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

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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) (“[A]n 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 civilized/(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).


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.\(^13\)

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\(^7\) CHRISTINE ETH & MATTHEW R. DUROSE, U.S. DEPT 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., ETH & 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. DEPT 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.thenettimes.com/features/native_americans/police_killings_native_lives_matter.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. Further, depending on the circumstances of a case, police departments and unions may take conflicting positions on the correctness of an officer’s conduct.

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. However, in an environment where police misconduct’s “bad apple” theory is ever-undermined by a steady stream of bystander footage, community wounds, already open, deepen and fester. Victims of police violence suffer both the physical and mental trauma born from the violation of a certain social trust. 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. Indisputably, those who have been subject to maltreatment at the hands of police deserve acknowledgement and justice, and their aggressors should personally account. 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

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).
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

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).
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, Edson Thevenin, Richard Gonzalez, Miguel Espinal, Richard Davis, Denis Reyes, David Felix, Samuel Harrell, Donald Ivy, Denzel Brown, Akai Gurley, Daniel


Satre, Eric Garner, Ronald Singleton, Travis Tellone, Steven J. Bell, and Lawrence Ports

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. 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.” These seventeen victims share several

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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 unarm ed at the time of their interactions with police. 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.

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 tasering; and one, the result of brutal physical assault while restrained. Ten of the seventeen men were Black, four were White, and three were Hispanic/Latino. 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. For less than half an accident while on duty, resulting in a death.


See infra Appendix. 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.\textsuperscript{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.\textsuperscript{53}

With these victims close in mind, this article explores the practical and procedural hurdles met during the search for police accountability though 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.\textsuperscript{54} Civil cases\textsuperscript{55} for excessive force or wrongful death are not only costly to maintain,\textsuperscript{56} but are often dismissed on the papers,\textsuperscript{57} weigh in favor of police accounts, or, due to economic considerations, result in settlements without meaningful evaluation on the merits.\textsuperscript{58}

\textbf{IV. \textit{Quis Custodiet Ipsos Custodes?}}

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

\textsuperscript{52} See infra Appendix.


\textsuperscript{54} See, e.g., Goodman, supra note 53.


\textsuperscript{57} See, e.g., Levine, supra note 23, at 755–56.

police officers are frequently required to act in defense of the public and in their own defense—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. There is no dispute that policing involves the threat of violence against officers and the use of violence by officers. 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.

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.” 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. In the crucible of policing—as with many high-stress professions—derivative aggression, comradely hazing, and gallows humor are part of the culture. 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. Thus, otherwise benign cultural features layer just

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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.
64 See Lu, supra note 63.
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.\textsuperscript{67} Actions taken in this context, including misconduct, are inevitable at best, and in their worst iterations, are tacitly sanctioned by superiors and peers.\textsuperscript{68}

Police departments’ internal investigators are well equipped to flag, review, and punish officers who violate department standards, rules, and the law.\textsuperscript{69} Yet, when misconduct is the issue, internal investigations have been assailed as being biased, ineffective, and preservative of the status quo.\textsuperscript{70} These sentiments reverberate especially in jurisdictions where police officers under internal investigation have statutory “Law Enforcement Officers’ Bill of Rights” (“LEOBOR”) protections.\textsuperscript{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 investigation\textsuperscript{72} 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 LAW ENF. POLICING (2015), https://nacla.org/article/rise-crime-disorder-and-authoritarian-policing-introductory-essay (last visited Mar. 20, 2017).

\textsuperscript{67}See Schneider & Amar, supra note 66.

\textsuperscript{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 WIEBURD ET AL., supra note 3, at 13 (discussing issues with officers not reporting abuses of authority).


\textsuperscript{70}See id.


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protections for internal investigation records. Moreover, the U.S. Supreme Court, in Garrity v. State of New Jersey, 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.

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. 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. In 2015, a Gallup poll found the nation's


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) (“Such ‘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 and negotiated agreements that provide protections to police officers suspected of committing a crime).

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

confidence in police at fifty-two percent, the lowest since 1993.\textsuperscript{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.\textsuperscript{79}

Public perceptions also suffer from the cloak of secrecy that surrounds data on the deaths of civilians by police.\textsuperscript{80} Although “netizens,”\textsuperscript{81} and as of 2015, the Washington Post and The Guardian, have catalogued law enforcement-related deaths,\textsuperscript{82} official information about these deaths is underreported and notoriously incomplete.\textsuperscript{83} Much of this is because the aggregation of statistics on such deaths first requires police departments to self-report.\textsuperscript{84} In an era where law enforcement’s effectiveness is
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. 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. By the well-known connection between a prosecutor’s control of the grand jury process and a ham sandwich, anomalous is the rare success of prosecutors to indict police suspects on such charges. 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. 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.


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. DEPT 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 phase 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.”

Most critical to this duty is the broad discretion a prosecutor enjoys in his or her grand jury presentation.

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.

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. 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.”

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.

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90 See, e.g., id. at 763, 764, 766.
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.
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

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97 See People v. Grant, 959 N.E.2d 479, 482 (N.Y. 2011) (quoting CRIM. PROC. LAW § 70.10(1)).
100 See Levine, supra note 23, at 752–53.
103 Id.
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.” 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. 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. In addition, a suspect does not generally have the automatic right to testify before the grand jury and suspects rarely appear, often due to their counsel’s assessment of the high procedural risks. 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.” Yet, in light of evidence that when suspects testify before a grand jury, the jury is more likely to hand up a “no” bill, that police suspects routinely appear when others do not smacks of other prosecutorial motivations and unequal prosecutorial treatment.

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

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104 See Gideon Lewis-Kraus, A Grand Juror Speaks, HARPER’S MAG., Mar. 1979, at 41, 43.
105 Id. at 43.
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).
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 those proceedings. See supra notes 28–44; see infra Appendix.
117 See Schram et al., supra note 38; Jaeh 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.
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;\textsuperscript{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;\textsuperscript{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.\textsuperscript{121}

As the appearance of institutional bias delegitimates the criminal justice system,\textsuperscript{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.\textsuperscript{123} These include the appointment of a special prosecutor,\textsuperscript{124} mandates on public access to grand jury records and police personnel records,\textsuperscript{125} legislation, federal oversight of local investigations and police departments,\textsuperscript{126} and, in the most


\textsuperscript{120} See Lyons, supra note 29; Robarge, supra note 29.

\textsuperscript{121} See Marzulli et al., supra note 28.


\textsuperscript{124} See, e.g., Snell, supra note 123; Jawando & Parsons, supra note 123.

\textsuperscript{125} See, e.g., Conti-Cook, supra note 123, at 1067.

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

Acknowledging that the protections afforded to police suspects harms public optics, Governor Andrew Cuomo, in 2015, by Executive Order 147, appointed the Attorney General as special prosecutor in matters where law enforcement was involved in the death of an unarmed civilian. 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.

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. Conflict on this point

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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.
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 Abelove, brought the case before a grand jury.135 In response, the Attorney General commenced an Article 78 proceeding,136 alleging that Abelove’s actions “flagrantly violated” the executive order, and seeking mandamus relief.137 Eventually, the parties reached a settlement whereby Abelove 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

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136 Stipulation of Settlement and Order of Discontinuance at 1, Schneiderman v. Abelove, (2016) (No. 1845-16) (case not yet reported). The Attorney General predicated this action on the assertion that Abelove 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).
138 See Stipulation of Settlement and Order of Discontinuance, supra note 136, at 1.
VII. POLICE MISCONDUCT IN THE CIVIL CONTEXT

By both New York State and national numbers, criminal prosecutions of police officers are unsuccessful.\textsuperscript{140} Yet, this does not leave those affected by excessive or deadly force entirely bereft of judicial redress.\textsuperscript{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.\textsuperscript{142} Though there are incongruities in relying on remedies available at civil law for the failure of procedural justice at criminal law,\textsuperscript{143} civil claims, and with far more regularity than their criminal counterparts, resolve in favor\textsuperscript{144} of plaintiffs or claimants.\textsuperscript{145} Even so, a sense of justice from this kind of resolution is elusive, if not entirely absent.\textsuperscript{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,\textsuperscript{147} and that when change does come, it may appear inconsistent.\textsuperscript{148}


\textsuperscript{141} See Shielded from Justice: Civil Remedies, supra note 56.

\textsuperscript{142} See id.

\textsuperscript{143} See id.

\textsuperscript{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-police-shootings-shows-racial-divide-article-1.


\textsuperscript{146} See Fisher et al., supra note 145.


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. 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. 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.”

Regarding deadly force, it may be appropriate in certain exigent circumstances and in situations where a police officer reasonably believes that the use of deadly physical force against him or her is imminent. 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.” 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.”

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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).

Regarding a search for justice, excessive force or wrongful death suits relative to police misconduct are difficult to maintain and prevail upon. 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.” 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.

Even when cases resolve on the merits or settle out of court, the true limitations of civil suits in punishing police misconduct materialize. The sobering reality is that for police misconduct, the wrongdoing officer is almost never personally accountable. 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. The study revealed that “[p]olice officers are virtually always indemnified” for the expenses that they incur in defending themselves against civil suits. 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.

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. The financial

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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. 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, or perhaps in a less direct fashion, municipal insurance plans, that foot the bill.

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.”

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), 50-1, 50-n (discussing corrections officers and police officers in Nassau County).


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).

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,
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. 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.

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