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Volume 123 | Issue 1

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Fall 2018

# Visibly (Un)Just: The Optics of Grand Jury Secrecy and Police Violence

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## Recommended Citation

Nicole Smith Futrell, *Visibly (Un)Just: The Optics of Grand Jury Secrecy and Police Violence*, 123 DICK. L. REV. 1 (2018).  
Available at: <https://ideas.dickinsonlaw.psu.edu/dlr/vol123/iss1/2>

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## Articles

# Visibly (Un)Just: The Optics of Grand Jury Secrecy and Police Violence

Nicole Smith Futrell\*

### ABSTRACT

Police violence has become more visible to the public through racial justice activism and social justice advocates' use of technology. Yet, the heightened visibility of policing has had limited impact on transparency and accountability in the legal process, particularly when a grand jury is empaneled to determine whether to issue an indictment in a case of police violence. When a grand jury decides not to indict, the requirement of grand jury secrecy prevents public disclosure of the testimony, witnesses, and evidence presented to the grand jury. Grand jury secrecy leaves those who have seen and experienced the act of police violence through activism and social media with no way of

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reconciling the grand jury’s decision with what they saw. As a result of increased demands for transparency and accountability in grand jury investigations of police violence, prosecutors, state legislators, and judicial and administrative policymakers have proposed or implemented measures to bring greater transparency to the grand jury process. However, their efforts have had varying degrees of success.

This Article examines efforts to reconcile the doctrine of grand jury secrecy with the public’s need for greater transparency and accountability following the highly visible police killings of Michael Brown, Eric Garner, and Tamir Rice. It argues that most of the attempts to bring greater transparency to the grand jury process fall short because of narrow assumptions about the concept of transparency and deep entrenchment of racial disparities in our criminal legal system. The Article considers how principles that have emerged from the heightened visibility of policing inform a more expansive type of grand jury visibility—one that does not merely seek to legitimize the grand jury process, but rather serves to shift power dynamics between the civilian and state. While increased transparency is not in and of itself a means of solving systemic problems of race and police violence, the ability to see, interpret, and influence how our current models of accountability function provides an important foundation for those working toward a reimagining of our justice systems and greater protections for marginalized minorities.

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## INTRODUCTION

*“Only the beginning and the end of the process—the apparently reckless shooting of a black child and the grand jury’s decision that that killing was not unreasonable—are truly public. Everything in between is either cloaked in legal secrecy or dribbled out in carefully choreographed press releases. And when it’s over, when the details are sufficiently blurred and the story is effectively muddled, the prosecutor can take refuge behind those anonymous grand jurors when he declares the whole episode to be nothing more than a sad accident.”*

—Sean Flynn<sup>1</sup>

Social justice advocates are harnessing videos displaying individual encounters with aggressive policing<sup>2</sup> to bring heightened at-

1. Sean Flynn, *The Tamir Rice Story: How to Make a Police Shooting Disappear*, GQ MAG. (July 14, 2016), <http://www.gq.com/story/tamir-rice-story>.

2. The term “aggressive policing” is used to refer to street-level interactions between police officers and civilians that are rooted in forceful or oppressive tactics and policies. Aggressive policing often includes the harsh policing of civilian conduct that the public would usually view as innocuous. The term refers to strategies such as stop and frisk, suspicionless police car stops, and zero tolerance policing. It may also involve the capricious or excessive use of physical force, as well as abusive behavior and language. Aggressive policing generally has a disproportionate impact on individuals and communities of color. *See generally*, Brett G. Stoudt et al., *Growing Up Policed in the Age of Aggressive Policing Policies*, 56 N.Y. L.

tention to disparities in the American criminal legal system. While media exposed aggressive police-citizen encounters in previous generations,<sup>3</sup> the advent of social media<sup>4</sup> and a renewed movement for racial and social justice have increased public awareness and stimulated criminal justice reform efforts.<sup>5</sup> The blending of activism and technology exposes a new level of policing visibility,<sup>6</sup> deepening the public's scrutiny of aggressive policing. However, the impact of greater policing visibility on prosecutorial decision-making transparency in cases of police violence has been mixed at best. In short, policing activity is increasingly visible, but the corresponding legal processes responsible for ensuring officer accountability remain largely concealed. Nowhere is this more apparent than in the state grand jury process, a part of the criminal legal system with intentionally low visibility.

When an officer kills an unarmed civilian under questionable circumstances,<sup>7</sup> the local prosecutor usually determines whether the officer will face criminal prosecution. Depending on the jurisdic-

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SCH. L. REV. 1331 (2012) (providing data and analysis on the impact of aggressive policing on youth in New York City).

3. In 1991, long before the ubiquitousness of camera phones, the Internet, and other social media sharing platforms, George Holliday, a Los Angeles plumber, stepped onto his balcony and used a camcorder to record the brutal beating of Rodney King by Los Angeles Police Department (LAPD) officers. The video depicts three officers, as part of a group of several more, kicking King and hitting him with nightsticks more than 50 times in less than a minute. A local news station acquired and broadcasted the recording before cable network news stations picked it up and broadcasted it widely. The vicious beating of King ignited already existing tensions between the LAPD and local communities of color and ultimately lead to the 1992 Los Angeles uprisings that followed the acquittal of the responsible officers. Gil Troy, *Filming Rodney King's Beating Ruined His Life*, DAILY BEAST (Mar. 3, 2016), <https://www.thedailybeast.com/filming-rodney-kings-beating-ruined-his-life>; Peter L. Davis, *Rodney King and the Decriminalization of Police Brutality in America: Direct and Judicial Access to the Grand Jury as Remedies for Victims of Police Brutality when the Prosecutor Declines to Prosecute*, 53 MD. L. REV. 271, 275 (1994).

4. BRIAN A. JACKSON, RESPECT AND LEGITIMACY—A TWO-WAY STREET: STRENGTHENING TRUST BETWEEN POLICE AND THE PUBLIC IN AN ERA OF INCREASING TRANSPARENCY 1–2 (2015), <https://bit.ly/2xcvZVh>.

5. See *id.*; see also Andrew J. Goldsmith, *Policing's New Visibility*, 50 BRIT. J. CRIMINOLOGY 914, 926–27 (2010).

6. Goldsmith, *supra* note 5, at 1 (citing John B. Thompson, *The New Visibility*, THEORY CULTURE & SOC'Y, Dec. 2005, at 31).

7. In the United States, there is no federal statute regulating the use of lethal force. Rather, the use of force is determined by the constitutions of each individual state. In *Graham v. Connor*, 490 U.S. 386 (1989), the United States Supreme Court established a jury standard by which an officer's use of force can be judged. The objective standard tasks a jury with determining "whether an officer's actions were 'objectively reasonable in light of the facts and circumstances confronting them' and that the 'reasonableness' of a particular use of force must be judged from the perspective of a 'reasonable officer on the scene.'" AMNESTY INT'L,

tion, the prosecutor will either make the charging determination on his or her own or present the case to a grand jury to determine whether probable cause for an indictment exists.<sup>8</sup> As a practical matter, in cases involving suspects who are not police officers, grand juries almost always return an indictment after a prosecutor's presentation of evidence.<sup>9</sup> However, the overwhelming tendency to indict all but vanishes when the subject of the grand jury's inquiry is a police officer.<sup>10</sup> When police officers kill unarmed civilians, they almost never face criminal prosecution.<sup>11</sup> In Dallas, for instance,

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DEADLY FORCE: POLICE USE OF LETHAL FORCE IN THE UNITED STATES 17 (2015) (quoting *Graham v. Connor*, 490 U.S. 386 (1989)), <http://bit.ly/2xLjNuR>.

8. Twenty-five states permit prosecutors to use an information or a complaint in lieu of a grand jury indictment when making a charging determination. Those states include: Arizona, Arkansas, California, Colorado, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Michigan, Montana, Nebraska, Nevada, New Mexico, Oklahoma, Oregon, South Dakota, Utah, Vermont, Washington, Wisconsin, and Wyoming. Twenty-three states require that grand jury indictments be used to charge serious crimes. Those states include: Alabama, Alaska, Delaware, Florida, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Virginia, and West Virginia. Two states, Connecticut and Pennsylvania, allow prosecutors to make charging decisions and utilize the grand jury for investigative purposes only. Steven M. Witzel, *Grand Jury Practice, Protests and Reform*, N.Y. L.J. (Jan. 15, 2015), <https://bit.ly/2MA2dhX>. For further information on how each state uses the grand jury, see NAT'L CTR. FOR STATE COURTS, GRAND JURIES: COMPOSITION AND FUNCTION, <https://bit.ly/2Ncji6G> (last visited Aug. 26, 2018). Some states also engage a preliminary hearing option where a judge determines whether probable cause to charge a crime exists.

9. Federal data gives some sense of this: According to the Bureau of Justice Statistics, U.S. attorneys prosecuted just over 162,000 federal cases in 2010. Grand juries declined to return an indictment in 11 of them. See MARK MOTIVANS, FEDERAL JUSTICE STATISTICS 2010—STATISTICAL TABLES (2013), <http://bit.ly/2R9E0IX>. Indeed, the widely acknowledged fact that prosecutors secure indictments in the overwhelming majority of their cases is what motivated the former chief judge of New York state's highest court Sol Wachtler's infamous remark that district attorneys "'by and large' . . . could get [a grand jury] to 'indict a ham sandwich.'" Josh Levin, *The Judge Who Coined "Indict a Ham Sandwich" Was Himself Indicted*, SLATE (Nov. 25, 2014), <https://bit.ly/1vlDVwx>.

10. Philip M. Stinson, *Charging a Police Officer in Fatal Shooting Case Is Rare, and a Conviction Is Even Rarer*, DAILY NEWS (May 31, 2017), <https://nydn.us/2rIO3I6>.

11. Even when an indictment is filed and a police officer faces criminal prosecution, the case almost always results in acquittal. See Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), <https://wapo.st/2xiPRFj> ("Of the 54 officers who were charged for fatally shooting someone while on duty over the past decade, 35 have had their cases resolved. Of those, a majority—21 officers—were acquitted or saw their charges dropped."). In the rare instances in which officers are convicted for shooting an unarmed civilian, sentencing is relatively light. For instance, former NYPD officer Peter Liang was convicted of manslaughter and official misconduct for killing Mr. Akai Gurley in his own apartment building yet was sentenced to five years of probation and 800

grand juries failed to indict in the over 60 cases of unarmed civilians killed by Dallas police since 2002.<sup>12</sup> In Houston, local grand juries have cleared police of shooting civilians 288 consecutive times.<sup>13</sup> Significantly, a distinct racial dimension underlies the failure to indict police violence. A substantial number of victims of fatal police use of force are people of color.<sup>14</sup>

When a grand jury decides not to indict in a highly publicized case of police violence, the public is often left with no way of reconciling how the grand jury reached its decision. The testimony, witnesses, and evidence presented to the grand jury are usually never revealed to the public. Grand jury secrecy, a long-standing tradition in American jurisprudence which requires secrecy during and after the presentation of evidence to grand jurors, prevents evidence presented to the grand jury from being made public. With the grand jury process shrouded in secrecy, citizens and advocates have found it difficult to engage in monitoring and remedying critical issues related to aggressive policing. As one scholar has noted, “By exposing the inner workings of the grand jury, transparency could lead to corrective processes promoting more informed, independent grand jury decisions as a result of public criticism.”<sup>15</sup> Therefore, the secrecy requirement, while a long-standing legal tradition, stands in direct tension with the contemporary need for transparency and accountability in the law enforcement process.

The heightened visibility of policing has sparked increased demands for transparency and accountability in grand jury matters in-

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hours of community service. Matt Hansen & Matt Pearce, *No Prison Time for Ex-NYPD Officer Peter Liang in Fatal Shooting of Akai Gurley*, L.A. TIMES (Apr. 19, 2016), <https://lat.ms/20UTdG4>. In April 2016, ex-Fairfax County officer Adam Torres, facing trial for second-degree murder for killing Mr. John Greer in his own doorway, pled guilty to involuntary manslaughter in exchange for a sentence of one year of jail time. Tom Jackman, *Ex-Fairfax Police Officer Who Killed John Greer Sentenced to One Year*, WASH. POST (June 24, 2016), <https://wapo.st/2MAkyv9>.

12. Tierney Sneed, *Garner, Brown Decisions Spark Calls for Grand Jury Reform*, U.S. NEWS & WORLD REP. (Dec. 12, 2014), <https://bit.ly/2MBOIy8>.

13. James Pinkerton, *Bulletproof: Hard to Charge*, HOUS. CHRON., <https://bit.ly/2pb9efN> (last visited Aug. 26, 2018). The reality that grand juries are not indicting police who commit violence is concerning, given that grand juries statistically almost never fail to return charges. See, e.g., Ben Casselman, *It's Incredibly Rare for a Grand Jury to Do What Ferguson's Just Did*, FIFTYTHREEEIGHT (Nov. 24, 2014), <https://53eig.ht/2u9911K> (citing research from the Bureau of Justice indicating that in 2010, grand juries failed to return indictments in 11 of 162,000 cases brought by federal prosecutors).

14. Kindy & Kelly, *supra* note 11; Kia Makarechi, *What the Data Really Says About Police and Racial Bias*, VANITY FAIR (July 14, 2016), <http://bit.ly/2OruCfj>.

15. Andrew E. Taslitz & Stephen E. Henderson, *Reforming the Grand Jury to Protect Privacy in Third Party Records*, 64 AM. U. L. REV. 195, 221 (2014).

volving police criminality. Some state legislatures and prosecutors who set policy recognize the harms of maintaining complete grand jury secrecy and embrace the theme of transparency, but with varying degrees of opaqueness.<sup>16</sup>

This Article suggests that heightened policing visibility and social activism have initiated a shift in power dynamics between marginalized communities and law enforcement. However, this shift in power dynamics has yet to manifest into legal accountability, particularly in grand jury presentations where the process leading to non-indictment is shrouded in secrecy. Efforts to reconcile the doctrine of grand jury secrecy with the public's demands for greater transparency and accountability following highly visible killings, such as those of Michael Brown, Eric Garner, and Tamir Rice, have largely fallen short. This Article examines grand jury transparency efforts and suggests that their limitations stem from narrow assumptions about the role of transparency and the impact of systemic social and racial challenges in our criminal legal system.

Part I lays the groundwork for examining the efforts toward transparency in jury proceedings in cases of civilian killings by police officers. It explores the impact of recent developments in technology and racial justice activism that led to a heightened visibility of police violence and the start of a shift in social power dynamics. Part II provides the historical context of and traditional justifications for grand jury secrecy. It describes how the grand jury process and traditional secrecy justifications are largely inapposite in highly visible cases of police criminality. Part III uses case examples to detail how prosecutors respond to calls for greater grand jury transparency. This part draws from each case example to suggest that current grand jury reform efforts are largely limited to three models. Each model is discussed and evaluated for its overall impact on grand jury transparency. Part IV argues that given the government's monopoly on the use of violence and the United States's long history of oppressing racial minorities, grand jury secrecy reform measures in cases of police violence must take an expansive view of transparency that does more than seek to legitimize the criminal legal process as it exists. This part identifies why the shortcomings of the current approaches exist and concludes by considering what transparency modeled on the lessons from policing's heightened visibility would look like.

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16. For a discussion of prosecutorial and legislative responses to calls for greater grand jury transparency in cases of police violence, see *infra* Part III.

## I. SEEING POLICE VIOLENCE

The evolving way we observe and understand police criminality against unarmed civilians has created pressure on the grand jury and its doctrine of secrecy. Changes in technology and social justice activism have unmasked the complexities of race and law enforcement. This section draws from the fields of communication media, sociology, and criminology to explore how advances in technology have led to a “new visibility” of police-citizen interactions in the United States. It also explores how social justice activists have wielded heightened policing visibility to expose the normalization of racialized police violence and challenge the lack of accountability provided by traditional legal institutions.

### A. *The New Visibility of Policing*

Social science scholars have observed the ways that changes in media and technology impact the power dynamics between a government and its people. Professor John B. Thompson’s social theorization of a “new visibility” explains how the development of communication media has significantly altered the balance of power between government and the public.<sup>17</sup> Historically, only the few in power could make certain events or interactions visible to the masses, making “visibility” a potent tool of social control.<sup>18</sup> However, greater access to technology and media has allowed some of that control to extend beyond only those in power.<sup>19</sup> Ordinary people, who were once only the receivers of media information, have now become the producers of media, making government practices

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17. John B. Thompson, *The New Visibility*, THEORY CULTURE & SOC’Y, Dec. 2005, at 31, 38. Professor Thompson writes:

Ever since the advent of print, political rulers have found it impossible to control completely the new kind of visibility made possible by the media and to shape it entirely to their liking; now, with the rise of the Internet and other digital technologies, it is more difficult than ever.

*Id.*

18. *Id.* at 36–37.

19. *Id.* at 39–40. Thompson explores the relationship between visibility and social control by drawing from Michel Foucault’s discussion of visibility in the modern disciplinary society. Foucault argues that many state institutions rely on a method of panoptic surveillance, where the few in power watch over the many. A panoptic system of observation creates a sense of constant surveillance, without a person actually knowing whether they are in fact being watched. The lack of certainty about when one is watched produces a sense of permanent visibility for those possibly observed, which in turn controls their actions even without the use of formal restraints. In more recent years, social critics have built on Foucault’s argument to suggest that technology employed by the government, particularly in the form of surveillance cameras in public spaces and tracking of Internet activity, has facilitated a broader use of governmental panoptic surveillance.

that were at one time obscured from public view “visible for all to see.”<sup>20</sup> This allows “those who exercise power, rather than those over whom power is exercised” to be subject to a new, heightened visibility.<sup>21</sup>

Technological advances, such as the incorporation of video cameras in mobile phones and the development of video sharing and social networking platforms, have made heightened visibility possible. Mobile phone cameras have reached wide levels of ownership. They are compact and portable and can be used discreetly. With connected wireless systems, mobile phones can also be used to transmit recordings to video sharing networks, which allows user-generated content to reach sizeable audiences.<sup>22</sup> Most recently, the introduction of live streaming features in social media sites allows these transmissions to happen in real time.<sup>23</sup> The liberalization of publication access has created a “post broadcasting age” in which traditional media’s gatekeeper role has been dramatically diminished.<sup>24</sup>

Professor Andrew Goldsmith applied the concept of new visibility and its implications for the balance of power between state and citizenry to policing.<sup>25</sup> Police officers serve as agents of the state, fully imbued with the enforcement power of the state. Visi-

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20. *Id.* at 31 (discussing media use of U.S. military staff’s personal photographs to expose the torture and degradation of prisoners in U.S. prisons overseas).

21. *Id.* at 40–41.

22. Steve Mann et al., *Cyborglogging with Camera Phones: Steps Towards Equiveillance*, in THE 14TH ACM INTERNATIONAL CONFERENCE ON MULTIMEDIA 2006 177, 177 (2006). *Sousveillance* “involves the recording of an activity by a participant in the activity.” *Id.* *Sousveillance* seeks to reverse the one-sided transparency created by surveillance. In recent years, the mobile phone camera has become a powerful *sousveillance* device. The phone camera allows for new mediated visibility of public officials through the eyes of marginalized individuals whose experiences are not usually reflected in mainstream media. The broad use of cellphone video cameras and the ubiquitous videotaping of public officials that results—or “pervasive image capture”—could enhance public discourse and accountability. See Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 339–51 (2011).

23. Kathleen Chaykowski, *Philando Castile’s Death on Facebook Live Highlights Problems for Social Media Apps*, FORBES (July 7, 2016), <https://bit.ly/2OpLmQI>.

24. See, e.g., John Hartley, *Less Popular but More Democratic?: Corrie, Clarkson and the Dancing Cru*, in TELEVISION STUDIES AFTER TV: UNDERSTANDING TELEVISION IN THE POST-BROADCASTING ERA 20, 20 (Graeme Turner & Jinna Tay eds., 2009) (“What counts as television is diversifying, across technology, mode of production, viewing experience, programming, production base and geography . . .”).

25. Goldsmith, *supra* note 5, at 922–30.

bility is a key feature of policing, with officers needing to navigate moments of both high and low public visibility. As Goldsmith describes, policing traditionally relies on positive, defined instances of controlled visibility.<sup>26</sup> On many occasions, police officers depend on the identification of their role in their day-to-day activities.<sup>27</sup> The use of uniforms, badges, and clearly marked patrol vehicles heighten awareness of their presence within a community and signal official authority.<sup>28</sup> Obvious markers of authority allow police officials to employ a type of visibility that projects professionalism and official competence worthy of public trust.<sup>29</sup> Affirmative displays of police work also support the positive public image of policing.<sup>30</sup> Police officers who solve crimes or take heroic actions help maintain a positive visibility that enhances credibility.<sup>31</sup>

The public is made to understand that on occasion, police work cannot take place in a visible manner.<sup>32</sup> Law enforcement officers must run covert undercover operations, and the integrity of their investigations may depend on withholding certain information from the public.<sup>33</sup> Many view lack of visibility in covert police operations as a necessary element of effective, professional police work.<sup>34</sup> As such, policing as a professional function worthy of credibility has required that police officers have control of their visibility, switch-

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26. *Id.* at 915.

27. *Id.*

28. *Id.*

29. *Id.* at 917.

30. *Id.* at 915.

31. Modern-day police forces, particularly in low-income, urban areas, also engage in a number of visibility-based strategies aimed at maintaining social control. The use of surveillance cameras, watch towers, drones, stop and frisk, and gang databases are all policing approaches aimed at monitoring the populace and compiling data about their histories and actions. The strategies cumulatively echo notions of panoptic surveillance, where the few hold an omnipresent sense of control over the many. See, e.g., Bob Hennelly, *A Look Inside the NYPD Surveillance System*, WNYC (May 21, 2010), <http://www.wnyc.org/story/71535-a-look-inside-the-nypd-surveillance-system> (“Right now . . . if you are in a public space south of Canal between the East River and the Hudson River, you are being watched. Hundreds of surveillance cameras send live feeds to an undisclosed location.”). See also K. Babe Howell, *Gang Policing: The Post Stop-and-Frisk Justification for Profile-Based Policing*, 5 U. DENV. CRIM. L. REV. 1, 2–3 (2015) (“Since 2001, the NYPD has adopted a surveillance-based policing model . . . . [T]he NYPD’s challenge in the face of loss of legal and political support for stop-and-frisk policing is to create a new avenue for intensive surveillance of young men of color . . . .”). See FRANK LEISHMAN & PAUL MASON, *POLICING AND THE MEDIA* 123 (2012), for a brief survey of the panoptic dimensions of modern police surveillance practices.

32. Goldsmith, *supra* note 5, at 915.

33. *Id.*

34. *Id.* at 916.

ing between the projection of positive “normal appearances” and hidden tactics and activities when they deem necessary.<sup>35</sup>

However, the controlled visibility of policing also necessitates the successful concealment of “back” activities, or police actions that constitute improper behavior and damage credibility.<sup>36</sup> Displays of police officers shooting unarmed people,<sup>37</sup> using abusive language during the course of an investigation,<sup>38</sup> or subjecting suspects to violent, overly aggressive physical contact<sup>39</sup> are all types of “back” activities that undermine the official authority and “normal appearances” upon which policing relies.<sup>40</sup> Advances in media and technology limit the concealability of “back” policing activities.<sup>41</sup>

The use of technology and cameras by both private citizens and public agencies continues to heighten the visibility of police officers

35. *Id.* at 915–17.

36. *Id.* at 917.

37. See, e.g., Katherine Blaisdell et al., *Race, Place and Police: The 2009 Shooting of Oscar Grant*, HARV. J. AFRICAN AM. PUB. POL’Y, 2015, at 65, <http://bit.ly/2NQB44o>; see also Daniel Politi, *Police in St. Louis Suburb Shoot Unarmed Black Teenager Multiple Times*, SLATE (Aug. 10, 2014), <https://bit.ly/1yliZTZ>; Alan Blinder, *Ex-Officer Who Shot Walter Scott Pleads Guilty in Charleston*, N.Y. TIMES (May 2, 2017), <https://nyti.ms/2CZE050>; Elisha Anderson, *Grandmother Says She Watched Police Kill 7-Year-Old*, USA TODAY (June 10, 2013), <https://usat.ly/2QySbkj>; Paul Meincke, *Family Calls for Justice for Rekia Boyd, Woman Shot to Death by Off-Duty Police Officer*, ABC 7 EYEWITNESS NEWS (Jan. 9, 2013), <https://abc7.ws/2OVnULi>.

38. While not a video recording, the audio captured on a cellphone during a stop and frisk encounter reveals the police ridiculing a Harlem teen for his mixed-race appearance and threatening to break his arm. See Conor Friedersdorf, *How a 17-Year-Old Changed the Politics of ‘Stop and Frisk’*, ATLANTIC (Oct. 11, 2012), <https://bit.ly/2MyXqgH>; see also Nicole Smith Futrell, *Vulnerable, Not Voiceless: Outsider Narrative in Advocacy Against Discriminatory Policing*, 93 N.C. L. REV. 1597 (2015).

39. Tim Stelloh & Tracy Connor, *Video Shows Cop Body-Slamming High School Girl in S.C. Classroom*, NBC NEWS (Oct. 26, 2015), <https://nbcnews.to/1N3x6ZG>.

40. Goldsmith, *supra* note 5, at 917.

41. Professors Ajay Sandhu and Kevin D. Haggerty explain:

When recorded, a police officer’s actions are no longer opaque, transitory moments in time, experienced only by the people in the immediate surroundings. Instead, they produce a semipermanent record that can be stored, distributed widely, repeatedly reexamined, slowed down, enhanced, and compared to other recordings. Consequently, video recordings alter the spatial and temporal dynamics of policing. In the process, cameras produce cascading and somewhat unpredictable changes in interpersonal dynamics and power relations.

Ajay Sandhu & Kevin D. Haggerty, *High-Visibility Policing: Policing on Camera and the Crisis of Police Legitimacy*, OXFORD HANDBOOKS ONLINE (2015), <https://bit.ly/2Oq4oX5> (internal citation omitted).

on patrol.<sup>42</sup> As a result, the progression of media and technology has allowed ordinary people to make the “back” activities of government actors, here police officers, visible to all.<sup>43</sup> Some scholars argue that increased visibility has a significant impact on shifting the power dynamics of policing.<sup>44</sup> Placing access to visibility in the hands of those subject to police power is seen as a way to bring transparency to police actions, minimize abuse of authority, and curtail the use of excessive force. Some argue that the additional

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42. States’ systems of observation have also been used to make police activities more visible. GPS locators in cars, dashboard cameras, body cameras, and police-owned street surveillance are some of the ways that data and images related to police activities are captured and recorded. Issues of transparency and public access to this information are related areas of discussion that are beyond the scope of this analysis. See Brent McDonald & Hillary Bachelder, *With Rise of Body Cameras, New Tests of Transparency and Trust*, N.Y. TIMES (Jan. 6, 2017), <https://nyti.ms/2xkPslU>; Radley Balko, *Police Cameras Without Transparency*, WASH. POST (Aug. 21, 2015), <https://wapo.st/2NgkQg7>.

43. The publishing of cellphone videos on traditional and social media sites is perhaps the most prominent example of how the actions of police officers are made more visible to the public. However, there are a number of citizen-sourced data-gathering “spinoffs” that also serve to function in a more organized way to increase the visibility of policing. “Copwatching,” for example, harnesses the impact of video recording police interactions in a very deliberate way. Rather than relying on spontaneous police filming, organized groups patrol their communities to monitor police activity, record their observations, and prevent police misconduct. In copwatch groups, “local residents become the subjects, rather than the objects, of policing: civilians set the terms of engagement by deciding when and where to record, which recordings to save, who can have access to the footage, and how to frame the narratives surrounding the release of any recordings.” Jocelyn Simonson, *Copwatching*, 104 CAL. L. REV. 391, 396 (2016). Crowdsourcing is another mechanism that increases mobilization and policing visibility. Local citizens and social justice organizations have built tools to access data and track officer conduct through publicly accessed or generated information. The Legal Aid Society, for example, is building a database that collects information on allegations of police misconduct from a variety of sources. After the killing of Michael Brown, a group of teens developed an app that allows users to submit the details of an incident of police misconduct and provide a rating for the officer. The app also integrates community boards, allowing users to collect data, communicate, and plan formal responses. Rebecca Borison, *Three Teenagers Created an App to Document Police Abuse*, BUS. INSIDER (Aug. 15, 2014), <https://read.bi/VvYcAD>. Another app employs data gathering to create “a mapping system of police performance” through “micro-moments” which will be aggregated to help police forces make adjustments to their practices. Kaveh Waddell, *An App that Tracks the Police to Keep Them in Check*, ATLANTIC (Apr. 15, 2016), <https://bit.ly/1qOCCr8>.

44. Sandhu & Haggerty, *supra* note 41, at 5; see David A. Harris, *Picture This: Body-Worn Video Devices (Head Cams) as Tools for Ensuring Fourth Amendment Compliance by Police*, 43 TEX. TECH L. REV. 357, 359 (2010); Manuel Castells, *Communication, Power and Counter-Power in the Network Society*, 1 INT’L J. COMM. 238 (2007); Torin Monahan, *Counter-Surveillance as Political Intervention?*, 16 SOC. SEMIOTICS 515 (2006).

scrutiny can ultimately lead to political action and progressive changes in policing.<sup>45</sup>

Policing's new visibility, Goldsmith suggests, represents the use of a strategic resource for political action:

[T]he making visible of actions and events is not just the outcome of leakage in systems of communication and information flow that are increasingly difficult to control; it is also an explicit strategy of individuals who know very well that mediated visibility can be a weapon in the struggles they wage in their day-to-day lives.<sup>46</sup>

Marginalized individuals and organizers employed this visibility to build a base of support and advocate for reform. The next section discusses activism around police criminality and how visibility became a central part of the movement's efforts to recognize the value of Black<sup>47</sup> lives and compel grand jury reform.

### *B. Social Activism and the Visibility of Police Violence*

Mediated visibility is a powerful, strategic resource for activists and organizers challenging the structural inequities in law enforcement practices. Organizers use the visibility of isolated incidents of police or vigilante violence<sup>48</sup> to directly underscore the broader, more obscured ways that social and legal institutions normalize the devaluation of marginalized people.<sup>49</sup>

45. Sandhu & Haggerty, *supra* note 41, at 4. However, the authors question the extent to which increased recordings of police impact their behaviors.

46. Goldsmith, *supra* note 5, at 918. Mediated visibility refers to visibility made possible through the use of media communication.

47. In this Article, I have chosen to capitalize the word Black as an acknowledgement of the ethnic cohesion of people of the African diaspora. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) (explaining that “Blacks, like Asians [and] Latinos . . . constitute a specific cultural group”); see also Lori L. Tharps, *The Case for Black with a Capital B*, N.Y. TIMES (Nov. 18, 2014), <https://nyti.ms/2PUzu9z> (placing the capitalization of “Black” in a historical context). All citations will retain their original capitalization.

48. Official state and vigilante violence have worked together throughout American history, with vigilante violence reinforcing both formal and informal codes of white supremacy. See, e.g., Keri Leigh Merritt, *Public, Private, and Vigilante Violence in Slave Societies, Part 3*, BLACK PERSPECTIVES (Jan. 11, 2017), <http://bit.ly/2OUcsOg>; see also David A. Love, *The Trayvon Martin Case Reveals a Vigilante Spirit in the U.S. Justice System*, GUARDIAN (Apr. 7, 2017), <https://bit.ly/2OpEsuO>.

49. Amna A. Akbar, *Law's Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 355 (2015) (“The movement exposes to the mainstream what black communities have argued—and black freedom struggles have organized against—for centuries: Law is not fair, it does not treat people equally, and its violence is lethal and routine.”).

While activism against racialized state criminality has a long and enduring history in the United States, the emergence of #BlackLivesMatter as an organizing principle and rallying cry inspired a new “ideological and political intervention” in addressing the casual killing of Black and brown people by the police.<sup>50</sup> While the Movement for Black Lives<sup>51</sup> takes on a broad range of concerns related to structural inequality and white supremacy, issues of policing and the criminal legal system have remained a primary part of its intersectional focus.<sup>52</sup>

The killing of 17-year-old Trayvon Martin in 2013 at the hands of George Zimmerman, a neighborhood vigilante in Sanford, Florida, is widely considered a significant origin moment for the Movement for Black Lives.<sup>53</sup> In July 2013, after a jury found Zimmerman not guilty of second-degree murder, Oakland activist Alicia Garza took to Facebook to write a “love letter to black people” that soon went viral.<sup>54</sup> This post and the phrase “Black Lives

50. In the words of the movement’s founders, Alicia Garza, Patrisse Cullors, and Opal Tometi: “Black Lives Matter is an ideological and political intervention in a world where Black lives are systematically and intentionally targeted for demise.” *Herstory*, BLACK LIVES MATTER (Sept. 10, 2017), <https://blacklivesmatter.com/about/herstory/>.

51. The Movement for Black Lives is “a collective of more than 50 organizations representing thousands of Black people from across the country” that formed “[i]n response to the sustained and increasingly visible violence against Black communities in the U.S. and globally.” *About Us*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/about/> (last visited Aug. 26, 2018).

52. The Movement for Black Lives and its far-reaching network has mystified some of its observers by its lack of adherence to a singular strategy, political ideology, or hierarchical leadership. As Professor Amna Akbar explains: “Short- and long-term goals vary among members of the movement, as do the tactics, strategies, and underlying commitments to liberal, reformist, and radical politics.” Akbar, *supra* note 49, at 356; see also John Eligon, *One Slogan, Many Methods: Black Lives Matter Enters Politics*, N.Y. TIMES (Nov. 18, 2015), <https://nyti.ms/2xcyjLZ>; Sandhya Somashekhar, *Protesters Slam Oprah over Comments that They Lack ‘Leadership’*, WASH. POST (Jan. 2, 2015), <https://wapo.st/2xeSh8S>.

53. Patrisse Cullors, *Opinion: #BlackLivesMatter Will Continue to Disrupt the Political Process*, WASH. POST (Aug. 18, 2015), <https://wapo.st/2NiGFM7> (“#BlackLivesMatter was created in 2013 after Trayvon Martin’s murderer, George Zimmerman, was acquitted for his crime, and dead 17-year-old Trayvon was posthumously placed on trial for his own murder. Black Lives Matter is both a network and a movement.”).

54. As Garza wrote:

[T]he sad part is, there’s a section of America who is cheering and celebrating right now. [A]nd that makes me sick to my stomach. We GOTTA get it together y’all. . . . [S]top saying we are not surprised. [T]hat’s a damn shame in itself. I continue to be surprised at how little Black lives matter. And I will continue that. [S]top giving up on black life. . . . [B]lack people. I love you. I love us. Our lives matter.

Jelani Cobb, *The Matter of Black Lives*, NEW YORKER (Mar. 14, 2016), <https://bit.ly/2k6Am0a>.

Matter” prompted Garza and fellow organizers, Patrisse Cullors and Opal Tometi, to take their message broadly to the streets and social media streams. Their message set the groundwork for a widespread movement and national conversation about race and law enforcement, set off by a string of police killings of Black people the following year.

On July 17, 2014, Eric Garner was killed in Staten Island, New York City, when a New York City Police Department (NYPD) officer put his forearm to Mr. Garner’s neck while arresting him for selling loose, untaxed cigarettes.<sup>55</sup> The interaction, along with his dying moments where Mr. Garner can be heard yelling “I can’t breathe” 11 times, was captured on a cellphone video recording and broadcasted around the globe.<sup>56</sup> A Staten Island grand jury issued a no true bill,<sup>57</sup> finding that there was insufficient evidence to charge the responsible officer.<sup>58</sup>

On August 4, 2014, John Crawford III was killed in a Walmart store in Beavercreek, Ohio, while holding a toy pellet gun.<sup>59</sup> Store surveillance video captured police officers shooting Mr. Crawford.<sup>60</sup> A grand jury in Greene County declined to indict the officer who shot Mr. Crawford on charges of murder, reckless homicide, or negligent homicide.<sup>61</sup>

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55. Joseph Goldstein & Nate Schweber, *Man’s Death After Chokehold Raises Old Issue for the Police*, N.Y. TIMES (July 18, 2014), <https://nyti.ms/2n0PWdm>.

56. *Id.*

57. A true bill is defined as: “A grand jury’s notation that a criminal charge should go before a petty jury for trial.” *True Bill*, BLACK’S LAW DICTIONARY (10th ed. 2014). Therefore, when a grand jury has issued a no true bill, it is the grand jury’s notation that there is not enough evidence to indict the accused.

58. 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, 2014), <https://nyti.ms/2z0kbZl>.

59. Mike Hayes & Ali Vingiano, *The Brief Life and Baffling Death of John Crawford III*, BUZZFEED NEWS (Oct. 3, 2014), <https://bzfd.it/2QEefKy>.

60. This video was not made publicly available until after the grand jury presentation. See Elahe Izadi, *Ohio Wal-Mart Surveillance Video Shows Police Shooting and Killing John Crawford III*, WASH. POST (Sept. 25, 2014), <https://wapo.st/2D15gAd> (“Surveillance video footage showing John Crawford III being shot and killed by police has been made public after a grand jury decided Wednesday not to indict officers in the Ohio Wal-Mart shooting death last month.”).

61. Jon Swaine, *Ohio Wal-Mart Video Reveals Moments Before Officer Killed John Crawford*, GUARDIAN (Sept. 25, 2014), <https://bit.ly/2xdrdXz> (“After hearing from 18 witnesses and considering video and audio evidence, the jurors concluded on their third day in session that Williams acted reasonably in shooting Crawford dead at the store in Beavercreek, a suburb of Dayton.”). The 911 witness who gave the officers plainly erroneous information about Crawford waving the gun at shoppers, pointing it at children, and reloading it, was also cleared by a local grand jury. Nick Wing, *911 Caller Will Not Be Charged for Giving Cops Bad Info Before Fatal Police Shooting*, HUFFINGTON POST (Apr. 18, 2016), <https://bit.ly/1oFHtcc>.

On August 9, 2014, Michael Brown was killed by a Ferguson, Missouri, police officer after he was stopped for blocking traffic.<sup>62</sup> The officer responsible for killing Brown was not indicted by a local grand jury.<sup>63</sup> Civil unrest around the nation followed both the shooting and the grand jury decision.<sup>64</sup>

On November 22, 2014, in Cleveland, Ohio, 12-year-old Tamir Rice was shot and killed within two seconds of a police officer arriving at the recreation center where he had been playing with a toy gun.<sup>65</sup> The police released a surveillance video four days after the shooting amidst pressure from Mr. Rice's family and the community.<sup>66</sup> A grand jury declined to indict the officers responsible for killing Mr. Rice.

These killings only represent a portion of the recent deaths of Black people at the hands of the police.<sup>67</sup>

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62. Sarah Mimms et al., *Ferguson Police Say Officer Stopped Michael Brown for 'Blocking Traffic'*, ATLANTIC (Aug. 15, 2014), <https://bit.ly/2NK3iIF>.

63. Larry Buchanan et al., *What Happened in Ferguson*, N.Y. TIMES (Aug. 10, 2015), <https://nyti.ms/2juM9jM>; Eyder Peralta & Bill Chappell, *Ferguson Jury: No Charges for Officer in Michael Brown's Death*, NAT'L PUB. RADIO (Nov. 24, 2014), <https://n.pr/2CY6MH>.

64. See *infra* Part III.C.

65. See Elahe Izadi & Peter Holley, *Video Shows Cleveland Officer Shooting 12-Year-Old Tamir Rice Within Seconds*, WASH. POST (Nov. 26, 2014), <https://wapo.st/2NLgL2J>; see also Michael Lester, *Timeline of Tamir Rice Case*, N.Y. TIMES (Dec. 29, 2015), <https://nyti.ms/2D21jLL>; Timothy Williams & Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. TIMES (Dec. 28, 2015), <https://nyti.ms/2QtdRk>.

66. Ryllie Danylko, *Protests Break Out in Cleveland Over Tamir Rice Shooting, Ferguson Grand Jury Decision*, CLEVELAND.COM (Nov. 26, 2014), <https://bit.ly/2MA13CU>; see also Flynn, *supra* note 1 ("What evidence is presented and how is not a matter of public record. Nor is whether a witness is treated with deference or, to borrow phrasing from that 74-page report, as one of the 'purported experts' hired by lawyers 'representing the Rice family in a federal civil lawsuit.'").

67. See, e.g., Aria Bendix, *No Charges for Officers in Alton Sterling Case*, ATLANTIC (May 2, 2017), <https://bit.ly/2QzD4Hx>; see also Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. TIMES (June 16, 2017), <https://nyti.ms/2Oq50vR>; Yasmeeen Serhan, *An Acquittal in the Fatal Shooting of Terrance Crutcher*, ATLANTIC (May 18, 2017), <https://bit.ly/2NJqYwO>; Sarah Maslin Nir, *Officer Peter Liang Convicted of Fatal Shooting of Akai Gurley in Brooklyn*, N.Y. TIMES (Feb. 11, 2016), <https://nyti.ms/2Qx9Usv>; Natasha Bach, *Police Violence Has Been Going On Forever, No Wonder People Are Fed Up with It*, HUFFINGTON POST (Aug. 28, 2014), <https://bit.ly/1BQymbJ>. On October 20, 2014, an officer in Chicago, Illinois, fired 16 shots in 14 seconds, killing 17-year-old Laquan McDonald as he walked away from police officers with a three-inch folding knife. Surveillance video of the shooting was released over one year after Mr. McDonald's death following a police cover up, journalist investigation, and litigation. Dashboard video of the killing was originally withheld from the public. After investigation, the officer was charged with first-degree murder. Cook County State Attorney Anita Alvarez lost her bid for re-election in 2016, as did McGinty in Cleveland, Ohio. See Nausheen Husain, *Timeline of the Laquan McDonald Case*,

Organizers working for the Movement for Black Lives used the visibility of these police killings to expose the insidious racism operating behind the mainstream media portrayals of race, policing, and our criminal legal system writ large. They successfully prompted a national conversation about race and law enforcement. Further, they created pressure on political and legal institutions, despite significant criticism of the movement's diverse and provocative tactics and goals.<sup>68</sup>

Activists have used many tactics after police killings—such as protests, disruptions of election rallies, and die-ins at local courthouses—to direct attention to the underlying systemic issues. The continuous display of public grieving, outrage, and frustration compelled political actors to pay attention. The activism also helped reveal the ways that the public and media remain willfully blind to the needless loss of human life.<sup>69</sup> For example, the national media's focus on Ferguson was not initially trained on the killing of Michael Brown, but rather on the civil unrest and destruction of local businesses that followed his killing.<sup>70</sup> Movement activists drew atten-

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CHI. TRIB. (June 27, 2017), <https://trib.in/2LO7pTI>. Recent cases also highlight the brutal, and sometimes fatal, treatment of African-Americans at the hands of police beyond shootings, such as during arrests and in custody. See, e.g., Tom Dart, *Sandra Bland Dashcam Video Shows Officer Threatened: 'I Will Light You Up'*, GUARDIAN (July 22, 2015), <https://bit.ly/2xbLsEY>; see also *Freddie Grey's Death in Police Custody—What We Know*, BBC (May 23, 2016), <https://bbc.in/1FuYFXP>.

68. The movement was initially criticized for what some viewed as an emphasis on anger and a departure from certain civil rights movement tactics, which emphasized respectability, unity, and specific policy demands. Barbara Reynolds, *I Was a Civil Rights Activist in the 1960s. But It's Hard For Me to Get Behind Black Lives Matter*, WASH. POST (Aug. 24, 2015), <https://wapo.st/2D8UhoC>.

69. Prior to the ascension of the Black Lives Matter movement, police shootings of African-Americans received scant, if any, attention by major media outlets. Any major media coverage relied heavily on official sources and was often characterized by victim-blaming. For an analysis of how and why this has changed, see Gene Demby, *The Butterfly Effects of Ferguson*, NAT'L PUB. RADIO (Aug. 11, 2016), <https://n.pr/2pbS7KZ> (arguing the movement closed the social distance between Black activists and communities and national news institutions, allowing the media ecosystem to accelerate its coverage of the issues). See also Brian Lambert, *How the Black Lives Matter Movement Is Changing Local Reporting*, MINNPOST.COM (Feb. 2, 2016), <http://bit.ly/2NKISPD> (discussing how local news media has been forced to adapt due to the increased contact between Black Lives Matter activists and national journalists, along with the intense use of social media).

70. As journalist Wesley Lowery explained:

[B]ut it was the destruction of the QuikTrip, not the police shooting of Mike Brown, that brought the national media's focus to Ferguson . . . even the breaking of a young black body left on public display, didn't catch the attention of the national media. It was the community's enraged response—broken windows and shattered storefronts—that drew the eyes of the nation.

tion to the absurdity of this, pointing out our society's willingness to abide the state killings of Blacks, while reserving outrage and demands for accountability for instances of property damage.<sup>71</sup>

Organizers and activists also use social media to name the individuals killed by the police and to tell humanizing stories in a way that counters the narratives constructed by some mainstream media sources.<sup>72</sup> Mainstream media vilified many of the victims for their clothing,<sup>73</sup> their past experiences with the criminal legal system, and whether they talked back to the police or "resisted arrest."<sup>74</sup> Each consideration suggests that somehow the victims' fates were of their own making. Those aligned with the principle of asserting value for Black lives emphasized the victims' identities as daughters, sons, fathers, mothers, and human beings worthy of more respect and dignity than the media gave them.<sup>75</sup> The movement helped emphasize

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Wesley Lowery, *Black Lives Matter: Birth of a Movement*, GUARDIAN (Jan. 17, 2017), <http://bit.ly/2NfpFpW>.

71. Transcript of Interview by Jim Gilmore with Wesley Lowery, PBS FRONTLINE (Oct. 26, 2016), <http://bit.ly/2DFZynC> ("[W]e're being lectured about how our anger is somehow not legitimate, that our pain is somehow not legitimate; that from the highest office in the land down to the most local offices in the land, we as a nation are more concerned about property damage than we are lives."); see also Ta-Nehisi Coates, *Barack Obama, Ferguson, and the Evidence of Things Left Unsaid*, ATLANTIC (Nov. 26, 2014), <http://bit.ly/2OpMXpL>.

72. Smith Futrell, *supra* note 38, at 1609 ("[P]ersonal stories are a powerful methodology for revealing and countering this perpetuation of racial subordination and exclusion of perspectives of color."); see also Bijan Stephen, *Social Media Helps Black Lives Matter Fight the Power*, WIRED (Nov. 2015), <http://bit.ly/2OpNtnH>; Renee Lewis, *Ferguson Reports Raise Questions on Media Criminalization of Blacks*, AL JAZEERA AM. (Aug. 14, 2014), <http://bit.ly/2xfmCv> (asking U.S. media how they would choose to represent African-American victims in Twitter campaign #iftheygunnedmedown); Bryan Adamson, "Thugs," "Crooks," and "Rebellious Negroes": *Racist and Racialized Media Coverage of Michael Brown and the Ferguson Demonstrations*, 32 HARV. J. RACIAL & ETHNIC JUST. 189, 209 (2016) (describing how the photos that media used as context for news stories about Michael Brown served to "fuel a news narrative of Black youth and crime").

73. Alexandra Le Tellier, *Geraldo Rivera: Wearing a Hoodie While Black Is Asking for It*, L.A. TIMES (Mar. 23, 2012), <http://bit.ly/2NiJCMH>.

74. See, e.g., Joe Soucheray, *Why Didn't Jamar Clark Take His Hands out of His Pockets*, PIONEER PRESS (Mar. 31, 2016), <http://bit.ly/2p7HBEy>; see also *No Charges for Ex-Milwaukee Cop Who Shot Dontre Hamilton*, VICE NEWS (Dec. 23, 2014), <http://bit.ly/2pccaIY> ("The white officer was fired from the police force, but prosecutors have ruled that he acted in self-defense when shooting Hamilton. Manney claimed that he shot Hamilton after the man grabbed his baton and struck him.").

75. Specific campaigns have developed to address the unique positions of Black women and Black transgender and gender non-conforming people: #Sayhername and #Blacktranslivesmatter. See Homa Khaleeli, *#SayHerName: Why Kimberlé Crenshaw Is Fighting for Forgotten Women*, GUARDIAN (May 30, 2016), <http://bit.ly/2xff2cx>; see also Lauren N. Williams, *Trans Activist Speaking Up for Victims of Violence and Transgender Women of Color*, TIME (2017), <https://ti.me/2xlm9Az>; André St. Clair, *Stop Killing Us: Black Trans Lives Matter*, HUF-

the point that respectability politics only serve to diminish the lives of those killed by the police.<sup>76</sup>

Finally, along with naming those killed by the police, the movement demonstrated that recordkeeping of the number of people killed by police each year had been nonexistent.<sup>77</sup> While the exact data remains difficult to ascertain,<sup>78</sup> it is clear that Blacks make up a disproportionate number of those killed by the police each year. According to FBI data, Black civilians were killed by police almost two times per week from 2005 to 2012.<sup>79</sup> Police shoot and kill young Black men in particular at 21 times the rate of young white men.<sup>80</sup> Over the last 15 years in New York City, police officers have killed 179 people in the line of duty, 27 percent of whom were unarmed.<sup>81</sup> Grand juries indicted officers in just three of those killings.<sup>82</sup>

The visibility and activism related to police criminality promoted official measures for better recordkeeping and prompted newspapers and social justice groups to begin implementing their own reporting and counting efforts.<sup>83</sup>

As awareness and demands for accountability grow within the public domain, the ways in which our legal institutions and grand jury process fall short become even more evident. Goldsmith's the-

FINGTON POST (Aug. 17, 2016), <http://bit.ly/2paTR7j>; Zeba Blay, *One Year After Sandra Bland's Death, #SayHerName Is As Important As Ever*, HUFFINGTON POST (July 13, 2016), <http://bit.ly/2p9slSb>.

76. Osagie K. Obasogie & Zachary Newman, *Black Lives Matter and Respectability Politics in Local News Accounts of Officer-Involved Civilian Deaths: An Early Empirical Assessment*, 2016 WIS. L. REV. 541, 553 (2016).

77. Wesley Lowery, *How Many Police Shootings a Year? No One Knows*, WASH. POST (Sept. 8, 2014), <https://wapo.st/2Ngvovx>.

78. THE NAT'L POLICE VIOLENCE MAP, MAPPING POLICE VIOLENCE (2015), <https://mappingpoliceviolence.org/aboutthedata/>.

79. Zach Newman, "Hands Up, Don't Shoot": Policing, Fatal Force, and Equal Protection in the Age of Colorblindness, 43 HASTINGS CONST. L.Q. 117, 123–24 (2015).

80. *Id.*; see also AMNESTY INT'L, *supra* note 7.

81. Colin Taylor Ross, *Policing Pontius Pilate: Police Violence, Local Prosecutors, and Legitimacy*, 53 HARV. J. ON LEGIS. 755, 757 (2016).

82. *Id.*

83. See, e.g., THE NAT'L POLICE VIOLENCE MAP, *supra* note 78 ("At least 208 black people have been killed by police in the U.S. in 2015."); see also *The Counted: People Killed by the Police*, GUARDIAN, <http://bit.ly/2p907MI> (last visited Sept. 28, 2018); Maya Rhodan, *White House Task Force Calls for Better Data on Police Shootings*, TIME (Mar. 2, 2015), <https://ti.me/2DcDGQP> (noting that a recent report issued by President Obama's task force called for improved record keeping of officer-involved shootings); Michael S. Schmidt, *F.B.I. Director Speaks Out on Race and Police Bias*, N.Y. TIMES (Feb. 12, 2015), <https://nyti.ms/2MzElef> ("'It's ridiculous that I can't tell you how many people were shot by the police last week, last month, last year,' Mr. Comey said.>").

ory of policing visibility predicts that legal institutions will fail to provide the necessary accountability:

[I]t seems highly probable that the new capacities for surveillance of policing inherent in these technologies may increase the police's accountability to the public . . . [m]uch, if not all, of that accountability, however, is likely to take place in the court of public opinion rather than through courts of law and other institutionalized channels of public accountability.<sup>84</sup>

The next section explores how the grand jury, with a deep tradition of secrecy, frequently fails to provide the kind of public accountability that the high visibility of these cases tends to demand.

## II. EVALUATING GRAND JURY SECRECY IN THE CONTEXT OF POLICE VIOLENCE VISIBILITY

The grand jury is a group of local citizens charged with hearing testimony and evidence presented by the prosecutor to determine if sufficient evidence to charge a suspect with an offense exists.<sup>85</sup> The Supreme Court has made clear that the grand jury's role is to accuse, not adjudicate.<sup>86</sup> The grand jury does not determine guilt or innocence, but rather decides whether a person will face criminal prosecution. The grand jury process is one of the few places within the criminal legal system where members of the community apply their own perspectives and experiences to the prosecutor's investigation of a case and charging decision.<sup>87</sup>

The grand jury is also, by design, one of the parts of the criminal justice process with the lowest visibility. The doctrine of grand jury secrecy—which restricts the disclosure of any of the witnesses, evidence, and testimony considered during the presentation of the case—is a key feature of the grand jury process. Grand jury secrecy serves to insulate all grand jury and prosecutor activity from public scrutiny.

The increased visibility of police violence has raised expectations about the kind of transparency and accountability that our legal institutions provide in cases of significant public interest. In order to understand the challenges that grand jury secrecy presents in the context of highly visible police criminality, this section dis-

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84. Goldsmith, *supra* note 5, at 915–16.

85. See generally Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL'Y & L. 67 (1995) (explaining the grand jury's role and evaluating state and federal grand jury systems).

86. *United States v. Calandra*, 414 U. S. 338 (1974).

87. Randall Eliason, *In Defense of the Grand Jury (Part 2): Grand Jury Secrecy*, SIDEBARS (May 25, 2016), <http://bit.ly/2Qzj5Zh>.

cusses why grand juries were traditionally designed to operate in secrecy. It then details the legal standards that articulate the justifications for grand jury secrecy and applies those justifications to the police violence context.

### A. *The Origins of Secrecy*

The practice of using grand juries was first imported to the American colonies from English legal tradition and later made its way into the federal government structure.<sup>88</sup> Many scholars trace the use of the grand jury back to 1166 with King Henry II's Grand Assize of Clarendon, a body composed of 12 knights who reported incidents from each of their localities to the Crown.<sup>89</sup> This body was largely responsible for conducting investigations into an individual's wrongdoing and providing local support for the centralized authority of the King. As such, this early predecessor of the modern day grand jury did not serve to protect the rights of the individual, but rather expanded the reach of royal dominion.<sup>90</sup>

One of the earliest references to secrecy and autonomy in grand jury proceedings is documented in the 1681 case of the Earl of Shaftesbury.<sup>91</sup> The Crown charged the Earl, a critic of the King, with treason.<sup>92</sup> The grand jurors heard evidence against the Earl in open court at King Charles II's insistence. After the hearing, the jurors questioned the witnesses in private and later, despite intense pressure, refused to indict, giving only their consciences as a reason for the refusal.<sup>93</sup> The Earl of Shaftesbury's case established a grand jury custom of hearing witness testimony in private, without the prosecutor or defendant. As one scholar noted, "secrecy made possible the discovery of truth and protected individuals from mali-

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88. See 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, 12–19 (1996), for an extensive discussion of grand jury usage in English and colonial American jurisprudences.

89. Michael K. Williams, *Grand Jury: Bulwark of Prosecutorial Immunity?*, 3 LOY. U. CHI. L.J. 305, 307 (1972); see also PAUL S. DIAMOND, *FEDERAL GRAND JURY PRACTICE AND PROCEDURE* 1.01 (5th ed. 2012); Nicole D. Valente, *Quiet No Longer: Opening the Door for Empowered Juries and Transparency*, 35 REV. LITIG. 135, 136 (2016); Hiroshi Fukurai & Zhuoyu Wang, *Proposal to Establish the Federal Civil Grand Jury System in America: Effective Civic Oversight of Federal Agencies and Governmental Personnel*, 3 J. CIV. LEGAL SCI. 1, 2 (2014).

90. William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 175 (1973).

91. Williams, *supra* note 89, at 307–08; GEORGE J. EDWARDS, JR., *THE GRAND JURY* 29 (1906); 8 JOHN HENRY WIGMORE, *WIGMORE ON EVIDENCE* § 2360 (3d ed. 1940).

92. Williams, *supra* note 89, at 307–08.

93. *Id.* at 308.

cious or hateful prosecution.”<sup>94</sup> More than just an arm of the central government, grand juries were seen as protecting the liberties of the innocent citizen from groundless accusations of crime.<sup>95</sup> Over time, the fear of autocracy and governmental coercion diminished in England, and the prosecutor began to attend grand jury proceedings and assist in taking testimony.<sup>96</sup> However, the importance of secrecy was cemented into the grand jury structure.

The early formation of the United States legal system adopted the grand jury process. Due to its composition of laypersons, the grand jury was regarded as a vital safeguard for the rights of individuals accused by the government, and secrecy was seen as a necessary element of this function.<sup>97</sup> The Fifth Amendment to the United States Constitution guarantees indictment by grand jury in cases of capital or other infamous crimes. This guarantee demonstrates the value placed on the grand jury’s traditional function: “to protect the innocent against unwarranted prosecution.”<sup>98</sup> Although the constitutional right to a grand jury indictment in a felony case is firmly established in the federal system, it has not been incorporated as to the states, and as such is not required in state prosecutions.<sup>99</sup> While “nearly all state constitutions provided for indictment by grand jury in the early nineteenth century,”<sup>100</sup> not all states actually make use of grand juries.<sup>101</sup> Each state designates the types of cases in which a grand jury indictment must be obtained. The independent choice available to the states creates a great deal of variation amongst state and federal grand jury prac-

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94. Kadish, *supra* note 88, at 16.

95. Campbell, *supra* note 90, at 175.

96. See Williams, *supra* note 89, at 305.

97. See *id.* at 308–10.

98. Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System*, 82 B.U. L. REV. 1, 13 (2002). Grand jury secrecy reforms cannot simply focus on legitimizing knowledge that there are limitations but create opportunities.

99. *Hurtado v. California*, 110 U.S. 516, 538 (1884) (holding that states need not incorporate the right to grand jury).

100. Williams, *supra* note 87, at 309. Williams further noted:

The [F]ifth [A]mendment is silent concerning the procedure of the grand jury. This meant that federal grand juries were intended to operate in accordance with procedures established in English common law. In addition, when the thirteen colonies federated in 1787 they adopted the English common law, and by virtue of this adoption, the English grand jury system was in force in the states. The grand jury system was, therefore, recognized as a secret proceeding in both federal and state jurisprudence.

*Id.*

101. Witzel, *supra* note 8; Simmons, *supra* note 98, at 16.

tices.<sup>102</sup> However, reliance on the doctrine of secrecy remains fairly consistent across state and federal jurisdictions.<sup>103</sup>

## *B. Challenging Secrecy's Justifications*

### *1. Traditional Justifications*

John Somers, an eminent late 17th century legal scholar who wrote on the early features of the grand jury, described the traditional justifications for grand jury secrecy.<sup>104</sup> The reasons were “first, to prevent the flight of criminals; second, to find out whether witnesses were biased; third, to be free from judicial oversight; fourth, to catch witnesses in their lies; and fifth, to permit the full development of evidence for a possible indictment some time in the future.”<sup>105</sup> Secrecy was valued for its ability to protect both the interests of the monarchy in discovering the truth and the targeted individuals from malicious or hateful prosecution.<sup>106</sup>

The historical justifications that Somers articulated provided a foundation for American judicial support of grand jury secrecy. In 1917, a Rhode Island federal district court addressed the issue of secrecy in the First Amendment context.<sup>107</sup> The court discussed six foundations for secrecy that largely reflected Somers’ justifications:

- (1) preventing the escape of offenders; (2) preventing the destruction of evidence; (3) preventing tampering with witnesses; (4) preserving the reputations of innocent persons whose conduct comes under the grand jury’s investigation; (5) encouraging witnesses to disclose their full knowledge of possible wrongdoing; and (6) preventing undue prejudice of the public jury pool.<sup>108</sup>

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102. See Simmons, *supra* note 98, at 16.

103. Brenner, *supra* note 85, at 86–87.

104. See Kadish, *supra* note 88, at 12–19.

105. *Id.* at 15.

106. *Id.* at 12–19.

107. See *id.* at 18 (citing *United States v. Providence Tribune Co.*, 241 F. 524 (D. R.I. 1917)).

108. *Id.* at 19; see also Daniel C. Richman, *Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket*, 36 AM. CRIM. L. REV. 339, 352–53 (1999) (“In *Douglas Oil Co. v. Petrol Oil Stops Northwest*, 441 U.S. 211 (1979), the Supreme Court had occasion to set out the rationales for grand jury secrecy . . . .”); George Edward Dazzo, *Opening the Door to the Grand Jury: Abandoning Secrecy for Secrecy’s Sake*, 3 D.C. L. REV. 139, 145 n.38 (1995) (“The policy reasons underlying the American rule of grand jury secrecy were articulated in *United States v. Amazon Industrial Corp.*, 55 F.2d 254, 261 (D. Md. 1931), and subsequently adopted by the Supreme Court in *Proctor & Gamble*, 356 U.S. at 681 n.6. (quoting *United States v. Rose*, 215 F.2d 617, 628–29 (3d Cir. (1954))”).

Proponents of grand jury secrecy often note that secrecy is vital to the protection of both the integrity of the process and the rights of the accused.<sup>109</sup>

Secrecy is said to protect the investigation itself. If the accused is aware of the investigation, there is concern that he or she will do things to interfere with the process, such as destroy evidence, tamper with or intimidate witnesses and grand jurors, collude with other accused persons, or leave the jurisdiction. Secrecy is also viewed as protecting individual jurors and the decision-making process itself from public criticism or personal retaliation. Protection of witnesses is of utmost concern to the courts. Secrecy in the grand jury context empowers witnesses to testify freely knowing that what they say will not be accessed by the accused or others. The same argument applies to the grand jury decision-making process. Secrecy enables jurors to deliberate free from concerns about backlash. Arguably, secrecy permits jurors to weigh the evidence with greater, more sincere reflection and deliberation.<sup>110</sup> Proponents of grand jury secrecy also argue that guarding witnesses, jurors, and process integrity requires that secrecy be maintained both during and after the grand jury process.<sup>111</sup>

## 2. *Critique of Traditional Justifications*

Although scholars question the usefulness of grand jury secrecy in the modern context,<sup>112</sup> the requirement of secrecy remains deeply embedded in the grand jury process. The petit jury provides an interesting point of comparison with the grand jury, particularly as traditional justifications for grand jury secrecy center on concerns about protection of witnesses and the decision-making process.

With the decision-making process in the petit jury, as in the grand jury, secrecy is a key component.<sup>113</sup> Jurors are permitted to weigh the evidence and come to a verdict in complete secrecy, uninhibited by fear of having their individual reflections judged by the

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109. This concept is often referred to as the sword and shield function of the grand jury. In theory, as a sword, the grand jury has the power to charge a citizen and hold his fundamental rights in jeopardy. As a shield, it protects the accused from governmental abuse of power by ensuring the approval of fellow citizens.

110. See Taslitz & Henderson, *supra* note 15, at 221. "Most states use preliminary hearings rather than grand juries in the run-of-the-mill case, yet preliminary hearings are not protected by special secrecy rules." *Id.* at 217.

111. Richman, *supra* note 108, at 345.

112. See Roger A. Fairfax, Jr., *Should the American Grand Jury Survive Ferguson?*, 58 How. L.J. 825, 827 (2015).

113. Taslitz & Henderson, *supra* note 15, at 220.

public.<sup>114</sup> However, unlike the grand jury, petit juries receive the evidence through an adversarial trial process that is tested by defense counsel and presided over by a judge in a public proceeding.<sup>115</sup> The grand jury operates with no judge, defense counsel, or public spectators.<sup>116</sup> Critically, the complete secrecy of the process serves to protect the decision-making process of not only the jurors but also the prosecutor in ways that do not occur at trial. The prosecutor does not need to reveal outside of the grand jury process what information he or she chose to include and exclude from the presentation to grand jurors or how deeply (or superficially) certain witnesses are examined.<sup>117</sup> Secrecy also allows the prosecutor to remain insulated from public criticism and backlash, shielded by the “verdict” of the grand jury.<sup>118</sup>

Indeed, the principle of secrecy seems to protect the prosecutor and the government just as much as, if not more than, jurors, witnesses, and the accused.<sup>119</sup> Any abuses, misconduct, or overreach of discretion on the prosecutor’s part in the grand jury cannot be revealed or addressed because of secrecy rules. The public has no ability to examine what happened in the grand jury and the grand jurors themselves are often barred from raising issues.<sup>120</sup> Criminal law experts criticize the grand jury for its lack of independence due to the dominance of the prosecutor.<sup>121</sup> Grand jurors are laypeople relying on the prosecutor’s direction. The prosecutor holds all of the legal knowledge. He or she tells jurors what the charge is, what the legal standards are, and how to weigh the evidence.<sup>122</sup> The prosecutor selects which witnesses and facts to present as well as the manner in which they are presented. The

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114. Additionally, witnesses in the petit jury testify publicly at a trial and are exposed to the same kinds of retaliation and retribution concerns that are of such importance at the grand jury stage. These concerns can be managed at both the accusatory stage and adjudicatory stage. *Id.* at 220–21.

115. *Id.* at 220.

116. *Id.*

117. *Id.* at 207–08.

118. See Roger A. Fairfax, Jr., *The Grand Jury’s Role in the Prosecution of Unjustified Police Killings—Challenges and Solutions*, 52 HARV. C.R.-C.L. L. REV. 397, 406 (2017).

119. Taslitz & Henderson, *supra* note 15, at 220.

120. Williams, *supra* note 89, at 310–11. A Ferguson grand juror’s recent lawsuit illustrates the need for more transparency in the grand jury system as a whole, starting with the admittance of testimony from former grand jurors. See Elias Isquith, “*Not the Way We Do Democracy!*” *Why Is a Ferguson Grand Juror Being Silenced?*, SALON (Jan. 15, 2015), <http://bit.ly/2xaCGqI>.

121. See Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1 (2004); Brenner, *supra* note 85, at 130.

122. See Brenner, *supra* note 85, at 72–73.

outsized influence of the prosecutor may lead the jury to the outcome the prosecutor desires.<sup>123</sup> In cases involving police officer suspects, some commentators suggest that the close working relationship between local prosecutors and police departments might lead the prosecutor to present the case in such a way that ensures the grand jury will not indict.<sup>124</sup> Additionally, in the event that grand jurors had concerns that the prosecutor was acting inappropriately, they would need assistance from the very same prosecutor responsible for the injustice in order to address it.<sup>125</sup> As such, prosecutors have significant control over the direction and outcome of the grand jury process, and secrecy serves to obscure the nuance of that control.

### C. *Applying Traditional Justifications and Critiques to Cases of Police Violence*

Many proponents of liberalizing the rules of grand jury secrecy in cases of police violence focus primarily on making testimony and evidence public once the grand jury completes its work and votes for a no true bill.<sup>126</sup> In discussing the release of grand jury testimony after the grand jury has convened, the Supreme Court has noted that the need to maintain secrecy becomes reduced after the proceedings, not eliminated.<sup>127</sup>

At the post-grand jury vote stage, it becomes apparent that many of the traditional justifications for secrecy, when applied to cases of police violence, prove inapposite. Indeed, none of the policy concerns underlying the rule of secrecy remain at issue when the

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123. See Fairfax, *supra* note 118, at 409.

124. See *id.*; Ari Melber, *The Tamir Rice Case Shows How Prosecutors Twist Grand Juries to Protect Police*, WASH. POST (Dec. 29, 2015), <https://wapo.st/2Ngvvar>.

125. Taslitz & Henderson, *supra* note 15, at 220. Grand juries operate under the control of the prosecutor largely without a role for a judge, defense attorney, or outside observers. Thus, if a grand juror had concerns about a prosecutor's conduct in presenting a case, it would be difficult to obtain recourse from someone other than the prosecutor.

126. Whether it is vital to maintain grand jury secrecy while the grand jurors conduct their evaluation should remain an issue subject to debate. The analysis in this Article only contemplates releasing information about the grand jury process after the grand jury convenes and issues a no true bill, not during the presentation of evidence.

127. *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 222 (1979). The Court noted that there are instances when the grand jury's shroud of secrecy can be lifted. *Id.* at 219–20. The Court acknowledged that once the grand jury disbands, the need to ensure a fair indictment process is no longer present. *Id.* However, it identified the need for grand jury secrecy as only “reduced,” not “eliminated.” *Id.* at 222.

grand jury has already voted a no true bill. Four of the justifications, which concern preventing the escape of offenders, preventing the destruction of evidence, preventing witness tampering, and preventing undue prejudice of the public jury pool, relate to the integrity of the ongoing grand jury investigation and potential trial proceedings. These justifications simply do not apply when the grand jury's work concludes without an indictment. The remaining justifications, which concern preserving the reputations of innocent persons under grand jury investigation and encouraging witnesses to disclose their full knowledge of possible wrongdoing, warrant additional discussion.

In regard to preserving the reputation of the subject of a grand jury investigation where the jury voted no true bill, the public often already knows the identities of police officer suspects. Reputational concern is not present in the same way that it might be for a private civilian witness in another type of case. Further, as a public servant accused of violence against an unarmed civilian, the individual's duty of service to the public arguably outweighs personal reputational considerations.

The argument that secrecy encourages witnesses to disclose their full knowledge of possible wrongdoing pertains more directly to an active grand jury inquiry than to one that has concluded. Proponents of secrecy suggest that in cases of police violence, an officer or civilian witness could testify freely about the actions of an accused officer without fear of retribution or retaliation. While this may be true during an active grand jury presentation, it is likely that witness names would be redacted to address any safety or privacy concerns after the investigation has concluded.<sup>128</sup> An additional argument is that the release of testimony after the grand jury presentation concludes chills the willingness of witnesses in other future grand juries from coming forward and testifying freely and fully.<sup>129</sup> However, this chilling concern is based on prospective harms that

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128. For additional discussion of how this chilling effect is regarded, see *infra* Part III.A.1.

129. Courts must consider not only the immediate effects upon a particular grand jury but also future grand juries. Persons called upon to testify will consider the likelihood that their testimony may one day be disclosed to outside parties. See *Douglas Oil*, 441 U.S. at 225–26. Indeed, the impact on the function of other grand juries is just one of the many policy interests at play. There is quite a bit of variation in how courts regard the impact of this chilling effect. The New Jersey Supreme Court, for example, gives this factor little weight because state witnesses will assume that indictments will follow and should be aware that the defendant will receive a complete grand jury transcript and witness testimony as part of pre-trial discovery.

should not outweigh the need for access to information that is current and responsive to issues of immediate social concern.

Beyond the inapplicability of traditional justifications to cases of police violence, the critiques of grand jury secrecy in the preceding section apply with even greater weight to these types of cases. In highly charged and highly visible cases of police violence, secrecy tends to protect the prosecutor. Secrecy allows information about how the prosecutor examines witnesses and presents evidence to remain shielded from public view. Prosecutors are allowed to take cover behind the grand jury, a group of local community members, when the ultimate decision is made. As the prosecutor in the Tamir Rice case maintained, “If you don’t trust the grand jury, you don’t trust your neighbors.”<sup>130</sup>

Prosecutors can take cover behind the grand jury, and grand jurors have no ability to speak out and provide any information. For example, in Michael Brown’s case in Ferguson, statutory rules barred a grand juror who wished to speak out publicly about the case despite the unusual public release of information.<sup>131</sup> The dichotomy between the prosecution’s ability to hide behind the grand jury process and the jurors’ inability to disclose what occurred ensures that any misconduct, abuse, or overreach in the grand jury process remains concealed. If secrecy at its core is about ensuring the integrity of the process, cases of police violence reveal how far away the modern grand jury has moved from that value. While grand jury secrecy was established to protect the independent decision-making of the grand jurors in their protective role between the state and the accused, it now primarily serves to reinforce the dominance of the prosecutor. Secrecy maintains the systemic status quo and prevents opportunities for transparency and accountability.<sup>132</sup>

### III. RECONCILING POLICE VIOLENCE VISIBILITY AND GRAND JURY SECRECY

Activism and the use of technology increased police violence visibility, intensifying public demands for greater transparency and accountability from prosecutors. Some jurisdictions responded by increasing the frequency with which they charge police officers with criminal offenses. In 2015, for example, a year marked by substantial activism and visibility around police violence, “eighteen police officers were charged in fatal on-duty shootings, more than three

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130. Flynn, *supra* note 1.

131. See Isquith, *supra* note 120.

132. Fairfax, *supra* note 118, at 406.

times the average yearly number over the preceding decade.”<sup>133</sup> Despite the fact that judges and juries rarely convict police officers, the shift in charging patterns certainly seems to suggest that the attention and pressure generated by heightened police violence visibility yielded a response.<sup>134</sup>

Prosecutors and policymakers have used or proposed various methods to ease grand jury disclosure restrictions.<sup>135</sup> This section briefly classifies and discusses the three most prominent approaches used to balance the justifications of grand jury secrecy with the public’s need for transparency and accountability. This Article terms the approaches as the Court Order Model, the Prosecutor/Grand Jury Report Model, and the Sunshine Model. The models are introduced by case examples that involved heightened visibility of police violence: Eric Garner, Tamir Rice, and Michael Brown. These cases demonstrate how prosecutors provided some level of information about the charging process, ranging from basic information<sup>136</sup> to an investigative report<sup>137</sup> to a comprehensive release of grand

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133. Margalynne J. Armstrong, *Are We Nearing the End of Impunity for Taking Black Lives?*, 56 SANTA CLARA L. REV. 721, 759 (2016).

134. Charging certainly does not translate into conviction. Of the 54 officers who were charged for fatally shooting someone while on duty over the past decade, 35 have had their cases resolved. Of those, a majority—21 officers—were acquitted or saw their charges dropped. See Kindy & Kelly, *supra* note 11; see also James C. McKinley Jr. & Al Baker, *Grand Jury System, With Exceptions, Favors the Police in Fatalities*, N.Y. TIMES (Dec. 7, 2014), <https://nyti.ms/2xbP9uk>.

135. Without question there are larger issues that need to be resolved with grand juries beyond the issue of secrecy, such as whether grand juries are the appropriate mechanism for making charging decision in these types of cases. In some states the grand jury is required for felony charges. California momentarily abolished the use of grand juries in cases of police violence through statute. However, a court ruling overturned that statute. See *People ex rel. Pierson v. Superior Court of El Dorado Cty.*, 212 Cal. Rptr. 3d 636 (Ct. App. 2017), *appeal denied*, No. S240238, 2017 Cal. LEXIS 2791 (Cal. Apr. 12, 2017). Other states allow the prosecutor to make the charging determination. Preliminary hearings are another available mechanism. Wisconsin passed a law in spring 2014 requiring outside state investigators and a newly created board to file a report on officer-involved deaths along with recommendations to the district attorney, which must be made public if charges are not filed. The question of who should be responsible for handling these cases is also worth consideration, given the actual or perceived conflict of interest of local prosecutors. See Kate Levine, *Who Shouldn’t Prosecute the Police*, 101 IOWA L. REV. 1447 (2016) for further discussion on the issue. While organizers and legal advocates pursue more sweeping measures of increased law enforcement accountability, many view improved grand jury transparency as one way to inform that process.

136. *In re Dist. Attorney of Richmond Cty.*, 8 N.Y.S.3d 856, 858 (Sup. Ct. 2014).

137. See OFFICE OF THE PROSECUTING ATTORNEY, CUYAHOGA COUNTY PROSECUTOR’S REPORT ON THE NOVEMBER 22, 2014 SHOOTING DEATH OF TAMIR RICE, <http://bit.ly/2NI8n4l> (last visited Sept. 28, 2018).

jury transcripts, photos, and witness statements, respectively.<sup>138</sup> After a discussion of the case example, each section explores other proposals or reform efforts related to that model, if they exist. The discussion of each model concludes by highlighting the strengths and weaknesses of the model.

### A. *The Court Order Model*

While each state provides its own legislative framework for grand juries, many states that utilize the grand jury process have fashioned statutes that fall in line with the federal approach. Under both the federal approach and the approach taken by many states, easing the rules of grand jury secrecy requires a judicial order.<sup>139</sup>

In *Douglas Oil Co. v. Petrol Stops Northwest*,<sup>140</sup> the U.S. Supreme Court identified several reasons for secrecy that centered on maintaining the integrity of the process, yet the Court also noted that there are instances when the grand jury's shroud of secrecy can be lifted, specifically upon a showing of "particularized need."<sup>141</sup> The Court acknowledged that once the grand jury disbands, concerns about ensuring a fair indictment process are no longer present. However, it identified the need for grand jury secrecy as only "reduced," not "eliminated."<sup>142</sup> Courts at the federal level have

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138. See *Documents Released in the Ferguson Case*, N.Y. TIMES (Dec. 15, 2014), <https://nyti.ms/2p9g1Xt>; Jennifer S. Mann, *Legal Experts React to Grand Jury Process in Michael Brown Shooting*, ST. LOUIS POST-DISPATCH (Nov. 26, 2014), <http://bit.ly/2xfavok>.

139. In the federal system, Federal Rule of Criminal Procedure 6(e) provides the framework for grand jury secrecy. See FED. R. CRIM. P. 6. It also provides possible sanctions and punishment for anyone who knowingly violates the rule. No one involved in the grand jury process, other than a witness, may disclose anything occurring before the grand jury, with only limited exception. *Butterworth v. Smith*, 494 U.S. 624, 629–36 (1990) (holding that Florida statute violates the First Amendment insofar as it prohibits a grand jury witness from disclosing his testimony after the grand jury's term has ended).

140. *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211 (1979).

141. *Id.* at 218.

142. *Id.* By this rule, district courts, as part of their supervisory authority over the grand jury, are explicitly given the discretion to determine whether disclosure of records is appropriate. See *id.* at 225–26. In *Pittsburgh Plate Glass Co. v. United States*, the Supreme Court held that the following factors must be considered in deciding whether to disclose: (1) the material sought must be necessary to prevent injustice in another proceeding; (2) the need for disclosure must be greater than the need for secrecy; and (3) the request for material must be narrowly tailored so as to disclose only necessary information. 360 U.S. 395, 399 (1959); see also Elizabeth G. Serio, *Dangerous Precedent: The Consequences of Allowing Prosecutorial Disregard of Grand Jury Secrecy*, 21 GEO. J. LEGAL ETHICS 1011, 1015–16 (2008).

found some limited exceptions to the secrecy rule using a “flexible test” for “special circumstances.”<sup>143</sup>

This section begins with a case example demonstrating the limitations of the particularized need standard and then discusses statutory proposals made to provide greater judicial flexibility in the release of grand jury information to the public.

### 1. *Eric Garner Case*

As referenced in Part I, on July 17, 2014, Eric Garner died in Staten Island, New York City, after an NYPD officer held him in a controversial chokehold maneuver during an arrest for the sale of loose, untaxed cigarettes.<sup>144</sup> The interaction was captured on cellphone video and disseminated widely across various traditional and social media sites.<sup>145</sup> People around the nation and the globe had the opportunity to view the events and develop their own questions and conclusions about the propriety of the police officer’s actions. Social activism and civil unrest accompanied widespread demands for justice. After the local prosecutor presented the case to a grand jury, grand jurors voted not to indict the officer responsible.

In New York, a court ruling is the only means by which grand jury minutes and evidence can be released to the public.<sup>146</sup> At various points in Eric Garner’s case, the prosecutor, civil liberties advocates, and other interest groups requested that the court release information about the proceeding to the public after the grand jury issued a no true bill. Despite these attempts to obtain information from the grand jury, the court refused to ease the secrecy requirement in any meaningful way,<sup>147</sup> leaving the public with scant infor-

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143. *In re* Petition of Craig, 131 F.3d 99, 104 (2d Cir. 1997) (finding that the district court had authority to go beyond the six exceptions listed in the rule mandating secrecy of grand jury proceedings to determine whether special circumstances existed that warranted release of official transcript). The Second Circuit has done so using a flexible test for special circumstances to release information with “historical interest.” *See id.*

144. Goldstein & Schweber, *supra* note 55 (illustrating how the police officer grabbed Garner around the neck with his arms, forcing Garner to the ground, and holding him in what authorities later identified as a chokehold while Garner can be heard saying, “I can’t breathe.”).

145. *See, e.g.*, Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner’s Death*, N.Y. TIMES (June 13, 2015), <https://nyti.ms/2MzRrs6>.

146. *See* N.Y. CRIM. PROC. LAW § 190.25 (Consol. 2018).

147. The only information provided to the public in this case came from a court request for limited disclosure from the Staten Island district attorney. *See In re* Dist. Attorney of Richmond Cty., 8 N.Y.S.3d 856, 858–59 (Sup. Ct. 2014). Recognizing the importance of maintaining public trust, the court provided a “limited incursion into the sacrosanct principle of grand jury secrecy . . . to serve overarch-

mation about the grand jury process related to the killing of Mr. Garner.

In *James v. Donovan*,<sup>148</sup> where the Public Advocate of New York City and other groups<sup>149</sup> requested the release of grand jury minutes connected to Eric Garner's death, the court set out the applicable legal standard:

Only if the compelling and particularized need threshold is met must the court then balance various factors to determine whether the public interest in the secrecy of the grand jury is outweighed by the public interest in disclosure. The decision as to whether to permit disclosure is committed to the trial court's discretion.<sup>150</sup>

The court noted that many of the concerns related to the traditional justifications for grand jury secrecy were not implicated in the case in that "the grand jury declined to return an indictment, and that the identities of the target, as well as of certain witnesses who testified before the grand jury, are already publicly known."<sup>151</sup> However, the court considered "ensuring the physical safety of witnesses, and protection from public scrutiny" as justifications for continued secrecy.<sup>152</sup> The court also cited concerns about a chilling effect for future grand jury witnesses in its findings.<sup>153</sup>

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ing public interest." *Id.* at 858. The court exercised its discretion under N.Y. CRIM. PROC. LAW § 190.25(4) to grant the district attorney's application "for leave to disclose certain limited details of the grand jury presentation in this matter." *Id.* The court granted disclosure of the time period for which the grand jury sat (nine weeks); the total number and types of witnesses (50 witnesses—22 of the witnesses were civilians, the remaining witnesses were police officers, emergency medical personnel, and doctors); and the number and types of exhibits admitted into evidence (60 exhibits—four videos, records regarding NYPD policies and procedures, medical records pertaining to the treatment of the deceased, photographs of the scene, autopsy photographs, and records pertaining to NYPD training). *Id.* The court also released disclosure of the instructions provided to the grand jury, which induced N.Y. PENAL LAW § 35.30 regarding a police officer's use of physical force in making an arrest, and that the grand jury voted to file its finding of dismissal with the court in conformity with N.Y. CRIM. PROC. LAW §§ 190.60, 190.75. *Id.*

148. *James v. Donovan*, 14 N.Y.S.3d 435 (App. Div. 2015).

149. Christopher Mathias, *The Fight over Eric Garner Grand Jury Records Continues*, HUFFINGTON POST (June 16, 2015), <http://bit.ly/2NgvEdZ>.

150. *James*, 14 N.Y.S.3d at 441 (citing *New York v. Robinson*, 781 N.E.2d 908, 908 (N.Y. 2002)).

151. *Id.* at 444.

152. *Id.*

153. The court expressed its concern stating, "Fear of future retribution or social stigma may act as powerful deterrents to those who would come forward and aid the grand jury in the performance of its duties." *Id.* (citing *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 222 (1979)).

In *In re Application of the District Attorney of Richmond County*,<sup>154</sup> an earlier case where the court considered the prosecuting attorney's request for a limited release of grand jury information, the court noted that New York, by statute, requires the judicial branch "to zealously guard the secrecy of grand jury proceedings, the confidentiality of which is properly assumed by witnesses appearing before that body."<sup>155</sup> The court then balanced the heavy presumption of secrecy with the interests of public disclosure. In so doing, the court noted the overwhelming public interest in the proceedings, stating:

Somewhat uniquely in this matter, the maintenance of trust in our criminal justice system lies at the heart of these proceedings, with implications affecting the continuing vitality of our core beliefs in fairness, and impartiality, at a crucial moment in the nation's history, where public confidence in the even-handed application of these core values among a diverse citizenry is being questioned.<sup>156</sup>

Despite what might be considered significant factors weighing in favor of disclosure, the court ruled in the interests of secrecy. The court permitted only the release of limited information, such as the length of time the grand jury sat and the number of witnesses and exhibits presented to them.<sup>157</sup>

## 2. *Proposals to Liberalize the Court's Authority*

### a. New York

In his 2015 State of the Judiciary speech, former New York Court of Appeals Chief Judge Jonathan Lippman recognized the need for liberalizing access to grand jury minutes in cases where no true bill is issued. He observed:

The public is left to speculate about the process, the evidence, the legal instructions, and the conclusions drawn by the grand jury. In cases of significant public interest, secrecy does not further the principles it is designed to protect but, in fact, significantly impedes fair comment and understanding of the court process.<sup>158</sup>

In response to this reality, Lippman proposed the development of legislation that would create a clear statutory presumption in

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154. *In re* Dist. Attorney of Richmond Cty., 8 N.Y.S.3d 856 (Sup. Ct. 2014).

155. *Id.* at 858.

156. *Id.*

157. *Id.* at 858–59.

158. JONATHAN LIPPMAN, ACCESS TO JUSTICE: MAKING THE IDEAL A REALITY 3 (2015), <https://www.nycourts.gov/whatsnew/pdf/2015-SOJ.pdf>.

favor of the court disclosing records of grand jury proceedings that result in no charges.<sup>159</sup> Lippman envisioned a presumption based on two important factors: (1) both the grand jury's investigation and the identity of the accused were already public knowledge and (2) the release of materials would promote a significant public interest.<sup>160</sup> Once a court makes the necessary findings, it would be authorized to disclose the record of the proceedings, the charges submitted, legal instructions provided by the prosecutor, and the testimony of all public servants and experts.<sup>161</sup> Under Lippman's proposal, the prosecutor would have the opportunity to redact testimony that might reveal a civilian witness's identity and to request a protective order upon a showing that releasing the information would impact an ongoing investigation or witness safety.<sup>162</sup>

b. Ohio

In a more comprehensive approach to addressing grand jury reforms, Chief Justice Maureen O'Connor of the Supreme Court of Ohio established the Task Force to Examine Improvements to the Ohio Grand Jury System in January 2016.<sup>163</sup> The purpose of the Task Force was to improve the functioning of the grand jury and the public's confidence in the justice system.<sup>164</sup> In July 2016, the task force issued a report with ten recommendations geared toward enhancing the grand jury system.<sup>165</sup>

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159. *Id.*

160. *Id.* at 3–4.

161. *Id.*

162. *Id.*

163. MAUREEN O'CONNOR ET AL., REPORT AND RECOMMENDATIONS OF THE TASK FORCE TO EXAMINE IMPROVEMENTS TO THE OHIO GRAND JURY SYSTEM (2016), <http://www.supremecourt.ohio.gov/publications/grandjurytf/report.pdf>.

164. *Id.*

165. *Id.* at 3–4. The ten recommendations are as follows: (1) grant the Ohio Attorney General's Office exclusive authority to investigate and prosecute police lethal use of force cases through its Special Prosecutions Section and the Bureau of Criminal Investigation; (2) amend the Ohio Jury Instructions regarding the role of the grand jury so as to emphasize the grand jury's independence; (3) improve grand jury orientation and education by providing a written copy of the judge's instructions for the grand jury to keep and encouraging jurors to re-read the instructions before hearing cases; (4) restructure Ohio Rule of Criminal Procedure 6 to increase clarity and reader comprehension; (5) amend Rule 6 to address the record of grand jury proceedings, including who has responsibility for creating and maintaining the record, as well as what is to be included in the record; (6) amend Rule 6 to establish a standardized procedure to allow for the limited release of the record of the grand jury proceedings; (7) create an informational grand jury video; (8) create an informational grand jury brochure; (9) have the Supreme Court work with other justice partners to create new outreach and educational opportunities; and (10) amend Chapter 2939 of the Ohio Revised Code to harmonize it with the grand jury composition and organizational requirements in Rule 6. *Id.* at 4.

Grand jury secrecy was an area of significant review and analysis for the task force.<sup>166</sup> In trying to balance the traditional justifications for secrecy with the public's need for greater transparency, the task force proposed allowing limited release of grand jury proceedings to the public through judicial order. The proposal includes a presumption that grand jury proceedings, unlike other court records regulated by the Public Access Rules of the Ohio courts, would be exempt from public access.<sup>167</sup> Any member of the press or public seeking grand jury records from a proceeding resulting in a no true bill would file a petition with the court. The petition would "state with particularity the reason for which it is made and how the presumption of secrecy is outweighed by the public interest in disclosure and transparency."<sup>168</sup> The court could then hold a hearing in camera for the requestor and prosecuting attorney to present their arguments for or against disclosure.<sup>169</sup> Records of the proceedings could be ordered released if the court determined by clear and convincing evidence that (1) public interest in transparency outweighs the presumption of secrecy, (2) the general public in the county of investigation is aware that an investigation has been conducted regarding the subject matter at issue, and (3) the general public is largely aware of the identity of the person investigated.<sup>170</sup> The report notes that the disclosure mechanism would be available to the public in not only police use of force cases but in any matter where issues of public interest are implicated.<sup>171</sup>

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166. Secrecy of proceedings and disclosure in Ohio is governed by Ohio Rule of Criminal Procedure 6. *Id.* at 12.

167. *Id.* at 14.

168. *Id.* at 15. This is in contrast to Public Access Rules which do not require the request to be in writing or that the person state a reason for the request.

169. *Id.*

170. *Id.* at 15–16.

171. Professor Ric Simmons, one of the members of the Ohio Task Force, said in reference to liberalizing grand jury secrecy rules:

Furthermore, reform measures could liberalize grand jury secrecy rules only in certain types of cases in which the cost of the secrecy is high and the benefits of liberalizing are considerable . . . . [T]he procedure for releasing grand jury transcripts could be carefully designed to avoid opening up a floodgate of demands for every case that is brought in front of the grand jury. For example, the rules could be amended to create a presumption of secrecy but allow a member of the public to overcome that presumption if he or she could demonstrate that release of the transcript were in the public interest.

Ric Simmons, *The Role of the Prosecutor and the Grand Jury in Police Use of Deadly Force Cases: Restoring the Grand Jury to Its Original Purpose*, 65 CLEV. ST. L. REV. 519, 532 (2017).

### c. Evaluating Liberalized Statutory Court Order Proposals

Lawmakers have yet to act on the proposals put forth in New York and Ohio. However, should either of the measures gain traction, they would help address the fact that the traditional justifications for grand jury secrecy do not apply in cases of police violence. As is demonstrated by the Eric Garner case, without changes to the governing rule or statute, courts are largely impeded from breaching secrecy even when the public interest clearly demands it. Lippman's proposed model for New York, which includes a statutory presumption of release, certainly creates a greater likelihood that requestors can access grand jury materials. Ohio's model contains specific showings that must be made by clear and convincing evidence, which leaves release more squarely in the court's discretion. The Ohio "clear and convincing" standard likely creates the potential for more information access denials than the New York model. The benefit of the Ohio model, however, is its comprehensive approach that makes the disclosure process available for any case involving the public interest.

Liberalizing the amount of information courts can release to the public provides a step in the right direction. The proposals in Ohio and New York both do well in addressing outdated statutory and rule-based limitations. However, proposals that utilize the Court Order Model still fall short of meaningful visibility for two primary reasons. First, these proposals permit a significant degree of prosecutorial intervention. Second, any model that relies heavily on court intervention and augments the court's role as gatekeeper to the information is less than ideal. Such models largely operate to bolster the credibility of the existing grand jury system. Furthermore, access to information is still completely controlled by the government, which does little to tilt the balance of power between citizen and state.

### *B. The Prosecutor/Grand Jury Report Model*

The Prosecutor/Grand Jury Report Model suggests that rather than providing the public with the direct evidence and testimony presented to the grand jury, a published report would reflect some of the evidence presented and summarize the findings and rationale.

This section begins with a discussion of the Tamir Rice case, in which the Report Model was used. It also details other approaches to reports on grand jury activity. As the sections below reveal, the Report Model can take a number of different forms. The key con-

siderations are whether the report is required in cases of non-indictment, who the author of the report is, and what kind of substantive information is included.

### 1. *Tamir Rice Case*

On November 22, 2014, 12-year-old Tamir Rice and his older sister were at a recreation center near their home in Cleveland, Ohio.<sup>172</sup> While at the center, an observer noticed Mr. Rice playing with what was later discovered to be a toy gun and called 911.<sup>173</sup> The 911 caller told the dispatcher that the person observed was “probably a juvenile” and that the item was probably a “fake” gun.<sup>174</sup> However, the parts of the description that indicated Mr. Rice was a juvenile and had a fake gun were left out of the information communicated to the police.<sup>175</sup> The call was categorized as of the highest priority.<sup>176</sup> The responding officers arriving on the scene encountered Mr. Rice sitting at a concrete picnic table doing nothing. The officer got out of his car and within 1.7 seconds fired at Mr. Rice, fatally injuring him from less than seven feet away.

A series of protests and uprisings both nationally and locally centered the killing of Mr. Rice within the larger national Black Lives Matter movement. In the midst of pressure from Tamir Rice’s family and advocates, Cleveland police released videotape footage to the public four days after the killing.<sup>177</sup> Over the course of nearly a year, several agencies and individuals connected to state and local government completed investigative and expert reports supporting the officer’s use of force in the case. These reports were released piecemeal to the public before a grand jury determination was made.<sup>178</sup>

The case was finally presented to a grand jury during a two-month time period from October to December 2015. On December 28, 2015, prosecuting attorney Timothy McGinty announced that the grand jury had decided not to indict. At that time, McGinty also released a report serving not as an overview of what transpired in the grand jury, but rather as a synopsis of the case with the intent “to provide the public with (1) an explanation of the

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172. Flynn, *supra* note 1.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. Danylko, *supra* note 66.

178. Michael McLaughlin, *Tamir Rice Investigation Turning into Another Ferguson, Family’s Lawyer Says*, HUFFINGTON POST (Dec. 19, 2016), <http://bit.ly/2xkg5as>.

legal standards used to review police use of deadly force (UDF) incidents, and (2) an overview of the facts and the process utilized in determining whether criminal liability is present.”<sup>179</sup> The report noted that it was based on information that was “gleaned from the exhaustive investigation” conducted by several state and local authorities to determine whether probable cause for criminal charges existed.<sup>180</sup> In short, the report provides details previously released to the public in investigative reports and legal analyses from various sources. As such, it does not directly discuss what evidence the grand jury considered.<sup>181</sup>

## 2. *Proposals Involving Grand Jury Report*

### a. New Jersey

In July 2015, John J. Huffman, Acting Attorney General of the State of New Jersey, issued a supplemental directive amending a previous Attorney General Directive on state-wide procedures and best practices for conducting use of force investigations.<sup>182</sup> The directive alludes to the fact that recent, highly visible instances of deadly police force across the nation necessitated a reexamination and enhancement of use of force investigations in the state.<sup>183</sup> Among other wide-ranging procedures, the directive calls for a

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179. OFFICE OF THE PROSECUTING ATTORNEY, *supra* note 137, at 1.

180. *Id.*

181. *Id.* Ohio does not allow for disclosure of grand jury transcripts and evidence without a court order. This case is unusual in the sense that McGinty’s post-grand jury report largely shared information from investigative and expert reports that had already been provided to the public before the grand jury’s consideration of the case even began. Following the grand jury’s decision, the local Cleveland NAACP filed suit requesting release of the Rice case grand jury transcripts. However, a three-judge panel at the Eighth District Court of Appeals ruled unanimously that the NAACP did not show that it was entitled to copies of the transcript despite the fact that McGinty had released numerous reports that the grand jury would consider before they considered them. The court noted that “[t]he fact that the office of the former prosecuting attorney disseminated selected portions of the evidence presented to the grand jury under the guise of ‘transparency’ was inappropriate.” *In re Investigation into the Nov. 22, 2014 Shooting Death of Tamir Rice*, 2018 OH Ct. App. 1087U, ¶ 19. It also acknowledged that few cases have incited more community outrage. *See id.* Nonetheless, the court held that “[i]t is critical to its functioning that the secretive nature of the work of a grand jury remains sacrosanct and inviolable.” *Id.* at ¶ 18.

182. *See* Supplemental Law Enforcement Directive from John J. Hoffman, Acting Attorney Gen., N.J. Office of the Attorney Gen. (July 28, 2015) [hereinafter Supplemental Directive], <http://bit.ly/2QA5XU2>. The New Jersey State Constitution and statutes provide the state’s Attorney General with broad authority to “establish and enforce uniform statewide standards that police and prosecutors must follow.” *Id.* at 1. The Attorney General establishes rules on how deadly force is used by police officers and how use of force incidents are investigated. *Id.*

183. *Id.*

comprehensive conflicts inquiry within the prosecuting attorney's office, a presumption of grand jury review in cases of police force that result in death or serious bodily injury of a civilian, and a mechanism for administrative review of the grand jury or local prosecutor's decision-making in issuing a no true bill or failing to present the case to the grand jury.<sup>184</sup>

The directive provides:

[T]o enhance transparency in conducting use-of-force investigations, in any instance where the matter is not presented to a grand jury for its review, or where the matter is presented to a grand jury and the grand jury returns a 'no bill' . . . [the prosecuting attorney] shall prepare a statement for public dissemination.<sup>185</sup>

The directive requires that the statement include specific findings regarding the factual circumstances of the incident and the lawfulness of the police use of force under the New Jersey Code of Criminal Justice.<sup>186</sup> Finally, the directive also instructs the prosecuting attorney to provide a statement explaining that he or she conducted a comprehensive conflicts inquiry and complied with all applicable sections of the supplemental directive.<sup>187</sup>

In describing the requirements of the prosecutor's public statement, the directive captures the tension between the traditional justifications for grand jury secrecy and the modern public's need for greater understanding and transparency in the grand jury decision-making process. The directive advises that the statement should comply with grand jury rules and "the need to protect the rights of witnesses and to prevent discouraging witnesses from providing information or cooperating with investigations in future cases."<sup>188</sup> Finally, it states that "notwithstanding the foregoing, the statement's findings shall include sufficient detail about the circumstances of

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184. *Id.* at 3. The directive also provides a mechanism for administrative review. "In any instance where the matter is not presented to a grand jury for its review, or where the matter is presented to a grand jury and the grand jury returns a 'no bill' (i.e., declines to issue an indictment), the County Prosecutor . . . shall, as appropriate, refer the use-of-force incident to the appropriate agency for administrative review in accordance with the Attorney General's Internal Affairs Policy and Procedures manual." *Id.* at 10.

185. *Id.* at 9.

186. *Id.*

187. *Id.*

188. *Id.*

the use of force to explain why the matter is not being prosecuted as a criminal offense.”<sup>189</sup>

#### b. Colorado

In May 2015, Colorado implemented legislation that impacts the disclosure of information following the investigation of a peace-officer involved shooting. The law provides that in instances where the district attorney is considering charges involving a police officer shooting a civilian and decides not to move forward with prosecution, he or she shall “release a report and publicly disclose the report explaining the district attorney’s findings, including the basis for the decision not to charge the officer with any criminal conduct.”<sup>190</sup> In instances where the district attorney refers the case to a grand jury, he or she must release a statement at time of referral “disclosing the purpose of the grand jury’s investigation.”<sup>191</sup>

The statute provides that if the grand jury returns a no true bill, the “grand jury may prepare or ask to be prepared a report of its findings if the grand jury determines that preparation and release of a report would be in the public interest.”<sup>192</sup> A report would be in the public interest if the allegations involve the misuse or misapplication of public funds, the abuse of authority of a public servant or peace officer, misfeasance or malfeasance with regard to a governmental function, or the commission of a class one, two, or three felony.<sup>193</sup>

#### c. Evaluating the Prosecutor/Grand Jury Report Model

The Prosecutor/Grand Jury Report Model appears to have a number of significant limitations, particularly when the report is authored by the prosecutor. For reasons discussed in greater detail in

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189. Supplemental Directive, *supra* note 182, at 9. Interestingly, the directive also notes the importance of community engagement before use of force investigations occur, stating: “To enhance public confidence in the integrity and impartiality of use-of-force investigations, it is vitally important for law enforcement executives to reach out to and engage community and faith-based leaders before use-of-force incidents occur.” *Id.* at 10.

190. COLO. REV. STAT. § 20-1-114(1) (2016).

191. *Id.* § 20-1-114(2). Section 16-5-205.5(1) provides:

The determination to prepare and release a report pursuant to this section must be made by an affirmative vote of at least the number of jurors that would have been required to return an indictment. The report shall be accompanied by certification that the grand jury has determined that release of the report is in the public interest, as described in subsection (5) of this section.

*Id.* § 16-5-205.5(1).

192. *Id.*

193. *Id.* § 16-5-205.5(5).

the next section, having the person responsible for the charging process present information about the investigation presents many opportunities for bias and mischaracterization, whether intended or not. The New Jersey proposal, which requires a public statement from the prosecutor, seems to fall very closely in line with the kind of report issued by McGinty in Ohio when the grand jury voted no true bill. Prosecutor reports tend to provide very little information that sheds new light or insights on the process from a disinterested perspective. Even further, as demonstrated in the prosecutor's report issued in the Tamir Rice case, allowing the prosecutor to prepare the report given to the public heightens the prosecutor's gate-keeping role. The prosecutor may be selective or even silent about what evidence the grand jury actually considered, yet still make claims of operating in full transparency. A prosecutor's report also does nothing to convey how grand jurors responded to the testimony of individual witnesses. Disclosure of the questions posed to the witness by the prosecutors or by grand jurors can reveal whether the grand jurors challenged or accepted the testimony provided by the witness.<sup>194</sup>

The report model established by the Colorado statute is an interesting variation from the New Jersey model, as it allows for a report from grand jury members. Although the Colorado grand jury report model still does not provide the raw evidence, testimony, and prosecutorial tone presented to the grand jury, it would give the public an opportunity to gain direct insight from members of the grand jury about their findings. However, given the concerns related to the lack of grand jury independence and the dominance of the prosecutor in general, the grand jury's report may also provide limited opportunity to access additional information. As such, because of the overwhelming influence of the prosecutor in both models, neither the prosecutor report nor the grand jury report reflect a shift in visibility or civilian-state power dynamics.

### C. *The Sunshine Model*

Each state, the District of Columbia, and the federal government have sunshine laws which require agencies to share informa-

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194. See, e.g., Richard A. Oppel Jr. & Mitch Smith, *Tamir Rice's Family Clashes with Prosecutor over Police Killing*, N.Y. TIMES (Dec. 23, 2015), <https://nyti.ms/2pccHdW> (reporting that McGinty has been faulted for allowing the accused officers to "to read personal statements to the grand jury without being cross-examined" while "mock[ing] and antagoniz[ing] the family's experts so that they could not finish explaining their findings to the jurors.").

tion they obtain with the general public.<sup>195</sup> Sunshine laws relate to transparency, openness, and accountability in government dealings.<sup>196</sup> However, there are many exceptions to the kinds of records that are available under a sunshine law request. Criminal records and grand jury proceedings almost always fall under the category of record not available to the public. This section discusses one very noteworthy case example of a prosecutor engaging with state sunshine law provisions to make grand jury evidence available to the public without a court order. The section concludes with an evaluation of the sunshine approach and a discussion of its very limited applicability.

### 1. *Michael Brown Case*

On August 9, 2014, Michael Brown and a friend were walking down a residential street near Mr. Brown's home in Ferguson, Missouri.<sup>197</sup> The two young men were approached by a squad car and the officer inside told Mr. Brown and his companion to move out of the street.<sup>198</sup> After driving past the young men, the squad car reversed and the officer again began to interact with Mr. Brown.<sup>199</sup> Conflicting accounts exist as to the events that transpired after this, but evidence shows that a brief altercation occurred before Mr. Brown was shot one time from the SUV.<sup>200</sup> The officer fired 12 shots, resulting in seven or eight gunshots to Mr. Brown's body.<sup>201</sup> Records show that an unarmed Mr. Brown was shot dead within three minutes of being stopped by the police.<sup>202</sup> Uprisings in Ferguson lasted for more than a week, and officers armed with military grade equipment responded to the area.<sup>203</sup> The state brought in various law enforcement agencies, such as the state highway patrol and the National Guard, in an attempt to control the uprisings.<sup>204</sup>

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195. THE REPORTERS COMM. FOR FREEDOM OF THE PRESS, THE FIRST AMENDMENT HANDBOOK 73 (Gregg P. Leslie ed., 7th ed. 2011), <http://bit.ly/2OqwS39>.

196. Robert L. Hess II, *Closed Records: Confidential, but Not Privileged from Discovery*, 65 J. MO. B. 17, 18 (2009).

197. Adamson, *supra* note 72, at 195.

198. Terrence McCoy, *Darren Wilson Explains Why He Killed Michael Brown*, WASH. POST (Nov. 25, 2014), <https://wapo.st/2InqbMM>.

199. U.S. DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 13 (Mar. 4, 2015) [hereinafter DOJ REPORT], <http://bit.ly/2pa3t1W>.

200. Adamson, *supra* note 72, at 195.

201. DOJ REPORT, *supra* note 199, at 16.

202. Adamson, *supra* note 72, at 196.

203. *Id.* at 198.

204. *Id.* at 196–97.

A grand jury convened to hear evidence in the case on August 20, 2014.<sup>205</sup> Over the course of three months, the grand jury met for 25 days and heard from 60 witnesses.<sup>206</sup> From the beginning of the presentation, the case was marked by a number of irregularities.<sup>207</sup> To start, typical grand juries are not presented with all of the evidence available in the case.<sup>208</sup> The grand jury is usually given the bare minimum necessary to establish probable cause and to secure an indictment. The prosecutor also does not usually instruct the jury on affirmative defenses to the crime that he or she is trying to establish.<sup>209</sup> The prosecuting attorney, Robert McCulloch, announced that the grand jury would hear all evidence, the proceedings would be transcribed, and the materials would be made public if the grand jury did not indict.<sup>210</sup> On the night of November 24, 2014, McCulloch announced that the grand jury would not indict Wilson.<sup>211</sup>

As promised at the outset, McCulloch sought to release information presented to the grand jury. He originally made a motion to the court to grant permission to disclose the proceedings but later relied on the state's sunshine law as a basis for disclosure.<sup>212</sup> Missouri's sunshine law provides the prosecuting attorney with the authority to transcribe evidence presented before a grand jury.<sup>213</sup> The law makes transcribed grand jury testimony a part of the prosecu-

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205. Emily Wax-Thibodeaux, *Ferguson Timeline: What's Happened Since the Aug. 9 Shooting of Michael Brown*, WASH. POST (Nov. 21, 2014), <https://wapo.st/2NRsjBW>.

206. Julie Bosman et al., *Amid Conflicting Accounts, Trusting Darren Wilson*, N.Y. TIMES (Nov. 25, 2014), <https://nyti.ms/2MA0UPT>.

207. *See Full Airing of Evidence in Brown Shooting Was Overwhelming Task*, ST. LOUIS POST-DISPATCH (Nov. 30, 2014), <http://bit.ly/2Qwn0Gh> (detailing the facts related to Mr. Brown's case and analyzing the substantive irregularities within the grand jury proceeding); *see also* DOJ REPORT, *supra* note 199, 78–86.

208. Kaimipono Wegner, *We Need More Ferguson-Style Grand Juries*, DAILY BEAST (Nov. 30, 2014), <https://thebea.st/2OYnfJg>; *see also* Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 753 (2016).

209. Wegner, *supra* note 208.

210. Robert Patrick, *St. Louis County Prosecutor Will Release Records if No Indictment*, ST. LOUIS POST-DISPATCH (Nov. 24, 2014), <http://bit.ly/2xkUfUq>.

211. Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <https://nyti.ms/2NLIRfn>.

212. *Id.*

213. MO. REV. STAT. § 56.190 (2016) states: "In all counties of class one, the stenographers in the office of the prosecuting attorney shall when so directed by the prosecuting attorney of such county, take down and transcribe for the use of the prosecuting attorney testimony and evidence before the grand jury of said county." *Id.*

tor's record because it is "for use of the prosecuting attorney."<sup>214</sup> There is no requirement that testimony be transcribed in every case under Missouri state law.<sup>215</sup>

An investigative report becomes an open record subject to disclosure once the investigation is inactive.<sup>216</sup> An investigative report is a record created by a law enforcement agency examining a crime or suspected crime in response to evidence of an incident report.<sup>217</sup> As such, when the grand jury declined to issue an indictment in the case of Michael Brown, the investigation became inactive and the transcribed record for the use of the prosecuting attorney became an open record subject to disclosure. As McCulloch noted in his court filings, public disclosure after an investigation becomes inactive is fully consistent with the reasons for secrecy.<sup>218</sup>

## 2. *Evaluating the Sunshine Model*

McCulloch's ability to work around the rules of grand jury secrecy was very unusual and likely to be limited to the specifics of the Brown case. As Missouri law gives the prosecuting attorney authority to transcribe evidence in the grand jury proceeding, such testimony is for the use of the prosecuting attorney and becomes a record of the prosecutor. Once the investigation is complete, it becomes an open record subject to disclosure. However, it is important to note that the prosecutor's request that the testimony be transcribed is what made it a public record. There is no obligation that testimony be transcribed in every case under Missouri law. Indeed, transcribing testimony is actually a rare occurrence in Missouri.<sup>219</sup>

In most states, grand jury proceedings are exempt from sunshine and freedom of information laws.<sup>220</sup> Thus, there is no practi-

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214. Memorandum in Support of Motion for Public Disclosure of Materials Considered by the Grand Jury at 1–2, *In re* Special Grand Jury, No. 14SL-MC15812 (Mo. Cir. Ct. Nov. 23, 2014).

215. *Id.* This transcribing for the use of the prosecuting attorney makes it a record pertaining to a crime or suspected crime within the purview of section 610.100 of the Missouri Sunshine Law.

216. MO. REV. STAT. § 610.100 (1)(3).

217. *Id.* § 610.100(1)(5).

218. Memorandum in Support of Motion for Public Disclosure of Materials Considered by the Grand Jury, *supra* note 214, at 8–9.

219. Heather Cole et al., 'Data Dump' After Ferguson May Be Tough Act to Follow, MO. LAW. WKLY. (Nov. 28, 2014), <http://bit.ly/2xfbd7o>.

220. See Memorandum in Support of Motion for Public Disclosure of Materials Considered by the Grand Jury, *supra* note 214, at 3. Indeed, McCulloch noted in his memorandum to the court: "There is no suggestion that the Grand Jury is subject to the Missouri Sunshine Law." *Id.*

cal suggestion that the sunshine law approach could be broadly applied to other types of cases or in other jurisdictions. However, the release of information under sunshine provisions demonstrates two important points. First, it shows that many of the concerns that give rise to secrecy are significantly diminished following grand jury deliberations. Although it would be difficult to argue that the disclosures appeased anyone, disclosure did not create the grave impact that one might expect. For example, the concern about protecting witnesses was diminished through redaction. Further, before the case was presented, all the witnesses knew that McCullough would seek release. The witnesses were informed about the possibility of release before testifying, and they still chose to testify. Concerns about chilling effects on future witnesses are hard to measure, but there certainly seemed to be no negative impact on the witnesses in this case.

Second, providing the public with all of the information that the grand jury considered allows the public to engage in critical scrutiny of the process. Some argue that the volume of information presented to the grand jury overwhelmed the grand jurors and made them unable to vote in favor of indictment. In most grand jury presentations, the prosecutor streamlines the information making it basic enough for the grand jury to process easily. Here, the release of information allowed the public to see the kind of treatment the police officer received in the grand jury proceedings. The prosecution presented extensive evidence, the officer was allowed to testify, and witnesses favorable to Mr. Brown were cross-examined and discredited.<sup>221</sup> The treatment was not typical, and it heightened concerns that the prosecution reserves more favorable treatment for white police officers who kill unarmed Black men.<sup>222</sup> What the documents do and don't say provides key insights into the grand jury process that the public would not be able to evaluate if absolute secrecy were maintained.

#### IV. MOVING CLOSER TO GRAND JURY VISIBILITY

Greater access to information about a grand jury's decision-making in cases of police violence is certainly not a panacea for issues of excessive police force and accountability in the United States. However, for those working toward a reimagining of our justice system and greater protection for marginalized minorities,

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221. Monica Davey et al., *Raised Hands, and the Doubts of a Grand Jury*, N.Y. TIMES (Nov. 29, 2014), <https://nyti.ms/2Oq6rdR>.

222. Jeffrey Toobin, *How Not to Use a Grand Jury*, NEW YORKER (Nov. 25, 2014), <http://bit.ly/2xmBQpZ>.

the ability to see and interpret how our current models function and where they fall short provides an important foundation.

As underscored in the preceding section, prosecutors and policymakers are considering various ways of providing some level of access to grand jury proceedings in cases of police violence which result in no indictment. The development of these efforts suggests that the heightened visibility of policing is impacting state and local policymakers. Yet, as the highlighted state and local approaches to greater transparency reveal, how policymakers regard transparency and its goals can vary widely. This Part argues that focus on traditional notions of transparency can prove more distracting than illuminating for those seeking a better understanding of prosecutorial and grand jury decision-making in cases of police criminality where no indictment is issued. It identifies why the shortcomings that result from the current approaches exist and concludes by drawing on principles from policing's new visibility to theorize a more meaningful approach to grand jury visibility.

#### A. *The Transparency Distraction*

In cases of police criminality, liberalizing access to grand jury decision-making when an indictment is not issued has largely been focused on notions of transparency. When it comes to democratic governance and the administration of justice, transparency is often considered a good thing.<sup>223</sup> Indeed, prosecutors running for office frequently do so on a platform of promises to bring greater transparency to the system. However, as the approaches above demonstrate, transparency can be a very amorphous concept, with more notional than practical meaning. Transparency's elusive practicality often allows its provider to define its meaning and parameters, as shown in the case examples above.

Those familiar with the inner workings of the administration of justice are well aware that most of the decision-making that takes place within the system occurs in ways that are rarely visible to the public.<sup>224</sup> Transparency is purposefully diminished at many moments, yet these moments are not seen as inconsistent with the goals of transparency. For example, discussions in judicial cham-

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223. Various individual constitutional rights related to criminal justice are embedded with transparency norms, such as the right to a public trial and the right to confront one's accusers. With the pervasive use of plea bargains and other pre-trial practices as means of case resolution, only a nominal percentage of cases ever proceed to a public trial.

224. Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 923 (2006).

bers are generally not open to the public, nor are jury deliberations. The details of ongoing prosecutions are often shielded from public scrutiny out of concern that openness will jeopardize the process of investigating and adjudicating wrongdoing. Ongoing grand jury investigations fall into this category. However, the heightened visibility of police violence renders the lack of transparency after the grand jury concludes without an indictment unacceptable. Prosecutors' and policymakers' willingness to take on the cause of "improving transparency" in these types of cases is only logical. Doing so creates political and structural benefits: it creates a sense of responsiveness to public outcry and helps to reaffirm the legitimacy of a system the outcry calls into question.

As long as the doctrine of secrecy remains sacrosanct, anything the prosecutor shares is more than the public would otherwise receive. When advocates receive more information about the grand jury process from the prosecutor than the doctrine of secrecy would traditionally provide, they are given a sense of having more access to procedures and decisions that will ultimately lead to greater accountability. By providing some information where there otherwise would have been none, prosecutors can at least provide the illusion that they are being completely transparent. Take for example the words of prosecuting attorney Timothy McGinty in the Tamir Rice case:

[T]ransparency is needed for an intelligent discussion of the important issues raised in police use of deadly force cases. This approach by our office has ended the protocol of total secrecy that once surrounded the use of deadly force by law enforcement officers. When a citizen is purposefully killed by police, the results of the investigation should be as public and transparent as possible.<sup>225</sup>

While this statement seems to strike the right tone in terms of recognizing that it is vital for the public to have access to investigative information in cases of police violence, it actually serves to reinforce the illusion of transparency. McGinty's version of transparency was still selective in what information was provided and strategic about when certain information was released. McGinty revealed investigative reports *before* the grand jury was actually convened, which some suggest influenced the grand jury pool. The prosecutor's version of transparency did little to provide meaningful access and information for advocates and citizens seeking reform.

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225. McLaughlin, *supra* note 178.

The Brown and Rice cases demonstrate that transparency is largely an ideal and that there are key practical considerations which ultimately prove limiting to those seeking clear information that can drive advocacy efforts. Prosecutors are the primary holders of decision-making authority and processing information at the grand jury stage. However, transparency requires prosecutors to share information openly with the public and others who stand outside of the law enforcement structure. Although prosecutors are, for the most part, publicly elected officials charged with representing the interests of the people of their jurisdictions, they are hardly “disinterested producers and providers of information.”<sup>226</sup> Prosecutors are political actors who, despite operating under a tremendous degree of insulation through protections such as prosecutorial immunity and discretion, must still navigate the complex challenges that come from being a public servant and a local government’s chief legal enforcement official. Cases where police officers kill unarmed civilians present some of the most fraught representations of prosecutorial tensions. It would be naive to presume that prosecutors can provide insights about their influence and decision-making process within the grand jury as pure information without intended or unintended bias, alteration, or distraction.<sup>227</sup>

Prosecutors and local policymakers carefully manage and define transparency by setting the terms of what information to disclose and how and when to disclose information. The power that government and institutional actors possess allows them to control and “shape possible ways of perceiving and talking about transparency.”<sup>228</sup> As governmental actors increasingly control the terms of transparency, they create the likelihood of prematurely curtailing real engagement about the relevance, nature, and quality of grand jury disclosures.<sup>229</sup>

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226. Lars Thøger Christensen & George Cheney, *Peering into Transparency: Challenging Ideals, Proxies, and Organizational Practices*, 25 COMM. THEORY 70, 74 (2015). In fact, there has been much discussion about prosecutorial interest and conflict of interest in these types of cases.

227. *Id.* at 75 (“Operating with flawed notions of senders, messages and receivers, the transparency ideal ignores major developments within the field of communication and upholds unrealistic expectations of insight into organizations, institutions, and governments.”).

228. *Id.* at 80.

229. Christensen & Cheney, *supra* note 226, at 84 (“In many uses of transparency, thus, we find examples of what Deetz calls ‘discursive closure’: the premature truncation or containment of a discussion, in this case, even in the announced interest in democracy.”).

One key area of access to information that does not come from the state is information from witnesses who testify. Grand jury secrecy rules do not apply to witnesses testifying before the grand jury. They have no limitation on discussing what they said, saw, or experienced before the grand jury. One example of the usefulness of a grand jury witness's statement relates to the Tamir Rice case, where interviews of grand jury witnesses provided much of the public information available about the case.<sup>230</sup> Another slightly ancillary strategy relates to the issuance of grand jury reports, much like what the Colorado statute provides. Although grand jury reports must be authorized by state statute, the strategy provides an opportunity for grand jurors to release public reports accusing individuals of misconduct or criminal activity even if they are not indicted.<sup>231</sup> These reports are often justified in cases involving the public interest.

### *B. Racial Justice, Police Violence, and Legitimacy*

Another shortcoming of the traditional belief about transparency in the approaches discussed above is that transparency can and should lead to greater criminal justice legitimacy. As this section discusses, efforts to bring about grand jury transparency would be more effective if they were not simply oriented around affirming credibility of the process. Those engaging with notions of transparency must acknowledge historic and systemic shortcomings and be open to the groundwork necessary for improvement.

In managing and defining the terms of transparency, prosecutors and policymakers often cite ensuring trust and legitimacy in the justice system as one of the purposes of liberalized disclosure. Building up the legitimacy of the justice system corresponds to our traditional ways of thinking about transparency. Transparency, as related to democratically oriented processes and norms, relies on “the ability of the citizenry to observe and scrutinize policy choices and to have a direct say in the formation and reformulation of these decisions.”<sup>232</sup> Proponents of transparency in the criminal legal system suggest that open access to information can help to dispel sus-

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230. Jonathan Witmer-Rich, *Restoring Independence to the Grand Jury: A Victim Advocate for Police Use of Force Cases*, 65 CLEV. ST. L. REV. 535, 555 (2017) (“[O]ne source of public information about what occurred in the Tamir Rice grand jury are interviews given to a journalist by several of the witnesses who testified in that proceeding.”).

231. Gregory D. Morrill, *Prosecutorial Investigations Using Grand Jury Reports: Due Process and Political Accountability Concerns*, 44 COLUM. J.L. & SOC. PROBS. 483, 497 (2011).

232. Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1164 (2000).

pictions and allow individuals to evaluate the decision-making of its representatives. Arguably, transparency can ultimately lead to deepened trust.<sup>233</sup> As one scholar noted:

As a program for accountable government, transparency demands high visibility in official decision-making . . . . Moreover, transparency requires not only visibility of policy choices but a publicly declared rationale for these decisions. Requiring government to announce both positive action and normative justification acknowledges the human desire to assess the bona fides of public officials.<sup>234</sup>

To varying extents, the public received transparency of positive action and normative justification with the grand jury disclosures in the Brown and Rice cases. While perhaps not “high visibility in official decisionmaking,” the public did receive some opportunity “to observe and scrutinize policy choices” and some degree of a “publicly declared rationale.”<sup>235</sup> Yet, while challenging to measure, it would be difficult to argue that the disclosures led to the public’s deepened sense of trust in the system.<sup>236</sup> Part of the problem rests on the fact that the information releases were designed to legitimize and sustain the system as it exists. While ensuring legitimacy in the system as it exists is perhaps a laudable goal in the abstract, the notion again overlooks practical realities about race and disparities of experience with the criminal legal system.

For many Blacks in particular, criminal justice trust and legitimacy is already a deeply fraught concept rooted in a collective experience and history. Observing how cases of police violence seem to avoid accountability simply affirms that understanding. Prosecutors and policymakers often fail to acknowledge the experiences of people of color and prioritize creating the perception of trustworthiness without considering what transparency that creates the reality of trustworthiness might involve.

The non-indictment of officers in police violence cases and the grand jury secrecy that keeps testimony and evidence concealed only tend to support the long historical and practical experiences of exclusion that racial and social minorities face. For many Black and Latino people in the United States, disparate treatment in the criminal legal system in arrests, plea offers, and sentencing is an endur-

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233. *Id.*

234. *Id.*

235. *Id.*

236. Some argue that the way prosecutors McGinty and McCullough handled the Tamir Rice and Michael Brown cases diminished the trust of their constituents and led to the eventual loss of each of their prosecutorial re-election campaigns.

ing reality. In recent years, with increasing attention paid to the causes and impact of mass incarceration, outside observers are now able to recognize these disparities, even if they don't impact their perceptions of fairness. Studies show that when compared with their white counterparts, African-Americans have less confidence in police officers and do not believe that police treat racial minorities fairly.<sup>237</sup> A recent Reuters poll shows that only 28 percent of African-Americans trust the police to be fair and just, while 61 percent of whites believe the police to be fair and just.<sup>238</sup> These trends are also observed in perceptions about the criminal legal process.<sup>239</sup> Indeed, studies examining racial disparities at the arrest, prosecution, and sentencing stages of criminal adjudication demonstrate that Blacks and Latinos experience worse outcomes than similarly situated white individuals.<sup>240</sup>

While there have been many causes identified for disparities along racial lines in perception and outcomes in the criminal justice system, it is evident that the United States' long-standing history of reinforcing racial hierarchy through its legal institutions is a significant factor. The grand jury itself contributes to this history. The grand jury, while often criticized, is also lauded for sustaining democratic ideals, such as requiring local members of a community to participate in the early stages of the criminal adjudication function of government. Some observers suggest that grand jurors selected from the community are best suited to assess the facts of a case

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237. Ross, *supra* note 81, at 765–67. As one author notes:

People are more inclined to follow the law when they believe that it is legitimate, even when it produces outcomes with which they disagree. More specifically, people see the law as more legitimate when they think that legal procedures and the system's overall treatment are fair. Scholars have termed this notion procedural justice. The fundamental idea is to communicate to citizens at all times the reasons why an agent of the criminal justice system is doing what she is doing, and to give an opportunity for that citizen to be heard. When this type of engagement is absent, resentment builds . . . . But when present, legitimacy has tremendous power: one study found that even serious offenders were more likely to comply with the law when they believed both in the law's substance and in the legitimacy of the actors enforcing it.

*Id.* at 765.

238. Bill Schneider, *Do Americans Trust Their Cops To Be Fair and Just? New Poll Contains Surprises*, REUTERS (Jan. 15, 2015), <https://reut.rs/2xgrS9M>.

239. PEW RESEARCH CTR., KING'S DREAM REMAINS AN ELUSIVE GOAL; MANY AMERICANS SEE RACIAL DISPARITIES 12–13 (2013), <https://pewtsr.ch/2pcnzsu>.

240. See generally BESIKI LUKA KUTATELADZE & NANCY R. ANDILORO, PROSECUTION AND RACIAL JUSTICE IN NEW YORK COUNTY (2014), <http://bit.ly/2NMtWjZ>.

given their localized perspectives and experiences, which may prove particularly useful in highly charged and emotional cases.<sup>241</sup>

However, the grand jury's populist orientation has not always been used in ways that protect the interests of racial and cultural minorities.<sup>242</sup> Quite to the contrary. Following the Civil War, grand juries acted in ways that legitimized and reinforced white racial dominance. For example, grand juries in southern states regularly refused to indict white people accused of committing acts of violence against recently freed Black men and women.<sup>243</sup> In the post-war period, grand juries were noted for "indict[ing] members of the occupying northern army for property damage . . . and blacks on the New Orleans police force for assault and false imprisonment of white citizens."<sup>244</sup>

While members of the grand jury historically used their discretion to very visibly maintain racial regimes,<sup>245</sup> such exercises of discretion continue to operate in low visibility in ways that contribute to the disparate perceptions and outcomes of Blacks involved in the criminal legal system. Outside of the view of public scrutiny, people of color and other marginalized groups are subjected to targeted policing practices, unauthorized displays of force, and unwritten rules of conduct.<sup>246</sup> Policing actions taken on marginalized minorities, often undetectable within the deep limits of officer discretion,

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241. Grand jurors selected from the community may be seen as contributing community voice and conscience to charged and emotional cases. Eliason, *supra* note 87. As Professor Roger A. Fairfax, Jr. explains:

However, much of the grand jury's value lies in what it represents and its capabilities. A lay entity, the grand jury can function as the voice and conscience of the community. Our constitutional system's view of the jury prefers the wisdom of common citizens to the professional competence of judges and prosecutors. By having its say in what charges might be visited upon an accused, the grand jury preserves the popular perspective in the administration of criminal justice—particularly given that most criminal cases today result in a guilty plea and are never presented to a trial jury.

Fairfax, *supra* note 112, at 829.

242. Simmons, *supra* note 98, at 14 n.64 (discussing how laws aimed at the Ku Klux Klan that were passed during the Civil War period were "virtually impossible to enforce" because grand juries refused to indict the defendants); *see also* Roger A. Fairfax, Jr., *Batson's Grand Jury DNA*, 97 IOWA L. REV. 1511, 1514 (2012) (discussing the history of excluding Blacks from local grand juries).

243. Simmons, *supra* note 98, at 14.

244. *Id.* The Supreme Court has established that a grand jury has the right to decline to indict even when the evidence satisfies the probable cause standard. *See Vasquez v. Hillery*, 474 U.S. 254, 263 (1986).

245. *See* Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2376 (2008) (discussing how the modern grand jury prevents minority groups from exercising influence over the evaluation of criminal laws).

246. Luna, *supra* note 232, at 1131–32.

form what one observer calls a “shadow code.”<sup>247</sup> The shadow code is a set of surreptitious practices and policies that are all too familiar to the marginalized individuals who experience it, but it is often invisible to those who do not.

The shadow code extends to the adjudication of officers accused of violence, creating what many perceive to be a two-tiered system of justice. Holding officers accused of criminality to a separate set of standards that fail to penalize their misconduct supports the concept of de facto decriminalization of police violence. Professor Peter L. Davis defines the de facto decriminalization of police brutality:<sup>248</sup>

[W]hen an act, though still deemed criminal by the legislature or common law, no longer results in sanction because the criminal justice system simply refuses to punish violations of the law—at least under certain circumstances. De facto decriminalization does not require the abandonment of all prosecution under the law. If only a very small percentage of the known violators is prosecuted (or convicted), however, at some point the sanction associated with the crime becomes so remote that the crime is effectively or functionally decriminalized.<sup>249</sup>

The causes of police violence decriminalization are varied. Some causes include the prominence of the police function in modern society, the willful blindness of the public and institutional actors to the realities of police criminal behavior, the close working relationship between prosecutors and the police, unchecked prosecutorial discretion, and diminished grand jury independence.<sup>250</sup>

During this political and social moment, Black people are grappling with the overwhelmingly punitive and wide-reaching impact that mass incarceration has had on individual lives, families, and communities. The damage that mass incarceration has inflicted on communities of color is only compounded when police officers who are video recorded committing violence against unarmed civilians

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247. *Id.*

248. Davis, *supra* note 3, at 275 n.10. Professor Peter Davis describes how society’s inability to use appropriate nomenclature when discussing police behaviors also contributes to a sense of de facto decriminalization. As he describes: “The use of terms like ‘police brutality,’ ‘police misconduct,’ and ‘excessive force’ demonstrate our conscious or unconscious judgment that assaults by police officers are not really crimes.” *Id.* at 286.

249. *Id.* at 275 n.10.

250. *Id.* at 275.

avoid charges through a process protected by secrecy.<sup>251</sup> Trust and legitimacy are difficult to achieve when a two-tiered system of justice continues to exist.

Police officers have a monopoly on the use of state violence to reinforce social order. When fatal acts of violence are employed against unarmed civilians, particularly in ways that are racialized and can be observed broadly by the public, long-standing harms that exist in this country deepen. As one scholar noted, “When the law reaches outcomes that are substantively unjust, or at least not visibly just, citizens view the law’s judgments as less credible and less worthy of respect.”<sup>252</sup> Communities of color have grown to expect that the law will reach judgments that are “substantively unjust, or at least not visibly just.”<sup>253</sup> Without recognition of what communities of color have learned to expect, transparency in service of legitimacy is an empty endeavor.<sup>254</sup> Transparency should not be about simply trying to get people who have no reason to buy into the system to do so. Transparency should be about acknowledging why there is no buy-in, acknowledging things don’t work well for everyone, and laying the groundwork to bring about change.

### C. *What Is Grand Jury Visibility?*

Transparency is not in and of itself a means of solving the complex social and systemic problems, such as how to obtain accountability for police criminality. However, rethinking transparency and moving towards a less one-sided, top-down sense of visibility can be a step towards revealing how complex social and systemic problems become entrenched within our legal process.

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251. See Kami Chavis, *Increasing Police Accountability: Restoring Trust and Legitimacy Through the Appointment of Independent Prosecutors*, 49 WASH. U. J.L. & POL’Y 137, 147–48 (2015).

252. See STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 51 (2012).

253. Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 950 (2006).

254. Ross, *supra* note 81, at 766. One author explains:

Ferguson, Staten Island, and Cleveland are not the only instances in which grand juries failed to indict police officers for the killings of unarmed black citizens. But they triggered outrage in part because people believed they represented such a clear corruption of the process by local prosecutors—a lack of procedural justice. Some protesters likely cared more about results than procedures. A protest against a particular result, however, does not necessarily implicate the system that produced it. As the procedural justice studies have found, citizens can tolerate adverse results so long as they have a sense that the system functioned fairly.

*Id.*

The new visibility of policing tells us that in order to move toward greater visibility within the criminal legal system, advocates cannot rely on prosecutorial benevolence alone to obtain vital information about grand juries. Those concerned with understanding decision-making processes in the grand jury and revealing underlying structural inequities must find ways to make access to grand jury information unavoidable.

Transparency suggests there is something to see, while visibility provides alternative routes to access and present it. Visibility is different from transparency in the sense that visibility allows access to information that the prosecutor or the government may not readily disclose. The information itself is not subject to initial interpretation by the government. Visibility is challenging in the grand jury context because unlike policing visibility, where individuals have more open access to police activity, the grand jury process is so guarded that advocates must often rely on information provided by the government to see what has transpired. Given the state's monopoly on the use of violence and this country's long history of oppressing marginalized minorities, grand jury secrecy reform measures in cases of police violence must take a more expansive view of information sharing. The measures must not be guided primarily by prosecutors and must do more than seek to legitimize the criminal legal process as it exists. Any actions the state takes to provide greater transparency should advance liberal presumptions in favor of release and approaches that favor open access.

## CONCLUSION

Social activism and its use of technology and media has led to a heightened visibility of policing, which has elevated and connected individual occurrences of police violence. Social activism's use of technology and media has also impacted public expectations of accountability and justice in our criminal legal system, particularly concerning the state-level grand jury. To some extent, the visibility of policing caused institutional actors, such as prosecutors, judges, and other policymakers, to reconsider the scope of grand jury secrecy. Some policymakers are developing ways to maintain the integrity of the grand jury process while providing the public with some measure of transparency. However, openness in government action should do more than legitimize the existing system and further marginalize the very people it should be serving. This Article's goal is to surface critical questions about the quality and limitations of the transparency efforts regarding grand jury secrecy in cases of non-indictment of police officer violence.

Principles drawn from policing's visibility have the potential to expand our understanding of information access. This Article does not suggest that activism, technology, and media can bring the same level of visibility to police violence cases presented to the grand jury as it does for incidents that unfold on the street. It also does not claim that greater transparency in the grand jury will solve issues of police violence and unequal justice in communities of color. Rather, this Article argues that there are core values to be drawn from the visibility of policing that can guide how advocates and policymakers consider transparency's role in improving or reimagining the grand jury process and other parts of the criminal legal system.