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## HARVESTING THE GRAND JURY'S "LAY EXPERTISE" IN OFFICER-INVOLVED SHOOTINGS

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*Officer-involved shootings put prosecutors in a bind. While prosecutors normally dominate the pretrial investigation and charging process, these tragedies force prosecutors to change their approach. The incident often pits the victim's family and community, who feel the case symbolizes a biased and unjust system, against officers and departments, who feel attacked for following their training in a high-stress situation. Prosecutors seek a result that preserves their support from both groups. To resolve this quagmire, prosecutors pass the buck, asking grand jurors to make charging determinations despite their tenuous understanding of the system, their powers, or their role. Many scholars have argued that grand jurors are destined to fail at the task.*

*This Article explains that unique circumstances in officer-involved shootings position grand jurors well to prevent future tragedies. While prosecutors ordinarily present grand jurors only a perfunctory version of events while seeking a quick and severe charge, prosecutors approach officer-involved shootings with greater care. They conduct thorough investigations and make complete evidentiary presentations that may last for months. Prosecutors then limit the grand jurors' choices to an up-or-down vote on indictment, hoping either result will shield the prosecutors from criticism. But through those detailed evidentiary presentations, grand jurors—unelected, individual citizens with minimal political motivations—develop a deep understanding of these tragic cases. Grand jurors are transformed from laypeople to experts; they learn both what caused this shooting and what might stop the next.*

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*Grand jurors in officer-involved shootings should be empowered to do far more than simply vote on indictment. They should know they can expand their investigatory ambit, comment on substantive law that favors officers, publicly report their views on the case and police training, or make referrals to civilian review boards. Empowering grand juries to harvest their “lay expertise” is a vital criminal justice reform.*

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#### I. INTRODUCTION

Just after midnight on June 27, 2022, a few miles from my office at the University of Akron, tragedy struck. Eight Akron police officers fired ninety-four shots at Jayland Walker, a twenty-five-year-old black man running from officers in a parking lot, causing forty-six entrance and graze wounds.<sup>1</sup> Officers then approached Walker’s bleeding body, rolled him onto his stomach, and

1. OHIO ATT’Y GEN.’S OFF., BUREAU OF CRIM. INVESTIGATION, INVESTIGATIVE REPORT 2022-1356, 001 PROSECUTOR SUMMARY 3 (Jan. 21, 2023), <https://www.ohioattorneygeneral.gov/getattachment/6d62cc90-ffae-498b-8d03-9b5d6fb946e3/001-Prosecutor-Summary.aspx> [https://perma.cc/5T6K-388P]; Eric Levenson, Dakin Andone, Polo Sandoval, Theresa Waldrop & Laura Ly, *Grand Jury Declines to Indict Akron Police Officers in Killing of Jayland Walker*, CNN (Apr. 17, 2023), <https://www.cnn.com/2023/04/17/us/jayland-walker-police-shooting-grand-jury/index.html> [https://perma.cc/JLT3-ZW2K]; Minyvonne Burke, *What to Know About Jayland Walker’s Shooting in Ohio*, NBC NEWS (Apr. 17, 2023, 2:52 PM), <https://www.nbcnews.com/news/us-news/jayland-walker-akron-officers-grand-jury-rcna78515> [https://perma.cc/6P5J-F6BB].

placed handcuffs on his wrists.<sup>2</sup> Though Walker was unarmed when he was killed, officers alleged that he had fired a shot from his car during a chase minutes earlier, then ran from his car and made a shooting motion with his arm towards the officers.<sup>3</sup> When investigators searched the driver's seat of Walker's car, they recovered a gun, a magazine of live rounds, and a wedding ring;<sup>4</sup> Walker's fiancé was killed in a hit-and-run accident a month earlier, sending Walker into personal turmoil that included searching the internet for methods of suicide and purchasing his first handgun.<sup>5</sup>

Ten months after the shooting, a special prosecutor appointed by the Ohio Attorney General's Office presented evidence to a special grand jury empaneled to review only that case.<sup>6</sup> The prosecutor spent weeks presenting evidence collected in the course of a nearly year-long investigation, including more than 100 interviews, physical evidence, DNA tests, and detailed phone and internet search records.<sup>7</sup> The grand jury heard emotional testimony from each officer under investigation, who were provided counsel by the Fraternal Order of Police<sup>8</sup> and were permitted to testify to the grand jury under Ohio law,<sup>9</sup> unlike most Ohio defendants.<sup>10</sup> The officers explained their hopes that Walker would stop during

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2. Amanda Garrett, *BCI Investigation Details Moments Police Shot Jayland Walker, Delays Notifying Family*, AKRON BEACON J. (June 22, 2023, 6:10 AM), [https://www.beaconjournal.com/story/news/2023/06/22/jayland-walker-akron-ohio-case-updates-police-shooting-bci-probe-details-investigation/70252120007/?utm\\_source=nabj-DailyBriefing&utm\\_medium=email&utm\\_campaign=daily-briefing&utm\\_term=hero&utm\\_content=OHIO-AKRON-NLETTER65](https://www.beaconjournal.com/story/news/2023/06/22/jayland-walker-akron-ohio-case-updates-police-shooting-bci-probe-details-investigation/70252120007/?utm_source=nabj-DailyBriefing&utm_medium=email&utm_campaign=daily-briefing&utm_term=hero&utm_content=OHIO-AKRON-NLETTER65) [<https://perma.cc/52P9-L7HE>].

3. Two officers initially tried to stop Walker for suspiciously driving past the same area several times with a broken taillight on his car; when Walker refused to stop and drove onto a local highway, the officers alleged that Walker fired a gunshot out of the driver's side window. OHIO ATT'Y GEN.'S OFF., *supra* note 1. The Walker family's attorney has publicly questioned whether the evidence shows that Walker ever fired shots during the incident. Amanda Garrett, *Jayland Walker's Death Gives New Life to Police Reform Movement in Akron*, AKRON BEACON J. (June 26, 2023, 12:04 PM), <https://www.beaconjournal.com/story/news/2023/06/22/jayland-walker-case-updates-attorney-critical-bci-investigation-shooting-akron-ohio-police/70253265007/> [<https://perma.cc/AZ53-95FQ>].

4. OHIO ATT'Y GEN.'S OFF., *supra* note 1; Burke, *supra* note 1.

5. Amanda Garrett, *Never-Before-Seen Texts, Photos, More Shed New Light into Life and Death of Jayland Walker*, AKRON BEACON J. (June 22, 2023, 6:12 AM), <https://www.beaconjournal.com/story/news/2023/06/22/jayland-walker-shooting-case-latest-updates-news-new-information-bci-investigation-akron-ohio/70243896007/> [<https://perma.cc/9G2B-LSHD>].

6. Levenson et al., *supra* note 1. During Ohio grand jury proceedings, officers are permitted to testify. *Id.* The eight officers involved in this case were initially placed on administrative leave but were reinstated months later and continue to serve on the force. *Id.* The department has not released the identity of the officers; they have been subject to several active and credible threats against their safety and the safety of their families. *Id.*

7. Ben Axelrod, *Ohio Attorney General Dave Yost Releases Evidence from Jayland Walker Grand Jury*, WKYC (Apr. 17, 2023, 11:38 PM), <https://www.wkyc.com/article/news/special-reports/jayland-walker/ohio-attorney-general-dave-yost-releases-evidence-jayland-walker-grand-jury/95-2b86050f-5678-4e3d-a1d1-c3457279f6fa> [<https://perma.cc/2WA9-9VUB>].

8. Garrett, *supra* note 3.

9. Levenson et al., *supra* note 1.

10. Bethany Bruner, *How Does Ohio's Grand Jury Process Work? Here's What You Should Know*, COLUMBUS DISPATCH (May 19, 2023, 10:01 AM), <https://www.dispatch.com/story/news/courts/2023/05/19/how-does-ohios-grand-jury-process-work-heres-what-you-should-know-franklin-county/70235179007/> [<https://perma.cc/W5LF-N6P3>].

the chase; their fear for their lives when they unloaded their guns; and their deteriorating mental health in the months that followed.<sup>11</sup>

After presenting the evidence, the special prosecutor asked the grand jurors<sup>12</sup> to first decide if Walker's shooting was justified or if another officer would have reacted identically;<sup>13</sup> only if the grand jurors found that the shooting was unjustified would they proceed to consider whether there was probable cause to believe the officers committed a crime.<sup>14</sup> The attorney general did not publicly release the grand jurors' votes.<sup>15</sup> In anticipation of protests that might follow the grand jury's decision, city officials erected barricades near the downtown courthouse and city hall in the days before the decision was reached.<sup>16</sup> Ultimately, the grand jury did not indict any of the eight officers.<sup>17</sup>

11. Garrett, *supra* note 2; Garrett, *supra* note 3. The officers were placed on a brief administrative leave immediately after the incident, followed by a return to the force in an administrative capacity, roles that continued during the grand jury proceedings. Levenson et al., *supra* note 1. The department has not released the identity of the officers; they have been subject to several active and credible threats against their safety and the safety of their families. *Id.*

12. The grand jury was composed of six women and three men, which included two black members. Stephanie WarSmith, *Grand Jury Decision: No Criminal Charges for 8 Akron Officers Who Shot Jayland Walker*, AKRON BEACON J. (Apr. 17, 2023, 7:28 PM), <https://www.beaconjournal.com/story/news/2023/04/17/grand-jury-decision-verdict-no-criminal-charges-for-akron-officers-who-shot-jayland-walker/70088282007/> [https://perma.cc/HQ3W-E4AS].

13. As of this writing, Ohio is one of the few remaining states without a use of force statute that specifies the conditions under which police officers may lawfully resort to deadly force. Cynthia Lee, *Officer-Created Jeopardy: Broadening the Time Frame for Assessing a Police Officer's Use of Deadly Force*, 89 GEO. WASH. L. REV. 1362, 1383 n.60 (2021) (noting that Ohio was one of seven states without a use of force statute as of January 2021). Instead, Ohio courts apply Supreme Court cases, such as *Graham v. Connor*, 490 U.S. 386 (1989), to determine when officers may legally resort to deadly force. *See State v. White*, 29 N.E.3d 939, 947 (Ohio 2015). In 2015, Ohio's governor created the Ohio Collaborative Community Police Advisory Board, which promulgated statewide standards to limit the use of deadly force by police officers. *U.S. Legislatures Slow to Limit Use of Force*, NBC NEWS (June 3, 2020, 8:08 AM), <https://www.nbcnews.com/politics/politics-news/us-legislatures-slow-limit-use-force-n1223281> [https://perma.cc/C377-7U8Q]; Brandon Addeo, *Use-of-Force Policies Aren't Mandatory for Ohio Police*, SANDUSKY REG. (June 6, 2020, 10:00 AM), <https://sanduskyregister.com/news/247978/use-of-force-policies-arent-mandatory-for-ohio-police/> [https://perma.cc/BEQ4-G4LX]. But, those recommendations have not been codified into law, and agency compliance with them is voluntary. *U.S. Legislatures Slow to Limit*, *supra* note 13; Addeo, *supra* note 13. Many local departments maintain policies on the use of force that require officer uses of deadly force to be objective reasonable based upon the totality of the circumstances. *See, e.g.*, CLEVELAND DIV. OF POLICE, 2.01.03, GENERAL POLICE ORDER, USE OF FORCE - GENERAL 1 (Mar. 20, 2023), <https://clevelandohio.gov/sites/clevelandohio/files/policies-procedures/2.01.03%20Use%20of%20Force%20-%20General.pdf> [https://perma.cc/JU6X-CH8S]. Such policies roughly align with the majority of state statutes on police use of force, which "allow an officer to use deadly force against a civilian if the officer reasonably believed deadly force was necessary to effectuate an arrest, prevent the escape of a felon, or protect the officer of others." Lee, *supra* note 13, at 1383. Most officer use-of-force statutes do not require a separate finding that the officer's actions were reasonable, as well as their beliefs. *Id.* at 1385.

14. WarSmith, *supra* note 12.

15. *Id.*

16. *Id.*

17. Garrett, *supra* note 5. The evidence presented to the grand jury has since been posted to the Ohio Attorney General's website. *Investigative Documents Related to Fatal Officer-Involved Shooting Cases*, OHIO ATT'Y GEN.'S OFF., <https://www.ohioattorneygeneral.gov/SpecialPages/Investigative-Documents> (last visited Mar. 9, 2024) [https://perma.cc/6NW2-3EG5]; *see also* Garrett, *supra* note 5 ("After a grand jury declined to charge the eight officers who fatally shot Walker, Ohio Attorney General Dave Yost quickly released thousands of pages of documents, videos, and photographs gathered during the state Bureau of Criminal Investigation's probe."). A local newspaper subsequently published a series of profiles detailing the officers' accounts of the

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Nobody wins in an officer-involved shooting. When police officers fire their weapons and a civilian is killed, the victim is not the only one harmed. The community, the police department, and the officers themselves feel the detrimental effects for years.<sup>18</sup> The overwhelming majority of police officers who honorably and responsibly protect our communities from danger and disorder<sup>19</sup> may feel under attack from angry protesters. The individual officers involved, even if their actions were justified, will be under intense public scrutiny and face life-changing professional and emotional challenges.<sup>20</sup> Victims and their loved ones must grieve publicly and seek justice for an event they struggle to explain or to understand. The results are uniformly tragic and divisive.

To assign legal consequences for these terrible events, prosecutors ask grand juries to assess the evidence and decide whether to pursue criminal charges,<sup>21</sup> typically under statutes that allow an officer to use deadly force where they reasonably believe it necessary.<sup>22</sup> But prosecutors dominate that process. They control both the evidence grand jurors consider and the conclusions they might reach.<sup>23</sup> Prosecutors use grand juries as a shield from criticism, then provide only the dichotomous choice between indicting the officers or returning a no-true-bill.<sup>24</sup> Some scholars have thus suggested scrapping the grand jury process entirely.<sup>25</sup>

This Article takes a different perspective. Grand jurors often receive significant evidence and insight into the causes of an officer-involved shooting.<sup>26</sup>

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shooting as well as Walker's personal struggles prior to his death. *Id.*; Garrett, *supra* note 2; Garrett, *supra* note 3.

18. See, e.g., Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 631–33.

19. Roger A. Fairfax, Jr., *The Grand Jury's Role in the Prosecution of Unjustified Police Killings—Challenges and Solutions*, 52 HARV. C.R.-C.L. L. REV. 397, 398 (2017).

20. See, e.g., Lee, *supra* note 18.

21. Grand jury indictments are required for felony cases in the federal system and about half of the states. Fairfax, *supra* note 19, at 401; Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 17–19 (2002). Even where not required, prosecutors may use the grand jury as a shield from criticism for failing to charge officers involved in these incidents. Fairfax, *supra* note 19, at 406 (“[A] prosecutor trying to avoid public accountability for an unpopular charging decision has the ability to simply hide behind the grand jury and assign blame to it for the decision either to indict or not to indict.”).

22. Such statutes typically permit deadly force when reasonably necessary to effectuate an arrest, stop a fleeing felon, or protect officers and the public. Lee, *supra* note 18, at 654–61 (explaining how state use of force statutes, which apply when an officer who is charged criminally for a use of force argues that they acted justifiably, differ from self-defense statutes, which apply to ordinary civilians); see also Lee, *supra* note 13, at 1383–85 (collecting and summarizing state use-of-force statutes).

23. See Fairfax, *supra* note 19, at 401.

24. *Id.* at 406.

25. For a summary of critiques of the grand jury in ordinary cases, see, e.g., Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 261 n.5 (1995) (collecting sources); Simmons, *supra* note 21, at 29–30 n.128 (collecting sources). For examples of critiques of the grand jury process in officer-involved shootings, see, e.g., Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 747 (2016); Fairfax, *supra* note 19, at 399–400 (collecting sources); Nicole Smith Futrell, *Visibly (Un)Just: The Optics of Grand Jury Secrecy and Police Violence*, 123 DICK. L. REV. 1, 4–5 (2018).

26. See, e.g., Smith Futrell, *supra* note 25; see also Fairfax, *supra* note 19, at 399–400.

Grand jurors thus develop a form of “lay expertise” about those tragedies that can be harvested, helping to prevent repetition of those cases.<sup>27</sup> Grand juries historically possess the authority to generate meaningful recommendations that might lower the odds of similar shootings.<sup>28</sup> Grand jurors should be empowered to use the breadth and depth of their traditional discretion to offer meaningful recommendations beyond a simple up-or-down vote on indictment under state law that favors officers. The grand jury’s wider menu of options should include opening broader departmental inquiries, publicly reporting findings and suggesting changes to substantive law and police procedures, and helping define the mission and scope of civilian review boards.

The grand jury’s lay expertise emerges from the distinct track upon which the modern grand jury operates in officer-involved shootings.<sup>29</sup> Although prosecutors exercise near-total control over the decisions that the grand jury reaches,<sup>30</sup> that control runs in opposite directions in ordinary cases and in officer-involved shootings.<sup>31</sup> First, in ordinary cases, a fast-paced and cursory grand jury process leads to an indictment rate above 90%.<sup>32</sup> Prosecutors present a one-sided description of events with no competing narrative, defense involvement, or pre-indictment investigation.<sup>33</sup> The grand jurors receive very little information about the case,<sup>34</sup> which often leads to quick, perfunctory charges.<sup>35</sup> On the other hand, in

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27. As Jocelyn Simonson has argued in favor of viewing police reform efforts through a power lens, many social movements for reform argue that expertise in policing arises not only from officers or sociologists, but from those individuals most impacted, positively and negatively, by policing in their neighborhoods and communities. Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 849–52 (2021). Grand jurors given the opportunity to digest voluminous information about an officer-involved shooting and thoroughly consider its causes can similarly develop meaningful expertise that might drive future change to policing practices.

28. See, e.g., Fairfax, *supra* note 19, at 414.

29. See, e.g., Levine, *supra* note 25, at 749 (“[P]olice appear to receive favorable treatment when they become criminal suspects: the amount of criminal process they receive from prosecutors before they are charged or indicted” far exceeds other cases); Fairfax, *supra* note 19, at 409 (“In other words, the prosecutor usually is advocating for the charges in the vast run of cases brought to the grand jury. In the police violence context, however, it is possible that some prosecutors approach their role in the grand jury differently.”).

30. Fairfax, *supra* note 19, at 408. (“Indeed, the grand jury gives the prosecutor nearly limitless ability to shape the presentation of the evidence and influence the grand jurors. There is no judge to oversee the prosecutor’s presentation and no defense attorney to offer a competing narrative.”).

31. For a summary of critiques of the grand jury in ordinary cases, see, e.g., Leipold, *supra* note 25, at 261 n.5 (collecting sources); Simmons, *supra* note 21, at 29–30 n.128 (collecting sources). For examples of critiques of the grand jury process in officer-involved shootings, see, e.g., Levine, *supra* note 25 (“[G]rand jury presentations in the Brown case and other police brutality cases have been roundly criticized by criminal justice advocates as a way for partisan prosecutors to shield the police.”); Fairfax, *supra* note 19, at 399–400 (“The grand juries’ decisions not to indict in these and other cases caused many to attack the grand jury and its use in cases in which law enforcement officers are accused of unjustified violence.”) (collecting sources).

32. Simmons, *supra* note 21, at 31–32 (citing a 99.5% indictment rate in federal cases and a 94.1% indictment rate in New York).

33. Fairfax, *supra* note 19, at 408; Levine, *supra* note 25, at 749.

34. At least in the federal system, prosecutors often control the subpoena process and determine “which witnesses and documents should be subpoenaed by the grand jury.” Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 26 (2004).

35. *Id.* at 23 (“Recent statistics show that on average, [federal] grand jur[ies] spend[] well under an hour considering evidence of a defendant’s guilt before voting to indict that defendant for a serious federal crime.”); *id.* at 23 n.129 (noting that federal grand juries spend 5.1 hours per session to deliver an average of 6 indictments).

officer-involved shootings, a much more deliberative process unfolds. Prosecutors lead thorough pre-charge investigations and often make complete presentations of all available evidence to the grand jury, then ask grand jurors to evaluate the reasonableness of the officer's belief in the need to use deadly force.<sup>36</sup> Relatively low indictment rates persist,<sup>37</sup> creating a perception of unfairness and unequal treatment for police in these cases<sup>38</sup>—even if those indictment rates reflect the appropriate application of the substantive criminal law.

Rather than the prosecutor limiting the possible outcomes the grand jury might reach, grand jurors should have a fuller understanding of their robust powers and their discretion to contradict prosecutorial wishes.<sup>39</sup> Empowered and informed grand jurors can both "nullify" the charging recommendations<sup>40</sup> of overzealous prosecutors in ordinary cases,<sup>41</sup> and they can publicly respond to officer-

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36. Levine, *supra* note 25, at 749; Fairfax, *supra* note 19, at 406. The recent presentation to a special grand jury in the Jayland Walker shooting in Akron, Ohio, exemplifies the thorough investigation and presentation typical in many officer-involved shootings today.

37. "A thorough analysis by the *Washington Post* and researchers at Bowling Green State University uncovered that, out of thousands of fatal shootings by law enforcement officers since 2005, only fifty-four had been charged or indicted" as of April 2015. Levine, *supra* note 25, at 763–64 (citing Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), <https://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/> [<https://perma.cc/CD83-HZ5F>]). According to statistics maintained by Professor Philip Matthew Stinson and the Henry A. Wallace Police Crime Database at Bowling Green State University, since 2005, there have been 179 nonfederal sworn law enforcement officers who have been charged with murder or manslaughter resulting from an on-duty shooting throughout the United States. Philip Matthew Stinson, *On-Duty Shootings: Police Officers Charged with Murder or Manslaughter, 2005-2023* (June 6, 2023) (on file with author); see also Fairfax, *supra* note 19, at 400 n.15–16 (collecting sources); Ric Simmons, *The Role of the Prosecutor and the Grand Jury in Police Use of Deadly Force Cases: Restoring the Grand Jury to Its Original Purpose*, 65 CLEV. ST. L. REV. 519, 524 (2017). There has been a slight increase in the rate at which officers were charged with murder or manslaughter in the post-George Floyd era; Stinson's data shows that between 2016 and 2019, forty-three officers were charged with murder or manslaughter stemming from an on-duty shooting, while from 2020 to 2023, seventy-one officers were charged. Audra D. S. Burch & Kelley Manley, *Police Officers Are Charged with Crimes, but Are Juries Convicting?*, N.Y. TIMES, <https://www.nytimes.com/2024/01/01/us/george-floyd-elijah-mcclain-police-brutality-black-lives-matter-trials-civil-rights.html?smid=nytcore-ios-share&referringSource=articleShare> (July 22, 2024) [<https://perma.cc/R57C-QDR6>]. But reformers argue that petit juries remain reluctant to convict the officers. *Id.*

38. Levine, *supra* note 25, at 769–70 ("When prosecutors and police appear to team up to arrest and convict as many people as possible while rigging the system so that no charges or indictments are brought when they are suspected of crimes, the appearance of justice is sullied.")

39. Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 706 (2008) ("Where the grand jury truly adds value is through its ability to exercise robust discretion *not* to indict where probable cause nevertheless exists—what might be termed 'grand jury nullification.'")

40. *Id.* at 708 ("[G]rand jury nullification occurs if the grand jury, despite receiving sufficient evidence to establish probable cause, 'exercises its own political, moral, and social judgment in reviewing the prosecutor's decision to bring the case' and declines to indict." (quoting Simmons, *supra* note 21, at 46)).

41. In ordinary cases, grand jurors can act as a democratic check on prosecutorial abuse of power, reflecting society's preferences and upholding justice in cases where charges seem inappropriate or overzealous. Simmons, *supra* note 21, at 2–3. As others have argued, grand juries in those cases should be informed of their independence, see STEPHEN MCINTOSH ET AL., REPORT AND RECOMMENDATIONS OF THE TASK FORCE TO EXAMINE IMPROVEMENTS TO THE OHIO GRAND JURY SYSTEM 10–11 (Supreme Court of Ohio ed., 2016); Andrew Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 313 (1995); Simmons, *supra* note 21, at 50, and should be entitled to see any exculpatory evidence. Levine, *supra* note 25, at 760; R. Michael Cassidy, *Toward a More Independent Grand Jury: Recasting and Enforcing the Prosecutor's Duty to Disclose Exculpatory Evidence*, 13 GEO. J. LEGAL ETHICS 361, 366 (2000). Reductions in grand jury secrecy and increases in the representativeness of the grand jury might also be important steps to improve grand

involved shootings. Harvesting the lay expertise of grand jurors would help shift governing and policymaking power away from traditional policing “experts” and towards those who are subject to policing practices.<sup>42</sup>

In officer-involved shootings, grand jurors can reflect the community’s preferences through a menu of potential actions, rather than merely shielding prosecutors. The grand jury should be able to conduct wider inquiries into department policies related to the case and possible additional charges;<sup>43</sup> recommend changes to substantive criminal law to further penalize officer misconduct;<sup>44</sup> and charge civilian review boards, independent commissions, or even internal department experts with investigating and altering department policies or training procedures.<sup>45</sup> Grand jurors should also be entitled to issue public reports of their findings.<sup>46</sup> Such an empowered and informed grand jury is not an historical outlier; it is quite consistent with the historical role played by that body.<sup>47</sup> Grand jurors who have gained expertise in the causes of an officer-involved shooting may find officer behavior morally abhorrent yet motivated by

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jury independence in ordinary cases. Fairfax, *supra* note 19, at 405–06. As others have argued, grand juries in those cases should be informed of their independence. STEPHEN MCINTOSH ET AL., *supra*; Ric Simmons, *Why Prosecutors Should Give Grand Juries Influence in Deciding Whether to Charge Police in Lethal Force Cases*, SCHOLARS STRATEGY NETWORK (Sept. 28, 2017), <https://scholars.org/contribution/why-prosecutors-should-give-grand-juries> [<https://perma.cc/FC3N-M3F8>].

42. As discussed in more detail below, *infra* Section IV.B, my proposal thus builds on Jocelyn Simonson’s insight that the modern criminal justice reform movement “suggests that power in governance and policymaking should be shifted away from the police and traditional experts, and toward people and groups whose political standing have been eroded by institutions of policing and criminal law.” Simonson, *supra* note 27, at 812. This also aligns with Donald Braman’s proposal fifteen years earlier that criminal justice reformers interested in equality “shift their focus from the doctrine of individual liberties to more modest policy reforms aimed at increasing the influence that citizens in disadvantaged communities exercise over the form of justice itself.” Donald Braman, *Criminal Law and the Pursuit of Equality*, 84 TEX. L. REV. 2097, 2099 (2006).

43. At present, “the grand jury has no power over the timing of indictment, let alone the formulation of criminal charges, or the determination whether to prosecute.” Kuckes, *supra* note 34, at 27.

44. *Infra* Subsection IV.B.3.

45. These recommendations are perhaps only a few of a possible menu of options that the grand jury might be presented in officer-involved shootings. Given the grand jury’s historical flexibility to behave not only as a charging mechanism, but also as an investigatory body and a political actor, Simmons, *supra* note 21, at 14, it seems entirely possible that the grand jury might fulfill these additional capacities. This may be especially appropriate where a special grand jury has been empaneled to hear only a single officer-involved shooting case, a relatively frequent occurrence in modern jurisprudence. Levine, *supra* note 25, at 766 (“[A]s the *New York Times* noted, ‘most prosecutors impanel a special grand jury to investigate police-related deaths’ and therefore ‘insulate themselves from the final decision, while appearing to fulfill the public desire for independent review.’”) (quoting James C. McKinley, Jr. & Al Baker, *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> [<https://perma.cc/SJX9-HYFK>]).

46. Grand juries have traditionally had such a reporting power, and many states maintain the practice of grand jury reporting on non-criminal matters, such as jail conditions and public school performance. See 3 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIM. PROC. § 8.3(h) (4th ed. 2023); see also RICHARD D. YOUNGER, THE PEOPLE’S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941, at 5–34 (1963).

47. YOUNGER, *supra* note 46.

fear or in compliance with the black letter of existing criminal statute. They need more choices than simply returning a no-true-bill.<sup>48</sup>

Grand jury empowerment is an overlooked source of meaningful change in criminal justice reform. Grand juries can enhance the community's voice in setting priorities and changing policing behavior for the better.<sup>49</sup> The grand jury can rebuff prosecutorial preferences that do not align with the community's sense of justice and make public calls for change.<sup>50</sup> These unelected, individual citizens with minimal political motivations<sup>51</sup> develop meaningful understanding of the causes of these tragic cases; they can harvest that understanding to increase public confidence in the legitimacy of the criminal justice system.<sup>52</sup> And in many ways, lay experts on the grand jury can evaluate the equities of a given case better than prosecutors.<sup>53</sup> They are not subject to the same political pressures and incentives, and they have not become inured to systemic biases and stereotypes.<sup>54</sup>

Harvesting the grand jury's lay expertise can improve the relationships between officers and the citizens they police, in part because it is a mechanism internal to the existing system of criminal adjudication.<sup>55</sup> Officers might view civilian review boards with unclear mandates as external dilettantes dictating policy from ivory towers. But the grand jury's investigatory scope, internal mechanics, and constitutional authority are already familiar to officers, departments,

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48. As noted above, the grand jurors in the Jayland Walker case were first asked to determine whether the officer's actions were justified because other officers would have reacted identically; only if the grand jurors found that the shooting was unjustified would they proceed to consider whether there was probable cause to believe the officers committed a crime under Ohio statute. Warsmith, *supra* note 12.

49. As Josh Bowers has suggested in his argument for a normative grand jury to evaluate public order misdemeanor cases, "public participation in criminal justice has the capacity to not just reshape pernicious perceptions of unfairness and injustice, but, perhaps, to promote fairness and justice *in fact*." Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 WAKE FOREST L. REV. 319, 320 (2012). Similarly, Kevin K. Washburn has argued that "[t]he grand jury could play a significant role in restoring the legitimacy of American criminal justice, particularly in communities of color that lack trust in the criminal justice system." Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2335 (2008). And Jocelyn Simonson notes that "[a] call for democracy in the criminal system is often a call for an increase in lay participation at multiple points in that system—a goal that might, in theory, shift political power." Simonson, *supra* note 27, at 801.

50. Washburn, *supra* note 49, at 2340 ("Judge Learned Hand called the grand jury 'the voice of the community,' and it has also been likened to 'the pulse of the community.'" (quoting *In re Kittle*, 180 F. 946, 947 (C.C.S.D.N.Y. 1910))); Alfredo Garcia, *The Fifth Amendment: A Comprehensive and Historical Approach*, 29 U. TOL. L. REV. 209, 231 (1998)).

51. Noah Weinstein & William J. Shaw, *Grand Jury Reports—A Safeguard of Democracy*, 1962 WASH. U. L.Q. 191, 191 ("A grand jury is a short-lived, representative, non-political body of citizens functioning without hope of personal aggrandizement. It comes from the citizens at large and soon disappears into its anonymity without individual recognition or personal reward and without ability to perpetuate itself in the public hierarchy." (quoted in Michael Vitiello & J. Clark Kelso, *Reform of California's Grand Jury System*, 35 LOY. L.A. L. REV. 513, 524 (2002))).

52. Bowers, *supra* note 49, at 323 (arguing that grand jury judgements on the equitable righteousness of charges can "promote discourse, democratic values, and perceptions of systemic legitimacy").

53. *Id.* at 332 (noting that the prosecutor "has no special claim against lay people to the evaluative art of equitable discretion").

54. As Chief Justice Rehnquist argued in the context of lay petit jurors, the "lay juror's 'very inexperience is an asset because it secures a fresh perception . . . , avoiding the stereotypes said to infect the judicial eye.'" *Id.* (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 355 (1979) (Rehnquist, J., dissenting)).

55. *See id.* at 334.

and prosecutors.<sup>56</sup> Those actors are more likely to accept and internalize the grand jury's decisions and recommendations than those of external actors.<sup>57</sup> And the grand jury can also provide clearer mandates for investigation and possible reform to external civilian review boards or commissions.

These reforms come with risks. Grand jurors might use discretion in unpredictable ways, perhaps indicting in cases where justice demands otherwise or returning a no-true-bill in cases where prosecution seems required, adding subjectivity to the charging process.<sup>58</sup> But charging decisions are always discretionary exercises of equitable judgment; they reflect a normative choice about the appropriateness of prosecution, not a legal ruling on the substance of criminal law.<sup>59</sup> Furthermore, the potential benefits of a grand jury that understands the extent of its powers outweigh those risks. Though grand jury exercises of discretion may sometimes be troubling, their presence overall provides the community with input and investment in the criminal justice system that may help heal communities and spur changes that break the cycle of violence, heartbreak, and distrust.<sup>60</sup>

The Article begins in Part II with a brief history of the different functions performed by grand juries over time. It then describes the relatively enfeebled version of the grand jury in most American jurisdictions today. In Part III, the Article explains the dual tracks of modern grand jury proceedings, highlighting the distinctions between the rushed and draconian process in ordinary cases and the more deliberate and detailed process in officer-involved shootings. Part IV of the Article then describes how grand juries can harvest their "lay expertise" developed in officer-involved shootings to respond more robustly to those tragedies. It offers both procedural suggestions—including changes to grand jury instructions and the provision of a grand jury legal advisor—and substantive options for grand jurors beyond a vote on indictment—including public reporting, changes to substantive law, and recommendations to oversight bodies. Finally, Part V explores how this reform from within the existing criminal justice system

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56. *Id.* at 323–39.

57. See Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. L. REV. 1, 3–4 (1996).

58. There is evidence that when petit jurors are provided an instruction that informs them of their ability to nullify a verdict otherwise called for by the facts presented, jurors feel comfortable ignoring many other standard elements of a fair trial and actually increase the likelihood of unwarranted convictions. See Travis Hreno, *Jury Nullification and the Bad Faith Juror*, 1 L., ETHICS & PHIL. 53, 58 (2013). The same phenomenon is certainly possible in the case of a grand jury.

59. As Josh Bowers has argued, while petit jury nullification involves the fundamentally legal question of legal guilt, charging decisions "descriptively and properly [involve] more than legal analysis"—namely, equitable concerns about the community's sense of justice. Bowers, *supra* note 49, at 338. Charging decisions are thus inherently equitable and subjective, and allocating more of that equitable and subjective authority to grand jurors rather than prosecutors does not render the law vague and subject in the same way that petit jury nullification might. Instead, "[g]rand jury discretion operates as a one-off check on the equities, but leaves the applicable law firmly in place." *Id.*

60. Kevin K. Washburn argues that the ability of the grand jury to nullify or contradict central government preferences, "while troubling in certain instances, can provide the local community the sense of participation and investment in criminal justice that is necessary to assure local confidence in that system." Washburn, *supra* note 49, at 2369.

is more likely to obtain support from all parties to officer-involved shootings. In Part VI, the Article concludes that teaching grand juries to harvest their "lay expertise" is a small but vital step towards empowering those subject to dangerous policing practices to correct systemic problems.

## II. A BRIEF HISTORY OF THE GRAND JURY'S MULTIFACETED ROLE

In most jurisdictions, the modern grand jury's primary role is to hear evidence from prosecutors and make charging decisions on serious crimes.<sup>61</sup> But the grand jury's historical roots, tracing back nearly nine centuries,<sup>62</sup> reveal a wider array of tasks and powers that have accompanied the body over time. This Part reviews some of the historical features of the grand jury that others have illuminated, with a focus on the wide variety of tasks and duties grand juries have performed. It contrasts that history with the modern, enfeebled version of the grand jury. This brief recapitulation of the grand jury's history demonstrates how this Article's prescription of a wide discretionary ambit for the modern grand jury aligns with the grand jury's history, even if it represents a break with recent practice.

### A. *The Historically Robust Grand Jury*

The grand jury's early appearances in English history begin with King Henry II's creation of the Grand Assize of Clarendon in the twelfth century, a body of 12 knights who reported crimes in their localities to the crown.<sup>63</sup> These early versions of the grand jury expanded central government power; they provided localized support for the Crown and its courts over those of the Church,<sup>64</sup> rather than protecting the rights of individuals against an overzealous monarch.<sup>65</sup> Knights serving on the Grand Assize did not hear evidence of the crimes or have any firsthand knowledge of their commission, but merely reported their belief of a person's guilt to the King.<sup>66</sup> The accusation itself was often fatal.<sup>67</sup> The accused were forced to undergo a trial by ordeal that frequently resulted in death or dismemberment.<sup>68</sup> Grand juries were thus generally feared by the public, rather than seen as a shield for the common man.<sup>69</sup>

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61. It is important to note that grand juries in especially high-profile or complex cases will sometimes fulfill a more investigatory role. Kuckes, *supra* note 34, at 30.

62. Gregory T. Fouts, Note, *Reading the Jurors Their Rights: The Continuing Question of Grand Jury Independence*, 79 IND. L.J. 323, 323, 325–26 (2004).

63. Simmons, *supra* note 21, at 4–5; Futrell, *supra* note 25, at 21; Kadish, *supra* note 57, at 5–6 (1996).

64. Simmons, *supra* note 21, at 5.

65. Futrell, *supra* note 25, at 21. As Futrell also notes, the tradition of grand jury secrecy began in seventeenth-century England, creating a "custom of hearing witness testimony in private, without the prosecutor or defendant." *Id.*

66. Simmons, *supra* note 21, at 5.

67. *Id.* at 5–6.

68. Kadish, *supra* note 57, at 6–7; Simmons, *supra* note 21, at 6; Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury's Shield*, 98 J. CRIM. L. & CRIMINOLOGY 1171, 1185–86 (2008).

69. Simmons, *supra* note 21, at 6.

Early in its history, the grand jury expanded beyond merely accusing individuals of serious crimes. For instance, knights on the Grand Assize of Clarendon were empowered to collect taxes and investigate the condition and maintenance of public works projects.<sup>70</sup> They were also tasked with generating revenue for the central government through their accusatory powers, and the grand jurors could even be fined if they failed to reach their quota of accusations.<sup>71</sup>

During the reign of Edward III in the fourteenth century, the Grand Assize was superseded by a larger, inquisitory body of knights with authority to begin a prosecution, while the original Grand Assize became responsible for determining guilt or innocence in capital crimes as an early form of the petit jury.<sup>72</sup> Over time, such a two-tiered process—with a grand jury initiating prosecution and a petit jury adjudicating guilt or innocence—was embedded in the English legal tradition.<sup>73</sup> The idea that grand juries should act as an impartial panel to screen potential criminal cases, conducted by common individuals sitting outside of the normal political process, took hold over the centuries, even if it was rarely reflected in the actual composition or work of English grand juries of the day.<sup>74</sup>

English grand juries also began to issue public reports that would identify misconduct by public officials, even when the grand jury did not initiate a formal prosecution.<sup>75</sup> English grand juries in the late seventeenth century also issued reports that would comment on broad matters of public concern, such as road maintenance and prison conditions.<sup>76</sup>

When the grand jury tradition was imported by the American colonies, it became a larger component of the daily operation of local government.<sup>77</sup> The colonial grand jury maintained a role in screening criminal accusations for validity and possible prosecution,<sup>78</sup> filling a gap in government resources to conduct thorough criminal investigations.<sup>79</sup> But colonial grand juries also undertook many ordinary government functions, including inspecting roads, levying taxes,

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70. Kadish, *supra* note 57, at 7.

71. Simmons, *supra* note 21, at 6 (citing Helene E. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701, 709 (1972)); Hoffmeister, *supra* note 68, at 1186.

72. Kadish, *supra* note 57, at 8.

73. *Id.* at 8–9; Simmons, *supra* note 21, at 6–7.

74. Simmons, *supra* note 21, at 7; Kadish, *supra* note 57, at 8–9. Both Simmons and Kadish point to the refusal of London grand juries to refuse to indict the Earl of Shaftesbury and his follower Stephen College in the late 1600s as the first true instance of grand juries acting as a shield against overzealous government prosecution. See Simmons, *supra* note 21, at 8–9; Kadish, *supra* note 57, at 9.

75. Barry Jeffrey Stern, *Revealing Misconduct by Public Officials Through Grand Jury Reports*, 136 U. PA. L. REV. 73, 76 (1987) (“There is a consensus among courts and commentators that, historically, common law grand juries performed a public reporting function by identifying official misconduct without initiating prosecution.”).

76. *Id.* at 84.

77. For the founding generation, “the grand jury was a center of civic life and interaction, playing a role in local governance and serving as a mechanism for the exchange and dissemination of ideas on government.” Roger A. Fairfax, Jr., *Grand Jury Innovation: Toward a Functional Makeover of the Ancient Bulwark of Liberty*, 19 WM. & MARY L. REV. 339, 346 (2010).

78. Kadish, *supra* note 57, at 10.

79. Washburn, *supra* note 49, at 2343 (cited in Levine, *supra* note 25, at 753).

monitoring public expenditures, and even exposing government corruption.<sup>80</sup> The administrative role of colonial grand juries in more mundane, daily operations of the local government was vast and varied, including a broad public reporting function.<sup>81</sup>

What made grand juries especially popular as the colonies approached independence, and likely entrenched them as an important component of self-government in the minds of the founders, was their resistance to monarchical preferences for prosecution.<sup>82</sup> For instance, several grand juries refused to indict newspaper publishers critical of the crown, despite the King's attempts to initiate prosecutions by information.<sup>83</sup> Grand juries thus represented a bulwark against central government authority in the colonies.<sup>84</sup> Grand juries also often reflected disagreement with central government laws that were unpopular locally.<sup>85</sup>

Colonial grand juries also maintained broad independence from prosecutors, who had a limited role in grand jury investigations.<sup>86</sup> The grand jury's broad powers included the ability both to initiate investigations on their own personal knowledge and to exclude prosecutors themselves from the grand jury room.<sup>87</sup> Grand juries composed of average citizens garnered a reputation as protectors of individual rights,<sup>88</sup> and were viewed as a sort of "ombudsmen whose actions touched upon every aspect of society."<sup>89</sup> Grand juries frequently issued reports that "were quite popular with the public and useful in drawing attention to both civil and criminal problems within the community."<sup>90</sup>

Grand juries thus became a popular institution in the new American government.<sup>91</sup> Eight of the thirteen original states recommended that they be included in the Bill of Rights amending the Constitution, and seven of the first

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80. Kadish, *supra* note 57, at 10–11; Simmons, *supra* note 21, at 10 (citing MARVIN E. FRANKEL & GARY NAFTALIS, *THE GRAND JURY: AN INSTITUTION ON TRIAL* 10–11 (1977)). Simmons notes that the grand jury "filled a void created by the scarcity of local representative government." *Id.*; see also Stern, *supra* note 75, at 84 (1987) (quoting YOUNGER, *supra* note 46, at 2).

81. Simmons, *supra* note 21, at 4 n.8 ("In the American colonies, the grand juries took on a variety of administrative tasks: New Jersey grand juries audited county funds; grand juries in the Carolinas inspected jails and other public buildings; Virginia grand juries undertook agricultural inspections; and Maryland grand juries settled land disputes."); Stern, *supra* note 75, at 84.

82. Hoffmeister, *supra* note 68, at 1174. ("[E]arly support for the grand jury was based on the notion that grand juries served as a protective barrier between citizens and the criminal charging process.")

83. Kadish, *supra* note 57, at 11; Simmons, *supra* note 21, at 12 ("[G]rand juries were not refusing to indict because of insufficient evidence but rather because the jurors were politically opposed to the prosecutions."); Fairfax, *supra* note 19, at 404.

84. Washburn, *supra* note 49, at 2344.

85. *Id.* at 2357–58.

86. Hoffmeister, *supra* note 68, at 1188.

87. *Id.*

88. Nicole Smith Futrell, *Visibly (Un)Just: The Optics of Grand Jury Secrecy and Police Violence*, 123 *DICK. L. REV.* 1, 22 (2018) (citing Michael K. Williams, *Grand Jury: Bulwark of Prosecutorial Immunity?*, 3 *LOY. U. CHI. L.J.* 305, 308–10 (1972)).

89. Hoffmeister, *supra* note 68, at 1188 (citing LEONARD W. LEVY, *THE PALLADIUM OF JUSTICE* 65–66, 68 (1999)).

90. Hoffmeister, *supra* note 68, at 1175 (citing LEVY, *supra* note 89). Hoffmeister adds that modern grand juries rarely issue such reports today, expect perhaps in large cases of public corruption. *Id.* at 1175.

91. Washburn, *supra* note 49, at 2344.

eight states subsequently admitted to the union included a provision for grand juries in their state constitutions.<sup>92</sup>

Grand juries were not wholly apolitical in the early United States, however. For example, when President Jefferson sought to indict his rival Aaron Burr for treason, a supportive grand jury in largely Republican Kentucky refused to indict Burr, forcing Jefferson to seek (and obtain) an indictment in Virginia instead.<sup>93</sup> Pre-Civil War and Reconstruction-era grand juries were also often political actors.<sup>94</sup> Southern grand juries both proposed legislation to tighten slavery laws and aggressively pursued slaves and slave-owners who violated existing statutes.<sup>95</sup> Similarly, post-war grand juries in the South “were infamous for refusing to indict those who were accused of committing acts of violence against the recently freed black men and women.”<sup>96</sup> These actions suggest that mainstream conceptions of the grand jury as a protector of minority rights against unjust prosecution do not always align with its history in the United States.<sup>97</sup>

### B. *The Modern, Enfeebled Grand Jury*

In contrast to its historical vitality, the grand jury today is significantly weaker. The modern grand jury has very little information about its own powers, almost no instruction on its abilities, and little conception of how it fits into the larger criminal justice process.<sup>98</sup> Grand jurors are thus susceptible to the complete control of prosecutors.

To begin, states and the federal government today vary widely in how they deploy and, in some cases, require grand juries.<sup>99</sup> The U.S. Supreme Court ruled in 1884 in *Hurtado v. California* that indictment by grand jury is not necessary for a defendant to receive due process, and thus state convictions obtained through a different charging process, such as a preliminary hearing, are constitutional.<sup>100</sup> Thus, in the post-Civil War era, many Western states (and even some in the Midwest) abolished the grand jury requirement, arguing that grand jurors lacked legal expertise, were too expensive, and operated inefficiently.<sup>101</sup> Thus, while grand jury indictments remain constitutionally required in federal felony cases, today only twenty-three states require grand jury indictments for serious

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92. Simmons, *supra* note 21, at 12. Debates over ratification of the Constitution solidified the perception of the grand jury as a shield for citizens against centralized government and overzealous prosecution. *Id.* at 14 (citing Susan M. Schiappa, Note, *Preserving the Autonomy and Function of the Grand Jury*: United States v. Williams, 43 CATH. U. L. REV. 311, 329 n. 98 (1993)).

93. Helene E. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701, 733–35 (1972); Simmons, *supra* note 21, at 13–14.

94. *Id.* at 14.

95. *Id.* (citing YOUNGER, *supra* note 46, at 1634–941, 85–90).

96. *Id.* (citing YOUNGER, *supra* note 46, at 1634–941, 128–29).

97. Instead, it is the modern-day grand jury that has become “adrift from its historical moorings.” Fouts, *supra* note 62, at 324.

98. Anna Offit, *Ethical Guidance for a Grand Jury*, 24 GEO. J. LEGAL ETHICS 761, 776 (2011).

99. Simmons, *supra* note 21, at 16.

100. *Hurtado v. California*, 110 U.S. 516, 517, 538 (1884).

101. Simmons, *supra* note 21, at 18.

felony charges.<sup>102</sup> Many other jurisdictions give the prosecutor the option to choose between indictment or a preliminary hearing.<sup>103</sup>

None of this variation, however, is clear to grand jurors themselves, who are often confused about both their responsibilities and their powers.<sup>104</sup> Instructions to grand jurors at the federal level are extremely limited, failing to inform grand jurors of their ability to consider the wisdom of criminal laws or determine which conduct merits criminal punishment.<sup>105</sup> "The prosecutor may instead . . . narrow the legal question to focus the [grand] jurors' attention on those issues that are most likely to ensure a finding of probable cause."<sup>106</sup> Instructions from prosecutors also tend to suggest the limited role that the grand jurors play in a larger criminal justice system, rather than explaining the full gamut of powers that grand jurors might utilize.<sup>107</sup> And in most settings, it is the prosecutors themselves who provide legal advice to the grand jury during the process,<sup>108</sup> without any printed instructions that grand jurors might refer to again later.<sup>109</sup> Grand jurors have little opportunity for independent and structured interaction, which might increase their independence.<sup>110</sup> This leaves grand juries underinformed and beholden to a seemingly omniscient prosecutor.

Grand jurors may also underestimate their own importance. Grand jurors may not realize that, with the prevalence of plea bargains, their decision on whether sufficient probable cause exists to indict is often the only legal test the evidence in a case will face.<sup>111</sup> Grand jurors are thus under the misimpression that their role is entirely preliminary and subject to robust review later in the crucible of a trial.<sup>112</sup> But in most cases, such subsequent review through trial

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102. Fairfax, *supra* note 19, at 401; Simmons, *supra* note 21, at 17–19.

103. This provides prosecutors the opportunity to elect the grand jury process in officer-involved shootings or other serious cases that might be the source of public criticism. Fairfax, *supra* note 19, at 406 ("[A] prosecutor trying to avoid public accountability for an unpopular charging decision has the ability to simply hide behind the grand jury and assign blame to it for the decision either to indict or not to indict.").

104. Anna Offit has noted "a sense of alienation and confusion among grand jurors, many of whom feel uncertain about their responsibilities during grand jury service." Offit, *supra* note 98, at 761.

105. Hoffmeister, *supra* note 68, at 1200–01. Hoffmeister argues that "[b]y not informing grand jurors about their full authority, the instructions work to turn the grand jury into a paper tiger—in stark contrast with its historical role as a safeguard against government oppression." *Id.* at 1202.

106. Kristin Henning, *Status, Race and the Rule of Law in the Grand Jury*, 58 HOWARD L.J. 833, 841 (2015).

107. Offit, *supra* note 98, at 776 ("[G]rand jurors are too frequently given instructions warning of the limitations of their powers rather than their ability to exercise them." (citing Michael D. Hawkins, *Honoring the Voice of the Citizen: Breathing Life into the Grand Jury Requirement*, in ROGER A. FAIRFAX, JR., GRAND JURY 2.0, at 117 (2010))).

108. Hoffmeister, *supra* note 68, at 1183.

109. Offit, *supra* note 98, at 779.

110. *Id.* at 777.

111. *Id.* at 770. As Justice Stevens once noted, "[a] grand jury indictment is just as likely to be the 'final step' in a criminal proceeding and the 'sole occasion' for public scrutiny as is a preliminary hearing." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 26 (1986) (Stevens, J., dissenting) (quoted in Hoffmeister, *supra* note 68, at 1183).

112. Offit, *supra* note 98, at 770.

never happens.<sup>113</sup> Grand jurors thus lack information both on the extent of their powers and their role in the broader criminal justice system.<sup>114</sup>

Nor do grand jurors typically control the flow of information and evidence that they consider; the prosecutor instead controls how that evidence is collected and presented.<sup>115</sup> And, in officer-involved shootings, permissive state laws allow prosecutors to inform grand jurors that they should evaluate the reasonableness of officer conduct, from the perspective of similar officers, before considering any substantive charges.<sup>116</sup>

Though the modern grand jury is enfeebled, its historical powers remain dormant in the background. As Justice Scalia argued when reviewing the historical record of grand juries in *United States v. Williams*, “the whole theory of [the grand jury’s] function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people.”<sup>117</sup> Scalia thus noted that the grand jury has wide discretion to investigate on mere suspicion that a law is being violated without regard to specific cases or controversies, all without any external authorization and with great independence from either prosecutors or judges.<sup>118</sup> Other commentators agree that because “the grand jury is entitled to ‘every man’s evidence,’ there are no real limits, outside of privileges, to what it can hear or investigate.”<sup>119</sup>

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As this historical review illustrates, the grand jury can do much more than mechanically dispense indictments in criminal cases in accordance with the prosecutor’s desires. The grand jury’s very popularity in early America was based both upon its occasional opposition to the prosecutorial preferences of the central government<sup>120</sup> and its fulfillment of a wide variety of daily administrative tasks that other branches failed to complete.<sup>121</sup> Grand juries can also fulfill a wider investigative and public reporting ambit, rather than merely receiving evidence from a prosecutor and providing an up-or-down vote on indictment.<sup>122</sup> Modern grand juries are comparatively limited in both their function and their understanding of their own powers.<sup>123</sup> But if grand juries were empowered with a

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113. *Id.* at 769.

114. *Id.* at 776.

115. Hoffmeister, *supra* note 68, at 1183.

116. Lee, *supra* note 13, at 1386.

117. *United States v. Williams*, 504 U.S. 36, 47 (1992). Scalia added that “the grand jury is an institution separate from the courts, over whose functioning the courts do not preside.” *Id.*

118. *Id.* at 48–49 (quoting *U.S. v. R. Enters., Inc.*, 498 U.S. 292, 297 (1991)); *see also* Hoffmeister, *supra* note 68, at 1180. This, of course, comes with the caveat that courts themselves have little power to create or alter grand jury procedures. *Williams*, 504 U.S. at 50. Nor, according to Scalia, does a suspect under grand jury investigations have the right to testify or have exculpatory evidence presented. *Id.* at 52.

119. Hoffmeister, *supra* note 68, at 1172 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972)).

120. Washburn, *supra* note 49, at 2346 (“[O]ne evil that the grand jury sought to address was the exercise of distant governmental power in the local community.”).

121. Simmons, *supra* note 21, at 15.

122. Stern, *supra* note 75, at 126 (arguing that a grand jury reporting function is “consistent with the historical role of the grand jury as a citizen watchdog over both noncriminal and criminal misconduct in government”).

123. Offit, *supra* note 98, at 776.

wider portfolio of discretionary choices, they would hardly be a historical outlier.<sup>124</sup>

### III. THE MODERN GRAND JURY'S TWO TRACKS

Just as the grand jury has not performed a uniform set of tasks over the arc of history, the modern grand jury does not take a one-size-fits-all approach to issuing charging decisions in criminal cases. Instead, the modern grand jury operates on two tracks: one for the ordinary, unpublicized criminal case; another for the high-profile, officer-involved shooting.<sup>125</sup> In each of these tracks, the prosecutor maintains near-total control of the proceedings and the information that is conveyed to the grand jurors.<sup>126</sup> Using that control, prosecutors widely vary the resources devoted to investigation and presentation of evidence in these two tracks.<sup>127</sup>

#### A. *Perfunctory Indictment in Ordinary Cases*

Start with the role of the grand jury in an ordinary criminal case. Though prosecutors could rely upon the grand jury as a robust screening mechanism to reveal and remove weak cases, the majority of grand jury proceedings are routine affairs with a predetermined outcome.<sup>128</sup> Indictments are frequently issued based upon scant evidence—nothing more than an arrest and an officer's statement.<sup>129</sup> Prosecutors may ignore, if not outright suppress, exculpatory evidence in front of the grand jury.<sup>130</sup> As Roger A. Fairfax, Jr., has noted, "the grand jury gives the prosecutor nearly limitless ability to shape the presentation of the evidence and influence the grand jurors. There is no judge to oversee the prosecutor's presentation and no defense attorney to offer a competing narrative."<sup>131</sup>

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124. Fairfax, *supra* note 77, at 353. ("[T]he grand jury has demonstrated its tremendous potential to contribute beyond the traditional roles assigned to it today.")

125. See, e.g., Levine, *supra* note 25, at 750 (describing the "inherent distributional inequality between the process given to the police and the process given to ordinary criminal suspects"); Fairfax, *supra* note 19, at 409 ("In other words, the prosecutor usually is advocating for the charges in the vast run of cases brought to the grand jury. In the police violence context, however, it is possible that some prosecutors approach their role in the grand jury differently.")

126. Hoffmeister, *supra* note 68, at 1183 ("[T]he prosecutor serves not only as the director of the grand jury proceeding, but also as the gatekeeper of information to the grand jury. The prosecutor determines the order of the evidence, requests that the court issue subpoenas, questions the witnesses, and drafts the charges.")

127. Henning, *supra* note 106, at 834.

128. Levine, *supra* note 25, at 757. As Ric Simmons notes, "[t]he weak grand juries prevalent in most jurisdictions in this country have given rise to a widespread generalization about the nature of the grand jury itself: it is fundamentally incapable of being anything other than a 'rubber stamp' willing to indict any case a prosecutor presents." Simmons, *supra* note 21, at 3 (collecting sources). Or as Kevin K. Washburn puts it, "[t]o the prosecutor, the grand jury is not really a partner, but an obligatory obstacle." Washburn, *supra* note 49, at 2365.

129. Henning, *supra* note 106, at 835 ("[T]he prosecutor routinely accepts the word of the complainant and the accusing officers without close examination or deep probing into contradictions or other shortcomings in the case."); see also Levine, *supra* note 25, at 757.

130. Levine, *supra* note 25, at 747–48 n.7 (collecting sources); see also *United States v. Williams*, 504 U.S. 36, 36 (1992) (prosecutors not required to present exculpatory evidence to grand juries).

131. Fairfax, *supra* note 19, at 408.

Prosecutors are also often able to co-opt the subpoena powers of the grand jury to their own ends, determining the extent of pre-indictment investigation as well as the specific targets of the grand jury's subpoena power.<sup>132</sup> Grand jurors thus hear only one unchallenged, limited version of the underlying events.<sup>133</sup> And the grand jurors' consideration of the case is brief: federal grand juries "spend[] well under an hour considering evidence of a defendant's guilt before voting to indict that defendant for a serious federal crime."<sup>134</sup>

The tradition of grand jury secrecy insulates the process from external influence, limiting any pressure prosecutors might feel to devote more resources to pre-indictment investigation and presentation of evidence.<sup>135</sup> Grand jury rules in the federal system do not require presentation of exculpatory evidence, and the majority of states "require only 'substantial' exculpation to be presented."<sup>136</sup> In most states, defense counsel and defendants themselves are generally excluded from the proceedings, with only limited exceptions and then only for limited portions of the prosecutor's presentation.<sup>137</sup> For cases that do not draw public attention or media coverage, "the public gets no information about what evidence is presented to the grand jury" and will struggle to evaluate the thoroughness of the prosecutor's presentation.<sup>138</sup>

Given the lack of contrary narratives, opposing arguments, or external reviews, prosecutors have little incentive to waste scarce investigatory resources when presenting ordinary cases to the grand jury.<sup>139</sup> Instead, prosecutors are motivated to seek the most, and most serious, charges possible as efficiently as possible, all as an opening gambit in plea bargaining.<sup>140</sup> Prosecutors will work closely with police to quickly dispose of cases, rather than the two serving as a check on one another's ambitions.<sup>141</sup> Even well-meaning and conscientious

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132. Kuckes, *supra* note 34, at 26 (discussing prosecutor cooption of grand jury subpoena powers in the federal system).

133. Levine, *supra* note 25, at 760 (citing Susan W. Brenner, *Grand Jurors Speak*, in GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY 25, 36 (Roger Anthony Fairfax, Jr. ed., 2011)); Cassidy, *supra* note 41, at 366.

134. Kuckes, *supra* note 34, at 23 (noting that federal grand juries spend 5.1 hours per session to deliver an average of six indictments).

135. Futrell, *supra* note 25, at 28.

136. Levine, *supra* note 25, at 760 n.84.

137. Simmons, *supra* note 21, at 23; Levine, *supra* note 25, at 761.

138. Fairfax, *supra* note 19, at 405.

139. Henning, *supra* note 106, at 837 ("[D]isparate approaches to police-shooting and non-police involved offenses may be the product of time constraints that require prosecutors to preserve limited grand jury resources for high profile police shootings and prevent them from presenting all grand juries with the same volume of evidence . . ."); Levine, *supra* note 25, at 755 ("Prosecutors' decisions not to allocate time or resources . . . either precharge or preindictment, is taken as a given in the vast majority of cases. Engaging in this type of rigorous review for so many suspects seems impossible given caseloads and budget constraints.")

140. Levine, *supra* note 25, at 757. Levine notes that "this is particularly true in low-level case, such as trespassing or possession of small amounts of drugs, where prosecutors' decisions will almost never be scrutinized and where a defendant will have every incentive to plead guilty for leniency rather than waiting, often in jail, for a full investigation or any testing of the proof against her." *Id.* at 759; see also Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1715 (2010).

141. Levine, *supra* note 25, at 757.

prosecutors are incentivized to charge frequently and severely,<sup>142</sup> and must also face the political pressure to demonstrate their toughness.<sup>143</sup>

The rate of indictments in ordinary cases thus remains extraordinarily high,<sup>144</sup> with commentators famously quipping that grand juries would indict a ham sandwich if prosecutors asked.<sup>145</sup> The grand jury process leads to indictments more than 99% of the time in federal cases and well above 90% in state cases.<sup>146</sup>

### B. *Incentives, Investigations, and Presentations in Officer-Involved Shootings*

The normal course of grand jury proceedings in officer-involved shootings is vastly different, in part because the incentives for prosecutors are significantly changed. Prosecutors are caught between angry constituents seeking retribution and defensive officers seeking support.<sup>147</sup> Thus, prosecutors tend to approach the grand jury process with reverence in officer-involved shootings.<sup>148</sup> Prosecutors hope that, if they provide a full accounting of the facts to the grand jury, any public dissatisfaction with the outcome will be directed towards the grand jurors rather than the prosecutors themselves.<sup>149</sup> Thus, prosecutors are intentionally deliberate.<sup>150</sup> The incentive to obtain the highest charges possible as quickly as possible, as in the lion's share of cases, is absent.<sup>151</sup> It is replaced by a desire to be thorough and fair, either in a genuine effort to obtain community input on the equities of a challenging case, or perhaps more likely to provide political cover.<sup>152</sup>

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142. Bowers, *supra* note 49, at 340 ("[P]rosecutorial charging decisions may be shaped by institutional incentives and biases that do not correlate with normative blameworthiness or particularized justice.").

143. Powerful professional and political incentives box even the most conscientious prosecutors into the role of competitive adversary." Levine, *supra* note 25, at 762.

144. Fairfax, *supra* note 19, at 399 ("Nearly every time a prosecutor asks a grand jury to return an indictment in a case, the grand jury complies." (citing MARK MOTIVANS, U.S. DEP'T OF JUST., FEDERAL JUSTICE STATISTICS 2010—STATISTICAL TABLES (2013), <https://bjs.ojp.gov/content/pub/pdf/fjs10st.pdf> [<https://perma.cc/THA7-YMBQ>])).

145. Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 929 (2006) (citing David Margolick, *Law Professor to Administer Courts in State*, N.Y. TIMES (Feb. 1, 1985), <https://www.nytimes.com/1985/02/01/nyregion/law-professor-to-administer-courts-in-state.html> [<https://perma.cc/Y9QT-SJ2L>] (quoting then-Chief Judge Sol Wachtler of New York Court of Appeals)).

146. Simmons, *supra* note 21, at 31–35 (citing a 99.5% indictment rate in federal cases and a 94.1% indictment rate in New York).

147. See Bibas, *supra* note 145, at 941–42.

148. See Fairfax, *supra* note 19, at 408–09.

149. *Id.* at 406 ("[A] prosecutor trying to avoid public accountability for an unpopular charging decision has the ability to simply hide behind the grand jury and assign blame to it for the decision either to indict or not to indict."); see also Simmons, *supra* note 37, at 525.

150. See Simmons, *supra* note 37, at 533.

151. *Id.* at 525.

152. *Id.*

These changes in incentives lead to far more thorough investigations in officer-involved shootings.<sup>153</sup> When police are suspects, prosecutors utilize their discretion to gather more evidence and hear from more witnesses, usually over several months or even years.<sup>154</sup> The process following Jayland Walker's death in Akron, Ohio, discussed in the opening vignette, illustrates the trends.<sup>155</sup> The investigation stretched over nearly a year after the shooting was complete, and included more than 100 interviews, physical evidence subjected to DNA testing, and detailed phone and internet search records.<sup>156</sup> The evidence also included testimony from the officers themselves, represented by counsel.<sup>157</sup> To draw another example from nearby Cleveland, consider the investigation following the police shooting of Tamir Rice, a twelve-year-old black child killed while carrying a replica of a firearm that officers mistook for a gun.<sup>158</sup> The prosecutor took over a year investigating the case, commissioning three independent reports on the facts that were eventually released to the public, and presented a wide array of testimony to the grand jurors, including that of the officers themselves.<sup>159</sup> Another example followed the shooting death of teenager Michael Brown in Ferguson, Missouri.<sup>160</sup> The prosecuting attorney in that case amassed testimony from dozens of witnesses including the defendant himself, statements from dozens more witnesses, crime scene reports, photographs, and physical evidence.<sup>161</sup> Similarly, when Eric Garner died after being put in a chokehold during an arrest in Staten Island, the prosecutor made an eight-week presentation to the grand jury replete with more than twenty civilian witnesses, multiple videos of the incident, and testimony from the defendant himself.<sup>162</sup> Though nationwide statistics on the phenomenon are lacking, the pattern of thorough, detailed investigation in officer-involved shootings that draw significant public attention is relatively clear.<sup>163</sup>

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153. Levine, *supra* note 25, at 766 (“[T]he thoroughness of the investigation is what separates police-suspect cases from other cases—not whether the investigation results in charges or an indictment.”).

154. *Id.* at 755 (citing ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 25 (2007)).

155. *Supra* notes 1–17 and accompanying text.

156. Axelrod, *supra* note 7; *Documents Released in the Ferguson Case*, N.Y. TIMES, <https://www.nytimes.com/interactive/2014/11/25/us/evidence-released-in-michael-brown-case.html> (last updated Dec. 15, 2014) [<https://perma.cc/7F7M-TN6V>].

157. Garrett, *supra* note 3.

158. Timothy Williams & Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. TIMES (Dec. 28, 2015), <https://www.nytimes.com/2015/12/29/us/tamir-rice-police-shooting-cleveland.html> [<https://perma.cc/ZS33-X5XP>].

159. *Id.* Professor Ric Simmons has argued that the prosecutor in the Tamir Rice case sought to use the grand jury as a shield, as indicated by his presentation to grand jurors. Simmons, *supra* note 37, at 528 (“Independent reports from witnesses who testified in the Rice grand jury show that the prosecutors were acting more like defense attorneys, aggressively cross-examining the witnesses who argued that the killing was unjustified. Meanwhile, the two defendant-officers were invited to the grand jury to read exculpatory statements and were not cross-examined at all.”).

160. *Documents Released in the Ferguson Case*, *supra* note 156.

161. *Id.*; Levine, *supra* note 25, at 766; *see also* Simmons, *supra* note 37, at 529.

162. Simmons, *supra* note 37, at 533.

163. McKinley & Baker, *supra* note 45.

Additionally, when officers are the suspects, prosecutors make far more complete presentations of all of the available evidence to the grand jury, ensuring that the case receives significant consideration and debate.<sup>164</sup> Frequently, prosecutors will empanel a special grand jury to hear the voluminous evidence in just a single case.<sup>165</sup> Prosecutors then often promise that grand jurors will receive a complete picture of the evidence that rivals the full presentation of evidence during trial.<sup>166</sup> This is borne out in the extent of witness testimony provided to grand jurors in officer-involved shootings.<sup>167</sup> In the Jayland Walker case, grand jurors heard testimony from all eight of the officers involved and received nearly 100 other interviews as part of a presentation of evidence stretching over multiple weeks;<sup>168</sup> in the Michael Brown case in Ferguson, grand jurors heard from sixty-two witnesses<sup>169</sup> and received "all available evidence" in the case;<sup>170</sup> in the choking death of Eric Garner, the grand jury heard two hours of testimony from the officer involved,<sup>171</sup> as well as testimony from another forty-nine witnesses.<sup>172</sup>

Prosecutors present that evidence to grand jurors in the context of state laws that are broadly favorable to officers.<sup>173</sup> In a 2021 Article that researched the status of state law on police use of force, Cynthia Lee determined that twenty-nine states used a "reasonable belief" standard, under which officers need only reasonably believe that deadly force was necessary to effectuate arrest, stop a fleeing felon, or protect themselves and the public from physical harm in order to avoid criminal liability.<sup>174</sup> Those statutes did not require a finding of reasonable action in addition to reasonable belief; as of 2020, only two states and the District of Columbia required such a reasonable action finding.<sup>175</sup> A handful of states even permitted the use of deadly force "based solely on the officer's honest belief that deadly force was necessary," irrespective of whether that belief was reasonable.<sup>176</sup> And a few others, including Ohio, have no use-of-force statute on the books, but instead rely upon Supreme Court decisions that similarly permit

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164. Levine, *supra* note 25, at 749; Henning, *supra* note 106, at 835 (quoting David Zucchino, *Prosecutor's Grand Jury Strategy in Ferguson Case Adds to Controversy*, L.A. TIMES (Nov. 25, 2014, 8:56 PM), <https://www.latimes.com/nation/la-na-ferguson-da-analysis-20141126-story.html> [<https://perma.cc/9WDR-G9UA>])).

165. Levine, *supra* note 25, at 766 ("There are no nationwide statistics for how often prosecutors present such full evidence to grand juries, but as the *New York Times* noted, 'most prosecutors impanel a special grand jury to investigate police-related deaths' and therefore 'insulate themselves from the final decision, while appearing to fulfill the public desire for an independent review.'" (quoting McKinley & Baker, *supra* note 45)).

166. Levine, *supra* note 25, at 766.

167. *See id.*

168. Axelrod, *supra* note 7.

169. *Documents Released in the Ferguson Case*, *supra* note 156.

170. Henning, *supra* note 106, at 835 (quoting Zucchino, *supra* note 164).

171. Amy Davidson Sorkin, *What the Eric Garner Grand Jury Didn't See*, NEW YORKER (Dec. 4, 2014), <https://www.newyorker.com/news/amy-davidson/eric-garner-grand-jury-didnt-see> [<https://perma.cc/6QU6-PQFW>].

172. McKinley & Baker, *supra* note 45.

173. *Id.*

174. Lee, *supra* note 13, at 1383 & n.60.

175. *Id.* at 1385.

176. *Id.* at 1383–84.

the use of deadly force where it was reasonable from the perspective of a similarly situated officer.<sup>177</sup>

This permissive state-law regime on officer use of deadly force gives prosecutors the opportunity to present grand jurors with a very limited set of options. Prosecutors can tell grand jurors to evaluate the reasonableness of the officer's belief before considering any substantive charges, and to do so in a way that focuses attention on what the suspect (and eventual victim) was doing at the time of the incident, rather than the officers.<sup>178</sup> For instance, in the Jayland Walker case, the special prosecutor gave grand jurors extremely limited options.<sup>179</sup> The special prosecutor asked the grand jurors to first decide if Walker's shooting was justified or if another officer would have reacted identically; only if the grand jurors found that the shooting was unjustified would they proceed to consider whether there was probable cause to believe the officers committed a crime.<sup>180</sup> Grand jurors were not instructed on any additional crimes that might apply to the facts, or presented with an opportunity to call for further investigation or examination of police practices and training in similar incidents.<sup>181</sup> In the Michael Brown case, the prosecutor's instructions similarly focused attention on the possible justifications for the shooting, noting that grand jurors must find probable cause that the officer did not act in lawful self-defense or use lawful force.<sup>182</sup> Again, the prosecutor did not present options outside of those limited possible probable cause findings. Such limited instructions "shape[] the jurors' understanding of their own role in weighing and evaluating the evidence."<sup>183</sup>

Faced with this onslaught of evidence and given limited options through state law and prosecutorial instructions, grand jurors rarely indict the suspected officers in these cases.<sup>184</sup> In the ten-year period between 2005 and 2015, "the *Washington Post* and researchers at Bowling Green State University uncovered that, out of thousands of fatal shootings by law enforcement officers . . . only

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177. *Id.* at 1379 n.41 (citing *State v. White*, 29 N.E.3d 939, 947 (Ohio 2015)). Importantly, states are not obligated to follow use of force guidelines established in Supreme Court decisions such as *Tennessee v. Garner*, 471 U.S. 1, 3 (1985), which established Fourth Amendment limits for the use of force in the context of a civil suit under 42 U.S.C. § 1983. *Id.* at 1378–79, nn.41–42. As Chad Flanders and Joseph Welling highlight, "[i]n deciding such a suit, the Court has to announce what the constitutional rule is—and so in *Garner*'s lawsuit, the Court had to say what amount of force counted as 'reasonable' under the Fourth Amendment. But, deciding the constitutional standard for *Garner*'s civil rights suit did not disturb what the standard had to be for state criminal law prosecutions. States still have the authority to dictate under what circumstances police could justifiably use deadly force, and so avoid punishment under state law." Chad Flanders & Joseph Welling, *Police Use of Deadly Force: State Statutes 30 Years After Garner*, 35 ST. LOUIS U. PUB. L. REV. 109, 110 (2015).

178. Lee, *supra* note 13, at 1386 ("[W]hen the jury is told that all they need to think about is whether the officer's belief in the need to use deadly force was reasonable, the jury will focus its attention on what the suspect or victim of the officer's use of force was doing.").

179. Warsmith, *supra* note 12.

180. *Id.*

181. Former president of the National District Attorneys Association William Fitzpatrick has reportedly stated that "it was not unusual in a police-involved shooting case for a prosecutor to lay out all the evidence and not ask a grand jury for a specific criminal charge." Zucchini, *supra* note 164.

182. Henning, *supra* note 106, at 841 (quoting Testimony of Grand Jury at 140, *State v. Wilson*, 2014 WL 666075 (Cir. Ct. Mo. 2014) (No. GJ2014-1121)).

183. *Id.* at 841–42.

184. Fairfax, *supra* note 19, at 400 nn.15–16 (collecting sources).

fifty-four had been charged or indicted.”<sup>185</sup> Professor Philip Matthew Stinson, who maintains the Henry A. Wallace Police Crime Database at Bowling Green State University, estimates that at least 98% of the time that officers shoot and kill on duty, there are no subsequent charges.<sup>186</sup> As Roger A. Fairfax has noted, the statistics may be even more startling in particular states, such as Georgia, where a study of over 170 fatal police shootings between 2010 and 2015 “revealed that prosecutors took forty-eight cases to the grand jury, and asked for an indictment in only nine. A grand jury indicted in only one of those cases, and the judge dismissed that manslaughter charge shortly thereafter.”<sup>187</sup>

The picture may be changing slightly following the death of George Floyd.<sup>188</sup> Stinson’s data shows that between 2016 and 2019, forty-three officers were charged with murder or manslaughter stemming from an on-duty shooting, while from 2020 to 2023, seventy-one officers were charged.<sup>189</sup> But that data does not distinguish charges brought by grand jury indictment or preliminary hearing, nor does it track prosecutions of law enforcement officers that did not involve shooting deaths.<sup>190</sup>

#### IV. HARVESTING THE GRAND JURY’S LAY EXPERTISE BY RESTORING ROBUST DISCRETION

The grand jury’s lay expertise can be harvested by restoring grand jurors the same robust discretion they have historically possessed. Informing and empowering the grand jury to use this discretion in ways contrary to the prosecutor’s preference will permit the grand jury to take meaningful action to curb future officer-involved shootings; it can also make the grand jury a more meaningful check on prosecutorial overzealousness in ordinary cases. Below, Section A addresses how an empowered grand jury might more frequently nullify prosecutorial preferences in ordinary cases. Section B then discusses the wider menu of options that can be provided to harvest the grand jury’s lay expertise in officer-involved shootings. Section C considers the risks associated with these proposals.

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185. Levine, *supra* note 25, at 763–64 (citing Kindy & Kelly, *supra* note 37).

186. Doug Livingston, *Why Police Nationwide Rarely Face Charges When They Kill in the Line of Duty*, AKRON BEACON J. (Apr. 7, 2023, 6:03 AM) <https://www.beaconjournal.com/story/news/local/2023/04/07/police-who-kill-on-duty-rarely-criminally-charged-jayland-walker-shooting-akron-special-grand-jury/70088053007/> [<https://perma.cc/BAY8-RKKJ>].

187. Fairfax, *supra* note 19, at 413.

188. See Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES, <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> (last updated Jan. 24, 2022) [<https://perma.cc/QB9J-KC9G>] (George Floyd was killed in police custody on May 25, 2020).

189. Burch & Manley, *supra* note 37.

190. Furthermore, reformers argue that petit juries remain reluctant to convict the officers, even if charges are filed. *Id.*

A. *Grand Jury Nullification in Ordinary Cases*

In ordinary cases where the prosecutor is motivated to efficiently seek the harshest charges possible, the grand jury should receive clear instructions on its ability to “nullify” by refusing to indict despite a prosecutor’s clear wishes to the contrary. As others have argued, the grand jury, as a representation of the community, can give voice to the equitable preferences of average citizens in ordinary cases,<sup>191</sup> and has often done so across history.<sup>192</sup> Ensuring that the grand jury has wide discretion to choose against indictment in ordinary cases allows them to fulfill an important role missing from the current system.<sup>193</sup> Grand jurors can act as a democratic check on prosecutorial abuse of power where charges seem inappropriate or overzealous,<sup>194</sup> even if the facts meet the statutory definition of a crime.<sup>195</sup> This is especially likely in the ordinary case involving lower-level crimes that draw less public attention.<sup>196</sup>

A first step towards increasing grand jury discretion to nullify in ordinary cases is thoroughly instructing the grand jury on the breadth of its discretion and control over the pre-indictment process. A commendable proposal came from the Supreme Court of Ohio’s Task Force to Examine Improvements to the Ohio Grand Jury System, a group of jurists, scholars, and citizens that convened in the summer of 2014.<sup>197</sup> The group suggested requiring grand jury instructions that informed the jurors of their independence, including their ability to request assistance from the court and to act as the sole judges of the facts of the case.<sup>198</sup> The task force suggested that those instructions remain available in printed form throughout the grand jury’s service.<sup>199</sup> This aligns with many scholarly calls for greater instruction on grand jury independence.<sup>200</sup>

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191. Simmons, *supra* note 37, at 521; Bowers, *supra* note 49, at 323. This function has been described over the years as the grand jury’s ‘mercy function’ or as ‘grand jury nullification.’” Simmons, *supra* note 21, at 46; *see also* Fairfax, *supra* note 39, at 706 (“Where the grand jury truly adds value is through its ability to exercise robust discretion *not* to indict where probable cause nevertheless exists—what might be termed ‘grand jury nullification.’”). Other prefer the term “grand jury discretion” to “grand jury nullification” because of negative connotations from petit jury nullification commentary. *Id.* at 708 n.10.

192. Washburn, *supra* note 49, at 2350. (“[T]he grand jury has always been thought to have the power to decline to indict a guilty suspect. Such an action is entirely lawful and, based on its rich historical heritage, apparently entirely legitimate.”). Washburn is also quick to note that “the grand jury has never lost this power,” even if it has fallen into disuse. *Id.* at 2358.

193. Fairfax, *supra* note 39, at 706 (“Where the grand jury truly adds value is through its ability to exercise robust discretion *not* to indict where probable cause nevertheless exists—what might be termed ‘grand jury nullification.’”); Bowers, *supra* note 49, at 323 (“[T]he normative grand jury has the capacity to promote discourse, democratic values, and perceptions of systemic legitimacy”).

194. Washburn, *supra* note 49, at 2264 (“The grand jury is an agent of the local community, with the responsibility to provide local community input (and potentially a veto) on the law that the prosecutor seeks to enforce as an agent of the legislature.”).

195. Simmons, *supra* note 21, at 2–3.

196. Bowers, *supra* note 49, at 321 (noting that low-level offenses are more likely to “raise tough normative questions and thereby to implicate equitable reasons against charging”).

197. STEPHEN MCINTOSH ET AL., *supra* note 41.

198. *Id.* at 10, 23–24.

199. *Id.* at 11, 21.

200. *See, e.g.,* Leipold, *supra* note 25, at 313 (citing LEROY D. CLARK, *THE GRAND JURY* 142 (1975); Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without*

Grand juries might be further empowered to exercise that discretionary nullification power if prosecutors had greater obligations to present them with exculpatory evidence.<sup>201</sup> Model ethical rules do not specifically require prosecutors to disclose exculpatory evidence to the grand jury, and state courts are reluctant to interpret those ethical obligations so broadly as to require the dismissal of indictments.<sup>202</sup> Grand jury rules are of little help in most jurisdictions.<sup>203</sup> Though a sparse few create a broad duty to disclose exculpatory evidence, far more either rely on rules or common law that requires only the disclosure of "substantially" exculpatory evidence, an amorphous category courts typically interpret in the prosecutors' favor.<sup>204</sup> Grand jurors thus hear only an unchallenged and extremely limited version of the underlying events.<sup>205</sup> Altering those rules to force prosecutors' hands when exculpatory evidence exists would encourage grand jurors to exercise more discretion in the ordinary case.<sup>206</sup>

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*Adjudication*, 78 MICH. L. REV. 463, 571–72 (1980)); Simmons, *supra* note 21, at 48–50 (discussing grand jury instructions in New York state that notify jurors of their independence and discretion); Fairfax, *supra* note 39, at 703–04.

201. Many scholars note the extent to which prosecutors can ignore and suppress exculpatory evidence. See Levine, *supra* note 25, at 747 n.7 (collecting sources).

202. Cassidy, *supra* note 41, at 377–81.

203. *Infra* notes 204–06 and accompanying text.

204. Cassidy, *supra* note 41, at 385–92; see also Levine, *supra* note 25, at 760 n.84.

205. Levine, *supra* note 25, at 760 (citing Brenner, *supra* note 133, at 25, 36; Cassidy, *supra* note 41, at 366).

206. As others have suggested, reducing grand jury secrecy and exposing the proceedings to the public would both clarify the discretionary role of the grand jury and offer a greater check on prosecutorial overexuberance. Fairfax, *supra* note 19, at 405–06 ("In most cases, the public gets no information about what evidence is presented to the grand jury."); Simmons, *supra* note 41. Proposals to standardize at least a limited release of grand jury records to the public were also floated by the Supreme Court of Ohio's Task Force to Examine Improvements to the Ohio Grand Jury System. STEPHEN MCINTOSH ET AL., *supra* note 41, at 14–17. ("[T]he complete secrecy of the process serves to protect the decision-making process of not only the jurors but also the prosecutor in ways that do not occur at trial. The prosecutor does not need to reveal outside of the grand jury process what information he or she chose to include and exclude from the presentation to grand jurors or how deeply (or superficially) certain witnesses are examined. Secrecy also allows the prosecutor to remain insulated from public criticism and backlash, shielded by the 'verdict' of the grand jury."). Futrell, *supra* note 25, at 25; see also Fairfax, *supra* note 19, at 405–06; Simmons, *supra* note 21, at 73. Though it is outside the scope of this Article, it may also be worth considering additional reforms to the grand jury to ensure that it more realistically reflects society's prosecutorial preferences. There is reason to think that the grand jury is not generally representative of the population and tends to skew towards older citizens with fewer professional and personal obligations who are able to serve for extended periods. Kuckes, *supra* note 34, at 17 (citing FRANKEL & NAFTALIS, *supra* note 80, at 45 ("Active and intelligent people are liable to have jobs that don't allow comfortably for the absences required by grand jury service.")); see also Robert A. Carp, *Federal Grand Juries: How True a "Cross Section of the Community"*, 7 JUST. SYS. J. 257, 257 (1982) (using a data set from an "American federal court Division between 1972 and 1978 . . . compared with updated census figures for this same Division" to conclude that those grand juries "[s]ystematically underrepresented . . . females, racial minorities, those with less education, younger persons, and those with low status occupations."); Vitiello & Kelso, *supra* note 51, at 582 ("Despite the lack of systematic reporting on the ethnic composition of grand juries, the evidence is substantial that California grand juries do not represent its diverse population."). Steps could be taken to make the grand jury more representative of the general population, perhaps by limiting the length of terms of service to increase age and ethnic diversity amongst grand jurors. The more genuinely the grand jury represents the community, the more justification it has to reflect real public condemnation of criminal acts. Bowers, *supra* note 49, at 334.

*B. An Increased Menu for Grand Jurors in Officer-Involved Shootings*

In officer-involved shootings, prosecutors typically invest appreciable investigatory resources and provide every evidentiary detail available to grand jurors.<sup>207</sup> The grand jury spends significant time—often weeks or months—digesting that voluminous information, thereby becoming uniquely familiar with many of the key factors that led to such a tragic outcome.<sup>208</sup> Those factors may include police training processes, on-scene emergency response procedures, personnel decisions, police leadership structures, substantive criminal law related to officer-involved shootings, and many others.<sup>209</sup> The well-informed grand jury considering an officer-involved shooting is therefore in an ideal position to understand how those factors influenced the tragic case before them and are likely to influence future tragic cases.<sup>210</sup> Though grand jurors enter their service as lay-people, they develop meaningful expertise that they can combine with community sensibilities to spur meaningful change and limit repetition of lawful but awful situations.<sup>211</sup>

My conception of grand jury lay expertise builds upon Jocelyn Simonson's astute observation that today's criminal justice reform movement focuses on shifting power away from its traditional centers and towards those most affected by the justice system's inequities.<sup>212</sup> Greater lay participation in the system ensures that the community's viewpoint, from the perspective of those most often repressed by policing practices, is represented.<sup>213</sup> Reformers highlight that expertise in criminal justice and policing lies not just with social scientists and officers, but with those subject to policing.<sup>214</sup> Transferring power to those groups ensures genuine democratic contestation of criminal justice priorities,

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207. See *supra* Section III.B.

208. See *supra* Section III.B.

209. See Levine, *supra* note 25, at 764–67; INST. FOR CRIM. JUST. TRAINING REFORM, <https://www.trainingreform.org> (last visited Mar. 9, 2024) [<https://perma.cc/M73M-PVYP>]; German Lopez, *Police Officers Are Prosecuted for Murder in Less than 2 Percent of Fatal Shootings*, VOX, <https://www.vox.com/21497089/derek-chauvin-george-floyd-trial-police-prosecutions-black-lives-matter> (last updated Apr. 2, 2021, 10:30 AM) [<https://perma.cc/3ENR-S5TQ>].

210. See Levine, *supra* note 25, at 766.

211. See *id.*

212. Simonson, *supra* note 27, at 788 (“[T]he power lens brings a critical eye to the ways in which the construction of expertise itself denies agency to the people who most frequently interact with police on the streets and on the roads: most often, poor Black and brown people. One way to unearth this analysis is to examine the governance and policymaking proposals being put forth by social movement actors—people traditionally thought of as ‘nonexperts’—themselves.”). Simonson argues that the movement focuses on shifting power in three senses: First, performing a reparative function by giving power downward to people who have been denied power by policing; Second, performing an anti-subordination function by refusing to perpetuate historical oppression in the system; and third, promoting contestatory democracy with the objective of facilitating countervailing power for those subject to state domination. *Id.* at 787.

213. *Id.* at 801; see also Braman, *supra* note 42, at 2100–01 (highlighting how jurors can extend the influence of communities in criminal justice reform).

214. Simonson, *supra* note 27, at 813, 829.

"enabl[ing] dominated groups to share governing power and hold government and elites accountable."<sup>215</sup>

Simonson also highlights that non-traditional experts, including frequent targets of policing, must have power "over *ex ante* policing decisions and priorities rather than simply *ex post* disciplinary or review decisions."<sup>216</sup> Put another way, "for police reform, people must be able to engage in collective contestation over the scope and methods of policing, rather than simply provide input into (or merely observe) those methods."<sup>217</sup>

Grand jurors in officer-involved shootings have developed the kind of non-traditional expertise that Simonson describes, and the grand jurors may be more representative of those subject to policing practices than the prosecutors are themselves.<sup>218</sup> The grand jurors have learned in great depth how the policies, procedures, and priorities of officers and departments led to one tragedy—and how those same policies, procedures, and priorities might lead to future tragedies.<sup>219</sup> But at present, prosecutorial dominance of the grand jury process stops grand jurors from capitalizing upon what they have learned to effect change.<sup>220</sup> Prosecutors instead ensure that grand juries can only make a single, *ex post* judgement about a single, tragic event.<sup>221</sup> Rather than simply responding with an up-or-down vote on indictment, the grand jury in officer-involved shootings must be provided a wider menu of discretionary options as an *ex ante* preventative measure against similar tragedies in the future.<sup>222</sup>

Unfortunately, prosecutors have every incentive to provide grand jurors only that dichotomous *ex post* choice with no other option for comment or recommendation.<sup>223</sup> Whether grand jurors charge the officers or not, the prosecutor can shift any blame from the public or the police onto those grand jurors, who have no recourse to respond.<sup>224</sup> Prosecutors thus see the grand jury as a convenient escape hatch from a politically unpalatable situation that pits two key

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215. *Id.* at 845. More than a decade earlier, Donald Braman similarly suggested policy reforms focused on increasing the voice of disadvantaged communities, specifically through the use of the petit jury. Braman, *supra* note 42, at 2130–31. For Braman, such lay participation brings something that the state itself cannot muster: "[w]hen the people partake in the moral judgment necessary to sanction a citizen, they are describing the contours of the moral world in which they wish to live—something the state is incapable of doing because it lacks immediate access to the relevant information about the social meaning and social costs involved." *Id.* at 2131.

216. *See* Simonson, *supra* note 27, at 815.

217. *Id.* at 847.

218. This is not to say that grand juries are perfectly representative of the community, as noted earlier. Again, grand juries tend to skew towards older citizens with fewer professional and personal obligations who are able to serve for extended periods. Kuckes, *supra* note 34, at 17 (citing FRANKEL & NAFTALIS, *supra* note 80, at 45); *see also* Carp, *supra* note 206; Vitiello & Kelso, *supra* note 51, at 582. Nonetheless, grand juries are a wider swatch of the community than the prosecutor themselves and can bring perspectives to the policing experience that are sorely lacking in many prosecutor's offices, even if the grand jurors are not drawn from a perfectly representative sample of the population.

219. *See supra* notes 209–10 and accompanying text.

220. *See supra* notes 125–27 and accompanying text.

221. *See supra* notes 209–10 and accompanying text.

222. Grand juries in general are uniquely positioned to make meaningful contributions to criminal justice reform given the length of their terms and exposure to many aspects of the system. Fairfax, *supra* note 77, at 353.

223. *See* Levine, *supra* note 25, at 767.

224. *See id.*

constituencies, the police and the communities they serve, against one another. Changes are thus needed to break this cycle of prosecutorial dominance and empower grand juries in officer-involved shootings.

To overcome the hurdle presented by prosecutorial domination, I propose two avenues of possible reform below. I then make suggestions for the substance of the grand jury's discretionary menu to respond to the evidence in officer-involved shootings.

### 1. *Grand Jury Instructions*

The first reform proposal is relatively simple; provide better, long-lasting instructions to grand jurors about the full gamut of their powers and discretion. States should require that grand jurors receive instructions, both verbally and in print, that provide information about their investigatory powers and possible responses to an officer-involved shooting, independent of any prosecutorial wishes.<sup>225</sup> To ensure compliance, these instructions could be given initially by the judge who empanels the grand jury hearing the case,<sup>226</sup> maintained in print for future reference, and reiterated after the prosecutor has completed their presentation of evidence.<sup>227</sup> This would broaden the sources of information about the grand jury's powers and responsibilities beyond the prosecutor, who provides the lion's share of guidance to grand jurors at present.<sup>228</sup>

The instructions should inform grand jurors of their broad investigatory powers,<sup>229</sup> making clear that they have the option to expand the investigatory scope of their inquiry beyond the individual case before them and into wider departmental policies that may have led to those tragic facts.<sup>230</sup> The instructions should include options described below to create reports, recommend changes to substantive criminal law, and charge other investigatory and oversight bodies with additional investigatory or reform-minded tasks.<sup>231</sup> The key is that the instructions emphasize, in a memorable way to which grand jurors can later refer, the options grand jurors have after receiving voluminous information about a

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225. STEPHEN MCINTOSH ET AL., *supra* note 41, at 10, 21; *see also* Leipold, *supra* note 25, at 313 (citing CLARK, *supra* note 200, at 142; Arenella, *supra* note 200, at 571–72); Simmons, *supra* note 21, at 48–50 (discussing grand jury instructions in New York state that notify jurors of their independence and discretion); Fairfax, *supra* note 39, at 703–04.

226. Offit, *supra* note 98, at 779. (“[G]reater judicial involvement with juror orientation could provide jurors a clearer understanding of their duties.”).

227. *Id.* (“Even if substantive changes are not made to grand jury orientation instructions, jurors might benefit from hearing instructions repeated to them more frequently, or presented in a different order so that they could better retain the information.”).

228. Cassidy, *supra* note 41, at 362 (“[T]he modern grand jury receives guidance and instruction from only one advocate—the prosecutor.”).

229. Fairfax, *supra* note 39, at 366. (“[T]he grand jury possesses the power to compel production of almost anything, from almost anyone.”).

230. At present, “the grand jury has no power over the timing of indictment, let alone the formulation of criminal charges, or the determination whether to prosecute.” Kuckes, *supra* note 34, at 27.

231. *See infra* Subsection IV.B.3.

tragic situation.<sup>232</sup> Doing so recognizes the value of their lay expertise and the need to harvest it as an *ex ante* measure to prevent future tragedies.<sup>233</sup>

Such instructions would mark an important shift from today's grand jury instructions, which have a limited scope and seem designed to limit the grand jury's powers and discretion. For instance, the United States Courts publishes a grand jury handbook that contains some information about the history of the federal grand jury and its typical role in the modern criminal process, though it does not include a discussion of the grand jury's wide discretion and independence from the prosecutor.<sup>234</sup> The handbook also advises grand jurors to consult with a government attorney or court before expanding their investigatory ambit.<sup>235</sup> The Judicial Conference of the United States has also approved a model federal grand jury charge that focuses on the constitutional role of the grand jury, though it is not mandatory and can be altered by individual courts.<sup>236</sup> That model grand jury charge also includes language on the limitations of grand jury discretion, including admonishments against commenting on the merit of substantive criminal law.<sup>237</sup> Some states, such as Ohio, also publish model grand jury instructions, though those are likewise discretionary and alterable by individual courts.<sup>238</sup> In 2000, the National Association of Criminal Defense Lawyers also proposed a federal grand jury bill of rights, which would have required more meaningful instructions made on the record and provided to the grand jury in print.<sup>239</sup> But, the proposal never resulted in substantive changes to model grand jury instructions.<sup>240</sup>

## 2. *Grand Jury Legal Advisor*

A second, more significant reform proposal is to create a grand jury legal advisor in the states of the kind currently deployed in Hawaii, a suggestion Thaddeus Hoffmeister raised more than a decade ago.<sup>241</sup> The grand jury legal advisor was implemented by Hawaii state constitutional amendment in 1978, and has since been able to advise the grand jury on any legal matters that arise during their service.<sup>242</sup> Appointed for one-year terms by the state's chief justice, the grand jury legal advisor is available upon the grand jurors' request to answer

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232. See *infra* Subsection IV.B.3.

233. Simonson, *supra* note 27, at 858. (“[T]he state can help those it newly recognizes as experts to understand and parse through complicated realities together.”).

234. ADMIN. OFF. OF THE U.S. COURTS, HANDBOOK FOR FEDERAL GRAND JURORS (n.d.), <https://www.uscourts.gov/sites/default/files/grand-handbook.pdf> [<https://perma.cc/VA2S-S3RW>].

235. *Id.* at 5.

236. JUD. CONF. OF U.S., MODEL GRAND JURY CHARGE 1, ¶ 2 (2007), <https://cldc.org/wp-content/uploads/2012/10/model-gj-charge.pdf> [<https://perma.cc/HG22-7ULM>].

237. *Id.* at 1, ¶¶ 6–7; Hoffmeister, *supra* note 68, at 1202 (“By not informing grand jurors about their full authority, the instructions work to turn the grand jury into a paper tiger—in stark contrast with its historical role as a safeguard against government oppression.”).

238. 2 OJI-CR § 301.07 (Ohio Jud. Conf. 2016); STEPHEN MCINTOSH ET AL., *supra* note 41, at 10.

239. Fairfax, *supra* note 77, at 348–49.

240. *Id.* at 349.

241. Hoffmeister, *supra* note 68, at 1215.

242. HAW. CONST. art. I, § 11; Hoffmeister, *supra* note 68, at 1215.

legal questions or provide legal research.<sup>243</sup> The grand jury legal advisor stands as a neutral third party in the grand jury process, one that can offer independent and unbiased answers to questions about the grand jury's service, powers, and role in the legal system.<sup>244</sup> The legal advisor does not answer fact-based questions, advise witnesses, or provide evidence; they simply act as an independent provider of counsel to grand jurors who are unsure of their duties and abilities.<sup>245</sup>

If adopted throughout the country, grand jury legal advisors would be able to provide grand jurors evaluating an officer-involved shooting with a description of their possible responses to an officer-involved shooting beyond an up-or-down vote on indictment.<sup>246</sup> They would increase the grand jury's independence by decreasing reliance upon the prosecutor as the source of legal information.<sup>247</sup> They can also contextualize the grand jury's role in a process where plea bargains dominate and police unions ensure broad protection for officers.<sup>248</sup> And in some ways, as Hoffmeister argues, the grand jury legal advisor may benefit the prosecutor, who will not be obligated to serve as both an advisor to, and advocate before, the grand jury.<sup>249</sup> This in turn might provide the prosecutor with political protection in officer-involved shootings; the prosecutor need not take responsibility for all of their possible responses to a tragic police shooting, which was instead provided to grand jurors by an independent actor as a matter of course in such officer-involved cases.<sup>250</sup>

### 3. *Substantive Options on the Grand Jury's Menu*

The key to the success of either reform proposal is the information provided to grand jurors about their available responses to an officer-involved shooting. The grand jury has many options for *ex ante* responses to prevent the next tragedy, yet today prosecutors ensure that the grand jury has no inkling of these choices.<sup>251</sup> I highlight here just three of those possibilities that might be considered either in expanded grand jury instructions or by a grand jury legal advisor. These recommendations are perhaps only a few of a possible menu of options that the grand jury might be presented with in officer-involved shootings. Each of these suggestions also seems well within the grand jury's historical powers and capacity.

First, grand jurors should be informed of the power to issue public reports of their findings in officer-involved shootings. Prosecutors often use grand jurors' up-or-down votes on charges in officer-involved shootings as a shield from

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243. Hoffmeister, *supra* note 68, at 1215.

244. *Id.* at 1177–78.

245. *Id.* at 1220.

246. *See id.* at 1177.

247. *See id.* at 1183, 1223; Cassidy, *supra* note 41, at 362.

248. Cassidy, *supra* note 41, at 365; *see also* Washburn, *supra* note 49, at 2349.

249. Hoffmeister, *supra* note 68, at 1225.

250. *See* Fairfax, *supra* note 19, at 406.

251. *See* Cassidy, *supra* note 41, at 364.

political criticism.<sup>252</sup> Often, officers are seemingly exonerated from wrongdoing by that dichotomous choice.<sup>253</sup> By sharing their views beyond the mere results of a vote on indictment, grand jurors would increase accountability for both prosecutors and officers.<sup>254</sup> Such public reporting would provide grand jurors an avenue to voice concerns about officer conduct or training procedures publicly. It may also temper public criticism of the grand jury process, as ordinary citizens will receive greater information about the reasons for the grand jury's decision on indictment, the grand jury's view of the causes of this tragedy, and possible methods to prevent another tragedy in the future.<sup>255</sup>

Such grand jury reporting is both a historical and present-day power of the grand jury. Historically, as noted above,<sup>256</sup> the grand jury was able to issue reports on broad issues of public concern or administration, acting as a kind of governmental ombudsmen. Second, many states today statutorily authorize at least some form of grand jury report, often in areas related to public administration, even including criminal justice matters such as jail conditions.<sup>257</sup> Additionally, the special grand jury in the federal system is structured to issue public reports of its findings.<sup>258</sup>

Second, grand jurors should have discretion to recommend changes to the substantive criminal law itself. Historically, the grand jury has expressed its views on the legitimacy of the substantive legal rules it was tasked with applying.<sup>259</sup> Modern grand jurors may wish to signal community disapproval of the behavior of particular officers, but struggle to do so unless the officers' conduct meets the statutory definition of a crime.<sup>260</sup> As a representative voice for the community's sense of justice, the grand jury should be able to respond more robustly to misconduct that is not technically criminal. Just as the grand jury may decline to enforce some substantive criminal laws,<sup>261</sup> the grand jury could voice its misgivings about legal doctrines such as qualified immunity or use-of-force statutes that protect officer misconduct.<sup>262</sup> Changes to statutory law that might capture such misconduct would expand the options for grand jurors and increase their ability to both heal the community and prevent future tragedies.

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252. Fairfax, *supra* note 19, at 406.

253. *Id.*

254. *See id.* at 406–07.

255. *See id.*

256. For more on the history of the grand jury issuing public reports, see *supra* Section II.A.

257. Cassidy, *supra* note 41, at 364 (“In lieu of an indictment, the grand juries of many states are authorized to publish their findings in the form of a ‘report’ to the court which impaneled them, recommending civil redress or systemic reform.” (quoting SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 3.01 (2d ed. 1997))); *see also* LAFAVE ET AL., *supra* note 46; YOUNGER, *supra* note 46, at 5–34.

258. Fairfax, *supra* note 77, at 367; Cassidy, *supra* note 41, at 364 n.21 (citing 18 U.S.C. § 3333).

259. Washburn, *supra* note 49, at 2346 (“[T]he historical narrative also suggests some other roles and responsibilities: considering the legitimacy of laws, and/or considering the legitimacy of the application of those laws in a particular case.”).

260. *See id.* at 2359–66.

261. *Id.* at 2364.

262. *Id.* at 2360.

Third, grand juries could be further empowered to interact meaningfully with civilian review boards or independent commissions, where those bodies exist. As discussed below,<sup>263</sup> such bodies often struggle to define their powers and procedures. But interaction with the grand jury after particularly high-profile cases might provide a clearer charge for independent bodies to begin investigations, recommend changes, or even engage with internal department experts to change department policies or training procedures.<sup>264</sup> The grand jury can harvest its lay expertise to suggest directions in which those additional bodies might continue to investigate and develop thorough reform proposals in a public-facing process with community input.<sup>265</sup> The grand jury would act as a starting point for reforms that shift power towards community members that are more commonly the subject of policing practices.<sup>266</sup>

### C. Risks

Increased grand jury discretion has risks. This Article's suggestions inject greater subjectivity into the criminal justice system, which might raise rule of law concerns similar to those levied against petit jury nullification.<sup>267</sup> Furthermore, expanded discretion could be abused in ways that lead to normatively dubious under- or over-indictment.<sup>268</sup> And prosecutors may be tempted to simply provide less information to grand juries that are empowered to respond to officer-involved shootings in the variety of ways I have suggested. But these objections can be overcome.

First, grand jury discretion would not allow subjectivity to permeate the criminal justice system. Grand jury nullification is inherently different from petit jury nullification given the different work products those two jury types produce.<sup>269</sup> While petit jury nullification involves the fundamentally legal question of legal guilt, charging decisions “descriptively and properly involve[] more than legal analysis”—namely, equitable concerns about the community's sense of justice.<sup>270</sup> Charging decisions always involve significant subjective and equitable choices on the part of prosecutors.<sup>271</sup> Increasing grand jury discretion merely redistributes some of the equitable power to a body that can reflect community mores, and is likely more representative of those subject to everyday policing

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263. See *infra* Part V.

264. See, e.g., *Levine*, *supra* note 25, at 768.

265. See *Cassidy*, *supra* note 41, at 364.

266. For more on reforms that focus on this power-shifting, see generally *Simonson*, *supra* note 27.

267. See, e.g., Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253 (1996).

268. There is evidence that when petit jurors are provided an instruction that informs them of their ability to nullify a verdict otherwise called for by the facts presented, jurors feel comfortable ignoring many other standard elements of a fair trial and actually increase the likelihood of unwarranted convictions. See *Hreno*, *supra* note 58, at 58. The same phenomenon is certainly possible in the case of a grand jury.

269. *Bowers*, *supra* note 49, at 338.

270. *Id.*

271. *Id.*

practices.<sup>272</sup> "Grand jury discretion operates as a one-off check on the equities, but leaves the applicable law firmly in place."<sup>273</sup>

Second, the potential benefits of an empowered and informed grand jury outweigh the concomitant risks. These reforms may both limit repetition of officer-involved shootings and increase the care with which prosecutors handle the lion's share of criminal cases.<sup>274</sup> They inject more community input about the practices of policing from those who have been subject to it. And as argued below, these reforms may stand a greater chance of successfully inculcating change than developing new bodies external to the criminal justice system to critique and reform policing within a community.

Some might suggest that, in response to a reinvigorated grand jury, prosecutors will simply stop providing full information about officer-involved shootings in order to prevent grand jurors from utilizing their expanded menu of options. But such limited presentations to the grand jury likely will not be politically palatable. The reason prosecutors began providing fuller information to grand juries in these tragic cases was to avoid the unrest and backlash that occurred when officers seemingly got off easy with a cursory investigatory process that included only exculpatory evidence.<sup>275</sup> Returning to such cursory investigation and grand jury presentation would duplicate that former unrest. Further, if prosecutors chose to quickly dispose of an officer-involved shooting by presenting only a brief description of inculpatory evidence against the officers (as they might in an ordinary case against a typical defendant), indictments against officers might increase, along with complaints from departments and unions about the fairness of the process.<sup>276</sup> Prosecutors can hardly risk deteriorating their relationship with law enforcement.<sup>277</sup> Prosecutors who short-circuit the grand jury process in officer-involved shootings will also lose the opportunity to test witnesses and theories on grand juries in a preview of potential petit juror reaction to the evidence<sup>278</sup>—an important loss for prosecutors who seek convictions in any prosecution they do pursue. In short, prosecutors actually need the grand jury to escape the political bind that officer-involved shootings present. Empowering grand jurors to respond more robustly to those cases will not change that dependence or the incentives that led prosecutors to rely upon grand juries in these cases in the first place.

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272. *Id.* at 333, 340.

273. *Id.* at 338.

274. *Id.* at 353–54.

275. *Id.* at 353.

276. *Id.* at 344.

277. *See Simmons, supra* note 37.

278. As Anna Offit noted in a broad sociological study of prosecutorial behavior in light of the likely views of future petit jurors, prosecutors often pay close attention to how grand jurors respond to witnesses or what questions those grand jurors raise, using that as a guide to how a petit jury might react in a later trial. Anna Offit, *Prosecuting in the Shadow of the Jury*, 113 *Nw. U. L. Rev.* 1071, 1090–91 (2019).

## V. REFORM FROM WITHIN THE CRIMINAL ADJUDICATION STRUCTURE

My proposals would reform a familiar aspect of the existing criminal adjudication structure. For actors already working within that system, including officers and prosecutors, the structure of the grand jury is well known, even if the expanded role this Article proposes is not. The grand jury is historically entrenched in our criminal justice system, including both broad powers and wide flexibility.<sup>279</sup> This distinguishes grand jury reform from external reform efforts, such as establishing civilian review and oversight to monitor officer misbehavior.<sup>280</sup> Those proposals introduce a new, heretofore unknown body into the criminal adjudication structure, one which actors internal to that system will naturally resist. Grand jury reform works differently, from inside the existing system, giving it a head-start over external reform proposals.

As my proposals suggest, the grand jury can also provide clearer mandates for investigation and possible reform to some of those external bodies that have proliferated in recent years. When those external bodies receive a clear charge from an actor internal to the criminal justice system, they will appear far more authoritative and subject to contestation. Those external bodies may face less resistance from political actors or police unions given the mandate they have received to work on a particular issue or identified problem from within the existing structure.

As an example of the resistance faced by such independent bodies, consider the Citizens' Police Oversight Board established by voters in Akron in the wake of Jayland Walker's killing. The board was established in 2022 by an amendment to the City's charter approved by 62% of voters.<sup>281</sup> After a contentious process to approve nominees to the nine-person board, the board was finally seated in March 2023.<sup>282</sup> But as of this writing, the board has been unable to initiate any investigations as it has awaited draft legislation from the Akron Law Department to establish its founding rules and the ambit of its investigatory power.<sup>283</sup> Members of the board have found themselves trapped in procedural limbo, stuck between reluctant city officials and a resistant fraternal order of police.<sup>284</sup> When the board attempted to propose rules to conduct future investigations, it met

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279. Fairfax, *supra* note 77, at 353 (“[T]he grand jury’s historical prestige makes it an ideal vehicle for bringing needed reform to the criminal justice system. Bolstered by centuries of history, the grand jury has a proven track record of operating at the center of the criminal process.”).

280. *Id.* at 367.

281. Doug Livingston, *Why Akron’s Citizens’ Police Oversight Board Still Can’t Launch Investigations*, AKRON BEACON J. (Aug. 4, 2023, 7:17 AM), <https://www.beaconjournal.com/story/news/local/2023/08/04/akron-voters-passed-issue-10-police-oversight-citizens-board-november-2022-but-delays-persist/70519640007/> [<https://perma.cc/BAY8-RKKJ>].

282. Dave “Dino” DeNatale & Carmen Blackwell, *Akron City Council Approves Candidates to Citizens’ Police Oversight Board*, WKYC (Mar. 8, 2023, 11:08 PM), <https://www.wkyc.com/article/news/local/akron/akron-city-council-special-meeting-police-review-board-candidates-minus-imokhai-okolo/95-c1e725ff-0490-4e89-b9de-53d75baa9053> [<https://perma.cc/7L7A-PPEK>].

283. Livingston, *supra* note 281.

284. *Id.*

resistance from the police union and had those rules rejected by the city council.<sup>285</sup> It remains unclear how the board can procedurally act to make any recommendations for change or investigate bad actors within the department.

The external motivation for many of the broadest reform proposals made in the post-George-Floyd era in part explains their general failure to propel change. Prosecutors, police departments, and individual officers generally have not accepted external reforms mandated by entities outside of that system.<sup>286</sup> Internal actors tend to view such broad external reforms as the work product of out-of-touch politicians or idealistic academics with little real-world chance of success.<sup>287</sup> Without buy-in from those internal system actors, these reforms may be doomed from the start.

Grand jury reform deserves more emphasis from within the criminal justice reform movement. Grand jury service is one of the few mechanisms for community members to serve a role internal to the system, especially as actual trials become relatively rare in the majority of criminal cases.<sup>288</sup> Grand juries can use that platform to reflect the community's voice in setting criminal justice priorities.<sup>289</sup> Grand juries can "promote discourse, democratic values, and perceptions of systemic legitimacy."<sup>290</sup> And in many ways, lay grand jurors can better evaluate the equities of a given case than prosecutors.<sup>291</sup> Grand jurors are not subject to the same political pressures, incentives, and cynicism as prosecutors, and have not become inured to the systemic biases and stereotypes already present in the criminal justice system.<sup>292</sup> Their apolitical viewpoint is especially important in performing the equitable evaluation of appropriate charges in a given case.

The reforms discussed in this Article would provide those members of the community with the tools to realign prosecutorial preferences with the community's sense of justice. Expressing those community preferences is a vital, but largely absent, ingredient in the two current tracks of grand jury process. Giving grand jurors the discretion to express those community preferences in a public

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285. Derek Kreider, *Akron City Council Rejects Police Oversight Board's Proposed Rules*, AKRON BEACON J. (Dec. 5, 2023, 4:03 PM), <https://www.beaconjournal.com/story/news/local/2023/12/05/akron-city-council-rejects-citizens-police-oversight-boards-rules-fop-investigations/71811203007/> [<https://perma.cc/T4AG-MPR2>].

286. See, e.g., *id.*

287. See Braman, *supra* note 42, at 2098 & n.8.

288. Washburn, *supra* note 49, at 2349 ("While plea bargaining has rendered the trial jury all but irrelevant as a nexus for citizen participation, one need look only to the grand jury for an institution that can fill this citizen review role very effectively."). For more on the rate of plea bargaining and its outsized role in our criminal justice system, see generally CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL (2021).

289. Bowers, *supra* note 49, at 333–34; Roger A. Fairfax, Jr., *Remaking the Grand Jury*, in GRAND JURY 2.0, *supra* note 133, at 331 (arguing that historically the grand jury served as a voice of the community).

290. Bowers, *supra* note 49, at 323.

291. *Id.* at 332 (noting that the prosecutor "has no special claim against lay people to the evaluative art of equitable discretion").

292. As Chief Justice Rehnquist argued in the context of lay petit jurors, the "lay juror's 'very inexperience is an asset because it secures a fresh perception . . . , avoiding the stereotypes said to infect the judicial eye.'" *Id.* at 332 (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 355 (1979) (Rehnquist, J., dissenting)).

and meaningful way might positively influence popular perceptions of fairness and justice in the criminal justice enterprise as a whole.<sup>293</sup>

Furthermore, the reforms suggested in this Article appear far more politically palatable than many of the broader reform proposals of the recent past. They represent, more than radical change, a realignment of the grand jury with its historically broad discretionary powers. As Part II illustrated,<sup>294</sup> grand juries have long been able to perform a wide variety of administrative functions and have had broad investigatory powers beyond considering a single case. And the grand jury historically serves to reject government preferences towards prosecution, or even challenge substantive criminal law edicts from the central government.<sup>295</sup> The reforms in this Article center on informing the grand jurors of their traditional powers and providing examples of how those powers might be deployed in response to officer-involved shootings. Providing such information to jurors is a low-cost endeavor that will empower grand jurors to exercise more of their traditional discretion, helping them to prevent repetition of tragic officer-involved shootings.

## VI. CONCLUSION

This Article's proposals are uniquely simple. The grand jury reforms here as a response to the tragic repetition of officer-involved shootings across the country are relatively straightforward, historically aligned with the grand jury's function and powers, and come from inside the existing criminal justice system. They also capitalize on aspects of the existing grand jury process when it evaluates an officer-involved shooting. In those cases, prosecutors hope to use grand juries as a shield from criticism by either the public or the police. To do so, prosecutors provide a great deal of objective information about the causes of these tragedies to grand juries. But those extra resources expended by prosecutors' offices to generate lay expertise on the grand jury are wasted when those grand jurors are told only to provide an up-or-down vote on indictment. The grand jury can and should do more. It should be empowered to respond meaningfully both to the case before them and to the causes of the next lawful but awful case likely to arise. Harvesting the grand jury's lay expertise also increases the voice of communities subject to policing practice in the reform movement. It is a small but vital step towards a more just system.

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293. *Id.* at 353.

294. *See supra* Part II.

295. Washburn, *supra* note 49, at 2366 (“[T]he compelling purpose[s] reflected in the historical narrative. . . suggests that the role of the grand jury was sometimes neither to prosecute, nor to adjudicate, but to serve a policy- and law-making (or at least law-blocking) role. In many respects, the grand jury is a quasi-political body designed to exercise local popular sovereignty.”).