

The Relationship Between Prosecutors and Police: Promoting Accountability and Building Public Trust

“[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 in the United States has become militarized, trained, and equipped to fight so-called “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 would go unpunished elsewhere. The predictable result of unlawful policing practices, including the excessive use of force, is the belief in communities of color 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.¹ Evidence shows there is virtually no accountability

for police officers involved in excessive use of force.² Of the nearly 100 officers arrested for the fatal use of force since 2005, only 35 have been convicted of a crime, often for substantially lower crimes than defendants in comparable murders not involving the police.³ Only three have been convicted for murder.⁴

Prosecutors’ dependence on police creates a conflict of interest that undermines their willingness and ability to prosecute police officers. For too long, prosecutors and courts have been indifferent to police violence. Even in recent cases that starkly illuminate the problem, prosecutors still fail to act.⁵ This is almost entirely due to fundamental problems in the police-prosecutor relationship.⁶ These seemingly independent actors have a symbiotic connection. In practice, prosecutors depend on police for the success of their cases, from charging to conviction.⁷ Police often guide cases with little oversight from prosecutors and are able to influence case outcomes from the moment of arrest.⁸ This interdependence means any decision to prosecute police misconduct carries the risk of police withdrawing their cooperation in future cases.⁹ The inherent conflict of interest in prosecuting cases of police misconduct and police violence is just one reason why prosecutors must create professional distance between their offices and local police departments.

Politics thwart prosecutor-led attempts to hold police accountable. In most jurisdictions, prosecutors are elected. Being “tough on crime” can make or break a candidacy, so police union endorsement is important. These unions often resist a district attorney’s reform attempt,¹⁰

actively undermine their election and re-election,¹¹ and strenuously oppose legislation to increase transparency and accountability in misconduct investigations.¹² Within First Amendment limits, police union and police labor organization contributions to district attorney candidates should be tightly controlled.¹³ This would shield prosecutors from undue police interference.¹⁴ State ethics rules for prosecutors could bar or restrict these campaign contributions.¹⁵

Grand Jury manipulation. Very rarely do grand juries indict in police cases of excessive use of force and other alleged misconduct, despite almost uniformly indicting for all other crimes presented to them.¹⁶ While a variety of factors contribute to this,¹⁷ it is mainly due to the considerable power prosecutors use in grand jury proceedings to affirmatively protect the police.¹⁸ Local prosecutors often provide law enforcement suspects greater procedural privilege at the grand jury stage than other suspects, allowing them to have the assistance of counsel, to hear evidence presented to the grand jury, and even to testify before the jurors.¹⁹ Special²⁰ and independent prosecutors appointed for grand jury proceedings of cases involving law enforcement suspects are less likely to feel pressure to make concessions.²¹ The secrecy surrounding grand jury proceedings insulates prosecutors from accountability for their actions related to police officer indictments.²² Lessening—or even removing—this secrecy would result in transparency in police misconduct cases.²³ Prosecutors can make public the evidence in the case, the rationale for their decisions to charge (or not charge) a police suspect, and the record of grand jury proceedings.²⁴ Office policy should strictly prohibit special accommodations for police suspects and their counsel, and line prosecutors who employ them should be disciplined.

Maintaining prosecutors and law enforcement collaboration must not override the need to hold police accountable. Prosecutor offices are

frequently complicit in police misconduct, which further undermines public confidence in local justice systems. Some offices, for instance, fail to disclose or cover up instances of police dishonesty.²⁵ Internal measures to track officer misconduct within prosecutor offices “are haphazard at best, and intentionally negligent at worst.”²⁶ Prosecutors must clean up their own houses. Prosecutors can refuse to cover-up police dishonesty and should prosecute excessive force cases.²⁷

Prosecutor-based police accountability improves the credibility of the criminal justice system. Misconduct and overreach by police when it comes to shoddy investigations, falsification of evidence,²⁸ and perjured testimony are well documented.²⁹ Because prosecutors are dependent on police work for the cases they prosecute, holding police accountable improves the integrity of prosecutorial work product. For example, holding police accountable for lying about evidence will result in fewer future instances of lying—and fewer cases in which false evidence is a barrier to successful and accurate prosecution.³⁰

Efforts to restore the public’s confidence in law enforcement by prosecuting police misconduct are important and require major reforms. Public confidence in the system is extremely fragile in communities of color.³¹ Recent polling on public perceptions of police,³² prosecutors,³³ and the criminal justice system³⁴ demonstrates how eroded the “appearance of justice” is for many communities, and reveals drastically different views that fall along racial³⁵ 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,³⁶ and only 31% of Black Americans feel that officers are held accountable when misconduct occurs, versus 70% of Whites.³⁷ This divide is widening and threatens the credibility and legitimacy of our criminal legal system.

Police accountability for misconduct and excessive use of force can be pursued in several ways,³⁸ including:

- **Independent Review.** “Independent investigations of all cases where police kill or seriously injure civilians” and similar contexts³⁹ is recommended. These can take a number of forms, most notably appointing special prosecutors, creating collaborative investigation teams, or creating civilian review boards.
- **Special prosecutors,** from outside the jurisdiction who operate independently of local prosecutors, can provide legitimate prosecution of law enforcement officers and avoid the “appearance of impropriety” that occurs in police misconduct cases where a local prosecutor’s “impartiality might reasonably be questioned.”⁴⁰
- **Collaborative Investigation Teams.** Employing collaborative investigation teams with representatives from police departments, prosecutor offices, and/or other government and community bodies promotes better misconduct investigations.⁴¹ One 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 District Attorney’s office determines whether to charge the officer.⁴² When no charge is brought, the office must prepare a decision letter, which is available to the public with the investigative file.⁴³
- **Civilian Review Boards (CRBs)** “consisting of qualified members with long-term appointments”⁴⁴ review the investigation and evidence and advise prosecutors. However, CRBs take significant investment of money and time to create, staff, and train,⁴⁵ and have been largely ineffective. Limiting their function to producing lists of potential special prosecutors may be preferable. This would increase community involvement while avoiding some problems that come when CRBs have substantial involvement.⁴⁶
- **Establish Conviction Integrity Units** to identify police officers who should be placed on “do-not-call” lists and disclosed to defense attorneys. Increasingly, advocates are calling for prosecutors to place officers with prior misconduct on restrictive lists,⁴⁷ which preclude them from participating in future trials. Chief prosecutors in Philadelphia, Baltimore, Brooklyn, Boston, Houston, and St. Louis have begun building lists that bar officers serving as witnesses for a host of bad acts.⁴⁸ The on-going debate about these lists being made publicly available⁴⁹ should not preclude prosecutors from sharing individual names with defense attorneys. The work of Conviction Integrity Units could identify officers who should be placed on such lists.

The Legal Defense Fund calls on district attorneys offices to hold police officers accountable for their misconduct, especially that involving excessive and fatal use of force; engage independent review of the most egregious cases of police violence; and actively assist police agencies to identify and correct the failures in policy that allow excessive violence to persist. This will help create community trust and reduce the harm done by police.



Notes

- 1 U.S. Dep't of Just., Bureau of Justice Statistics, *National Sources of Law Enforcement Employment Data*, (Oct. 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 (Mar. 13, 2019), <https://www.nbcnews.com/news/nbcblk/police-officers-convicted-fatal-shootings-are-exception-not-rule-n982741>.
- 3 *Id.*
- 4 *Id.*
- 5 One example involves Georgia prosecutors who 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. Braktkon Booker, *Georgia Attorney General Names New Prosecutor In Ahmaud Arbery Case*, NPR (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/?sreturn=20200716200903>; see also 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, 1352-53 (2018).
- 6 See generally Somil Trivedi & Nicole Gonzalez Van Cleve, *To Serve and Protect Each Other: How Police-Prosecutor Codependence Enables Police Misconduct*, 100 B.U.L. Rev. 895 (2020).
- 7 Kate Levine, *Who Shouldn't Prosecute the Police*, 101 Iowa L. Rev. 1447, 1465 (2016).
- 8 *Id.* at 1465-67 ("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 interviewing and supporting victims and families, and for gathering physical evidence that may appear unimportant but could have enormous impact later in the process. 'Facts, in this sense, are not objective entities which exist independently of the [police] but are created by them.'") (footnotes omitted); see also Maybell Romero, *Prosecutors and Police: An Unholy Union*, 54 U. Rich. L. Rev. 101, 103 (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.") (footnote omitted).
- 9 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* 7 (Univ. of Pitts. Sch. of Law, Working Paper No. 2011-19, 2011); Trivedi & Gonzalez Van Cleve, *supra* note 6, at 909.
- 10 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> (Feb. 25, 2020).
- 11 Eliyahu Kamisher, *LA Police Union Contributes \$1 Million to Anti-George Gascón PAC*, Appeal (Jan. 20, 2020), <https://theappeal.org/george-gascon-los-angeles-police-union/>.
- 12 See generally Kathrine J. Bies, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 Stan. L. & Pol'y Rev. 109, 112 (2017).
- 13 The Times Editorial Board, *Editorial: Here's how to hold police accountable: Don't let their unions give money to prosecutors*, L.A. Times (June 1, 2020), <https://www.latimes.com/opinion/story/2020-06-01/minneapolis-floyd-police-prosecutors>.
- 14 Eric Westervelt, *Are Prosecutors Too Cozy With Police? Some DAs Say Campaign Contributions Need To End*, NPR (June 18, 2020), <https://www.npr.org/2020/06/18/879562369/are-prosecutors-too-cozy-with-police-some-das-say-campaign-contributions-need-to>.
- 15 Eliyahu Kamisher, *California DAs Call For Ban On Police Union Money And Endorsements In Prosecutorial Elections*, Appeal (June 3, 2020), <https://theappeal.org/california-das-call-for-ban-on-police-union-money-and-endorsements-in-prosecutorial-elections/>.
- 16 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. & Al Baker, *Grand Jury System, With Exceptions, Favors the Police in Fatalities*, N.Y. Times (Dec. 7, 2014), <https://www.nytimes.com/2014/12/08/nyregion/grand-juries-seldom-charge-police-officers-in-fatal-actions.html>.

- 17 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 Fairfax, Jr., *supra* note 16, at 403–04.
- 18 See *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).
- 19 See generally Caleb J. Robertson, *Restoring Public Confidence in the Criminal Justice System: Policing Prosecutions When Prosecutors Prosecute Police*, 67 Emory L.J. 853, 875-76 (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 of Michael Brown).
- 20 *Id.* at 879.
- 21 *Id.* at 877; Fairfax, *supra* note 16, at 416–17.
- 22 Fairfax, *supra* note 16, at 406; see also Nicole Smith Futrell, *Visibly (Un)Just: The Optics of Grand Jury Secrecy and Police Violence*, 123 Dick. L. Rev. 1, 1, 28 (2018) (discussing that even with the heightened visibility on policing over the last several years, there has been limited impact on transparency and accountability in the legal process, particularly when a grand jury is empaneled).
- 23 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).
- 24 Futrell, *supra* note 22, at 36.
- 25 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, 311 (2001).
- 26 Joseph & Winston, *supra* note 25.
- 27 See Office of The State’s Att’y for Balt. City, *Investigating and Prosecuting Police Misconduct: Reform Proposals* (2016) [hereinafter State’s Att’y], <https://www.stattorney.org/images/PolicyReformFull.pdf>.
- 28 See generally Deborah Davis & Richard A. Leo, *A Damning Cascade of Investigative Errors: Flaws in Homicide Investigation in the USA* (Univ. of S.F. Law, Research Paper No. 2016-02, 2016).
- 29 See generally Steven Zeidman, *From Dropsy to Testilying: Prosecutorial Apathy, Ennui, or Complicity?*, Ohio State 16 J. Crim. Law, 423, 425 (2019); See Conway, *supra* note 5, at 1354, 1367-78 (discussing how prosecutors rely heavily on police testimony in many cases (despite their perjury), which leads to reluctance to bring charges against them for misconduct).
- 30 See e.g., Harris, *supra* note 9, at 7; see also *id.* at 11.
- 31 See e.g., Christopher Salvatore, et al. *Assessing Public Confidence In The Criminal Justice System*. 88 Int’l. Soc. Sci. Rev. 3, 5 (2013); Gene Demby, *For People Of Color, Relationships With Police Are Complicated*, NPR, (Aug. 15, 2014), <https://www.npr.org/2014/08/15/340562861/for-people-of-color-relationships-with-police-are-complicated>.
- 32 John Gramlich, *From police to parole, black and white Americans differ widely in their views of criminal justice system*, Pew Res. Ctr (May 21, 2019), <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/>; see also Jeffrey M. Jones, *In U.S., Confidence in Police Lowest in 22 Years*, Gallup (June 19, 2015), <https://news.gallup.com/poll/183704/confidence-police-lowest-years.aspx>.
- 33 Press Release, *Americans Overwhelming Support Prosecutorial Reform*, Poll Finds, ACLU (Dec. 12, 2017), <https://www.aclu.org/press-releases/americans-overwhelmingly-support-prosecutorial-reform-poll-finds>.
- 34 *Confidence in Institutions*, Gallup, <https://news.gallup.com/poll/1597/confidence-institutions.aspx> (last visited Sept. 12, 2020); see also Jim Norman, *Confidence in Police Back at Historical Average*, Gallup (July 10, 2017), <https://news.gallup.com/poll/213869/confidence-police-back-historical-average.aspx>.
- 35 *Crime, Law Enforcement, and Criminal Justice*, Quinnipiac University Poll. April 6-9, 2018, PollingReport.com, <https://www.pollingreport.com/crime.htm> (last visited on Sept. 12, 2020).
- 36 Gramlich, *supra* note 32.
- 37 *Id.*

38 See Samuel Walker, *Institutionalizing Police Accountability Reforms: The Problem of Making Police Reforms Endure*, 32 St. Louis Univ. Pub. L. Rev. 57, 84–85 (2012).

39 *Independent Investigations and Prosecutions*, Campaign Zero, <https://www.joincampaignzero.org/investigations> (last visited Aug. 12, 2020).

40 Robertson, *supra* note 19, at 861.

41 See State's Att'y, *supra* note 27, at 6.

42 *Id.* at 6–7.

43 *Id.*

44 Robertson, *supra* note 19, at 883

45 See *id.*

46 *Id.* at 885. See e.g. Natalie Delgadillo, *Civilian Oversight of Police Appeals to Many. But Is It Always Effective?*, *Governing* (May 25, 2017), <https://www.governing.com/topics/public-justice-safety/gov-civilian-oversight-police-charter-amendment.html>; see also Priyanka Boghani, *Is Civilian Oversight the Answer to Distrust of Police?*, PBS (July 13, 2016), <https://www.pbs.org/wgbh/frontline/article/is-civilian-oversight-the-answer-to-distrust-of-police/>.

47 Elizabeth Weill-Greenberg, *When Cops Lie, Should Prosecutors Rely Upon Their Testimony At Trial*, *Appeal* (July 29, 2019), <https://theappeal.org/advocates-demand-da-do-not-call-lists-dishonest-biased-police/>; see also Henry Gass, *When DA doesn't consider an officer reliable, should public know?*, *Christian Sci. Monitor* (Sept. 3, 2019), <https://www.csmonitor.com/USA/Justice/2019/0903/When-DA-doesn-t-consider-an-officer-reliable-should-public-know>; Justin George & Eli Hager, *One Way To Deal With Cops Who Lie? Blacklist Them, Some DAs Say*, *Marshall Project* (Jan. 17, 2019), <https://www.themarshallproject.org/2019/01/17/one-way-to-deal-with-cops-who-lie-blacklist-them-some-das-say>.

48 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.*, *Balt. Sun* (Feb. 11, 2020), <https://www.baltimoresun.com/news/crime/bs-md-ci-cr-do-not-call-list-compel-20200211-xsjzrh2we5df7etgreyxgu2e4y-story.html>; John Annese, *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-nc546s2xuvbvypnautt6rkeq-story.html>; Zak Cheney-Rice, *NYC Prosecutors Are Keeping Lists of Police Officers Who Lie Too Much to Be Trusted in Court*, *N.Y. 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*, *Hous. Chron.* (July 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 News* (Aug. 30, 2018), <https://apnews.com/40a8a74dff0a4820b383905b93f3a91c/St.-Louis-prosecutor-lists-28-officers-on-'exclusion-list'>.

49 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* (Sept. 1, 2019), <https://www.mcall.com/news/pennsylvania/mc-nws-pa-criminal-justice-problem-police-20190901-i5qkue23e5bg5kpymtrk6ortae-story.html>.