

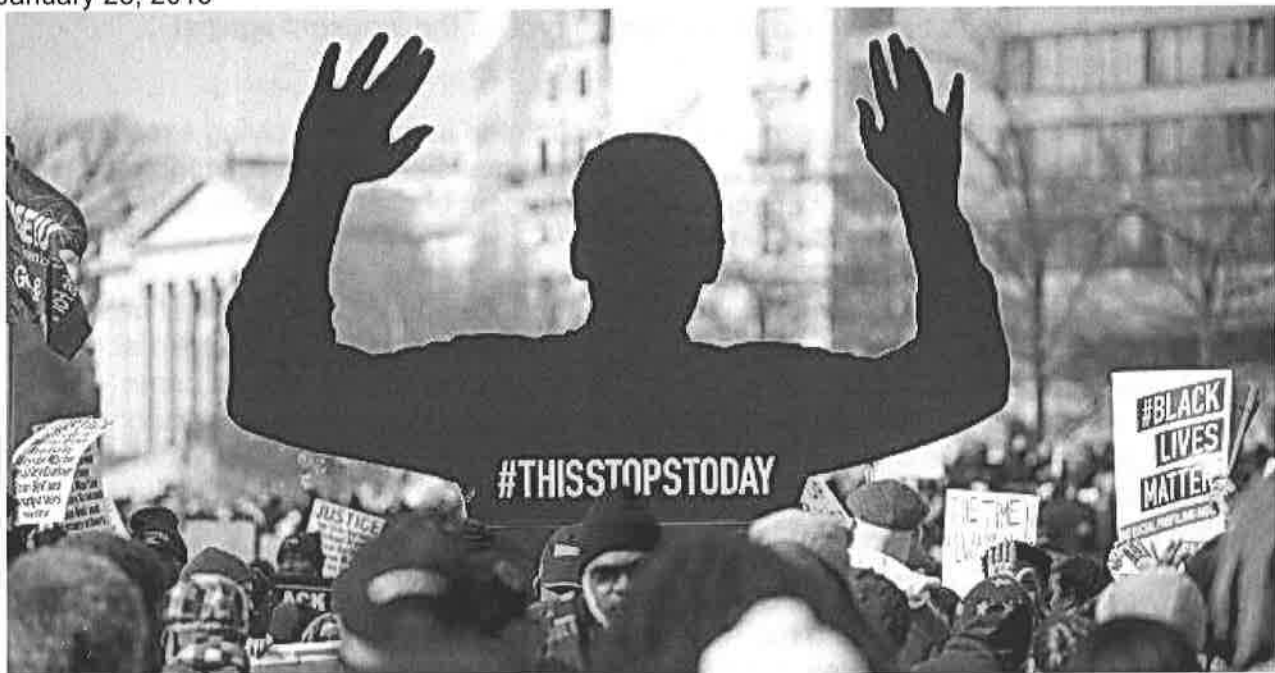
BRENNAN CENTER FOR JUSTICE

at New York University School of Law

What Is on the Horizon for Grand Jury Reform?

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The decisions by grand juries not to indict officers in the Michael Brown shooting in Ferguson, Mo. and the Eric Brown chokehold case in Staten Island, N.Y., have spurred various proposals to reform grand juries. These calls are likely to increase if grand juries also decide against indictments in the deaths of Akai Gurley in Brooklyn, N.Y. and Tamir Rice in Cleveland, Ohio. Some of the current proposals may deserve consideration but they would have greater long-term impact and meaning if they improve transparency within the criminal justice system more generally and are not limited to cases just involving police.

Grand juries have long been a means for citizens to exercise influence over the judicial process, dating back to 12th century England. The first formal grand jury in the U.S. was established in Massachusetts in 1635, more than a century before the American Revolution. Grand juries work very differently than the trial juries that are so ubiquitous in film and on television. Grand jurors can submit questions for the prosecutor to ask of witnesses. Defense lawyers are not present. Their hearings are secret. A grand jury must

reach a quorum (in the Ferguson case, for example, nine out of 12) to determine whether reasonable cause exists for the government to bring criminal charges against a defendant. A trial jury, on the other hand, has a much higher burden of proof and must (in almost all states) unanimously agree the prosecutor proved his or her case beyond a reasonable doubt in order to convict the defendant. Their decisions have a higher standard because they decide whether a defendant is innocent or guilty.

In the wake of recent events, many are asking an important question: should the grand jury process be changed?

Some defend the secrecy of today's proceedings, arguing that it is needed to protect the reputations and privacy of those accused of crimes who may very well be innocent. After all, the grand jury uses its remarkable power both as a sword to formally bring charges against those who break the law and as a shield to protect the innocent against unsubstantiated accusations.

Others have called for special prosecutors to be appointed in cases involving excessive force by the police; a method believed to improve both oversight and investigation. Others have vocalized the need to create specialized independent bodies that focus solely on police misconduct.

At the federal level, Rep. Hank Johnson (D-Ga.) announced on Wednesday that he will reintroduce the Grand Jury Reform Act, which the Congressman had introduced at the end of last year's session. The measure would require that where an alleged crime occurred involving a police officer, the governor would appoint a special prosecutor to conduct a public probable cause hearing, and one that is open to the public. What gives the legislation teeth is that law enforcement would forfeit federal funding unless they adopted the new rules.

In New York, Attorney General Eric Schneiderman recently asked Gov. Andrew Cuomo to sign an Executive Order providing the Attorney General with jurisdiction to investigate police killings of unarmed civilians. On Wednesday, in conjunction with his State of the State speech, Gov. Cuomo made it clear that he is working to make Grand Jury procedures more transparent and accountable. Specifically, his plan includes authorizing prosecutors to issue a Grand Jury report or factual letter explaining the proceedings in police fatality cases where a no true bill is issued. He also proposed appointing an independent monitor to review such cases resulting in no true bills, giving them the authority to then recommend a special prosecutor.

And, it seems that prosecutors in New York are willing to work with the governor on some reforms. On Monday, the *New York Daily News* reported on a letter the District Attorneys Association of the State of New York sent to Gov. Cuomo agreeing to some reforms, including, "once a decision not to indict is made by a grand jury, a report could be issued revealing 'the credible evidence' considered by the panel in making the decision." They also suggested that the report could propose disciplinary sanctions for the police officer involved.

Meanwhile, some New York state legislators are thinking about reforms. For example, Staten Island Sen. Diane Savino (D) and Assembly Member Matthew Titone (D) plan to introduce legislation that would compel release of the details of grand jury deliberations.

Iowa, a state that without recent high-profile cases involving police, will likely see legislation introduced this year to change grand juries. Bob Babcock, of Davenport, a member of the progressive advocacy group Progressive Action for the Common Good, is working on legislation requiring an independent prosecutor to be assigned to grand juries investigating excessive force by police. On the west coast, the California legislative black caucus is considering potential legislation, including whether grand juries should even be authorized to investigate cases concerning police officers.

Missouri, Oregon, and Texas are also contemplating grand jury changes that are broader than just cases involving policing misconduct. In Missouri, state Rep. Brandon Ellington (D) filed a bill to change the state constitution to end Missouri's grand jury system. Instead, Ellington proposes prosecutors use preliminary hearings, which are common in many states and are held in open court.

In Oregon, Rep Jennifer Williamson's (D) bill would require digital audio records for all grand jury hearings and allow those who are indicted to obtain copies of the recordings before trial. Oregon retains the dubious distinction as one of three states that relies on the hand written notes of a juror for its official record.

In Texas, Sen. John Whitmire (D) and State Rep. Harold Dutton Jr. (D) recently introduced bills to eliminate what is referred to as the "key man" or "pick-a-pal" system. It would require the courts to randomly summon jurors (the way most jurisdictions work) instead of what happens now, where a district judge picks three to five people to serve as grand jury commissioners, who are then charged with finding 30 prospective grand jurors and selecting 12 who qualify. Critics have long argued that grand jurors in Texas are often pulled from those with strong ties to the criminal justice system such as: lawyers, court reporters, and probation officers.

In the midst of today's conversation on race and criminal justice, it is important to watch whether and how grand jury reform unfolds. If Washington and states do consider change, policymakers would be wise to consider potential reforms' impact on the overall ramifications to the criminal justice system. A thoughtful examination of the process is needed as these reforms may extend beyond mere cases where police are involved in criminal activity, and if implemented correctly, have a positive impact on the criminal justice system overall.

(Photo: AP)

