

Conflict of Interest in Prosecuting Police Officers: Examining the Incentives Facing District Attorneys

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High-profile cases like those of Michael Brown in Ferguson, Missouri, and Breonna Taylor in Louisville, Kentucky, have garnered attention from the media and the academy alike about decisions by grand juries not to charge police officers with homicide.

While much of this focus centers on alleged racial bias on the part of police officers and the criminal justice system writ large, it's also important to examine the perverse incentives faced by local district attorneys tasked with prosecuting police.

District attorneys rely on close professional relationships with police officers and law enforcement departments to prosecute criminal cases. Professional incentives require district attorneys to win cases. They can't do that without cooperation from the police who investigate and bring criminal complaints. Moreover, police unions have disproportionate influence on district attorney elections.

Applying a law & economics lens to criminal justice offers a way forward that could better align incentives to prosecute police officers who break the law.

Aligning incentives in the legal profession

The legal profession is regulated largely by the rules of professional conduct developed by bar associations in each jurisdiction. The stated goal of these rules is to promote legal ethics among attorneys admitted to the bar. But these rules can also be understood economically. The organized bar can use legal ethics rules to increase its members' profits in two main ways: by restricting entry to the practice of law and by adopting efficient rules that reduce the costs of contracting between lawyers and clients.

The bar's rules can restrict competition in the market by requiring prospective lawyers to have graduated from an accredited law school and passed a bar exam, or to have substantial experience in another jurisdiction before they are allowed to waive in. The ability to practice law in a given jurisdiction without having taken the necessary steps to become a member of the bar is limited to *pro hac vice* rules that require working with a member of the bar. The result of the limitations allows lawyers to raise prices higher than they would without the restrictions on competition.

But the rules also can promote economically efficient outcomes. For instance, conflict-of-

interest rules prevent lawyers from representing clients who have interests directly adverse to other clients, or where there would be significant risk that representation would be materially limited by responsibilities to other clients or former clients. (See, for example, Rule 1.7 of the [American Bar Association's Model Rules of Professional Conduct](#).) Many of these conflicts are waivable, but [some are not](#).

It is worth considering why these rules make sense economically. In a world devoid of transaction costs and strategic behavior, lawyers and clients could negotiate complete contracts for each representation, which would include compensation for those who would possibly be hurt by conflicts. But that's not the real world. Conflict-of-interest rules are designed to overcome the principal-agent problems that arise from representing clients with adverse interests, including the potential use of information from representations to the detriment of those clients. Thus, [conflict-of-interest rules supply efficient defaults](#) that generally limit potentially harmful representation.

Incentives in prosecuting police

Imagine the following scenario: a local district attorney works with a municipal police officer on a number of cases over the years, relying upon that officer's evidence and testimony to prosecute criminal defendants. A video of the officer is later posted on YouTube showing him beating a non-resisting handcuffed citizen with his baton. The district attorney must now make the decision of whether to charge the officer with potential crimes.

The bar's usual conflict-of-interest rules, as described above, [do not apply the same way to prosecutors](#). The prosecutor's client is presumed to be the public, rather than the police officers with whom they work on a daily basis. Thus, the district attorney is not deemed to face an ethical problem in prosecuting the officer, despite their long-standing professional institutional relationship. The rules of professional conduct don't require a district attorney to recuse herself from the case.

Following the incentives, it is no surprise that prosecutors often give benefit of the doubt to police officers in allegations of criminal conduct. One of a prosecutor's primary jobs is to ensure judges and juries believe the testimony of police officers. Future relationships with officers may be impaired by police prosecutions that are perceived by law enforcement to be unfair.

Elections are ineffective checks on prosecutorial power

While in theory (and [sometimes in fact](#)), public elections could serve as a check on district attorneys who fail to live up to their duty to prosecute unlawful behavior by police officers, there are reasons to be skeptical that they successfully do so consistently. Public choice economics helps explain why.

The public as a whole is dispersed and unorganized, especially when it comes to its interest as potential victims of the criminal justice system. On the other hand, police unions and

associations are organized to forward the interest of law enforcement officers. Indeed, among the benefits police unions commonly provide to members are lawyers to defend against civil rights lawsuits and criminal prosecutions. Police unions and associations also can exert significant influence on who is chosen to be district attorney in the first place. Such organized interests often are among the leaders in [spending](#) and [campaigning](#) for or against district attorney candidates. By contrast, the voting public tends to have far less information about and interest in those elections.

Getting the incentives right

In pursuing institutional reform, it is important both to get the incentives right and to remain cognizant of trade-offs. The goal should be to align incentives so that there is no disincentive for prosecuting police officers criminally if the facts call for it. Some popular proposed reforms, however, could be both legally deficient or suffer from similar incentive problems.

For instance, a number of California district attorneys and candidates have [called for an amendment](#) to the state's rules of professional conduct to define it as a conflict of interest for a district attorney candidate to receive campaign contributions from a police union. While this calls out the same problem identified here, the proposal would be subject to challenge on [First Amendment grounds](#) for targeting political speech, and on equal protection grounds for preferencing other groups over police unions.

Other possibilities, such as escalating police prosecutions to the state attorney general's office, face the same public choice and conflict-of-interest problems identified for local district attorneys.

One way to avoid the conflict of interest inherent in police prosecutions might be to [appoint special prosecutors when there are police defendants](#). Bar associations could [create a panel of lawyers for appointment](#) in such cases, much like some jurisdictions have for indigent defendants. The special prosecutor would need investigatory power and the ability to carry out the case on behalf of the public.

Conclusion

The incentives faced by district attorneys contribute to the problem of insufficient prosecution of police officers who engage in criminal behavior. Prosecutors who generally rely upon close professional relationships with police officers have a conflict of interest when it comes to cases where police officers are the defendants. A new path is needed to get the incentives right.

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