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**The Interaction and Relationship Between Prosecutors  
and Police Officers in the U.S., and How  
This Affects Police Reform Efforts**

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# The Interaction and Relationship between Prosecutors and Police Officers in the U.S., and How This Affects Police Reform Efforts

*David A. Harris*

## I. Introduction

In some of the nations of Europe, prosecutors control police under a clear relationship mandated by law. Prosecutors may direct police investigative activities and can order police to pursue particular avenues of inquiry, including the investigation of possibly exculpatory evidence.<sup>1</sup> For example, Italian prosecutors have direct control over law enforcement; the police report to prosecutors, who often shape what police officers do in individual cases.<sup>2</sup> In the U.S., however, prosecutors do not control the police. Instead, the chief of police—also known as the police superintendent or commissioner—controls police departments. The elected head of the jurisdiction, such as the city mayor or county executive, appoints the chief and can fire him at will.<sup>3</sup> Prosecutors may consult with police in ongoing cases, with, for example, police seeking advice on how to conduct a legally thorny search or seizure. But these arrangements tend to be informal, and in many American jurisdictions, they do not exist.

In general, then, American police officers handle the investigative phase of a case with almost complete autonomy. When they finish the investigation, the police then hand off the case to prosecutors, who bring and pursue charges against defendants in courts. This separation, and the resulting lack of any police accountability to prosecuting authorities, has long been the norm in the U.S. and usually causes few problems. But when issues of police misconduct arise in the criminal justice system, this separation of police and prosecutorial domains allows unchecked abusive, even criminal, police behavior to take place. And when this happens, the whole system sustains damage, including the very concept and authority of the rule of law.

This chapter will examine the interaction and relationship between American prosecutors and police departments, and the consequences of these arrangements for police misconduct and efforts to reform police agencies. It begins with a description of how these disparate but interlocking parts of the American criminal justice system function together, with particular emphasis on two signal characteristics of the American prosecutorial function: the federal nature of prosecution in the U.S., and the popular election of the vast majority of American prosecutors. With these characteristics in mind, the chapter then describes the implications of police misconduct and suggests possibilities for reforming deficient police practices. The potential for police reform through the efforts of prosecutors may appear bleak, but a relatively new federal

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<sup>1</sup> Ed Cape et al., "Procedural Rights at the Investigative Stage: Towards a Real Commitment to Minimum Standards," in *Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union*, eds. Ed Cape, et al. (Antwerpen: Intersentia, 2007), 7-9.

<sup>2</sup> Michele Caianiello, "The Investigative Stage of the Criminal Process in Italy," in Cape et al., *Suspects in Europe*, 133-134.

<sup>3</sup> The one exception to this paradigm is the elected county sheriff, a common feature of the American political landscape at the local level.

statute has begun to make a difference.<sup>4</sup> This new law, known as the “pattern or practice” statute, holds the key to making progress in American police practices.

## **II. The Basics of the Prosecutor/Police Relationship in the U.S.**

### **A. Independent of Each Other**

There are more than 17,000 American police departments of varying sizes.<sup>5</sup> No national police force exists in the U.S., although a few agencies, such as the Federal Bureau of Investigation (FBI), have national jurisdiction and authority to enforce specific federal crimes such as large-scale drug trafficking offenses or crimes that cross state lines. However, this gives federal police forces, even the vaunted FBI, only a limited ability to affect the vast majority of crimes across the nation. Instead, the bulk of criminal conduct in America is handled by the thousands of police departments operating at either the local or state level. These police forces act independent of each other, operating only in their own geographic and political spheres.

There are fewer prosecutorial offices in the U.S. than police departments, with most prosecutors’ offices processing cases from the various police departments within their jurisdictions. Of particular importance here, police departments and prosecutorial offices operate independently of each other. They are not part of the same government agency, and the police do not report to, and are not formally accountable to, the prosecutors in the jurisdictions. Both police departments and prosecutors’ offices form part of the jurisdiction’s law enforcement team, so to speak, but each works independently of the other and at different points along the continuum of the criminal justice process.

The police respond to the report of a crime, assure the safety of victims and the integrity of the crime scene, gather evidence, and make arrests if possible. Prosecutors typically play no role in this phase of the case. Once the police arrest a suspect and close their investigation, the results of the police investigation—reports, evidence, and the like—go to the prosecutor’s office. Police may confer with prosecutors to describe the case facts more thoroughly than provided in the formal case file, particularly when it becomes necessary for police personnel to serve as witnesses at a preliminary hearing, at a proceeding to consider pretrial motions, or during trial. But the basic template is for the police to investigate the case and to make arrests when appropriate, with the case then moving into the hands of prosecutors for legal proceedings.

### **B. Mutual Dependence**

Police and prosecutors may act independently, but they also depend on each other. In the U.S., neither office has sufficient power or resources to carry out the entire law enforcement task from investigation to punishment. Police officers conduct the investigation and make arrests, but they are not able to end the case on their own; prosecutors must accept the case and move it from its investigatory phase to a conclusion. Similarly, prosecutors may dominate the judicial processing of the case, but they have neither the resources nor the expertise to conduct

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<sup>4</sup> Violent Crime and Law Enforcement Control Act of 1994, 42 U.S.C. § 14141 (1994).

<sup>5</sup> Brian D. Reaves, "Census of State and Local Law Enforcement Agencies, 2004," *Bureau of Justice Statistics Bulletin*, June 28, 2007, <http://bjs.ojp.usdoj.gov/content/pub/pdf/cslllea04.pdf>.

investigations of everyday crime.<sup>6</sup> Regardless of their formal autonomy, police and prosecutors find themselves mutually dependent members of the same team, working together to address crime. Prosecutors rely upon police to find and interview witnesses, and to get the strongest possible evidence in a form that can be used to prove a defendant's guilt in court. Police depend on prosecutors to bring cases through the legal thicket of the court system so that the suspects they arrest are brought to justice.

Despite the fact that they play on the same team, a level of tension, mistrust, and mutual suspicion often characterizes the relationship between police and prosecutors. The differences in their respective roles and functions, as well as the disparities in social class, educational levels, and the like, can produce real divergences of opinions over particular cases, as well as personal and professional wariness. Police often feel as if they do the "real" work of law enforcement. Officers complain that prosecutors do not understand the tough job of the police, and "sell them out" by accepting guilty pleas that do not punish criminals harshly enough. For their part, prosecutors often feel that police do not understand the need to follow the law while they enforce it and pay insufficient attention to the legalities that can make or break a case.

Overall, police and prosecutors—with their mixture of independence and dependence, their roles as teammates, and their mutual suspicion—share a complicated relationship. One thing remains clear, though: In the U.S., police departments generally do not come under the direct control of the prosecutors' offices in the jurisdiction that they both share. They often work together—indeed, they must do so to attain the goal of public safety and justice—but their interaction is an uneasy one. Moreover, this mixture of independence, dependence, and mistrust has important consequences.

Because American prosecutors depend on police to bring them evidence and witnesses that are crucial to the successful prosecution of their cases, and given the existing tensions that often characterizes the relationships between them, American prosecutors often find themselves reluctant to alienate police officers.<sup>7</sup> Prosecutors need to work with the police on an ongoing basis. They need to have police officers find the witnesses and evidence necessary to put on a convincing case, and to show up in court and act as convincing witnesses when necessary. Unsurprisingly, prosecutors do not wish to jeopardize their relationships with their colleagues in law enforcement. Thus, prosecutors may reject any inclination to insist on better or more evidence for a particular case, or, for that matter, to insist on better police practices overall, in an effort to get along with police in the short term.

### **III. Two Central Characteristics of the Structure of the U.S. Prosecutorial Power**

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<sup>6</sup> The situation may be somewhat different during a complex investigation by a grand jury, in which prosecutors play the lead role; prosecutors use grand jury investigations to target complicated conspiracies, political cases, organized crime, or financial fraud. Yale Kamisar, Wayne R. LeFave, and Jerold H. Israel, "Grand Jury Review," in *Modern Criminal Procedure* 12th ed. (St. Paul, MN: Thomson/West 2008), 1038-1080.

<sup>7</sup> Erwin Chemerinsky, "The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles," *Virginia Journal of Social Policy & the Law* 8 (2001): 305; Laurie L. Levenson, "The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial," *University of California at Los Angeles Law Review* 41 (1994): 509, 536-538.

Anyone desiring a full understanding of how prosecutorial systems in the U.S. work, and how this affects prosecutors' relations with police, must consider two central facts: First, prosecutorial power exists in the U.S. in the context of a federal system. Second, chief prosecutors at the state level obtain office through elections. Both of these facts influence the ability and desire of prosecutors to change police behavior, even when facts expose egregious misconduct.

### **A. The Federal Separation of Prosecutorial Power**

America's federal system is composed of a national government with limited powers and fifty state governments with more general "police powers." The national (or federal) prosecutorial power is lodged in the executive branch of the government, specifically, within the U.S. Department of Justice headed by the Attorney General. The power of the national government to prosecute criminal cases is limited to violations of federal criminal statutes. These statutes cover offenses that are characterized by some impingement of a national interest, such as assault on or interference with an agent of the federal government, the robbery of a federally insured bank, or offenses that are committed across state boundaries (e.g., interstate or international crime or drug conspiracies). But again, this prosecutorial power—carried out by designated United States Attorneys and their staffs in the nation's 93 federal judicial districts—exists within the limited sphere of offenses specifically defined by national statutes.

Each of the fifty states has its own set of criminal laws and its own criminal justice system. Although the national criminal justice system is powerful within its sphere, the criminal justice systems of the states actually handle the overwhelming majority of criminal cases in the U.S.<sup>8</sup> State laws governing criminal offenses cover the entire gamut of crimes, from minor misdemeanors involving traffic offenses, for instance, to the most serious crimes such as rape and murder. As a result, the state prosecutorial power actually reaches considerably more criminal conduct than the national prosecutorial power does.

In almost all of the states, district attorneys exercise the state's prosecutorial powers. A typical district attorney's office will serve one county, though it is common in rural areas with low populations for a group of counties to come under the jurisdiction of a single district attorney. The district attorney is the highest law enforcement officer in his county and prosecutes all of the state-level crimes committed and charged by his office. The district attorney exercises this function with complete independence from any other prosecuting authority.<sup>9</sup> Although the U.S. Attorney General holds the federal prosecutorial power, no county prosecutor reports to the Attorney General or would feel constrained to follow his or her orders or recommendations. Similarly, each state has its own attorney general, but by and large, county prosecutors have no obligation to comply with the wishes of the state attorney general. In sum, the U.S. system separates prosecutorial powers into national and state levels, which operate in their own spheres and the rarely intersect. The states' prosecutorial powers are also highly decentralized, with each county's district attorney operating with almost total autonomy.

### **B. State Prosecutors as Local Elected Officials**

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<sup>8</sup> Kamisar, LeFave, and Israel, *Modern Criminal Procedure*, 18.

<sup>9</sup> Ronald F. Wright, "How Prosecutor Elections Fail Us," *Ohio State Journal of Criminal Law* 6 (2009): 589.

In the U.S., federal prosecutors working for the national government and state prosecutors who enforce violations of state law come to their respective offices in different ways. On the federal level, the President nominates the candidates for U.S. Attorney General, who are then subject to confirmation by the Senate. The Attorney General's representatives who prosecute federal crimes across the nation are called United States Attorneys. The President nominates and the Senate confirms one U.S. Attorney for each of the 93 judicial districts in the U.S. A staff of lawyers called assistant U.S. Attorneys works in each of the 93 offices. The number of staff lawyers depends on the amount of federal criminal activity in the district.

State-level district attorneys come to office in a different way. Instead of nomination by the states' governors, voters for each county elect their own chief prosecutors.<sup>10</sup> In all but the smallest jurisdictions, a staff of assistant prosecutors carries out most of the day-to-day prosecution work. The elected prosecutor sets office policy, hires and fires staff, serves as the public face of the office, and sometimes makes important decisions in individual cases, even if he will not try the cases in court. However, some elected prosecutors might themselves prepare and try cases in court, especially in very small jurisdictions. But the primary job of the elected prosecutor is to serve as the administering official with responsibility for the prosecution of crimes in the jurisdiction.

The elected nature of the position means that the state prosecutor is ultimately accountable only to the voters of the jurisdiction. As long as the chief prosecutor satisfies a majority of those voters, he controls the prosecutorial office and carries out its functions. To be sure, a jury or a judge may reject the position advocated by the prosecutor's office in an individual case, a witness may refuse to cooperate with the prosecutor, or a police officer may refuse to re-investigate when asked. But in most other decisions in the process, state prosecutors hold almost complete power, subject only to the ballot box and the prosecutors' desire to retain the office.

Moreover, since the prosecutor's position is an elected office with a strong local focus, it often attracts politically ambitious individuals who seek to advance his career by building a favorable record on "law and order" issues, paving the way for future campaigns for a higher office. If the majority of voters do not approve of the way the prosecutor's office performs, they can use the next election to fire the prosecutor through the ballot box or refuse to elect him for that higher office. These political stakes help ensure that a prosecutor will try to remain in the good graces of the voters. In other ways, however, elections have not proven to be an effective tool for keeping prosecutors accountable.<sup>11</sup> Among other things, the political process surrounding the prosecutor may diminish his inclination to do anything that might alienate voters—such as prosecuting a police officer for abusive conduct, or pressing for reform of police agencies.

#### **IV. Implications: The Stakes for Police Misconduct and Reform**

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<sup>10</sup> According to Professor Wright, "All but three states elect their prosecutors at the local level. Even in the three outliers (Alaska, Connecticut, and New Jersey), the elected state attorney general appoints the chief prosecutors at the local level." *Ibid.*

<sup>11</sup> *Ibid.*

The two key facts described above—the state-based nature of the great majority of American prosecutorial activity and the elective nature of the office—create significant consequences for criminal justice policies concerning the nature of police misconduct and the institution of practical reforms that address these issues. The electoral origin of most prosecutorial power in the U.S. makes it unlikely that prosecutors can or will do anything to address police misconduct. At the same time, the existent federal prosecutorial authority supplies at least one possibility for police reform.

To begin with, however, it is important to ask whether, or why, state prosecutors should be interested in police misconduct. On the one hand, police misconduct does not fall within the responsibilities of American prosecutors, at least strictly speaking. Prosecutors' duties begin and end with carrying out the job of charging, processing, and trying defendants accused of crimes. They do not bear the burden of ensuring that the police carry out their investigative and order-keeping functions in the best possible way. Of course, when misconduct reaches the level of law-breaking—for instance, taking bribes, using excessive physical force on suspects, or engaging in criminal activity for their own benefit—police officers can, and should, become the subjects of criminal investigations, charges, and trials. Nonetheless, this simple sketch of prosecutorial responsibility for police wrongdoing only addresses the issue's surface.

Returning to the discussion, police and prosecutors are independent of each other but also profoundly dependent on each other—and prosecutors ignore this at their peril. If police act without integrity, their actions inevitably taint other actors in the system, including prosecutors. If police lie about the gathering of evidence and regularly break the law to ensure that criminals receive punishment, regardless of the legal niceties involved in making a case, prosecutors who accept the results without question become complicit in an “ends justify the means” approach. When breaking the law to serve some greater good becomes an accepted part of routine police procedures, abusive treatment of citizens will be overlooked in the pursuit of overarching goals, and the legitimacy of the entire criminal justice process and the law itself will come into question in the eyes of the public. Research suggests that this has a strong impact on the likelihood that citizens will willingly accept the legitimacy of police authority.<sup>12</sup> For these reasons, prosecutors have much to lose when police conduct goes uncontested and begins to take root as a regular practice.

As stated above, prosecutors can challenge police misconduct by charging officers with crimes arising from their illegal conduct. However, comparatively little of this misconduct rises to the level of provable criminal activity. Many times, police misconduct may be borderline criminal and therefore hard to prove, or it may involve officers carrying out of police functions in ways that create problems for the system or produce wrongful convictions. But prosecutors still have the power to affect police actions. Prosecutors can rein in police excesses by using the leverage that they have by virtue of their positions in the system. They determine whether a case will go forward, which, in turn, can influence how police conduct themselves. For example, if the issue concerns the best practices for law enforcement—for instance, the use of simultaneous rather than sequential lineups, which minimize the risk of false positive identifications by

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<sup>12</sup> Jeffrey Fagan and Tom Tyler, “Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?,” *Ohio State Journal of Criminal Law* 6 (2008): 231-232.

eyewitnesses<sup>13</sup>—prosecutors could simply refuse to go forward on cases in which the preferred practices have not been followed. Prosecutors have done this in other contexts.<sup>14</sup>

This brings into sharp focus the consequences of elected state and local prosecutors handling the vast majority of criminal cases. Because the prosecutors who do most of the prosecutorial work in the U.S. must stand for re-election and remain accountable for their actions only through the ballot box, few of them will wish to make a regular practice of standing up to the police in individual cases, let alone attempting to make the police change their practices. In other words, the popular election of most of American prosecutors will make them reluctant to take on the police or to assert control over them in any meaningful way, even when officers have engaged in egregious criminal conduct.

Putting aside for the moment cases in which police officers themselves are prosecuted, elected prosecutors face huge hurdles in attempting to control police or even standing up to them. First, the police themselves, rather than some independent agency, are often the ones that investigate complaints of police misconduct,<sup>15</sup> creating an inherent conflict of interest. Not only does self-investigation create the potential for bias, but it also makes the public reluctant to accept the investigation's results as legitimate. Second, prosecutors in many jurisdictions will only prosecute police misconduct when those cases have been investigated and referred to their office by the police themselves, again building an inherent conflict of interest directly into the system.<sup>16</sup> Third, such cases impact the close working relationship between police and prosecutors, potentially jeopardizing the cooperation needed by prosecutors in order to put their everyday cases together successfully.<sup>17</sup> Without the kind of assistance that police officers normally provide as a matter of course, evidence may not make it to court, witnesses may not be interviewed or may fail to show up for trial, and officers may fail to serve subpoenas or forward reports to prosecutors. Needless to say, this impedes the prosecutor's own ability to succeed and advance professionally.

As for prosecuting police officers for their criminal behavior, the election of local prosecutors makes bringing these cases very difficult and quite uncommon, even instances of serious abuse of citizens. First, when deciding whether to pursue police officers on criminal charges, prosecutors face the reality that both police officers and prosecutors often know one another, usually feel that they are part of the same team, and may feel bound by loyalties born from working together over long periods. For these reasons, prosecutors face enormous pressure

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<sup>13</sup> Gary L. Wells, Amina Memon, and Steven D. Penrod, "Eyewitness Evidence: Improving Its Probative Value," *Psychological Science in the Public Interest* 7 (2006): 45.

<sup>14</sup> David A. Harris, *Profiles in Injustice: Why Racial Profiling Cannot Work* (New York: The New Press, 2002), 158-159.

<sup>15</sup> Asit S. Panwala, "The Failure of Local and Federal Prosecutors to Curb Police Brutality," *Fordham Urban Law Journal* 30 (2003): 648; John V. Jacobi, "Prosecuting Police Misconduct," *Wisconsin Law Review* 2000 (2000): 804. By contrast, Pittsburgh, Pennsylvania, establishes an independent agency, the Citizens Police Review Board, to investigate complaints against police officers. The Board has its own budget, staff, and investigators, and is independent of the police department and the city government. Citizens Police Review Board, City of Pittsburgh, Pennsylvania Code of Ordinances, tit. 6, art. VI (Oct. 15, 1997), [http://library4.municode.com/default-test/home.htm?infobase=13525&doc\\_action=whatsnew](http://library4.municode.com/default-test/home.htm?infobase=13525&doc_action=whatsnew).

<sup>16</sup> Paul Hoffman, "The Feds, Lies and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America," *Southern California Law Review* 66 (1993): 1462.

<sup>17</sup> *Ibid.*, 536 n.150; Panwala, "Failure to Curb Police Brutality," 651-652.



from both police and fellow prosecutors not to go forward with such cases.<sup>18</sup> Second, there are enormous political downsides to bringing charges against police officers. Among other things, the prosecutor's next political opponent could paint him as soft on crime or even anti-law enforcement. Police in most American jurisdictions belong to unions, and union endorsements are a much sought-after prize that can carry weight with the voting public. Not surprisingly, a prosecutor who stands up to police misconduct becomes less likely to receive a union endorsement. Police unions can also encourage their members to cast their votes for or against particular prosecutorial candidates, and the unions and their members may work to persuade other people to do the same.

Third, prosecutions of police officers are extremely hard to win, and thus, they do not make especially attractive cases for politically ambitious district attorneys who want a strong, positive record. Cases against police officers reverse the normal perceptions that most citizens have of the world, putting the officer in the role of defendant. The switch in roles—from a crime-fighter, who usually enjoys the benefit of the doubt and a presumption of truthfulness and correct conduct, to a defendant accused of committing crime—can be difficult for jurors to accept.<sup>19</sup> The witnesses to police misconduct may be persons of less than stellar backgrounds, such as the drug dealer the police officer supposedly robbed or the thief who would have been arrested but for the beating allegedly administered by the officer. These witnesses do not appear to be trustworthy, straight-laced citizens. Instead, they often have criminal records and are sometimes engaged in criminal activity when arrested,<sup>20</sup> making them poor witnesses subject to tough cross-examination and impeachment at trial. Moreover, police officers in the U.S. tend to protect each other by refusing to testify or give evidence against a fellow officer. This “code of silence” is a well-documented and widespread phenomenon in the U.S.,<sup>21</sup> and it makes proving any case against a police officer exceedingly difficult.

For these reasons, it is simply easier and politically beneficial in most cases for prosecutors to look the other way when faced with the prospect of correcting police practices or charging officers for misconduct or abuse.<sup>22</sup> The general “hands off” attitude that American prosecutors take creates a culture of impunity—a feeling that police, as the ostensible “good guys,” can get away with anything in a system where the ends always justify the means.<sup>23</sup> For a few officers, this culture encourages them to cross the line into outright criminality. Although it may rarely happen, the damage from such misconduct can be immense.<sup>24</sup> When citizens see police violating the law, even in the pursuit of some greater good, they feel less obligated to

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<sup>18</sup> Levenson, “Civil Rights Prosecutions,” 538 n.158.

<sup>19</sup> Testimony of James Frye, Professor of Criminal Justice, American University, *Police Brutality: Hearings before the Subcommittee on Civil & Constitutional Rights of the House Committee on the Judiciary*, 102nd Cong., 1st Sess. (1991).

<sup>20</sup> Panwala, “Failure to Curb Police Brutality,” 647.

<sup>21</sup> *Ibid.*, 648; Jacobi, “Prosecuting Police Misconduct,” 803; Levenson, “Civil Rights Prosecutions,” 537 n.153.

<sup>22</sup> Chemerinsky, “Prosecutors Dealing with Police Abuse,” 310; Christopher Slobogin, “Testilying: Police Perjury and What to Do About It,” *University of Colorado Law Review* 67 (1996): 1047.

<sup>23</sup> Panwala, “Failure to Curb Police Brutality,” 652.

<sup>24</sup> Jacobi, “Prosecuting Police Misconduct,” 789.

follow the law themselves. Any impulse they might have to cooperate with the police in helping to create community safety and well-being is directly undermined, maybe even destroyed.<sup>25</sup>

## **V. Why Local Prosecutors' Reluctance to Take On Police Makes Federal Prosecutors Important**

The difficulties of state-level police prosecutions have prompted scholars and practitioners to turn to the national government for answers. When local officials cannot or will not oppose harmful and illegal police practices or refuse to prosecute officers who have allegedly committed crimes, federal prosecutors may have the power to undertake legal actions to address these problems. In a limited number of cases, federally initiated actions have been taken against police in one of two forms: prosecutions for violating rights under the U.S. Constitution, and “pattern or practice” lawsuits designed to address wholesale violations of the law by police departments.

### **A. Prosecution for Violation of Federal Civil Rights Law**

Federal prosecutors have jurisdiction to charge local police not simply because they believe that state officials should have pursued the cases. Rather, the DOJ or a U.S. Attorney's office may bring criminal charges where the evidence shows that the defendants violated federal law. More importantly for our purposes, federal prosecutors can also prosecute police officers for violating a person's constitutional rights. The statute used for this purpose is 18 U.S.C. §242, which was enacted to allow the national government to prosecute persons acting under authority of state law who deprive victims of their constitutional rights. Congress created this law to protect black Americans from the violence used by state and local governments and their private proxies in the post-Civil War American South.<sup>26</sup> In the twentieth century, however, this law evolved into a tool that allowed the federal government to prosecute state and local officials or their agents who violated state laws that deprived others of their constitutional rights.

When federal prosecutors indict and try police officers for violations of this law, they must usually prove all of the same facts as required in a state-law based trial, with all of the same situational limitations involved with bringing a case against a police officer. For example, charging a police officer of committing murder, under many state statutory schemes, would require proof that the officer caused the death of a human being with premeditation and deliberation. The case also carries the same types of difficulties as a state-level prosecution: a police officer, normally a trusted, upright figure, is the defendant, accused by victims who may make less than ideal witnesses and protected by the police code of silence against officers testifying against their colleagues.

The real problem, however, lies in the federal statute itself. Since it is a law designed to prosecute only those who violate the *constitutional rights* of the victim, it requires more proof than a state-level trial for the same incident. The prosecutor will have to prove that the defendant not only did the act in question, but also did so willfully intending to deprive the defendant of his rights. In the 1945 case, *Screws v. United States*, the U.S. Supreme Court reviewed a conviction of three police officers for violation of federal civil rights laws by purposely beating the victim to

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<sup>25</sup> Panwala, “Failure to Curb Police Brutality,” 640.

<sup>26</sup> *Screws v. United States*, 325 U.S. 91, 98 (1945).

death. The Court stated that a conviction under 18 U.S.C. §242 required proof of a specific intention on the part of the defendants to deprive the victim of his constitutional rights. An intention to simply assault or kill the victim did not suffice; instead, the defendants must have wished to deprive the victim of his federal rights.<sup>27</sup>

The Court's limitation suggests that state-level jurisdictions have primary responsibility to clean up their own messes, so to speak. To this day, the idea permeates the modern understanding of when it is appropriate for the federal government to bring a case charging a police officer or other state actor with violating federal civil rights. This interpretation, combined with the extra burden of proving specific intent to violate the victim's constitutional rights, makes clear that federal civil rights prosecutions are, at best, only a partial answer to the unwillingness of state prosecutors to take on the police.

## **B. "Pattern or Practice" Lawsuits against Police Departments**

In 1994, the U.S. Congress created an alternative method of attacking the problem of police misconduct when local leaders cannot or will not take on this task. As part of a larger anti-crime statute, Congress created the "pattern or practice" law, 42 U.S.C. § 14141, giving the U.S. Department of Justice a new tool to attack police misconduct, abuse, and corruption. Specifically, the law authorized the Department of Justice to investigate police departments for evidence of any "pattern or practice" of conduct that violated the civil rights of people in their jurisdictions.<sup>28</sup> Because the authority conferred only concerned patterns of conduct or general practices, the law could not—indeed, it was not designed to—support investigations of particular incidents or individual cases of police misconduct or violence.<sup>29</sup> Rather, the idea was to look at the overall picture of conduct that violated the Constitution. For example, allegations of "racial profiling" would raise the following types of questions: Did officers consistently stop motorists without probable cause, or pedestrians without reasonable suspicion? Did they routinely violate the Fourth Amendment's search and seizure rules by searching in the pockets of everyone they stopped, without any reasonable suspicion? Were there patterns of beatings that followed many arrests, or that followed the arrests of persons of particular demographic groups?

If an investigation turns up evidence of such patterns or practices, the law gives the Department of Justice the authority to bring suit—a civil action, not a criminal charge—to force the reform of the police department by a federal court. These suits target the police departments, not any particular officer(s), and do not seek damages. If a suit is brought to a successful conclusion, the government may ask the judge to require particular changes or reforms in the police department—such as better training or supervision, the use of monitoring systems for aspects of police behavior, the improvement of custodial facilities, or the installation of cameras in squad cars. The idea behind the law was to create a method for structural reforms of police organizations, instead of just pursuing a single case concerning one past incident. In this way, the law could affect the broader array of factors that were responsible for the police misconduct.

In the years since its passage, the pattern or practice law has been used to conduct investigations of more than twenty police departments in the U.S. Among them have been some

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<sup>27</sup> *Ibid.*, 103.

<sup>28</sup> Violent Crime and Law Enforcement Control Act of 1994, 42 U.S.C. § 14141 (1994).

<sup>29</sup> However, individual cases could be addressed through prosecutions pursuant to 18 U.S.C. § 242 or under state law.

of the largest and most troubled agencies: the Los Angeles Police Department, the Washington D.C. Metropolitan Police Department, the Cincinnati Police Department, and the New Jersey State Police, to name a few. In most pattern or practice cases, the investigations conducted by the Department of Justice have not been tried to verdict but instead resulted in settlements with the police departments.<sup>30</sup> These settlements have taken the form of consent decrees—detailed agreements between the Department of Justice and the police departments regarding what the departments must do, going forward, to change its practices.

The consent decrees must be approved by a federal judge and typically last for five years. They also usually require an independent monitor, who measures compliance by the police department and periodically reports to the court. All told, these pattern or practice actions have been among the most successful efforts ever to reform police departments in the U.S. In Pittsburgh, for example, the five-year consent decree resulted in measurable improvements to the police force. According to an independent study conducted by the Vera Institute of Justice, the consent decree improved police service and police compliance with constitutional standards, resulting in an improved police department overall.<sup>31</sup>

## VI. Conclusion

The structure of prosecutorial power in the U.S. results in a deeply local orientation toward law enforcement. Elected officials enforce state laws and bring the vast majority of criminal cases, but they are accountable only through the imperfect mechanism of elections by local voting constituencies. As a result, few of these prosecutors exhibit any willingness to take on the police by opposing their methods and insisting on others, or by prosecuting police officers when there is evidence that they have committed crimes. This leaves a significant vacuum in any effort to assure that police behave legally and properly, and are held accountable for their actions. Federal power to prosecute criminal violations of constitutional rights can fill some of this gap, but the reach of this tactic remains limited. The advent of the “pattern or practice” statute provides federal prosecutors a new tool to attack police misconduct. Although not available to prosecute individual officers in particular cases, the pattern or practice statute may represent a way to approach the problem of police misconduct on a wholesale, organizational level, which may turn out to be more valuable and less problematic in the long run than individual prosecutions.

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<sup>30</sup> See “Conduct of Law Enforcement Agencies Settlements and Court Decisions,” [http://www.justice.gov/crt/about/spl/findsettle.php#Police Misconduct Settlements](http://www.justice.gov/crt/about/spl/findsettle.php#Police%20Misconduct%20Settlements).

<sup>31</sup> Robert C. Davis, et al., “Turning Necessity Into Virtue: Pittsburgh’s Experience with a Federal Consent Decree,” *Vera Institute of Justice*, Sept. 1 2002, <http://www.vera.org/content/turning-necessity-virtue-pittsburghs-experience-federal-consent-decree>.