

A MATTER OF DUE REGARD: POLICE MISCONDUCT, THE
NEW YORK STATE COURTS, AND THE EMPTINESS OF
THEORETICAL JUSTICE

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I. INTRODUCTION

Whether across front pages and television screens, or in conversations and confrontations, concerns about law enforcement’s use of force are at the forefront of national consciousness. Anxieties about police authority and abuse are neither novel nor new. They trace to the Framers’ unease toward standing armies in peacetime;¹ the context giving rise to the Wickersham Commission, created to address Prohibition-era concerns about corrupt police practices;² and the violence that engulfed Los Angeles after the 1991 beating of Rodney King at the hands of police.³ These concerns, however, stand in sharp relief against police opinions.⁴ A Police Foundation and U.S. Department of Justice (“DOJ”) survey of law enforcement officers indicated that, while officers, in general, did not approve of

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¹ See, e.g., Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1165, 1168–69 (1991) (“[An army] was *not* composed of a randomly conscripted cross-section of . . . all [c]itizens capable of bearing arms[], but was instead filled with *hired* guns. These men, full-time soldiers who had sold themselves into virtual bondage to the government . . . weakened their ties to civil(ized)/(ian) society.”); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 647–48 (1989); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 836–37 (1994).

² See RECORDS OF THE WICKERSHAM COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT: PART 1: RECORDS OF THE COMMITTEE ON OFFICIAL LAWLESSNESS, at v, vi (Kermit Hall et al. eds., 1997), http://www.lexisnexis.com/documents/academic/upa_cis/1965_WickershamCommPt1.pdf.

³ Chelsea Matiash & Lily Rothman, *The Beating that Changed America: What Happened to Rodney King 25 Years Ago*, TIME (Mar. 3, 2016), <http://time.com/4245175/rodney-king-la-riots-anniversary/>; see DAVID WEISBURD ET AL., THE ABUSE OF POLICE AUTHORITY: A NATIONAL STUDY OF POLICE OFFICERS’ ATTITUDES 12 (2001), <https://www.policefoundation.org/wp-content/uploads/2015/06/Weisburd-et-al.-2001-The-Abuse-of-Police-Authority.pdf>.

⁴ See WEISBURD ET AL., *supra* note 3, at 14.

excessive force, they believed that the public was “too concerned” with police brutality.⁵

This sentiment may reflect the fact that the majority of individuals killed by police are armed with objectively deadly weapons,⁶ and that the use of force by law enforcement, threatened or experienced, is a rare occurrence.⁷ Yet, this evidence is little assurance on the occasions when, in employing force, officers can quickly find themselves crossing the line between what is reasonable and what is excessive.⁸ It is even less comforting to individuals, families, and communities left reeling in the wake of incidents that raise more questions—and outrage—than answers.⁹ This outrage is particularly acute among those who confront the use of police force more frequently than others—youth, men, and persons of color.¹⁰ Incidents of police force also occur more frequently in low-income communities of color,¹¹ in areas where police presence is more routine than exceptional,¹² and in neighborhoods where the over-policing of minor crimes has a counterintuitive relationship to the under-policing of major crimes.¹³

⁵ See *id.*; see generally Auriandra, *Polls: Police Brutality—What the Police Have to Say*, DAILY KOS: BLOG (Aug. 22, 2014), www.dailykos.com/story/2014/8/22/1323722/-Polls-Police-Brutality-What-The-Police-Have-To-Say (discussing police misconduct).

⁶ See, e.g., Kimberly Kindy et al., *Fatal Police Shootings in 2015 Approaching 400 Nationwide*, WASH. POST (May 30, 2015), https://www.washingtonpost.com/national/fatal-police-shootings-in-2015-approaching-400-nationwide/2015/05/30/d322256a-058e-11e5-a428-c984eb077d4e_story.html.

⁷ CHRISTINE EITH & MATTHEW R. DUROSE, U.S. DEP’T OF JUST., CONTACTS BETWEEN POLICE AND THE PUBLIC 11 (2011), www.bjs.gov/content/pub/pdf/cpp08.pdf (noting that a 2008 Bureau of Justice Statistics (“BJS”) analysis indicated that out of 39,914,000 instances of police-civilian conduct, 776,000, or 1.9%, occasioned the use or the threat of force).

⁸ See, e.g., Matiash & Rothman, *supra* note 3.

⁹ See, e.g., EITH & DUROSE, *supra* note 7, at 12.

¹⁰ In 2011, BJS data indicated that, out of all considered categories of persons age sixteen and older having contact with police, men, black, and younger persons were more likely to have a contact that resulted in the use or threat of force. See LYNN LANGTON & MATTHEW DUROSE, U.S. DEP’T OF JUST., POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS 3 (2013), www.bjs.gov/content/pub/pdf/pbtss11.pdf. This is to say nothing of the many deaths of Native individuals at the hands of police, which occur at a rate—when controlled for the size of Native communities—higher than that of Black individuals. See Stephanie Woodard, *The Police Killings No One is Talking About*, THESE TIMES, (Oct. 17, 2016), www.inthesetimes.com/features/native_american_police_killings_native_lives_matter.html.

¹¹ See, e.g., Runa Rajagopal, *Building Justice: How Segregation Enables Over-Policing of Communities of Color*, CITY LIMITS (Sept. 26, 2016), www.citylimits.org/2016/09/26/how-segregated-housing-enables-over-policing-of-low-income-communities-of-color/.

¹² See Sarah Childress, *The Problem with “Broken Windows” Policing*, PBS (June 28, 2016), www.pbs.org/wgbh/frontline/article/the-problem-with-broken-windows-policing/.

¹³ See David Kennedy, *Black Communities: Overpoliced for Petty Crimes, Ignored for Major Ones*, L.A. TIMES (Apr. 10, 2015), www.latimes.com/opinion/bookclub/la-reading-los-angeles-kennedy-ghettoside-20150404-story.html.

When discussing police misconduct, it is critical to acknowledge that what constitutes misconduct as a matter of force resists easy interpretation—especially before the law. The same actions that give rise to community mistrust and anger may concurrently result in civil liability, but not criminal culpability.¹⁴ Further, depending on the circumstances of a case, police departments and unions may take conflicting positions on the correctness of an officer’s conduct.¹⁵

Communities touched by instances of police violence require meaningful address by and engagement with police. These communities must also commit to renegotiating trust and respect with law enforcement.¹⁶ However, in an environment where police misconduct’s “bad apple” theory¹⁷ is ever-undermined by a steady stream of bystander footage, community wounds, already open, deepen and fester.¹⁸ Victims of police violence suffer both the physical and mental trauma born from the violation of a certain social trust.¹⁹ They also suffer in more quantitative terms, in the form of medical expenses, lost income, and legal fees—all of which take time to pursue, navigate, and resolve.²⁰ Indisputably, those who have been subject to maltreatment at the hands of police deserve acknowledgement and justice, and their aggressors should personally account.²¹ Yet, as recent criminal and civil proceedings have demonstrated, justice and accountability are theoretical, if not entirely empty, gestures. This article takes a look at these proceedings in a New York State framework, and endeavors to

¹⁴ See Christopher A. Love, *The Myth of Message-Sending: The Continuing Search for a True Deterrent to Police Misconduct*, 12 J. SUFFOLK ACAD. L. 45, 45, 46, 49 (1998).

¹⁵ See *id.* at 46; see also Dugald McConnell & Brian Todd, *Defenders of Cop Involved in Garner Death Say He’s a ‘Model Officer,’* CNN (Dec. 22, 2014), www.cnn.com/2014/12/04/us/police-officer-daniel-pantaleo (providing an example of outrage to police conduct).

¹⁶ See Kate Abbey-Lambertz & Joseph Erbentraut, *The Simple Strategies that could Fundamentally Change how Communities View their Police*, HUFFINGTON POST (Feb. 17, 2015), http://www.huffingtonpost.com/2015/02/17/community-policing-police-trust_n_6607766.html.

¹⁷ See Auriandra, *supra* note 5; Jay Stanley, *We Need to Move Beyond the Frame of the “Bad Apple Cop,”* AM. CIV. LIBERTIES UNION (Mar. 19, 2015), <https://www.aclu.org/blog/we-need-move-beyond-frame-bad-apple-cop>.

¹⁸ See Conor Friedersdorf, *Video Killed Trust in Police Officers*, ATLANTIC (Aug. 18, 2014), www.theatlantic.com/national/archive/2014/08/police-officers-havent-earned-our-instinctive-trust/378657; Stanley, *supra* note 17.

¹⁹ See, e.g., Imani J. Jackson, *The Trauma of Police Brutality*, USA TODAY (Sept. 2, 2016), <http://www.usatoday.com/story/opinion/policing/spotlight/2016/09/02/trauma-police-brutality-column/89019122/>; Love, *supra* note 14, at 58.

²⁰ See Love, *supra* note 14, at 45; David Packman, *The Truth About Police Misconduct Litigation*, CATO INST. (Feb. 22, 2010), <https://www.policemisconduct.net/the-truth-about-police-misconduct-litigation/>.

²¹ See Love, *supra* note 14, at 61.

understand the courts' limitations on meting out meaningful justice.

II. POLICING IN THE FRAME OF INSTITUTIONAL LEGITIMACY AND PROCEDURAL JUSTICE

The difference in perceptions of policing marks the contrast between worlds, differing often not only in racial composition, but in matters of economics, political engagement, and the ease of access to social and legal institutions.²² As a result, by virtue of experience and exposure, people of color²³ frequently view law enforcement as untrustworthy and less legitimate.²⁴ Institutional legitimacy is critical to the concept of justice, and, as to law enforcement and the criminal justice system, that legitimacy arises not from fear, but from a community that experiences equity and fairness before the law.²⁵ Legitimacy further hinges upon procedural justice—that is, the subjective and objective notion that those caught up in the legal system are treated equally and without caveat or qualification.²⁶ As it stands today, the institutional biases in favor of law enforcement in the criminal context, as well as the functional limitations of civil redress, keep a sense of justice in response to police misconduct evanescent.²⁷

²² See, e.g., Reed Collins, *Strolling While Poor: How Broken-Windows Policing Created a New Crime in Baltimore*, 14 GEO. J. ON POVERTY L. & POL'Y 419, 427, 428, 430, 435 (2007); Friedersdorf, *supra* note 18; Jens Manuel Krogstad, *Latino Confidence in Local Police Lower than among Whites*, PEW RES. CTR. (Aug. 28, 2014), www.pewresearch.org/fact-tank/2014/08/28/latino-confidence-in-local-police-lower-than-among-whites; Sam Mitrani, *Stop Kidding Yourself: The Police were Created to Control Working Class and Poor People*, LAB. & WORKING CLASS HIST. ASS'N (Dec. 29, 2014), <https://lawcha.org/wordpress/2014/12/29/stop-kidding-police-created-control-working-class-poor-people>; Rich Morin & Renee Stepler, *The Racial Confidence Gap in Police Performance*, PEW RES. CTR. (Sept. 29, 2016), www.pewsocialtrends.org/2016/09/29/the-racial-confidence-gap-in-police-performance/.

²³ See, e.g., Kindy et al., *supra* note 6; see Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 767 (2016); see also ASSOCIATED PRESS & NORC, LAW ENFORCEMENT AND VIOLENCE: THE DIVIDE BETWEEN BLACK AND WHITE AMERICANS 1, 13, 15 (2015), www.apnorc.org/PDFs/Police%20Violence/Issue%20Brief_PoliceFinal.pdf (discussing tensions between minorities and the police).

²⁴ See *Race, Trust and Police Legitimacy*, NAT'L INST. JUST., www.nij.gov/topics/law-enforcement/legitimacy/pages/welcome.aspx (last updated July 14, 2016).

²⁵ See Colin Taylor Ross, Note, *Policing Pontius Pilate: Police Violence, Local Prosecutors, and Legitimacy*, 53 HARV. J. ON LEGIS. 755, 765 (2016); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 L. & SOC'Y REV. 513, 516–17, 519 (2003); *Race, Trust and Police Legitimacy*, *supra* note 24.

²⁶ See Ross, *supra* note 25, at 765, 766.

²⁷ See Lindsey de Stefan, Comment, *"No Man is Above the Law and No Man is Below it": How Qualified Immunity Reform Could Create Accountability and Curb Widespread Police Misconduct*, 47 SETON HALL L. REV. 543, 543, 557, 558 (2017); Ross, *supra* note 25, at 780.

III. SEARCHING FOR JUSTICE AMONG THE NAMES OF THE DEAD

A. Delrawn Small,²⁸ Edson Thevenin,²⁹ Richard Gonzalez,³⁰ Miguel Espinal,³¹ Richard Davis,³² Denis Reyes,³³ David Felix,³⁴ Samuel Harrell,³⁵ Donald Ivy,³⁶ Denzel Brown,³⁷ Akai Gurley,³⁸ Daniel

²⁸ See John Marzulli et al., *Off-Duty Cop Who Killed Delrawn Small in Road Rage Incident Indicted on Murder Charges; Widow Welcomes News*, N.Y. DAILY NEWS (Sept. 27, 2016), www.nydailynews.com/new-york/murder-charges-killed-delrawn-small-article-1.2807244.

²⁹ See Brendan J. Lyons, *Grand Jury Didn't Hear Witnesses in Troy Fatal Police Shooting*, TIMES UNION (Apr. 30, 2016), www.timesunion.com/local/article/Grand-jury-didn-t-hear-witnesses-in-Troy-fatal-7385078.php; Mark Robarge, *Mayor: Troy to Cooperate With State Probe of Officer-Involved Shooting*, TROY REC. (May 2, 2016), www.troyrecord.com/article/TR/20160502/NEWS/160509923.

³⁰ See Kerry Burke et al., *NYPD Investigating Cause of Death for Suspected Cocaine User Who Died While in Police Handcuffs in the Bronx*, N.Y. DAILY NEWS (Mar. 17, 2016), <http://www.nydailynews.com/new-york/bronx/suspected-cocaine-addict-died-police-handcuffs-article-1.2568676>; Ashley Southall & Liam Stack, *Bronx Man, 54, Dies in Police Custody After Being Handcuffed over Tussle*, N.Y. TIMES (Mar. 18, 2016), <https://www.nytimes.com/2016/03/18/nyregion/bronx-man-54-dies-in-police-custody-after-being-handcuffed-over-tussle.html>.

³¹ See Al Baker & J. David Goodman, *New York Police Officer Fatally Shoots Unarmed Man after Chase into Westchester*, N.Y. TIMES (Dec. 8, 2015), <https://www.nytimes.com/2015/12/09/nyregion/yonkers-police-chase-off-saw-mill.html>; Joseph Stepansky & Thomas Tracy, *Cop said Ex-Con Tried to Grab his Gun when he Fired Fatal Shot after Police Chase through Bronx*, N.Y. DAILY NEWS (Dec. 9, 2015), <http://www.nydailynews.com/new-york/bronx/man-involved-deadly-police-chase-westchester-free-article-1.2460362>.

³² See Jon Hand & David Riley, *Police Have Video Footage of Fatal Tasing*, DEMOCRAT & CHRON. (June 1, 2015), <http://www.democratandchronicle.com/story/news/2015/06/01/richard-gregory-davis-rochester-taser-death-video/28312513/>; Jeremy Moule, *Violence against Black Men, against Police, Rocks Country*, CITY NEWSPAPER (July 8, 2016), <http://www.rochestercitynewspaper.com/NewsBlog/archives/2016/07/08/violence-against-black-men-against-police-rocks-country>.

³³ See Lauren Gambino, *'He Couldn't Breathe': The NYPD, Mental Illness and Denis Reyes' Final Minutes*, GUARDIAN (June 3, 2015), <https://www.theguardian.com/us-news/2015/jun/03/denis-reyes-the-counted-nypd>; Nolan Hicks, *Landmark Reform of Police Prosecutions too Late in Case of Mentally Ill Man's Death*, N.Y. DAILY NEWS (July 13, 2015), <http://www.nydailynews.com/new-york/mentally-ill-man-dead-cops-respond-bronx-home-article-1.2291140>.

³⁴ See J. David Goodman, *Suspect Fatally Shot by Detective in East Village had Mental Illness and a Troubled Past*, N.Y. TIMES (Apr. 26, 2015), <https://www.nytimes.com/2015/04/27/nyregion/suspect-fatally-shot-by-detective-in-east-village-had-mental-illness-and-a-troubled-past.html>; Marissa Ram & Brendan M. Conner, *David Felix: Jailed by an Unjust System, Failed by City Services, Killed by Police*, GUARDIAN (June 10, 2015), <https://www.theguardian.com/commentisfree/2015/jun/10/david-felix-immigration-mental-illness-killed-by-police>.

³⁵ See Christopher Mathias, *#BlackLivesMatter Activists Call for Changes in Brutal Death of Prisoner Samuel Harrell*, HUFFINGTON POST (Aug. 27, 2015), http://www.huffingtonpost.com/entry/blacklivesmatter-samuel-harrell_us_55df11d0e4b08dc094868466; Michael Winerip & Michael Schwartz, *Prison Guard 'Beat Up Squad' is Blamed in New York Inmate's Death*, N.Y. TIMES (Aug. 18, 2015), <https://www.nytimes.com/2015/08/19/nyregion/fishkill-prison-inmate-died-after-fight-with-officers-records-show.html>.

³⁶ See Robert Gavin, *DA: Police will not Face Charges in Death of Donald Ivy*, TIMES UNION (Oct. 29, 2015), <http://www.timesunion.com/local/article/Prosecutors-to-discuss-death-of-Donald-Ivy-who-6595969.php>.

³⁷ See Associated Press, *Officer Lauded for Killing Man who Tried to Steal Car With 2 Boys Inside*, N.Y. TIMES (Mar. 23, 2015), https://www.nytimes.com/2015/03/24/nyregion/officer-lauded-for-killing-man-who-tried-to-steal-car-with-2-boys-inside.html?_r=0.

*Satre,*³⁹ *Eric Garner,*⁴⁰ *Ronald Singleton,*⁴¹ *Travis Tellone,*⁴² *Steven J. Bell,*⁴³ and *Lawrence Ports*⁴⁴

This article focuses on law enforcement's use of excessive force and deadly force in New York State since 2013. The year marks the crystallization of the then-nascent Black Lives Matter movement, as well as the explosion in media coverage of police shootings.⁴⁵ This article arose out of curiosity about the obscure: how did New York State's criminal and civil courts grapple with the unarmed, deadly force's most objectively innocent victims?

Between 2013 and the summer of 2016, the seventeen individuals named above met their deaths due directly to the use of deadly force by New York law enforcement—otherwise known as “deaths by legal intervention.”⁴⁶ These seventeen victims share several

³⁸ See Jamie Schram et al., *NYPD Cop Indicted in Stairway Killing of Akai Gurley*, N.Y. POST (Feb. 10, 2015), <http://nypost.com/2015/02/10/grand-jury-indicts-nypd-cop-in-stairway-killing-of-akai-gurley/>.

³⁹ See Matthew Hamilton, *Stun Gun Death Puzzles Cops, Kin*, TIMES UNION (Sept. 22, 2014), <http://www.timesunion.com/local/article/Police-to-hold-press-conference-about-Ballston-5770775.php>.

⁴⁰ See J. David Goodman & Michael Wilson, *Officer Daniel Pantaleo told Grand Jury he Meant no Harm to Eric Garner*, N.Y. TIMES (Dec. 3, 2014), <https://www.nytimes.com/2014/12/04/nyregion/officer-told-grand-jury-he-meant-no-harm-to-eric-garner.html>.

⁴¹ See Marisa Marcellino, *Death of Man Restrained by NYPD Ruled Homicide*, CNN (Sept. 2, 2014), <http://www.cnn.com/2014/08/30/justice/new-york-police-death/>.

⁴² See Thane Grauel, *Yonkers Police ID Man who Died after Foot Chase*, LOHUD (June 13, 2014), <http://www.lohud.com/story/news/crime/2014/06/13/yonkers-police-identify-man-died-foot-chase/10416385/>.

⁴³ See Robert Gavin & Bob Gardinier, *No Gun Found in Death*, TIMES UNION (Nov. 18, 2013), <http://www.timesunion.com/local/article/No-gun-found-in-death-4990568.php>.

⁴⁴ See Timothy Bolger, *Kings Park Man Dies After Struggle with Police*, LONG ISLAND PRESS (Oct. 13, 2013), <https://www.longislandpress.com/2013/10/13/kings-park-man-dies-after-struggle-with-police/>.

⁴⁵ See Osagie K. Obasogie & Zachary Newman, *Black Lives Matter and Respectability Politics in Local News Accounts of Officer-Involved Civilian Deaths: An Early Empirical Assessment*, 2016 WIS. L. REV. 541, 542; Elliott C. McLaughlin, *We're Not Seeing More Police Shootings, Just More News Coverage*, CNN (Apr. 21, 2015), www.cnn.com/2015/04/20/us/police-brutality-video-social-media-attitudes/; *Social Media Plays Major Role in National Debate on Police Violence*, PBS, www.pbs.org/newshour/bb/social-media-plays-major-role-national-debate-police-brutality/ (last visited Mar. 25, 2017); *About Us*, BLACK LIVES MATTER, <http://blacklivesmatter.com/about/> (last visited Mar. 25, 2017).

⁴⁶ See “*Death by Legal Intervention*” by the Numbers, PSYCHOL. BENEFITS SOC'Y (July 2, 2015), <https://psychologybenefits.org/2015/07/02/police-shootings-data/>; see also *infra* Appendix (providing details regarding the seventeen victims' deaths). The Appendix provides, for the relevant time period, data that reflects direct confrontations with police while the officer was either on duty or the death was caused by an off-duty officer's use of his service weapon. This examination excludes cases where an unarmed victim: was killed as an innocent bystander during the pursuit of a criminal suspect; died while in police custody but not due to reasons involving police intervention; during matters where an off-duty officer indisputably committed a criminal or criminally negligent act resulting in the death of himself, herself, or another; and matters where a member of law enforcement was involved in

characteristics: all are male, between the ages of twenty-one and sixty, and were unarmed at the time of their interactions with police.⁴⁷ Notably, the failure of law enforcement to recognize or acknowledge the signs of mental illness or medical distress is a common theme in the moments preceding these victims' deaths.⁴⁸

Seven deaths were the result of gunshots; six, the result of cardiac arrest while being restrained or as the result of a physical altercation; three, the result of taserings; and one, the result of brutal physical assault while restrained.⁴⁹ Ten of the seventeen men were Black, four were White, and three were Hispanic/Latino.⁵⁰ Where reliable census data could be found, the average income of the victims' neighborhoods was \$39,116, placing the victims in the lower income tier for both the state and nation.⁵¹ For less than half

an accident while on duty, resulting in a death.

⁴⁷ See *infra* Appendix. The criminal trial of former New York Police Department ("NYPD") Officer Peter Liang for the 2014 shooting death of Akai Gurley, and the video released of EMS workers and NYPD officers present after Eric Garner's 2014 altercation with police, pointedly evidence the issue in New York State and across the country. See Alan Feuer, *Parents Renew a Personal Push to Compel CPR Training for Police in New York*, N.Y. TIMES (Sept. 14, 2016), www.nytimes.com/2016/09/15/nyregion/parents-renew-a-personal-push-to-compel-cpr-training-for-police-in-new-york.html; Shaun King, *Exploring What it Means when Police Refuse to Provide Medical Attention to their Victims*, DAILY KOS (June 2, 2015), www.dailykos.com/story/2015/6/2/1389815/-Exploring-what-it-means-when-police-completely-refuse-medical-attention-to-their-victims; Richard Pérez-Peña, *Why First Aid is Often Lacking in the Moments after a Police Shooting*, N.Y. TIMES (Sept. 21, 2016), www.nytimes.com/2016/09/22/us/why-first-aid-is-often-lacking-in-the-moments-after-a-police-shooting.html; Harry Siegel, *The Lonesome Death of Eric Garner*, N.Y. DAILY NEWS (Dec. 3, 2014), www.nydailynews.com/opinion/harry-siegel-lonesome-death-eric-garner-article-1.2032281; see also Woodard, *supra* note 10 (illustrating a lack of medical intervention in the context of death-by-legal-intervention in the Native American community). First introduced in 2011, the New York State Assembly has routinely passed Briana's Law, a measure that would require that state and local police officers receive CPR training every two years. As of this writing, the bill has languished in the State Senate. See Assemb. B. 8232, 238th Reg. Sess. (N.Y. 2015).

⁴⁸ See Gary Howell, *The Dark Frontier: The Violent and Often Tragic Point of Contact between Law Enforcement and the Mentally Ill*, 17 SCHOLAR 343, 359 (2015). There have long been issues with the interaction of law enforcement with the mentally ill. See, e.g., Jamiles Lartey, *Risk of Being Killed by Police is 16 Times Greater for Those with Mental Illness*, GUARDIAN (Dec. 10, 2015), <https://www.theguardian.com/us-news/2015/dec/10/risk-of-being-killed-by-police-16-times-greater-mental-illness>; Michael D. Thompson, *When Police Deal with People who Have Mental Health Issues*, SCI. AM.: GUEST BLOG (Aug. 28, 2016), <https://blogs.scientificamerican.com/guest-blog/when-police-deal-with-people-who-have-mental-health-issues>; Woodard, *supra* note 10.

⁴⁹ See *infra* Appendix.

⁵⁰ See *infra* Appendix.

⁵¹ See *infra* Appendix; see also *America's Shrinking Middle Class: A Close Look at Changes Within Metropolitan Areas*, PEW RES. CTR. (May 11, 2016), www.pewsocialtrends.org/2016/05/11/americas-shrinking-middle-class-a-close-look-at-changes-within-metropolitan-areas/ (providing income data); Tami Luhby & Tiffany Baker, *What is Middle Class, Anyway?*, CNN MONEY, money.cnn.com/infographic/economy/what-is-middle-class-anyway (last visited Apr. 21, 2017) (providing the same).

of the victims, the incident induced a prosecutor to bring the case before a grand jury; in only two of these did a grand jury hand up a “yes” bill.⁵² Finally, in cases not otherwise still under investigation or pending civil resolution, as of the writing of this article, the families of three of the victims received settlements ranging from \$1.25 million to \$5.9 million.⁵³

With these victims close in mind, this article explores the practical and procedural hurdles met during the search for police accountability through New York’s criminal and civil courts. While the pursuit of justice through these channels is an option for holding police accountable for misconduct, criminal cases, if they materialize at all, are plagued by grand juries’ consistent declination to indict police suspects.⁵⁴ Civil cases⁵⁵ for excessive force or wrongful death are not only costly to maintain,⁵⁶ but are often dismissed on the papers,⁵⁷ weigh in favor of police accounts, or, due to economic considerations, result in settlements without meaningful evaluation on the merits.⁵⁸

IV. *QUIS CUSTODIET IPSOS CUSTODES?*

By virtue of their profession and the obligations set out by law,

⁵² See *infra* Appendix.

⁵³ See, e.g., J. David Goodman, *Eric Garner Case Is Settled by New York City for \$5.9 Million*, N.Y. TIMES (July 13, 2015), www.nytimes.com/2015/07/14/nyregion/eric-garner-case-is-settled-by-new-york-city-for-5-9-million.html; see John Marzulli & Christina Carrega-Woodby, *City to Pay Settlement of More Than \$4M to Family of Akai Gurley Who Was Fatally Shot by Former Police Officer Peter Liang*, N.Y. DAILY NEWS (Aug. 15, 2016), www.nydailynews.com/amp/new-york/city-pay-settlement-4m-family-akai-gurley-article-1.2752497; Ryan J. Farrick, *Mother of Ron Singleton, Killed During NYPD Encounter, Settles for \$1.25m*, LEGAL READER (Sept. 28 2017), www.legalreader.com/mother-ron-singleton-nypd-settles-1-25m.

⁵⁴ See, e.g., Goodman, *supra* note 53.

⁵⁵ While this article examines only excessive use of force claims brought under the laws of New York State, 42 U.S.C. § 1983 permits an aggrieved party to pursue a cause of action arising out of an allegation that a municipality—by policy or custom, and acting affirmatively through its agent—violated an individual’s Fourth Amendment right by using excessive force. See 42 U.S.C. § 1983 (2012); *Graham v. Connor*, 490 U.S. 386, 388, 393–96 (1989); *Chamberlain v. City of White Plains*, 986 F. Supp. 2d 363, 378, 383 (S.D.N.Y. 2013); see also Mark S. Bruder, *When Police Use Excessive Force: Choosing a Constitutional Threshold of Liability in Justice v. Dennis*, 62 ST. JOHN’S L. REV. 735, 735–38 (1988) (discussing the availability of civil channels as a remedy for misconduct committed by an officer).

⁵⁶ See, e.g., *Shielded from Justice: Police Brutality and Accountability in the United States: Civil Remedies*, HUM. RTS. WATCH, <https://www.hrw.org/legacy/reports98/police/uspo30.htm> (last visited Apr. 21, 2017) [hereinafter *Shielded from Justice: Civil Remedies*].

⁵⁷ See, e.g., Levine, *supra* note 23, at 755–56.

⁵⁸ See, e.g., *id.* at 755–56, 758–59; Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197, 1200 (2016) (discussing the early exculpation of police officers in cases); *Shielded from Justice: Civil Remedies*, *supra* note 56; see also *Villanueva v. New York*, No. 2014-044-077 (N.Y. Ct. Cl. 2014).

police officers are frequently required to act in defense of the public and in their own defense⁵⁹—realities that require both attention to situational nuances and acknowledgement of an officer’s perceptive fallibilities, particularly in the retrospective context of civil claims and criminal prosecution.⁶⁰ There is no dispute that policing involves the threat of violence against officers and the use of violence by officers.⁶¹ Yet, there is little consensus as to whether force is appropriate when used as a particular type of shield, and also as to who or what is to blame for perceptions that excessive force is appropriate where it may in fact not be.⁶²

Despite the laudable fact that police officers have bound themselves to a profession where risks are constant, danger is omnipresent, and duty requires extraordinary acts, officers are not “priests in blue.”⁶³ Where an officer’s limitations and flaws exist, in conjunction with his or her strengths, a duty to protect and serve filters through whatever social or institutional teachings have been imparted upon his or her subjective view of the world.⁶⁴ In the crucible of policing—as with many high-stress professions—derivative aggression, comradely hazing, and gallows humor are part of the culture.⁶⁵ But policing is distinct. Its historical arc tacks to America’s legacy of racial division, the protection of capitalist-class assets and interests, and the assertion of authoritarian power and control as apportioned to social, political, or economic anxieties.⁶⁶ Thus, otherwise benign cultural features layer just

⁵⁹ See J. Michael McGuinness, *Shootings by Police Officers are Analyzed under Standards Based on Objective Reasonableness*, 72 N.Y. ST. BAR J. 17, 17 (2000).

⁶⁰ See *id.* at 18; see also Carol A. Archbold & Edward R. Maguire, *Studying Civil Suits Against the Police: A Serendipitous Finding of Sample Selection Bias*, 5 POLICE Q. 222, 226 (2002) (discussing civil suits filed against police).

⁶¹ See WEISBURD ET AL., *supra* note 3, at 12, 19.

⁶² *Id.* at 12, 13, 14; see ASSOCIATED PRESS & NORC, *supra* note 23, at 2.

⁶³ See Rachel Lu, *You Don’t Have to be Black Lives Matter to Support Police Accountability*, FEDERALIST, <http://thefederalist.com/2016/07/07/you-dont-have-to-be-black-lives-matter-to-support-police-accountability/> (last visited Mar. 20, 2017); see also Brad W. Smith & Malcolm D. Holmes, *Police Use of Excessive Force in Minority Communities: A Test of the Minority Threat, Place, and Community Accountability Hypotheses*, 61 SOC. PROB. 83, 84–87 (2014).

⁶⁴ See Lu, *supra* note 63.

⁶⁵ See James Wolcott, *The Other Cultural Forces Behind Police Brutality*, VANITY FAIR (July 2015), www.vanityfair.com/culture/2015/06/police-deaths-baltimore-ferguson-james-wolcott.

⁶⁶ See, e.g., Steiker, *supra* note 1, at 839 (“The influence of race on the structure of law enforcement dates back at least to the creation of the first modern police forces. The military style of the new police—their uniforms, arms, and military drilling—first appeared in the early nineteenth-century ‘slave patrols’ organized by many Southern cities to police their slave populations.”); Mitrani, *supra* note 22 (“The violence the police carried out and their moral separation from those they patrolled were not the consequences of the brutality of individual officers, but were the consequences of careful policies designed to mold the police

beneath that particular history.⁶⁷ Actions taken in this context, including misconduct, are inevitable at best, and in their worst iterations, are tacitly sanctioned by superiors and peers.⁶⁸

Police departments' internal investigators are well equipped to flag, review, and punish officers who violate department standards, rules, and the law.⁶⁹ Yet, when misconduct is the issue, internal investigations have been assailed as being biased, ineffective, and preservative of the status quo.⁷⁰ These sentiments reverberate especially in jurisdictions where police officers under internal investigation have statutory "Law Enforcement Officers' Bill of Rights" ("LEOBOR") protections.⁷¹ Although New York State does not have LEOBOR-type protections by statute, police union contracts frequently contain protections that officers must be afforded when they are subject to internal investigation⁷² and New York State Civil Rights Law section 50-a instates disclosure

into a force that could use violence to deal with the social problems that accompanied the development of a wage-labor economy."); Cathy Schneider & Paul E. Amar, *The Rise of Crime, Disorder and Authoritarian Policing: An Introductory Essay*, NORTH AM. CONGRESS ON LATIN AM., <https://nacla.org/article/rise-crime-disorder-and-authoritarian-policing-introductory-essay> (last visited Mar. 20, 2017).

⁶⁷ See Schneider & Amar, *supra* note 66.

⁶⁸ See Joseph Goldstein, *Officers, Exhorted to Report Corruption, Still Fear Retaliation*, N.Y. TIMES (June 24, 2012), www.nytimes.com/2012/06/25/nyregion/new-york-police-officers-face-retaliation-for-reporting-corruption.html; Jerome Skolnick, *Code Blue*, PROSPECT (Dec. 19, 2001), prospect.org/article/code-blue ("Police are caught between the imperatives of the blue wall of silence and police department rules compelling a cop who knows of police misconduct to notify Internal Affairs investigators immediately. If the officer promptly reports an incident, he's labeled a 'rat' or a 'cheese eater' by other cops. . . . [This] can conceal (and possibly encourage) egregious violations of civil rights, not to mention less extreme incidents of unwarranted violence and abuse."); see also WEISBURD ET AL., *supra* note 3, at 13 (discussing issues with officers not reporting abuses of authority).

⁶⁹ See Walter Katz, *Enhancing Accountability and Trust with Independent Investigations of Police Lethal Force*, 128 HARV. L. REV. F. 235, 237–38 (2015).

⁷⁰ See *id.*

⁷¹ See Eli Hager, *Blue Shield*, MARSHALL PROJECT (Apr. 27, 2015), <https://www.themarshallproject.org/2015/04/27/blue-shield#.6ZVtLHyZC>; see generally Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills of Rights*, 14 B.U. PUB. INT. L.J. 185, 185–88 (2005) (discussing LEOBOR and police accountability).

⁷² See, e.g., *People v. Thomas*, 8 N.E.3d 308, 314 (N.Y. 2014); *People v. Smith*, 814 N.Y.S.2d 360, 361–62 (App. Div. 2006); Tom Robbins, *A Brutal Beating Wakes Attica's Ghosts*, N.Y. TIMES (Feb. 28, 2015), www.nytimes.com/2015/03/01/nyregion/attica-prison-infamous-for-bloodshed-faces-a-reckoning-as-guards-go-on-trial.html; Michael Winerip et al., *New York State Corrections Dept. Takes On Guards' Union Over Brutality*, N.Y. TIMES (Apr. 11, 2016), www.nytimes.com/2016/04/12/nyregion/new-york-state-corrections-dept-takes-on-guards-union-over-brutality.html ("Rules governing internal affairs investigations require [corrections] officers to receive 24 hours' notice before being questioned, and while on the job, a guard cannot be penalized for refusing to answer questions from an outside law enforcement agency. Moreover, details of disciplinary measures taken against guards are kept secret from the public, because of privacy protections won by the police and corrections unions over the years.").

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protections for internal investigation records.⁷³ Moreover, the U.S. Supreme Court, in *Garrity v. State of New Jersey*,⁷⁴ set forth the principle that law enforcement officers, among other public employees, have the right to be free from compulsory self-incrimination when they are subject to internal investigation.⁷⁵

V. POLICE MISCONDUCT IN THE PUBLIC EYE

Incidents of police misconduct by excessive force do not occur in a vacuum, particularly when they point to infirmities in the organizational structure that supports and surrounds law enforcement.⁷⁶ As reports of police brutality abound and police have taken contestable actions that result in the appearance of unnecessary death execution, public trust in law enforcement has reached a new nadir.⁷⁷ In 2015, a Gallup poll found the nation's

⁷³ See *In re McGee v. Johnson*, 927 N.Y.S.2d 605, 606 (App. Div. 2011); Elias Isquith, *America's Police Misconduct Nightmare: How the Law Shields Cops from Accountability*, SALON (Oct. 1, 2015), www.salon.com/2015/10/15/americas_police_misconduct_nightmare_how_theLaw_shields_cops_from_accountability; see also David Uberti, *How New York Protects Police Records from Public View*, COLUM. JOURNALISM REV., www.cjr.org/b-roll/how_new_york_protects_police_r.php (last visited Mar. 20, 2017).

⁷⁴ *Garrity v. New Jersey*, 385 U.S. 493 (1967).

⁷⁵ See *id.* at 500. In New York, when an individual testifies before a grand jury relative to misconduct, he or she is automatically afforded transactional immunity from that testimony being used against him or her as basis for a separate indictment, unless he or she waives the protection. See N.Y. CRIM. PROC. LAW §§ 190.40, 190.45 (McKinney 2017). This general protection, in the frame of police misconduct, takes on new significance in conjunction with the protections afforded to police officers pursuant to union contracts. See Steven D. Clymer, *Compelled Statements from Police Officers and Garrity Immunity*, 76 N.Y.U. L. REV. 1309, 1312 (2001) (“[S]uch ‘Garrity immunity’ does not bar later prosecution of a police officer who has given a compelled statement, [but] it does impose on the prosecution the substantial burden of demonstrating that it has not made direct or indirect use of the defendant officer’s statement. If investigators, prosecutors, or witnesses have learned the contents of a compelled statement, that burden can create difficult or even insurmountable impediments to criminal prosecution.”); Levine, *supra* note 58, at 1200–01 (discussing local and state government statutes or negotiated agreements that provide protections to police officers suspected of committing a crime).

⁷⁶ See, e.g., Steiker, *supra* note 1, at 839; Mitrani, *supra* note 22.

⁷⁷ See, e.g., *War on Police: How the Federal Government Undermines State and Local Law Enforcement: Hearing Before the S. Comm. on the Judiciary, Subcomm. on Oversight, Agency Action, Fed. Rights & Fed. Courts*, 114th Cong. 2 (2015) (statement of Sherrilyn Ifill, President & Director-Counsel of NAACP Legal Defense & Educ. Fund, Inc.), <https://www.hsdl.org/?abstract&did=793651> [hereinafter Ifill Statement]; 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?_r=1; Steve Dool, *Why Aren't Police Brutality Videos Bringing Justice?*, COMPLEX (July 14, 2016), <http://www.complex.com/life/2016/07/videos-not-enough-conviction>; Miles Klee, *The 9 Videos that Exposed Police Brutality in 2014*, DAILY DOT (Dec. 11, 2015), <https://www.dailydot.com/layer8/shocking-police-brutality-videos-2014/>.

confidence in police at fifty-two percent, the lowest since 1993.⁷⁸ In 2016, a similar poll—published before the live-streamed death of Philando Castile, the capture of Alton Sterling’s death by bystander video, and the shooting of Terence Crutcher—placed the public trust slightly higher, at fifty-six percent.⁷⁹

Public perceptions also suffer from the cloak of secrecy that surrounds data on the deaths of civilians by police.⁸⁰ Although “netizens,”⁸¹ and as of 2015, the *Washington Post* and *The Guardian*, have catalogued law enforcement-related deaths,⁸² official information about these deaths is underreported and notoriously incomplete.⁸³ Much of this is because the aggregation of statistics on such deaths first requires police departments to self-report.⁸⁴ In an era where law enforcement’s effectiveness is

⁷⁸ See Jeffrey M. Jones, *In U.S., Confidence in Police Lowest in 22 Years*, GALLUP (June 19, 2015), <http://www.gallup.com/poll/183704/confidence-police-lowest-years.aspx>.

⁷⁹ See Frank Newport, *U.S. Confidence in Police Recovers from Last Year’s Low*, GALLUP (June 14, 2016), <http://www.gallup.com/poll/192701/confidence-police-recovers-last-year-low.aspx>. This figure is in the context of a record high in 2004 of 64%.

⁸⁰ See, e.g., *U.S. Police Shootings: How Many Die Each Year?*, BBC NEWS (July 18, 2016), <http://www.bbc.com/news/magazine-36826297> (“Official data on the number of people killed by the police turns out to be remarkably unreliable.”).

⁸¹ D. Brian Burghart, author of FatalEncounters.org, has tracked law enforcement-related deaths from 2000 to present. See FATAL ENCOUNTERS, <http://www.fatalevents.org/> (last visited Mar. 26, 2017). The result of Internet searches and public records requests, it remains the most extensive account of these deaths in the county. See Eric Markowitz, *Meet the Man Who Spends 10 Hours a Day Tracking Police Shootings*, GQ (July 8, 2016), <http://www.gq.com/story/fatal-encounters-police-statistics-interview>; see also *Killed by Police 2017*, KILLED BY POLICE, <http://killedbypolice.net> (last visited Mar. 26, 2017) (tracking individuals killed by police since May of 2013).

⁸² See *2015 Washington Post Database of Police Shootings*, WASH. POST, <https://www.washingtonpost.com/graphics/national/police-shootings/> (last visited Mar. 26, 2017); *The Counted: Tracking People Killed by Police in the United States*, GUARDIAN, <https://www.theguardian.com/us-news/series/counted-us-police-killings> (last visited Mar. 26, 2017).

⁸³ See, e.g., Rob Barry & Coulter Jones, *Incomplete Records: Hundreds of Police Killings Undocumented in Federal Stats*, WALL STREET J. (Dec. 3, 2014), <https://www.wsj.com/articles/hundreds-of-police-killings-are-unaccounted-in-federal-statistics-1417577504>; James B. Comey, Dir., Fed. Bureau of Investigation, Remarks at Georgetown University: Hard Truths: Law Enforcement and Race (Feb. 12, 2015), <https://www.fbi.gov/news/stories/law-enforcement-and-race> (“Demographic data regarding officer-involved shootings is not consistently reported to [the Federal Bureau of Investigation (“FBI”)]. . . . Because reporting is voluntary, our data is incomplete and therefore, in the aggregate, unreliable.”); David A. Graham, *Why is it so Hard to Track Police Killings?*, ATLANTIC (June 3, 2015), <https://www.theatlantic.com/politics/archive/2015/06/why-is-it-so-hard-to-track-police-killings/394772>.

⁸⁴ The Death in Custody Reporting Act of 2013 tied federal funds received by states’ police departments to a duty to report deaths occurring while a person was “detained, under arrest, . . . in the process of being arrested, . . . en route to be incarcerated, or . . . incarcerated.” 42 U.S.C. § 13727(a) (2012). Should a state fail to comply with the duty to report custodial deaths, it would face, at the Attorney General’s discretion, a ten percent cut in federal funding. *Id.* § 13727(c)(2). Regardless, a 2014 review by the *Wall Street Journal* discovered that FBI counts of custodial deaths between 2007 and 2012 from 105 of the county’s largest police departments failed to account for over 550 deaths. See Barry & Jones,

measured by the reduction of crime, the declination of police departments to report this data is unsurprising.

VI. POLICE MISCONDUCT IN THE CRIMINAL CONTEXT

What distinguishes police misconduct in the criminal context is the prosecutorial procedure afforded police suspects, one that is vastly different from that provided to other suspects.⁸⁵ Regarding criminal charges for police misconduct in New York State, the charges set forward by a prosecutor have ranged from second degree murder and manslaughter, to criminally negligent homicide, assault, and official misconduct.⁸⁶ By the well-known connection between a prosecutor's control of the grand jury process and a ham sandwich,⁸⁷ anomalous is the rare success of prosecutors to indict police suspects on such charges.⁸⁸ This anomaly, objectively considered, both delegitimizes the criminal justice system as a matter of public perception, and more seriously, indicates a failure of procedural justice.⁸⁹ In fact, so rarely does a criminal prosecution

supra note 83; see generally Joseph B. Richardson, *Who Shot Ya? How Emergency Departments Can Collect Reliable Police Shooting Data*, J. OF URB. HEALTH: BULLETIN OF THE N.Y. ACAD. OF MED (Dec. 2015) (discussing the inconsistent reporting of deaths while in police custody). In August 2016, the BJS issued a sixty-day notice for public commentary on an initiative to require all law enforcement agencies to report custody and arrest-related deaths. See Notice: Agency Information Collection Activities; Proposed Collection Comments Requested; New Collection: Arrest-Related Deaths Program, 81 Fed. Reg. 51489 (Aug. 4, 2016). As a check on under-reporting, where the BJS through an independent, open-source method, discovered a relevant death, the new rules would require police departments to confirm or correct this BJS information. See *id.*; see also Jon Swaine, *Police will be Required to Report Officer-Involved Deaths Under New U.S. System*, GUARDIAN (Aug. 8, 2016), <https://www.theguardian.com/us-news/2016/aug/08/police-officer-related-deaths-department-of-justice> (providing an overview of the DOJ's officer-involved deaths reporting system).

⁸⁵ See Justin L. Amos, Note, *Who Watches the Watchers?*, 50 NEW ENG. L. REV. 319, 322–25 (2016); Levine, *supra* note 23, at 755–56 (discussing the changes to the charge and indictment process when police officers are involved as defendants); Ross, *supra* note 25, at 761–65 (discussing the appearance of grand jury manipulation in cases where police officers are involved as defendants); see also James C. McKinley Jr. & Al Barker, *Grand Jury System, with Exceptions, Favors the Police in Fatalities*, N.Y. TIMES (Dec. 7, 2014), <https://www.nytimes.com/2014/12/08/nyregion/grand-juries-seldom-charge-police-officers-in-fatal-actions.html> (discussing the use of special grand juries to investigate and gather evidence before arresting and indicting police officers).

⁸⁶ See *infra* notes 118–22 and accompanying text.

⁸⁷ See Levine, *supra* note 23, at 760; Adam Pasick, *The Bizarre Tale of the “Indict a Ham Sandwich” Judge who Became a Felon*, QUARTZ (Nov. 26, 2014), <https://qz.com/303017/the-bizarre-tale-of-the-indict-a-ham-sandwich-judge-who-became-a-felon/>.

⁸⁸ See Ross, *supra* note 25, at 764. In 2012, the most recent year for which data has been published, federal prosecutors failed to procure an indictment in 14 out of 29,770 cases, reflecting 0.1% of cases. See MARK MOTIVANS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2012: STATISTICAL TABLES 12 (2015), www.bjs.gov/content/pub/pdf/fjs12st.pdf.

⁸⁹ See Ross, *supra* note 25, at 766.

move beyond the grand jury phase⁹⁰ that this article need only center its focus on the curious aspects of grand jury proceedings as applied to police suspects.

Before analyzing those tensions, an overview of New York State's grand jury process is in order. As is well established, grand jury proceedings are heavily weighted in favor of the prosecution; indeed, it is "axiomatic that a prosecutor, in presenting evidence and potential charges to a grand jury, . . . [has] the duty not only to secure indictments but also to see that justice is done."⁹¹ Most critical to this duty is the broad discretion a prosecutor enjoys in his or her grand jury presentation.⁹²

In all cases of an alleged felony, a prosecutor must bring the charge before the grand jury's sixteen to twenty-three members in order to determine whether probable cause exists to legitimize that charge.⁹³ Unlike a trial jury, the grand jury is not an adjudicatory body, and thus, as compared to the stricture of trial, a jury is permitted to hear an extraordinary breadth of evidence.⁹⁴ During proceedings, the prosecutor and the court are the sole legal advisors of the grand jury, as statute bars advisement from any other source, treating such outside intervention as "improper."⁹⁵ Where at least twelve members of the grand jury vote in favor of indicting the accused, the indictment must be based on "competent evidence"—that is, evidence that, standing alone and viewed most favorably toward the People, is legally sufficient to make a *prima facie* case warranting conviction.⁹⁶ The critical distinction between grand jury

⁹⁰ See, e.g., *id.* at 763, 764, 766.

⁹¹ *People v. Morel*, 17 N.Y.S.3d 102, 107 (App. Div. 2015) (quoting *People v. Huston*, 668 N.E.2d 1362, 1366 (N.Y. 1996)); see *People v. Lancaster*, 503 N.E.2d 990, 993 (N.Y. 1986); *People v. Brandon*, 20 N.Y.S.3d 432, 434 (App. Div. 2015) (citations omitted).

⁹² See *Brandon*, 20 N.Y.S.3d at 434.

⁹³ See N.Y. CONST. art. I, § 6; N.Y. CRIM. PROC. LAW §§ 190.05, 190.25(1), 190.60(1) (McKinney 2017); *People v. Di Falco*, 377 N.E.2d 732, 735 (N.Y. 1978); *People v. Felman*, 529 N.Y.S.2d 395, 399 (App. Div. 1988) (Levine, J., dissenting). Subject only to certain actions of the court, *sua sponte*, "[n]either the grand jury panel nor any individual grand juror may be challenged" by a suspect before an indictment. CRIM. PROC. LAW § 190.20(2). After a grand jury has charged a suspect by way of an indictment, at which time he or she becomes a criminal defendant, the defendant may challenge the panel by way of a motion to dismiss or reduce the indictment. See *id.* §§ 210.20(1), 210.35.

⁹⁴ See *United States v. Williams*, 504 U.S. 36, 48, 50 (1992) (citations omitted); Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 267–68 (1995). Even so, New York is more protective of suspects than federal and other states' grand jury proceedings in respect to exculpatory evidence. Matt Kaiser, *New York is a Great Place to be Indicted*, ABOVE L. (July 17, 2014), <https://abovethelaw.com/2014/07/new-york-is-a-great-place-to-be-indicted/>.

⁹⁵ *Di Falco*, 377 N.E.2d at 735–36; see CRIM. PROC. LAW § 190.25(6); Ross, *supra* note 25, at 762.

⁹⁶ See CRIM. PROC. LAW § 190.25(1); *Hutson*, 668 N.E.2d at 1367 (citation omitted).

evidence and that adduced at a trial is that grand jury evidence need not drive toward proving guilt beyond a reasonable doubt.⁹⁷

Where the matter before the grand jury concerns police misconduct, this usual process becomes more nuanced. A prosecutor's customary practice of collaboration with law enforcement takes on a new character—one that affords an officer accused of misconduct greater procedural benefit.⁹⁸ Where a police suspect is concerned, a prosecutor's evidentiary presentation to the grand jury is no less broad, but it is much more exploratory.⁹⁹ It is akin to a sort of trial scrimmage rather than the usual presentation of the one-sided, highly curated evidence necessary to cross the low threshold of probable cause.¹⁰⁰

The difference in the treatment of police suspects compared to other suspects before the grand jury can be stark.¹⁰¹ For example, though the Richmond County grand jury records in the case of Eric Garner were never released,¹⁰² in a 2014 *New Yorker* article, Jonathan Blitzer noted: “A judge has already released some basic information about the [*Garner*] grand jury, including how long it sat (nine weeks); how many witnesses the prosecutor called (fifty); and how many exhibits he presented (sixty).”¹⁰³ Compare the scope of these proceedings to Gideon Lewis-Kraus's 2015 *Harper's Magazine* article describing his time as a grand juror in New York County in

⁹⁷ See *People v. Grant*, 959 N.E.2d 479, 482 (N.Y. 2011) (quoting CRIM. PROC. LAW § 70.10(1)).

⁹⁸ See ERIK LUNA & MARIANNE L. WADE, *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* 56, 57 (2012); Amos, *supra* note 85, at 336; Levine, *supra* note 23, at 749; David A. Graham, *What Can the U.S. do to Improve Police Accountability?*, ATLANTIC (Apr. 27, 2016), www.theatlantic.com/politics/archive/2016/03/police-accountability/472524/ (“Because the police are essential to every criminal case—as witnesses and as investigators—a prosecutor who wants to go after a cop is risking alienating the very officers she relies on in every other case.”); Martin Kaste, *It's a Complicated Relationship between Prosecutors, Police*, NPR (Dec. 4, 2014), <http://www.npr.org/2014/12/04/368529402/its-a-complicated-relationship-between-prosecutors-police>; *Shielded from Justice: Police Brutality and Accountability in the United States: Local Criminal Prosecution*, HUM. RTS. WATCH, <https://www.hrw.org/legacy/reports98/police/uspo31.htm> (last updated June 1998) [hereinafter *Shielded from Justice: Local Criminal Prosecution*]; Jeffrey Toobin, *How Not to Use a Grand Jury*, NEW YORKER (Nov. 25, 2014), www.newyorker.com/news/news-desk/use-grand-jury.

⁹⁹ Levine, *supra* note 23, at 767; see Katherine Goldwasser, *The Prosecution, the Grand Jury, and the Decision Not to Charge*, in *FERGUSON'S FAULT LINES: THE RACE QUAKE THAT ROCKED THE NATION* 37, 38–39 (2016), www.americanbar.org/content/dam/aba/multimedia/cle/materials/2016/05/ce1605fss.authcheckdam.pdf.

¹⁰⁰ See Levine, *supra* note 23, at 752–53.

¹⁰¹ See, e.g., Goldwasser, *supra* note 99, at 38–39.

¹⁰² See Jonathan Blitzer, *The Case to Release the Garner Grand Jury Records*, NEW YORKER (Mar. 10, 2015), www.newyorker.com/news/news-desk/the-case-to-release-the-garner-grand-jury-records.

¹⁰³ *Id.*

2014.¹⁰⁴ He wrote: “Over the course of sixty hours of service, we voted on more than a hundred cases. The number of times we refused to indict could be counted on one finger.”¹⁰⁵ Based on these numbers, the amount of time Lewis-Kraus spent per case breaks down to an approximate average of thirty-six minutes against the *Garner* case’s nine weeks.

Another irregularity occurs when a police suspect testifies to the grand jury.¹⁰⁶ This might not be remarkable were it not for the fact that in New York State, as in many other jurisdictions, a prosecutor is not required to inform a suspect that a grand jury proceeding is pending.¹⁰⁷ In addition, a suspect does not generally have the automatic right to testify before the grand jury¹⁰⁸ and suspects rarely appear, often due to their counsel’s assessment of the high procedural risks.¹⁰⁹ Absent certain other circumstances, a suspect may appear if the grand jury so requests, or, he or she can request to appear if the request is made “prior to the filing of any indictment or any direction to file a prosecutor’s information in the matter.”¹¹⁰ Yet, in light of evidence that when suspects testify before a grand jury, the jury is more likely to hand up a “no” bill,¹¹¹ that police suspects routinely appear when others do not smacks of other prosecutorial motivations and unequal prosecutorial treatment.¹¹²

As noted before, data on officer-involved fatalities across New York State and attributes on the circumstances of those deaths are difficult to obtain.¹¹³ Due to the statutory secrecy of New York

¹⁰⁴ See Gideon Lewis-Kraus, *A Grand Juror Speaks*, HARPER’S MAG., Mar. 1979, at 41, 43.

¹⁰⁵ *Id.* at 43.

¹⁰⁶ See, e.g., Shaila K. Dewan & William K. Rashbaum, *Officer Avoids Indictment in Killing on Brooklyn Rooftop*, N.Y. TIMES (Feb. 18, 2004), www.nytimes.com/2004/02/18/nyregion/officer-avoids-indictment-in-killing-on-brooklyn-rooftop.html; William Glaberson, *New Trend Before Grand Juries: Meet the Accused*, N.Y. TIMES (June 20, 2004), www.nytimes.com/2004/06/20/nyregion/new-trend-before-grand-juries-meet-the-accused.html?_r=0.

¹⁰⁷ See N.Y. CRIM. PROC. LAW § 190.50(2) (McKinney 2017) (“The people may call as a witness in a grand jury proceeding any person believed by the district attorney to possess relevant information or knowledge.”). Though a suspect may indeed possess relevant information or knowledge, this provision does not require the prosecutor to involve a suspect in the grand jury proceeding. See *id.* § 190.50(5)(a); *People v. Morel*, 17 N.Y.S.3d 102, 107 (App. Div. 2015).

¹⁰⁸ See CRIM. PROC. LAW § 190.50(5)(a); *United States v. Williams*, 504 U.S. 36, 52 (1992) (citations omitted).

¹⁰⁹ See Goldwasser, *supra* note 99, at 39.

¹¹⁰ CRIM. PROC. LAW § 190.50(5)(a).

¹¹¹ See Glaberson, *supra* note 106.

¹¹² See McKinley & Barker, *supra* note 85.

¹¹³ See *supra* notes 83–84 and accompanying text.

State's grand jury process,¹¹⁴ records on the proceedings and the identities of the witnesses who appear are designed to remain obscure.¹¹⁵ Cases where prosecutors have revealed aspects of the grand jury proceedings—i.e., in the deaths of Akai Gurley, Eric Garner, Donald Ivy, Edson Thevenin, and Delrawn Small—make clearer both the importance of suspects testifying and, where police misconduct is at issue, the significance that police suspects frequently testify.¹¹⁶ While correlation does not always equal causation and the handling of each case is reflective of distinct prosecutorial choices at the grand jury stage, the outcomes of these cases are noteworthy:

- In the 2014 death of Gurley, who was shot after entering a dark public housing stairwell, NYPD Officer Peter Liang declined to testify before the grand jury—he was indicted of second degree manslaughter, criminally negligent homicide, assault, reckless endangerment, and two counts of official misconduct;¹¹⁷
- In the 2014 death of Garner, who NYPD Officer Daniel Pantaleo placed in a chokehold after Garner resisted arrest when stopped for selling loose cigarettes, Pantaleo testified before a grand jury—he was not indicted.¹¹⁸

¹¹⁴ See CRIM. PROC. LAW § 190.25(4)(a).

¹¹⁵ See *id.* For the vast majority of cases, “[g]rand jury proceedings are secret, and no grand juror, or other [applicable] person . . . may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding.” *Id.* Unauthorized and intentional disclosures of grand jury proceedings are subject to criminal charge pursuant to Penal Law section 215.70. *Id.*

¹¹⁶ These listed are not the only ones whose cases appeared before a grand jury between 2013 and when Executive Order 147 appointed the Attorney General as special prosecutor in 2015; however, the author could not secure sufficient detail regarding the testifying witnesses at these proceedings. See *supra* notes 28–44; see *infra* Appendix.

¹¹⁷ See Schram et al., *supra* note 38; Jaeah Lee, *Why was Peter Liang One of So Few Cops Convicted for Killing an Unarmed Man?*, MOTHER JONES (Apr. 8, 2016), www.motherjones.com/politics/2016/03/peter-liang-police-conviction-nypd. For its similarity to Gurley’s case yet with a different grand jury conclusion, compare this with the 2004 shooting of Timothy Stansbury Jr. by NYPD Officer Richard Neri. See Daryl Khan, *Officer in 2004 Fatal Shooting is Given a 30-Day Suspension*, N.Y. TIMES (Dec. 31, 2006), <http://www.nytimes.com/2006/12/31/nyregion/31suspend.html>; see also Dewan & Rashbaum, *supra* note 106.

¹¹⁸ See Stephen L. Carter, *Law Puts us All in Same Danger as Eric Garner*, BLOOMBERG (Dec. 4, 2014), <https://www.bloomberg.com/view/articles/2014-12-04/law-puts-us-all-in-same-danger-as-eric-garner>; Goodman & Wilson, *supra* note 40. In February 2016, federal prosecutors began presenting evidence to a second grand jury—though other officers were called to testify, Pantaleo declined. See Al Baker & Eli Rosenberg, *Federal Grand Jury Begins Hearing Evidence in Eric Garner Case*, N.Y. TIMES (Feb. 11, 2016), www.nytimes.com

- In the 2015 death of Ivy, who Albany Police stopped after mistakenly believing that he was armed and who was tasered when he attempted to flee, officers testified before the grand jury—none were indicted;¹¹⁹
- In the 2015 death of Thevenin, who was shot by Troy Police Sergeant Randall French after he attempted to flee a traffic stop, French testified before a grand jury—he was not indicted;¹²⁰ and
- In the 2016 death of Small, who off-duty NYPD Officer Wayne Isaacs shot using his service weapon after a road-rage incident, Issacs declined to testify to the grand jury—he was indicted of second degree murder.¹²¹

As the appearance of institutional bias delegitimizes the criminal justice system,¹²² critics of the grand jury and the apparent lack of police accountability have proposed a host of interventions to bring more legitimacy to the process.¹²³ These include the appointment of a special prosecutor,¹²⁴ mandates on public access to grand jury records and police personnel records,¹²⁵ legislation, federal oversight of local investigations and police departments,¹²⁶ and, in the most

.com/2016/02/11/nyregion/federal-grand-jury-begins-hearing-evidence-in-eric-garner-case.html. Though Pantaleo declined to testify, the federal grand jury was allowed to consider his prior state court grand jury testimony. *Id.*

¹¹⁹ See Gavin, *supra* note 36; Anya Tucker, *Video Footage Released Showing Dontay Ivy Confrontation*, NEWS10 ABC (Oct. 30, 2015), www.news10.com/2015/10/30/video-footage-released-showing-dontay-ivy-confrontation.

¹²⁰ See Lyons, *supra* note 29; Robarge, *supra* note 29.

¹²¹ See Marzulli et al., *supra* note 28.

¹²² See, e.g., Paul Cassel, *Who Prosecutes the Police? Perceptions of Bias in Police Misconduct Investigations and a Possible Remedy*, WASH. POST (Dec. 5, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/05/who-prosecutes-the-police-perceptions-of-bias-in-police-misconduct-investigations-and-a-possible-remedy/?utm_term=.82be817948cd.

¹²³ See, e.g., Amos, *supra* note 85, at 338, 339, 341–43; Ifill Statement, *supra* note 77, at 2; Michele L. Jawando & Chelsea Parsons, *4 Ideas that Could Begin to Reform the Criminal Justice System and Improve Police-Community Relations*, CTR. FOR AM. PROGRESS (Dec. 18, 2014), <https://www.americanprogress.org/issues/courts/report/2014/12/18/103578/4-ideas-that-could-begin-to-reform-the-criminal-justice-system-and-improve-police-community-relations/>; Cassel, *supra* note 122; Ross, *supra* note 25, at 767; Tristan Snell, *Can Grand Juries Handle Police Cases?*, BROOK. Q., brooklynquarterly.org/eric-garner-can-grand-jury-system-handle-police-cases/ (last visited Apr. 22, 2017); see generally Cynthia H. Conti-Cook, *Defending the Public: Police Accountability in the Courtroom*, 46 SETON HALL L. REV. 1063, 1067 (2016) (discussing public accountability and review of police conduct).

¹²⁴ See, e.g., Snell, *supra* note 123; Jawando & Parsons, *supra* note 123.

¹²⁵ See, e.g., Conti-Cook, *supra* note 123, at 1067.

¹²⁶ See Simone Weichselbaum, *The Problems with Policing the Police*, TIME, www.time.com/police-shootings-justice-department-civil-rights-investigations/ (last visited Mar. 28, 2017).

extreme, the elimination of the grand jury entirely.¹²⁷ Critics of these propositions exist in equal measure.¹²⁸

Acknowledging that the protections afforded to police suspects harms public optics, Governor Andrew Cuomo, in 2015, by Executive Order 147,¹²⁹ appointed the Attorney General as special prosecutor in matters where law enforcement was involved in the death of an unarmed civilian.¹³⁰ Declaring that “[t]he justice system does not work without the trust of the people,” and that “it was imperative that New York [State] act to address the crisis of confidence that has been plaguing communities nationwide,” the Governor, via the order, also permitted the Attorney General to investigate deaths where there was a question as to whether an individual was armed at the time of confrontation with police.¹³¹

Opposition to the order centered around the Governor’s proposition that the Attorney General’s appointment in this capacity should be permanent, which would completely divest local prosecutors of their traditional jurisdiction.¹³² Conflict on this point

¹²⁷ See, e.g., Kari Hong, *It’s Time to Get Rid of Grand Juries*, BOS. GLOBE (Dec. 5, 2014) <https://www.bostonglobe.com/opinion/2014/12/05/ferguson-eric-garner-show-that-time-get-rid-grand-juries/qGDw7ci78rkrdNNbBpI4XM/story.html>.

¹²⁸ See, e.g., Kenneth Lovett, *Cuomo Wants Special Prosecutor for Police Killings to Be a National Model*, N.Y. DAILY NEWS (July 15, 2015), www.nydailynews.com/news/politics/cuomo-pushes-special-prosecutor-national-model-article-1.2292955; Weichselbaum, *supra* note 126.

¹²⁹ N.Y. Exec. Order No. 147, 9 N.Y. COMP. CODES R. & REGS. tit. 9, § 8.147 (2015); see also Lauren-Brooke Eisen, *In New York, Attorney General as Special Prosecutor*, BRENNAN CTR. FOR JUST. (July 17, 2015), <https://www.brennancenter.org/blog/new-york-attorney-general-special-prosecutor> (stating how Governor Cuomo responded to controversial police-related deaths).

¹³⁰ See Press Release, Governor Andrew M. Cuomo, Governor Cuomo Signs Executive Order Appointing NYS Attorney General as Special Prosecutor in Cases Where Law Enforcement Officers Are Involved in Deaths of Civilians (July 8, 2015), <https://www.governor.ny.gov/news/governor-cuomo-signs-executive-order-appointing-nys-attorney-general-special-prosecutor-cases>. Since the initial order, Governor Cuomo has issued five expansions directed at “any and all unlawful acts or omissions or alleged unlawful acts or omissions by any law enforcement officer, as listed in subdivision 34 of section 1.20 of the Criminal Procedure Law,” as to the deaths of Raynette Turner, Felix Kumi, Miguel Espinal, Edson Thevenin, and Delrawn Small. See N.Y. Exec. Order No. 147.1, 9 N.Y. COMP. CODES R. & REGS. tit. 9, § 8.147.1; N.Y. Exec. Order No. 147.2, 9 N.Y. COMP. CODES R. & REGS. tit. 9, § 8.147.2; N.Y. Exec. Order No. 147.3, 9 N.Y. COMP. CODES R. & REGS. tit. 9, § 8.147.3; N.Y. Exec. Order No. 147.4, 9 N.Y. COMP. CODES R. & REGS. tit. 9, § 8.147.4; N.Y. Exec. Order No. 147.5, 9 N.Y. COMP. CODES R. & REGS. tit. 9, § 8.147.5.

¹³¹ Press Release, Governor Andrew M. Cuomo, Governor Cuomo, Attorney General Schneiderman Hold Briefing on Special Prosecutor Executive Order for 100+ Members of Clergy, Community Leaders and State Legislators (July 29, 2015), <https://www.governor.ny.gov/news/governor-cuomo-attorney-general-schneiderman-hold-briefing-special-prosecutor-executive-order>.

¹³² See Eisen, *supra* note 129.

arose in the investigation of Thevenin's death in Troy, New York.¹³³ Though Attorney General investigators became involved in the case on the day of the incident, as required by the executive order,¹³⁴ less than five days after the shooting, the Rensselaer County District Attorney, Joel Ablove, brought the case before a grand jury.¹³⁵ In response, the Attorney General commenced an Article 78 proceeding,¹³⁶ alleging that Ablove's actions "flagrantly violated" the executive order, and seeking mandamus relief.¹³⁷ Eventually, the parties reached a settlement whereby Ablove agreed to transfer his office's investigation and case files to the Attorney General.¹³⁸ Taking a more democratically conservative track, critics of the order asserted that it was incumbent upon the local electorate, should they oppose a sitting District Attorney's failure or inability to prosecute law enforcement, to remove him or her, and critics also asserted that the Governor's proposal circumvented the necessary cloak of secrecy surrounding the grand jury process.¹³⁹

¹³³ See Robert Gavin, *Ablove Promised to Handle 'All Cases,'* TIMES UNION (Apr. 28, 2016), <http://www.timesunion.com/tuplus-local/article/Ablove-promised-to-handle-all-cases-7382713.php>; *infra* Appendix.

¹³⁴ See Memorandum of Law in Support of the Petition at 5–6, *Schneiderman v. Ablove*, (2016) (No. 1845-16) (case not yet reported).

¹³⁵ See Vivian Yee, *New York Attorney General Sues Over Police Shooting Case in Troy*, N.Y. TIMES (Apr. 27, 2016), www.nytimes.com/2016/04/28/nyregion/new-york-attorney-general-sues-over-police-shooting-case-in-troy.html.

¹³⁶ Stipulation of Settlement and Order of Discontinuance at 1, *Schneiderman v. Ablove*, (2016) (No. 1845-16) (case not yet reported). The Attorney General predicated this action on the assertion that Ablove had, given Executive Order 147, acted in excess of his jurisdiction. See *id.* Proceedings brought under Civil Practice Law and Rules ("CPLR") Article 78 challenge the actions of administrative or governmental bodies and officers. See N.Y. CRIM. PROC. LAW § 7803 (McKinney 2017).

¹³⁷ See Memorandum of Law in Support of the Petition, *supra* note 134, at 1; Press Release, N.Y. State Attorney Gen., A.G. Schneiderman Sues to Compel Rensselaer County District Attorney to Comply with Governor's Executive Order in Case of Civilian Death Caused by Police Officer in Troy (Apr. 27, 2016), <https://ag.ny.gov/press-release/ag-schneiderman-sues-compel-rensselaer-county-district-attorney-comply-governor%E2%80%99s> reaches-settlement-of-ag's-lawsuit-in-edson-thevenin-case (stating that Ablove agreed to turn over his files to the Attorney General's office as part of a settlement).

¹³⁸ See Stipulation of Settlement and Order of Discontinuance, *supra* note 136, at 1.

¹³⁹ See, e.g., Colby Hamilton & Josefa Velasquez, *Opposition to Cuomo's Special Prosecutor Proposal Grows*, POLITICO (Feb. 4, 2016), www.politico.com/states/new-york/albany/story/2016/02/opposition-to-cuomos-special-prosecutor-proposal-grows-000000; Noah Remnick, *Cuomo's Order for Special Prosecutor in Police Deaths is Criticized*, N.Y. TIMES (July 8, 2015), www.nytimes.com/2015/07/09/nyregion/cuomos-order-for-special-prosecutor-in-police-deaths-is-criticized.html.

VII. POLICE MISCONDUCT IN THE CIVIL CONTEXT

By both New York State and national numbers, criminal prosecutions of police officers are unsuccessful.¹⁴⁰ Yet, this does not leave those affected by excessive or deadly force entirely bereft of judicial redress.¹⁴¹ In increasing numbers, victims and families have brought civil rights complaints before local review boards and have filed civil suits for excessive force or wrongful death.¹⁴² Though there are incongruities in relying on remedies available at civil law for the failure of procedural justice at criminal law,¹⁴³ civil claims, and with far more regularity than their criminal counterparts, resolve in favor¹⁴⁴ of plaintiffs or claimants.¹⁴⁵ Even so, a sense of justice from this kind of resolution is elusive, if not entirely absent.¹⁴⁶ Moreover, if communities are concerned with cutting at the institutional roots of police misconduct, they must recognize that civil suits are slow to impact police department practices, policies, and perspectives,¹⁴⁷ and that when change does come, it may appear inconsistent.¹⁴⁸

¹⁴⁰ See, e.g., 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>; Nick Wing, *We Pay a Shocking Amount for Police Misconduct, and Cops Want Us Just to Accept it. We Shouldn't*, HUFFINGTON POST (May 29, 2015), http://www.huffingtonpost.com/2015/05/29/police-misconduct-settlements_n_7423386.html.

¹⁴¹ See *Shielded from Justice: Civil Remedies*, *supra* note 56.

¹⁴² See *id.*

¹⁴³ See *id.*

¹⁴⁴ Highlighting racism's present-day legacy, a civil resolution favorable to victims and families has been referred to as a "ghetto lottery." See Leonard Greene, *Disgusting 'Ghetto Lottery' Rhetoric after Police Shootings Illustrates America's Racial Divide—and Trump Enables it*, N.Y. DAILY NEWS (Sept. 27 2016), www.nydailynews.com/news/national/ghetto-lottery-rhetoric-shootings-shows-racial-divide-article-1.

¹⁴⁵ Marc Fisher et al., *Uneven Justice*, WASH. POST (Nov. 3, 2015), www.washingtonpost.com/sf/investigative/2015/11/03/uneven-justice/; see N.Y.C. AFFAIRS COMM., N.Y.C. BAR ASS'N, COMMITTEE REPORT: THE FAILURE OF CIVIL DAMAGES CLAIMS TO MODIFY POLICE PRACTICES, AND RECOMMENDATIONS FOR CHANGE (2000), http://www2.nycbar.org/Publications/reports/show_html_new.php?rid=32 [hereinafter N.Y.C. AFFAIRS COMMITTEE REPORT]; see generally Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1332–34, 1345–48 (1991) (discussing the interplay between civil remedies and criminal prosecutions).

¹⁴⁶ See Fisher et al., *supra* note 145.

¹⁴⁷ N.Y.C. AFFAIRS COMMITTEE REPORT, *supra* note 145; see Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1045–48 (2010); Bob Hennelly, *NYPD Payouts up, but New Lawsuits Down*, CITY & ST. N.Y. (Mar. 7, 2016), <http://cityandstateny.com/articles/politics/new-york-city/nypd-payouts-up-but-new-lawsuits-down.html#.WPvZ3PnyUk>.

¹⁴⁸ See Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits do not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URB. L.J. 587, 588–89, 600 (2000); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L.

To understand what “excessive force” means, understanding its latitudes is imperative. In New York State, police officers have wide discretion in employing force in response to a given situation.¹⁴⁹ Review of an incident first asks whether, under Fourth Amendment parameters, the force used by a police officer making an arrest was objectively reasonable under the circumstances presented.¹⁵⁰ Turning to the clarity of case law, “[t]he use of force must be judged ‘from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight,’ [which] recognize[es] that ‘police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.’”¹⁵¹

Regarding deadly force, it may be appropriate in certain exigent circumstances¹⁵² and in situations where a police officer reasonably believes that the use of deadly physical force against him or her is imminent.¹⁵³ In other words, an officer’s decision to use deadly force “is objectively reasonable only if the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.”¹⁵⁴ These analyses occur, however, with an eye toward the Supreme Court’s acknowledgement that “[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape [in instances w]here the suspect poses no immediate threat to [an] officer.”¹⁵⁵

REV. 885, 955–60 (2014) [hereinafter Schwartz, *Indemnification*]; Susan Milligan, *Police Settlement Cases Rare—and Rarely Deter Misconduct*, U.S. NEWS (Sept. 9, 2015), www.usnews.com/news/articles/2015/09/09/police-settlement-cases-rare-and-rarely-deter-misconduct.

¹⁴⁹ See, e.g., *Cerbelli v. City of New York*, No. 99 CV 6846, 2008 U.S. Dist. LEXIS 109341, at *76–80 (E.D.N.Y. Sept. 8, 2008) (citations omitted).

¹⁵⁰ See N.Y. PENAL LAW § 35.30(1) (McKinney 2017); *Brown v. Hoffman*, 997 N.Y.S.2d 767, 771 (App. Div. 2014) (citations omitted); *Holland v. City of Poughkeepsie*, 935 N.Y.S.2d 583, 588 (App. Div. 2011) (citations omitted); *Shirvanion v. New York*, 883 N.Y.S.2d 639, 640 (App. Div. 2009); *Ostrander v. State*, 735 N.Y.S.2d 163, 164 (App. Div. 2001); *Prior v. Cty. of Saratoga*, 664 N.Y.S.2d 871, 872 (App. Div. 1997).

¹⁵¹ *Bridenbaker v. City of Buffalo*, 28 N.Y.S.3d 545, 547 (App. Div. 2016) (quoting *Holland*, 935 N.Y.S.2d at 588).

¹⁵² See, e.g., *McCummings v. New York City Transit Auth.*, 613 N.E.2d 559, 561 (N.Y. 1993).

¹⁵³ See PENAL LAW § 35.30(1); *Williams v. City of New York*, 811 N.E.2d 1103, 1109–10 (N.Y. 2004); *Williams v. City of New York*, 12 N.Y.S.3d 256, 258 (App. Div. 2015) (quoting *Cowan v. Breen*, 352 F.3d 756, 762 (2d Cir. 2003)).

¹⁵⁴ *Williams*, 12 N.Y.S.3d at 258 (quoting *Cowan*, 352 F.3d at 762); see *Johnson v. City of New York*, 942 N.E.2d 219, 223 (N.Y. 2010); *Bridenbaker*, 28 N.Y.S.3d at 547 (quoting *Holland*, 935 N.Y.S.2d at 588).

¹⁵⁵ *Tennessee v. Garner*, 471 U.S. 1, 11 (1985); see *McCummings*, 613 N.E.2d at 561–62.

Regarding a search for justice, excessive force or wrongful death suits relative to police misconduct are difficult to maintain and prevail upon.¹⁵⁶ The standard of proof in a civil claim rests on the plaintiff or claimant, who must establish his or her claim by a “preponderance of the credible evidence.”¹⁵⁷ While this standard of evidence may be less than the criminal context’s “beyond a reasonable doubt,” overcoming the reality that there is a premium on police testimony in general—and particularly when that testimony cuts against a plaintiff’s or claimant’s assertions—is a difficult task.¹⁵⁸

Even when cases resolve on the merits or settle out of court, the true limitations of civil suits in punishing police misconduct materialize.¹⁵⁹ The sobering reality is that for police misconduct, the wrongdoing officer is almost never personally accountable.¹⁶⁰ Take, for example, a recent examination of data from the fifty largest municipal police departments and the fifty largest law enforcement agencies in the United States.¹⁶¹ The study revealed that “[p]olice officers are virtually always indemnified” for the expenses that they incur in defending themselves against civil suits.¹⁶² Specifically:

Between 2006 and 2011, in forty-four of the country’s largest jurisdictions, officers financially contributed to settlements and judgments in just [0].41% of the approximately 9225 civil rights damages actions resolved in plaintiffs’ favor, and their contributions amounted to just [0].02% of the over \$730 million spent by cities, counties, and states in these cases. Officers did not pay a dime of the over \$3.9 million awarded in punitive damages.¹⁶³

Where a plaintiff or claimant prevails on a claim, New York State law mandates that damages or settlement monies are to be paid out of general municipal funds, not police budgets.¹⁶⁴ The financial

¹⁵⁶ See Howard Friedman, *To Protect and Serve?*, AM. ASS’N FOR JUST. TRIAL, Dec. 2011, at 14.

¹⁵⁷ *Martin v. New York*, 833 N.Y.S.2d 706, 708 (App. Div. 2007); see *Guastella v. New York*, 24 N.Y.S.3d 139, 140 (App. Div. 2016); *Eisenberg v. New York*, 912 N.Y.S.2d 436, 436 (App. Div. 2010); *White v. New York*, 838 N.Y.S.2d 705, 707 (App. Div. 2007).

¹⁵⁸ See, e.g., *Villanueva v. New York*, No. 2014-044-077 (N.Y. Ct. Cl. 2014).

¹⁵⁹ See, e.g., Joanna C. Schwartz, *What Police Learn From Lawsuits*, 33 CARDOZO L. REV. 841, 880–81 (2012) [hereinafter Schwartz, *What Police Learn*].

¹⁶⁰ See Schwartz, *Indemnification*, *supra* note 148, at 889–90, 919.

¹⁶¹ *Id.* at 890.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ See N.Y. GEN. MUN. LAW §§ 50-k(3)–(4) (McKinney 2017); *Perez v. City of New York*,

obligations set by these statutes also include an officer's legal expenses incurred in defending the suit.¹⁶⁵ In essence, regardless of whether a municipality chooses to fight a claim until the end or settle with a victim, it is taxpayer-derived monies,¹⁶⁶ or perhaps in a less direct fashion, municipal insurance plans, that foot the bill.¹⁶⁷ Noting the disconnect between such statutes and calls for reform, indemnification critics have proposed that should municipal funds that were used to defend or settle suits to tug at the purse strings of police departments, law enforcement might "find more to learn from litigation."¹⁶⁸

841 N.Y.S.2d 559, 560 (App. Div. 2007); *Phillips v. Legeret*, 529 N.Y.S.2d 579, 580 (App. Div. 1988); N.Y. Attorney Gen., Informal Opinion Letter No. 94-23 (1994) [hereinafter N.Y. Attorney Gen. Opinion Letter]; N.Y.C. AFFAIRS COMMITTEE REPORT, *supra* note 145 ("[New York City] pays nearly all the damages arising out of claims of abuse by police officers."). As to the rest of the state, statutes demand that public funds be expended to indemnify police officers who are the subject of excessive force suits. *See Phillips*, 529 N.Y.S.2d at 580. One statute requires that other municipalities, authorities, or agencies "assume the liability to the extent that it shall save harmless, any duly appointed police officer . . . [thereof] for any negligent act or tort" if said "police officer, at the time of the negligent act or tort complained of, was acting in the performance of his [or her] duties and within the scope of his [or her] employment." GEN. MUN. LAW § 50-j(1); *see id.* §§ 50-j(9) (stating that the provision does not apply to New York City), 50-l, 50-n (discussing corrections officers and police officers in Nassau County).

¹⁶⁵ *See* GEN. MUN. LAW §§ 50-k(3)–(4); *see also* John Surico, *A Lawyer Explains Where Police Shooting Settlement Cash Actually Goes*, VICE (Apr. 28, 2016), www.vice.com/read/a-lawyer-explains-where-police-shooting-settlement-cash-actually-goes.

¹⁶⁶ *See, e.g.*, Rachel M. Cohen, *City Coffers, not Police Budgets, Hit Hard by the High Cost of Brutality*, PROSPECT (Sept. 26, 2014), <http://prospect.org/article/city-coffers-not-police-budgets-hit-hattard-high-cost-brutality>; N.Y. Attorney Gen. Opinion Letter, *supra* note 164.

¹⁶⁷ *See* GEN. MUN. LAW §§ 50-k(3)–(4); N.Y.C. AFFAIRS COMMITTEE REPORT, *supra* note 145. In New York City, it is required that where an officer's conduct was in the scope of his or her employ and did not otherwise violate rules or regulations, the city must "indemnify and save harmless its employees in the amount of any judgment obtained against such employees in any . . . court, or in the amount of any settlement of a claim." *See* GEN. MUN. LAW § 50-k(3).

¹⁶⁸ Joanna C. Schwartz, *Watching the Detectives*, N.Y. TIMES (June 15, 2011), www.nytimes.com/2011/06/16/opinion/16schwartz.html; *see* Archbold & Maguire, *supra* note 60, at 227. Data regarding the number of civil rights suits against law enforcement and monies therewith paid is scarce. *See id.* The author sought information regarding monies expended by New York State in defending or settling civil claims arising out of allegations of State Police misconduct; however, as of October 2016, the Office of the State Comptroller indicated that its "databases do not categorize files in such a way that any information would be extracted from a query that would be responsive to [the] request." FOIL Request from Ms. Felicia Reid to State of N.Y. Office of the State Comptroller (Oct. 12, 2016) (on file with the author). New York City, however, does report on such civil claims. *See, e.g.*, OFFICE OF THE N.Y.C. COMPTROLLER, CLAIMS REPORT: FISCAL YEAR 2015, at 10 (2016), http://comptroller.nyc.gov/wp-content/uploads/documents/Claims_Report_FY_2015.pdf. According to the New York City Comptroller, in fiscal year 2015, 4,919 police action claims (claims resulting from various allegations of misconduct and brought under state law) were filed against the city for which it paid \$119.2 million in settlements. *Id.* In 2013 and 2014, the city received 5,581 and 5,641, respectively, police action claims resulting in, correspondingly, settlement payouts of \$62.9 million and \$71.9 million. *Id.* In this report, the Comptroller also issued statistics for

In 2015, the *Washington Post* undertook a year-long study to examine the dispositions of cases across the country where police officers had been criminally charged for fatally shooting victims.¹⁶⁹ Over a ten-year period, during which time fifty-nine officers were charged, eleven were convicted and sentenced—an approximate eighteen percent accountability rate.¹⁷⁰ In contrast, where forty-six families of victims pursued claims in civil court, thirty-two were awarded monetary compensation—an approximate seventy percent accountability rate.¹⁷¹ Though monetary awards (whether the result of a successful resolution of a suit on the merits or an out-of-court settlement) is some recognition for victims and families, the victory is often more theoretical than actual.¹⁷² This has as much to do with the qualitative emptiness of dollars as it does with the fact that redress by money is limited, and dispassionately so, to a municipality's cost-benefit analysis of trial versus settlement;¹⁷³ the calculation of value for the loss of financial support from a spouse or parent;¹⁷⁴ and the more abstract valuation of the loss of companionship from a spouse or child.¹⁷⁵ It may well be impossible to meaningfully compensate the many friends, family members, and relations of those who comprise the whole of a victim's familial, social, or professional community.

VIII. CONCLUSION: AN UNCERTAIN FUTURE

Armed with a general understanding of police violence's legal topography, it seems clear, however cynical, that the path to "justice" with the highest likelihood of rectification is civil suit. Yet,

civil claims brought under 42 U.S.C. § 1983; however, payouts for constitutional violations by law enforcement were not separately reported. *Id.* at 11.

¹⁶⁹ See Fisher et al., *supra* note 145.

¹⁷⁰ See *id.*

¹⁷¹ See *id.*; see also Steven Rich et al., *Fatal Shootings by Police Lead to a Wide Range of Settlements for Families*, WASH. POST (Nov. 4, 2015), <https://www.washingtonpost.com/graphics/investigations/police-shootings-civil-suits> (providing more detail on the *Washington Post* study that was conducted on fatal shootings that resulted in officers being criminally charged).

¹⁷² See, e.g., Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html; Marzulli & Carrega-Woodby, *supra* note 53.

¹⁷³ See A.G. Sulzberger & Tim Stelloh, *Bell Case Underlines Limits of Wrongful-Death Payouts*, N.Y. TIMES (July 28, 2010), www.nytimes.com/2010/07/29/nyregion/29bell.html.

¹⁷⁴ See *id.*

¹⁷⁵ See *id.*; see also Alan Feuer, *In Police Misconduct Lawsuits, Potent Incentives Point to a Payout*, N.Y. TIMES (Aug. 16, 2016), www.nytimes.com/2016/08/17/nyregion/police-misconduct-lawsuit-settlements.html (discussing factors that are taken into consideration for a settlement).

scrutinizing the history and current state of police violence, that route seems never-ending where a life lost and a community fractured are concerned. However well-intentioned ideas may be for legislation, policy shifts, and executive action, these take an institutional bird's eye view of a complex issue that resounds at the intersection of history, power, and an imperfect system of redress.¹⁷⁶ As such, finding justice through the courts will always have some limitation unless these routes work concurrently with police departments' efforts to renegotiate communication and trust with local communities. However, those efforts cannot exist in a vacuum. Police departments, local and state legislators, and the courts, recognizing the inequality of the playing field, must also give consideration to and take meaningful steps toward curbing the institutional advantages given to police officers where those advantages, honestly acknowledged, are not universally due.¹⁷⁷

¹⁷⁶ *See id.*

¹⁷⁷ *See, e.g.,* Isquith, *supra* note 73; Lu, *supra* note 63; Terrell Jermaine Starr, *Community Policing is not the Solution to Police Brutality. It Makes it Worse*, WASH. POST (Nov. 3, 2015), https://www.washingtonpost.com/posteverything/wp/2015/11/03/community-policing-is-not-the-solution-to-police-brutality-it-makes-it-worse/?utm_term=.fa1d5632fe4e.

APPENDIX¹⁷⁸

NAME	DATE	Police Action	STATUS	MILITARY/LEAD	RACE	ETHNICITY	AGE	HEIGHT	WEIGHT	HAIR	EYES	SCARS	LOC ARREST/RESPONDING	CRIMINAL CASE/INVESTIGATION	CIVIL CASE/SETTLEMENT
Diabetes Smith	07/24/16	Gunshot	Criticism	None reported to a local newspaper; no action taken on either side; no response to Stop Smart's requests.	B	M	27	N/A	N/A	Admitted to Police, NY / NY	N/A	N/A	Admitted to Police, NY / NY	Y/Y+	Pending
Edman Thoreau	04/17/16	Gunshot	Criticism	After being a target, Thoreau's vehicle was towed by police. Thoreau was taken to a hospital. Thoreau's attorney, Michael French, advised that French developed the weapon before Thoreau's vehicle was shot. Police shot of that Thoreau and his vehicle.	B	M	27	24.5/4 (12/180)	160/170 (5'10")	Black	Blue	N/A	Brooklyn South Bridge, Tron, NY / NY	Y/N+	Pending
Richard Gonzalez	07/14/16	Gunshot	Criticism	Which being returned and hand-offed, police and Gonzalez engaged in a physical altercation.	B	M	24	54-58	14.5/2 (10/84)	Black	N/A	140 E 17th St, New York, NY / NY	N/N+	N	
Miguel England	12/01/15	Gunshot	Criticism	After a traffic stop, England fled police in his vehicle from the Bronx to New York City, and England fled on foot from a nearby park. England fled to his vehicle, which was shot and England fled to his vehicle.	B	M	26	N/A	N/A	Stop 14th Street, New York, NY / NY	N/A	N/A	Stop 14th Street, New York, NY / NY	N/N+	Pending
Richard Davis	07/14/15	Taser	Criticism	Taser after changing police.	B	M	20	180/33 (140/11)	170/30 (5'10")	Black	N/A	Truman St and Morgan St, Rochester, NY / NY	Y/N	Pending	
Dasha Reyes	08/13/15	Physical Abuse	Criticism	After responding to a domestic disturbance, police attempted to arrest Reyes, who suffered from bipolar disorder and schizophrenia. Reyes suffered a heart attack.	B	M	40	26.9/9 (10/80)	274 E 19th St, New York, NY / NY	Black	N/A	518 E 20th St, New York, NY / NY	N/N	N	
David Parks	04/28/15	Gunshot	Criticism	Gunshot (possibly due to suboptimal-aimed shots, behavior).	B/H	M	24	21.2/9 (10/90)	170/30 (5'10")	Black	N/A	518 E 20th St, New York, NY / NY	N/N	N	
Samuel Howard	04/21/15	Beating	None	Punched and kicked by 20 officers while on the ground, handcuffed.	B	M	30	N/A	N/A	FLAHR Correctional Facility / DOCKS	N/A	Flahar Correctional Facility / DOCKS	Physical guard / Intergovernmental	Pending	
Donald "Timothy" Fry	04/02/15	Taser	Criticism	By, who suffered from paranoid schizophrenia, and heart problems, was sprayed by police and arrested. He received arrest and arrested in the Police used him as a weapon.	B	M	29	20.6/5 (12/210)	140/30 (4'10")	Black	N/A	140/30 (4'10")	NY / NY	Y/N	Pending
Donald Brown	07/22/15	Gunshot	Criticism	Shotgun of a rifle. Brown attempted to use a vehicle. Police attempted to subdue him with a taser but did not succeed.	B	M	21	N/A	N/A	Staten Island, New York, NY / NY	N/A	N/A	Staten Island, New York, NY / NY	N/N	N
Abdul Carter	11/20/14	Gunshot	Criticism	Timber was shot after entering a housing project stairwell during a search for a suspect. Carter was shot in the chest and leg and received medical attention. The officer present did not escape.	B	M	28	17.6/6 (11/280)	167/30 (5'10")	Black	N/A	307 Leffing Ave, Rosedale, NY / NY	Y/N	Y/N	
Donald Stone	09/21/14	Taser	Criticism	After responding to a domestic disturbance, Stone was tasered by a police officer. Stone was arrested and taken to a hospital.	B	M	41	26.0/2 (12/200)	170/30 (5'10")	Black	N/A	170/30 (5'10")	NY / NY	Y/N	N/A
Eric Carter	07/17/14	Physical Abuse	Criticism	After and altercation with police, Carter was placed in a double-sided cell. Carter was arrested and taken to a hospital.	B	M	43	21.2/8 (10/81)	160/30 (5'10")	Black	N/A	202 Bay Street, Staten Island, NY / NY	Y/N	Y/N	
Harold Stigleman	07/11/14	Physical Abuse	Criticism	After an altercation with police, while Stigleman was high on drugs and in a daze, police restrained him. Due to several other factors, including a seizure, Stigleman suffered a heart attack. Police did not attempt to get Stigleman to a hospital.	B	M	48	26.1/3 (10/220)	160/30 (5'10")	Black	N/A	160/30 (5'10")	NY / NY	N/N	Pending
Yusef Williams	06/01/14	Physical Abuse	Criticism	After allegedly knocking over a vehicle, Williams was apprehended by police. Williams suffered a heart attack.	B	M	20	N/A	N/A	160/30 (5'10")	N/A	N/A	160/30 (5'10")	N/N	N
Reginald J. Bell	11/13/13	Gunshot	Criticism	After responding to a domestic disturbance, police shot at Bell after he fled. Bell was taken to a hospital. Bell was arrested and taken to a hospital.	B	M	28	21.2/8 (10/220)	160/30 (5'10")	Black	N/A	160/30 (5'10")	NY / NY	Y/N	N
Laverne Davis	08/12/13	Physical Abuse	Criticism	After being arrested to escape from a mental health facility, Davis was taken to a hospital. Davis was arrested and taken to a hospital.	B	M	60	N/A	N/A	101 South St, New York, NY / NY	N/A	N/A	101 South St, New York, NY / NY	N/A	N/A

¹⁷⁸ This chart is the author's original research and all information has been verified by and remains on file with her.