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Law Enforcement Organization Relationships

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While earlier chapters (CITES) considered case-specific interactions between prosecutors and law enforcement officers, this one explores organizational interactions that, to some extent, address those retail engagements at a wholesale level. These prosecutorial interactions can go beyond the case context to more broadly affect the nature and quality of criminal justice within a county, district, or other jurisdictional unit.

Horizontal Alignment and Coordinate Powers

Foundational to the American criminal justice system is what Mirjan Damaška characterized as the “coordinate mode of organization.” (1984, 44). Organizational alignment is horizontal rather vertical, with police and prosecutorial units working as equal partners, and neither having hierarchical power over the other. Indeed, in most cases, police and prosecutors have separate lines of political accountability. Deputy sheriffs reporting to elected sheriffs (Tomberlin 2018, 113), or police officers reporting to police chiefs appointed by elected mayors, will bring cases to District Attorney’s offices headed by an elected DA. Even in the federal system, where, at least in theory, all criminal enforcement units could be in a single department, they aren’t. Most investigation and apprehension units are in the Justice Department, but others are in Homeland Security, Treasury, or elsewhere in the Executive Branch. And even though the U.S. Attorney General and the Deputy Attorney General sit atop an organizational chart that includes all Justice Department special agents and all federal prosecutors, they are the only two federal officials with hierarchical authority crossing the police-prosecutor divide. Fragmented authority reigns here as well (Richman 2003, 755-56). As a general matter, American prosecutors simply lack the formal authority to order the police to investigate and bring them a case, and the police lack formal authority to require that prosecutors take any particular case or type of case.

One can easily imagine a variety of more hierarchical models, and can easily find them abroad now or in the past. In one model, the police could dominate. Prior to the establishment of the Crown Prosecution Service in 1985, the police in England and Wales “were responsible for criminal prosecutions, which they brought either in person, or through locally instructed prosecuting solicitors.” (Hodgson 2010, 76, 83; Gattrell 1990, 262; Godfrey 2008, 171). Alternatively, prosecutors could be in charge from the start. In France, the procureur is understood to have direct authority over the police investigation of a case (Hodgson 2010, 1368). In Japan, prosecutors “strongly and frequently direct police investigations.” (Johnson 2012, 42) In China, at least in theory, prosecutors “are
accorded a supervisory function which enables them to oversee all the law enforcement agencies, including the courts and the police.” (Mou 2017, 621) The US, because of some combination of path dependence and ideological commitment to separation of power principles, has not gone in either of these directions.

One caveat: although the practice often eludes scholarly attention, since it generally involves only misdemeanor offenses, a “surprising number” of US jurisdictions allow police officers (notwithstanding their lack of a license to practice law) to directly file and prosecute criminal cases (Horwitz 1998, 1306). Arguments have been made that such an arrangement violates the Due Process Clause, in part because an arresting officer often acts as both witness and prosecutor (Frye 2012, 339). Yet the practice can still be found in underfunded jurisdictions or where the minimization of legal personnel (since the judge may not be a lawyer either) is deemed a virtue (New York City Bar Task Force on Town and Village Courts, 2007).

**Prosecutors as Gatekeepers**

As a general matter, however, prosecutors are gatekeepers for all criminal charges, and have a monopoly on their being brought. Thus, a prosecutor filing charges that are sought by the police in a particular case is far from a foregone conclusion. Indeed, gatekeeping at this critical juncture lies at the heart of the prosecutorial role. Reasons for declining to file may be technical in nature –like “insufficient evidence” or a “bad search” – but they may also be “office policy.” Assessments of evidentiary strength may themselves reflect views of the zeal with which a case should be pursued, since case files are artifacts of enforcer effort (Richman 2003, 762-63). They too may reflect office policy.

Such decisions might be routinized and unilateral. Indeed, the norm in most cases, especially at the county level, involves the police officers presenting arrests that they have made on their own initiative to prosecutors who, seeing the case for the first time, will decide whether to bring charges. The roles played in this set-piece can reinforce regrettably narrow perspectives (Griffin 2017, 326). Police officers or agents will all too often believe their job stops with an arrest, and will think of themselves as having little stake in the disposition of a case (Richman 2013, 774-775). Such an attitude will be reinforced by agency performance metrics that don’t consider adjudicative concerns (Richman 2013, 763), and by the readiness of the police to use an arrest as a regulatory tool in its own right, irrespective of the adjudicative outcome (Jain 2015, 809; Feeley 1979). Prosecutors too might have a limited conception of their role, and think of themselves as passive recipients of a file created by the police. Yet, there are plenty of agents and officers who look beyond such a narrow conception of their job and have considered views on what happens to a case (Richman 2016, 44). Similarly, there are many prosecutors who embrace their repeat-player status and want to shape police behavior in future cases.

Even when the police have unilaterally investigated a case without prosecutorial input, they could be encouraged or even required to preliminarily consult with prosecutors before making an arrest (Gershowitz 2019). Such moves can help ensure that weak or
otherwise inappropriate cases get weeded out expeditiously, saving many an arrestee from unnecessary transport and booking hardships. Canvassing practices around the nation, Adam Gershowitz reports that according to prosecutors in Harris County, Texas, “police officers cannot make any warrantless arrest without first calling the ‘intake hotline’ and receiving approval from a prosecutor” (2019, 28). He also offers evidence that other counties adopting this ostensibly resource-intensive system have actually saved money (2019, 34).

Moreover, prosecutors will regularly work closely with cops or agents to make a case, particularly where prosecutors are gatekeepers over needed investigative techniques – e.g. grand juries, search warrants, electronic surveillance, cooperation agreements (Richman 2003, 781-782). Each of these tools requires a level of prosecutorial engagement, preparation, and, for most, sponsorship with bureaucratic hierarchies and judicial authorities that tend to make a prosecutor a partner, or at least reviewer, in investigative decision making. When an investigation can be pursued only with the help of an accomplice witness, the prosecutor who will have to negotiate a cooperation agreement and guilty plea will have an influence on how the investigation develops that a colleague who simply sits in the complaint room and reviews arrests lacks for those cases. And the prosecutor who has spent weeks calling fact witnesses into the grand jury and negotiating subpoena compliance will be far more prepared to suggest new avenues of inquiry to the investigating agency than the prosecutor who simply presents a “fully” investigated case to the grand jury for an indictment.

Whether arising out of investigative exigencies or simply a deliberative process at the charging stage, productive interactions between police officers and prosecutors have considerable promise. As I’ve suggested elsewhere, the engagement of diverse professionals answering to separate organizations with separate lines of political accountability and distinct cultures allows, at least potentially, for mutual monitoring and “can promote depolarization and more thoughtful decisionmaking” (Richman 2013, 810) (discussing how the organizational literature on team production can help “reconcile us to the doctrinal oddity of thinking in separation of power terms within the executive branch.”). Anchored in a legal culture that connects them to other professionals, including defense lawyers, and tasked with defending police tactics and investigative adequacy in court, prosecutors might be tempted to worry about “cowboy” or “street-oriented” cops. However, a shared commitment to broad public safety, legality and even justice goals, coupled with the erosion of professional boundaries natural in high-pressure worksites, can lead to “knowledge transfer” (Abbott 1988, 65; Richman 2003, 792) and mutual respect. These interactions therefore ought to be embraced at the case level, and even formalized.

The nature and extent of police-prosecutorial collaboration will affect not only the quality of investigations and prosecutions but the very kind of cases that get pursued. “The

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1 But see Russell M. Gold, 2014, 1646) (noting that police have authority, in most jurisdictions, to obtain a warrant without prosecutorial approval).

2 For further discussions of how separation of power principles can be implemented within a prosecutor’s office, see Barkow 2009, 897; Barkow 2006, 989; Green & Roiphe 2017, 510-11.
pressures on police forces with crime control and patrol responsibilities are indefeasible,” and often “come at the cost of the intensive police work needed to investigate crimes not in plain view” (Richman 2016, 55). Many such crimes, entailing some of the most grievous exercises of illegitimate power – domestic violence, organized crime, or corruption – can be pursued only if prosecutors get involved early and intensively. Working closely with police officers, prosecutors can ensure that evidence is developed that withstands changes in a domestic violence victim’s readiness to implicate her assailant (Richman 2016, 56; Nelson 2012, 526). In cases involving more organized criminal conduct, prosecutors’ unique competence lies in their ability to deploy the adjudicative process itself as an investigative tool, striking the cooperation deals that allow the targeting of those who would otherwise enjoy impunity (Richman 2016, 56; Richman 1995, 69).

Of course, there can be downsides to close cooperation between prosecutors and police officers in developing a case. “Prosecutors who have helped call the shots in an investigation will be hard pressed to retain their magisterial perspective not just about the tactics used in the investigation, but about whether charges should be pursued thereafter” (Richman 2003, 802; Barkow 2009, 896.). Early involvement can only heighten the risks of prosecutorial “tunnel vision,” “the confirmation bias and selective information processing” that can lead investigators “to search out and recall information that tends to confirm one’s existing beliefs, and to devalue disconfirming evidence” (Burke 2007, 517; Bandes 2006, 475; Findley & Scott 2006, 291; Godsey 2019). Moreover, integral membership in the investigative team can make prosecutors prone to conforming to consensus and not undercutting the “team” (Simon 2012, 28-29).

At best, however, there will be productive and enriching interaction across institutional roles, with the “structured interaction of enforcers drawn from two relatively distinct cultures” promoting “depolarization and more thoughtful decisionmaking” (Richman 2003, 810). The goal ought to be the “team” valorized in the organizational literature, as a set of individuals (1) whose agencies’ contributions are thought to be mutually complementary in their productive capacities and (2) whose individual characteristics—including such matters as their knowledge and skills, their access to resources and to status within their home agencies, their aspirations and beliefs, their personal strengths and weaknesses—are taken into account by those, including the team members themselves, who organize their respective activities (Bardach 1998, 117).

Police-prosecutor interactions can continue after the charging decision to include decisions as to disposition. As Feeley & Lazerson observed: “Because prosecutors are the dominant members of the police-court transaction, they often attempt to make the police feel part of the legal process by soliciting officers’ advice about the appropriate plea or sentence” (1983, 216). One way to do this is through the “boundary-spanning institutions” (Feeley & Lazerson 1983, 216) that jurisdictions have established over the years. In Charlotte, North Carolina, for instance, the detectives on a homicide case are
formally included in prosecutorial deliberations on what position to take in plea negotiations (Abel 2017, 1748-49). This arrangement was designed to address

a recurring conflict between prosecutors and police, a conflict that had grown acute under a prior district attorney’s regime. Previously, prosecutors and police were at each other’s throats, publicly blaming each other for settling too many cases too cheaply. Police blamed prosecutors for pleading out murder cases that could have received stiffer penalties at trial, and claimed these lenient plea agreements were making it harder to enforce the law on the street. Prosecutors replied that the cases could not go to trial because the police had performed such shoddy investigative work (Abel 2017, 1749).

The Charlotte prosecutor who fails to consult with interested police officers on a case disposition and takes a position at odds with their strong preferences might find herself the subject of a complaint to her superiors (Abel 2017, 1763). Officers can also “derail a plea by leaking word that the prosecutor is considering a lenient offer and did not consult with police first. If the plea offer has already been made, officers may go on the record to voice their dissatisfaction with the plea and make clear that they were not consulted” (Abel 2017, 1746). In some jurisdictions, the prosecutor might even suffer the disruptive intervention of the police as a separate actor in the adjudicative process (Richman 2003, 829 (noting disparate state case law on whether the police are bound by the prosecutor’s position and arguing: “Giving the defendant the ability to claim breach and withdraw his plea” when the police argue for a harsher punishment than the prosecutor has agreed to would be both “a spur to [police]-prosecutor collaboration” and “a matter of simple fairness.”); Abel 2017 1765-69). Optimally, however, the risk of such interventions will simply lead to better communication and internalization of police perspectives into prosecutorial decision making.

Organizational Conflicts Over Charging

Prosecutorial screening and charging decisions are not simply the site of professional interactions at the case level, but a site of potential organizational conflict, with the priorities and tactics that shape a police department’s or law enforcement agency’s supply of cases often at odds with the policy preferences of the prosecutor’s office. The conflict can usefully be seen in market terms, with prosecutorial control over access to the adjudication process generally mirrored by a police monopoly over the supply of materials for the bringing of cases.

An important qualification: An ordinarily stark bilateral monopoly might be qualified when jurisdictions overlap. When an investigation spans two boroughs, the New York Police Department might be able to play one county DA’s office against another, or might be able to interest the local U.S. Attorney’s office. For its part, a DA’s office might not be wholly reliant on the local police, and might take cases from federal or state agencies. At the federal level, the multiplicity of enforcement agencies and the flexibility of venue rules allow for similar games that marginally reduce what otherwise would be monopoly power of prosecutors and agencies (Richman 2003, 759-61).
Does prosecutorial monopoly power mean that the police will internalize prosecutorial preferences in order to achieve their own goals? Not necessarily, and the consequences of their failing to do so can be disastrous. When, for example, the New Orleans District Attorney, in a laudable effort to reduce plea bargaining incentives, required his prosecutors to increase the rigor with which they screened cases before charging, the New Orleans Police Department might have responded by bringing stronger cases. (Wright & Miller. 2002). But it did not and simply accepted the rejection of an extraordinarily high number of its serious felony arrests, with predicable public safety consequences (Richman 2006, 2058-60).

Disjunctions between police and prosecutorial decision-making may be rooted less in institutional dysfunction than in varying political preferences or policy judgments. Elections or the political appointment process for prosecutors are highly imperfect mechanisms for capturing public sentiments. (Wright 2009; Gold 2011). Neither, given party dynamics and the broad range of issues in play during mayoral elections, can one expect police leadership necessarily to reflect broad community preferences. Nonetheless, the responsiveness, however attenuated, of both prosecutor’s offices and police departments to their respective mechanisms of democratic accountability (and to the interest groups that exploit those mechanisms) will regularly put them on different pages with respect to enforcement priorities, strategies, and tactics.

The likelihood that this will happen gets far greater when one extends the model to consider the “mesh of networked institutions” (Richman 2016, 68) in which police and prosecutors do their work. Police tactics often respond to public safety concerns, officer-protection needs, community relationships or the lack thereof, and performance metrics – which are sometimes poorly chosen, like the number if street stops (Baker 2017; Mummolo 2017)). At its heart, a great deal of police work is spatially oriented: neighborhoods to patrol, property to protect, information sources to cultivate in a particular area. A prosecutor’s office may also respond to those concerns, but its obligation to navigate the legal and equitable demands of courts, juries, and defense counsel may dramatically affect its perspective, requiring it to wrestle with issues of equality, due process, community norms, and moral desert that sometimes get short shift in the policing project.

Such demands, as well as a distinct professional perspective, may make prosecutors look askance at the steady stream of low-level misdemeanor arrests that will inevitably accompany a police department’s pursuit of an order maintenance strategy. Experienced prosecutors screening these arrests may weed quite a few out, deeming them unworthy of a full adjudication, and perhaps questioning the need for the suspect to have a criminal record (Natapoff 2018, 68-71; Bowers 2010, 1693-1703). As Natapoff notes, however, “[t]he combination of enormous caseloads and inexperienced prosecutors” will leave police officers with “de facto prosecutorial authority” in the misdemeanor world (Natapoff 2018, 70-71).
Disjunctions between police and prosecutor policy preferences are not merely a feature of a mutual monitoring model, but offer a promise of a broader accountability for both institutions that goes beyond this mesh of inside actors. It generally won’t take long before serious conflicts spill out into the public arena, with local (or even national) media outlets eagerly disseminating the on- or off-the-record complaints of each side, trying to mobilize or curry favor with voters or funders or both. As I’ve noted elsewhere:

Iterated interaction between police and prosecutors is not unique to liberal democracies. The same creative tensions presumably arise in authoritarian states, without necessarily contributing to democratic accountability. What distinguishes the interactions in a liberal democracy is the nature of the institutions involved, with the possibility that police and prosecutors there have diverse political anchors that bring a dialogic richness (perhaps with expletives) to their conversations. What also distinguishes them is that, in an open society and a media interested in crime news, these arguments easily spill into public discourse (Richman 2016, 68).

The resulting discourse can provide an important source of accountability for institutions whose decisional processes are generally all too opaque. Of course, there is also a risk that the public dialogue may be skewed in one direction, as can occur when the electoral power of police unions has an outsized influence in the election of a local prosecutor. Abel reports that “unions sometimes see it as their duty to speak up when their members are upset about the way prosecutors are handling cases” (2017, 1763). Given the variable and often inadequate mix of information available to voters in prosecutorial elections (Wright 2014, 593; Medwed 2004), the absence of voices of moderation to balance police union critiques (and votes) can lead to regrettable electoral consequences.

Even where interactions are not productive in the narrow sense, leaving, say, the police aggrieved at what they believe an unduly risk-averse prosecutorial decision, the resulting tension at the police-prosecutor fault line can promote prosecutorial accountability with respect to specific cases. This is certainly what occurred when police dissatisfaction with the Manhattan DA’s decision not to prosecute famed producer Harvey Weinstein in 2015 spilled into the front pages in 2017 (McKinley 2017) and sparked further inquiries that led to serious felony charges against him in 2018. How the continued cross-organizational finger-pointing in this case will play out remains to be seen (Rose & Friedman 2018).

Broader differences as to how cases are pursued can also spill into public discourse. Whether the differences of policy preferences or legal compliance may itself be a matter of disagreement. Reacting in 2012 to the level and nature of the New York Police Department’s “stop and frisk” tactics, the Bronx DA refused to prosecute arrests from housing projects in the absence an interview with the arresting office “to ensure that the arrest was warranted” (Goldstein 2012). Did the DA affirmatively intend to reduce the nature of the police footprint in the projects or would any such reduction have simply been an unintended result of punctilious case preparation? Either way, it’s hard to imagine that the DA’s view of the underlying policing project did not color the intensive
scrutiny she mandated for the tactics used therein (Howell 2014, 304).

Other times, the policy differences will be quite clear. Perhaps the most transparent airing of differences has occurred as jurisdictions struggle to reconcile changing public attitudes toward marijuana usage with the frequency with which police stops (often with a racialized distribution) end in marijuana possession arrests (Mueller 2018; Rice 2018). Lauren Ouziel has nicely highlighted the distinct ways each criminal justice bureaucracy refracts public preferences will lead to particularly constructive (or problematic) dialogues when refracted through criminal justice bureaucracies during a period of policy flux (Ouziel 2018).

**Prosecutorial Role in Monitoring and Training Police**

In their role as adjudicative gatekeeper, and particularly when they do not see a case until they need to make a charging decision, prosecutors will inevitably act on their assessments of police conduct: Did the police gather sufficient evidence? Did the gathering of the evidence comply with constitutional and sub-constitutional requirements? Police internalization of prosecutorial decisions in this regard may have an educative and disciplinary effect. Yet, prosecutors can do much more to promote compliance with evidentiary standards and the rule of law, both in specific cases and through wider ranges vehicles.

As David Sklansky explains:

> Prosecutors present and defend the work of the police in court, but they also explain and legitimize the law to the police, and—in varying degrees—supervise the police to ensure they comply with the law. They are envoys—“culture-brokers”—between the realm of the judges and the domain of law enforcement, between the courtroom and the squad room (2017, 503-504).

Prosecutors can play the role of “translators and organizational intermediaries” (Sklansky 2017, 504) in a number of ways. At the very least, they can ensure that police officers fully understand why evidence found to have been illegally seized has been suppressed. Not only can every suppression decision be a teaching moment, but even so can the preparation for every suppression hearing. When doing the latter, prosecutors must take care to avoid presenting the relevant legal standard as a target the officer should tailor his testimony to fit. Indeed, a prosecutor is particularly well placed to ensure that officers should testify truthfully (Williams 2001, 836-837), in part by assuring officers that she is perfectly prepared to work with any true set of facts.

Prosecutors might go even further than working to get the police to internalize judicial rulings. Fourth Amendment’s exclusionary rule doctrine has found any number of exceptions – scenarios when unconstitutionally obtained evidence can nonetheless be introduced against a defendant. Russell Gold has suggested that prosecutors have an executive and ethical obligation to avoid using evidence that they deem unconstitutionally obtained even when a court would allow its use – “a duty of
administrative suppression” (2014, 1595). Were prosecutors to take this duty seriously, he reasons, the police, to avoid this suppression would be incentivized to consult prosecutors for their Fourth Amendment expertise, which would allow prosecutors to serve their intended role as an intra-executive-branch check. Police would more frequently ask prosecutors to approve warrant applications—as ethical standards already recommend—and prosecutors would have reason to make that review as stringent as possible (2014, 1596).

Moreover, after the fact, were prosecutors to tell officers not just of their decision to suppress but of the rationale for doing so, officers would gain a far better understanding of the constitutional duties that judicial suppression decisions under-enforce (Gold 2014, 1596). Gold’s assumption that the public safety effects of prosecutors accepting this extrajudicial role would be minimal is contestable. But he is quite right to focus on the promise of the prosecutorial role in promoting constitutional policing.

Prosecutors can similarly turn their dismissal of a case against a person the police have arrested without a warrant into a “teachable moment” (Gershowitz 2018). Adam Gershowitz urges prosecutors’ offices to adopt a formal policy in that regard and suggests the possibility of a database that could identify officers who regularly bring in weak cases. Surveying a variety of offices, he found wide variation in the degree to which prosecutors tried to communicate dismissal information to police officers (2019, 9). Prosecutor feedback has been found particularly useful in promoting police compliance with evidentiary collection protocols that lead to stronger cases against domestic abusers (Nelson 2013, 8).

Efforts by prosecutors to educate police officers (and perhaps vice-versa, since good teachers always learn from their students) will often occur in more formal settings. The ABA Criminal Justice Standards for the Prosecution Function recommend that prosecutor offices promote compliance by law enforcement personnel with applicable legal rules, including rules against improper bias. The prosecutor’s office should keep law enforcement personnel informed of relevant legal and legal ethics issues and developments as they relate to prosecution matters, and advise law enforcement personnel of relevant prosecution policies and procedures.

(ABA Standards 2015, 3-3.2; Logan 2011, 108). Even where the prosecutor’s office does not have a formal role in police training, as in Atlanta, police academy “instructors consult with the D.A.’s Office about specific problem areas in which the District Attorneys would like to see the recruits receive more training” (Hirokawa 2000, 322).

*Disclosure as a Site of Police-Prosecutorial Interaction*

Police-Prosecutor interaction, and the possibility of enhanced police accountability, can involve police conduct separate from the investigative activity that generated the
interaction. Such is the case when the constitutional obligation on a prosecutor to disclose “material” exculpatory or impeachment evidence to defense counsel (often referred to as the Brady obligation) requires inquiry into the disciplinary records of police officers whose past abusive or deceit actions might constitute evidence of just this sort. In deference to this obligation and spurred by its interaction with defense lawyers pressing for such disclosure, a prosecutor’s office might use its leverage over a police department to press for disciplinary records and investigative reports that the department is averse to sharing (McKinley 2018). Many offices do not, however, leaving the compliance with the constitutional mandate to police departments, or to defense counsel diligence (when records are publicly available) (Abel 2015, 743; Levine 2019).

A prosecutor’s office may use its privileged access to information about officer conduct not merely to ensure disclosure and adjudicative fairness but to deter and sanction illegal or improper conduct. Such efforts can be informal and invisible to outsiders, say, a conversation between a supervisory prosecutor and a police supervisor or commander about a problematic officer. Yet a prosecutor trying to send a broader message—perhaps to the public or even to the entire police force—that she will not tolerate certain behavior or practices can go further. In 2018, for example, the Circuit Attorney for St. Louis delivered an “exclusion list” to the police department naming twenty-eight officers that her office would henceforth not accept cases from. She spoke only generally about the “responsibility” of prosecutors to “defend the integrity of the criminal justice system,” and how any “breach of trust” on the part of an officer, when it came to the “veracity” of his word “must be approached with deep concern.” In response, an official from the police union, complained that some officers were on the list because they “asserted their Fifth Amendment right against self-incrimination in cases where [the prosecutor]’s office was simultaneously reviewing an officer’s conduct in a police shooting and pursuing charges against the person shot” (Byers 2018).

When a police officer’s disciplinary record is serious enough to lead a prosecutor’s office to avoid calling him as witness—lest his credibility be undermined with such impeachment material—the officer’s value to his department will likely suffer. The prospect of this happening can itself lead to troubling strategic acting within the shared workspace, with prosecutors putting officers on the “Brady list” for trivial or otherwise unjustified reasons, perhaps even at the behest of a police chief seeking to punish a disfavored officer” (Abel 2015, 781-82). The possibility of misuse, however, ought not deter a prosecutor’s office from carefully considering, and disclosing, Brady material and appreciating the institutional consequences of its doing so.

Police Shootings

While prosecutorial disclosure obligations can be a source of tension with police rank and file and perhaps police leadership, that tension pales beside that arising when the police-prosecutor interaction occurs not in the context of adjudicating charges against a civilian defendant but when prosecutors consider and pursue criminal charges against an officer for violence or abuse against a civilian.

As Kate Levine cogently notes:

[T]he same skills and relationships that effectuate a functioning system when prosecuting civilian defendants make local prosecutors the least objective adversaries when it comes to prosecuting law enforcement. When prosecuting an officer, the prosecutor must switch from her reliance on the police as allies to the position of an adversary, questioning the credibility and judgment of a police officer, charging the officer with crimes that often carry stiff prison sentences, and pursuing the case against the officer as vigorously as she would against a civilian defendant (Levine 2016, 1470).

Whatever internal conflict a prosecutor feels by virtue of her position will likely be exacerbated by external forces when she needs to decide whether to charge an officer. Now the police union likely to have played a part in the prosecutor’s election will often have strong views (Levine 2016, 1476), as will interest groups whose expressions of views will not necessarily be proportionate to their knowledge of the actual facts of the case. Police leadership might steer officers away from an oppositional stance, but they cannot be counted on to do so. Because of these “cognitive biases and political pressures,” Levine would bar local prosecutors from handling these cases, leaving them to a prosecutor from a different county, the state attorney general, or federal prosecutors, even as she acknowledges the drawbacks of each alternative. Suffice it to say that jurisdictions around the nation are still working through how best to handle these cases.

Although cases involving police misconduct occupy but a small part of a prosecutor’s docket, they have, as Rachel Harmon observes, “substantial symbolic and normative importance”:

No other form of remedy so clearly expresses the government’s condemnation of specific police violations of law, and none shows as much respect for the victims of police misconduct, especially with respect to police violence. Prosecutions also build public confidence in the government’s commitment to lawful policing and fair application of criminal justice (Harmon 2018, 43).

Conclusion

Although police departments and prosecutor’s offices cannot function without a high degree of collaboration, their organizational roles and networks, coupled with the distinctive perspectives of their personnel, will inevitably and regularly lead to forceful dialogue and occasionally disruptive friction over the range of their interactions. Within the frame of an individual case, those involved might fairly worry that such friction will undermine thoughtful deliberation about public safety, the rule of law, and democratic responsiveness. Viewed more broadly, however, these interactions are a critical source of just such deliberation, which will become even healthier and more valuable when the
dialogue breaks out of the closed world of criminal justice bureaucracies and includes the public to which these bureaucracies are ultimately responsible.
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