

# Shielded from Justice: How State Attorneys General Can Provide Structural Remedies to the Criminal Prosecutions of Police Officers

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*The recent string of police shootings involving unarmed civilians has prompted national outcry over the actions of law enforcement officials. Many state and local law enforcement agencies today are reexamining the way prosecutors handle these incidents. In most jurisdictions today, District Attorneys are responsible for investigating such cases, which is problematic given the reciprocal relationship that exists between District Attorneys and law enforcement agencies. Specifically, District Attorneys rely on police officers to make arrests, interrogate suspects and testify at trial. In turn, police officers rely on District Attorneys to translate their arrests into convictions. This relationship creates a real or perceived conflict-of-interest, which can severely undermine public confidence in the criminal justice system.*

*State Attorneys General, however, may provide structural solutions to this problem. To illustrate this, this Note conducts a broad survey of the five major categories of actions that State Attorneys General can use during investigations into police shootings. This Note also offers recommendations as to how State Attorneys General can improve on current practices to ensure fair investigations and outcomes. Recommendations include appointing a special prosecutor from a different district; launching a conflict-of-interest inquiry; cooperating with the federal government in devising a national database of police shootings; and reexamining the legal parameters of the use of force.*

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## I. INTRODUCTION

Prosecutors' failures at persuading grand juries to indict police officers who have shot unarmed civilians have recently begun to attract national attention. Such non-indictments have resulted in severe public unrest and rioting in cities like Ferguson,<sup>1</sup> New York,<sup>2</sup> Baltimore,<sup>3</sup> and Chicago.<sup>4</sup> They have exacerbated and shone a spotlight on the severely damaged relations between communities and law enforcement, causing many states to reassess how they conduct police oversight. For example, the city councils of Seattle<sup>5</sup> and Sacramento<sup>6</sup> have passed sweeping legislation intended to reform the way their police departments discipline officers. Although there may be several explanations for this failure to reach indictments, this Note argues that structural solutions to the problem may be found in the relationships between state attorneys (henceforth known as "District Attorneys") and State Attorneys General.<sup>7</sup>

This Note is divided into four parts. Part II explores the challenges in bringing charges against a police officer who shoots an unarmed civilian. Part III discusses the various models adopted over time by states to prevent any real or perceived conflicts-of-interest that result when District Attorneys investigate police shootings within their own jurisdiction. Part IV discusses the curious case of New York, which adapted a hybrid model for involving the State Attorney General in the prosecution of local

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1. See *Ferguson Riots: Ruling Sparks Night of Violence*, BBC NEWS (Nov. 25, 2014), <http://www.bbc.com/news/world-us-canada-30190224> [https://perma.cc/U2PW-DLKU].

2. See Harrison Jacobs & Associated Press, *Eric Garner Protests Turn Violent in California*, BUS. INSIDER (Dec. 7, 2014, 8:23 AM), <http://www.businessinsider.com/eric-garner-protests-turn-violent-in-california-2014-12> [https://perma.cc/L7S5-2G83].

3. See Holly Yan & Dana Ford, *Baltimore Riots: Looting, Fires Engulf City After Freddie Gray's Funeral*, CNN (Apr. 28, 2015, 10:30 AM), <http://www.cnn.com/2015/04/27/us/baltimore-unrest/> [https://perma.cc/3B64-GMRH].

4. See Tony Briscoe, *Protesters Plan 'Black Christmas' March Along Mag Mile*, CHI. TRIB. (Dec. 23, 2015, 11:37 AM), <http://www.chicagotribune.com/news/local/breaking/ct-laquan-mcdonald-city-hall-protest-20151222-story.html> [https://perma.cc/R2MH-7YCZ].

5. See Steve Miletich, *Judge Allows Seattle Police Reforms to Move Forward, But with a Major Change*, SEATTLE TIMES (Jan. 6, 2017, 6:16 PM), <http://www.seattletimes.com/seattle-news/crime/judge-allows-seattle-police-reforms-to-move-forward-but-with-a-major-change/> [https://perma.cc/8M6Q-L822].

6. See Drew Bollea, *Sacramento City Council Passes Ordinance Reforming Police Use Of Force Policy*, CBS SACRAMENTO (Nov. 29, 2016, 10:06 PM), <http://sacramento.cbslocal.com/2016/11/29/sacramento-city-council-passes-ordinance-reforming-police-use-of-force-policy/> [https://perma.cc/7EZQ-545K].

7. For consistency, this Note uses the term "local prosecutors" interchangeably with "District Attorneys."

cases after facing intense political pressure. This hybrid model temporarily transfers authority over police shooting cases from District Attorneys to state attorneys general after District Attorneys first conduct a preliminary investigation. Part V discusses some recommended actions for State Attorneys General to take, which can help restore public trust in the criminal justice system while also ensuring procedural fairness in the investigation of police officers.

## II. THE CHALLENGES IN PROSECUTING POLICE OFFICERS

Recently, law enforcement agencies across the country have drawn criticism for their investigations of police shootings of unarmed black civilians.<sup>8</sup> In some cases, the problem has involved District Attorneys dragging their feet in bringing charges against police officers suspected of unlawfully using lethal force, as in the case of prosecutor Anita Alvarez, who took more than a year to return charges against the killer of Laquan McDonald, a mentally ill black youth.<sup>9</sup>

More often, though, District Attorneys simply fail to convince a grand jury that probable cause exists to indict officers in the first place. Examples of such failings include high-profile cases such as the killing of Tamir Rice,<sup>10</sup> Eric Garner,<sup>11</sup> Sandra Bland,<sup>12</sup>

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8. See Associated Press, *La. Police Face Criticism of McKnight Shooting Investigation*, SPECTRUM NEWS: ANTELOPE VALLEY (Dec. 3, 2016, 7:29 AM), <http://www.twcnews.com/ca/antelope-valley/news/2016/12/3/la--police-face-criticism-of-mcknight-shooting-investigation.html> [<https://perma.cc/D43A-UFPF>]; AirTalk, *Alton Sterling, Philando Castile police shootings reignite criticism of law enforcement*, 89.3 KPCC (July 7, 2016), <http://www.scpr.org/programs/airtalk/2016/07/07/50291/two-fatal-police-shootings-reignite-criticism-of-l/> [<https://perma.cc/8UZC-V3XB>]; Charles Thomas, *Alvarez Critics Question Handling of Police Shooting*, ABC7 CHI. (Nov. 19, 2015), <http://abc7chicago.com/politics/alvarez-critics-question-handling-of-police-shooting/1091981/> [<https://perma.cc/MF3W-R2ZB>].

9. See Leon Neyfakh, *Why Did It Take More Than a Year to Charge the Officer Who Shot Laquan McDonald*, SLATE (Nov. 25, 2015, 4:41 PM), [http://www.slate.com/articles/news\\_and\\_politics/crime/2015/11/laquan\\_mcdonald\\_kim\\_fox\\_on\\_why\\_anita\\_alvarez\\_mishandled\\_the\\_jason\\_van\\_dyke.html](http://www.slate.com/articles/news_and_politics/crime/2015/11/laquan_mcdonald_kim_fox_on_why_anita_alvarez_mishandled_the_jason_van_dyke.html) [<https://perma.cc/C6MA-M97H>] (explaining that a delay of 13 months to file charges was excessive and likely motivated by concerns of civil unrest, where there was a clear videotape, multiple eyewitnesses and available autopsy report, even with the extra due diligence required in a police shooting.).

10. See Ashley Fantz, Steve Almasy & Catherine E. Schoichet, *Tamir Rice shooting: No charges for officers*, CNN (Dec. 28, 2015, 7:22 PM), <http://www.cnn.com/2015/12/28/us/tamir-rice-shooting/> [<https://perma.cc/J4TW-PECG>].

11. Andrew Siff, Jonathan Dienst & Jennifer Millman, *Grand Jury Declines to Indict NYPD Officer in Eric Garner Chokehold Death*, NBC N.Y. (Dec. 3, 2014, 2:24 PM),

and Michael Brown.<sup>13</sup> This is surprising given the level of influence District Attorneys have over a grand jury. After all, when a grand jury convenes, District Attorneys decide what evidence is presented as well as which witnesses testify and even in what order.<sup>14</sup> In addition, prosecutors are not required to present exculpatory evidence to a grand jury,<sup>15</sup> and grand jury indictments may still be valid even if the evidence presented was illegally obtained.<sup>16</sup>

Such wide discretion by District Attorneys has led to the popular aphorism that a prosecutor could convince a grand jury to “indict a ham sandwich” if that is what he or she wanted.<sup>17</sup> In fact, according to the Bureau of Justice Statistics, of the 162,000 federal cases that United States Attorneys have prosecuted, grand juries have brought charges in all but 11 of them.<sup>18</sup> While this figure considers only federal prosecutors and not state and local District Attorneys, this may be because not all states employ grand juries when bringing forth charges against defendants since a grand jury is not required by the 5th Amendment.<sup>19</sup> Regardless, the high rate of success that federal prosecutors have in charging defendants with a crime supports the proposition that

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<http://www.nbcnewyork.com/news/local/Grand-Jury-Decision-Eric-Garner-Statens-Island-Chokehold-Death-NYPD-284595921.html> [https://perma.cc/ME4J-DHUH].

12. See Dana Ford & Ed Payne, *Grand jury decides against indictment in Sandra Bland's death*, CNN (Dec. 23, 2015, 12:02 AM), <http://www.cnn.com/2015/12/21/us/sandra-bland-no-indictments/> [https://perma.cc/D33P-HNVG].

13. See Erin McClam, *Ferguson Cop Darren Wilson Not Indicted in Shooting of Michael Brown*, NBC NEWS (Nov. 25, 2014, 2:21 AM), <http://www.nbcnews.com/storyline/michael-brown-shooting/ferguson-cop-darren-wilson-not-indicted-shooting-michael-brown-n255391> [https://perma.cc/AKJ2-5543].

14. See Peter F. Vaira, *The Role of the Prosecutor Inside the Grand Jury Room: Where Is the Foul Line*, 75 J. CRIM. L. & CRIMINOLOGY 1129, 1131 (1984).

15. See *United States v. Williams*, 504 U.S. 36, 49 (1992) (holding that defendant's trial right to receive material exculpatory evidence from prosecutors established in *Brady v. Maryland*, 373 U.S. 83 (1963) does not apply to grand jury proceedings).

16. See *United States v. Calandra*, 414 U.S. 338, 351–52 (1974).

17. Marcia Kramer & Frank Lombardi, *Chief judge wanted to abolish grand juries*, N. Y. DAILY NEWS (Nov. 26, 2014, 5:23 AM), <http://www.nydailynews.com/news/politics/chief-judge-wanted-abolish-grand-juries-article-1.2025208> [https://perma.cc/52R8-PK7U].

18. See generally MARK A. MOTIVANS, U.S. DEPT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS, 2010 — STATISTICAL TABLES 12 (2013), <https://www.bjs.gov/content/pub/pdf/fjs10st.pdf> [https://perma.cc/8TX5-WUC8]; see also Ben Casselman, *It's Incredibly Rare For A Grand Jury To Do What Ferguson's Just Did*, FIVETHIRTYEIGHT (Nov. 24, 2014, 9:30 PM), <http://fivethirtyeight.com/datalab/ferguson-michael-brown-indictment-darren-wilson/> [https://perma.cc/TP6N-T5H2].

19. See *Hurtado v. California*, 110 U.S. 516 (U.S. 1884).

prosecutors — both federal and state alike — generally have a significant edge during the grand jury process.

This advantage raises the question: why are grand juries not indicting police officers suspected of unlawfully using lethal force? At least two possible explanations exist: The first is juror bias. Jurors may be inclined to believe police officers' accounts, and therefore be more likely to see force as justified. In fact, in a June 2016 Gallup survey that measured the public's confidence in government institutions, respondents ranked police third, behind only the military and small business.<sup>20</sup>

The focus of this Note, however, is on a second possible explanation: prosecutorial bias. District Attorneys, after all, are elected officials who frequently depend on law enforcement agencies to collect evidence and produce testimony for criminal trials.<sup>21</sup> In addition, prosecutors tend to have very close personal relationships with police officers due to the nature of their jobs, which can result in real or perceived conflicts-of-interest that can undermine efforts to root out corruption at the local level.<sup>22</sup>

This may result in District Attorneys presenting a less compelling case against officers, whether consciously or unconsciously. For example, scholars Jeffrey Fagan and Bernard Harcourt found that during the grand jury investigation into the shooting death of Michael Brown the District Attorney had failed to rigorously cross-examine the police officer accused of killing Mr. Brown.<sup>23</sup> The District Attorney had also openly searched for inconsistencies in the testimonies of people who could have served as potential witnesses for the prosecution.<sup>24</sup>

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20. See Jim Norman, *Americans' Confidence in Institutions Stays Low*, GALLUP (June 13, 2016), <http://www.gallup.com/poll/192581/americans-confidence-institutions-stays-low.aspx> [https://perma.cc/Z29E-AVQ8].

21. See Jon Swaine, Oliver Laughland, Jamiles Lartey & Ciara McCarthy, *The Counted, Ties That Bind*, THE GUARDIAN (Dec. 31, 2015, 8:00 AM), <https://www.theguardian.com/us-news/2015/dec/31/ties-that-bind-conflicts-of-interest-police-killings> [https://perma.cc/V6MB-542E].

22. See Martin Kaste, *It's a Complicated Relationship Between Prosecutors, Police*, NPR (Dec. 4, 2014, 4:07 PM), <http://www.npr.org/2014/12/04/368529402/its-a-complicated-relationship-between-prosecutors-police> [https://perma.cc/6Q39-PKH4].

23. See Jeffrey Fagan and Bernard Harcourt, *Professors Fagan and Harcourt Provide Facts on Grand Jury Practice In Light of Ferguson Decision*, COLUMBIA LAW SCHOOL (Dec. 5, 2014), [http://www.law.columbia.edu/media\\_inquiries/news\\_events/2014/november2014/Facts-on-Ferguson-Grand-Jury](http://www.law.columbia.edu/media_inquiries/news_events/2014/november2014/Facts-on-Ferguson-Grand-Jury) [https://perma.cc/QY4M-RJEB].

24. *Id.*

### III. STATES HAVE DIFFERENT MODELS FOR INVESTIGATING POLICE SHOOTINGS

States have adopted five models for investigating police shootings: (A) having original jurisdiction over criminal matters involving police officers; (B) having concurrent prosecutorial powers with local prosecutors; (C) having full discretion to intervene in criminal prosecutions of police officers; (D) acting upon request by a political entity; and (E) having independent investigative units.

All of the models include shifting at least part of the prosecutorial responsibility from the District Attorney onto the State Attorney General, who is the chief legal officer of the state. However, the level of prosecutorial responsibility that the Attorney General assumes in lieu of local prosecutors varies from state to state depending on a state's resources and historical precedent.

What each model has in common is a structure wherein the State Attorney General serves as a "check" on three types of District Attorneys: (1) District Attorneys who are unwilling to pursue charges for purposes of political expediency; (2) District Attorneys who lack the resources or expertise to prosecute police shootings; and (3) District Attorneys who are not perceived as impartial by segments of the population. Having a check on this last type of District Attorney is especially important because perceptions by minority communities — who are disproportionately more likely to experience violence by police than whites<sup>25</sup> — are not to be ignored even if the District Attorney has acted properly. Otherwise, the public would lose confidence in the justice system's ability to hold government officials accountable for their actions.

#### A. STATES WITH ORIGINAL JURISDICTION

The first category of State Attorney General prosecutorial power is called "original jurisdiction," which means that police shootings occurring within the state automatically fall under their jurisdiction unless otherwise stipulated.<sup>26</sup>

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25. See SHELLEY HYLAND, LYNN LANGTON & ELIZABETH DAVIS, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, POLICE USE OF NONFATAL FORCE 2 (2015).

26. See ATTORNEYS GENERAL STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES 308 (Emily Myers ed., 2d ed. 2013).

Maine, for example, adopted the original jurisdiction model in 1995. In this regard, the statutory language is clear.

*The Attorney General has exclusive responsibility for the direction and control of any criminal investigation of a law enforcement officer who, while acting in the performance of that law enforcement officer's duties, uses deadly force . . . Any law enforcement agency whose officer uses deadly force shall notify, as soon as practicable, the Attorney General of the event.*<sup>27</sup>

This does not mean that the Maine Attorney General must assume control over the investigation of every case involving police that results in the death of a civilian. The Maine Attorney General has permitted District Attorneys to investigate cases lacking overt police-civilian interaction. For example, on December 5, 2015, a driver in Union, Maine failed to stop for police and sped off, eventually hitting a tree and dying.<sup>28</sup> The Maine Attorney General later released a statement deferring to the District Attorney because the driver's vehicle had not struck the patrol car and the chase had also ended before the crash.<sup>29</sup>

Maine's approach demonstrates that, like many other states, the Attorney General has plenary power over localities.<sup>30</sup> However, although the Attorney General technically has original jurisdiction over criminal matters within its state, this authority is not rigidly defined. In fact, the Maine Attorney General has a wide degree of prosecutorial discretion in deciding whether to exercise this jurisdiction and to whom it may delegate those powers. Such discretion is useful for small states like Maine whose resources can be strained when it has to conduct the large, complex investigations that police shootings normally require.<sup>31</sup> For example, Maine has historically spent a relatively small amount of money on law enforcement per capita compared to other states,

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27. ME. REV. STAT. ANN. tit. 5, § 200-A (2017) (emphasis added).

28. See Stephen Betts, *Two Teens Killed in Union Crash After Failing to Stop for Police*, BANGOR DAILY NEWS (Dec. 6, 2015, 6:25 PM), <http://bangordailynews.com/2015/12/06/news/midcoast/two-teens-killed-in-union-crash-after-failing-to-stop-for-police/> [<https://perma.cc/B75S-RCFS>].

29. *Id.*

30. ME. REV. STAT. ANN. tit. 5, § 200-A (2017); ALASKA STAT. § 44.23.020 (2016); N.H. REV. STAT. ANN. § 7:6 (2007); R.I. Const. art. IX, § 12.

31. See ATTORNEYS GENERAL STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES, *supra* note 26, at 318, tbl.17-1.

likely due to its low crime rate.<sup>32</sup> In fact, among all U.S. states, Maine has spent the fifth lowest amount of money on police and fire protection.<sup>33</sup> Deciding whether to transfer a police shooting case to a District Attorney can be useful if Maine lacks the manpower to adequately pursue an investigation.

Connecticut has a similar law to Maine's, requiring its Division of Criminal Justice to investigate any deadly force used by law enforcement.<sup>34</sup> Like Maine, the Connecticut statute permits the State Attorney General to investigate the case or allow a District Attorney from a judicial district other than the judicial district in which the incident occurred to investigate the case:

In causing such an investigation to be made, the Chief State's Attorney may . . . designate a prosecutorial official from a judicial district other than the judicial district in which the incident occurred to conduct the investigation or may . . . appoint a special assistant state's attorney or special deputy assistant state's attorney to conduct the investigation. If the Chief State's Attorney designates a prosecutorial official from another judicial district or appoints a special prosecutor to conduct the investigation, the Chief State's Attorney shall, upon the request of such prosecutorial official or special prosecutor, appoint a special inspector or special inspectors to assist in such investigation.<sup>35</sup>

This provision was recently used in Bridgeport, Connecticut after a state trooper fatally shot a robbery suspect.<sup>36</sup> In that case, the Chief State's Attorney transferred the case to a special prosecutor from a jurisdiction different from the one in which the incident

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32. See PHILIP A. TROSTEL, MAINE'S STATE AND LOCAL GOVERNMENT PAYROLL AND EXPENDITURE 21–22 (Brookings Institution, 2006), <https://www.brookings.edu/wp-content/uploads/2016/07/payroll.pdf> [<https://perma.cc/8CGH-HL6B>].

33. See *State Police and Fire Spending Rank*, U.S. GOV'T SPENDING [http://www.usgovernmentspending.com/compare\\_state\\_spending\\_2016m50s](http://www.usgovernmentspending.com/compare_state_spending_2016m50s) [<https://perma.cc/K9J3-U8Z3>] (last visited May 3, 2017).

34. CONN. GEN. STAT. § 51-277(a) (Lexis Advance through all 2016 public laws).

35. CONN. GEN. STAT. §§ 51-277(b)-(c) (Lexis Advance through all 2016 public laws).

36. See David I. Cohen, *Report of the State's Attorney for the Judicial District of Stamford-Norwalk Concerning the Use of Deadly Physical Force Resulting in the Death of Bryan Stukes in the City of Bridgeport on April 1, 2013*, CT. DIVISION OF CRIM. JUST. (July 8, 2014), <http://www.ct.gov/csao/cwp/view.asp?a=1802&q=548346> [<https://perma.cc/HHG7-BHVQ>].



occurred. That new prosecutor then chose a special law enforcement team<sup>37</sup> to assist his office in the investigation.<sup>38</sup>

North Carolina similarly authorizes the Attorney General to investigate and prosecute crimes involving police officers, but only if requested by the District Attorney.<sup>39</sup> In recent years, however, the public has begun to scrutinize North Carolina's model after the Attorney General began to be perceived as unwilling or unable to bring successful prosecutions against police officers. For example, in the case of Randall Kerrick, who was shot to death after police officers mistook him for a burglary suspect, the trial jury deadlocked and the North Carolina Attorney General declined to retry the police officer responsible for Kerrick's death.<sup>40</sup> This case demonstrates that even when a State Attorney General assumes control over a case involving police officers, structural challenges still exist that reduce the likelihood of actually convicting police officers who are indicted on charges related to the shooting of unarmed civilians.

## B. STATES WITH CONCURRENT PROSECUTORIAL POWERS

The second category of State Attorney General prosecutorial power is best characterized as concurrent prosecutorial powers.<sup>41</sup> In other words, State Attorney Generals can investigate cases concomitantly with local prosecutors, but they often choose to simply assist the local prosecutor by agreeing to prosecute a certain set of crimes instead. Vermont grants concurrent prosecutorial responsibility over crimes that occur within the state to the

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37. *See id.* The District Attorney declined to press charges after finding that the state trooper had properly used deadly force against a suspect that reasonably could have posed a danger to other people.

38. Questions about prosecutorial bias in cases in which special prosecutors are given control over an investigation into a police shooting are discussed more in Part V of this Note.

39. *See Duties and Responsibilities*, N.C. DEP'T OF JUST. <http://www.ncdoj.gov/About-DOJ/The-Attorney-General/Duties-and-Responsibilities.aspx> [https://perma.cc/6BGN-8GJV] (last visited May 13, 2017).

40. *See* ABC11 & Associated Press, *Attorney General: State Not Pursuing 2nd Trial for Charlotte Police Officer Who Shot Unarmed Man*, WTVD-TV RALEIGH-DURHAM (Aug. 28, 2015), <http://abc11.com/news/nc-attorney-general-no-2nd-trial-for-charlotte-officer/960458/> [https://perma.cc/DWP6-9N7H].

41. *See* STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES, *supra* note 26, at 327, tbl.17-1. Other states that have concurrent prosecutorial power include Utah, Vermont, South Dakota, and South Carolina.

Attorney General and local prosecutors.<sup>42</sup> This power also enables the Vermont Attorney General to bring charges in a case when a local prosecutor refrains from commencing a criminal prosecution, which allows the state to investigate a case that the District Attorney would have otherwise declined.<sup>43</sup>

Such a cooperative arrangement would presumably result in more indictments of police officers since every case of police misconduct in such a system is subject to double scrutiny: first by District Attorneys and second by the State Attorney General in cases where the District Attorneys decline to bring charges or another issue arises. This increased scrutiny, however, does not necessarily result in harsh punishments for those officers who are successfully convicted in shooting cases. In 2012, for example, Vermont Attorney General Bill Sorell boasted that he had prosecuted the most police officers in the state's history.<sup>44</sup> Yet the evidence paints a murkier picture. Of the officers who have faced criminal prosecution for misconduct, few were sentenced to prison terms longer than six months. Most officers simply paid fines of \$1,000 or less and were placed on probation, which seems like a very light sentence compared to the charges against them.<sup>45</sup> Thus, this is an example in which a state with concurrent prosecutorial authority appeared to not rigorously prosecute a police officer criminally charged with shooting a civilian.<sup>46</sup>

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42. VT. STAT. ANN. tit. 3, § 152 (Lexis Advance through Chapter 25 of the 2017 session but not including changes and corrections made by the Vermont Legislative Council. The final official version of the statutes affected by the 2017 session legislation will appear on Lexis.com and Lexis Advance in October 2017) ("The Attorney General may represent the State in all civil and criminal matters as at common law and as allowed by statute. The Attorney General shall also have the same authority throughout the State as a State's Attorney.").

43. *See Office of State's Attorney v. Office of Attorney Gen.*, 138 Vt. 10 (1979) (holding where a state's attorney decides not to initiate a criminal prosecution, the sovereign power of the state to punish for crimes has not been set in motion in the first instance by an agency of the state authorized to do so, and an equal prosecutorial authority, such as the Attorney General, may initiate a criminal prosecution).

44. *See Nat Rudarakanchana, Has Vermont's Top Law Enforcement Officer Given Police a Pass?*, VTDIGGER (Aug. 24, 2012, 11:52 AM), <http://vtdigger.org/2012/08/24/has-vermonts-top-law-enforcement-officer-given-police-a-pass/> [<https://perma.cc/4D79-Z8PN>].

45. *See id.*

46. Among the few police officers who are convicted for shooting civilians, they generally receive light prison sentences relative to the severity of the crime. For example, a study in 2015 by the Washington Post and criminologist Philip M. Stinson revealed that of the 54 police officers who were criminally charged with shooting a civilian, 11 were convicted, and on average they received four years in prison. *See* Kimberly Kindy and Kimbriell Kelly,

Although it is difficult to explain what the precise explanation is for this, one possibility is that State Attorneys General may be subject to the same type of biases as local prosecutors when they handle a police shooting. That is, State Attorneys General are also law enforcement officials who may feel “loyal” to police officers simply by virtue of their occupation, in the same way District Attorneys may feel loyal to police officers because of the nature of their work together.<sup>47</sup> In addition, State Attorneys General are subject to outside political pressure from state police unions to act more leniently with respect to police officers who are subjects of a shooting investigation.<sup>48</sup>

Moreover, it is not necessarily the fact that fewer investigations and indictments of police officers result in substantive injustice. After all, some police officers indicted on charges related to shootings of unarmed civilians may actually be justified in exercising deadly force against someone — if they can prove that he or she posed a threat to them or others. However, even in an individual case where a police officer is justified in using lethal force, the lack of a rigorous grand jury investigation can harm perceptions of justice. For example, when a pattern exists in which police officers can shoot unarmed civilians and avoid an indictment, let alone a conviction, the public can begin to view the police as lacking oversight. This can cause communities, especially minority ones, to lose trust in the criminal justice system, thereby damaging the types of relationships with the police that are critical to solving crimes.

### C. STATES WITH FULL DISCRETION

The third model describes State Attorneys General who have full discretion to intervene in statutorily authorized criminal cases when they believe it is in their states’ interest.<sup>49</sup> In these situ-

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*Thousands Dead, Few Prosecuted*, THE WASHINGTON POST (Apr. 11, 2015), [http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/?utm\\_term=.e529d040229b](http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/?utm_term=.e529d040229b) [<https://perma.cc/K8NS-3AC7>].

47. See Kaste, *supra* note 22.

48. See Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1475 (2016).

49. See, e.g., N.M. STAT. ANN. § 8-5-2 (2017); MASS. GEN. LAWS ANN. ch. 12, § 6 (West 2016); NEV. REV. STAT. ANN. § 228.120 (West 2016); 71 PA. STAT. AND CONS. STAT. ANN. § 732-205 (West 2016); Cal Const. art. V, § 13 (“Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law of which the superior court

ations, the local prosecutors often begin criminal proceedings and the State Attorney General will monitor the case closely to determine whether intervention is necessary. Such scenarios may arise when local prosecutors have not taken action when they should have, when they have taken some action when they should not have, or when they have a perceived conflict-of-interest.<sup>50</sup>

New Mexico's legislature granted the state's Attorney General full discretion to intervene in criminal matters involving the police, giving that office the power to:

. . . prosecute and defend in any other court or tribunal all actions and proceedings, civil or criminal, in which the state may be a party or interested *when, in his judgment, the interest of the state requires such action* or when requested to do so by the governor.<sup>51</sup>

In this regard, the language is clear: New Mexico's Attorney General has full discretion in determining whether it is in the state's interest to remove a case from a local prosecutor's control.<sup>52</sup>

At first glance, this system appears to serve as an added layer of accountability over police officers since Attorneys General can evaluate whether an investigation by a District Attorney is meeting high investigative standards. However, some Attorneys General may be unwilling to devote the time and energy necessary to oversee District Attorneys' casework. For example, former California Attorney General Kamala Harris has defended her use of discretion in allowing county prosecutors to handle police shootings instead of her office, citing resource constraints.<sup>53</sup> Her office has appealed efforts by judges to remove District Attorneys from cases involving police officers, arguing that "the law is resound-

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shall have jurisdiction, and in such cases the Attorney General shall have all the powers of a district attorney. When required by the public interest or directed by the Governor, the Attorney General shall assist any district attorney in the discharge of the duties of that office.").

50. See STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES, *supra* note 26, at 309.

51. N.M. STAT. ANN. § 8-5-2 (2017) (emphasis added).

52. See STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES, *supra* note 26, at 319, tbl.17-1.

53. See Bob Egelko, *Kamala Harris Sees Safeguards in D.A.s Prosecuting Police Killings*, SFGATE (Dec. 22, 2014, 8:22 AM), <http://www.sfgate.com/news/article/Kamala-Harris-sees-safeguards-in-D-A-s-5972586.php> [<https://perma.cc/86V2-B3ZM>].

ingly clear that prosecutorial misconduct, even egregious misconduct, cannot form the basis to recuse a District Attorney.”<sup>54</sup>

#### D. STATE ATTORNEYS GENERAL WHO ACT UPON REQUEST BY A POLITICAL ENTITY

The fourth model involves State Attorneys General who may intervene in a criminal case only upon request by another political entity, such as legislatures, Governors, and District Attorneys.<sup>55</sup> This occurs most often when the crime is very specialized and requires the expertise of prosecutors in the State Attorney General’s office or when a perceived conflict-of-interest arises.

Under the fourth model, challenges can arise when District Attorneys opt not to consult the Attorney General and instead handle the matter on their own. In Arizona, for example, the Attorney General’s prosecutorial powers are limited to consumer protection and complex financial crimes, so most violent crimes, such as police shootings, are under the jurisdiction of District Attorneys unless they specifically request help from the Attorney General or the Governor assigns the case to the Attorney General.<sup>56</sup> Those District Attorneys who choose to keep the cases to themselves may have disappointing results, as in the case of Jose Guereña, an Iraqi war veteran who was killed during a botched drug raid by a Tucson SWAT team.<sup>57</sup> In that case, Guereña was not found with any drug contraband, nor was it ever proven that he had shot his firearm first, as was previously reported by police officers on the scene.<sup>58</sup> All of the officers were cleared of any wrongdoing after the District Attorney declared that their use of

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54. City News Service, *Scott Dekraai hearing: Attorneys say judge was right in kicking DA from the case*, PRESS TELEGRAM (DEC. 18, 2015, 8:21 PM), <http://www.presstelegram.com/general-news/20151218/scott-dekraai-hearing-attorneys-say-judge-was-right-in-kicking-da-from-the-case> [https://perma.cc/JG8Y-YMWS].

55. See STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES, *supra* note 26

56. See *About the Office*, ARIZONA ATTORNEY GENERAL MARK BRNOVICH, <https://www.azag.gov/about> [https://perma.cc/QRV9-FTD5] (last visited May 20, 2017).

57. See Ellen Tumposky, *Arizona SWAT Team Defends Shooting Iraq Vet 60 Times*, ABC NEWS (May 20, 2011), <http://abcnews.go.com/US/tucson-swat-team-defends-shooting-iraq-marine-veteran/story?id=13640112> [https://perma.cc/4LZE-YY4R].

58. *Id.*

deadly force was reasonable.<sup>59</sup> Guereña had been struck by over 60 bullets.<sup>60</sup>

Like in Arizona, in Illinois the State Attorney General lacks original jurisdiction over violent crimes, including police-related shootings.<sup>61</sup> In practice, this means that unless a political entity like a District Attorney, State Legislature, or Governor requests that the Attorney General take the case, the Attorney General has little recourse other than to permit the District Attorney to handle the case.<sup>62</sup> Such limited powers help to explain why the Illinois Attorney General has sought federal assistance to ensure meaningful reform, even if this is accomplished through civil litigation. For example, in the Laquan McDonald case, wherein a 17-year-old black male was shot 16 times by a police officer,<sup>63</sup> Illinois Attorney General Lisa Madigan was not initially formally asked by local prosecutors to intervene.<sup>64</sup> As a result, she attempted to enlist assistance from federal prosecutors.<sup>65</sup>

Similarly, the Colorado Attorney General lacks authority to prosecute criminal actions without the explicit permission of the Governor.<sup>66</sup> Therefore, the Colorado Attorney General lacks original jurisdiction over violent crimes, including police-related shootings; instead, the office is mainly concentrated on fraud and anti-trust actions.<sup>67</sup> So rather than requesting assistance from the Colorado Attorney General, a District Attorney in a jurisdiction where a police shooting occurred may instead consult with their counterparts in other jurisdictions. For example, in 2015 Naeschylus Vinzant was an unarmed fugitive who was shot and

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59. See Robert Anglen, *SWAT killing of Marine in Tucson: Probe clears officers*, THE ARIZONA REPUBLIC (June 11, 2015), <http://archive.azcentral.com/news/articles/2011/06/14/20110614tucson-swat-shooting-officers-cleared14-ON.html> [<https://perma.cc/666G-6H49>].

60. *Id.*

61. See STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES, *supra* note 26, at 319, tbl.17-1.

62. *Id.*

63. See Meghan Keneally, *Chicago Cop Who Allegedly Shot Teen Laquan McDonald 16 Times Charged With Murder*, ABC NEWS (Nov. 24, 2015, 4:54 PM), <http://abcnews.go.com/US/chicago-cop-allegedly-shot-teen-laquan-mcdonald-16/story?id=35391346> [<https://perma.cc/Z7HF-HDNR>].

64. See Aamer Madhani, *Illinois AG asks Justice to probe Chicago cops*, USA TODAY (Dec. 2, 2015, 12:17 PM), <http://www.usatoday.com/story/news/2015/12/01/illinois-attorney-general-asks-justice-investigate-chicago-police/76633350/> [<https://perma.cc/UH8Z-LFHH>].

65. *Id.*

66. See *People ex rel. Tooley v. District Court*, 549 P.2d 774 (Colo. 1976).

67. See COLO. DEP'T OF LAW, <https://coag.gov/about-us/office-sections/criminal-justice> [<https://perma.cc/X6EG-F6XX>] (last visited Feb. 18, 2017).

killed after he attempted to flee upon encountering officers. The District Attorney who investigated his death foresaw a potential conflict-of-interest with his office and requested that another District Attorney manage the case.<sup>68</sup> As in the Illinois case mentioned above, the District Attorney bypassed the Colorado Attorney General and did not request assistance investigating Vinzant's death.<sup>69</sup>

#### E. STATES WITH INDEPENDENT INVESTIGATIVE UNITS

The fifth model describes states that have delegated in whole or in part the investigation of a police shooting to a state investigatory department, which then creates a report that is ultimately reviewed by the State Attorney General. The State Attorney General then ultimately evaluates the evidence collected to decide whether the use of deadly force was unlawful or justified. These reports are often released to the public.

Delaware has such a model. Its State Attorney General is broadly authorized to investigate crimes within the state.<sup>70</sup> As such, it uses special investigators<sup>71</sup> within the Office of Civil Rights and Public Trust to examine — independent from law enforcement authorities — any event involving the use of deadly force. This unit publicly reports its findings,<sup>72</sup> which are reviewed by the State Attorney General, and an independent decision is then made as to whether the use of deadly force was justified.<sup>73</sup> If unjustified, the officer is arrested and wrung up on criminal charges.<sup>74</sup> Short of an indictment, however, the office may also suggest that the subject officer's police department take administrative disciplinary action.<sup>75</sup> One example of this model

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68. See *Jefferson County DA To Review Aurora Police Shooting Case*, CBS DENVER (Mar. 13, 2015, 10:31 AM), <http://denver.cbslocal.com/2015/03/13/potential-conflicts-prompt-reassignment-of-aurora-police-shooting-review/> [https://perma.cc/7JJU-GR6T].

69. *Id.*

70. DEL. CODE ANN. tit. 29 § 2504 (West 2017).

71. DEL. CODE ANN. tit. 29 § 2514 (West 2017).

72. See *Police Deadly Force Investigations*, DEL. DEP'T OF JUSTICE, <http://attorneygeneral.delaware.gov/executive/deadlyforce.shtml> <http://attorneygeneral.delaware.gov/executive/deadlyforce.shtml> [https://perma.cc/E82H-PGDD] (last visited Feb. 20, 2017).

73. See Sean O'Sullivan, *How Delaware reviews police deadly force debated*, THE NEWS J. (Dec. 14, 2014), <http://www.delawareonline.com/story/news/crime/2014/12/14/delaware-reviews-police-deadly-force-debated/20395615/> [https://perma.cc/HTS4-EXZM].

74. *Id.*

75. *Id.*

in action occurred in 2015, when police shot and killed a man in a wheelchair who was waving a firearm.<sup>76</sup>

Tennessee temporarily adopted a similar model in the 2015 fatal shooting of an unarmed 19-year-old named Darrius Stewart by a Memphis police officer.<sup>77</sup> In that case, the District Attorney recommended that the investigation be completed by the Tennessee Bureau of Investigations (TBI), which is an independent branch of state government, in order to ensure a fair process and reduce the public perception of partiality.<sup>78</sup>

Under this model, significant questions may arise as to the fairness of an investigation that is conducted by an outside state investigatory department. Outside state investigatory departments may sometimes arrive late to a crime scene, contaminating evidence or making it more difficult to find evidence.<sup>79</sup> For example, the TBI in the Tennessee case was called in three days after the shooting, at which point Memphis police had already questioned witnesses and gathered evidence.<sup>80</sup> As a result, the TBI was unable to examine the original crime scene, which might have compromised the validity of their findings given the variety of ways in which evidence could be contaminated.<sup>81</sup> This, combined with the fact that the grand jury failed to indict the officer in question even after the local District Attorney had suggested charges based off of TBI's findings, creates doubt about the objectivity of the investigation. Moreover, the credibility of an outside investigatory agency like TBI can be cast into doubt if it is not transparent with its findings. For example, TBI's decision to seal

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76. See Marc Torrence, *Police Kill Wheelchair-Bound Man in Delaware; Federal Investigation Requested*, ACROSS AM. PATCH (Sept. 30, 2015), <http://patch.com/us/across-america/police-kill-wheelchair-bound-man-delaware-federal-investigation-requested-0>, <http://patch.com/us/across-america/police-kill-wheelchair-bound-man-delaware-federal-investigation-requested-0> [https://perma.cc/WX9H-4JJW].

77. See Bill Dries, *TBI Probe of Fatal Police Shootings Becomes Policy*, MEM. DAILY NEWS (Oct. 19, 2015), <https://www.memphisdailynews.com/news/2015/oct/19/tbi-probe-of-fatal-police-shootings-becomes-policy/> [https://perma.cc/W8PB-GLV5].

78. *Id.*

79. Jacinthia Jones & Katie Fretland, *Independent Investigations of Police Shootings Becoming the Norm*, COM. APPEAL (Dec. 19, 2015), <http://www.commercialappeal.com/news/crime/independent-investigations-of-police-shootings-becoming-the-norm--271a5a42-a4ba-0aa6-e053-0100007fbd-363034701.html> [https://perma.cc/H55S-WARB].

80. *Id.*

81. See TECHNICAL WORKING GROUP ON CRIME SCENE INVESTIGATION, OFFICE OF JUSTICE PROGRAMS, CRIME SCENE INVESTIGATION: A GUIDE FOR LAW ENFORCEMENT 42 (2000).



its investigative files on the case generated much public controversy.<sup>82</sup>

Iowa's variant of the investigative unit model differs from the aforementioned states in that the state's investigative unit, the Iowa Division of Criminal Investigation, is housed within the same department as the state police.<sup>83</sup> This obviously heightens the risk of a real or perceived conflict-of-interest, given that investigators may be unwilling to discover evidence of wrongdoing by other officers who work alongside them either because of loyalty or fear of retaliation from other officers.<sup>84</sup> For example, in Waterloo, Iowa, the Iowa Attorney General cleared a group of police officers of wrongdoing after they shot and injured a suspect who suddenly drove his car towards them.<sup>85</sup> His office experienced heavy criticism after it was discovered that several of the investigators were former police officers.<sup>86</sup>

#### IV. NEW YORK'S APPROACH

New York has recently taken a hybrid approach to the challenges that stem from prosecuting police officers charged with the deaths of civilians either during confrontations with the police or while they are in police custody. Generally speaking, the New York Attorney General has had broad powers in consumer protection and anti-trust prosecution, and rarely accepted homicide cases unless requested by a Governor.<sup>87</sup> In fact, the last time the New York Attorney General was assigned a murder case through this method was in 1996, when Governor George Pataki transferred a murder case from Bronx District Attorney Robert John-

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82. See generally Sasha Jones, *Court Orders Release of Darrius Stewart TBI File*, WAFB NEWS (Dec. 8, 2015), <http://www.wafb.com/story/30698225/court-orders-release-of-darrius-stewart-tbi-file> [<https://perma.cc/7DM5-ZPUH>].

83. See IOWA DEPT OF PUB. SAFETY, <http://www.dps.state.ia.us/DCI/index.shtml> [<https://perma.cc/K9H8-TV8P>] (last visited Feb. 10, 2017).

84. See ROGER G. DUNHAM & GEOFFREY P. ALPERT, *CRITICAL ISSUES IN POLICING: CONTEMPORARY READINGS* 113 (7th ed. 2015) (describing that the practice is commonly referred to as "the blue wall of silence").

85. Melissa Dawkins, *Iowa Attorney General Clears Waterloo Police Officer in Police-Involved Shooting*, KCRG-TV9 (Dec. 16, 2015, 3:47 PM), <http://www.kcrg.com/content/news/Iowa-Attorney-General-Clears-Waterloo-Police-in-Officer-Involved-Shooting-362689031.html> [<https://perma.cc/6YQ9-GDFA>].

86. See *id.*

87. *Our Office*, NEW YORK ATTORNEY GENERAL STATE ATTORNEY GENERAL, <https://ag.ny.gov/our-office> [<https://perma.cc/U3SG-K8LX>] (last visited Feb. 14, 2017); see also *In re Nassau Cty. Grand Jury Tecum*, 797 N.Y.S.2d 790 (2005); *People v. Adams*, 2 Misc. 3d 166, 766 N.Y.S.2d 765 (Niagara County Ct. 2003).

son to the Attorney General because of Johnson's opposition to the death penalty.<sup>88</sup> In that case, a police officer was shot and killed.<sup>89</sup> In contrast, Governor Pataki opted against using this authority for incidents in which police officers killed unarmed civilians, such as in the case of Amadou Diallo, who was shot several times when police officers mistook his wallet for a firearm.<sup>90</sup> Similarly, Governor Elliot Spitzer did not see the need for a special prosecutor in the case of Sean Bell, who was shot by police officers outside a nightclub.<sup>91</sup>

New York has since changed its approach. In July 2015, following a series of police shootings that drew national outrage, New York Governor Andrew Cuomo issued Executive Order 147, which granted the State Attorney General, Eric Schneiderman, exclusive temporary authority<sup>92</sup> over the investigation and prosecution of certain police-caused civilian deaths.<sup>93</sup> No longer would New York's 62 District Attorneys be permitted to take on these cases. Schneiderman, who had initially requested the order, immediately praised Governor Cuomo's action, arguing that it was a novel method by which to eliminate the conflicts-of-interest that can arise when District Attorneys are asked to investigate allegations of misconduct by local law enforcement officers. He even went so far as to describe the Governor's decision as a critical step towards ending mass arrest and incarceration.<sup>94</sup> After all, it

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88. See Rachel Swarns, *A Killing in the Bronx: The Overview; Governor Removes Prosecutor from Murder Case*, N.Y. TIMES (Mar. 22, 1996), <http://www.nytimes.com/1996/03/22/nyregion/killing-bronx-overview-governor-removes-bronx-prosecutor-murder-case.html?pagewanted=all> [https://perma.cc/S24F-A232].

89. *Id.*

90. See Robert McFadden, *Four Officers Indicted for Murder in Killing Of Diallo, Lawyer Says*, N.Y. TIMES (Mar. 26, 1999), <http://www.nytimes.com/1999/03/26/nyregion/four-officers-indicted-for-murder-in-killing-of-diallo-lawyer-says.html?pagewanted=all> [https://perma.cc/8V2Y-ANY2] (last visited Feb. 10, 2016).

91. See Al Baker & William K. Rashbaum, *Man Wounded in Queens Shooting Leaves the Hospital*, N.Y. TIMES (Dec. 6, 2006), [http://www.nytimes.com/2006/12/06/nyregion/06shoot.html?\\_r=0](http://www.nytimes.com/2006/12/06/nyregion/06shoot.html?_r=0) [https://perma.cc/X997-ZBS2].

92. See *Attorney General Eric Schneiderman Gets Year to Investigate Police Shootings*, TIMESUNION (June 24, 2015), <http://www.timesunion.com/news/article/Attorney-General-Eric-Schneiderman-gets-year-to-6346014.php> [https://perma.cc/L47A-9H36].

93. See Noah Remnick, *Cuomo to Appoint Special Prosecutor for Killings by Police*, N.Y. TIMES (July 7, 2015), [https://www.nytimes.com/2015/07/08/nyregion/cuomo-to-appoint-special-prosecutor-for-killings-by-police.html?\\_r=0](https://www.nytimes.com/2015/07/08/nyregion/cuomo-to-appoint-special-prosecutor-for-killings-by-police.html?_r=0) [https://perma.cc/CRE4-QNQZ].

94. See Karen Dewitt, *Governor Appoints Attorney General as Special Prosecutor*, WXXI NEWS (July 8, 2015), <http://nypost.com/2015/07/13/special-prosecutor-for-cops-here-come-the-witch-hunts/> [https://perma.cc/5C9Y-S9KL].

would be the first time that a state as influential as New York would grant sole authority to a state official for the investigation and potential prosecution of violent criminal misconduct by law local enforcement authorities.

Nevertheless, Schneiderman may have overestimated how effective his new powers are. While these new prosecutorial powers may draw national headlines, models like New York's are unlikely to have much of an impact on removing the conflict-of-interest that exists between District Attorneys and law enforcement. Nor are they likely to address much of the concerns of the families of those killed during encounters with police. The problems of New York's approach are discussed more comprehensively below.

#### A. DRAWBACKS OF NEW YORK'S APPROACH

##### 1. *The New York Attorney General's Office Has a Common Law Power to Intervene in Police Shooting Cases*

First, New York's new prosecutorial powers are not nearly as novel as he has described. The common law in New York already confers upon the New York Attorney General authority to bring charges against criminal defendants or intervene in criminal proceedings.<sup>95</sup> For example, in *People v. Miner*, the Appellate Division of the New York Supreme Court (Appellate Division) delineated the State Attorney General's power to conduct and intervene in prosecutions of "certain classes" of criminal cases.<sup>96</sup> While this case alone may not authorize interference in any criminal proceeding — such as a police-caused civilian death — *Miner*, combined with later opinions, can generally be interpreted to apply to all types of state crimes.<sup>97</sup> One such opinion is *Johnson v. Pataki*, wherein the Appellate Division ruled that District Attorneys do not operate in a "zone of independence" that shielded them from intervention by the New York Attorney General. The court in that case made clear that the state constitution had not designated a specific — let alone exclusive — prosecutorial duty upon District Attorneys.<sup>98</sup>

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95. See Earl H. De Long, *Powers and Duties of the State Attorney-General in Criminal Prosecution*, 25 J. OF CRIM. L. AND CRIMINOLOGY 358, 362 (1934).

96. *People v. Miner*, 2 Lans. 396 (N.Y. Gen. Term 1868).

97. See De Long, *supra* note 95, at 363.

98. *Johnson v. Pataki*, 655 N.Y.S.2d 463 (N.Y. App. Div. 1997).

In addition to the common law, New York's State Legislature has statutorily authorized the State Attorney General to intervene in local criminal cases upon request from the Governor.<sup>99</sup> For example, § 63 of the New York Consolidated Laws Service states that District Attorneys are not insulated from intervention by the State Attorney General. In this regard, the language is clear:

The Attorney General shall . . . [w]henever required by the governor, attend in person, or by one of his deputies, any term of the supreme court or appear before the grand jury thereof for the purpose of managing and conducting in such court or before such jury criminal actions or proceedings as shall be specified in such requirement; *in which case the attorney-general or his deputy so attending shall exercise all the powers and perform all the duties in respect of such actions or proceedings, which the district attorney would otherwise be authorized or required to exercise or perform*; and in any of such actions or proceedings the district attorney shall only exercise such powers and perform such duties as are required of him by the attorney-general or the deputy attorney-general so attending . . . [T]he attorney-general may, with the approval of the governor, and when directed by the governor, shall, inquire into matters concerning the public peace, public safety, and public justice.<sup>100</sup>

In this sense, New York's model is similar to Model 4<sup>101</sup> in which State Attorneys General may assume responsibility over police shootings upon request by a political entity.

The rulings in *Miner* and *Pataki*, combined with the New York Consolidated Laws, demonstrate that the state's judicial and legislative branches have worked in tandem to shape the ability of the New York Attorney General to intervene in certain types of

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99. *Haggerty v. Himelein*, 677 N.E.2d 276 (N.Y. 1997) ("Had Attorney General's office asserted its authority in local criminal matter to exercise all powers and perform all duties that District Attorney would otherwise be authorized or required to exercise or perform, absence of Executive Order would render such intervention jurisdictionally defective even if requested and agreed to by District Attorney.").

100. N.Y. EXEC. LAW § 63 (Lexis Advance through 2017 released chapters 1-24, 50-58) (emphasis added).

101. STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES, *supra* note 26, at 310.

crimes. Therefore, Schneiderman's newfound powers may not be as novel as he claims them to be in the fight to obtain justice for the victims of police officers who use unlawful force against unarmed civilians. This is significant because it suggests that either the State Attorney General is unaware of his own legal authority, or, more likely, he deliberately issued an executive order for political purposes.

## 2. *The New York Attorney General Lacks the Requisite Expertise*

Besides judicial constraints mentioned above, New York Attorney General's Office generally lacks the expertise that District Attorneys typically have in rigorously pursuing a criminal prosecution because of statutory limitations on its power. After all, before Schneiderman's transfer of power, the vast majority of the Attorney General's criminal prosecutorial powers were constrained to financial schemes such as securities fraud, money laundering, and consumer fraud conspiracies.<sup>102</sup> Furthermore, on the rare occasion that the Attorney General's Office has independently prosecuted a homicide case, at least some were based on referrals from local prosecutors involving either cold cases<sup>103</sup> or elder abuse.<sup>104</sup> Therefore, it seems Schneiderman has lacked the kind of exposure to the criminal justice system necessary to deftly manage a police shooting. Indeed, before becoming Attorney General, Schneiderman had never even prosecuted a criminal matter, let alone a homicide case.<sup>105</sup>

On the other hand, New York's District Attorney Offices have historically handled cases involving police shootings of unarmed civilians and thus are much more familiar with the evidentiary standards that need to be met in order to indict and convict police officers. For example, Bronx District Attorney Robert Johnson

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102. *Id.*

103. See Press Release, Office of the Attorney General, A.G. Schneiderman Announces Prison Sentence In 1979 Buffalo Cold Case Killing ATTORNEY GENERAL (Dec. 5, 2015), <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-prison-sentence-1979-buffalo-cold-case-killing> [https://perma.cc/XV2J-JQKV].

104. See Press Release, Office of the Attorney General, A.G. Schneiderman Announces Homicide Conviction By Jury Of Long Island Nursing Home Healthcare Worker In Resident Death ATTORNEY GENERAL (July 10, 2015), <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-homicide-conviction-jury-long-island-nursing-home-healthcare> [https://perma.cc/CN74-XNZX].

105. See Sam Roberts, *Schneiderman is Elected New York's Attorney General*, N.Y. TIMES (Nov. 3, 2010), <http://www.nytimes.com/2010/11/03/nyregion/03nyag.html> [https://perma.cc/9YD6-SG2L].

was a former prosecutor before serving as a district attorney<sup>106</sup> and has handled nine cases of fatalities involving the NYPD, as well as two nonfatal cases in the year 2016 alone.<sup>107</sup> Queens District Attorney Richard Brown led the investigation into the 2016 shooting of Sean Bell, a young groom-to-be celebrating his bachelor party,<sup>108</sup> and Brooklyn District Attorney Kenneth Thompson tried the officer who shot Akai Gurley, who was shot in the dark stairwell of a housing project when the officer misfired his weapon.<sup>109</sup> Both cases were highly publicized and complex enough to test the mettle of even the most experienced District Attorney. And though each of these district attorneys suffered a real or perceived conflict-of-interest given their dependence on the NYPD in fulfilling their duties, it still does not cast into doubt that district attorneys generally are more experienced at police homicide cases than, say, the New York state attorney general would be.

Therefore, given the judicial and statutory constraints on the powers and duties of the New York Attorney General, it is hard to believe that Schneiderman and his staff would be capable of adequately investigating a homicide case involving police officers, which is a relatively complex matter warranting extensive investigative resources, especially in the first few hours after an incident. To his credit, he has argued that he is willing to dispense an unlimited amount of money from his office to support his new prosecutorial duties.<sup>110</sup> However, little effort has been made to show what the taxpayer money would be used for or how it would be spent efficiently.

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106. See Sam Verhovek, *Robert Thomas Johnson; 'Devastating Adversary'*, N.Y. TIMES (Sept. 17, 1988), <http://www.nytimes.com/1988/09/17/nyregion/men-in-the-news-robert-thomas-johnson-devastating-adversary.html> [https://perma.cc/7VT3-2WDW].

107. Colby Hamilton, *City prosecutors wary of A.G.'s new role*, POLITICO (July 9, 2015, 2:21 PM), <http://www.politico.com/states/new-york/city-hall/story/2015/07/city-prosecutors-wary-of-ags-new-role-023643> [https://perma.cc/5VDZ-Y37T].

108. See Michael Wilson, *3 Detectives Acquitted in Bell Shooting*, N.Y. TIMES (Apr. 26, 2008), <http://www.nytimes.com/2008/04/26/nyregion/26BELL.html> [https://perma.cc/CH63-KKJM].

109. See Christina Carrega-Woodby et al., *Akai Gurley's family outraged after Brooklyn DA Kenneth Thompson recommends house arrest, no jail time, for ex-NYPD Cop Peter Liang*, N.Y. DAILY NEWS (Mar. 24, 2016), <http://www.nydailynews.com/new-york/nyc-crime/brooklyn-da-recommends-no-jail-time-ex-cop-peter-liang-article-1.2575264> [https://perma.cc/LFX9-48FY].

110. See Will Bredderman, *'Whatever Resources Necessary': Schneiderman Rolls Out Cop Homicide Team*, OBSERVER NEWS (July 9, 2015, 12:42 PM), <http://observer.com/2015/07/whatever-resources-necessary-schneiderman-rolls-out-cop-homicide-team/> [https://perma.cc/QQ8D-HDCA].

### 3. *District Attorneys Still Remain Involved in the Investigation*

Third, Schneiderman's new prosecutorial powers are superfluous given the continuing involvement of District Attorneys in police shooting cases. That is because after Governor Cuomo issued Executive Order 147, Schneiderman quickly directed all of the state's 62 District Attorneys to conduct a preliminary investigation in any police shooting case before it is transferred to his office.<sup>111</sup> This preliminary investigation includes interviewing witnesses, drafting search warrants, and collecting evidence, among other responsibilities.<sup>112</sup> Such an instruction undermines the purpose of the Governor's executive order, which was to strip District Attorneys of their jurisdiction over police shootings.<sup>113</sup> Thus, Schneiderman has permitted New York's District Attorneys to remain part of the investigative process despite his purported lack of confidence<sup>114</sup> in them to conduct impartial investigations in police shooting cases.

More importantly, though — since both the New York Attorney General and District Attorneys are obligated to follow the Governor's executive order as issued — any attempt by Schneiderman to amend that order by ordering that District Attorneys conduct a preliminary investigation may be unlawful. After all, only the Governor may amend a legal executive order.<sup>115</sup> This makes it likely that the evidence collected by District Attorneys during the early stages of an investigation will be challenged by

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111. See E-mail from Eric Scheiderman, Attorney General, State of New York, to District Attorneys of the State of New York (July 13, 2015) (on file with author).

112. *Id.*

113. See Letter from Eric Schneiderman, Attorney General, State of New York, to Andrew Cuomo, Governor, State of New York (Dec. 8, 2014), <http://www.ag.ny.gov/pdfs/Schneiderman-to-Cuomo-12-08-14.pdf> [<https://perma.cc/W9LS-DA8A>]. “[S]uch appointment of a special prosecutor will *supersede* in all ways the authority and jurisdiction of a county District Attorney to *manage, interpret, prosecute or inquire* about such incidents.” N.Y. Exec. Order No. 147 (July 8, 2015) (first and second emphasis added).

114. See Letter from Eric Schneiderman, Attorney General, State of New York, to Andrew Cuomo, Governor, State of New York (Dec. 8, 2014), <http://www.ag.ny.gov/pdfs/Schneiderman-to-Cuomo-12-08-14.pdf> [<https://perma.cc/W9LS-DA8A>] (“I write because of the current crisis of confidence in our State’s criminal justice system. In New York, and across the country, the promise of equal justice under law has been eroded by a series of tragedies involving the death of unarmed persons as a result of the use of force by law enforcement officers. Many of these tragedies involve unarmed persons of color. All too often the families of the victims and the members of their communities are left with the belief that our criminal justice system has both been unjustly targeted and inexplicably failed them . . . This crisis of confidence is long in the making and has deep roots.”).

115. N.Y. Const. art. IV, § 1.

opposing counsel as illegally obtained, and therefore inadmissible at court.

## V. RECOMMENDATIONS FOR RESPONDING TO POLICE SHOOTING CASES

As discussed above, there can be a real or perceived conflict-of-interest when a District Attorney oversees an investigation of a police shooting within his or her jurisdiction.<sup>116</sup> This stems from the close working relationship between police officers and local prosecutors. After all, prosecutors rely on the police to collect evidence, provide testimony, and execute search warrants. Furthermore, it is very easy for police officers and prosecutors to relate to one another on a personal level given their complementary roles in law enforcement.<sup>117</sup> As a result, this can affect the ability of prosecutors to objectively evaluate the justification of a police shooting.

States over the years have developed formal and informal methods to alleviate some of the concerns that arise when District Attorneys attempt to hold officers accountable for their actions. While their approaches differ depending on their office's prosecutorial resources and historical precedent, State Attorneys General often serve as a check on local prosecutors who are unwilling or unable to prosecute a police officer for the death of a civilian.

### A. SPECIAL PROSECUTORS

Having a State Attorney General remove a case from the ambit of a District Attorney, for example, is a good start. So is requiring District Attorneys to recuse themselves from police shooting cases within their jurisdiction. There is no guarantee that this would reduce police shooting incidents, nor increase the number of convictions in these kinds of cases, but it would at least reduce the real or perceived conflict-of-interest that may exist when a District Attorney oversees a case within its own ju-

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116. Kaste, *supra* note 22.

117. See Martin Kaste, *All Things Considered: It's A Complicated Relationship Between Prosecutors, Police*, NPR (Dec. 4, 2014), <http://www.npr.org/2014/12/04/368529402/its-a-complicated-relationship-between-prosecutors-police> [https://perma.cc/YSM2-CHWN].



risdiction. However, as seen with Schneiderman, State Attorneys General may not be adequately experienced to manage a police shooting case by themselves.<sup>118</sup>

A better idea would be to require the use of “special prosecutors” in police shooting cases, which are usually District Attorneys from different jurisdictions who are less reliant on the local police force. Several states have already acted to do this, including Connecticut<sup>119</sup> and Pennsylvania.<sup>120</sup> At the federal level, Congressmen Steve Cohen (D-TN) had once proposed a bill that would condition the disbursement of federal funds to state and local law enforcement agencies on states’ adoption of a national standard for police shooting cases, including the use of a special prosecutor.<sup>121</sup> One of the benefits of this proposal is that it would have helped spare the special prosecutor from facing a learning curve, since the special prosecutor would already be well versed in state criminal law.<sup>122</sup>

On the other hand, a state or federal law that removes cases from a District Attorney in favor of a special prosecutor is problematic. After all, such a policy would reduce the decision-making power of the community most affected by a given incident of prosecutorial inadequacy or misconduct. This is because special prosecutors would not be as accountable to the community where the police shooting incident occurred as a typical District Attorney would.<sup>123</sup> In addition, there is no guarantee that a special prosecutor would be free of the type of bias that is naturally presumed when District Attorneys investigate a police shooting case in the same jurisdiction where they typically work.<sup>124</sup> Nevertheless, although it may not completely eliminate a substantive conflict-of-interest, special prosecutors at least can reduce the perception of a conflict-of-interest, which has bred distrust against police officers in communities where shootings have occurred.

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118. Roberts, *supra* note 105.

119. H.R. 7103, 2015 Leg. Sess. (Ct. 2015); *see also* Joseph Avila, *Bill Would Require Outside Prosecutors for Police Deadly Force Cases*, WALL ST. J. (Apr. 6, 2015), <https://www.wsj.com/articles/bill-would-require-outside-prosecutors-for-police-deadly-force-cases-1428367724> [<https://perma.cc/B5X4-MBSP>].

120. S. 400, 2015 Leg. Sess. (Pa. 2015).

121. H.R. 2302, 114th Cong., (2015), <https://www.congress.gov/bill/114th-congress/house-bill/2302/text>.

122. *See* Levine, *supra* note 48 at 1489–90.

123. *See id.* at 1489.

124. *See id.* at 1486.

## B. CLARIFY THE LEGAL PARAMETERS OF EMPLOYING DEADLY FORCE

Alternatively, instead of removing these cases from the ambit of District Attorneys, another effective response to the problems inherent in investigating police is to try to reduce these incidents from occurring altogether. For example, state legislatures could try to reduce the broad latitude that officers currently have in determining what constitutes a reasonable risk to officer safety. Currently, officers may use lethal force on a suspect if they have probable cause to believe the suspect poses a significant threat of death or injury to the officer or others.<sup>125</sup> Besides that, there are no specific national legislative guidelines<sup>126</sup> over how or when state and local law enforcement agencies can use lethal force.<sup>127</sup> Some police departments, for example, in the absence of any more specificity, have taken administrative actions to better identify the legal parameters of an officer's authority to use lethal force. For example, since 2003 South Dakota has implemented a unique 13-week training course for its police officers so they can learn alternative, less-than-lethal methods for getting civilians to comply with their orders.<sup>128</sup> Philadelphia<sup>129</sup> and Cleveland<sup>130</sup> have also implemented new non-lethal training for police officers in an effort to disarm potentially violent confrontations with civilians.

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125. *Tenn. v. Garner*, 471 U.S. 1 (1985) (ruling that deadly force should not be allowed in the apprehension of a criminal unless there was probable cause to believe [he or she] had committed a felony and was dangerous).

126. The Department of Justice does, however, have its own lethal use of force guidelines for its own law enforcement officers. *Memorandum on Resolution 14*, THE UNITED STATES DEPARTMENT OF JUSTICE ARCHIVES (Mar. 8, 2017), <https://www.justice.gov/archives/ag/attorney-general-october-17-1995-memorandum-resolution-14-attachment-0> [<https://perma.cc/HM27-3EWC>].

127. *See To avoid deadly shootings, police deploy new training tactics*, PBS NEWS HOUR (Jan. 23, 2016), <http://www.pbs.org/newshour/bb/to-avoid-deadly-shootings-police-deploy-new-training-tactics/> [<https://perma.cc/W53R-V2>].

128. *See* Marty Jackley, *Attorney General Marty Jackley: Use of Force Training is Integral*, THE RAPID CITY J. (Dec. 20, 2015, 5:00 AM), [http://rapidcityjournal.com/news/local/communities/belle\\_fourche/attorney-general-marty-jackley-use-of-force-training-is-integral/article\\_e9c63fb7-6c81-55f2-b37c-ccf06a09a8e2.html](http://rapidcityjournal.com/news/local/communities/belle_fourche/attorney-general-marty-jackley-use-of-force-training-is-integral/article_e9c63fb7-6c81-55f2-b37c-ccf06a09a8e2.html) [<https://perma.cc/MQK6-NKYS>].

129. *See* Trymaine Lee, *Philadelphia Police Department makes rapid reforms: Report*, MSNBC (Dec. 22, 2015), <http://www.msnbc.com/msnbc/philadelphia-police-department-makes-rapid-reforms-report> [<https://perma.cc/BQG3-MMQW>].

130. *See Revised Use-of-Force Policies Submitted for Cleveland Police*, NBC N.Y. (Nov. 16, 2017), <http://www.nbcnewyork.com/news/national-international/Revised-Use-of-Force-Policies-Submitted-for-Cleveland-Police-401519196.html?amp=y> [<https://perma.cc/6CUP-W6MT>].

Besides state legislatures and law enforcement departments identifying the legal parameters of use of force, State Attorneys General may also be able to play a role here. For example, the New Jersey Attorney General has listed and codified its own “Use of Force Policy” regarding specific practices for encounters with unarmed civilians who are disobeying police orders.<sup>131</sup> He has also required that county prosecutors, who are responsible for investigating police shootings in the state, educate community leaders on when and how police officers are authorized to use deadly force.<sup>132</sup> At the same time, the New Jersey Attorney General has ordered that police officers receive additional information as to the procedures that occur when an officer’s use of force is subject to investigation. Such information may include explanations of “the investigative process, the statutory and constitutional rights afforded to law enforcement officers whose use of force is subject to investigation, and how the presumption of innocence applies” to them.<sup>133</sup>

Although not a panacea to the problem of police shootings, the New Jersey Attorney General’s policies help clear up some of the ambiguity around what constitutes lawful use of deadly force. The community engagement programs specifically describe the situations in which police officers can reasonably employ deadly force against civilians, which increases greater understanding between citizens and their police while at the same time preserving public trust in the criminal justice system. At the same time, the information sessions for police officers help set their expectations about what to expect during in which their actions are coming under increasing media scrutiny.

### C. CONDUCT A CONFLICT-OF-INTEREST INQUIRY

As discussed above, the presumption of a real or perceived conflict-of-interest will always exist if a local prosecutor is permitted to manage a police shooting case merely by virtue of their relationship with police officers. The question, therefore, is a matter of degree: what kind of perceived conflict-of-interest necessitates having a local prosecutor recuse him or herself from a

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131. See Law Enforcement Directive from John J. Hoffman, Att. Gen., State of New Jersey, to Dir., Division of Criminal Justice et al. (July 28, 2015) (on file with author).

132. *Id.* at 11.

133. *Id.* at 10.

case, or having it removed from them by the State Attorney General? One way State Attorneys General can help here is by codifying or formalizing the processes for determining whether a local prosecutor has a real, potential, or perceived conflict-of-interest. This may also extend to members of the prosecutor's staff or investigative team.

New Jersey again leads the way in creating rigorous and comprehensive procedures with regards to investigations of police officers, this time regarding conflicts-of-interest.<sup>134</sup> In that state, the New Jersey Attorney General has explicitly stipulated that county prosecutors initiate a conflict-of-interest inquiry within the first three days following the start of an investigation into a police shooting.<sup>135</sup> Such an inquiry will examine whether any member of the county prosecutor's leadership team — such as a first assistant prosecutor or chief of detectives — has had any “personal or professional interaction” with the police officer that is the subject of the investigation.<sup>136</sup>

Part of the conflict-of-interest inquiry that the New Jersey Attorney General has ordered also requires that the prosecutor determine whether the police officer was planning to testify on behalf of the state in pending criminal or civil matters.<sup>137</sup> The findings are then delivered to the New Jersey Attorney General, who then determines whether any actions are necessary to ensure the impartiality of the investigation.<sup>138</sup> Such actions could include “superseding the investigation, assigning the investigation to [another prosecutor's office], ordering the recusal of any person or taking such other actions as may be needed to ensure the impartiality and independence of the investigation.”<sup>139</sup> All of these procedures help reduce the chances of a real, potential, or perceived conflict-of-interest from undermining the effectiveness of an investigation.

#### D. DEVELOP A DATABASE FOR POLICE SHOOTINGS

Besides defining the legal parameters of use of force and creating a conflicts-of-interest inquiry, State Attorneys General could

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134. *See id.* at 2.

135. *See id.* at 3.

136. *Id.* at 4.

137. *See id.* at 3.

138. *See id.* at 4.

139. *Id.*

also take measures to better track police shootings so as to understand why and how these incidents occur. After all, no federal database currently exists with reliable data on police shootings, as previous reporting has been voluntary and occurs weeks or months after an incident.<sup>140</sup> The absence of a central hub of information on this subject therefore makes it difficult to determine whether police shootings are isolated occurrences or part of an alarming trend.

Some State Attorneys General have already begun to take action to compile this data. Texas, for example, recently approved legislation requiring local police to report shootings to the State Attorney General within 30 days after the date of the incidents.<sup>141</sup> California has also released a searchable database containing nearly 10 years of information regarding people who have died in police custody, including the race of the victims.<sup>142</sup> This database shows that between 2005 and 2014, 1,202 people have died while being arrested in California, 75% of which cases are homicides.<sup>143</sup> It also shows that approximately 62% of the people killed during arrests were black or Latino, reaffirming the common belief<sup>144</sup> that black and Latino men are disproportionately victims of police violence.<sup>145</sup>

## VI. CONCLUSION

Police shootings of unarmed civilians are not new occurrences. They have occurred since long before Ferguson was splashed onto news headlines. Over the years, states have developed their own mechanisms to alleviate some of the concerns that arise when District Attorneys attempt to hold officers accountable for their actions. These models can be divided into five rough categories:

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140. See Wesley Lowery, *How many police shootings a year? No one knows*, WASH. POST (Sept. 8, 2014), <https://www.washingtonpost.com/news/post-nation/wp/2014/09/08/how-many-police-shootings-a-year-no-one-knows/> [http://perma.cc/9KDK-H9M8].

141. See Dylan Baddour, *Texas debuts public database of police shootings*, HOUS. CHRON. (Oct. 9, 2015, 2:52 PM), <http://www.chron.com/news/houston-texas/texas/article/police-shooting-data-texas-law-enforcement-6557066.php> [http://perma.cc/TU7P-972Y].

142. See Matt Novak, *California's New Website Shows Numbers of People Killed by Police, and Their Race*, GIZMODO (Sept. 2, 2015, 4:45 PM), <http://gizmodo.com/californias-new-website-shows-numbers-of-people-killed-1728229464> [http://perma.cc/4YDC-L4CC].

143. *Id.*

144. See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 27 (1998).

145. See Novak, *supra* note 142.

(A) states with original jurisdiction over criminal matters involving police officers; (B) states with concurrent prosecutorial powers; (C) states with full discretion to intervene in criminal prosecutions of police officers; (D) states that act upon request by a political entity; and (E) states with independent investigative units.

Each of these models grants authority to the State Attorney General over criminal investigations into police shootings, albeit to varying degrees. Some states tend to have very active State Attorneys General that oversee most local prosecutions, whereas others are more passive and detached because they do not have the statutory power to intervene, opting instead to delegate more responsibility to local prosecutors. Such discrepancies largely depend on the State Attorney General's prosecutorial resources and historical precedent. Regardless, State Attorneys General continue to retain the authority to serve as a check on local prosecutors who are unwilling or unable to prosecute a police officer for the death of a civilian.

However, an overly active State Attorney General that intervenes routinely into criminal investigations of police shootings does not necessarily translate into more impartial investigations and fair outcomes. For example, New York Attorney General Eric Schneiderman — who was given temporary authority by Governor Andrew Cuomo over cases involving police-caused civilian deaths — has responded to the national outcry over police shootings by creating an office specifically for these types of incidents. However, he may have overstated the efficacy of his new powers.

First, his office already possesses authority to intervene in cases against law enforcement. In addition, even if his office chooses to handle these cases, Schneiderman — who until recently had never prosecuted a crime, let alone any homicides<sup>146</sup> — lacks the requisite experience and resources to oversee the increasingly complex homicide investigations to which District Attorneys are traditionally accustomed. Lastly, Schneiderman's instructions that District Attorneys remain part of the preliminary investigation into police shootings undermines the purpose of Governor Cuomo's executive order, which was to strip District

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146. Sam Roberts, *Schneiderman is Elected New York's Attorney General*, N.Y. TIMES (Nov. 3, 2010), <http://www.nytimes.com/2010/11/03/nyregion/03nyag.html> [<http://perma.cc/86LU-K3D8>].

Attorneys of their jurisdiction over police shooting cases because of presumed bias.

Instead of removing these cases from the ambit of District Attorneys, perhaps a more effective response would be for the legislature to reduce the broad latitude that officers currently have in determining what constitutes a reasonable risk to his or her own safety. In addition, police departments could take administrative actions to better identify the legal parameters of an officer's authority to use lethal force. For example, since 2003 South Dakota has implemented a unique 13-week training course for its police officers so they can learn alternative, "less-than-lethal" methods for getting civilians to comply with their orders.<sup>147</sup> More training could thus result in fewer fatalities.

Still, police shootings are complex criminal matters involving multiple parties in stressful circumstances. After all, the nature of law enforcement requires that officers enter tense, high-adrenaline confrontations with oftentimes highly emotional civilians. This can make it very difficult to assess the level of threat that a civilian may pose to officers. As a result, no panacea may exist to prevent future officer shootings. But states can seek to deter officers from unreasonably using lethal force by ensuring that officers for whom probable cause exists to charge for a crime are indicted. To do this, states must refine and formalize their own investigation protocols for handling police shooting cases. This will require a multi-pronged approach consisting of clearer guidelines on what constitutes lawful use of force, better tracking of police shootings, and improved coordination between State Attorneys General and District Attorneys. This would not only encourage police officers to consider less-than-lethal methods for defusing confrontations, but it would help ensure justice for the families of those who tragically lose their lives during encounters with the police.

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147. See Marty Jackley, *supra* note 128.

Additionally, State Attorneys General should develop a comprehensive conflict-of-interest inquiry, preferably modeled after New Jersey's, which will ensure a truly independent investigation of the police. Even if police officers are exonerated for their actions, a comprehensive conflict-of-interest review helps ensure that the investigation was procedurally sound. This can restore public confidence in the criminal justice system at a time when millions of Americans, particularly from minority communities, question whether police officers are being held accountable for their actions.