

THE PROSECUTOR'S ROLE IN ADDRESSING
OFFICER-INVOLVED FATALITIES AND CRITICAL INCIDENTS

**A TOOLKIT FOR PROSECUTORS AND COMMUNITIES,
BY PROSECUTORS AND COMMUNITIES**

FEBRUARY 2019

FROM THE INSTITUTE FOR INNOVATION IN PROSECUTION

The Institute for Innovation in Prosecution at John Jay College of Criminal Justice (IIP) partners with prosecutors and the communities they serve to advance a more equitable and effective criminal justice system. Through strategic initiatives that examine the role of the prosecutor, convene diverse stakeholders, and emphasize human dignity, the IIP provides a collaborative national platform for prosecutors, policy experts, and directly impacted community members to examine the most persistent challenges in the criminal justice system, and to generate actionable solutions that prioritize community-centered standards of safety, equity, and wellness.

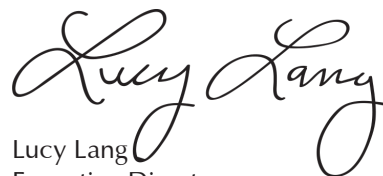
There has been no challenge more pressing, and no solution more elusive, than addressing officer-involved fatalities and critical incidents. The death of people, disproportionately people of color, and the lack of accountability for those involved has long been a national crisis. While there have been efforts at cultivating dialogue around these issues, there has been limited work around harnessing the power of the prosecutor to address these tragedies.

We are immensely grateful to members of IIP's Working Group on Officer-Involved Fatalities for addressing this significant gap in the field. Over the past year, members lent their time, experiences, and expertise to devise tangible steps to prevent police use-of-force, and to provide a path to accountability for unjustified force. We are proud to share the culmination of their collaboration and commitment to this work: *A Toolkit for Prosecutors and Communities, by Prosecutors and Communities*.

In gratitude and partnership,



Karol V. Mason
President
John Jay College of Criminal Justice



Lucy Lang
Executive Director
The Institute for Innovation in Prosecution
John Jay College of Criminal Justice

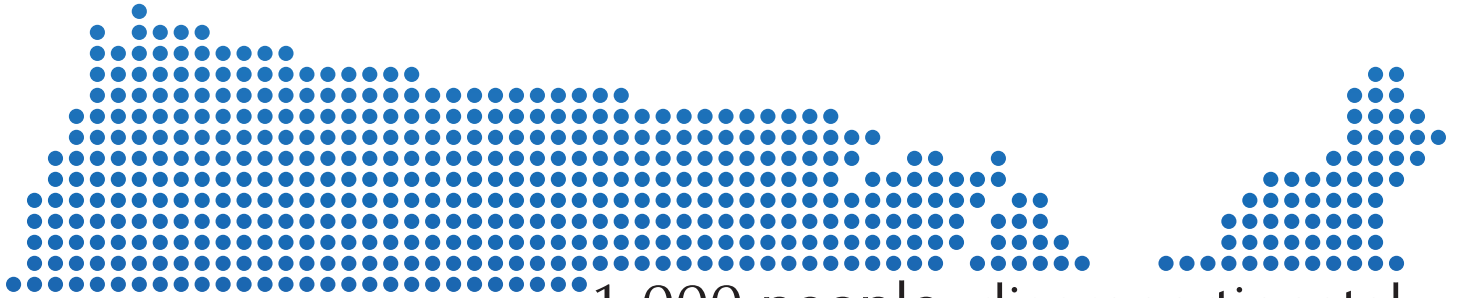
TABLE OF CONTENTS

4	Working Group Members
7	The Working Group
12	The Toolkit
16	Data Checklist
18	Investigative Checklist
20	State Statute Checklist
22	Use-of-Force Policy Guidelines
24	Brady Policy Guidelines
28	Glossary
29	Resources

WORKING GROUP MEMBERS

1. **Lumumba Akinwole-Bandele**, Senior Community Organizer, NAACP Legal Defense and Education Fund
2. **John Alden**, Managing Attorney, Independent Investigations Bureau, San Francisco, CA District Attorney's Office
3. **Roy L. Austin, Jr.**, Partner, Harris, Wiltshire & Grannis, LLP; former Deputy Assistant to President Barack Obama for Urban Affairs, Justice and Opportunity
4. **Iris Baez**, Founder, Anthony Baez Foundation; Mother of Anthony Baez (killed by NYPD in 1994)
5. **Chiraag Bains**, Director of Legal Strategies, Demos
6. **Valerie Bell**, Mother of Sean Bell (killed by NYPD in 2006)
7. **Alvin Bragg**, former Chief Deputy Attorney General, New York
8. **Paul Butler**, The Albert Brick Professor in Law, Georgetown Law
9. **Gwen Carr**, Mother of Eric Garner (killed by NYPD in 2014)
10. **Clarence Castile**, St. Paul, MN Reserve Officer; Uncle of Philando Castile (killed by St. Anthony PD in 2016)
11. **Valerie Castile**, Founder of Philando Castile Relief Foundation; Mother of Philando Castile (killed by St. Anthony PD in 2016)
12. **John Chisholm**, District Attorney, Milwaukee, WI
13. **John Choi**, County Attorney, Ramsey County, MN
14. **Ed Chung**, Vice President for Criminal Justice Reform, Center for American Progress
15. **Angela J. Davis**, Professor of Law, American University Washington College of Law
16. **Ronald L. Davis**, Principal Consultant, 21st Century Policing Solutions, LLC; former Director of the Office of Community Oriented Policing Services, US Department of Justice
17. **Victoria Davis**, Sister of Delrawn Small (killed by NYPD in 2016)
18. **Cristine DeBerry**, Chief of Staff, Independent Investigations Bureau, San Francisco, CA District Attorney's Office
19. **Kadiatou Diallo**, President & Founder, The Amadou Diallo Foundation; Mother of Amadou Diallo (killed by NYPD in 1999)
20. **James Doyle**, Fellow, National Institute of Justice
21. **Todd Foglesong**, Professor of Global Practice, University of Toronto Munk School of Global Affairs & Public Policy
22. **Michael Freeman**, County Attorney, Hennepin County, MN
23. **George Gascón**, District Attorney, San Francisco, CA
24. **Lawrence Grandpre**, Director of Research, Leaders for a Beautiful Struggle, Baltimore, MD

25. **Aurie Hall**, Former Acting Director, Criminal & Juvenile Justice Program, Open Society Institute – Baltimore, MD
26. **Crystal C. Hall**, Associate Professor, University of Washington Evans School of Public Policy & Governance
27. **Kristine Hamman**, Executive Director, Prosecutors' Center for Excellence
28. **Jill Harris**, Head of Policy and Strategy, Kings County, NY District Attorney's Office
29. **Farhang Heydari**, Deputy Director, Policing Project, New York University School of Law
30. **Kathleen Hill**, Former Director of Policy, Cook County, IL State Attorney's Office
31. **Robert Himelblau**, Supervising Deputy District Attorney, San Joaquin County, CA District Attorney's Office
32. **Tara Huffman**, Director of Criminal and Juvenile Justice, Open Society Institute – Baltimore
33. **Wanda Johnson**, Founder, Oscar Grant Foundation; Mother of Oscar Grant (killed by BART police officer in 2009)
34. **Joo-Hyun Kang**, Director, Communities United for Police Reform
35. **Lucy Lang**, Executive Director, The Institute for Innovation in Prosecution at John Jay College of Criminal Justice
36. **Karol Mason**, President, John Jay College of Criminal Justice; former United States Assistant Attorney General
37. **Stephanie Morales**, Commonwealth Attorney, Portsmouth County, VA
38. **William Ramirez**, Executive Director, ACLU – Puerto Rico
39. **Meg Reiss**, Chief of Social Justice, Kings County, NY District Attorney's Office
40. **Dan Satterberg**, Prosecuting Attorney, King County, WA
41. **Paul Schnell**, Police Chief, Inver Grover Heights, MN
42. **Erica Schumacher**, Director of Strategic Initiatives, Ramsey, MN County Attorney's Office
43. **Jennifer Shaw**, Program Officer, Open Society Foundation
44. **Samuel Sinyangwe**, Policy Analyst & Data Scientist, Campaign Zero
45. **Tarek Tomez**, Chief Information Officer, City of St. Paul, MN
46. **Cyrus Vance, Jr.**, District Attorney, Manhattan, NY
47. **Tori Verber Salazar**, District Attorney, San Joaquin County, CA
48. **Fred Watts**, Executive Director, Police Athletic League
49. **Tali Farhadian Weinstein**, General Counsel, Kings County, NY District Attorney's Office
50. **Marny Zimmer**, Director of Policy, Cook County, IL State Attorney's Office



In the United States every year, approximately **1,000 people, disproportionately people of color, are killed at the hands of law enforcement.**¹

In the decade between 2005 and 2015, only 54 police officers faced criminal charges for fatally shooting someone in the line of duty, and nearly half of such cases resulted in acquittal or dismissal.² Increased accountability for police officers involved in these tragedies has the potential to improve communities' sense of safety and to enhance trust between law enforcement and communities. Elected prosecutors and the communities they serve are uniquely situated to serve as leaders in building a path towards accountability.



1. "National Police Shootings Database," The Washington Post, 2015-2018; "Mapping Police Violence," Campaign Zero, 2015-2017; "The Counted," The Guardian, 2015-2016.

2. "Police Officers Prosecuted for Deadly Use of Force," The Washington Post, 11 Apr. 2015.

THE WORKING GROUP

The Institute for Innovation in Prosecution at John Jay College of Criminal Justice (IIP) convened a year-long examination of police use-of-force. Comprised of 50 experts from across the country – individuals who have lost loved ones to police violence; prosecutors; police chiefs; policy experts; academics; and advocates – the Working Group on Officer-Involved Fatalities and Critical Incidents (Working Group) convened around the shared goals of preventing use-of-force, and providing a path to accountability for unjustified force.

Working Group members convened around the shared goals of preventing use-of-force, and providing a path to accountability for unjustified force.

The Working Group brought together stakeholders from all sides of this issue. The diversity of the working group allowed for an honest reckoning of the factors that contribute to use-of-force and to limited accountability, and a careful examination of previously neglected nuances that can help to reduce and address these tragedies. Since its first convening, held in February 2018, the Working Group has provided a platform for directly impacted family members, prosecutors, and police chiefs to share their stories, learn from each other’s experiences, and work together to build a more just system. Working Group members collaborated over the past year to identify action for prosecutors to take and communities to advocate for in order to reach these shared goals. Their collaboration culminated in a Toolkit for Prosecutors and Communities, by Prosecutors and Communities (the Toolkit).

The Toolkit draws on the insight of Working Group members as well as existing data and research in order to provide actionable and adaptable steps for prosecutors and communities to prevent and address officer-involved fatalities and other critical incidents in their local jurisdictions.

While there is no shortage of research or reports about officer-involved critical incidents, there has yet to be a guidebook that offers tangible steps for prosecutors and communities to take. This Toolkit addresses this gap. It aims to:

-
- **Reduce officer use-of-force**
 - **Ensure thorough, transparent, and timely investigations**
 - **Strengthen state statute language to provide a path to accountability**
 - **Evaluate local policies using data, racial justice, and human dignity as core metrics**
 - **Foster dialogue and partnerships between prosecutors and communities to address use-of-force**
-



Members of the IIP's Working Group on Officer-Involved Fatalities at John Jay College of Criminal Justice, New York, NY. October 2018

The Working Group was led by individuals who have lost loved ones to police violence; prosecutors; and police chiefs.



Commonwealth Attorney Stephanie Morales, Wanda Johnson, and Victoria Davis share insight on how prosecutors can engage with families directly impacted by officer-involved critical incidents. October 2018



How can we translate conversation into action? Roy L. Austin, Jr. leads the Working Group in a session on "Action Mapping." February 2018

HOW TO USE

The Toolkit aims to cultivate dialogue between prosecutors, communities, law enforcement partners, and other local stakeholders. It draws upon prosecutors' discretion:

- Within the criminal justice system, over charging decisions and investigative protocol
- As democratically elected officials, to partner with the communities they serve
- As the chief local law enforcement official, to influence local policies and priorities

STAKEHOLDERS

The Toolkit is designed to be used by state and local prosecutors and the communities they serve. It provides a road map for prosecutors to evaluate their existing processes, to compare their policies and protocol with best practices, and to enhance their office's and their jurisdiction's standards regarding officer-involved critical incidents. The checklists and policy documents provide concrete suggestions and examples to do this. In addition to action for prosecutors to implement directly within their offices, the Toolkit also has suggestions for prosecutors to shape local policies beyond their immediate discretion, such as by partnering with their local police department and talking with their state legislature. Prosecutors can also use the Toolkit as a way to engage with and inform family members directly impacted by the critical incident, a priority that is emphasized throughout the Toolkit. Community organizations can also use the Toolkit as a way to guide discussions with their elected prosecutor and prosecutor candidates in order to ensure that local policies and protocol are comprehensive, aligned with best practices, and reflect local priorities.



Valerie and Clarence Castile, Philando Castile's mother and uncle, discussing their partnership with Ramsey County (MN) Prosecutor John Choi. October, 2018

IMPLEMENTATION

The Toolkit is designed to be actionable and adaptable. It includes tangible steps for prosecutors to take and for communities to advocate for, with sufficient flexibility to be tailored to individual jurisdictions' unique needs. While each jurisdiction has specific nuances and protocol to consider, the Toolkit provides key questions and components that can guide local infrastructure and processes. It includes actions that prosecutors can take to reduce the likelihood of an officer-involved critical incident, and to address critical incidents through investigative protocol that reduces reactivity and sets standards of independence, timeliness, and transparency. Before beginning to implement the Toolkit, prosecutors should first present it to their communities and their staff for input and discussion. After local and internal review, prosecutors can use the Toolkit to evaluate and strengthen their existing policies and infrastructure.

EVALUATION

As with any tool or strategy, implementation and impact of the Toolkit should be carefully and continually evaluated and refined. Prosecutors should ensure that it is meeting its aims of preventing use of force, providing a path to appropriate accountability when these tragedies do occur, and fostering local dialogue about use-of-force policies and protocol.

The IIP invites feedback and questions from prosecutors and communities interested in adopting the Toolkit. Please contact IIP_JohnJay@prosecution.org for further information and resources.



Seated left-to-right: Ronald L. Davis, District Attorney Cyrus Vance, Jr., Chiraag Bains, Commonwealth Attorney Stephanie Morales, and Wanda Johnson. October 2018

BEFORE An Officer-Involved Critical Incident Occurs

Internal Infrastructure

Does your office:

Report the impact of your decisions?

NO

Collect data, analyze charges driving caseload and racial disparities

YES

Monitor potential police misconduct?

NO

Create/Strengthen Brady-Giglio Infrastructure

YES

Have established critical incident investigative protocol?

NO

Outline investigative steps, timeline, and transparency

YES

Discuss office's **data, policies, and protocol** with **community organizations** and **law enforcement partners**

External Infrastructure

Do you have recurring meetings with:

Community organizations?

NO

Schedule community forum

YES

Invite community suggestions on:

- **Charging priorities**
- **Standards of transparency**
- **Legislative priorities**

Local law enforcement partners?

NO

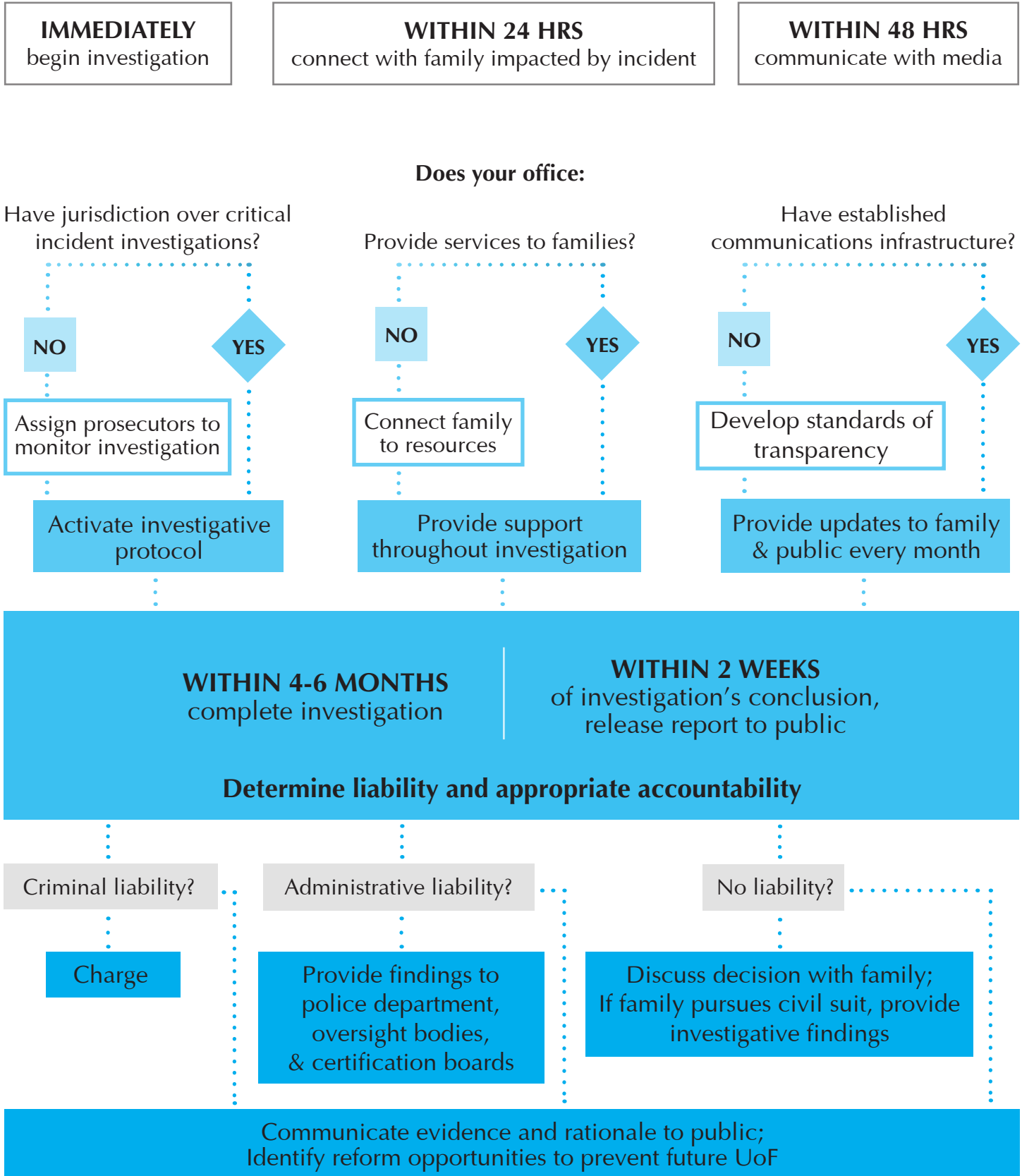
Schedule local law enforcement convening

YES

Align prosecutor & law enforcement policies on:

- **Reducing low-level enforcement & charging**
- **Use of Force best practices**
- **Critical incident investigative protocol**

AFTER An Officer-Involved Critical Incident Occurs



Action for Prosecutors to Take and Communities to Advocate For **BEFORE** Officer-Involved Critical Incident Occurs

WITHIN A PROSECUTOR'S OFFICE

- Create data-driven policies**
 - Collect & disaggregate case data by race of defendant & officer, prosecutor assigned
 - Analyze & discuss data with staff
 - Decline to prosecute low-level charges driving disparities and caseloads

- Monitor potential police misconduct**
 - Ensure infrastructure meets Brady-Giglio standards
 - Decline cases from officers with pattern of allegations against them
 - Pursue formal investigations of officers if evidence to sustain allegations

- Codify critical incident investigative protocol**
 - Create independent investigative unit
 - Assign prosecutors to unit, ensure they do not interact with police on other cases
 - Set timeframes and standards of transparency

WITHIN A PROSECUTOR'S JURISDICTION

- Publish case data**
 - Invite suggestions from community organizations on charging priorities
 - Work with law enforcement partners to reduce enforcement of low-level offenses
 - Publish policy to decline low-level offenses

- Publish critical incident policies**
 - Make Brady policies and investigative protocol public and accessible
 - Work with law enforcement to align policies and infrastructure
 - Invite insight from community organizations on standards of transparency

- Contribute to public discourse on UoF**
 - Encourage local police department to adopt UoF best practices
 - Advocate for state statute language that provides a path to accountability
 - Convene forums on UoF with community groups, law enforcement, other stakeholders

Action for Prosecutors to Take and Communities to Advocate For **AFTER** Officer-Involved Critical Incident Occurs

WITHIN A PROSECUTOR'S OFFICE

- Conduct investigation**
 - Immediately respond to scene and activate investigative protocol
 - Coordinate with local law enforcement partners
 - Conclude within 4-6 months of incident

- Determine liability**
 - Based on investigation's findings, determine criminal, administrative, or no liability
 - Write and publish report within 2 weeks of investigation's conclusion
 - Discuss liability decision, evidence, and rationale publicly

- Identify opportunities for reform**
 - Document any challenges in investigation, i.e. blockades from union policy, police department, or state statute?
 - Family informed throughout?
 - Independent, thorough, timely investigation?

WITHIN A PROSECUTOR'S JURISDICTION

- Inform the family directly impacted**
 - Contact the family within 24 hours of incident and every month throughout investigation
 - Support family in accessing services
 - Ensure family has access to evidence as soon as possible and prior to public release

- Inform the public**
 - Issue press release within 48 hours of incident and provide updates every month thereafter
 - Meet standards of transparency, i.e. release video footage within 10 days
 - Use language that affirms dignity of person harmed

- Communicate path to accountability**
 - If criminal liability, charge
 - If administrative liability, provide findings to police department, oversight bodies
 - If wrongdoing but no liability, document why, advocate for reform
 - Provide information to family for civil suit
 - If no wrongdoing, document why, opportunities to prevent future UoF

DATA CHECKLIST

Prosecutors can take immediate steps to reduce the likelihood of use-of-force. As chief local law enforcement officials, prosecutors make charging decisions that influence local enforcement priorities. If prosecutors choose to not file low-level offenses, which disproportionately impact people of color, this can reduce incentives for police to make stops for minor crimes, and can ultimately reduce unnecessary interactions between police and residents. Through simple data collection and analysis, prosecutors can identify charges that are driving their office's caseload and racial disparities, and can decline to file these charges.

Why should prosecutors consider using their discretion to minimize unnecessary enforcement? Philando Castile was stopped over fifty times for low-level offenses prior to the time of his death. Reducing incentives for police to make stops for low-level or financially-related offenses can help to reduce risk and enhance trust.

LEARN MORE

On use of discretion Manhattan (NY) District Attorney Cyrus Vance, Jr. declined to prosecute marijuana possession and turnstile jumping.

On data in prosecution Cook County (IL) State's Attorney Kim Foxx released an unprecedented data report on her office's impact.

On disparities in enforcement See The Bureau of Justice Statistics, "Special Report: Contacts Between Police and the Public, 2015," October 2018.

STEP 1: COLLECT CASE DATA

CASE INTAKE

- Quantity / Acceptance Rate
- Arresting Charge(s) / Context
- Filing Charge(s)
- Defendent Demographics
- Officer Demographics
- Prosecutor / Bureau Assigned

CASE OUTCOME

- Pre-Trial / Bail Recommendation
- Plea Conditions / Sentence Recommendation
- Acquittal / Dismissal
- Time to Resolution / Range of Time

STEP 2: ANALYZE DATA

CASE ANALYSIS

- Charges driving caseload?
- Racial and/or geographic disparities in case intake and outcomes?
- Discrepancies between arrests, charges, and office priorities?
 - i.e.* Are low level charges unnecessarily extending criminal justice reach?
 - i.e.* Are low level charges undermining focus on more serious crimes?
 - i.e.* Are disparities in case intake and outcomes undermining fairness?

STEP 3: USE DATA

PUBLISH DATA

- Make data public and accessible
- Discuss findings with staff, law enforcement partners, community organizations
- Invite suggestions for data-driven policies

DEVELOP DATA-DRIVEN POLICIES

- Work with law enforcement to minimize arrests for low-level offenses
- Minimize prosecution of low-level cases
- Examine charges that are driving disparities

INVESTIGATIVE CHECKLIST

After an officer-involved critical incident, there is often an urgent push from the public for answers. Having an established investigative protocol in place prior to a critical incident can ensure thoroughness, transparency, and timeliness, while reducing potential for reactivity.

In order to strengthen critical incident investigative protocol, consider the following questions for standard investigations and compare them with your answers for critical incident investigations, aiming to close any discrepancies:

- How often do I engage with family members who lost a loved one?
 - How long does it take my office to interview witnesses, run forensics, and indict a suspect?
 - How long does it take my office to close an investigation?
-

LEARN MORE

“Considerations and Recommendations Regarding State and Local Officer-Involved Use-of-Force Investigations”

A 2017 report from the Bureau of Justice Assistance

“Independent Investigation Models”

A 2018 presentation by Karen Chung, Senior Policy Advisor to the Seattle (WA) Community Police Commission

“Independent Investigations of Officer-Involved Shootings”

A 2018 report from Major City Chiefs

BEFORE AN OFFICER-INVOLVED INCIDENT OCCURS

- Create an independent investigative bureau and assign prosecutors who:**
 - Only work on officer-involved critical incidents
 - Do not work with local law enforcement on any cases
 - Establish investigative protocol, timeframe, and standards of transparency

IMMEDIATELY FOLLOWING AN OFFICE-INVOLVED INCIDENT

- The independent investigative bureau should:**
 - Reach out to the family directly impacted within 24 hours
 - Convene local law enforcement agencies within 48 hours
 - Issue press release about context of incident and investigative timeframe within 48 hours

OVER THE COURSE OF THE INVESTIGATION

- The independent investigative bureau should provide transparency:**
 - Conversations with the family and updates to the press at least once a month
 - Discuss evidence with family 24 hours prior to public release
 - Release audio/video footage to press within 10 days of incident

WITHIN 4-6 MONTHS OF CRITICAL INCIDENT

- The independent investigative bureau should:**
 - Complete investigation
 - Make decision regarding liability, citing evidence and rationale
 - Write and publish report within 2 weeks of investigation's conclusion

BASED ON LIABILITY DETERMINATION

- Provide evidence, rationale, and next steps. If findings indicate:**
 - Criminal liability, file charges
 - Administrative violations, inform police department, oversight bodies, certification boards
 - Wrongdoing but no liability, provide information to family should they seek civil suit
 - Wrongdoing but no liability, document reasons and advocate for reform
 - No wrongdoing, communicate evidence and rationale publicly

FOLLOWING INVESTIGATION, DISCUSS LESSONS

- and opportunities for reform to prevent future critical incidents.**

STATE STATUTE CHECKLIST

Using their positions as elected officials, prosecutors can serve as leaders in public discourse and legislative debates. Prosecutors can partner with their local law schools and community organizations to analyze existing state statutes, and to develop a legal framework that provides a path to appropriate accountability.

To analyze existing state statutes, consider specific language that:

- Implies guilt of the person directly impacted by the critical incident (e.g., “suspect”)
 - Provides subjective language (e.g., “apparent risk”)
 - Places a significantly high burden of proof on the prosecutor (e.g., “malicious intent”)
-

When considering whether use-of-force was reasonable, prosecutors should consider and should instruct juries to consider the following questions:

- Did officer follow department training and protocol?
- Did officer have time and attempt to deescalate situation?
- Did officer mitigate danger, such as by announcing oneself?
- Did officer escalate danger, such as shooting at a moving vehicle or following person into a dark, narrow space?
- Did officer call for back-up and medical assistance?

HOW DOES YOUR STATE STATUTE DEFINE DEADLY FORCE?

The US Department of Justice defines deadly force as, “force that a law enforcement officer uses with the purpose of causing, or that the officer knows to create a substantial risk of causing, death, or serious bodily harm.” Deadly force is justified only when:

Used In Defense of Self/Others

Officers may use deadly force only when necessary, as defined by an imminent threat to self or others.

- *Imminent* is defined as an active threat.
- *Necessary* means there are no other options aside from force to prevent the threat of harm to self or others.

All Other Means Exhausted

Officers should rely on the least harmful means possible, relying on force only when no other options possible, and using lethal force only as a last resort.

- Officers should aim to de-escalate situations before resorting to force of any kind.
- Officers should give a warning before using force.

Intended to Protect Life

Officers may only use force to protect life, and should proactively preserve the life of anyone harmed, including the person against whom force was used.

- Officer should only use force that is necessary and proportional to mitigate any potential risk.
- If force is used, officers should immediately provide and/or call for medical assistance.

HOW DOES YOUR STATE STATUTE DEFINE MECHANISMS OF ACCOUNTABILITY?

Mechanisms should be formalized and stipulated in state statutes in order to ensure thorough and consistent protocol for any officer-involved critical incident. Specific stipulations may include:

Reporting

A uniform state-wide reporting infrastructure should include:

- A mandate to immediately report the incident to department superiors, oversight bodies, local prosecutor, and state attorney general.
- A written report and in-person interview(s) of officer(s) and witnesses.

Investigation

An immediate, impartial, and comprehensive investigation should consider the context of the incident, including but not limited to:

- Was the force necessary and proportional?
- Did the officer(s) exhaust all other means possible prior to using force?
- Did the officer(s) follow their department training and policies?

Sanctions

Sanctions should be delineated based on liability. If investigation finds:

- Criminal liability, officer becomes defendant and subject to same charges, due process, and sanctions as other individuals facing criminal charges.
- Violation of department protocol, officer should be reviewed for termination and/or de-certification, and barred from joining other departments.

USE-OF-FORCE POLICY GUIDELINES

The following checklist, developed by the Policing Project at New York University School of Law, outlines best practices on use of deadly force. Prosecutors can encourage their local police department to incorporate these best practices in their training and policy, and prosecutors can consider these questions when determining reasonableness in officer-involved critical incidents.

The Policing Project is dedicated to strengthening the relationship between police and the communities they serve by developing best practices for policing agencies, promoting transparency around policing policies and practices, facilitating community involvement in setting policing policies and priorities, and promoting data collection and cost-benefit analysis of policing.

USE OF FORCE PRINCIPLES, GENERALLY

1. Do the Department's policies emphasize necessity, de-escalation, and proportionality when using force?
2. Do the Department's policies require that each of an officer's decisions leading up to a use of force be reasonable (not just the specific use of force at the particular moment that it was applied)?
3. Do the Department's policies require that officers consider a person's specific characteristics, such as mental capacity, developmental disability, the influences of drugs or alcohol, and/or language barriers, when determining whether force is appropriate?
4. Do the Department's policies prohibit use of force to subdue a subject(s) who is not suspected of any criminal conduct, unless necessary to protect an officer's or another person's safety?
5. Do the Department's policies prohibit use of force as retaliation?
6. Do the Department's policies prohibit use of force against a person who only verbally confront officers and is not involved in criminal conduct?
7. Do the Department's policies prohibit use of force against a person who is handcuffed or otherwise restrained (because that person does not present a threat)?
8. Do the Department's policies impose a duty to intervene on officers during improper force?
9. Do the Department's policies require officers to promptly render aid to injured subjects?
10. Does the Department's policy require all uses of deadly force, whether intentional or unintentional, to be immediately reported and investigated?

FIREARMS SPECIFIC POLICIES

1. Do the Department's policies consider each firearm discharge as a separate use of force that must be specifically justified?
2. Do the Department's policies require officers to give a verbal warning and identify themselves as police officers before discharging a firearm, when possible?
3. Do the Department's policies prohibit officers from firing warning shots?
4. Do the Department's policies prohibit officers from shooting at or from moving vehicles?
5. Do the Department's policies consider pointing a firearm at a person to be a use of force?
6. Do the Department's policies prohibit shooting through a door, window, or in other circumstances in which the target is not clearly in view?

POLICIES FOR NON-FIREARMS USES OF FORCE

1. Do the Department's policies prohibit maneuvers that may cut off blood or oxygen to a subject's head (e.g., choke holds, strangleholds) except when lethal force is allowed?
2. Do the Department's policies prohibit techniques and modes of transport that run a substantial risk of positional asphyxia (e.g., putting a person prone on the ground while restrained)?
3. Do the Department's ECW (Taser) policies prohibit use against certain "high risk populations," including those who are pregnant, infirm, elderly, or small in size?
4. Do the Department's policies limit intentional weapon strikes (such as with a baton) to the head to only those situations when lethal force is permitted?

BRADY POLICY GUIDELINES

Shared courtesy of Ramsey County (MN) Prosecutor's Office. Prosecutors can assess and strengthen their existing Brady infrastructure based on this policy document.

BRADY POLICY

St. Paul Police Department, St. Paul City Attorney's Office,
Ramsey County Attorney's Office

- 1) A St. Paul Brady Committee will be formed and will meet monthly. The Committee's general function will be to coordinate Brady-related efforts specific to the St. Paul Police Department, ensure effective ongoing communication, and address needs and problems as they arise. The Committee will consist of the Brady Prosecutors from each prosecution office, St. Paul Police Department personnel, and others as needed.
- 2) The City Attorney's Office and the Ramsey County Attorney's Office will each name a "Brady Prosecutor" who will be responsible for coordinating Brady compliance within the prosecution office.
- 3) The St. Paul Police Department will notify the Brady Prosecutors of any potential Brady data regarding an officer. This includes Private data.¹ The Brady Prosecutors will be given "need-to know" status for review of Private data for Brady purposes.
- 4) The Brady Prosecutors will review any data received from the St. Paul Police Department at the monthly committee meeting. The Brady Prosecutors will determine if the data is potentially disclosable under Brady and, if so, how the data will be categorized. There are three categories: "Always Disclose - Public," "Sometimes Disclose - Public," and "Private." The Brady Prosecutors will also determine whether the data should be taken into account by prosecutors at the time of charging.
- 5) The St. Paul City Attorney and the Ramsey County Attorney will each notify officers that they have been identified as having potentially disclosable Brady data by sending a letter to each identified officer. The letters will include any relevant IA complaint numbers for the officer's reference.
- 6) The Brady Prosecutor in each prosecution office will create and maintain a Brady tracking document to track Brady compliance. The tracking document will be comprised of: the name each officer with potential Brady data; the identified applicable category; and included data about the disciplined conduct. Only the Brady Prosecutors will have access to this tracking document.
- 7) The Brady Prosecutors will distribute a Brady Identifying Document ("BID") comprising all officers with potential Brady data to case prosecutors in each office. This document will also include a separate group of officers whose data should be taken into account at charging rather than waiting to consider the effect of the data after charges have been filed. The BID will go to all case prosecutors with admonitions to maintain confidentiality of the document. The BID will include the names of officers whose relevant data is Private data. For these officers, case prosecutors will be given limited "need-to-know" status permitting them to know only that the officer may have potential Brady data. The Brady Prosecutors will communicate with each other prior to adding anyone to the BID.
- 8) Each case prosecutor is responsible for checking the BID for officer/witnesses prior to charging and prior to pre-trials.

¹ The terms "Public" and "Private" data refer to data on individuals as defined in the Minnesota Government Data Practices Act, Minn. Stat. § 13.02, subs. 12, 15 (2012).

City Attorney Office

- a) If an officer/witness is on the BID, Assistant St. Paul City Attorneys will notify a Brady Prosecutor in the City Attorney's Office. The Brady Prosecutor will provide guidance and more details about the disciplined conduct, if necessary, to assist the case prosecutor's decision on whether to disclose the data as potentially exculpatory.
- b) If the case prosecutor decides to disclose data that is "Public," the Brady Prosecutor will make necessary requests of the St. Paul Police Department.² Upon receipt, the case prosecutor will disclose the data to the defense.
- c) If the case prosecutor decides to disclose data that is "Private," the Brady Prosecutor will instruct the case prosecutor to seek in camera review as follows:
 - i) Upon receipt of Public data, the case prosecutor will disclose the Brady-related Public data and complete and file disclosure notices, motions for in camera review, and proposed orders. The Brady Prosecutor will be responsible for maintaining and updating templates to be used for the data.
 - ii) The case prosecutor will provide the St. Paul Police Department with an executed judge's order for production of the data for in camera review.¹
 - iii) The St. Paul Police Department will compile the data and deliver it to the judge for review. The case prosecutor will be notified when the data is delivered.

Ramsey County Attorney Office

- a) The BID will be separated into Group A and Group B. Group A will include all officers in the "Sometimes Disclose - "Public" and "Private" categories. Group B will include all officers in the "Always Disclose - Public" category.
- b) If an officer is on Group A, the case prosecutor will consult with the Brady Prosecutor. The Brady Prosecutor will provide guidance and more details about the disciplined conduct, if necessary, to assist the case prosecutor's decision on whether to disclose the data as potentially exculpatory.
 - i) If the case prosecutor decides to disclose data that is "Public," the case prosecutor will make necessary requests of the St. Paul Police Department.² Upon receipt, the case prosecutor will disclose the data to the defense.
 - ii) If the case prosecutor decides to disclose data that is "Private," the Brady Prosecutor will instruct the case prosecutor to file disclosure notices, motions for in-camera review, and proposed orders. The Brady Prosecutor will be responsible for maintaining and updating templates to be used for the data. The case prosecutor will provide the St. Paul Police Department with an executed judge's order for production of the data for in-camera review.¹ The St. Paul Police Department will compile

² All requests for data, Public or Private, require a two-week advance notice to gather, prepare, and deliver the data. Additionally, the Saint Paul Police Department requires an executed court order before they will begin to gather and prepare the Private data for an in-camera review. The production of Private data involves data review and potential redaction of multiple pages of documents.

the data and deliver it to the judge for review. The case prosecutor will be notified when the data is delivered.

iii) If an officer is in Group B, the case prosecutor will contact the appropriate law enforcement agency and ask for all Brady data re: the officer. Upon receipt, the case prosecutor will disclose the data to the defense.

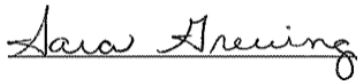
9) All case prosecutors will notify a Brady Prosecutor of any judicial rulings regarding Brady data.

10) In all cases in which there has been disclosure of data, the case prosecutor will be responsible for suppression motions and arguments.

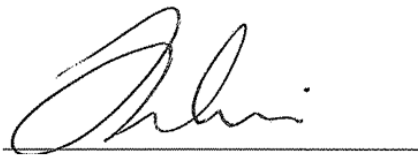
11) Case prosecutors will notify the Brady Prosecutor regarding all hearings, rulings, and consequences specific to the Brady data. Case prosecutors will also notify the Brady Prosecutor regarding any prosecutorial decisions made due to the existence of Brady data (e.g., charging decisions, dismissals, decisions not to use the officer as a witness, etc.).

12) The Brady Prosecutors will maintain ongoing communication with each other and the St. Paul Police Department regarding disclosure of officer-related Brady data and prosecutorial decisions made due to the existence of Brady data.

We, the undersigned, on behalf of the St. Paul City Attorney's Office, the Ramsey County Attorney's Office, and the St. Paul Police Department respectively, hereby adopt the attached "Brady Policy."



2/28/2013
Date



John J. Choi
Ramsey County Attorney
50 W. Kellogg Ave., Suite 315
St. Paul, MN 55102

3-8-13
Date



Thomas E. Smith
Chief of Police
St. Paul Police Department
367 Grove St
St Paul, MN 55101

2-29-20
Date

GLOSSARY

Brady-Giglio

Refers to standards that were established via two Supreme Court cases, **Brady v. Maryland (1963)** and **Giglio v. United States (1972)**. Based on the Supreme Court’s ruling in Brady, prosecutors must disclose any evidence that is exculpatory. Giglio extends that ruling, mandating that prosecutors disclose any information that may be used to impeach the credibility of a witness, including law enforcement officers.

Community Groups/Organizations

Broadly defined, any local cohort of individuals, usually organized around a common set of goals. This includes but is not limited to advocacy organizations, faith groups, service providers, legal aid providers, unions, membership organizations, support groups, and others. This toolkit suggests that prosecutors engage with a wide range of community groups, ensuring that the perspectives and priorities of those most impacted by the criminal justice system and officer-involved critical incidents are taken into consideration.

Officer-Involved Critical Incident

Commonly referred to here as Officer-Involved and Critical Incident – refers to any incident involving a law enforcement officer that results in death or injury to a person. This toolkit takes a broad understanding of critical incidents and does not limit its definition to particular type of force or a particular context, nor does it specify whether force is excessive or appropriate; instead, it offers investigative best practices to make such determinations.

Local Law Enforcement Partners

Broadly defined, any local agency or department with law enforcement duties. This includes but is not limited to a prosecutor’s office, police department, sheriff’s office, state attorney general’s office, US Attorney’s Office, forensic department, police commission, and others. The Toolkit suggests prosecutors pro actively engage with their local law enforcement partners in order to align policies and priorities.

Use of Force

Commonly referred to here as UoF – the Toolkit relies on the definition provided by the U.S. Department of Justice: “Broadly speaking, the use of force by law enforcement officers becomes necessary and is permitted under specific circumstances, such as in self-defense or in defense of another individual or group ... Law enforcement officers should use only the amount of force necessary to mitigate an incident, make an arrest, or protect themselves or others from harm. The levels, or continuum, of force police use include basic verbal and physical restraint, less-lethal force, and lethal force.”

RESOURCES

- Abel, J. **“Brady’s Blind Spot,”** Stanford Law Review 67(4), 2015.
- Amnesty International, **“Deadly Force: Police Use of Lethal Force in the United States,”** 2015.
- Association of Prosecuting Attorneys, **“21st Century Principles of Prosecution: Peace Officer Use of Force Project,”** 2016.
- Bui, Q., **“Calls to 911 From Black Neighborhoods Fell After a Case of Police Violence,”** The New York Times, 2016.
- Burch, J., **“CALEA accreditation – a platform for excellence and reform,”** Police Foundation.
- Campaign Zero, **“Police Use of Force Policy Analysis,”** 2016.
- Campaign Zero, **“Mapping Police Violence,”** 2018.
- Charbonneau, A., Spencer, K., Glaser, J., **“Understanding Racial Disparities in Police Use of Lethal Force: Lessons from Fatal Police-on-Police Shootings,”** Journal of Social Issues 73(4), 2017.
- Chung, Karen, **“Independent Investigation Models: A presentation by Karen Chung, Senior Policy Advisor to the Seattle (WA) Community Police Commission,”** 2018.
- Culhane, S.E., Boman IV, J.H., Schweitzer, K., **“Public Perceptions of the Justifiability of Police Shootings: The Role of Body Cameras in a Pre- and Post-Ferguson Experiment,”** Police Quarterly 19(3), 2016.
- Fairfax, R.A. **“The Grand Jury’s Role in the Prosecution of Unjustified Police Killings – Challenges and Solutions,”** Harvard Law Review 52, 2017.
- Foxx, K.M., **“Cook County State’s Attorney Data Report,”** 2018.
- Goldman, R.L., and Puro, S., **“Revocation of Police Officer Certification: A Vialbe Remedy for Police Misconduct,”** St. Louis University Law Journal 45, 2009.
- Grady, R.H., Butler, B.J., and Loftus, E.F., **“What Should Happen After An Officer-Involved Shooting? Memory Concerns in Police Reporting Procedures,”** Journal of Applied Research in Memory and Cognition 5(3), 2016.
- Graham, D.A. **“What Can the US Do to Improve Police Accountability,”** The Atlantic, 2016.
- Katz, W., **“Enhancing Accountability and Trust with Independent Investigations of Police Lethal Force,”** Harvard Law Review Forum 235, 2015.
- Kelly, K., Lowery, W., and Rich, S., **“Fired/Rehired,”** The Washington Post, 2017.
- Kindy, K. and Kelly, K., **“Thousands Dead, Few Prosecuted,”** The Washington Post, 2015.
- Macfarlane, K.A. **“Los Angeles v. Mendez: Proximate Cause Promise for Police Shooting Victims,”** Columbia Law Review 118(2), 2018.
- Major City Chiefs, **“Independent Investigations of Officer-Involved Shootings,”** 2018.
- Manhattan District Attorney’s Office, **“Press Release: D.A. Vance Ends Prosecution of Marijuana Possession and Smoking Cases,”** 2018.

- Mesic, A, Franklin, L., Cansever, A., Potter, F., Sharma, A., Knopov, A., Siegel, M., **“The Relationship Between Structural Racism and Black-White Disparities in Fatal Police Shootings at the State Level,”** Journal of the National Medical Association 110(2), 2018.
- Police Executive Research Forum, **“Guiding Principles on Use of Force: A Paper in the Critical Issues in Policing Series,”** 2016.
- Reiss, M., **“Why the Prosecutor’s Role in Officer-Involved Deaths Has Become Critical,”** The Crime Report, 2018.
- Rushin, S. and DeProspero, A. **“Interrogating Police Officers,”** George Washington Law Review, 2018.
- Saligari, J. and Evans, R. **“Beacon of Hope? Lessons Learned from Efforts to Reduce Civilian Deaths from Police Shootings in an Australian State,”** J Urban Health 93(1), 2016.
- Sanchez, R., **“California lawmakers seek change in police lethal force standard,”** CNN, 2018.
- Sherman, L.W., **“Reducing Fatal Police Shootings as System Crashes: Research, Theory, and Practice,”** Annual Review of Criminology 1, 2018.
- The Associated Press, **“Washington Legislature narrowly Oks change to police deadly force law,”** The Seattle Times, 2018.
- The Guardian, **“The Counted,”** 2016.
- The Washington Post, **“National Police Shootings Database,”** 2018.
- The Washington Post, **“Police Officers Prosecuted for Deadly Use of Force,”** 2015.
- US Department of Justice, Bureau of Justice Statistics, **“Use of Force,”** 2018.
- US Department of Justice, Office of Community Oriented Policing Services, **“Final Report of The President’s Task Force on 21st Century Policing,”** 2015.
- US Department of Justice, Bureau of Justice Assistance, **“Considerations and Recommendations Regarding State and Local Officer-Involved Use-of-Force Investigations,”** 2017.
- US Department of Justice, Bureau of Justice Statistics, **“Special Report: Contacts Between Police and the Public, 2015,”** October 2018.
- US General Services Administration, Office of Evaluation Sciences, **“Facilitating Action to Build Stronger Community-Police Relationships,”** 2016.

The Institute for Innovation in Prosecution provides a collaborative national platform for prosecutors and the communities they serve to advance a more equitable and effective criminal justice system, founded on community-centered standards of safety, fairness, and dignity.

The Institute for Innovation in Prosecution
John Jay College of Criminal Justice
524 W. 59th St., Ste. 1140B | New York, NY 10019
www.prosecution.org | IIP_JohnJay@prosecution.org



Writing and Design: Allison Goldberg
Graphic Design: Dana Yee, Emily Kim, Gretchen Helpenstell

© Institute for Innovation in Prosecution at John Jay College of Criminal Justice 2019.
All rights reserved.