Who Will Believe You

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He could see her distress clearly. From the safety of his car he could see her on the roadside, left after a friend’s arrest for a DUI. He could see her wobbling from alcohol. He could also see her shivering from cold, or fear. He pulled up beside her and reassured her that everything would be alright. He got out his car and offered to drive her to her family; however, when they got to her family he grabbed her by the wrist and forced her back into the car. Once in the car, he began to threaten her into performing oral sex on him. She eventually complied because she knew he had a gun. He drove her to an abandoned field, pulled her from his vehicle, and raped her on the hood of his car. He then forced her to take off the rest her clothes. Over the course of an hour he raped her repeatedly, each time putting a gun to her head while threatening to kill the woman and her entire family. After Officer Maiorino finished raping her, he threatened her with arrest.\(^1\)

Officer Maiorino tried to deny everything, but an investigation aimed at the victim exposed his misconduct. First, he explained that his victim was drunk. Then he explained that she was the passenger in a police pursuit and had motive to make up a story. He added that the woman’s claim was probably retaliatory for the arrest of her friend. If the department wanted to bring a charges against the woman for false claims, they would need to gather evidence. The evidence shocked the department when it contradicted the officer’s account. The evidence did corroborate with the survivor of his attack. In the end, Officer Maiorino was unable to explain

how the victim’s DNA was found on a used condom full of his ejaculate, how her DNA ended upon his underwear, and how his DNA ended up on her abandoned underwear. In an effort to backtrack, he later claimed that the encounter was consensual. Even though Maiorino had had misconduct issues before, several of the officers who worked with him have sworn that he must be innocent. One officer even stated that “there are always two sides to a story.” Officer Maiorino awaits trial.²

As disturbing as the Maiorino case may be, figures from the United States Bureau of Justice department indicate that police sexual misconduct remains fairly common.³ For instance, in 2010 the Bureau of Justice brought 6,613 charges of misconduct against officers within the United States. Of these charges, a total of 9.3% were for sexual misconduct. In comparison, 23.3% of all charges of misconduct by an officer were for excessive force, but only 1.3% of the excessive force charges ended in a fatality.⁴ Thus, a police officer is 7 times more likely to commit sexual misconduct than to commit unjustified deadly use of a firearm. Furthermore, the figures on rape committed by police officers fail to include all of the sexual misconduct that goes unreported.⁵ Survivors of rape by a police officer are less likely to contact another officer to report the rape.⁶ It is likely that the number of reported police rapes falls far behind the national


⁶ Id.
average of 32% of all rapes being reported. At the same time that women risk sexual misconduct from the police, they are also exposed to excessive police force. Last year, 11 women were shot and killed in what has been labeled “justifiable homicide” by the police. Data shows that women face many forms of misconduct when interacting with the police.

The aim of this paper is to explore how the ongoing and unjust issue of police misconduct towards women, like that of the Maiorino case, exists and is maintained in the United States. Part A examines how the legal system fails to punish bad officers both at the state and federal level. Part B addresses how bias works as a safeguard in favor of offending officers; this section also considers how the public has an unfounded trust in law enforcement and an equally unfounded suspicion of survivors. Part C looks at how local prosecutors have a conflict of interest that prevents them from upholding the law when it comes to enforcing charges against the police. Part D of this paper offers some potential solutions to this issue.

A. The Legal System Fails to Punish Officers:

This section purposes to show how the legal system, both at the state and federal level, fails to punish officers and protect women from misconduct because too much power and leeway has been granted to the police. The first portion of this section illustrates how historically effective law enforcement required a large degree of freedom. As a result, police have misused this freedom because they have not seen repercussions from the law. The next portion of this


section analyses the legal tests that would hold an officer accountable and shows them to have no preventive power; the portion looks first at the state level then at the federal level.

I. The historical overview of law enforcement

One of the reasons that the legal system hesitates to prosecute police officer misconduct is that the system relies upon the existence of police officers. In fact, enforcement of the law is one of the cornerstones of civilization.\textsuperscript{9} To ensure that civilization may succeed, the law must have an agent that can enforce order, protect the innocent, and bring the guilty to justice.\textsuperscript{10} These agents--law officers--have been mandated to bring peace to parts of society that are harmful, dangerous, and violent.\textsuperscript{11} Society allows officers of the law to arrest and use force where needed against those who would undermine these noble aspirations.\textsuperscript{12} Society largely accepts that the nature of law enforcement dictates that an officer’s behavior will be based on split-second decisions in risky situations.\textsuperscript{13} Furthermore, society wants these officers to be able to defend themselves, to be able to make on-the-spot decisions, and to stand as a deterrent.\textsuperscript{14}

\textsuperscript{10} Id.
\textsuperscript{11} Id.
\textsuperscript{12} Id.
\textsuperscript{13} Id.
However, an officer of the law has limited pass in their interaction with the community.\textsuperscript{15} In fact, an officer can commit misconduct in many ways with the public. Misconduct can be defined as a dereliction of duty: unlawful, dishonest, or improper behavior, especially by someone in a position of authority or trust.\textsuperscript{16} Officer misconduct may include, but is not limited to: false confessions, false arrest, use or creation of false evidence, intimidation, brutality, corruption, repression, discrimination, sexual abuse, and excessive force.\textsuperscript{17}

Historically, parts of law enforcement have engaged in misconduct since the founding of the country.\textsuperscript{18} In fact, initially the United States law enforcement followed the common law structure of a sheriff, some deputies, and a court system to hear cases, but little in the form of regulation of law enforcement.\textsuperscript{19} The common law structure worked well in small agriculture societies because everyone knew each other.\textsuperscript{20} However, the common law structure collapsed in large cities because the population grew massively.\textsuperscript{21} By the end of the Civil War, most areas had private police forces that served to keep the peace.\textsuperscript{22} Corrupt local politicians and

\textsuperscript{15} The Challenge of Crime in a Free Society, A Report by the President's Commission on Law Enforcement and Administration of Justice (1967).

\textsuperscript{16} MISCONDUCT, Black's Law Dictionary (10th ed. 2014).

\textsuperscript{17} See 42 U.S.C.A. § 1983 (West).


\textsuperscript{20} Id.

\textsuperscript{21} Id.

\textsuperscript{22} Id.
organizations used private police as enforcement.\textsuperscript{23} For instance, both the Ku Klux Klan and the Pinkerton Detective Agency thrived in this climate.\textsuperscript{24} The federal system eventually decided to combat local private law enforcement and to move towards public law enforcement. Congress passed 42 USC §1983 to expose the Ku Klux Klan to liability and to hold local police forces accountable for violating civil rights.\textsuperscript{25} Currently the legal system attempts to uses this legislation and other legal devices to fight misconduct.

II. Women are not protected by current low standards

Another reason that the system fails to prosecute officer misconduct: the legal tests that would hold an officer accountable have no preventive power and create an economic interest for the local government to protect the officer. In fact, an officer of the law has many easily applied defenses at the state level because the standards are set intentionally low. In instances of sexual misconduct, a city’s civil liability functions as a safeguard for an offending officer because the city has an interest in ignoring sexual misconduct, or does nothing to prevent its officers from engaging in it. As far as excessive force, the standard the officer must operate under is a patchwork built from case law. Both officer and the city employers are subject to state and federal cases, alike, but federal litigation represents only a loss to taxpayers.

i. Overcoming a Sexual Misconduct Claim at the State Level

\textsuperscript{23} Id.

\textsuperscript{24} Id.

\textsuperscript{25} Id.
When an officer of the law commits rape, a sexual battery, they are subject to the state’s criminal laws like any other citizen.\textsuperscript{26} They might also be subject to federal law under 42 USC §1983.\textsuperscript{27} At the state level, however, the city that employs the officer has an interest in the sexual misconduct because they could be held liable for damages through the legal doctrine of \textit{respondeat superior}.\textsuperscript{28} This legal doctrine works to hold the employer, private or public, responsible for the actions of the employee.\textsuperscript{29} There are three basic forms of this doctrine: motivation to serve, job-created authority, and middle ground foreseeability.\textsuperscript{30} Each form of \textit{respondeat superior} paradoxically allows the officer to still engage in sexual misconduct and offers no true deterrence. As a side note, the average officer of the law does not have deep pockets and can be viewed as being judgment-proof.\textsuperscript{31}

The “motivation to serve test” of \textit{respondeat superior} is a common law doctrine.\textsuperscript{32} The main element in this test requires that the employee’s behavior had to intentionally serve the employer when the tort happened for liability to carry to the employer.\textsuperscript{33} For the actions of the employee to carry liability for the employer, the actions must have been the type authorized

\textsuperscript{26} Miller v. Superior Court, 168 Cal. App. 3d 376, 379, 214 Cal. Rptr. 125, 126 (Ct. App. 1985).

\textsuperscript{27} Andrews v. Fowler, 98 F.3d 1069 (8th Cir. 1996).


\textsuperscript{29} Mary M. v. City of Los Angeles, 54 Cal. 3d 202, 215, 814 P.2d 1341, 1348 (1991).

\textsuperscript{30} Restatement (Third) Of Agency § 2.04 (2006)

\textsuperscript{31} “Police Officer Salary,” http://www1.salary.com/Police-Officer-Salary.html

\textsuperscript{32} Restatement (Third) Of Agency § 2.04 (2006).

\textsuperscript{33} \textit{Id.}
through employment. The action must also be in the time and location authorized. When the actions of the employee are not within those parameters, no liability is extended to the employer. Jurisdictions that use this test are protected from being held vicariously liable for sexual misconduct of their employees.

If this test were applied to the Maiorino case, it would result in the city he worked for avoiding liability because the entire rape was outside of the authorized behavior of an officer. If anything, the exact opposite behavior, the act of preventing rape, is what Maiorino was authorized to do. There was no way that Maiorino’s behavior could be construed as furthering the authorized behaviors of a law officer; the police are authorized to protect and serve, not rape. The city that hired Maiorino, if they use this test, would be protected from being held vicariously liable for the brutal rape he committed.

With the financial liability erased, the department has no economic incentive to watch out for officers like Maiorino. In fact, it wastes a city’s limited resources to investigate officers for a crime that the city does not have to pay for. If anything, such an investigation risks harming public perception of law enforcement because it would make the department appear to be corrupt. A city has no reason to create such a public relations nightmare as that would harm

34 Id.
35 Id.
36 Id.
37 Id.
39 Id.
the city. The public in recent years has shown a willingness to riot in the face of police corruption, and riots have far reaching economic impacts on a city.\textsuperscript{40} Rioting hurts infrastructure, tourism, and local businesses. Furthermore, officers of the law will not appreciate an investigation for a crime that the city has no economic stake in.\textsuperscript{41} A city with no liability has good reason not to look into bad officers.

To avoid charges from the public, the officer will choose victims the officer can defend against easily.\textsuperscript{42} The officer will use authority to look for a victim who fears arrest, who garners little sympathy from the public, and whose lack of credibility will prevent charges.\textsuperscript{43} The survivor of such a selection process will have to contend with arrest, having the public reject their account out of hand, and being contradicted by a “respected” officer.\textsuperscript{44} Also, for these reasons an offending officer will likely have many victims.\textsuperscript{45}

A different version of \textit{respondeat superior} looks for “created authority.” This test holds that when an employee uses authority or power granted from the employer, liability extends to the employer for the tortious actions of the employee.\textsuperscript{46} The courts under this test hold the

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\textsuperscript{40} \textit{Id.}
\textsuperscript{41} See Forrest Scogin, \textit{“Fear of Litigation Among Law Enforcement Officers”}, 10 Am. J. Police 41 (1991)
\textsuperscript{42} \textit{“Oklahoma City Police Fire Daniel Holtzclaw, Officer Accused Of Sexual Assaults”} http://www.huffingtonpost.com/2015/01/08/daniel-holtzclaw-fired-oklahoma-city_n_6440136.html, (January 8, 2015).
\textsuperscript{44} \textit{Id.}
\textsuperscript{45} \textit{Id.}
\end{flushleft}
employer accountable for creating the power the employee used.\textsuperscript{47} In Applewhite v. City of Baton Rouge, a Louisiana court applied liability to a city when an officer employed by the city committed rape while on duty. By giving the officer a weapon, a vehicle, and a uniform, the city had given the officer the authority needed to commit sexual misconduct. The court found it irrelevant that the officer was not acting within the authorization of the city.\textsuperscript{48}

If the courts applied this test to the Maiorino case, the city would be found vicariously liable for making him an officer. The city gave Maiorino the badge that he used to display his authority. The city gave Maiorino a gun that he put against the head of his victim. The city gave Maiorino a vehicle that used to take the victim to an abandoned field. The authority and power that the city gave to Maiorino made the rape possible, and exposed the city to liability.

When the city is exposed to liability, it has one of two options: either pay out-of-pocket for civil judgments or get insurance to protect from liability.\textsuperscript{49} When a city chooses to pay out of pocket, it has a financial incentive to train officers so as to avoid misconduct and to eliminate officers who pose a high risk.\textsuperscript{50} However, this same financial incentive encourages a city to defend all officers’ behavior, as litigation can have a tremendous economic impact.\textsuperscript{51} If an officer of the law is accused of sexual misconduct, the city has a strong stance to reject the claims not based on the merits but upon the financial risk. As a consequence of shared liability,

\textsuperscript{47} Id.

\textsuperscript{48} Id.


\textsuperscript{50} Id.

\textsuperscript{51} “Civil Remedies,”
http://www.columbia.edu/itc/journalism/cases/katrina/Human%20Rights%20Watch/uspohtml/uspo30.htm
the officer’s defense and dismissal of claims of misconduct will be an attractive reason to reject the victim’s account.

If the city, on the other hand, under this version of respondeat superior, acquires insurance in an effort to protect against liability, the officer will still use simple defenses in the pursuit of protecting against sexual misconduct charges. In fact, at a minimum, the insurance represents a financial interest to the city, in that a large civil judgment would raise the insurance rate.\textsuperscript{52} At worst, however, the insurance creates a moral hazard because the city no longer needs to protect from misconduct if insurance will cover liability. The officer under these circumstances can still use simple and readily accepted defenses to continue to perpetrate sexual misconduct, while the city employer either actively ignores the issue or does nothing to prevent the tortious behavior.

The final version of respondeat superior attempts to find a middle ground between the other two tests.\textsuperscript{53} The test holds that, for the employer to be held liable for the employee, the actions of the employee must be “foreseeable.” States that adopt this standard differ on what exactly is “foreseeable.”\textsuperscript{54} Nearly identical cases in different states that have adopted the same law may turn out with contradictory outcomes based on what “foreseeable” means in the context of an actual case.\textsuperscript{55} This third version also fails to prevent an officer from utilizing the authority of the law to commit misconduct because it faces the same insurance issues as the last test; the

\textsuperscript{52}Id.
\textsuperscript{54}Id.
\textsuperscript{55}Compare, Boykin v. District of Columbia, 484 A.2d 560 (D.C. 1984) and Simmons v. United States, 805 F.2d 1363 (9th Cir. 1986).
main difference is that the city will not always be responsible for sexual misconduct of the officer.

In the end, when an officer commits sexual misconduct, the city is tethered to the officer through either civil liability or public perception. The officer can use this tethering to dismiss both criminal and civil charges that a victim would bring against the officer. To aid in this dismissal, the officer can choose victims from the general public who are likely to be dismissed. If all else fails, and the officer selection process turns out poorly, the officer can always resort to physical force.

ii. Overcoming Excessive Force Claims at the State Level

Similar to sexual misconduct, an offending officer has an easy time dismissing excessive force claims against women because similar issues exist for the employing city. At the state level, police officers operate under a standard dictated by the United States Supreme Court in Graham v Connor. This standard allows an officer to use an amount of force necessary to make a lawful arrest. State courts, when faced with questions of what is “necessary,” use a test that examines the circumstance of the case. The court asks the jury to figure out what a reasonable person would do with the same knowledge that the officer had. Factors that control if the force was reasonable are the severity of the crime, the immediacy of the threat

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57 Id.

58 Id.

59 Id.
posed by the suspect, and the level of resistance the suspect gives in being arrested.\textsuperscript{60} From this legal construct, an officer can use varying degrees of force during an arrest.\textsuperscript{61}

The main issue in a criminal excessive force claim is whether the suspect presented immediate threat to safety of police officers or bystanders.\textsuperscript{62} However, a secondary issue that courts look for revolves around the real fact that, “police officers are often forced to make split-second judgments, in circumstances that are tense, uncertain, and rapidly evolving, about the amount of force that is necessary in a particular situation; not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers amounts to excessive force.”\textsuperscript{63}

To discredit the second issue and show that the officer was not reasonable is incredibly difficult and has many obstacles. If in the case of Officer Maiorino, had he decided not to take his victim back to her family, to shoot her, and claim she posed a threat, her family would encounter many difficulties in bringing charges. For one, the investigators in the case would be conducted by a combination of police detectives and investigators who would know Maiorino from working with him. It is incredibly likely that regardless of any evidence contradicting Maiorino, they would believe him innocent; after all, this is the belief of many of his fellow officers in his rape case, despite damning evidence. Second, If Maiorino had shot and killed his victim there would be nobody to contradict him, and his victim had an earlier run-in with the law. In cases where an officer has been shown to be unreasonable, many of them involve the officer accidently being recorded by a third party, but in Maiorino’s case there would have been

\textsuperscript{60} Id.

\textsuperscript{61} See Id.


no chance of that in an abandoned field. It is possible that of the at least 11 women shot last year to death by police officers one of them might have suffered this fate, and the officer would use the Graham v Connor standard to shield himself from charges.

A city employer will likely pay little for an offence if the officer is found liable for a civil charge. First, the officer at the state level is no different than a private citizen when it comes to tort law. The officer will face common law battery claims: unlawful, harmful, and offensive contact made with another person with the intent to do so. Although a police officer’s use of force is privileged, anything past that standard would be liable for tort claims. The officer will have affirmative defenses such as self-defense to protect against claims. A self-defense claim has an objective standard: did the police officer reasonably believe it necessary to commit to self-defense? The officer does not actually have to be in real danger to use this defense, only have a reasonable belief that defending was needed.

Unlike sexual misconduct, were a city will carry insurance for such instance, excessive force claims are generally paid out from an officer’s surety bond. The police officer buys

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66 Id.


69 Id.

70 Id.

surety bonds so that cost of excessive force falls on the officer and not the city.\textsuperscript{72} State statutes have forced officers into this construction, and vary from state to state.\textsuperscript{73} However, these bonds are rarely activated because if a case goes to trial, juries have shown to have a predisposition to be in the favor of the police officers' account.\textsuperscript{74}

In the end, when a police officer commits excessive force against a woman, he knows that the woman’s claim will have an uphill battle. The officer has defenses, making relief against any action ineffective. The victim of excessive force for these reasons frequently must find a federal remedy.

III. How Officers Avoid Federal Civil Remedies.

Although a plaintiff can bring a claim in state court and an offending officer may face state charges, officers of the law view federal civil charges under Title 42 U.S. Code Section 1983, a much more real threat.\textsuperscript{75} However, this federal law acts as no real deterrent for misconduct by the police, because taxpayers pay the judgment.\textsuperscript{76} The officers of the law are aware that state courts are less willing to find in favor of a plaintiff or bring charges for
committing misconduct. The liability of the officer can be dependent upon the city. The statute states:

Any person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

There are two requirements for a Section 1983 lawsuits taken from this statute to be applicable to an officer committing misconduct. First, the police officer must be “acting under the color of law.” Specifically, “acting under the color of law” is the misuse of power invested in the officer and while using the authority of the state. By relying on the authority of a state, this statute eliminates private citizens, but also some actions taken by a police officer that were unauthorized. The second requirement is that there must be a constitutional violation or

77 Id.
78 Id.
81 Id.
82 Id.
violation of a federally protected right.\textsuperscript{83} This requirement voids violations to state laws, state constitutions, and similar localized law.\textsuperscript{84}

In officer Maiorino’s case, the court would find the first requirement for a section 1983 claim. Maiorino was “acting under the color of the law” because he threatened to have his survivor arrested for not complying with his demands. He was also “acting under the color of the law” when he used his vehicle to trick her into getting inside. Also, using his outfit, badge, and gun represent the same “acting under the color of law.” Without the authority vested in him from the state, his victim would likely have never have gotten into his vehicle, never been afraid of going to jail, and never complied with his demands.

Furthermore, the court would also find the second requirement in this test. Maiorino violated a federal liberty interest which is protected by the due process clause of the Fourteenth Amendment: a person has a right to bodily integrity.\textsuperscript{85} Maiorino, by raping his victim, while on duty, in uniform, and with a gun, denied her right to bodily integrity. The standard for this violation is set by \textit{Doe v. Taylor Independent School District}, 15 F.3d 443 (5th Cir.1994), in which the court rationalized that a high school student had her rights violated when her teacher tied her to a chair and sexually assaulted her.\textsuperscript{86} The survivor in the Maiorino rape would have been denied her bodily integrity in a similar fashion.

If Maiorino’s case was particularly bad, his lawyer and the attorney representing the city would attempt to settle with the victim. The strongest cases presented by victims of serious

\textsuperscript{83} 42 U.S.C.A. § 1983 (West).

\textsuperscript{84} \textit{Id}.

\textsuperscript{85} \textit{Doe v. Taylor Independent School District}, 15 F.3d 443 (5th Cir.1994)

\textsuperscript{86} \textit{Id}.
misconduct by an officer of the law are quickly settled to save the city embarrassment.\textsuperscript{87} The survivor is paid to be silent not only about the amount of the settlement, but about the information regarding the case. Everyone involved with the case signs non-disclosure agreements, no parties admit to wrong-doing, and the case goes away.\textsuperscript{88}

As Maiorino will likely be judgment-proof, the only real pocket to collect from is the city employer. However, the city does not care about the money because the money comes from taxpayers.\textsuperscript{89} In most cases, the money comes from the city’s general fund, and is a small fraction of the budget.\textsuperscript{90} In fact, the taxpayer in such a city pays for the misconduct a total of three times: once to pay the wages of the officer while engaged in misconduct, again for any settlements that occur from the misconduct, and a third time to pay for officer defense funds to prevent future litigation for similar issues.

\textsection{1983 does nothing to encourage a city to create deterrents for officers engaging in sexual misconduct or excessive force, doing little to protect women from offending police officers. The real value of the a \textsection{1983 claim is that it might help a victim recover money, but for every successful survivor there will be many that will not be so lucky, because once again the officer will be investigated by officers he knows. \textsection{1983 has the same weakness as the state law for similar claims. Even if the case reaches the courts, the victim will still have to battle bias that will harm her case.

\textsuperscript{87}“Civil Remedies,” http://www.columbia.edu/itc/journalism/cases/katrina/Human\%20Rights\%20Watch/uspohtml/uspo30.htm

\textsuperscript{88}\textit{Id.}

\textsuperscript{89}\textit{Id.}

\textsuperscript{90}\textit{Id.}

\textsuperscript{91}\textit{Id.}
B. Bias Protects Offending Officers

Even when a survivor of police misconduct brings charges against an offending officer, that survivor will face the unfounded judgments of both police and juries. The offending officer will face biases also, but mostly positive biases that insulate the officer from judgment. Most of these biases are unconsciously made by both the jury and the police working the case. Women of color face more bias when confronting an offending officer, because social perception and constructs are in favor of the police.

The purpose of this section is to show that when a woman survives misconduct from a police officer she will face unfair biases through the legal system; a second purpose is to show how bias works as padding for a bad officer against being convicted. The first portion of this section explains the concept of implicit bias and how implicit bias works in society. The second part depicts how a survivor will have her claim initially investigated by officers who will be biased against her. The next portion, assuming that a survivor has made it to trial, looks at the bias a survivor will face from a jury that is prosecuting the officer. The final portions look at another layer of bias that women of color face when standing against an officer who has committed misconduct.

I. New Methods of Looking at Bias
Implicit bias is a built-in, pre-made decision that is hidden from the consciousness of the person who holds the bias.\textsuperscript{92} It functions as a fountainhead for thoughts, attitudes, and actions for a person as they operate in the world.\textsuperscript{93} The mind has a job of sorting all of this information from the senses that a person has while in the world.\textsuperscript{94} Psychologists believe that most of this processing happens unconsciously and that the conscious mind is unaware of it going on.\textsuperscript{95} Furthermore, psychologists argue that the brain sorts this information into recognizable patterns, lumping similar objects and experiences together.\textsuperscript{96} These lumps of information, however, can lead a person to false conclusions about new objects. The brain also uses this same process to categorize people based on race, gender, sexuality, and many other facets.\textsuperscript{97} It is believed that the brain is capable of doing this with highly nuanced distinctions, nearly instantly.\textsuperscript{98} It is also believed that all humans use this process.\textsuperscript{99}

Social scientists at Harvard University have been developing a test to measure these implicit biases within people towards many different categories; this is called Project Implicit.\textsuperscript{100}

\textsuperscript{92}“Understanding and Interpreting IAT Results,”
https://implicit.harvard.edu/implicit/demo/background/understanding.html


\textsuperscript{94}Id.

\textsuperscript{95}Id.

\textsuperscript{96}Id.

\textsuperscript{97}Id.

\textsuperscript{98}Id.

\textsuperscript{99}Id.

\textsuperscript{100}“Understanding and Interpreting IAT Results,”
https://implicit.harvard.edu/implicit/demo/background/understanding.html
By evaluating the reaction times of a person when exposed to different stimuli, you can gauge how biased they are towards a particular group because the brain takes longer to process perceived negative information. Since this project’s inception, large quantities of data have been generated because the test is open to the general public. Project Implicit has generated data that has caused a lot public scrutiny, but has stood up to testing.

Here are some of the key concepts of this data. First, about 83% of all white and Asian people show a bias in favor of white people and against black people. Second, most people who test for any bias are unaware that they actually hold a bias. Third, people who have tested for higher levels of bias have been shown to behave in more discriminatory manner at work. The level of bias differs between any two people. Fourth, bias can be reduced through positive interaction with the group that the bias is held against. Finally, bias against women so far has been shown, but factors largely into viewing women as less accurate, less capable, and

101 Id.
102 Id.
103 Id.
104 Id.
105 Id.
106 Id.
107 Id.
108 Id.
better suited for domestic work.\textsuperscript{109} Put more frankly, the current data shows that society holds an implicit bias against women. This includes the police.

II. Police Officer Implicit Bias Against Women

Police officers have implicit bias against women and this negatively impacts women as they are subjected to arbitrary and unfavorable governmental treatment. Current anti-discrimination laws do not address implicit bias, nor does the hiring practice of police departments or police training.\textsuperscript{110} All human beings contain implicit biases; police officers are human, and therefore all police officers contain some bias.\textsuperscript{111} Furthermore, as officers frequently must deal with the rough elements in society, the implicit biases that they will certainly form will cause them to deal with the public in a manner that reflects those biases.\textsuperscript{112}

Returning to the case of Officer Maiorino, it would be unlikely that Maiorino was acting from a place of implicit bias; if anything he is just plain biased against women. However, his fellow officers who defended him were likely expressing implicit bias when they defended Maiorino in the face of highly damning evidence. These same officers could have been part of the investigation into the victim’s claims. A real investigation into Maiorino would not be done by his friends and co-workers. After all, Maiorino’s co-workers would view the victim

\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
negatively for the earlier police chase, and for being a woman not engaged in domestic duty. The police officers’ likely implicit bias will be that the woman is not only outside of the domestic work arena, but a bad person for being so.

The officers are not without reason for forming negative implicit biases against women. About 14% of all violent offenders are women.\textsuperscript{113} Approximately 40% of all women who are arrested are found to be either on drugs or intoxicated.\textsuperscript{114} Over 30% of violent female suspects are intoxicated during arrest.\textsuperscript{115} Although women who get arrested for violent crimes represent less than 1% of the population, the officers will frequently interact with this negative element.\textsuperscript{116} This creates a scenario where women can be viewed during an arrest from a biased standpoint. Maiorino’s fellow officers might still believe that “there are two sides to every story,” and that he could be innocent, because of biases formed from prior negative experiences with women. Compounding this problem, these same lopsided investigators would be expected to give testimony to a jury that likely already would be biased against the victim to begin with.

\textbf{III. Jury Bias Against Women}

Once again the survivor of misconduct has an up-hill battle in court, because the decision making process will go to a jury. Juries historically have a tendency to favor officers, but will also carry gender bias that will harm the survivors’ recovery.

\textsuperscript{113} \url{http://www.bjs.gov/content/pub/pdf/wo.pdf}

\textsuperscript{114} Id.

\textsuperscript{115} Id.

\textsuperscript{116} Id.
Nationally, 66% of all defendants are convicted in a court of law; for police officers, that number is only 33% when they are defendants. Jury bias, where police are seen as heroes, creates this disparity in conviction rates. Criminal and civil juries are constructed from the general public. The general public, even during times of national rioting over police brutality, is strongly biased in favor of the police. Part of the explanation of the bias in favor of police is the fact that police do perform a vital function that allows a civilized society to exist. Also, jurors know that being a police officer is a dangerous job. Out of the perception of police as heroes, the single most common strategy of defense attorney in a misconduct case will be to ask the jury to put themselves in the officer’s shoes; this reinforces the bias of the jury further. During all of this, the jurors will have the attitude that they are behaving in a fair manner.

If a person cannot accurately assess one’s own biases, then one will not be able to assess how those biases will affect a trial. For instance, if a person has a strong preference for whites, but believes that they are neutral, then upon seeing a black female survivor for the first time, up against a white officer, a bias can creep into the courtroom, cloaked in a sense of rational judgment, and harm a victim’s chance of being given a fair trial. A case before a jury comes down to a final person; if that final person decides a case from that bias, then justice is not served, because the case was decided upon biases and not upon the merits.

118 Id.
119 Id.
120 Id.
121 Id.
122 Id.
In the case of Maiorino, the officer will face both civil and criminal suits; but based on the fact that he is a police officer, and nothing else, he will benefit by having twice the chance of the national average of beating his case—regardless of the merits of the claims against him. Factors that will benefit Maiorino is that he will have other officers vouching for his character, he will benefit by having his victim described as drunk, part of a police pursuit, and having a motive to lie. All of this evidence will play into the idea that the woman in the case violated her role as a domestic worker.

IV. Bias against women of color

One of the terrible aspects of sexual misconduct when perpetrated by an officer is that the victim can be selected from a large sample of the public, and chosen based on the officer’s ability to use the system to defeat any claims that come from the victim. On the other hand, excessive force is generally a form of misconduct that happens in the moment and is based off of discrimination. Both forms of misconduct affect women in different ways depending on the race of the woman. In general, black women, while having a justified reason for not trusting the police based upon historical events, are the least likely to report, receive help, or find a conviction in cases of misconduct. Other women of color can face both language and immigration barriers in dealing with misconduct. Data on these issues are scarce, but an examination of cases helps illustrate these issues.

123 Id.

i. Black Women

In 2014, Officer Daniel Holtzclaw faced charges of forcible oral sodomy and indecent exposure. His fellow officers arrested him for a claim of sexual assault against a middle-aged Black woman. Officers in his department went through his log and started back-tracking all of his interactions. Currently Holtzclaw is facing 16 felony charges all stemming from sexual misconduct. So far the department located 8 victims, but strongly believes that there are many more.

All of Holtzclaw’s victims are Black women. His defense attorney argues that all of the women are a product of over-zealous police force, stemming from an initial altercation with one black female who became upset with being pulled over. The prosecution’s argument: “Holtzclaw’s ‘mistake’ was believing his last victim was similar to his other alleged victims: all Black middle-aged women, but women of a lower social status and with reason to fear the authorities. Holtzclaw chose Black women with active warrants or drug paraphernalia in their possession. However, the final victim had no criminal record and had no drugs in her vehicle. She was driving through the neighborhood where the other women were confronted, but she didn’t live there.”


126 Id.


128 Id.
Holtzclaw was relying on what the statistics show about the treatment of Black women to help him select targets of his misconduct. Black unemployment rate has consistently been twice as high as white unemployment rate for 50 years.\textsuperscript{129} The racial disparity of incarceration rates is bigger than it was in the 1960s.\textsuperscript{130} Black women are statistically more likely to be living at the poverty line, and do not have the financial capacity to litigate misconduct.\textsuperscript{131} Furthermore, there are more Black women with criminal records to select from, as Blacks are incarcerated at greater rates than any other race.\textsuperscript{132} Nobody wants to risk going back to jail and Holtzclaw knew this. Furthermore, as an officer Holtzclaw would likely have known that Blacks in general face racial bias and are not believed over officers by juries.\textsuperscript{133} Poignantly, Holtzclaw’s own biases led to him being caught: not all Black women are poor.

\textit{ii. Latinas}

Abraham Joseph, a police officer out of Texas, made several arrests one night at a cantina parking lot. Joseph arrested two undocumented immigrants that worked at the establishment. Initially arresting a man and a woman, the officer let the man go and took the woman, who

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\textsuperscript{129} Brad Plumer, "\textit{These ten charts show the black-white economic gap hasn’t budged in 50 years}," \url{http://www.washingtonpost.com/blogs/wonkblog/wp/2013/08/28/these-seven-charts-show-the-black-white-economic-gap-hasnt-budged-in-50-years/} (August 23, 2013).

\textsuperscript{130} \textit{Id.}

\textsuperscript{131} \textit{Id.}

\textsuperscript{132} \textit{Id.}

\textsuperscript{133} Tracy Grove, "\textit{Implicit Bias And The Police}," \url{http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=2499&issue_id=10} (2011).
\end{flushleft}
immigrated from El Salvador, to a secluded location. The officer never took off his uniform, leaving on his gun and badge as he raped the woman. The prosecution believes that Joseph targeted her because fear of deportation would prevent her from bringing charges against an officer.134 The prosecution also argues that because the woman spoke little English the officer believed this would also aid in preventing the victim from getting justice.135

There were 11.2 million unauthorized immigrants in the U.S. in 2012.136 Approximately half of the unauthorized immigrants were from Mexico.137 53% of all undocumented immigrants are women.138 Approximately 1/3 of all unauthorized immigrants do not speak English.139 Officer Joseph knows that Latinas when faced with violence and discrimination by the police will likely be perceived as “illegal immigrants” regardless of their immigration status. If he wants he can confirm a victim’s residency during an arrest to make sure of an undocumented status. He will also want to know if the survivor does not speak English, as this will work to his advantage because the system favors English speakers.140


135 Id.


137 Id.


140 Id.
C. Prosecutor Conflict

Prosecutors have a conflict in cases where they must convict an officer with whom they have worked. The prosecutor has a role in achieving justice for the state, but also must maintain a working relationship with the police department. The role of prosecutor in cases of police misconduct is one that jeopardizes legal ethical standards and a working relationship developed between the police department and the prosecutor’s office.

Model Rules Of Professional Conduct 1.3 states:

A lawyer shall act with reasonable diligence and promptness in representing a client.\(^{141}\)

Model Rules Of Professional Conduct 1.7 states:

(a) a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.\(^{142}\)

The Model Rules articulate a standard that prevents a lawyer from representing multiple clients, who pose loyalty conflicts.\(^{143}\) The lawyer must be competent and diligent in representing

\(^{141}\) RPC Rule 1.3

\(^{142}\) RPC Rule 1.7

\(^{143}\) RPC Rule 1.3 Commentary
any client that they take. The model rules forbid conflicts of this manner because either client could receive reduced advocacy. A client requires an attorney that will advocate, be professional, and commit to loyal representation. The duty of diligence is a fundamental pillar of the practice of law.

To apply these rules, case law shows that courts are aware that conflicts need to be dealt with to make the system function, regardless of the level of the disloyalty. In In Re Neville, the courts penalized a lawyer with a 60 day suspension for merely entering into a business deal with a client that had unfavorable terms to his client. The client filed a complaint for disloyalty when he realized that the deal between him and his attorney was unfavorable. The court upheld the 60 day suspension of the attorney’s ability to practice because the court did not view the transaction as creating a scenario where disloyalty had occurred. The lawyer owed the client the loyalty of due diligence and advocacy; their deal would blunt the fealty of the lawyer.

Police and prosecutors are intertwined in the system, but the prosecutor must also search for justice for the state. A prosecutor representing the state owes a standard of diligence and advocacy no less than any lawyer owes a client. To live up to this standard the prosecutor must rely on police officers. The lawyer advocating for the state normally functions with no

\[\text{144 RPC Rule 1.7 Commentary}\]
\[\text{145 Id.}\]
\[\text{146 Id.}\]
\[\text{147 In re Nevill, 39 Cal. 3d 729, 735, 704 P.2d 1332, 1336 (1985)}\]
\[\text{148 Id.}\]
\[\text{149 RPC Rule 3.8 Commentary}\]
threat of ethical violation accept when advocating for the state means to prosecute an officer. Through this collaborative process, prosecutors and police officers build a working relationship that serves the state interest. The police are responsible for the collection of evidence and being witnesses for the prosecution, and the prosecutor instructs them in legal requirements of evidence collection and how to interact with the public.\textsuperscript{151}

In Maiorino’s case, the prosecutor falls into a conflict of interest between the state and her working relationship with the police department. Many of Maiorino’s fellow officers believe, even though evidence shows otherwise, that he is in fact innocent. If the prosecutor successfully sends Maiorino to prison for 15 years to life, his fellow officers will respond by not caring about the needs of the prosecutor. The prosecutor will have deeply injured the working relationship between the district attorney’s office and the police department. The officers in turn will be justified in feeling this way because, as agents of the state, the state’s lawyer has turned against them and is no longer loyal to them. On the other hand, if the Prosecutor decides go soft on the offending officer, the state’s interest is ignored.

The prosecutor’s conflict of interest also robs the victim of a zealous advocate. A victim deserves a prosecutor who will seek justice, wants to keep the public safe, and maintain social order. A prosecutor should not tolerate a police officer engaging in sexual misconduct, because of injury to the victim. Nor should a prosecutor give the police department an easy out in order to maintain a working relationship. The victim is owed the diligence, zeal, and determination that a prosecutor should bring. Prosecutors need to avoid conflicted representation.

\textsuperscript{151} \textit{Id.}
D. Real Solutions To Misconduct:

No single step will lower the risk to women and solve the misconduct issue, but there are some rational steps. First, officers should wear cameras to record their behavior. Second, they should be trained to deal with social bias. Third, special prosecutors without a conflict of interest should be implemented. Finally, new laws that have real penalties should be passed. All of these steps would work best if done in combination with each other.

i. Cameras and Training

Cameras are a great step in preventing misconduct, and also aid in police work by creating evidence that a prosecutor can use against a suspect. Preliminary testing with cameras has shown that officer misconduct is drastically reduced when police officers are forced to wear cameras.\textsuperscript{152} In fact, districts using this tactic have seen a reduction of 88\% in reports of misconduct by officers of the law by the general public.\textsuperscript{153} It is hard to commit excessive force or sexual abuse when this behavior will be digitally recorded, accessible to superiors, and used as strong evidence at any trial. Cameras also will operate as a reassurance to communities that no longer trust the police; the public will internalize that the police are more accountable and that officers are safer to be around.


\textsuperscript{153} Id.
However, cameras are not an absolute solution. For a starter, cameras do not always pick up the most crucial parts of an event; they might not show if the officer was allowed to use deadly force or not simply because the angle was bad. It can, also, be assumed that an officer who has the intent to commit rape is going to find a way to eliminate the cameras during this transgression. The simplest way to do this is by simply attacking a person while off duty that the officer found while on duty. In fact, this is a common enough tactic of officer who engages in sexual misconduct. In San Jose, officer Geoffrey Graves returned after he was no longer on duty to rape a woman that he had helped only hours earlier.\textsuperscript{154} After responding to a domestic dispute, Graves dropped his victim off at a hotel and returned without other officers, and raped the woman. He is currently facing 13 years to life.\textsuperscript{155}

Another step in the right direction of reducing the risk of police misconduct toward women would be to train officers and educate them about implicit bias. It has been shown that, when officers are put in a place that portrays people of diverse races in a positive manner, the impact of implicit bias is lessened.\textsuperscript{156} It has also been shown that by teaching an officer about implicit bias, the consciousness allows for self-correcting behavior.\textsuperscript{157} If an officer knows that he is biased against women, he can make a conscious effort to ignore the bias; this has been shown to be somewhat effective.\textsuperscript{158} By lessening the implicit bias, two things will occur: one,

\begin{footnotesize}
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\item Id.
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police will be less likely to dismiss people from minority groups based on internal bias, and two, they might become less inclined to use excessive force.

ii. Special Prosecutors

By creating a separate office of prosecutors, one disconnected to police, with its own set of investigators, the interest of the state can be truly represented by local prosecutors. An offending officer would no longer have a prosecutor who fears reprisal from fellow officers. Ultimately this reduces the risk to women in society from misconduct.

The local prosecutor can work with police knowing that it will not create a conflict in the future, because pursuing an offending officer would be done by outside prosecution. This would free the local prosecutor to give legal advice to officers, develop strong working relationships, and not worrying about evidence issues down the road. When an officer commits misconduct, the local prosecutor would not be thrown into a scenario where compromise is the most likely outcome.

The special prosecutor would also come with other benefits outside of eliminating conflict at a local level. The special prosecutor would become more adept at understanding the issue of police misconduct, better at prosecuting it, and more efficient at getting convictions, because the special prosecutor would be focused on this specific area of law. Currently only about one third of all police charges end in conviction, half of the national average.159 A special prosecutor could drastically improve these numbers, because of the repeated familiarity with the issues involving misconduct cases.

iii. Real Penalties.

Women are in danger when interacting with a police officer, because cities and officers do not view the laws as a real threat. The penalties need to be much steeper and impossible to mitigate with insurance and bonds.

As stated earlier, when an officer is subject to a judgment for misconduct, that judgment is paid by surety bond and protects the city from paying for liability. Steps could be taken to make the risk real for both the officers and the city. First, a real threat to the economic stability of the city and the officer would be posed by making surety bonds void in cases of sexual assault or fatal excessive force. Further economic risk should be created by regulating the insurance that a city can use to offset judgment for misconduct by the police. By capping the city insurance to 50% maximum coverage, it will force the city into paying out of pocket for the actions of the officers. Finally, the awards to victims of police misconduct should increase drastically. By having to pay out large sums of money, a city would have an incentive to train officers, monitor for misconduct, and prevent nearly unchecked violence against women.

E. Conclusion

In conclusion, the system fails to prosecute officers who participate in misconduct because the current laws do not have enough strength to work as a deterrent, social biases allow the officer to operate with positive public perception, and prosecutors face conflicts of interest in police cases. No woman should ever have to fear that when she dials 911 for help, the
responding officer will commit unthinkable misconduct against her. No woman should ever have to worry that the legal system will culminate in a concert of bias against her. No woman should have to worry that the law will not be enforced because the prosecutor is concerned with a relationship between two offices. Misconduct should be deterred in all case, and prosecuted fully when it occurs.