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Appointing an Independent Prosecutor in Cases of Police Misconduct: Repairing Trust in the Criminal Justice System

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APPOINTING AN INDEPENDENT PROSECUTOR IN CASES OF POLICE MISCONDUCT:
REPAIRING TRUST IN THE CRIMINAL JUSTICE SYSTEM

I. INTRODUCTION

“I can’t breathe.”¹ These were the last words uttered by Eric Garner on July 17, 2014.² Not once, not twice, but eleven times, Eric Garner pleaded to the New York Police Department (“NYPD”) officer who had placed him in a chokehold, “I can’t breathe.”³ And what heinous crime was Eric Garner accused of committing that justified this use of force? Selling untaxed cigarettes.⁴ Eric Garner was not the first unarmed black man to have a fatal encounter with the police, nor was he the last.⁵ The deaths of Eric Garner and several others led to protests and demonstrations against police brutality, with Eric Garner’s fatal words becoming a rallying cry for the Black Lives Matter movement.⁶

The incident was captured on video, the Medical Examiner ruled Eric Garner’s death to be a homicide, the NYPD Commissioner announced at a press conference that Eric Garner appeared to have been put in a chokehold as defined in the department’s guide, and such chokeholds are prohibited by the department.⁷ Despite this all, a Richmond County grand jury declined to indict

¹ Ashley Southall, *‘I Can’t Breathe’: 5 Years After Eric Garner’s Death, an Officer Faces Trial*, N.Y. TIMES (May 12, 2019), <https://www.nytimes.com/2019/05/12/nyregion/eric-garner-death-daniel-pantaleo-chokehold.html>.

² Terry Gross, *‘I Can’t Breathe’ Examines Modern Policing and the Life and Death of Eric Garner*, NPR (Oct. 23, 2017), <https://www.npr.org/2017/10/23/559498678/i-can-t-breathe-explores-life-and-death-at-the-hands-of-police>.

³ *Id.*; Southall, *supra* note 1.

⁴ Southall, *supra* note 1.

⁵ Vanessa Swales & Adeel Hassan, *White Alabama Officer Guilty of Manslaughter for Killing Black Man*, N.Y. TIMES (Nov. 22, 2019), <https://www.nytimes.com/2019/11/22/us/ac-smith-guilty-police-shooting.html>.

⁶ Mark Morales et. al., *Prosecutors Say They Could Not Prove NYPD Officer Acted Willfully in Eric Garner’s Death*, CNN (July 16, 2019), <https://www.cnn.com/2019/07/16/us/eric-garner-death-five-years-later/index.html>; Katie Benner, *Eric Garner’s Death Will Not Lead to Federal Charges for N.Y.P.D. Officer*, N.Y. TIMES (July 16, 2019), <https://www.nytimes.com/2019/07/16/nyregion/eric-garner-case-death-daniel-pantaleo.html>.

⁷ John Del Signore, *[Updates] Grand Jury Won’t Indict NYPD Officer in Eric Garner Chokehold Death*, GOTHAMIST (Dec. 3, 2014), <https://gothamist.com/news/updates-grand-jury-wont-indict-nypd-officer-in-eric-garner-chokehold-death>; see Mark Morales et. al., *Chants of ‘I Can’t Breathe!’ Erupt as the Officer in the Eric Garner Case Won’t Face Federal Charges*, CNN (July 17, 2019), <https://www.cnn.com/2019/07/17/us/eric-garner-no-federal-charges-against-officer-reaction/index.html>.

Daniel Pantaleo, the NYPD officer responsible for Eric Garner’s death.⁸ Just as Eric Garner was neither the first nor the last unarmed black man to have a fatal encounter with the police,⁹ Daniel Pantaleo was neither the first nor the last officer to avoid charges after such an encounter occurred.¹⁰

This recent wave of non-indictments of police officers involved in fatal encounters with unarmed black men has led to an increase in public scrutiny of how our criminal justice system handles cases where police are the defendants.¹¹ Prosecutors work hand-in-hand with police officers on a daily basis.¹² Prosecutors rely on the police to provide evidence and testimony for their cases.¹³ A district attorney’s office would likely not be able to operate without the assistance and cooperation of local police officers. And yet, we expect those same prosecutors, who are relying on the police for their cooperation one day, to turn around and prosecute them the next day.¹⁴ Prior to her election as New York State Attorney General, Letitia James stated “it’s unrealistic to expect even the best district attorney to be absolutely impartial in cases where they are asked to prosecute a police officer.”¹⁵ Further, whether a bias actually exists or not, the

⁸ Benner, *supra* note 6.

⁹ See *supra* text accompanying note 5.

¹⁰ Oliver Laughland et. al., *Cleveland Officer Who Fatally Shot Tamir Rice Will Not Face Criminal Charges*, GUARDIAN (Dec. 28, 2015), <https://www.theguardian.com/us-news/2015/dec/28/tamir-rice-shooting-no-charges-cleveland-officer-timothy-loehmann>.

¹¹ Caleb J. Robertson, *Restoring Public Confidence in the Criminal Justice System: Policing Prosecutions When Prosecutors Prosecute Police*, 67 EMORY L.J. 853, 855 (2018).

¹² Kate Levine, *Who Shouldn’t Prosecute the Police*, 101 IOWA L. REV. 1447, 1450 (2016).

¹³ Paul Cassell, *Who Prosecutes the Police? Perceptions of Bias in Police Misconduct Investigations and a Possible Remedy*, WASH. POST. (Dec. 5, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/05/who-prosecutes-the-police-perceptions-of-bias-in-police-misconduct-investigations-and-a-possible-remedy>.

¹⁴ *Id.* “Our justice system allows district attorneys to be charged with the great responsibility of prosecuting the very same police officers they work side-by-side with every day and whose union support they seek when running for reelection.” 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>.

¹⁵ James, *supra* note 14.

perception of bias undermines public trust in our criminal justice system and creates problems that go far beyond any individual case.¹⁶

This Paper argues that, in order to avoid the perception of bias, an independent, special prosecutor should be appointed to handle cases of police misconduct. Part II will examine the background and history of the interaction between police officers and the district attorney's offices.¹⁷ In Part III, this Paper will analyze the main ethical issue involved in the prosecution of police misconduct—conflict of interest—and the impact it has on our system.¹⁸ In Part IV, this Paper will propose removal of cases involving police misconduct from the district attorney's office, focusing mainly on a solution for New York State, assess the various options for removal, and discuss whether removal should apply in all cases of police misconduct, or be limited to those cases involving fatalities.¹⁹

II. INTERACTION BETWEEN POLICE OFFICERS AND THE DISTRICT ATTORNEY'S OFFICE

A. *Assistance in Prosecuting Cases*

If you walk into a district attorney's office on any given day, you will undoubtedly encounter at least one, if not several police officers. Prosecutors rely on the police throughout virtually every stage of the prosecution.²⁰ A prosecutor's case could end before it even starts, if a police officer makes a mistake. The district attorney's office relies on police officers to properly collect and preserve evidence, investigate criminal offenses, make arrests, file a police report with

¹⁶ See Robertson, *supra* note 11, at 856. “[T]he appearance of conflicted local prosecutors, enhanced procedural protections for police-suspects, and racial tensions shake public confidence in the outcomes of criminal proceedings against police-suspects, even if those outcomes are likely correct.” *Id.*

¹⁷ See *infra* Part II.

¹⁸ See *infra* Part III.

¹⁹ See *infra* Part IV.

²⁰ See Rahel Gebreyes, *The Close Relationship Between Prosecutors and Police Officers*, HUFF POST (Jan. 12, 2016), https://www.huffpost.com/entry/police-prosecutor-relationship_n_56951b56e4b09dbb4bac9218.

all relevant facts, conduct witness interviews, turn over body worn camera footage, and provide crucial testimony if the case goes to trial.²¹

Let's use a homicide as an example. The police hear a gun shot. They turn the corner and see one man with a gunshot wound on the ground and another man running in the opposite direction. They run after him, stop him, pat him down, remove a gun from his waist band, and place him under arrest. They bring him down to the station and interview him, at which point he gives a full confession. Throughout everything that just happened, there were several legal issues that may potentially impact the case.²² Did the search and seizure comply with the Fourth Amendment?²³ Was the confession given voluntarily under the Fourteenth Amendment?²⁴ Was the suspect given Miranda warnings?²⁵ If the suspect waived his Miranda warnings, was that waiver made knowingly, intelligently, and voluntarily?²⁶ If the answer to any of these questions is no, a prosecutor is going to have a difficult time obtaining a conviction, regardless of how strong the evidence of guilt is.

At the end of the day, a police officer's job is to investigate crimes and make arrests.²⁷ They do not have the same incentives as prosecutors to ensure that arrests, confessions, and searches are constitutional.²⁸ Therefore, "respect for their prosecutorial coworkers plays a critical role in ensuring that an arrest turns into a conviction."²⁹ Without that respect, police officers don't

²¹ Jason Supplee, *Police Officer to Prosecutor: The Benefits and Challenges of a Career Move*, ABA FOR LAW STUDENTS (Aug. 14, 2018), <https://abaforlawstudents.com/2018/08/14/police-officer-to-prosecutor-the-benefits-and-challenges-of-a-career-move>.

²² See Levine, *supra* note 12, at 1466.

²³ U.S. CONST. amend. IV; see Levine, *supra* note 12, at 1466.

²⁴ U.S. CONST. amend. XIV; see, e.g., *Aschraft v. Tennessee*, 322 U.S. 143, 145-47 (1994).

²⁵ *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966); see Levine, *supra* note 12, at 1466.

²⁶ *Miranda*, 384 U.S. at 444.

²⁷ Levine, *supra* note 12, at 1467.

²⁸ *Id.*

²⁹ *Id.*

have the same incentive to try as hard to abide by constitutional safeguards because, at the end of the day, after the arrest, their primary job is done.

Prosecutors are required to turn over certain documents to the defense as part of discovery.³⁰ This includes, but is not limited to, statements made by the defendant to a police officer, police reports, police notes, and body-worn-camera footage,³¹ most of which is in the possession of the police officers who responded to the scene or conducted the interview. Prosecutors are obligated to turn over these documents no later than fifteen days after the defendant's arraignment.³² They also must submit a certificate of compliance stating that they have turned over all known discoverable materials.³³ If the prosecutor fails to turn over these documents within fifteen days or fails to submit a certificate of compliance, they cannot be deemed ready for trial, and their case may be dismissed.³⁴ Therefore, prosecutors rely on the police to turn over these documents in a timely matter.

Finally, prosecutors rely on police for their testimony.³⁵ When it comes to prosecutors having a desire to foster good working relationships with the police, testimony is arguably the most important piece. Prosecutors rely on police testimony in various stages including the grand jury, hearings, and trials.³⁶ However, it is not as simple as an officer getting on the stand and recounting what happened. There are many scenarios where a bad relationship between an officer

³⁰ See N.Y. CRIM. PRO. LAW 245.20 (McKinney 2020).

³¹ *Id.*

³² N.Y. CRIM. PRO. LAW 245.10 (McKinney 2020). The time period may be stayed up to an additional thirty days when the materials are exceptionally voluminous or are not in the actual possession of the prosecution, despite diligent, good faith efforts. *Id.*

³³ CENTER FOR COURT INNOVATION, DISCOVERY REFORM IN NEW YORK SUMMARY OF MAJOR LEGISLATIVE PROVISIONS, https://www.courtinnovation.org/sites/default/files/media/document/2019/Discovery_NYS-Summary.pdf.

³⁴ *Id.*

³⁵ See Supplee, *supra* note 21.

³⁶ See, e.g., Robertson, *supra* note 11, at 866-67; Levine, *supra* note 12, at 1469; Supplee, *supra* note 21.

and a prosecutor can lead to detrimental consequences in a prosecutor's case.³⁷ For example, sometimes a prosecutor must ask confrontational questions on direct examination if an officer has an admissible disciplinary record.³⁸ If the prosecutor does not bring it up, the defense attorney will surely bring it up on cross examination and then it will look like the prosecutor or the police officer was trying to hide it.³⁹ However, if the prosecutor and the police officer do not have a good working relationship, this line of questioning may cause the police officer to become defensive or angry.⁴⁰ Further, "numerous assistant district attorneys have reported at least one or two cases that grand jurors rejected in part because of 'the attitude or incompetence of the primary police witness.'"⁴¹ Therefore, it is imperative that prosecutors maintain a good working relationship with police officers to ensure their cases are not negatively impacted.⁴²

B. *Political and Financial Support*

District attorneys are elected in forty-five states, including New York.⁴³ It is not uncommon for police organizations to contribute to political campaigns of district attorneys.⁴⁴ "[P]olice associations from San Jose and Los Angeles donated nearly \$600,000 to DA's during 2018 elections in the Bay Area, including Alameda District Attorney Nancy O'Malley."⁴⁵ Most notably, Fremont's police union donated \$10,000 to her re-election campaign while her office was

³⁷ See, e.g., Robertson, *supra* note 11, at 866-67; Levine, *supra* note 12, at 1469.

³⁸ Levine, *supra* note 12, at 1469.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Robertson, *supra* note 11, at 866.

⁴² See *id.* at 867.

⁴³ FAIR AND JUST PROSECUTION, ELECTED PROSECUTORS FILE STATE SUPREME COURT BRIEF IN SUPPORT OF NEW TRIAL FOR INNOCENT MAN BEHIND BARS (Feb. 10, 2020), <https://fairandjustprosecution.org/wp-content/uploads/2020/02/Johnson-SC-Amicus-Brief-Release.pdf>; Evan Hughes, *America's Prosecutors were Supposed to Be Accountable to Voters. What Went Wrong?*, POLITICO (Nov. 5, 2017), <https://www.politico.com/magazine/story/2017/11/05/cyrus-vance-jr-americas-prosecutor-problem-215786>.

⁴⁴ Gebreyes, *supra* note 20. Jamiles Lartey, a reporter for The Guardian, stated that "police unions, fraternal orders, all of these different police organizations are fairly common contributors to the political campaigns of prosecutors." *Id.*

⁴⁵ TCR Staff, *Police and Prosecutors: An 'Unholy Union'?*, CRIME REPORT (Sept. 25, 2019), <https://thecrimereport.org/2019/09/25/police-and-prosecutors-too-close-for-comfort>.

investigating three of their officers' actions in the fatal shootings of two separate people.⁴⁶ All three officers were later cleared of wrongdoing.⁴⁷

The Sacramento District Attorney Anne Marie Schubert also faced scrutiny for certain campaign contributions.⁴⁸ In 2018, she received \$10,000 from the California Statewide Law Enforcement Association just two days after police shot and killed Stephon Clark, an unarmed black man, and \$3,000 from another police union, the Sacramento County Alliance of Law Enforcement, three days later.⁴⁹ Nearly a year later, District Attorney Schubert announced that the officers responsible for Clark's death would not face criminal charges.⁵⁰

Police unions also hold large political influence over the elections of their local district attorneys, even without making financial donations.⁵¹ “When a powerful police union charges that a politician is ‘soft on crime,’ that candidate's chances for election or reelection can be dramatically reduced.”⁵² Therefore, if a district attorney's office chooses to prosecute police-defendants, the district attorney will likely face the possibility that he or she will not be reelected if she crosses the powerful police unions.⁵³

⁴⁶ Joseph Geha, *Conflict of Interest? DA Accepted \$10,000 Donation from Fremont Cops While Investigating Them*, MERCURY NEWS (Mar. 20, 2018), <https://www.mercurynews.com/2018/03/20/da-accepted-10000-donation-from-fremont-cops-while-investigating-them>.

⁴⁷ *Id.*

⁴⁸ See Shaun King, *Law Enforcement Groups Gave \$420,000 to DA Deciding Whether to Bring Charges Against Cops Who Killed Stephon Clark*, INTERCEPT (Apr. 25, 2018), <https://theintercept.com/2018/04/25/stephon-clark-police-shooting-district-attorney>; see also Darrell Smith, *DA Gets \$13,000 from Police Union – and More Protests – Days After Stephon Clark's Death*, SACRAMENTO BEE (Apr. 6, 2018), <https://www.sacbee.com/news/local/article207924559.html>.

⁴⁹ King, *supra* note 48.

⁵⁰ *No Criminal Charges for Sacramento Police Officers who Fatally Shot Stephon Clark*, NPR (Mar. 2, 2019), <https://www.npr.org/2019/03/02/699719214/officers-in-stephon-clark-shooting-wont-be-charged-says-sacramento-d-a>.

⁵¹ See Levine, *supra* note 12, at 1476.

⁵² Peter L. Davis, *Rodney King and the Decriminalization of Police Brutality in America: Direct and Judicial Access to the Grand Jury as Remedies for Victims of Police Brutality when the Prosecution Declines to Prosecute*, 53 MD. L. REV., 271, 282 (1994).

⁵³ See Levine, *supra* note 12, at 1476-77.

III. CONFLICT OF INTEREST IN PROSECUTING CASES OF POLICE MISCONDUCT

Not only does a conflict of interest between the district attorney's office and the police officer being prosecuted create a risk that the officer will not be held accountable for his actions, an actual or perception of bias undermines the public's confidence and trust in the criminal justice system.⁵⁴ Subpart A discusses the prosecution of police officers,⁵⁵ Subpart B discusses the ethical issue of conflict of interest, both generally as well as in the context of police prosecution,⁵⁶ Subpart C addresses the impact the perception of bias has on our system of criminal justice,⁵⁷ and Subpart D addresses the affect the perception of bias has on local communities by undermining their trust in the system.⁵⁸

A. *Prosecuting their Partners*

As discussed in Part II, the prosecutors in the district attorney's office work closely with police officers on a regular basis.⁵⁹ When those police officers are accused of police misconduct, the district attorney's office is tasked with prosecuting them.⁶⁰ It is absurd to ask prosecutors to "simply switch roles from ally to adversary the moment an officer is accused of criminal wrongdoing."⁶¹

When the district attorney's office handles cases of police misconduct, there is a risk that they will decline to prosecute police due to a conflict of interest rather than lack of evidence or lack of guilt.⁶² A study regarding the prosecution of police officers involved in police misconduct

⁵⁴ N.Y. Exec. Order No. 147.

⁵⁵ *See infra* Part III.A.

⁵⁶ *See infra* Part III.B.

⁵⁷ *See infra* Part III.C.

⁵⁸ *See infra* Part III.D.

⁵⁹ *See supra* Part II.A.

⁶⁰ *See, e.g.,* Benner, *supra* note 6.

⁶¹ *See* Levine, *supra* note 12, at 1471.

⁶² *See, e.g.,* Kami Chavis Simmons, *Ferguson and Beyond: Increasing Police Accountability: Restoring Trust and Legitimacy Through the Appointment of Independent Prosecutors*, 49 WASH. U. J.L. & POL'Y 137, 139 (2015).

was conducted from April 2009 to December 2010.⁶³ During that time, 8,300 credible reports were filed against nearly 11,000 law enforcement officers.⁶⁴ However, only 3,238 resulted in criminal charges, of which only 1,063 resulted in a conviction.⁶⁵

When looking at the data specific to excessive force cases, the results are similar.⁶⁶ The study found that during the same time period 2,716 officers were accused of using excessive force.⁶⁷ However, only about 200 of those officers were actually charged, and of those charged, only seventy-seven were actually convicted.⁶⁸ Most significantly, out of all the excessive force cases, 430 were accused of killing a person using excessive force, yet only thirty of those officers were charged, and only half of those thirty were actually convicted.⁶⁹ This data makes it clear that the conflict of interest is interfering with the district attorney's office's ability to objectively ensure that justice is served in these cases.

If you look back at the Introduction section of this Paper, you'll see that it was in fact the grand jury that declined to indict Daniel Pantaleo for the death of Eric Garner.⁷⁰ Some may argue that it "would be wrong to blame the prosecutor for the grand jury's decision not to indict. It is ultimately up to the grand jury to decide the officer's fate, and it is not the prosecutor's fault if a

⁶³ *Id.* at 146 (citing David Packman, *2010 NPMSRP Police Misconduct Statistical Report – Draft*, CATO INST. (Apr. 5, 2011), <http://www.policemisconduct.net/2010-npmsrp-police-misconduct-statistical-report>).

⁶⁴ *Id.*; Reuben Fischer-Baum, *Allegations of Police Misconduct Rarely Result in Charges*, FIVETHIRTYEIGHT (Nov. 25, 2014), <https://fivethirtyeight.com/features/allegations-of-police-misconduct-rarely-result-in-charges>.

⁶⁵ Simmons, *supra* note 62, at 146; Fischer-Baum, *supra* note 64.

⁶⁶ Simmons, *supra* note 62, at 147.

⁶⁷ *Id.* (citing Adeshina Emmanuel, *Indictments, Convictions of Police Officers in Civilian Deaths Rare*, CHI. REP. (Nov. 6, 2014), <https://www.chicagoreporter.com/indictments-convictions-police-officers-civilian-deaths-rare>).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See *supra* text accompanying note 8.

jury gives the officer the benefit of the doubt.”⁷¹ However, police officer-defendants often receive differential treatment at the grand jury stage than their civilian-defendant counterparts.⁷²

As previously mentioned, just as Eric Garner was neither the first nor the last unarmed black man to have a fatal encounter with the police, Daniel Pantaleo was neither the first nor the last officer to avoid charges after such an encounter occurred.⁷³ Less than one month later, Michael Brown, an eighteen-year-old unarmed black man, was fatally shot by a white police officer in Ferguson, Missouri.⁷⁴ A grand jury declined to indict him.⁷⁵ In that case, the prosecutor treated the grand jury proceedings like a trial, with his presentation spanning three months and involving over seventy hours of testimony, which is uncommon and a typical civilian-defendant would arguably not receive such treatment.⁷⁶ The prosecutor called more than sixty witnesses, including the defendant himself, which is extremely rare in grand jury proceedings.⁷⁷ The transcripts of the grand jury proceedings show that the prosecutor assertively questioned potential prosecution witnesses by probing to find prior inconsistent statements, almost taking on the role of a defense attorney rather than a prosecutor.⁷⁸ Lastly, the prosecutor never suggested what charges the grand jury

⁷¹ Simmons, *supra* note 62, at 155. Heather MacDonald, *District Attorneys Have Shown They Can Prosecute Police*, N.Y. TIMES (Apr. 28, 2015), <https://www.nytimes.com/roomfordebate/2014/12/04/do-cases-like-eric-garners-require-a-special-prosecutor/district-attorneys-have-shown-they-can-prosecute-police>.

It is wrong to blame the prosecutor when juries decide not to indict or convict an officer. That judgment represents the jury’s understanding that officers’ good faith decisions, made instantaneously in difficult circumstances, should be given the benefit of the doubt and not criminalized, even when the outcome of an officer’s discretion results in an unintended tragedy like Eric Garner’s death.

Id.

⁷² Robertson, *supra* note 11, at 857.

⁷³ See *supra* text accompanying note 10.

⁷⁴ Jake Halpern, *Darren Wilson Was Not Indicted for Shooting Michael Brown. Many People Question Whether Justice Was Done.*, NEW YORKER (Aug. 3, 2015), <https://www.newyorker.com/magazine/2015/08/10/the-cop>.

⁷⁵ *Id.*

⁷⁶ See Robertson, *supra* note 11, at 876; Colin Taylor Ross, *Policing Pontius Pilate: Police Violence, Local Prosecutors, and Legitimacy*, 53 HARV. J. ON LEGIS. 755, 763 (2016).

⁷⁷ See Robertson, *supra* note 11, at 876.

⁷⁸ Victoria Knott, *Reconsidering the Use of the Grand Jury: Eliminating Prosecutorial Discretion to Indict Law Enforcement Officers*, 38 T. JEFFERSON L. REV. 202, 225 (2016).

should consider, which is unusual behavior for a prosecutor.⁷⁹ Overall, it is clear that the prosecutor's actions throughout the grand jury proceedings display, at a minimum, preferential treatment towards police officer-defendants over civilian-defendants.⁸⁰ Nearly all cases presented to grand juries result in indictments when the defendant is a civilian,⁸¹ and yet the failure to indict has become a routine outcome for cases where the defendant is a police officer.⁸²

B. *Conflict of Interest*

When prosecutors go from allies to adversaries, there is a clear conflict of interest. The question is whether this violates any ethical rules. All fifty states and the District of Columbia have adopted a version of the Model Rules of Professional Conduct.⁸³ The rules cover a wide range of conduct, but the only rule that specifically addresses the behavior of prosecutors is rule 3.8: Special Responsibilities of a Prosecutor.⁸⁴ Rule 3.8 fails to address relations with the police.⁸⁵ It also fails to address any conflict of interest.

When looking at the Model Rules of Professional Conduct, the rule that generally discusses conflicts of interest is rule 1.7.⁸⁶ However, rule 1.7 deals with conflicts of interest with private lawyers who represent clients, not prosecutors representing the People.⁸⁷ Rule 1.7 states:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more

⁷⁹ *Id.* at 226.

⁸⁰ *See id.*

⁸¹ Robertson, *supra* note 11, at 866.

⁸² Ross, *supra* note 76, at 764.

⁸³ Michael E. McCabe, Jr., *Seeking National Uniformity, California (Finally Adopts New Ethics Rules)*, MCCABE LAW (May 11, 2018), <https://www.ipethicslaw.com/seeking-national-uniformity-california-finally-adopts-new-ethics-rules>; Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 282 (2007).

⁸⁴ MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 1983); McCabe, Jr, *supra* note 83, at 282.

⁸⁵ Davis, *supra* note 83, at 284.

⁸⁶ MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N 1983).

⁸⁷ *Id.*

clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.⁸⁸

Such a rule cannot be easily applied to the role of a prosecutor. First, provision (1) will never apply as the representation of one client will never be directly adverse to another considering there is only one ongoing client: the People.⁸⁹ Again, with provision (2), there is no risk that the lawyer's responsibilities will be materially limited by their responsibilities to another client or former client, as they do not have any. One could argue that the prosecutor has a personal interest in maintaining a good relationship with the police officers; however, the real conflict of interest is that the office as a whole has an interest in maintaining a good relationship with the police officers.⁹⁰ Therefore, rule 1.7 does not adequately address the ethical issue at hand. As a result, the district attorney's office is free to continue prosecuting, or in reality, neglecting to prosecute police officers charged with misconduct without issue.⁹¹ While this Paper only focuses on solutions for the actual prosecution of cases, it is worth noting that an additional Model Rule of Professional Conduct relating to this issue, or an amendment to an existing rule, might be a potential solution worth looking into as well.⁹²

C. *Perception of Bias*

The Supreme Court has stated that “what matters is not the reality of bias or prejudice but its appearance.”⁹³ Perhaps some of those 8,300 credible reports where officers were accused of misconduct but did not lead to an officer being charged was not because of a conflict of interest, but because of lack of evidence or some other valid reason. The problem is that, because these

⁸⁸ *Id.*

⁸⁹ CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, The Client of the Prosecutor § 3-1.3 (4th ed. 2017).

⁹⁰ *See supra* Part II.

⁹¹ MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 1983). “It is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct.” *Id.*

⁹² *See infra* Part IV.

⁹³ *Liteky v. United States*, 510 U.S. 540, 548 (1994).

investigations and decisions are made behind closed doors, the perception of bias will always exist.⁹⁴ For example, perhaps the investigation into the death of Stephon Clark⁹⁵ revealed that the officer's use of force really was justified. The payments from the police unions to District Attorney Schubert⁹⁶ as well as the general relationship between the police and the district attorney's office create a perception of bias that will prevent the public from ever believing that a fair and just result was achieved, whether that is true or not.⁹⁷ The public's thought process imaginably looks something like this:

In what universe would she ever hold them accountable? Ever? Any reasonable person would understand that all of these donations and loans from the law enforcement community create the appearance of a serious conflict of interest for a district attorney. How in the world is a prosecutor ever supposed to be objective in the pursuit of justice when it comes to police misconduct if the votes and money from those very officers helped them get into office?⁹⁸

D. Undermining Public Trust in the System

As a result of the perception of bias, comes the consequence of a loss of trust in the criminal justice system as a whole.⁹⁹ “As one commentator noted regarding the deaths of Brown and Garner, ‘broad 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.’”¹⁰⁰ Prosecutors are meant to serve as ministers of justice.¹⁰¹ However, there is currently a public perception that white police officers are not being held accountable by prosecutors—a poll conducted in 2014 found that only

⁹⁴ See Levine, *supra* note 12, at 1482.

⁹⁵ See *supra* text accompanying note 49.

⁹⁶ See *supra* text accompanying notes 48-50.

⁹⁷ King, *supra* note 48.

⁹⁸ *Id.*

⁹⁹ See Simmons, *supra* note 62, at 147-48.

¹⁰⁰ *Id.* at 148 (citing Walter Katz, *Enhancing Accountability and Trust with Independent Investigations of Police Lethal Force*, 128 HARV. L. REV. 235, 236-37 (2015)).

¹⁰¹ See, e.g., Levine, *supra* note 12, at 1482 (noting the “prosecutor’s role as a minister of justice”).

37 percent of people believed that the criminal justice system could be trusted to deal with police officer-defendants.¹⁰²

Not only does police brutality directly have a disproportionate impact on racial minorities, as black men are 2.5 times more likely to be killed by police during their lifetime than white men,¹⁰³ the indirect impact also disparately impacts minorities by undermining their trust in the criminal justice system.¹⁰⁴ When the white officers responsible for killing unarmed black men are not criminally charged, we are painting a picture for the black members of our community of “white officers escaping judgment for the killing of black victims.”¹⁰⁵ These often are the same prosecutors responsible for putting thousands of minorities in prison.¹⁰⁶ It is easy to understand why these minority communities who are disproportionately affected by mass incarceration¹⁰⁷ would be enraged to see those responsible for the death of their family members, friends, and community members walk free, when those same prosecutors have no trouble incarcerating members of their community for much less. By allowing the district attorney’s office to prosecute the same officers that they work closely with on a daily basis, we are causing further damage to these communities’ perception that the criminal justice system is fair.¹⁰⁸

¹⁰² *Id.* (citing Peter Moore, *Poll Results: Police*, YOUGov (Aug. 14, 2014), <https://today.yougov.com/topics/politics/articles-reports/2014/08/14/poll-results-police>).

¹⁰³ Kashmiria Gander, *Black Men are 2.5 Times More Likely to Be Killed by Police Over Their Lifetime than White Men*, NEWSWEEK (Aug. 5, 2019), <https://www.newsweek.com/black-men-2-5-times-more-likely-killed-police-white-men-1452549>.

¹⁰⁴ *See* Robertson, *supra* note 11, at 877-79.

¹⁰⁵ Levine, *supra* note 12, at 1481.

¹⁰⁶ *Id.* at 1482.

¹⁰⁷ Robertson, *supra* note 11, at 877.

¹⁰⁸ *Id.* at 879.

IV. CASES OF POLICE MISCONDUCT SHOULD BE APPOINTED TO AN INDEPENDENT
PROSECUTOR

Whether there is an actual conflict of interest or merely a perception of bias, the most beneficial solution is to appoint an independent, special prosecutor.¹⁰⁹ “Automatically removing a local prosecutor spares her from having to balance the public's desire for police accountability and the police officers' indignation at being over-scrutinized, thus preserving the local prosecutor's relations with both her constituency and law enforcement partners.”¹¹⁰ Subpart A will discuss the various options for determining who should be the independent prosecutor, while analyzing the benefits and drawbacks of each option.¹¹¹ Subpart B will discuss the logistics of which types of cases the independent prosecutor should have jurisdiction over.¹¹² Subpart C will discuss the general arguments against the appointment of an independent prosecutor.¹¹³

A. *Who Should Be the Independent Prosecutor?*

1. Prosecution by the State Attorney General's Office

While the Richmond County grand jury's decision not to indict Daniel Pantaleo caused quite the uproar, some good did come out of it.¹¹⁴ Following this decision, former New York State Attorney General Eric Schneiderman called upon Governor Andrew Cuomo to name him special prosecutor for incidents of police-involved deaths of unarmed civilians.¹¹⁵ On July 8th, 2015,

¹⁰⁹ Justin L. Amos, *Who Watches the Watchers?*, 50 NEW ENG. L. REV. 319, 338 (2016).

¹¹⁰ Robertson, *supra* note 11, at 867.

¹¹¹ See *infra* Part IV.A.

¹¹² See *infra* Part IV.B.

¹¹³ See *infra* Part IV.C.

¹¹⁴ “The December 2014 failure of a Staten Island grand jury to indict Daniel Pantaleo, the officer who had placed Garner in a deadly chokehold, had sparked a public outcry, and Black Lives Matter protests erupted across the country.” Rachel Silberstein, *How Cuomo's Special Prosecutor Order Is Playing Out, 19 Months Later*, GOTHAM GAZETTE (Feb. 27, 2017), <https://www.gothamgazette.com/state/6778-while-cuomo-s-special-prosecutor-order-continues-calls-for-permanency-remain>.

¹¹⁵ Silberstein, *supra* note 114.

Governor Cuomo issued an executive order doing just that.¹¹⁶ Governor Cuomo’s executive order addresses the public’s concern that incidents involving the deaths of unarmed civilians cannot be prosecuted by local district attorney’s offices without conflict or bias, or the perception thereof.¹¹⁷

However, this executive order has yet to be codified into law.¹¹⁸ Executive orders are not permanent, and advocates and victims’ families have been pushing for this executive order to be written into law to ensure cases of police misconduct are permanently brought under the attorney general’s jurisdiction.¹¹⁹ If this proposal were to be codified into law, it would establish an Office of Special Investigation within the Office of the Attorney General in New York State to investigate and, where necessary, prosecute police officers involved in the deaths of civilians.¹²⁰ This solution is beneficial because it provides a centralized office to investigate and prosecute these crimes, whereas the latter two solutions that will be discussed in Subparts 2¹²¹ and 3¹²² are still investigating and prosecuting various other types of crimes.¹²³

The main drawback of appointing the attorney general as the independent prosecutor is that the state attorney general generally lacks the expertise and exposure to the criminal justice system necessary to prosecute cases of police misconduct.¹²⁴ “[T]he vast majority of the Attorney General’s criminal prosecutorial powers were constrained to financial schemes such as securities

¹¹⁶ N.Y. Exec. Order No. 147 (Jul. 8, 2015), <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/old-files/EO147.pdf>.

¹¹⁷ N.Y. Exec. Order No. 147.

¹¹⁸ *Governor Cuomo Calls on Legislature to Codify Executive Order Establishing Special Prosecutor in Cases Where Law Enforcement Officers Are Involved in Deaths of Civilians into State Law*, N.Y. STATE GOVERNOR (Jun. 3, 2019), <https://www.governor.ny.gov/news/governor-cuomo-calls-legislature-codify-executive-order-establishing-special-prosecutor-cases>. As of this writing, New York Senate Bill S.2574A, which is designed to codify the executive order and establish an Office of Special Investigation, is in committee. S.2574A, 2019-2020 Leg. Sess., (N.Y. 2019); *Senate Bill S2574A*, N.Y. STATE S., <https://www.nysenate.gov/legislation/bills/2019/S2574> (last visited Jun. 3, 2020).

¹¹⁹ Silberstein, *supra* note 114.

¹²⁰ See N.Y. STATE GOVERNOR, *supra* note 118.

¹²¹ See *infra* Part IV.A.2.

¹²² See *infra* Part IV.A.3.

¹²³ See Levine, *supra* note 12, at 1490.

¹²⁴ Isaac G. Lara, *Shielded from Justice: How States Attorneys General Can Provide Structural Remedies to the Criminal Prosecutions of Police Officers*, 50 COLUM. J.L. & SOC. PROBS. 551, 571-72 (2017).

fraud, money laundering, and consumer fraud conspiracies.”¹²⁵ On the other hand, prosecutors have historically been tasked with handling cases involving police misconduct, both fatal and non-fatal.¹²⁶ Therefore, the district attorney’s office is the more competent option to handle these cases as they are more familiar with the evidentiary standards that need to be met in order to convict police officers.¹²⁷

2. Prosecution by a Different County’s District Attorney’s Office

One alternative to creating an Office of Special Investigation within the Attorney General’s Office to investigate police cases is removal to a district attorney’s office from a different jurisdiction in the state.¹²⁸ This alternative is likely the most cost efficient and simplistic as it does not require creating any new agencies or any further training.¹²⁹ Contrary to the attorney general’s office, who may be unfamiliar with prosecuting these types of cases, no extra training would be necessary for the district attorney’s office in a different jurisdiction in the same state to take on this role.¹³⁰

However, this solution might not do much to solve the issue of a perception of bias or conflict of interest. In a state such as New York, the NYPD works with several district attorney’s offices on a regular basis, and therefore, even moving a case to a neighboring district attorney’s office might not make a difference.¹³¹ Further, these prosecutors may have developed a partiality

¹²⁵ *Id.* at 571.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Levine, *supra* note 12, at 1488.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ See, e.g., *Detectives, N. Y. CITY POLICE DEP’T*, <https://www1.nyc.gov/site/nypd/bureaus/investigative/detectives.page> (last visited Apr. 25, 2020). NYPD Detectives work in Manhattan, the Bronx, Queens, Staten Island, and Brooklyn. *Id.*

in favor of law enforcement generally that is likely to lead to a conflict of interest or perception of bias, even if they do not work with those same police officers on a day-to-day basis.¹³²

3. Prosecution by Federal Prosecutors

The final alternative is to appoint federal prosecutors as independent prosecutors for cases where police are involved in civilian fatalities. The main benefit to this solution is that, because they work at the federal level, they are generally not beholden to local police in the way that state prosecutors are.¹³³ They are also appointed, rather than elected, so there is an appearance of impartiality due to political insulation that the district attorney's office and the state attorney general's office both do not have.¹³⁴ Nonetheless, there are many concerns with this solution. First, because federal prosecutors are not elected, they are not directly answerable to the local communities that are being affected by this issue, which may lead to insensitivity to community rights and values.¹³⁵ "Federal prosecutors are less likely than their local counterparts to serve as sources of accountability for police brutality."¹³⁶ Secondly, federal prosecutors would require training in state criminal law and evidentiary rules given that they practice in federal court;¹³⁷ although not a major ordeal, it would take some time and money. Finally, the federal system deals with many of the same class and race problems that the local criminal justice systems deal with, so there is no saying that federal prosecutors will be any more inclined to prosecute a white police officer for the death of an unarmed black man than a state prosecutor would be.¹³⁸

¹³² Levine, *supra* note 12, at 1489.

¹³³ *Id.* at 1491.

¹³⁴ Robertson, *supra* note 11, at 882.

¹³⁵ Levine, *supra* note 12, at 1492.

¹³⁶ Asit S. Panwala, *The Failure of Local and Federal Prosecutors to Curb Police Brutality*, 30 FORDHAM URB. L.J. 639, 657 (2003).

¹³⁷ Levine, *supra* note 12, at 1492.

¹³⁸ *See id.*

B. *Which Types of Police Misconduct Should Be Appointed to an Independent
Prosecutor?*

Once it is decided who will handle the cases, the next question to decide is which types of cases will the independent prosecutor have jurisdiction over? There are four main options: all cases of police misconduct, all cases involving excessive use of force, all cases involving civilian fatalities, or only those cases of officer-involved fatalities where the citizen was unarmed. There is no doubt that nonviolent forms of police misconduct, such as perjury, are prevalent, perhaps even more prevalent than police brutality.¹³⁹ There is commonly an unwritten code within the walls of the police department which prevents police officers from testifying truthfully on the stand if it would implicate problematic conduct of a fellow officer.¹⁴⁰ However, the idea that police can use excessive force without facing repercussions is a much more pressing issue to the public, and therefore should be the primary concern of removal to an independent prosecutor.¹⁴¹

“There is a broad range of injuries between a suspect’s broken wrist and an officer-involved fatality.”¹⁴² Therefore, the next question is whether cases should be removed to an independent prosecutor in all cases of excessive force or only in cases involving the death of a civilian. The answer to this question will likely vary from area to area based on size and needs.¹⁴³ With that being said, to ensure that justice is served in cases of officer-involved fatalities, it may be best to start by limiting jurisdiction only to those cases of officer-involved fatalities, and to continue to

¹³⁹ See Robertson, *supra* note 11, at 884; Joseph Goldstein, ‘Testilying’ by Police: A Stubborn Problem, N.Y. TIMES (Mar. 18, 2018), <https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html> (noting an investigation which found that on more than twenty-five occasions between January 2015 and March 2018 a key aspect of an NYPD officer’s testimony was untrue).

¹⁴⁰ Robertson, *supra* note 11, at 884 (citing 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, 237, 240 (1998)). See also Goldstein, *supra* note 139.

¹⁴¹ Robertson, *supra* note 11, at 884.

¹⁴² *Id.*

¹⁴³ *Id.* at 885.

allow the district attorney's office to prosecute all other cases of police misconduct for the time being. This will allow the independent prosecutor to focus their resources on the most serious cases in which police kill civilians.¹⁴⁴

The final question is whether cases should be removed to an independent prosecutor only in cases whether the civilian was unarmed. The executive order issued by Governor Cuomo limited the appointment of the attorney general as special prosecutor to cases involving the death of an unarmed civilian, or where there is significant question as to whether the civilian was armed at the time of their death.¹⁴⁵ However, since this executive order was enacted, critics have argued that the order is too narrow, and that the scope should be broadened to allow the attorney general to have jurisdiction over all cases of excessive use of force, whether the deceased was armed or not.¹⁴⁶ To demonstrate why the scope should be broadened, take the case of Deborah Danner, a sixty-six-year-old emotionally disturbed woman who was fatally shot in a confrontation with an NYPD officer in October 2016.¹⁴⁷ The attorney general's office determined that the case did not fall under its jurisdiction because she was holding a baseball bat during the confrontation; therefore, the case was left to be handled by the Bronx County District Attorney's Office.¹⁴⁸ Overall, the scope should be expanded to all cases in which an officer kills a civilian, because even in cases in which a civilian is "armed," the fatality may not necessarily be justified and an independent investigation from an objective source is required.¹⁴⁹

¹⁴⁴ *Id.* at 884.

¹⁴⁵ *See supra* text accompanying notes 115-116.

¹⁴⁶ Silberstein, *supra* note 114.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* The NYPD officer responsible for Deborah Danner's death, Hugh Barry, was indicted and charged with murder by the Bronx District Attorney's Office. John Annese & Thomas Tracy, *NYPD Sergeant Acquitted in Mentally Ill Bronx Woman's Shooting Death Returns to Work*, Daily News (Mar. 1, 2018), <https://www.nydailynews.com/new-york/bronx/nypd-sergeant-acquitted-bronx-woman-killing-returns-work-article-1.3849037>. He was later acquitted and returned to working as an NYPD officer. *Id.*

¹⁴⁹ Silberstein, *supra* note 114.

C. Arguments Against Appointing an Independent Prosecutor

Police power and crime control has generally been a local matter throughout United States history.¹⁵⁰ In New York, there are sixty-two counties and each has a district attorney elected to serve and enforce the law in that local area.¹⁵¹ The main argument against appointing an independent prosecutor, in any form, is that it strips the elected district attorney of power to serve their community.¹⁵² Former District Attorney “Ken Thompson of Brooklyn said he and his counterparts would be ‘robbed’ of their right to enforce the law locally.”¹⁵³ Further, by appointing an independent prosecutor, the district attorney’s office is essentially conceding that their office is incapable of handling those cases and fulfilling its mission, thereby sending a message of illegitimacy to its constituents.¹⁵⁴ Part of the entire issue of this conflict of interest and perception of bias is that it undermines the trust in the criminal justice system.¹⁵⁵ If appointing an independent prosecutor may lead the public to question the district attorney’s office’s legitimacy, perhaps we are doing more harm than good. However, we are only removing cases to an independent prosecutor in a very small number of instances, and overall the public will likely gain more trust in seeing that the district attorney’s office is taking action to acknowledge the perception of bias rather than being concerned that they are losing any legitimacy.¹⁵⁶

¹⁵⁰ Rukiya Mohamed, *Death by Cop: The Lessons of Ferguson Prove the Need for Special Prosecutors*, 59 HOW. L.J. 271, 289 (2015).

¹⁵¹ *About Us*, DISTRICT ATTORNEYS ASS’N OF THE ST. OF N.Y., <http://www.daasny.com> (last visited Apr. 15, 2020).

¹⁵² Mohamed, *supra* note 150, at 282. “[R]equiring special prosecutors in these cases improperly wrests control from local officials elected by the communities they serve.” Robertson, *supra* note 11, at 856.

¹⁵³ Jon Swaine et al., *Ties That Bind*, GUARDIAN (Dec. 31, 2015), <https://www.theguardian.com/us-news/2015/dec/31/ties-that-bind-conflicts-of-interest-police-killings>.

¹⁵⁴ Mohamed, *supra* note 150, at 288-89.

¹⁵⁵ *See supra* Part III.D.

¹⁵⁶ *See* Mohamed, *supra* note 150, at 290.

V. CONCLUSION

While the use of an independent, special prosecutor is certainly not going to solve the problem of police brutality entirely, removing the conflict of interest that is inherent when the district attorney's office prosecutes local law enforcement will help ensure that police officers are held accountable.¹⁵⁷ It is also an important step towards rebuilding trust many communities are currently lacking in police, prosecutors, and the criminal justice system as a whole.¹⁵⁸ In order to ensure that the system is fair and just, assistant district attorneys must step back and allow an unbiased, neutral prosecutor to investigate cases of police involved fatalities.¹⁵⁹

¹⁵⁷ See Knott, *supra* note 78, at 205. "The inherent conflict of interest between prosecutors and police officers means officers are not always held accountable for their wrongful and illegal conduct." *Id.*

¹⁵⁸ See Simmons, *supra* note 62, at 157-58.

¹⁵⁹ *Id.*