Journal of Criminal Justice and Law (JCJL)
Where We Are We Going?

Welcome to the second issue of the Journal of Criminal Justice and Law! The inaugural issue was published in January of 2017, with Craig Hemmens as the Guest Editor. In his editorial comments, Professor Hemmens addressed the important question of “Why We Are Here?” In my opening of the second issue, I would like to take some time to highlight a second question, “Where We Are Going?”

The response to the first issue was overwhelmingly positive. In March, at the invitation of Professor Rolando del Carmen, I attended a panel at the Academy of Criminal Justice Sciences (ACJS) annual meeting. The panel provided attendees the opportunity to discuss the future of law in undergraduate and graduate programs in criminal justice. There is clear interest in reinforcement of the simple and in many ways self–evident position that law should have a central role in higher education programs in criminal justice. I hope this journal will be an important mechanism of keeping law alive, well, and firmly entrenched in programs in our field. It is well on its way. It provides legal scholars in criminal law and procedure, as well as those interested in the empirical study of law and its implications, with an outlet for their work.

In the time since the ACJS meeting, the journal has been in contact with the Law and Public Policy Section of ACJS about the potential for that section to adopt the journal as an official publication. Discussion on this potential opportunity is ongoing. The goal is to develop JCL into a premier peer–reviewed journal in the field, and one that professionals turn to for high quality scholarship in the areas of criminal law, criminal procedure, and court systems and practices. An adoption of the journal by a well–respected national organization is a crucial step in advancing the journal. I hope to have more to report on this development when we publish the first issue of 2018.

In this Issue

In this second issue of the Journal of Criminal Justice and Law we have three articles and one invited essay. Each manuscript focuses on a timely, important legal issue in criminal justice, and adds to our knowledge base in unique and creative ways.

The article “Transparency behind bars: A history of Kansas jail inspections, current practices, and possible reform,” is authored by Melanie K. Worsley and Amy Memmer, both of the Criminal Justice and Legal Studies Department of Washburn University. It examines statutes regulating the processes through which state and local jurisdictions conduct examinations of jail facilities. Their analysis of state statutes focuses on variation in states with respect to the oversight body and the mechanism of enforcement. This article concludes that the development of state statutes alone is not enough to ensure the safety and overall health of jail facilities. Rather, interested stakeholders must believe in the benefits of the statutory authority. The authors suggest that attention must be paid to the seven distinct functions identified by prior literature: regulation, audit, accreditation, investigation, legal, reporting, and inspecting/monitoring.

The article “Droning on: The state and federal legal response to the deregulation of U.S. airspace for small unmanned aircraft systems,” is authored by Lisa K. Decker of the Department of Criminology and Criminal Justice at Indiana State University. It examines the existing laws regulating the use of small unmanned aircraft systems (drones). Currently, 21 states have unmanned aircraft system legislation that regulates citizen use, and 18 states have regulatory statutes that focused on law enforcement use. The authors conclude by considering future legal developments that may come as unmanned aircrafts become more popular and common in society.

The article “Grand juries and cases of police use of force: Are prosecutors opening a closed door?,” is written by Joseph P. Conti of the Department of Criminal Justice, Anthropology, and Forensic Studies at Edinboro University. The article reviews recent cases of police use of deadly force that have resulted in citizen deaths. It specifically addresses the practice of prosecutors who utilize their discretion to present full reviews of evidence including that which is exculpatory and favorable to police to grand juries. The author examines whether utilizing full review in police cases of deadly force potentially opens the door to legal and ethical obligations to use full reviews in cases of deadly force used by citizens.

The invited essay, “County judges and cosmetologists: A preliminary inquiry into ‘Constitutional’ county courts,” is written by Larry Karson, of the Department Criminal Justice and Social Work at the University of Houston–Downtown. Professor Karson critically examines the use of these courts in Texas, which permits judges with very little statutorily–mandated training in the law to decide criminal cases. The essay concludes that the
solution is rather simple. In many locations, a county court at law has replaced the judicial responsibilities of the county judge. Professor Karson asserts that this should become the norm across the state of Texas.
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Melanie K. Worsley 1 and Amy Memmer 1

Abstract
Accountability in the corrections system is essential to protecting the well-being and safety of inmates. To provide a better understanding of the methods of ensuring the humane treatment of inmates, this article traces the history of Kansas’s jail inspection policy, beginning with passage of the state’s 1973 jail inspection statute. An examination of the legislative history of Kansas’s inspection statute and jail inspection reports, in addition to oral history interviews with corrections officials, reveals that the statute was effective in providing accountability and producing measurable improvements in jail conditions. The history of Kansas’s jail inspection statute, including its repeal in 1996, also reveals that the statute’s failure to address key issues undermined the overall effectiveness of the legislation. A survey and evaluation of other states’ jail inspection statutes provides guidance so that moving forward, states considering implementing inspection statutes will know what issues an inspection statute should address.

Keywords
jails, oversight, reform

I. Introduction
In 2008, the Criminal Justice Section of the American Bar Association issued a report and recommendation urging federal, state, tribal, and territorial governments to institute effective monitoring of correctional and detention facilities (Saltzburg, 2008, p. 2). Advocating for the adoption of comprehensive oversight plans that incorporated monitoring by independent agencies, the Criminal Justice Section outlined key components for effective monitoring, including...
the establishment of an effective and independent monitor, an adequately funded process, and an inspection process allowing the inspectors to have “broad and unhindered access” to correctional facilities (Saltzburg, 2008, pp. 2-3). Furthermore, the Section emphasized that the goal of external oversight should be to make correctional facilities “more transparent and accountable to the public” (Saltzburg, 2008, p. 5).

These recommendations for oversight reflect a broader movement to ensure correctional reform through transparency and accountability. According to Michele Deitch, a leading scholar of correctional oversight, the term oversight refers to several distinct functions, including regulation, audit, accreditation, investigation, legal, reporting, and inspection/monitoring (Deitch, 2010a, p. 1439). Deitch contends that each function is essential and “contributes to the overall goals of transparency and accountability,” and she notes that “[n]o one entity can meaningfully serve every function, if for no reason other than the fact that there are different constituencies involved with regard to each function” (Deitch, 2010a, pp. 1439, 1440). Deitch further asserts that “the best way to ensure that oversight is effective is to ensure that each of these critical functions is being served effectively, through whatever oversight mechanisms exist in a particular jurisdiction” (Deitch, 2010a, p. 1445).

There are various oversight mechanisms designed to ensure transparency and accountability, and as Deitch has noted, the focus should be on be “encouraging the development of a range of both effective internal accountability measures and robust external oversight mechanisms” (Deitch, 2010a, p. 1445). An ombudsman or independent monitor can be charged with investigating inmate complaints, issuing reports, and conducting routine monitoring activities (Denver Office of the Independent Monitor, 2016). Similarly, an inspector general’s office can be charged with investigating allegations of inmate abuse, and litigation can be used to force correctional facilities to protect inmates’ constitutional rights (Florida Department of Corrections, 2016). The American Correctional Association has created standards for correctional facilities, and the Commission of Accreditation for Corrections, the official accrediting body of the American Correctional Association, conducts voluntary audits of correctional facilities (American Correctional Association, 2016). States have also implemented regulatory oversight of correctional facilities, and the focus of this paper is on the regulatory oversight and inspection/monitoring of jails. Currently, 24 states regulate the oversight of county and city jails through jail inspection statutes (see Tables 1 and 2, which are based on a 2016 survey of jail inspection statutes).

Kansas, in an attempt at such transparency, passed a jail inspection statute in 1973 as part of sweeping statewide correctional reform. The statute was eventually repealed in 1996, and currently no legislation mandates the external oversight of county and city jails. An examination of the legislative history of Kansas’s inspection statute and jail inspection reports, in addition to oral history interviews with corrections officials and former jail inspectors, demonstrates that Kansas’s inspection statute did provide some level of accountability and was a catalyst for change. The history also demonstrates that fundamental flaws in the adoption of the jail inspection statute, including the language of the statute itself, ultimately undermined its effectiveness and led to its repeal. Proponents of the jail inspection statute failed to secure sufficient buy-in from stakeholders, which led to pushback against the overall reform effort. Additionally, the statute was not fully developed, and the function of the jail inspection program was not clearly defined. Finally,
the jail inspection statute was not part of a comprehensive, multifaceted approach to external oversight but was instead the only effort to establish oversight of the jails.

The history of Kansas’s jail inspection statute shows that a jail inspection statute can be an effective component of a comprehensive external oversight plan. The following examination of the successes and failures of the inspection statute during the 23-year period from 1973 to 1996, along with a look at other states’ current jail inspection statutes, provides guidance for those interested in creating a correctional system that is accountable and transparent.

II. Legislative History

Beginning in the 1950s, concern was growing among criminal justice professionals in Kansas regarding the conditions of the state’s jails. A 1959 survey of jail administrators confirmed these concerns, indicating that the conditions in Kansas jails were deplorable (Heim, 1983). In response to the 1959 survey results, corrections officials such as Theodore ("Ted") Heim and advocates such as Ken Kerle began pushing for reform. Ted Heim, Assistant Director of Penal Institutions in Kansas, regularly recommended in the institutions’ biannual report that Kansas implement a jail inspection program (Heim interview, February 8, 2016). Ken Kerle, a native Kansas and jail consultant who conducted at least 66 audits of jails in 20 different states, advocated for change in Kansas’s correctional institutions, including the implementation of jail inspections (Kerle interview, April 18, 2016).

During this time, legislators and jail officials became increasingly concerned about potential civil liability for jail personnel (Heim interview, February 8, 2016). Before the 1960s, courts followed the “hands off” doctrine and allowed corrections officials wide leeway in addressing correctional matters (Cripe, Pearlman, & Koskiak, 2013, p. 71). Kansas shifted from this “hands off” approach when it held in Levier v. State (1972, p. 448) that an inmate’s rights included “entitlement to adequate food, light, clothing, medical care and treatment, sanitary facilities, reasonable opportunity for physical exercise and protection against physical or psychological abuse or unnecessary indignity—in short, the basic necessities of civilized existence.” The shift of the Kansas Supreme Court made correctional facilities more vulnerable to civil lawsuits. Fueled by growing concerns about the conditions of Kansas jails, increased worries over the possibility of lawsuits, and continued efforts by criminal justice professionals pushing for reform, the Kansas legislature passed a jail inspection statute in 1973.

A. The 1973 Jail Inspection Legislation

In 1973, comprehensive legislation was introduced in Kansas that adopted a new approach to corrections that focused on rehabilitating offenders. The legislation, Senate Bill 72, specifically noted that the legislative purpose was to establish a corrections policy ensuring that convicted persons could “be returned to private life in the communities of the state with improved work habits, education, mental and physical health and attitudes necessary to become and remain useful and self-reliant citizens” (S.B. 72, 1973 Sess.). As part of this comprehensive reform, the legislation included a provision, Section 37, to ensure that correctional institutions and jails were sanitary, safe, and not a detriment to human life. Section 37 also gave the Secretary of Corrections the authority to create jail standards and to conduct periodic jail inspections (S.B. 72, 1973 Sess.).
Section 37 went through several committees in the Kansas Senate and House of Representatives with only minor revisions, but when it reached the House Committee of the Whole, substantial additions were made (S.B. 72, 1973 Sess., As Amended by the House Com. of the Whole). The version of Section 37 that left the House Committee of the Whole (version 5) outlined the procedure the Secretary of Corrections would follow if a jail failed inspection. Under version 5, the secretary was required to notify the governing body with jurisdiction over the jail that the jail had failed inspection. If the governing body failed to make the needed repairs or improvements within 60 days, the secretary was authorized to prohibit the jail from incarcerating inmates. Version 5 also established an appeals process for jails that failed inspection. If funds to cover the cost of the necessary repairs or improvements were insufficient, version 5 provided that the governing body could appeal to the district court in the county where the jail was located. If the district court agreed that there were insufficient funds, the court could then direct the Secretary of Corrections to “effect the necessary repairs and improvements within the limitations of the legislative appropriations for such purpose” (S.B. 72, 1973 Sess., As Amended by the House Com. of the Whole).

The version 5 revisions proved to be too much for the Senate, and after the House and Senate held a joint conference committee, the House agreed to abandon its proposed revisions. The Senate and House ultimately approved a more basic version of Section 37, which was notably silent about the inspection process and failed to include an enforcement mechanism. The governor later signed Senate Bill Number 72 into law. Section 37 of the bill, which became Kan. Stat. Ann. § 75-5228 (1973), stated the following:

No person shall be incarcerated in any correctional institution or jail or any part thereof that has been deemed unsanitary, unsafe or a detriment to human life by the Secretary of Corrections. The secretary is hereby authorized to promulgate standards relating to the sanitation and safety of such institutions and jails. In promulgating such standards and in inspecting such institutions and jails, the secretary shall request assistance from the state board of health and the state fire marshal.

Although the Kansas legislature did take a positive step toward oversight by passing a jail inspection statute, the final compromise between the House and Senate resulted in a flawed statute that the legislature subsequently revisited.


The first attempt to revisit the inspection statute occurred in 1976, when advocates for jail reform, such as Joseph ("Joe") Ruskowitz, then Deputy Secretary of the Kansas Department of Corrections, pushed to amend Kan. Stat. Ann. § 75-5228 so that the statute would outline the inspection process and include an enforcement mechanism. Their advocacy, however, was met with resistance from those who did not support anything more than an advisory function for the annual inspections (Ruskowitz interview I, February 8, 2016). As a result, the 1976 amendment became yet another compromise. The amended statute added language making it clear that the jail standards created by the Secretary of Corrections were “advisory standards,” and the amendment again did not provide any guidance regarding the inspection process. In 1981, the
legislature finally clarified that inspections should occur annually (Kan. Stat. Ann § 75-5228 [Supp. 1981]). The 1976 amendment did add an enforcement mechanism to the statute:

(b) Whenever the secretary shall determine that a county jail fails to meet the sanitation and safety standards applicable thereto and recommends that the use of such jail be abandoned or substantial improvements be made therein, the secretary shall meet with a committee comprised of (1) the judge of the district court of the judicial district in which the jail is located or, if the district court has more than one division, the administrative judge of such court; (2) the county attorney or district attorney of the county or district in which the jail is located; and (3) the chairman of the board of county commissioners of the county in which the jail is located. If a majority of such committee finds that the recommendations of the secretary are unreasonable, the committee shall file a statement of its findings with the clerk of the county in which the jail is located, and no further action shall be taken. If in the opinion of a majority of such committee the recommendations of the secretary are reasonable, no action shall be taken on such recommendations without a public hearing thereon. Such hearing shall be held in the courthouse in the county in which the jail is located and a notice of the time, place and purpose of such meeting published in the official county newspaper. After such hearing, the committee shall file a statement of its findings and recommendations with the clerk of the county in which the jail is located, and it shall be the duty of the board of county commissioners of such county to issue the necessary orders and cause to be made the necessary purchases or repairs in accordance with the recommendations of the committee (1976 Kan. Sess. Laws 1458).

The enforcement mechanism required that a committee comprising a judge from the county district court, the county attorney, and the chairperson of the board of county commissioners review the recommendations issued by the Secretary of Corrections regarding deficiencies identified in the jail. If a majority of the committee members found that the recommendations were unreasonable, the statute authorized the committee to ignore the recommendations. If a majority of the committee members determined that the recommendations were reasonable, the statute required the committee to hold a public hearing to discuss the matter. After the public hearing, the committee was required to file its recommendations with the county clerk, and the board of county commissioners was required to fund the necessary improvements.

There were several problems with the 1976 enforcement mechanism. First, it required the Secretary of Corrections to go through a tedious and timely process to try to get the jail to comply with the minimum standards. Second, the enforcement mechanism created a conflict of interest by having the chairperson of the board of county commissioners, the person who would ultimately have to fund the recommended repairs, serve on the committee charged with determining whether the recommendations were reasonable. Third, the 1976 amendment functionally minimized the role of the jail inspector and instead empowered a committee with no real expertise in jail conditions to be responsible for determining whether the recommendations were reasonable. Finally, the 1976 amendment did not require anyone to reinspect the jail to verify that
the necessary improvements had been carried out. Collectively, the statute’s deficiencies limited the enforcement mechanism of the amended statute.

C. Continued Progress and Setbacks

As the jail inspections process in Kansas continued to evolve, there were several occasions when points of contention arose and were debated among the stakeholders, including Department of Corrections employees, jail administrators, jail inspectors, and groups like the American Civil Liberties Union. The two main areas of repeated contention were the following: (1) whether the recommendations based on the annual jail inspections should be mandatory or advisory; and (2) whether the statute should contain a stronger enforcement mechanism that would allow the Department of Corrections to force a facility in noncompliance with the recommendations to be closed until the conditions of the jail were brought into compliance with the standards (Ruskowitz Interview 1, February 8, 2016).

Advocates for mandatory, rather than advisory, jail standards and a stronger enforcement mechanism faced an uphill battle. Much of the resistance came from sheriffs in charge of overseeing the local jails (Ruskowitz interview 1, February 8, 2016). Although many sheriffs and jail administrators were resistant to jail inspections, their reasons for opposing the inspection statute varied. Some sheriffs were opposed to any inspection statute because such a statute undermined their autonomy (Ruskowitz interview 1, February 8, 2016). Other sheriffs and administrators were aware of their facilities’ deficiencies, and some had even sought additional funding only to have their requests denied. Nonetheless, these sheriffs and administrators feared that having a facility’s deficiencies made public would make them vulnerable to future litigation (Ruskowitz interview 1, February 8, 2016).

Some sheriffs and jail administrators recognized the benefits of an inspection by a qualified jail inspector. These sheriffs and administrators understood that jail inspectors did not simply inspect the jails, write up a list of violations, make advisory recommendations, and then leave. Instead, the inspectors provided jail administration and staff with guidance and technical assistance; attended local sheriff’s meetings; visited jails more often than annually; and provided resources, instruction, and guidance on how to correct deficiencies (Ruskowitz interview 1, February 8, 2016). For those who embraced the jail inspection process, the inspection statute resulted in positive changes. During this period, eight to ten new jails were built, repairs were made to existing jails, and deficiencies in many facilities declined (Ruskowitz interview 2, February 9, 2016).

As these positive changes were realized, advocates became hopeful that they could secure support for mandatory jail standards and a stronger enforcement mechanism. Ultimately, advocates were not able to garner the necessary support, and the positive effect of the jail inspection statute plateaued. In the early 1980s, local jails stopped receiving federal funding through the Law Enforcement Assistance Act of 1965 to make improvements to facilities and provide training, and local governing bodies were forced to look to their own general funds to make the needed repairs (Kerle interview, April 18, 2016). These local governing bodies were reluctant to spend money from general funds because improving jail conditions was not a politically appealing expenditure (Kerle interview, April 18, 2016). Consequently, in the late 1980s,
the Secretary of Corrections ended the jail inspections program, and the legislation remained dormant for almost a decade.

**D. Repeal of the Jail Inspection Statute in 1996**

In 1996, Governor Bill Graves initiated a directive to the Secretary of Corrections to identify nonessential programs. In the letter to the House Judiciary Committee, the Secretary of Corrections identified the annual jail inspections as a program that could be discontinued “because the [Kan. Stat. Ann. § 75-5228] standards are advisory only and no authority is provided to enforce them” (letter from the Secretary of Corrections, 1996). The Secretary of Corrections further noted that “[u]ltimately, local officials choose whether to implement the corrective actions recommended by jail inspectors and are responsible for defending litigation concerning local detention facilities” (letter from the Secretary of Corrections, 1996). Based on this information, the governor recommended elimination of the jail inspections program in his fiscal year 1997 budget, and House Bill No. 2791, which proposed elimination of the jail inspection program, was introduced (H.B. 2791, 1996 Sess.).

At a committee hearing before the House, a representative from the Department of Corrections appeared in support of the bill. According to supplemental notes prepared by the Legislative Research Department, “[t]he representative noted that jail inspections standards are advisory only and the Department has no authority to enforce them. The local officials ultimately decide whether to implement the standards. The program is unnecessary and expensive and, therefore, can be eliminated” (H.B. 2791, 1996 Sess., Supplemental Note). The legislature agreed with the committee recommendation, and Kan. Stat. Ann. 75-5228 was repealed in 1996 (1996 Kan. Sess. Laws 413).

**III. Kansas Jail Inspection Reports: Positive and Negative Effects of the Inspection Program**

An examination of the jail inspection reports provides insight into the ability of the inspection statute to produce change, as well as the ways in which the jail inspection program was being marginalized. When inspections were first conducted in 1975, fewer than 2% of jails (2/142) met the minimum jail standards (Kan. Dep’t. of Corr., First Annual Jail Inspection Report 1975, pp. 1-2). Rather than being discouraged by this result, jail inspectors noted in early reports that in an age of increasing crime and incarceration, local governmental agencies seemed to recognize the need for safe, secure, and sanitary detention facilities and were making outstanding progress in trying to achieve those endeavors (Kan. Dep’t. of Corr., Annual Jail Inspection Report 1976, p. 77). The local agencies’ commitment to ameliorating jail conditions resulted in actual improvements to jail conditions. In 1976, more than 23% of jails (28/121) met the minimum jail standards, while 21 jails were voluntary closed because of an inability to comply with jail standards (Kan. Dep’t. of Corr., Annual Jail Inspection Report 1976, p. 77). By 1977, more than 32% of jails (38/118) were in compliance with minimum standards, and that number increased to more than 33% (41/122) in 1978 (Kan. Dep’t. of Corr., Annual Jail Inspection Report 1977, p. 5; Kan. Dep’t. of Corr., Annual Jail Inspection Report 1978, pp. 3, 9).

Although inspection reports demonstrate that meaningful progress and improvements did occur, as of 1978, three years into the inspection process, more than 66% of jails (81/122) were still not in compliance with minimum jail standards (Kan. Dep’t. of Corr., Annual Jail Inspection
Report 1978, pp. 3, 9). The Department of Corrections recognized the need for more rapid improvement in jail conditions, and the 1977 Annual Jail Inspection Report noted the following:

In this age of recognized human rights, more and more people are becoming aware of the right of the confined and seeking the assurance those rights are respected. State and federal courts throughout the nation are hearing cases regarding alleged ‘cruel and unusual punishment’ because of the deplorable conditions of city, county and state detention/correctional facilities. With the changing public and judicial attitudes impacting on the environment of local detention operations, it is anticipated that rapid change for the improvement of detention facilities and programs is inevitable. (Kan. Dep’t. of Corr., Annual Jail Inspection Report 1977, p. 2)

Over the years, the number of jails being closed for noncompliance declined, but jail inspection reports in the 1980s still made note of jails that were “no longer in operation due to noncompliance with jail standards” (Kan. Dep’t. of Corr., Annual Jail Inspection Reports, 1982-1984). One such report in 1982 noted that Hamilton County Jail had been “torn down due to deplorable conditions and noncompliance with Jail Standards” (Kan. Dep’t. of Corr., Annual Jail Inspection Report 1982, p. 55). Even without a strong enforcement mechanism, Kansas’s jail inspection statute produced notable improvements in Kansas jails. The effectiveness of this enforcement mechanism, however, was limited to situations in which facilities had “deplorable conditions.” Facilities with continued annual violations that undercut the safety and security of inmates and staff were allowed to continue to house inmates because the violations did not rise to the level of deplorable conditions.

Serious violations frequently noted in jail inspection reports included the following: (1) hazardous materials and/or equipment in cells; (2) electrical cords and/or fixtures accessible to inmates; (3) does not comply with Department of Health and Environment standards; (4) does not comply with State Fire Marshal’s regulations; (5) does not provide three meals daily; (6) inadequate ventilation; (7) does not maintain adequate separation of inmates; (8) no smoke detection system; and (9) too many inmates in the dormitories. Many facilities had the same violations noted year after year in the inspection reports with no apparent sign of improvement. For example, in 1977, Rice County Jail had 21 deficiencies noted in the annual jail inspection report, all of which had been previously noted in prior inspection reports. Of the 21 deficiencies noted in 1977, seven were found to be urgent, eight were deemed necessary, and the remaining six were noted as desirable (Kan. Dep’t. of Corr., Annual Jail Inspection Report 1977, pp. 37-38). One year later, Rice County Jail was cited for 19 deficiencies, all of which had been noted in the 1977 jail inspection report (Kan. Dep’t. of Corr., Annual Jail Inspections Report 1978, pp. 33-34). By 1980, Rice County Jail had reduced its deficiencies to 12, although 11 had been noted in previous inspection reports (Kan. Dep’t. of Corr., Annual Jail Inspections Report 1980, p. 40).

Whereas some of these deficiencies were serious and would be expensive to address, certain other deficiencies, such as having no written policies and procedures, would cost little money to correct. Yet, these easily remedied deficiencies remained year after year with no improvement. Only the facilities with glaring violations were held accountable, while other facilities with violations not deemed deplorable were permitted to continue housing inmates despite not making the recommended improvements.
Despite the shortcomings of the jail inspection statute, the inspection reports show that the inspection statute did produce tangible benefits. Starting in 1982, the reports contain frequent findings that “no deficiencies [were] found” at jail facilities (Kan. Dep’t. of Corr., Annual Jail Inspection Report 1982). Furthermore, some facilities with long-standing, repeated deficiencies were, over time, able to reduce the number of violations substantially. By 1984, Rice County Jail had only two deficiencies noted in its annual inspection report (Kan. Dep’t. of Corr., Annual Jail Inspection Report 1984, p. 39). This change marked a 10-fold improvement for Rice County Jail from 1977 to 1984.

IV. Reflecting on the History of Kansas’s Jail Inspection Statute
Several lessons can be gleaned from the history of Kansas’s jail inspection statute. Jail inspection statutes must be comprehensive and fully developed, and the function of the statute must be clearly established. Kansas’s inspection statute was an attempt to serve a regulatory function as well as an inspection/monitoring function. The blended design of the statute resulted in the undermining of both functions. The legislation tried to exercise regulatory control over the quality of jails, but without an enforcement mechanism, the statute could not mandate compliance with jail standards (Deitch, 2010a, p. 1440). On the other hand, the inspection statute was also designed to serve an inspection/monitoring function. Kansas’s inspection statute was viewed as a way for sheriffs and jail administrators to receive technical support and advice from jail inspectors (Deitch, 2010a, p. 1443). This blend of two very different functions served to heighten the pushback from reluctant sheriffs and jail administrators, and as such, it undermined the overall effectiveness of the statute. Additionally, Kansas’s inspection statute was the only means of external oversight of state jails. States should not, however, rely on a jail inspection statute as the sole means of oversight. Rather, an inspection statute should serve a concrete and identifiable function that is part of a larger, multifaceted approach to correctional oversight.

For jail inspection legislation to produce sustainable change, key stakeholders must buy into the process. Although there were advocates for reform in Kansas, the jail inspection statute ultimately was met with much resistance from other key stakeholders, including some sheriffs, jail administrators, legislators, local governing bodies, and the public. The jail inspection statute was, in some ways, an afterthought to larger statewide correctional reform. Consequently, the focus was on securing support for the overall correction reform legislation rather than the specific jail inspection provision. Building widespread support for jail inspections is timely and labor-intensive and requires advocates to identify and promote varying and differing rationales for oversight. Certainly, the humane treatment of inmates should be the primary driving force for oversight. Identifying secondary benefits, however, can also persuade reluctant stakeholders to embrace change. These secondary benefits include technical support, reduced litigation, and the avoidance of bad publicity.

V. Moving Forward: A Roadmap for Future Jail Inspection Legislation
In its recommendation and report, the Criminal Justice Section of the American Bar Association outlined key requirements for effective monitoring of correctional facilities (Saltzburg, 2008, pp. 2-3). These key requirements include having an independent monitor; ensuring that the oversight agency is properly funded and staffed; ensuring that inspectors have the necessary training and
expertise; guaranteeing that the monitoring agency has gold-key access to the facility, records, and inmates; providing protection for inmates and staff against retaliation; requiring the facility to cooperate fully in the monitoring process; allowing the monitoring agency to conduct scheduled and unannounced visits; making the monitoring reports public; and requiring follow-up visits to ensure that any deficiencies noted are properly addressed (Saltzburg, 2008, pp. 2-3). Although a survey of current jail inspection statutes demonstrates that some states are moving forward and are including the recommended key requirements, the survey also demonstrates that more work needs to be done.

A. Prior Jail Inspection Research

In 2010, Michele Deitch conducted a “state-by-state inventory of independent oversight mechanisms for correctional institutions” (Deitch, 2010b, p. 1755). This comprehensive study involved an examination of oversight bodies that operated at the state level. Deitch canvassed “Departments of Correction, state legislative offices, and various advocacy groups in each state” (Deitch, 2010b, p. 1756). Because approaches to oversight varied among the states, Deitch’s research team tried to locate a contact person in each state to determine the oversight mechanism, if any, used within the state (Deitch, 2010b, p. 1756).

Deitch’s research was an impressive undertaking and is an excellent resource for learning more about the different approaches used by each state, but the study was conducted more than 6 years ago, and some of the information included is understandably dated. For instance, when Deitch conducted her research in 2010, Alabama had a statute mandating that the Board of Corrections conduct semiannual inspections of local jails (Deitch, 2010b, p. 1781; Ala. Code § 14-6-81). In 2015, however, the Alabama legislature repealed this inspection statute (Ala. Code 2015-70, § 1[50]). Now, only grand juries are statutorily mandated to conduct county jail inspections (Ala. Code § 12-16-191). Additionally, Deitch’s study does not provide an evaluation of the various approaches used by states. As Deitch noted, she specifically refrained from evaluating the different approaches because she wanted the research to “be a starting point for discussion” (Deitch, 2010b, p. 1755). Yet, to have a better understanding of what provisions should be included in an inspection statute, evaluation of the effectiveness of different provisions within an inspection statute is essential. Accordingly, it is important to build upon and expand Deitch’s previous research.

B. Methods Used in the 2016 Survey

For the 2016 jail inspection statute survey, WestlawNext was used first to identify which states have jail inspection statutes. One researcher conducted the survey by using the same combination of search terms for each state (jail /p inspection!), and only state statutes were examined – the survey did not examine city, county, or agency regulations. The search was run for each of the 50 states, and if the original search did not produce a hit, a second researcher verified that the state did not have an inspection statute.

To be included in the results in Table 1, a statute had to be current and had to apply to all county and city jails — for example, not just to juvenile facilities. Although Table 1 includes both states that require jail inspections (n=25) and states that require only fire and/or health safety inspections (n=5), states with only fire and/or health safety inspections are not included in the
discussion of the results (n=25). Once state jail inspection statutes were identified, each statute was evaluated to determine (1) what oversight body was in charge of the inspections (Table 1), (2) whether the statute included a discussion of the inspection process, and (3) what enforcement mechanism, if any, the statute contained (Table 2). Additionally, an exploratory survey of each jail inspection statute was conducted to gather information regarding issues that statutes should address when the inspection process is outlined.

C. Oversight Body

Internal investigations and internal audits are an important part of monitoring jail conditions, but true oversight comes from an external oversight body (Deitch, 2010b, p. 1757). Whether the oversight body is independent, however, should not be the only measure for determining the appropriate oversight body. Inspectors should also have adequate training and expertise to conduct their core duties of inspecting, consultation, and technical assistance (Rosazza, 2007, p. 81). Thus, in evaluating the most effective oversight body, attention must be paid to the independence, training, and expertise of the inspectors. State statutes vary as to which body is charged with overseeing the jail inspection process, and consequently, they vary as to whether there is true external oversight and whether the inspectors have the requisite training and expertise.

Of the 25 states with jail inspection statutes, the statutes of 11 states are in line with Kansas’s former jail inspection statute and require the state’s Department of Corrections to conduct jail inspections. For states that do not have a unified corrections system, having the state’s Department of Corrections oversee jails inspections constitutes sufficient independent oversight (Deitch, 2010b, p. 1757).

1 No statute on jail inspection was found for the states of Alaska, Arizona, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Missouri, Nevada, New Hampshire, Rhode Island, South Dakota, Utah, Vermont, and Wyoming.

2 Jail inspection statutes were at one time in place in several states but have since been repealed. States that have repealed statutes include the following: Alabama (Ala. Code § 1975 14-6-81, repealed Apr. 21, 2015); Colorado (Colo. Rev. Stat. § 17-26-134, repealed Apr. 24, 1996); Connecticut (Conn. Gen. Stat. § 18-47, repealed Oct. 1, 1960); Kansas (Kan. Stat. Ann. § 75-5228, repealed July 1, 1996); and Washington (Wash. Rev. Code § 72.01.420, repealed June 23, 1977).

Additionally, Department of Corrections employees have corrections experience and can provide technical support to help jails make the necessary repairs and improvements. Other states, such as Texas and Nebraska, require that jail inspections be conducted by a separate board or commission. Although a minority of the states use this approach, a separate board or commission that operates independently of the correctional system provides truly independent oversight and expertise.

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<th>TABLE 1: Survey of State Jail Inspection Statutes</th>
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Another approach, used by seven states, is to require the board of county commissioners to conduct inspections of local jails. The county commissioners do not operate the county jails, but they determine funding for jails. Additionally, the statutes do not make it clear who is charged with actually conducting the inspections. If the commissioners themselves conduct the inspections, there is an issue because the commissioners most likely do not have the expertise and training necessary to inspect and provide technical assistance to the local jails. The county commissioners could hire external inspectors with the requisite training and expertise, but the statutes do not require this approach. Regardless of who actually conducts the inspections, the county commissioners are still charged with overseeing the process, so there is no external, independent oversight.

Finally, five states rely on grand juries to conduct inspections. Although grand juries constitute an independent oversight body, grand jurors generally do not have sufficient training or expertise in conducting inspections nor are they able to provide technical support to help jails make the necessary repairs or improvements. Independent oversight without sufficient training and expertise is not a satisfactory approach to external oversight of jails.

D. Inspection Process

The history of Kansas’s jail inspection statutes demonstrates the need to provide direction regarding inspections and suggests that formalizing the inspection process can help make a jail inspection statute more effective. Requirements that inspection statutes should address include the creation of jail standards, how often jail inspections are required, whether the inspections are announced in advance, the process for jails taking corrective action to address deficiencies, the appeals process, and whether the standards are mandatory or advisory. State inspection statutes should also give inspectors “gold-key” access – inspectors should have access to all parts of the facility, inmates, staff, and records, and conversations with jail inspectors should be confidential. Additionally, the statute should ensure that the inspection is more than just a “paper review” by requiring inspectors to observe practices and talk to inmates and staff. Finally, to ensure that inspections lead to accountability and transparency, the statute should require that the inspection reports be made public.

States should also ensure that jail standards are in place to guide the inspection process. These jail standards should be developed with input from key stakeholders, including corrections officials, local and state government actors, and citizens, and state inspection statutes should address how the standards are developed, what subjects the standards should cover, and how the standards can be adjusted or revised. The jail standards should go beyond environmental issues and address other key issues, such as use of force, health care, mental health, and other issues involving the treatment of inmates.

Maine’s jail inspection statute provides a comprehensive approach to the jail inspection process. Notably, Maine’s statute requires the Department of Corrections to create jail standards “setting forth requirements for maintaining safe, healthful and secure facilities” (Me. Rev. Stat. tit. 34, § 1208). The inspection statute requires the commissioner to conduct a comprehensive inspection every 2 years and supplemental inspections at least 3 times every 2 years (Me. Rev. Stat. tit. 34, § 1208).
Maine’s inspection statute also addresses whether the inspections are announced or unannounced. The statute provides that the commissioner may have access to any records the commissioner deems necessary and that the commissioner may conduct unannounced or announced inspections. After conducting an inspection, the commissioner is required to send a report of the inspection within 15 days to the necessary parties. The report must include a summary of the inspection findings and any issues of noncompliance (Me. Rev. Stat. tit. 34, § 1208[2][D]).

Maine’s statute provides county and municipal officials 60 days in which to take corrective action or offer a plan for correcting deficiencies noted in an inspection report. If the county or municipal officials fail to fix the deficiencies or offer a corrective plan, the commissioner has the authority “to restrict or modify the operations of the facility … which action may include ordering an entire facility closed until the deficiencies have been corrected” (Me. Rev. Stat. tit. 34, §

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**TABLE 2: Survey of State Jail Inspection Statutes (Enforcement)**

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<tr>
<th>Enforcement Mechanism</th>
<th>None</th>
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1208[3][B]). Before such action is taken, the statute requires that the commissioner first offer to consult with county or municipal officials to discuss the planned action. The commissioner is also given emergency powers, which permit the commissioner to take immediate action “if noncompliance is determined to endanger the safety of the staff, inmates or visitors of any county or municipal detention facility” (Me. Rev. Stat. tit. 34, § 1208[4]).

Jail facilities in Maine are permitted by statute to request variances from established departmental standards (Me. Rev. Stat. tit. 34, § 1208[5]). Maine’s jail inspection statute also requires the commissioner to create an advisory committee, which the commissioner must consult when establishing jail standards and “may consult when variances are sought, when actions are contemplated by the commissioner in response to a failure to comply with standards and when the commissioner determines that the consultation is necessary for other reasons” (Me. Rev. Stat. tit. 34, § 1208[6]). Finally, the jail inspection statute allows the commissioner to provide technical assistance “to facilitate compliance with standards” (Me. Rev. Stat. tit. 34, § 1208[7]).

Maine’s jail inspection statute provides a good example of the issues a jail inspection statute should address, but its inspection statute is not without problems. For instance, the inspection statute permits the commissioner to “dispense with this inspection if, when it is due, the facility is accredited by a nationally recognized correctional accrediting body” (Me. Rev. Stat. tit. 34, § 1208[2]). Although the intent of this provision may be to encourage facilities to go through the accreditation process, accreditation “is designed to measure an agency’s specific operations against best practices in the field, rather than to assess whether any wrongdoings or human rights violations have occurred” (Deitch, 2010a, p. 1441). Furthermore, accreditation is a “relatively static form of oversight, as it is based on a snapshot view of the facility at a particular point in time” (Deitch, 2010a, p. 1441). Accreditation should supplement rather than replace the jail inspection process.

E. Enforcement Mechanism

Before determining what type of enforcement mechanism, if any, a jail inspection statute should have, the function of the jail inspection statute must first be identified. If an inspection statute is meant to be a form of regulation, the statute must contain some kind of enforcement mechanism (Deitch, 2010a, p. 1440). On the other hand, if the purpose of the statute is to provide inspection and monitoring, an enforcement mechanism may not be necessary, and the inspector’s recommendations may be advisory (Deitch, 2010a, p. 1443). Some viewed Kansas’s jail inspection statute as a regulation, but the provisions of the statute – advisory jail standards and a weak enforcement mechanism – resulted in a statute that functioned to provide only inspections and monitoring. As the history of Kansas’s jail inspection statute demonstrates, a statute that provides only inspections and monitoring can produce some change, but additional oversight measures, such as true regulation, may be necessary because sometimes more is needed to bring jails into compliance with minimum jail standards. Even when an inspection statute serves a regulatory function, the enforcement mechanism should be “used as a last resort, when all other efforts to work with local officials to resolve issues have failed” (Martin, 2007, p. 23).

The majority of state jail inspection statutes (13/25) do not mention an enforcement mechanism. Requiring jail inspections is a good first step and can lead to positive change, but the lack of an enforcement mechanism ultimately undermines the effectiveness of the oversight,
especially when the jail inspection statute is the only process in place to provide the external oversight of jails. Other inspection statutes include an explicit enforcement mechanism provision. In 10 states, the inspecting body is permitted to place limitations on the jail, including closing the jail, if serious safety concerns are raised during inspection and to close the jail if it fails to take appropriate corrective action. Four states provide a court remedy for noncompliance with jail standards.

Mississippi’s jail inspection statute contains a unique enforcement mechanism provision. In Mississippi, if a grand jury’s inspection of a jail reveals “any violation or neglect of duty as to the jail, the sheriff may be punished as for a misdemeanor, or may be fined as for a contempt, such not to exceed Fifty Dollar ($50.00)” (Miss. Code Ann. § 13-5-55). Holding a sheriff criminally liable for neglect of duty is a heavy sanction, and grand juries may be reluctant to raise concerns regarding problems identified during an inspection because of the punishment the sheriff would face. Additionally, sheriffs may be in control of county jails, but they are also themselves reliant on local government bodies to provide funding to make the necessary repairs.

When what enforcement mechanism should be used in a jail inspection statute is under consideration, it is important to keep in mind that the goal of the inspection process should be to ensure compliance with jail standards and to ensure that “enforcement is used as a last resort” (Martin, 2007, p. 23). Accordingly, the enforcement mechanism should serve to encourage jail facilities to comply with the jail standards requirement and should not be simply punitive in nature, and the mechanism should not be so severe that those conducting the inspections are reluctant to note deficiencies.

VI. Conclusions
Inspection statutes mandating the external oversight of jail conditions can help ensure the safety and well-being of inmates housed in jails; however, simply having a statute on the books accomplishes little if the statute is not followed or enforced. To ensure that an inspection statute will be followed, interested stakeholders – from taxpayers to sheriffs and administrators to state legislators – must believe that an inspection statute is beneficial. An inspection statute must also be tailored to fit the needs of the corrections system and local jails within the state. To craft a statute that has support and is tailored to fit the needs of a corrections system, future research is necessary to determine what the current oversight practices are within a state and to gauge interest in and commitment to the external oversight of jails. Furthermore, a jail inspection statute alone is not sufficient to ensure adequate external oversight. A multifaceted, comprehensive approach to oversight that addresses the seven distinct functions identified by Deitch (regulation, audit, accreditation, investigation, legal, reporting, and inspecting/monitoring) is key to ensuring accountability and transparency. Ultimately, continued research and conversations regarding correctional oversight and jail inspection statutes are essential to instituting reform that guarantees the safe and humane treatment of inmates.

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Letter from Charles E. Simmons, Secretary of Corrections, to House Judiciary Committee,Attachment 3 (1996, Feb. 12). (On file with Kansas Legislative Administrative Services.)


**Case Cited**

**Legislation Cited**
Ala. Code § 14-6-81 (repealed 2015)
S.B. 72, 1973 Sess., As Amended by House Com. of the Whole (Kan. 1973)

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Lisa Kay Decker

Abstract
With the 2012 congressional mandate that the Federal Aviation Administration promulgate rules allowing the use of small unmanned aircraft systems (commonly called drones) in U.S. airspace, many have expressed concerns about potential invasions of privacy by both private citizens and law enforcement agencies. This article provides a survey of the state and federal case law and legislative responses to such concerns through August of 2016, with a detailed focus on legislative enactments creating crimes related to civilian drone use and regulating the law enforcement use of drones to collect evidence in criminal investigations. The article also analyzes and attempts to make sense of the seemingly “hit-or-miss” state legislative responses to the advent of widespread drone use in the United States.

Keywords
legislation, drones, U.S. airspace, privacy, technology

I. Introduction
In February of 2012, the U.S. Congress enacted the FAA Modernization and Reform Act,\(^1\) which mandated that the Federal Aviation Administration (FAA) implement regulations for the integration of small unmanned aircraft systems (sUAS), also commonly referred to as unmanned

aerial or aircraft systems (UAS), unmanned aerial vehicles (UAVs), or drones, into U.S. airspace. Throughout this work, the terms UAS and drone are used interchangeably, generally to refer to small unmanned aircraft systems. However, when a specific legislative enactment regarding drones is referenced, the precise statutory language crafted within that statute to refer to UAS is used.

As the federal deregulation of U.S. airspace for drone use has progressed, the FAA has promulgated rules related to the registration and marking of sUAS, as well as their safe operation. Regarding the registration and marking issues, the FAA published its Interim Final Rule on December 16, 2015. This Interim Final Rule addresses only the basic requirements for the registration and marking of UAS, as well as age restrictions on who can register a UAS.

On June 28, 2016, the FAA published “Operation and Certification of Small Unmanned Aircraft Systems, Final Rule.” This rule addresses issues related to the commercial operation sUAS, including aircraft requirements, operator certification and responsibilities, and operational limitations; these include a prohibition against flying over persons not involved in an operation who are not under cover of a structure or a stationary vehicle. The rule also allows a certificate of waiver of the rule’s provisions to the extent that an applicant can show that safe operation can still be accomplished.

The FAA website suggests that law enforcement agencies may apply to obtain a blanket public Certificate of Waiver or Authorization (COA) allowing “nationwide flights in class G airspace at or below 400 feet, self-certification of the UAS pilot, and the option to obtain emergency COAs (e-COAs) under special circumstances.” Beyond this, the FAA has not made any specific attempt to regulate the use of drones by law enforcement or to address privacy issues related to drones, leaving such issues to state and federal legislators.

Since the 2012 federal mandate to integrate drones into the national airspace, private citizens and legislators alike have been in near-panic mode over its potential effect on privacy. News articles abound with headlines such as these: “Technology 2012: Smile! You’re on Government Camera,” “Drones Over America. Are They Spying on You?” “Sen. Dianne Feinstein Says There’s No Regulation of Commercial Drones,” and “Spies in the Sky Signal New Age of Surveillance.” The Orwellian fear that Big Brother is watching, via drone, has become palpable.

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2 Registration and Marking Requirements for Small Unmanned Aircraft, Interim Final Rule, 80 FR 78593 (Dec. 16, 2015).
3 Operation and Certification of Small Unmanned Aircraft Systems, Final Rule, 81 FR 42063 (June 28, 2016).
6 Drones over America. Are they spying on you? Thousands of drones could be routinely flying over the United States within the next ten years. They can help with law enforcement and border control, but they also raise questions about invasion of privacy. (2012, June 16, Saturday). The Christian Science Monitor, 852 words, Brad Knickerbocker, staff writer.
II. Parameters of This Work
As outlined above, the FAA deregulation process that has played out over the last 4 years has been limited to issues regarding the registration and safe operation of UAS by hobbyists and commercial users. The FAA regulations do not address issues such as civil causes of action for drone use behaviors. Predictably, neither do the FAA guidelines address potential criminal justice issues related to drone use, such as the creation of drone crimes or the permissible uses of UAS by police in criminal investigations. Accordingly, a flurry of legislative action has begun to address this legal void.

The focus of this article is on the legal response to the newly authorized use of drones as it relates to the criminal justice process, defined in this work as the creation of drone crimes and/or the regulation of police use of drones, including civil causes of action for the improper use of drones. It addresses the minimal case law on drone issues and then outlines the general parameters of federal and state UAS legislative action related to drone use. The article then turns to an overview of the various crimes and civil causes of action created by state legislation. Next, it undertakes an in-depth discussion of state legislative responses to police use of drones, with a particular focus on the use of UAS in criminal investigations. Finally, the article makes observations about trends in the existing legislation and endeavors to identify some common themes in the disparate state legislative schemes, and then to identify considerations for future legislative action.

As the main focus of this article is the effect of U.S. airspace deregulation vis-à-vis drones on criminal justice practices and policies, a detailed review of the FAA registration and safety regulations is not undertaken.

III. Absence of State and Federal Case Law Addressing Law Enforcement Use of UAS
Although a wealth of general Fourth Amendment surveillance jurisprudence exists, there is a nearly total void of case law at the state and federal level specifically addressing the civilian or law enforcement use of drones. Perhaps this is not surprising, given the relatively short time that drone use has been allowed under the FAA deregulation, which began in 2012. Although a number of cases exist regarding privacy interests and the military use of unmanned aerial systems, a search of legal databases for the term “drone” related to Fourth Amendment issues yielded only a few cases. Most concerned circumstances in which “Drone” was a proper name, instances in which attorneys “droned on,” or cases such as Jacobus v. Heurta (2013), in which a pro se defendant attempted

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10 See, e.g., U.S. v. Williams, 616 F.3d 760 (8th Cir. 2010), where a man named Drones “was a mid-level heroin supplier in the St. Louis area,” and United States v. Drones, 218 F.3d 496, 504 (5th Cir. 2000), where “Drones” was pursuing habeas corpus relief based on ineffective assistance of counsel claims in his conviction for conspiracy to possess crack cocaine with intent to distribute and aiding and abetting possession of crack cocaine.

11 See, e.g., People v. Santiago, 22 N.Y.3d 740, 986 N.Y.S.2d 375, 9 N.E.3d 870 (2014), where the court recognized the benefits of presentations using technology instead of a presentation where an attorney “drones” on and on.

to sue the FAA, claiming it was using drones to surveil him because he got into an argument with a pilot.

One of the only cases that even mention the law enforcement use of drones is the 2015 U.S. Federal District Court case of Blanton v. Deloach (2015), in which a citizen filed suit claiming he was unlawfully targeted for traffic citations by a sheriff’s office; the targeting included the use of a drone to determine his location. While dismissing the complaint for failure to state a claim, the court noted as an aside that “[i]ntraditionally, watching or observing a person in a public place is not an intrusion upon one’s privacy” (Summers v. Bailey, 1995). Summers v. Bailey, 55 F.3d 1564 (11th Cir. 1995). Additionally, courts in this Circuit have held that “[f]ollowing someone, without more, is not a violation of the Constitution or laws of the United States” (Hunter v. Abi, 2014). Hunter v. Abi, No. 2:13-CV-661-WKW, 2014 WL 495359, at *8 (M.D. Ala. Feb. 5, 2014).\(^{14}\)

IV. Overview of the Proposed Federal Legislative Action on Privacy Issues Related to UAS Use

Fresh on the heels of the FAA’s 2012 deregulation of airspace for drone use, members of Congress began sponsoring legislation regarding the potential new use of drones. Proposed legislation related to privacy issues in general included the Farmer’s Privacy Act of 2012,\(^{15}\) restricting the Environmental Protections Agency’s use of drones over agricultural lands. Members of the Senate also sought to use a Department of Transportation appropriations bill to prevent funding of the FAA deregulation efforts until the agency undertook a detailed report about the potential privacy effect of drones.\(^{16}\) The Drone Aircraft Privacy and Transparency Act of 2013\(^{17}\) also sought to require the FAA to study and identify drone privacy issues, but it attempted to do so with a proposed amendment to the FAA Modernization and Reform Act of 2012.

Examples of proposed legislation specifically related to the federal law enforcement use of drones include the Preserving American Privacy Act of 2013,\(^{18}\) which sought to ban the weaponization of drones as well as their warrantless use by governmental agencies, and the Preserving Freedom from Unwarranted Surveillance Act of 2013,\(^{19}\) seeking to prohibit U.S. agencies from gathering evidence for use in a criminal prosecution or a regulatory case without a warrant. (An identical bill was introduced in the U.S. Senate as S. 1016.\(^{20}\)) During the 114th session of Congress (2015-2016), bills were proposed in both the House and the Senate seeking, among other things, to require law enforcement and other governmental agencies to obtain warrants to collect investigative information via drones.\(^{21}\)

None of the federal bills addressing these privacy issues related to the use of drones were enacted, and most never moved beyond assignment to committee.

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\(^{14}\) Id. at footnote 4, p. 6.


\(^{16}\) S. 1243, 113th Cong. (1st Sess. 2013).

\(^{17}\) H.R. 1262, 113th Cong. (1st Sess. 2013).


\(^{19}\) H.R. 972, 113th Cong. (1st Sess. 2013).


V. Overview of and General Trends in State Legislation Regarding the Use of UAS

In 2013, state legislatures began addressing a variety of issues regarding drones. That year, 130 bills and resolutions were considered by 43 states, and ultimately 13 states enacted 16 new laws. An additional 16 resolutions (many mandating study committees for drone privacy issues) were adopted in 2013 by 11 states.\(^\text{22}\) In 2014, overall state legislative action dropped significantly, with only 35 states considering legislation and 10 states enacting 12 new drone laws.\(^\text{23}\) Drone-related legislative activity at the state level rebounded sharply in 2015, with 45 states considering 168 bills; 20 states eventually enacted 26 pieces of legislation, and another five states adopted resolutions, again related mostly to establishing study committees on various drone-related issues.\(^\text{24}\) During 2015, 26 states enacted laws addressing a wide range of issues related to UAS use. With the 2016 state legislative sessions winding down, 38 states have considered additional drone laws, and 28 new laws have been passed by 15 states.

After 4 years of legislative action, 19 states (Alabama, California, Colorado, Connecticut, Delaware, Georgia, Kentucky, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, Pennsylvania, South Carolina, South Dakota, Washington, and Wyoming) have not yet enacted any drone-related laws. As is detailed below, of the 31 states that have enacted drone laws, four have enacted only administrative/funding laws, nine have enacted various drone-related crimes but have no regulation of law enforcement investigative use of drones, seven have regulated law enforcement investigative use of drones but created no drone crimes, and eleven have enacted legislation concerning both drone crimes and the law enforcement use of drones.

VI. States With Legislation Only on Funding or Administrative Positions Related to UAS

Although nearly all states have considered UAS legislation, only 32 states have passed laws related to some manner of drone use. The type and scope of the UAS-related state legislation vary widely. Four states – Hawaii, Maryland, Ohio, and Rhode Island – have passed only limited legislation addressing administrative and funding issues. These states have left unaddressed those issues related to privacy crimes or law enforcement investigation matters.

Legislation in Hawaii has provided the funding of staff positions to plan for degree and training programs for professional unmanned aircraft systems pilots\(^\text{25}\) and has created a chief operating officer for the Hawaii unmanned aerial systems test site.\(^\text{26}\) Likewise, Maryland’s legislation has addressed only limited drone-related issues, such as the appropriation of funds for its UAS test


site\textsuperscript{27} and the preemption of county or municipality ability to regulate drone operation.\textsuperscript{28} In Ohio, the only drone-related legislative enactment creates an aerospace and aviation committee whose duties include the development of unmanned aerial vehicle technology.\textsuperscript{29} Rhode Island has addressed the use of drones only to the extent of assigning all legal authority within the state to the Rhode Island Airport Corporation.\textsuperscript{30}

Thus, 27 states currently have enacted laws concerning the law enforcement use of drones and/or creating crimes related to drone use. Some of these 27 states have also passed laws concerning the administration and funding of drone research; however, this article focuses only on the criminal justice–related drone legislation of those states.

VII. State Legislation on UAS
Of the 27 states that have enacted legislation addressing criminal justice issues surrounding UAS use, nine states\textsuperscript{31} (Arizona, Arkansas, Kansas, Louisiana, Michigan, Mississippi, New Hampshire, Oklahoma, and West Virginia) have created crimes or civil causes of action related to drone use without addressing the law enforcement use of drones for criminal investigation. An additional eleven states\textsuperscript{32} (Florida, Idaho, Indiana, Nevada, North Carolina, Oregon, Tennessee, Texas, Utah, Vermont, and Wisconsin) have legislated both drone crimes and drone use by police in criminal investigations.

A. Citizen Use: Creation of Crimes and/or Private Causes of Action
An overview of drone crimes legislation that regulates citizen use is presented in Table 1. In 2016, Arizona amended its criminal code section “Miscellaneous Offenses” to make the operation of unmanned aircraft that interferes with the operations of law enforcement, firefighters, or emergency services a class 1 misdemeanor.\textsuperscript{33} The legislation also made it a class 6 felony to use an unmanned aircraft or unmanned aircraft system “to intentionally photograph or loiter over or near a critical facility in the furtherance of a criminal offense.”\textsuperscript{34} A second offense for drone use in furtherance of a criminal offense related to a critical facility is punishable as a class 5 felony.\textsuperscript{35} It is also a crime in Arizona to operate a UAS in violation of federal law.\textsuperscript{36}

\textsuperscript{27}2013 Md. Sess. Laws, Ch. 423 §52(6), H.B. 100.
\textsuperscript{28}Md. Code Ann., Com. Law § 14-301 (West).
\textsuperscript{29}Ohio Rev. Code Ann. §122.98 (West).
\textsuperscript{30}Rhode Island H.B. 7511, Unpiloted Aerial Vehicle Regulation (effective July 1, 2016 without governor’s signature).
\textsuperscript{31}Some sources count California among the states that have passed drone crime legislation. However, this article does not include California’s legislation amending its “physical or constructive invasion of privacy” statute, West’s Ann. Cal. Civ. Code § 1708.8, to include invasions of privacy via airspace as there is no specific mention of UAS or drones in the statute.
\textsuperscript{32}Some count Indiana’s Ind. Code Ann. § 35-46-8.5-1 (West), which makes it a drone-related crime to place electronic surveillance equipment on the property of another without consent; however, as it makes no specific mention of UAS or drone use, it is not counted here as UAS legislation.
\textsuperscript{34}Id.
In 2015, Arkansas amended its existing crime of Video Voyeurism to include the use of an “unmanned vehicle or aircraft.” Arkansas also created criminal and civil penalties for the unauthorized use of UAS to surveil a critical infrastructure. In the Arkansas statute, the phrase critical infrastructure relates to electric power generations systems and to petroleum, chemical, and rubber facilities.

In Florida, the Freedom from Unwarranted Surveillance Act was amended in 2015 to create a civil cause of action for damages, including punitive damages, and injunctive relief for the unlawful surveillance of persons or property via drone. The state has not passed criminal laws related to drone use.

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40 Id.
Idaho added a drone crime related to hunting in 2016 when it amended its existing laws regulating methods of taking wildlife to include unmanned aircraft systems. It is a misdemeanor under the Idaho code to hunt game from, molest game with, or hunt game with the aid of any unmanned aircraft system.\textsuperscript{42}

In 2013, the Illinois legislature amended its criminal law on hunter or fisherman interference to include the use of a drone to interfere with the “lawful taking of wildlife or aquatic life.”\textsuperscript{43}

In 2016, Indiana similarly added a section, “Prohibition Against the Use of an Unmanned Aerial Vehicle to Aid in the taking of an Animal,” to its Fish and Wildlife code.\textsuperscript{44} The law forbids the use of a UAV to “search for, scout, locate, or detect a wild animal to which the hunting season applies as an aid to take the wild animal.”\textsuperscript{45} Violation of the prohibition is a class C infraction unless the violation is done in a knowingly and intentional manner, in which case it constitutes a class C misdemeanor.\textsuperscript{46}

Kansas, which had passed no drone legislation until 2016, took a small first step in regulating drone use by amending its existing Protection from Stalking Act to include certain uses of unmanned aerial systems.\textsuperscript{47} Under Kansas stalking law, the definition of harassment was expanded to include “any course of conduct carried out through the use of an unmanned aerial system over or near any dwelling, occupied vehicle, or other place where one may reasonably expect to be safe from uninvited intrusion or surveillance.”\textsuperscript{48}

By legislative action in 2014, Louisiana created the crime of Unlawful Use of an Unmanned Aircraft System and punishes by a minimum $500 fine and up to 6 months in jail the nongovernmental use of an unmanned aircraft system to surveil “a targeted facility.” Targeted facilities are defined to include petroleum and alumina refineries, chemical and rubber manufacturing facilities, and nuclear power electric generation facilities. Louisiana also passed a law in 2015 regulating the use of unmanned aerial systems in agriculture.

In 2016, the Louisiana State Legislature added substantially to its list of drone-related crimes. It amended its Resisting an Officer statute to include knowing interference with a “police cordon” and authorized police or fire personnel to disable the offending UAS if it endangers the safety of persons.\textsuperscript{49} In 2016, Louisiana also added the intentional use of a UAS over correctional facilities to the existing crime of Unlawful Use of an Unmanned Aircraft System,\textsuperscript{50} added schools to the existing list of “targeted facilities,”\textsuperscript{51} and added use of a UAS as a mechanism by which the existing crimes of Video Voyeurism,\textsuperscript{52} Peeping Tom,\textsuperscript{53} and Criminal Trespass\textsuperscript{54} could be committed.

\textsuperscript{42} Idaho Code Ann. § 36-1101 (West).
\textsuperscript{44} IC 14-22-6-16.
\textsuperscript{45} Id.
\textsuperscript{46} IC 14-22-38-1.
\textsuperscript{47} K.S.A. 60-31a02.
\textsuperscript{48} Id.
\textsuperscript{49} LSA-R.S. 14:108.
\textsuperscript{50} LSA-R.S. 14:337.
\textsuperscript{51} Id.
\textsuperscript{52} LSA-R.S. 14:283.
\textsuperscript{53} LSA-R.S. 14:284.
\textsuperscript{54} LSA-R.S. 14: 63.
In 2015, Michigan passed two pieces of legislation, one criminalizing the use of UAS to interfere with a person who is lawfully hunting or fishing and one making it illegal for anyone other than State Department of Natural Resources and Environmental Protection staff to take game or fish while using “an unmanned vehicle or unmanned device that uses aerodynamic forces to achieve flight or an unmanned vehicle or unmanned device that operates on the surface of water or under water.” The sum total of Michigan’s criminal justice regulation related to drones consists of these two statutes.

In Mississippi, the only foray into criminal justice–related drone legislation came in 2015, when it amended its existing Voyeurism statute to include peeping by use of “drone” and other electronic devices.

In 2015, Nevada made it a class D felony to weaponize an unmanned aerial vehicle and a class C felony to discharge a weaponized UAV. The state also created a number of other crimes related to UAV use. Unauthorized operation of a UAV within 500 feet of a critical facility or an airport is a misdemeanor in Nevada. The Nevada legislation added unmanned aerial vehicle to the definition of aircraft in its Operation of Aircraft While Under the Influence statute and includes operation of a UAV “with reckless disregard for the safety of other persons and with willful indifference to injuries that could result from such operation” in its definition of the misdemeanor crime of Dangerous Flying. Nevada also created a civil cause of action for trespass against anyone unlawfully flying a drone within 250 feet over property after having previously done the same and having been warned against it.

In New Hampshire, the enactment of criminal justice–related drone legislation has been limited to the 2015 passage of legislation prohibiting interference with the lawful taking of game or the surveillance of those lawfully taking game by use of an unmanned aerial vehicle other than by government agents in performance of their official duties.

Conversely, North Carolina has created more crimes related to unmanned aircraft system use than any other state. North Carolina, passing extensive drone legislation in 2014, made it a class 1 misdemeanor to operate a UAS for commercial purposes without authorization, to unlawfully disseminate images recorded via UAS to hunt or fish while using a UAS, and to commit a second offense of using a UAS to wrongfully interfere with the lawful taking of wildlife.

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57 Miss. Laws 2015, Ch. 489 (S.B. No. 2022), § 1, eff. July 1, 2015. Interestingly, this amendment to address peeping by use of technology also addresses issues related to the practice of “up-skirting.”
Felony crimes in North Carolina regarding UAS use include possessing a weaponized UAS (a class E felony)\(^{68}\) and disrupting the operation of or damaging a manned aircraft while in motion by using a UAS (a class H felony).\(^{69}\) North Carolina also provides for civil relief from unwarranted surveillance via unmanned aircraft system and provides for injunctive relief, actual damages, or $5,000 per wrongful photograph or video published, plus attorneys' fees and costs.\(^{70}\)

Oklahoma, making a first, limited venture into drone regulation in 2016, created a civil cause of action for designated wrongful operations of unmanned aircraft over an enumerated list of “critical infrastructure” facilities.\(^{71}\) The law, which took effect on November 1, 2016, excludes government entities and their representatives from liability in addition to owner operators of the critical infrastructure facilities and their designees.\(^{72}\)

In 2013, Oregon enacted legislation creating a number of drone crimes. It prohibited a public body from operating a drone that is weaponized or capable of directing a laser.\(^{73}\) Oregon made it a class A felony to possess or control a drone and to intentionally cause or attempt to cause the drone to interfere with aircraft in a number of different ways (fire a projectile at, direct a laser at, or crash into the aircraft) while in the air.\(^{74}\) The 2013 Oregon legislation makes it a class C felony to interfere with or gain unauthorized control over an unmanned aircraft system licensed by the FAA or operated by the U.S. Armed Forces.\(^{75}\) Oregon law also creates a cause of action for damages for certain unauthorized low-flying operations of unmanned aircraft systems over private property.\(^{76}\)

In 2016, Oregon expanded its 2013 prohibition against operation by a public body of a drone capable of being weaponized to include such operations by any persons.\(^{77}\) Through legislation in 2016, Oregon also created a class A violation for operating a UAS over or allowing it to come in contact with specifically enumerated critical infrastructures, including power, transportation, telecommunication, and correctional facilities.\(^{78}\)

Tennessee passed drone crimes legislation in 2014, 2015, and 2016. The 2014 Tennessee legislature set out a number of circumstances under which it is lawful to capture images while using an unmanned aircraft,\(^{79}\) including public safety and commercial uses, and then made it a class C misdemeanor to capture an image of an individual or privately owned property except as specifically allowed by law.\(^{80}\) In 2015, Tennessee criminalized the use of a drone over fireworks discharge sites, large open-air venues, and correctional facilities.\(^{81}\)

\(^{71}\) 2016 Ok. ENR. H. B. No. 2299.
\(^{72}\) Id.
\(^{75}\) Id.
\(^{78}\) Or. Laws 2016 Ch. 72, § 13 (West).
\(^{79}\) Tenn. Code Ann. § 70-4-302 (West).
\(^{81}\) Id.
In 2016, the Tennessee legislature added prohibitions against using drones within 250 feet of other critical infrastructure, including electrical, chemical, and petroleum facilities. The nonconsensual video surveillance by drone of persons lawfully hunting or fishing is also a class C misdemeanor in Tennessee.

In 2013, Texas passed extensive criminal justice–related drone legislation. Texas, like Tennessee, enumerates lawful uses of an unmanned aircraft to capture images and then makes it a class C misdemeanor to use unmanned aircraft to capture, possess, or distribute an image of a person or individual other than as allowed by law. It is a defense to the illegal use of unmanned aircraft to capture an image if the image has not been disclosed and is destroyed when the accused realizes the image violates the statute. Other Texas laws make it a class B misdemeanor to use unmanned aircraft in the state capitol complex in violation of rules promulgated by the complex director or to operate an unmanned aircraft lower than 400 feet above land containing enumerated critical infrastructure facilities. It is a class A misdemeanor in Texas to commit a second offense of unlawfully flying an unmanned aircraft over a critical infrastructure facility.

In 2016, Utah added drone crimes related to operation near wildfires to its already existing drone laws. Utah has made it a class A misdemeanor to operate a drone causing an aircraft fighting a wildfire to err in dropping its payload, a third-degree felony to crash into such an aircraft, and a second-degree felony to cause such an aircraft to crash. A second piece of legislation in 2016 amended the same statute to make it a class B misdemeanor to fly over an area designated as a wildfire scene and authorizes certain law enforcement officers to neutralize unmanned aircraft flying in violation of the law.

In 2016, Vermont enacted its first drone legislation concerning citizen use. It prohibited the weaponization of drones. In Vermont, it is a crime punishable by up to 1 year in jail and up to a $1,000 fine to “[e]quip a drone with a dangerous or deadly weapon or fire a projectile from a drone.”

In 2015, the West Virginia legislature created crimes related to the use of drones to take game. It amended its existing statute, Unlawful methods of hunting and fishing and other unlawful acts, to make it a misdemeanor to hunt by firing from a drone or by using a drone to herd animals.

In 2014, Wisconsin created two drone crimes that relate to citizen use. The legislature made it a felony to possess a weaponized drone, exempting armed forces members acting in their official capacity, and also made it a class A misdemeanor in Wisconsin to use a drone to observe or

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86 Tex. Govt. Code Ann. § 423.003 (c) (West).
90 Id.
91 Utah Code Ann. § 65A-3-2.5 (West).
record a person in a location where the person has a reasonable expectation of privacy.\textsuperscript{96} In 2016, Wisconsin added two new drone prohibitions, the first by amending its Interference with Hunting, Fishing, or Trapping statute to include interference by use of a drone\textsuperscript{97} and the second setting a $5,000 penalty for the unlawful operation of a drone over the grounds of any correctional institution.\textsuperscript{98}

\section*{B. Law Enforcement Use: Regulating Investigation Power}


Although Alaska has created no drone crimes, it has regulated police use of UAS. The Alaska 2014 legislation expressly prohibits law enforcement use of unmanned aircraft systems except as otherwise provided in Alaska law.\textsuperscript{99} The law also requires police agencies that utilize UAS to adopt procedures for their use following detailed requirements set out in the statute.\textsuperscript{100} The Alaska provisions for police use of UAS are short and simple. Police may use drones to collect evidence in a criminal investigation pursuant to a search warrant or as otherwise allowed by judicially recognized exception to the search warrant requirement.\textsuperscript{101} Police may also make use of UAS in a situation not designed to obtain evidence for use in a criminal investigation.\textsuperscript{102}

Alaska law forbids the retention of an image obtained through police use of UAS unless the image is necessary to an investigation/prosecution, necessary for training purposes, or required to be kept by statute.\textsuperscript{103} Nonretainable images are specifically deemed confidential and not public record.\textsuperscript{104}

Florida was among the earliest states to regulate police use of drones. In 2013, it expressly prohibited law enforcement from using drones to gather evidence except in specifically enumerated circumstances.\textsuperscript{105} Exceptions include the following: countering the high risk of a terrorist attack,\textsuperscript{106} with a warrant,\textsuperscript{107} other exigent circumstances including but not limited to protection of life, prevention of serious property damage, to prevent escape or destruction of evidence, or to search for missing persons.\textsuperscript{108} Florida allows other lawful drone uses not related to commerce and other agency business.\textsuperscript{109} Remedies for a law enforcement violation of Florida

\textsuperscript{96} Wis. Stat. Ann. § 942.10 (West).
\textsuperscript{97} Wis. Stat. Ann. § 29.083 (West).
\textsuperscript{99} Alaska Stat. § 18.65.900.
\textsuperscript{100} Alaska Stat. § 18.65.901.
\textsuperscript{101} Alaska Stat. § 18.65.902(1).
\textsuperscript{102} Alaska Stat. § 18.65.902(2).
\textsuperscript{103} Alaska Stat. § 18.65.903(a).
\textsuperscript{104} Alaska Stat. § 18.65.903(b).
TABLE 2: State Statutes That Regulate Law Enforcement Use of UAS

<table>
<thead>
<tr>
<th>State</th>
<th>Warrant Required</th>
<th>Enumerated Warrant Exceptions</th>
<th>Exceptions per Existing Jurisprudence</th>
<th>Evidence Excluded</th>
<th>Civil Cause of Action</th>
<th>Use Report Required</th>
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drone statutes include a civil cause of action against the agency\textsuperscript{110} and a prohibition against use of any evidence obtained in violation of drone laws in a criminal prosecution\textsuperscript{111}.

In 2013, the Idaho legislature regulated unmanned aircraft use by police via one fairly brief statute.\textsuperscript{112} Related to law enforcement, use of an unmanned aircraft system is prohibited “[a]bsent a warrant, and except for emergency response for safety, search and rescue or controlled substance investigations.”\textsuperscript{113} Idaho law allows consensual UAS surveillance of a dwelling and its curtilage\textsuperscript{114} or of a person.\textsuperscript{115} Remedy for violation of the Idaho UAS law is a civil cause of action for damages against the violating person or agency in the sum of actual damages or $1,000, plus attorneys’ fees and costs.\textsuperscript{116} The Idaho statute also provides for some private use of UAS.\textsuperscript{117}

Illinois enacted an extensive drone regulation scheme in 2013. It prohibits law enforcement agencies from gathering information by drone except in specific enumerated circumstances.\textsuperscript{118} Allowable law enforcement uses for drones in Illinois include countering high risk of terrorist

\textsuperscript{112} Idaho Code Ann. § 21-213 (West).
\textsuperscript{113} Idaho Code Ann. § 21-213 (2)(a) (West).
\textsuperscript{114} Idaho Code Ann. § 21-213 (2)(a)(i) (West).
\textsuperscript{115} Idaho Code Ann. § 21-213 (2)(b) (West).
\textsuperscript{116} Idaho Code Ann. § 21-213 (3) (West).
\textsuperscript{117} Idaho Code Ann. § 21-213 (West).

Under Illinois law, evidence obtained by police in violation of Illinois statute is presumptively inadmissible in court unless the state can show it meets a judicially recognized exception to the exclusionary rule.\footnote{725 Ill. Comp. Stat. Ann. § 167/15-6 (West).} Police agencies in Illinois owning drones must report the number of drones owned to the Illinois Criminal Justice Information Authority, and an annual list detailing police agency drone ownership is made publicly available.\footnote{725 Ill. Comp. Stat. Ann. § 167/15-7 (West).}

Illinois is one of the few states that specifically regulate the retention and disclosure of information collected by drone. Information obtained via drone by a law enforcement agency must be destroyed within 30 days unless it contains evidence of a crime or is relevant to an ongoing trial or investigation.\footnote{725 Ill. Comp. Stat. Ann. § 167/15-8 (West).} Additionally, a law enforcement agency is forbidden to share information gathered by drone except with a supervisor of another agency where it has met a threshold of reasonable suspicion of criminal activity or relates to an ongoing criminal investigation.\footnote{725 Ill. Comp. Stat. Ann. § 167/15-9 (West).}

In 2014, Illinois added to its existing laws regulating law enforcement use of drones. The existing Freedom from Drone Surveillance Act was amended to authorize police to use drones during a disaster or public health emergency\footnote{725 Ill. Comp. Stat. Ann. § 167/15-10 (West).} and added a section that prohibits law enforcement from obtaining evidence through use of a drone owned by a private citizen, but it allows a private citizen to voluntarily provide evidence to police that the private citizen acquired independently of police involvement.\footnote{725 Ill. Comp. Stat. Ann. § 167/15-11 (West).} The 2014 legislation also specifically states that any information acquired from the independent action of private citizens is subject to the same retention and disclosure requirements as information obtained by the police via drone.\footnote{725 Ill. Comp. Stat. Ann. § 167/15-12 (West).}

As a part of a broad piece of surveillance and privacy legislation, Indiana enacted a requirement that law enforcement officers obtain a search warrant before use of an unmanned aerial vehicle except with regard to specific enumerated exceptions.\footnote{725 Ill. Comp. Stat. Ann. § 167/15-13 (West).} The exceptions include exigent circumstances requiring a warrantless search (presumably as otherwise set out in existing jurisprudence), high risk of a terrorist attack, for search-and-rescue or recovery operations, in conjunction with a natural disaster or to perform a survey for noncriminal justice purposes, or with property owner consent.\footnote{725 Ill. Comp. Stat. Ann. § 167/15-14 (West).} Indiana specifically excludes information, including derivative
information, unlawfully obtained via UAV from being used in any administrative or judicial proceeding.\textsuperscript{133} Indiana also added UAVs to its definition of a tracking device.\textsuperscript{134}

In 2014, Iowa passed a brief item of legislation addressing three points about police use of an unmanned aerial vehicle. First, Iowa prohibited use of a UAV for purposes of traffic enforcement.\textsuperscript{135} It also prohibited the use of evidence obtained by UAV in any civil or criminal proceeding absent a search warrant or other authorization under state and federal law.\textsuperscript{136} Lastly, Iowa mandated the department of public safety, in consultation with various law enforcement agencies, to report on whether a modification of the criminal code was advisable to regulate UAV use and to develop suggested guidelines for the use of UAVs in Iowa.\textsuperscript{137}

In 2015, Maine dealt with police drone use in a single code section, “Regulation of unmanned aerial vehicles.”\textsuperscript{138} Maine’s law requires that police agencies receive permission from their governing body before acquiring a UAV.\textsuperscript{139} The law also mandates that the Maine Criminal Justice Academy, with advice from the state attorney general, create policies and protocols for law enforcement use of UAVs\textsuperscript{140} and requires that police agencies be in compliance with those policies and protocols before using a UAV.\textsuperscript{141} Data collection and reporting concerning each use of UAV by law enforcement are also required.\textsuperscript{142}

Maine law requires that police officers either have a warrant for UAV use for criminal investigations or that the use fall within a recognized warrant exception,\textsuperscript{143} and it prohibits police from weaponizing UAVs.\textsuperscript{144} The law specifically authorizes police use of UAVs for search-and-rescue operations necessary to protect persons, for related training, and for noncriminal investigative functions like assessment of accidents, fires, floods, or storm damage.\textsuperscript{145} Maine law also approves emergency use of UAVs by law enforcement when authorized by the head of the agency or the governor.\textsuperscript{146}

In Montana, the sole item of legislation related to unmanned aerial vehicle use is a brief statute passed in 2013 addressing only law enforcement use. The Montana law prohibits the use at trial of evidence obtained by unmanned aerial vehicle without a warrant or pursuant to a judicially recognized search warrant exception.\textsuperscript{147} The Montana law does allow information obtained from the warrantless monitoring of public lands or international borders to be used in an affidavit of probable cause to support a search warrant.\textsuperscript{148}

\textsuperscript{133} Ind. Code Ann. § 35-33-5-10 (West).
\textsuperscript{134} Ind. Code Ann. § 35-31.5-2-227.5 (West).
\textsuperscript{135} Iowa Code Ann. § 321.492B (West).
\textsuperscript{136} Iowa Code Ann. § 808.15 (West).
\textsuperscript{137} Iowa Acts 2014, Chap. 1111.
\textsuperscript{144} \textit{Id}.
\textsuperscript{145} \textit{Id}.
\textsuperscript{146} \textit{Id}.
\textsuperscript{147} Mont. Code Ann. § 46-5-109 (West).
\textsuperscript{148} Mont. Code Ann. § 46-5-109(2) (West).
In 2015, Nevada legislation regulated the use of unmanned aerial vehicles by law enforcement.\textsuperscript{149} Nevada’s statute permits law enforcement use of UAVs except as expressly prohibited.\textsuperscript{150} These prohibitions include a location where a person has a reasonable expectation of privacy except by warrant issued for a limited period of time not to exceed 10 days.\textsuperscript{151} The Nevada statute then goes on to list specifically authorized warrantless police uses of a UAV to include exigent circumstances surrounding a crime that is occurring or about to occur, by property owner consent, for purpose of certain search-and-rescue operations, declared state of emergency, and to combat terrorism, with reporting requirements attached.\textsuperscript{152}

Nevada law also specifically prohibits the use of information unlawfully obtained by UAV from being used in any administrative, adjudicatory, or judicial proceeding or to establish reasonable suspicion or probable cause.\textsuperscript{153} A Nevada public agency (agency, office, bureau, board, commission, department or division of the state, or a political subdivision of the state other than a law enforcement agency\textsuperscript{154}) may not use a UAV to assist police in conducting a criminal investigation, and any information collected by a public agency by UAV may likewise not be used in any administrative, adjudicatory, or judicial proceeding or to establish reasonable suspicion or probable cause.\textsuperscript{155}

In 2014, North Carolina enacted one of the more comprehensive drone legislative schemes. In addition to creating numerous drone-related crimes (discussed previously), North Carolina enumerates specific circumstances under which police use of an unmanned aircraft system is allowed, including pursuant to a warrant, to counter a terrorist attack under certain specific parameters, of an area in plain view, or under exigent circumstances to protect life, prevent serious damage to property, prevent escape, or conduct pursuit of a suspect, prevent the destruction of evidence, or to search for a missing person.\textsuperscript{156} North Carolina also permits law enforcement to use UAVs to undertake photography of gatherings, whether on public or private land, to which the public is invited.\textsuperscript{157}

Under North Carolina law, unlawfully obtained UAV evidence is excluded from use in a criminal prosecution but allows a good faith exception.\textsuperscript{158} The law also creates a civil cause of action against a state agency, as well as a private citizen or other entity, that conducts unwarranted surveillance via UAV.\textsuperscript{159} Damages may be either actual or $5,000 per wrongfully published photograph or video and may include attorneys’ fees.\textsuperscript{160} North Carolina law also provides injunctive relief from unwarranted UAV surveillance.\textsuperscript{161}

\textsuperscript{149} Ne\textsuperscript{v} Rev. Stat. Ann. AB 239 § 20 (West).
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Ne\textsuperscript{v} Rev. Stat. Ann. § 493.020 (West).
\textsuperscript{155} Ne\textsuperscript{v} Rev. Stat. Ann. AB 239 § 21 (West).
\textsuperscript{157} Id.
\textsuperscript{160} Id.
\textsuperscript{161} Id.
North Dakota’s drone law, passed in 2015, simply prohibits information obtained by an unmanned aerial vehicle system from being used in any prosecution, proceeding, or affidavit of probable cause in support of a search warrant unless obtained via warrant or exception to the search warrant requirement.\textsuperscript{162} North Dakota uniquely requires UAV warrants to include a data collection statement concerning details about the UAV flight, maximum flight period, and how information will be collected, used, retained, or destroyed.\textsuperscript{163}

The North Dakota statute also enumerates exceptions, allowing the use of UAVs to patrol borders, by police to prevent bodily harm or imminent danger to life, in a catastrophe that is environmental or weather-related, or for certain research, education, training, testing, or development-related applications.\textsuperscript{164} North Dakota expressly prohibits law enforcement weaponization of UAVs and forbids police to authorize the use of a UAV by one private person to surveil another private person without consent.\textsuperscript{165} The statute also bans UAV “[s]urveillance of the lawful exercise of constitutional rights unless the surveillance is otherwise allowed.”\textsuperscript{166}

In 2013, Oregon, which also has fairly extensive drone crimes legislation, enacted a broad piece of legislation regulating police use of drones. The state prohibits law enforcement use of an unmanned aircraft system to acquire information except in specific circumstances enumerated by statute\textsuperscript{167} and mandates that evidence obtained in violation of the Oregon UAS laws is not admissible at any judicial, administrative, or other adjudicative proceeding or in arbitration.\textsuperscript{168} Likewise, such illegally obtained evidence may not be used to establish reasonable suspicion or probable cause that a crime has occurred.\textsuperscript{169}

Specific circumstances under which Oregon authorizes police UAS use include surveillance pursuant to a warrant\textsuperscript{170} or where law enforcement has probable cause to believe a crime has been, is being, or is about to be committed and there is not time to obtain a warrant.\textsuperscript{171} UAV search warrants under Oregon law may not be issued for more than 30 days and are renewable.\textsuperscript{172}

UAVs may also be used by police with written consent of the individual or the property owner surveilled;\textsuperscript{173} for search-and-rescue activities, and in states of emergency\textsuperscript{174} subject to certain reporting requirements. Oregon also allows police limited use of UAS to reconstruct or physically assess a crime scene\textsuperscript{175} and for law enforcement training purposes; however, no information acquired during training may be used in court or as a basis for reasonable suspicion or probable

\textsuperscript{162} N.D. Cent. Code Ann. § 29-29.4-02 (West).
\textsuperscript{163} N.D. Cent. Code Ann. § 29-29.4-03 (West).
\textsuperscript{164} N.D. Cent. Code Ann. § 29-29.4-04 (West).
\textsuperscript{165} N.D. Cent. Code Ann. § 29-29.4-05 (West).
\textsuperscript{166} Id.
\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{174} Id.
cause that a crime has been committed. Law enforcement agencies in Oregon must report drone ownership to the Oregon Department of Aviation, as well as certain details about drone use.

In 2016, Oregon added to its earlier police regulation of drones by requiring that all public bodies operating unmanned aircraft systems establish detailed policies and procedures that include rules about use, storage, retention, and sharing of recorded data and to make such rules available to the public.

Tennessee was one of the first states to deal with police use of drones, passing legislation in early 2013. Tennessee law prohibits the use of drones by law enforcement except under specific enumerated circumstances. Conditions under which police in Tennessee are allowed to use drones to gather evidence or other information include pursuant to a warrant, to counter a high risk of a terrorist attack, in exigent circumstances to save life, for continuous aerial surveillance of a fugitive, escapee, or hostage situation, or to search for a missing person. Tennessee law forbids dissemination and requires prompt destruction of information collected that is collateral to actual targets.

Additionally, Tennessee drone law specifically identifies police use of a drone as a search under Fourth Amendment jurisprudence and requires that all drone searches adhere to search-and-seizure requirements of the federal and state constitutions. Tennessee law expressly prohibits evidence collected in violation of the statute to be used in any criminal prosecution in the state.

In its extensive 2013 drone legislation, Texas not only established a number of drone crimes, discussed above, but also regulated police use of drones. Texas law enumerates 21 permissive uses of an unmanned aircraft to capture an image, and one such use is “pursuant to a valid search or arrest warrant.” Other statutory permissive uses of an unmanned aircraft to capture an image that relate to law enforcement include immediate pursuit of a felon, documentation of a felony crime scene, investigation of the scene of a human fatality or a motor vehicle accident resulting in death or serious bodily injury or occurring on a state or federal highway, searching for a missing person, tactical operations that risk threat to human life, and certain private property

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180 Id.
181 Id.
with owner permission.\textsuperscript{191} State or local law enforcement may additionally capture UAS images to assist in certain state of emergency responsivities,\textsuperscript{192} and to lawfully collect air quality data.\textsuperscript{193}

Other permissible uses of drones in Texas, not specific to law enforcement but that might come within law enforcement duties, include surveillance at the scene of a hazardous waste spill,\textsuperscript{194} to aid in fire suppression,\textsuperscript{195} to rescue a person who is in danger,\textsuperscript{196} surveillance of real property within 25 miles of the U.S. border,\textsuperscript{197} public property and persons on public property,\textsuperscript{198} for protection of oil pipeline and rig safety,\textsuperscript{199} and for port authority security.\textsuperscript{200} Use of unmanned aircraft to capture an image in Texas, other than those authorized by statute, whether by public or by government agents, is a crime, as outlined previously. Texas has also mandated the Department of Public Safety to create rules for the use of unmanned aircraft in the state\textsuperscript{201} and requires specific, detailed biennial reports to the governor, lieutenant governor, and members of the legislature on law enforcement uses of unmanned aircraft.\textsuperscript{202}

Utah passed legislation in 2014 providing oversight in police use of drones. Utah’s law regulating police use of UAVs prohibits police from obtaining, receiving, or using unmanned aircraft system data unless under specific enumerated conditions.\textsuperscript{203} Police may of course obtain UAV data under the terms of a search warrant but also pursuant to judicially established search warrant exceptions or to search for a missing person in an area where there is no expectation of privacy.\textsuperscript{204}

Under Utah statute, a law enforcement agency may obtain UAS surveillance data collected by a nongovernmental actor if it appears to relate to the commission of a crime and the nongovernmental actor in good faith believes disclosure is necessary to protect life or remedy an emergency.\textsuperscript{205} Police in Utah may also operate UAS at a testing site but must destroy the data collected within a reasonable amount of time after use.\textsuperscript{206} Data collected during a search for a lost or missing person must also be destroyed within a reasonable amount of time.\textsuperscript{207} Utah has additional provisions regulating the retention and disclosure of data pertaining to persons who are not the target of an investigation.\textsuperscript{208} The state has extensive requirements for police agencies to

\textsuperscript{192} Tex. Govt. Code Ann. § 423.002 (a)(9)(A) & (B) (West).
\textsuperscript{201} Tex. Govt. Code Ann. § 423.007 (West).
\textsuperscript{202} Tex. Govt. Code Ann. § 423.008 (West).
\textsuperscript{203} Utah Code Ann. § 63G-18-103(1) (West).
\textsuperscript{204} Id.
\textsuperscript{205} Utah Code Ann. § 63G-18-103(2) (West).
\textsuperscript{206} Utah Code Ann. § 63G-18-103(3) (West).
\textsuperscript{207} Id.
\textsuperscript{208} Utah Code Ann. § 63G-18-104 (West).
report details of UAS use. The report is made to the Department of Public Safety and is publicized on the department’s websites.\(^{209}\)

In 2016, Vermont passed a law related to the law enforcement use of drones. Vermont’s regulation of police use of drones, which became effective on October 1, 2016, requires that police officers using drones for “the investigation, detection, or prosecution of a crime” must obtain a warrant or have a judicially recognized exception to the warrant requirement.\(^{210}\) Uniquely, if police use a drone in exigent circumstances, without a warrant pursuant to a judicially recognized warrant exception, Vermont requires that they obtain a search warrant within 48 hours after the start of drone use, and if the court fails to grant the warrant, the drone use must end and the information gathered be destroyed.\(^{211}\) Use of a drone for investigatory purposes pursuant to a warrant or a judicially recognized exception must be conducted in a way intended to limit the data collected to the target of the surveillance and to avoid collecting data regarding nontargeted persons or places.\(^{212}\)

Vermont law expressly forbids police drone use to “gather or retain data on private citizens peacefully exercising their constitutional rights of free speech and assembly”\(^{213}\) unless it is done pursuant to a warrant or for observational, public safety purposes where data is not gathered or retained.\(^{214}\) Also unique to the Vermont statutes is an express prohibition against the use of “facial recognition or any other biometric matching technology” on data collected by drones related to any person or place not a target of surveillance.\(^{215}\) Vermont law expressly allows the warrantless use of a drone for noninvestigative purposes such as search and rescue and the assessment of accidents, fires, floods, and storm damage.\(^{216}\) Evidence gathered in violation of Vermont’s Law Enforcement Use of Drone statute is not admissible in any judicial or administrative matter.\(^{217}\)

On April 3, 2013, Virginia was the first state to enact drone legislation when it prohibited drone use for state law enforcement purposes, excepting a few public safety uses, until July 1, 2015, to allow time to investigate and develop laws regulating investigatory law enforcement drone use.\(^{218}\) Then, in April of 2015, Virginia legislators passed a law, Use of Unmanned Aircraft Systems by Public Bodies,\(^{219}\) requiring that any investigative use of UAS by a state agency be done pursuant to a search warrant or an administrative/inspection warrant. Exceptions to the search warrant requirement were enumerated and relate to amber and blue alerts, immediate danger to persons, and consensual use, but no law enforcement purposes such as traffic, flood and wildfire assessment, or certain military training uses.\(^{220}\) Virginia has not yet created any drone crimes.

In addition to the drone-related crimes discussed earlier, Wisconsin has a brief, simple statute regulating law enforcement use of drones. Under Wisconsin law, police must obtain a warrant to

\(^{220}\) Id.
use a drone to collect information relative to a criminal investigation if they are surveilling a place where a person has a reasonable expectation of privacy. Wisconsin law provides specific exceptions to the search warrant requirement for the use of drones to prevent danger to an individual, prevent imminent destruction of evidence, to surveil a location to assist in serving an arrest warrant, to locate an escaped prisoner, or to assist in a search-and-rescue operation.

VIII. Observations on Legislative Actions to Date
In the 4 years since the federal government declared its intent to integrate drones into the national airspace, there has been a flurry of legislative action surrounding the permissible use of drones, primarily at the state level. The federal government, although it has considered some bills, including proposals to regulate police use of drones and ban weaponization of drones, has yet to act on criminal justice–related drone use issues. However, as already detailed in this article, a wide variety of state legislation has been enacted creating drone crimes and regulating police use of drones.

When one surveys the existing state legislative actions to date, the first and most obvious impression is that there is little uniformity from state to state concerning criminal justice drone legislation. Nearly half of the states, 23 to be precise, have not enacted any criminal justice–related drone legislation at all. The states that have enacted such legislation range from West Virginia, which has passed only one law creating hunting and fishing drone-related crimes, to Oregon and Tennessee, which have created a number of drone crimes and also extensively legislated police use of drones, and there is a wide variety of legislative enactment in between. Even when states have enacted drone laws on the same subjects, the specific content of the laws varies widely.

The only universal provision in the legislation examined in this article is found within statutes dealing with law enforcement use of drones; all use some mechanism to require generally that police drone use must be pursuant to a warrant, and all regulating states provide some mechanism for exceptions to the warrant requirement. Some specifically delineate exceptions to the warrant requirement, some list lawful uses and require a warrant for remaining uses, and some tie the warrant requirement to the existing search warrant jurisprudence. However, other provisions surrounding the regulation of police use of drones vary among the 18 states that have passed such legislation.

IX. Anticipated Future Legal Developments
Because federal deregulation of the national airspace for drone use is relatively new and the legislative provisions on drone use are even newer, virtually no case law discussing police use of drones exists, and there is currently no case law at all interpreting recently legislated drone crimes. It will likely take many years for the first drone cases to make their way through the trial and appellate court systems at the state and federal level, and not until then will we have any real guidance as to how such jurisprudence will develop.

One obvious question regarding future legal development in criminal justice–related drone law is whether or not the federal government will eventually pass some legislation. Potential federal legislation could come in two related areas, acting either to preempt some state authority

222 Id.
to regulate criminal justice–related drone issues or to create criminal justice–related drone laws that relate only to the federal government — for example, federal drone crimes and regulation of the federal law enforcement use of drones for investigative purposes.

The notion that the federal government will act to preempt state authority to create state drone crimes or to regulate the state law enforcement use of drones seems unlikely. If such preemption were to occur, it makes sense that it would have been done soon after the 2012 deregulation process had begun instead of 4 years later, when 27 states had already enacted a large number of laws only to be subsequently preempted. Also, the fact that Congress has not even been able to move such laws out of committee in previous attempts makes it doubtful that such laws will be forthcoming.

It is, however, not unlikely that the federal government will eventually create federal drone crimes or regulate drone use by federal law enforcement because such legislation is exclusively within its jurisdiction and would not affect the state drone legislation that has accumulated during 4 years. Although the federal law enforcement use of drones could be regulated via existing Fourth Amendment search and seizure jurisprudence, any federal drone crimes would of course have to come from legislative enactment.

The future course of state legislative actions seems impossible to predict. It is probably safe to say that there will be additional criminal justice–related drone legislation in the years to come, but exactly what kind and how much is uncertain. Much will likely depend upon whether the prophesied flood of privacy-invading drone use feared by some legislators actually comes to pass, or perhaps on whether one high-profile drone case motivates additional state legislation. In the absence of a visible, intrusive surge in drone use by police or private citizens, it seems likely that interest in drone legislation will dwindle as time passes.

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Grand Juries and Cases of Police Use of Deadly Force: Are Prosecutors Opening a Closed Door?

Joseph P. Conti

Abstract
In recent years, considerable national attention has been focused upon cases in which police officers used deadly force that resulted in the death of private citizens. The officers often contended that the use of deadly force was justified under the circumstances. Prosecutors then presented these cases to grand juries to determine whether criminal prosecutions were warranted. Some prosecutors have elected to provide full grand jury reviews that include the presentation of exculpatory evidence or at least evidence favorable to the police. Although prosecutors have no constitutional obligation to provide such reviews, those who elect to provide full grand jury reviews to police potentially open the door to the imposition of legal and ethical obligations to provide such reviews to private citizens who have used deadly force that resulted in the death of another person and who, like the police officers, contend that the use of deadly force was justified under the circumstances.¹

Keywords
grand jury, deadly force, prosecution, policing

¹ The information contained within this article does not provide and should not be relied upon as legal advice or opinion. This article should not be used or relied upon to address any particular facts or circumstances before a lawyer has been consulted. The information and opinions set forth within this article may or may not reflect the views of Edinboro University.

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I. Introduction
At the outset, clarification of certain terminology should be undertaken. Throughout this article, references will be made to "police officer cases," "private citizen cases," and "full grand jury reviews." As used within this article, the term "police officer cases" refers to those instances in which a police officer during the course of performing his or her law enforcement duties used deadly force that resulted in the death of a person. Further, the police officer has claimed that the use of deadly force was justifiable under the circumstances of the case. The term "private citizen cases" refers to those instances in which a private citizen used deadly force that resulted in the death of a person. Like the police officer, the private citizen has claimed that the use of deadly force was justifiable under the circumstances of the case. Both types of cases entail the potential misuse of deadly force that resulted in the death of a person and corresponding claims by the actor that the use of deadly force was justifiable under the circumstances. It is imperative to keep in mind when reviewing this article that "private citizen cases" do not include any other forms of cases in which private citizens may be facing criminal liability. Finally, as used within this article, the term "full grand jury review" involves the presentation by prosecutors of all relevant evidence pertaining to the use of deadly force by a suspect, including but not limited to evidence submitted by the suspect for review and consideration by the grand jury, evidence that is exculpatory in nature, and/or evidence that is favorable to the suspect even if not exculpatory in nature.

In recent years, considerable national public and media attention has been focused upon police officer cases. In response to community demands for reviews in those cases, some prosecutors through the lawful exercise of their discretion have resorted to presenting the cases to grand juries to determine whether criminal prosecutions of the police officers are warranted. The traditional role of grand juries has not been to review evidence that is either exculpatory in nature or at least favorable to the suspect. Indeed, the Supreme Court of the United States (hereinafter referred to as "The Court") to date has not required prosecutors to present such evidence to grand juries. Yet, the public has become keenly aware of the fact that some prosecutors have elected to present exculpatory evidence to grand juries for consideration in police officer cases.

Over the years, considerable scholarly attention has been given to the use of grand jury proceedings and the disclosure of exculpatory evidence in grand jury proceedings. Some have called for the complete elimination of any opportunity to have cases involving police officers presented to grand juries for review. For reasons largely different from those set forth in this article, it has also been argued that a full grand jury process should be extended to all potential criminal cases against private citizens, or at least those involving felonies, as well as to a wide range of cases involving potential criminal activity by police officers. An argument has also been proffered for the amendment of Rule 6 of the Federal Rules of Criminal Procedure to require the disclosure of exculpatory evidence in felony federal grand jury proceedings. Finally, an argument

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2 See Kate Levine, How We Prosecute the Police, 104 Geo. L. J. 745, 749 footnote 15 (2016).
3 Id., at 745-776.
has been advanced that in all state grand jury proceedings, prosecutors should be required to present all substantial and admissible exculpatory evidence.\(^5\)

The purpose of this article is not to advocate the wholesale abolition of grand jury proceedings. As well, the purpose of this article is not to advocate the use of full grand jury reviews in all felony and misdemeanor cases at the state level. Viable constitutional arguments for such an approach are not likely to exist. Also, the nationwide use of full grand jury reviews in millions of cases each year would be quite costly and unmanageable. Moreover, this article is not intended to argue that the presentation of exculpatory evidence in police officer cases is, in and of itself, inappropriate.

This article does, however, focus upon the constitutional and ethical implications of a top prosecutor's decision to use full grand jury reviews to address the potential criminal liability of police officers in police officer cases, yet to deny full grand jury reviews to private citizens in private citizen cases. Police officer cases have recently received substantial national attention, and the manner in which they are handled by prosecutors has serious constitutional and ethical implications, as well as serious implications for the level of confidence in our criminal justice system that the public maintains.

As noted previously, the traditional role of grand juries has not been to review evidence that is either exculpatory in nature or at least favorable to a suspect. The Court has determined as a general rule that prosecutors are not required to present such evidence to grand juries regardless of the identity or circumstances of the defendant. However, although no federal constitutional provision requires them to do so, some prosecutors have elected to employ full grand jury reviews in police officer cases by presenting, along with other relevant evidence, evidence that is exculpatory in nature or at least favorable to the police officers. That approach to police officer cases raises an important legal and ethical question: Once prosecutors have themselves elected to transform the grand jury process from its traditional role to a more expanded role by providing full grand jury reviews in police officer cases, what legally and ethically viable basis exists to allow those same prosecutors to deny full grand jury reviews in private citizen cases?

This article examines the realistic prospect that prosecutors who provide full grand jury reviews in police officer cases open the door to the imposition of legal and ethical obligations to provide full grand jury reviews in private citizen cases in which private citizens, like the police officers, contend that their use of deadly force was justified under the circumstances. Essentially, there are significant legal and ethical reasons to conclude that once prosecutors resort to the use of full grand jury reviews in police officer cases, they may have created a corresponding obligation to provide the same reviews in private citizen cases. It is worthy of note that there are no case decisions that directly address this particular legal and ethical issue. Nevertheless, to examine the legal and ethical implications of providing full grand jury reviews in police officer cases, an effort has been undertaken to extrapolate from existing case decisions.

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II. The Transformation of Grand Jury Proceedings Analysis

A. Traditional Grand Juries and the Disclosure of Exculpatory Evidence

Within the United States, either of two types of grand jury is employed. One form of grand jury conducts investigations and ultimately decides whether to recommend to the prosecutor that a particular person be charged with criminal offenses. The recommendation to the prosecutor is set forth in a legal document commonly known as a presentment.\(^6\) A second form of grand jury examines testimony and evidence ultimately to decide whether probable cause for a prosecution exists. If it determines that probable cause does exist, the grand jury issues an indictment setting forth the charges. If it determines that probable cause does not exist, the grand jury issues a no bill.\(^7\) Prosecutors can use either form of grand jury to address police officer cases and private citizen cases. In addition, in either form of grand jury proceeding, the traditional role of the prosecutor is to serve as the government representative and is the only person involved in conducting the proceedings. Defense counsel is not present during the proceedings, and the suspect is not permitted to be present unless he or she has received a subpoena to appear and testify. The prosecutor is permitted to select the evidence that will be received and reviewed by the grand jury. In essence, the prosecutor controls the grand jury’s access to information.\(^8\) Finally, grand jury proceedings are not open to the public and are conducted in secret.\(^9\)

The Court has, through the Fourteenth Amendment Due Process provision, incorporated the Fifth Amendment Grand Jury provision and made it applicable to the states.\(^10\) Therefore, the states are free to implement a grand jury system or to proceed by criminal information.\(^11\) In 49 states plus the District of Columbia, criminal justice systems are maintained that either require or at least permit the use of grand juries by prosecutors to obtain indictments.\(^12\) Specifically, 23 of the 49 states and the District of Columbia require grand jury indictments for most or all felony offenses,\(^13\) and 25 of the 49 states authorize the option of seeking grand jury indictments for most felonies.\(^14\) Finally, Pennsylvania, the last of the 49 states, allows prosecutors the option of pursuing

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\(^7\) Id. See also Ali Lombardo, The Grand Jury and Exculpatory Evidence: Should the Prosecutor Be Required to Disclose Exculpatory Evidence to the Grand Jury, 48 Clev. St. L. Rev. 829, 835 (2000).
\(^8\) See Neely, supra, at 181.
\(^12\) See Neubauer and Fradella, supra, at 279 (Cengage, 12th Edition, 2015).
\(^13\) Id. (The 23 states that require grand jury indictments are Alabama, Alaska, Delaware, Florida, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Virginia, and West Virginia.)
\(^14\) Id. (The 25 states that have a grand jury option are Arizona, Arkansas, California, Colorado, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Michigan, Montana, Nebraska, Nevada, New Mexico, Oklahoma, Oregon, South Dakota, Utah, Vermont, Washington, Wisconsin, and Wyoming.)
grand jury indictments when witness intimidation is an issue.\textsuperscript{15} Connecticut is the only state in the country that has abolished the use of grand jury indictments.\textsuperscript{16} In 45 states, the top prosecutor at the county level who is authorized to use grand jury proceedings is an elected district attorney or a county prosecutor.\textsuperscript{17}

On the grounds that it has a limited supervisory role in federal court proceedings, The Court in \textit{United States v. Williams}\textsuperscript{18} declined to impose a constitutional requirement for federal prosecutors to disclose exculpatory evidence in grand jury proceedings.\textsuperscript{19} For a better understanding of the importance and relevance of The Court’s decision in \textit{United States v. Williams}, a brief review of the legal history leading up that case is in order. In 1987, The United States Court of Appeals for the Tenth Circuit addressed the case of \textit{United States v. Page}.\textsuperscript{20} The Circuit Court reviewed a claim by the defendant that his conviction should be set aside on the basis that the prosecutor failed to present exculpatory evidence to the grand jury that issued the indictment.\textsuperscript{21} The Circuit Court reviewed the legal history surrounding the issue of whether prosecutors were required under the Constitution to present exculpatory evidence to a grand jury. Specifically, the Circuit Court noted that two views existed within the United States Courts of Appeals.

The view of some courts was that prosecutors had no constitutional obligation to present exculpatory evidence to a grand jury.\textsuperscript{22} That view was based upon the understanding that the grand jury has traditionally been required to determine whether probable cause exists to support a prosecution, not to determine the guilt or innocence of the potential defendant.\textsuperscript{23} Concerns about the creation of a "mini-trial" quality in grand jury proceedings were expressed by some courts well before \textit{United States v. Page} when they addressed the question of whether an obligation to present exculpatory evidence should be imposed.\textsuperscript{24}

A second view, expressed by other courts, was that prosecutors did have a constitutional obligation to present exculpatory evidence to a grand jury if that evidence clearly negated the defendant's guilt.\textsuperscript{25} The second view stressed the importance of allowing a grand jury to hear all

\textsuperscript{16} See Neubauer and Fradella, supra, at 279.
\textsuperscript{17} See Eric S. Fish, Prosecutorial Constitutionalism, 90 S. Cal. L. Rev. 237, 280 (2017).
\textsuperscript{20} See United States v. Page, 808 F.2d 723 (10th Cir. 1987).
\textsuperscript{21} \textit{Id.}, at 727.
\textsuperscript{22} \textit{Id.} (The Circuit Court referenced by example case decisions from the Courts of Appeals for the Sixth, Eighth, and Ninth Circuits.)
\textsuperscript{23} \textit{Id.}
\textsuperscript{24} See United States v. Ciambrone, 601 F.2d 622 (2nd Cir. 1979).
\textsuperscript{25} See United States v. Page at 727-728 (the Circuit Court referenced by example, case decisions from the Courts of Appeals for the Second and Seventh Circuits, including the decision in United States v. Ciambrone, \textit{supra}).
relevant evidence before it decided whether to issue an indictment.\textsuperscript{26} The Circuit Court in \textit{United States v. Page} adopted the second view but denied the defendant's request to dismiss the indictment, reasoning that the evidence the defendant sought to present was not clearly exculpatory in nature.\textsuperscript{27}

It comes as no surprise then that when the United States Court of Appeals for the Tenth Circuit was presented with first level of appeal in the case of \textit{United States v. Williams},\textsuperscript{28} the Circuit Court once again declared that prosecutors have a constitutional obligation to present substantial exculpatory evidence to a grand jury.\textsuperscript{29} The Circuit Court ultimately determined that the prosecutor had failed to satisfy that obligation and affirmed the trial court's dismissal of the indictment.\textsuperscript{30}

On appeal from the Circuit Court, in \textit{United States v. Williams},\textsuperscript{31} The Court addressed a rather straightforward issue. As stated by The Court:

The question presented in this case is whether the district court may dismiss an otherwise valid indictment because the Government failed to disclose to the grand jury "substantial exculpatory evidence" in its possession.\textsuperscript{32}

On the grounds that it has a limited supervisory role in federal court proceedings, The Court declined to impose a constitutional requirement for federal prosecutors to disclose exculpatory evidence in grand jury proceedings.\textsuperscript{33} In arriving at its decision, The Court at considerable length reviewed the historical legal underpinnings of the grand jury process.\textsuperscript{34} Although The Court did not make express reference to concerns about the creation of "mini-trials" within the context of grand jury proceedings, it nevertheless addressed the subject. As to that matter, The Court emphasized that the traditional purpose of the grand jury has not been to determine guilt or innocence, as would be done during a trial.\textsuperscript{35}

In describing the traditional role of grand juries, The Court stated:

\ldots requiring the prosecutor to present exculpatory evidence as well as incriminating evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body.\textsuperscript{36}

It is axiomatic that the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge (citation omitted). That has always been so; and to make the assessment, it has always been thought sufficient to hear only the prosecutor's side.\textsuperscript{37}

\begin{thebibliography}{99}
\bibitem{26} \textit{Id.}
\bibitem{27} \textit{Id.}, at 728.
\bibitem{28} See United States v. Williams, 899 F.2d 898 (10th Cir. 1990).
\bibitem{29} \textit{Id.}, at 900.
\bibitem{30} \textit{Id.}, at 903-904.
\bibitem{32} \textit{Id.}, at 37-38.
\bibitem{34} See United States v. Williams, 504 U.S. 47-51 (1992).
\bibitem{35} \textit{Id.}, at 51.
\bibitem{36} \textit{Id.}
\bibitem{37} \textit{Id.}
\end{thebibliography}
Imposing upon the prosecutor a legal obligation to present exculpatory evidence in his possession would be incompatible with this system.  

B. Breaking With Tradition

Although The Court in United States v. Williams declared as a general rule that prosecutors are not required under the U.S. Constitution to present exculpatory evidence to grand juries, The Court did not foreclose the opportunity to put exculpatory evidence requirements in place. As one example, on the federal level the Department of Justice has instituted a nonbinding internal policy that requires prosecutors to disclose to the grand jury substantial exculpatory evidence known to the prosecutor if that evidence negates the guilt of the subject of the investigation, regardless of the identity or occupation of the subject of the investigation. Because this is only an internal operating policy, it is subject to later amendment or elimination by the Department of Justice.

As another example, states are free to provide under their individual constitutions, statutes, and rules of procedure greater legal protections to defendants and suspects than are required under the U.S. Constitution. As one greater legal protection, states are free to require, and some states have required prosecutors to present, exculpatory evidence in grand jury proceedings. Of the 49 states that maintain criminal justice systems that include indicting grand juries, approximately one-third require the presentation of exculpatory evidence to grand juries. Therefore, the majority of the states that utilize indicting grand juries grant the prosecutor the discretion to decide whether exculpatory evidence will be presented during grand jury proceedings. By way of example, the states of Missouri (Brown case) and Ohio (Rice case), discussed later in greater detail, are included within the majority of states that grant discretion to prosecutors as to whether to present exculpatory evidence to grand juries.

In two prominent police officer cases, the prosecutors in the exercise of their discretion broke with tradition and provided full grand jury reviews to the police officers. Specifically, grand juries were empaneled to receive and review volumes of evidence, some of which included evidence favorable to the police officers, for the purpose of aiding the prosecutors in determining whether criminal charges were warranted against the officers. One case was based upon the fatal shooting of Michael Brown in Ferguson, Missouri, on August 9, 2014, by Officer Darren Wilson, who was on duty at the time and observed Michael Brown walking on a street following a reported convenience store episode. To determine whether a prosecution against Officer Wilson was warranted, the prosecution provided a full grand jury review of the case. There are now 19 volumes of transcribed testimony in existence as a result of the grand jury investigation. As part of the grand jury proceedings, testimony in support of Officer Wilson's claim of justifiable use of force.

38 Id., at 52.
39 See Neely, supra, at 173; see also Brett Eaton, Relieving the Tension: New Mexico’s Departure From the Federal Position That There Is No Requirement to Present Exculpatory Evidence to the Grand Jury, 41 N.M. L. Rev. 467, 498 (2011).
41 See State v. Hogan, 144 N.J. 216, 232-234 (1996); see also Lombardo, supra, at 842-857.
42 See State v. Hogan, 144 N.J. 216, 233 (1996); see also Lombardo, supra, at 842-857; see also Cassidy, supra, at 382-392. (The states of Alaska, Arizona, California, Hawaii, Massachusetts, Minnesota, Montana, Nevada, New Jersey, North Dakota, Oregon, and Utah require the presentation of exculpatory evidence to grand juries. The same is required within the District of Columbia. New York, New Mexico, and Georgia provide an opportunity for the potential defendant to appear and present evidence.)
deadly force was taken directly from Officer Wilson. In addition, the grand jury received the testimony of more than 50 witnesses and received expert reports in the nature of crime laboratory firearm evidence, as well as drug test results, medical records, and a toxicology report for Officer Wilson. In the end, the grand jury declined to issue an indictment against Officer Wilson and instead issued a no bill of indictment.\textsuperscript{45}

The second case was based upon the fatal shooting of Tamir Rice in Cleveland, Ohio, on November 22, 2014. Tamir Rice was fatally shot by Officer Timothy Loehmann when Officer Loehmann was responding to a call for law enforcement intervention along with his partner, Officer Frank Garmback. As was the case in Ferguson, Missouri, the prosecution provided a full grand jury review of the case to determine whether criminal charges against the officers were warranted. Both officers were permitted to submit written statements in support of the use of deadly force by Officer Loehmann. However, both officers chose not to testify, and therefore, neither officer was subjected to cross-examination by the prosecution.\textsuperscript{46} Experts retained by the prosecution prepared reports that were submitted to the grand jury. Those experts opined that Officer Loehmann acted reasonably under the circumstances.\textsuperscript{47} It is noteworthy that the Cuyahoga County Prosecutor’s Office had previously enacted an office policy that a grand jury was required to review all fatal cases of police deadly force.\textsuperscript{49} In accordance with that policy, evidence could be and was received from the defense attorneys representing Officers Loehmann and Garmback.\textsuperscript{49} Ultimately, no criminal charges were recommended by the grand jury.\textsuperscript{50}

Recent analysis indicates that thousands of fatal police shootings occurred between 2005 and 2015. The Brown and Rice cases have certainly intensified the national interest in police shootings, and significant national attention has been paid to the practice of prosecutors providing

\textsuperscript{43} See Levine, supra, at 766.
\textsuperscript{47} See Cuyahoga County Prosecutor’s Report, supra, at 31-33.
\textsuperscript{48} Id., at 34.
\textsuperscript{50} Id. (Melber); Id. (Higgs).
full grand jury reviews in police officer cases.\textsuperscript{52} Given that fatal police shootings will not cease to occur and that in a majority of states many prosecutors who are elected to office will continue to have discretion as to whether to provide full grand jury reviews exclusively in police officer cases, the constitutional and ethical issues related to the provision of full grand jury reviews exclusively in police officer cases are highly relevant. Moreover, those issues are particularly important when one considers what appears to be a diminishing public faith in the criminal justice system and particularly in the use of grand juries to decide whether criminal charges are warranted in police officer cases.\textsuperscript{53}

### III. Opening The Door

Since its decision in \textit{United States v. Williams}, The Court has not issued a decision concerning the constitutionality of providing full grand jury reviews exclusively to police officers.\textsuperscript{54} For that reason, to examine the legal and ethical implications of providing full grand jury reviews exclusively in police officer cases, an effort has been undertaken within this article to extrapolate from existing case decisions.

As noted previously, as a matter of interpreting its supervisory role in federal court proceedings, The Court in \textit{United States v. Williams} declined to impose a constitutional requirement for federal prosecutors to disclose exculpatory evidence in grand jury proceedings.\textsuperscript{55} The Court, through Justice Scalia, declared that it would not impose such a requirement because to do so would alter the traditional role of the grand jury, \textit{transforming} (emphasis added) it from an accusatory body into an adjudicatory body.\textsuperscript{56}

However, at this juncture, it is important to take stock of what The Court did \textit{not} address in \textit{United States v. Williams}. Of greatest importance is the fact that The Court did not address the constitutional implications for prosecutors \textit{who themselves} transform the traditional grand jury proceeding into a more expanded, arguably more adjudicative "mini-trial" by electing to provide full grand jury reviews in police officer cases.\textsuperscript{57} As previously noted, The Court in deciding that

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\textsuperscript{52} See Melber, supra; see also Higgs, supra; see also St. Louis Public Radio, supra.


\textsuperscript{54} The effect of limited financial resources, case dismissals on alternative grounds, favorable plea bargains, acquittals at trial, and/or the absence of significant exculpatory evidence in some earlier cases may account to a fair extent for the absence of a decision by The Court to date. However, given the recent strong national interest in police shooting cases and the public's declining faith in the fairness of the criminal justice system, the absence of a decision to date does not serve to diminish the importance of the constitutional issues surrounding the provision of full grand jury reviews in police officer cases. Moreover, the potential for a future case certainly exists, especially in light of the recent Brown and Rice cases and the national scrutiny they have received.


\textsuperscript{56} Id., at 51-53.

\textsuperscript{57} Id., at 38-39. (In United States v. Williams, the defendant as a private citizen contended that the prosecution failed to present substantial exculpatory evidence to the grand jury and that the indictment against him was legally flawed for that reason. Based upon its review of the traditional role of grand juries, The Court declined to provide any relief to the defendant.)
prosecutors have no constitutional obligation to present exculpatory evidence to grand juries clearly rested its decision upon a review of the traditional role of grand juries as accusatory bodies. The Court’s analysis and ultimate decision were not based upon a review of an expanded role of grand juries created by prosecutors, such as occurred in the Brown and Rice cases. In particular, The Court was not called upon to review Due Process or Equal Protection claims related to the differential treatment of police officers and private citizens based upon prosecutors electing to provide full grand jury reviews exclusively to police officers. Consequently, The Court’s decision in United States v. Williams may very well have failed to provide prosecutors with a viable legal defense to the Due Process claims, Equal Protection claims, and ethical claims raised by people who have been denied full grand jury reviews in private citizen cases when, within the same jurisdiction, full grand jury reviews have been provided in police officer cases.

Issues related to fairness in private citizen cases can be resolved through the creation of a specific rule of procedure, statute, or constitutional provision that requires prosecutors to disclose exculpatory evidence to grand juries regardless of the identity or occupation of the defendant. As noted previously, some states have already created the procedural apparatus for doing just that in state grand jury proceedings. However, in the absence of a specific rule of procedure, constitutional provision, or statute, prosecutors may nevertheless encounter an obligation to provide a full grand jury review in private citizen cases when they “open the door” by electing to transform their grand jury proceedings from a traditional role to a more expanded role through the use of full grand jury reviews in police officer cases, as was done in the aforementioned Brown and Rice cases. Essentially, by creating an expanded role for their grand juries in police officer cases, prosecutors might create a constitutional obligation to provide full grand jury reviews in private citizen cases when none previously existed.

The foundation for this proposition can be found in two important cases addressed by The Court. In Griffin v. Illinois, when addressing the right of access to the courts, The Court was called upon to review the constitutionality of an Illinois statute that furnished for purposes of appeal free stenographic trial transcripts only to defendants convicted and sentenced to death. In all other criminal cases, the defendants on appeal were required to pay for the creation of trial transcripts. Utilizing a Due Process and Equal Protection analysis, The Court determined the statute to be unconstitutional.

In the relevant part, The Court in Griffin v. Illinois stated the following:

It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. ... But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty.

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58 Id., at 47-53.
59 See State v. Hogan, 144 N.J. 232-234; see also Lombardo, supra, at 842-857; see also, Cassidy, supra, at 384-392.
61 Id., at 14.
62 Id., at 20.
63 Id., at 18.
The decision in *Griffin v. Illinois* has been interpreted in support of the proposition that a state may not be required to offer an appellate system, but once a state elects to do so, the state cannot unfairly discriminate against people as part of providing that system to its citizens.64

In *Evitts v. Lucey,*65 the Court 29 years later faced a similar review of the system of appeals in Kentucky. The defendant claimed that he had been denied his right to counsel as part of his appeal from a criminal conviction. The government argued, *inter alia,* that because the state of Kentucky was not constitutionally required to create a system of appeals, the state’s system of appeals was immune from constitutional scrutiny.66 Following the same reasoning employed in *Griffin v. Illinois,* the Court in *Evitts v. Lucey* declared that although a state may not be constitutionally required to create a system of appeals, once the state exercises its discretion (emphasis added) to create such a system, the state as a matter fundamental fairness under the Due Process clause must implement measures to ensure that defendants are treated fairly by being provided the effective assistance of counsel on appeal.67 Therefore, the Court’s decisions in these cases clearly points out an important constitutional principle: Once a state in the exercise of its discretion elects to act in a particular area of the criminal justice system, Due Process and Equal Protection principles can be applied to create constitutional obligations where none previously existed.

Relevant to the issues raised within this article, it is true that prosecutors are not the “state” as that term was used within *Griffin v. Illinois* and *Evitts v. Lucey* in that prosecutors do not enact statewide legal systems such as those addressed in those cases. However, state prosecutors who take legal action on behalf of the state certainly qualify as “state actors” for purposes of Due Process and Equal Protection analysis.68 Consequently, prosecutors fully represent the interests of the states and qualify as state actors subject to Due Process and Equal Protection requirements when they pursue prosecutions through state-authorized grand jury proceedings. Therefore, as state actors, prosecutors have an obligation to seek fairness and justice in all criminal proceedings in which they participate, including grand jury proceedings.69

In summary, although the Court in *Griffin v. Illinois* and *Evitts v. Lucey* did not specifically address grand jury proceedings, the decisions in those cases lend considerable support to the proposition that prosecutors, as state actors, potentially create the legal obligation to provide full grand jury reviews in private citizen cases even though no such obligation previously existed. Like the state of Illinois in *Griffin v. Illinois* and the state of Kentucky in *Evitts v. Lucey,* prosecutors who are not constitutionally required to do so, but who nevertheless exercise their discretion to provide full grand jury reviews in police officer cases, are in effect creating a local grand jury system that will be subject to Due Process and Equal Protection requirements. The prosecutors may very well thereafter under Due Process and Equal Protection analysis be required to provide full grand jury reviews in private citizen cases as well.

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66 Id., at 400.
67 Id., at 400-401.
IV. The Arguments for Full Grand Jury Reviews in Police Officer and Private Citizen Cases

A. Application of Due Process and Equal Protection to Grand Jury Generally

For those private citizens who are denied full grand jury reviews in jurisdictions that provide such reviews to police officers, several Procedural Due Process and Equal Protection principles can be relied upon as the foundation for challenges to the decisions to prosecute them.

First, the Due Process clause has been interpreted by The Court as a flexible legal protection that permits the creation of procedural protections depending upon the demands of a particular situation. Therefore, Due Process protections are not rigidly defined and limited to the specific constitutional guarantees set forth within the Bill of Rights. For example, even though the Sixth Amendment right to a speedy trial applies to unconstitutional delay during the post-indictment process, The Court determined long ago that Due Process protections apply to pre-arrest and pre-indictment delay by prosecutors in initiating criminal prosecutions. To be sure, the use of grand juries is an important facet of the pre-arrest and pre-indictment process, and Due Process protections therefore could arguably apply to the presentation of evidence during grand jury proceedings as an important aspect of the pre-indictment process.

Second, Procedural Due Process protections are designed to ensure that the government employs a fair decision-making process before taking any action that will directly impair the life or liberty of a person. The decision-making process must be fundamentally fair when it is being determined whether there is a factual or legal basis for the government’s decision to take such action against a defendant. At the same time, Equal Protection guarantees require the government to treat similarly situated defendants in the same manner. Any arbitrary preference for one class of persons over another may give rise to a claim of a denial of equal protection under the laws.

Under Procedural Due Process analysis, the grand jury process is certainly a key aspect of the decision-making process related to who will or will not be prosecuted for criminal charges. When a grand jury has made a decision to prosecute and a prosecution is undertaken, the subsequent arrest of the defendant and imposition of bail place significant restrictions upon the defendant’s liberty and freedom of movement, especially if the conditions of bail serve to confine his or her

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72 See United States v. Lovasco, 431 U.S. 783 (1977); see also United States v. Marion, 404 U.S. 307 (1971); see also Rich, supra, at 165 (citing United States v. Marion, 404 U.S. 307 (1971) (West, Vol. 2, Third Edition, 2011). (The Court has declared that although the Sixth Amendment Right to Speedy Trial applies only to the lapse of time between the issuance of an indictment and the ultimate trial, the application of the Due Process principle of fundamental fairness may result in the dismissal of a prosecution for those defendants who have experienced unreasonable and prejudicial delay by police and/or prosecutors before a criminal prosecution is initiated.)
movement to a particular jurisdiction—and more so when bail cannot be posted and the person remains incarcerated during the pendency of the court proceedings. Therefore, the application of Procedural Due Process requirements for a fundamentally fair presentation of evidence to grand juries as part of the decision-making process is certainly reasonable. Moreover, as will be argued in greater detail later, Equal Protection principles can protect against any arbitrary distinctions between police officers and private citizens in terms of the nature and quality of the grand jury proceedings they will receive.

Third, the application of Due Process and Equal Protection principles to the grand jury process is nothing new. Specifically, racial discrimination during the selection of grand jurors has been area in which Due Process and Equal Protection claims have been successful. Although The Court has understandably considered issues related to racial discrimination to be of major importance, the grand jury selection cases demonstrate that grand jury proceedings are well within the scope and application of Due Process and Equal Protection protections.

Fourth and finally, over the years the courts have also been called upon to scrutinize the misconduct of prosecutors when they are presenting evidence during the course of grand jury proceedings, and the courts have done so with reference to the need for prosecutors to abide by the principle of fundamental fairness when conducting grand jury proceedings. The Court has also recognized the importance of a person’s reputation in the community. When court proceedings may result in damage to a person’s reputation, Due Process protections have been applied to ensure a fair opportunity to be heard. As the United States Court of Appeals for the Third Circuit stated in *United States v. Serubo*,

... the prosecutor operates without the check of a judge or trained legal adversary, and virtually immune from public scrutiny. The prosecutor’s abuse of his special relationship to the grand jury poses an enormous risk to defendants as well. For while in theory a trial provides the defendant with a full opportunity to contest and disprove the charges against him, in practice, the handing up of an indictment will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo. Where the potential for abuse is so great, and the consequences of a mistaken indictment so serious, the ethical

77 See Rich, *supra*, at 204, 213-14 (West, Vol. 2, Third Edition, 2011). See also Campbell v. Louisiana, 523 U.S. 392 (1998). (Campbell was indicted on a charge of murder. In a pretrial motion to quash the indictment, Campbell alleged that the grand jury was selected in a racially discriminatory manner that violated, *inter alia*, his equal protection and due process rights under the Fourteenth Amendment. The Court determined that Campbell had the requisite standing to raise his constitutional claims. In doing so, The Court declared that Equal Protection and Due Process objections to discrimination against black persons may be raised with respect to the selection of grand jurors who ultimately serve on the grand jury.) See also Peters v. Kiff, 407 U.S. 493 (1972). (Peters was indicted for burglary by a grand jury in the state of Georgia. The Court declared that Due Process protections are applicable when racial discrimination occurs during the selection of grand jurors.)

78 See Dissent of Justice Stevens, United States v. Williams, 504 U.S. 36, 60-64 (1992). (Examples of prosecutorial misconduct during grand jury proceedings that have been reviewed by the courts include failing to inform the grand jury of its authority to subpoena witnesses, misstating the facts on cross-examination of a witness, operating under a conflict of interest, and presenting perjured testimony.)


80 See United States v. Serubo, 604 F.2d 807 (3rd Cir. 1979).
responsibilities of the prosecutor, and the obligation of the judiciary to protect against even the appearance of unfairness, are correspondingly heightened.81 (parenthetical emphasis added)

Furthermore, The Court in United States v. Williams did not necessarily foreclose court scrutiny of prosecutorial conduct in grand jury proceedings.82 Consequently, Due Process and Equal Protection principles have been applied and will continue to be applied to the grand jury process. The Court in particular has scrutinized the presentation of evidence during grand jury proceedings and has not foreclosed the review of claims related to fundamental procedural fairness and the creation of arbitrary distinctions. Claims of that nature, when raised by private citizens who have been denied full grand jury reviews that have been provided exclusively to police officers, may very well give rise to scrutiny by the courts. To be sure, the exercise of scrutiny by the courts is of significant consequence because any private citizen who successfully raises Due Process and/or Equal Protection claims with regard to the grand jury process may ultimately receive a dismissal of the indictment or a reversal of the judgment of conviction.83

B. Application of Due Process and Equal Protection to Police Officer and Private Citizen Cases

As previously noted, like the state of Illinois in Griffin v. Illinois84 and the state of Kentucky in Evitts v. Lucey,85 prosecutors who are not constitutionally required to do so but who nevertheless exercise their discretion to provide full grand jury reviews in police officer cases, in effect, create a local grand jury system that will be subject to the Due Process and Equal Protection requirements. The prosecutors may very well thereafter under Due Process and Equal Protection analysis be required to provide full grand jury reviews in private citizen cases as well.

The grand jury selection cases86 and prosecutorial misconduct87 cases also indicate that Equal Protection and Due Process principles can be and have been applied to grand jury proceedings. Additionally, as an important facet of the grand jury process, the Due Process principles requiring fair decision making by government officials when a person’s life or liberty is at stake apply to the decision-making process of prosecutors, including the decision to provide full grand jury reviews in police officer cases. Specifically, as part of the prosecutor’s decision-making

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81 Id., at 817; for similar remarks, see also Dissent of Justice Stevens, United States v. Williams, 504 U.S. 62-63 (1992).
87 See Dissent of Justice Stevens, United States v. Williams, 504 U.S. 60-64 (1992). (Examples of prosecutorial misconduct during grand jury proceedings that have been reviewed by the courts include failing to inform the grand jury of its authority to subpoena witnesses, misstating the facts on cross-examination of a witness, operating under a conflict of interest, and presenting perjured testimony.)
process, in those jurisdictions where grand jury proceedings will be used to address both police officer cases and private citizen cases, any differential treatment of police officers in the form of providing full grand jury reviews in police officer cases and only traditional grand jury reviews in private citizen cases will most certainly give rise to a strong perception of prosecution bias in favor of police officers and against private citizens, which will cast serious doubt upon the constitutional integrity of the grand jury process. By the same token, where grand jury proceedings are optional, any decision to provide a full grand jury review in police officer cases and to deny any form of grand jury review in private citizen cases will give rise to the same strong perception of prosecution bias. In essence, any such differential treatment may very well be viewed by the courts as reflecting the same measure of arbitrariness, unfairness, and inequality that was addressed by The Court in Griffin v. Illinois, Evitts v. Lucey, the grand jury discrimination cases, and the prosecutorial misconduct cases.

Charging policies exist to guide prosecutors through the process of making decisions as to whether an individual will be charged, and if so with which offense(s). Any internal operating policy created by prosecutors that provides for the use of full grand jury reviews to determine whether a police officer will be charged, and if so with which offense(s), qualifies as a charging policy. Under the Equal Protection clause, prosecutors do not have unlimited latitude in developing charging policies. Charging policies must be carefully developed and must comport with constitutional protections against unlawful discrimination in charging decisions. Any charging policy or criminal procedure must be applied with equal force for the benefit of all similarly situated defendants. Although it is true that prosecution charging policies can expand upon Due Process protections to achieve procedural fairness, charging policies cannot serve to promote discriminatory prosecution practices. By way of example, as previously noted, The Court has determined that prosecutors are not constitutionally required to present exculpatory evidence to grand juries. Nevertheless, the Department of Justice has instituted an internal operating policy that expands procedural protections and provides for the presentation to grand juries of "substantial evidence that directly negates the guilt of the subject of the investigation." Of particular importance, however, is the

89 See Peters v. Kiff, supra, 407 U.S. 502-503. ("Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases and they increase the risk of actual bias as well.) See also Brenner and Shaw, supra, at 169 (Thomson-West, Vol. 1, Second Edition, 2006).
93 See Dissent of Justice Stevens, United States v. Williams, 504 U.S. 60-64 (1992). (Examples of prosecutorial misconduct during grand jury proceedings that have been reviewed by the courts include failing to inform the grand jury of its authority to subpoena witnesses, misstating the facts on cross-examination of a witness, operating under a conflict of interest, and presenting perjured testimony.)
94 See Fish, supra, at 284-286.
96 See Fish, supra, at 295.
97 Id., at 294; see also United States Attorney’s Manual section 9-11.233 (2015). (The manual provides that prosecutors must present or otherwise disclose to the grand jury substantial evidence that directly negates the guilt of a subject of an investigation before seeking an indictment against that person.)
fact that the Department of Justice policy does not benefit only one particular category of defendants, such as police officers, but instead applies to all grand jury cases regardless of the identity or occupation of the defendant. Consequently, the Department of Justice policy does not reflect a discriminatory purpose or design.

Prosecutors may argue that police officer cases often involve a complex set of facts and legal issues, and for that reason, exculpatory evidence, if it exists, should be brought to the attention of the grand jury. Consequently, prosecutors may very well argue that full grand jury reviews are essential to the process of deciding whether a criminal prosecution is warranted in police officer cases and yet are unnecessary in private citizen cases. In essence, prosecutors may argue that the defendants in police officer cases and private citizens are not similarly situated for purposes of Equal Protection analysis or Due Process fundamental fairness analysis because police officer cases are more complicated than private citizen cases.

Although it is true that prosecutors may legitimately argue full grand jury reviews should be used in police officer cases, those same prosecutors must understand that as a matter of Equal Protection principles, it may very well be successfully argued that private citizens in private citizen cases are situated similarly to police officers in police officer cases. Both lawyers and judges well know that private citizen cases often entail complex facts and complex legal self-protection issues with which jurors must grapple. In addition, common sense informs us that exculpatory evidence can also exist in private citizen cases. Moreover, both police officer cases and private citizen cases entail the potential misuse of deadly force that has resulted in the death of an individual, and both entail claims by the actor that the use of deadly force was reasonable and necessary under the circumstances of the case. Like police officers, many private citizens will have exculpatory versions to present to a grand jury in support of their claim that the use of force was justified under the circumstances.

Although it is also true that police officers encounter different circumstances related to the performance of their professional duties, those circumstances can be effectively addressed as part of a full grand jury review (i.e., through the presentation of expert testimony, as was done in the Tamir Rice case), just as can be any special circumstances that private citizens face in private citizen cases. The professional roles and duties of police officers do not justify a difference in prosecutors’ treatment of police officer cases and private citizen cases.

Grand jury procedures that differ based upon who is the potential defendant are subject to claims of arbitrariness and undermine the essential need for the perception of legitimacy in the criminal justice process. Furthermore, as noted previously, The Court has determined that Due Process is denied when the procedural circumstances create the likelihood or appearance of bias.

The risk of actual prejudice or harm to defendants in private citizen cases also exists if the defendants are denied the opportunity for full grand jury reviews. Evidence exists that private citizens experience exceptionally high indictment rates when prosecutors utilize traditional grand juries with no opportunity for the defense to submit exculpatory evidence or at least evidence favorable to the private citizen. It is highly doubtful that police officers who receive full grand jury reviews will experience such high rates of indictment, and it is further doubtful that private

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98 See 130 Harv. L. Rev., supra, at 1219.
100 See Siegel and Worrall, supra, at 187; see also Neely, supra, at 182; see also Ric Simmons, Re-examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System? 82 B.U. L. Rev. 1, 31-35 (2002).
citizens who receive full grand jury reviews will experience such high indictment rates. Time and well-structured research will tell. However, in the meantime, a significant potential for actual prejudice or harm in the form of higher indictment rates will exist and will provide private citizens who are denied full grand jury reviews with the foundation for legitimate claims of the denial of Due Process and Equal Protection. Corresponding to the potential experience of higher indictment rates for private citizens, one cannot reasonably discount the personal implications of being under indictment. The issuance of an indictment can have substantial negative consequences for a defendant, including but not limited to loss of employment, loss of liberty pending trial or dismissal, disruption of family, loss of reputation within the community, and heavy financial costs, none of which is certain to be restored if a dismissal or acquittal occurs at some later date.101

When court proceedings may result in damage to a person’s reputation, Due Process protections have been applied to ensure a fair opportunity to be heard.102 That having been said, a critical question arises: Why should private citizens in private citizen cases be forced to endure a prosecution and await a trial before an opportunity to present exculpatory evidence arises when police officers can have exculpatory evidence presented to a grand jury and succeed in avoiding the negative ramifications of a prosecution altogether? It would be fundamentally unfair to advise suspects in private citizen cases that their opportunity to present favorable or exculpatory evidence will occur at the time of trial while at the same time police officers are advised that they will have the opportunity to present favorable or exculpatory evidence in full grand jury reviews to potentially avoid any prosecution whatsoever. In view of the substantial negative consequences to private citizens a prosecution can bring, it is difficult to argue that police officers should be afforded special treatment through full grand jury reviews because they personally stand to lose significantly more than private citizens if prosecuted. A decision to allow full grand jury reviews exclusively in police officer cases unfairly provides a clear and substantial benefit to police officers that private citizens do not enjoy and, as such, seriously offends both Due Process fundamental fairness and Equal Protection arbitrary discrimination principles.

One distinct reality is that prosecutors may create a policy to provide full grand jury reviews to police officers on the basis of political concerns.103 In 45 states, the top prosecutors at a local level are elected as district attorneys or county prosecutors.104 Most people, especially police officers, would be grateful for the opportunity to provide their version of events to a grand jury, to provide expert reports that support their version of events, and to present the testimony of lay witnesses who support their version of events. The opportunity to do so is even more desirable when police officers know the prosecutor will be the one producing and presenting that information on their behalf and the officers may in the end escape a criminal prosecution.

At the same time, full grand jury reviews may very well allow a prosecutor to avoid the negative consequences of a decision to charge a police officer by permitting the prosecutor to assign responsibility for his or her decision to the grand jurors. Finally, the prosecutor may use full

101 See Dissent of Justice Stevens in United States v. Williams, 504 U.S. 62-63 (1992); see also Neely, supra, at 188.
grand jury reviews to avoid the negative political consequences registered by members of the community because of a decision not to charge. Once again, the prosecutor would be in a position to assign responsibility for the decision to the grand jurors.

The achievement of any political goal by providing full grand jury reviews to police officers is unrealistic for practical and constitutional reasons. First and foremost, political concerns and objectives will not withstand a constitutional challenge raised by private citizens. Although the use of full grand jury reviews may be politically expedient for prosecutors, political expediency has not served and cannot serve as the justification for disparate treatment under an Equal Protection or Due Process analysis.

Secondly, prosecutors by the very nature of grand jury proceedings control the presentation of evidence to grand jurors. Prosecutors determine which questions will be asked of witnesses and which ones will not be asked. Prosecutors also determine which evidence will be presented and which evidence will be withheld from consideration by the grand jurors. Thus, prosecutors can certainly maintain a significant degree of control over the ultimate outcome of the grand jury proceedings. Given the nationwide attention to cases such as those of Rice and Brown, the public, if not previously aware, is now much more aware of the degree of control that prosecutors exercise over the grand jury process. As a purely practical matter, therefore, prosecutors cannot effectively shield themselves from a grand jury's decision not to indict a police officer by claiming that the grand jury's decision was the product of its independent judgment and deliberation.

There is one final legal point to be advanced. Up to this point, the legal implications of providing full grand jury reviews in police officer cases and only traditional grand jury reviews in private citizen cases have been addressed. To be sure, though, when prosecutors elect not to use grand jury proceedings at all in private citizen cases, the private citizens who are denied the benefits of a full grand jury review that is being provided to police officers within the same jurisdiction will experience a denial of fundamental fairness and equal protection of the laws comparable to that experienced by private citizens who receive traditional grand jury reviews while police officers in the same jurisdiction receive full grand jury reviews. Essentially, the foregoing concerns for arbitrariness, fundamental fairness, and equal protection of the laws will not disappear if and when prosecutors make charging decisions in private citizen cases without the use of grand juries.

C. Ethical Consideration in Grand Jury Proceedings

In addition to constitutional concerns, legitimate ethical concerns arise when full grand jury reviews are provided in police officer cases but not in private citizen cases. It has long been understood that prosecutors have an ethical obligation to seek justice in criminal cases, not merely to seek convictions. Although they do not have the force and effect of law, the American Bar Association ("ABA") and the National District Attorneys Association ("NDAA") have created specific ethical standards related to the conduct of prosecutors during grand jury proceedings.

The ABA has issued the following relevant standard:

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105 See 130 Harv. L. Rev., supra, at 1208.
No prosecutor should knowingly fail to disclose to the grand jury evidence which tends to negate guilt or mitigate the offense.107

The NDAA in similar fashion has promulgated the following standard:
A prosecutor should disclose any credible evidence of actual innocence known to the prosecutor or other credible evidence that tends to negate guilt, as required by law or applicable rules of ethical conduct.108

Again, consistent with the foregoing standards, the Department of Justice has created an internal operating policy regarding the disclosure of exculpatory evidence. Under that nonbinding policy, prosecutors are required to disclose substantial exculpatory evidence known to them if that evidence negates the guilt of the subject of the investigation.109 The Department of Justice created and implemented the policy based upon the belief that the Department would be in the best position to seek justice by requiring prosecutors to disclose substantial exculpatory evidence as provided under the policy regardless of the identity or occupation of the subject of the investigation.110

Adhering to these ethical standards in grand jury proceeding for police officer cases is certainly laudable. However, there is no legitimate basis for failing to adhere to those same standards when prosecutors are addressing private citizen cases. The use of traditional grand juries or no grand juries at all in private citizen cases while full grand jury reviews are provided in police officer cases cannot begin to comport with the responsibility of prosecutors to seek justice in all cases.

V. Additional Issues: Full Grand Jury Reviews in All Cases and the Use of Independent Prosecutors

A. Full Grand Jury Review in All Cases

The purpose of this article has been to undertake a constitutional analysis of the exercise of prosecutorial discretion to provide full grand jury reviews exclusively to police officers in police officer cases. Although viable constitutional arguments exist for the obligation to provide full grand jury reviews in private citizen cases when such reviews are provided in police officer cases, a viable constitutional argument for requiring the provision of full grand jury reviews in all criminal cases involving private citizens does not exist, and for that reason, it has not been advanced within this article.

First, in those jurisdictions where prosecutors have not elected to institute a policy or practice of providing full grand jury reviews in police officer cases, the decision in United States v. Williams has been viewed as settling the point. In other words, The Court has already decided that it will not require the presentation of exculpatory evidence to grand juries in all criminal cases, whether they involve police officers or private citizens as potential defendants.

109 See Neely, supra, at 173; see also Eaton, supra, at 498.
110 See Eaton, supra, at 498-499.
Second, as argued within this article, an exception to the general rule enunciated by The Court in United States v. Williams arguably exists in those jurisdictions where prosecutors have elected to institute a policy or practice of providing full grand jury reviews exclusively in police officer cases. The Court has yet to weigh in on that matter. Nevertheless, if asked to address whether full grand jury reviews should be provided in all cases involving private citizens, The Court will not likely determine that Due Process and Equal Protection principles support an argument that such reviews should be provided to all private citizens in all criminal cases (i.e., cases involving burglary, robbery, thefts, assaults). Essentially, the degree of unfairness and arbitrary discrimination normally addressed by those constitutional principles will not likely be deemed present when full grand jury reviews are denied in cases involving burglary or theft as opposed to cases involving the use of deadly force that has resulted in death and in which, like police officers, private citizens are claiming that the use of force was fully justified under the circumstances. The strongest arguments for fundamental unfairness under Due Process principles and arbitrary discrimination under Equal Protection principles are founded upon the proposition that police officers in police officer cases and private citizens in private citizen cases are similarly situated under the law, and for that reason, both deserve the benefit of full grand jury reviews. The same cannot be argued nearly as effectively when all other forms of criminal cases involving private citizens as potential defendants are addressed.

B. Independent Prosecutors

Based upon the proposition that prosecutors have an inherent conflict of interest when making charging decisions concerning police officers with whom they closely work, some have called for the use of independent prosecutors in police officer cases.\(^{111}\) The argument has been advanced that the use of independent prosecutors who have no relationship with the police officers or the department at issue will have the capacity to avoid the inherent conflicts of interest that local prosecutors face.\(^{112}\) Essentially, the independent prosecutors would be appointed by the government to investigate and decide whether a prosecution was warranted in particular police officer cases.\(^{113}\) The charging decision would thereby be wholly removed from the local prosecutors and placed in the hands of an independent prosecutor.

The use of independent prosecutors, however, will not eliminate the constitutional issues addressed within this article. As previously noted, indicting grand jury systems exist in 49 states,\(^{114}\) and only approximately one-third of those states require the presentation of exculpatory evidence to grand juries.\(^{115}\) Therefore, in a majority of states, prosecutors can exercise their discretion as to whether to provide full grand jury reviews. Unless the grand jury systems are wholly abolished and replaced by independent prosecutors in those states, local prosecutors will continue to avail

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\(^{111}\) See Chavis Simmons, supra, at 150, 153-157.

\(^{112}\) Id., at 153.


\(^{115}\) See State v. Hogan, 144 N.J. 233; see also Lombardo, supra, at 842-857; see also Cassidy, supra, at 382-392. (The states of Alaska, Arizona, California, Hawaii, Massachusetts, Minnesota, Montana, Nevada, New Jersey, North Dakota, Oregon, and Utah require the presentation of exculpatory evidence to grand juries. The same is required within the District of Columbia. New York, New Mexico, and Georgia provide an opportunity for the potential defendant to appear and present evidence.)
themselves of the grand jury process and will have the opportunity to develop prosecution policies for the investigation and prosecution of police officer cases that could include the provision of full grand jury reviews only in police officer cases. To the extent that they do so, the constitutional and ethical issues raised within this article will exist.

It is also important to note that any states that do adopt the use of independent prosecutors will nevertheless be able to retain their grand jury systems. Ultimately then, like all other prosecutors, the independent prosecutors will have the authority to decide what evidence will be presented to grand juries in police officer cases. If independent prosecutors are used only for police officer cases and the prosecutors’ policy is to provide full grand jury reviews in police officer cases, the use of independent prosecutors will not serve to eliminate the Due Process, Equal Protection, and ethical issues raised when full grand jury reviews are provided exclusively in police officer cases and not in private citizen cases.

Ultimately, a strong reform to be achieved would be for states with grand jury systems to require the presentation of exculpatory evidence in deadly force cases without reference to the identity or occupation of the defendant, and to use independent prosecutors to present the cases so as to minimize the concerns regarding an inherent conflict of interest.

VI. Conclusion

Whether prosecutors resort to the use of a traditional grand jury process or use no grand jury process at all to review private citizen cases (as they are defined within this article), strong arguments exist that private citizens will, as a matter of constitutional analysis, be unjustifiably denied the benefits of a full grand jury review when such reviews are provided exclusively to police officers in police officer cases. That is not to say that prosecutors should decline to provide full grand jury reviews in police officer cases. However, it is to say that by offering such reviews in police officer cases, prosecutors may very well create for themselves both legal and ethical obligations to provide those same reviews in private citizen cases. The United States Supreme Court in United States v. Williams based its decision upon a review of the traditional role of grand juries, not upon the expanded role recently used by some prosecutors in which exculpatory evidence or at least evidence favorable to police officers was presented to grand juries. The constitutional ramifications of such a transformation of grand jury proceedings by prosecutors was not even remotely considered by The Court in United States v. Williams.

If prosecutors do not favor the idea of providing full grand jury reviews in private citizen cases because doing so would serve to convert the grand jury process into a "mini-trial," they have the option of declining to do so in police officer cases. It is not being advocated that on constitutional grounds, a general obligation to provide full grand jury reviews should be foisted upon prosecutors in all states and in all cases. However, it is being argued that prosecutors may very well foist upon themselves the obligation to provide full grand jury reviews in private citizen cases when, in their own exercise of professional discretion, they elect to create a special grand jury process within their jurisdictions by providing full grand jury reviews in police officer cases. In essence, in the absence of a relevant statute, regulation, or rule of procedure that requires them to do so, prosecutors may very well hold the legal keys as to whether they will be required to provide full grand jury reviews in private citizen cases.
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County Judges and Cosmetologists: A Preliminary Inquiry into “Constitutional” County Courts

Larry Karson

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."¹

Since at least the days of Prohibition there has been a discussion regarding the professionalism of the individuals involved in the American criminal justice system.² From the police officers being required to have some college education along with months of academy training in the law and procedures of the justice system to attorneys being mandated, after college, to complete a 3 year program of formalized academic training in the law and passing a state administered exam of competence, the requirements that determined competency have increased as society and the law have become more complex.³

Yet, in Texas, one aspect of the judiciary has been exempt from this development toward professionalization. Functioning as if major portions of Texas had yet to enter the twenty-first century, Texas fails to even require a high school diploma, let alone a college education or legal training, for a judge to sit on the “constitutional” county court bench and oversee criminal cases that may include capital murder. While a cosmetologist requires 1,500 hours of instruction in...
Texas, the only education for donning a judicial robe is simply being “well informed in the law of the State”, whatever that may mean.\(^4\)

The county courts were originally established during the existence of the Texas Republic in the early nineteenth century, in a time when Texas was comprised of small, rural communities with limited access to trained scholars of the law. The county courts, along with the justice of the peace courts, allowed for a prompt resolution of minor civil and criminal issues, recognizing that the county judge, though not necessarily formally educated in the law, had knowledge of the local community and an awareness of its immediate concerns.\(^5\) As part of the state’s eventual four-tiered judicial system, there was to be one county court for each county established in the state.\(^6\) Today that judicial authority is codified in Article 5 of the Texas Constitution.\(^7\)

The responsibilities of the elected county judge are bifurcated under Texas law. First, and foremost, are the judge’s responsibilities as the chief administrator of the county Commissioners Court, working in conjunction with four elected county commissioners.\(^8\) Besides serving as the chief administrator for the county government, with all the administrative duties that entails (which may range from indigent healthcare to flood plain administration), the county judge is the budgeting officer of counties with a population under 225,000, handles numerous duties related to elections, serves as the ex officio county school superintendent in counties with less than 3,000 students, and heads emergency management within the county.\(^9\)

**Judicial Duties**

In 210 of the 254 counties in Texas, the county judge also has a judicial responsibility. He (approximately 90 percent are men) may preside over a trial court of record for misdemeanors where the penalty is a jail sentence of up to one year, juvenile matters, mental health, various civil actions between $200 and $10,000, probate, and is responsible for appellate review (trial *de novo*) for cases tried by the justice (also known as the justice of the peace) and municipal courts.\(^10\)

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7 Texas Constitution, Article Five, Judicial Department, Section 15.


10 Office of Court Administration, *Annual Statistical Report for the Judiciary, Fiscal Year 2016*, xiv, http://www.txcourts.gov/media/1436989/annual-statistical-report-for-the-texas-judiciary-fy-2016.pdf; Office of Court Administration, *Texas Courts: A Descriptive Summary*, 8, http://www.txcourts.gov/media/10753/court-overview.pdf. Note: Some county court jurisdictions vary depending on individual statutes that created other courts. In 36 counties, for example, the county courts also have concurrent jurisdiction in civil cases with the justice courts. In some counties, the appeals go to a county court at law or to the district court.
In the more populated counties in Texas, such as Harris (Houston), Bexar (San Antonio), Travis (Austin), Dallas, and El Paso, for example, the state legislature has deemed it prudent to exempt the county judge of judicial duties, having established county courts at law and probate courts to fulfill that responsibility. These courts, which require an attorney on the bench, allow the county’s chief executive to focus solely on his administrative responsibilities. Yet for 210 counties in Texas, the county judge is burdened with both executive and judicial responsibilities.

As the county judge is an elected position, selected by the majority of voters from across the county, the requirements are determined by state statute. As mentioned earlier, there is only one primary requirement specified – that the county judge “shall be well informed in the law of the State.” Unlike district courts that handle felony cases or county courts at law in metropolitan areas, both of which mandate an attorney as judge, there is no requirement that the county judge be licensed to practice law in Texas.

As for the education of the county judge after election, they are governed by the Rules of Judicial Education which only require 30 hours of instruction to be completed before or within one year of taking office in the “administrative duties of office and substantive, procedural and evidentiary laws...and each fiscal year thereafter, complete at least 16 hours.” This is even less than is required for a newly elected justice of the peace, a local trial court judge whose trials are subject to appeal to the county court, who is required to “complete an 80-hour live course of instruction” along with 20-hour course the following year.

Unlike the lower justice of the peace courts that handle traffic tickets with the penalty limited to a minor fine, the county courts handled 50,000 criminal cases in fiscal year 2016 nearly a quarter of which were drug related. Thirteen percent were for driving while intoxicated, with another 10 percent for theft. Assault cases approached another 10 percent, as did driving with an invalid or suspended license. The potential penalty in many of these cases was up to one year in confinement (for any class A misdemeanor offense).

For 15,000 of these cases, the defendant’s representation was divided almost evenly between appointed and retained counsel. For the other 35,000 cases, the defendant had to rely on the prosecutor or the county judge to protect their constitutional rights. With 3 percent of all criminal cases handled by a bench trial and less than 1 percent by a jury trial, the legal knowledge of the county judge can be crucial to protecting a defendant’s civil rights and liberties.
But the power and authority of the county judge extends beyond the criminal docket. Almost 6,000 civil cases were filed in county courts in FY 16 along with over 18,000 probate and guardianship cases. Juveniles accounted for another 1,800 cases, running the gamut of violations from conduct in need of supervision (CINS) to delinquent conduct that varied from capital murder to contempt of court with almost 600 of them classified as felonies.19 Mental health cases included over 7,000 applications with over 2,400 final commitment hearings held leading to 1,400 commitments for temporary mental health services with almost 100 persons committed for extended mental health services. With 6,000 protective custody orders signed, over 1,000 orders to authorize psychoactive medications were also granted.20

Catechumen Court

Texas is a state that has not historically hesitated at regulating any profession that has the ability to harm its citizens. A cosmetologist, for example, requires 1,500 hours of instruction, a plumber four years of apprenticeship.21 Attorneys practicing law must be licensed by the state.22 Judges serving on appellate or district courts are also required to establish a level of proficiency in their profession beyond simple licensure.23 Yet county judges can commit someone to jail or to a mental health facility with absolutely no training in the law during their first year on the bench and less than four days of training prior in their second year of service as a judge.

Catechumen Court

Courts are entrusted to play a variety of roles in society. From assessing culpability and punishment to deciding disputes over property, those on the bench are expected to have knowledge of not only the law (and the philosophy behind it) but also of the substantive legal procedures involved in determining a just outcome.

As federal district judge Charles E. Wyzanski, Jr. explained, a trial judge has “scope to use a judge’s initiative and discretion” not only in the “width of choice in sentencing defendants” but to “help lawyers frame the issues and develop the facts so that there may be a meaningful and complete record” as well as to “help counsel develop uncertain points of law.” Wyzanski further commented that “by instruction to juries, and in appropriate cases, by comment on the evidence he may help the juries better understand their high civic function,” maintaining that “his conduct of a trial may fashion and sustain the moral principles of the community.” With little to no legal training, a county judge may be unable to effectively fulfill any of those concerns.24

With the Supreme Court’s historical focus on individual rights and equality under the Constitution, lower courts have been tasked, more than ever, with the protections of individual

19 Ibid., Detail – 33-35.
20 Ibid., Detail – 36.
Without a foundation in constitutional law the nuances involved in determining their applicability may be easily lost on the layman. Whether involving a search that brings into question the competency of the detaining officer or the voluntariness of the defendant’s oral consent, an educational foundation in constitutional law is considered appropriate for any arbitrator serving on the bench. Yet for many a county judge, only four days of legal training and a couple of days a year in continuing education is considered acceptable for protecting the constitutional rights of those defendants who appear before the court. And though judges have resources available to assist them in fulfilling their responsibilities, including communication with other judges, the prosecutor’s office or the defense bar, these may be of little avail in the middle of a trial, hearing or plea.

There are competent county judges serving their communities across the state. A small percentage (approximately 17 percent of all 254 county judges) are attorneys. Another group are knowledgeable thanks to their initiative in reading the law coupled with their numerous years of service on the bench. Yet for those recently elected or with a low case docket, that expertise has little opportunity to develop, let alone reach any level of acceptable proficiency as “an arbiter of facts and law for the resolution of disputes.”

Prosecuting attorneys also inclined to prefer a judge who has been educated as an attorney. One prosecutor recalled an instance where a non-attorney justice resolved a traffic offense and commented that since he (the justice) did the same violation all the time, he was dismissing the case. Another told of questioning a witness only to have the defense object. When the justice announced “overruled,” the prosecutor continued with the question, only to have the justice inform the prosecutor “I overruled you” failing to recognize the difference between sustaining an objection and overruling one. The premise of deferring a legal decision to someone who has no training in the law seems an anathema to many prosecutors (the principal legal expert in almost all county courts).

Yet one of the fundamental reasons to eliminate judicial duties from the responsibilities of the county judge is simply the perception of a conflict of interest. As chief administrator of the county, the county judge carries the responsibility of balancing a rural budget. As county judge, he has the opportunity to supplement the positive side of the ledger with imposed fines in cases that he may have presided over and determined guilt. He can also, by the power of his judicial position, influence the “going rate” within his jurisdiction for any penalties agreed to by the prosecuting office when a plea bargain is accepted. Further, in many cases, the county judge’s salary is partially paid for by court fees. By a judge simply claiming that 40 percent of the workload of his position will be judicial, the state of Texas supplements his county salary with a stipend of $25,000, a

28 Personal communication with author, June, 2016.
29 Personal communication with author, July, 2017.
portion of which is drawn from court fees. In rural counties that have a low caseload a county judge may be perceived to have a financial incentive to “milk” or manipulate the docket to justify the stipend. In those counties that already have a county court at law (with an attorney serving as judge), the county judge may force himself into the judicial process by claiming a portion of the court at law casework to justify his salary “bonus.”

Solution

Few states continue to allow an individual uneducated in the law to serve in a judicial capacity and the few that do generally limit that service to the justice of the peace, probate or municipal courts while also limiting the power of the court.

For Texas, the solution is already in the hands of the state. In many locations a county court at law has replaced the judicial functions of the county judge, the state itself having confirmed that an educated attorney is not only more appropriate for the bench but also should be required to fulfill the court’s responsibilities. With 243 county courts at law in 92 counties already in place, their further growth would address many of the faults of the current county court system. In the days of the horse and buggy, the proximity of the county seat – and its courts – was critical to the needs of the local community. Today, thanks to the auto and the state highway system, that need is all but nonexistent – and Texas concurs, having already established some multicounty courts at law to handle the casework of multiple counties.

The Supreme Court, in *Gideon v. Wainwright* (1963), determined that the right to counsel for a defendant in a criminal case was critical to obtaining a fair trial and was a fundamental right under the Fourteenth Amendment. In that decision, Justice Black quoted an earlier decision, *Powell v. Alabama* (1932):

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. (p. 69).

Yet, in Texas, the judge the defendant will face may be as uneducated in the law as that “intelligent and educated layman” Justice Black describes, if the defendant is appearing in front one of the state’s 210 “constitutional” county courts that hears cases. If the defendant requires the “guiding

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hand of counsel” at every step of the proceedings against him, is it no less applicable for the referee of the proceedings to have the same “skills and knowledge” as counsel? Shouldn’t the judge actually be trained in the law he enforces? Texas requires more training for a deputy serving as a jailer than it does for the judge who sentences an individual to that jail. One would suspect that is not, from Justice Black’s perspective, quite just.

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35 Texas Commission on Law Enforcement, “Course Curriculum Materials and Updates, Courses for Licensure, 2011 Basic County Corrections,” https://www.tcole.texas.gov/content/course-curriculum-materials-and-updates-0
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