

# PROSECUTION OR PERSECUTION?

STOP  
POLICE  
MURDERS

STOP  
POLICE  
BRUTALITY

Chief Joel F. Shults, Ed.D

AND UNIVERSITY SCHOOL OF LAW

The National Police Association's free Law Enforcement education series is designed for home school, classroom, or independent learning. As part of our nonprofit educational mission, it prepares you for careers in public safety. This series is authored by [Chief Joel F. Shults, Ed.D.](#)

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## LAPD Officer Sued For, What Else, Doing Her Job

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When watching an officer involved shooting (OIS) video, many people wince and race to say the officer's actions were wrong or what they would have done "better." Those trained to do the job, cops, say, "that's exactly what I would have done." Now, an LAPD officer is being sued for doing the right thing.

This happens when radicals try to fix something that isn't broken—they break it. While organizations should always strive to improve, American law enforcement agencies as a whole are not broken. In fact, the United States has some of the best law enforcement agencies and law enforcers on the planet—when their leaders allow them to be. Law enforcement does not need "reform." It's the anti-cop politicians, political groups, and the media who need to reform—they are what's broken in our society.

However, they've adopted and perpetuated the mythical narrative that cops are wantonly abusing and killing minorities. Even some good folks within law enforcement and some police allies have conceded a need for "police reform." There is no empirical evidence police reform is needed—none. There are only dubious anecdotes and outright lies about the police. Just because you don't like the way cops do their jobs does not make it wrong.

But, because of this pervasive myth, you get situations like this about LAPD Police Officer Toni McBride. Officer McBride is also a model who appears in gun

magazines and is a [skilled competitive shooter](#), something I'm sure her fellow cops appreciate. Having watched the video evidence available, Officer McBride is exceptionally professional, competent, and calm under extraordinary pressure.

On April 22, 2020, at about 5:38 p.m., Officer McBride was working in a two-person marked patrol unit in LAPD's Newton Division in downtown Los Angeles. She was the passenger officer and appeared to be eating her dinner on the run. She and her partner were en route to an unrelated, dispatched call when they on-viewed a multiple vehicle collision scene.

People calling 911 informed LAPD dispatchers that a 5-car collision had occurred. One caller reported, "The man in the car that hit everyone is... uh, the man, he's killing himself in his car." The dispatcher asks the caller to repeat. The caller says, "The man is trying to kill himself... stabbing himself." Then the caller says, "The police are here."

The dispatcher broadcasts there is a man armed with a knife at the scene. Witnesses at the scene also tell Officer McBride and her partner the suspect is armed with a knife. Officer McBrides' [officer body cam video](#), and two bystanders' videos, recorded the confrontation with the 38-year-old suspect, Daniel Hernandez.

Viewers can see officers arriving at a chaotic scene, speaking with witnesses, and ushering people to safety. One of the crashed vehicles is a large pickup truck witnesses described the suspect was driving. A witness

at the scene tells officers the suspect wants to hurt himself.

Officer McBride asks why the suspect wants to hurt himself. The witness answers, "We don't know. He's the one who caused the accident." Apparently, the suspect had intentionally struck at least four vehicles, which would be an alleged vehicular assault, a felony.

Officer McBride requests back up, asks her partner if he has cover, and tells several bystanders to clear the area. In fact, in this apparently Hispanic neighborhood, she also asks bystanders speaking in Spanish to move to safety.

The suspect, armed with a knife, steps into view from the far side of his truck, facing Officer McBride. She yells at the suspect to "stay right there." Instead, Hernandez strides toward her, the clutching the weapon. Officer McBride shouts four times for the suspect to drop the knife. The suspect continues to advance on the officer in a menacing fashion with his arms flared out from his sides.

Officer McBride fires at him twice. The suspect falls but gets back up and lunges forward. She shoots two more times, and he falls again. While on the pavement he rolls as if trying to get up and still refuses to drop the knife. She fires two final shots. Each of the two-round volleys were in response to the suspect's continued aggression. He never let go of the knife.

With the suspect down, not moving but still gripping the knife, the officers move in slowly. They remove the

knife, secure the suspect, and call for paramedics. Officer McBride also notifies dispatch of a safe approach route for responding officers and gets with her partner to clear the suspect's vehicle. Earlier, she expressed concern someone might be in the vehicle injured.

From beginning to end, Officer McBride exhibited she is a proficient and conscientious police officer. But that's not enough these days. While it's difficult to condemn people who criticize police after a loved-one has been killed in an OIS, wrong is wrong, and suing a police officer who hasn't done anything wrong is wrong.

Ironically, the family, through their lawyer, Arnaldo Casillas, is trying to use Officer McBride's exceptional shooting skills, an important police skill, against her. According to Dan Zimmerman, [writing](#) in Thetruthaboutguns.com reported "they contend that she responded like the competitive shooter seen on video, racing to get off shots." Casillas added, "She loves to shoot all these things as fast as she can." That's the idea, counselor; hesitation gets cops killed.

Other comments suggested Officer McBride should have gotten behind her patrol car "to buy time." Some say she should have done more to deescalate the situation. Others say the suspect wasn't close enough when she shot him. So, she's supposed to bet her life that the suspect was suddenly going to change his mind and surrender?

With an edged weapon (as opposed to a firearm) moving to cover provides no advantage. Telling the suspect to



“stay right there...” and telling him to drop the knife four times while he continues to advance on her with the weapon is what de-escalation looks like.

Anyone watching that video could see that man was not going to stop unless someone stopped him. Think about the initial reports: Witnesses said the suspect intentionally crashed into four cars and said he was in his truck “trying to kill himself... stabbing himself.” The suspect’s walk toward Officer McBride had possible suicide-by-cop written all over it.

Regarding distance, the suspect was closing fast and could have picked up speed at any moment. Officers keep many possibilities in their mental Rolodexes that wouldn’t occur to most people. What if her first shots missed? You might say not her because she’s such a good shot. True, but it’s different when the target wants to kill you. Remember, even after her first shots hit him, he kept charging, and even tried to get up again after her second shots.

What if her gun had a malfunction? It would take time for her to clear it before she could fire again. What if she decided to relinquish her stationary position and tripped while moving behind the car? These and other risks lurk in the back of officers’ minds during high stress incidents.

In a society where even highly placed politicians and city councils call for defunding, reallocating funds, or outright abolishing the police, legal attacks on officers who are doing their jobs correctly are devastating for public safety in American communities.

Very few of the most qualified candidates are going to choose to be police officers. They watch the news and see an officer in Atlanta sitting in jail awaiting his murder trial after doing as he was trained. And they watch the news and see an LAPD officer being sued after doing as she was trained.

Why would anyone want to become a police officer in many jurisdictions, especially in some of America's largest cities? Governments hire police officers while at the same time many despise cops. Would you decide to work at a place where you knew the people who hired you hate you?

## The Quest for Perfection in Policing

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To err is human says the poet, but nothing less than perfection is allowed for today's police officers.

It seems that the notions of probable cause and reasonable suspicion have been replaced by standards of certainty previously expected only of juries. With the spread of the elimination of qualified immunity, police officers are increasingly expected to enter violent, chaotic circumstances and make the perfect decision every time.

There is, of course, a high expectation because stakes are often high. In war, there is tolerance for collateral damage in combat operations. In violent encounters involving our police officers, there is little allowance for error. The courts have consistently abided by Constitutional guidelines of reasonableness. This standard doesn't require perfection. It requires that a reasonable person, with the same knowledge as the person being judged, would find the action as within the range of normal.

Proof beyond a reasonable doubt (not beyond a shadow of a doubt), is required for conviction of a crime. Probable cause basically means that a thing is more likely than not and is necessary for an arrest or the issuance of a search warrant. Reasonable suspicion means that behavior or circumstances would arouse an informed observer's belief that something deserves further investigation because of its association with illicit behavior.

All this means that police officers must always act reasonably, but that includes the possibility of being wrong. The reality of human limitation will result in unfortunate outcomes. Heart surgery has a 6% risk of death. The death rate for vehicle crashes is 11 fatalities for every 100,000 persons, roughly .001 percent. The Center for Disease Control reports that Over 76 million doses of COVID-19 vaccines were administered in the United States from December 14, 2020, through March 1, 2021. During this time they received 1,381 reports of death (0.0018%) among people who received a COVID-19 vaccine. An interesting disclaimer states that no direct cause of death should be implied. There is a chance that a death will occur while in flight at a rate of 0.005 per 100,000 flight hours. Although contested, the figure of 400,000 has been used in calculating deaths related to medical errors.

Let's cipher from estimates from police-involved deaths. At approximately 1000 deaths per year among 750000 law enforcement officers and assuming an average of one contact per day by 500,000 of those officers, we can estimate that citizens are contacted by police at a rate of over 17 million times per year. This results in a very liberal estimate of the chance of being killed by a police officer in any given year is .001 percent. This even includes fighting with an officer, confronting an officer with a weapon, and being arrested for a felony since studies show that officers use great restraint in utilizing deadly force.

Back in the 70s one of the trendy management programs to improve industrial efficiency was called

Zero Defects. Anyone who has worked for the government or corporate America has survived some of these kinds of motivational programs. Lapel pins, posters, slogans, t-shirts, and educational videos encourage teamwork, pride, and productivity. Zero Defects was like that. The idea of making no mistakes was an idealistic goal with the hope that workers would improve quality and profits. In industry, we've seen quality improvement plans of one stripe or another. Some are very complex, and some are of the bumper sticker variety. While many management programs have been borrowed from industry and applied to law enforcement, the pursuit of perfection is not an assembly line process.

There are many protections for citizens to encourage proficiency and accuracy in policing. Police officers do not want to make contacts, searches, and arrests that will not be successfully prosecuted. Therefore, in addition to the multitude of laws, department regulations, and court decisions that guide their behavior, the threat of losing a case or having a case refused by the prosecutor is a powerful incentive for quality work. This is on top of the threats of lawsuit and criminal prosecution for misconduct. One bad case can effectively ruin a career if an officer's credibility means no case they are involved in will be prosecuted.

Can policing achieve zero defect performance? It is a great goal, but simply not possible given the inherent unpredictability of the job.

## It Is Too Easy For a Prosecutor To End a Police Career

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We can add to the list of ways a police officer can be fired when we include the results of a Supreme Court decision in 1963. The decision in *Brady v. Maryland* (373 U.S. 83) rightly ruled that prosecutors must disclose exculpatory evidence that the government has in its possession to the defense as part of its case. Exculpatory evidence is anything that might provide evidence that the accused could use to achieve a verdict of not guilty.

For example, if law enforcement is aware of a possible suspect, even if that suspect is never interviewed or contacted, but finds enough evidence that the defendant was the guilty party, the name of that suspect must be given to the defense. The defense may then pounce on the possibility that their defendant may not be the guilty party since another suspect was not properly eliminated by a thorough investigation.

Evidence that may tend to reduce the credibility of a witness's testimony must also be released. A statement made during an investigation that is contrary to the testimony given at trial or was changed in subsequent interviews may help the defense challenge that testimony.

Since challenges to witness credibility is important to both sides in a trial, the attorneys can seek to reveal evidence of past unreliability or falsehoods. This includes police officers. Prosecutors who are aware of

credibility problems with officers who may testify in a case must, therefore, disclose that to the defense. To facilitate this, prosecutors are required to maintain a list of officers who have been accused of misconduct, especially in cases where the officer is accused of making false statements or other dishonest acts.

The problem for many officers is that they have no way to appeal being placed on a Brady list. An officer who is not able to testify in court cases loses their value and can be fired. A Denver Post investigation requested the Brady list of each of the state's District Attorneys but some DAs did not provide their list because they believe such lists are not a matter of public record. The reporters also found that there is no uniform policy across DA offices in the state about what qualifies for an entry on their Brady list. Some DAs don't even know why an officer is on the list.

It may come down to a judge's ruling in a particular case whether an officer's reason for being on the list is relevant to their testimony in a given case. While the rule makes sense to bring an investigation's shortcoming or misconduct to light for a fair trial, its arbitrary application from agency to agency can spell the end of a police officer's career with little recourse.

In 2020, Lansing, Michigan Chief of Police Daryl Green discovered he was on a Brady list based on a 20-year-old incident. He had assisted medical personnel with a combative patient and didn't believe that the event merited a use of force report. The patient complained. Green was placed on a Brady list with no notice, no due

process, and no opportunity to rebut the claim. He was able to eventually get his name removed from the list.

Officer Travis Hamilton was asked by a reporter covering an impending court case about Hamilton's inclusion on a Brady list. This was the first time Hamilton was aware that a list even existed. When he filed a public records disclosure request he found that he was on a list with ten other officers, some of whom were also unaware of the list. There was no notation as to the reason for his inclusion on the list. Seven months after his initial records request he submitted an updated request and was told that there was no such list.

After resigning over the resulting news article and controversy, Hamilton began a three-year quest to clarify officers' rights regarding this career-killing procedure. As a result, the Iowa legislature now requires policies listing the criteria for placing a name on a Brady list, written notice to the officer with access to supporting records justifying inclusion on the list, a written notice of a prosecutor's decision with the right to appeal, along with some other due process considerations.

More work needs to be done to make these procedures fair to defendants, prosecutors, and police officers and to define the level of offense and levels of proof offered before putting an officer's career and reputation at risk unjustly.



## Another Murder Charge for An Officer Struggling for His Life

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To speculate on the outcome of a criminal case, much less presume to know what facts the jury might see in a given case, is something an observer must approach with an open mind. Those with access to the television cameras seem to have no such hesitation.

Grand Rapids, Michigan officer Christopher Schurr has been charged with 2nd-degree murder after an April 4th struggle with a suspect, Patrick Lyoya, whom Schurr eventually shot. It is not hard for those in law enforcement who have been in life and death struggles to understand how a situation can rise to the level that an officer feels it necessary to employ lethal force.

It is also not hard to recognize the political activism at work in this case. A nationally known civil rights attorney urges everyone to “stay angry”. The local NAACP leader said that he hopes the charges will send a message that an officer’s job is to protect and serve, with the implication that this never includes using force on someone. Public comments show that those who believe the officer was in the wrong can’t wait for the conviction. They’re not saying they can’t wait until all the facts are presented – just a conviction.

A news reporter refers to Lyoya as a “victim” and another said that he “was killed over a traffic stop”. The department’s chief of police wants Schurr fired or at least have no pay while suspended. Meanwhile, local police associations are stating that it was a “ridiculous

miscarriage of justice and cited Schurr's exemplary record and community service, including a recent mission trip to Kenya.

The essentials of the event are partly recorded on Schurr's body worn camera and a civilian cell phone recording. Schurr made a traffic stop on the car that Lyoya was operating. During Schurr's dialogue with the car's occupants, he mentions that the license plates do not match the vehicle. Lyoya gets out of the car against Schurr's instructions. They struggle. Schurr repeats the command to "stop resisting" multiple times during a two-minute struggle. Schurr's Taser was heard triggered at least twice and it was a struggle over the Taser that resulted in the shooting.

During the struggle, Schurr unholsters his duty weapon and fires one round that enters Lyoya at the back of the head. There are the talking points for the cry to imprison Schurr for life - it was only a traffic stop, the officer failed to de-escalate, the driver was a different skin color than the officer, deadly force was not necessary, it's fundamentally unfair to shoot a person from behind.

Here are the talking points from a police perspective, at least for this writer. Mismatched plates can be anything from a mistake on the owner's part, to borrowed plates from a friend's car to stolen plates, to a stolen car. An officer investigating the mismatch cannot assume that is an error or an opportunity to collect a fine from a citizen. The assumption that the car might be stolen comes with a host of possibilities. The car may have been violently taken. The car may be part of an organized crime ring. The car may be used in drug

trafficking in order to avoid civil forfeiture of the owner's vehicle. The driver may resist violently if they are at risk of a felony charge, or a parole revocation for the offense.

In other words, this was an investigative stop that was clearly lawful, reasonable, and fraught with dangerous possibilities.

Compliance with an officer, including remaining in the vehicle or exiting the vehicle, is a legal requirement. The risk of the officer having to use coercion falls on the vehicle occupants, who can ensure their own safety by working with the officer within the law. Non-compliance is not a mere annoyance of a challenge to an officer's authority and ego. Non-compliance is a frequent precursor to fight or flight. The fact that there was another occupant in the car means that the officer faces potential threats from either, a conclusion that becomes more reasonable with each passing moment.

This event occurred during cold weather, meaning that heavy clothing capable of concealing weapons was worn by the driver. Control of the officer's Taser was a critical component of this event. Had the device become controlled by Schurr's adversary who chose to fight the officer, the tragic results could have been magnified. Although the Taser is not a deadly weapon, its designed capacity for immobilizing a person presents a significant threat to an officer if used against them. If the officer is incapacitated, even briefly, from any injury including from an electronic weapon, the opportunity for an adversary to seize the officer's other weapons or even their patrol car. This creates an incalculable hazard to

the public at large, and an opportunity for the officer to be murdered.

If the threat of such incapacitation was imminent, an officer would certainly need to ensure that it didn't happen. When an officer operates to preserve their own life and safety it is not an act of selfishness or a call to allow themselves to be sacrificed. The altruism of survival is that an officer must stay engaged and able.

Fatigue is also an incapacitating threat. Research and the experience of athletes and combatants show that more than a minute of active fighting can lead to depletion of the body's adrenaline and muscle control. If an officer is nearing exhaustion while fighting for their life while wearing over 30 pounds of gear, they must end the fight and win the fight.

The fact that a suspect is shot in the head or back does not automatically create the assumption that the shooting was unlawful or even unfair. Active resisters twist and turn, and a deadly threat can exist regardless of the resister's posture.

I want justice done as well as anyone does. But for justice to happen, courts and juries must be educated on the scientific realities of deadly encounters. If the evidence exists to keep Schurr a free man he deserves to have it heard beyond the rage of politicians and activists.

## Fighting Rogue Prosecutors

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Most District Attorneys and Prosecutors are dedicated, overworked, and decent public servants. I would not want to paint the profession with the same broad brush that anti-law enforcement forces do with police officers. Inept or corrupt DAs are accountable at the ballot box, but for some, the election cycle doesn't come fast enough to get them out of office.

The San Luis Valley (SLV) region of Colorado is a collection of sparsely populated counties that are plagued by plenty of criminal activity. Their District Attorney is Alonzo Payne, who is listed on Bernie Sanders' website (first clue) as: "a criminal justice reformer, advocating for measures to reduce incarceration and stop the criminalization of poverty in Southern Colorado. He has advocated for economic justice measures, including raising the minimum wage and Medicare for All, and is committed to representing the proud people of San Luis Valley. Payne's effort to keep criminals out of trouble has left a bitter taste in the mouths of voters who are launching a recall effort ahead of the next election.

The unique aspect of this recall effort is that it does not come from just a handful of disenchanting citizens. In an unusual step, the city council of the SLV largest town, Alamosa (population 9500), has joined the public cry to get Payne out of office. Payne's campaign website proclaims "I will move forward with real criminal justice reform and improve the lives of all residents of the San

Luis Valley” So far, the main beneficiaries of his tenure are criminals.

At the council meeting featuring presentations by City Manager Heather Brooks and Alamosa Chief of Police Ken Anderson, Brooks stated that “we have information coming to us almost daily” about failures of the DAs office. Conversations to resolve and understand Payne’s conduct have been attempted but, according to Brooks, “We’ve made every effort to meet with the District Attorney to share these concerns but those efforts have been fruitless”. Other county officials in the judicial district within the jurisdiction of Payne’s office attended, including Saguache County Sheriff Dan Warwick and Costilla County Sheriff Danny Sanchez.

Many citizens lined up to speak on the matter. Anderson spoke in frustration, according to the local newspaper’s record of the hearing, “Over the past nine months, the Alamosa Police Department (APD) has conducted more than 40 drug operations. In one operation, APD confiscated half a pound of heroine, thousands of dollars in cash and weapons capable of penetrating a bulletproof vest or the side of a vehicle. Even with strong evidence, none of the 40 cases have gone to trial. Instead, they have been pled down to less serious charges with minimal jail time. In some cases, charges have been dismissed”. Some prosecution was submitted to federal courts where tough sentences were handed down, so the investigations produced actionable evidence.

The notably stoic Anderson fought tears as he recounted the case of a 13 year old boy who was beaten

by five other students. The boy committed suicide as the case languished on Payne's desk. "Our officers have literally had arrestees laugh as they're handcuffed, and I've had to watch this as the chief. Officers' lives are at risk every time they get up and put on a uniform. Our neighborhoods and residents are at risk when criminals are allowed to avoid jail time and walk around our community. I'm the one they call when they're scared and I'm running out of things to say.

The city council is not the only entity disgusted with Payne's performance. Even the Democrat Attorney General Phil Weiser is investigating Payne for violating the Victim's Rights Act after a state investigation found numerous instances of mistreatment of crime victims. One county judge cited Payne for contempt in lying about the willingness of a domestic violence victim to testify.

The list of inaction on cases and "sweetheart" plea deals continues. Alamosa Mayor Ty Coleman stated "Reduced charges. Complaints from victims. Criminals laugh while being arrested. They laugh! This must stop. It has to." DA Payne responded in writing to the issues presented saying "I appreciate the inquiry but will not comment on a political issue with other public entities."

One of those political issues is a set of charges alleging that an attorney and former employee with embezzlement, a charge that has all the appearances of retribution rather than a valid pursuit of justice.

The SLV community is a great example of citizens rising up against prosecutors using their discretion to pursue an agenda contrary to the safety of the community.



## Cops Blamed in Riots with Indictments out of Austin

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Austin, Texas Police Chief Joseph Chacon stepped up to the microphone to slam the public announcement of his officers' indictments for their actions during riot conditions. "I am disappointed to hear the D.A.'s press conference statements regarding anticipated indictments related to the 2020 protests. As a department, we asked officers to work under the most chaotic of circumstances in May 2020 and to make split-second decisions to protect all participants. There were significant portions of times that the crowds were riotous and violent," he said. "I am not aware of any conduct that, given the circumstances, these officers were working under would rise to the level of a criminal violation by these officers."

As the old saying goes, a D.A. could get a grand jury to indict a ham sandwich, an indication of the sway a prosecutor has in seeking charges. This particular district attorney is notoriously in the camp of many around the country whose hope and purpose is the persecution of police officers.

Protests related to the death of George Floyd spread to over 2000 towns, some of which resulted in a record-breaking loss of up to 2 billion dollars and dozens of deaths. The extent of violence and destruction is that over 14,000 people were arrested in connection with the nearly six hundred identified riots that sometimes accompanied the many peaceful protests. Many prosecutors routinely dropped charges of those

arrested even when assault and property damage was evident. Some prosecutors announced in advance that there would be little criminal prosecution.

The Austin Police Association (APA) president Ken Casaday released a statement claiming politicization of the announcement. “The district attorney is using this case to drive voters to the polls, He is driving people to vote for a far-left radical ex-city councilman who is running for Congress. Greg Casar did more to ruin the city of Austin through spearheading the defunding of the police movement more than anyone else in the history of the city of Austin, and DA José Garza is following in his footsteps. If there are officers who have done something wrong we understand, but these officers were only doing what they were told to do with the equipment the city of Austin provided them during those days of the riots.”

Recalling the intensity and persistence of frightening disturbances across the country. Police officers, often understaffed, fatigued, without appropriate protective gear, and restricted by restraints from judges and politicians, faced immeasurable dangers. During the height of the protests, APA reported on Facebook “We are so proud of the Officers of APD! Yesterday, they took on massive crowds who were rioting and blocking Interstate 35 and other roadways. The protest began peacefully, but quickly got out of control when Antifa types started to agitate the crowd.” In May of 2020 Fox news 7 of Austin reported that “Protesters threw rocks, bottles, paint, and other dangerous items at police officers. Officers responded with pepper spray, rubber bullets, and bean bag rounds in an attempt to control

the crowds of protesters. A few fires were also set near APD headquarters. One vehicle was doused with gasoline, a dumpster for a gas station nearby was also set on fire. Restaurants and stores on Dirty Sixth Street were also damaged and vandalized.”

At the time Casady urged officers not to report for duty “unless they get the equipment needed to protect themselves and citizens during those protests. Now, they’ve taken our abilities to deal with riots and people that are creating havoc in our city. They’ve taken our CS gas away ... which hurt nobody on the interstate that day. The people left in about five seconds. It was a very effective tool.”

An August 13, 2020 headline in the Texas Tribune read “Austin City Council cuts police department budget by one-third”. A year later, a September headline on the KVEU television website read “With 60 homicides this year, Austin reaches all-time high”. Of course, police critics refuse to acknowledge a cause-effect relationship between the two headlines. But Travis County District Attorney Garza apparently thinks prosecuting police officers from the front lines of rioting by imported antagonists is good for Austin.

Elections have consequences, and public safety is among them.

## Ten Questions to Ask When a Prosecutor Charges a Police Officer

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Police in the United States do not technically charge anybody with anything. We hear about “pressing charges” and we hear officers on television dramatically say “I’m charging you with murder” but in reality, the police can only send a set of facts to somebody who can decide about charges, and that’s the prosecutor. Whether elected or appointed, prosecutors are a key link in the criminal justice process. Even traffic citations don’t become a true charging document until signed by the prosecutor. Until then it is merely a recitation of facts and an invitation for the alleged violator to come to court

It’s a fine point of justice jargon but the principle is an important one. In order to ensure due process in criminal cases, a review of arrests and investigations by an impartial judicial official is essential. The concept of due process arose early in man’s efforts to regulate society. The law of Moses, in addition to the Ten Commandments, discussed the amount of evidence necessary to impose punishment, the necessity of judges to arbitrate disputes, and the appropriate compensation to impose on wrongdoers for their victims. In more modern times, the Magna Carta of 1215 outlined protections against the arbitrary and unilateral imprisonment and punishment by those of royal influence. The royal class, claiming Divine Right, though that since God had obviously put them in charge that to defy them was akin to defying God himself. Freedom-loving folks disagreed.

Americans from early times had great suspicion of government abusing its power, especially through the use of force applied through its armed government agents. The 5th and 6th amendments to the Constitution outlined the principles of government conduct toward the accused. Among those principles was the requirement of grand juries and evidence amounting to at least probable cause.

While the initial determination of probable cause must be made by an officer who chooses to take someone into custody, the determination of the arresting officer's justification is subject to a quick review by other officials. Just another way that police officers are held accountable for the exercise of their authority.

The question then is who is reviewing the reviewer? Judges and grand juries are dependent on the information brought to them by the prosecutors. Prosecutors have their audience to perform for. Making charges against police officers is one way that activist prosecutors can appeal to a public with an appetite for suspicion of law enforcement.

For the citizen observer, the prosecution is often the only voice explaining their decision. The police must remain muted, and the emotional pleas of the family whose member was shot by police lead the news reports. There are some things to watch for as clues to a politically motivated prosecution.

1. The prosecutor is tough on cops but not tough on crime.

2. The prosecutor is in an area with significant anti-police sentiment – usually a minority of citizens but with loud voices.
  3. The media leads with emotional stories of the victim’s personal life. Cops who use deadly force against someone who was about to turn their life around, just had a birthday, or had a great smile are doomed even if the suspect has a record of violence
  4. The prosecutor files charges years after the event
  5. The prosecutor files charges after other investigations concluded the officer was justified
  6. The prosecutor talks about failure to de-escalate even when the officer gave multiple verbal commands and hesitated to use deadly force
  7. The prosecutor minimizes the circumstances, the suspect’s weapon, or appearance of a weapon
  8. The prosecutor claims that a vehicle attempting to hit an officer or escape from a violent crime was not a deadly threat
  9. The prosecutor claims that police should be held to a higher standard, which means a lower standard of proof for the officer being charged.
  10. The prosecutor makes sure to be the headline
- One must support the prosecution of truly rogue officers whose negligence causes others to suffer, but disregarding the realities of a deadly force encounter cannot spell justice for the officer, the prosecutor, or the public.

## The Camera Doesn't Lie- Or Does It?

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Most police officers had some understandable skepticism about body-worn cameras (BWC) recording all of their activity. Despite the critics, the reason was not that police officers were afraid that all of their nefarious, violent, racist, and corrupt activity would be discovered. The reasons were much more practical.

The cumbersome nature of being wired up for duty every day complicates the already tedious process of “donning and doffing” the patrol officer’s gear. In addition to the 30 pounds or so of ballistic vest, equipment belt, and other protective gear we now add batteries, cameras, microphones, and wires that must be threaded through the uniform depending on the type of camera used. Some types even get triggered to turn on when the sidearm is removed from the holster. Some are voice-activated, and some are tied to the car’s dash camera which gets activated when the overhead emergency lights are switched on. Most must be switched on by the officer according to department policy when making a citizen contact of some sort or engaging in other activity.

Keeping equipment attached and intact during a struggle with a suspect or physical activity like a foot pursuit or rushing to a rescue is a concern when getting into uniform. An officer has a lot on their equipment belt including their radio, keys, and other items. Cell phones may be secured in pockets or attached to the shoulder epaulets where a microphone may be located. Add a camera and you have a lot of things just itching to fall off

during a fight or chase. Remembering to hit the on switch when someone is shooting at you might possibly slip one's mind, but would not be forgiven as a breach of policy.

Another concern is privacy, and not the officers', but the citizens. Even advocates of BWC recognize that citizens may be less likely to approach officers with information or requests, believing that it will all be recorded. Victims may be less likely to want to have officers in their homes with the possibility that their chaos might be on the evening news or YouTube.

Officers also know that life on the streets can be rough. That means harsh language, the use of force, and chaotic and tragic scenes will be subject to review. The idea that the police help shield the general public from the gory and awful aspects of tragedy has simply gone away. A morbidly curious and voyeuristic public will want to see what no one should have to see.

Officers know that the camera does not see and hear everything at a scene but that a jury will think that it does. A camera cannot see what the officer's eyes see. It cannot perceive with the experienced and trained brain of a first responder all the nuances of human behavior that go into an officer's decision to arrest or not. It cannot detect the mood of a hostile crowd or a threatening bystander.

Although not the immediate concern of the officer on the street, police administrators must calculate the high cost of retaining hours and hours of video as potential evidence. Investigators must review hours of video,



determine what must and must not be released to the public, and arrange for the blurring of images of persons in the video whose identities must be protected.

Despite all of these challenges, BWCs have been accepted by officers as a great asset. Several studies have shown that officer behavior has not been dramatically affected by being tethered to a prying eye during their work day. Importantly, research shows that the BWCs have affirmed the remarkable professionalism, lawful conduct, and restraint that is a hallmark of quality policing. For those critics who were hoping for a “gotcha” moment to prove all of the fantasies that cops are universally inept and corrupt, there has been nothing but disappointment to find that thousands of law enforcement officers are doing amazing work every day.

## No Contact, No Complaint

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You don't hear much about "de-policing" lately. It refers to a police officer's reticence to take on any proactive police work, only going to calls as directed, and doing the bare minimum in whatever they do. The mantra is "no contact, no complaint".

Critics may decry this attitude but it is one they have created and, in many ways, required. For example, the city of Denver, Colorado recently joined Kansas City and the states of Virginia and California in eliminating jay-walking laws. With the goal of reducing police contacts – alleging, of course, that police are harassing the homeless and minorities – crosswalks are still the recommended place to cross a street, but playing chicken with traffic is now perfectly fine.

Another de-policing mandate is keeping police from making traffic stops. In the words of Berkely, California activist Darrell Owens, prohibiting police from traffic enforcement is a way to "make sure nobody does anything that justifies this cop pumping 4 rounds of lead into me". An associated rule, also popular on the west coast, is to prohibit police from chasing anyone if they do attempt to stop them for a traffic violation (or for that matter, any number of offenses).

Critics who hear of an offender eluding and resisting police, resulting in a forceful arrest, use of a Taser, or a shooting will seldom point out that the law requires yielding to a police officer's signal to stop. Also ignored is that fleeing from an officer is often because the driver

is engaged in current or recent dangerous criminal activity, is wanted on a warrant, is under the influence of an intoxicating substance, or has other reasons to resist violently. The narrative is not the violence of the offender, but that it all started because the officer tried to stop them for a malfunctioning taillight or expired license plate.

Another area of effort to help police stay low and out of touch with citizens is increasing the legalization of drugs. Psychedelic mushrooms and high THC content candy are thought to be safely used in the basements of those treating themselves for various maladies, to be punished only if purchased without paying the lucrative taxes on them.

As a bit of a libertarian, I think it's a good thing for society to consider whether we are over-regulated and how frequently we want armed government agents to check up on us. History teaches us that society must establish some standards for our mutual benefit, and we have defaulted to our police whenever we make a new rule to be enforced in ways that we later find distressing. Our experiment in democracy and freedom is, admittedly, a work in progress.

The problem with that is society still expects its police officers to interact with people in need and people who pose a threat to them. They still call 911 when a homeless person is in their yard, or a suspicious person wanders onto their residential street. Police officers used to be expected to do what the courts have called "community care-taking", and officers have traditionally taken that responsibility to heart. That

means checking on a person who seems to be disoriented or ill or responding to a relative's request to check on an elderly person that doesn't answer their phone calls.

Now an officer has to consider that every contact could go sour. The person who is resistive might be in the throes of a medical emergency. Should the officer simply let them walk away to their own fate, or can they use restraint to care for the person and call for medical help? If an officer is attacked while checking on someone's well-being must they simply leave? What if someone else is at risk? What happens to the neighbors if the police decide it isn't worth the risk or trouble to make contact with someone? Officers have been criminally charged for defending themselves after being attacked with an edged weapon because the other person was mentally ill or deemed to have been too weak or elderly to do much damage.

Most police officers keep doing what they know is best for their community. But if they decided to stay at the station or keep their blinders on when in the patrol car, who could blame them?

## The Biology of a Tragedy

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How could that happen? The question that even law enforcement officers ask after a controversial shooting may never have answers. What we know about the human mind and body can provide some potential insights into the shooting of Daunte Wright by veteran Brooklyn Center, Minnesota officer Kim Potter.

On New Year's Day 2009 transit police at an Oakland station responded to a disturbance and detained Oscar Grant. While Grant was prone and officers attempted to restrain him, Officer Johannes Mehserle drew what he mistakenly thought was his TASER and fired a round from his duty firearm into Grant, killing him.

In 2015 a Tulsa reserve police officer, Bob Bates, shouted "TASER" before shooting Eric Harris who was fleeing from an undercover operation. Bates is heard after the sound of a gunshot saying "I shot him, I'm sorry."

There have been other mix-ups of less notoriety. Given the frequency of these weapons drawn at the ready but rarely fired, although no consolation to survivors on either end of the gun, such fatal errors are rare.

As a strong advocate of letting investigations take their course, detailed commentary is premature. But the questions that the public has are urgent. Demands for quick answers are prompting police leaders to release information quickly, a decision necessary in today's environment, but seldom wise from an investigator's

standpoint. Police Chief Tim Gannon released a portion of the body-worn camera video of the incident, along with his assessment that the shooting was an accidental discharge. Both Gannon and Potter have resigned.

Typical immediate analyses will include blaming the department for poor training. If there is a training deficit at the root of this incident, it must be reevaluated in the light of human performance. As we look at what we know about the event – and there is surely much we do not yet know – it is clear that the limitations of human biology are at play.

When the brain perceives a threat to its body or identity, it kicks in brain chemistry that creates significant changes in the way the muscles, vessels, and nerves of the body perform. The awareness of a threat comes from the five senses, and how those sensations compare to the experiences of the person that are filed away in the conscious and subconscious mind.

In this case, the officers were at high alert. Daunte Wright – described in many news articles as being shot on a traffic stop – was wanted on a warrant for failure to appear on a gun-related charge that had resulted from a contact with Minneapolis police. Warrants are not discretionary for officers. Officers would expect the very real possibility that this person, who had already been involved in a firearms-related offense and was not cooperating in the disposition of that charge, would be in possession of a firearm and would resist. This observation is not made to imply that Wright is to blame for his demise (although compliance would have created

a much different outcome) but to describe the origin of the officers' threat perception.

No training is going to keep the brain from doing what the brain does. With a perceived threat the senses can change. Rather than becoming categorically more acute, the senses actually become more selective, unwilling to spend the body's resources on irrelevant inputs. Vision becomes focused on the highest potential of threat. In this case, having a resistive person attempting to get back in their vehicle would focus attention on the suspect's hands. Why would a person attempt to wrest themselves away and get back in their car? Did they intend to ram the officer's car or assault the officer with the open car door? Might they have a weapon they want to get their hands on? Is there evidence they want to try to destroy? Are they willing to drive dangerously in an attempt to flee?

The human eye is not a camera lens, recording everything in the same focus. When one wonders why the officer simply didn't see that she had a firearm instead of a TASER, the answer is that her brain focused her sense of sight elsewhere.

Another chemical change that the brain commands is the course of blood in the body. When preparing for the classic fight or flight, the body depends on the large muscle groups. Blood, whose chemical composition is changing to adapt to possible injury, is routed to oxygenate the muscles most likely to be used in a struggle or pursuit. This robs, to some degree, the blood supply to smaller muscles like the fingers. Nerves that could sense pain are dulled in anticipation of combat. It

is likely that the officer could not feel the difference between the heavy firearm and the lighter, curvier contour of the TASER.

Research shows that the decision to deploy a weapon may take less time than the decision to stop deploying the weapon. Another decision that takes time – and we measure time in milliseconds during these fast-moving events – is the transition from lethal force to the less-lethal force of the TASER or other tool. The decision is complex. Was the other officer going to deploy a TASER? If so, Potter would have been ready with her sidearm, because less-lethal force with another officer present is not used unless lethal force is available should the TASER fail. If Potter's thinking process was first to draw her sidearm, then switch to a TASER after reassessment, she may have thought that she had already switched to the TASER. We have all planned to grab the car keys after we get something out of the backseat, then shut the door locking our keys in. This example is nowhere near the consequence of Potter's thinking glitch, but it illustrates the human mind's potential to fail us when sequencing thoughts and behaviors in rapidly changing circumstances.

Our understanding of human limitations has not caught up with the ideology of our expectations. Heroes aren't allowed mistakes.



## About The Author

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