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Criminal Doctrines of Faith

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DAVID JAROS

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CRIMINAL DOCTRINES OF FAITH

DAVID JAROS*

Abstract: Decisions like *Miranda v. Arizona* helped popularize a conception of the courts as a protector of criminal defendants and a bulwark against overly aggressive law enforcement. But from arrest through trial, the U.S. Supreme Court has fashioned criminal constitutional procedure with a deep and abiding faith in the motivations of the criminal justice system's actors. Even decisions that vindicate individual constitutional rights at the expense of police and prosecutorial power are shaped by the Court's fundamental trust in those same actors. They establish, in essence, "Criminal Doctrines of Faith." Criminal Doctrines of Faith pervade each stage of the criminal process—from cases that govern the pursuit of suspects and searches of homes to the disclosure of exculpatory evidence and the defendant's capacity to waive a jury trial. This faith in law enforcement takes several forms. Some decisions reflect a simple faith in the character of police and prosecutors, but others reflect faith in the institutions in which they work or in the courts' ability to identify and deter misconduct. Recent high-profile prosecutions of police officers have highlighted and raised new questions about how much criminal procedure should rest on faith. In such cases, trusted government actors, both police and prosecutors, have attacked the integrity of a criminal process ostensibly designed to control their own behavior. Using the trials of the Baltimore police officers charged in the death of Freddie Gray as a lens, this Article highlights how the Supreme Court's faith in police and prosecutors raises profound questions about the strength of these doctrines, the importance of more skeptical and diverse viewpoints on courts, and the viability of court-led regulation of law enforcement actors.

INTRODUCTION

When Maryland's State Attorney, Marilyn Mosby declared that she had filed criminal charges against the six Baltimore police officers she believed were responsible for the death of Freddie Gray, a bitter and often rancorous public debate immediately commenced over the propriety of her

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* Associate Professor of Law, University of Baltimore School of Law. Thanks are due for insightful comments and conversations with Josh Bowers, Doug Colbert, Brandon Garrett, Rachel Harmon, Carissa Hessick, Will Hubbard, Lee Kovarsky, Colin Starger and all the attendees of The Criminal Justice Roundtable at the University of Virginia School of Law. Adam Zimmerman was decidedly unhelpful, and all the errors are his.

actions, the guilt of the officers, and the manner in which poor minority communities were being policed across the United States.¹ Yet, despite widespread division over nearly every aspect of these cases, advocates on both sides were united in one critical respect: each expressed their lack of confidence in the capacity of the criminal justice system to fairly and accurately resolve the cases.²

The shared distrust of the legal system to mete out justice raised important questions about the legitimacy and the integrity of important political institutions.³ But there was also a notable irony in the Freddie Gray cases. Although participants on both sides expressed a lack of faith in the system's ability to resolve the cases fairly, the legal issues and the ultimate outcome of the cases were shaped by criminal doctrines that were predicated on the Supreme Court's faith in that same system and its actors.

Some constitutional doctrines are premised on a historical understanding of a particular constitutional provision.⁴ Others are shaped by the text itself.⁵ Scholars have debated the import of a comma and its impact on the scope of the federal courts' jurisdiction.⁶ Debates over the meaning of the Second Amendment have focused on the framers' interest in militias and their concern (or lack thereof) in individuals' personal right to own firearms.⁷ What was striking about the trials of the officers charged in the death

¹ See, e.g., Charlotte Alter, *Baltimore Cops to Face Charges in Freddie Gray Case*, TIME (May 1, 2015), <http://time.com/3843342/freddie-gray-charges-police-baltimore/> [<https://perma.cc/4R33-45FL>] (describing community responses both supporting and condemning the decision to charge the officers); Editorial, *The Lessons of Baltimore, and Ferguson, and Too Many Places*, L.A. TIMES (Apr. 29, 2015), <http://www.latimes.com/opinion/editorials/la-ed-baltimore-20150429-story.html> [<https://perma.cc/S4Z5-GZ74>]. Freddie Gray was a young African-American Baltimore man who was fatally injured while shackled in the back of a police van. See *infra* notes 21–39 and accompanying text.

² See Lauryn P. Gouldin, *Redefining Reasonable Seizures*, 93 DENV. L. REV. 53, 55–56 (2015) (describing protests born out of the death of Freddie Gray and several other highly publicized deaths of black men that highlighted skepticism in heavily policed communities that the judiciary would reign in the reach of the police); Alter, *supra* note 1 (including statements by the lawyer for the Baltimore police union, who expressed skepticism about the fairness of the charges against the officers).

³ See Gouldin, *supra* note 2, at 56 (discussing the impact of the protests).

⁴ R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121, 128 (1994).

⁵ *Id.*

⁶ See, e.g., Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 217 n.50 (1985) (“[T]he comma after ‘fact’ clearly implies that the ‘exceptions’ power applies to appellate jurisdiction generally and not simply to facts.”).

⁷ Kenneth Lasson, *Blunderbuss Scholarship: Perverting the Original Intent and Plain Meaning of the Second Amendment*, 32 U. BALT. L. REV. 127, 130 (2003) (“From a strictly historical perspective, however, the overwhelming weight of available evidence demonstrates that the pri-

of Freddie Gray was the number of legal issues that were resolved by doctrines, based not on history or text, but rather on the Supreme Court's presumption that police and prosecutors are to be trusted.

While decisions like *Mapp v. Ohio* and *Miranda v. Arizona* popularized a conception of the Supreme Court as a protector of criminal defendants and a bulwark against overly aggressive law enforcement,⁸ scholars have long criticized the Court for its tendency to side with the government in criminal procedure cases.⁹ Such scholars have noted the Court's reluctance to impede effective criminal investigations, the justices' penchant for asserting dubious factual claims about the nature of policing, and their willingness to defer to police "expertise."¹⁰ The Court has been equally solicitous of prosecutors. Prosecutors, it has found, must be afforded absolute immunity so that they can act with "courage and independence."¹¹ The Court has presumed repeatedly that "the government attorney in a criminal prosecution is not an ordinary party to a controversy, but a servant of the

mary concern of the Founding Fathers was the concept of a militia—as distinguished from a standing federal army—not the right of each individual citizen to own firearms.”).

⁸ See Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 765 (2012) (“But whatever else the Court can be said to have done, it allocated wholesale the responsibility for solving the problem of policing to courts and promoted the regulation of the police primarily by constitutional adjudication.”); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 791–92 (2006) (“When the Supreme Court constitutionalized criminal procedure in the 1960s the conventional wisdom, evidently shared by the Justices, held that elected legislators would never adequately protect the interests of criminal suspects and defendants.”). See generally *Miranda v. Arizona*, 384 U.S. 436 (1966) (creating a prophylactic rule to protect the Fifth Amendment’s protection against self-incrimination); *Mapp v. Ohio*, 367 U.S. 643 (1961) (extending from federal to state courts the exclusionary rule as a remedy for a Fourth Amendment violation).

⁹ See, e.g., John Michael Harlow, *California v. Acevedo: The Ominous March of a Loyal Foot Soldier*, 52 LA. L. REV. 1205, 1263 (1992) (describing the Court’s increasing deference to law enforcement); Elizabeth E. Joh, *Discretionless Policing: Technology and the Fourth Amendment*, 95 CALIF. L. REV. 199, 200–01 (2007) (“Ever since the Warren Court’s revolution in criminal procedure, numerous decisions have imposed constitutional constraints on the police, yet none of them curb police discretion to any meaningful degree.” (footnote omitted)); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 273 (arguing that, between 1996 and 1997, the Supreme Court’s decisions in four cases related to vehicle stops “strongly favor law enforcement”).

¹⁰ See Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 1997–98 (2017) (noting the Court’s command for deference to law enforcement); Sklansky, *supra* note 9, at 324 (“The judiciary, moreover, has shied away from detailed regulation of police officers’ use of force, partly because it fears hampering law enforcement . . .”); Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 848–49, 851 (2014) (arguing that the Court has based a number of criminal procedure decisions on inaccurate assumptions about policing).

¹¹ *Imbler v. Pachtman*, 424 U.S. 409, 422–23 (1976) (quoting *Pearson v. Reed*, 44 P.2d 592, 597 (Cal. Dist. Ct. App. 1935)); see *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (“In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.”).

law.”¹² In *Singer v. United States*, the Court held that prosecutors need not articulate their reasons for refusing to allow a defendant to waive a jury, proclaiming its “confidence in the integrity of the federal prosecutor” when it rejected the idea that “prosecutors would demand a jury trial for an ignoble purpose.”¹³

Yet, perhaps because the Court’s rulings at times vindicate defendants’ rights and restrict prosecutorial and police activity¹⁴ and at other times grant criminal justice actors broad license to act,¹⁵ the Court’s failure to assess accurately either the nature of the government’s actions or the ramifications of its rulings is generally regarded as a discrete failure in appreciating the specifics of the case rather than a bias that favors one side over the other.¹⁶

A closer analysis of the Court’s decisions, however, reveals that criminal constitutional procedure is fashioned with a deep and abiding faith in the motivations of criminal justice system actors.¹⁷ Even those decisions that vindicate individual constitutional rights at the expense of police and prosecutorial power are shaped by the Court’s fundamental belief that police and prosecutors can be trusted. This Article suggests that the Court’s abiding faith in the criminal justice system in the face of the deep distrust exhibited by both supporters and detractors of the prosecution of the officers charged in the death of Freddie Gray is not merely ironic. On the contrary, the Court’s holdings that are premised on its faith in the criminal justice system raise profound questions about the strength of those precedents, the importance of diverse viewpoints on the Court, and the viability of court-led regulation of police and prosecutors.

Part I of this Article explores several key Supreme Court decisions that played pivotal roles in the cases against the officers charged in the death of Freddie Gray and identifies how those decisions are founded, either explicitly or implicitly, on trusting the motivations and actions of police and pros-

¹² *Singer v. United States*, 380 U.S. 24, 37 (1965) (internal quotations omitted) (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)).

¹³ *Id.* at 37.

¹⁴ *See, e.g., Brady v. Maryland*, 373 U.S. 83, 87 (1963) (forbidding the prosecution to withhold favorable evidence from the defendant); *Mapp*, 367 U.S. at 655 (prohibiting the use in state courts of evidence obtained by the police in violation of the Fourth Amendment).

¹⁵ *See, e.g., Whren v. United States*, 517 U.S. 806, 813 (1996) (holding that traffic stops are valid regardless of the subjective motivations of the investigating officers, so long as the officers have probable cause to make the stop); *United States v. Leon*, 468 U.S. 897, 987 (1984) (adopting the “good faith exception” to the exclusionary rule).

¹⁶ *See, e.g., Stoughton, supra* note 10, at 852 (discussing how the Court’s reliance on inaccurate facts also leads to faulty rulings).

¹⁷ Although this Article speaks of the Court’s “faith” in police and prosecutors, this terminology is not to suggest that all nine Justices share identical views or that no case exists in which the majority decision adopted a skeptical view of how police and prosecutors behave.

ecutors.¹⁸ Part II delves deeper into the Supreme Court’s criminal procedure jurisprudence and identifies three potential sources of faith for the doctrines established by those cases: faith in police and prosecutors’ character, faith in the institutions in which they work, and faith in the courts’ ability to identify and deter misconduct.¹⁹ Part III considers three questions: (1) whether “Criminal Doctrines of Faith” are particularly vulnerable to narrowing by lower courts; (2) what these cases suggest about the value of diverse viewpoints on the federal bench; and, (3) what the courts’ reliance on the good intentions of police and prosecutors means for the viability of court-led regulation of police and prosecutors.²⁰

I. CRIMINAL DOCTRINES OF FAITH AND THE FREDDIE GRAY TRIALS

A. *The Death of Freddie Gray*

When twenty-five-year-old Freddie Gray saw Lieutenant Brian Rice at 8:39 a.m. on a bright spring April morning, he made a fatal error—he ran.²¹ Had Mr. Gray lived in nearby Roland Park, an affluent neighborhood a few miles north, Officer Rice would have lacked the authority to order his fellow bike officers, Edward Nero and Garrett Miller, to pursue and seize Mr. Gray.²² Unfortunately, the Sandtown-Winchester neighborhood of North-West Baltimore where Freddie Gray grew up suffered from one of the highest crime rates in the city.²³ As a result, Mr. Gray’s decision to avoid police contact was not an exercise of his right to “ignore the police presence and

¹⁸ See *infra* notes 21–148 and accompanying text.

¹⁹ See *infra* notes 149–211 and accompanying text.

²⁰ See *infra* notes 212–282 and accompanying text.

²¹ See Kevin Rector, *The 45-minute Mystery of Freddie Gray’s Death*, BALT. SUN (Apr. 25, 2015), <http://data.baltimoresun.com/freddie-gray/> [https://perma.cc/5EJP-BPXE] (describing Freddie Gray’s encounter with police on April 12, 2015).

²² See *id.* (explaining the officers’ justifications for pursuing Mr. Gray included that “he ran . . . in an area known for drug dealing[.]”); see also Christopher Corbett, *Baltimore’s Truth in Freddie Gray’s Death*, REUTERS: THE GREAT DEBATE (Apr. 28, 2015), <http://blogs.reuters.com/great-debate/2015/04/28/the-baltimore-truth-in-freddie-grays-life-and-death/> [https://perma.cc/A9NB-98UF] (describing the dichotomy between Roland Park in North Baltimore and West Baltimore where Mr. Gray lived).

²³ See Adam Marton & Emma Patti Harris, *Graphic: Sandtown-Winchester Neighborhood Ranks Well Below City Average in Most Health Factors*, BALT. SUN (Apr. 30, 2015), <http://www.baltimoresun.com/news/data/bal-sandtownwinchester-neighborhood-health-well-below-city-average-in-most-factors-20150430-htmistory.html> [https://web.archive.org/web/20180908011350/http://www.baltimoresun.com/news/data/bal-sandtownwinchester-neighborhood-health-well-below-city-average-in-most-factors-20150430-htmistory.html] (ranking Baltimore neighborhoods based on criteria such as the rate of non-fatal shootings and homicides).

go about his business.”²⁴ Instead, it gave the police the license they needed to chase him down, forcibly subdue him, and search him for weapons.²⁵ When their search uncovered a knife that allegedly violated a city ordinance, the officers were legally authorized to place Mr. Gray under arrest.²⁶

Although questions remain to this day as to how and when Mr. Gray ultimately received his fatal injury, the immediate aftermath of Mr. Gray’s arrest was caught on camera.²⁷ After being forcibly subdued and held face down on the pavement with his legs bent backwards in a “leg lace” hold, Mr. Gray complained loudly and his screams of pain brought out the residents of the Gilmore Homes public housing complex where Mr. Gray had grown up.²⁸ One of those residents, Kevin Moore, filmed Mr. Gray being dragged screaming to a Baltimore Police Transport Wagon with his hands

²⁴ See *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) (citation omitted) (“[W]hen an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business.” (citing *Florida v. Royer*, 460 U.S. 491, 498 (1983))).

²⁵ See *id.* at 124 (concluding that “unprovoked flight” in a “high crime area” constitutes “reasonable suspicion” justifying a suspect’s temporary detention).

²⁶ See *United States v. Watson*, 423 U.S. 411, 421, 424 (1976) (upholding the validity of a warrantless arrest based upon probable cause); Justin Fenton, *Video Shows Officer Operating the Knife Recovered from Freddie Gray*, BALT. SUN (Oct. 31, 2016), <http://www.baltimoresun.com/news/maryland/investigations/bs-md-ci-freddie-gray-knife-video-20161028-story.html> [<https://web.archive.org/web/20171108032736/http://www.baltimoresun.com/news/maryland/investigations/bs-md-ci-freddie-gray-knife-video-20161028-story.html>] (describing the knife Mr. Gray was carrying as possibly illegal under a decades-old ordinance). *But see* William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 MO. L. REV. 771, 826–27, 828 n.233 (1993) (observing that, although most states allow police to make warrantless arrests on probable cause for misdemeanors committed in the arresting officer’s presence, the Supreme Court has never explicitly endorsed the practice).

²⁷ See generally Rector, *supra* note 21 (indicating points in time when Mr. Gray’s condition was unknown).

²⁸ Colin Campbell, *Man Critically Injured in Videotaped Baltimore Police Encounter*, BALT. SUN (Apr. 14, 2015), <http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-gilmor-homes-arrest-20150413-story.html> [<https://web.archive.org/web/20180712015352/http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-gilmor-homes-arrest-20150413-story.html>]; Karl Merton Ferron, *Investigating the Freddie Gray Case*, BALT. SUN, <http://www.baltimoresun.com/news/maryland/baltimore-city/bal-behind-the-scenes-baltimore-police-investi-002-photo.html> [<https://perma.cc/JN9D-V653>]; Justin George, *Exclusive Look Inside the Freddie Gray Investigation*, BALT. SUN (May 2, 2015), <http://www.baltimoresun.com/news/maryland/sun-investigates/bs-md-ci-freddie-gray-investigation-20150502-story.html> [<https://web.archive.org/web/20180712014601/http://www.baltimoresun.com/news/maryland/sun-investigates/bs-md-ci-freddie-gray-investigation-20150502-story.html>]; Eyder Peralta, *Timeline: What We Know About the Freddie Gray Arrest*, NPR: THE TWO-WAY (May 1, 2015), <https://www.npr.org/sections/thetwo-way/2015/05/01/403629104/baltimore-protests-what-we-know-about-the-freddie-gray-arrest> [<https://perma.cc/9GNM-XTRQ>]; Rector, *supra* note 21.

cuffed behind his back.²⁹ After the rear doors were closed by the driver, Officer Caesar Goodson, the van swayed back and forth as Mr. Gray continued to protest his detention from the inside of the vehicle.³⁰

At trial, the prosecution would contest the defendants' claim that they were forced to make a hurried exit from Gilmore Homes in the face of an increasingly hostile crowd.³¹ Regardless of the reason, the van driver was ordered to leave the area for Central Booking.³² Moments later, however, Lieutenant Rice ordered Officer Goodson to pull over so that officers could meet the van and place Mr. Gray in additional constraints.³³ As a result, Mr. Gray was subsequently removed from the van and placed in leg shackles.³⁴ The officers later testified that the uncooperative Mr. Gray was then carried back inside the van and placed face down on the metal floor with his ankles shackled together and his arms handcuffed behind his back.³⁵

Exactly what happened next remains a mystery to this day. Approximately forty minutes after Mr. Gray was initially loaded into the police van, he arrived at the Western District police station "unresponsive" and in "serious medical distress," having sustained a spinal injury in the course of his ride that proved to be fatal a week later.³⁶ The graphic video of Mr. Gray's arrest and his subsequent death sparked widespread civil protests and riot-

²⁹ Kevin Richardson, *Man Who Shot Freddie Gray Arrest Video, 'I Finally Made a Difference,'* BALT. SUN (May 1, 2015), <http://www.baltimoresun.com/videos/83439379-132.html> [<https://web.archive.org/web/20180712022211/http://www.baltimoresun.com/videos/83439379-132.html>].

³⁰ See Juliet Linderman, *In Trial Over Prisoner's Death, Seat Belt Policy Is Examined,* WASH. TIMES (May 17, 2016), <https://go.shr.lc/2NImNhS> [<https://perma.cc/X5GL-UENL>] (describing testimony that the van was shaking back and forth).

³¹ Donna Owens, *Baltimore Police Lieutenant Acquitted in Freddie Gray Case,* REUTERS (July 18, 2016), <https://www.reuters.com/article/us-baltimore-police/baltimore-police-lieutenant-acquitted-in-freddie-gray-case-idUSKCN0ZY0YP> [<https://perma.cc/4P9T-QUX9>].

³² Adam Marton & Emma Patti Harris, *Freddie Gray Arrest Timeline,* BALT. SUN (Apr. 21, 2015), <http://www.baltimoresun.com/news/maryland/baltimore-city/bal-map-freddie-gray-arrest-timeline-20150421-htmstory.html> [<https://web.archive.org/web/20180712015856/http://www.baltimoresun.com/news/maryland/baltimore-city/bal-map-freddie-gray-arrest-timeline-20150421-htmstory.html>]; *Timeline: Freddie Gray's Arrest, Death and the Aftermath,* BALT. SUN, <http://data.baltimoresun.com/news/freddie-gray/> [<https://perma.cc/VA7L-AUM9>].

³³ Marton & Harris, *supra* note 32; *Timeline: Freddie Gray's Arrest, Death and the Aftermath,* *supra* note 32.

³⁴ Rector, *supra* note 21; *Timeline: Freddie Gray's Arrest, Death and the Aftermath,* *supra* note 32.

³⁵ Peralta, *supra* note 28.

³⁶ Meredith Cohn, *Medical Professionals Will Try to Determine How Gray's Neck Was Injured,* BALT. SUN (Apr. 30, 2015), <http://www.baltimoresun.com/health/bs-hs-freddie-gray-medical-20150427-story.html> [<https://web.archive.org/web/20180712020909/http://www.baltimoresun.com/health/bs-hs-freddie-gray-medical-20150427-story.html>].

ing in the streets of Baltimore, prompting the Governor to order the National Guard to secure the city.³⁷

Anger over Mr. Gray's death was fueled, in part, by widespread stories that Baltimore police officers punished difficult arrestees by giving them "rough rides," a practice in which officers deliberately drive erratically so as to throw unsecured detainees around the van and cause them injury.³⁸ It was in this context that the Baltimore State's Attorney, Marilyn Mosby, took to the steps of the Baltimore War Memorial across from City Hall and publicly announced that her office was pursuing criminal charges against six of the officers who had been involved in the arrest, transport, and death of Mr. Gray.³⁹

B. Trials and Errors: Three Instances of Criminal Doctrines of Faith

The trials of the officers charged in Freddie Gray's death received substantial public attention and contributed to a nationwide debate over police involved deaths, racial justice, and the policing of poor minority communities.⁴⁰ Yet, rather than resolve what happened to Freddie Gray and restore faith in the criminal justice system, the trials served to further polarize public opinion and raise doubts about the actions of not only the defendant police officers, but also the officers who investigated the cases and the prosecutors who brought the charges.⁴¹ When the prosecution finally dismissed the remaining cases without securing a single conviction, the Baltimore State's Attorney, Marilyn Mosby, excoriated the police and declared that department investigators had sabotaged the State's case in a successful effort to protect their own.⁴² Across town, police union officials and the offic-

³⁷ Sheryl Gay Stolberg, *Baltimore Enlists National Guard and a Curfew to Fight Riots and Looting*, N.Y. TIMES (Apr. 27, 2015), <https://nyti.ms/2m88WqB> [<https://perma.cc/FK67-FNGZ>].

³⁸ Doug Donovan, *Proving 'Rough Ride' in Court Is Difficult, Police and Legal Experts Say*, BALT. SUN (June 23, 2016), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-rough-rides-20160623-story.html> [<https://web.archive.org/web/20180712021455/http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-rough-rides-20160623-story.html>].

³⁹ George, *supra* note 28.

⁴⁰ See, e.g., Haeyoun Park & Jasmine C. Lee, *Looking for Accountability in Police-Involved Deaths of Blacks*, N.Y. TIMES (May 3, 2017), <https://nyti.ms/2jS8ESr> [<https://perma.cc/A7FH-CWRL>] (describing the nationwide protests and policy debates ignited by high profile police involved deaths).

⁴¹ Sheryl Gay Stolberg & Jess Bidgood, *All Charges Dropped Against Baltimore Officers in Freddie Gray Case*, N.Y. TIMES (July 27, 2016), <https://www.nytimes.com/2016/07/28/us/charges-dropped-against-3-remaining-officers-in-freddie-gray-case.html> [<https://perma.cc/RTF5-MQMU>].

⁴² *Transcript: State's Attorney Marilyn Mosby on the Dropped Charges*, BALT. SUN (July 27, 2016), <http://www.baltimoresun.com/news/maryland/freddie-gray/bal-transcript-state-s-attorney-marilyn-mosby-on-the-dropped-charges-20160727-story.html> [<https://web.archive.org/web/2018>

ers' attorneys publically maintained that the acquittals vindicated their claims that the charges against the officers had been politically motivated and that the State's Attorney had deliberately ignored exculpatory evidence.⁴³

The deep distrust and hostility between the police and the city's chief prosecutor appeared to reflect national divisions over police misconduct and racial justice.⁴⁴ But three key moments in the trials involved Criminal Doctrines of Faith—doctrines which presumed that both the police and prosecutors could be trusted.

1. *Illinois v. Wardlow* and the Alleged Assault of Freddie Gray by Bike Patrol Officers

Freddie Gray's decision to run when he saw Lieutenant Brian Rice not only led directly to his death, it also critically undermined the State's case against the officers involved in his detention and arrest.⁴⁵ A police officer cannot detain an individual, even temporarily, if the officer lacks a reasonably articulable suspicion that "criminal activity may be afoot."⁴⁶ Moreover, the courts have recognized that individuals have a right to refuse to speak to the police and officers cannot stop a person who deliberately avoids police

0713024435/http://www.baltimoresun.com/news/maryland/freddie-gray/bal-transcript-state-s-attorney-marilyn-mosby-on-the-dropped-charges-20160727-story.html].

⁴³ See Alter, *supra* note 1 (presenting the police union's initial condemnation of the charges as beyond the boundaries of the law); Stolberg & Bidgood, *supra* note 41 (alluding to the political ramifications of the trials); Pamela Wood & Wyatt Massey, *Baltimore FOP President: 'Justice Has Been Done' in Dropping Charges Against Police Officers*, BALT. SUN (July 27, 2016), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-charges-dropped-fop-20160727-story.html> [https://web.archive.org/web/20171114125703/http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-charges-dropped-fop-20160727-story.html] (offering the defense's response to the dropped charges).

⁴⁴ See, e.g., Scott Dance, *Donald Trump: Marilyn Mosby 'Should Prosecute Herself,'* BALT. SUN (July 27, 2016), <http://www.baltimoresun.com/news/maryland/freddie-gray/bal-donald-trump-marilyn-mosby-should-prosecute-herself-20160727-story.html> [https://web.archive.org/web/20171114125703/http://www.baltimoresun.com/news/maryland/freddie-gray/bal-donald-trump-marilyn-mosby-should-prosecute-herself-20160727-story.html] (condemning the prosecutor while celebrating the police officers); Nicole Hemmer, Opinion, *The Brutality President*, U.S. NEWS & WORLD REP. (Aug. 29, 2017), <https://www.usnews.com/opinion/thomas-jefferson-street/articles/2017-08-29/donald-trump-is-the-police-brutality-president> [https://web.archive.org/web/20180714030918/https://www.usnews.com/opinion/thomas-jefferson-street/articles/2017-08-29/donald-trump-is-the-police-brutality-president] (describing President Trump's implicit endorsement of racial profiling and his explicit support for the rough treatment of suspects).

⁴⁵ See, e.g., *Transcript: State's Attorney Marilyn Mosby on the Dropped Charges*, *supra* note 42 (linking Mr. Gray's decision to run to his death).

⁴⁶ See *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (outlining the criteria required for detention).

contact.⁴⁷ Yet while Freddie Gray may have had the right to “walk away” from Lieutenant Rice, he did not have the right to run.⁴⁸

In 2000, in *Illinois v. Wardlow*, Chief Justice William Rehnquist distinguished the mere refusal to interact with the police from “unprovoked flight,” explaining that “unprovoked flight” in a “high crime area” could constitute reasonable suspicion sufficient to support the officer’s right to forcibly detain a suspect.⁴⁹ Although the *Wardlow* decision has been roundly criticized for creating disparities between the way that poor communities of color and wealthier (typically whiter) communities are policed, Freddie Gray’s decision to run from Lieutenant Rice provided the officers with the legal justification they needed to pursue and detain him.⁵⁰ This legal authority would subsequently prove to be a crucial obstacle in the State’s effort to convict the three arresting officers of assault.⁵¹

When State’s Attorney Marilyn Mosby initially announced that she was filing charges, the three bike officers involved in Mr. Gray’s arrest were accused of committing intentional and negligent assault, false imprisonment, and misconduct in office.⁵² Although the “spring assisted knife” that

⁴⁷ *Royer*, 460 U.S. at 497–98 (“The person approached [by the police] . . . need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way.” (citing *Terry*, 392 U.S. at 32–33 (Harlan, J., concurring); *id.* at 34 (White, J., concurring))); see also *United States v. Sprinkle*, 106 F.3d 613, 618 (4th Cir. 1997) (affirming that officers lacked “reasonable, articulable suspicion” to stop an individual who sought to hide his face and drive away from police at normal speed).

⁴⁸ See *Terry*, 392 U.S. at 32–33 (Harlan, J., concurring) (explaining that “ordinarily the person addressed has an equal right to ignore his interrogator and walk away”).

⁴⁹ *Wardlow*, 528 U.S. at 124.

⁵⁰ See *id.* (finding that defendant’s “unprovoked flight” from officers in area of heavy narcotics trafficking supported reasonable suspicion that defendant was involved in criminal activity and justified his temporary detention); Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2448 (2017) (“Indeed, even setting aside the question of how a ‘high crime area’ is to be identified or bounded, *Wardlow* explicitly subsidizes police activity in neighborhoods of concentrated poverty in comparison to wealthy neighborhoods.”); Adam B. Wolf, *The Adversity of Race and Place: Fourth Amendment Jurisprudence in Illinois v. Wardlow*, 528 S. Ct. 673 (2000), 5 MICH. J. RACE & L. 711, 715 (2000) (arguing that *Wardlow* recognizes substantially fewer Fourth Amendment protections for people of color and indigent citizens than for the wealthy and white); Owens, *supra* note 31 (noting that Mr. Gray “fled unprovoked in a high-crime area” and it was this flight that resulted in the officers chasing him).

⁵¹ See *Transcript: State’s Attorney Marilyn Mosby on the Dropped Charges*, *supra* note 42 (explaining the chief prosecutor’s decision to drop the remaining charges in light of not guilty verdicts already handed down for other defendants).

⁵² See MD. CODE ANN., CRIM. LAW § 3-203 (West 2018) (defining statutorily intentional and negligent assault); *Duncan v. State*, 384 A.2d 456, 458 (Md. 1978) (describing the common law crime of misconduct); *Midgett v. State*, 139 A.2d 209, 216 (Md. 1958) (describing the elements of the common law charge of false imprisonment); Lori Aratani, Paul Duggan & Dan Morse, *Six Officers Charged in Death of Freddie Gray*, WASH. POST (May 1, 2015), <https://www.washington>

the police recovered from Mr. Gray may have been legal under state law, unfortunately for the prosecution, the defense was able to point to a city ordinance that appeared to ban such weapons.⁵³ As a result, the State's Attorney was unable to claim that the police lacked probable cause to hold Mr. Gray once the knife was discovered.⁵⁴ Moreover, despite the graphic video of Mr. Gray being dragged screaming to the police van, no additional evidence materialized that suggested that the officers had physically assaulted Mr. Gray.⁵⁵ In fact, the autopsy suggested that the only significant injury Mr. Gray received was the blow to the head that effectively severed his spine, which both the defense and the prosecution agreed occurred after Mr. Gray had been loaded into the van and driven away.⁵⁶

As a result, the prosecution was forced to abandon the false imprisonment charge and pursue an assault charge premised not on a deliberate beating, but on the theory that the officers lacked the authority to touch Mr. Gray before the knife was recovered.⁵⁷ Under this theory, any contact the officers made with Mr. Gray would constitute an "offensive touching," thereby satisfying the battery element for second degree felony assault.⁵⁸

post.com/local/overnight-calm-in-baltimore-as-tensions-remain-and-protests-expected/2015/05/01/00e07e7a-efe6-11e4-8666-a1d756d0218e_story.html?utm_term=.7344d5a0f75b [https://perma.cc/Y9XQ-YN5X] (outlining the initial charges).

⁵³ Fenton, *supra* note 26. Although the prosecution abandoned its claim that the knife was legal, the question as to whether the ordinance did in fact apply to Mr. Gray's knife was never fully resolved. See *id.* (explaining the discussion surrounding Mr. Gray's knife and the ordinance).

⁵⁴ See *Carroll v. United States*, 267 U.S. 132, 149 (1925) ("On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause . . . the search and seizure are valid."); Fenton, *supra* note 26 (discussing the legality of Mr. Gray's arrest).

⁵⁵ See Rector, *supra* note 21 (detailing the lack of concrete evidence of a substantial physical altercation).

⁵⁶ Justin Fenton, *Autopsy of Freddie Gray Shows 'High-Energy' Impact*, BALT. SUN (June 24, 2015), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-freddie-gray-autopsy-20150623-story.html> [https://web.archive.org/web/20180901110206/http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-freddie-gray-autopsy-20150623-story.html].

⁵⁷ See Fenton, *supra* note 26 (discussing the prosecution's theory that Mr. "Gray was illegally detained before the knife was found"); Peter Hermann & Paul Duggan, *Six Baltimore Police Officers Indicted in Death of Freddie Gray*, WASH. POST (May 21, 2015), https://www.washingtonpost.com/local/crime/six-baltimore-police-officers-indicted-in-death-of-freddie-gray/2015/05/21/182f2778-fe1b-11e4-805c-c3f407e5a9e9_story.html?utm_term=.302b7a76c60e [https://perma.cc/N67M-92KM] (contrasting the indictments to the initial charges). The officers were not indicted on the false imprisonment charges, though it remains unclear whether the grand jury refused to indict or whether the State chose not to pursue those charges after reviewing the available evidence. Hermann & Duggan, *supra*.

⁵⁸ See *Claggett v. State*, 670 A.2d 1002, 1009 (Md. 1996) ("Battery is commonly defined as a harmful, unlawful, or offensive touching. Moreover, the unlawful application of force to another, however slight, constitutes a battery." (citations omitted)).

The flaw in the prosecution's argument was that there was little doubt under *Wardlow* that the officers had the right to pursue and detain Mr. Gray.⁵⁹ There was no question that the area of West Baltimore where Mr. Gray was arrested was a "high crime area."⁶⁰ In fact, just three weeks prior to Mr. Gray's fatal encounter with the officers, the State's Attorney had requested that the police target the neighborhood with "enhanced" drug enforcement efforts.⁶¹ At the close of trial, the prosecution was forced to concede that the police were authorized under *Wardlow* to pursue and briefly detain Mr. Gray when he fled from Lieutenant Rice.⁶² As a result, the prosecution was compelled to argue that Mr. Gray's lawful detention "morphed" into an arrest without probable cause in the three and a half minutes between his initial seizure and the discovery of the knife.⁶³ In support of this argument, the prosecution argued that, by waiting for Lieutenant Rice to arrive on the scene rather than radioing for additional information, Officers Nero and Miller were not sufficiently diligent in dispelling their "reasonable suspicion."⁶⁴

In her closing argument, Assistant State's Attorney Janice Bledsoe argued that African-American men in Baltimore are routinely "jacked up" by the police and that officers habitually seize suspects without probable cause and "throw them up against the wall."⁶⁵ Relying on *Wardlow*, the defense,

⁵⁹ See *Wardlow*, 528 U.S. at 124 (allowing law enforcement to stop an individual who runs away unprovoked in a "high crime area").

⁶⁰ See Marton & Harris, *supra* note 23 (comparing certain crime statistics for Sandtown-Winchester to the Baltimore city average).

⁶¹ Kevin Rector, *Baltimore Prosecutor Asked Police to Target Area Where Freddie Gray Was Arrested*, BALT. SUN (June 9, 2015), <http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-mosby-email-20150609-story.html> [<https://web.archive.org/web/20180808011915/http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-mosby-email-20150609-story.html>].

⁶² *Transcript of the Verdict Hearing for Officer Edward M. Nero*, WASH. POST (May 23, 2016), https://www.washingtonpost.com/local/transcript-of-the-verdict-hearing-for-officer-edward-m-nero/2016/05/23/9ce6e780-2124-11e6-8690-f14ca9de2972_story.html?utm_term=.1e13f8a121e7 [<https://perma.cc/X22G-ML66>].

⁶³ See Fenton, *supra* note 26 (discussing the allegedly illegal arrest); David A. Graham, *Can Prosecutors Convict Anyone at All in the Death of Freddie Gray?*, THE ATLANTIC (June 6, 2016), <https://www.theatlantic.com/politics/archive/2016/06/freddie-gray-caesar-goodson-trial/485792/> [<https://perma.cc/ENC3-CPAH>] (describing the prosecution's theory).

⁶⁴ See Graham, *supra* note 63 (elaborating on the prosecution's interpretation and application of *Wardlow*). Lieutenant Rice was pursuing a second suspect who had been with Mr. Gray and so Officers Nero and Miller made the arrest. *Timeline: Freddie Gray's Arrest to His Fatal Spinal Cord Injury*, CBS BALT. (June 23, 2106), <https://baltimore.cbslocal.com/2016/06/23/timeline-freddie-grays-arrest-to-his-fatal-spinal-cord-injury/> [<https://perma.cc/X5YJ-58EL>].

⁶⁵ Kevin Rector & Justin Fenton, *Prosecutors, Defense Disagree in Closings on What Constitutes an Assault at Officer Edward Nero's Trial*, BALT. SUN (May 19, 2016), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-nero-closing-20160519-story.html> [<https://web.archive.org/web/20171116223642/http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-nero->

focusing on the specifics of the Gray case, responded that “[b]eing detained is a horrible thing, but the law allows this,” and Baltimore Circuit Judge Barry G. Williams called the practice “a separate issue.”⁶⁶

Ultimately, Judge Williams acquitted Officer Nero, finding that the State failed to prove that Nero touched Mr. Gray during the critical interval between Gray’s seizure and the discovery of his knife.⁶⁷ Effectively hamstrung by the *Wardlow* decision, the prosecution was unable to demonstrate that the police officers’ decision to chase, tackle, and search Mr. Gray violated the law.

A closer analysis of *Wardlow*, however, reveals that the prosecution’s observations about police practices were not “a separate issue” but rather struck at the foundation of the decision—the Supreme Court’s faith in the police. In essence, *Wardlow* didn’t validate the actions of the police in the Freddie Gray cases. Rather, the actions of the police in the Freddie Gray cases cast doubt on the legitimacy of the *Wardlow* decision.

In *Wardlow*, Chief Justice Rehnquist explained that “[h]eadlong flight . . . is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.”⁶⁸ Casually embedded in this pronouncement, however, is the presumption that a young African-American man in a high crime area would not flee the presence of a law enforcement officer absent a substantial likelihood that he was engaged in criminal activity. Yet if the prosecution’s claim were true—that police officers regularly jack up young black men without reasonable suspicion, much less probable cause—then Chief Justice Rehnquist’s empirical claim becomes suspect.

The fundamental premise of *Wardlow* is that running from the police is indicative of criminal activity.⁶⁹ If individuals run out of fear of police harassment, then the claim that flight in a high crime area supports a finding of reasonable suspicion is substantially weaker. In fact, given the likelihood that police misconduct occurs at a greater rate in heavily policed high crime

closing-20160519-story.html]; see Graham, *supra* note 63 (offering additional claims of brutality made by the State’s Attorney).

⁶⁶ See *Wardlow*, 528 U.S. at 124; *Terry*, 392 U.S. at 22 (allowing the police to stop a person for investigatory purposes); P. Kenneth Burns, *Nero Trial Is Now in Judge’s Hands*, WYPR (May 19, 2016), <http://news.wypr.org/post/nero-trial-now-judge-s-hands#stream/0> [<https://perma.cc/2326-YB7E>] (providing judge’s response to prosecution’s closing arguments in Officer Nero’s trial); Mike Hellgren, *Judge in Freddie Gray-Officer Trial Grills Prosecutors*, CBS BALT. (May 19, 2016), <http://baltimore.cbslocal.com/2016/05/19/edward-nero-trial-closing-arguments> [<https://perma.cc/2UTA-96J3>] (recapping the closing arguments).

⁶⁷ *Transcript of the Verdict Hearing for Officer Edward M. Nero*, *supra* note 62.

⁶⁸ *Wardlow*, 528 U.S. at 124.

⁶⁹ *Id.*

areas, it may be that flight from the police in such places is less likely to justify a seizure than running in more affluent areas of town where such harassment is less frequent.⁷⁰

In a report on policing in Baltimore produced by the Department of Justice (DOJ) in the wake of Freddie Gray's death, the DOJ found that Baltimore Police Department (BPD) officers "routinely" detained and questioned individuals who were "sitting, standing, or walking in public areas, even where officers ha[d] no basis to suspect them of wrongdoing."⁷¹ Only 3.7% of the 7200 BPD stops reviewed by the DOJ resulted in either an arrest or even the issuance of a citation.⁷² Moreover, the DOJ found that Baltimore citizens were at times detained and transported to booking facilities simply for not having adequate identification on their person, a practice that the DOJ noted was unconstitutional even in instances in which the officers *had* reasonable suspicion.⁷³ When one patrol officer protested that he had no valid reason to stop and disperse a group of young African-American males on a street corner, his sergeant, in the presence of the DOJ observer, responded, "[t]hen make something up."⁷⁴

Unjustified detentions were not the only concern outlined in the DOJ report that might shake one's faith in the presumptions undergirding *Wardlow*. The report also included instances in which suspects had been subjected to humiliating (and unlawful) public strip searches; unjustified arrests for non-criminal activities, such as standing on a public street that bordered public property; and overly aggressive police tactics that escalated to physical assault and other forms of "unreasonable uses of force."⁷⁵ The documented use of these tactics is not to suggest that all officers or even the vast majority of officers were regularly breaking the law. If these practices were sufficiently widespread to shape the public's *perception* of the police, however, then they would explain why a young man like Freddie Gray would

⁷⁰ See Erwin Chemerinsky, *Law Enforcement and Criminal Law Decisions*, 28 PEPP. L. REV. 517, 525 (2001) ("Imagine the next case where the flight occurs in a wealthy, white, suburban area. In many ways, flight in those circumstances is even more suspicious than in inner cities where there is often great distrust of police officers.").

⁷¹ CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 28 (2016) <https://www.justice.gov/crt/file/883296/download> [<https://perma.cc/7SEY-JDDD>] [hereinafter BALTIMORE DOJ REPORT].

⁷² *Id.*

⁷³ *Id.* (citing *United States v. Zavala*, 541 F.3d 562, 579–80 (5th Cir. 2008)) (noting that the holding in *Zavala* was that a "90-minute detention in which the suspect was handcuffed, placed in a police car, and transported to a different location 'morphed from a *Terry* detention into a de facto arrest'" (citation omitted)).

⁷⁴ *Id.* at 29.

⁷⁵ *Id.* at 33–35, 74–80, 91–96.

run from an officer, even if criminality were not “afoot.” Indeed, the DOJ report described as much, stating that:

Community members told [the DOJ] in interviews that even when they believe they have done nothing wrong, they flee from interactions with officers, believing that it is better to run at the sight of an officer rather than take the risk that an interaction with the officer will result in unnecessary and excessive force being used against them.⁷⁶

This critique of Chief Justice Rehnquist’s assumptions in *Wardlow* is not novel.⁷⁷ Indeed, in his dissent in the same case, Justice John Paul Stevens explained that “[a]mong some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer’s sudden presence.”⁷⁸ Yet, while the anecdotal evidence encapsulated in the DOJ’s report closely mirrors Justice Stevens’s view, Chief Justice Rehnquist’s faith in law enforcement ultimately controlled the outcome of *Wardlow* and became the prevailing law of the land. As a result, even as Freddie Gray’s death sparked a nationwide conversation about law enforcement’s actions in poor minority communities, the trials of the officers charged in his death were shaped by a doctrine based on the assumption that individuals do not run from the police unless they are guilty of committing a crime.⁷⁹

2. Compelling Testimony: *Kastigar v. United States* and the Prosecution’s Grant of Limited Use Immunity

The first officer to stand trial was Officer William Porter.⁸⁰ Porter responded to the van driver’s request for additional support at the van’s subsequent stops.⁸¹ The prosecution alleged that Officer Porter had ignored

⁷⁶ *Id.* at 79.

⁷⁷ See *Wardlow*, 528 U.S. at 132 (Stevens, J., dissenting) (arguing that running from the police could stem from fear of the police and not guilt); BALTIMORE DOJ REPORT, *supra* note 71 (reflecting on how the local citizens’ fear of police results in flight).

⁷⁸ *Wardlow*, 528 U.S. at 132 (Stevens, J., dissenting).

⁷⁹ See *id.* at 124 (describing the defendant’s “unprovoked flight” as a justification for the officers to “investigate”).

⁸⁰ David Collins, *Neurosurgeon: Freddie Gray Suffered Complete Spinal Cord Injury*, WBALTV (Dec. 11, 2015), <http://www.wbalv.com/article/neurosurgeon-freddie-gray-suffered-complete-spinal-cord-injury/7097683> [<https://perma.cc/624J-7ZWL>].

⁸¹ *Timeline: Freddie Gray’s Arrest to His Fatal Spinal Cord Injury*, *supra* note 65.

Freddie Gray's request to be taken to a hospital at the third stop, instead choosing to lift the injured Mr. Gray off of the van's floor and place him without a seatbelt restraint on the van's steel bench.⁸² Officer Porter was charged with involuntary manslaughter, reckless endangerment, assault, and misconduct for failing to seek medical attention for Mr. Gray.⁸³ After failing to persuade Judge Williams to shift venue out of the city, the defense elected to try the case in front of a jury of Baltimore citizens.⁸⁴ The result after three days of deliberation was a hung jury, and the judge declared a mistrial.⁸⁵

The mistrial left the prosecution in a quandary. Officer Goodson, the van driver who was charged with the most serious crime, depraved heart murder, had refused to make a statement about the events of April 12.⁸⁶ As a result, the prosecution needed the testimony of Officer Porter to establish some of the essential facts in their case against Goodson.⁸⁷ Porter, facing the prospect of a second trial, indicated that he would invoke his Fifth Amendment right against self-incrimination if the prosecution were to call him to testify against his fellow officer.⁸⁸ As a result, after the judge refused to postpone the Goodson trial to allow the State to retry Porter, it appeared that the prosecution would have to choose which police officer they would continue to pursue.⁸⁹

⁸² *Id.* The question of when Mr. Gray received his injury and whether Officer Porter lifted Mr. Gray himself or provided assistance as Mr. Gray maneuvered himself to the bench was hotly contested throughout the trials. See Collins, *supra* note 80 (discussing the possibilities of when and how Mr. Gray received his injury in conjunction with the testimony of Officer Porter with respect to the assistance he provided).

⁸³ Collins, *supra* note 80; *How Grand Jury Charges Against Officers in Freddie Gray Case Compare to the Original Charges*, BALT. SUN (May 22, 2015), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-officer-charges-list-20150522-story.html> [<https://web.archive.org/web/20180306062749/http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-officer-charges-list-20150522-story.html>].

⁸⁴ Justin Fenton & Kevin Rector, *Mistrial Declared in Trial of Officer William Porter in Death of Freddie Gray*, BALT. SUN (Dec. 16, 2015), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-porter-trial-jury-wednesday-20151216-story.html> [<https://web.archive.org/web/20180306202034/http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-porter-trial-jury-wednesday-20151216-story.html>].

⁸⁵ *Id.*; see also State v. Rice, 136 A.3d 720, 725 (Md. 2016) (summarizing the outcome of Officer Porter's trial in the Maryland Court of Special Appeals opinion on compelling Officer Porter's testimony).

⁸⁶ Justin Fenton & Kevin Rector, *Officer Goodson Trial: Prosecutor Says Freddie Gray 'Was Injured Because He Got a Rough Ride'*, BALT. SUN (June 9, 2016), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-goodson-day-1-20160609-story.html> [<https://web.archive.org/web/20171116124915/http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-goodson-day-1-20160609-story.html>]; Owens, *supra* note 31.

⁸⁷ Fenton & Rector, *supra* note 86.

⁸⁸ Rice, 136 A.3d at 729.

⁸⁹ See generally Justin Fenton & Kevin Rector, *Trial of Baltimore Officer Goodson Postponed by Maryland Appeals Court*, BALT. SUN (Jan. 11, 2016), <http://www.baltimoresun.com/news/>

Rather than forgo either case, the prosecution sought a court order, pursuant to Maryland's immunity statute, to compel Officer Porter to testify.⁹⁰ The drafted order did not grant Porter full immunity for his actions.⁹¹ Instead, it conferred limited use immunity that barred the State from using evidence derived from Porter's compelled testimony but otherwise left the State free to prosecute him at a later date.⁹² In response, Porter argued that limited use immunity was insufficient to protect his rights under both the Fifth Amendment and Article 22 of the Maryland Declaration of Rights, because "[t]here can be no real assurance that a prosecutor, either deliberately or accidentally, will not use information obtained through immunized testimony."⁹³ The Circuit Court and later the Maryland Court of Appeals, however, held that the order was governed by the Supreme Court's decision in *Kastigar v. United States*.⁹⁴ In 1972, in *Kastigar*, the Supreme Court held that prosecutors can compel witnesses to testify with limited use immunity and then subsequently prosecute those witnesses so long as they demonstrate that their evidence is "derived from a legitimate source wholly independent of the compelled testimony."⁹⁵

Miranda v. Arizona and years of television crime dramas have led the public to believe that the Fifth Amendment guarantees individuals "the right

maryland/freddie-gray/bs-md-goodson-trial-begins-20160111-story.html [https://web.archive.org/web/20160127215217/http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-goodson-trial-begins-20160111-story.html] (discussing the lower and appellate court decisions about Officer Porter's testimony in relation to the trials of the other officers).

⁹⁰ MD. CODE ANN., CTS. & JUD. PROC. § 9-123 (West 2018); *Rice*, 136 A.3d at 729. The State's Attorney subsequently sought to compel a second defendant, Officer Garrett Miller, to testify in its case against Edward Nero under a similar grant of limited immunity. Kevin Rector, *Before Next Trial in Freddie Gray Case, Prosecutors Face Legal 'Minefield' Over Immunized Testimony*, BALT. SUN (July 25, 2016), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-garrett-miller-freddie-gray-kastigar-hearing-20160724-story.html> [https://web.archive.org/web/20180411060522/http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-garrett-miller-freddie-gray-kastigar-hearing-20160724-story.html].

⁹¹ See *Rice*, 135 A.3d at 726 (upholding "use and derivative use immunity").

⁹² *Id.*

⁹³ MD. CONST., Declaration of Rights, art. 22; *Rice*, 136 A.3d at 730, 745. Article 22 of the Maryland Declaration of Rights states, "That no man ought to be compelled to give evidence against himself in a criminal case." MD. CONST., Declaration of Rights, art. 22. Article 22 has been interpreted to be "*in pari materia*" with the Fifth Amendment. See *Lupfer v. State*, 21 A.3d 1080, 1091 (Md. 2011) ("We have stated repeatedly that 'the privilege against self-incrimination protected by Article 22 of the Maryland Declaration of Rights "generally" is "*in pari materia*" with the Self-Incrimination Clause of the Fifth Amendment.'" (quoting *Marshall v. State*, 999 A.2d 1029, 1035 (2010))).

⁹⁴ See, e.g., *Rice*, 136 A.3d at 730, 746 (applying *Kastigar v. United States*, 406 U.S. 441 (1972) to Officer Porter's situation).

⁹⁵ *Kastigar*, 406 U.S. at 460.

to remain silent.”⁹⁶ In fact, the right not to be compelled to be a witness against oneself is far more narrow than popular culture might lead one to believe. In 1892, the Supreme Court in *Counselman v. Hitchcock* seemed to suggest that nothing short of full transactional immunity would suffice to allow the state to compel a suspect to testify.⁹⁷ In *Kastigar*, however, the Court explained that *Counselman* had only held that statutory grants of immunity had to be “coextensive” with the scope of the Fifth Amendment privilege, and that, rather than require full transactional immunity, the state could compel a witness to testify so long as it was prohibited from making any use of either the compelled testimony or its fruits.⁹⁸

The *Kastigar* Court stressed that it was the prosecution that bore the “heavy burden” of proving the government’s evidence was developed independent of the compelled testimony.⁹⁹ But the use and derivative use doctrine is hardly the “comprehensive safeguard” that the majority contended it to be.¹⁰⁰ Just as *Wardlow* evinced the Court’s faith in the police, so too did *Kastigar* reveal the Court’s reliance on “the integrity and good faith of the prosecuting authorities.”¹⁰¹ Although *Kastigar* required that prosecutors shoulder the burden of proving their evidence is independent, as Justice Thurgood Marshall indicated in his dissent, stating:

⁹⁶ *Miranda*, 384 U.S. at 444 (“Prior to any questioning, the person must be warned that he has a right to remain silent . . .”); *Anderson v. Terhune*, 516 F.3d 781, 783 (9th Cir. 2008) (“From television shows like ‘Law & Order’ to movies such as ‘Guys and Dolls,’ we are steeped in the culture that knows a person in custody has ‘the right to remain silent.’”); see Steven D. Stark, *Perry Mason Meets Sonny Crockett: The History of Lawyers and the Police as Television Heroes*, 42 U. MIAMI L. REV. 229, 251 (1987) (relating the story of a suspect who told a police officer, “I got the right to remain silent! . . . You guys can’t trick me. I know my rights! I watch TV!”).

⁹⁷ *Counselman v. Hitchcock*, 142 U.S. 547, 586 (1892) (suggesting that immunity statutes “must afford absolute immunity against future prosecution for the offense to which the question relates”), *overruled in part by Kastigar*, 406 U.S. 411 (1972); see C. Albert Bowers, *Divining the Framers’ Intentions: The Immunity Standard for Criminal Proceedings Under the Utah Constitution*, 2000 UTAH L. REV. 135, 135 (describing transactional immunity prior to *Kastigar v. United States*); see also *Brown v. Walker*, 161 U.S. 591, 620 (1896) (affirming *Counselman*’s reasoning that full transactional immunity was necessary to satisfy the demands of the Fifth Amendment).

⁹⁸ *Kastigar*, 406 U.S. at 453 (“Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection.”).

⁹⁹ *Id.* at 461–62 (“One raising a claim under this statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources.”).

¹⁰⁰ See *id.* at 460 (“This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an ‘investigatory lead,’ and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures.” (citation omitted)).

¹⁰¹ *Id.* at 469 (Marshall, J., dissenting).

They alone are in a position to trace the chains of information and investigation that lead to the evidence to be used in a criminal prosecution. A witness who suspects that his compelled testimony was used to develop a lead will be hard pressed indeed to ferret out the evidence necessary to prove it.¹⁰²

Given this practical reality, Justice Marshall explained, the burden of proving that evidence is independent is not difficult to meet when the defendant cannot produce any “contrary evidence.”¹⁰³

In fact, *Kastigar* did more than presume that prosecutors would act with the best of intentions—the Court also presumed that well-meaning prosecutors would not inadvertently use evidence derived from the compelled testimony. In his dissent to a denial of certiorari in 1971, in *Piccirillo v. New York*, Justice William J. Brennan decried the application of use and derivative use immunity, not only because of the “enormous difficulty” a defendant would face in attempting to identify whether the evidence used against him was derived from his compelled testimony, but also because prosecutors are fallible and they might inadvertently exchange information or make inferences based upon compelled testimony even when they fully intended to respect *Kastigar*’s prohibitions.¹⁰⁴

In some respects, Officer Porter’s case might have been the best case scenario for the State to compel a defendant to testify with use and derivative use immunity. Porter’s first trial provided the defense and the court with a full preview of the State’s evidence, leaving Porter in a relatively good position to recognize if new evidence was offered that might have been derived from his compelled testimony. Viewed another way, the prosecution should have had little trouble meeting their “heavy burden” under *Kastigar* so long as they presented the same evidence that they had offered in the case that resulted in a mistrial. Yet even if the State made no adjustments to their trial strategy and they presented the same case-in-chief that they had offered in the first trial, there remained the possibility that the case against Porter could be “tainted” by his compelled testimony. Justice Brennan’s concern that prosecutors “working in the same office” might ex-

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Piccirillo v. New York*, 400 U.S. 548, 568 (1971) (Brennan, J., dissenting); see *Kastigar*, 406 U.S. at 469 (Marshall, J., dissenting) (“[E]ven their good faith is not a sufficient safeguard. For the paths of information through the investigative bureaucracy may well be long and winding, and even a prosecutor acting in the best of faith cannot be certain that somewhere in the depths of his investigative apparatus, often including hundreds of employees, there was not some prohibited use of the compelled testimony.”).

change information or make “subtle inferences” based on the actions of their fellow attorneys presented a very real concern in the Officer Porter case.¹⁰⁵ Indeed, the defense indicated that they planned to “raise questions about the communication between the original prosecutors and the clean team,” the new prosecution team that was ostensibly insulated within the State’s Attorney’s office from Officer Porter’s compelled testimony.¹⁰⁶

Ultimately, the State never had to demonstrate whether they could have satisfied their burden under *Kastigar*. On July 27, 2017, the State’s Attorney dropped the charges against the remaining officers without having secured a single conviction.¹⁰⁷ In a case that was marked by allegations of prosecutorial misconduct, ethics violations, and assertions that the charges were both politically motivated and defamatory, it was again striking that the case was shaped by a constitutional doctrine that was premised on the “integrity and good faith of the prosecuting authorities.”¹⁰⁸

¹⁰⁵ See *Piccirillo*, 400 U.S. at 568 (Brennan, J., dissenting) (expressing skepticism about the integrity of use and derivative use immunity).

¹⁰⁶ Justin Fenton, *Second Prosecutor in Freddie Gray Cases Leaves State’s Attorney’s Office*, BALT. SUN (Aug. 5, 2016), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-second-freddie-gray-prosecutor-leaves-20160805-story.html> [<https://web.archive.org/web/20161031064000/http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-second-freddie-gray-prosecutor-leaves-20160805-story.html>].

¹⁰⁷ Kevin Rector, *Charges Dropped, Freddie Gray Case Concludes with Zero Convictions Against Officers*, BALT. SUN (July 27, 2016), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-miller-pretrial-motions-20160727-story.html> [<https://web.archive.org/web/20180813214625/http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-miller-pretrial-motions-20160727-story.html>]. After the State dismissed the charges against the remaining defendants, the lead prosecutor, Michael Schatzow, admitted that he had communicated with the clean team on multiple occasions, but he denied that those communications had either violated *Kastigar* or that they had impacted the decision to drop the charges. Justin Fenton, *Prosecutors in Freddie Gray Case Maintain They Had Evidence to Convict Officers*, BALT. SUN (July 28, 2016), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-freddie-gray-prosecutors-speak-20160728-story.html> [<https://web.archive.org/web/20180908040024/http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-freddie-gray-prosecutors-speak-20160728-story.html>].

¹⁰⁸ See *Kastigar*, 406 U.S. at 469 (Brennan, J., dissenting) (doubting whether prosecutors’ “good faith is . . . a sufficient safeguard”); Ryan M. McDermott, *Prosecutors of Officers Accused in Freddie Gray Death Face Pressure for Disbarment*, WASH. TIMES (July 18, 2016), <https://www.washingtontimes.com/news/2016/jul/18/john-banzhaf-law-professor-seeks-disbarment-of-bal/> [<https://perma.cc/JER6-QRV5>] (highlighting concerns that prosecutors brought charges based on community pressure and “without sufficient evidence”); Elliott McLaughlin & Steve Almasy, *Freddie Gray Officers Suing Prosecutor Marilyn Mosby*, CNN (July 28, 2016), <http://www.cnn.com/2016/07/27/us/baltimore-marilyn-mosby-officer-lawsuits-freddie-gray/index.html> [<https://perma.cc/4HCL-QMJ3>] (describing allegations of prosecutorial misconduct); Kevin Rector, *Law Professor Calls for Disbarment of Additional Prosecutors in Freddie Gray Case*, BALT. SUN (July 19, 2016), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-new-banzhaf-complaints-20160719-story.html> [<https://web.archive.org/web/20180908040520/http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-new-banzhaf-complaints-20160719-story.html>] (explaining disbarment complaints in reaction to succession of acquittals in the cases).

3. Failing to Disclose: *Brady v. Maryland* Violations in the Trials of the Officers Charged in the Death of Freddie Gray

The trials of the officers charged in the death of Freddie Gray were the subject of national attention and intense public scrutiny.¹⁰⁹ From the moment Marilyn Mosby publically announced the charges against the six police officers, every stage of the trial was covered by local and national media.¹¹⁰ Given the vast amount of attention the cases received, it was all the more surprising when, in the middle of the trial of the van driver, Officer Cesar Goodson, the prosecution was found to have failed to meet their obligation under *Brady v. Maryland* to disclose exculpatory evidence to the defense, not once, but on two separate occasions.¹¹¹

Donta Allen was an arrestee who had been transported in the same van as Freddie Gray.¹¹² Because the transport wagons were split in half by a solid wall, Mr. Allen was unable to observe Mr. Gray, but he initially told police investigators that Gray “was banging his head against the metal like he was trying to knock himself out.”¹¹³ A little over two weeks after the incident, however, Mr. Allen recanted his statement, claiming that the police were “trying to make it seem like I told them that, I made it like Freddie Gray did that to hisself [sic].”¹¹⁴ Mr. Allen’s contradicting claims compli-

¹⁰⁹ See, e.g., Stolberg & Bidgood, *supra* note 41 (discussing the impact of the Freddie Gray trials).

¹¹⁰ See, e.g., Alter, *supra* note 1 (providing national coverage of the charges); Rector, *supra* note 108 (providing local coverage of the disbarment complaints leveled against the prosecutors).

¹¹¹ See *Brady*, 373 U.S. at 87 (holding that the prosecution must provide exculpatory evidence to the defense to comport with due process); Justin Fenton & Kevin Rector, *Judge Williams to Hold Hearing on Witness Disclosure as Officer Goodson’s Trial Opens*, BALT. SUN (June 8, 2016), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-goodson-hearing-20160608-story.html> [<https://web.archive.org/web/20171116124911/http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-goodson-hearing-20160608-story.html>] (reporting on the possibility that a potential witness interview by the prosecution provided evidence favorable to the defense); Safia Samee Ali, *Trial of Van Driver in Freddie Gray Case Reveals Prosecutor Violations*, NBC NEWS (June 23, 2016), <https://www.nbcnews.com/storyline/baltimore-unrest/trial-van-driver-freddie-gray-case-reveals-prosecutor-violations-n596731> [<https://perma.cc/J9Y5-5JJD>] (explaining Judge Williams’s finding of two *Brady* violations).

¹¹² Kevin Rector, *Donta Allen, Man in the Van with Freddie Gray, Back in the Spotlight as Driver’s Trial Begins*, BALT. SUN (June 9, 2016), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-donta-allen-role-20160609-story.html> [<https://web.archive.org/web/20171116124822/http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-donta-allen-role-20160609-story.html>].

¹¹³ *Id.*

¹¹⁴ Mike Schuh, *The Other Man in the Van with Freddie Gray Breaks His Silence*, CBS BALT. (Apr. 30, 2015), <http://baltimore.cbslocal.com/2015/04/30/wjz-exclusive-the-other-man-in-the-van-with-freddie-gray-breaks-his-silence/> [<https://perma.cc/6ZXW-CRY5>]; see Diana Owens, *Coroner Said Death of Baltimore Detainee Freddie Gray an Accident-Witness*, REUTERS, (June 16, 2016) <https://www.reuters.com/article/us-baltimore-police/coroner-said-death-of-baltimore-detainee->

cated the narrative for both sides of the case, but it was the State's failure to turn over their notes from an undisclosed second meeting with Mr. Allen that prompted Judge Williams to admonish the prosecution, exclaiming, "I'm not saying you did anything nefarious. I'm saying you don't understand what 'exculpatory' means."¹¹⁵

Although Judge Williams denied the defendant's motion to dismiss on the basis of the State's failure to disclose their meeting with Mr. Allen, he told the prosecution, "My concern becomes what else is out there. If your office doesn't get [discovery obligations], I don't know where we are at this point."¹¹⁶ Judge Williams's misgivings proved prescient when, not long after rebuking the State for failing to disclose their "secret" meeting with Donta Allen, the defense demonstrated that the State had again violated its obligations under *Brady* by failing to turn over the lead detective's notes which included statements by the medical examiner that described Mr. Gray's death as a "freakish accident."¹¹⁷

The State's failure to turn over the notes of the lead detective, Dawnnyell Taylor, exposed the deep distrust that existed, not only between the defense and the prosecution, but between the prosecution and the detectives charged with investigating the cases.¹¹⁸ In light of the State's failure to turn over Detective Taylor's notes, Judge Williams permitted the defense to call Taylor to the stand.¹¹⁹ In her testimony, she accused the prosecution of deliberately ignoring evidence that the officers were innocent.¹²⁰ In her subsequent cross-examination by Chief Deputy State's Attorney Michael Schatzow, the prosecutor accused the detective of sabotaging the State's case in an effort to protect her fellow officers.¹²¹ Detective Taylor's time on the stand did little to restore the public's faith in the process. Rather, it was striking that in a case marked by procedural doctrines that rely on the integrity of police and prosecutors, each agency accused the other of not being trustworthy.¹²²

freddie-gray-an-accident-witness-idUSKCN0Z21Z0 [https://perma.cc/W4KE-2CML] ("Allen recounted that statement in court, saying he never hear[d] loud banging, adding he was high on heroin and Xanax when he gave his initial police report.").

¹¹⁵ Fenton & Rector, *supra* note 86; Samee Ali, *supra* note 111.

¹¹⁶ Fenton & Rector, *supra* note 86 (quoting Judge Barry G. Williams).

¹¹⁷ See Samee Ali, *supra* note 111 (explaining the discovery of a second *Brady* violation).

¹¹⁸ Brian Witte, *Baltimore Officer's Trial Highlights Tensions Between Police, Prosecutors*, NBC4 WASH. (June 16, 2016), <https://www.nbcwashington.com/news/local/Judge-Police-Officers-Trial-to-Move-Forward-on-All-Charges-383286081.html> [https://perma.cc/C8QB-W3D8].

¹¹⁹ Samee Ali, *supra* note 111.

¹²⁰ *Id.*

¹²¹ Witte, *supra* note 118.

¹²² It is notable that the two *Brady* violations identified in the trial of Officer Goodson only came to light because the lawyer for Donta Allen decided to come forward after watching the case in the press, and the chief investigating officer, Detective Dawnnyell Taylor, was sympathetic to

Initially, *Brady* might appear to be the opposite of a criminal doctrine of faith.¹²³ By requiring prosecutors to turn over potentially exculpatory evidence to the defense, the Supreme Court certainly suggested that it was skeptical that prosecutors would fulfill their “special duty to seek justice, not merely to convict” without some sort of intervention.¹²⁴ Unfortunately, even as the Court sought to protect defendants from overzealous or unethical prosecutorial gamesmanship, the decision and its progeny were shaped by the Court’s abiding faith that prosecutors could be trusted to voluntarily and effectively execute their ethical obligations.

Although the *Brady* Court recognized that the suppression of evidence favorable to an accused violated due process, it chose not to dictate a specific remedy to ensure that such failures didn’t recur.¹²⁵ Instead, the Court presumed that, once the constitutional obligation had been identified, prosecutors would “transcend” their adversarial role and turn over exculpatory evidence because their interest in winning their case would be trumped by their desire and obligation to do justice.¹²⁶ Moreover, the Court did not require that prosecutors voluntarily turn over *all* of the evidence at their disposal, but only the evidence that they deemed “material either to guilt or to punishment.”¹²⁷ As the Court would later explain, for evidence to be “material” it must not only be exculpatory, but it is must also be so persuasive that it would cast doubt on the criminal conviction or sentence.¹²⁸

the officer-defendant. See Fenton & Rector, *supra* note 111 (detailing Donta Allen’s attorney’s role in the discovery of misconduct); Baynard Woods, *Police Rising*, REAL NEWS NETWORK (Nov. 30, 2017), <https://therealnews.com/columns/print1130baltimorerising> [<https://perma.cc/YMH5-B2ZX>] (portraying Taylor’s sympathy for fellow members of her police union). If anything, the failure of the prosecution to satisfy its *Brady* obligations in the trials of the officers involved in the death of Freddie Gray raises the question: how do prosecutors behave in instances in which the investigators and the media are uninterested in the outcome of the case? Samee Ali, *supra* note 111 (referencing a quote from David Jaros). At one point during the trial, the Fraternal Order of Police tweeted a meme of Leonardo DiCaprio in “The Great Gatsby” toasting with the words, “Here’s to the Baltimore 6 Defense Team, The FOP and Detective Taylor.” Woods, *supra*. See generally BALTIMORE RISING (HBO Films 2017) (showing Detective Taylor pumping her fist when she heard news of Officer Goodson’s acquittal).

¹²³ See Darryl K. Brown, *Criminal Procedure Entitlements, Professionalism, and Lawyering Norms*, 61 OHIO ST. L.J. 801, 824 (2000) (“*Brady* exists because trust of prosecutors to reveal exculpatory evidence, even with clear ethical obligations, is an insufficient safeguard.” (footnote omitted)).

¹²⁴ *Connick v. Thompson*, 563 U.S. 51, 65–66 (2011) (quotations omitted).

¹²⁵ See *Brady*, 373 U.S. at 87, 90–91 (stating the constitutional right implicated by withholding evidence but then ruling out a hypothetical remedy).

¹²⁶ See *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985) (citing *Brady*, 373 U.S. at 87–88).

¹²⁷ *Brady*, 373 U.S. at 87.

¹²⁸ See *Bagley*, 473 U.S. at 678. Although the materiality standard delineated in *Bagley* ostensibly applies to the appellate review of alleged *Brady* violations, various jurisdictions have used it

The Court's decision to resolve the problem of prosecutors failing to disclose exculpatory information by simply acknowledging their duty was, by no means, the Court's only option. First, the Court could have refused to leave it to prosecutors to determine whether exculpatory evidence was "material."¹²⁹ Alternatively, the Court could have adopted an even broader remedy and required "open file discovery," a rule which would obligate prosecutors to reveal all of their evidence, both inculpatory and exculpatory, to the defense.¹³⁰ Instead, the Court trusted that prosecutors' sense of justice would be sufficient to ensure that they would turn over evidence that would reduce their chances of obtaining a conviction.

Although several of the Court's *Brady* decisions involved intentional failures to disclose, those decisions have largely downplayed the possibility that a significant number of prosecutors would deliberately commit misconduct by hiding exculpatory evidence.¹³¹ To be fair, it is difficult to devise a rule that would prevent a prosecutor from deliberately burying evidence. While *Brady* failures continue to be unearthed with troubling frequency,¹³² the practical challenges to uncovering what a prosecutor chooses not to reveal are enormous.¹³³

to define the prosecutor's discovery obligations at the trial level. See Ellen Yaroshefsky, *Prosecutorial Disclosure Obligations*, 62 HASTINGS L.J. 1321, 1325 (2011) (describing the materiality standard as a "source of significant and ongoing controversy, because in many jurisdictions, this standard for reversal on appeal is also utilized as the standard for defining the duty to provide pretrial disclosure of information").

¹²⁹ See generally Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481 (2009) (detailing the benefits of a prophylactic rule requiring disclosure of all exculpatory evidence regardless of materiality, but ultimately advocating for a broader rule requiring "open file discovery"); Colin Starger, *Expanding Stare Decisis: The Role of Precedent in the Unfolding Dialectic of Brady v. Maryland*, 46 LOY. L.A. L. REV. 77, 128-44 (2012) (tracing the Supreme Court's sharp internal debate over interpretation of materiality culminating in *Bagley*).

¹³⁰ See Burke, *supra* note 129, at 519 ("[T]his Article has urged a prophylactic rule requiring open file discovery in which prosecutors disclose not only exculpatory evidence, but all of the evidence against the defendant."); Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1557 (2010) ("The best way to guarantee that defendants obtain the exculpatory evidence owed to them under *Brady* is to require 'open file discovery' where prosecutors must turn over all evidence known to the government, exculpatory and inculpatory alike."); Starger, *supra* note 129 (highlighting dissents in the *Brady* line of Supreme Court cases where individual Justices pushed for broader interpretation of obligation to disclose).

¹³¹ See, e.g., *Connick*, 563 U.S. at 65-66 (describing presumption that prosecutors seek justice rather than wins); *Bagley*, 473 U.S. at 685 (Marshall, J., dissenting) (disagreeing with the Court's holding that the prosecutor's deliberate failure to disclose impeachment evidence was "harmless error").

¹³² See Medwed, *supra* note 130, at 1539, 1551 (explaining that "*Brady* violations take place with regularity" and that "[a]lthough intentional *Brady* violations by bad actors are the exception rather than the rule, the annals of criminal law are sufficiently rife with anecdotes of this misbehavior to cause concern"); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 698 (1987) ("[A] disturbingly large num-

Unfortunately, the Court's faith in prosecutors helped shape rules that not only make it easier for prosecutors acting in bad faith to deliberately suppress exculpatory evidence, but also increase the likelihood that well-intentioned prosecutors will suppress such evidence inadvertently. By leaving decisions about materiality to the discretion of prosecutors, the Court provided cover for "bad actors" to argue that they simply thought the evidence, although exculpatory, was not material.¹³⁴ In 1985, in *United States v. Bagley*, the defendant discovered that the prosecutor had failed to turn over exculpatory evidence that the defense had *specifically requested*.¹³⁵ The Supreme Court, however, ruled that even the *deliberate* suppression of potentially exculpatory evidence was irrelevant if the evidence was subsequently deemed to be immaterial.¹³⁶ While the Court may believe that "the prudent prosecutor will resolve doubtful questions in favor of disclosure,"¹³⁷ the rule crafted in *Brady* and its progeny provides ample wiggle room for unethical attorneys to ignore their discovery obligations.¹³⁸

Perhaps the greater danger is that the Court's faith in prosecutors shaped a rule which increased the odds that well-intentioned prosecutors, confident

ber of published opinions indicate that prosecutors knowingly presented false evidence or deliberately suppressed unquestionably exculpatory evidence."); Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 U. D.C. L. REV. 275, 278, 285 (2004) (explaining that prosecutorial misconduct, primarily failing to turn over exculpatory evidence, contributed to forty-five percent of the exonerated clients represented first wrought by the Innocence Project and suggesting that these violations were "merely the tip of the iceberg").

¹³³ See Sara Gurwitsch, *When Self-Policing Does Not Work: A Proposal for Policing Prosecutors in Their Obligation to Provide Exculpatory Evidence to the Defense*, 50 SANTA CLARA L. REV. 303, 306–07 (2010) ("The type of full-scale re-investigation that is typically necessary to discover previously suppressed exculpatory evidence post-conviction is rarely conducted."); Medwed, *supra* note 130, at 1548 ("Discretionary decisions by prosecutors, like disclosure choices . . . are not made in courtrooms or during formal negotiations with defense counsel, but behind closed doors far from the prying eyes of defendants, judges, and state ethics boards.").

¹³⁴ See Medwed, *supra* note 130, at 1544 (considering the likelihood of non-disclosure by both good and bad actors); Yaroshefsky, *supra* note 132, at 296 (describing the reluctance of courts and discipline boards to second guess prosecutors' discretionary decisions).

¹³⁵ See *Bagley*, 473 U.S. at 669–70, 671–72 (detailing the evidence requested and provided, and then the eventual discovery of the requested evidence during the appeals process that was withheld).

¹³⁶ *Id.* at 683 (holding that the reviewing court should consider the materiality of the evidence suppressed); *id.* at 714 (Stevens, J., dissenting) ("[T]he Court's analysis reduces the significance of deliberate prosecutorial suppression of potentially exculpatory evidence to that merely of one of numerous factors that 'may' be considered by a reviewing court.").

¹³⁷ *United States v. Agurs*, 427 U.S. 97, 108 (1976); see also *Kyles v. Whitley*, 514 U.S. 419, 439 (1995) ("This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence." (citing *Agurs*, 427 U.S. at 108)).

¹³⁸ See, e.g., *Bagley*, 473 U.S. at 706 (Marshall, J., dissenting) (explaining that the materiality requirement in *Brady* encourages prosecutors "to gamble on a finding of harmlessness" and "provides the prosecutor with ample room to withhold favorable evidence").

in the strength of their case and the guilt of their defendants, might mistakenly determine that exculpatory evidence need not be turned over to the defense. Prosecutors are tasked with seeking justice and ensuring that defendants receive fair process.¹³⁹ But they also are encouraged to vigorously pursue convictions and to make sure the guilty do not go free.¹⁴⁰ The result is that prosecutors are particularly vulnerable to cognitive bias interfering with their evaluation of whether evidence is both material and exculpatory.¹⁴¹ By allowing prosecutors to withhold nonmaterial exculpatory evidence, the Court trusted that prosecutors would not only be motivated to satisfy the demands of due process, but also would be capable of making such highly discretionary decisions accurately in the face of powerful and often unconscious incentives to find that such evidence need not be disclosed.¹⁴²

C. Faith Across the Criminal Process

Brady, *Kastigar*, and *Wardlow* are not criminal procedure outliers. Indeed, a quick survey of landmark Supreme Court decisions reveals a substantial number of doctrines predicated on faith in the system and its actors. Moreover, these doctrines of faith are not limited to one particular area, but rather span the entire criminal process. From investigation and pretrial discovery to the trial itself, one can find examples of doctrines that have been

¹³⁹ See Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 405 (“In this role as a minister of justice, the prosecutor has the responsibility ‘not simply . . . of an advocate,’ but to adopt a somewhat neutral stance ‘to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of the sufficient evidence.’” (quoting MODEL RULES OF PROF’L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS’N 2003)) (citing *United States v. Kalfayan*, 8 F.3d 1315, 1323 (9th Cir. 1993))).

¹⁴⁰ Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2471 (2004) (“[P]rosecutors want to ensure convictions Favorable win-loss statistics boost prosecutors’ egos, their esteem, their praise by colleagues, and their prospects for promotion and career advancement.”); see also Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 390 (2001) (“The desire to win inevitably wins out over matters of procedural fairness, such as disclosure.”).

¹⁴¹ See Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1590–91 (2006) (describing how cognitive bias can affect the exercise of prosecutorial discretionary decisions); Susan S. Kuo & C.W. Taylor, *In Prosecutors We Trust: UK Lessons for Illinois Disclosure*, 38 LOY. U. CHI. L.J. 695, 706–07 (2007) (“The desire to win a case may cause some prosecutors to concentrate their sights solely on achieving victory, at the expense of upholding justice. The quest for success can affect a prosecutor’s ability to objectively weigh the materiality of potentially exculpatory evidence, a phenomenon referred to as ‘tunnel vision’ or ‘confirmatory bias.’” (footnote omitted)).

¹⁴² See Medwed, *supra* note 130, at 1551 (“The most pressing problem relates to how well-meaning prosecutors tend to interpret their constitutional disclosure obligations in a way that all too often leads to withholding.”).

shaped by the Court's belief that prosecutors and the police "dutifully carry out their obligations within constitutional limits."¹⁴³

At the early stages of the criminal process, the Court has allowed officers to deliberately create exigent circumstances "with the bad faith intent" of avoiding the warrant requirement, excused the unlawful detention of suspects if the officer subsequently discovers a warrant, and endorsed pretextual traffic stops despite concerns that the practice could invite racial profiling.¹⁴⁴ During pretrial discovery, prosecutors are trusted to evaluate their evidence and decide for themselves what they should be obligated to turn over to the defense.¹⁴⁵ At trial, prosecutors can deny defendants the opportunity to waive a jury.¹⁴⁶ Then, when picking that jury, prosecutors can offer an "implausible or fantastic" justification for striking a juror and their reason need not make sense so long as it is held to be race neutral.¹⁴⁷ At each stage of the criminal process, one finds doctrines built on the presumption that police and prosecutors understand their legal obligations and can be trusted to act with integrity and honesty.¹⁴⁸

Yet, although it is relatively easy to identify Criminal Doctrines of Faith throughout the criminal process, it is more difficult to discern the basis for the Court's trust. While some decisions betray an idealistic view of how police and prosecutors behave, others appear to be shaped by the Court's belief that institutional checks will prevent criminal justice actors from abusing their authority. To further complicate the inquiry, some decisions may be shaped by a faith in the system and its actors that is derived from more than one source.

¹⁴³ *E.g.*, *Atwater v. City of Lago Vista*, 165 F.3d 380, 389 (5th Cir. 1999) (framing the Fourth Amendment as a check on the power of the police), *vacated en banc*, 171 F.3d 258 (5th Cir. 1999).

¹⁴⁴ *See Utah v. Strieff*, 136 S. Ct. 2056, 2059 (2016) (holding that discovering a warrant validated evidence seized after an unlawful detention); *Kentucky v. King*, 563 U.S. 452, 464 (2011) (invalidating a subjective test of "bad faith intent"); *Whren v. United States*, 517 U.S. 806, 810-11 (1996) (rejecting the concerns of petitioners—black men—that police pull over certain individuals committing common traffic violations on pretext and not to actually enforce the traffic laws); *see also* Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 431 (1997) ("Empirical evidence suggests that race is frequently the defining factor in pretextual traffic stops.").

¹⁴⁵ *See Bagley*, 473 U.S. at 671 (detailing what the prosecution did not turn over in response to defendant's pretrial discovery request).

¹⁴⁶ *Singer*, 380 U.S. at 36-37.

¹⁴⁷ *See Purkett v. Elem*, 514 U.S. 765, 768-69 (1995) (holding that the prosecutor's strike of a black juror could be justified and found race neutral when the juror was struck on the basis that he had "long, unkempt hair, a mustache, and a beard").

¹⁴⁸ *See, e.g., Singer*, 380 U.S. at 37 (referencing the Court's "confidence in the integrity of the federal prosecutor" to support its decision to allow prosecutors to compel a defendant to have a jury trial).

The following section examines some of the Court's most prominent criminal procedure decisions and identifies three potential sources of faith for the doctrines established by those cases. After disaggregating the Court's potential justifications for trusting police and prosecutors, the subsequent section explores what it might mean if the Court's faith proves to be misplaced.

II. THREE SOURCES OF FAITH IN CRIMINAL PROCEDURE DOCTRINE

A. Faith in Character

Scholars have explored multiple rationales for the Court's deference to police and prosecutors.¹⁴⁹ In some instances, separation of powers concerns deter courts from interfering in the daily work of law enforcement.¹⁵⁰ Other times, the Court's reluctance to act stems from its presumption that the police have a special expertise that warrants deference to their "street level" decisions.¹⁵¹ There exists, however, an additional rationale that has largely gone unacknowledged—that the Court's doctrine may be built, in part, on its faith in the strength of character of these criminal justice actors.

¹⁴⁹ See, e.g., Lvovsky, *supra* note 10, at 1997–98 (summarizing existing criticism of the Court's reliance on police expertise); Stoughton, *supra* note 10, at 848–49 (identifying and challenging the Supreme Court's factual presumptions about the nature of policing).

¹⁵⁰ See Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1025 (2006) ("The Supreme Court is of the view that a prosecutor's charging and plea bargaining decisions are largely off limits from judicial review."); David M. Jaros & Adam S. Zimmerman, *Judging Aggregate Settlement*, 94 WASH. U.L. REV. 545, 590 (2017) ("[C]onstitutional concerns regarding the separation of powers also impede the judiciary from seizing control of the settlement process.").

¹⁵¹ See, e.g., *Ornelas v. United States*, 517 U.S. 690, 699 (1996) ("[A] police officer views the facts through the lens of his police experience and expertise."); *United States v. Cortez*, 449 U.S. 411, 418 (1981) ("[A] trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person."); *Brown v. Texas*, 443 U.S. 47, 52 n.2 (1979) ("This situation is to be distinguished from the observations of a trained, experienced police officer who is able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer."); *Terry v. Ohio*, 392 U.S. 1, 33 (1968) ("Officer McFadden had no probable cause to arrest Terry for anything, but he had observed circumstances that would reasonably lead an experienced, prudent policeman to suspect that Terry was about to engage in burglary or robbery." (emphasis added)); see also Lvovsky, *supra* note 10, at 1997–98 (describing the Court's view of the police as experts); Eric J. Miller, *Detective Fiction: Race, Authority, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 213, 227 (2012) ("Police training and experience thus establishes the police as craftsmen members of a specialized guild, one that the Court has granted something of a monopoly on evaluating the significance of criminogenic evidence. The rest of us, including the judiciary, lack this specialized guild knowledge and so should defer to the on-the-street judgments of police experts."); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2063 (2011) ("The Court's behavioral assumption is that officers, based upon their experiences, are better than civilians at distinguishing innocent from guilty conduct. Presumably, as frequent observers of behavior, officers are better equipped to predict whether an individual's behavior signals involvement in criminal activity.").

The idea that police and prosecutors follow a “moral code” is deeply embedded in popular culture.¹⁵² In many respects, the recurring explanation that prosecutors and police officers who violate the rules are “bad apples” implies that the vast majority of law enforcement actors can be trusted to obey both the letter and spirit of the law.¹⁵³ This faith in law enforcement plays out in three interrelated assumptions: (1) police and prosecutors do not regularly engage in misconduct in the course of their duties; (2) they will voluntarily follow the constitutional rules promulgated by the Court; and, (3) they are not only willing to follow, but are also capable of following, those constitutional rules.

Although it is never explicitly acknowledged, the Court’s assumption that the police do not regularly engage in misconduct is essential to decisions like *Illinois v. Wardlow*. Chief Justice Rehnquist’s determination that flight from the police is “suggestive” of criminality is premised on a world in which police officers do not regularly harass individuals when they en-

¹⁵² See Anthony V. Alfieri, *Community Prosecutors*, 90 CALIF. L. REV. 1465, 1504 (2002) (describing “[g]ood prosecutors . . . [as] the virtuous agents of justice and the celebrants of truth”); see also Brian M. Murray, *Prosecutorial Responsibility and Collateral Consequences*, 12 STAN. J. CIV. RTS. & CIV. LIBERTIES 213, 240 (2016) (“Constitutional criminal process jurisprudence already views the prosecutor as a special agent of justice.”); Ronald M. Sandgrund, *Dialogue: Does Popular Culture Influence Lawyers, Judges, and Juries?—Part III*, 44 COLO. LAWYER 51, 54 (Mar. 2015) (“Generally speaking, TV pits ‘good guy’ prosecutors against ‘bad guy’ defense attorneys, and places prosecutors, as opposed to defense attorneys, on the moral high ground of the legal practice.”).

¹⁵³ See *Wilson v. Layne*, 526 U.S. 603, 618 (1999) (Stevens, J., concurring in part and dissenting in part) (“My sincere respect for the competence of the typical member of the law enforcement profession precludes my assent to the suggestion that a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful.”); Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 52 (2016) (describing the assumption that “intentional prosecutorial law-breaking was aberrational, the fault of rogue prosecutors—‘a few bad apples’” (citation omitted)); Aliza Chasin, *Jersey City Suspends Officers Who Kicked Victim on Fire After Crash, Two Deputy Chiefs Transferred*, WPIX 11 NEWS (June 12, 2017), <http://pix11.com/2017/06/12/jersey-city-suspends-officers-who-kicked-victim-on-fire-after-crash-transfers-others/> [<https://web.archive.org/web/20170911085039/https://pix11.com/2017/06/12/jersey-city-suspends-officers-who-kicked-victim-on-fire-after-crash-transfers-others/>] (“Look, we have a high standard for the police department They do a tremendous job. We’re not going to let just a few bad apples be a reflection on the entire police department or the entire city[.]” quoting Jersey City Mayor Steven Fulop’s response to four officers beating an innocent bystander); *Ferguson Mayor Says ‘Bad Apples’ Not Indicative of Police Dept.*, NBS NIGHTLY NEWS WITH LESTER HOLT (Mar. 13, 2015), <https://www.nbcnews.com/nightly-news/video/ferguson-mayor-says-bad-apples-not-indicative-of-police-dept-412990019892> [<https://perma.cc/V2SM-JYPS>] (characterizing disparate racial impact of police actions or racial bias within the police department as due to a few “bad apples”); see also *Last Week Tonight with John Oliver: Police Accountability* (HBO television broadcast Oct. 2, 2016), <https://www.youtube.com/watch?v=zaD84DTGULo> [<https://perma.cc/6457-EDTG>] (highlighting community calls for accountability that are met with the “just a few bad apples” argument).

gage in non-criminal activities.¹⁵⁴ If a sufficient number of police officers intimidate, abuse, take property, or otherwise mistreat law-abiding citizens, then the foundation of the *Wardlow* doctrine collapses.¹⁵⁵ Notably, the assumption that police officers do not commit such misconduct is separate from the assumption that the police willingly follow the constitutional limits the Court places upon their activities. Viewed narrowly, *Wardlow* only involved a determination about what constituted reasonable suspicion.¹⁵⁶ The critical assumption in *Wardlow*—that the police do not mistreat the public—is separate from the particular rule that the Court established, yet it was an essential prerequisite to the decision. Nor was it the only assumption about the moral character of law enforcement embedded in *Wardlow*. In addition to assuming that law abiding citizens would not have good reasons to run from the police, the Court made a second assumption about moral character—that, once established, the police can be trusted not to subvert the constitutional restrictions that the Court places on them.

Seth Stoughton, a legal scholar and a former police officer, noted in his article, *Policing Facts*, that “[t]he Court has only rarely credited fears that police officers will attempt to circumscribe the constitutional limits to their authority.”¹⁵⁷ In *Wardlow*, the Court assumed that officers would diligently adhere to the rules it had been refining since 1968 when *Terry v. Ohio* required that officers restrain themselves from seizing a suspect if they lacked reasonable suspicion.¹⁵⁸ What went unacknowledged in the decision was the possibility that the Court’s explanations might be used by officers to tailor their testimony to ensure the admissibility of evidence they recovered under questionable circumstances.

¹⁵⁴ See *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (holding that flight may be a factor when police calculate reasonable suspicion); see *supra* notes 49–79 and accompanying text.

¹⁵⁵ See, e.g., Dan Rodricks, *The High Cost of Bad Cops*, BALT. SUN, (Jan. 6, 2016), <http://www.baltimoresun.com/news/maryland/dan-rodricks-blog/bs-md-rodricks-0107-story.html> [<https://web.archive.org/web/20180910040139/http://www.baltimoresun.com/news/maryland/dan-rodricks-blog/bs-md-rodricks-0107-story.html>] (describing revelations that officers in the Baltimore Gun Trace Task Force were robbing and assaulting members of the public, selling drugs, planting evidence, and writing false reports, and how that impacted the public’s trust).

¹⁵⁶ See *Wardlow*, 528 U.S. at 124 (drawing the boundaries around what factors can influence a finding of reasonable suspicion).

¹⁵⁷ Stoughton, *supra* note 10, at 861; see also Anthony O’Rourke, *Structural Overdelegation in Criminal Procedure*, 103 J. CRIM. L. & CRIMINOLOGY 407, 411 (2013) (“[T]he court may underestimate the extent to which law enforcement officials are unable or unwilling to implement a constitutional objective, and might therefore use the discretion they are accorded to undermine the objective.”)

¹⁵⁸ *Terry*, 392 U.S. at 30 (establishing that the police must have reasonable suspicion to seize a suspect).

One might well argue that, in the case of *Wardlow*, the Court had few options other than trusting the police to follow its instructions, but the same cannot be said of its decision in 2016 in *Utah v. Strieff*. In *Strieff*, the Court refused to suppress the fruit of an unlawful search because the officer subsequently discovered that the defendant, whom he had unlawfully stopped, had an outstanding warrant for a traffic violation.¹⁵⁹ While the majority was quick to chalk up the officer's Fourth Amendment violation to "two good-faith mistakes,"¹⁶⁰ the dissenters took a more skeptical view. Justice Elena Kagan described the stop as a "calculated decision . . . designed for investigatory purposes."¹⁶¹ In a striking acknowledgement of the possibility that the police might deliberately circumvent the Court's Fourth Amendment protections, another dissenter, Justice Sonia Sotomayor, stressed that such strategic violations of the Fourth Amendment were not "isolated instance[s] of negligence," but rather were "the product of institutionalized training procedures."¹⁶² Justice Sotomayor's acknowledgement that many officers are taught to "stop and question first, develop reasonable suspicion later" was particularly notable in light of the majority's refusal to acknowledge the possibility that the police might deliberately sidestep the Fourth Amendment protections established by the Court's own decisions.¹⁶³

Strieff is not the only case where the majority of the Court conspicuously failed to acknowledge the possibility that the police might purposely circumvent or openly violate constitutional rules. In 1980, in *United States v. Mendenhall*, the majority was torn between concluding that Federal Agents had reasonable suspicion to seize Ms. Mendenhall between airline flights and escort her to a DEA office for a strip-search and concluding that no seizure ever took place because Ms. Mendenhall voluntarily accompanied the officers to be searched.¹⁶⁴ Although the conclusion of Chief Justice Warren E. Burger and Justices Lewis F. Powell, Jr. and Harry Blackmun that the officers had reasonable suspicion to stop Ms. Mendenhall is debatable, it was the determination by the remainder of the majority that the defendant *voluntarily chose* to forego her connecting flight and instead elected

¹⁵⁹ *Utah v. Strieff*, 136 S. Ct. 2056, 2059 (2016).

¹⁶⁰ *Id.* at 2063 ("In stopping Strieff, Officer Fackrell made two good-faith mistakes.").

¹⁶¹ *Id.* at 2072 (Kagan, J., dissenting).

¹⁶² *Id.* at 2063; *id.* at 2069 (Sotomayor, J., dissenting)

¹⁶³ *Id.* at 2069 (Sotomayor, J., dissenting) ("The New York City Police Department long trained officers to, in the words of a District Judge, 'stop and question first, develop reasonable suspicion later.'" (quoting *Ligon v. New York*, 925 F. Supp. 2d 478, 538 (S.D.N.Y. 2013))).

¹⁶⁴ *United States v. Mendenhall*, 446 U.S. 544, 555, 560 (1980) (finding that Ms. Mendenhall was not seized for Fourth Amendment purposes, and that the actions of law enforcement complied with Fourth Amendment standards).

to take part in a strip search that demonstrated the Court's deep and abiding faith in the character of the police.

Finding that "nothing in the record suggests that . . . [Ms. Mendenhall] had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way," Justice Stewart and then-Justice Rehnquist assumed that a "reasonable person" could trust that the officers would respect her decision to invoke her Fourth Amendment rights.¹⁶⁵ In fact, as the dissent noted, the agents conceded that Ms. Mendenhall would have been forcibly restrained if she had refused their "request."¹⁶⁶ If one acknowledges a world in which police officers ignore the invocation of constitutional rights, the finding that Ms. Mendenhall "freely and voluntarily" consented to her detention and search becomes dubious at best. The majority's faith in police officers' moral character and its presumption that officers dutifully follow the constitutional rules established by the Court is thus an unspoken but critical component of the Court's decisions allowing for the voluntary waiver of constitutional rights. If one were to acknowledge that suspects reasonably expect that their invocation of constitutional rights will be ignored, then waivers of those rights can hardly be deemed "voluntary."¹⁶⁷

In addition to assuming that the police conscientiously follow the Court's constitutional mandates, the Court also maintains its faith in the capacity of law enforcement to follow the complex doctrines the Court has established. In her article, *The Judicial Presumption of Police Expertise*, Anna Lvovsky describes how both lower and appellate courts have embraced the idea that police have specialized expertise and knowledge that deserve the courts' deference and respect.¹⁶⁸ As Lvovsky explains, the idea that the police possess unique experiences and training that give them superior abilities to detect and appropriately respond to criminal activity (and danger) has shaped the Fourth Amendment doctrines that ostensibly regu-

¹⁶⁵ See *id.* at 554–55 (defining Fourth Amendment seizure from the view of a "reasonable person" with the "reasonable person" as the one seized).

¹⁶⁶ *Id.* at 576 (White, J., dissenting) ("Indeed, the only testimony concerning what occurred between Agent Anderson's 'request' and Ms. Mendenhall's arrival at the DEA office is the agent's testimony that if Ms. Mendenhall had wanted to leave at that point she would have been forcibly restrained.")

¹⁶⁷ See, e.g., *Davis v. United States*, 512 U.S. 452, 472–73 (1994) (Souter, J., concurring in the judgment) ("When a suspect understands his (expressed) wishes to have been ignored . . . in contravention of the 'rights' just read to him by his interrogator, he may well see further objection as futile and confession (true or not) as the only way to end his interrogation.")

¹⁶⁸ See Lvovsky, *supra* note 10 at 1998–99 (outlining the growing respect afforded to the police by the judiciary).

late police behavior.¹⁶⁹ The Court's faith in the police's exceptional competence, however, is not limited to their crime fighting skills. Embedded implicitly in its decisions is the Court's presumption that the police can learn and apply the complex legal doctrines that it outlines in its cases.¹⁷⁰ Thus, the Court assumes that officers on the beat can appreciate not only the distinctions between "reasonable suspicion" and "probable cause" but also how those distinctions affect their authority to stop, detain, and arrest.

The Court's faith in prosecutors, reflected in cases like *Brady v. Maryland* in 1963 and *Kastigar v. United States* in 1972 closely mirrors the assumptions it made about police officers in cases like *Wardlow*: (1) they do not commit misconduct; (2) they diligently follow Court imposed constitutional limits; and (3) they are capable of applying complicated legal rules to their everyday practice.

Although *Brady* and its progeny outlined prosecutors' constitutional obligation to turn over exculpatory evidence that is "material," those decisions presumed that, once informed of their discovery obligations, prosecutors would diligently seek to satisfy them.¹⁷¹ Although evidence suggests that *Brady* violations are "more than episodic" and that "scores of innocent people have been convicted by those violations," there is no way to know how many such failures are due to prosecutors consciously disregarding their ethical responsibilities.¹⁷² What is clear is that because the Court had sufficient faith that prosecutors would transcend their adversarial role if told to do so, it created no mechanism to ensure compliance with the Court's requirements and left it to the prosecutors themselves to decide whether evidence was both material and exculpatory.¹⁷³

¹⁶⁹ *Id.* at 2025 ("Tracking closely with the rise of the police expert witness, judges also began invoking the police's criminological insights as grounds for deference under the Fourth Amendment.").

¹⁷⁰ Occasionally, the Court makes the presumption explicitly. *See, e.g., Davis*, 564 U.S. at 241 ("Responsible law enforcement officers will take care to learn 'what is required of them' under Fourth Amendment precedent and will conform their conduct to these rules." (citation omitted)).

¹⁷¹ *See supra* notes 111–142 and accompanying text.

¹⁷² Barry Scheck, *Four Reforms for the Twenty-First Century*, 96 JUDICATURE 323, 330 (2013); *see Kuo & Taylor, supra* note 141, at 705 (suggesting that some *Brady* failures "arise from the prosecution's deliberate decision to withhold information from the defense" and citing several notable examples).

¹⁷³ *See United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985) ("The Court has recognized, however, that the prosecutor's role transcends that of an adversary: he 'is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)) (citing *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963))); Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 533 (2007) ("*Brady* depends on the integrity, good faith, and professionalism of the prosecutor for its effectiveness.").

The Court's belief that prosecutors would diligently follow Court imposed constitutional limits and subvert their desire to win in favor of their loyalty to truth and the law was similarly evidenced in *Kastigar*. As discussed above, *Kastigar* requires that prosecutors prove to the court that the evidence they seek to use is not the product of the defendant's coerced testimony.¹⁷⁴ In practice, this requirement offers defendants little solace. As the dissent in *Kastigar* noted, because defendants are in a poor position to demonstrate that the prosecutor's evidence was not acquired independently, the government will likely have little difficulty satisfying its burden.¹⁷⁵ Justice Marshall explained, "The good faith of the prosecuting authorities is thus the sole safeguard of the witness' rights."¹⁷⁶

Brady and *Kastigar* also reflect the Court's belief that prosecutors are not only willing to follow the Court's constitutional directives, but they are also capable of doing so. There is a very real danger that prosecutors, anxious to ensure that guilty defendants do not go free and incentivized professionally to obtain "wins," will persuade "themselves that a satisfactory reason justifies not providing the exculpatory evidence, such as 'the defense must have discovered it themselves,' or 'it is just an aberration and does not really undercut the prosecution's case.'"¹⁷⁷ Similarly, as the dissent noted in *Kastigar*, prosecutors may not be aware that fellow prosecutors or investigators who have worked on the case have either deliberately or, perhaps, inadvertently made use of the compelled testimony.¹⁷⁸

B. Faith in Institutions

While the Court's decisions appear to place great faith in the moral character of police and prosecutors, there may be an alternative explanation for its willingness to trust law enforcement to do the right thing—the Court's faith in the institutions in which those actors work. In *Hudson v. Michigan*, the Supreme Court rejected a categorical rule excluding evidence obtained in violation of its "knock and announce" rule stating, "[a]s long ago as 1980 we felt it proper to 'assume' that unlawful police behavior

¹⁷⁴ See *supra* notes 94–108 and accompanying text.

¹⁷⁵ *Kastigar v. United States*, 406 U.S. 441, 469 (1972) (Marshall, J., dissenting).

¹⁷⁶ *Id.*

¹⁷⁷ Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 34 (2001); see also Bibas, *supra* note 140, at 2471 (discussing the professional pressures on prosecutors); Burke, *supra* note 141, at 1590–91 (describing how cognitive bias can affect prosecutorial discretion).

¹⁷⁸ *Kastigar*, 406 U.S. at 469 (Marshall, J., dissenting).

would ‘be dealt with appropriately’ by the authorities.”¹⁷⁹ Similarly, despite a “flagrantly illegal search,” the Court, in *United States v. Payner*, reinstated the defendant’s conviction explaining that lower courts should not “assume that similar lawless conduct, if brought to the attention of responsible officials, would not be dealt with appropriately.”¹⁸⁰ Thus, it may be that the Court’s faith is not in the individual moral strength of police and prosecutors, but rather in the institutional capacity of administrative agencies to effectively regulate the behavior of their members.

Just as the *Hudson* Court relied on “internal police discipline” to ensure that officers would “take the constitutional rights of citizens seriously,” the Court has dismissed concerns about prosecutorial misconduct by assuming that prosecutor offices would adopt policies and disciplinary procedures to regulate themselves.¹⁸¹ In 2017, in *Turner v. United States*, the Court was reassured that prosecutors who had failed to turn over exculpatory evidence to the defense had adopted a new “generous policy of discovery” to ensure that they would meet their future *Brady* obligations.¹⁸² Similarly, in 1983, in *United States v. Hasting*, the Court admonished the Seventh Circuit Court of Appeals for reversing a conviction when the prosecutor had commented at trial on the defendants’ failure to testify, suggesting, instead, that the court should have relied on the Department of Justice’s internal disciplinary procedures to deal with the problem.¹⁸³

¹⁷⁹ *Hudson v. Michigan*, 547 U.S. 586, 598–99 (2006) (quoting *United States v. Payner*, 447 U.S. 727, 733 n.5 (1980)) (internal quotations and lack of irony omitted).

¹⁸⁰ *Payner*, 447 U.S. at 733 n.5; see also Eric J. Miller, *Detective Fiction: Race, Authority, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 213, 219–20 (2012) (explaining that the Court presumes that “superior officers transmit respect for the Constitution and fourth-amendment norms to their inferior officers, and punish failures to abide by the requirements (including the constitutional requirements) of police professionalism” (footnote omitted)).

¹⁸¹ See *Hudson*, 547 U.S. at 598–99 (implying faith in a more professionalized police force). Although the Court has generally assumed that existing administrative controls are sufficient to effectively regulate prosecutors, some scholars have proposed reforms to increase internal oversight and diminish the risk that prosecutors will commit misconduct or abuse their considerable discretion. See generally Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009) (proposing a model that spreads certain functions of a prosecutor office among different types of prosecutors); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009) (promoting the use of internal business-like incentives to change the culture of prosecutors’ offices).

¹⁸² *Turner v. United States*, 137 S. Ct. 1885, 1893 (2017) (“[T]he Government assured the Court at oral argument that subsequent to petitioners’ trial, it ha[d] adopted a generous policy of discovery in criminal cases under which it discloses any information that a defendant might wish to use.”).

¹⁸³ *United States v. Hasting*, 461 U.S. 499, 506 n.5 (1983) (suggesting the circuit court “could have dealt with the offending argument . . . by asking the Department of Justice to initiate a disciplinary proceeding against [the prosecutor]” (citation omitted)).

In addition to relying on prosecutor offices to discipline attorneys who commit misconduct, the Court has cited the ethical demands of the bar as further reason to trust prosecutors to follow the law.¹⁸⁴ In 1976, in *Imbler v. Pachtman*, the Court explained that the public need not fear prosecutorial misconduct because “a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.”¹⁸⁵ In 2011, in *Connick v. Thompson*, the Court went so far as to find that a District Attorney was excused from providing the attorneys who worked for him “formal in-house training about how to obey the law” because he was “entitled to rely on prosecutors’ professional training and ethical obligations . . . to prevent . . . constitutional violations.”¹⁸⁶ Unfortunately, the wisdom of the Court’s reliance on the bar to ensure that prosecutors heed their ethical (and constitutionally mandated) duties may be more dubious than the case law suggests. In fact, multiple studies suggest that prosecutors are rarely disciplined by the bar *even after* appellate courts identified “prosecutorial misconduct [that] led to dismissals, sentence reductions, or reversals”¹⁸⁷

To some extent, the exclusionary rule, one of the most prominent remedies crafted by the Court to regulate police and prosecutors, is premised on the idea that law enforcement institutions will penalize members who hamper successful prosecutions by failing to follow the Court’s constitutional

¹⁸⁴ See *Connick v. Thompson*, 563 U.S. 51, 66 (2011) (finding that the District Attorney was entitled to presume that his prosecutors would understand and fulfill their *Brady* obligations, because “[a]n attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment”); Lesley E. Williams, *The Civil Regulation of Prosecutors*, 67 *FORDHAM L. REV.* 3441, 3441 (1999) (“The availability of discipline by professional associations in cases of prosecutorial misconduct encouraged the Supreme Court to grant prosecutors absolute immunity for trial-related activities under § 1983.”).

¹⁸⁵ *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976).

¹⁸⁶ *Connick*, 563 U.S. at 66–67.

¹⁸⁷ Shima Baradaran Baughman, *Subconstitutional Checks*, 92 *NOTRE DAME L. REV.* 1071, 1097 (2017) (noting that “over 2000 cases from 1970 to 2003 where prosecutorial misconduct led to dismissals, sentence reductions, or reversals, prosecutors were disciplined in only forty-four of those cases”); see also Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors’ Conflicts of Interest*, 58 *B.C. L. REV.* 463, 485 (2017) (“Prosecutors are rarely disciplined for anything”); David Keenan, Deborah Jane Cooper, David Lebowitz & Tamar Lerer, *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, 220 (2011), <http://yalelawjournal.org/forum/the-myth-of-prosecutorial-accountability-after-connick-v-thompson-why-existing-professional-responsibility-measures-cannot-protect-against-prosecutorial-misconduct> [<https://perma.cc/9KLW-HJC4>] (describing multiple studies in which the bar failed to discipline prosecutors after their misconduct had been identified by the courts).

rules.¹⁸⁸ The effectiveness of the exclusionary rule as a deterrent depends on a number of assumptions.¹⁸⁹ Chief among them is the notion that law enforcement actors are personally invested in the success of the criminal case—either out of a desire for justice or because of their own personal interests.¹⁹⁰ Yet, there are reasons to question to what extent police departments and prosecutor offices actually incentivize their employees to follow their own internal policies and the law.¹⁹¹

As former law enforcement officer and legal scholar Seth Stoughton has described, “officers are under no formal pressure to concern themselves with convictions, and there is informal discouragement of such concern.”¹⁹² Although often anecdotal, there is considerable support for the proposition that officers are encouraged to focus not on the admissibility of evidence but on making arrests.¹⁹³ As one officer explained, “[My supervisor] really likes arrests, and I give them to him . . . I don’t give a shit if they [the state’s attorney’s office] won’t take it. That’s their problem.”¹⁹⁴ Similarly, while prosecutors ostensibly are governed by not only internal policies but also the ethical rules that govern all attorneys, “few observers of [the] system have confidence that [internal regulation] serves as an adequate mechanism for ensuring prosecutorial accountability.”¹⁹⁵

¹⁸⁸ See *Elkins v. United States*, 364 U.S. 206, 217 (1960) (“The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.”).

¹⁸⁹ See, e.g., Eugene R. Milhizer, *Debunking Five Great Myths About the Fourth Amendment Exclusionary Rule*, 211 MIL. L. REV. 211, 229–30 (2012) (offering seven distinct reasons why the exclusionary rule might not deter police misconduct).

¹⁹⁰ See, e.g., George M. Dery III, *Allowing “Lawless Police Conduct” in Order to Forbid “Lawless Civilian Conduct”*: *The Court Further Erodes the Exclusionary Rule in Utah v. Strieff*, 44 HASTINGS CONST. L.Q. 393, 428 (2017) (“When the exclusionary rule’s costs are visited upon the individual officer, he or she will suffer in a personal and pragmatic way. Lost cases due to exclusion of evidence, particularly if they continue to occur, could cause individual upset, loss of professional reputation, and even damage to career prospects. Patterns of failure reflect poorly on leadership, which feel the pressure to discipline or at the very least educate.”).

¹⁹¹ See, e.g., Fred Klein, *A View from Inside the Ropes: A Prosecutor’s Viewpoint on Disclosing Exculpatory Evidence*, 38 HOFSTRA L. REV. 867, 876 (2010) (“I would not be the first to suggest that the failure to disclose exculpatory information results from an office culture that rewards convictions and breeds an attitude that the prosecution is engaged in a battle against the guilty, so the ends justify the means.”).

¹⁹² Stoughton, *supra* note 10, at 877.

¹⁹³ *Id.* at 877–82 (describing officer indifference to conviction rates and the failure of police agencies to discipline officers whose errors prevent convictions).

¹⁹⁴ PETER MOSKOS, *COP IN THE HOOD: MY YEAR POLICING BALTIMORE’S EASTERN DISTRICT 44* (2008).

¹⁹⁵ Yaroshefsky, *supra* note 132, at 289; see Bibas, *supra* note 181, at 976 (“One empirical survey found that state bar authorities had reviewed only fourteen cases in six years in which prosecutors had suppressed exculpatory or impeachment evidence.”); Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685, 722–23 (2006) (“The absence of signifi-

There remains, however, a third possible explanation for the faith in police and prosecutors that has shaped the Court's criminal procedure jurisprudence. It may be that the Court relies, not on the moral character of police and prosecutors nor on the restraints imposed by the institutions in which they work, but rather on the judiciary's ability to effectively deter misconduct and ensure that constitutional rules are followed.

C. Faith in the Courts

The Court may not believe that police and prosecutors are especially trustworthy or that the institutions within which they work are particularly effective at restraining their behavior. Instead, the Court may have faith in the judicial system to deter misconduct and identify those instances in which police or prosecutors break constitutional rules. Arguably, the three doctrinal criminal procedure cases that played pivotal roles in the Freddie Gray trials—*Brady*, *Kastigar*, and *Wardlow*—assumed, not that all police and prosecutors would diligently follow the constitutional rules dictated by the Court, but rather that the courts could effectively root out and remedy those instances in which those rules were violated.

In *Kastigar*, the Court did not merely identify the State's obligation to refrain from using the defendant's compelled statement and evidence derived from the compelled statement.¹⁹⁶ It also placed on the prosecution the "heavy burden" of proving to the trial court that "all of the evidence it propose[d] to use was derived from legitimate independent sources."¹⁹⁷ At first blush, *Kastigar* might appear skeptical of prosecutors—adopting a "trust but verify" approach rather than just assuming that prosecutors would voluntarily refrain from using "fruit" of the compelled testimony against the defendant. This view, however, is predicated on the assumption that trial courts can ferret out those instances when the compelled testimony has bled into the defendant's trial.

Although evidence developed prior to the compelled testimony is obviously independent, trial courts face a difficult task in identifying whether

cant discipline of prosecutors is particularly noteworthy in cases in which prosecutors intentionally suppress evidence that leads to a reversal of a defendant's conviction and a stinging rebuke by a court of the prosecutor's misconduct. Although one would realistically expect disciplinary agencies to proceed aggressively against such unscrupulous conduct, such is not the case."); Rosen, *supra* note 132, at 697 ("The results of this research demonstrate that despite the universal adoption by the states of Disciplinary Rules prohibiting prosecutorial suppression of exculpatory evidence and falsification of evidence, and despite numerous reported cases showing violations of these rules, disciplinary charges have been brought infrequently and meaningful sanctions rarely applied.") (footnotes omitted)).

¹⁹⁶ *Kastigar*, 406 U.S. at 460.

¹⁹⁷ *Id.* at 461–62.

subsequently discovered evidence is tainted. Despite the *Kastigar* majority's claim that prosecutors bear a "heavy burden" to prove proffered evidence was developed independently, it is relatively easy for a prosecutor to manufacture innocent accounts for how evidence was discovered and quite challenging for trial courts to see through such explanations.¹⁹⁸ An "informal and undetected exchange of information" is almost impossible for a defendant to uncover.¹⁹⁹ Additionally, as Justice Marshall noted in his dissent:

[T]he paths of information through the investigative bureaucracy may well be long and winding, and even a prosecutor acting in the best of faith cannot be certain that somewhere in the depths of his investigative apparatus, often including hundreds of employees, there was not some prohibited use of the compelled testimony.²⁰⁰

Although the Court may have faith in trial courts' ability to discern fact from fiction, evidence suggests that judges are either "unable to distinguish carefully crafted lies from truth or . . . they err on the side of punishing a culpable defendant, even if the police may have lied."²⁰¹ Thus, the *Kastigar* majority might have *believed* that trial courts provide "very substantial protection."²⁰² But, in contrast to the Court's belief, the reality for defendants is that they are confronted with a doctrine that "leave[s] the witness 'dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities.'"²⁰³

¹⁹⁸ See *id.* at 461–62 (declaring the responsibility of the prosecutor); *id.* at 469 (Marshall, J., dissenting) ("A witness who suspects that his compelled testimony was used to develop a lead will be hard pressed indeed to ferret out the evidence necessary to prove it. And of course it is no answer to say he need not prove it, for though the Court puts the burden of proof on the government, the government will have no difficulty in meeting its burden by mere assertion if the witness produces no contrary evidence.").

¹⁹⁹ See *id.* at 464 (Douglas, J., dissenting) (explaining that informal exchanges of information are less of a concern when the compelled testimony occurs in a separate jurisdiction from the prosecuting one).

²⁰⁰ *Id.* at 469 (Marshall, J., dissenting).

²⁰¹ Melanie D. Wilson, *Improbable Cause: A Case for Judging Police by a More Majestic Standard*, 15 BERKELEY J. CRIM. L. 259, 263–64 (2010) (describing the results of a two-year study of suppression hearings in the District of Kansas); see Laurie L. Levenson, *Unnerving the Judges: Judicial Responsibility for the Rampart Scandal*, 34 LOY. L.A. L. REV. 787, 790 (2001) (describing how "judges unwittingly participate in police perjury and misconduct by not critically examining police credibility" and that "judges appear to . . . ignor[e] telltale signs that police officers fabricate testimony to obtain convictions").

²⁰² *Kastigar*, 406 U.S. at 461.

²⁰³ *Id.* at 469 (Marshall, J., dissenting) (quoting *id.* at 460 (majority opinion)).

Much like *Kastigar*, the *Wardlow* decision was also built on the idea that trial courts act as a backstop to ensure that evidence that is acquired unconstitutionally is filtered out before trial. In addition to demonstrating the Court's belief that honest citizens need not fear the police, *Wardlow* operated on the presumption that courts could review the circumstances of the arrest, which are typically related to the court by the arresting officer, and make an accurate determination as to whether or not the police had the legal authority to detain the suspect.²⁰⁴ Yet, a number of studies raise doubts as to whether such hearings effectively deter police misconduct.²⁰⁵ First, there is scant evidence that the requirement that officers testify under oath inhibits the police from inventing facts which support either probable cause or reasonable suspicion.²⁰⁶ Second, as with *Kastigar*, there is little evidence that trial courts are either able or willing to identify instances when officers lie.²⁰⁷ Finally, even if trial courts were to disbelieve officer testimony, the exclusion of evidence may not deter future misconduct.²⁰⁸

Unlike *Wardlow* and *Kastigar*, *Brady* does not rely significantly on trial courts to help ensure that its constitutional dictates are followed. Arguably, however, the *Brady* Court's belief that prosecutors would voluntarily turn over evidence that might hurt their ability to obtain a conviction was

²⁰⁴ This presumption is also the foundation of the exclusionary rule and decisions like *Mapp v. Ohio*, 367 U.S. 643 (1961), and *Miranda v. Arizona*, 384 U.S. 436 (1966), which rely on trial courts to hold hearings to determine whether evidence has been obtained unconstitutionally.

²⁰⁵ Morgan Cloud, *Judges, "Testifying," and the Constitution*, 69 S. CAL. L. REV. 1341, 1355–56 (1996) (describing how "[a] number of empirical studies . . . suggest that perjured testimony by police officers is distressingly common" and "police officers commit perjury most often to avoid suppression of evidence and to fabricate probable cause, knowing that judges 'may wink' at obvious police perjury in order to admit incriminating evidence" (footnotes omitted)); see Donald A. Dripps, *Police, Plus Perjury, Equals Polygraphy*, 86 J. CRIM. L. & CRIMINOLOGY 693, 698 (1996) (describing several studies concluding that the perjury by police officers was widespread).

²⁰⁶ See Dripps, *supra* note 205, at 693 ("Police perjury has been called 'pervasive,' 'an integral feature of urban police work,' and the 'demon in the criminal process.'" (footnotes omitted)); Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1050 (1987) ("Sixteen of twenty-one responding officers (seventy-six percent) . . . agreed that the police do 'shade the facts a little (or a lot) to establish probable cause when there may not have been probable cause in fact.');" Irving Younger, *The Perjury Routine*, THE NATION, May 8, 1967, at 596 ("[E]ven if his lies are exposed in the courtroom, the policeman is as likely to be indicted for perjury by his co-worker, the prosecutor, as he is to be struck down by thunderbolts from an avenging heaven."). A famous study by Sarah Barlow uncovered a substantial increase in officer testimony that drugs spontaneously "dropped" from defendants' pockets after the Supreme Court ruled in *Mapp v. Ohio* that unconstitutionally obtained evidence had to be excluded from trial. Sarah Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960–62*, 4 CRIM. L. BULL. 549, 549 (1968).

²⁰⁷ See Cloud, *supra* note 205, at 1356 (indicating that "judges may 'wink' at obvious police perjury in order to admit incriminating evidence" (internal quotations omitted) (footnote omitted)).

²⁰⁸ See *supra* notes 188–195 and accompanying text.

buttressed by its expectation that appellate review would help keep prosecutors honest. Unfortunately, the Court's decisions dictating the standard for appellate review of alleged *Brady* violations have undermined, rather than strengthened, the incentive for prosecutors to fulfill their *Brady* obligations. The Court in *Bagley* held that defendants seeking to reverse their convictions must demonstrate that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."²⁰⁹ By obligating defendants to demonstrate, not only that the prosecutor had failed to turn over evidence favorable to the accused, but that the production of such evidence was likely to have affected the trial, the Court greatly reduced the likelihood that appellate review would effectively deter prosecutors from ignoring their *Brady* obligations.

D. Faith in Overlapping Sources of Protection

It is possible that the Court's faith in police and prosecutors is derived from all three sources—the character of the actors who operate the criminal justice system, the institutions within which they work, and the judiciary's ability to supervise and discipline individuals and organizations that fail to follow the Court's criminal procedure directives. Yet the very fact that there exist multiple justifications for the Court's presumption that police and prosecutors can be trusted may, perversely, undermine the legitimacy of that belief.

A number of scholars have highlighted the danger that overlapping sources for ensuring accountability can result in a diffusion of responsibility that invites abuse.²¹⁰ Thus, although it is possible that institutional controls such as bar disciplinary committees, police internal review boards, and administrative supervision might complement judicial oversight over rogue criminal justice actors, it seems equally likely that the multiple justifications for trusting police and prosecutors increases, rather than diminishes, the probability that police and prosecutors are ignoring their constitutional obligations. Indeed, the presumption that, except for "a few bad apples," the

²⁰⁹ *United States v. Bagley*, 473 U.S. 667, 682 (1985); see *supra* notes 135–138 and accompanying text.

²¹⁰ *E.g.*, Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 91 (1995) ("The lack of enforcement may be traced in part to the diffusion of regulatory authority. Standards of prosecutorial conduct are underenforced precisely because each of the various disciplinary authorities can justify relying on others to carry the load."); Bidish Sarma, *Using Deterrence Theory to Promote Prosecutorial Accountability*, 21 LEWIS & CLARK L. REV. 573, 619 (2017) (describing how "the diffusion [of responsibility] produces inaction and finger-pointing"); Yaroshefsky, *supra* note 132, at 292 ("The belief in judicial oversight, like the faith in the efficacy of internal controls, results in a lack of accountability because disciplinary committees defer to courts and prosecutors' systems of regulation. . . . [Moreover,] the lack of coordination between these institutions diminishes their responsiveness in taking necessary action.").

majority of prosecutors and police are of good moral character may explain the relative paucity of prosecutorial disciplinary proceedings and the perceived failure of trial courts to regulate bad policing.²¹¹

III. IMPLICATIONS OF THE SUPREME COURT'S MISPLACED FAITH

If neither the individual nor collective explanations for trusting police and prosecutors justify the “faith” embedded in the Supreme Court’s criminal procedure decisions, then the implications of perpetuating these “Doctrines of Faith” are significant for the criminal justice system. Part III of this Article explores three questions.²¹² First, if the Court’s faith in police and prosecutors is misplaced, are the Court’s decisions that rely on those assumptions particularly vulnerable to narrowing by lower courts?²¹³ Second, what do these cases suggest about the value of diverse viewpoints on the federal bench?²¹⁴ Finally, what does the Court’s reliance on the good intentions of police and prosecutors mean for the viability of court-led regulation of police and prosecutors?²¹⁵

A. *Questioning the Court’s Precedents and Their Application*

On a cold Boston evening on December 18, 2011, two police officers observed Jimmy Warren, a black male, walking with an acquaintance near a park.²¹⁶ Believing that Warren and his companion fit the very general description of two burglary suspects, the two officers approached to investigate, but before the officers could say more than, “Hey fellas,” Warren, much like Freddie Gray, ran.²¹⁷ The officers pursued Mr. Warren, and, following a breathless foot chase, apprehended him after a brief struggle.²¹⁸ The officers recovered a gun on the property not far from where Mr. Warren was captured.²¹⁹ Prior to trial, Mr. Warren moved to suppress the firearm

²¹¹ See Cloud, *supra* note 205, at 1356 (indicating that police believe they can get away with perjury); Green, *supra* note 210, at 89 (describing the “dearth of reported disciplinary proceedings”).

²¹² See *infra* notes 213–282 and accompanying text.

²¹³ See *infra* notes 216–253 and accompanying text.

²¹⁴ See *infra* notes 254–273 and accompanying text.

²¹⁵ See *infra* notes 274–282 and accompanying text.

²¹⁶ Commonwealth v. Warren, 58 N.E.3d 333, 336 (Mass. 2016).

²¹⁷ *Id.* at 338, 339 (recapping the interactions between police and the supposed suspects, characterizing the description of the burglary suspects as “vague” and “bare-bones” and suggesting that it “contribute[d] nothing to the officers’ ability to distinguish the defendant from any other black male wearing dark clothes and a ‘hoodie’ in” the Roxbury neighborhood of Boston (citation omitted)).

²¹⁸ See *id.* at 337 (providing a minute-by-minute account of the arrest).

²¹⁹ *Id.* at 337–38.

and his statements arguing that the police lacked reasonable suspicion for the stop.²²⁰ The motion was denied and Mr. Warren was convicted of unlawful possession of a firearm after a short bench trial.²²¹

The trial court's refusal to suppress the gun was unsurprising. Mirroring the Supreme Court's reasoning in its 2000 decision in *Illinois v. Wardlow*, Massachusetts state law at the time described "evasive" behavior in a "high crime area" as relevant factors in evaluating reasonable suspicion.²²² The Massachusetts Supreme Judicial Court, however, chose to examine the factual assumptions that lay at the core of the *Wardlow* reasoning.²²³ Citing a Boston Police Department report that documented a pattern of racial profiling of black males in the city and statistics that black men were disproportionately targeted for repeat police encounters, the court explained that, in light of current police practices, flight was "not necessarily probative of a suspect's state of mind or consciousness of guilt."²²⁴ Instead the court reversed the trial court's finding of reasonable suspicion and stated that "the finding that black males in Boston are disproportionately and repeatedly targeted for [Field Interrogation and Observation] encounters suggests a reason for flight totally unrelated to consciousness of guilt."²²⁵

The 2016 *Warren* decision involved state law but notably its reasoning could easily be applied to *Wardlow* itself. The Massachusetts Supreme Judicial Court did not eliminate flight as a factor in its reasonable suspicion analysis.²²⁶ Instead, the court recognized that the existing legal framework was open to incorporating new empirical evidence about how the police and

²²⁰ *Id.* at 335–36.

²²¹ *Id.*

²²² See *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (incorporating flight in a "high crime area" as a relevant factor for a stop based on reasonable suspicion); *Commonwealth v. Depina*, 922 N.E.2d 778, 786 (Mass. 2010) (finding that "the defendant's obvious effort to avoid encountering the police" supported a finding of reasonable suspicion); *Commonwealth v. Stoute*, 665 N.E.2d 93, 98 (Mass. 1996) (finding that the defendant's "accelerated pace as he drew away from the officers" and the fact that the area had a "very high" rate of crime were factors in determining reasonable suspicion); *Commonwealth v. Doocey*, 778 N.E.2d 1023, 1028, 1029 (Mass. App. Ct. 2002) (factoring "the actions of the suspect upon the initial police encounter, including evasive or unusual behavior" as well as whether the location was a "high crime area" in its determination of reasonable suspicion). Although the Massachusetts precedents on reasonable suspicion reflect the same language and reasoning as *Wardlow*, neither those cases, nor the *Warren* decision, cite *Wardlow* directly.

²²³ See *Warren*, 58 N.E.3d at 341–42 (discussing the assumptions about flight).

²²⁴ *Id.* at 342.

²²⁵ *Id.* at 342–43.

²²⁶ *Id.* at 342.

the public interact.²²⁷ Although some trial courts may mistakenly assume that *Wardlow* created a simple test requiring only a finding of flight in a high crime area to establish reasonable suspicion, in fact, the decision did not set forth such a rigid calculus. As a result, both state and federal courts are free to incorporate a greater skepticism of the behavior of the police into their own cases evaluating reasonable suspicion. Taking their cue from Massachusetts, such courts would do well to consider recent reports detailing widespread police misconduct such as the Department of Justice's investigation of the Ferguson Police Department and a similar report detailing a pattern or practice of policing in Baltimore that violated the Constitution and federal law.²²⁸

While the framework for the *Wardlow* decision allows lower courts to incorporate a less trusting view of the police into their analysis, the Supreme Court's 1968 decision in *Brady v. Maryland*, appears less susceptible to reform. Even if courts were to adopt a skeptical view of prosecutors, their ability to ensure that exculpatory evidence is turned over remains limited.²²⁹ Yet while the courts may struggle to identify *Brady* violations, they can do more to encourage prosecutors to fully satisfy their *Brady* obligations.

The problem of prosecutors failing to turn over exculpatory evidence was exacerbated by the Court's decision to limit the obligation to evidence that is deemed to be "material."²³⁰ Lower courts, however, may have to shoulder some of the blame for the degree to which the materiality standard has enticed prosecutors to withhold potentially exculpatory evidence. In his dissent decrying the refusal of the Ninth Circuit Court of Appeals to overturn a defendant's conviction in spite of the prosecution's failure to disclose powerful impeachment evidence for a key State witness, Chief Judge Alex Kozinski wrote, "By raising the materiality bar impossibly high, the panel invites prosecutors to avert their gaze from exculpatory evidence, secure in the belief that, if it turns up after the defendant has been convicted, judges

²²⁷ See *id.* ("Given this reality for black males in the city of Boston, a judge should, in appropriate cases, consider the report's findings in weighing flight as a factor in the reasonable suspicion calculus.")

²²⁸ See BALTIMORE DOJ REPORT, *supra* note 71, at 28–29 (describing unwarranted stops by police); CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 15–24 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<https://perma.cc/ERN8-ZKY5>] (finding that pattern of unwarranted stops and arrests erodes public trust in the police).

²²⁹ Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2088 (2016) ("[I]nformation gaps contribute to judges' and defense attorneys' inability to detect *Brady* problems, because they will often not know about exculpatory or impeaching information relevant to the case at hand even when such information has been disclosed or revealed in some other setting.")

²³⁰ See *supra* notes 122–142 and accompanying text.

will dismiss the *Brady* violation as immaterial.”²³¹ If lower court judges instead were to shift their calculus and require a stronger showing that the failure to disclose could not have impacted the outcome of the trial, then they might send the message Judge Kozinski hoped to convey: “Betray *Brady* . . . and you will lose your ill-gotten conviction.”²³²

In addition to increasing the required confidence level for immateriality, trial courts, reluctant to simply trust prosecutors to “do the right thing,” might consider an innovative proposal by Professor Cynthia E. Jones to provide juries with an adverse inference instruction when prosecutors fail to meet their *Brady* obligations.²³³

Generally, when *Brady* violations are discovered before or during the course of trial, courts order disclosure, and, if necessary, grant the defense a continuance.²³⁴ This remedy, however, does little to counter the powerful incentives prosecutors face to favor nondisclosure in close cases. Some scholars have suggested that judges should simply dismiss cases whenever a *Brady* violation occurs.²³⁵ Courts, however, have largely resisted such “drastic” sanctions and appellate courts have reversed some dismissals suggesting that *Brady* violations should, whenever possible, be remedied with “less severe measures.”²³⁶ It may simply be unrealistic to expect that courts would regularly declare a mistrial when prosecutors fail to meet their discovery obligations. Such a decision would surely test the resolve of judges,

²³¹ *United States v. Olsen*, 737 F.3d 625, 633 (9th Cir. 2013) (Kozinski, J., dissenting).

²³² *Id.*

²³³ See Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 451 (2010) (proposing the following jury instruction, “Ladies and Gentlemen, [u]nder the United States Constitution, in order for the defendant to receive a fair trial, the government is required to inform the defense of any information known to the government that tends to suggest the defendant might not have committed the crime(s) charged as well as information that casts doubt on the credibility of the government’s own evidence. In this case, the government intentionally withheld such evidence from the defense. Specifically, the government failed to inform the defense that []. In evaluating the merits of this case, you can decide what weight, if any, to give to the government’s misconduct. The government’s actions, standing alone, or in combination with other facts presented in this case, may create a reasonable doubt in your mind about the defendant’s guilt.”) (alterations in original).

²³⁴ See, e.g., *id.* at 470–71 (offering an example of the minimal impact of the current remedies of a *Brady* violation on the prosecution).

²³⁵ See, e.g., Michael D. Cicchini, *Prosecutorial Misconduct at Trial: A New Perspective Rooted in Confrontation Clause Jurisprudence*, 37 SETON HALL L. REV. 335, 336 (2007) (“[U]pon a finding of prosecutorial misconduct . . . [a] mistrial should be granted without any judicial determination of whether the defendant would be found guilty absent the misconduct.”).

²³⁶ See, e.g., *People v. Kelly*, 467 N.E.2d 498, 501 (N.Y. 1984) (“Although the choice of ‘appropriate’ action is committed to the sound discretion of the trial court, as a general matter the drastic remedy of dismissal should not be invoked where less severe measures can rectify the harm done by the loss of evidence.”); Jones, *supra* note 233, at 444 (explaining that “dismissal is a ‘disfavored’ or ‘drastic’ sanction that is rarely imposed” (footnote omitted)).

who would be forced to decide whether to dismiss without prejudice, which would waste judicial resources and could disadvantage the defendant, or to dismiss with prejudice and perhaps allow a guilty party to go free. An adverse inference charge, however, would allow judges concerned about prosecutors' failure to satisfy their *Brady* obligations to increase the pressure on prosecutors to disclose potential exculpatory information without requiring judges to expose themselves to reversal or to shoulder responsibility for an allegedly guilty party escaping justice. Moreover, an instruction hampering prosecutors' ability to obtain a conviction at trial may be a greater incentive to fulfill their *Brady* obligations than the threat of a reversal from an appellate court years later.²³⁷

Finally, courts can do more to determine whether the Supreme Court's faith that prosecutors will reliably disclose favorable evidence to the accused is warranted. Some judges have suggested that "[t]here is an epidemic of *Brady* violations abroad in the land."²³⁸ Despite this suggestion, there have been only limited efforts to develop systemic data about the scope and breadth of the disease. Although judges are ostensibly tasked with safeguarding the entire judicial process, their role is generally transactional; each case, and even individual discovery issues, tend to be viewed in isolation and on a literal case-by-case basis.²³⁹ Yet, as Professor Andrew Manuel Crespo has noted, trial courts are in the position to gather a wealth of data about what is actually happening at the ground level of the criminal justice system.²⁴⁰ The Superior Court of the District of Columbia has already begun to develop a database of "digitized *Brady* disclosures . . . through formal electronic docket entries, informal emailed submissions to the 'chambers file,' as well as digitally transcribed colloquies in open court."²⁴¹ Such

²³⁷ See Jones, *supra* note 233, at 451 (discussing the potential impact of a *Brady* instruction).

²³⁸ Olsen, 737 F.3d at 626 (Kozinski, J., dissenting).

²³⁹ See Crespo, *supra* note 229, at 2057 (describing the critique that courts approach the administration of the criminal justice system through the adjudication of individual cases and lack a "holistic picture of how the criminal justice system operates"); Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 164 (2015) (suggesting that courts effectively examine individual incidents to determine the admissibility of evidence but are less capable at assessing the broader implications of policing strategies that can have a substantial impact on the population being policed); Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039, 1056 (2016) ("Fourth Amendment law has developed few tools to put . . . [the] pieces together, to see a whole greater than the sum of its parts.")

²⁴⁰ See Crespo, *supra* note 229, at 2090 ("Criminal courts thus often wind up in possession of considerable caches of digitized disclosures that, taken together, form a broad knowledge base of potential *Brady* information, which prosecutors or defense attorneys could easily search to check the accuracy of the representations (or silences) made in subsequent cases.")

²⁴¹ *Id.* at 2089–90.

efforts expanded on the efforts of the public defender's office in that jurisdiction, which had been compiling digital copies of witness testimony with digital annotations by its attorneys.²⁴² By gathering system-wide facts about *Brady* violations, lower courts can effectively test the Supreme Court's faith that "a prosecutor anxious about tacking too close to the wind" will reliably disclose exculpatory evidence.²⁴³

As with *Brady* violations, trial courts and defendants are ill-equipped to identify instances when a defendant's testimony induced under *Kastigar v. United States* has infected his or her trial.²⁴⁴ Nevertheless, by requiring prosecutors to commit themselves to certain safeguards in advance of trial, trial courts may be able to ameliorate some of the dangers posed by the prosecution's employment of use and derivative use immunity.

It was notable that the surprise announcement that the Baltimore State's Attorney's Office was dismissing the remaining charges against the officers charged in the death of Freddie Gray was made on the morning the court had scheduled the *Kastigar* hearing for Officer Miller.²⁴⁵ While the prosecution had established a "clean team" of prosecutors who ostensibly lacked knowledge of the compelled testimony, defense attorneys had been prepared to argue that the lead prosecutor had tainted the team by communicating with the clean team prosecutors as they prepared for trial.²⁴⁶ Indeed, Chief Deputy State's Attorney Michael Schatzow, who was on the original prosecution team, denied the clean team was tainted, but he subsequently admitted that he had communicated with the clean team on multiple occasions.²⁴⁷

Kastigar itself may have contributed to the defense and the prosecution's disagreement over the propriety of the prosecutor's communications with the clean team. *Kastigar* described the state's burden as proving that

²⁴² *Id.* at 2090.

²⁴³ See *Kyles v. Whitley*, 514 U.S. 419, 439 (1995) (perpetuating the Court's belief in the prosecutor as an inherently good actor).

²⁴⁴ See *Kastigar v. United States*, 406 U.S. 441, 469 (1972) (Marshall, J., dissenting) ("A witness who suspects that his compelled testimony was used to develop a lead will be hard pressed indeed to ferret out the evidence necessary to prove it."); Bowers, *supra* note 97, at 169 ("[T]hose jurisdictions that have carefully examined the practicality of the derivative use immunity doctrine have found it does not work in practice.").

²⁴⁵ Saliqa Khan, *State Drops Charges Against Officers in Freddie Gray Case*, WBALTV (July 29, 2016), <http://www.wbalv.com/article/state-drops-charges-against-officers-in-freddie-gray-case/7101967> [<https://perma.cc/F5K4-AXRM>].

²⁴⁶ Justin Fenton, *Prosecutors in Freddie Gray Case Maintain They Had Evidence to Convict Officers*, BALTIMORE SUN (July 28, 2016), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-freddie-gray-prosecutors-speak-20160728-story.html> [<https://web.archive.org/web/20180908040024/http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-freddie-gray-prosecutors-speak-20160728-story.html>].

²⁴⁷ *Id.*

all of the evidence it proposed to use was derived from “legitimate independent sources.”²⁴⁸ Left unsaid was the degree to which the government could use the coerced testimony for things other than deriving admissible evidence. While several lower courts have held that the government’s burden is not simply to introduce independent evidence but to demonstrate that the coerced testimony has not influenced such things as trial strategy, the decision to initiate a prosecution, the plea offer, and a myriad of other non-evidentiary issues, the prosecutor took a far narrower view of his *Kastigar* obligations.²⁴⁹ When asked about his discussions with the “clean team,” Mr. Schatzow simply stated, “There was no requirement that we not be allowed to talk to people.”²⁵⁰

The Chief Deputy State’s Attorney’s statement is indicative of one of the failings of *Kastigar* and of one way skeptical courts can better protect defendants. Compelling testimony under *Kastigar* is surprisingly straightforward—prosecutors have no obligation to describe how they plan to utilize the testimony or what safeguards they intend to employ to ensure that the compelled testimony does not adversely affect the defendant.²⁵¹ Instead of asking prosecutors to give post hoc explanations for how evidence was derived, trial courts should, when possible, set forth clear expectations about the safeguards prosecutors are expected to adopt. Such safeguards could include physical restrictions on access to the recorded testimony, including “records of persons to whom access was granted and the purpose for which the testimony was examined.”²⁵² Any communication between individuals with knowledge of the testimony and the prosecuting attorneys could be recorded and provided to the court for in camera review. Moreo-

²⁴⁸ *Kastigar*, 406 U.S. at 461.

²⁴⁹ See, e.g., *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973) (including “assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy” in its definition of improper use of compelled testimony).

²⁵⁰ See WJZ-13 CBS Baltimore, *Lead Prosecutors Break Silence on Freddie Gray Trials*, YOUTUBE (July 28, 2016), <https://www.youtube.com/watch?v=rbK2H4HYNJQ> [<https://perma.cc/U8AJ-MWJY>] (answering reporters’ questions alongside Deputy State’s Attorney, Janice Bledsoe).

²⁵¹ See, e.g., MD. CODE ANN., CTS. & JUD. PROC. § 9-123 (West 2018) (empowering prosecutors to compel testimony with few other guidelines).

²⁵² See U.S. DEPT OF JUSTICE, U.S. ATTORNEY’S CRIMINAL RESOURCE MANUAL § 726 (1997), <https://www.justice.gov/usam/criminal-resource-manual-726-steps-avoid-taint> [<https://perma.cc/2B54-ZK2A>] (“[P]rosecutors should take the following precautions in the case of a witness who may possibly be prosecuted for an offense about which the witness may be questioned during his/her compelled testimony: . . . Ensure that the witness’s immunized testimony is recorded verbatim and thereafter maintained in a secure location to which access is documented”); Jefferson Keenan, *Nonevidentiary Use of Compelled Testimony and the Increased Likelihood of Conviction*, 32 ARIZ. L. REV. 173, 190 (1990) (discussing a variety of protective measures).

ver, prosecutors should commit themselves to those safeguards prior to the issuance of an order to compel. Some scholars have suggested that the prosecutor should be required to “swear that he has not had access to privileged testimony or to any information derived from it” when trying a witness who has previously testified under a grant of immunity.²⁵³ Although such a requirement may be productive, pre-committing the prosecution to certain affirmative safeguards may be more effective at ensuring that compelled testimony does not infect the defendant’s trial and that prosecutors are not tempted to cover for communications that may have created unintentional taint.

B. *The Need for Diverse Viewpoints on the Courts*

Ultimately, the Court’s Criminal Doctrines of Faith are grounded in empirical presumptions about how police and prosecutors behave.²⁵⁴ Whether the Justices who authored those decisions premised their assumptions on their belief in the strong personal character of police and prosecutors, the effectiveness of administrative checks on misbehavior, or the judiciary’s ability to identify and deter misconduct, the question must be asked: Why did the Court believe them?

One explanation is that the faith in police and prosecutors evidenced in the Court’s majority opinions was shaped, in part, by the Justices’ own personal and cultural experience with the criminal justice system.²⁵⁵ As United States District Judge Edward M. Chen has observed, “[J]udges draw upon the breadth and depth of their own life experience, upon the knowledge and understanding of people, and of human nature . . . inevitably, one’s ethnic and racial background contributes to those life experiences.”²⁵⁶ Because no

²⁵³ See, e.g., Keenan, *supra* note 252 (“[P]rosecution staff must swear that they have neither acquired nor attempted to acquire knowledge of the substance of the immunized testimony.”); Note, *Standards for Exclusion in Immunity Cases After Kastigar and Zicarelli*, 82 YALE L.J. 171, 186 (1972) (discussing the pros and cons of an oath regarding lack of access).

²⁵⁴ See Stoughton, *supra* note 10, at 850 (describing the Court’s use of legislative facts in cases involving the police to make assumptions about the police). See generally Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255 (2012) (describing the plethora of Supreme Court decisions that turn on “legislative facts” identified by the Justices).

²⁵⁵ See Tomiko Brown-Nagin, *Identity Matters: The Case of Judge Constance Baker Motley*, 117 COLUM. L. REV. 1691, 1693 (2017) (“Whether and how identity shapes judging is an enduring question and a high-stakes proposition, given the tremendous power that judges wield.”); Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 468–69 (2000) (“An important step in accepting this exercise of judicial representation lies in acknowledging that white judges also function as representatives. They articulate, engage and affirm narratives with which they are familiar and with which they share with their constituent communities.”).

²⁵⁶ Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 CALIF. L. REV. 1109, 1120 (2003); see Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL’Y REV. 325, 329

single or even primary cultural perspective exists, it is important not to “essentialize” a particular community.²⁵⁷ But it is beyond debate that people of color experience the criminal justice system very differently than whites.²⁵⁸ It is thus worth exploring whether a more diverse bench might produce a more balanced view of how police and prosecutors actually act.²⁵⁹

Utah v. Strieff, decided in 2016, provides a striking example of both the advantages and the limits of seeking to improve judicial decision-making by increasing the diversity of the bench.²⁶⁰ The author of the majority decision, Justice Clarence Thomas, found that Officer Fackrell had simply made “two good-faith mistakes” and that there was “no indication that this unlawful stop was part of any systemic or recurrent police misconduct.”²⁶¹ Justice Thomas gives lie to the claim that a judge of color will necessarily incorporate the prevailing concerns of the racial group with which he or she identifies.²⁶² Yet, Justice Sotomayor’s scathing dissent, directly challenging the majority’s faith in the motivations of the officer and the broader practices of police departments across the country, was shaped by her own personal perspectives as a Latina woman.²⁶³ Justice Sotomayor’s recog-

(2002) (“[Judicial diversity] is good because it is inevitable that judges’ different professional and life experiences have some bearing on how they confront various problems that come before them.”).

²⁵⁷ Ifill, *supra* note 255, at 414 (“[D]iversity advocates need not, and indeed should not, argue that the African American community is monolithic in its configuration, views, or values, or that only one ‘black perspective’ exists. Essentializing African American communities or judges denies the richness and complexity of African American political thought.”).

²⁵⁸ See *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (citing TANEHISI COATES, *BETWEEN THE WORLD AND ME* (2015); MICHELLE ALEXANDER, *THE NEW JIM CROW* 95–136 (2010); JAMES BALDWIN, *THE FIRE NEXT TIME* (1963); W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* (1903) (explaining that “it is no secret that people of color are disproportionate victims of . . . [suspicionless stops]” and describing how “black and brown parents have given their children ‘the talk’—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them”).

²⁵⁹ See James Andrew Wynn, Jr. & Eli Paul Mazur, *Judicial Diversity: Where Independence and Accountability Meet*, 67 ALB. L. REV. 775, 781–82 (2004) (“More important than a perception of bias, however, is that the absence of diversity creates (in fact) a judicial partiality to the values and stories of the groups overrepresented—white men—in its midst.”).

²⁶⁰ See *Strieff*, 136 S. Ct. at 2063 (holding the evidence discovered was admissible).

²⁶¹ *Id.*

²⁶² See Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 MICH. J. RACE & L. 5, 13–14 (2004) (noting that Justice Thomas “writes with a distinctively African American voice” but “has a conservative perspective with which many African Americans disagree”).

²⁶³ See *Strieff*, 136 S. Ct. at 2068, 2069 (Sotomayor, J., dissenting) (“Most striking about the Court’s opinion is its insistence that the event here was ‘isolated,’ with ‘no indication that this unlawful stop was part of any systemic or recurrent police misconduct.’ Respectfully, nothing about this case is isolated.” (citation omitted)). Justice Sotomayor has openly embraced the idea

nition that “suspicionless” stops were not a rare act of negligence, but rather the product of police training and deliberate strategy, challenged the majority’s view of how police operate in street encounters.²⁶⁴ Justice Sotomayor’s fresh perspective was not limited to her views on how police officers actually behave. Her dissent described the trauma that unlawful detentions and searches have on their victims, recognized the connection between the specific stop at issue in the case with the broader issues of racial profiling, and called attention to the perception that “black and brown parents” need to warn their children that the police may be a danger to them.²⁶⁵

The Court’s lack of professional diversity may also contribute to its uncritical view of police and prosecutors. Since 1975, the number of former prosecutors on the Supreme Court has more than tripled.²⁶⁶ As of today, seven of the nine Justices have prior prosecutorial experience.²⁶⁷ Although those Justices with such experience undoubtedly bring a valuable practical perspective to the Court’s deliberations, “[t]heir experiences are all of a piece: years spent advocating with earnestness and vigor on behalf of the interests of law enforcement, in the always challenging struggle to contain and combat crime.”²⁶⁸ In an editorial titled, “The Homogenous Federal Bench,” the New York Times Editorial Board decried the lack of professional diversity among federal judges, arguing that even under the Obama administration judicial nominees were “drawn overwhelmingly from the ranks of prosecutors and corporate lawyers” and that “[t]his deprives the courts of crucial perspectives and reduces public trust in the justice system.”²⁶⁹ The Court, and indeed the entire federal judiciary, currently lacks judges who have advocated on behalf of those who have “seen policemen from the nightstick

that her decisions would be informed by her cultural experiences. *See* Sonia Sotomayor, *A Latina Judge’s Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002).

²⁶⁴ *Strieff*, 136 S. Ct. at 2069 (Sotomayor, J., dissenting) (“I do not doubt that most officers act in ‘good faith’ and do not set out to break the law. That does not mean these stops are ‘isolated instance[s] of negligence,’ however . . . [M]any are the product of institutionalized training procedures”).

²⁶⁵ *See id.* at 2069–70 (detailing extensively the humiliations endured by the targets of “suspicionless stops” and how entire communities are raised in the shadow of this police practice).

²⁶⁶ Andrew Manuel Crespo, *Regaining Perspective: Constitutional Criminal Adjudication in the U.S. Supreme Court*, 100 MINN. L. REV. 1985, 1987 (2016).

²⁶⁷ *Id.* at 1995.

²⁶⁸ *Id.* at 2000 (citation omitted).

²⁶⁹ Editorial, *The Homogeneous Federal Bench*, N.Y. TIMES (Feb. 6, 2014), <https://nyti.ms/liwbG6b> [<https://perma.cc/4ZQ9-P2Q3>]; *see* Elizabeth Warren, *The Corporate Capture of the Federal Courts*, 17 U. D.C. L. REV. 4, 6 (2014) (“According to a study published by the American Constitution Society, as of 2008, the federal appellate bench was ‘dominated by judges whose previous professional experience is generally corporate or prosecutorial.’” (footnote omitted)).

end.”²⁷⁰ Thus, it is hardly surprising that the doctrines shaped by those judges tend to reflect a lack of skepticism about the ways in which police and prosecutors behave.

One need not accept Justice Sotomayor’s account in *Strieff* to recognize that judicial decision-making is improved when a variety of voices and perspectives are included in the deliberative process.²⁷¹ If the Court’s criminal procedure decisions have been marked by a bias in favor of police and prosecutors, part of the explanation and some of the solution likely lies in the diversity of the Court. A diverse bench ensures “that a single set of values or views do not dominate judicial decision-making.”²⁷² To the extent that multiple perspectives challenge the benign assumptions the Court has traditionally made about the police and prosecutors, a more diverse Court may lead to doctrines that are more skeptical of the criminal justice system and more protective of civil liberties.²⁷³

C. Losing Faith in the Courts

For the last half century, the primary approach to regulating the criminal justice system and its actors has been to rely on the Constitution and the courts to establish threshold standards to prevent abuse.²⁷⁴ Some scholars

²⁷⁰ Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 409 (1974) (considering the influence on perspective of dealing with the police as adversary); see ALLIANCE FOR JUSTICE, BROADENING THE BENCH: PROFESSIONAL DIVERSITY AND JUDICIAL NOMINATIONS 4 (“As this report details, the federal judiciary is currently lacking in judges with experience (a) working for public interest organizations; (b) as public defenders or indigent criminal defense attorneys; and (c) representing individual clients—like employees, consumers, or personal injury plaintiffs—in private practice.”); Crespo, *supra* note 250, at 2001 (citing Amsterdam, *supra*) (discussing how the Court could reverse its homogeneity).

²⁷¹ See Edwards, *supra* note 256, at 329 (describing how diversity on the bench leads to more informed discussions and better outcomes); Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?*, 105 NW. U. L. REV. 587, 590 (2011) (“[D]iversity ensures that more voices are heard in the decision making process.”).

²⁷² Ifill, *supra* note 255, at 411.

²⁷³ See Strieff, 136 S. Ct. at 2071 (Sotomayor, J., dissenting) (characterizing the experiences of people of color in the criminal justice system as the “canaries in the coal mine” and declaring that “unlawful police stops corrode all our civil liberties and threaten all our lives”).

²⁷⁴ David M. Jaros, *Preempting the Police*, 55 B.C. L. REV. 1149, 1150 (2014) (describing the reliance on the courts to regulate law enforcement); see Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 790 (1970) (arguing that the “lack of legislative and executive attention to the problems of police treatment of suspects . . . forces the Court into the role of lawmaker in this area”); Harmon, *supra* note 8, at 763 (“The problem of regulating police power through law has been shoehorned into the narrow confines of constitutional criminal procedure.”); Daniel J. Solove, *Fourth Amendment Codification and Professor Kerr’s Misguided Call for Judicial Deference*, 74 FORDHAM L. REV. 747, 747 (2005) (“Since the criminal procedure revolution of the Warren Court era, the courts have been the primary rule makers in the field of criminal procedure.”).

have suggested that the courts are ill-suited for this role and that, in the absence of judicial intervention, the other branches might have done a better job at curtailing misconduct.²⁷⁵ Several scholars have focused on the courts' inability to develop flexible rules and their limited capacity to respond to rapidly changing circumstances such as when technological advances change the parameters of what law enforcement is able to do.²⁷⁶ Other scholars have challenged the courts' "inaccurate empirical conclusions" and "flawed normative arguments about both rights and remedies."²⁷⁷ Although there remains the hope that the Supreme Court will develop a more balanced perspective, its historic inclination to assume the best of police and prosecutors may be further evidence that it would be beneficial if other institutions took on the difficult task of restraining criminal justice actors who abuse their discretion.

It is beyond the scope of this Article to attempt to describe what kind of rules and regimes the legislature and the executive branch might develop if they were to assume a more active role in policing the criminal justice system. Moreover, there remains the very real risk that placing a greater burden on the judiciary's sister branches to curb misconduct will diffuse responsibility and result in even less effective oversight.²⁷⁸ It may be, however, that recognizing the courts' persistent bias in favor of police and prosecutors will help to counter the other branches' tendency to cede responsibility for police and prosecutorial misconduct to the judiciary.

Given the underlying bias in the courts' criminal procedure decisions, the judiciary's most productive role may be one that prods the other branches of government to take responsibility for developing effective rules and sys-

²⁷⁵ See David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1295 (2002) (suggesting that several seminal criminal procedure decisions "may have slowed legislative innovation by a kind of informal preemption, occupying the field and providing a single, pre-approved solution"); Stuntz, *supra* note 8, at 792 ("The Court drove legislators, along with the dollars they control, away from those areas where legislation might have done the most good (policing and procedure), and into those areas where it is bound to do the most harm (crime definition and sentencing).").

²⁷⁶ See Stuntz, *supra* note 8, at 785 (suggesting that criminal procedure law should be radically restructured to allow for flexibility and innovation). See generally Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 857–81 (2004) (arguing that it is difficult for the Court to adopt a flexible rule under the Fourth Amendment and describing the advantages that legislatures have when it comes to regulating police activity involving new technologies).

²⁷⁷ See, e.g., Harmon, *supra* note 8, at 775, 776 (arguing that because of these "institutional deficiencies, constitutional rights are not enforced to their 'full conceptual boundaries'" (footnote omitted)).

²⁷⁸ See *supra* note 210 and accompanying text.

tems that will adequately protect the public.²⁷⁹ While the courts, for decades, have been viewed as setting the outermost limits of what police and prosecutors may do, some have suggested that their most useful function has been to invite the other branches to more closely consider which policies they should adopt.²⁸⁰ The “politics of crime” may discourage politicians from attempting to curb police and prosecutorial abuses.²⁸¹ When prodded to action, however, the political process may be more likely to uncover embedded biases and alternative perspectives than the judiciary has been able to thus far.

Should the Supreme Court, however, continue to play a substantial role in prescribing rules that shape police and prosecutorial behavior, the extent to which the Justices recognize and question the assumptions they make about how police and prosecutors behave will likely determine the effectiveness of the safeguards they design. In many respects, this examination of the Court’s assumptions may have been what Justice Sotomayor was urging when she argued:

We must not pretend that the countless people who are routinely targeted by police are “isolated.” They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but.²⁸²

By questioning its faith in the police and prosecutors, the Supreme Court has the capacity to restore the public’s faith in both the Court and its doctrines.

²⁷⁹ See, e.g., Jaros, *supra* note 274, at 1152–53 (advocating for state courts to use the preemption doctrine to prod legislatures to provide greater guidance about police activities that the legislatures condone by forcing those legislatures to explicitly endorse or ban questionable police practices).

²⁸⁰ See *id.* at 1195 (“By prodding the legislature to either limit or affirmatively sanction police conduct, courts can help ensure that the interests of the disenfranchised are at least debated in a public forum.”); Sklansky, *supra* note 275, at 1296 (arguing that “reasonableness review under the Fourth Amendment may well encourage the political branches to think harder about, and to articulate, the grounds for the search and seizure policies they adopt”).

²⁸¹ See Jaros, *supra* note 274, at 1151 (“Unfortunately, although egregious cases of police misconduct can temporarily galvanize the public and, for a short time, their representatives, the politics of crime tends to deter politicians from taking an active role in limiting police power.”).

²⁸² *Strieff*, 136 S. Ct. at 2071 (Sotomayor, J., dissenting) (urging a reexamination of the Court’s precedent on suspicionless stops).

CONCLUSION

The death of Freddie Gray, the subsequent federal investigation of the Baltimore City Police Department, and the battles between the States' Attorney's office, the six defendants, and the officers who investigated the circumstances of Mr. Gray's fatal injury suggest that the Court's faith in police and prosecutors may be misplaced. Coupled with other high profile incidents of police and prosecutorial error and misconduct, the Freddie Gray cases indicate that the Court's criminal procedure jurisprudence is ripe for reconsideration. The Court's failure to recognize that criminal justice actors do not always "do the right thing" is also evidence of the need for a diverse bench to ensure that such assumptions are effectively interrogated. Finally, the Court's reliance on the good intentions of police and prosecutors suggest that it may be dangerous to rely solely upon the judiciary to prevent police and prosecutorial abuse and that the Court's most useful function may be to prod the other branches of government into taking a greater role in regulating law enforcement actors.