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## Restoring Public Confidence in the Criminal Justice System: Policing Prosecutions When Prosecutors Prosecute Police

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# **RESTORING PUBLIC CONFIDENCE IN THE CRIMINAL JUSTICE SYSTEM: POLICING PROSECUTIONS WHEN PROSECUTORS PROSECUTE POLICE**

## **ABSTRACT**

*Recent high-profile cases of police violence that have ended with non-indictments of the involved officers have increased public scrutiny of criminal justice systems' approach to police-suspects. This Comment focuses on the assertion made by many that local prosecutors cannot fairly prosecute their law enforcement counterparts because of unfair bias. This Comment puts to the side the issue of whether such bias actually exists and instead focuses on the perception that these biases exist, arguing that systemic changes are needed to address the appearance of injustice they cause. The perception of bias degrades the appearance of justice to the public and police alike, endangering the legitimacy of the legal system; for that reason, we ought to presumptively disqualify local prosecutors from handling cases involving police-suspects. Instead, an independent special prosecutor, an outsider appointed by the state attorney general, or a civilian review board should handle such cases.*

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## INTRODUCTION

A recent pattern of high-profile non-indictments of police officers involved in the deaths of unarmed black Americans has led to renewed scrutiny of how police-suspects are treated by the criminal justice system, and has caused many to call for the appointment of independent special prosecutors to investigate cases of officer-involved fatalities and uses of force.<sup>1</sup> In the 2015–2016 legislative sessions, for example, fifteen state legislatures considered measures that would require the appointment of an independent special prosecutor to investigate officer-involved fatalities, yet all fifteen proposals failed to pass into law.<sup>2</sup> Today, only Maine and Connecticut have enacted legislation requiring appointment of special prosecutors to handle officer-involved fatalities.<sup>3</sup>

Those most opposed to this reform appear to be local prosecutors.<sup>4</sup> Nebraska offers a particularly acute example of local prosecutor resistance. Until 2010, Nebraska required special prosecutors to investigate all officer-involved fatalities.<sup>5</sup> In 2010, following vigorous campaigning efforts by Omaha County prosecutor Don Kleine, Nebraska's legislature voted to abolish the rule.<sup>6</sup> According to the *Guardian*, Nebraska police officers killed nine

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<sup>1</sup> See, e.g., Paul Cassell, *Who Prosecutes the Police? Perceptions of Bias in Police Misconduct Investigations and a Possible Remedy*, WASH. POST: VOLOKH CONSPIRACY (Dec. 5, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/05/who-prosecutes-the-police-perceptions-of-bias-in-police-misconduct-investigations-and-a-possible-remedy/>; Zusha Elinson, *Police Reviews in Deaths Scrutinized*, WALL ST. J. (Jan. 11, 2015, 5:46 PM), <http://www.wsj.com/articles/police-reviews-in-deaths-scrutinized-1421016273>; Brad Schrade, *Can Prosecutors Be Fair in Police Shooting Cases?*, ATLANTA J. CONST. (Mar. 18, 2016, 3:15 PM), <http://www.myajc.com/news/state—regional-govt—politics/can-prosecutors-fair-police-shooting-cases/b8pGMJtzA6HDCY2IJCAVOJ/>; Jon Swaine et al., *Ties That Bind*, GUARDIAN (Dec. 31, 2015, 8:00 AM), <https://www.theguardian.com/us-news/2015/dec/31/ties-that-bind-conflicts-of-interest-police-killings>.

<sup>2</sup> See Swaine et al., *supra* note 1 (listing states that proposed special prosecutor legislation: California, Georgia, Illinois, Indiana, Iowa, Maryland, Massachusetts, Missouri, New Jersey, New York, Oregon, Pennsylvania, South Carolina, Texas, and Vermont).

<sup>3</sup> See *id.*

<sup>4</sup> See, e.g., Marc Debbaudt, *Legislation Calling for Independent Police Prosecutor Is Unnecessary*, ASS'N DEPUTY DISTRICT ATT'YS, <http://campaign.r20.constantcontact.com/render?ca=817dce2e-9ba2-420d-87c0-7535c3aa5f58&c=1e35a160-bf69-11e4-8754-d4ae52733d3a&ch=1f6c2590-bf69-11e4-87b6-d4ae52733d3a> (last visited Mar. 16, 2018).

<sup>5</sup> See NEB. REV. STAT. ANN. § 29-1401 (West 2016); see also Swaine et al., *supra* note 1. For a comprehensive look at the legislative history of the earlier statute, see Richard E. Shugrue, *The Grand Jury in Nebraska*, 33 CREIGHTON L. REV. 39, 55–60 (1999).

<sup>6</sup> See NEB. REV. STAT. ANN. § 29-1401 (West 2016); Neb. Legis. B. 842, 101 Legis., 2d Sess. (Neb. 2010); see also Swaine et al., *supra* note 1.

individuals in 2015.<sup>7</sup> Kleine oversaw four of these clearances, more than any other district attorney in the country that year.<sup>8</sup> Kleine's justification for abolishing the rule typifies the most common arguments local prosecutors make in favor of retaining control over cases involving police-suspects: (1) that prosecutors' professional obligations ensure they will treat police-suspects fairly and (2) that requiring special prosecutors in these cases improperly wrests control from local officials elected by the communities they serve.<sup>9</sup>

Not all prosecutors agree. Following a Staten Island grand jury's failure to return an indictment against NYPD Officer Daniel Panteleo for the death of Eric Garner,<sup>10</sup> New York Governor Andrew Cuomo issued an executive order requiring a special prosecutor to investigate any case in which a police officer was involved in the death of an unarmed person.<sup>11</sup> The order came after New York Attorney General Eric Schneiderman and other advocates called for a measure to restore public confidence in the criminal justice system.<sup>12</sup>

Schneiderman's emphasis on public confidence is appropriate. As recent cases illustrate, the appearance of conflicted local prosecutors, enhanced procedural protections for police-suspects, and racial tensions shake public confidence in the outcomes of criminal proceedings against police-suspects, even if those outcomes are likely correct. This shaken public confidence illustrates the central concept of this Comment: the appearance of justice.

Justice Scalia once wrote, "Wise observers have long understood that the appearance of justice is as important as its reality."<sup>13</sup> The idea that "justice must satisfy the appearance of justice" arose out of early rulings on judicial recusal,<sup>14</sup> but the concept is especially relevant in the context of criminal prosecutions of police-suspects. Local prosecutors handling cases involving police-suspects fail to satisfy the appearance of justice because they face an

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<sup>7</sup> See *The Counted: People Killed by Police in the US*, GUARDIAN, <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database#> (last visited Mar. 16, 2018).

<sup>8</sup> Swaine et al., *supra* note 1.

<sup>9</sup> See *id.*

<sup>10</sup> See J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), <https://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html>.

<sup>11</sup> See N.Y. Exec. Order No. 147 (July 8, 2015), <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/old-files/EO147.pdf>.

<sup>12</sup> See *A.G. Schneiderman Requests Executive Order to Restore Public Confidence in Criminal Justice System*, ATT'Y GEN. ERIC T. SCHNEIDERMAN (Dec. 8, 2014), <https://ag.ny.gov/press-release/ag-schneiderman-requests-executive-order-restore-public-confidence-criminal-justice>.

<sup>13</sup> *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 161 n.3 (1994) (Scalia, J., dissenting).

<sup>14</sup> *Offutt v. United States*, 348 U.S. 11, 14 (1954).

unavoidable apparent conflict of interest in such circumstances. This failure is worsened by the differential treatment afforded police-suspects and the ubiquitous racial disparities inherent in U.S. criminal justice systems.

This Comment does not rely on any assertion of actual bias on the part of local prosecutors called on to prosecute their law enforcement counterparts. The appearance of bias and the resulting harm to the public's perception of the legitimacy of the criminal justice system supplies ample justification for the presumptive disqualification of local prosecutors from cases involving police-suspects. The first Part of this Comment describes how this appearance problem arises. To address this problem, the second Part proposes a framework for selecting an independent special prosecutor that will satisfy the appearance of justice.

## I. FAILURE TO SATISFY THE APPEARANCE OF JUSTICE

Local prosecutors handling criminal cases against their local law enforcement counterparts fails to satisfy the appearance of justice. Perceived conflicts of interest, disparate process afforded to police-suspects, and significant racial issues undermine the public's faith in local prosecutors' objectivity in cases against police.<sup>15</sup> This Part begins with an overview of procedural justice to explain the importance of the appearance of justice in ensuring the legitimacy and functionality of the criminal justice system, especially in cases against police. Next, it considers conflict-of-interest law and its application to prosecutors, and it explains how the perception that conflicts exist arises in cases where local prosecutors handle cases against police. Then, it focuses on the differential treatment police officers receive at the grand jury stage. Finally, it discusses the importance of race issues in shaping the public perception of police prosecutions.

### A. *Procedural Justice, Legitimacy, and the Appearance of Justice*

Appearance of fairness is essential to a functional criminal justice system. In 1990, Professor Tom Tyler used empirical evidence to show that people are more likely to comply with the law if they believe in the legitimacy of legal authorities.<sup>16</sup> The empirical evidence cited by Professor Tyler showed the

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<sup>15</sup> See *infra* Sections I.A–C.

<sup>16</sup> See TOM R. TYLER, WHY PEOPLE OBEY THE LAW 4, 64 (1990) [hereinafter TYLER, WHY PEOPLE OBEY THE LAW]; Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 310–22 (2003) (describing the process and results of several empirical studies on the relationship between perceived legitimacy of legal authorities and compliance with those authorities) [hereinafter Tyler,

primary factor influencing an individual's evaluation of a legal authority's legitimacy is the individual's perception of "procedural justice."<sup>17</sup> Procedural justice refers to the subjective perception of fair procedures, not whether those procedures are objectively fair.<sup>18</sup> People are willing to accept unfavorable outcomes of legal proceedings if they are delivered through procedures they perceive to be fair.<sup>19</sup> Legal authorities can therefore enhance the perceived legitimacy of their actions by employing procedures the public perceives as being fair.<sup>20</sup> Since 1990, these findings have been confirmed by numerous empirical studies.<sup>21</sup> These legitimacy concerns demonstrate that the appearance of justice is more than mere pandering to the mob's sense of justice.

Procedural justice is of special importance to the prosecution and investigation of police-suspects. Any perception of bias in the investigation and prosecution of police will result in dissatisfaction with the outcome, regardless of its accuracy. For example, in Ferguson, Missouri, prosecutor Robert McCulloch's handling of the case against officer Darren Wilson tainted the outcome in the eyes of the public.<sup>22</sup> Many called for McCulloch's recusal following his announcement that he would present the case for a grand jury to decide without making a recommendation to indict to the jurors.<sup>23</sup> Critics questioned McCulloch's ability to be objective in this case based on his personal connection to law enforcement—McCulloch's own father was a

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*Procedural Justice*]; see also Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spousal Assault*, 31 L. & SOC'Y REV. 1 (1997) (describing an empirical study showing that men who dealt with police officers called to their homes in response to accusations of domestic violence had a significantly lower recidivism rate for domestic violence if they felt fairly treated by the officer who initially responded to the call).

<sup>17</sup> TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 16, at 107 ("[P]rocedural justice is . . . found to be the primary factor mediating the impact of experience on views about legitimacy.").

<sup>18</sup> Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 56 (2002) ("[P]rocedural justice is concerned not with 'actual' fairness (the realm of philosophers), but with people's *perception* of fairness (the realm of psychologists).").

<sup>19</sup> See TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 16, at 107 ("[F]air procedures can act as a cushion of support when authorities are delivering unfavorable outcomes. If unfavorable outcomes are delivered through procedures viewed as fair, the unfavorable outcomes do not harm the legitimacy of legal authorities."). People use procedural justice as a measure of legitimacy because: (1) it is simpler to evaluate process than outcomes and (2) it is generally easier for people to agree on the fairness of procedure for decision making than on moral values underlying perceptions of the outcomes. *Id.* at 108–09.

<sup>20</sup> *Id.* at 110 ("[T]he fairness of procedures enhances or diminishes the legitimacy of legal authorities and future compliance with the law.").

<sup>21</sup> See generally Tyler, *Procedural Justice*, *supra* note 16.

<sup>22</sup> See Frances Robles, *St. Louis County Prosecutor Defends Objectivity*, N.Y. TIMES (Aug. 20, 2014), <https://www.nytimes.com/2014/08/21/us/st-louis-county-prosecutor-defends-objectivity.html>.

<sup>23</sup> See *id.*

police officer shot in the line of duty by a black man.<sup>24</sup> McCulloch dismissed these criticisms and insisted on his ability to perform his duties objectively.<sup>25</sup> The criticism and assertions of bias against McCulloch only grew after the grand jury returned no indictment against Wilson.<sup>26</sup> The Department of Justice conducted its own investigation into the shooting death of Michael Brown and concluded the case lacked “prosecutive merit,” a conclusion in accord with the grand jury’s return of no indictment.<sup>27</sup> The results of the Department of Justice investigation suggests the grand jury’s decision was substantively correct.<sup>28</sup> Even so, the grand jury decision renewed the unrest in Ferguson and sparked protests in more than 170 cities around the United States.<sup>29</sup> Even if McCulloch approached the case with total objectivity and achieved the correct result, his unusual handling of the case and the appearance of personal bias delegitimized the outcome in the eyes of the public.

This problem with the appearance of justice persists even in cases in which local prosecutors successfully indict police officers and zealously prosecute them at trial, although it takes on a different character. When police are not charged for high-profile killings, the process appears to the public and the victims to be biased in favor of the police-suspects. On the other hand, local prosecutors who zealously pursue charges against police in high-profile cases face accusations that they are over-prosecuting police for political gain.<sup>30</sup> The prosecution of the six Baltimore police officers charged for the killing of Freddie Gray illustrates this point. Attorneys for the police officers filed a motion to dismiss prosecutor Marilyn Mosby from the case, arguing she faced

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<sup>24</sup> See Kimberly Kindy, *Objectivity of Prosecutor in Missouri Shooting of Michael Brown Is Questioned*, WASH. POST. (Aug. 15, 2014), [https://www.washingtonpost.com/politics/objectivity-of-prosecutor-in-missouri-shooting-of-michael-brown-is-questioned/2014/08/15/1fe20690-24bc-11e4-958c-268a320a60ce\\_story.html](https://www.washingtonpost.com/politics/objectivity-of-prosecutor-in-missouri-shooting-of-michael-brown-is-questioned/2014/08/15/1fe20690-24bc-11e4-958c-268a320a60ce_story.html).

<sup>25</sup> See *id.*

<sup>26</sup> See Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <https://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html>.

<sup>27</sup> See DEP’T OF JUSTICE, DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 86 (2015).

<sup>28</sup> See Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 768 (2016) (“All the evidence gathering and weighing may have actually led to the legally correct result.”).

<sup>29</sup> See Steve Almasy & Holly Yan, *Protestors Fill Streets Across Country as Ferguson Protests Spread Coast to Coast*, CNN (Nov. 26, 2014, 7:26 AM), [www.cnn.com/2014/11/25/us/national-ferguson-protests/](http://www.cnn.com/2014/11/25/us/national-ferguson-protests/).

<sup>30</sup> See Wil S. Hylton, *Baltimore vs. Marilyn Mosby*, N.Y. TIMES MAG. (Sept. 28, 2016), <http://www.nytimes.com/2016/10/02/magazine/marilyn-mosby-freddie-gray-baltimore.html>.

conflicts of interest arising from political pressures and civil unrest.<sup>31</sup> Following their acquittal, five of the officers filed defamation suits against Mosby.<sup>32</sup> This perception by the police that a local prosecutor is unfairly prosecuting police officers for cynical purposes stymies attempts to increase police accountability. Any message about acceptable police behavior that might be conveyed by charging police officers would be undermined by the perception that those charges were political instead of substantive.

The above problems result because of the appearance of a conflict of interest. The next section discusses the apparent conflict that arises when prosecutors handle cases involving police-suspects.

### *B. Conflicts-of-Interest Law and the Appearance of Justice*

The appearance-of-justice principles undergirding conflicts-of-interest law provide a strong justification for presumptive disqualification of local prosecutors in criminal cases involving police-suspects.<sup>33</sup> The appearance-of-justice concept is closely intertwined with conflict-of-interest law. In fact, the principle that “justice must satisfy the appearance of justice” arose out of conflict-of-interest rulings regarding judges.<sup>34</sup> The next subsection discusses the appearance of impropriety standard conflicts-of-interest law applies to judges, and argues that the same standard should apply to prosecutors because of their quasi-judicial role and duty to seek justice. Then the focus turns to the apparent conflict inevitably created when local prosecutors are called in to handle cases involving police-suspects. This section concludes that a presumptive disqualification of local prosecutors in such cases is necessary to address the problems posed by that apparent conflict.

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<sup>31</sup> See Justin Fenton, *Officers in Freddie Gray Case Move to Dismiss Charges*, BALT. SUN (May 8, 2015, 10:19 PM), <http://www.baltimoresun.com/sports/bs-md-ci-freddie-gray-motion-to-dismiss-20150508-story.html>

<sup>32</sup> See Hylton, *supra* note 30.

<sup>33</sup> Professor Kate Levine examined the problems associated with local prosecutors' involvement in police-defendant cases through the lens of conflicts-of-interest law. See Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447 (2016). Levine's analysis concluded that local prosecutors should not be involved in criminal cases against their local law enforcement counterparts, and she weighed several potential reforms to address the problem. See *id.* This Comment focuses more closely on the appearance-of-justice issues raised by her article, and it considers a process for appointing special prosecutors in greater depth. See *infra* Part II.

<sup>34</sup> *Offutt v. United States*, 348 U.S. 11, 14 (1954).

### 1. *The Appearance of Impropriety Standard Should Apply to Prosecutors*

The “appearance of impropriety”<sup>35</sup> standard applied to judges should also apply to prosecutors because they hold a quasi-judicial role and should promote the interests of the communities and governments they serve. While the three primary legal actors in criminal proceedings—judges, prosecutors, and defense attorneys—all have an obligation to avoid conflicts of interest for any given case, the standards for recusal vary along with the roles played by each actor.<sup>36</sup> Judges, as neutral decisionmakers and embodiments of the judiciary, must avoid even the appearance of partiality or impropriety to preserve confidence in the judiciary.<sup>37</sup> The same justifications for applying the standard to judges holds true for prosecutors, even if to a somewhat lesser extent.

Conflicts-of-interest law and ethical standards charge judges with a high degree of responsibility for maintaining the appearance of justice. Judges are to “act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety,” according to the Model Code of Judicial Conduct.<sup>38</sup> Federal law requires judges to disqualify themselves “in any proceeding in which [their] impartiality might reasonably be questioned.”<sup>39</sup> This standard does not require a finding that the judge is actually partial to one side of a dispute to justify disqualification.<sup>40</sup> Instead, the

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<sup>35</sup> This standard is also referred to as the “appearance of impartiality” or the “appearance of partiality” standard. See Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge’s Impartiality “Might Reasonably Be Questioned,”* 14 GEO. J. LEGAL ETHICS 55, 55 n.2 (“Whether a judge’s impartiality might reasonably be questioned is also referred to as the appearance of partiality, the appearance of impropriety, or negative appearances.”).

<sup>36</sup> See, e.g., MODEL CODE OF JUDICIAL CONDUCT § 1.2, 2.11 (AM. BAR ASS’N 2011); ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION §§ 3-1.3, 4-3.5 (AM. BAR ASS’N 2003).

<sup>37</sup> See MODEL CODE OF JUDICIAL CONDUCT § 1.2 (AM. BAR ASS’N 2010).

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

<sup>39</sup> 28 U.S.C. § 455(a) (2012); see also MODEL CODE OF JUDICIAL CONDUCT § 1.2 cmt. 5 (AM. BAR ASS’N 2010) (“The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge’s honesty, impartiality, temperament, or fitness to serve as a judge.”); cf. *id.* § 2.11(A) (“A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned . . .”).

<sup>40</sup> See Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563, 1566 (2012) (noting that codes of judicial conduct require disqualification when a judge’s “impartiality can be reasonably questioned, not only when it is rightly questioned”).

standard reflects the important duty of judges to maintain at all times the appearance of justice and impartiality.<sup>41</sup>

Considering judges' role as neutral decision makers, the application of the appearance of impropriety standard to judges aligns with key concepts of procedural justice. Procedural justice studies have identified four primary factors that contribute to judgments of a procedure's fairness.<sup>42</sup> Two of these elements relate to characteristics of the decision maker: (1) the decision maker's impartiality (i.e., the extent to which the individual perceives that the decision maker impartially follows the rules and comes to an unbiased decision)<sup>43</sup> and (2) the decision maker's trustworthiness (i.e., whether the individual perceives that the decision maker is motivated to be fair to both sides of the case).<sup>44</sup> At trial and during pre-trial hearings, the judge is the decision maker for most issues outside the final verdict, so it is essential to the perception of procedural justice that the judge appears impartial and trustworthy. The quasi-judicial role of prosecutors suggests prosecutors should carry a similar burden to appear impartial and trustworthy in exercising their discretionary authority.

The appearance of impropriety standard should apply to prosecutors because of their quasi-judicial role as decision makers. A prosecutor serves as "an administrator of justice, an advocate, and an officer of the court" whose duty "is to seek justice, not merely to convict."<sup>45</sup> A prosecutor expected to advocate in our adversarial criminal justice system cannot be expected to be as impartial as a judge, but at the same time the obligation to "seek justice" counters the idea that prosecutors be "pure advocates" interested only in winning cases.<sup>46</sup> However, like a judge, prosecutors represent the government

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<sup>41</sup> See *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988) ("The very purpose of [the federal judicial recusal statute] is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible."); *United States v. Amico*, 486 F.3d 764, 767 (2d Cir. 2007) (disqualifying a district judge but noting the decision stems only from concerns over the appearance of impartiality and should not "be understood to conclude—or even imply—that the district judge engaged in misconduct").

<sup>42</sup> See Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCHOL. 117, 121 (2000) ("[F]our elements of procedures are the primary factors that contribute to judgments about their fairness: opportunities for participation (voice), the neutrality of the forum, the trustworthiness of the authorities, and the degree to which people receive treatment with dignity and respect.").

<sup>43</sup> See *id.* at 122.

<sup>44</sup> See *id.*

<sup>45</sup> CRIMINAL JUSTICE PROSECUTION FUNCTION & DEF. FUNCTION STANDARDS § 3-1.2 (AM. BAR. ASS'N 1993); see also *Berger v. United States*, 295 U.S. 78, 88 (1935) (noting the interest of the prosecution in a criminal case "is not that [the prosecutor] shall win a case, but that justice shall be done").

<sup>46</sup> See Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 57 (1991). But see Daniel Epps, *Adversarial Asymmetry in the Criminal*

as a whole and possess a high degree of discretionary power over criminal prosecutions.<sup>47</sup> Prosecutors should therefore have a similar responsibility to maintain public confidence in the justice system by avoiding perceived improprieties.<sup>48</sup>

Analogizing prosecutors to defense attorneys also supports the application of the appearance of impropriety standard to prosecutors. Defense attorneys avoid conflicts by comparing their interests with their clients' and ensuring they do not conflict.<sup>49</sup> The first step of this relatively simple analysis is to identify the interests of the defense attorney and her client.<sup>50</sup> By contrast, identifying conflicts of prosecutors is complicated because they lack a single, readily identifiable client.<sup>51</sup>

Although prosecutors lack a single, readily identifiable client, they still serve a number of important interests. Professor Fred Zacharias proposes that the "client" of a prosecutor is more accurately defined as several "constituencies," including the community, victims of crime, defendants, and the government.<sup>52</sup> Each of these constituencies has an interest in a criminal justice system that appears fair. By contrast, American Bar Association (ABA) commentary flatly states, "A prosecutor's client is the people who live in the

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*Process*, 91 N.Y.U. L. REV. 762, 765–68 (2016) (arguing that more adversarial prosecutors with a focus on maximizing punishment would solve a number of problems in the criminal justice system).

<sup>47</sup> See Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. 699, 731 (1998) ("As the government's spokesperson, the prosecutor brandishes tremendous authority and discretion in directing investigations, defining the crimes to be charged, affecting punishment, and deciding whether or not to prosecute at all.").

<sup>48</sup> See *id.*; see also *People v. Witty*, 36 P.3d 69, 73 (Colo. App. 2000) ("[T]o maintain the public's confidence that the system is fair, perceived improprieties must be avoided.").

<sup>49</sup> See Susan W. Brenner & James Geoffrey Durham, *Towards Resolving Prosecutor Conflicts of Interest*, 6 GEO. J. LEGAL ETHICS 415, 471 (1993) ("[A] conflict is . . . any interest attributable to the lawyer which interferes with her exercise of independent judgment on behalf of a client." (internal quotation marks omitted)).

<sup>50</sup> See Laurie L. Levenson, *Conflicts over Conflicts: Challenges in Redrafting the ABA Standards for Criminal Justice on Conflicts of Interest*, 38 HASTINGS CONST. L.Q. 879, 880 (2011) (noting that "frankly, defense lawyers have it easy" when it comes to identifying conflicts of interest).

<sup>51</sup> See Brenner & Durham, *supra* note 49, at 471–72 ("Not having a readily identifiable client, [a prosecutor] does not have a readily identifiable benchmark to be used in determining whether he has a conflict."). Brenner and Durham argue that "there is no effective answer to the question, 'who is the prosecutor's client?'. On the contrary, all the question does is raise the issue of how prosecutor conflicts of interest should be resolved after recognizing that there is no client and the basic ethics rules are of limited usefulness." *Id.* at 468 n.249. Brenner and Durham instead posit that "system conflicts" peculiar to prosecutors come not from clients, but rather from "strong pressures arising from three distinct aspects of his job. First, the prosecutor is a politician and must answer directly or indirectly to the electorate. Second, the prosecutor is an advocate who strives to convict. Third, the prosecutor is ethically charged to be an 'administrator of justice.'" *Id.* at 468–69.

<sup>52</sup> See Zacharias, *supra* note 46, at 57.

prosecutor's jurisdiction."<sup>53</sup> The people in a prosecutor's jurisdiction clearly have an interest in maintaining a justice system that appears fair. Regardless of who or what is considered to be a prosecutor's client, that client will have an interest in the appearance of a fair justice system. Therefore, anything that threatens that interest should be considered a conflict requiring recusal of the prosecutor.

Despite these strong justifications for applying the appearance of impartiality standard to prosecutors, prosecutors' obligation to appear impartial when making pre-charge decisions is less established.<sup>54</sup> In fact, the most recent ABA prosecution standards removed the requirement that prosecutors avoid the appearance of conflict in addition to actual conflicts.<sup>55</sup> Federal law does require disqualification of a prosecutor from participating in an investigation if it would result in the appearance of a "personal, financial, or political conflict of interest."<sup>56</sup> Some courts have continued to follow the appearance of impropriety standard even though it is no longer codified.<sup>57</sup> Even so, most states still lack a codified version of the standard.

Even if the appearance of impropriety standard uniformly applied to prosecutors, it would still be inadequate to address the problems posed to the appearance of justice when local prosecutors handle cases involving police-suspects. The next section explains how local prosecutors handling cases involving police-suspects raise special concerns about the appearance of conflicts, but reliance on ethical standards alone to address these apparent

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<sup>53</sup> CRIMINAL JUSTICE PROSECUTION FUNCTION & DEF. FUNCTION STANDARDS Commentary to § 3-1.3 (AM. BAR. ASS'N 1993).

<sup>54</sup> See Flowers, *supra* note 47, at 731-34.

<sup>55</sup> See CRIMINAL JUSTICE PROSECUTION FUNCTION & DEF. FUNCTION STANDARDS History of Standard § 3-1.3 (AM. BAR. ASS'N, 3d ed. 1993). The former standard read: "A prosecutor should avoid the appearance or reality of a conflict of interest with respect to official duties. In some instances, as defined in codes of professional responsibility, failure to do so will constitute unprofessional conduct." *Id.* The current standard reads: "A prosecutor should avoid a conflict of interest with respect to his or her official duties." *Id.*

<sup>56</sup> See 28 U.S.C. § 528 (2012) ("The Attorney General shall promulgate rules and regulations which require the disqualification of any officer or employee of the Department of Justice, including a United States attorney or a member of such attorney's staff, from participation in a particular investigation or prosecution if such participation may result in a personal, financial, or political conflict of interest, or the appearance thereof. Such rules and regulations may provide that a willful violation of any provision thereof shall result in removal from office." (emphasis added)).

<sup>57</sup> See, e.g., Turbin v. Superior Court, 797 P.2d 734, 738 (Ariz. Ct. App. 1990) (holding the appearance of impropriety standard is still applicable to determination of disqualification despite change in the Rules of Professional Conduct); First Am. Carriers, Inc. v. Kroger Co., 787 S.W.2d 669, 672 (Ark. 1990) (reasoning that the appearance of impropriety standard could be found in "what the preamble to the Rules refers to as 'moral and ethical considerations' that should guide lawyers, who have 'special responsibility for the quality of justice'"); People v. Witty, 36 P.3d 69, 74 (Colo. App. 2000) (affirming the district court's decision to disqualify district attorney's office based on the appearance of impropriety standard).

conflicts would fail to address the problem. Note that to the extent a prosecutor's conflict biases her *toward* the police-suspect, it is highly unlikely the police-suspect will move to disqualify such a prosecutor.<sup>58</sup> The decision to disqualify a local prosecutor based on inherent conflicts arising from the prosecution of police-suspects thus falls on the prosecutors themselves.<sup>59</sup> While application of the appearance of impropriety standard would provide guidance to prosecutors on how to evaluate their own conflicts,<sup>60</sup> the ultimate decision of whether to recuse themselves would be based on their own conscience. As discussed in the next section, when local prosecutors prosecute police, the appearance of a conflict to the public is so strong that a prosecutor's assurances that he can fairly prosecute a police-suspect will do little to address that appearance problem. The only workable solution is presumptive disqualification.

## 2. *The Apparent Conflict When Local Prosecutors Prosecute Police*

Local district attorneys should be presumptively barred from prosecutions of police officers in their locality because these cases give rise to an apparent conflict that threatens the appearance of justice. The appearance of a conflict arises for two reasons: (1) the "symbiotic relationship"<sup>61</sup> between local district attorney offices and their law enforcement counterparts and (2) the systemic pressures on local district attorneys to avoid charging and prosecuting police.<sup>62</sup> Both of these causes for the appearance of a conflict will inevitably arise because they are inherent in the criminal justice system. Thus, presumptive disqualification is the only way to adequately address them.

The apparent conflict arises first because of the close relationship prosecutors have with local law enforcement. Prosecutors work closely with police on nearly every criminal case. This close working relationship with, and reliance on, police results in two potential bases for perceiving a conflict when local prosecutors are called on to prosecute police-suspects: (1) the close

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<sup>58</sup> See Levine, *supra* note 33, at 1456. No case in the relevant ALR database involved disqualification of a prosecutor based on the concern that the prosecutor's relationship with the accused would afford the accused favorable treatment. See generally Allan L. Schwartz, Annotation, *Disqualification of a Prosecuting Attorney in State Criminal Case on Account of Relationship with Accused*, 42 A.L.R.5th 581 (1996).

<sup>59</sup> See Levine, *supra* note 33, at 1456.

<sup>60</sup> See Flowers, *supra* note 47, at 736.

<sup>61</sup> See Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 719 & n.149 (1996) (borrowing the "perfectly descriptive" term, "symbiotic relationship," from James R. Davis, *A Comparison of Attitudes Toward the New York City Police*, 17 J. POLICE SCI. & ADMIN. 238, 289 (1990)).

<sup>62</sup> See Levine, *supra* note 33, at 1465–77.

working relationship is likely to lead to mutual respect and admiration, which might color a prosecutor's decisions<sup>63</sup> and (2) the reliance on police to achieve professional goals creates the danger of harm to a district attorney's career if he runs afoul of the police.<sup>64</sup> Neither of these characteristics of the prosecutorial process is problematic on its own. In fact, the public interest in having efficient investigations is served by local prosecutors and law enforcement agencies maintaining smooth working relationships. But in the context of police-suspects, these aspects of the criminal investigation and conviction process create the appearance of a conflict.

At every stage of a criminal case, a prosecutor's cooperation with the police is essential to success. At the pre-arrest stage, "police decide whom, where, and what to investigate."<sup>65</sup> Police are then responsible for gathering evidence, including physical evidence and witness testimony.<sup>66</sup> After gathering evidence, police then make the arrest and interrogate the suspect.<sup>67</sup> And through all of this pre-indictment and pre-trial process, the police must ensure they comply with constitutional requirements, or they risk torpedoing the case at trial.<sup>68</sup> At the grand jury stage, the lead investigating police officer is often the only witness called to testify before the grand jurors.<sup>69</sup> Although nearly all cases presented to grand juries result in indictments, numerous assistant district attorneys have reported at least one or two cases that grand jurors rejected in part because of "the attitude or incompetence of the primary police witness."<sup>70</sup> Prosecutors continue to rely on police testimony if a case continues to trial. In

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<sup>63</sup> See Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 792 (2003) ("[O]ne ought not underestimate the unifying influence of a shared commitment to 'getting the bad guys,' hardened by the adversarial process, nurtured by mutual respect and need, and on occasion lubricated by alcohol. . . . [T]he social relationships that can arise out of constant and routine contacts will provide a solid foundation for trust.").

<sup>64</sup> See Lauri L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 536–38, 536 n.150 (1994) ("A deputy district attorney who has a reputation of being hard on the police may be given the run-around, kept in the dark about investigative details, or simply be kept waiting interminably at the scene of the shooting or later when he or she attempts to follow up. Deputy district attorneys state that passive noncooperation, delays, mix-ups, unavailability of personnel and other similar tactics by the Sheriff's Department can severely prejudice an investigation or prosecution of a deputy for misconduct." (citation omitted)).

<sup>65</sup> STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 32 (2012).

<sup>66</sup> See Levine, *supra* note 33, at 1467–68.

<sup>67</sup> See *id.* at 1467.

<sup>68</sup> See *id.*

<sup>69</sup> See *id.*; Simmons, *supra* note 18, at 21.

<sup>70</sup> Simmons, *supra* note 18, at 63. Simmons notes, however, that the prosecutors he interviewed may search for a reason for a grand jury's rejection outside their own performance, and that search may result in them placing the blame on the testifying police officers. *Id.* at 63 n.254.

sum, prosecutors need the police to do their jobs, so they need to foster good relationships to ensure smooth handling of criminal cases.

This desire to foster good working relationships between police and prosecutors is itself a reason to presumptively bar local prosecutors from handling cases involving police-suspects. As noted above, a local prosecutor who obtains an indictment of a police officer might be perceived by the police as being overzealous or politically motivated in pursuing charges, damaging their relationships. Automatically removing a local prosecutor spares her from having to balance the public's desire for police accountability and the police officers' indignation at being over-scrutinized, thus preserving the local prosecutor's relations with both her constituency and law enforcement partners.

Systemic pressures also give rise to the appearance of a conflict. As elected officials or appointees of elected officials, district attorneys are often subject to pressures from the electorate and special interest groups. Police unions in particular possess considerable power to sway elections of district attorneys.<sup>71</sup> Police unions can also exert pressure on individual cases by organizing their members to demonstrate against police prosecutions.<sup>72</sup> Combined with the close working relationships between local prosecutors and police, these systemic pressures create the appearance of a conflict when prosecutors are called on to prosecute police-suspects.

Even if the perception that local prosecutors are biased in favor of police-suspects is a false one, such favorable bias may not be the only advantage police-suspects have over civilian suspects. First, police misconduct is already underreported and underinvestigated.<sup>73</sup> Second, even when authorities respond

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<sup>71</sup> See Levine, *supra* note 33, at 1475–77.

<sup>72</sup> See *id.* (describing the arraignment of NYPD officers charged with being involved in a ticket-fixing scheme where “hundreds of off-duty police officers taunted prosecutors, physically stopped the media from filming the defendants, and even called the then-police commissioner Raymond Kelly a hypocrite” (internal quotation marks omitted)).

<sup>73</sup> See Freeman, *supra* note 61, at 703 n.103. Freeman argues that “[p]olice crimes are notoriously underreported because victims are often afraid of complaining” and because police departments fail to “establish and publicize citizen complaint procedures.” *Id.* (citing ANTHONY M. PATE & LORIE A. FRIDELL, POLICE USE OF FORCE: OFFICIAL REPORTS, CITIZEN COMPLAINTS, AND LEGAL CONSEQUENCES 35–36, 38–40 (1993)). Moreover, police officers benefit from the “code of silence” binding their fellow officers from exposing officer misconduct. *Id.* at 725 n.174 (citing JEROME H. SKOLNICK & JAMES FYFE, ABOVE THE LAW 110–11 (1993) (explaining that the code is enforced by the “threat of shunning” and the “siege view of the world” adopted by police departments or units that take an “us and them” view of their relations to the public)); see also Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 237, 240 (1998) (defining the “blue wall of silence” as “an unwritten code . . . which prohibits disclosing perjury or other misconduct by fellow

to reports of police misconduct, police officers are “insiders” in the criminal justice system, and that insider status affords them special insider “knowledge about how [the] opaque system operates.”<sup>74</sup> This special knowledge places them at a significant advantage compared to civilian suspects and defendants from the outset.<sup>75</sup> Third, police officers enjoy many formal procedural protections.<sup>76</sup> Fourth, both federal and state statutory laws strongly favor police officers charged with crimes,<sup>77</sup> and Supreme Court jurisprudence has heightened protections for law enforcement.<sup>78</sup> Finally, jurors tend to have a natural bias in favor of law enforcement.<sup>79</sup> These advantages only heighten the

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officers, or even testifying truthfully if the facts would implicate the conduct of a fellow officer” and noting that “in many departments, an officer who breaks the code of silence can expect brutal retaliation from his or her companions”). Many court opinions have recognized the existence of this code of silence in police departments. *See* Gabriel J. Chin & Scott C. Wells, *supra*, at 238 n.16 (listing cases).

<sup>74</sup> *See* Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197, 1208 (2016); *see also* Levine, *supra* note 28, at 762 (“Because of their sophistication as criminal justice insiders, police suspects are far less likely to confess to a crime, speak to police without a lawyer, or fall prey to psychological interrogation tactics.”).

<sup>75</sup> *See* Levine, *supra* note 74, at 1208.

<sup>76</sup> *See id.* at 1212–27 (describing formal protections for police shielding them from the type of police interrogation civilian suspects are often subject to).

<sup>77</sup> *Compare, e.g.,* MO. ANN. STAT. § 563.046 (West 2017) (allowing officer use of deadly force when “the officer reasonably believes that such use of deadly force is immediately necessary to effect the arrest or prevent an escape from custody and also reasonably believes [the target]: (a) Has committed or attempted to commit a felony offense involving the infliction or threatened infliction of serious physical injury; or (b) Is attempting to escape by use of a deadly weapon or dangerous instrument; or (c) May otherwise endanger life or inflict serious physical injury to the officer or others unless arrested without delay”), *with* MO. ANN. STAT. § 563.031 (West 2017) (describing more limited instances where an ordinary citizen is allowed to use deadly force). This comparison does not suggest the differences in the standards are unfair or illogical. It merely illustrates one of the advantages given to police officers charged with crimes related to officer-involved fatalities. Federal law carries an even higher burden of proof because it requires proof beyond a reasonable doubt that the police officer acted with specific intent to deprive the victim of a constitutional right. *Screws v. United States*, 325 U.S. 91, 103 (1945) (plurality opinion) (determining the constitutionality of the statute could be saved by requiring proof that the defendant had acted with “a specific intent to deprive a person of a federal right made definite by decision or other rule of law”); *see also* John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 806–11 (2000) (citing 18 U.S.C. § 242 (2012)) (arguing the specific intent requirement of 18 U.S.C. § 242 limits its usefulness in prosecuting police misconduct).

<sup>78</sup> *See* *Graham v. Connor*, 490 U.S. 386, 396 (1989) (holding that probable cause for excessive force cases must be analyzed under the Fourth Amendment’s objective reasonableness standard, such reasonableness being “judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight”); *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (holding that it is not unconstitutional for a police officer to use deadly force to prevent the escape of a suspect that the police officer has probable cause to believe poses a threat of serious physical harm to the officer or to others). Following an Ohio grand jury’s decision to decline indictment of the police officer who shot and killed Tamir Rice, the Cuyahoga County prosecutor’s office released a seventy-page report explaining the investigation and applicable legal standards leading to the non-indictment. TIMOTHY J. MCGINTY, OFFICE OF THE PROSECUTING ATTORNEY, CUYAHOGA COUNTY PROSECUTOR’S REPORT ON THE NOVEMBER 22, 2014 SHOOTING DEATH OF TAMIR RICE (2015). The report explains the legal standard set by *Garner* and *Graham* and its application to the Tamir Rice case, illustrating the application of the “reasonable officer” standard. *Id.* at 35–36, 66.

<sup>79</sup> *See* Levine, *supra* note 33, at 1465 n.79.

perception that police-suspects are not fairly prosecuted, making it all the more important to ensure the prosecutor is someone free of the apparent conflict described above.

The public's perception of these inherent and systemic pressures faced by district attorneys when prosecuting police-suspects demonstrates why, in general, these prosecutions fail to satisfy the appearance of justice. The next section examines how these issues present themselves in a particular phase of the criminal justice process: the grand jury.

### *C. Differential Treatment: The Grand Jury*

In theory, allowing a grand jury to determine whether a criminal case against a police officer should proceed to trial ought to counter the perception of a biased prosecutor because it transfers the decision to a group of lay jurors. In reality, the use of a grand jury does little to enhance the appearance of fairness and may in fact detract from it. Considering the prosecutor's overwhelming control over grand jury proceedings and the stark differences between the treatment of civilian and police-suspects at the grand jury stage, many see the use of the grand jury against police-suspects as a means for local prosecutors to insulate themselves from public scrutiny instead of a way to make the process produce fairer outcomes.<sup>80</sup> This section discusses prosecutorial control and differential treatment of police-suspects at the grand jury stage, but first it is necessary to consider the grand jury's function.

#### *1. The Function of the Grand Jury*

Traditionally, each grand jury would serve two distinct functions: "investigating whether crimes have been committed" and determining whether evidence presented by prosecutors merited indictment.<sup>81</sup> When grand juries use their investigative powers, they are said to act as a "sword" for the prosecution to ferret out crimes.<sup>82</sup> When grand juries screen cases brought by prosecutors to determine whether the evidence provides sufficient probable cause to indict the person accused of the crime, they are said to act as a "shield" for the accused against overzealous prosecution.<sup>83</sup> The Supreme Court has

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<sup>80</sup> See, e.g., Ben Trachtenberg, *No, You "Stand Up": Why Prosecutors Should Stop Hiding Behind Grand Juries*, 80 MO. L. REV. 1099, 1100 (2015).

<sup>81</sup> See SARA SUN BEALE ET AL., GRAND LAW JURY & PRACTICE § 1:7, Westlaw (database updated Nov. 2015).

<sup>82</sup> See *id.*; 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, 362 (2000).

<sup>83</sup> See BEALE ET AL., *supra* note 81, § 1:7; Cassidy, *supra* note 82, at 362.

consistently viewed this shield function as the primary purpose of the grand jury.<sup>84</sup>

In modern practice, jurisdictions tend to split these functions between investigating grand juries and indicting grand juries.<sup>85</sup> Even in jurisdictions that no longer require indictment by grand jury and instead proceed by the prosecutor's information,<sup>86</sup> the investigating grand jury still plays an important role, particularly in investigating business crime, political corruption, and organized crime.<sup>87</sup> In such cases, the grand jury's expansive subpoena power, backed by its ability to invoke the court's contempt power against witnesses who refuse to testify, serves as a powerful investigative tool for the prosecution.<sup>88</sup> By contrast, an indicting grand jury does not itself investigate allegations of criminal activity, but instead weighs the evidence presented by the prosecution to determine whether there is sufficient evidentiary support to justify bringing charges against the accused.<sup>89</sup> In making this determination, the indicting grand jury is supposed to shield the accused from unjust

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<sup>84</sup> See, e.g., *United States v. Mandujano*, 425 U.S. 564, 571 (1976) (plurality opinion) (“[N]otwithstanding periodic criticism, . . . the grand jury continues to function as a barrier to reckless or unfounded charges.”); *United States v. Dionisio*, 410 U.S. 1, 17 (1973) (describing the grand jury’s “historic role” as being a “protective bulwark standing solidly between the ordinary citizen and the overzealous prosecutor”); *Wood v. Georgia*, 370 U.S. 375, 390 (1962) (“Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.”); see also Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 11–13 (2004) (describing Supreme Court rhetoric about the grand jury’s shield function).

<sup>85</sup> BEALE ET AL., *supra* note 81, § 1:7 (“In large federal districts, for example, there is usually one grand jury impaneled to perform the routine screening or indicting function, while another investigating grand jury hears cases requiring lengthy and complex investigations.”).

<sup>86</sup> In 1884, the Supreme Court held the Fifth Amendment’s Grand Jury Clause was not incorporated by the Fourteenth Amendment’s Due Process Clause, and thus did not apply to the states. *Hurtado v. California*, 110 U.S. 516 (1884). Today, only nineteen states require grand jury indictment for all felony cases. BEALE ET AL., *supra* note 81, § 1:7 n.2 (identifying indictment states as Alabama, Alaska, Delaware, Georgia, Kentucky, Maine, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, and West Virginia). Four jurisdictions require grand jury review only for capital or life imprisonment cases: Florida, Louisiana, Minnesota, and Rhode Island. *Id.* Roughly half the states proceed on charges brought by information after the prosecution presents its case to a judge at a preliminary hearing for a probable cause determination. *Id.* § 1:7 n.1.10 (identifying information states as Arizona, Arkansas, California, Colorado, Connecticut, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Vermont, Washington, Wisconsin, and Wyoming). Note that Missouri is an information state; meaning *McCulloch*’s decision to proceed by grand jury against Officer Wilson was in his discretion, not required by law. See *id.*

<sup>87</sup> BEALE ET AL., *supra* note 81, § 1:7.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

prosecution by screening out cases with insufficient factual support.<sup>90</sup> However, whether grand juries can effectively perform this shield function is arguable.

The principal criticism brought against the grand jury is that it can no longer serve this shield function, primarily due to the overwhelming control the prosecutor exerts over the proceedings.<sup>91</sup> Many charge that the level of control the prosecutor has over the proceedings allows the prosecutor to get whatever result she wants.<sup>92</sup> As discussed below, the prosecutor's influence over the grand jury, combined with the stark differences between grand jury process afforded police and civilian suspects, erode the appearance of justice.

## 2. *Role of the Prosecutor in the Grand Jury*

In most grand jury systems throughout the United States, the prosecutor plays a central, authoritative role in the indictment process. This high level of control allows prosecutors to achieve their desired outcome in most cases they present to a grand jury.<sup>93</sup> Prosecutors' discretion over whether to present a case before a grand jury most obviously demonstrates the level of control they have over the grand jury process. In the pre-indictment phase, prosecutors have complete discretion over deciding whether to pursue charges or to drop the case entirely.<sup>94</sup> Some view this initial charging stage as being indirectly screened by a grand jury: ideally, if a prosecutor thinks the evidence is insufficient to convince a grand jury to indict, she will decline to present the case to the grand jury.<sup>95</sup> A prosecutor's control over a criminal case is highest at this preliminary stage, but she does not relinquish much control once she decides to pursue indictment by grand jury.

Once a prosecutor decides to move forward with a criminal case and pursue indictment, the grand jury proceedings are under her control because modern grand jury practice allows her to frame the legal and factual elements

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<sup>90</sup> *Id.*

<sup>91</sup> See, e.g., William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174 (1973); Kuckes, *supra* note 84, at 26–27. *But cf.* Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 294 (1995) (arguing that the jurors themselves are to blame for ineffective shield function because they are non-lawyers being asked to answer the legal question of whether probable cause exists).

<sup>92</sup> See *supra* note 91 and accompanying text.

<sup>93</sup> See Andrew D. Leipold, *Prosecutorial Charging Practices and Grand Jury Screening: Some Empirical Observations*, in GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY 196–97 (Roger A. Fairfax ed., 2011).

<sup>94</sup> See *supra* note 91 and accompanying text.

<sup>95</sup> Leipold, *supra* note 91, at 278.

of the case. The prosecutor determines what charges to bring before the grand jury and which documents and witnesses to subpoena using the grand jury's broad subpoena powers.<sup>96</sup> Throughout the proceeding, the prosecutor is often the only lawyer in the room and serves as the lay jurors' only legal advisor.<sup>97</sup> Altogether, this authority allows the prosecutor to set and define the legal elements of any given case.

Certain procedural advantages enable the prosecutor to shape the factual elements of a case with little restriction. First, ordinary evidentiary rules do not apply to federal grand jury proceedings,<sup>98</sup> and only two of the nineteen states that require indictments for felony cases fully apply the rules of evidence to grand jury proceedings.<sup>99</sup> The absence of evidentiary rules means there is no restriction on hearsay evidence being presented to a grand jury, allowing a prosecutor to present her entire case using one witness, usually the lead investigator, to detail the relevant facts.<sup>100</sup>

Exculpatory evidence is usually not included in the prosecutor's presentation. Federal prosecutors have no legal obligation to present exculpatory evidence to a grand jury;<sup>101</sup> at the state level, some jurisdictions follow the federal rule, while others require disclosure of exculpatory evidence only in certain circumstances.<sup>102</sup> Naturally, no jurisdiction precludes the

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<sup>96</sup> See Kuckes, *supra* note 84, at 26–27.

<sup>97</sup> See *id.* at 30. At the federal level and in many states, the only time the prosecutor must leave is during the grand jury's deliberations, which begin when the prosecutor decides she has presented enough evidence. See FED. R. CRIM. P. 6(d); see also Kuckes, *supra* note 84, at 31 (2004). Hawaii is the only state that automatically provides the grand jury its own counsel. See HAW. CONST. art. I, § 11.

<sup>98</sup> See *United States v. Calandra*, 414 U.S. 338, 344–45 (1974) (holding that the grand jury's consideration of illegally obtained evidence does not invalidate the indictment); *Costello v. United States*, 350 U.S. 359, 364 (1956) (holding that applying the hearsay rule to grand jury proceedings “would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules”).

<sup>99</sup> See *Simmons*, *supra* note 18, at 23 (noting that only New York and Alaska require indictments for felony charges and fully apply the rules of evidence).

<sup>100</sup> See *Costello*, 350 U.S. at 363–64 (holding it is proper to present hearsay evidence to a federal grand jury); Kuckes, *supra* note 84, at 20; see also U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-11.232 (1997) (“As a general rule, it is proper to present hearsay to the grand jury.”).

<sup>101</sup> See *United States v. Williams*, 504 U.S. 36, 55 (1992) (holding that dismissal of an indictment for failure to disclose exculpatory evidence to a grand jury was not proper). Prosecutors may have a professional obligation to disclose exculpatory evidence, as recognized by the ABA Standards for Criminal Justice. See CRIMINAL JUSTICE PROSECUTION FUNCTION & DEF. FUNCTION STANDARDS § 3-3.6 (AM. BAR. ASS'N 1993) (“No prosecutor should knowingly fail to disclose to the grand jury evidence which tends to negate guilt or mitigate the offense.”). The United States Attorneys' Manual states the Department of Justice policy is to disclose “substantial evidence that directly negates the guilt” of the accused. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-11.233 (1997).

<sup>102</sup> See Sharon N. Humble, *Duty of Prosecutor to Present Exculpatory Evidence to State Grand Jury*, 49 A.L.R.5th 639 (1997) (listing cases).

presentation of exculpatory evidence to the grand jury, meaning a prosecutor seeking to avoid indictment can present such evidence. In sum, the prosecutor who wants to secure an indictment can and often does “present a barebones and extremely skewed version of the facts” to the grand jury.<sup>103</sup> Even if a prosecutor fails to achieve an indictment on the first go, in most states and at the federal level, the state is not precluded from re-presenting a case to a new grand jury.<sup>104</sup> These advantages allow the prosecutor to shape both the legal and factual elements of a case for the grand jury to ensure the desired outcome.

In most jurisdictions, the way a prosecutor chooses to shape a case before a grand jury is not subject to judicial review. These rules are consistent with the Supreme Court’s tendency to avoid judicial review of grand jury proceedings, effectively leaving the process in the hands of the prosecutors while ostensibly intending to put the process in the hands of the jurors themselves.<sup>105</sup> By contrast, in some jurisdictions such as New York, grand jury proceedings are subject to judicial review.<sup>106</sup> While such judicial review may make a prosecutor more likely to present a detailed case,<sup>107</sup> it seems unlikely to substantially shift the balance of control over the proceedings away from prosecutors.

At least in the eyes of the public, the limited statistical data regarding grand jury indictments supports the view that prosecutors will almost always get the outcome they want from a grand jury.<sup>108</sup> At the federal level, according to the Bureau of Justice Statistics, from October 1, 2011 through September 30, 2012 (the most recent dataset), U.S. attorneys investigated 196,109 criminal offenses and prosecuted 166,339 of those cases.<sup>109</sup> Of the 29,770 cases U.S. attorneys declined to prosecute, only fourteen were because of the return of a no true

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<sup>103</sup> Levine, *supra* note 28, at 759.

<sup>104</sup> See BEALE ET AL., *supra* note 83, § 8:6; see also Simmons, *supra* note 18, at 20 (noting that there are no restrictions on resubmission at the federal level, and only four states that require a grand jury indictment impose a restriction on resubmission: Alaska, Georgia, Pennsylvania, and New York).

<sup>105</sup> *Williams*, 504 U.S. at 47 (“[T]he grand jury is an institution separate from the courts, over whose functioning the courts do not preside.”); see also *id.* at 55–56 (Stevens, J., dissenting) (arguing that the result of the case is that “a federal court has no power to enforce the prosecutor’s obligation to protect the fundamental fairness of proceedings before the grand jury”).

<sup>106</sup> N.Y. CRIM. PROC. LAW §§ 210.30(2)–(3) (McKinney 2009).

<sup>107</sup> See Simmons, *supra* note 18, at 26.

<sup>108</sup> See Ben Casselman, *It’s Incredibly Rare for a Grand Jury to Do What Ferguson’s Just Did*, FIVETHIRTYEIGHT (Nov. 24, 2014, 9:30 PM), <http://fivethirtyeight.com/datalab/ferguson-michael-brown-indictment-darren-wilson/> (citing 2010 data compiled by the Bureau of Justice Statistics that federal grand juries declined to return indictments in only eleven out of 162,000 cases).

<sup>109</sup> See MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2012 - STATISTICAL TABLES 11–12 (2015).

bill.<sup>110</sup> Citing similar statistics from 2010, media observers reported a success rate of 99.99%.<sup>111</sup> There are few accurate statistical studies of state grand jury indictment rates, making it difficult to determine whether there is a comparable indictment rate at the state level.<sup>112</sup> Regardless, the message the public receives from these statistics and media interpretations of them is clear: prosecutors get the outcome they want from a grand jury proceeding almost every time.<sup>113</sup>

Considering the power of the prosecutor over the grand jury process, a non-indictment in a high-profile case raises the question of whether the prosecutor wanted an indictment in the first place. In the context of police prosecutions, non-indictments have led some to accuse the prosecutors of both bias and misuse of the grand jury as a means of insulation from public scrutiny.<sup>114</sup> Regardless of the accuracy of these accusations, when a grand jury returns no indictment, the level of control a prosecutor has over the grand jury process gives rise to the reasonable perception that the prosecutor has led the jurors, consciously or unconsciously, to vote against indictment. In the police-suspect context, such a perception seems even more reasonable when considering the numerous differences between grand jury proceedings for civilian and police-suspects.

### 3. *Comparing Grand Juries: Police vs. Civilian Suspects*

In terms of both outcomes and process, grand juries function very differently in cases against police-suspects than they do in cases against civilian suspects. These differences reinforce the perception that prosecutors are favorably biased toward the police, and they contribute to the public view that police officers can exercise deadly or excessive force with impunity.

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<sup>110</sup> *Id.* at 12. A grand jury returns a “no true bill” when it does not find enough evidence to indict the defendant.

<sup>111</sup> *See, e.g.,* Zachary A. Goldfarb, *The Single Chart that Shows that Federal Grand Juries Indict 99.99 Percent of the Time*, WASH. POST (Nov. 24, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/11/24/the-single-chart-that-shows-that-grand-juries-indict-99-99-percent-of-the-time/> (citing MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2010 - STATISTICAL TABLES (2013)).

<sup>112</sup> *See also* Simmons, *supra* note 18, at 35. Simmons analyzed New York grand jury data from 1999. He determined 8% is a “realistic number” for the percentage of felony cases resulting in grand jury dismissals or reductions to misdemeanors. *See id.* at 34.

<sup>113</sup> Some scholars consider these statistics with more nuanced interpretations. *See, e.g.,* Leipold, *supra* note 91, at 278 (noting that high indictment rates might result from prosecutor self-screening prior to any request for indictment); *see also* Leipold, *supra* note 93, at 196–97.

<sup>114</sup> *See* Trachtenberg, *supra* note 80, at 1100 (arguing McCulloch “abdicated the usual role of the prosecutor” to the grand jury). *But see* Frank O. Bowman III, *Vox Populi: Robert McCulloch, Ferguson, & the Roles of Prosecutors and Grand Juries in High-Profile Cases*, 80 MO. L. REV. 1111 (2015) (countering Trachtenberg’s argument).

The differences in outcomes are the most immediately apparent. As noted above, the high level of control prosecutors have over a grand jury proceeding combined with statistical and anecdotal evidence has led to the widely held view that a prosecutor can almost always obtain an indictment if she desires one. That the grand juries in three high-profile officer-involved fatality cases returned no indictment raised significant public outcry.<sup>115</sup>

The effects of these non-indictments in terms of the public's view of justice are exacerbated by the rarity of charges being pursued at all. The federal government has done a very poor job of keeping accurate track of officer-involved fatalities, although there are some signs of improvement.<sup>116</sup> To fill the recordkeeping gaps, media outlets such as the *Guardian* and the *Washington Post* have started projects to count the number of officer-involved fatalities using a number of techniques.<sup>117</sup> An analysis by the *Washington Post* found that out of the thousands of officer-involved shooting deaths between 2005 and 2015, only fifty-four officers were criminally charged.<sup>118</sup> Considering this low level of officer accountability, non-indictment by a grand jury can seem to the public like taking one step forward and two steps back.

Perhaps more troubling than the difference in outcomes is the difference in process employed to reach those outcomes. Prosecutors and statutes in some states offer far greater procedural protection for police-suspects.<sup>119</sup> For example, while civilian suspects have no right to hear the evidence presented to a grand jury, to be represented by counsel at a grand jury proceeding, or to testify at the grand jury proceeding, some states afford police officers all of these rights by statute.<sup>120</sup> In Georgia, until recently, the police officer's statement to the grand jury was immune from cross-examination.<sup>121</sup> The importance of the right of the accused police officer to stand before the grand jury considering criminal charges against him and testify to his side of the story should not be underestimated. For example, in a grand jury proceeding

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<sup>115</sup> See *supra* notes 1–4 and accompanying text.

<sup>116</sup> See Jon Swaine & Ciara McCarthy, *Killings by US Police Logged at Twice the Previous Rate Under New Federal Program*, *GUARDIAN* (Dec. 15, 2016, 5:00 PM), <https://www.theguardian.com/us-news/2016/dec/15/us-police-killings-department-of-justice-program>.

<sup>117</sup> See *The Counted*, *supra* note 7.

<sup>118</sup> Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, *WASH. POST* (Apr. 11, 2015), <http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/>. These numbers do not include non-shooting deaths. See *id.*

<sup>119</sup> See Levine, *supra* note 28, at 749.

<sup>120</sup> See, e.g., Brad Schrade, *Grand Jury Privilege Curtailed for Ga. Officers in Shooting Cases*, *ATLANTA J. CONST.* (Apr. 26, 2016, 4:34 PM), <http://www.myajc.com/news/grand-jury-privilege-curtailed-for-officers-shooting-cases/W3RYQj9l5ibJFHmVLRf3cN/>.

<sup>121</sup> See *id.*

against two police officers for the shooting death of an unarmed mother, two jurors hugged the police officers after they gave their emotional testimonies.<sup>122</sup>

But the primary difference in grand jury process afforded to police-suspects is the thoroughness of the proceedings. As Professor Kate Levine notes, “[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.”<sup>123</sup> In Ferguson, for example, McCulloch told the jurors the proceeding would be “like a trial.”<sup>124</sup> McCulloch followed through on that statement. He called more than sixty witnesses, including Officer Wilson himself, to testify before the grand jury; allowed jurors to compare that testimony with dozens of police interviews; and presented forensic and crime scene reports, photographs of the crime scene, and physical evidence, including Wilson’s car, gun, and clothing.<sup>125</sup> This level of thoroughness is rarely afforded civilian suspects.

Standing alone, these lengthy and involved proceedings are not inherently unfair. In fact, such detailed and thorough investigations should in theory help jurors reach more accurate conclusions. The appearance of unfairness arises when these grand jury proceedings are compared with those conducted for crimes alleged to have been committed by civilian-suspects. Ironically, in these cases against police-suspects, prosecutors institute the same procedural protections many advocates for grand jury reform say should be implemented for all criminal cases.<sup>126</sup> To be sure, local prosecutors who use the grand jury in this fashion against police-suspects might do so with good intentions. In high-profile cases, prosecutors might think a thorough investigation with the involvement of community members followed by the release of a report explaining the evidence will make it more likely for the public to accept the outcome. However, in light of the way prosecutors normally handle grand jury proceedings, the more expansive process afforded police-suspects looks like bias in action instead of an honest quest for an accurate outcome. This disparity suggests that prosecutors, who have almost total control over the grand jury process and normally obtain indictments at very high rates, are

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<sup>122</sup> Brad Schrade, *Did Caroline Small Have to Die?*, ATLANTA J. CONST., <http://investigations.myajc.com/caroline-small-shooting/> (last visited Sept. 20, 2017).

<sup>123</sup> See Levine, *supra* note 28, at 766.

<sup>124</sup> See *id.*

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

<sup>126</sup> See Simmons, *supra* note 18.

using the grand jury in police-suspect cases to insulate themselves from public dissatisfaction with the charging decision.

Replacing the local prosecutor with an independent special prosecutor would prevent this perception problem, primarily because an independent special prosecutor would have more incentive to exercise discretion in the pre-indictment stage. As described below, an independent special prosecutor would be viewed by the public and the police as less biased, meaning her decision to pursue or not to pursue charges would be viewed as more legitimate, especially if the investigation and reasoning behind that decision were made public. Freed from the constraints of pre-existing relationships with local law enforcement, the special prosecutor could pursue indictment in cases in which she truly thinks charges are warranted, removing any suspicion that she was only using the grand jury as a cover against public scrutiny. In essence, an independent special prosecutor would have authority to exercise her charging decision in cases involving police-suspects in the same way a local prosecutor uses it in cases involving civilian-suspects.

#### *D. Race and the Appearance of Justice*

The role of race in police brutality and criminal justice in the United States has completely undermined the appearance of justice in minority communities. Nationwide statistics and reports from individual communities reveal the scope of racial disparities that run through every level of the criminal justice system. That these communities have already lost confidence in the fairness of the legal system supports implementing policies that enhance the appearance of justice.

Nationally, criminal justice systems disparately impact minorities. Mass incarceration has had a disproportionate impact on black Americans. Despite representing 13.6% of the total population of the United States,<sup>127</sup> black Americans make up approximately 35.4% of the total prison population, numerically outnumbering the white prison population.<sup>128</sup> Sentencing disparities, particularly with capital punishment, further the perception of

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<sup>127</sup> SONYA RASTOGI ET AL., U.S. CENSUS BUREAU, 2010 CENSUS BRIEFS 3 tbl.1 (2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf>.

<sup>128</sup> E. ANN CARSON & ELIZABETH ANDERSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2015 6 tbl.3 (2016) (reporting that in 2015, out of a total prison population of 1,476,847, 523,000 prisoners were black, and 499,400 were white). There is a similar disparity in the population of inmates in local jails. TODD D. MINTON & ZHEN ZENG, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JAIL INMATES IN 2015 5 tbl.4 (2016) (reporting that at the end of 2015, 35.1% of jail inmates were black).

systemic racial bias in the criminal justice system.<sup>129</sup> In terms of policing, black Americans are significantly more likely than white Americans to be killed by police.<sup>130</sup>

The racial disparities these nationwide statistics show are even more acute in certain communities. The reports released by the Department of Justice evaluating the practices of the Ferguson and Baltimore police departments vividly illustrate racially discriminatory police practices at the local level and the damage these practices cause to community relations with police and legal authorities.<sup>131</sup> Both reports found that the police in these cities stopped, searched, and arrested black Americans in disproportionate numbers.<sup>132</sup> The reports also found substantial disparities in charges for misdemeanor offenses subject to higher degrees of police officer discretion, such as trespass or failure to obey an officer's orders.<sup>133</sup> As the Ferguson Report points out, "African Americans' views of [the police] are shaped not just by *what* [police] officers do, but by *how* they do it."<sup>134</sup> Both reports point out that the interactions between police and black Americans are often characterized by aggression.<sup>135</sup>

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<sup>129</sup> See David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411 (2004); see also *McCleskey v. Kemp*, 481 U.S. 279 (1987). In *McCleskey*, an inmate on death row in Georgia sought to overturn his sentence based on a statistical study showing black defendants convicted of killing white victims were substantially more likely to receive the death sentence. *Id.* The Court affirmed the defendant's sentence because he could not show that the alleged discrimination impacted him specifically. *Id.* at 297–99.

<sup>130</sup> See *The Counted*, *supra* note 7 (showing that in 2016, 6.66 black Americans per million were killed by police while only 2.9 white Americans per million were killed by police). It should also be noted that Native Americans are even more likely than black Americans to be killed by police. *Id.*; see also Elise Hansen, *Native Americans: The Forgotten Minority in Police Shootings*, CNN (Nov. 13, 2017, 2:51 PM), <http://www.cnn.com/2017/11/10/us/native-lives-matter/index.html>.

<sup>131</sup> See CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 47–73 (2016) [hereinafter BALTIMORE REPORT]; CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 62–88 (2015) [hereinafter FERGUSON REPORT].

<sup>132</sup> See BALTIMORE REPORT, *supra* note 131, at 63–64; FERGUSON REPORT, *supra* note 131, at 64–67 ("Upon accounting for differences in [non-race-based] variables, African Americans remained 2.07 times more likely to be searched; 2.00 times more likely to receive a citation; and 2.37 times more likely to be arrested than other stopped individuals.").

<sup>133</sup> See BALTIMORE REPORT, *supra* note 131, at 55 ("Although they make up only 63 percent of Baltimore's population, African Americans accounted for: 87 percent of the 3,400 charges for resisting arrest; 89 percent of 1,350 charges for making a false statement to an officer; 84 percent of the 4,000 charges for failing to obey an order; 86 percent of the more than 1,000 charges for hindering or obstruction; 83 percent of the roughly 6,500 arrests for disorderly conduct; and 88 percent of the nearly 3,500 arrests for trespassing on posted property."); FERGUSON REPORT, *supra* note 131, at 67 ("While African Americans make up 67% of Ferguson's population, they make up 95% of Manner of Walking in Roadway charges; 94% of Failure to Comply charges; 92% of Resisting Arrest charges; 92% of Peace Disturbance charges; and 89% of Failure to Obey charges.").

<sup>134</sup> FERGUSON REPORT, *supra* note 131, at 79.

<sup>135</sup> See BALTIMORE REPORT, *supra* note 131, at 157; FERGUSON REPORT, *supra* note 131, at 79–88.

This discriminatory treatment has led to a “disconnect and distrust”<sup>136</sup> between the black communities and the police in both cities.<sup>137</sup> The Baltimore Report states flatly, “The relationship between the Baltimore Police Department and many of the communities it serves is broken.”<sup>138</sup> Allowing local prosecutors to handle cases involving police-suspects causes further damage to these communities’ perception that the justice system is fair.

Putting all these pieces together reveals a portrait of injustice. As Professor Levine writes, “[T]he racial injustice of our criminal law crystalizes in the imagery of white officers escaping judgment for the killing of black victims.”<sup>139</sup> Whether this imagery depicts actual or intentional discrimination is irrelevant. What matters is the appearance of this imagery in the minds of the people who have been disproportionately impacted by the criminal justice system. Any step toward making the process by which police-suspects are prosecuted appear more just could go a long way toward dispelling that perception. This Comment’s proposal represents such a step.

Considering the complete disconnect between police and minority communities in cities like Ferguson and Baltimore, it might seem that merely replacing the local prosecutor would do little if anything to rehabilitate those communities’ perceptions of the justice system’s fairness. Obviously, this Comment’s proposal will do little to address the disparate treatment of minorities by the criminal justice system, but it is a step in the right direction, and one that is easier and quicker to implement than the considerable systemic and societal reforms necessary to fully address these issues.

## II. APPOINTING THE SPECIAL PROSECUTOR

Part I demonstrates that local prosecutors ought to be presumptively disqualified from prosecuting cases involving police-suspects. This conclusion leads to the question: If not local prosecutors, then who should prosecute the police? This Part proposes a framework for appointing an independent special prosecutor designed to address the apparent conflict of interest described above.<sup>140</sup> Addressing this apparent conflict will enhance the appearance of

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<sup>136</sup> FERGUSON REPORT, *supra* note 131, at 79.

<sup>137</sup> BALTIMORE REPORT, *supra* note 131, at 157; FERGUSON REPORT, *supra* note 131, at 79.

<sup>138</sup> BALTIMORE REPORT, *supra* note 131, at 157.

<sup>139</sup> Levine, *supra* note 33, at 1480–81.

<sup>140</sup> *See supra* Section II.B.

justice and bolster the public's trust in the legitimacy of the criminal justice system.<sup>141</sup>

To summarize the proposed process for appointing a special prosecutor: certain conditions (i.e., officer-involved fatality, the use of force resulting in serious bodily injury, or both) trigger an appointment process involving the random selection of the special prosecutor from a list of qualified attorneys. The qualifications to be placed on this list will be set by statute, and the list will be curated either by the state attorney general or a civilian review board.

It is important to note the narrow scope of this proposed framework. As in criminal cases involving civilian suspects, the special prosecutor would have to work with an investigative agency. Similar issues with the appearance of justice arise when the investigating agency is the same agency employing the police officer under investigation.<sup>142</sup> This Comment's proposal does not address what this investigative agency should be, but it assumes an independent investigative body will be available to assist the special prosecutor, who will supervise the investigation, decide what charges to present to the grand jury, and prosecute the case.

The ideal process to appoint special prosecutors will maximize three factors: impartiality, efficiency, and accountability. Impartiality in this context requires insulation from the actual and apparent conflicts local prosecutors face when prosecuting police-defendants. Should the special prosecutor decide charges are appropriate, then impartiality calls for special prosecutors who will pursue those charges vigorously. At the same time, maximizing impartiality protects police from overzealous special prosecutors who would negatively impact efficiency, fairness, and accuracy.

Determination of a process's efficiency is based on its costs to implement, both financial and political. Accountability addresses the fact that special prosecutors represent the same constituencies as the local prosecutors they replace, including the local community. Maximizing accountability will also help protect from the overzealous special prosecutor. Most importantly, it should be clear to the public that special prosecutors are impartial, experienced, and accountable.

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<sup>141</sup> Furthermore, if the apparent conflict is an actual conflict for some local prosecutors, leading them to allow police officers to escape judgment for what would otherwise be criminal conduct, this solution would enhance police accountability.

<sup>142</sup> See AMARI L. HAMMONDS ET AL., STANFORD CRIMINAL JUSTICE CTR., AT ARM'S LENGTH: IMPROVING CRIMINAL INVESTIGATIONS OF POLICE SHOOTINGS 7–13 (2016).

### A. *Narrowing Alternatives*

Before delving into who should prosecute the police, it is worth explaining who should *not* prosecute the police. Part I explained why local prosecutors fall into the latter category. This section considers two alternative replacements: (1) another prosecutor, either at the local, state, or federal level and (2) civilian review boards. Neither of these options is best suited to balance the appearance of justice with cost, efficiency, and accountability concerns.

#### 1. *Other Prosecutors*

The first pool of candidates to consider is prosecutors from other jurisdictions on the local, state, and federal levels. There are three options from this pool: (1) a district attorney from a different county in the same state, (2) the state Attorney General's office, or (3) a federal prosecutor. Each of these options carries a different set of pros and cons.

Removing cases involving police-suspects to a different district attorney's office is perhaps the most efficient option, but this efficiency comes at a cost to accountability and the appearance of impartiality. This option would be efficient first because a different district attorney in the same state would already be sufficiently familiar with state's criminal laws to lead police prosecution without the need for extra training.<sup>143</sup> Second, many jurisdictions already address conflicts with systems to substitute the conflicted district attorney's office with a different county's district attorney.<sup>144</sup> The only political change needed to effect this solution would therefore be a rule presumptively disqualifying local prosecutors from handling cases against police-suspects.<sup>145</sup> Third, because this solution would fold neatly into the duties and responsibilities of the replacement prosecutors, the administrative costs of handling such a substitution would be lower than any other solution.<sup>146</sup>

While this solution's maximization of efficiency might make it "the most politically palatable,"<sup>147</sup> it comes at a cost to impartiality and accountability. First, this solution would do little to enhance the appearance of fairness and impartiality. A district attorney in a nearby county would not look very

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<sup>143</sup> See Levine, *supra* note 33, at 1488.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> See *id.*

<sup>147</sup> *Id.*

different to the public than the prosecutor she replaces. She would still be an “insider” to the criminal justice system occupying the same position as the first district attorney.<sup>148</sup> To the public, it might look as if the first district attorney simply phoned a friend who would afford the same preferential treatment to the police-defendant that she would have done, had the law not required her to transfer the case. She might still regularly work with the same police she would be prosecuting and would still be subjected to the same systemic political pressures and tactics of police unions.<sup>149</sup> This perception problem would likely persist even if the replacement district attorney’s home office were across the state because she would still be an insider to the criminal justice system. And the further away the replacement district attorney’s home office from the jurisdiction, the less accountability there is likely to be.

Second, even when transferring from a nearby county, a district attorney from a different county would not be accountable to the jurisdiction she temporarily transfers into. If the community is dissatisfied with the outcome reached or process the replacement employs, it has no recourse against the replacement at the voting booths as it might with its own district attorney.

Another alternative prosecutor would be the state attorney general’s office. With this solution, cases involving police-suspects would be elevated to the state level by automatically transferring them to the state attorney general’s office. While this might be a better option than a neighboring district attorney’s office, it still suffers from questions of impartiality because state attorney generals are most often appointed by the governor, who would at least appear to be subject to the same systemic political pressures as the local district attorneys.

States could also decide to refer all cases in which police are suspects to federal prosecutors. As appointed—not elected—officials, the political insulation of federal prosecutors means this option would go a long way toward promoting the appearance of impartiality, but this solution carries with it significant problems of accountability. Moreover, it would raise serious federalism concerns.<sup>150</sup>

The insider–outsider problem is a common flaw for all three options discussed above. This problem hampers the potential for these options to improve the public’s perception of justice. All three types of prosecutors come

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<sup>148</sup> See *supra* notes 73–74 and accompanying text.

<sup>149</sup> See Levine, *supra* note 34, at 1488.

<sup>150</sup> See Jacobi, *supra* note 74, at 815.

from what appears to be the same criminal justice system, carrying with them the same biases and racial prejudices as any other prosecutor.

## 2. *Civilian Review Boards*

The insider problem could be avoided by instead using an “outsider prosecution solution,” in which prosecutors are removed from police-defendant cases altogether.<sup>151</sup> One type of outsider could be a civilian review board (CRB), consisting of qualified members with long-term appointments. This CRB would investigate cases of police misconduct, make charging decisions, and appoint an independent special prosecutor to adjudicate the case. This is an attractive option, especially because it features community involvement, but its flaws and potential for failure outweigh these justifications.

The CRB solution comes with numerous problems. CRBs often lack investigative experience, and providing the training necessary to give the required investigative skills would be costly and time consuming.<sup>152</sup> CRBs also needlessly complicate the investigation and charging process, often resulting in long delays.<sup>153</sup> Baltimore provides an object lesson in potential failures of a CRB. Baltimore’s CRB is supposed to check police misconduct via an investigation and review process.<sup>154</sup> However, the Department of Justice concluded the CRB is ineffective because it lacks resources and authority.<sup>155</sup> These issues rendered the CRB wholly ineffective at addressing complaints.<sup>156</sup> These high costs and the high potential for failure militate against sole reliance on CRBs.

### B. *Framework for Appointing Special Prosecutors*

This section proposes a framework designed to address the apparent conflict problem while balancing costs and efficiency. First, it establishes which conditions should trigger the appointment process. Next, it explains where the independent special prosecutors would be drawn from, and then describes their powers and responsibilities. It ends by suggesting methods for funding the program.

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<sup>151</sup> Levine, *supra* note 33, at 1492.

<sup>152</sup> See HAMMONDS ET AL., *supra* note 142, at 13–15.

<sup>153</sup> *Id.*

<sup>154</sup> BALTIMORE REPORT, *supra* note 131, at 148.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

### 1. *What Conditions Trigger Appointment?*

Police misconduct comes in many different flavors, and many of the more minor infractions often go underreported, so the conditions triggering the appointment process should be limited to ensure efficiency. If the goal of appointing an independent special prosecutor is to promote the appearance of accountability for officers who engage in misconduct that raises the public's concern and outcry, then the circumstances triggering the appointment process should be determined based primarily on which types of police misconduct most concern the public.

At the broadest level, only cases involving police use of force should trigger the appointment process. While police perjury and other forms of nonviolent misconduct are prevalent,<sup>157</sup> the perception that police can use force with impunity is a much more salient issue to the public. At the very least, officer-involved fatalities should automatically trigger the appointment process. Federal law already requires states to report officer-involved fatalities if they wish to avoid losing federal funds for law enforcement,<sup>158</sup> so this method would not need to rely on a complaints process to know when to initiate an investigation and appoint a special prosecutor. However, cases of excessive force raise similar concerns as officer-involved fatalities, even if to a lesser extent. The next question to decide is which forms of police use of force should trigger the appointment process.

There is a broad range of injuries between a suspect's broken wrist and an officer-involved fatality. Additional factual circumstances, such as whether the injured party was armed, may be considered as well. Another consideration is limiting the scope of circumstances triggering appointment based on the actions of the person injured by police action. For example, last year, New York Governor Andrew Cuomo issued an executive order appointing the New York State Attorney General as the special prosecutor to investigate and prosecute cases in which a police officer kills an unarmed civilian.<sup>159</sup> The order also applies to cases in which there is a question of whether the civilian was armed.<sup>160</sup> The armed status of the civilian serves as an effective filter to allow focus on the most alarming cases in which police kill unarmed citizens, but it also leaves room for criticism for being underinclusive.

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<sup>157</sup> See *supra* note 73 and accompanying text.

<sup>158</sup> See 42 U.S.C. § 13727 (2012).

<sup>159</sup> See *supra* notes 10–11 and accompanying text.

<sup>160</sup> See N.Y. Exec. Order No. 147, *supra* note 11.

Ultimately, the most effective criteria for triggering the appointment process will vary from state to state depending on the state's size and specific needs.

## 2. *Logistics of Appointment*

Administration of the appointment process should primarily be the responsibility of the state attorney general's office. To insulate this process from the political process and ensure speedy selections, special prosecutors should be randomly selected from a list of qualified attorneys. The selection criteria should be set out by the legislation instituting the process. At a minimum, these qualifications should require extensive criminal law trial experience. This list could be curated by the attorney general or even a CRB.

The state attorney general could be responsible for curation of the list and determination of an attorney's inclusion on it. While an attorney general might not be completely insulated from the political process and attendant pressures, her role as a curator of a list with admission criteria set by legislation, combined with the special prosecutor's independence once selected, are sufficient guarantees of impartiality.

Alternatively, a CRB could fill the role of curator. Limiting the CRB's role to this narrowly circumscribed task should help avoid the problems CRBs often have.<sup>161</sup> This alternative would have the added benefit of increased community involvement in ensuring impartiality of special prosecutors. Either alternative could accomplish the goal of enhancing the appearance of justice; however, of the two, the attorney general would be more cost-effective.

## 3. *Powers, Responsibilities, and Oversight*

If independent special prosecutors are appointed in the pre-charge stage, they should have all the powers and authority of the local prosecutors they replace, including discretion over whether to pursue charges at all. Similarly, if a CRB is responsible for making charging decisions and appointing special prosecutors when it determines charges are warranted, it should have the corresponding powers and authority up to the point it makes that appointment. To prevent the problem of overzealous prosecution, the judiciary or a CRB<sup>162</sup> should have a supervisory role over the special prosecutor by reviewing complaints from defendants of prosecutorial misconduct. While this oversight

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<sup>161</sup> See *supra* Section II.A.3.

<sup>162</sup> But see *supra* Section II.A.2.

represents a departure from the usual treatment of prosecutors' discretionary decisions, it is important to maintain the perception that these prosecutors are neutral and abide by extrinsic standards in making these decisions.

Special prosecutors handling police cases also have significant responsibilities in ensuring the public understands and accepts charging decisions and the reasoning behind grand juries' decisions on indictment. To that end, for cases in which the special prosecutor decides charges are not warranted against the police-suspect, she should publish two separate reports: (1) a comprehensive and thorough account of the investigation, legal analysis, and any other factors that determined the charging decision and (2) a short-form version of the comprehensive report designed to be read and understood by the general public. Transcripts of the grand jury proceedings should also be public, and summaries of the proceedings should be produced and made available to the public.

#### CONCLUSION

Ensuring public confidence in the fairness of the justice system requires constant efforts to readjust to respond to new challenges. Because cell phone videos and social media have thrust police behavior into the public eye, it is more important than ever to ensure that police accused of criminal misconduct in the line of duty are treated by a process that appears fair. The framework this Comment proposes will increase the sense of procedural justice by treating prosecutors as quasi-judicial decision makers whose impartiality and trustworthiness must be apparent. The framework addresses impartiality by removing the apparent incentives local prosecutors have to be lenient or overly harsh on police-suspects. It ensures the appearance of trustworthiness via its vetting process for the list of special prosecutors and its transparency and oversight requirements. This framework would thus replace local prosecutors, with their apparent conflicts and opaque decision-making processes, with decision makers who appear neutral and trustworthy.

The use of an independent special prosecutor in these cases is not to ensure police officers are charged more often. Rather, it creates a process that will increase the public's acceptance of the substantive outcomes in these cases, whether the outcome is non-indictment or conviction. The increased chance of public acceptance creates space to allow the actors in the criminal justice system to work toward achieving the correct substantive outcome without their judgment being unduly influenced by external pressures from the public and the police.

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