence in the context of scientific evidence and collecting cases).

<sup>310</sup> *See Han Tak Lee v. Glunt*, 667 F.3d 397, 407–08 (3d Cir. 2012) (concluding based on new scientific developments that scientific evidence used in arson trial was unreliable and violated due process); *Hall v. Dir. Corrections*, 343 F.3d 976, 981 (9th Cir. 2003) (“Hall does not claim that the prosecution knew that the jailhouse notes were false at the time they were admitted into evidence; however, Hall does argue that to allow his conviction to stand, based on the present knowl-

bility claim could be a way to escape the timing and other limitations of the *Brady* doctrine, which are described *supra* subpart IV.B. Yet, these due process reliability claims have generally not been used in the context of discredited officers, a further sign that police misconduct is treated differently from other types of systemic problems.<sup>311</sup>

With paid informants, lab technicians, and forensic experts, the criminal justice system has acknowledged that serial witnesses pose systemic problems—that an individual’s misconduct in one case may well be repeated in numerous cases. That same acknowledgment is absent when the serial witness is a cop.

Of course, there are distinctions between officers and other types of serial witnesses. Maybe a systemic response to lab misconduct makes more sense than to police misconduct because the lab technician’s impact on a case is easier to quantify (positive test, negative test) and the lab technician’s involvement in the case is more methodically tracked.<sup>312</sup> But, if these distinctions justify a more systemic treatment of lab misconduct than officer misconduct, perhaps the solution is to require better record-keeping for officers’ case work so that it can be more efficiently reviewed. Likewise, it may seem inapt to compare police officers to paid informants. Informants are very often criminals.<sup>313</sup> Meanwhile, police officers are public servants. It could seem only natural to be more suspicious of the

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edge that the evidence was falsified, is a violation of his right to due process . . . .”); *Gimenez v. Ochoa*, 821 F.3d 1136, 1144 (9th Cir. 2016) (“[A] petitioner may claim that scientific evidence . . . ‘infect[ed] his entire trial with error of constitutional dimensions.’ Such a petition for relief is not a ‘freestanding innocence claim,’ but a due process claim.” (internal citations omitted)).

<sup>311</sup> *But see* *Pennsylvania v. Mejia-Arias*, 734 A.2d 870, 874 (Pa. Super. Ct. 1999) (“Appellee sought evidence that the BNI agents ‘fabricated or lied about probable cause, committed perjury, etc., in this and in other cases.’ In particular, appellee’s counsel sought to learn the names of witnesses who could testify as to the officers’ pattern or practice of lying in order to obtain search warrants. If the files contained such evidence, it could be exculpatory.” (internal citations omitted)).

<sup>312</sup> *Scheck*, *supra* note 45, at 744 (“To the best of my knowledge, there is no District Attorney’s office right now, with or without a CIU, which has a formalized protocol calling for root cause analysis (RCA) of wrongful convictions, much less serious errors by prosecutors that do not result in wrongful convictions. Most accredited crime laboratories, in sharp contrast, are required to do RCAs by accrediting bodies whenever there is a serious ‘non-conformity.’ The National Commission on Forensic Science has adopted an excellent ‘Directive Recommendation’ with commentary explaining how to do an RCA and the organizational literature supporting the practice.” (internal citations omitted)).

<sup>313</sup> *See generally* ALEXANDRA NATAPOFF, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE* (2009) (analyzing use of informants in the criminal justice system).

systemic problems that emanate from an informant's testimony than from an officer's testimony. But when we are talking about officers who have been profoundly discredited, including by being criminally convicted, that baseline presumption of trustworthiness no longer serves to distinguish the officer from the informant.<sup>314</sup>

Ultimately, the failure is conceptual. The criminal justice actors fail to see police officers' misconduct in the same systemic terms as the misconduct of other serial witnesses. This special solicitude for police officers is dangerous and unsupportable. Each discredited officer must be treated as a systemic problem.

### B. The Corrupt Cop: Too Big to Fail?

Cop tracing is expensive and resource-intensive, but that is not sufficient justification for ignoring the systemic effects of an officer's misconduct. Yes, there would be significant costs to cop tracing. These costs could vary upward or downward depending on how often and how intensively the tracing is conducted. Reviewing even a single conviction is time-consuming and requires expertise. A busy homicide detective might work on 500 murder cases or more in a career. Clearly, it would be an enormous investment to review the merits of all of these cases, and that is just for a single detective. Cop tracing could require similar efforts for numerous officers who have been discredited. And even if the prosecution could find the resources to carry out cop tracing, there would be the additional challenge of getting the defense bar to field an adequate number of habeas attorneys to pursue relief in court. These cost concerns might seem like a severe strike against cop tracing. And, yet, the cost concerns may not be so much a problem with cop tracing as they are a problem with the scope of police misconduct.

To say that cop tracing is too expensive to pursue, because even a single cop is involved in so many cases, is another way of saying that the corrupt cop is too big to fail. This is a dangerous message for the justice system to convey, not only because it expresses a lack of confidence in the integrity of the police, but also because it signals a measure of impunity for dishonest officers. A corrupt officer's knowledge that no one down the

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<sup>314</sup> W. David Ball, *The Plausible and the Possible: A Bayesian Approach to the Analysis of Reasonable Suspicion*, 55 AM. CRIM. L. REV. 511, 532 (2018) (describing Bayesian theory to evaluate individual cases in light of prior knowledge about systemic problems).

line will be interested in reviewing all of his cases, no matter how corrupt he turns out to be, may well serve as a form of encouragement to continue in his corrupt ways. Prosecutors, too, may conclude that there is no need to inquire too deeply into an officer's integrity. By contrast, if there were the possibility that some future cop tracing efforts could undermine all the officer's convictions, perhaps officers would be dissuaded from misconduct and prosecutors would be motivated to take more proactive steps on the front end to ensure that their cases do not rely on officers with credibility problems.

Indeed, when it comes to the costs of cop tracing, it may be that there are efficiencies in going from the corrupt officer backward to the run of all of his cases. Once the criminal justice system has spent the resources needed to identify an officer's corruption in one case, say, through a corruption trial or a habeas case, those costs could be amortized by seeking out the officer's other cases for examination. The cop tracing paradigm does just that. It starts with the corrupt officer and moves backward to the corrupt officer's case work rather than treating the officer's corruption as a one-off problem confined to a particular habeas petitioner.

### C. Case Aggregation Challenges

Cop tracing or, really, the lack of cop tracing shows the ways in which important connections among cases are obscured by the atomization of the criminal justice system. The difficulty in tracing an officer's work across past cases parallels other problems that people have encountered in attempting to track serial actors through the court system. In the context of the Fourth Amendment, scholars have called for tracking an officer's "probable cause" and "reasonable suspicion" determinations across their many cases to see how truly reasonable the officer is.<sup>315</sup> In the charging context, scholars have called for tracking the frequency with which an officer's charging recommendations are accepted or rejected by the prosecutor, again, with the idea of assessing officers' conduct outside of the four corners of the individual case.<sup>316</sup> Similarly, scholars have

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<sup>315</sup> L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1167 (2012) ("Requiring evidence of hit rates might also spark beneficial institutional changes. If hit rates become important, departments will have to create a system for collecting officer hit rate data.").

<sup>316</sup> Adam M. Gershowitz, *Prosecutorial Dismissals as Teachable Moments (and Databases) for the Police*, 86 GEO. WASH. L. REV. 1525, 1525 (2018) ("[P]ropos[ing] that prosecutors—in large offices—a dismissal database that will identify problem officers who repeatedly bring in weak cases that have to be dismissed. Prosecu-

called for tracking a prosecutor's use of peremptory strikes across all of his cases, only to find that access to the public-record information about jury selection to be severely limited.<sup>317</sup> One leading author has urged courts themselves to take the initiative in analyzing the reams of data they possess, in the hopes that the courts could identify systemic trends across seemingly unrelated cases. "[I]n an increasingly paperless world," the author writes, "technology opens up powerful new opportunities, transforming systemic facts from heaps of inaccessible administrative information into a digital library of latent institutional knowledge, a library that is increasingly amenable to technological tools that render it organizable, searchable, and accessible."<sup>318</sup> Like cop tracing, these initiatives all take aim at the prevailing notion that each case is a tub on its own bottom. The aim of tracing is to aggregate data across numerous cases so that larger patterns are revealed. In short, tracing is an attempt to identify the systemic nature of seemingly episodic problems.

But these attempts at aggregation collide with the reality of a justice system that is disorganized, decentralized, and disinclined to provide access to data that would be needed to see these case-to-case connections. As shown in the cop-tracing context, something as basic and banal as a list of an officer's cases may be logistically impossible to compile. Nor is there any doctrinal or judicial pressure on the institutions that possess this systemic information to make it available to the litigants who need it. Because the starting point for cop tracing is so basic—compiling a list of an officer's cases—the fact that there is resistance to cop tracing does not augur well for the more detailed and complex efforts at systemic tracing that other scholars have proposed.

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tors can then recommend that police departments provide further training to those officers.”).

<sup>317</sup> Ronald F. Wright, Kami Chavis & Gregory S. Parks, *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. ILL. L. REV. 1407, 1442 (2018) (describing efforts to collect jury selection data in North Carolina and criticizing the lack of access to this and other court-record information: “It is startling that public courts, in an age when electronic information surrounds us on all sides, make it so difficult to track jury selection practices across different cases. . . . Information about the performance of public servants in the criminal courts, in aggregate form, would be easy to collect and to publish. Jury selection goes to the heart of public participation in criminal justice: this is precisely where the sun needs to shine first.”).

<sup>318</sup> Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2070 (2016).

It is important to note that the resistance to aggregating data across cases is sometimes motivated by a desire to protect criminal defendants' rights. Limitations on accessing court records are seen as privacy protections for the accused. But these privacy protections also enable corrupt officers to hide their misconduct. Much has been written about and done in recent years to limit the collateral consequences that come with being arrested, prosecuted, or convicted of a crime.<sup>319</sup> One initiative to blunt the collateral consequences of a criminal prosecution has been the effort to seal and expunge criminal case files.<sup>320</sup> The migration of court records online and the ease with which information can be disseminated on the internet has created additional pressure to limit access to criminal court records. And even beyond concerns about collateral consequences of convictions, there are worries that public access to court records can facilitate identity theft, witness intimidation, and other dangerous acts.<sup>321</sup> For example, websites like Whosarat.com allow defendants to publicly post information about the informants and other witnesses in their cases and share this information with others who know about the witnesses from their own cases.<sup>322</sup>

Legitimate concerns about these and other problems have led to many proposals for restricting access to case files.<sup>323</sup> Clerks of the court have imposed an array of reforms to make access to court records more difficult—to effectively undermine

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<sup>319</sup> E.g., SARAH ESTHER LAGESON, *DIGITAL PUNISHMENT: PRIVACY, STIGMA, AND THE HARMS OF DATA-DRIVEN CRIMINAL JUSTICE* (2020); Christopher Uggen & Robert Stewart, *Piling On: Collateral Consequences and Community Supervision*, 99 MINN. L. REV. 1871, 1874-75 (2015); Alessandro Corda, *More Justice and Less Harm: Reinventing Access to Criminal History Records*, 60 HOW. L.J. 1, 6 (2016) ("The current wide dissemination of CCRs for non-justice purposes is not the product of deliberate decisions about punishment principles, sentencing policy or crime prevention.")

<sup>320</sup> LAGESON, *supra* note 319, at 10; David S. Ardia, *Privacy and Court Records: Online Access and the Loss of Practical Obscurity*, 2017 U. ILL. L. REV. 1385, 1396 (2017).

<sup>321</sup> David L. Snyder, Note, *Nonparty Remote Electronic Access to Plea Agreements in the Second Circuit*, 35 FORDHAM URB. L.J. 1263, 1265 (2008).

<sup>322</sup> WHO'S A RAT, <https://whosarat.com/> [<https://perma.cc/X39N-SSTU>] (last visited Jan. 14, 2022) (offering subscribers access to information about informants in criminal cases).

<sup>323</sup> Snyder, *supra* note 321, at 1303-06; Peter A. Winn, *Judicial Information Management in an Electronic Age: Old Standards, New Challenges*, 3 FED. CTS. L. REV. 135, 168-74 (2009); Jenny R. Yampolsky, *Wanted Posters on the Internet: United States v. Carmichael and New Criminal Defense Tools to Level the Playing Field*, 32 NEW ENG. J. CRIM. & CIV. CONFINEMENT 279, 279 (2006); DAVID RAUMA, FED. JUD. CTR., *REMOTE PUBLIC ACCESS TO ELECTRONIC CRIMINAL CASE RECORDS: A REPORT ON A PILOT PROJECT IN ELEVEN FEDERAL COURTS 1-2* (2003).

the accessibility gains that technology has provided.<sup>324</sup> In Orange County, California, for example, the clerk of the court required any defense lawyer wanting to use the clerk's online records portal to accept a restrictive user agreement. The agreement prohibited "copying, saving, . . . or emailing information . . . except in the course of representation of a party" and gave the clerk the right to audit the use of the database and terminate a user's access for any reason.<sup>325</sup> These restrictions stand in the way of building a cop tracing infrastructure and making much-needed connections among cases. Significantly, while no such restrictions exist or could exist on the use of paper court records, neither could those paper records be used for effective aggregation of case information.<sup>326</sup> State legislatures have also entered the fray by denying public access to swaths of criminal court records, including those of any person who has been exonerated or whose case has been dropped.<sup>327</sup>

While there are many good reasons to support case sealing, there are unintended consequences that should be considered. One of the consequences of this effort to avoid collateral consequences is the impediment to making connections among cases. Where privacy restrictions make it harder to learn what has happened in criminal proceedings, other defendants will struggle to see patterns that may involve the same serial witnesses in their own cases.<sup>328</sup> In New York, for example, where

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<sup>324</sup> U.S. Dep't of Just. v. Repts. Comm. for Freedom of Press, 489 U.S. 749, 762 (1989); Ardia, *supra* note 320, at 1413, 1415, 1441 ("Can courts go further and require that their records not be modified, posted online, or aggregated with other personal information?" "[C]an courts impose restrictions on the use of court records as a condition of access to the records in the first place?" "The cases do not definitively answer these questions, but the weight of authority seems to support the conclusion that the First Amendment does not require courts to provide online access to their records."); Seth Katsuya Endo, *Contracting for Confidential Discovery*, 53 U.C. DAVIS L. REV. 1249, 1271 n.134 (2020) ("[T]he public cares about keeping sensitive information private, even if it is in an otherwise public document, when its use does not serve the public interest.").

<sup>325</sup> *Terms of Use Agreement*, SUPER. CT. ORANGE CNTY., <https://ocportal.occourts.org/terms> [<https://perma.cc/E7XM-N24L>].

<sup>326</sup> Ardia, *supra* note 320, at 1298.

<sup>327</sup> N.Y. CRIM. PROC. LAW § 160.50 (McKinney 2020) (describing conditions upon which criminal records are sealed); S.B. 731, 2021–2022 Leg., Reg. Sess. (Cal. 2021) ("[T]he court shall not disclose information concerning an arrest that is granted relief pursuant to this section to any person or entity, in any format, except to the person whose arrest was granted relief or a criminal justice agency, as defined in Section 851.92.").

<sup>328</sup> See Rebecca Wexler, *Privacy Asymmetries: Access to Data in Criminal Defense Investigations*, 68 UCLA L. REV. 212, 215 (2021) (describing privacy statutes that prevent defense from accessing information that prosecutors are permitted to access); Hannah Bloch-Wehba, *Visible Policing: Technology, Transparency, and Democratic Control*, 109 CAL. L. REV. 917, 925 (2021).



state law seals the criminal court files of anyone who has been exonerated, the sealing winds up benefiting the corrupt officer, not just the exoneree. That is true because other defendants cannot access the court files to see which officers were involved or what details of the officer's misconduct were exposed.

One vivid illustration of this dynamic can be seen in a much-celebrated report by the Brooklyn District Attorney's Office. The report, *426 Years: An Examination of 25 Wrongful Convictions in Brooklyn, New York*, describes the errors and official misconduct that led to the twenty-five most recent convictions in Brooklyn.<sup>329</sup> But the report does not name a single officer (or defendant) involved in any of these cases, because of the New York requirement that records be sealed once there is an exoneration.<sup>330</sup> Because there are no officer names, no current habeas petitioners could use the 100-page report to look for the names of officers who may have corrupted their own cases. Cop tracing seeks to connect the dots among cases; the privacy protections for court records prevent those connections from being made.

Another challenge facing efforts to aggregate information can be found in the clash of interests between those who want forward-looking aggregation and those who want backward-looking aggregation. There are many efforts now underway to gather information on dishonest cops, and these efforts show the divide between backward- and forward-looking initiatives. Prosecutors, police departments, defense organizations, and public interest groups are in the midst of compiling lists of officers with credibility problems, compilations often referred to as "*Brady* lists."<sup>331</sup> The idea of a *Brady* list is that every time an officer with a credibility problem is slated to testify in a case, the prosecution will be put on notice that the officer might have

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<sup>329</sup> KINGS CNTY. DIST. ATT'YS OFF., *426 YEARS: AN EXAMINATION OF 25 WRONGFUL CONVICTIONS IN BROOKLYN, NEW YORK* (2020), [http://www.brooklynda.org/wp-content/uploads/2020/07/KCDA\\_CRUReport\\_v4r3-FINAL.pdf](http://www.brooklynda.org/wp-content/uploads/2020/07/KCDA_CRUReport_v4r3-FINAL.pdf) [<https://perma.cc/LDR5-LTWU>].

<sup>330</sup> *Id.* at 2 ("[T]he KCDA obtained judicial permission to unseal, for purposes of writing this Report, certain records from these cases that would otherwise have remained confidential under New York law and make those records available only to the Report's researchers and authors on a confidential basis. Consistent with that court order, the names of the defendants have been replaced with pseudonyms and witnesses are referred to only by initials. The memoranda will be resealed now that the Report is complete. This Report does not discuss grand jury matters, which remain sealed by law.").

<sup>331</sup> Jonathan Abel, *Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 762 (2015).

some credibility problems that need to be disclosed to the defense.

Defense groups have developed their own sophisticated databases that collect information about every officer on the police force. These databases store information including published internal affairs findings of misconduct, information about in-court impeachment that has occurred during a criminal trial, allegations and findings from civil suits brought against the officers, and any social media or news clippings that might speak to the officers' credibility problems.<sup>332</sup> In New York City, the database is so user-friendly that public defenders can look on their smart phones while in court to pull up dossiers on the officers involved in their cases.<sup>333</sup> This technology is now being exported nationwide by the National Association of Criminal Defense Lawyers.<sup>334</sup> In fact, databases

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<sup>332</sup> See *The Cop Accountability Project*, LEGAL AID SOC'Y, <https://legalaidnyc.org/programs-projects-units/the-cop-accountability-project/> [<https://perma.cc/55VU-7LRC>] (last visited Nov. 20, 2021); *NYC Federal Civil Rights Lawsuit Data, 2015 to June 2018*, CAPSTAT, <https://www.capstat.nyc> [<https://perma.cc/5DCN-M8YX>] (last visited Nov. 20, 2021); Leon Neyfakh, *The Bad Cop Database: Radical New Idea for Keeping Tabs on Police Misconduct*, SLATE (Feb. 13, 2015), <https://slate.com/news-and-politics/2015/02/bad-cops-a-new-database-collects-information-about-cop-misconduct-and-provides-it-to-defense-lawyers.html> [<https://perma.cc/KE7Z-8VTR>]; *CopMonitor*, S.F. PUB. DEF.'S OFF., <https://sfpublicdefender.org/copwatch/> [<https://perma.cc/MC97-4HN9>] (last visited Sept. 18, 2021) (providing searchable access to police misconduct records); Cynthia H. Conti-Cook, *Defending the Public: Police Accountability in the Courtroom*, 46 SETON HALL L. REV. 1063, 1084 (2016); Cynthia H. Conti-Cook, *Open Data Policing*, 106 GEO. L. J. ONLINE 1, 17-18 (2017) ("Lawyers have used information about an officer's history of unlawfully searching people to argue at arraignments that evidence, also likely found illegally in the instant case, will ultimately be suppressed. At bail hearings, in plea negotiations, discovery motions, hearings, and trials, Legal Aid Society lawyers are using police accountability data to change the narrative in the courtroom about what happened during a specific encounter between a client and an officer." (internal citations omitted)); see Ali Winston, *Looking for Details on Rogue N.Y. Police Officers? This Database Might Help*, N.Y. TIMES, (Mar. 6, 2019) <https://www.nytimes.com/2019/03/06/nyregion/nypd-capstat-legal-aid-society.html> [<https://perma.cc/3VUV-NDPB>] (quoting Cynthia Conti-Cook, one of the leaders of the CAPstat project: "We hope that this is a tool for the city to identify patterns and address common patterns of misconduct that are pretty obvious if you digest the lawsuits that are coming in and being served on the city," Ms. Conti-Cook said"); Joanna C. Schwartz, *Who Can Police the Police?*, 2016 U. CHI. LEGAL F. 437, 479-81 (2016) (noting recent development of New York's Cop Accountability Database).

<sup>333</sup> Barry Scheck, *Preface: The Integrity of Our Convictions: Holding Stakeholders Accountable in an Era of Criminal Justice Reform*, 48 GEO. L.J. ANN. REV. CRIM. PROC. iii, xiv (2019) ("By 2016, they had created a database that Legal Aid attorneys could interrogate on their smart phones at first appearance upon learning of the officer who had arrested their clients.").

<sup>334</sup> *Full Disclosure Project*, NAT'L ASS'N CRIM. DEF. LAWS, <https://www.nacdl.org/Landing/FullDisclosureProject> [<https://perma.cc/N825-GJJC>] (last visited Mar. 15, 2022); *Nation's Criminal Defense Bar Launches Full Disclo-*

tracking troubled cops are so popular that they have even captured the attention of Congress, which listed a cop tracking apparatus in its recent proposals for police reform.<sup>335</sup> These efforts at identifying and following officers have only been strengthened by recent expansions to the public records laws, which have added more misconduct records to the mix.<sup>336</sup>

While these misconduct databases are a laudable step, it should be noted how little they can do to help those who have already been convicted. Trial attorneys use these databases to impeach the testimony of witnesses in pending cases and to make sure that these problematic officers are impeached in future cases. The goal of the databases is forward-looking: to prevent tainted officers from giving unimpeached testimony. The forward-looking orientation of these databases is not surprising. It is what is required by the *Brady* doctrine: once the officer's misconduct is known to the prosecution team, it must be disclosed.<sup>337</sup> Moreover, it serves the interests of the public defender agencies leading these tracking efforts. Their clients are the ones with active cases today and in the future.

But the problem with these forward-looking initiatives is that they risk ignoring the victims of these same corrupt officers in prior cases. No matter how much misconduct evidence is collected about an officer, it will be of no use to the officer's prior victims if there is no way to identify which cases the officer worked on previously. In other words, to carry out a backward-looking review, the police misconduct databases need to collect data on the officer's case history. The information about what cases an officer has worked on is a sort of metadata needed to weaponize the police misconduct evidence. Forward-looking databases do not need to dig up this information. The defendant in a pending or future case will know that

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*sure Project to Enable Defenders to Overcome Law Enforcement Secrecy Laws and Expose Misconduct*, NAT'L ASS'N CRIM. DEF. LAWS. (Sept. 23, 2020), <https://www.nacdl.org/newsrelease/FullDisclosureProjectLaunch> [<https://perma.cc/J34U-LPBW>] ("The data will be immediately and easily accessible to defense attorneys, ensuring that police conduct in every case is scrutinized from the first appearance. The information can be utilized at every phase of a case to materially alter outcomes by showing courts and prosecutors that key witnesses in their cases lack credibility or have engaged in a pattern of misconduct.").

<sup>335</sup> H.R. 1280, 117th Cong. (2021) (creating the National Police Misconduct Registry).

<sup>336</sup> See S.B. 1421, 2017–2018 Leg., Reg. Sess. (Cal. 2018); CAL. PENAL CODE §§ 832.7; S.B. 8496, 2020 Leg., Reg. Sess. (N.Y. 2020) (repealing N.Y. Civ. Rights Law 50-a); Rebecca Brown & Cynthia Conti-Cook, *Crime Without Punishment*, 46 HUM. RTS. 14, 14–17 (2021) (discussing repeal of New York police privacy law); *Kalven v. City of Chicago*, 2014 IL App (1st) 121846 ¶ 32.

<sup>337</sup> See *supra* subpart IV.B.

the officer is involved in his case. Where the metadata—the case tracing information—is essential is when one tries to find the former defendants who are no longer clients of any defense agency and are locked up in prison without any right to habeas counsel. These former defendants can be invisible to data aggregation projects, like police misconduct databases, because they require the collection and application of additional metadata about an officer’s case history. This is yet another reason that cop tracing is so badly needed.

#### D. Failing to Plan, Planning to Fail

The study of cop tracing and its absence also shed light on a troubling theme in discussions about criminal justice: the role of serendipity. The justice system is an enormous network of connected and unconnected events. Millions upon millions of cases are processed through the criminal courts.<sup>338</sup> There are repeat players on all sides: defendants, officers, victims, and witnesses. The same person might be a defendant, a victim, and a witness in any order. With so many cases, there is always the chance for serendipity. No one could ever reduce the criminal justice system to a perfectly predictable and catalogued body of data. But much more could be done to organize and systematize the existing data to reveal connections among cases. Cop tracing is a call for such organization. It is a statement that justice should not rely on or extol serendipity.

Law enforcement, for its part, appears to have embraced the idea of organizing and systematizing the data in its possession. The law enforcement orthodoxy of the moment is the pursuit of “mosaic” data collection. Under a mosaic theory of investigation, all forms of data are valuable and should be collected. Even if the millions of datapoints are worthless in their own right, they can be fused together to reveal larger patterns.<sup>339</sup> To this end, law enforcement collects fingerprints, DNA, biometrics, communications metadata, information about gang affiliations, social network nodes, locational data,

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<sup>338</sup> Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 965 (2021).

<sup>339</sup> Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 313 (2012); Jace C. Gatewood, *District of Columbia Jones and the Mosaic Theory—In Search of a Public Right of Privacy: The Equilibrium Effect of the Mosaic Theory*, 92 NEB. L. REV. 504, 506 (2014); David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 630 (2005).

and other information, all with the hope of someday using it to solve cases.<sup>340</sup> Collect enough data and chaos will reveal order.

But when it comes to collecting even the most basic information about an officer's on-the-job conduct—the cases the officer investigated and the cases in which the officer testified—there seems to be little interest on the part of law enforcement in making case-to-case connections. Courts, prosecutors, and police departments curate case information in ways that prevent defendants from seeing the larger picture of, say, an officer's pattern of misconduct. Indeed, these institutions have little to gain and much to lose from revealing patterns of misconduct that emerge from their own data. As a result of this lack of action, connections go unexamined. Or, more accurately, they are not systematically examined.

Where connections are made between cases, the serendipity is celebrated. It should not be. The making of happenstance connections among cases is actually a sign of a failure to collect data systematically. Consider these examples:

- In the scandal involving Detective Scarcella's cases, it turned out that Scarcella had used the same witness—a drug-addicted prostitute named Teresa Gomez—as an eyewitness in three unrelated cases.<sup>341</sup> In all three cases, Gomez's testimony was dubious. She was fuzzy on the details. She claimed to have seen the killing from an improbable angle or location. Had defendants been able to see that she appeared in these three cases involving

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<sup>340</sup> E.g., David H. Kaye, *A Fourth Amendment Theory for Arrestee DNA and Other Biometric Databases*, 15 U. PA. J. CONST. L. 1095, 1095–96 (2013) (fingerprints, photographs, and DNA samples); R. Craig Curtis, Michael C. Gizzi & Michael J. Kittleson, *Using Technology the Founders Never Dreamed of: Cell Phones as Tracking Devices and the Fourth Amendment*, 4 U. DENVER CRIM. L. REV. 61, 62–63 (locational data); Joshua D. Wright, *The Constitutional Failure of Gang Databases*, 2 STAN. J. C.R. & C.L. 115, 117 (2005) (information about gang affiliation).

<sup>341</sup> See Robles & Kleinfeld, *supra* note 56; Christina Carrega, *Disgraced Ex-Detective Louis Scarcella Accused of Forcing Sundhe Moses to Cop to 1995 Murder Maintains He Did Nothing Wrong*, N.Y. DAILY NEWS (May 26, 2017), <https://www.nydailynews.com/new-york/brooklyn/disgraced-ex-detective-testifies-convict-fights-clear-article-1.3198713> [<https://perma.cc/4YEC-KLRA>] (“Gomez was a drug-addicted prostitute Scarcella utilized to land five murder convictions.” These included Robert Hill, Darryl Austin, and Alvenia Jeanette.); Tim Walker, *Did the NYPD's Star Homicide Detective Rig Evidence to Secure Dozens of Convictions?*, INDEPENDENT (May 13, 2013), <https://www.independent.co.uk/news/world/americas/did-the-nypd-s-star-homicide-detective-rig-evidence-to-secure-dozens-of-convictions-8612985.html> [<https://perma.cc/2JM9-778B>] (“[P]olice had allowed convicted criminals to leave jail, smoke crack and visit prostitutes if they agreed to incriminate Mr. Ranta.”).

Scarcella, they might have suspected that she was doing Scarcella's bidding.

- In Orange County, California, a stroke of luck and much hard work led public defender Scott Sanders to uncover a long-running scheme of constitutional violations in the Orange County Jail.<sup>342</sup> Jailers and prosecutors had been planting informants in the cells next to high-value defendants with instructions to obtain confessions. This program violated the Sixth Amendment right to counsel and went undetected for years until Sanders happened to see the same informant appear in two unrelated murder cases. In both of those cases, the informant improbably claimed to have obtained a confession in jail. It was either a coincidence or part of a larger pattern. The serendipitous connection between two unrelated cases set Sanders off on years of investigation that uncovered a much wider program of constitutional violations and coverups. The discovery of the Orange County Jail scandal led a judge to take the death penalty off the table in one mass-murder case and to recuse the entire district attorney's office from the prosecution of that case. Numerous other criminal cases have been compromised by the discovery of this program of illegal action.<sup>343</sup>
- In Brooklyn, public defender Debora Silberman was able to spot a pattern of suspicious police behavior that led to the dismissal of gun charges against her client, Jeffrey Herring. Officers claimed that Herring had placed a gun in a plastic bag and then thrown it into the bushes to evade detection by police. Silberman had heard of another case with similar facts involving these officers.<sup>344</sup> She used her office's case management system to search for arrests made by these officers and came across a pattern of arrests by the same officers, alleging virtually the same facts and often in implausible ways.<sup>345</sup> In some of those cases, judges had thrown out the charges when they found the officers not to be credible or where the informants who had supposedly provided the tip were not produced.<sup>346</sup> In a court filing two inches thick, Silberman documented the officers' patterns across all of these

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<sup>342</sup> Jennifer Medina, *U.S. Examines Whether Orange County Violated Defendants' Rights*, N.Y. TIMES (Dec. 15, 2016), <https://www.nytimes.com/2016/12/15/us/orange-county-justice-department.html> [<https://perma.cc/9JS7-XMDP>].

<sup>343</sup> Editorial, *Dishonest Prosecutors, Lots of Them*, N.Y. TIMES (Sept. 30, 2015), <https://www.nytimes.com/2015/09/30/opinion/dishonest-prosecutors-lots-of-them-in-southern-calif.html> [<https://perma.cc/7K8A-D4D9>].

<sup>344</sup> Telephone Interview with Debora Silberman, Brooklyn Def. Servs. (Jan. 19, 2021) [hereinafter Silberman Interview].

<sup>345</sup> *Id.*

<sup>346</sup> Clifford, *supra* note 57.

cases. The prosecution dismissed the case against Herring. Other cases involving these officers were thrown out as a result. Had Silberman not been able to track down the officers' other cases, the pattern of misconduct could have remained undiscovered.

- Beyond these examples, even a casual review of the stories leading up to exonerations shows how serendipitous the process can be—often because there are no systematic ways to make the connections among cases.<sup>347</sup> Such serendipitous connections among cases have occurred when a victim in one case recognized the actual perpetrator of the crime because that perpetrator was sitting in the prosecutor's office waiting to talk with the prosecutor as a witness in another case.<sup>348</sup> Or the connection among cases was made when a defendant or witness in one case confessed to a crime that a defendant in another case had already been convicted of.<sup>349</sup> Lucky connections among

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<sup>347</sup> See, e.g., Maurice Possley, *Ruddy Quezada*, NAT'L REGISTRY OF EXONERATIONS (Dec. 11, 2017), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4746> [<https://perma.cc/54NV-JY4B>] ("In 2002, federal prosecutors disclosed that during an unrelated investigation, Wilfredo Caraballo, a prisoner serving multiple life sentences for contract killings, said that he—not Quezada—shot Rosado. However, Caraballo also said that Quezada had hired him to shoot Reyes and Salcedo."); Jim Dwyer, *The True Story of How a City in Fear Brutalized the Central Park Five*, N.Y. TIMES (May 30, 2019), <https://www.nytimes.com/2019/05/30/arts/television/when-they-see-us-real-story.html> [<https://perma.cc/A9WD-L46U>] (referring to belated confession by Mattias Reyes to having been the rapist and killer: "Two days before the attack on Ms. Meili, he had raped another woman in the park. In the three months after, he raped four others, murdering one. He always acted alone. His admissions in 2002 about the 1989 park rapes came while he was serving time for the other crimes."); George Hunter, *Podcast: Sins of Detroit, Davontae Sanford's Road to Freedom, Part 2*, DET. NEWS (Nov. 26, 2019), <https://www.detroitnews.com/story/podcasts/sins-of-detroit/2019/11/26/podcast-sins-detroit-davontae-sanford-wrongful-conviction-detroit-police/4306137002/> [<https://perma.cc/L2DZ-E754>] (reporting that, a month after Davontae Sanford was convicted of quadruple murder, a Detroit hitman confessed to twelve murders including the quadruple, but prosecutors charged him with only eight of the killings).

<sup>348</sup> Robert P. Mosteller, *Why Defense Attorneys Cannot, but Do, Care About Innocence*, 50 SANTA CLARA L. REV. 1, 26 (2010) ("[Three witnesses in a case] almost literally confronted their mistake when they recognized the person who actually robbed them sitting in the large witness waiting area they had passed through. The perpetrator was apparently a victim or a witness in another case. The federal prosecutor was fully convinced of the sincerity of their change of heart and had the man they now identified placed under arrest.")

<sup>349</sup> See, e.g., Brief for Former Prosecutors as Amici Curiae in Support of Petitioners at 4, *Woods v. Smith*, 138 S. Ct. 61 (2017) ("[T]he lead detective in Mr. Woods's case knew that a particular witness's death was unrelated to the case because of a separate investigation conducted by the same detective."); Maurice Possley, *David Peralta*, NAT'L REGISTRY OF EXONERATIONS (Sept. 19, 2013), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4275> [<https://perma.cc/BVN3-TTRT>] (describing how FBI investigation of Surenos 13 gang led to information that exonerated a different defendant of murder); Meddle,

cases have come out when a detective recognized that a statement in one case helped exonerate a convicted defendant in another case,<sup>350</sup> or when an innocent person was wrongfully sent to prison and, there, encountered the per-

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*So They KNOW Who Killed Tamara?*, DETROITYES! (Sept. 14, 2010), <https://www.detroityes.com/mb/showthread.php?7054-So-They-KNOW-Who-Killed-Tamara> [<https://perma.cc/UP9B-DCP3>] (“Retired Detroit police homicide investigator Mike Carlisle testified in an unrelated case he has strong but circumstantial evidence that Darrett King shot Greene on April 30, 2003.”); Maurice Possley, *Roy Alvarez*, NAT’L REGISTRY OF EXONERATIONS (Jan. 20, 2014), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4351> [<https://perma.cc/R2F6-H7EW>] (“Prior to sentencing, Alvarez discovered that in December 1994—two weeks before he was arrested—the same detective who handled his case arrested another man, Raul Silva, on charges of committing several armed robberies of video stores in the same geographic area.”); Stephanie Denzel, *Christopher Harding*, NAT’L REGISTRY OF EXONERATIONS (Jan. 2, 2018), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3277> [<https://perma.cc/AYW5-KSWP>] (“Two years later, in 1997, an unrelated federal investigation revealed that Robert Owens, Dwayne Owens’s cousin, may have been the other shooter, and that Harding’s conviction was the result of police and prosecutorial misconduct.”); Michael S. Perry, *Donnell Johnson*, NAT’L REGISTRY OF EXONERATIONS (Jan. 13, 2022), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3330> [<https://perma.cc/MR49-W2E6>] (“In the course of an unrelated federal drug investigation, a gang member made a deal with prosecutors and told authorities that Johnson was not the real killer. Instead, he identified two other fellow gang members as the shooters.”); Maurice Possley, *Raymond Martorano*, NAT’L REGISTRY OF EXONERATIONS (Aug. 4, 2020), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4549> [<https://perma.cc/F33C-KXJV>] (“Although the federal investigation was unrelated to the prosecution of Daidone and Martorano, federal prosecutors were aware of the significance of [a letter found in a separate investigation]. They turned it over to Philadelphia prosecutors who in turn disclosed it to lawyers for Daidone and Martorano.”); Maurice Possley, *Eric Glisson*, NAT’L REGISTRY OF EXONERATIONS (Apr. 22, 2016), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4074> [<https://perma.cc/Q6FL-QJ76>] (“In May 2012, federal prosecutors in New York received a letter from Glisson, who was serving his sentence at Sing Sing prison. Glisson wrote that he had heard that Diop’s killers were members of the SMM gang. The letter was addressed to a prosecutor who no longer was in the U.S. Attorney’s Office and by sheer luck was handed off to O’Malley, who instantly realized that the description of the crime in Glisson’s letter matched what Rodriguez and Vega told him nine years earlier.”); Abby Ohlheiser, *Louisiana Inmate About to Go Free, After 30 Years on Death Row*, ATLANTIC (Mar. 11, 2014), <https://www.theatlantic.com/national/archive/2014/03/glenn-ford-about-be-free-man-after-30-years-death-row-tk/359040/> [<https://perma.cc/6YZN-CPLR>] (“According to the earlier court filings cited by the AP, a ‘reliable informant’ facing questioning in an unrelated case told prosecutors that another man had admitted to Rozeman’s murder,” thus leading to Glenn Ford’s exoneration.)

<sup>350</sup> See, e.g., Josh Saul, *Free After Being Wrongly Jailed for Almost 25 Years*, N.Y. POST (Nov. 18, 2013), <https://nypost.com/2013/11/18/freedom-after-being-wrongly-imprisoned-for-25-years/> [<https://perma.cc/Z4W8-HNCH>] (“[A] Jamaican gangbanger who became a federal cooperator in an unrelated case told the FBI that one of his fellow gang members was Wynn’s real killer.”); Joaquin Sapien, *For a Respected Prosecutor, an Unpardonable Failure*, PROPUBLICA (June 4, 2014), <https://www.propublica.org/article/for-a-respected-prosecutor-an-unpardonable-failure> [<https://perma.cc/3T5Z-RK9D>] (“A prosecutor in a subse-



son who actually committed the crime, thus leading to evidence that exonerated the innocent party.<sup>351</sup> In other examples of serendipity, a long-lost piece of exculpatory physical evidence in one case happened to be filed under the wrong case number and an alert investigator found it decades later while researching an entirely different case for a different client.<sup>352</sup> Or, consider the serendipity of a jailhouse lawyer who was helping a fellow inmate on that inmate's case only to come across evidence that wound up freeing the jailhouse lawyer.<sup>353</sup> This idiosyncratic list could go on and on.<sup>354</sup> The important point is the obvious

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quent, unrelated case had taken testimony from a man who said he was the person who had forced Acevedo to carry out the killing.”).

<sup>351</sup> See David J. Krajceck, *America's Guilt Mill*, PRISON LEGAL NEWS (Mar. 28, 2017), <https://www.prisonlegalnews.org/news/2017/mar/28/americas-guilt-mill/> [<https://perma.cc/98WJ-56V5>] (“Once again, luck played a role in her exoneration. Rodriguez-Gallegos was assigned to the same Florence prison as Jernigan. Her inmate friend Michelle learned that the new arrival was a bank robber. She told Jernigan, ‘It’s just a hunch, but tell your lawyer to do a search on her name.’”).

<sup>352</sup> See, e.g., Initial Brief of Appellant at 20, *United States v. Phillips*, No. 10-3706 (3d Cir. Nov. 28, 2012); *Madrid v. Wilson*, 590 F. App’x 773, 775 (10th Cir. 2014) (“In March 2012, the Natrona County District Attorney’s Office provided the Innocence Center with a file relating to a different case. On June 21, 2012, a law student working for the Innocence Center found a document in that file that seemed relevant to Madrid’s case.”); Maurice Possley, *Enzo Cestoni*, NAT’L REGISTRY OF EXONERATIONS (Apr. 26, 2019), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5542> [<https://perma.cc/BT3E-K84M>] (“[A]n attorney in an unrelated investigation told FBI agent Somnhot that the government had charged ‘the wrong guys’ in the case.”); Mark Walker, *Untested Evidence Found in Stacy Larson Murder Case*, ARGUS LEADER (Apr. 19, 2016), <https://www.argusleader.com/story/news/crime/2016/04/18/untested-evidence-found-stacy-larson-murder-case/83196184/> [<https://perma.cc/6SVJ-BXK4>] (“McCook County Sheriff Mark Norris said he was cleaning an evidence locker when he found an envelope related to Stacy Larson’s second-degree murder case.”); *Strengthening Forensic Science Includes Supporting Forensic Laboratory Funding*, INNOCENCE PROJECT (Sept. 18, 2017), <https://www.innocenceproject.org/strengthening-forensic-science-includes-supporting-forensic-laboratory-funding/> [<https://perma.cc/48XV-JR45>] (“Henry James spent nearly 30 years in prison for a crime he did not commit. . . . His evidence was thought to be lost until Milton Dureau, a crime lab official who had committed Mr. James’s case number to memory after searching for it for years, stumbled upon the evidence while looking for evidence in an unrelated case.”).

<sup>353</sup> Maurice Possley, *Andrew Wilson*, NAT’L REGISTRY OF EXONERATIONS (Nov. 4, 2021), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5111> [<https://perma.cc/8Z74-K8FA>] (“Wilson was helping a fellow inmate, Horace Burns, with his legal work and discovered that Burns’s attorney had uncovered a payment of \$1,000 that Detective Marks had arranged for Bishop to help pay her rent and other expenses. That payment had not been disclosed to Wilson’s trial defense attorney.”).

<sup>354</sup> Marvin Zalman & Matthew Larson, *Elephants in the Station House: Serial Crimes, Wrongful Convictions, and Expanding Wrongful Conviction Analysis to Include Police Investigation*, 79 ALB. L. REV. 941, 1027–28 (2015) (“Two convictions for sexual assaults on young boys, against Larry Youngblood and Ricardo Rachell,

one: cases in the criminal justice system are connected to each other in important and surprising ways—and the connections can easily be overlooked.

Legal opinions, attorney lore, and news accounts all speak of the great luck that is involved in these serendipitous exonerations.<sup>355</sup> But this luck has a more sinister side: it is a sign of a failure to harvest the connections among cases. For every injustice that is corrected thanks to some serendipitous break, there are other injustices that go unnoticed for want of this luck. As Samuel Gross and Michael Shaffer write, “Many of the exonerated defendants we know about are the beneficiaries of equally improbable chains of happenstance. For each, there are many other unknown innocent defendants whose convictions remain undisturbed.”<sup>356</sup>

Cop tracing cannot eliminate the need for luck in making these case-to-case connections. But the problem illustrated by this discussion of cop tracing is that there is distressingly little investment in building the infrastructure needed to reveal these important case-to-case connections. Without informa-

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were obtained with mistaken eyewitness identification and a lack of proper forensic testing. In Rachell’s Texas case, similar sexual assaults continued in the vicinity after he was incarcerated. This should have sent a clear signal to investigators and prosecutors, especially when the actual perpetrator, Andrew Hawthorne, was a registered sex offender who lived in the same vicinity. Furthermore, the same officers who had arrested Hawthorne arrested Rachell but failed to see any connection to the crime for which Rachell was convicted. The offender in Youngblood’s case, Walter Cruise, may have been harder to spot, as he had lived in Texas and Arizona and his more dispersed crime pattern did not create the sense that a local molester was at work. DNA testing helped exonerate both Rachell and Youngblood.” (internal citations omitted).

<sup>355</sup> *E.g.*, *Kevin Byrd*, NAT’L REGISTRY OF EXONERATIONS (before June 2012), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3079> [<https://perma.cc/YH6X-H928>] (“Kevin Byrd’s case is particularly disturbing, because it was due to pure luck that he eventually was able to prove his innocence. As the evidence warehouse becomes overcrowded, it is standard procedure in Harris County to throw away evidence in old cases where appellate courts have upheld the conviction. In 1994, the trial exhibit with a semen sample that would later free Byrd was one of many that were slated to be destroyed. The clerk, however, submitted a list of cases where evidence would be thrown away to the district attorney’s office, so they could cross out cases where they wanted evidence preserved. Perhaps by sheer chance, they drew a line through Byrd’s case and the evidence was saved. To this day, the prosecutors are unsure why they chose to retain the semen sample, and note that it would have been perfectly acceptable, per their guidelines, to have thrown out this crucial piece of evidence back in 1994. In 2001, Byrd received a lump sum of \$30,189 in state compensation plus a monthly annuity of \$5,200.”).

<sup>356</sup> Samuel R. Gross & Michael Shaffer, *Introduction*, in EXONERATIONS IN THE UNITED STATES, 1989–2012: REPORT BY THE NATIONAL REGISTRY OF EXONERATIONS 1, 5 (2012), [https://www.law.umich.edu/special/exoneration/Documents/exonerations\\_us\\_1989\\_2012\\_full\\_report.pdf](https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf) [<https://perma.cc/97ZT-KX5G>].

tion about an officer's corpus of cases, it is impossible to bring justice to the past victims of even the most corrupt cops. Cop tracing is the refusal to accept that a cop's history of misconduct is unknowable. It is also the refusal to accept that the connections among a cop's cases will somehow come out on their own. Making these critical connections among cases currently relies on serendipity, but the effort to make inter-case connections should be routine.

The ultimate goal of cop tracing is to shift the presumption about an officer's misconduct. Rather than assuming that the corruption is limited to the one case where it has been detected, the assumption should be the opposite. If one presumes that the officer's misconduct is limited to a single case, that presumption—right or wrong—is never tested, because there is no review of the officer's many other cases. By contrast, if one presumes that the officer's misconduct has spread to other cases, that presumption will lead to testing of the other cases that can confirm or rebut the presumption that the officer's conduct has spread. It is better to presume that an officer's misconduct is systemic and then be proven wrong through testing than to presume that the misconduct is episodic and never learn about its systemic reach because no testing was done.

In matters as serious and systemic as a police officer's corruption, justice cannot rely on serendipity alone.

#### CONCLUSION

Cop tracing is but one part of the effort to uncover and remedy police corruption. Though reopening old cases is costly and difficult, it is essential to preventing miscarriages of justice and to admitting, forthrightly, that the criminal justice system makes mistakes. For there to be a true accounting of the problems that even a single cop's actions can pose to the system, there must be a systemic effort to trace a cop's work across his many cases. There are costs, to be sure, in tracking an officer's cases. But there are also costs in letting injustice go undetected. While some may fear that cop tracing is too big, too expensive, or too disruptive, the source of these problems is not cop tracing itself. Instead, the problem is the scale of police corruption and its spread throughout the justice system.

## APPENDIX: NOTES ON INTERVIEW METHODOLOGY

This Article draws on examples of police misconduct and exonerations from around the country. As part of my effort to understand what had—and had not—been done to trace corrupt officers' cases, I conducted a number of interviews with criminal justice actors. Prior to the interviews, I sought and received an Institutional Review Board exemption.

The interviews themselves were open-ended. I asked interviewees about individual cases involving specific officers and what, if anything, had been done to identify other cases involving those same officers. I followed up with questions about legal, logistical, and other impediments to this type of accounting. Prior to publishing information from the interviews, I gave each interviewee the opportunity to review the cited material and to consent or decline to the use of it for this Article. I also permitted the interviewees to make alterations to their quotes. All of this was in an effort to ensure that the statements were accurate and that I had consent to use the material.

As I have done in previous work, I used a “snowballing” method to identify interview subjects.<sup>357</sup> This involved asking interviewees for suggestions of other people to interview and other case studies to examine. Among the interviewees, Scott Sanders was the only one I had spoken to prior to this project.

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<sup>357</sup> See Jonathan Abel, *Cops and Pleas: Police Officers' Influence on Plea Bargaining*, 126 YALE L.J. 1730, 1735 (2017) (describing interviewing method).

