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THE GRAND JURY: A SHIELD OF A DIFFERENT SORT

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I. INTRODUCTION

According to the Washington Post, 991 people were shot to death by police officers in the United States during calendar year 2015, and 957 people were fatally shot in 2016.[1] A disproportionate percentage of the citizens killed in these police-civilian encounters were black.[2] Events in Ferguson, Missouri; Chicago, Illinois; Charlotte, North Carolina; Baton Rouge, Louisiana; and Staten Island, New York—to name but a few affected cities—have now exposed deep distrust between communities of color and law enforcement. Greater transparency is necessary to begin to heal this culture of distrust and to inform the debate going forward about police practices in America.

The recent spate of deadly police-civilian encounters has generated enormous media coverage, national discourse, and a proliferation of recommended solutions. Perhaps the most notable and comprehensive set of recommendations was issued by the President's Task Force on 21st Century Policing. Created by President Obama in December 2014, the task force consisted of nine members drawn from police, academic and other law enforcement-related professions.[3] In its Final Report, issued in May 2015, the committee proffered a number of recommendations that stressed, among other things, the need for altering law enforcement culture, improving training, and forging better police-community partnerships.[4] But the committee defined its principal task in terms of needing to improve police-community trust.[5] It declared that trust "is essential in a democracy" and central to the "stability of our communities, the integrity of our criminal justice system, and the safe and effective delivery of policing services."[6]

Healthy perceptions about the police serve several purposes: they nurture positive norms surrounding law-abiding behavior,

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[1] Kimbriell Kelley et al., *Fatal Shootings by Police Remain Relatively Unchanged After Two Years*, WASH. POST (Dec. 30, 2016), https://www.washingtonpost.com/investigations/fatal-shootings-by-police-remain-relatively-unchanged-after-two-years/2016/12/30/fc807596-c3ca-11e6-9578-0054287507db_story.html?utm_term=.e3a1a9be36f6.

[2] *Id.*

[3] FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, at v (May 2015), https://cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf.

[4] *Id.* at 1–4.

[5] *Id.* at 5.

[6] *Id.*

make police work easier by encouraging citizens to report crime, and make it more likely that people will credit testimony of police witnesses if they are ever called to serve on a jury in a criminal case. In short, public trust not only helps advance the police investigative function, but it also serves to legitimize the attendant criminal adjudicative process.

The public's perception of law enforcement legitimacy is highly influenced by actions that occur at a very critical and early juncture of the criminal justice process—the grand jury. The paucity of grand jury indictments returned in cases involving police-involved shootings has caused many to question the integrity of the grand jury process.[7] Grand jury secrecy and the prosecutor's unchecked discretion with respect to the presentation of evidence are inherent characteristics of grand jury practice.[8] While they were enacted to serve the twin goals of non-corruptibility and efficiency, they also greatly facilitate a prosecutor's ability to secure an indictment if he wishes and to secure a no-bill if he does not.

When the Supreme Court first referred to the grand jury as a "shield" in the case of *United States v. Mandujano*, it was referring to the grand jury's function as a shield against the arbitrary exercise of governmental power.[9] Requiring indictments to be commenced by grand jury investigation and vote assures (1) that

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[7] On average, only one percent of the annual killings of civilians by police officers ultimately produced an indictment charging police with criminal misconduct of any kind. Kelly et al., *supra* note 1; 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/?utm_term=.7ef4c328658a ("Grand juries, at least at the federal level, almost always vote to indict people accused by prosecutors of a crime. . . . [F]ederal prosecutors pursued over 160,000 cases against defendants in 2009–2010 (the last period for which there is data), and grand juries only voted not to return an indictment in 11. . . . Grand juries, at least at the state level, often do not indict police officers.").

[8] *See* Matthew Hector, *Grand Juries in the Spotlight*, 103 ILL. B.J. 15, 15 (2015) (describing the "secret nature of grand jury proceedings"); Roger A. Fairfax, Jr., *Should the American Grand Jury Survive Ferguson?*, 58 HOW. L.J. 825, 828–29 (2015) ("[T]he prosecutor may present a case unencumbered by most of the evidentiary, procedural, and constitutional rules that govern the petit jury's consideration at trial. . . . In other words, the deck is stacked in favor of the government . . . . The truth is that prosecutors do have significant control over grand jury proceedings and, therefore, can engineer outcomes if they desire.").

[9] 425 U.S. 564, 573 (1976); *see also* Wood v. Georgia, 370 U.S. 375, 390 (1962) (describing the grand jury's role in safeguarding against over-callous prosecutors).

charges are not commenced without probable cause, (2) that the reputation of the putative target is protected in the event that charges are not forthcoming, and (3) that community representatives are involved in the decisionmaking process.[10]

However, recent high profile cases suggest that the prosecutor may now be using the grand jury as a shield of a very different sort—that is, a shield from public accountability. A prosecutor who wishes to avoid bringing difficult charges against a police officer can present a lopsided case to the grand jury and then, with a wink and a nod, blame the decision not to indict on community representatives rather than acknowledging and justifying the decision himself. In essence, the shield function of the grand jury is now being twisted to the prosecutor's advantage.

In this Essay, we will suggest three modest but important reforms to the grand jury process that we think will help increase transparency, reduce the legitimacy deficit, and restore public confidence in what are admittedly very difficult charging decisions involving the police use of deadly force. Part I examines grand jury secrecy rules in the context of externally created evidence (e.g., dash-cam and body-cam videos) and argues for a uniform, interpretive approach consistent with that followed by a majority of states. Part II discusses evidence presentation before the grand jury and urges the adoption of a rule that mandates the recording of grand jury instructions. Finally, Part III argues that state criminal procedure rules should be amended to empower states' attorneys to move the court for the public release of redacted grand jury minutes in instances when a no-bill is returned and it is in the public interest.

II. RECORDS MARKED BEFORE THE GRAND JURY: THE NEED FOR A UNIFORM APPROACH

Federal grand jury secrecy rules, which are set forth in Rule 6(e) of the Federal Rules of Criminal Procedure,[11] are interpreted

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[10] *Wood*, 370 U.S. at 390.

[11] FED. R. CRIM. P. 6(e)(2)(B) (delineating individuals who "must not disclose a matter occurring before the grand jury"); 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 8.5(b) (4th ed. 2015) ("Grand jury secrecy requirements are imposed in almost every jurisdiction by statute or court rule. Secrecy provisions typically state that the grand jurors and specified persons appearing before the grand jury . . . are bound not to disclose any matter

in conjunction with the Freedom of Information Act (FOIA). Illustrative of this relationship is FOIA exemption (b)(3), which provides that disclosure "does not apply to matters that are . . . specifically exempted from disclosure by statute."[12] Rule 6(e) is a qualifying statute under this exemption.[13] Thus, information and material that falls within the confines of Rule 6(e) are exempted from public disclosure pursuant to exemption (b)(3). As a general matter, state FOIA rules mirror those in the federal FOIA provision.[14] Thus, information and material protected under local grand jury secrecy laws are usually, if not always, exempt from disclosure under state FOIA rules.

Though the interrelationship between the two provisions is relatively easy to define, more intricate questions are presented in regards to the scope of the evidentiary matter subject to the secrecy rules. Certain questions in this context, such as witness grand jury testimony and grand jury witness identity, are comparatively straightforward and rarely present debatable issues.[15] On the other hand, questions regarding evidence generated outside and independent of the grand jury process (e.g., subpoenaed documents and physical evidence) have produced an uneven landscape of judicial and governmental responses. Nevertheless, a majority approach has emerged—followed in the federal courts and in most states—which holds that evidence that has its origins outside of the context of the grand jury and was

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occurring before the grand jury except in accordance with a judicial order authorized by the secrecy provision or some other specified exception.").

[12] Freedom of Information Act, 5 U.S.C. § 552(b)(3) (2016).

[13] Butler v. U.S. Dep't of Justice, 368 F. Supp. 2d 776, 785 (E.D. Mich. 2005); *see also* Rugiero v. U.S. Dep't of Justice, 257 F.3d 534, 549 (6th Cir. 2001); Solar Sources, Inc. v. United States, 142 F.3d 1033, 1037 n.4 (7th Cir. 1998); Church of Scientology Int'l v. U.S. Dep't of Justice, 30 F.3d 224, 235 (1st Cir. 1994); McDonnell v. United States, 4 F.3d 1227, 1246–47 (3d Cir. 1993); Fund for Constitutional Gov't v. Nat'l Archives & Records Serv., 656 F.2d 856, 868 (D.C. Cir. 1981).

[14] 132 AM. JUR. *Proof of Facts 3d* 1 § 14 (2013) ("The exemptions in the state freedom of information laws are similar to those in the Federal FOIA. Generally, the Federal FOIA covers classified matters of national defense or foreign policy; agency internal rules and practices; information specifically exempted by other statutes; trade secrets, commercial, or financial information; privileged interagency or intra-agency memoranda or letters; personal information affecting an individual's privacy; investigatory records compiled for law enforcement purposes; financial institution records; geographical and geophysical information concerning wells."). *See, e.g.*, MASS. GEN. LAWS ch. 4, § 7(26)(f) (2017).

[15] SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 5.6 (2d ed. 2016) (stating general rules about grand jury secrecy).

independently generated is generally not subject to the grand jury secrecy rule.[16] The determining factor, however, is not the material's birthplace but whether the evidentiary matter reveals something of "essence" about the grand jury deliberative process. As stated by the Fourth Circuit in *In re Grand Jury Subpoena:*

> The substantive content of "matters occurring before the grand jury" can be anything that may reveal what has transpired before the grand jury. . . . However, Rule 6(e)(2) protects from disclosure "only the essence of what takes place in the grand jury room, in order to preserve the freedom and integrity of the deliberative process."[17]

Thus, the mere fact that an evidentiary item was introduced during the course of a grand jury investigation does not necessarily shield that item from disclosure.[18] Similarly, the mere fact that an evidentiary item was generated independently of a grand jury investigation does not render it automatically disclosable.[19] Rather, the central inquiry is whether its public release would disclose something about the inner workings of the grand jury. If yes, the item is automatically shielded from disclosure. If not, the item is not protected by Rule 6(e), but it may sometimes be withheld under the criminal investigative exception of a state's freedom of information act.[20]

Despite this majority approach, there have been some notable high-profile deviations where the government has resisted public disclosure, citing grand jury secrecy as a rationale. Consider the well-publicized case of Laquan McDonald, the seventeen year-old who was killed in Chicago, Illinois, on October 20, 2014, after being repeatedly fired upon by an officer with the Chicago Police

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[16] *Id.*

[17] *In re* Grand Jury Subpoena, 920 F.2d 235, 241–42 (4th Cir. 1990) (citations omitted); *see also In re* Grand Jury Matter (Catania), 682 F.2d 61, 63 (3d Cir. 1982); *In re* Grand Jury Investigation, 610 F.2d 202, 216–17 (5th Cir. 1980); Anaya v. United States, 815 F.2d 1373, 1378–79 (10th Cir. 1987).

[18] BEALE ET AL., *supra* note 15, § 5.6.

[19] *Id.*

[20] *See, e.g.*, MASS. GEN. LAWS ch. 4, § 7(26)(f) (2017).

Department (CPD).[21] In response to an Illinois Freedom of Information Act request that sought the production of, inter alia, a dash cam video which depicted the shooting, the CPD resisted its release.[22] In its first affirmative defense, the CPD argued that the release of the video would compromise the city's ongoing criminal investigation as well as a pending federal grand jury investigation.[23] But a circuit court judge in Cook County, Illinois, disagreed, finding that the CPD could not rely upon ongoing investigations performed by entities (U.S. Attorney, FBI, State Attorneys, and federal grand jury) other than the CPD.[24] And, assuming a right on the part of the CPD to rely upon such investigations, the court further found that the department was unable to demonstrate by clear and convincing evidence that the video's release "would . . . obstruct an ongoing criminal investigation."[25]

Dash-cam, body-cam, and cell phone videos, as well as footage from cameras publicly mounted and those hoisted by businesses, are preexisting materials that, except in rare circumstances, are generated for purposes independent of a grand jury investigation. Thus, the mere presentation of such material before the grand jury, without more, does not justify their suppression from public view. As noted, the federal courts and the majority of state courts follow this approach. But the problem lies with the growing minority of states that do not.[26] It is these states that effectively

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[21] Smith v. Chicago Police Dep't, No. 2015 CH 11780, 1 (Cir. Ct. Cook Co., Ill. Nov. 19, 2015), https://assets.documentcloud.org/documents/2638910/Ruling-ordering-release-of-Laquan-McDonald-video.pdf.

[22] *Id.* at 2.

[23] *Id.* at 3.

[24] *Id.* at 17–18.

[25] *Id.* at 18. For other instances where the government resisted the release of dash-cam videos, see also State *ex rel.* Cincinnati Enquirer v. Deters, No. 2015-1222, 2016 WL 7386206 (Ohio Dec. 20, 2016) (stating that the prosecutor resisted the newspaper's formal request for release of bodycam video, claiming that it would "taint grand jury investigation"); Lee Hermiston, *Dash Camera Footage of Jerime Mitchell Shooting Released*, CEDAR RAPIDS GAZETTE (Dec. 8, 2016, 2:57 PM), http://www.thegazette.com/subject/news/public-safety/linn-county/dash-camera-footage-of-jerime-mitchell-shooting-released-20161208 (describing the government resisting calls for release of dash-cam video of officer shooting of Jerime Mitchell in Cedar Rapids, Iowa, until after grand jury decided against charging the officer).

[26] Niraj Chokshi, *These Are the States That Want to Regulate Police Body Camera Videos*, WASH. POST (Feb. 25, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/02/25/these-are-the-states-that-want-to-regulate-police-body-camera-videos/?utm_term=.0d5b9c8779eb (stating that "[a] dozen states explicitly restrict public access to police body camera footage, while a dozen more are considering limits"); Mary D. Fan, *Privacy, Public Disclosure,*

block public access to critical information that would otherwise be subject to public disclosure. Illustrative of this trend is a law passed in North Carolina in 2016, which establishes that law enforcement recordings, such as dash-cam and body-cam videos, are not considered public records.[27] Under the law, individuals whose images or voices appear in the video may request a viewing of the tape, but are neither guaranteed such an opportunity nor are they permitted to make a copy.[28] Only a court can authorize the public release of such recordings.[29]

The impact of such laws is clear. The exemption of preexisting tapes and material from public records laws will hinder the ability of aggrieved individuals to demonstrate police misconduct, will heighten community-police tensions, and will deepen community distrust of the criminal adjudicative process. Indeed, if such laws proliferate, then public distrust of the grand jury charging process will be exacerbated rather than ameliorated.[30]

Police Body Cameras: Policy Splits, 68 ALA. L. REV. 395, 400–01 nn.20–22 (2016) (detailing information regarding various state body camera public disclosure laws); Serena Lei, *Police Body-Worn Cameras: Where Your State Stands*, URBAN INSTITUTE (2016), http://apps.urban.org/features/body-camera/ (discussing various laws across the states regarding body cameras); *State Law Enforcement Body Camera Policies*, EPIC (2017), https://epic.org/ state-policy/police-cams/ (discussing recently enacted laws in Florida and North Dakota regarding public access to police camera evidence, as well as pending legislation in various states).

[27] 2016 N.C. Sess. Laws 88 (exempting from public records "visual, audio, or visual and audio recording[s] captured by a body-worn camera, a dashboard camera, or any other video or audio recording device operated by or on behalf of a law enforcement agency or law enforcement agency personnel when carrying out law enforcement responsibilities"); Jonah Engel Bromwich, *Video of Charlotte Police Shooting Could Be the Last Released in North Carolina*, N.Y. TIMES (Sept. 26, 2016), https://www.nytimes.com/2016/09/27/us/keith-scott-shooting-video-charlotte.html; Wesley Lowery, *More Police Shootings are Being Caught on Camera—But Many of Those Videos Aren't Released to the Public*, WASH. POST (Sept. 22, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/09/22/more-police-shootings-are-being-caught-on-camera-but-many-of-those-videos-arent-released-to-the-public/?utm_term=.4555eb462d24.

[28] *See* 2016 N.C. Sess. Laws 88 (indicating that the head of a law enforcement agency may disclose recordings to a limited number of individuals, but emphasizing that requests for such disclosure can be rejected upon consideration of various factors).

[29] Alan Neuhauser, *North Carolina Blocks Release of Police Video*, U.S. NEWS (July 13, 2016), http://www.usnews.com/news/articles/2016-07-13/north-carolina-law-blocks-release-of-police-video ("[R]ecordings from body- or dashboard-mounted cameras can only be released to the public through a court order, instead of via a public records request.").

[30] *See* Julie Craven, *North Carolina Doesn't Seem to Want People to See Police Camera Footage*, HUFFINGTON POST (July 12, 2016), http://www.huffingtonpost.com/entry/north-carolina-police-camera-footage_us_57850a43e4b0ed2111d7952a ("While police camera footage does help the public hold police officers accountable, it rarely leads to indictments or

The majority approach to grand jury secrecy properly safeguards the grand jury deliberative process, as well as attendant privacy interests, and appropriately delimits the boundary line between protected and non-protected grand jury material. Concluding that dash-cam and body-cam videos are not protected by mandatory grand jury secrecy rules does not mean that they will be automatically discoverable; it just means the police departments and prosecutor's offices will have the *discretion* to disclose them to the public if they believe such disclosure will not compromise an ongoing criminal investigation.[31] Quite simply, law enforcement officers should not hide behind grand jury secrecy rules in pretending that certain items are automatically non-disclosable—they should be transparent and take ownership of discretion when the law vests them with such.

A rule that recognizes that independently generated evidentiary matter with origins outside the grand jury is not subject to grand jury secrecy provides a clear guideline for the government to follow in the event of a formal request for the release of such information. Our endorsement of the majority approach to grand jury secrecy provides greater clarification regarding what grand jury material is subject to public disclosure, enhances transparency and community trust in the criminal adjudicative process, and aids in improving police-community relations.

Consider the findings in a 2015 report prepared by an Ad Hoc Police Practices Review Commission subcommittee in Fairfax County, Virginia.[32] The committee was formed "after public outcry over the lack of information or movement in the still unresolved"

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convictions. In 2015, only 15 officers were indicted on murder or manslaughter charges for on-duty killings of civilians — and 10 of the cases involved video. That's a sharp increase from the prior average of less than five indictments per year over 10 years. But still, no police officers were actually convicted on murder or manslaughter charges in 2015.").

[31] *See, e.g.*, MASS. GEN. LAWS ch. 4, § 7(26)(f) (2016) (allowing withholding of "investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest").

[32] Tom Jackman, *Report: Fairfax Police Need 'Real Change—Now' in Public Communications*, WASH. POST (July 24, 2015), https://www.washingtonpost.com/news/local/wp/2015/07/24/report-fairfax-police-need-real-change-now-in-public-communications/?utm_term=.aa934acf1af7.

shooting death of an unarmed Springfield, Virginia resident in 2013 by a Fairfax County Police Department officer.[33] The report concluded that it was essential that the police department improve its community communication and adopt a policy that "fosters transparency."[34] Specifically, the report cited the mishandling of "[c]ommunications in recent high-profile use-of-force and critical incident cases" which produced a diminishment in public trust in the legitimacy of the police.[35] And it further concluded that had more transparent departmental policies been in place, the controversies that led to the creation of the ad hoc commission would have likely been avoided.[36] The subcommittee also noted the longstanding practice by the police department of rejecting record requests pursuant to Virginia's freedom of information law.[37] The report requested that the Board of Supervisors "publicly adopt a resolution . . . to revisit FOIA laws with an eye toward expanding instead of limiting the public release of information related to police-involved shootings and other police practices and procedures related to official police activities."[38]

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[33] *Id.*; *see also* Tom Jackman, *Ex-Fairfax Officer Adam Torres Pleads Guilty to Manslaughter in Shooting Death of John Geer*, WASH. POST (Apr. 18, 2016), https://www.washingtonpost.com/news/true-crime/wp/2016/04/18/ex-fairfax-officer-adam-torres-pleads-guilty-to-manslaughter-in-shooting-death-of-john-geer/?utm_term=.ce2504f6877c (noting that disclosures from the wrongful death action arising from the Geer shooting "created an uproar").

[34] Jackman, *supra* note 32; *see also* Angela Woolsey, *Fairfax County Approves Independent Auditor for Police*, FAIRFAX TIMES (Oct. 3, 2016), http://www.fairfaxtimes.com/ articles/fairfax-county-approves-independent-auditor-for-police/article_1cf1f0ec-89b1-11e6-baba-0bb86719ed48.html ("In addition to use-of-force practices, the ad hoc commission made recommendations concerning independent oversight, communications, recruitment and vetting, and mental health and crisis intervention team (CIT) training.").

[35] Jackman, *supra* note 32.

[36] *Id.*; *see also* AD HOC POLICE PRACTICES REVIEW COMMISSION, FINAL REPORT 45 (2015), http://www.fairfaxcounty.gov/chairman/pdf/adhoc-final-10.8.15.pdf ("If the department had policies that fostered real transparency, it's unlikely the controversies in recent years would have lasted so long and there likely would not have even been a call to form this Commission.").

[37] Jackman, *supra* note 32; *see also* AD HOC POLICE PRACTICES REVIEW COMMISSION, *supra* note 36, at 13 (recommending that the Fairfax County Police Department stop its practice of resisting all FOIA requests, and provide explanations in the event that records are withheld).

[38] AD HOC POLICE PRACTICES REVIEW COMMISSION, *supra* note 36, at 49.

III. THE PROSECUTOR'S LEGAL INSTRUCTIONS TO THE GRAND JURY SHOULD BE RECORDED

The dearth of indictments returned in police-involved shooting cases has spurred debate on the topic of grand jury reform. The grand jury is the primary process followed by the federal government in charging felony cases, and followed by slightly less than one-half of our fifty states.[39] A grand jury is typically composed of between sixteen and twenty-three members impartially drawn from the district wherein it sits, and an indictment cannot be issued by the body unless a majority of the quorum present, hearing an evidentiary presentation from only the prosecution, concludes that probable cause exists that the individual(s) named in the charging instrument committed the crimes alleged.

Some reformists have advocated for abandoning the use of the grand jury altogether in cases involving police-involved killings. California did just that, passing a statute in 2015 that prohibited state prosecutors from using the grand jury to investigate police "use of force" cases.[40] But that special statute was recently struck down by the California Court of Appeals, which ruled that the statute was inconsistent with the state constitution's delegation of power to the grand jury.[41]

At the local level, certain district attorneys have reacted to increasing public skepticism about the grand jury process by making charging decisions in police use of force cases themselves, without utilizing that charging body. In Charlotte, North Carolina, Mecklenburg County District Attorney Andrew Murray

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[39] Almost all of the fifty states allow charges to be pursued by means of the grand jury process, though slightly less than half (twenty-two) now mandate its use in felony cases. *See* SUSAN W. BRENNER & LORI E. SHAW, FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE § 24:2 (2d ed. 2006); *see also* Hurtado v. California, 110 U.S. 516, 521 (1884) (neither the Fifth Amendment nor the Due Process Clause requires states to utilize grand juries to charge felony cases).

[40] On August 10, 2015, California Governor Jerry Brown signed SB 227 which prohibited prosecutors from using grand juries in police use of deadly force cases. Melanie Mason, *Gov. Brown Signs Law Banning Grand Juries in Police Deadly Force Cases*, L.A. TIMES (Aug. 11, 2015), http://www.latimes.com/local/political/la-ma-pc-brown-grand-juries-201508 11-stor y.html.

[41] The People *ex rel.* Vern Pierson v. The Superior Court of El Dorado County, 7 Cal. App. 5th 402 (Cal. Ct. App. 2017).

investigated the controversial shooting of Keith Scott by gathering the evidence and presenting it to a panel of experts within his own office, who unanimously concluded that the responsible officer should not be charged because the suspect presented an imminent threat of violence at the time of the confrontation.[42] In Minneapolis, Hennepin County District Attorney Michael Freeman announced in investigating the shooting death of Jamar Clark that he will no longer use the grand jury in any future police shooting case.[43] According to Freeman, "the accountability and transparency limitations are too high to overcome," and he would rather make these difficult decisions himself.[44]

But abandoning the grand jury is an extreme solution that forfeits many important procedural tools that law enforcement may need to uncover the facts.[45] It is the equivalent of throwing the baby out with the bath water. The grand jury has the power to subpoena records and testimony from reluctant witnesses (such as fellow officers, family members, or gang associates) which prosecutors cannot obtain in states that do not grant prosecutors the power of administrative subpoena. Hospital records, internal human resources records, and social media communications are often unavailable to the prosecutor in the absence of a formal subpoena. Fellow officers concerned about being perceived as turncoats and crossing the "Thin Blue Line" may be reluctant to cooperate with the prosecutor without a formal subpoena. In many states, the district attorney is powerless to apply for a judicial grant of immunity in the absence of an assertion of a privilege under oath before the grand jury.[46] Perhaps most

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[42] *See* Richard Fausset, *Charlotte Officer 'Justified' in Fatal Shooting of Keith Scott*, N.Y. TIMES (Nov. 30, 2016), https://www.nytimes.com/2016/11/30/us/charlotte-officer-acted-lawfully-in-fatal-shooting-of-keith-scott.html.

[43] David Chanen, *Hennepin County to Stop Using Grand Juries in Officer-Involved Shootings*, MINNEAPOLIS STAR TRIB., Mar. 16, 2016, http://www.startribune.com/hennepin-county-attorney-to-provide-update-into-jamar-clark-inquiry/372229891/.

[44] Amy Forliti, *Prosecutor Says No Grand Jury in Minneapolis Police Shooting*, SAN DIEGO TRIB., http://www.sandiegouniontribune.com/sdut-prosecutor-says-no-grand-jury-in-minneapolis-2016mar16-story.html.

[45] *See* Randall Eliason, *In Defense of the Grand Jury (Part One)*, SIDEBARS BLOG, May 24, 2016, https://rdeliason.com/2016/03/24/the-guilty-ham-sandwich-in-defense-of-the-grand-jury-part-1/ (discussing benefits of the grand jury).

[46] *See, e.g.*, MASS. GEN. LAWS ch. 233, § 20E (2016) (setting forth procedure in Massachusetts).

importantly, the grand jury allows a prosecutor to see how testimony is likely to hold up (or change) under oath when it is subject to the pains and penalty of perjury, powers not replicable in a simple interview setting. For all of these reasons, the California District Attorneys' Association objected to depriving prosecutors of the use of the grand jury in cases involving police-involved shootings before Governor Brown signed controversial SB 227 in 2015.[47]

Grand jury manipulation (or public *perception* of manipulation) is one of the central problems with respect to police shooting investigations.[48] The transcript of the Ferguson, Missouri grand jury proceeding reveals just how far prosecutors can sometimes go in skewing factual presentations in police-involved shooting cases—not only do they fail to "cross examine" police officers such as Darren Wilson, who would otherwise be perceived as a potential "target" during any other type of preliminary investigation, but they closely cross examine and impeach civilian witnesses who might normally be perceived as neutral and cooperative.[49] There is little doubt that prosecutors have the ability to shape the case before the grand jury "as a means to drop cases they don't want to pursue, without subjecting themselves to the political heat for not bringing charges."[50] Though the Ferguson grand jury transcripts

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[47] Mason, *supra* note 40.

[48] *See generally* R. Michael Cassidy, *Who Should Investigate Police Involved Killings?*, MASS. LAW. WKLY. 47 (May 25, 2015) (advocating the use of independent prosecutors).

[49] *See* Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. REV. 762 (2016).

[50] *Id.* at 811–13. *See* Marjorie Cohn, *Prosecutor Manipulates Grand Jury Process to Shield Officer*, HUFFINGTON POST (Nov. 28, 2014), http://www.huffingtonpost.com/marjorie-cohn/prosecutor-manipulates-grand-jury-to-shield-officer_b_6240578.html; *see also* Colin Taylor Ross, *Policing Pontius Pilate: Police Violence, Local Prosecutors, and Legitimacy*, 53 HARV. J. ON LEGIS. 755, 763–64 (2016) ("The statistics and popular conception of grand juries did not square with McCulloch's actions. McCulloch gave an atypically comprehensive presentation to the grand jury that spanned three months and involved over seventy hours of testimony from over fifty witnesses, including Wilson. The jury had to weigh both exculpatory and inculpatory evidence and McCulloch took no stance on whether criminal charges were warranted. Some legal analysts, and McCulloch himself, said that the reason for the lengthy, thorough proceeding was so that the jurors—and the public after the release of the jury transcripts—could see every side of the story. Again, this is a common approach in cases involving killings by police, but not in similar cases involving civilians.").

were later released, this imbalance in the proceedings did little to quell criticism of the grand jury process.[51]

It turns out that the Ferguson grand jury that cleared Darren Wilson for the death of Michael Brown was *misinstructed* on the correct standard to apply to police use of force cases. At the beginning of the proceedings, the prosecutor instructed the grand jury that police in Missouri are justified in using deadly force to arrest a fleeing felon, without regard to whether that felon possessed a weapon and/or presented a risk of danger to the police officer or others.[52] The constitutional standard under *Tennessee v. Garner* is that, before using deadly force, the police officer must entertain an objectively reasonable fear that the victim presented a danger to the officer or to members of the public.[53] The prosecutor later clarified this standard after the grand jury had heard all the evidence. Our point here is that members of the public and voters in St. Louis County would never have known about the prosecutor's confusing legal instructions before the grand jury if these instructions had not been recorded.

Our proposals in this Essay focus on *reforms* in the grand jury process, rather than abolition or abandonment of the grand jury. One badly needed reform is to require that a prosecutor's legal instructions to the grand jury be recorded. This will serve as a prophylactic to encourage prosecutors to get the law right, and to present it to the grand jury in a fair and balanced way.

In federal court[54] and in the majority of jurisdictions that utilize the grand jury,[55] everything that occurs before the grand jury except the deliberations and vote of the jurors must be recorded. This practice is consistent with the American Bar Association's Criminal Justice Standards, which require that "[t]he entirety of the proceedings occurring before a grand jury, including the

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[51] In *The New Yorker Magazine*, Jeffrey Toobin criticized DA Robert McCulloch for implementing "a document dump," approach to the grand jury that "is virtually without precedent in the law of Missouri or anywhere else." Jeffrey Toobin, *How Not to Use a Grand Jury*, NEW YORKER (Nov. 25, 2014), http://www.newyorker.com/news/news-desk/use-grand-jury.

[52] William Freivogel, *Grand Jury Wrangled with Confusing Instructions*, ST. LOUIS PUB. RADIO (Nov. 26, 2014), http://news.stlpublicradio.org/post/grand-jury-wrangled-confusing-instructions#stream/0.

[53] 471 U.S. 1, 6 (1985).

[54] FED. R. CRIM. P. 6(e)(1).

[55] BEALE ET AL., *supra* note 15, § 4.9.

prosecutor's communications with and presentations and instructions to the grand jury, should be recorded in some manner, and that record should be preserved."[56] Yet eleven states require only the recording of a witness's "testimony" before the grand jury,[57] which means that a prosecutor can put his thumb on the scale by giving lopsided, misleading, or imbalanced legal instructions. These statutes and rules of criminal procedure should be amended to follow the federal model.

Notably, two state supreme courts have required the recording of instructions before the grand jury even though the applicable state rule of criminal procedure did not expressly require it. In *State v. Grewell*,[58] the Ohio Supreme Court ruled that recording was necessary to protect against abuse of grand jury proceedings and a prosecutorial appeal to the passions of the grand jury.

> [A] sophisticated prosecutor must acknowledge that there develops between a grand jury and the prosecutor with whom the jury is closeted a rapport—a dependency relationship—which can easily be turned into an instrument of influence on grand jury deliberations. Recordation is the most effective restraint upon such potential abuses.[59]

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[56] AM. BAR ASS'N, ABA CRIMINAL JUSTICE STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION 3–4.5(d) (4th ed. 2015) ("The entirety of the proceedings occurring before a grand jury, including the prosecutor's communications with and presentations and instructions to the grand jury, should be recorded in some manner, and that record should be preserved.").

[57] *See* CAL. PENAL CODE § 938 (West 2016); 725 ILL. COMP. STAT. ANN. 5/112-7 (West 2016); KY. R. CR. P. 5.16 (2017); MD. CODE ANN., CTS. & JUD. PROC. § 8-416 (West 2016); MI. R. RCRP MCR 6.107 (2017); MONT. CODE ANN. § 46-11-316 (West 2016); N.D. CENT. CODE ANN. § 29-10.1-16 (West 2016); OKLA. STAT. ANN. tit. 22, § 340 (West 2016); S.D. CODIFIED LAWS § 23A-5-11.1 (2016); TEX. CODE CRIM. PROC. ANN. art. 20.012 (West 2015); VA CODE ANN. § 19.2-215.9 (2016).

[58] 543 N.E.2d 93, 96 (Ohio 1989).

[59] *Id.*, *quoting* United States v. Gramolini, 301 F. Supp. 39, 41–42 (D. R.I. 1969). Ohio originally required recording of grand jury "proceedings" by interpreting Ohio R. Crim. P. R. 22, which requires proceedings in all felony cases to be recorded and which was originally interpreted to apply only to trials and pre-trial proceedings. Subsequent decisions clarified *Grewell* and confirmed that the prosecutor's legal instructions must also be recorded. State v. Goff, 2013 WL 139545, at *13, *32 (Ohio Ct. App. 2013).

The Massachusetts Supreme Judicial Court recently required recording of grand jury instructions pursuant to its general superintendence power over the lower courts.[60]

Opponents of our proposal may argue that recording grand jury instructions will lead to time-consuming pre-trial litigation about whether the legal instructions were inaccurate, or whether they were inadequate under the circumstances because they failed to include instructions on lesser included offenses and possible affirmative defenses. Yet this critique confuses the question of whether instructions should be *recorded* with the question of whether they should be *turned over* to the defendant after indictment. The former does not necessarily require the latter. In New York, for example, assistant district attorneys have long been required to record their instructions to the grand jury.[61] Yet the transcript of these instructions is not regularly turned over to the defense counsel. Defense counsel may move at arraignment to have the court inspect the minutes for error and sufficiency.[62] Only if, after in camera review, the court finds that there may be a problem with the instructions and that the court would be aided by the parties briefing does the court order release of the instructions to the defendant.[63] This procedure seems to have worked reasonably well in New York without substantial added costs to criminal litigation.

IV. STATE RULES OF CRIMINAL PROCEDURE SHOULD BE AMENDED TO ALLOW DISCLOSURE OF GRAND JURY MINUTES TO THE PUBLIC IN LIMITED CIRCUMSTANCES

In Ferguson, Missouri, District Attorney Robert McCulloch took the highly unusual step of releasing to the public minutes of the grand jury investigation into the death of Michael Brown after a

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[60] Commonwealth v. Grassie, 476 Mass. 202, 220 (2017).

[61] People v. Percy, 45 A.D.2d 284, 285 (N.Y. App. Div. 1974), *aff'd*, 345 N.E.2d 582 (N.Y.S.2d 1975).

[62] N.Y. CPL § 210.30 (McKinney 2009). New York practice differs from federal practice; in New York, defendants may challenge the legal sufficiency of the evidence presented to the grand jury. *Compare* N.Y. CPL § 210.20 (McKinney 2009), *with* Costello v. United States, 350 U.S. 359, 363 (1956).

[63] N.Y. CPL § 210.30 (McKinney 2009).

no-bill was returned.[64] Whether or not that release did anything to alleviate public unrest and racial tensions in the city, it certainly added to transparency and allowed citizens (and future voters) to get a rare glimpse into how the district attorney handled the case. In Staten Island, by contrast, the New York Public Advocate, the Civil Liberties Union, the Legal Aid Society, and the NAACP sought judicial release of the transcripts in the Eric Garner death investigation under N.Y. CPL § 190.25, and were denied.[65] That decision to withhold the grand jury minutes further fueled public unrest and added to the legitimacy deficit clouding law enforcement.[66]

While grand jury proceedings are traditionally conducted in secret, this presumption of secrecy is not absolute. Indeed, federal judges are authorized to release grand jury materials upon a showing of "particularized need."[67] This particularized need standard is followed in many states,[68] and indeed was the operative standard which the New York trial and appellate courts followed in declining to release the Eric Garner grand jury materials.[69]

The Eric Garner stranglehold case in Staten Island shows how hard it is for the public to gain access to grand jury minutes, and how corrosive the presumption of grand jury secrecy can be to

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[64] Benjamin Weiser, *Mixed Motives Seen in Prosecutor's Decision to Release Ferguson Grand Jury Minutes*, N.Y. TIMES (Nov. 25, 2014), https://www.nytimes.com/2014/11/26/us/mixed-motives-seen-in-prosecutors-decision-to-release-ferguson-grand-jury-materials.html?_r=0.

[65] *In re* James v. Donovan, 130 A.D.3d 1032, 1032 (N.Y. App. Div. 2015) (affirming decision of trial court declining to release transcripts). The lower court reasoned that the petitioners had not made a showing of "compelling and particularized need" because if "maximizing the public's awareness" of the operations of the grand jury were a sufficient grounds to rebut legal presumption against disclosure, there would be nothing left of the rule. *Id.* at 1037–38.

[66] *See* Matt Taibbi, *Decision to Keep Garner Grand Jury Minutes Secret Continues the Crime*, ROLLING STONE (Mar. 20, 2015), http://www.rollingstone.com/politics/news/decision-to-keep-garner-grand-jury-minutes-secret-continues-the-crime-20150320 (describing the decisions to keep the grand jury minutes secret as "a disaster").

[67] Douglas Oil Co. v. Petrol Stops Nw., 441 U.S. 211, 223–24 (1979).

[68] BEALE ET AL., *supra* note 15, § 5.3. *But see* S.C. CODE ANN. § 14-7-1720(a) (2015) (stating that the person performing official function before grand jury may release grand jury materials "when directed by a court for the purpose of . . . further[ing] justice").

[69] *In re* James, 130 A.D.3d at 1037 ("The legal standard that must initially be applied to petitions seeking the disclosure of grand jury material is whether the party seeking disclosure can establish a 'compelling and particularized need' . . . .").

public confidence.[70] The close working relationship between prosecutors and police may cause the public to question the prosecutor's impartiality and wonder whether the secret grand jury presentation was conducted fairly.[71]

In the *Douglas Oil* case, the Supreme Court identified five specific interests advanced by keeping grand jury proceedings secret: (1) it encourages witnesses to come forward; (2) it encourages witnesses to testify fully and frankly; (3) it helps protect against flight by the putative target of the grand jury investigation; (4) it helps prevent actors from tampering with witnesses or jurors; and (5) it serves to protect the target(s) or subject(s) of the grand jury investigation from embarrassment and public ridicule in the event that they are not indicted.[72] For these reasons, the court reiterated in *Douglas Oil* that "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings" and that civil litigants must make a showing of "particularized need" before gaining access to grand jury materials.[73]

In police shooting cases where the grand jury investigation has terminated with a "no-bill," three of the five interests in secrecy identified in *Douglas Oil* are no longer applicable: the subject of the investigation and his associates have no incentive to tamper with witnesses or jurors; flight will not compromise future judicial proceedings; and, at least where the officer involved has already been identified by the media, the reputational interests of the subject of the investigation will not be compromised.

The sole remaining societal interests at stake in cloaking these investigations with secrecy are (1) encouraging witnesses to come forward and (2) encouraging them to testify frankly. Proponents of grand jury secrecy argue that, if witnesses know that their

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[70] J. David Goodman, *Appeals Court Rules For Transcripts in Eric Garner Case to Remain Sealed*, N.Y. TIMES (Nov. 23, 2015), https://www.nytimes.com/2015/11/24/nyregion/appeals-court-rules-for-transcripts-in-eric-garner-case-to-remain-sealed.html ("The grand jury's decision last December spurred protests across New York and beyond, and amplified national calls for changes in police practices and to the grand jury system.").

[71] *See* Christopher Mathias & Lilly Workneh, *Grand Jury Declines to Indict NYPD Officer in Chokehold Death of Eric Garner*, HUFFINGTON POST (Dec. 3, 2014), http://www.huffingtonpost.com/2014/12/03/eric-garner_n_6263656.html (stating that the failure to indict "leaves New Yorkers with an inescapable question").

[72] *Douglas Oil*, 441 U.S. at 219.

[73] *Id.* at 217–18.

testimony before the grand jury may later be released, that will have a chilling effect on their testimony. Private citizens may be reluctant to testify or, if they do, they may be guarded and circumspect in recounting events. But these two interests can be accommodated—at least in part—by redacting the names and identifying information of witnesses before any transcripts are released. Do these two interests outweigh the need for public understanding of the criminal justice system? Should informed public debate about the continued utility of the grand jury be sacrificed on the altar of secrecy?

The "particularized need" doctrine under Rule 6(e) concerns disclosure of grand jury materials to other litigants, to civil government officials or agencies, and to foreign tribunals. It does not envision release of transcripts to the public. But there is also a line of federal authority that suggests that courts have the "inherent authority" to release grand jury transcripts to the public in exceptional cases.[74] A leading case on this issue is *In re Biaggi*, in which the district court exercised its discretion to release a grand jury witness's testimony, where the witness was a candidate for public office, where both the witness and the government petitioned for its release, and where the *New York Times* had falsely claimed that the witness had asserted his Fifth Amendment rights in the grand jury.[75] In affirming this exercise of discretion, the Second Circuit stated that "[o]ur decision should therefore not be taken as demanding, or even authorizing, public disclosure of a witness' grand jury testimony in every case where he seeks this and the Government consents. It rests on the exercise of a sound discretion under the special circumstances of this case."[76] This "specialized circumstances" doctrine has also been invoked by District Court Judge Peter Leisure of the Southern District of New York, who authorized disclosure of grand jury materials to a historian and biographer of Alger Hiss.[77] Adopting the *Biaggi*, exception, the court exercised its inherent authority to release certain grand jury materials because there was "sustained and widespread historical interest in the Hiss case"

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[74] BEALE ET AL., *supra* note 15, § 5.19.

[75] 478 F.2d 489, 490–91 (2d Cir. 1973).

[76] *Id.* at 494 (Friendly, J., Supplemental Opinion).

[77] *In re* Am. Historical Ass'n, 49 F. Supp. 2d 274, 295 (S.D.N.Y. 1999).

and the investigation was long over and most of the witnesses had died.[78]

Assessment of whether "special circumstances" exist or whether a "particularized need" has been met involves a flexible balancing of the need for secrecy against the need for disclosure.[79] Because these doctrines represent an exception to the rule of secrecy, decisions granting disclosure will be rare, and will be highly dependent on context and the identity of the decision maker. If states are more receptive to public dissemination of grand jury minutes, they should amend their rules of criminal procedure to more carefully identify the circumstances in which it should be allowed. In fact, in denying release in the Eric Garner investigation, New York state judge William Garnett essentially recognized that this topic was the appropriate province of statutory reform rather than case-by-case adjudication by the judiciary: if there is going to be any change in the presumption of secrecy for newsworthy cases, that "should be effected by the legislature."[80]

We maintain that state legislatures should step in to the breach and amend their rules of criminal procedure to clarify a court's power to release grand jury materials to the public in certain narrow circumstances. This may help avoid the results in cases like the Eric Garner death investigation in Staten Island. The suggested text of our proposed provision is set forth below:

> A court may order the disclosure of grand jury minutes upon the motion of any person upon a particularized showing that (1) the grand jury's investigation has concluded without an indictment; (2) a significant number of members of the general public in the county from which the grand jury was drawn are currently aware that a criminal investigation was conducted and

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[78] *Id.* at 293–95.

[79] *See, e.g.*, United States v. John Doe, Inc. I, 481 U.S. 101, 112–17 (1987) (finding a particularized need despite the availability of the grand jury materials from other sources); United States v. Sells Engineering, Inc., 463 U.S. 418, 443, 445 (1983) (describing the *Douglas Oil* standard as "highly flexible").

[80] *See* Brief of Petitioner-Appellant New York Civil Liberties Union at 20–21, *In re* James v. Donovan, 14 N.Y.S.3d 435 (N.Y. App. Div. 2015) (AD No 2015-02774) (siting Judge Garnett's order).

> of the subject matter of that investigation; (3) a significant number of members of the general public in the county from which the grand jury was drawn know the identity of the subject(s) of the grand jury proceedings; and (4) there is a compelling public interest in the revelation of investigatory facts that outweighs the need for grand jury secrecy. A compelling public interest in revelation of investigatory facts under subsection (4) shall be presumed whenever either the District Attorney conducting the grand jury investigation or the state Attorney General petitions the court for disclosure. If the prosecutor investigated two or more suspects in the grand jury proceedings for similar misconduct arising out of a common nucleus of operative facts and one or more of these suspects was indicted by the grand jury, the court should not consider a petition under this paragraph until the charges against the indicted defendant have been resolved by dismissal, change of plea, or trial. Whenever the court orders disclosure of grand jury minutes under this paragraph, the names and identifying information of any witnesses, staff of the prosecutor's office, and grand jurors shall be redacted.

Subsections 1–4 of this proposal were drawn heavily from the recommendations of a task force appointed by the Supreme Court of Ohio to examine improvements in the Ohio grand jury system[81] following the fatal shooting of twelve-year-old Tamir Rice in 2014, who was holding a pellet gun at the time of his death.[82] The task force's proposed amendments to Ohio Rule of Criminal Procedure 6 are still pending in Ohio.[83] One difference between our proposal

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[81] *See* THE SUPREME COURT OF OHIO, REPORT AND RECOMMENDATIONS OF THE TASK FORCE TO EXAMINE IMPROVEMENTS TO THE OHIO GRAND JURY SYSTEM 14–17 (July), https://www.supremecourt.ohio.gov/Publications/grandJuryTF/report.pdf [hereinafter REPORT] (proposing amendments to the Ohio Rules of Criminal Procedure).

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

[83] REPORT, *supra* note 81, Appendix B at 27.

and the pending Ohio recommendation is that the "compelling public interest" identified in our rule is *presumed* where either the District Attorney in charge of the local grand jury or the State Attorney General has joined in the petition for public release. As law enforcement officials responsible for working closely with the police to maintain public order and safety, we believe that prosecutors are often better positioned than judges to assess the temperature of the community and the corrosive effects grand jury secrecy may be having on relationships between the police and citizens. They are also closer to the investigation of violent crime and better able to assess the likely chilling effect disclosure may have on future witnesses. For each of these reasons, we have inserted a presumption that allows the court to find the "compelling public interest" prong of the disclosure rule met when the application comes from, or is joined by, a duly elected chief prosecutor.

V. CONCLUSION

Healthy and sustained perceptions of systemic legitimacy are largely undergirded by the public's confidence that criminal processes are fair. The perceived unfairness of the grand jury system, particularly as applied to police misconduct cases, adds to our current legitimacy deficit in criminal law. Given the secretive nature of that body's deliberative process, it is essential that the public have confidence that fair procedures are followed. Indeed, the experiences in Ferguson, Missouri and Staten Island, New York highlight some of the critical problems that can manifest when the public's faith in the process is diminished. To help address these concerns, this Essay proposes measures that enhance transparency, check the exercise of prosecutorial discretion, and contribute to the sustenance of community trust in this critical phase of the criminal litigation process. If adopted, these measures will make the grand jury charging process—a mainstay of American criminal adjudication—more equitable in appearance and in fact.