

Investigating and Prosecuting Police Misconduct: Reform Proposals



**Office of the State's Attorney
for Baltimore City**

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We live at a time when police misconduct, particularly in communities of color, receives a previously unknown level of exposure. That exposure has created a strain on the relationship between police, prosecutors, and communities that feel somehow different than tensions of the past. The problems are harder than ever to ignore, and the opportunity for officers to make groundbreaking strides has never been greater. Heartbreaking reports like the Department of Justice's Investigation of the Baltimore Police Department leave us to ask not whether reform is needed, but rather, how it can be most fully achieved. In this moment of crisis that begins in our own conscience and extends to the world around us, we must deliver the equal rights and equal justice that advocates of criminal justice reform have sought for generations. To those who have been hurt, I promise that you are heard. You are seen. Your presence is felt.

These challenges serve as a daily testament to police and prosecutors having both inherited a legacy of failed approaches. These failed approaches belie a sweeping problem that must be understood as systemic in nature. That means the problem persists as part of the laws and practices that define the criminal justice system, in spite of a majority of police officers within it standing out as fundamentally good people. We value that such good people work in such dangerous jobs, where they serve an important role in the community. By acknowledging this truth, we must also acknowledge the iniquity of failing to address the problems that have come to define many public perceptions of police officers. To that end, when it comes to police misconduct, our communities must know that police who break the law will be held accountable for it. Such accountability requires the legitimate possibility of facing prosecution. When communities see that prosecutors are reluctant to bring charges against police officers, even in high profile and traumatizing cases of misconduct resulting in death, they see further evidence of a broken system.

In seeking equal justice as a prosecutor, I do not conflate justice with convictions. As a first principle, justice is best served by avoiding the instances of injury or death that lead to prosecution. Next, justice is better served when there is a genuine possibility that a prosecutor will bring charges, following an uncompromised investigation, with the choice to prosecute leading to a trial by one's peers. Prosecution of such cases allows us to say with greater confidence whether a defendant is innocent, and to respond accordingly- that process itself, not some assumed outcome from it, is a more perfect realization of justice.

As State's Attorney for Baltimore City, my Office's role is to ensure that the truth is known and justice done when there are allegations of police misconduct. Truth and justice in the face of such misconduct are most fully realized when the Office of the State's Attorney is able to work with the Baltimore Police Department in a relationship of reform. The policy proposals outlined in this document are designed to foster that relationship. The work before us is difficult, but it is and will always be work worth doing.

Let us begin this work today.

Marilyn J. Mosby
State's Attorney for Baltimore City

Responding to a Use-of-Force Incident: A Collaborative Investigative Team

Incidents involving use-of-force and loss of human life are highly complex and sensitive matters implicating the most fundamental liberties guaranteed in a free society. Beyond the very happening of the incident, the moments, hours, and days immediately following an officer-involved shooting are critical, not only for the safety of the involved parties, but for the maintenance of true partnership and trust between the public, law enforcement, and prosecutors.

Procedural justice, which concerns the way that police officers and other legal authorities interact with the public, is how the legitimacy of the criminal justice system is built and maintained.¹ The Community Relations Service (CRS) of the U.S. Department of Justice (DOJ) identifies post-incident investigation as one of several “flash points” or “triggering incidents” related to a police use-of-force incident; The CRS characterizes these incidents as “tension-heightening events that catalyze discontent” and can lead to the onset of civil disorder.² During these flashpoints, the need for a process that communities regard as impartial and just is at its highest.

Findings of the West Baltimore Community Commission on Police Misconduct

In recent years, public scrutiny of police-involved shootings, the subsequent investigations, and prosecution of officer misconduct or lack thereof have been marked by a perceived lack of transparency or impartiality related to investigations that are seen as unjustly protective of police.

Before the Department of Justice released its recent report, community members identified law enforcement officer accountability as a core deficiency in police-community relations. The West Baltimore Community Commission on Police Misconduct highlighted “institutional unresponsiveness” and “institutional corruption” related to police investigation of police misconduct. In data collected through surveys, 70% of informants alleged accounts of fraud related to a police misconduct complaint. In 46% of surveyed cases it was alleged that the police department “manipulated institutional procedures” to frustrate the advancement of an investigation.³

The Baltimore Police Department’s Special Investigation Response Team

In a lethal force investigation, an investigative team led by local law enforcement gathers evidence, locates witnesses, and conducts interviews, including interviews of the involved officers. The Baltimore Police Department (BPD) has a Special Investigation Response Team

¹ See National Initiative for Building Community Truth & Justice, ISSUE BRIEF: PROCEDURAL JUSTICE, <https://trustandjustice.org/resources/guide/issue-brief-procedural-justice>.

² U.S. Department of Justice Community Relations Service, POLICE USE OF EXCESSIVE FORCE, A CONCILIATION HANDBOOK FOR THE POLICE AND THE COMMUNITY 24 (2002), <https://www.justice.gov/archive/crs/pubs/pdexcex.pdf>

³ West Baltimore Community Commission on Police Misconduct, OVER-POLICED, YET UNDERSERVED: THE PEOPLE’S FINDINGS REGARDING POLICE MISCONDUCT IN WEST BALTIMORE 15-17 (2015), <http://www.noboundariescoalition.com/wp-content/uploads/2016/03/No-Boundaries-Layout-Web-1.pdf>

(SIRT) housed in its Office of Professional Responsibility (OPR). Department policy is currently set by General Order G-10, Categorical Use of Force and In-Custody Death Response. This Order requires BPD's investigators to issue a series of three reports following a reviewable incident, such as a shooting.

- A 24-hour report summarizing basic facts of the incident and sent to key leadership personnel within the department. A 72-hour briefing then follows.
- A criminal investigative report is due to the State's Attorney's Office (SAO) within ninety (90) days of the incident, unless there are exigent circumstances. The investigative report is presented to the SAO in order to determine charges.
- A final report and administrative presentation is written after the SAO issues its findings, and is due 90 days after the SAO's decision.

In the time between the initial internal response by the SIRT and the 90-day deadline, public confidence in the legitimacy of the investigation may become strained or lost entirely. Furthermore, as demonstrated by the findings of the West Baltimore Commission, many in the public are likely to lose faith in any procedure that is perceived to be not transparent or just. Undoubtedly, the internal and insulated nature of our present use-of-force protocol contributes to the loss of public confidence in these proceedings.

Solution: Replacing SIRT with a Collaborative Investigative Team

A solution to our current system may be replacing the SIRT with a more collaborative response team of law enforcement investigators, who respond to use-of-force incidents or other cases that raise the possibility of misconduct, such as in-custody deaths. Such a team would involve law enforcement partners entirely outside of BPD, such as the State's Attorney's Office, to ensure the integrity of the investigation via external checks and balances. The existing SIRT would be fully replaced by this new team.

As an example of how a more collaborative approach can work, officer-involved shooting protocol in Denver requires notice be given to both police department investigators and the Denver District Attorney's office. Personnel from both offices collaborate in the investigation. The local District Attorney's office has specially-trained assistant district attorneys who report to the scene of the shooting and then to police headquarters, while participating in the taking of statements from citizen and officer witnesses as well as involved officers. These investigators maintain an ongoing role in the investigation. A charging decision is made immediately upon conclusion of the investigation; if the decision is not to charge, a

decision letter is prepared and made available to the public. At that point, the District Attorney's investigative file is made available to the public for review.⁴

An equally collaborative approach for Baltimore could see the SIRT replaced by an investigative team including the following members, appointed by their respective agencies and approved by the BPD and the SAO:

- An investigator from the State's Attorney's Office – The SAO is both a partner with law enforcement and an elected official responsible for representing the interests of the community. As such, the SAO's involvement at an early point in an investigation is crucial to reassuring the public of the integrity of the investigation. The SAO would appoint this member.
- An investigator from the Baltimore Police Department – A member of the BPD is critical to the success of each investigation. The BPD's Office of Professional Responsibility would appoint this member.
- An investigator from the Civilian Review Board – The Civilian Review Board (CRB) is an oversight board established to maintain and improve police-community relations. Having a CRB member on the investigative team would be essential to ensuring transparency and accountability. The CRB would appoint this member.
- A Maryland State Police investigator – An investigator from the Maryland State Police (MSP) would bring additional and balanced law enforcement perspective and skill to the investigative team. The MSP would appoint this member.

This team would be charged with public communication, and with the goals of increasing transparency, accountability, and public confidence. In addition to providing regular communication throughout the investigative process, the independent investigative file compiled by this team could be made available to the public once a no-charge decision is made, as in the Denver example.

The Investigation: State's Attorney's Office Investigators Should Be Granted Police Powers in Cases of Police Misconduct

When prosecutors and police have a strong working relationship, there is communication and collaboration throughout the entire judicial process, beginning with the investigation and continuing through trial. Police and prosecutors must work together to develop sufficient factual information and legally-admissible evidence to correctly charge crimes and obtain convictions.

⁴ Denver District Attorney's Office, OFFICER-INVOLVED SHOOTING PROTOCOL 1-3 (2015)
http://www.denverda.org/News_Release/Decision_Letters/OFFICER-INVOLVED%20SHOOTING%20PROTOCOL%202015%20-revised%20May%202015%20.pdf

Prosecutors, however, must have their own identity distinct from police, and convey openness, transparency, and integrity.⁵

Investigative techniques are often the focus of reform efforts when it comes to the handling of police misconduct. Following the Rodney King trials, both the Kolts Report and Christopher Commission addressed the need to shore up lax investigative techniques. Recommendations included giving a local prosecutor's office access in the critical first hours to all information sources for the investigation.⁶ Commentators even recommend that U.S. jurisdictions copy reforms implemented in countries like the United Kingdom, Canada, and Norway, where governments have implemented entirely independent agencies to both investigate and in some cases prosecute police misconduct.⁷

In cases of police misconduct, particularly use-of-force deaths, the importance of an independent State's Attorney's Office is clear. Recent cases of police use of lethal force that resulted in no filing of criminal charges have deepened and exposed the public's loss of trust in the investigatory process, particularly when it is carried out by police.⁸ The ability to act independently and ensure a proper investigation, however, requires not just immediate and complete access to information sources and evidence, but the power to conduct an investigation itself. Important parts of any investigation include the ability to take evidence and access evidence, access to all fact witnesses, unrestricted access to officer and agency records, power to issue subpoenas and search warrants, powers of arrest, and access to forensic laboratories.⁹

Solution: Police Powers for SAO Investigators

A simple reform measure is providing investigators with the SAO the same investigatory police powers that law enforcement possess. There are jurisdictions throughout the United States and in Maryland that have explicitly authorized investigators in the local prosecutor's office to exercise such powers.

The California Penal Code gives district attorney investigators the same general police powers as law enforcement officers.¹⁰ In both Dorchester County and Talbot County, a state's attorney may designate criminal investigators as peace officers if they have met certain training standards. Investigators designated as peace officers have the power to make an arrest, the power to serve a warrant, summons, or subpoena, and the power to possess and carry a firearm.¹¹

⁵ Association of Prosecuting Attorneys, PROSECUTOR'S POLICY GUIDE 3, 8 (2012), <http://www.apainc.org/wp-content/uploads/The-Prosecutors-Policy-Guide-4.26-12.pdf>.

⁶ Laurie L. Levenson, *Special Issue: The Rodney King Trials: Civil Rights Prosecutions and Double Jeopardy: The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 604 (February 2004).

⁷ Walter Katz, *Enhancing Accountability and Trust with Independent Investigations of Police Lethal Force*, HARVARD LAW REVIEW FORUM, April 2015, <http://harvardreview.org/2015/04/enhancing-accountability-and-trust-with-independent-investigations-of-police-lethal-force/>

⁸ Katz, *supra* note 7.

⁹ Katz, *supra* note 7.

¹⁰ CA Penal Code § 803.1.

¹¹ Md. Code, Crim. Pro., §§ 15-410(e)(6)(i)-(iii), 15-421(d)(3)-(6)

In Garrett County, Maryland, state's attorney investigators have the same powers, rights, protections, and benefits as a county deputy sheriff.¹²

Having the power to serve warrants, make arrests, and otherwise take a more primary role in an investigation would enable a state's attorney investigator to fully participate in a use-of-force or police misconduct investigation, rather than relying on police department investigators. This proposal would also improve the functioning of the collaborative investigative team discussed above. Should such a team be formed as recommended, the participating SAO investigator would be able to more fully partner with state and local police investigators as an equal member of the team.

An independent state's attorney with investigators who possess the same investigative powers as police, along with earnest communication with the public, offers a level of transparency, independence, and accountability that can rebuild public trust in the investigation process. Rebuilding this trust is crucial to rebuilding faith in the justice system.

Prosecution: Cross-Designating Federal Prosecutors to Bring Charges Under State Law

Local prosecutors and law enforcement depend on a close working partnership for their mutual success. If officers do not discharge investigative duties, a local prosecutor will not be able to obtain convictions; similarly, if a local prosecutor does not prosecute cases, then police work will not result in mitigation of crime or rehabilitation and reentry of returning citizens. Therefore, there are two dangers to avoid in the prosecution of police misconduct: (1) the pressure for unjust leniency on the police, and (2) the possibility of a breakdown in relations between a prosecutor's office and the local police force when the decision is made to prosecute officers.

If local or state prosecutors are perceived as unable to discharge their duties in cases of officer misconduct, activists may look to federal power to serve as a backstop.¹³ However, federal prosecutorial power in such cases is limited relative to the power available under state law. Whereas under state law prosecutors may bring a range of statutory and common law charges in cases of police misconduct, only a few such charges are available under federal statutes. There are three primary federal statutes that are implicated in use of force incidents: 42 U.S.C. § 1983 (civil remedy), 18 U.S.C. § 241, 242 (the primary criminal remedy), and 42 U.S.C. § 14141 (a misconduct statute that is the basis for "pattern or practice" investigations). The federal criminal statute requires actual malice for conviction, which is a comparatively high bar.

Recent Proposals to Expand Federal Involvement in Police Misconduct

Recent events have prompted new calls to evaluate the role of local prosecutors in investigating and charging law enforcement officers involved in use of force incidents, particularly officer-involved shootings or in-custody deaths. A bill introduced by the 114th Congress, the Police Accountability Act of 2015, would create a new federal crime for certain

¹² Md. Code, Crim. Pro., § 15-412(d)(1)(i)-(ii)

¹³ Katz, *supra* note 7.

police uses of lethal force (H.R. 1102). Commentators have argued that due to the inherent difficulties with local or state prosecutors handling police misconduct cases, federal prosecutors should be given authority to prosecute in state court under state law in such cases.¹⁴ Some commentators speculate, however, that such action would require the federal government to adopt an implementing statute or regulatory program under the 14th amendment, giving prosecutors the power to address police misconduct in state court under state law. Pursued as such, new prosecutorial power might be connected to a program setting and seeking implementation of minimum police accountability standards under a form of cooperative federalism.¹⁵ Each of these approaches likely faces an uphill battle, given resistance to a perceived “over-federalization” of crime, and some aversion to a perceived expansion of federal power.¹⁶

Solution: Cross-designation via a Memorandum of Understanding (MOU)

A strong alternative is for local or state jurisdictions to request or otherwise enter into a memorandum of understanding (MOU) with federal prosecuting attorneys regarding police misconduct cases. The practice of cross-designating prosecutors already exists.¹⁷ When prosecutors are cross-designated, they “cross” jurisdictional boundaries and bring charges in the other jurisdiction, under the laws of that jurisdiction. An MOU between jurisdictions for police misconduct cases would specifically establish a discretionary procedure whereby a local prosecutor could request independent review from federal prosecutors following a no-charge decision. Within certain limits, the Attorney General already has authority to assign federal prosecutors to state or local prosecutors’ offices, and no additional authorization should be required from Congress so long as resources devoted to such cases are consistent with an appropriations bill passed by Congress.

Two considerations regarding the role of local prosecutors must be balanced in any MOU establishing a cooperative approach: 1) the need for independent oversight, and 2) the need for local leadership and accountability. First, accountability to the community is critically important. A local prosecutor must be responsible for a just and impartial investigation, charging, and prosecution. Though a close partner with the police, the prosecutor is independent and protects the interests of society. No one is better familiar with the local context than an elected local prosecutor. A prosecutor must be capable of acting independently to hold officers accountable who break the law. Recognizing the difficulties for a local prosecutor considering charging police, however, the presence of an independent attorney with the same power to bring charges would mitigate the potential for police to exercise undue leverage over a local prosecutor. The joint presence would also ease the inherent politicization of a decision to charge that would otherwise be made by a single elected official. Finally, by knowing that local prosecutors can

¹⁴ Kate Levine, *Who Shouldn’t Prosecute the Police*, 101 IOWA L. REV. 1447 (2015).

¹⁵ Kami Chavis Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, 62 ALA L. REV. 351 (2011).

¹⁶ American Legislative Exchange Council, *THE OVER-FEDERALIZATION OF CRIME IN AMERICA*, <https://www.alec.org/article/overfederalization-crime-america/>

¹⁷ Victoria L. Killion, *Case Note and Comment: No Points for the Assist? A Closer Look at the Role of Special Assistant United States Attorneys in the Cooperative Model of Federal Prosecution*, 82 TEMP. L. REV. 789 (2009).

request a federal review of an investigatory file, community members would gain a point of advocacy leverage if the local prosecutor declines to request such a review.

Thus, a regime of cross-designation would be comparatively easy to implement, easily tailored to local conditions, and retain opportunities for local leadership and accountability. It would also strengthen the ability of a federal attorney to serve as a backstop for justice.

At Trial: Increase Accountability to Local Communities by Giving Prosecutors and Judges a Role in Electing Bench Trials

The Constitution's Sixth Amendment guarantees criminal defendants the right to "an impartial jury of the state and district wherein the crime shall have been committed."¹⁸ In reading the Sixth Amendment, it is important to note the key phrase: "an impartial jury."¹⁹ Nonjury trials are often referred to as bench trials. Bench trials have become increasingly prevalent in the court system, primarily as a means of making the justice system quicker and cheaper by bypassing jury trials that tend to take longer and require more resources- not necessarily because bench trials offer greater access to justice than jury trials. Moreover, the Sixth Amendment does not guarantee a defendant's right to a bench trial.

In criminal cases, prosecutors and judges at the federal level have a kind of veto power over a defendant's waiver of their right to a jury trial. The Federal Rules of Criminal Procedure explain, "If the defendant is entitled to a jury trial, the trial must be by jury..."²⁰ The rule goes on to stipulate the three hurdles that must be cleared in order to allow a bench trial instead of a jury trial: "(1) the defendant waives a jury trial in writing; (2) the government [as embodied by the prosecutor] consents; and (3) the court [through the judge] approves."²¹ Thus, if the prosecutor does not consent to a bench trial or the judge does not approve a bench trial, a defendant's preference for a bench trial is not in itself sufficient to trigger a bench trial.

Federal case law confirms that defendants have no constitutional right to a bench trial, and that the prosecutor has a defining voice in whether a bench trial is allowed. In Singer vs. United States, the Supreme Court found that defendants have no constitutional right to bench trials by a judge.²² The Court reached its decision by reasoning that it is constitutionally permissible to grant a prosecutor and judge the power of consent over whether defendants can waive their right to a jury trial.²³ Thus, the Supreme Court effectively provided prosecutors and judges the right to require that a defendant face a trial by jury. Smith v. Zimmerman demonstrates that the Supreme Court's ruling in Singer applies explicitly at a state level. In Zimmerman, the Third Circuit explains that if a state trial judge denies a defendant a bench trial,

¹⁸ U.S. CONST. amend. VI

¹⁹ *Id.*

²⁰ Fed. Rule Crim. P. 23

²¹ *Id.*

²² 380 U.S. 24, 36 (1965)

²³ *Id.*

doing so “does not implicate any federal constitutional rights,” and no federal statutory right to a criminal bench trial exists.²⁴

There is pronounced agreement across federal circuit courts that no federal right to a bench trial exists.²⁵ To be fair, however, the ability of the judge or prosecutor to block a defendant’s waiver of a jury trial is not absolute across federal circuits. Twenty-four years after Singer, the First Circuit sought to define the contours of the government’s ability to require jury trials in U.S. vs. Collamore.²⁶ The First Circuit explained that a defendant can override a requirement by the government that a defendant face a jury by demonstrating that “compelling” circumstances make an impartial jury either impossible or unlikely.²⁷ Establishing such compelling circumstances, however, is quite difficult. The Fourth Circuit, for example, reasoned that even if a case involves grisly evidence of kidnapping and murder that might motivate a jury to passion and prejudice, such facts still offered no right to a nonjury trial.²⁸

Since the U.S. Constitution does not provide defendants a right to bench trial, any right to a bench trial that a defendant might seek in state court could only be based in state law. The question, then, is whether states are helping or harming the criminal justice system by providing bench trial rights.

By the 1980s, legal scholars began noting that defendants perceived bench trials to be more lenient in the sentencing phase than jury trials; writers also noted that any judicial preference for bench trials is often tied as much to expedience as to justice:²⁹

Defendants could, for example, simply waive the right [to jury trial] on their own initiative based on a perception that defendants usually receive a more lenient sentence after a bench trial conviction than after a jury trial conviction. (This perception has been instrumental in helping jurisdictions that rely on bench trials to attain their efficiency goals.)³⁰

²⁴ 768 F.2d 69, 71 (3d Cir. 1985)

²⁵ For instance, in U.S. v. Johnson, the Fifth Circuit reasoned both that there is no right to a bench trial and that a presiding judge must consent before a jury trial can be bypassed in favor of a bench trial. In DeLisle v. Rivers, the Sixth Circuit decided en banc that no right to a bench trial exists, even if it is the prosecutor rather than the defendant who objects to a trial by jury. In U.S. v. Jackson, the Eighth Circuit reinforces that no right to a bench trial exists, that government consent is required to allow for a bench trial, and that its ruling includes *pro se* defendants. The Seventh Circuit’s opinion in Williams v. De Robertis and the Ninth Circuit’s opinion in U.S. v. U.S. Dist. Ct. both provide explicit recognition that there is no federal right to a bench trial, and that the prosecutor and the trial judge hold veto power over whether to allow a bench trial.

²⁶ 868 F.2d 24, 28 (1st Cir. 1989)

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Constitutional Alternatives to Plea Bargaining: A New Waive*, 132 U. PA. L. REV. 327, 346 (1984).

³⁰ *Id.*

Empirical evidence seems to comport with common wisdom that judges are slightly more likely overall to convict than juries.³¹ Regardless of how individual defendants fare under a bench or jury trial, arguments about efficiency do not resolve the question whether a bench trial is more effective at delivering justice or maintaining public trust in the justice system.

The jury trial as an institution reflects our democratic values of representation and deliberative decision-making. Further, in the realm of racial bias, there is indication that a jury trial is preferable to a bench trial. There can be no question that the criminal justice system as a whole reflects systemic racial bias. For instance, for “drug-related offenses, black defendants are 13.4 times more likely to be arrested, and 11.8 times more likely to be imprisoned than white defendants.”³² Further, “in a study of bail-setting in Connecticut, [researchers] found that judges set bail at amounts that were twenty-five percent higher for black defendants than for similarly situated white defendants.”³³ Research also shows that “federal judges imposed sentences on black Americans that were twelve percent longer than those imposed on comparable white defendants.”³⁴ Sadly, the paradigm of racial disparity holds even when penalties are at their most severe. “[R]esearch on capital punishment shows that... ‘black defendants are more likely than white defendants’ to receive the death penalty.”³⁵

Implicit bias for characteristics such as race or gender is generally understood to be a pervasive phenomenon in society, though levels of bias vary at an individual level.³⁶ In 2008, researchers explored whether judges hold the same implicit racial biases as previous studies found to be present in the general population, and if so, whether “these biases account for racially disparate outcomes in the criminal justice system?”³⁷ The researchers found that, “(1) Judges hold implicit racial biases. (2) These biases can influence their judgment. (3) Judges can, at least in some instances, compensate for their implicit biases.”³⁸ The researchers arrived at these conclusions by testing a large sample of trial judges from across the country for implicit and explicit biases. Researchers presented the judges with hypothetical cases, and tested their decision-making on the basis of explicit and implicit manipulation of racial cues within the cases.³⁹

³¹ Research also found an agreement rate between judges and juries of approximately 75%. Brian H. Bornstein, *Judges vs. Juries*, COURT REVIEW, 2006, <http://aja.ncsc.dni.us/courtrv/cr43-2/CR43-2Bornstein.pdf>.

³² Shima Baradaran, *Race, Prediction, and Discretion*, 81 GEO. WASH. L. REV. 157 (2013).

³³ Jeffrey J. Rachlinski, Sheri Johnson, Andrew J. Wistrich, and Cris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1196 (2009) (internal quotation marks omitted).

³⁴ *Id.* (internal quotation marks omitted).

³⁵ *Id.* (internal quotation marks omitted).

³⁶ National Center for State Courts, *IMPLICIT BIAS: A PRIMER FOR COURTS 3* (2009), http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/unit_3_kang.auth_checkdam.pdf

³⁷ Rachlinski, Johnson, Wistrich, and Guthrie, *supra* note 38.

³⁸ *Id.* at 1197.

³⁹ This study appears to be the only study existing that tested actual trial judges for racial bias. See Jerry Kang, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1146 (2012). There are other anecdotal accounts including that of Judge Mark Bennet who wrote about taking the Harvard Project Implicit Race IAT. See Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL’Y REV., 149, 150 (2010).

The research reached clear conclusions when implicit racial biases were tested. “Implicit associations influenced judges- both black judges and white judges- when we manipulated the race of the defendant by subliminal methods.”⁴⁰ The researchers found that “The story for the explicit manipulation of race is more complicated, however.”⁴¹

The white judges, unlike the white adults in [another study focusing on biases in the general public], treated African American and Caucasian defendants comparably. But the proper interpretation of this finding is unclear. We observed a trend among the white judges in that the higher their white preference [in pre-simulation testing], the more *favorably* they treated the African American defendant...⁴²

The researchers reasoned that several factors led to this result. “These judges were, we believe, highly motivated to avoid making biased judgments, at least in our study.”⁴³ This desire to avoid biased actions leading the judges to overcompensate by offering favorable treatment to the black defendant was likely based, at least in part, on the judges reporting “that they suspected racial bias was being studied [during the explicit bias testing].”⁴⁴ Thus, judges exhibit biased behavior when triggered by implicit cues, but are capable of compensating for their biases when triggered by explicit cues, at least when trying to avoid the appearance of bias. The problem is that this desire to avoid an appearance of bias leads to partiality again. Either result presents concerns.

Solution: Give Prosecutors and Judges a Role in Electing Bench Trials

In considering what makes for a just court verdict that maintains public trust in the justice system, it is again worth referencing case studies on bias in the court system, and how such bias can be offset. Researchers have found that improving the diversity of appellate court panels impacts the outcome of those panels’ decisions. “One study found that ‘adding a female judge to the panel more than doubled the probability that a male judge ruled for the plaintiff in sexual harassment cases...and nearly tripled this probability in sex discrimination cases.’”⁴⁵ The authors simultaneously suggest making multi-judge trial courts the norm for this reason, while acknowledging that the expense of having multi-judge trial courts is likely prohibitive in itself.⁴⁶

Assuming that multi-judge trial courts are cost prohibitive, a diverse jury, because it will contain a diverse pool of deliberators, may be the best way to control for bias in the courtroom. The researchers who tested for racial bias among trial judges offer the same suggestion: “Perhaps the only entity in the system that might avoid the influence of the bigot in the brain is a diversely composed jury.”⁴⁷ Thus, we have come full circle. Cross sectionalism is a bedrock principle of

⁴⁰ *Id.* at 1223.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 1223.

⁴⁴ *Id.* at 1223.

⁴⁵ *Id.* at 1231.

⁴⁶ *Id.*

our justice system, and the system's premise that juries deliver a higher quality of justice.⁴⁸ Given the potential benefit of limiting any impact from implicit bias, it is worth considering giving the judge and prosecutor a role in electing a bench trial as is done in the federal court system.

The available research comparing judges and juries' decision making generally compares individual judges with individual jurors, not deliberating juries.⁴⁹ However, when juries deliberate, there is evidence that deliberation can result in: "attenuation of judgment biases in some instances, improve[d] memory for trial evidence, increase[d] complex reasoning about the evidence and arguments presented, and reduce[d] variability in decisions."⁵⁰ Moreover, the democratic nature of a diverse jury is reflected in the perception of fairness in a trial outcome when a jury is diversely composed.⁵¹

A further consideration is the extent to which trial by jury, rather than a bench trial, is as much about an affected community as it is about the accused. Composing a diverse jury reflects the democratic value of equal representation. This is important not just in light of a defendant's right to trial by a jury of her peers, but also in light of public trust that the outcome of a criminal proceeding is fair and just. As scholars have begun to point out, "the jury trial right, particularly the criminal jury trial right, was almost entirely predicated on validating the community's right to propound moral judgment on local citizens, and little concerned with the defendant's individual rights and liberties."⁵² This historical context is especially important "since the Supreme Court has grounded much of its sentencing jurisprudence on the historical rights of the community."⁵³ As such, a clear way to "exercise the collective jury trial right today is to eliminate bench trials."⁵⁴ The extent to which bench trials undermine traditional notions of providing an aggrieved community justice in criminal matters cannot be understated:

Such concerns include the trial court's unappealable power to grant or deny bench trial requests; the fiction that a court can simultaneously inhabit the role of judge and jury; the use of bench trials as formalized plea deals where the defendant will not plead guilty but the defense counsel, prosecution, and court agree on punishment and sentence; the democratic deliberation and improved decision making that jury trials provide.... All of these concerns about bench trials, combined with the original, historical understanding of the jury trial right, give good reason to eliminate, or at least substantially reduce, the use of the procedure. Relying on

⁴⁸ Kenneth S. Klein, Theodore D. Klastorin, *Do Diverse Juries Aid or Impede Justice?*, 1999 WIS L. REV. 553, 553–556 (1999).

⁴⁹ *Id.* at 500.

⁵⁰ *Id.* at 501.

⁵¹ Ashish S. Joshi, Christina T. Kline, *Lack of Jury Diversity: A National Problem with Individual Consequences*, AMERICAN BAR ASSOCIATION, 2015, http://www.americanbar.org/groups/litigation/committees/diversity-inclusion/news_articles_2015/lack-of-jury-diversity-national-problem-individual-consequences.html

⁵² Laura I Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IN. L. REV. 397, 440 (2008).

⁵³ *Id.* at 441.

⁵⁴ *Id.*

bench trials instead of using the traditional jury trial not only completely cuts off the community's right, but also eliminates any public expressive aspect of criminal justice. The public trial aspect of the criminal jury trial right reflects that '[w]hat transpires in the court room is public property.' This public facet was 'an inescapable concomitant of trial by jury, quite unrelated to the rights of the accused.'⁵⁵

Maryland's criminal procedure could require that the prosecutor and the judge agree to a defendant's waiver of jury trial, save for in compelling circumstances, just as is already done in the federal courts and in some states. With no right to a bench trial existing under the U.S. constitution, Maryland is free to place this limit on bench trials. A judge would still play the usual role in preparing each case for trial, and a judge could still take the case from a jury if the situation warrants it. This change would not likely affect the ultimate election of jury or bench trial in lower-stakes cases, and allowing prosecutors a role in electing a bench trial would promote public trust in the fairness of the outcome of high profile cases.

The Administrative Hearing: Police Hearing Boards Should Have a Balance of Public and Officer Input

Under Maryland law, if:

"[an] investigation or interrogation of a law enforcement officer results in a recommendation of demotion, dismissal, transfer, loss of pay, reassignment, or similar action that is considered punitive, the law enforcement officer is entitled to a hearing on the issues by a hearing board before the law enforcement agency takes that action."⁵⁶

Maryland's General Assembly passed House Bill 1016 ("HB 1016") in 2016, which among other reforms, authorizes municipalities to *allow* public participation on the hearing boards described above.⁵⁷ The authorization does not *require* that municipalities allow public participation, however, and leaves local governments with broad discretion to define the strength of public participation even if it is incorporated into the boards.⁵⁸

HB 1016 reads that:

"subject to [this bill], a chief may appoint, as a nonvoting member of the hearing board, one member of the public who has received training administered by the Maryland Police Training and

⁵⁵ *Id.* at 441-442 (internal quotation marks omitted).

⁵⁶ Md. Code, § 519 (2008).

⁵⁷ *Id.*

⁵⁸ *Id.*

Standards Commission on the Law Enforcement Officers' Bill of Rights and matters relating to police procedures.”⁵⁹

This section of HB 1016 demonstrates that without codifying action on the part of a local municipality, a municipality's police “chief” is entitled to appoint only one member of the public to the hearing board. Moreover, the member of the public is not allowed to cast a vote on the board, undermining his or her opportunity to impact the board's decision. Thus, the section highlights how imperative it is that municipalities pass additional legislation at a local level, as authorized to by HB 1016, strengthening the public's role in hearing boards.

Solution: Pass Local Legislation Requiring Two Voting Members of the Public on Local Hearing Boards

HB 1016 provides clear parameters for how strong public participation in the hearing boards can be:

“If authorized by local law, a hearing board formed under paragraph (1) of this subsection may include up to two voting or nonvoting members of the public who have received training administered by the Maryland Police Training and Standards Commission on the Law Enforcement Officers' Bill of Rights and matters relating to police procedures.”⁶⁰

As such, Baltimore City's law should not only allow two members of the public to serve on the board, but those two members should be specified as voting members of the board.

Alternative Hearing Boards

The bill does leave two notable loopholes under which local municipalities can provide an appearance of increased accountability by stipulating that hearing boards include two voting members of the public, without actually offering those members a defining role. The following section creates the first loophole:

“A law enforcement agency or the agency's superior governmental authority that has recognized and certified an exclusive collective bargaining representative may negotiate with the representative an alternative method of forming a hearing board.”⁶¹

If the local municipality allows an alternative method of forming a hearing board to become part of its collective bargaining agreement, then even if it requires standard hearing boards to include two voting members of the public, an accused officer could opt out of such hearing boards in

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

favor of an alternative method for forming the board that might be guaranteed in a local collective bargaining agreement. The following passages grants them this authority:

“(ii) a law enforcement officer may elect the alternative method of forming a hearing board if:

1. the law enforcement officer works in a law enforcement agency described in subparagraph (i) of this paragraph; and
2. the law enforcement officer is included in the collective bargaining unit.”⁶²

Solution: Do Not Offer Alternative Hearing Boards at a Local Level

It is imperative that Baltimore City not only allow two voting members of the public to participate in standard hearing boards, but also to guarantee a role for the two public members by not allowing any alternative hearing methods to be created as part of a collective bargaining agreement with the police union.

Determining a Hearing Board’s Size

The other loophole that allows voting members of the public to be included on hearing boards without having a meaningful role in the boards, is if board membership is increased to an extent that two voting members have a diluted impact on board decisions. The section creating this loophole reads, “the hearing board authorized under this section shall consist of **at least three** (emphasis added) voting members....”⁶³ Thus, three voting members of the hearing board is a floor for membership, not a ceiling. This floor leaves local municipalities free to include one or two voting members of the public on hearing boards as a concession to improved accountability, while structuring the boards to include enough voting members from the police department to drastically outweigh members of the public in any vote.

Solution: Stipulate that Hearing Boards Have No More than Five (5) Voting Members

Local police hearing boards should be codified to allow no more than five voting members, meaning three sworn officers serve on the hearing board. For Baltimore City, one of the three sworn officers should be a member of Chief Melvin Russell’s Community Collaboration Division. This officer’s close relationship with Baltimore communities would create a swing vote that balances the input of two members of the public and two sworn officers from outside the Community Collaboration Division.

⁶² *Id.* at 12.

⁶³ *Id.* at 11.

Why Civilian Input Matters

In explaining how local municipalities should codify these civilian oversight provisions, it is just as important to discuss why civilian oversight is so important. The final report issued by the President's Task Force on 21st Century Policing explains that civilian oversight is important not just because it can improve a police department's practices, but because it can "strengthen trust with the community."⁶⁴ When it comes to improving the police department, however, civilian oversight is not intended to simply be "an advocate for the community or for the police."⁶⁵ Rather, it is an opportunity to have an impartial body "bring stakeholders together to work collaboratively and proactively to help make policing more effective and responsive to the community."⁶⁶ Without such oversight it becomes difficult to maintain the public's trust.⁶⁷ It is increasingly clear that public trust in police departments and effective policing go hand in hand, and that one cannot exist for long without the other. Civilian oversight is uniquely situated to deliver both goals simultaneously.

The Los Angeles Police Department has taken great strides to engage the public in the task of creating safer communities, and does so by utilizing its civilian governance system as a means of formalized engagement.⁶⁸ Its Board of Police Commissioners is a five-person body comprised entirely of citizens appointed by the city's mayor.⁶⁹ Beyond demonstrating how important it is that boards for civilian oversight have a critical mass of civilians, Los Angeles' board shows that civilian oversight is an opportunity to engage in true community policing that offers residents an opportunity to "respond to police in more constructive and proactive ways."⁷⁰

There are a tremendous number of opportunities for civilian involvement with the police department to have positive impacts, but many are outside the more focused scope of codifying HB 1016's potential reforms at a local level. It must be emphasized, however, that codifying HB 1016's reforms can begin delivering the positive impacts gestured at above, while serving as a platform for expanded community involvement in the future. As such, it is imperative that Baltimore codify the strongest iterations of HB 1016's reforms, so that our residents can begin benefiting from its impacts now.

⁶⁴ U.S. DEP'T OF JUSTICE, REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 26 (May 2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 44.

⁶⁹ *Id.*

⁷⁰ *Id.*