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The Grand Jury's Role in the Prosecution of Unjustified Police Killings — Challenges and Solutions

Roger A. Fairfax, Jr.*

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INTRODUCTION

One of the most profound tests of trust in a society is when the state must be relied upon to hold itself accountable for violating the rights of the governed. Nowhere is this more true than in the context of the prosecution of law enforcement officers for unjustified violence against civilians. The reasons for this are twofold. First, it should go without saying that police perform a vital — and extremely difficult and dangerous — function, and bravely serve as the prophylactic between civil society and complete chaos.¹ As President Obama recently wrote, “[p]olice officers are the heroic backbone of our communities.”² Law enforcement officers, most of whom serve honorably, responsibly, and often heroically, deserve not only our gratitude and respect, but — when accused of misconduct — also the due process we aspire to afford all defendants.

A second reason is that prosecutors — the very ministers of justice we rely upon for accountability — work with and depend upon law enforcement officers in the discharge of their duties. Police officers are the front-line representatives of the law enforcement complex of which prosecutors are a part. Police officers exercise discretion, gather evidence, apprehend individuals so that they can face justice, and bring cases for prosecution. In most criminal cases, law enforcement officers work hand in hand with prosecutors toward a shared goal of bringing criminal offenders to justice. Thus, it is no surprise that some express doubts about the ability of prosecutors’ offices to fairly evaluate and prosecute allegations against police officers in their jurisdictions.³

However, there is another criminal justice actor that potentially further complicates this picture. The grand jury is an ancient, but often misunderstood, vehicle for community influence in the criminal justice system. It once enjoyed a reputation as a “bulwark” of liberty,⁴ designed to shield individuals from meritless prosecutions by requiring the acquiescence of laypeople in the initiation of criminal charges.⁵ This reputation was ce-

¹ See Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 840 (2017).

² *Id.* at 840.

³ See, e.g., J. Vincent Aprile II, *Challenging The Grand Jury Prosecutor's Conflict of Interest*, 31 CRIM. JUST. 34, 34 (2016); Brad Schrade, *Can Prosecutors Be Fair in Police Shooting Cases?*, ATLANTA JOURNAL-CONSTITUTION (March 18, 2016), <http://www.ajc.com/news/state-regional-govt-politics/can-prosecutors-fair-police-shooting-cases/b8pGMJtzA6HDCY2IJCAVOJ/>, archived at <https://perma.cc/YT8K-C445>.

⁴ *United States v. Mandujano*, 425 U.S. 564, 589 (1976) (Brennan, J., concurring in the judgment); *United States v. Dionisio*, 410 U.S. 1, 17 (1973).

⁵ See U.S. Const., amend. V; Fed. R. Crim. P. 7 (requiring prosecution by indictment for offenses punishable by death or imprisonment of more than one year). See generally Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 MINN. L. REV. 398, 408–11 (2006) (reviewing the historical evolution of the grand jury in English and early American common law); Helene E. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701, 701–02 (1971–72) (discussing the grand jury function of shielding individual liberty against prosecutorial overreach by the Crown).

mented during the seventeenth and eighteenth centuries when grand juries in England and colonial America were seen as important safeguards against governmental overreaching.⁶ Indeed, the grand jury's prestige during these eras led to the right to grand jury indictment being enshrined in the Bill of Rights.⁷

In modern times, however, the grand jury has become known as the captive of the prosecutor.⁸ Instead of a protection for those accused of criminal offenses, today's grand jury is seen by many primarily as a potent investigative tool for the government.⁹ This perception is driven in large part by the fact that grand juries almost never vote to decline an indictment.¹⁰ Nearly every time a prosecutor asks a grand jury to return an indictment in a case, the grand jury complies.¹¹

Given the grand jury's track record, many have expressed serious concerns about the recent spate of cases in which grand juries have declined to indict law enforcement officers accused of killing unarmed civilians.¹² The shooting death of Michael Brown in Ferguson, Missouri, and the asphyxiation death of Eric Garner on Staten Island, New York — both at the hands of law enforcement officers — galvanized a movement and sparked a national conversation about race and policing.¹³ The grand juries' decisions not to

⁶ See, e.g., Schwartz, *supra* note 5, at 701; see also Fairfax, Jr., *supra* note 5, at 409–10.

⁷ See, e.g., GEORGE J. EDWARDS, *THE GRAND JURY: AN ESSAY* 15 (1906), <http://constitution.org/gje/gje.pdf>, archived at <https://perma.cc/8ACY-V2K6>; Fairfax, Jr., *supra* note 5, at 410–12.

⁸ See, e.g., Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 323 (1995).

⁹ See *id.* at 314–16.

¹⁰ See *United States v. Navarro-Vargas*, 408 F.3d 1184, 1195 (9th Cir. 2005). But see Susan W. Brenner, *Grand Jurors Speak*, in *GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY* 25, 25–27 (Roger Anthony Fairfax, Jr. ed., 2011) (noting the conscientiousness of grand jurors); Frank O. Bowman, III, *Vox Populi: Robert McCulloch, Ferguson, & the Roles of Prosecutors and Grand Juries in High-Profile Cases*, 80 MO. L. REV. 1111, 1123–24 (2015) (discussing the seriousness with which grand jurors take their role); Roger A. Fairfax, Jr., *Grand Jury Innovation: Toward a Functional Makeover of the Ancient Bulwark of Liberty*, 19 WM. & MARY BILL RTS. J. 339, 342–44 (2010) (defending the grand jury against the charge of over-compliance).

¹¹ See Mark Motivans, U.S. DEP'T OF JUSTICE, *Federal Justice Statistics 2010 — Statistical Tables* (2013); Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 929 (2006) (arguing that grand juries “are dominated by prosecutors and would ‘indict a ham sandwich’ if prosecutors asked them to do so.”). But see Fairfax, Jr., *supra* note 10, at 343–44 (highlighting alternative reasons, other than pliancy, for high rate of indictment).

¹² See, e.g., J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2015), <https://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html>, archived at <https://perma.cc/K5LR-Y589>; Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <https://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html>, archived at <https://perma.cc/5GTQ-K2ZA>; see also Roger A. Fairfax, Jr., *Should the American Grand Jury Survive Ferguson?*, 58 HOWARD L. J. 825, 826–27 (2015).

¹³ In August of 2014, Darren Wilson, a police officer in Ferguson, Missouri fatally shot an 18-year-old unarmed African-American young man named Michael Brown. See, e.g., *What*

indict in these and other cases caused many to attack the grand jury and its use in cases in which law enforcement officers are accused of unjustified violence.¹⁴ However, it appears that these contemporary cases mimic historical patterns in police violence cases.¹⁵ Indeed, grand juries almost never indict police officers in these types of cases.¹⁶

Happened in Ferguson?, N.Y. TIMES (Aug. 10, 2015), <https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html>, archived at <https://perma.cc/3YYH-D8GV>. The grand jury in the case declined to issue an indictment against Officer Wilson in the case. See Chico Harlan et al., *Ferguson Police Officer Won't be Charged in Fatal Shooting*, WASH. POST (Nov. 25, 2014), https://www.washingtonpost.com/politics/grand-jury-reaches-decision-in-case-of-ferguson-officer/2014/11/24/de48e7e4-71d7-11e4-893f-86bd390a3340_story.html?utm_term=.27b274ae0de3, archived at <https://perma.cc/M9RB-KSCV>; see also *Timeline for a Body: 4 Hours in the Middle of a Ferguson Street*, N.Y. TIMES (Aug. 23, 2014), <https://www.nytimes.com/2014/08/24/us/michael-brown-a-bodys-timeline-4-hours-on-a-ferguson-street.html>, archived at <https://perma.cc/2SL8-VY3F>; *Autopsy Shows Michael Brown Was Struck at Least 6 Times*, N.Y. TIMES (Aug. 17, 2014), <https://www.nytimes.com/2014/08/18/us/michael-brown-autopsy-shows-he-was-shot-at-least-6-times.html>, archived at <https://perma.cc/3VSQ-4E9U>.

In July of 2014, New York Police Department officers Justin Damico and Daniel Pantaleo confronted a 43-year-old unarmed African-American man named Eric Garner, who was allegedly selling untaxed tobacco cigarettes in front of a Staten Island store. Officer Pantaleo placed Mr. Garner in a NYPD-prohibited chokehold and brought him to the ground, maintaining the hold even as Mr. Garner gasped, "I can't breathe," repeatedly before losing consciousness and going into cardiac arrest and dying. See Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html>, archived at <https://perma.cc/XT9M-SHAT>. The grand jury in the case declined to return an indictment against Officer Pantaleo. See, e.g., J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2015), <https://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html>, archived at <https://perma.cc/P9LM-K8XT>.

¹⁴ See, e.g., LaDoris Hazzard Cordell, *Abolish Grand Juries: Justice for Eric Garner and Michael Brown*, SLATE (Dec. 9, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/12/abolish_grand_juries_justice_for_eric_garner_and_michael_brown.html, archived at <https://perma.cc/KQ2E-MK25>; Tierney Sneed, *Garner, Brown Decisions Spark Calls for Grand Jury Reform*, U.S. NEWS (Dec. 12, 2014), <http://www.usnews.com/news/articles/2014/12/12/after-eric-garner-michael-brown-decisions-calls-for-grand-jury-reform>, archived at <https://perma.cc/K22F-E7Q3>.

¹⁵ See, e.g., Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 763–64 (2016) (citing studies showing small numbers of indictments of police in the period beginning 2000 or 2005); James C. McKinley & Al Baker, *Grand Jury System, With Exceptions, Favors the Police in Fatalities*, N.Y. TIMES (Dec. 7, 2014), <https://www.nytimes.com/2014/12/08/nyregion/grand-juries-seldom-charge-police-officers-in-fatal-actions.html>, archived at <https://perma.cc/9XKD-YR43> (noting that a 2014 indictment of a Charlotte-Mecklenberg police officer who killed an unarmed black man was the first officer from that department indicted in a fatal police shooting in 30 years).

¹⁶ See, e.g., Ben Casselman, *It's Incredibly Rare for a Grand Jury to do What Ferguson's Just Did*, FIVE THIRTY EIGHT (Nov. 24, 2014), <https://fivethirtyeight.com/datalab/ferguson-michael-brown-indictment-darren-wilson>, archived at <https://perma.cc/45Z3-FXH6> (describing procedural and substantive issues that may make grand juries less likely to indict officers compared to other potential defendants); see also Letter from Sherrilyn A. Ifill, Director-Counsel, NAACP Legal Defense and Educational Fund, Inc., to Judge Maura McShane, 21st Judicial Circuit, Clayton, Missouri (Jan. 5, 2015), http://www.naacpldf.org/files/case_issue/NAACP%20LDF%20Letter%20to%20Judge%20Maura%20McShane.pdf, archived at <https://perma.cc/LE5E-YVPF>.

This article seeks to explore why this is, taking into account the role and function of the grand jury, and the issues and realities associated with the prosecution of police violence. The article begins, in Part I, with a discussion of the grand jury's historical role in the United States and the function it plays in today's criminal justice system. Part II then examines the challenges to obtaining grand jury indictments in cases involving police violence and identifies common themes and obstacles to grand jury indictment in these cases — in particular, certain structural features of the grand jury and the role of the prosecutor. Finally, Part III critiques the various reform proposals that have emerged in recent years and advances a number of ideas for enhancing the role of the grand jury in cases involving unjustified police violence against civilians.

I. THE ROLE AND FUNCTION OF THE GRAND JURY

The grand jury is a body of laypeople, typically numbering between more than a dozen and fewer than two dozen,¹⁷ tasked with determining whether there is a sufficient basis for charges to proceed to trial.¹⁸ The prosecutor is responsible for presenting evidence, in secret,¹⁹ to the grand jury that establishes probable cause to believe that the accused committed the charged offense. In gathering this evidence, the prosecutor has access to the grand jury's subpoena authority, which can compel both sworn testimony and the production of tangible evidence.²⁰ If the grand jury is persuaded by the prosecutor's presentation of evidence that there is probable cause, it typically returns an indictment.²¹ The defendant must then face trial on the charges in the indictment.

A grand jury indictment is required in felony cases in the federal system and in about half of the states.²² The chief alternative to the grand jury indictment requirement is the preliminary hearing, which involves the prosecutor presenting evidence in an open courtroom proceeding in an effort to persuade a judge that probable cause exists to hold a defendant over for trial.²³ Unlike in the grand jury, preliminary hearings allow defense counsel

¹⁷ See, e.g., FED. R. CRIM. P. 6(a)(1); see SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 4:8 (2d. ed. 2015).

¹⁸ See generally FED. R. CRIM. P. 6(a)(1). But see Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 719–20, 743–45 (2008) (exploring whether grand juries should exercise discretion beyond merely determining whether there is sufficient evidence for an indictment).

¹⁹ See BEALE ET. AL, *supra* note 17, at § 1:6.

²⁰ See R. Michael Cassidy, *Toward a More Independent Grand Jury: Recasting and Enforcing the Prosecutor's Duty to Disclose Exculpatory Evidence*, 13 GEO. J. LEGAL ETHICS 361, 363 (2000).

²¹ See, e.g., Niki Kuckes, *Retelling Grand Jury History*, in GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY 125, 142–47 (Roger Anthony Fairfax, Jr., ed., 2011); Roger A. Fairfax, Jr., *Grand Jury Innovation: Toward a Functional Makeover of the Ancient Bulwark of Liberty*, 19 WM & MARY BILL RTS. J. 339, 343 n.20 (2010).

²² See BEALE ET. AL, *supra* note 17, at § 1:1; Fairfax, Jr., *supra* note 18, at 743–45.

²³ See, e.g., FED. R. CRIM. P. 5.1; MO. ANN. STAT. § 544.250. 1 (West).

to be present, cross-examine government witnesses, and challenge the prosecution's evidence.²⁴ Some jurisdictions give the prosecutor a choice between the two methods of initiating criminal cases.²⁵

In those jurisdictions and cases in which the grand jury is the arbiter of whether charges proceed to trial, the grand jury is an important, community-based protection for an individual accused of a crime. The grand jurors are in a position to shield a defendant from the allegations of a biased or corrupt prosecutor seeking to bring a baseless case. Although a criminal defendant always has the subsequent opportunity to prevail at trial, the grand jury can prevent an individual from ever having to defend against meritless charges and face the stigma as well as the reputational and litigation costs of formal accusation.²⁶

Despite its important role, the grand jury is one of the least understood elements of the American criminal justice system. While those accused of crime are often perplexed by the intricacies of the procedures employed by the state to adjudicate their cases, virtually *everyone* with an interest in the criminal process — prosecutors, defense lawyers, victims, defendants, and the public — seems to lack a complete understanding of what the grand jury is and what it is supposed to do.

The primary reason for this is that the grand jury operates out of the public gaze and is even shrouded from the view of most lawyers. Secrecy rules typically limit those who may be in the grand jury room to the grand jurors, the prosecutor, and the testifying witness.²⁷ These secrecy rules also often prohibit everyone except the witness from divulging what took place during grand jury proceedings.²⁸ Violation of these secrecy rules may result in civil or criminal contempt of court.²⁹ Grand jury secrecy is designed to serve worthy goals, such as protecting the reputations of individuals who are under investigation but are ultimately cleared, cloaking the identity and safety of grand jurors and witnesses, and preventing those under investigation from fleeing justice.³⁰ But whatever its underlying rationale, grand jury secrecy severely cramps public understanding of the institution. This basic lack of exposure leads to everything from unrealistic expectations to outright fantasy about what can be expected from the grand jury in a given case.

²⁴ *Id.*

²⁵ *See, e.g.*, MO. REV. STAT. § 545.010 (West).

²⁶ Although criminal cases may be dismissed before trial for a myriad of reasons, including a finding of no probable cause by a judge at a preliminary hearing, *see, e.g.*, FED. R. CRIM. P. 5.1, the grand jury is the only *lay* entity that can protect a defendant from having to defend against unfounded charges at trial. *See also* FED. R. CRIM. P. 12.

²⁷ *See, e.g.*, FED. R. CRIM. P. 6(d).

²⁸ *See* FED. R. CRIM. P. 6(e).

²⁹ *See, e.g.*, FED. R. CRIM. P. 6(e)(7).

³⁰ *See* Fairfax, Jr., *supra* note 18, at 748 (2008); *see generally* Niki Kuckes, *The Democratic Prosecutor: Explaining the Democratic Function of the Federal Grand Jury*, 94 GEO. L. J. 1266 (2006).

The second barrier to public appreciation for the grand jury is that the institution is, by its very nature, limited in its role and function. Despite the attention paid to the grand jury, some lose sight of the notion that it is an early procedural step potentially leading to the subsequent dispositive determinations of verdict after jury or bench trial. Grand juries do not resolve the ultimate issue of culpability; rather, they simply determine whether or not there is enough evidence to establish probable cause and that the case against the defendant should proceed. Although there is room for debate over whether the grand jury should take a more active role in exercising discretion over whether prosecutions should go forward,³¹ it is the case that the entity has, at most, a preliminary role. Its decision to indict is necessarily subordinated to that of the petit jury or, more often, a judge presiding over a guilty plea.

II. STRUCTURAL AND FUNCTIONAL CHALLENGES TO OBTAINING GRAND JURY INDICTMENTS IN CASES INVOLVING POLICE VIOLENCE

As mentioned above, the American grand jury often is criticized for indicting too frequently.³² Commentators have advanced a variety of reasons for the grand jury's perceived ineffectiveness as a protection for defendants. Among these are the secrecy of the grand jury process, the lack of information given to grand jurors regarding their role, and the unchecked prosecutorial control of the grand jury given the fact that neither a judge nor a defense lawyer participates in the process.³³ However, despite these articulated reasons why grand juries almost always indict, it is also true that grand juries very rarely indict in cases involving allegations of unjustified police violence.³⁴ This Part explores how some of the structural features of the grand jury — in particular, the role of grand jury secrecy and prosecutorial dominance of the grand jury — work to create this discrepancy.

A. *Grand Jury Secrecy*

Grand jury secrecy is an integral part of the American grand jury. It is fair to trace the respect for the need for secrecy in the grand jury process to two English cases often associated with the evolution of the grand jury's protective function.³⁵ During the reign of Charles II, criminal cases were pursued against certain religious rivals of the monarchy, including Stephen Colledge and Anthony Ashley Cooper, the Earl of Shaftesbury.³⁶ In the face

³¹ See Kuckes, *supra* note 30, at 1268–69.

³² See *supra* text accompanying notes 10 & 11; see also Fairfax, Jr., *supra* note 10, at 342.

³³ See *id.*

³⁴ See *supra* text accompanying notes 15 & 16.

³⁵ See Fairfax, Jr., *supra* note 18, at 703, 721–22.

³⁶ See, e.g., EDWARDS, *supra* note 7, at 14; Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1, 9 (1996).

of tremendous pressure from the King, London grand juries refused to return indictments against the two dissidents after insisting on hearing certain testimony in private despite the monarch's prosecutors seeking to have all evidence heard by the grand jurors in open court.³⁷ A second example can be found a little more than a century later in a fledgling new America, when Pennsylvania grand jurors resisted a libel prosecution against a newspaper publisher who had been critical of the court.³⁸ There, the grand jurors held firm to their convictions in spite of the tongue-lashing they received from the judges in open court.³⁹

These cases demonstrate the importance of grand jury secrecy for protecting witnesses and supporting their ability to give free and open testimony without fear of reprisal.⁴⁰ They also show that grand jurors themselves should be insulated from external pressure during their investigations and deliberations, and protected against retaliation or coercion after their decisions.⁴¹ Another important reason for grand jury secrecy is the need to conceal sensitive investigations from potential defendants who might flee after becoming aware of the probe. Finally, the grand jury's secrecy can help to protect the reputations of those who are investigated but ultimately cleared of wrongdoing.⁴²

1. *Insulating Grand Jurors' Identities and Deliberations from Public Scrutiny*

This need for secrecy in the process, which was quite evident from the grand jury's earliest origins, also may play a role in the low frequency of indictments in cases involving allegations of unjustified police violence. This is because the grand jurors, shielded from public accountability, can more easily permit their own biases to drive their decision-making. The grand jury enjoys a historical reputation as the "voice of the community."⁴³ The typically larger size of the grand jury perhaps affords the potential for broader representation and the chance that the grand jury will reflect a fair cross-section of the community.⁴⁴ However, in practice, there is not typi-

³⁷ See EDWARDS, *supra* note 7, at 14.

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See BEALE, *supra* note 17, at § 5:1; Daniel C. Richman, *Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket*, 36 AM. CRIM. L. REV. 339, 352-53 (1999).

⁴¹ See *United States v. Navarro-Vargas*, 408 F.3d 1184, 1201 (9th Cir. 2005).

⁴² See, e.g., Fairfax, Jr., *supra* note 18, at 748.

⁴³ See Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL'Y & L. 67, 78 (1995).

⁴⁴ See Fairfax, Jr., *supra* note 18, at 703, 715 n.49, 745, 745 n.241. But see Kevin K. Washburn, *Restoring the Grand Jury*, in GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY 253, 266-77 (Roger Anthony Fairfax, Jr., ed. 2011).

cally a voir dire or other mechanism for ensuring representativeness and diversity in the grand jury.⁴⁵

If a particular grand jury reflected narrow and biased pro-law enforcement views, it would be very difficult to persuade a majority of grand jurors to return an indictment against a law enforcement officer regardless of the evidence presented.⁴⁶ When you overlay issues of race that have been a feature of many of these police killing cases,⁴⁷ the obstacles can become even more significant, particularly when the decisions are made behind closed doors by individuals who are completely unaccountable to the public for their decisions.

Furthermore, for one who feels that the grand jury has not performed appropriately in a given case, making a compelling argument to that effect is an uphill battle. As discussed above, the grand jury process is secret by design. In most cases, the public gets no information about what evidence is presented to the grand jury.⁴⁸ Therefore, estimations about whether the grand jury's decision in any given case is supported by the evidence usually are doomed from the start. One can speculate but, because one can never know exactly what evidence the grand jury considered and the light in which it was cast by the prosecutor, one can never know whether the grand jury's decision was reasonable.⁴⁹

This stands in stark contrast to the petit jury context in which public trials can be observed and the evidence may be assessed. Although one cannot be certain about the dynamics in jury deliberations,⁵⁰ all facets of the trial accessible to the jurors are available to the public.⁵¹ However, if a grand jury were predisposed not to approve charges against law enforcement despite the evidence in the case, the cover of secrecy and anonymity certainly would also facilitate their nullification. In other words, the lack of

⁴⁵ See generally Roger A. Fairfax, Jr., *Batson's Grand Jury DNA*, 97 IOWA L. REV. 1511 (2012).

⁴⁶ See, e.g., Harry Enten, *The Grand Jury in the Eric Garner Chokehold Case Was Especially Unlikely to Indict*, FIVE THIRTY EIGHT, (Dec. 3, 2014), <https://fivethirtyeight.com/data/lab/eric-garner-chokehold-staten-island-grand-jury-indict/>, archived at <https://perma.cc/Y89B-WLEG>.

⁴⁷ See generally Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.-C.L. L. REV. 159 (2016).

⁴⁸ Fairfax, Jr., *supra* note 18, at 748–49.

⁴⁹ One glaring exception is the Ferguson case in which the prosecutor took the unprecedented step of releasing the grand jury transcripts. See *infra* Part II.A.2; *The Testimony the Grand Jury Heard in the Michael Brown Case*, ST. LOUIS TIMES-DISPATCH (Nov. 24, 2014), http://www.stltoday.com/news/multimedia/special/the-testimony-the-grand-jury-heard-in-the-michael-brown/html_47d95368-a8f2-5ae1-9173-6653c15d0f0e.html archived at <https://perma.cc/2KSP-EWTA>.

⁵⁰ See, e.g., *Tanner v. United States*, 483 U.S. 107, 125 (1987); FED. R. EVID. 606. But see *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (permitting evidentiary inquiry into juror's statement of reliance on racial stereotypes in jury deliberations).

⁵¹ See, e.g., *Presley v. Georgia*, 558 U.S. 209, 212–13 (2010); see also *Duncan v. Louisiana*, 391 U.S. 145, 151–58 (1968) (describing evolution and role of petit jury).

transparency leads to a lack of accountability on the part of the grand jurors for their decision.

All of that said, one of the very purposes of grand jury secrecy is to shield the grand jurors from external influences.⁵² If public sentiment in favor of (or against) the return of an indictment in a police killing case were permitted to influence grand jurors, this important safeguard of the integrity of grand juror deliberations would be compromised. Indeed, the grand jury's design subordinates transparency and accountability to the desire to protect the grand jury from external pressure.⁵³

2. *Insulating Prosecutorial Performance From Public Scrutiny*

When a prosecutor makes a decision not to bring charges against a police officer in one of these cases, he or she must face public scrutiny of that decision. Also, because most American chief prosecutors are elected,⁵⁴ there is added significance to the public pressure placed upon these decisions. In the highly-charged atmosphere surrounding a police killing of an unarmed civilian, for example, a prosecutor may have one eye on the evidence and another on the polling data leading up to the next election.

The secrecy of the grand jury process has two main implications here. First, a prosecutor trying to avoid public accountability for an unpopular charging decision has the ability to simply hide behind the grand jury and assign blame to it for the decision either to indict or not to indict.⁵⁵ In the Ferguson case, the prosecutor had the choice to file criminal homicide charges against the officer who shot and killed Michael Brown.⁵⁶ Instead, he chose to commit to the grand jury the decision whether the charges should go forward.⁵⁷ Although it is impossible to know whether any particular prosecutor who has the choice uses the grand jury to avoid taking the blame for his or her own decision not to proceed with charges in a given case, the practice would not be surprising given the intense public scrutiny of these prosecutorial decisions.

Second, the secrecy of the grand jury shields from public view whether the prosecutor even put forth a good faith effort to persuade the grand jury to

⁵² See *United States v. Navarro-Vargas*, 408 F.3d 1184, 1201–02 (9th Cir. 2005); see also Fairfax, Jr., *supra* note 18, at 748.

⁵³ See Fairfax, Jr., *supra* note 18, at 748–49.

⁵⁴ See ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 10–11 (2007); Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1528 (2012); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OH. ST. J. CRIM. L. 581, 589 (2009).

⁵⁵ See *infra* Part II.B.2.

⁵⁶ See MO. ANN. STAT. § 545.010 (West); *State v. McGee*, 757 S.W.2d 321, 325 (Mo. Ct. App. 1988).

⁵⁷ See Ben Trachtenberg, *No, You “Stand Up”: Why Prosecutors Should Stop Hiding Behind Grand Juries*, 80 MO. L. REV. 1099, 1100 (2015). But see Frank O. Bowman, III, *Vox Populi: Robert McCulloch, Ferguson, & the Roles of Prosecutors and Grand Juries in High-Profile Cases*, 80 MO. L. REV. 1111, 1112 (2015).

return an indictment. For example, as discussed below,⁵⁸ a review of the Ferguson grand jury transcript — something to which researchers rarely, if ever, have access — raises questions whether prosecutors put forth a robust effort to convince the grand jurors to indict in the case.⁵⁹ Also, although we do not have the grand jury transcripts in other recent cases, commentators have raised similar questions about the prosecutorial efforts in some of those cases as well.⁶⁰ If a prosecutor wants to use the grand jury to insulate from criticism his or her decision not to pursue charges in particular case, the secrecy of the grand jury is a powerful tool.

3. *Legal Instructions to the Grand Jury*

The prosecutor is often referred to as the “legal advisor” to the grand jury.⁶¹ This is because there is no judge present in grand jury proceedings and questions that grand jurors have regarding the law governing the case must be answered by the prosecutor. The grand jurors, of course, typically are laypeople and rely heavily upon the prosecutor’s explanations of legal doctrines and principles. As an officer of the court subject to ethical regulation,⁶² the prosecutor is expected to act in good faith when instructing the grand jurors on the law.⁶³

Nevertheless, the legal instructions given to the grand jury by the prosecutor — which are particularly important in cases involving justification defenses to homicide or use of deadly force allegations — are shrouded in secrecy and generally not subject to review. As we saw in the Ferguson case, the prosecutor’s instructions to the grand jury were flawed at best, and may have actually impacted the grand jury’s decision on the indictment.⁶⁴

⁵⁸ See *infra* Part II.B.

⁵⁹ See Levine, *supra* note 15, at 766; Ruth Steinhardt, *Missouri Grand Jury Declines to Indict Police Officer in Fatal Shooting*, GW TODAY (Nov. 26, 2014), <https://gwtoday.gwu.edu/missouri-grand-jury-declines-indict-police-officer-fatal-shooting>, archived at <https://perma.cc/CGN2-4TLF>; Jeffrey Toobin, *How Not to Use a Grand Jury*, THE NEW YORKER (Nov. 25, 2014), <http://www.newyorker.com/news/news-desk/use-grand-jury>, archived at <https://perma.cc/7SXA-LGF2>.

⁶⁰ See, e.g., Levine, *supra* note 15, at 766–67 (2016); Trachtenberg, *supra* note 57, at 1101–02; see also Ari Melber, *The Tamir Rice Case Shows How Prosecutors Twist Grand Juries to Protect Police*, WASH. POST, Dec. 29, 2015, https://www.washingtonpost.com/posteverything/wp/2015/12/29/in-tamir-rices-case-the-grand-jury-process-was-turned-upside-down/?utm_term=.e884bbe63e11, archived at <https://perma.cc/2YWK-A2YS>.

⁶¹ See BEALE ET. AL, *supra* note 17, at § 4:15; Kristin Henning, *Status, Race and the Rule of Law in the Grand Jury*, 58 HOW. L.J. 833, 841 (2015). Cf. Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury’s Shield*, 98 J. CRIM. L. CRIMINOLOGY 1171 (2008).

⁶² See, e.g., MODEL RULES OF PROF’L CONDUCT r. 3.8 (AM. BAR ASS’N 2014); MODEL CODE OF PROF’L RESPONSIBILITY CANON 7, DR 7-103 (AM. BAR ASS’N 1980).

⁶³ See, e.g., AMERICAN BAR ASS’N, CRIMINAL JUSTICE STANDARDS: PROSECUTION FUNCTION 3-4.5.

⁶⁴ See, e.g., Henning, *supra* note 61, at 841–43; Jeffrey Fagan & Bernard Harcourt, *Professors Fagan and Harcourt Provide Facts on Grand Jury Practice in Light of Ferguson Decision* (Dec. 2014), http://www.law.columbia.edu/media_inquiries/news_events/2014/no-

The secrecy of the legal instructions to the grand jury can be a barrier to public confidence in the outcome of grand jury proceedings. To be sure, a defendant who desires to challenge her indictment by a grand jury may, in certain circumstances, petition the court to disclose the legal instructions the prosecutor gave to the grand jurors.⁶⁵ However, if the public is dissatisfied with a grand jury's decision not to indict in a given case, there is no ability to have the prosecutor's legal instructions reviewed for either legal error or bad faith.

B. The Prosecutorial Function as an Obstacle to Indictments in Police Violence Cases

1. The Outsized Role of the Prosecutor in the Grand Jury Process

The prosecutor has a degree of control of grand jury proceedings that is unparalleled in the criminal justice system.⁶⁶ Consider the preliminary hearing, in which the government is tasked with demonstrating to the court that probable cause exists to warrant going to trial. In that proceeding, there is a defense attorney and a judge present, and each of these actors has the ability to challenge the prosecutor and her presentation of evidence.⁶⁷ The defense counsel can cross-examine government witnesses and introduce evidence to rebut the assertions advanced by the prosecutor.⁶⁸ The judge can assess the credibility of government witnesses firsthand and can ensure that the prosecutor is making arguments grounded in the evidence. Likewise, at trial, all of the criminal procedural rights, such as the right to cross-examination, the defendant's right to compel witnesses to testify, and the right to testify, all place checks on the prosecutor.

Not so in the grand jury context. Indeed, the grand jury gives the prosecutor nearly limitless ability to shape the presentation of the evidence and influence the grand jurors.⁶⁹ There is no judge to oversee the prosecutor's presentation and no defense attorney to offer a competing narrative.⁷⁰ Although the grand jury technically has the authority to subpoena its own witnesses and evidence, most grand jurors either do not have the information or do not have the will to exert control over proceedings.⁷¹ Thus, grand jurors

vember2014/Facts-on-Ferguson-Grand-Jury, archived at <https://perma.cc/4NY3-E62M>. See Steinhardt, *supra* note 59.

⁶⁵ See, e.g., FED. R. CRIM. P. 6(e)(3)(E)(ii); N.Y. CRIM. PROC. L. 190.25(6); see also Benjamin E. Rosenberg, *A Proposed Addition to the Federal Rules of Criminal Procedure Requiring the Disclosure of the Prosecutor's Legal Instructions to the Grand Jury*, 38 AM. CRIM. L. REV. 1443 (2001).

⁶⁶ See, e.g., Levine, *supra* note 15, at 753.

⁶⁷ See, e.g., FED. R. CRIM. P. 5.1.

⁶⁸ *Id.*

⁶⁹ See, e.g., Levine, *supra* note 15, at 760–62.

⁷⁰ *Id.*

⁷¹ See *id.*; BEALE ET. AL, *supra* note 17, at § 4:15.

typically will only see and hear what the prosecutor wants.⁷² As a result, the prosecutor has outsized influence over the outcome of grand jury proceedings.

2. *Prosecutorial Motives in Police Killing Cases*

The vast majority of jurisdictions in the United States elect their prosecutors.⁷³ For better or worse, most prosecutors may have reason to be concerned about public opinion in high-profile cases, despite ethical admonitions to ignore such considerations.⁷⁴ Given the central role prosecutors play in the grand jury, therefore, they may seek to use the grand jury to shield themselves from public backlash for an unpopular charging decision in a police killing case. This is particularly so because prosecutors have the ability to shape the proceedings as they see fit. If a prosecutor is not inclined to bring a case against a law enforcement officer, a weak presentation before a grand jury can both make the case go away and protect the prosecutor from those who advocated pursuit of the charges. As mentioned above, the secrecy of the grand jury facilitates this strategy.⁷⁵

Potential motivations are curious given that prosecutors typically bring cases before the grand jury with the intention of obtaining an indictment. Although the prosecutor is sometimes referred to as the legal advisor to the grand jury,⁷⁶ the prosecutor's presentation of evidence usually is designed to lead to the grand jury approving the charges in the case. Indeed, given the low standard of proof and the historical high rate of indictment, there might even be more professional stigma associated with failure to obtain an indictment than for failure to obtain a conviction at trial. In other words, the prosecutor usually is advocating for the charges in the vast run of cases brought to the grand jury.⁷⁷ In the police violence context, however, it is possible that some prosecutors approach their role in the grand jury differently.

While the records of grand jury proceedings are almost never made available, the released transcripts from the Ferguson police shooting case arguably reveal a relatively tepid effort on the part the prosecutors to obtain an indictment.⁷⁸ The prosecutors called would-be government witnesses before the grand jury and impeached their credibility with statements they

⁷² *Id.*

⁷³ Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OH. ST. J. CRIM. L. 581, 589 (2009).

⁷⁴ See, e.g., CRIMINAL JUSTICE STANDARDS: PROSECUTION FUNCTION § 3-3.9 (AM. BAR ASS'N 1993).

⁷⁵ See *supra* Part II.A.

⁷⁶ See sources cited *supra* note 61.

⁷⁷ See, e.g., Levine, *supra* note 15, at 746–47.

⁷⁸ See *id.* at 760–62, 766; Steinhardt, *supra* note 59; see also *The Testimony the Grand Jury Heard in the Michael Brown Case*, ST. LOUIS TIMES-DISPATCH (Nov. 24, 2014), http://www.stltoday.com/news/multimedia/special/the-testimony-the-grand-jury-heard-in-the-michael-brown/html_47d95368-a8f2-5ae1-9173-6653c15d0f0e.html.

allegedly made in the media.⁷⁹ The prosecutors also failed to aggressively challenge flaws in the local police department's handling of the forensic evidence from the shooting scene.⁸⁰

Finally, the prosecutors did not appear to mount an aggressive cross-examination of the target of the grand jury investigation when officer Darren Wilson testified.⁸¹ Typically, when a prosecutor has the opportunity to question a defendant under oath at trial or in the grand jury, the result is a blistering cross-examination designed to challenge the defendant's version of events and bolster the government's theory of the case. The need for this type of scrutiny is particularly acute in self-defense or other justifiable homicide cases in which the defendant is the only one of the principal parties still alive and able to testify. In the Ferguson case, the questioning was relatively light and did not seem designed to challenge the officer's narrative at all, despite the obvious incentive to do so in a case involving an asserted defense of justifiable homicide.⁸²

As described above, the prosecutors in Ferguson did not seem to be advocating in favor of the grand jury returning an indictment.⁸³ To be sure, some have argued that the more neutral approach to grand jury presentations used in the Ferguson case — and presumably employed by prosecutors in similar police killing cases — is preferable to the typical, more aggressive attempt to obtain indictments in other types of criminal cases, and that this same sort of even-handed treatment should be extended to *all* targets of grand jury investigations.⁸⁴ However, the neutral approach seems to be reserved for police cases.

III. REFORM PROPOSALS

Understandably, a great deal of anger and confusion came in the wake of the recent high-profile cases in which the grand jury declined to indict officers who killed unarmed civilians.⁸⁵ Some well-meaning and insightful

⁷⁹ Steinhardt, *supra* note 59.

⁸⁰ See, e.g., Jerry Markon & Tom Hamburger, *Unorthodox Police Procedures Emerge in Grand Jury Documents*, WASH. POST (Nov. 25, 2014), https://www.washingtonpost.com/politics/seemingly-unorthodox-police-procedures-emerge-in-grand-jury-documents/2014/11/25/48152574-74e0-11e4-bd1b-03009bd3e984_story.html?utm_term=.bf5e1886a792, archived at <https://perma.cc/SRL7-LXJU>.

⁸¹ *Id.*

⁸² See, e.g., Marisol Bello, Greg Toppo, and Peter Eisler, *Grand Jury Charges Are Easy, Except Against Police*, USA TODAY (Nov. 25, 2014), <http://www.usatoday.com/story/news/nation/2014/11/25/ferguson-grand-jury/70098616/>, archived at <https://perma.cc/25PQ-DFK5>.

⁸³ See, e.g., Toobin, *supra* note 59.

⁸⁴ See Henning, *supra* note 61, at 838–43; Levine, *supra* note 15, at 771–75.

⁸⁵ See, e.g., Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <https://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html>, archived at <https://perma.cc/53ME-U3LJ>; J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES, Dec. 3, 2015, <https://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold->

critics of the administration of criminal justice in the United States focused the blame on the grand jury itself and called for its abolition in the wake of these tragic cases.⁸⁶ As the author has argued elsewhere, this is a misguided response.⁸⁷ Despite the structural features of the grand jury that may make indictment in police violence cases more difficult, there is still tremendous value in using the grand jury in this context.⁸⁸

That said, we must ensure that the grand jury and mechanisms of due process operate effectively, even when police officers are being investigated or accused. In the wake of these tragedies that seem to continue with alarming frequency,⁸⁹ a number of reform proposals have been developed to address the perceived shortcomings of the grand jury in police violence cases.⁹⁰ This Part considers some of these reform proposals, including the most promising one, which is directed primarily at the prosecutor rather than the grand jury.

death-of-eric-garner.html archived at <https://perma.cc/L3AU-4D26>; see also Roger A. Fairfax, Jr., *Should the American Grand Jury Survive Ferguson?*, 58 HOWARD L. J. 825, 826–27 (2015).

⁸⁶ See, e.g., Roger A. Fairfax, Jr., *Should the American Grand Jury Survive Ferguson?*, 58 HOW. L.J. 825, 826 n.8 (2015).

⁸⁷ *Id.* at 827–31.

⁸⁸ Indeed, rather than abolishing the grand jury, we should seek to put it to greater use in order to address problems in the administration of justice. One potential use, for example, is the seldom-used power of the grand jury to issue reports on allegations of official misconduct. When a federal criminal civil rights investigation fails to yield charges under the exceptionally high standard employed in those cases, the Justice Department sometimes still conducts an investigation of the jurisdiction. See, e.g., U.S. DEPT OF JUST. CIV. RTS. DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (Mar. 4, 2015). Federal and most state grand juries have the authority to issue reports. See 18 U.S.C. § 3331; GRAND JURY LAW & PRACTICE § 2:2 (2d ed. 2016). The use of this grand jury function to expose more systemic causes of unjustified police violence in jurisdictions would not only provide the opportunity to shine light on these matters of public concern, but would demonstrate the grand jury's continued relevance in the modern criminal justice system. See, e.g., Roger A. Fairfax, Jr., *Grand Jury Innovation: Toward a Functional Makeover of the Ancient Bulwark of Liberty*, 19 WM & MARY BILL RTS. J. 339, 342–44 (2010).

⁸⁹ See Kimberly Kindy et al., *Fatal Shootings By Police Police Are Up in the First Six Months of 2016*, WASH. POST (July 7, 2016), https://www.washingtonpost.com/national/fatal-shootings-by-police-surpass-2015s-rate/2016/07/07/81b708f2-3d42-11e6-84e8-1580c7db5275_story.html?utm_term=.f390dcae6f3a, archived at <https://perma.cc/T6HL-AYKF>. Cf. Ricardo Salazar-Limon v. City of Houston, Texas, 581 U.S. __ (2017) (Sotomayor, J., dissenting) (slip op. at 7 n.2) (noting that “commentators have observed the increasing frequency of incidents in which unarmed men allegedly reach to empty waistbands when facing armed officers”).

⁹⁰ Although grand jury reforms are not among the reform measures mentioned by President Obama in his recent article summarizing his criminal justice legacy, he did acknowledge that the Task Force on 21st Century Policing was launched “in the wake of events in Ferguson, Cleveland, and New York City.” Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 840 (2017). See also PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING (2015).

A. *Judicial Oversight of the Grand Jury*

Following the grand jury's decision not to indict in the Eric Garner incident, New York State entertained a number of grand jury reform proposals. The chief judge of the New York high court proposed the addition of a judge to grand jury proceedings to supervise the process and the prosecutor's conduct.⁹¹ This proposal responds to the concern that, left solely to the prosecutor, the grand jury process in police cases will not receive the same level of effort and advocacy as other criminal matters.⁹² The process also would presumably provide a safeguard against erroneous legal instructions given to the grand jurors.⁹³

However, there is no guarantee that the presence of a judge would make such indictments more likely. In fact, the presence of a judge could have a chilling effect in cases where the prosecutor is attempting to make a difficult case against a police officer and the judge disapproves of the prosecutorial decision to pursue charges. In addition, by adding a judge to the process, the grand jury moves ever closer toward resembling a trial, which is counter to the spirit and purpose of the grand jury, which was designed as a preliminary proceeding.⁹⁴

B. *Remove Option of Utilizing Grand Jury in Police Killing Cases*

Recall that, despite the fact that in Missouri the prosecutor is able to bring murder charges without the intervention of the grand jury, St. Louis County chief prosecutor Robert McCulloch chose to present the charges to a grand jury.⁹⁵ In the wake of Ferguson, the California state legislature passed S.B. 227, which prohibited prosecutors from using the grand jury in most cases in which a police officer is suspected of shooting or using excessive force against a civilian leading to their death.⁹⁶ The effect of the law was to remove the option of committing the prosecutorial decision to the grand jury in cases involving police killings. In other words, the law effectively abolished the grand jury in police killing cases.⁹⁷

⁹¹ See JONATHAN LIPPMAN, ACCESS TO JUSTICE: MAKING THE IDEAL A REALITY, THE STATE OF THE JUDICIARY 2015 2–4 (Feb. 17, 2015); Editorial, *A Judge's Idea for Grand Jury Reform*, New York Times (Feb. 19, 2015), <https://www.nytimes.com/2015/02/19/opinion/a-judges-idea-for-grand-jury-reform.html>, archived at <https://perma.cc/P4Z8-L2UC>. The chief judge also proposed the disclosure of grand jury transcripts in police killing cases and the appointment of a special prosecutor in cases in which police officers are accused. See *id.* at 3–4.

⁹² See *supra* Part II.B.

⁹³ See *supra* Part II.A.3.

⁹⁴ See, e.g., *United States v. Williams*, 504 U.S. 36, 48–50 (1992).

⁹⁵ See *supra* Part II.A.2.

⁹⁶ See S.B. 227, 2015 Senate (Cal. 2015) (amending Section 919 of the CAL. PENAL CODE).

⁹⁷ The bill was signed into law by Governor Brown in August of 2015. In January of 2017, the California Court of Appeals declared the law invalid under the California State

The bill's backers seemed to be motivated by a desire for transparency in the charging decisions made by prosecutors.⁹⁸ The prosecutors, who are elected, must make charging decisions based on the evidence and are held accountable for their decisions at the ballot box. However, while a prosecutor would no longer be able to hide behind the grand jury's refusal to indict a police officer,⁹⁹ the law could be viewed as simply removing community involvement from the charging process and placing the charging decision exclusively in the hands of the prosecutor. If the concern is that some prosecutors will be inclined to manipulate the grand jury process behind the scenes to avoid bringing these types of prosecutions, there may be little confidence — electoral accountability notwithstanding — that the same prosecutors will choose to bring these cases in the absence of the grand jury.

C. Discard Preferential Treatment of Police Defendants in Grand Jury Proceedings

Recent statistics on fatal police shootings in the state of Georgia are startling. About half of the over 180 people shot and killed by police in Georgia between 2010 and 2015 were either unarmed or were shot by police in the back.¹⁰⁰ A study of a subset of over 170 fatal police shootings during that same timeframe revealed that prosecutors took 48 cases to the grand jury, and asked for an indictment in only nine.¹⁰¹ A grand jury indicted in only one of those cases, and the judge dismissed that manslaughter charge shortly thereafter.¹⁰²

Constitution. See *Court Tosses California Law that Barred Grand Juries from Investigating Police Shootings*, L.A. TIMES (Jan. 11, 2017), <http://www.latimes.com/local/lanow/la-me-ln-grand-jury-police-shootings-20170111-story.html>, archived at <https://perma.cc/5K8R-3BJG>.

⁹⁸ See, e.g., Melody Gutierrez, *State Ends Secret Hearings in Police Killings of Civilians*, S.F. CHRONICLE, Aug. 11, 2015, <http://www.sfgate.com/politics/article/California-eliminates-use-of-grand-juries-to-6438501.php>, archived at <https://perma.cc/6LQF-EHEZ>; Allie Gross, *California Becomes the First State to Ban Grand Juries in Police Shooting Cases*, MOTHER JONES, Aug. 13, 2015, <http://www.motherjones.com/politics/2015/08/california-becomes-first-state-ban-grand-juries-police-shooting-cases>, archived at <https://perma.cc/2KTB-E968>. Although California was the first state to pass such a law, the Hennepin County, Minnesota prosecutor recently announced that he would no longer use the grand jury in police shooting cases. See David Chanen & Libor Jany, *Hennepin County to Stop Using Grand Juries in Officer-Involved Shootings*, STAR TRIBUNE, Mar. 16, 2016, <http://www.startribune.com/hennepin-county-attorney-to-provide-update-into-jamar-clark-inquiry/372229891/>, archived at <https://perma.cc/6VWU-3CX8>.

⁹⁹ See *supra* Part II.A.2.

¹⁰⁰ See Brad Schrader & Jennifer Peebles, *Unarmed and Shot in the Back*, ATLANTA JOURNAL-CONSTITUTION, <http://investigations.myajc.com/overtheline/ga-police-shootings/> archived at <https://perma.cc/MTN5-FEZ4>.

¹⁰¹ See Brad Schrader & Jennifer Peebles, *171 Shot Dead, Zero Prosecuted*, ATLANTA JOURNAL CONSTITUTION, <http://investigations.myajc.com/overtheline/prosecuted/> archived at <https://perma.cc/PT3N-BDVB>.

¹⁰² See Katie Mettler, *Atlanta Grand Jury Issues Murder Indictment in Fatal Police Shooting of Unarmed Man*, WASH. POST (Sept. 1, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/09/01/in-rare-move-atlanta-grand-jury-indicts-fired-police-officer-on->

The rarity of grand jury indictments in Georgia police shooting cases may not be surprising to some. Until very recently, Georgia had the nation's most pro-police set of procedures relating to the prosecution of police officers for unjustified violence.¹⁰³ Police officers in Georgia, until 2016, had the right to be present during the entirety of the grand jury proceeding and listen to and observe — in person — all of the witness testimony against them.¹⁰⁴ At the conclusion of the grand jury presentation, the police officer was given the last word, with an opportunity to make a statement to the grand jurors without any rebuttal by the prosecutor.¹⁰⁵

In 2016, Georgia Governor Nathan Deal signed a law that removed the ability of police officers to be present throughout the grand jury proceeding.¹⁰⁶ Now, police officers may make a statement to the grand jurors, but cannot observe the proceeding in its entirety.¹⁰⁷ Furthermore, these police officer statements can be challenged by the prosecutor through cross-examination.¹⁰⁸ An additional feature of the law mandates a transcript of grand jury proceedings so that there is a public record of the evidence considered by the grand jury.¹⁰⁹

While these reforms represent a tremendous improvement on the prior procedure, they still place the fate of such proceedings in the hands of a local prosecutor who may or may not lack the independence necessary for effective prosecution of these types of cases before the grand jury.

D. Additional Procedural Mechanisms to Supplement the Grand Jury

The Grand Jury Reform Act of 2015, a bill introduced in the 114th Congress, sought to respond to the prevalence of grand jury indictment declinations in police killing cases by creating an additional procedural mechanism.¹¹⁰ Under the bill, a state receiving certain federal funding must adopt a procedure whereby any death resulting from the use of deadly force by law enforcement would require notification of the governor of the state, who would then select, at random, a local elected prosecutor from a different jurisdiction in the state to serve as a special prosecutor.¹¹¹

murder-charge-in-fatal-shooting/?utm_term=.87049c9f8a74, archived at <https://perma.cc/657A-HGJC>.

¹⁰³ See Brad Schrade, *Grand Jury Privilege Curtailed for Ga. Officers in Shooting Cases*, ATLANTA JOURNAL-CONSTITUTION (Apr. 26, 2016), <http://www.myajc.com/news/grand-jury-privilege-curtailed-for-officers-shooting-cases/W3RYQj9I5ibJFHmVLRf3cN/>, archived at <https://perma.cc/K9DU-TRZJ>.

¹⁰⁴ See *id.*

¹⁰⁵ See *id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Grand Jury Reform Act of 2015, H.R. 429, 114th Cong. (2015).

¹¹¹ *Id.* at § 3.

Within ninety days of the appointment, the special prosecutor would be required to present evidence in a public hearing, after which a judge would determine whether there is probable cause.¹¹² This judicial determination, along with the written charging recommendation of the special prosecutor, would be transmitted to the prosecutor in the jurisdiction where the killing occurred.¹¹³ The bill makes clear that the procedure “shall be purely advisory, and shall have no binding effect on the elected prosecutor of the locality in which the death occurred.”¹¹⁴

However, despite having thirty-two co-sponsors, the bill was not passed.¹¹⁵ Even if the legislation were to become law, it notably leaves the decision whether to prosecute — or even go to a grand jury — to the local prosecutor.¹¹⁶ While there is the hope that the public hearing would promote transparency and accountability, ultimately it does not ensure that the crucial decision to seek an indictment is in the hands of a prosecutor independent of the local law enforcement community in the jurisdiction.

E. Enhance Transparency of the Grand Jury Process

A number of jurisdictions have considered or adopted proposals to enhance the transparency of the grand jury process by making public the transcripts of grand jury witness testimony and legal instructions given to the grand jurors.¹¹⁷ As discussed above, the lack of transparency caused by the grand jury's secrecy can contribute to a lack of confidence that the prosecutor — or the grand jurors themselves — seriously and fairly considered charges against police defendants in cases in which there was no indictment.

Of course, this legitimate desire for transparency must be balanced with the very real benefits derived from grand jury secrecy. While disclosure of the legal instructions given to grand jurors is generally a good idea,¹¹⁸ it is not clear whether releasing witness testimony would lead to more indictments in these types of cases. There would be a tremendous disincentive for a police officer witness to testify against a fellow police officer if his or her

¹¹² *Id.* at § 3(c).

¹¹³ *Id.* at § 3(f).

¹¹⁴ *Id.* at § 3(h).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at § 3(h).

¹¹⁷ See, e.g., LIPPMAN, *supra* note 91, at 3–4; Schrade, *supra* note 103; Editorial, *Bill on Grand Jury Reform a Welcome Move Toward Transparency*, STATEN ISLAND ADVANCE (Dec. 8, 2014), http://www.silive.com/opinion/index.ssf/2014/12/bill_on_grand_jury_reform_a_we.html, archived at <https://perma.cc/G6JZ-2B7V>; see also Lauren-Brooke Eisen, *What is on the Horizon for Grand Jury Reform?*, HUFF. POST (Mar. 25, 2015), http://www.huffingtonpost.com/laurenbrooke-eisen/what-is-on-the-horizon-fo_b_6535090.html, archived at <https://perma.cc/A63M-UGUR>.

¹¹⁸ See NAT'L ASS'N OF CRIM. DEF. LAWYERS, *FEDERAL GRAND JURY REFORM REPORT & BILL OF RIGHTS* (2000); Benjamin E. Rosenberg, *A Proposed Addition to the Federal Rules of Criminal Procedure Requiring the Disclosure of the Prosecutor's Legal Instructions to the Grand Jury*, 38 AM. CRIM. L. REV. 1443, 1446–48 (2001) (proposing a rule that would require grand jury instructions to be disclosed to defendants).

testimony would be made public. Also, civilian witnesses might be less likely to testify against a police officer if their testimony and identities were to be disclosed. Finally, the secrecy of the grand jury is also designed to protect the reputations of those who are ultimately cleared by the investigation. That value could be in tension with a system in which the full proceedings of the grand jury were made available for public consumption.¹¹⁹

F. Ensuring the Independence of the Prosecutor

Perhaps the most important factor related to the grand jury's effectiveness in these cases is the real or perceived lack of independence of the prosecutor who is tasked with investigating and bringing charges against law enforcement officers. As discussed above, prosecutors work closely with law enforcement in the discharge of their duties.¹²⁰ Prosecutors depend upon police officers to investigate criminal allegations, gather evidence, and give testimony at trial. Prosecutors entrust entire criminal cases to the work of law enforcement officers, and vice versa. As a result of this close working relationship, there is a real concern that prosecutors are unable to be objective in assessing criminal allegations lodged against law enforcement officers. When prosecutors seem unable or unwilling to pursue criminal charges against police officers, some chalk it up to prosecutorial bias in favor of the law enforcement agencies with which they work on a daily basis.

Consequently, there have been many calls for the use of independent prosecutors to handle investigations of police officers.¹²¹ Particularly in the wake of the high-profile cases involving police killings, there have been proposals for the provision of independent prosecutors with no prior connection to the jurisdiction in which the law enforcement officer discharges his or her duties.¹²² By ensuring the independence of the prosecutor from the agency

¹¹⁹ As mentioned above, there are significant burdens associated with simply being put on trial, even if one is ultimately acquitted. See, e.g., *Kaley v. United States*, 134 S.Ct. 1090, 1098 (2014); see also *supra* text accompanying note 26.

¹²⁰ See *supra* Part I.

¹²¹ See, e.g., Jordain Carney, *House Dems: Use Independent Prosecutors for Police Shootings*, THE HILL (Dec. 29, 2015), <http://thehill.com/blogs/floor-action/house/264389-dems-use-independent-prosecutors-for-police-shootings>, archived at <https://perma.cc/EM8A-RRJL>; Editorial, *Police Deadly Force Cases Call for Independent Prosecutors*, CHI. TRIB., Dec. 21, 2015, <http://www.chicagotribune.com/news/opinion/editorials/ct-laquan-mcdonald-special-prosecutor-law-edit-20151221-story.html>, archived at <https://perma.cc/46Y4-EPUD>; Editorial, *Police Abuse Cases Need Special Prosecutors*, WASH. POST, Dec. 6, 2014, https://www.washingtonpost.com/opinions/police-abuse-cases-need-special-prosecutors/2014/12/06/fcf57e28-7cd6-11e4-b821-503cc7efed9e_story.html?utm_term=.1b1d7ce687db, archived at <https://perma.cc/Q57X-A8MH>.

¹²² See, e.g., Ruben Rosario, *After Philando Castile's Death, Time for an Independent Prosecutor in Police Shootings*, TWIN CITIES PIONEER PRESS (Aug. 3, 2016), <http://www.twincities.com/2016/08/03/rosario-its-time-for-a-special-prosecutor/>, archived at <https://perma.cc/3JK7-BLEF>.

of the police officer, there will be a greater chance that the grand jury investigation will be conducted in an appropriate manner.

Three basic independent prosecutor models have been proposed. The first is the temporary independent prosecutor brought in from another jurisdiction. This "guest" prosecutor could be from a neighboring county or city within the state, and could be given access to the grand jury in the jurisdiction in which the incident occurred. This arrangement would avoid the danger of prosecutorial partiality borne of the prior relationship with the accused law enforcement officer or the employing agency.¹²³

A second model contemplates the appointment of a private attorney who is deputized to prosecute the case against police officers in a jurisdiction. Again, this private, deputized prosecuting attorney would be given access to the grand jury in those jurisdictions requiring or permitting indictment. There are serious questions to be asked about the use of private attorneys exercising the discretion entrusted to public prosecutors.¹²⁴ However, the desire for independence from law enforcement in a given community may outweigh the concern about private attorneys discharging the prosecutorial function.

A third model involves the installation of a permanent government attorney, not resident in the prosecutor's office, tasked with handling the investigation and prosecution of law enforcement officers within the jurisdiction. The state of New York recently adopted this model following the outrage after the Staten Island grand jury's refusal to indict officer Daniel Pantaleo in the chokehold killing of Eric Garner.¹²⁵

All of these models raise the question of whether there is sufficient accountability when an independent prosecutor is brought in to usurp the prosecutor elected by the community in which the case is being considered.¹²⁶ However, the accountability concern, though important, must give

¹²³ See, e.g., Kami Chavis Simmons, *Increasing Police Accountability Restoring Trust and Legitimacy Through the Appointment of Independent Prosecutors*, 49 WASH. U. J. L. & PUB. POL'Y 137, 151 (2015).

¹²⁴ See Roger A. Fairfax, Jr., *Outsourcing Criminal Prosecution? The Limits of Criminal Justice Privatization*, 2010 U. CHI. LEGAL FORUM 265, 283–97.

¹²⁵ The inaugural holder of this position, Alvin Bragg, is a senior attorney in the state Attorney General's office and has experience as a federal prosecutor in Manhattan. See Erica Orden, *Lead Prosecutor Named for N.Y. Police Deadly-Force Cases*, WALL ST. J. (July 9, 2015), <https://www.wsj.com/articles/lead-prosecutor-named-for-n-y-police-deadly-force-cases-1436475430>, archived at <https://perma.cc/9BF9-5J2R>. Bragg is responsible for investigating all cases involving police killings of unarmed civilians throughout the state of New York. See *id.*

¹²⁶ The late Brooklyn District Attorney Kenneth Thompson, who was aggressive in pursuing indictments of police officers for unjustified killings, opposed the use of special prosecutors in these cases on accountability grounds. See Statement of Brooklyn District Attorney Ken Thompson On Call By New York State Attorney General to Act as Special Prosecutor in Cases of Fatal Shootings (Dec. 16, 2014), <http://brooklynda.org/2014/12/16/statement-of-brooklyn-district-attorney-ken-thompson-on-call-by-new-york-state-attorney-general-to-act-as-special-prosecutor-in-cases-of-fatal-shootings/>, archived at <https://perma.cc/28JL-GDS2>. Baltimore City State's Attorney Marilyn Mosby, who supervised the Freddie Gray cases, also resisted calls for an independent prosecutor on grounds of community accountability. See

way to the need to avoid conflicts of interest in cases involving the prosecution of law enforcement officers. Indeed, the independence of the prosecutor is crucial to public confidence in the outcome of these grand jury investigations, whether or not they result in an indictment.

CONCLUSION

It bears repeating that some police officers are not indicted by grand juries because there is, in fact, no probable cause to believe that they committed a crime. The circumstances of a particular violent police encounter, though tragic, may have involved a justified use of deadly force. In those cases, the grand jury properly declined to indict. However, it is unlikely that virtually *all* cases involving police killings of civilians lack the probable cause to proceed to trial. Thus, it is important to examine the role, the structure, and the function of the grand jury in the disposition of those cases.

Even though many of the proposed reforms are imperfect, they represent worthwhile attempts to construct a more just system in which no one is above the law. But grand jury reform is but one piece of the larger effort to prevent these tragic events from continuing with the depressing frequency of the past few years. Bringing charges in these cases does not guarantee that justice will be served. Indeed, as we witnessed in the Walter Scott case, the videotaped shooting of an unarmed man in the back was not enough to secure a conviction at trial.¹²⁷

Furthermore, while a just conviction is certainly welcomed and deserved by families of those unjustly killed by law enforcement, those families would much rather have their loved one alive. In order to prevent these tragedies in the first place, we must continue to invest in training law enforcement and supporting best practices on threat assessment, implicit bias, and the use of force. We must also work on fostering police and community relations, and promoting within both law enforcement and the larger society a culture of tolerance and mutual respect that honors the dignity and conse-

Richard A. Oppel, Jr. & Richard Perez-Pena, *Baltimore Case is Full of Conflicts, Lawyers for Officers Contend*, N.Y. TIMES (May 8, 2015), <https://www.nytimes.com/2015/05/09/us/justice-department-begins-civil-rights-inquiry-into-baltimore-police.html>, archived at <https://perma.cc/LG39-LB8M>.

¹²⁷ See Alan Blinder, *Mistrial for South Carolina Officer Who Shot Walter Scott*, N.Y. TIMES (Dec. 5, 2016), <https://www.nytimes.com/2016/12/05/us/walter-scott-michael-slager-north-charleston.html>, archived at <https://perma.cc/7QJX-2E6Q>. The state has indicated that it plans to retry Slager on the murder charges, and federal charges are pending. See Andrew Knapp, *State Retrial of Michael Slager Set for March 1, 2017, Ahead of Federal Proceeding*, POST AND COURIER (Dec. 29, 2016), http://www.postandcourier.com/news/state-retrial-of-michael-slager-set-for-march-ahead-of/article_f1d4e0c4-ce0a-11e6-ac47-17a7c199c2ea.html, archived at <https://perma.cc/BE4F-JAGL>. See generally Michael Sokolove, *What Does It Take to Convict a Cop?*, MOTHER JONES (March/April 2017), <http://www.motherjones.com/politics/2017/01/michael-slager-trial-walter-scott-police-shooting-north-charleston-south-carolina>, archived at <https://perma.cc/S9XG-KTTS>.

quence of every life protected daily by “the heroic backbone of our communities.”¹²⁸ Nothing is a panacea, but it is all worth the effort.

¹²⁸ Obama, *supra* note 1, at 840.

