Can Police Misconduct Be Limited?

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I. INTRODUCTION

Police violence has spawned numerous political, legal, and scholarly ideas over the past several years. Since the 2020 uprisings after the killing of George Floyd, the conversation on police, their usefulness, their upstandingness, their credibility, their power, and their centrality to our deeply broken criminal legal system has grown louder, and, in many cases, richer. In an interesting turn, the trend in criminal law scholarship focusing on police is to advocate easing the prosecution and conviction of police crimes.[1] This is in tension with the general thrust of decades of criminal law scholarship, which is almost exclusively about reducing, if not eradicating, our criminal legal system.[2]

Recent scholarship advocating incarceration for police is not exceptional, however. Legal scholarship remains punitive in areas where progressive academics and advocates see incarceration as a way to redistribute power. As Benjamin Levin and I have recently written, those who have taken up the carceral mantle are often progressive academics and activists who wish to use prison to redistribute power and responsibility[3]: from the wealthy to the poor; cis heterosexual men to queer people, women, trans and nonbinary people;[4] and White People to people of color.[5] And within this movement is the idea that we can make police accountable through criminal law.[6] To do to police what they do to so many others, to lock them up.

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[1] *See* sources cited *infra* note 19.

[2] *See infra* note 56 and accompanying text.

[3] Benjamin Levin & Kate Levine, *Redistributing Justice*, 124 COLUM. L. REV. 1, 11–12 (forthcoming 2024), (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4677787 [https://perma.cc/Y5BW-K924]).

[4] *Id.* at 28, 32.

[5] *Id.* at 30.

[6] *See* Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV. 997, 1016–17 (2021) (discussing the numerous proposals that have been made to change procedural and substantive law to make it easier to prosecute the police.).

Professor Hendricks' *Tolling Justice* is a significant contribution to this kind of literature.[7] The Article takes a dataset from the National Registry of Exonerations (NRE) and uses it to determine what possible crimes were committed by police en route to the conviction of an innocent person.[8] It then makes educated inferences as to why those crimes were never prosecuted.[9] It finds that in numerous cases, crimes by police went unprosecuted because the Statute of Limitations (SOL) for that crime had passed by the time a prosecutor discovered or expressed interest in prosecuting the crime.[10] The Article then proposes a solution of eliminating the SOLs for crimes committed by police.[11]

This Response will make two main points. First, as a descriptive piece, *Tolling Justice* makes a significant contribution to our understanding of police criminality beyond extreme violence. Most scholars writing about police crime tend to focus on high salience acts of police brutality.[12] This Article looks at a deeper and broader set of police wrongdoing, some of which it posits is criminal.[13] In doing so, it surfaces some of the aggregate trauma that police misconduct wreaks on thousands of people ensnared in our criminal legal system. Her article also reminds us that so much crime, whether by police or other favored groups, goes unprosecuted.

Despite the descriptive power of *Tolling Justice*, however, this response critiques the ultimate conclusion that the SOLs should be eliminated for police crimes.[14] In particular, I will argue that her prescription is limitless, or at least her Article does not provide an adequate limiting principle despite her aim to increase prosecution only for police. There is little consensus on who is most

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[7] *See generally* Anjelica Hendricks, *Tolling Justice*, 85 OHIO ST. L.J. (forthcoming 2024) (on file with the *Ohio State Law Journal*).

[8] Hendricks, *supra* note 7, at 10, 14 ("Ultimately, after comparing the NRE's reported facts concerning police misconduct against the applicable state criminal offenses, I determined that a total of 838 likely police crimes were committed across 482 of the 1,431 cases that the NRE coded as involving police misconduct.").

[9] *Id.* at Part II.

[10] *Id.* at 42. ("After following the above steps to code whether the statutes of limitation had expired in each of the 838 likely police crimes identified in the NRE data set, the data showed that the statute of limitations had expired in 642 crimes. In other words, 76.61% of all of the likely police crimes identified in the data set were ones for which no criminal prosecution was possible to the governing statutes of limitation.") I do not totally know how Hendricks makes this inference. Even if the SOL had run by the time a person was exonerated, or by the time a prosecutor publicly acknowledged evidence that police had committed a crime, *id.* at 29, it is impossible to know if prosecutors were aware of these crimes years earlier and chose not to pursue them for numerous reasons, most obviously because acknowledging police misconduct would hamper their case against the eventually exonerated individual. In general, however, I will leave it to empiricists to analyze the data set and the inferences drawn from it and assume for my response that Hendricks' data and conclusions are generally correct.

[11] *Id.* at Part IV.

[12] *See* sources cited *infra* note19.

[13] *See* Hendricks, *supra* note 7, at 10, 14.

[14] *See* Hendricks, *supra* note 7, at Part IV.

deserving of criminal punishment.[15] In fact, the same argument, that police crimes are exceptional, has been successfully made to enlarge the statutes of limitation in numerous states for another group of progressive bogeymen, sexual offenders.[16]

Tolling Justice makes a similar move to a number of recent scholarly articles that aim to redistribute power through incarceration. In its attempt to find justice through the criminal system, it raises the specter of net widening of the criminal legal system.[17] From the perspective of one who cares about Decarceration, net widening, no matter how well-intentioned, is not a tenable solution.

II. UNDERSTANDING THE SCOPE OF POLICE CRIMINALITY

As a descriptive piece, *Tolling Justice* is a timely scholarly contribution. It excavates data about how and when police who commit crimes in cases that result in exoneration are (or are not) prosecuted.[18] Much of the recent literature on police criminality focuses almost exclusively on high salience crimes of

[15] *See* Levin & Levine, *supra* note **Error! Bookmark not defined.**, at 5–6.

[16] *See* sources cited *infra* note 70.

[17] Hendricks, *supra* note 7, at 60 (recommending the elimination of SOL for police crime because this "enhances methods for criminal prosecution").

[18] *Id.* at Parts I–II.

violence.[19] While this is understandable given the 2020 protests,[20] followed by the intense public and media scrutiny focused on Derek Chauvin's trial and conviction for murder,[21] it is hugely underinclusive.

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[19] *See, e.g.*, Nadia Banteka, *Police Brutality as Torture*, 70 UCLA L. REV. 470, 497–98 (2023); Zachary D. Kaufman, *Police Policing Police*, 91 GEO. WASH. L. REV. 353, 363 (2023) (arguing for statutes "explicitly punishing 'bystander' officers [to police brutality] and prodding them to act instead as 'upstanders.'"); Guyora Binder & Ekow N. Yankah, *Police Killings as Felony Murder*, 17 HARV. L. & POL'Y REV. 157, 168 (2022); Levine, *supra* note 6, at 1009 (arguing that prosecuting police violence is not an effective solution to police violence); Vida B. Johnson, *KKK in the PD: White Supremacist Police and What to Do About It*, 23 LEWIS & CLARK L. REV. 205, 238–39 (2019) ("With so few prosecutions of police even in the wake of high profile murders of unarmed civilians, it is not hard to see that most prosecutors have failed to act vigorously to rid police departments of troubled officers. Few efforts to rid departments of problem officers, even in this moment of heightened scrutiny, have been seen." (footnote omitted)); Mitchell F. Crusto, *Right to Life: Interest-Convergence Policing*, 71 RUTGERS U. L. REV. 63, 110–11 (2018) (suggesting a statute that would read, in part: "The Justice Department is hereby mandated to investigate each and every use of lethal force by local or state police officers, in non-custodial circumstances"); Adam Harris Kurland, *The Enduring Virtues of Deferential Federalism: The Federal Government's Proper Role in Prosecuting Law Enforcement Officers for Civil Rights Offenses*, 70 HASTINGS L.J. 771, 775 (2019) (arguing that federal prosecutors should prosecute police for shootings); Olwyn Conway, *"How Can I Reconcile with You When Your Foot Is on My Neck?": The Role of Justice in the Pursuit of Truth and Reconciliation*, 2018 MICH. ST. L. REV. 1349, 1351–52 (more prosecutions for police killings); Darryl K. Brown, *Criminal Enforcement Redundancy: Oversight of Decisions Not to Prosecute*, 103 MINN. L. REV. 843, 844 (2018) (arguing that criminal laws against police violence are underenforced); Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 639 (advocating for changing substantive law to make it easier to prosecute police for violence); Jasmine B. Gonzales Rose, *Racial Character Evidence in Police Killing Cases*, 2018 WIS. L. REV. 369, 375 (2018); Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 463, 466 (2017) (police shootings are an example of conflicts); Rebecca Roiphe, *The Duty to Charge in Police Use of Excessive Force Cases*, 65 CLEV. ST. L. REV. 503, 505 (2017); Jonathan Witmer-Rich, *Restoring Independence to the Grand Jury: A Victim Advocate for Police Use of Force Cases*, 65 CLEV. ST. L. REV. 535, 541 (2017); Paul Savoy, *Reopening Ferguson and Rethinking Civil Rights Prosecutions*, 41 N.Y.U. REV. L. & SOC. CHANGE 277, 284–85 (2017) (proposing that Congress eliminate the "willfulness" requirement from federal criminal law that allows prosecutions of police for civil rights violations); J. Richard Broughton, *The Federal Death Penalty, Trumpism, and Civil Rights Enforcement*, 67 AM. U. L. REV. 1611, 1643 (2018) (suggesting death penalty for police killings). *But see* Levin & Levine, *supra* note 3, at 2; Levine, *supra* note 6, at 1003.

[20] Gabriel R. Sanchez, *Americans Continue to Protest for Racial Justice 60 Years After the March on Washington*, BROOKINGS (Aug. 25, 2023), https://www.brookings.edu/articles/americans-continue-to-protest-for-racial-justice-60-years-after-the-march-on-washington [https://perma.cc/4D4P-QR2G] ("The Black Lives Matter protests in 2020 following the murder of George Floyd are the strongest example of the continued relevance of protest action to voice frustration and attempt to influence policy action among Americans. With as many as 26 million people estimated to have participated, it is the largest protest movement in American history.").

In fact, police likely commit much misconduct that could satisfy criminal statutory definitions. There is police violence short of killing: arrestees are often gravely injured,[22] and even more often they are non-gravely injured.[23] Police also rape and sodomize arrestees, and they commit less severe forms of sexual assault regularly.[24] Going further, one can easily imagine everyday arrestees are being handcuffed and put into police cars or vans in ways that would easily meet a definition of assault.[25] Indeed, as Devon Carbado notes, the notion that "police killings of African Americans [are] aberrant and extraordinary, [shows our] failing to see their connections to the routine, to the everyday, and to the ordinary [violence by police]."[26]

Going beyond violence, there are a host of crimes police commit often and with virtual impunity.[27] Police perjury is so rampant that there is a term of art, "testilying", dedicated to that particular type of prevarication.[28] And police perjury doesn't just happen in a trial setting: police lie about probable cause to

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[21] *Nielsen: At Least 23.2 Million Watched Verdict in Derek Chauvin Trial*, CBS NEWS (Apr. 22, 2021), https://www.cbsnews.com/minnesota/news/nielsen-at-least-23-2-million-watched-verdict-in-derek-chauvin-trial [https://perma.cc/PU4A-JRTY].

[22] *See Police Shootings Database 2015–2024: Search by Race, Age, Department*, WASH. POST (last updated Jan. 18, 2024), https://www.washingtonpost.com/graphics/investigations/police-shootings-database [https://perma.cc/QQ7Z-VABP] ("On average, police in the United States shoot and kill more than 1,000 people every year . . . ."). Clearly, many, if not most, of these killings are legal, but some are certainly statutorily murder or manslaughter whether or not they are charged as such.

[23] *See, e.g.*, Levine, *supra* note 6, at 1052 (There are "more than 700,000 *reported* instances of threatened or actual non-fatal force by police between 2002 and 2011, including shouts, curses, threatened force, pushing or grabbing, hitting or kicking, using pepper spray, using an electroshock weapon, pointing a gun, or using other force.").

[24] Philip Matthew Stinson, Robert W. Taylor & John Liederbach, *The Situational Context of Police Sexual Violence: Data and Police Implications*, 12 FAM. INTIMATE PARTNER VIOLENCE Q. 59, 59 (2020) ("Rather than an anomaly, sexual predation on the part of police, along with the routine cover-ups that perpetuate these crimes, appears to be just one component of the 'rotten barrel' that depicts a culture of police corruption.").

[25] One of the charges brought against Officer Edward Nero in the killing of Freddie Gray was that his arrest of Gray was in and of itself an assault. *See* Kate Levine, *Charm City's Odd Charging Theory Against One of Six Defendants in Freddie Gray Killing*, PRAWFSBLAWG (May 17, 2016), https://prawfsblawg.blogs.com/prawfsblawg/2016/05/charm-citys-charges-against-officer-in-freddie-grey-killing.html [https://perma.cc/CZ43-6QCG].

[26] Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CAL. L. REV. 125, 128 (2017).

[27] *See infra* notes 28–34 and accompanying text.

[28] *See, e.g.*, Joseph Goldstein, *'Testilying' by Police: A Stubborn Problem*, N.Y. TIMES (Mar. 18, 2018), https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html [https://perma.cc/7639-F44K] (discussing the "entrenched [police] perjury problem several decades in the making that shows little sign of fading").

get warrants, to arrest people, and to enter their homes.[29] Police steal drugs,[30] weapons,[31] and money.[32] Police hide evidence, they plant evidence, they alter evidence, and they "lose" evidence only to find it later.[33] Police who know about these crimes are conspirators and aiders. The criminal code is vast, and police crimes run its gamut.

There is a minefield of police misconduct that could be characterized as criminal and prosecuted if the system functioned differently.[34] And *Tolling Justice* contributes to our understanding by actually showing, through her data analysis, the many different kinds of police crime that can lead to wrongful convictions.[35] The Article analyzes a data set of 1,431 exonerations from the National Registry of Exonerations (NRE)[36] by figuring out what reported misconduct by police could have been charged as a crime in various states.[37] Through this analysis, it discovers and surfaces numerous potential criminal acts committed by police including:

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[29] *See, e.g.*, Press Release, Off. of Pub. Affs. Dep't of Just., Former Louisville, Kentucky, Police Detective Pleads Guilty to a Federal Crime Related to the Death of Breonna Taylor (Aug. 23, 2022), https://www.justice.gov/opa/pr/former-louisville-kentucky-police-detective-pleads-guilty-federal-crime-related-death-breonna [https://perma.cc/DCH5-FVSG] ("The Justice Department announced today that former Louisville Metro Police Department (LMPD) Detective Kelly Goodlett, 35, pleaded guilty in federal court to conspiring to commit two federal crimes. Goodlett admitted that she conspired with another former LMPD detective, both to falsify an affidavit to obtain a warrant to search Breonna Taylor's home without probable cause, which resulted in Taylor's death, and to cover up the false warrant by lying to criminal investigators after Taylor was killed.").

[30] *See, e.g.*, Joe Espy, *Miami Police Officer Accused of Stealing Drugs and Money During Traffic Stops*, NBC2 NEWS (Nov. 20, 2023), https://nbc-2.com/news/crime/2023/11/17/miami-police-officer-accused-of-stealing-drugs-and-money-during-traffic-stops [https://perma.cc/78WB-X4T4].

[31] *See, e.g.*, Colin Moynihan, *New York Police Officer Charged in Gun Theft*, N.Y. TIMES (July 13, 2012), https://www.nytimes.com/2012/07/14/nyregion/new-york-city-officer-is-charged-in-gun-theft.html [https://perma.cc/A4U5-BHUH].

[32] *See, e.g.*, Espy, *supra* note 30.

[33] *See* Hendricks, *supra* note 7, at 13–17.

[34] *Id.* at 6 ("Police officers commit a range of criminal activity. Though the general media focuses on viral violent police criminal acts, police are also committing egregious acts in the normal course of their investigations." (footnote omitted)).

[35] *Id.* at 13. One thing Professor Hendricks' article does not delve into is how much more common the crimes she cites to are in cases that lead to wrongful convictions. This is an important empirical question, as she herself acknowledges. *See* Hendricks, *supra* note 7, at 12, n.60. One could readily speculate, however, that cases that lead to wrongful convictions are far more likely to be cases where police commit crimes, and where police commit *certain types of crimes*, like perjury or obstruction for example.

[36] *Id.* at 10, 13.

[37] *See* Hendricks, *supra* note 7, at 13. According to Hendricks, her analysis produced a total of "838 likely police crimes [that] were committed across 482 of the 1,431 cases that the NRE coded as involving police misconduct." *Id.* at 14.

> assault when police physically beat an exoneree to wrongfully confess to a crime that they didn't commit; perjury when police testify untruthfully; tampering with evidence when police conceal favorable evidence from the defense or prosecution; intimidation of a witness when police coerce witnesses to falsely accuse an exoneree; obstruction of justice when police unlawful actions taint an investigation as to preclude the prosecution from properly seeking justice; and official misconduct, when police, with corrupt intent, conduct unlawful behavior in their official capacity for a benefit.[38]

Armed with this range of potential crimes that lead to wrongful convictions, *Tolling Justice* brings them to life by telling the stories of specific misconduct, illustrating the harm that such misconduct has caused individual exonerees.[39]

These data and the stories they tell show a way that police criminality, beyond extreme brutality, leads to the conviction of factually innocent people.[40] The conviction of the factually innocent is a result that rankles even those who do not see a problem with the mistreatment of marginalized, but factually guilty, people. And for this reason, at the very least, the Article's deep dive into a data set about the wrongfully convicted is a significant scholarly intervention.

Tolling Justice's contribution tells us something important about police crimes, a subset of criminality that has a lot of noise around it but little in the way of rich or thick description. What the Article helps show is that in the aggregate, the amount of police criminal misconduct that goes not only unprosecuted but unidentified obfuscates the scope of the damage police do, and do mostly to already marginalized communities.[41] This is something I have also tried to call attention to, albeit in a very different context. In an article arguing that incarcerating police is neither a principled nor a useful way to combat police criminality, I note that "police commit [misconduct] against citizens every day, [misconduct] that does not result in death and usually does not come to the attention of the general public."[42]

Tolling Justice's focus on so many unprosecuted crimes is a good reminder of another problematic phenomenon in the criminal legal system: the amount of crime that goes unnoticed or unenforced by police and prosecutors.[43] For instance, police do not solve most crimes,[44] prosecutors use their finite resources

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[38] *Id.* at 13.
[39] *Id.* at 15–16, 34, 38.
[40] *Id.* at 15–16, 34, 38.
[41] *Id.* at 59–60.
[42] Levine, *supra* note 6, at 1051.
[43] *But see* Hendricks, *supra* note 7, at 17–18. Hendricks acknowledges some role for prosecutorial discretion in police prosecutions (or the lack thereof) but is skeptical that this, rather than the statutes of limitation, is a main contributor to her concerns about underprosecution. *Id.* at 27.
[44] Shima Baradaran Baughman, *Crime and the Mythology of Police*, 99 WASH. U. L. REV. 65, 76 (2021) ("Police have never successfully solved crimes with any regularity, as arrest and clearance rates are consistently low throughout history.") (footnote omitted).

to prosecute the cases they want to,[45] and prosecutors reach the plea negotiations most advantageous to them.[46] This sloppiness, discretion, and resource allocation leads most problematically to the racist application of the criminal legal system.[47]

Thus, scattershot criminal enforcement is not simply—or perhaps even most problematically—an issue of favoritism toward police. It has long been noted that White people are prosecuted at a much lower rate for drug crimes despite their usage being equal to that of their Black and Brown counterparts.[48] Favoritism and race-based criminal enforcement are exacerbated by where policing occurs. For example, Marbre Stahly Butts has noted that one would imagine police abolition had already occurred on the Upper East Side [of Manhattan] because there is so little police presence in this wealthy, largely White enclave, where, presumably, people are also committing crime.[49]

One way to look at bias in criminal law "under"-enforcement is from a maximalist point of view: to say, we need to ramp up criminal law and procedure, with more statutes, more resources, more police, and more prosecutors to address the wide variety of crimes and actors that are not being prosecuted or punished.[50]Another way of looking at this is from a perspective of criminal law abolition: because of system design and flaws, our criminal legal system has been and always will be used to capture and punish not the most

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[45] Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 496 (2017) ("[P]rosecutorial discretion is perhaps most commonly described as serving a purpose related to the efficient allocation of limited enforcement resources.").

[46] Ben A. McJunkin & J.J. Prescott, *Collusive Prosecution*, 108 IOWA L. REV. 1653, 1683 (2023) ("[D]efendants as a class are vulnerable to the various ways prosecutors exercise their discretion, including with respect to which terms they deem negotiable.").

[47] Alice Ristroph, *The Thin Blue Line from Crime to Punishment*, 108 J. CRIM. L. & CRIMINOLOGY 305, 327 (2018) ("It is all too well established that police and prosecutorial discretion yield patterns of racially disparate treatment, in which minorities are more likely to receive the greatest investigative scrutiny, the most serious charges, and the heaviest penalties.").

[48] *US: Drug Arrests Skewed by Race*, HUM. RTS. WATCH (Mar. 2, 2009), https://www.hrw.org/news/2009/03/02/us-drug-arrests-skewed-race?gad_source=1&gclid=Cj0KCQiAkKqsBhC3ARIsAEEjuJj0Dy9hdynbgZQ8A6bGqCL7Zjl0sQWnn7rpjT5VBF2Af2FPJStd6SwaAp8FEALw_wcB [https://perma.cc/9WTS-CBMK] ("Blacks have been arrested nationwide on drug charges at higher rates than whites for nearly three decades, even though they engage in drug offenses at comparable rates . . . .").

[49] Symposium, *Changing the Way We See Modern Policing: Abolition or Reform*, 27 CARDOZO J. EQUAL RTS. & SOC. JUST. 435, 443–44 (2021) ("If you go to the Hamptons or the Upper East Side, places where there are lots of rich, white people, you often find very few police . . . .").

[50] Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. REV. 762, 765 (2016) ("The basic problem is that prosecutors . . . have no inherent incentive to seek maximal punishment within the criminal process, both in deciding which cases to bring and in litigating individual cases.").

deserving, but the most vulnerable, least favored members of society. From this perspective, we should avoid making the criminal legal system more powerful in an attempt to make it fairer.[51]

While *Tolling Justice* aims to limit its ambit to *police* crimes, its prescription, to extend or abolish the statute of limitation for general crimes committed by police, could be applied limitlessly.

III. DECARCERATION AND LIMITING PRINCIPLES

Tolling Justice is explicitly not abolitionist.[52] Yet it directly engages with abolitionism by suggesting that its prescription—to make it easier to prosecute and imprison more police—is a second-best solution to Decarceration.[53] It is here that I center my critique of the Article.

In this Part I worry in writing that *Tolling Justice's* prescription to extend the SOL for police crimes has no limiting principle. This is a problem in a world where there doesn't seem to be consensus, even among progressives,[54] on who the "worst of the worst" are.[55] I illustrate this with a specific example, sexual assault, where the Article's exact prescription, and the logic for it, have been used to extend or abolish the SOL in numerous states for numerous crimes.

Abolitionist, and even some reform, literature, is clear that criminal law proposals that enlarge the criminal code or allow for *more* people to be put in prison are antithetical to the pursuit of a world with few or no prisons.[56] I have

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[51] Levin & Levine, *supra* note **Error! Bookmark not defined.**, at Part III.

[52] Hendricks, *supra* note 7, at 4 ("[T]his Article does not advance abolition principles. . . .").

[53] *Id.*

> I understand that we cannot prosecute our way out of a world tainted with police transgressions. Scholars are justifiably grappling with the future of policing in America in response to centuries of abuse. Professor Brandon Hasbrouck has argued that modern policing is akin to badges and incidents of slavery that should be abolished under the Thirteenth Amendment and replaced with true racial equality and justice. Professor Amna Akbar has unpacked failures of reforming police and how fighting mass criminalization requires a transformation of state and society to a place which no longer relies on police. And some argue that police abolition would also require the abolition of contemporary prosecutors.

Id.

[54] By "progressive," I mean left-leaning democrats who are generally in favor of reducing the level of incarceration. *See* Levin & Levine, *supra* note **Error! Bookmark not defined.**, at 2 n.8 for a much fuller discussion.

[55] *Cf.* Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013, 2032 (2022) ("To insist upon the necessity of prisons to protect society from 'the dangerous few' presupposes the existence of such a class of dangerous persons (and, perhaps, some consensus regarding who qualifies).").

[56] Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis*, 120 MICH. L. REV. 1199, 1208 (2022) (reviewing MARIAME KABA, WE DO THIS 'TIL WE

written a lot on the subject, so my position, that prosecuting police is not abolitionist, nor a useful solution to the problem of police crimes, is clear.[57] Many, however, might well find themselves agreeing instead with Professor Hendricks, when she says that given the state of the criminal legal system we currently have, "letting police officers walk free despite torturing, abusing, and falsely testifying against the people they are sworn to protect" is "unjust."[58]

Indeed, since at least the uprisings of 2020, there seems to be a concurrence among many left-leaning people that police are a particular problem that criminal law should solve.[59] And it is this project that *Tolling Justice* attempts to further. The Article's prescription for prosecuting more police—to eliminate SOLs for police crimes— does not have an intellectual or legal limiting principle, despite its goal to apply only to police.

Professor Hendricks writes:

> Although abolitionists and reformers may be at odds, there should be consensus on at least one point: victims of police crimes deserve an acknowledgement that they were brutally harmed by government actors. This Article reflects just one way society can begin offering those acknowledgements within the criminal legal system—a path worth considering given the many roadblocks victims face within the civil system.[60]

There are numerous issues with this statement, starting with the proposition that incarceration is an acceptable way to acknowledge victim harm, or that many victims want such a method of acknowledgment.[61] Most importantly,

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FREE US (2021)) ("[A]bolitionists . . . adamantly oppose reforms that invest resources into surveillance, policing, and punishment systems.").

[57] *See* Levin & Levine, *supra* note **Error! Bookmark not defined.**, at 2; Kate Levine, *The Progressive Love Affair with the Carceral State*, 120 Mich. L. Rev. 1225. 1228 (2022); Levine, *supra* note 6, at 1003.

[58] Hendricks, *supra* note 7, at 4.

[59] *See* sources cited *supra* note 19.

[60] Hendricks, *supra* note 7, at 4–5 (footnotes omitted). *See also id.* at 46 & n.273, (discussing qualified immunity and other barriers to civil remedies); I. Bennett Capers, *Still Against Prosecutors*, 13 CAL. L. REV. ONLINE 95, 98, 106 (2022) (arguing that victims should be given more options for justice rather than fewer—be it by criminal prosecution, restorative justice, or another pathway,—so that victims may chart their own journeys).

[61] Hendricks, *supra* note 7, at 4–5; *see also* Lara Bazelon & Bruce A. Green, *Victims' Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 293, 297 (2020). ("By its nature, the [criminal] adversary process denies victims autonomy and puts them at risk of further psychological harm and invasion of privacy. While procedural reforms may enhance victims' participation or reduce the intrusiveness of direct and cross-examination, many victims will continue to find the process inhospitable, if not painful. We also critique the victims' rights efforts insofar as they fail to acknowledge important differences among crime victims. This movement overlooks those who seek to avoid the criminal process because they will not be healed, but expect only to be further harmed, by a criminal prosecution, even one that results in the offender's conviction and incarceration. We then explore whether there are other ways to advocate for victims, specifically victims of sexual assault, outside of the

however, is the suggestion implicit in the quoted paragraph that there is some unique harm caused by police, because of SOLs, that should form the basis for consensus on the Article's proposal.

The assumption that "abolitionists and reformists" can agree here strikes me as inaccurate. As Levin and I have recently written, even those who believe in the efficacy of prison for particularly "bad" actors cannot come to a consensus on who the most deserving offenders are.[62] Legal scholars and left-leaning activists have recently proposed harsher criminal legal action against at least domestic abuse,[63] crimes of gender subordination,[64] wage theft,[65] hate crimes,[66] and animal abuse.[67] And, like police crimes, the logic behind these criminalization proposals is that each category of offense or offender is using their societal power or privilege to subordinate an historically marginalized race, gender, sexuality, class, or species.[68]

Thus, the extension of SOL for police could easily be seen to apply to other areas where crimes are seen as underprosecuted or where offenders are seen as particularly privileged. One might argue, however, that the particular problem that *Tolling Justice* identifies is that it is somehow harder to discover crimes committed by police than other individuals and that is the limiting principle.[69] But even if we narrow her proposal to only SOL extension and only for crimes where evidence is hard to discover, we see a parallel in terms of sexual assault. In fact, one interested in putting Hendricks' proposal into action could look at the activism in the realm of sex assault as a blueprint. Since at least 2019, many states have abolished or extended SOLs for crimes involving sexual assault and sex trafficking.[70] The arguments for extending or abolishing these SOLs are

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traditional criminal justice system, that may provide better opportunities to exert agency and promote healing.").

But see Hendricks, *supra* note 7, at 4 n.14 ("I understand that this argument may appear to align with victims' right scholarship. However, this article does not argue that police victims should determine the punishment of their abusers. This Article does not address theories of punishment, on the contrary, this Article is narrowly tailored to address the thus far failure of states to acknowledge the victimhood of large groups of people—victims of police crimes whereby statutes of limitations preclude police prosecutions.").

[62] Levin & Levine, *supra* note **Error! Bookmark not defined.**, at 5–6 (no consensus over whether we need to reform or abolish criminal system nor as to whom the system should be levied against).

[63] *Id.* at 36–37.

[64] *Id.* at 32–36.

[65] *Id.* at 22–27.

[66] *Id.* at 27–32.

[67] *See, e.g.*, Justin Marceau, *Palliative Animal Law: The War on Animal Cruelty*, 134 HARV. L. REV. F. 250, 251 (2021) (criticizing criminal turn in animal rights).

[68] Levin & Levine, *supra* note **Error! Bookmark not defined.**, at 3.

[69] *See* Hendricks, *supra* note 7, at Part II (discussing potential reasons why police who commit misconduct are shielded from prosecution).

[70] H.B. 962, Gen. Assemb., 2019 Reg. Sess. (Pa. 2019) (eliminating the statute of limitations for a victim under 18, at the time of assault, for trafficking, involuntary sexual servitude, rape, statutory assault, involuntary deviate sexual intercourse (IDSI), sexual

similar to the Article's arguments for extending the SOLs for police crimes: there is often a major power imbalance between the offender and the victim, evidence can be hard to come by, and those who perpetrate these crimes are

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assault, institutional sexual assault, aggravated indecent assault, and incest; extending the time to twenty years from the date of the offense for victims between 18 and 23 to seek remedies for indecent assault/exposure, incest, sexual assault, rape, IDSI, sexual servitude, institutional sexual assault, and aggravated indecent assault; and extending the time for victims 24 and older at the time of the assault to twelve years from the date of offense to seek remedies); H.B. 492, 2021 Reg. Sess. (La. 2021) (eliminating the ten-year statute of limitations related to sexual abuse of a minor); H.B. 565, 111th Gen. Assembly., Reg. Sess. (Tenn. 2019) (eliminating the statute of limitations for offenses committed against a minor after July 1, 2019, or prior to July 1, 2019, unless barred by a prior applicable time limitation for offenses including trafficking for a commercial sex act, aggravated rape, rape, aggravated sexual battery, sexual battery, mitigated statutory rape, statutory rape, aggravated statutory rape, indecent exposure (when the offense is classified as a felony offense), patronizing prostitution, promotion of prostitution, continuous sexual abuse of a child, rape of a child, sexual battery by an authority figure, solicitation of a minor (when the offense is classified as a felony offense), soliciting sexual exploitation of a minor (exploitation of a minor by electronic means), aggravated rape of a child, statutory rape by an authority figure, unlawful photographing (when the offense is classified as a felony offense), observation without consent (when the offense is classified as a felony offense), incest, sexual exploitation of a minor, aggravated sexual exploitation of a minor, and especially aggravated sexual exploitation of a minor); S.B. 6574, 242nd Leg., 2019 Leg. Sess. (N.Y. 2019) (extending the NY statute of limitations for second-degree rape and second-degree criminal sexual act to twenty years, third-degree rape and third-degree criminal sexual act to ten years); Leg. Doc. 67, 129th Leg., 1st Reg. Sess. (Me. 2019) (eliminating the statute of limitations for incest; unlawful sexual contact; sexual abuse of a minor, rape, or gross sexual assault of a minor); S.B. 3, 2019 Gen. Assemb., Reg. Sess. (Conn. 2019) (eliminating the criminal SOL for any felony or misdemeanor offense involving sexual abuse, sexual exploitation or sexual assault of a minor, including risk of injury involving intimate contact with a victim under age 16. Also extends the criminal SOL for sexual abuse, sexual exploitation or sexual assault of victims age 18, 19, or 20 until they attain 51 years of age and for sexual assault of a victim age 21 or older to twenty years from the offense for felonies and ten years from the offense for misdemeanors); H.B. 640, 66th Leg., Reg. Sess. (Mont. 2019) (extending prosecution for a felony offense may be commenced within ten years after it is committed, except that it may be commenced at any time if the victim was younger than 18 years of age when the offense was committed); H.B. 1425, 66th Leg., Reg. Sess. (N.D. 2019) (extending the statute of limitations for prosecution of a sexual offense against a minor from ten years to twenty-one years); H.B. 20, 63rd Leg., 2019 Gen. Sess. (Utah 2019) (eliminating the criminal SOL for felony human trafficking of a child, which includes trafficking for sexual exploitation of the child); S.B. 5649, 66th Leg., 2019 Reg. Sess. (Wash. 2019) (eliminating the statute of limitations for sexual offenses committed against minors including rape in the first degree and second degree of a sixteen year old; rape of a child in first degree, second degree, and third degree; sexual misconduct with a minor in the first degree; custodial sexual misconduct in the first degree; child molestation in the first, second, and third degree; and sexual exploitation of a minor; extending the statute of limitations to twenty years for the following crimes: rape in the first and second degree; indecent liberties; and extending the statute of limitations to ten years for the following crimes: rape in the third degree; and incest); and H.B. 199, 26th Leg., 2nd Reg. Sess. (Fla. 2020) (eliminating the statute of limitations for sexual offenses committed against victims younger than 18).

particularly deserving of incarceration.[71] If there is something that limits these SOL-related arguments to perpetrators of sex crimes and police and not, say, hate crimes or white collar crimes, I am unable to see it.

VI. CONCLUSION

There is little consensus about what criminal law should do. Even among those who agree the system doesn't work as it should, there is no consensus on how it *should* work. Recently, despite a general appearance of a trend to Decarceration, numerous progressive scholars and activists have turned to the criminal legal system to redistribute power and to right the wrongs they see as particularly heinous. *Tolling Justice* contributes an insightful data-driven project to this vein of criminal legal scholarship. The article has much to offer to those who believe that the criminal system should continue its incarceratory mission. And there is no doubt that police misconduct is a brutal problem that cannot be ignored. Still, from a perspective of one who believes in radical Decarceration, I fear the punitive turn represented by *Tolling Justice* and its ilk.

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[71] *See, e.g.*, Press Release, MANHATTAN DIST. ATT'Y'S OFF., *D.A. Bragg, NYS Senator Cleare Announce Legislation to Combat Sex Trafficking Across New York State* (Apr. 9, 2022), https://manhattanda.org/d-a-bragg-nys-senator-cleare-announce-legislation-to-combat-sex-trafficking-across-new-york-state/ [https://perma.cc/5JYC-PUF7] (discussing reasons for supporting bill to eliminate SOL for child sex trafficking in NYC, including, "to ensure adequate prosecution and punishment of those who prey on the most vulnerable").