ARGENTINA'S SOLUTION TO THE MICHAEL BROWN TRAVESTY: A ROLE FOR THE COMPLAINANT VICTIM IN CRIMINAL PROCEEDINGS

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I. Introduction

Something has to change regarding police abuse cases in the United States. Police officers continue to shoot unarmed Black and Latino men without any consequence. Shooting after shooting, victims and society are left with a feeling of injustice and many unanswered questions. This article is a mere attempt to contribute to the discussion on what can change. In Argentina, the victim of a crime is entitled to fully participate in criminal investigations and trials to seek a conviction.[1] Victims, as a party in the criminal proceeding, are called "querellante."[2] Roughly translated, it means the "complainant victim." The role of the complainant victim in the criminal process in Argentina has proven to be significant in the search for justice while maintaining the proper balance between defense and prosecution, which is necessary for an adequate justice system. The participation of the victim has proven essential to human rights processes in combating police misconduct and pursuing the prosecution of ordinary crimes, such as business fraud and other economic crimes, while not destroying the proper balance required to assure a fair trial for the defendant. Their presence has been especially important in human rights trials dealing with cases of enforced disappearances, torture, rape, kidnapping of children and homicide that took place during the Argentine dictatorship

1. Código Procesal Penal de la Nación [Cód. Proc. Pen.] [Crim. Pro. Code] art. 82 (2017) (Arg.), http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/383/texact.htm.
2. *Id.*

between 1976-1983 or in cases of institutional violence.[3] Greater access for the complainant victim helps achieve better results, and in many cases, justice. In the case of the proceedings regarding the crimes committed during the Argentine dictatorship, the complainant victims played a central role in reopening terminated cases.[4] Therefore, the participation of the victim has enhanced the possibility of reducing the gap between real and legal justice, and, as a consequence, conveyed truth, memory, and justice from the legal system to society regarding the worst crimes committed during the last dictatorship.

In the United States, whether it is at the federal or state level, the victim depends almost entirely on the actions of the prosecutor, including whether the prosecutor seeks to file the case, the direction the case is taken, or any plea agreements offered.[5] True, there is some minimal involvement, such as sentencing hearings where the victim may give an impact statement,[6] or where the prosecution allows the involvement of the victim in accepting plea agreements.[7] However, victims in the United States do not enjoy the full participation as in Argentina. As a result, they still rely on the prosecutor's will to involve them. Although there are some specific issues addressed in new laws, such as California's Victim's Bill of Rights[8] known as Marsy's

3. *See* LUIS ALBERTO ROMERO, A HISTORY OF ARGENTINA IN THE TWENTIETH CENTURY 217 (James P. Brennan trans., Pa. St. U. Press 2002) (1994); JORGE TAIANA ET AL., CTR. OF LEGAL & SOC. STUD. & INT'L CTR. FOR TRANSITIONAL JUST., MAKING JUSTICE.: FURTHER DISCUSSIONS ON THE PROSECUTION OF CRIMES AGAINST HUMANITY IN ARGENTINA 13, 16-17 (Paula Arturo trans., 2011).

4. *See* TAIANA, *supra* note 3, at 16-17.

5. *See* ALEJANDRO D. CARRIÓ, THE CRIMINAL JUSTICE SYSTEM OF ARGENTINA (AN OVERVIEW FOR AMERICAN READERS) 71 n.90 (1989) ("Contrast [the criminal justice system of Argentina] with the American scheme, in which the victim is provided with no means of initiating criminal proceedings or taking any part in them."); Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 821, 832 (2013) (discussing the great power prosecutors maintain within the American criminal justice system).

6. *See, e.g.*, *Ariel Castro Sentencing: Victim Impact Statements by Michelle Knight, Relatives of Berry, DeJesus*, ABC NEWS 5 CLEVELAND (Aug. 2, 2013, 5:21 AM), http://www.news5cleveland.com/news/local-news/oh-cuyahoga/ariel-castro-sentencing-victim-impact-statements-by-michelle-knight-relatives-of-amanda-berry-gina-dejesus (describing the involvement in the sentencing hearing of the responsible for the killing of their relative); *Driver Gets Fifty-One Years to Life for Adenhart Death,* ORANGE CTY. REG. (Dec. 23, 2010, 9:11 AM), http://www.ocregister.com/2010/12/23/driver-gets-51-years-to-life-for-adenhart-death/.

7. *See* 18 U.S.C. § 3771(a)(4) (2012); 18 U.S.C. § 3771(a)(9) (2012 & Supp. III 2016).

8. CAL. CONST. art. I, § 28 (Deering 2009); CAL. PENAL CODE §§ 3041.5, 3043 (Deering 2009) (expanding victims' rights in parole proceedings for prisoners sentenced to life in prison with the possibility of parole, applying their rights to all hearings for the purpose of setting, postponing, or rescinding of life prisoner parole dates).

Law, the victim is not entitled to participate in the criminal proceeding.[9]

Take the Michael Brown case, for example. In August of 2014, Michael Brown was shot and killed by Ferguson Police Officer, Darren Wilson.[10] This was an extremely controversial shooting, considering that Brown was unarmed and presented no immediate threat, but still, Wilson shot him approximately seven times.[11] Because Brown's family was not entitled to participate in the proceedings that followed, they were forced to rely entirely on the prosecutor, who decided to present the evidence to the grand jury in a way that some have criticized as pro-police.[12] Furthermore, evidence was gathered almost without any involvement of Brown's family.[13] Against all odds, the result was a "no bill" from the grand jury.[14] This was unusual considering the overwhelming statistics that grand juries vote to indict.[15] If Michael Brown's family had been allowed to participate in the criminal proceedings, the result might have been completely different. Moreover, through counsel of their choice, they would have had increased control over how all the evidence was gathered and presented,

9. *See* CAL. CONST. art. I, § 28, subsec. (b)(8) (establishing the victim's right to be heard upon any release decision, plea, and sentencing hearing in California); CARRIÓ, *supra* note 5 (pointing out that the Argentine criminal system allows for victim participation while the American criminal system does not).

10. DEP'T OF JUST., DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON, 1, 4 (Mar. 4, 2015) [hereinafter DEP'T OF JUST. REP.], https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf.

11. *Id.* at 7, 17 (reporting that Brown was shot at least six or as many as eight times); *see* Larry Buchanan et al., *What Happened in Ferguson?*, N.Y. TIMES, https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html (last updated Aug. 10, 2015) (discussing the societal uproar surrounding the shooting and that several witnesses recounted that Brown had posed no immediate threat to officer Wilson).

12. *See* Marisol Bello et al., *Grand Jury Charges are Easy, Except Against Police*, USA TODAY (Nov. 25, 2014), https://www.usatoday.com/story/news/nation/2014/11/25/ferguson-grand-jury/70098616/; David Zucchino, *Prosecution's Grand Jury Strategy in Ferguson Adds to Controversy*, L.A. TIMES (Nov. 25, 2014, 8:49 PM), http://www.latimes.com/nation/la-na-ferguson-da-analysis-20141126-story.html.

13. *See* DEP'T OF JUST. REP., *supra* note 10, at 9, 59 (indicating the negligible instances of the Brown family's involvement).

14. Jeffrey Fagan & Bernard E. Harcourt, *Fact Sheet on the Michael Brown Case*, COLUM. L. SCH., http://www.law.columbia.edu/news/2014/11/michael-brown-case-fact-sheet (last updated Dec. 5, 2014, 12:00 PM); *see* Eyder Peralta & Bill Chappell, *Ferguson Jury: No Charges For Officer In Michael Brown's Death*, NPR (Nov. 24, 2014, 3:37 PM), http://www.npr.org/sections/thetwo-way/2014/11/24/366370100/grand-jury-reaches-decision-in-michael-brown-case.

15. *See Restoring Legitimacy: The Grand Jury as the Prosecutor's Administrative Agency*, 130 HARV. L. REV. 1205, 1210 (2017) (citing MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2012 - STATISTICAL TABLES 12 (2015)).

the use of witnesses, and selection of experts. In addition, the Brown family could have participated in the preparation of the case presented to the grand jury. This would allow real control over how the case was introduced to the grand jury. Under this scenario, a true bill seems more possible.

In Argentina, the complainant victim can even participate in what is a rough equivalent to a U.S. plea bargain, the "abbreviated trial."[16] In that proceeding, similar to the U.S. plea bargain, there is a negotiation of the penalty between defendant and prosecutor, but the complainant victim has a right to give an opinion about the agreement that is presented to the deciding judge.[17] And if the complainant victim does not agree with the conviction terms, they have the right to an appeal.[18] This equivalent heightens the victim's sense of receiving justice, something that should be considered in the U.S. Generally, after an indictment by a grand jury, a vast majority of cases are pleaded.[19] After an indictment is obtained, and with the participation of the complainant victim, the possibility of a plea bargain is diminished.[20] This not only favors the interest of the complainant victim but also favors the defendant, as well as the proper administration of justice. The relatives of someone killed often dislike a plea bargain, and as the complainant victim, they should have a say on that matter. Also, the complainant victim deserves a proper outcome; the complainant victim deserve to know who the defendant is, why they are being punished, and what punishment they will receive for the crime committed. The reasons for, and the rights established in Marsy's law, demonstrate this by recognizing the victim's right to justice and due process, and therefore, explicitly establishes the right to confer with the prosecutor regarding arrest and the charges filed, among other issues.[21]

Plea bargaining, a specific but often used and important stage of criminal procedure, will likely achieve better results with the involvement of the complainant victim. In Argentina, the participation of the complainant victim in the probation hearing can be important in shap-

16. *See* CÓD. PROC. PEN. art. 431 bis (Arg.); *see also* Alejandro D. Carrió & Alejandro M. Garro, *Argentina*, *in* Criminal Procedure: A Worldwide Study 46 (Craig Bradley ed., 2d ed. 2007) (discussing the concept and process of an "abbreviated trial").

17. *See* CÓD. PROC. PEN. art. 431 bis para. 3 (Arg.).

18. *Id.* para. 6.

19. *See* Missouri v. Frye, 566 U.S. 134, 143 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."); *Criminal Cases*, BUREAU OF JUSTICE STATISTICS, https://www.bjs.gov/index.cfm?ty=tp&tid=23 (last visited Sept. 3, 2017).

20. *See* CARRIÓ, *supra* note 5, at 178-79, 184, 179 n.22.

21. CAL. CONST. art. I §28, subsec. (b)(6).

ing the conditions imposed on the defendant. Therefore, the conditions to grant the probation, by request of the complainant victim, will be tailored to the offense, such as attending a human rights course, donating money to a specific charity, etc.

This article is divided into two sections. The first describes and explains the powers and capabilities of the complainant victim in the Argentinean criminal system and shows the differences and similarities with the prosecutor's role. It also discusses the role and influence of the complainant victim in criminal cases of crimes against humanity and institutional violence in Argentina. The first section shows how the participation of the complainant victim is an important part of the search for justice. The second section tries to show, through the review and analysis of the evidence in the Michael Brown case, that participation in the criminal proceeding against Darren Wilson by the complainant victim, his family in this case, would have created a different result.

II. The Victim in the Criminal Procedure in Argentina: A Complete Overview

A. *Review of the Present Situation of the Complainant Victim in Argentina*

1. Who can be a Complainant Victim?

Individuals: From the inception of Argentina's first criminal procedure code in 1889,[22] victims in Argentina have been entitled to participate in the criminal process with the representation of a lawyer on their behalf.[23] To achieve the status of "complainant victim," the complainant victim must be directly injured by the crime or, in the case of a crime resulting in the death of the victim, the closest relative of the deceased, particularly the spouse, parents, or children.[24] Also, the legal tutor of a disabled person can also become a complainant victim on his behalf.[25]

An illustrative example is offered through the killing of Franco Almiron and Mauricio Ramos and the attempted murder of Joaquin Romero on February 3, 2011 by the police of the Province of Buenos

22. *See generally* 5 A. Esmein, The Continental Legal Hist. Series—A Hist. of Continental Crim. Pro.: With Special Reference to Fr. 596 (John Simpson trans., Ass'n of Am. L. Schools 1968) (indicating that the Argentine Code of Criminal Procedure came into force in 1889).

23. *See* Cód. Proc. Pen. art. 80, 82 (Arg.); Carrió, *supra* note 5, at 20.

24. Cód. Proc. Pen. art. 82 (Arg.).

25. *Id.*

Aires.[26] In that case, the mother of Franco Almiron and Joaquin Romero became complainant victims in the criminal proceedings and fully participated in the investigation.[27] Their participation has proven to be critical. Only a few days after the same law enforcement agency responsible for the crimes filed the police report, the prosecutor was ready to close the investigation.[28] The prosecutor was determined to accept the version of facts presented by law enforcement, which assumed the police responded to a gang of armed men trying to derail a train to steal cargo in the shantytown of Carcova.[29] The police created a story where many armed men fired at them after throwing branches of trees on the rails while the officers only tried to protect the train from being stolen.[30]

However, in having the complainant victims participate, they not only avoided the closure of the investigation but were able to prove what had really happened that day. Three years later, the truth came out. The derail of the train was an accident, and not planned as the police had suggested.[31] The alleged "gang" of armed men shooting at the police turned out to be only one man. Furthermore, the shots he fired were an hour before the shooting of the kids and in a different location—100 meters away from where Franco, Mauricio, and Joaquin were standing simply watching what was going on.[32] Because of the participation of the claimant victims, it was proven that the three of

26. *See Reclamo de Justicia a Cuatro Meses de los Asesinatos de José León Suárez*, CENTRO DE ESTUDIOS LEGALES Y SOCIALES (June 9, 2011), http://www.cels.org.ar/web/2011/06/reclamo-de-justicia-a-cuatro-meses-de-los-asesinatos-de-jose-leon-suarez/.

27. *See Juicio por la Masacre de Carcova: Solicitan la Condena de los Policías Imputados*, CENTRO DE ESTUDIOS LEGALES Y SOCIALES (Mar. 11, 2014), http://www.cels.org.ar/web/2014/03/juicio-por-la-masacre-de-carcova-solicitan-la-condena-de-los-policias-imputados/.

28. *See Policeman condemned for 2011 killings in José León Suárez*, BUENOS AIRES HERALD (Mar. 15, 2014), http://www.buenosairesherald.com/article/154469/policeman-condemned-for-2011-killings-in-jos%C3%A9-le%C3%B3n-su%C3%A1rez.

29. *See Argentina News Roundup: 20th February 2014*, THE ARG. INDEP. (Feb. 20, 2014), http://www.argentinaindependent.com/currentaffairs/argentina-news-roundup-20th-february-2014/; *Argentina News Roundup: 17th March 2014: Ex-Police Officer Acquitted in 'Masacre de La Cárcova' Trial*, THE ARGENTINA INDEPENDENT (Mar. 17, 2014), http://www.argentinaindependent.com/currentaffairs/argentina-news-roundup-17th-march-2014/.

30. *See* Alan Gerónimo, *A 6 Anos de la Masacre de la Carcova*, LA IZQUIERDA DIARO (Feb. 3, 2017), https://www.laizquierdadiario.com/A-6-anos-de-la-Masacre-de-La-Carcova.

31. *See Reclamo de Justicia a Cuatro Meses de los Asesinatos de José León Suárez*, *supra* note 26.

32. *See* Ben Darlington, *Two Youths Shot Dead in Chaotic Train Robbery, While Fresh Leads Shed New Light on the Disappearance of Julio Lopez*, PULSAMÉRICA: THE IMPARTIAL LATIN AM. NEWS MAG. (Feb. 7, 2011), http://www.pulsamerica.co.uk/2011/02/argentina-this-week-9/.

them were the only kids watching what was going on.[33] By the time of their death, many officers were on the scene, firing hundreds of shotgun rubber rounds.[34] The trial court concluded that the police were responsible for the death of Mauricio and Franco, and the attempted murder of Joaquin.[35]

Groups: There is also a special provision in which civil associations and foundations can become a complainant victim in cases of human rights violations and crimes against humanity.[36] The specific requirement is that their statutory purpose has to be directly related to the defense of the affected human rights.[37] For example, Center for Legal and Social Studies ("CELS"),[38] a human rights organization in Argentina with a large background in litigating crimes against humanity committed by the last dictatorship in Argentina, utilizes this possibility as a way to initiate and foster criminal investigations regarding the crimes committed by the dictators.[39] Recently, the CELS has been accepted as a complainant victim in criminal proceedings against the dictators in the disappearance of twenty-six workers from Molinos Rio de la Plata.[40] The criminal investigation seeks to determine the level of responsibility of the directors of Bunge & Born, an economic group that owned Molinos Rio de la Plata during that time, in the workers' disappearances committed by the dictatorship with their participation.[41]

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33. *Masacre de la Cárcova: Absolvieron al Policía Acusado de Asesinar a Franco Almirón y Mauricio Ramos*, El Diario de Buenos Aires (Mar. 17, 2014), http://www.eldiariodebuenosaires.com/2014/03/17/masacre-de-la-carcova-absolvieron-al-policia-acusado-de-asesinar-a-franco-almiron-y-mauricio-ramos/.

34. *Id.*; *see* Darlington, *supra* note 32.

35. *See A Cinco Anos de la Masacre de la Carcova: "Seguimos Pidiendo Justicia"*, Infojus Noticias: Agencia Nacional de Noticias Juridicas (Feb. 3, 2016), http://www.infojusnoticias.gov.ar/nacionales/a-cinco-anos-de-la-masacre-de-la-carcova-seguimos-pidiendo-justicia-11032.html; *Reclamo de Justicia a Cuatro Meses de los Asesinatos de José León Suárez*, *supra* note 26.

36. Cód. Proc. Pen. art. 82 bis (Arg.).

37. *Id.*

38. Centro de Estudios Legales y Sociales, https://www.cels.org.ar/web/.

39. *See* U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., Argentina 2014 Human Rights Report 2 (2014).

40. Centro de Estudios Legales y Sociales, CELS Joins Court Probe to Uncover Corporate Complicity in Crimes Against Humanity (Sept. 18, 2014); *New Lawsuit Over Dictatorship-Era Crimes,* Buenos Aires Herald (Sept. 9, 2014), http://www.buenosairesherald.com/article/169274/new-lawsuit-over-dictatorshipera-crimes.

41. *See* Bueno Aires Herald, *supra* note 40; Alejandra Dandan, *Una Querella Para Investigar al Directorio de Bunge & Born*, Pagina 12 (Sept. 8, 2014), https://www.pagina12.com.ar/diario/elpais/1-254807-2014-09-08.html.

2. Powers Established in the Criminal Procedure Code

Argentina has a two stage criminal process: an investigation stage where a judge determines if a case should go to trial, and a trial stage, where the parties make their arguments before a three-judge panel.[42] The complainant victim may participate in both. First, the complainant victim has to present itself in court and be admitted as a party in the investigation of the crime.[43] If the victim is denied its pretended role, the victim can appeal to the Court of Appeals.[44] Since the Supreme Court of the Nation recognizes the right of the victim to get a response as within their constitutional rights, a victim persistently denied of becoming a "complainant victim" can take the case up to the Supreme Court.[45]

Once accepted, the complainant victim can do almost everything that the public prosecutor can. In the investigatory stage, the complainant victim can participate in the questioning of all witnesses, by formulating questions and objecting whenever the questions made by the public prosecutor or defense counsel are inadequate.[46] They also can have their own expert witnesses participate in all the different forensic analyses.[47] If their own expert witness does not concur with the official expert, they are allowed to present their own findings.[48] Article 82 of the Federal Criminal Procedure establishes that the complainant victim may "as such, to promote the process, provide elements of conviction, argue about them and appeal to the scope of this Code."[49]

When sufficient evidence is gathered against a person, the complainant victim can then ask the court to call that person as a suspect so that the suspect formally becomes a defendant.[50] After the defendant is called before the judge, the complainant victim has the power to ask the judge to send the case to the oral trial stage of the proceeding.[51] The complainant victim is also entitled to participate in the trial.[52] In Argentina's federal criminal system, and in almost all local

42. *See* CÓD. PROC. PEN. art. 25, 32 (Arg.); CARRIÓ, *supra* note 5, at 29.
43. CÓD. PROC. PEN. art. 83 (Arg.); *see* CARRIÓ, *supra* note 5, at 70-71.
44. *See* CARRIÓ, *supra* note 5, at 41.
45. *See id.* at 41, 215.
46. *See id.* at 72.
47. *See* CÓD. PROC. PEN. art. 259 (Arg.); CARRIÓ, *supra* note 5, at 72.
48. *See* CÓD. PROC. PEN. art. 80, 259 (Arg.); Carrió & Garro, *supra* note 16, at 48 (citing CÓD. PROC. PEN. art. 259 (Arg.)).
49. CÓD. PROC. PEN. art. 82 (Arg.).
50. *See* CARRIÓ, *supra* note 5, at 72.
51. *Id.*
52. *Id.* at 70.

criminal systems, there are no jury trials.[53] Rather, the evidence is presented by the parties to a three-judge tribunal.[54] One of the three judges presides over the hearings and makes most decisions regarding the admissibility of the questions made to witnesses.[55] After closing arguments, the three judges communicate the decision they have reached, including a written ruling with their reasoning about the facts and how they applied the law.[56] In this type of trial, the complainant victim enjoys the same powers as the public prosecutor. This means he can examine and bring his own witness and his own expert witnesses to the stand, cross-examine all witnesses of the defense, and, after all the evidence is presented, the complainant victim has the power to make a closing statement and ask the three-judge tribunal for a conviction.[57] Finally, at every stage of the procedure, including in the case of an acquittal, the complainant victim is entitled to appeal the rulings it considers unjustified or wrongfully decided.[58] For example, in the case of the killings in the shantytown of Carcova mentioned above, the trial concluded with an acquittal for one of the policemen who killed Franco and Mauricio.[59] The appeal from the prosecution and the complainant victim was successful, and the acquittal was declared null.[60] A new trial is set to happen.[61]

3. Differences From the Public Prosecutor's Powers

The most significant difference regarding the public prosecutor's powers and the complainant victim's powers is participation in the bail process. The Criminal Procedure Code is clear that the complainant victim may not appeal any kind of decision regarding bail.[62] Therefore, victims may offer an opinion to the judge about bail, but nothing more. For example, the complainant can urge the court to have the defendant remain in custody but would not be able to appeal the decision of the judge to grant bail. An important policy justification under-

53. *See* Carrió & Garro, *supra* note 16, at 48.

54. *Id.*

55. *See* Cód. Proc. Pen. art. 375 (Arg.).

56. Carrió, *supra* note 5, at 202, 215.

57. *Id.* at 61, 72, 202.

58. *See* Cód. Proc. Pen. art. 435 (Arg.); Carrió, *supra* note 5, at 214.

59. *See Masacre de la Cárcova: Casación Anuló la Absolución de un ex Policía Bonaerense y Agravó la Condena de Otro*, Centro de Estudios Legales y Sociales (Nov. 3, 2015), http://www.cels.org.ar/web/2015/11/masacre-de-la-carcova-casacion-anulo-la-absolucion-de-un-ex-policia-bonaerense-y-agravo-la-condena-de-otro/.

60. *Id.*

61. *Id.*

62. *See* Cód. Proc. Pen. art. 332 (Arg.).

lies this distinction of powers. The victim's sole interest in participating in the investigation is to seek justice. Whether the defendant remains or does not remain in custody while the proceedings advance towards a conviction, is a precautionary measure not directly related to the investigation. Rather, the issue of bail is tied to assuring the presence of the defendant at trial. Therefore, the only party, other than the defendant, with appeal powers on the issue of bail, is the public prosecutor.

4. Powers Recognized by Interpretation by the Supreme Court and the Influence of Inter-American System Rulings Recognizing Victims' Rights in the Argentine System

The Supreme Court and the Inter-American Human Rights System have been central in pushing Argentina to expand the rights of victims in the criminal process.[63] Although not expressly established in the Criminal Procedure Code, the National Supreme Court of Justice in *Santillan*[64] ruled that a trial court may convict a defendant, even without the prosecution seeking a conviction, by acting solely on the basis of the accusation of the complainant victim.[65] So, if the public prosecutor decides during his closing argument, for whatever reason, to ask the trial court to acquit the defendant, but the complainant victim in its own closing argument asks that the defendant should be convicted, the trial court may choose to convict. To decide this way, the Court considers that:

> anyone to whom the law recognizes standing to sue to defend their rights is covered by the guarantee of due process enshrined in art. 18 of the Constitution, which guarantees all litigants alike the right to obtain a reasoned judgment . . . .
>
> . . .
>
> under the right to jurisdiction implicitly enshrined in the article of the Constitution and whose scope, as the possibility of occurring before a court to seek justice and get helpful adjudication of the rights of litigants (Decisions 199:617; 305:2150 —La Ley, 1984-B, 206—, among others), is consistent with recognizing arts 8th, para-

63. *See, e.g.*, Jorge Luis Bronstein v. Argentina, Cases 11.205, 11.236, 11.238, 11.239,11.242, 11.243, 11.244, 11.247, 11.248,11.249, 11.251, 11.254, 11.255, 11.257, 11.258, 11.261, 11.263, 11.305, 11.320, 11.326, 11.330, 11.499, 11.504, Inter-Am. Comm'n H.R., Report No. 2/97, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 61, §§ i-ii (1997).

64. Corte Suprema de Justicia de la Nación [CSJN][National Supreme Court of Justice], 13/08/1998, "Santillán, Francisco A. / recurso extraordinario," Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1998-321-2021) (Arg.).

65. *Id.* at 2027.

graph first, of the American Convention on Human Rights and article 14.1 of the International Covenant on Civil and Political Rights.[66]

After *Santillan*, the Supreme Court issued several rulings reaffirming this important power recognized in the complainant victim and further explained how it should be applied.[67] These rulings were based on international human rights treaties that recognize the rights of the victim.[68] In direct connection with this recognition of rights in the complainant victim, it is important to consider that in Argentina many human rights treaties have constitutional status.[69] This means they are considered part of the Constitution, and therefore, they are also considered the supreme law of Argentina.[70]

In *Del'Olio,*[71] for example, the Court expressly mentioned that as long as there is a formal accusation of a crime so that the defendant may know what the accusation is, it does not matter if the accusation is made either by the prosecution or by the complainant victim.[72] In *Quiroga,*[73] the Court expressly referred to the "autonomy" of the criminal complainant in the criminal procedure where the public prosecutor decides to close an investigation.[74] Autonomy is a full recognition of the complainant victim as a party in the criminal procedure with extended and important powers, including the possibility to carry on with the procedure without the public prosecutor either filing charges or asking the trial court for a conviction.[75]

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66. *Id.* at 2029.

67. *E.g.*, Corte Suprema de Justicia de la Nación [CSJN][National Supreme Court of Justice], 11/07/2007, "Sabio, Edgardo Alberto, Herrero, Carlos Washington / falsedad material de documento," Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2007-330-3092) (Arg.).

68. *See, e.g.*, *id.* at 3094 (citing International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 172; G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948)).

69. Art. 75, para. 22, CÓNSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

70. *Id.*

71. Corte Suprema de Justicia de la Nación [CSJN][National Supreme Court of Justice], 11/07/2006, "Del'Olio, Edgardo Luis y Del'Olio, Juan Carlos / defraudación por administración fraudulenta," Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2006-329-2596) (Arg.).

72. *Id.* at 2598.

73. Corte Suprema de Justicia de la Nación [CSJN][National Supreme Court of Justice], 23/12/2004, "Quiroga, Edgardo Oscar / causa 4302," Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2004-327-5863) (Arg.).

74. *Id.* at 5895.

75. LAURENCE BURGORGUE LARSEN & AMAYA ÚBEDA DE TORRES, THE INTER-AMERICAN COURT OF HUMAN RIGHTS: CASE LAW AND COMMENTARY 43 (Rosalind Greenstein trans., Oxford University Press 2011).

The importance of Human Rights treaties in Argentina is underscored in the following example. In *Ekmekdjian*,[76] Ekmekdjian was denied his right to exercise a public rejoinder regarding some statements made in open television about Jesus and the Virgin Mary.[77] As a result, he filed a lawsuit against the owner of the TV show.[78] The Supreme Court held that the rights recognized by the American Convention on Human Rights, such as the right to a replica, are applicable in the domestic courts without the necessity of any regulating law by Congress.[79] Since the ruling in *Ekmekdjian* in 1992, and two years before the Constitution was modified to incorporate human rights treaties, the Supreme Court has taken the lead in applying human right standards into the domestic administration of justice.[80]

By the early '90s, Argentina had ratified many human right treaties, which the Supreme Court recognized the importance and applicability of their standards and rules in the domestic justice system.[81] Therefore, during the process to reform the Constitution in 1994, the inclusion of constitutional status of the human rights treaties was on the agenda.[82] Finally, the reform included the human rights treaties that were already ratified by Argentina, which opened the door to the inclusion of future human rights treaties.[83] Under a special constitutional provision, with the approval of two-thirds of the members of the National Congress, a human rights treaty can be incorporated into the Constitution, such as the inclusion of the Convention on Imprescriptibility of Crimes of War and Against Humanity in 2003.[84] After the constitutional modification, the Court applied for the first time the new constitutional scheme set in *Giroldi.*[85] In *Giroldi*, the defendant

76. Corte Suprema de Justicia de la Nación [CSJN][National Supreme Court of Justice], 7/07/1992, "Ekmekdjian, Miguel A. c. Sofovich, Gerardo y otros / recurso extraordinario," Fallos (1992-315-1503) (Arg.).

77. *Id.*

78. *Id.*

79. *Id.* at 1505-06.

80. *Id.* at 1514.

81. *See generally* CSJN, 7/07/1992, "Ekmekdjian, Miguael A.," Fallos (1992-315-1503); CSJN, 13/08/1998, "Santillán, Francisco A.," Fallos (1998-321-2021) (Arg.).

82. Janet K. Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, 37 COLUM. J. TRANSNAT'L L. 281, 288-289 (1999) (discussing the problems and promise of Argentina's internalization of international law, such as human rights treaties, via constitutionalization).

83. Art. 75, para. 22, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

84. *Id.* art. 30, 75 para. 22.

85. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 7/4/1995, "Horacio David Giroldi y Otro / recurso extraordinario," Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1995-318-514) (Arg.); *see* Ariel E. Dulitzky, *La Aplicación de los Tratados Sobre Derechos Humanos por los Tribunales Locales: Un Estudio Comparado*, 1997

was denied an appeal on a suspended conviction and sought the declaration of unconstitutionality of the article of the Criminal Procedure Code that established that inability to appeal.[86] By applying the new constitutional scheme, the Supreme Court declared unconstitutional a national law for violating Article 8.2h of the American Convention on Human Rights.[87] Human Rights treaties and rulings by the Inter-American Court are therefore binding for Argentina's judicial system.[88] Regarding the issue of participation by the complainant victim, Argentina's Supreme Court acknowledges that the Inter-American Court of Human Rights has established standards where the Court recognizes the right of the victim to an effective remedy and participation in the criminal procedure.[89] In *Bayarri v. Argentina*[90] the Court said:

> Denial of access to justice is related to the effectiveness of remedies, within the meaning of Article 25 of the American Convention, since it is not possible to say that a criminal case in which the clarification of the facts and determining the imputed criminal responsibility is impossible due to an unjustified delay in it, may be considered as an effective judicial remedy. The right to an effective remedy requires judges to direct the process as to avoid undue delays and obstructions that lead to impunity, thus frustrating due judicial protection of human rights.[91]

Also, in a case against *Brazil*,[92] the Inter-American Commission on Human Rights said that "the family of the victim must have full access and capacity to act at all stages and levels of investigations, in accordance with domestic law and the provisions of the American Convention."[93]

CELS 68 (explaining that the Argentinean Supreme Court established that the jurisprudence of the Inter-American Commission of Human Rights is also mandatory for Argentinean Courts).

86. CSJN 7/4/1995, "Horacio David Giroldi," Fallos (1995-318-516).

87. *Id.* at 527-31.

88. Sadly, this may be under review. In March 2017, the Supreme Court issued its ruling in the "Fontevecchia" case where, although it sustained the obligation of complying with Inter-American Court decisions, they established a set of variables that may change the criteria. *Las Consecuencias del fallo Fontevecchia de la CSJN para la vigencia de los DD.HH*, CENTRO DE ESTUDIOS LEGALES Y SOCIALES (Feb. 18, 2017), http://www.cels.org.ar/web/wp-content/uploads/2017/02/cels-sobre-fallo-fontevecchia-.pdf.

89. *See* Bayarri v. Argentina, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 187 (Oct. 30, 2008).

90. *Id.* ¶¶ 102-03.

91. *Id.* ¶ 116.

92. Fernandes v. Brazil, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L./V/II.111, doc. 20 rev. (2001).

93. *Id.*

5. Limits

The criminal procedure establishes certain limitations on the powers of the complainant victim so as to maintain the proper balance of force between the accusing parties and the defendant. The first and most important limitation on the complainant victim is the opportunity to become one. He cannot become a party at any time under any circumstance.[94] He may only become a complainant victim any time during the investigatory stage of the proceedings, but not after.[95] In the investigatory stage, almost all of the evidence is gathered, including witnesses, experts, and forensic evidence.[96] If the investigatory judge rules there is enough evidence about the defendant committing the alleged crime, they will send the case to the trial stage.[97] If the criminal proceedings passed from the investigatory stage to the trial stage, or is already at the trial stage, the opportunity to become a complainant victim is gone, and therefore, has no possibility of becoming a party.[98]

As explained above, the criminal procedure in Argentina has two stages: an investigatory stage and a trial stage. In order to be permitted to participate in the second stage, where the complainant victim themselves can even ask the trial court to convict the defendant, there is a specific requirement that the complainant victim has to have participated in the previous stage.[99] This requirement preserves the right of the defendant to know what facts are the ones for which he will face at trial. This right is protected by demanding that both the public prosecutor and complainant victim be precise about the facts that are the basis of the criminal charges presented against the defendant.[100] Therefore, if the complainant victim has not participated in the investigatory stage, and has not described with precision what the defendant allegedly did, the defendant will not be able to properly prepare a defense at the trial stage since he does not know what facts he is being accused according to the complainant victim.

The complainant victim also faces one simple but important risk—if by the end of the criminal proceedings the defendant is found to be innocent, the complainant victim will have to face all costs made

94. CÓD. PROC. PEN. art. 84, 90, 179 (Arg.).
95. *Id.* art. 90.
96. *Id.* art. 216, 304.
97. *Id.* art. 306.
98. *Id.* art. 84, 90.
99. *See id.* art. 60, 86, 346, 347, 353 ter., 374.
100. *See id.* art. 83, 346, 347, 374.

by the defendant.[101] This rule is a deterrent policy that assures there is no misuse of the complainant victim policy, and only a concrete and harmed victim with a true interest will become a complainant victim. Finally, to preserve the proper balance in the process between the defendant and prosecution and for procedural economy, the trial judge has the discretion before the trial begins to accumulate all complainant victims on one legal representation.[102] With this decision, all complainant victims will be a party to the trial, but in one formal representation on behalf of all the complainant victims. As a practical matter, instead of having one lawyer for each victim who would question witnesses, introduce experts, and make opening and closing statements, there would be only one attorney representing all the victims. This procedure is regularly used; for example, it was used in the trials of crimes against humanity committed by the last dictatorship between 1976 and 1983, where there are hundreds, perhaps thousands of victims seeking justice.[103]

B. Analysis and Review of the Influence of the Complainant Victim in Human Rights Processes

As we will see in this section, the influence of the complainant victim cannot be underestimated. The use of the powers described above, by victims of the cruelest and most unthinkable crimes, has proven to be an inestimable enhancement for the criminal process and the search for justice. Let's see.

1. Crimes Against Humanity

After the first trial in 1985 known as the "Juicio a las Juntas Militares"[104] ("Trial of the Military Boards"), several executive decisions and federal laws enacted in 1986 and 1987 made it almost impossible to prosecute and convict the dictators and their collaborators under the Argentine dictatorship.[105] These new laws almost completely eliminated the possibility of prosecuting and convicting the

101. *Id.* art. 531.

102. *Id.* art. 85, 416.

103. *See Human Rights: 300 Trials Still Open*, BUENOS AIRES HERALD (June 14, 2015), http://www.buenosairesherald.com/article/191569/human-rights-300-trials-still-open.

104. *See Documentos Historicos*, MEMORIA ABIERTA, http://www.memoriaabierta.org.ar/materiales/documentos_historicos.html/ (last visited Oct. 10, 2017); *Juicio a las Juntas*, MEMORIA ABIERTA, http://www.memoriaabierta.org.ar/juicioalasjuntas/ (last visited Oct. 10, 2017).

105. *See generally* Law No. 23.492, Dec. 24, 1986, [1986-B] B.O. 1100 (Arg.) (providing for immunity against criminal actions for alleged participation, to any degree, by those related to the establishment of violent forms of political action and the few exceptions to that immunity); Law No. 23.521, June 8, 1987, [1987-A] B.O. 260 (Arg.) (providing criminal immunity for alleged

dictators and their collaborators who were responsible for over 30,000 enforced disappearances and thousands of homicides, torture, child appropriation, and sexual abuse cases.[106]

Due to pressure from the Argentine military, two laws passed that, together, attempted to curtail most trials against the dictators and their collaborators, even against the worst abusers. First, the Full Stop Law,[107] passed in 1986, shortened the statute of limitations of the perpetrators by establishing a sixty day limit to initiate all criminal investigations regarding human rights crimes committed during the dictatorship.[108] Second, the Due Obedience Law,[109] enacted in 1987, generally limited the criminal prosecutions of military officers to the rank of Colonel or above, allowing most junior officers, even the most heinous torturers, to escape prosecution.[110] Complainant victims, however, pushed back. First, in 1998, the complainant victims, represented by the "Abuelas de Plaza de Mayo" Organization, and starting in 2000, victims represented by the CELS, commenced a criminal complaint process that eventually led to the declaration of unconstitutionality of the laws that protected the human rights abusers.[111] For example, in a motion by CELS in 2000, the complainant victim in the criminal case known as *Simón*,[112] asked the judge to nullify the laws that blocked the prosecutions.[113] On March 6, 2001, the judge declared, for the first time since they were enacted by Congress, that both the Full Stop and Due Obedience Laws were invalid, unconstitutional, and null.[114] The Court of Appeals affirmed the ruling on November 9, 2001.[115]

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participation, to any degree, by those who helped establish violent forms of political action acting under authority or in obedience as subordinates).

106. Centro de Estudios Legales y Sociales (CELS), Derechos Humanos y Control Civil Sobre las Fuerzas Armadas 27, 30, 36-37 (2006), http://www.cels.org.ar/web/wp-content/uploads/2016/12/2006Control-civil-de-las-Fuerzas-Armadas.pdf.

107. Law No. 23.492, B.O. 1100 (Arg.).

108. *Id.* art. 1.

109. Law No. 23.521, B.O. 260 (Arg.).

110. *Id.*; *see also Argentina: The Full Stop and Due Obedience Laws and International Law*, Amnesty International, 1 (2003).

111. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/6/2005, "Julio Hector Simon y otros / recurso extraordinario," Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2005-328-2064) (Arg.).

112. *Id.*

113. *See id.*

114. *Id.* at 2131*; see, e.g.*, Victoria Ginzberg, *Una Llave Para Reabrir la Justicia,* Pagina 12 (Jan. 3, 2001), http://www.pagina12.com.ar/2001/01-03/01-03-07/pag03.htm.

115. *Reluctant Partner: The Argentine Government's Failure to Back Trials of Human Rights Violators*, 13 Human Rights Watch (2001), https://www.hrw.org/legacy/reports/2001/argentina/argen1201-01.htm#P53_4982.

The judicial, historical, and political impact of these decisions were instant and comprehensive. For the first time since 1986 and 1987, there were no limits on the ability to prosecute the authors of the worst atrocities in Argentine history. After years of struggle, justice for the complainant victim seemed to be possible. Finally, in 2005, the Supreme Court in *Simón* not only affirmed the decision of the lower courts holding that the limiting laws were unconstitutional but also declared constitutional a law, enacted by Congress in 2003, that, by its implication, repudiated the Full Stop and Due Obedience Laws.[116] The Supreme Court decision opened the door for an unprecedented process of justice for the crimes against humanity committed during the dictatorship.[117] Since then, dozens of oral trials have taken place all over the country.[118] Courts convicted hundreds of military officers at all ranks, but there were also many acquittals.[119] The sole existence of these acquittals is the best sign that trials are carried out with all the due process rights of the defendants observed, and that the influence of the victim, sometimes working side by side with the prosecutor, does not destroy nor affect the balance of the process. By using the justice system to jail the authors of the worst offenses against human rights in Argentine history, the victims and their relatives taught a lesson to human rights violators. These victims showed them that in the search for justice, they respected every single right that the Constitution offered to the dictators as criminal defendants, something that the dictators and their collaborators did not do with regards to the victims' rights.

2. Institutional Violence

The influence of the complainant victim has been equally significant in crimes involving institutional violence, such as police abuse cases that often include homicide. First, the participation of victims has significantly reduced the possibility of impunity.[120] The presence of the complainant victim makes it difficult for courts to dismiss a case when the prosecutor is not interested in investigating the police. It is common for prosecutors to try to close investigations too quickly. This

116. CSJN, 14/6/2005, "Julio Hector Simon," L.L. (2005-328-2347) (Arg.).

117. *See, e.g.*, *Proceso de Justicia Estadísticas*, CENTRO DE ESTUDIOS LEGALES Y SOCIALES, http://www.cels.org.ar/web/estadisticas-delitos-de-lesa-humanidad/ (last updated June 30, 2017).

118. *Id.*

119. *Id.*

120. *See A Tres Años de la Masacre de la Carcova,* CENTRO DE ESTUDIOS LEGALES Y SOCIALES (Jan. 6, 2014), http://www.cels.org.ar/web/2014/01/a-tres-anos-de-la-masacre-de-la-carcova-el-modelo-de-seguridad-bonaerense-a-juicio/.

occurs most often in police abuse cases because the victims are often minorities or foreigners—mainly poor young men of the so-called "Villas" (shantytowns)—who are not usually protected by the public prosecutors. As mentioned above regarding the killing of Franco Almiron and Mauricio Ramos and the attempted killing of Joaquin Romero by police, impunity is exactly what was avoided by the complainant victim becoming a party in the criminal investigation and stopping the dismissal of the case.[121] All the victims were habitants of "La Carcova," one of the poorest shantytowns in the Province of Buenos Aires, but the families of the victims thwarted the public prosecutor's decision to close the investigation.[122]

Second, the presence of a complainant victim ensures greater scrutiny of all actors connected to the incident.[123] Often, when the public prosecutor does investigate, the prosecutor only focuses on the police officer who has killed the young man without considering higher-ups.[124] Prosecutors rarely address the fact that someone gave the order to carry a lethal weapon to a situation, such as a social protest in the streets, that did not justify it, or that, sometimes, the person giving the orders was at the scene with the defendant.[125] In other words, when a prosecutor charges the officer, the investigation will end unless the complainant victim steps up and provides the court with a big picture that fully shows what actually happened on the day of the crime and highlights all of the persons responsible for the crime. In the case of Mauricio Ramos, Franco Almiron, and Joaquín Romero mentioned above, the families and their lawyers, acting as complainant victims, are currently trying to bring the high-ranking officers, who were in charge of the two shooters, to court.[126] Even before the trial against the two shooters began, the complainant victims unsuccessfully tried, due to the lack of interest of the public prosecutor, to get a second trial for the officers who gave the orders on that day and who were directly responsible for the deaths.[127]

Third, sometimes attorneys for the criminal complainant have a stronger grasp of the case than the trial stage prosecutor since Argen-

121. *Id.*

122. *Id.*

123. *See* CARRIÓ, *supra* note 5, at 30-31, 178-79.

124. *19 y 20 de Diciembre de 2001: Condenas a la Represión de la Protesta Social*, CENTRO DE ESTUDIOS LEGALES Y SOCIALES (May 23, 2016), http://www.cels.org.ar/web/2016/05/19-y-20-de-diciembre-de-2001-condenas-a-la-represion-de-la-protesta-social/.

125. *Id.*

126. *See A Tres Años de la Masacre de la Carcova*, *supra* note 120.

127. *See* Carlos Rodriguez, *La Segunda Muerte de Mauricio y Franco*, PAGINA 12 (Mar. 15, 2014), https://www.pagina12.com.ar/diario/sociedad/3-241895-2014-03-15.html.

tina splits the criminal process into two stages, an investigation stage and a trial stage. The trial prosecutor is rarely the individual who prosecuted at the investigation stage.[128] Furthermore, institutional violence cases are often very complex. Since the investigatory prosecutor is not the one taking the case to trial, he may not especially be concerned about how the case concludes. His primary goal is to get enough evidence to send the case to the trial court, but often that is not enough to get a conviction. The requirements to move from the investigation stage to the trial stage are significantly lower than those demanded to convict at trial.[129]

The presence of complainant victims also helps human rights groups focus society's attention on the need for policy changes. The criminal complainant may often obtain information that would otherwise be kept hidden by the police, and sometimes, the cases will show that it was a political decision taken by superiors that led to the lower ranking police officers to commit abuses.[130] Thus, not only does the presence of a complainant victim help institutional violence cases move forward in the face of resistance from prosecutors and judges who often have a close relationship with the police, but the complainant victim's participation in the process can also become a tool for institutional reform.

C. Analysis of the Role of the Complainant Victim in Argentina's New Accusatorial System

On December 4, 2014, the Argentine Congress enacted the new Criminal Procedure Code,[131] the implementation of which is still unclear. The biggest change brought about by the new code is structural, causing the system to resemble the system used in the United States. The Code moves from a mixture of accusatory and inquisitor to a purely accusatory system.[132] Therefore, the distribution of powers and capabilities in the procedure is established the same way as the United States procedure. Also, the Code institutes the "docket,"[133] which es-

128. *See* CARRIÓ, *supra* note 5, at 172-73.

129. *See* CÓD. PROC. PEN. art. 349 (Arg.); CARRIÓ, *supra* note 5, at 197.

130. CARRIÓ, *supra* note 5, at 178-79.

131. *See* Leonel Poblete Codutti, *Argentina's New Criminal Code Bill*, TELESUR (Oct. 28, 2014, 3:35 PM), https://www.telesurtv.net/english/analysis/Argentinas-New-Criminal-Code-Bill-20141028-0036.html. *See generally* CÓD. PROC. PEN. (Arg.).

132. CÓD. PROC. PEN. art. 9 (Arg.).

133. *Id.* art. 57.

tablishes time limits to make the process move more swiftly, and includes a hearing similar to the preliminary hearing before trial.[134]

However, the role and capabilities of the complainant victim remain effective entirely. Therefore, the complainant victim will have the same authority as previously held: the ability to interview witnesses, produce and gather evidence, as well as participate in the trial and ask for a conviction.[135] The powers of the complainant victim, as previously established by the Supreme Court, are also included expressly in the new criminal procedure code with full "autonomy" of the complainant victim to continue with the procedure when the public prosecutor decides to dismiss an investigation.[136]

III. Analysis of the Michael Brown Case By Introducing the Participation of the Complainant Victim

A. Brief Introduction to the Second Part of This Article

This part of the article intends only one thing—to explain the importance the role of the complainant victim would have had in the decision-making process of the Michael Brown case. Participation by the complainant victim would have ensured a more just resolution. To that end, as a complainant victim, Michael Brown's family would have been involved in the preparation and gathering of the evidence, the introduction and questioning of proposed experts and witnesses, and the production of any other evidence the public prosecutor did not offer or discover in the investigation. This section intends to show that the presence of the complainant victim could have influenced the way the public prosecutor introduced the evidence, and what evidence was ultimately sent to the grand jury. Ultimately, it shows how the final outcome, the "no bill" decision by the grand jury, could have come out precisely the opposite way.

This Article does not intend to criticize the work done by any of the involved authorities, but the Argentinean experience of the complainant victim has proven to be an enhancement of criminal proceedings and the everyday search for justice. Therefore, this Article intends to be a contribution to the public discussion about cases that involve potential abuse by the police and to raise concerns about a system of criminal investigation that is dominated and controlled by

134. *Id.*
135. *Id.* art. 80.
136. *Id.*

the prosecutor and police without reasonable possibilities of control or influence by anyone outside the procedure. Not even the victim.

B. Control the Understandable Hurry to Call a Grand Jury

Michael Brown, an unarmed black teenager from Ferguson, Missouri, was shot and killed by a white Police Officer, Darren Wilson, on August 9, 2014.[137] Brown was walking down the street with his friend Dorian Johnson.[138] Apparently, they had stolen a few packages of cigarettes when Wilson encountered Brown and Johnson.[139] Wilson stated that that is when he realized that the two men matched the robbery suspects' descriptions.[140] Wilson backed up his cruiser and blocked them.[141] An altercation ensued with Brown and Wilson struggling through the window of the police vehicle until Wilson was able to fire his gun one time from inside his car.[142] Brown and Johnson then fled, with Wilson in pursuit of Brown.[143] Brown stopped and turned to face the officer.[144] According to Wilson, Brown moved toward him.[145] Allegedly in self-defense, Wilson fired at Brown several times, all shots striking him in the front, with the possible exception of the two bullets fired into Brown's right arm.[146] According to other witnesses, Brown was standing with his hands up when Wilson started shooting.[147] During the entire altercation, Wilson fired a total of twelve bullets with the last probably being the fatal shot.[148]

On August 20, only eleven days after the incident, the grand jury hearings began.[149] Considering the social significance this case reached and the enormous amount of evidence to be gathered, calling

137. DEP'T OF JUST. REP., *supra* note 10.
138. *Id.* at 6.
139. *Id.*
140. *Id.* at 13.
141. *Id.*
142. *Id.* at 6.
143. *Id.* at 7.
144. *Id.*
145. *Id.*
146. *Id.* at 7, 10.
147. Steve Nelson, *Police Attorneys: Brown Head Wounds not Fatal to Officer's Defense*, U.S. NEWS (Aug. 18, 2014, 4:49 PM), https://www.usnews.com/news/articles/2014/08/18/police-attorneys-michael-brown-head-wounds-not-fatal-to-officers-defense. *But see* DEP'T OF JUST. REP., *supra* note 10, at 8 (explaining that, of the accounts claiming Brown had his hands up when Wilson fired his gun, none were reliable because some were inconsistent with physical and forensic evidence, some were inconsistent with the witnesses' prior testimony, and some were admittedly inaccurate).
148. DEP'T OF JUST. REP., *supra* note 10, at 7, 18.
149. Transcript of Grand Jury Trial Vol. I, Missouri v. Wilson, WL 6657091 (2014) (No. GJ2014-0820) [hereinafter Grand Jury Vol. I].

the grand jury that quickly could be easily considered premature. However, the rush was also understandable due to the social pressure in Ferguson at the time.[150] This hard-to-reconcile situation between the social desire for a proper and quick response and the need to present to a grand jury a well-prepared case could have been resolved with the involvement of the complainant victim.

On the very first day of the grand jury hearing, the prosecutor explained to the grand jury that there were still some important pieces of evidence without finalization. The prosecutor explained, "So there is a lot that is still going on with the officers gathering the evidence, evidence is being tested, being evaluated. I say evaluated, it is being looked at, firearms evidence, the firearms people are looking at, DNA evidence, the DNA are examining that."[151] So, this shows the prosecutor was perfectly aware that the case was not ready to be properly introduced to a grand jury but, nevertheless, chose to proceed. Finalizing evidence while the grand jury is hearing the case is not a proper solution. What if some particular piece of evidence that is finished in the middle of the hearings contradicts another piece of evidence that was already introduced by the prosecution? What if the contradiction is only apparent then and it is all about having enough time to process the evidence properly? The prosecution's case-in-chief will be jeopardized and with it, the entire case. The introduction of witnesses in a disorganized manner can confuse the grand jury. Furthermore, it is reasonable to think that to present a case properly, the prosecutor must first have prepared all the evidence to be presented. Then, prepare their case-in-chief, and finally, introduce it to the jurors. For example, the analysis and results of the firearm forensic analysis on Wilson's gun finished on September 8, eighteen days after the beginning of the grand jury.[152] We should also consider that Darren Wilson

150. *See, e.g.*, *id.* at 7 (Prosecutor McCulloch explaining that the case was still in the middle of investigation and alluding to the fact that there was unrest in Ferguson at the time); David Catanese, *Potential Presidential Candidates find Common Ground on Ferguson*, U.S. NEWS (Aug. 14, 2014, 4:20 PM), https://www.usnews.com/news/blogs/run-2016/2014/08/14/cruz-paul-warren-weigh-in-on-ferguson; Pema Levy, *How Strong is the Legal Case Against Darren Wilson?*, NEWSWEEK (Aug. 19, 2014 12:58 PM), http://www.newsweek.com/how-strong-legal-case-against-darren-wilson-265675; Nelson, *supra* note 147; Tierney Sneed, *NAACP to Cops: Identify Michael Brown Shooter*, U.S. NEWS (Aug. 12, 2014, 6:39 PM), https://www.usnews.com/news/articles/2014/08/12/naacp-to-cops-identify-michael-brown-shooter.

151. Grand Jury Vol. I, *supra* note 149, at 7.

152. ST. LOUIS COUNTY POLICE DEP'T, CRIME LABORATORY ANALYSIS REPORT 1 (2014), http://www.documentcloud.org/documents/1371001-crime-lab-firearm-evidence.html [https://perma.cc/334R-ZSS7] [hereinafter CRIME LABORATORY ANALYSIS REPORT].

had not been arrested during this time. As a result, the prosecutor was under no statutory requirement to call the grand jury in such a hurry.

On the other hand, in cases involving potential police abuse or any case with significant societal demand, often public and mass media play important roles on how the case evolves on a daily basis. As a result, high pressure is put on the authorities in charge of dealing with the case. In that context, the prosecution deals with a great amount of pressure. Society is asking for a proper and quick response. The protests on the streets of Ferguson, Missouri and the violent response by law enforcement agencies against individuals' First Amendment rights in the days following the shooting of Michael Brown, are of public knowledge and show the social significance of the shooting and the need for an answer.[153]

If Michael Brown's family were entitled to participate in the criminal proceeding against Officer Wilson as a complainant victim, they could have utilized their powers in the proceedings to avoid presenting the case to the grand jury until it was complete. Also, as a complainant victim in this kind of investigation, they would have reasonably had the support and respect of the public, and therefore, could have utilized this influence to pressure the prosecutor to not introduce the case to a grand jury until it was ready. Furthermore, the complainant victim, who enjoys the same powers as the prosecutor, has the possibility to file an injunction, restraining the presentation of the case for grand jury consideration or by any other recourse available.[154] As a party to the proceedings, the complainant victim can formally request an injunction and let the judge decide whether the prosecutor should carry on with the grand jury or momentarily suspend the call on the grand jury.[155] Although the prosecution and complainant victim theoretically are aiming at the same goal, that does not mean it always happens or that they always want it done in the same way. In cases of abuse by the police, it is often normal to see the prosecutor trying to protect the law enforcement agency involved.[156] In situations like this, the complainant victim would have the recourses,

153. *See, e.g.*, *Looting Erupts After Vigil for Slain Missouri Teen Michael Brown*, NBC NEWS (Aug. 11, 2014, 3:58 AM), https://www.nbcnews.com/news/us-news/looting-erupts-after-vigil-slain-missouri-teen-michael-brown-n177426.

154. *See* CÓD. PROC. PEN. art. 45, 80, 82 (Arg.).

155. *See id.* art. 80.

156. *See* David Packman, *The Problem with Prosecuting Police in Washington State*, CATO INST. (Feb. 27, 2011), https://www.policemisconduct.net/the-problem-with-prosecuting-police-in-washington-state/ (reporting an inverse relationship between prosecution and conviction rates for law enforcement).

such as an injunction, to prevent the prosecutor from jeopardizing the case.

Compared to reactions a prosecutor seeking postponement would endure, the public will hardly question the complainant victim's decision to postpone the case by a few weeks or months. Public opinion, which was highly involved in how the case moved on a daily basis, would see the involvement of Michael Brown's family and any decision to postpone the grand jury hearings and, therefore, diminish any belief that the prosecution was protecting law enforcement or being dishonest in any other way. This would ensure that the case is introduced to a grand jury in a consistent, serious, and strategically prepared manner.

Finally, if the situation were in reverse, where the prosecutor inexplicably postpones the proceedings even though all the evidence is ready for trial, the complainant victim would have the powers to activate the case.[157] As a first course of action, the complainant victim, having direct involvement with the prosecution's office, can insist on the summoning of the grand jury.[158] The prosecution would then have to at least listen to what the complainant victim has to say, since it is a party to the proceedings. Also, depending on the stage of the case, the complainant victim would be entitled to file a complaint and ask the judge to set a date for a preliminary hearing.[159]

C. An Unusual Strategy of the Prosecution Before the Grand Jury

Generally, prosecutors present only enough evidence to secure a bill of indictment.[160] In 1985, former Chief Judge Sol Wachtler said, if they so desired, a prosecutor could persuade a grand jury to "indict a ham sandwich."[161] In 2010, official statistics tended to confirm the message Judge Wachtler conveyed twenty-five years earlier as only eleven of all federal cases were dismissed by a "No Bill" decision.[162] In this case, the prosecution made the unusual decision to present absolutely all of its evidence to the grand jury, even evidence that was unnecessary to the case, instead of only presenting enough evidence to

157. *See* CÓD. PROC. PEN. art. 80 (Arg.).

158. *See id.*

159. *See id.* art. 80, 82.

160. *See* Judd Legum, *Legal Experts Explain Why the Ferguson Grand Jury Was Set Up for Failure,* THINKPROGRESS (Nov. 25, 2014, 2:10 AM), https://thinkprogress.org/legal-experts-explain-why-the-ferguson-grand-jury-was-set-up-for-failure-363f71a74b78/.

161. Marcia Kramer & Frank Lombardi, *New Top State Judge: Abolish Grand Juries & Let Us Decide*, N.Y. DAILEY NEWS, Jan. 31, 1985, at 3.

162. *See* MOTIVANS, *supra* note 15.

get a "True Bill" and go to trial as usual.[163] The prosecutor decided to present to the grand jury all the witnesses of the crime and all the people that had participated in some way, either by calling 911 because they heard gun shots or by standing in a place where they might have seen something.[164] Every single person, every possible witness, was introduced to the grand jury.[165] Therefore, when the prosecution went before the grand jury, he gave them everything he had, and thereby, converted the grand jury into some kind of trial. He did this however, without a defendant, a judge, or any rules of admissibility of evidence and without the many particularities a trial has that a grand jury does not.[166]

The complainant victim in Argentina works the criminal procedure such as a private litigator would. The complainint vicitim also enjoys almost the same kind of powers as the public prosecutor would. In this sense, the complainant victim participates in the production of all the evidence, as we will see later below. This means he will share the job and directly participate in how the evidence is gathered and will have the ability to influence the prosecutor. In the Michael Brown case, a lot of people criticized the prosecution's strategy, including the prosecutor's presentation of all the evidence to the grand jury rather than only the necessary evidence.[167] It is definitely not normal, or necessary, to present every witness related to the investigation. Presenting such evidence can amount to the equivalent of "reasonable doubt" and increase the likelihood of the grand jury returning a "No Bill" when a trial would have seemed necessary to ensure justice through a public trial involving all parties. Under the current system of handling grand juries, this evidence was a matter for a jury trial, not a grand jury hearing. Whether this was done to protect law enforcement by

163. *See* WILLIAM T. HOSTON, RACE AND THE BLACK MALE SUBCULTURE: THE LIVES OF TOBY WALLER 70 (2016); *see also* Erica Smith, *Prosecutors Answer Questions about Michael Brown Case*, ST. LOUIS PUBLIC RADIO (Oct. 1, 2014) (stating that the grand jury heard much more evidence in this case than grand juries typically do).

164. *See* Smith, *supra* note 163.

165. *See id.*

166. *See* Jeffrey Fagan & Bernard E. Harcourt, *Professors Fagan and Harcourt Provide Facts on Grand Jury Practice In Light of Ferguson Decision*, COLUMBIA LAW SCHOOL, http://www.law.columbia.edu/media_inquiries/news_events/2014/november2014/Facts-on-Ferguson-Grand-Jury (last updated Dec. 5, 2014, 12:00 PM).

167. *See, e.g.*, *id.*; Legum, *supra* note 160; Alice Miranda Ollstein & Kira Lerner, *Experts Blast Ferguson Prosecutor's Press Conference, Legal Strategy*, THINK PROGRESS (Nov. 25, 2014, 7:54 PM), https://thinkprogress.org/experts-blast-ferguson-prosecutors-press-conference-legal-strategy-202dfd230ad3/; Tierney Sneed, *Scrutiny Over Handling of Michael Brown Case Continues*, U.S. NEWS (Jan. 6, 2015, 6:43 PM), https://www.usnews.com/news/articles/2015/01/06/scrutiny-over-handling-of-michael-brown-case-continues.

misleading the grand jury so that a "No bill" would result or whether it was part of some rare but out-of-good-faith strategy by the prosecutor, a complainant victim would have likely made things different by influencing the prosecutor on how they could present the case to the grand jury.

Therefore, the prosecutor turned this grand jury hearing into a trial, where either the defendant is found guilty and will lose his liberty or is acquitted and remains a free man. As mentioned earlier, the prosecutor in the Michael Brown case also decided to do something that does not usually happen in every trial: he called to the stand every possible witness related to the investigation and questioned them on every single issue, including mere procedural rules.[168] As mentioned, this is not normal in an ordinary grand jury, where the prosecutor only introduces the most relevant evidence. All this evidence is important in a trial, but not necessarily in a grand jury hearing where the goal is to decide whether a trial should even occur. This notion is particularly relevant regarding witnesses of the crime for one other reason. If for some reason the grand jury returned a "True Bill," Darren Wilson would still have been benefited from the prosecutor's actions since, now, he would have been able to better prepare for trial. As opposed to a defendant who had an ordinary grand jury, Darren Wilson, for example, could reasonably get a copy of the grand jury hearing transcripts and use it during his actual trial. For defendants who do not get the same treatment police officer Darren Wilson received,

> the most important benefit of the grand jury is neither shield nor sword, but discovery. After a prosecution witness testifies on direct examination at a federal trial, the defendant may obtain a copy of the transcript of any relevant grand jury testimony of that witness. . . the transcript might be useful to impeach the trial testimony of a witness.[169]

Although in federal prosecutions the defendant is not entitled to a transcript of the grand jury proceedings as a general rule,[170] the combination of Federal Rules of Criminal Procedure 16(a)(1)(B)(iii),[171] the Jencks Act 18 U.S.C.A. §3500,[172] and the pros-

168. *See* Fagan & Harcourt, *supra* note 166; Sneed, *supra* note 167.

169. MYRON MOSKOVITZ, CASES AND PROBLEMS IN CRIMINAL PROCEDURE: THE COURTROOM 219 (Lexis Nexis, 5th ed. 2009).

170. *See* FED. R. CRIM. P. 6(e).

171. *See* FED. R. CRIM. P. 16(a)(1)(B)(iii).

172. *See* Jencks Act, 18 U.S.C. § 3500(b) (2012) (providing all persons accused of violating federal law may obtain copies of witness statements *after* that person has testified).

ecutor's constitutional duty to disclose favorable evidence to the defense under the Brady Rule[173] would have allowed Darren Wilson to obtain a transcript, which would have better prepared him for trial than any other defendant.

In sum, if Darren Wilson had to face trial, he would reasonably have had something that absolutely no other defendant has ever had—a full copy of transcripts from the grand jury hearings where all the relevant witnesses testified. Why afford Darren Wilson this incredible advantage over any other kind of "defendant?" As a matter of principle, the advantage should be available for both kinds of defendants, not only for law enforcement agents.

As mentioned before, presenting all the evidence to the grand jury is not consistent with the true purpose of a grand jury, which is to determine whether there is probable cause to believe that the criminal suspect has committed the crime.[174] How criminal investigators worked and how evidence is gathered is not intended to be part of the grand jury's job. The involvement of the complainant victim will usually mean that the prosecutor will likely be more careful in how he works and what he does since someone with the same resources is not only working along with him but has almost the same powers. When the public prosecutor works the case, prepares his case-in-chief, and calls for a grand jury, he controls the procedure entirely. That is why, ironically, the result was a "No Bill" for Darren Wilson, although prosecutors tend to get incredibly high rates of "True Bill."[175] This is not to say that the current system works just fine; it does not. The issue is showing that the involvement of the complainant victim might have avoided any confusion the prosecution presented to the grand jury that led to the "No Bill" decision. Therefore, it is the simple fact that this high-profile case clearly needed to be sorted out through a public trial and the way the public prosecutor worked severely diminished the possibility of that happening.

By involving the complainant victim, who is only concerned about this particular criminal proceeding and not pressured by public opinion or concerned about keeping a good relationship with the law enforcement agencies, the decision of presenting the case, as the prosecutor did in the Michael Brown grand jury hearing, can be reasona-

173. *See* Brady v. Maryland, 373 U.S. 83 (1963) (requiring prosecutors to disclose materially exculpatory evidence in the government's possession to the defense).

174. *See* LAURA BEREND & JEAN RAMIREZ, CRIMINAL LITIGATION IN ACTION 137 (Carolina Acad. Press, 2d ed. 2012).

175. *See* MOTIVANS, *supra* note 15.

bly avoided. A complainant victim would undoubtedly try to avoid presenting the case like the prosecutor did and would not leave the testimony of Darren Wilson unchallenged. This might be done by having the ability to talk to the prosecutor on a daily basis, discuss the case and try to have an influence on the prosecutor's case-in-chief. In this matter, the complainant victim would influence the prosecutor to not bring Darren Wilson to the stand before the grand jury, but if he did, the complainant victim would make the prosecutor question Wilson regarding the contradictions in his testimony versus the witnesses' testimony.

D. The Initial Approach That Can Determine the Fate of the Case

When Michael Brown died, the death turned into a criminal investigation.[176] The record shows that from the very first moment, officers and investigators took the approach that Darren Wilson was the victim and that Michael Brown was the suspect.[177] One of the crime scene detectives, from the St. Louis County Police Department, testified in the grand jury hearing and said clearly, "At first, we treated it as an 'assault on law enforcement.'"[178] Also, if one were to look at the numerous police reports, every single one of them says, "Victim: Darren Wilson, Suspect: Michael Brown."[179] Furthermore, when interviewing many of the witnesses, the detectives referred to the death of Michael Brown as an "incident."[180] This subtle reference to what happened illustrates how the detectives of the St. Louis Police Depart-

176. *See* St. Louis County Police Dep't, Crime Laboratory Controlled Substance Analysis Report (2014), https://assets.documentcloud.org/documents/1371000/crime-lab-controlled-substance-report.pdf [https://perma.cc/JH5D-8S86] [hereinafter Controlled Substance Report].

177. *Id.*

178. Transcript of Grand Jury Trial Vol. II at 43, Missouri v. Wilson, WL 6657092 (2014) (No. GJ2014-0903), https://assets.documentcloud.org/documents/1370904/grand-jury-volume-2.pdf [https://perma.cc/FU89-KNKN] [hereinafter Grand Jury Vol. II].

179. *See, e.g.*, Crime Laboratory Analysis Report, *supra* note 152; Controlled Substance Report, *supra* note 178; St. Louis County Police Dep't, Crime Laboratory Weapon Analysis Report 1 (2014), https://assets.documentcloud.org/documents/1371001/crime-lab-firearm-evidence.pdf [https://perma.cc/334R-ZSS7] [hereinafter Crime Laboratory Weapon Analysis].

180. *See* Interview by Det. of St. Louis County Police Dep't, Bureau of Crimes Against Persons, with unnamed Witness at St. Louis County Police Headquarters 1 (Aug. 11, 2014, 11:39 AM), https://assets.documentcloud.org/documents/1370946/interview-witness-10.pdf [https://perma.cc/QNM4-DYDE] [hereinafter Witness Interview 10]; Interview by Det. of St. Louis Cty. Police Dep't, Bureau of Crimes Against Persons, with unnamed Witness at St. Louis County Police Headquarters 7 (Aug. 9, 2014, 2:19 PM), https://assets.documentcloud.org/documents/1370955/interview-witness-16.pdf [https://perma.cc/R7LB-SGR9] [hereinafter Witness Interview 16].

ment addressed the situation of the eyewitnesses they questioned. The same crime scene detective later testified that only a few hours after the shooting, "a detective that had spoken with him [Darren Wilson] was now back at the scene giving us things to look for."[181] So after Darren Wilson gave his side of the story, the detective returned to the scene to start working on the case.[182] Clearly, the "things to look for" concerned Wilson's version of events. This approach, where Brown was considered a suspect, continued when Darren Wilson testified again the next day.[183]

So we have the following situation: the police department that is controlling the crime scene, gathering all the forensic evidence through their correspondent specialists, and looking and talking to witnesses, are focusing on the entire incident as if the victim is Darren Wilson and the suspect is Michael Brown. All of this occurred in the first hours and days of the investigation when the most important evidence has to be gathered, and especially when witnesses are to be questioned so that their memory is as fresh as possible. Maybe this particular approach can explain how Darren Wilson was able to wash his hands before any photographs, samples, or other forensic evidence was taken and why it was not raised as an issue by the investigating officers or the prosecution.[184] Also, no one raised an issue when Wilson calmly described, in his second interview, how he sealed his own gun in an evidence envelope.[185] In short, Wilson, the shooter, washed the blood off his hands and "sealed" the murder weapon himself. Apparently, he also cleaned the gun as the Crime Laboratory Weapon Analysis Report stated "Defect: Apparent blood was cleaned from the firearm before analysis. The firearm is in otherwise normal firing condition."[186] The sealing of the weapon by Wilson, and the fact that no fingerprints were taken from it, creates one simple possibility: to corroborate Wilson's version of the story. In Wilson's story, while

181. *See* Grand Jury Vol. II, *supra* note 178 at 126-27.

182. *See* St. Louis County Police Dep't, Investigative Report 14-43984, at 4 (2014), https://assets.documentcloud.org/documents/1370990/14-43984-care-main.pdf [https://perma.cc/4Z7H-LDZ7] [hereinafter Investigative Report].

183. *See* Interview by Det. of St. Louis County Police Dep't, Bureau of Crimes Against Persons, with Darren Wilson, Police Officer, St. Louis Cty. Police Dep't at St. Louis County Police Headquarters (Aug. 10, 2014 10:16 AM), https://assets.documentcloud.org/documents/1370945/interview-po-darren-wilson.pdf [https://perma.cc/SXV5-DXQ2] [hereinafter Darren Wilson Interview].

184. *Id.* (Darren Wilson stated that as soon as he got to the police station, "I went into the bathroom to wash the blood off and I had also realized I had blood on the inside of my left hand from my fingertips to about my wrists.").

185. *Id.*

186. *See* Crime Laboratory Weapon Analysis, *supra* note 179, at 1.

Brown was attacking Wilson when he was still in the patrol car, Brown was able to grab Wilson's gun since his "hand was large enough to encompass the top of the slide, a large portion of the handgrips, and the trigger guard,"[187] according to Wilson for "Hmmm, ten seconds."[188] But ten seconds is more than enough time to leave fingerprints on a gun that Brown allegedly touched almost everywhere. However, the prosecutor did not address this issue and, therefore, only Wilson's allegations remained.[189]

Neither the police investigating nor the prosecution raised any concern about the erased fingerprints from Wilson's weapon as a complainant victim would have. If evidence is lost, the complainant victim could have cross-examined Wilson and raised the issue in front of a jury so that it could determine whether the actions impacted Wilson's credibility. It is, therefore, natural to assume that following the story given by Darren Wilson only one or two hours after the shooting of Michael Brown, the police were trying to confirm Wilson's story, as the example of Witness 22 will later show. The police were not trying to discover the truth of what happened that day. They were clearly trying to corroborate the statements given by Police Officer Darren Wilson to other police officers of the same law enforcement agency investigating the crime; the way that the police intently focused on corroborating Wilson's version was not controlled by anyone. This is not to say that this was unmistakably wrong. Of course, Darren Wilson's statements should have been taken into consideration, but there should have been at least one more piece of evidence, one more possible way of how things occurred. It was not the one and only version to verify.

Enabling the complainant victim to have a voice in the proceedings would not have voided the focus that the police had in the first hours, maybe not even in the first two or three days. However, it could have altered the ensuing investigation as this approach was taken by the police until at least September 3, 2014, as the crime lab firearm report indicated.[190] By this time, the grand jury had already been empaneled.[191] However, by this time, the complainant victim would be involved in the investigation, and any necessary shift in how

187. *See* INVESTIGATIVE REPORT, *supra* note 182, at 14.

188. *See* Darren Wilson Interview, *supra* note 183, at 11.

189. *See* Grand Jury Vol. II, *supra* note 178, at 43.

190. *See* CRIME LABORATORY ANALYSIS REPORT, *supra* note 152.

191. *See* Lauren Raab, *Q&A Grand Jury Starts on Michael Brown Case: What You Need to Know*, L.A. TIMES (Aug. 20, 2014, 10:36 PM), http://www.latimes.com/nation/nationnow/la-na-nn-grand-jury-ferguson-michael-brown-20140820-story.html.

the police and prosecutor were investigating the shooting would have occurred. If the police investigators were reluctant to make the proper shift, the complainant victim would have enough powers to focus the investigation differently. The complainant victim can interrogate witnesses on their own, or with the police investigators, and work with the crime scene investigators and forensic evidence analysts.[192] They can also utilize their own experts if they believe the "official" experts are not working properly.[193] For example, if by questioning the witnesses, the complainant victim considers that the production of specific forensic analysis may be useful to corroborate or discard the different versions of how things happened, he has the authority to conduct a forensic analysis if the crime investigators or the prosecution decides not to do so.[194]

A perfect example comes from the release of information that resulted from a second autopsy performed by a medical examiner on behalf of the family. According to the private autopsy, Michael Brown had seven entrance wounds instead of six as the Medical Examiner of the St. Louis County determined.[195] The missing entrance wound was only mentioned by the St. Louis Medical Examiner as a "tangential (graze) gunshot wound near the ventral surface of the right thumb," and it states that "no powder stipple is identified. The exact directional path of the gunshot wound cannot be easily determined."[196] Whereas, the private autopsy states that:

> the first wound was in the right hand and occurred at the patrol car as confirmed by skin tissue on the car . . . police photographs taken before the first autopsy [the one performed by the St. Louis Medical Examiner] show black soot on skin and the microscopic sections

192. *See* CÓD. PROC. PEN. art. 80, 259, 389 (Arg.); *see also* REDRESS & INSTITUTE OF SECURITIES STUDIES, VICTIM PARTICIPATION IN CRIMINAL LAW PROCEEDINGS, SURVEY OF DOMESTIC PRACTICE FOR APPLICATION TO INTERNATIONAL CRIMES PROSECUTIONS, 54, 67 (2015), http://www.redress.org/downloads/1508victim-rights-report.pdf.

193. *See* CÓD. PROC. PEN. art. 259 (Arg.); *see also* CARRIÓ, *supra* note 5, at 72; CRIMINAL PROCEDURE: A WORLDWIDE STUDY, *supra* note 16, at 48.

194. *See* CÓD. PROC. PEN. art. 80, 259 (Arg.); REDRESS & INSTITUTE OF SECURITIES STUDIES, *supra* note 192.

195. PRIVATE AUTOPSY REPORT OF MICHAEL BROWN (2014), https://assets.documentcloud.org/documents/1371008/michael-brown-private-autopsy-report.pdf [https://perma.cc/8NRT-7CAX] [hereinafter PRIVATE AUTOPSY REPORT]; SAINT LOUIS COUNTY HEALTH OFFICE OF THE MEDICAL EXAMINER, POST-MORTEM EXAMINATION (2014), https://assets.documentcloud.org/documents/1370992/2014-5143-autopsy-report.pdf [https://perma.cc/5XNS-BX25] [hereinafter ST. LOUIS POST-MORTEM EXAMINATION].

196. ST. LOUIS POST-MORTEM EXAMINATION, *supra* note 195.

> show gunshot particulate matter under the skin that indicate that the gun was within inches of the hand when discharged.[197]

This shows the difference between the autopsy that was done by the official examiner, which established six entrance wounds, and therefore, six shots that hit Michael Brown, whereas the autopsy completed by the private examiner clearly showed seven. This establishes an additional shot that hit Michael Brown's body. Another difference lies in the fact that one medical examiner did not identify any powder, but the other one did.[198] The potential significance, however, of these two differences in the investigation will now never be fully known. Maybe if the forensic analysts had photographs of the blood on Darren Wilson's hands and gun, they would have been able to estimate roughly the amount of blood Michael Brown had lost after the first shot he received, which would have been useful forensic evidence to consider. It would have also been useful to know for certain whether Michael Brown was already injured or not, and to what extent, when the following set of shots finally killed him. Also, it may have been useful for the grand jury to properly assess whether Brown represented a real threat to Wilson at that moment.

It is true that the medical examiner that performed the private autopsy, Dr. Michael Baden, testified before the grand jury.[199] This, however, does not change the fact that he was not allowed to see all the evidence necessary to perform a complete autopsy, or that he only testified as a witness to the autopsy he performed.[200] He did not testify as an expert working for one of the parties of the procedure. If Michael Brown's family were a complainant victim, Dr. Baden would have played the role of private examiner to a party to the procedure. Furthermore, he would have had access to all the evidence available (as a medical examiner of the complainant victim the prosecutor cannot deny access to the evidence), and he would have participated in the autopsy with the Medical Examiner of St. Louis County. In any sense, his report and his testimony would automatically entail more gravity as "evidence" since the evidence is for a party of the proceed-

197. PRIVATE AUTOPSY REPORT, *supra* note 195.

198. *Id.* (finding gunshot particulate matter); ST. LOUIS POST-MORTEM EXAMINATION, *supra* note 195 ("no powder stipple is identified.").

199. Transcript of Grand Jury Trial Vol. XXIII, at 7-13, Missouri v. Wilson, WL 6657433 (2014) (No. GJ2014-0916), https://assets.documentcloud.org/documents/1370560/grand-jury-volume-23.pdf [https://perma.cc/84FV-PX4J]; *see* John Eligon, *Pathologist is Witness in Ferguson Death Inquiry*, N.Y. TIMES, Nov. 13, 2014, at A16.

200. Letter from Forensic Pathologist to Prosecutor (Nov. 24, 2014), https://assets.documentcloud.org/documents/1370988/11-24-14-letter.pdf [https://perma.cc/M24L-P8F2].

ing. This would also mean that the difference between one autopsy and the other would be resolved by two medical examiners working together, and in the case they do not agree on the forensic analysis, both of them would be able to present to the jury their opinion with the same weight. Therefore, the ones deciding the issue would be the trier of fact, who it should be.

E. A Different Approach Regarding Witnesses

Another example of the complainant victim controlling the gathering of the evidence is related to witnesses. On the same day Michael Brown was shot, at 5:06 pm, a couple of hours after the incident, a detective of the St. Louis County Police Department questioned a witness, identified in the released documents as Witness 22.[201] The witness' testimony could easily be considered as contradicting Darren Wilson's version. Darren Wilson had reported that Michael Brown started running towards him.[202] However, Witness 22 stated that she saw everything after the first two shots and she "saw the young man grabbing his, either his stomach or his side and had it . . . then he put his hands up and then the man just keep aiming . . . um . . . firing . . . and then that was it. And then I went outside and saw the rest of it."[203] She also added that after the first few shots Michael Brown "was kneeling" and she expressly mentioned, after the first "clarifying" question by the questioning Detective, that Brown was "grabbin' his self."[204]

The first significant issue that the complainant victim could have addressed was to further develop the questioning of this witness. This person clearly saw the most important part of the event—she saw Michael Brown put his hands up. Therefore, she contradicts Darren Wilson's version of the story, particularly on the issue of Brown charging towards Wilson. But her questioning by detectives lasted only four minutes (from 5:06 pm to 5:10 pm).[205] This was one of the shortest questionings of the many witnesses the detectives interviewed, and therefore could have not properly and carefully developed what the witness saw. It is hard to properly assess the credibility of a witness in

201. Interview by Det. of St. Louis Cty. Police Dep't, Bureau of Crimes Against Persons, with unnamed Witness at St. Louis County Police Headquarters (Aug. 9, 2014, 5:06 PM), https://assets.documentcloud.org/documents/1370956/interview-witness-22.pdf [https://perma.cc/U8LH-QK4U] [hereinafter Witness Interview 22].

202. *See* Darren Wilson Interview, *supra* note 183.

203. Witness Interview 22, *supra* note 201.

204. *Id.*

205. *Id.*

only four minutes. On the contrary, for example, Witness 10, who gave an initial statement corroborating Wilson's version, was interviewed thoroughly for thirty-seven minutes.[206] It might also be important to note that this witness showed up voluntarily, and when asked "what is your opinion of-of that incident itself," he stated that Wilson "handled the situation correct force wise [sic]."[207]

Secondly, it is important to take in consideration that the majority of the clarifying questions made by the Detective to Witness 22 were regarding the witness' mention of Michael Brown "grabbing his side." After her first time telling what she saw, the Detective clarified "at first, um, but then he went to his-his side or to his uh . . . ."[208] She then clarified that he was grabbing himself, likely where Michael Brown received the first shots, but the Detective insisted, "Okay. So, kinda-kinda towards his waist on either side or the back. We're not sure why."[209] She answered "uh huh. yeah" and the detective's immediate follow-up question was, "Uh, and then you saw how many more shots?"[210] The Detective focused primarily, and almost exclusively on, Michael Brown going to his waistband.[211] Once he focused on that, he immediately asked about how many shots Wilson made.[212] He asked almost no other question about the entire scene she witnessed.[213]

An officer saying "I thought he was going for his waistband" is the usual explanation for an officer who shot an unarmed man.[214] This version is often used by officers, and relied on by the courts and juries, to find the actions of the officer "objectively reasonable."[215] Therefore, the case is either dismissed, probable cause could not be demonstrated, or at trial, the jury considers the officer's action within the

206. Witness Interview 10, *supra* note 180.

207. *Id.* at 15.

208. Witness Interview 22, *supra* note 201.

209. *Id.*

210. *Id.*

211. *See id.*

212. *See id.*

213. *See id.*

214. *See, e.g.*, Arthur Delaney, *The Most Dangerous Thing You Can Own is Your Waistband*, HUFFINGTON POST (Mar. 3, 2015, 1:54 PM), http://www.huffingtonpost.com/2015/03/03/waistbands_n_6791990.html; Arthur Delaney & Diane Jeanty, *Police Shootings Of Unarmed Men Often Have Something In Common: The Waistband Defense*, HUFFINGTON POST (Dec. 10, 2014, 6:58 PM), http://www.huffingtonpost.com/2014/12/10/police-shootings_n_6303846.html; Cassandra Fairbanks, *Another Unarmed Man Killed by Police, After, You Guessed It, Reaching for His Waistband*, THE FREE THOUGHT PROJECT, (Dec. 3, 2014), http://thefreethoughtproject.com/unarmed-man-left-dead-after-guessed-it-reaching-waistband/.

215. *See* Graham v. Connor, 490 U.S. 386, 397, 399 (1989) (establishing the "objectively reasonable" standard to determine the legality of every use of force decision a law enforcement officer makes) (citing Scott v. United States, 436 U.S. 128, 137-39 (1978)).

law. This is also called "perception shooting"[216] or "threat perception failure"[217] and is a significant problem in police shooting cases, especially when the victim is black.[218] In fact, in his first interview, Wilson mentioned that Brown had placed his hand on his waistband just before Wilson shot him.[219] He confirmed this in his second interview, the next day.[220] But surprisingly, on neither day did he say anything about Brown possibly carrying a gun whenever he describes the moment he first saw Brown walking in the middle of the street.[221] Yet, when Wilson recalled the struggle that happened while he was still in his patrol car, he stated that he believed Brown was going for his gun, and that he actually touched it.[222] This means Brown did not have any weapon that day, and if he actually did move his hand towards his waistband, as Wilson stated, he was clearly not intending to get to a gun. The issue here is that the questioning of Witness 22 happened only a few hours after the shooting, which means the detective was clearly trying to build the usual defense that police officers use when they shoot unarmed people.

The complainant victim, on the other hand, would have asked additional questions to make clear that the witness was only trying to convey that Michael Brown was not looking for a gun in his waist, but was reacting naturally to being shot by putting his hands in that area. The complainant victim could have cleared the path on this significant issue, which often occurs in police shooting cases, by eliminating the possibility of Wilson's defense that Brown was going for his waistband.

With the presence of a complainant victim, the focus on gathering evidence would, therefore, not only be about the version that Darren Wilson provided. The focus would have been to find out what actually happened, not only to corroborate Wilson's version. This may be considered a subtle difference, but it could have meant a big difference in

216. *See, e.g.*, POLICE EXECUTIVE RESEARCH FORUM, CRITICAL ISSUES IN POLICING SERIES, AN INTEGRATED APPROACH TO DE-ESCALATION AND MINIMIZING USE OF FORCE 8, 36 (2012).

217. *See, e.g.*, GEORGE FACHNER & STEVEN CARTER, COLLABORATIVE REFORM INITIATIVE, AN ASSESSMENT OF DEADLY FORCE IN THE PHILADELPHIA POLICE DEPARTMENT 3, 30-32, 71, 82 (2015); Charles M. Blow, *Officers' Race Matters Less Than You Think*, N.Y. TIMES (Mar. 26, 2015), https://www.nytimes.com/2015/03/26/opinion/charles-blow-officer-race-matters-less-than-you-think.html?partner=rssnyt&emc=rss&_r=1.

218. FACHNER & CARTER, *supra* note 217 at 3, 31-33, 71, 82.

219. *See* INVESTIGATIVE REPORT, *supra* note 182 at 14.

220. *See* Darren Wilson Interview, *supra* note 183, at 10.

221. *See* INVESTIGATIVE REPORT, *supra* note 182, at 13; *see also* Darren Wilson Interview, *supra* note 183, at 10.

222. *See* Darren Wilson Interview, *supra* note 183.

the outcome of the investigation. It is impossible to know how different the investigation might have been with a broader approach of how things happened. But clearly, the outcome could have been avoided by the involvement of the complainant victim. The recourses the complainant victim has, the pressure they inherently put on the prosecutor, and how they choose to work are crucial in avoiding or limiting the consequences of this type of decisions.

F. The Questioning of Darren Wilson

This particularized focus on the police investigation, Darren Wilson as the victim and Michael Brown as the suspect, is directly related to something important—the questioning of Darren Wilson throughout the investigation. First, after the initial statement that was taken a few minutes after the shooting of Michael Brown, Wilson gave another statement at the offices of the St. Louis Police Department the day after.[223] Wilson was questioned by two detectives of the St. Louis police, with the presence of his lawyer.[224] The interview was brief, lasting only thirty-one minutes.[225] During that brief interview, Darren Wilson was allowed to extensively explain how he believed things happened but was not questioned about any of the contradicting evidence already known by the detectives.[226] Many witnesses had been interviewed the same day of the shooting, which contradicted several important parts of Wilson's story.[227] However, the detectives that talked to him did not ask any questions about those interviews. They asked several questions about how and where Wilson was injured by Michael Brown and made some clarifying questions over his story, but nothing else.[228]

The same treatment continued when Darren Wilson testified before the grand jury. Wilson testified like someone who was not a defendant, or at least like someone who did not feel threatened by the ongoing investigation. In terms of facts, he was never a defendant. St. Louis County Prosecutor Robert McCulloch explained it perfectly: "It's not unusual to ask someone who may be a target to testify; it is

223. *Id.*

224. *Id.*

225. *Id.*

226. *See* Witness Interview 16, *supra* note 180; *cf.* Darren Wilson Interview, *supra* note 183 (Witness 16 stated that Brown's hands were in the air while Wilson stated Brown's hands were on his waistband; the Detective did not address the differences).

227. *See, e.g.*, Witness Interview 10, *supra* note 180; Witness Interview 16, *supra* note 180; Witness Interview 22, *supra* note 201.

228. *See* Darren Wilson Interview, *supra* note 183.

unusual to have someone who is a target actually testify."[229] As we clearly see from the prosecutor's statements as well as the fact that the police investigators did not consider Darren Wilson as an actual target, Wilson testified before the grand jury without risks. He was treated extremely gentle without cross-examination of evidence that contradicted his testimony.[230] Everything looks like it was designed to get a "No Bill." Maybe that is why Darren Wilson did not plead the 5th Amendment against compelled self-incrimination. For the prosecutor, Wilson was only someone who may be a target. But by the time of the Prosecutor's October 1st interview and the start of the grand jury, we can be sure that the prosecutor already had the information that many witnesses said Darren Wilson was lying and that he unlawfully shot Michael Brown. He definitely knew that Wilson shot Brown at least six times and that Brown was unarmed.[231] Shouldn't this be enough to treat Darren Wilson as an actual suspect, and therefore, not testify in front of the grand jury, giving his version of the facts, without any kind of cross-examination? Would this have been the scenario in a case not involving a police officer or with the involvement of a complainant victim? Probably not. How many homicides are there where the police were not involved, the prosecutor may have found contradicting evidence, but still got an indictment by presenting only the witnesses he chooses to? Maybe every other case except this one. In this kind of situation, the involvement of the complainant victim is crucial for the proper investigation of crimes like the one Darren Wilson committed.

The particularized focus during the investigation, the special treatment Darren Wilson received, the decision to present absolutely all witnesses before the grand jury, and every issue that could have been approached differently, would have been addressed by a complainant victim. The complainant victim would have been involved in the case with the prosecutor. They would have been aware of how things were being carried away, and with enough powers, could have

229. *See* Smith, *supra* note 163.

230. *See* Transcript of Grand Jury Trial Vol. V, at 234, Missouri v. Wilson, WL 6657433 (2014) (No. GJ2014-0916), https://assets.documentcloud.org/documents/1370736/grand-jury-volume-5.pdf [https://perma.cc/QVA4-EWRF] [hereinafter Grand Jury Vol. V]; *cf.* Witness Interview 16, *supra* note 180 (indicating that, during Wilson's testimony, Wilson was not questioned regarding the position of Brown's hands, even though Witness 16's account contradicted Wilson's).

231. SAINT LOUIS COUNTY HEALTH OFFICE OF THE MEDICAL EXAMINER, NARRATIVE REPORT OF INVESTIGATION 1 (2014), https://bloximages.newyork1.vip.townnews.com/stltoday.com/content/tncms/assets/v3/editorial/c/e0/ce018d0c-5998-11e4-b700-001a4bcf6878/5447202ea9b4e.pdf.pdf.

done things on their own if they determined that the prosecution was not doing a thorough job. It is highly unlikely that a complainant victim would allow the prosecutor to make the suspect take the stand before the grand jury. Ultimately, the focus of the investigation would have been different once the complainant victim was formally admitted as a party to the procedure.

IV. Different, New Evidence

One of the biggest controversies within the different accounts was whether Michael Brown was facing Darren Wilson when he was shot, especially the first shot during the second set of shots, and whether he was running towards Wilson or simply standing with his hands in the air.[232] Furthermore, the actual body position of Michael Brown when he was shot was never determined.[233] Therefore, this is one of the most important things that was left unsolved. Although in the public autopsy there were some indications about the apparent position of Michael Brown when he was shot and the trajectory of the wounds could enlighten us a little bit by providing some information for experts to analyze, the prosecutor made the decision not to try to determine precisely how Brown's body was positioned. Also, as explained above, there was a difference in the number of entrance wounds between the St. Louis Medical Examiner and the private examiner. This indetermination was presented to the grand jury and is probably one of the biggest reasons for the "No Bill" decision. If there was no evidence presented to the grand jury that conclusively contradicted Darren Wilson's version of Michael Brown's position when he started shooting, it is understandable that this particular issue might have influenced the grand jury's decision. This, of course, summed up with the fact that the prosecution did not cross-examine Darren Wilson on any substantive issue, particularly regarding the different version of events told by Dorian Johnson, the person who was with Michael Brown at the time of the shooting.

The complainant victim could have asked and worked on this issue. The complainant victim could have designated his own experts, and if the prosecutor was not willing to engage in a new kind of forensic evidence analysis, he could have asked the judge to order a new analysis. Therefore, the complainant victim could have offered and proposed a set of experts who could determine precisely how Michael

232. *See generally* Witness Interview 16, *supra* note 180; Grand Jury Vol. V, *supra* note 230, at 229.

233. *See* Dep't of Just. Rep., *supra* note 10, at 19.

Brown's body was positioned. Comparing and analyzing all the different testimonies against the entrance wounds found in Michael Brown's body, photographs of the scene, the blood patterns on Michael Brown's clothing, and so forth, the prosecution could have reasonably tried to determine how Brown's body was positioned. Furthermore, this could have given credit to Dorian Johnson's testimony, or on the contrary, to Darren Wilson's testimony.

The complainant victim could have not only proposed experts but could have also worked on the specific issues that the experts would later testify to. For example, they could have asked a specific and well-defined issue such as, whether by analyzing the injuries in Michael Brown's body and considering the characteristics of the entrance wound, would the order of impact match either the testimony of Darren Wilson, Dorian Johnson, or any other witnesses that testified on that issue. Second, they could have also seen if any of the injuries sustained by Michael Brown were consistent with any of the testimonies where precision regarding the order of the shots was mentioned by a witness. Third, they could have tried to corroborate or discard Wilson's testimony that Michael Brown was running towards him by matching it with the analysis of the presence (or absence) of abrasions or tattooing in the wounds, or the size of the entrance wound, and whether they were consistent with each other. The same could be said regarding Dorian Johnson's testimony or any other useful tactic a complainant victim could employ.

It is also a good option to try to work with computer experts to digitally recreate the event. Here, they could have digitally recreated the event according to the wounds in Michael Brown's body, the autopsy, the different testimonies on the issue, the photographs of the crime scene, the blood stains on the street, and so forth. A computer-generated animation ("CGA")[234] can be an effective tool for a grand jury, or a jury, in their determination of what happened. Considering that the complainant victim is entitled to propose and produce different kinds of forensic evidence, this may have been a useful tool in determining what really happened on that day in Ferguson. Maybe, by recreating Darren Wilson's version and Dorian Johnson's version, it would have been easier for the grand jury to discard one testimony over the other.

234. *See generally* Victoria Webster & Fred E. (Trey) Bourn III, *The Use of Computer-Generated Animations and Simulations in Trial*, INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL, http://www.iadclaw.org/publications-news/defensecounseljournal/the-use-of-computer-generated-animations-and-simulations-at-trial.

Also, in the same sense, a reconstruction of the event could have been proposed by the complainant victim. With the participation of Darren Wilson, Dorian Johnson, and all other witnesses, they could have put the patrol-car in the same position as it was and reenacted how the events occurred according to the different witnesses. Therefore, a jury might have found that one particular version of the story seemed unrealistic or unbelievable, or found that a certain witness, from where they were located, could not have reasonably seen what they claimed.

The race factor in police shootings might also be something to consider in criminal proceedings. In this sense, the Federal Department of Justice engaged in an investigation surrounding the death of Michael Brown.[235] The report's findings were released on March 4, 2015 and found that the Ferguson Police Department [FPD] engaged in everyday discrimination and abuse of force against black citizens.[236] The Report made by the Department of Justice clearly stated, "Ferguson's approach to law enforcement both reflects and reinforces racial bias, including stereotyping. The harms of Ferguson's police and court practices are borne disproportionately by African Americans, and there is evidence that this is due in part to intentional discrimination on the basis of race."[237] The report developed the percentages in disparities, and stated that, "these disparities are also present in FPD's use of force."[238] The conclusion was simple:

> Our investigation indicates that this disproportionate burden on African Americans cannot be explained by any difference in the rate at which people of different races violate the law. Rather, our investigation has revealed that these disparities occur, at least in part, because of unlawful bias against and stereotypes about African Americans.[239]

It is hard to say whether what Darren Wilson did was a hate crime, but it is undisputed that discrimination played a factor in what happened.[240] If a complainant victim were a party to the proceeding, they could have introduced this issue in the criminal investigation. This could have been accomplished by the complainant victim actually making an argument on the issue, requesting the judge to issue sub-

235. DEP'T OF JUST. REP., *supra* note 10.

236. *Id.* at 5.

237. *Id.* at 4.

238. *Id.* at 5.

239. *Id.*

240. *Id.* at 62.

poena duces tecum[241] to the Ferguson Police Department for police reports, or by simply introducing the Department of Justice report as evidence. The latter could have only been done if the criminal investigation was not closed by March 4, 2015, a reasonable option if a trial would have occurred.

Given the situation, a careful analysis of all police reports filed by Darren Wilson, whether there were any complaints filed against him or if he was involved in any shooting situation in the past, the complainant victim could have introduced this information into the investigation. Of course, Darren Wilson's defense would probably have raised the question of inadmissibility of this evidence as character evidence, but the point here is that the prosecutor did not even consider this issue. A complainant victim participating in the procedure could have done it on their own. It is definitely an element that a grand jury or a jury in a trial might be interested in knowing and taking into consideration. With proper jury instructions, it might have been useful information for the grand jury. This information could have been the foundation for the introduction of bias-based police conduct to the grand jury. The information about discrimination based on race by the Ferguson Police Department could have been used by an expert witness to testify whether this was considered bias-based policing, and what it might mean to a police officer working on the streets. The complainant victim could have hired his own expert to let him explain the issue to the grand jury or jury in an upcoming trial so that they can, as their role of trier of fact, determine whether it played some part in how Darren Wilson acted on August 9, 2014.

Darren Wilson approached Michael Brown and Dorian Johnson apparently because they were just walking down the middle of the street.[242] That was the beginning of the encounter that ended only a few moments later in Brown's death.[243] By considering the issues analyzed by the Federal Department of Justice mentioned above, it might be useful to take into consideration the following findings: "African Americans account for 95% of Manner of Walking charges; 94% of all Fail to Comply charges; 92% of all Resisting Arrest charges; 92% of all Peace Disturbance charges; and 89% of all Failure to Obey charges."[244] Michael Brown was black and was walking in the middle on the street instead of the sidewalk. Apparently, Brown talked back

241. *Subpoena Duces Tecum*, BLACK'S LAW DICTIONARY (10th ed. 2014).

242. *See* Darren Wilson Interview, *supra* note 183, at 4.

243. *Id.*

244. *See* DEP'T OF JUST. REP., *supra* note 10, at 62.

to Darren Wilson when Wilson "gently" told them to stop walking in the middle of the street. The findings of the report made by the Federal Department of Justice could be another example of evidence that might show that Darren Wilson was not telling the truth, or that he was acting upon preconceived stereotypes and prejudices.

This issue, raised in the public discussion after the release of the report of the Federal Department of Justice, was not presented to the grand jury for its consideration. The complainant victim through subpoena doces tecum to the Ferguson Police Department as explained above, by calling witnesses to the stand to testify on Ferguson officer's practices, or simply through an expert explaining the grand jury what is bias-raced policing, might have done it.

V. Conclusion

Ever since the killing of Michael Brown, all around the United States the issue of discrimination in police practices and racial profiling by law enforcement has been raised and the concern is still out there. Although the problem of discrimination by the police against black people cannot be considered new, since Michael Brown's death, it has become more visible than it was in the last twenty years. This is a problem that concerns and affects the United States entirely.

As we saw, several critiques were made regarding the decisions the public prosecutor made in this case. We also saw that many things could have been dealt with differently. It is hard to say that justice was served in this case, as it is often the case in police shootings. This important issue can be better resolved with the involvement of the complainant victim in the criminal proceedings. The Argentinean experience is a good example of how the criminal system, and everyone involved in it, are benefited by the participation of the victim in the investigation.