

# NOTE

## POLICING PONTIUS PILATE: POLICE VIOLENCE, LOCAL PROSECUTORS, AND LEGITIMACY

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*As America faces a crisis in the public faith in the criminal justice system’s ability to hold police officers accountable under the law, the focus has turned to the role of prosecutors. Many reformers believe that they have found the current system’s weak point: the close relationship between local police and prosecutors. This relationship can lead to favoritism and lax enforcement—exemplified by the use of the opaque grand jury procedure. The proposed solutions therefore have focused on cutting out local prosecutors from police accountability efforts, and replacing them with special, independent—either federal, or at least politically insulated—prosecutors.*

*But an examination of the actual effects of the disempowerment of local prosecutors cautions strongly against such steps. The crisis of faith in the criminal justice system is real, as is the inherent tension between cooperating with local police one day and prosecuting them the next. Completely removing that tension, however, would needlessly sacrifice the experience and ability of the local prosecutors who could most decisively enforce accountability, and cripple the political measures that local communities are beginning to use to force them to do so. Instead, a multi-tier system of checks could use independent layers of*

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*review to augment, rather than replace, local prosecutors, while still maintaining local political control over the officials who hold officers of the law accountable.*

## I. INTRODUCTION

A small group of men gathers in a corner office at police headquarters downtown. They have met to discuss a case of alleged police brutality.

“What are we facing from the riot?” a lieutenant asks.

“Three witnesses’ statements,” responds the deputy commissioner, seated behind his desk. “All of them saying the officer’s assault on the youth was unprovoked.”

“What does the state’s attorney say?” the lieutenant asks the commissioner.

“He says it goes to a grand jury.”

The internal investigations commander standing beside the commissioner has seen this all before. “That’s him doing Pontius Pilate,” he says. “The grand jury doesn’t indict, he looks clean for passing the buck.”

“And if they do indict?” the lieutenant asks.

“They won’t,” the commissioner concludes with a laugh.

This was not a conversation among police officers in Ferguson, Missouri as they dealt with the aftermath of the shooting of Michael Brown, or in Cleveland, Ohio, as officials contemplated the response to the shooting of Tamir Rice.<sup>1</sup> But given the criminal justice climate in the United States today, it could well have been. In fact, the dialogue is from an episode of the HBO show *The Wire*, which was acclaimed for its accurate portrayal of the behind-the-scenes reality of policing in America.<sup>2</sup> The conversation among the command staff is more than a gripping piece of fiction. The episode, which aired in 2002, reflected what criminal justice insiders—including the show’s creators, a long-time police reporter and a veteran police officer—knew well at the time: grand juries can serve as cover for local prosecutors who fail to hold police accountable.

That grievance now serves as one of the foundations of the growing critique of the American criminal justice system. Frustration and suspicion about prosecutorial decisions in police killings have swiftly moved from the notebooks of crime reporters to the streets of American cities to the questions in presidential debates. Though much of the focus of the post-Ferguson protests were on broader issues of racial justice, an important strain of the

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<sup>1</sup> See, e.g., Larry Buchanan et al., *What Happened in Ferguson?*, N.Y. TIMES, [http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html?\\_r=0](http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html?_r=0) [<https://perma.cc/Y66J-KDUA>] (last updated Aug. 10, 2015); Jaeah Lee, *Anger is Boiling Over the Outcome of New Probes into the Police Shooting of a 12-year-old. Here Are 6 Takeaways*, MOTHER JONES (Oct. 11, 2015, 7:17 PM), <http://www.motherjones.com/politics/2015/10/new-tamir-rice-investigations-cleveland-police-shooting-6-takeaways%20> [<https://perma.cc/JA3R-FUBA>].

<sup>2</sup> *The Wire: The Buys* (HBO television broadcast June 16, 2002).

general resentment focused on the more specific issue of a lack of police accountability.<sup>3</sup> Those critiquing the system have had ample fuel for their discontent. Since Ferguson, the number of controversial police killings has grown into a significant blot on the American justice system.<sup>4</sup> Shortly after Ferguson, a Staten Island prosecutor and grand jury declined to indict a New York Police Department (“NYPD”) officer on any charge, after he put a black man in a chokehold and wrestled him to the ground.<sup>5</sup> The man, Eric Garner, died in the hospital and the coroner ruled that the force used by police was the main cause.<sup>6</sup> In November of that same year, a Cleveland, Ohio, police officer shot and killed Tamir Rice, a twelve-year-old black boy armed with a pellet gun. Rice’s family accused the local prosecutor of using the grand jury as a screen in refusing to seek an indictment.<sup>7</sup> Cuyahoga County Prosecutor Timothy J. McGinty openly admitted that he was empaneling a grand jury—as he does for all police killings—because he would prefer that the decision to indict be made by “citizens . . . rather than prosecutors.”<sup>8</sup>

While full national statistics are profoundly lacking, a number of imperfect metrics indicate that a disproportionate number of people killed and injured by police are black.<sup>9</sup> But the lack of prosecutions for police use of force cuts across demographics. In America’s largest city, New York, on-duty police officers have killed 179 people, 27% unarmed, in the last 15 years. Grand juries indicted officers in just three of the killings.<sup>10</sup> In Hous-

<sup>3</sup> See, e.g., Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html> [https://perma.cc/KDA7-9KEY].

<sup>4</sup> See, e.g., Richard O. Opel Jr. & Mitch Smith, *Tamir Rice’s Family Clashes with Prosecutor Over Police Killing*, N.Y. TIMES (Dec. 23, 2015), <http://www.nytimes.com/2015/12/24/us/tamir-rices-family-and-prosecutor-quarrel-over-release-of-evidence.html> [https://perma.cc/JWU5-HEGU].

<sup>5</sup> N.Y. DAILY NEWS, *Eric Garner Video—Unedited Version*, YOUTUBE (July 12, 2015), <https://www.youtube.com/watch?v=JpGxagKOkv8> [https://perma.cc/3MUJ-8LX9].

<sup>6</sup> Joseph Goldstein & Marc Santora, *Staten Island Man Died from Chokehold During Arrest, Autopsy Finds*, N.Y. TIMES (Aug. 1, 2014), <http://www.nytimes.com/2014/08/02/nyregion/staten-island-man-died-from-officers-chokehold-autopsy-finds.html> [https://perma.cc/JS3E-BQS6].

<sup>7</sup> Opel & Smith, *supra* note 4.

<sup>8</sup> *Id.*

<sup>9</sup> See Jaeah Lee, *Here’s the Data That Shows Cops Kill Black People at a Higher Rate Than White People*, MOTHER JONES (Sept. 10, 2014, 6:00 AM), <http://www.motherjones.com/politics/2014/08/police-shootings-ferguson-race-data> [https://perma.cc/9N29-6Y75]; Jaeah Lee, *Exactly How Often Do Police Shoot Unarmed Black Men?*, MOTHER JONES (Aug. 15, 2014, 6:00 AM), <http://www.motherjones.com/politics/2014/08/police-shootings-michael-brown-ferguson-black-men> [https://perma.cc/EL46-3RJX]; Damian Ortellado, *Emergency Room Reports Reveal Racial Disparity in Injuries Caused by Police*, SUNLIGHT FOUND. (Sept. 4, 2014, 3:58 PM), <http://sunlightfoundation.com/blog/2014/09/04/cdc-hospital-reports-reveal-racial-disparity-in-injuries-caused-by-police/> [https://perma.cc/593F-PFFA].

<sup>10</sup> Sarah Ryley et al., *In 179 Fatalities Involving On-Duty NYPD Cops in 15 Years, Only 3 Cases Led to Indictments—and Just 1 Conviction*, N.Y. DAILY NEWS (Dec. 8, 2014, 2:30 AM), <http://www.nydailynews.com/new-york/nyc-crime/179-nypd-involved-deaths-3-indicted-exclusive-article-1.2037357> [https://perma.cc/C39V-LP19].

ton, police officers shot, fatally and non-fatally, 121 people, more than 25% unarmed, between 2008 and 2012. Houston sits in Harris County, where grand juries declined to indict in any of the cases. In fact, the last time a Houston police officer was indicted for a shooting was in 2004, giving Harris County grand juries a record of 288 consecutive no true bills—decisions not to indict—in such cases.<sup>11</sup> Nationwide, only approximately 54 officers have been prosecuted for on-duty killings since 2005.<sup>12</sup>

Despite the lack of indictments in so many police killings, the failure to indict is not being directed by any central authority. The facts of each police-involved fatality can and do differ wildly. This is obvious from even a cursory examination of the different incidents in Ferguson, Cleveland, and Staten Island, or even the Oregon State Police's killing of one of the members of the recent occupation of a federal wildlife refuge center.<sup>13</sup> Police officers have long been given wide discretion under state and federal law to use the amount of force they deem reasonable,<sup>14</sup> and jurors may be loath to second-guess split-second or life-or-death decisions. Local prosecutors, meanwhile, are inherent partners with local police in their crime-fighting duties, and may be reluctant to push as hard for indictments as they would in a typical case.<sup>15</sup> But it does not take an evil conspiracy to undermine the public's trust in the criminal justice system, only a pattern of incidents and a sense that the game is rigged. Criminal justice researchers are increasingly discovering that legitimacy—the popular sense that the law is fair and its upholders are justified—is the underappreciated foundation of a society

<sup>11</sup> James Pinkerton, *Hard to Charge: Bulletproof Part 3*, HOUSTON CHRON. (Nov. 17, 2013), <http://www.houstonchronicle.com/local/investigations/item/Bulletproof-Part-3-Hard-to-charge-24421.php> [https://perma.cc/E72W-MS7T].

<sup>12</sup> Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), <http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/> [https://perma.cc/GE5C-U22D].

<sup>13</sup> In Ferguson, the officer and Brown got into a physical altercation and tussled over the officer's gun just before the shooting, 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 6 (2015), [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj\\_report\\_on\\_shooting\\_of\\_michael\\_brown\\_1.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf) [https://perma.cc/4Q7N-CFUW]; in Cleveland, the officer was responding to the report of a man with a gun and shot Rice seconds after arriving on the scene, *see Lee, supra* note 1; in Staten Island, the officer was attempting to put Garner in handcuffs for selling untaxed cigarettes, Goldstein & Santora, *supra* note 6; in Oregon, armed extremists occupied a federal building, Alex Altman, *Why the Feds Have Not Ended the Oregon Militia Standoff*, TIME (Jan. 4, 2016), <http://time.com/4167006/oregon-militia-standoff-ranchers-fbi/> [https://perma.cc/5HZX-EGBD].

<sup>14</sup> *See, e.g.,* Graham v. Connor, 490 U.S. 386, 396 (1989) (“The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer in the scene, rather than with the 20/20 vision of hindsight.”); Peggy Triplett, *Police Use of Deadly Force: Research Efforts of the National Institute of Law Enforcement and Criminal Justice*, in A COMMUNITY CONCERN: POLICE USE OF DEADLY FORCE 61 (Nat'l Inst. of Law Enf't & Criminal Justice ed., 1979), <https://www.ncjrs.gov/pdffiles1/Digitization/132789NCJRS.pdf> [https://perma.cc/K5QL-7MCQ].

<sup>15</sup> Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. (forthcoming 2016).

based on law and order.<sup>16</sup> The events of the past two years and the ongoing nationwide response to them have done serious harm to the perceived legitimacy of the criminal justice system. Action is needed to restore the public's full faith and confidence.

In the wake of recent events, journalists, researchers, and lawmakers have gone public with various proposals to fix the system that deals with police violence—and already find themselves in a bitter battle over the right solution. While some proposals have gone so far as to suggest a virtual end to the grand jury system for police killings,<sup>17</sup> most center on reducing local control over discipline for police misconduct.<sup>18</sup> Some proposals have emphasized an increased federal role,<sup>19</sup> others an increased state role, and still others both<sup>20</sup>—all while local prosecutors defend their turf.<sup>21</sup> There is a strong, common theme: additional checks and balances. States differ greatly in their specific organizations of criminal justice authority and so detailed policy prescriptions necessarily vary. But a general model for the investigation and prosecution of police killings can be envisioned. What the existing proposals ignore is that the various levels of governance would amplify their respective efforts by giving each other a chance to hold police officers accountable, rather than by grabbing complete authority from one another. A successive, multi-tiered approach to police accountability would provide a workable model to boost legitimacy by first offering local officials a chance to bring charges, then an independent prosecutor, and then the grand jury itself, with federal civil rights charges as a final option for egregious cases.

Part II of this Note lays out the problems currently facing the justice system, as it grapples with the legitimacy crisis that its response to police killings has sparked. Part III examines the various proposals from the country that have been suggested, and in a few cases implemented, to deal with this crisis; it points out why no workable, comprehensive solutions have yet

<sup>16</sup> See Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 L. & Soc'y REV. 513, 513 (2003); ZOE MENDEL, OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, RACIAL RECONCILIATION, TRUTH-TELLING, AND POLICE LEGITIMACY 15–16 (2012), <http://ric-zai-inc.com/Publications/cops-p241-pub.pdf> [<https://perma.cc/B9EV-XR5D>].

<sup>17</sup> See, e.g., Melody Gutierrez, *Calls Grow to Eliminate Grand Juries' Secrecy in Police Killings*, S.F. CHRON. (Dec. 14, 2014, 7:11 PM), <http://www.sfchronicle.com/crime/article/Calls-grow-to-eliminate-grand-juries-secrecy-5956945.php> [<https://perma.cc/68VH-5EEL>].

<sup>18</sup> See, e.g., Editorial, *Police Deadly Force Cases Call for Independent Prosecutors*, CHI. TRIB. (Dec. 21, 2015, 5:33 PM), <http://www.chicagotribune.com/news/opinion/editorials/ct-laquan-mcdonald-special-prosecutor-law-edit-20151221-story.html> [<https://perma.cc/6KNS-TBNQ>] (arguing for some form of prosecutor for police killings who is not reliant on cooperation with police in their day-to-day functions).

<sup>19</sup> See Anthony L. Fisher, *Bernie Sanders Calls for "Automatic" Federal Investigations of Deaths in Police Custody*, REASON.COM: HIT & RUN (Jan. 17, 2016, 11:11 PM), <https://reason.com/blog/2016/01/17/bernie-sanders-shootings-police> [<https://perma.cc/GW89-W44A>].

<sup>20</sup> *Independent Investigations and Prosecutions*, CAMPAIGN ZERO <http://www.join-campaignzero.org/investigations> [<https://perma.cc/A6R8-9FS8>].

<sup>21</sup> See, e.g., AP, *Chokehold Case Stirs Debate on Special Prosecutors*, TAMPA BAY TIMES (Dec. 8, 2014, 8:58 AM), <http://www.tampabay.com/news/publicsafety/crime/chokehold-case-stirs-debate-on-special-prosecutors/2209392> [<https://perma.cc/944N-YA4Q>].

been presented. Part IV describes the new accountability system that state and local authorities could adopt to both maximize the system's legitimacy and empower officials at all levels to conduct robust investigations of police killings. The plan is not without obstacles, including possible police retrenchment in reaction to the multiple chances for prosecution. Fundamentally, however, the new model provides a necessary foundation to inspire public confidence that police officers will be held accountable when they break the law.

## II. THE CRISIS OF THE STATUS QUO

On April 4, 1968, the Reverend Martin Luther King, Jr. was assassinated in Memphis, Tennessee. In the week that followed, scores of American cities burned as violent racial riots broke out across the country.<sup>22</sup> In perhaps no place was the chaos worse than in the nation's capital, Washington, D.C.<sup>23</sup> Fifteen thousand Army and National Guard troops took to the streets of the city to help the police try to restore order.<sup>24</sup> Attorney General William Ramsey Clark had been in Memphis to respond to King's assassination and on his return trip on the evening of April 12, he had a view of D.C. from above. "The city looked like it had been bombed from the air," he described later.<sup>25</sup> In the midst of this pandemonium, a white D.C. police officer believed he saw a looter with a gun and shot and killed him. The twenty year-old black man, who had a wife and young daughter and was employed as a custodian at the Naval Research Laboratory, was found holding a piece of glass. An advisory coroner's jury found that the killing had been a case of willful homicide, but a grand jury would not indict the officer.<sup>26</sup> The decision was in line with a clear pattern. From the beginning of 1967 until October of 1968, a period of intense racial tension in America, Washington, D.C. police killed seventeen citizens, thirteen of them black.<sup>27</sup> No officer was indicted.<sup>28</sup> Some D.C. citizens at the time made allegations similar to those being levelled today: that the killings and lack of accountability revealed that the public did not truly control the officers whose job it was to keep them safe.<sup>29</sup>

Grand juries have long been at the forefront of the justice system's controversial handling of police killings in America. Now, as in the 1960s, a perception of unfairness corrodes the foundations of a legal system that ex-

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<sup>22</sup> See CLAY RISEN, *A NATION ON FIRE: AMERICA IN THE WAKE OF THE KING ASSASSINATION* 4 (2009) (noting that "[r]iots ripped the hearts out of scores of inner-city communities" and that "more than 120 cities erupted in violence").

<sup>23</sup> See *id.* at 129–39.

<sup>24</sup> *Id.* at 135.

<sup>25</sup> *Id.* at 136.

<sup>26</sup> *Id.* at 132–33.

<sup>27</sup> See Thomas W. Lippmann, *Here's History of Police-Citizen Deaths in Washington Since January of 1967*, WASH. POST, Oct. 13, 1968, at D1, D7.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

ists to protect the rights of all. Specifically, the system of police accountability stands accused of manipulation to unduly protect those in uniform. Without change, the underlying institutions of criminal justice and law and order could fall victim to a wide-reaching withdrawal of public support.

### A. Appearance of Grand Jury Manipulation

The recent non-indictments in Ferguson, Staten Island, Cleveland, and other cities and towns across the country have both challenged the faith of many in the criminal justice system and exposed specific flaws in the way investigations of police killings are handled. In Ferguson, activists of the burgeoning Black Lives Matter movement accused St. Louis County Prosecuting Attorney Robert McCulloch and his assistants of purposely putting forward a simultaneously overly comprehensive and yet lackluster presentation to the grand jury to overwhelm it and induce a no true bill.<sup>30</sup> As Harvard Law School Professor Noah Feldman put it to the *New York Times*, “[McCulloch] didn’t want an indictment—and didn’t want to [be] blamed for not getting one.”<sup>31</sup> In other words, he acted, as *The Wire* aptly put it, like a Pontius Pilate. Pontius Pilate was Governor of the Roman Province of Judea in the first century of the Common Era, and most notably the state official who, wary of public backlash, absolved himself of any responsibility and let angry mob members decide the fate of one Jesus Christ. In that case, however, the mob did indict.<sup>32</sup>

McCulloch was faced with a similar predicament: he wanted to remove himself from the accountability equation. At the time, the facts surrounding the shooting death of Michael Brown were confused. Some witnesses corroborated Ferguson Police Department Officer Darren Wilson’s story that Brown punched him, grabbed at his gun, and then entered into a “full charge” at him.<sup>33</sup> Forensic and physical evidence did not contradict that narrative, and the Department of Justice’s (“DOJ”) comprehensive report would later lend more backing to some form of it.<sup>34</sup> Other witnesses offered the

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<sup>30</sup> Benjamin Weiser, *Mixed Motives Seen in Prosecutor’s Decision to Release Ferguson Grand Jury Materials*, N.Y. TIMES (Nov. 25, 2014), <http://www.nytimes.com/2014/11/26/us/mixed-motives-seen-in-prosecutors-decision-to-release-ferguson-grand-jury-materials.html> [<https://perma.cc/H3RN-88WT>].

<sup>31</sup> *Id.*

<sup>32</sup> See *Matthew* 27:15–26.

<sup>33</sup> Erik Eckholm, *Witnesses Told Grand Jury That Michael Brown Charged at Darren Wilson, Prosecutor Says*, N.Y. TIMES (Nov. 24, 2014), <http://www.nytimes.com/2014/11/25/us/witnesses-told-grand-jury-that-michael-brown-charged-at-darren-wilson-prosecutor-says.html> [<https://perma.cc/YNR7-6ERF>].

<sup>34</sup> Julie Bosman et al., *Amid Conflicting Accounts, Trusting Darren Wilson*, N.Y. TIMES (Nov. 25, 2014), <http://www.nytimes.com/2014/11/26/us/ferguson-grand-jury-weighed-mass-of-evidence-much-of-it-conflicting.html> [<https://perma.cc/N5RA-K5SJ>]; U.S. DEP’T OF JUSTICE, *supra* note 13, at 5–8 (noting inability to state for certain that Brown was charging at Wilson, but concluding that Brown had been moving toward him). The Ferguson incident may well end up being to the police accountability movement what the Boston Massacre was to the American Revolution: an ambiguous, divisive spurt of violence that may have been at least

starkly different picture that Brown had been trying to surrender when Wilson shot and killed him.<sup>35</sup> Many witnesses contradicted each other and still others recanted their initial testimony.<sup>36</sup> Based on some combination of these many pieces of evidence, McCulloch could have formed the opinion that Wilson had committed no crime, or, at the very least, that there was insufficient proof to prove that he had. If McCulloch had treated the Wilson case as if it were a normal investigation and followed standard operating procedure, at that point he simply could have closed the case file. Yet that option would leave behind no grand jury process, no public availability of transcripts, and every appearance of a rigged, secretive process that never left McCulloch's desk.

McCulloch instead turned to a procedure that an increasing number of local prosecutors around the country are choosing in cases of police violence: the automatic empaneling of a grand jury. In Manhattan, the automatic empaneling of a grand jury has long been the practice of the district attorney for police shootings.<sup>37</sup> Former longtime Manhattan District Attorney Robert Morgenthau has said that he decided to present all fatal police shootings to a grand jury so as to build "confidence in the integrity of law enforcement and the criminal justice system."<sup>38</sup> Ironically, in a highly scrutinized case where a certain outcome is expected and demanded by an angry public, the automatic grand jury triggers the opposite effect. The reason lies in prosecutors' frequent adoption of different approaches for police and for non-police cases in front of the grand jury. Grand juries share almost nothing with their more famous cousin, the courtroom jury. Rules governing grand jury proceedings allow prosecutors maximum discretion and afford defendants few rights.<sup>39</sup> First, far less is generally known about grand juries because they take place in secret. A grand jury acts essentially as an investigative tool of the prosecutor.<sup>40</sup> As such, the prosecutor is under no obligation

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partly justified, but that most of all served to highlight larger, structural injustices. *See Summary of Events*, BOS. MASSACRE HIST. SOC'Y, <http://www.bostonmassacre.net/plot/index.htm> [<https://perma.cc/2BRP-DK4S>].

<sup>35</sup> Bosman et al., *supra* note 34.

<sup>36</sup> *Id.*

<sup>37</sup> Ryley et al., *supra* note 10.

<sup>38</sup> *Id.*

<sup>39</sup> *See, e.g.*, *United States v. Williams*, 504 U.S. 36, 55 (1992) (holding that courts cannot force prosecutors to disclose exculpatory evidence to a grand jury); *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 380–81 (2d Cir. 1973) (holding that prosecutors retain total discretion as to whether to bring charges and that courts cannot compel them to do so).

<sup>40</sup> *See, e.g.*, Jeffrey Toobin, *How Not To Use A Grand Jury*, *NEW YORKER* (Nov. 25, 2014), <http://www.newyorker.com/news/news-desk/use-grand-jury> [<https://perma.cc/CUK6-EMZ8>]; STANDARDS FOR CRIMINAL JUSTICE: PROSECUTORIAL INVESTIGATIONS § 2.9 (AM. BAR ASS'N 2014), [http://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/Pros\\_Investigations.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/Pros_Investigations.authcheckdam.pdf) [<https://perma.cc/DR3K-RHMD>] (demonstrating, through extensive guidelines for grand jury use, just how broad the grand jury's investigative use can be should a prosecutor choose).



to present any evidence that cuts against his case.<sup>41</sup> In most cases, then, when prosecutors believe that a crime has been committed and that the defendant is guilty, they build one-sided cases that easily pass the low bar of a probable cause standard.<sup>42</sup> Former New York Court of Appeals Chief Judge Sol Wachtler famously once said that any prosecutor who wanted to could get a grand jury to “indict a ham sandwich.”<sup>43</sup> Indeed, in the aftermath of Ferguson, media reports cited Bureau of Justice Statistics numbers that showed that in 2010, federal grand juries returned no true bills in just 11 cases nationwide.<sup>44</sup> As grand jury critic and University of Illinois Law Professor Andrew Leipold noted, “[i]f the prosecutor wants an indictment and doesn’t get one, something has gone terribly wrong.”<sup>45</sup>

The statistics and popular conception of grand juries did not square with McCulloch’s actions. McCulloch gave an atypically comprehensive presentation to the grand jury that spanned three months and involved over seventy hours of testimony from over fifty witnesses, including Wilson.<sup>46</sup> The jury had to weigh both exculpatory and inculpatory evidence and McCulloch took no stance on whether criminal charges were warranted.<sup>47</sup> Some legal analysts, and McCulloch himself, said that the reason for the lengthy, thorough proceeding was so that the jurors—and the public after the release of the jury transcripts—could see every side of the story.<sup>48</sup> Again, this is a

<sup>41</sup> *Williams*, 504 U.S. at 52 (holding that an otherwise valid indictment cannot be dismissed only because of a prosecutor’s decision not to disclose substantial exculpatory evidence to the grand jury).

<sup>42</sup> See Toobin, *supra* note 40; Ben Casselman, *It’s Incredibly Rare for a Grand Jury to Do What Ferguson’s Just Did*, FIVETHIRTYEIGHT (Nov. 24, 2014, 9:30 PM), <http://fivethirtyeight.com/datalab/ferguson-michael-brown-indictment-darren-wilson/> [<https://perma.cc/3PYG-T5LG>].

<sup>43</sup> David Gould, *Sol Wachtler*, HIST. SOC’Y N.Y. CTS., <https://www.nycourts.gov/history/legal-history-new-york/luminaries-court-appeals/wachtler-sol.html> [<https://perma.cc/8S5A-YQK7>]. Wachtler was also indicted himself and given a fifteen month sentence in federal prison. See *id.*; Diana Jean Schemo, *A Prison Term of 15 Months for Wachtler*, N.Y. TIMES (Sept. 10, 1993), <http://www.nytimes.com/1993/09/10/nyregion/a-prison-term-of-15-months-for-wachtler.html> [<https://perma.cc/XJ22-829T>].

<sup>44</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2010—STATISTICAL TABLES 12 tbl.2.3 (2013) [hereinafter STATISTICS 2010], <http://www.bjs.gov/content/pub/pdf/fjs10st.pdf> [<https://perma.cc/9FCU-DNR4>]; see, e.g., Casselman, *supra* note 42. The reports ignored that federal prosecutors declined to bring charges at all for lack of criminal intent or for lack of commission of a federal offense in a further 7,688 cases. See STATISTICS 2010, *supra*, at 12 tbl.2.3.

<sup>45</sup> Casselman, *supra* note 42.

<sup>46</sup> Emanuella Grinberg, *Ferguson Decision: What Witnesses Told the Grand Jury*, CNN (Nov. 26, 2014, 8:00 PM), <http://www.cnn.com/2014/11/25/justice/ferguson-decision-michael-brown-witness-testimony/> [<https://perma.cc/4ZKX-8M8K>].

<sup>47</sup> Alex Altman, *Grand Jury Process Raises Questions About a Ferguson Indictment*, TIME (Sept. 18, 2014), <http://time.com/3399022/ferguson-michael-brown-darren-wilson-grand-jury/> [<https://perma.cc/NL5V-4KNJ>].

<sup>48</sup> See, e.g., Mark O’Mara, *Why Ferguson Grand Jury is Taking So Long*, CNN (Nov. 19, 2014, 12:58 PM), <http://www.cnn.com/2014/11/18/opinion/omara-ferguson-months-long-grand-jury/> [<https://perma.cc/NL5V-4KNJ>]; Press Conference, Robert McCulloch, C-SPAN, at 8:45 (Nov. 24, 2014), <http://www.c-span.org/video/?322925-1/ferguson-missouri-grand-jury-decision-announcement> [<https://perma.cc/7CVZ-KJ4E>].

common approach in cases involving killings by police, but not in similar cases involving civilians.<sup>49</sup> The local prosecutor in a less-noticed police killing case in Texas explained his decision to offer an unusually comprehensive view of the case: “This one was, I and my colleagues felt, was not clear cut, that it should be presented to a grand jury. And it was. And we presented everything.”<sup>50</sup> McGinty, the prosecutor in Cleveland, went so far as to use the opinions of outside experts to give the grand jury a broader perspective on the officer’s use of force against Tamir Rice—perspective that suggested that the officer had acted reasonably.<sup>51</sup>

The precise motives that drive McCulloch and other prosecutors in his position to take an uncharacteristically comprehensive stance are of course unknown and may differ from case to case. The Pontius Pilate motive of political insulation is plausible given the often highly charged atmosphere that surrounds police violence, but so too is an honest attempt to better ascertain the truth via a flexible process. One Colorado prosecutor gave voice to a rationale that falls somewhere in between the two, offering a vision of the grand jury as that of a “sounding board” to make sure the community endorses the sensitive and often racially charged decision.<sup>52</sup>

Whatever the actual motive of local prosecutors, the public has noticed the obvious: that the failure to indict is an anomaly for normal cases, but a routine outcome for police cases. The prosecutorial approach of giving grand juries a fuller look at a case, with less guidance from the prosecutor, results in fewer indictments. Many observers now see the process as a way for prosecutors to hold a secret, skewed trial for a police officer defendant.<sup>53</sup> Similar to McCulloch, Staten Island District Attorney Daniel Donovan pursued a similarly lengthy, comprehensive grand jury process in the Garner

<sup>49</sup> See James C. McKinley Jr. & Al Baker, *Grand Jury System, with Exceptions, Favors the Police in Fatalities*, N.Y. TIMES (Dec. 7, 2014), <http://www.nytimes.com/2014/12/08/nyregion/grand-juries-seldom-charge-police-officers-in-fatal-actions.html> [https://perma.cc/TH7F-Z8EM].

<sup>50</sup> Phil Hesel, *New Video Released in Controversial Texas Police Shooting*, NBC NEWS (Dec. 12, 2015, 12:26 AM), <http://www.nbcnews.com/news/us-news/new-video-released-controversial-texas-police-shooting-n478826> [https://perma.cc/VR6R-BW69].

<sup>51</sup> Jane Morice, *Activists, Families of Cleveland Police Shooting Victims React to Reports on Tamir Rice Shooting*, NE. OHIO MEDIA GROUP (Oct. 10, 2015, 11:39 PM), [http://www.cleveland.com/metro/index.ssf/2015/10/community\\_families\\_of\\_cleveland.html](http://www.cleveland.com/metro/index.ssf/2015/10/community_families_of_cleveland.html) [https://perma.cc/CL5L-6UXL]. McGinty parried criticisms of this decision by saying that he had retained outside experts in another high-profile police killing case to argue against the officer’s reasonableness. Timothy Williams & Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. TIMES (Dec. 28, 2015), [http://www.nytimes.com/2015/12/29/us/tamir-rice-police-shooting-cleveland.html?\\_r=0](http://www.nytimes.com/2015/12/29/us/tamir-rice-police-shooting-cleveland.html?_r=0) [https://perma.cc/9E79-MZLB]. In the Tamir Rice case, McGinty ultimately came out explicitly against an indictment. *Id.*

<sup>52</sup> McKinley & Baker, *supra* note 49.

<sup>53</sup> See, e.g., Toobin, *supra* note 40; Dahlia Lithwick & Sonja West, *Shadow Trial*, SLATE (Nov. 26, 2014, 4:35 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/11/ferguson\\_grand\\_jury\\_investigation\\_a\\_shadow\\_trial\\_violates\\_the\\_public\\_s\\_right.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/11/ferguson_grand_jury_investigation_a_shadow_trial_violates_the_public_s_right.html) [https://perma.cc/D9QH-LELN].

case that also failed to produce an indictment.<sup>54</sup> The recent cases and the wider trend of grand jury inaction in the face of police violence have painted a picture of prosecutors failing to hold their police partners accountable.

### B. Crisis of Legitimacy

The harm caused by the perception of manipulation and favoritism goes far deeper than street protests and angry op-eds. Yale Law School Professors Tracey Meares and Tom Tyler, among others, have performed a number of studies on how citizens react to their treatment by the criminal justice system.<sup>55</sup> They each wanted an explanation for why most people, even criminals, obey the law most of the time. While each found that deterrence was an important factor, even stronger was the perceived legitimacy of the law itself.<sup>56</sup> People are more inclined to follow the law when they believe that it is legitimate, even when it produces outcomes with which they disagree.<sup>57</sup> More specifically, people see the law as more legitimate when they think that legal procedures and the system's overall treatment are fair.<sup>58</sup> Scholars have termed this notion procedural justice.<sup>59</sup> 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.<sup>60</sup> When this type of engagement is absent, resentment builds. Indeed, when Eric Garner began to resist arrest, he cited prior instances of police harassment—"Every time you see me, you want to mess with me. I'm tired of it. It stops today."<sup>61</sup>—as the reason for his anger. 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.<sup>62</sup> As Meares frames it, "[p]eople obey the law because they think

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<sup>54</sup> See, e.g., Christopher Robbins, *Legal Experts Say Eric Garner Grand Jury Did Exactly What DA Wanted: Nothing*, GOTHAMIST (Dec. 3, 2014, 4:25 PM), [http://gothamist.com/2014/12/03/eric\\_garner\\_verdict\\_jury.php](http://gothamist.com/2014/12/03/eric_garner_verdict_jury.php) [https://perma.cc/5SGM-ZUS8].

<sup>55</sup> See, e.g., The Justice Department, *Tracey Meares (1 of 6): Understanding Deterrence and Legitimacy in Law Enforcement*, YOUTUBE (Apr. 11, 2011) [hereinafter *Meares: Understanding Deterrence*], <https://www.youtube.com/watch?v=pbUKFclIQ5c> [https://perma.cc/G6CD-694T]; TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 56 (1990), [http://www.psych.nyu.edu/tyler/lab/Chapters\\_1-4.pdf](http://www.psych.nyu.edu/tyler/lab/Chapters_1-4.pdf) [https://perma.cc/R2GA-ZZ5X].

<sup>56</sup> TYLER, *supra* note 55, at 56.

<sup>57</sup> Sunshine & Tyler, *supra* note 16, at 513.

<sup>58</sup> *Id.*

<sup>59</sup> See, e.g., Emily Gold & Melissa Bradley, *The Case for Procedural Justice: Fairness as a Crime Prevention Tool*, COMMUNITY POLICING DISPATCH (Sept. 2013), [http://cops.usdoj.gov/html/dispatch/09-2013/fairness\\_as\\_a\\_crime\\_prevention\\_tool.asp](http://cops.usdoj.gov/html/dispatch/09-2013/fairness_as_a_crime_prevention_tool.asp) [https://perma.cc/EWL8-A33V].

<sup>60</sup> *Id.*

<sup>61</sup> Susanna Capelouto, *Eric Garner: The Haunting Last Words of a Dying Man*, CNN (Dec. 8, 2014, 7:31 PM), <http://www.cnn.com/2014/12/04/us/garner-last-words/> [https://perma.cc/7C3R-8R4P].

<sup>62</sup> Andrew V. Papachristos, Tracey L. Meares & Jeffrey Fagan, *Why Do Criminals Obey the Law? The Influence of Legitimacy and Social Networks on Active Gun Offenders* 2, 4 (Yale

it's right, or because they think that government agents have the right to tell them what to do."<sup>63</sup>

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.<sup>64</sup> 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.<sup>65</sup> Some protesters likely cared more about results than procedures.<sup>66</sup> 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.<sup>67</sup> But the perceived rigged nature of the police accountability system has undermined wider faith in the criminal justice system. Slogans such as “indict the system” have been commonplace on social media and at protests, and writers in national media organizations have expressed similar sentiments of systemic overhaul.<sup>68</sup> Outspoken journalist Matt Taibbi has warned that “[w]hen that perception [of police illegitimacy] sinks in, it's not just going to be one Eric Garner deciding that listening to police orders ‘ends today’. It's going to be everyone.”<sup>69</sup> The fear that something as intangible as the perception of legitimacy could so drastically affect law and order might seem far-fetched if the research did not support it so strongly. As Professor David Kennedy, another leading criminal justice researcher and the person in charge of recent federal efforts by the DOJ to rebuild trust between communities and law enforce-

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L. & Econ. Research Paper No. 373, 2009), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1326631](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1326631) [<https://perma.cc/2ELW-ZLCJ>].

<sup>63</sup> Meares: *Understanding Deterrence*, *supra* note 55.

<sup>64</sup> See, e.g., Editorial, CHI. TRIB., *supra* note 18; Kindy & Kelly, *supra* note 12.

<sup>65</sup> See, e.g., Ari Melber, *The Tamir Rice Case Shows How Prosecutors Twist Grand Juries to Protect Police*, WASH. POST (Dec. 29, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/12/29/in-tamir-rices-case-the-grand-jury-process-was-turned-upside-down/> [<https://perma.cc/6ZFK-SPZU>]. Observers began suspecting procedural foul play even before the grand jury had reached its decision. See, e.g., Alex Altman, *Grand Jury Process Raises Questions About a Ferguson Indictment*, TIME (Sept. 18, 2014), <http://time.com/3399022/ferguson-michael-brown-darren-wilson-grand-jury/> [<https://perma.cc/93HL-UGLQ>].

<sup>66</sup> See, e.g., Moni Basu et al., *Fires, Chaos Erupt in Ferguson After Grand Jury Doesn't Indict in Michael Brown Case*, CNN (Nov. 25, 2014, 8:53 AM), <http://www.cnn.com/2014/11/24/justice/ferguson-grand-jury/> [<https://perma.cc/QZT9-6YB9>].

<sup>67</sup> Sunshine & Tyler, *supra* note 16, at 514.

<sup>68</sup> See, e.g., Julie Zauzmer & Clarence Williams, *D.C. Marchers Protest Deaths of Michael Brown, Eric Garner*, WASH. POST (Dec. 3, 2014), [http://www.washingtonpost.com/local/dc-marchers-protest-deaths-of-michael-brown-eric-garner/2014/12/03/7ec3ed1c-7b48-11e4-9a27-6fdb6c12bff8\\_story.html](http://www.washingtonpost.com/local/dc-marchers-protest-deaths-of-michael-brown-eric-garner/2014/12/03/7ec3ed1c-7b48-11e4-9a27-6fdb6c12bff8_story.html) [<https://perma.cc/XWg8-HEQ2>]; Editorial, *A Crisis of Confidence in Prosecutors*, N.Y. TIMES (Dec. 8, 2014), <http://www.nytimes.com/2014/12/09/opinion/a-crisis-of-confidence-in-prosecutors.html> [<https://perma.cc/DH5G-TYHZ>].

<sup>69</sup> Matt Taibbi, *The Police in America Are Becoming Illegitimate*, ROLLING STONE (Dec. 5, 2014), <http://www.rollingstone.com/politics/news/the-police-in-america-are-becoming-illegitimate-20141205> [<https://perma.cc/88WK-88HC>].

ment, has said of the current legitimacy crisis: “[t]he potential for this to be deeply, permanently destructive is . . . very high.”<sup>70</sup>

### III. EXISTING PROPOSALS AND PLANS

Public discourse is already awash with proposals to fix the broken police accountability system.<sup>71</sup> There is an appetite for action, but little agreement as to what kind of action. Radical left-wing commentators have taken to sympathetic national outlets to push for measures as extreme as the abolishment of the police.<sup>72</sup> Most proposals are less absurd and call for various mechanisms of prosecutorial independence and added scrutiny. Yet a similar idea is at their hearts: that local criminal justice institutions are not to be trusted. Whether the proposal is to bring in special state or federal authorities, the most talked-about proposals have thus far largely shut out local officials. And local officials have noticed.<sup>73</sup> An examination of the plans reveals that while most of them rightly identify and address sources of actual and perceived biases, some are unworkable and others would do unintended harm to the goals they are trying to achieve.

#### A. Increased Federal Oversight

With the need for action evident, many lawmakers, journalists, and scholars have already proposed creating additional checks on police action by turning to the law enforcer of last resort: the federal government. The federal government is already active in the field of local police accountability.<sup>74</sup> Federal interventions in the affairs of local police agencies currently take two forms: prosecutions of individual officers and department-wide reforms.

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<sup>70</sup> *The Police-Community Divide*, WNYC (Dec. 12, 2014), <http://www.wnyc.org/story/po-lice-community-divide/> [https://perma.cc/ZZN4-S27W] (David Kennedy, starting at 20:55).

<sup>71</sup> *See, e.g.*, Gutierrez, *supra* note 17; Editorial, CHI. TRIB., *supra* note 18.

<sup>72</sup> Mychal Denzel Smith, *Abolish the Police. Instead, Let's Have Full Social, Economic, and Political Equality*, NATION (Apr. 9, 2015), <http://www.thenation.com/article/abolish-police-instead-lets-have-full-social-economic-and-political-equality/> [https://perma.cc/JVK2-D8XC]; José Martin, *Policing is a Dirty Job, But Nobody's Gotta Do It: 6 Ideas for a Cop-Free World*, ROLLING STONE (Dec. 16, 2014), <http://www.rollingstone.com/politics/news/policing-is-a-dirty-job-but-nobodys-gotta-do-it-6-ideas-for-a-cop-free-world-20141216> [https://perma.cc/3PG7-YS6D]. One wonders who would be left to enforce a law abolishing the position of law enforcer.

<sup>73</sup> *See, e.g.*, Micaela Parker, *Local DAs Decry Cuomo Executive Order*, UTICA OBSERVER-DISPATCH (Aug. 5, 2015, 7:55 AM), <http://www.uticaod.com/article/20150805/NEWS/150809751> [https://perma.cc/4DPB-BGZR].

<sup>74</sup> *See, e.g.*, Joe Domanick, *Police Reform's Best Tool: A Federal Consent Decree*, CRIME REP. (July 15, 2014, 5:29 AM), <http://www.thecrimereport.org/news/articles/2014-07-police-reforms-best-tool-a-federal-consent-decree> [https://perma.cc/N9CC-26BZ].

### 1. “Color of Law” Prosecutions

The first is a civil rights prosecution for deprivation of rights under “color of law.” Essentially, prosecutors charge that a police officer used the inherent powers that come with his position as a law enforcement officer to intentionally deprive a citizen of her rights.<sup>75</sup> Perhaps the most famous “color of law” prosecution was that of four Los Angeles Police Department (“LAPD”) officers for the 1991 beating of Rodney King, an unarmed black man, with batons while he lay on the ground.<sup>76</sup> While the conduct at issue in a federal case is often the same as in a state case—the LAPD officers had been acquitted at their first, state trial by twelve non-black jurors—a federal case is harder to prove. Federal prosecutors must meet the high evidentiary standard of “willful” use of unreasonable force.<sup>77</sup> Federal charges cannot be brought if an officer was merely acting negligently or even recklessly.<sup>78</sup> This enhanced standard limits the scope of federal prosecutions to egregious cases where the illegal intent of the police officer is clear.<sup>79</sup> Even in the King case, the federal judge ruled that only the final few blows of the officers’ beating constituted the civil rights violation.<sup>80</sup>

Commentators have decried the high standard of willful use of unreasonable force as a barrier to effective federal action, and academics and legislators in the 1990s advocated for its removal.<sup>81</sup> The removal of the specific intent requirement—created by the word “willful”—could give federal prosecutors a far greater reach over instances of local police abuse by al-

<sup>75</sup> See 18 U.S.C. § 242 (2012).

<sup>76</sup> See Jim Newton, *Koon, Powell Get 2 1/2 Years in Prison*, L.A. TIMES (Aug. 5, 1993), [http://articles.latimes.com/print/1993-08-05/news/mn-20655\\_1\\_officer-powell](http://articles.latimes.com/print/1993-08-05/news/mn-20655_1_officer-powell) [https://perma.cc/MZ9H-FXKM].

<sup>77</sup> See 18 U.S.C. § 242 (2012); *Screws v. United States*, 325 U.S. 91, 101–02 (1945). *Screws* has its own appalling racial context: Claude Screws was a local sheriff in Georgia who, along with two of his deputies, beat a black man to death for allegedly stealing a tire. *Screws*, 325 U.S. at 92–93. While awaiting the result of the Supreme Court case, the voters of Baker County, Georgia, overwhelmingly re-elected him. Christopher Waldrep, *Mack Claude Screws: Justice in Baker County*, in 100 AMERICANS MAKING CONSTITUTIONAL HISTORY: A BIOGRAPHICAL HISTORY 180, 182 (Melvin I. Urofsky ed. 2004).

<sup>78</sup> Asit S. Panwala, *The Failure of Local and Federal Prosecutors to Curb Police Brutality*, 30 FORDHAM URB. L.J. 639, 646 (2002).

<sup>79</sup> *Id.* Federal prosecutors have declined to go forward with charges against officers in the shooting of Michael Brown, Erik Eckholm & Matt Apuzzo, *Darren Wilson is Cleared of Rights Violation in Ferguson Shooting*, N.Y. TIMES (Mar. 4, 2015), <http://www.nytimes.com/2015/03/05/us/darren-wilson-is-cleared-of-rights-violations-in-ferguson-shooting.html> [https://perma.cc/GP64-XECT], but an investigation of Eric Garner’s death is ongoing, see Matt Zapotosky, *Federal Grand Jury Begins Hearing Evidence in Eric Garner’s Death*, WASH. POST (Feb. 11, 2016), [https://www.washingtonpost.com/world/national-security/federal-grand-jury-begins-hearing-evidence-on-eric-garners-death/2016/02/11/4751b36a-d0f5-11e5-88cd-753e80cd29ad\\_story.html](https://www.washingtonpost.com/world/national-security/federal-grand-jury-begins-hearing-evidence-on-eric-garners-death/2016/02/11/4751b36a-d0f5-11e5-88cd-753e80cd29ad_story.html) [https://perma.cc/J56R-MU8E]. They have not yet officially launched an investigation of the Tamir Rice killing.

<sup>80</sup> Newton, *supra* note 76.

<sup>81</sup> See Paul Hoffman, *The Feds, Lies, And Videotape: The Need For an Effective Federal Role In Controlling Police Abuse In Urban America*, 66 S. CAL. L. REV. 1453, 1491–92, 1522–23 (1992–1993).

lowing them to pursue cases that are less than clear-cut, as police killings cases tend to be. The elimination of the standard, however, would amount to a federal government mandate to replicate, rather than augment, the efforts of local accountability systems. Federal law enforcement is not meant as a wholesale replacement of local efforts: it has neither the resources nor localized knowledge necessary to fully take over the job that local internal affairs investigators are now performing.

Advocates might argue that removing the specific intent requirement would only increase the number of possible federal targets, not necessitate that federal prosecutors actually follow through on each instance of unreasonable force within their expanded purview. But expanding the range of targets could decrease the deterrent effect of federal prosecutions, and therefore their ability to fix the police accountability system. While federal prosecutors of the Criminal Section of the DOJ's Civil Rights Division bring a wealth of resources to bear on each individual case they take, they have a wide variety of other statutes to enforce, including those dealing with human trafficking, hate crimes, and voter intimidation.<sup>82</sup> A huge increase in the number of targets combined with unenhanced resources would mean that the Criminal Section could either take only a vanishingly small percentage of the cases that would be entrusted to it by law, or take more cases but impose long delays on their resolution. Either approach would violate the fundamental principles of deterrence: swiftness and certainty.<sup>83</sup>

Furthermore, public confidence would hardly be boosted by a system that nominally held police accountable, but that brought prosecutions either rarely or extremely slowly. As even Paul Hoffman, a former American Civil Liberties Union attorney and advocate for the removal of specific intent, admitted, "[f]ederal criminal civil rights prosecutions will never be the most significant weapon in controlling abuse."<sup>84</sup> Federal civil rights prosecutions function well in their current role as a reliable, targeted, resource-intensive response to the worst cases of police violence.

## 2. *Consent Decrees*

The second, broader federal tool is holding local police departments accountable as a whole through court-enforced consent decrees and monitors.<sup>85</sup> The 1994 Violent Crime Control and Law Enforcement Act gave the DOJ the authority to investigate the practices and patterns of conduct of

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<sup>82</sup> *Statutes Enforced by the Criminal Section*, U.S. DEP'T OF JUSTICE (Aug. 13, 2015), <https://www.justice.gov/crt/statutes-enforced-criminal-section> [https://perma.cc/99U2-JB6C].

<sup>83</sup> See, e.g., Mark Kleiman, *Thinking About Punishment*, NYU MARRON INST. URB. MGMT. (June 26, 2014), <http://marroninstitute.nyu.edu/content/working-papers/thinking-about-punishment> [https://perma.cc/QW3C-PD4P].

<sup>84</sup> Hoffman, *supra* note 81, at 1523.

<sup>85</sup> See Domanick, *supra* note 74. A consent decree in this context is an agreement between the DOJ and the police department that the department is at fault and that the department agrees to implement reforms overseen by a judge. See *id.* A monitor operates similarly, except

entire police departments, and its use has become far more robust under President Obama's Attorneys General.<sup>86</sup> In 2012 alone, the DOJ entered into consent decrees with the police departments of New Orleans, Louisiana; Warren, Ohio; Seattle, Washington; East Haven, Connecticut; and Puerto Rico.<sup>87</sup> The DOJ has conducted oversight on departments large and small for a range of issues, from systemic use of excessive force<sup>88</sup> to discrimination against Latino residents.<sup>89</sup> When given the time to take root, the approach has borne fruit in the form of more professional police departments better connected to the communities they serve.<sup>90</sup> Even as the Civil Rights Division declined to prosecute Darren Wilson, the Special Litigation Section, the unit responsible for the consent decrees, produced the hard-hitting "Ferguson report" that outlined the Ferguson police department and court system's systematic use of the city's black population as a vehicle for raising revenue through fines and court costs.<sup>91</sup>

Despite the success of the federal litigation section, the federal infrastructure cannot handle, in a timely manner, the type of nationwide effort needed to restore legitimacy. The federal reform process is time- and resource-intensive: in Detroit, a federal monitor was in place for eleven years;<sup>92</sup> in Los Angeles, twelve years.<sup>93</sup> Even with the recent increase in enforcement, the Civil Rights Division has only entered approximately two dozen consent decrees with police departments.<sup>94</sup> There are approximately 6,400 police departments in the United States that have more than ten sworn personnel.<sup>95</sup> Moreover, departmental change will not always mitigate the im-

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that the court appoints an expert as monitor to perform the supervision rather than do it itself. *See id.*

<sup>86</sup> 42 U.S.C. § 14141 (2012); Domanick, *supra* note 74; POLICE EXEC. RES. FORUM, CIVIL RIGHTS INVESTIGATIONS OF LOCAL POLICE: LESSONS LEARNED, 1–5 (2013) [hereinafter PERF], [http://www.policeforum.org/assets/docs/Critical\\_Issues\\_Series/civil%20rights%20investigations%20of%20local%20police%20-%20lessons%20learned%202013.pdf](http://www.policeforum.org/assets/docs/Critical_Issues_Series/civil%20rights%20investigations%20of%20local%20police%20-%20lessons%20learned%202013.pdf) [https://perma.cc/LUR6-A7VY].

<sup>87</sup> PERF, *supra* note 86, at 4.

<sup>88</sup> *See, e.g., id.* at 30.

<sup>89</sup> THOMAS E. PEREZ, CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF EAST HAVEN POLICE DEPARTMENT 1–2 (2011), [http://www.justice.gov/sites/default/files/crt/legacy/2011/12/19/easthaven\\_findletter\\_12-19-11.pdf](http://www.justice.gov/sites/default/files/crt/legacy/2011/12/19/easthaven_findletter_12-19-11.pdf) [https://perma.cc/Y8YL-KVLK].

<sup>90</sup> PERF, *supra* note 86, at 34–35.

<sup>91</sup> *See generally* CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015), [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [https://perma.cc/7LM8-M2R9]; Michael Doyle, *Ferguson Grand Jury Does Not Indict, but Probes Continue in Washington*, MCLATCHYDC (Nov. 24, 2014, 5:25 PM), <http://www.mcclatchydc.com/2014/11/24/247965/ferguson-probes-continue-in-washington.html> [https://perma.cc/Q26D-Y8F5].

<sup>92</sup> *See* Elisha Anderson & Robert Allen, *Judge Lifts Federal Monitor's Oversight of Detroit Police*, DETROIT FREE PRESS (Aug. 25, 2014, 8:12 PM), <http://archive.freep.com/article/20140825/NEWS01/308250153/Detroit-police-consent-agreement> [https://perma.cc/G4GX-JW72].

<sup>93</sup> PERF, *supra* note 86, at 2.

<sup>94</sup> *Id.* at 1; Domanick, *supra* note 74.

<sup>95</sup> *See* Brian A. Reaves, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, LOCAL POLICE DEPARTMENTS 2013: PERSONNEL, POLICIES, AND PRACTICES 3 (2015), <http://www.bjs.gov/content/pub/pdf/lpd13ppp.pdf> [https://perma.cc/NDZ9-AZ45].



pect of individual, immediate cases of perceived injustice. Effective police accountability needs both short- and long-term mechanisms.

### B. Special Prosecutors

Most proposals that have not called for federal intervention seek action instead from some form of independent prosecutor who would take over the responsibilities of local officials for police violence. In New York State, Attorney General Eric Schneiderman asked Governor Andrew Cuomo for direct authority to investigate and prosecute all cases of police killings of unarmed citizens.<sup>96</sup> Months later, Cuomo used an executive order to do just that.<sup>97</sup> A proposed bill in the state legislature aimed to have the same effect but would have given the prosecutorial responsibilities to a new, permanent special prosecutor's office.<sup>98</sup> Such a freestanding police misconduct prosecutor has a precedent in New York. In 1973, in the wake of a series of corruption scandals, a special prosecutor's office was formed to combat police corruption.<sup>99</sup>

The core reason, then and now, for a prosecutor one step removed from the daily grind of street-level law enforcement has been the fear that local prosecutors are too close to police officers to offer the kind of unbiased assessment needed.<sup>100</sup> The problem, in most cases, is not one of blatant corruption, or even necessarily of the Machiavellian calculus by prosecutors that they will need police support in future cases, but of natural human instinct. Police officers and prosecutors at the local level are functional colleagues. As Georgetown Law Professor Paul Butler, a former federal prosecutor, observed, "prosecutors see the same cops over and over, and they bond with them."<sup>101</sup> Appointing a special, independent prosecutor would at the very least reduce that bias.

<sup>96</sup> Letter from Eric T. Schneiderman, Att'y Gen., N.Y. State, to Andrew M. Cuomo, Governor, N.Y. State (Dec. 8, 2014), <http://www.ag.ny.gov/pdfs/Schneiderman-to-Cuomo-12-08-14.pdf> [https://perma.cc/L8RT-UZGM].

<sup>97</sup> 2015 N.Y. Sess. Laws Exec. Order No. 147 (McKinney), available at <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO147.pdf> [https://perma.cc/9U6H-NHS8].

<sup>98</sup> Erin Durkin, *State Pols Propose Bill to Create Special Prosecutor for Police Killing Cases*, N.Y. DAILY NEWS: DAILY POLITICS (Dec. 4, 2014, 2:55 PM), <http://www.nydailynews.com/blogs/dailypolitics/state-pols-propose-special-prosecutor-police-killings-blog-entry-1.2033542> [https://perma.cc/9HP8-CP5N].

<sup>99</sup> Martin Gottlieb, *Decline Seen in Police Corruption Effort*, N.Y. TIMES (June 27, 1992), <http://www.nytimes.com/1992/06/27/nyregion/decline-seen-in-police-corruption-effort.html> [https://perma.cc/W7VH-9Q3A]; Ali Winston, *How Special Prosecutor Can Help Bring Police to Justice*, BLOOMBERGBUSINESS (Dec. 11, 2014, 1:38 PM), <http://www.bloomberg.com/bw/articles/2014-12-11/how-special-prosecutors-can-help-bring-police-to-justice> [https://perma.cc/PB79-WLYG]. The office was eliminated in 1990 because "it had outlived its purpose." Winston, *supra*.

<sup>100</sup> See Editorial, *Policing the Police*, N.Y. TIMES (Oct. 4, 1993), <http://www.nytimes.com/1993/10/04/opinion/policing-the-police.html> [https://perma.cc/3KCS-BBVH].

<sup>101</sup> Paul Butler, *The System Must Counteract Prosecutors' Natural Sympathies for Cops*, N.Y. TIMES (Dec. 4, 2014), <http://www.nytimes.com/roomfordebate/2014/12/04/do-cases-like->

Still, bias has not prevented all effective efforts by local prosecutors to hold police officers accountable for bad acts. In Brooklyn in November 2014—the same month the grand jury in Ferguson declined to indict Wilson—prosecutors charged two officers for assaulting a sixteen-year-old as he tried to surrender.<sup>102</sup> In 2006, the district attorney in Queens indicted three officers for the shooting death of an unarmed black man.<sup>103</sup> In 2003, Manhattan prosecutors convicted an officer of criminally negligent homicide after he killed an unarmed black man in a raid;<sup>104</sup> they have also indicted eight officers for perjury or falsifying paperwork since 2010.<sup>105</sup> Between 2005 and 2011, approximately thirty-one on-duty police officers nationwide were charged with non-negligent manslaughter or murder in gun-related cases.<sup>106</sup> That may seem like a small number given the estimated thousands of police homicides that occurred during that period,<sup>107</sup> but the statistic demonstrates that while the local system of police accountability may be weak, a system does exist. Indeed, it is too early to draw a conclusion, but in the aftermath of the high-profile non-indictments and resulting protests, the rate at which police officers are indicted for killings appears to have greatly increased.<sup>108</sup> Even if it required a national public backlash to prompt action, the local accountability infrastructure has started to churn. But the focus is rightly on legitimacy. As Cuomo pointed out in the aftermath of his executive order, whether prosecutorial bias is real or not is partly beside the point. Even if the bias is merely a perception, then “people don’t have faith, and if they don’t have faith, you have a problem.”<sup>109</sup>

The proposals to simply shift accountability one level up, however, ignore that the police accountability ecosystem is a fragile one where unin-

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eric-garners-require-a-special-prosecutor/the-system-must-counteract-prosecutors-natural-sympathies-for-cops [https://perma.cc/GGH3-7FMY].

<sup>102</sup> Stephanie Clifford, *2 New York City Officers Charged with Assaulting Teenager*, N.Y. TIMES (Nov. 5, 2014), <http://www.nytimes.com/2014/11/06/nyregion/2-new-york-city-officers-charged-with-assaulting-teenager.html> [https://perma.cc/57W2-CAQY].

<sup>103</sup> Michael Wilson, *3 Detectives Acquitted in Bell Shooting*, N.Y. TIMES (Apr. 26, 2008), <http://www.nytimes.com/2008/04/26/nyregion/26BELL.html?pagewanted=all> [https://perma.cc/ZV4X-G3ZQ]. The trial judge acquitted them on all charges. *Id.*

<sup>104</sup> Michael Brick & Nicholas Confessore, *Suit Is Settled in 2003 Killing of Immigrant*, N.Y. TIMES (July 21, 2006), <http://www.nytimes.com/2006/07/21/nyregion/21zongo.html> [https://perma.cc/59VT-2BXW].

<sup>105</sup> Press Release, N.Y. Cty. Dist. Attorney’s Office, *DA Vance Announces Indictment of NYPD Detective for Lying Under Oath About Drug Arrests* (Apr. 30, 2014), <http://manhattanda.org/da-vance-announces-indictment-nypd-detective-lying-under-oath-about-drug-arrests> [https://perma.cc/8JNB-LB3Q].

<sup>106</sup> Philip Stinson, *Police Crime Involving Firearms*, BOWLING GREEN ST. U.: POLICE INTEGRITY LOST (Aug. 20, 2014, 11:53 AM), <https://blogs.bgsu.edu/pilproject/2014/08/20/police-crime-involving-firearms/> [https://perma.cc/6WS3-PC9W].

<sup>107</sup> See Kindy & Kelly, *supra* note 12.

<sup>108</sup> Conor Friedersdorf, *The Number of Cops Indicted for Murder Spikes Upward*, ATLANTIC (Aug. 19, 2015), <http://www.theatlantic.com/politics/archive/2015/08/the-shocking-number-of-cops-recently-indicted-for-murder/401732/> [https://perma.cc/88XE-85TM].

<sup>109</sup> Josefa Velasquez, *Amid Confusion, Cuomo Seeks to Clarify Executive Order*, POLITICO N.Y. (Sept. 4, 2015, 5:53 AM), <http://www.capitalnewyork.com/article/albany/2015/09/8575900/amid-confusion-cuomo-seeks-clarify-executive-order> [https://perma.cc/U4C9-KP8P].

tended consequences are easy to trigger. Splitting prosecutorial oversight of the police—between police killings and all other police misconduct cases—runs the serious risk of undermining efforts on both sides of the split. First, the creation of a new, permanent special prosecutor risks undermining existing local systems of accountability and stunting their potential growth. The proposals essentially give up hope on local officials when it comes to police killings. Yet they still leave district attorneys with authority over the vast majority of police internal affairs matters. Leaving them that authority while depriving them of the power to investigate and prosecute the most serious offenses—the killing of civilians—would seem to ensure that local efforts never achieve full form. Once the state takes over, in short order there will be no local veteran prosecutors with experience on police killings. The relevant institutional memory of the organization most knowledgeable about local police practices would soon be effectively wiped out. And with the power to investigate the vast majority of police misconduct cases still in local hands, the new special prosecutor would be hard pressed to develop a similar knowledge base. Even within the category of police killings, it may be difficult to create abstract rules of jurisdiction that are easy to apply to the complex facts of actual cases. For example, Cuomo’s executive order is already generating much confusion and uncertainty because specific cases have not fallen neatly into the broad categories set up by the order.<sup>110</sup> If applied nationwide, the messy business of dividing responsibility risks tangling the lines of police accountability and giving prosecutors another tool to dodge responsibility amid the confusion.

Second, disempowering local prosecutors effectively disempowers local communities by choking off their political recourse. Local district attorneys have rightly described the proposals for a special prosecutor to wholly take over their duties for police killings as a power grab away from the people who elected them.<sup>111</sup> “The people of Brooklyn have voted for their District Attorney to keep them safe from all crimes, including those of police brutality,” Brooklyn District Attorney Kenneth Thompson argued.<sup>112</sup> Thompson leads the office that, amidst the news of high-profile non-indictment after non-indictment, indicted three NYPD officers for assault, and conducted a grand jury investigation of another police killing of an unarmed black man that later led to a manslaughter conviction.<sup>113</sup> The former federal

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<sup>110</sup> See *id.*

<sup>111</sup> See, e.g., Noah Remnick, *Cuomo’s Order for Special Prosecutor in Police Deaths is Criticized*, N.Y. TIMES (July 8, 2015), <http://www.nytimes.com/2015/07/09/nyregion/cuomo-order-for-special-prosecutor-in-police-deaths-is-criticized.html> [<https://perma.cc/VZ72-2AD5>].

<sup>112</sup> Harry Bruinius, *In Wake of Garner Case, New Plan to Investigate Cops Who Kill Takes Shape*, CHRISTIAN SCI. MONITOR (Dec. 9, 2014), <http://www.csmonitor.com/USA/Justice/2014/1209/In-wake-of-Garner-case-new-plan-to-investigate-cops-who-kill-takes-shape-video> [<https://perma.cc/Z86S-GB4Y>].

<sup>113</sup> Robert Lewis, *DA Says No Politics in Police Prosecutions*, WNYC (Feb. 19, 2015), <http://www.wnyc.org/story/da-says-no-politics-police-prosecutions/> [<https://perma.cc/9QHL->

prosecutor and criminal defense lawyer worked hard to create the public impression that he will, if warranted, conduct fair investigations that pull no punches against the police.<sup>114</sup> A blanket special prosecutor law cuts far too broadly: the proposals would strip Thompson of authority just as readily as they would a prosecutor seen as outspokenly biased in favor of officers.

Local communities would also lose their direct political recourse if they are unsatisfied with their prosecutor's approach towards police killings. Local prosecutors in the United States are overwhelmingly elected at the local level.<sup>115</sup> Political mobilization against statewide officials would prove far more difficult for a particular community than it would against a local office-holder. Former veteran New York and California prosecutor Asit Panwala has also noted that holding police officers accountable for abuses is often a matter of political will.<sup>116</sup> The press and the public will be better able—and have already begun<sup>117</sup>—to exhibit that will if the official that they must target or influence is directly accountable to local voters.<sup>118</sup> Local control is a valuable commodity: critics of the modern wave of state-appointed emergency managers—predominantly in black communities such as Flint, Michigan—could be justifiably shocked to see activists press for the surrender of local control of criminal justice in favor of state-appointed special prosecutors, over cases predominantly in black communities.<sup>119</sup>

The anti-local proposals also ignore that, once local residents lose power, the appointment of special prosecutors can cut both ways. State governors and attorneys general are hardly apolitical. In 1996, New York Gover-

VSVU]; Sarah Maslin Nir, *Officer Peter Liang Convicted in Fatal Shooting of Akai Gurley in Brooklyn*, N.Y. TIMES (Feb. 11, 2016), [http://www.nytimes.com/2016/02/12/nyregion/officer-peter-liang-convicted-in-fatal-shooting-of-akai-gurley-in-brooklyn.html?\\_r=0](http://www.nytimes.com/2016/02/12/nyregion/officer-peter-liang-convicted-in-fatal-shooting-of-akai-gurley-in-brooklyn.html?_r=0) [https://perma.cc/WA8H-ABA9].

<sup>114</sup> See Stephanie Clifford, *A Police Killing Puts Heavy Expectations on a Prosecutor*, N.Y. TIMES (Dec. 9, 2014), <http://www.nytimes.com/2014/12/10/nyregion/high-expectations-for-brooklyn-prosecutor-in-handling-of-fatal-police-shooting.html?src=recg> [https://perma.cc/BDL3-UMD8].

<sup>115</sup> See STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS, 2005, at 2 (July 2006), <http://www.bjs.gov/content/pub/pdf/psc05.pdf> [https://perma.cc/D9UY-L23S].

<sup>116</sup> Cf. Panwala, *supra* note 78, at 659–60 (discussing the difficulties of gathering political will to allocate resources to investigations of police abuse).

<sup>117</sup> Brandon Ellington Patterson, *This Chicago Election Hinges on a "Black Lives" Case—and It's Not the Only One*, MOTHER JONES (Feb. 17, 2016, 7:00 AM), <http://www.motherjones.com/politics/2016/02/chicago-cook-county-states-attorney-race-anita-alvarez-kim-foxx-black-lives-matter> [https://perma.cc/QR88-8MR8].

<sup>118</sup> Panwala, *supra* note 78, at 655–58.

<sup>119</sup> See Julie Bosman & Monica Davey, *Anger in Michigan Over Appointing Emergency Managers*, N.Y. TIMES (Jan. 22, 2016), <http://www.nytimes.com/2016/01/23/us/anger-in-michigan-over-appointing-emergency-managers.html> [https://perma.cc/V245-9A9E]. But see Joseph Berger, *The Odd Circle Of School Control; 'Power to the People' in 1960's is Now Seen as 'Amateur Hour'*, N.Y. TIMES (June 16, 2002), <http://www.nytimes.com/2002/06/16/nyregion/odd-circle-school-control-power-people-1960-s-now-seen-amateur-hour.html?pagewanted=all> [https://perma.cc/7X92-9SPG] (noting that the New York City communities that sought local school control in the 1960s were happy to re-centralize power when the management problems of a de-centralized system became apparent).

nor George Pataki used the appointment of a special prosecutor to take prosecutorial power away from the Bronx District Attorney because the governor felt he was not pro-police enough to try a cop-killer.<sup>120</sup> A state attorney general might be far more publically pro-police than a specific district attorney. Would legislators then pass a bill to send the case back to the locals? Police killings will always be complex and controversial. A more thought-out solution is needed to restore public confidence without risking long-term effectiveness and sapping local communities of their political power.

### C. California's Public Hearings

California has taken a separate course and chosen to reform the police accountability system by replacing secret grand jury proceedings with public, adversarial hearings for some police killing cases.<sup>121</sup> The policy stands out because it does not disempower local prosecutors, but instead punctures the grand jury's veil of secrecy that many had criticized in the wake of the Ferguson and Staten Island deaths.<sup>122</sup> The hope is that prosecutors will have a harder time using the grand jury as political cover when they must explain their decision in a public forum.<sup>123</sup> Still, as even supporters of the policy change have noted, the policy's impact is partly blunted because it does not require such hearings in all cases of killing by police.<sup>124</sup> And while California prosecutors will no longer have grand jurors as a screen to cover for inaction, neither will their decisions be reviewed by any higher authority, apart from an unlikely federal review. Essentially, if a California prosecutor declines to bring charges against a police officer, an angry public will know who to blame, but will be without further recourse to obtain justice in that case. The proposal outlined below is superior to both the California proposal and the others outlined above, because it mandates that the actions of local prosecutors will be scrutinized both by an independent authority and by members of the public.

## IV. POLICY PROPOSAL: LOCAL AUTHORITY; INDEPENDENT, PUBLIC OVERSIGHT

A successful police accountability framework would marshal the benefits that each layer of governance offers. The basic structure would be a clear

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<sup>120</sup> Leonard Levitt, *Don't Count on the Feds*, NYPD CONFIDENTIAL (Dec. 8, 2014), <http://nypdconfidential.com/columns/2014/141208.html> [https://perma.cc/E9KF-UN86].

<sup>121</sup> S.B. 227, 2015–2016 Leg., Reg. Sess. (Cal. 2015); Caren Morrison, *How the Justice System Fails Us After Police Shootings*, NEW REPUBLIC (Dec. 10, 2015), <https://newrepublic.com/article/125489/justice-system-fails-us-police-shootings> [https://perma.cc/E4ZE-95FE].

<sup>122</sup> Melanie Mason, *Gov. Brown Signs Law Barring Grand Juries in Police Deadly Force Cases*, L.A. TIMES (Aug. 11, 2015, 2:36 PM), <http://www.latimes.com/local/political/la-me-pc-brown-grand-juries-20150811-story.html> [https://perma.cc/UW7H-NFR2].

<sup>123</sup> Morrison, *supra* note 121.

<sup>124</sup> *Id.*

chain of police accountability that starts and focuses on local prosecutors, but that runs from them to an independent prosecutor and then finally to the grand jury itself. The law implementing such a framework could emerge either from a state legislature or, depending on state law, from the executive order of a state governor. The substance could remain the same whether its origin was a law or an order—there is ample precedent for both.<sup>125</sup> The exact language used and authorities drawn upon would necessarily differ because of the complex and varied differences between the criminal justice systems of each of the fifty states. In some states, the precise mechanism establishing the new system could even involve the judicial branch in its implementation.<sup>126</sup> But a model statute for a state legislature could look something like the following:

Section 1: The Governor of the State of One-of-the-Fifty-States is hereby required to appoint a special prosecutor in all cases in which a police officer of said state is the proximate cause of the death of a civilian, and in which the prosecutor in whose local jurisdiction said incident occurred has concluded the investigation of the incident without an indictment being returned. The special prosecutor shall have the full authority to re-investigate the case to his or her satisfaction, using investigative personnel of his or her choosing, and to prosecute the case if warranted. The special prosecutor shall not be an active or former law enforcement official of the local jurisdiction in which the incident occurred.

Section 2: Whatever the findings of the investigation, the special prosecutor shall be required to present the resulting evidence to a grand jury, whose members shall vote on the return of an indictment. In the event of an indictment, the special prosecutor shall prosecute the case. In the event of a no true bill, the jurisdiction and authority of the special prosecutor over the case shall terminate.

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<sup>125</sup> See, e.g., MICH. COMP. LAWS § 49.160 (2015) (outlining permissible special prosecutor appointment procedures); H.B. 291, 99th Gen. Assemb., Reg. Sess. (Ill. 2015) (describing a proposed state legislature bill to appoint a special prosecutor for all officer-involved felonies); 2015 N.Y. Sess. Laws Exec. Order No. 147, *supra* note 97; Maurice H. Nadjari, *New York State's Office of the Special Prosecutor: A Creation Born of Necessity*, 2 HOFSTRA L. REV. 97, 97 (1974), <http://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=2482&context=hlr> [<https://perma.cc/3XWU-A57C>] (detailing the creation of a different kind of state special prosecutor); Michael Dresser, *House Panel Turns Down Bill Letting State Prosecutor Probe Police Killings*, BALTIMORE SUN: MD. POLITICS BLOG (Mar. 19, 2015, 12:55 PM), <http://www.baltimoresun.com/news/maryland/politics/blog/bal-house-panel-turns-down-bill-having-state-prosecutor-probe-police-killings-20150319-story.html> [<https://perma.cc/AS9P-3XM7>]; Press Release, Am. Civil Liberties Union, *Groundbreaking Police Accountability Bill Passes* (June 29, 2015), <http://www.aclut.org/updates/groundbreaking-police-accountability-bill-passes/> [<https://perma.cc/8ZJZ-AQ9T>].

<sup>126</sup> See, e.g., WIS. STAT. § 978.05(8) (2015) (detailing procedures for appointment of special prosecutors by state courts).

Section 3: The Governor shall have the authority to re-appoint a special prosecutor to a case that has resulted in a no true bill in the event of the discovery of new, substantial evidence in the case.

Whatever the precise language used, the law or order should establish two primary accountability mechanisms and omit the one currently most in vogue. The omission is critical: the framework would not wholly strip local prosecutors of the power to prosecute police killings within their jurisdiction. This is the status quo, so implementation would require no legislative language at all. In the event of a non-indictment in a police killing case, however, the law would establish a layer of independent review of the local proceedings—either in the form of a statewide prosecutor, or simply one from a different jurisdiction. That official would have the power to investigate the killing and present evidence to a grand jury and if necessary prosecute the case. Finally, the actions of that official would in turn be checked by the members of the grand jury he impanels. Unlike the local prosecutor, the independent prosecutor would be required to present his evidence to a grand jury, which would have the final opportunity to indict if it found probable cause from the evidence presented. These three layers of accountability are examined in greater detail below.

#### A. *Local Authority First*

The first layer is local. For both the political accountability and pragmatic reasons outlined above, local officials should retain primary control over crime in their jurisdiction, even crime committed by police officers. No other level of government has the extensive knowledge of police operations and personnel and electoral-driven need to respond to the pulse of the community that make local prosecutors ultimately better positioned to handle internal police investigations as a whole. This “first crack” capacity to investigate all police killings—against armed or unarmed victims—would incentivize local prosecutors to continue on their current track of developing experienced personnel and procedures that can apply a high level of scrutiny to law enforcement.<sup>127</sup> Local prosecutors could then bring the case before a grand jury if they felt it warranted by their investigation, using either the typical, aggressive, selective approach or the atypical, neutral, comprehensive approach that McCulloch chose in the Ferguson case. The choice would remain entirely theirs. Local voters have an electoral recourse if they do not agree with a given approach.

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<sup>127</sup> See, e.g., Friedersdorf, *supra* note 108 (noting recent increase in number of charges against police officers).

### B. *Special Prosecutor*

The second layer is the special prosecutor. If local authorities decline to bring the case to a grand jury, or even if they bring the case but the jury declines to indict,<sup>128</sup> then a second level of an outside prosecutor would be triggered. The prosecutor could be a state-level official or an official from a local jurisdiction that covers a different police department. Politics by necessity would remain peripherally involved: an elected official of some kind, whether it be a mayor, county commissioner, or governor, would appoint the special prosecutor. One could imagine a state that allows a judicial official to appoint the special prosecutor, but even that official would be tied to politics by election or appointment, depending on the state. No prosecution is perfect.

As mentioned, depending on the state, the special prosecutor's jurisdiction could be the creation of either an executive order or the passage of a law by the legislature—the latter would better embed the changes by ensuring that the new framework survives the election of a new governor. This second layer of prosecution would step in to examine the case and make an independent determination as to whether charges are appropriate.

The key difference between this system and the existing proposals is that it functions as a check, rather than as a replacement, on local prosecutors. Functionally, the system would institute the enhanced federal model that some have advocated, but on a far more workable scale.<sup>129</sup> An outside body would have oversight power and the ability to step in when it feels a lower body has erred in failing to indict or to seek an indictment. There would not be the specific intent requirement that, rightly, restrains the reach of federal prosecutors, and the special prosecutor would have power over all police killings, justified, accidental, or otherwise. Further, the special prosecutor system avoids assigning an unnaturally broad oversight role to the federal government, which is unsuited for the task. The local prosecutors—the potential Pontius Pilates—maintain their autonomy, but thanks to the special prosecutor, they do not have the final say.

### C. *The People's Final Check*

And neither does the special prosecutor. If the special prosecutor concurs with the judgment of the local prosecutor, or local grand jury, that an indictment is not warranted, then, as the final democratic check on police actions, she still would be required by the new accountability framework to lay out the full facts of the case, comprehensively, to a grand jury and honor

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<sup>128</sup> See *United States v. Williams*, 504 U.S. 36, 49 (1992) (“The Double Jeopardy Clause of the Fifth Amendment does not bar a grand jury from returning an indictment when a prior grand jury has refused to do so.”).

<sup>129</sup> See generally Hoffman, *supra* note 81.



its decision.<sup>130</sup> Some might cry ethical foul: the American Bar Association mandates that prosecutors “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”<sup>131</sup> But the special prosecutor is free to present the facts to the grand jurors without a recommendation for or against prosecution, and then to abide by its decision if she finds that the charge was supported by probable cause—no one has suggested that the Ferguson or Cleveland prosecutors would have committed an ethical foul had the grand jury indicted despite their lack of recommendation, and they went ahead and prosecuted the case.<sup>132</sup> Nor are double-jeopardy rules an obstacle, as the Supreme Court has held that they do not apply to grand jury proceedings.<sup>133</sup>

While the legal obstacles are illusory, the benefits would be real. Giving the public, in the form of a mandatory grand jury triggered by lack of local indictment, the ultimate veto power on prosecutorial inaction would boost legitimacy. Some academics have advocated for, and a few states have adopted in some form, a more robust way for citizens to independently approach grand juries with their complaints in order to combat “the symbiotic relationship between police and public prosecutors.”<sup>134</sup> The democratic backstop approach outlined above takes inspiration from those proposals to ensure that a grand jury hears the facts of a police killing case no matter the biases of officials at any level. How often grand jurors would indict in practice after two prosecutors have declined to recommend that course is not the crucial point—what is crucial for rebuilding the system’s legitimacy is the fact that they could. On top of this new state and local-driven system, no changes are needed to maintain the prospect of a federal investigation and indictment as a looming intervention for cases of willful police abuse. At each successive stage, prosecutors would be given the chance to act, and would be incentivized to defend their turf by conducting sufficiently thorough investigations so that other bodies could do nothing else but confirm their findings.

Police unions would likely retort that the new system would make police officers vulnerable to the whims of politics and disincentivize aggressive policing by opening them up to the repeated chance of prosecution. The President of the New York State Troopers Police Benevolent Association has already described Cuomo’s police accountability changes as establishing a system by which police officers “would be subjected to different protocols

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<sup>130</sup> As with all grand jury proceedings, this would happen behind closed doors between just the prosecutor and the grand jurors.

<sup>131</sup> MODEL RULES OF PROF’L CONDUCT r. 3.8(a) (AM. BAR ASS’N 1983).

<sup>132</sup> In other words, a prosecutor cannot lack for probable cause if a grand jury has just told him that there is probable cause.

<sup>133</sup> *Williams*, 504 U.S. at 49.

<sup>134</sup> 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, 309–52, 356 (1994).

than any other citizen” and subject to “a double jeopardy situation.”<sup>135</sup> But the unique powers that the public grants to officers of the law do necessitate a unique focus on holding them accountable when they stray from their mission. And the built-in advantages afforded police officers would still remain: the broad standard of reasonableness<sup>136</sup> and the natural sympathy and deference of most citizens towards law enforcement. Of course, an overzealous prosecutor would have the ability to railroad charges through a grand jury—but that is nothing new. The current defenses to government overreach would remain for unjustly indicted police officers: judges, juries, and trials, and all the powerful legal tools, such as cross-examination, that accompany them. The long-term interests of police officers and civilians alike depend on preserving the social bonds formed by legitimacy.

## V. CONCLUSION

There are no troops in the streets. Several of our cities have burned,<sup>137</sup> but the sense of injustice has not yet given rise to the type of conflagration that this country experienced in 1968. Nonetheless, today, the country’s institutions of law and order again face a crisis of legitimacy. The public climate and the flaws in the system demand action to preserve the legitimacy of American law enforcement and criminal justice. Much of the recent anger has been levelled against local prosecutors and, unsurprisingly, most proposals for reform work to cut those officials out of the police accountability process. But society must not abandon all faith in the local agents of the justice system. Instead, reforms must incentivize them to live up to their full potential as checks on police abuses, directly accountable to the public. The successive, multi-tiered model offers the best chance to do so, by increasing the level of scrutiny and oversight without prying away their powers. Not every local district attorney is a Pontius Pilate looking for a way to duck responsibility. But having additional layers ready on standby ensures that even if the worst instincts or biases of a local official surface, there are standard, automatic channels of recourse that the public can observe, comprehend, and respect.

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<sup>135</sup> Lou Michel, *Troopers Union Opposes Cuomo’s Proposed Changes to Grand Jury System*, BUFFALO NEWS (Jan. 29, 2015, 5:02 PM), <http://www.buffalonews.com/city-region/troopers-union-opposes-cuomos-proposed-changes-to-grand-jury-system-20150129> [https://perma.cc/26NM-S7SD].

<sup>136</sup> *Graham v. Connor*, 490 U.S. 386, 396 (1989).

<sup>137</sup> See, e.g., *Ferguson Riots: Ruling Sparks Night of Violence*, BBC (Nov. 25, 2014), <http://www.bbc.com/news/world-us-canada-30190224> [https://perma.cc/YKR2-67PD]; Sabrina Toppa, *The Baltimore Riots Cost an Estimated \$9 Million in Damages*, TIME (May 14, 2015), <http://time.com/3858181/baltimore-riots-damages-businesses-homes-freddie-gray/> [https://perma.cc/3MWB-KRR6].