

# HOW THE GRAND JURY PROCESS DIMINISHES BLACK LIVES BY SUPPORTING POLICE BRUTALITY AND RACISM

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Charleena Lyles, Shukri Ali, Deborah Danner, Rekia Boyd, Aiyana Stanley-Jones, Philando Castile, Freddie Gray, Michael Brown, Eric Garner, Tamir Rice, Mya Hall, Sandra Bland, Alton Sterling, Stephon Clark, George Floyd, and Breonna Taylor.<sup>1</sup>

In America, the harsh reality is that the problem of police brutality<sup>2</sup> against Black people goes far beyond these highly publicized incidents. For years there has been a call for justice when police officers are not held accountable for causing the serious injury or death of Black men, women, and children.<sup>3</sup> Throughout history, the responses from the impacted communities have included marches, boycotts, and protests.<sup>4</sup> However, police brutality against Black people continues to be an issue in this so-called “post-civil rights era.”<sup>5</sup>

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<sup>1</sup> These names, to name a few, belong to Black lives that have been unjustly taken by police officers. KHIARA M. BRIDGES, *CRITICAL RACE THEORY: A PRIMER* 3-4 (2019).

<sup>2</sup> April Walker, *Racial Profiling-Separate and Unequal Keeping the Minorities in Line-The Role of Law Enforcement in America*, 23 ST. THOMAS L. REV. 579-80 (2011) (defining police brutality as “the use of excessive physical force or verbal assault and psychological intimidation” and it is “one of the most serious, enduring, and divisive human rights violations in the United States.”).

<sup>3</sup> Damien Cave & Rochelle Oliver, *The Raw Videos That Have Sparked Outrage Over Police Treatment of Blacks*, N.Y. TIMES (Oct. 4, 2016), <https://www.nytimes.com/interactive/2015/07/30/us/police-videos-race.html>; Drew Harwell, *How the Horror of Police Violence Against Blacks Was Shared in the Years Before Facebook*, WASH. POST: THE SWITCH (July 7, 2016), <https://www.washingtonpost.com/news/the-switch/wp/2016/07/07/how-the-horror-of-police-violence-against-blacks-was-shared-in-the-years-before-facebook>.

<sup>4</sup> See generally ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE* 67 (1984) (“[N]onviolence became a disciplined form of mass struggle because it was systematically developed through the organized structures of the movement.”); Frederick C. Harris, *The Next Civil Rights Movement?*, DISSENT, 2015, at 34, 38 (describing protest tactics used by the civil rights movement and Black Lives Matter); Elahe Izadi, *Black Lives Matter and America’s Long History of Resisting Civil Rights Protesters*, WASH. POST, Apr. 19, 2016, <https://www.washingtonpost.com/news/the-fix/wp/2016/04/19/black-lives-matters-and-americas-long-history-of-resisting-civil-rights-protesters>.

<sup>5</sup> See Stephan A. Schwartz, *Police Brutality and Racism in America*, US NAT’L LIBR. OF MED. NAT’L INST. OF HEALTH (July 2, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7331505/> (stating “[t]he rate of fatal police shootings among Black Americans was much higher than that for any other ethnicity, standing at 30 fatal shootings per million of the population as of June 2020.”).

Despite the fact Black people comprise only 13 percent of this country's population,<sup>6</sup> police brutality has disproportionately impacted Black lives for a long time in America.

According to data between 2013 and 2018, there were a total of 6,176 fatal police shootings in America.<sup>7</sup> Of the 5,700 shootings in which the race of the victim was known, roughly 28 percent involved Black victims, which represents more than twice the proportion of Blacks in the overall population.<sup>8</sup> And again, in 2020 and 2021, the rate of which Black Americans were killed by police officers was more than twice as high as the rate for White Americans killed by police officers.<sup>9</sup>

Not only are Black lives being unjustly taken by police officers, but there is also little to no accountability and no justice for the victims or their families. There are very few instances where police officers are charged for the deaths in these cases, let alone held accountable for their actions.<sup>10</sup> In recent years, this categorical indifference for Black lives has led to the creation of the Black Lives Matter ("BLM")<sup>11</sup> movement and subsequent groups who bring attention to these tragedies that plague American society. This movement and others are effects of the

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<sup>6</sup> *Race Data Tables*, US CENSUS BUREAU, <https://www.census.gov/topics/population/race/data/tables.html> (last visited Feb. 22, 2022).

<sup>7</sup> *Mapping Police Violence*, MAPPING POLICE VIOLENCE PROJECT, <https://mappingpoliceviolence.org> (last visited Feb. 23, 2022).

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

<sup>9</sup> *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database> (last visited Feb. 23, 2022).

<sup>10</sup> The Los Angeles County District Attorney's Office publishes its decisions to decline to prosecute officers for killing suspects. As of April 2016, it had not charged a single officer in the hundreds of police killings since 2000. Other jurisdictions have similar investigatory policies when it comes to police fatalities. *See, e.g., Decision Memos*, CLARK CITY DIST. ATT'Y OFF., [http://www.clarkcountynv.gov/Depts/district\\_attorney/Pages/DecisionMemos.aspx](http://www.clarkcountynv.gov/Depts/district_attorney/Pages/DecisionMemos.aspx) (last visited Feb. 23, 2022); Matt Ferner, *Los Angeles Law Enforcement Officers Kill About One Person a Week*, HUFFINGTON POST (Sept. 16, 2014, 8:59 PM), <http://www.huffingtonpost.com/2014/09/16/nearly-600-people-have-been-5831042.html> (noting that "nearly 600" people were killed by police since 2000); 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/>.

<sup>11</sup> BLM advocates for complete reform in policing policies, as well as true accountability for police departments that systematically violate the rights of Black individuals. *See About the Black Lives Matter Network*, BLACK LIVES MATTER, <http://blacklivesmatter.com/about> (last visited Feb. 23, 2022).

continued failure of this country’s legislature and judiciary to enact and apply laws that effectively address the racially driven violence that police officers commit against Black people.

While there have been some changes made to the ways police officers are trained to handle encounters with Black men, women, and children, like implicit bias training and the use of body cameras, the problem remains the same—Black lives are still being taken at disproportionate rates with no repercussions.<sup>12</sup> Many would argue that the answers lie in systemic bias that favors police officers, from the way these cases are investigated to the skewed legal standards governing police brutality.<sup>13</sup> But, in order to properly understand police brutality today, it must be viewed through a racial lens, because in America, “extinguishing [B]lack lives is legally, constitutionally, and culturally permissible.”<sup>14</sup> To try and address police brutality in another way would lead us to the same flawed conclusions and failed remedies.

When cases of police brutality occur, the State and/or prosecutor has three options: (1) present evidence to the grand jury and seek an indictment; (2) charge the officer without a grand jury indictment; or (3) conclude the killing was justified based on the police officer’s report and decide not to pursue any criminal charges. This Note will focus on the second option, the grand jury process. There is a famous legal saying, that a prosecutor can get a grand jury to “indict a sandwich” – meaning, indict *anyone*.<sup>15</sup> Statistics on federal grand jury indictments show the

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<sup>12</sup> Garret Felber, *What Black Lives Matter Means Beyond Policing Reform*, U.S. NEWS (July 12, 2016, 10:04 AM), <https://www.usnews.com/news/articles/2016-07-12/whatblack-lives-matter-means-beyond-policing-reform>; see also sources cited *supra* note 10.

<sup>13</sup> Terry Gilbert et al., *Why Grand Juries So Rarely Indict In Police Shootings*, CLEVELAND (Sept. 29, 2017), [https://www.cleveland.com/opinion/2017/09/why\\_grand\\_juries\\_so\\_rarely\\_ind.html](https://www.cleveland.com/opinion/2017/09/why_grand_juries_so_rarely_ind.html).

<sup>14</sup> Zach Newman, Note, “*Hands Up, Don’t Shoot*”: *Policing, Fatal Force, and Equal Protection in the Age of Colorblindness*, 43 HASTINGS CONST. L.Q. 117, 119 (2015).

<sup>15</sup> “*Indict a Ham Sandwich*,” THE BIG APPLE, [https://www.barrypopik.com/index.php/new\\_york\\_city/entry/indict\\_a\\_ham\\_sandwich](https://www.barrypopik.com/index.php/new_york_city/entry/indict_a_ham_sandwich) (last visited Feb. 23, 2022).

famous legal saying is not far from reality.<sup>16</sup> Yet despite this notion of indictments being extremely easy to obtain, grand juries almost never indict in police brutality cases.<sup>17</sup>

This disparity, coupled with the ever-growing number of cases of police brutality against Black victims, has made the topic of police brutality very popular in recent years. Scholarly critiques of police brutality tend to focus on the criminal justice system, the actions of police officers, police reform, and how the police are typically prosecuted.<sup>18</sup> This Note instead focuses on the grand jury process, the ways in which a prosecutor's use of the grand jury can further deny justice to the victims of police brutality, and how racism fuels the denial of justice.

This Note proceeds in three parts and argues that in order to adequately bring justice and healing to the Black community and victims of police brutality, grand juries should not be used in cases involving police officers and Black victims, because the grand jury process can never be free from prejudice or racism. Part I of this Note examines the grand jury, the history, the typical process, and the problems with the grand jury. Part II compares the typical grand jury process with those cases involving police officers and Black victims, focusing on the cases of Tamir Rice, Michael Brown, Eric Garner, and Breonna Taylor. Finally, Part III analyzes alternatives to the use of the grand jury in cases of police brutality and Black victims.

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<sup>16</sup> See Bill Hutchinson, *Breonna Taylor Case Sparks Renewed Scrutiny of Grand Juries in Police Misconduct Cases*, ABC NEWS (Oct. 9, 2020), <https://abcnews.go.com/US/breonna-taylor-case-sparks-renewed-scrutiny-grand-juries/story>. (stating “[i]n 2010, out of the 162,000 federal cases prosecuted that year, grand juries declined to indict in only eleven cases.”).

<sup>17</sup> See sources cited *supra* note 10.

<sup>18</sup> See Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745 (2018); Victoria Knott, Comment, *Reconsidering the Use of the Grand Jury: Eliminating Prosecutorial Discretion To Indict Law Enforcement Officers*, 38 T. JEFFERSON L. REV. 202 (2016); Corinthia A. Carter, *Police Brutality, the Law & Today's Social Justice Movement: How the Lack of Police Accountability has Fueled #Hashtag Activism*, 20 CUNY L. REV. 521 (2017); Dayna Vadala, Student Thesis, *Prosecuting the Police: How America's Criminal Justice System Has Failed Breonna Taylor and Other People of Color*, TRINITY COLL. DIGIT. REPOSITORY 1 (2021) [https://digitalrepository.trincoll.edu/theses?utm\\_source=digitalrepository.trincoll.edu%2Ftheses%2F926&utm\\_medium=PDF&utm\\_campaign=PDFCoverPages](https://digitalrepository.trincoll.edu/theses?utm_source=digitalrepository.trincoll.edu%2Ftheses%2F926&utm_medium=PDF&utm_campaign=PDFCoverPages).

## I. THE GRAND JURY

The grand jury originated in 12th century England and was established in America in 1635, with its process cloaked in secrecy.<sup>19</sup> The Fifth Amendment of the United States Constitution provides for the right to a grand jury in a federal criminal case.<sup>20</sup> The right to an indictment by a grand jury is one of the few rights that have not been made applicable to the states through the Fourteenth Amendment.<sup>21</sup> The use of a grand jury is optional in many states, and the prosecutor decides in private whether to seek an indictment.<sup>22</sup> The two main purposes of the grand jury are: (1) to review evidence of criminal wrongdoing and issue an indictment if there is sufficient evidence; and (2) to serve as an additional investigative arm of the government and help gather evidence for the prosecution.<sup>23</sup> Critics of the grand jury maintain that it has not fulfilled either purpose, especially in police brutality cases.<sup>24</sup>

Grand juries are “the citizen-bodies tasked with determining whether a prosecutor has probable cause to go forward with charges against a criminal suspect.”<sup>25</sup> While considered essential to the criminal justice process, grand juries do not hold the power to decide the guilt or punishment of a party. Rather, the grand jury system is designed to act as a safeguard on the prosecutor’s authority to bring serious charges against individuals, with the prosecutor working closely with the grand jury to decide whether to bring charges or an indictment against a

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<sup>19</sup> See Knott, *supra* note 18; 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, 6-16 (1996); Roger A. Fairfax, *Should the American Grand Jury Survive Ferguson*, 58 HOW. L.J. 825, 826-28 (2015) (stating that the movement to abolish the grand jury in America is not a new movement, and England, from which the U.S. borrowed the concept of a grand jury, abandoned the use of the grand jury in the 1930s).

<sup>20</sup> U.S. CONST. amend. V.

<sup>21</sup> *Hurtado v. California*, 110 U.S. 516, 535 (1884) (holding that although the Fifth Amendment provided for an indictment by grand jury it does not mean the states are obligated to provide the same procedure in order to satisfy the due process requirements under the Fourteenth Amendment).

<sup>22</sup> Melody Gutierrez, *State Ends Secret Hearings in Police Killings of Civilians*, S.F. GATE (Aug. 11, 2015, 5:44 PM), <http://www.sfgate.com/politics/article/California-eliminates-use-of-grand-juries-to-6438501.php>.

<sup>23</sup> Knott, *supra* note 18.

<sup>24</sup> *Id.*; see Fairfax, *supra* note 19.

<sup>25</sup> Levine, *supra* note 18, at 752.

potential defendant.<sup>26</sup> The grand jury was created to serve as a shield between simple accusations and convictions, and also permitted prosecutions of corrupt government agents.<sup>27</sup>

*A. The Typical Grand Jury Proceeding*

Current grand jury proceedings are held in total secrecy, without a judge, defendant, or defense counsel present, and evidence is presented to between sixteen and twenty-three qualified citizens.<sup>28</sup> Unlike most criminal proceedings, the grand jury process operates under a veil of secrecy to protect witnesses and the innocent, as well as encourage full disclosure.<sup>29</sup> This means that the details of grand jury proceedings largely remain confidential. Jurors are not allowed to talk about what happened during the grand jury proceeding or the information that the prosecutor presented.<sup>30</sup> In theory, the grand jury is an independent body, but the reality is that the process is controlled by the prosecution from the investigation to the presentation of evidence.<sup>31</sup>

The prosecutor is the most powerful figure in the criminal justice system because they hold the power to charge. Prosecutors can control the actions that other people take and what happens to other people. With this power comes the ability to exercise discretion. Prosecutors rarely have to justify their decisions to charge or not to charge, what evidence they present to the grand jury, or what process they use to make these decisions.<sup>32</sup> Normally, when a prosecutor

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<sup>26</sup> See Knott, *supra* note 18, at 207.

<sup>27</sup> Kadish, *supra* note 19, at 9-10.

<sup>28</sup> 18 U.S.C.S. § 3321 (2015); FED. R. CRIM. P. 6(d) (2015); see also Gerald D. Robin, *The Grand Jury: Historical Roots, Contemporary Operations and Calls for Reform*, KAPLAN, [https://kucampus.kaplan.edu/documentstore/docs09/pdf/picj/vol2/issue2/The\\_Grand\\_Jury.pdf](https://kucampus.kaplan.edu/documentstore/docs09/pdf/picj/vol2/issue2/The_Grand_Jury.pdf) (last visited Feb. 23, 2022).

<sup>29</sup> See Robin, *supra* note 28 (“Secrecy requirements are intended to encourage witnesses to be completely truthful when testifying about their knowledge of crime commission, to prevent witness and/or juror tampering, to avoid leaking information to reporters, and to protect the identities and reputations of innocent accused who are not indicted.”).

<sup>30</sup> See FED. R. CRIM. P. 6(e)(2), (7) (“Unless these rules provide otherwise . . . [a grand juror] “must not disclose a matter occurring before the grand jury. . . A knowing violation of Rule 6 . . . may be punished as a contempt of court.”).

<sup>31</sup> Knott, *supra* note 18, at 208.

<sup>32</sup> *Id.*

presents a case to the grand jury, the proceedings almost always result in the prosecutor getting indictments for the charges they seek to bring.<sup>33</sup> But, because of the disparity in recent cases of police brutality, grand juries have become the focus of criticism in the legal profession, academic circles, and society as a whole, making the movement for abolition of the grand jury in these cases of police brutality a continuing issue.<sup>34</sup>

In cases involving everyday people, indictments are easily obtained. The process is typically very simple: a police report is read to the grand jury, the indictment is drafted, and the grand jurors vote within minutes.<sup>35</sup> Federal law requires no presentation of exculpatory evidence to grand juries.<sup>36</sup> While state rules vary, most require only “substantial” exculpation to be presented.<sup>37</sup> This means that witnesses who challenge the police’s or complainant’s version of events are rarely required to testify.<sup>38</sup> There is also no hearsay evidence rule in grand jury proceedings, which takes away the opportunity for jurors to hear from a live witness and access their credibility.<sup>39</sup> Nor are defense attorneys allowed in the room.<sup>40</sup> While there are some circumstances that will allow a defense attorney to attend the proceedings, the attorney may not

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<sup>33</sup> See Levine, *supra* note 18.

<sup>34</sup> See *id.*; Fairfax, *supra* note 19.

<sup>35</sup> See Gilbert, *supra* note 13.

<sup>36</sup> Levine, *supra* note 18, at 760.

<sup>37</sup> Some states do require exculpatory evidence to be presented to a grand jury. Most states only require it if “the exculpatory value is substantial” but a few states, such as Montana and California, have broader requirements. See *State v. Hogan*, 676 A.2d 533, 541 (N.J. 1996) (discussing state practices); see also *United States v. Williams*, 504 U.S. 36, 51 (1992) (“[R]equiring the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury’s historical role, transforming it from an accusatory to an adjudicatory body.”).

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

<sup>39</sup> See, e.g., Fairfax, *supra* note 19, at 705 (noting that grand jurors “usually [hear evidence] in the form of unchallenged hearsay testimony”); Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 21 (2002) (“[Because] grand jurors do not hear directly from the key witnesses in a case, they are unable to effectively evaluate witness credibility. Far more critical, allowing hearsay testimony results in streamlined, assembly-line presentations in which grand jurors lose the incentive to evaluate the cases at all.”).

<sup>40</sup> Fairfax, *supra* note 19, at 755; see also Susan W. Brenner, *Grand Jurors Speak*, GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY 25, 36 (Roger Anthony Fairfax, Jr. ed., 2011) (noting an e-mail from a grand juror who was upset at “never hearing from an attorney for the accused”); Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 289 (1995) (“[J]udges and defense counsel are not present at the hearings. . .”).

challenge questions put to her client by the prosecutor.<sup>41</sup> In some states, a defense attorney is permitted in the room only when his or her client has a right to and elects to testify. When this happens, the attorney is only allowed in the room for that portion of the presentation. There is also no judge in the room, nor will a judge review a grand jury transcript unless a defendant mounts a specific challenge later in the process.<sup>42</sup> Grand juries do not need a unanimous vote from all members to indict. Depending on the jurisdiction, a supermajority of two-thirds or three-fourths agreement is required.<sup>43</sup>

There are several problems with the grand jury that makes it extremely difficult to bring justice and hold police officer's accountable, these include the prosecutor's control over the grand jury and the inherent conflict of interest between police officers and prosecutors. The next section will further discuss these problems.

#### *B. Problems with the Grand Jury*

The grand jury was once seen as a safeguard on the prosecutor's ability to bring serious charges against individuals and a way for the prosecutor to bring charges against government officials without too much blowback.<sup>44</sup> Now however, grand juries have been the focus of tremendous criticism and a movement for abolition of the grand jury is growing because police brutality is going unpunished. There is a reluctance of local governments to prosecute police brutality.<sup>45</sup> Not only does this reluctance empower future misconduct, but it also creates a

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<sup>41</sup> See Simmons, *supra* note 37, at 23 (“The overwhelming majority of states and the federal government do not give the defendant any right to testify on his own behalf.”).

<sup>42</sup> See *id.* at 26-27 (noting that judges rarely review transcripts in the federal system or most states). *But see Discovery by a Criminal Defendant of His Own Grand-Jury Testimony*, 68 COLUM. L. REV. 311, 311 (1968) (“Even in the special case where all a defendant seeks is the record of the testimony that he gave before the grand jury himself, tradition is on the side of non-disclosure.”).

<sup>43</sup> *How Does a Grand Jury Work?*, FINDLAW (Nov. 9, 2020), <https://www.findlaw.com/criminal/criminal-procedure/how-does-a-grand-jury-work.html>.

<sup>44</sup> Levine, *supra* note 18.

<sup>45</sup> See Vadala, *supra* note 18, at 28; see also sources cited in note 10.

distrust between police officers and communities because victims of police brutality are given no justice. No justice means no accountability. No accountability means no healing or reconciliation, especially for the communities of color affected by police brutality.

Aside from the reluctance of prosecutors to pursue investigations or bring charges against police officers, there are also numerous judicial doctrines and policies that shield police officers from any charges at all.<sup>46</sup> Turning a blind eye when these cases of police brutality occur, supports police brutality and racism. When a police officer is not held accountable for the death of a Black person time and time again, it reiterates that in America, Black lives do *not* matter.

In cases of police brutality, prosecutors have continually failed in securing justice for the victims. Prosecutors largely control the charging decision, as they hold the power to decide when and whether or not criminal charges should be pursued and against whom. This discretion allows the prosecutor to have complete control over the grand jury.

#### 1. The Prosecutor

According to U.S. Supreme Court Justice George Sutherland, the duty of the prosecutor is to see that justice is served, and to use every legitimate means to bring a just conviction.<sup>47</sup> Despite this duty of justice, the truth is that prosecutors avoid indictments from grand juries in cases in which police officers are the suspects.<sup>48</sup> This perception underlies the notion that

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<sup>46</sup> John V. Jacobi, *Prosecuting Police Misconduct*, L. J. LIBR., (2000), <https://heinonline.org/HOL/Page?handle=hein.journals/wlr2000&id=807&collection=journals&index=>; *see also* Vadala, *supra* note 18, at 29.

<sup>47</sup> *See* Berger v. United States, 295 U.S. 78, 88 (1935) (“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”).

<sup>48</sup> HOWARD W. GOLDSTEIN, GRAND JURY PRACTICE: HISTORY OF THE GRAND JURY § 2.04 (2015); *see also* Editorial Board, *A Crisis of Confidence in Prosecutors*, N.Y. TIMES, Dec. 9, 2014, at A30 (explaining that there is an obvious inherent conflict of interest when prosecutors prosecute police officers; further, although a bias may not necessarily be proven in a given case, the public still perceives this bias).

prosecutors are unable to be impartial when guiding the grand jury on the law and facts of a particular case.<sup>49</sup> Because grand jury proceedings are almost always kept secret, it can be difficult to fully comprehend how much prosecutors dominate and control every aspect of these proceedings. The secrecy contributes to the prosecutor's total control over the grand jury. The lack of transparency in the grand jury process encourages illegitimate uses of the grand jury and makes it difficult to evaluate whether the prosecutor is legitimately trying to obtain the grand jury's independent decision.<sup>50</sup>

The grand jury is criticized for its inability to perform its screening function of checking prosecutors and witnesses before an indictment is rendered.<sup>51</sup> However, this criticism and the notion that a grand jury will find probable cause to “indict a sandwich”<sup>52</sup> puts the lack of functionality on the wrong group. The prosecutor is given total discretion to decide what charges to submit, what witnesses to call, and how much evidence to present in order to elicit an indictment without checks and balances of the judge, defense counsel, or jury, as they have at a criminal trial.<sup>53</sup> This in turn means that the grand jury completely depends on the prosecutor for all its information, advice, and direction.

a. Control

Prosecutorial power is understood either in the terms of influence or in outcomes. When a prosecutor presents a case to a grand jury, they almost always get indictments for all the charges they seek because of the power the prosecutor holds over the grand jury. The grand jury only hears one curated and unchallenged version of events from the prosecutor. The prosecutor

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<sup>49</sup> See GOLDSTEIN, *supra* note 46; Tierney Sneed, *Garner, Brown Decision Spark Calls for Grand Jury Reform*, U.S. NEWS (Dec. 12, 2014), <http://www.usnews.com/news/articles/2014/12/12/after-eric-garner-michael-brown-decisions-callsfor-grand-jury-reform> (indicating the need for reform to the current use of grand juries in America).

<sup>50</sup> Vadala, *supra* note 18, at 44.

<sup>51</sup> See Fairfax, *supra* note 19.

<sup>52</sup> See *supra* note 15.

<sup>53</sup> See *supra* Part I. for in-depth discussion of the grand jury process.

explains the law, presents evidence, and questions witnesses to the grand jury.<sup>54</sup> Thus, the decision whether to charge a police officer for their actions is in reality the prosecutor's decision, not the grand jury's. Prosecutors can essentially determine the outcome of the grand jury by presenting their choice of evidence, their selection of witnesses, and their questions. While the grand jurors are permitted to request certain evidence of witnesses, they often do not know what to ask for, especially if the prosecutor chooses not to share certain information with the grand jury.<sup>55</sup> This evidence, or the lack thereof, can have a significant impact on the outcome of the case.<sup>56</sup>

The fact that prosecutors have immense control over grand jury proceedings can cause problems because prosecutors can use the grand jury to perform some other function, depending on the prosecutor's motive. For example, the prosecutor may use the grand jury as a political cover. A prosecutor who does not want to move forward on a particular case can claim that the decision not to press charges was made by the grand jury in order to shield their reputation.<sup>57</sup> Another problem with the grand jury process is that it allows the prosecutors to use the grand jury as a "rubber stamp" to automatically approve of charges upon which they have already decided.<sup>58</sup> If a prosecutor does not want to indict the case, but also do not want to take

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<sup>54</sup> See Vadala, *supra* note 18, at 41.

<sup>55</sup> *Should the Grand Jury Be Abolished*, JRANK, <http://law.jrank.org/pages/7197/Grand-JurySHOULD-GRAND-JURY-BE-ABOLISHED.html> (last visited Feb. 22, 2022) ("Critics note that many states abolished all or part of the grand jury's jurisdiction at the end of the nineteenth century, in large part because the process had come increasingly under the control of prosecutors.").

<sup>56</sup> *Id.*; see also *infra* Section II.A-C.

<sup>57</sup> *Id.*

<sup>58</sup> Critics of the grand jury believe that it should be abolished because it merely acts as a "rubber-stamp." See, e.g., Benjamin E. Rosenberg, *A Proposed Addition to the Federal Rules of Criminal Procedure Requiring the Disclosure of the Prosecutor's Legal Instructions to the Grand Jury*, 38 AM. CRIM. L. REV. 1443, 1443 (2001) ("[T]he grand jury has been widely criticized for acting as a 'rubber stamp' for the prosecutor, thereby failing to fulfill its screening function."); see also *supra* note 53.

responsibility for that decision, they will intentionally present a weak case to the grand jury, leading the grand jury to refuse to indict in the case.<sup>59</sup>

In police brutality cases, prosecutors treat the grand jury as a “rubber-stamp” to automatically dismiss charges against the police.<sup>60</sup> When the prosecutor decides to use the grand jury in this way, the legitimacy of the grand jury suffers. Even worse, is that unlike a traditional criminal trial, the public does not have a right to know which witnesses are called, what evidence is presented, or the discussion that takes place during the grand jury proceedings.<sup>61</sup> This means that the prosecutor’s decision can go virtually unchecked and the public’s questions stay unanswered.

Turning to another problem with the grand jury process, prosecutors have certain incentives not to suggest certain charges to the jury and to manipulate a case in a way that will benefit the police officer in question. Prosecutors often work closely with police officers, creating a conflict of interest in maintaining their working relationships and their duty to prosecute police brutality.<sup>62</sup>

#### b. Conflict of Interest

Despite the countless instances and evidence of brutality against Black people by police officers, police brutality has not been treated equally by state criminal law.<sup>63</sup> While police officers are meant to protect and enforce the law, those same laws are not always enforced against police officers. Police officers are rarely prosecuted because fellow government officials

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<sup>59</sup> See Vadala, *supra* note 18, at 43; see also 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 (2017); Angela J. Davis, *The Power and Discretion of the American Prosecutor*, DROIT ET CULTURES 55, 56-66 (2005).

<sup>60</sup> For examples and further discussion of this problem in recent cases of police brutality, see *infra* Part II.

<sup>61</sup> See *supra* Part I.A.

<sup>62</sup> See, e.g., Kate Levine, *Who Shouldn’t Prosecute the Police*, 101 IOWA L. REV. 1447 (2016) (examining the conflict of interest between local prosecutors and law enforcement).

<sup>63</sup> Vadala, *supra* note 18, at 39-40.

are reluctant to pursue investigations of their own colleagues' misconduct.<sup>64</sup> When a prosecutor seeks an indictment against a police officer, often he or she is put in a problematic situation and may abuse his or her discretion in order to preserve their valuable relationship with police officers. This inherent conflict of interest between prosecutors and police officers means officers are not always held accountable for their wrongful and illegal conduct.<sup>65</sup>

Prosecutors and police officers work closely and depend on cooperation to be successful. Prosecutors rely on police testimony to win trials, and those trial wins are essential to earning promotions within the office and for elections or re-elections. Prosecutors have also described an overt pressure to comply with a police culture of “silence and violence” meaning that questioning an officer’s version of events is seen as a sign of “disrespect” to the officer.<sup>66</sup> Prosecutors are often accustomed to giving credibility to claims by police officers rather than conflicting claims by defendants or suspects. Often, a prosecutor will side in favor of the police unless clear evidence contradicts the police officer’s account and supports the victims. All of these factors that create a conflict of interest for prosecutors makes them unlikely to investigate and pursue criminal charges against police officers in a neutral manner.<sup>67</sup>

Because prosecutors are dependent upon police officers, many argue that it is impossible for them to impartially handle a case when a police officer is the defendant. The idea that a prosecutor must find such extreme evidence to even consider charging a police officer with a fatal crime illustrates the reluctance of prosecutors to charge their fellow law enforcement

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<sup>64</sup> See *id.*; see also Nicole Gonzalez Van Cleve & Somil Trivedi, *Why Prosecutors Keep Letting Police Get Away with Murder*, SLATE (June 5, 2020), <https://slate.com/news-and-politics/2020/06/why-prosecutors-keep-letting-police-get-awaywith-murder.html>.

<sup>65</sup> See Vadala, *supra* note 18.

<sup>66</sup> *Id.* at 51.

<sup>67</sup> See *id.* at 52; Jonathan Witmer-Rich, *Restoring Independence to the Grand Jury: A Victim Advocate for Police Use of Force Cases*, 65 CLEV. ST. L. REV. 535 (2017).

partners. This prosecutorial process for police officers threatens the legitimacy of criminal law by protecting police officers.<sup>68</sup>

Not only are prosecutors very unlikely to pursue criminal charges against police officers for police brutality, but there is also evidence that in the rare instances in which prosecutors do present these cases to grand juries, they do so in a way that is remarkably different from most other case presentations to grand juries.<sup>69</sup> Part II discusses how this disparity has been displayed in recent cases of police brutality: Tamir Rice, Michael Brown, Eric Garner, and Breonna Taylor.

## II. DISPARITY IN THE GRAND JURY PROCESS FOR POLICE SUSPECTS AND BLACK VICTIMS

As discussed above, under the current grand jury system, most suspects are charged or indicted with little due process, despite the vast array of investigative and evidence-testing mechanisms at a prosecutor's disposal.<sup>70</sup> Yet, as we have seen in recent years, when a police officer is the suspect, the usual grand jury process appears to unravel, especially in cases involving police officers and Black victims.<sup>71</sup>

When a prosecutor presents a police brutality case to a grand jury, either because of their own belief that a crime may have occurred or because of bias and racism, something different from the usual charge decision occurs. Police suspects get an additional layer of discretionary investigation and evidence weighing.<sup>72</sup> As discussed above, in most ordinary criminal cases not involving police officers as suspects, grand jury presentations are brief, and few live witnesses

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<sup>68</sup> Levine, *supra* note 18, at 768.

<sup>69</sup> See Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 703 (1996) (noting that “[p]olice brutality is treated differently from other crimes.”). Freeman also states, “Police crimes are underreported, underinvestigated, underprosecuted and underconvicted. If a case clears these hurdles and is successfully prosecuted, the chances are that it will be undersentenced relative to crimes not involving police brutality.” *Id.*

<sup>70</sup> Levine, *supra* note 18, at 757.

<sup>71</sup> In cases involving police brutality, the process is drawn-out and can take months. *See id.*

<sup>72</sup> For example, in police brutality cases, prosecutors investigate, gather evidence, both inculpatory and exculpatory, and when they do not decline charges on their own, they often present a full case to the grand jury. *See id.* at 763.

are called.<sup>73</sup> But, in several high-profile cases involving police officers, prosecutors have conducted what appeared to be “an extensive full-blown trial before the grand jury.”<sup>74</sup> For instance, prosecutors have “called all potentially relevant fact witnesses to testify in person, commissioned multiple expert reports and called expert witnesses, staged and presented elaborate reconstructions, introduced voluminous documentary evidence, and focused extensively on possible defenses.”<sup>75</sup> In some cases, prosecutors have even allowed the suspect officers to testify before the grand jury without being subject to cross-examination. This is important because suspects of the grand jury rarely testify in proceedings, as previously noted.<sup>76</sup> Suspects of the grand jury typically choose not to risk testifying because their attorneys are not present in the room and are unable to make the proper objections or to provide context or clarification regarding the subject matter of the investigation.<sup>77</sup> For this reason, defense attorneys usually advise suspects not to testify.

The following cases support this notion and highlight how this difference in case treatment can support the continued denial of justice for victims of police brutality. The cases of Tamir Rice, Michael Brown, Eric Garner, and Breonna Taylor help highlight that police brutality against Black people has been ongoing with impunity for many years.

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<sup>73</sup> See *supra* Part I.

<sup>74</sup> See Witmer-Rich, *supra* note 65, at 538.

<sup>75</sup> *Id.* at 539.

<sup>76</sup> Nancy Leong, *Getting the Facts Right About the Ferguson Grand Jury Decision*, HUFFINGTON POST, <http://www.huffingtonpost.com/nancy-leong/getting-the-facts-right-ab6233660.html> (last updated Jan. 28, 2015) (“It is actually rare for a [target] to testify in front of a grand jury. It’s not unheard of, and the practice varies from one jurisdiction to another. There is no absolute right for a [target] to testify in front of a jury that is investigating him. The prosecutor gave Darren Wilson an opportunity that he was not constitutionally or statutorily required to provide.”).

<sup>77</sup> See *id.*

A. *Tamir Rice*

In 2014, Tamir Rice was 12-years-old when he was shot and killed by Cleveland police officers while playing in a park.<sup>78</sup> Rice was playing with a toy gun in the park and was fatally shot by the officers within two seconds of their arrival at the park.<sup>79</sup> The officers took four minutes before they tried to administer first aid to Rice.<sup>80</sup> Following the shooting, the police officers involved argued they feared for their lives, while Rice's family believed the shooting was unnecessary.<sup>81</sup>

It took the Prosecuting Attorney, Timothy McGinty, more than a year to present the case to the grand jury.<sup>82</sup> The grand jury made the decision to decline to indict or file criminal charges against either of the two officers involved.<sup>83</sup> In Rice's case, McGinty presented extensive evidence, including an enhancement of the video footage; multiple expert witnesses; multiple fact witnesses; 911 call recordings; and physical evidence.<sup>84</sup> This unusual process for police officers, before they formally become defendants, has been maligned by the public, the legal community, and scholars. It has been seen as a way for prosecutors to exculpate criminal suspects whom they do not want to prosecute.<sup>85</sup> Rice's case was one of the first to highlight this

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<sup>78</sup> Sean Flynn, *The Tamir Rice Story: How to Make a Police Shooting Disappear*, GQ (July 14, 2016), <http://www.gq.com/story/tamirrice-story>.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *See id.*; *see also* Mike Hayes, *Here's a Brief History of the Tamir Rice Shooting* (Dec. 28, 2015, 2:47 PM), <https://www.buzzfeednews.com/article/mikehayes/heres-a-brief-history-of-the-tamir-rice-shooting>.

<sup>82</sup> *See* Hayes, *supra* note 79.

<sup>83</sup> *Id.*

<sup>84</sup> While the prosecutor's office is prohibited from stating what it presented to the grand jury, the prosecutor's public report indicates the scope of the proceeding. *See* Timothy J. McGinty, TAMIR RICE PROSECUTOR'S REPORT, [http://prosecutor.cuyahogacounty.us/pdf\\_prosecutor/enUS/Rice%20Case%20Report%20FINAL%20FINAL%2012-28a.pdf](http://prosecutor.cuyahogacounty.us/pdf_prosecutor/enUS/Rice%20Case%20Report%20FINAL%20FINAL%2012-28a.pdf) (last visited Feb. 23, 2022); *see also* Cory Shaffer, *Grand Jury Hearing Evidence in Tamir Rice Shooting*, CLEVELAND (Oct. 27, 2015), [http://www.cleveland.com/metro/index.ssf/2015/10/grand\\_jury\\_hearing\\_evidence\\_in.html](http://www.cleveland.com/metro/index.ssf/2015/10/grand_jury_hearing_evidence_in.html).

<sup>85</sup> Levine, *supra* note 18, at 756.

difference in treatment between police suspects and normal suspects. The following cases can more useful because the veil of secrecy was eliminated in them.

*B. Michael Brown*

In the same year, 2014, Michael Brown was 18-years-old when he was shot and killed by Ferguson police officer Darren Wilson.<sup>86</sup> A grand jury declined to indict Wilson, who killed Brown and left his body in the street for four hours.<sup>87</sup> Prosecuting Attorney Robert McCulloch came under fire for his handling of the shooting death of Brown by officer Wilson.<sup>88</sup> McCulloch's announcement of no indictment and the release of the grand jury transcripts revealed that the process officer Wilson received was virtually unrecognizable to those familiar with the way grand juries usually work for normal suspects.<sup>89</sup>

The published transcripts showed that McCulloch made the decision to present a seemingly full case to the grand jury. The transcripts revealed that McCulloch addressed the jury by saying the jury would hear "every statement" and "every bit of evidence" and that the

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<sup>86</sup> *Know Their Names: Black People Killed by the Police in the U.S.*, ALJAZEERA AMERICA, <https://interactive.aljazeera.com/aje/2020/know-their-names/index.html> (last visited Feb. 23, 2022).

<sup>87</sup> *Id.*

<sup>88</sup> See Jeremy Kohler, *Statement of St. Louis Prosecuting Attorney Robert P. McCulloch*, ST. LOUIS POST DISPATCH (Nov. 24, 2014, 8:15 PM), [http://www.stltoday.com/news/local/crime-and-courts/statementof-st-louis-prosecuting-attorney-robert-p-mcculloch/article\\_2becfef3-9b4b-5e1e-9043-f586f389ef91.html](http://www.stltoday.com/news/local/crime-and-courts/statementof-st-louis-prosecuting-attorney-robert-p-mcculloch/article_2becfef3-9b4b-5e1e-9043-f586f389ef91.html); see also Tamara Aparton, *SF Public Defender's Statement on Grand Jury Decision*, SF PUB. DEFENDER (Nov. 26, 2014), <http://sfpublicdefender.org/news/2014/11/sf-public-defenders-statement-on-grand-jury-decision>; Sara Hossaini, *Public Defenders Hold 'Black Lives Matter' Rallies for Police Accountability*, KQED NEWS (Dec. 18, 2014), <http://ww2.kqed.org/news/2014/12/18/public-defendershold-black-lives-matter-rallies-for-police-accountability>; Joan McCarter, *Bob McCulloch: Prosecutor or Defense Attorney for Darren Wilson?*, DAILY KOS (Nov. 25, 2014, 9:42 AM), <http://www.dailykos.com/story/2014/11/25/1347403/-Bob-McCulloch-Prosecutor-or-defense-attorney-for-Darren-Wilson>; Letter from Sherrilyn A. Ifill, President & Dir.-Counsel, NAACP Legal Def. & Edu. Fund, Inc., to Hon. Maura McShane, Judge, 21st Judicial Circuit 2 (Jan. 5, 2015) (on file with author) (calling for an investigation into the State v. Darren Wilson Grand Jury Proceedings for, among other things, preferential treatment of the defendant and erroneous instructions on the law).

<sup>89</sup> Typically, prosecutors present highly curated and inculpatory pieces of their case designed to induce quick and sure indictments. See Jeffrey Fagan & Bernard E. Harcourt, *Professors Fagan and Harcourt Provide Facts on Grand Jury Practice in Light of Ferguson Decision*, COLUMB. L. SCH. (Dec. 5, 2015, 12:00 PM), [http://www.law.columbia.edu/media\\_inquiries/news\\_events/2014/november2014/Facts-on-FergusonGrand-Jury](http://www.law.columbia.edu/media_inquiries/news_events/2014/november2014/Facts-on-FergusonGrand-Jury); See generally Transcript of Grand Jury Missouri v. Wilson (Aug. 20, 2014), <http://int.nyt.com/newsgraphics/2014/11/24/ferguson-evidence/assets/gj-testimony/grandjury-volume-01.pdf>.

proceeding would be “like a trial.”<sup>90</sup> The grand jury heard sixty-two witnesses, including officer Wilson.<sup>91</sup> Jurors were also able to compare testimony with dozens of interviews conducted by police after the shooting; forensic and crime scene reports; photographs of the crime scene; Wilson’s car, gun, and clothing; and close-ups of Wilson’s face, as he alleged he had been struck several times by Brown.<sup>92</sup> And only after this “trial” did the grand jury decide not to indict, following with McCulloch dropping all charges against officer Wilson.

McCulloch’s decision to present a full case to the grand jury is not uncommon in police brutality cases. For some reason, prosecutors use their full arsenal of procedural discretion when a police suspect’s liberty and reputation is on the line: they conduct thorough pre-charge investigations, credit an officer’s version of events, and either exercise their option to present exculpatory evidence to a grand jury or, in many cases, decline to charge altogether.<sup>93</sup> Public scrutiny also tends to motivate prosecutors to explain their otherwise secret decision making and is a valuable tool for those looking to understand the discretionary “black box” in which prosecutors operate.<sup>94</sup>

### C. *Eric Garner*

Although a judge has so far refused to release the transcripts in the choking death of Eric Garner, we know that the officer suspect spoke to the jurors for two hours.<sup>95</sup> The jury also heard

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<sup>90</sup> See Transcript of Grand Jury Missouri v. Wilson, *supra* note 86, at 9.

<sup>91</sup> See *Witness List, Documents Released in the Ferguson Case*, N.Y. TIMES (Dec. 15, 2014), <http://www.nytimes.com/interactive/2014/11/25/us/evidence-released-in-michael-brown-case.html>.

<sup>92</sup> See *id.*

<sup>93</sup> See Levine, *supra* note 18, at 756; see generally Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125 (2008).

<sup>94</sup> See Levine, *supra* note 18, at 756.

<sup>95</sup> See *id.*; Howard M. Wasserman, *Epilogue: Moral Panics and Body Cameras*, 92 WASH. U. L. REV. 845, 846 (2015) (“[A] New York grand jury declined to indict New York City police officer Daniel Pantaleo in the death of Eric Garner during an arrest for selling loose cigarettes.”).

from forty-nine other witnesses.<sup>96</sup> There are no nationwide statistics for how often prosecutors present such full evidence to grand juries, but as the *New York Times* noted, “most prosecutors impanel a special grand jury to investigate police-related deaths” and therefore “insulate themselves from the final decision, while appearing to fulfill the public desire for an independent review.”<sup>97</sup> This seemingly cynical use of the grand jury was among the reasons the public and many defense attorneys—who believed the process was infected with bias—have been so outraged at these non-indictments.<sup>98</sup>

#### D. Breonna Taylor

In 2020, Breonna Taylor, a 26-year-old Black woman, died after being shot in her apartment by Louisville police officers.<sup>99</sup> The officers fired thirty-two shots into Taylor’s apartment.<sup>100</sup> While the City of Louisville agreed to pay Taylor’s family, the three police officers involved were not indicted on charges related to Taylor’s death.<sup>101</sup>

The wrongful death of Breonna Taylor led to nationwide protests and demonstrations, and there are still many unanswered questions and lingering feelings of injustice. Following the

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<sup>96</sup> Amy Davidson, *What the Eric Garner Grand Jury Didn’t See*, NEW YORKER (Dec. 4, 2014), <http://www.newyorker.com/news/amy-davidson/eric-garner-grand-jury-didnt-see>.

<sup>97</sup> 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/grandjuries-seldom-charge-police-officers-in-fatal-actions.html?\\_r0](http://www.nytimes.com/2014/12/08/nyregion/grandjuries-seldom-charge-police-officers-in-fatal-actions.html?_r0).

<sup>98</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-wilsonshooting-michael-brown-grand-jury.html>; 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), <http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokeholddeath-of-eric-garner.html>.

<sup>99</sup> See Vadala, *supra* note 18, at 54-58; see also Arlin Cuncic, *The Psychology Behind Police Brutality*, VERYWELL MIND (last updated on Jan. 17, 2021), <https://www.verywellmind.com/the-psychology-behind-police-brutality-5077410>.

<sup>100</sup> See Cuncic, *supra* note 97.

<sup>101</sup> The grand jury indicted former Louisville police officer Brett Hankison for three counts of “wanton endangerment in the first degree” for his actions during the raid in which he fired three shots into a neighboring apartment. No indictment was returned against Sergeant Jonathan Mattingly or Detective Myles Cosgrove, both of whom fired the bullets that struck and killed Breonna Taylor in her home that night. See Andrew Wolfson, *Breonna Taylor Facts: What Did Daniel Cameron Present to Grand Jury*, USA TODAY (Sept. 26, 2020), <https://www.usatoday.com/story/news/nation/2020/09/26/breonna-taylor-decision-unansweredquestions-daniel-cameron-grand-jury/3548920001/>.

grand jury decision not to charge any of the officers involved with the fatal shooting of Taylor, Ben Crump, one of the attorneys for the Taylor family, called the decision part of a “pattern of the blatant disrespect and marginalization of Black people, but especially Black women.”<sup>102</sup> He further stated, “[t]here seems to be two justice systems in America: one for Black America, and one for White America.”<sup>103</sup> There was a lot of controversy surrounding the Kentucky Attorney General, Daniel Cameron, and whether or not the grand jurors were given all the information necessary to decide whether the police officers who shot and killed Taylor should have been charged for her death. Because the prosecutor has essentially exclusive access to and control over the grand jury, grand juries are completely dependent on them.<sup>104</sup> This was irrefutable in Taylor’s case.

After the proceeding, an unidentified juror filed a motion asking for the judge to unseal the transcripts and records from the case and requested to speak freely about the case. The grand juror accused Cameron of “using the grand jurors as a shield to deflect accountability and responsibility.”<sup>105</sup> After a court order to release the recordings and pressure for disclosure by Kentucky Governor Andy Beshear, the transcripts were released to the public. A statement from Cameron revealed that the only charge he recommended to the grand jury was wanton endangerment.<sup>106</sup> However, the motion filed by the unidentified juror noted that Cameron had previously made public statements saying that his team walked the grand jury “through every

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<sup>102</sup> N’dea Yancey-Bragg, Ben Tobin, & Andrew Wolfson, *Breonna Taylor: Ben Crump Slams Decision, Call to Release Transcripts*, USA TODAY (Sept. 25, 2020), <https://www.usatoday.com/story/news/nation/2020/09/25/breonna-taylor-family-ben-crump-slam-decision-release-transcripts/3530842001/>.

<sup>103</sup> *Id.*

<sup>104</sup> *See supra* Part I.A. (discussing the power of the prosecutor over the grand jury process).

<sup>105</sup> Bridget Read & Angelina Chapin, *Breonna Taylor Grand Jury: What Really Happened*, N.Y. MAG. (Oct. 27, 2020), <https://www.thecut.com/2020/10/breonna-taylor-grand-jury-what-reallyhappened.html>.

<sup>106</sup> *Id.*; *see also* Vadala, *supra* note 18, at 47.

homicide offense, and also presented all of the information that was available to the grand jury.”<sup>107</sup>

One of the major issues with the grand jury process is that an inexperienced and untrained body of citizens is not suited to recognize unwarranted prosecutions in a proceeding at which they hear only the government’s side of the case and depend entirely on the prosecutor for legal advice and direction.<sup>108</sup> Cameron’s statement that the grand jury “agreed” with his decision to solely charge officer Hankison implied that jurors had been allowed to weigh the option of charging all three officers. But that was not the case. The unidentified juror who filed a motion asking for the judge to unseal the transcript was “unsettled by the fact that the grand jury was not given an option of charging the two officers at a time when the community has been roiled by demonstrations seeking their indictment. The 12-member panel was presented only with possible charges for Brett Hankison.”<sup>109</sup>

As the cases of Rice, Brown, Garner, and Taylor have shown, if you are a police officer accused of brutality against a Black person, your case will be thoroughly investigated and your chance of facing no charges is dramatically increased. While most suspects are reflexively charged with as many charges as the substantive law will allow, and without any pre-charge weighing of the strength of the evidence by a prosecutor, or a grand jury exposed to a full set of evidence, police suspects get an additional layer of discretionary investigation and evidence weighing.<sup>110</sup> This different process is not only unfair, but it is also systemically racist because it sends the message time and time again, that Black lives matter less in America. This problem

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<sup>107</sup> Vadala, *supra* note 18; Minyvonne Burke et al., *Breonna Taylor Grand Jury Recordings Paint Chaotic, Confusing Scene*, NBC NEWS (Oct. 2, 2020), <https://www.nbcnews.com/news/us-news/grand-jury-recordings-released-breonna-taylor-casen1241803>.

<sup>108</sup> See Vadala, *supra* note 18, at 42.

<sup>109</sup> Read & Chapin, *supra* note 102.

<sup>110</sup> Levine, *supra* note 18, at 767.

must be fixed immediately. Part III considers possible solutions to addressing police brutality and to bringing justice to those affected by police brutality against Black people.

### III. SOLUTIONS: BRINGING JUSTICE AND ACCOUNTABILITY TO POLICE BRUTALITY CASES

Until the use of grand juries in police brutality cases is abolished to address the racial components of police brutality against Black people, and police officers are actually held accountable for their actions, America will continue this cycle of unjustified deaths and civil unrest. The following are recommendations that should be applied at the federal and state level. However, it should be noted that change cannot be accomplished by merely training officers in diversity or equipping them with new technology; rather it must be achieved by a number of means which include addressing the racists and oppressive ideals that are rooted in the grand jury process and the American criminal justice system. This Part will discuss the need for abolition of grand juries in police brutality cases and the alternatives that could be used to bring charges against police officers.

#### A. *Abolishing the Grand Jury*

The use of grand juries in police brutality cases should no longer be an option. While realistically the complete abolition of grand juries may take years or decades to accomplish, the system can be reformed to eliminate some of the current abuses that support police brutality and racism in the meantime. And although no reform of the grand jury system can completely eliminate police brutality and racism, the following suggestions can provide greater transparency and accountability.

There are alternatives to using grand juries in police brutality cases. For example, some states allow prosecutors the choice of seeking a criminal indictment in a grand jury or filing a

criminal complaint on their own following an investigation.<sup>111</sup> Another option in bringing charges is the use of a preliminary hearing.<sup>112</sup> These two options would be great solutions that would increase transparency and accountability in cases of police brutality. Prosecutors would not be able to hide behind the secrecy of the closed-door grand jury proceedings. They would have to take responsibility for their decisions to charge or not to charge and for their decisions on how they present the case. Implicit bias training is also essential to combatting the systemic racism within our criminal justice and legal system.<sup>113</sup>

#### 1. Criminal Complaints

In two recent high-profile cases, the police-involved murder of George Floyd in Minneapolis and the fatal police shooting of Rayshard Brooks in Atlanta, prosecutors filed criminal complaints charging the police officers with murder instead of using the grand jury.<sup>114</sup>

The death of George Floyd, a 46-year-old Black man, drew worldwide outrage in the summer of 2020 after a video circulated showing officer Derek Chauvin holding his knee on Floyd's neck for more than nine minutes while he gasped for breath.<sup>115</sup> George Floyd's death spurred nationwide protests against police brutality. Unlike the previous cases addressed, officer Chauvin and the three other officers<sup>116</sup> involved in Floyd's death were rightfully fired and charged with a variety of crimes after the video of the arrest surfaced.<sup>117</sup>

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<sup>111</sup> Hutchinson, *supra* note 16.

<sup>112</sup> See *infra* Part III.A.2. for a discussion on preliminary hearings.

<sup>113</sup> See *infra* Part III.A.3. for a discussion on training against racial bias.

<sup>114</sup> Hutchinson, *supra* note 16.

<sup>115</sup> *How George Floyd Died, and What Happened Next*, N.Y. TIMES (Nov. 1, 2021), <https://www.nytimes.com/article/george-floyd.html>.

<sup>116</sup> The three other officers involved are: Thomas Lane, Tou Thao, and J. Alexander Kuneg. See *id.*

<sup>117</sup> The three other officers were charged with aiding and abetting second-degree murder and aiding and abetting second-degree manslaughter. The other three officers involved will be tried in March. See *id.*

In the following year, 2021, also unlike the previous cases, officer Chauvin was found guilty of second-degree murder, third-degree murder, and second-degree manslaughter.<sup>118</sup> After the verdict was announced, Philonise Floyd, one of George Floyd’s brothers, said, “[w]e are able to breathe again.” Even President Biden praised the verdict, calling it a “too rare” step to deliver “basic accountability” for Black people in America.<sup>119</sup>

As we can see from the outcome of the George Floyd case, the use of a criminal complaint is a better choice in cases of police brutality when compared to the grand jury process. The filing of a criminal complaint is much faster than the filing of a grand jury indictment. A criminal complaint allows the arrest to happen once the complaint is filed.<sup>120</sup> This would help bring faster justice and accountability to the police officer’s actions, as compared to the lengthy and timely process that police brutality cases often take in grand juries.<sup>121</sup> It also would take away the opportunity for the prosecutor to use the grand jury as a shield or cover up.

## 2. Preliminary Hearings

In two states, Connecticut and Pennsylvania, the use of grand juries for all criminal indictments was abolished.<sup>122</sup> These states are opting instead for preliminary hearings in open court with a judge who decides if there is probable cause to support the charges based on the evidence presented by prosecutors. Defense attorneys also challenge the case.<sup>123</sup>

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<sup>118</sup> See *id.*

<sup>119</sup> See *id.*; see also *Biden Calls Chauvin Verdict a ‘Much Too Rare’ Moment of Justice*, N.Y. TIMES (Apr. 20, 2021), <https://www.nytimes.com/2021/04/20/us/politics/biden-harris-chauvin-verdict-speech.html>.

<sup>120</sup> See Sara J. Berman, *Why Prosecutors Choose Grand Juries Instead of Preliminary Hearings*, NOLO (last visited Feb. 23, 2022), <https://www.nolo.com/legal-encyclopedia/why-prosecutors-choose-grand-juries-preliminary.html#:~:text=Prosecutors%20often%20prefer%20grand%20juries%20because%20the%20proceedings.it%20protects%20their%20reputation%20should%20no%20charges%20issue.>

<sup>121</sup> See *supra* Part II.

<sup>122</sup> See Jason K. Matthews, *The Evolution of Connecticut’s Grand Jury System* (Jan. 18, 2022) (legislative fellow research report discussing how Connecticut law was changed in 1983 to no longer permit grand jury indictments) (available at <https://www.cga.ct.gov/2002/rpt/2002-R-0088.htm>); see also Hutchison, *supra* note 16 (discussing how Pennsylvania did away with grand juries in criminal cases in the 1970s).

<sup>123</sup> See Hutchison, *supra* note 16; see also Berman, *supra* note 118.

Like a grand jury, a preliminary hearing is meant to determine whether there is enough probable cause to indict a criminal suspect. What makes preliminary hearings a better choice is that preliminary hearings are open to the public and involve lawyers on both sides, as well as a judge.<sup>124</sup> These differences make the preliminary hearing more adversarial, which can have a significant impact by taking away the one-sidedness or non-adversarial aspects of grand juries.<sup>125</sup> Also, the fact that preliminary hearings are open to the public takes away the issue of secrecy which protects grand jury proceedings.<sup>126</sup> Although some aspects of preliminary hearings might be more advantageous to defendants,<sup>127</sup> these advantages arguably are not present in cases of police brutality because of the ways in which prosecutors present almost full cases to the grand jury in these instances.<sup>128</sup>

### 3. Training Against Racial Biases

Lastly, the U.S. must develop and implement training designed to mitigate the influence of racial biases held by police officers, public defenders, prosecutors, judges, and jury members. Scholarly research has revealed that a significant portion of such disparities in policing may be attributed to implicit racial biases.<sup>129</sup> Subconscious racial associations influence the way police officers perform their jobs. Police officers often make fast decisions with imperfect information, activating these biases to fill in missing information, which in turn, allows individuals to make decisions in the limited time they have based on assumptions that are most likely not true.

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<sup>124</sup> Berman, *supra* note 118.

<sup>125</sup> *See id.*

<sup>126</sup> *See supra* Part I.A.

<sup>127</sup> In preliminary hearings, defendants are permitted to cross-examine prosecution witnesses and get a “good preview” of the prosecution’s case. *See* Berman, *supra* note 118.

<sup>128</sup> *See supra* Part II.

<sup>129</sup> *See Sentencing Policy: Report to the United Nations on Racial Disparities in the United States Criminal Justice System*, SENTENCING PROJECT (Apr. 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities> (defining “implicit racial bias” as the “unconscious associations humans make about racial groups.”); *see also* Cassandra Chaney & Ray V. Robertson, *Racism and Police Brutality in America*, 17 J. OF AFR. AM. STUDIES 480 (2013).

Research has shown that the vast majority of Americans implicitly associate Black people with adjectives such as “dangerous,” “aggressive,” “violent,” and “criminal.”<sup>130</sup> This implicit racial association of Black people with dangerous or aggressive behavior increases police officers’ willingness to employ violent force against them, which as we have seen, can often turn out deadly.<sup>131</sup> Studies have also shown that it is possible to control the effects of implicit racial biases on individual decision making.<sup>132</sup> The best approach would be to collaborate with political leaders and scholars to develop the most effective training programs to reduce the influence of implicit bias on our government officials. While our laws may seem “racially neutral”<sup>133</sup> on their face; these laws have proven to be insufficient to eliminate racial bias and racial disparity amongst prosecutors and police officers in the context of police brutality against Black people.

#### CONCLUSION

In America, the unfortunate truth is that justice for victims of police brutality is often never served. America’s justice system is built on practices and policies that shield police officers from liability and prevent justice for victims. In *Berger v. United States*, the U.S. Supreme Court stated that, in order to have police working effectively and efficiently, they need to be held accountable for their wrongdoings, and prosecutors must seek a just result.<sup>134</sup> Yet there is a continued denial of justice and disregard for people of color in America is undeniable and egregious. As a society, we must agree that enough is enough.

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<sup>130</sup> See generally Emma Pierson et. al., *A Large-Scale Analysis of Racial Disparities in Police Stops across the United States*, 4 NATURE HUM. BEHAV. 736 (July 2020), <https://www.nature.com/articles/s41562-020-0858-1.pdf> (assessing racial disparities in policing in America by compiling and analyzing data from traffic stops conducted throughout the country).

<sup>131</sup> Vadala, *supra* note 18, at 8-9.

<sup>132</sup> See *id.*; see also Pierson, *supra* note 128.

<sup>133</sup> Vadala, *supra* note 18, at 66.

<sup>134</sup> 295 U.S. 78, 88 (1935).

Police officers disproportionately kill Black people in this country with impunity because our system of policing encourages such violence and our legal system protects the use of such violence. There is a lack of accountability for police officers and a low indictment rate in cases involving police brutality largely because of the inherent problems with the grand jury process. These problems include the prosecutor's power and control over the grand jury process and the inherent conflict of interest between prosecutors and police officers. These aspects give prosecutors nearly unlimited discretion which they can abuse when the suspect is a police officer. This abuse of power leads to disparity in case treatment and results in grand juries declining to indict the police officers responsible. In order to combat this abuse of power and ultimately stop supporting racism by devaluing Black lives, another charging process should be used – like criminal complaints or preliminary hearings – and at the minimum, implicit bias training for all criminal justice and legal professionals must be implemented.

Existing laws governing the grand jury process and police officers must be updated to reflect the public's concerns. As a society, it is time to stand up against the racism that has entrenched our country since the beginning. It is time to admit our current system is broken, even by those who might not feel or be affected by the brokenness. As a lawyer, comes the duty to advocate for the justice of all people and the duty to not allow other government actors to act without accountability. Police brutality against Black people is an issue much bigger than just one case, one verdict, one denial of justice, or just one moment. The acts of police brutality that ended the lives of Tamir Rice, Michael Brown, Eric Garner, Breonna Taylor, and so many countless others should not only never occur but should especially result in charges against the

police officers involved. Like the mayor of Minneapolis, Jacob Frey, said after the death of George Floyd, “[b]eing Black in American should not be a death sentence.”<sup>135</sup>

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<sup>135</sup> *See supra* note 113.