

**CALIFORNIA WESTERN INTERNATIONAL  
LAW JOURNAL**

**VOLUME 48**

**FALL 2017**

**NUMBER 1**

**ACCOUNTABILITY IN POLICING: HOW COMPLICITY  
PERPETUATES INSTITUTIONAL INJUSTICE AND INEQUITIES  
IN THE UNITED STATES AND SOUTH AFRICA**

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\* J.D. 2017, New York University School of Law. I would like to thank NYU School of Law for funding and facilitating my research in South Africa. I would like to thank Professor Peggy Cooper-Davis for supervising and guiding this research by helping me focus as well as believing in me. I would also like to thank all those in Johannesburg and Pretoria in South Africa who allowed me to interview them for this Article, sometimes at great personal risk. I would also like to give a special thank you to the interviewees who took the time to read and provide feedback on this Article. Finally, I would like to thank Professor Michael Bosworth and Rory Fleming for reading this Article and providing feedback.

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## INTRODUCTION

A comparison of the United States and South Africa is instructive in understanding how complicit behavior perpetuates institutional racism. In both the United States and South Africa, police and prosecutors have often faced accusations of racially biased decision-making. Racial bias is not a new concept; it is derived from political systems that separated people based on race.<sup>1</sup> In the United States, the system is commonly known as segregation; in South Africa, the system is known as apartheid. Significantly, in both countries, the racial

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1. See generally MARTIN N. MARGER, RACE AND ETHNIC RELATIONS: AMERICAN AND GLOBAL PERSPECTIVES (10th ed. 2015).

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separation was institutionalized and enforced by governmental agents, particularly police and prosecutors.

However, there are notable differences between the two countries' accountability systems for policing that reveal a deeper understanding of the causes of institutional racism than would be possible when examining each country separately. One lesson revealed is the importance of understanding the impact of race through the intersectional lens of each country's patriarchal system and culture. Additionally, the differences in the countries' structures and functions of accountability systems for policing are instructive because of the similarities in the countries' histories.

This Article is a culmination of research and interviews personally conducted by the author in South Africa. Many of the understandings regarding the structures and function of policing accountability in South Africa are directly based off the interviews conducted. The Article will begin with an overview of political inequality and three methods that can be used to understand a citizen's ability to exercise political power. Section II discusses the structural barriers created by using criminal prosecutions as a solution for police violence. Section III examines the barriers to civil lawsuits as a means for accountability against police violence. Section IV analyzes the policing culture of impunity, and how it has acted as a barrier to self-regulation and internal accountability. Finally, Section V proposes lessons on how to improve accountability for police violence in the future.

#### I. POLITICAL INEQUALITY AND CITIZENS' ABILITY TO DEMAND CHANGE

There are three measures of political inequality that can be used to understand how members of the public exercise political power: voice, representation, and influence.<sup>2</sup> Political power, in the context of accountability for police violence, informs the public's ability to hold police officers and prosecutors responsible for their decisions. For example, both the United States and South Africa's Constitutions provide universal suffrage and the right to protest—so voice is

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2. John Gaventa & Carin Runciman, *Untangling Economic and Political Inequality: the Case of South Africa*, in ISSC ET AL., *WORLD SOCIAL SCIENCE REPORT 2016, CHALLENGING INEQUALITIES: PATHWAYS TO A JUST WORLD* 70, 70–71 (UNESCO pub., 2016).

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available. However, as a practical matter, there are inherent systemic limitations in both countries that create political inequality.

### A. Voice

In the United States, many police chiefs and prosecutors are publicly elected.<sup>3</sup> However, voting rights have been eroded through gerrymandering, voter identification laws, and limitations to sections of the Voting Rights Act that were designed to limit discriminatory voting rights restrictions.<sup>4</sup> Furthermore, there are six million convicted felons in the United States that are unable to vote.<sup>5</sup> Accordingly, many United States citizens have restricted or limited ability to effect change and correct inequality through the voting process.

Unlike the United States, in South Africa, citizens do not vote for police chiefs or prosecutors.<sup>6</sup> Instead, all of these positions are either appointed (many by the President) or obtained through civil service.<sup>7</sup> Willie Hofmeyr, a member of the Constitutional Assembly and co-chair of the committee dealing with the judiciary and the legal system,<sup>8</sup> stated, “A lot of us went in [to drafting the Constitution] starry-eyed” and in retrospect, the Constitutional Assembly should have realized that “not every President was going to be Mandela.”<sup>9</sup> As a result of this

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3. Scott M. Matheson, *The Prosecutor, The Press, and Free Speech*, 38 *FORDHAM L. REV.* 865, 879 (1990).

4. ARI BERMAN, *GIVE US THE BALLOT* (2016). See also Amita Kelly, *Does it Matter that 95% of Elected Prosecutors are White?*, NPR (July 8, 2015, 4:59 PM), <https://www.npr.org/sections/itsallpolitics/2015/07/08/420913118/does-it-matter-that-95-of-elected-prosecutors-are-white>.

5. Christopher Uggen et al., *6 Million Lost Voters: State-Level Estimates of Felon Disenfranchisement, 2016*, THE SENTENCING PROJECT (Oct. 6, 2016), <http://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/>.

6. Interview with Willie Hofmeyr, Deputy Nat'l Dir. of Pub. Prosecutions, Nat'l Prosecuting Auth., in Pretoria, S. Afr. (Jan. 12, 2017) [hereinafter Hofmeyr Interview].

7. *Id.* See generally Adam Kassner, *Diggin' Deep into Gold Fields: South Africa's Unrealized Black Economic Empowerment in the Shadows of Executive Discretion*, 48 *CORNELL INT'L L.J.* 667 (2015).

8. William Andrew “Willie” Hofmeyr, SOUTH AFRICA HISTORY ONLINE (Sept. 1, 2011), <http://www.sahistory.org.za/people/william-andrew-willie-hofmeyr>.

9. Hofmeyr Interview, *supra* note 6.

truth, Hofmeyr believes that having the president appoint such a large amount of law enforcement positions with little oversight was not the best idea.<sup>10</sup> Hofmeyr now believes that law enforcement positions should be appointed in ways more similar to other officials, such as the Public Protector or the head of the South African Human Rights Commission.<sup>11</sup> Both of these positions require a confirmation process of 60% parliamentary approval, preceded by a public interview process to ensure adequate opportunity for public scrutiny and voice.<sup>12</sup>

### *B. Representation*

In the United States, prosecutors are vested with the ability to potentially hold police officers accountable.<sup>13</sup> However, prosecutors are publicly elected, and elected prosecutors do not reflect the demographics of the American public.<sup>14</sup> White Americans make up 95% of elected prosecutors and women make up 17% of elected prosecutors.<sup>15</sup> This racial and gender disparity is exacerbated because legislators who write the laws that create systems of accountability for police are also largely unrepresentative of public demographics.<sup>16</sup> This disparity is demonstrated in the chart below:<sup>17</sup>

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10. *Id.*

11. *Id.*

12. *Id.*

13. Prosecution of Violation of Certain Law, 42 U.S.C. § 1987 (Westlaw through Pub. Law. No. 115-90). See generally John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 803–11 (2000).

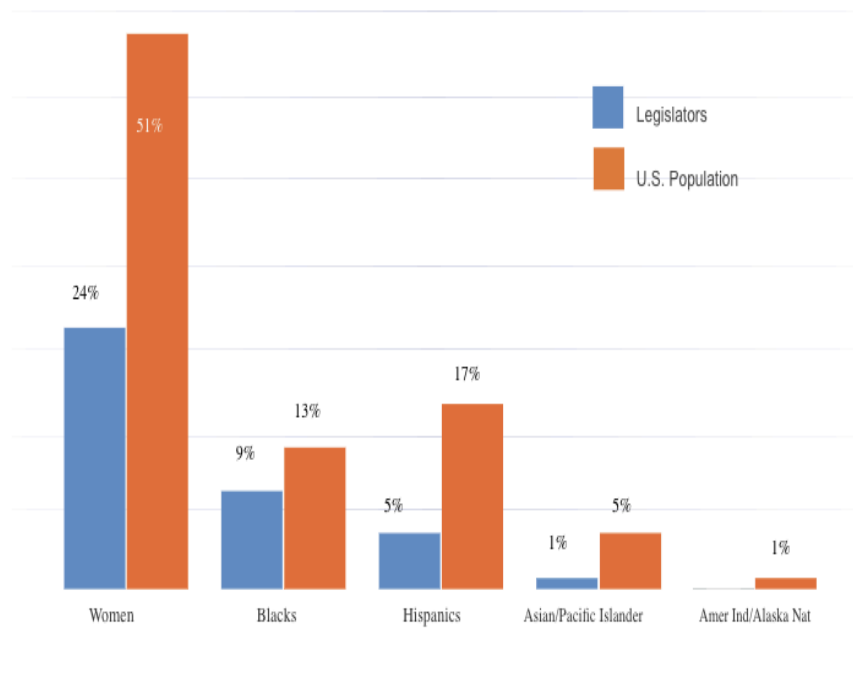
14. See Jamiles Lartey, *White Men Make up 79% of Elected Prosecutors in US, Study Says*, THE GUARDIAN (July 7, 2015, 5:32 PM), <https://www.theguardian.com/law/2015/jul/07/us-elected-prosecutors-white-men-criminal-justice-system>.

15. *Id.*

16. Reid Wilson, *In the States: Breaking Down Legislative Demographics*, MORNING CONSULT (Dec. 11, 2015, 12:48 PM), <https://morningconsult.com/2015/12/11/in-the-states-breaking-down-legislative-demographics/>.

17. *Id.*

## Women and Minority Legislators Compared to U.S. Population



In South Africa, there are active efforts to broaden the recruitment of prosecutors, as part of general legal affirmative action requirements, so that prosecutors are more representative of the racial and gender composition in South Africa.<sup>18</sup> In the United States, prosecutors are trained lawyers; therefore, one apparent barrier to establishing a representative pipeline among prosecutors is the continued racial disparities in educational attainment.<sup>19</sup>

Further comparing each country's federal legislatures, the South African National Assembly has greater gender equality than the United States Congress. In 2015, 40% of the National Assembly's members

18. Hofmeyr Interview, *supra* note 6.

19. MARGER, *supra* note 1, at 202–04. See generally JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (2012); Ronald Brownstein, *The Challenge of Educational Inequality*, THE ATLANTIC (May 19, 2016), <https://www.theatlantic.com/education/archive/2016/05/education-inequality-takes-center-stage/483405/>; Am. Psychol. Ass'n, *Ethnic and Racial Disparities in Education* (Aug. 3, 2012), <https://www.apa.org/ed/resources/racial-disparities.pdf>.

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were women,<sup>20</sup> whereas only 24% of United States' legislators were women.<sup>21</sup> One possible reason for this is the African National Congress ("ANC"), the current majority in South Africa, adopted a 50% voluntary gender quota system in parliament.<sup>22</sup>

Still, in South Africa, heterosexism and patriarchy continue to be part of the culture with patriarchy cutting across race and class.<sup>23</sup> As a result, "ambitious women climb the ladder of patriarchy," and those who try to speak up against it "pay a higher price politically" than those who might disagree on policy issues.<sup>24</sup> Thus, more representation does not necessarily yield equitable outcomes as cultural forces persist. It is important to understand the disparities in representation through the lens of both race and gender to gain a greater understanding of the power structures within these institutions.

### *C. Influence*

In both countries, the most significant disparities exist within the realm of relative influence and power. Three factors limit an individual's ability to exert influence over the political system: money, optimism about agency, and narratives perpetuated by the press. Each of these factors impact an individual's ability to effect change within the government that would allow for greater accountability of police violence.

#### *1. Money as Influence*

In the United States, *Citizens United v. Federal Election Comm'n*, a recent United States Supreme Court decision, opened the floodgates that previously protected the political system from corporate money.<sup>25</sup> One study estimated 26% of the 2016 presidential election spending

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20. Hofmeyr Interview, *supra* note 6; SADC GENDER PROTOCOL 2017 BAROMETER 74 (Collen Morna et al., eds., 2017); *South Africa*, QUOTA PROJECT (Feb. 4, 2015), <http://www.quotaproject.org/country/south-africa>.

21. *See generally* Wilson, *supra* note 16.

22. *See* Constitution of the African National Congress, Rule 6 (Nov. 2007).

23. Interview with Gail Smith, Head of Advocacy and Comm., S. Afr. Hum. Rts. Comm'n, in Johannesburg, S. Afr. (Jan. 11, 2017) [hereinafter Smith Interview].

24. *Id.*

25. *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010).

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was possible as a result of *Citizens United*.<sup>26</sup> Thus, those with access to corporate money possess an outsized influence on the election of decision makers who serve to protect individual rights and develop systems of accountability.

In South Africa, working for the government (in both elected and civil servant positions) is often the only means of upward social mobility.<sup>27</sup> Accordingly, individuals are more likely to take and perform those jobs in accordance with their own self-interest, rather than out of a calling to public service.<sup>28</sup> Corruption within this system is amplified by a middle class that seeks upward mobility, but remains deeply divided by race.<sup>29</sup> This ultimately results in a group of people who are unable to consolidate enough political power to change the system.<sup>30</sup> Consequently, many South Africans are left “fighting over crumbs the economic elite are willing to give.”<sup>31</sup> The patriarchal culture provides further “scaffolding of corruption” because much of the corruption in South Africa is done in accordance with the familial relationships of men.<sup>32</sup>

While the corruption of the political process by wealth in South Africa is more direct than the United States, both countries must deal with the political inequality of those with money or power having an outsized influence.

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26. Adam Lioz et al., *Court Cash: 2016 Election Money Resulting Directly From Supreme Court Rulings*, DEMOS (Mar. 14, 2017), <http://www.demos.org/publication/court-cash-2016-election-money-resulting-directly-supreme-court-rulings>.

27. Interview with Steven Friedman, Res. Professor, U. of Johannesburg, in Johannesburg, S. Afr. (Jan. 11, 2017) [hereinafter Friedman Interview].

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. Smith Interview, *supra* note 23; *see also* IBP, US-SOUTH AFRICA ECONOMIC AND POLITICAL COOPERATION HANDBOOK: STRATEGIC INFORMATION, DEVELOPMENTS, CONTACTS 57 (2003); Barbara Oomen, *Group Rights in Post-Apartheid South Africa: The Case of Traditional Leaders*, 44 J. LEGAL PLURALISM 73, 88 (1999).



## 2. *Optimism and Belief in Agency*

In the United States, Black Americans are almost evenly split on whether the country will eventually make the changes needed to give Blacks equal rights to Whites. Forty-two percent believe the country will eventually make the necessary changes, 43% do not, and 8% argue the country has already made such changes.<sup>33</sup> On the other hand, White Americans are much more optimistic about the current state of equality with 38% believing the necessary changes have been made, 40% believing the changes will be made, and only 11% believing that they will not be made.<sup>34</sup> These numbers are likely explained by the differences in each group's experiences with governmental interactions.<sup>35</sup> For example, Black Americans are 2.8 times more likely than White Americans to die as a result of interactions with the government.<sup>36</sup> Despite the differences in each group's experiences with the government, Black American voter participation is only 5% less than White Americans.<sup>37</sup> Thus, in the United States, despite the lack of optimism about equal rights and the disparities in police violence, Black Americans continue to demonstrate comparable belief in their agency through voting.

In South Africa, democracy and the personal agency that accompanies it are still nascent. Black South Africans, in particular, while disappointed, are not surprised to see people in positions of power exploit and abuse the citizenry.<sup>38</sup> Furthermore, South African people

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33. Renee Stepler, *5 Key Takeaways About Views of Race and Inequality in America*, PEW RES. CTR. (June 27, 2016), <http://www.pewresearch.org/fact-tank/2016/06/27/key-takeaways-race-and-inequality/>.

34. *Id.*

35. James W. Buehler, *Racial/Ethnic Disparities in the Use of Lethal Force by US Police, 2010-2014*, 107 AM. J. PUB. HEALTH 295 (2017).

36. *Id.*

37. *Voting Turnout Rates, by Race and Ethnicity, 2014*, PEW RES. CTR. (Jan. 19, 2016), [http://www.pewhispanic.org/2016/01/19/millennials-make-up-almost-half-of-latino-eligible-voters-in-2016/ph\\_election-2016\\_appen-chart-07/](http://www.pewhispanic.org/2016/01/19/millennials-make-up-almost-half-of-latino-eligible-voters-in-2016/ph_election-2016_appen-chart-07/).

38. Interview with Sipiwe Segodi, Project Officer, Freedom of Expression Inst., in Soweto, S. Afr. (Jan. 7, 2017) [hereinafter Segodi Interview]; see also Kassner, *supra* note 7, at 685 ("President Jacob Zuma—himself the subject of 783 counts of corruption that were dropped—has overseen a tumultuous regime that has faced numerous corruption charges encompassing the abuse of public funds, from

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have a deep loyalty to the African National Congress—the current majority party and party of the liberation movement.<sup>39</sup> This loyalty, coupled with a history of an oppressive government, creates a challenging environment for political alternatives.<sup>40</sup> Thus, disappointment with economic stagnation is often understood as disappointment with democracy because “freedom is yielding very little” for people in regards to material change given “you can’t eat freedom.”<sup>41</sup> Some members of the liberation movement recognize this challenge saying, “We didn’t do it for the sake of the organization [referring to the ANC], we did it for the country.”<sup>42</sup>

However, many South Africans are realistic and willing to accept incremental change.<sup>43</sup> One challenge to realizing material change in South Africa is that entrepreneurship is not a deeply valued concept.<sup>44</sup> Both the liberation movement’s founding communist ideas, such as governmental allocation of resources, as well as apartheid-era oppression created a culture that does not support entrepreneurship.<sup>45</sup> As a result, the economic disappointment people feel is exacerbated by a lack of agency. Therefore, in South Africa, the belief in agency, or lack thereof, directly influences South Africans’ ability and desire to utilize the government, which further exacerbates the political inequality.

### 3. Narratives Perpetuated by the Press

While both countries have a free press, they deal with issues regarding media “echo chambers”<sup>46</sup> that present different information

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improvement of his rural Nkandla residence to improper awarding of government contracts.”).

39. Interview with Carin Runciman, Senior Researcher, U. of Johannesburg, in Johannesburg, S. Afr. (Jan. 10, 2017) [hereinafter Runciman Interview].

40. *Id.*

41. *Id.*

42. Interview with Robert McBride, Exec. Dir., The Indep. Police Investigative Directorate, in Pretoria, S. Afr. (Jan. 12, 2017) [hereinafter McBride Interview].

43. Runciman Interview, *supra* note 39.

44. *Id.*

45. *Id.*

46. See JESSICA CLARK & TRACY VAN SLYKE, BEYOND THE ECHO CHAMBER: HOW A NETWORKED PROGRESSIVE MEDIA CAN RESHAPE AMERICAN POLITICS (2010).

and context. In the United States, this was attributed to increasingly partisan news consumption.<sup>47</sup> Although many Americans' main news source is television, "40% of all Americans get their news from online sources," including social media such as Facebook and Twitter.<sup>48</sup> The main problem with new online sources is that many are secondary news sources with altered or skewed information.<sup>49</sup> Moreover, many U.S. media outlets continue to show Black Americans in "crime news narratives," which have a severe impact on accountability for police violence against Black Americans.<sup>50</sup>

For example, Tamir Rice was a 12-year-old African American with a fake gun who was shot and killed after police officers were alerted to a "man" in a nearby park with a "gun."<sup>51</sup> From the time of Rice's death to the shooting officer's "grand jury, 5,912 media items and broadcast reports were published on the racially-charged killing."<sup>52</sup> Significantly, during a press conference, the prosecutor in charge of the officer's indictment stated he felt no need to present certain information to the grand jury because the jurors could read about it in the newspaper.<sup>53</sup>

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An "echo chamber" is a term used to describe a situation where information and ideas are perpetuated and validated by repeated communications within a specific system. *Id.*

47. Brendan Nyhan, *Relatively Few Americans Live in Partisan Media Bubble, But They're Influential*, N.Y. TIMES (Sept. 7, 2016), [https://www.nytimes.com/2016/09/08/upshot/relatively-few-people-are-partisan-news-consumers-but-theyre-influential.html?\\_r=0](https://www.nytimes.com/2016/09/08/upshot/relatively-few-people-are-partisan-news-consumers-but-theyre-influential.html?_r=0).

48. Bryan Adamson, *Reconsidering Pre-Indictment Publicity: Racialized Crime News, Grand Juries and Tamir Rice*, ALA. L. REV. 1, 41 (2017); see also Amy Mitchell et al., *The Modern News Consumer: news Attitudes and Practices in the Digital Era*, PEW RES. CTR. (July 7, 2016), <http://www.journalism.org/2016/07/07/the-modern-news-consumer/>.

49. See generally CLARK & SLYKE, *supra* note 46.

50. Adamson, *supra* note 48, at 4; see also Joseph Torres, *Interrupting a White Racial Narrative: Ruling Gives Communities of Color More Opportunities to Tell Our Stories*, FREEPRESS (July 14, 2016), <https://www.freepress.net/blog/2016/07/14/ruling-gives-communities-of-color-more-opportunities>; Blavity Team, *New Study Finds News Outlets Promote False, Negative Portrayals of Black Families that Don't Match Reality*, BLAVITY (last updated Dec. 19, 2017), <https://blavity.com/color-change-study-news-outlets-promote-false-negative-portrayals-black-families-reality>.

51. Adamson, *supra* note 48, at 2.

52. *Id.* at 2–3.

53. *Id.* at 4.

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Thus, in the United States, the media plays a critical role in accountability for police violence.

In South Africa, Black journalists perceive the press as “still very [racially] segregated because of ownership of newspapers.”<sup>54</sup> The South African government runs many of the radio and television stations, which remain important methods of news consumption.<sup>55</sup> This also allows the government to control what information is shared. For example, the South African Broadcasting Corporation<sup>56</sup> censored reports of protests and decided not to broadcast “violent” protests.<sup>57</sup> However, unlike the United States, South Africa’s Internet connectivity remains relatively low.<sup>58</sup> According to the Central Intelligence Agency’s World Factbook, 54% of South Africans are connected to the Internet.<sup>59</sup> Still, activists in South Africa state the community is using social media to document these incidents, and when the public does not take pictures, “we don’t know what happens in the cases.”<sup>60</sup> Thus, social media and online news sources are beginning to play a larger role in South Africa as they do in the United States.

Finally, in both countries, the media has played a significant role in drawing and connecting historic comparisons between policing practices from the eras of racial separation and present day incidents.<sup>61</sup>

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54. Interview with Mpileleni Duma, Journalist, Sowetan Live, in Johannesburg, S. Afr. (Jan. 4, 2017) [hereinafter Duma Interview].

55. Hofmeyr Interview, *supra* note 6.

56. *See, e.g.*, South African Broadcasting Corp., <http://www.sabc.co.za/sabc/> (last visited Jan. 14, 2018). “The SABC controls all free broadcast television and the majority of major radio outlets. The SABC was once seen as the Government’s voice, but it is not in the midst, of a historic reorganization and change of direction. Although it is still state owned, the SABC maintains its editorial independence from the Government. SABC news programming offered balanced coverage of the Government and the leading opposition parties.” *South Africa*, 22 Ann. Hum. Rts. Rep. Submitted to Cong. By U.S. Dep’t St. 616, 320 (1997).

57. Interview with Bongani Xezwi, Organizer, Right to Know, in Soweto, S. Afr. (Jan. 9, 2017) [hereinafter Xezwi Interview].

58. *Id.*

59. Central Intelligence Agency, *Africa: South Africa*, WORLD FACTBOOK (last updated Jan. 11, 2018), <https://www.cia.gov/library/publications/resources/the-world-factbook/geos/sf.html>.

60. Xezwi interview, *supra* note 57.

61. Hofmeyr Interview, *supra* note 6; Charles Blow, *Police Violence: American Epidemic, American Consent*, N.Y. TIMES (Sept. 26, 2016),

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Thus, the media has the ability to exert influence over the political process, and those who control or distort it command a disproportionate amount of political power.

## II. STRUCTURAL BARRIERS TO CRIMINAL PROSECUTIONS AS A MEANS OF ACCOUNTABILITY FOR POLICE VIOLENCE

### A. *United States*

In the United States, the broad range of acceptable standards for use of police force creates the basis for structural barriers to criminal prosecutions as a means of accountability for police violence. Indeed, a constitutionally mandated “reasonableness standard” has evolved through common law and applies nationally for police use of force.<sup>62</sup> However, detailed policies are decided at local and state levels of government, and each police department mandates and enforces its own use of force policy.<sup>63</sup> Furthermore, police unions often negotiate due process protections beyond what is afforded to civilians. For example, when police misconduct has occurred or been alleged, interviewing the police officer may be delayed or stagnated based on pre-negotiated regulations, making these cases even more difficult to investigate.<sup>64</sup>

Generally, the local prosecutor’s office has jurisdiction to file criminal charges, which often results in conflicting incentives because local prosecutors depend on local police forces to investigate all of their cases.<sup>65</sup> Federal civil rights claims enforce Constitutional limits on law enforcement officers’ conduct and are meant to serve as a safeguard

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<https://www.nytimes.com/2016/09/26/opinion/police-violence-american-epidemic-american-consent.html>.

62. See *Graham v. Connor*, 490 U.S. 386, 387 (1989); *Terry v. Ohio*, 392 U.S. 1, 20–22 (1968).

63. See *generally Review*, USE OF FORCE PROJECT (Sept. 20, 2016), <http://useofforceproject.org/#review>.

64. See *generally Review*, CHECK THE POLICE (June 29, 2016), <http://www.checkthepolice.org/#review>.

65. Radley Balko, *Prosecutors’ Union Inadvertently Demonstrates Why Local Prosecutors Shouldn’t Investigate Police Shootings*, WASH. POST (June 23, 2015), [https://www.washingtonpost.com/news/the-watch/wp/2015/06/23/prosecutors-union-inadvertently-demonstrates-why-local-prosecutors-shouldnt-investigate-police-shootings/?utm\\_term=.7cea680a5f9f](https://www.washingtonpost.com/news/the-watch/wp/2015/06/23/prosecutors-union-inadvertently-demonstrates-why-local-prosecutors-shouldnt-investigate-police-shootings/?utm_term=.7cea680a5f9f).

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against these incentive structures.<sup>66</sup> However, even with a motivated prosecutor, the doctrine of qualified immunity limits criminal prosecution that holds police officers accountable.<sup>67</sup> Qualified immunity shields government employees from civil damages liability so long as their actions could be found to be reasonably consistent with rights they allegedly violated.<sup>68</sup> Additionally, qualified immunity can make criminal prosecutions more challenging because one of the threshold questions is whether the force used was beyond what is objectively reasonable and consistent with the individual's constitutional rights.<sup>69</sup> Therefore, the analysis significantly depends on how the case law, regarding use of force, is applied in a jurisdiction.

In the United States, there are additional structural issues that undermine the effectiveness of criminal prosecutions as a means of accountability for police violence. First, the United States is the only country in the world that has elected prosecutors.<sup>70</sup> Prosecutors who are publicly elected may be more concerned with who among their constituents are likely to vote in the next local elections, and those constituents' willingness to prosecute law enforcement.<sup>71</sup> Second, a prosecutor's decision to charge or not to charge a police officer is not subject to any review process within the jurisdiction where it was decided.<sup>72</sup> Additionally, there is no avenue to challenge prosecutorial discretion for charging outside a government actor's jurisdiction.<sup>73</sup> Third, United States' judges are often former prosecutors; therefore,

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66. 18 U.S.C. § 242 (Westlaw through Pub. L. No. 115-89).

67. *See generally* 42 U.S.C. § 1983 (Westlaw); *see also* Anderson v. Creighton, 483 U.S. 635, 638 (1987).

68. Creighton, 483 U.S. at 638.

69. Cty. of Sacramento v. Lewis, 523 U.S. 833, 846–47 (1998). *Cf.* Sandin v. Conner, 515 U.S. 472 (1995) (holding even prisoners have a liberty interest from serious bodily injury or death).

70. Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 6, 15, 28 (2012).

71. *See* Russell M. Gold, "Clientless" Lawyers, 92 WASH. L. REV. 87, 95 (2017). *See generally* David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473 (2016); Kelly Bowden Gray, *Community Prosecution: After Two Decades, Still New Frontiers*, 32 J. LEGAL PROF. 199, 200–02 (2008).

72. Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 380 (2d Cir. 1973).

73. *See id.* at 380–81.

many deal with the same acculturation issues that current prosecutors face both as a result of their former role as a prosecutor and their current one as a neutral arbiter of the law.<sup>74</sup> Finally, even where there may be a robust prosecution effort, juries are unlikely to convict police officers.<sup>75</sup> Jurors are unlikely to convict police officers because they are hesitant to question a police officer's judgment and are likely to view police officers as people they would trust in their daily lives.<sup>76</sup>

The United States has various barriers to overcome, but some have recognized the need to create change. In 2015, California Senator Barbara Boxer and New Jersey Senator Cory Booker submitted the Police Reporting Information, Data, and Evidence Act of 2015, which would require every case where an officer kills or causes serious bodily injury against a civilian to the Department of Justice.<sup>77</sup> Additionally, the police department would have to report all victims' demographic data.<sup>78</sup>

### B. South Africa

The formal structures in South Africa are much more robust relative to the United States. First, the Criminal Procedure Act explicitly states and governs the standard for use of deadly force by police,<sup>79</sup> and the Constitutional Court has interpreted this standard.<sup>80</sup> Thus, in South Africa, there is an explicit constitutional standard that governs use of

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74. The Editorial Board, *The Homogeneous Federal Bench*, N.Y. TIMES (Feb. 6, 2014), [https://www.nytimes.com/2014/02/07/opinion/the-homogeneous-federal-bench.html?\\_r=0](https://www.nytimes.com/2014/02/07/opinion/the-homogeneous-federal-bench.html?_r=0).

75. Kimberly Kindy and Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), [http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/?utm\\_term=.a9076bb16152](http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/?utm_term=.a9076bb16152).

76. *Id.*

77. See Police Reporting Information, Data, and Evidence Act of 2015, S. 1476, 114th Cong. (1st Sess. 2015) [hereinafter PRIDE Act]; David A. Graham, *Why Is It So Hard to Track Police Killings?*, THE ATLANTIC (June 3, 2015), <https://www.theatlantic.com/politics/archive/2015/06/why-is-it-so-hard-to-track-police-killings/394772/>.

78. PRIDE Act, *supra* note 77, § 2(B).

79. Criminal Procedure Act 51 of 1977 § 49 (S. Afr.).

80. Okyerebea Ampofo-Anti, Kim Robinson & Stu Woolman, *The South African Police Service*, S. AFR. CONST. 23B.3 (2008).

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force, unlike the United States, where there is a series of fact specific common law cases.<sup>81</sup> Second, national statutory law establishes and governs the institutions that govern police (South African Police Service); investigations of the police (Independent Police Investigative Directorate); prosecutions (National Prosecuting Authority); and human rights (South Africa Human Rights Commission).<sup>82</sup>

Although police officers do belong to unions in South Africa, they do not have enough collective bargaining power to create procedural barriers to investigations, such as additional due process rights not afforded to civilians.<sup>83</sup> This allows for national consistency in training and accountability practices as well as equal legitimacy among each institution. Further, there is mandated reporting for individuals who die in police custody or are killed as a result of police action.<sup>84</sup> This reporting allows for patterns to be identified and interventions to be conducted.<sup>85</sup> However, two identified weaknesses are that there is no auditing process for these reports, and the National Prosecuting Authority (NPA) does not prosecute violations of the mandatory reporting statute.<sup>86</sup>

Two recent developments have further strengthened South Africa's institutional framework. First, McBride's Constitutional Court case affirmed and strengthened the independence of the Independent Police Investigative Directorate (IPID).<sup>87</sup> However, the IPID continues to recognize the dangers associated with holding systems of power accountable, with McBride saying, "We might be causalities of the work, but we're laying a foundation."<sup>88</sup> Second, IPID's leadership recently made an internal policy change to refer all cases to the NPA for review regardless of the recommendation about whether or not the case should be prosecuted, thereby creating a secondary layer of

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81. Hofmeyr Interview, *supra* note 6.

82. *Id.* See generally South African Police Service Act 68 of 1995 (last updated Sept. 28, 2012).

83. McBride Interview, *supra* note 42.

84. *Id.*

85. *Id.*

86. *Id.*

87. See News 24, *Constitutional court rules in favour of Robert McBride*, MAIL & GUARDIAN (Sept. 6, 2016, 10:48AM), <https://mg.co.za/article/2016-09-06-breaking-concourt-rules-in-favour-of-robert-mcbride>.

88. McBride Interview, *supra* note 42.



review.<sup>89</sup> Previously, IPID only sent cases it believed should be prosecuted by the NPA.<sup>90</sup> Thus, while IPID maintains the investigatory role in police violence cases, they are no longer providing the NPA with a limited selection of cases. Additionally, there was legislative discussion about making appointments confirmable and to create a removal process in response to concerns about the NPA's politicization.<sup>91</sup> This would create a system of checks and balances on law enforcement institutions rather than concentrating that power in executive appointments.

In South Africa, the barriers for prosecutors holding police officers accountable are less structural and result more from the way the structures function.<sup>92</sup> First, in South Africa, when a police officer is charged with a crime, the Directors of Public Prosecution (DPP) must be informed, and a more senior prosecutor at the regional level (as opposed to a local one) *may* take over the case.<sup>93</sup> However, despite the increased possibility for conflicts of interest with local prosecutors, currently, a regional prosecutor is not required to take over the case.<sup>94</sup> Second, South African prosecutors usually have that job for the entirety of their career, which presents concerns about prosecuting officers attempting to maintain good relationships with police officers, as a matter of reputation.<sup>95</sup> This conflict could be remedied by creating a unit that solely focuses on prosecutions of police officers. Similarly, the head of the NPA can currently reassign prosecutors and, thus, is susceptible to capture.<sup>96</sup> This issue is not merely hypothetical; in a

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89. Interview with Matthews Sesoko, Dir. of Investigations, The Indep. Police Investigative Directorate, in Pretoria, S. Afr. (Jan. 12, 2017) [hereinafter Sesoko Interview].

90. *Id.*

91. Thulani Gqirana, *Breytenbach: Decay of SA's Justice System Must End*, MAIL & GUARDIAN (Jan. 22, 2015, 6:33 AM), <https://mg.co.za/article/2015-01-22-breytenbach-decay-of-sas-justice-system-must-end>.

92. *See generally* Greg Nicolson, *After 59 Deaths Allegedly at the Hands of the SAPS in Gauteng, No Officer has Faced Justice*, THE DAILY MAVERICK (July 18, 2017, 11:40 AM), <https://www.dailymaverick.co.za/article/2017-07-18-after-59-deaths-allegedly-at-the-hands-of-saps-in-gauteng-no-officer-has-faced-justice/#.WYOAdPyuqA>.

93. Hofmeyr Interview, *supra* note 6.

94. *Id.*

95. *Id.*

96. *Id.*

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recent police corruption case, the head of the NPA assigned prosecutors who were not skilled enough to undertake those cases.<sup>97</sup> Third, the investigations of police officers are subject to serious resource constraints.<sup>98</sup> However, there is speculation that these resource constraints are intentional in an attempt to limit the IPID's ability to investigate corruption.<sup>99</sup> Finally, the accountability mechanism outlined in the National Prosecuting Authority Act for prosecutors is still being implemented and does not provide a robust check on prosecutorial discretion as of yet.<sup>100</sup>

*C. Cultural and Systemic Barriers to Prosecution as a Means  
for Accountability of Police Violence*

Although the United States and South Africa experience different structural barriers for prosecution to be used as a viable tool for accountability of police violence, the cultural issues are largely similar. In the United States, the prosecution of criminal laws during the segregation era that sought to oppress Black Americans were not entirely eliminated.<sup>101</sup> Instead, laws requiring racial separation transformed into race-neutral laws with racially disparate impacts enforced by prosecutors in the form of the war on drugs.<sup>102</sup>

In South Africa, every prosecutor kept their job post-apartheid as a result of the "sunset clauses;"<sup>103</sup> however, there was a voluntary early retirement program.<sup>104</sup> Thus, in both countries, after the eras of racial

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97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*; see also National Prosecution Authority Act 32 of 1998 § 28(2)(4) (S. Afr.) ("The procedure to be followed in conducting an investigation shall be determined by the Investigating Director at his or her discretion. . . .").

101. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF BLINDNESS* (The New Press ed., 2010); Jasmine B. Gonzales Rose, *Race Inequity Fifty Years Later: Language Rights Under the Civil Rights Act of 1964*, 6 ALA. L. REV. 167 (2014); Lawrence Rosenthal, *Pragmatism, Originalism, Race, and the Case Against Terry v. Ohio*, 43 TEX. L. REV. 299 (2010).

102. See ALEXANDER, *supra* note 101.

103. HEIN MARAIS, *SOUTH AFRICA: LIMITS TO CHANGE: THE POLITICAL ECONOMY OF TRANSITION* 220 (U. Capetown Press 2d ed., 2001). These sunset clauses were created in 1993 to protect incumbent civil servants from retrenchment. *Id.*

104. Hofmeyr Interview, *supra* note 6.

separation, the general culture of prosecutions persisted because the prosecutors during the segregation era were the same personnel who trained the next generation of prosecutors. Furthermore, prosecutors in both countries became acculturated towards a default of trust towards police officers because their role requires them to trust police in prosecuting their other cases on a daily basis.<sup>105</sup>

In the United States, the majority of Americans have only recently become aware of critiques about police violence.<sup>106</sup> Similarly, in South Africa, while there is activism around the way police treat protestors, there is little focus on the way police interact with alleged criminal suspects.<sup>107</sup> Some argue the public may be unwilling to criticize policing practices when crime rates are high, and instead demand harsher government action, as is currently the case in South Africa.<sup>108</sup> However, disaggregated data, in both countries, demonstrates crime rates do not correlate or causally relate to levels of police violence.<sup>109</sup> Therefore, this suggests the public disinclination to criticize government action is largely due to cultural priorities.<sup>110</sup> Additionally, in the United States, police violence may make communities less willing to engage with the police, thereby creating a negative cycle of community violence and further justification for police violence.<sup>111</sup>

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105. *Id.*; see also Jacobi, *supra* note 13, at 803–04 (“[United States] prosecutors also find themselves in a difficult position when faced with an accusation of police misconduct. They work closely with police and their ability to succeed in their everyday tasks of prosecuting routine crimes depends on the work and cooperation of police officers.”).

106. Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1775–77 (2016); Katie Nodjimbadem, *The Long, Painful History of Police Brutality in the U.S.*, SMITHSONIAN (July 27, 2017), <https://www.smithsonianmag.com/smithsonian-institution/long-painful-history-police-brutality-in-the-us-180964098/>.

107. Xezwi Interview, *supra* note 57.

108. Telephone Interview with Antony Albeker, Author, *The Dirty Work of Democracy* (Jan. 13, 2017) [hereinafter Albeker Interview].

109. DAVID BRUCE, AN ACCEPTABLE PRICE TO PAY?: THE USE OF LETHAL FORCE BY POLICE IN SOUTH AFRICA 5–6 (2010); see also *Police Violence Map, It’s Not About Crime*, MAPPING POLICE VIOLENCE (last updated Jan. 3, 2018), <https://mappingpoliceviolence.org/> (graph demonstrates the lack of correlation between crime rate and police violence in the United States).

110. BRUCE, *supra* note 109, at 5–6.

111. Matthew Desmond et al., *Police Violence and Citizen Crime Reporting in the Black Community*, 81 AM. SOC. REV. 857 (2016).

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Likewise, in South Africa, the correlation is closely related to deaths of police officers because “police always revenge.”<sup>112</sup>

Both countries also share systemic issues in the viability of prosecutors’ offices as a means for accountability for police violence. For example, in both countries, prosecutors are not responsible for the agencies conducting the case investigation, but the strength of the case directly depends on the strength of the investigation. In the United States, prosecutors are often dependent on the investigation of the same police departments where the accused officer works. For example, in the Freddie Gray case in Baltimore, the prosecutor Marilyn Mosby received very little assistance from the police department in conducting the investigation.<sup>113</sup>

Similarly, in South Africa, the NPA runs into issues of police networks where police officers try to cover up for each other.<sup>114</sup> IPID is responsible for investigating criminal activity by the police as well as all deaths that occur in police custody.<sup>115</sup> Although it is independent from police services, IPID has been described as “useless” by organizers because local police conduct the initial crime scene survey and preservation, during which many basic forensics are compromised and dockets are lost.<sup>116</sup> Additionally, IPID noted the police are familiar with the investigatory process, and the majority of cases are those where police officers are the only witnesses.<sup>117</sup> Issues of familiarity with process are also true in the United States.

Overall, both countries face different structural barriers when using prosecutors as a means to hold officers accountable for police violence. South Africa’s creation of IPID shows one possible solution is to create an independent group of investigators unconnected to internal police departments. However, any independent body that will be used as a

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112. Segodi Interview, *supra* note 38.

113. Wil S. Hylton, *Baltimore vs. Marilyn Mosby*, N.Y. TIMES (Sept. 28, 2016), <https://www.nytimes.com/2016/10/02/magazine/marilyn-mosby-freddie-gray-baltimore.html>.

114. Hofmeyr Interview, *supra* note 6.

115. *Id.*

116. Interview with Dale McKinley, Author, South Africa’s Corporatised Liberation: A critical analysis of the ANC in power, in Johannesburg, S. Afr. (Jan. 10, 2017) [hereinafter McKinley Interview].

117. Xezwi Interview, *supra* note 57.

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means for policing accountability needs effective investigatory tools to actually hold police officers accountable.

### III. BARRIERS TO CIVIL SUITS AS A MEANS FOR ACCOUNTABILITY AGAINST POLICE VIOLENCE

In the United States, individuals can only bring civil rights claims against local municipalities, including police departments and prosecutors' offices, when an injury is inflicted as a result of a government policy.<sup>118</sup> Otherwise, individuals are limited, if not completely barred, from suing governmental entities under the doctrine of sovereign immunity.<sup>119</sup> These types of suits are further complicated by obscure policies regarding data collection requirements and limitations on public access to data that make it challenging to identify a governmental agency's pattern or practice of bad policy.<sup>120</sup> The federal government does not mandate all state and local departments to report deaths in their custody, and the principles of federalism would make such mandates challenging.<sup>121</sup>

On the other hand, in South Africa, civil suits can be brought against the NPA for failure to bring criminal charges, thereby making the NPA's decisions subject to judicial review.<sup>122</sup> Further, the legal procedure, in such cases, provides plaintiffs with a high level of access to information during discovery.<sup>123</sup> However, much of the population face financial barriers when bringing civil suits, and the non-profit impact litigation sector is still developing.<sup>124</sup> Therefore, in both the United States and South Africa, civil litigation provides recourse for a limited subset of individuals who would seek to hold police officers accountable through civil, rather than criminal, litigation.

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118. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978).

119. *See id.*

120. *See United States v. Armstrong*, 517 U.S. 456, 468 (1996).

121. *See* Juleyka Lantigua-Williams, *The Justice Department Corrects for A Use-of-Force Blind Spot*, THE ATLANTIC (Oct. 14, 2016), <https://www.theatlantic.com/politics/archive/2016/10/justice-department-police-use-force/504050/>.

122. Hofmeyr Interview, *supra* note 6.

123. *Id.*

124. The non-profit litigation sector not only represents clients, but also seeks to change the law. Altbeker Interview, *supra* note 108.

## IV. PAST AS A PROLOGUE: POLICING CULTURE OF IMPUNITY AS A BARRIER TO SELF-REGULATION AND INTERNAL ACCOUNTABILITY

The concept of path dependency is instructive in understanding why police departments in both countries continue to demonstrate similar behaviors to the eras of racial separation and fail to self-regulate or hold themselves accountable. Path dependency is the theory that an organization or institution's history greatly informs its present state.<sup>125</sup> Path dependency occurs for three possible reasons: (1) historical experiences shape mutually consistent expectations; (2) informational channels or codes and durable physical goods allow an organization to operate efficiently; and (3) the strong interrelatedness among the constituent elements of complex organizations.<sup>126</sup> In modern parlance, these three concepts could be defined as: (1) institutional values or culture, (2) patterns of behaviors and continued tools, and (3) social networks and relationships.

*A. Institutional Values and Culture*

Both the United States and South Africa practice unique and strong policing cultures. Often, that culture includes an element of impunity. In the United States, law students participating in the Civil Rights and Restorative Justice Project are investigating murders of African Americans during an era of racial terror from 1930 to 1970.<sup>127</sup> Before these law students' efforts, many of these murders were never investigated by police, let alone tried in a court of law.<sup>128</sup> Presently,

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125. INSTITUTIONAL REFORMS AND PEACEBUILDING: CHANGE, PATH-DEPENDENCY AND SOCIETAL DIVISIONS IN POST-WAR COMMUNITIES 91 (Nadine Anzor & Sabine Kurtenbach eds., 2016); Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001); Paul A. David, *Why are Institutions the 'Carriers of History'?* *Path Dependence and the Evolution of Conventions, Organizations and Institutions*, 5 STRUCTURAL & ECON. DYNAMICS 205, 207 (1994).

126. David, *supra* note 125, at 209.

127. Beth Schwartzapfel, *Getting Away with Murder*, THE MARSHALL PROJECT (Jan. 3, 2017, 10:00 PM), [https://www.themarshallproject.org/2017/01/03/getting-away-withmurder?utm\\_medium=email&utm\\_campaign=newsletter&utm\\_source=opening-statement&utm\\_term=newsletter-20170104-665#.nq2Ud83Fr](https://www.themarshallproject.org/2017/01/03/getting-away-withmurder?utm_medium=email&utm_campaign=newsletter&utm_source=opening-statement&utm_term=newsletter-20170104-665#.nq2Ud83Fr).

128. *Id.*

72% of U.S. police officers disagree with the statement, “[O]fficers who consistently do a poor job are held accountable.”<sup>129</sup>

In South Africa, Matthews Sesoko, the Director of Investigations for IPID, stated, “I don’t think they [police] are trained to be violent in police college, the problem is when they get to the precinct and who their mentors were.”<sup>130</sup> Sesoko emphasized this culture is not new, stating the “problem is you have a culture of a police force from the apartheid era where it was a normal thing to be brutal to citizens. There was always impunity.”<sup>131</sup> Thus, a culture of impunity has historical roots in both the United States and South Africa.

Additionally, in both countries, the culture of policing is deeply rooted in police officers’ identity as police officers. In the United States, according to Chicago Mayor Rahm Emanuel, this creates a problem known as the “thin blue line” or the “code of silence.”<sup>132</sup> This policing culture can be so deeply ingrained that even head police officers and the departments’ internal affairs units can become compromised.<sup>133</sup> Significantly, these are the very officers who are charged with investigating police misconduct and violence.<sup>134</sup> Similarly, in South Africa, Robert McBride says that for police officers, “regardless of color, blood stays blue.”<sup>135</sup> Additionally, McBride stated that the code of silence in South Africa amongst police officers creates a “blue curtain, behind which you are not allowed to see.”<sup>136</sup>

Both the United States and South Africa’s policing cultures are related to the large percentage of men in the police force. As of 2013,

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129. Rich Morin et al., *Behind the Badge: Inside America’s Police Departments*, PEW SOC. TRENDS (Jan. 11, 2017), <http://www.pewsocialtrends.org/2017/01/11/inside-americas-police-departments/>.

130. Sesoko Interview, *supra* note 89.

131. *Id.*

132. Jamie Kalven, *Code of Silence: Part 1*, THE INTERCEPT (Oct. 6, 2016, 6:00 AM), <https://theintercept.com/2016/10/06/in-the-chicago-police-department-if-the-bosses-say-it-didnt-happen-it-didnt-happen/>. Shannon Spalding, a former Chicago police officer, was financial destroyed and stripped of her job for failing to abide by the “code of silence” or “thin blue line.” In an interview, Spalding called this behavior ““Operation Smoke and Mirrors . . . If four bosses in the department say it didn’t happen, it didn’t happen.”” *Id.*

133. *Id.*

134. *Id.*

135. McBride Interview, *supra* note 42.

136. *Id.*

women accounted for just 12% of local, full-time police officers in the United States.<sup>137</sup> In South Africa, women accounted for 32.5% of commissioned officers in the 2015-2016 annual report.<sup>138</sup> However, only 18% of officers patrolling the street were women.<sup>139</sup> In the United States, analysis shows “hyper masculinity of the rank and file is encouraged, reinforced and policed in numerous ways.”<sup>140</sup>

One report found the level of an officer’s insecurity with his own masculinity (also known as masculinity threat) predicted whether the officer had used force against Black men in the last two years.<sup>141</sup> South African police officers, like their American counterparts, also have a culture of masculinity.<sup>142</sup> Antony Albeker, a researcher who conducted an ethnographic study of police officers noted, “It’s quite explicit. It’s all for the women’s safety, obviously, is the way they see it. Nevertheless, it’s constant in the way they police gender roles.”<sup>143</sup> Therefore, South Africa and the United States’ policing share similar barriers in the form of racial bias and patriarchal attitudes that undermine changes in policing post-apartheid.

### *B. Patterns of Behavior and Continued Tools*

In the United States and South Africa, the continuation in policing behavior suggests that institutional biases create differences in lived experiences for citizens, even if the laws provide equal protection under

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137. Brian A. Reaves, *Local Police Departments, 2013: Personnel, Policies, and Practices*, BUREAU OF JUSTICE STATISTICS, 4 (2015).

138. Dep’t of Police, SOUTH AFRICAN POLICE SERVICE: ANNUAL REPORT 2015/16 34 (2016), [https://www.saps.gov.za/about/stratframework/annual\\_report/2015\\_2016/saps\\_annual\\_report\\_2015\\_2016.pdf](https://www.saps.gov.za/about/stratframework/annual_report/2015_2016/saps_annual_report_2015_2016.pdf).

139. Interview with David Bruce, Independent Researcher, in Johannesburg, S. Afr. (Jan. 6, 2017) [hereinafter Bruce Interview].

140. L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 131 (2014).

141. *Id.* at 136.

142. McBride Interview, *supra* note 42.

143. Albeker Interview, *supra* note 108. An ethnographic study generally “refers to a social science research that [] explores ‘the nature of particular social phenomena, rather than setting out to test hypotheses about them . . . .’” Davis S. Caudill, *Law, Science and Science Studies: Contrasting the Deposition of a Scientific Expert With Ethnographic Studies of Scientific Practice*, 12 S. CAL. INTERDIS. L.J. 85, 85 (2002).



the law. The racial biases and presumptions regarding who is presumed a criminal seem to remain in both countries. Furthermore, in both countries, the way police officers conceive their role and the tools that are used to effectuate their roles do not appear to have significantly changed since segregation or apartheid.

In the United States, neither explicit racism nor implicit racial bias was associated with greater use of force by police officers.<sup>144</sup> A masculinity report conducted in the United States hypothesized racial stereotypes about Black men as “violent, criminal, dangerous, and animal-like” construct Black men as more masculine in relation to other men, and that this masculinity threat causes police officers to use greater force.<sup>145</sup> Finding masculinity threats as the cause for greater use of force, rather than racism, helps explain why increasing representation of Black police officers does not reduce the use of force by officers in a police department.<sup>146</sup>

In South Africa, 63% of commissioned officers are Black African and 24% are White.<sup>147</sup> Still, Antony Altbeker, the ethnographic researcher described above, stated, “I’m pretty sure they [Black officers] have internalized all the profiling. I don’t think there’s too much of a difference between White cops and Black cops between who’s a criminal and who’s not. I think that those sets of ideas and prejudices are common throughout the police.”<sup>148</sup> According to Dr. Fazel Randera, who served on the South African Truth and Reconciliation Commission, these biases are not new, stating that prior to the end of apartheid in 1994, the “propaganda was Black people were savages.”<sup>149</sup>

The way police officers conceptualize their roles in both countries also reflects that change has been limited since the days when police officers were enforcing racial separation. In the United States, 31% of

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144. Richardson & Goff, *supra* note 140, at 136.

145. *Id.* at 136–37.

146. *See generally* Sean Nicholson-Crotty, Jill Nicholson-Crotty & Sergio Fernandez, *Will More Black Cops Matter? Officer Race and Police-Involved Homicides of Black Citizens*, 77 PUB. ADMIN. REV. 206 (2017).

147. Altbeker Interview, *supra* note 108.

148. *Id.*

149. Interview with Dr. Fazel Randera, Fmr. Comm., The Indep. S. Afr. Truth and Reconciliation Comm’n, in Johannesburg, S. Afr. (Jan. 11, 2017) [hereinafter Randera Interview].

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officers say they view themselves as protectors, 8% as enforcers and 62% view themselves as protectors and enforcers equally.<sup>150</sup> Similarly, in South Africa, Altbeker says, “What really changed after apartheid was who’s in power, but what was supposed to change was that police were supposed to see themselves as not protecting the state, but providing services to citizens.”<sup>151</sup>

In the United States, academia has drawn clear lines from slave catchers to policing during segregation to police violence in the present day.<sup>152</sup> Additionally, the United States’ history of racial discrimination has been explored in popular culture through films and books.<sup>153</sup> In South Africa, both the media and elders in communities have drawn the connection between apartheid-era policing practices and current misconduct.<sup>154</sup> One organizer, Bongani Xezwi, said the police use the “same tactics of intimidation as [the] apartheid government.”<sup>155</sup> Based on Xezwi’s interactions with the police, he believes “most of the policies that were supposed to change after apartheid didn’t change.”<sup>156</sup> Willie Hofmeyr opined that there was a post-apartheid effort to try to make the police force more of a civilian force; however, in the face of growing crime, “some of the militarization [of the police] is justifiable.”<sup>157</sup> Journalist Mpikeleni Duma referred to the efforts to demilitarize the police as “cosmetic rethinking.”<sup>158</sup>

Ultimately, police officers in neither country are able to self-regulate nor hold themselves accountable because there is a policing culture and system that allows police officers to hide under a shield of impunity.

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150. Rich Morin et al., *Behind the Badge*, PEW RES. CTR. (Jan. 11, 2017), <http://www.pewsocialtrends.org/2017/01/11/behind-the-badge/>.

151. Altbeker, *supra* note 108.

152. See Gloria J. Browne-Marshall, *Stop and Frisk: From Slave-Catchers to NYPD, A Legal Commentary*, 21 TROTTER R. 98 (2013).

153. See generally ALEXANDER, *supra* note 101; see also THE 13TH (Netflix 2016).

154. Segodi Interview, *supra* note 38.

155. Xezwi Interview, *supra* note 57.

156. *Id.*

157. Hofmeyr Interview, *supra* note 6.

158. Duma Interview, *supra* note 54.

## V. LESSONS ON HOW TO IMPROVE ACCOUNTABILITY FOR POLICE VIOLENCE

In comparing the structures and functional practices that strengthen and limit accountability in the United States and South Africa, one may glean lessons on how to improve these systems that are obfuscated when only looking at one system. First, it is necessary to exercise caution in presuming solutions can be derived from measurable disparities between the two countries. Intersectional analysis suggests the racial composition of a police department does not change incidents of unjustified use of force; however, gender composition may. This supports the hypothesis that the cause of racial disparities in use of force cases may relate more to perceptions of a masculinity threat—often related to race—rather than implicit or explicit racial bias.<sup>159</sup> Thus, an effort to correct racial biases in police departments would not necessarily solve the issues of use of force.

Second, the comparative analysis illustrates the United States can do much more to improve the structural process of investigating and prosecuting police violence, and the current challenges are not inherent or forgone conclusions. On the other hand, South Africa's challenges demonstrates that changing formal institutions will only fix some of the issues, and there is a need to actively work on changing the culture of the institutions. As Matthews Sesoko points out, corruption for the purposes of monetary gain does not necessitate violence on the part of police.<sup>160</sup> Therefore, misconduct in South Africa is more attributable to culture than issues of corruption.<sup>161</sup> Whereas the United States places a significant emphasis on policing culture without considering institutional responsibility for holding police accountable, and whether the appropriate institutions are empowered and capable to successfully investigate police.

Finally, the public must be empowered to hold the government accountable to have consistent limits on state violence. This can be done through structures that improve voice, representation, and influence as well as cultural changes that help improve individuals' belief in their own agency and ability to exert influence. The structural

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159. Richardson & Goff, *supra* note 140.

160. Sesoko Interview, *supra* note 89.

161. *Id.*

robustness of the South African prosecution system demonstrates that the United States needs to address its institutional shortcomings to improve its processes for police accountability. However, some of the functional neutering of South African prosecutors' efficacy demonstrates a need to examine systems of accountability to identify and correct breakdowns in those systems.

In both countries, little, if any, attention is paid to complicit prosecutors who perpetuate institutional racism by failing to hold police officers accountable. Given that prosecutors were responsible for enforcing many of the segregation-era and apartheid-era laws, they provide an instructive case study for how institutional racism perpetuates after the formal dismantling of legal structures of racial separation. The case study outlined in this paper demonstrates that complicity in perpetuating institutionalized injustices and inequities is not necessarily a problem of individuals with bad intentions. Rather it is a problem of structures, systems, and cultures that create barriers to accountability. Due to path dependency, efforts must be taken in a proactive manner to change these structures, systems and cultures.

#### A. History

First, a shared national history is important to understand the historical narratives that influence some citizens. In the United States, efforts to document the history of slavery and racial violence are relatively recent.<sup>162</sup> As a result, in the last fifty years after the end of segregation, and over the last 200 years since the end of slavery, counter narratives have developed around both of those systems of oppression. Part of the challenge is that the Confederacy continues to be celebrated publicly in parts of the United States.<sup>163</sup> On the other hand, the more painful parts of American history are just now becoming public through

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162. See, e.g., *Universities Studying Slavery*, PRESIDENT'S COMMISSION ON SLAVERY AND THE UNIVERSITY, <http://slavery.virginia.edu/universities-studying-slavery/>; *Lynching in America: Confronting the Legacy of Racial Terror*, EQUAL JUST. INITIATIVE (2015), <http://eji.org/sites/default/files/lynching-in-america-second-edition-summary.pdf/>.

163. See Joe Sterling, *A New Alabama Law Makes Sure Confederate Monuments are Here to Stay*, CNN (May 26, 2017, 5:19 PM), <http://www.cnn.com/2017/05/26/us/alabama-confederate-monuments-bill-trnd/>.

the National Museum of African American History and Culture and Equal Justice Initiative's lynching memorial.<sup>164</sup>

By contrast, South Africa rapidly attempted to contend with its complicated history through museums such as the Apartheid Museum<sup>165</sup> and historical sites such as Liliesleaf Farm.<sup>166</sup> This may be attributed to the differences in the demographics of the two countries or it may reflect a greater willingness to deal with past challenges in the absence of a narrative around exceptionalism that is embedded into the American psyche.<sup>167</sup>

### B. "Rehumanization"

After a political system systematically dehumanizes people based on socially constructed characteristics, the country must undergo a national process of "rehumanization" to heal. In the United States, the government has only recently begun to apologize for its past misconduct. Indeed, the International Association of Chiefs of Police (IACP) apologized for its past role in racially discriminatory policing, and the U.S. House of Representatives apologized for the United States' history of slavery.<sup>168</sup> Additionally, the Department of Justice has

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164. See Vinson Cunningham, *Making a Home for Black History*, THE NEW YORKER (Aug. 29, 2016), <http://www.newyorker.com/magazine/2016/08/29/analyzing-the-national-museum-of-african-american-history-and-culture>; Jonathan Capehart, *What the Lynching Memorial Will Force Us All to Face*, WASH. POST (Dec. 21, 2016), [https://www.washingtonpost.com/blogs/post-partisan/wp/2016/12/21/what-the-lynching-memorial-will-force-us-all-to-face/?utm\\_term=.aa65bf96557c](https://www.washingtonpost.com/blogs/post-partisan/wp/2016/12/21/what-the-lynching-memorial-will-force-us-all-to-face/?utm_term=.aa65bf96557c).

165. APARTHEID MUSEUM, *About the Museum*, <https://www.apartheidmuseum.org/about-museum-0> (last visited Jan. 14, 2018).

166. SOUTH AFR. EXPLORED, *The Liliesleaf Farm*, <https://www.savenues.com/attractionsga/liliesleaf-farm.htm> (last visited Jan. 14, 2018).

167. "Faith in their own [American] exceptionalism has sometimes led to a certain obtuseness on the part of Americans, a tendency to preach at other nations rather than listen to them, a tendency as well to assume that American motives are pure where those of others are not..." Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1480 (2003).

168. Tom Jackman, *U.S. Police Chiefs Group Apologizes for 'Historical Mistreatment' of Minorities*, WASH. POST (Oct. 17, 2016), [https://www.washingtonpost.com/news/true-crime/wp/2016/10/17/head-of-u-s-police-chiefs-apologizes-for-historic-mistreatment-of-minorities/?utm\\_term=](https://www.washingtonpost.com/news/true-crime/wp/2016/10/17/head-of-u-s-police-chiefs-apologizes-for-historic-mistreatment-of-minorities/?utm_term=).

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funded a Trust and Justice initiative to attempt to facilitate conversations in the spirit of reconciliation at the local level.<sup>169</sup> However, these conversations are taking place decades, if not centuries, after the initial violations occurred. Therefore, the process of healing is more difficult because dehumanizing narratives have passed down through generations without government acknowledgment of these atrocities. Now, those attempting to undergo this healing in the United States do not necessarily have the memory of overt injustices their ancestors participated in or were complicit in allowing to occur.

However, in South Africa, there was a Truth and Reconciliation Commission (“TRC”).<sup>170</sup> Robert McBride, who received amnesty from the TRC said, “When you have the opportunity to speak to people who you have caused harm it rehumanizes you to yourself.”<sup>171</sup> He clarified that it serves to ameliorate the “psychic numbing where you are solely focused on your political mission.”<sup>172</sup> Further, Fazel Randera, who was a commissioner of the TRC, noted, “[O]ne doesn’t get the sense that any White person feels that they were complicit in apartheid,” and, consequently, they “don’t understand the advantages they got that continue to give them advantages in the new South Africa.”<sup>173</sup>

One reason for this may be that while some institutional examination was done, its focus had a limited scope. Antony Altbeker says that because the TRC’s focus was on political policing and not day-to-day policing, a majority of police officers think the TRC was irrelevant to the work they were involved in.<sup>174</sup> Altbeker believes, “[T]he gross human rights violations focus of [the] TRC missed the whole point of apartheid. Because, measured on those terms, it wasn’t particularly oppressive. The point of apartheid was the systemic indignity, oppressive, and resource sapping that was part of it.”<sup>175</sup> In

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3d428df1f12d; *House Apologizes for Slavery, ‘Jim Crow’ Injustices*, CNN (July 29, 2008, 7:11 PM), <http://www.cnn.com/2008/POLITICS/07/29/house.slavery/>.

169. *Reconciliation*, NATIONAL INITIATIVE FOR BUILDING COMMUNITY TRUST AND JUSTICE, <https://trustandjustice.org/resources/intervention/reconciliation> (last visited Jan. 14, 2018).

170. Promotion of National United and Reconciliation Act 34 of 1995 (S. Afr.).

171. McBride Interview, *supra* note 42.

172. *Id.*

173. Randera Interview, *supra* note 149.

174. Altbeker Interview, *supra* note 108.

175. *Id.*

this way, while a process like the TRC may provide rehumanization for individuals, more is needed to change institutions and acknowledge complicity.

### *C. Trainings on Institutional Roles in Past Injustices*

A national shared history and rehumanizing process is insufficient to combat the path dependency of institutions without specific trainings within institutions that allow new members to understand what past injustices the institution has committed. This education allows newer individuals to understand public reactions to the institution and builds a culture of vigilance in ensuring similar injustices never occur again.

Neither country has pursued a national effort to incentivize trainings for all prosecutors' offices to understand and acknowledge the roles their institutions had in perpetuating unjust laws nor their complicity in allowing crimes of racial terror to go unpunished. In South Africa, the lack of historical trainings has allowed for a counter-narrative to develop within the policing subculture about police officers' role in apartheid.<sup>176</sup> Therefore, many ignore their role in perpetuating apartheid and believe they were instrumental in providing the order to transition South Africa to democracy.<sup>177</sup> It is important for institutions, whose members were actively or complicity involved in perpetuating injustices in the past, to teach new members about the institution's history so they can appreciate and cautiously hold the power they currently yield.

### *D. Reexamination of Tools Institutions Use*

If institutions have new mandates, such as the way prosecutors' offices are now required to ensure an equal application of the law, it drastically shifts their roles from enforcers to protectors. As such, it is important to reexamine the tools those institutions are using to effectuate those goals. In the United States, this has not occurred in a public manner around prosecution though there have been efforts to reimagine who can fulfill that role. For example, in a recent election, a

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176. *Id.*

177. *Id.*

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civil rights lawyer won a prosecutorial election.<sup>178</sup> There was also thoughtful examination around the culture of policing at the national level in the United States through the President's Task Force on 21st Century Policing.<sup>179</sup>

In post-apartheid South Africa, people believed the problem of bad actors was endemic in the police, and there was less concern about prosecutors' behavior under apartheid.<sup>180</sup> Still, during the transition period from apartheid to democracy, prosecutors played a key role in investigating rogue elements of the armed services and had the opportunity to reexamine their role as enforcers and shift to a protector model.<sup>181</sup> A reevaluation of the tools police officers use was contemplated during the negotiations prior to a new constitution, but was left incomplete.<sup>182</sup> As a result, police officers today are widely criticized for their inability to effectively conduct public service or public order policing.<sup>183</sup>

*E. Institutions Need to Commit Themselves to Data Collection and Transparency*

To illuminate and hold institutions accountable for their actions, institutions need to commit to data collection and transparency of that data. In the United States, with a system of decentralized prosecutions, there are only a few offices that are beginning to share data. For example, in Cleveland, Ohio, the prosecutor's office publicly shares data on prosecution disaggregated by race.<sup>184</sup> Moreover, in Philadelphia, Pennsylvania, the District Attorney's office announced

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178. Julia Terruso, *DA Primary Winner Larry Krasner: I'm not beholden to Soros*, PHILLY.COM (May 17, 2017, 12:24 PM), <http://www.philly.com/philly/news/politics/city/Larry-Krasner-District-Attorney-Democratic-primary-winner-Soros.html>.

179. *Final Report of the President's Task Force on 21st Century Policing*, THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING (May 2015), [https://cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf).

180. Hofmeyr, *supra* note 6.

181. *Id.*

182. *Id.*

183. Friedman Interview, *supra* note 27.

184. *Benchmarks and Data*, CUYAHOGA COUNTY OFFICE OF THE PROSECUTOR, <http://prosecutor.cuyahogacounty.us/en-US/benchmarks-data.aspx> (last visited May 2017).



transparent use-of-force protocol.<sup>185</sup> In South Africa, some of these transparency measures are embedded within the structures through reporting requirements.<sup>186</sup> However, there are flaws in ensuring robustness of data collection and ensuring there are adequate resources and information provided to the public so they can serve as a check on data collection and transparency.<sup>187</sup>

#### *F. Government Needs to Encourage Civic Participation*

All of the information provided to the public is not actionable because as discussed *supra*, individuals in both countries have limited ability to participate in the political process.<sup>188</sup> Accordingly, governments must actively work to combat political inequality so that all citizens can have voice, representation, and influence. In the United States, this is largely about improving processes that confer more political power on some individuals over others. In South Africa, this is also a concern; but there is a broader concern that as a young democracy, many people still do not know their individual due process rights under the new Constitution.<sup>189</sup> In both countries, the governments can close information gaps through outreach efforts and the creation of forums that actively solicit feedback from citizens to ensure they feel heard and the government is responsive to their concerns.

#### CONCLUSION

In conclusion, both the United States and South Africa struggle with political inequality that continues to create barriers for the will of the people to be enacted in government. Furthermore, both countries have structural issues in prosecutions of police violence that limit its effectiveness as a tool for accountability. These issues are exacerbated

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185. Philadelphia District Attorney's Office, *Philadelphia District Attorney Announces Transparent, Progressive Officer Involved Shooting Protocol* (Nov. 10, 2016), <https://phillyda.wordpress.com/2016/11/10/philadelphia-district-attorney-announces-transparent-progressive-officer-involved-shooting-protocol/>.

186. Bruce Interview, *supra* note 139.

187. McBride Interview, *supra* note 42.

188. See Discussion Part I.

189. Randerer Interview, *supra* note 149.

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by cultural and systemic issues surrounding prosecutions of police violence. Similarly, civil lawsuits as a tool of accountability have limitations. Finally, an ongoing culture of impunity within policing makes internal self-regulation a challenge as a tool of accountability. Still, given the countries' shared history of racial separation, a comparative analysis of these countries is instructive in providing lessons for how both countries can improve their systems of accountability around police violence. Finally, using the complicity of prosecutors and other challenges of policing accountability, a framework for undoing institutionalized injustices can be proposed with the hope of limiting future societal harms by institutions created to serve the public.