

# Increasing Police Accountability: Restoring Trust and Legitimacy Through the Appointment of Independent Prosecutors

Kami Chavis Simmons\*

## INTRODUCTION

Immediately following the shooting death of Michael Brown in Ferguson, Missouri and the death of Eric Gardner at the hands of a New York City Police Department officer, criminal justice advocates called for greater measures to hold police officers accountable for their actions.<sup>1</sup> For many observers, the failure to secure criminal indictments against the officers involved in each of these deaths of unarmed citizens suggested various shortcomings in the criminal justice system.<sup>2</sup> In the wake of these and other deaths, President Obama signed an order establishing the President's Task Force on 21st Century Policing, a body of scholars, practitioners, and policymakers that would examine ways to improve trust between communities and police.<sup>3</sup> Yet in the weeks following the release of

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\* Professor of Law and Director of the Criminal Justice Program, Wake Forest University School of Law. B.A. University of North Carolina; J.D. Harvard Law School. I would like to thank Ashley Brompton and Amanda Whorton for providing valuable research assistance.

1. More than a dozen states are considering legislation aimed at increasing police accountability following the deaths. Reid Wilson, *Police Accountability Measures Flood State Legislatures After Ferguson, Staten Island*, WASH. POST (Feb. 4, 2015), <http://www.washingtonpost.com/blogs/govbeat/wp/2015/02/04/police-accountability-measures-flood-state-legislatures-after-ferguson-staten-island/>.

2. See, e.g., Katrina vanden Heuvel, *Fixing a Broken Justice System*, WASH. POST (Dec. 16, 2014), [http://www.washingtonpost.com/opinions/katrina-vanden-heuvel-fixing-a-broken-justice-system/2014/12/16/76239b2e-8496-11e4-b9b7-b8632ae73d25\\_story.html](http://www.washingtonpost.com/opinions/katrina-vanden-heuvel-fixing-a-broken-justice-system/2014/12/16/76239b2e-8496-11e4-b9b7-b8632ae73d25_story.html).

3. Establishment of the President's Task Force on 21st Century Policing, 79 Fed. Reg. 246 (Dec. 23, 2014), available at <http://www.gpo.gov/fdsys/pkg/FR-2014-12-23/pdf/2014-30195.pdf>; *President's Task Force on 21st Century Policing*, OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUST., <http://www.cops.usdoj.gov/policingtaskforce> (last visited May 28, 2015).

the Task Force's report, a North Charleston, South Carolina police officer fatally shot Walter Scott in the back, and vigorous protests erupted in Baltimore, Maryland after Freddie Gray died of injuries he sustained while in police custody.<sup>4</sup> These deaths have reignited many debates about a myriad of reform proposals that police accountability experts have been discussing for decades. For example, reformers have urged more officer training focused on de-escalation techniques and cultural or racial bias.<sup>5</sup> Others called for greater statistical tracking to measure the breadth of the problem of officer-involved deaths.<sup>6</sup> Yet another hotly contested reform proposal involves requiring police officers to wear body cameras.<sup>7</sup> The NAACP, the ACLU, and The Lawyers' Committee for Civil Rights Under Law have supported initiatives requiring police to wear body cameras.<sup>8</sup> In

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4. Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged With Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), <http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html>; Scott Malone, Ian Simpson & Warren Strobel, *Marchers Protest Police Violence in Baltimore*, NEW YORK, REUTERS (Apr. 30, 2015, 2:53 AM), <http://www.reuters.com/article/us-usa-police-baltimore-idUSKBN0N1N720150430>. It is argued by some that special prosecutors can dampen or eliminate real and perceived conflicts of interest that occur when a local office prosecutes a police officer. *See, e.g.*, Editorial, *Police Abuse Cases Need Special Prosecutors*, WASH. POST (Dec. 6, 2014), [http://www.washingtonpost.com/opinions/police-abuse-cases-need-special-prosecutors/2014/12/06/fcf57e28-7cd6-11e4-b821-503cc7efed9e\\_story.html](http://www.washingtonpost.com/opinions/police-abuse-cases-need-special-prosecutors/2014/12/06/fcf57e28-7cd6-11e4-b821-503cc7efed9e_story.html).

5. MICHAEL D. WHITE, POLICE OFFICER BODY-WORN CAMERAS: ASSESSING THE EVIDENCE 10 (2014), available at <https://www.ojpdagnosticcenter.org/sites/default/files/spotlight/download/Police%20Officer%20Body-Worn%20Cameras.pdf>. *See also* LINDSAY MILLER, JESSICA TOLIVER & POLICE EXECUTIVE RESEARCH FORUM, IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED 48 (2014), available at <http://ric-zai-inc.com/Publications/cops-p296-pub.pdf>.

6. *See* Arron C. Davis & Wesley Lowery, *FBI Director Calls Lack of Data on Police Shootings "Ridiculous," "Embarrassing,"* WASH. POST (Oct. 7, 2015), [https://www.washingtonpost.com/national/fbi-director-calls-lack-of-data-on-police-shootings-ridiculous-embarrassing/2015/10/07/c0ebaf7a-6d16-11e5-b31c-d80d62b53e28\\_story.html](https://www.washingtonpost.com/national/fbi-director-calls-lack-of-data-on-police-shootings-ridiculous-embarrassing/2015/10/07/c0ebaf7a-6d16-11e5-b31c-d80d62b53e28_story.html).

7. *See* James S. Muller, *To Police the Police, Body Cameras are a Must*, L.A. TIMES (May 11, 2015), <http://www.latimes.com/opinion/op-ed/la-oe-muller-body-camera-data-shows-unnecessary-force-20150508-story.html>. *But see* Janet Vertesi, *The Problem with Police Body Cameras*, TIME (May 4, 2015), <http://time.com/3843157/the-problem-with-police-body-cameras/>.

8. *See Civil Rights Coalition Urges National Reforms and Recommendations to Address Police Abuse*, NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE, <http://www.naacp.org/press/entry/civil-rights-coalition-continues-to-urge-national-reforms-and-recommendation> (last visited May 30, 2015) (describing the Department of Justice's National Initiative for Building Community Trust and Justice and providing statements from the ACLU, Lawyers' Committee, and NAACP supporting the program).

addition, President Obama has proposed that \$75 million of federal money be made available for local law enforcement to purchase and train officers to use body cameras.<sup>9</sup> Many of these reforms may result in additional transparency about deaths or serious injuries suffered in police custody, assist in identifying structural failures and opportunities to enhance training, and lead to more effective policy solutions. However, the aforementioned police accountability measures may not result in punishment of individual officers who have employed excessive force, because even when seemingly damning evidence exists, prosecutions of officers have traditionally been rare and even when officers are prosecuted, convictions are difficult to secure.<sup>10</sup>

Amid the calls for accountability, recent public outrage reached a fever pitch when officers were not held criminally responsible for recent high-profile deaths. Numerous advocates noted that local prosecutors face inherent conflicts of interest and for this reason, these advocates call for independent agencies or special prosecutors to prosecute these cases. In particular, the St. Louis County District Attorney Bob McCulloch received numerous requests to recuse himself from the prosecution of Officer Darren Wilson for fear that he would not vigorously seek an indictment.<sup>11</sup> Indeed, once the grand jury declined to indict Wilson, critics combed the grand jury

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9. Nolan Feeney, *Obama Requests Funds for Police Body Cameras to Address 'Simmering Distrust' After Ferguson*, TIME (Dec. 1, 2014), <http://time.com/3613058/obama-ferguson-police-body-cameras-funding/>.

10. Only forty-one police officers were charged with homicide for an on-duty shooting from 2004 to 2011. Zusha Elinson & Joe Palazzolo, *Police Rarely Criminally Charged for On-Duty Shootings*, WALL ST. J. (Nov. 24, 2014, 7:22 PM), <http://www.wsj.com/articles/police-rarely-criminally-charged-for-on-duty-shootings-1416874955>.

11. These calls for recusal are based on the fact that McCulloch's father was a police officer and was shot and killed by an African American man. Leigh Ann Caldwell, *Concerns Arise About Prosecutor in Michael Brown Case*, CNN (Aug. 20, 2014, 12:48 PM), <http://www.cnn.com/2014/08/19/us/ferguson-prosecutor-mcculloch/>. For a discussion of the racial make-up of Ferguson and historic racism in St. Louis, see Wesley Lowery, Carol D. Leonnig & Mark Berman, *Even Before Michael Brown's Slaying in Ferguson, Racial Questions Hung Over Police*, WASH. POST (Aug. 13, 2014), [http://www.washingtonpost.com/politics/even-before-teen-michael-browns-slaying-in-mo-racial-questions-have-hung-over-police/2014/08/13/78b3c5c6-2307-11e4-86ca-6f03cbd15c1a\\_story.html](http://www.washingtonpost.com/politics/even-before-teen-michael-browns-slaying-in-mo-racial-questions-have-hung-over-police/2014/08/13/78b3c5c6-2307-11e4-86ca-6f03cbd15c1a_story.html).

testimony to critique McCulloch's strategy.<sup>12</sup> Similarly, Staten Island District Attorney Daniel Donovan faced criticism over his failure to indict the officer whose chokehold killed Eric Garner, despite the existence of videotaped footage in that case.<sup>13</sup> There was a sense that many had lost faith in their local prosecutors to be able to set aside their close relationships with local law enforcement in order to conduct a fair trial of police officers engaged in alleged misconduct and excessive use of force.<sup>14</sup> In contrast, jubilant crowds flooded the streets of Baltimore when the chief prosecutor, Marilyn Mosby, revealed numerous charges against six officers involved in the death of Freddie Gray.<sup>15</sup> Shortly thereafter, many who supported the officers called for Mosby's recusal citing her political ties and criticized the swiftness of her office in levying charges against the officers.<sup>16</sup> McCulloch, who is white and whose constituents are largely white, was criticized because he failed to secure an indictment for killing an unarmed black man.<sup>17</sup> Mosby, on the other hand, who is African American, was criticized for bringing charges and there was a suggestion that she was merely appeasing a largely black constituency, as well as trying to quell the violence that had broken out in several of Baltimore's black neighborhoods.<sup>18</sup> Each of these cases demonstrates that the criminal prosecution of law enforcement

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12. See David Zucchino, *Prosecutor's Grand Jury Strategy in Ferguson Case Adds to Controversy*, L.A. TIMES (Nov. 25, 2014, 8:49 PM), <http://www.latimes.com/nation/la-na-ferguson-da-analysis-20141126-story.html>.

13. Alexander Burns, *Daniel Donovan Gets Wary Welcome to Congress After Eric Garner Case*, N.Y. TIMES (May 22, 2015), [http://www.nytimes.com/2015/05/23/nyregion/daniel-donovan-gets-a-wary-welcome-to-congress-after-eric-garner-case.html?\\_r=0](http://www.nytimes.com/2015/05/23/nyregion/daniel-donovan-gets-a-wary-welcome-to-congress-after-eric-garner-case.html?_r=0).

14. Walter Katz, *Enhancing Accountability and Trust with Independent Investigations of Police Lethal Force*, 128 HARV. L. REV. 235, 236–37 (2015), available at [http://cdn.harvardlawreview.org/wp-content/uploads/2015/04/vol128\\_Katz.pdf](http://cdn.harvardlawreview.org/wp-content/uploads/2015/04/vol128_Katz.pdf) (noting that “[t]he Brown and Garner cases embodied not only general distrust between police and minority communities, but also the loss of the public's trust in the investigations and reviews of police-involved deaths.”).

15. Alan Blinder & Richard Pérez-Peña, *6 Baltimore Police Officers Charged in Freddie Gray Death*, N.Y. TIMES (May 1, 2015), [http://www.nytimes.com/2015/05/02/us/freddie-gray-autopsy-report-given-to-baltimore-prosecutors.html?\\_r=0](http://www.nytimes.com/2015/05/02/us/freddie-gray-autopsy-report-given-to-baltimore-prosecutors.html?_r=0).

16. See Peter Hermann & Lynh Bui, *Defense Lawyers: Marilyn Mosby Should Recuse Herself from Gray Case*, WASH. POST (May 8, 2015), [https://www.washingtonpost.com/local/crime/defense-marilyn-mosby-should-recuse-herself-from-freddie-gray-case/2015/05/08/d701c51c-f5c8-11e4-bcc4-e8141e5eb0c9\\_story.html](https://www.washingtonpost.com/local/crime/defense-marilyn-mosby-should-recuse-herself-from-freddie-gray-case/2015/05/08/d701c51c-f5c8-11e4-bcc4-e8141e5eb0c9_story.html).

17. See Jeffrey Toobin, *How Not to Use a Grand Jury*, NEW YORKER (Nov. 25, 2014), <http://www.newyorker.com/news/news-desk/use-grand-jury>.

18. See Hermann & Bui, *supra* note 16.

officers is fraught with actual or potential conflicts of interest and political issues that threaten to undermine the legitimacy of the criminal justice system. These issues become more acute when one considers the implications for racial minorities who have a longstanding distrust of the criminal justice system. In each instance, various segments of the local community criticized the local prosecutor for their actions based on potential conflicts of interest. In either case, the appointment of an independent prosecutor might have alleviated the appearance of impropriety and led to greater confidence in the criminal justice process for both the victims and the police defendants.

Criminal prosecution of police officers raises a myriad of issues that this Article will begin to explore. First, while there has been a paradigmatic shift in police accountability in recent decades from remedies focusing on individual officers to those focusing on broad organizational reform, this Article will explore the important role that the deterrence rationale of criminal prosecution might play as one tool to address police misconduct. Second, other than deterrence, criminal prosecutions serve numerous goals, including retribution for the harms imposed upon the victims and society for the crimes. Historically, many racial minorities, when compared with their white counterparts, lack faith in equity and fairness of the criminal justice system.<sup>19</sup> Recent deaths of unarmed blacks at the hands of police and what many see as a failure to hold the officers accountable, and have yet again exposed the racial dynamics at play within the criminal justice system. Part I of this paper summarizes the various tools currently used to keep police officers accountable for their actions, and contextualizes criminal prosecution as one tool in the toolkit of police accountability—one blade on the Swiss-army knife needed to achieve effective and sustainable police accountability. Part II will argue that the current manner in which many local prosecutions proceed, which is replete with potential (and inherent) conflicts of interest, undermines both the deterrence rationale and public confidence in whether both victims and police officers are treated

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19. Bill Schneider, *Do Americans Trust Their Cops to Be Fair and Just? New Poll Contains Surprises.*, REUTERS (Jan. 15, 2015), <http://blogs.reuters.com/great-debate/2015/01/15/one-third-of-americans-believe-police-lie-routinely/>.

fairly when local prosecutors are responsible for investigating and deciding whether to criminally charge officers. This part will explore the challenges and dangerous implications of the current model. Part III of this Article will explore the merits of several proposals to reform this process, focusing primarily upon the appointment of independent prosecutors rather than local ones to investigate and prosecute police-involved deaths.<sup>20</sup>

#### I. ASSESSING CRIMINAL PROSECUTION AS A PROPER TOOL IN THE POLICE ACCOUNTABILITY TOOLKIT

The deaths of Michael Brown, Eric Gardner, Walter Scott, and Freddie Gray at the hands of police have become symbolic of the need for increased police accountability in the United States. Although there is no comprehensive national database on police-involved shootings, one group estimates that in 2015 there were 1138 deaths at the hands of police.<sup>21</sup> One study showed that 490 people were killed by police between January and June 11, 2015, and that 138 of the victims were African American (which means that although blacks constitute 12 percent of the U.S. population, they accounted for nearly 30 percent of those killed by police officers in the first half of this past year).<sup>22</sup> Between January and August 2015, police killed 55 unarmed African Americans and the rates of police violence are much higher against African Americans (7.18 per million) versus whites (2.92 per million).<sup>23</sup> In a 2014 study, New York City's Civilian Complaint Review Board (CCRB) found that

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20. Following the failure of the grand juries to indict the police officers involved in deaths of both Michael Brown and Eric Gardner, some critics argued that independent prosecutors should be appointed to replace the decision making power of grand juries in these cases. This paper does not explore models a model that would usurp the power of the grand jury, but rather examines the merits and disadvantages of appointing an independent prosecutor to investigate or prosecute the case rather than the local prosecutor.

21. This number is accurate as of December 22, 2015. *The Counted: People Killed by Police in the U.S.*, THE GUARDIAN, <http://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> (last visited Dec. 22, 2015) [hereinafter *The Counted*].

22. Peniel E. Joseph, *The Number of Times African-Americans Were Brutalized by Police This Year*, REUTERS (June 11, 2015), <http://blogs.reuters.com/great-debate/2015/06/11/the-number-times-black-people-were-brutalized-by-police-this-year-unknown/>.

23. *The Counted*, *supra* note 21.

while African Americans made up 23 percent of the city's population, they represented 55 percent of reported victims of alleged misconduct from 2008 to 2013.<sup>24</sup>

As the recent events make clear, these individual acts of police violence demonstrate that these events often are symptomatic of a larger problem plaguing local police departments nationwide. It is well-established that police violence is generally a product of organizational or institutional factors that influence police departments rather than individual officers. Thus, effective remedies need to strike at the heart of police culture in order to deter misconduct of individual police officers, but should also address systemic issues within these institutions that might contribute to police misconduct.

#### *A. The Current "Toolkit" to Address Police Misconduct*

Throughout history, numerous remedies aimed at curbing police misconduct and increasing accountability have included both external and internal mechanisms. Internal remedies such as internal investigations are fraught with conflicts, but external oversight measures such as citizen review boards have also faced criticism.<sup>25</sup> Court-sanctioned remedies such as the exclusionary rule also have proved inadequate to address police misconduct.<sup>26</sup> While civil actions against officers might offer compensation to a few successful victims, these suits have not spurred widespread reforms.<sup>27</sup> The recent deaths of unarmed citizens in police custody have also sparked new discussions about the merits and efficacy of criminal prosecutions of

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24. N.Y.C. CIVILIAN COMPLAINT REVIEW BD., 2013 REPORT (2014), available at [http://www.nyc.gov/html/ccrb/downloads/pdf/CCRB%20Annual\\_2013.pdf](http://www.nyc.gov/html/ccrb/downloads/pdf/CCRB%20Annual_2013.pdf) [<http://perma.cc/M37N-L5BR>].

25. See, e.g., James R. Hudson, *Police Review Boards and Police Accountability*, 36 LAW & CONTEMP. PROBS. 515, 521 (1971).

26. Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 9 (2009).

27. For the amount of money jurisdictions spend on civil cases, see Zusha Elinson & Dan Frosch, *Cost of Police-Misconduct Cases Soars in Big U.S. Cities*, WALL ST. J. (July 15, 2015, 10:30 PM), <http://www.wsj.com/articles/cost-of-police-misconduct-cases-soars-in-big-u-s-cities-1437013834> (noting that the "10 cities with the largest police departments paid out \$248.7 million last year in settlements and court judgments in police-misconduct cases, up 48% from \$163.3 million in 2010. . .").

police officers.<sup>28</sup> It seems clear that new tools are needed in order to protect citizens, especially the most vulnerable, from the increasingly visible transgressions of the police.

*B. Why are State and Federal Criminal Prosecutions of Law Enforcement Officers So Rare?*

Although the recent trend in policing has focused upon organizational change and forward-looking reforms to prevent future instances of police misconduct, police officers who may have acted outside of the legal boundaries to effectuate a stop, search, or arrest of a subject can face criminal prosecution either at the state or the federal level. The deaths of Michael Brown, Eric Garner, and others have also caused a public outcry for criminal prosecution of the officers involved in those deaths, and the failure of prosecutors to secure indictments in either of these cases has highlighted the shortcomings of criminal prosecution as a viable tool to address police misconduct. While advocates continue to press for widespread changes in law enforcement practices, there has also been an increased focus on examining the current models of criminally prosecuting officers. Criminal prosecutions of police officers are uncommon and judges and juries often exonerate the few officers who face prosecution.<sup>29</sup>

But what accounts for the failure to prosecute or convict police officers accused of using excessive force? The failure to indict officers in Michael Brown's death and the death of Eric Garner renewed the debate about why police officers rarely face criminal charges for their roles in police-related deaths. Many experts note that there is an "inherent conflict of interest that exists between the prosecutors' offices and the police officers upon whose work the

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28. See Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), <http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/>.

29. State criminal prosecutions resulting from violations of state laws against assault, aggravated assault, manslaughter and murder are another method of holding police officers accountable. See *John V. Jacobi, Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 803 (2000) (discussing the reluctance of police officers to pursue investigations of fellow officers' misconduct) [hereinafter *Jacobi*].



prosecutors rely.”<sup>30</sup> It has long been argued that the primary reason local prosecutors are hesitant to pursue cases that involve police officers is due to the close relationships between prosecutors and officers.<sup>31</sup> Although prosecutors conduct the investigations alone and officers respond to the crimes alone, they depend on each other and work as a team.<sup>32</sup> Prosecutors depend on officers for information, witnesses, and evidence making their relationships ongoing.<sup>33</sup> The potential conflicts of interest extend beyond the ability to secure police witnesses for trials. For example, more than 80 percent of local prosecutors are elected, and they not only work closely with police to investigate and punish crimes, but also often depend on police union endorsements to win and keep their jobs.<sup>34</sup> Thus local prosecutors are heavily influenced not to make decisions that would anger those unions.<sup>35</sup>

## II. SHARPENING THE TOOL OF CRIMINAL PROSECUTION—WHY HOLDING OFFICERS CRIMINALLY RESPONSIBLE MATTERS

### *A. A Dearth of Prosecutions Where Appropriate Undermines the Rationale of Criminal Punishment*

While all of the methods to address police misconduct have shortcomings, a failure to prosecute police officers who may have used excessive force has broader implications for the criminal justice system. When there is a criminal violation, there are generally two overarching theories to justify punishing the offender. Punishment is based on either retribution, a “backward” looking theory that is focused on the crime itself and emphasizes the concept that the

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30. Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 501 (citing *Jacobi*, *supra* note 29, at 789).

31. *Jacobi*, *supra* note 29, at 803.

32. *Id.* at 803–04.

33. *Id.* at 803.

34. Editorial Board, *Reform Prosecuting Police Misconduct: Our View*, USA TODAY (Dec. 10, 2014 6:37 PM), <http://www.usatoday.com/story/opinion/2014/12/10/eric-garner-staten-island-police-district-attorney-editorials-debates/20216333/>.

35. *Id.*

offender *deserves* punishment, or on utilitarianism, which focuses on deterring future criminal conduct.<sup>36</sup>

In regards to police shootings, officers are rarely prosecuted, suggesting a sense that the police are often above reproach in such situations. A recent Washington Post analysis of fatal police shootings between 2005 and 2015, showed that despite thousands of shootings, only fifty-four officers were criminally prosecuted.<sup>37</sup> Bowling Green State University criminologist Philip M. Stinson and The Washington Post identified the fifty-four prosecutions and the cases were gleaned from news reports, grand jury announcements and news releases from prosecutors.<sup>38</sup>

More generally, evidence also shows a large disparity between officers who are accused of committing crimes, and the number who are actually charged or convicted for those crimes. For example, a study regarding prosecution of police officers from April 2009 until December 2010 showed that during that time 8,300 credible reports were filled against nearly 11,000 officers, but of those reports only 3,238 resulted in criminal charges.<sup>39</sup> Of those 3,238 officers only 1,063 officers were convicted, and only 36 percent of those convicted were actually incarcerated.<sup>40</sup> The study provided detailed graphs comparing the conviction and incarceration rates of law enforcement and the general public. Conviction rates showed that nearly 70 percent of the general public was convicted, while about 35 percent of officers were convicted.<sup>41</sup> Similarly the incarceration rates showed that nearly 70 percent of the general public was incarcerated for their crimes, while only about 35 percent of law enforcement officers were incarcerated for their crimes.<sup>42</sup>

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36. John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 4–5 (1955).

37. Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), <http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/>.

38. *Id.*

39. David Packman, *2010 NPMSRP Police Misconduct Statistical Report—Draft*, CATO INST. (Apr. 5, 2011, 12:55 AM), <http://www.policemisconduct.net/2010-npmsrp-police-misconduct-statistical-report/>.

40. *Id.*

41. *Id.*

42. *Id.*

This data revealed similar findings when focusing specifically on cases involving excessive force.<sup>43</sup> The report found that 2,716 officers were accused of using excessive force, but only about 200 of those officers were charged. Of those charged, only 77 officers were convicted.<sup>44</sup> Of the officers accused of using excessive force, 430 officers were accused of killing a person but only 30 officers were charged, and only half of those 30 were convicted.<sup>45</sup> In some areas, police are rarely prosecuted at all. For example, in Florida an officer had not been charged with shooting a civilian in twenty years.<sup>46</sup> NAACP Legal Defense and Educational Fund chief litigator, Christina Swarns, argued that in cases of police shootings, the interests of prosecutors may not always align with victims, but rather with the police they work “hand in hand” with, and has urged greater independence.<sup>47</sup> Notably, from January 2009 through November 2011, Chicago had 441 misconduct cases (75 percent were excessive force and wrongful arrest cases) that led to paid settlements to victims—however not one of those cases led to an indictment or conviction, showing that cities rarely wish to admit their wrongdoings.<sup>48</sup>

*B. A Failure to Prosecute Officers Undermine Public Confidence in Investigations of Officer-Involved Deaths*

Historically, studies have demonstrated shown that when compared with their white counterparts, African Americans have less confidence in police officers and do not believe that police treat racial minorities fairly. A recent Reuters poll shows that only 28 percent of African American trust police to be fair and just, while 61 percent of whites believe police to be fair and just. These figures elucidate deep racial divisions regarding the legitimacy of the criminal justice

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43. Adeshina Emmanuel, *Indictments, Convictions of Police Officers in Civilian Deaths Rare*, CHI. REP. (Nov. 6, 2014), <http://chicagoreporter.com/indictments-convictions-police-officers-civilian-deaths-rare/>.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

system in the United States. At a time when blacks are disproportionately incarcerated, many of whom are jailed for non-violent drug crimes, it seems anathema to many that a fair and impartial justice system would allow police officers to escape punishment or condemnation for the violence visited upon unarmed racial minorities. As one commentator noted regarding the deaths of Brown and Garner, “[b]road cross-sections of the public have lost trust in local law enforcement agencies due to their perception of biased investigations of such deadly-force incidents.”<sup>49</sup>

### III. PROPOSALS FOR REFORM

In the wake of a number of deaths of unarmed black men at the hands of police officers, President Obama appointed the President’s Task Force on 21st Century Policing to examine ways in which to increase police accountability and promote public safety. The Task Force’s report specifically noted that the use of independent prosecutors to review “cases of inappropriate deadly force” will help to build “mutual trust between community and law enforcement.”<sup>50</sup>

#### *A. Independent Investigations*

When there is a death in police custody, many police departments conduct an internal investigation. Typically, the results of the investigation are disclosed to local prosecutors who will then decide whether to pursue criminal charges against the officers involved. Internal investigations can be a valuable tool for a police department because they not only provide an opportunity for the department to learn about how officers behave in certain circumstances, and but a properly run division responsible for internal oversight could signal to officers that the department takes allegations of misconduct seriously. However, these internal police investigations often lack transparency, and the public is generally distrustful of allowing officers within the same department to investigate their fellow

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49. Katz, *supra* note 14, at 236–37.

50. OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP’T OF JUST., FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21<sup>ST</sup> CENTURY POLICING 21 (2015), *available at* [http://www.cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf).

officers.<sup>51</sup> Officers who investigate other officers within the same department, even if they are in entirely within the office, face inherent conflicts of interest, and may not want to be seen as violating the “code of silence” endemic in police culture or breaching the loyalty they have to fellow officers.<sup>52</sup>

Therefore, in addition to internal investigations, state legislation should also mandate an independent investigation of deaths in police custody. In 2014, Wisconsin became the first state to mandate outside investigators with respect to officer-involved shootings.<sup>53</sup> Currently Wisconsin is one of the only states to mandate an independent investigation of an officer-involved death. The Wisconsin law provides that “each agency shall have a written policy regarding the investigation of officer-involved deaths that involve a law enforcement officer employed by the law enforcement agency.”<sup>54</sup> The law further requires an investigation conducted by at least two investigators, one of whom is the lead investigator and neither of whom is employed by a law enforcement agency that employs a law enforcement officer involved in the officer-involved death.<sup>55</sup> While

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51. These investigations are often perceived as illegitimate because of the conflicts of interest existing among the officers and those assigned to investigate them. For example, Paul Chevigny notes that in the Internal Affairs Division of New York City’s Police Department, “[s]uperior officers did not want to root out corruption, both because it might threaten their jobs and because they wanted to maintain a good image for the department.” PAUL CHEVIGNY, *EDGE OF THE KNIFE: POLICE VIOLENCE IN THE AMERICAS* 79–80 (1995). The Danziger Bridge shooting in the wake of Hurricane Katrina provides one example of how officers in the same department failed to properly investigate officers involved in a shooting. After several officers shot several unarmed citizens crossing the bridge, the supervisors who were called to investigate the scene participated in a cover-up and ultimately faced criminal prosecution themselves. See *New Orleans Cops Convicted in Post-Katrina Shootings Case*, CNN (Aug. 5, 2011, 3:44 PM), <http://www.cnn.com/2011/CRIME/08/05/louisiana.danziger.bridge.shooting/>.

52. The blue code of silence also makes it difficult for investigating officers to gather information regarding alleged instances of police misconduct. See also Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering “Custom” in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 84–85 (2000) (discussing the lack of cooperation experienced by police officers investigating their fellow officers).

53. See *In Wisconsin, a Decade Old Shooting Leads to New Law*, NPR (Dec. 15, 2014, 1:27 PM), <http://www.npr.org/2014/12/13/370592433/in-wisconsin-a-decade-old-police-shooting-leads-to-new-law>; See also Candice Bernd, *Wisconsin Passes First State Law Requiring Independent Investigations of Police Custody Deaths*, TRUTHOUT (May 3, 2014, 9:10 AM), <http://www.truth-out.org/news/item/23463-wisconsin-passes-first-state-law-requiring-independent-investigations-of-police-custody-deaths>.

54. See A.B. 409 Gen. Assemb., Reg. Sess. (Wis. 2013).

55. *Id.*

many local jurisdictions follow a similar protocol regarding deaths in custody, Wisconsin is one of the only states to currently mandate that an independent body investigate these deaths.<sup>56</sup>

In October 2014, state legislator Reed Gusciora introduced similar legislation in New Jersey.<sup>57</sup> Many states already use state agencies such as the State Bureau of Investigation or the Attorney General's office to take responsibility for the investigation but do not require that these agencies take responsibility for the investigation of officer involved uses of force or death. Connecticut also has an independent prosecutor law. This law requires that the state's Division of Criminal Justice investigate any police-involved death and allows the state's chief attorney to appoint a special prosecutor if he or she sees fit.<sup>58</sup> Missouri Senator Jamilah Nasheed and Missouri Representative Jay Barnes have offered legislation that would require a special prosecutor to head up all investigations of police-involved deaths.<sup>59</sup>

On July 8, New York Governor, Andrew Cuomo, at the request of New York's Attorney General, Eric Schneiderman, issued Executive Order No. 147, which appoints the New York State Attorney General as a special prosecutor in matters relating to the deaths of unarmed civilians caused by law enforcement officers. This order will also allow the special prosecutor to review cases where there is a question whether the civilian was armed and dangerous at the time of his or her death.<sup>60</sup> Thus, the order does not cover all police killings, but only those where a suspect was unarmed or whether there was a question about whether the suspect was armed.<sup>61</sup> After the announcement,

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56. Holly Yan & Ashley Fantz, *Police Kill Teen: Why Wisconsin's Investigation Will Be Different*, CNN (Mar. 10, 2015, 12:48 PM), <http://www.cnn.com/2015/03/10/us/wisconsin-police-shooting-rules/>.

57. The New Jersey Law requires "two independent persons to investigate an act or mission by a police officer, which directly results in the death of an individual." A. 3756, 216th Leg., Reg. Sess. (N.J. 2014). Those individuals must be, "employed by the county prosecutor of a county other than where the fatal incident occurred." *Id.*

58. CONN. GEN. STAT. § 51-277(a) (2012).

59. Mike Lear, *MO Rep, Sen Want Special Prosecutors in All Police Shootings*, MISSOURINET (Oct. 13, 2014), <http://www.missourinet.com/2014/10/13/two-mo-lawmakers-want-special-prosecutors-in-all-officer-involved-shootings/>.

60. Noah Remnick, *Cuomo's Order for Special Prosecutor in Police Deaths Is Criticized*, July 9, 2015, <http://www.nytimes.com/2015/07/09/nyregion/cuomos-order-for-special-prosecutor-in-police-deaths-is-criticized.html>.

61. *Id.*

critics were quick to note concerns about whether “that there will be pressure on a special prosecutor to indict an officer for the sake of public perception and that does not serve the ends of justice.”<sup>62</sup>

### *B. Models of Independent Prosecutors*

Even once an investigation is complete, there still exists the question as to whether the officer(s) involved in the shooting will face criminal prosecution, and there are many hurdles to securing criminal convictions for officers accused of excessive uses of force. The first step often involves the local prosecutor’s decision whether to charge the officer with a crime. As with all criminal cases, the prosecutor enjoys wide (and often unfettered) discretion regarding whether to impose criminal charges.<sup>63</sup> Prosecutors and police officers work as part of the same team and inevitably develop a close relationship—prosecutors rely on police officers to investigate cases, interrogate suspects, and testify at trial, and police officers rely on prosecutors to turn their arrests into convictions.<sup>64</sup> Put simply, prosecutors need the cooperation of the police to win cases. Thus prosecutors may face a conflict of interest because it may be difficult for them to bring successful prosecutions if they have to send their key witnesses, the police officers, to prison for an officer-involved death.<sup>65</sup> Therefore, it may be unrealistic to expect even the best district attorney to remain unbiased when they have to prosecute a police officer.<sup>66</sup>

Given that local prosecutors will rely heavily upon police officers within the same department to assist with their investigation of other

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62. Joseph Schatt, *NY Governor Names Special Prosecutor for Killings by Police*, CNN (July 9, 2015), <http://www.cnn.com/2015/07/09/us/new-york-special-prosecutor/> (quoting Patrick Lynch, head of the Patrolmen’s Benevolent Association).

63. See Rachel Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1351–53 (2007-08) (discussing how courts do not review prosecutorial charging decisions).

64. Paul Butler, Op-Ed., *The System Must Counteract Prosecutors’ Natural Sympathies for Cops*, N.Y. TIMES (Apr. 28, 2015), <http://www.nytimes.com/roomfordebate/2014/12/04/do-cases-like-eric-garner-require-a-special-prosecutor/the-system-must-counteract-prosecutors-natural-sympathies-for-cops>

65. *Id.*

66. Letitia James, *Prosecutors and Police: The Inherent Conflict in Our Courts*, MSNBC (Dec. 5, 2014), <http://www.msnbc.com/msnbc/prosecutors-police-inherent-conflict-our-courts>.

cases, inherent conflicts of interest exist.<sup>67</sup> Similarly, many local District Attorneys are elected, and prosecuting police officers might damage their reputation with a large part of the electorate. Many of their endorsements come from law enforcement unions, which could impact their chances for reelection.<sup>68</sup> Even though prosecutors have an ethical obligation to ignore such considerations, the risk that these apparent conflicts may play a role in their decision or ability to effectively prosecute the case against an officer too great to ignore.<sup>69</sup>

In addition to prosecutions under state law, the federal government also has the ability to prosecute officers who are accused of excessive uses of force pursuant to 18 U.S.C. § 242. Section 242 provides that it is unlawful for a person acting “under color of any law, statute, ordinance, regulation, or custom, [to] willfully subject [] any inhabitant 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.”<sup>70</sup> While the possibility of federal intervention removes the local prosecutor, and thus the conflict of interest, federal officials have agreed that state prosecution is the preferred avenue for criminal prosecutions of law enforcement officers, and therefore federal intervention should serve only as a “back-stop.”<sup>71</sup> Accordingly,

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67. See Jacobi, *supra* note 29, at 803.

68. William Lynch III, *Why We Need Independent Prosecutors*, HUFFINGTON POST (Apr. 27, 2015), [http://www.huffingtonpost.com/-william-lynch-iii/why-we-need-independent-p\\_b\\_7153826.html](http://www.huffingtonpost.com/-william-lynch-iii/why-we-need-independent-p_b_7153826.html). For example, the Staten Island District Attorney, Daniel Donovan received campaign donations from a number of organizations closely connected with law enforcement including the Patrolmen’s Benevolent Association, the Detectives’ Endowment Association, the Sergeants Benevolent Association, the Captains Endowment Association, the Lieutenants Benevolent Association, the Correction Officers Benevolent Association, the Bridge and Tunnels Superior Officers Council, the Bridge and Tunnel Officers Benevolent Association, and the Fraternal Order of Police. *Id.*

69. This issue was of particular concern in the Michael Brown shooting. In this case, many community members believed that the prosecutors’ ties to law enforcement were too close and the apparent conflicts of interest delegitimized his role from the beginning. Elizabeth Chuck, *Prosecutor in Michael Brown Case Has Deep Family Ties to Police*, NBC NEWS (Aug. 20, 2014, 10:18 AM), <http://www.nbcnews.com/storyline/michael-brown-shooting/prosecutor-michael-brown-case-has-deep-family-ties-police-n183911>.

70. 18 U.S.C. § 242 (2000).

71. See *Police Brutality: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 3 (1991) (recording testimony of John R. Dunne, then-Assistant Att’y Gen., Civ. Rights Div., U.S. Dep’t of Justice).



federal prosecutions for excessive force are extremely rare, and local prosecutors thereby retain exclusive control over the vast majority cases against police officers accused of excessive force.<sup>72</sup>

Given these inherent conflicts of interest, in order to assure public confidence in criminal proceedings involving police officers and deadly uses of force, reformers have called for the appointment of “special prosecutors” or “independent prosecutors” to prosecute these cases at the local level.<sup>73</sup> There are several models of independent prosecution that might achieve greater confidence regarding criminal prosecutions of officers who are accused of excessive uses of force. First, similar to independent *investigations* of such cases, many states already have rules that allow the State Attorney General or another independent body to *prosecute* controversial cases.<sup>74</sup> States could pass legislation that would mandate automatic referral of all such cases to an independent or special prosecutor, instead of relying on the discretion of authorities to determine which cases a special prosecutor will hear.<sup>75</sup> According to Congressional Research Services legal analysis, Connecticut is one of the only states that currently requires the appointment of a special prosecutor in police-related deadly use of force incidents, but other states’ lawmakers are quickly moving to introduce similar legislation.<sup>76</sup> For example, a

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72. The Justice Department’s Civil Rights Division, during President Obama’s administration, prosecuted 385 police officers for civil rights violations. Bob Egelko, *Obama Team More Likely Than Predecessors to Prosecute Police*, S.F. CHRON. (Aug. 21, 2014, 7:56 AM), <http://www.sfgate.com/crime/article/Obama-team-more-likely-than-predecessors-to-5702851.php>. In addition to the infrequency of federal prosecutions, is also notoriously difficult to secure successful prosecutions in federal cases because the federal law requires the prosecutor to establish the officer “willfully” violated the victim’s rights, which is a high burden to demonstrate. See 18 U.S.C. § 242.

73. See also The Editorial Board *Police Abuse Cases Need Special Prosecutors*, WASH. POST (Dec. 6, 2014), [http://www.washingtonpost.com/opinions/police-abuse-cases-need-special-prosecutors/2014/12/06/fcf57e28-7cd6-11e4-b821-503cc7efed9e\\_story.html](http://www.washingtonpost.com/opinions/police-abuse-cases-need-special-prosecutors/2014/12/06/fcf57e28-7cd6-11e4-b821-503cc7efed9e_story.html).

74. See, e.g., Exec. Order No. 147 (N.Y. 2015), available at <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO147.pdf>. A recent Editorial in the New York Times called this model the “best solution.” The Editorial Board, *A Crisis of Confidence in Prosecutors*, N.Y. TIMES (Dec. 8, 2014), [http://www.nytimes.com/2014/12/09/opinion/a-crisis-of-confidence-in-prosecutors.html?\\_r=0](http://www.nytimes.com/2014/12/09/opinion/a-crisis-of-confidence-in-prosecutors.html?_r=0) [hereinafter *Crisis in Confidence*]

75. *Crisis in Confidence*, supra note 74.

76. *Special Prosecutors: Investigations and Prosecutions of Police Use of Deadly Force*, FAS.ORG (Dec. 12, 2014), <https://www.fas.org/sgp/crs/misc/specpro.pdf> (citing CONN. GEN. STAT. § 51-277(a) (2012)). See also *Haygood to Seek Independent Prosecutor for Deadly-*

Pennsylvania lawmaker plans to introduce legislation that would require the state attorney general to appoint an independent special prosecutor whenever a police officer is involved in a deadly force incident.<sup>77</sup>

Another option would be for states to establish permanent independent prosecutors offices and pass legislation that would allow authorities to refer officer-involved fatalities to this office for investigation and/or prosecution. This option seems less viable for some jurisdictions because establishing a separate office to review these cases might seem inefficient if the area has an infrequent amount of police-related deaths. This option, however, might be an attractive option for larger municipalities that experience multiple officer-involved fatalities per year.

### *C. Critiquing the Independent Prosecutor Model*

While many believe that the appointment of independent prosecutors is necessary to ensure an unbiased and fair investigation, there are others who question whether independent prosecutors will indeed remain independent.<sup>78</sup> Some observers have noted that by their very nature, prosecutors may be limited by an “us-versus-them” viewpoint.<sup>79</sup> Similarly, some district attorneys have vocally opposed the idea of independent prosecutors, stating that as district attorney, they would not hesitate to prosecute an officer to the fullest extent of the law and that remaining independent in spite of political pressures is, in fact, the purpose of electing a district attorney.<sup>80</sup> Critics of

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*Force Incidents*, PA SENATE (Dec. 19, 2014), <http://www.pasenate.com/2014/12/19/haywood-to-seek-independent-prosecutor-for-deadly-force-incidents/> [hereinafter *Independent Prosecutor*].

77. *Independent Prosecutor*, *supra* note 76.

78. Delores Jones-Brown, *Special Prosecutors are Useful, but Not a Guarantee Against Prejudice*, N.Y. TIMES (Dec. 5, 2014, 2:58 PM), <http://www.nytimes.com/roomfordebate/2014/12/04/do-cases-like-eric-garners-require-a-special-prosecutor/special-prosecutors-are-useful-but-not-a-guarantee-against-prejudice>.

79. *Id.*

80. See, e.g., Larry Miller, *Use of Independent Prosecutors Bothers Philly D.A.*, PHILA. TRIB. (Mar. 5, 2015, 9:00 AM), [http://www.phillytrib.com/news/use-of-independent-prosecutors-bothers-philly-d-a/article\\_b7642718-b5a7-5b6a-bd13-cc8abb6148a0.html](http://www.phillytrib.com/news/use-of-independent-prosecutors-bothers-philly-d-a/article_b7642718-b5a7-5b6a-bd13-cc8abb6148a0.html); and Jeff Rosen, *The Role of Prosecutors in Officer-Involved Shootings*, SANTA CLARA U. MARKKULA CENTER FOR APPLIED ETHICS, [http://www.scu.edu/ethics/practicing/focusareas/government\\_ethics/prosecutor-role.html](http://www.scu.edu/ethics/practicing/focusareas/government_ethics/prosecutor-role.html) (last visited May 27, 2015).

independent prosecutors have also noted that it would be wrong to blame the prosecutor for the grand jury's decision not to indict.<sup>81</sup> It is ultimately up to the grand jury to decide the officer's fate, and it is not the prosecutor's fault if a jury gives the officer the benefit of the doubt.<sup>82</sup>

There is historical precedent for appointing independent prosecutors to maintain the integrity of criminal investigation or prosecution where actual or potential conflicts of interest might exist. Unfortunately, several high-profile cases in which a special prosecutor was appointed remind us that this model is also susceptible to abuse. Appointing an independent prosecutor has been the subject of controversy since Richard Nixon's Watergate scandal.<sup>83</sup> While independent prosecutors date back to 1875, the most notable instance of the use of a special prosecutor is in the aftermath of Watergate.<sup>84</sup> After the public lost trust in the government, Congress enacted the Independent Counsel Act in 1978, which called for the use of a special prosecutor any time allegations were brought against high officials in the executive branch, including the President and his cabinet members.<sup>85</sup> The Independent Counsel Act, amidst criticism, was upheld as constitutional.<sup>86</sup> Those who lauded the Act suggested that it helped "uncover the truth behind allegations of criminal wrongdoing," and ensured accountability.<sup>87</sup> Others believe that the Act "vindicated the public trust" in the system to conduct fair investigations.<sup>88</sup> Still others have suggested that it helped maintain the system of checks and balances, because otherwise, "members of

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81. Heather MacDonald, Op-Ed., *District Attorneys Have Shown They Can Prosecute Police*, N.Y. TIMES (Apr. 28, 2015, 10:42 AM), <http://www.nytimes.com/roomfordebate/2014/12/04/do-cases-like-eric-garner-require-a-special-prosecutor/district-attorneys-have-shown-they-can-prosecute-police>.

82. *Id.*

83. Alexander I. Tachmes, *Independent Counsels Under the Ethics in Government Act of 1978: A Violation of the Separation of Powers Doctrine or an Essential Check on Executive Power?*, 42 U. MIAMI L. REV. 735, 736 (1988).

84. Donald C. Smaltz, *The Independent Counsel Act: A View From Inside*, 86 GEO. L.J. 2307, 2310–11 (1998).

85. *Id.* at 2310, 2320.

86. *Morrison v. Olson*, 487 U.S. 654 (1988).

87. Smaltz, *supra* note 84, at 2368.

88. John Q. Barrett, *Independent Counsel Law Improvements for the Next Five Years*, 51 ADMIN. L. REV. 631, 635–36 (1999).

the executive branch will be responsible for the prosecution of other executive officers, a stark a conflict of interest.”<sup>89</sup>

The Independent Counsel Act provided that the Attorney General can launch a preliminary investigation against any person covered by the Act who may have violated federal criminal law.<sup>90</sup> Those covered under the Act include the President, Vice President, the CIA Director, members of Congress, and other high-ranking officials.<sup>91</sup> If the Attorney General believes that further investigation is needed, he or she can call for the appointment of independent counsel.<sup>92</sup> The independent counsel has authority to fully investigate and prosecute the matter.<sup>93</sup> Their investigative and prosecutorial duties include proceedings before a grand jury, court proceedings and litigation, appealing court decisions, and reviewing evidence.<sup>94</sup> After Kenneth Starr’s controversial investigation of Clinton after the Monica Lewinsky scandal, there were calls to reform the statute.<sup>95</sup> One commentator noted that “To the horror of civil libertarians and others, Starr and his cohorts engaged in brutal tactics in their quest for the scalp of a sitting president” and noted that it was “unlikely that a ‘regular’ federal prosecutor, as opposed to this ‘special one,’ could’ve gotten away with such a rampage through due process, fairness and ordinary decency.”<sup>96</sup> In 1999, Congress allowed the statute to lapse and there is currently no federal independent prosecutor’s statute.<sup>97</sup>

Similarly, Heather MacDonald notes particular difficulties that occurred in the context of special prosecutors appointed to prosecute

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89. Tachmes, *supra* note 83, at 764.

90. 28 U.S.C. § 591(a) (1994).

91. *Id.* § 591(b)-(c).

92. *Id.* § 592(c).

93. *Id.* § 593(b)(3).

94. *Id.* § 594(a) (2012). See also Jack Maskell, *The Independent Counsel Law*, 45 FED. LAW. 28, 34 (1998) (discussing the provisions of the Act).

95. Joseph S. Hall, Nicholas Pullen & Kandace Rayos, *Independent Counsel Investigations*, 36 AM. CRIM. L. REV. 809, 814 (1999).

96. Harvey Silvergate, Op-Ed., *A Special Prosecutor Is a Bad Idea with Unintended Consequences*, N.Y. TIMES (Dec. 5, 2014, 2:58 PM), <http://www.nytimes.com/roomfordebate/2014/12/04/do-cases-like-eric-gamers-require-a-special-prosecutor/a-special-prosecutor-is-a-bad-idea-with-unanticipated-consequences>.

97. 28 U.S.C. § 599 (1994).

police and argues that the “narrow mandate can lead to abuse.”<sup>98</sup> Specifically, she recalls that in the wake of the Knapp Commission’s findings of endemic corruption within the New York Police Department, New York State created a special prosecutor to prosecute officers involved in misconduct.<sup>99</sup> In this instance, while many felt that local prosecutors could not fairly prosecute officers because of their close relationships, the plan backfired, and “overzealous tactics” by the special prosecutor led to the reversal of convictions based on entrapment and other improper tactics.<sup>100</sup> She also suggests that “[t]he threat of being displaced by a special prosecutor can also undermine a district attorney’s independence” when politically or ideologically motivated.<sup>101</sup> This serves as a reminder of the thin line that such prosecutors must walk in these situations.

#### CONCLUSION

Standing alone, there is no single remedy that will eliminate police misconduct. An entire mosaic of reforms will be necessary to resolve some of the complex issues surrounding police reform in order to restore the legitimacy that currently is clearly lacking in many communities. But each tile in the mosaic must be strong and intact. Strengthening the models of criminal prosecution, by ensuring that investigations and subsequent prosecutions are conducted without actual or even the appearance of conflicts of interest will be an integral step in increasing the legitimacy of the process. Yet, appointing an independent prosecutor is not a panacea and policy makers must address numerous issues to assess viable alternatives to local prosecutors. For example, for any proposal to appoint a special prosecutor, policy makers must address several important questions about the authority of the prosecutor and the structure and staffing of such an entity. First, what conditions would trigger the appointment

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98. MacDonald, *supra* note 81.

99. *Id.*

100. *Id.*

101. *Id.*

of a special prosecutor?<sup>102</sup> Would referral be automatic or within the discretion of a local authority (e.g., the local DA herself, or another judicial official)? Furthermore, would the independent prosecutor be available only for officer-involved fatalities or other allegations of uses of force? Finally, policymakers must consider what types of qualifications this independent prosecutor should possess. Would a local prosecutor currently working in a neighboring jurisdiction suffice or, by virtue of their position, would they experience the same apparent or actual conflicts of interest that a prosecutor in the same jurisdiction? Would a cadre of retired prosecutors staff the office, particularly if the jurisdiction experienced only a small number of triggering incidents. These questions deserve further study in order to effectively restore trust and reduce police violence.

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102. *See generally* JACK MASKELL, CONG. RESEARCH SERV., INDEPENDENT COUNSELS, SPECIAL PROSECUTORS, SPECIAL COUNSELS, AND THE ROLE OF CONGRESS (2013), *available at* <https://www.fas.org/sgp/crs/misc/R43112.pdf>.