

# The Relationship Between Prosecutors and Police: Promoting Accountability and Building Public Confidence

**“[N]othing since slavery—not Jim Crow segregation, not forced convict labor, not lynching, not restrictive covenants in housing, not being shut out of New Deal programs like Social Security and the GI Bill, not massive resistance to school desegregation, not the ceaseless efforts to prevent African Americans from voting—nothing has sparked the level of outrage among African Americans as when they have felt under violent attack by the police.”**

– Paul Butler, *CHOKEHOLD: POLICING BLACK MEN* (2017).

Law enforcement has become militarized, trained, and equipped to fight wars on drugs and crime, and to treat citizens as if they are the enemy. Founded on institutional racism, law enforcement aggression leads to communities of color being overpoliced—African Americans are more likely to interact with police and more likely to be arrested for actions that go unpunished elsewhere. The predictable result of unlawful policing practices, including the excessive use of force, is the belief by the public that law enforcement is an oppressive force threatening community security, not protecting it. This situation begs the question—who is policing the police? Too often the answer is no one. There are approximately 18,000 law enforcement agencies in the U.S.<sup>1</sup> Evidence shows there is virtually no accountability for police officers involved in cases of excessive force.<sup>2</sup> Of the nearly 100 officers arrested since 2005 for fatal use of force, only 35 have been convicted of a crime, often for substantially lower crimes than convictions in comparable non-police involved murders.<sup>3</sup> Only were convicted for the crime of murder.<sup>4</sup>

**Prosecutors’ dependence on police creates a conflict of interest that undermines their willingness and ability to prosecute police officers.** Police accountability in America is an issue that should concern every resident.<sup>5</sup> For far too long, prosecutors and the courts have been indifferent to police violence. Even as recent cases starkly illuminate the problem, prosecutors still hesitate or fail to act.<sup>6</sup> A major portion of the blame falls on fundamental problems that exist in the police-prosecutor relationship.<sup>7</sup> These seemingly independent actors have a very symbiotic connection. In practice, prosecutors depend almost entirely on police for the success of their cases, from charging to conviction.<sup>8</sup> Police often guide cases with little oversight from prosecutors and are able to influence case outcomes from the moment of arrest.<sup>9</sup> This interdependence means any decision to prosecute police misconduct carries the risk of police withdrawing their cooperation in future cases.<sup>10</sup> Inherent conflict of interest in prosecuting police misconduct and police violence is just one reason why prosecutors must create more professional distance between their offices and local police departments.

**Politics can thwart prosecutor-led attempts to hold police accountable. In most jurisdictions, prosecutors are elected officials.** Being seen as “tough on crime” can make or break a candidacy, so police union endorsement is important. Within the bounds of the First Amendment, the ability of police unions and police labor organizations to make contributions to prosecutor candidates during elections should be tightly controlled.<sup>11</sup> This would help shield prosecutors from undue interference from police officers.<sup>12</sup> State ethics rules for prosecutors could bar or restrict these campaign contributions.<sup>13</sup> Also, police unions often resist district attorneys’ reform attempts,<sup>14</sup> actively undermine their re-election efforts,<sup>15</sup> and strenuously oppose legislation aimed at increasing transparency and accountability in misconduct investigations.<sup>16</sup>

**Grand Jury manipulation.** Very rarely do grand juries indict in cases of police excessive use of force and other acts of alleged misconduct despite almost uniformly indicting for all other crimes presented to them.<sup>17</sup> While a variety of factors contribute to this,<sup>18</sup> it is mainly due to the considerable power prosecutors use in grand jury proceedings to affirmatively to protect the police.<sup>19</sup> In fact, grand jury proceedings involving police suspects are also markedly more thorough than those in any other contexts.<sup>20</sup> Local prosecutors often provide police-suspects much greater procedural privileges at the grand jury stage than other suspects by allowing them right to counsel, to hear evidence presented to the grand jury, and even to testify before the jurors.<sup>21</sup> Special<sup>22</sup> and independent prosecutors appointed to handle grand jury proceedings of police-suspect cases are less likely to feel pressure to make these types of concessions.<sup>23</sup> The secrecy surrounding these proceedings insulates prosecutors from accountability for whatever actions they take to (not) convince jurors to indict police-suspects.<sup>24</sup> Lessening—or even removing—this secrecy would result in more transparency in police misconduct cases.<sup>25</sup> Including judges and/or defense attorneys in grand jury proceedings could prevent prosecutors from outsized influence in their outcomes. Currently, prosecutors have the “nearly limitless ability to shape the presentation of the evidence and influence the grand jurors.”<sup>26</sup> Prosecutors must begin to restore community trust by publishing the evidence presented to the jury and summarizing the findings and rationale of their decisions to charge (or not charge) a police suspect.<sup>27</sup>

**Keeping the law enforcement relationship collaborative does not override the need to hold police accountable for their actions.** The need to safeguard day-to-day police/prosecutor interactions leads many prosecutor offices to largely ignore the many instances of police misconduct and police slayings of unarmed individuals, often Black men and boys.<sup>28</sup> This fuels outrage in many communities where no effective recourse exists. In fact, prosecutor offices are frequently complicit in police misconduct and this complicity further undermines public confidence in many local justice systems. Some offices, for instance, fail to disclose evidence and otherwise cover up instances of police dishonesty.<sup>29</sup> Many offices’ internal measures to track instances of officer misconduct within prosecutor offices “are haphazard at best, and intentionally negligent at worst.”<sup>30</sup> Prosecutors must clean up their own houses. Prosecutors can and should refuse to cover-up police dishonesty and prosecute excessive force cases.<sup>31</sup>

**Prosecutor-based police accountability improves the credibility of the criminal justice system.**

Research has clearly documented misconduct and overreach by police when it comes to shoddy investigations and falsification of evidence<sup>32</sup> and perjured testimony.<sup>33</sup> Because prosecutors are dependent on police work for the cases they prosecute, holding police accountable improves the integrity of their own work product. For example, holding police accountable for lying about evidence will result in fewer instances of such lying going forward—and fewer cases in which false evidence becomes a barrier to successful prosecution.<sup>34</sup>

**Even though convictions are few, efforts to restore the public’s confidence in law enforcement by prosecuting police misconduct are important and require major reforms.**

Where it exists, public confidence in the system is extremely fragile in communities of color.<sup>35</sup> Recent polling on the public perceptions of police,<sup>36</sup> prosecutors,<sup>37</sup> and the criminal justice system<sup>38</sup> demonstrates how eroded the “appearance of justice” is for many communities, and reveals drastically different views that divide along racial<sup>39</sup> and socio-economic lines. When asked about their views on police in their communities, 33% of Blacks said police do an “excellent or good job” versus 75% of their White counterparts,<sup>40</sup> and only 31% of Black Americans feel that police are able hold “officers accountable when misconduct occurs, versus 70% of Whites.<sup>41</sup> This divide keeps widening and threatens the very foundation of our criminal legal system.

## Police accountability can be pursued in a number of ways, including:

- **Independent Review.** “Independent investigations of all cases where police kill or seriously injure civilians” and similar misconduct-prone contexts<sup>42</sup> is frequently recommended. These can take a number of forms, most notably by appointing special prosecutors, creating collaborative investigation teams, or creating civil review boards.
- **Special prosecutors** from outside the jurisdiction can help avoid the “appearance of impropriety” that might occur in police misconduct cases where a local prosecutor’s “impartiality might reasonably be questioned.”<sup>43</sup>
- **Collaborative Investigation Teams.** Employing collaborative investigation teams comprised of representatives from police departments, prosecutor offices, and/or other government and community bodies could promote better misconduct investigations.<sup>44</sup> One such model exists in Denver: its officer-involved shooting protocol requires that police department investigators and the district attorney’s office collaborate in the shooting investigation, before the DA’s office determines whether to charge the officer.<sup>45</sup> Where the decision is not to charge, the office must prepare a decision letter, which it makes available to the public along with the investigative file.<sup>46</sup>
- **Civilian Review Boards (CRBs)** “consisting of qualified members with long-term appointments”<sup>47</sup> could replace prosecutors. However, CRBs take significant investment of money and time to create, staff, and train,<sup>48</sup> and have been largely ineffective. Limiting their function to producing lists of potential special prosecutors might be a solution. This increases community involvement in the special prosecutor’s work while avoiding some of the problems of that come when CRBs have more substantial involvement.<sup>49</sup>
- **Decertification of police officers who engage in misconduct.** Prosecutors should refer all officer misconduct to local police headquarters and recommend that proceedings be initiated against officers before existing Peace Officers Standards and Training Commissions. These bodies are typically charged with ensuring that officers who offer perjured testimony, falsify documents, tamper with evidence, obstruct police-involved shooting investigations, etc., are stripped of their professional license and forfeit the privilege to be law enforcement officers.<sup>50</sup> Increasingly, advocates are calling for these officers to be placed on restrictive “do-not-call” lists,<sup>51</sup> which preclude officers with prior misconduct from participating in future trials. Chief prosecutors in Philadelphia, Baltimore, Brooklyn, Boston, Houston, and St. Louis City have begun building lists that bar officers serving as witnesses for a host of bad acts.<sup>52</sup> There is on-going debate about these lists being made publicly available.<sup>53</sup>

## Conclusion

From police perjury leading to wrongful convictions to police-involved shootings and other excessive use of force cases, prosecutors have failed to hold police accountable for criminal actions. Consequently, the systems that are legitimized by the trust that communities place in them have failed those communities, particularly people of color. Police misconduct and police violence are issues of the utmost importance when an elected prosecutor promises to administer a fair and equitable system of justice in her community. Police violence deserves to

be met with the full extent of law and prosecutors should pursue every conceivable remedy to hold police officers to account for their fatal use of force. Independent prosecutors should handle these egregious cases. Prosecutors can and must ensure that they play a role in restoring and maintaining public confidence in the criminal justice system. They must encourage law enforcement agencies to take steps to institutionalize reforms<sup>54</sup> that ensure that public confidence is built to help restore community trust and reduce harm done by police.



## Notes

1. Bureau of Justice Statistics, National Sources of Law Enforcement Employment Data, October 4, 2016, <https://www.bjs.gov/content/pub/pdf/nsleed.pdf>.
2. Janell Ross, Police Officers Convicted for Fatal Shootings are the Exception, Not the Rule, NBC NEWS, <https://www.nbcnews.com/news/nbcblk/police-officers-convicted-fatal-shootings-are-exception-not-rule-n982741> (last visited April 17, 2020).
3. *Id.*
4. *Id.*
5. Rachel A. Harmon, Legal Remedies for Police Misconduct, in Academy for Justice, a Report on Scholarship and Criminal Justice Reform (Erik Luna ed., 2017).
6. An example is several Georgia prosecutors recused themselves from investigating the murder of Ahmaud Arbery, a young Black man, by a former law enforcement officer and his son. See e.g. Brakkton Booker, Georgia Attorney General Names New Prosecutor In Ahmaud Arbery Case, SLATE (May 11, 2020), [npr.org/2020/05/11/854011906/georgia-attorney-general-names-new-prosecutor-in-ahmaud-arbery-case](https://www.npr.org/2020/05/11/854011906/georgia-attorney-general-names-new-prosecutor-in-ahmaud-arbery-case); Katheryn Tucker, DAs Who Passed on Prosecution in Arbery Case Now Being Investigated, LAW.COM (May 15, 2020), <https://www.law.com/dailyreportonline/2020/05/15/das-who-passed-on-prosecution-in-arbery-case-now-being-investigated/?slreturn=20200716200903>.
7. See generally Somil Trivedi and Nicole Gonzalez Van Cleve, To Serve and Protect Each Other: How Police-Prosecutor Codependence Enables Police Misconduct, 100 B.U.L. REV. 895 (2020).
8. Kate Levine, Who Shouldn't Prosecute the Police, 101 IOWA L. REV. 1447 (2016)
9. *Id.* at 1465-1467 (“Moreover, the police create and control the facts of most criminal cases. The police have, at a most fundamental level, the ability to select facts, to reject facts, to not seek facts, to evaluate facts and to generate facts. Officers are responsible for getting statements from often reluctant witnesses, for inter-viewing and supporting victims and families, and for gathering physical evidence that may appear unimportant but could have enormous impact later on in the process. Facts, in this sense, are not objective entities which exist independently of the [police] but are created by them.”). (internal citations omitted); see also Maybell Romero, Prosecutors and Police: An Unholy Union, 54 U. RICH. L. REV. 101, 102 (2020) (“[P]olice have been shown to exert a great deal of power not just in how a prosecutor prepares for trial, but also how prosecutors engage in plea bargaining...This close cooperation between prosecutors and police, however, has started to extend beyond just plea bargaining and trial preparation.”).
10. See generally David A. Harris, The Interaction and Relationship Between Prosecutors and Police Officers in the U.S., and How This Affects Police Reform Efforts 1 (Univ. of Pittsburgh Sch. of Law, Working Paper No. 2011-19, 2011); Trivedi, *supra* note 7, at 908.
11. The Times Editorial Board, Editorial: Here's how to hold police accountable: Don't let their unions give money to prosecutors, L.A. TIMES, (Jun. 1, 2020, 3:00 AM), <https://www.latimes.com/opinion/story/2020-06-01/minneapolis-floyd-police-prosecutors>.
12. Eric Westervelt, Are Prosecutors Too Cozy With Police? Some DAs Say Campaign Contributions Need To End, NPR (Jun. 18, 2020, 2:06 PM), <https://www.npr.org/2020/06/18/879562369/are-prosecutors-too-cozy-with-police-some-das-say-campaign-contributions-need-to>.
13. Eliyahu Kamisher, California Das Call For Ban On Police Union Money And Endorsements In Prosecutorial Elections, THE APPEAL (Jun. 03, 2020), <https://theappeal.org/california-das-call-for-ban-on-police-union-money-and-endorsements-in-prosecutorial-elections/>
14. Lara Bazelon, A Progressive Prosecutor Pledged to Reform the System. The System's Fighting Back, SLATE, <https://slate.com/news-and-politics/2020/02/st-louis-prosecutor-kim-gardner-lamar-johnson-innocent.html> (last visited on April 16, 2020).

## Notes

15. Wil S. Hylton, Baltimore vs. Marilyn Mosby, *THE NEW YORK TIMES*, September 28, 2016, <https://www.nytimes.com/2016/10/02/magazine/marilyn-mosby-fred-die-gray-baltimore.html>.
16. See generally Kathrine J. Bies, Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct, *Stan. L. & Pol’y Rev.* 28, 109 (2017).
17. Roger A. Fairfax, Jr., The Grand Jury’s Role in the Prosecution of Unjustified Police Killings—Challenges and Solutions, 52 *HARV. C.R.-C.L. L. REV.* 397, 403 (2017); James C. McKinley Jr. and Al Baker, Grand Jury System, With Exceptions, Favors the Police in Fatalities, *THE N.Y. TIMES* (DEC. 7, 2014), [HTTPS://WWW.NYTIMES.COM/2014/12/08/NYREGION/GRAND-JURIES-SELDOM-CHARGE-POLICE-OFFICERS-IN-FATAL-ACTIONS.HTML](https://www.nytimes.com/2014/12/08/nyregion/grand-juries-seldom-charge-police-officers-in-fatal-actions.html).
18. One such factor is the secrecy of grand jury proceedings, which may let the anonymous jurors more easily allow their biases to drive their decision-making. See *id.* at 404.
19. *Id.* at 407 (describing the prosecutor’s role in grand jury proceedings as similar to the jurors’ “legal advisor” answering questions jurors have regarding relevant law).
20. Caleb J. Robertson, Restoring Public Confidence in the Criminal Justice System: Policing Prosecutions When Prosecutors Prosecute Police, 67 *EMORY L.J.* 853, 876 (2018) (recounting that Ferguson, MO prosecutor Robert McCulloch called over sixty witnesses, offered comparisons between testimony and dozens of police interviews, and presented forensic evidence and crime scene reports in grand jury proceedings stemming from Officer Darren Wilson’s killing Michael Brown).
21. *Id.* at 875.
22. Robertson, *supra* note 25, at 879.
23. *Id.* at 877; Fairfax, *supra* note 22, at 416–17.
24. Rogers, *supra* note 22, at 406; see also Nicole Smith Futrell, Visibly (Un)Just: The Optics of Grand Jury Secrecy and Police Violence, 123 *DICKINSON L. R.* 1 (2018) (discussing that even with the heightened visibility on policing over the last several years, it has had limited impact on transparency and accountability in the legal process, particularly when a grand jury is empaneled).
25. See generally Ric Simmons, The Role of The Prosecutor and The Grand Jury in Police Use of Deadly Force Cases: Restoring The Grand Jury to Its Original Purpose, 62 *Clev. St. L. Rev.* 519 (2017).
26. Rogers, *supra* note 22, at 408.
27. Futrell, *supra* note 29, at 36.
28. 76 Black Men And Boys Killed By Police, *NEWSONE*, <https://newsone.com/playlist/black-men-boy-who-were-killed-by-police/> (last visited on April 16, 2020).
29. George Joseph & Ali Winston, When Prosecutors Bury Police Lies, *APPEAL* (Sep. 17, 2019), <https://theappeal.org/prosecutors-police-lies/>; see also *id.* (“Former prosecutors say that internal assessments of dishonesty are rarely memorialized. And even when clear credibility findings regarding officers are made by judges, several recent cases suggest prosecutors fail to consistently track and disclose these records.”); see also Erwin Chemerinsky, The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles, 8 *VA. J. Soc. Pol’y & L.* 305 (2001).
30. *Id.*
31. See OFFICE OF THE STATE’S ATT’Y FOR BALT. CITY, INVESTIGATING AND PROSECUTING POLICE MISCONDUCT: REFORM PROPOSALS (2016), <https://www.stattorney.org/images/PolicyReformFull.pdf> [hereinafter STATE’S ATT’Y] (last visited August 4, 2020).
32. See generally Deborah Davis and Richard A. Leo, A Damning Cascade of Investigative Errors: Flaws in Homicide Investigation in the USA, (Univ. of San Francisco Law, Research Paper 2016-02, 2016).
33. See generally Steven Zeidman, From Dropsy to Testifying: Prosecutorial Apathy, Ennui, or Complicity?, *Ohio State J. Crim. Law* 16, 423 (2019).

## Notes

34. David A. Harris, *The Interaction and Relationship Between Prosecutors and Police Officers in the U.S., and How This Affects Police Reform Efforts 1* (Univ. of Pittsburgh Sch. of Law, Working Paper No. 2011-19, 2011).
35. See e.g., Christopher Salvatore, et al. *Assessing Public Confidence In The Criminal Justice System*. 88 *Int’l. Soc. Sci. Rev.* 3 (2013); Gene Demby, *For People Of Color, Relationships With Police Are Complicated*, NPR, <https://www.npr.org/2014/08/15/340562861/for-people-of-color-relationships-with-police-are-complicated> (last visited April 17, 2020).
36. John Gramlich, *From Police to Parole, Black and White Americans Differ Widely in Their Views of Criminal Justice System*, PEW RESEARCH CENTER, <https://www.pewresearch.org/fact-tank/2019/05/21/from-police-to-parole-black-and-white-americans-differ-widely-in-their-views-of-criminal-justice-system/> (last visited on April 17, 2020); see also Jeffrey M. Jones, *In U.S., Confidence in Police Lowest in 22 Years*, GALLUP, <https://news.gallup.com/poll/183704/confidence-police-lowest-years.aspx> (last visited April 17, 2020).
37. *Americans Overwhelming Support Prosecutorial Reform, Poll Finds*, ACLU, <https://www.aclu.org/press-releases/americans-overwhelmingly-support-prosecutorial-reform-poll-finds> (last visited April 17, 2020).
38. *Confidence in Institutions*, GALLUP, <https://news.gallup.com/poll/1597/confidence-institutions.aspx> (last visited April 17, 2020); see also Jim Norman, *Confidence in Police Back at Historical Average*, GALLUP, <https://news.gallup.com/poll/213869/confidence-police-back-historical-average.aspx> (last visited on April 17, 2020).
39. *Crime, Law Enforcement, and Criminal Justice*, Quinnipiac University Poll. April 6-9, 2018, POLLINGREPORT.COM, <https://www.pollingreport.com/crime.htm> (last visited on April 17, 2020).
40. Gramlich, *supra* note 44.
41. *Id.*
42. See, e.g., *Independent Investigations and Prosecutions*, CAMPAIGN ZERO, <https://www.joincampaignzero.org/investigations> (last visited Feb. 11, 2020) [hereinafter CAMPAIGN ZERO].
43. Robertson, *supra* note 2, at 861.
44. See STATE’S ATT’Y, *supra* note 11, at 6.
45. *Id.*, at 6-7
46. *Id.* at 7.
47. Robertson, *supra* note 2, at 883
48. *Id.* at 883.
49. *Id.* at 885. See e.g. Natalie Delgadillo, *Civilian Oversight of Police Appeals to Many. But Is It Always Effective?*, GOVERNING, [HTTPS://WWW.GOVERNING.COM/TOPICS/PUBLIC-JUSTICE-SAFETY/GOV-CIVILIAN-OVERSIGHT-POLICE-CHARTER-AMENDMENT.HTML](https://www.governing.com/topics/public-justice-safety/gov-civilian-oversight-police-charter-amendment.html) (last visited August 3, 2020); see also Priyanka Boghani, *Is Civilian Oversight the Answer to Distrust of Police?*, PBS, <https://www.pbs.org/wgbh/frontline/article/is-civilian-oversight-the-answer-to-distrust-of-police/> (last visited August 3, 2020).
50. Goldman, *supra* note 87, at 47 (“Without a certificate, an individual cannot be employed as a police officer in that state.”).
51. Elizabeth Weill-Greenberg, *When Cops Lie, Should Prosecutors Rely Upon Their Testimony At Trial*, THE APPEAL, <https://theappeal.org/advocates-demand-da-do-not-call-lists-dishonest-biased-police/> (last visited on April 19, 2020; see also, Henry Gass, *When DA Doesn’t Consider An Officer Reliable, Should Public Know?*, THE CHRISTIAN SCIENCE MONITOR, <https://www.csmonitor.com/USA/Justice/2019/0903/When-DA-doesn-t-consider-an-officer-reliable-should-public-know> (last visited on April 19, 2020); Justin George and Eli Hager, *One Way To Deal With Cops Who Lie? Blacklist Them, Some DAs Say*, THE MARSHALL PROJECT, <https://www.themarshallproject.org/2019/01/17/one-way-to-deal-with-cops-who-lie-blacklist-them-some-das-say> (last visited April 19, 2020).

## Notes

52. See e.g. Justin Fenton, Baltimore's State's Attorney says she has a list of 300 officers with credibility issues. Public defenders are demanding to see it, THE BALTIMORE SUN, <https://www.baltimoresun.com/news/crime/bs-md-ci-cr-do-not-call-list-compel-20200211-xsjzrh2we5df7etqreyxgu2e4y-story.html>; John An-nese, Brooklyn D.A. releases list of cops with credibility problems, NY Daily News (Nov. 6, 2019), <https://www.nydailynews.com/new-york/nyc-crime/ny-brooklyn-da-releases-list-of-cops-with-credibility-problems-20191107-nc546s2xuvbzvypnautt6rkeq-story.html>; Zak Cheney-Rice, NYPD FEB. 18, 2020 NYC Prosecutors Are Keeping Lists of Police Officers Who Lie Too Much to Be Trusted in Court, NY Mag. (Feb. 18, 2020), <https://nymag.com/intelligencer/2020/02/nyc-prosecutors-keep-lists-of-cops-who-lie-too-much.html>; Keri Blakinger, Advocates call on Harris County DA to release name of untrustworthy cops, Houston Chronicle (Jul. 19, 2019), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Advocates-call-on-Harris-County-DA-to-release-14108434.php>; Jim Slater, St. Louis prosecutor lists 28 officers on 'exclusion list', AP (Aug. 30, 2018), <https://apnews.com/40a8a74dff0a4820b383905b-93f3a91c/St.-Louis-prosecutor-lists-28-officers-on-'exclusion-list'>.

53. Michael Casey, If police officers can't be trusted, they end up on a list. But in Philadelphia, elsewhere, debate rages over whether they should stay a secret, MORNING CALL (Sep. 1, 2019), <https://www.mcall.com/news/pennsylvania/mc-nws-pa-criminal-justice-problem-police-20190901-i5qkue23e5bg5kpymtrk6ortae-story.html>.

54. See Samuel Walker, Institutionalizing Police Accountability Reforms, The Problem of Making Police Reforms Endure, 32 St. Louis U. Pub. L. Rev. 57 (2012).