Using Big Data to Dismantle Systemic Barriers: How Tracking Official Misconduct Can Foster Justice and Increase Accountability in the Criminal Legal System

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ABSTRACT

The U.S. criminal legal system is a vast and complex machine, long subject to public and scholarly scrutiny. The U.S. incarcerates more people than any other nation, holding an astonishing 1.9 million individuals behind bars. Of them, approximately eighty percent are indigent, and over sixty percent are racial minorities, despite these groups comprising a relatively small portion of the overall population. In this expansive system, which disproportionately targets minorities and the poor, it is unsurprising that justice is not always served: Human error and bias are nearly guaranteed to occur at some juncture. Experts estimate that about four percent of imprisoned individuals in America are actually innocent of the crimes for which they were convicted, meaning nearly 50,000 people are potentially being wrongfully held in state or federal prisons today. Still, wrongful convictions based on actual innocence are only one piece of the puzzle. Many more individuals have been unjustly convicted due to violations of their constitutional rights. Class and race, however, are not the only common characteristics shared by those trapped in this derelict system—an alarming number of them were put there by misbehaving officials occupying positions of power.

Recent data reveals that sixty percent of overturned criminal convictions in the United States were obtained as the result of official misconduct by government actors, most frequently involving the concealment, falsification, or misrepresentation of evidence by police and prosecutors. High-profile cases of misconduct have been widely reported in the media and analyzed by scholars. Advocates and policymakers have sought reform through litigation, legislation,

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and other means, but these efforts have largely fallen short of achieving change for a variety of reasons, not the least of which is because criminal justice stakeholders routinely disagree about the nature and extent of official misconduct, what it derives from, and how often it occurs. As a result, relatively little progress has been made over time to meaningfully examine some of the most pervasive systemic injustices rooted in official malfeasance. But why is this? And why, in an era of heightened public awareness about deficiencies in the criminal legal system and unprecedented access to information, has this issue not been adequately addressed?

This Article seeks to answer these questions by examining the role and scope of known instances of official misconduct and evaluating the mechanisms by which stakeholders have attempted to combat it. It scrutinizes the successes and failures of these efforts, highlighting how the lack of comprehensive data collection has hindered reform. Specifically, this piece is the first to argue that the absence of robust empirical data on official misconduct has impeded a thorough understanding of its underlying causes and consequences, its frequency and volume, and the patterns that emerge within it. In advocating for the use of big data systems to uniformly track and analyze misconduct at the state and regional levels, the Article explores advancements that could be achieved if stakeholders prioritized systematic misconduct data collection. Finally, it proposes a collaborative framework for collecting, analyzing, and sharing misconduct data, offering practical guidance for implementing the necessary infrastructure.

By fostering transparency, encouraging best practices, and holding officials accountable, the use of big data systems to study official misconduct could dismantle systemic barriers to justice and revolutionize the system as we know it.

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INTRODUCTION

"When misconduct is neither acknowledged nor punished, the line between acceptable behavior and misconduct begins to blur." -Angela J. Davis[1]

Johnny Lee Gates was only twenty-one years old when he was arrested, convicted, and sentenced to death for crimes he always maintained he did not commit.[2] Living with intellectual disability and a sixth-grade education, he became the target of local police in January 1977, when an incentivized informant suggested his involvement in the slaying and sexual assault of a young, white, immigrant bride of an Army soldier in Columbus, Georgia.[3] After a squad of mostly white detectives subjected Gates to death penalty threats, Gates reluctantly made a confession that did not match the basic crime scene evidence already analyzed by police.[4] Typed by detectives and never read aloud to Gates, the confession was, as one post-conviction judge would later articulate, hard to believe.[5]

Interestingly, despite the inconsistencies between Gates's confession and the crime scene evidence and a complete dearth of physical evidence to support the

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1. Angela J. Davis, *Prosecutors Who Intentionally Break the Law*, 1 AM. CRIM. L. BRIEF 16, 23 (2011) [hereinafter Davis, *Prosecutors Who Intentionally Break the Law*].

2. *See* State v. Gates, 308 Ga. 238, 239 (2020) [hereinafter *Gates II*].

3. *Id.* at 239, 241. This was nearly two months after prosecutors urged a grand jury not to indict a white man, Lester Sanders, who was arrested and confessed to killing the woman after being caught fondling the victim's body at the mortuary. Trial Transcript Vol. 1 at 228, *Gates II*, 308 Ga. 238 (2020) (SU-1975-CR-38335). Before the grand jury's no bill, an officer testified that the white man's confession revealed information about the crime that was previously unknown to police and that only the true perpetrator could have known. *Johnny Gates*, GA. INNOCENCE PROJECT, https://www.georgiainnocenceproject.org/freed-client/johnny-lee-gates/ [https://perma.cc/N6SF-36M8] (last visited Mar. 28, 2025).

4. Trial Transcript Vol. 2 at 369–75, 377, 395–96, 412–13, *Gates II*, 308 Ga. 238 (2020) (SU-1975-CR-38335); *Johnny Gates*, *supra* note 3. The Georgia Supreme Court, in 2020, recognized that Gates's confession was given under "somewhat suggestive circumstances." *Gates II*, 308 Ga. at 262.

5. "I can show you something right now in these [crime scene] photographs that contradicts what was said on [Gates's] confession," the judge that later vacated Gates's conviction stated in an evidentiary hearing. Oct. 2002 Evidentiary Hearing Transcript at 44, *Gates II*, 308 Ga. (SU-1975-CR-38335); *Johnny Gates*, *supra* note 3. The confession included information that Gates shot the victim in the bed, but there was no blood on the bed, and the victim's body was discovered on the floor near the bedroom door, for example. Trial Transcript vol. 2, *supra* note 4, at 400–01; Sup. Ct. Ga. R., vol. 45, Def. Ex. 4 at 1, *Gates II*, 308 Ga. 238 (SU-1975-CR-38335). The Georgia Supreme Court noted several other inconsistencies in its opinion. *Gates II*, 308 Ga. at 262–63.

theory of Gates as the perpetrator, the police decided to do something they had never before done in a homicide investigation: They took Gates to the crime scene—two months after the attack—and had him walk through it while repeating the substance of the puzzling confession on videotape.[6] Five to ten minutes before the recorded start time of the videotaped confession, the police phoned an identification technician to come to the crime scene to dust one item, a heater, for fingerprints.[7] The technician, who knew the police had already searched for fingerprints but found none of value, did as instructed: He went to the scene and dusted the one requested item where the homicide captain "more or less said" the prints were.[8] He was surprised to find multiple of Gates's fingerprints in "very good" condition.[9] In fact, they were so clear and pristine, as he later testified, that under normal conditions, he would say the prints were recently placed there.[10]

About an hour later, a neighbor of the victim who lived a few feet from the crime scene—through which Gates had just been escorted—was called to the police station to view a live lineup that included Gates.[11] The neighbor, a white salesman, was home during the attack and had earlier reported seeing a suspicious Black man about an hour before the murder.[12] Although Gates did not resemble the physical description of the suspicious man previously provided by the eyewitness, other than his race and gender, the neighbor identified Gates.[13] With a confession, fingerprints, and an identification in tow, the State headed to trial, even as additional evidence mounted that Gates was not the perpetrator.

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6. *Johnny Gates*, *supra* note 3; *Gates II*, 308 Ga. at 242; Gates v. State, 244 Ga. 587, 588–89 (1979) [hereinafter *Gates I*]; Extraordinary Motion for New Trial Transcript vol. III at 460, *Gates II*, 308 Ga. (SU-1975-CR-38335) [hereinafter EMNT Tr.]. The prosecution used the videotaped confession to argue that Gates was familiar with the apartment to bolster the authenticity of the confession. *See* Trial Transcript vol. 3 at 499–500, *Gates II*, 308 Ga. (SU-1975-CR-38335). Gates introduced an affidavit during his 2018 post-conviction proceedings from a former homicide captain indicating police had brought Gates to the crime scene before making the videotaped confession. Trial Transcript vol. 2, *supra* note 4, at 363–65; EMNT Tr. vol. III, *supra*, at 460, Defendant's Exhibit 34 at 1, *Gates II*, 308 Ga. (SU-1975-CR-38335).

7. Trial Transcript vol. 2, *supra* note 4, at 453–56; *Gates II*, 308 Ga. at 242–43; *Gates II*, 308 Ga. 238 (SU-1975-CR-38335); *Johnny Gates*, *supra* note 3.

8. Trial Transcript vol. 2, *supra* note 4, at 454–56.

9. *Id.* at 456.

10. *Id.* at 455. As the Georgia Supreme Court explained in 2020, "[t]he fingerprint evidence suffered from a number of weaknesses." *Gates II*, 308 Ga. at 264.

11. Trial Tr. vol. 2, *supra* note 4, at 317.

12. *Id.* at 310–11. The neighbor previously told police the person he saw on November 30, 1976, was a Black man, standing about 5'9 or 5'10 inches tall and weighing 170 pounds. Defendant's Exhibit 19, *Gates II*, 308 Ga. (SU-1975-CR-38335) (Supplementary Police Report of Reynolds, Dec. 1, 1976).

13. Trial Transcript vol. 2, *supra* note 4, at 310–11; Defendant's Exhibit 19, *supra* note 12; Ga. Sup. Ct. R., vol. 6 at 1256, *Gates II*, 308 Ga. 238 (SU-1975-CR-38335). Gates was 5'5 and weighed 130 pounds at the time. Ga. Sup. Ct. R., vol. 6 at 1256, *Gates II*, 308 Ga. (SU-1975-CR-38335) (Supplementary Report of Hillhouse, Lynn, Myles, Rowe, and Hicks, Jan. 31, 1977). "Here, as with Gates' confessions, the record reflects a number of problems with Hudgins' identifications of Gates," the Georgia Supreme Court observed. *Gates II*, 308 Ga. at 263. "As noted above, on cross-examination, Hudgins admitted that Gates was two to three years younger and four to five inches shorter than the person Hudgins described during his direct testimony regarding the man who came to his door. Hudgins also testified that, of the four other people in the live police lineup besides Gates, one was 'considerably taller' than Gates, and one was 'considerably heavier.'" *Id.*

Indeed, months before Gates's capital murder trial, he submitted to blood tests that revealed his global blood type to be Type O.[14] This information, which was provided to the State, was significant for two reasons: (1) because seminal fluid collected from the victim's body and clothing belonged to someone with Type B blood, and (2) because a large, unexplained blood smear found mere inches from the victim's body at the scene of the crime also belonged to someone with Type B blood.[15] The victim, like Gates, had Type O blood.[16]

The death penalty trial lasted three days and was presided over by a man referred to as "the hanging judge" due to his record of imposing capital punishment.[17] During jury selection, veteran prosecutors Bill Smith and Doug Pullen utilized their peremptory challenges to strike all qualified, prospective Black jurors from the panel.[18] Smith then made racially charged closing arguments to the jury.[19] Gates was tried, convicted, and sentenced to death by nine white men and three white women.[20]

Gates's attorney, William Cain, at times served as the sole public defender for the city.[21] He later testified on habeas review that he and other local defense attorneys had an agreement never to object to jury pool composition on the basis of race.[22] Before trial, Cain filed a motion requesting that Gates be appointed as co-counsel in his own death penalty case.[23] He conducted virtually no investigation, which was apparent throughout his performance at trial: Cain called no witnesses in either the merits or mitigation phases of the capital proceeding and introduced no documentary evidence.[24]

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14. Defendant's Exhibit 27, *Gates II*, 308 Ga. (SU-1975-CR-38335); Amended Extraordinary Motion for New Trial, *Gates II*, 308 Ga. (SU-1975-CR-38335) (citing Correspondence from Aubrey Walker, Dept. of Corrections, to William Smith (May 31, 1977) (documenting Gates's blood type as Type O)); *Johnny Gates*, *supra* note 3.

15. Order on Defendant's Extraordinary Motion for New Trial at 26, *Gates II*, 308 Ga. (SU-1975-CR-38335) [hereinafter Order Granting Defendant's EMNT]; *Johnny Gates*, *supra* note 3; Defendant's Exhibit 26, *Gates II*, 308 Ga. (SU-1975-CR-38335) (GBI Crime Lab Supplementary Report).

16. Trial Transcript vol. 2, *supra* note 4, at 290. The post-conviction court that later overturned Gates's conviction found that the Type B blood was "material and exculpatory evidence because it placed a third party on the scene. . ." Order Granting Defendant's EMNT, *supra* note 15, at 26.

17. In 1979, *Chic* magazine published an article naming Judge John Henry Land as one of the United States's top four "hanging judges" based on his capital punishment statistics. DAVID ROSE, THE BIG EDDY CLUB: THE STOCKING STRANGLINGS AND SOUTHERN JUSTICE 127 (2007); Jim Houston, *No-nonsense Judge Land often crossed lines*, COLUMBUS LEDGER-ENQUIRER (July 28, 2015), https://www.ledger-enquirer.com/news/local/article29214085.html [https://perma.cc/2LTV-8XL5].

18. Order Granting Defendant's EMNT, *supra* note 15, at 5.

19. *Id.*

20. EMNT Hearing Transcript vol. III at Defendant's Exhibit 13, *Gates II*, 308 Ga. (SU-1975-CR-38335).

21. Deposition of William S. Cain at 60–63, *Tucker v. Zant*, No. 4766 (Sup. Ct. Butts County, Oct. 9, 1980). Cain was authorized to hire an assistant public defender only years into his contract. *Id.* That attorney did not assist in Gates's case. While a second attotney was ultimately permitted to assist Cain at Gates's trial, Cain examined all witnesses and presented all arguments. *See* Trial Transcript vols. 1-3, *supra* notes 3–6.

22. Ronald J. Tabak, *Representing Johnny Lee Gates*, 35 U. TOL. L. REV. 603, 606 (2004).

23. Undated Motion to Allow Defendant to Participate at Trial as Co-counsel, *Gates II*, 308 Ga. (SU-1975-CR-38335).

24. *See Gates II*, 308 Ga. at 243.

Gates's convictions and death sentence were unsurprisingly affirmed on appeal less than two years later, and the State destroyed nearly every item of physical evidence connected to the case before the Georgia Supreme Court issued a decision.[25] Indigent and lacking a constitutionally guaranteed right to counsel, Gates then sought the assistance of pro bono counsel.[26] He bounced from lawyers and post-conviction proceedings for years before his death sentence was eventually converted to life in prison without the possibility of parole, following protracted litigation pursuant to *Atkins v. Virginia*.[27]

It was not until 2015 that things took a major turn. Interns at the Georgia Innocence Project (GIP) discovered two items of evidence in the prosecutor's files that were documented by the State as having been destroyed in May 1979.[28] GIP sought DNA testing on the items—a bathrobe belt and necktie used to forcefully bind the victim during the attack.[29] The Southern Center for Human Rights (Southern Center)—which had recently litigated another Georgia death penalty case involving race discrimination by one of the same prosecutors at the United States Supreme Court—soon joined the litigation team.[30] Together, GIP and the Southern Center filed a post-conviction motion requesting Gates's conviction be overturned due to exculpatory DNA results and a variety of official misconduct, including unconstitutional race discrimination in jury selection, the State's failure to disclose exculpatory evidence in violation of *Brady v. Maryland*, and unconstitutional evidence destruction.[31]

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25. *Id.* at 243–46.

26. *See Johnny Gates*, *supra* note 3; Pennsylvania v. Finley, 481 U.S. 551, 555 (1987).

27. On the seventh day of Gates's intellectual disability trial, the court declared a mistrial after a State's witness improperly revealed that Gates was sentenced to death. *Gates II,* 308 Ga. at 246. Following the mistrial, the State entered into an agreement with Gates to convert his death sentence to life in prison without the possibility of parole. *Id.* In the course of litigating Gates's jury discrimination claim in 2018, his post-conviction counsel also discovered and admitted at a hearing the State's jury selection notes from that trial. EMNT Hearing Transcript vol. III at Defendant's Exhibit 13 at 12, *Gates II*, 308 Ga. (SU-1975-CR-38335). Markings contained within the notes suggested that prosecutors in the Muscogee County District Attorney's Office may have engaged in similar jury selection practices during the 2003 trial. *Id.*

28. *Johnny Gates*, *supra* note 3.

29. *Gates II*, 308 Ga. at 247; Extraordinary Motion for New Trial and Mot. for Post-conviction DNA Testing, *Gates II*, 308 Ga. (SU-1975-CR-38335).

30. In 2016, the United States Supreme Court vacated the 1987 death sentence of Timothy Foster, a Black man convicted of murder in Floyd County, Georgia. Foster v. Chatman, 578 U.S. 488, 514 (2016). The Southern Center for Human Rights represented Foster in post-conviction proceedings and discovered the prosecution's jury selection notes, which illustrated the racially discriminatory motivations underlying the use of their peremptory strikes against all prospective Black jurors to ensure Foster received an all-white jury. *Id.* at 494–96. While Floyd County is in a different judicial district than Muscogee County, Doug Pullen advised Floyd prosecutor Stephen Lanier and even traveled there to assist him in jury selection. *Id.* at 492; R. Robin McDonald, *Thompson is Among Ex-Prosecutors Who Back Georgia Death Row Inmate*, DAILY REP. (Aug. 3, 2015), https://www.schr.org/files/post/files/Ex-prosecutors%20file%20amicus%20brief%20Daily%20Rpt.pdf [https://perma.cc/9S74-7G3T].

31. *Gates II*, 308 Ga. at 248 n.12; Amended Extraordinary Mot. For New Trial, *Gates II*, 308 Ga. (SU-1975-CR-38335).

In January 2019, following years of contested litigation, Gates's conviction was vacated, and he was awarded a new trial on the DNA grounds.[32] The judge issued an order with extensive factual findings supporting Gates's claims of invidious race discrimination by the trial prosecutors, including evidence that the prosecutors unconstitutionally empanelled all-white juries in all but one capital murder case involving Black defendants from 1975 to 1979,[33] the Court denied relief on all non-DNA issues, largely on procedural grounds.[34] Following an unsuccessful appeal and the onset of the COVID-19 pandemic, the State still refused to dismiss the charges against Gates.[35] At sixty-four years old and trapped in a county jail pre-trial during the height of the COVID-19 pandemic, Gates accepted a plea offer to lesser charges with a sentence of time-served pursuant to *North Carolina v. Alford*, fully maintaining his innocence, to achieve release in May 2020—more than forty-three years since his wrongful incarceration began.[36] Gates was not exonerated or compensated.[37] The State never apologized nor accepted responsibility for any of its misconduct.[38] No one involved in obtaining Gates's wrongful conviction was ever held accountable for their behavior.

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32. Order Granting Defendant's EMNT, *supra* note 15, at 16–26.

33. *Id.* at 4–11. In the single case during the time frame in which an all-white jury was avoided, the prospective Black jurors outnumbered the prosecution's strikes. *Id.* at 8. According to GIP's website, a statistician testified at an evidentiary hearing on Gates's motion, that "the odds the all-white juries in those death trials not being selected specifically for their race was about the same as the odds of winning the Powerball lottery three times in a row, using the exact same numbers each time." *Johnny Gates*, *supra* note 3.

34. Order Granting Defendant's EMNT, *supra* note 15, at 12. While Gates was able to meet the almost impossible burden of proving that the State engaged in a pattern of race discrimination in jury selection in his case and others under Swain v. Alabama, 380 U.S. 202 (1965) (the precursor to Batson v. Kentucky, 476 U.S. 79 (1986)), the procedural posture of Gates's case required that he show that he acted with reasonable diligence in bringing his claim. *See* Timberlake v. State, 246 Ga. 488, 491 (1980). The court found Gates failed to account for the delay in filing his motion. Order Granting Defendant's EMNT, *supra* note 15, at 12. The court also denied Gates's suppression claims on diligence and other grounds. *Id.* at 16.

35. *Johnny Gates*, *supra* note 3.

36. In 2020, Gates's counsel filed multiple motions to dismiss the underlying indictment and requests for bond prior to Gates's acceptance of the *Alford* agreement. Motion to Dismiss the Indictment Due to the State's Destruction of Evidence, *Gates II*, 308 Ga. (SU-1975-CR-38335); Motion to Prohibit the State from Retrying Johnny Gates After Relying on Race Discrimination to Incarcerate Him for Over Four Decades, *Gates II*, 308 Ga. (SU-1975-CR-38335); Motion for Expedited Consideration of Motions to Dismiss Indictment, *Gates II*, 308 Ga. (SU-1975-CR-38335); Motion for Bond, *Gates II*, 308 Ga. (SU-1975-CR-38335).

37. *See* Muscogee County Superior Court, *'Guilty but innocent': Columbus GA man to walk free after serving 43 years for murder,* LEDGER-ENQUIRER (May 15, 2020, at 2:30 PM), https://www.ledger-enquirer.com/news/local/crime/article242771251.html [https://archive.ph/ovdOQ].

38. *See id.* Until July 2025, Georgia was one of only 11 states that did not have a formal, statutory mechanism to compensate individuals after being wrongfully incarcerated. *See* Tim Darnell, *Wrongful Conviction Compensation Act takes effect in Georgia July 1. Here's what it means*, ATLANTA NEWS FIRST (June 16, 2025, at 10:36 AM EDT), https://www.atlantanewsfirst.com/2025/06/16/wrongful-conviction-compensation-act-takes-effect-georgia-july-1/ [https://perma.cc/4VSF-ZMRU]; Deidra Dukes, *Georgia lawmakers pushing for compensation for wrongfully convicted*, FOX 5 ATLANTA (Feb. 20, 2025, 1:22 P.M.), https://www.fox5atlanta.com/news/georgia-lawmakers-pushing-compensation-wrongfully-convicted [https://perma.cc/6LJJ-E37M]. *See also* Marissa Cohen, *How to Alleviate the Repercussions of Wrongful Convictions: Holistically Righting the Wrongs of Inadequate Compensation Statutes*, 44 CARDOZO L. REV. 2063, 2085–86, (2023).

Gates's case was marred with misconduct from the start, by almost every actor in the system. That misconduct stole nearly half of a century from him and came dangerously close to claiming his life. Similar misconduct by the same officials has almost certainly cost the lives of countless other individuals. Meanwhile, victims of crime were denied justice, communities were put at risk, and a mockery was made of the virtues the criminal legal system purports to uphold. Unfortunately, this type of compounding official misbehavior and its devastating impact is a continuing phenomenon. Gates's story is not unique. However, it highlights a major contributor to wrongful convictions—official misconduct—an ongoing and serious threat in the U.S. criminal legal system that frequently remains undiscovered and unaddressed for far too long.[39]

The United States incarcerates more people than any other country in the world: 1.9 million individuals at the rate of 580 per 100,000 residents.[40] Of them, approximately eighty percent are indigent, and just over sixty percent are racial minorities, despite those populations comprising a relatively small portion of the overall population.[41] In this expansive system that disparately targets minorities and the poor for prosecution, it comes as little surprise that justice is not always served: Human error and bias are nearly guaranteed to occur at some juncture.[42] Experts estimate that about 4–6 percent of imprisoned people in America are actually innocent of the crimes for which they were convicted, meaning just under 50,000 people are potentially being wrongfully held in state or federal prisons today.[43] But wrongful convictions based on actual innocence are just one piece of the puzzle; many others also have been unjustly convicted after being denied their rights under the U.S. Constitution. Erroneous convictions are not the only common characteristic shared by those trapped in the system, however: An alarming number of impacted individuals were put there by misbehaving officials.[44]

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39. *See generally* SAMUEL R. GROSS ET AL., NATIONAL REGISTRY OF EXONERATIONS, GOVERNMENT MISCONDUCT AND CONVICTING THE INNOCENT: THE ROLE OF PROSECUTORS, POLICE, AND OTHER LAW ENFORCEMENT iii (2020).

40. *United States Profile*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/profiles/US.html#overview [https://perma.cc/3KCW-EXVE] (last visited Jan. 30, 2025).

41. *See* CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES (2000); John Gross, *Reframing the Indigent Defense Crisis*, HARV. L. REV. BLOG (Mar. 18, 2023), https://harvardlawreview.org/blog/2023/03/reframing-the-indigent-defense-crisis/ [https://perma.cc/K6YU-GC8H]. *See also* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2024*, PRISON POL'Y INITIATIVE (Mar. 24, 2024), https://www.prisonpolicy.org/reports/pie2024.html#community [https://perma.cc/4896-36Y7].

42. *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, THE SENTENCING PROJECT (Apr. 19, 2018), https://www.sentencingproject.org/reports/report-to-the-united-nations-on-racial-disparities-in-the-u-s-criminal-justice-system/ [https://perma.cc/HT64-QQWP].

43. *See Beneath the Statistics: The Structural and Systemic Causes of Our Wrongful Conviction Problem*, GA. INNOCENCE PROJECT, https://www.georgiainnocenceproject.org/general/beneath-the-statistics-the-structural-and-systemic-causes-of-our-wrongful-conviction-problem/ [https://perma.cc/F98Z-XUNN] (last visited June 1, 2025).

44. NATIONAL REGISTRY OF EXONERATIONS, 2023 ANNUAL REPORT 3 (2024) [hereinafter 2023 Annual Report].

Recent data compiled by the National Registry of Exonerations (the Registry), perhaps the most comprehensive existing resource on official misconduct, suggests approximately sixty percent of overturned criminal convictions resulting in exoneration in the United States were obtained as the result of official misconduct by government actors, a six-percent increase since the Registry published its ground-breaking report, *Government Misconduct and Convicting the Innocent*, in September 2020.[45] In 2023 alone, official misconduct was a factor in seventy-seven percent of all exonerations–and eighty-five percent of homicide cases.[46]

In fact, official misconduct seems to permeate every aspect of exoneration cases. As of the publication of its report, the Registry concluded that official misconduct was a factor in sixty-two percent of white-collar exonerations, thirty-nine percent of drug-related exonerations, forty-four percent of child sexual abuse exonerations, nearly forty percent of other sexual assault and robbery cases, and fifty-five percent of exonerations related to other violent crimes.[47] Even non-violent crime exonerations were a product of official misconduct thirty-two percent of the time.[48] The Registry's data also shows that official misconduct has a disproportionate impact on people of color when it comes to certain crimes. Black and Latinx exonerees' convictions were a result of official misconduct in seventy-seven percent of murder exonerations and eighty-seven percent of murder exonerations involving death sentences, as well as forty-four percent of drug-related exonerations.[49] The misconduct most frequently involved the concealment, falsification, or misrepresentation of evidence by police and prosecutors.[50]

While shocking to the conscience, these figures likely paint a conservative picture of the official misconduct that routinely contributes to criminal convictions. This is so because the Registry's data focuses only on innocence cases. Even among that narrow subset of cases, the Registry: (1) does not account for convictions overturned on misconduct grounds that did not result in exoneration, including cases resolved with *Alford* pleas, like Gates's; (2) considers only cases in which convictions have been vacated, despite compelling suggestions that many wrongfully and unjustly convicted people are prevented from successful pursuit

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45. *Browse Cases*, NAT'L REGISTRY OF EXONERATIONS, https://exonerationregistry.org/ [https://perma.cc/R48B-4JC9] (last visited Jan. 30, 2025) (selecting "official misconduct" tag and filtering total exoneration cases involving official misconduct by year, as compared to overall exonerations figure.) *See also* GROSS ET AL., *supra* note 39, at iii. For purposes of contextualizing the Registry's data, cases are classified as an "exoneration" only if a person who was convicted of a crime is "officially and completely cleared based on new evidence of innocence." *Id.* Furthermore, the Report "is limited to misconduct by government officials that contributed to the false convictions of defendants who were later exonerated—misconduct that distorts the evidence used to determine guilt or innocence. Concretely, that means misconduct that produces unreliable, misleading or false evidence of guilt, or that conceals, distorts or undercuts true evidence of innocence. " *Id.*

46. 2023 Annual Report, *supra* note 44, at 3.

47. GROSS ET AL., *supra* note 39, at 12.

48. *Id.*

49. This is compared to sixty-four and sixty-eight percent, respectively, for white exonerees in murder cases, and twenty-two percent for white exonerees in drug cases. *Id.* at xi.

50. *Id.*

of their claims due to a variety of factors, including lack of counsel and procedural barriers to relief; (3) does not account for misconduct committed by judges; and (4) does not account for misconduct committed by defense counsel.[51]

As discussed below, there is no central repository that captures the full scope of official misconduct in criminal convictions.[52] Other databases that track forms of official misconduct are generally narrow in focus, often limited to death penalty cases or incidents of police brutality, and are confined to a small number of jurisdictions. Even then, the data is typically restricted to specific actors or particular types of offenses.[53] The resulting information, while important, is not broadly comprehensive. Accordingly, it stands to reason that a large subset of official misconduct in the criminal legal system is presently undocumented and unstudied.

The public's limited access to information about official misconduct—confined primarily to cases of actual innocence, capital offenses, and police brutality—is deeply problematic for three key reasons. First, it creates a false sense of reliability in the system by suggesting that official misconduct only occurs at significant rates in these extreme—yet myopic—classes of cases, thereby stifling public discourse and emboldening some stakeholders to disregard the underlying conditions known to produce to such cases. Second, it undermines the effectiveness of current reform efforts, which may attempt to address issues without knowing their full systemic depth. Lastly, and most critically, it prevents stakeholders from meaningfully examining the full depth, scope, and root causes of official misconduct in the criminal legal system, thereby thwarting evidence-based solutions with the potential to correct and prevent misconduct on a systemic scale.

High-profile instances of police and prosecutor misconduct have been studied by scholars and reported on by mass media extensively.[54] Advocates have sought both relief and reform through litigation, legislation, and otherwise.[55] But, those

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51. *Id.* at iii, 9. Inadequate legal counsel, tracked separately, was prevalent in about 27% of exoneration cases. *Id.* at ix–xii.

52. *See, e.g.*, *About NDI*, INT'L ASS'N OF DIRS. OF L. ENF'T STANDARDS AND TRAINING, https://www.iadlest.org/our-services/ndi/about-ndi [https://perma.cc/H4GP-CP2C] (last visited Jan. 30, 2025); *Execution Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/database/executions [https://perma.cc/L66D-DMTH] (last visited Jan. 30, 2025).

53. *See* Claudia Lauer & Alanna Durkin Richer, *Justice Department creates database to track misconduct records by federal law enforcement*, PBS NEWS (Dec. 18, 2023), https://www.pbs.org/newshour/politics/justice-department-creates-database-to-track-misconduct-records-by-federal-law-enforcement [https://perma.cc/TW9M-2BYS]. *See, e.g.*, *About NDI*, *supra* note 52; *Execution Database*, *supra* note 52.

54. *See, e.g.*, GROSS ET AL., *supra* note 39; ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 5-8, 168-71 (Oxford Univ. Press 2007); Joaquin Sapien, *Trial and Error: Report Says Prosecutors Rarely Pay Price for Mistakes and Misconduct*, PROPUBLICA (Mar. 29, 2016), https://www.propublica.org/article/report-says-prosecutors-rarely-pay-price-for-mistakes-and-misconduct [https://perma.cc/Q5M9-32EN]; Nate Jones, *Public Records Laws Shield Police from Scrutiny – and Accountability*, WASH. POST (July 30, 2021), https://www.washingtonpost.com/investigations/public-records-laws-shield-police-from-scrutiny–and-accountability/2021/07/29/be401388-a794-11eb-bca5-048b2759a489_story.html [https://perma.cc/A8ME-HD3X].

55. *See,* e.g., *Connick v. Thompson*, 563 U.S. 51 (2011); *In the Courts, Legislative Advocacy*, NAT'L POLICE ACCOUNTABILITY PROJECT, https://www.nlg-npap.org [https://perma.cc/3CNR-845S]; Innocence Staff, *New York Times Editorial Explains Why Prosecutors Require an Oversight Commission*, INNOCENCE PROJECT (Aug.

efforts have overwhelmingly fallen short of curtailing misconduct for many reasons, not the least of which is because criminal justice stakeholders routinely disagree about the essence and extent of what official misconduct actually is.[56] This is likely because the very nature of official misconduct makes it difficult to uncover in the first place, and when it is detected, incidents often go undocumented and unpublicized.[57] Information becomes siloed and transparency is stifled. It should come as little surprise then that minimal progress has been made over time to meaningfully examine, correct, and prevent pervasive injustices rooted in official malfeasance. Put simply, limited knowledge begets limited evidence, which in turn produces limited results.[58]

In an era with arguably the most public acknowledgment of deficiencies in the criminal legal system in this nation's history, advanced technology, and unprecedented access to information, there is no reason our collective knowledge and understanding of official misconduct should remain inadequate. In contrast, there is every reason for criminal justice stakeholders to document and share data related to official misconduct in criminal cases in their jurisdictions. Doing so would fill the gap in information about official misconduct that is currently unknown or understudied and, in turn, would make strides toward correcting and preventing further misconduct by providing a comprehensive foundation for reform efforts.

This Article's central thesis is that the collection of sweeping official misconduct data on a systemic level is necessary to analyze ways to effectively combat what society already knows is a systemic problem, and that doing so has the power to transform the criminal legal system as we know it. In addition to making the case for widespread data collection, this Article proposes a methodology for gathering, analyzing, and sharing such data—which includes leveraging advanced

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15, 2018), https://innocenceproject.org/editorial-explains-why-prosecutors-require-oversight-commission/ [https://perma.cc/7R2E-GCXT]; Alexandra Hutzler, *What Is the George Floyd Justice in Policing Act?*, ABC NEWS (Feb. 2, 2023), https://abcnews.go.com/Politics/george-floyd-justice-policing-act/story?id=96851132 [https://perma.cc/DV82-V4FV].

56. *See, e.g.*, Shawn E. Minihan, *Measuring Prosecutorial Actions: An Analysis of Misconduct versus Error*, THE PROSECUTOR (2014), https://ndaa.org/wp-content/uploads/misconduct.pdf (last visited June 29, 2025) [https://perma.cc/D7E7-BLJP]; *Definition of Prosecutorial Misconduct*, CTR. FOR PROSECUTOR INTEGRITY, https://www.prosecutorintegrity.org/registry/definition/ [https://perma.cc/U7XT-U6JW] (last visited Jan. 30, 2025); *Official Misconduct*, INNOCENCE PROJECT, https://innocenceproject.org/official-misconduct/ [https://perma.cc/9FL9-X9N3] (last visited Jan. 30, 2025); Charles E. MacLean, James Berles & Adam Lamparello, *Stop Blaming the Prosecutors: The Real Causes of Wrongful Convictions and Rightful Exonerations*, 44 HOFSTRA L. REV. 151, 155 (2015); THE NAT'L REGISTRY OF EXONERATIONS, *% Exonerations by Contributing Factors*, https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx [https://perma.cc/8NQ8-6N65] (last visited Jan. 30, 2025) [hereinafter *Percent Exonerations*]; *see generally* GROSS ET AL., *supra* note 39, at iii.

57. Emma Zack, *Why Holding Prosecutors Accountable Is So Difficult*, INNOCENCE PROJECT (Apr. 23, 2020), https://innocenceproject.org/why-holding-prosecutors-accountable-is-so-difficult/ [https://perma.cc/29YF-5W58].

58. *See* Robert Klemko & John Sullivan, *The push to remake policing takes decades, only to begin again*, WASH. POST (June 10, 2021), https://www.washingtonpost.com/investigations/interactive/2021/police-reform-failure/ [https://perma.cc/8PYS-2WHQ].

technological systems to create public-facing databases on state and regional bases. It also offers flexible suggestions for collaborative implementation and administration of the data.

As evidenced by programs in a variety of fields, including some initiatives in the criminal legal space, databases are an effective means of gathering, organizing, and sharing large quantities of information.[59] Thanks to advances in technology, the creation and maintenance of shared database programs are easily feasible because of their flexibility, accessibility, and cost efficiency.[60] Furthermore, by sharing the responsibility of collecting, digesting, and safeguarding official misconduct information, criminal justice stakeholders from various sides of the podium could have guaranteed exposure to the information contained within the data, which may mobilize them to assume active roles in discerning the most appropriate remedies and deterrents for the underlying issues. Doing so could have the added benefit of equalizing the associated labor and costs of database maintenance. For these reasons, this Article proposes creating official misconduct databases to be designed and administered by criminal justice stakeholders representing a variety of roles in the system.

In Section I, this Article examines the concept of official misconduct, its known role and scope within the U.S. criminal legal system, and areas where data remains insufficiently explored. Section II reviews the mechanisms by which stakeholders have challenged misconduct on case-by-case and jurisdiction-specific bases, analyzing both their successes and failures. Section III delves into the factors behind these outcomes, arguing that the lack of comprehensive empirical data has hindered a thorough understanding of the causes and consequences of official misconduct, its prevalence and frequency, and the trends it reveals.

Section IV envisions a reformed criminal legal system informed by robust misconduct data, exploring potential strategies and policy advancements that could arise from access to such evidence. Section V advocates prioritizing the systematic tracking of official misconduct at state and regional levels, using advanced technology to catalog, identify, and analyze its prevalence and patterns. It proposes a collaborative approach to data collection, analysis, and sharing, along with a practical framework for implementing the necessary infrastructure.

Finally, the Conclusion explains how the end result—a robust collection of misconduct data spanning jurisdictions throughout the nation—could be used to

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59. *See, e.g.*, *Advancing the Use of Data in Prosecution: What We Measure Matters*, FAIR AND JUST PROSECUTION (Oct. 2023), https://fairandjustprosecution.org/wp-content/uploads/2023/10/FJP-Data-Innovations-White-Paper-Oct-2023.pdf [https://perma.cc/J8XA-SR52].

60. *See* Chen Cuello, *Understanding the Different Types of Databases & When to Use Them*, RIVERY (Dec. 14, 2024), https://rivery.io/data-learning-center/database-types-guide/ [https://perma.cc/X9N6-LZML]; *see, e.g.*, Mike Stetz, *Tech tools and software platforms for legal education and career*, NAT'L JURIST (Feb. 2, 2024), https://nationaljurist.com/national-jurist/news/tech-tools-and-software-platforms-for-legal-education-and-career/ [https://perma.cc/N268-XRPY].

foster justice, promote best practices, and enhance accountability, revolutionizing the criminal legal system as we know it.

I. DEFINING OFFICIAL MISCONDUCT: ITS KNOWN PREVALENCE AND SCOPE

To address official misconduct, it is essential to first establish what it encompasses.[61] Varying definitions of "misconduct" and who is considered an "official" abound, with some stakeholders calling for narrower interpretations of the terms and others advocating for broader understandings.[62] Of course, all definitions of "official misconduct" involve the violation of some law, policy, or oath by a person occupying some role as a public official.[63] Defining official misconduct, therefore, requires two distinct analyses. First, it is necessary to determine who qualifies as an "official." Next, it must be established what specific actions or behaviors constitute "misconduct." Once these questions are answered, a framework for documenting misconduct is possible.

A. WHO IS CONSIDERED AN "OFFICIAL"?

In surveying definitions of official misconduct, it is first necessary to consider who counts as an "official." The literature has generally indicated that "officials" include three classes of actors: government actors, quasi-government actors, and officers of the court.[64]

1. GOVERNMENT ACTORS

Scholars, advocates, and stakeholders almost always use the term "official" in official misconduct to refer to state or federal government actors of some sort.[65]

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61. A non-exhaustive sampling of official misconduct definitions includes, "[m]isconduct committed by a government actor," QUATTRONE CTR, HIDDEN HAZARDS: PROSECUTORIAL MISCONDUCT CLAIMS IN PENNSYLVANIA, 2000–2016 4 (2021) [hereinafter *Hidden Hazards*], and that committed by "any public official who is acting with governmental authority, including police, prosecutors, judges, correctional officials, and more." Taryn Merkl, *Protecting Against Police Brutality and Official Misconduct*, BRENNAN CTR. (Apr. 29, 2021), https://www.brennancenter.org/our-work/research-reports/protecting-against-police-brutality-and-official-misconduct [https://perma.cc/2V2T-C6LA].

62. The NRE limits its definition of "official misconduct" to "misconduct that produces unreliable, misleading or false evidence of guilt, or that conceals, distorts or undercuts true evidence of innocence." GROSS ET AL., *supra* note 39, at iii. Conversely, other scholars leave open the door for more expansive interpretations of the many forms official misconduct can take, depending on the actor. *See* Mia Gilliam, *The Role of Official Misconduct in Wrongful Convictions* (Mar. 18, 2016) (M.S. thesis, Illinois State University) (ISU ReD: Research and eData).

63. Ben Covington, *State Official Misconduct Statutes and Anticorruption Federalism after* Kelly v. United States, 121 COLUM. L. REV. F. 273, 281–84 (2021).

64. *Id.* at 274; *Hidden Hazards*, *supra* note 61, at 4; John B. Gould, Victoria M. Smiegocki & Richard A. Leo, *Criminology: Theorizing Failed Prosecutions*, 112 J. CRIM. L. & CRIMINOLOGY 329, 338–39 (2022).

65. Covington, *supra* note 63, at 281–82. A public official reaches "anyone who is an employee of a governmental instrumentality within the state." *Id.* at 281. This necessarily includes "elected political officials at both the state and local level, police officers and sheriffs, government attorneys, and corrections officials . . . official misconduct—depending on the jurisdiction—may extend beyond these core applications to individuals who

This is because most traditional public official roles exist as natural extensions of the government, as they are vested with the authority to carry out some subset of the powers of the government.[66] There exists a wide variety of government actors, from elected and appointed officials to those who work on their behalf.[67] Stated simply, this Article considers a government actor as anyone who is acting on behalf of the government and has the legal authority to do so.[68]

In the context of collecting official misconduct data, it makes sense that the primary focus is on government actors, given they are vested with power and trust that few others enjoy.[69] For that reason, when such actors abuse their authority, consequences for the public are often most severe.[70] It follows that the strongest safeguards are necessary to both remedy and prevent their misbehavior.[71]

In the context of criminal law, government actors traditionally include judges, prosecutors, and law enforcement officers, as well as—but to a somewhat lesser extent—crime laboratory analysts and child welfare workers.[72] While misconduct by public and private defense attorneys may qualify as "official" actions, as explained below, they are not typically considered government actors.[73]

2. QUASI AND PROSPECTIVE GOVERNMENT ACTORS

Some consider quasi-government actors—individuals employed by quasi-public entities—and temporary or prospective government actors as "officials."[74] While public information concerning misconduct by these actors is more limited, some state anti-corruption statutes include reference to them when describing persons subject to official misconduct laws.[75]

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are employees of quasi-public entities, individuals who wield state authority on a temporary basis, or individuals who are set to assume, but have not yet taken, office." *Id.*

66. For example, police, prosecutors, and the people they employ are extensions of the executive branch and its duty to enforce the law. Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor's Role*, 47 U.C. DAVIS L. REV., 1591, 1633 (2014) (asserting that a prosecutor's role serves "as an intra-executive branch check to encourage police to comply with the law").

67. Covington, *supra* note 63, at 282.

68. *Id.* at 284.

69. Gilliam, *supra* note 62.

70. Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 56, 70–71 (2005); Carl E. Stewart, *Abuse of Power & Judicial Misconduct: A Reflection on Contemporary Ethical Issues Facing Judges*, 1. U. ST. THOMAS L.J. 464, 465–66 (2003).

71. *See generally* Mildred Scott, *Prosecutorial Misconduct: Shouldn't the Punishment Fit the Crime?*, S. TEX. L. REV. 325 (2019); *see also* David Keenan et al., *The Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 217 (Oct. 25, 2011).

72. *See* GROSS ET AL., *supra* note 39, at x; *see also* Gould et al., *supra* note 64, at 338–39 ("Police may poorly investigate a case and miss key evidence or become so devoted to one theory of a case that they fail to fully investigate others. Forensic technicians may err in collecting physical evidence, making it unusable."); Maria Rojas, *Modernizing Justice: Implementing Blockchain Technology into the Criminal Justice System to Reduce Mass Incarceration,* 47 NOVA L. REV. 199, 208 (2023).

73. GROSS ET AL., *supra* note 39, at x.

74. Covington, *supra* note 63, at 281–82.

75. *Id.*

3. DEFENSE COUNSEL AND OTHER OFFICERS OF THE COURT

Finally, another category of actors that may constitute "officials" for purposes of official misconduct reporting are officers of the court.[76] These are people within the legal system with an obligation to ensure the fair administration of justice and to uphold the law.[77] Officers of the court include some positions that overlap with more traditional notions of government actors—such as judges, judicial staffers, and prosecutors—but also other court staff and, perhaps most significantly, public and private defense counsel.[78]

Pretermitting prosecutors and judges, to the extent that officers of the court are omitted from conversations about official misconduct, it is likely because many do not fit the bill of traditional government actors and, perhaps, because any misconduct committed by them is particularly difficult to uncover.[79] Nevertheless, they also commit misconduct.[80] For that reason, some scholars advocate for including defense counsel when measuring the scope of official misconduct, if a reliable means of identifying and recording their conduct can be realized.[81] To the extent that scholars have advocated against including defense counsel in official misconduct reporting, it has not been because defense counsel do not commit harmful misconduct, but rather because of arguments that misconduct by defense counsel may most often be induced by disparately high caseloads and minimal resource support for public defenders.[82] This debate is further addressed below.

For now, however, it is notable that in establishing the first half of the official misconduct framework, there is broad agreement that the conduct of government actors—judges, prosecutors, police, and more—is the epitome of what official misconduct contemplates.[83]

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76. Deborah M. Hussey Freeland, *What is a Lawyer? A Reconstruction of the Lawyer as an Officer of the Court*, 31 ST. LOUIS U. PUB. L. REV. 425, 431 (2012).

77. *Id.*

78. *Id.*; Roberta K. Flowers, *The Role of the Defense Attorney: Not Just an Advocate*, 7 OHIO ST. J. CRIM. L. 647, 647 (2010); Stewart, *supra* note 70, at 466; *see, e.g.*, Antoine v. Byers & Anderson, Inc. 508 U.S. 429, 436–37 (1993) (discussing the role of a court stenographer as an officer of the court).

79. Zack, *supra* note 57.

80. Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 1 BYU L. REV. 1, 7 n.35 (2002); Keenan et al., *supra* note 71, at 217 n.72 ("In preparing this article, I surveyed the reported decisions for the past twenty-five years. Although I uncovered a large number of cases in which defense attorneys had been punished for contemptuous courtroom behavior, I did not find a single case in which a prosecutor had been so disciplined.").

81. Bill Piatt, *Reinventing the Wheel: Construing Ethical Approaches to State Indigent Legal Defense Systems*, 2 ST. MARY'S J. LEGAL MAL. & ETHICS 372, 375 (2012); *Inadequate Legal Defense*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Inadequate-Defense.aspx [https://perma.cc/VTU6-PKDC] (last visited Jan. 31, 2025).

82. *Cf.* GROSS ET AL., *supra* note 39, at 9–10; Nicholas M. Pace et al., *National Public Defense Workload Study* 1, 10–11 (2023); Samantha Jaffe, *It's Not You, It's Your Caseload: Using Cronic to Solve Indigent Defense Underfunding*, 116 MICH. L. REV. 1465, 1478 (2018).

83. Gilliam, *supra* note 62; Kamali'ilani T. Wetherell, *Official Misconduct and Error Correction Mechanisms in Exonerated Death Penalty Cases* (May 5, 2021) (M.A. thesis, University of Nevada, Las Vegas) (ProQuest); Merkl, *supra* note 61.

B. WHAT QUALIFIES AS "MISCONDUCT"?

When defining what qualifies as "misconduct," there is significant variation in scholarly and stakeholder opinions, as misconduct is often context specific.[84]

In a basic sense, there is broad consensus that official misconduct must be the result of an official action that violates a law, policy, or rule and results in the violation of an official's duty or oath of office.[85] Conflicting views concern the significance to be ascribed to the intentionality or inadvertence of such conduct and whether and to what extent the conduct impacted an individual's rights.[86]

In an effort to capture conservative data and minimize the potential chilling effect against official actors, some scholars and stakeholders advocate for limiting official misconduct to intentional and bad-faith violations, which typically result in the most egregious miscarriages of justice.[87] Others argue for more expansive definitions that would include both inadvertent and potentially inadvertent conduct, such as when a prosecutor fails to turn over exculpatory evidence pursuant to *Brady v. Maryland*.[88] Public policy seems to weigh in favor of the latter.[89]

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84. Tiffany Murphy, *Federal habeas corpus and systemic official misconduct: Why form trumps constitutional rights*, 66 U. KAN. L. REV. 1, 3 (2017). ("Examples of prosecutorial misconduct include withholding exculpatory evidence, making false statements to the court, falsifying evidence, and paying witnesses without disclosing it to the defense."); *Hidden Hazards*, *supra* note 61, at 7 ("'Prosecutorial misconduct' is any conduct by a prosecutor that does not comport with a law or procedural or ethical rule governing prosecutorial activity at any point in a criminal proceeding, regardless of the prosecutor's intent."); GROSS ET AL., *supra* note 39, at iii (defining misconduct as that which "distorts the evidence used to determine guilt or innocence. Concretely, that means misconduct that produces unreliable, misleading or false evidence of guilt, or that conceals, distorts or undercuts true evidence of innocence.").

85. Covington, *supra* note 63, at 273; State statutes generally define official misconduct by addressing unauthorized actions related to a public official's official duties, such as exercising power unlawfully or refraining from performing legally mandated duties. Notably, they also tend to emphasize the knowledge or intent of the public official in committing these acts. While the core principles are largely consistent, statutes vary in classification. For example, New Jersey and Tennessee treat official misconduct as a severe crime compared to New York's classification as official misconduct as a misdemeanor. *See* N.J. REV. STAT. § 2C:30-2 (West 1979); N.Y. Penal Law § 195.00 (McKinney 2025); TENN. CODE ANN. § 39-16-402(a) (West 2014).

86. *Hidden Hazards*, *supra* note 61, at 5; *see also* Davis, *Prosecutors Who Intentionally Break the Law*, *supra* note 1, at 24.

87. Minihan, *supra* note 56, at 23; Saul M. Kassin et al., *Prosecutorial Misconduct: Assessment of Perspectives from the Bench*, 58 AM. JUDGES ASS'N. CT. REV., 162, 163 (2023).

88. *See Hidden Hazards*, *supra* note 61, at 5; *see also* Davis, *Prosecutors Who Intentionally Break the Law*, *supra* note 1, at 24. Courts have also weighed in on the issue of defining official misconduct. *See* Michael J. Morgan, *Bridging The Gap: Assessing the State of Federal Corruption Law After* Kelly v. United States, 89 FORDHAM L. REV. 2339, 2373 (2021) ("Some state courts have debated how 'official misconduct' is defined within statutes. The main question that arises is what qualifies as the public official's 'duty' and what types of actions amount to 'official misconduct'.").

89. *Hidden Hazards*, *supra* note 61, at 5 ("The vast majority of prosecutorial misconduct appears to be inadvertent, but even inadvertent mistakes can be hugely consequential to the crime victim, family members, and the defendant, and greatly undermine public confidence in our judicial system.");

Some prosecutors may not actually realize the illegality of their behavior, especially inexperienced prosecutors in offices that foster a culture of winning at any cost. If a prosecution office does not train its prosecutors to reveal Brady information and otherwise play by the rules, these prosecutors may unknowingly cross the line from acceptable to illegal behavior. Even when prosecutors know their behavior is illegal, the harmless error doctrine and the absence of meaningful oversight by bar disciplinary authorities serve to encourage the offending behavior.

1. DELIBERATE MISCONDUCT

While different entities define official misconduct in a multitude of ways, virtually all agree that intentional or deliberate misbehavior always qualifies.[90] Of the states that explicitly criminalize official misconduct and public corruption by statute, nearly all define official misconduct as intentionally engaging in an unlawful act that the official actor knows is unlawful.[91] Moreover, when it comes to the criminal legal system specifically, while attorneys only constitute a faction of system actors, they play an outsized role. Disciplinary rules governing lawyer and judicial professionalism explicitly prohibit knowingly engaging in, or failing to engage in, certain conduct, which also covers intentional acts.[92]

For example, all lawyers are subject to ethics rules promulgated by their jurisdictions—and all jurisdictions have adopted some variation of the American Bar Association's (ABA) Model Rule of Professional Conduct 3.8, outlining the special duties of a prosecutor.[93] It is a violation of Model Rule 3.8 for a prosecutor to (1) prosecute a charge that she knows is not supported by probable cause; (2) knowingly fail to timely disclose to defense counsel exculpatory or mitigation evidence; (3) knowingly fail to disclose the existence of new, credible, and material evidence indicating that a convicted defendant did not commit the crime for which they were convicted (and conduct an investigation into the crime, if in their jurisdiction); and (4) knowingly fail to remedy the conviction of an innocent defendant as shown by clear and convincing evidence.[94] For attorneys with clients seeking post-conviction relief or civil damages because of official misconduct, it is also often the case that they must prove that the prosecutor knew or should have known the conduct was improper.[95] Some scholars, practitioners, and think tanks, including those that define misconduct in broader terms, tend to focus on the collection and study of intentional misconduct.[96]

Davis, *Prosecutors Who Intentionally Break the Law*, *supra* note 1, at 24.

90. *See* GROSS ET AL., *supra* note 39, at iii; *Browse Cases*, Official Misconduct Tags, *supra* note 45; Kassin et al., *supra* note 87, at 163, 166.

91. *See* Covington, *supra* note 63, at 281, 284.

92. For example, the ABA's Model Rules of Professional Conduct for attorneys and Code of Judicial Conduct for judges discuss knowing misconduct in 8.4 and 2.2–2.10, respectively. MODEL RULES OF PROF'L CONDUCT R. 8.4 (2018) [hereinafter MODEL RULES]. *See* MODEL CODE OF JUD. CONDUCT R. 2.2–2.10 (2004). Moreover, certain law enforcement agencies outline forms of deliberate misconduct in their own policy manuals. *See* Kate Levine, *Discipline and Policing*, 68 DUKE L. J. 839, 862–64 (2019).

93. MODEL RULES R. 3.8 (2018).

94. MODEL RULES R. 3.8 (a), (d), (g-h) (2018). Only twenty jurisdictions have adopted a combination of provisions (d), (g), and (h) of the Model Rules, regarding the disclosure of exculpatory and mitigation evidence, post-conviction disclosure of evidence of innocence, and the duty to remedy wrongful convictions. *See* ABA CPR Policy Implementation Committee, *Variations of the ABA Model Rules of Professional Conduct*, ABA, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-3-8.pdf [https://perma.cc/8J75-8KDY] (last visited Jan. 26, 2025).

95. *See* Paul J. Spiegalman, *Prosecutorial Misconduct in Closing Argument: The Role of Intent in Appellate Review*, 1 U. AR. J. APP. PRAC. & PROCESS 115, 118 (1999).

96. *See* Brandon L. Garrett, Adam M. Gershowitz & Jennifer Teitcher, *The* Brady *Database*, 114 J. OF

From the perspective of those seeking to detect, punish, and prevent the most egregious forms of misconduct, it makes sense to focus on intentionality, as opposed to instances of incompetence or mistake.[97] It is also true that, for data collection purposes, gathering and reporting information on intentional instances of official misconduct is likely easier because the information is often more readily available.[98] That said, it also leads to a conservative, though some may argue more reliable, data set.[99] Others counter that focusing on intentional misconduct and excluding all other forms encourages those with authority to overlook or dismiss problematic behavior that may equally result in public harm.[100]

2. RECKLESS, NEGLECTFUL, OR OTHERWISE INADVERTENT MISCONDUCT

Organizations focusing on the role of official misconduct in wrongful conviction cases tend to define official misconduct more broadly and treat it as encompassing misbehavior that may not be intentional or committed in bad faith.[101] For

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Crim. L. & Criminology 185, 190 (2024) (EXPLAINING FINDINGS FROM ANALYSIS OF *BRADY* CLAIMS, INCLUDING MANY CASES IN WHICH COURTS FOUND THE MISCONDUCT TO BE INTENTIONAL); MARK NILES, *A NEW BALANCE OF EVILS: PROSECUTORIAL MISCONDUCT,* IQBAL*, AND THE END OF ABSOLUTE IMMUNITY*, STANFORD J. OF C.R. & C.L. 137, 139 (2017) (SURVEYING INSTANCES OF PROSECUTORIAL MISCONDUCT AND THE INEFFECTIVENESS OF NON-CIVIL LIABILITY MECHANISMS FOR COMBATING IT); *HOW DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION CONDUCTS PATTERN-OR-PRACTICE INVESTIGATIONS*, U.S. DEP'T OF JUST., HTTPS://WWW.JUSTICE.GOV/ARCHIVES/FILE/HOW-PP-INVESTIGATIONS-WORK/DL [HTTPS://PERMA.CC/SKA4-RHVX] (LAST VISITED AUG. 4, 2025) ("THE DEPARTMENT OF JUSTICE'S CIVIL RIGHTS DIVISION HAS EMPLOYED ['PATTERN-OR-PRACTICE'] INVESTIGATION [S] IN COMMUNITIES ACROSS THE NATION TO REFORM SERIOUS PATTERNS AND PRACTICES OF EXCESSIVE FORCE, BIASED POLICING AND OTHER UNCONSTITUTIONAL PRACTICES BY LAW ENFORCEMENT."); *ACCOUNTABILITY*, CIV. RIGHTS CORPS, HTTPS://CIVILRIGHTSCORPS.ORG/ACCOUNTABILITY/ [HTTPS://PERMA.CC/G79L-FYUX] (LAST VISITED AUG. 4, 2025) ("THE POLICING PROJECT AT CRC WORKS TO HOLD POLICE ACCOUNTABLE FOR ABUSIVE CONDUCT WHILE BUILDING SHARED COMMUNITY AND POWER AMONG LEGAL ADVOCATES, COMMUNITY ORGANIZERS, AND SURVIVORS.").

97. *See* Minihan, *supra* note 56, at 24.

98. *See* GROSS ET AL., *supra* note 39, at 8 ("A few types of official misconduct are public and visible for all to see—improper closing argument, for example. Most, however, are concealed—witness tampering, concealing exculpatory evidence, forensic fraud, and so forth. We determine whether misconduct occurred based on the information available to us, which inevitably means that we miss misconduct that was successfully hidden.")

99. *Id.* at 9. ("[W]e miss misconduct that was successfully hidden, so the rates we report are liable to be under-estimates.")

100. *See, e.g.*, Mary N. Bowman, *Mitigating Foul Blows*, 49 GA. L. REV. 309, 319–20 (2015).

Prosecutors serve a unique dual role in the criminal justice system: to prevent the guilty from going free and the innocent from being convicted. "[T]he more we learn about human behavior, the less confident we should be about whether motivations are malicious, intentional, or even wholly conscious." Focusing on the cognitive dimensions surrounding prosecutorial misconduct is valuable, "not because all prosecutors are well intentioned, but because suggesting that only bad-intentioned prosecutors are at risk of poor decision making is simply too easy." A well-established body of cognitive science research shows that people's decisions are impacted by cognitive biases . . . Given the fine line between proper argument and prosecutorial trial misconduct, even well-intentioned prosecutors may sometimes cross the line inadvertently . . .

Id. (quoting Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science,* 47 WM. & MARY L. REV. 1587, 1614 (2006)).

101. *See generally Hidden Hazards*, *supra* note 61, at 3–5; Merkl, *supra* note 61, at 8; GROSS ET AL., *supra* note 39, at iii.

example, the Quattrone Center for the Fair Administration of Justice, a national research and policy hub that examines wrongful arrests and convictions, defines prosecutorial misconduct as "any conduct. . . that does not comport with a law or procedural or ethical rule governing prosecutorial activity at any point in a criminal proceeding, regardless of the prosecutor's intent."[102] Moreover, the National Registry of Exonerations defines official misconduct as occurring when "a prosecutor, police officer, or less frequently, forensic analyst or child welfare worker, violates an official duty in the investigation or prosecution of a criminal case and that violation contributes to the conviction of a defendant who is later exonerated."[103] According to the Registry's 2020 report on government misconduct,

> Some forms of misconduct are deliberate by definition—*perjury* by a law enforcement official, or forensic *fraud*—and some are always deliberate in operation, such as violence in interrogations. Some are usually deliberate, but not inevitably—for example, misconduct in interrogations that does not include violence—and some, in particular concealing exculpatory evidence, may or may not be deliberate. One form of witness tampering—abusive questioning of a child victim—was probably never a deliberate act of misconduct because the officials involved believed it was appropriate and necessary.[104]

While a significant portion of the official misconduct in innocence cases may have occurred intentionally, organizations largely examine the bigger picture of the violation of legal or professional norms that result in miscarriages of justice and harm to the public.[105] Similarly, individuals leading the charge for police and prosecutor reform seem more inclined to adopt a more expansive definition of official misconduct.[106] If the focus of the inquiry is broader than mere disciplinary action against individual offenders—and, when it comes to innocence organizations and stakeholders pushing for reform, it often is[107]—a more expansive

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102. *Hidden Hazards*, *supra* note 61, at 7.

103. GROSS ET AL., *supra* note 39, at 8.

104. *Id.*

105. *See, e.g.*, *Hidden Hazards*, *supra* note 61, at 5.

106. *Definition of Prosecutorial Misconduct*, CTR. FOR PROSECUTORIAL INTEGRITY, https://www.prosecutorintegrity.org/registry/definition/ [https://perma.cc/C2TM-S6VY] (last visited Jan. 31, 2025) [hereinafter *Prosecutor Integrity*] (defining police misconduct as "any conduct, intentional or inadvertent, during the course of prosecution that: 1. Violates the applicable code of professional ethics, 2. Breaks a pertinent law, or 3. Prejudices, or appears to prejudice the administration of justice."); *What is Police Misconduct*, POLICE BRUTALITY CTR., https://policebrutalitycenter.org/what-is-police-misconduct/ [https://perma.cc/RSV6-QDVA] (last visited Jan. 31, 2025) ("Police misconduct occurs when a law enforcement officer, acting or claiming to act in their official capacity, engages in unlawful and wrongful acts that violate a person's constitutional rights. The officer also violates state and federal law, police training policies, and standard protocol rules.").

107. Beyond disciplinary actions against offending actors, these groups may choose to pursue findings of official misconduct to support legal claims for relief, or to educate the public and pursue systemic reform. *See About*, INNOCENCE PROJECT https://innocenceproject.org/about/#:~:text=The%20Innocence%20Project%20works%20to,systems%20of%20justice%20for%20everyone [https://perma.cc/EJ8U-AMM4] (last visited Aug. 4, 2025) ("The Innocence Project works to free the innocent, prevent wrongful convictions, and create

definition of misconduct that accounts for official recklessness, neglect, and inadvertence is well-founded.

First, a more expansive definition acknowledges the myriad of ways officials' actions can negatively impact individuals within the system and the system itself. Second, it also recognizes that the collection and analysis of incidents meeting this broader definition provides a better understanding of why and how the criminal legal system came to be the way that it is. Finally, it helps identify solutions for the correction and prevention of misconduct.

C. THE KNOWN PREVALENCE OF OFFICIAL MISCONDUCT IN THE CRIMINAL LEGAL SYSTEM

With an understanding of what official misconduct is, it is crucial to next examine the extent of its known impact on the criminal legal system. As discussed, much of what is known about official misconduct and the frequency with which it occurs derives from the study of wrongful conviction cases and, to a lesser extent, death penalty cases and instances of excessive force by police.[108] Studying these cases offers an important glimpse into the flaws of the human-run criminal legal system and the serious consequences of unaddressed official misconduct, but it remains just that—a glimpse. Currently, the full impact of official misconduct on the criminal legal system is unknown, and it will remain so until more comprehensive data is collected and published.

While it captures only a fraction of information, the Registry is arguably the leading source on the prevalence of official misconduct in criminal convictions.[109] It describes official misconduct as:

> misconduct by government officials that *contributed* to the *false convictions* of defendants who were later exonerated—misconduct that distorts the evidence used to determine guilt or innocence. Concretely, that means misconduct that produces unreliable, misleading or false evidence of guilt, or that conceals, distorts or undercuts true evidence of innocence.[110]

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fair, compassionate, and equitable systems of justice for everyone."); *See also Transforming Systems*, INNOCENCE PROJECT: https://innocenceproject.org/transforming-systems/ [https://perma.cc/7BKG-4TP8] (last visited Aug. 4, 2025).

108. *See generally* Russell Covey, *Police Misconduct as a Cause of Wrongful Conviction*, 90 WASH. U. L. REV. 1133, 1134 (2013); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WISC. L. REV. 399, 399–400 (2006); Wetherell, *supra* note 83, at iii.

109. GROSS ET AL., *supra* note 39, at 9. ("Our database is unique. We have detailed information on all known convictions of innocent defendants who were later exonerated. . . . Because we have detailed information about these convictions, we can begin to describe how this sort of misconduct operates—who does what, when, how, and in which cases."); *Exoneration Registry*, NATIONAL REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/about.aspx [https://perma.cc/4B2V-LRRT] (last visited Jan. 31, 2025). *See also Government Misconduct Cause of Most Wrongful Convictions*, U.C. IRVINE SCH. OF SOC. ECOLOGY, (Sept. 30, 2020), https://socialecology.uci.edu/news/government-misconduct-cause-most-wrongful-convictions?utm [https://perma.cc/4H5N-FDR5] ("This report is by far the most thorough study ever of official misconduct by police, prosecutors, and others in criminal cases in the United States.").

110. GROSS ET AL., *supra* note 39, at iii.

While placing narrow parameters on the cases it studies and explicitly exempting from its data set misconduct that does not directly contribute to a conviction (one example being the use of excessive force by police), the Registry includes intentional and inadvertent misconduct in its reporting.[111] Furthermore, the Registry also considers police, crime lab analysts, child welfare workers, and prosecutors as "officials" within the scope of government misconduct.[112] Notably, the Registry's data does not contemplate misconduct committed by judges due to an absence of data.[113] At the time of its 2020 Report on government misconduct, the Registry also did not account for misconduct by defense counsel for similar reasons, while noting that defense lawyers may be excluded from traditional definitions of who constitutes a "government" official.[114] Nevertheless, the Registry has explained it would report misconduct by defense counsel if it had adequate information, because (1) instances of defense misconduct are likely comparable to others in the system, (2) they are officers of the court, and (3) they are frequently paid by the government.[115]

Thus, even for innocence exoneration cases, official misconduct is likely underreported—a disturbing reality when considering the prominent rate at which the Registry found official misconduct infected the cases it has examined. To date, official misconduct has contributed to 2,255 of the 3,725 exoneration cases in its database.[116] In 2023 alone, official misconduct played a role in seventy-seven percent of reported exoneration cases nationally.[117] As of the 2020 comprehensive report, the most common official misconduct infractions were committed by police and prosecutors and manifested in the form of witness tampering, misconduct in interrogations of suspects, fabrication of evidence, concealment of exculpatory evidence, and misconduct at trial.[118] In state court cases, prosecutors and police committed misconduct at similar rates, but prosecutors committed misconduct more than twice as often as police in federal cases—and seven times as often as police in federal, white-collar cases.[119]

The Registry is not the only source of known official misconduct data, however. According to the Death Penalty Information Center (DPIC), prosecutorial misconduct played a role in more than 550 death row reversals and exonerations

111. *Id.* at iii, 13.

112. *Id.* at iii.

113. *Id.* at x.

114. *Id.*

115. *Id.* at 9. While it does not include the information as part of its official misconduct reporting, the Registry does report data on the role of "inadequate legal counsel" as a contributor to wrongful convictions. To date, inadequate legal counsel has contributed to twenty-eight percent of exoneration cases. *Browse Cases*, *supra* note 45.

116. *Explore Exonerations (Map)*, THE NAT'L REGISTRY OF EXONERATIONS, https://exonerationregistry.org/Exonerations-in-the-United-States-Map# [https://perma.cc/42YS-RVY8] (last visited August 20, 2025) (data about official misconduct as a contributing factor accessed by filtering for "Official Misconduct" and comparing to total number of exonerations without any filters applied).

117. 2023 ANNUAL REPORT, *supra* note 44, at 4.

118. GROSS ET AL., *supra* note 39, at iv.

119. *Id.*

between 1972 and 2022, more than five percent of all death sentences handed down in the last fifty years.[120] These cases occurred in 228 counties and spanned thirty-two states and the federal system.[121] The withholding of exculpatory evidence, improper arguments at trial, use of false evidence, and jury discrimination ranked among the most common forms of misconduct.[122] DPIC cautions that its data represents merely a fraction of official misconduct in its cases; it does not account for cases where judges made factual findings of prosecutorial misconduct but denied claims on materiality or harmless error grounds, nor does it consider misconduct reversals where capital charges were pursued but defendants were convicted of lesser charges or avoided death sentences.[123]

Some other bodies of data capturing instances of official misconduct beyond innocence and capital cases also exist, though they are often maintained less uniformly, and the forms of misconduct on which they report vary significantly.[124] Nevertheless, the information they provide also supports the notion that official misconduct plays a key role in undermining the values and legitimacy of the criminal legal system.[125] A sampling of data from available sources reveals the following about law enforcement misconduct, prosecutor misconduct, and other forms of official misconduct:

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120. *DPIC Analysis Finds Prosecutorial Misconduct Implicated in More than 550 Death Penalty Reversals or Exonerations*, DEATH PENALTY INFO. CTR. (June 30, 2022) [hereinafter *DPIC Analysis*] https://deathpenaltyinfo.org/news/dpic-analysis-finds-prosecutorial-misconduct-implicated-in-more-than-550-death-penalty-reversals-or-exonerations [https://perma.cc/PJ3T-APWL].

121. *Id.*

122. *Id.*

123. *Id.*

124. BRADY LIST, https://giglio-bradylist.com/ [https://archive.ph/NhYJ2] last visited Jan. 31, 2025); *Registry Database*, CTR. FOR PROSECUTOR INTEGRITY, [hereinafter CPI Database] https://www.prosecutorintegrity.org/registry/database/ [https://perma.cc/RW3G-2ZTG] (last visited Jan. 31, 2025); *Vermont Brady Letter Database*, AIRTABLE, https://airtable.com/app8VTGJ9e4OblhDh/shrJ4eNWJ1ROMWtBR/tblnbyRpnRt03Mfl8/viwCU2PIH3MXP4nzo [https://perma.cc/JN66-X6WQ] (last visited Jan. 31, 2025); *Law Enforcement Lookup*, THE LEGAL AID SOCIETY, https://legalaidnyc.org/law-enforcement-look-up/ [https://perma.cc/7HNL-PQR5] (last visited Jan. 31, 2025); CIVIL POLICE DATA PROJECT, https://cpdp.co/ [https://perma.cc/4SJF-2EHA] (last visited Jan. 31, 2025); MAPPING POLICE VIOLENCE (Aug. 11, 2024), https://mappingpoliceviolence.org/ [https://perma.cc/6DUF-UKX5]; LOUISIANA LAW ENFORCEMENT ACCOUNTABILITY DATABASE, [hereinafter LLEAD] https://llead.co/ [https://perma.cc/C37T-QB9R] (last visited Jan. 31, 2025). As can be discerned from the above databases and many others, the majority of publicly available misconduct data sets limit their focus to police misconduct. Outside of the context of *Brady* violations and high-profile media accounts, data on prosecutor misconduct is rarely captured. Apart from investigative journalism pieces, data sets focused on judicial and defense counsel misconduct are virtually non-existent. "Currently, the judiciary only publicly reports instances in which judges are formally reprimanded by dumping misconduct orders onto the U.S. Courts website, redacting judges' names, and making the orders nearly impossible to search through." Aliza Shatzman, *The Judiciary Accountability Act: Dismantling the Myth of the Untouchable Judge*, 27 N.Y.U. J. LEGIS. & PUB. POL'Y QUORUM 1, 5 (2022); *see also Exploring the misdeeds of judges across Americ*a, REUTERS, https://www.reuters.com/investigates/special-report/usa-judges-data/ [https://archive.ph/lLutU] (last visited Jan. 31, 2025).

125. Jonathan Harwell et al., *Righteous Indignation: Prosecutorial Misconduct, Brady, and the Cognitive Limits of Self-Policing*, 87 TENN. L. REV. 715, 717 (2020) ("The evaluation of available information supports the conclusion that, while exact numbers cannot be placed on the scale, prosecutorial misconduct is nonetheless a problem requiring attention, given both the evidence of its wide-spread nature and of its unique destructiveness to our justice system.").

1. LAW ENFORCEMENT MISCONDUCT

- Police killed approximately 1,360 people in 2023.[126]
- Approximately 250,000 people are injured by law enforcement officers annually.[127]
- Ninety-six percent of people killed by police in 2023 involved police shootings. Tasers, physical force, and police vehicles accounted for most other deaths. Officers were charged with a crime in only ten cases.[128]
- Most unarmed people killed by police were people of color. Black people were more likely to be killed by police, more likely to be unarmed, and less likely to be threatening someone when killed.[129]
- As of September 2020, police misconduct was the leading form of official misconduct contributing to wrongful conviction exonerations.[130] In seventeen percent of cases, officials—primarily police—induced witnesses to provide false evidence or withhold accurate information.[131]

2. PROSECUTOR MISCONDUCT

- Prosecutorial misconduct was a contributor to thirty percent of wrongful conviction exonerations, as of 2020.[132] The most common infractions were concealment of substantive evidence of innocence and impeachment evidence and misconduct at trial—including knowingly permitting perjury, lying in court, and making improper arguments.[133]
- In death penalty cases, prosecutorial misconduct has been a factor in 550 reversals and exonerations, comprising roughly five percent of all capital cases in the United States.[134]
- Nearly thirty-nine percent of prosecutorial misconduct cases tracked by the Center for Prosecutor Integrity involved prosecutors' use of inadmissible evidence, false evidence, or perjury.[135]

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126. MAPPING POLICE VIOLENCE, *supra* note 124. While not every police killing may be attributable to misconduct, the available data and recent anecdotal evidence discussed throughout this Article suggest many are.

127. *U.S. Data on Police Shootings and Violence*, U. OF ILL. CHI., [hereinafter *Police Shooting Data*] https://policeepi.uic.edu/u-s-data-on-police-shootings-and-violence/ [https://perma.cc/JFC9-V8VQ]. Of course, not every officer-involved injury constitutes misconduct. Nevertheless, many may be the product of it.

128. MAPPING POLICE VIOLENCE, *supra* note 124.

129. *Id.*

130. GROSS ET AL., *supra* note 39, at iv, 12. Police committed misconduct in thirty-five percent of cases. *Id.* Forensic analysts, who may be considered as part of law enforcement in some jurisdictions, committed misconduct in three percent of cases. *Id.* at iv, 11. Child welfare workers committed misconduct in two percent of cases. *Id.*

131. GROSS ET AL., *supra* note 39, at 30.

132. *Id.* at 12.

133. *Id.* at 32–33.

134. *DPIC Analysis, supra* note 120.

135. That percentage is taken from 1,058 cases. *Most Common Types of Prosecutorial Misconduct - All Cases*, CTR. FOR PROSECUTOR INTEGRITY, https://www.prosecutorintegrity.org/registry/graph/all/ [https://perma.cc/K39X-9AUL] (last visited Aug. 4, 2024).

- Between 2015 and 2019, there were approximately eighty two cases where courts found *Brady* violations nationally.[136] Though federal prosecutions account for fewer than one percent of all criminal cases, federal prosecutors were responsible for thirty-three percent of the *Brady* violations between 2015 and 2019.[137] Despite egregious violations, such as interview notes documenting a prosecutor's star witness as "a fawning, desperate supplicant willing to 'do everything [the prosecutor] said,'" none of the *Brady* violations between 2015 and 2019 barred the government from retrying the case.[138]
- Prosecutors are rarely disciplined for their misconduct. A 2013 report by the Center for Prosecutor Integrity found that nine studies examined 3,625 instances of prosecutorial misconduct in both state systems and nationally between 1963 and 2013 and that prosecutors were disciplined in only sixty three cases—roughly two percent of the time.[139] In only fourteen of those cases were prosecutors suspended from practice or disbarred.[140] Since 2013, several organizations have conducted jurisdiction-specific studies of prosecutorial misconduct and reached similar results.[141]

3. OTHER MISCONDUCT

- Data on judicial misconduct claims is exceptionally limited. According to the United States Courts, in 2021, there were 1,305 complaints lodged against federal judges.[142] The allegations were most frequently related to: the merits of decision or ruling (989 complaints); other misconduct (462 complaints); discrimination on the basis of race, color, sex, or other characteristic (108 complaints); delayed decisions (91 complaints); and hostility toward litigants, lawyers, judicial employees, or others (69 complaints).[143]

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136. These numbers, however, do not represent the total universe of cases where the government may have violated its *Brady* obligation, because the nature of such violations is that they are often undiscovered. Garrett et al., *supra* note 96, at 203 (citing Samuel R. Wiseman, Brady, *Trust, and Error*, 13 LOY. J. PUB. INT. L. 447, 454 (2012)).

137. *Id.* at 20.

138. *Id.* at 19, 21 (alteration in original).

139. *An Epidemic of Prosecutor Misconduct*, CTR. FOR PROSECUTOR INTEGRITY, 8 (2013) https://www.prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutorMisconduct.pdf [https://perma.cc/F3YA-5VCP].

140. *Id.*

141. For example, the Quattrone Center for the Fair Administration of Justice examined prosecutorial misconduct claims in Pennsylvania from 2000–2016 and discovered that only two prosecutors were disciplined for misbehavior in relation to their jobs. *Hidden Hazards*, *supra* note 61, at 41. In Ohio, journalists published a database of prosecutorial misconduct cases they examined between 2018–2021: Of the 447 cases studied, findings of prosecutorial misconduct were made in about twenty percent of cases but none were subjected to discipline. Gabriela Alcalde et al., *How Ohio prosecutors broke rules to win convictions and got away with it*, NPR (Dec. 14, 2023) https://www.npr.org/2023/12/14/1216111092/ohio-court-prosecutor-misconduct-due-process-rights [https://perma.cc/J57Y-JYN8].

142. *Complaints Against Judges — Judicial Business 2021*, U.S. CTS. (updated Feb. 2024), https://www.uscourts.gov/statistics-reports/complaints-against-judges-judicial-business-2021 [https://perma.cc/5DNV-VPPE].

143. *Id.*

Of the total complaints, the vast majority were dismissed in whole or in part as being directly related to judicial decisions or lacking sufficient evidence.[144]

- Roughly fifteen judges have ever been impeached by Congress, only eight of which were convicted by the Senate.[145] The most recent was in 2010, when G. Thomas Porteous, Jr. was convicted on charges of accepting bribes and making false statements.[146]
- Despite the previously mentioned statistics, however, an investigative reporting series published in 2020 revealed 1,509 cases in which judges resigned, retired, or were publicly reprimanded for misconduct between 2008 and 2019.[147] Reporters also identified over 3,000 additional cases of judicial discipline administered in the same time frame where the circumstances of the misconduct allegations and the identities of the judges were kept secret.[148] Ninety percent of judges were permitted to remain on the bench.[149]
- Finally, data on misconduct committed by criminal defense counsel is also captured infrequently. This is likely because of underreporting. Furthermore, the traditional legal mechanism for remedying convictions resulting from defense counsel behavior is ineffective assistance of counsel, which often results from under-resourcing. Ineffective assistance of counsel claims are among the most commonly asserted in post-conviction litigation, with a notoriously slim success rate.[150] Nonetheless, inadequate defense counsel is

144. *Id.*

145. *Impeachments of Federal Judges*, FED. JUD. CTR., https://www.fjc.gov/history/judges/impeachments-federal-judges [https://perma.cc/R8CL-XQ8G] (last visited Jan. 31, 2025).

146. *Id.*

147. Michael Berens & John Shiffman, *Thousands of U.S. judges broke laws or oaths remained on the bench*, REUTERS (Jun. 30, 2020), https://www.reuters.com/investigates/special-report/usa-judges-misconduct/ [https://perma.cc/YR4W-9MUL].

148. *Id.*

149. *Id.*

150. Ineffective assistance of counsel claims have been reported to have a success rate as low as eight percent. Irene Oritseweyinmi Joe, *Learning from Mistakes*, 80 WASH. & LEE L. REV. 297, 309 n.47 (2023). *See* VICTOR E. FLANGO, HABEAS CORPUS IN STATE AND FEDERAL COURTS 62 (1994) (noting that state and federal courts granted 8% and less than 1% of ineffective assistance petitions, respectively, in 1992). In a study of the first 255 DNA exonerations, fifty-four claims of ineffective assistance were raised, an overwhelming majority (eighty-one percent) of which courts rejected. EMILY M. WEST, COURT FINDINGS OF INEFFECTIVE ASSISTANCE OF COUNSEL IN POST-CONVICTION APPEALS AMONG THE FIRST 255 DNA EXONERATION CASES 3 (2010). In another six percent of those fifty-four cases, the court found the error harmless. *Id.* In his empirical study of innocence litigation, Brandon Garrett identified thirty-eight exonerees who raised ineffective assistance of counsel claims. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 114 (2008) [hereinafter Garrett, *Judging Innocence*]. Only four of those thirty-eight achieved reversals on that basis. *Id.* Three of those four exonerees were represented by the same attorney, who was later disbarred for unrelated reasons. *Id.* at 115. Of the 3,725 cases in the National Registry of Exonerations, 1,038 of those had "Inadequate Legal Defense" as a contributing factor. *Search Exonerations, supra* note 27. Of those 1,038, 545 (fifty-two percent) are identified as Black, and 131 (twelve percent) are identified as Hispanic. *Id.* Other scholars have also commented on the near-Herculean efforts required to prevail on such claims:

> [A]s a result of *Strickland*, an ineffective assistance of counsel claim is essentially rendered a viable claim available only to the truly innocent criminal defendant . . . . [A] *Strickland* challenge requires the cooperation of the attorney about whom the petitioner complains. Any one of these reasons individually makes bringing a successful ineffective assistance of counsel claim - even where one received deplorable legal assistance - an arduous task. Taken together, they make *Strickland* challenges exceedingly difficult to win. In fact, . . . these reasons together contribute to

> estimated to have contributed to nearly thirty percent of all exoneration cases.[151]

Thus, despite having limited information about the prevalence and extent of official misconduct, it is clear that it plays a major role in countless cases each year, resulting in the denial of justice to victims and the system, creating new victims out of defendants, and undermining the accuracy and accountability the system is supposed to provide.

D. THE SUSPECTED PREVALENCE OF OFFICIAL MISCONDUCT AND THE NEED FOR BROADER COLLECTION OF MISCONDUCT DATA

Existing data sets on official misconduct, while increasing in popularity and numbers, are still relatively limited. Those that do exist on a national scale typically concentrate on innocence exonerations, the death penalty, and high-profile instances of police brutality. Although these areas are perhaps most consequential, this narrow focus fails to capture data on the diverse range of criminal cases and the numerous forms of official misconduct that occur within them—a feat that would be nearly impossible to accomplish by a single entity on a national scale, anyhow. Most other public-facing databases employ narrow focuses, often limited to law enforcement misconduct, and are created and maintained inconsistently, likely due to a lack of financial and administrative support.[152] Because existing databases employ limited reporting parameters, the documented instances of official misconduct likely represent only a fraction of the actual occurrences.

There is significant support for this hypothesis. The previously discussed datasets—with their disturbingly bleak figures—nonetheless omit entire categories of officials from their reporting, as well as cases at certain procedural stages, specific types of case resolutions, and more.[153] For instance, these exclusions do not even account for cases where judges found misconduct but claims failed due to procedural issues, materiality determinations, or harmless error review.[154] Nor do they

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> the reality that the vast majority of ineffective assistance of counsel claims are denied even when the claims concern deplorable legal assistance.

Duncan, *supra* note 80, at 19–20.

151. *Exoneration Detail List*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View=%7bFAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7%7d&FilterField1=ILD&FilterValue1=8%5FILD [https://perma.cc/R2SQ-UJS2] (last visited Jan. 31, 2025).

152. MAPPING POLICE VIOLENCE, *supra* note 124; *Police Shooting Data*, *supra* note 127.

153. Most criminal cases—somewhere around ninety percent, depending on the jurisdiction—end with a guilty plea. THEA JOHNSON, PLEA BARGAIN TASK FORCE REPORT, 36 n.2 (2023). As a result, very few cases make it far enough to have pre-trial hearings, where litigants are more likely to discover government misconduct. *Id.* at 6. And, once a plea is entered, it is unlikely that any misconduct will ever be discovered. *Id.* Many in the legal profession now recognize that innocent people do plead guilty, but many states make it nearly impossible to get back into court after doing so. *Id.* at 20; GROSS ET AL., *supra* note 39, at 9–10; *Documenting Prosecutorial Misconduct Reversals and Exonerations in Capital Cases,* DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/documenting-prosecutorial-misconduct-reversals-and-exonerations-in-capital-cases [https://perma.cc/7NE8-NGTX] (last visited Jan. 31, 2025).

154. *Hidden Hazards*, *supra* note 61, at 9.

account for cases marred by misconduct that never made it to court.[155] Notably, none of them consider the countless cases in which official misconduct occurred but remains hidden or the proof of which was destroyed.[156] The reality is that we do not yet know how commonly official misconduct occurs in criminal cases across the board, but every shred of evidence suggests it happens with great frequency and that the blows it strikes are both foul and devastating.[157]

The less criminal justice stakeholders, policy makers, and legal scholars know about the true depth and breadth of official misconduct in the criminal legal system, the longer it will continue without adequate evidence necessary for corrective and preventive reform initiatives. The ABA recognized as much when it called on courts, prosecutors, public defenders, and other stakeholders to create public databases "to assess and monitor racial and other biases in the plea process" its *Plea Bargain Task Force Report.*[158] According to the Report, the current system lacks transparency, which undercuts the ability of policy makers to make necessary improvements.[159] In the end, the more information is known, shared, and studied, the more likely that individual litigants will achieve relief, offenders will be subject to accountability, and the system will successfully mobilize efforts to prevent official misconduct before it ever occurs.

II. LESSONS LEARNED FROM PROMINENT EFFORTS TO COMBAT OFFICIAL MISCONDUCT

Official misconduct has plagued the American criminal legal system since its inception.[160] Adoption of the Thirteenth Amendment effectively legalized the

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155. GROSS ET AL., *supra* note 39, at 53.

> Deception about the law, unlike deception about the facts of the case at hand, is misconduct. Police officers are seen by civilians as authorities on the law; suspects are likely to believe police lies about the law because they have no independent knowledge of their own—and that can make a resulting confession "involuntary" and inadmissible in court. Judging from exonerations, the most common form of deception about the law in interrogations is sham plea bargaining by police.

Id.

156. *Id.* at 84.

157. The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935).

158. JOHNSON, *supra* note 153, at 28.

159. *Id.*

160. Infamous examples of such misconduct abound over time. *See, e.g.*, Erwin Chemerinsky, *The Rampart Scandal and the Criminal Justice System in Los Angeles County*, 57 GUILD PRAC. 122, 123 (2000); Stefania Bordone & David Wright, *The Inconvenience of Justice: How Unmitigated Official Misconduct almost Destroyed the Lives of Five Young Boys from Harlem*, 9 J. RACE, GENDER, ETHNICITY 203, 210 (2020); Press Release, Veteran D.C. Defense Attorney Charles F. Daum Sentenced to Serve 63 Months in Prison for

slavery of incarcerated persons, and scholars argue that it exists as the origin of the criminal legal system's lengthy and sordid entanglement with race discrimination and human rights abuses.[161] There is no doubt that race discrimination and official misconduct committed by the full gamut of actors contemplated in Section I—police, prosecutors, judges, defense attorneys, and so forth—have been closely intertwined over time and, evidence suggests, continue to be.[162]

While instances of official misconduct extend beyond those rooted in racial bias, the impact of systemic racism has been most profound.[163] As a result, it has often been the case throughout history that the need to combat the criminal legal system's racially discriminatory nature has mobilized advocates and inspired the most powerful movements toward reform.[164] This has continued to ring true in recent years.[165]

A. OFFICIAL MISCONDUCT REFORM EFFORTS IN A POST-2020 SOCIETY

The murder of George Floyd ignited a movement for police reform the likes of which remain unparalleled in modern American history.[166] Floyd, a Black man, was killed by a white Minneapolis police officer with a history of misconduct, Derek Chauvin, after Chauvin pinned his knee against Floyd's neck for nine

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Obstruction of Justice, DEP'T OF JUST. (Mar. 12, 2013), https://www.justice.gov/opa/pr/veteran-dc-defense-attorney-charles-f-daum-sentenced-serve-63-months-prison-obstruction [https://perma.cc/C73E-VE7A]; Alizeh Hussain, *Preventing Wrongful Convictions: An Investigation Into the Roots, Effects, and Deterrents of Prosecutorial Misconduct* (May 12, 2020) (B.A. thesis, University of Texas at Austin).

161. *See* Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 908 (2019).

162. GROSS ET AL., *supra* note 39, at 12, 153.

163. Julian M. Rucker & Jennifer A. Richardson, *Toward an Understanding of Structural Racism: Implications for Criminal Justice*, SCIENCE 3 (2022) (arguing that "Americans' ignorance of the role of structural racism in contemporary society contributes to our willingness to tolerate such stark levels of racial inequity in criminal justice outcomes").

164. *See* Roland Mireku Yeboah, *From the Civil Rights Movement to Black Lives Matter: The African Union and the African–Americans in the United States*, 12 J. PAN. AFR. STUD. 166, 173-75 (2018); J. R. Lasley, *The Impact of the Rodney King Incident on Citizen Attitude Toward Police*, 3 POLICING SOC'Y: INT'L J. RES. POL'Y 245, 254 (1994) (study finding declining attitudes toward police were fueled by the Rodney King controversy and the movement that followed); Edward R. Maguire, Justin Nix & Bradley A. Campbell, *A War on Cops: The Effects of Ferguson on the Number of U.S. Police Officers Murdered in the Line of Duty*, 34 JUST. Q. 739, 740 (2017).

165. Hussain, *supra* note 160; s*ee also* GROSS ET AL., *supra* note 39, at 3.

> Misconduct by law enforcement officials in the United States has received a lot of attention in recent years. The lion's share has been directed at police misconduct and was catalyzed by Black Lives Matter, a national movement that gained prominence in 2014 after the police killings of Michael Brown in Ferguson, Missouri, and Eric Garner in New York City, and has grown immensely in size and impact since the killing of George Floyd in Minneapolis in 2020. The main focus of Black Lives Matter, and of the demands and proposals for reform it has generated, is police violence and police treatment of African Americans and other people of color.

Id.

166. George Floyd's murder sparked the largest racial justice protests in the United States since the Civil Rights Movement. *See* Jason Silverstein, *The Global Impact of George Floyd: How Black Lives Matter Protests Shaped Movements Around the World*, CBS NEWS (June 4, 2021, at 7:39 PM), https://www.cbsnews.com/news/george-floyd-black-lives-matter-impact/ [https://perma.cc/C4MV-2SJF].

minutes.[167] Video footage of the incident quickly went viral, and the public demanded accountability.[168]

Floyd's murder came on the heels of the deaths of other unarmed Black Americans caused by white law enforcement,[169] including Breonna Taylor and Ahmaud Arbery earlier in 2020, which followed countless other Black and Brown lives senselessly lost at the hands of police.[170] The Black Lives Matter movement mobilized protestors and organizers in droves across the United States, and the result initially seemed revolutionary: Individuals and communities across the world came together in mass quantities to demand justice for the victims of racial oppression and accountability for the people and the system that oppressed them.[171] The media covered the movement extensively, and little time passed before politicians on local, state, and national scales began echoing whistleblowers' calls for change.[172] On an unprecedented scale, the American public appeared to recognize the inherent bias woven into the fabric of the criminal legal system.[173] What followed were a series of targeted requests to respect Black lives, which are disproportionately impacted by the criminal legal system, by limiting the reach of the carceral system and reforming its inadequacies.[174]

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167. Evan Hill, Ainara Tiefenthäler et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html [https://perma.cc/663F-YZ4H].

168. *Id.*

169. Ahmaud Arbery was murdered by three men: Travis McMichael, Gregory McMichael, and William "Roddie" Bryan; Gregory McMichael, the father of Travis McMichael, previously worked as an investigator for the now former Brunswick Judicial Circuit District Attorney Jackie Johnson, who was later indicted for violating her oath of office and hindering the investigation into the McMichaels. *Gregory McMichael had 16 calls with then-DA Jackie Johnson in the weeks after Ahmaud Arbery's death, court document says*, CBS NEWS (May 5, 2022), https://www.cbsnews.com/news/ahmaud-arbery-death-gregory-mcmichael-district-attorney-jackie-johnson-spoke-16-times-document-says/ [https://perma.cc/L7S2-Q4AX]. The case against Johnson was dismissed in early 2025. ASSOC. PRESS, *Judge tosses last charge against ex-prosecutor accused of misconduct in Ahmaud Arbery case*, CNN (Feb. 5, 2025): https://www.cnn.com/2025/02/05/us/ahmaud-arbery-prosecutor-jackie-johnson.

170. Police violence against Black and Brown people has unfortunately been a routine recurrence in American society. Leonard Moore, *Police Brutality in The United States*, BRITANNICA (July 31, 2024), https://www.britannica.com/topic/police-brutality-in-the-United-States-2064580 [https://perma.cc/Q3CY-P7PQ]. The inception of the Black Lives Matter Movement is rooted in this reality; the advocacy group formed in 2013 in response to George Zimmerman's murder acquittal for the death of Trayvon Martin. *Our History*, BLACK LIVES MATTER (Mar. 19, 2024), https://blacklivesmatter.com/our-history/ [https://perma.cc/M3YQ-PZC4]. Black Lives Matter garnered national notoriety the following year when it organized protests in response to Darren Wilson's killing of Michael Brown in Ferguson, Missouri. *Id.*

171. Cheryl Boudreau, Scott A. MacKenzie & Daniel J. Simmons, *Police Violence and Public Opinion After George Floyd: How the Black Lives Matter Movement and Endorsements Affect Support for Reforms*, POL. RSCH Q., 497, 498 (2022).

172. *Id.* at 500.

173. David Schultz, *The $2 Billion-Plus Price of Injustice: A Methodological Map for Police Reform in the George Floyd Era*, 47 MITCHELL HAMLINE L. REV. 203, 222 (2021).

174. Boudreau et al., *supra* note 171, at 498.

1. POLICE MISCONDUCT

First, the public sought to address reform through policing. Many communities called for the reallocation of funds from law enforcement to social services and community resources designed prevent crime, while others advocated for limited police involvement in mental health crises and traffic matters altogether.[175] New York City, touting the nation's largest police force, became the first municipality to abolish qualified immunity as a bar to civil liability against misbehaving officers in state court, a move Colorado made on a state-wide basis just months earlier, quickly followed by New Mexico.[176] Ballot initiatives and legislative policing reforms targeting police oversight also made waves.[177] Twenty-five states, as well as Washington, D.C., passed laws directly responsive to the circumstances of Floyd's murder, focusing on the use of force, the duty of law enforcement to intervene in and report police misconduct, and broader policies about misconduct reporting and decertification.[178] Nineteen states and Washington, D.C. limited the types of force law enforcement are permitted to use and when, and required that instances of force be reported to the state or federal government.[179] Twelve states and Washington, D.C. imposed a duty on law enforcement officers to intervene when excessive force is used, and all but one of those states required officers to report such situations to their supervisors.[180] Fourteen states enacted legislation to establish or strengthen decertification processes, and thirteen imposed a duty on agencies to report evidence of officer misconduct to the state government.[181]

Efforts did not stop there. Ten states created or required maintenance of police misconduct databases, some of which were made publicly available.[182] Additionally, citizen review boards, police oversight commissions, or both were created anew, or their existing authority expanded, in six states.[183]

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175. Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, BRENNAN CTR. (May 21, 2021), https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder [perma.cc/7B6G-PTDG]. *See also Defund the Police Should Police Departments Be Defunded, If Not Abolished?*, BRITANNICA (Feb. 5, 2025), https://www.britannica.com/procon/defund-the-police-debate [https://perma.cc/Z6FW-5AFU] (outlining various arguments in favor of and against defunding police departments).

176. *Id.*; Innocence Staff, *New Mexico Governor Signs Historic Legislation to End Qualified Immunity*, INNOCENCE PROJECT (April 7, 2021), https://innocenceproject.org/new-mexico-historic-legislation-to-end-qualified-immunity/ [https://perma.cc/2VZN-HNMS] [hereinafter *End Qualified Immunity*]; Nick Sibilla, *New Mexico Bans Qualified Immunity for All Government Workers, Including Police*, FORBES (Apr. 8, 2021, 1:13 P.M.), https://www.forbes.com/sites/nicksibilla/2021/04/07/new-mexico-prohibits-qualified-immunity-for-all-government-workers-including-police/ [https://perma.cc/SQN4-LWNX].

177. Sarah Figgatt, *Progressive Criminal Justice Ballot Initiatives Won Big in the 2020 Election*, AM. PROGRESS (Nov. 19, 2020), https://www.americanprogress.org/article/progressive-criminal-justice-ballot-initiatives-won-big-2020-election/ [https://archive.ph/OAv0x].

178. Subramanian & Arzy, *supra* note 175.

179. *Id.*; *End Qualified Immunity*, *supra* note 176.

180. Subramanian & Arzy, *supra* note 175.

181. *Id.*

182. *Id.*

183. Cheryl Corley, *Across The Country, Voters Approve More Civilian Oversight For Police*, NPR (Nov. 7, 2020, at 11:05 A.M.), https://www.npr.org/2020/11/07/931806105/across-the-country-voters-approve-more-

At the federal level, lawmakers in 2020 sought to enact legislation addressing accountability for police misconduct in the form of the George Floyd Justice in Policing Act.[184] The bill, which proposed streamlining police oversight, mandating the collection of data on police encounters, and limiting qualified immunity, passed the House one month after Floyd's death, but it failed in the Senate.[185] A year later, the bill was revived and again passed the House but stalled in the Senate amid debates concerning its qualified immunity provisions.[186] Nevertheless, in May 2022, former President Biden signed an executive order purporting to work toward some of the initiatives laid out in the failed legislation.[187] The Executive Order on Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety promised to (1) promote accountability by creating a national database of police misconduct for federal law enforcement officers (which aggregated data to be made public by the Attorney General), in addition to improving pattern-or-practice investigations into civil rights violations, expediting misconduct investigations and discipline, and requiring federal officers to adopt and implement body camera policies; (2) raise standards for use of force practices by banning the use of chokeholds and carotid restraints absent authorized deadly force, restricting no-knock entries, emphasizing de-escalation by requiring intervention to stop excessive force, and restricting the transfer and purchase of military equipment; (3) improve training for federal officers; (4) improve transparency for federal use of force data; and (5) strategize toward broader reform by exploring incarceration alternatives, improving prison and jail conditions, and fully implementing the First Step Act.[188]

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civilian-oversight-for-police [https://perma.cc/H6DA-KSLE]; Ayanna Alexander, *Voters Back More Police Oversight After George Floyd's Death*, BL (Nov. 5, 2020, at 2:44 P.M.), https://news.bloomberglaw.com/social-justice/voters-nationwide-ok-police-oversight-measures-after-floyd-death [perma.cc/3EYB-S4LN].

184. H.R. 7120, 116th Cong. (2020).

185. *Id.* The Senate pushed a counter-proposal in 2020 that also failed. S. 3985, 116th Cong. (2020).

186. Alexandra Hutzler, *What is the George Floyd Justice in Policing Act?*, ABC NEWS (Feb. 2, 2023), https://abcnews.go.com/Politics/george-floyd-justice-policing-act/story?id=96851132 [https://perma.cc/DV82-V4FV].

187. Exec. Order No. 14074, 87 Fed. Reg. 32945 (May 25, 2022).

188. *Id.*; *FACT SHEET: President Biden to Sign Historic Executive Order to Advance Effective, Accountable Policing and Strengthen Public Safety*, THE WHITE HOUSE (May 25, 2022), [hereinafter *Accountable Policing Fact Sheet*] https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/25/fact-sheet-president-biden-to-sign-historic-executive-order-to-advance-effective-accountable-policing-and-strengthen-public-safety/ [https://archive.ph/mdN4m]. Despite Biden's efforts, on January 20, 2025, President Trump rescinded Biden's Executive Order, further illustrating the dire need for increased data collection and oversight. *See Initial Rescissions of Harmful Executive Orders and Actions*, THE WHITE HOUSE (Jan. 20, 2025) [hereinafter *Initial Recissions*], https://www.whitehouse.gov/presidential-actions/2025/01/initial-rescissions-of-harmful-executive-orders-and-actions/ [https://perma.cc/26VA-NGH2]. Since President Trump revoked the Executive Order, the National Law Enforcement Accountability Database (NLEAD) is no longer active. Users can no longer query or add data to the NLEAD, and the DOJ is decommissioning the NLEAD in accordance with federal standards. *See* Hernandez D. Stroud, *Trump Reverses Biden Directive on Policing Reforms*, BRENNAN CTR. (Jan. 22, 2025), https://www.brennancenter.org/our-work/analysis-opinion/trump-reverses-biden-directive-policing-reforms [https://perma.cc/4A3Y-AAXX].

By 2022, the nation saw prosecutors achieve convictions for Chauvin and the other officers present for the murder of Floyd,[189] as well as the three men involved in the murder of Ahmaud Arbery—a remarkable feat considering the infrequency with which officers are prosecuted for misconduct.[190] Officers involved in the death of Breonna Taylor were also charged federally with civil rights violations, use of excessive force, and obstruction.[191] Each of the men convicted for Arbery's killing was additionally convicted of federal hate crimes.[192]

Broader reform efforts targeted the viability and appropriateness of qualified immunity in federal and state courts.[193] Further, some pushed for proactive accountability systems in policing—like mandating recordation of interrogations and engaging external, regulatory bodies to review and vet departmental policies.[194]

2. PROSECUTOR MISCONDUCT

Although most of the post-2020 reform efforts concerned practices aimed at combating police misconduct, officers were not the only focus of activists' attention.[195] "Tough-on-crime" prosecutors, including many incumbents, were ousted at the polls in favor of progressive opponents that ran on accountability and de-incarceration platforms.[196] Prosecutor campaigns in several jurisdictions promised the creation of Conviction Integrity Units to help review and remedy official misconduct that resulted in wrongful convictions, while others focused on consequences for misbehaving police officers and more transparency in prosecutors' exercise of discretion.[197]

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189. Juliana Kim, *Derek Chauvin, officer convicted of George Floyd's murder, was stabbed in prison*, NPR (Nov. 25, 2023, at 10:56 A.M.), https://www.npr.org/2023/11/25/1215190487/derek-chauvin-stabbed-prison [https://perma.cc/WEC8-58K9].

190. Philip Matthew Stinson, Sr. et al., *Police Integrity Lost: A Study of Law Enforcement Officers Arrested*, U.S. DEPT. OF JUST. (Jan. 2016), https://www.ojp.gov/pdffiles1/nij/grants/249850.pdf [https://perma.cc/6XYR-DQYV].

191. Emma Bowman, *4 current and former cops were federally charged in Breonna Taylor's death*, NPR (Aug. 4, 2022), https://www.npr.org/2022/08/04/1115659537/breonna-taylor-police-charges-ky [perma.cc/VNK8-9BJN].

192. Mike Hayes et al., *Live updates: Ahmaud Arbery's killers found guilty on all counts in federal hate crime trial*, CNN (Feb. 22, 2022), https://www.cnn.com/us/live-news/ahmaud-arbery-killing-hate-crimes-verdict/ [https://perma.cc/84PD-JJXV].

193. Ed Yohnka et al., *Ending Qualified Immunity Once and For All is the Next Step in Holding Police Accountable*, ACLU (Mar. 23, 2021), https://www.aclu.org/news/criminal-law-reform/ending-qualified-immunity-once-and-for-all-is-the-next-step-in-holding-police-accountable [https://perma.cc/5LWA-V6HX]; RACHEL HARMON, LAW OF THE POLICE 775-77 (2021).

194. HARMON, *supra* note 193, at 780-81.

195. Frank Leon Roberts, *How Black Lives Matter Changed the Way Americans Fight for Freedom*, ACLU (Jul. 13, 2018), https://www.aclu.org/news/racial-justice/how-black-lives-matter-changed-way-americans-fight [https://perma.cc/NDM5-GEYL].

196. Jeremy Kohler, *Police Resistance and Politics Undercut the Authority of Prosecutors Trying to Reform the Justice System*, PROPUBLICA (Oct. 11, 2023), https://www.propublica.org/article/police-politicians-undermined-reform-prosecutors-chicago-philadelphia [perma.cc/KG8C-KXWE].

197. *See* Sam Levin, *How Black Lives Matter reshaped the race for Los Angeles' top prosecutor*, GUARDIAN (Oct. 15, 2020), https://www.theguardian.com/us-news/2020/oct/15/los-angeles-district-attorney-black-lives-matter [https://

In line with progressive agendas, some prosecutors sought to strengthen ethics requirements by adopting rules of professional conduct that more closely mirror the ABA's Model Rule 3.8, which governs the special duties of a prosecutor.[198] Model Rule 3.8, among other things, requires prosecutors to (1) dismiss cases lacking probable cause, (2) turn over exculpatory and mitigating evidence, and (3) take responsibility for remedying convictions of innocent defendants.[199] By November 2024, twenty-seven states adopted Model Rule 3.8(g), requiring prosecutors to disclose new evidence of a convicted defendant's innocence, and twenty states adopted Model Rule 3.8(h), requiring that prosecutors seek to remedy wrongful convictions.[200]

Some jurisdictions sought to create oversight commissions.[201] This was the case in Georgia, for example, where bills introduced by Democrats failed in both 2020 and 2021.[202] The legislation was prompted, in part, by former Brunswick District Attorney Jackie Johnson's purported interference with the investigation into Arbery's murderers, white men, two of whom had personal connections to Johnson.[203] Similarly branded legislation backed by conservatives passed the Georgia General Assembly in 2023, however, creating the Prosecuting Attorneys

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perma.cc/Z23X-7VMN]; Caren Morrison, *Progressive prosecutors scored big wins in 2020 elections, boosting a nationwide trend*, THE CONVERSATION (Nov. 18, 2020), https://theconversation.com/progressive-prosecutors-scored-big-wins-in-2020-elections-boosting-a-nationwide-trend-149322 [https://perma.cc/XJT6-PU2B]; Greg Land, *Five GOP Georgia District Attorneys Defeated in Election*, LAW.COM (Nov. 4, 2020), https://www.law.com/dailyreportonline/2020/11/04/five-gop-georgia-district-attorneys-defeated-in-election/?slreturn=20250126165957 [https://perma.cc/WT73-7EWH].

198. MODEL RULES R. 3.8; Greg Land, *State Bar Approves Rule Allowing Disbarment for Prosecutors Who Hide Evidence*, DAILY REPORT (Mar. 24, 2021), https://www.law.com/dailyreportonline/2021/03/24/state-bar-approves-rule-allowing-disbarment-for-prosecutors-who-hide-evidence/ [https://perma.cc/8CE4-WQSD] (Dekalb County District Attorney Sherry Boston, who headed a committee to address prosecutor misconduct, stated, "[w]e saw and heard what everybody was seeing in the media, and we shared those concerns. As district attorneys, we have a responsibility to make sure there's community trust, public trust in how we're managing these important responsibilities. We thought it was important to be proactive and not reactive."). Colorado also modified its Rule 3.8 to strengthen prosecutor disclosure obligations. Susan Humiston, *Ethics News From Around the Country*, MINN. ST. BAR ASS'N (last visited Aug. 25, 2024), https://lprb.mncourts.gov/articles/Articles/ETHICS%20NEWS%20from%20around%20the%20country.pdf [https://perma.cc/9VS5-V3Z7].

199. MODEL RULES R. 3.8; *Variations of the ABA Model Rules of Professional Conduct*, ABA, *supra* note 94.

200. *Id*. Separately, California, in 2023, adopted a new rule requiring attorneys to report misconduct by other attorneys, which would include prosecutor misconduct. Harriet Ryan & Matt Hamilton, *In Major Reform, California Attorneys Must Report Misconduct by Their Peers*, L.A. TIMES (June 26, 2023), https://www.latimes.com/california/story/2023-06-22/california-attorneys-must-now-report-misconduct-by-their-peers [https://perma.cc/75MY-L5Q7].

201. *New York State Commission on Prosecutorial Conduct*, N.Y., https://www.ny.gov/new-york-state-commission-prosecutorial-conduct (last visited Aug. 25, 2024).

202. Ga. H.R. Bill 143, Reg. Sess. (2021); Ga. H.R. Bill 1214, Reg. Sess. (2020).

203. *Gregory McMichael had 16 calls with then-DA Jackie Johnson in the weeks after Ahmaud Arbery's death, court document says*, supra note 169; Fox 5 Atlanta Digital Team, *Ahmaud Arbery's father claims case against former DA is deliberately delayed*, FOX 5 ATLANTA (Nov. 28, 2023), https://www.fox5atlanta.com/news/ahmaud-arberys-father-case-da-jackie-johnson-delay [https://perma.cc/T2BV-LRKE]. Johnson was ultimately voted out of office and later indicted for obstruction of justice related to the case. *Carr Announces Indictment of Former Brunswick DA for Violation of Oath of Public Officer and Obstruction of a Law Enforcement Officer*, GA. ATT'Y GEN. (Sept. 2, 2021), https://law.georgia.gov/press-releases/2021-09-02/carr-announces-indictment-former-brunswick-da-violation-oath-public [https://perma.cc/HM56-KBAJ].

Qualifications Commission (PAQC).[204] While the origins of earlier oversight commission efforts were responsive to misconduct and racial injustice, the PAQC has been criticized as a politically motivated means to regulate prosecutors' decisions not to pursue low-level offenses and to prosecute President Trump's election interference case out of Fulton County.[205] Other prosecutor oversight reforms also have been launched in recent memory.[206] New York's commission, created as the first in the United States in 2021—and the only independent entity of its kind—began its work last year.[207]

Scholars who study prosecutorial misconduct have made other suggestions for reform, which include improving state bar disciplinary actions against prosecutors, prosecuting prosecutors for egregious misconduct, and eroding the absolute immunity that blocks civil liability against them.[208] Some suggest creating a database of prosecutors who violate constitutional disclosure obligations under *Brady v. Maryland;*[209] others encourage courts to publish the names of prosecutors who commit misconduct in reported opinions and submit letters to affected defendants and victims whose cases were marred by prosecutors' malfeasance.[210]

From an impact litigation standpoint, scholars have also suggested various reforms. For example, in the context of disclosures pursuant to *Brady* and the troubles its progeny have created, many have argued for mechanisms to counteract those problems, including open-file discovery, trial remedies, the erosion of impossibly high materiality standards placed on post-conviction litigants seeking relief due to withheld evidence, stronger prosecutorial ethics rules, and

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204. S.B. 92, 2023-2024 Leg. (Ga. 2023). The charge was dismissed in 2025. ASSOC. PRESS, *Judge tosses last charge*, supra note 169.

205. Stanley Dunlap, *Georgia House approves revised prosecutor oversight commission as Senate investigates Willis,* GA. RECORDER, (Jan. 30, 2024), https://georgiarecorder.com/2024/01/30/georgia-house-approves-revised-prosecutor-oversight-commission-as-senate-investigates-willis/.

206. *See* Akela Lacy, *17 States Have Now Tried to Pass Bills That Strip Powers From Reform-Minded Prosecutors*, INTERCEPT (Mar. 3, 2023).

207. *See New York State Commission on Prosecutorial Conduct*, https://www.ny.gov/new-york-state-commission-prosecutorial-conduct [https://perma.cc/77K5-D76A] (last visited Jan. 31, 2025) ("The Commission on Prosecutorial Conduct (CPC) is dedicated to investigating prosecutorial conduct in New York State, serving to strengthen oversight of New York's prosecutors and to hold them to the highest ethical standards in the exercise of their duties").

208. Bruce A. Green, *Regulating Prosecutors' Courtroom Misconduct*, 50 LOY. U. CHI. L.J. 101, 119 (2019); Thomas P. Sullivan & Maurice Possley, *The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform*, 105 NW. J. CRIM. L. & CRIMINOLOGY, 881, 923 (2015); Johns, *supra* note 70, at 70-71.

209. *See* Garrett et al., *supra* note 96, at 242–45 ("Establishing new institutions could help detect, prevent, and remedy *Brady* violations and assure that discovery is carefully and ethically provided. As Ellen Yaroshefsky has pointed out, despite a range of prosecutorial misconduct scandals, 'few offices have gathered data or performed system-wide studies' either in response to violations or to assess how well they disclose evidence. One solution is to require prosecutors themselves to investigate, measure, and assess compliance with disclosure obligations"); *Search Individual Profiles*, BRADY LIST, https://giglio-bradylist.com/individual [https://perma.cc/SNE5-ATZC] (last visited June 23, 2025) ("There are currently 1,109,302 individual profiles on the Brady List, including: law enforcement [Sheriff Deputies and Police Officers] and prosecutors.").

210. *Id.*

more.[211] But the scope of strategic litigation initiatives extends far beyond the bounds of just *Brady*. When it comes to claims made under *Napue v. Illinois*[212]—which require that the government either affirmatively presented or failed to correct false or misleading testimony to achieve relief—some have advocated for lowering the standard by which defendants must prove the prosecutor's knowledge of the falsity or misleading nature of the evidence from one of actual to constructive or imputed knowledge, akin to the standard applied in *Brady*.[213] Similarly, advocates have led efforts to dismantle the requirement that defendants show that government officials acted in bad faith to prevail on certain types of evidence destruction claims under *Arizona v. Youngblood.*[214] They have taken the position that defendants should not be forced to carry the crippling burden of proving that government officials engaged in patterns of race discrimination in jury selection over time to prevail on Equal Protection claims under the *Batson* precursor, *Swain v. Alabama*[215]—a position that ultimately prevailed in the form of *Batson* overruling *Swain,*[216] though *Batson* was not made retroactively applicable to the thousands convicted before 1986 whose juries were composed in racially discriminatory manners.[217] In the same vein, scholars have filled the pages of academic publications arguing that even the standard imposed by *Batson*, which dictates that actors violate the U.S. Constitution essentially only if they can offer no race-neutral reasons for exercising peremptory strikes against persons of color—is too high a bar to satisfy—thus failing to safeguard against discrimination.[218]

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211. Michael Serota, *Stare Decisis and the* Brady *Doctrine*, 5 HARV. L. & POL'Y REV. 415, 420–21 (2011) (collecting sources). "[W]hile *Brady*'s materiality requirement gives prosecutors a substantial amount of discretion, it concomitantly limits trial judges' ability to order constitutionally mandated discovery of favorable evidence that does not rise to the level of materiality. As a result, many trial judges who seek to ensure that defendants receive broad access to evidence revile this restraint, and it has created a significant amount of tension within the criminal justice system, leading to high-profile discovery conflicts and pronounced calls for reform." *Id.* at 416. "[T]wo cases neatly illustrate *Brady*'s weak enforceability. By effectively eliminating municipal liability even when prosecutors deliberately suppress evidence, *Connick* gives a wink-and-nod to nondisclosure. By limiting section 1983 protection against retaliation for good faith compliance with discovery duties, *Garcetti* sends a chilling message that prosecutors may be damned if they do disclose beneficial evidence to the defense." Janet Moore, *Democracy and Criminal Discovery Reform After* Connick *and* Garcetti, 77 BROOK. L. REV. 1329,1332 (2012).

212. Napue v. Illinois, 360 U.S. 264, 269-70 (1959).

213. United States v. Wallach, 935 F. 2d 445, 457 (2d Cir. 1991).

214. Arizona v. Youngblood, 488 U.S. 51, 58 (1988); Catherine Greene Burnett, *"If Only": Best Practices for Evidence Retention in the Wake of the DNA Revolution*, 52 S. TEX. L. REV. 335, 339-40, 344-45 (2011).

215. *See generally* Swain v. Alabama, 380 U.S. 202 (1965); *see* George Bundy Smith, *The Use of Peremptory Challenges to Strike Blacks from Juries*, 27 HOW. L.J. 1571 (1984).

216. Batson v. Kentucky, 476 U.S. 79, at 92-93. ("Since this interpretation of *Swain* has placed on defendants a crippling burden of proof, prosecutors' peremptory challenges are now largely immune from constitutional scrutiny. For reasons that follow, we reject this evidentiary formulation as inconsistent with standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause.").

217. *See* Allen v. Hardy, 478 U.S. 255, 259-61 (1986).

218. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149 (2010); Graham R. Cronogue, *Lies, Damn Lies, and Batson Challenges: The Right to Use Statistical Evidence to Prove Racial Bias*, 6 U. MIAMI RACE & SOC. JUST. L. REV. ISS. 103 (2016); Payton Pope, *Black Lives Matter in the Jury Box: Abolishing the Peremptory Strike*, 74 FLA. L. REV. 671 (2022).

3. JUDICIAL MISCONDUCT

Although post-2020 misconduct reforms did not specifically focus on judicial misconduct, they nonetheless reignited discourse surrounding judicial accountability.[219]

In June 2020, *Reuters* published a first-of-its-kind national investigative reporting series on judicial misconduct.[220] The publication reviewed 1,509 cases between 2008 and 2019 in which judges retired, resigned, or were disciplined. Ninety percent of them were permitted to return to the bench following the imposition of their disciplinary penalties.[221] Those figures do not account for the roughly 3,613 cases *Reuters* uncovered in which judges were disciplined but their identities and the details of their offenses were concealed from the public.[222] Infractions enumerated in the report included: race and sex discrimination, sexual harassment, nepotism, berating victims of domestic violence, presiding over court while drunk, and in one instance, operating under a religious delusion.[223] At least 5,206 people were impacted by the misconduct *Reuters* studied.[224]

Following the publication of the *Reuters* series, more harrowing tales of judicial misconduct have come to light—from local and state court judges to those in the federal judiciary, including the U.S. Supreme Court.[225] As a result, stakeholders suggested reforms, such as changing procedures in various jurisdictions to make initiating and investigating judicial complaints easier, increasing penalties for judicial misconduct, and encouraging transparency in reporting the outcome of disciplinary proceedings.[226]

In the federal system, lawmakers and organizations advocated requiring federal judges to disclose detailed financial holdings, strengthening standards for recusal, and imposing term limits.[227] In 2021, former President Biden signed an

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219. Patrick Maley, *Wardlow after Black Lives Matter: Using a Protest Movement to Establish a Colorable Equal Protection Challenge to Supreme Court Precedent*, 52 SETON HALL L. REV. 1437, 1471 (2024).

220. Berens & Shiffman, *supra* note 147.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *See* Melissa N. Baker & Kayla S. Canelo, *Judges Behaving Badly: Judicial Misconduct and a Threat to Rights*, J. EXPERIMENTAL POL. SCI. 1, 1, 7-9 (2024).

226. Caprice L. Roberts, *Judicial Fidelity*, 51 PEPP. L. REV. 1 (2024); Stewart, *supra* note 70, at 464; Erik Ortiz, *Robed in Secrecy: How Judges Accused of Misconduct Can Dodge Public Scrutiny*, NBC NEWS (Dec. 26, 2021), https://www.nbcnews.com/news/us-news/robed-secrecy-judges-accused-misconduct-can-dodge-public-scrutiny-rcna7638 [https://perma.cc/H8W3-ADWV].

227. "Financial disclosure reports for judicial officers and [certain] judiciary employees are filed with the Administrative Office of the U.S. Courts [(AO)] in accordance with the requirements of the Ethics in Government Act, as amended (5 U.S.C. §§ 13101–13111). The [AO] provides free online access to downloadable electronic copies of reports," which include periodic transaction reports, filed by various judicial officers such as "bankruptcy judges, magistrate judges, and special trial judges." *Federal Judicial Financial Disclosure Reports*, U.S. CTS., https://pub.jefs.uscourts.gov/ [https://perma.cc/52SV-K626] (last visited Aug. 25, 2024). *See also* Madeleine Carlisle, *You'll Soon Be Able to Look Up Supreme Court Justices' Wall Street Investments*, TIME, (May 13, 2022), https://time.com/6176657/supreme-court-justices-ethics-rules/ [https://perma.cc/895N-TXEY]; U.S. SUPREME COURT WORKING GROUP, THE CASE FOR SUPREME COURT TERM LIMITS (AM.

executive order commissioning a study on potential reforms for the nation's high court, which overwhelmingly tracked these suggested reform initiatives.[228] In late 2023, amid historic misconduct allegations against multiple justices and mass public scrutiny, the Supreme Court was pressured to adopt an ethics code for the first time.[229]

4. DEFENSE ATTORNEY MISCONDUCT

Misbehaving defense attorneys and the broader inadequacy of indigent defense systems across the country have also garnered whistleblower and media scrutiny amid accountability efforts.[230] While misconduct perpetrated by defense counsel has not inspired public discourse to the same degree as prosecutor and police misconduct, stakeholders have long recognized the dangers of inadequate legal counsel in criminal cases.[231]

Following the COVID-19 pandemic and public demands for greater accountability in the wake of Floyd's murder, many states have continued to struggle to provide indigent defendants with their constitutionally guaranteed right to counsel.[232] Media investigations and a recent study by the RAND Corporation, in

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Acad. of Arts & Sciences 2023); DEVON OMBRES ET AL., *COMBINING ETHICS AND TERM LIMITS STRENGTHENS EFFORTS TO REIN IN A SUPREME COURT RUN AMOK*, AM. PROGRESS (JUL. 25, 2024), HTTPS://WWW.AMERICANPROGRESS.ORG/ARTICLE/COMBINING-ETHICS-AND-TERM-LIMITS-STRENGTHENS-EFFORTS-TO-REIN-IN-A-SUPREME-COURT-RUN-AMOK/ [HTTPS://PERMA.CC/NF75-SGKF].

228. Exec. Order No. 14023, 86 Fed. Reg. 19569 (Apr. 9, 2021); Ellena Erskine, *Presidential court commission approves final report, identifying disagreement on expansion*, SCOTUSBLOG (Dec. 8, 2021), https://www.scotusblog.com/2021/12/presidential-court-commission-approves-final-report-identifying-disagreement-on-expansion/ [https://perma.cc/9H8S-XVN4].

229. CODE OF CONDUCT FOR JUSTICES OF THE SUPREME COURT OF THE UNITED STATES (2023). Notably, the ethics code has been heavily criticized for its lack of enforceability, among other issues. Jodi Kantor & Abbie VanSickle, *Inside the Supreme Court Ethics Debate: Who Judges the Justices?*, N.Y. TIMES (Dec. 5, 2024), https://www.nytimes.com/2024/12/03/us/supreme-court-ethics-rules.html [https://perma.cc/7ZQ4-5E8A].

230. Heather Baxter, *Too Many Clients, Too Little Time: How States Are Forcing Public Defenders to Violate Their Ethical Obligations*, 25 FED. SENT'G REP. 91, 91–92 (2012); Andy Pierrotti, *'An Unacceptable Crisis.' Defendants Languishing in Jail Because of Public Defender Shortage*, ATLANTA NEWS FIRST (Jan. 3, 2023), https://www.atlantanewsfirst.com/2023/01/03/an-unacceptable-crisis-defendants-languishing-jail-because-public-defender-shortage/ [https://perma.cc/5AMM-PVTP]; Andy Pierrotti, *Here's Why These Public Defenders Left Their Jobs*, ATLANTA NEWS FIRST (Jan. 5, 2023), https://www.atlantanewsfirst.com/2022/12/30/sixth-part-three-why-theyre-leaving/ [https://perma.cc/V42P-YMZC]; Dylan Jackson, *Crisis in Georgia's Public Defender System Fuels Case Backlog, Jail Overcrowding*, ATLANTA J. CONST. (Nov. 10, 2022), https://www.ajc.com/news/investigations/crisis-in-georgias-public-defender-system-fuels-case-backlog-jail-overcrowding/6G47GRR3HJGRZLDQBPSZES2MBU [https://perma.cc/DY5H-YGZ8].

231. *See* GROSS ET AL., *supra* note 39, at 9–10 ("The failures of defense counsel are overwhelmingly sins of omission, especially the failure to investigate their clients' cases. The absence of action is hard to spot. A failure to even try to contact persuasive alibi witnesses will rarely be apparent at trial, and almost never when a guilty plea is taken. Unless such failures are actually litigated—which is uncommon—they are likely to remain unknown."); Baxter, *supra* note 230.

232. Radley Balko, *The Perpetual Crisis in Indigent Defense*, THE WATCH (Sept. 27, 2023), https://radleybalko.substack.com/p/the-perpetual-crisis-in-indigent [https://perma.cc/WLW8-SGBK]; Julie Pattison-Gordon, *Staffing and Funding Shortages Persist for Public Defenders*, GOVERNING (May 20, 2025), https://www.governing.com/workforce/staffing-and-funding-shortages-persist-for-public-defenders [https://perma.cc/2ZMV-PSP6]; Paul Heaton, *Gideon's*

collaboration with the ABA and the National Center for State Courts, reveal a systemic crisis in defense representation within the supposedly adversarial U.S. criminal legal system: No jurisdiction allocates public defenders sufficient time and resources to adhere to modern caseload best practices, and resource disparity between the government and defense counsel is nearly universal.[233] The result amounts to the constructive denial of the right to counsel in numerous jurisdictions.[234]

Working toward a robust and enduring solution to defense misconduct and inadequacy is uniquely challenging. This is because the precise role of defense misconduct has been difficult to assign, for two primary reasons: (1) defense misconduct is extraordinarily difficult to quantify, perhaps more so than any other official misconduct; and (2) many of the most common forms of defense misconduct are likely induced by systemic underfunding and a lack of basic resources.[235]

One reason defense attorney misconduct has been particularly hard to quantify is because detecting and defining "misconduct" in the defense context is difficult.[236] Many objective understandings of what constitutes misconduct involve a clear violation of legal rules or a factual finding by a neutral arbiter. Outside of financial malfeasance, criminal defense counsel are seldom subject to disciplinary action by state bar authorities.[237] Additionally, while constitutional claims of

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Promise Versus Gideon's Reality: Resource Shortfalls in Pennsylvania Public Defenders, QUATTRONE CTR. (May 2024), https://www.law.upenn.edu/live/files/13057-gideon-promise-vs-reality [https://perma.cc/45NF-M3M2]; John Gross, *Reframing the Indigent Defense Crisis*, HARVARD L. REV. BLOG (Mar. 18, 2023) [hereinafter *Reframing the Indigent Defense Crisis*], https://harvardlawreview.org/blog/2023/03/reframing-the-indigent-defense-crisis/ [https://perma.cc/J55A-PNT7].

233. Balko, *supra* note 232; *see generally* Pace et al., *supra* note 82.

234. Pace et al., *supra* note 82, at 114; *Reframing the Indigent Defense Crisis*, *supra* note 232.

235. *See* GROSS ET AL., *supra* note 39, at 9 ("The failures of defense counsel are overwhelmingly sins of omission, especially the failure to investigate their clients' cases"); *Legal Defense of Indigents: Create the Georgia Public Defender Standards Council to Set State-Wide Standards for the Legal Representation of Indigent Defendants and Provide Budget Authority to Such Council*, 20 GA. ST. U. L. REV. 105, 106-07 (2003); Taylor Payne, *Plight of the Public Defender: Excessive Caseload as a Non-Mitigating Factor in Sanctions for Ethical Violations*, 83 MO. L. REV. 1087, 1089, 1122 (2018); Pattison-Gordon, *supra* note 232. In analyzing the effectiveness of counsel's performance juxtaposed against the backdrop of insufficient resources for public defenders, one student scholar opined: "The root of the problem is not the actions of individual public defenders, but inadequate funding for indigent defense. It is a systemic problem, one that courts, blinded by a focus on individual determinations under an individualistic understanding of the right to counsel, has failed to understand, let alone grant a remedy to address in full." Jay C. Hauser, *Funding the Unfunded Non-mandate: An Equal Justice Case for Adequate Funding of Public Defense*, U. PA. J.L. & SOC. CHANGE 287, 289 (2022).

236. *See,* e.g., GROSS et al., *supra* note 39, at 9–10; John P. Gross, *The Problems with the National Public Defense Workload Study*, NAT'L ASS'N FOR PUB. DEF., (Mar. 12, 2025), https://publicdefenders.us/blogs/the-problems-with-the-national-public-defense-workload-study/ [https://perma.cc/58LH-8FSQ] ("The official ethical guidance from the American Bar Association is that having an excessive caseload is a violation of the Model Rules of Professional Conduct and public defenders who engage in the practice of triage can face professional discipline. It is an open secret that virtually all public defenders engage in the practice of triage and therefore, according to the letter of the law, are behaving unethically.").

237. Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1195 (2003); Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 18 (2007), (stating that "many disciplinary agencies will not docket charges of incompetence against

ineffective assistance of counsel are commonly litigated in both state and federal proceedings, successful claims are exceedingly rare due to prevailing legal standards.[238]

Generally, litigants attempting to prove their counsel ineffective must show not only that their attorneys' performance was objectively deficient according to professional norms, but also that, *but for* their deficient performance, the outcome of their proceedings would have been different.[239] Moreover, there is a strong presumption that defense counsel acted reasonably, and almost any decision counsel claims as "strategy" will not suffice to prove deficient performance.[240] This is a remarkably high standard to meet;[241] while some defendants can satisfy the first prong of the test, significantly fewer are able to satisfy the second.[242] For practical purposes, this high bar for ineffectiveness means an attorney may commit misconduct—even egregiously so—yet there may never be a successful factual finding or claim against that attorney. In contrast, it may often be easier to quantify certain types of misconduct by prosecutors. For example, while successful *Brady* claims are also relatively rare, factual findings that a prosecutor suppressed favorable evidence are somewhat common— even when *Brady* claims fail on materiality grounds; in contrast, findings that defense counsel's performance was objectively deficient are exceptionally rare, even without reaching the prejudice prong of *Strickland's* analysis.[243]

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criminal defense attorneys"); JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 181, 181 (2000) (noting that "Nearly all disciplinary action by bar associations arises from abuse of client funds— typically money that was given to an attorney to be held in escrow for a home purchase.")

238. *See* Brandon L. Garrett, *Gideon, Strickland, and the Right to Effective Representation: Validating the Right to Counsel*, 70 WASH. & LEE L. REV. 927, 928 (2013) [hereinafter *Validating*] ("It was in Strickland v. Washington, more than twenty years after Gideon's Trumpet sounded, that the Court cemented the principle that a defendant is entitled not just to a lawyer, but to a reasonably effective advocate. The Court ruled, however, that a trial verdict should not be reversed even if the defense performed so unreasonably as to be constitutionally ineffective, so long as those failures did not materially prejudice the outcome. The Court's ruling itself suggested that the entitlement to a reasonably effective advocate would be a thin one."); Kenneth Williams, *Does Strickland Prejudice Defendants on Death Row?*, 43 U. RICH. L. REV. 1459, 1461 (2009); Strickland v. Washington, 466 U.S. 668 (1984).

239. Strickland, 466 U.S. at 687-88, 694.

240. *See id.* at 687-691.

241. *See* Williams, *supra* note 238, at 1461; Erin M. Morrissey, *Too Much of a Not-so-Good Thing:* Trevino v. Davis *and the Overly Deferential* Strickland *Standard*, 92 TUL. L. REV. 943, 952-54 (2018); Daniel J. Capra & Joseph Tartakovsky, *Why Strickland is the Wrong Test for Violations of the Right to Testify*, 70 WASH. & LEE L. REV. 95, 103 (2013) ("This Strickland 'prejudice' standard has been nearly impossible for defendants to meet—resulting in a constitutional right without a remedy").

242. *Validating*, *supra* note 238, at 936–38. *See* Capra & Tartakovsky, *supra* note 241, at 112–17. *See also* Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 B.C. L. REV. 1069, 1079 (2009) ("The rare defendant who is able to demonstrate that counsel's performance was deficient will not prevail on an ineffective assistance claim unless she can also demonstrate prejudice. . . Like the performance prong, the prejudice prong has also been the subject of criticism, most of which claims that the prong is too difficult to satisfy.").

243. For example, in one recent study of *Brady* claims spanning over 800 cases across several years, relief was granted in only 81 cases. Garrett et al., *supra* note 96, at 190. However, courts made factual findings that prosecutors suppressed evidence in 114 cases. *Id.* When it comes to ineffective assistance claims, courts

A second significant obstacle to quantifying defense misconduct lies in the reluctance of stakeholders to label many attorney actions (or inactions) that stem from systemic under-resourcing as actual misconduct, especially given the variation in definitions of misconduct to begin with.[244] Most criminal defendants in the United States are indigent and rely on public defenders for representation at both trial and appellate levels. Tragically, these public defenders are grossly under-resourced, burdened with caseloads far exceeding recommended standards.[245]

Under these circumstances, a defense attorney may undertake every action her time and resources permit but may still fail to meet case demands, resulting in harm to the client just the same. For instance, a Georgia public defender with an active felony caseload exceeding 500 realistically cannot meet with her clients often; as a result, she may not learn the facts of their cases until they land on a trial calendar.[246] By that stage, she may not have the capacity to conduct necessary investigations involving social workers, scientists, and other experts cases routinely require. Even if the public defender loses the case because she overlooked an obvious point in her investigation—an oversight potentially leading to a wrongful conviction and significant sentence for her client— many stakeholders might hesitate to suggest she engaged in misconduct. The reality is that the public defender may have done everything she had the resources to do under the circumstances, but the resources were inadequate. In essence, the system, not the individual attorney, may be the true culprit of certain types of misconduct.

In addition to the question of intentionality, some stakeholders are undoubtedly concerned about reporting the conduct described above as "misconduct" because of the negative impact doing so could have on the public perception of indigent defense,[247]

"regularly presume that defense attorney actions that might seem to reflect attorney incompetence actually reflect deliberate, strategic choices by counsel." Eve Brensike Primus, *Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness*, 72 STAN. L. REV. 1581, 1584–85; *See also* Richard Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 633–34 (1986) ("The primary reason appellate courts give for denying ineffective assistance claims is that the court does not wish to second-guess a lawyer's decisions concerning proper trial strategy or tactics.").

244. GROSS ET AL., *supra* note 39, at 9, 151-53; *see also* NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 18-19, 100-01(Am. Bar Ass'n 2011).

245. HARLOW, *supra* note 41; *Reframing the Indigent Defense Crisis*, *supra* note 232. *See generally* Pace et al., *supra* note 82 (setting forth new standards for public defense workloads and noting that many public defense providers are currently overburdened in terms of workload).

246. This was true for Clayton County, Georgia public defender Linda Day, who resigned from her long-time position with the Georgia Public Defender Council after her caseload began exceeding 600 cases at a time. "You're pissing on fires as they come up. So cases don't really get looked at until they show up on a trial calendar," Day said in a press interview. Andy Pierrotti, *Georgia's top public defender flips, admits her agency cannot hire enough lawyers*, ATLANTA NEWS FIRST (Jan. 25, 2023, 1:53 PM), https://www.atlantanewsfirst.com/2023/01/25/georgia-public-defenders-council-director-admits-she-cannot-find-enough-attorneys/ [https://perma.cc/JH5R-L7M4].

247. *See* LEFSTEIN, *supra* note 244, at 100; Sullivan & Possley, *supra* note 208, at 904-06; Andrew Engelson, *Defenseless: Lack of public defenders creates a crisis for indigent clients and increased caseloads for lawyers*, ABA J. (Aug. 1, 2024), https://www.abajournal.com/magazine/article/defenseless [https://perma.

which historically has been fraught.[248] Research suggests this negative public image operates to the detriment of defenders by undercutting efforts to secure better pay, office funding, and other resources, while limiting the public's empathy and respect for the vital role public defenders play.[249]

Nonetheless, public policy favors tracking defense misconduct because, regardless of mitigating factors, it still results in harm to indigent individuals, as well as the broader criminal legal system. And, of course, just like other actors within the system, defense counsel are not immune from malfeasance. The utility of studying defense misconduct data cannot be overstated; it may be critical to promulgating solutions to the persistent defense crisis.[250]

For similar reasons, the Registry tracks the role of inadequate legal counsel as a wrongful conviction factor.[251] It defines inadequate legal counsel as "obviously and grossly inadequate" representation at trial.[252] Of the Registry's reported 3,725 exonerations since 1989, 1,038 involved inadequate legal counsel.[253] That means roughly twenty-eight percent of innocence exonerations have involved inadequate counsel, under a procedurally and substantively conservative definition.[254] While the Registry does not report inadequate counsel in the same way that it does misconduct by

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cc/CG53-NM9Z]; Kelsey Henderson and Reveka Shteynberg, *Perceptions About Appointed and Privately-Retained Defense Attorney Representation: (How) Do They Diffe*r?, 23 J. CRIMINOLOGY, CRIM. JUST., L. & SOC'Y 45, 47 (2022).

248. *Id.* ("[T]he general public hold negative biases against public defenders"). *See also* People v. Huffman, 71 Cal. App. 3d 63, 70 n.2 (1977) ("For the benefit of the uninitiated, 'dump truck' is a term commonly used by criminal defendants when complaining about the public defender. The origins of the phrase are somewhat obscure. However, it probably means that in the eyes of the defendant the public defender is simply trying to dump him rather than afford him a vigorous defense"); Kimberlianne Podlas, *Guilty on All Accounts: Law & Order's Impact on Public Perception of Law and Order*, 18 SETON HALL J. SPORTS & ENT. L. 1, 4 (2008).

249. Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473, 482 (1982).

250. LEFSTEIN, *supra* note 244, at 26-27 ("[E]very attorney who practices law in the United States, including all who represent indigent clients, are subject to their respective states' rules of professional conduct. . . . Excessive caseloads among lawyers representing indigent criminal and juvenile clients implicate a number of state rules of professional conduct."); Barry C. Scheck, *Four Reforms for the Twenty-first Century*, 96 JUDICATURE 323, 327 (2013) (describing the Department of Justice's efforts to "improve the quality of indigent defense services including innovative data collection to assess the quality of court-appointed counsel.").

251. *Inadequate Legal Defense*, *supra* note 81 (explaining that "[t]he inability of public defense systems to provide sufficiently zealous legal representation to indigent clients is a long-standing and pervasive problem in the United States.") (The Registry's description of inadequate legal defense is supported by a masters thesis by graduate student Rosa Greenbaum at the University of California, Irvine Criminology, Law & Society. Her study, which was "drawn from a qualitative analysis of 366 cases listed in the National Registry of Exonerations in which Inadequate Legal Defense (ILD) was deemed a contributor to a wrongful conviction," found that investigative failures were far more frequent than other types of legal inadequacies in the Registry's ILD cases, appearing in 80.6% of cases, while trial errors were found in just 50.8% of these wrongful convictions. In 34.7% of cases, the failures were solely investigative. The larger implication is that the relative dearth of investigators in public defense systems is a problem deserving similar attention as the more commonly understood issue of too few lawyers handling too many cases.").

252. *Glossary*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx (last visited Mar. 31, 2025) [https://perma.cc/E52Y-C48H].

253. *Browse Cases*, *supra* note 45.

254. *Id.* The exact figure is 27.9%.

traditional government actors, the reasons for capturing the data for defense attorneys and other actors is the same.

To that end, scholars have suggested improving attorney discipline oversight by creating simpler and more transparent complaint processes, strengthening investigations into defense counsel conduct, and imposing harsher punishments where appropriate.[255] Some have called for a national attorney discipline database.[256] Others have requested closer monitoring by courts of indigent defense caseloads and time spent on appointed cases, and imposition of mandatory caseload caps consistent with recommendations by the ABA, or recommended increased funding and training opportunities for public defenders.[257] Additional proposals have suggested impact litigation to lower the threshold standard for ineffective assistance, as well as remedial legislation.[258]

5. BUILDING A CULTURE THAT REJECTS MISCONDUCT

Of course, official misconduct reform efforts did not begin and certainly have not ended with the advocacy inspired by the desire to hold George Floyd's killer—and the system that allowed for his death—accountable. But the power wielded by the Black Lives Matter movement in the wake of Floyd's death was undeniable, and it reinvigorated the nation's quest for a culture of justice, accountability, and equality in a way that sparked community dialogues about reform in nearly all facets of the criminal legal system. As a result, meaningful changes were achieved in some areas.[259] Other strides toward progress were

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255. *See Report on Attorney Responsibility in Criminal Cases*, N.Y. STATE JUST. TASK FORCE (Feb. 2017); Bruce A. Green, *Selectively Disciplining Advocates*, 90 FORDHAM L. REV. 151, 193 (2022); Eve B. Primus, *Defense Counsel and Public Defence*, *in* REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 121, 134 (Erik Luna ed., 2017); Alex B. Long, *Imposing Lawyer Sanctions in a Post-January 6 World*, 36 GEO. J. LEGAL ETHICS 273, 276–77 (2023) ("There are longstanding concerns about whether state disciplinary agencies have the resources to aggressively pursue professional misconduct to the point that professional discipline serves as a deterrent. But aside from those concerns, there is a more basic question: assuming the lawyers in question have actually committed the ethics violations they are charged with, are they likely to receive a meaningful sanction?").

256. *See* Jacquelyn M. Desch, *Attorney Discipline Online*, 29 GEO J. LEGAL ETHICS 921 (2016); Green, *supra* note 208, at 119.

257. *See* Primus, *supra* note 255, at 134; Aaron Gottlieb, *Do Public Defender Resources Matter? The Effect of Public Defender and Support Staff Caseloads on the Incarceration of Felony Defendants*, 12 J. SOC'Y FOR SOC. WORK & RSCH., 569, 571-72 (2021).

258. Jake Petrillo, *Rectifying Bad Precedence: A Re-Examination of* Strickland v. Washington *(1984) in New York State Courts*, COLUM. UNDERGRADUATE L. REV. (Jan. 19, 2022), https://www.culawreview.org/journal/rectifying-bad-precedence-a-re-examination-of-strickland-v-washington-1984-in-new-york-state-courts [https://perma.cc/8HSM-6TXP]; Lauren Sudeall Lucas, *Public Defense Litigation: An Overview*, IND. L. REV. 89, 90-106 (2018); Primus, *supra* note 255, at 1585; Jennifer M. Allen, *Free for All a Free For All: The Supreme Court's Abdication of Duty in Failing to Establish Standards for Indigent Defense*, 27 L. & INEQ. 399-411 (2009).

259. *See generally* Rashawn Ray, *Black Lives Matter at 10 years: 8 ways the movement has been highly effective*, BROOKINGS (Oct. 12, 2022), https://www.brookings.edu/articles/black-lives-matter-at-10-years-what-impact-has-it-had-on-policing/ [https://perma.cc/VAG3-PNQD]; Leslie R. Crutchfield, *Black Lives Matter: From Protests to Lasting Change*, THE CHRONICLE OF PHILANTHROPY (June 18, 2020), https://www.

attempted and failed.[260] Nevertheless, the surface was scratched. Recognizing that enduring change often stems from cultural shifts, education, and societal understanding over mere legislation and litigation, the successes of the movement against misconduct outweighed its failures. More importantly, it effectively primed the public for the ongoing struggle toward justice.

B. THE LEGACY OF RECENT REFORMS AND WHY TRANSFORMATIVE CHANGE REMAINS ELUSIVE

The progress achieved by community activism in the wake of protests following the high-profile police brutality cases in 2020 should be celebrated. Strides were made at historic levels, and there now exist more safeguards against official misconduct—particularly police misconduct—than before.[261] But for all the successes of the movement, significant threats still endure that do, can, and will continue to result in the denial of justice for those involved in the criminal legal system. That is, until appropriate actions are taken to mitigate and remedy the problems. The question becomes: What will it take to induce such action? This Article posits that irrefutable evidence of the depth and prevalence of official misconduct is paramount.

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philanthropy.com/article/Black-Lives-Matter-From/249017?cid=cpfd_home [https://perma.cc/X8M8-AN3H]; Angela Onwuachi-Willig, *The Trauma of Awakening to Racism: Did the Tragic Killing of George Floyd Result in Cultural Trauma for Whites?*, 58 HOU. L. REV. (2021); Liz Crampton, *States passed 243 policing bills — and left activists wanting*, POLITICO (May 26, 2021, 4:00 AM), https://www.politico.com/news/2021/05/26/states-policing-bills-490850#:~:text=Governors%20in%20nearly%20every%20state,off%20by%20George%20Floyd's%20murder [https://perma.cc/BR3Z-Q2DZ]; Exec. Order No. 14074, 87 Fed. Reg. 32945 (May 31, 2022); Tate Fegley & Ilia Murtazashvili, *From defunding to refunding police: institutions and the persistence of policing budgets*, 196 PUB. CHOICE 123, 123 (2023).

260. Charles M. Blow, *The Great Erasure*, N.Y. TIMES (May 20, 2022), https://www.nytimes.com/interactive/2022/05/20/opinion/blm-george-floyd-mural.html [https://perma.cc/NXJ5-RFGQ].

261. *See* Travis Campbell, *Black Lives Matter's Effect on Police Lethal Use of Force*, 141 J. URB. ECON. (Apr. 4, 2024); Colleen Slevin, *States diverge on police reforms after George Floyd killing*, PBS (Dec. 30, 2021, 12:41 P.M.), https://www.pbs.org/newshour/nation/states-diverge-on-police-reforms-after-george-floyd-killing [https://archive.ph/9uA8J]; Paul Butler, *Was Black Lives Matter a Failure? It Depends on Where You Look*, WASH. POST (May 21, 2025), https://www.washingtonpost.com/opinions/2025/05/21/blm-police-reform-states-localities/ [https://perma.cc/VJ9Q-DCQ7] ("States have quietly become laboratories for meaningful police accountability and criminal justice reform. This progress remains largely unacknowledged in our national discourse, but the evidence is substantial and worth celebrating. Consider that since 2020, more than 30 states have enacted more than 140 new laws addressing police accountability and oversight. The numbers are striking: Twenty-four states banned or restricted chokeholds, at least 13 enacted broader restrictions on use of force, and at least four have banned no-knock warrants — the practice that led to the 2020 death of medical worker Breonna Taylor in Louisville. Police use-of-force policies have been overhauled nationwide."); Rebecca Richardson et al., *Tempering Expectations: A Qualitative Study of Prosecutorial Reform*, 58 J. RSCH. IN CRIME & DELINQUENCY 41 (2021); Alice Speri, *$150m paid in police misconduct claims shows violent response to 2020 protests, experts say*, THE GUARDIAN (May 25, 2024): https://www.theguardian.com/us-news/article/2024/may/25/police-misconduct-payment-2020-protest [https://perma.cc/NR5Z-D3HK] ("In addition to seeking compensation for victims, many of the settlements were catalysts for reforms, the report notes. Some forced cities to impose transparency measures such as requirements that police turn on their body cameras and display their badge numbers, restrictions on the use of less-lethal weapons, and changes to local rules that unduly restricted the right to protest.").

The post-2020 criminal justice reform efforts have demonstrated a powerful lesson: When people are informed and understand what is happening in their communities, they act.

1. SUCCESSES TO BE CELEBRATED

Of all the successes of the post-2020 reform movement, a few deserve special recognition for their lasting impact. Among them are the record number of police reform bills passed in state legislatures.[262] Policymakers have dramatically curtailed the circumstances and methods under which certain forms of force may be used, and they have considered and, in several jurisdictions, implemented alternative pursuit practices, which have sparked meaningful discussions about the reallocation of funds from policing to social programs.[263] Significantly, their efforts also had a trickle-down effect, illuminating misconduct that had largely escaped public scrutiny in other areas of the government, including the actions of prosecutors and, to a lesser degree, judges and other system officials.[264] But the most consequential success stemming from the movement is broader recognition of systemic racism in the criminal legal system, and the conversations that recognition has sparked.[265] As one journalist articulated in 2020, "'systemic racism' went mainstream."[266]

> "What had been an abstract argument made in numbers and percentages by a cadre of activists and academics became impossible to deny. The dam of resistance burst, and 'systemic racism'—the idea and the phrase itself—went mainstream practically overnight," one reporter wrote in a reflection piece about the impact of Floyd's death on America, emphasizing that this was true even for the former president.[267] "Biden did something no presidential nominee, or winner, had done: He used the phrase 'systemic racism' in his convention speech—and again on election night, and again in his inaugural address."[268]

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262. Crampton, *supra* note 259.

263. Exec. Order No. 14074, 87 Fed. Reg. 32945 (May 31, 2022); *see* Fegley & Murtazashvili, *supra* note 259, at 123.

264. *See* Adrian Florido, *Black Lives Matter Activists Push to Vote Out Los Angeles Prosecutor*, NPR (Oct. 21, 2020), https://www.npr.org/2020/10/21/926329248/black-lives-matter-activists-push-to-vote-out-los-angeles-prosecutor; Caren Morrison, *Progressive prosecutors scored big wins in 2020 elections, boosting a nationwide trend*, THE CONVERSATION (Nov. 18, 2020), https://theconversation.com/progressive-prosecutors-scored-big-wins-in-2020-elections-boosting-a-nationwide-trend-149322 [https://perma.cc/EU22-FSCX] ("Black Lives Matter protests have also focused attention on how prosecutors make decisions—whom they prosecute and how severely, particularly in police violence cases.").

265. *See* Ray, *supra* note 259.

266. *What George Floyd Changed*, POLITICO (May 23, 2021, 7:00 AM), https://www.politico.com/news/magazine/2021/05/23/what-george-floyd-changed-490199#:~:text=The%20dam%20of%20resistance%20burst,into%20their%20reporting%20and%20advertising [https://archive.ph/kw4sA].

267. *Id.*

268. Joe Biden, Inaugural Address (Jan. 20, 2021), available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/20/inaugural-address-by-president-joseph-r-biden-jr/ [https://perma.cc/YP8J-MSM4]; Joe Biden, Democratic National Convention Speech (Aug. 21, 2020), available at https://www.cnn.com/2020/08/20/politics/biden-dnc-speech-transcript/index.html [https://perma.cc/EAS9-BSFD].

This mainstream-ification of structural racism re-shaped all four corners of American life, from art and culture to science and law. It forced stakeholders, activists, academics, and everyday citizens to confront the nation's history and consider modern policies and systems through the lens of oppression. In doing all of this, it invited the country to engage in the ultimate act of service: unification in the continued pursuit of justice and accountability.

2. FAILURES TO BE REVERSED OR MITIGATED

Despite significant progress since 2020, the nation is still far from adequately addressing the pervasive issue of official misconduct within the criminal legal system. Evidence of this shortcoming abounds.

While recent years have witnessed a focus on police reform, the impact of many of these reforms has been relatively limited. For instance, policies restricting the use of certain force methods, including chokeholds, account for less than one percent of police killings.[269] Departmental mandates to intervene and report when an officer witnesses the use of excessive force were already in place in many jurisdictions before formal codification, including within the Minneapolis Police Department when Floyd was murdered.[270] Moreover, police unions continue to wield significant power, obstructing efforts to decertify and terminate officers involved in misconduct.[271]

Police unions and communications hubs have also undermined reform efforts by engaging in media campaigns and political activism designed to minimize and counter ongoing discussions about police misconduct, sometimes misleadingly so.[272] They have asserted that police reforms caused officers to leave the law enforcement profession in significant numbers, which in turn resulted in increased levels of violent crime following the pandemic.[273] While both claims have been refuted by authorities and data, they are nevertheless baked into some public officials' anti-police reform rhetoric.[274] This pushback has undercut the support for abolition of qualified immunity for federal and state officers. To date, only four states (Colorado, Nevada, New Mexico, and Nevada) and one municipality (New York City) have fully banned qualified immunity for police in state or local court actions, despite the initial introduction of similar bills in over half of the country.[275]

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269. Subramanian & Arzy, *supra* note 175.

270. *Id.*; Kimberly Kindy, *Dozens of states have tried to end qualified immunity. Police officers and unions help beat nearly every bill.*, WASHINGTON POST (Oct. 7, 2021), https://www.washingtonpost.com/politics/qualified-immunity-police-lobbying-state-legislatures/2021/10/06/60e546bc-0cdf-11ec-aea1-42a8138f132a_story.html [https://archive.ph/evcEG].

271. Subramanian & Arzy, *supra* note 175.

272. *What George Floyd Changed*, *supra* note 266.

273. *See* Alisa Chang et al., *Reports Claimed That Police Left In Droves Due To BLM. New Data Say That's Not True*, NPR (Sept. 8, 2021, 4:56 PM), https://www.npr.org/2021/09/08/1035224864/reports-claimed-that-police-left-in-droves-due-to-blm-new-data-say-thats-not-tru [https://perma.cc/6F5D-DS2A].

274. Kindy, *supra* note 270.

275. *State Bans on Qualified Immunity*, INST. FOR JUST. (2025), https://ij.org/qualified-immunity-state-reforms/ [https://perma.cc/22B2-T9TE]; Police1 Staff, *Qualified immunity: A state-by-state review*, POLICE1

These roadblocks have impacted other areas of the system, as well. Many of the progressive prosecutors elected in the fall of 2020 have either failed to conform to their reformist campaign policies or were prevented from fulfilling them by other government actors.[276] It continues to be the case that few prosecutors are held accountable for even the most egregious examples of misconduct committed in the course of their jobs—whether through state bar discipline, criminal charges, or otherwise.[277] These realities, coupled with the status quo of applicable legal standards for challenging systemic abuses, means that the ability of impacted persons to discover, understand, and utilize evidence of prosecutor misconduct remains difficult, if not impossible.[278] Accountability reforms targeting judges and defense counsel have similarly failed to ease the burdens placed on impacted individuals.[279] Thus, despite the surge of activism after 2020, the overall landscape of official misconduct within the criminal legal system has witnessed only modest change.[280] The key to ensuring progress is identifying *why*.

(June 20, 2025), https://www.police1.com/legal/qualified-immunity-a-state-by-state-review [https://perma.cc/MQV6-LY9D];

Nick Sibilla, *New York City Bans Qualified Immunity For Cops Who Use Excessive Force*, FORBES (Apr. 30, 2021), https://www.forbes.com/sites/nicksibilla/2021/04/29/new-york-city-limits-qualified-immunity-makes-it-easier-to-sue-cops-who-use-excessive-force/#:~:text=So%20far%2C%20only%20Colorado%20and,that%20has%20curtailed%20qualified%20immunity [https://perma.cc/G3M2-BRGG].

276. *See* Brad Haywood, *Busting the Myth: Many progressive prosecutors promised bold change. In Virginia and elsewhere, reformers are realizing they're carceral actors are all the same*, INQUEST (June 10, 2022): https://inquest.org/busting-the-myth-progressive-prosecutors/ [https://perma.cc/GP9P-7U39]; Kohler, *supra* note 196; Akela Lacy, *States Have Now Tried to Pass Bills That Strip Power From Reform-minded Prosecutors*, THE INTERCEPT (Mar. 3, 2023), https://theintercept.com/2023/03/03/reform-prosecutors-state-legistatures/ [https://perma.cc/NLG4-R6NN].

277. *See* Scott, *supra* note 71, at 359; *Prosecutorial Oversight: A National Dialogue in the Wake of* Connick v. Thompson, INNOCENCE PROJECT 1, 8 (Mar. 2016) [hereinafter *Prosecutorial Oversight*]; Levin, *supra* note 237, at 1–2; Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 NYU ANN. SURV. OF AM. LAW 45, 83 (May 18, 2005); Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 290-91 (2007).

278. *See* Jason Kreag, *Disclosing Prosecutorial Misconduct*, 72 VAND L. REV. 297, 306, 332, n.195; Zack, *supra* note 57.

279. Alexis Hoag-Fordjour, *Back to the Future: (Re)Constructing Ineffective Assistance of Counsel*, 58 U. C. DAVIS L. REV. 111, 114-116, 161-164 (2024); Marco Poggio, *Public Defenders are 'Dangerously' Overworked, Report Finds*, LAW 360 (Sept. 12, 2023), https://www.law360.com/pulse/articles/1719991/public-defenders-are-dangerously-overworked-report-finds [https://perma.cc/VH2G-P7HJ]; Lefstein, *supra* note 244, at 11 ("Subordinate and supervisory lawyers employed by public defense programs are rarely disciplined because of excessive caseloads. . ."); GROSS ET AL., *supra* note 39 at 9 ([J]udging from anecdotal evidence—[defense attorney] misconduct and incompetence may do as much to produce false convictions as misconduct by prosecutors and police officers combined."); Michael Waldman, *New Supreme Court Ethics Code Is Designed to Fail*, BRENNAN CTR. (Nov. 14, 2023), https://www.brennancenter.org/our-work/analysis-opinion/new-supreme-court-ethics-code-designed-fail [https://perma.cc/C5RY-G7YM]; Sarah M.R. Cravens, *Off the Record: Transparency Challenges in Judicial Misconduct and Discipline*, CASE W. RSRV. L. REV. 1053, 1054-55 (2024).

280. Jamiles Lartey, *Five Years After George Floyd's Murder, Police Reforms Are Being Rolled Back*, THE MARSHALL PROJECT (May 17, 2025), https://www.themarshallproject.org/2025/05/17/george-floyd-police-reforms-stall [https://perma.cc/6A3M-PF2K]; Eric Tegethoff, *Behind the Right's War on Prosecutors*, THE APPEAL (Aug. 3, 2023) https://theappeal.org/conservatives-progressive-prosecutors-reform/ [https://perma.cc/

Two primary factors have contributed to this stagnation: (1) a dearth of irrefutable, empirically sound evidence illustrating how often, why, and by what means official misconduct occurs in the criminal legal system as a whole, and (2) a resulting inability to enact effective countermeasures to combat misconduct in the absence of robust data.

That being said, it is not as if we know nothing about official misconduct. Evidence suggests that misconduct plays a leading role in the delegitimization of the criminal legal system, which brings significant consequences for justice, freedom, and democracy.[281] However, most of what is known about official misconduct is fragmented, confined to specific areas and actors, and limited in scope. Data collection, screening, and publication are inconsistent, and access to this information is often restricted, from both those in the legal system and the general public. While several prominent databases do catalog specific types of misconduct committed by narrow classes of actors—most often, police—they provide only a partial picture of the realities of the system.[282] This Article does not aim to criticize existing data collection efforts. However, it remains true that available datasets are not sufficiently comprehensive to prevail over the false—but tacitly accepted—rhetoric peddled by anti-reformists that most everyone intrinsically would prefer to believe: Misconduct is infrequent, occurs in isolation, and is committed by just "a few bad apples."

Of course, existing evidence does not support this rhetoric.[283] But the scarcity of misconduct data extending beyond innocence, death penalty, and brutality cases invites doubt; that is the primary reason comprehensive empirical data is necessary. Current figures fail to capture the scope of misconduct occurring in

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GEQ2-PAK5]; Marco Poggio, *Public Defenders are 'Dangerously' Overworked, Report Finds*, LAW360 (Sept. 12, 2023), https://www.law360.com/pulse/articles/1719991/public-defenders-are-dangerously-overworked-report-finds [https://perma.cc/U63P-YXVQ]. *See* Katie Herchenroeder, *Supreme Court Justice Clarence Thomas Went On Even More Undisclosed Trips: Senate Democrats,* VANITY FAIR (Dec. 22, 2024), https://www.vanityfair.com/news/story/supreme-court-justice-clarence-thomas-undisclosed-trips-senate-democrats?srsltid=AfmBOoo8QWsdYX9IPUo5bjd6tNw1Wmp_5uGplzK23ODhAg4sRV3inWIu [https://perma.cc/5535-AMRA].

281. Joel B. Rudin, *Taking Prosecutorial Misconduct 'Unseriously': Brady Violations and The Myth of Professional Account*, THE CHAMPION (Dec. 2012): https://www.nacdl.org/Article/December2012-TakingProsecutorialMisconductU [https://perma.cc/63MY-UUHN]; Janet Moore, *Democracy and Criminal Discovery Reform After* Connick *and* Garcetti, 77 BROOK. L. REV. 1329, 1387-88 (2012).

282. *See* CPI Database*, supra* note 124; MAPPING POLICE VIOLENCE, *supra* note 124; *Police Shooting Data*, *supra* note 127; *Police Decertification Database*, NAT'L CONF. OF STATE LEGISLATURES, https://app.powerbi.com/view?r=eyJrIjoiM2EyYWZmYzQtODg5Yy00Mjg4LTk4YTktNTQyNWYzNDdiMTRlIiwidCI6IjM4MmZiOGIwLTRkYzMtNDEwNy04MGJkLTM1OTViMjQzMmZhZSIsImMiOjZ9 [https://perma.cc/HBR9-8YQ4] (last visited Aug. 24, 2024); *National Police Index*, INVISIBLE INST., https://invisible.institute/national-police-index [https://perma.cc/SV2D-M7C4] (last visited Jan. 28, 2025); *Registry Database*, CTR. FOR PROSECUTOR INTEGRITY, https://www.prosecutorintegrity.org/registry/database/ [https://perma.cc/LG7W-5C72] (last visited Jan. 28, 2025); MAPPING POLICE VIOLENCE, *supra* note 124; *Henry A. Wallace Police Crime Database*, BOWLING GREEN ST. U., https://policecrime.bgsu.edu/Home/Map [https://perma.cc/7DU6-RQWF] (last visited Jan. 28, 2025).

283. GROSS ET AL. *supra* note 39, at 11.

more routine, mundane matters in which system actors partake daily. Without that information, reform efforts are easier to defeat.

To ensure accountability for bad actors while correcting past harm and preventing it in the future, stakeholders, scholars, and policy makers require the opportunity to study how and why official misconduct happens. Data collection and analysis would likely have been, and still can be, a solution; but until official misconduct data is tracked on a broader scale, "transformative change. . . [will] remain[] elusive."[284]

III. HOW A DEARTH OF EMPIRICAL DATA HAS UNDERMINED WIDESPREAD REFORM

Dr. Martin Luther King, Jr. said that "the arc of the moral universe bends toward justice."[285] While history has taught that politics and culture can dramatically impact the interpretations, understandings, and priorities of an era, administrations are always fleeting. For that reason, real, enduring change must be the byproduct of human connection, relationships, and initiatives that are evidence-based and intersectional, capable of transcending the attitudes of the day to achieve a common goal.[286] Knowledge is the first support in the bend toward justice.[287]

The events of 2020, and countless other movements that came long before, have illustrated how widespread exposure to the harrowing realities of oppression can unite communities in pursuit of change.[288] That exposure can take many forms. The nation was exposed—on video and in real-time—to Floyd's tragic

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284. Subramanian & Arzy, *supra* note 175.

285. Dr. Joseph Coohill, *Martin Luther King, Jr. "The Arc of the Moral Universe Is Long, But It Bends Toward Justice" Quote or No Quote?*, PROFESSOR BUZZKILL (May 23, 2022), https://professorbuzzkill.com/2022/05/23/martin-luther-king-jr-the-arc-of-the-moral-universe-is-long-but-it-bends-toward-justice-quote-or-no-quote/ [https://perma.cc/TRM7-BTS5] (noting that Martin Luther King, Jr. employed the expression, but Theodore Parker "was the originator of the concept of the arc of the moral universe bending towards justice").

286. *See* Jocelyn Simonson, *Democratising Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1612 (2017) (arguing that "bottom-up forms of participation are not only powerful and important, but also crucial for *democratic* criminal justice. Collective mechanisms of resistance and contestation build agency, remedy power imbalances, bring aggregate structural harms into view, and shift deeply entrenched legal and constitutional meanings. Many of these forms of contestation display a faith in local democracy as a tool of responsive criminal justice, while simultaneously maintaining a healthy skepticism of the law and existing legal institutions that maintain the status quo.") *Id.*

287. *See* Silverstein, *supra* note 166; Jamiles Lartey, *Three Years After George Floyd's Murder, Police Reforms are Slow-Paced*, THE MARSHALL PROJECT (June 3, 2023), https://www.themarshallproject.org/2023/06/03/george-floyd-police-reform [https://perma.cc/83AA-QZTZ] (acknowledging that the protests following the death of George Floyd and others sparked reform but pointing out how slow and marginal some reforms were); Jason Spear, *How George Floyd's Death Became A Catalyst for Change*, SMITHSONIAN, https://nmaahc.si.edu/explore/stories/how-george-floyds-death-became-catalyst-change [https://perma.cc/QN84-9NNS] (last visited July 27, 2024).

288. *See Subsequent protests: George Floyd, Ahmaud Arbery, and Breonna Taylor*, ENCYC. BRITANNICA (March 21, 2025), https://www.britannica.com/topic/Black-Lives-Matter/Subsequent-protests-George-Floyd-Ahmaud-Arbery-and-Breonna-Taylor [https://perma.cc/X2DD-7MZP].

murder.[289] In the aftermath, many Americans' views of policing changed.[290] Activists were mobilized.[291] They tried to change the system—and on a small scale, they succeeded. Among their most successful policy reforms were those targeting the exact circumstances of Floyd's killing.[292] Conversely, the areas where activists enjoyed less success or altogether failed to secure change involved issues that have received significantly less exposure.[293]

Not all official misconduct leaves a paper (or video) trail,[294] but a sizable portion of it does.[295] Part of the problem is this information has not been routinely captured over time, preventing sectors of the public from understanding how easily and senselessly life-altering misconduct can occur. The practical consequence is that society cannot promulgate effective solutions to problems that it cannot appreciate. This must change.

Information about official misconduct, if collected and properly shared and studied, could better educate the public about what happens in its criminal legal system, and it could be the catalyst for broad sweeping change that has previously been unachievable.

A. WE DO NOT KNOW WHAT WE DO NOT KNOW

Too often, meaningful change is undermined by a lack of understanding of perspectives different from one's own.[296] Where lived experience is absent, education

289. Hill et al., *supra* note 167.

290. *See Subsequent protests: George Floyd, Ahmaud Arbery, and Breonna Taylor*, *supra* note 287.

291. *Id.*

292. Subramanian & Arzy, *supra* note 175 ("Throughout the past year, at least 30 states and Washington, DC, enacted one or more statewide legislative policing reforms, [and] . . . 25 states and DC addressed at least one of three areas directly related to the circumstances of Floyd's killing: use of force; duty for officers to intervene, report, or render medical aid in instances of police misconduct; and policies relating to law enforcement misconduct reporting and decertification. . .").

293. *See* David A. Graham, *How Criminal-Justice Reform Fell Apart*, THE ATLANTIC (May 26, 2022), https://www.theatlantic.com/ideas/archive/2022/05/george-floyd-anniversary-police-reform-violent-crime/630174/ [https://perma.cc/786B-36BZ] (Detailing how the support for criminal justice reform galvanized in 2020, but support dried up soon after when crime rates rose).

294. For example, prosecutors or defense attorneys could engage in improper, *ex parte* communications with judges about active cases. Such conduct would not leave a paper trail, could have a profound impact on a case, and would be difficult to discover, let alone prove.

295. *See* Anjelica Hendricks, *Exposing Police Misconduct in Pre-Trial Criminal Proceedings*, 24 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 214 (2021) (noting how the Philadelphia Police Department withheld an officer's disciplinary history, which included "sustained charges of falsification of documents"). "A recent national examination of prosecutor relationships with their respective law enforcement agencies, conducted by the Institute for Innovation in Prosecution, is the first collection to shed light on the specific details of *Brady-Giglio* policies. That report, *Tracking Police Misconduct* (hereinafter 'IIP report'), explains why it is crucial for prosecutors to have a *Brady-Giglio* list and outlines how prosecutorial offices can start collecting, or better maintain, this information." *Id.* at 208.

296. *See* Simonson, *supra* note 286, at 1611-12 (arguing that "seeking consensus may lead us to privilege discourse that repeats rather than re-envisions our reigning ideas of what criminal justice should look like. A complete blueprint for democratic criminal justice requires embracing adversarial, contestatory forms of participation and resistance that go beyond the decorum of calm deliberation to build power and push for transformation.").

must be abundant.[297] It is critical that education flows from information that is sound, verified, and comprehensive so that decision-makers are capable of grasping the full picture and acting appropriately.[298]

In the context of criminal justice reform, stakeholders must be equipped with the experience and education necessary to make informed decisions—whether that decision is a vote on proposed legislation, a judgment call on whether to pursue or overturn a conviction, or a determination of whether to report misconduct for disciplinary review. Many, but not all, criminal justice stakeholders come to this work with some combination of experience and education.[299] Most of them are white men whose experiences align with the perspective of the government.[300] Even more broadly, it is unlikely that most stakeholders have dedicated significant time and resources to studying official misconduct committed by their own. These are precisely the reasons that a well-rounded education is central to decision-making that is well-informed, fair, and just.

As detailed in Section I, the lack of official misconduct data obscures the true extent of the problem and leaves the public dangerously uninformed. Citizens remain unaware of the frequency, scope, and causes of official misconduct, likely cognizant only of high-profile incidents. Other misconduct that occurs on a routine basis may be dismissed as less threatening or overlooked due to implicit bias. This

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297. *Id.*

298. *Id.*

299. *See* EMILY D. BUEHLER, STATE AND LOCAL LAW ENFORCEMENT TRAINING ACADEMIES, 2018 – STATISTICAL TABLES (2021) (noting that, as of 2018, roughly 25% of state law enforcement training academies required that their instructors have a 2-year college degree or higher, and 30% did not require law enforcement experience); Joseph Cranney, *The Untouchables: These Judges Can Have Less Training Than Barbers but Still Decide Thousands of Cases Each Year*, PROPUBLICA (Nov. 27, 2019, 5:00 AM), https://www.propublica.org/article/these-judges-can-have-less-training-than-barbers-but-still-decide-thousands-of-cases-each-year [https://perma.cc/X2DQ-PC7E] ("[Magistrates] who aren't lawyers must observe five civil and five criminal hearings, including two jury trials in the state's circuit courts. They must also complete a hands-on training course, which totals 57 1/2 hours. By comparison, police officers who often appear before magistrates must complete a 12-week training academy. South Carolina is also stricter on its barbers: their school mandates 1,500 hours."). When it comes to lived experience, judges and lawyers are particularly unlikely to have personal experience with the criminal legal system, due to the privileged backgrounds from which most attorneys originate. As of 2024, the ABA reported that approximately 77% of lawyers were white; a variety of studies also indicate that law school applicants tend to come from higher-income families.

300. *See* Amita Kelly, *Does It Matter That 95 Percent of Elected Prosecutors Are White?,* NPR (July 8, 2015, at 4:59 PM), https://www.npr.org/sections/itsallpolitics/2015/07/08/420913118/does-it-matter-that-95-of-elected-prosecutors-are-white [https://perma.cc/Q9RT-T9V9] ("A report out this week found that 95 percent of the country's elected prosecutors are white, and 83 percent are men. Only 1 percent are women of color . . . . The proportion of white elected prosecutors is higher than that of attorneys in general. According to the American Bar Association, 88 percent of lawyers are white."); *see also* Clark Neily, *Are A Disproportionate Number of Federal Judges Former Government Advocates?*, CATO INST. (May 27, 2021), https://www.cato.org/study/are-disproportionate-number-federal-judges-former-government-advocates [https://archive.ph/rfi91]; *Why Do So Few Public Defenders Become Judges?*, NPR (Mar. 19, 2022, at 6:00 PM), https://www.npr.org/2022/03/18/1087579255/why-do-so-few-public-defenders-become-judges [https://perma.cc/VA8R-XFRQ]; Wendy Sawyer and Alex Clark, *New data: The rise of the "prosecutor politician"*, PRISON POL'Y INITIATIVE (July 13, 2017), https://www.prisonpolicy.org/blog/2017/07/13/prosecutors/ [https://perma.cc/9T3K-RMF4].

lack of information can lead to the misconception that misconduct is rare, unintentional, or localized, diminishing the perceived need for preventative measures.[301]

Those studying the criminal legal system have seen this scenario play out repeatedly in politics, litigation, disciplinary proceedings, and beyond. People in positions of power have repeatedly told the public that comprehensive police reform is not necessary to combat the actions of "a few bad apples," acting in isolation.[302] The same sentiment has been echoed for misbehaving judges, prosecutors, and defense attorneys to minimize the perception of systemic misconduct within the legal system—even in the face of well-publicized instances.[303] But even when baseless, these assurances have a persuasive effect on the public's perception of events, especially for those with limited exposure to the issues.[304] As time goes on, a consensus can become difficult to reach and whistleblowers may tire, causing momentum to wane and public scrutiny to decline until the next national incident occurs.

The public's desire to believe in the rarity of official misconduct is understandable. Apart from political affiliations and the role of both explicit and implicit bias in the "few bad apples" trope, people generally want to believe they live in a society where crime and corruption among its leaders is rare. It is a matter of basic psychology that individuals are more likely to believe the information they wish to be accurate.[305] Misconduct committed by trusted local, state, and national officials—many of whom have been supported and elected to office by members of the public—can feel like betrayal.[306] This disillusionment, combined with

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301. Saul M. Kassin et al., *Prosecutorial Misconduct: Assessment of Perspectives from the Bench*, 58 CT. REV. 162, 166 ("Many patterns presented would be cured or considered acceptable, ethical conduct by prosecutors because the competent defense counsel would check, call or challenge the conduct and protect the defendant from any adverse consequences").

302. This includes comments made by President Trump during his first administration, as well as former attorney general William Barr, and former FBI director Christopher Wray. *See* Peter Baker & Thomas Kaplan, *Trump Defends Police, But Says He'll Sign Order Encouraging Better Practices*, N.Y. TIMES (June 11, 2020), https://www.nytimes.com/2020/06/11/us/politics/trump-biden-police.html [https://archive.ph/TZNhj]; Katie Benner, *Barr Says There Is No Systemic Racism In Policing*, N.Y. TIMES (June 7, 2020), https://www.nytimes.com/2020/06/07/us/politics/justice-department-barr-racism-police.html [https://archive.ph/Wip2d]; *FBI Director Chris Wray on 'Bad Apples Within Law* Enforcement,' CBS 19 (Mar. 2, 2021, at 12:27 PM), https://www.cbs19.tv/video/news/politics/national-politics/fbi-director-chris-wray-law-enforcement/507-05a6997b-eb58-4783-9e94-063fb8d087ee [https://perma.cc/TMX6-29VC?type=standard]; *see also* Aaron Chalfin and Jacob Kaplan, *How many complaints against police officers can be abated by incapacitating a few "bad apples?"*, 20 CRIMINOLOGY & PUB. POL'Y (2021); *but see* Vida B. Johnson, *Whom do Prosecutors Protect?*, 104 BOS. U. L. REV. 289, 322 (2024).

303. Cynthia Gray, *The Line Between Legal Error and Judicial Misconduct, Balancing Judicial Independence and Accountability*, 32 HOFSTRA L. REV. 1245, 1245 (2004); Johnson, *supra* note 302, at 305 n.83; *Judges Mostly Agree on Most Problematic Prosecutorial Misconduct, But That Doesn't Translate to Accountability*, INNOCENCE PROJECT (Mar. 23, 2023) https://innocenceproject.org/judges-mostly-agree-on-most-problematic-prosecutorial-misconduct-but-that-doesnt-translate-to-accountability/ [https://perma.cc/39CZ-KLGG].

304. *See Public Perceptions of the Police*, COUNCIL ON CRIM. JUST., https://councilonj.org/public-perceptions-of-the-police/ [https://perma.cc/JQJ7-XU57] (last visited Aug. 18, 2024) ("You can never underestimate the role of elected officials in moving public opinion with the signals they are sending to their constituents.").

305. Cecilia Heyes, *Rethinking Norm Psychology*, 19 PERSP. ON PSYCH. SCI. 12, 30 (2024).

306. Helen Norton, *Government Falsehoods, Democratic Harm, and the Constitution*, 82 OHIO ST. L.J. ONLINE 1, 3 (2021).

limited data on the scope and consequences of misconduct and a lack of direct exposure to its harms, makes it easy to dismiss the need for systemic reform, despite the potentially devastating impact of such inaction.

Take, for example, the overwhelming public outcry for police reform and accountability in 2020, which called upon leaders to recognize and combat systemic racism in American policing. Demands for change brought citizens together in droves that transcended ordinary politics.[307] Activists focused their advocacy on achieving not just preventive measures, but also meaningful accountability for those who abuse their power.[308] Support for citizen oversight boards and independent investigations into allegations of police misconduct was widespread, and polling at the time suggested at least two-thirds of Americans—including eighty-six percent of Black Americans and seventy-five percent of Latinx Americans—favored the abolition of qualified immunity.[309] It appeared that the nation was on the brink of change at the will of the people. Despite the social movement underway throughout the country, however, Republican leadership made statements denouncing Black Lives Matter protests and deflecting systemic racism and corruption among law enforcement, instead blaming police brutality on isolated incidents.[310] Just six days after Floyd's death, White House National Security Advisor Robert O'Brien famously denied the existence of systemic racism in policing and proclaimed in his State of the Union address that, "There's a few bad apples that are giving law

307. Audra D. S. Burch et al., *The Death of George Floyd Reignited a Movement. What Happens Now?,* N. Y. TIMES (June 23, 2023), https://www.nytimes.com/2021/04/20/us/george-floyd-protests-police-reform.html [https://archive.ph/0ndfk].

308. Brad Brooks, *Citizens Lead the Call for Police Reform Since George Floyd's Death*, REUTERS (Apr. 13, 2021, at 6:08 AM), https://www.reuters.com/world/us/protesting-shaping-police-reform-citizens-lead-way-since-george-floyds-death-2021-04-13/ [https://archive.ph/zSRIb].

309. *Majority of Public Favors Giving Civilians Power to Sue Police Officers For Misconduct,* PEW RSCH. CTR., (July 9, 2020), https://www.pewresearch.org/politics/2020/07/09/majority-of-public-favors-giving-civilians-the-power-to-sue-police-officers-for-misconduct/ [https://perma.cc/TPV9-AY4W].

310. Laura Barron-Lopez & Alex Thompson, *Facing Bleak November, Republicans Look to Stroke BLM Blacklash*, POLITICO (Aug. 10, 2020, at 4:30 AM), https://www.politico.com/news/2020/08/10/elections-republicans-black-lives-matterbacklash-389906 [https://archive.ph/EWF6Y]; Sophie Quinton, *Republicans Respond to Black Lives Matter with Anti-Protest Bills*, STATELINE (Feb. 4, 2021, at 12:00 AM), https://stateline.org/2021/02/04/republicans-respond-to-black-lives-matter-with-anti-protest-bills/ [https://archive.ph/9MyXK]; Bill Hutchinson, *Turning Point: Black Lives Matter organizers say right-wing backlash was expected as movement grew*, ABC NEWS (OCT. 25, 2020, at 10:00 AM), https://abcnews.go.com/US/turning-point-black-lives-matter-organizers-wing-backlash/story?id=72863444 [https://perma.cc/U77L-A2KX]; Jason Lemon, *Lindsey Graham Dismisses Systemic Racism in Policing Because VP Kamala Harris is Black*, NEWSWEEK (Apr. 25, 2021, at 2:05 PM), https://www.newsweek.com/lindsey-graham-dismisses-systemic-racism-policing-because-vp-kamala-harris-black-1586275 [https://perma.cc/M8P8-G2P7]; Madison J. Gray, *Sen. Tim Scott Says His GOP Police Reform Bill Similar to Democrats' Plan*, BET (June 18, 2020), https://www.bet.com/article/m6paz2/sen-tim-scott-says-gop-police-reform-bill-similar-to-dems [https://archive.ph/9U2Ln]; Samuel Smith, *James Dobson, Tim Scott Talk George Floyd; Senator urges Christians to Oppose 'Bad Apples'*, CHRISTIAN POST (June 7, 2020), https://www.christianpost.com/news/james-dobson-tim-scott-talk-george-floyd-senator-urges-christians-to-oppose-bad-apples.html/ [https://perma.cc/TPG5-4KPJ].

enforcement a terrible name."[311] These sentiments were soon echoed by then President Trump, and former attorney general William Barr.[312]

By the time congressional Democrats introduced the George Floyd Justice in Policing Act (the Floyd Act), there was already disagreement along party lines about the depth of police reform necessary.[313] While the House bill drew criticism from Black Lives Matter for not going far enough to remedy systemic misconduct, it would have lowered the criminal intent required to convict law enforcement officers in federal police misconduct prosecutions, limited the availability of qualified immunity as a defense to liability for officers in private lawsuits, and granted administrative subpoena power to the Department of Justice in pattern-or-practice investigations into law enforcement misconduct.[314] The bill passed the House with overwhelming support from Democrats, but failed in the Senate, where Republicans introduced a competing police reform bill[315] that failed to address police accountability enforcement mechanisms—an omission heavily criticized by the NAACP Legal Defense and Education Fund and the American Civil Liberties Union.[316] Both bills were ultimately unsuccessful.[317]

In 2021, efforts to revive the Floyd Act were successful in the House—passing a second time with a margin of 220 to 212—but again stalled in the Senate.[318]

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311. Rebecca Klar, *National Security Adviser Blames 'A Few Bad Apples,' Says there's Not Systemic Racism in Law Enforcement*, THE HILL (May 31, 2010), https://thehill.com/homenews/administration/500328-national-security-adviser-blames-a-few-bad-apples-says-theres-not/ [https://perma.cc/M3PQ-KYNF].

312. Baker & Kaplan, s*upra* note 302; Benner, *supra* note 302.; *FBI Director Chris Wray on 'Bad Apples Within Law Enforcement'*, supra note 302.

313. *See* Barbara Sprunt, *READ: Democrats Release Legislation to Overhaul Policing*, NPR (June 8, 2020), https://www.npr.org/2020/06/08/872180672/read-democrats-release-legislation-to-overhaul-policing [https://perma.cc/Q23T-BYUB].

314. Assoc. Press, *Movement for Black Lives Opposes George Floyd Justice in Policing Act*, PBS NEWS (Mar. 17, 2021), https://www.pbs.org/newshour/politics/movement-for-black-lives-opposes-george-floyd-justice-in-policing-act [https://perma.cc/Z8JE-3Y2K]; Maya King, *Black Lives matter Goes Big on Policy Agenda*, POLITICO (Aug. 28, 2020), https://www.politico.com/news/2020/08/28/black-lives-matter-breathe-act-403905 [https://perma.cc/BLW9-SRTW]; S.3912, 116th Cong. (2020).

315. Claudia Grisales & Brian Naylor, *Republicans' Police Reform Bill Focus On Transparency And Training*, NPR (June 17, 2020), https://www.npr.org/2020/06/17/879082580/republicans-police-reform-bill-focuses-on-transparency-and-training [https://perma.cc/RFN6-GZQC].

316. *Read Senate Republicans' Proposed Police Reform Legislation*, NPR (June 17, 2020), https://www.npr.org/2020/06/17/879081319/read-senate-republicans-proposed-police-reform-legislation [https://perma.cc/S96T-7PHK]; Lisa Cylar Barrett, Re: Vote NO On the Motion to Proceed – S. 3985 the JUSTICE Act, (June 22, 2020), https://www.naacpldf.org/wp-content/uploads/2020.06.22-NAACP-LDF-Vote-No-Letter-to-US-Senate-re-JUSTICE-Act-S.-3985-FINAL-004.pdf [https://perma.cc/L8N9-938Y]; *ACLU Statement of Opposition to Sen. Tim Scott's So-Called "Justice Act"*, ACLU (June 24, 2020), https://www.aclu.org/press-releases/aclu-statement-opposition-sen-tim-scotts-so-called-justice-act [https://perma.cc/F6F4-JXC9].

317. Ray Sanchez, *Renewed Calls for Passage of George Floyd Justice in Policing Act After Fatal Shooting of Black Woman in Her Home,* CNN (July 25, 2024), https://www.cnn.com/2024/07/25/us/george-floyd-justice-in-policing-act/index.html [https://perma.cc/PBA5-6PUY]; Jason Breslow, *Where Efforts to Overhaul Policing Stand in Congress After Chauvin Verdict*, NPR (Apr. 21, 2021), https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/04/21/989500468/where-efforts-to-overhaul-policing-stand-in-congress-after-chauvin-verdict [https://perma.cc/C8MS-VCWW].

318. H.R. 1280, 117th Cong. (2021).

The Bill was re-introduced in 2024, but its fate was no different.[319] In the current political environment five years after Floyd's murder, the legislation seems unlikely to remain a Congressional priority.[320]

The prevailing rhetoric that official misconduct tends to occur in isolation permeates more than just the context of police misconduct. Consider disciplinary proceedings against attorneys. Scholars and practitioners have long criticized the treatment of misbehaving prosecutors and defense attorneys as insufficient to curb ethics rules violations.[321] First, it is relatively rare that complaints are lodged against attorneys, perhaps because complainants are disincentivized by the system to file them and many jurisdictions make the complaint process difficult to discern and execute.[322] As a result, fewer complaints are filed, and a false sense of legitimacy is perpetuated.[323] Yet, even when seemingly meritorious complaints are lodged, rarely are they sustained; even more rarely are the attorneys subjected to serious discipline.[324] Research suggests that this is the result of disciplinary systems favoring attorneys.[325] Authorities may be reluctant to punish lawyers due to the perception that attorney misconduct is rare and isolated, a conclusion potentially reinforced by incomplete reporting.[326] The potential to permenantly

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319. The 2024 killing of Sonya Massey at the hands of an officer in her own home prompted renewed calls for passing the legislation. Sanchez, *supra* note 317 ("Any policing overhaul that can find support in a divided Congress will likely be stripped of crucial provisions opposed by Republicans and law enforcement groups."). Nevertheless, the renewed bill was unsuccessful. S.B. 4991, 118th Cong. (2024). While Biden's 2022 Executive Order was responsive to several points in the draft bills, it almost entirely avoided the sources of contention. *See* Stroud, *supra* note 187. Moreover, even the Executive Order is now a relic of the past, as it was among the first to be rescinded by President Trump's administration in January 2025. *Initial Recissions*, *supra* note 188.

320. H.R. 8525, 118th Cong. (2024). *See* Stroud, *supra* note 187.

321. *See* Arthur F. Greenbaum, *The Automatic Reporting of Lawyer Misconduct to Disciplinary Authorities: Filling the Reporting Gap*, 73 OHIO ST. L.J. 437, 439 (2011–2012); Davis, *supra* note 277.

322. Greenbaum, *supra* note 321, at 439–41 ("To the extent a lawyer engages in number of small missteps that standing alone would not warrant discipline, but in the aggregate might, this 'pattern' evidence is often lost. Pattern evidence can also influence the level of sanction sought by disciplinary officials.") ("While lawyers and judges have an ethical duty to report lawyer misconduct, that duty is often ignored. Most commentators attribute this to several factors. The first is a societal attitude toward reporting the misconduct of others—we live in an anti-snitch culture. This is reinforced by the potential negative ramifications of reporting, including soured professional relations and possible retaliatory actions."); *See also* Davis, *supra* note 277, at 291.

323. Greenbaum, *supra* note 322.

324. *See* Davis, *supra* note 277, at 276–77 ("The Supreme Court has recommended that prosecutors be referred to the relevant disciplinary authorities when they engage in misconduct. However, for reasons that remain unclear, referrals of prosecutors rarely occur. Even when referrals occur, state bar authorities seldom hold prosecutors accountable for misconduct. The Office of Professional Responsibility of the U.S. Justice Department … has a similar weak record."); *See* Angela J. Davis, *The American Prosecutor: Power, Discretion, and Misconduct*, 23 CRIM. JUST. 25, 37 (2008) [hereinafter Davis, *American Prosecutor*].

325. Davis, *American Prosecutor*, *supra* note 324, at 37; Davis, *Prosecutors Who Intentionally Break the Law*, *supra* note 1, at 21 (In a study, "… a number of the prosecutors not only totally escaped punishment or even a reprimand, but advanced in their careers"); *see also* Kreag, *supra* note 278, at 303-04; *see generally* STANDING COMM. ON PRO. REGUL. OF THE AM. BAR ASS'N, 2021 SURVEY ON LAWYER DISCIPLINE SYSTEMS (2021).

326. Levin, *supra* note 237, at 9 n.44.

harm careers may also be a factor.[327] In criminal law, it is exceptionally rare that prosecutors, in particular, face disciplinary sanctions.[328]

Yet another example of criminal justice stakeholders often subscribing to the "few bad apples" trope is judges in post-conviction cases—many of whom come from prosecutor backgrounds—and rely heavily on the harmless error doctrine and finality considerations to justify denying claims for relief based on official misconduct.[329] Sources suggest that judges may be hostile toward allegations of official misconduct in the first place.[330] When it comes to harmless error review of legal claims predicated on misconduct evidence, they may be more willing to speculate and minimize the weight of the malfeasance on the validity of a jury's verdict rather than reverse a conviction.[331] Moreover, judges frequently favor the public policy consideration of finality over individual relief, likely influenced by the perceived unfairness of someone who is believed to be guilty being able to walk on a "technicality."[332] These common occurrences may stem from the misconception that government and defense misconduct is an infrequent and inconsequential phenomenon, especially as compared to the seriousness of criminal convictions most likely to result in post-conviction litigation.[333]

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327. *Id.*

328. Keenan et al., *supra* note 71, at 205.

329. A significant portion of state and federal judges come from prosecutor backgrounds. *See* Esther Nir & Siyu Liu, *The Influence of Prior Legal background on Judicial Sentencing Considerations*, 6 CRIM. JUST. AGENTS & RESP. 42 (2023). *See also* Kenichi Serino, *How having a former public defender on the Supreme Court could be 'revolutionary'*, PBS NEWS (Mar. 21, 2022), https://www.pbs.org/newshour/politics/few-public-defenders-become-federal-judges-ketanji-brown-jackson-would-be-the-supreme-courts-first [https://perma.cc/PL5T-6JKE]; Neily, *supra* note 300; Michael Friedrich, *The Rise of Public Defense Attorneys on the Judiciary*, ARNOLD VENTURES (April 5, 2022), https://www.arnoldventures.org/stories/the-rise-of-public-defense-attorneys-on-the-judiciary#:~:text=Since%20his%20election%2C%20President%20Biden,career%2C%20the%20White%20House%20reports [https://perma.cc/HQU7-EZ]. Moreover, they rely heavily on the harmless error doctrine–a legal principle allowing courts to affirm convictions despite error if they speculate that the error did not affect the outcome of the proceeding–to deny relief in post-conviction cases. Nick Swartsell et al., *Improper Conduct: How the Harmless Error Doctrine Lets Prosecutors' Mistakes Slide*, IDEASTREAM (Dec. 20, 2023), https://www.ideastream.org/2023-12-20/improper-conduct-how-the-harmless-error-doctrine-lets-prosecutors-mistakes-slide [https://perma.cc/5DTQ-MTX7]. *See* 28 U.S.C. § 2111 – Harmless error: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." *See also* John M. Greabe, *The Riddle of Harmless Error Revisited*, 54 HOUS. L. REV., 59, 77 (2016); Ross C. Reggio, *Harmless Constitutional Error: How a Minor Doctrine Meant to Improve Judicial Efficiency is Eroding American's Founding Ideals*, 1, 3, 60 (2019) (thesis, Claremont Colleges) (available at https://scholarship.claremont.edu/cgi/viewcontent.cgi?article=3191&context=cmc_theses).

330. *See* Casey J. Bastian, *Examining Pro-prosecution Bias in the Judiciary: Unconscious Biases of a Prosecutorial Background*, CRIMINAL LEGAL NEWS (Feb. 15, 2025), https://www.criminallegalnews.org/news/2025/feb/15/examining-pro-prosecution-bias-judiciary-unconscious-biases-prosecutorial-background/#:~:text=Multiple%20studies%20reviewed%20cases%20from,were%20less%20likely%20to%20decide [https://perma.cc/LMC9-Z5BA]; Carrie Johnson, *Judicial system fails at policing workplace misconduct, study finds*, NPR (July 17, 2024): https://www.npr.org/2024/07/17/nx-s1-5042340/judges-misconduct-self-policing-report [https://perma.cc/9DRG-FJ4P].

331. Reggio, *supra* note 329.

332. *Id.* at 28, 33.

333. Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2096 (2010).

These responses do a disservice to the public because they rely upon and perpetuate decision-making built upon the faulty assumption that misconduct plays a minimal role in the criminal legal system—a conclusion that existing evidence does not support and that additional information is not likely to either. Rather than basing life-altering decisions on assumptions, systemic issues should warrant systemic inquiry grounded in evidence—not conjecture.

B. WE CANNOT FIX WHAT WE DO NOT KNOW

If we do not know the extent to which official misconduct occurs and the universe of whom it involves, it follows that we cannot properly study it to understand its precise origins. Without the means to critically analyze misconduct data, we risk perpetuating what existing evidence already challenges as a myth: that official misconduct is rare and limited to isolated instances of malfeasance in high-stakes cases.[334] Put simply, without systemic information, it is impossible to develop intelligent, evidence-based solutions to address the problems systemic misconduct creates, let alone solutions robust enough to withstand public scrutiny and gain bipartisan support.

IV. A REIMAGINED CRIMINAL LEGAL SYSTEM: WHAT BIG DATA COULD DO

In a world where criminal justice stakeholders and community members have access to comprehensive information about official misconduct—who commits it, where it occurs, how often it happens, and why—it becomes possible to address it effectively. This transparency could empower voters to elect leaders who acknowledge the threat misconduct poses to justice and who support grassroots reform efforts. By committing to close analysis of the data and a conviction to act on it, we could develop innovative solutions to address ongoing issues, correct systemic flaws, and prevent future misconduct. The potential for meaningful change is immeasurable.

Imagine if we knew the rate at which prosecutors routinely withhold exculpatory evidence in a given jurisdiction or how often they suborn perjury, yet are still permitted to prosecute without consequence. Imagine knowing the extent to which police officers engage in racial profiling to make arrests or utilize coercive interrogation tactics to obtain confessions. Suppose there was a way to study how often and why defense attorneys fail to fully investigate their clients' cases, forgoing legal defenses or mitigation evidence. What if data could illustrate the frequency with which judges fail to recuse themselves from cases in which they have an interest, or how often they engage in improper *ex parte* conversations. What might we learn, and how could the system be changed?

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334. Keenan et al., *supra* note 71, at 205.

Transcending speculation and anecdotal evidence, the data could reveal answers to these questions across jurisdictions, allowing stakeholders an opportunity not only to share and pinpoint remedial action necessary to aid impacted persons, but also to consider trends to determine which circumstances are most likely to produce misconduct. A proactive approach is necessary to ensure progress.

A. Corrective Action Against Official Misconduct: Justice and Integrity

Concerted action to correct and prevent official misconduct is required to ensure integrity in the system, such that justice is served and accountability is levied. To that end, this Subsection focuses on forms of corrective action that may be employed to address official misconduct that has already occurred, focusing on the urgency of relief for its victims.

1. DISCOVERY OF EVIDENCE SUPPORTING LEGAL CLAIMS

Existing evidence illustrates that a staggering number of people are wrongfully convicted of crimes because of official misconduct, spending on average 11.6 years in prison before their claims are adjudicated and their convictions overturned.[335] However, due to the narrow reporting parameters of this data, the known cases likely represent a fraction of the individuals whose cases have been impacted by similar misbehavior. That means there are potentially countless people sitting in prisons today because some criminal justice stakeholder—or a combination of them—ran afoul of the law.[336] This does not even consider pre-trial detainees who may be similarly situated; many may not know that their cases were impacted by official misconduct, while others may suspect that an official engaged in misconduct in their case but lack evidentiary support sufficient to raise the issue in court.[337] Because evidence of official misconduct can be notoriously difficult to unmask, there can be little doubt that most wrongfully or unjustly convicted persons will serve out their sentences without ever discovering the official misconduct their convictions may be attributable to.[338] Localized data could dramatically change this reality.

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335. Brianne Roesser, *Wrongful conviction exonerations on the rise, per National Registry of Exonerations*, SPECTRUM NEWS 1 (Jan. 25, 2024): https://spectrumlocalnews.com/nys/central-ny/news/2024/01/25/wrongful-conviction-exonerations-on-the-rise [https://perma.cc/D5ZN-69AR]. One scholarly study of *Brady* claims from 2015-2019 found 82 of 808 claims brought were successful, and that the mean time for resolution of the claim was ten years. Garrett et al., *supra* note 96, at 215. More than one third of the cases took upwards of 12 years to resolve the violation; ten took at least 20 years to resolve; five took more than 30 years; the remainder took between 0 and 12 years. *Id*. at 215-16.

336. *See* Joy, *supra* note 108, at 407; Jon B. Gould et al., *Predicting Erroneous Convictions*, 99 IOWA L. REV. 471, 479 (2014).

337. *See* Anjelica Hendricks, *Exposing Police Misconduct in Pre-Trial Criminal Proceedings*, 24 N.Y.U. J. LEGIS. & PUB. POL'Y 177–83 (2021).

338. When misconduct is unintentional, it can be difficult for litigants to uncover because prosecutors generally "control access to evidence needed to investigate" misconduct claims and may push back when individuals seek to reverse their convictions—but when misconduct is intentional, the difficulty is compounded, because the prosecutor may try to conceal their wrongdoing. Zack, *supra* note 57.

Over time, access to public-facing data could offer a path to justice for those wronged by official misconduct by helping them discover evidence of it. In some cases, these datasets may contain direct evidence related to an individual's case. More often, however, the data may reveal that an official involved in the case committed misconduct in other instances. This discovery could trigger investigations leading to evidence of misconduct in the original case. Furthermore, the revelation of misconduct in one case may present avenues for relief in seemingly unrelated cases.

In any of these scenarios, the information revealed could be used to prompt further investigation into potential claims for relief predicated on official misconduct. The data could also be used to underscore the gravity of the official misconduct in certain cases and assist judges in determining whether relief is in the public interest, instead of analyzing cases in a vacuum. Impacted persons could utilize the information to seek post-conviction relief in the form of vacatur, resentencing, or otherwise;[339] those not yet in a post-conviction posture could use the data to aid in pretrial discovery requests and evidentiary proceedings.[340]

2. ORGANIZATIONAL SCREENING AND MASS EXONERATIONS

In the same vein, the data could be used to unearth patterns and trends in official misconduct that may aid practitioners in case screening and investigation of specific bad actors for purposes of mass exoneration litigation.[341] Lawyers are increasingly specializing in exonerating those wrongly convicted due to repeat offenders.[342] The Exoneration Project, for example, a Chicago-based nonprofit law office, worked to achieve the first mass exoneration involving murder charges in the United States in 2022, when six men and one woman were released from prison after Chicago Detective Reynaldo Guevara framed them for a crime they did not commit. Together, they served a combined 113.5 years.[343] At least thirty-

339. Many impacted persons standing to benefit from the misconduct data will already have been convicted and will no longer enjoy the right to appointed counsel. The discovery of evidence supporting a valid legal claim, however, would significantly increase their chances of attracting *pro bono* post-conviction counsel or convincing a judge to exercise their discretion to appoint counsel.

340. *See* Robert P. Mosteller, *Exculpatory Evidence. Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 262-63 (2008).

341. Green, *supra* note 208, at 119.

342. Chuck Goudie et al., *Unprecedented data project exposes what advocates call wrongful conviction crisis in Chicago*, ABC 7 CHI. (Dec. 5, 2023), https://abc7chicago.com/chicago-wrongful-conviction-lawsuit-truth-hope-and-justice-initiative-taxes/14146243/ [https://perma.cc/7KTF-RRLQ]; Ray Cortopassi, *Chicago lawyer stands out for ability to overturn wrongful convictions*, WGN (Oct. 31, 2023), https://wgntv.com/news/cover-story/chicago-lawyer-stands-out-for-ability-to-overturn-wrongful-convictions/https://perma.cc/H7U4-UEGM].

343. Maher Kawash, *7 men with cases tied to disgraced CPD Detective Reynaldo Guevara seek to overturn convictions*, ABC 7 CHI. (Feb. 29, 2024), https://abc7chicago.com/wrongful-conviction-detective-reynaldo-guevara-chicago-police-department-overturned/14480355/[perma.cc/6R69-GCF5]; *Seven Survivors of CPD Det. Guevara's Misconduct File Court Petitions to Overturn Their Convictions,* THE EXONERATION PROJECT, https://www.exonerationproject.org/stories/guevara-mass-filing/ [https://perma.cc/4XEK-NASS] (last visited Aug. 4, 2025).

six others have also been exonerated based on Guevara's misconduct, which included coercing false identifications, fabricating anonymous tips, and using physical force to obtain confessions.[344] The data this Article contemplates collecting could be used to identify repeat bad actors and those who have been affected by their misconduct, potentially expediting justice by helping impacted persons and prospective attorneys find one another.

3. PENALTIES FOR VIOLATING BEST PRACTICES LAWS

When it comes to rectifying past official misconduct, data could inspire reforms in statutory best-practices legislation. In response to already-known wrongful conviction factors, many jurisdictions have enacted best-practices statutes to safeguard against impropriety.[345] Examples include statutes outlining procedures for administering eyewitness identification methods,[346] requiring that custodial interrogations be audio and video recorded,[347] and requiring that biological evidence be preserved pending completion of the imposed sentence.[348] While the existence of these best-practices statutes is a step in the right direction, as they encourage compliance with evidence-based recommended norms, many lack meaningful enforcement mechanisms sufficient to deter non-adherence.[349] If the data were to show that particular officers or agencies administer line-ups according to their subjective desires and do so with impunity, for example, perhaps legislators would see fit to create an enforcement mechanism requiring that non-conforming identifications be excluded from evidence at subsequent proceedings.

Additional examples abound. Consider evidence preservation. For jurisdictions with laws requiring the preservation of evidence with no consequence embedded for its destruction, perhaps data illustrating patterns or practices of agencies "losing" or destroying evidence would prompt a presumption that the evidence was

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344. *Id.*

345. Daniele Selby, *20 Recent Justice Reform Measures to Celebrate*, INNOCENCE PROJECT (Oct. 6, 2021), https://innocenceproject.org/20-recent-justice-reform-measures-to-celebrate/[perma.cc/NFW6-VJJ3]; INNOCENCE PROJECT, *Transforming Systems*, https://innocenceproject.org/transforming-systems/[perma.cc/WZ6R-78LH]; Kristine Hamann & Rebecca R. Brown, *Best Practices for Prosecutors: A Nationwide Movement*, 31 CRIM. JUST. 27, 28 (2016).

346. GA. CODE ANN. § 17-20-2 (Live Lineups, Photo Lineups, or Showups; Written Policies); Brandon L. Garrett, *Self-Policing: Dissemination and Adoption of Police Eyewitness Policies in Virginia*, 105 VA. L. REV. ONLINE, 96, 98 (2019), https://virginialawreview.org/wp-content/uploads/2020/12/Garrett%20Final.pdf [perma.cc/K8UQ-TSS9].

347. OHIO REV. CODE ANN. § 2933.81 (Electronic Recording of Custodial Interrogations).

348. N.C. GEN. STAT. ANN. § 15A-268 (Preservation of biological evidence)

Brandon L. Garrett, *Wrongful Convictions*, ANN. REV. CRIMINOLOGY, Sept. 2019; Talley Bettens, *The effects of confessions on misconduct and guilty pleas in exonerations: Implications for discovery policies*, CRIMINOLOGY & PUB. POL'Y, Sep. 2023.

349. For example, Georgia's statute provides that a "court *may* consider the failure to comply with the requirements of" its identification procedure requirements whenever an identification is challenged in court. GA. CODE ANN. § 17-20-3. The permissive language renders Georgia's statute effectively toothless, as it lacks any meaningful enforcement mechanism.

favorable in future proceedings.[350] Adding enforcement mechanisms to existing best practices statutes could aid persons impacted by official misconduct at the pre-trial stage in particular, by providing a remedy in their cases instantly.

4. CHANGED LEGAL STANDARDS FOR LITIGATION OF MISCONDUCT CLAIMS

Another way the data could support corrective reform is by aiding efforts to relax some of the prevailing procedures and legal standards under which impacted persons must operate to challenge their convictions on official misconduct grounds.

It is notoriously difficult for persons within the carceral system to uncover evidence of official misconduct, and it is even harder for them to prevail in their legal claims based upon it.[351] This is true for a variety of reasons; many bad actors do a good job of concealing their misdeeds, discovery in post-conviction is limited, and many convicted persons are left to investigate and litigate their cases from prison because they have no right to appointed counsel.[352] Even when victims manage to uncover evidence to support a misconduct claim, and even when represented by counsel, they often face nearly insurmountable barriers to relief. Strict procedural bars may prevent their claims from being heard on the merits, and even merit-based reviews impose crushing burdens on individuals to prove how the misconduct impacted the outcome of their case.[353] Over time, proposals to change these legal frameworks have been explored—ranging from relaxing procedural rules to re-imagining substantive legal standards, and more.[354]

When it comes to procedure, policies emphasizing the need for finality of the litigation have come under heavy scrutiny, as they have been used to inform laws limiting the periods within which post-conviction litigants may bring their claims to court.[355] Separately but similarly, the legal standards for several types of claims require litigants to show that they exercised due diligence in asserting their claims, which is typically construed as burdening litigants with seeking vindication of their rights at the earliest possible opportunity.[356] But in a system involving the mass incarceration of mostly indigent people, delays and resource scarcities are the norm

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350. *See, e.g.*, GA. CODE ANN. § 17-5-56 (Preservation of Physical Evidence Collected at the Scene of the Crime).

351. Zack, *supra* note 57; Williams, *supra* note 238, at 1461.

352. *See* Michelle Nethercott, *Finality, Fairness, and the Problem of Innocence in Maryland*, 52 U. BALT. L. REV. 33, 44-46 (2022). *See also* Laurie L. Levenson, *Searching for Injustice: The Challenge of Postconviction Discovery, Investigation, and Litigation*, 87 UCLA L. REV. 545, 547, n. 8 (2014); Davis, *American Prosecutor, supra* note 324, at 37.

353. Morrissey, *supra* note 241, at 964.

354. *See* Nethercott, *supra* note 352, at 69. *See also* Mona Morsi, *Preventative Prescription for the Prejudice Problem: The Impossibility of Prevailing on Ineffective Assistance of Counsel Claims and a Collateral Remedy*, 55 U. TOL. L. REV. 339, 340 (2024).

355. Nate Nieman, *Rights without Remedies: How the Illinois Post-Conviction Hearing Act's Standing Requirement Has Failed Defendants*, 44 N. ILL. U. L. REV. 21, 28 (2023); Maxfield et al., *Junk Statute: How Post-Conviction Statutes Fail Petitioners Convicted Based on False or Misleading Forensic Evidence*, 75 RUTGERS U. L. REV. 1343, 1351 (2024).

356. Maxfield et al., *supra* note 355, at 1351.

and compound already-existing barriers to the discovery of critical evidence.[357] As a result, many have criticized existing post-conviction procedural frameworks as contributing to the perpetuation of injustice by shielding bad actors from exposure and related consequences.[358]

The interpretation and application of materiality standards involved in post-conviction claims have also been criticized.[359] Among them are the standards by which litigants must prove that the government's withholding of evidence under *Brady* or a defense attorney's deficient performance under *Strickland* ultimately impacted their cases.[360] While distinct issues, the standard by which litigants must prove the evidence undermined the validity of their convictions is similar among the two: In both instances, the defendant must show a reasonable probability that the outcome of the proceeding would have been different, *but for* the error (the prosecution's concealment of the evidence or the defense attorney's deficient performance).[361] Critics argue the materiality standards for both claims are too high to be achievable in most cases, even those involving severe misconduct, which allows prosecutors and defense attorneys to act with impunity while distorting to fiction two of the most revered constitutional rights in criminal law.[362]

Suggestions for reformed standards have taken many shapes—too many to recount in detail for the purposes of this Article. Among the most common suggestions are eliminating the materiality requirement for *Brady* claims in the pretrial context or altogether and creating a presumption that prejudice flows from a finding of deficient defense counsel performance in all cases, or eliminating the prejudice assessment for ineffective assistance claims entirely.[363] Systemic data

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357. *Id.* at 1353. ("The PCRA's diligence requirements disparately impact those seeking relief based on scientific developments. The PCRA requires petitioners seeking to invoke the "new facts" exception to the PCRA's one-year time bar to show that the facts upon which their claims are predicated "could not have been ascertained" earlier "by the exercise of due diligence." Courts interpreting this diligence requirement often do not take into account the particular challenges that indigent, incarcerated individuals face in bringing claims based on new scientific evidence.")

358. *Id.* at 1353 ("This system puts an almost insurmountable burden on a petitioner."); Nieman, *supra* note 355, at 23-24 (2023); Daniel S. Medwed, *The Zeal-Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 158 n.160 (2004).

359. Williams, *supra* note 238, at 1461; Morrissey, *supra* note 241, at 964; Maxfield et al., *supra* note 355, at 1351.

360. Williams, *supra* note 238 at 1461; Morrissey, *supra* note 241, at 964.

361. For *Brady* claims see United States v. Bagley, 743 U.S. 667, 682 (1985); United States v. Agurs, 427 U.S. 97, 112-13 (1976); Strickland, 466 U.S. 694.

362. Andrew G. Ferguson, *Big Data Prosecution and Brady*, 67 UCLA L. REV. 180, 218-19 (2020); Kreag, *supra* note 322 at 306 n.52 (2019); Sullivan & Possley, *supra* note 208, at 918; Williams, *supra* note 238, at 1461; Morrissey, *supra* note 241, at 964; Maxfield et al., *supra* note 355, at 1351; Allen, *supra* note 258.

363. Michael Serota, *Stare Decisis and the Brady Doctrine*, 5 HARV. L. & POL'Y REV. 415, 416, 421-24 (2011); Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 500 (2009); Robert M. Cary, *Exculpatory Evidence: A Call for Reform after the Unlawful Prosecution of Senator Ted Stevens*, 36 LITIG. 34-41 (2010); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1864-65 (1994); Morsi, *supra* note 354, at 346 (describing the difficulties of satisfying *Strickland* and quoting Justice Thurgood Marshall's dissenting opinion in the case: "Further, Justice Marshall said that the satisfaction of the first prong [of *Strickland*], "a showing that the performance of a

on official misconduct could greatly enhance ongoing discussions about the necessity and effectiveness of reforming existing standards.

B. Preventive Action Against Official Misconduct: Integrity and Accountability

In addition to corrective action to remedy the effects of official misconduct on impacted persons, preventive action is necessary to intercept and deter continuing misconduct, thereby ensuring integrity and accountability in the criminal legal system.

1. IMPROVED TRAINING AND EDUCATION

First, the data could be used to inform improvements to education and training for stakeholders in various sectors of the criminal legal system.

Law Enforcement

Stakeholders have long called for improvements in law enforcement education to reduce incidents of misconduct, including training in explicit and implicit bias, de-escalation, mental health intervention, and relationship-building.[364] Others have advocated for the increased adoption of best-practices standards, including measures that require the routine use of body cameras; discontinuation of choke-holds and no-knock warrants; reinforcement of *Brady* and evidence preservation obligations; and the adoption of post-conviction investigation standards.[365] If these changes cannot be achieved through legislation, then they must be effected through departmental and accreditation-body policies.[366] These recommendations exist independently from calls for local and state governments to consider reallocation of resources away from policing and into more community-based social programs; reprioritization of investigative pursuits away from low-level, non-

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defendant's lawyer departed from constitutionally prescribed standards[,] requires a new trial regardless of whether the defendant suffered demonstrable prejudice thereby."); Allen, *supra* note 258, at 401; Lissa Griffin, *The Right to Effective Assistance of Appellate Counsel*, 97 W. VA. L. REV. 1, 47 (1994).

364. Laurie O. Robinson, *Five Years After Ferguson: Reflecting on Police Reform and What's Ahead*, 687 ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. 1 (2020); Jocelyn Simonson, *Police Reform through a Power Lens*, 130 YALE L.J. 778 (2021); Dawn M. Hunter, *Is Police Reform Possible? Reimagining the Criminal Legal System to Support Health Equity*, 94 TEMPLE L. REV. 583 (2022).

365. *See* Andrew G. Ferguson, *Big Data Prosecution and* Brady, 67 UCLA L. REV. 4, 67-68 (Jul. 24, 2020); Weihua Li & Humera Lodhi, *Which States are Taking on Police Reform After George Floyd?*, MARSHALL PROJECT (June 18, 2020, at 3:00 PM), https://www.themarshallproject.org/2020/06/18/which-states-aretaking-on-police-reform-after-george-floyd [https://perma.cc/5VWR-XBVW]; *NIST/NIJ Technical Working Group On Biological Evidence Preservation*, NIST Forensic Science (updated April 5, 2022), https://www.nist.gov/forensic-science/nistnij-technical-working-group-biological-evidence-preservation [perma.cc/83RB-XKKK]; *Transforming Systems*, supra note 345.

366. Anthony A. Braga et al., *Police reform in public housing contexts: Body-worn cameras, surveillance, and harm reduction in New York City Housing Authority Developments*, 23 CRIMINOLOGY & PUB. POL'Y 605 (2024); Rashawn Ray et al., *A better path forward for criminal justice: Police reform*, BROOKINGS (Apr. 2021), https://www.brookings.edu/articles/a-better-path-forward-for-criminal-justice-police-reform/ [perma.cc/M9TV-A24N].

violent offenses; implementation of potential citizen oversight initiatives; and increased transparency by making officer personnel files widely available.[367] Data could aid every one of these preventive reforms.

It could do so by illustrating the necessity of increased training and education in these areas, shedding light on specific incidents that could have been prevented or mitigated. The data could additionally help inform the substance of the learning sessions, as well as discussions and debates concerning potential changes in police practices.

Prosecutors

To some extent, similar reform efforts also have been advocated in the context of prosecution. Likewise, data could aid in efforts to better train prosecutors on the role of bias in the criminal legal system, as well as proper conformity with their ethical and constitutional mandates by pinpointing breakdowns in the compliance processes.[368] Similarly, the data could provide a baseline for examining the need and viability of open file policies and *Brady* lists in individual jurisdictions, among other discovery-related best practices.[369] Data could also catalyze consideration of more innovative approaches to *Brady* observance, like certification of compliance prior to entry of guilty pleas.[370]

Judges

Increased training on bias and education aimed at providing broader exposure to the realities of the system has also been advocated for judges.[371] Data could help accomplish both by forcing judges to confront the consequences of gross underrepresentation of arbiters of color, as well as judges who hail from a defense

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367. Robin S. Engel, *Moving beyond "Best Practice": Experiences in Police Reform and a Call for Evidence to Reduce Officer-Involved Shootings*, THE ANNALS OF THE AM. ACAD.OF POL. AND SOC. SCI. (2020).

368. *Prosecutorial Reform*, BRENNAN CTR., https://www.brennancenter.org/issues/end-mass-incarceration/changing-incentives/prosecutorial-reform [perma.cc/726Y-JRZG]; *Prosecutorial Oversight*, *supra* note 277, at 8; Sullivan & Possley, *supra* note 208, at 923; *21 Principles for the 21st Century Prosecutor*, BRENNAN CTR., https://www.brennancenter.org/sites/default/files/publications/FJP_21Principles_FINAL.pdf [perma.cc/4NMU-3HA8].

369. *See* Steve Reilly & Mark Nichols, *Hundreds of officers have been labeled liars. Some still help send people to prison.*, USA TODAY (Dec. 16, 2019): https://www.usatoday.com/in-depth/news/investigations/2019/10/14/brady-lists-police-officers-dishonest-corrupt-still-testify-investigation-database/2233386001/[perma.cc/PG9S-8W3C].

370. Garrett et al., *supra* note 96.

371. Clayton B. Drummond et al., *Addressing Official Misconduct: Increasing Accountability in Reducing Wrongful Convictions*, 1 WRONGFUL CONV. L. REV. 270 (2020); Veronica Root Martinez, *Avoiding Judicial Discipline*, 115 NW. U. L. REV. 953 (2020); Matthew Mendez et al., *Judicial Recusal Reform: Toward Independent Consideration of Disqualification*, BRENNAN CTR. (2016) https://www.brennancenter.org/sites/default/files/2019-08/Report_Judicial_Recusal_Reform.pdf [https://perma.cc/EG78-RJ35]; Danielle Root et al., *Structural Reforms to the Federal Judiciary*, CTR. FOR AM. PROGRESS (May 2019), https://www.americanprogress.org/wp-content/uploads/sites/2/2019/05/JudicialReform-report-1.pdf [perma.cc/7LXD-7JBQ]; Shawn C. Marsh & Diane C. Marsh, *Being Explicit about Implicit Bias Training for the Judiciary,* 56 CT. REV. J. AM. JUDGES ASS'N 92, 96-7 (2020).

background.[372] It could also be used to illustrate the rate at which judges grant post-conviction relief on misconduct grounds, refer attorneys to bar authorities for discipline, and encourage government training on *Brady* compliance—the meaningful examination of which may open eyes and inspire reconsideration of judges' own established practices that perpetuate injustice. Finally, as with all stakeholders, data specific to judicial misconduct could help judges identify circumstances under which they themselves are most prone to commit misconduct and implement practices to better safeguard against doing so.

Defense Attorneys

With regard to defense counsel, data could similarly aid in efforts to educate on the role of bias in lawyering, as well as the impact and consequences of unprepared and underprepared advocacy.[373] In doing so, the data could foster continued dialogue about the need to limit indigent defense caseloads and support resource parity among prosecutors and defenders. It could also help establish a baseline for what inadequate representation looks like, thereby helping attorneys who take on appeals or post-conviction cases better identify and articulate deficient performance by clients' prior counsel and how they were prejudiced by it. Further, it would serve as a guide for practitioners away from problematic practices.

2. STRENGTHENED DISCIPLINARY MECHANISMS FOR BAD ACTORS

Significantly, data also could be used as a catalyst for strengthened disciplinary mechanisms against bad actors in all sectors of the criminal legal system.

Law Enforcement

Many criticize the limited disciplinary actions taken against law enforcement as inadequate because of the decentralized nature of American policing.[374] The practical reality of a decentralized police force means that differing policing agencies are largely left to self-govern.[375] Decertification processes, if they exist, vary widely by state, and terminations, resignations, or other disciplinary decisions may be siloed from agency counterparts in other jurisdictions.[376] This can

372. Bernice B. Donald, *Implicit Bias: The Science, Influence, and Impact on Justice*, 22 SEDONA CONF. J. 583, 588 (2021).

373. Brian J. Ostrom & Jordan Bowman, *The Evolving Character of Public Defense: Comparing Criminal Case Processing Effectiveness and Outcomes across Holistic Public Defense, Traditional Public Defense, and Privately Retained Counsel*, 30 S. CAL. INTERDISC. L.J. 611 (2021).

374. Engel, *supra* note 367; Robin S. Engel et al., *Owning Police Reform: The Path Forward for Practitioners and Researchers*, 47 AM. J. CRIM. JUST. 1225 (2022).

375. Robert M. Bloom & Nina Labovich, *The Challenge of Deterring Bad Police Behavior: Implementing Reforms That Hold Police Accountable*, 71 CASE W. RSRV. L. REV. 923, 924 (2021).

376. *Developments in Law Enforcement Officer Certification and Decertification*, NAT'L CONF. OF STATE LEGISLATURES (Feb. 17, 2023), https://www.ncsl.org/civil-and-criminal-justice/developments-in-law-enforcement-officer-certification-and-decertification [https://archive.ph/6X3zn]; Joshua P. Jendian, *Police Reform in California: Preventing*

effectively undercut the purpose of discipline, as officers are free to apply for positions in neighboring departments until the cycle repeats and they move elsewhere.[377] This phenomenon, referred to as the "wandering officer" problem, places the public at risk while allowing misbehaving officers to skirt any real accountability.[378]

Proponents of reform have called for centralized decertification processes across the country. They have also suggested addressing the issue of "wandering officers" by making officer personnel files more accessible and creating law enforcement decertification databases.[379] The data could support these efforts by illustrating the need for transparency in policing while supplementing known law enforcement misconduct data collected by government agencies. Additional data could include information beyond the scope of siloed internal investigations, citizen complaints, or even criminal proceedings, perhaps alerting appropriate stakeholders to problem officers and issues about which they were not aware.

Prosecutors, Defenders, and Judges

While all jurisdictions employ disciplinary procedures to hold attorneys and judges who violate applicable ethics codes accountable, a majority of them have been criticized for failing to adequately investigate or impose punishment upon them, even in extreme cases.[380] A particularly illuminating example is a leading study on prosecutor discipline that determined prosecutors faced disciplinary action by state bar authorities in just two percent of misconduct cases from 1963

"*Bad Apples*" *from* "*Spoiling the Whole Bunch*", 54 U. PAC. L. REV. 305 (2023); Ben Grunwald et al., *The Wandering Officer*, 129 YALE L.J. 1676 (2020); Nomaan Merchant, *US police registry would fail without changes in states*, AP NEWS (June 26, 2020) https://apnews.com/article/2015003554eade8968b74272d141ea80 [https://archive.ph/CfTUb] ("Minnesota revokes an officer's license automatically only after the officer is convicted of a felony. Georgia can take an officer's license on several grounds, including misuse of force, committing a theft that isn't prosecuted or lying in an internal investigation.").

377. Grunwald et al., *supra* note 376, at 1682. *See also* Chris Stein, *New US background database unlikely to stop police misconduct, critics warn*, THE GUARDIAN (Feb. 18, 2024) https://www.theguardian.com/us-news/2024/feb/18/database-police-officer-background-checks [perma.cc/XW8B-5NXG] ("The more than 17,500 state and local police agencies in the United States employ about 788,000 officers, but no comprehensive database exists of their employment records, despite concerns over "wandering officers", or police who bounce from department to department after resigning or being terminated due to misconduct.").

378. *Id.*

379. Existing databases are limited, however, and have been criticized as insufficient to combat the problem of wandering officers; because jurisdictions may define misconduct differently and employ different decertification processes, many misbehaving officers are bound to fall through the cracks. Merchant, supra note 376. While Former president Biden's 2022 executive order on police accountability created a national database to track police misconduct, President Trump rescinded that order upon taking office. Exec. Order No. 14,148, 90 Fed. Reg. at 8239; further, reporting was mandatory only for federal agencies. Chris Stein, *New US background database unlikely to stop police misconduct, critics warn*, THE GUARDIAN (Feb. 18, 2024), https://www.theguardian.com/us-news/2024/feb/18/database-police-officer-background-checks [perma.cc/XW8B-5NXG].

380. Garrett et al., *supra* note 96.

to 2013, and were disbarred even less frequently.[381] Moreover, while over 4,500 judges nationwide were disciplined for misconduct between 2008 to 2019, ninety percent of them were permitted to remain on the bench, even when the misconduct was serious.[382] Suggested reforms have included making the complaint processes easier to initiate and more transparent; heightened scrutiny of complaints by state bar authorities; a willingness by decision-makers to actually impose punishment when criminal attorneys—especially prosecutors—misbehave; and in the case of judges, ensuring that early retirement or resignation is not an accepted alternative to complaint adjudication[383] The data could highlight the necessity for such moves to effectively prevent and deter misconduct, while shining added light on the reality that, in many jurisdictions, these actors are routinely treated as existing above the law. It could further counteract the baseless narrative that only "a few bad apples" are to blame for misconduct that is currently being advanced by the failures of the disciplinary processes to curtail those acting with impunity.

3. EROSION OF IMMUNITY

The data could supplement on-going conversations about the continued viability of immunity doctrines that protect government actors from civil liability when sued for violating individuals' civil rights.[384]

Police are vested with "qualified immunity," meaning they are exempt from personal liability and payment of money damages in federal civil rights lawsuits unless a complainant can prove the officer violated a "clearly established" right and that a reasonable person under the same circumstances would have understood the unlawfulness of their actions.[385] Practically speaking, the requirement that plaintiffs show that a violated right is "clearly established" has been construed to mean that, unless binding precedent exists involving virtually the exact same circumstances giving rise to the lawsuit, recovery is precluded.[386] Similarly, but on an even larger scale, prosecutors and judges enjoy "absolute immunity" against civil liability for violations of rights committed during the course of their jobs as advocates and arbiters, respectively, including when they act intentionally

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381. *An Epidemic of Prosecutor Misconduct*, CTR. FOR PROSECUTOR INTEGRITY, 8, (2013), https://www.prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutorMisconduct.pdf [perma.cc/UB73-MYNW].

382. Berens & Shiffman, *supra* note 147. One example of such serious misconduct: an Alabama judge was given an eleven-month suspension before being allowed to return to the bench for breaking state and federal laws by ordering the incarceration of hundreds of Montgomery residents unable to pay traffic fines – a practice that went on for years. *Id.*

383. *Recommendations for Judicial Discipline Systems*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., 1, 12 (Jul. 2018); Martinez, *supra* note 371, at 958.

384. *Prosecutorial Oversight*, *supra* note 277.

385. *Qualified Immunity FAQ*, LEGAL DEF. FUND, https://www.naacpldf.org/qualified-immunity/ [https://perma.cc/DR9E-CWV9] (last visited Apr. 6, 2025).

386. *Id.*

and maliciously.[387] When they commit misconduct acting as investigators or administrators, however, they are entitled to the lower threshold of qualified immunity.[388]

While the doctrines theoretically protect government actors from frivolous claims, they have been sharply criticized as preventing meaningful accountability for corrupt actors who commit even the most dangerous misconduct.[389] Only a fraction of cases brought against misbehaving government actors make it past summary judgment.[390] These circumstances lend further credence to the harmful rhetoric that official misconduct is rare and isolated, while victims are ignored.

The data collected could reveal the frequency of official misconduct and the widespread lack of accountability for its perpetrators. In effect, the data may strengthen the case for reconsidering and restructuring (or even abolishing) these untenable systems that conceal misconduct—misconduct at times so serious that it may even rival or surpass the severity of the underlying crimes bad actors purport to address.

4. CRIMINAL PROSECUTION FOR BAD ACTORS

Next, activists have called for prosecutors to utilize existing criminal law statutes to prosecute bad actors within the criminal legal system who commit the most serious offenses while on the job, especially cases involving excessive force and intentional obstruction of justice.[391] While there have been examples of such bad actors held accountable through criminal prosecution in a handful of high-profile cases in recent years, it is still exceedingly rare that criminal justice officials

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387. *Prosecutorial Immunity,* INST. FOR JUST., https://ij.org/issues/project-on-immunity-and-accountability/immunity-for-prosecutorial-conduct/#:~:text=Prosecutorial%20immunity%20is%20an%20absolute,of%20the%20criminal%20justice%20system.%E2%80%9D [https://archive.ph/yT8Fb] (last visited Aug. 4, 2025); Grace N. Rowden, *Narrowing Judicial Immunity: Holding Judges Accountable For Exercising Jurisdiction Where They Are Statutorily Barred From Doing So*, MO. L. REV., (Apr. 26, 2024), https://lawreview.missouri.edu/narrowing-judicial-immunity-holding-judges-accountable-for-exercising-jurisdiction-where-they-are-statutorily-barred-from-doing-so/ [https://perma.cc/K9MU-NHKJ].

388. Thomas J. Foltz, *Prosecutorial Immunity No Longer Absolute*, 8 CRIM. JUST. 21, 60 (1994).

389. *See* Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1340 (Jun. 2021); Jay Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, CATO INST. (Sept. 14, 2020), https://www.cato.org/policy-analysis/qualified-immunity-legal-practical-moral-failure [https://perma.cc/2DZW-2BFX].

390. Bobbi Sheahan, *Qualified Immunity Today*, FBI L. ENF'T. BULLETIN (Oct. 23, 2023), https://leb.fbi.gov/articles/featured-articles/qualified-immunity-today#:~:text=By%20Bobbi%20Reilly%20Sheahan%2C%20J.D.&text=Such%20conduct%20is%20protected%20by,this%20protection%20is%20not%20absolute. [https://perma.cc/2YUP-F7RP] ("From 1982 to 2020, the Court dealt with qualified immunity in 30 cases. The plaintiffs prevailed in only two: Hope v. Pelzer (2002) and Groh v. Ramirez (2004).") (quoting Erwin Chemerinsky, *Chemerinsky: SCOTUS Hands Down a Rare Civil Rights victory on Qualitied Immunity,* ABA J. (Feb. 1, 2021), https://www.abajournal.com/columns/article/chemerinsky-scotus-hands-down-a-rare-civil-rights-victory-on-qualified-immunity [https://perma.cc/YH6M-3GR6].

391. Amy Forliti & Michael Tarm, *Activists seek laws after officer cleared in Jacob Blake shooting*, THE PRESS DEMOCRAT (Jan. 6, 2021), https://www.pressdemocrat.com/article/news/activists-seek-laws-after-officer-cleared-in-jacob-blake-shooting/[perma.cc/AE2T-JZTW]; Nakylah Carter, *Criminal charges called for against deputies, officer in alleged assault of 2 Black men*, ABC NEWS (Jul. 5, 2023), https://abcnews.go.com/US/criminal-charges-called-deputies-officer-alleged-assault-2/story?id=100708119 [perma.cc/4CHX-M92Q].

face charges for violating the law.[392] In fact, the first time a prosecutor was actually jailed for misconduct resulting in a wrongful conviction in the United States was in 2013.[393] The prosecutor was Ken Anderson, a district judge at the time of his arrest, who served only five days of a ten-day sentence for his role in concealing exculpatory evidence that led to a man's wrongful conviction for murder and an accompanying twenty-five years of wrongful incarceration.[394]

The data could bring awareness to the devastating harms that official misconduct can inflict, including misconduct that results in the loss of life and significant periods of liberty, and lay bare the near-total lack of consequences that accompany it. In doing so, the data could send the message that officials operating in the criminal legal system should not exist beyond the bounds of justice.

C. Mitigating Official Misconduct System Wide: A Continued Commitment to Learning

Finally, the data could have an ongoing impact on the mitigation of official misconduct across the criminal legal system. If data were collected, maintained, and updated over time, as this Article proposes, reform efforts far beyond those surveyed in this Section are possible. The data, which would only grow in quantity and richness over time, could continue to be studied by diverse cross-sections of each jurisdiction or region and be used to anchor continued conversations about the need for reform, especially community-based solutions. This may result in the future promulgation of reforms that stakeholders have not yet contemplated. As our collective knowledge grows, so should the array of potential solutions; evidence suggests such knowledge and subsequent action will lead to the most positive, enduring systemic impact. As the adage goes, "Knowledge is power." And here, the potential for increased knowledge could radically transform the criminal legal system.

V. HOW TO TRACK SYSTEMIC OFFICIAL MISCONDUCT USING BIG DATA SYSTEMS: A BLUEPRINT

In addition to its immense utility for igniting change in the criminal legal system, the beauty of building official misconduct databases is that it can be done in a highly customizable way to fit the needs of various stakeholders, with relative ease. As illustrated by the growing number of existing databases across professions, including those already tracking various events in the realm of criminal law, big data systems—designed to analyze and interpret information from large and complex sources—can be created to capture information from vast data

392. Carter, *supra* note 391.

393. Daniele Selby, *Only One Prosecutor Has Ever Been Jailed for Misconduct Leading to a Wrongful Conviction*, INNOCENCE PROJECT (Nov. 11, 2020), https://innocenceproject.org/news/ken-anderson-michael-morton-prosecutorial-misconduct-jail/ [https://perma.cc/7CZM-UAPF].

394. Anderson was also disbarred. *Id.*

sets, housed on any number of software platforms, with a wide range of functionality.[395] From big to small, highly technical to simplistic, and expensive to cost-efficient, stakeholders looking to utilize databases to aggregate, organize, and examine information have nearly endless options. There is no one-size-fits-all approach.

To that end, there is room for variation in the way stakeholders may choose to track official misconduct data. For example, such considerations include: the appropriate jurisdictional scope; whether the data should be made publicly available; how official misconduct should be defined; and who is responsible for administering the database. These are just a few important decisions that relevant stakeholders must parse through to determine what type of system will work best to make a difference in their communities.

While this Section does not provide definitive answers to each of these questions, it does aim to offer practical and well-supported suggestions for those interested in building out official misconduct databases, with the goal of encouraging the creation of empirical official misconduct databases on a national scale.

A. Building and Utilizing Robust Databases

In determining how best to build official misconduct databases, it is first necessary to assess the desired scope, audience, and utility of the data to determine how it may be used. These insights will help stakeholders determine whether, when, and how to collect differing sources of data and what technology may be needed to properly analyze it.

1. STATE AND REGIONAL EFFORTS TO BUILD SYSTEMIC DATA

An important defining scope of official misconduct databases is the geographical boundaries sought to be imposed on the systems.

While this Article has focused on the need to track occurrences of official misconduct on a broad, systemic scale, and creating a centralized national database no doubt would be convenient from a data-consumption perspective, a national database involving the level of detailed information needed for fruitful data

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395. *See* David Deming, *Balancing Privacy With Data Sharing for the Public Good*, N.Y. TIMES (Feb. 19, 2021) https://www.nytimes.com/2021/02/19/business/privacy-open-data-public.html [https://archive.ph/wCWXP]; *See* Julie Libarkin, *Academic Sexual Misconduct Database*, ACADEMIC SEXUAL MISCONDUCT DATABASE https://academic-sexual-misconduct-database.org/ [https://perma.cc/3P8L-U8Y2] (last visited Apr. 6, 2025); *New Database Eases Release of Judges' Finance Reports*, U.S. CTS. (Nov. 7, 2022), https://www.uscourts.gov/data-news/judiciary-news/2022/11/07/new-database-eases-release-judges-finance-reports#:~:text=A%20new%20free%20public%20database,version%20of%20federal%20judges'%20reports. [https://perma.cc/S3YV-KZCK]; *See* Lauer & Richer, *supra* note 53 (detailing the U.S. Department of Justice's decision to create a database to track officer misconduct); *Police Misconduct Data Projects,* AIRTABLE, https://airtable.com/appOAwkAN7zIeLBUm/shrjtanodkAnoCwlI/tblEl1xEKCmbbhQn5?viewControls=on [https://perma.cc/LP4M-BL2S] (last visited Apr. 6, 2025); Chicago Justice Project, *The most comprehensive archive of misconduct allegations against the Chicago Police Department*, CHICAGO POLICE BD. INFO. CTR., http://www.cpbinfocenter.org/ [https://perma.cc/53DG-NAU8] (last visited Mar. 25, 2025).

would be inherently difficult to manage.[396] To accomplish such a feat, expensive and complex technology would have to be employed to accommodate the volume of data, as well as a large, centralized unit of staff to collect, input, organize, and update the information.[397] Even then, centralized staff would likely struggle to obtain key records from certain states, due to complicated and sometimes restrictive freedom of information laws.[398] Undoubtedly, these considerations have factored into decisions regarding the structure of existing databases that house more limited sets of information. Because the benefits of a singular national database could quickly be outweighed by unwieldy costs— both financial and logistical— this Article advocates for the creation of state or regional databases.[399]

Databases limited in geographical scope would be more manageable from an administrative standpoint. The data sets would be smaller and more easily organized, and the personnel, storage, and technology required to filter through the data would be more cost-effective.[400] Because jurisdictions are unique and laws and policies differ widely by state, deconstructing official misconduct on a more local scale may make the underlying data easier to obtain.

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396. The most recent census of state prosecutors by the Department of Justice, published in 2011, found there were 2,330 state prosecutor offices in 2007, and those offices employed "78,000 attorneys, investigators, paralegals, and support staff." STEVEN W. PERRY & DUREN BANKS, 2007 NATIONAL CENSUS OF STATE COURT PROSECUTORS 1 (2011). The most recent census of state public defender offices by the Department of Justice, re-published in 2009, found there were 957 public defender offices in 49 states, and those offices employed more than 15,000 full-time attorneys. LYNN LANGTON AND DONALD J. FAROLE, JR., CENSUS OF PUBLIC DEFENDER OFFICES 2007, 1 (2009). These now-outdated numbers likely underestimate the current size of state prosecutor offices and public defense offices, and they don't take into account their federal counterparts or any other actors whose misconduct should be tracked.

397. *See Collect Data: Data Sources for Police Misconduct,* NACDL (Apr. 25, 2023), https://www.nacdl.org/Content/CollectDataSourcesforPoliceMisconduct [https://perma.cc/73JH-VEC7] (last visited Mar. 25, 2025) [hereinafter *NACDL Data*].

398. For example, some states, like Alabama, take the position that non-residents may not avail themselves of the state open records laws. *Supreme Court: States can prohibit non-residents from using public records laws to gether information*, REPORTS COMM. FOR FREEDOM OF THE PRESS (Apr. 29, 2013), https://www.rcfp.org/supreme-court-states-can-prohibit-non-residents-using-public-records/ [https://perma.cc/8EU3-AMWN]. Moreover, some states may block public access to certain records altogether. Sam Stecklow, *Police employment history is usually a public record. In Alabama, it's a state secret*, INVISIBLE INST. (Sept. 19, 2024), https://www.al.com/news/2024/09/police-employment-history-is-usually-a-public-record-in-alabama-its-a-state-secret.html#:~:text=In%20Alabama%2C%20almost%20all%20police,increasingly%20so%20in%20recent%20years [https://perma.cc/F3WD-KMJF]. *See also FOIA 101: Demystifying Public Records Laws in Each State*, GRANICUS https://granicus.com/blog/foia-101-demystifying-public-records-laws-in-each-state/#:~:text=Sunshine%20Laws%20in%20Florida%20and,is%20exempt%20from%20this%20law [https://perma.cc/3BLB-PX94] (last visited Mar. 25, 2025) (outlining some of the nuances between public records laws and the variety of terminology).

399. *See NACDL Data*, *supra* note 397.

400. Emerging India Analytics, *Decoding Data Size: Pros and Cons of Working with Small Data Sets*, MEDIUM (Jan. 2, 2024), https://medium.com/@analyticsemergingindia/decoding-data-size-pros-and-cons-of-working-with-small-data-sets-bc1ea0792da6 [https://perma.cc/92V9-4XQU] ("Working with smaller datasets enables researchers to conduct experiments at lower costs as they require fewer resources such as storage space or computational power."); Alan Zeichick, *11 Ways to Minimize Data Costs and Drive Growth*, ORACLE (May 31, 2023), https://www.oracle.com/mysql/reduce-data-costs/#minimize-data-costs [https://perma.cc/28WF-A9ER].

Significantly, constructing databases on state and regional levels also may help foster more buy-in from stakeholders in those specific communities. Stakeholder enthusiasm could prompt heightened awareness and commitment to action, in addition to the potential willingness of jurisdictional stakeholders to take ownership of database administration. From a practical standpoint, organizing databases by states or regions would likely be helpful for the individual stakeholders examining the underlying data.

Decisions about the appropriateness of collecting data on a state level versus regionally could be informed by the size of the area and the financial and labor resources unique to each jurisdiction, which is discussed in more depth in Subsection (B).

Ultimately, if states or regions were to create their own official misconduct databases, the underlying data could be richer than that capable of being captured on a singular national database and without much of the hassle.

2. PUBLIC-FACING SYSTEMS

Next, stakeholders should determine the audience with whom the databases should be shared. Differing approaches could be taken to provide access to the information. Of the existing databases that already track components of official misconduct, some are wholly public-facing;[401] some are available only to internal audiences;[402] some redact sensitive information, including the names of offending actors, but are otherwise public; and some provide only aggregate information to preserve anonymity.[403] There are a host of competing interests that inform each of these approaches, most of which center on the debate over offending actors' privacy rights and reputational harm versus the public's right to know who is committing official misconduct in their communities.[404] While this is yet another area where reasonable stakeholders' minds may differ, this Article urges the creation of public-facing databases that provide as much information about instances of official misconduct as is legally permissible.

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401. *See* LLEAD, *supra* note 124, ("search by name, agency, and keyword.").

402. *Request NDI Access*, INT'L ASS'N OF DIRS. OF L. ENF'T STANDARDS AND TRAINING, https://www.iadlest.org/our-services/ndi/request-ndi-access [https://perma.cc/5GRM-AFGQ] (last visited Mar. 25, 2025) ("The National Decertification Index (NDI) is intended for use by law enforcement agencies and POST organizations.")

403. Previously, this was the model of NLEAD, which no longer exists after being undone by President Trump's executive order on January 20, 2025. Stroud, *supra* note 187. For a non-exhaustive list of known police accountability data sets varying in available data, see *Full Disclosure Project: Known Police Accountability Data Sets*, NAT'L ASS'N OF CRIM. DEF. LAWYERS, https://www.nacdl.org/Content/FullDisclosureProjectResources [https://perma.cc/AJ9N-L3YZ] (last visited Mar. 25, 2025).

404. *See* Asher Stocker, *NY State Police: 6 takeaways from 20 years of misconduct records*, J. NEWS (Aug. 17, 2023), https://www.lohud.com/story/news/2023/08/17/ny-state-police-misconduct-6-takeaways-from-two-decades-of-records/70605730007/ [https://perma.cc/YJF2-UJX5] ("Despite 50-a's repeal in 2020, many police departments continue to withhold records of misconduct, arguing that the public should not know about cases where the department has exonerated an officer's conduct through an internal investigation."); Deming, *supra* note 395 (addressing the general public interest in data sharing and protecting individual privacy).

The reasons for this approach are three-fold. First, it is the only way to promote transparency—a virtue that is often lacking when it comes to official misconduct.[405] The derivative effects of official misconduct in the criminal legal system impact communities everywhere and, by extension, everyone in them. It follows that every person should have a right to know when their leaders, many of whom they elected or supported and whom their tax dollars are otherwise funding, violate the law. Knowledge of misconduct also invites the public to contribute to solutions, which may involve providing additional data and insight.

Second, making the information public is necessary to foster accountability for offending actors. Indeed, too rarely are officials who commit misconduct held accountable for their actions—whether it be through disciplinary action, prosecution, or civil liability.[406] Oftentimes, judges refuse to even name bad actors in orders or opinions detailing factual findings of misconduct in the most extreme circumstances.[407] The collective impact of the systemic failure to hold bad actors accountable is that it sends a message that such behavior is acceptable, and it emboldens them to act with impunity.[408] Public-facing official misconduct databases, through their mere existence, could help prevent this.[409] While the goal of the official misconduct databases contemplated by this Article is not to serve as a mechanism for shaming, rebuke, or even punishment, their purpose is to shine light on the truth of the criminal legal system, for better and for worse, so that meaningful reform is possible. Fostering accountability is a necessary component

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405. *See generally Hidden Hazards*, *supra* note 61.

406. *See* Chris Glorioso & Kristina Pavlovic, *I-Team: New Discipline Data Reveals NYPD Cops Rarely Penalized for Expensive Lawsuits*, NBC 4 NEW YORK (Apr. 14, 2021), https://www.nbcnewyork.com/investigations/i-team-new-discipline-data-reveals-nypd-cops-rarely-penalized-for-expensive-lawsuits/2999713/ [https://archive.ph/tweM8] ("The I-Team used the new database to cross-reference NYPD officers named in excessive force lawsuits that settled for $100,000 or more between 2015 and 2018. Of the 97 cops who fit the search criteria, just three showed up as having any disciplinary history at all in the NYPD Member of Service Profile portal."); Moiz Syed & Derek Willis, *New Records Show the NYPD's Favored Punishment: Less Vacation Time*, PROPUBLICA (June 22, 2021), https://projects.propublica.org/nypd-disciplinary-records/ [https://perma.cc/YT8K-K8SJ].

407. Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1067 ("If misconduct is important enough to reverse the conviction of a criminal defendant, then it would seem sensible that the public and particularly the legal community should know the name of the perpetrator of the misconduct. Yet, courts often go out of their way to avoid publicizing the names of prosecutors."); Lara Bazelon, *For Shame: The Public Humiliation of Prosecutors by Judges to Correct Wrongful Convictions*, 29 GEO. J. LEGAL ETHICS 305, 318-19 (2016) ("There have always been judges who have shamed prosecutors face-to-face in their courtrooms. In the pre-internet era, for the shaming to be a truly public sanction in a run-of-the-mill case, judges had to put it in writing. This practice of 'naming names' in judicial opinions was, and remains, uncommon. While instances in which prosecutors are 'name-shamed' receive extensive media coverage, they are the exception rather than the rule.").

408. *See* Gershowitz, supra note 407, at 1101 ("With a lack of objective or first-hand information, supervising prosecutors and judges will extend the long leash of plea-bargaining power based on prosecutors' reputations. Those reputations may well be accurate. However, it is also quite possible that judges and supervising prosecutors may be unaware of a subordinate's misconduct in other courtrooms.").

409. *See id*. at 1100 ("The criminal justice system suffers from poor information flow. Insiders and particularly outsiders operate with information deficits that limit their ability to make good decisions. Prosecutorial Misconduct Projects would serve an information-forcing function that could ameliorate the problem.").

of doing just that. To the extent that sharing the details of official misconduct incidents, as made available in public records and as is legally permissible, may paint offending actors in a negative light, public policy favors disclosure.

Finally, public-facing information is required to effectuate justice.[410] It is often difficult, if not impossible, for persons whose cases have been impacted by instances of official misconduct to uncover evidence of it.[411] To help impacted persons discover evidence of official misconduct in their own cases, information about known misconduct and the officials that perpetrated it must be disclosed.

The benefits of full and fair disclosure of official misconduct information far outweigh the potential costs.[412] Of course, all publicly shared information must comply with applicable laws concerning the redaction of sensitive personal information, and it must derive from legitimate sources containing facts that are verifiable and true. Advocates may argue that relying solely on verifiable facts from public records to support misconduct reporting will inevitably overlook instances that never resulted in official documentation. While this limitation is acknowledged, it is unavoidable. Not all cases of official misconduct can be captured in a public-facing system.[413] However, individuals, offices, and agencies could maintain their own internal data systems to supplement the information in public databases—such as information known to them from pending cases or personal experiences—and would be free to share this data with trusted parties as they see fit.

3. DEFINING THE THRESHOLD FOR DATABASE INCLUSION

Once the general size, scope, and accessibility of the databases are determined, the major question becomes how those building databases wish to define official misconduct for purposes of inclusion.

To be sure, different organizations have promulgated varying definitions for who constitutes an "official," as well as what conduct falls within the purview of

410. Kreag, *supra* note 278.

411. Zack, *supra* note 57.

412. *See Virginia Just Made Closed Criminal Investigative Files Public—Here's Why That Matters*, INNOCENCE PROJECT (Apr. 1, 2021), https://innocenceproject.org/virginia-criminal-investigation-files-police-accountability-northam-signs-law/ [https://perma.cc/DHV7-KAGD] ("Access to police misconduct records is crucial to addressing and preventing wrongful convictions. . .keeping misconduct records secret could contribute to even more wrongful convictions."); *Hidden Hazards, supra note* 61, at 67, ("No public dataset of administrative or hiring decisions related to prosecutorial misconduct is published by any District Attorney's Office or United States Attorney's Office in Pennsylvania, even in aggregate fashion. If individual offices subject their attorneys to internal discipline for instances of prosecutorial misconduct, we are unable to measure it. Such discipline may be useful within the office, but unless they are communicated to other attorneys in the office and to the general public, they are unlikely to serve as useful measures of accountability or deterrence, and they cannot restore the public's faith that any DA's Office is adequately 'self-policing' its prosecutors for their misconduct."); *See* Deming, *supra* note 395.

413. Information derived from active investigations or pending cases may not be capable of being reported in real time, for example. Moreover, reporting on anecdotal information received but not verified by any official source could expose database administrators to civil liability, thus weighing in favor of not publicly reporting such information.

"misconduct."[414] But there is no perfect description. Each set of stakeholders taking part in database creation can choose to define it as they deem appropriate. To best serve the underlying objectives of the databases as set forth in this Article—system integrity, accountability, and justice—simple definitions involving the violation of binding laws or rules by any official in the criminal legal system would produce the richest and most accurate data sets.[415] Whatever the decision, stakeholders must create a working definition that each jurisdictional database can apply uniformly.

Based upon that definition, those staffing the database should collect publicly available records and media reports in accordance with their own processes and procedures for reporting. The order, frequency, and methodology of source collection may depend on whether the databases prioritize known, suspected, or unknown misconduct, and whether the data collection will begin at present or retroactively with time frames in the past.[416] Common sources of official misconduct information include: personnel files, police and laboratory reports, transcripts, orders, opinions, pleadings, media reports, and more.[417]

4. DATABASE PLATFORMS AND BIG DATA TOOLS

Once stakeholders have formed a clear vision for their databases, they should begin exploring potential platforms for hosting the data. A wide array of digital, cloud-based platforms capable of aggregating, organizing, and filtering mass quantities of data exist with varying degrees of functionality that differ dramatically in size and cost.[418] Stakeholders in each jurisdiction have the flexibility to choose from existing platforms to fit their needs based on factors such as size, cost, operating preferences, and user-friendliness.

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414. *See supra* Section I.

415. This is because simple definitions are easier to understand and apply uniformly, thus facilitating accuracy and transparency in reporting, which safeguards the integrity of the underlying data. Capturing data on a broad array of actors will also help stakeholders ensure their reporting parameters are not under-inclusive, as is the case with most currently available datasets, addressed in Section I.

416. While it might seem most intuitive that stakeholders begin building databases with information known to them about official misconduct and offending actors in their areas, some entities have prioritized collection of prospective data by obtaining personnel files and media reports for entire individual law enforcement staffs in their jurisdiction, then publishing whatever the data may show. *See LLEAD, supra* note 124.

417. *See NACDL Data*, *supra* note 397.

418. *See What is a relational database*, GOOGLE CLOUD. https://cloud.google.com/learn/what-is-a-relational-database [https://perma.cc/V42B-V32K] (last visited Mar. 25, 2025) ("A relational database (RDB) is a way of structuring information in tables, rows, and columns. An RDB has the ability to establish links–or relationships–between information by joining tables, which makes it easy to understand and gain insights about the relationship between various data points."). *See also Domo's platform features*, DOMO, https://www.domo.com/features#bi-analytics [https://perma.cc/2DPP-9YC6] (last visited Mar. 25, 2025); *IBM Products*, IBM, https://www.ibm.com/products [https://perma.cc/PE3R-HGUJ] (last visited Mar. 25, 2025); Enterprise BI. Spreadsheet UI., SIGMA COMPUTING, https://www.sigmacomputing.com/ [https://perma.cc/KU36-CVQ2] (last visited Mar. 25, 2025).

On the low-cost end, stakeholders with limited resources could utilize basic spreadsheet resources like Microsoft Excel, Google Sheets, or similar alternatives to build and catalog data. For stakeholders with slightly more resources seeking low-cost programs with a higher degree of functionality than traditional spreadsheets, hybrid database programs like Airtable[419] may be more suitable. For those with increased resources and technological skills, the sky is the limit. Certain database programs, like the Louisiana Law Enforcement Accountability Database (LLEAD), have created open-source platforms meant to serve as a model for future work in other jurisdictions.[420] Any of these platforms can be made publicly accessible via a website.

In addition to selecting platforms for hosting official misconduct databases, stakeholders may also consider the use and availability of big data tools such as e-discovery software and, in today's technology-centered world, even artificial intelligence, to help synthesize and analyze files, noting patterns and trends, and culling files for further review.[421]

The use of these data tools could make file management and analysis more efficient and accurate than manual methods, and many programs now offer lower-cost alternative program models, as well as grant-funded program use at no cost.[422]

B. Administration and Implementation of Databases

In addition to deciphering the information to be tracked and deciding how to organize it, a key decision is determining who will be responsible for managing and implementing databases in their respective jurisdictions.

1. INDIVIDUAL VERSUS COLLABORATIVE EFFORTS

Stakeholders would have wide latitude to vary in their administration and implementation of the databases. The political, labor, and financial responsibilities that

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419. Airtable is an example of a relational database. AIRTABLE, https://www.airtable.com [https://perma.cc/C5YW-6FBT] (last visited Apr. 6, 2025).

420. *LLEAD*, *supra* note 124. Additionally, NACDL's Full Disclosure Project (FDP), which concluded its run in 2023 after three years of providing data-support services, also open-sourced the Legal Aid Society of New York's police database application and used it to help seven defender organizations establish police misconduct databases. *Full Disclosure Project: Known Police Accountability Data Sets*, *supra* note 403. Despite the conclusion of the three-year FDP grant initiative, the technology firm Techtivist continues to support the existing defender databases and helps additional defense organizations continue to launch similar databases. *Techtivist's Journey*, TECHTIVIST, https://www.techtivist.com/about [https://perma.cc/NW9Y-JM34] (last visited Apr. 6, 2025).

421. One example of a spreadsheet software that could be used to organize and analyze data is Microsoft Excel. *See What is Microsoft Excel?*, LENOVO, https://www.lenovo.com/us/en/glossary/microsoft-excel/ [perma.cc/5YSF-7LRB] (last visited Apr. 6, 2025). Relativity and Everlaw are two examples of prominent e-discovery tools that could be used to analyze and break down large sets of data and information. RELATIVITY, https://www.relativity.com/data-solutions/ediscovery/[perma.cc/H6RL-9HPN] (last visited Apr. 6, 2025); EVERLAW, https://try.everlaw.com/litigation-preparation/[perma.cc/VT8P-Z87N] (last visited Apr. 6, 2025).

422. One example is Relativity's Justice for Change program. *Justice for Change,* RELATIVITY, https://www.relativity.com/company/commitments/social-impact/justice-for-change/[perma.cc/2U4G-3J7Z] (last visited Apr. 6, 2025) [hereinafter Justice for Change Program].

accompany the creation and maintenance of these databases would likely mean more variation in this area than most others. Every jurisdiction brings unique issues, and there must be flexibility to make the data systems work. If clear guidelines are set and followed, there is no reason the misconduct databases cannot serve their intended purposes, no matter the approach.

Building a Team of Effective Stakeholder Administrators

As with designing the databases, there can be no one-size-fits-all approach to the administration of these databases. Databases could be created and managed by a variety of stakeholders in a multitude of ways.

Traditional Defense-based Leadership

First, the databases could be created and maintained by criminal defense organizations. In the universe of current and previously existing databases, this has been the norm. From 2020 to 2023, the National Association for Criminal Defense Lawyers (NACDL) ran an initiative called the Full Disclosure Project, which worked with the Legal Aid Society of New York to create an open-source model of their renowned police misconduct database and share access to it with the broader criminal defense community.[423] While the Project concluded in 2023, it boasted having helped seven defense organizations create a total of five state-wide and two city-wide police misconduct databases, tracking over 150,000 officers from nearly 2,000 agencies.[424] During its time, it also consulted with ninety public defenders, innocence organizations, and private defender organizations to determine how to begin tracking police misconduct.[425] It published resources for data collection, which are still available on NACDL's website.[426] Additionally, recall LLEAD, another prominent example of a defense-led database initiative, which was created by the Innocence Project of New Orleans in conjunction with the technology engineering company Public Data Works.[427]

Historically, most efforts to track official misconduct have focused on police, and to a lesser extent, prosecutor misconduct, so it is no surprise that the criminal defense community has taken the lead on collecting and managing the data.[428] What is less clear is how the defense community and government actors would perform in policing their own misconduct.

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423. *The Full Disclosure Project: Known Police Accountability Data Sets*, *supra* note 403.

424. *Id.*

425. *Id.*

426. *Id.*; *See Getting Started Tracking Police Misconduct*, NACDL, https://www.nacdl.org/Landing/StartTrackingPoliceMisconduct [https://perma.cc/K9JE-Q8Z5] (last visited Apr. 6, 2025).

427. *LLEAD*, *supra* note 124.

428. *See* CPI Database*, supra* note 124; MAPPING POLICE VIOLENCE*, supra* note 124; *Police Shooting Data, supra* note 124; *Police Decertification Database*, *supra* note 282.

One advantage of this model is that, depending on the type of office, many defense agencies could be eligible for potential grant funding for the administration of the databases.[429]

Government Leadership

Another option for database administration is through government leadership. While rarer, there have been instances of government agencies managing misconduct data, including the creation of prosecutor *Brady* lists in some jurisdictions.[430] Moreover, a recent well-publicized example of a government-managed misconduct database is the national police misconduct database created through former president Biden's 2022 Executive Order on Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety.[431] The database, which was rolled out in 2023 but rescinded by the Trump Administration in January 2025, collected police misconduct data on federal agents and state police where departments volunteered information to the federal government.[432] While this national police database suggested an increasing interest by the federal government in combating police misconduct, it is notable that the database no longer seems to be a government priority; further, when it did exist, it published only aggregate data about the misconduct.[433] The role of state government in policing misconduct remains to be seen.[434]

On the one hand, government leadership might seem like a natural fit for the management of law enforcement, attorney, and judicial malfeasance because it routinely deals with each party on some level and is already charged with ensuring the integrity of the criminal legal system. An added benefit to government

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429. *See* Justice for Change Program, *supra* note 422.

430. *Law Enforcement Legislation: Significant Trends 2022*, NAT'L CONF OF STATE LEGISLATURES, https://www.ncsl.org/civil-and-criminal-justice/law-enforcement-legislation-significant-trends-2022 (last visited Apr. 6, 2025); *Brady List*, *supra* note 124 ("To ensure fair trials the Supreme Court of the United States created the *Brady* doctrine obligating the prosecutor of every case to investigate, gather, and disclose all information about any individual upon whose testimony they will rely. The *Brady List* is the definitive public-facing platform of record for information about officer misconduct, decertification, public complaints, use-of-force reports, do-not-call listings [Giglio letter], and more potential impeachment disclosures. This platform is available as a service to all Peace Officer Standards & Training [POST] Departments, Prosecutors, and Law Enforcement Organizations [LEOrgs]."); *see also Georgia Brady List & Giglio List,* BRADY LIST, https://giglio-bradylist.com/united-states/georgia [https://archive.ph/P9mSk] (last visited Apr. 6, 2025).

431. Exec. Order No. 14,074, 87 Fed. Reg. 32,945 (May 25, 2022); *Accountable Policing Fact Sheet, supra* note 185.

432. Exec. Order No. 14,074, 87 Fed. Reg. at 32,950; *Accountable Policing Fact Sheet*, *supra* note 180; Exec. Order No. 14,148, 90 Fed. Reg. at 8239.

433. *Justice Department Fact Sheet on Implementing Executive Order on Advancing Effective, Accountable Police and Criminal Justice Practices to Enhance Public Trust and Public Safety*, DOJ ARCHIVES https://www.justice.gov/archives/olp/justice-department-fact-sheet-implementing-executive-order-advancing-effective-accountable#:~:text=Implementing%20Executive%20Order%2014074%20is,guide%20policies%20and%20decision%20making [perma.cc/YA42-2CDJ] (last visited Apr. 6, 2025).

434. Lauer & Richer, *supra* note 53.

administration is also the potential for government funding of the databases.[435] However, critics would likely argue that when it comes to systemic misconduct implicating a broad array of government actors, government leadership cannot be trusted to effectively lead the charge on efforts to dismantle official misconduct on its own. Such criticism would be valid. One way to address the issue is to create a system where counterparts can function as checks and balances on one another.

Third Party Leadership

An effective alternative could be third party database administration by a non-profit, law school, or pro bono practice familiar with official misconduct issues.[436] There are numerous examples of these various counterparts creating and maintaining databases related to criminal justice issues, including issues specific to police and prosecutor misconduct.[437] A major benefit to this approach is more neutrality toward the system itself and the official actors that comprise it, which could prompt stricter scrutiny and more accountability.

Depending on the type of organization, these third party agencies, like defender offices, could be eligible for potential grant funding for the administration of the databases.[438]

Combination Approaches to Leadership

Finally, there is the potential for database creation and maintenance by multiple representatives of the above entities.

Because the data sets sought to be mined are voluminous and complex, gathering, inputting, organizing, and analyzing the data, while achievable in cost-efficient ways, will still be resource intensive—particularly in terms of labor. One way to mitigate that is collaboration among multiple entities. Sharing labor workloads and financial costs could make the databases more readily achievable. For that reason, this Article encourages collaborative administration models where multiple stakeholders or entities work together to build, report, and study the data. This could be accomplished in a variety of ways. Databases could be created

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435. For example, in 2023, the State of California gave U.C. Berkeley $6.87 million to develop a police misconduct database. *State Funds Development of First-Of-Its-Kind Police Misconduct Database*, BERKELEY RSCH. (June 28, 2023), https://vcresearch.berkeley.edu/news/state-funds-development-first-its-kind-police-misconduct-database [perma.cc/H5UP-CTRD] [hereinafter Berkeley Misconduct Project]. Similarly, the U.S. Department of Justice routinely solicits applications for grant funds related to other initiatives. *Available Funding*, U.S. DEP'T OF JUSTICE, https://bja.ojp.gov/funding/current [perma.cc/N9S2-CLV9] (last visited Apr. 6, 2025) [hereinafter DOJ Grants].

436. *See* Berkeley Misconduct Project, *supra* note 435.

437. CPI Database*, supra* note 124; *Law Enforcement Lookup*, LEGAL AID SOC'Y, https://legalaidnyc.org/law-enforcement-look-up/[perma.cc/V2DB-L7A2] (last visited Apr. 6, 2025); Green, *supra* note 208, at 119; *ABA Legal Education Police Practices Consortium*, AM BAR. ASS'N. https://www.americanbar.org/groups/criminal_justice/police_practices/ [https://perma.cc/8B4U-PUU5]; Lauer & Richer, *supra* note 53.

438. *See* DOJ Grants, *supra* note 435; Justice for Change Program, *supra* note 422; Berkeley Misconduct Project, *supra* note 435.

and maintained by any combination of stakeholder entities, including defense agencies, government agencies, nonprofit groups, pro bono practices, and even law schools. The key is determining wherein lies the interest, resources, bandwidth, and commitment to ensuring the programs' success.

Effective databases will require buy-in and participation from the various counterparts of the criminal legal system, so criminal justice stakeholder input in the design, implementation, and analysis of the data is critical.[439] For that reason, the ideal approach to database administration would be to have data systems created and managed collaboratively by representatives of each of the major players in the system—defense attorneys, judges, prosecutors, law enforcement—and an external entity that acts as a neutral third party.

There are many reasons this approach would be ideal. First, there is the obvious: Criminal justice stakeholders are on the front lines and observe the inner workings of the criminal legal system every day. They are the most exposed to the existence and consequences of official misconduct in the system because they make up the system and are responsible for both the justice and injustice it dispenses; thus, they must play a critical role in the examination of misconduct that occurs to aid in determining its solution. Furthermore, neutral third parties can offer an outside perspective. Second, having misconduct databases administered by these different counterparts helps foster both credibility and accountability, with each criminal justice counterpart functioning as a check and balance against one another. Representatives from these roles, working in tandem, would function as an acknowledgment of the seriousness of official misconduct and the fact that collecting and analyzing this data is in the interest of the public good. Third, and critically, it could foster community among criminal justice stakeholders and help them better understand the humanity and imperfection of the system itself, thus making them more likely to reach common ground in pursuit of system improvement. Lastly, in terms of funding for the infrastructure of the database creation and maintenance, this approach would diversify sources of potential funding, such as through government budgets and grant opportunities, while allowing for overhead costs to be shared among collaborators.

Buy-In and Enforcement Mechanisms

Community and criminal justice stakeholder buy-in would be critical to the success of the official misconduct databases, no matter the specific forms they take. The mission, design, and operating procedures of each database should

439. Emilee Green et al., *The Effectiveness and Implications of Police Reform: A Review of the Literature*, ILL. CRIM. JUST. INFO. AUTH. (Oct. 2022), https://researchhub.icjia-api.cloud/uploads/fullreport%20-%20police%20reform-221027T15592678.pdf [perma.cc/KA2L-764G] ("Repairing the relationship between police and the public is a critical first step in reform efforts; without public faith in the police, the effects of these efforts may be short-lived. Together, community members, law enforcement leaders, policymakers, and researchers should continue to collaborate and evaluate police reform efforts"); *see also* Karl Haushalter et al., *Collaboration Across Social Boundaries: A Practical Guide*, STAN. SOC. INNOVATION REV. (May 2, 2024), https://ssir.org/articles/entry/collaboration-across-social-boundaries [perma.cc/Y7Q9-5DAE].

specify the responsibilities of each stakeholder counterpart, and concrete deadlines should be set forth to ensure timely progress in building, reporting, and updating the data sets.[440]

Depending on community support, administrative preferences, and funding sources and conditions, the databases could function as purely volunteer-based initiatives with no mandatory productivity provisions, or alternatively could be built into staff positions housed within stakeholder agencies administering the databases. Another infrastructure option could even include state legislatures creating stakeholder positions and staffing by way of independent commissions.

Cost and Resources Commitment

The potential costs associated with creating and implementing the databases would boil down to two major categories: (1) funding for the database technology, and (2) funding for the labor to maintain the database.

Again, the financial costs associated with building the databases and the big data tools needed to process and analyze the data vary widely by size, scope, and platform. Certain companies, like *Relativity*, now offer grant programs that provide temporary access to innovative e-discovery software.[441] The practical reality is that stakeholders could create databases for little financial cost (nearly for free, on a smaller scale) or spend up to thousands of dollars, depending on the choice of program. The same can be said of data processing tools, if funded through grant programs or otherwise.

Finally, in terms of labor costs, there is no doubt that it would take considerable time and resources to collect, input, analyze, and update the types of data contemplated by these databases.[442] Data collection plans must first be created to identify public records in need of collection.[443] Then, administrators would need to determine the proper procedures for accessing the records, likely relying on the Freedom of Information Act and individual state open records laws, which vary considerably

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440. *See Organize Data: Scope Your Project—Make a Data Collection Plan*, NAT'L ASS'N OF CRIM. DEF. LAWS., https://www.nacdl.org/Content/CollectScopeYourProjectMakeaDataCollectionPlan [https://perma.cc/WRR5-2QX4] (describing the necessity of defining the scope of data to be collected, potential sources of data, prioritization of data, and collaboration management); *Organize Data: FDP Application Staffing Needs*, NAT'L ASS'N OF CRIM. DEF. LAWS., https://www.nacdl.org/Content/OrganizeFDPApplicationStaffingNeeds [https://perma.cc/MVK6-2CU5] (describing the different skill sets and responsibilities necessary to implement the Full Disclosure Project application); *Organize Data: How to Collaborate on an FDP Database*, NAT'L ASS'N OF CRIM. DEF. LAWS., https://www.nacdl.org/Content/OrganizeHowtoCollaborateonanFDPDatabase [https://perma.cc/24MT-LGVX] (explaining the technical logistics of collaborative databases).

441. *Justice for Change: We believe that discovering truth is fundamental to the creation of a more just world*, RELATIVITY, https://www.relativity.com/company/commitments/social-impact/justice-for-change/[perma.cc/VS5D-ZSGY] (last visited Apr. 6, 2025).

442. *Best Practices: How to Design a Database*, CONCEPTA, (June 13, 2023), https://www.conceptatech.com/blog/best-practices-how-to-design-a-database [https://perma.cc/DFK7-XTFJ?type=image].

443. *Best Practices for Tracking Police Data*, NACDL, https://www.nacdl.org/Media/BestPracticesforTrackingPoliceMisconduct100622 [perma.cc/98BZ-X3TA] (last visited Apr. 6, 2025).

and may also result in copying and processing fees.[444] This is separate and apart from additional records that may need to be obtained from primary sources like court reporters, media outlets, or online. Once records are received, they must be scanned, filed, and redacted before information is input and uploaded into the database.[445] This must all occur before the real work—analyzing and reporting the data and then continuously updating it—even begins. Consider also the volume of records and the frequency with which this imputation cycle would need to be repeated.

To obtain and report data in a timely manner, there must be a sufficient number of dedicated personnel responsible for contributing to each database. Personnel could take the form of full or part-time staff or volunteers housed within stakeholder agencies, or positions could be created as part of legislative advocacy, as explained above. The number of personnel needed will depend on the size of the jurisdiction's criminal legal system and the expected volume of data that will need to be inputted, as well as the availability of funding for personnel. As with fees associated with the database platform and big data tools, government and grant funding could potentially cover the costs of labor.

There are many creative ways to produce and maintain official misconduct databases that are both cost-effective and resource efficient. Given the myriad of ways official misconduct databases could improve the criminal legal system, whatever fees ultimately assessed are likely to be nominal in comparison to the benefits conferred to the criminal legal system and the public as a whole.

C. Forward Toward Progress

Official misconduct databases as contemplated in this Article have the potential to dramatically transform the criminal legal landscape as we know it—into one that is more fair, just, and accountable by shining light on the truths of the system. As illustrated in this Section, the methods by which the databases can be designed, shared, administered, and implemented vary and can be customized to meet the needs and resources of individual jurisdictions. Given the powerful and efficient means by which the databases could reveal empirical, systemic misconduct data, and considering the relatively simple, cost-effective actions necessary to create and maintain the databases, there is no reason stakeholders and members of the public should remain in the dark when it comes to understanding the scope and prevalence of official misconduct in the U.S. criminal legal system.

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444. *Freedom of Information Act Statute*, U.S. DEP'T OF JUST., https://www.foia.gov/foia-statute.html [perma.cc/EQ6G-63JN] (last visited Apr. 6, 2025); Burt A. Braverman & Wesley R. Heppler, *A Practical Review of State Open Records Laws*, 49 GEO. WASH. L. REV. 720 (1981).

445. *See What Are the Methods of Data Collection?*, LOTAME (May 2, 2024), https://www.lotame.com/what-are-the-methods-of-data-collection/ [https://perma.cc/TZ6M-L8NN].

CONCLUSION

Currently, stakeholders, scholars, and the public know alarmingly little about the overall prevalence and role of official misconduct within the criminal legal system. This knowledge gap stems from a lack of diverse, systemic data sets. While existing evidence points to significant issues in areas such as wrongful convictions, capital cases, and excessive use of force, broader data is needed to understand how, why, and at what rate official misconduct occurs. This limitation in knowledge perpetuates the "few bad apples" narrative—a baseless trope that undermines efforts to address systemic misconduct and safeguard against its recurrence.

Without comprehensive data, meaningful reform is stalled, leaving official misconduct to persist unchecked, while fostering a false sense of reliability in the criminal legal system. Conversely, increasing access to and analysis of misconduct data could expose the depth and breadth of the issue, bolster transparency, and support accountability. By equipping litigants with evidence to achieve relief, holding offenders accountable, and mobilizing reform efforts, systemic data would underscore the urgency and seriousness of what is likely an official misconduct epidemic.

This data—this evidence—has the potential to combat implicit bias, illuminate hidden truths, and drive increased transparency, litigation, and policy change. It represents perhaps the best opportunity to effect lasting, meaningful change in the nation's overextended carceral system. If stakeholders commit to collaboratively tracking and analyzing misconduct on a systemic level—a feasible, cost-efficient, and accessible endeavor—the end result could be a comprehensive collection of misconduct data spanning jurisdictions throughout the entire nation that could be used to foster justice, encourage best practices, and demand accountability on a vast scale, ultimately revolutionizing the landscape of the criminal legal system.