

2018

Prosecutorial Dismissals as Teachable Moments (and Databases) for the Police

Adam M. Gershowitz

William & Mary Law School, amgershowitz@wm.edu

Prosecutorial Dismissals as Teachable Moments (and Databases) for the Police

Adam M. Gershowitz*

ABSTRACT

The criminal justice process typically begins when the police make a warrantless arrest. Although police usually do a good job of bringing in the “right” cases, they do make mistakes. Officers sometimes arrest suspects even though there is no evidence to prove an essential element of the crime. Police also conduct unlawful searches and interrogations. And officers make arrests in marginal cases—schoolyard fights are a good example—in which prosecutors do not think a criminal conviction is appropriate. Accordingly, prosecutors regularly dismiss cases after police have made warrantless arrests and suspects have sat in jail for days, or even weeks. In a functioning criminal justice system, we should expect prosecutors to use dismissals as “teachable moments” for the police so that officers can avoid making incorrect and unnecessary arrests in the future. Yet, as this Essay documents, prosecutors do not always notify police about the errors that led to their cases being dismissed.

This Essay proposes that prosecutors inform police officers that their cases were dismissed and of the reasons for the dismissal. This information will educate police officers about the elements of crimes in the penal code, the realities about which cases are difficult for prosecutors to prove, and the charging policies of the prosecutor’s office. Dismissal information will enable police officers to better decide when to make warrantless arrests, and it should reduce the number of weak cases that are input into the criminal justice system in the first place. In turn, reducing case inputs will benefit overburdened criminal justice actors—prosecutors, public defenders, judges, and court staff—by enabling them to spend more time on cases that will not be dismissed outright. And having police avoid unnecessary arrests will benefit defendants by avoiding needless incarceration and the cascade of other repercussions that follow an arrest.

This Essay also proposes that prosecutors—particularly in large offices—create a dismissal database that will identify problem officers who repeatedly bring in weak cases that have to be dismissed. Prosecutors can then recommend that police departments provide further training to those officers. A database might also limit the moral-hazard problem of police being judged only on their arrests, rather than on case resolutions. Finally, prosecutors

* Associate Dean for Research and Faculty Development and Professor of Law, William & Mary Law School. I am grateful to Dean Roger Fairfax for inviting me to participate in this symposium, Jason Kreag for helpful comments, and Elizabeth Lester-Abdalla for excellent research assistance.

should embrace this proposal because a dismissal database would not dramatically increase the amount of Brady evidence prosecutors would be required to disclose.

TABLE OF CONTENTS

INTRODUCTION	1526
I. POLICE AUTHORITY TO MAKE WARRANTLESS ARRESTS	1530
II. PROSECUTORS FREQUENTLY DISMISS CASES WHERE POLICE ARRESTED	1531
III. DISMISSALS AS TEACHABLE MOMENTS FOR POLICE OFFICERS	1535
A. <i>Notification and Explanation of Dismissals in Almost All Cases</i>	1536
B. <i>Notification in Some Cases</i>	1537
C. <i>Variations in the Amount of Information Conveyed</i> .	1538
D. <i>No Information from Prosecutors to Police About Dismissals</i>	1539
IV. DESIGNING THE MOST EFFECTIVE DISMISSAL NOTICE FOR POLICE OFFICERS	1540
V. PROSECUTORS SHOULD CREATE A DATABASE OF OFFICERS WHOSE CASES ARE DISMISSED	1542
A. <i>Benefits of a Dismissal Database</i>	1542
B. <i>The Brady Concern</i>	1546
CONCLUSION	1550

INTRODUCTION

Police officers make the initial inputs into the criminal justice system, and they make a lot of them. Although a small percentage of cases begin with grand jury indictments or arrest warrants guided by prosecutors, the vast majority of arrests are not planned in advance.¹ Police observe what they believe is criminal conduct, and the officers make the decision on the spot whether to arrest the individual. Although prosecutors are regularly referred to as the most powerful actors in the criminal justice system,² it is the police who have the initial

¹ See Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 324 (2016).

² See, e.g., Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 960 (2009). Prosecutors are often portrayed as the villains of the criminal justice system. For a recent example, see JOHN F. PFAFF, *LOCKED IN* 127–34 (2017). Not all experts, however, believe that prosecutors are as powerful as the conventional wisdom suggests. See, e.g., Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 835–838 (2018).

power to change a person's life by taking them to jail and starting the machinery of criminal justice. And they do this a lot: each year, police arrest about eleven million individuals.³

Even if we assume that most police officers are well intentioned—which I do—they are not infallible in deciding whom to arrest. Police receive very little legal training about their state's criminal code.⁴ And officers rarely consult with prosecutors at the moment of arrest to ask whether it will be feasible to successfully prosecute the individual who is being arrested.⁵ Put simply, police are offered little guidance on arrests and must exercise their best judgment in determining whom to take into custody and whom to send on their way.

Although many police officers exercise their discretion quite well, in the big picture there is reason to be concerned. Prosecutors dismiss a huge number of cases with no conviction being entered.⁶ In many of these cases, police officers did nothing wrong. For example, prosecutors dismiss cases because key witnesses die, recant, or disappear. They also cut deals in exchange for defendants testifying against other individuals. In these types of cases, police error does not lead to the dismissal of charges. But other dismissals *do* happen because of police error: prosecutors drop charges because police arrested even though there was no evidence to establish one of the elements of the offense, or because the search was invalid or the confession violated *Miranda* and the evidence will therefore be suppressed. Although specific numbers are hard to come by, we know that prosecutors dismiss cases because of clear police error.⁷ In other instances, police conduct proper searches and arrests, but prosecutors dismiss the cases because of a

³ See FBI, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES, 2016: ARRESTS 2 (2017), <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/persons-arrest-ed.pdf> [<https://perma.cc/L8HF-BHFU>]; FBI, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES, 2013: ARRESTS 2 (2014), https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/persons-arrested/arrestmain_final.pdf [<https://perma.cc/L7FX-D7G4>].

⁴ See Wayne A. Logan, *Police Mistakes of Law*, 61 EMORY L.J. 69, 103–09 (2011) (reviewing studies showing that police academies spend only a few dozen hours teaching law).

⁵ See generally Adam M. Gershowitz, *Justice on the Line: Prosecutorial Screening Before Arrest*, 2019 U. ILL. L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3037172 [<https://perma.cc/EE6V-RENC>].

⁶ See BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009—STATISTICAL TABLES 24 (2013) (finding that prosecutors dismiss twenty-five percent of felony charges). The rate is much higher in some jurisdictions. See, e.g., Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 72–74 (2002); Bellin, *supra* note 2, at 10–11.

⁷ Cf. *United States v. Leon*, 468 U.S. 897, 907 n.6 (1984) (collecting studies that estimate the number of cases not prosecuted due to the exclusionary rule).

sense that saddling an individual with a criminal conviction would be unjust or unnecessary under the circumstances.⁸

In an overcrowded criminal justice system, prosecutors should discourage police from making warrantless arrests that the prosecutors will later dismiss outright. We do not want police to make searches or conduct interrogations that will later be found to be invalid. Jails are too overcrowded to house unnecessary arrestees. Prosecutors, defense attorneys, court clerks, and judges are too overburdened to deal with cases that will be dropped. And, of course, we should not want arrestees to suffer needless incarceration, expensive bail bonds, embarrassing mug shots, possible job loss, and other consequences of arrest if their cases will ultimately be dismissed outright without conviction.⁹

So, how do we help police officers to avoid making unnecessary arrests? The most obvious possibility is increased training: more courses in substantive criminal law and criminal procedure would certainly help officers to make better decisions on the street. Another possibility—currently embraced by only a small number of jurisdictions—would be to require police to obtain permission for warrantless arrests from prosecutors *prior* to taking suspects to jail.¹⁰ The problem with both of these proposals is that they are time consuming and expensive.¹¹

This Essay therefore offers a much less expensive approach: prosecutors' offices should adopt a formal policy requiring that prosecutors notify the arresting police officer each time one of her warrantless arrests is dismissed and the reason for the dismissal. If a case is dismissed because the prosecutor could not prove one of the elements of the offense, the prosecutor should explain what evidence was lacking. If the search was invalid, the prosecutor should provide a brief explanation of what the officer should have done differently. If police officers receive these communications, then they will hopefully recognize their errors and perform better in future cases. In short, dismissals should be teachable moments for police. Some prosecutors' offices already explain to police why their cases were dismissed, but

⁸ See, e.g., Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1254 (2011) (offering example of a prosecutor declining to bring charges against a homeless person who was trespassing in a building during a snowstorm).

⁹ See Harmon, *supra* note 1, at 313–20.

¹⁰ See generally Gershowitz, *supra* note 5 (exploring the Harris County model and documenting how rarely it is used in other counties).

¹¹ While I acknowledge the enormous cost, I strongly endorse the prosecutorial-screening approach utilized in a handful of jurisdictions. See *id.* at 14.

the practice is far from universal. And in some jurisdictions, prosecutors only notify the police about dismissals on an ad hoc basis, or only in certain types of cases, or they provide notification without an explanation of *why* the case was dismissed.

Additionally, prosecutors could use their dismissal notifications to create a database that allows the prosecutor's office to see which officers are bringing in weak cases that are ultimately dismissed. Aggregated data, in turn, would enable prosecutors to insist that police departments provide additional training to certain officers on particular topics. A database would be a small step toward correcting the moral-hazard problem that police face: police officers may be rewarded by their departments for making arrests, but they are not held to account when those cases turn out to be weak and have to be dismissed by prosecutors. Although prosecutors' offices do not oversee police departments, and thus lack the authority to discipline officers who bring in weak cases,¹² highlighting officers with frequent dismissals would put pressure on police departments to reign in officers who are wasting the time of other actors in the criminal justice system.¹³

Part I of this Essay briefly reviews police authority to conduct warrantless arrests and input cases into the criminal justice system. Part I explains how prosecutors rarely review cases at the moment of arrest and typically only dig into the cases days or weeks later. Part II then explains some of the reasons why prosecutors dismiss cases after arrest. Part III then describes interviews with nearly twenty prosecutors' offices about how they communicate dismissal information to the police. Part III demonstrates that some prosecutors' offices are effectively informing police officers about the dismissals, while other offices are not doing so. Part IV then offers best practices for prosecutors' offices to adopt in using dismissals as teachable moments. Finally, Part V explores the benefits and challenges of maintaining a database that tracks police officers to identify the officers who bring in weak cases that end in dismissals. In particular, Part V explores whether such databases would create *Brady* material that prosecutors would have to turn over to the defense.

¹² See Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor's Role*, 47 U.C. DAVIS L. REV. 1591, 1644 (2014).

¹³ Cf. Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 Nw. U. L. REV. 1609, 1626 (2012) ("One might think that prosecutors, who bear the costs of exclusion, would see that police were trained to avoid violations in the first place or would insist that some mix of incentives and discipline were put in place to assure police compliance. . . . But police and prosecutors often behave as though they work for different entities, rather than being the obvious assembly line from street to prison that they are.").

I. POLICE AUTHORITY TO MAKE WARRANTLESS ARRESTS

Most arrests in the United States are made without a warrant.¹⁴ Police have constitutional authority to arrest without a warrant so long as there is probable cause and the officers are not entering a home.¹⁵ Moreover, as numerous scholars have recognized, legislatures have criminalized a huge number of offenses.¹⁶ And state legislatures have made many crimes—even low-level misdemeanors—arrestable offenses that enable the police to take people into custody.¹⁷ Accordingly, police have enormous power to arrest individuals and to begin the criminal justice process.

Of course, prosecutors ultimately decide which cases will move forward with formal charges. But in many jurisdictions, prosecutors do not become involved in warrantless arrests until the probable cause hearing, which is often forty-eight hours after arrest.¹⁸ In a recent study, I analyzed more than forty prosecutors' offices around the country and found that in most jurisdictions, prosecutors do not provide much guidance to police at the time of warrantless arrests.¹⁹ Many prosecutors' offices maintain hotlines for police to call if the officers have questions before making a warrantless arrest.²⁰ But most jurisdictions reported that calls are not mandatory and that police tend to call only in high-profile cases or those that seem complicated to the officers.²¹ In short, as a general matter across the United States, it is rare for prosecutors to advise police about whether to make a warrantless arrest or to release the suspect.

A police officer's decision to arrest will trigger a huge litany of consequences for the arrestee: incarceration, the need to post bail, internet-accessible arrest records, mug shots, immigration and housing consequences because agencies track arrest records, the prospect of job loss because of incarceration, and difficulty in finding new work because of arrest records.²² An officer's decision to arrest will also

¹⁴ See Harmon, *supra* note 1.

¹⁵ See *Payton v. New York*, 445 U.S. 573, 586–87 (1980).

¹⁶ For the most prominent exposition, see William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507, 513–17 (2001).

¹⁷ See Wayne A. Logan, *Street Legal: The Court Affords Police Constitutional Carte Blanche*, 77 IND. L.J. 419, 466 (2002) (noting the “multitude of now arrestable low-level offenses contained in federal, state, and local laws, and the acknowledged willingness of government actors to utilize minor legal offenses to serve broader law enforcement ends”).

¹⁸ See Gershowitz, *supra* note 5, at 5.

¹⁹ See *id.* at 5–14.

²⁰ See *id.*

²¹ See *id.*

²² See Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 820–25 (2015).

input a new case into an overburdened criminal justice system; in many jurisdictions, prosecutors, public defenders, clerks, and judges already have more cases than they can handle.²³

Accordingly, for the good of the defendant and the criminal justice system, we should want police to exercise their arrest authority wisely. This means arresting in cases that are good candidates for successful prosecution, but releasing suspects when prosecutors will not be able to prove an element of the offense or when convictions would seem unjust. As explained below, police officers do not always exercise their enormous authority in the same way that prosecutors would.

II. PROSECUTORS FREQUENTLY DISMISS CASES WHERE POLICE ARRESTED

Prosecutors dismiss a huge number of cases with no conviction being entered.²⁴ For example, many charges are dismissed because the prosecutor struck a plea deal with the defendant on other charges. In these cases, the police did not err in making the arrest; the dismissal was simply for efficiency or systemic reasons. In other cases, however, prosecutors dismiss charges because police should not have made the arrest in the first place. These “unnecessary arrests” are the ones that this Essay is concerned with.

There are numerous types of “unnecessary arrests” that police bring into the system. First, there are good faith errors. Police officers are not legally trained²⁵ and thus may not understand that prosecutors will be unable to prove an element of the offense. For instance, each year, thousands of Americans bring guns and other weapons to the airport and attempt to take them through airport security.²⁶ Police officers sometimes arrest the travelers without realizing how difficult it is to prove guilt in such cases. To convict a defendant in some jurisdictions, it is not enough for the prosecutor to show that the gun was in a suitcase; instead the prosecutor must show that the traveler “reck-

²³ See generally Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261 (2011) (describing excessive caseloads handled by prosecutors in large jurisdictions).

²⁴ See *supra* note 6 and accompanying text.

²⁵ See *supra* note 4 and accompanying text.

²⁶ See Fredrick Kunkle, Opinion, *Trump Aide Was Among Record Numbers Taking a Gun Through TSA Checkpoint Last Year, Police Say*, WASH. POST (Jan. 27, 2017), https://www.washingtonpost.com/news/tripping/wp/2017/01/27/trump-aide-was-among-record-numbers-taking-a-gun-through-tsa-checkpoint-last-year/?utm_term=.b1992b2a956c [<https://perma.cc/C2G5-447P>] (noting that the TSA found more than 3,300 firearms in carry-on bags in 2016).

lessly” brought it through security.²⁷ Prosecutors know that it is difficult to show this mens rea because travelers can easily claim that they were unaware the gun was in the bag and that they were simply negligent. Accordingly, prosecutors often dismiss the charges.²⁸

Second, police officers sometimes bring in cases that might be termed “contempt of cop.” Officers arrest suspects for resisting arrest—perhaps because the individual pulled his arms away when the officer tried to handcuff him. Police also arrest for evading arrest—perhaps because the suspect took a long time to pull over after the officer activated her police siren. Once again, proving mens rea in these cases is difficult.²⁹ Thus, although police arrest on resisting and evading charges with some frequency, prosecutors dismiss those charges with some frequency.³⁰

Third, police sometimes arrest individuals to clear a street corner, to show a police presence in a tough neighborhood, or to gather evidence or information.³¹ For example, New York City police officers arrested 1,876 people for loitering over the span of a decade even though a federal court had already struck down the loitering statute and enjoined the City from relying on it.³² Perhaps police see good practical reasons to arrest in these kinds of cases, but prosecutors regularly dismiss the cases.³³

Fourth, and much more concerning, police sometimes make warrantless arrests for their own benefit. Police departments track arrest statistics³⁴ to prevent officers from ducking work and wasting their shifts.³⁵ Officers, therefore, might arrest an individual to improve their arrest numbers. Worse yet, in some jurisdictions, because police officers are paid overtime for appearing in court, they have an incentive

²⁷ See, e.g., TEX. PENAL CODE ANN. § 46.03(a)(5) (West 2011).

²⁸ Interview with Ed McClees, Former Prosecutor, Harris Cty., Tex. (June 3, 2017).

²⁹ See, e.g., TEX. PENAL CODE ANN. § 38.04 (West 2013) (requiring the prosecution to prove an intentional mens rea).

³⁰ Interview with Laura Killinger, Former Prosecutor, Harris County, Tex. (June 3, 2017).

³¹ Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1332 (2012); see Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1695 (2010); Harmon, *supra* note 1, at 357.

³² See Charlie Gerstein & J.J. Prescott, *Process Costs and Police Discretion*, 128 HARV. L. REV. F. 268, 275 (2015).

³³ See Gershowitz, *supra* note 5, at 18–19.

³⁴ Cf. JOHN A. ETERNO & ELI B. SILVERMAN, *THE CRIME NUMBERS GAME* 28 (2012) (discussing some statistics collected about police officers).

³⁵ In the infamous words of Detective Jimmy McNulty of *The Wire*, “We can lock a guy up on a humble, we can lock him up for real, or we can . . . pull under the expressway and drink ourselves to death, and our side partners will cover it. So no one—and I mean no one—tells us how to waste our shift.” *The Wire: Misgivings* (HBO Nov. 19, 2006) (at 30:39).

to make arrests that will lead to court pay.³⁶ One prosecutor (who wished to remain anonymous) explained that some police officers are more prone to arrest if they think they will be paid overtime to testify in court, even if the case is weak.³⁷

Fifth, prosecutors dismiss cases as a matter of justice. In these cases, police were not wrong, as a matter of law, to arrest the individual because all the elements of the offense were present and the suspect violated the penal code. Nevertheless, the prosecutor might decide it is not in society's best interests for the individual to have a criminal conviction. For instance, police are often called when a fight breaks out between high-school students.³⁸ Although it may be legally permissible to charge one or both students with assault, prosecutors sometimes look at the age of the suspects and their lack of a criminal record and opt to dismiss the case.³⁹ Similarly, when police arrest suspects for low-level drug charges or possession of drug paraphernalia, prosecutors will sometimes dismiss those cases as well.⁴⁰ Put simply, prosecutors sometimes see cases differently (and more leniently) than police officers.⁴¹

The fourth and fifth categories—arrests to improve statistics and arrests in cases that seem unjust—point to an inherent problem in the design of the criminal justice system. Police officers are evaluated based on their arrests; police departments do not award promotions or raises based on the number of convictions that result from those arrests.⁴² In other words, police supervisors look at police officers' day-

36 See Alan Feuer & Joseph Goldstein, *The Arrest Was a Bust. The Officers Got Overtime Anyway*, N.Y. TIMES (Feb. 19, 2018), <https://www.nytimes.com/2018/02/19/nyregion/new-york-police-overtime-pay-trial.html> [<https://perma.cc/HM48-JE4P>].

37 Interview with Anonymous Prosecutor from Midwestern County (July 13, 2017).

38 See, e.g., Sarah Gonzalez, *How School Zero Tolerance Rules Turn Bad Behavior into a Crime*, STATEIMPACT FLA. (Feb. 25, 2013, 6:30 AM), <https://perma.cc/JQ9E-T5DT>.

39 See Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color*, 98 CORNELL L. REV. 383, 444 (2013).

40 See, e.g., Tony Briscoe, *Cook County State's Attorney Will Dismiss Minor Pot Cases*, CHI. TRIB. (Apr. 20, 2015, 7:52 AM), <http://www.chicagotribune.com/ct-drug-policy-reform-met-20150419-story.html> [<https://perma.cc/4UKX-S5LE>]; Brian Rogers, *Harris County DA's Easing of Crack Pipe Policy Stirs Storm*, HOUS. CHRON. (Dec. 8, 2009, 6:30 AM), <http://www.chron.com/news/houston-texas/article/Harris-County-DA-s-easing-of-crack-pipe-policy-1613537.php> [<https://perma.cc/93TJ-NMJU>].

41 See Jonathan Abel, *Cops and Pleas: Police Officers' Influence on Plea Bargaining*, 126 YALE L.J. 1730, 1775 (2017) (“[P]olice and prosecutors may come to different values for a case . . . because the two parts of the prosecution team may have different moral or cultural views of culpability.”).

42 See Bar-Gill & Friedman, *supra* note 13, at 1625 (“The evidence and the literature suggest that convictions are low on the list of things police are rewarded or punished for. Police care about arrests, not convictions.”).

to-day effectiveness when determining rewards, not whether their performance results in convictions.⁴³ This is the same moral-hazard problem that affects countless other areas of the public and private world, most famously compensation for bankers.⁴⁴ Because police do not have to internalize the costs and consequences of overarresting, they may face perverse incentives to arrest when they should instead release suspects on the street.

It is difficult to know how often the moral-hazard problem or simple lack of knowledge of the law causes police to make wrongful or unnecessary arrests. We know that prosecutors dismiss a huge number of cases, but the studies done to date do not break down cases between dismissals as part of plea bargains and dismissals because of police error. It is, therefore, impossible to know exactly how often prosecutors dismiss charges because police brought in flawed cases. Nevertheless, there is reason to believe the number of dismissals due to what we might call police error or unjust arrests is substantial.

In a few jurisdictions in Texas, police cannot make warrantless arrests on the street unless they call an intake hotline and first receive permission from a prosecutor.⁴⁵ In these jurisdictions, calls to the intake division are mandatory and prosecutors report rejecting a considerable number of cases.⁴⁶ For instance, a study of the intake system in Harris County, Texas, estimated that prosecutors rejected about ten percent of cases in which police officers sought charges.⁴⁷ In El Paso County, Texas, the percentage of cases in which prosecutors rejected police requests for charges was even higher.⁴⁸

In short, police arrest in more cases than prosecutors are willing to charge. The amount of daylight between police and prosecutors surely differs by jurisdiction. But across the board, there is room for police to improve their arrest decisions. As the next Part explains, some prosecutors can use dismissals as teachable moments to help police learn when to release, rather than arrest, suspects. However, the

⁴³ See Andrew E. Taslitz, *Police Are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgment Right*, 8 OHIO ST. J. CRIM. L. 7, 60 (2010) (“Police departments also often reward arrests, regardless of whether they lead to prosecutions or convictions.”).

⁴⁴ See, e.g., Simon Johnson & James Kwak, *Lehman Brothers and the Persistence of Moral Hazard*, WASH. POST (Sept. 15, 2009, 8:33 AM), http://www.washingtonpost.com/wp-dyn/content/article/2009/09/15/AR2009091500943_pf.html [<https://perma.cc/RES2-QK9N>].

⁴⁵ See Gershowitz, *supra* note 5, at 26–36.

⁴⁶ See DOTTIE CARMICHAEL ET AL., *EVALUATING THE IMPACT OF DIRECT ELECTRONIC FILING IN CRIMINAL CASES* 8 (2006).

⁴⁷ See Gershowitz, *supra* note 5, at 33–34.

⁴⁸ See *id.*

effectiveness of these communications varies by office, and some prosecutors' offices do not provide basic dismissal information to the police.

III. DISMISSALS AS TEACHABLE MOMENTS FOR POLICE OFFICERS

The criminal justice system—to the extent you can call it a system—suffers from a terrible information flow problem. Examples abound: arrestees have to hire a private lawyer or decide to stick with the public defender without knowing which lawyer is more capable;⁴⁹ judges must decide whether to trust prosecutors and defense attorneys without knowing how they comported themselves in other courtrooms; and most prosecutors make plea bargain offers without knowing how crowded the jails are or understanding how long an inmate is likely to spend in prison before being paroled.⁵⁰

Worse yet, the lack of information causes actors to make bad decisions. Consider what happens as a result of the information deficits outlined above. Arrestees may fire their free appointed lawyer and spend their life savings (and that of their families) to hire an inferior retained attorney. Judges may trust the word of prosecutors without realizing that those same lawyers have engaged in misconduct in the courtroom down the hall.⁵¹ And prosecutors may make stiff plea bargain offers without realizing the degree of overcrowding in a prison on the other side of the state where the inmate will be incarcerated.⁵²

Although it has received less attention, a similar information flow problem exists between police and prosecutors—when prosecutors dismiss some warrantless arrests, police may not learn that the cases were dismissed or why they were dismissed. If we think of some dismissed cases as the results of wrongful or unnecessary arrests, we should want the police to understand that they have made mistakes so that they do not repeat them in the future. In this way, dismissals can

⁴⁹ On the public's lack of understanding of the machinations of the criminal justice system, see Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911 (2006).

⁵⁰ See Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47, 49 nn.9–10 (2008) (describing why prosecutors do not take the resources available to jails and prisons into account when deciding whether to offer a plea bargain).

⁵¹ To combat this problem, I have suggested publicly shaming prosecutors whose cases are reversed for misconduct. See generally Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059 (2009).

⁵² To ameliorate this problem, I have suggested that jails and prisons regularly notify prosecutors of capacity and conditions. See generally Gershowitz, *supra* note 50.

be teachable moments, but only if prosecutors explain the dismissals, and the reasons for them, to the police.

This Part describes the practices of nearly twenty prosecutors' offices in informing police about dismissals. Some prosecutors' offices explain all dismissals to the arresting officers. Other prosecutors' offices explain dismissals only in cases where the police officers made apparent errors. Still other prosecutors' offices inform the police officers of the dismissals but do not explain the reasons why the cases were dismissed. And in some offices, prosecutors do not tell officers that cases have been dismissed at all. In short, there is considerable variation in how much information prosecutors communicate to the police.

A. Notification and Explanation of Dismissals in Almost All Cases

Some prosecutors' offices make a concerted effort to inform police officers when a case has been dismissed. For instance, a prosecutor in Louisville, Kentucky, explained that

we would usually advise the officer as to why we recommended no indictment or refused to present [the case to the grand jury]. . . . Usually we like to treat these events as “teachable moments” that allow us to educate an officer as to how the case might have been better handled or prepared.⁵³

In Ventura County, California, prosecutors “give a reason for not filing a case in the first place, and if [they] filed the case but later dismissed it, [they] would say why.”⁵⁴ In Allegheny County, Pennsylvania, the district attorney's office does not “proceed with any resolution on a case without letting the victim and the officers know.”⁵⁵ Similarly, in Denton County, Texas, the district attorney's office notifies the officers in every case in which they decline to file charges and most cases (though perhaps not every single misdemeanor) when charges are dismissed after filing.⁵⁶ In Pima County, Arizona, officers are usually present when prosecutors decline to

⁵³ Email from Jeffrey Cooke, Assistant Commonwealth's Attorney, Louisville Office of the Commonwealth's Attorney, to Elizabeth Lester-Abdalla (July 14, 2017, 10:38 AM) (on file with author).

⁵⁴ Email from Mike Frawley, Ventura Cty. Dist. Attorney's Office, to Elizabeth Lester-Abdalla (July 14, 2017, 11:15 AM) (on file with author).

⁵⁵ Email from Mike Manko, Allegheny Cty. Dist. Attorney's Office, to Adam Gershowitz (July 13, 2017, 3:53 PM) (on file with author).

⁵⁶ See Email from Jamie Beck, First Assistant Criminal Dist. Attorney, Denton Cty. Dist. Attorney's Office, to Elizabeth Lester-Abdalla (July 17, 2017, 3:50 PM) (on file with author).

move forward with a case (because cases are often rejected on the cusp of presenting officer testimony to a grand jury), and when cases are dismissed after indictment, a paralegal in the prosecutor's office will typically email the officer.⁵⁷ The Fort Bend County District Attorney's Office in Texas goes further by having secretaries draft a memo to the officers specifying the reasons for the dismissal.⁵⁸

B. Notification in Some Cases

Other prosecutors' offices notify the police about dismissals in some, but not all, cases. A number of prosecutors' offices appear to focus their communication efforts on cases in which the officers have made clear errors. For instance, in Shelby County, Tennessee, the district attorney's office does not have a policy on informing police about case dismissals and generally does not inform the police about dismissals.⁵⁹ However, "if the case was dismissed because of a mistake that the officer made, [they] try to let the officer know what the mistake was and what he might do differently in the future."⁶⁰ In Los Angeles, California, when a prosecutor dismisses a case she "would only tell officers who have asked to be informed, or who are present in court when the case is dismissed, or if the dismissal was necessitated by police error for which case-specific training is in order."⁶¹ Prosecutors do not inform all officers of dismissals "as matter of course."⁶²

Similarly, in Essex County, Massachusetts, prosecutors ordinarily do not inform police officers about dismissals because in their view, most dismissals are not because of police error.⁶³ However, "[i]f there is an egregious error by the officer and that is the reason for the dismissal ([for example, a] bad search warrant), then the [prosecutor] would likely tell them."⁶⁴ A prosecutor in Fresno, California, offered a similar explanation: "If there is a problem with the case" the prosecutors "will routinely let the officer know so that the same mistakes are

⁵⁷ See Telephone Interview with Amelia Cramer, Chief Deputy Pima Cty. Attorney (Aug. 10, 2017).

⁵⁸ See Email from Wesley Wittig, Exec. Assistant Dist. Attorney, Fort Bend Cty. Dist. Attorney's Office, to Adam Gershowitz (July 13, 2017, 4:12 PM) (on file with author).

⁵⁹ Email from Alanda Dwyer, Office of Shelby Cty. Dist. Attorney Gen., to Adam Gershowitz (July 13, 2017, 5:05 PM) (on file with author).

⁶⁰ *Id.*

⁶¹ Email from Devallis Rutledge, Special Counsel to the Dist. Attorney, L.A. Cty. Dist. Attorney's Office, to Adam Gershowitz (July 13, 2017, 5:05 PM) (on file with author).

⁶² *Id.*

⁶³ See Email from Carrie Kimball-Monahan, Essex Cty. Dist. Attorney's Office, to Elizabeth Lester-Abdalla (July 25, 2017, 12:02 PM) (on file with author).

⁶⁴ *Id.* According to an Essex County prosecutor, "[t]his doesn't happen frequently." *Id.*

not made in the future.”⁶⁵ Likewise, in New Haven, Connecticut, prosecutors ordinarily do not notify police about dismissals, but “[t]here is an informal practice where several prosecutors, but not all, do alert police officers in the event an arrest is dismissed. This particularly applies to incidents related to motor vehicle stops and[]/or searches. The prosecutors do this, in part, as a training mechanism.”⁶⁶

Other prosecutors’ offices explained that communication with police officers might depend on whether the case was declined at the outset or dismissed after charges had been filed. For instance, in Contra Costa, California, police agencies bring in cases and request that prosecutors file charges. If the prosecutors do not file charges, “the agencies are notified that we declined to charge a case and the agencies are given some general information as to why ([i.e.,] ‘insufficient evidence’).”⁶⁷ By contrast, for cases that prosecutors “do file but subsequently dismiss, [prosecutors] do not generally inform the agencies of the basis for the dismissal” because those cases are usually dismissed “in the interests of justice.”⁶⁸

C. *Variations in the Amount of Information Conveyed*

For prosecutors’ offices that notify police about dismissals, the amount of information provided to the officers varies considerably. Some prosecutors’ offices typically, though not always, provide an explanation for the dismissals. As noted above, in Fort Bend County, Texas, the district attorney’s office sends the officers a memorandum explaining the dismissal.⁶⁹ Similarly, in Hennepin County, Minnesota (home to Minneapolis), when prosecutors “close a case, including by dismissal, [they] note the case disposition in [their] case management system. That generates an email to the investigator telling him/her of the disposition of their case. . . . Depending on the circumstances, there may or may not be an explanation.”⁷⁰ However, a senior attorney in the Hennepin County office noted that prosecutors typically

⁶⁵ Email from Steve Wright, Fresno Cty. Office of the Dist. Attorney, to Adam Gershowitz (July 24, 2017, 12:35 PM) (on file with author).

⁶⁶ Email from Robert Sage, New Haven State’s Attorney’s Office, to Elizabeth Lester-Abdalla (July 17, 2017, 9:12 AM) (on file with author).

⁶⁷ Email from Brian Feinberg, Deputy Dist. Attorney, Contra Costa Cty. Dist. Attorney’s Office, to Adam Gershowitz (July 13, 2017, 6:26 PM) (on file with author).

⁶⁸ *Id.*

⁶⁹ See Email from Wesley Wittig, Exec. Assistant Dist. Attorney, Fort Bend Cty. Dist. Attorney’s Office, to Adam Gershowitz (July 13, 2017, 4:12 PM) (on file with author).

⁷⁰ Email from Alan Harris, Managing Assistant Hennepin Cty. Attorney, Hennepin Cty. Attorney’s Office, to Adam Gershowitz (July 13, 2017, 6:02 PM) (on file with author).

provide an explanation for the officers if their case was dismissed as part of a plea bargain.⁷¹

Other jurisdictions inform the police about dismissals but do not typically provide explanations of the reasons for dropping charges. For instance, in Wayne County, Michigan (home to Detroit), prosecutors will note in the file that is returned to the police that the case was “dismissed because there is insufficient evidence to prosecute.”⁷² Wayne County prosecutors do not, however, specify the reason why they are not proceeding with the case unless asked by the officer in charge of the case.⁷³

D. No Information from Prosecutors to Police About Dismissals

Finally, in some district attorney’s offices, prosecutors simply do not tell police officers that a case has been dismissed. For example, in Kern County, California, prosecutors do not inform police about dismissals “unless the officer specifically asks what happened.”⁷⁴ In Norfolk, Massachusetts, prosecutors do not notify police about dismissals and instead rely on the officers learning “indirectly, as they would no longer be required to be a witness” or because other police department employees sitting in court might notify the arresting officers.⁷⁵ Similarly, representatives of district attorney’s offices in Essex County, New Jersey,⁷⁶ Lee County, Florida,⁷⁷ and Salt Lake County, Utah,⁷⁸ explained that their prosecutors ordinarily do not inform police officers about case dismissals.

* * *

Although the responses of the eighteen offices described above are a very small percentage of the 2,330 prosecutors’ offices in the

⁷¹ *See id.*

⁷² Email from Maria Miller, Wayne Cty. Assistant Prosecutor, to Adam Gershowitz (July 13, 2017, 7:51 PM) (on file with author).

⁷³ *See id.*

⁷⁴ Email from Mark Pafford, Kern Cty. Dist. Attorney’s Office, to Elizabeth Lester-Abdalla (July 14, 2017, 11:01 AM) (on file with author).

⁷⁵ Email from David Traub, Norfolk Cty. Dist. Attorney’s Office, to Elizabeth Lester-Abdalla (July 21, 2017, 12:53 PM) (on file with author).

⁷⁶ *See* Email from Katherine Carter, Pub. Info. Officer, Essex Cty. Prosecutor’s Office, to Adam Gershowitz (July 13, 2017, 3:48 PM) (on file with author).

⁷⁷ *See* Email from Kelly Worcester, Lee Cty. Dist. Attorney’s Office, to Elizabeth Lester-Abdalla (July 17, 2017, 9:21 AM) (on file with author).

⁷⁸ *See* Email from Blake Nakamura, Salt Lake Cty. Dist. Attorney’s Office, to Adam Gershowitz (July 14, 2017, 4:07 PM) (on file with author).

United States,⁷⁹ they demonstrate the wide variations between offices. Some offices notify police officers about dismissals in all cases and try to educate the police so that they can avoid errors in the future. Other offices leave it to prosecutors' discretion to decide which dismissals to notify police about. Some prosecutors' offices provide information to police about particular types of cases, such as motor vehicle stops or searches. Still other county prosecutors' offices notify police officers that cases were dismissed but do not provide explanations of the reasons for the dismissals. And some prosecutors tell officers nothing about dismissals.

Moreover, although prosecutors in some offices described the value in having prosecutors educate police officers about dismissals, most offices do not appear to have a formal policy requiring that prosecutors transmit information to police officers. Rather, in many of the prosecutors' offices described above, it appears that prosecutors simply exercise their best judgment about when to talk with police about case dismissals. For instance, a prosecutor in Louisville, Kentucky—an office that strongly endorses using dismissals as “teachable moments” for police—explained that “[t]here is no formal policy. The prosecutor assigned to the case informs the officer and, depending on the case, may give further information or suggestions.”⁸⁰

IV. DESIGNING THE MOST EFFECTIVE DISMISSAL NOTICE FOR POLICE OFFICERS

As described in Part III, prosecutors' offices differ in whether and how much they communicate with police officers about dismissals. This Part briefly offers some best practices that prosecutors should embrace.⁸¹

First, prosecutors' offices should adopt a formal policy requiring that the arresting officer be notified when any case is dismissed. Prosecutors in many offices are extremely busy; often, some tasks have to go undone, and the first thing to give way is usually a task that is not mandatory. Even if a prosecutor knows it is a good idea to communicate with police officers about dismissals—both to maintain good relations and to improve the officers' performance—busy prosecutors

⁷⁹ See BUREAU OF JUSTICE STATISTICS, PROSECUTORS IN STATE COURTS, 2007, at 1 (2011).

⁸⁰ Email from Jeffrey Cooke to Elizabeth Lester-Abdalla, *supra* note 53.

⁸¹ As Professor Rachel Harmon has explained, we typically think of the regulation of the police as a judicial question involving constitutional criminal procedure. There are, however, other methods that can effectively constrain and constructively shape police behavior. See generally Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761 (2012).

might skip that task if it is only a suggested practice. Indeed, because dismissals may upset some police officers, prosecutors have further incentive to avoid these difficult conversations.

The best way to ensure that police are informed about dismissals is to make it mandatory for prosecutors to inform them. Prosecutors' offices already mandate such information flow to victims pursuant to the Crime Victims' Rights Act, which provides federal crime victims with a reasonable right to confer with the prosecutor.⁸² Many states followed suit, either by constitutional amendment, statute, or internal prosecutor's office policy.⁸³ Although it might be challenging to convince legislatures to enact comparable legislation for informing police officers, it would be wise for prosecutors to embrace mandatory office policies of reporting dismissals to police officers.

Second, prosecutors should communicate dismissals to police officers in *all* cases, not simply those in which the police officer made a clear error. As noted, some police officers become upset when prosecutors dismiss cases or refuse to file charges in the first place.⁸⁴

Because police officers are repeat players in the system, there is a natural temptation for prosecutors to avoid conflict with them.⁸⁵ If a prosecutor's office only requires communication in cases of police "error," there will be a temptation for prosecutors to conclude that dismissals were not for police error. Put differently, prosecutors might quietly dismiss a case as "routine" rather than as "police error" to avoid having a difficult or time-consuming conversation with the officer.

Moreover, police officers can learn from prosecutors not only in cases in which they committed overt error, but also in cases in which they did not. The state criminal codes and Fourth Amendment doctrine are complicated. Even if the police officer did not commit a

⁸² For a discussion, see Elliot Smith, *Is There a Pre-Charge Conferral Right in the CVRA?*, 2010 U. CHI. LEGAL F. 407.

⁸³ See Elizabeth N. Jones, *The Ascending Role of Crime Victims in Plea-Bargaining and Beyond*, 117 W. VA. L. REV. 97, 115 (2014) ("Another significant right permits victims to consult with the prosecutor on their case."); cf. John W. Stickels et al., *Elected Texas District and County Attorneys' Perceptions of Crime Victim Involvement in Criminal Prosecutions*, 14 TEX. WESLEYAN L. REV. 1, 20–21 (2007) (describing emphasis prosecutors place on satisfying victims).

⁸⁴ See Abel, *supra* note 41, at 1738 ("Police put their lives on the line to investigate and arrest defendants, only to see prosecutors deal away the cases for some fraction of what they could have received at trial. It is not hard to see why this might upset officers.").

⁸⁵ See *id.* at 1762 ("Police departments and district attorneys' offices necessarily work together on many thousands of cases each year, and the chain of command on each side of the prosecution team has a lot at stake in maintaining good working relations with their prosecution-team colleagues.").

grievous error, she may learn something from the prosecutor that could help her in a future arrest.

Third, in communicating dismissals, prosecutors should explain the reasons for the dismissals. In some prosecutors' offices, the computer system is set up to simply send a report to the police officer that a case was dismissed for "insufficient evidence."⁸⁶ But insufficient evidence could mean multiple things. For example, if a witness recanted or if the prosecutor digs into a case and finds that the witness' criminal history makes her unreliable or unpersuasive, the prosecutor might believe a conviction is unlikely because of insufficient evidence; police would likely learn little from this type of "insufficient evidence" dismissal. But in other cases, prosecutors might conclude that there is simply not enough information to establish a required element of the crime. Perhaps the statute has a stringent mens rea, or it requires proof of a complicated element for which factual evidence is simply missing; or perhaps the officers failed to collect all the key evidence. Police officers could undoubtedly benefit from being informed of these holes in the cases. Police see similar cases with regularity and they might not arrest again in a weak case if they understood the reason an earlier, similar case was dismissed.

Communicating the reason for the dismissal is important not just in cases where elements of the offense are missing, but also when prosecutors dismiss cases as a matter of justice. If police officers have a better understanding of cases in which prosecutors will not move forward, the officers can avoid bringing those "unjust" cases into the criminal justice system in the first place.

Finally, for reasons described below in Part V, prosecutors should communicate information about the dismissals in writing so that the information can be aggregated into a database.

V. PROSECUTORS SHOULD CREATE A DATABASE OF OFFICERS WHOSE CASES ARE DISMISSED

A. *Benefits of a Dismissal Database*

As described in Part IV, the criminal justice system would function better if prosecutors' offices had a clear policy to notify arresting officers each time one of their cases is dismissed and provide the reasons for the dismissals. Using a computer system to make the notifications—rather than doing it only in person or by phone—would offer another possible benefit: a computerized notification system would

⁸⁶ See, e.g., Email from Maria Miller to Adam Gershowitz, *supra* note 72.

enable prosecutors to build a database and track the police officers and precincts who bring in cases that are repeatedly dismissed.⁸⁷

At present, prosecutors are likely aware of some “problem” officers who do a sloppy job writing police reports, arrest in questionable cases, or engage in problematic searches and interrogations. For instance, as a senior prosecutor in Montgomery County, Texas explained:

[O]ver time, we have individually learned that some officers may occasionally need additional assistance with presenting their cases or with determining appropriate charges. We then try to work with those officers, perhaps with a little extra attention. In a few rare cases, we may contact the officer[']s supervisor if persistent or pronounced problems in this area continue to occur.⁸⁸

Logically, prosecutors in smaller jurisdictions are more aware of problem officers, simply because there are not as many police officers to keep track of.⁸⁹ These smaller jurisdictions would likely see only a modest benefit from maintaining a database of officers whose cases are dismissed because of police error.⁹⁰

Large and medium-sized jurisdictions, however, are a very different story. Medium-sized prosecutors’ offices that serve communities of 250,000 to 1,000,000 people typically have roughly fifty prosecutors.⁹¹ Large prosecutors’ offices that serve counties of more than 1,000,000 people will have roughly 200 (and in some offices as many as

⁸⁷ On the rise, benefits, and fallibility of criminal justice data collection, see Wayne A. Logan & Andrew Guthrie Ferguson, *Policing Criminal Justice Data*, 101 MINN. L. REV. 541 (2016). While this Essay focuses on the benefits of a database of police errors, that is not to say we should not also track prosecutorial behavior as well. See Jason Kreag, *Prosecutorial Analytics*, 94 WASH. U. L. REV. 771 (2017) (advocating data collection involving, *inter alia*, prosecutorial action during jury selection and charging).

⁸⁸ Email from Mike Holley, First Assistant Dist. Attorney, Montgomery Cty. Dist. Attorney’s Office, to Adam Gershowitz (July 13, 2017, 4:07 PM) (on file with author).

⁸⁹ About half of police departments in the United States have ten officers or fewer. BUREAU OF JUSTICE STATISTICS, LOCAL POLICE DEPARTMENTS, 2013: PERSONNEL, POLICIES, AND PRACTICES 3 (2015) [hereinafter BJS, LOCAL POLICE DEP’T’S]. And over 70% of prosecutor’s offices serve districts with populations of fewer than 100,000 people. BUREAU OF JUSTICE STATISTICS, *supra* note 79, at 3 tbl.3.

⁹⁰ Because turnover in prosecutors’ offices is fairly high, a database might prove somewhat useful to junior prosecutors in jurisdictions of any size who do not yet have the lay of the land. But logic dictates that databases in small communities are not likely to be a panacea to improve police practices.

⁹¹ See BUREAU OF JUSTICE STATISTICS, *supra* note 79, at 4 tbl.2 (showing that this figure includes, on average, one chief prosecutor, forty-three assistant prosecutors, seven supervisory attorneys, and three managing attorneys).

1,000) prosecutors.⁹² These prosecutors will be working with hundreds, thousands, or even tens of thousands of officers.⁹³ Indeed, in some large counties, prosecutors work with dozens of different police, constable, sheriff's, and other law enforcement agencies. In Los Angeles, California, for example, the district attorney's office interfaces with nearly one hundred different law enforcement agencies.⁹⁴

In medium and large jurisdictions, prosecutors cannot possibly have enough interaction with the hundreds or thousands of police officers to know which officers regularly bring in cases that will be dismissed and which officers are in most need of training. Of course, there will be hallway gossip among prosecutors about "who to be careful of" but such talk will not reach all prosecutors and it will be underinclusive in identifying the problem officers. In short, many prosecutors will not learn of numerous problem officers.

A database that tracks dismissals by individual officers would fill the information gap and would serve multiple functions. First, and most obviously, a database could signal that individual officers are problematic and in need of remedial training or discipline. Imagine, for example, that at the end of the calendar year, prosecutors see that a handful of officers had particularly high numbers of arrests that were dismissed for insufficient evidence. The prosecutor's office could report this to the police department and strongly encourage increased training.

Second, a database might show that a particular precinct in the police department is performing poorly compared with the department as a whole. Perhaps there is a culture in that precinct that encourages high numbers of arrests, even in weak cases.⁹⁵ If the prosecutor's office presented this data to the police chief and expressed displeasure that the precinct was wasting the valuable time of

⁹² See *id.* (accounting for an average of 1 chief prosecutor, 187 assistant prosecutors, 31 supervisory attorneys, and 13 managing attorneys); Gershowitz & Killinger, *supra* note 23, at 268 tbl.1 (listing the number of prosecutors in large district attorneys' offices).

⁹³ Only 5.3% of police departments in the United States have more than 100 officers, but those departments employ 62.8% of full-time officers. See BJS, LOCAL POLICE DEP'TS, *supra* note 89, at 3. New York City alone employs more than 34,000 full-time police officers. See *id.* at 3 tbl.2.

⁹⁴ See Email from Devallis Rutledge, Special Counsel to the L.A. Dist. Attorney, to Adam Gershowitz (May 17, 2017, 2:10 PM) (on file with author).

⁹⁵ See, e.g., Ford Fessenden & David Rohde, *Dismissed Before Reaching Court, Flawed Arrests Rise in New York*, N.Y. TIMES, Aug. 23, 1999, at A1, B6 ("In the two police precincts that make up Washington Heights, Inwood and northern Harlem, prosecutors threw out 120 of the 2,035 arrests—a rate, 5.9 percent, that is about twice as high as in the rest of Manhattan during that period.").

the prosecutor's office, the police chief might reassign precinct commanders and attempt to replace the management of the problematic precinct.⁹⁶

Third, a database might signal that some officers, some precincts, or even an entire police department has a poor understanding of the legal elements of a particular crime. For example, many states criminalize being a felon in possession of a firearm.⁹⁷ However, in some states—Texas is a good example—the definition of who qualifies as a felon for purposes of the statute is complicated, and police officers sometimes wrongfully arrest people who are not technically felons under the definition in the statute.⁹⁸ A database that tracks dismissals might show that certain officers (or entire precincts or departments) are misunderstanding sections of the penal code.

Similarly, a database might indicate that prosecutors across the office are dismissing a particular type of case, not because police misunderstood the law, but because the prosecutors think convictions are not merited as a matter of justice. As noted above, police officers sometimes arrest high school students for fighting on school grounds, and prosecutors sometimes dismiss those cases because they do not believe the teenagers should be saddled with criminal convictions.⁹⁹ Prosecutors also sometimes dismiss low-level drug charges or possession of drug paraphernalia charges, even though police officers correctly recognized that all the elements of the crime were present.¹⁰⁰ A database of charges dismissed “as a matter of justice” would help police officers to learn when to exercise their authority to arrest and when to release suspects on the street. For example, if police officers learn that prosecutors regularly dismiss cases involving possession of

⁹⁶ Police departments sometimes make changes to senior police management to remedy problems within the department. *See, e.g.*, Al Baker, *Shake-Up in Hierarchy of the New York Police Department*, N.Y. TIMES (Jan. 9, 2018), <https://www.nytimes.com/2018/01/09/nyregion/new-york-police-department-nypd-nyc.html> [<https://perma.cc/9ND4-YUN4>]; David Cruz, *Shakeup at Newark Police Department Returns Former Director to Old Post*, NJTV NEWS (Dec. 21, 2015, 5:00 PM), <https://www.njtvonline.org/news/video/shakeup-at-newark-police-department-returns-former-director-to-old-post/> [<https://perma.cc/FGR8-MHFD>]; Naheed Rajwani, *Dallas Chief's Decision to Demote Top Brass Shocks Rank-and-File Police*, DALL. NEWS (Nov. 30, 2017, 4:15 PM), <https://www.dallasnews.com/news/dallas-police/2017/11/30/police-chief-demotes-top-brass-major-shakeup-dallas-command-staff> [<https://perma.cc/FZH5-QK7C>].

⁹⁷ *See, e.g.*, MICH. COMP. LAWS ANN. § 750.224f (West 2004); OR. REV. STAT. ANN. § 166.270 (West 2003); TEX. PENAL CODE ANN. § 46.04(a) (West 2009).

⁹⁸ *See, e.g.*, Ramon v. State, No. 13-15-00146-CR, 2016 WL 3364979 (Tex. App. June 16, 2016).

⁹⁹ *See, e.g., supra* notes 38–39 and accompanying text.

¹⁰⁰ *See supra* note 40 and accompanying text.

drug paraphernalia, the officers might choose not to arrest the next person they find in possession of a crack pipe.

In sum, a database of dismissals should help police departments to identify (1) problem officers in need of training or discipline; (2) precincts that are performing poorly relative to the rest of the department; (3) deficits in officers' understanding of particular crimes; and (4) crimes that prosecutors dismiss out of a sense of justice and for which the officers should be reluctant to make arrests.

Despite these benefits, however, it appears prosecutors do not maintain dismissal databases. Not a single one of the eighteen prosecutors' offices interviewed for this Essay maintains a list or database of officers whose cases had been dismissed.

B. *The Brady Concern*

One reason that prosecutors may not carefully track and document dismissals is that it is time consuming and logistically challenging. This rationale is not particularly persuasive, however, because prosecutors must file paperwork to decline or dismiss charges. Moreover, many large and medium-sized prosecutors' offices have sophisticated computer systems for managing charges and dockets. Creating a database that tracks dismissals and officers should not be complicated.

A more logical reason that prosecutors may not want to compile a database of officers whose cases have been dismissed is the concern that it might be discoverable. The *Brady* doctrine requires prosecutors to disclose to the defendant any favorable and material evidence known to prosecutors or the police.¹⁰¹ Favorable evidence includes that which is exculpatory or which impeaches.¹⁰² To be material, there must be a reasonable probability that the evidence would change the outcome as to guilt or punishment.¹⁰³ Prosecutors cannot avoid *Brady* obligations by sticking their heads in the sand. In *Kyles v. Whitley*,¹⁰⁴ the Supreme Court imposed a duty on trial prosecutors to learn of favorable evidence in possession of other prosecutors or the police.¹⁰⁵

A database of officers whose cases are frequently dismissed would not be exculpatory evidence, but some of the database entries

¹⁰¹ See *Brady v. Maryland*, 373 U.S. 83, 87–89 (1963).

¹⁰² See *United States v. Bagley*, 473 U.S. 667, 676 (1985).

¹⁰³ See Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 McGEORGE L. REV. 643, 649 (2002). The Court has not been particularly generous as to what constitutes materiality. *Id.* at 645.

¹⁰⁴ 514 U.S. 419 (1995).

¹⁰⁵ See *id.* at 437.

might be considered impeachment evidence. For instance, if a police officer will testify in a defendant's trial, a database listing dishonest behavior by the officer in previous cases would be favorable to the defendant because it could be useful for impeachment.

Surprisingly, the scope of impeachment evidence remains somewhat uncharted territory more than fifty years after the initial *Brady* decision. As Jonathan Abel recently explained, the Supreme Court has never decided whether the *Brady* doctrine applies to police personnel files.¹⁰⁶ Lower federal courts have not clearly answered the question,¹⁰⁷ and state courts are all over the map.¹⁰⁸ The situation is complicated because in some states—California is a good example—statutes provide that personnel records are confidential and shall not be disclosed in criminal or civil proceedings, subject to limited exceptions.¹⁰⁹

A database of police officers whose cases have been frequently dismissed is not a classic item for a personnel file. It is not a disciplinary write-up or an internal affairs investigation. At most, it might be construed as a performance evaluation, but even that is uncertain. A simple list of dismissals, without more, implies that the officer has performed poorly, but it does not explicitly state as such. Moreover, the database would not be in an officer's personnel file, but instead would be a standalone document. All of which suggests that it would likely be more accessible to prosecutors, less confidential, and thus more likely to fall within the *Brady* doctrine. As such, an argument that a dismissal database should enjoy blanket exemption from *Brady* disclosure would be weak.

However, just because a database of dismissals would not be exempt from the *Brady* doctrine, does not mean that prosecutors would necessarily have to turn over database entries in all or even most cases. To fall within *Brady*, the database entries must contain impeachment evidence for the particular officer in question. Many database entries about officers, however, would not constitute impeachment evidence. For example, imagine the database included the following dismissal categories:

- (1) Case dismissed for insufficient evidence to prosecute for [Crime X].

¹⁰⁶ See Jonathan Abel, *Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 751 (2015).

¹⁰⁷ Cf. *id.* at 757–58 (describing an unresolved circuit split on this issue).

¹⁰⁸ See *id.* at 762–79.

¹⁰⁹ See, e.g., CAL. PENAL CODE § 832.7(a) (West 2008).

- (2) Case dismissed because the officer misunderstood the elements required to prove [Crime X].
- (3) Case dismissed in the interest of justice.
- (4) Case dismissed because the search may not satisfy Fourth Amendment requirements.
- (5) Case dismissed because of police misconduct, specifically [explanation].

If the prosecutor's office generated a document showing the number of cases Officer Smith had dismissed for each category, none of the information in categories one through four would be impeachment. None of those categories indicates, on its face, that Officer Smith lied or that his credibility is in question. The data does not indicate that he planted, hid, or otherwise mishandled evidence. Categories one through four indicate that Officer Smith did not have a good understanding of the evidence necessary to secure a conviction, the prosecutors' policies for exercising their discretion as a matter of justice, and the Supreme Court's Fourth Amendment jurisprudence.

Of course, we could speculate that Officer Smith knew the elements of the crimes were not met and chose to arrest anyway, or that Officer Smith purposefully violated the Fourth or Fifth Amendment. If true, that would be impeachment evidence that reflects on the officer's honesty.¹¹⁰ But those conclusions are mere speculation and would not be present in the dismissal database. The *Brady* doctrine does not require prosecutors to go on a fishing expedition to ferret out impeachment evidence based on speculation.¹¹¹ Put differently, a defendant's hope that an officer's prior cases were dismissed for nefarious conduct rather than lack of legal knowledge of the criminal code or the Fourth or Fifth Amendment should not trigger a *Brady* obligation.

To the extent that any cases are dismissed because of police misconduct, that, of course, would be quite different. If a prosecutor knows or should know that a police officer has previously engaged in misconduct leading to the dismissal of criminal charges, that would

¹¹⁰ See, e.g., *Milke v. Ryan*, 711 F.3d 998, 1015–16, 1020–22 app. (9th Cir. 2013) (reversing conviction in part based on officer's history of Fourth and Fifth Amendment violations).

¹¹¹ See BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 5:25 (Thompson Reuters 2017–18) (reviewing various types of obligations imposed on prosecutors by the *Brady* doctrine but noting that “a defendant has no right to embark on an investigative fishing expedition of everything in the prosecutor's possession or control in the hope that something useful might turn up”).

constitute impeachment evidence that the prosecutor would have to disclose to the defense.¹¹²

The possibility of police misconduct cases may be enough to deter some prosecutor's offices from creating any type of dismissal database. But it should not be: prosecutors' offices should want to identify "*Brady* cops"—those who will be unable to testify due to prior misconduct—as early as possible so that those officers do not taint future cases and cause appellate problems for years to come.¹¹³ Moreover, prosecutors will almost certainly be aware (or should have been aware) of some of these "*Brady* cops" already and thus would have had *Brady* obligations even in the absence of a dismissal database.¹¹⁴ Additionally, many courts do not require that *Brady* evidence be turned over until the eve of trial, at which point most cases will already have pleaded or been dismissed.¹¹⁵ Indeed, in *United States v. Ruiz*,¹¹⁶ the Supreme Court explicitly recognized that defendants could waive their right to receive impeachment material as part of a guilty plea.¹¹⁷ In short, a dismissal database would likely create only a small number of new *Brady* obligations. Moreover, the information would already be in the database, making it easy for the prosecutor to turn it over. Although the burden on prosecutors would be minimal, the potential benefit to defendants would be substantial, and it would serve the interests of justice for prosecutors to share this information expeditiously.

Finally, the cost-benefit analysis should favor the dismissal database even if it occasionally creates *Brady* material. If a dismissal database leads to better police training and, as a result, officers bringing in fewer weak cases, that benefit should outweigh the cost of creating a *Brady* record in a small number of cases.¹¹⁸

¹¹² *Milke*, 711 F.3d at 1017. This would be particularly clear if the information were in a standalone database, rather than in the officer's personnel file.

¹¹³ See Abel, *supra* note 106, at 746 (explaining that *Brady* cops "cannot make arrests, investigate cases, or conduct any other police work that might lead to the witness stand. Such officers would be well advised to start looking for a new profession.").

¹¹⁴ See *supra* Section V.A.

¹¹⁵ See Miriam H. Baer, *Timing Brady*, 115 COLUM. L. REV. 1, 13 (2015).

¹¹⁶ 536 U.S. 622 (2002).

¹¹⁷ *Id.* at 633 ("[T]he Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant.").

¹¹⁸ The existing *Brady* jurisprudence does a poor job of incentivizing *Brady* disclosures and of holding prosecutors responsible for violations. See, e.g., Jason Kreag, *The Jury's Brady Right*, 98 B.U. L. REV. 345, 383 (2018) (advocating for increased prosecutorial disclosure, *inter alia*, through the elimination of the materiality prong). Accordingly, a dismissal database may have the additional benefit of signaling more clearly to prosecutors the need to be on the lookout for *Brady* material and to disclose it.

CONCLUSION

Police officers have enormous power in the American criminal justice system. A police officer's decision to arrest leads to an arrest record, a mug shot, incarceration pending bail, the need to post money for release, and a paper trail that may influence employment, housing, deportation, and job prospects down the road. Even assuming most police officers are well intentioned, the reality is that they receive little formal legal training and do not typically consult with prosecutors about the initial decision to make a warrantless arrest. The best hope for police officers to make good arrest decisions is for them to understand how prosecutors eventually resolve cases after arrest. If prosecutors dismiss cases—for lack of evidence or out of a sense of justice—then police officers should know about the dismissals and the reasons in order to more effectively police their next shifts.

In some jurisdictions, prosecutors use dismissals as “teachable moments” and inform police officers about all dismissals. Other prosecutors' offices communicate dismissal information to police officers only when the officers have made clear errors. Still other prosecutors' offices provide little or no information about dismissals and put the onus on the officers to inquire why their cases were dismissed.

Prosecutors' offices should establish formal policies mandating that prosecutors inform police officers that their cases were dismissed and of the reasons for dropping charges. Requiring communication in all cases will educate police officers about the elements of crimes in the penal code, the realities about which cases are difficult for prosecutors to prove, as well as the formal charging policies and informal practices of the prosecutor's office. This information will enable police officers to better decide when to make warrantless arrests, and it should reduce the number of weak cases brought into the criminal justice system. Reducing inputs will benefit overburdened prosecutors, public defenders, judges, and court staff by enabling them to spend more time on cases that will not be outright dismissed. And, of course, having police avoid unnecessary arrests will benefit defendants by avoiding needless incarceration and the cascade of other repercussions that follow an arrest.

A formal policy of notifying police officers of all dismissals will also enable prosecutors' offices to build a database. In medium- and large-sized offices—where it is impossible for prosecutors to know every police officer—a database will identify problem officers who are repeatedly bringing in weak cases. Prosecutors can then recommend that police departments provide further training to those officers. A

database might also make a dent in the moral-hazard problem of police being judged only on their arrests rather than case resolutions. Finally, a database that primarily documents inadvertent police charging errors will, for the most part, not create impeachment evidence that would have to be disclosed under the *Brady* doctrine.

In the vast majority of cases, warrantless arrests are the first step in the criminal justice process. Prosecutors should arm police with the best information so that the officers avoid as many incorrect or ill-advised arrests as possible. Sharing information about dismissals will help the officers to exercise their enormous authority more wisely.