

2017

Who Watches the Watchmen? How Prosecutors Fail to Protect Citizens from Police Violence

Joshua Hegarty

Follow this and additional works at: <http://digitalcommons.hamline.edu/jplp>

Recommended Citation

Hegarty, Joshua (2017) "Who Watches the Watchmen? How Prosecutors Fail to Protect Citizens from Police Violence," *Journal of Public Law and Policy*: Vol. 37: Iss. 1, Article 6.

Available at: <http://digitalcommons.hamline.edu/jplp/vol37/iss1/6>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Hamline. It has been accepted for inclusion in *Journal of Public Law and Policy* by an authorized editor of DigitalCommons@Hamline. For more information, please contact digitalcommons@hamline.edu.

Mitchell Hamline Law Journal of Public Policy and Practice

Volume 37 | Issue 1

Article 6

2016

Who Watches the Watchmen? How Prosecutors Fail to Protect Citizens from Police Violence

Joshua Hegarty

Mitchell Hamline School of Law

Follow this and additional works at: <http://digitalcommons.hamline.edu/jplp>

Part of the [International Law Commons](#), [Legal Ethics and Professional Responsibility Commons](#), and the [Sexuality and the Law Commons](#).

Recommended Citation

Hegarty, Joshua (2016) "Who Watches the Watchmen? How Prosecutors Fail to Protect Citizens from Police Violence," *Mitchell Hamline Law Journal of Public Policy and Practice*: Vol. 37: Iss. 1, Article 6.

Available at: <http://digitalcommons.hamline.edu/jplp/vol36/iss1/6>

This article is brought to you for free and open access by DigitalCommons@Hamline. It has been accepted for inclusion in the Mitchell Hamline Law Journal of Public Policy and Practice by an authorized administrator of DigitalCommons@Hamline. For more information, please contact Benjamin.Lacy@mitchellhamline.edu.

WHO WATCHES THE WATCHMEN? HOW PROSECUTORS FAIL TO PROTECT CITIZENS FROM POLICE VIOLENCE

Joshua Hegarty

I. INTRODUCTION

Prosecutors are arguably the most powerful agents of the criminal justice system. It is not an uncommon sentiment expressed within the legal community, whether for law students, practicing attorneys, and former prosecutors, that it is a position for attorneys who play to win. Prosecutors often do win, but in large part, it is because their discretion allows them to set the rules.

While judges typically are afforded discretion in sentencing, their hands can be, and often are, bound by mandatory sentencing legislation. Police officers have similarly been granted broad discretion under 4th Amendment jurisprudence, however, this discretion can be tempered by prosecutors, with their choices on who to charge, for what crimes, and in the event of trial, what evidence to present. Prosecutors gain their power from their broad discretion, specifically with respect to who to charge with crimes. While prosecutorial discretion is a useful and very important tool, it is so broad as to open the door for prosecutors to act against the public good, whether through biased, discriminatory, or political exercise of their discretion. Legal attacks levied against prosecutors on the basis of discriminatory prosecution have largely resulted in further shielding of prosecutors and creating incredibly high standards of proof to show misconduct.

The likelihood of political decisions is especially apparent when citizens accuse police officers of crimes and when citizens are killed by police officers, or

otherwise wind up dead in police custody. In nearly all jurisdictions in the United States, chief prosecutors are elected officials.¹ As such, all of their prosecutorial decisions, along with the general policies imposed upon the prosecutors working beneath them, have some basis in politicizing, as there are certainly instances where the public good may be different than what the public perceives to be good. When police officers are accused of crimes, this problem is exasperated. Prosecutors rely upon the cooperation of police departments to do their job and the voting public tends to respect and believe the police. Short of overwhelmingly clear evidence of unwarranted violence by a police officer, even charging a police officer with a crime may have tremendous political backlash for a prosecutor.

In the past, events of police violence were more easily brushed off as intermittent, rather than epidemic. But because of new media and new technology, it is clear that citizens are killed by police officers at alarming rates across the country despite the fact that on the job police deaths appear to be on the decline. Even more alarming is the lack of indictments against those police officers, even in circumstances when unarmed people are handled with lethal force. Even when officers are indicted, they are rarely convicted, and when convicted, significantly less likely than the general population to spend time incarcerated.

Whatever the reason for this failure to indict, it sends a message to our police officers in that their power is not being restricted and that they are allowed to use lethal force when non-lethal force, or even no force at all, might suffice.

¹ This is not the case for Federal Prosecutors, as they are appointed by the President and confirmed by the Senate. Amongst the states, only Alaska, Connecticut, and New Jersey select their chief prosecutors through gubernatorial appointment. In all other states, the chief prosecutor, whether known as the “District Attorney,” “County Attorney,” or some other title, is elected by popular ballot.

America's prosecutors are clearly not even attempting to hold police officers accountable for lives of the people that they kill and do not even appear to pretend that they are doing so. Because of this, we need to implement a system by which independent offices, not dependent upon police cooperation, and not subject to replacement by public opinion, would be tasked with investigating and prosecuting police officers accused of crimes.

II. THE VALUE OF PROSECUTORIAL DISCRETION

Discretion is the chief tool prosecutors use in exercising their duty to seek justice as it allows prosecutors to act with the special insight granted by their position. In fact, despite the windows it opens for abuse of the justice system, prosecutorial discretion is necessary for the criminal justice system to function at all, for several reasons. First, while sentencing guidelines and criminal statutes do not always allow for circumstances to mitigate a perpetrator's sentence when appropriate, a prosecutor can always elect to forgo charges.² This allows, although does not require, the justice system to treat defendants as individuals in ways that are not always otherwise available. Some would argue that prosecutors can, and should, be among the chief agents in reforming the criminal justice system, specifically because of the powers afforded by discretion.³ The possibility of over-criminalization, that is lawmakers crafting criminal statutes that either criminalize behavior that does not harm society, or otherwise using terms that create overly broad prohibitions, requires an intermediary to prevent the waste of

² Prosecutorial Misconduct § 4:3 (2d ed.)

³ See generally K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 Geo. J. Legal Ethics 285 (2014).

public resources in enforcing bad laws.⁴ Prosecutorial discretion is the only available tool in our criminal justice system that can serve this role. But ultimately, even if these reasons failed to justify prosecutorial discretion, it would still be a necessary tool purely on the basis of the sheer volume of crimes that are committed weighed against the actual, and limited, amount of resources that can be devoted to law enforcement.⁵ Governments have limited budgets, and finite numbers of prosecutors and judges. To remove prosecutorial discretion completely would have to require that all people arrested or suspected of crimes must be charged, regardless of factors such as the social harms resulting from the alleged offense or the amount and nature of evidence that could support a conviction. Without an agent of government deciding which investigations are worth carrying out, which charges to consider, and what parties to haul into court, the criminal justice system would grind to a halt. Abolishing prosecutorial discretion, therefore, would be entirely unworkable.

III. THE COSTS OF DISCRETION⁶

While discretion does have clear benefits for the justice system, it has very real costs as well. A primary concern is that prosecutors use their discretion in racially discriminatory ways, and even a cursory glance at the differences in prison populations between people of color and white people justifies this

⁴ Prosecutorial Misconduct § 4:3 (2d ed.)

⁵ Prosecutorial Misconduct § 4:3 (2d ed.)

⁶ A major area of debate in relation to prosecutorial discretion is the use of plea bargaining as it pertains to issues of procedural fairness and the likelihood of innocent people pleading guilty in order to avoid being found guilty through a potentially unfair trial. There is a considerable body of scholarship on the topic. Plea bargaining, however, will be largely ignored here, as this Article is concerned chiefly with charging discretion. When no one is charged, plea bargaining does not become a relevant issue.

concern.⁷ Even more concerning is how willing the Supreme Court has been in protecting prosecutors from claims of discriminatory prosecution, in the process protecting even further the ability of prosecutors to avoid being scrutinized for discretionary charges that are not related to a protected status of the charged party.

In *McCleskey v. Kemp*, the Supreme Court ruled that the results of the Baldus Study could not support a finding that any specific defendant was discriminated against in sentencing.⁸ The study showed a high correlation existed within the state of Georgia between the races of criminal defendants and their victims, and the likelihood of a defendant being convicted and sentenced to death. The findings suggested that racial discrimination in prosecution and sentencing had led to a disproportionate amount of black defendants being sentenced to death, and even more so when accused of killing white people. This decision is most notably remembered as establishing that racial discrimination within the justice system must be established by very specific evidence, and that is why it can be found in Criminal Law and Constitutional Law textbooks. However, it also stands for the, potentially equally important, proposition that judicial and prosecutorial discretion are “firmly entrenched in American law,” and, as such, “are final and unreviewable.”⁹ There is simply no room within the justice system for any party to review the decisions of a prosecutor to charge anyone with a

⁷ It demands noting that while this Article is focused on police misconduct and violence, it is not written as an attempt to explore deeper racial biases in the American justice system, and as such is written in what amounts to racially neutral language. This is not, by any means, an attempt to ignore that police violence and other misconduct is suffered in disproportionate amounts by people of color. The issue of reducing police violence is, to this author’s mind, one of the very few racialized problems in the justice system that may be solvable through racially neutral solutions. For a very full examination of systematic racism and biases in the criminal justice system, see Michelle Alexander’s *The New Jim Crow*.

⁸ 481 U.S. 279, (1987)

⁹ *McCleskey v. Kemp*, 481 U.S. 279, 311-12, (1987)

crime unless that review is based upon claims of unlawful discrimination. The corollary goes unsaid: there is nothing that can be done when a prosecutor fails to bring charges despite the arguable existence of probable cause. This is the problem inherent with the ways that prosecutors treat police officers; there just is no recourse to seek justice for the families of those killed by police officers, except for trying to convince a prosecutor to change his mind. While political pressure, in theory, could lead to such a change in opinion, it is not as if elections happen on demand. The more likely result of political pressure to bring charges is that grand jury will be called. This poses a very specific problem that will be explained in greater detail below.

In 1996, the Supreme Court elected to further shield prosecutorial discretion in *United States v. Armstrong*, where it held that discovery that could show discrimination in charging can only be obtained by, essentially, proving the very discrimination that the discovery would show.¹⁰ The prosecutor in *Armstrong* was accused of racially discriminating in charging decisions, and, so, the defendant attempted to gain discovery to show that the prosecutor could have charged similarly situated people of different races, but elected not to do so. While such a standard to prevail appears reasonable and well in line with *McCleskey*, the problem is that the *McCleskey* standard has become the same one to be applied for discovery of the very documents that most likely satisfy the burden of proof. That is, in order to obtain discovery of documents to help plead a case of racial discrimination in prosecution, very specific evidence of actual racial discrimination in the very prosecution being targeted must be provided. This

¹⁰ 517 U.S. 456, (1996)

decision effectively allows prosecutors to discriminate in charging because of the high impossibility of proving such discrimination. But, it also serves to heighten the protections afforded to the decisions of prosecutors. Because discovery is so heavily guarded, and because there are no classes afforded special protection against discrimination related to whether or not a person is a police officer, there is nothing to prevent a prosecutor from simply deciding to never charge police officers with crimes.

These decisions support the notion that prosecutors have essentially unfettered discretion. Their decisions are shielded from review and can be made for any reason, so long as they cannot be shown to be discrimination based upon a legally protected status of a charged defendant. While raising obvious issues about racial discrimination in prosecution, these protections also allow for other arbitrary, personal, professional, or political reasons to factor into the decisions of prosecutors. With no oversight, and no requirements to charge any particular individuals, prosecutors have been allowed to do as they please, without penalty, except under egregious circumstances.

When charges are shown to have an illegal and discriminatory basis, they can be thrown out.¹¹ While showing such discrimination proves to be a considerable burden, the remedy of having charges dropped reflects a clear legal policy: it is a recognition that unlawful discrimination is so harmful that the justice system would rather dismiss charges when probable cause might exist, then to allow discrimination to affect charging decisions.

¹¹ Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 *Fordham L. Rev.* 1511, 1518 (2000)

Ethical guidelines do, sometimes, exist, which mean to control the ways in which prosecutors exercise their discretion. However, many, such as those provided by the Department of Justice, and are expected to apply to federal prosecutors, are exactly that, guidelines. They are not enforceable by law.¹²

The issues commonly raised in discussions about prosecutorial discretion tend to focus on discrimination related to defendants who have been charged with a crime. What is not often discussed is the issue of a failure to bring charges. Only legislative action could correct this. Of course, for the reasons explained above, prosecutors could not be required to charge all persons for whom probable cause existed.¹³ The result would simply exhaust government resources, or else be ignored by prosecutors as overzealous legislation. To be enforceable, rules regulating mandatory prosecution would have to differ from the ethical guidelines that currently exist, and in so doing create either a private right of action or else a mandatory review of decisions not charge from an independent source. Either type of enforcement would be unworkable. A private right of action would either grant unlimited standing, such that any person could petition the government to bring charges against any person, or else it would have to limit standing in ways that would be inherently arbitrary, that would, at times, grant no person standing. Independent review would be an administrative quagmire, as it would necessarily require prosecutors to conduct investigation into all potential crimes, and then to present their findings before independent review boards. It is certainly a miscarriage of justice for a person to escape criminal charges solely because the

¹² Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 *Fordham L. Rev.* 1511, 1512 (2000)

¹³ *Prosecutorial Misconduct* § 4:3 (2d ed.)

relevant prosecutor's office declines to charge that person. Yet, the very nature, and necessity, of discretion precludes the possibility of mandatory charging.

IV. THE SPECIAL PROBLEM OF GRAND JURIES¹⁴

Grand juries pose a particularly interesting, and political, role for prosecutors. While the 5th Amendment requires the use of grand juries in the process of prosecution for federal crimes, in State jurisdictions, procedures can vary. In most jurisdictions, prosecutors have the option of either bringing a case before a grand jury or before a judge in a preliminary hearing.¹⁵ The purpose of either is the same, to determine if probable cause exists to support charges against an accused person. In the 2009-2010 year, federal prosecutors attempted to prosecute more than 150,000 defendants, and in only 11 of these cases did a grand jury fail to indict the accused.¹⁶ This is not a coincidence. In a very real sense, a grand jury's job is to indict, and return a "true bill," which a prosecutor uses to move forward with charging. Prosecutors have discretion in deciding what cases to present before a grand jury, and will typically decline to do so unless they expect an indictment.

While a prosecutor is not necessarily bound by the decision of a grand jury, and can elect to not charge a person who has been indicted, or can attempt to prove probable cause in a hearing after a grand jury does not indict, the grand jury

¹⁴ While grand juries predate the Revolutionary War, and are mentioned in the 5th Amendment, they are still a misunderstood process, often omitted from representations of the justice system in popular media. While they do vary amongst jurisdictions, the process typically involves a prosecutor presenting evidence and witnesses before a group of citizens who are then tasked with answering the question of whether or not a crime may have been committed and whether or not the accused may have committed the crime in question. A unanimous decision is not required and the standard is far below the "beyond a reasonable doubt" standard applied in criminal trials.

¹⁵ *How Does a Grand Jury Work?*, FindLaw, <http://criminal.findlaw.com/criminal-procedure/how-does-a-grand-jury-work.html>

¹⁶ Department of Justice Statistics, <http://www.bjs.gov/content/pub/pdf/fjs10st.pdf>

process, in effect, takes the charging decision away from the prosecutor.¹⁷ This process allows a prosecutor to take advantage of the likely outcomes of a grand jury in order to bring charges or fail to bring charges in a way that can appear blameless to the public. Because information regarding indictment rates with grand juries is fairly ascertainable, prosecutors can essentially use the grand jury process to exercise their charging discretion in a way that serves to insulate them politically. The process allows prosecutors to not look foolish in bringing charges after a grand jury votes to indict on what might be flimsy evidence, while also allowing a prosecutor to look competent and faultless when what might be substantial evidence fails to sway a grand jury.

The grand jury process has been criticized by some as unnecessary and outdated, especially given the fact that they are no longer used in England. Some would also consider it an infringement upon the rights of the accused, as proceedings are conducted in secret, and the accused has right to confront witnesses or otherwise inform the jurors of exculpatory evidence.¹⁸ In many proceedings, the only representatives of the justice system present are prosecutors. There is no judge, and so, instructions of law are given by the very prosecutors asking for an indictment.¹⁹ Jurors are allowed to consider evidence that would not be admissible at trial, including hearsay, illegally obtained evidence, or even the

¹⁷ *How Does a Grand Jury Work?*, FindLaw, <http://criminal.findlaw.com/criminal-procedure/how-does-a-grand-jury-work.html>

¹⁸ Gregory D. Morril, *Prosecutorial Investigations Using Grand Jury Reports: Due Process and Political Accountability Concerns*, 44 Colum. J.L. & Soc. Probs. 483, 485 (2011)

¹⁹ Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 Cornell L. Rev. 260, 266 (1995)

personal opinion of the prosecutor.²⁰ In addition to these potential problems for the accused, some would argue that these same problems render grand jurors amongst the least qualified to make decisions to indict.²¹ Such critics have noted that the only ways to correct these issues in a grand jury process would be to make the process more similar to a jury trial, with cross-examination, a requirement to bring forth exculpatory evidence, and only allowing the consideration of admissible evidence.²² Rather than make such changes, which would drastically alter the process itself, some would suggest that the process be done away with entirely. While this Article is not concerned with the question of whether grand juries should be abandoned under American law, it will be addressed below how the many criticisms of the process suggesting that it unfairly favors indictment can show opposite results when a prosecutor appears to not desire indictment. It may just as easily serve as a “rubber stamp” as it can a “get out of jail free card” for both the police and the prosecutor.

V. POLICE VIOLENCE

Police violence is occurring at epidemic levels and has been since at least 1976. In 1976, the FBI began tracking the number of times in which a police officer shot and killed someone in the line of duty. Since then, its data suggests

²⁰ Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 Cornell L. Rev. 260, 267 (1995)

²¹ Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 Cornell L. Rev. 260 (1995)

²² Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 Cornell L. Rev. 260 (1995)

that there has not been a single year with fewer than 300 lethal police shootings. The highest number the FBI has recorded was 460 fatal police shootings per year. However, federal officials have admitted this data is largely dependent on the self-reporting of local police departments, and is consequently, almost certainly lower than the actual number of lethal police shootings.²³ This data, being limited to lethal police shootings, obviously ignores non-lethal instances of police violence, data about people who die while in police custody, and instances of sexual violence by police officers. Because the FBI data's self-reporting makes the data unable to accurately document the instances of police related killings, the Washington Post has elected to undertake its own accounting of lethal police shootings.²⁴ This data is compiled through tracking localized news reports, reviewing information compiled by other independent databases and through additional investigatory reporting.²⁵ This data is similarly limited to the specific issue of citizens who are shot to death by police in the line of duty. It does not include instances in which people die in other ways during an encounter with police, or within police custody. Nor does it include other causes of death, or even instances of non-lethal violence. It does, however, allow for viewing the data according to demographics, such as race, age, gender, mental illness, threat level, and the presence of a weapon.

²³ Wesley Lowery, *There have been 500 people shot and killed by police in the U.S. so far in 2015* (Jul. 10, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/07/10/there-have-been-500-people-shot-and-killed-by-police-in-the-u-s-so-far-in-2015/>.

²⁴ <http://www.washingtonpost.com/graphics/national/police-shootings/>

²⁵ *How The Washington Post is examining police shootings in the U.S.*, (June 30, 2015), https://www.washingtonpost.com/national/how-the-washington-post-is-examining-police-shootings-in-the-us/2015/06/29/f42c10b2-151b-11e5-9518-f9e0a8959f32_story.html

According to this data, in 2015, 987 people have been shot to death by police officers in the United States, across every state except for Rhode Island.²⁶ The Washington Post has continued to compile this data into 2016, and as of January 15, 2016, there have been 24 people shot and killed by police.²⁷

What could be responsible for this rash of killings? Popular opinion would suggest that the job of a police officer must be increasingly dangerous. Wisconsin Governor Scott Walker, in an attempt to discredit Barack Obama during his run for presidency, suggested exactly this: that the number of police officers killed in the line of duty has increased during Obama's presidency.²⁸ However, the opposite has proven true. Police fatalities have been decreasing since Ronald Reagan's presidency. Statistics have been compiled with respect to the number of police fatalities during first seven years of every two term president since, and including, Reagan. During Reagan's presidency, there were 576, 528 for Clinton, and 405 for Bush. As of September 3, 2015, only 314 police officers had died in the line of duty during Obama's presidency.²⁹ As of November 15, 2015, only 110 police officers had died in the line of duty. Of these, only 35 were gun related, down 19% since 2014, while 47 were due to traffic accidents.³⁰ By the end of 2015, the total amount of police officer fatalities

²⁶ Of these shootings, 38 of the killed were both unarmed and black. Fewer than half of the killed were white.

²⁷ <http://www.washingtonpost.com/graphics/national/police-shootings/>

²⁸ Jud Lounsbury, *Police Fatalities Much Lower Than Under Reagan, Yet Walker Blames Obama*, (Sep. 3, 2015), <http://www.progressive.org/news/2015/09/188286/police-fatalities-much-lower-under-reagan-yet-walker-blames-obama>

²⁹ Jud Lounsbury, *Police Fatalities Much Lower Than Under Reagan, Yet Walker Blames Obama*, (Sep. 3, 2015), <http://www.progressive.org/news/2015/09/188286/police-fatalities-much-lower-under-reagan-yet-walker-blames-obama>

³⁰ National Law Enforcement Officers Memorial Fund, <http://www.nleomf.org/facts/officer-fatalities-data>

totalled fewer than 130, with some apparent discrepancy in the numbers reported by the Officer Down Memorial Page, reporting 129, and the National Law Enforcement Officers Memorial Fund, reporting 124.³¹³² Despite the 24 reported deaths caused by police shootings so far in 2016, neither organization currently reports any police officers having died as of January 15, 2016. The NLEOMF has also compiled statistics to provide a year by year comparison of the number of police officers killed, which does show a slight increase since 2013, but also shows a dramatic decrease since the 1970s, which had a spike of 280 officers killed in 1974.³³ While there is no record of those killed by police as comprehensive as that put together by the Washington Post for this time period, there is the admittedly incomplete record from the FBI, which indicates a general range of 300-450 people killed by police gunfire every year since 1976, rising and falling with peaks in 1976, 1993 and 2013.³⁴ While police fatalities have decreased over 40 years, citizen fatalities by police have, in the best case, stayed consistent, and in the worst case, increased.

So, while it is clear that the job of a police officer is inherently dangerous, it is not as apparent that the profession is increasingly lethal. In fact, the amount of danger inherent in being a police officer has decreased so much that, according to Department of Labor statistics, the job of police officer is only the 18th most

³¹ Officer Down Memorial Page, <https://www.odmp.org/search/year?year=2015>

³² National Law Enforcement Officers Memorial Fund, <http://www.nleomf.org/facts/recently-fallen/recently-fallen-2015/?referrer=http://www.nleomf.org/facts/recently-fallen/>

³³ National Law Enforcement Officers Memorial Fund, <http://www.nleomf.org/facts/research-bulletins/>

³⁴ Wesley Lowery, There have been 500 people shot and killed by police in the U.S. so far in 2015 (Jul. 10, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/07/10/there-have-been-500-people-shot-and-killed-by-police-in-the-u-s-so-far-in-2015/>.

dangerous job in the United States.³⁵ It lags behind loggers, fishers, garbage collectors, taxi drivers, and bartenders. This Article does not seek to answer the question of why lethal police shootings have been on the rise, but the cause surely is not an increase in the amount of police fatalities.³⁶ While there is a minor increase over the past few years, this is part of a heavy decline since 1976. In fact, some have considered this data with respect to the United States population over time in order to develop a metric to measure the safety of police officers.³⁷ Under this analysis, despite the uptick in sheer numbers of police deaths from 2013 to 2015, 2015 would be considered the second safest year for police officers in the entire history of the United States, with a rate of 0.112 gun-related deaths per one-million people.³⁸ Police are becoming safer while the citizenry is not.

VI. POLICE INDICTMENTS, CONVICTIONS, & INCARCERATION

The rates at which grand juries vote to indict police officers is alarming when compared to rates of non-police officers who are indicted by grand jury. As mentioned above, in the 2009-2010 year, only 11 grand juries related to federal

³⁵ Gwynn Guilford, *Garbage collectors are more likely to die on the job than police patrol officers*, (May 24, 2015), <http://qz.com/410585/garbage-collectors-are-more-likely-to-die-on-the-job-than-police-patrol-officers/>

³⁶ Again, this Author would recommend Michelle Alexander's *The New Jim Crow* to help provide, at least, a partial answer to this question as it pertains to a combination of policing done for profit, racial profiling in police work, harmful drug policies, and the militarization of the police.

³⁷ Radley Balko, *In the end, 2015 saw no 'war on cops' and no 'national crime wave'*, (Dec. 22, 2015), <https://www.washingtonpost.com/news/the-watch/wp/2015/12/22/in-the-end-2015-saw-no-war-on-cops-and-no-national-crime-wave/>

³⁸ Radley Balko, *In the end, 2015 saw no 'war on cops' and no 'national crime wave'*, (Dec. 22, 2015), <https://www.washingtonpost.com/news/the-watch/wp/2015/12/22/in-the-end-2015-saw-no-war-on-cops-and-no-national-crime-wave/>

prosecutions did not indict out of more than 150,000 potential prosecutions.³⁹ During the 7 year period of 2004-2011, the FBI investigated 2,718 incidents in which a police officer killed someone in the line of duty. Over this same 7 year period, only 41 police officers were charged with manslaughter or murder because of these incidents.⁴⁰ The Cato Institute tracked allegations of police misconduct involving almost 11,000 police officers from April 2009 through December 2010. Of these, less than a third resulted in criminal charges, and of these charged, less than a third led to a conviction.⁴¹ While these raw pieces of data obviously cannot include significant information about the specific nature of any of these incidents, they demonstrate, but do not explain, a very simple truth: police officers are almost never charged with crimes.

What could be the reason for this? The grand jury process is almost certainly a part of it. As indicated earlier, the purpose of grand juries is to indict. Former New York State Chief Judge Sol Wachtler once remarked that a prosecutor could persuade a grand jury to “indict a ham sandwich.”⁴² Is this the case, then, why can prosecutors not persuade grand juries to indict police officers? Perhaps, it is because of the unspoken corollary. If a prosecutor can convince a jury to indict a ham sandwich, why would a prosecutor not be able to convince a jury that the same ham sandwich committed no crime? A grand jury will decline

³⁹ Department of Justice Statistics, <http://www.bjs.gov/content/pub/pdf/fjs10st.pdf>

⁴⁰ Zusha Elinson and Joe Palazzolo, *Police Rarely Criminally Charged for On-Duty Shootings*, (Nov. 24, 2014, 7:22 PM), <http://www.wsj.com/articles/police-rarely-criminally-charged-for-on-duty-shootings-1416874955>

⁴¹ Zusha Elinson and Joe Palazzolo, *Police Rarely Criminally Charged for On-Duty Shootings*, (Nov. 24, 2014, 7:22 PM), <http://www.wsj.com/articles/police-rarely-criminally-charged-for-on-duty-shootings-1416874955>

⁴² Ben Casselman, *It's Incredibly Rare For A Grand Jury To Do What Ferguson's Just Did*, (Nov. 24, 2014, 9:30 PM), <http://fivethirtyeight.com/datalab/ferguson-michael-brown-indictment-darren-wilson/>

to indict if a prosecutor appears to desire that outcome, “thereby absolving the prosecutor from making a difficult political decision and leaving responsibility with the grand jury.”⁴³

A look at the grand jury held in St. Louis County in relation to the killing of Michael Brown in Ferguson, Missouri may shed some light on the matter. Transcripts from this grand jury show that the prosecutors cross-examined its own potential witnesses, which is highly unusual, since grand juries are led by the prosecutor and for the purpose of finding support for prosecution.⁴⁴ Darren Wilson, however, the would-be defendant, was not cross-examined and delivered four hours of testimony. During the process, the grand jury received inaccurate information suggesting that a police officer is allowed to shoot and kill a fleeing suspect, regardless whether or not that police officer feared the decedent. While this was corrected, it was weeks into the process. The transcripts were then released to the public, which is unusual when considering that grand jurors are sworn to secrecy. This is especially strange because in Missouri, it is a crime for a grand juror to release such information.

Another more recent example of strange behavior from a prosecutor during a grand jury comes from the process surrounding the lack of indictment of Timothy Loehmann and Frank Garmback in relation to the November 2014 shooting of Tamir Rice. The shooting was caught on camera, and video is widely

⁴³ Gregory D. Morril, *Prosecutorial Investigations Using Grand Jury Reports: Due Process and Political Accountability Concerns*, 44 Colum. J.L. & Soc. Probs. 483, 502-03 (2011)

⁴⁴ Jeffrey Fagan and Bernard E. Harcourt, *Professors Fagan and Harcourt Provide Facts on Grand Jury Practice In Light of Ferguson Decision*, (December 5, 2014, 12:00 PM), https://www.law.columbia.edu/media_inquiries/news_events/2014/november2014/Facts-on-Ferguson-Grand-Jury

available on the internet. In it, Rice can be seen in a park holding a pellet gun.⁴⁵ Some time later, he is seen sitting on a bench in the same park, as a police cruiser pulls up next to him, within the park. As the officers exit the car, Rice's body can be seen falling, having been shot.

More than a year later, Cuyahoga County Prosecutor, Timothy McGinty, concluded the grand jury, and when it was over, there was no indictment. One might wonder how this can be, considering that Rice was twelve years old at the time, and because of how suddenly after arriving upon the scene, the police opened fire. Why was there no indictment of either Loehmann or Garmback here? Because McGinty recommended to the grand jury that they should not indict either police officer.⁴⁶ In addition to his recommendation, McGinty and his office provided three separate reports declaring the shooting appropriate from experts, the type of which might be procured by a defense attorney in a criminal proceeding. In a press conference announcing the results of the grand jury, McGinty said "We don't second guess police officers."⁴⁷ Essentially, McGinty wanted the grand jury to believe that Rice reached for the pellet gun, which the officers were to have reasonably mistaken for a real gun, and then opened fire. What this ignores, however, is that when the police were called on Rice, dispatch was told that the gun was likely not real, and that the police dispatch failed to provide this information to the officers who arrived on scene. This story also

⁴⁵ *Tamir Rice: police release video of 12-year old's fatal shooting* –video, (Nov. 26, 2014), <http://www.theguardian.com/us-news/video/2014/nov/26/cleveland-video-tamir-rice-shooting-police>

⁴⁶ Jamil Smith, *The Tamir Rice Rule*, (December 29, 2015), <https://newrepublic.com/article/126737/tamir-rice-rule>

⁴⁷ Jamil Smith, *The Tamir Rice Rule*, (December 29, 2015), <https://newrepublic.com/article/126737/tamir-rice-rule>

ignores the notion of “Officer-Created Jeopardy,” which is a term describing events in which police officers act carelessly, thereby creating a dangerous situation, resulting in the use of force for protection.⁴⁸ Operating on the assumption that Rice was brandishing a real gun and potentially dangerous, as police calls had indicated Rice had pointed it at passersby, the officers made a tactical error by choosing to approach Rice by bringing the cruiser within point blank shooting range of Rice. Doing so put the officers into a compromised position because, were the gun real, Rice would have been able to open fire almost immediately upon the officers, which in turn created the fear, that McGinty believed justified the shooting of Rice. McGinty could have done differently, and could have used this officer created jeopardy as a basis for criminality, arguing that because they were unreasonable in creating a dangerous situation without cause, they are not protected from guilt and punishment for the consequences of that initial reckless action.⁴⁹ Whether or not this would have been a winning strategy in court, the choice not to employ it is telling, because it is the choice to allow police more power over civilians, rather than to attempt to diminish police power.

⁴⁸ Leon Neyfakh, *Tamir Rice’s Death Resulted From “Officer-Created Jeopardy.” So Why Were No Officers Indicted?*, (Dec. 28, 2015.), http://www.slate.com/blogs/the_slatest/2015/12/28/tamir_rice_s_death_didn_t_lead_to_indictments_because_of_supreme_court_vagueness.html

⁴⁹ Leon Neyfakh, *Tamir Rice’s Death Resulted From “Officer-Created Jeopardy.” So Why Were No Officers Indicted?*, (Dec. 28, 2015.), http://www.slate.com/blogs/the_slatest/2015/12/28/tamir_rice_s_death_didn_t_lead_to_indictments_because_of_supreme_court_vagueness.html

McGinty described Rice's death as "a perfect storm of human error,"⁵⁰ and while this may very well be true, the same could not be said of the grand jury that he led. McGinty was under no obligation to carry out grand jury proceedings, and in fact, electing to do so only to recommend no charges undermines the very purpose. He could have, just as easily called a press conference and announced that no charges would be brought for the same reasons that he recommended as much to the jury. There is no human error here, but only human intention. Why he bothered with a grand jury rather than a press conference alone is unclear. But the results are palpable. Prosecutors have the power to decide who is and is not being hauled into court, and they want us to know that they do not second guess police officers.

Certainly, there are many reasons why a grand jury might not indict, or a prosecutor might not bring charges against, a police officer. The facts of the grand juries described above, while full of unusual behavior by the prosecutors' offices, certainly explain why those grand jury did not indict. In so doing, the members of those jury behaved as would be expected from the statistics listed above. But what explains these statistics?

There are a litany of potential factors that might explain why charges are not brought against police officers. There is potential juror bias, jurors favoring the testimony of police officers about what kinds of behavior is justified; prosecutorial bias, prosecutorial bias, prosecutors, whether consciously or unconsciously, presenting a weaker case to a grand jury in order to protect the

⁵⁰ Jamil Smith, *The Tamir Rice Rule*, (December 29, 2015), <https://newrepublic.com/article/126737/tamir-rice-rule>

working relationship between the police department and prosecutor's office; and public pressure, bringing a case to a grand jury, rather than a preliminary hearing before a judge, as a means of responding to the public, and in so doing, presenting a case that may not be fully formed.⁵¹ These factors are not mutually exclusive, nor are they necessarily exhaustive, but they, collectively build to circumstances in which prosecutors can respond to public pressures in a way that releases them from potential backlash. Those who want a police officer charged are expected to be satisfied with a prosecutor's attempt to bring charges. Those who want no charges brought are expected to be satisfied by the grand jury's decision. Either way, the decision has the appearance of being taken out of the hands of the prosecutor.

In the instances when police are indicted, they are still convicted and incarcerated at considerably lower rates than those of the general population. According to data compiled by the Bureau of Justice, when police officers are indicted and formally charged with crimes, only 33% of those charges result in conviction, as opposed to the 66% conviction rate for the general population. In the cases when police officers are convicted, only 12% actually face incarceration, compared to the 48% rate of incarceration for convictions of members of the general public.⁵²⁵³ Prosecutorial discretion clearly factors into the

⁵¹ Ben Casselman, *It's Incredibly Rare For A Grand Jury To Do What Ferguson's Just Did*, (Nov. 24, 2014, 9:30 PM), <http://fivethirtyeight.com/datalab/ferguson-michael-brown-indictment-darren-wilson/>

⁵² James Woods, *5 facts exposing the media's lies about police shootings*, (Sep. 7, 2015), <http://usuncut.com/black-lives-matter/5-facts-expose-media-lies-police-shootings/>

⁵³ Reuben Fischer-Baum, *Allegations Of Police Misconduct Rarely Result In Charges*, (Nov. 25, 2014, 9:45 AM), <http://fivethirtyeight.com/datalab/allegations-of-police-misconduct-rarely-result-in-charges/>

lack of charges against police officers. How much it factors into conviction and sentencing is an open question, but one that need not be answered at this time. It is fruitless to delve into how to convict police officers when it is so difficult already to indict them.

VII. WHY CIVIL LAWSUITS FAIL TO DELIVER JUSTICE

Prosecutors are just not doing enough to hold police officers accountable when suspects or civilians do not survive their police interactions. But our legal system allows people to seek justice in other ways, largely through financial compensation. In some instances, family survived by those killed by police officers do bring wrongful death cases against the department, city or state in question. Of course, as civil lawsuits, there is no risk of prison time for the accused police officer, and so the burden of proof is considerably lower than in a criminal proceeding. But are they effective at halting police violence?

Rather than evaluate the specific awards or settlements given in these lawsuits, this Article will focus on some of the specifics surrounding the July 2014 death of Eric Garner in Staten Island, New York City. Garner was questioned by police on accusations of illegally selling loose cigarettes and when he became agitated, several police officers detained him. This altercation has been caught on tape and is widely available to watch on the internet.⁵⁴ In the video, one of the police officers, Daniel Pantaleo, clearly wraps his arm around Garner's neck in order to bring him to the ground. When Garner is on the ground, he repeatedly says, "I can't breathe," until passing out. He was later pronounced

⁵⁴ *'I can't breathe': Eric Garner put in chokehold by NYPD officer—video*, (Dec. 4, 2014), <http://www.theguardian.com/us-news/video/2014/dec/04/i-cant-breathe-eric-garner-chokehold-death-video>

dead, ruled a homicide through compression of his neck.⁵⁵ Daniel Pantaleo was then faced with a grand jury that declined to indict him for Garner's death. Garner's family filed a wrongful death lawsuit against New York City, which was released in a settlement for \$5.9 million, which did not include any admission of fault in Garner's death by Pantaleo, the NYPD, New York City, or New York State.⁵⁶

This settlement has been criticized by police officers, including the head of the Sergeants Benevolent Association police union, calling it "obscene," "shameful," and an injustice for New York taxpayers, on the basis that a jury would have awarded significantly lower amount, if anything at all.⁵⁷ Garner's family, while accepting the settlement, made it clear that they did not believe justice had been served, with one of Garner's children recounting that "Justice is when somebody is held accountable for what they do."⁵⁸

These reactions get exactly to the core of why civil lawsuits after police violence is just not justice. While the criticism from the police could be fairly characterized as ignoring the significance of Garner's death on a national scale, it raises a strong point in terms of who is picking up the bill. In these wrongful death suits, the city, or state, is the party with the ability to pay damages, not the individual police officer in question. Therefore, whether winning a lawsuit or

⁵⁵Jeffrey Fagan and Bernard E. Harcourt, *Fact Sheet in Richmond County (Staten Island) Grand Jury in Eric Garner Homicide*, (Jan. 23, 2015), <http://web.law.columbia.edu/social-justice/forum-on-police-accountability/facts/faqs-eric-garner>

⁵⁶ CBSNews, *Eric Garner Family says \$5.9 million settlement isn't a victory*, (Jul. 14, 2015), <http://www.cbsnews.com/news/eric-garner-family-says-5-9-million-settlement-isnt-a-victory/>

⁵⁷ Joe Tacopino, Shawn Cohen and Yoav Gonen, *Union head blasts city's \$5.9M settlement in Eric Garner case*, (Jul. 13, 2015), <http://nypost.com/2015/07/13/city-reaches-5-9m-settlement-in-garner-chokehold-case/>

⁵⁸ CBSNews, *Eric Garner Family says \$5.9 million settlement isn't a victory*, (Jul. 14, 2015), <http://www.cbsnews.com/news/eric-garner-family-says-5-9-million-settlement-isnt-a-victory/>

accepting a settlement, the only way a family can recover anything is at the taxpayers' expense. This might be acceptable if the citizenry had direct control over policing practices and could proactively alter police practices immediately after being dealt such a financial blow, but that is not the case in New York City or anywhere. This raises the other point: in what sense is Daniel Pantaleo being held accountable for his actions? He has no obligation to make any payments to Garner's family. While the Department of Justice has announced it would be investigating the case, there has been no public announcement on the progress of this investigation since it was begun in January 2015, and it is unclear, and in this Author's opinion, unlikely, that charges will be brought.⁵⁹ The worst case scenario for Pantaleo could be a loss of his job, which is in no way commensurate with Garner's loss of his life⁶⁰

The further question has yet to be addressed: do these kinds of lawsuits cause police officers to behave any differently? Is the violence tempered? This settlement was announced in July of 2015. From August 1 to December 31 of 2015, there were 418 people shot and killed by police across the United States.⁶¹ Five of these people were killed in New York State. During all of 2015, 18 people were killed by police in New York State. Whether or not the public attention of Garner's death and settlement for Garner's family is responsible for these

⁵⁹ Of course, here, there would also be issues in the difficulty of proving a case under 18 U.S. Code § 242, in that it requires a showing of a willful deprivation of rights for race based reasons. This poses greater problems in cases when a police officer kills a person of his or her own race, and is not a tenable solution to the failings of local prosecutors.

⁶⁰ Although, this is, also, unclear without review of the police union contract that controls the department's employment terms, as one of the mainstays of union agreements is to require termination only for cause. Given that union representatives argued that Pantaleo did not do anything prohibited in the apprehension of Garner, it is at least a possibility that no such cause would be found for termination.

⁶¹ <http://www.washingtonpost.com/graphics/national/police-shootings/>

numbers in New York is unclear. Across the nation, however, it is apparent that there has been no clear decrease in police related fatalities. Regardless, however, even if such a decrease could be shown, would that be an acceptable public policy to forward? Should we live in a country in which the acceptable way to prevent police violence is to wait until a case becomes egregious enough to justify 7 figure settlements in every state and then to let the effect of such financial losses lead to a decrease in violence? How many will die in the meantime?

VIII. THE NEED FOR INDEPENDENT INVESTIGATION AND PROSECUTION

The sheer number of incidents in which police officers kill citizens in the line of duty suggests a problem, in and of itself. When looked at in relation to the number of incidents in which police officers are killed and the rate at which police officers are indicted, convicted and incarcerated, it is nothing short of an epidemic, that shows prosecutors are failing to hold police officers accountable. The only alternative is to presume that in the vast majority of cases, police officers are entirely justified in the use of lethal force, even fewer than 130 police officers have died in the line of duty during 2015, almost 8 times as many were so fearful for their lives to justify lethal force. It requires believing that in at least 93 instances, police were so justified when faced with an unarmed person.⁶²

Typically, proposals to help control the abuses of justice that can result from prosecutorial discretion focus on plea bargaining and discriminatory charging. Interesting, and potentially useful, proposals have included judicial review of charging decisions, to as to have an early chance to challenge charges

⁶² <https://www.washingtonpost.com/graphics/national/police-shootings/>

as discriminatory, as well as creating standards for plea bargaining to create more consistent and, downright, fair results from these bargaining agreements.⁶³ While these proposals would support the rights afforded to the accused, they would do nothing to affect those who, for whatever reason, avoid even the accusation. In fact, similar proposals to require prosecution in certain instances would prove unworkable, as explained above.

The only viable solutions to the problems of police violence is to actually punish police officers for their bad behavior. But, because prosecutors have demonstrated an unwillingness to prosecute police officers, the only realistic solutions would have to include removing such decisions from the hands of prosecutors. Some might criticize this viewpoint as extreme, claiming that the number of police officers facing charges in 2015 is a significant increase over the previous rates. However, this argument is a clear failure. While it is true that the rates of charges being brought has increased, and has even increased by a 3, from about 5 per year up to 15, as of November 2015, this is simply not enough to deliver justice.⁶⁴ Even with the threefold increase, the raw numbers are simply not enough. There are others who have engaged in tracking police related deaths using different criteria than that of the Washington Post, and have reported numbers upwards of 1,200.⁶⁵ By any metric used to track these death, this

⁶³ See Yue Ma, *A Comparative View of Judicial Supervision of Prosecutorial Discretion*, 44 No. 1 Crim. Law Bull. Art 2, 2008

⁶⁴ Martin Kaste, *Since Ferguson, A Rise In Charges Against Police Officers*, (Nov. 25, 2015), http://www.npr.org/2015/11/25/457415588/since-ferguson-a-rise-in-charges-against-police-officers?utm_source=facebook.com&utm_medium=social&utm_campaign=npr&utm_term=nprnews&utm_content=2051

⁶⁵ Shaun King, *King: Record number of police officers were charged with murder or manslaughter in 2015—not a single one convicted*, (Jan. 5, 2016),

amounts to less than 2% of police related fatalities having charges brought against officers. Further, these 15 instances do not all correspond to incidences which occurred during 2015. As referenced above, many grand jury proceedings do not begin until months, and sometimes years after the potential crime has been committed. Of 2015 incidents, only 7 cases led to charges.⁶⁶ Even if we, as a society, are to grant that police officers are best equipped to assess dangerous situations and to decide when force is appropriate, would we also have to accept that when police officers are responsible for, potentially, 1,000 deaths, that we should not second guess them more than 98% percent of the time?

Further, were the argument to have teeth that the current increase in charges is sufficient, the cause of this increase must be evaluated. In a vacuum, one might assume that a threefold increase in charges would correspond to a threefold increase of incidences of police related killings. This is simply not true, however. While the Washington Post has only begun to compile data beginning in 2015, other sources have been doing so for further back. One source, Killed By Police, suggests that in 2014, 1,111 people were killed by police and in 2013, 771 were killed.⁶⁷ As noted above, the FBI does compile data that is entirely voluntarily reported by police departments, and leads to numbers in the range of 300-450 per year. Of course, all of this is regardless of the fact that only 7 of the 15 officers charged in 2015 were in relation to events that occurred within 2015.

<http://www.nydailynews.com/news/national/king-no-convictions-cops-charged-murder-2015-article-1.2486371>

⁶⁶ Shaun King, *King: Record number of police officers were charged with murder or manslaughter in 2015—not a single one convicted*, (Jan. 5, 2016),

<http://www.nydailynews.com/news/national/king-no-convictions-cops-charged-murder-2015-article-1.2486371>

⁶⁷ *Killed By Police*, <http://www.killedbypolice.net/>

Even if a threefold increase in rates of police related killings were found to exist, which available data does not support, the adjusted rate of charges brought for 2015 would not reflect that increase.

What else, then, might be the reason for the above average rate of charges? One possibility may be footage. While the Cook County Attorney absolutely rejected that charges for the killer of Laquan McDonald, in Chicago, had anything to do with the, at the time, forthcoming release of footage of the shooting, it is worth considering that because of the combination of pushes for police body cameras, the use of dash board cameras, citizens equipped smartphones, and security cameras, more and more incidents of police violence are being caught on tape.⁶⁸ Some would suggest that the availability of this type of footage is the only thing at all influencing the decisions to prosecute.⁶⁹ It is difficult to say how great of an affect this is having on prosecutors, due to the likely political ramifications of saying that public availability of these videos is what is leading to charges, rather than the duty to seek justice. But, to suggest that video has had no effect whatsoever strikes this Author as disingenuous.

Another possibility for this increase might have to do with the increased levels of unrest resulting out of police related deaths. Since Michael Brown's death in Ferguson, Missouri, in 2014, there have been demonstrations across the country, largely led by the Black Lives Matter movement, demanding justice for

⁶⁸ Martin Kaste, *Since Ferguson, A Rise In Charges Against Police Officers*, (Nov. 25, 2015), http://www.npr.org/2015/11/25/457415588/since-ferguson-a-rise-in-charges-against-police-officers?utm_source=facebook.com&utm_medium=social&utm_campaign=npr&utm_term=nprnews&utm_content=2051

⁶⁹ Don Babwin, *Number of Police Officers Charged With Murder, Manslaughter Triples In 2015*, (Dec. 4, 2015), http://www.huffingtonpost.com/entry/police-shooting-charges_5661b436e4b079b2818e4765

those killed by police. Characterized both as protests and as riots, these demonstrations have been met with both significant media attention and considerable police action. While, just as with footage, it is unlikely that a prosecutor would admit that charges have been brought against a police officer because of protest, rather than for the pursuit of justice, it is clear that some sections of public discourse have adjusted and will no longer be silent in response to police violence. Again, to discount the effect of these demonstrations on the behavior of prosecutors appears disingenuous.

But, while public pressure could certainly justify why a prosecutor chooses to focus on murders rather than petty thefts, such public pressure is inexcusable as the sole reason for prosecuting a police officer. The duty to seek justice must include holding accountable police officers whose actions have unnecessary lethal consequences, regardless of if there is a protest at the site of the shooting or if there is publicly available footage of unjustifiable behavior. Fortunately, there is another system that can be implemented.

Rather than leave these decisions in the hands of regular prosecutors, who have failed to act to solve the problem of police violence, someone else must be given the task. In order to do this, there must be independent review, from state agencies, that are not dependent upon police cooperation for the regular course of their work, and who would not be subject to reelection due to dissatisfaction from the public. There is one federal bill, currently under review by the House Subcommittee on Crime, Terrorism, Homeland Security and Investigations that could help to solve this problem: the Police Training and Independent Review Act

of 2015. The bill would require that any state in receipt of federal funding to assist in law enforcement to institute both specialized training related to cultural diversity, racial biases and how to safely interact with the mentally ill or else risk loss of up to 20% of such funding. But more importantly, it would require such states to have active laws that would support independent prosecution of members of law enforcement or risk lose up to 20% of such funding.⁷⁰ While this bill would form a good start, it does not go far enough, as it fails to specify the nature and extent of authority that such independent prosecution would have. While, if passed into law, it is a near certainty that most states would enact appropriate legislation as to comply, there is little within the text of the bill to indicate how effective those pieces of legislation would be. A better proposal could be built upon the bare bones of the Police Training and Independent Review Act, one that would elaborate on the type of legislation that would adequately satisfy the provisions of the Act.⁷¹

What is truly needed is a series of Special Prosecutor's Offices at the individual state levels, or else a functional equivalent. Such offices must have the authority to bring charges and prosecute those charges in an effective manner. In order to do so, these offices must be sufficiently funded to employ personnel and obtain other resources as necessary to fully investigate charges. While the current

⁷⁰ 114th CONGRESS, 1st Session, 2015 CONG US HR 2302

⁷¹ It is worth noting that this bill has had no progress since being referred to committee in June 2015, and without further public attention and especially without bipartisan support, the bill is not likely to move forward at all.

financial incentives of the Act are likely to guarantee compliance, the Act could, and should, be further amended to provide additional funding for these agencies.⁷²

Neither aspect, independent investigation nor independent prosecution, on its own would be enough. Both must work in tandem to remove the possibility of ineffective investigation due to reliance on the police to police themselves or ineffective prosecution caused by the necessary working relationships between police officers and prosecutors.

If one is unmoved by the data detailed above and believes that current prosecutors are beginning to take action on their own, because of the increase in charges in 2015, this Author has only the following to say: People are dying while we wait for prosecutors to figure things out for themselves. Perhaps prosecutors will come to a consensus and work actively to combat the problem of police violence. But perhaps they will not. Perhaps they will conclude that we should not second guess police officers. The only solution is to force them to do so.

IX. CONCLUSIONS

Police officers are a necessary aspect of society. Because of the access to firearms in the United States, it is necessary for police officers to be equipped with firearms of their own, for the instances when they are faced with lethal force, so that they may use lethal force to protect themselves or to protect the lives of others. But, the manner in which America's police are using this force is unacceptable. The rates of police killing citizens is nearly 8 times higher than the rates of police dying in the line of duty.

⁷² Campaign Zero, <http://www.joincampaignzero.org/investigations>

Nonetheless, they have been afforded protections by the only agents of government with the authority to hold them accountable. Prosecutors continuously fail to bring charges against police officers because of political pressures and maintenance of a work relationship. As a result, the police are unrestrained and our citizens are unprotected. These results confound on one another, as a lack of police officers being charged reinforces the idea that police are more likely than not justified in the lethal use of force. The fewer charges are brought, the more political pressure there is for prosecutors to not bring charges. This system is unworkable and inhumane.

Prosecutors have broad discretion, and they need this discretion to do their jobs. But prosecutors also play to win. They do not call grand juries unless they expect indictment or unless they want to relieve pressure placed upon them. They do not try cases they expect to lose. And they do not bring charges with political costs. Prosecutors play to win, but their discretion lets them make the rules, and these rules favor police officers who kill rather than those killed by the police.

This power must be taken away from prosecutors, and put in the hands of people with nothing to lose from disgruntling police departments. Police officers are meant to be the guardians of our society, and prosecutors the ones responsible for guarding us from them. They have failed to do so, and so, we now need watchmen willing, and able, to do the job.