



TESTIMONY IN SUPPORT OF HB 857:

Office of the Attorney General – Independent Investigations Division – Authority to Prosecute

TO: Members of the House Judiciary Committee

FROM: **Heather Warnken, Center for Criminal Justice Reform, Univ of Baltimore School of Law**

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My name is Heather Warnken and I am the Executive Director of the University of Baltimore School of Law’s Center for Criminal Justice Reform. The Center is dedicated to supporting community driven efforts to improve public safety and address the harm and inequity caused by the criminal legal system.

In direct alignment with this mission, we are grateful for this opportunity to testify in support of HB 857.

Impartial independent investigations are the bedrock of the American legal system. Few incidents challenge the integrity and legitimacy of this system more than the decision to prosecute or decline to charge a death involving a police officer. An inherent conflict of interest exists when State’s Attorneys investigate and prosecute officers from the same police departments that they work with and rely upon everyday. This conflict of interest casts doubt not only on the capacity and effectiveness of local prosecutions of officers when needed and warranted, but also undermines their credibility when those offices legitimately determine that a prosecution is unwarranted.

HB 857 represents an important step toward legitimacy and viability of a legal system notoriously rife with systemic racism, and continually damaged by the litany of police violence and misconduct cases that have given rise to some of the strongest social movements in recent memory. By taking this important step, aligned with best practices as discussed below, of vesting prosecution authority in the Attorney General, HB 857 will help to ensure that cases warranting a criminal charge are pursued, and that decisions *not* to prosecute are accepted by the public as the product of a legitimate and unbiased evaluation of the facts and the law.

Challenges in police accountability

No matter a person’s view of the current state of policing, there is simply no question that some officers, some of the time, abuse their authority in tragic and utterly inexcusable ways. There is no shortage of evidence to support this, with a disturbingly regular cadence of high profile police violence in the headlines, including the cell phone, body camera and other footage that has brought this reality into the American consciousness and dialogue in inescapable ways. Most recently the devastating footage of officers brutally beating Tyre Nichols to death in Memphis served as such an example. We have in Maryland our own long list of high profile deaths at the hands of police, along with an ongoing deeper

well of allegations of police use of force and other forms of misconduct that many lament happen with impunity in far less headline-grabbing ways.

Justice for victims of violence understandably looks different to different individuals; however, one of the most common features is the need for assurance that the pain they've experienced will not be repeated, for them or anybody else. For victims of police violence this often is uniquely out of reach.

Black people are three times more likely to be killed by police.¹ Across the country, police are charged in less than 2% of fatal shootings, and convicted in less than a third of those cases.² Notwithstanding numerous "reforms" and infusion of resources since the murder of George Floyd, deaths resulting from police interactions have not abated. Of the nearly 1,200 people killed by police in 2022, criminal charges were subsequently filed against only nine officers.

Even though not all police shootings are unjustified, various experts across the field agree this number is incredibly low.³ Furthermore, consequences beyond criminal prosecution are also exceedingly rare, with departments rarely disciplining officers.⁴ Why is accountability, especially through prosecution, so rare?

- **Even with solid evidence, which is often unavailable, cases against police officers are often very difficult to prove.** Police violence often occurs in a legally complicated context, making it difficult to prove in the face of an officer's unique protections and defenses.⁵ If the person killed or harmed was alleged to have a weapon, or if the officer can otherwise posit they feared for their life based on truthful or untruthful⁶ assertions, it often makes trying the case highly unlikely to

¹ <https://mappingpoliceviolence.us/>.

² <https://mappingpoliceviolence.us/>;

<https://www.theatlantic.com/ideas/archive/2023/01/police-misconduct-consequences-qualified-immunity/672899/>.

³ <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/>;

<https://www.vox.com/21497089/derek-chauvin-george-floyd-trial-police-prosecutions-black-lives-matter>.

⁴ <https://www.chicagotribune.com/news/ct-chicago-police-misconduct-settlements-met-20160129-story.html>;

<https://www.audacy.com/wcbs880/articles/nypd-paid-nearly-69-million-in-settlements-in-2019>.

⁵ Though policies and procedures in some agencies have tightened up on use of force, such as BPD's in the aftermath of the consent decree, the law gives officers wide latitude to use force. Under the legal standards set by the Supreme Court, police officers can be legally justified in using force if they merely perceive a threat, regardless of whether that threat was there. The legal question comes down to whether the officer acted reasonably as other officers would in similar situations. This can be interpreted easily by judges, prosecutors, members of the jury and general public toward excusing the force even when it was not warranted; even when someone needlessly killed.

⁶ Lying by officers is a disturbingly pervasive phenomenon, as documented in the extensive independent investigation surrounding the origins, causes and consequences of Baltimore's Gun Trace Task Force. Regarding the prevalence of disregard for truth, the report notes, "*It should be obvious that the integrity of our criminal justice system relies on the honesty and integrity of police officers. Providing false or misleading information to BPD, prosecutors, or courts for whatever purpose undermines one of the central pillars of our system of criminal justice. And yet our investigation revealed that for many officers, the practice of submitting false, incomplete, or misleading information in police reports, in applications for search warrants, and in court testimony began early in their careers. According to the witnesses we interviewed, this has been a widespread problem. We have no reliable way to measure the extent to which it remains.*"

<https://static1.squarespace.com/static/5e25f215b3dbd6661a25b79d/t/61dfb04407c9d81f367972d8/1642049639956/GTTF+Report-c2-c2-c2.pdf>

result in conviction.⁷ That context is exacerbated by reluctance of fellow witnessing officers to provide incriminating or any substantial information in the course of investigation (sometimes referred to as “the blue wall of silence”⁸), and the reluctance of certain members of the public, who often end up on juries, to doubt the credibility or split second decision-making of officers.⁹

- **Numerous other protections uniquely available to officers.** Another set of factors and doctrines, beyond the wide latitude officers have to employ force, such as qualified immunity, have created the perception - and often reality - that police are untouchable, even for the most grievous of harms.¹⁰
- **Conflict of interest.** The actor currently responsible for bringing these charges in Maryland and in many states, the local prosecutor, works closely with their local police department, creating an inherent tension and reluctance to jeopardize the relationships they depend on in the course of their daily responsibilities investigating, charging and trying cases.¹¹ These tensions are not theoretical, and can exist in highly problematic ways at both the individual and organizational level. In the relatively rare examples of local prosecutors choosing to pursue these cases nationally, some have spoken out about the barriers and repercussions they faced.¹²

These tensions are familiar in Maryland, including within the painful recent memory of the death of Freddie Gray in police custody, and the mass protests and turbulent legal saga that unfolded in the aftermath.¹³

HB 857 and the need for change

Two very serious problems with the status quo in Maryland are 1) lack of accountability for unjustified police violence; and 2) lack of legitimacy of the criminal legal system and broader government in the eyes of impacted families, communities, and indeed, growing swaths of the public at large.

The first is of utmost importance, especially in responding to the trauma and devastation these events cause to the victims' families and communities. Both challenges are inextricably linked.

⁷ <https://harvardlawreview.org/2017/06/why-do-courts-defer-to-cops/>;

<https://www.nytimes.com/2017/05/31/us/police-shootings-trial-jury.html>.

⁸ <https://www.nytimes.com/1985/06/16/weekinreview/the-unwritten-code-that-stops-police-from-speaking.html>.

⁹ <https://www.vox.com/2014/11/25/7173695/ferguson-police-officer-prosecution>.

¹⁰ <https://columbialawreview.org/content/police-suspects/>.

¹¹ At Arm's Length: Improving Criminal Investigations of Police Shootings, Stanford Law School Center for Criminal Justice (2016), <https://law.stanford.edu/wp-content/uploads/2016/09/At-Arms-Length-Oct-2016.pdf>.

¹² <https://www.mprnews.org/story/2018/03/22/rights-protections-at-heart-of-spat-between-prosecutors-police>.

¹³ With a national spotlight, then State's Attorney Marilyn Mosby when deciding to drop the charges her office initially brought against members of BPD stated: “After much thought and prayer, it has become clear that without being able to work with an independent investigatory agency from the very start, without having a say in the election of whether cases proceed in front of a judge or jury, without communal oversight of police in this community, without substantive reforms to the current criminal justice system, we could try this case 100 times just like it and we would still end up with the same result.”

The importance of legitimacy and trust in the system in order for that system to function cannot be overstated. Currently in Maryland, not only is systemic legitimacy eroded through a structure that makes pursuit of these cases highly unlikely,¹⁴ but depending on the county, fosters a sense of “justice by geography,” informed more by the individual State’s Attorney’s positioning than the facts of the case, and promoting negative public sentiment that prosecutors and law enforcement protect each other. When police violence occurs, communities rightfully want to know who is protecting them.

As in many states, the individuals heading these offices and making ultimate charging decisions are elected officials, adding another politically fraught dynamic. These conflicts of interest, real and perceived, contribute to the contempt community members feel towards the criminal legal system.

The legitimacy of the system in the eyes of many Marylanders, especially Black, brown and low income residents living in highly policed communities, who are statistically far more likely to be victims of police violence, is already in crisis. Trust and collaboration between community members and those investigating and trying cases is frayed, as demonstrated in part by abysmally low clearance rates in Baltimore and other jurisdictions throughout the state.¹⁵

HB 857, a natural extension of prior reforms, takes another step in the right direction in addressing these challenges, especially the irrefutable conflicts of interest currently impeding processes to hold officers accountable for criminal behavior. Although giving prosecutorial powers to the Attorney General’s Independent Investigations Division is not a cure all for police accountability, or the many complex challenges surrounding these incidents, the benefits of moving charging decisions to an independent actor is itself meaningful change, and aligned with growing awareness of national best practices.

As stated by the U.S. Commission on Civil Rights, “Investigation and prosecution of use of force cases should be made as independent and public as possible. The agencies investigating and determining whether to move forward with prosecution should not have an ongoing relationship with the department.”¹⁶ Also made clear by Fair and Just Prosecution are the following recommendations:

“(1) creating independent and transparent investigatory and charging procedures following police-involved critical incidents, and (2) overhauling or standing up dedicated public integrity or civil rights units. In addition, another critical police accountability measure is revising discovery policies and

¹⁴ In the first year of the Independent Investigations Division (IID)’s existence, local prosecutors made their charging decisions in 11 cases which IID investigated, all of which were declinations to prosecute. Independent Investigations Division First Annual Report, https://www.marylandattorneygeneral.gov/Reports/IID_First_Annual_Report.pdf.

¹⁵ BPD homicide clearance rates dropped again in 2022, down to 36%, from 42% the previous year, and is even lower for nonfatal shootings. This includes cases where any arrest was made or the case was “cleared by other means” like the suspect is subsequently murdered.

¹⁶ Police Use of Force: An Examination of Modern Policing Practices, US Commission on Civil Rights, November 2018, <https://www.usccr.gov/files/pubs/2018/11-15-Police-Force.pdf>.



procedures, including a “feedback loop” to identify police officers who routinely engage in misconduct.”¹⁷

With HB 857, Maryland has an opportunity to move toward these practices alongside a growing number of states.¹⁸ To be clear, independent prosecution authority is not the end all and be all; and in fact, it is imperative that the legislature and other elected officials continue to pursue more meaningful tools of accountability beyond the criminal legal system. There is a great deal of work to do across the state beyond HB 857 focused on prevention and needed culture change surrounding policing overall. Even a more fair, transparent process, and increase in warranted prosecutions and convictions of officers who commit murder or other serious harm does not heal those who have been victimized, and it never will. But it is an important piece of what we owe the citizens of this state, and what the legitimacy of our institutions require.

For these reasons, we urge a favorable report.

¹⁷ Promoting Independent Police Accountability Mechanism, Fair and Just Prosecution (2017), <https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.Police-Accountability.9.25.pdf>.

¹⁸ At least 8 states have some form of independent prosecution authority: CA, DE, ME, NJ, NY, RI, VT, WA.