

PUTTING POLICE IN THE PADDYWAGON: AN ANALYSIS OF THE DIFFICULTIES OF PROSECUTING POLICE AND PROPOSED SOLUTIONS

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INTRODUCTION

The nation is traumatized. Years ago, the world watched as Rodney King was beaten by police officers. King was bludgeoned fifty-six times, kicked multiple times, and tased. However, when criminal charges were brought, the officers were acquitted. Two decades later, the nation watched video footage of Tamir Rice, a twelve-year-old African American boy, being shot and killed by police officers with no restraint. Again, the officers were acquitted. The nation then watched video footage of Philando Castile, a man following lawful orders, being shot and killed in front of his girlfriend and daughter by police officers. Once more, the officer was acquitted. Time and time again, the nation has watched circumstances of police brutality and misconduct happen right in front of its eyes and each time cries out for a different result. Yet, despite the pleas of the masses, nothing changes. Now, here it goes again: the nation watched as George Floyd had a knee placed on his neck for eight minutes and forty-six seconds and watched another human being take their last breath. Is it not a sad reality that the nation sat in anxiety believing, once again, a man would be wrongfully acquitted for his actions as a police officer?

The goal of this Note is to confront this cyclical nature of police misconduct by providing an analysis on what legal barriers exist that prevent the public from seeing the prosecution of the police, the devastating impacts that result from such lack of accountability, and possible solutions to help rectify the problem from a legal standpoint. First, Part I will explain what exactly police misconduct is and then identify data illustrating that the accountability of police misconduct is shockingly low. Part II will then identify direct barriers that interfere with the process of prosecuting the police, such as prosecutorial discretion and jury bias. It will then take note of indirect barriers that affect the prosecution process. Part III will seek to explain that severe consequences such as the loss of legitimacy, a

* J.D. Candidate, University of Toledo College of Law (2022). There are too many thank-yous to put in one citation. But first, I would like to thank my Faculty Advisor Gregory Gilchrist for encouraging me to write on this topic and mentoring me throughout this entire process. Next, I would like to thank my friends who spend some of their time to either review my thoughts or listen to my various ramblings. Finally, I would like to thank my mom, Annette Hill, for giving me my sense of justice and teaching me that we can make the world a better place in our own little ways. This note was written in the spirit of the song “Make Them Hear You” from the musical “Ragtime” and I hope it encourages other scholars to write in the same vein.

descent into lawlessness, and the deaths of minority groups will be the direct outcome if police misconduct remains unchecked. Then, this article will illustrate why prosecuting the police is the most likely solution that will avoid those consequences. Finally, Part IV will propose solutions which may dismantle the barriers in prosecuting police, such as special counsel appointments, legislative reform, and a culture shift.

This Note's premise is not to "solve" police misconduct. Arguably, no note can. Instead, it is the hope of the author that this Note will prompt open and honest discussions on how society views the police, provide a light to the glaring truths that exist in our legal systems, and discuss the ramifications if no reform is to take place. It is imperative action is taken soon.

I. GENERAL INFORMATION ABOUT POLICE MISCONDUCT

A. *What is Police Misconduct?*

The term "police misconduct" has been subject to a variety of interpretations, granting the term either a narrow or broad scope, depending on what the advocate is trying to accomplish. The Supreme Court of the United States, for instance, attributed police misconduct with a narrow meaning by finding police misconduct to be "[misuse[s]] of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."¹ In this definition, the Court prescribes that only affirmative acts of an officer constitute misconduct.² Under this narrow construction, police misconduct fails to encompass many problematic "inactions" police can partake in that can lead to harm. For example, simple things such as sleeping on the job or accepting free meals are smaller infractions which are excluded from police misconduct.³ This narrow construction has also allowed police officers to stand by while constitutional rights were being violated in front of them. It is only recently that some states are starting to add a "failure to intervene" duty to their officers.⁴ The federal government has already incorporated this duty.⁵

In comparison, a broader reading of police misconduct would include all acts by police that are "deviant, dishonest, improper, unethical, or criminal."⁶ The

1. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982) (quoting *United States v. Classic*, 313 U.S. 299, 325-26 (1941)).

2. BRIAN A. MAULE, *POLICE MISCONDUCT IN BROOKLYN* 9-12 (Cham Springer, 2017).

3. BRIAN A. MAULE, *POLICE MISCONDUCT IN BROOKLYN* 10 (Cham Springer, 2017).

4. See Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, BRENNAN CTR. (May 21, 2021), <https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder>; *Legislative Responses for Policing-State Bill Tracking Database*, NAT'L CONF. OF ST. LEGISLATURES, <https://www.ncsl.org/research/civil-and-criminal-justice/legislative-responses-for-policing.aspx> (search key word duty to intervene).

5. *Law Enforcement Misconduct*, U.S. DEP'T OF JUST., <https://www.justice.gov/crt/law-enforcement-misconduct> (last visited Mar. 29, 2022).

6. Julian B. Roebuck & Thomas Barker, *A Typology of Police Corruption*, 21 SOC. PROBS. 423 (1974).

scope of this understanding is useful to prosecution as it allows officials to reach a whole plethora of acts which cause harm. However, the problem of a broad reading of police misconduct is it allows lesser infractions to be a source of prosecution. Legitimate legal tactics such as police deception or more mundane incidents, such as an officer having a bad attitude while on duty, become subject to a crime. Both interpretations have academic and public support, making discussions about police misconduct vary as scholars choose one interpretation over the other.⁷ This in turn leads to a variety of narratives on the issue of police misconduct, police brutality, and a constant cultural battle on how to achieve justice.

Therefore, for the purposes of this paper, the operative definition of police misconduct will encompass all acts the Department of Justice has the authority to act upon.⁸ This includes “uses of excessive force, . . . sexual misconduct, theft, false arrest, and deliberate indifference to serious medical needs or a substantial risk of harm to a person in custody.”⁹ Furthermore, this definition encompasses acts which involve the obstruction of justice such as “prevent[ing] a victim or witnesses from reporting the misconduct, lying to federal, state, or local officials during the course of an investigation into the potential misconduct, writing a false report to conceal misconduct, or fabricating evidence.”¹⁰ All these acts will be considered misconduct while an officer is on or off duty, as long as the officer is “clothed with the color of law.”¹¹ Color of law requiring that the person committing the misconduct “purport to act under ‘some right or privilege created by the state’” or their “conduct is . . . chargeable to the State.”¹² In short, color of law requires someone acts under the “pretense of law.”¹³ With this understanding, it is necessary to discuss the prevalence of police misconduct.

B. How Accountable is the Legal System Being in Handling Police Misconduct?

There is a lack of nationwide studies and data recording the crimes of law enforcement officers and their misconduct.¹⁴ However, objective studies still find police misconduct is not being prosecuted at an acceptable rate. After tracking nearly 11,000 cases of police misconduct allegations in the U.S. for approximately a year, one such study found only 3,238 of those cases resulted in criminal charges,

7. BRIAN A. MAULE, *POLICE MISCONDUCT IN BROOKLYN* 10 (Cham Springer, 2017).

8. *Law Enforcement Misconduct*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/law-enforcement-misconduct> (last visited Mar. 29, 2022).

9. *Id.*

10. *Id.*

11. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982) (quoting *United States v. Classic*, 313 U.S. 299, 325-26 (1941)); *Law Enforcement Misconduct*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/law-enforcement-misconduct> (last visited Mar. 29, 2022).

12. *Washington-Pope v. City of Philadelphia*, 979 F. Supp. 2d 544, 553 (E.D. Pa. 2013) (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)).

13. *Screws v. United States*, 325 U.S. 91, 111 (1945).

14. Philip M. Stinson et al., *Police Integrity Lost: A Study of Law Enforcement Officers Arrested*, NAT’L INST. OF JUST. (Jan. 2016), <https://www.ojp.gov/pdffiles1/nij/grants/249850.pdf>.

and 1,063 (35%) of those charged criminally resulted in convictions.¹⁵ This is in comparison to the general public who receives a 70% conviction rate.¹⁶ The same study then found 2,716 officers were accused of using excessive force, yet, only about 200 of those officers were charged. Of those charged, only 77 officers were convicted.¹⁷ Even if the excessive force used rose to the level of killing a citizen, out of the 2,716 officers accused of brutality, only 30 officers were charged, and only half of those 30 officers were convicted.¹⁸

However, these numbers are not an anomaly. Some scholars have found that in cases of murder “it’s very rare that an officer gets charged with a homicide offense resulting from their on-duty conduct, even though people are killed on a fairly regular basis.”¹⁹ In fact, over the course of a seven year observation, ending in 2011, only 41 officers were ever charged with murder or manslaughter due to deadly force while on duty.²⁰ Seeing as statistically nearly 1,000 citizens die in a fatal shooting at the hands of police every year, this charge rate is very low.²¹ This low charge rate is more evident when data collected from 2005 to 2014 showed that when approximately 10,000 Americans were killed by police on duty during that time frame, only 153 officers were ever charged.²² This equates to about 1.5% of on-duty killings getting charged, leaving many without recourse.²³ From a historical standpoint, the trend seems to be the same. In the state of New York, not one police officer was convicted of homicide for an on-duty shooting between 1977 and 1995, despite “scores of fatal shootings.”²⁴

If perhaps the alleged misconduct did not rise to the level of prosecution, data collected by the Bureau of Justice Statistics found that state and local law enforcement agencies received more than 26,000 complaints about police use of force.²⁵ The study represented about 5% of all police departments.²⁶ The data illustrated that 34% of the complaints of excessive force were thrown out due to insufficient evidence, 25% were deemed unfounded, and 23% resulted in

15. Kami Chavis Simmons, *Increasing Police Accountability: Restoring Trust and Legitimacy Through the Appointment of Independent Prosecutors*, 49 WASH. U. J. L. & POL’Y 137, 146 (2015).

16. *Id.*

17. *Id.* at 147.

18. *Id.*

19. Zusha Elinson & Joe Palazzolo, *Police Rarely Criminally Charged for On-Duty Shootings*, WALL ST. J. (Nov. 24, 2014), <https://www.wsj.com/articles/police-rarely-criminally-charged-for-on-duty-shootings-1416874955> (quoting Phillip Stenson, an assistant professor of criminal justice at Bowling Green who received a federal grant to study arrests of police officers).

20. *Id.*

21. *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> (Mar. 29, 2022, 8:37 PM).

22. Tom Jackman & Devlin Barrett, *Charging Officers with Crimes is Still Difficult for Prosecutors*, WASH. POST (May 29, 2020), <https://www.washingtonpost.com/crime-law/2020/05/29/charging-cops-with-crimes-is-still-difficult-prosecutors/>.

23. *Id.*

24. Thorne Clark, *Protection from Protection: Section 1983 and the ADA’s Implications for Devising a Race-Conscious Police Misconduct Statute*, 150 U. PA. L. REV. 1585, 1594-95 (2002).

25. Matthew J. Hickman, *Citizen Complaints About Police Use of Force*, U.S. DEP’T OF JUST.: OFF. OF JUST. PROGRAMS (June 2006), <https://bjs.ojp.gov/content/pub/pdf/ccpuf.pdf>.

26. *Id.*

exonerations.²⁷ What is most shocking is that only 8% of the complaints led to *any* disciplinary action.²⁸

Lastly, with the rise of social media and cell phones with recording capabilities, the awareness of police misconduct has become more than an upward trend in public discourse.²⁹ It has become a hot button issue in need of discussion. For example, presidential candidates have taken the time to address the issue in their platform.³⁰ Other government actors, such as federal judges, have written opinions on the issue, highlighting the problem.³¹ Finally, law students have entered the fray, exploring the idea of what future initiatives the criminal justice system can adopt to address the issue.³² However, while the movement and action being taken is important and necessary, a discussion must take place to identify why accountability in police misconduct is low and understand why prosecuting police misconduct has a systematic wall in front of it.

II. IDENTIFYING DIRECT BARRIERS THAT PREVENT THE PROSECUTION OF POLICE

When analyzing police misconduct and the process of prosecuting those crimes, no single act or phenomenon is responsible for the lack of prosecution. In other words, it is not a singular “wall” that prevents the legal system from delivering justice in police misconduct instances. Instead, a series of barriers exist in the legal system that make prosecution a momentous task.

A. Prosecutors

The first barrier is created by the very same agent who is supposed to bring the charges on behalf of the public: the prosecutor. The power of the prosecutor has been grounds for continuous debate. Some believe the power of the prosecutor is “virtually absolute.”³³ A prosecutor, at their discretion, can bring charges, create plea bargains, and threaten action without many checks in their decision making.³⁴ As a result of this power, a prosecutor can pick and choose when and who to

27. *Id.*

28. *Id.*

29. Nicol Turner Lee, *Where Would Racial Progress in Policing be Without Camera Phones?*, BROOKINGS INST. (June 5, 2020), <https://www.brookings.edu/blog/fixgov/2020/06/05/where-would-racial-progress-in-policing-be-without-camera-phones/>.

30. Elena Moore, *Trump’s and Biden’s Plans for Criminal Justice*, NAT’L PUB. RADIO (Oct. 16, 2020), <https://www.npr.org/2020/10/16/921662530/trumps-and-biden-s-plans-for-criminal-justice>.

31. *United States v. Densmore*, No. 2:20-mj-00464-BNW-3 (D. Nev. June 9, 2020). (Judge states that George Floyd is the latest example of police brutality against Black men).

32. Raychel Lean, *Racism, Police Brutality and What Attorneys Can Do: UM Law Hosts Candid Discussion*, DAILY BUS. REV. (June 2, 2020), <https://www.law.com/dailybusinessreview/2020/06/02/racism-police-brutality-and-what-attorneys-can-do-um-law-hosts-candid-discussion/> (a panel of law students and professors discuss the current problems they have with the legal system).

33. Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1252 (2004).

34. David Alan Sklansky, *Criminology: The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 507-08 (2016).

prosecute, giving them more “control over life, liberty, and reputation” of other people than any person in America.³⁵ Furthermore, it is a prosecutor’s key role in the administration of justice that provides them with a massive amount of influence in the criminal justice system. A prosecutor, through either recommendations or influence, can push police officers to investigate certain crimes over others, convince magistrates to issue warrants, compel grand juries to indict, persuade judges to imprison or pressure defendants to plead guilty.³⁶ Through such methods, a prosecutor has influence over every criminal justice outcome.³⁷ With such influence, a prosecutor is perhaps the most important authority in the criminal justice system.³⁸

The pushback to that theory is that a prosecutor does not have absolute power.³⁹ Instead, a prosecutor may have influence over the results of criminal justice cases, but they do not have control over everything.⁴⁰ Other actors such as judges, legislators, defense attorneys, juries, and police can thwart the tools of the prosecutor through their own agency.⁴¹ A grand jury could refuse to indict, a judge can deny a warrant, or a legislator could change the laws.⁴² A prosecutor’s power, in a sense, is “facilitating the goals approved by those other actors” and as such, everything a prosecutor does is “done by others.”⁴³

The relevance of the prosecutor’s power manifests itself when one examines police misconduct and their subsequent prosecution. Prosecutors have the power to bring charges against officers where evidence of misconduct arises.⁴⁴ The question that must be answered then is why the rate of charging and conviction is so low.⁴⁵ One articulable reason prosecutors do not want to charge police for their misconduct is because prosecutors will only bring charges they believe will win, and police are difficult to convict.

Prosecutors are taught and trained by the criminal system to adopt a “winning” mentality.⁴⁶ Getting a conviction means a significant amount to a prosecutor, but not for principles of justice. Rather, convictions are more of a contest to be won and each conviction a prosecutor gets is a successful tally on the score board.⁴⁷ While there are prosecutors who refrain from this mindset and wish

35. Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 3 (1940).

36. Sklansky, *supra* note 34, at 483.

37. Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 212 (2019).

38. *Id.* at 189.

39. *Id.* at 171.

40. *Id.* at 212.

41. *Id.*

42. *Id.*

43. *Id.* at 200.

44. Sklansky, *supra* note 34, at 483.

45. 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, 898 (2020).

46. Kami Chavis Simmons, *supra* note 15, at 146.

47. Catherine Ferguson-Gilbert, *It is Not Whether You Win or Lose, It is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283, 289 (2001).

47. *Id.*

for just results, the culture of winning in the criminal justice system affects every prosecutor to a degree.⁴⁸ The system motivates prosecutors to win by allowing them to wear their conviction rate like a medal which the prosecutor can use to advocate for promotions or elections.⁴⁹ In instances of police misconduct, the “winning” mentality makes a prosecutor afraid to lose.⁵⁰ The basis of this fear can come from a variety of places; for instance, prosecutors may fear they “will be unable to push jurors past that reticence to question police action and win.”⁵¹ Also, the prosecutor may believe that witnesses cannot carry the burden of being more credible than a police officer.⁵² A variety of scenarios similar to these examples give prosecutors pause when deciding to charge a police officer for their misconduct.

The second articulable reason prosecutors refuse to bring charges is their close relationship with the police. Prosecutors do not want to “bite the hand” that provides them with evidence. For example, a prosecutor in a town or district with limited resources depends on the police for handling investigations.⁵³ If they were to put that working relationship in jeopardy by charging police, the prosecutors may now fear that they cannot succeed in their job.⁵⁴ Thus, prosecutors “ostensibly protect police so that police can bring in and help convict more cases.”⁵⁵

Furthermore, prosecutors have a disincentive in prosecuting police officers. There is evidence that prosecutors actively hide or refuse to prosecute police misconduct.⁵⁶ In some accounts by former prosecutors, they discussed how a culture of “shading or lying” surrounded their relationship with the police.⁵⁷ In that culture, a prosecutor had to “align with the police at all costs—even when there were egregious errors in cases.”⁵⁸ If a prosecutor was found to be breaking that norm, they were intimidated, taunted, or forcibly limited in their ability to take cases and do their regular duties.⁵⁹ The prosecutor was seen as “dead” in the office and could expect no promotion or praise as a prosecutor from that point forward.⁶⁰

The last reason a prosecutor’s power interferes with prosecuting the police is that prosecutors may choose to abuse the pre-charge process when facing a police

48. *Id.* at 290-91.

49. *Id.* at 292-96; see Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 758-59 (2016).

50. Janell Ross, *Police Officers Convicted for Fatal Shootings Are the Exception, Not the Rule*, NBC NEWS (Mar. 14, 2019), <https://www.nbcnews.com/news/nbcblk/police-officers-convicted-fatal-shootings-are-exception-not-rule-n982741>.

51. *Id.* (quoting Phillip Stenson).

52. *Id.*

53. Gabriel J. Chin & Scott C. Wells, *The “Blue Wall Of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 263 (1998).

54. *Id.*

55. Trivedi & Van Cleve, *supra* note 44, at 912.

56. *Id.* at 901-19.

57. *Id.* at 906-907.

58. *Id.* at 905.

59. *Id.*

60. *Id.*

suspect.⁶¹ For example, during the fatal police shooting of Tamir Rice, a twelve-year-old child from Cleveland, Ohio, the prosecutors took “extraordinary” steps in the pre-charge stages before approaching a grand jury.⁶² Three independent commission reports were collected in regard to the events of that case.⁶³ However, what is notable is that most suspects never receive this kind of review before a charge.⁶⁴ In fact, it seems police-suspects are the only culprits given the opportunity to receive the full arsenal of prosecutorial discretion.⁶⁵

Giving police officers this disproportionate treatment provides them with an unfair advantage in the legal system. Prosecutors in police misconduct cases “speak to any witness they can, review all the evidence, and think seriously about the charges and defenses to those charges.”⁶⁶ Grand juries are “[given] weeks considering the charges in [the police’s] case.”⁶⁷ When given that opportunity, the “chance of facing no charges is dramatically increased.”⁶⁸ But such luxuries are not afforded to the average suspect who is given no such strict review of their case, and in turn, are almost always indicted by a grand jury,⁶⁹ therefore creating a huge discrepancy in the administration of justice.

Understanding the reasons, the influence of the prosecutor, and how that influence is wielded in the legal system, is without question creating an obstacle in prosecuting the police. However, they are not the only actor in the criminal justice process that presents a major obstacle in holding police accountable.

B. *Jury Bias*

Even if the brave prosecutor chooses to bring charges, police are not treated the same as other suspects in the trial process. Currently, on the federal level, the grand jury indictment rate has been 99% in all cases pursued by the Department of Justice.⁷⁰ One famous joke among the legal community is that a grand jury would

61. Levine, *supra* note 49, at 757.

62. *Id.* at 756.

63. *Id.*

64. *Id.* at 757.

65. *Id.* at 756.

66. *Id.* at 775.

67. *Id.*

68. *Id.*

69. *Id.* at 757, 760.

70. See Mark Motivans, *Federal Justice Statistics 2010 - Statistical Tables*, U.S. DEP’T OF JUST.: OFF. OF JUST. PROGRAMS (Dec. 2013), <https://bjs.ojp.gov/content/pub/pdf/fjs10st.pdf>; Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 274-75 (1995); Debra Cassens Weiss, *Grand Juries Almost Always Indict, Federal Stats Show; Is There a Shooting Exception for Cops?*, ABA J. (Nov. 26, 2014), https://www.abajournal.com/news/article/grand_juries_almost_always_indict_federal_stats_show_is_there_a_cop_shootin; Zachary A. Goldfarb, *The Single Chart that Shows that Federal Grand Juries Indict 99.99 Percent of the Time*, WASH. POST (Nov. 24, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/11/24/the-single-chart-that-shows-that-grand-juries-indict-99-99-percent-of-the-time>; Ben Casselman, *It’s Incredibly Rare for a Grand Jury to do What Ferguson’s Just Did*, FIFTYTHREE (Nov. 24, 2014), <https://fivethirtyeight.com/features/ferguson-michael-brown-indictment-darren-wilson/>.

“‘indict a ham sandwich’ if the district attorney asked nicely.”⁷¹ Many citizens perceive the function of the grand jury as a “rubber stamp.”⁷² In short, it is very easy to get a grand jury to agree with a prosecutor and their charges. However, in instances of police misconduct, law enforcement is “nearly immune” from indictment.⁷³ This can logically lead to two scenarios. One, the prosecutor in the proceedings threw the case in some fashion to help the officer avoid prosecution (which prosecutors are incentivized to do so, as discussed above). Or two, the grand jury did not want to indict the police.

The reason conclusion two is viable is that a jury of our peers gives insurmountable deference and credence to police officers. For example, one researcher wrote that “[t]o charge an officer in a fatal shooting, it takes something so egregious, so over the top that it cannot be explained in any rational way.”⁷⁴ Part of that high standard arises from a juror’s belief in the police. Jurors believe police officers are “law keepers and not law breaker[s].”⁷⁵ Police in the eye of a juror are a great idol intended to be the “last line of defense against the great unwashed.”⁷⁶ As a result, “in the face of almost any evidence,” a jury will tend to not convict an officer or run contrary to this mythology of the police.⁷⁷ An officer is given the “true benefit of the doubt” when it comes to their crimes, and in turn prevents them from facing prosecution.⁷⁸

Nevertheless, the truth remains that police *do* lie and are capable of great harm. In fact, there are plenty of documented incidents where police officers lied under oath.⁷⁹ In some jurisdictions, police lying became so commonplace, the term “*testilying*” was borne.⁸⁰ One state court noted in their opinion that officers in their area were rampantly lying.⁸¹ Moreover, officers need not outright deceive to create misconduct. A lapse in judgment in their actions or being ignorant of certain facts or procedures may result in misconduct.⁸² In fact, it is very likely “police officers are probably involved in far more misconduct and corruption than has been unearthed” to public knowledge.⁸³ In short, what jurors fail to do in convicting police officers are recognize their human errors and flaws. An officer can have a

71. *Do We Need Grand Juries?*, N.Y. TIMES, (Feb. 18, 1985), <https://www.nytimes.com/1985/02/18/opinion/do-we-need-grand-juries.html>.

72. Susan W. Brenner, *Faults, Fallacies, and the Future of Our Criminal Justice System: The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL’Y & L. 67, 67 (1995).

73. Goldfarb, *supra* note 70.

74. Levine, *supra* note 49, at 764.

75. David Lewis, *The Urban Criminal Justice System & The Juror’s Perception*, 20 FORDHAM URB. L.J. 561, 563 (1993).

76. *Id.* at 564.

77. *Id.*

78. *Id.*

79. Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 PEPP. L. REV. 245, 272-277 (2017).

80. *Id.* at 272.

81. *People v. McMurty*, 314 N.Y.S.2d 194, 195-96 (Crim. Ct. of N.Y. 1970).

82. Lewis, *supra* note 75, at 566.

83. Johnson, *supra* note 79, at 266-67.

bad day or commit immoral travesties and infractions, as is the flaw of human nature. But when viewing a police officer, a juror sees:

a hero figure. The weapon, the uniform, all of these trappings make the police look invincible. The heart of the power of the image is that he keeps us all safe from the unknown. The icon of the cop is that he is wise – wise in a way that he protects us from the terrible knowledge that he needs to do his work. In his wisdom lies our safety. The iconography is that the police officer will guide us through this case because we are lost. His testimony has a heightened value despite the jury's pledge to treat him like any other witness.⁸⁴

In turn, this desire to keep police officers on this pedestal gives them unmatched credibility and ethos in the trial process. Psychological evidence supports this conclusion. Calvin Lai, a leading expert on implicit bias and an assistant professor of psychological and brain sciences at Washington University, hinted that implicit bias and the preconceived belief of a juror can cause them to grant more credibility to a police officer.⁸⁵ Furthermore, legal scholars support the proposition that, in practice, an officer outweighs all other witnesses' credibility in presenting their testimony and defenses.⁸⁶

Even if there is a juror who is aware of this bias to police and chooses to scrutinize the words of a police officer, the jury bias problem does not vanish. First, the scrutinizing juror is in the minority of the American population.⁸⁷ A national poll discovered that 53% of Americans believe that the police are "fair and just."⁸⁸ In addition to that, the poll found that 31% of Americans believe the police lie routinely.⁸⁹ Second, even if the scrutinizing juror is empaneled into an actual jury, evidence indicates that it will not translate in the courtroom,⁹⁰ the "blue knight" in their honorable uniform will prevail.⁹¹ Compounded with all this evidence, prosecutors arguably have a higher burden of proof in criminal convictions of

84. Lewis, *supra* note 75, at 565-66.

85. Mark Curnutte, *Why Juries Have a Hard Time Convicting Cops*, CINCINNATI ENQUIRER (July 24, 2017), <https://www.cincinnati.com/story/news/2017/07/24/possible-covict-police-officer-because-whites-reluctance-do-so/492380001/>.

86. See Zusha Elinson & Joe Palazzolo, *Police Rarely Criminally Charged for On-Duty Shootings*, WALL ST. J. (Nov. 24, 2014), <https://www.wsj.com/articles/police-rarely-criminally-charged-for-on-duty-shootings-1416874955> (quoting Maki Habersfeld, professor and chairwoman of the Department of Law, Police Science and Criminal Justice Administration at John Jay College of Criminal Justice in New York); German Lopez, *Cops Are Almost Never Prosecuted and Convicted for Use of Force*, VOX (Nov. 14, 2018), <https://www.vox.com/identities/2016/8/13/17938234/police-shootings-killings-prosecutions-court> (quoting David Rudovsky, coauthor of *See generally* Jennifer E. Laurin et al, *Prosecuting Misconduct: Law and Litigation 1* (Thomson-Reuters 3d. 2020)).

87. Bill Schneider, *One Third of Americans Believe Police Lie Routinely*, Column in *Cyclical Consumer Goods*, REUTERS (Jan. 15, 2015, 7:05 AM), <https://www.reuters.com/article/usa-police/column-one-third-of-americans-believe-police-lie-routinely-idINL1N0UU01J20150115> (Mr. Schneider is a Professor of Public Policy and Public and International Law at George Mason University).

88. *Id.*

89. *Id.*

90. Johnson, *supra* note 79, at 295.

91. Gabriel J. Chin & Scott C. Wells, *The "Blue Wall Of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 245 (1998).

police officers in comparison to the average citizen, putting them in a higher “class” in the legal system.

This very “class” runs contrary to the ingrained principles of the American legal system that no one is above the law, yet police officers are granted an exception that places them above the laws they swore to protect. But, the laws in place today may have been designed to create such an effect.

C. Legal Defenses Available to Police Officers

The last notable barrier that impedes the prosecution of police is in the law itself. Specifically, jury instructions in police defendant cases create more overwhelming odds that need to be surmounted to prosecute and convict a police officer.⁹² The key issue that arises from jury instructions is how current legal doctrine aids police officers in their defense of police misconduct. The reasonable use of force doctrine in excessive force cases illustrates the problem.⁹³

In 1989, the Supreme Court ruled that in order to find an officer liable under 18 U.S.C. § 1983, a factfinder must determine if the force used by the officer was “reasonable.”⁹⁴ The factfinder must determine reasonableness by analyzing “from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight” and furthermore, that the officer had to possibly make “split-second judgments” in a “tense, uncertain, and rapidly evolving” situation.⁹⁵ This “Graham rule” was established under 18 U.S.C. § 1983 claims. However, the doctrine has been adopted in the prosecution of police officers and in some states’ use of force statutes.⁹⁶ The Graham rule, as a result of being adopted in the criminal context, is being used today in police misconduct cases.⁹⁷ It helps defend police misconduct by shifting the focus of the jury to an area more beneficial to a

92. See *Graham v. Connor*, 490 U.S. 386 (1989) (The pivotal case in which the Supreme Court created the “reasonable officer” standard).

93. See generally *id.* (Officers stop Graham for his suspicious behavior at a convenience store; however, the suspicious behavior the officers observed were Graham’s symptoms from his diabetes. Officers then apply force to the defendant in which they broke the Graham’s foot, cut his wrists, bruised his forehead, and injured his shoulder. Court creates new Fourth Amendment standard for police officers.).

94. *Id.* at 396.

95. *Id.* at 396-97.

96. See Justifiable Homicide: By Peace Officer, CALCRIM 507 (2020); MINN. STAT. § 609.06 (2020); N.C. GEN. STAT. § 15A-401 (2020); 18 PA. CONST. STAT. § 508 (2020); Grey Lacour & Emma Way, *So Why Did Randall Kerrick Testify?*, CHARLOTTE MAG. (Aug. 17, 2015), <https://www.charlottemagazine.com/so-why-did-randall-kerrick-testify/>; Eileen Sullivan, *A 25-Year-Old Supreme Court Case Will Shape the Investigation in Ferguson*, BUS. INSIDER (Aug. 22, 2014), <https://www.businessinsider.com/a-25-year-old-supreme-court-case-will-shape-the-investigation-in-ferguson-2014-8>; Pioneer Press, *Read the Judge’s Instructions to Yanez Jury*, TWINCITIES (June 13, 2017), <https://www.twincities.com/2017/06/13/read-the-judges-instructions-to-the-yanez-jury/>.

97. See generally *Cnty. of L.A. v. Mendez*, 137 S. Ct. 1539 (2017) (Using the Graham standard).

police officer.⁹⁸ It hyperfocuses the analysis of a jury on the dangerousness of a police officer's job and the stress they may undertake.⁹⁹

This creates two problems. The first problem is that it causes the jury to ignore other aspects of policing such as training, experience, policies and procedures that make police officers better able to deal with danger without using excessive force than a lay citizen would.¹⁰⁰ This in turn results in a "uneven, one-sided manner that usually favors the police."¹⁰¹ The second problem that arises from hyperfocusing on the dangers of policing is it requires an average citizen to guess or imagine if they were under that stressful situation.¹⁰² This results in the jury favoring the police officer.

Juries without law enforcement training and experience who are focused solely on this aspect will be deferential to a police officer's use of force—up to and including deadly force—because it can be scary to project oneself onto the streets and into the high-stress world of policing without the training, expertise, and experience of a professional officer.¹⁰³

In short, a jury will succumb to the credibility of the police officer because they simply cannot imagine the world their "blue knight" lives in, despite the training, experience and practice that prepares officers for those exact moments. "Jury instructions at odds with the reality of police bias allow the phenomenon of giving undue weight to police officer testimony to continue. Jurors are instructed that an officer is just like anyone else..."¹⁰⁴ which is contrary to the very training they undergo. Officers are not trained to think like an average citizen.

Therefore, the Graham rule enables police misconduct by creating "a one-dimensional, overly deferential 'reasonable person in a high-stress situation' standard whose application is disproportionately based on the guesswork of the fact finder."¹⁰⁵ This is just one doctrinal example that illustrates jury instructions giving police the upper hand. Other cases surrounding police credibility have also had a similar issue of favoring police and their credibility.¹⁰⁶ The barrier jury instructions present adds one more hurdle in the path to prosecute police.

D. Indirect Barriers That Impede Prosecution

It is important to recognize there are other systemic barriers which indirectly interfere with the process of prosecuting the police. Most of these barriers created by the police themselves.

98. Mitch Zamoff, *Determining the Perspective of a Reasonable Police Officer: An Evidence-Based Proposal*, 65 VILL. L. REV. 585, 590 (2020).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. Johnson, *supra* note 79, at 296.

105. Zamoff, *supra* note 98, at 590.

106. Johnson, *supra* note 79, at 256-59.

E. Police Unions

First, police unions, just like any other unions, are powerful groups that were designed to give their members more collective bargaining power with their employers. However, police unions also gather financial resources and political clout in order to donate and endorse political candidates that will pass favorable legislation for police officers.¹⁰⁷ They first arose during the Civil Rights Era in the 1960s and 1970s, when activists at the time were advocating for greater transparency and accountability in police departments.¹⁰⁸ Civil rights activists sought civilian review boards, transferring authority of the police from the police chief to the city commissioner, and protections against unreasonable searches and seizures.¹⁰⁹ Police departments wanted to fight off these initiatives, feeling their profession was under attack.¹¹⁰ Through the work of police unions, the “rank-and-file police officer gained a major voice in state and local government.”¹¹¹ Initiatives of civilian review boards were halted, and in some states, a police bill of rights was established, which entitled officers to certain due process protection if they just so happened to be investigated for misconduct.¹¹²

The problem with police unions, as explained in the history above, is they consistently fight against police accountability. “Since they emerged as a powerful factor in policing in the late 1960s, police unions have been a largely negative force with regard to police accountability. Unions have almost consistently opposed all measures designed to improve police-community relations, particularly the creation of citizen review boards.”¹¹³ Furthermore, “whether through pushing for ‘law enforcement officers’ bills of rights’ at the legislative level or contractual provisions, unions act to shield officers from public view and from accountability for alleged misconduct.”¹¹⁴ Police unions actively advocate for legislative barriers that create “impediments to police accountability, such as: ‘formal waiting periods that delay investigations;...prohibitions on the use of non-sworn investigators in misconduct investigations;...pre-disciplinary hearings that include rank-and-file officers on the hearing board; and...statutes of limitations on the retention and use of data on officer misconduct.’”¹¹⁵

In regard to prosecution of police officers, the same obstruction remains true. Recently in St. Louis, a prosecutor wanted to investigate police misconduct in their local police department, however, the police union stepped in by creating a legal

107. Katherine J. Bies, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 STAN. L. & POL’Y REV. 109, 123 (2017).

108. *Id.* at 120-21.

109. *Id.* at 121-22.

110. *Id.* at 120.

111. *Id.* at 123.

112. *Id.* at 125.

113. Samuel Walker, “Not Dead Yet”: *The National Police Crisis, A New Conversation About Policing, and the Prospects for Accountability-Related Police Reform*, 2018 U. ILL. L. REV. 1777, 1817 (2018).

114. Benjamin Levin, *What’s Wrong With Police Unions?*, 120 COLUM. L. REV. 1333, 1345 (2020).

115. Bies, *supra* note 107, at 125.

battle and preventing the investigation.¹¹⁶ Furthermore, police unions take steps to “demonize” police reform to prevent any accountability. They do this “by simply framing any opposition to their political agenda as endangering safety..., forc[ing] policymakers to choose between supporting the union’s political agenda and endangering public safety.”¹¹⁷

Under these circumstances, it is very clear police unions would get in the way of preventing any public initiatives that might make prosecuting police a more manageable task. This is certainly true in light of the fact that there is no “comparable oppositional force to counter the police union lobby.”¹¹⁸ Scholars argue the only way to counteract police unions power is to have “continued, active, and organized resistance to encourage greater accountability and transparency in police departments.”¹¹⁹ Until such a resistance appears, police unions will not only continue to prevent a solution to police accountability, but also worsen misconduct. A study from the University of Oxford found that protections created in police contracts, lobbied by police unions, *directly and positively* correlate with citizen abuse.¹²⁰ Along the same vein, the University of Chicago found that collective bargaining rights, advocated for by police unions in Florida, lead to an approximate 40% increase in violent police misconduct.¹²¹ Considering those statistics, police unions and culture are part of the police accountability problem and deserve their own discussion on how to be addressed.

F. Police Culture

The second obstacle indirectly preventing police prosecution is police culture. Police culture refers to the developed “unwritten rules which dictate appropriate conduct in different circumstances” in policing.¹²² To be fair, all occupational groups develop a culture due to the shared experiences the professionals endure, a “brotherhood” of the profession.¹²³ Yet, what is unique about the police culture is it has a negative effect which alters society at large. For instance, the Blue Wall of Silence is “an unwritten code in many departments which prohibits disclosing perjury or other misconduct by fellow officers, or even testifying truthfully if the facts would implicate the conduct of a fellow officer.”¹²⁴ The existence of this Blue Wall is noted academically and is a well-documented

116. Noam Scheiber et al., *How Police Unions Became Such Powerful Opponents to Reform Efforts*, N.Y. TIMES (June 6, 2020), <https://www.nytimes.com/2020/06/06/us/police-unions-minneapolis-kroll.html>.

117. Bies, *supra* note 107, at 141.

118. *Id.* at 144.

119. *Id.*

120. Abdul Rad, *Police Institutions and Police Abuse: Evidence from the US*, UNIV. OF OXFORD (Apr. 23, 2018), <http://dx.doi.org/10.2139/ssrn.3246419>.

121. Dhammika Dharmapala et al., *Collective Bargaining and Police Misconduct: Evidence from Florida*, UNIV. OF CHICAGO COASE-SANDOR INST. FOR LAW & ECON., (Aug. 1, 2019), https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3095217.

122. Chin & Wells, *supra* note 53, at 250.

123. *Id.* at 250-51.

124. *Id.* at 237.

phenomenon in the public sphere.¹²⁵ The Blue Wall was created as a result of how police officers felt about outside pressure from the media, the courts, and the public, forcing them to conduct an exceptional job at all times.¹²⁶ Officers then become in fear of failing these high expectations, and find the only people that understand this fear are their “brothers and sisters,” fellow police officers.¹²⁷ This in turn creates strong feelings of loyalty to their fellow officers and the desire to protect each other.¹²⁸ These bonds of loyalty are not necessarily bad. However, the bonds become a problem when honest police officers who want to do the right thing now feel this duty to protect corrupt police officers.¹²⁹ This duty to protect even strains an officer’s allegiance to the department and the community, making them play second fiddle to their allegiance to the corrupt police officer.¹³⁰ “When this happens, loyalty itself becomes corrupt and erects the strongest barriers to corruption control: the code of silence and the ‘Us vs. Them’ mentality.”¹³¹

As a result, incidents of police misconduct are harder to investigate because their fellow police officer who witnessed the corrupt behavior will either not speak out against it or lie about the events that took place.¹³² For example, in cases of excessive force, some departments that were discovered to have a Blue Line of silence had officers use scripted language in describing the arrests of their suspects, even though the facts of those arrests did not match their testimony.¹³³ Other horrifying ways police act under this Blue Wall is by lying under sworn oath, manufacturing evidence to support their fellow corrupt officer, or falsifying documents to hide corruption.¹³⁴

Furthermore, if an officer wanted to break this Blue Wall of silence, they may be subject to, and fear the consequences of, retaliation by their coworkers. “The code of silence carries with it a self-enforcement mechanism which ensures that officers will not break the code: officers who violate this code may be subject to harsh reprisals.”¹³⁵ Such acts of retaliation include labeling the rule-breaker as a “rat” or “snitch.”¹³⁶ As a result of these labels, the honest police officer is now ostracized in other units, precincts, or departments to which they may transfer. Results of breaking the code of silence have included the “end of an officer’s

125. See *Brandon v. Allen*, 645 F. Supp. 1261, 1266-67 (W.D. Tenn. 1986) (finding a code of silence existed within the police department and that the city was liable by enabling abusive police behavior through the aforementioned code); Ann C. Hodges & Justin Pugh, *Crossing the Thin Blue Line: Protecting Law Enforcement Officers Who Blow the Whistle*, 52 U.C. DAVIS L. REV. 1, 8-10 (2018); Earl Ofari Hutchinson, *It’s Time for Cops to Break the Blue Code of Silence*, HUFFINGTON POST (Sep. 25, 2017), https://www.huffpost.com/entry/its-time-for-cops-to-brea_b_12173778.

126. Chin & Wells, *supra* note 53, at 250-52.

127. *Id.* Gabriel J. Chin & Scott C. Wells, *The “Blue Wall Of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 250-52 (1998).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 253.

132. *Id.* at 254.

133. *Id.*

134. *Id.* at 256.

135. *Id.* at 257.

136. *Id.* at 257.

career,” forced relocation, their locker being burned, their tires being slashed, threats of physical harm on themselves or their family, destruction and thievery of personal property, and dead rats being placed in their patrol car.¹³⁷ The most dangerous act of retaliation that officers fear is when they find themselves in a dangerous situation requiring backup and coworkers refuse to respond to the scene with any expediency, forcing him to handle the circumstances alone. In some instances, this may be fatal to the police officer.¹³⁸ These are all documented acts that have been or are being used to deter the honest police officer from breaking the code of silence. The deterrence effects of these acts are so strong, some officers would not even try to report misconduct anonymously.¹³⁹ As a result, “corrupt and honest officers alike may be tempted to lie on the witness stand, falsify documents, lie to the media and the public, and generally cover-up any and all acts or events occurring under the blue shroud which may foment the wrath of the code of silence.”¹⁴⁰ This is why some commentators believe that the fight to stop police misconduct will never come from the police themselves.¹⁴¹

It is important to remember when discussing police culture is that police are “insiders” in the criminal justice system. Police, as a nature of their profession, have a better understanding of the criminal legal process than any regular citizen.¹⁴² This makes them a tougher defendant to face and gives them significant advantages in comparison to the normal populace. Considering this and the other barriers that exist in prosecuting the police, the push to prosecute the police is a daunting task that seems not easily overcome.

III. WHAT AMERICA LOSES IF NOTHING CHANGES

These inherent challenges in prosecuting the police will require substantial reform and resources to fix the status quo. Yet, ultimately, this effort will be worth it as the nation has an incredible amount to lose if police accountability is not demonstrated. Without a sign of change, the government risks disastrous effects such as lawlessness and the loss of American lives. Prosecution arguably is the only path that will help avoid these effects.

A. *A Threat to Legitimacy and a Descent into Lawlessness*

Police misconduct will lead to lawlessness and currently, the police are losing their legitimacy. Legitimacy is “regarded as a reservoir of loyalty on which leaders can draw, giving them the discretionary authority, they require to govern

137. Gabriel J. Chin & Scott C. Wells, *The “Blue Wall Of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 258 (1998) (brackets omitted).

138. *Id.* at 257-58.

139. *Id.* at 260.

140. *Id.* at 261.

141. *Id.*

142. Caleb J. Robertson, *Restoring Public Confidence in the Criminal Justice System: Policing Prosecutions When Prosecutors Prosecute Police*, 67 EMORY L.J. 853, 867-68 (2018).

effectively.”¹⁴³ Further “[c]itizens who accept the legitimacy of the legal system and its officials are expected to comply with their dictates even when the dictates conflict with their self-interest.”¹⁴⁴ In terms of how the police are perceived, legitimacy is needed for the people to believe the police are the rightful body to enforce the laws. But as a result of the rampant exposure of police brutality incidents, that legitimacy is now under threat.¹⁴⁵ As of August 2020, a recent poll of Americans showed that public trust in the police is down to forty-eight percent.¹⁴⁶ What is notable of that percentage is that it was the first time in Gallup’s twenty-seven-year long history of recording the public trust in the police that it found that police trust is below a majority.¹⁴⁷ A showing of support may not increase at any point in the near future as more instances of police brutality are recorded and highlighted in the public sphere.¹⁴⁸

If the police or the legal system cannot build back public confidence and regain legitimacy, many legal scholars have theorized that it may result in an uptick in crime and a descent into lawlessness. One scholar wrote that “there is a causal link between the perception of the law and levels of compliance.”¹⁴⁹ Therefore, if perceptions of the law are unfair, such as the criminal justice system’s failure to hold police accountable, then crime will ultimately rise. Furthermore, police misconduct is the direct cause of this increase as “police misconduct teaches them (people) that the government violates these rules every day and that they have no recourse. If their government does not follow the rules, reason the [people], why should they?”¹⁵⁰ Past justices of the Supreme Court have echoed the concern of police accountability. Justice Brandeis once wrote when dissenting on a question of police seizures that “[i]f the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.”¹⁵¹ To declare that in the administration of the criminal law the end justifies the means...would bring terrible retribution.”¹⁵² Chief Justice Warren in his deliberations of *Terry v. Ohio*, realized that many of the riots during the Civil Rights Era were connected to police mistreatment.¹⁵³

143. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 26 (Princeton University Press, 1990).

144. *Id.*

145. Megan Brenan, *Amid Pandemic, Confidence in Key U.S. Institutions Surges*, GALLUP NEWS (Aug. 12, 2020), <https://news.gallup.com/poll/317135/amid-pandemic-confidence-key-institutions-surges.aspx>.

146. *Id.*

147. *Id.*

148. Lee, *supra* note 29. Nicol Turner Lee, *Where Would Racial Progress in Policing Be Without Camera Phones?*, BROOKINGS INST. (June 5, 2020), <https://www.brookings.edu/blog/fixgov/2020/06/05/where-would-racial-progress-in-policing-be-without-camera-phones/>.

149. I. Bennett Capers, *Crime, Legitimacy, and Testifying*, 83 IND. L.J. 835, 842 (2008).

150. James Forman, Jr., CHILDREN, COPS, AND CITIZENSHIP: WHY CONSERVATIVES SHOULD OPPOSE RACIAL PROFILING, IN *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 150, 156 (Marc Mauer & Meda Chesney-Lind eds., 2002).

151. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

152. *Id.*

153. Capers, *supra* note 149, at 863.

Empirical evidence of human behavior supports the idea that a lack of legitimacy increases criminal behavior. One study found that when two groups of participants were primed with different new stories, one group being primed with stories that showed the government was “just,” the other group primed with “unjust” news stories.¹⁵⁴ The group primed with unjust stories were significantly more willing to commit petty crimes.¹⁵⁵ The study did have limitations in that it only measured the willingness to commit a crime and could not anticipate if that would translate to actually committing it.¹⁵⁶ But the data in the study still suggests that if people were to believe that the laws were unjust, or unjustly applied, then an inclination to commit crime increases.¹⁵⁷ Next, a loss of legitimacy not only leads to more crimes being committed but also interferes with the ability of police to fight crime.

For the police to be successful in controlling crime and maintaining social order, they must have active public cooperation, not simply political support and approval. Cooperation increases not only when the public views the police as effective in controlling crime and maintaining social order, but also when citizens see the police as legitimate authorities who are entitled to be obeyed.¹⁵⁸

Thus, when police are no longer perceived as being legitimate, cooperation goes down and hurts investigations.¹⁵⁹ In regards to police investigations, acts such as calling the police, helping the police identify a dangerous person, reporting dangerous or alarming activity, and helping in community-police initiatives are now undermined and impeded as a result of low cooperation.¹⁶⁰ But the lack of cooperation goes further than police investigations if the people find that the police are illegitimate. Other examples would be dropping charges because witnesses do not want to cooperate, a juror who hangs an entire trial because they believe the police treated the defendant unfairly, a jury who acquits a defendant despite overwhelming evidence on the contrary, and citizens not appearing for jury duty because they believe the system is illegitimate.¹⁶¹ These examples show that if police are not held accountable for the misconduct that arises for their acts, the entire judicial system becomes halted in its ability to administer justice and that undermines the entire United States government.

154. Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1410-15 (2005).

155. *Id.*

156. *Id.* at 1415-16.

157. Capers, *supra* note 149, at 842.

158. Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?* 6 OHIO ST. J. CRIM. L. 231, 266-67 (2008).

159. Forman, *supra* note 150, at 158-159.

160. Tyler & Fagan, *supra* note 158, at 270.

161. DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 169 (New Press, 1st ed. 1999).

B. *Black and Brown Death*

Exposing the misdeeds of the police through prosecution would lead to a greater loss of legitimacy and in turn lead to the aforementioned effects. “But while this may be true for those who have little or no contact with the criminal justice system, this will hardly be the case with those in high crime communities where perceptions of illegitimacy and undemocratic policing are already strongly held.”¹⁶² This highlights the next disastrous effect, when there is no accountability on the police, the abuse and killing of minority groups occurs and becomes even more rampant. There is a plethora of well-established scholarship that indicates police officers are more likely to encounter or target people of color, especially Black Americans, for investigation or arrest.¹⁶³ This is a widespread and known phenomenon within American society that has gathered massive concern from courts. Supreme Court Justice Sotomayor once wrote:

[I]t is no secret that people of color are disproportionate victims of [stops lacking the requisite suspicion]. . . . For generations, black and brown parents have given their children “the talk”—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.¹⁶⁴

Understanding that people of color are frequently the target of the police, Justice Sotomayor came to the logical conclusion that follows that people of color are frequently the victims of police misconduct as a result of police interactions.¹⁶⁵ People of color are the groups most likely to suffer from excessive force, false

162. Capers, *supra* note 149, at 878.

163. For a robust discussion on ongoing historical marginalization of Black Americans by the police, see Carolyn L. Todd, *Why Police Brutality is a Public Health Issue*, SELF (June 17, 2020), <https://www.self.com/story/police-brutality-public-health-issue>; *Stop and Frisk Data*, N.Y. CIV. LIBERTIES UNION, <https://www.nyclu.org/en/stop-and-frisk-data> (last visited Mar. 31, 2022, 1:26 PM); Jonathan Blanks, *Do Police Treat All Races Equally?*, CATO INST. (Oct. 1, 2019, 10:38 AM), <https://www.cato.org/blog/do-police-treat-all-races-equally>; *What Decades of Traffic Stop Data Reveals About Police Bias*, CBS NEWS (Mar. 2, 2019), <https://www.cbsnews.com/news/what-decades-of-traffic-stop-data-reveals-about-police-bias>; Alice George, *The 1968 Kerner Commission Got It Right, But Nobody Listened*, SMITHSONIAN MAG. (Mar. 1, 2018), <https://www.smithsonianmag.com/smithsonian-institution/1968-kerner-commission-got-it-right-nobody-listened-180968318/>; Topher Sanders et al., *Walking While Black*, PROPUBLICA (Nov. 16, 2017), <https://features.propublica.org/walking-while-black/jacksonville-pedestrian-violations-racial-profiling/>; Charles R. Epp et al., *Pulled Over: How Police Stops Define Race and Citizenship* (Univ. of Chicago Press, 2014); MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* (Princeton Univ. Press, 2016); MICHAEL TONRY, *PUNISHING RACE: A CONTINUING AMERICAN DILEMMA* (Oxford Univ. Press, 2011); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (The New Press, 2010); KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (Harvard Univ. Press, 2010); RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* (Univ. of Cal. Press, 2007); Rod K. Brunson, “Police Don’t Like Black People”: African-American Young Men’s Accumulated Police Experiences, 6 CRIMINOLOGY & PUB. POL’Y 71 (2007); David Cole, *supra* note 161, at 16-55.

164. Utah v. Strieff, 579 U.S. 232, 254 (2016) (Sotomayor, J., dissenting) (citation omitted).

165. *Id.*

evidence being planted against their cases, and many other injustices, especially when police misconduct goes unchecked.¹⁶⁶ It is the names of Rayshard Brooks, George Floyd, Breonna Taylor, Philando Castille, Alton Sterling, Freddie Gray, Eric Garner, Gabriella Nevarez, Tamir Rice, Michael Brown, and many other countless souls, that represent the casualties of police misconduct.¹⁶⁷ It is a result of police misconduct that:

many of our fellow citizens already feel insecure regardless of their location. In a society where some are considered dangerous even when they are in their living rooms eating ice cream, asleep in their beds, playing in the park, standing in the pulpit of their church, birdwatching, exercising in public, or walking home from a trip to the store to purchase a bag of Skittles¹⁶⁸

In turn, many people of color possess an entirely different perspective on police, creating “Two Americas.”¹⁶⁹ One America sees the police as society’s trusted saviors and knights, the other sees them as abusers and murderers.¹⁷⁰

But “[i]n the words of Dr. Martin Luther King Jr., we are [once again] reminded that ‘we are tied together in a single garment of destiny, caught in an inescapable network of mutuality,’ [and] that our individual freedom is inextricably bound to the freedom of others.”¹⁷¹ The concerns of police misconduct should not only be the concerns of people of color but the concern of every American citizen. Justice Sotomayor wrote that the plight that many people of color face is “the canar[y] in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere.”¹⁷² These countless deaths of people of color are a clear sign that police misconduct is going unchecked. It is a sign that Americans are losing a police force they can trust, a judicial system that can protect them, and a government that can safeguard them from abuse. “To continue to turn a blind eye to the thousands of instances of misconduct hurts everyone involved.”¹⁷³

“Officers who use excessive force but are not disciplined may subsequently abuse other citizens. The failure to discipline one officer may embolden other officers to violate departmental standards and abuse citizens.”¹⁷⁴ Furthermore, some psychologists speculate that without reform, police brutality and misconduct will ultimately become a public health concern as it affects life expectancy and the

166. See Stefan Newton, *The Excessive Use of Force Against Blacks in the United States of America*, 22 INT’L J. HUM. RTS. 1067, 1067-68 (2018); Gabriel J. Chin, *supra* note 53.

167. Alia Chughtai, *Know Their Names; Black People Killed in the U.S.*, AL JEEZERA, <https://interactive.aljazeera.com/aje/2020/know-their-names/index.html> (last visited Mar. 31, 2022, 2:23 PM).

168. See *United States v. Curry*, 965 F.3d 313, 331 (4th Cir. 2020), as amended (July 15, 2020), as amended (July 16, 2020).

169. See *id.*

170. See *Curry*, 965 F.3d at 331.

171. *United States v. Black*, 707 F.3d 531, 542 (4th Cir. 2013) (quoting Martin Luther King Jr.).

172. Strieff, *supra* note 164, at 254.

173. Johnson, *supra* note 79, at 304.

174. Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills of Rights*, 14 B.U. PUB. INT. L.J. 185, 201 (2005).

mental wellbeing of many Americans.¹⁷⁵ Nevertheless, the consequences of leaving police misconduct unchecked and unaccountable are too great and too costly to the future of the United States.

C. *Why Prosecution is the Best Solution*

The best course of action in this regard is to propose reforms that make prosecuting the police easier. Prosecuting the police has a variety of benefits. For starters, prosecuting misconduct deters further misconduct. Policing the police inspires fear in officers who may otherwise commit crimes such as perjury, fabricating evidence, and even more serious forms of misconduct such as brutality, and would drop the overall rate of misconduct.¹⁷⁶ Prosecuting the police would deter misconduct further by “weeding out bad apples” in the police department who are responsible for more misconduct than the average officer.¹⁷⁷ Next, prosecuting the police can lead to culture change in police departments. By prosecuting the police, department heads are forced to reconsider their organizational policies, rules, and regulation that propagate misconduct and create a culture where corruption no longer breeds corruption but “honesty breed[s] honesty.”¹⁷⁸

Finally, prosecuting the police is the only way to rebuild public confidence. Through prosecuting police, the legal system answers the outcry that many citizens have been desiring: a fair application of the law. The public will begin to believe again that no one is above the law, which will show the “government’s commitment to lawful policing and fair application of criminal justice.”¹⁷⁹ If public trust is restored, scholars suggest there will be a “significant diminution of crime.”¹⁸⁰ Furthermore, if people believe the system is fair, they will more than likely voluntarily submit to the laws and social norms of the nation.¹⁸¹ This will inevitably lead to people becoming more beholden to their sense of civic duty and much more cooperative with the police.¹⁸² Considering these possible outcomes, prosecuting the police is a viable method.

Critics of prosecuting police would prefer other avenues, such as civil lawsuits. Those methods come with their own legal challenges, such as qualified immunity. These other avenues also lack the power had by the prosecution. Prosecution has a unique effect that no other remedy can provide. As one author wrote, “[n]o other form of remedy so clearly expresses the government’s

175. See Michael Friedman, *What Happens When We Don’t Trust Law Enforcement?*, PSYCHOL. TODAY (Sept. 9, 2014), <https://www.psychologytoday.com/us/blog/brick-brick/201409/what-happens-when-we-dont-trust-law-enforcement-0>; Carolyn Todd, *supra* note 163; *Why Police Brutality is Health Issue*, SELF (June 17, 2020), <https://www.self.com/story/police-brutality-public-health-issue>.

176. Capers, *supra* note 149, at 879.

177. *Id.*

178. *Id.*

179. Rachel Harmon, *Legal Remedies for Police Misconduct*, in 2 REFORMING CRIM. JUST.: POLICING 27, 43 (Erik Luna ed., 2017).

180. Capers, *supra* note 149, at 877.

181. *Id.*

182. *Id.*

condemnation of specific police violations of law, and none shows as much respect for the victims of police misconduct. . . .”¹⁸³ This symbolic scolding attached to prosecution is the catalyst for major change. Fellow citizens that see the police being punished for wrongdoing may inspire public confidence more than any other alternative. Private suit actions, while important, are unlikely to create meaningful change, as they are usually isolated by nature and tend to have little impact on societal reforms.¹⁸⁴ Prosecution, in this light, is the most significant avenue to hold police accountable.

The final resounding criticism about prosecuting the police is that it will not ultimately fix the problem of police misconduct. “Criminal law can punish, and in some instances, deter police brutality, but it cannot of itself force fundamental change in how a department is run, supervised, led, and made accountable.”¹⁸⁵ In other words, police misconduct is not an isolated issue, but rather a systemic one.¹⁸⁶ Police misconduct is a consequence of a system that already does not want to hold police accountable as it upholds structural racism in the United States. This is evidenced by all the barriers put in place to prevent prosecution and further supported by the lack of accountability on police in their interdepartmental dealings.¹⁸⁷ Therefore, prosecuting “bad apple” police officers will do little to effectuate change as “bad apples come from rotten trees.”¹⁸⁸ It then follows that prosecuting police will just help uphold the system that creates the problem.¹⁸⁹ As one critical race author once titled their work, “[t]he Master’s tools will never dismantle the master’s house.”¹⁹⁰

This criticism holds a valid objection. Prosecuting the police may legitimize in some way the very system which allows state-sanctioned violence.¹⁹¹ However, proposing different method to prosecute the police may be able to create real change. The “master’s house” may not be able to be toppled with his current tools, but that does not mean a new house cannot be built using them. Discussing new ways to tackle this flawed system may be the only way to create a better society for all citizens.

183. Harmon, *supra* note 179.

184. Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 21 (2001).

185. MARY M. CHEH, *Are Lawsuits an Answer to Police Brutality*, in POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 247 (Geller & Toch eds., 1996).

186. Kate Levine, *We Cannot Prosecute Our Way to Making Black Lives Matter*, L. & POL. ECON. PROJECT (June 10, 2020), <https://lpeproject.org/blog/prosecuting-police-wont-make-black-lives-matter/>.

187. Judith A.M. Scully, *Rotten Apple or Rotten Barrel?: The Role of Civil Rights Lawyers in Ending the Culture of Police Violence*, 21 NAT’L BLACK L.J. 137, 139-149 (2009).

188. Rashawn Ray, *Bad Apples Come from Rotten Trees in Policing*, BROOKINGS INST., (May 30, 2020) <https://www.brookings.edu/blog/how-we-rise/2020/05/30/bad-apples-come-from-rotten-trees-in-policing>.

189. Levine, *supra* note 186.

190. AUDRE LORDE, *THE MASTER’S TOOLS WILL NEVER DISMANTLE THE MASTER’S HOUSE* (1983).

191. Levine, *supra* note 186.

IV. SOLUTIONS

In this quest to create reforms that lead to a more free and just society, advocates must understand that there is no single ideal reform or legislation that is going to fix police misconduct and brutality. The enabling of police misconduct in the legal system, as outlined previously, is a consequence of a variety of actors and laws in the system, each requiring careful consideration in how they are reformed. Police misconduct is a much larger systemic problem, and as a result, a series of potentially significant reforms is the more viable path in containing it.¹⁹²

A. *Special Prosecutors*1. *What A Special Prosecutor Should Do*

One viable and significant solution that could counteract the prosecutorial discretion barrier is for the legislature to enact reforms that create an automatic mechanism in instances of alleged police misconduct, where an independent prosecutor or a special independent team of prosecutors is appointed to oversee the case. A special prosecutor is “[a] lawyer appointed to investigate and, if justified, seek indictments in a particular case.”¹⁹³ Further, “a special prosecutor may be appointed either to investigate and present evidence to a grand jury, or to prosecute an actually pending case, or both.”¹⁹⁴ While a special prosecutor can be an ordinary prosecutor or an attorney who has never been a prosecutor before, the attorney, granted power that is comparable to a local prosecutor or authority, must come from a jurisdiction outside the location the case is being adjudicated.¹⁹⁵ The special prosecutor’s sole duty would be to pursue an indictment in a grand jury proceeding and a conviction in police misconduct cases.

A special prosecutor would not have the same conflict of interest local prosecutors may when called upon to prosecute their own police department. The local prosecutor relies on their police force for gathering evidence and conducting investigations. In addition, the prosecutor certainly needs police cooperation for testimony and other purposes to win other cases. Therefore, the local prosecutor does not have a strong incentive to pursue and prosecute misconduct cases in their jurisdiction. On the contrary, a special prosecutor would have a much greater incentive to prosecute the police. A special prosecutor has little need for continued police cooperation as they do not need to work with the police heavily on their other cases. The special prosecutor is also less motivated by the winning mentality compared to their local counterparts as a special prosecutor has no concern for reelection or promotion. Furthermore, a special prosecutor has a greater

192. Kami Chavis Simmons, *Increasing Police Accountability: Restoring Trust and Legitimacy Through the Appointment of Independent Prosecutors*, 49 WASH. U. J.L. & POL’Y 137, 157 (2015).

193. *Special Prosecutor*, BLACK’S LAW DICTIONARY (11th ed. 2019).

194. Janet Ann Fairchild, *Validity, Under State Law, of Appointment of Independent Special Prosecutor to Handle Political or Controversial Prosecutions or Investigations of Persons Other Than Regular Prosecutor*, 84 A.L.R.3d 29, 1a (2014).

195. *Id.*

inclination to be charge in police misconduct cases because prosecuting police misconduct is their sole duty while appointed.

In addition to these benefits, public scrutiny intensifies when an unelected official is involved in the case. Thus, the special prosecutor will likely be more diligent with their case management and investigation.¹⁹⁶ Finally, special prosecutors have a precedent in maintaining the integrity of cases, even when a potential conflict of interest may exist.¹⁹⁷ Notable examples of special prosecutors in use include the Watergate scandal during the Nixon era, the Clinton investigation of Monica Lewinsky, and the Mueller investigation during the Trump Administration. Nevertheless, a consensus exists that the answer to prosecutorial discretion can be found in advocating for special prosecutors.¹⁹⁸

B. Models for a Special Prosecutors

1. Federal Government vs. State Government

There are various models on how a special prosecutor can be implemented in the legal system. The debate begins with whether the federal government or the individual should be the authority to appoint and create special prosecutors. The federal government can prosecute officers who are accused of misconduct pursuant to 18 U.S.C. § 242.¹⁹⁹ Section 242 provides that it is unlawful for a person acting “under color in any law, statute, ordinance, regulation, or custom, [to] willfully subject[] any person of any State, Territory, Commonwealth, Possession or District to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States.”²⁰⁰ The federal government also typically has a vast amount of resources that will help these special prosecutors complete their tasks. In contrast, a state government may need to both answer and administer justice appropriate for the local community and form the appropriate laws. Moreover, state governments taking the reins over police misconduct would avoid the criticism of federal intervention in local issues.²⁰¹ The most ideal resolution to this debate, and the desired model of some federal officials, is to have state governments implement their own systems in tackling police misconduct and allow the federal government to be the backbone or safety-net in instances where

196. *Id.* at 151.

197. *Id.* at 155.

198. See Madison McWithey, *Taking a Deeper Dive into Progressive Prosecution: Evaluating the Trend Through the Lens of Geography: Part Two: External Constraints*, 61 B.C.L. REV. E. SUPP. 49, 53 (2020); Justin L. Amos, *Who Watches the Watchers?*, 50 NEW ENG. L. REV. 319, 327-28 (2016); Rukiya Mohamed, *Death by Cop: The Lessons of Ferguson Prove the Need for Special Prosecutors*, 59 HOW. L.J. 271, 298-300 (2015); Simmons, *supra* note 192 at 167; Clifton B. Parker, *Grand Jury System Flawed in Ferguson Case but Still Valuable for Investigations*, *Stanford Law Professor Says*, STAN. REP. (Dec. 9, 2014), <https://news.stanford.edu/news/2014/december/grand-jury-qanda-120914.html>.

199. 18 U.S.C. § 242 (2021).

200. *Id.*

201. Simmons, *supra* note 192 at 152.

the misconduct is not addressed.²⁰² This model would allow both sovereigns to break the link between the local prosecutor and create accountability in police misconduct instances.

C. *Appointed Prosecutors*

The second discussion of the model of special prosecutors is how are the special prosecutors chosen. Some advocates argue that the special prosecutor should be appointed by the Attorney General of the jurisdiction and be dismissed after such cases of police misconduct are addressed.²⁰³ Connecticut is an example of one state that has adopted this approach.²⁰⁴ The benefit of this idea is that it allows less wealthy states to not carry the burden of providing resources to a full-time office in their budget. Appointing independent counsels is an “expensive and time consuming” undertaking.²⁰⁵ Independent counsels have high start-up costs and use more expensive investigation tactics in their cases; therefore, they typically have higher costs as compared to their local counterparts.²⁰⁶ Also, in this instance, if the state had just few police misconduct cases, this style of legislation would allow their respective government to address police misconduct on a need basis. Furthermore, the benefit of the Attorney General of the state having the power of appointment comes with the idea that now the special prosecutor is somewhat accountable to an elected (or appointed) official.

The downside to this approach is that by not having a standing or consistent prosecutor working on police misconduct cases, a variance will develop in how each case is managed. This inconsistency in case outcomes may cause the public’s trust to wane. Another critique of the special prosecutor system is the appointment of the special prosecutor by the Attorney General. If appointed by the Attorney General, the special prosecutor and their agenda may be influenced by the political machinations surrounding the case. Consequently, even if the Attorney General appointed an apolitical prosecutor, “[they will] inevitably [get] caught up in the ‘political swirl’ of executive branch politics.”²⁰⁷ Finally, “any appointed special prosecutor would be restricted by the amount of funding they are authorized and would have to make decisions about which cases to pursue based on budgetary limitations, much in the same way prosecutors already do.”²⁰⁸ This would breed further inconsistency in case outcomes, leading to more public contempt.

202. See *Police Brutality: Hearings Before the Subcomm. on the Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102nd Cong., 1st Sess. 131, at 3 (1991) (recording testimony of John R. Dunne, then Assistant Att’y Gen., Civ. Rights Div., U.S. Dep’t of Just.).

203. Simmons, *supra* note 192 at 153.

204. CONN. GEN. STAT. § 51-277a (2019).

205. Donald C. Smaltz, *The Independent Counsel: A View from Inside*, 86 GEO. L.J. 2307, 2366 (1998).

206. *Id.*

207. *Id.* at 2310.

208. Levine, *supra* note 49, at 1496-97.

D. *An Office of Special Counsel*

The second approach is creating an office or prosecutorial team that is dedicated to, and has sole prosecutorial authority over, police misconduct instances in the state. One state that has taken this approach is New York, as seen in the signing of legislation by former Governor Andrew Cuomo in June of 2020.²⁰⁹ With this approach, a state would establish a permanent independent office of prosecutors and pass legislation granting it authority to investigate all police misconduct and officer-involved fatalities and determine whether prosecution is deemed necessary.²¹⁰ This office, with dedicated resources and personnel, would be responsible for increasing accountability in police misconduct cases. More so, it seems likely that the office's use of consistent personnel with consistent case management would produce more consistent outcomes. Next, an office of the special prosecutor would be useful in states with larger municipalities where police misconduct is more common annually. Finally, this approach is popular with community organizations as community engagement can occur by presenting a list of recommended prosecutors for the office.²¹¹

The negatives of this approach begin with the expense of maintaining the office. Maintaining an office of the special prosecutor is more expensive than those of their local counterparts and increases the cost of litigation, which ultimately burdens taxpayers. This would especially be true in jurisdictions where police misconduct is infrequent. Next, as this office would not be under the direct control of the Attorney General, the accountability to the public is more tenuous and could create greater public distrust as a result. Finally, creating a dedicated office to investigating and prosecuting police misconduct may force the special prosecutors to be more zealous than necessary as they must consistently demonstrate their value to politicians and the people.²¹² As a result, they will most likely be more inclined to use improper tactics in their case that jeopardize due process rights or risk an overturning of convictions.

E. *Criticisms of Special Prosecution*

Assessing the benefits and disadvantages of each approach will ultimately be a task best suited for the legislature. Yet, consistent criticism between the two approaches can be addressed. The expense element of both approaches is a valid

209. N.Y. OFF. OF SPECIAL INVESTIGATION § 70-b (McKinney 2021).

210. Simmons, *supra* note 192 at 154.

211. *Independent Investigations and Prosecutions*, CAMPAIGN ZERO, <https://www.joincampaignzero.org/investigations> (last visited Mar. 31, 2022, 4:28 PM), Editorial Board, *Police Abuse Cases Need Special Prosecutors*, WASH. POST (Dec. 6, 2014), https://www.washingtonpost.com/opinions/police-abuse-cases-need-special-prosecutors/2014/12/06/fcf57e28-7cd6-11e4-b821-503cc7efed9e_story.html, Kate Elizabeth Queram, *Proponents Say Assigning Special Prosecutors to Investigate When Police Officers Use Deadly Force Can Eliminate a Potential Conflict Of Interest Among Local District Attorneys Who Regularly Work With Police*, ROUTE FIFTY (June 22, 2020), <https://www.route-fifty.com/public-safety/2020/06/lawmakers-call-special-prosecutors-oversee-cases-police-killing-s/166330/>.

212. Simmons, *supra* note 192, at 157.

concern. “But when compared to insuring the safety and welfare of the people and upholding the rule of law . . . the costs are a small price to pay.”²¹³ Police misconduct has a larger and more concerning impact than the cost a state will have to bear to correct them. The legitimacy of the very government is facing a conceivable threat that, if unaddressed, risks our free society. Considering those circumstances, regardless of the chosen approach, special prosecutors are needed to uphold the law.

The next overarching criticism to special prosecutors is that it creates a slippery slope that strips local prosecutors of their power and legitimacy.²¹⁴ This criticism flows logically from the idea that citizens put their faith in their local prosecutors under the belief that the local prosecutor can administer justice, in *all* cases, including prosecution of the police.²¹⁵ Therefore, if states gave special prosecutors the sole authority in police misconduct because local prosecutors fail in said instances, the people are more inclined to question their local prosecutors.

If a state prosecutor were to concede that an outsider is better equipped to handle a particular case, it would suggest “that her office is incapable of fulfilling its mission;” no state prosecutor’s office desires to acquiesce in such an idea by giving up its power unnecessarily. Accordingly, . . . appoint[ing] a special prosecutor in all . . . [police misconduct] cases would create an impression of illegitimacy with the state prosecutor’s constituents since its office would be unable to fulfill its mission in all of those cases.”²¹⁶

In short, the appointment of a special prosecutor would show the citizenry that their local prosecutors have failed in a fundamental duty of their position. As the Supreme Court wrote, prosecutors have an “obligation” to be impartial and the interests of “criminal prosecution . . . [should be] not to win a case, but that justice shall be done.”²¹⁷ The presence of a special prosecutor shows that this duty has been breached and the local prosecutors will face the ramifications.

However, the status quo too breeds illegitimacy. As one scholar noted, currently local prosecutors have an “appearance of impropriety” problem.²¹⁸ The language of the appearance of impropriety stems from the Model Code of Judicial Conduct which states “[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”²¹⁹ Judges have a very critical role in the legal process as they carry the responsibility to deliver justice fairly. But what makes this language applicable to prosecutors?²²⁰ The public perceives prosecutors as “an administrator of justice, an advocate, and an

213. Smaltz, *supra* note 205, at 2366.

214. Mohamed, *supra* note, 198 at 282.

215. *Id.* at 288.

216. *Id.* at 288-89 (quoting Asit S. Panwala, *The Failure of Local and Federal Prosecutors to Curb Police Brutality*, 30 FORDHAM URB. L.J. 639, 656 (2003)).

217. *Berger v. United States*, 295 U.S. 78, 88 (1935).

218. Robertson, *supra* note 142, at 861.

219. MODEL CODE OF JUD. CONDUCT r.1.2 (ABA 2020).

220. Robertson, *supra* note 142, at 862.

officer of the court' whose duty 'is to seek justice, not merely to convict.'"²²¹ This duty to seek justice, in the eyes of the public, need not be the same level of impartiality that a judge must hold, but a prosecutor should "maintain public confidence in the justice system by avoiding perceived improprieties."²²² Prosecutors currently have failed and created an appearance of impropriety in two ways that have been discussed: "(1) the 'symbiotic relationship' between local district attorney offices and their law enforcement counterparts, and (2) the systemic pressures on local district attorneys to avoid charging and prosecuting police."²²³ The public is very much aware of the working relationship between the prosecutor and police. Some citizens even believe local prosecutors should be barred from cases involving police suspects due to this relationship.²²⁴

Next, the systemic pressures on prosecutors to avoid police prosecution are known as well. The public understands that organizations such as police unions have the power to sway elections.²²⁵ This power makes local prosecutors beholden to police and, as a consequence, bars them from vigorously prosecuting the police. "The public's perception of these inherent and systemic pressures faced by district attorneys when prosecuting police-suspects demonstrates why, in general, these prosecutions fail to satisfy the appearance of justice."²²⁶ Under this analysis, if prosecutors are currently seen by the public as wrongdoers in the administration of justice, then the appearance of a special prosecutor has little effect in worsening legitimacy. Instead, the opposite may be true as citizens "would understand that the proposed legislation simply weighs the countervailing principles and recognizes that the need for unbiased prosecutors substantially outweighs the need for elected prosecutors to wield their power and sustain their legitimacy and accountability[.]"²²⁷ In short, if public confidence is ever to be restored, the local prosecutor must be courageous and willing to step aside to the advent of the special prosecutor. The short-term slight on their appearance and power is a necessary cost to forward the more important long-term goal of having a perceptibly just legal system.

F. Legislative Reform

The next possible solution is to reform the applicable laws. One method is to reform the law in a way that counterbalances jury bias. Local citizens believe that their blue knights are fighting a "war" in which they are being scrutinized unjustly.²²⁸ These kinds of attitudes will likely seep into jury pools, aiding the

221. *Id.* at 862-63 (quoting CRIM. JUST. PROSECUTION FUNCTION & DEF. FUNCTION STANDARDS § 3-1.2 (ABA 1993)).

222. *Id.* at 863.

223. *Id.* at 865.

224. *Id.* at 867.

225. *Id.* at 868-69.

226. *Id.* at 869.

227. Mohamed, *supra* note 198, at 290.

228. Emily Ekins, *Policing in America: Understanding Public Attitudes Toward the Police. Results from a National Survey*, CATO INST. (Dec. 7, 2016), <https://www.cato.org/survey-reports/policing-america-understanding-public-attitudes-toward-police-results-national#>.

police in avoiding prosecution. Therefore, laws must be composed to counter these troublesome beliefs.

As discussed earlier in Part II, the Graham Rule strongly favors police and their defenses when placed in jury instructions.²²⁹ Thus, laws should be created to reform jury instructions so that the focus of the trial does not become the dangerousness and fear involved in the profession of policing. A focus on danger and stress automatically triggers the biases of a jury and creates a dramatic show of favor to the police defendant.²³⁰ The new laws must shift the focus of the jury from these subjective factors to objective factors like training, experience, and department regulations the officer must follow. With this instruction, the jury will be tasked with asking whether a reasonable officer on the scene would have taken the same steps as the defendant.²³¹ If these following steps are taken, the laws may be able to counteract some of the barriers that protect the police.

The final reform necessary lies outside of the legal profession. Ultimately, a culture shift is needed regarding the belief of the police. A majority of Americans believe police are “knights.” Knights in the sense of a romanticized medieval fairytale in which they guard our “honor.” This mythos surrounding the police fosters worship and idolization for the police in a way that they have become nearly infallible and virtually free of prosecution in the eyes of the law.²³² Furthermore, society has allowed a culture to form within the law enforcement profession that enables misconduct and makes it hard to eradicate. These misconceived beliefs have entered our legal system and have enabled a system that grants the opportunity for abuse to be unchecked and a loss of rights such as due process, and freedom from interference. This system is contrary to reality. Police can be bad, police can make mistakes, police are human just like the citizens they swear to protect, and it is for those reasons they deserve to be assessed with more scrutiny.

The culture shift need not be so large that citizens stop trusting the police entirely. Instead, the culture need only change to the point where an officer’s actions are given less credence during their line of duty and society feels more comfortable questioning their decisions. At one point in American history, the people had a healthy distrust of law enforcement that kept them in strict check.²³³ During the founding of the nation, the Framers were wary of law enforcement and the abuses of which they were capable.²³⁴ This wariness led them to write the Constitution as a way to limit law enforcement power and to ensure the rights of the people, as seen in the Fourth Amendment and Fifth Amendment.²³⁵ The U.S. Supreme Court also echoed this distrust by writing opinions that collectively tried to fight abuse by police officers and their arbitrary decisions.²³⁶ But now, over two

229. *Graham v. Connor*, 490 U.S. 386 (1989).

230. Zamoff, *supra* note 98, at 590.

231. *Id.*

232. Lewis, *supra* note 75, at 564.

233. Rachel Moran, *In Police We Trust*, 62 VILL. L. REV. 953, 958-960 (2017).

234. *Id.*

235. U.S. CONST. amend. V; U.S. CONST. amend. IV.

236. *See generally id.* at 958-60. *See Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring law enforcement to warn criminal suspects of their right to counsel and right to remain silent before custodial interrogations); *Escobedo v. Illinois*, 378 U.S. 478 (1964) (giving Sixth Amendment rights

centuries after the Constitution was ratified, “American police officers enjoy broad discretion to search and seize without warrants, use force on the citizens they are intended to serve, and generally act with little fear of being held accountable for mistreatment of the people they are ostensibly intended to serve and protect.”²³⁷

Finally, even if one prosecution is a success, such as the George Floyd prosecution,²³⁸ the barriers do not magically disappear. If there is to be an answer to this large systemic issue, action is required.

CONCLUSION

An important topic that scholars should consider is why the nation permitted police accountability to fall so low. Some would argue, following the teachings of Derrick Bell, the reason police misconduct has not seen proper reform is that misconduct enforces racial hierarchies in America.²³⁹ Police misconduct targets Black and Brown bodies, and through this targeting, people of color are put in a subordinate status, while the white majority can enjoy comfort.²⁴⁰ Challenging police misconduct, in a sense, challenges the racial hierarchy of America and the legal system may have been designed to preserve those hierarchies. After all, how “can [we] eradicate racism from a nation built and dependent upon it.”²⁴¹ This thought must be fleshed out in another discussion as it may hinder all progress that may come from fighting police misconduct. As “we must especially beware of that small group of selfish men who would clip the wings of the American eagle in order to feather their own nests.”²⁴²

Nevertheless, the American citizen, whose duty it is to be ever vigilant of the abuses of their government, have failed to be vigilant of the police. The answer to the accountability problem of police misconduct will not be discovered in one note, one decade, or even one lifetime. However, it is a necessary task to find the best possible solution together. We must be able to prune the weeds of injustice from our system, or we may risk losing the entire garden that we call our nation.

to counsel during police interrogations); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding exclusionary rule is applicable to states); *Monroe v. Pape*, 365 U.S. 167 (1961) (holding that illegal actions of police officers can constitute deprivation of civil rights); *Boyd v. United States*, 116 U.S. 616 (1886).

237. Moran, *supra* note 233, at 961.

238. Ray Sanchez & Eric Levenson, *Derek Chauvin Sentenced to 22.5 Years in Death of George Floyd*, CNN (June 25, 2021, 9:54 PM), <https://www.cnn.com/2021/06/25/us/derek-chauvin-sentencing-george-floyd/index.html>.

239. Alexis Hoag, *Derrick Bell's Interest Convergence and the Permanence of Racism: A Reflection on Resistance*, HARV. L. BLOG (Aug. 24, 2020), <https://blog.harvardlawreview.org/derrick-bells-interest-convergence-and-the-permanence-of-racism-a-reflection-on-resistance/>.

240. *Id.*

241. *Id.*

242. President Franklin Delano Roosevelt, State of the Union Address (Jan. 6, 1941).