

Embracing Federalism in Special Prosecution Models: An Analysis of Experimentation in the States

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The main project of this Note is to use the example of police officer-involved deaths of unarmed civilians to craft and apply different special prosecution models. In Part II, this Note starts from the proposition that a special prosecutor should supersede the local prosecutor to investigate and prosecute certain cases, such as the police-involved death of unarmed civilians. This Note then identifies and addresses the criticisms made by opponents of special prosecution models.

In Part III, this Note presents and analyzes the existing special prosecution models implemented in states to address cases of police officer-involved deaths of unarmed civilians. Part IV uses the example of New York as an in-depth case study. Then, Part V distills down these complete state models to “dimensions” – areas where the models differ – to provide an analytical structure for readers to use in their own evaluation and design of special prosecution models. The dimensions also provide a structure for Part VI, which proposes and evaluates special prosecution models that seek to address incidents of police officer involved deaths of unarmed civilians. The broader utility of the dimensions will be as a framework for any future special prosecution model that seeks to address any future latent law enforcement gaps.

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I. INTRODUCTION

Precipitated in all corners of the country, from Ferguson, Missouri to Staten Island, New York, America has begun to reckon with the disparate treatment of racial minorities by the criminal justice system. Public outcry following the police officer-involved deaths of unarmed civilians and the decision not to press charges against the officers who killed Michael Brown in Ferguson and Eric Garner in New York City led to nationwide protests and activism.¹ Much of the conversation has centered on widespread prosecutorial misconduct and lack of police accountability.² Access to information and commentary on specific incidents through digital media such as blogs, YouTube, and social media have broadened public interest in the role of special prosecutors beyond academics and activists.³ Families of victims have called for special prosecutors in numerous cases, including that of Laquan McDonald in Chicago and Tamir Rice in Cleveland.⁴

In response to escalating discord, President Obama formed the Presidential Task Force on 21st Century Policing (the Task Force) to examine the issue and make recommendations on how to build public trust and improve relations between communities and law enforcement officers.⁵ In May 2015, after gathering testimony from hundreds of community members, law enforcement stakeholders, researchers, and civic leaders, the Task Force released its report.⁶ Among many other recommendations, the report called for “policies that mandate the use of external and independent prosecutors in cases of police use of force resulting in

1. Benjamin Mueller & Ashley Southall, *25,000 March in New York to Protest Police Violence*, N.Y. TIMES, (Dec. 13, 2014), https://www.nytimes.com/2014/12/14/nyregion/in-new-york-thousands-march-in-continuing-protests-over-garner-case.html?_r=0 [http://perma.cc/9KJ2-W5AS].

2. Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 89 (2016).

3. *See id.* at 90.

4. Steve Schmadeke, *Judge: Special prosecutor to probe police accounts of McDonald shooting*, CHI. TRIB. (July 1, 2016), <http://www.chicagotribune.com/news/local/breaking/ct-laquan-mcdonald-jason-van-dyke-court-met-20160701-story.html> [http://perma.cc/B95P-F3GH]; Jason Hanna and Ed Payne, *Family of Tamir Rice calls for special prosecutor in shooting case*, CNN (Oct. 16, 2015), <http://www.cnn.com/2015/10/16/us/tamir-rice-shooting-family-letter/> [http://perma.cc/4B3P-H3XD].

5. PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING III (2015), https://www.ncep.safety.org/assets/files/library/TaskForce_FinalReport.pdf [https://perma.cc/8D40C-CDTC] [hereinafter TASK FORCE REPORT].

6. *Id.*

death, officer-involved shootings resulting in injury or death, or in-custody deaths.”⁷ Independent prosecutors, also known as “special prosecutors,” would deliver more transparency to the public and encourage mutual trust between communities and law enforcement.⁸ Several states have responded by enacting measures to deal with the investigation and prosecution of police-involved deaths of unarmed civilians.⁹

The urgency of action by the states to implement such policies has only increased with the change of presidential administrations. Since the beginning of the Trump Administration, activists have lost a relatively sympathetic ally in the Obama Department of Justice.¹⁰ Thus, if the problem of prosecutorial misconduct is to be addressed, the states must take action to mandate the use of special prosecutors in officer-involved deaths of unarmed civilians. States, however, have myriad options in their use of special prosecutors. This Note urges the use of special prosecutors in this area, showcases the variety of ways in which the special prosecution model may be used, and builds a framework for evaluating the effectiveness of various models. While this Note discusses special prosecution in the context of police-involved deaths of unarmed civilian, it also seeks to disaggregate the monolithic term “special prosecution” to assess more broadly the considerations for developing any effective special prosecution model.

Part II of this Note defines the term special prosecutor and lays out the arguments in favor of mandating the use of a special prosecutor in cases of police-involved deaths of unarmed civilians. It goes on to identify and evaluate critiques of the special prose-

7. *Id.* at 21.

8. *Id.*

9. *Law Enforcement Overview*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/civil-and-criminal-justice/law-enforcement.aspx> [http://perma.cc/9TVA-H7DM] (last visited Apr. 8, 2018).

10. See German Lopez, *It’s official: the Trump administration will “pull back” from investigating police abuses*, VOX (Jan. 10, 2017), <http://www.vox.com/policy-and-politics/2016/11/16/13640540/trump-obama-police-brutality> [http://perma.cc/Z2RU-CBN6] (“Under President Barack Obama, the Justice Department took on more civil rights investigations of local police departments than Obama’s two predecessors. . . . [T]he Obama Justice Department has investigated nearly two dozen police departments, from Baltimore to Ferguson, Missouri — uncovering a wide range of abusive, even racist, police practices.”); see also AMES C. GRAWERT & NATASHA CAMHI, BRENNAN CTR. FOR JUSTICE, *CRIMINAL JUSTICE IN PRESIDENT TRUMP’S FIRST 100 DAYS* (2017), <https://www.brennancenter.org/publication/criminal-justice-president-trumps-first-100-days> [http://perma.cc/QSG7-RXHV] (discussing President Trump’s ‘tough on crime’ approach to criminal justice including the review of existing consent decrees with local police departments and attempt to stall the pending settlements).

cution model. Part III presents and analyzes different models enacted by the states, while Part IV examines the New York Model in-depth as a case study. Part V steps back from the special prosecution models used by the states to break them down into “dimensions” that provide a toolbox for evaluating any special prosecution model. Part VI then applies the dimensions to present and analyze proposed special prosecution models that would address incidents of police officer involved deaths of unarmed civilians.

II. EXAMINING THE ROLE OF “SPECIAL PROSECUTOR”

Debate over special prosecutors is widespread, with many arguments made for and against their use.¹¹ Before developing a theory of how special prosecution models should be designed and evaluated, it is important to establish their importance through a careful examination of these arguments. This part begins by defining the term “special prosecutor” as it will be used in this Note. It then explores arguments for and against mandating the use of special prosecutors in cases of police-involved deaths of unarmed civilians.

A. DEFINITION AND AUTHORITY OF A SPECIAL PROSECUTOR

A special prosecutor is “[a] lawyer appointed to investigate and, if justified, seek indictments in a particular case.”¹² The need for a special prosecutor may arise because the original “prosecuting attorney is legally precluded from proceeding due to a conflict of interest”; because she or he “is faced with a difficult case beyond [her or] his investigative and legal abilities”; or because there “is corruption within the judicial/governmental system, and public confidence requires an ‘uninvolved’ outsider to investigate and prosecute.”¹³ The need for a special prosecutor may also come from the “common sense realization that the con-

11. See *infra* Parts II.B–C.

12. *Special Prosecutor*, BLACK’S LAW DICTIONARY (10th ed. 2014). A term sometimes used interchangeably with “special prosecutor” is “independent counsel,” which is defined as “an attorney hired to provide an unbiased opinion about a case or to conduct an impartial investigation.” *Independent Counsel*, BLACK’S LAW DICTIONARY (10th ed. 2014).

13. 4 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 13.3(f) (4th ed. 2015).

tinued integrity of the system demands one.”¹⁴ Depending on state law, a judge, governor, attorney general, or legislature may appoint a special prosecutor.¹⁵

Special prosecutors are usually reserved for rare situations where a crisis renders the ordinary process defective.¹⁶ Given the departure from normal practice, appointers of special prosecutors should take “extreme caution in the identification of systemic problems requiring special prosecution,” consider the “least intrusive remedies sufficient to meet an identified law enforcement gap,” and narrowly articulate the special prosecutor’s “specific mandates, jurisdiction, and powers.”¹⁷

As this Note assesses the New York special prosecution model in more depth, this section begins with New York’s definition of special prosecutor. Under New York law, “prosecutor” means a district attorney or any other public servant who represents the people in a criminal action.¹⁸ A special prosecutor in New York — unlike a district attorney elected by her constituents — derives her authority from the Attorney General and Governor, who are elected independently.¹⁹ New York’s Executive Law grants the Attorney General the power to supersede the authority of any district attorney in any investigation and prosecution at the direction of the governor.²⁰

New York is not alone in this broad grant of authority over the appointment of special prosecutors to state-level actors. Most states have laws and rules allowing the attorney general to su-

14. Lawrence Taylor, *A Needed Specialty: The Special Prosecutor*, 61 JUDICATURE 220, 223 (1977).

15. Lawrence T. Kurlander & Valerie Friedlander, *Perilous Executive Power — Perspective On Special Prosecutors in New York*, 16 HOFSTRA L. REV. 35, 35 (1987) (describing that New York law provides for the appointment of a special prosecutor by a criminal trial court judge, the legislature, or the governor); *see also* Schmadeke, *supra* note 4 (explaining that a judge in Illinois has appointed a special prosecutor to investigate the death of Laquan McDonald at the hands of police); *see infra* note 22 and accompanying text (discussing New Jersey law, which provides for the attorney general to appoint a special prosecutor).

16. Joseph Bellacosa, *The Honorable Hugh R. Jones Fifth Memorial Lecture: Cogitations Concerning the Special Prosecutor Paradigm: Is the Cure Worse than the Disease?*, 21 ST. JOHN’S J.L. COMM. 615, 634 (2007).

17. Kurlander & Friedlander, *supra* note 15, at 62.

18. N.Y. CRIM. PROC. LAW § 1.20 (McKinney 2013).

19. *Id.*

20. N.Y. EXEC. LAW § 63(2) (McKinney 2014). *See also* Johnson v. Pataki, 691 N.E.2d 1002, 1006 (N.Y. 1997); Robert Pitler, *Superseding the District Attorneys in New York City — The Constitutionality and Legality of Executive Order No. 55*, 41 FORDHAM L. REV. 517, 532 (1973) (“Traditional principles of judicial review would seem to preclude a challenge to the Governor’s order requiring supersede unless there is no basis for his conclusion.”).

persede local prosecutors to investigate and prosecute cases where there is a conflict of interest.²¹ While a state's legal structure could resemble that of New York — where the people elect DAs who generally have jurisdiction over most criminal matters — there are also states where jurisdiction over all criminal matters resides with the attorney general instead.²²

Thus, a special prosecutor may be understood as an unbiased and impartial attorney — an outsider — appointed to address a specific failing in the normal procedures of investigation and prosecution. In the next section, this Note argues that the real and perceived failure in the investigation and prosecution of unarmed civilian deaths at the hands of police is the type of “identified law enforcement gap”²³ in which special prosecutors are typically deployed. Specifically, this Note recommends that special prosecutors be used in cases of police officer-involved deaths of unarmed civilians. Pointedly, the recommendation is limited to incidents where law enforcement officers have caused the death of an unarmed civilian. While this line-drawing may seem arbitrary — it would exclude persons who are, for example, crippled or in other ways injured in police-involved incidents — it is necessary to prevent the overreaching of special prosecutors and maintain their special position as outsiders. Moreover, in other cases, victims retain the right to testify in court, speak out publicly, and generally serve as their own advocates through normal channels. Consequently, this Note proceeds with New York's definition for when a special prosecutor should be used: when there has been an incident “involving the death of an unarmed civilian, whether in custody or not, caused by a law enforcement officer,”

21. Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 532 (2011).

22. For example, in New Jersey, the attorney general has jurisdiction over all criminal matters. See N.J.S.A. 52:17B-98. In New Jersey, as in Connecticut and Maine, in a situation where the local prosecutor may have a conflict of interest, such as a use-of-force incident involving a police officer, the attorney general may appoint a prosecutor from a different jurisdiction, order a prosecutor's recusal, or take any “other actions as may be needed to ensure the impartiality and independence of the investigation.” N.J. Att'y General Supplemental Law Enforcement Regarding Uniform Statewide Procedures and Best Practices for Conducting Police-Use-of-Force Investigations, 4 (July 28, 2015), http://www.njdcj.org/agguide/directives/2006-5_SRT_OIS.pdf [<http://perma.cc/6W55-YT2S>] [hereinafter Supplemental Law Enforcement]. Therefore, although the sources of authority and the jurisdictional structures differ, in practice both New York and New Jersey allow for the use of special prosecutors.

23. Kurlander and Friedlander, *supra* note 15, at 62.

or where there is “a significant question as to whether the civilian was armed and dangerous at the time of his or her death.”²⁴

B. THE NECESSITY OF A SPECIAL PROSECUTOR

This section synthesizes various arguments calling for special prosecutors in cases of police officer involved deaths of unarmed civilians. First, from investigation through prosecution, prosecutors exercise considerable discretion creating the potential for unchecked prosecutorial misconduct in certain circumstances. Second, local prosecutors often possess an inherent bias — perhaps unconscious — in favor of local law enforcement, resulting in a conflict of interest. Third, elections do not hold local prosecutors equally accountable to all community members, and district attorneys may actually prefer special prosecutors in such politically potent cases. Fourth, and most importantly, public mistrust of the criminal justice system requires a special prosecutor to ensure perceptions of legitimacy. Taken together, these factors illustrate the necessity of a special prosecutor in the area of police-involved deaths of unarmed civilians.

1. *Prosecutorial Discretion and The Potential for Misconduct*

As law enforcement officers, police and prosecutors exercise unfettered discretion over their cases. Police officers interview suspects, collect statements from witnesses, and make arrests. They therefore exercise significant control over the facts presented to the prosecutor in most criminal cases.²⁵ Police officers and line prosecutors often decide how hard and when to push an investigation with little oversight.²⁶

Notwithstanding their broad discretion, prosecutors are not immune from criticism or allegations of misconduct. Those allegations, however, have conventionally focused on intentional, ra-

24. N.Y. Exec. Order No. 147 (July 8, 2015), <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/old-files//EO147.pdf> [<http://perma.cc/7ASA-82M3>].

25. See Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1446–67 (2016).

26. STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 34 (2012) (“Prosecutors rarely explain publicly why they have declined prosecution, pursued felony charges, or bargained away imprisonment.”); see also Green & Yaroshefsky, *supra* note 2, at 63–65 (2016).

ther than negligent or inadvertent, wrongdoing.²⁷ Thus, traditional views of prosecutorial misconduct ignore the possibility that the office, rather than the individual line prosecutor, is to blame for failing to train, supervise, and establish internal processes to prevent wrongdoing.²⁸ Further, an aggressive office culture may promote disregard for ethical obligations.²⁹ Professor Peter Joy argues that prosecutorial misconduct results from three institutional conditions: “vague ethics rules that provide ambiguous guidance to prosecutors; vast discretionary authority with little or no transparency; and inadequate remedies for prosecutorial misconduct, which create perverse incentives for prosecutors to engage in, rather than refrain from, prosecutorial misconduct.”³⁰ According to universal ethical standards, later discussed, prosecutorial misconduct is inevitable when prosecutors proceed despite conflicts of interest or inherent bias.

2. *Inherent and Unconscious Bias Results in a Conflict of Interest*

Prosecutors rely on good relationships with the police in order to do their jobs effectively.³¹ They work closely with police and depend on police cooperation in both pending and future cases.³² For example, law enforcement officers serve as key witnesses at trial, and thus prosecutors need their assistance to win convictions.³³ Even more broadly, local prosecutors and the police likely have a past working relationship, and maintaining this close connection is in prosecutors’ self-interest.³⁴ According to Professors Peter Joy and Kevin McMunigal, these factors contribute to an “ethical blindness on the part of the prosecutor to appreciate the substantial risk that the prosecutor’s representation of the government may be adversely affected during an investigation

27. See Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xxiii (2015) (suggesting a prosecutor will intentionally engage in misconduct by relying on testimony of cops known to be lying or acquiescing in a police scheme to create exculpatory evidence.); see also Green & Yaroshefsky, *supra* note 2, at 58.

28. Green & Yaroshefsky, *supra* note 2, at 59.

29. *Id.*

30. Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 400 (2006).

31. See Levine, *supra* note 25, at 1468.

32. Joy, *supra* note 30, at 48 (2015).

33. See Levine, *supra* note 25, at 1468.

34. Joy, *supra* note 30, at 48.

into wrongdoing by the police.”³⁵ Thus, prosecutors may not purposefully be acting unethically in failing to recognize the conflict of interest in cases of police-involved deaths of unarmed civilians; rather unconscious bias may infect the normal exercise of prosecutorial discretion.³⁶

Professors Robbennolt and Sternlight argue that many ethical failures involving lawyers occur unconsciously and unintentionally, even when the attorney has knowledge of the relevant ethical rules.³⁷ Moreover, they contend, “people who are primed to think of themselves as highly ethical are *more* likely to act unethically.”³⁸ Additionally, people who feel powerful can be more likely to engage in unethical behaviors and be less concerned about social censure.³⁹ Prosecutors, with their quasi-judicial role and mandate to carry out justice on behalf of the public,⁴⁰ may therefore be especially susceptible to engaging in unintentionally unethical behavior.⁴¹

35. *Id.* Psychological research shows that even if a prosecutor appreciates her ethical and professional responsibility to investigate and prosecute objectively, self-interest often prevails despite a genuine attempt to comply with ethical mandates. Don A. Moore & George Loewenstein, *Self-Interest, Automaticity, and the Psychology of Conflict of Interest*, 17 SOC. JUST. RES. 189, 191 (2004). The reason for this fundamental default to self-interested behavior is that when professional responsibilities clash with self-interest, the two motives tend to be processed differently: self-interest exerts a more automatic influence than do professional responsibilities. *Id.* at 190. Automatic processes, occurring outside of conscious awareness, are difficult to eliminate or completely correct. *Id.*

36. See Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1112 (2013). Research suggests that tasks inconsistent with a prosecutor’s self-interest, such as aggressive pursuit of charges against police officers, can result in the unwitting bending of facts to fit beliefs rather than vice versa. See Moore & Loewenstein, *supra* note 35, at 193–95.

37. Robbennolt & Sternlight, *supra* note 36, at 1156 (2013). Under the American Bar Association’s ethical rules, a lawyer should not proceed with a representation if the representation “involves a concurrent conflict of interest.” Model Rules of Prof’l Responsibility R. 1.7 (2014). ABA Model Rule 1.7(a)(2) states that a conflict of interest exists when there is a “significant risk that the representation of one or more 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.” *Id.* However, under Model Rule 1.7(b)(1), a lawyer may proceed with the representation if she “reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.” *Id.* Accordingly, prosecutors have not breached ethical standards if they “reasonably believe” that they are unbiased or lack a “personal interest” in cases of officer-involved shootings of unarmed civilians. If the bias in favor of police is unconscious, prosecutors may “reasonably believe” they lack a personal interest in certain outcomes.

38. Robbennolt & Sternlight, *supra* note 36, at 1161.

39. *Id.* at 1144.

40. See Levine, *supra* note 25, at 1453.

41. Robbennolt and Sternlight, *supra* note 36, at 1161.

Nevertheless, local prosecutors in cases of police officer-involved deaths of unarmed civilians rarely recuse themselves voluntarily.⁴² One explanation is that prosecutors see themselves as objective actors and entirely competent to conduct the investigation.⁴³ Robbennolt and Sternlight argue that people generally tend to be overconfident about their abilities to be “ethical, unbiased, [and] competent”; attorneys in particular tend to believe that their own ethics “are more stringent than those of” their colleagues.⁴⁴

These ethical blind spots contribute to the failure to see the moral components of a decision because psychological processes obscure the ethical dilemma.⁴⁵ Like other people, attorneys tend to conflate what is fair or ethical with what serves their own interest. This leads to confirmation bias.⁴⁶ Ethical blind spots and confirmation bias become particularly dangerous for prosecutors who are charged with objectively serving the public good. This illusion of objectivity, held by many attorneys,⁴⁷ may be exacerbated for prosecutors, since research shows that approaching a conflict or negotiation from a more competitive perspective, like the adversarial nature of the high-stakes criminal justice system, tends to increase unethical behavior.⁴⁸

3. *The Failure of Elections*

Political accountability through local elections generally serves as an important check on district attorneys in their execu-

42. See Levine, *supra* note 25, at 1477–78 (explaining prosecutors are typically not asked to recuse themselves in cases involving local police because the public — technically the prosecutor’s client — does not have the ability to raise a conflict of interest claim).

43. Tigran Eldred, drawing on behavioral economics, described these two phenomena as the “self as moral” bias or “illusion of objectivity” — where a person has a tendency to believe herself to be more honest, ethical, and fair than others — and the “self as competent” bias — wherein a person sees herself, falsely in many circumstances, as possessing a series of desirable attributes to a greater degree than others. Levine, *supra* note 25, at 1462–63 (citing Tigran W. Eldred, *The Psychology of Conflicts of Interest in Criminal Cases*, 58 U. KAN. L. REV. 43, 66 (2009)).

44. Robbennolt & Sternlight, *supra* note 36, at 1116.

45. *Id.* at 1120.

46. *Id.* at 1129–30 (defining confirmation bias as the interpretation of “new information in ways that favor our existing beliefs and to ignore dissent or other indications of ethical challenges”).

47. See *id.* at 1116.

48. *Id.* at 1137–40 (noting that the “zealous advocacy” required in an adversarial system may lead counsel to find behavior inappropriate in other contexts to be unproblematic — for example, vigorously cross-examining a candid and cooperative witness).

tion of justice and representation of the public. In cases of police misconduct, however, elections do not seem to hold local prosecutors accountable. More than 80% of local prosecutors are elected;⁴⁹ however, most citizens have little information about — or interest in — district attorney elections.⁵⁰ For example, despite the forceful criticism of the handling of the investigation, as well as riots and protests surrounding the officer-involved death of Michael Brown in Ferguson, the county prosecutor — who later failed to secure a grand jury indictment against the police officer — easily won re-election.⁵¹

Law enforcement, on the other hand, is well-informed and very interested in the outcome of elections, and their political support matters. Local prosecutors will often seek police union endorsements and rely on valuable campaign contributions from individual police officers, police political action committees, and unions.⁵² For instance, as Professor Kate Levine explains, “[w]hen a powerful police union charges that a politician is ‘soft on crime,’ that candidate’s chances for election or reelection can be dramatically reduced.”⁵³ Thus, local DAs may not voluntarily cede power to a special prosecutor because it might look like they are dodging responsibility or being “soft on crime,” which could negatively affect their chances at re-election. Moreover, DAs face the potential for political blowback no matter what decisions they make relating to cases of officer-involved deaths of unarmed civilians. Just as criticism followed the white prosecutor who failed to indict the officer in Ferguson, so did the reverse occur for the black prosecutor in Baltimore who brought charges relating to the officer-involved death of Freddie Gray. Critics of the Balti-

49. Kami Chavis Simmons, *Ferguson and Beyond: Increasing Police Accountability, Restoring Trust and Legitimacy Through the Appointment of Independent Prosecutors*, 49 WASH. U. J.L. & POLY 137, 145 (2015).

50. Levine, *supra* note 25, at 1476 (2016).

51. Elliott C. McLaughlin, *4 in 10 Ferguson voters cast ballots; turnout still trails county, 2010 totals*, CNN POLITICS (Nov. 6, 2014), <http://www.cnn.com/2014/11/06/politics/missouri-elections-ferguson-voter-turnout/> [<https://perma.cc/7VAK-3BKU>].

52. See Jon Swaine et al., *Ties that bind*, THE GUARDIAN (Dec. 31, 2015), <https://www.theguardian.com/us-news/2015/dec/31/ties-that-bind-conflicts-of-interest-police-killings> [<https://perma.cc/7D4A-N3G4>]; but see Patricia Madej, *Who is Larry Krasner, Philadelphia’s district attorney-elect, and why is his win a big deal?*, THE PHILA. INQUIRER (Nov. 8, 2017), <http://www.philly.com/philly/news/politics/larry-krasner-election-philadelphia-da-civil-rights-lawyer-20171108.html> [<https://perma.cc/S7EG-3FJY>] (explaining that liberal billionaire George Soros donated \$1.45 million in support of the elected progressive candidate for Philadelphia District Attorney, Larry Krasner).

53. Levine, *supra* note 25, at 1476 (2016).

more prosecutor alleged that she was merely appeasing her largely black constituency by bringing charges against police officers in that incident.⁵⁴ Therefore, while DAs must outwardly disapprove of special prosecutors, the punting of controversial cases could be politically opportune.

4. *Public Mistrust and Perceptions of Legitimacy Require A Special Prosecutor*

An animating force behind New York Governor Cuomo's decision to use special prosecutors in cases of police-involved deaths of unarmed civilians was public mistrust of local prosecutors' ability to fairly investigate and prosecute those cases.⁵⁵ Announcing his decision, Governor Cuomo stated that "a criminal justice system does not work without trust."⁵⁶ Yet, almost three-quarters of Americans lack confidence in the criminal justice system.⁵⁷ Moreover, minority groups express more negative attitudes about the police and less trust in the system.⁵⁸ For example, one of the slogans that the Black Lives Matter movement has adopted in its protests against police shootings of unarmed civilians is "Indict the System."⁵⁹ Perceptions of illegitimacy lead people to express their frustrations outside of the justice system through protest and rioting, as evidenced by the protests in Ferguson following the "no true bill" grand jury verdict.⁶⁰

When the public believes that the criminal justice system does not and cannot ensure fairness in certain cases, states must address these concerns by creating procedures that restore trust in

54. See Simmons, *supra* note 49, at 140.

55. Josefa Velasquez, *Amid confusion, Cuomo seeks to clarify executive order*, POLITICO N.Y. (Sept. 4, 2015), <http://www.politico.com/states/new-york/albany/story/2015/09/amid-confusion-cuomo-seeks-to-clarify-executive-order-025277> [https://perma.cc/JLZ9-XFUP].

56. 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> [https://perma.cc/Q2G5-HUPB].

57. BIBAS, *supra* note 26, at 51 (2012).

58. Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 L. & SOC'Y REV. 513, 515 (2003).

59. Julie Zauzmer & Clarence Williams, *D.C. marchers protest deaths of Michael Brown, Eric Garner*, WASH. POST (Dec. 3, 2014), https://www.washingtonpost.com/local/dc-marchers-protest-deaths-of-michael-brown-eric-garner/2014/12/03/7ec3ed1c-7b48-11e4-9a27-6fdb612bff8_story.html?utm_term=.6f495f2f0000 [https://perma.cc/7UW3-ZLYF].

60. Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <https://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html> [https://perma.cc/N3NA-SEVP].

the system. As Governor Cuomo has acknowledged, the concern is less about actual prejudice but rather the public's perception of the integrity of the criminal justice system.⁶¹ Where the public identifies their mistrust of existing procedures, states need to create new practices, such as automatic procedures to install a special prosecutor, to correct perceived failures. The use of special prosecutors will therefore serve the important function of both preserving and restoring faith in the criminal justice system.

Given the broad discretion exercised by prosecutors, the inherent conscious and unconscious bias of local prosecutors towards local police departments, the resulting conflict of interest, and the failure of ethical standards and elections to hold local prosecutors accountable or force recusal, states should be concerned that the public has lost faith in the ability of the criminal justice system to effectively investigate and prosecute incidents of officer-involved deaths of unarmed civilians. The real and perceived failing of normal procedures to ensure justice in these cases creates a clear need for special prosecutors to respond to this law enforcement gap, as evidenced by the recommendation of President Obama's Task Force on 21st Century Policing.⁶² The question thus becomes how best to employ special prosecutors.

C. CRITICISM OF THE USE OF SPECIAL PROSECUTORS

While this Note argues for the necessity of special prosecutors in cases of police officer-involved deaths of unarmed civilians, criticism of the special prosecution model indicates that it is not universally extolled. The most well-known denunciation of special prosecutors comes from Justice Scalia's dissent in *Morrison v. Olson*,⁶³ which upheld the federal special prosecutor law. Justice Scalia argued that if a special prosecutor were to abuse her pow-

61. Velasquez, *Cuomo seeks to clarify executive order*, *supra* note 55; Levine, *supra* note 25, at 1453.

62. See TASK FORCE REPORT, *supra* note 5, at 21 ("The task force encourages policies that mandate the use of external and independent prosecutors in cases of police use of force resulting in death, officer-involved shootings resulting in injury or death, or in-custody deaths.").

63. *Morrison v. Olson*, 487 U.S. 654, 697–734 (1988) (Scalia, J., dissenting).

er, there would be no remedy, “not even a political one.”⁶⁴ In a scenario with a bad special prosecutor, “there would be no one accountable to the public to whom the blame could be assigned.”⁶⁵ A special prosecutor’s isolation from internal and external checks and balances “is designed to heighten, not to check, all of the occupational hazards of the dedicated prosecution; the danger of too narrow a focus, of the loss of perspective, of preoccupation with the pursuit of one alleged suspect to the exclusion of other interests.”⁶⁶ While proponents of the use of special prosecutors value this independence, Justice Scalia found that such independence made it functionally impossible to keep special prosecutors in check.

Similarly, former New York Court of Appeals Judge Joseph Bellacosa focused his critique on the culture of special prosecutors’ offices. He likened special prosecutors to “runaway grand juries” in that both “presume to be unconstrained by the boundaries of ordinary and prescribed rules.”⁶⁷ He argued that “[t]hey are often puffed up or blinded by their own purity of purpose and an excessively zealous vision of the idealized end result.”⁶⁸ He described special prosecutors as self-righteous and as having an “I alone know best” attitude.⁶⁹ In his comments, Judge Bellacosa specifically referenced the unscrupulous practices of special prosecutors in the 1970s in New York City, discussed briefly in Part IV.⁷⁰ In evaluating the modern use of special prosecutors by the states in situations of officer-involved deaths of unarmed civilians, Heather McDonald of the Manhattan Institute echoed Judge Bellacosa’s concern about entrapment and other unscrupulous tactics employed by the special prosecutor’s office in the 1970s. She argues that “[c]ity prosecutors have since proved themselves fully capable of prosecuting criminal cops and representing the public will.”⁷¹

64. *Id.* at 730.

65. *Id.* at 731.

66. Brief for H. Levi et al. as Amici Curiae, p. 11, *Morrison*, 487 U.S. at 731–32 (Scalia, J., dissenting).

67. Bellacosa, *supra* note 16, at 647 (2007).

68. *Id.*

69. *Id.*

70. *Id.* at 629. *See also infra* notes 129–133 and accompanying text.

71. Heather MacDonald, Opinion, *District Attorneys Have Shown They Can Prosecute the 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> [<https://perma.cc/B7K8-TUDN>].

Thus, critics of special prosecutors have decried the potential for abuse of unchecked power. Special prosecutors do not, however, have to follow the model used in New York City in the 1970s condemned by Judge Bellacosca or the federal model denounced by Justice Scalia. As this Note will explore, there are many ways to employ special prosecutors narrowly. Furthermore, the concern about special prosecutors using broad authorizations to expand their own roles is less relevant in instances where the mandate of the special prosecutor has been carefully limited by an accompanying attenuated grant of authority. While states should not seek to intentionally cripple the role of special prosecutors, well-crafted laws can properly address concerns regarding abuse of power.

Local prosecutors have also argued that the use of special prosecutors exacerbates mistrust in the criminal justice system. For example, New York Governor Andrew Cuomo's Executive Order was opposed by former Brooklyn DA Kenneth Thompson, who argued that "the people of Brooklyn have voted for their District Attorney to keep them safe from all crimes, including those of police brutality."⁷² Accordingly, implementation of a special prosecution model may validate claims that local police and prosecutors cannot do their jobs effectively, thereby destabilizing the normal criminal justice processes by reinforcing mistrust of the system.⁷³ Additionally, as Lawrence Kurlander and Valerie Friedlander argue, "[p]recipitant interference with local law enforcement creates the potential for atrophy of local law enforcement officers' ability to deal with criminal activity within their jurisdiction and a concomitant loss of accountability."⁷⁴ While concerning, these potential issues do not overshadow the reasons outlined in Section B for requiring a special prosecutor in cases of police-involved deaths of unarmed civilians.

This Note must also address a final limitation on the effectiveness of any special prosecution model used to address issues involving police. That is, all special prosecutors must rely on in-

72. Press Release, District Attorney Kenneth Thompson, Statement of Brooklyn District Attorney Ken Thompson on Call By New York State Attorney General to Act as Special Prosecutor in Cases of Fatal Shootings (Dec. 16, 2014), <http://brooklynda.org/2014/12/16/statement-of-brooklyn-district-attorney-ken-thompson-on-call-by-new-york-state-attorney-general-to-act-as-special-prosecutor-in-cases-of-fatal-shootings/> [https://perma.cc/X3KC-2X3T].

73. See Kurlander & Friedlander, *supra* note 15, at 60.

74. *Id.*

investigators to collect evidence to build their cases. These investigators will likely be from the local police department where an incident has occurred.⁷⁵ Therefore, the special prosecutor in almost every case must rely on the very police department against which she may later bring charges for evidence that may implicate that department. This is a structural problem not easily addressed. Although it is well-accepted that prosecutors do and should play some role in investigative decision-making,⁷⁶ police — not prosecutors — have the ability, expertise, and manpower to collect evidence and conduct the investigation.⁷⁷ According to Professor Daniel Richman, “even with the experience gained through regular investigative involvement, prosecutors just may not be very good at making investigative calls that require the ‘street smarts’ or industry knowledge that agents pride themselves on developing.”⁷⁸ One potential solution to the problem of local police conducting investigations into their own departments would be the use of state investigators to ensure the independence of the investigation. The drawbacks are pronounced, however, in that state investigators lack the expertise and relation-

75. The District Attorneys Association of the State of New York (DAASNY) noted this issue when Governor Cuomo announced the Executive Order providing for the use of special prosecutors in case of police-involved deaths of unarmed civilians. Josefa Velasquez, *State D.A.s Call Cuomo Special Prosecutor ‘Gravely Flawed’*, POLITICO (July 13, 2015), <https://www.politico.com/states/new-york/albany/story/2015/07/state-das-call-cuomo-special-prosecutor-gravely-flawed-000000> [<https://perma.cc/JLZ9-XFUP>] (“It may take the AG’s office hours to respond to an incident — particularly in upstate rural areas. The first few hours of an investigation are critical. What happens to the investigation during that time?”). In response to this concern, Attorney General Schneiderman issued a letter to all district attorneys in the state informing them that their offices would conduct preliminary investigations while the special prosecution unit determined whether it had jurisdiction. See Letter from Eric T. Schniederman, Attorney General, New York State, to District Attorneys of the State of New York (July 13, 2015), https://ag.ny.gov/pdfs/7_13_15_ETS_letter_to_DAs_Designation.pdf [<https://perma.cc/FV48-CFED>] (stating that the preliminary investigation includes “questioning witnesses, drafting search warrants, preserving evidence, and supporting the investigation of the incident, but does not include, without prior authorization from the Special Prosecutor or his designee, conferring immunity on any witness, eliciting witness testimony in grand jury proceedings, or entering plea or cooperation agreements.”).

76. Rory K. Little, *Proportionality As An Ethical Precept for Prosecutors In Their Investigatory Role*, 68 FORDHAM L. REV. 723, 736–37 (1999) (stating that “the concept that prosecutors do and should play some role, and often a critical one, in investigative decisionmaking now seems to be embedded and well-accepted”).

77. See Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 767–68 (2003).

78. *Id.* at 805.

ships of local police and cannot respond as quickly to an incident when it occurs.⁷⁹

Rather, the best solution might be increased oversight of local investigators or police by the special prosecutor. As Professor Rory Little argues, “Prosecutors, due to their training, experience, and temperament, can provide a healthy brake on non-lawyer enforcement personnel.”⁸⁰ Furthermore, prosecutors do have control over the coercive elements of the investigative process such as the subpoena power, contempt proceedings, the issuance of warrants, and leniency and immunity agreements.⁸¹ A special prosecutor who exercises vigilant supervision over an investigation may help resolve potential concerns with local police conducting investigations into their own departments.

III. DIFFERENT STATE MODELS

Justice Brandeis famously endorsed the idea that “[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”⁸² In the area of police-involved deaths of unarmed civilians, states have indeed begun to experiment.⁸³ States have created procedures to improve the transparency and independence of investigations into incidents of police officer-involved deaths or allegations of police abuse of force.⁸⁴ This Part examines various policy solutions attempted by the states — namely, jurisdiction-removal in Connecticut; an oversight body in Hawaii; independent evidence-gathering and investigation in Wisconsin, Illinois and Utah; and grand jury reform in California and Georgia. This part excludes New York, which will be discussed in depth in Part VI.

The Connecticut Model uses laws already on the books to assign a prosecutor from a different jurisdiction to investigate and

79. See *infra* note 75 and accompanying text.

80. Little, *supra* note 76, at 729.

81. See Richman, *supra* note 77, at 780; see also Little, *supra* note 76, at 737.

82. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

83. Swaine et al., *supra* note 52 (“Legislators in more than a dozen states are now attempting to wrest responsibility for investigating deadly police incidents from local DAs and hand it to state-level or other special prosecutors.”).

84. *Law Enforcement Overview*, *supra* note 9.

prosecute incidents of police misconduct. Connecticut law already gave the chief state's attorney the authority to appoint a prosecutor from another district in the state to investigate police killings.⁸⁵ New legislation passed in 2015, however, requires that cases involving deadly police encounters be assigned to prosecutors from outside the police officer's jurisdiction; 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."⁸⁶ Furthermore, Connecticut's Division of Criminal Justice will now investigate all cases of use of force by police officers and "have the responsibility of determining whether the use of physical force by the peace officer was appropriate."⁸⁷ Thus, the important hallmarks of the Connecticut Model are that in *all* police killings, including of armed persons, the law provides that the chief state's attorney may make an ad hoc appointment of another District Attorney from a different jurisdiction — not a state-level prosecutor — to investigate.⁸⁸

Connecticut law also now requires more sophisticated record-keeping by law enforcement. All law enforcement agencies must maintain records of every incident where a police officer uses force likely to cause serious physical injury or death or discharges a firearm.⁸⁹ The record has to include the name of the officer; the

85. Lauren-Brooke "L.B." Eisen, *In New York, Attorney General as Special Prosecutor*, BRENNAN CENTER FOR JUSTICE: BLOG, <https://www.brennancenter.org/blog/new-york-attorney-general-special-prosecutor> [<https://perma.cc/GAT8-FMUN>] (last visited Apr. 8, 2017); *see, e.g.*, Isaac Lara, Note, *Shielded from Justice: How State Attorneys General Can Provide Structural Remedies to the Criminal Prosecutions of Police Officers*, 50 COLUM. J.L. & SOC. PROBS. 551, 558 (2017) (observing that Connecticut, like Maine, gives jurisdiction over all police shootings to the Attorney General); *see also* Supplemental Law Enforcement, *supra* note 22 (discussing the New Jersey Attorney General's ability to appoint a prosecutor for a different district).

86. CONN. GEN. STAT. § 51-277a (2018).

87. *Id.*

88. In Connecticut, the Chief State's Attorney and not the Attorney General is responsible for the prosecution of all criminal matters. The individual state's attorneys act as would a local district attorney in other states. However, the state's attorneys in Connecticut, unlike in most states, are appointed by the Criminal Justice Commission, which consists of the Chief State's Attorney and six members appointed by the Governor and confirmed by the General Assembly. Connecticut, therefore, may be unique in its ability to appoint local prosecutors to a different jurisdiction. Nevertheless, the general point is that states often do have idiosyncratic procedures and can tailor their special prosecution models appropriately. *Frequently Asked Questions*, CONN. DIV. OF CRIM. JUST., <http://www.ct.gov/csao/cwp/view.asp?a=1795&q=285526&csaoNav=|> [<https://perma.cc/X6P9-4G4Z>] (last visited Apr. 8, 2018).

89. *Law Enforcement Overview*, *supra* note 9.

time and place of the incident; a description of what occurred during the incident; and, to the extent known, the names of the victims and witnesses present at such incident.⁹⁰

Unlike in Connecticut, which uses existing procedures in new ways to address deadly police incidents. Hawaii created a new entity — the Law Enforcement Officer Independent Review Board — within the Office of the Attorney General to investigate incidents of officer-involved killings.⁹¹ The Hawaii legislature also funded the new Independent Review Board with an initial appropriation of \$500,000.⁹² The new law tasks the Attorney General with appointing members to the nine seats on the Board but requires the panel to consist of a deputy attorney general, a former prosecuting attorney from each county, a retired judge, a former high-ranking law enforcement officer, and two members of the community.⁹³ After an incident, the Board makes voluntary recommendations to the prosecutor in the county where the incident occurred.⁹⁴ Notably, Hawaiian law already provided that the Attorney General might intervene in local prosecutions when it is “clearly apparent that compelling public interests require.”⁹⁵ Thus, the Hawaii Model does not call for use of a special prosecutor. The Hawaii Model, however, is noteworthy for both its funding of the Independent Review Board and that board’s home within the Office of the Attorney General. In contrast to New York, which had to fund its reform efforts through the existing budget of the Attorney General,⁹⁶ Hawaii appropriated funds specifically for the purpose of addressing cases of officer-involved deaths of civilians. Furthermore, similar to the Connecticut model, the law allows for review of all cases of officer-involved deaths.⁹⁷

90. *Id.*

91. *Id.*

92. *Id.* Board members are unpaid but may be reimbursed for some expenses. Lynn Kawano, *New Oversight Panel to Investigate Officer-Involved Deaths*, HAW. NEWS NOW (July 6, 2016), <http://www.hawaiinewsnow.com/story/32388501/state-law-will-establish-panel-to-review-all-officer-involved-deaths-in-hawaii> [https://perma.cc/4ESB-VJD6].

93. Kawano, *supra* note 92.

94. *Id.* (“Hawaii’s panel won’t just look at fatal shootings, but any situation that involves a death, including traffic accidents or those involving the use of a Taser.”).

95. Barkow, *supra* note 21, at 557.

96. See Will Bredderman, *Whatever Resources Necessary: Schneiderman Rolls Out Cop Homicide Team*, OBSERVER, July 9, 2015, <http://observer.com/2015/07/whatever-resources-necessary-schneiderman-rolls-out-cop-homicide-team/> [http://perma.cc/7VN2-LC9C].

97. See *Frequently Asked Questions*, *supra* note 88.

Similar to Hawaii in their emphasis on creating more independent investigations without appointing a special prosecutor, Wisconsin, Illinois, and Utah have passed laws stating that the same department as the officer under review may not employ the personnel investigating an officer's use of force.⁹⁸ Utah specifically requires that its law enforcement agencies work with the district or county attorney to designate an agency to investigate instances in which officers use force.⁹⁹ In Illinois and Wisconsin, a report must be filed detailing decisions not to charge the officer, and the report is released directly to the public.¹⁰⁰ The laws do not, however, mandate the appointment of a special prosecutor, which has led to public controversy. For example, in July 2016, a county judge appointed a special prosecutor to investigate the shooting of Laquan McDonald, a teenager wielding a knife, by police officers.¹⁰¹ Previously, a coalition of community groups, attorneys, and a family member had filed a petition seeking a special prosecutor, arguing that the state attorney had failed to charge police officers and botched trials when charges were brought.¹⁰² Thus, the Wisconsin, Illinois, and Utah Models represent a commitment to more transparent and independent investigations and decision-making, but have not addressed the issue with specificity. As seen in the case of Laquan McDonald — where the Department of Justice, Chicago's inspector general's office, and a judicially appointed special prosecutor are running parallel investigations¹⁰³ — the resulting confusion can lead to increased public mistrust and outcry.¹⁰⁴ Accordingly, states should seek to define the mandate and appointment procedures of special prosecutors with more clarity.

Georgia and California have focused reform efforts on the grand jury process. In Georgia, a 2015 news investigation galvanized reform when it reported that no police officer in the past six

98. *Law Enforcement Overview*, *supra* note 9.

99. *Id.*

100. *Id.*

101. Schmadeke, *supra* note 4.

102. *Id.*

103. *Id.*

104. The confusion in Illinois may have resulted from the state's legal framework, which does not give the Attorney General jurisdiction over violent crimes including fatal police shootings. Lara, *supra* note 85, at 564 (describing the Attorney General's lack of authority to intervene in the McDonald case without a request from the district attorney, legislature, or governor, and the resulting attempt by the Attorney General to request federal assistance).

years faced prosecution for a fatal shooting.¹⁰⁵ Now, grand juries may use their civil authority to inquire into situations where an officer has caused serious bodily injury or death.¹⁰⁶ Furthermore, Georgia passed a new reporting requirement. All evidence and legal advice reported to the grand jury is recorded and, if the attorney general is advised not to seek indictment, a report is created and made available to the public.¹⁰⁷ As of 2016, police may no longer be present for the entire grand jury proceeding, listen to all the evidence against them and then make a statement at the end that cannot be challenged or questioned.¹⁰⁸ Before this change, Georgia was the only state that allowed this broad special treatment for police officers facing possible criminal charges.¹⁰⁹ While Georgia has thus far not gone the route of requiring a special prosecutor in police officer-involved deaths of unarmed civilians, the proposal remains on the table.¹¹⁰

California law generally prohibits grand juries from inquiring into incidents that involve a fatal shooting or use of excessive force by a police officer.¹¹¹ Instead, cases go through a preliminary hearing process that, in contrast to a grand jury proceeding, is public, adversarial, and allows cross-examination of witnesses.¹¹² Beginning in 2017, California also now requires detailed reporting of all instances where an officer has shot or been shot by a civilian, or when an officer has harmed or been harmed by a civilian, to the Department of Justice.¹¹³ These reports are made available to the public through the Department of Justice's annual crime report.¹¹⁴

105. Brad Schrade, *Grand jury privilege curtailed for Ga. officers in shooting cases*, THE ATLANTA JOURNAL-CONSTITUTION (Apr. 26, 2016), <http://www.myajc.com/news/grand-jury-privilege-curtailed-for-officers-shooting-cases/W3RYQj9l5ibJFHmVLRf3cN/> [http://perma.cc/GQ8C-BUA4] [hereinafter Schrade, *Grand jury privilege curtailed*].

106. *Law Enforcement Overview*, *supra* note 9.

107. *Id.*

108. Schrade, *Grand jury privilege curtailed*, *supra* note 105.

109. *Id.*

110. Former local prosecutors in Georgia, along with others, continue to call for more reform, specifically the use of special prosecutors for incidents of police killings. See Brad Schrade, *Former DAs Say Their Boss Breached Ethics, Mishandled Fatal Police Shooting of Caroline Small*, THE ATLANTA JOURNAL-CONSTITUTION, <http://investigations.myajc.com/overtheline/da-misconduct> [http://perma.cc/67AG-JT73].

111. *Law Enforcement Overview*, *supra* note 9.

112. *Id.*

113. *Id.*

114. *Id.*

Not all states have successfully made reforms. For example, in 2015 in Maryland — where the police-involved death of Freddie Gray occurred — the legislature failed to grant authority to the Office of State Prosecutor, which handles political corruption cases, to investigate any case in which a police officer kills someone in the line of duty.¹¹⁵ In Minnesota, the county prosecutor assigned to the case of the fatal police shooting of Philando Castile, refused to step aside, despite the victim's family's repeated request that a special prosecutor handle the case.¹¹⁶ Instead, the county attorney voluntarily appointed a former Department of Justice official to help review the case and weigh the evidence.¹¹⁷ Although the local prosecutor brought criminal charges against the officer without convening a grand jury,¹¹⁸ a jury acquitted the officer of all charges in the fatal shooting.¹¹⁹ It remains to be seen if other prosecutors facing local pressure adopt the voluntary quasi-special prosecutor solution, which fell short of the Castile family's desire for a special prosecutor to assume complete control of the case.¹²⁰

While several states and the federal government have recently recognized the importance of addressing community mistrust in cases of police-involved deaths of civilians, states have enacted very different models as solutions. Connecticut has enacted reform by leveraging existing legal structures to more comprehensively address incidents of police misconduct. California and Georgia have focused on more limited reform of the grand jury process. Hawaii has charted its own path with an Independent Review Board housed within the Office of the Attorney General. Other states have made various legislative commitments to criminal justice reform but lacked clarity in implementation, which

115. Eisen, *supra* note 85.

116. Christina Capecchi & Mitch Smith, *Special Prosecutor Joins Philando Castile Shooting Case in Minnesota*, N.Y. TIMES (July 29, 2016), https://www.nytimes.com/2016/07/30/us/philando-castile-police-shooting-minnesota.html?_r=0 [http://perma.cc/3P4D-WBRA].

117. *Id.*

118. *Philando Castile Case: Who Are the Key Figures in Trial of Officer Jeronimo Yanez?*, NBC NEWS (May 30, 2017), <https://www.nbcnews.com/news/us-news/philando-castile-case-who-are-key-figures-trial-officer-jeronimo-n765976> [http://perma.cc/TN6S-6XTS] (reporting that the prosecutor brought charges directly to increase transparency).

119. Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. TIMES (June 16, 2017), https://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html?_r=0 [http://perma.cc/79HJ-S5SB].

120. Capecchi & Smith, *supra* note 116.

seems to have resulted in confusion.¹²¹ Nevertheless, most states have emphasized new reporting requirements, likely in an effort to increase transparency and encourage better relationships with local communities.

IV. THE NEW YORK MODEL

A. NEW YORK'S SUPERSEDER POWER: FRAMEWORK AND HISTORY

New York's Constitution and Executive Law provides that the Governor may supersede a local prosecutor in all matters through the Attorney General.¹²² Professor Robert Pitler, a former Manhattan Assistant District Attorney,¹²³ wrote that the superseder power was designed to provide “an orderly and predictable vehicle to enable the Governor to fulfill his constitutional duty to ‘take care that the laws are faithfully executed’” with the limit on such authority “the constitutional requirement that there be a ‘reasonable relationship between the action taken and the executive function.’”¹²⁴ Judicial review of the governor's exercise of the superseder power has shown that the courts will not closely scrutinize the reasonableness or necessity of executive action for use of the superseder power.¹²⁵ Despite a potentially expansive legal framework, New York governors have been reticent to question the effectiveness of local prosecutors by calling on the Attorney General or a special prosecutor to intervene.¹²⁶

121. See *supra* note 110 and accompanying text.

122. See *supra* notes 18–20.

123. *Brooklyn Law School Mourns the Loss of Professor Robert Pitler '66*, BROOK. L. SCHOOL (Mar. 16, 2015), <https://www.brooklaw.edu/newsandevents/news/2015/03-16-2015> [<http://perma.cc/ZT62-YPE5>].

124. Robert Pitler, *supra* note 20, at 531.

125. Kurlander & Friedlander, *supra* note 15, at 45. Even though jurisdiction over criminal matters usually falls with district attorneys, no New York law guarantees the right to have crimes investigated or prosecuted by local authorities. *Matter of Johnson v Pataki*, 691 N.E.2d 1002, 1006 (1997) (“While prosecutorial authority over the decades has in fact passed from the Attorney-General to the District Attorneys, the Legislature has recognized for more than 150 years the authority of the Attorney-General to prosecute crimes, even at the local level, when properly directed to do so by the Governor.”); see also Lara, *supra* note 85, at 569 (2017) (discussing the *Pataki* case: “The court in that case made clear that the state constitution had not designated a specific — let alone exclusive — prosecutorial duty upon District Attorneys.”).

126. Kurlander & Friedlander, *supra* note 15 at 59.

In 1894, Governor Flower stated that the superseder power was “designed for extraordinary emergencies and should not be exercised except under peculiar circumstances.”¹²⁷ However, he added that there would be times that “the interests of a thorough and impartial prosecution demand that the Attorney-General should supersede the district attorney.”¹²⁸ Accordingly, special prosecutors have been appointed at various times throughout New York history when issues of public mistrust and the perception of legitimacy have arisen.

In 1973, Governor Nelson A. Rockefeller issued five executive orders for a special prosecutor to supersede the district attorneys in all five counties in New York City in matters of corruption within the criminal justice system.¹²⁹ The Knapp Commission report that led to Rockefeller’s executive orders identified “the inherent conflict and mounting public distrust involved in the use of local police and criminal justice agencies to investigate and prosecute charges against themselves” as the reason for the use of special prosecutors.¹³⁰ Rockefeller therefore appointed a special prosecutor with the broad mandate to investigate and prosecute “corrupt acts connected in any way to the administration of the criminal justice system in New York City when committed by a public servant or any other individual whose conduct is in any way related to the corrupt act of a public servant.”¹³¹ The mandate had no expiration date and applied both retroactively to acts already committed and proactively to future misconduct.¹³² This extensive grant of power led to the use of problematic tactics such as leaking information of ongoing investigations to reporters and basing indictments on flimsy evidence.¹³³ Under a cloud of widely publicized abuses,¹³⁴ any future special prosecution model in New

127. Pitler, *supra* note 20 at 523.

128. *Id.*

129. *Id.* at 517.

130. Kurlander & Friedlander, *supra* note 15 at 53.

131. Pitler, *supra* note 124, at 536.

132. *See id.* at 536–38.

133. MICHAEL ARMSTRONG, THEY WISHED THEY WERE HONEST: THE KNAPP COMMISSION AND NEW YORK CITY POLICE CORRUPTION 238 (2012).

134. *See* Jeffrey Schmalz, *A ‘Temporary’ Prosecutor’s Office Gets Its 5th Occupant*, N.Y. TIMES (June 23, 1985), <http://www.nytimes.com/1985/06/23/weekinreview/a-temporary-prosecutor-s-office-gets-its-5th-occupant.html> [<https://perma.cc/4BF5-TYQX>]; *see also* Bellacosa, *supra* note 16, at 632 (calling the tactics of the special prosecutor “McCarthy-era-like”).

York — or even in other states — would need to be crafted to avoid a broad mandate with unlimited jurisdiction.¹³⁵

B. CURRENT CRISIS IN NEW YORK: PROSECUTORIAL AND LEGISLATIVE FAILURE LEAD TO EXECUTIVE ORDER 147

While vast citywide corruption in the criminal justice system created the law enforcement crisis of the 1970s, the current crisis is more narrowly conscribed. Nevertheless, mistrust in the normal procedures of the criminal justice system in cases of police officer-involved deaths of unarmed civilians is equally pervasive. The failure to indict police officers involved in fatal incidents with civilians,¹³⁶ including in the high-profile death of Eric Garner,¹³⁷ led the New York state legislature to consider various reform proposals in 2014. All eventually failed to pass.¹³⁸ This legislative failure prompted Governor Cuomo to take executive action at the urging of Attorney General Schneiderman, nearly a year after Garner's death.¹³⁹

The resulting Executive Order 147, signed on July 8, 2015, designates the Attorney General a “special prosecutor” to “investigate, and if warranted, prosecute certain matters involving the death of an unarmed civilian, whether in custody or not, caused by a law enforcement officer,” or where there is “a significant question as to whether the civilian was armed and dangerous at the time of his or her death.”¹⁴⁰ The Executive Order mandates that the Attorney General conduct a “full, reasoned, and independent investigation including, but not limited to, gathering and

135. Despite the controversy in New York City, the state nevertheless created special statewide prosecution offices for the investigation and prosecution of nursing home abuse, narcotics offenses, and organized crime. Kurlander & Friedlander, *supra* note 15, at 54–55. These offices reflect governors' willingness to exercise the superseder power in specific and predetermined circumstances.

136. Levine, *supra* note 25, at 1479 (“[O]ut of 179 police killings in New York, only three led to an indictment.”); Sarah Ryley et al., *In 179 NYPD-involved deaths, only 3 indicted — Exclusive*, N.Y. DAILY NEWS (Dec. 8, 2014), <http://www.nydailynews.com/new-york/nyc-crime/179-nypd-involved-deaths-3-indicted-exclusive-article-1.2037357> [http://perma.cc/T6AQ-N8E3] (finding that since 1999, 27% of people killed by cops were unarmed, and where race was known, 86% were black or Hispanic).

137. Sandhya Somashekhar, *Oprah Says Protesters Lack Clear Demands. Here's What They Do Want.*, WASH. POST (Jan. 6, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/01/06/oprah-says-protesters-lack-clear-demands-heres-what-they-do-want/?tid=a_inl&utm_term=.34d222754ff1 [http://perma.cc/3WEL-6C9W].

138. Remnick, *supra* note 56.

139. *Id.*

140. N.Y. Exec. Order No. 147, *supra* note 24.

analyzing evidence, conducting witness interviews, and reviewing investigative reports, scientific reports, and audio and video recordings.”¹⁴¹ Finally, the Executive Order requires the Attorney General to provide to the governor a “report on all cases where, the special prosecutor declines to present evidence to a grand jury regarding the death of a civilian as described in this Order,” or “the grand jury declines to return an indictment on any charges.”¹⁴² The report should include an explanation of that outcome and any recommendations for systemic reform arising from the investigation.¹⁴³

The Executive Order has been met with mixed reactions.¹⁴⁴ It has been embraced by most proponents of reform, particularly by the families of individuals who died in police interactions, and by their advocates.¹⁴⁵ By contrast, law enforcement officials have voiced concerns about the anticipated effects of the Order. The president of the New York City Patrolmen’s Benevolent Association explained that the order could put “pressure on a special prosecutor to indict an officer for the sake of public perception and that does not serve the ends of justice.”¹⁴⁶ The District Attorneys Association of the State of New York called the Order “gravely flawed” and stated that it “invites serious legal issues” about how cases will be investigated, noting that “District Attorneys have far more experience — and resources — in dealing with these cases than either the governor or the attorney general.”¹⁴⁷

141. *Id.*

142. *Id.*

143. *Id.*

144. See Lara, *supra* note 85, at 569–73 (2017) (discussing the drawbacks of the New York Model including the Attorney General’s lack of expertise in prosecuting police cases and that the preliminary investigation will be done by local law enforcement and prosecutors); *but see infra* note 149 and accompanying text (detailing the biographies of the veteran prosecutors working in New York’s Special Investigation and Prosecution Unit).

145. Remnick, *supra* note 56.

146. Mark Berman, *New York Will Have a Special Prosecutor Look Into Some Deaths at the Hands of Police*, WASH. POST (July 10, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/07/10/new-york-will-have-a-special-prosecutor-look-into-some-deaths-at-the-hands-of-police/?utm_term=.abe7da94ed15 [<http://perma.cc/M99U-WQK9>].

147. Glenn Blain, *State DA Group Blasts Cuomo’s Pick of AG Eric Schneiderman as Special Prosecutor for Police-Involved Deaths*, N.Y. DAILY NEWS (July 13, 2015), <http://www.nydailynews.com/news/politics/state-da-group-blasts-cuomo-special-prosecutor-article-1.2290808> [perma.cc/W7LB-T3UY]; *see also supra* note 75 and accompanying text (describing the DAASNY’s criticism of the special prosecution unit’s inability to conduct an investigation without the assistance of local law enforcement who arrive first to the scene of an incident). One potential legal issue is the question of immunity for special prosecutors who have been found to have improperly asserted jurisdiction and conducted an investigation over the district attorney. Prosecutors are generally shielded

The District Attorneys' Association President expressed particular disapproval at the "dichotomy" between the "private assurances" of Governor Cuomo and Attorney General Schneiderman that local DAs are "trustworthy" and the "public rhetoric questioning our trustworthiness, questioning our professionalism and calling for our disqualification."¹⁴⁸

The Attorney General nevertheless proceeded to form a special unit within the existing organization of his office called the Special Investigations and Prosecutions Unit (SIPU) to carry out the mandates of Executive Order 147.¹⁴⁹ This small, permanent unit consists of veteran prosecutors with experience in federal, state, and local criminal prosecutions.¹⁵⁰ Despite early criticism from local law enforcement and DAs' offices, the implementation of the Executive Order has not resulted in vast usurpation of local district attorneys.¹⁵¹ According to the Office of the Attorney General, most DAs have been "cordial" and have complied with the executive order.¹⁵² Only one DA has refused to turn over the investigative files at the request of the Attorney General.¹⁵³

from civil liability because "[t]he public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." *Imbler v. Pachtman*, 424 U.S. 409, 424–25 (1976). The immunity defense exists, among other reasons, to encourage public service, prevent distractions for officials, and prevent the inhibition of discretionary action. *See generally* *Harlow v. Fitzgerald*, 475 U.S. 800, 816 (1982). On the other hand, the damages remedy protects the rights of citizens. *Id.* at 807. Nevertheless, prosecutors are thought to be best held accountable through criminal liability and professional discipline rather than civil liability. *Imbler*, 424 U.S. at 429. While courts have not had course to address immunity for a special prosecutor who improperly asserts jurisdiction, it is emblematic of the legal novelty of state special prosecution models and an area of potential future litigation.

148. Fredric U. Dicker, *DAs meet with Cuomo and Schneiderman on police-involved deaths*, N.Y. POST (Aug. 2, 2015) <http://nypost.com/2015/08/02/das-meet-with-cuomo-and-schneiderman-on-police-involved-deaths> [<https://perma.cc/A37W-MY7B>].

149. Press Release, Attorney General Eric Schneiderman, A.G. Schneiderman Names Veteran Prosecutor Alvin Bragg To Lead New Special Investigations And Prosecutions Unit (July 9, 2015) <https://ag.ny.gov/press-release/ag-schneiderman-names-veteran-prosecutor-alvin-bragg-lead-new-special-investigations> [<http://perma.cc/CK2V-KB6X>] (detailing the biographies of the prosecutors appointed to SIPU and highlighting the trial experience of each).

150. *Id.*

151. *See* Velasquez, *Cuomo seeks to clarify executive order*, *supra* note 55.

152. Brendan J. Lyons, *Attorney General sues DA Abelove over fatal police shooting*, ALBANY TIMES UNION (April 27, 2016), <http://www.timesunion.com/local/article/Attorney-General-sues-district-attorney-over-7379463.php> [<https://perma.cc/BRP3-CS42>].

153. *Id.* The Attorney General subsequently sued to enforce the Executive Order and compel the DA to turn over all the evidence surrounding a fatal police shooting that occurred in April 2016. Meanwhile, the DA independently pursued an exculpatory grand jury proceeding, which led the Attorney General to indict the DA on charges of official misconduct and perjury in November 2017. Press Release, Attorney General Eric Schnei-

Furthermore, as of February 2018, SIPU has launched a total of eleven investigations since the signing of the Executive Order in July 2015.¹⁵⁴ In investigations resulting in decisions not to press charges against police officers, SIPU has released detailed reports to the public explaining in detail the exculpatory evidence. Given the absence of large-scale public protests, such as those which followed the Eric Garner case,¹⁵⁵ transparency seems to have largely quelled public dissatisfaction and mistrust, although the lack of public outcry may be due to the absence of a controversial incident.

Since the Executive Order, the New York legislature has introduced several bills to reform the criminal justice system, including identical Senate and Assembly bills that would enact Executive Order 147 into statute.¹⁵⁶ Other bills would increase transparency by prohibiting a grand jury, which operates in secrecy, from inquiring into an incident of deadly force,¹⁵⁷ and require a judge to be present at certain stages of a grand jury proceeding concerning enumerated felonies involving a police officer.¹⁵⁸ Though these legislative initiatives have yet to pass, the numerous bills suggest that legislators are considering how to make the criminal justice system more responsive to citizens' concerns with and criticisms of the system's current procedures.¹⁵⁹

derman, A.G. Schneiderman Announces Indictment Charging Rensselaer County DA Joel Abelove With Official Misconduct And Perjury (Dec. 1, 2017), <https://ag.ny.gov/press-release/ag-schneiderman-announces-indictment-charging-rensselaer-county-da-joel-abelove> [<http://perma.cc/5A6C-G5PJ>] (“[District Attorney] Abelove allegedly withheld material evidence from the grand jury, effectively coopting its ability to make an informed decision about the matter — with the inevitable and intended result that no charges were brought against French.” Additionally, DA Abelove allegedly took the “extraordinary step of conferring immunity upon [the police officer] before the grand jury even took a vote.”).

154. *Special Investigations and Prosecutions Unit*, N.Y. OFFICE OF THE ATTORNEY GENERAL, <https://ag.ny.gov/SIPU> [<http://perma.cc/Y5LZ-AHGS>].

155. See Mueller & Southall, *supra* note 1.

156. S.B. 2180, 238th Leg. Sess. (N.Y. 2015); Assemb. B. 7228, 238th Leg. Sess. (N.Y. 2016).

157. S.B. 6038, 238th Leg. Sess. (N.Y. 2015); Assemb. B. 8364, 238th Leg. Sess. (N.Y. 2015).

158. S.B. 6038, 238th Leg. Sess. (N.Y. 2015); Assemb. B. 7194, 238th Leg. Sess. (N.Y. 2015).

159. In February 2018, a criminal justice reform package was introduced that included a bill that would create an Office of Special Investigation to “investigate when a civilian dies either in law enforcement custody or after an encounter with a law enforcement officer.” Press Release, Assembly Speaker Carl E. Heastie, Assembly Majority Introduces Comprehensive Criminal Justice Reform Package (Feb. 12, 2018) <http://assembly.state.ny.us/Press/files/20180212.php> [<https://perma.cc/ZJ8D-F4SD>].

The New York Model uses the superseder power to ensure that a permanent, state-level special prosecution unit may intervene in investigations into a narrow set of incidents.¹⁶⁰ This model is grounded in gubernatorial authority, although as evidenced by the relevant bills introduced to the state legislature, the model could be enacted by state legislatures. The next Part takes the New York Model, and the other state models discussed in Part III, and disaggregates these packages of reforms into “dimensions” to provide a framework for analyzing these state models and the proposed special prosecution models in Part VI.

V. DIMENSIONS FOR EVALUATING SPECIAL PROSECUTION MODELS

Although reform-oriented states have not all implemented models mandating the use of a special prosecutor in cases of police officer-involved deaths of civilians, President Obama’s Task Force and this Note argue that a special prosecutor is a critical tool in building trust in the criminal justice system in such cases.¹⁶¹ The Task Force Report, however, does not define what it means by “special prosecutor” and “special prosecution.” The report also predates many of the models adopted by the states. As the diversity in state models demonstrates, states have interpreted the term to have very different meanings. Accordingly, this Note seeks to disaggregate the term “special prosecution” and elucidate the variety of options and combinations of options that accomplish similar purpose. This part seeks to provide a blueprint for readers to conceptualize the various packages of options discussed earlier in this Note and proposed in the following part. Here, this Note identifies specific areas where special prosecution models may be different and provides a framework for readers to do their own evaluations of existing and proposed special prosecution models. While this Note will later propose specific models intended to address the use of special prosecutors for police-officer involved deaths of unarmed civilians, the following “di-

160. See N.Y. Exec. Order No. 147, *supra* note 24.

161. See TASK FORCE REPORT, *supra* note 5.

mensions” should be useful to readers considering the use of special prosecutors to address any latent social problem.¹⁶²

A. TRIGGERING CONDITION

As previously discussed, special prosecutors should only be used in specific circumstances.¹⁶³ Thus, the triggering condition for a special prosecutor should be clearly articulated and narrowly defined to avoid confusion, reduce the potential for a special prosecutor exceeding her narrow mandate, and to ensure the use of normal procedures except in precisely articulated circumstances. Under the New York Model, the triggering condition for a special prosecutor will be “an incident involving the death of an unarmed civilian caused by a law enforcement officer,” or when there is a “significant question as to whether the civilian was armed and dangerous at the time of his or her death.”¹⁶⁴ The Connecticut Model, however, is triggered by any deadly police encounter.¹⁶⁵ No matter how a state chooses to define its trigger condition, the condition should be defined with precision.

B. APPOINTMENT AND TENURE

Generally, the governor, state legislature, or a judge may appoint a special prosecutor.¹⁶⁶ The manner of such appointment, however, may take many forms. Under the New York Model, the governor’s executive order delegated to the attorney general the authority to create a permanent unit staffed with career attorneys.¹⁶⁷ The permanent special prosecution unit — and therefore the special prosecutors — have indefinite tenure.¹⁶⁸ States could, however, go the route of ad hoc appointments, so that specific in-

162. For example, other areas where states may want to craft a special prosecution model could include perceived corruption of city officials (as in the Knapp Commission context) or conflicts of interest arising from campaign donations to elected prosecutors.

163. See *supra* notes 16–17 and accompanying text.

164. N.Y. Exec. Order No. 147, *supra* note 24.

165. See Frequently Asked Questions, *supra* note 88; see L.A. COUNTY DISTRICT ATTORNEY’S OFF., PROTOCOL FOR DISTRICT ATTORNEY OFFICER-INVOLVED SHOOTING RESPONSE PROGRAM FOR OFFICER/DEPUTY-INVOLVED SHOOTINGS AND IN-CUSTODY DEATHS (2014), <http://da.co.la.ca.us/sites/default/files/policies/JSID%20DART%20Protocol%202014.pdf> [<http://perma.cc/LM4N-9W9E>] [hereinafter PROTOCOL] (defining the triggering condition for the Los Angeles Model).

166. See Kurlander & Friedlander, *supra* note 15.

167. N.Y. Exec. Order No. 147, *supra* note 24.

168. *Id.*

cidents — defined by the triggering condition — would provide for the appointment of a special prosecutor. Ad hoc appointment would perhaps be the more cost-efficient model, as the state would not have to pay annual salaries of seasoned attorneys. Accordingly, ad hoc appointment may be better for smaller states that have fewer incidents that would trigger use of a special prosecutor and thus justify the expenditure of resources to maintain a permanent unit.¹⁶⁹

Another potential benefit of ad hoc appointment is the reduced risk that the special prosecutors themselves would become entrenched in a broken system. On the other hand, ad hoc attorneys might never develop expertise in these specific types of cases that would be gained by career special prosecutors within a permanent unit. Furthermore, a special prosecutor within a permanent unit may be more likely to be held accountable by colleagues. Meanwhile, an ad hoc prosecutor must only vaguely answer to her or his appointee and therefore may be less accountable.¹⁷⁰

Another option would be the ad hoc appointment of a quasi-special prosecutor like the voluntary appointment made by the prosecutor in the Philando Castile case in Minnesota.¹⁷¹ As in that case, the special prosecutor would be a seasoned attorney, with independence from the local community, who would consult with the local prosecutor and make non-binding recommendations.¹⁷² While the prosecutor in Minnesota implemented this model voluntarily,¹⁷³ a governor, legislature, attorney general or judge could require the ad hoc appointment of such a “quasi-special prosecutor” or “special prosecutor consultant.” An obvious downside would be the complete lack of authority of the special prosecutor and the requirement of cooperation between the special prosecutor and the local DA. Nevertheless, this would be a middle-of-the-road solution that may be attractive to states where sweeping criminal justice reform is politically infeasible.

169. See Lara, *supra* note 85 (discussing Maine’s ad hoc appointment of special prosecutors by the attorney general).

170. On the other hand, a permanent unit could lead to an overly aggressive office culture. See Green & Yaroshefsky, *supra* note 2. An ad hoc prosecutor could conversely be closely scrutinized by an attentive public and accordingly be held more accountable than a permanent special prosecution unit.

171. See Capecchi & Smith, *supra* note 116.

172. *Id.*

173. *Id.*

States might also go the route of a permanent special prosecution unit within a district attorney's office.¹⁷⁴ DAs could create specialized units with more independence within their own offices to handle specific types of cases where there are conflict of interest concerns. Although this option will be discussed more in Part VI, one issue would be the close connection of the unit to local politics through the elected DA. On the one hand, regular district attorney elections could increase the political accountability of special prosecution unit, which would have policies affirmed or denounced through the DA's election. On the other hand, the district attorney's own special prosecution unit model could be undermined if it cannot exercise sufficient independent discretion.

C. SELECTION

As previously discussed, judges, governors, attorney generals, and legislatures typically have the discretion to appoint special prosecutors,¹⁷⁵ and they have a variety of options for how to select them. With any permanent special prosecution unit, housed either in the Attorney General or District Attorney's office, the selection of special prosecutors for the unit would likely be at the discretion of the chief prosecutor of that office.¹⁷⁶ States could also follow the selection process of the Connecticut Model where the chief state's attorney may appoint a special prosecutor from a judicial district other than the judicial district in which the incident occurred.¹⁷⁷

If states decide to move in the direction of ad hoc appointments, they could create a list of approved special prosecutors from which ad hoc special prosecutors would be chosen. The list could be created by the legislature, the attorney general, by a panel of judges — or any combination thereof. States could enlist community boards to approve the list, thereby incorporating community feedback. Selection of a special prosecutor could be through automatic rotation through the list or at the discretion of the appointee. In practice, Professor Levine explains, “these lists could be modeled on the federal Criminal Justice Act panel —

174. This model, discussed in Part VI, is referred to in this Note as the Los Angeles Model. See Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. Rev. 509 (1994).

175. See Kurlander & Friedlander, *supra* note 15.

176. See *infra* note 210 and accompanying text.

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

lists of qualified lawyers who are appointed to represent indigent defendants when the federal defender office is unable to.”¹⁷⁸ Given the need for criminal trial experience, however, this list might consist of many former prosecutors who might have similar prejudices as local prosecutors.¹⁷⁹ Additionally, unlike for Criminal Justice Act panels, special prosecutors may require more expertise in investigation than private practice attorneys representing indigent defendants in federal court. Thus, to create such a list, states would need to decide on criteria that would qualify attorneys for placement on the list, keeping in mind concerns about experience, capability, and bias. States would also need to determine the compensation and tenure for attorneys on this list of approved special prosecutors. In general, a pre-approved list of potential special prosecutors may be beneficial in states with deep political divisions, as it would reassure the public that the special prosecutor does not serve the political goals of his or her appointee.

D. FUNDING

Hawaii took the lead in appropriating \$500,000 to its newly created Law Enforcement Officer Independent Review Board.¹⁸⁰ In New York, however, the Governor’s executive order did not come with a grant of money from the legislature for implementation, and therefore the New York Attorney General had to find room within his existing budget to afford the permanent special prosecution unit created by the order.¹⁸¹ Likely, the question of funding will be answered by whether the legislature, which can appropriate funds, or the governor, who cannot, has enacted the model for a special prosecutor. The federal government may also be able to incentivize the use of special prosecutors through Congress’ exercise of its Spending Power.¹⁸²

178. Levine, *supra* note 25, at 1494.

179. Conversely, the process of getting approval to be on the list could be discerning enough to weed-out those persons with potential biases. Further, simply existing outside the normal system may be enough to limit the institutional concerns regarding local prosecutors and ensure justice.

180. See *supra* note 92 and accompanying text.

181. Bredderman, *supra* note 96; Xander Landen, *Schneiderman Unveils Special Prosecutor’s Unit*, WNYC (July 9, 2015), <http://www.wnyc.org/story/schneiderman-unveils-special-prosecutors-unit/> [<http://perma.cc/KV7C-VVE4>].

182. U.S. CONST. art. I, § 8, cl. 3. Under the Spending Power, Congress may attach conditions for receipt of federal funds with the limitations that the legislation must be in

Notably, the question of funding will also link directly to the political feasibility dimension. Models with less overhead and fewer institutional costs may be more politically feasible than models requiring extensive training or the hiring of permanent staff. The funding dimension also addresses the potential economic consequences of *not* enacting procedures for a special prosecutor. For instance, economic disruption followed protests and riots after the grand jury decided not to indict the officer in Ferguson.¹⁸³ Similarly, after Freddie Gray's death in Baltimore, the demonstrations left Baltimore with a \$12.9 million insurance claim for the damage.¹⁸⁴ Additional economic disruption could result if businesses preemptively close from fears of rioting. The public's knowledge of a state's special prosecution procedures could diminish citizens' desires to express frustrations in the streets.¹⁸⁵

E. DEGREE OF INDEPENDENCE FROM VOTERS

Any special prosecution model will include some degree of intentional independence from the normal processes and procedures of the criminal justice system — which is the whole point.¹⁸⁶ Given the concern, however, for untethered special

pursuit of the general welfare, that the conditions must be unambiguous for the states, and that the legislation must be in the pursuit of national projects or programs without another constitutional provision providing an independent bar to the legislation. *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987) (upholding a federal statute conditioning states' receipt of a portion federal money funding highways on the adoption of a minimum drinking age of 21). While Congress can pass laws meant to influence a state's legislative choices, federal statutes must avoid coercive conditions. *See New York v. United States*, 505 U.S. 144, 166–67 (1992) (holding unconstitutional the provisions of the Low-Level Radioactive Waste Policy Act requiring states to take ownership of radioactive waste or implement certain regulations because it violated the Tenth Amendment). Therefore, Congress could enact legislation, subject to the limits of the Spending Power, that would encourage states to create special prosecution models.

183. Susie Poppick, *Can Ferguson Recover? The Lasting Economic Impact of Violent Unrest*, TIME: MONEY (Nov. 25, 2014), <http://time.com/money/3145128/ferguson-riots-recovery-economic-impact-unrest/> [<http://perma.cc/C4VK-GW3T>].

184. *\$12.9M Paid On Insurance Claims for Baltimore Riot Damage*, BALTIMORE SUN (Aug. 25, 2015), <http://www.baltimoresun.com/news/maryland/freddie-gray/bal-129m-paid-on-insurance-claims-for-baltimore-riot-damage-20150826-story.html> [<http://perma.cc/FD7H-KFXC>].

185. *See supra* note 61 and accompanying text; *see also* TASK FORCE REPORT, *supra* note 5, at 1 (“[La]w enforcement agencies should adopt procedural justice as the guiding principle for internal and external policies and practices to guide their interactions with rank and file officers and with the citizens they serve.”).

186. *See supra* note 13 and accompanying text.

prosecutors,¹⁸⁷ states should consider ways to balance their degree of independence from voters with appropriate political accountability.

The decision whether to appoint a single ad hoc prosecutor for each potential incident or to create a permanent special prosecution unit affects the degree of independence the special prosecutor will have from voters. Disappointment with a permanent special prosecution unit could have political ramifications for the attorney general and governor, who may each be directly accountable to voters. On the other hand, a high-profile mishap by a single special prosecutor could potentially carry worse political consequences for an appointee than an institutional mistake from a permanent unit. Nevertheless, any incident involving highly contested facts, like most incidents of officer-involved killings of unarmed civilians, could end up becoming politically charged. Therefore, a perfect balance of independence and political accountability may not exist.

President Obama's Task Force on 21st Century Policing proposed increased oversight of police through community boards.¹⁸⁸ These boards would review procedures after an incident that could be understood to have ramifications in the community's trust in law enforcement and the criminal justice system.¹⁸⁹ While the report does not specifically propose community board review of special prosecutors,¹⁹⁰ boards could approve the list of special prosecutors from which ad hoc appointments are made,¹⁹¹ and/or review the reports made by special prosecutors when determining whether to press charges and make recommendations regarding indictments. Such community oversight would help engage the local community in the criminal justice system through the special prosecutor. Conversely, too much community oversight could hamper the ability of special prosecutors to make

187. See *supra* note 134 and accompanying text (discussing the abuses of the special prosecutors, given a broad mandate to pursue public corruption, in New York City in the 1970s).

188. TASK FORCE REPORT, *supra* note 5, at 26 ("Recommendation: Some form of civilian oversight of law enforcement is important in order to strengthen trust with the community.").

189. *Id.* at 88.

190. *Id.* ("There are important arguments for having civilian oversight even though we lack strong research evidence that it works. Therefore we urge action on further research, based on the guiding principle of procedural justice, to find evidence-based practices to implement successful civilian oversight mechanisms.").

191. See Levine, *supra* note 25.

independent decisions and exercise their best professional judgment. Thus, states must also seek to balance community engagement with the necessity of independent decision-making when considering the level of citizen involvement to incorporate into a special prosecution model.

F. DISCLOSURE AND TRANSPARENCY

Given the specific concern of public mistrust in the normal criminal justice system procedures,¹⁹² any special prosecution model should seek to incorporate transparency in the methodology, practices, and decision-making of the special prosecutor.¹⁹³ As states make changes to increase disclosure and reporting of police-involved shootings and fatal shootings, they may approach these processes differently in substance and method.

States might consider whether local police departments, special prosecutors' offices, or state-level agencies should disclose the information. As previously discussed, California collects data and then reports it to the Department of Justice, which then discloses the information in its annual report.¹⁹⁴ Colorado's Division of Justice discloses the information regarding officer-involved shootings in its own annual report.¹⁹⁵ Other states and municipalities may choose to disclose information at the local level to hold local officials more directly accountable. States should also consider their goal of increasing transparency when determining how regularly information is released, e.g., annually, bi-annually, or quarterly.

The type of information reported is also important and may vary from state to state. Prior to 2015, only North Carolina and Oregon required the collection of data for all cases where police use deadly force.¹⁹⁶ Some states like Oregon and California require the collection of specific information for each deadly use of force, including the name, gender, race, ethnicity and age of the

192. See Velasquez, *Cuomo seeks to clarify executive order*, *supra* note 55 (discussing public mistrust as the animating force behind Governor Cuomo's decision to create a permanent special prosecution model in New York).

193. Traditional law enforcement officers such as police departments and local district attorney's offices may also want to increase transparency through greater disclosure and better recordkeeping.

194. See *supra* note 113 and accompanying text.

195. *Law Enforcement Overview*, *supra* note 9.

196. *Id.*

deceased.¹⁹⁷ Colorado increased the amount of data collected to include the medically documented physical or mental ailment of the suspect; the age, gender race and ethnicity of the officer; the basis of the stop or contact that led to the shooting; and the officer's reason for the shooting.¹⁹⁸ Thus states should consider the amount and type of information they want to collect in addition to how it is disclosed and who discloses it, while keeping in mind the overall goal of informing and reassuring the public. In this way, transparency through disclosure and recordkeeping serves as a check on police, district attorneys, and special prosecutors.

G. LEGAL AND POLITICAL FEASIBILITY

When crafting a special prosecution model, states must consider their options based on the legal and political feasibility of implementing their policy choices. “Most state legislatures face no constitutional limitations on the legislature’s ability to allocate power to state-level as opposed to local-level prosecutors.”¹⁹⁹ Therefore, if a state chose to pursue the New York Model, it would likely have laws and rules allowing the attorney general to supersede local prosecutors. Moreover, states like New Jersey and Connecticut already permit state-level prosecutors to oversee, manage, and intervene in investigations.²⁰⁰ Further, states have traditionally prosecuted public corruption, benefits fraud, regulatory crimes, conflict of interests, and other statewide crimes outside the normal local prosecution model.²⁰¹ Thus, while each state’s legal framework will determine the type of special prosecution model enacted, states likely do not require new laws to provide for a special prosecution model.

The success of initiatives to enact a special prosecution model may also depend on the public’s political support for such changes. The degree of political will might also influence the type of special prosecution model states seek to employ. On one end, states that lack a politically organized criminal justice reform

197. *Id.*

198. *Id.*

199. Barkow, *supra* note 21, at 537.

200. See Supplemental Law Enforcement, *supra* note 22 (discussing New Jersey’s legal framework for jurisdiction in criminal matters); see also *Frequently Asked Questions*, *supra* note 88 (detailing Connecticut’s laws for assigning special prosecutors).

201. See Barkow, *supra* note 21, at 546–50 (discussing these [above] areas as the few contexts where states have consciously departed from the local prosecution framework).

movement might similarly lack the political will to implement any special prosecution model. On the other hand, a highly publicized incident might induce communities to pressure their elected officials into more dramatic action like a permanent special prosecution unit. Furthermore, as mentioned, any discussion of political feasibility will likely include the cost-efficiency of the proposed model.

VI. PROPOSED MODELS TO ADDRESS INCIDENTS OF POLICE OFFICER INVOLVED DEATHS OF UNARMED CIVILIANS

This Part uses the dimensions presented in the previous part to evaluate several proposed special prosecution models that specifically address incidents of police officer involved deaths of unarmed civilians. While the dimensions may be used in the evaluation of any special prosecution model used to address future unspecified law enforcement gaps, their application here demonstrates their utility. The purpose of the dimensions from Part V is to provide a roadmap for present and future analysis of special prosecution models. By breaking down the choices within models through the dimensions, the benefits and inadequacies of the proposed models in this Part are made clear. Some of the packages of choices have been tried by the states while others are presented as mere possibilities for states to consider.

As an initial matter, the triggering condition must be identified. Here, as previously mentioned in Part II, the triggering condition should be a police officer-involved death of an unarmed civilian, or when there is a question as to whether the civilian was armed and dangerous at the time of her or his death.²⁰² As discussed, if the use of a special prosecutor could be triggered by an incident where a victim suffered grave bodily injury at the hands of police, the victim would be still be able to seek justice for her or himself through normal procedures such as in-court testimony or a civil suit. Similarly, if the trigger were any death at the hands of police, any special prosecution model would become overrun with routine cases where police routinely use deadly

202. See N.Y. Exec. Order No. 147, *supra* note 24.

force. Accordingly, this Note endorses a limited triggering condition for all the proposed models to ensure a narrow mandate for the special prosecutor and reduce the risk of abuse of power.²⁰³

A. PROPOSED MODEL I: SPECIAL PROSECUTION UNITS WITHIN LOCAL DISTRICT ATTORNEYS' OFFICES (THE LOS ANGELES MODEL)

Instead of creating permanent units of special prosecutors under the auspices of the Attorney General, states could create such units within local district attorney offices. For example, Los Angeles has a special unit known as the Justice System Integrity Division,²⁰⁴ formerly called the "Special Investigation Division" (SID), to specifically prosecute police misconduct cases.²⁰⁵ As with all the proposed models, the Los Angeles Model would be triggered by a narrowly defined triggering condition.²⁰⁶ One benefit to the Los Angeles Model is its geographical limitations. Jurisdiction would be limited to the county or judicial district, so investigators from the unit would be able to arrive quickly to the scene of an incident to help resolve issues of evidence collection and potential taint by local law enforcement.²⁰⁷

Under the dimension of independence from voters, however, it may be difficult to achieve the proper balance of political accountability. The unit is close to voters, linked to the elected DA, and thus could lack the proper degree of independence from a fickle electorate. In the 1990s, critics decried Los Angeles' SID for an "epidemic of under-prosecution of police misconduct."²⁰⁸ A local judge, also a former SID prosecutor, urged that a special

203. See *supra* notes 133–134 and accompanying text (discussing the abuses of power from the broad mandate given to special prosecutors in New York City in the 1970s).

204. In 2001, former DA Steve Cooley restructured the office, splitting SID into two new units: the Public Integrity Division and the Justice System Integrity Division. Edward Humes, *Courting Trouble*, 46 L.A. MAG. 94, 217–18, (2001).

205. Levenson, *supra* note 174, at 558.

206. *The Justice System Integrity Division's jurisdiction is triggered when either "a peace officer, on or off duty, shoots and injures any person during the scope and course of employment" or "an individual dies while in the custody or control of a law enforcement officer or agency and the law enforcement agency investigating the death or the police agency in whose custody the deceased was confined requests our presence and assistance."* PROTOCOL, *supra* note 165.

207. See *supra* note 75.

208. Scott Glover & Matt Wait, *LAPD Misconduct Cases Rarely Resulted in Charges*, L.A. TIMES, Oct. 22, 2000, http://www.latimes.com/local/la-me-glover_102200-story.html [<http://perma.cc/YQ85-VB77>].

prosecutorial agency or other independent body should take over the responsibility of prosecuting cases of alleged police misconduct.²⁰⁹ Thus, the Los Angeles Model may result in under-enforcement of incidents because local DAs are subject to regular re-election and may be hesitant to take an aggressive stance against a local department for fear of political retribution from a well-organized and funded police union.

The Los Angeles Model also suffers from problems under the appointment and tenure dimension. The DA herself would likely have responsibility for hiring the line prosecutors for the special unit.²¹⁰ Attorneys within the special unit are typically veteran prosecutors with many years of experience within the DA's office.²¹¹ Professor Levine argues that these prosecutors "will likely have played or will later play another role in the office."²¹² Accordingly, they may suffer from the same unconscious bias in favor of police as other local prosecutors. Simply put, local special prosecutors may not aggressively pursue charges against a police department with which they may need to collaborate on future cases.²¹³ For these reasons, the Los Angeles Model may not be able to ensure the independence of special prosecutors to make unbiased decisions and evaluations. On the other hand, as with any permanent special prosecution unit, the Los Angeles Model provides the benefits of institutional knowledge, experience, and expertise over ad hoc appointment. It is likely that, due to funding constraints, this model would only work in a large urban center with enough potential incidents to justify a permanent local special prosecution model.

B. PROPOSED MODEL II: REMOVAL TO A DIFFERENT JURISDICTION'S DA (THE CONNECTICUT MODEL)

As described in Part V, the Connecticut Model requires that in all police killings, including of armed persons, the chief state's attorney may appoint another district attorney from a different jurisdiction to investigate and prosecute. Another state could

209. *Id.*

210. This system would parallel the Attorney General's authority in New York to hire staff for the state-level special prosecution unit. *Supra* note 149 and accompanying text.

211. *Id.*

212. Levine, *supra* note 25, at 1485.

213. See *supra* notes 31–33 and accompanying text (discussing the close relationship between prosecutors and local law enforcement).

easily modify the triggering condition to be more limited, so this section evaluates the other aspects of the Connecticut Model. Notably, the Connecticut Model is a variation on ad hoc appointment, as the state does not have a permanent unit or approved list of special prosecutors.

A clear advantage of the Connecticut Model is the elimination of the selection issue, which is resolved through the chief state's attorney appointing a DA from another part of the state. Another advantage of this model is its political feasibility due to its cost-efficiency. Under this model, states do not have to expend resources on hiring and paying new attorneys to fill a permanent unit. Furthermore, a DA will be completely familiar with the state's criminal laws, so there is no need to expend resources for extra training or instruction.²¹⁴ Nevertheless, under the legal feasibility dimension, the Connecticut Model only works in states with a similar legal structure, such as New Jersey, where local prosecutors are appointed rather than elected.²¹⁵

The Connecticut Model does not resolve many of the basic concerns with having local prosecutors handle cases of police involved deaths of unarmed civilians. Prosecutors may have developed the same biases in favor of law enforcement even if they do not work with and rely on the same police force. Consequently, while the Connecticut Model has the advantages of political feasibility, cost-efficiency, and easy selection, it lacks sufficient independence from the entrenched system as well as broad applicability to states that elect rather than appoint local prosecutors.

C. PROPOSED MODEL III: CIVILIAN OVERSIGHT BOARD

Another possible model, recommended by President Obama's Task Force, is the formation of civilian oversight boards tasked with investigating cases of officer-involved deaths of unarmed civilians.²¹⁶ If the board reached the decision to pursue criminal charges, the board would appoint a special prosecutor. The board could consist of appointed community members, civil rights and defense attorneys, judges, and former prosecutors and police offi-

214. *Id.*

215. *See supra* note 22 (explaining how appointed local prosecutors in states like New Jersey have different jurisdictional mandates than elected district attorneys).

216. *See supra* notes 189–190.

cials.²¹⁷ Professor Levine explains that this form of civilian oversight board would look like “the already-instituted civilian complaint review boards in several major cities, who are tasked with overseeing allegations of police misconduct.”²¹⁸ These boards, however, would have “subpoena power, access to an investigative arm, and the power to decide whether to charge officers or not.”²¹⁹ States could model a civilian oversight board on Hawaii’s example or craft their own under this Note’s “dimensions.”

Under the disclosure dimension, the civilian oversight board would help balance transparency in the proceedings with institutional actors providing expertise in navigating the criminal justice system. In furthering the goal of transparency, the board could release public reports similar to the detailed report required under the New York Model. Under the dimension of independence from voters, political accountability becomes less of an issue when community members participate directly in decision-making.

While the Civilian Oversight Board Model presents well under the disclosure and degree of independence from voters dimensions, the model fails under the legal and political feasibility dimension. Legally, implementation of such a model would require new criminal justice reform legislation, which — as seen in New York²²⁰ — can be hard to enact. Furthermore, implementation of a radically new system could be costly, which may be a deterrent to state legislators. Thus, this model lacks broad transferability to the states because it lacks legal and political feasibility.

D. PROPOSED MODEL IV: PERMANENT SPECIAL PROSECUTION UNIT WITHIN THE OFFICE OF THE STATE ATTORNEY GENERAL (THE NEW YORK MODEL)

The New York Model consists of a permanent special unit under the authority of the state attorney general. As discussed in Part IV, New York’s legal framework allowed Governor Cuomo, as opposed to the legislature, to enact the model through an executive order. Nevertheless, for states without a similar legal framework allowing the governor to unilaterally enact such a

217. Levine, *supra* note 25, at 1494.

218. *Id.*

219. *Id.*

220. See Reminck, *supra* note 56.

change, a state legislature would be able to enact the model as well, since state actors typically have concurrent jurisdiction with local authorities.²²¹ Thus, the New York Model satisfies the legal feasibility dimension, because the legal apparatus for a state-level permanent unit already exists in most states. Accordingly, the New York Model has great potential for implementation by the states.

Another advantage of the New York Model is that it has achieved balance under the dimension of independence from voters. State-level actors are directly accountable to voters but face less acute political pressure because they are not accountable solely to the community in which the investigation and prosecution is occurring. Conversely, while state-level prosecutors may face similar pressures from state police unions as local DAs,²²² attorneys general are typically reelected independently, so the public may hold the attorney general directly responsible for the actions of an abusive or ineffective permanent special prosecution unit.²²³

A potential downside to the New York Model is that state-level prosecutors generally have limited courtroom experience trying cases in comparison to local ADAs who routinely go to trial.²²⁴ On the other hand, the creation of a permanent model would allow prosecutors in that office to develop specific expertise in the investigation and prosecution of cases of police officer involved deaths of unarmed civilians. Further, as in New York, the Attorney General could and should hire experienced courtroom lawyers.²²⁵

Another possible disadvantage of the New York Model is political infeasibility due to its high costs. In terms of cost-efficiency, the New York Model is not the cheapest option available to states, as states must pay a permanent staff. Nonetheless, as previously discussed, New York managed to implement its model

221. Barkow, *supra* note 21, at 537. Many states already have state-level prosecutors that supersede local DAs in other areas such as public corruption, benefits fraud, and regulatory crimes. *See supra* note 201.

222. Levine, *supra* note 25, at 1490.

223. Barkow, *supra* note 21, at 538.

224. *See generally* Levine, *supra* note 25, at 1490 (“As state attorneys general tend to prosecute only a limited number and types of cases, the office may be less familiar with the state’s criminal law than a local counterpart.”).

225. *See* Press Release, Veteran Prosecutor Alvin Bragg To Lead New Unit, *supra* note 149.

without additional appropriations from the legislature.²²⁶ This suggests that states may be able to modify existing budgets if the legislature does not appropriate additional funds. Under the funding prong, an existing special prosecution unit might diminish potential economic consequences from rioting and protesting if the public is assured that a scrupulous permanent unit exists to handle these cases as they arise.²²⁷ Further, given the need for permanent funding, the New York Model would likely work best in larger states with the potential for more incidents. Still, the New York Model's implementation in large states presents geographical problems in terms of having state-level investigators arrive at an incident in a timely matter.²²⁸

E. A QUALIFIED ENDORSEMENT OF THE NEW YORK MODEL

In the interest of building the public's trust in the criminal justice system, avoiding the conscious and unconscious biases of prosecutors, and imbuing the system with better ethics, this Note gives a qualified endorsement of the New York special prosecution model for cases of police officer involved deaths of unarmed civilians. Professor Barkow suggests that states should balance the relative institutional competencies in determining whether attorneys general should exercise their superseder power for certain types of cases.²²⁹ Where attorneys general have typically intervened, states have determined "the benefits of bringing those cases at a higher level of government outweighs the costs to local autonomy."²³⁰ The benefits of state-level accountability, distance from the normal criminal justice system, and the development of expertise in these cases outweighs the disadvantages.

Nevertheless, the endorsement of the New York Model is circumscribed. Since 2015, SIPU has tried only case.²³¹ After a

226. See Bredderman, *supra* note 96.

227. See *infra* note 236 (discussing the response to a police officer's acquittal, which included a stated confidence in the New York Model).

228. See *supra* note 75.

229. See Barkow, *supra* note 21, at 579.

230. *Id.*

231. Although the Attorney General has indicted one other individual under Executive Order 147 — a district attorney who refused to concede jurisdiction and then allegedly hampered SIPU's investigation. See *supra* note 152. In the incident that went to trial in November 2017, an off-duty police officer, Wayne Isaacs, shot and killed Delrawn Small while stopped at a traffic light in Brooklyn. Ashley Southall, *Police Officer Found Not Guilty in Off-Duty Shooting of Unarmed Man*, N.Y. TIMES (Nov. 6, 2017),

three-day deliberation in November 2017, the jury acquitted the police officer.²³² While blame for the acquittal has not fallen on SIPU prosecutors,²³³ the failure to win a conviction against a police officer in the first trial under the Executive Order suggests that there may be other dynamics play.²³⁴ Whether the laws are written too much in favor of protecting police or juries are too compelled by the gravitas of police officers, who swear an oath to run toward danger,²³⁵ only more attempts at prosecution will determine whether the New York Model can succeed. Nevertheless,

<https://www.nytimes.com/2017/11/06/nyregion/new-york-officer-wayne-isaacs-acquitted.html> [<http://perma.cc/MN86-57Y5>]. Surveillance video footage showed Mr. Small getting out of his car and then falling back to the ground as he reached the window of Mr. Isaacs' vehicle. *Id.* Mr. Isaacs' testified that "he began to fear for his life as Mr. Small approached him, not far from East New York, one of the city's most violent neighborhoods." *Id.* Mr. Small's girlfriend, who was in the car with her daughter during the incident, testified that Mr. Isaacs had cut them off before reaching the traffic light. *Id.* Mr. Isaacs also testified that Mr. Small "threatened to kill him and punched him," although the surveillance tape did not capture it. *Id.* "Although prosecutors disputed that the punch occurred, a doctor and a nurse testified that they treated Officer Isaacs for swelling after the incident and gave him ibuprofen." *Id.*

232. Ashley Southall, *Police Officer Found Not Guilty in Off-Duty Shooting of Unarmed Man*, N.Y. TIMES (Nov. 6, 2017), <https://www.nytimes.com/2017/11/06/nyregion/new-york-officer-wayne-isaacs-acquitted.html> [<http://perma.cc/MN86-57Y5>].

233. After the acquittal, the National Association for the Advancement of Colored People (NAACP) Legal Defense and Educational Fund released a statement thanking SIPU for prosecuting the case and urging more states to implement special prosecution models. Press Release, Sherrilyn Ifill, NAACP LDF, LDF Statement on Acquittal of NYPD Officer Wayne Isaacs for Delrawn Small's Death (Nov. 6, 2017), <http://www.naacpldf.org/press-release/ldf-statement-acquittal-nypd-officer-wayne-isaacs-delrawn-small%E2%80%99s-death> [<http://perma.cc/7EYE-F2MD>] ("While we're extremely disappointed by the verdict, we thank New York Attorney General Eric Schneiderman's office for prosecuting this case. This was the first trial for a police-involved shooting prosecuted by the New York State Attorney General's Special Investigations and Prosecutions Unit since Governor Cuomo issued an executive order, and while the result is far from what we had hoped for, we still believe in the value of empowering special prosecutors to bring these cases. Authorizing special prosecutors will not guarantee convictions, but it will help ensure that political considerations and conflicts of interest do not stymie efforts to hold individual law enforcement officers accountable for criminal wrongdoing. We urge leaders across the country to follow Governor Cuomo's example and allow special prosecutors to handle police misconduct cases.")

234. Both Officer Isaacs and Mr. Small were black, and jury members were of mixed race and age. Gina Bellafante, *Road Rage, Then A Shot. For A Police Officer, It Is Called Self-Defense.*, N.Y. TIMES (Nov. 9, 2017), <https://www.nytimes.com/2017/11/09/nyregion/wayne-isaacs-acquittal-police-shooting-.html> [<http://perma.cc/MP47-G8PY>].

235. "Under New York state law, the use of deadly physical force can be justified if a person reasonably believes an assailant is using or is about to use lethal force or commit a violent crime, such as rape or robbery. In most cases, civilians have a duty to retreat if safe options are available, but police officers are under no such obligation when attempting to make an arrest or prevent an escape." Ashley Southall, *Police Officer Found Not Guilty in Off-Duty Shooting of Unarmed Man*, N.Y. TIMES (Nov. 6, 2017), <https://www.nytimes.com/2017/11/06/nyregion/new-york-officer-wayne-isaacs-acquitted.html> [<http://perma.cc/MN86-57Y5>].

there is guarded optimism that the New York Model can forestall mass public protest and preempt public outcries of unfairness.²³⁶ Further, the evaluation of the New York Model on the dimensions presented in this Note shows that New York has a well-considered, institutionalized approach to administer justice in cases of police officer involved deaths of unarmed civilians. Despite this qualified recommendation of the New York Model, states can and should use the dimensions outlined in Part V to tailor a special prosecution model to fit the specific needs and laws of the state.

VII. CONCLUSION

This Note shows there is no one-size-fits-all special prosecution model for universal implementation by the states. The main project of this Note is to use instances of police officer-involved deaths of unarmed civilians as a lens to argue for the necessity of special prosecutors in certain circumstances and explore the variety of special prosecution models that could be used in these cases. In an era where reformers may look to the states, not the federal government, for new policies, this Note seeks to empower activists to embrace federalism — to see the benefits of experimentation in the states. The dimensions identified and presented in the Note should be used to structure debate about different special prosecution models and give states criteria from which to select options for what would work best in each state.

The qualified endorsement of the New York model shows the general lack of empirical evidence about the effectiveness of all the proposed special prosecution models. Since a controversial case garnering close national attention has yet to test one of the existing state models, it is unclear if any special prosecution model can effectively address citizens' concerns with the normal procedures of the criminal justice system. Nonetheless, this Note

236. See *supra* note 233 (discussing the NAACP's response to the acquittal); see also *Statement from Delrawn Small's brother and sister, Victor Dempsey and Victoria Davis, COMMUNITIES UNITED FOR POLICE REFORM* (Nov. 6, 2017), <http://changethenypd.org/releases/family-delrawn-small-responds-not-guilty-verdict-against-nypd-officer-wayne-isaacs-who> [<http://perma.cc/K6X2-5TG2>] ("The facts of this case were always clear and the importance of having an independent prosecutor from the Attorney General's office should not be overlooked. Yet, our society must confront the problematic issues related to race and power that lead grand juries and juries to fail to hold officers fully accountable when they kill people of color.").

encourages states to be proactive in implementing a special prosecution model before an incident occurs. If states embrace their role as the laboratories of democracy, the resulting experimentation should ultimately produce best practices for special prosecution.