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### How We Prosecute the Police

Kate Levine

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# ARTICLES

## How We Prosecute the Police

KATE LEVINE\*

*Police brutality is at the center of a growing national conversation on state power, race, and our problematic law enforcement culture. Focus on police conduct, in particular when and whether it should be criminal, is on the minds of scholars and political actors like never before. Yet this new focus has brought up a host of undertheorized questions about how the police are treated when they become the subject of criminal prosecutions.*

*This Article is part of a larger project wherein I examine the ways in which criminal procedure is different for the police than other suspects. Here, my focus is on the seemingly special precharge and preindictment process that police receive. Prosecutors have the discretion to investigate cases before charging and to present robust cases to grand juries for any suspect. Yet, most charging decisions are reflexive and uninvestigated. Similarly, most grand jury hearings are dominated entirely by prosecutors who present one-sided, highly curated versions of events. As we have seen repeatedly, however, when police liberty is on the line, these processes change: prosecutors tend to conduct a thorough precharge investigation and they present a full account of an accusation, including exculpatory evidence, to grand juries.*

*This thorough criminal process has led to what many see as a lack of criminal accountability for police. In response, scholars and politicians have called for prosecutors to treat the police more like other suspects: to strip the police of the precharge/preindictment process they receive. Here, I argue that the reverse solution is far more powerful: prosecutors should extend the precharge and preindictment process they give police to all criminal suspects. A host of reformative possibilities would flow from more careful investigation and evidence weighing before a criminal suspect is charged or indicted. Moreover, reallocating resources to this important moment in the criminal justice process could reduce the untenable costs of our overburdened system.*

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## INTRODUCTION

When Robert McCulloch, the St. Louis County prosecuting attorney, announced that there would be no indictment in the shooting death of teenager Michael Brown by Ferguson police officer Darren Wilson, the decision engendered public outrage.<sup>1</sup> But his announcement and the release of the grand jury transcripts from the hearings raised the hackles of those familiar with the criminal justice system for another reason. The process Wilson received was virtually unrecognizable to those familiar with the way grand juries operate for most suspects. The published transcripts showed a host of differences from the normal picture of a modern grand jury hearing, during which prosecutors present highly curated and inculpatory pieces of their case designed to induce

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1. See Jeremy Kohler, *Statement of St. Louis Prosecuting Attorney Robert P. McCulloch*, ST. LOUIS POST DISPATCH (Nov. 24, 2014, 8:15 PM), [http://www.stltoday.com/news/local/crime-and-courts/statement-of-st-louis-prosecuting-attorney-robert-p-mcculloch/article\\_2becfef3-9b4b-5e1e-9043-f586f389ef91.html](http://www.stltoday.com/news/local/crime-and-courts/statement-of-st-louis-prosecuting-attorney-robert-p-mcculloch/article_2becfef3-9b4b-5e1e-9043-f586f389ef91.html); see also Tamara Aparton, *SF Public Defender's Statement on Grand Jury Decision*, SF PUB. DEFENDER (Nov. 26, 2014), <http://sfpublicdefender.org/news/2014/11/sf-public-defenders-statement-on-grand-jury-decision/>; Sara Hossaini, *Public Defenders Hold 'Black Lives Matter' Rallies for Police Accountability*, KQED NEWS (Dec. 18, 2014), <http://ww2.kqed.org/news/2014/12/18/public-defenders-hold-black-lives-matter-rallies-for-police-accountability/> (“Public defenders in San Francisco, Alameda, Contra Costa, Santa Clara and Solano counties protested in support of national outrage over decisions not to indict police officers involved in the deaths of unarmed black men.”); Joan McCarter, *Bob McCulloch: Prosecutor or Defense Attorney for Darren Wilson?*, DAILY KOS (Nov. 25, 2014, 9:42 AM), <http://www.dailykos.com/story/2014/11/25/1347403/-Bob-McCulloch-Prosecutor-or-defense-attorney-for-Darren-Wilson#>; Letter from Sherrilyn A. Ifill, President & Dir.-Counsel, NAACP Legal Def. & Edu. Fund, Inc., to Hon. Maura McShane, Judge, 21st Judicial Circuit 2 (Jan. 5, 2015), [http://www.naacpldf.org/files/case\\_issue/NAACP%20LDF%20Open%20Letter%20to%20Judge%20Maura%20McShane.pdf](http://www.naacpldf.org/files/case_issue/NAACP%20LDF%20Open%20Letter%20to%20Judge%20Maura%20McShane.pdf) (calling for an investigation into the *State v. Darren Wilson* Grand Jury Proceedings for, among other things, preferential treatment of the defendant and erroneous instructions on the law).

quick and sure indictments.<sup>2</sup> The Ferguson grand jury instead heard “every statement” and “every bit of evidence” in the proceeding that they were told would be “like a trial.”<sup>3</sup> As the transcripts revealed, they heard dozens of witnesses, including Darren Wilson, and examined reams of evidence.<sup>4</sup> Only after this “trial” did the jury decide not to indict.

For the most part, public outrage at McCulloch and other district attorneys has focused on how only a few officers are held criminally accountable for what, to many, appear to be violent, criminal acts of brutality and murder against primarily African-American men, women, and children. Regardless of whether criminal law is the most effective way of reforming our problematic police culture, many people want to see the police held accountable. Thus, the thorough grand jury presentations in the Brown case and other police brutality cases have been roundly criticized by criminal justice advocates as a way for partisan prosecutors to shield the police.<sup>5</sup>

Scholarly critiques of prosecutorial discretion tend to focus on what happens after a prosecutor decides to charge a suspect or gets a grand jury indictment. One rich strand of scholarship describes the many problems with plea bargaining, including the lawless grey area in which it operates and the funding and power differentials between prosecutors and defense attorneys.<sup>6</sup> Another set of scholarship looks at the ways in which prosecutors turn a blind eye to, or actively hide, evidence that might exculpate a defendant, both before and after a conviction or guilty plea is finalized.<sup>7</sup> Reams of scholarship look at the lack of

2. See Jeffrey Fagan & Bernard E. Harcourt, *Professors Fagan and Harcourt Provide Facts on Grand Jury Practice in Light of Ferguson Decision*, COLUMB. L. SCH. (Dec. 5, 2015, 12:00 PM) [http://www.law.columbia.edu/media\\_inquiries/news\\_events/2014/november2014/Facts-on-Ferguson-Grand-Jury](http://www.law.columbia.edu/media_inquiries/news_events/2014/november2014/Facts-on-Ferguson-Grand-Jury); see also *infra* Section II.A. See generally Transcript of Grand Jury Missouri v. Wilson (Aug. 20, 2014), <http://int.nyt.com/newsgraphics/2014/11/24/ferguson-evidence/assets/gj-testimony/grand-jury-volume-01.pdf>.

3. Transcript of Grand Jury at 8, 9, 21, Missouri v. Wilson (Aug. 20, 2014), <http://int.nyt.com/newsgraphics/2014/11/24/ferguson-evidence/assets/gj-testimony/grand-jury-volume-01.pdf>; see also *infra* notes 125–29.

4. See *infra* Section II.B. For an interesting critical take on Wilson’s testimony as evidence of a problematic culture of race and masculinity, see L. Song Richardson, *Police Racial Violence: Lessons from Social Psychology*, 83 *FORDHAM L. REV.* 2961, 2971 (2015) (noting that Wilson testified Brown called him “too much of . . . a pussy to shoot”) (alteration in original).

5. See, e.g., Letter from Sherrilyn A. Ifill to Judge Maura McShane, *supra* note 1, at 7–9.

6. See generally Samuel L. Bray, *Power Rules*, 110 *COLUM. L. REV.* 1172, 1188 (2010) (discussing the power differential in plea bargaining); Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 *N.Y.U. ANN. SURV. AM. L.* 783, 784 (1997) (underfunding of public defenders); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 *YALE L.J.* 1979 (1992) (plea bargaining process is infected with structural problems); William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 *HARV. L. REV.* 2548, 2549–50 (2004) (law has limited effect on plea bargains); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 *HARV. L. REV.* 780, 819 (2006) (“Prosecutors prone to abuse their authority usually do so through low-visibility plea bargains . . .”).

7. See generally Miriam H. Baer, *Timing Brady*, 115 *COLUM. L. REV.* 1 (2015) (discussing how prosecutors are more likely to withhold *Brady* as they become more sure of their stake in a case); Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 *CASE W. RES. L. REV.*

judicial oversight at every stage of the process, from plea bargains to sentencing decisions, and waivers that make pleas virtually unreviewable by appellate courts.<sup>8</sup> Finally, another strand of scholarship laments the many ways in which prosecutorial discretion and secrecy affect society. One vein of this scholarship looks at participation in the criminal justice process—searching for ways to bring juries into plea bargaining and to protect the rights of observers.<sup>9</sup> The other examines the ways in which high conviction rates and imprisonment, particularly of young, black men, rend the fabric of African-American families and communities.<sup>10</sup>

Although each of these strands of scholarship addresses important, problematic aspects of unbridled prosecutorial discretion, this Article focuses on the less-theorized, but potentially most important aspect of prosecutorial decision making: the process employed when prosecutors decide whether to charge and how to pursue an indictment of a criminal suspect.<sup>11</sup> In particular, I will focus

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531 (2007) (prosecutorial gamesmanship in the wake of *Brady*); Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 263 (2011) (excessive caseloads lead to prosecutorial errors); Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of Brady Through the Defendant Due Diligence Rule*, 60 UCLA L. REV. 138, 138 (2012) (addressing the “practice of courts forgiving prosecutors for failing to disclose *Brady* evidence if the defendant or his lawyer knew or with due diligence could have known about the evidence”).

8. See Stephanos Bibas, *How Apprendi Affects Institutional Allocations of Power*, 87 IOWA L. REV. 465, 470–74 (2002) (arguing that the *Apprendi* line of decisions increased prosecutorial power over sentencing); Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 117 (1999) (arguing that certain constitutional rights should be nonnegotiable and that judges should be empowered to prevent defendants from giving up these rights); Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 78–92 (2015) (discussing problems with plea waivers in context of proposed ineffective assistance of counsel waivers).

9. See Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 731 (2010) (suggesting that we “incorporate the local community into the guilty-plea procedure through the use of a plea jury”); Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2174 (2014) (arguing that citizen observation of criminal process is “uniquely suited to help restore public participation and accountability in a world without juries”).

10. See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 18 (1998) (“[P]rosecutors, through their overall duty to pursue justice, have the responsibility to use their discretion to help eradicate the discriminatory treatment of African Americans in the criminal justice system.”); Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 383 (2013) (arguing that juvenile prosecutors must “resist external pressures to respond punitively to exaggerated perceptions of threat by youth of color”); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 374 (2001) (“Prosecutors uphold the banishment of a generation of African American men simply by playing their role in the context of today’s criminal justice system.”).

11. Some scholars, in particular Josh Bowers, have written about or acknowledged the importance of the initial charging decision. These articles focus mostly on the decision whether to prosecute, not the procedure prosecutors use to make such decisions. See, e.g., Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1709 (2010) (“[P]rosecutors’ initial decisions of what and whether to charge are somewhat dispositive on the question of whether the defendant will ultimately end up with some type of conviction . . . .”); Davis, *supra* note 10, at 21 (“The first and ‘most important function exercised by a prosecutor’ is the charging

on the menu of procedural options prosecutors have at their disposal when making these critical decisions.

Critics have also pointed to the numerous ways police seem to be virtually above the criminal law. Among these criticisms are the inherently problematic, close professional relationship between police and prosecutors,<sup>12</sup> the favorable substantive and constitutional laws that allow police to commit violence at a rate some argue is not appropriate,<sup>13</sup> and the “blue wall of silence,” in which police either refuse to testify against one another or collude to present their stories in the least criminal light.<sup>14</sup>

In considering prosecutors’ precharge decisions, this Article also illuminates another way in which the police appear to receive favorable treatment when they become criminal suspects: the amount of criminal process they receive from prosecutors before they are charged or indicted. In particular, I identify two processes that prosecutors could employ in any case but rarely do except for when police liberty is on the line: precharge investigation and full evidentiary presentations to the grand jury.

Although criminal justice scholars and the public at large are enraged about the use of these procedures in police cases,<sup>15</sup> I argue here that the problem is not

decision.”); Kyle Graham, *Overcharging*, 11 OHIO ST. J. CRIM. L. 701, 707–08 (2014); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 31 (2002) (arguing that prosecutors should use charge “screening” as the principal alternative to plea bargains”).

12. See, e.g., Kate Levine, *Who Shouldn’t Prosecute the Police*, 101 IOWA L. REV. (forthcoming 2016) (examining the conflict of interest between local prosecutors and law enforcement).

13. Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 778 (2012) (arguing that the Constitution allows police violence that is not desirable).

14. See, e.g., Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 237 (1998) (“Police officers . . . lie under oath because of the ‘blue wall of silence,’ an unwritten code in many departments which prohibits . . . testifying truthfully if the facts would implicate the conduct of a fellow officer.”); Alexandra Holmes, Note, *Bridging the Information Gap: The Department of Justice’s “Pattern or Practice” Suits and Community Organizations*, 92 TEX. L. REV. 1241, 1246 (2014) (“[T]he ‘blue wall of silence’ that describes fellow officers’ unwillingness to testify against the defendant often prevents prosecutors from developing a case.”).

15. See, e.g., Brian Beutler, *The NYC Cop Who Strangled Eric Garner to Death is Free Thanks to a Legal Flaw. Here’s How Voters Can Fix It.*, 3 NEW REPUBLIC (Dec. 3, 2014), <http://www.newrepublic.com/article/120478/eric-garner-police-officer-shouldve-been-investigated-independently> (quoting Professor Ronald Wright about the ability to appoint special prosecutors in cases of police brutality); Paul Butler, *The System Must Counteract Prosecutors’ Natural Sympathies for Cops*, N.Y. TIMES (Apr. 28, 2015, 12:26 PM), <http://www.nytimes.com/roomfordebate/2014/12/04/do-cases-like-eric-garners-require-a-special-prosecutor/the-system-must-counteract-prosecutors-natural-sympathies-for-cops>; Paul Cassell, *Who Prosecutes the Police? Perceptions of Bias in Police Misconduct Investigations and a Possible Remedy*, WASH. POST (Dec. 5, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/05/who-prosecutes-the-police-perceptions-of-bias-in-police-misconduct-investigations-and-a-possible-remedy/>; Melanie Mason, *Bill Barring Grand Juries in Police Deadly Force Cases Clears Assembly*, L.A. TIMES (Jul. 16, 2015, 11:07 AM), <http://www.latimes.com/local/political/la-me-pc-grand-juries-bill-20150716-story.html> (discussing a California bill to remove police investigations from grand juries because of secrecy and fears about bias); Noah Remnick, *Cuomo to Appoint Special Prosecutor for Killings by Police*, N.Y. TIMES (Jul. 7, 2015), <http://www.nytimes.com/2015/07/08/nyregion/cuomo-to-appoint-special-prosecutor-for-killings-by-police.html> (discussing New York Governor’s executive order appointing the State Attorney General as a special prosecutor in all police fatality cases); Howard

the procedure prosecutors employ in such cases, but rather the inherent distributional inequality between the process given to the police and the process given to ordinary criminal suspects. Calls to cabin prosecutors' investigations and grand jury presentations when police are suspects miss an important opportunity to engage in meaningful conversation about why such process is not used for other criminal suspects.

To that end, this Article investigates these presumed preferential procedures as a way to upend the notion that precharge process is a system failure. In fact, it imagines the processes that police tend to get as a critical and novel way to reform the status quo.<sup>16</sup> It explores what the criminal justice world might look like if prosecutors conducted precharge investigations in every case, reallocating resources to a point in the system before a suspect became a defendant. It argues that in such a world both innocent and guilty-but-harmless suspects might fare better, as would the legitimacy and accuracy of the system itself.

This Article also argues that grand juries should be treated as evidence-weighting bodies, rather than prosecutorial rubber stamps, to increase citizen participation in our increasingly opaque and bureaucratic system of justice; to test the veracity and credibility of eyewitnesses; and to check prosecutorial and law enforcement overreach.<sup>17</sup>

Perhaps most surprisingly, a more thorough precharge process may better allocate scarce resources. Prosecutors would be forced to make hard decisions before pursuing cases. This might weed out factually or normatively innocent suspects before such people are incarcerated.<sup>18</sup> More accurate process could reduce incarceration costs and reduce lawsuits from exonerated individuals.

This Article proceeds in three Parts. Part I examines the importance of precharge/preindictment decision making by prosecutors in a world of mass plea bargaining. These charging decisions set the entire criminal justice process in motion, with irreversible consequences for both defendants and the system. Part II compares the type of process prosecutors tend to give ordinary suspects with the type of process they tend to give to police suspects, including thorough investigation and full evidentiary presentations to well-informed grand juries. Finally, Part III addresses the peril and the promise of prosecutorial process for police. It addresses the systemic harms that flow from unequal process for criminal justice insiders but imagines what would happen if, rather than strip the police of this prosecutorial process, we instead insist that *all* suspects get this kind of precharge/preindictment treatment. To the extent that such a proposal seems administratively and economically radical, I argue that we must be thinking about the volume of criminal defendants that make such process

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Wasserman, *Prosecuting Police—The Role of the Grand-Jury Pool*, PRAWFSBLAWG (Dec. 4, 2014, 5:41 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2014/12/prosecuting-police-the-role-of-the-grand-jury-pool.html> (critiquing use of the grand jury in Ferguson, Missouri).

16. See Davis, *supra* note 10, at 18.

17. See *infra* Section III.B.

18. See *infra* Section III.B.

infeasible, rather than reflexively justifying the status quo through references to resource constraints.

There is a wide-ranging and timely scholarly discussion occurring about the best way to regulate the police.<sup>19</sup> But, within this conversation, there should also be room for a comparison of the way prosecutors exercise their procedural discretion when police are suspects with the way most other criminal suspects are treated. This examination yields some important and counterintuitive conclusions about how we might reform our overly harsh and economically overburdened criminal justice system.

### I. CHARGING DECISIONS IN AN AGE OF MASS PLEA BARGAINING

Legal scholarship regarding prosecutorial discretion almost uniformly laments or proposes cabining prosecutors.<sup>20</sup> It also tends to focus heavily on what happens after charges have been filed or indictments secured.<sup>21</sup> In an era of mass plea bargaining, our focus should shift to the discretionary decision making a prosecutor must do before a suspect becomes a defendant through the formal filing of criminal charges.<sup>22</sup> Although charging decisions are made with

19. For recent scholarship examining the noncriminal laws that regulate police, see, e.g., Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179 (2014); Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847 (2014); for how lawsuits can regulate police, see Harmon, *supra* note 13; Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014); for who should be tasked with prosecuting the police, see Levine, *supra* note 12; for scholarship arguing for more prosecutions of less-visible police crimes, see I. Bennett Capers, *Crime, Legitimacy, and Testifying*, 83 IND. L.J. 835, 873 (2008); and for scholarship urging preemptive reform, see David M. Jaros, *Preempting the Police*, 55 B.C. L. REV. 1149, 1149 (2014).

20. See Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 961 (2009) (separation of powers is not a check on discretion); Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN ST. L. REV. 1155, 1161 (2005) (discretion and overcriminalization); Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHL.-KENT L. REV. 605 (1998) (problems with selective prosecutions); Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 648–49 (2004) (bad consequences of using informants); Nirej Sekhon, *The Pedagogical Prosecutor*, 44 SETON HALL L. REV. 1, 3–4 (2014) (agency costs of discretion). *But see, e.g.*, Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & C.R. L. REV. 369, 370–71 (2010) (positive features of discretion).

21. See *supra* notes 6–10.

22. Depending on the jurisdiction and the severity of a crime, charges are either decided on and filed by a prosecutor, or presented to a grand jury or judge who must determine that there is probable cause to go forward with the case. Such a decision by a grand jury is known as an indictment. Most misdemeanors are not required to be presented to a grand jury in any state. See Bowers, *supra* 11, at 1713. For felonies, there is a split among states. The states that do not require indictments for felony charges, also known as “information states,” are Arizona, Arkansas, California, Colorado, Connecticut, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Vermont, Washington, Wisconsin, and Wyoming. SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 1:7 n.1.1, Westlaw (database updated Nov. 2014). States that require indictments for most felony prosecutions are Alabama, Alaska, Delaware, Georgia, Kentucky, Maine, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, and West Virginia. *Id.* at n.2.



almost no process and grand juries rarely question such decisions, a wide range of evidence-testing processes are available for prosecutors to use at their discretion. The availability of precharge process—investigation, witness interviews, conversations with defendants, and rigorous evidence testing at the grand jury stage—shows that prosecutorial discretion need not only tend toward the harshness that it has come to symbolize.<sup>23</sup> Instead, prosecutors have an underutilized and undertheorized opportunity to weed out weak and relatively unimportant cases before a defendant, and society, must bear the costs of prosecution, incarceration, collateral consequences, and, in some cases, exoneration.

The popular and systemic checks that historically limited prosecutorial power—grand juries, petit juries, evidentiary review by trial judges, and review by appellate judges—have all but disappeared in the age of mass arrests and plea bargaining.<sup>24</sup> In the past, lawmaking and enforcement were a more localized and public affair.<sup>25</sup> As Stephanos Bibas writes, the “local community . . . literally saw justice done,” through public trials with local citizen juries.<sup>26</sup> If prosecutors brought too many or too harsh charges, there were several citizen-based mechanisms for checking them. Similarly, the credibility of the police and other witnesses could be checked by a jury at trial.<sup>27</sup> More trials also meant more opportunity for judicial review at the trial and appellate stage.<sup>28</sup>

Grand juries, the citizen-bodies tasked with determining whether a prosecutor has probable cause to go forward with charges against a criminal suspect, also used to be a more active and participatory institution. Historically, these bodies served to ensure that charges were not personal vendettas by politicians, and

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23. See, e.g., GEORGE FISHER, *PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* 212–21 (2003) (arguing that prosecutors overcharge and punish defendants for exercising trial rights); H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 83–84 (2011) (arguing that prosecutors coerce defendants to plead through overcharging); Ellen S. Podgor, *Race-ing Prosecutors' Ethics Codes*, 44 HARV. C.R.-C.L. L. REV. 461, 463 (2009) (noting “ample examples of ‘pretextual’ prosecutions on extraneous charges when prosecutors believe the accused individuals are inherently evil”).

24. See generally WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

25. See STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* xviii (2012) (“Criminal justice used to be individualized, moral, transparent, and participatory . . .”). Of course, as Bibas notes, the older model of criminal justice was not better—in fact, in many ways it was rife with far more problems, including overt racism, brutality, and corrupt politicians. See *id.* at xx.

26. *Id.* at xix.

27. David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 457 (1999) (noting that juries are competent to assess the credibility of police witnesses).

28. Nancy J. King, *Regulating Settlement: What Is Left of the Rule of Law in the Criminal Process?*, 56 DEPAUL L. REV. 389, 391 (2007) (finding that “in a random sample of 971 written plea agreements submitted to the United States Sentencing Commission between October 2003 and June 2004, 63% contained express waivers of the right to review past and future error; in some districts virtually every plea agreement contained such a waiver . . . . These waivers have been recognized in state cases as well.”).

they used their broad power to vigorously interview witnesses.<sup>29</sup> They also tended to more actively decline charges, whether because evidence was thin or because the prosecution defied the public's sense of morality.<sup>30</sup> In fact, "traditionally, . . . the grand jury was seen as the major bar to prosecutorial overreaching."<sup>31</sup>

Today, however, trials have all but disappeared,<sup>32</sup> and grand juries have become veritable rubber stamps on a prosecutor's decision to charge as many and as severe charges as she wants.<sup>33</sup> At the same time, because so much criminal law is decided through plea bargaining, how a suspect is charged matters far more. Prosecutors are much less likely to discover weak spots in their cases, and defendants lose out on the protections afforded them by the Constitution, either through pretrial procedure such as suppression hearings, cross-examination of the prosecution's witnesses, or appellate review.<sup>34</sup>

Despite the magnitude of an initial decision to charge or indict, these decisions are often made reflexively, with no investigation and no accountability mechanism.<sup>35</sup> These charging decisions are also among the most opaque made by any actor in the legal system.<sup>36</sup> Prosecutors rarely have to justify their decisions to charge or not to charge, what evidence they present to a grand jury, or what process they use to make these decisions. Yet because approximately ninety percent of cases end in a plea bargain,<sup>37</sup> and because so many suspects are accused only of low-level charges, where pleading guilty is less onerous than fighting the charges,<sup>38</sup> the decision to charge a suspect is often tantamount

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29. See Kevin K. Washburn, *Restoring the Grand Jury*, 76 *FORDHAM L. REV.* 2333, 2343 (2008) ("The early colonial grand juries worked independently and proactively, at least in part because local government was relatively limited with few or no police resources to investigate accusations.").

30. See Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 *WAKE FOREST L. REV.* 319, 323 (2012) ("[T]he grand jury historically served (and, in sub-rosa fashion, continues to serve) as a normative check, notwithstanding its ostensible function as a probable-cause screen."); Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 *B.U. L. REV.* 1, 16 (2002) ("Although the grand juries' actions have been based on ever-shifting political grounds rather than immutable legal standards, in each case their decision was popular in the community and served to enhance the grand jury's reputation as a protector of liberty.").

31. Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 *COLUM. L. REV. SIDEBAR* 102, 106 (2013).

32. See LINDSEY DEVERS, U.S. DEP'T OF JUSTICE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 1 (2011), <http://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf> ("While there are no exact estimates of the proportion of cases that are resolved through plea bargaining, scholars estimate that about 90 to 95 percent of both federal and state court cases are resolved through this process.").

33. See *infra* Section II.A.

34. See, e.g., *Boykin v. Alabama*, 395 U.S. 238, 242–44 (1969) (observing that entry of a guilty plea involves waiver of the right against self-incrimination, the right to trial by jury, and the right to confront one's accusers).

35. See generally Bowers, *supra* note 11.

36. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *MICH. L. REV.* 505, 580 (2001) ("[P]olice and prosecutors are necessarily in the business of rough pre-adjudication screening, of separating the probably guilty from the probably innocent. That screening is bound to be unreviewable, or close to it.").

37. See DEVERS, *supra* note 32, at 1.

38. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 *HARV. L. REV.* 2464, 2468 (2004) ("[D]etained defendants strike bargains for time served instead of awaiting their day in

to a conviction.<sup>39</sup>

Regardless of whether a charging decision “inexorably” leads to a guilty plea,<sup>40</sup> the decision to charge initiates a process through which a criminal suspect becomes a defendant and is subject to pre-plea or preconviction loss of liberty, lifetime stigma, and collateral consequences that may be more onerous than the direct punishment.<sup>41</sup> Because a criminal charge or indictment is a serious harm to a defendant in and of itself, the ability of a prosecutor to subsequently reduce charges or decide not to prosecute after formal charges are filed does not lessen the importance of this initial, pro forma, and rarely reviewed decision.<sup>42</sup>

Charging decisions may also lead to a host of administrative costs that must be borne by the public. Many criminal defendants must be represented by an attorney once they are charged.<sup>43</sup> Society must fund an indigent defendant’s stay in a local jail, assuming she cannot make the money bail set by a judge,<sup>44</sup> and then foot the bill for incarceration or monitoring once she is sentenced.<sup>45</sup> Thus, although it may be counterintuitive, reallocating resources to these pre-charge/indictment decisions might actually relieve some of the financial outlay society must make to support mass incarceration. It might also help solve some

court. Plea bargaining, then, often happens in the shadow not of trial but of bail decisions.”); Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1122 (2008) (“[T]he pretrial process is painful. Punishment does not begin with sentence. Many defendants—even the innocent—do not welcome a process that frequently constitutes most, if not all, of the punishment they will face.”); Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1238 (2008) (“The odds of fighting and winning a criminal case at trial have never been smaller, a fact attested to by the ever-shrinking number of defendants who successfully contest charges at trial.”).

39. See Bowers, *supra* note 11, at 1709 (“A charge leads almost inevitably and quickly to some adjudication of guilt.”); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1328 (2012).

40. Natapoff, *supra* note 39, at 1328.

41. See, e.g., Heidi Altman, *Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO. L.J. 1, 1 (2012) (“As a result of recent trends in immigration law and policy, virtually any interaction with the criminal justice system leaves noncitizens, regardless of their lawful or unlawful status, at a very real risk of deportation or other negative immigration penalties.”).

42. Michael Edmund O’Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1442 (2004) (“A prosecutor’s decision to proceed with, or to forgo, a criminal prosecution . . . not only has tremendous consequences for the individual defendant, but also for his family, business associates, and his community.”).

43. See, e.g., *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991) (noting that the right to an attorney attaches once “a prosecution is commenced, that is, ‘at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment’” (quoting *United States v. Gouveia*, 467 U.S. 180, 188 (1984))).

44. Douglas L. Colbert, *When the Cheering (for Gideon) Stops: The Defense Bar and Representation at Initial Bail Hearings*, 36 CHAMPION 10, 10 (2012) (“Those who cannot afford bail, including many charged with nonviolent crimes, will remain in jail between two and 70 days, waiting for their assigned lawyer’s advocacy before a judicial officer. Taxpayers are left to pay the high cost of incarceration before trial.”).

45. See JOHN SCHMITT ET AL., CTR. FOR ECON. POLICY & RESEARCH, THE HIGH BUDGETARY COST OF INCARCERATION 2 (2010), <http://www.cepr.net/documents/publications/incarceration-2010-06.pdf> (“The financial costs of our corrections policies are staggering. In 2008, federal, state, and local governments spent about \$75 billion on corrections . . .”).

of the most vexing problems that have arisen during the incarceration binge of the last several decades. For one thing, precharge investigation or grand jury process might uncover falsely accused suspects, saving them the torture of false accusation and potential punishment and society the cost of their incarceration and the civil suits they file once exonerated.<sup>46</sup> For another, they might require prosecutors to recognize how often they are charging poor, African-American defendants with low-level crimes. In the aggregate, these choices cost society undue sums of money and ensure that a disproportionate number of individuals of a particular race are incarcerated and monitored for crimes often committed in roughly equal numbers by whites and African-Americans.<sup>47</sup>

Precharge process is rarely considered as a potential option in the majority of criminal cases.<sup>48</sup> Yet prosecutors actually have a wide range of potential process that they could engage in before making a charging decision. In any given case, they can decide what evidence to gather, what credibility to give statements from suspects, victims, witnesses, and police, and how much evidence they present to a grand jury in those states that require an indictment to proceed with certain charges.<sup>49</sup> Prosecutors' decisions not to allocate time or resources to such factors, either precharge or preindictment, is taken as a given in the vast majority of cases. Engaging in this type of rigorous review for so many suspects seems impossible given caseloads and budget constraints.<sup>50</sup> And because the standard to charge is only probable cause, a police officer's or eyewitness's statement is usually enough to convince a prosecutor to go forward.<sup>51</sup>

But, as we have seen in the past year, when the police are the suspects, the usual charge and indictment process appears to unravel. This can be seen in the unusually detailed presentation of evidence to the grand jury in the choking

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46. See, e.g., Lawrence C. Marshall, *Gideon's Paradox*, 73 *FORDHAM L. REV.* 955, 967 (2004) (discussing millions spent on incarcerating and compensating innocent people).

47. For instance, whites and African-Americans use drugs at approximately the same rates, while whites sell drugs at a higher rate than African-Americans. Yet African-Americans are two-to-three times more likely to be arrested for sale or possession. See Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, *BROOKINGS* (Sept. 30, 2014, 11:37 AM), <http://www.brookings.edu/blogs/social-mobility-memos/posts/2014/09/30-war-on-drugs-black-social-mobility-rothwell>; see also D. Marvin Jones, "He's a Black Male . . . Something Is Wrong with Him!" *The Role of Race in the Stand Your Ground Debate*, 68 *U. MIAMI L. REV.* 1025, 1041 (2014) ("Blacks abuse cocaine at rates statistically indistinguishable from the rates of abuse by whites. There is no meaningful difference. However, the perception by police, prosecutors and judges is obviously very different. While blacks and whites use drugs at statistically identical rates, 68% of those arrested for drugs, and 90% of those imprisoned for drugs are black.").

48. Bowers, *supra* note 11, at 1710 (noting that a prosecutor may be more inclined to dismiss a case postcharge).

49. ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 25 (2007) ("[B]ecause the prosecutor maintains unilateral control over the grand jury, in most cases [it] is simply a tool of the prosecutor . . .").

50. Cf. Wright & Miller, *supra* note 11, at 34 (arguing that prosecutors should "invest serious resources in early evaluation of cases").

51. Bowers, *supra* note 11, at 1716 (explaining that prosecutors charge more often in cases where police observation is the only evidence).

death of Eric Garner at the hands of police in Staten Island, New York, which lead to no indictment.<sup>52</sup> It is also apparent in the investigation into the police shooting of twelve-year-old Tamir Rice in Cleveland, Ohio, and the grand jury's decision not to indict there.<sup>53</sup> It took the prosecutor more than a year to present the case to a grand jury,<sup>54</sup> and before doing so, three commissioned independent reports were released discussing the facts of the shooting and concluding that the officers had not committed criminal acts.<sup>55</sup> This seemingly extraordinary process for police suspects, before they formally become defendants through charge or indictment, has been maligned by the public, the legal community, and scholars. It has been seen as a way for prosecutors to exculpate criminal suspects whom they do not want to prosecute.<sup>56</sup>

As I argue here, however, prosecutors' use of their discretionary procedural power, whether leading to charges or not, actually becomes more structurally sound in police-suspect cases. For a variety of reasons, prosecutors use their full arsenal of procedural discretion when a police-suspect's liberty and reputation is on the line: they conduct thorough precharge investigations, credit an officer-suspect's version of events, and either exercise their option to present exculpatory evidence to a grand jury or, in many cases, decline to charge altogether.<sup>57</sup> Public scrutiny also tends to motivate prosecutors to explain their otherwise secret decision making<sup>58</sup> and is a valuable tool for those looking to understand the discretionary "black box" in which prosecutors operate.<sup>59</sup>

The importance of an initial charge or indictment cannot be overstated. Thus, a comparison of the type of process police receive before formal charges are initiated and the process most other suspects receive deserves further examination. Below, I describe two ways in which prosecutors tend to give police

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52. Howard M. Wasserman, *Epilogue: Moral Panics and Body Cameras*, 92 WASH. U. L. REV. 845, 846 (2015) ("[A] New York grand jury declined to indict New York City police officer Daniel Pantaleo in the death of Eric Garner during an arrest for selling loose cigarettes.").

53. Timothy Williams & Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. TIMES (Dec. 28, 2015), [http://www.nytimes.com/2015/12/29/us/tamir-rice-police-shooting-cleveland.html?\\_r=0](http://www.nytimes.com/2015/12/29/us/tamir-rice-police-shooting-cleveland.html?_r=0).

54. *Id.* (noting that the shooting took place in November 2014).

55. Press Release, Cuyahoga Cty. Office of the Prosecutor, Statement from Cuyahoga County Prosecutor Timothy J. McGinty on the Release of Three Additional Reports Regarding the Death of Tamir Rice (Oct. 10, 2015), <http://prosecutor.cuyahogacounty.us/en-US/2015-10-10-pr-statement-on-reports.aspx> [hereinafter *Statement from Cuyahoga County*].

56. *See supra* note 15.

57. *See supra* note 15.

58. For instance, Robert McCullough held a press conference after a grand jury declined to charge Darren Wilson in which he explained the process by which the jury made its decision. *Ferguson, Missouri Grand Jury Decision Announcement*, C-SPAN (Nov. 24, 2014), <http://www.c-span.org/video/?322925-1/ferguson-missouri-grand-jury-decision-announcement>. State's Attorney Marilyn Mosby held a press conference when she decided to press charges against six officers accused in the killing of Baltimore teen Freddie Gray. *Watch: Baltimore's State's Attorney Announces Findings of Freddie Gray Investigation*, MEDIAITE (May 1, 2015, 10:51 AM), <http://www.mediaite.com/tv/watch-live-baltimores-states-attorney-holds-briefing-on-freddie-gray/>.

59. *See generally* Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125 (2008).

suspects far more precharge process than other suspects: investigation into the facts and circumstances surrounding the case and rigorous evidentiary presentations to grand juries.

## II. COMPARING PROSECUTORIAL PROCEDURES FOR MOST SUSPECTS AND THE POLICE

In our current criminal justice climate, most suspects are charged or indicted with little process, despite the vast array of investigative and evidence-testing mechanisms at prosecutors' disposal. In this Part, I compare this reflexive charging of most suspects with the thorough precharge process given to many police suspects.

### A. PROSECUTORIAL PROCEDURE FOR MOST SUSPECTS

Prosecutors rarely use their full procedural arsenal for the majority of suspects. Based only on an arrest and the statement of a law enforcement officer, they routinely find what passes for probable cause to charge a suspect.<sup>60</sup> Prosecutors also engage in the potentially unethical<sup>61</sup> but widely accepted practice of overcharging, both horizontally—in the form of multiple different charges arising out of the same offense—and vertically—charging a suspect with more serious crimes than the evidence bears out. Prosecutors then use these extra charges as bargaining chips during plea negotiations.<sup>62</sup>

The prosecutor–police relationship in charging decisions against ordinary suspects has caused concern among criminal justice scholars for several reasons. Prosecutors and police team up to pressure potential misdemeanants to confess and plead guilty.<sup>63</sup> Prosecutors do not check their law enforcement partners by refusing to pursue cases where police have violated a suspect's constitutional rights.<sup>64</sup> And prosecutors use their vast charging power to ratchet

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60. See *supra* note 39.

61. See Andrew D. Leipold, *Prosecutorial Charging Practices and Grand Jury Screening: Some Empirical Observations*, in GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY 195, 199 (Roger Anthony Fairfax, Jr. ed., 2011) (arguing that overcharging is “ethically questionable” even if it does not violate a specific ethics rule).

62. See Graham, *supra* note 11, at 704–05 (“Thus, in both vertical and horizontal overcharging, the prosecutor originally alleges a charge or charges that she subjectively does not want to pursue to conviction, or is at least indifferent about prosecuting. Instead, the extraneous or unduly severe allegations are put forward to incentivize the defendant to plead guilty to another charge or charges.”).

63. See Bowers, *supra* note 11, at 1660 (“Prosecutors adopt near-categorical charging strategies in petty cases, because petty charges provide cover to the police for consummated arrests and institutional advantages to prosecutors in the form of cheap and expeditious plea convictions.”); Natapoff, *supra* note 39, at 1328 (“Prosecutors fail to screen and instead charge arrestees based solely on allegations in police reports.”); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 59 (1991) (“Through the police and grand jury, [the prosecutor] monopolizes the ability to coerce testimony and obtain cooperation in the investigation of crimes.”).

64. See Bowers, *supra* note 11, at 1701 (“Just as police are inclined to make arrests to provide cover for searches, prosecutors are inclined to file charges to provide cover for police arrests.”); Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1361–62 (1997) (noting that prosecutors often do not speak to officers in person,

up the amount and severity of charges a suspect faces to induce a swift and sure resolution of guilt without a trial and without checking the evidence presented by police.<sup>65</sup>

In a world of scarce resources, prosecutors often use their discretion to charge cases they know they can win, rather than cases that represent the most problematic behavior (which often require greater outlay of resources) or even cases where a suspect is most likely guilty.<sup>66</sup> This mentality flows from a variety of professional and political incentives.<sup>67</sup> Line prosecutors are often promoted due to their success at obtaining convictions,<sup>68</sup> and district attorneys run for reelection on their “tough on crime” stance.<sup>69</sup> Although it is unlikely that any prosecutor believes that it is the right substantive outcome, the economic and political reality is that convicting an innocent, or guilty-but-harmless, suspect hurts a prosecutor far less than having a high acquittal rate or declining

which makes it harder to assess credibility before filing charges); Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 *FORDHAM URB. L.J.* 315, 349–50 (2005) (same).

65. *Lafley v. Cooper*, 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting) (“[The plea bargaining system] presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense . . . .”); Natapoff, *supra* note 39, at 1331 (“A growing literature indicates that urban police routinely arrest people for reasons other than probable cause, that high-volume arrest policies such as zero tolerance and order maintenance create a substantial risk of evidentially weak arrests, that mechanisms for checking whether arrests are based on probable cause are sporadic, and finally that, if those mechanisms do kick in, police sometimes lie about whether there was sufficient evidence for an arrest.”).

66. See Paul Butler, *How Can You Prosecute Those People?*, in *HOW CAN YOU REPRESENT THOSE PEOPLE?* 15, 19 (Abbe Smith & Monroe H. Freedman eds., 2013) (“[T]he prosecutor’s ‘knowledge’ of guilt is mainly secondary and not well-informed.”); Stephanos Bibas, *Sacrificing Quantity for Quality: Better Focusing Prosecutors’ Scarce Resources*, 106 *NW. U. L. REV. COLLOQUY* 138, 138 (2011) (“Indeed, individual prosecutors often reactively prosecute the cases that come before them, instead of proactively setting priorities and focusing on system-wide tradeoffs.”); Natapoff, *supra* note 39, at 1316 (“Misdemeanants routinely plead to low-level crimes for which there is little or no evidence, without assistance of counsel or any other meaningful adversarial process. In some cases, defendants are demonstrably innocent. In others, the process is so lax that we cannot say with any certainty whether defendants are guilty or not.”).

67. See Adriaan Lanni, *Implementing the Neighborhood Grand Jury*, in *GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY* 171, 173 (Roger Anthony Fairfax, Jr. ed., 2011) (“Charging decisions are routinely influenced . . . by any number of factors such as law enforcement priorities, the prosecutor’s assessment of the defendant’s likelihood of reoffending . . . and whether the case will advance the prosecutor’s career.”).

68. See DAVIS, *supra* note 49, at 34 (noting that an assistant prosecutor who did not secure convictions “would not be promoted or otherwise advance in [an elected district attorney’s office]”); Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 *WASH. L. REV.* 35, 45 (2009) (“[A] ‘tough on crime’ rhetoric often resonates with the public, an important consideration given that nearly all state and local district attorneys gain their positions through public elections.”); Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 *NOTRE DAME L. REV.* 321, 331 (2002) (“[P]rosecutors use sensible measures to gauge their effectiveness at fulfilling [their crime-reduction] mandate. First, they often focus on conviction rates.”).

69. See BIBAS, *supra* note 25, at 43 (“Because [district attorneys] face electoral pressure to maximize convictions, they push their unelected subordinates to increase conviction rates.”); DAVIS, *supra* note 49, at 34.

to prosecute a suspect who may later commit a more serious crime.<sup>70</sup> Prosecutors may also worry about using their resources to investigate a criminal accusation precharge, particularly if it ends in a declination. They leave that to their police partners.<sup>71</sup>

This is particularly true in low-level cases, such as trespassing or possession of small amounts of drugs, where prosecutors' decisions will almost never be scrutinized and where a defendant will have every incentive to plead guilty for leniency rather than waiting, often in jail, for a full investigation or any testing of the proof against her.<sup>72</sup> In fact, the lowest-level cases are often subject to the least amount of review from prosecutors. Alexandra Natapoff has shown that this may lead to the conviction of many innocent defendants.<sup>73</sup> Josh Bowers has posited that prosecutors use their "equitable discretion"—their ability to decline charges in cases where the evidence may be present but the harm to society extremely slight—least in low-level, victimless cases where society would reasonably want them to use it most.<sup>74</sup>

In comparison to low-level criminal charges, prosecutors appear to review more serious allegations of criminal actions with more care. In serious felony cases such as homicide or assault crimes, prosecutors do more before they charge: reviewing evidence, speaking to witnesses, and declining to charge where there appears to be little probable cause.<sup>75</sup> Yet, it is still rare for a suspect accused even of a serious felony to have her case dismissed precharge or preindictment.<sup>76</sup> Moreover, even in states where a grand jury is required to indict for felony charges,<sup>77</sup> prosecutors present a barebones and extremely skewed version of the facts in order to ensure that the charges they want

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70. See Stuntz, *supra* note 36, at 534 (“[P]rosecutors have a substantial incentive to win the cases they bring. One piece of evidence for this fairly obvious proposition is the frequency with which elected prosecutors cite conviction rates in their campaigns.”); Josh Bowers, *The Unusual Man in the Usual Place*, 157 U. PA. L. REV. PENNUMBRA 260, 262 (2009) (“Police and prosecutors play averages by arresting and charging the usual recidivist suspects . . .”).

71. See, e.g., Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 630 (2014) (“[P]olice practices mediate criminal events and arrests. This is especially true of misdemeanors. The police can find as many [misdemeanors] . . . as they devote the time and resources to find.”).

72. Charlie Gerstein, Note, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 MICH. L. REV. 1513, 1515 (2013) (“Defendants who are required to post bail that they cannot afford may end up pleading guilty to avoid waiting in jail.”).

73. See generally Natapoff, *supra* note 39.

74. See generally Bowers, *supra* note 11.

75. See Bowers, *supra* note 11, at 1715 (“[I]f there are reasons—administrative, legal, or equitable—to forego prosecution [in serious criminal cases], prosecutors are likelier to perceive and act upon the relevant considerations. Prosecutors are motivated to pay attention, because little missteps on big charges run risks of creating big subsequent adjudicatory and political headaches.”).

76. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 45–46 (1997) (noting that one-fifth of felony arrests are declined).

77. Simmons, *supra* note 30, at 19 (“Today, the grand jury requirement remains in only nineteen states. In the other jurisdictions, prosecutors usually proceed by filing an information with the court and then submitting the case to a preliminary hearing conducted by a judge or magistrate.” (footnote omitted)).



become indictments.<sup>78</sup>

When prosecutors must present cases to a grand jury, the proceedings almost always result in the prosecutor getting indictments for all the charges she seeks to bring.<sup>79</sup> The grand jury is maligned for its inability to perform its screening function of checking prosecutors and witnesses before an indictment is rendered.<sup>80</sup> The notion that a grand jury will find probable cause to indict “a ham sandwich,” however, puts the onus of this lack of functionality on the wrong group.<sup>81</sup> Structurally, a grand jury has all the capacity that a petit jury has to comprehend and weigh evidence.<sup>82</sup> And, although probable cause is a low standard, it is not no standard. The reason that grand juries indict in such an overwhelming number of cases is due, at least in far larger share than credit is given, to the fact that they hear only one curated and unchallenged version of events.<sup>83</sup>

Grand jury proceedings are almost always kept secret. Thus, it is hard to illustrate how much prosecutors dominate and control every aspect of these proceedings. But the rules governing the grand jury make it relatively plain that unless a prosecutor *wants* the grand jury to question her case, it won't. Federal law requires no presentation of exculpatory evidence to grand juries. Although states' rules vary, most require only “substantial” exculpation to be presented.<sup>84</sup>

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78. See, e.g., Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 GEO. L.J. 1265, 1268 (2006) (“[A] defendant charged by the grand jury receives . . . a secret, one-sided review process administered by the prosecutor.”); Simmons, *supra* note 30, at 27 (“[T]here is no real check on the quantity or quality of the evidence that a federal prosecutor needs to present to a grand jury.”).

79. Benjamin E. Rosenberg, *A Proposed Addition to the Federal Rules of Criminal Procedure Requiring the Disclosure of the Prosecutor's Legal Instructions to the Grand Jury*, 38 AM. CRIM. L. REV. 1443, 1443 (2001) (“[T]he grand jury has been widely criticized for acting as a ‘rubber stamp’ for the prosecutor, thereby failing to fulfill its screening function.”).

80. See, e.g., Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 705–06 (2008) (describing critiques of the grand jury as a body that does just what the prosecutor requests).

81. See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 929 (2006) (“In theory, citizens run grand juries, but in practice they are dominated by prosecutors and would ‘indict a ham sandwich’ if prosecutors asked them to do so.”).

82. See Fairfax, Jr., *supra* note 80, at 706 (arguing that modern conception of the grand jury misses its power to check prosecutors and ensure legitimacy); Washburn, *supra* note 29, at 2337 (same).

83. See Susan W. Brenner, *Grand Jurors Speak*, in GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY 25, 36 (Roger Anthony Fairfax, Jr. ed., 2011) (including an e-mail from grand juror noting that “the system is slanted toward the prosecution . . . the professionals against the common folk”) (alteration in original); R. Michael Cassidy, *Toward A More Independent Grand Jury: Recasting and Enforcing the Prosecutor's Duty to Disclose Exculpatory Evidence*, 13 GEO. J. LEGAL ETHICS 361, 366 (2000) (arguing that states should prevent prosecutors from “distorting the evidence before the grand jury by omitting evidence in their possession that substantially negates the defendant's guilt”); Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 13 (2004) (arguing that prosecutors are “affirmatively encourage[d] . . . to minimize the grand jury's consideration of the evidence”).

84. Some states do require exculpatory evidence to be presented to a grand jury. Most only require it if “the exculpatory value is substantial,” but a few, such as Montana and California, have broader requirements. *State v. Hogan*, 676 A.2d 533, 541 (N.J. 1996) [(discussing state practices); See also

This means rarely requiring witnesses who challenge the police's or complainant's version of events to testify. There is also no hearsay rule in the grand jury room, which means that grand jurors often do not hear from live witnesses or judge their credibility.<sup>85</sup> Nor is a defense attorney allowed in the room.<sup>86</sup> The only time a defense attorney is permitted to attend a session is when her client has a right to and elects to testify and then, only for that portion of the presentation.<sup>87</sup> She may not challenge questions put to her client by a prosecutor, should the client testify, including questions about unrelated but damning past arrests and convictions.<sup>88</sup> There is no judge in the room, nor will a judge review a grand jury transcript unless a defendant mounts a specific challenge later in the process.<sup>89</sup>

It is a crime for a grand juror to report on the proceedings she participates in, so stories from actual grand jurors are rare.<sup>90</sup> A *Harper's* author, however was willing to speak about the process he experienced while serving. In his rare firsthand account, he wrote that prosecutors in the grand jury room are "singularly powerful narrators": "[t]he number of times we refused to indict [in over 100 cases] could be counted on one finger. We were simply not expected to dismiss charges."<sup>91</sup> When one juror asked how an officer could have deduced while still inside her police car that two young robbery suspects were intoxi-

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United States v. Williams, 504 U.S. 36, 51 (1992) ("[R]equiring the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body.").

85. See, e.g., Brenner, *supra* note 83, at 33–34 (noting that one grand juror related how a DEA agent gave a summary of his interview with a witness rather than calling that witness to appear); Fairfax, *supra* note 80, at 705 (noting that grand jurors "usually [hear evidence] in the form of unchallenged hearsay testimony"); Simmons, *supra* note 30, at 21 ("[Because] grand jurors do not hear directly from the key witnesses in a case, they are unable to effectively evaluate witness credibility. Far more critical, allowing hearsay testimony results in streamlined, assembly-line presentations in which grand jurors lose the incentive to evaluate the cases at all.").

86. Fairfax, *supra* note 80, at 755; see also Brenner, *supra* note 83, at 36 (noting an e-mail from a grand juror who was upset at "never hearing from an attorney for the accused"); Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 289 (1995) ("[J]udges and defense counsel are not present at the hearings . . .").

87. Simmons, *supra* note 30, at 23 ("The overwhelming majority of states and the federal government do not give the defendant any right to testify on his own behalf.").

88. See Fairfax, *supra* note 80, at 755 ("[E]videntiary restrictions do not limit the questions that a prosecutor can ask a witness before a grand jury."); Simmons, *supra* note 30, at 24 ("[A] defendant faces so many disadvantages in the grand jury that the defendant is unlikely to perceive the proceeding favorably no matter what the rules are.").

89. Simmons, *supra* note 30, at 26–27 (noting that judges rarely review transcripts in the federal system or most states). *But see Discovery by a Criminal Defendant of His Own Grand-Jury Testimony*, 68 COLUM. L. REV. 311, 311 (1968) ("Even in the special case where all a defendant seeks is the record of the testimony that he gave before the grand jury himself, tradition is on the side of non-disclosure.").

90. See, e.g., FED. R. CRIM. P. 6(e)(2), (7) ("Unless these rules provide otherwise . . . [a grand juror] must not disclose a matter occurring before the grand jury . . . . A knowing violation of Rule 6 . . . may be punished as a contempt of court.").

91. Gideon Lewis-Kraus, *A Grand Juror Speaks: The Inside Story of How Prosecutors Always Get Their Way*, HARPER'S MAG., Mar. 2015, at 41, 43, <http://harpers.org/archive/2015/03/a-grand-juror-speaks/>.

cated, the prosecutor told him, “Those are the sorts of procedural questions that will be addressed at trial.”<sup>92</sup> In other words, according to this prosecutor, testing the officer’s credibility was not part of the probable cause determination.

E-mails to Susan W. Brenner, a scholar who set up a grand jury information website, confirm that prosecutors jealously guard what questions the grand jury may pose to a witness.<sup>93</sup> One federal grand juror wrote of a New Jersey practice in which prosecutors excused witnesses before the jurors were permitted to ask questions about their testimony.<sup>94</sup> Then, the prosecutors would routinely spend twenty minutes out of the room before bringing the witness back in front of the grand jurors to answer their questions.<sup>95</sup> In that juror’s opinion, the witnesses’ answers were “carefully rehearsed and parroted back” to the grand jurors.<sup>96</sup>

The way prosecutors use grand juries, when they must, is a choice, not a mandate.<sup>97</sup> The same is true for prosecutors’ decisions about the credibility of police, witness statements, and the facts of an accusation, and whether and what to charge. Powerful professional and political incentives box even the most conscientious prosecutors into the role of competitive adversary. However, the ethical mandate of a prosecutor to be a “minister of justice” should invoke more thoughtful precharge or preindictment behavior.<sup>98</sup> Such behavior has been on display in recent police-suspect cases.

#### B. PROSECUTORIAL PROCEDURE FOR POLICE SUSPECTS

Police suspects have a number of inherent advantages that flow from their position as insiders in the criminal justice system, particularly with regard to their interactions with prosecutors and with each other.<sup>99</sup> Because of their sophistication as criminal justice insiders, police suspects are far less likely to confess to a crime, speak to police without a lawyer, or fall prey to psychological interrogation tactics.<sup>100</sup> Due to the well-known blue wall of silence, police

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92. *Id.* at 44.

93. Brenner, *supra* note 83, at 28.

94. *Id.*

95. *Id.*

96. *Id.*

97. The prosecutorial curation of and control over grand juries is also a modern invention. For the history of grand juries’ functions, see generally Suja A. Thomas, *Blackstone’s Curse: The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States*, 55 WM. & MARY L. REV. 1195, 1214 (2014); Kuckes, *supra* note 78, at 1302 (“[T]he power to ‘nullify’ valid charges has been described by influential commentators as ‘arguably . . . the most important attribute of grand jury review from the perspective of those who insisted that a grand jury clause be included in the Bill of Rights.’”).

98. Zacharias, *supra* note 63, at 46 (“In civil litigation, the [professional responsibility codes] presume that good outcomes result when lawyers represent clients aggressively. In criminal cases, the codes do not rely as fully on competitive lawyering. They treat prosecutors as advocates, but also as ‘ministers’ having an ethical duty to ‘do justice.’” (footnote omitted)).

99. Kate Levine, *Police Suspects*, 116 COLUM. L. REV. (forthcoming 2016) (on file with author); see generally BIBAS, *supra* note 25 (laying out the problematic bureaucratic and insider-driven criminal justice system).

100. See generally Levine, *supra* note 99.

officers are far less likely to inculpate a fellow officer when he is a suspect.<sup>101</sup> Nor are fellow police likely to report an officer's criminal behavior, meaning that much police criminality goes completely unpunished.<sup>102</sup>

One might imagine that the natural response from prosecutors would be to use their discretion to ensure charges against officers when their alleged criminal activity comes to light, knowing, as they surely do, that police behavior must be particularly egregious in order for anyone to take note.<sup>103</sup> But the opposite appears to be true; police are rarely charged for criminal behavior that most know is commonplace.<sup>104</sup> This is truer for lower-level police criminality than it is for more high-profile brutality cases. For instance, police lie under oath so often that a term, "testilying" has been coined for the practice.<sup>105</sup> Yet, as one author wrote, an officer is more likely to get "struck by lightning" than charged with perjury.<sup>106</sup>

In more high-stakes cases, wherein prosecutors must consider criminal charges against police suspects, either because of their own belief that a crime may have occurred or because of public scrutiny, something different from the usual robotic charge decision occurs. Prosecutors investigate, gather evidence, both inculpatory and exculpatory, and when they do not decline charges on their own, they often present a full case to a grand jury.<sup>107</sup>

Prosecutors decline to charge officers who kill (often unarmed) suspects at an extremely high rate. Although recordkeeping by the federal government has been extremely poor,<sup>108</sup> academics, citizens, and media outlets have begun their own collection of reports. A thorough analysis by the *Washington Post* and

101. See *supra* note 14 and accompanying text.

102. See *supra* note 14 and accompanying text.

103. Capers, *supra* note 19, at 837 ("[T]he zone of law enforcement . . . is . . . a zone of under-enforcement. Except in the most egregious cases—those involving brutality or death, for example—law enforcement officers can engage in otherwise sanctionable and criminal behavior usually without fear of consequences." (footnote omitted)).

104. As I note in a forthcoming article, prosecutors have an inherent conflict when they are tasked with investigating and charging their law enforcement partners—personal, professional, and political obstacles infect decision making at every stage of such cases. See Levine, *supra* note 12.

105. See Capers, *supra* note 19, at 870 ("[Police] lies are so pervasive that even former prosecutors have described them as 'commonplace' and 'prevalent.' Surveyed prosecutors, defense attorneys, and judges believed perjury was present in approximately twenty percent of all cases." (footnote omitted)); see generally Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037 (1996).

106. Jennifer E. Koepke, *The Failure to Breach the Blue Wall of Silence: The Circling of the Wagons to Protect Police Perjury*, 39 WASHBURN L.J. 211, 211 (2000) (citing Ruben Castaneda, *Police Officer Perjury Not Rare, Observers Say; Indictment May Be a First in Pr. George's*, WASH. POST, Feb. 17, 1999, at B1).

107. A salient example of this process is the three reports that have been filed in the Tamir Rice shooting in Ohio. These reports preceded the prosecutor's presentation to the grand jury in that case. See *Statement from Cuyahoga County*, *supra* note 55; see also *supra* notes 92–104.

108. Wesley Lowery, *How Many Police Shootings a Year? No One Knows*, WASH. POST (Sept. 8, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/09/08/how-many-police-shootings-a-year-no-one-knows/> (quoting a Department of Justice statistician stating that FBI shooting data has "significant limitations in terms of coverage and reliability").

researchers at Bowling Green State University uncovered that, out of thousands of fatal shootings by law enforcement officers since 2005, only fifty-four had been charged or indicted.<sup>109</sup> According to the study, in the majority of charged cases, prosecutors had evidence of “a victim shot in the back, a video recording of the incident, incriminating testimony from other officers or allegations of a coverup.”<sup>110</sup> As one of the researchers noted, “[t]o charge an officer in a fatal shooting, it takes something so egregious, so over the top that it cannot be explained in any rational way.”<sup>111</sup>

The idea that something egregious must be found to even consider charging an officer with a fatal crime illustrates the caution with which prosecutors proceed when it comes to their law enforcement partners. This is also elucidated by the thorough investigations done by prosecutors before deciding whether to charge an officer involved in a civilian killing. For instance, the Los Angeles County District Attorney’s Office publishes its decisions to decline to prosecute officers for killing suspects.<sup>112</sup> As of April 2016, it had not charged a single officer in the hundreds of police killings since 2000.<sup>113</sup> These decision memos show the systematic and careful use of procedural discretion that goes into such cases.

For instance, a video from a 2013 shooting in Gardena, California, in which prosecutors declined to charge officers for killing an unarmed man, was only recently released by order of a U.S. district court judge, over the strenuous objections of lawyers for Gardena and the officers.<sup>114</sup> But the prosecutors’ letter declining to charge has been public since July 2014.<sup>115</sup> The letter cites interviews with all four officers involved in the incident as well as three civilian witnesses: two were with the decedent and one was a witness to a bicycle theft that triggered the incident.<sup>116</sup> A district attorney and investigator were given a “walk-through” of the scene.<sup>117</sup> The letter also reports on three different videos from officers’ dash-cams,<sup>118</sup> and an independent investigation by a retired

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109. Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), <http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/>.

110. *Id.*

111. *Id.* (quoting Bowling Green State University criminologist Philip M. Stinson).

112. Although I will focus on Los Angeles, other jurisdictions have similar investigatory policies when it comes to police fatalities. *See, e.g., Decision Memos*, CLARK CTY. NEV. DIST. ATTY’S OFF., [http://www.clarkcountynv.gov/Depts/district\\_attorney/Pages/DecisionMemos.aspx](http://www.clarkcountynv.gov/Depts/district_attorney/Pages/DecisionMemos.aspx) (last visited Nov. 22, 2015).

113. Matt Ferner, *Los Angeles Law Enforcement Officers Kill About One Person a Week*, HUFFINGTON POST (Sept. 16, 2014, 8:59 PM), [http://www.huffingtonpost.com/2014/09/16/nearly-600-people-have-been\\_5831042.html](http://www.huffingtonpost.com/2014/09/16/nearly-600-people-have-been_5831042.html) (noting that “nearly 600” people were killed by police since 2000).

114. Brittny Mejia et al., *This is the Shooting Video Gardena Police Didn’t Want You to See*, L.A. TIMES (July 15, 2015, 2:46 PM), <http://www.latimes.com/local/lanow/la-me-ln-gardena-officer-shooting-20150714-story.html>.

115. Letter from Jackie Lacey, Dist. Attorney, L.A. Cty. Dist. Attorney’s Office, to Duane Harris, Captain, Homicide Bureau, L.A. Cty. Sherriff’s Dep’t (July 2, 2014), <http://documents.latimes.com/damemo-gardena-police-shooting-unarmed-men-captured-video/>.

116. *Id.*

117. *Id.* at 1.

118. *Id.* at 10–11.

LAPD captain.<sup>119</sup> It then goes through a legal analysis of applicable case law and concludes with several paragraphs applying the legal standard to the facts.<sup>120</sup>

The publication of the video has led some to claim that it shows unequivocally the unjustified shooting of an unarmed, nondangerous, and innocent suspect.<sup>121</sup> Assuming that the video corroborates the district attorney's report, however, the detailed and thorough investigation that produced such a report illustrates the tremendous precharge procedural advantages police officers receive. The thorough and lengthy review of factual evidence and legal analysis would surprise an attorney defending a civilian charged with a violent crime, particularly in a case where identity was not in question.<sup>122</sup> Several other letters from the Los Angeles District Attorney's Office show similar investigative rigor.<sup>123</sup>

Police suspects receive thorough process charges are brought against officers too, as shown by the recent charges in Freddie Gray's death from a spinal cord injury on a "rough ride" in a Baltimore police van.<sup>124</sup> Although many praised State's Attorney Marilyn Mosby for her quick resolution to charge six officers, she made clear that the charges were the product of a "thorough" and "independent" investigation, with her team working "around the clock" to interview witnesses, watch video footage of Gray's arrest and videotaped statements to police, review Gray's medical records, and survey the police van's route.<sup>125</sup> In

119. *Id.* at 12–13.

120. *Id.* at 13–14.

121. *See, e.g.,* Rory Carroll, *Ricardo Diaz Zeferino: Videos of Police Shooting Unarmed Man in Bike Theft Go Public*, *GUARDIAN* (July 14, 2015, 11:55 PM), <http://www.theguardian.com/us-news/2015/jul/15/ricardo-diaz-zeferino-video-of-shooting-by-los-angeles-police-made-public> (quoting attorney who says shooting was clearly a "criminal act").

122. *See* Todd Oppenheim, *Opinion, Another Baltimore Injustice*, *N.Y. TIMES* (Nov. 28, 2015), <http://mobile.nytimes.com/2015/11/29/opinion/another-baltimore-injustice.html?smid=tw-share&referrer=> (discussing remarkably different treatment at all stages of process for police officers accused in Gray's death compared to other Baltimore defendants); *cf.* Kate Levine, *supra* note 99 (discussing an entire layer of procedural protection afforded only to police during interrogation).

123. *See, e.g.,* Letter from Jackie Lacey, Dist. Attorney, L.A. Cty. Dist. Attorney's Office, to Phillip L. Sanchez, Chief, Pasadena Police Dep't (Dec. 17, 2012), [http://extras.mnginteractive.com/live/media/site205/2012/1217/20121217\\_013713\\_JSID\\_File\\_12-0207.pdf](http://extras.mnginteractive.com/live/media/site205/2012/1217/20121217_013713_JSID_File_12-0207.pdf) (finding no charges in shooting of unarmed man suspected in armed robbery); Letter from Steve Cooley, Dist. Attorney, L.A. Cty. Dist. Attorney's Office, to Rick Esteves, Chief, Downey Police Dep't (Oct. 23, 2012), <http://abclocal.go.com/three/kabc/kabc/downey-ois-da-letter-2.pdf> (finding no charges in killing of man mistakenly identified as robbery suspect who fled from police); Letter from Steve Cooley, Dist. Attorney, L.A. Cty. Dist. Attorney's Office, to James Voge, Captain, Force Investigation Div., L.A. Police Dep't (Dec. 5, 2005), <http://mdcbowen.org/cobb/archives/garciaois.pdf> (finding no charges filed in a case where police shot and killed a thirteen-year-old auto-theft suspect).

124. *See, e.g.,* Manny Fernandez, *Freddie Gray's Injury and the Police 'Rough Ride,'* *N.Y. TIMES* (Apr. 30, 2015), <http://www.nytimes.com/2015/05/01/us/freddie-grays-injury-and-the-police-rough-ride.html>. This should counter the suggestion that prosecutors only do thorough precharge investigation when they are *looking* to exculpate law enforcement.

125. *See Watch: Baltimore Prosecutor Charges Six Police Officers, Calls Freddie Gray's Death a "Homicide,"* *DEMOCRACY NOW* (May 1, 2015), [http://www.democracynow.org/blog/2015/5/1/watch\\_baltimore\\_prosecutor\\_charges\\_six\\_police](http://www.democracynow.org/blog/2015/5/1/watch_baltimore_prosecutor_charges_six_police).

other words, the thoroughness of the investigation is what separates police-suspect cases from other cases—not whether the investigation results in charges or an indictment.

Similarly, a tremendous amount of resources and investigation is put into grand jury presentations for police suspects. St. Louis County Prosecuting Attorney Robert McCullough came under fire for his handling of the shooting death of teenager Michael Brown by Officer Darren Wilson in Ferguson, Missouri.<sup>126</sup> In particular, much scrutiny was devoted to the grand jury process, where the jurors heard dozens of witnesses over weeks of testimony.<sup>127</sup> The published transcripts showed a host of differences from the normal picture of a modern grand jury hearing. McCulloch addressed the jury, letting them know they would hear “every statement” and “every bit of evidence” and that the proceeding would be “like a trial.”<sup>128</sup> The jury heard sixty-two witnesses, including Darren Wilson and Dorian Johnson, who was with Michael Brown when the shooting occurred.<sup>129</sup> Jurors were also able to compare testimony with dozens of interviews conducted by police after the shooting; forensic and crime scene reports; photographs of the crime scene; Wilson’s car, gun, and clothing; and close-ups of Wilson’s face, as he alleged he had been struck several times by Brown.<sup>130</sup> Only after this “trial” did the jury decide not to indict.

McCulloch’s decision to present a full case to the grand jury is not uncommon in police cases.<sup>131</sup> Although a judge has so far refused to release the transcripts in the choking death of Eric Garner, we know that the suspect-officer spoke to the jurors for two hours.<sup>132</sup> The jury also heard from forty-nine other witnesses.<sup>133</sup> There are no nationwide statistics for how often prosecutors present such full evidence to grand juries, but as the *New York Times* noted, “most prosecutors impanel a special grand jury to investigate police-related deaths” and therefore “insulate themselves from the final decision, while appearing to fulfill the public desire for an independent review.”<sup>134</sup> This seemingly cynical use of the grand jury was among the reasons the public and many

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126. See, e.g., Kate Levine, *The Ultimate Conflict*, SLATE (Sept. 11, 2014, 2:50 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/09/local\\_prosecutor\\_bob\\_mcculloch\\_should\\_not\\_be\\_the\\_one\\_to\\_decide\\_whether\\_to.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/09/local_prosecutor_bob_mcculloch_should_not_be_the_one_to_decide_whether_to.html).

127. See Transcript of Grand Jury at 9, *Missouri v. Wilson* (Aug. 20, 2014), <http://int.nyt.com/newsgraphics/2014/11/24/ferguson-evidence/assets/gj-testimony/grand-jury-volume-01.pdf>.

128. *Id.* at 8, 9, 21; cf. BERNARD E. HARCOURT, COLUMBIA LAW SCHOOL: PUB. LAW & LEGAL THEORY WORKING PAPER GRP., PAPER NO. 14-480, THREE ESSAYS IN CRIMINAL JUSTICE (2015) (comparing the cursory review of a death penalty decision in Alabama with the trial-like process in Ferguson).

129. See *Witness List, Documents Released in the Ferguson Case*, N.Y. TIMES (Dec. 15, 2014), <http://www.nytimes.com/interactive/2014/11/25/us/evidence-released-in-michael-brown-case.html>.

130. For all of the evidence and testimony that was released in the Darren Wilson case, see *id.*

131. See, e.g., James C. McKinley Jr. & Al Baker, *Grand Jury System, With Exceptions, Favors the Police in Fatalities*, N.Y. TIMES (Dec. 7, 2014), [http://www.nytimes.com/2014/12/08/nyregion/grand-juries-seldom-charge-police-officers-in-fatal-actions.html?\\_r=0](http://www.nytimes.com/2014/12/08/nyregion/grand-juries-seldom-charge-police-officers-in-fatal-actions.html?_r=0).

132. Amy Davidson, *What the Eric Garner Grand Jury Didn't See*, NEW YORKER (Dec. 4, 2014), <http://www.newyorker.com/news/amy-davidson/eric-garner-grand-jury-didnt-see>.

133. McKinley & Baker, *supra* note 131.

134. *Id.*

defense attorneys—who believed the process was infected with bias—have been so outraged at these nonindictments.<sup>135</sup>

Most suspects are reflexively charged with as many charges as the substantive law will allow, and without any precharge weighing of the strength of the evidence by a prosecutor, or a grand jury exposed to a full set of evidence. In comparison, police suspects get an additional layer of discretionary investigation and evidence weighing.

### III. THE PERIL AND PROMISE OF THIS PICTURE

Systematic harms flow from the extra process that prosecutors give almost exclusively to law enforcement officers. The current distributional state of precharge/preindictment process is untenable because it favors already-advantaged criminal justice actors, threatens the appearance of justice and the legitimacy of the criminal law. But despite these problems, stripping the police of this process is not the solution. Instead, prosecutors should be encouraged or required to do more thorough precharge investigation and present more evenhanded preindictment cases to grand juries. This Part also considers the practical objection that giving thorough precharge process to all suspects would effectively shut down the criminal justice system.

#### A. THE PERILS OF PROCESS FOR THE POLICE

The public's anger at nonindictments in police-brutality cases tends to focus on the substantive outcomes—no charges for white police officers killing unarmed, often young, black men.<sup>136</sup> A number of commentators, scholars,<sup>137</sup> and lawmakers<sup>138</sup> have aimed their criticism at the biased process police suspects appear to receive. In Ferguson, however, the actual ruling may have

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135. See, e.g., Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html>; J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), [http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html?\\_r=1](http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html?_r=1).

136. See, e.g., *About Us*, BLACK LIVES MATTER, <http://blacklivesmatter.com/about/> (last visited Nov. 7, 2015) (stating that the movement was created to address, among other issues, “extrajudicial killings of Black people by police and vigilantes”). Race has also played a role in the recent and rare conviction of an officer for killing an unarmed man. Some claim that the conviction of Officer Peter Liang, who is Chinese, in Brooklyn, New York was not supported by the mostly white police union, and that his conviction had as much to do with race as with his crime. See Max Rivlin-Nadler, *Police Union Turns Its Back on Cop Who Killed Innocent Man In Brooklyn Stairwell*, GOTHAMIST (Jan. 28, 2016, 11:17 AM) (discussing belief that if Liang had been white, union would have been present at his trial), [http://gothamist.com/2016/01/28/akai\\_gurley\\_liang\\_trial.php](http://gothamist.com/2016/01/28/akai_gurley_liang_trial.php); Rick Rojas, *In New York, Thousands Protest Officer Liang's Conviction*, N.Y. TIMES (Feb. 20, 2016) (noting that some in the Chinese community believe Liang was targeted because of his race), <http://www.nytimes.com/2016/02/21/nyregion/in-new-york-thousands-protest-officer-liangs-conviction.html>.

137. See *supra* note 15.

138. Mason, *supra* note 15 (describing a California Assembly bill that would substitute an evidentiary hearing for grand jury); Remnick, *supra* note 15.



been sensible. The Department of Justice also conducted its own investigation and came to the same conclusion as the grand jury—that Wilson’s actions were not criminal.<sup>139</sup> All the evidence gathering and weighing may have actually led to the legally correct result. McCulloch’s seeming law-enforcement bias aside,<sup>140</sup> he appears to have done a careful and thorough review of evidence in that case.

But the process that police suspects receive from prosecutors is harmful from another perspective because it highlights the ways in which prosecutors fail to use their discretion to investigate and decline charges in the thousands of other cases that come before them. This prosecutorial process differential is unfair and threatens the legitimacy of the criminal law by favoring insider suspects despite the inherent benefits their status already gives them.<sup>141</sup>

The picture of our criminal justice system is already one of bias and unfairness. Recent attention has uncovered a criminal justice “mill” that does a bad job distinguishing between the innocent and guilty.<sup>142</sup> Moreover, the system overly punishes thousands of relatively less-guilty suspects who commit crimes that have little to no bearing on society’s safety.<sup>143</sup> Prosecutors can excuse this ugly picture by noting that they have heavy caseloads and no mechanism for checking police in every case.<sup>144</sup> They have to bring charges and work out the innocence or relative guilt of a suspect in the plea-bargaining stage.<sup>145</sup> Yet they appear to have ample resources and judgment when it comes to police suspects.

Racial minorities, in heavily policed areas who do not have the resources to adequately defend themselves are regularly arrested, put in jail, pushed through the system, and saddled with criminal records that carry a host of debilitating collateral consequences.<sup>146</sup> Yet the police, who contribute to this cycle, are treated carefully in the rare circumstances in which their potential criminality is

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139. See DEP’T OF JUSTICE, REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 86 (2015), [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj\\_report\\_on\\_shooting\\_of\\_michael\\_brown\\_1.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf) (concluding that the case lacked “prosecutive merit”).

140. See, e.g., Pema Levy, *Ferguson Prosecutor Robert P. McCulloch’s Long History of Siding With the Police*, NEWSWEEK (Aug. 29, 2014, 6:33 AM), <http://www.newsweek.com/2014/09/12/ferguson-prosecutor-robert-p-mccullochs-long-history-siding-police-267357.html>.

141. See generally Levine, *supra* note 99 (discussing formal affirmative rights against interrogation tactics that police receive through statute or negotiated agreement).

142. See, e.g., Natapoff, *supra* note 39, at 1328 (noting that many factually innocent misdemeanants plead guilty).

143. Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a “Pointless Indignity,”* 66 STAN. L. REV. 987, 1035–36 (2014) (noting that misdemeanors and order-maintenance crimes are the most common grist for the “modern criminal justice mill”).

144. See Gershowitz & Killinger, *supra* note 7, at 263 (“Prosecutors in many large cities have caseloads far in excess of the recommended guidelines that scholars often cite to criticize the caseloads of public defenders.”).

145. Bowers, *supra* note 11, at 1708 (“Post-charge, prosecutors are prone to consider *anything* legitimate that terminates cases quickly.”).

146. See Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 129 (2009) (noting serious collateral consequences that flow from pleading guilty to a misdemeanor).

even discovered and reported. These most sophisticated suspects, who are least prone to being arrested mistakenly, confessing mistakenly, being housed in jail while awaiting charges or indictments, or being pushed into a harsh plea bargain, are also given the greatest chance of never facing charges to begin with.<sup>147</sup>

The extra process prosecutors give police also leads to serious optics problems. Citizens who are all but shut out of the criminal justice process see police getting away with terrible, seemingly criminal behavior. Defense attorneys and defendants see police getting precharge procedural advantages they could not dream of.<sup>148</sup> It is not hard to understand that the conclusion drawn from these cases is that the criminal justice system is rigged in favor of those on the inside.

The important due process principle that justice appear just<sup>149</sup> grew out of an earlier rule that judges were presumed to be impartial arbitrators.<sup>150</sup> As it became widely recognized that no person could ever be completely impartial,<sup>151</sup> the standard became one of appearance—an aspiration that even if a judge brought her life experiences and biases to the bench, she should do everything in her power to set them aside and appear impartial.<sup>152</sup>

Prosecutors in our criminal justice system perform quasi-judicial functions, and they are often the main contact that outsiders have with the justice system.<sup>153</sup> Thus, we should seek to ensure that prosecutors also appear unbiased.<sup>154</sup> When prosecutors and police appear to team up to arrest and convict as many people as possible while rigging the system so that no charges or indictments

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147. See Levine, *supra* note 99.

148. See David Feige, *Fairness in Ferguson*, SLATE (Nov. 18, 2014, 3:07 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/11/darren\\_wilson\\_grand\\_jury\\_ferguson\\_prosecutor\\_opens\\_proceedings\\_to\\_both\\_sides.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/11/darren_wilson_grand_jury_ferguson_prosecutor_opens_proceedings_to_both_sides.html).

149. See, e.g., *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988) (noting that a potentially biased judge must recuse himself “to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible”).

150. See Charles Gardner Geyh, *Can the Rule of Law Survive Judicial Politics?*, 97 CORNELL L. REV. 191, 250 (2012).

151. See John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 250–52 (1987) (noting that judges brought experience and biases to the bench but that disqualification for appearance of bias was still important); Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563, 1638 (2012) (“Often we think that reality is insulated from any influence that can be linked to appearance, but sometimes an appearance becomes the basis for conduct that fosters a corresponding reality over time, and sometimes the concepts collapse in the first place.”).

152. See Geyh, *supra* note 150, at 250 (“[I]n the 1970s, federal and state laws were revised to require disqualification whenever a judge was biased or his ‘impartiality might reasonably be questioned.’”); Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 45–46 (1987) (“This aspiration to impartiality, however, is just that—an aspiration rather than a description—because it may suppress the inevitability of the existence of a perspective and thus make it harder for the observer, or anyone else, to challenge the absence of objectivity.”).

153. Cf. Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 457 (1992) (“Whether American prosecutors can be . . . ‘ministers of justice’ . . . or should ‘temper zeal with human kindness’ . . . are unanswerable questions in a criminal justice model that emphasizes crime control over protecting individual rights.”).

154. See Levine, *supra* note 12 (arguing that prosecutors must satisfy the appearance standard).

are brought when they are suspected of crimes, the appearance of justice is sullied.

This appearance problem threatens the legitimacy of the criminal law.<sup>155</sup> Scholars such as Tom Tyler and others have conducted empirical work in an attempt to determine what makes the criminal law legitimate to those who must obey its dictates.<sup>156</sup> This research has shown that what people care most about from legal authorities is “procedural justice.”<sup>157</sup> They want law enforcement to appear unbiased and process to be distributed in an evenhanded and fair-seeming manner.<sup>158</sup> In other words, the comparative substantive outcome of a defendant’s case matters less to her than the sense that she was treated fairly by unbiased legal actors.<sup>159</sup> This work showed further that these precepts not only made people believe the system was fairer, but also motivated them to obey the criminal law for reasons other than fear of being apprehended.<sup>160</sup>

When prosecutors distribute procedures unfairly to other insiders, the system’s legitimacy is seriously threatened. Citizens who might otherwise trust authorities are given reason to doubt them, and citizens whose contact with the justice system already leads to distrust are given even more reason to believe that law enforcement officials are biased.

#### B. THE PROMISE OF PRECHARGE/PREINDICTMENT PROCESS

Given the many systemic harms triggered by additional precharge/preindictment process for police suspects, it is little wonder that legal academics, politicians, and citizens are in favor of reducing the advantages that police suspects receive from prosecutors.<sup>161</sup> In this section, however, I argue that the opposite solution is far more powerful. In fact, the process given to police precharge or preindictment might not only be fairer,<sup>162</sup> but also more accurate in terms of fewer innocent suspects being charged and a more practical allocation of prosecutorial resources.<sup>163</sup>

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155. See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

156. *Id.*

157. *Id.* at 6–7 (noting that the normative view of procedural justice views people as concerned with procedural aspects of their experience rather than the outcome of their criminal justice contact).

158. TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* 14–15 (2002) (noting that people will be more deferential to the law if they see law enforcement as unbiased).

159. TYLER, *supra* note 155, at 73 (noting that “the perception of unequal treatment . . . is the single most important source of popular dissatisfaction with the American legal system”).

160. *Id.* at 110 (showing that “the fairness of procedures enhances or diminishes . . . future compliance with the law”).

161. See *supra* note 15.

162. See Wright & Miller, *supra* note 11, at 33 (“The public in general, and victims in particular, lose faith in a system where the primary goal is processing and the secondary goal is justice.”).

163. See Josh Bowers, *Physician, Heal Thyself: Discretion and the Problem of Excessive Prosecutorial Caseloads, a Response to Adam Gershowitz and Laura Killinger*, 106 NW. U. L. REV. COLLOQUY 143, 145 (2011) (arguing that “the prosecutor has a mechanism to ease her own [excessive caseload] pain—that is, prosecutorial discretion”).

The process police receive tells us something exciting and potentially transformative about the criminal justice machine. Prosecutors, when they have the will, can serve as a finger in the dam of criminal justice harshness. Grand juries too have the capacity to be much more than the irrelevant, rubber-stamping institutions they have become.<sup>164</sup> Moreover, there is a whole world of precharge and preindictment decision making that has an enormous impact on defendants, not to mention administrative costs.

The process prosecutors give to police tells us something about their motivations. When they are charging or indicting an ordinary suspect, the context of the crime, the criminogenic factors that led to it, and the harm to the defendant's reputation, family, and life are not factors that outweigh a prosecutor's goals to charge and eventually convict when they can.<sup>165</sup> These motivations, however, are upended when a police officer's life is on the line: prosecutors work closely with the police, rely on them for every case they try, and their relationships may bleed from professional to social.<sup>166</sup> In other words, they are looking at a police suspect with a world of context and understanding that is simply missing when an ordinary suspect is before them.<sup>167</sup>

But what would it look like if prosecutors approached all potential defendants with the same sensitivity they use with police defendants? It would mean that they would pause and think before charging; it would mean that factual accuracy became the paramount goal; it would mean that they might consider the normative value of a conviction rather than the ease of achieving one. In other words, it would mean a turn to precharge/preindictment process—the same process afforded the police.

Precharge/preindictment process for all defendants has many theoretical advantages. The most obvious is that it might stem the tide of false convictions.<sup>168</sup> If prosecutors actually investigated cases, questioned police statements, listened to a suspect's story, and questioned potential witnesses before charging a case, they would inevitably intercept innocent people before they were swept into the criminal justice machine.<sup>169</sup> Such a practice would also help law enforcement—discovering that a suspect is innocent before she is charged would allow police

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164. *See supra* note 97.

165. *See generally* Bowers, *supra* note 11; Natapoff, *supra* note 39.

166. Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 792 (2003) (“[O]ne ought not underestimate the unifying influence of a shared commitment to ‘getting the bad guys,’ hardened by the adversarial process, nurtured by mutual respect and need, and on occasion lubricated by alcohol.”).

167. *Id.*; *see also* Levine, *supra* note 12.

168. *See, e.g.*, Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 527 (2005) (studying hundreds of exonerations and noting that “it is certain—this is the clearest implication of our study—that many defendants who are not on this list, no doubt thousands, have been falsely convicted of serious crimes but have not been exonerated”).

169. *See* Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 337 (2001) (“[T]he prosecutor's role as a minister of justice [is] to protect innocent persons from wrongful convictions . . . [as evidenced in] the ethical rules that require a prosecutor to have confidence in the truth of the criminal charge . . .”).

to continue searching for the person who actually committed the crime while evidence remained relatively fresh.

Precharge scrutiny would also force prosecutors to consider the normative value of a given charge. For instance, if a prosecutor's usual practice was to investigate all cases precharge, she would have to think carefully about which cases were actually worth prosecuting. For example, even if a trespassing case, where someone was arrested for being in public housing without proper identification,<sup>170</sup> seemed easy to charge and convict, would it be worth the process? This is the opposite of the logic under which prosecutors currently operate.<sup>171</sup> Because they do not conduct precharge investigations, these small, socially harmless cases are the easiest to close, and therefore the most likely to be charged.<sup>172</sup> If we upend the reflexive charging process, an entire world emerges where minimally harmful cases are dismissed leaving time and resources to investigate more serious cases before a suspect becomes a defendant.<sup>173</sup>

And what of grand juries? Should prosecutors have to investigate and present exculpatory as well as inculpatory evidence to a grand jury to get an indictment? In theory, presenting exculpatory evidence would lead to a more accurate, legitimate, and democratic indictment process. For instance, imagine a case where the only evidence of a crime is an eyewitness—a notoriously unreliable yet overused source of evidence<sup>174</sup>—what if the prosecutor had to actually call this witness to testify? A number of positive results would flow from such a rule: the witness would have to appear in court and testify under oath in front of other citizens. This might well help prosecutors sort out, before indictment, whether an eyewitness was as reliable as the police suggested, whether she was motivated enough to go through with the process, and whether she was a credible witness.

Moreover, the grand jury would have an actual role in the process. In other words it would insert, at a crucial moment, a check from criminal justice

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170. Such arrests are an ongoing phenomenon in New York City public housing. A 2010 lawsuit claimed that tenants and their guests were routinely charged with trespassing during “vertical sweeps” where police came into the houses looking for criminal activity. In 2008, there were 5,841 such arrests. See Cara Buckley, *Lawsuit Takes Aim at Trespassing Arrests in New York Public Housing*, N.Y. TIMES (Jan. 29, 2010), [http://www.nytimes.com/2010/01/26/nyregion/30housing.html?\\_r=1](http://www.nytimes.com/2010/01/26/nyregion/30housing.html?_r=1).

171. See *supra* Section II.A. There are, of course, some exceptions to this statement. See, e.g., Stephanie Clifford, *Proposal to Limit Prosecutions of Marijuana Cases in Brooklyn*, N.Y. TIMES (Apr. 23, 2014) (discussing District Attorney Kenneth Thompson's policy decision not to prosecute people for possession of small amounts of marijuana), <http://www.nytimes.com/2014/04/24/nyregion/in-brooklyn-proposing-to-end-prosecutions-for-low-level-marijuana-offenses.html>.

172. See *supra* Section II.A.

173. See Wright & Miller, *supra* note 11, at 52 (“Screening can prevent arbitrary allocation of resources and inconsistent decisions in prosecution more generally.”).

174. See generally Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984) (reviewing unreliability of eyewitness testimony, particularly cross-racial identifications).

outsiders on prosecutor's incentives and judgment.<sup>175</sup> Not only would this make the process more fair and potentially more accurate for defendants. It would also go a long way toward restoring the image of criminal justice as a democratic process worthy of citizens' trust.<sup>176</sup>

Of course, precharge process, and particularly presenting full cases to grand juries, is economically impossible in our current system. It would be impossible to investigate every minor case or hold a "mini-trial" for every serious case. But this raises the bigger question of why we have so many cases in our criminal justice system to begin with.<sup>177</sup> Hundreds of thousands of people, some factually innocent, are convicted of felonies and misdemeanors and criminally punished every year.<sup>178</sup> Politicians on both the right and the left already recognize that this is an untenable way to proceed.<sup>179</sup> Giving such cases serious consideration before charging them should be considered as one possible solution to our mass incarceration problem.

There should also be more careful sorting of felony cases that require indictments. Many drug crimes are felonies.<sup>180</sup> In such cases, an indictment or judicial finding of probable cause is necessary. Treating the grand jury as a rubber stamp has allowed prosecutors to indict and convict thousands of drug defendants, charged with possession of small amounts of illegal or prescription drugs.<sup>181</sup> Furthermore, the people who are being arrested and convicted for

175. See Washburn, *supra* note 29, at 2352 ("Despite the widespread belief that the grand jury's role is to serve as a check on the prosecutor, the grand jury is widely criticized for failing to live up to this role.").

176. See, e.g., Simmons, *supra* note 30, at 65 ("The numbers suggest that a strong majority of grand jurors perceived [their] role as useful and important to our criminal justice system. [They believed] that public participation in the criminal justice system enhances the fairness of the proceeding . . .").

177. See, e.g., K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 289 (2014) (arguing prosecutors have an ethical duty to reduce amount of defendants in the system by exercising prosecutorial discretion not to prosecute).

178. See PETER WAGNER & LEAH SAKALA, PRISON POLICY INITIATIVE, MASS INCARCERATION: THE WHOLE PIE (2014) (noting that almost 300,000 people are in jail for minor offenses).

179. See, e.g., *Bipartisan Justice Reform Bill is Best Chance in a Generation to Reduce Incarceration*, BRENNAN CTR. FOR JUST. (Oct. 1, 2015), <https://www.brennancenter.org/press-release/bipartisan-justice-reform-bill-best-chance-generation-reduce-incarceration> (discussing the merits of a bipartisan senate bill aimed at reducing mass incarceration).

180. See, e.g., *New York Drug Possession Laws*, FINDLAW, <http://statelaws.findlaw.com/new-york-law/new-york-drug-possession-laws.html#sthash.KLGS5iz8.dpuf> (last visited Jan. 3, 2016).

A defendant convicted of a class A-1 felony (possession of eight or more ounces of substances containing a narcotic drug or 5,760 milligrams of methadone) may be sentenced to a term of 8 to 20 years imprisonment or a fine of \$100,000. Convictions of class B to class E felonies range from sentences of a minimum of one year to a maximum of 1.5 to 9 years or fines ranging from \$15,000 to \$30,000 for class B and class C felonies.

*Id.*

181. See, e.g., Steven B. Duke, *Mass Imprisonment, Crime Rates, and the Drug War: A Penological and Humanitarian Disgrace*, 9 CONN. PUB. INT. L.J. 17, 24 (2009) ("[D]rug crimes account for the most [prison] admissions."); Lisa R. Nakdai, Note, *Are New York's Rockefeller Drug Laws Killing the Messenger for the Sake of the Message?*, 30 HOFSTRA L. REV. 557, 560 (2001) ("[D]rug felonies are

these drug crimes are far from the only people actually committing them. It is well known that wealthy and poor, white and African-American people use drugs at the same rate.<sup>182</sup> And yet a look at who is incarcerated for such “crimes” yields an entirely different racial picture.<sup>183</sup> As we search for ways to reduce the effects of the war on drugs, asking prosecutors to weigh the seriousness of cases, to examine evidence, and to bring such cases before a body of citizens who may make their own decisions about the merits of a case is an attractive solution.<sup>184</sup> Even assuming such a solution is not practically possible, however, the power of its suggestion is clear: the way the indictment process works is a choice, not a mandate.

Michelle Alexander has explored the question of what would happen if every defendant who could chose to exercise her right to a trial. She argues that the exercise of this right would make our current system impossible to continue.<sup>185</sup> Although such an opinion may seem polemical rather than practical, it does ask us to consider several seemingly settled questions about our current system. Individually, many defendants are well-counseled to take plea bargains and avoid the possibility of a longer sentence after a trial, but in the aggregate it is clear that the system has been allowed to balloon to its current state, in part, because such rights are not exercised.<sup>186</sup> The alternative of testing charges before a grand jury brings up the same kinds of questions: What would happen if citizens insisted on their right to participate in the decision of whether to charge a criminal suspect? What if citizens rejected the current state of the grand jury system and insisted that they hear from actual witnesses, rather than police hearsay about what witnesses saw? What if prosecutors were required to present exculpatory evidence rather than evidence geared only toward achieving indictment? At a higher level, we might ask, why does our current system exist?<sup>187</sup> And why do we simply accept the response that it would be impossible to give preindictment process to all defendants because of resource constraints?

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considered the ‘single most significant factor underlying the remarkable growth of the prison population’ in New York.”).

182. See *supra* note 47 and accompanying text.

183. See *supra* note 47 and accompanying text.

184. For articles discussing the historical role of grand jurors as making normative decisions about the merits of laws, rather than simply weighing facts, see *supra* note 97; see also Bowers, *supra* note 30, at 321 (suggesting a grand jury for misdemeanors that weighs the worthiness of charges in low-level cases).

185. Michelle Alexander, Opinion, *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 10, 2012), <http://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html> (“The system of mass incarceration depends almost entirely on the cooperation of those it seeks to control. If everyone charged with crimes suddenly exercised his constitutional rights, there would not be enough judges, lawyers or prison cells to deal with the ensuing tsunami of litigation.”).

186. *Id.*

187. Washburn, *supra* note 29, at 2346 (arguing that “the historical narrative [of grand juries] . . . suggests some other roles and responsibilities [not valued in the modern conception]: considering the legitimacy of laws, and/or considering the legitimacy of the application of those laws in a particular case”).

Prosecutors have limited resources. What they do with those resources, however, is a choice. One choice that prosecutors have tended to make is to reserve process only for the police and a select few other suspects who have the resources to challenge the process at every stage.<sup>188</sup> This is certainly one way to preserve resources, but it is not the fairest, most accurate, or most systemically legitimate way to do so, leading to a picture of favoritism, collusion, and bias toward favored suspects. It is also not necessarily the most cost effective. In fact, investing more resources upfront may reduce costs by reducing charges, convictions, and incarcerations generally. Of course, such reduction would have to come from smart choices, but precharge process is one mechanism to ensure that such choices are based on more thoughtful reasoning. We can imagine such process would lead to fewer people who are prosecuted, incarcerated, forced to undergo costly monitoring, and lose economic opportunities through collateral consequences and the stigma of a conviction.<sup>189</sup> In terms of innocent suspects, it will also save states money in the form of costly appeals and civil lawsuits.<sup>190</sup>

#### CONCLUSION

Our current system of charging and indicting goes something like this: if you are an ordinary criminal suspect, arrested for a misdemeanor, a prosecutor charges you reflexively, without investigation into the facts and circumstances of your case. That charge almost always leads to a conviction. If you are arrested for a felony, you are charged with several crimes, and a grand jury indicts you based on a quick, curated, and prosecutor-dominated process. Because you are charged with so many different crimes, you plead guilty to some rather than face trial for all of them. Your case is never investigated. Or, you wait in jail for months or more while your case is investigated, and plea bargaining occurs. You still probably plead guilty.

If you are a police officer accused of a crime, your case is thoroughly investigated precharge. Prosecutors speak to any witness they can, review all the evidence, and think seriously about the charges and defenses to those charges. If your case is brought to a grand jury, you and any witness to the crime will testify, and the grand jury will spend weeks considering the charges in your case. Your chance of facing no charges is dramatically increased.

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188. White-collar offenders are the most salient example of these other privileged defendants. *See, e.g.,* Rebecca A. Pinto, *The Public Interest and Private Financing of Criminal Prosecutions*, 77 WASH. U. L.Q. 1343, 1363–64 (1999) (“One reason for the noted under-enforcement of white-collar crimes may be that prosecutors must invest more resources to prevail in white-collar cases than in other cases . . . [A] prosecutor might decline to bring meritorious white-collar crime cases because she believes that she can more easily ‘win’ cases against indigent defendants in street crime cases.”).

189. For a thorough exploration of the collateral consequences associated with imprisonment, see *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (Marc Mauer & Meda Chesney-Lind eds., 2002).

190. *See* Marshall, *supra* note 46.



Moreover, you are treated like a *potential* suspect whose own version of events matters.

This process differential is unfair. It leads to serious systemic harms that have come to light recently. This realization has led many to call for less process for police. This Article has argued that the far more desirable conclusion is to give more process to the rest of us. Anyone serious about criminal justice reform needs to consider how prosecutors treat police suspects. The process they give their law enforcement partners has much to tell us about how to create a better system for everyone.