

## OFFICER-INVOLVED SHOOTING INVESTIGATIONS DEMYSTIFIED: SLASHING THROUGH THE GORDIAN KNOT

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### ABSTRACT

*One of the largest issues currently facing law enforcement in the United States is police officers shooting civilians and the subsequent criminal investigations of the officers involved. This Article uses primary source material regarding such shootings, analysis of current prosecution models and case statistics, psychological studies, and application of relevant laws and ethical rules to suggest an entirely new model for investigating officer-involved shootings.*

*This Article argues that two fundamental changes to the standard protocol for investigating officer-involved shootings will result in more accurate, just, and efficient investigations. First, the investigations must be conducted by an entirely independent agency, separate from the agency involved in the shooting. Second, the investigation should follow a vertical prosecution model, with prosecutors involved with and directing the investigation (along with an independent agency) from the inception of the investigation. The latter issue has been completely unexplored by the academic community. The Article also describes law enforcement and police union resistance to these proposed changes in the investigative model.*

*In addition, the Article takes the reader into the heart of officer-involved shooting investigations, using actual shootings to describe*

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*detailed procedural and tactical issues that must be addressed to improve reliability and public trust outcomes for these investigations. For instance, the simple acts of rendering immediate first aid to an injured civilian and covering up the body of a deceased civilian can have powerful impacts on community trust. Despite massive confusion, already established ethical rules govern when recordings of officer-involved shootings may be publicly released and dictate that one union-affiliated law firm cannot be allowed to represent all of the police officers involved in a shooting. A complex interplay between labor law, psychological issues, and tactical considerations provides the necessary and proper procedures for the crucial interview of police officers involved in a shooting. Many of these issues have been ignored or overlooked by scholars and working prosecutors to date. This Article suggests the optimal procedures for officer-involved shooting investigations using existing agencies and resources, but also sets forth a completely original re-imagining of officer-involved shooting investigations using a fully autonomous agency.*

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## INTRODUCTION

When a police officer shoots and kills a civilian, all hell breaks loose. By definition, a law enforcement officer has just committed the homicide of a citizen. The story will flood social media, lead the nightly news, and be on the front page of the local newspaper. There may be protests, and those protests may turn violent. The law enforcement agency and prosecutor involved will be under tremendous, and often competing, political and public pressures. Making things worse, there are a hodge-podge of investigative protocols followed across the nation, depending on location and agency, with little-to-no consistency. As a result, prosecutors may take years to make a charging decision. And, where charges are filed, the results are unpredictable. Not surprisingly, the public has minimal confidence in the process.

This confusion and chaos are unnecessary. By following a few fundamental rules during the investigation, law enforcement in the United States can make the investigation (and the subsequent charging decision and trial) in officer-involved

shootings much more reliable and efficient. Two basic protocols address the majority of the problems that arise in these cases: (1) using an independent investigative agency, and (2) employing a vertical prosecution model, with prosecutors involved in the investigation immediately. The use of a vertical prosecution model has not been sufficiently explored in the academic or practical literature on this subject. Interestingly, following these two protocols solves most of the current problems with officer-involved shooting investigations rather elegantly.

In addition, there are some other extremely precise procedures for officer-involved shooting investigations that merit discussion. Many of these issues—such as the rules governing legal conflicts of interest covering who can represent which police officers in a shooting,<sup>1</sup> why these investigations stretch on for years and how to shorten this time frame, and ethical rules addressing the public release of recordings in officer-involved shootings—previously have been disregarded or simply missed by legal scholars in the field of criminal law.

Some of the protocols suggested here are distinct shifts in the investigative model used by law enforcement in the United States. Some of the protocols suggested require a significant change in police culture or the law. Some of the protocols suggested address small tactics, albeit with sweeping impacts. A recurring theme throughout this Article is that officer-involved shooting investigations are criminal investigations; the procedures used should be designed to ascertain the truth—as with any criminal investigation—not merely to protect the police or respond to political pressures.

This Article systematically addresses both the large and small issues that arise in officer-involved shooting investigations. Following these suggested protocols will lead to investigations that are more efficient, more transparent, and more just for all

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1. See MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR ASS'N 2018) (one law firm representing all officers involved in the investigation and/or trial would likely create a conflict of interest).

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parties involved. Academics, law enforcement, and the public can use this Article to understand both the enormous complexities and sometimes straightforward solutions to the problems that exist in officer-involved shooting investigations. The simple goal is to help restore confidence in a justice system that has appeared broken and confounded by this issue, particularly in the last decade.

This Article is set forth in four main parts. Part I is a brief overview of the background context for officer-involved shootings, describing certain basic facts about law enforcement in the United States and the prevalence of officer-involved shootings. Part II explores the necessity of having an independent agency investigate officer-involved shootings, including a discussion of law enforcement resistance to this concept. Part III describes the advantages of using a vertical prosecution model for officer-involved shootings, similar to the federal model for investigations, with the prosecutors involved immediately and throughout the investigation. Part IV takes the reader chronologically through an officer-involved shooting investigation, pointing out the significant areas that cause problems in these investigations and proposing solutions to these problems, some simple and some subtle. Part IV includes consideration of an entirely autonomous investigative and prosecutorial agency to deal with officer-involved shootings in the United States.

For purposes of this Article, I assume a standard set of facts: a law enforcement officer in the line of duty shoots and kills a civilian.<sup>2</sup>

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2. Using this standard set of facts clarifies the discussion of this issue and addresses the scenario that garners the most public and academic discussion. Moreover, an officer-involved shooting where the civilian is not killed will require the same procedural steps and safeguards, with the addition of interviewing the surviving civilian. During the course of this Article, the person shot will simply be referred to as the “civilian,” eschewing the terms “suspect” and “victim,” both of which are used by advocates with various perspectives on this topic, but both of which assert conclusions that simply are not yet known at the time of the officer-involved shooting investigation.

## I. NATIONAL BACKGROUND FOR OFFICER-INVOLVED SHOOTINGS

Laquan McDonald in Chicago. Michael Brown in Ferguson, Missouri. Amadou Diallo and Eric Garner in New York. Ahmaud Arbery in Georgia. Breonna Taylor in Louisville. Freddie Gray in Baltimore. George Floyd in Minneapolis. Each of these cases were civilian deaths at the hands of law enforcement officers.<sup>3</sup> Each drew enormous local and national attention.<sup>4</sup> However, rather than simply re-hash these specific incidents, it is useful to start with some basic background facts about law enforcement and officer-involved shootings in the United States.

The population of the United States is approximately 330 million people.<sup>5</sup> There are an estimated 18,000 law enforcement agencies in the nation, including local police departments, state agencies, and federal agencies.<sup>6</sup> These law enforcement agencies vary from one-person departments to the 36,000 sworn members of the New York City Police Department.<sup>7</sup> In 2018,

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3. See Daniel Funke & Tina Susman, *From Ferguson to Baton Rouge: Deaths of Black Men and Women at the Hands of Police*, L.A. TIMES (July 12, 2016, 3:45 PM), <https://www.latimes.com/nation/la-na-police-deaths-20160707-snap-htlstory.html>; Nausheen Husain, *Laquan McDonald Timeline: The Shooting, the Video, the Verdict and the Sentencing*, CHI. TRIB. (Jan. 18, 2019, 7:22 PM), <https://www.chicagotribune.com/news/laquan-mcdonald/ct-graphics-laquan-mcdonald-officers-fired-timeline-htlstory.html>; Ryan W. Miller, Trevor Hughes & Grace Hauck, *Former Minneapolis Police Officer Derek Chauvin Arrested, Charged with Murder in George Floyd's Death: Updates*, USA TODAY, <https://www.usatoday.com/story/news/nation/2020/05/29/minneapolis-death-george-floyd-protests-escalate-police-precinct-fire/5279830002/> (May 29, 2020, 10:26 PM).

4. See, e.g., Arian Campo-Flores, Talal Ansari, Erin Ailworth & Valerie Bauerlein, *Anger and Unrest Sweep Across U.S.*, WALL ST. J., <https://www.wsj.com/articles/george-floyd-protests-minneapolis-11590844180> (June 1, 2020, 7:51 AM).

5. *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <https://www.census.gov/popclock/> (last visited Sept. 7, 2020).

6. See BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 249681, NATIONAL SOURCES OF LAW ENFORCEMENT EMPLOYMENT DATA 1 (2016), <https://www.bjs.gov/content/pub/pdf/nslead.pdf>.

7. *Id.*; see also *About NYPD*, N.Y.C. POLICE DEP'T, <https://www1.nyc.gov/site/nypd/about/about-nypd/about-nypd-landing.page> (last visited Sept. 7, 2020) (reporting approximately 36,000 police officers in N.Y.P.D.).

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there were more than 680,000 police officers employed in the United States, with a peak of over 700,000 in 2008.<sup>8</sup>

It is useful to think of police departments as being comprised of two overlapping structures. The first is the formal command structure, from patrol officer to chief.<sup>9</sup> The second is the police union, the bargaining unit that represents the rank-and-file police officers in contract negotiations, disciplinary procedures, and other labor issues.<sup>10</sup> Both structures play significant roles in officer-involved shootings.

And out of these numbers of civilians and police officers, how many fatal police shootings of civilians take place every year? Disturbingly, there is no national database that accurately tracks officer-involved shootings. The FBI's crime statistics do not capture this information, although the recently proposed Justice in Policing Act of 2020 would create such a federal database.<sup>11</sup> In 2015, *The Washington Post* began tracking all fatal shootings by on-duty police officers in the United States, relying on a combination of police reports, news stories, and social media posts.<sup>12</sup> The *Post* found that "police nationwide have shot and killed almost the same number of people annually" since the beginning of its *Fatal Force* project.<sup>13</sup> In 2015, 994 civilians were killed; in 2016, 962 civilians; in 2017, 986 civilians; in 2018, 992 civilians; and in 2019, 1004 civilians.<sup>14</sup> The *Post* also reported that while fatal police shootings occur across

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8. See Erin Duffin, *Number of Full-Time Law Enforcement Officers in the United States 2004 to 2018*, STATISTA (Sept. 30, 2019), <https://www.statista.com/statistics/191694/number-of-law-enforcement-officers-in-the-us/>.

9. See *What Are the Ranks of Police Officers?*, POLICE1 (Sept. 21, 2016), <https://www.policeone.com/police-administration/articles/what-are-the-ranks-of-police-officers-ubmv1W4wzK43uuM4/>.

10. See Marvin J. Levine, *A Historical Overview of Police Unionization in the United States*, 61 POLICE J. 334, 334-43 (1988).

11. See George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. § 118 (as passed by House of Reps., June 25, 2020).

12. See *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/2019/national/police-shootings-2019/> (Aug. 10, 2020).

13. *Id.*

14. *Id.* These statistics only detail shootings, so civilian deaths caused by police where there was no shooting, such as Eric Garner and George Floyd, are not captured.

the country, and have occurred in every state, the shootings cluster more heavily in densely-populated urban areas.<sup>15</sup> This data is all relevant in understanding some of the basic dynamics of officer-involved shooting investigations.

## II. REQUIRING INDEPENDENT INVESTIGATIONS

### A. *The Independent Agency Model*

Currently, when a police officer may have murdered a civilian, the majority of law enforcement agencies in the United States insist on investigating themselves.<sup>16</sup> Simply put, if a police officer from Police Department Alpha shoots and kills a civilian, Police Department Alpha conducts the homicide investigation of its own police officer. A large segment of the law enforcement community has voiced support for this incestuous investigation model.<sup>17</sup>

The first fundamental rule for improving all aspects of officer-involved shooting criminal investigations is requiring that an

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15. See *id.* Interestingly, the FBI does collect data regarding the number of law enforcement officers killed every year, divided between officers “feloniously” killed and officers killed in accidents. See, e.g., *Law Enforcement Officers Killed and Assaulted (LEOKA) Program*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/services/cjis/ucr/leoka> (last visited Nov. 2, 2020). The number of officers feloniously killed by year is as follows: for 2016, 66 police officers; for 2017, 46 police officers; for 2018, 56 police officers; and for 2019, 48 police officers. See *UCR Publications*, FBI, <https://www.fbi.gov/services/cjis/ucr/publications#LEOKA> (last visited Sept. 7, 2020), for annual publications of the Law Enforcement Officers Killed and Assaulted Report.

16. See JOSEPH B. KUHNS, JOSIE F. CAMBARERI, SHANNON MESSER & DARREL STEPHENS, MAJOR CITIES CHIEFS ASS’N, INDEPENDENT INVESTIGATION OF OFFICER-INVOLVED SHOOTINGS 14 (2018) [hereinafter MAJOR CITIES CHIEFS REPORT], [https://www.majorcitieschiefs.com/pdf/news/ois\\_fiinal\\_report\\_9\\_27\\_18.pdf](https://www.majorcitieschiefs.com/pdf/news/ois_fiinal_report_9_27_18.pdf) (noting that most of the responding agencies reported that officer-involved shooting investigations are often conducted by homicide detectives from the agency involved in the shooting as well as an internal investigation team).

17. See INT’L ASS’N OF CHIEFS OF POLICE, OFFICER-INVOLVED SHOOTINGS: A GUIDE FOR LAW ENFORCEMENT LEADERS 3–4 (2016) [hereinafter IACP REPORT], [https://www.theiacp.org/sites/default/files/2018-08/e051602754\\_Officer\\_Involved\\_v8.pdf](https://www.theiacp.org/sites/default/files/2018-08/e051602754_Officer_Involved_v8.pdf) (recommending internal agency members do officer-involved shooting investigations); see also MAJOR CITIES CHIEFS REPORT, *supra* note 16, at 14–15 (less than 20% of surveyed agencies permitted a completely independent investigation by an external agency of officer-involved shootings; 87% of investigations done by internal teams); Walter Katz, *Enhancing Accountability and Trust with Independent Investigations of Police Lethal Force*, 128 HARV. L. REV. F. 235, 237–38 (2015), <https://harvardlawreview.org/2015/04/enhancing-accountability-and-trust-with-independent-investigations-of-police-lethal-force/>.



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independent agency investigate such shootings. This means that if a police officer from Police Department Alpha shoots a civilian, then Police Department Alpha will not be the investigative agency for the shooting. Instead, Law Enforcement Agency Bravo will conduct the criminal investigation of the potential homicide charges.<sup>18</sup>

There are three reasons for requiring that an independent agency conduct the criminal investigation of an officer-involved shooting: bias, prejudice, and skills. The issue of bias is obvious. The potential for prejudice is a more refined point, not examined in the academic literature in this area and often not recognized by the general public, but clandestinely acknowledged in law enforcement. The third issue, skills, is straightforward.

The first reason to require independent investigations of officer-involved shootings is to avoid actual or perceived bias. Addressing actual bias, police officers who work for the same organization are psychologically and socially disinclined to find fault with a fellow officer, particularly where the result could be an arrest for homicide charges, with the resulting publicity, possible incarceration, and loss of employment.<sup>19</sup> Police officers are equally reluctant to criticize the training of or otherwise discredit their own organization.<sup>20</sup> Thus, investigators from the same agency as the officer under investigation bring an actual bias to the investigation, a bias that will taint every step of the investigation.

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18. It is important to note that every officer-involved shooting will have two necessary investigations: (1) the criminal investigation, to determine if criminal charges will be filed, and (2) the internal administrative investigation, to determine if the officers complied with the agency's relevant policies. See IACP REPORT, *supra* note 17, at 16–17. This article addresses solely the criminal investigation, except to note that the internal administrative investigation must be kept separate from the criminal investigation.

19. See, e.g., AMARI L. HAMMONDS, KATHERINE KAISER MOY, RACHEL R. SUHR & CAMERON VANDERWALL, STANFORD CRIM. JUST. CTR., AT ARM'S LENGTH: IMPROVING CRIMINAL INVESTIGATIONS OF POLICE SHOOTINGS 12 (2016), <https://law.stanford.edu/wp-content/uploads/2016/09/At-Arms-Length-Oct-2016.pdf>; see also Katz, *supra* note 17, at 238.

20. See sources cited *supra* note 19 and accompanying text.

As important as actual bias is the appearance of bias. Even if an internal investigation was hypothetically unbiased, the public perception of a police agency investigating itself for a potential police-on-civilian homicide would be that the investigation was biased.<sup>21</sup> The public does not trust the police to call balls and strikes for their own team.<sup>22</sup> The “thin blue line” of police officers protecting their own is alive and well in the public’s mind.<sup>23</sup>

The second reason to require independent investigations of officer-involved shootings is more subtle—to avoid internal prejudice within a police organization. Law enforcement organizations are made up of social and political tribes like any other organization.<sup>24</sup> Somebody slept with somebody else’s husband or wife. Somebody stole somebody else’s promotion. Somebody lost a drunken brawl to somebody else twenty years ago. Whatever happened, the law enforcement agencies now have some officers with a grudge against other officers. That could happen in any business, agency, or other organization. But the impact in an officer-involved shooting of these hidden

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21. See Stephen P. Savage, *Thinking Independence: Calling the Police to Account Through the Independent Investigation of Police Complaints*, 53 BRITISH J. CRIMINOLOGY 94, 103 (2013); IACP REPORT, *supra* note 17, at 5; Katz, *supra* note 17, at 235–37.

22. Indeed, the very concept of a professional sports team supplying the umpire or referee for a contest from within the ranks of their own team highlights the absurdity of this idea of law enforcement agencies investigating themselves. In order to avoid tainting the process, every person who will call “balls and strikes” during the investigation and prosecution of an officer-involved shooting (i.e., the investigators, the prosecutors, the judge, and the jury) needs to be independent and unbiased. See Katz, *supra* note 17, at 238–39 (“[I]nterviewers of involved officers slant investigations by using ‘softball, open-ended questions’ that allow for narrative responses, fail to challenge factual assertions by the officer, and ask leading questions at opportune moments that likely ‘signal to the officer what he is supposed to say in order to get off the hook.’ . . . When the investigator and the subject of the investigation are connected to the same organization, there is a natural impulse to interpret evidence in a way that supports the conclusion the interpreter would prefer.”).

23. See Savage, *supra* note 21, at 104.

24. See MARK BAKER, COPS: THEIR LIVES IN THEIR OWN WORDS 212 (1985) (“[T]he blue tribe of blood brothers is made of human beings who have fears, faults and prejudices like everyone else.”); see also JOHN P. CRANK, UNDERSTANDING POLICE CULTURE, at iii, 1 (2d ed. 2004) (examining both unique and common aspects of police culture; police culture reproduces general human culture; culture tends to reproduce itself in similar ways in different organizations).

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prejudices can be catastrophic if an agency tries to investigate itself.

The following hypothetical illustrates the problem of potential prejudice in officer-involved shooting investigations. Detective Blaine and Officer Laszlo both work for the Casablanca Police Department. Officer Laszlo shoots and kills a civilian while on duty. The Casablanca PD decides to investigate itself. Detective Blaine is assigned to the investigative team, investigating his fellow officer, Officer Laszlo. Officer Laszlo eventually is charged with murder, with key findings reported by Detective Blaine. Unbeknownst to the prosecutor, Officer Laszlo romanced Detective Blaine's girlfriend five years ago, and is now married to her. When Detective Blaine testifies at Officer Laszlo's murder trial about his key findings, Detective Blaine will be crucified when he is impeached on cross-examination using this information about Blaine's prejudice against Laszlo.<sup>25</sup>

Such prejudices are inherent in any organization, and the police are not immune. In fact, reports of prejudicial internal issues for law enforcement organizations are easy to locate.<sup>26</sup>

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25. A cross-examination like this is child's play for any criminal defense lawyer:

Detective Blaine, you don't like Officer Laszlo, do you? You have known Officer Laszlo for 15 years, correct? You used to date Ilsa Lund, correct? But Ilsa decided that she liked Officer Laszlo more than you, correct? And in fact, Ilsa dated and then married Officer Laszlo five years ago, correct? And ever since then, you have been angry at Officer Laszlo, is that fair to say? So when you reported that Officer Laszlo could not have seen that the civilian was holding a weapon from where Officer Laszlo was standing, you are just trying to get back at Officer Laszlo for stealing your girlfriend, isn't that true?

Officer Laszlo would be certain to report this information to his defense lawyer. Detective Blaine would be unlikely to report the information to the prosecutor and this information would not be included in any written report from the investigation.

26. See, e.g., Andrea Estes, *State Police Commander Clears Trooper Who Was Forced to Falsify Records in 'Troopergate' Scandal*, BOS. GLOBE (Oct. 31, 2019, 4:15 PM), <https://www.bostonglobe.com/metro/2019/10/31/state-police-commander-clears-trooper-who-was-forced-falsify-records-troopergate-scandal/u6aUd94oWOqG4f7RGaYjZJ/story.html> (detailing how a trooper was forced by his supervisors to delete embarrassing information about arrest of daughter of judge); Taryn Asher, *Detroit Police Officers Fight Each Other in Undercover Op Gone Wrong*, FOX 2 DETROIT (Nov. 13, 2017), <https://www.fox2detroit.com/news/detroit-police-officers-fight-each-other-in-undercover-op-gone-wrong> (reporting that two sets of officers from same police

The issues that are unreported and unknown are an even bigger problem. Moreover, the larger the police department, the greater the probability that such internal disputes exist, and the larger police departments are the departments most likely to try to investigate themselves.<sup>27</sup> Using an independent investigative agency takes such messy intra-departmental issues out of these sensitive investigations.<sup>28</sup> An external, independent agency simply would not be involved in the internal issues and petty grievances that can taint an agency investigating itself.<sup>29</sup>

Finally, using an independent agency for officer-involved shootings ensures that the investigating agency has the requisite skills to do a complex homicide investigation. As previously mentioned, there are approximately 18,000 law enforcement agencies in the United States.<sup>30</sup> These agencies range from sophisticated organizations with thousands of employees to departments that consist of one part-time police officer and a patrol vehicle.<sup>31</sup> The assigned independent agency (designated before an officer-involved shooting happens) must

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department were involved in brawl with each other while on duty); *Sexual Affair Could Cost Police Officer His Law Enforcement Certification*, WFTV 9 ABC, <https://www.wftv.com/news/local/sexual-affair-could-cost-police-officer-his-law-en/69607376/> (Apr. 21, 2015, 5:23 PM) (reporting that two police officers were caught having a sexual affair on duty, which was exposed by the wife of one of the officers); Shawn R. Beals, *State Police Union Claims Favoritism in Discipline of High-Ranking Official*, HARTFORD COURANT (Nov. 12, 2013), <https://www.courant.com/news/connecticut/hc-xpm-2013-11-12-hc-state-police-video-destroyed-20131112-story.html> (reporting that a high-ranking police official was allowed to retire without discipline, despite ordering the deletion of an audio recording in a criminal investigation); *Trooper Sues State Police Commissioner*, PENNLIVE, [https://www.pennlive.com/midstate/2008/03/trooper\\_targets\\_col\\_jeffrey\\_mi.html](https://www.pennlive.com/midstate/2008/03/trooper_targets_col_jeffrey_mi.html) (Mar. 23, 2019) (reporting that a trooper sued a state police commissioner for ordering the trooper not to issue a ticket for speeding to another state police ranking officer). All of these cases share the same theme—internal dissension and intra-agency disputes for law enforcement.

27. See *infra* Section II.B (discussing reluctance of large police organizations to allow independent investigations).

28. See Savage, *supra* note 21.

29. See *id.*

30. See Katz, *supra* note 17, at 240.

31. See Yolanda Martinez & Celina Fang, *When You're the Only Cop in Town*, MARSHALL PROJECT, (Oct. 26, 2018, 6:00 AM), <https://www.themarshallproject.org/2018/10/24/when-youre-the-only-cop-in-town>.

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be an agency with the requisite skills, training, and resources to conduct such an investigation.

In practice, this means that the designated independent agency must be an agency with significant experience and ongoing repetitions running homicide investigations. An investigation into an officer-involved shooting that results in death is a homicide investigation.<sup>32</sup> The minimum tools and experience to run an officer-involved shooting investigation are the same tools and experience required to run a standard homicide investigation: crime scene forensics, skilled interviewers, ballistics, knowledge of homicide charging issues, computer forensics, etc.<sup>33</sup>

That then leaves the question of who should serve as the independent agency to conduct officer-involved shooting investigations. The independent agency must have jurisdiction to investigate.<sup>34</sup> The simple response is that most places in the United States are covered by multiple law enforcement agencies with jurisdiction. For instance, a single township may fall within the jurisdiction of the local municipal police department, a state investigative agency, detectives employed by the district attorney's office, state police, a county sheriff's department, and/or federal agencies. If the shooting is done by one of these agencies, many of the other listed agencies have the resources, skills, and jurisdiction to be the independent investigating agency.<sup>35</sup>

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32. See *Arrest-Related Deaths*, BUREAU JUST. STAT., <https://www.bjs.gov/index.cfm?ty=tp&tid=82> (last visited Aug. 9, 2020).

33. See, e.g., VERNON J. GEBERTH, *PRACTICAL HOMICIDE INVESTIGATIONS: TACTICS, PROCEDURES, AND FORENSIC TECHNIQUES* 1154–61 (5th ed. 2015).

34. See generally Charles M. Kneier, *Territorial Jurisdiction of Local Law Enforcement Officers*, 9 N.C. L. REV. 283 (1930) (explaining the application of the common law notion of territorial police jurisdiction to modern local law enforcement agencies within the United States).

35. The fact that there is an independent agency investigating the officer-involved shooting does not mean that the department involved in the shooting is entirely excluded. That department still would be involved in providing its relevant body camera and vehicle recordings, policies, personnel files, and access to its officers. However, it will not play any substantive role in the criminal investigation.

Other models can be used as well. Regional teams can be created, much like police departments use regional teams for SWAT operations and drug operations. In Wisconsin, the Milwaukee area is covered for purposes of officer-involved shootings by a group of twenty-one independent law enforcement agencies.<sup>36</sup> Where one agency is involved in the shooting, two investigators from the group of other independent agencies step in to do the investigation (and the officer involved in the shooting specifically may not be employed by the investigating agencies).<sup>37</sup> This use of regional teams is particularly attractive in areas where there are fewer law enforcement agencies or stretched resources,<sup>38</sup> which is exactly why the model is used in SWAT and drug operations.

Internationally, some countries have created free-standing agencies for the purpose of investigating officer-involved shootings.<sup>39</sup> In Canada, an entirely independent agency has been established that handles every aspect of an officer-involved shooting.<sup>40</sup> The Special Investigation Unit (SIU) has no affiliation with any other Canadian law enforcement agency, thereby ensuring complete independence.<sup>41</sup> When some Canadian police agencies still failed to cooperate with the SIU during investigations of officer-involved shootings, an entirely predictable situation, the Canadian Police Services Act regulations were amended in 1999 to require full police cooperation with any SIU investigations.<sup>42</sup>

Thus, having an independent agency investigate officer-involved shootings is sound policy, good for enhancing public trust, and feasible. As a result, state legislators can and should

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36. MAJOR CITIES CHIEFS REPORT, *supra* note 16, at 26.

37. WIS. STAT. § 175.47 (2020); MAJOR CITIES CHIEFS REPORT, *supra* note 16, at 6.

38. *See* MAJOR CITIES CHIEFS REPORT, *supra* note 16, at 3.

39. *See* Katz, *supra* note 17, at 241–44 (identifying Canada, the United Kingdom, and Norway).

40. *See What We Do*, SPECIAL INVESTIGATION UNIT, [https://www.siu.on.ca/en/what\\_we\\_do.php](https://www.siu.on.ca/en/what_we_do.php) (Nov. 1, 2019).

41. *See id.*

42. *See* Conduct and Duties of Police Officers Requesting Investigation by the Special Investigation Unit, O. Reg. 673/98 s. 11 (3) (Can.).

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pass legislation making it a requirement. Such laws or executive orders have been created in Utah, Connecticut, New Jersey, New York, and a few other jurisdictions.<sup>43</sup>

*B. Law Enforcement Resistance to the Independent Agency Model*

If the independent agency model is unequivocally a better model for investigating officer-involved shootings, what has stopped it from being adopted nation-wide? Two factors come into play: (1) law enforcement territoriality, and (2) police union obstructionism.

*1. Law enforcement territoriality*

The law enforcement territoriality issue predictably comes up in any discussions with agency commanders. When police commanders of large agencies are asked if an independent agency should investigate local police departments in officer-involved shootings, the answer is typically “Yes.” When then asked if their own agency should be investigated by an independent agency if an officer-involved shooting takes place, however, the answer often turns into “No,” as many agencies are inclined to believe that they have the resources, skills, and integrity to investigate themselves.<sup>44</sup> Law enforcement agencies do not like to have any other law enforcement agency examining and potentially criticizing their practices.<sup>45</sup>

This dispute was played out in stark fashion in Northampton County, Pennsylvania in 2017. Members of the Pennsylvania State Police (PSP) engaged in an officer-involved shooting, killing a civilian after his mother called to report that the civilian

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43. See, e.g., UTAH CODE ANN. § 72-2-408 (LexisNexis 2020); CONN. GEN. STAT. § 51-277a (2019); N. J. STAT. ANN. § 52:17B-107 (West 2020); 50 ILL. COMP. STAT. § 727/1-10 (2020); WIS. STAT. § 175.47 (2020); N.Y. Exec. Order No. 147 (July 8, 2015).

44. See MAJOR CITIES CHIEFS REPORT, *supra* note 16, at 18–19 (discussing officer perspectives on the benefits of internal investigations).

45. This dynamic is not surprising. A possible criticism of the independent agency model is that, for example, ExxonMobil would not appreciate being investigated by Royal Dutch Shell. However, given that the goal of law enforcement is supposed to be ascertaining the truth and reaching a just conclusion, as opposed to profits, the comparison is inapposite.

was potentially suicidal.<sup>46</sup> The county district attorney announced that the county detectives assigned to the district attorney's office would be the independent agency to investigate the PSP shooting.<sup>47</sup> Under Pennsylvania law, the district attorney is the chief law enforcement officer for the county, so the district attorney had the authority to make this decision.<sup>48</sup> However, PSP refused to cede the scene and refused to cooperate.<sup>49</sup> The district attorney was forced instead to use a grand jury investigation.<sup>50</sup> While the grand jury report eventually cleared the officers involved in the shooting, the report skewered PSP for its refusal to allow an independent investigative agency.<sup>51</sup>

In fact, the state police commanders called as witnesses before the Northampton grand jury testified exactly as predicted.<sup>52</sup> None of them admitted or recognized that the public would not trust an agency investigating itself.<sup>53</sup> One commander stated, "[W]e have the resources, knowledge and experience to conduct an investigation better than anyone else."<sup>54</sup> Another stated, "[W]e have a long history of investigating our own."<sup>55</sup> And the lead commander for the state police said he would

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46. See Northampton County Investigating Grand Jury Report Part Two at 2–3, *In re: Northampton County Investigating Grand Jury 2016*, No. 434-2016 (C.P. Northampton Cty. Dec. 27, 2017) [hereinafter Northampton Grand Jury Report]. To the extent that this Article cites to any report that is not available through a general public search, the report is on file with the *Drexel Law Review*.

47. *Id.* at 4.

48. See 71 PA. STAT. AND CONS. STAT. ANN. § 732-206(a) (West 2020). As this Article explores, Pennsylvania has been a focal point for these issues because the state district attorneys association adopted a statewide policy recommending independent investigations, the first state prosecutor's association in the nation to do so. See *PA District Attorneys Recommend Independent Investigations of Officer Involved Shootings*, PA. DIST. ATT'YS ASS'N (Nov. 29, 2016), <https://www.pdaa.org/pa-district-attorneys-recommend-independent-investigations-of-officer-involved-shootings-pdaa-issues-first-in-the-nation-best-practices-guidelines-for-police-shootings/>.

49. See Northampton Grand Jury Report, *supra* note 46 at 5–6.

50. See *id.* at 7.

51. See *id.* at 32, 34–35.

52. See *id.* at 30.

53. See *id.*

54. *Id.*

55. *Id.*



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completely resist an outside agency investigating his state police and would recommend against such a practice to the governor.<sup>56</sup>

Interestingly, when asked for his opinion, Pennsylvania Governor Tom Wolf, an avowed criminal justice reformer, stated that he had no problem with the state police investigating themselves in officer-involved shootings.<sup>57</sup> Governor Wolf stated, “This is the way they’ve been doing it and I think they’re trying to do the right thing.”<sup>58</sup> Perhaps not so surprisingly, the governor was entering an election year and was seeking the endorsement of the Pennsylvania State Troopers Association, which he ultimately received.<sup>59</sup> The governor was subsequently re-elected and has chosen not to re-visit the issue.<sup>60</sup> This sequence provides a powerful example of political considerations subverting a necessary criminal justice reform.

The reluctance to accept independent agency investigations pervades law enforcement. For instance, in 2016, the International Association of Chiefs of Police issued a guide for officer-involved shootings.<sup>61</sup> The guide provides excellent insight into the nuts and bolts of officer-involved shooting investigations.<sup>62</sup> However, the guide recommends that units from inside the involved department investigate their own agency’s officer-involved shootings.<sup>63</sup> The same guide states that smaller agencies without the requisite resources might use outside investigative agencies, but gives only a passing reference to the fact that “some” larger agencies use

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56. *Id.* at 29.

57. See Wallace McKelvey, ‘I Support the State Police’: Gov. Tom Wolf on Troopers Investigating Their Own, PENNLIVE, [https://www.pennlive.com/news/2017/12/gov\\_tom\\_wolf\\_state\\_police\\_das.html](https://www.pennlive.com/news/2017/12/gov_tom_wolf_state_police_das.html) (Jan. 5, 2019).

58. *Id.*

59. See 2018 Governor Endorsement, Pennsylvania State Troopers Ass’n (Sept. 26, 2018), <https://www.psta.org/wp-content/uploads/2019/05/PSTA-2018-Governor-Endorsement.pdf>.

60. See Marc Levy, *Governor Tom Wolf Wins 2nd Term as Pennsylvania Governor*, A.P. NEWS (Nov. 7, 2018), <https://apnews.com/6c5c179f20a34bf8ae7ac27d9456d954>.

61. See IACP REPORT, *supra* note 17, at 3–4.

62. See *id.* at 1.

63. See *id.* at 3.

independent investigations of officer-involved shootings.<sup>64</sup> While providing solid technical advice on investigations, the views endorsed by the International Association of Chiefs of Police—a powerful voice in law enforcement—reflects an obvious distaste for large agencies allowing an independent agency to investigate in officer-involved shootings.

A few simple hypotheticals help to demonstrate the fundamental flaw with law enforcement agencies attempting to investigate themselves in officer-involved shootings:

- A Boeing 737 airplane suffers a design failure and crashes, killing 147 people. Boeing announces that it will run the investigation, excluding all other investigators.
- The New England Patriots football team is accused of stealing another team's playbook. The Patriots' coach announces that he will investigate the matter, assuring the public of his impartiality.
- A local daycare center is accused of allowing sexual assaults on children. The daycare says it will investigate the matter "internally" and promises "complete transparency."

In each of these scenarios, the proposal would be laughed out of court, mocked by the media, and reviled by the public. In real life, in each one of these scenarios, an independent agency conducts the investigation.<sup>65</sup> The same model should apply to officer-involved shooting investigations. Matters of grave

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64. *Id.* at 3–5.

65. The Federal Aviation Administration would investigate the plane crash, the National Football League would investigate the football team, and local law enforcement would investigate the daycare agency. *See, e.g., Statement from Acting FAA Administrator Daniel K. Elwell, FAA Updates On Boeing 737 Max*, FED. AVIATION ADMIN. (Mar. 12, 2019, 6:10 PM), <https://www.faa.gov/news/updates/?newsId=93206>; Nick Goss, *Roger Goodell Gives Update On Patriots Investigation*, NBC SPORTS BOS. (Dec. 12, 2019, 9:59 AM), <https://www.nbc.com/news/sports/nbc-sports-boston/goodell-gives-update-on-patriots-investigation-antonio-brown/2047675>; Gerald Tracy & Joe Galli, *Daycare Did Not Report Sexual Abuse Allegations, Say They Didn't Believe Victims*, NBC NEWS4SA (Feb. 5, 2019), <https://news4sanantonio.com/news/local/daycare-did-not-report-sexual-abuse-allegations-say-they-didnt-believe-victims>.

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importance and public concern merit an investigation of unquestioned integrity. Law enforcement territoriality must be overcome.

## 2. Police union interference

In the context of officer-involved shooting investigations, the disconnect between law enforcement agencies' view of themselves and the public's view is stark. Law enforcement agencies believe that they should be trusted to investigate themselves in officer-involved shootings; the public disagrees.<sup>66</sup> The view of police unions about independent investigations of officer-involved shootings is even more negative than the resistance from police agencies, albeit for different reasons.

Thus, the second main impediment to independent agency investigations of officer-involved shootings in the United States is police unions. Union leadership believes that independent agency investigations are more likely to result in criminal charges for officer-involved shootings.<sup>67</sup> Accordingly, the unions often react negatively to any involvement from independent agencies.<sup>68</sup>

As an example, in Pittsburgh, Pennsylvania, the local district attorney required independent agency investigations for

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66. See MAJOR CITIES CHIEFS REPORT, *supra* note 16, at 18; see also Sally Kestin, *Police Investigate Themselves; Families Cry Foul*, S. FLA. SUN SENTINEL (Apr. 14, 2012), <https://www.sun-sentinel.com/news/fl-xpm-2012-04-14-fl-police-investigating-themselves-20120414-story.html>; Press Release, Reuters & Ipsos, Poll: George Floyd Protests & Police Reform (June 9–10, 2020), <https://www.ipsos.com/en-us/news-polls/reuters-ipsos-data-police-reform-george-floyd-2020-06-12> (choose "Download").

67. See James Surowiecki, *Why Are Police Unions Blocking Reform?*, NEW YORKER (Sept. 12, 2016), <https://www.newyorker.com/magazine/2016/09/19/why-are-police-unions-blocking-reform> (noting that "[a]cross the nation, unions have led the battle to limit the power of civilian-review boards, generally by arguing that civilians are in no position to judge the split-second decisions that police officers make").

68. See *id.* One notable exception to union opposition was in Wisconsin, where the police unions supported the independent investigation model. See HAMMONDS ET AL., *supra* note 19, at 21.

officer-involved shootings.<sup>69</sup> The local police union president interfered with one officer-involved shooting investigation to such an extent that the district attorney threatened the union leader with obstruction of justice charges.<sup>70</sup> In that shooting, two Pittsburgh police officers shot and killed a civilian on January 22, 2017.<sup>71</sup> The union leader physically stopped the officers involved in the shooting from being interviewed by the independent agency.<sup>72</sup> When the independent agency attempted to interview the officers, “[the union president] stood up, proclaimed that the [independent agency investigators] were not coming into the conference room, and declared that he and [the two officers involved in the shooting] were leaving unless somebody was going to arrest the Officers.”<sup>73</sup>

In a separate officer-involved shooting in Pittsburgh on April 29, 2017, the same union leader also was caught in a recording making statements to one of the officers involved in the shooting: “And the first time you’re going to tell your story in its entirety is to [the Union attorney]. . . . We don’t talk to homicide. . . . They [the independent agency] know the fucking game. Oh, she [the independent agency’s investigator] just wants—because she hopes you say something.”<sup>74</sup>

The Pittsburgh shootings represent blatant, but not unusual, examples of how negatively police unions react to independent agency investigations or any reforms of investigating potential police misconduct. As one scholar has noted, “[P]olice unions are . . . a powerful political constituency. . . . [As a result,] many police officers receive excessive procedural protections during internal disciplinary investigations, effectively immunizing

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69. Report B at 4–8, *In re: The 2017 Allegheny County Investigating Grand Jury Case C*, No. CP-02-MD-5289-2017 (C. P. Allegheny Cnty. Oct. 4, 2018) [hereinafter *Allegheny Grand Jury Report*].

70. *See id.* at 15–16, 44.

71. *See id.* at 2.

72. *See id.* at 14.

73. *Id.*

74. *Id.* at 17, 21–22 (alteration in first sentence included in original) (alteration in last two sentences not included in original).

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them from the consequences of misconduct.”<sup>75</sup> The police unions are political animals who are adept at working both sides of the aisle. For Democrats, the police unions play the “union card.”<sup>76</sup> For Republicans, the police unions play the “law and order card.”<sup>77</sup> Thus, they historically have been successful at inspiring fealty, or at least fear, from both political parties.

Because of law enforcement territoriality and police union opposition, prosecutors and legislators have demonstrated little appetite for requiring that independent agencies investigate officer-involved shootings. Neither prosecutors nor legislators want to face the political backlash from law enforcement in general and police unions in particular. In one instance, an incumbent district attorney incurred the political wrath of the police union, who then placed billboards around the city demanding a new district attorney.<sup>78</sup> One of the reasons for the enmity of the police union? The district attorney was attempting to reform the process for investigating officer-involved shootings.<sup>79</sup> Ironically, the new district attorney who eventually was elected was adamantly opposed to the police

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75. Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1215–16, 1253 (2017) (discussing political strength of police unions across the political spectrum, resulting in excessive procedural protections given to police in misconduct investigations).

76. See, e.g., Dylan Matthews, *How Police Unions Became So Powerful—And How They Can Be Tamed*, VOX (June 24, 2020, 9:00 AM), <https://www.vox.com/policy-and-politics/21290981/police-union-contracts-minneapolis-reform> (discussing general historical political ties) (“The American left and labor have been close allies for more than a century . . .”).

77. See, e.g., Eleanor Clift, *The GOP and Police Unions: A Love Story*, DAILY BEAST, <https://www.thedailybeast.com/the-gop-and-police-unions-a-love-story> (Apr. 14, 2017, 1:19 PM) (“Republicans and unions are like oil and water: They don’t go together. Except for one big exception. Republican politicians support police unions and unionized fire fighters too, often exempting them from the scorched earth policies they direct toward other public sector unions, like teachers and government workers.”).

78. See Chris Brennan, *FOP Adds to an Already Bad Week for Seth Williams*, PHILA. INQUIRER (Jan. 18, 2017, 4:16 PM), [https://www.inquirer.com/philly/news/politics/20170119\\_FOP\\_adds\\_to\\_an\\_already\\_bad\\_week\\_for\\_Seth\\_Williams.html](https://www.inquirer.com/philly/news/politics/20170119_FOP_adds_to_an_already_bad_week_for_Seth_Williams.html). (stating that the police union president had billboard posted along a major highway stating, “Help Wanted. New Philadelphia District Attorney. Please contact FOP Lodge 5.”)

79. See David Gambacorta, *DA’s Office to Release Files on Police Shootings*, PHILA. MAG. (Nov. 10, 2016, 4:08 PM), <https://www.phillymag.com/news/2016/11/10/police-shootings-seth-williams/>.

union on virtually every issue.<sup>80</sup> Interestingly, even in cities led by “reform” district attorneys and “reform” politicians, such as Philadelphia and Houston, there has been little or no attempt to mandate independent agency investigations for officer-involved shootings.<sup>81</sup>

Until state political bodies step in and make legislative changes requiring that an independent agency investigate officer-involved shootings, the flawed nature of these investigations and complete lack of public trust in the integrity of the process will continue.<sup>82</sup> Because elected officials are afraid to lose the endorsement of police unions and law enforcement agencies, the politicians are hesitant to pass such legislation.<sup>83</sup> This hesitation must change, for the good of both the public and the police.<sup>84</sup> The public would benefit from unbiased investigations. The police would benefit from non-prejudicial investigations. Both would benefit from the public trusting the

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80. See Joe Trinacria, *Philly FOP President Blasts DA Krasner in Letter to Police Cadets*, PHILA. MAG. (Mar. 2, 2018, 2:07 PM), <https://www.phillymag.com/news/2018/03/02/mcnesby-krasner-police-cadets/> (stating the police union president called new district attorney and his supporters “anti-law enforcement” and “parasites of the city”).

81. See Allan Smith, *Progressive DAs Are Shaking Up the Criminal Justice System. Pro-Police Groups Aren't Happy*, NBC NEWS, <https://www.nbcnews.com/politics/justice-department/these-reform-prosecutors-are-shaking-system-pro-police-groups-aren-n1033286> (Aug. 19, 2019, 12:01 PM) (identifying Philadelphia District Attorney Larry Krasner as the most progressive district attorney in the nation); see also Jordan Smith, *Overzealous Prosecutors Ousted Across the Country, Showing There Is Still Hope for Reform*, INTERCEPT (Nov. 10, 2016, 11:24 AM), <https://theintercept.com/2016/11/10/overzealous-prosecutors-ousted-across-the-country-showing-there-is-still-hope-for-reform/> (touting new Houston District Attorney Kim Ogg as progressive leader for new district attorneys). Houston and Philadelphia still use internal teams to investigate officer-involved shootings. See DIRECTIVE 10.1: USE OF FORCE—INVOLVING THE DISCHARGE OF FIREARMS, PHILA. POLICE DEP'T 8, (rev. 2017), <https://www.phillypolice.com/assets/directives/D10.1.pdf>. Houston even automatically refers to the civilians who have been shot as “suspects” on their official website, without knowing whether the civilian was or was not a suspect in any crime. See *Officer Involved Shootings*, CITY HOUS., <https://www.houstontx.gov/police/ois/> (last visited Aug. 18, 2020).

82. In 2015, a federal task force recommended that completely independent agencies investigate officer-involved shootings. See PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, U.S. DEP'T OF JUST., FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 1, 21 (2015), [https://cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf).

83. See Rushin, *supra* note 75, at 1247.

84. See generally HAMMONDS ET AL., *supra* note 19 (examining current investigative procedures and recommending an approach to minimize conflicts of interest, accountability, and expertise).

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integrity of law enforcement in general. The current political climate, with both political parties seeking to distance themselves from police unions,<sup>85</sup> may provide an opportunity for this type of reform.

### III. THE NEED FOR VERTICAL PROSECUTIONS

The second key element for improved officer-involved shooting investigations is the immediate involvement and direction of the prosecutors who will have to make the charging decision and try any resulting criminal case. This means using a vertical prosecution model. This element has remained almost completely unexplored in the literature and research addressing officer-involved shootings, and thus merits some basic background explanation of prosecution models.

There are two main prosecution models: horizontal prosecutions and vertical prosecutions.<sup>86</sup> The horizontal prosecution model is an assembly-line model.<sup>87</sup> The police do the investigation and charging of the crime, then hand off the file to the prosecutors, who try the case or enter a plea bargain.<sup>88</sup>

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85. See Editorial, *The Problem with Police Unions*, WALL ST. J. (June 10, 2020, 7:16 PM), <https://www.wsj.com/articles/the-problem-with-police-unions-11591830984> (“Remember the furor in 2011 when Republican governors tried to reform collective bargaining for government workers? Well, what do you know, suddenly Democrats say public-union labor agreements are frustrating police reform.”).

86. See David L. Weimer, *Vertical Prosecution and Career Criminal Bureaus: How Many and Who?*, 8 J. CRIM. JUST. 369, 370 (1980) (explaining how establishing vertical prosecution units, as opposed to horizontal, allows for enhanced trial posture and greater control over plea bargaining); JOHN BUCHANAN, NAT’L CRIM. JUST. REF. SERV., U.S. DEP’T OF JUST., NCJ 120288, POLICE-PROSECUTOR TEAMS: INNOVATIONS IN SEVERAL JURISDICTIONS 1–2 (1989), <https://www.ncjrs.gov> (search “120288”; then choose “Police-Prosecutor Teams: Innovations in Several Jurisdictions”); CASSIA SPOHN & CRAIG HEMMENS, COURTS: A TEXT/READER 13 (2009) (explaining how some prosecutors’ offices choose a horizontal approach while others work vertically). See generally Kay L. Levine & Ronald F. Wright, *Prosecution in 3-D*, 102 J. CRIM. L. & CRIMINOLOGY 1119 (2012) (discussing the internal processes, workflow, and organizational effectiveness of the prosecutorial office).

87. See Weimer, *supra* note 86.

88. Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 751 (2003); see BUCHANAN, *supra* note 86. See generally Weimer, *supra* note 86 (examining prosecutors’ plea bargain decisions in vertical and horizontal units).

There is little interaction or collaboration between the police and prosecutors in this model.<sup>89</sup>

The vertical prosecution model is very different. In this model, prosecutors and investigators work together right from the inception of the investigation through trial.<sup>90</sup> The prosecutors and law enforcement agents collaborate on investigative strategies, who gets interviewed when, which investigative tools to use, what and when to charge, and trial strategies.<sup>91</sup> This model is time- and resource-intensive.<sup>92</sup>

Generally speaking, state and local prosecutors use the horizontal prosecution model, while federal prosecutors use the vertical prosecution model.<sup>93</sup> Because of the sheer volume of cases, most district attorneys' offices have little choice but to use the horizontal prosecution model.<sup>94</sup> Many local prosecutors' offices handle thousands of cases per year.<sup>95</sup> By comparison, even a large federal prosecutor's office might only handle a few hundred cases per year.<sup>96</sup> For example, in 2018, the Chester County (Pennsylvania) District Attorney's Office handled 6,433 cases with thirty-seven prosecutors.<sup>97</sup> During the same year, the United States Attorney's Office for the Eastern District of Pennsylvania, which covers Chester County and eight other counties in southeastern Pennsylvania, filed only 470 cases,

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89. See BUCHANAN, *supra* note 86, at 1 ("Prosecutors need a great deal of information to build a case but usually lack person-to-person contact with the officer most knowledgeable about the case.").

90. See BUCHANAN, *supra* note 86, at 2.

91. See *id.* at 3.

92. Weimer, *supra* note 86, at 370.

93. See generally SPOHN & HEMMENS, *supra* note 86, at 12–13 (describing general organizational structures of state and federal prosecutors' offices).

94. See Weimer, *supra* note 86, at 369.

95. See, e.g., COMMONWEALTH OF PA. CT. OF COMMON PLEAS CASE MGMT. SYS., CHESTER COUNTY CRIMINAL CASE INDEX (2019) [hereinafter CPCMS FORM REPORTS].

96. See, e.g., U.S. ATTYS' ANN. STAT. REP. 4 (2018) [hereinafter U.S. ATTYS' REPORT], <https://www.justice.gov/usao/page/file/1199336/download>.

97. See CPCMS FORM REPORTS, *supra* note 95; CHESTER CNTY. DIST. ATT'Y 2019, BUDGET REQUEST (listing thirty-seven prosecutors for 2018).



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while employing over 100 prosecutors.<sup>98</sup> This means that each local prosecutor handled an average of 170-plus cases per year, while each federal prosecutor filed less than five cases per year.

Logically, every local drunk driving or shoplifting case does not merit a full-scale collaboration between police and prosecutors, not even if they had the time. Local and state police are accustomed to and comfortable with the horizontal model, and may resent prosecutors for “interfering” with “their” investigation.<sup>99</sup>

With fewer but more complex cases, federal prosecutors and agents generally use the vertical prosecution method.<sup>100</sup> Federal prosecutors and agents are accustomed to working in this fashion. The result usually is a more thoroughly investigated case with fewer factual holes and virtually no legal errors.<sup>101</sup> More sophisticated local prosecutors have started to use this same model for major cases, such as child abuse, homicides, complex fraud investigations, sexual assaults, and political corruption cases.<sup>102</sup>

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98. See U.S. ATTYS’ REPORT, *supra* note 96, at 2 tbl.1; see also *Criminal Division—Eastern District of Pennsylvania*, U.S. DEP’T JUST., <https://www.justice.gov/usao-edpa/divisions/criminal-division> (July 27, 2020). Some of the federal cases are complex, multi-defendant indictments, requiring greater time. However, some are also simple immigration cases. The workload of federal prosecutors’ offices is a topic for another time.

99. See Alexandra Natapoff, *When the Police Become Prosecutors: Officers Quietly Wield a Lot of Unchecked Prosecutorial Power*, N.Y. TIMES (Dec. 26, 2018), <https://www.nytimes.com/2018/12/26/opinion/police-prosecutors-misdemeanors.html>.

100. See SPOHN & HEMMENS, *supra* note 86, at 12–13; see also Richman, *supra* note 86, at 828 (“Federal investigative agents handle fewer cases and more often become personally involved in the outcome of their cases than do local police. As a result, they possess both the incentive and information needed to monitor plea bargaining practices. It is not clear how successful agency attempts to shape bargains are . . . . But prosecutor anticipations of agency reactions to overly lenient bargains undoubtedly contribute to existing stringent practices.”). See generally LISA D. WILLIAMS, CAROLYN STAFFORD STEIN, ANDREW CHAN & IRIS HSIAO, HARVARD L. SCH., *SIZING UP THE PROSECUTION: A QUICK GUIDE TO LOCAL PROSECUTION* (2010), <https://hls.harvard.edu/content/uploads/2008/07/prosecution2010.pdf> (describing general hierarchical structures of local, state, and federal prosecutors’ offices).

101. See Weimer, *supra* note 86, at 370.

102. See, e.g., FAIR & JUST PROSECUTION, *BUILDING COMMUNITY TRUST: A COMPENDIUM OF COMMUNITY PROSECUTION MODELS FROM ACROSS THE NATION* 4, 9 (2018), [https://fairandjustprosecution.org/wp-content/uploads/2018/04/FJP\\_Brief\\_CommunityProsCompendium.pdf](https://fairandjustprosecution.org/wp-content/uploads/2018/04/FJP_Brief_CommunityProsCompendium.pdf) (listing specific prosecutors’ offices using vertical prosecution models in certain areas); *Child*

Traditionally, officer-involved shooting investigations have followed the horizontal prosecution model.<sup>103</sup> The police investigate a shooting on their own, then hand the file over to the prosecutors to review and make a charging decision.<sup>104</sup>

However, officer-involved shootings are too complex and sensitive to handle with the horizontal prosecution model. American law enforcement should and must switch to a vertical prosecution model for officer-involved shooting investigations.<sup>105</sup>

The vertical prosecution model has multiple distinct advantages in officer-involved shootings. First, the collaboration between prosecutors and investigators leads to a deeper, more thorough, and more nuanced investigation.<sup>106</sup> Second, the stakes and public scrutiny on these investigations merit the time and resources required by the vertical model. Third, there are legal complexities to officer-involved shooting investigations, discussed *infra*, which require an attorney's

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*Physical Abuse, Endangerment, and Neglect Unit of the Family Violence Division*, CNTY. SANTA CLARA OFF. DIST. ATT'Y, <https://www.sccgov.org/sites/da/prosecution/DistrictAttorneyDepartments/Pages/ChildAbuseUnit.aspx> (last visited Sept. 10, 2020) ("All [child abuse cases] are vertically prosecuted . . ."); *Vertical Prosecution: Child Abuse and Sexual Assault*, SAN JOAQUIN CNTY. DIST. ATTY'S OFF., <https://www.sjgov.org/da/units/vertical/casa> (last visited Sept. 10, 2020) (noting vertical prosecutions for domestic violence, child abuse, human trafficking, etc.).

103. See MAJOR CITIES CHIEFS REPORT, *supra* note 16, at 14–15.

104. See *id.*

105. The vertical prosecution model for officer-involved shootings was first raised in the Pennsylvania District Attorneys Association Best Practices for Officer-Involved Shootings. See PA. DIST. ATT'YS ASS'N, OFFICER-INVOLVED SHOOTING INVESTIGATION BEST PRACTICES 2–3 (rev. 2016) [hereinafter PDAA REPORT], <https://judiciary.pasenategop.com/wp-content/uploads/sites/42/2020/06/PA-District-Attorneys-Association-Officer-Involved-Shooting-Investigation-Best-Practices.pdf> ("At the conclusion of the investigation, the District Attorney of the jurisdiction where the officer-involved shooting took place will be required to make a decision whether the shooting was justified or whether criminal charges should be filed. Because the District Attorney has this responsibility, it is important that the Independent Agency report directly to the District Attorney in order to assure that all necessary investigative steps are followed. The District Attorney shall designate the Independent Agency, and the Independent Agency shall work under the direction of the District Attorney."). The PDAA Report was followed in March 2017 with a recommendation by the Association of Prosecuting Attorneys that mirrored the PDAA Report, including on the issue of prosecutors directing and overseeing the investigation. See ASS'N OF PROSECUTING ATT'YS, 21ST CENTURY PRINCIPLES OF PROSECUTION PEACE OFFICER USE OF FORCE PROJECT (2017) [hereinafter APA REPORT], [https://www.statattorney.org/images/APAs\\_21st\\_Century\\_Principles\\_of\\_Prosecution-Officer\\_Use\\_of\\_Force\\_Cases.pdf](https://www.statattorney.org/images/APAs_21st_Century_Principles_of_Prosecution-Officer_Use_of_Force_Cases.pdf).

106. See WILLIAMS ET AL., *supra* note 100, at 10.

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training and knowledge to avoid significant errors.<sup>107</sup> Fourth, the prosecutor's involvement throughout the process acts as a constant check to determine if an investigation is being obstructed by the agency being investigated or police unions, and a different investigative tool such as the grand jury may be required.<sup>108</sup> Fifth, the ongoing collaboration speeds up the investigative process; it prevents the scenario where the police investigate for a year, send the file to the prosecutor, who then sends it back to the police with dozens of unanswered questions, triggering further months of investigation.<sup>109</sup> Sixth and finally, the vertical prosecution model allows the prosecutor, who will be required to make the final charging decision, to have his or her specific questions asked and answered in a manner that allows for a fully informed decision.<sup>110</sup>

For example, the City X Police Department is involved in an officer-involved shooting. The department freezes the scene and notifies the designated independent investigative agency and prosecutor's office. The independent agency and an assigned team of prosecutors immediately go to the scene and establish a command center nearby. The independent agency is processing the scene, interviewing witnesses, collecting evidence, etc., all while conferring with the prosecutors on legal issues and strategic decisions. For prosecutors and law enforcement who are accustomed to this vertical prosecution model, it works efficiently and benefits both the investigating agency and the prosecutors in completing a thorough, unbiased, and timely investigation. Any subsequent trial also would be improved as a result of this immediate and constant collaboration between the investigators and prosecutors.

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107. See *infra* Part IV. In addition, the prosecutors still must remember to stay in their legal lanes. For instance, prosecutors may observe and comment remotely on interviews, but may not do the interviewing. Prosecutors must be careful not to turn themselves into witnesses.

108. See *infra* Part IV.

109. See *infra* text accompanying notes 161–74.

110. See *infra* text accompanying notes 264–75.

Some might argue that because local prosecutors are unfamiliar with the vertical prosecution model, it would be too onerous and complex to make the switch away from the horizontal model in officer-involved shootings. There are two valid responses to this argument. First, every new federal prosecutor needs to learn and implement the vertical prosecution model; experienced local prosecutors should have little trouble gaining a skill that tyro federal prosecutors are expected to master within a year.<sup>111</sup> Second, as previously mentioned, many modern local prosecutors already have moved to a vertical prosecution model for more complex and high-profile cases, such as homicides, child abuse, sexual assaults, fraud, and corruption.<sup>112</sup> Thus, the vertical prosecution model is accessible and adaptable for local prosecutors.

Given the clear superiority of the vertical prosecution model, there is no reason it cannot be adopted nationwide for officer-involved shootings. There are no legal impediments.<sup>113</sup> The volume of lethal officer-involved shootings is small enough that it will not overwhelm prosecutorial resources.<sup>114</sup> The importance of credible officer-involved shooting investigations is paramount in improving and maintaining public trust. The largest practical problem will be convincing local law enforcement agencies, accustomed to the horizontal model, to adopt the vertical prosecution model more commonly used by their federal colleagues. This is a cultural shift, not a legal shift.

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111. See U.S. Dep't of Just., Just. Manual § 9-27.110 (2018); see also ELISE BARANOUSKI, JOAN RUTTENBERG & CAROLYN STAFFORD STEIN, HARV. L. SCH., THE FAST TRACK TO A U.S. ATTORNEY'S OFFICE 3 (2014), <https://hls.harvard.edu/content/uploads/2008/06/fast-track-final.pdf> (noting the speed with which new Assistant United States Attorneys are expected to grasp new skills and try complex cases).

112. See *supra* text accompanying footnote 102.

113. See Weimer, *supra* note 86, at 370 (describing vertical prosecution and its legal effects on an investigation).

114. See *Fatal Force*, *supra* note 12 (noting an average of approximately 1,000 fatal shootings by police per year over last five years).

#### IV. THE DEVILISH DETAILS: A CHRONOLOGY OF OFFICER-INVOLVED SHOOTING INVESTIGATION ISSUES

The previous sections have articulated that: (1) an independent agency should investigate officer-involved shootings; and (2) a vertical prosecution/investigation model should be used, with prosecutors immediately involved with the investigation. However, the devil is in the details of these investigations. This Article will now examine a series of smaller issues, each of which can have explosive impacts on officer-involved shooting investigations if not handled correctly. For ease of examination, the issues are addressed in the rough chronological order of an officer-involved shooting investigation, from the initial shooting itself through the charging decision.

Two themes emerge from the discussion of these smaller issues. First, following the independent agency and vertical prosecution model discussed *supra* provides a hard-wired solution to many of these smaller issues. Second, these investigations are criminal investigations, and must be treated as such; law enforcement politics should not be allowed to warp investigations into whether a member of law enforcement has murdered a civilian.

Significantly, the procedures discussed below are suggested as creating some uniform national standards for officer-involved shooting investigations. To date, there is a complete lack of consistency around the United States regarding how these investigations are handled. This lack of consistency across the nation is a red flag in itself for law enforcement. In most areas, law enforcement has achieved some level of uniformity in investigations and prosecutions.<sup>115</sup> The way a homicide is investigated in Portland, Oregon, for example, is basically the same as it would be in Portland, Maine.<sup>116</sup> Drug cases are run

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115. See generally GEBERTH, *supra* note 33 (detailing, as a guide, general ways to conduct a homicide investigation).

116. See, e.g., *id.*

the same way in Minnesota and Miami.<sup>117</sup> Child abuse cases use consistent protocols from New York to Los Angeles.<sup>118</sup> The significant inconsistencies across the nation in officer-involved shooting investigations indicates both a lack of understanding and inefficiency. Simply put, law enforcement has not yet figured out how to deal with these cases.

While considering these detailed suggestions in the clinical comfort of an academic discussion, it is important to remember the actual context where these procedures will have to be employed. Walking onto the scene of an officer-involved shooting is a surreal and disturbing experience. A civilian is dead, with the body often still at the scene. The officers involved in the shooting are still there as well, unlike the normal homicide scene where the shooter is long gone. The officers can see the body, their ears are still ringing from the gunshots, their hearts are racing, and they are worried about the civilian, and about whether they will be cleared or charged with murder. The other rank-and-file officers are milling around, not sure how to treat the officers involved in the shooting. The commanding officers are arriving, grim-faced, hoping the agency's training was adequate, wondering whether their officers reacted appropriately, and guessing who is going to be blamed. The police union representatives are attempting to get access to the officers involved and already are planning a defense. The crime scene forensics team is trying to get control of the scene and begin processing it. The public, family members of the dead civilian, and the media are hovering over the scene, all waiting for news, all ready to erupt. The prosecutor and the independent investigative agency are attempting to coordinate the entire investigation, knowing that the police officers at the scene are not sure whether to treat them as friend or foe, and

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117. See generally GREGORY D. LEE, GLOBAL DRUG ENFORCEMENT: PRACTICAL INVESTIGATIVE TECHNIQUES (2003) (listing standard drug law enforcement techniques).

118. See, e.g., *How the CAC Model Works*, NAT'L CHILD.'S ALL., <https://www.nationalchildrensalliance.org/cac-model/> (last visited Sept. 10, 2020) (discussing the child abuse model used in all 50 states).

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knowing that a single mistake can lead to a botched investigation and a community literally and figuratively in flames. The stakes are high. The tension is extreme. The world is watching. Try to be perfect.

With this context in mind, the smaller and more precise individual issues of an officer-involved shooting are discussed below. Again, the standard set of facts is assumed: an on-duty police officer shoots and kills a civilian.

### A. Initial Safety

In any officer-involved shooting, the initial safety of everybody must be confirmed. This means that the officers involved, any civilians nearby, and all other parties must be checked for injuries and treated.<sup>119</sup> If the shooting was triggered by somebody with a knife or gun, the police need to secure the weapon and the person, thereby neutralizing any immediate threat.<sup>120</sup>

All of that is basic procedure for police. However, law enforcement needs to understand that confirming safety and providing first aid also applies to the person they just shot.<sup>121</sup> The police must be trained to treat that person for any injuries as soon as it is safe to do so.<sup>122</sup>

The reason for this procedure is basic. First, law enforcement is charged with protecting life; it is simply the right thing to do.<sup>123</sup> Second, the message that is sent by immediately

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119. See PDAA REPORT, *supra* note 105, at 3.

120. See, e.g., *id.* at 3–4.

121. See Richard Pérez-Peña, *Why First Aid Is Often Lacking in the Moments After a Police Shooting*, N.Y. TIMES (Sept. 21, 2016), <https://www.nytimes.com/2016/09/22/us/why-first-aid-is-often-lacking-in-the-moments-after-a-police-shooting.html>.

122. *Id.*

123. See LAW ENF'T CODE OF ETHICS (INT'L ASS'N OF CHIEFS OF POLICE 1957), <https://www.theiacp.org/resources/law-enforcement-code-of-ethics> (“As a law enforcement officer, my fundamental duty is to serve the community; to safeguard lives and property; to protect the innocent against deception, the weak against oppression or intimidation and the peaceful against violence or disorder; and to respect the constitutional rights of all to liberty, equality, and justice.”). Controversially, while the police accept this role, the federal courts have specifically found that there is no constitutional duty for the police to protect persons. See *Warren v. District of Columbia*, 444 A.2d 1, 5 (D.C. Cir. 1981).

rendering first aid is, “We did not want to shoot this person, we only did so because it was necessary, and now we are doing everything we can to save the person’s life.” This is a powerful public message.

For example, there was an officer-involved shooting in a courthouse in Chester County, Pennsylvania in August of 2015.<sup>124</sup> A man with a knife ran through security and started to stab a deputy sheriff.<sup>125</sup> Another deputy sheriff shot the knife-wielding man.<sup>126</sup> All law enforcement personnel in the lobby secured the assailant, then immediately began to render first aid.<sup>127</sup> The civilian was conscious and clinging to life when he was transported to a trauma center for further treatment.<sup>128</sup> The photograph on the front page of the local paper was the man being loaded into an ambulance, still alive.<sup>129</sup> He later died at the hospital, but the message that everything possible had been done to save him was delivered.<sup>130</sup> There were no public protests and the family of the man expressed appreciation for the life-saving efforts of the officers.

Compare that shooting to the officer-involved shooting of Laquan McDonald in Chicago in 2014.<sup>131</sup> In that incident, McDonald was displaying a knife on a public street when he was shot sixteen times by one Chicago police officer.<sup>132</sup> There

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124. See Press Release, Dist. Atty’s Off. of Chester Cnty., District Attorney’s Office Findings Re: Shooting at Chester County Justice Center (Aug. 27, 2015) [hereinafter Chester Cnty. Press Release].

125. *Id.* at 2.

126. *Id.*

127. *Id.*

128. See *id.*

129. See Michael P. Rellahan, *Chester County Justice Center Suspect Dead*, CHESTER CNTY. DAILY LOC. NEWS (Aug. 25, 2015), [https://www.dailylocal.com/news/chester-county-justice-center-suspect-dead/article\\_883e567e-77f6-5a2e-97ad-d6d010da1e34.html](https://www.dailylocal.com/news/chester-county-justice-center-suspect-dead/article_883e567e-77f6-5a2e-97ad-d6d010da1e34.html).

130. See Chester Cnty. Press Release, *supra* note 124, at 2–3.

131. See Safia Samee Ali, *Inspector General Report Shows At Least 16 Officers Involved in Cover-Up of Laquan McDonald Shooting*, NBC NEWS (Oct. 9, 2019), <https://www.nbcnews.com/news/us-news/inspector-general-report-shows-least-16-officers-involved-cover-laquan-n1064401>.

132. See The Oregonian, *Chicago Police Dashcam Video Shows Officer Jason Van Dyke Shooting Laquan McDonald*, YOUTUBE (Nov. 24, 2015), <https://www.youtube.com/watch?v=MySKxiEtVwY>.



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were multiple other officers present.<sup>133</sup> None rendered aid to McDonald.<sup>134</sup> Another police vehicle arrived shortly after the shooting, two officers exited and walked directly by the prostrate McDonald without rendering aid.<sup>135</sup> The dash camera video recording of the incident was subsequently released publicly.<sup>136</sup> The message delivered to the public in that shooting was that law enforcement did not care about the well-being of the person they shot.<sup>137</sup> The results of the shooting investigation, including the lack of medical attention to the civilian, were incredibly damaging for both the community and the Chicago Police Department.<sup>138</sup>

In yet another example of this problem, an Atlanta police officer shot and killed Rayshard Brooks on June 12, 2020, after attempting to arrest Brooks for being intoxicated.<sup>139</sup> The civilian's family noted that, immediately after the shooting, the police officers at the scene donned plastic gloves, recovered spent shell casings from the shooting, and only then rendered first aid to Brooks.<sup>140</sup>

Scene safety is an important step in officer-involved shootings. Including immediate first aid to the individual shot is a powerful moral and public relations message as part of that procedure.

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133. See *id.*; see also Ali, *supra* note 131.

134. See The Oregonian, *supra* note 132.

135. See *id.*

136. See *id.*

137. See Ali, *supra* note 131.

138. See, e.g., P.R. Lockhart, *Did Chicago Police Cover Up the Laquan McDonald Shooting?*, VOX (Jan. 17, 2019, 6:00 AM), <https://www.vox.com/2019/1/17/18184158/chicago-police-conspiracy-trial-verdict-mcdonald-van-dyke> ("The Laquan McDonald shooting rocked Chicago . . . . Outrage over McDonald's death fueled a damning Justice Department investigation into the Chicago Police Department.").

139. See *Family of Atlanta Shooting Victim Disputes Police Account*, N.Y. TIMES, <https://www.nytimes.com/2020/06/13/us/atlanta-police-shooting-chief-brooks.html> (June 16, 2020).

140. *Id.*

### B. Scene Integrity

The next important rule for officer-involved shooting investigations covers another basic procedure, but with a few important additions. The general rule is to maintain scene integrity.<sup>141</sup>

Maintaining scene integrity is a requirement in any crime scene.<sup>142</sup> However, officer-involved shootings present some unique challenges.

Officer-involved shooting crime scenes are often large, sometimes spanning multiple city blocks.<sup>143</sup> The entire crime scene needs to be secured with a combination of personnel, vehicles, and crime scene tape.<sup>144</sup> There can only be one entrance/exit to the scene, with a strict log kept of who enters and leaves and when they do so.<sup>145</sup> The scene commander must limit entrance to the crime scene forensics team and only the relevant investigators and commanders.<sup>146</sup> This latter restriction can be difficult, as police brass and politicians all may want access.<sup>147</sup>

In addition, prosecutors and investigators need to think about the distance and spacing for scene security. In most officer-involved shootings, it is useful to extend the crime scene security line further out than normal by a couple of blocks.<sup>148</sup> This has multiple benefits. It allows the crime scene forensic

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141. See PDAA REPORT, *supra* note 105, at 3.

142. See IACP REPORT, *supra* note 17, at 10–11.

143. See, e.g., *Four Dead, Including Suspect, in Colorado Springs Shootings*, BUS. INSIDER (Oct. 31, 2015, 5:23 PM), <https://amp.businessinsider.com/r-four-dead-including-suspect-in-colorado-springs-shootings-2015-10>

144. See NAT'L FORENSIC SCI. TECH. CTR., CRIME SCENE INVESTIGATION: A GUIDE FOR LAW ENFORCEMENT 5 (2013) [hereinafter NFSTC REPORT], <https://www.utsystem.edu/sites/default/files/offices/police/policies/Crime-Scene-Investigation.pdf>.

145. See IACP REPORT, *supra* note 17, at 10–11.

146. *Id.*

147. The agency involved in the shooting will have initial control over the scene, but will turn the scene over to the independent agency when they arrive. See NFSTC REPORT, *supra* note 144, at 4.

148. See *id.* at 4–5.

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team to work unimpeded and undistracted.<sup>149</sup> It aids in locating more potential recordings of the incident.<sup>150</sup> It also keeps potentially unruly crowds at a distance, making it less likely that large crowds will form or security issues will develop.<sup>151</sup> Keeping things calm is an important aspect of these investigations.<sup>152</sup>

The rest of the scene integrity requirements are simple “Homicide 101” rules for preserving and processing a scene.<sup>153</sup> However, one addition is crucial. If a civilian is dead at the scene, with first aid having failed, the police must shield the body from view while the scene is being processed.<sup>154</sup> Using a patrol vehicle, special protective panels, or a tent are all acceptable options.

The reason for this rule is simple, but has been overlooked many times. For instance, in an officer-involved shooting in Ferguson, Missouri, the body of Michael Brown was left uncovered on the street in the middle of the day for hours.<sup>155</sup> Predictably, such a shocking sight eventually drew a large and outraged crowd of protestors and family.<sup>156</sup> The image was then broadcast by the media across the nation, compounding the anger.<sup>157</sup> The simple process of covering the body prevents such a problem.<sup>158</sup> If a picture paints a thousand words, the lack of a picture may save a thousand complaints.

When this rule is explained to the police, two justifications are offered. The first is to prevent a potential riot. The second is

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149. *See id.* at 5.

150. *See id.* at 4.

151. *See id.* at 5, 11.

152. *See* IACP REPORT, *supra* note 17, at 26.

153. *See generally, e.g.,* GEBERTH, *supra* note 33.

154. *See* PDAA REPORT, *supra* note 105, at 3.

155. Julie Bosman & Joseph Goldstein, *Timeline for a Body: 4 Hours in the Middle of a Ferguson Street*, N.Y. TIMES (Aug. 23, 2014), <https://www.nytimes.com/2014/08/24/us/michael-brown-a-bodys-timeline-4-hours-on-a-ferguson-street.html>.

156. *See id.*

157. *Id.*

158. *Id.* There obviously were other aspects of the Michael Brown shooting and investigation that drew public criticism. However, the treatment of the body played a catalyzing role.

because regardless of whether the civilian was a wanted murderer or a local minister, the deceased was somebody's child, sibling, parent, cousin, or friend, and that whole circle of people will appreciate respect being shown to the body. This is a cultural norm that permeates human society and history.<sup>159</sup> Even classical literature echoes this norm, as one can simply peruse *The Iliad* and observe the outrage engendered by Achilles' desecration of the body of the defeated Hector, dragging the corpse around the city of Troy.<sup>160</sup> Whether the reason is preventing mayhem or showing respect, most modern law enforcement agencies are open to adopting this procedure, once they are introduced to it. It is a low-tech, low-cost means of avoiding a significant problem.

This is another area where an experienced and independent investigative agency is useful. With repeated exposure to such shooting scenes and investigations, the independent agency would have both the protocols and tools to avert this problem. Covering up the body of the deceased would be a standard operating procedure. It has not become a standard protocol across the nation to date, because with all of the complex issues surrounding officer-involved shootings, sometimes the simple details have been overlooked.

### C. Immediate Notification—The Golden Hour

The next crucial requirement for officer-involved shooting investigations is immediate notification. As soon as any imminent danger has been neutralized, the agency involved in

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159. See generally Sheelagh McGuinness & Margaret Brazier, *Respecting Living Means Respecting the Dead Too*, 28 OXFORD J. LEGAL STUDIES 297 (2008); SUZANNA COHEN, LODDON MALLEE REG'L PALLIATIVE CARE CONSORTIUM, AN OUTLINE OF DIFFERENT CULTURAL BELIEFS AT THE TIME OF DEATH (2011), [https://www.academia.edu/30891853/AN\\_OUTLINE\\_OF\\_DIFFERENT\\_CULTURAL\\_BELIEFS\\_AT\\_THE\\_TIME\\_OF\\_DEATH](https://www.academia.edu/30891853/AN_OUTLINE_OF_DIFFERENT_CULTURAL_BELIEFS_AT_THE_TIME_OF_DEATH); Julie Beck, *Why Humans Care for the Bodies of the Dead*, ATLANTIC (Nov. 12, 2015), <https://www.theatlantic.com/health/archive/2015/11/why-humans-care-for-the-bodies-of-the-dead/415425/> (all discussing societal norms surrounding the interest of the deceased's body and the corresponding interests of their surviving kin).

160. See HOMER, *THE ILIAD* bk. 22 (D.C.H Rieu & E.V. Rieu trans., Peter Jones ed., rev. ed. 2003) (c. 762 B.C.).

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the shooting must immediately notify both the relevant prosecutor's office and the independent investigating agency.<sup>161</sup>

The immediacy of the notification is important because most things that go wrong in a high-stakes investigation go wrong very rapidly. In acute trauma medical cases, doctors talk about "the golden hour" — if they can get the patient on the operating table within an hour, the chances of saving the patient increase dramatically.<sup>162</sup>

The "golden hour" concept applies with similar force in officer-involved shootings.<sup>163</sup> In the first 60 minutes after an officer-involved shooting, critical errors may be made by the agency involved in the shooting. The police are dealing with both a traumatic event and the looming publicity. Instant notification allows an experienced and unbiased third party to take command and begin making dispassionate strategic decisions.<sup>164</sup>

Additionally, it is important that the notification be made immediately to both the prosecutorial and investigative agency. The prosecutor and independent investigative agency need to begin coordinating the investigation quickly. The independent agency needs to take over command of the scene, begin assessing and collecting evidence,<sup>165</sup> and consider interview options. In the vertical prosecution model, the independent investigative agency will be consulting with the assigned prosecutor as the investigation unfolds, often very rapidly, to

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161. See PDAA REPORT, *supra* note 105, at 3.

162. See generally Hannah Pham, Yana Puckett & Sharmila Dissanaikie, *Faster On-Scene Times Associated with Decreased Mortality in Helicopter Emergency Medical Services (HEMS) Transported Trauma Patients*, TRAUMA SURGERY & ACUTE CARE OPEN, Oct. 2017 ("One of the most fundamental tenets of trauma care is the 'Golden Hour.'"). See also RA Cowley, *A Total Emergency Medical System for the State of Maryland*, MD. ST. MED. J., July 1975, at 37–45.

163. See Savage, *supra* note 21, at 105 (explicitly linking "golden hour" concept to police shootings).

164. See Conduct and Duties of Police Officers Requesting Investigation by the Special Investigation Unit, O. Reg. 267/10 s. 3 (1) (Can.) (requiring immediate notification of shooting incident); see also POLICE EXEC. RSCH. F., BUREAU OF JUST. ASSISTANCE, PROMISING STRATEGIES FOR STRENGTHENING HOMICIDE INVESTIGATIONS 12 (2018) ("[H]omicide cases are more likely to be cleared when detectives arrive at the scene within 30 minutes . . .").

165. See IACP REPORT, *supra* note 17, at 10 (noting the need for notifications).

address issues such as search warrants and interviews.<sup>166</sup> The prosecutor and investigative agency also will need to establish a command post to coordinate investigative efforts and deal with public communications.<sup>167</sup>

There are horror stories associated with the failure to notify the independent agency immediately. In one shooting involving the Pennsylvania State Police in May of 2018, the state police waited four hours to notify the prosecutor and independent investigating agency about the officer-involved shooting.<sup>168</sup> In that four hours, the state police allowed a tractor trailer to leave the shooting scene with potential ballistic evidence, allowed another unrelated tractor trailer to pull into the scene, permitted union representatives to spirit away the officers involved without being interviewed, failed to keep a timely and accurate crime scene log, and then back-filled information on the crime scene log regarding who was present when.<sup>169</sup> These are the sort of errors that can make a difficult case to charge virtually impossible. Pennsylvania State Police commanders previously had stated their opposition to an independent agency investigating state police officer-involved shootings, as played out in Northampton County during the prior year,<sup>170</sup> which may have been the source of this decision to delay notification.<sup>171</sup>

By comparison, immediate notification of both the prosecutorial agency and independent investigative agency can quickly change the arc of an investigation. In the Chester County courthouse shooting discussed *supra*, where the civilian barged through security with a knife to stab a deputy sheriff and was shot by another sheriff, the independent investigative

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166. See, e.g., BUCHANAN, *supra* note 86.

167. See IACP REPORT, *supra* note 17, at 14.

168. See Memorandum from the Chester Cnty. Dist. Atty's Off. on Trooper-Involved Shooting to Pa. State Police 6 (July 26, 2018) [hereinafter Chester Cnty. July 2018 Memorandum to PSP].

169. *Id.* at 8–11.

170. See *supra* Section II.B.1.

171. Chester Cnty. July 2018 Memorandum to PSP, *supra* note 168, at 6 n.7.

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agency and the prosecutors were promptly notified.<sup>172</sup> Within the initial hours after the shooting, the prosecutor's office used its unique resources to discover two critical facts about the civilian: (1) he was the brother of a current homicide defendant who had killed their father during the previous year; and (2) in the months prior to this shooting, the civilian had jumped the fence at the White House in Washington, D.C., but was not shot by the Secret Service.<sup>173</sup> Without the prosecutorial agency being immediately involved, it could have been weeks or months before this information was discovered. The immediate notification of the prosecutors under the vertical prosecution model provided unique resources to the investigation, which in turn provided critical information about the civilian's mental health status and possible motives for his conduct.<sup>174</sup> The narrative quickly changed from the story of a White sheriff shooting a Black civilian to a productive discourse on mental health and security issues.<sup>175</sup>

This immediate notification requirement is a small but crucial part of officer-involved shooting investigations. If an agency involved in a shooting fails to report the shooting to prosecutors and the independent investigative body for a few hours, much less a full day, then there will be strong public suspicion about what happened during the delay, and that suspicion may be justified. The public will believe that evidence was manipulated and police stories were fabricated or coordinated.<sup>176</sup> In order to

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172. See Chester Cnty. Press Release, *supra* note 124, at 3; *supra* text accompanying notes 124–30.

173. Chester Cnty. Press Release, *supra* note 124, at 1–2.

174. See *id.*

175. See, e.g., Justine McDaniel & Michaelle Bond, *Questions Linger in Courthouse Shooting*, PHILA. INQUIRER (Aug. 25, 2015), [https://www.inquirer.com/philly/news/20150826\\_Reports\\_Two\\_injured\\_in\\_Chesco\\_courthouse\\_shooting.html](https://www.inquirer.com/philly/news/20150826_Reports_Two_injured_in_Chesco_courthouse_shooting.html).

176. In both the Allegheny Grand Jury Report and the Chester County July 2018 Memorandum to PSP, significant issues were raised about notification delays by the agency involved in the shooting. See Chester Cnty. July 2018 Memorandum to PSP, *supra* note 168, at 6 n.7 (“The disagreement of PSP’s former Commissioner with the DAO Policy [regarding an independent investigative agency] may have been the source of some of PSP’s failures to follow the protocol and resulting problems in the investigation.”); Allegheny Grand Jury Report, *supra*

avoid this problem, the notification call should be made within a few minutes of the scene being stabilized, allowing the independent criminal investigation to begin immediately.<sup>177</sup>

#### D. *Processing the Scene*

Processing the scene of an officer-involved shooting is almost entirely similar to processing the scene of any homicide. However, there are a few important modifications.

First, the independent investigative agency processes the scene.<sup>178</sup> The agency involved in the shooting merely freezes the scene until the independent agency arrives.

Second, police officers are taught to render firearms at a scene safe by unloading any civilian weapons and re-loading their own firearms. Instead, in an officer-involved shooting, the firearms of the officers and any civilian who fired must be preserved “as-is,” if possible.<sup>179</sup> This means that if a weapon is on the ground, it should stay there (provided it can be kept there safely). If a gun was in single-action or double-action, it should be left in that condition. Neither the magazine nor any rounds of ammunition should be replaced once the danger has

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note 69, at 35–36 (department notified the union representative before notifying the independent investigative agency).

177. The author has experienced numerous officer-involved shootings where the notifications to the prosecutor and independent agency were made within 5-15 minutes of the shooting, allowing for very efficient and reliable investigations. There is no reason why this cannot be the norm. In fact, in an example with an extraordinarily capable SWAT commander, the commander reported out during the middle of a gunfire exchange with a barricaded suspect that the SWAT team had fired at the suspect and would need the district attorney’s office and an independent investigative agency to start responding to the scene for immediate scene control and interviews once the barricade was concluded. The barricaded gunman surrendered shortly thereafter. The SWAT team members, with officers from over ten different police departments, were interviewed at a separate location immediately after the event (with union counsel present) and all of the interviews were completed within four hours of the gunman surrendering, allowing the SWAT personnel (who had been out in the freezing cold for 8-10 hours at the event) to go home. The incident was fully investigated within a week of a fairly complex multi-agency shooting.

178. See PDAA REPORT, *supra* note 105, at 4.

179. See IACP REPORT, *supra* note 17, at 9 (noting that “[o]fficers must secure in place all firearms and other weapons in the vicinity”).



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been neutralized.<sup>180</sup> The unaltered firearms and their locations convey a large amount of significant information, such as the potential location of the officer, the potential location of the civilian, the number of rounds fired, and the mechanical condition of the gun.<sup>181</sup> Ideally, the weapons used in the shooting should be documented at the scene by the independent agency and placed into evidence carefully and unaltered until examined by a firearms expert.<sup>182</sup>

Third, another significant and useful addition to processing officer-involved shooting scenes is a three-dimensional scene processing tool.<sup>183</sup> These tools have hardware and software that allow a three-dimensional reproduction of the shooting scene.<sup>184</sup> The software allows the investigators and the jury to view and analyze minute details of the scene, presenting a re-creation of officer and civilian locations, various angles of view, precise measurements of distance, and large amounts of other data.<sup>185</sup> These tools are expensive, but have demonstrated significant benefits with respect to the amount of information yielded.<sup>186</sup> Once again, having a designated and qualified independent

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180. See *id.* at 9–10.

181. See, e.g., Ian Urbina, *Catching Killers by Matching Tiny Marks on Bullets*, N.Y. TIMES (Nov. 16, 2018), <https://www.nytimes.com/2018/11/16/us/bullets-police-evidence-nibin.html>.

182. See IACP REPORT, *supra* note 17, at 10. In addition, the duty belt of the officers involved in the shooting should be taken and examined. The duty belt contains important information, such as whether the officer had a less lethal option (e.g., a taser) or if the officer accessed a reserve magazine.

183. See, e.g., Nick Flor, *Technology Corner: Virtual Crime Scene Reconstruction: The Basics of 3D Modeling*, 6 J. DIG. FORENSICS, SECURITY & L. 67, 67–68 (2011).

184. See, e.g., *id.*

185. See Ross Tredinnick, Simon Smith & Kevin Ponto, *A Cost-Benefit Analysis of 3D Scanning Technology for Crime Scene Investigation*, FORENSIC SCI. INT'L: REPS., Nov. 2019, at 1 (“3D surface scanning technology allows for the acquisition of a digital representation of a physical real world space. Agents can process and visualize this data to obtain a 3D model of a crime scene at a resolution and level of detail dependent on device settings. . . . Furthermore, the technology provides the ability to perform evaluations and measurements at a later time, independently of crime scene access.”).

186. See *id.* at 7 (detailing benefit of adopting 3D technology in high-crime areas or localities with high incidences of traffic-related accidents). In the absence of or in addition to 3D technology, a drone is often useful to take a wide area view and recordings of the scene.

agency is important, as such an agency already would possess such tools.<sup>187</sup>

Fourth and finally, canvassing the scene for any possible video/audio recordings is crucial. Police body cameras and vehicle cameras are obviously useful, as they may provide actual audio and video from the police perspective.<sup>188</sup> Civilians with phones, store-front videos, police-installed street cameras, and even doorbell cameras may have recorded other visual angles or the sounds of the shooting.<sup>189</sup> All of these potential recordings must be collected and analyzed.

Processing an officer-involved shooting scene is vital to the investigation. Given the ramifications, it must be processed with no mistakes.

#### E. Calculating Number of Shots Fired

Ascertaining the number of shots fired in an officer-involved shooting is important. At first glance, it seems like it would be simple. However, it often is a difficult task.<sup>190</sup>

Imagine a scenario where three police officers all fired multiple rounds at a civilian, hitting the civilian seven times. To determine how many rounds each officer fired, there are a number of possible methods.

First, the officers can be questioned. However, police recollection and estimates of rounds fired are notoriously

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187. See, e.g., Chester Cnty. July 2018 Memorandum to PSP, *supra* note 168, at 8 (noting state police lacked access to 3D digital imaging tool, which designated independent agency possessed).

188. See IACP REPORT, *supra* note 17, at 16.

189. See Charles Scudder, *Hello Stranger: How Doorbell Cameras in North Texas are Helping Police and Residents Catch Bad Guys*, DALL. MORNING NEWS (Apr. 19, 2019, 5:30 AM), <https://www.dallasnews.com/news/crime/2019/04/19/hello-stranger-how-doorbell-cameras-in-north-texas-are-helping-police-and-residents-catch-bad-guys/>; see also Chester County July 2018 Memorandum to PSP, *supra* note 168, at 4 n. 4 (discussing recovered recordings from police vehicles and commercial business in officer-involved shooting investigation).

190. See Michael Wood, *Counting on Failure: An Argument Against Counting Rounds*, POLICE1 (Jan. 16, 2015), <https://www.policeone.com/police-products/firearms/training/articles/counting-on-failure-an-argument-against-counting-rounds-yQywG4OxTbpWGtDG/>.

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unreliable.<sup>191</sup> Given the stress and adrenaline of the situation, this is not surprising.<sup>192</sup>

Second, the crime scene team can count the number of expended shell casings recovered that match the officers' weapons and duty ammunition. The problem with this method is that any experienced crime scene analyst will advise that shell casing counts also are not always accurate.<sup>193</sup> Shell casings are small, light-weight, and easy to miss in a large scene. Casings take strange bounces. In a rainy scene, the casings may end up down a sewer drain. Shell casings can be stepped on or driven over in the initial confusion before a scene is secured, and end up in the tread of a boot or tire. At some scenes, fewer shell casings are collected than were fired, as shell casings are lost or missed.<sup>194</sup> At some scenes, *more* shell casings are recovered than were fired, as old shell casings from prior street shootings are mixed in with the evidence.<sup>195</sup> Only a ballistics match will confirm which officer fired which recovered shell casing, and this still does not tell the investigators how many total shots were fired.<sup>196</sup>

Counting the rounds that penetrated the civilian provides more information. However, police officers do not always hit their target. For instance, one study reported that police

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191. *See id.*

192. *See id.* ("An officer experiencing high levels of Sympathetic Nervous System activation would be physically and mentally hindered from counting his shots accurately."). Researchers have demonstrated the impact of psychological stress on memory recall even outside of the law enforcement arena. Sabrina Kuhlmann, Marcel Piel & Oliver T. Wolf, *Impaired Memory Retrieval after Psychosocial Stress in Healthy Young Men*, 2005 J. NEUROSCIENCE 2977, 2977 ("The present study thus demonstrates that psychosocial stress impairs memory retrieval in humans and suggests that emotionally arousing material is especially sensitive to this effect.").

193. *See* Tom Ashmore, *Successful Ground Searching*, EVIDENCE TECH. MAG., [http://www.evidencemagazine.com/index.php?option=com\\_content&task=view&id=1893&Itemid=9](http://www.evidencemagazine.com/index.php?option=com_content&task=view&id=1893&Itemid=9) (last visited Aug. 8, 2020).

194. Interviews with Kenneth Beam, retired Detective, Chester Cnty, Pa., and Gary Lynch, Detective, Chester Cnty, Pa. (June 22, 2020). Detectives Beam and Lynch are the former and current heads, respectively, of the Crime Scene Forensics Unit for the Chester County Detectives, who handle all homicides in Chester County, including officer-involved shootings. They have processed hundreds of shooting scenes with shell casings.

195. *Id.*

196. *See, e.g.,* Urbina, *supra* note 181.

completely missed any target in approximately 50% of discharges, and the total “hit rate” was only 35% for all shootings.<sup>197</sup> Even when officers are shooting at a car, which is problematic for other reasons, they often miss; in one reported shooting, three officers fired eight shots from close range at a vehicle, and only one shot hit the car.<sup>198</sup> In addition, “through-and-through” injuries, where a bullet both penetrates and exits the body, complicate this issue, as such rounds often are not recovered and, when recovered, may be shattered or deformed.<sup>199</sup>

Of course, if the officers have body cameras or vehicle cameras activated, a visual and audio review of the recordings will help to ascertain the number of shots fired. However, the angles of the video recording and the audio of overlapping shots or echoes can be difficult to decipher.<sup>200</sup>

In the overall experience of crime scene investigators, the most accurate count of shots fired for each police officer is obtained through the “round count.” The round count checks the number of rounds of ammunition remaining in an officer’s firearm after a shooting. Thus, if the officer’s firearm carried eleven rounds (ten in the magazine and one in the chamber), and only five rounds are still present after a shooting, the investigators can conclude that particular officer fired six rounds.<sup>201</sup>

But experience has shown that not all police officers carry fully “topped off”<sup>202</sup> weapons, and not all police officers even

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197. See Chuck Remsberg, *New Study on Shooting Accuracy: How Does Your Agency Stack Up?*, FORCE SCI. INST. (Nov. 28, 2018), <https://www.forcescience.org/2018/11/new-study-on-shooting-accuracy-how-does-your-agency-stack-up/>.

198. See Chester Cnty. July 2018 Memorandum to PSP, *supra* note 168, at 4–5.

199. See, e.g., J. Scott Denton, Adrienne Segovia & James A. Filkins, *Practical Pathology of Gunshot Wounds*, 130 ARCHIVES PATHOLOGY & LAB’Y MED. 1283, 1285–86 (2006).

200. See Robert C. Maher & Steven R. Shaw, *Deciphering Gunshot Recordings*, AES 33RD INT’L CONF., June 2008, at 1, 3.

201. See Chester Cnty. July 2018 Memorandum to PSP, *supra* note 168 at 5 (discussing round count after shooting).

202. See, e.g., *Discussion Forum on Topping off Weapon Magazines*, GLOCK TALK, <https://www.glocktalk.com/threads/do-you-bother-topping-off-your-magazine.1686037/> (last visited Aug. 22, 2020).

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remember how many rounds they were carrying. Some officers carry one less than a full magazine in order to preserve magazine spring life.<sup>203</sup> Some departments or individual officers do not carry a round in the chamber.<sup>204</sup> And some officers simply forget to top off after firing a shot during training or some other event.<sup>205</sup> The best remedy for this problem is to insist that all officers top off at roll call and for commanders to spot-check their officers on occasion.

In the end, investigators will use all of the above-referenced methods to get the best possible information on the number of rounds fired. But investigators and researchers need to realize that this number is not guaranteed to be correct.<sup>206</sup>

### F. Split Up the Officers

In the immediate aftermath of an officer-involved shooting, it is often a chaotic scene. The scene commander still must issue a critical early order—to split up the officers involved in the shooting.<sup>207</sup>

The way this works is straightforward. Once the scene has been secured and a quick “public safety interview” has been conducted, all of the officers involved in the shooting are called

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203. *Id.*

204. See, e.g., *Authorized Ammunition*, NEW ORLEANS POLICE DEP’T OPERATIONS MANUAL ch. 1.4.1, at 1–2 (2015), <https://www.nola.gov/getattachment/NOPD/NOPD-Consent-Decree/Chapter-1-4-1-Authorized-Ammunition.pdf/> (not permitting officers to top off their weapons, but requiring that every officer carry the full capacity of their magazine).

205. See Chester Cnty. July 2018 Memorandum to PSP, *supra* note 168, at 5 (two officers in shooting did not have topped off weapons, but did not recall that they had not topped off their duty firearms).

206. Of course, this still may leave open the question of which officer fired the fatal shot. Consider the complexity of seven officers firing forty-three rounds, five rounds hit the civilian, but only one round actually killed the civilian. If the rounds are recovered from the body of the civilian, and are not too deformed, a ballistics match can be performed to match the rounds to a particular gun. There also are still questions of firearms being swapped between officers or even firearms disappearing from the scene. If the fatal rounds fired were “through and through” and the rounds were not recovered, this ballistics match is not possible. Simply put, addressing the complex issue of which officer fired the deadly shot when multiple officers fired multiple rounds requires an entirely separate article to address all possible variables.

207. See PDAA REPORT, *supra* note 105, at 4.

together by the scene commander.<sup>208</sup> They can confirm their mutual physical well-being.<sup>209</sup> Next, the scene commander is responsible for physically splitting up the officers for interviews and instructing the officers not to communicate with each other about the facts of the shooting.<sup>210</sup> Each officer is then transported separately to a secure location for interviews. Given how rapidly this action of separating the officers must occur, it is usually the scene commander from the agency involved in the shooting who must give this order, as the notification to the independent agency and prosecutor's office will still be taking place.<sup>211</sup>

There are two reasons for this rule. First, it maintains the independent recollection of the officers for the initial interview. Second, it prevents later accusations that the officers were left together and concocted a story to clear themselves.

In any criminal investigation, competent investigators will split up multiple suspects or multiple witnesses for the same reasons.<sup>212</sup> An officer-involved shooting investigation is a criminal investigation.<sup>213</sup> The same rules should be followed to preserve the integrity of the officer interviews.

In an officer-involved shooting in Coatesville, PA during 2013, the two officers involved in the shooting (which started with the civilian firing at the officers) were left together in a squad car immediately after the shooting.<sup>214</sup> The trial of the

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208. See IACP REPORT, *supra* note 17, at 9–14.

209. See PDAA REPORT, *supra* note 105, at 4. From both a short-term and long-term psychological standpoint, it is important for the officers to check with each other and to be treated respectfully. See Laurence Miller, *Officer-Involved Shooting: Reaction Patterns, Response Protocols, and Psychological Intervention Strategies*, 8 INT'L J. EMERGENCY MENTAL HEALTH 239, 244–47 (2006).

210. See IACP REPORT, *supra* note 17, at 9–14.

211. See *id.*

212. See U.S. DEP'T OF JUST., NCJ 178240, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 15 (1999) (“Separate witnesses and instruct them to avoid discussing details of the incident with other witnesses.”); see also IACP REPORT, *supra* note 17, at 10.

213. See IACP REPORT, *supra* note 17, at 10.

214. See Trial Transcript at 93–96, 107–08, Commonwealth v. Fiorentino, No. 309-2014 (C.P. Chester Cnty, June 25, 2015) [hereinafter June 25 Trial Transcript] (officer involved in shooting

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civilian for shooting at the officers then involved extensive cross-examination about whether the officers used their time together to create a story about the shooting.<sup>215</sup> These types of mistakes are easily avoidable, and led to a modification of the officer-involved shooting policy that covered that police agency to require immediately separating the officers.<sup>216</sup> Many good policies come from learning about somebody else's mistakes.

Even if an officer or some officers are not able to be interviewed immediately (because of trauma or contractual provisions), the officers should be instructed not to communicate with the other officers involved about the incident.<sup>217</sup> This includes cautioning them not to meet to discuss the shooting, as well as not communicating via phone, text, social media, etc. Reminding the officers that they will be asked to confirm this lack of communication when they eventually are interviewed (as well as actually checking electronic communication records in appropriate cases) is a useful tool to assure compliance. Because the prosecutors assigned to the case know that this is an area likely to be explored by the defense at trial, this is exactly the type of prophylactic warning that prosecutors can enforce by being immediately involved in the investigation, further supporting use of the vertical prosecution model.

Like most of the other rules listed above, this is a simple rule. Like most of the other rules listed above, this rule is often forgotten in the heat of the moment and can undermine the integrity of the investigation.

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cross-examined about fact he was left in patrol car and transported with other officer involved in shooting, giving them opportunity to fabricate story); Trial Transcript at 123–26, Commonwealth v. Fiorentino, No. 309-2014 (C.P. Chester Cnty, June 26, 2015) (investigating officer admits on cross-examination that officers should have been separated immediately after shooting to prevent opportunity to discuss shooting facts).

215. See June 25 Trial Transcript, *supra* note 214, at 93–96.

216. See THOMAS P. HOGAN, CHESTER COUNTY DISTRICT ATTORNEY OFFICER-INVOLVED SHOOTING POLICY 2–3 (Rev. 2015) (adding provision about separating officers immediately and transporting them separately).

217. See Chester Cnty. July 2018 Memorandum to PSP, *supra* note 168 at 9–10 (discussing commander's failure to separate officers and failure to instruct officers not to speak with each other about shooting incidents).

*G. Photographing Officers*

The next important procedure in officer-involved shootings is small, basic, and often overlooked. It is the requirement that the officers involved in the shooting all be photographed in the uniform or other gear they were wearing at the time of the shooting.<sup>218</sup>

The reasoning for this procedure is to have a full record in response to possible statements by the civilian who was shot, where the civilian is not killed. If the civilian shot at the police officers or even pulled a weapon, a civilian who survives an officer-involved shooting sometimes claims that he did not know the people approaching were police.<sup>219</sup> The civilian may claim that he thought the people approaching were criminals who were attacking him or attempting to commit a robbery.<sup>220</sup> Experienced investigators will recognize this claim, which is not totally implausible in a violent urban area.

Photographing the police officers in the uniforms they were wearing during the shooting tests the truth of this claim. If the officers were in normal full uniforms, it is difficult to claim that they were not recognizable as law enforcement.<sup>221</sup> If the police were in undercover outfits, which often are intended to make the police look like criminals, the civilian's claim has some validity.<sup>222</sup> If the police were in a mixed outfit (e.g., undercover

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218. See IACP REPORT, *supra* note 17, at 11–12; PDAA REPORT, *supra* note 105, at 5.

219. See, e.g., Stephen Bitsoli, *Is There a Right of Self-Defense Against Police?*, CRIME REP. (June 10, 2019), <https://thecrimereport.org/2019/06/10/is-there-a-right-of-self-defense-against-police> (discussing officer-involved shootings during no-knock search warrant raids); see also Kevin Sack, *Door-Busting Drug Raids Leave a Trail of Blood*, N.Y. TIMES (Mar. 18, 2017), <https://www.nytimes.com/interactive/2017/03/18/us/forced-entry-warrant-drug-raid.html?smid=pl-share>.

220. See, e.g., Bitsoli, *supra* note 219.

221. See, e.g., Ali Watkins, Elisha Brown & Katie Van Syckle, *Gunman Storms N.Y.P.D. Precinct After Firing at Police Van, Wounding 2*, N.Y. TIMES, <https://www.nytimes.com/2020/02/08/nyregion/police-shooting-Bronx.html> (July 12, 2020).

222. See, e.g., Tim Jimenez, *Another Undercover Philly Cop Escapes Gunfire as Shooter Gets Away*, KYW NEWSRADIO, <https://kywnewsradio.radio.com/articles/news/another-undercover-philly-cop-escapes-gunfire> (Sept. 4, 2019, 9:50 AM).



clothes but wearing a ballistic vest marked “POLICE” and displaying a badge), then the claim is an open issue.<sup>223</sup>

As with all parts of an officer-involved shooting investigation, the devil is in the details, and little details matter. An independent investigative agency paired with experienced prosecutors are exponentially more likely to remember and cover these details than a pressured agency trying to investigate itself with no legal guidance.

#### H. Bar Union Representatives from Participating in the Criminal Investigation

During any officer-involved shooting investigation, the officers’ union representative usually will become involved at some point.<sup>224</sup> The union representative is another police officer from the same agency who holds an elected position of authority in the bargaining unit/union that covers the police officers in the agency. The officers may want to consult with their union representative before being interviewed or may want a union member present for any interviews.<sup>225</sup> Generally speaking, this is not problematic and is a legal right for the officers in certain interviews.<sup>226</sup>

However, any union representative of the officer involved in the shooting must be strictly barred from taking part in the substantive criminal investigation.<sup>227</sup> Where an independent

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223. See, e.g., Louis Hansen, *Man Convicted of Shooting at Undercover Norfolk Cop*, VIRGINIAN-PILOT (Mar. 21, 2013, 12:00 AM), [https://www.pilotonline.com/news/crime/article\\_bed7ee80-fd6a-58eb-b4b0-65bef9d1228a.html](https://www.pilotonline.com/news/crime/article_bed7ee80-fd6a-58eb-b4b0-65bef9d1228a.html).

224. See, e.g., Editorial, *Why Is KC Police Union Fighting Outside Investigations of Officer-Involved Shootings?*, KAN. CITY STAR. (June 25, 2020, 5:00 AM), <https://www.kansascity.com/opinion/editorials/article243784852.html>; see also Rich Lord, *When Police Shoot or Kill, Who Investigates? Pittsburgh Police Union Wrestle Over Process*, NEW PITTSBURGH COURIER (June 11, 2020), <https://newpittsburghcourier.com/2020/06/11/when-police-shoot-or-kill-who-investigates-pittsburgh-police-union-wrestle-over-process/>.

225. *Weingarten Rights*, L. ENF’T OFFICERS SEC. UNIONS - D.C., <https://www.leosudc.org/weingarten-rights> (last visited Aug. 20, 2020) (advising union members to always request to have other union members present for interviews).

226. See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975) (holding union members have right to union representation at investigatory interviews).

227. See PDAA REPORT, *supra* note 105, at 5.

agency is doing the investigation, this will happen automatically, because the union representative for the agency being investigated would not be part of the independent investigative agency.

Where agencies attempt to investigate themselves, any investigative role by the union representative will be viewed as suspect. There have been cases where the union representative drove the officers involved in the shooting back to the station as a group, leading to potential claims that the union representative orchestrated a cover-up.<sup>228</sup> If the union representative does the crime scene review or the round count, questions of impartiality and accuracy will be raised.<sup>229</sup> Thus, the leader of any officer-involved shooting investigation must immediately identify the union representatives and inform them that they are to play no role in the substantive criminal investigation. Again, the presence of a prosecutor via the vertical prosecution model helps to enforce these procedures that may not look important until the case goes to trial.

### *I. Keep Internal Affairs Investigations Separate*

In all officer-involved shootings, there will be an internal affairs investigation in addition to the criminal investigation.<sup>230</sup> These two investigations must be kept entirely separate because the two investigations operate under different procedural rules and use different standards.<sup>231</sup>

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228. Chester Cnty. July 2018 Memorandum to PSP, *supra* note 168, at 10 (noting that a union representative transported three officers involved in the shooting together back to the state police barracks before any interviews; union representative also involved in transport and logging of evidence). The memo states, "This error [the transport of the three officers together] would lead to an effective cross-examination that the union representative coached and colluded with the Troopers involved in the shooting to create a fabricated story more likely to exonerate the Troopers." *Id.*

229. *See id.* at 8–9.

230. *See supra* note 18.

231. *See* PDAA REPORT, *supra* note 105, at 5.

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The dynamics and standards of an internal affairs investigation are very different from a criminal investigation.<sup>232</sup> The internal affairs investigation is concerned with whether the officer complied with the agency's procedures and protocols.<sup>233</sup> The criminal investigation is focused on whether the officer's use of force was justified and potential charges under criminal laws.<sup>234</sup>

More importantly and more likely to confound a criminal investigation, during the course of an internal affairs investigation the officer being interviewed will be given "Garrity warnings." In *Garrity v. New Jersey*,<sup>235</sup> the Supreme Court held that an incriminating statement made by a police officer is inadmissible against the officer in a criminal trial if the officer made the statement under the threat that the officer would lose his or her job if the officer invoked the right to remain silent.<sup>236</sup> The Court concluded that, under those narrow circumstances, the statement would be considered coerced because the officer was denied any meaningful opportunity to assert his or her Fifth Amendment rights.<sup>237</sup> Under current practices for internal affairs investigations by most police agencies, standard *Garrity* warnings are given informing officers that they are being compelled by their employer to be interviewed, but the information from the interview may not be used in any criminal investigation.<sup>238</sup>

By contrast, in the criminal investigation of an officer-involved shooting, there should be no *Garrity* warnings or the

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232. See N.J. ATT'Y GEN., INTERNAL AFFAIRS POLICY & PROCEDURE 32-39 (rev. 2017) (discussing different procedures used in administrative and criminal proceedings involving police officers).

233. *Id.* at 12.

234. *Id.* at 35.

235. 385 U.S. 493 (1967).

236. *Id.* at 499-500.

237. *Id.*

238. See, e.g., INT'L ASS'N OF POLICE CHIEFS, INTERNAL AFFAIRS: A STRATEGY FOR SMALLER DEPARTMENTS 4 (2018), <https://www.theiacp.org/sites/default/files/2018-08/BP-InternalAffairs.pdf>; Eric P. Daigle, *Garrity Warnings: To Give or Not to Give, That Is the Question*, POLICE CHIEF (Feb. 2013), <http://www.reid.com/pdfs/policechiefmagArticle.pdf>.

protections that arise from them. The interviews in the criminal investigation are voluntary interviews (or may be compelled by a grand jury), but they are in no way protected from use in the potential criminal prosecution.<sup>239</sup>

When agencies attempt to combine the criminal investigation and the internal affairs investigation, they are courting danger.<sup>240</sup> The officer being interviewed may claim *Garrity* exclusionary rights for his or her statement, either immediately or subsequently, if *Garrity* warnings are given or even if members of the agency's internal affairs department are present for the interview of the officers in the criminal investigation.<sup>241</sup>

Two examples that span the last decade demonstrate the ongoing problems with using *Garrity* warnings in officer-involved shooting criminal investigations (or other use of force investigations).

First, in 2011, the United States Department of Justice (DOJ) was conducting a civil rights investigation of the Seattle Police Department (Seattle PD).<sup>242</sup> During the course of that investigation, DOJ discovered that Seattle PD, who investigated itself in officer-involved shootings, had a standard practice of administering *Garrity* warnings to every officer interviewed in every use-of-force case, including officer-involved shootings.<sup>243</sup> DOJ advised Seattle PD to discontinue this practice.<sup>244</sup> DOJ noted that the blanket use of *Garrity* warnings would compromise potential criminal prosecutions by excluding the officers' statements from use in the criminal investigation.<sup>245</sup>

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239. See Matthew Bernt, *Should Public Employers Be Forced to Warn Their Employees of Their Immunity and Duty to Answer Questions before Demanding Answers and Taking Adverse Action?*, 56 CATH. U. L. REV. 1037, 1041–48 (2007).

240. See Steven D. Clymer, *Compelled Statements from Police Officers and Garrity Immunity*, 76 N.Y.U. L. REV. 1309, 1334–35 (2001).

241. See *id.* at 1332–35.

242. See Letter from Jonathan M. Smith, Chief, Civ. Rights Div. Special Litig. Section, U.S. Dep't of Just. & Jenny A. Durkan, U.S. Att'y, W. Dist. of Washington, to Michael McGinn, Seattle Mayor, 1 (Nov. 23, 2011), [https://www.justice.gov/sites/default/files/crt/legacy/2011/12/16/seattlepd\\_TA\\_11-23-11.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2011/12/16/seattlepd_TA_11-23-11.pdf).

243. *Id.*

244. See *id.* at 7–8.

245. *Id.* at 5.

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DOJ used as an example a case where a Seattle police officer charged with assault had moved to dismiss the case based on the claim that his statement was made under *Garrity* protections.<sup>246</sup> DOJ recommended that Seattle stop administering *Garrity* warnings as a blanket policy and that potential criminal investigations for use of force be separated from internal affairs investigations in order to avoid the *Garrity* issue.<sup>247</sup>

Second, proving that this issue has not gone away, the union president for the Pittsburgh Police Department currently and publicly advises every police officer to invoke *Garrity* in every interview. The Pittsburgh union leader has posted on his union website that officers can and should invoke *Garrity* whenever they are interviewed in any matter where they “are being investigated for possible criminal conduct.”<sup>248</sup> This is both legally incorrect, conflating the criminal investigation and the administrative investigation, and confusing for all involved. The local district attorney has threatened to charge that same union president with obstruction of justice for attempting to confound officer-involved shooting investigations.<sup>249</sup> Thus, police unions continue to use *Garrity* inappropriately in the context of criminal investigations of officer-involved shootings.

There are a few simple procedural solutions to this issue. The internal affairs investigation must be kept entirely separate from the criminal investigation.<sup>250</sup> The use of an independent investigating agency automatically takes care of this problem, as it does for many issues in officer-involved shootings; the independent agency does not employ the officers being interviewed, and thus *Garrity* is inapplicable. In addition, the investigators in the criminal investigation should affirmatively advise the officers being interviewed that this is a voluntary

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246. *Id.* at 2.

247. *Id.* at 7–8.

248. FRATERNAL ORD. OF POLICE LODGE NO. 1, <http://pittsburghpolicefop.com/> (last visited Nov. 19, 2020).

249. See Allegheny Grand Jury Report, *supra* note 69, at 15–16, 44.

250. See PDAA REPORT, *supra* note 105, at 5.

interview and *Garrity* does not apply. Investigators may want to make the point that this is a criminal investigation even more clearly by administering *Miranda* warnings,<sup>251</sup> although such a step is not legally required for voluntary interviews and can cause friction and suspicion by the officers being interviewed. Whatever the instruction given by the investigators, if the officers then refuse to be interviewed, the use of a grand jury may be necessary to compel testimony. Once again, the constant presence of prosecutors during the investigation, as called for in the vertical prosecution model, allows this potentially tricky legal issue to be identified and addressed before it becomes a problem.<sup>252</sup>

The final issue for the internal affairs investigation is when it should take place relative to the criminal investigation. The best practice is for the internal affairs investigation to proceed *after* the independent criminal investigation is completed.<sup>253</sup> This avoids the problem of multiple statements from the same individuals, procedural confusion, and wasted time. In addition, the results of the criminal investigation may be used in the later internal affairs investigation, making the process run more efficiently.<sup>254</sup>

### J. *Interviewing the Officers*

One of the most difficult areas of officer-involved shooting investigations is the interview of the officers involved. Several interesting questions arise. When? Where? Who is present? Recorded or not? These are precisely the type of issues dealt

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251. See IACP REPORT, *supra* note 17, at 18; see generally *Miranda v. Arizona*, 384 U.S. 436 (1966) (establishing pre-interrogatory warnings for individuals in custody).

252. See Clymer, *supra* note 240, at 1327–38 (discussing five ways in which *Garrity* immunity hinders a prosecutor's case).

253. See IACP REPORT, *supra* note 17, at 16–17 (discussing how *Garrity* immunity impacts criminal investigations because they take place first).

254. Attempting to run simultaneous parallel investigations (both criminal and internal affairs) leads to a factual and procedural morass. Allowing the internal affairs investigation to go first would create unacceptable delays in the criminal investigation, allowing the tail to wag the dog.

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with best by an independent investigative agency and the vertical prosecution model. Here, it is particularly important to stress that these are criminal investigations into a potential homicide; in a homicide investigation, every available suspect and witness is interviewed as soon as possible.<sup>255</sup>

1. *Public safety interviews versus formal interviews*

Generally, there will be a minimum of two interviews for the officers involved in the shooting: (1) the “public safety/scene orientation” interview; and (2) the formal interview.<sup>256</sup> The timing of these interviews may be dictated by external circumstances, such as an officer being injured.<sup>257</sup> For purposes of this discussion, I assume the most frequent scenario, where the officers shoot a civilian and the officers are not physically injured.

The first interview takes place immediately at the scene, once it is secured. This public safety/scene orientation interview is to check who discharged their weapon, where everybody was located, if there is another weapon or person not yet secured, and other basic information.<sup>258</sup> It does not include the question of the reason for the shooting, although that may be volunteered by the officer.

The public safety/general scene orientation interview serves multiple purposes. It makes sure that there are no unknown dangers still lurking at the scene. It also gives the crime scene processing unit the basic information they need to process the scene thoroughly. The crime scene investigators need to know

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255. See Rushin, *supra* note 75, at 1227 (citing SAMUEL WALKER, THE BALTIMORE POLICE UNION CONTRACT AND THE LAW ENFORCEMENT OFFICER’S BILL OF RIGHTS: IMPEDIMENTS TO ACCOUNTABILITY (2015), <https://samuelwalker.net/wp-content/uploads/2015/06/BALTIMORE-POLICE-UNION-CONTRACTFinal.pdf>) (discussing law enforcement best practice of immediate interviews).

256. PDAA REPORT, *supra* note 105, at 4–5. These are the interviews in the criminal investigation. The officers also may be interviewed in the internal affairs investigation, unless that investigation simply incorporates the interviews from the criminal investigation.

257. See *id.* at 4.

258. See IACP REPORT, *supra* note 17, at 11–12.

where the officers were standing, where the civilian was located, and other details. Furthermore, these interviews give the independent investigators the basic information necessary to start the investigation; without an introduction to what happened, the investigators might just be looking at a street scene or a vacant lot with no idea what they are looking for or even logically where to begin.

The second, more in-depth interview of the officers involved in the shooting takes place after a “cooling off” period.<sup>259</sup> Depending on the circumstances of the shooting, this formal interview takes place ideally a couple of hours after the shooting under a more controlled environment than at the scene.<sup>260</sup> The interview could be delayed longer if an officer is injured.<sup>261</sup> For purposes of the criminal investigation, the faster the better for this formal interview.<sup>262</sup>

The formal interview gets into all of the details of the shooting.<sup>263</sup> It covers the officer’s personal and service history, daily activity (both off- and on-duty) prior to the shooting, information known by the officer leading up to the shooting, force options, the shooting itself, and the immediate aftermath.<sup>264</sup> Most importantly, the interview covers the “why” of the shooting, the vital issue for purposes of the criminal investigation.<sup>265</sup>

For this formal interview, the independent investigators and the prosecutors will want to confer before, during, and after the interviews.<sup>266</sup> An experienced investigative team will have a standard set of questions to cover.<sup>267</sup> Before the interviews begin, the investigators and prosecutors will need to discuss

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259. PDAA REPORT, *supra* note 105, at 4.

260. *See id.*

261. *See id.*

262. APA REPORT, *supra* note 105, at 19.

263. *See* IACP REPORT, *supra* note 17, at 21–22.

264. *See id.*

265. *See id.*

266. *See* APA REPORT, *supra* note 105, at 18–19.

267. *See* IACP REPORT, *supra* note 17, at 21–22.



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modifications to these questions to fit the specific facts of the case. The prosecutors then will want to watch the interviews taking place (preferably from outside the interview room), making sure that every area is covered sufficiently and discussing follow-up areas during breaks. Even after the interview is concluded, the investigators and prosecutors will need to talk about how the information learned will affect other interviews of different officers. The alternative is to have the interviews conducted without the prosecutor, and the officers having to be re-interviewed later to address issues that the prosecutor wants covered but were missed initially. Thus, the vertical prosecution model is important to achieve a sufficient, efficient, and timely interview.

The independent investigative team model also becomes important during these interviews. The interviewers cannot be seen as coddling the officers being interviewed or leading the officers into favorable responses.<sup>268</sup> If an agency is interviewing its own members, this is both a natural tendency and something that the public or jury would perceive as happening.<sup>269</sup> Independent agency interviewers are less likely to engage in such behavior and, equally important, less likely to be perceived by the community and fact-finder as showing such bias.<sup>270</sup>

Thus, once again, the independent agency and vertical prosecution model add substantial benefits to this phase of an officer-involved shooting investigation.

## 2. *Review of evidence by the officers*

The formal interview may include having the officers involved in the shooting review some of the physical evidence recovered (e.g., body camera recordings).<sup>271</sup> However, the best

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268. See Savage, *supra* note 21, at 104; see also Katz, *supra* note 17, at 238.

269. See HAMMONDS ET AL., *supra* note 19, at 12; Katz, *supra* note 17, at 235–38; Savage, *supra* note 21, at 102–03.

270. See Savage, *supra* note 21, at 101.

271. IACP Report, *supra* note 17, at 20–21.

practice is to interview the officer before allowing the officers to review the evidence.<sup>272</sup> This allows the interviewers to get the officers' actual recollection of the events, not a reconstruction shaped around the evidence.<sup>273</sup> Evidence like the recordings can be used later to get more detail.<sup>274</sup>

Interviewers should treat officers like any other witness or suspect on this issue of reviewing recordings and other evidence. If the interviewer suspects that the officer is lying, the interviewer may want to lock the officer into the lie rather than reveal the evidence. However, if the officer is slightly confused, reviewing some of the physical evidence to clarify the statement is useful.<sup>275</sup> In addition, a later walk-through of the scene with the officer often yields even richer details for the investigative process. This is how law enforcement treats witnesses and suspects in a regular criminal investigation, for purposes of seeking the truth. Thus, the same practices should apply in an officer-involved shooting, which is a criminal investigation.

### 3. *Location of interviews*

The location of officer interviews also warrants some thought. If the officers are being interviewed within a short period of time after the shooting, then the location almost necessarily will be at the officers' agency. However, if the interviews are taking place after any significant gap in time, then the interviews should take place at the office of the independent investigating agency. This avoids any confusion about the difference between the criminal investigation and the internal affairs investigation.<sup>276</sup> It also allows the investigating agency to have all of their necessary tools available for the interviews, such as

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272. *See id.*

273. *See id.*

274. *See id.*

275. *See* Rebecca Hofstein Grady, Brendon J. Butler & Elizabeth F. Loftus, *What Should Happen After an Officer-Involved Shooting? Memory Concerns in Police Reporting Procedures*, 5 J. APPLIED RSCH. MEMORY & COGNITION 246, 247 (2016).

276. *See supra* Section IV.I.

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access to the recovered evidence and the ability to confer freely and privately with the assigned prosecutors.

#### 4. *Instructions to officers when sent home*

Whether the formal interview is conducted a few hours after the shooting or days later, a standard set of instructions should be given to the officers before they are sent home after the shooting.<sup>277</sup> The officers are still carrying a large load of adrenaline, so they should be instructed to work out for thirty to sixty minutes.<sup>278</sup> After the workout, they should hydrate and then be strictly limited to one alcoholic drink.<sup>279</sup> The officer should follow his or her normal pre-sleep routine (e.g., reading to kids, watching television, etc.). The idea is to blow out the excess adrenaline and allow the officers a solid sleep cycle, but avoid getting drunk.<sup>280</sup> As previously covered, the officer also must be instructed not to discuss the shooting with any of the other officers involved until the investigation is concluded.<sup>281</sup> Finally, the officer should be advised of what counseling services are available through their agency and instructed to participate in the counseling.<sup>282</sup>

#### 5. *The problems caused by law enforcement politics*

The above procedures outline how the officer interviews should and often do take place in officer-involved shootings. Many thorny issues can arise that create obstacles to these best

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277. The following instructions have come about as a result of working with police officers following multiple police shootings. They are a mix of psychological and physiological issues, combined with a knowledge of police culture. Simply put, these instructions work, when followed by the police. *See generally* IACP REPORT, *supra* note 17, at 23–28.

278. *See id.* at 9 (“[T]he rush of adrenaline under these circumstances can mask [injuries]. Additionally, the stress of such an incident creates severe elevations in blood pressure, pulse rate, respiration, and body temperature, all of which can be dangerous.”).

279. *See* IACP REPORT, *supra* note 17, at 27.

280. These instructions reflect the knowledge that some officers may develop behavioral problems, such as increased aggression, alcohol abuse, and sleep problems in the days following an officer-involved shooting. IACP REPORT, *supra* note 17, at 25.

281. *See supra* Section IV.F.

282. *See* IACP REPORT, *supra* note 17, at 27–28.

practices. Almost all of the problems discussed below are caused by law enforcement politics.

Some police unions object to the initial public safety interview, claiming that the officers may still be confused or unclear from the trauma of the shooting.<sup>283</sup> This is a valid (if overstated) concern. As a result, this interview is not considered the formal, comprehensive interview for the investigation.<sup>284</sup> Nevertheless, it is a way to get quick and necessary information on the investigation.

However, some police organizations have collective bargaining agreements stating that an officer may not be interviewed at all for twenty-four, forty-eight, or even seventy-two hours after an officer-involved shooting.<sup>285</sup> In addition, some states have laws that prevent the interview of an officer involved in a shooting for multiple days, called "Law Enforcement Officers' Bill of Rights."<sup>286</sup> In *Police Union Contracts*, Professor Stephen Rushin has done an outstanding job of aggregating and analyzing police collective bargaining agreements and such protective state laws.<sup>287</sup> This Article discusses the wisdom of these restrictive rules below, but there are several ways to address this issue in order to get the initial

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283. See Grady et al., *supra* note 275, at 248–49; see also Rushin, *supra* note 75, at 1227–28 (discussing how delay periods are often enshrined in police contracts).

284. See, e.g., IACP REPORT, *supra* note 17, at 11–12, 20–21.

285. See, e.g., Rushin, *supra* note 75, at 1225–27 (collecting and describing police contracts across the nation that require delays in interviewing police where there are allegations of misconduct, including shootings); see also Northampton Grand Jury Report, *supra* note 46, at 24 (reporting Pennsylvania's state police commissioner's acknowledgment of a 72-hour waiting period to interview troopers involved in shooting); Lisa Marie Pane & Peter Hall, *Laws Shield Police Officers from Being Questioned for Days or Weeks After They Shoot Someone*, MORNING CALL (Oct. 26, 2019, 5:16 AM), <https://www.mcall.com/news/pennsylvania/mc-nws-police-officers-shooting-20191027-tor6i4isqnhgxdruqa3gnknvm-story.html>.

286. See, e.g., Rushin, *supra* note 75, at 1208–11 (describing historical development of law enforcement bill of rights laws); see also MD. PUB. SAFETY CODE §3-104(j)(2) (LexisNexis 2020) (officer can delay interrogation by five days by requesting right to counsel). The Maryland provision actually used to provide for a ten-day delay but was amended after the Freddie Gray civilian death in Baltimore. Elizabeth Janney, *Unrest from Freddie Gray's Death Sparks Law Changes*, PATCH (May 10, 2016, 10:22 PM), <https://patch.com/maryland/northbaltimore/unrest-freddie-grays-death-sparks-law-changes>.

287. See Rushin, *supra* note 75, at 1225–27.

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public safety interview while avoiding the potential problems raised by police unions.

For instance, the officer could give the public safety interview information in a “proffer,” a legal device that allows information to be conveyed for investigative purposes, but cannot be used against the interviewee.<sup>288</sup> Such proffers require the approval of a prosecutor,<sup>289</sup> which is another reason that a prosecutor should be part of this vertical prosecution/investigation of the shooting. Another option is for the state legislature to pass laws requiring a public safety interview, but also providing that the initial information cannot be used against the officer, an approach that has not yet been attempted. Such laws would mimic the effect of proffers.<sup>290</sup> Finally, the option that works best and presents the fewest problems is for the officer involved to give a quick and basic oral statement to the investigators, voluntarily waiving any time restrictions in a collective bargaining agreement. Experienced investigators and prosecutors understand that this information is subject to a “fog of war” problem,<sup>291</sup> so it is not the final statement from the officer, but it is a necessary first step so that the scene can be safely processed and the investigation started.

As far as the police union agreements that restrict an officer from being interviewed in any manner for up to seventy-two

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288. See, e.g., *United States v. Rosemond*, 841 F.3d 95, 107–09 (2d Cir. 2016) (exploring proffer boundaries).

289. See *id.*

290. Some police executives have suggested that another option is for an on-scene supervisor to issue *Garrity* warnings to get the information, thereby providing the information but protecting the officer from use of that information against the officer in the criminal investigation. See, e.g., Clymer, *supra* note 240, at 1327–35. The problem with this solution is that the *Garrity*-protected statement then could not be used in any criminal prosecution and/or could taint the rest of the criminal investigation. See *supra* text accompanying notes 231–54 (discussing the complexities of *Garrity* warnings).

291. See Grady et al., *supra* note 275, at 248 (“Research has shown that memory accuracy can be impaired by intense stress.”).

hours, such contractual terms should be abolished by law.<sup>292</sup> The same goes for state laws mandating a delay in the interviews of officers involved in shootings. Imagine an officer-involved shooting by a White police officer of an unarmed, twelve-year-old Black child. If the independent investigators could not get a statement for three or ten days, then: (1) everybody in the public would suspect that the officer was being coached by union lawyers and (2) full-scale riots might break out in the interim.<sup>293</sup> Allowing a delay in officer interviews erodes public confidence and impedes the search for the truth.<sup>294</sup>

Police unions like to claim that forty-eight or seventy-two hours is the optimum psychological time frame for the average person to engage in full recollection after a traumatic incident.<sup>295</sup> However, a review of psychological literature on this topic reveals that there is no empirical support for this argument.<sup>296</sup> In fact, and supported by simple common sense, studies have shown that highly negative emotional events (like a shooting) are well-retained in memory from the standpoint of both the

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292. Police officers are not allowed to go on strike by law, for the safety of the public. Legislation addressing officer-involved shooting interviews similarly involve public safety. These internal rules about delaying the interviews of officers have a long and tarnished history. The recent obituary for a police union lawyer from the 1970's in New York spoke glowingly about: (1) how the attorney resisted efforts to change New York's then rule requiring investigators to wait 48 hours before interviewing officers suspected of misconduct; (2) the number of tainted officers the attorney had represented; and (3) how the attorney had written an article for the police entitled "The District Attorney Is Not Your Friend." See Sam Roberts, *Joseph Fallek, Lawyer who Defended Police Officers, Dies at 93*, N.Y. TIMES (Dec. 24, 2019), <https://www.nytimes.com/2019/12/24/nyregion/joseph-fallek-dead.html>.

293. See Rushin, *supra* note 75, at 1240 (discussing how delays in interrogation of police officers in shootings allow coordination of stories to deflect responsibility and blame away from police).

294. See *id.* at Appendix D, v-vi, xi.

295. See Grady et al., *supra* note 275, at 248 (discussing organizations supporting waiting periods); see also Rushin, *supra* note 75, at 1227-28 (discussing how delay periods are often enshrined in police union contracts).

296. See SAMUEL WALKER, POLICE UNION CONTRACT "WAITING PERIODS" FOR MISCONDUCT INVESTIGATIONS NOT SUPPORTED BY SCIENTIFIC EVIDENCE 2-3 (2015), <https://samuelwalker.net/wp-content/uploads/2015/06/48HourSciencepdf.pdf>; see also Grady et al., *supra* note 275, at 248 ("Despite research showing impaired memory accuracy after intense stress, research has not demonstrated that a waiting period after the stress will lead to an increase in memory accuracy.").

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event and details.<sup>297</sup> Moreover, in an area that has not yet been extensively discussed or examined by psychological research, police officers are trained to engage in violence where necessary<sup>298</sup> and trained in recall.<sup>299</sup> Logically, this means that police officers are likely to be better at recalling a violent event. Thus, this police union argument is unpersuasive. Furthermore, in an ordinary murder investigation, the suspects and witnesses are interviewed as soon as possible, with follow-ups as necessary.<sup>300</sup> Officer-involved shootings should be treated the same way.<sup>301</sup>

Police unions have been fighting and will continue to fight tooth-and-nail to avoid immediate interviews of officers in shooting cases.<sup>302</sup> Prosecutors already have a tool at their disposal to address this problem. For prosecutors' offices with sitting grand juries, the officers can be compelled to testify immediately before the grand jury.<sup>303</sup> In any eventuality, the presence of prosecutors through the vertical prosecution model would act as both a check on and monitor over potential union interference.

The fact of the matter is that in most justified shootings, the officers are more than willing to waive any time restriction, be

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297. WALKER, *supra* note 296, at 3.

298. See KIMBERLY A. CRAWFORD, REVIEW OF DEADLY FORCE INCIDENT: TAMIR RICE 3, <http://i2.cdn.turner.com/cnn/2015/images/10/10/crawford-review.of.deadly.force-tamir.rice.pdf>.

299. See, e.g., Jonathan W. Page et. al, *Brief Mental Skills Training Improves Memory and Performance in High Stress Police Cadet Training*, 31 J. POLICE & CRIM. PSYCH. 122, 123 (2015).

300. See WALKER, *supra* note 296, at 5.

301. See *id.*

302. For instance, in the ongoing battle in Pittsburgh over officer-involved shootings, the union filed and prevailed in an unfair labor practices claim when the city required immediate interviews of the officers involved in a shooting. The city previously had agreed to a forty-eight-hour delay before interviewing such officers. *FOP Fort Pitt Lodge No. 1 v. City of Pittsburgh*, Nos. PF-C-18-26-W, at 7,11 (Pa. Lab. Rels. Bd. May 8, 2020). The persistent fight between the Pittsburgh police union leader and the local district attorney's office will be important to observe as it continues to unfold. See generally Jonathan D. Silver, *Pa. Labor Board Ruling Favors Pittsburgh Police Union in Handling of Critical Incidents*, PITT. POST-GAZETTE (May 14, 2020, 6:26 PM), <https://www.post-gazette.com/news/crime-courts/2020/05/14/pittsburgh-police-union-fop-critical-incident-pennsylvania-labor-relations-board/stories/202005130127>.

303. See PDAA REPORT, *supra* note 105, at 5. Nevertheless, the officers could still invoke their Fifth Amendment rights.

interviewed, and move the investigation along. In past experience, it is the union leaders who are preventing these timely interviews.<sup>304</sup>

6. *To record or not to record interviews*

The final major issue for interviewing officers in officer-involved shootings is whether to record the formal interview.<sup>305</sup> The various considerations are as follows. First, investigators generally record any murder suspect who will speak with them. Second, and cutting in the other direction, police officers (and people in general) act and speak differently when they know that they are being recorded.<sup>306</sup> Third, changing directions yet again, younger police officers are now accustomed to being recorded all day long, mainly because of the modern use of body cameras and vehicle-mounted cameras, as well as civilian recordings, and thus are not unduly affected by being recorded.<sup>307</sup>

Twenty years ago, such interviews were seldom recorded.<sup>308</sup> The current trend is to record the interviews. Particularly where there is any hint that the shooting might not be justified, the interviews should be recorded. Overall, given the nature and scrutiny over these investigations, the best standardized practice is to record all such interviews.<sup>309</sup>

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304. See Allegheny Grand Jury Report, *supra* note 69, at 21–22.

305. See IACP REPORT, *supra* note 17, at 20.

306. See Torin Monahan & Jill A. Fisher, *Benefits of “Observer Effects”: Lessons from the Field*, 10 QUALITATIVE RES. 357, 357–58 (2010) (discussing “Hawthorne Effect,” where people act differently because they know they are being observed).

307. See Christopher Griffith, *The Next Generation of Cops Will Always Be Recording*, POPULAR MECHANICS (Apr. 1, 2015), <https://www.popularmechanics.com/technology/security/g1941/police-body-cameras/>.

308. See, e.g., Radhika Anand, *Trends in Recording Police Interviews*, OFFICER.COM (Feb. 1, 2008), <https://www.officer.com/command-hq/article/10249125/trends-in-recording-police-interviews>.

309. See IACP REPORT, *supra* note 17, at 20.



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When a prosecutor charges a police officer with homicide in an officer-involved shooting case, the prosecutor already has two strikes against them at trial because of jurors' disinclination to convict a police officer and the discordant state of officer-involved shooting investigations. If the interview process for the police officers involved is tainted, which often seems to be the goal of police unions, prosecutors have virtually no chance of a conviction, which seems to satisfy the police unions. State legislators need to give prosecutors the tools to fight these battles fairly, without interference by the police unions. This will require some changes in state laws regarding interviewing police officers in officer-involved shootings, but such changes are a clear necessity. Meanwhile, the use of independent investigative agencies and the vertical prosecution model can immediately improve the actual and perceived legitimacy of the interviews in officer-involved shooting investigations.

*K. Conflicts of Interest in Legal Representation*

Another area of officer-involved shooting criminal investigations that has been largely overlooked both in the academic literature and in practice is conflict of interest rules in legal representation. As in any criminal investigation, the prosecutors involved in the vertical prosecution must be cognizant of conflicts of interest by the attorneys representing the officers.

In the usual investigation scenario, counsel for the union attempts to represent all of the officers involved in any way in the incident, from officers who fired their weapons to officers who were mere witnesses. Depending on the facts, this legal representation often presents conflicts of interest, and those conflicts may be non-waivable.<sup>310</sup>

Consider the following example. Five police officers confront a man with a knife. Two of the officers fire at the civilian, killing him. The other three officers do not fire.

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310. See MODEL RULES OF PRO. CONDUCT rs. 1.7, 1.8 (AM. BAR ASS'N 2018).

Under these circumstances, the legal interests of the officers are very different. Two of the officers are potential defendants. Three of the officers are mere witnesses. In such a scenario, due to potential conflicts, it would be inappropriate for union counsel to represent all five officers during the criminal investigation or trial.<sup>311</sup>

To demonstrate how straightforward this conflict is, simply tweak the above-referenced police hypothetical slightly. Imagine five gang members confronting a rival gang member on the street, perhaps five Crips cornering one Blood. Two of the Crips shoot and kill the Blood gang member, while the other three Crips merely watch. In a criminal prosecution, the ethical rules on conflicts would require each of the shooters to have separate lawyers. Depending on specific facts, the other three Crips might each require his own lawyer or it is possible all three could be represented by one lawyer. But under no circumstances would all five Crips be permitted to be represented by one lawyer, with such a representation barred by conflict of interest rules.

An officer-involved shooting is a criminal investigation. The same conflict of interest rules apply for legal representation as apply in the gang-related shooting hypothetical. Thus, one lawyer or law firm could not represent all five officers in the criminal investigation for the above-described hypothetical. Failure to enforce such conflict of interest rules is a virtual invitation for one counsel to coordinate a story for five people who have very different interests, which is a clear impediment

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311. See *id.* Rule 1.7 identifies a conflict of interest as existing, inter alia, where “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.* r. 1.7(a)(2). Rule 1.8 notes restrictions on taking actions that may disadvantage one client and prohibiting aggregated agreements for guilty pleas. *Id.* r. 1.8(b), (g). See also *Wheat v. United States*, 486 U.S. 153, 160–62 (1988) (explaining that certain conflicts in multiple representations by a lawyer in a criminal case cannot be waived: “Not only the interest of a criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple representation.”); *United States v. Guerrero*, 546 F.3d 328, 334 (5th Cir. 2008) (“Representation of a government witness . . . while also representing the defendant he is testifying against raises serious conflicts of interest.”).

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to getting to the truth. This is particularly true where there is a contractually or legally required time delay in interviewing the officers. If one law firm is representing all five police officers in the situation previously described (the two shooters and three non-shooters), and has a delay of three days or ten days before interviews take place, that is more than enough time to concoct, coordinate, or massage the story of the officers.<sup>312</sup>

Whether police union lawyers actually are engaging in such tactics may be open for debate. However, the perception that such coordinated coaching takes place is very real and very damaging to public respect for the integrity of the investigation. Moreover, if the two police officers who fired their weapons in the hypothetical were charged with homicide, then union counsel for all five officers could be in the totally impermissible position of having to cross-examine the three non-shooting officers when they were called as prosecution witnesses.<sup>313</sup> In fact, the only time that counsel for the police seem to adhere to conflict of interest rules is when the police actually are charged, leading to judicial oversight of conflicts.<sup>314</sup> Of course, by that time, the damage of a conflicted representation already has been done. It is amazing that this issue has not yet been explored and exposed by both academics and the courts. The likely exposure point eventually will come when some enterprising prosecutor is forced to immunize a police officer in an officer-involved shooting case (presumably not an officer who fired their weapon) to expose what union counsel actually are doing to massage and coordinate stories during the course of an investigation.

The party best situated to monitor and control this conflict of interest issue is the prosecutor's office working the

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312. See Rushin, *supra* note 75, at 1240.

313. See *Wheat*, 486 U.S. at 156.

314. See, e.g., Michael Lansu, *Chicago Cops Found Not Guilty in Cover-Up of Laquan McDonald Shooting*, NPR (Jan. 17, 2019, 6:09 AM), <https://www.wbez.org/stories/chicago-cops-not-guilty-in-cover-up-of-laquan-mcdonald-shooting/366b3a29-c2b7-4a45-8644-90b8bc3b3590> (by the time of trial, each officer had his own representation).

investigation.<sup>315</sup> This is yet another reason to use the vertical prosecution model, with the prosecutors immediately present to make sure that there is not a conflict of interest *during the investigation* for the lawyers representing the officers involved in the shooting. In fact, without the early involvement of prosecutors to monitor potential conflicts of interest, union counsel remain totally unchecked and unsupervised.<sup>316</sup> The police cannot be expected to have any familiarity with conflict of interest laws and would have no mechanism to address such issues. Vertical prosecution thus becomes a critical element in preventing obstruction and reaching the truth.

#### L. *Releasing the Video: If and When*

In today's world, many officer-involved shootings are captured on video. Police body cameras, patrol vehicle cameras, security cameras, and civilian smart phones all increase the probability that the shooting will be recorded.

Much time and energy has been devoted by law enforcement and the media regarding whether such videos should be released publicly.<sup>317</sup> The answer is straightforward and already addressed by ethical rules for prosecutors in most states—although many people seem to have missed the relevant rules, based on the uncontrolled and inconsistent manner in which such recordings have been publicly disclosed around the nation.

Prosecutors are forbidden from releasing (or allowing the police to release) any type of evidence that would prejudice a

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315. See *Wheat*, 486 U.S. at 155–56 (noting government prosecutors raised conflict for defense counsel with court).

316. See generally Reade Levinson & Michael Berens, *Special Report: How Union, Supreme Court Shield Minneapolis Cops*, REUTERS (June 4, 2020, 12:10 PM), <https://www.reuters.com/article/us-minneapolis-police-culture-specialrep/special-report-how-union-supreme-court-shield-minneapolis-cops-idUSKBN23B2LL> (describing policies widespread among police unions and departments that create significant obstacles to officer-involved shooting investigations).

317. See, e.g., MAJOR CITIES CHIEFS REPORT, *supra* note 16, at 19; Ashley Southall & Jeffrey C. Mays, *Police Consider Releasing Body Camera Footage in Fatal Bronx Shooting*, N.Y. TIMES (Sept. 7, 2017), <https://www.nytimes.com/2017/09/07/nyregion/bronx-police-shooting-body-cameras.html>.

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fair trial.<sup>318</sup> It is difficult to imagine something more likely to taint a jury pool than the release of the video of an officer-involved shooting during the criminal investigation. Thus, before a charging decision has been made, the video should not be released.<sup>319</sup> In the vertical prosecution and independent agency model, this issue can be coordinated and controlled.<sup>320</sup> It is the prosecutor's burden to make sure this restriction is adhered to by the police.<sup>321</sup>

If the prosecutor decides at the end of the investigation to charge the officers, the same ethical rules apply.<sup>322</sup> The recording is now evidence that will be played and analyzed at trial. The release of the recording with charges pending is likely to result in adverse pre-trial publicity and is a probable ethical breach when the matter is as serious as an officer-involved shooting.<sup>323</sup>

Interestingly, when the release of such a recording is posed in the framework of established ethical rules, any confusion about the release of the recordings evaporates. The rules governing such a public release are already in place and simply should be followed.

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318. See MODEL RULES OF PRO. CONDUCT r. 3.6(a) (AM. BAR ASS'N 2018) ("A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."); see also *id.* r. 3.8(f) ("The prosecutor in a criminal case shall . . . except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.").

319. See PDAA REPORT, *supra* note 107, at 5–6.

320. See *id.*; see also *Sizing Up the Prosecution*, *supra* note 102, at 9 (vertical prosecution models involve the prosecutor from the outset and allow the prosecutor to control the release of information as a result).

321. Of course, the prosecutor cannot control civilians who may have recorded the incident from releasing the video.

322. See MODEL RULES OF PRO. CONDUCT rs. 3.6(a), 3.8(f).

323. See PDAA REPORT, *supra* note 105, at 5–6.

If the prosecutor decides not to charge the officers, then the rules of professional conduct do not address the release of such a recording. The better practice is to release the recording with the written report, allowing the public to see and evaluate the same recording viewed by the prosecutor in making his or her decision.<sup>324</sup> Exceptions may apply, particularly where the family of the person who was shot requests that the recording not be released and concurs that the shooting was justified.<sup>325</sup>

### M. Preliminary Statements to the Public

What statements are made to the public and when they are made are controversial subjects in officer-involved shootings, so both the preliminary and final statements merit a discussion. Every law enforcement agency struggles with whether to make a preliminary public statement after a high-profile officer-involved shooting. The answer is almost always that a preliminary statement is useful and appropriate, with certain restrictions.<sup>326</sup>

The initial reason to put out a preliminary statement (usually oral, to meet media demands and time constraints) is to prevent misinformation.<sup>327</sup> In the absence of an initial statement of basic facts from authorities, the media and public will turn to second-hand sources, such as social media and “I saw it all” witnesses.<sup>328</sup> Unwinding the bad information can become

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324. *Id.*

325. The author had a unique situation where there was a justified officer-involved shooting, but the president judge threatened to hold the author (then the Chester County District Attorney) in contempt if he released the recording of the shooting. A constitutional showdown between the executive and judicial branches was averted when the family of the slain man and local community leaders requested that the District Attorney’s Office not release the video amid general public and private agreement that the shooting was justified and that any further media attention would hurt the family.

326. See PDAA REPORT, *supra* note 105, at 6.

327. This is not a new issue, just one that seems to be forgotten on a regular basis. See, e.g., Kenneth A. Lachlan, J. Pete Blair, Paul D. Skalski, David K. Westerman & Patric Spence, *Media Coverage of the Cincinnati Riots and Implications for Law Enforcement Public Relations*, 16 POLICE F. 12, 20 (2007) (describing the importance of initial public statements in response to a law enforcement crisis to head off sensationalized reporting).

328. See *id.* at 16, 20–21.

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extremely difficult and damaging to the investigation.<sup>329</sup> In addition, the lack of an initial statement naturally leads to the conclusion that authorities are hiding something.<sup>330</sup>

Following are some basic suggestions for the scope and rules for the preliminary statement. These ground rules serve several purposes. Providing the basic facts gives the media and the public the framework of the case, allowing informed discussion. The preliminary statement itself demonstrates transparency and enhances trust. Announcing that an independent agency is investigating highlights the unbiased nature of the investigation. Finally, some of the ground rules are prophylactic in nature, preventing common problems. The suggestions follow.

First, the content of the initial statement should be brief and factual.<sup>331</sup> Simple issues like the time, location, number of officers involved, condition of anybody hurt, and other straightforward facts can be described. The statement should identify the independent agency conducting the investigation, with contact information for anybody who may have witnessed anything.

Second, the initial statement should begin and end with the caveat that this is an ongoing investigation and the statement only includes preliminary facts. The prosecutor making the preliminary statement should make it clear that due to the ongoing nature of the investigation, they will not be taking questions from the media at this time. This no-questions limitation serves a dual purpose: (1) it prevents the initial statement from potentially wandering into speculation; and (2) it stops the awkward scenario of a reporter asking an explosive question and receiving a “no comment” answer. For instance, a reporter asking, “Is it true that the civilian shot has ties to a terrorist organization?” and receiving the response, “No comment,” is an exchange that is unlikely to engender trust and

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329. *See id.* at 20–21.

330. *See id.* at 20.

331. *See id.*

calm. The prosecutor needs to announce the ground rules, make the statement, then walk away.

Third, the preliminary statement usually is made the same day as the shooting. Waiting any longer than that invites disinformation and suspicion. The preliminary statement must not include any speculation as to whether the shooting was justified. Any such speculation prior to the completion of the investigation may raise a suspicion of bias. The prosecutor in the George Floyd case in Minneapolis ran dead-on into this problem when he stated during his initial press briefing that, “[T]here’s other evidence that does not support a criminal charge.”<sup>332</sup> While the prosecutor eventually walked back this statement and filed murder charges,<sup>333</sup> it caused a significant amount of confusion and consternation.

Finally, the preliminary statement should be made by the prosecutor’s office that is charged with making the final determination on charging in the case. The prosecutor is aware of the ethical rules that constrain the government in potential criminal cases, and thus will be appropriately cautious in making any statements.<sup>334</sup> In addition, having anybody from the law enforcement agency involved in the shooting making a statement may lead to claims of a lack of independence in the investigation. Even worse, a commander from the agency involved in the shooting making an immediate public comment

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332. Justine Coleman, *Prosecutors Say They Won’t ‘Rush’ Charges Against Officers in George Floyd’s Death*, HILL (May 28, 2020, 7:27 PM), <https://thehill.com/homenews/state-watch/500045-floyd-prosecutors-say-they-wont-rush-charges>.

333. See Colin Dwyer & Vanessa Romo, *George Floyd’s Arresting Officer Charged With 3rd Degree Murder, Manslaughter*, NPR (May 29, 2020, 10:11 AM), <https://www.npr.org/2020/05/29/864732088/minneapolis-seethes-over-george-floyds-death-as-trump-calls-protesters-thugs>. Days later, prosecutors upgraded the charge to second-degree murder; Lorenzo Reyes, *New Charges in George Floyd’s Death: Derek Chauvin Faces Second-Degree Murder; 3 Other Officers Charged*, USA TODAY (June 3, 2020, 9:30 PM), <https://www.usatoday.com/story/news/nation/2020/06/03/george-floyd-death-charges-derek-chauvin-police/3134766001/>.

334. See MODEL RULES OF PRO. CONDUCT, rs. 3.6(a), 3.8(f) (AM. BAR ASS’N 2018); see also *supra* Section IV.L (discussing the ethical rules for releasing video of officer-involved shootings; these rules also constrain the release of other information related to the investigation).



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that the shooting was “justified” creates a legal and public relations quagmire.<sup>335</sup>

Once the preliminary statement has been made, complete confidentiality must cover the investigation until a final conclusion is reached. All law enforcement officers involved in the shooting or investigation must be told that the integrity of the investigation requires confidentiality. A breach of this confidentiality to the media should be a firing offense.

For an excellent example of how *not* to handle a preliminary statement, as well as many other confounding issues, the statement by the Waycross District Attorney in the shooting of Ahmaud Arbery in Georgia deserves particular mention.<sup>336</sup> On February 23, 2020, Arbery, a Black male, was running down a road.<sup>337</sup> Three men, all White, were following Arbery, later claiming that they suspected that he was involved in burglaries.<sup>338</sup> Arbery and one of the men got into a confrontation, and the man shot and killed Arbery, a portion of which was caught on video and publicly released.<sup>339</sup> The Waycross District Attorney was investigating the shooting with the county police department.<sup>340</sup> It turned out that one of the men involved was a former police officer for that county police

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335. The preliminary statement about the shooting and the subsequent announcement of any charging decision should be made in a controlled setting with only the media present. Ideally, this would follow the same format as a normal press conference for a prosecutor—within a secure office (such as the prosecutor’s office or a police station) and including only the media. Making such announcements with the public or the civilian’s family present can be an invitation to a well-publicized confrontation. See Youseff Rddad & Amy Forliti, *Prosecutor: Minneapolis Cops Justified in Shooting Black Man*, SALT LAKE TRIB. (July 30, 2018), <https://www.sltrib.com/news/nation-world/2018/07/30/prosecutor-minneapolis/> (prosecutor shouted down by community members at public press conference regarding officer-involved shooting).

336. The Arbery shooting involved a former police officer, making it an ex-officer-involved shooting rather than the traditional officer-involved shooting, but all of the main elements of an officer-involved shooting are implicated. See Mahita Gajanan, *After National Outcry, Justice Department Weighs Hate Crime Charges in Ahmaud Arbery’s Killing. Here’s What to Know*, TIME, <https://time.com/5832731/ahmaud-arbery-shooting-georgia-murder/> (May 7, 2020, 4:23 PM).

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

department and former investigator for a local district attorney's office.<sup>341</sup>

After months of delay, the Waycross District Attorney issued a rather remarkable letter to the county police department, which was made public.<sup>342</sup> In the letter, the district attorney advised that he was conflicting the investigation out to another district attorney's office to handle, despite asserting no real conflict.<sup>343</sup> Rather than stopping with the recusal decision, the letter then proceeded to state: (1) the district attorney gave the police an opinion the day after the shooting that the shooting was justified; (2) "[w]e do not see grounds for an arrest"; (3) the shooter was engaged in justifiable self-defense; and (4) "Arbery's mental health records & prior convictions help explain his apparent aggressive nature."<sup>344</sup>

The newly assigned district attorney's office, however, arrested the shooter and the shooter's father (who was the former police officer) for murder.<sup>345</sup> The prior letter from the Waycross District Attorney creates a bevy of practical, ethical, and legal problems for the ongoing investigation and prosecution. The jury pool has been potentially tainted by the letter. The defense may attempt to use the letter at trial. Some of the statements in the letter may pose ethical concerns for the Waycross District Attorney. The letter, published prominently by the *New York Times*,<sup>346</sup> will have a persistent and certainly deleterious effect on the subsequent prosecution in this officer-involved shooting. This is a bell that cannot be unrung.

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341. *Id.* Of course, this attempt to investigate a former colleague also demonstrates the problem with not using an independent investigative agency, as discussed *supra* Part II.

342. See Letter from George E. Barnhill, Dist. Att'y, Waycross Jud. Cir., to Tom Jump, Captain, Glynn County Police, (released Apr. 3, 2020), <https://int.nyt.com/data/documenthelper/6916-george-barnhill-letter-to-glyn/b52fa09cdc974b970b79/optimized/full.pdf>; see also *Glynn County Releases Statement on Shooting Death of Ahmaud Arbery*, WTOC, <https://www.wtoc.com/2020/05/09/glynn-county-releases-statement-shooting-death-ahmaud-arbery/> (May 9, 2020, 5:06 PM).

343. Letter from George E. Barnhill, *supra* note 342.

344. *Id.*

345. Richard Fausset, *2 Suspects Charged with Murder in Ahmaud Arbery Shooting*, N.Y. TIMES, <https://www.nytimes.com/2020/05/07/us/ahmaud-arbery-shooting-arrest.html> (May 21, 2020).

346. *Id.*

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A lack of practical experience and lack of standardized procedures for handling such high-profile officer-involved shootings is a deadly combination. The above-described procedures can help law enforcement avoid the bramble bush of issues created by no statement, or worse, a statement like the one made in Georgia.

The completion of the preliminary statement then leads to two natural questions: (1) How long will the investigation take? and (2) How will the final results be reported? Each of those questions is answered below.

#### N. *Time to Complete Investigation*

Time is of the essence in an officer-involved shooting investigation.<sup>347</sup> Every day that goes by without a decision has negative consequences for the family of the deceased, the police officers and agency involved, and general public trust. However, the need for speed must be balanced by the requisite thoroughness for such a significant matter. Just as in any major case, the goal of quick closure and the desire for thoroughness may be at odds with one another.<sup>348</sup>

Looking around the nation, the length of time to complete these investigations varies widely. Occasionally, a prosecutor will call it a “good shoot”<sup>349</sup> shortly after arriving at the scene of the shooting. More often, these cases take years before a prosecutor announces whether the shooting was justified or charges will be filed.<sup>350</sup>

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347. See APA REPORT, *supra* note 105, at 16.

348. See IACP REPORT, *supra* note 17, at 17.

349. See, e.g., Justin Fenton, *Prosecutors Explain Why They Decided Shooting by Baltimore Police Commander Was Justified*, BALT. SUN (May 9, 2016, 7:11 PM), <https://www.baltimoresun.com/news/crime/bs-md-ci-prosecutors-shooting-cleared-20160509-story.html>. Prosecutors and investigators should eliminate the term “good shoot” from these investigations. While it is a term of art in law enforcement, it is perceived negatively by the public. Simply put, there is no “good” shooting, only a shooting that is justified or not justified.

350. See, e.g., Jason Green, *Sunnyvale Officer Cleared in Fatal 2015 Shooting*, MERCURY NEWS, <https://www.mercurynews.com/2019/09/17/sunnyvale-officer-cleared-in-fatal-shooting-of-transient/> (Sept. 18, 2019, 2:03 PM) (reporting that over four years had passed before the report,

These extended gaps before making a decision do not make any sense. While there is always the outlier case, it is difficult to think of a shooting investigation where a prosecutor has more evidence immediately available than an officer-involved shooting. The prosecutor has the weapon, the identity of the shooter, the full background on the shooter, often multiple other law enforcement witnesses, recordings, immediate notification and crime scene processing, and usually the statement of the shooter. In an average homicide investigation, with all of that information available, a prosecutor should be able to make a charging decision within a matter of days after receiving completed reports.

So what is taking so many officer-involved shooting investigations so long to complete? First and most obviously, the answer is politics. The external pressures on an elected prosecutor to make the correct call are enormous and often directly opposing.<sup>351</sup> The police unions want to hear that the shooting was justified. The family of the civilian and some community groups want to hear about the murder charges. The prosecutor can become paralyzed by the competing pressures. And this fear of political repercussions is not unwarranted—the seven-term prosecutor who handled the Michael Brown shooting in Ferguson was summarily voted out of office in the next election.<sup>352</sup>

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finding the shooting justified, was issued); Husain, *supra* note 3 (reporting thirteen months to file charges); Jay Cannon & Emily Johnson, *From Eric Garner's Death to Firing of NYPD Officer: A Timeline of Key Events*, USA TODAY, <https://www.usatoday.com/story/news/2019/08/20/eric-garner-timeline-chokehold-death-daniel-pantaleo-fired/2059708001/> (Aug. 20, 2019, 10:49 AM) (reporting five years to reach decision not to charge in choke-hold death case).

351. In the United States, an overwhelming majority of chief prosecutors are elected. See CARISSA BYRNE HESSICK, *THE PROSECUTORS AND POLITICS PROJECT, NATIONAL STUDY OF PROSECUTOR ELECTIONS* 4 (2020), <https://law.unc.edu/wp-content/uploads/2020/01/National-Study-Prosecutor-Elections-2020.pdf>; Michael J. Ellis, *The Origin of Elected Prosecutors*, 121 *Yale L.J.* 1528, 1530 (2012) (“The United States is the only country in the world where citizens elect prosecutors.”); see also George Coppolo, *OLR Research Report* (Feb. 24, 2003), <https://www.cga.ct.gov/2003/rpt/2003-R-0231.htm> (cataloging by state the elected chief prosecutors).

352. *Prosecutor Who Handled Michael Brown Shooting in Ferguson Loses Democratic Primary*, NBC NEWS (Aug. 8, 2018, 8:17 AM), <https://www.nbcnews.com/storyline/michael-brown-shooting/prosecutor-who-handled-michael-brown-shooting-ferguson-loses-democratic-primary-n898621>.

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Second, the less well-known drag on these investigations is when agencies attempt to investigate themselves. An independent agency working with the prosecutor can dedicate its resources exclusively to completing the officer-involved shooting investigation.<sup>353</sup> An agency investigating itself will be subject to being pulled in multiple other directions. Moreover, this author's experience has shown that an independent agency will have reports reviewed by supervisors only for accuracy, resulting in a relatively quick process. By comparison, an agency investigating itself will have reports reviewed up-and-down the chain of command to make sure that the agency is portrayed in the best possible light, and the non-independent investigators will know this fact when they are writing their reports, all of which slows the process.<sup>354</sup> For instance, one agency attempting to investigate itself in Pennsylvania (not surprisingly, the Pennsylvania State Police, discussed in other scenarios above) included their own written conclusion that the shooting was justified, a clear response to institutional pressure.<sup>355</sup>

By comparison, under the Wisconsin model of independent agency investigations, many investigations of officer-involved shootings are completed in thirty to sixty days.<sup>356</sup> This is anecdotal proof that independent investigations will move more quickly and efficiently.

In addition, an agency investigating itself, without guidance and direction from the prosecutor, nearly always will submit a report that will be sent back by the prosecutor with a list of

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353. See, e.g., HAMMONDS ET AL., *supra* note 19, at 22.

354. See *id.* at 10 (discussing the "natural impulse to interpret evidence in a way that the interpreter would prefer" when an agency investigates itself).

355. See Memorandum from the Chester Cnty. Dist. Atty's Office on Trooper-Involved Shooting to Pa. State Police 5 (Mar. 18, 2019) (on file with the *Drexel Law Review*) ("In the investigative synopsis of the incident, one Trooper attempts to draw the conclusion that the conduct of the Troopers who fired their weapons was legally justifiable. That opinion, while correct, does not fall within the purview of a factual report and should not be included as a matter of best practices. The ultimate legal conclusion is left to the DAO.").

356. See HAMMONDS ET AL., *supra* note 19, at 30–31.

questions and requests.<sup>357</sup> This process, which is the horizontal prosecution model,<sup>358</sup> can be repeated over and over again, as months and years go by. Under a vertical prosecution model, an independent agency working with the prosecutor would have answered those questions during the course of the investigation.

How long should an officer-involved shooting investigation take? The answer, of course, is as long as necessary, but no longer than that. Realistically, unless the officers involved are not cooperating, such an investigation should take no longer than sixty days, and often can be completed in less than two weeks.<sup>359</sup> The keys are investigation by an independent agency and the vertical prosecution model, with the prosecutor and independent agency working together from the start.

#### O. *Final Report to the Public*

The final step in officer-involved shooting investigations is announcing a decision. This process falls into two possible tracks: (1) announcing charges against the officers or (2) announcing that the shooting was justified and no charges will be filed. The two tracks have different requirements and procedures.

If the officers are being charged, the prosecutor needs to treat the announcement like any other high-profile criminal case.<sup>360</sup> This means sensitivity to tainting the jury pool with any public comments.<sup>361</sup> Moreover, any facts that are released must be limited to the facts alleged in the criminal charging document, whether it is a complaint or indictment.<sup>362</sup> The officers are identified, just as any charged defendant would be.<sup>363</sup> These

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357. See APA REPORT, *supra* note 105, at 20.

358. See *supra* Part III.

359. See HAMMONDS ET AL., *supra* note 19, at 30–31.

360. See *supra* Section IV.L.

361. See *supra* Section IV.L.

362. See MODEL RULES OF PRO. CONDUCT rs. 3.6, 3.8(f) (AM. BAR ASS'N 2018).

363. See *id.*

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procedures all follow the normal ethical rules that govern prosecutors.<sup>364</sup>

Where there is a decision that the shooting was justified, and thus no charges will be filed, prosecutors have demonstrated considerable confusion about how to handle the announcement.<sup>365</sup> How much detail? Release any recordings? Identify the officers? The questions are myriad.

The answers, however, are fairly simple. Regarding the level of detail, the more the better. The public should be allowed to assess essentially the same information that was available to the prosecutor.

Many prosecutors release detailed written reports.<sup>366</sup> This has the benefit of presenting an organized review of the evidence while still being factually rich and clear on the law.<sup>367</sup>

Other prosecutors release a short statement, but make publicly available all of the underlying investigative reports and data.<sup>368</sup> This approach can be problematic because some states restrict public dissemination of raw law enforcement data or reports.<sup>369</sup> Moreover, the sheer disorganized volume of the investigative material defeats all but the most dedicated researcher from fully accessing and comprehending such a data

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364. *Id.*

365. *See, e.g.,* Rddad & Forliti, *supra* note 335 (reporting that a prosecutor was shouted down by community members at a public press conference after videos of officer-involved shooting were released).

366. *See, e.g.,* Report of the State's Attorney for the Judicial District of Waterbury Concerning the Death of Jayson Negron in the City of Bridgeport on May 9, 2017, CONN. STATE DIV. CRIM. JUST., <https://portal.ct.gov/DCJ/Whats-News/Reports-on-the-Use-of-Force-by-Peace-Officers/2017--May--Jayson-Negron--Bridgeport> (last visited Oct. 29, 2020) (containing extensive factual and legal analysis of officer-involved shooting where officers were cleared); *see also* COLO. REV. STAT. § 20-1-114 (2019) (Colorado law mandating that district attorneys release a detailed public report even if no criminal charges are filed in officer-involved shooting).

367. *See* APA REPORT, *supra* note 105, at 20.

368. *See, e.g.,* Officer-Involved Shootings (And Other Incidents of Force Resulting in Serious Injury or Death), CITY OF SACRAMENTO POLICE DEPT., <https://www.cityofsacramento.org/Police/Transparency/Officer-Involved-Shootings> (last visited Oct. 29, 2020) (detailing the process to follow and the law that requires the records be publicly available).

369. *See, e.g.,* 18 PA. CONS. STAT. ANN. § 9106(c) (2020) (restricting public dissemination of certain law enforcement reports unless specified criteria are met).

dump.<sup>370</sup> However, this approach does have the value of complete transparency.

Finally, some prosecutors simply announce that the shooting was justified, with no other details, or do not even make a public announcement when an officer is cleared.<sup>371</sup> This approach often draws a storm of protest from the public and the media because of the lack of any transparency.<sup>372</sup>

Out of these three approaches, experience has shown the detailed report to be the best approach. It should provide sufficient factual detail so that the reader feels that nothing is being hidden. It allows the prosecutor to organize the investigative details in a manner that makes it understandable, including both the facts and the law. It also avoids any legal restrictions on releasing raw law enforcement files.<sup>373</sup>

Should the names of the officers who are not being charged be released? Generally, prosecutors should follow the same rules used in normal criminal cases—if suspects are charged, their names are released; if suspects are not charged, their names are not released.<sup>374</sup>

An analogous hypothetical provides useful context. Imagine a school teacher, Fred Smith, accused of having sex with a student. If the investigation resulted in charges, the headlines would read, “Teacher Fred Smith Accused of Sexually Assaulting Student!” If the investigation resulted in no charges, but the prosecutor still released Smith’s name, the headlines would read, “Teacher Fred Smith Not Charged with Sexually Assaulting Student!” In the age of internet searches, the two headlines would both have a significant and permanent

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370. For an example, the report on Jayson Negron’s death is not only thirty-nine pages of findings and applicable law but contains eighty-six attachments of varying length containing evidence from the investigation. *See, e.g., Report of the State’s Attorney for the Judicial District of Waterbury Concerning the Death of Jayson Negron*, *supra* note 366.

371. *See* Jon Swaine & Ciara McCarthy, *Dozens of Killings by US Police Ruled Justified Without Public Being Notified*, *GUARDIAN* (Apr. 13, 2016, 12:17 PM), <https://www.theguardian.com/us-news/2016/apr/13/the-counted-us-police-killings-officers-cleared>.

372. *See id.*

373. *See* APA REPORT, *supra* note 105, at 20–21.

374. *See* PDAA REPORT, *supra* note 105, at 6.



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negative impact on Fred Smith, despite the directly opposite investigative results.

The same reasoning applies to the release of officers' names. If the officers are not charged, then prosecutors should not release their names.<sup>375</sup> Releasing the names results in a permanent negative public record for an uncharged law enforcement officer. Release of the names also may place the officers in physical danger. Of additional importance, the officer and department involved should be consulted on the issue. Counterintuitively, the officers involved may affirmatively want their names released, particularly if their names already have been made public through common sources like social media. But the general rule of criminal cases covers most of these investigations—no charges means no names are released.<sup>376</sup>

Even where officers are not charged, there may be significant training, procedural, or other issues that the prosecutor needs to report to the agency. A memorandum from the prosecutor to the agency's commanders can address those issues.<sup>377</sup> In addition, a post-investigation debriefing or "hot wash" with all parties involved is often a useful exercise.<sup>378</sup>

Regarding the release of videos where the prosecutor is not charging, such videos should be released, as previously discussed.<sup>379</sup> Releasing the video in a non-charging scenario does not risk tainting a potential jury. In addition, it provides the transparency of allowing the public to see what the prosecutor based their decision on, paired up with the written report. The video may use appropriate technology to shield the identity of civilians and the officers, such as the blurring of facial features.

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375. *Id.*

376. *Id.*

377. *See, e.g.,* Chester Cnty. July 2018 Memorandum to PSP, *supra* note 168, at 15 (detailing legal, training, and procedural issues to be addressed by state police going forward).

378. *See* IACP REPORT, *supra* note 17, at 22.

379. *See supra* text accompanying notes 326–33.

When they choose not to charge an officer involved in a shooting, some prosecutors release detailed reports in a timely fashion, seeking to provide reliable information and allay any possible confusion or suspicions.<sup>380</sup> Any attempts to hide details or delay such reports leads to mounting public frustration and suspicion, none of which is good for the integrity of these investigations.<sup>381</sup>

*P. What Would the Phronimos Do?*

After discussing all of the above issues, I would be remiss if I did not offer a radical re-imagining of officer-involved shooting investigations, assuming no budgetary or political constraints, and applying the practical and moral virtues of the Aristotelian *Phronimos*.<sup>382</sup>

In an ideal world, the investigation and prosecution of officer-involved shootings would be handled by entirely independent law enforcement agencies and prosecutors, with no other role than to investigate and prosecute these cases. The investigators would have to be recruited from skilled homicide and internal affairs detectives. The prosecutors would similarly have to be recruited from experienced homicide and corruption trial attorneys, all with extensive exposure to the vertical prosecution model. Both the investigators and the prosecutors should be placed in an agency with complete political autonomy and dedicated funding. This could be done at a state level or a federal level (with regional offices around the nation). The teams could use existing state laws and jurisdiction. If a

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380. See, e.g., Laura McCrystal, *Pennsylvania Prosecutors Outline New Guidelines on Officer-Involved Shootings*, PHILA. INQUIRER (Nov. 29, 2016), [https://www.inquirer.com/philly/news/20161130\\_Pennsylvania\\_prosecutors\\_outline\\_new\\_guidelines\\_on\\_officer-involved\\_shootings.html](https://www.inquirer.com/philly/news/20161130_Pennsylvania_prosecutors_outline_new_guidelines_on_officer-involved_shootings.html).

381. See, e.g., Swaine & McCarthy *supra* note 371.

382. See Chris W. Surprenant, *Politics and Practical Wisdom: Rethinking Aristotle's Account of Phronesis*, 31 *TOPOI* 221, 222 (2012) ("For Aristotle, therefore, becoming *phronimos* requires an individual to (1) possess knowledge of what constitutes virtuous behavior, (2) possess knowledge of the means necessary to attain virtuous ends, and (3) act in a manner that allows one to attain these ends.").

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federal model was used, 18 U.S.C. § 924(c) could be amended to include officer-involved shootings of civilians.<sup>383</sup> The leader of the agency would have to be an experienced prosecutor with absolutely no political aspirations, because the job would effectively be political suicide, getting caught between incredibly strong interest groups and the media. Whether using a state model or a federal model, the agency would have to have exclusive jurisdiction over officer-involved shootings and no ability to defer the case to another agency; declinations could only be on the merits of the case.

Interestingly, even as this Article was being prepared for publication, federal legislators proposed the Justice in Policing Act of 2020 (the “Act”).<sup>384</sup> The Act makes a broad-based, aspirational attempt to require independent investigations of officer-involved shootings.<sup>385</sup> The Act fails to grapple with the real-life issues of expertise, case-loads, jurisdiction, and other factors explored in this Article, but represents the first nationwide attempt to address the necessary evolution to independent investigations in these deadly force incidents. If federal officials are, in the vernacular, willing to “put their money where their mouths are,” perhaps they will review this Article and create the suggested free-standing agency to address officer-involved shootings. In fact, the \$750 million allocated by the Act<sup>386</sup> for the United States Attorney General to implement independent investigations of officer-involved shootings would rather easily cover the creation of such an agency. It will be fascinating to watch the political and legal battles on this and the many other issues raised in the Act.

Given the relative rarity of fatal officer-involved shootings and practical problems like geography, budgets, and

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383. See 18 U.S.C. § 924(c). This statute addresses, inter alia, crimes of violence committed with a firearm, has a built-in interstate nexus regarding the firearm, and includes a maximum potential sentence of life imprisonment.

384. See George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (as passed by House of Reps., June 25, 2020).

385. See *id.* § 104.

386. *Id.*

jurisdiction, the creation of a completely autonomous and dedicated agency to investigate and prosecute officer-involved shootings is improbable. Additionally, given the political forces in play, such a dedicated agency may be impossible. However, entirely independent investigations of these shootings and vertical prosecutions are eminently achievable by utilizing the existing criminal justice system.

#### CONCLUSION

A fatal officer-involved shooting is a horrific event for everybody involved—the civilian, the civilian’s family, the police, and the public. To date, the handling of officer-involved shooting investigations has compounded the trauma of such events. Failures to understand and follow proper protocols, established laws and ethical rules, and simple common sense has led to tainted investigations and hobbled prosecutions.

As explained above, two main changes in the criminal investigations of officer-involved shootings will vastly improve the integrity of the investigations and prosecutions. First, the shootings must be investigated by an independent agency. Second, a vertical prosecution model must be used, with prosecutors coordinating with the independent investigating agency within minutes of the shooting. These two changes address the majority of the current problems with officer-involved shooting investigations in the United States. In addition, there are a series of small but particularly important procedures that should be followed to improve public trust in, and the quality of, these investigations. One recurring theme is that these are criminal investigations and should be treated with the standard rules and practices for such investigations, resisting the influence of law enforcement politics.

The protocols listed in this Article require changes in the law, some changes in understanding the dynamics of these investigations, but most of all, a change in police culture. A law enforcement agency is not capable of investigating itself in an officer-involved shooting and maintaining any claim to

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impartiality. The public simply will not trust the results. Furthermore, the legal complexities of these investigations require the immediate and ongoing involvement of prosecutors. The better law enforcement leaders already have absorbed these messages. The leaders who are stuck in the medieval mindset of “we do it this way because this is the way we have always done it” are one bad shooting away from learning their lesson the hard way. The police unions who are protecting their members from justice at any costs by obstructing these investigations must be addressed, both by prosecutors and legislators.

I hope that the protocols, and reasoning behind the protocols, contained in this Article provide a significant addition to the sparse academic and practical literature on the topic of officer-involved shooting investigations. More importantly, I hope that this discussion provides a path forward for law enforcement, legislators, and the public in addressing this critical issue.