

# BETRAYING THE AMERICAN PUBLIC'S TRUST AND POLICE ACCOUNTABILITY INTERROGATIONS: THE DARREN WILSON STORY

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## *Introduction*

There are three parts to the criminal justice system in the United States: law enforcement, the court system, and corrections.<sup>1</sup> Within the court system, falls the role of the grand jury, which was first impaneled in America in 1635.<sup>2</sup> The right to a grand jury is instilled in the Constitution of this very country, “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .” A grand jury simply needs to determine that there is enough probable cause<sup>3</sup> in order to

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\* Juris Doctor Candidate May 2021, St Thomas University School of Law. I was born in Miami, Florida, and was raised in Hialeah, Florida. I am a Palestinian-American, and both of my parents immigrated to the United States in the 80's. The topic of racial injustice has been rooted in my own background as a Palestinian in a manner similar to the racial injustice against Black people in the United States, which contributed to me writing this paper, and making sure that injustices are spoken up against. Which leads me to the specific instance where prosecutors are supposed to seek justice, but in this case the injustice of the proceedings against Darren Wilson in the murder of Michael Brown reflected a completely different aspect of what their roles set out.

<sup>1</sup> *Intro to the American Criminal Justice System*, U.S. CRIM. JUST. SYS., <http://www.correctionalofficer.org/us-criminal-justice-system> (last visited on Dec. 2, 2020) (explaining each component of the criminal justice system and the role it plays within the system).

<sup>2</sup> ROGER A. FAIRFAX JR., *ADJUDICATORY CRIMINAL PROCEDURE: CASES, STATUTES, AND MATERIALS* 67 (1st ed. 2017).

<sup>3</sup> *See Probable Cause*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/probable\\_cause](https://www.law.cornell.edu/wex/probable_cause) (last visited Nov. 24, 2020) (defining probable cause as when the courts find “there is a reasonable basis for believing that a crime may have been committed (for an arrest) or when evidence of the crime is present in the place to be searched.”).

press formal charges, resulting in an indictment against the defendant.<sup>4</sup> A grand jury returns either a true bill<sup>5</sup> or no true bill, while a petit jury returns a verdict.<sup>6</sup>

The grand jury's role is to decide on indicting an individual. Simply put, the grand jury's single task is to determine whether there is a sufficient amount of evidence so that charges can be brought,<sup>7</sup> whereas a conviction means that the individual was found guilty of the crime(s) they were indicted with.<sup>8</sup> This is a secret process, and very little to nothing is revealed to the outside world. No one really knows what goes on in it except for those jurors in the panel, and the prosecution. The grand jury is only presented evidence by the prosecutor. The defense does not play a role in the proceedings, and the jurors depend solely on the law and evidence presented by the prosecutor.<sup>9</sup>

Although it has been said that a grand jury can "indict a ham sandwich,"<sup>10</sup> this has proven to be untrue when it comes down to indicting law enforcement related shootings. Countless times we have seen unarmed Black men and women killed by law enforcement and

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<sup>4</sup> See *Grand Jury*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/grand\\_jury](https://www.law.cornell.edu/wex/grand_jury) (last visited Nov. 24, 2020) (defining grand jury).

<sup>5</sup> See *true bill*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/true\\_bill](https://www.law.cornell.edu/wex/true_bill) (last visited Dec. 12, 2020) (defining true bill).

<sup>6</sup> See *Verdict*, CORNELL L. SCH., <https://www.law.cornell.edu/wex/verdict> (last visited Mar. 29, 2021) (defining verdict).

<sup>7</sup> See Alexis Kelly, *What Is the Role of a Grand Jury?*, ALL LAW, <https://www.alllaw.com/criminal-law/what-is-the-role-of-a-grand-jury.html> (last visited Mar. 29, 2021) (explaining the grand jury's purpose and task).

<sup>8</sup> See Gann McCloskey & Barry PLLC, *Consequences of an Indictment vs. a Conviction*, COLLINS GANN MCCLOSKEY & BARRY PLLC (Jan. 5, 2015), <https://www.cgmbesq.com/blog/2015/january/consequences-of-an-indictment-vs-a-conviction/> (explaining a conviction).

<sup>9</sup> Kelly, *supra* note 7.

<sup>10</sup> See *Do We Need Grand Juries?*, N.Y. TIMES (Feb. 18, 1985), <https://www.nytimes.com/1985/02/18/opinion/do-we-need-grand-juries.html> (quoting Chief Judge of New York Sol Wachtler, and his opinion of that the grand jury works as "the prosecutor's pawn than the citizen's shield.").

no indictment returns. We have seen it in Sacramento, California;<sup>11</sup> we have seen it in Louisville, Kentucky;<sup>12</sup> we have seen it in Staten Island, New York;<sup>13</sup> and we continue to see it across the United States of America.

Why is it that there is a higher chance of no indictment when the victim is Black than when the victim is white?<sup>14</sup> The reason that I am asking this question is not because of assumptions, but rather because of specific instances. These victims range from age, height, weight, and even gender, however the one thing they all have in common is the color of their skin. These victims are just a few of the many that were subject to the unlawful killings at the hands of law enforcement, and each and every one of them was Black.

Stephon Clark (Clark), twenty-two (22) years old, father of two, football lover, and a young man, had his life ahead of him until March 18, 2018 when he was shot and killed by two officers of the Sacramento Police Department.<sup>15</sup> The police officers did not fire once or twice, instead they fired a total of twenty (20) times at Clark, whom was unarmed.<sup>16</sup> The police officers allegedly believed that he was pointing a gun at them, but the only thing found on Clark was a cell phone.<sup>17</sup>

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<sup>11</sup> See *infra* note 15.

<sup>12</sup> See *infra* note 21.

<sup>13</sup> See *infra* note 16.

<sup>14</sup> See Jaeah Lee & Katie Rose Quandt, *Here's What Happens to Police Officers Who Shoot Unarmed Black Men*, MOTHER JONES (Aug. 20, 2014), <https://www.motherjones.com/politics/2014/08/darren-wilson-ferguson-police-officers-shoot-unarmed-black-men/>; see also Adam Serwer, *Why Grand Juries Don't Indict Cops When They Kill*, BUZZFEED NEWS (Dec. 3, 2014, 8:08 PM), <https://www.buzzfeednews.com/article/adamserwer/evidence-of-things-we-all-see>.

<sup>15</sup> Nicole Santana Cruz, *Stephon Clark: Surrounded by love, trouble and tragedy, and now a rallying cry for justice after police shooting*, L.A. TIMES (Mar. 29, 2018, 3:00 PM), <https://www.latimes.com/local/lanow/la-me-stephon-clark-profile-20180328-story.html>.

<sup>16</sup> Alia Churgtai, *Know their names – Black People Killed By The Police In the US*, AL JAZEERA, <https://interactive.aljazeera.com/aje/2020/know-their-names/index.html> (last visited Nov. 11, 2020).

<sup>17</sup> *Id.*

Eric Garner (Garner), forty-three (43) years old, father of six, known as the neighborhood peacemaker, suffocated to death while officer Daniel Pantaleo held him down in a chokehold while Garner was gasping for air and urging to bring out his last words: “I can’t breathe.”<sup>18</sup> His murder was the result of a maneuver that was banned by the New York Police Department in 1994, and is explicitly banned in the department’s patrol guide.<sup>19</sup> There was no record or evidence of Garner posing a threat to the officers, and he was unarmed.<sup>20</sup>

Breonna Taylor (Taylor), twenty-six (26) years old, full-time Emergency Room Technician, loved to play cards with her aunts, and wanted to make a difference in people’s lives.<sup>21</sup> She was shot and killed by three white plainclothes officers, Jonathan Mattingly, Brett Hankison, and Myles Cosgrove, while she was asleep in her home that she shared with her boyfriend, Kenneth Walker (Walker).<sup>22</sup> On March, 13, 2020, police officers arrived to execute a no-knock warrant (which later became a knock and announce warrant) at Taylor’s home though she, herself, was not the subject of the investigation: her ex-boyfriend who no longer lived there was.<sup>23</sup> The officers returned fire, shooting dozens of times hitting and killing Taylor.<sup>24</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> Michael R. Sisak, *NYPD training official: Garner officer used banned chokehold*, AP NEWS, (May 14, 2019), <https://apnews.com/article/69ae3f174b4741edaa3a68af9ad1ee98>.

<sup>20</sup> *Another police officer walks, but the fight is not over. We stand for Eric Garner*, US HUM. RTS. NETWORK (July 23, 2019), <https://ushrnetwork.org/news/132/100/Another-police-officer-walks-but-the-fight-is-not-over.-We-stand-for-Eric-Garner>.

<sup>21</sup> Ari Shapiro, Jason Fuller, & Becky Sullivan, *As the nation chants her name, Breonna Taylor’s family grieves a life ‘robbed’*, MPR NEWS, June 5, 2020, , <https://www.mprnews.org/story/2020/06/04/npr-as-the-nation-chants-her-name-breonna-taylors-family-grieves-a-life-robbed>.

<sup>22</sup> *Breonna Taylor: What happened on the night of her death?*, BBC NEWS, (October 8, 2020), <https://www.bbc.com/news/world-us-canada-54210448>.

<sup>23</sup> Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor’s Death*, N.Y. TIMES, (October 30, 2020), <https://www.nytimes.com/article/breonna-taylor-police.html>.

<sup>24</sup> *Id.*

Their race was what put them into the same bubble; what put their stories on an unfortunate pedestal was the fact that not one of the law enforcement officials involved in their deaths were indicted when prosecutors presented their deaths to a grand jury. We must take note that these cases were not in the same state, rather they were spread throughout the country. Meaning that the individual prosecuting the case was not the same person presenting each of these cases to each grand jury. This makes us sit back and evaluate whether there really was not enough probable cause to render an indictment, whether the prosecutors are intentionally failing to lead to an indictment, or whether these prosecutors truly are not capable of doing their jobs.

This paper will be focused on the specific failure by prosecutors to obtain an indictment when Michael Brown (Brown), the victim, was shot by law enforcement and will discuss: (1) systematic racism in the City of Ferguson (Ferguson), and the events leading up to the Darren Wilson (Wilson) case; (2) the specificities of the grand jury proceedings in the Wilson case; and (3) finally, conclude by evaluating how the Wilson case led to no indictment, and how attempting to indict a police officer is completely different.

*I. Racism in Ferguson—Leading Up to the Darren Wilson Case*

August 9, 2014 is a day that will be marked in history. A life was lost, but the truth uncovered will be rooted in cases forever.

*A. Michael Brown and His Story*

Brown was born on May 20, 1996, in Florissant, Missouri to Lesley McSpadden and Michael Brown, Sr.<sup>25</sup> Growing up, Brown struggled in school, but he was able to get back on track and graduated with his high school class in 2014.<sup>26</sup> Although this is just a mini biography about Michael, unfortunately, the most important trait about him is his skin color. Michael was not only an eighteen-year-old young man raised in northern St. Louis County, Missouri, he was an unarmed, Black teen, shot and killed by Darren Wilson, a white police officer in Ferguson, Missouri.<sup>27</sup> “Hands up, don’t shoot,” were the last words said by Brown.<sup>28</sup>

Brown’s body laid in the August summer sun for four (4) hours; he laid there lifeless for everyone to see.<sup>29</sup> The St. Louis County

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<sup>25</sup> Daudi Abe, *Michael Brown Jr. (1996-2014)*, BLACKPAST, (July 21, 2016), <https://www.blackpast.org/african-american-history/brown-jr-michael-1996-2014/>.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *But see* Michelle Ye Hee Lee, ‘Hands up, don’t shoot’ did not happen in Ferguson, WASH. POST, (March 19, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/03/19/hands-up-dont-shoot-did-not-happen-in-ferguson/>.

<sup>29</sup> *Timeline of events in shooting of Michael Brown in Ferguson*, AP NEWS, (Aug. 8, 2019), <https://apnews.com/article/9aa32033692547699a3b61da8fd1fc62>; *see also* Julie Bosman & Joseph Goldstein, *Timeline for a Body; 4 Hours in the Middle of a Ferguson Street*, N.Y. TIMES, (Aug. 23, 2014), <https://www.ny-times.com/2014/08/24/us/michael-brown-a-bodys-timeline-4-hours-on-a-ferguson-street.html> (neighbors had to witness Brown’s body lay on the ground for four hours and explained that “[i]t was very disrespectful to the community and the people who live there. It also sent the message from law enforcement that ‘we can do this to you any day, any time, in broad daylight, and there’s nothing you can do about it.’”).

Police Department had officers on the scene almost immediately, however it took about forty (40) minutes for homicide detectives to be called, and after they had arrived, it took about another hour for an investigator from the medical examiner's office to arrive.<sup>30</sup> His body was out in the open for everyone to record. Brown's body, according to experts and other police chiefs, should have been covered immediately<sup>31</sup> after emergency medical workers arrived. Questions were being asked, but no answers were given to Brown's family members. It was a story that needed to be unraveled.<sup>32</sup>

### *B. Getting to Know Ferguson and the Racism Within It*

To understand the racial animosity by the Ferguson's government, we must first understand the roots of Ferguson. Ferguson is in St. Louis County, Missouri. As reported by the United States Census Bureau, as of 2020, Ferguson is home to approximately 21,000 people, with 69.9% of the population being Black or African American.<sup>33</sup> However, Ferguson was not always a predominantly Black community, it was quite the opposite up until the late 1960s, when Larman Williams became one of the very first African Americans to move into Ferguson.<sup>34</sup> Ferguson was a whites-only suburb, and once Larman Williams moved in, it was the initiation of the white flight.<sup>35</sup> Whites were moving out while Blacks were moving in, but the racial tension was present and has remained present since.<sup>36</sup> The Black population

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Providing an explanation of the collective community trauma following his body lying there for hours would not be justified simply by addressing it in this paper.

<sup>30</sup> Bosman & Goldstein, *supra* note 29.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Ferguson City, Missouri*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/profile?g=1600000US2923986> (last visited Nov. 22, 2020).

<sup>34</sup> Richard Rothstein, *The Making of Ferguson*, ECON. POL'Y INST. (Oct. 15, 2014), <https://www.epi.org/publication/making-ferguson/>.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

in Ferguson was also a result of the construction of the Lambert International Airport in Kinloch in the 1980s, in which many of the residents were consequently displaced.<sup>37</sup>

In 2014, Ferguson was broadly functioning as a governmental system like in 1920, with a white majority government, whereas the population was majority Black citizens. With regard to the police department in 2014, of the fifty-four (54) sworn in officers, only four were African American.<sup>38</sup> At the time of Brown's shooting, the mayor was white, the police chief was white, and there was one of six city council members that was Black.<sup>39</sup> The racial hostility and division within Ferguson was a warning sign to the United States Department of Justice (DOJ), and after the shooting of Brown, the DOJ decided to investigate the Ferguson Police Department (FPD).<sup>40</sup>

The uprising that occurred following Brown's death was not a reaction to an isolated incident; it was a response to years of institutionalized racism, oppression and exploitation. Aside from the grand jury proceedings in the case, which will be further discussed in Part II, the DOJ Civil Rights Division's investigation will also be addressed.<sup>41</sup> Their investigation revealed key information of the FPD, including

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<sup>37</sup> Jeffrey Smith, *You Can't Understand Ferguson Without First Understanding These Three Things*, NEW REPUBLIC, (Aug. 15, 2014), <https://newrepublic.com/article/119106/ferguson-missouri-complicated-history-poverty-and-racial-tension> (providing an explanation of the history of the City of Ferguson, and how three major points, Kinloch, J.D. Shelley, and Bellerive, contributed to what we know as Ferguson today).

<sup>38</sup> U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 7 (Mar. 4, 2015), [https://www.justice.gov/sites/default/files/crt/legacy/2015/03/04/ferguson\\_findings\\_3-4-15.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2015/03/04/ferguson_findings_3-4-15.pdf) [hereinafter FPD REP.].

<sup>39</sup> Jacob Weissman, *Ferguson, Missouri: Black city, white leaders*, PITTSBURGH POST-GAZETTE (Aug. 17, 2014, 12:00 AM), <https://www.post-gazette.com/opinion/Op-Ed/2014/08/17/Ferguson-Missouri-Black-city-white-leaders/stories/201408170081>.

<sup>40</sup> See generally FPD REP., *supra* note 38.

<sup>41</sup> See *infra* Part II.



that institutional racism was integrated in its force.<sup>42</sup> Institutional racism “occurs when institutions such as governments ... discriminate against certain groups of people based on race, colour ... often unintentional[ly].”<sup>43</sup> The definition in itself states “*often* unintentional,” however, Ferguson *was intentional*. In fact, the DOJ, in their investigation, clearly wrote:

Our investigation indicates that this disproportionate burden on African Americans cannot be explained by any difference in the rate at which people of different races violate the law. Rather, our investigation has revealed that these disparities occur, at least in part, because of unlawful bias against and stereotypes about African Americans. We have found substantial evidence of racial bias among police and court staff in Ferguson.<sup>44</sup>

The treatment of the Black and African-American community in Ferguson was far from any progressive movement to a more unified country. The FPD took no part in hiding their actions and instead spread the blatant racist actions on to others outside of the FPD. The FPD took white supremacy<sup>45</sup> to another level. They used it as their power source, and as *The Atlantic* accurately wrote:

[W]hite supremacy—as evidenced in Ferguson—is not ultimately interested in how responsible you are, nor how respectable you look. White supremacy is neither

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<sup>42</sup> FPD REP., *supra* note 38.

<sup>43</sup> *Glossary*, RACISMNOWAY <https://racismnoway.com.au/about-racism/understanding-racism/glossary/> (last visited Nov. 20, 2020) (defining institutional racism, also known as systematic racism).

<sup>44</sup> FPD REP, *supra* note 38, at 5.

<sup>45</sup> Ta-Nehisi Coates, *The Gangsters of Ferguson*, ATLANTIC (Mar. 5, 2015), <https://www.theatlantic.com/politics/archive/2015/03/The-Gangsters-Of-Ferguson/386893/>.

a misunderstanding nor a failure of manners. White supremacy is the machinery of Galactus which allows for the potential devouring of everything you own. White supremacy is the technology, patented in this enlightened era, to ensure that what is yours inevitably becomes mine.<sup>46</sup>

The white flight from the city did not occur with regard to the government, but rather it was the initiation of allowing a growth of white supremacy in the government. In the DOJ's investigation, it was revealed that Blacks were disproportionately targeted, and the FPD had engaged in violations of the First, Fourth, and Fourteenth Amendments.<sup>47</sup>

The constitutional violations surrounded the FPD's practices and patterns of the use of unreasonable force, interfering with the freedom of expression, arrests without probable cause, and stopping individuals without reasonable suspicion.<sup>48</sup> The range of violations may have varied, but the common ground for them all is that Blacks were the targets of a majority these violations. The abuse of power from the members of the FPD was also targeted specifically at Blacks.<sup>49</sup>

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<sup>46</sup> *Id.*

<sup>47</sup> Press Release, U.S. Dep't of Justice, *Justice Department Announces Findings of Two Civil Rights Investigations in Ferguson, Missouri*, (Mar. 4, 2015) (on file at <https://www.justice.gov/opa/pr/justice-department-announces-findings-two-civil-rights-investigations-ferguson-missouri>) [hereinafter DOJ Findings]; see generally FPD REP, *supra* note 38.

<sup>48</sup> FPD REP, *supra* note 38 (explaining that the investigation uncovered excessive force used by police officers resulting from stops or arrests which had no basis of law).

<sup>49</sup> *Id.* at 17-18 (illustrating the example of an African-American male bus patron waiting at the bus stop being abruptly approached and interrogated by a police officer, and being asked to hand over his ID for no reason, and once the officer ran the patron's ID and found no warrants under his name, the officer told the patron to "get the hell out of my face.").

The racial bias was uncovered in the DOJ report with the following numbers reported: “Ferguson’s law enforcement practices overwhelmingly impact African Americans. Data collected by the Ferguson Police Department from 2012 to 2014 shows that African Americans account for 85% of vehicle stops, 90% of citations, and 93% of arrests made by FPD officers, despite comprising only 67% of Ferguson’s population.”<sup>50</sup>

The more money that was generated by the FPD, meant the more money that was taken from the citizens as a result of fines and fees throughout the year.

*C. Where does the money to build up a city come from?*

The Ferguson Municipal Court is operated as part of the FPD and thus is supervised by the Ferguson Chief of Police. The court and the police department are basically a system within a system, and that means the control is in house. Accordingly, the DOJ’s report found that court officials have worked with the city officials, and police officials in order to maximize their revenue. However, that revenue was not produced using constitutional strategies. The DOJ uncovered that the revenue was produced by excessive fining, and the fining all starts with the citizens of Ferguson. Ferguson focused on generating revenue by enforcing the Ferguson municipal code provisions. The City’s budget was achieved year after year, with addition to increasing year after year.<sup>51</sup>

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<sup>50</sup> *Id.* at 4.

<sup>51</sup> *Id.* at 9-10 (explaining that “the \$11.07 million in general fund revenue the City collected in fiscal year 2010, \$1.38 million came from fines and fees collected by the court; similarly, in fiscal year 2011, the City’s general fund revenue of \$11.44 million included \$1.41 million from fines and fees. In its budget for fiscal year 2012, however, the City predicted that revenue from municipal fines and fees would increase over 30% from the previous year’s amount to \$1.92 million; the court exceeded that target, collecting \$2.11 million. In its budget for fiscal year 2013, the City budgeted for fines and fees to yield \$2.11 million; the court exceeded that target as well, collecting \$2.46 million.”).

The average of the revenue generated from fines and fees collected between 2010 and 2013, was approximately \$1.84 million.<sup>52</sup> In 2012 and 2013 the budgeted numbers for fines and fees were exceeded, and although at the time of the release of the DOJ report the actual revenue collected had not been released for 2014, the budget for the court was to generate \$2.63 million.<sup>53</sup>

The money was not being conjured as a result of felonies or even misdemeanors, they were code violations.<sup>54</sup> Code violations included high grass and weeds, animal control ordinances, violations of requirements for permits to rent an apartment, among several other violations.<sup>55</sup> In addition to maximizing the amount of violations that the city officials could fine for, Ferguson's fines were excessive in nature in comparison to other municipalities.<sup>56</sup> Without the citations, the city does not make its revenue, and without the funding the officials do not get paid. Except once again the revenue disproportionately affected the Black community, because they are the majority in the community. More violations committed by the citizens means that more fines will be charged, and more fines charged means that there will be more court appearances, and unfortunately when they fail to appear more violations are pinned onto that individual.<sup>57</sup> Rather, the money was worth more at the end of the day than the citizens.

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<sup>52</sup> *Id.* at 9 (providing that the general fund revenue the City of Ferguson collected that originated from fines and fees were as follows: in 2010, \$1.38 million; 2011, \$1.41 million; 2012, \$2.11 million; and 2013, \$2.11 million).

<sup>53</sup> *Id.*

<sup>54</sup> FPD REP, *supra* note 38, at 7.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 10 (providing an example of how the city, police, and court officials would generate revenue, with parking fines between other municipalities ranging from \$5-\$100, Ferguson's same fine is \$102; a similar variance is seen for the city's fine charge for weeds/tall grass, with one city being as low as \$5 whereas in Ferguson it ranged from \$77-102).

<sup>57</sup> *Id.* at 15 (revealing that a council member stated that the judge at the time "does not listen to the testimony, does not review the reports or the criminal history of defendants, and doesn't let all the pertinent witnesses testify before rendering a verdict.").

*D. The City's Revenue and its Effects*

We can say that race does not play a role in court proceedings, and we can say that it did not play a role in the Wilson case, but we know that would be a blatant, harmful, lie. First, there are two issues with trying to ignore race: one, the four hundred (400) years of oppression of Blacks would be washed away, and two, the role that race plays in society is being ultimately ignored. Even if someone does not see themselves as racist, or they are not blatantly racist with their words, their actions may prove otherwise. Ferguson has been built off of racial capitalism. The facts from the DOJ report amplify that white individuals, Ferguson's city officials, predominantly white institutions, and Ferguson's government, have derived their economic value from its association with the nonwhite racial identities, the Black citizens of Ferguson.<sup>58</sup>

Although there are arguments that there is no racial capital foundation in Ferguson, the reason it may seem that way is because the population is majority Black, however, statistics have shown that Blacks account for more than the majority when it comes to vehicle stops, citations, and arrests.<sup>59</sup> Ferguson was capitalizing off of African Americans on more occasions than whites.<sup>60</sup> Black lives throughout history have been undervalued.<sup>61</sup> however, Ferguson took that undervalued historical context and capitalized off of it. When one race is classified, all races are classified, thus, when considering black lives as second-class citizens, white lives are given a privilege, and that

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<sup>58</sup> See generally Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013).

<sup>59</sup> FPD REP., *supra* note 38, at 4 (explaining that African-Americans are more than twice as likely to be searched during a traffic stop than white drivers, while they are less likely to have contraband found on them than white drivers).

<sup>60</sup> *Id.* (reiterating the methods in which the FPD was capitalizing off the Black community, with the FPD issuing at least four citations during a single incident to African Americans a total of 73 times between 2012 to 2014, whereas, with whites it only occurred twice).

<sup>61</sup> Leong, *supra* note 58, at 2158 (amplifying that Black people were conceptualized as property).

privilege was reflected by the DOJ's report as well. History continuously repeats itself, and that includes undermining the black race, and the superiority of the police force.

## II. *Grand Jury Proceedings in the Darren Wilson Case*

### A. *Robert McCulloch*

Before understanding the proceedings as a whole, we need to understand who the prosecutor was in this case. At the time of the shooting, the St. Louis County prosecutor was Robert McCulloch (McCulloch). McCulloch had a history of being pro-police,<sup>62</sup> which is not shocking as a prosecutor depends on the police to conduct their investigations. However, McCulloch had more of a tie to the police force than the average prosecutor. His father was a police officer,<sup>63</sup> and his mother, brother, cousin, and uncle also worked for the St. Louis Police Department.<sup>64</sup> Nevertheless, that is not what really hits the target with the nail for McCulloch's role with the police department, it is his decision not to prosecute police involved shootings.

In Missouri, a prosecutor is permitted to bring murder charges without the use of the grand jury,<sup>65</sup> however, McCulloch chose the alternate route. Due to his connection with law enforcement, he also chose the alternate route of asserting that he could be unbiased, and

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<sup>62</sup> Pema Levy, *Ferguson Prosecutor Robert P. McCulloch's Long History of Siding with the Police*, NEWSWEEK (Aug. 29, 2014), <https://www.newsweek.com/ferguson-prosecutor-robert-p-mccullochs-long-history-siding-police-267357>.

<sup>63</sup> *Prosecutor in Michael Brown Case Has Deep Family Ties to Police*, NBC NEWS (Aug. 20, 2014), <https://www.nbcnews.com/storyline/michael-brown-shooting/prosecutor-michael-brown-case-has-deep-family-ties-police-n183911> (explaining that McCulloch's father was killed in the line of duty when he was 12 years old by a Black suspect).

<sup>64</sup> *Id.*

<sup>65</sup> Ben Casselman, *It's Incredibly Rare for a Grand Jury to Do What Ferguson's Just Did*, FIVETHIRTYEIGHT (Nov. 24, 2014), <https://fivethirtyeight.com/features/ferguson-michael-brown-indictment-darren-wilson/>.

despite the request from different outlets for a special prosecutor to take his place, he asserted that “he could weigh the evidence fairly.”<sup>66</sup>

McCulloch had been a prosecuting attorney for St. Louis County, Missouri for twenty-three (23) years as of the time Brown was killed. He then became the chief prosecuting attorney for the Wilson case.<sup>67</sup> At the beginning of his career, McCulloch had a case, known as the Jack in the Box case, similar to Wilson’s in that it was an unarmed Black victim involving law enforcement shooters. In June of 2000 there was a drug sting conducted by the Federal Drug Enforcement Agency and local law enforcement in Missouri.<sup>68</sup> The drug sting turned fatal when two officers fired twenty-one (21) shots through a small-time drug dealer’s windshield, who was the target of the sting.<sup>69</sup> The shots killed the target, Earl Murray, and the passenger of the vehicle, Ronald Beasley, who had not been involved in the investigation.<sup>70</sup>

This case, like Wilson’s, was sent to a grand jury, and also returned no indictment.<sup>71</sup> However, the crucial resemblances about both grand jury proceedings were how McCulloch conducted them. In the Jack in the Box case, McCulloch allowed both officers involved in the shooting to testify. The police officers said that they saw the suspect’s car move toward them, and McCulloch stated that the police’s witnesses unanimously agreed with the shooter’s story.<sup>72</sup> The plot twist was that there was evidence later disproving the testimony, and there

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<sup>66</sup> ROGER A. FAIRFAX JR., *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT* 215 (Angela Davis et al. eds., 1st ed. 2017).

<sup>67</sup> *Prosecutor in Michael Brown Case Has Deep Family Ties to Police*, *supra* note 63.

<sup>68</sup> Alan Pyke, *If You Want to Understand the Ferguson Prosecution, You Should Know About the Jack in the Box Case*, THINKPROGRESS (Jan. 10, 2015), <https://archive.thinkprogress.org/if-you-want-to-understand-the-ferguson-prosecution-you-should-know-about-the-jack-in-the-box-case-17fb3ed987f2/>.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

was no unanimity between the stories.<sup>73</sup> In addition to providing faulty details to the public about the witnesses for the police,<sup>74</sup> McCulloch continuously damaged the character of the victims, presenting them as criminals, rather than human beings that were just killed. Furthermore, McCulloch failed to provide evidence in support of the victims and against the officers that were the subjects of the grand jury investigation.<sup>75</sup> Finally, McCulloch stopped a witness's testimony midway to ensure that the rest of it was not revealed.<sup>76</sup> The Jack in the Box case should have been a warning signal to the officials in St. Louis, however, the warning signals were ignored, and history had its chance to repeat itself in 2014.

The following section will break down the first grand jury proceeding in the Wilson case while comparing it to the Jack in the Box case in which the prosecution failed to indict the law enforcement officials involved in the shooting of an unarmed black man. We could argue that McCulloch was not a career prosecutor at the time of the Jack in the Box case, however, twenty-three (23) years later, he is more than capable of securing an indictment in a case where there is clear "probable cause." An easy-to-meet standard because it has such a low threshold in comparison to the standard at a criminal trial of "beyond a reasonable doubt."<sup>77</sup>

### *B. First Grand Jury*

The prosecutor's role in the grand jury is to present enough evidence to the jurors in order to establish probable cause.<sup>78</sup> In the

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<sup>73</sup> *Id.* (explaining that three out of thirteen officers testified that the suspects moved toward the shooters, and two of the three were actually the officers themselves, but it was later revealed that the third person was falsely testifying).

<sup>74</sup> Pyke, *supra* note 68.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> See *supra* text accompanying note 3.

<sup>78</sup> See Kelly, *supra* note 7.



Wilson case, however, what McCulloch did was allow enough evidence to be entered into the proceedings for a trial's verdict determination instead.<sup>79</sup> Ferguson is so highly segregated with regard to race that it makes you question how race did not play a role in the grand jury proceedings. This was an advantage that the prosecution failed to use when presenting its case.

The first grand jury proceeding in 2014 for the Wilson case was extensive in comparison to other grand jury proceedings. The grand jury started to hear evidence in order to determine whether Wilson would be charged with first-degree murder, second-degree murder, voluntary manslaughter, or involuntary manslaughter.<sup>80</sup> Although the grand jury returned with a no true bill, the facts of this case must be looked into.

The evidence presented at the grand jury proceedings was extensive, which leads to believe that McCulloch already knew that he would not get an indictment, and likely just wanted to leave it all on the table so that he could say he "gave it his all." He would want people to say that he fought tooth and nail as a prosecutor should, to receive an indictment, however, what is not posted on every billboard in Missouri, but perhaps should be, is the fact that McCulloch had been a prosecutor for twenty-three (23) years at the time of the Wilson case.<sup>81</sup> Up to that point he had taken four cases, excluding Wilson's, to the grand jury that were officer involved shootings, and returned no indictments.<sup>82</sup>

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<sup>79</sup> Jeffrey Toobin, *How Not to Use A Grand Jury*, NEW YORKER (Nov. 25, 2014), <https://www.newyorker.com/news/news-desk/use-grand-jury> (explaining that if McCulloch's lawyers had only used the evidence that incriminated Wilson, an indictment would have been secured).

<sup>80</sup> Jenée Desmond-Harris & Dara Lind, *Why Darren Wilson Wasn't Charged for Killing Michael Brown*, VOX (Nov. 24, 2014, 9:55 PM), <https://www.vox.com/2014/11/24/7175967/darren-wilson-charges-michael-brown-ferguson>.

<sup>81</sup> *See Prosecutor in Michael Brown Case Has Deep Family Ties to Police*, *supra* note 63.

<sup>82</sup> Dana Milbank, *Bob McCulloch's Pathetic Prosecution of Darren Wilson*, WASH. POST (Nov. 25, 2014), <https://www.washingtonpost.com/opinions/dana-milbank->

McCulloch at the onset of the case instructed jurors that this was going to be their “first, last and probably the only time [he] think[s] that [they] will see [him] in relation to this case. Certainly, in the grand jury.”<sup>83</sup> That can be seen as McCulloch’s first perspective of how successful this case was really going to be. Although McCulloch did not directly participate in the grand jury proceedings, Kathi Alizadeh (Alizadeh), and Sheila Whirley (Whirley), were to be the primary attorneys in the grand jury for this case, but he was still the head prosecuting attorney.<sup>84</sup> While McCulloch was not directly questioning witnesses or presenting evidence, the same tactics he used in the Jack in the Box case were used and he once again successfully failed to indict a police officer.<sup>85</sup>

Here, the grand jury proceedings were about seventy (70) hours long, with over sixty (60) witnesses, including three (3) medical examiners, within the span of three (3) months while convening for twenty-five (25) days. The grand jury proceeding in Wilson’s case was significantly different than a typical grand jury proceeding which would usually include one or two witnesses.<sup>86</sup> However, the most provocative fact was that Wilson testified. Rarely do you see a defendant testify, much less do so for four (4) hours.<sup>87</sup>

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bob-mccullochs-pathetic-prosecution-of-darren-wilson/2014/11/25/a8459e16-74d5-11e4-a755-e32227229e7b\_story.html.

<sup>83</sup> Transcript of Grand Jury, Volume I at 6, *State of Missouri v. Darren Wilson* (2014) [hereinafter Transcript of Grand Jury, Volume I].

<sup>84</sup> *Id.*; see NATIONAL RESEARCH COUNCIL, WHAT’S CHANGING IN PROSECUTION? REPORT OF A WORKSHOP 7 (Philip Heymann & Carol Petrie eds., 2001) (explaining that a chief prosecutor has complete authority and control over the policies and practices with regard to prosecutions in their jurisdictions).

<sup>85</sup> See *supra* notes 74-76 and accompanying text.

<sup>86</sup> Jeffrey Fagan & Bernard E. Harcourt, *Professors Fagan and Harcourt Provide Facts On Grand Jury Practice In Light of Ferguson Decision*, COLUM. (Dec. 5, 2014, 12:00 PM), <https://www.law.columbia.edu/news/archive/professors-fagan-and-harcourt-provide-facts-grand-jury-practice-light-ferguson-decision>.

<sup>87</sup> *Id.*

Both cases provided the jurors with an abundant amount of evidence. Now, generally speaking at a trial, the more evidence the better. Nevertheless, when the grand jurors' role is to make one determination and that is of probable cause, providing so much in so little time can be overwhelming, and significantly inefficient.

The proceedings in the Wilson case were unusual in a way that was rarely and most likely never seen in a grand jury proceeding. At grand jury proceedings, the defense never presents their case for the jury to take into consideration.<sup>88</sup> A defense is presented at the trial in order for the petit jury<sup>89</sup> to decide a verdict. The prosecution rarely brings in a potential defendant when presenting their case to the grand jurors—and it seems like common sense as to why—but to put it plainly and specifically to the Wilson case, Wilson was brought in, but Brown was not. You cannot bring in a dead person, but you can have one that is alive to convince you of anything when there is no one to rebut it.

During Wilson's testimony, on several instances, Alizadeh and Whirley asked if Wilson felt like his life was in danger.<sup>90</sup> By asking this question, this was opening the door for Wilson to provide his defense. The prosecution team handed over their case and any attempt of proving that they had a case with substance when they allowed Wilson to take control of it.<sup>91</sup> When Wilson was asked about his initial encounter with Brown and Dorian Johnson (Johnson),<sup>92</sup> he asked the

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

<sup>89</sup> *What Is The Difference Between A Petit Jury And A Grand Jury?*, ALMD, <https://www.almd.uscourts.gov/faq/what-difference-between-petit-jury-and-grand-jury> (last visited Dec. 2, 2020) (defining petit jury as one that “listens to evidence presented by both parties during a trial and returns a verdict.”).

<sup>90</sup> *See generally* Transcript of Grand Jury, Volume V at 207, *State of Missouri v. Darren Wilson* (2014) [hereinafter Transcript of Grand Jury, Volume V].

<sup>91</sup> *Id.*

<sup>92</sup> *See generally id.* (detailing that when Brown was stopped he was with his friend Johnson at the time); *see also* Wesley Lowery, *Dorian Johnson, witness to the Ferguson shooting, sticks by his story*, WASH. POST (Aug. 9, 2019, 4:54 PM), <https://www.washingtonpost.com/national/dorian-johnson-witness-to-the-ferguson-shooting-sticks-by-his-story/2019/08/08/79ff3760-b77e-11e9-a091-6a96e67d9>

prosecutors if he should just go full in with the entire story—at that point the prosecution should have said no and asked specific questions. Not being able to determine what was going to come out of Wilson’s mouth would have been a risk for any prosecutor that was working to get an indictment. Still, it was questionable as to where his testimony would direct this case.

“The biggest thing that jumps out is prosecutors who aren’t prosecuting,” Bloom said, “prosecutors who let the target of the investigation come in, in a very friendly, relaxed way, and simply tell the story. There is absolutely zero cross-examination. Cross-examination is the hallmark of our system, it’s the crucible of truth. And I don’t say that to use flowery language. That’s how we get at the truth.”<sup>93</sup>

Cross-examination has a history of playing the role of being the credibility officer. I say credibility officer because the attorney on cross-examination may want to question the “witness’s ability to identify or recollect or try to impeach the witness or the evidence.”<sup>94</sup> The purpose is to diminish the witness’s credibility, which may include showing the witness’s bias or prejudice.<sup>95</sup> Being able to potentially impeach a witness allows for a possible lie to be exposed while on the stand, however, the prosecutors failed to do so in this case. They allowed for

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cce\_story.html (summarizing Johnson’s encounter with Brown and Wilson, and how he was a witness in the grand jury).

<sup>93</sup> Paul Rosenberg, *Everything the Darren Wilson grand jury got wrong: The lies, errors and mistruths that let Michael Brown’s killer off the hook*, SALON (Nov. 27, 2014, 1:45 AM), [https://www.salon.com/2014/11/26/everything\\_the\\_darren\\_wilson\\_grand\\_jury\\_got\\_wrong\\_the\\_lies\\_and\\_mistruths\\_that\\_let\\_michael\\_browns\\_killer\\_off\\_the\\_hook/](https://www.salon.com/2014/11/26/everything_the_darren_wilson_grand_jury_got_wrong_the_lies_and_mistruths_that_let_michael_browns_killer_off_the_hook/) (quoting Lisa Bloom, NBC Analyst).

<sup>94</sup> *How Courts Work*, ABA (Sept. 9, 2019), [https://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/crossexam/](https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/crossexam/).

<sup>95</sup> *Id.*

Wilson to run the show and rather than attempting to reduce his credibility, they permitted him to explain his bias. If a cross-examination was attempted, it would have allowed for jurors to identify his possible biases, however that was not done in this case.

Indicting police officers is a different ballpark because of the sense of trust that citizens have in the justice system, and in the support police officers provide for this country. With the secrecy of the grand jury, we never fully know what is going on between the jurors and the prosecution. Nevertheless, we did see what went on in the Wilson case and we know that the prosecution was the center of where it fell apart. There was a failure to cross-examine Wilson, and with complete control of the questions to ask, the prosecution failed to take that opportunity.<sup>96</sup>

In addition to the lack of cross-examination of Wilson, the prosecution failed to provide a clear explanation of the law. Alizadeh not only provided outdated law at the beginning of the proceedings,<sup>97</sup> and there was only an attempt to correct the law weeks later—after Wilson had testified.<sup>98</sup> Yet, with the attempt to correct the law, she

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<sup>96</sup> See generally Transcript of Grand Jury, *supra* note 83, at 195-281.

<sup>97</sup> See *id.* at 134-36 (Alizadeh informed the grand jurors that the Missouri statute initially presented at the beginning of trial was no longer to be followed, because of the United States Supreme Court's ruling in *Tennessee v. Garner*, 471 U.S. 1 (1989), where the Court held that "the use of deadly force to prevent the escape of an apparently unarmed suspected felon" is unconstitutional "unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer"); see also *id.* (Alizadeh and Whirley failing to inform jurors that Garner was also about an unarmed African American boy who was shot and killed by a white police officer after fleeing from a burglary).

<sup>98</sup> See Cassandra Fairbanks, "Shocking Mistake" Exposed in Darren Wilson Grand Jury, THE FREE THOUGHT PROJECT (Nov. 28, 2014), <https://thefreethoughtproject.com/shocking-mistake-prosecutorial-misconduct-mike-brown-case/> (stating that Assistant Prosecuting Attorney Kathy Alizadeh provided jurors on September 16, 2014 with a copy of Missouri's statute that is used to determine use of force, to later come back three weeks later on November 21, 2014 and explain that the law previously given is not up to date with current case law); see also Transcript of Grand Jury, Volume XXIV at 134-46, *State of Missouri v. Darren Wilson* (2014).

failed to clarify the law when the jurors would ask questions. Alizadeh's task was to accurately provide the law to the grand jurors in order for them to come to a decision, instead, she did the opposite. She presented the law in a minimal way to downplay its importance. Alizadeh told a juror who asked about what the current law is and if the United States Supreme Court's law overrides Missouri statutes, "just don't worry about that," and when the juror asked if they should disregard the law initially given to them, she responded, "not that that matters much to you."<sup>99</sup> This was a failure on her behalf to clarify the law, and her co-prosecutor to intervene, as she has on multiple occasions, to clarify the law as well.

Following a failure to clarify the preceding law, the prosecution provided instructions on how the jurors should determine probable cause. The explanation was rather confusing, and not as clear as it could have been presented. When one of the jurors asked for an explanation of probable cause and the defense, Alizadeh stated,

You must find probable cause to believe that he committed the offense, which means that he met all the elements of that offense. You remember that from your grand jury days. And you must find probable cause to believe that Darren Wilson did not act in lawful self-defense ... and [] you [must] find probable cause to believe that [Darren Wilson] did not use lawful force in making an arrest .... And only if you find those things, which is kind of like finding a negative, you cannot return an indictment on anything or true bill unless you find both of those things. Because both are complete defenses to any offense and they both have been raised in his, in the evidence.<sup>100</sup>

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<sup>99</sup> See Transcript of Grand Jury, *supra* note 83, at 136.

<sup>100</sup> *Id.* at 139-40.

If the grand jurors were not already overwhelmed by the amount of evidence, the explanation of what they should find or should not find when coming to their decision most likely did the job. But that is not where both prosecutors stopped the hearing, both continued on to explain that witness statements must be challenged as far as their jobs are concerned and that is what they were doing throughout presenting the information.<sup>101</sup> Additionally, it seemed to be that they were trying to suggest to the jurors that they provided an unbiased presentation of evidence as a whole, however, as the analysis of the presentation of evidence explained above, there was an explicit bias throughout the hearing. That bias was likely a contribution to the decision of the jurors not to indict Wilson and rendering a no true bill.

### *C. Second Grand Jury*

Following the failure of indicting Wilson in 2014, in a time of distress in Ferguson, history was made four years after Brown's shooting: Wesley Bell (Bell), was elected as St. Louis County's first Black prosecutor.<sup>102</sup> The sight of a change in leadership was hope to the people of Ferguson; within forty-eight (48) hours of being in office, Bell decided to terminate Alizadeh, who was responsible for presenting evidence at the grand jury proceedings, but not for long.

As part of his campaign pledges, Bell vowed "to appoint special prosecutors in police-shooting cases. ..."<sup>103</sup> An act that should have been taken by McCulloch, or the governor of Missouri. Yet, when Bell took office and after spending five (5) months investigating the evidence in the case, he concluded that he would not indict. Bell

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<sup>101</sup> *See id.*

<sup>102</sup> Alice Speri, *Five Years after Ferguson, St. Louis County's New Prosecutor Confronts a Racist Criminal Justice System*, INTERCEPT (Jan. 24, 2019, 1:58 PM), <https://theintercept.com/2019/01/24/wesley-bell-st-louis-prosecutor-ferguson/>.

<sup>103</sup> Eric Levitz, *Progressive Reformer Ousts St. Louis Prosecutor Who Didn't Charge Cop in Michael Brown Case*, INTELLIGENCER (Aug. 8, 2018), <https://nymag.com/intelligencer/2018/08/st-louis-election-prosecutor-wesley-bell-beats-bob-mcculloch-michael-brown-ferguson.html>.

stated that the decision not to indict Wilson did not exonerate him of killing Brown.<sup>104</sup> However, the decision of not indicting Wilson came from two aspects, the first being to take it to a grand jury and letting the grand jury decide, or second, formally charging Wilson without an indictment.<sup>105</sup> However, Bell decided to take the second alternative and not take the case to the grand jury at all. He said, “the question of whether we can prove a case at trial is different than clearing him of any and all wrongdoing.”<sup>106</sup>

### *III. No Indictment, the Difficulties to Indict Law Enforcement*

The lack of indicting Wilson not once but twice must be addressed as part of a local dilemma, and the failure throughout the nation to do the same in similar situations, goes to show that there is a systematic issue with indicting a member of law enforcement. The concern at the grand jury stage is the lack of accountability of law enforcement and prosecutors, because they have total control of the situation.

#### *A. Failure to Indict*

Since 2014 the percentage of Americans that trust law enforcement to treat Black and white people equally has decreased.<sup>107</sup> The faith in law enforcement at the local level has decreased as a whole,

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<sup>104</sup> See Jim Salter, *Prosecutor: No Charges for officer in Michael Brown's death*, AP NEWS (July 30, 2020), <https://apnews.com/article/darren-wilson-shootings-police-race-and-ethnicity-st-louis-38cbd0d2a9e50445bd2d875e1c48f89a>.

<sup>105</sup> See *id.*

<sup>106</sup> Wesley Bell announces he reopened Michael Brown case, but will not file charges, KMOV4 (July 31, 2020), [https://www.kmov.com/news/wesley-bell-announces-he-reopened-michael-brown-case-but-will-not-file-charges/article\\_4cd15f40-d2ab-11ea-b206-7b9148e28007.html](https://www.kmov.com/news/wesley-bell-announces-he-reopened-michael-brown-case-but-will-not-file-charges/article_4cd15f40-d2ab-11ea-b206-7b9148e28007.html).

<sup>107</sup> Laura Santhanam, *Two-Thirds of Black Americans Don't Trust the Police to Treat Them Equally. Most White Americans Do.*, PBS (June 5, 2020, 12:00 PM), <https://www.pbs.org/newshour/politics/two-thirds-of-black-americans-dont-trust-the-police-to-treat-them-equally-most-white-americans-do>.



and when the data regarding confidence in policing is broken down by race, it is revealed that only six (6) percent of African Americans have a great deal of faith in the local police's ability to treat Blacks and whites equally.<sup>108</sup> With the increase in distrust and the minimal chance that a police officer would be indicted causes a distrust in the system as a whole, and that includes the role of prosecutors.

Prosecutors are voted in by the people, and they can also be voted out, which is a concern for the prosecutor when it comes to deciding which cases to take to the grand jury. It also means the prosecutor must determine what evidence and how much of it to present to the grand jurors. As we saw in the Wilson case, McCulloch and his team opted to present all the evidence they had at their disposal and chose to question the reliability of the evidence that would be in their favor, rather than the evidence that was not in their favor. The proceedings in the Wilson case contradicted everything we know about what a grand jury proceeding should aim for. There was a failure to indict Wilson for the shooting and killing of Brown, and it was because of the mishandling of the grand jury proceedings by the prosecutors.

As discussed previously, grand jury proceedings are a secret process, and the public never finds out what is discussed in the proceedings;<sup>109</sup> all that is known is the results of whether there was, or not, an indictment.<sup>110</sup> Gaining more insight into the process of the grand jury would allow for a fix in the system. The public must be able to know what happens during the proceedings to have an insight into what questions are asked, what kind evidence is shown, and who is made to testify, which would allow them to determine whether the prosecutors are intentionally failing.

There were certain points in the Wilson cases' grand jury proceedings that were red flags, specifically in the method that was taken by the prosecution, and the failure to mention race. The fact that race

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<sup>108</sup> *See id.*

<sup>109</sup> *See supra* Introduction.

<sup>110</sup> FED. R. CRIM. P. 6. (explaining the grand jury requirements under the federal rules of criminal procedure, and providing the instances in which a grand jury proceeding may be disclosed by the court).

was not mentioned in the proceedings is a major concern, especially with the information revealed in the Department of Justice's investigation.<sup>111</sup> Many cases in history fail to portray race as a factor but race often is a major player when considering what really got those cases to the final point. For instance, in *Terry v. Ohio*, the U.S. Supreme Court essentially allowed for police officers to legally racially profile.<sup>112</sup> Although race was not mentioned at all in the Court's opinion in *Ohio*, the effects were as such. The same results can be seen regarding Ferguson.

After the DOJ report was released, it became a warning signal to not just people outside of Ferguson, but to people across the world. Racial profiling and racial biases played a systematic role, and the people of Ferguson were not in control; rather, the city's officials—which included the police officers, courts, and prosecutors—were. The disproportionate racial impact on the Black community, combined with the DOJ's explicit finding that the focus of the city was on generating revenue affecting the FPD's police and court practices, should have been a signal to reconvene either another grand jury or take a further look into the specific grand jury for the Wilson case.<sup>113</sup> The DOJ's investigation should have been an eye-opener and changed the practices of how the proceedings are conducted.

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<sup>111</sup> See FPD REP., *supra* note 38.

<sup>112</sup> *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (holding “that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him,” and this holding is a subjective perspective of the officer in the situation because an action by a white person may not be unusual to conclude that criminal activity may be afoot, while the same action done by a Black person would be considered the opposite).

<sup>113</sup> See *supra* note 51 and accompanying text.

*B. Where to Go with the Grand Jury?*

The grand jury has found its end in many countries around the world, but with the United States continuing with the process, there are two options as to how to proceed with it: abolish the grand jury as a whole or amend it.<sup>114</sup> Abolishing the process may be extreme where instead we should aim to correct the system's real issue by holding prosecutors accountable for intentionally failing to secure an indictment in a case as clear as Wilson's. Hence, I am proposing an amendment to the policies of the grand jury.

The primary change that would be the most effective would be to not take certain cases—specifically cases involving law enforcement—to the grand jury, but instead take them to trial automatically. The concept of the grand jury was derived from England centuries ago, and over eighty (80) years ago England decided to abolish the concept.<sup>115</sup> It may be time for the United States to follow in those steps, at least in regard to attempting an indictment of a police officer involved in the shooting of any civilian.

The obstacles behind why it is rare for any member of law enforcement to be indicted and why it is a higher burden to overcome is because of the role that a police officer plays in society. “The accountability and transparency limitations of a grand jury are too high a hurdle to overcome.”<sup>116</sup> Although a minority of people do not trust the police, the majority do.<sup>117</sup> Police officers are the ones you call in times

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<sup>114</sup> See *grand jury*, BRITANNICA, <https://www.britannica.com/topic/grand-jury> (last visited Nov. 4, 2021).

<sup>115</sup> William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174 (1973).

<sup>116</sup> Alanna Durkin Richer, *AP Explains: Powerful grand juries stay shrouded in secrecy*, AP NEWS (Sept. 24, 2020), <https://apnews.com/article/breonna-taylor-shootings-police-juries-courts-ae8527aa406ea4c7dd35fac4f7203f66> (quoting Hennepin County Attorney Mike Freeman from 2016).

<sup>117</sup> Santhanam, *supra* note 107 (explaining that about 18 percent of Americans take the view that police officers treat people with different skin colors differently; also explaining that in 2014 at the time of Michael Brown's death there was high sense of confidence in the police force from 41 percent of Americans).

of an emergency, which in turn creates the very reason they are placed at the top of a pedestal. When analyzing everything an officer has done in any given case, we either lose trust in the system, or we lose our trust in the person we trained to protect the lives of the citizens of the community—which includes the life that was killed.

### *C. Ineffective Litigation*

Although the proposal is to abolish certain cases from coming to the grand jury, the primary reason is because of what happens in those proceedings. The biases that lurk from the prosecutors and the jurors are the concern, and those biases have led to ineffective litigation. McCulloch's history with law enforcement, and decision to remain on the case was injustice at its core, not only for the Brown family but for the people of Ferguson and St. Louis County.<sup>118</sup> McCulloch not only had pro-law enforcement opinions, but the Wilson case was also almost an exact replica of the Jack in the Box case.<sup>119</sup> When McCulloch was asked to step down for the case and allow a special prosecutor to take on the case, he refused and stated he could be objective—yet, from his history, we know that to be untrue.<sup>120</sup>

As Wilson testified, the procedure a police officer follows after they are implicated in an incident involving significant use of force, the police officer gets into contact with a Fraternal Order of Police's (FOP) representative, immediately after the incident and the police officer is advised on what steps to take.<sup>121</sup> Although there is an attorney-client privilege, if the prosecution was going to call on every person that lived in Ferguson at the time to testify in the grand jury, they should have also called the FOP attorney to testify—to provide limited

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<sup>118</sup> See *Prosecutor in Michael Brown Case Has Deep Family Ties to Police*, *supra* note 63.

<sup>119</sup> See Pyke, *supra* note 68.

<sup>120</sup> See FAIRFAX, *supra* note 66 and accompanying text.

<sup>121</sup> See Transcript of Grand Jury, Volume V *supra*, note 90 at 247.

testimony as to what guidance they generally provide to all police officers involved in such events.

Prosecutors have the duty to ensure that they can attain justice not only for the victim but any potential victim. That duty includes attacking a case from all directions and in this case, it meant cross-examining Wilson, and asking him questions that would have incriminated him rather than allowing him to defend himself, in order to rebut his case in every possible way. It also means never calling on Wilson to testify at the grand jury to ensure they made the most of their chances of explaining to the grand jury that an injustice had occurred. Wilson would have been able to have his case heard at trial because that is where his right lies, and not with the right to be present at the grand jury proceedings.

There is qualified immunity<sup>122</sup> that protects police officers, and then there is prosecutorial immunity<sup>123</sup> that protects prosecutors. Due to prosecutorial immunity, the intentional failure will continue until the law is overturned. The grand jury proceedings, while they continue to be a secret process, will not allow for amending the process, and as the law and the grand jury remain the same there will continue to be a violation of citizens' rights.

McCulloch stated that he has no intention of walking away from the position and that he has been doing the same job for twenty-four (24) years, in addition to saying that he has been doing "a very

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<sup>122</sup> Nathaniel Sobel, *What Is Qualified Immunity, and What Does It Have to Do With Police Reform?*, LAWFARE (June 6, 2020, 12:16 PM), <https://www.lawfare-blog.com/what-qualified-immunity-and-what-does-it-have-do-police-reform> (explaining the doctrine of qualified immunity and providing its historical context).

<sup>123</sup> See *Imbler v. Pachtman*, 424 U.S. 409 (1976) (holding in a case where the petitioner was convicted of murder petitioned for state habeas corpus against a prosecutor who knowingly presented false testimony during the trial and not providing the defense with the exculpatory evidence that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under [Section 1983 of the Civil Rights Act of 1871]").

good job.”<sup>124</sup> Thus, he has made it clear that this was an intentional failure to bring an indictment. His failure with the Jack in the Box case, his failure to step down, and his failure to assess how his team presented the evidence in this case was all intentional. There is no answer quite clear for whether an indictment may have been secured, but we will not know regarding Wilson’s case because that failure was intentional.

#### *IV. Conclusion*

How coincidental can it be that the only people that do not get indicted are the same ones who bring a case to the prosecutor to begin with? The coincidence is far beyond imaginable that it is astronomical. At the beginning of this paper the question regarding the no true bill resulting from the grand jury proceedings was a result of whether there was really not enough probable cause to render an indictment, whether the prosecutors are intentionally failing to lead to an indict, or whether these prosecutors truly are not capable of doing their jobs. The answer, as it pertains to the Wilson grand jury, is clear: it was the prosecutors intentionally failing. However, it cannot be assumed that each time there is a police shooting involving a white police officer and a black victim that the grand jury will decline to indict because of the lack of probable cause in the facts in the case. Rather, what must be analyzed is whether the facts of the case were presented to the grand jury with the efforts put in by the prosecutors. The main lesson learned from the release of the grand jury transcripts in the Wilson case is that not only is accountability on the police officers necessary, but also accountability on the prosecutors.

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<sup>124</sup> Frances Robles, *St. Louis County Prosecutor Defends Objectivity*, N.Y. TIMES (Aug. 20, 2014), <https://www.nytimes.com/2014/08/21/us/st-louis-county-prosecutor-defends-objectivity.html>.