

PROBABLE CAUSE AND PERFORMING “FOR THE PEOPLE”

IRENE ORITSEWEYINMI JOE†

ABSTRACT

The summer of 2020 presented the American public with two very different versions of how a state’s top prosecutor might respond to excessive use of force by law enforcement. In Kentucky, Attorney General Daniel Cameron was criticized for his conduct after stories emerged of his biased presentation to a grand jury contemplating whether officers should face criminal charges for killing an unarmed person, Breonna Taylor, in her own home. In Minnesota, Attorney General Keith Ellison proved to be less controversial as public sentiment emphasized his willingness to pursue the type of justice that the public demanded against all of the officers involved in killing an unarmed George Floyd upon suspicion that he used a counterfeit \$20 bill. The outcome of the criminal charges against the officers involved in the killing of George Floyd remains to be seen, but the transparency of Attorney General Ellison’s decisions fostered positive reactions from those evaluating his use of the criminal process.

The unique moment of racial reckoning about law enforcement’s racial bias in its use of force that has resulted from the events of the summer has brought to the surface some hidden truths about the criminal process. Most clearly, the difference in outcome and public perceptions of the criminal investigations into the deaths of Breonna Taylor and George Floyd brings to the forefront the extent to which the grand jury process allows a prosecutor to “perform” the prosecutorial function without actually engaging in what the public would consider a good-faith examination of the evidence. What is also clear is that, when prosecutors rely on police investigation decisions that themselves may have originated from racial bias, there is limited confidence the nation can have that the criminal process is free from racial bias.

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† Assistant Professor of Law, Martin Luther King, Jr. Hall Research Scholar at the University of California at Davis School of Law. Thanks to Ifeoma Ajunwa, Guy-Uriel Charles, Steven Koh, Jasmine Harris, Melissa Murray, Sunita Patel, and the creators/participants in the Duke Law Culp Colloquium. I also appreciate the careful and detailed editing of Kiyoshi Din, Shelly Richter, Dayja Tillman, Elizabeth Wilson, and the *Duke Law Journal* editors. Thank you to Dean Kevin R. Johnson and U.C. Davis School of Law for additional research support.

A moment such as this, marked by massive public protest about racial inequities in the criminal justice system, requires prosecutors to carefully examine their standard prosecutorial practice and remove any processes that could facilitate or enhance racial inequities. In other words, prosecutors should accept these public protests as formal notice that something is awry, that they need to carefully examine their legal practice, and that they must fix any problems they find in that examination. This Essay explores two important ways to address the problems brought to the forefront by the criminal processes resulting from Breonna Taylor’s and George Floyd’s deaths. These would be to confront how both the grand jury process and the widespread, systematic acceptance of police officer narratives for initial charging decisions can foster racial bias. These two realities can hide the influence of racial bias in what appears to be a neutral criminal process, thus allowing the prosecution to perform as a minister of justice while actually reinforcing the very systemic marginalization that this moment of reckoning and the prosecutor’s own ethical obligations demands be addressed.

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INTRODUCTION

On March 13, 2020, plainclothes police officers from the Louisville Metro Police Department fatally shot 26-year-old Breonna Taylor in her apartment.¹ According to early police statements, officers arrived at the home to serve a warrant on an individual who did not live at that address and fired gunshots in response to gunfire initiated by Kenneth Walker, Taylor’s boyfriend.² In the dozens of gunshots fired during the

1. See Darcy Costello & Tessa Duvall, *Breonna Taylor Shooting: What Happened the Night Louisville Police Fatally Shot Breonna Taylor*, USA TODAY (May 15, 2020, 8:23 AM), <https://www.usatoday.com/story/news/nation/2020/05/15/minute-minute-account-breonna-taylor-fatal-shooting-louisville-police/5196867002> [<https://perma.cc/V7UV-24RH>].

2. See Christina Carrega & Sabina Ghebremedhin, *Timeline: Inside the Investigation of Breonna Taylor’s Killing and Its Aftermath*, ABC NEWS (Nov. 17, 2020, 11:31 AM), <https://abcnews.go.com/US/timeline-inside-investigation-breonna-taylors-killing-aftermath/story?id=71217247> [<https://perma.cc/CS9G-G2HG>]; Dylan Lovan, ‘Somebody Shot My Girlfriend’: 911 Call in Police Shooting, ABC NEWS (May 28, 2020, 4:12 PM), <https://abcnews.go.com/US/wireStory/shot-girlfriend-911-call-police-shooting-70940401>

interaction, one police officer was shot in the leg, Walker was unhurt, and Taylor was struck by eight bullets.³ Protests ensued soon after the shooting,⁴ as the public questioned how an innocent Black woman could be shot and killed in her own apartment.

Six months later, Daniel Cameron, the Kentucky Attorney General, announced a grand jury decision in Taylor's killing that angered many.⁵ According to Cameron, the grand jury had been presented with relevant evidence and had decided to only issue criminal charges against one of the three police officers who were present at the scene.⁶ This officer was charged with wantonly endangering Taylor's neighbors with his errant gunshots.⁷ As frustrated commentators noted, even though Taylor had been an innocent woman killed in her own apartment home, the grand jury had effectively charged the police officers with criminal behavior only for the shots that had missed hitting Taylor.⁸

On May 25, 2020, less than two months after Taylor was killed, a video was made of a police officer from the Minneapolis Police Department kneeling on the neck of George Floyd, an unarmed 46-year-old Black man; three other officers stood nearby. Over the next few weeks, millions of people would watch the last 9 minutes and 29 seconds of Floyd's life as he struggled to breathe under the weight of

[<https://perma.cc/MH3B-84X3>]. Officers sought the no-knock warrant to enter Taylor's apartment because they believed her ex-boyfriend was using her address to mail drugs. Carrega & Ghebremedhin, *supra*.

3. See Lovan, *supra* note 2.

4. See Bailey Loosemore, *Breonna Taylor Protests in Louisville: What Activists Want, and What They've Accomplished*, USA TODAY (Oct. 2, 2020, 6:01 AM), <https://www.usatoday.com/story/news/nation/2020/10/02/breonna-taylor-what-you-need-know-louisville-protests/5879867002> [<https://perma.cc/3AUV-KJ56>].

5. See *AG Daniel Cameron Press Conference Transcript September 23: Breonna Taylor Decision*, REV (Sept. 23, 2020), [hereinafter *Daniel Cameron Transcript*] <https://www.rev.com/blog/transcripts/ag-daniel-cameron-press-conference-transcript-september-23-breonna-taylor-decision> [<https://perma.cc/B7UA-JRCH>]; Erik Ortiz, *Kentucky AG Daniel Cameron Takes Heat After No Direct Charges Are Filed in Breonna Taylor's Death*, NBC (Sept. 23, 2020), <https://www.nbcnews.com/news/us-news/kentucky-ag-daniel-cameron-takes-heat-after-no-direct-charges-n1240886> [<https://perma.cc/HYJ3-6L2R>].

6. See *Daniel Cameron Transcript*, *supra* note 5.

7. See *Breonna Taylor: Police Officer Charged But Not Over Death*, BBC NEWS (Sept. 23, 2020), <https://www.bbc.com/news/world-us-canada-54273317> [<https://perma.cc/C6TS-2KFQ>] (noting that the officer was charged with wanton endangerment for firing into a neighbor's apartment during the raid).

8. See, e.g., Charles M. Blow, *Breonna Taylor and Perpetual Black Trauma*, N.Y. TIMES (Sept. 24, 2020), <https://www.nytimes.com/2020/09/24/opinion/breonna-taylor-black-trauma.html> [<https://perma.cc/6SAN-W93R>] ("In essence, a former officer was charged for the shots that missed [Breonna Taylor].").

the kneeling police officer, crying to his deceased mother for help.⁹ This video shocked many and led to nationwide protests. On May 29, 2020, just four days after Floyd’s death, the local prosecutor brought criminal charges against the officer who knelt on Floyd’s neck.¹⁰ By June 3, 2021, charges were also brought against the three other officers who stood nearby.¹¹ The case against the police officers was soon transferred to Minnesota Attorney General Keith Ellison, after local and state officials raised concerns about the county prosecutor’s ability to handle the prosecution without undue influence.¹² Trials for each of the four officers accused of playing a role in killing Floyd were set to begin less than a year after he was killed.¹³

This Essay unfolds in three parts. Part I provides the relevant background for understanding how the criminal process has responded to the deaths of Breonna Taylor and George Floyd. Part II describes more fully the problem presented when prosecutors make charging

9. ABC News, *Opening Statements in the Trial of Derek Chauvin*, YOUTUBE, at 3:25–5:00 (Mar. 29, 2021), <https://www.youtube.com/watch?v=UwDQ30MNVKs> [<https://perma.cc/J67C-BUNU>].

10. See Complaint at 1, *State v. Chauvin*, No. 27-CR-20-12646 (Minn. D. Ct. May 29, 2020). The officer was originally charged with third-degree murder and second-degree manslaughter. *Id.* The Minnesota State Attorney General later announced upgraded charges of second-degree murder would be sought against the officer. See Max Cohen, *Charges Upgraded Against Former Minneapolis Officer Derek Chauvin in George Floyd Death*, POLITICO (June 3, 2020, 4:31 PM), <https://www.politico.com/news/2020/06/03/minnesota-charges-3-more-former-officers-in-george-floyd-death-298949> [<https://perma.cc/Z5JH-82VE>].

11. AP, *Key Events Since George Floyd’s Arrest and Death*, VOA (Mar. 7, 2021), <https://www.voanews.com/usa/race-america/key-events-george-floyds-arrest-and-death> [<https://perma.cc/8N4P-QLRF>].

12. Alex Johnson, *Minnesota Attorney General to Take Over Prosecutions In George Floyd’s Death*, NBC NEWS (May 31, 2020, 5:40 PM), <https://www.nbcnews.com/news/us-news/minnesota-attorney-general-take-over-prosecutions-george-floyd-s-death-n1220636> [<https://perma.cc/QQX7-TWWK>]. Ten members of the Minneapolis Delegation wrote to the Governor asking that the jurisdiction over the case be transferred to the Attorney General’s Office. See Press Release, Minnesota House of Representatives, *Minneapolis Delegation Sends Letter to Governor Tim Walz* (May 29, 2020), <https://www.house.leg.state.mn.us/members/profile/news/15468/29981> [<https://perma.cc/7KEL-3JCE>]. The letter was written in response to public outcry at the local prosecutor suggesting there could be exculpatory evidence exonerating the officers at a press conference. *Id.* In response to the press conference, many felt concerned that the county attorney’s office could not investigate and prosecute these cases. *Id.*

13. David K. Li, *Former Minneapolis Police Officer Derek Chauvin To Be Tried Separately in George Floyd Death Case*, NBC NEWS (Jan. 12, 2021, 11:41 AM), <https://www.nbcnews.com/news/us-news/former-minneapolis-police-officer-derek-chauvin-be-tried-separately-george-n1253905> [<https://perma.cc/YT2U-37E5>]. On March 29, 2021, the trial against Derek Chauvin, the officer who knelt on Floyd’s neck, began. Janell Ross & Melissa Chan, *‘America is on Trial’ as Derek Chauvin Faces Justice in the Death of George Floyd*, TIME (Mar. 29, 2021, 12:12 PM), <https://time.com/5950398/derek-chauvin-trial-george-floyd-opening> [<https://perma.cc/CRT2-MF8Y>].

decisions that either rely on police officers' arrest decisions or question the appropriateness of police officers' use of force. Part III explains how the grand jury process can unjustly enable a prosecutor to follow the letter of the law while ensuring her own biased judgment prevails in the grand jury's charging decision and the prosecutor's use of police officer narratives to make charging decisions are examples of how law can be practiced in an understated discriminatory fashion in violation of ethical rules that guide legal practice. This Essay posits that prosecutors should reexamine their use of both of these mechanisms as they allow racial bias to easily infect the criminal process. It provides two possible solutions: a formal policy for the presentation of evidence to a grand jury where possible in police officer use of force cases and engaging in further investigation when law enforcement provides its own narratives of probable cause that may have been influenced by racial bias to determine if that is indeed the case.

I. BACKGROUND

At the earliest stage of every criminal proceeding, the question that must be answered by the prosecution before filing a criminal complaint is whether there is probable cause to conclude that a crime has occurred.¹⁴ Ordinarily, this question can be answered through the prosecutor's own evaluation of the available evidence and subsequent presentation to the court in a preliminary hearing.¹⁵ In some cases, the question either can be or must be answered through a grand jury process whereby members of the community evaluate the evidence presented by the prosecutor and issue their own finding.¹⁶ Probable cause is considered a relatively low standard, only requiring proof that some criminal behavior has occurred, and the accused person is likely responsible.¹⁷ The significant uproar after the grand jury failed to

14. *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) ("Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.").

15. Scholars have described the inherent racialized problems with these decisions. See generally Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202 (2007) (noting the role prosecutors play in fostering racial disparities with their charging decisions).

16. If the prosecutor makes the evaluation and files the complaint, a court must make its own probable cause determination soon after. *Gerstein*, 420 U.S. at 114, 118–19. If a grand jury determines probable cause exists, then the court is not required to hold its own subsequent probable cause hearing. *Id.* at 117 n.20.

17. *Illinois v. Gates*, 462 U.S. 213, 231–32 (1983). There is evidence that the finding for probable cause in Taylor's case was inadequate and misleading. See Jason Riley, *Breonna Taylor Warrant Was 'Misleading,' Louisville Police Investigators Find*, WDRB (Oct. 7, 2020),

return an indictment for homicide or a related charge against the officers involved in Taylor’s shooting¹⁸ reflected the public’s incredulousness at the outcome. It was shocking to many that an innocent woman could be killed in her own home by law enforcement without there being enough evidence that something criminal had occurred to meet the low probable cause standard.

The grand jury process inspired strong criticism and suspicion. Indeed, on November 25, 2020, the NAACP Legal Defense Fund (“LDF”), one of the nation’s leading civil rights organizations, issued a report concluding that Cameron had presented a biased view of the case that favored law enforcement to the grand jury.¹⁹ According to the report, Cameron refused to even present the grand jury with potential homicide charges or explain how the claimed initial shots by Walker could have been justified under existing self-defense principles.²⁰ The report described how such a presentation prevented the grand jury from reaching any finding that differed from Cameron’s conclusion that there was no probable cause for any crimes against Breonna Taylor.²¹

The public conversation following the criminal investigation into the killing of George Floyd was markedly different. Although Attorney General Ellison had no prior experience as a prosecutor before his election to the Minnesota attorney general seat, and the attorney general’s office rarely handled criminal cases, Ellison was lauded as a prosecutor who was pursuing every avenue to ensure the criminal process reached its conclusion with integrity.²² The criminal

https://www.wdrb.com/in-depth/breonna-taylor-warrant-was-misleading-louisville-police-investigators-find/article_5066abb4-08ee-11eb-983a-6f7458a23340.html [https://perma.cc/6ER9-KZGZ].

18. Kate Linthicum, *Protests Erupt After Grand Jury Does Not Charge Louisville Officers in Killing of Breonna Taylor*, L.A. TIMES (Sept. 23, 2020, 9:03 PM), <https://www.latimes.com/world-nation/story/2020-09-23/grand-jury-indictment-in-breonna-taylor-case> [https://perma.cc/58EH-QGTK].

19. JUST. IN PUB. SAFETY PROJECT, NAACP LEGAL DEF. & EDUC. FUND, JUSTICE DENIED: A CALL FOR A NEW GRAND JURY INVESTIGATION INTO THE KILLING OF BREONNA TAYLOR 3 (2020), https://www.naacpldf.org/wp-content/uploads/LDF_10272020_BreonnaTaylor-11.pdf [https://perma.cc/7CU6-4FHM].

20. *Id.* (citing to the grand jury report recordings).

21. *Justice Denied: An Overview of the Grand Jury Proceedings in the Breonna Taylor Case*, JUST. IN PUB. SAFETY PROJECT, NAACP LEGAL DEF. & EDUC. FUND, <https://www.naacpldf.org/justice-denied-a-call-for-a-new-grand-jury-investigation-into-the-police-shooting-of-breonna-taylor> [https://perma.cc/A6ZT-Z64G].

22. See Ben Terris, *Americans Want Justice for George Floyd. Keith Ellison Is in Charge of Getting It.*, WASH. POST (June 18, 2020, 6:00 AM), https://www.washingtonpost.com/lifestyle/style/americans-want-justice-for-george-floyd-keith-ellison-is-in-charge-of-getting-it/2020/06/17/243ba312-b012-11ea-856d-5054296735e5_story.html [https://perma.cc/KC3M-EBX2]. It is

case about the killing of Floyd was actually initiated without a grand jury determination of probable cause.²³ Instead, the decision reflected the judgment of county prosecutors that the evidence presented was sufficient to indicate some crime had occurred and the officer who knelt on Floyd's neck for 9 minutes and 29 seconds was responsible.²⁴

In the criminal process, prosecutors are ministers of justice and facilitators of the safety and well-being of the community they were elected to serve. Rule 3.8 of the Model Rules of Professional Conduct attempts to capture the twin responsibility and authority prosecutors possess in those roles.²⁵ The Rules require all lawyers to engage in legal practices that maintain the integrity of the legal system and advance improvements where necessary.²⁶ The Rules go further to mandate special responsibilities for prosecutors in Rule 3.8. This Rule notes the responsibility of prosecutors to practice in a way that accounts for their unique ability to use the power of government to affect people's lives and liberty.²⁷ It provides guidance for prosecutors to do so ethically.²⁸

Rule 3.8, titled "Special Responsibilities of a Prosecutor," begins by stating that a prosecutor in a criminal case shall not pursue a criminal charge unless the prosecutor knows it is supported by probable cause.²⁹ This rule reflects general constitutional principles but also seems to recognize that even with this basic constitutional floor, prosecutors could operate in a manner that abuses their awesome

worth considering if this is reflective of Ellison having less connections or partiality to the criminal and law enforcement institutions in Minnesota.

23. See Jacob Gershman & Deanna Paul, *Criminal Charges in George Floyd's Death Set Up Legal Battle*, WALL ST. J. (June 3, 2020, 11:10 PM), <https://www.wsj.com/articles/criminal-charges-in-george-floyds-death-set-up-legal-battle-11590791419> [<https://perma.cc/448G-9AE6>] (noting how quickly prosecutors charged both Derek Chauvin with third-degree murder, manslaughter, and, later, second-degree murder for the killing of Floyd and the other three officers involved in the killing with aiding and abetting second-degree murder).

24. *Id.*

25. See MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N 2018) (requiring prosecutors to "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause").

26. Rules 8.1–8.5 are contained under the heading "Maintaining the Integrity of the Profession."

27. See *id.* MODEL RULES OF PRO. CONDUCT cmt. 1 (AM. BAR ASS'N 2018) (noting that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate," which carries "specific obligations").

28. See generally *id.* r. 3.8 (providing several rules for prosecutors, including the disclosure of exculpatory evidence, assuring the defendant is apprised of her rights to counsel, and refraining from certain extrajudicial statements).

29. *Id.* r. 3.8(a). This could also be coupled with the American Bar Association's adoption of Model Rule 8.4(g) prohibiting attorneys from practicing law in a discriminatory manner. See *id.* r. 8.4(g).

authority. For example, a prosecutor could await a formal court determination, perhaps initiated by a defense filing if not simple court calendaring rules, for a defendant to be released by court order stating that the available evidence is insufficient to warrant a hold, instead of just dismissing a case she knows is not supported by probable cause.³⁰ In refusing to dismiss such an unsupported case, a prosecutor could force a defendant to experience the challenges of facing a criminal charge, whether it be continued incarceration or simply uncertainty about the future, for a substantial period of time. Additionally, in placing this ethical requirement on the prosecutor, Rule 3.8 provides a second layer of review in case either the grand jury or the court makes mistakes in their own probable cause finding. This could happen if more information comes to light after the probable cause hearing because of the type of continued investigation that often occurs after an arrest is made.³¹ Rule 3.8 thus places the onus on the prosecutor to be proactive in caring for the defendant through probable cause findings by placing the prosecutor’s bar license on the line.³²

The Model Rules require prosecutors to follow all of the attendant rules and not just those provided in its Special Rule for Prosecutors. This means the recent addition of Rule 8.4(g), as well as our growing understanding of how racial bias infects the criminal process, provides additional context for the prosecutor’s probable cause determination.³³

30. See, e.g., CAL. PENAL CODE § 991(a) (1980) (“If the defendant is in custody . . . and, if the public offense is a misdemeanor to which the defendant has pleaded not guilty, the magistrate, on motion of counsel for the defendant or the defendant, shall determine whether there is probable cause . . .”); CAL. PENAL CODE § 995(a) (1982) (providing that, upon the defendant’s motion, a California trial court shall set aside the indictment or information if the defendant has been indicted or committed “without reasonable or probable cause”).

31. “The Supreme Court’s decision in *Brady v. Maryland* requires the prosecution to disclose evidence that establishes the defendant’s factual innocence during a trial.” Michael Nasser Petegorsky, Note, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599, 3599 (2014) (discussing *Brady v. Maryland*, 373 U.S. 83 (1963)). Because the right protects the fairness of a trial, the prosecutor’s obligation to disclose material exculpatory evidence does not cease with a court’s probable cause determination. See *id.* Numerous writers have argued that prosecutors’ obligations under *Brady* also apply during the plea bargaining phases. *Id.* at 3641. See generally Colin Miller, *The Right to Evidence of Innocence Before Pleading Guilty*, 53 U.C. DAVIS L. REV. 271 (2019) (arguing that under the caselaw that inspired *Brady*, prosecutors have an obligation during the plea bargaining context to disclose exculpatory evidence).

32. See *Disbar*, LEGAL INFO. INST. (May 2020), <https://www.law.cornell.edu/wex/disbar> [<https://perma.cc/VTV5-5W4C>] (“Causes of disbarment may include: a felony involving ‘moral turpitude,’ forgery, fraud, a history of dishonesty, consistent lack of attention to clients . . . or any pattern of violation of the professional code of ethics.”).

33. This rule has met with both substantial support and fierce opposition. See Irene Oritseweyinmi Joe, *Regulating Implicit Bias in Federal Criminal Process*, 108 CALIF. L. REV. 965, 976 (2020) (explaining how federal courts should account for this rule in their courtroom

Rule 8.4(g) prescribes that it is misconduct for a lawyer to engage in any behavior that the lawyer knows or reasonably should know is discriminatory on the basis of race. Rule 3.8 and Rule 8.4(g) combine in a way that suggests prosecutors should consider whether the process by which they determine a case is supported by probable cause relies on racial bias or other discriminatory motivations.³⁴ The criminal processes that followed the killings of Breonna Taylor and George Floyd present areas that are ripe for such misconduct.

Both prosecutorial charging decisions based on officer narratives and grand jury deliberations are subject to little public review—with grand jury deliberations being secret and prosecutors possessing almost unlimited charging discretion.³⁵ Using the grand jury, however,

procedures). Maine, Missouri, New Hampshire, New Mexico, Pennsylvania, and Vermont adopted some variation of 8.4(g) after 2016. ME. RULES OF PRO. CONDUCT r. 8.4(g) (BD. OVERSEERS BAR 2019); MO. RULES OF PRO. CONDUCT r. 8.4(g) (MO. SUP. CT. 2019); N.H. RULES OF PRO. CONDUCT r. 8.4(g) (N.H. BAR ASS'N 2019); N.M. RULES OF PRO. CONDUCT r. 16-804(g) (N.M. SUP. CT. 2019); PENN. RULES OF PRO. CONDUCT r. 8.4(g) (PENN. SUP. CT. 2020); VT. RULES OF PRO. CONDUCT r. 8.4(g) (VT. SUP. CT. 2017). Others have adopted comments regarding discrimination. See AM. BAR ASS'N, JURISDICTIONAL ADOPTION OF RULE 8.4(G) OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT 1-7 (2019), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_adapt_8_4_g.pdf [<https://perma.cc/8CZB-N6FT>]. Several states, however, have versions of rules that preexist 8.4(g), but guard against discrimination by attorneys in at least some contexts. See, e.g., CALIF. RULES OF PRO. CONDUCT r. 8.4.1 (STATE BAR OF CALIF. 2018); COLO. RULES OF PRO. CONDUCT r. 8.4(g) (COLO. BAR ASS'N 2020); FLA. RULES OF PRO. CONDUCT r. 4-8.4(d) (FLA. BAR 2018); ILL. RULES OF PRO. CONDUCT r. 8.4(d) & cmt. 3 (SUP. CT. ILL. 2010). Several states have explicitly rejected Model Rule 8.4g. Kim Colby, *South Dakota Supreme Court Rejects a Version of ABA Model Rule 8.4(g)*, FEDERALIST SOC'Y (Mar. 12, 2020), <https://fedsoc.org/commentary/fedsoc-blog/south-dakota-supreme-court-rejects-a-version-of-aba-model-rule-8-4-g> [<https://perma.cc/JJ48-6WPX>] (At least thirteen states are known to have rejected, or abandoned efforts to adopt, a version of ABA Model Rule 8.4(g): Alaska, Arizona, Idaho, Illinois, Louisiana, Minnesota, Montana, Nevada, North Dakota, South Carolina, South Dakota, Tennessee, and Texas.). The arguments in opposition to this rule focus primarily on First Amendment implications and a potential chilling effect on freedom of speech. See Joseph Brophy, *ABA Rule 8.4(g) Struck Down by Federal Court*, MARICOPA LAW. (Jan. 2021), <https://www.jhc.law/wp-content/uploads/sites/1600623/2021/01/ABA-Rule-8-4-g-Struck-Down-by-Federal-Court.pdf> [<https://perma.cc/4GJQ-TXU5>].

34. See K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 287 (2014) (“[C]hief prosecutors [should] . . . decline to prosecute minor offenses where arrest patterns show a disparate impact on racial minorities or where overburdened prosecutors and courts cannot provide procedural justice.”).

35. See *United States v. Armstrong*, 517 U.S. 456, 464–66 (1996) (discussing prosecutorial charging discretion and the elements of a selective prosecution claim); Alanna Durkin Richer, *AP Explains: Powerful Grand Juries Stay Shrouded in Secrecy*, AP (Sept. 24, 2020), <https://apnews.com/article/breonna-taylor-shootings-police-juries-courts-ae8527aa406ea4c7dd35fac4f7203f66> [<https://perma.cc/REW6-CXX9>] (“But critics [of grand jury secrecy] say the secrecy makes it impossible for the public to scrutinize the work of the prosecutors and hold them accountable and creates the impression that the process is unfair.”).

in a police officer shooting case such as that of Taylor not only permits the prosecutor to present facts in a light that might reflect her own racial bias but also gives her bias a sense of formal neutrality. The added layer of a group of community members who make the formal decision gives the impression that the prosecutor did not make the formal charging decision when in fact, as shown by the LDF study, the very evidence presented and the charges proposed are what the prosecutor thinks is appropriate.³⁶ In this situation, the grand jury process appears to give the prosecutor an easy out—the ability to claim she pursued using the formal channels of the criminal process against a potential defendant when that may not actually be the case.³⁷

Similarly, relying on a police officer’s recitation of facts supporting an allegation of criminal conduct allows racial bias to infect the criminal process. For example, the police response to a possible arrest for using a counterfeit \$20 bill in the George Floyd case provides evidence of the type of racialized motivations that can lead police officers to patrol certain neighborhoods and perceive criminal behavior more easily in people of color. Studies have shown that crime occurs in all types of neighborhoods.³⁸ However, both explicit and implicit biases lead people to view certain areas as more crime-ridden and certain people as more crime-oriented. If police officers are making patrol and arrest decisions from discriminatory perspective, then prosecutors who rely on their decisions are adopting this racial bias in their practice of law. Both this practice and the use of the grand jury to suggest a neutral application of such bias contravene the purposes of both Rule 3.8 and Rule 8.4(g) by allowing, if not placing, the prosecutor in a position where their discriminatory decisions actually initiate or circumvent the criminal process.

II. THE INEQUITY OF THE USUAL PROBABLE CAUSE INQUIRY

As stated above, ethical rules guiding prosecutors’ charging decisions require prosecutors to refuse to initiate, or continue forward, in a criminal case if the prosecutor knows the case is not supported by probable cause. Some offices go beyond this requirement and charge their line prosecutors to move forward on a criminal case only if they

36. See JUST. IN PUB. SAFETY PROJECT, *supra* note 19, at 3.

37. For further examples of this, see the discussion *infra* Part III.

38. See generally Adam Benforado, *The Geography of Criminal Law*, 31 CARDOZO L. REV. 823, 846–48 (2010) (describing the various factors that can produce crime in a neighborhood).

believe they can prove the case beyond a reasonable doubt,³⁹ the more demanding standard of proof required to find a defendant guilty at trial.⁴⁰ This moment of racial reckoning,⁴¹ however, has made more salient a point about police bias and concentration that has been recognized by marginalized communities for decades. That is, the police targeting of certain individuals and communities heavily contributes to the disproportionate outcomes based on race that exist in the criminal justice system.

If prosecutors recognize that selective policing maintains the racial and social inequities of the criminal justice system, then their sole inquiry when deciding whether to proceed with a criminal case should not be whether the evidence presented by the investigating officer is sufficient to establish probable cause or prove a case beyond a reasonable doubt. Instead, in instances where an officer decides to make an arrest, prosecutors should consider the circumstances that led the officer to the environment where that officer made the arrest.⁴² Selective or disproportionate policing means that officers are more likely to find criminal behavior in the neighborhoods they choose to target. If this targeted policing is done in a racially biased manner or based on racialized motivations, then it is tainted by the stain of racial discrimination. Prosecutors should consider these cases, even if they are supported by probable cause, as illegitimate and use their discretion to refrain from moving the cases forward. Indeed, to do so could implicate ethical rules prohibiting discriminatory practices.

The reasoning that would permit the justifiable refusal to move forward in the criminal prosecution of these cases would be similar to the fruit of the poisonous tree arguments that already exist in criminal procedure doctrine. This doctrine combines with the exclusionary rule to exclude evidence that is obtained in relation to an unconstitutional

39. See, e.g., *Charging Decision*, DENVER DA, <https://www.denverda.org/charging-decision> [<https://perma.cc/V8KJ-JJMK>] (“If a determination is made that the facts do not support a reasonable belief the charge can be proven beyond a reasonable doubt, there is a legal and ethical duty to decline to file charges.”).

40. See generally *In re Winship*, 397 U.S. 358 (1970) (upholding the beyond reasonable doubt standard as required by the Due Process Clause of the Fifth and Fourteenth Amendments).

41. See Leah Asmelash, *How Black Lives Matter Went from a Hashtag to a Global Rallying Cry*, CNN (July 26, 2020, 2:00 PM), <https://www.cnn.com/2020/07/26/us/black-lives-matter-explainer-trnd/index.html> [<https://perma.cc/65D7-FJK5>] (documenting the contemporary origins and evolution of the Black Lives Matter movement).

42. This could be done by simply keeping records of whether a police officer was responding to a call from a witness to criminal behavior or just approached the defendant as part of a patrol. The prosecutor could question the police officer about what led them to patrol the area and compare patrolling decisions to other neighborhoods.

act.⁴³ Prosecutors should question whether the arresting officer’s presence in a certain area was based on or influenced by racial prejudice.⁴⁴ If so, the officer’s very presence in the location was improper and anything obtained after that, even if lawful, should play a limited role in the prosecutor’s decision to prosecute. Instead, the prosecutor should determine whether relying on the officer’s discriminatory behavior would render the prosecutor’s pursuit of criminal charges a continuation of the officer’s racially biased behavior. Only after engaging in this exploration can the prosecutor make a reasoned and ethical decision about whether to move forward on a criminal case and limit such a process from being tainted by racial bias.

There are a number of ways that policing can be conducted in a discriminatory manner. These range from the individual decisions a police officer makes to the practices and policies that a police department or agency chooses to follow. Even if a law exists on the books that provides clear terms for identifying criminal behavior and a police officer has significant evidence that this behavior has occurred, that officer can choose whether to arrest the individual.⁴⁵ Additionally, police departments engage in their own form of triage in selecting when and where to patrol, and the methods they will use while doing it.⁴⁶

Selective policing is not automatically a “bad” thing. Indeed, as Professor Monica Bell has noted in her work, having police officers fully reconcile with the communities that they patrol might help

43. *Nardone v. United States*, 308 U.S. 338, 341 (1939).

44. Radley Balko, *There’s Overwhelming Evidence that the Criminal Justice System Is Racist. Here’s the Proof*, WASH. POST (June 10, 2020), <https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/#Policing> [<https://perma.cc/ZT7F-RKQ8>]; see also I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1563–67 (2020) (criticizing prosecutors for their role in a highly flawed criminal justice system); GEORGE L. KELLING, NAT’L INST. OF JUST., RESEARCH REPORT: “BROKEN WINDOWS” AND POLICE DISCRETION iii (1999) (seeking to “understand better why officers make arrests in some circumstances and not others”); *id.* at 51 (suggesting an approach by which police identify neighborhood priorities and rank problems within those priorities, then consider tactical options depending on resources of neighborhoods).

45. Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 VAND. L. REV. 1497, 1512–16 (2007); Jillian K. Swencionis & Phillip Atiba Goff, *The Psychological Science of Racial Bias and Policing*, 23 PSYCH. PUB. POL’Y & L. 398, 399–400 (2017) (noting significant discretion is a risk factor for discriminatory behavior).

46. See generally Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997) (explaining a new form of policing oriented around problem-solving and how it relates to a traditional understanding of police discretion).

improve the very nature of policing.⁴⁷ This reconciliation would have to consider the systemic problems that have plagued the relationship between law enforcement and the communities they serve by policing.⁴⁸ In its absence, though, racial bias, either explicit or implicit, could still form the basis for policing decisions. Prosecutors should pursue ways to ensure that racially biased police procedures, such as which neighborhoods to monitor more closely and what behavior is considered suspicious, do not infect a line prosecutor's decisions on when, and how, to charge those who may have violated criminal laws.⁴⁹

As scholars have noted, prosecutors play an important public policy role in the criminal justice system.⁵⁰ They receive police reports of criminal behavior. In some ways, this fact alone makes prosecutors a primary line of defense in preventing racially motivated arrest decisions from gaining the legitimacy of being addressed through the criminal process. Both this moment of racial reckoning and their professional responsibilities as members of the legal profession require prosecutors to consider that reality and adopt steps to act consistently with that role. Making law enforcement, and the community both institutions serve, aware of this prosecutorial policy could contribute greatly to a less racially biased criminal justice system.

Prosecutors already have the ability to exercise their authority in this way. Their virtually unlimited discretion on whether cases move forward in the criminal process means that they can serve as a check on police officer decisions about whom to arrest.⁵¹ This could be

47. See Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2145 (2017) (describing a process by which police may engage with minority communities in an effort to reckon with and ameliorate prior police misconduct).

48. *Id.*

49. Legal estrangement, which details the tense relationship between law enforcement and people in poor communities of color, describes a theory of detachment and alienation in law enforcement. See generally Bell, *supra* note 47 (introducing and developing the theory of legal estrangement). The perception of this type of regulatory regime is backed by evidence. Social science clearly articulates the risk of bias in all forms of decision-making. See L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2628, 2634–41 (2013) (detailing how even well-meaning public defenders make decisions influenced by racial bias). The policing environment, and the types of discretionary decisions that occur in such an environment, are fertile territory for racial bias. In an important article about racial bias and policing, Professors Jillian K. Swencionis and Phillip Atiba Goff describe five situational risk factors for racial bias in policing. Swencionis & Goff, *supra* note 45, at 398. These risk factors are discretion, novice status, crime focus, cognitive demand, and identity threats. *Id.*

50. See Bruce A. Green, *Urban Policing and Public Policy – The Prosecutor's Role*, 51 GA. L. REV. 1179, 1180 (2017).

51. For an explanation of various ways prosecutors can use their discretion in racially biased ways, see generally Angela Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 821 (2013) (describing ways in which prosecutor's discretionary

considered a form of supervising the police and questioning their patrol decisions, but such oversight would serve an important public policy objective as it would limit the influence of racial bias in the criminal process.⁵² Technology could also be useful in this attempt to limit racial bias in the criminal process through charging discretion. Technological tools, such as the body cam, can provide prosecutors with additional information about how a police officer directs their attention.⁵³ These tools could assist in the attempt to monitor police officers for decisions motivated by explicit or implicit racial bias as they would provide clear evidence of where a police officer concentrated their efforts.⁵⁴ Although prosecutors may not be able to bring criminal charges against police departments for choosing certain neighborhoods to monitor more frequently and in more intrusive ways, they can call attention to these decisions or negate some impact of these decisions by refusing to go forward on cases that reflect unfair and unjust monitoring.

As attorneys subject to a state bar, prosecutors have both a duty to ethically proceed in criminal cases and a duty to improve the practice of law.⁵⁵ During this moment of racial reckoning, prosecutors should not sit on the sidelines as the public questions police discretion. Instead, these attorneys must examine the ways in which their own decisions rely on police decisions and ask if there is an acceptable method to disentangle themselves from the racially biased outcomes that might occur from discriminatory police practices.

III. THE GRAND JURY PERFORMANCE PROBLEM

The grand jury can be complicated. Although its design would suggest it serves as a critical way of reinforcing the community’s role in the criminal process, its real-life use has proven otherwise. The grand jury is not prescribed by the constitution as necessary for a fair criminal process in every criminal case.⁵⁶ This allows for its potential misuse in

decisions play a role in “creating and maintaining the racial disparities in the criminal justice system”).

52. See Green, *supra* note 49, at 1201.

53. See, e.g., Ashley Southall, *Police Body Cameras Cited as ‘Powerful Tool’ Against Stop-and-Frisk Abuses*, N.Y. TIMES (Nov. 30, 2020), <https://www.nytimes.com/2020/11/30/nyregion/nypd-body-cameras.html> [<https://perma.cc/8RNT-9YTF>] (“Police body cameras can help reduce the kind of bogus stops that have fueled accusations of racial bias and harassment against police officers in New York City, according to a long-awaited report released Monday.”).

54. See *id.*; Chaz Arnett, *Race, Surveillance, and Resistance*, 81 OHIO ST. L.J. 1103, 1104–06 (2020).

55. See Irene Oritseweyinmi Joe, *Regulating Mass Prosecution*, 53 U.C. DAVIS L. REV. 1175, 1211–22 (2020).

56. See *Hurtado v. California*, 110 U.S. 516, 538 (1884).

cases with a high degree of public interest, such as those involving officer use of force.

The federal government is required to use grand juries for all felony cases, but state governments do not have this same constitutional obligation.⁵⁷ Only half of state governments actually use grand juries and only 22 of the states that use them require them to be used for certain criminal cases.⁵⁸ Because Kentucky, where Breonna Taylor was killed, requires a grand jury for all felony cases, the attorney general had to present some evidence before proceeding with any potential criminal charges.⁵⁹ Minnesota, where George Floyd was killed, only requires a grand jury to be convened when public interest requires it or a county attorney requests it.⁶⁰

In some ways, the grand jury can be performative for highly publicized cases. This is because aspects of the criminal process are naturally performative.⁶¹ Criminal law is most clearly defined as a system of regulating behavior that is deserving of *society's* moral condemnation.⁶² Hence, the laws are established by a group of the community's representatives and violations of the law are determined by community members.⁶³ As a result, much of the trial court process happens in public and the final determination is made by general members of the community. This inherently creates a degree of public performance. Despite this reality, criminal procedural rules are

57. See *id.* at 534, 538. Some state constitutions require the grand jury for certain criminal cases. See, e.g., ALA. CONST. art. I, § 8 (requiring grand jury for cases involving capital punishment); FLA. CONST. art. 1, § 15 (requiring the grand jury for capital crimes).

58. See 4 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 15.1(d), (g) (4th ed., updated Dec. 2020).

59. KY. CONST. § 12.

60. MINN. R. CRIM. P. 18.01.

61. As Professor Hershini Bhana Young notes,

The overlap between performance and the law might seem obvious in today's age of trials as public spectacles. Less obvious are the ways in which the law, facing large-scale, state-sanctioned historical injustices, has *put performance to work* . . . [resulting] in a subtle shift of emphasis away from judgment and punitive sentencing as the end point of legal proceedings.

Cf. Hershini Bhana Young, *Performing the Abyss: Octavia Butler's Fledgling and the Law*, 47 STUD. NOVEL 210, 210 (2015) (citations omitted).

62. Kenworthy Bilz & Janice Nadler, *Chapter 3: Law, Psychology, and Morality*, in 50 PSYCHOLOGY OF LEARNING & MOTIVATION 101, 101, 122 (2009) ("People see legal regulation of behaviors as a way to define the bounds of good citizenship and to condemn those who do not share their worldview."); see also Sandra G. Mayson, *The Concept of Criminal Law*, 14 CRIM. L. & PHIL. 447, 449 (2020) (defining criminal law as a mechanism of collective condemnation used to enact a polity's shared moral code).

63. Although it is sometimes a sole representative of the government who acts as the prosecutor in bringing forward the criminal charges, the process expects the actor to represent the community's interests in doing so and not just their own sense of what is appropriate.

instituted to provide some objective formality to the process by removing the type of spectacle that could occur if it were strictly a performance.

Grand jury secrecy is actually consistent with the motivations that exist to make the criminal process a community process.⁶⁴ The grand jury is composed of members of the community, and their ability to evaluate the available evidence in secrecy protects them from any subterfuge or undue influence.⁶⁵ The problem arises in that the prosecutor is able to provide whatever information she thinks is relevant to the grand jury to aid in their final determination.⁶⁶ The prosecutor also asks the grand jury members to make decisions on only the charges the prosecutor deems appropriate.⁶⁷ This process of deciding in advance what is acceptable to promote as warranting a probable cause finding is similar to the prosecutor making the decision to file charges on her own. If the prosecutor has already determined that the case should not go forward, she can act consistently with that belief by only presenting the grand jury what she believes will encourage the outcome she desires.⁶⁸

Scholars have argued that prosecutors should rely on grand juries for cases involving law enforcement’s use of force.⁶⁹ Grand jury scholar

64. See Note, *Restoring Legitimacy: The Grand Jury as the Prosecutor’s Administrative Agency*, 130 HARV. L. REV. 1205, 1209 (2017) (“As a traditional aspect of grand juries, secrecy has been justified by the rationales of avoiding giving the accused a chance to flee, protecting the reputation of the accused prior to an indictment, preventing witness tampering or harassment, and fostering uninhibited juror deliberation and investigation.”).

65. *Id.*; Richer, *supra* note 35.

66. *Restoring Legitimacy*, *supra* note 64, at 1208 (“The complete prosecutorial control over the grand jury—particularly over the flow of information and grand jury procedure—solidifies the grand jury’s dependence on the prosecutor.”).

67. *Id.* at 1222–23 (proposing as a reform to the grand jury process that a “grand jury representative could be required, as independent counsel, to inform the grand jury of lesser charges, which would allow the jury to become more engaged in the process of formulating charges”).

68. A prosecutor might choose to use a grand jury to obtain an indictment if they are not convinced a judge will support their charging decision. The grand jury process allows the prosecutors to move forward on a case without a finding of probable cause by a judge as a neutral arbiter of the proceedings. “The most important factor in the grand jury’s probable cause determination is the evidence presented during the proceedings, and the prosecutor is the sole source of the evidence upon which the grand jury must decide whether to indict.” *Id.* at 1208. As a result, “there is a growing perception that grand juries are the prosecutor’s sword—to be used in furtherance of governmental goals—while acting as the prosecutor’s shield from the prying eyes of the public.” *Id.* at 1209.

69. See, e.g., Ric Simmons, *The Role of the Prosecutor and the Grand Jury in Police Use of Deadly Force Cases: Restoring the Grand Jury to Its Original Purpose*, 65 CLEV. ST. L. REV. 519, 519, 530 (2017) (“[P]rosecutors should feel compelled to use the grand jury to assist them in their

Ric Simmons notes the low indictment and conviction rates for police officers whose use of force has caused the death of citizens.⁷⁰ In advocating for a dedicated turn to using the grand jury process for these types of crimes, he describes three models of the grand jury process.

The first is the “Business as Usual” model where prosecutors make a simplistic grand jury presentation.⁷¹ In this type of presentation, the prosecutor seeks the type of routine approval that has led to a generalized belief that grand juries will issue indictments for any case a prosecutor puts before them.⁷² In providing an example for this type of model, Simmons turns to Baltimore City Attorney Marilyn Mosby’s attempted prosecution of the six police officers involved in the death of Freddie Gray.⁷³ Simmons claims this bare-bones presentation of evidence actually prevented the prosecutor from identifying certain weaknesses in the case and thus led to a complete lack of punishment for any of the officers involved.⁷⁴

exercise of prosecutorial discretion. Some prosecutors, like Robert McCullough in Ferguson, have recognized the value of grand juries in these situations, but most prosecutors have not.”).

70. *Id.* at 524–25 (“[T]he lower indictment rates in cases involving police lethal use of force are evidence that prosecutors are using the grand juries to perform some other function . . . as [a] political cover . . . [or] to guide her exercise of prosecutorial discretion . . .”).

71. *Id.* at 526–27.

72. *Id.* at 526.

73. *Id.* at 526–27.

74. Freddie Gray’s case ended with no convictions for any of the police officers charged in his death. Kevin Rector, *Charges Dropped, Freddie Gray Case Concludes with Zero Convictions Against Officers*, BALT. SUN (July 27, 2016, 8:57 PM) [hereinafter *Charges Dropped*], <https://www.baltimoresun.com/news/crime/bs-md-ci-miller-pretrial-motions-20160727-story.html> [https://perma.cc/KD27-FN6Y]. Officer Edward Nero, charged with second-degree assault, was acquitted of all charges on May 23, 2016. Justin Fenton & Kevin Rector, *Freddie Gray Case: Baltimore Police Officer Edward Nero Found Not Guilty of All Charges*, BALT. SUN (May 23, 2016, 8:07 PM), <https://www.baltimoresun.com/news/crime/bs-md-ci-nero-verdict-20160521-story.html> [https://perma.cc/38Z2-4PRA]. Officer Caesar Goodson, who picked up seven charges including second-degree depraved heart murder, was acquitted of all seven charges on June 23. Justin Fenton & Kevin Rector, *Freddie Gray Case: Officer Caesar Goodson Jr. Not Guilty on All Charges*, BALT. SUN (June 23, 2016, 9:01 PM), <https://www.baltimoresun.com/news/crime/bs-md-ci-goodson-verdict-20160623-story.html> [https://perma.cc/QFL3-FAY3]. Lieutenant Brian Rice, with four counts including involuntary manslaughter, was acquitted on July 18. Kevin Rector, *Judge Acquits Lt. Brian Rice of All Charges in Freddie Gray Case*, BALT. SUN (July 18, 2016, 7:32 PM), <https://www.baltimoresun.com/news/crime/bs-md-ci-rice-verdict-20160718-story.html> [https://perma.cc/8WQZ-YSMG]. Officer Garrett Miller, charged with three counts the worst of which was second-degree assault, had all charges dropped on July 27. *Charges Dropped, supra*. For Officer William Porter, who was facing a charge of involuntary manslaughter on top of three others, the judge declared a mistrial in December; seven months later on July 27, prosecutors dropped all charges. *Id.* The same day, prosecutors dropped all charges against Sergeant Alicia White who was facing, among others, a charge of involuntary manslaughter. *Id.*

The second model Simmons describes is the “Grand Jury as Political Cover” model he ascribes to the criminal process involving the death of 12-year-old Tamir Rice,⁷⁵ a Black child who was shot and killed by law enforcement after he was spotted playing with a toy replica of a gun in a public recreation center.⁷⁶ With facts that sound achingly familiar to those in the criminal investigation following the killing of Breonna Taylor, after months of no official action and eventually a municipal court judge’s finding of probable cause,⁷⁷ Cuyahoga County Prosecutor Tim McGinty presented manipulated evidence to a grand jury that resulted in its decision not to indict the officer involved.⁷⁸

The final model of the grand jury process according to Simmons is the “Grand Jury as a Legitimate Community Voice.”⁷⁹ Simmons uses the Michael Brown case as an example of this model.⁸⁰ In the investigation of Brown’s killing, the prosecutor presented over 60 witnesses to the grand jury.⁸¹ He allowed the defendant to testify as part of the ordinarily secret grand jury proceedings and even released

75. See Simmons, *supra* note 69, at 527.

76. See Vanessa Romo, *Justice Department Declines to Prosecute Cleveland Officers in Death of Tamir Rice*, NPR (Dec. 29, 2020, 6:27 PM), <https://www.npr.org/2020/12/29/951277146/justice-department-declines-to-prosecute-cleveland-officers-who-killed-tamir-ric> [<https://perma.cc/79S8-QWT9>].

77. See David A. Graham, ‘*Probable Cause*’ in the Killing of Tamir Rice, ATLANTIC (June 11, 2015), <https://www.theatlantic.com/politics/archive/2015/06/tamir-rice-case-cleveland/395420> [<https://perma.cc/F24Q-UTTM>]. The Municipal Court judge concluded that the officer responsible for killing Tamir Rice should be charged with several crimes, noting the court was “thunderstruck at how quickly this event turned deadly.” *Id.*

78. See Simmons, *supra* note 69, at 527–28. As Simmons explains, when a prosecutor does not want to pursue a case, but does not have the political will to make that decision, they may present a weak case to a grand jury. *Id.* at 527. In these cases, the grand jury is led to issue a no true bill. *Id.* Simmons argues this was the case with respect to McGinty’s decisions regarding Tamir Rice’s killing. *Id.* Several people present at the grand jury proceedings later criticized the prosecutors’ presentation of the case, with some likening the prosecutors to defense attorneys working on behalf of the officers. *Id.*; see also Sean Flynn, *The Tamir Rice Story: How to Make a Police Shooting Disappear*, GQ (July 14, 2016), <https://www.gq.com/story/tamir-rice-story> [<https://perma.cc/2RE3-EUZ3>].

Interestingly enough, both Kentucky and Ohio require a grand jury indictment for all felony cases. KY. CONST. § 12; OHIO CONST. art. I, § 10; OHIO R. CRIM. P. 7(a).

79. Simmons, *supra* note 69, at 528.

80. *Id.* at 528–29.

81. See Erik Eckholm, *Witnesses Told Grand Jury That Michael Brown Charged at Darren Wilson, Prosecutor Says*, N.Y. TIMES (Nov. 24, 2014), <https://www.nytimes.com/2014/11/25/us/witnesses-told-grand-jury-that-michael-brown-charged-at-darren-wilson-prosecutor-says.html> [<https://perma.cc/PP7U-EU25>].

the entire transcript of the proceedings after the jury refused to indict the officer.⁸²

None of these models for the grand jury process are particularly comforting with regard to the desire to remove racial bias from the probable cause determination in grand jury proceedings. The Business as Usual model could encourage some cases to go forward when they should not. There are massive emotional, mental, and financial costs to both the defendant and the community that await the outcome of a criminal investigation when a probable cause determination is made erroneously.⁸³ The Grand Jury as Political Cover model undermines the integrity of the criminal process. By presenting the case to a grand jury as a nation waits with bated breath, the prosecutor could be perceived as looking to use the grand jury process to simply issue a stamp of approval on a decision the prosecutor has already made.⁸⁴

Even the example of the Grand Jury as a Legitimate Community Voice provides a problem of racial dynamics. The grand jury or preliminary hearing is not meant to be a trial and, indeed, cannot be. The criminal process is set up such that the question at this stage is whether some evidence exists that a crime has occurred, and the defendant is responsible. This is an entirely different question than whether reasonable doubt exists that the defendant is guilty, which is answered at the trial.⁸⁵ This means evidentiary standards are different,⁸⁶ and indeed the courts do not assume a role as a neutral arbiter to ensure that proceedings are fair.⁸⁷ Sometimes there is power for the community in just knowing the death of an unarmed Black person could be considered as a potential crime even if a petit jury, using the procedural rules required to ensure a fair and just conviction, might conclude it was not unlawful.⁸⁸ This is why this early stage, and

82. Simmons, *supra* note 69, at 529.

83. Some of these consequences have been clearly outlined in the arrest context. *See generally* Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809 (2015) (describing a range of consequences—deportation, eviction, license suspension, custody disruption, and adverse employment actions simply from the commencement of a criminal process and before conviction).

84. Simmons, *supra* note 69, at 525.

85. *See In re Winship*, 397 U.S. 358, 364 (1970).

86. *See, e.g., United States v. Calandra*, 414 U.S. 338, 354 (1974) (declining to extend the exclusionary rule to grand jury proceedings).

87. *See, e.g., United States v. Williams*, 504 U.S. 36, 50 (1992). (“[A]ny power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings.”).

88. This reasoning recalls the historical understanding of how mass incarceration in D.C. resulted, at least in part, by the Black community’s desire to be seen as worth being cared for by law enforcement – a way of showing their lives and safety mattered. *See generally* JAMES

the lower probable cause standard, can be an important part of the criminal law apparatus.

There are also definitional concerns when asking questions beyond the basic probable cause standard or attempting to conduct a trial at the grand jury stage. The grand jury is not a trial jury. These two types of juries may share a common name and description, but they are composed differently, and that difference is reflected in the different final questions they must answer.⁸⁹ At a trial, jury selection ideally seeks only those jurors who would be fair and impartial jurors for the facts in the particular case at hand. This means that in a case of a police officer shooting an unarmed Black person, questions could be asked of the potential jurors to root out any explicit or implicit bias that could affect their reasoned decision-making. But this type of jury selection process does not exist in grand jury proceedings.⁹⁰ Any introduction of racial bias in the criminal process is disturbing and unacceptable, but, when racial bias allows a perpetrator to escape the criminal process at this initial probable cause determination stage in the grand jury proceedings, there is little substitute or entity to make up for that failure at a later stage.⁹¹ This means bias must be rooted out at the earliest stages for communities to maintain faith in the criminal process.

The potential racial bias problems associated with the grand jury and the concern with such bias captured in the Rules mean prosecutors should reconsider how they use the grand jury. The Business as Usual

FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017) (noting how Black leaders in positions of power supported the “War on Crime” in response to a rise in crime and drug addiction). Support for increased incarceration and harsher sentencing, which knowingly and predominantly impacted Black citizens, was influenced by a desire to both attack gun violence in the Black community and force officials to recognize and address the value of Black victims and lives. *Id.* at 60–64. For example, activists in favor of mandatory sentencing felt that the sentencing laws on the books were “largely disobeyed and ignored by the judges and prosecutors,” citing how only 7.6 percent of those convicted of illegal gun possession had received jail time during that period. *Id.* at 60.

89. *Types of Juries*, U.S. CTS., <https://www.uscourts.gov/services-forms/jury-service/types-juries> [<https://perma.cc/J42V-FRTK>].

90. Defense attorneys are not required in grand jury proceedings and prosecutors are permitted to present, or decline to present, any evidence they feel is appropriate for the grand jury to make their charging decision.

91. There may be some civil redress—such as the \$12 million dollar settlement for Breonna Taylor’s death—but absent the prosecutor pursuing a preliminary hearing or convening another grand jury, both unlikely given the prosecutor’s decision impacting the initial grand jury determination, there are no remedies using the criminal process. See Rukmini Callimachi, *Breonna Taylor’s Family to Receive \$12 Million Settlement from City of Louisville*, N.Y. TIMES (Oct. 2, 2020), <https://www.nytimes.com/2020/09/15/us/breonna-taylor-settlement-louisville.html> [<https://perma.cc/BY6W-K8GM>].

model and the Grand Jury as a Legitimate Community Voice facilitate noncompliance with ethical rules.⁹² The third possibility for the grand jury, however, invites additional scrutiny in the cases of police officer use of force against unarmed Black people. If evidence arises that a prosecutor may have used a grand jury as political cover to account for her own decision that there should be no criminal charge in such a case, then the appropriate disciplinary committee should investigate. The grand jury is simply answering the question of whether there is sufficient evidence presented to it to allow for a determination that a crime may have been committed. Thus, the prosecutor's decision to use the grand jury to cover her own decision that a crime has not been committed, despite widespread community protests indicating the contrary, should initiate concerns of whether racial bias has infected the prosecutor's use of the criminal process. This is not to say that the prosecutor absolutely behaved in a biased way. It is simply a recognition that racial bias can play a part in such decisions, and using the grand jury to cover what would otherwise be a routine process for the prosecutor presents as proof of using the criminal process in an inappropriate manner and must be addressed.

Even if a jurisdiction requires the prosecutor to turn to a grand jury before instituting criminal charges against a defendant, a prosecutor can adopt certain practices to limit the role their bias might play in the presentation of evidence. These might include having neutral parties within the prosecutor's office examine the charges the prosecutor plans to present to the grand jury or having such parties evaluate the transcript of the presentation of evidence after the grand jury has reached its determination.⁹³ Because this would occur within the prosecutor's office, neither of these would undermine the secrecy of the grand jury or the prosecutor's charging decision. Regardless of what type of ameliorative policy is adopted, such a change would help the prosecutor better realize how their practice of law might be influenced by their personal biases and pursue strategies for reducing its discriminatory impact on the criminal process.

92. Simmons, *supra* note 69, at 526, 528.

93. These could be similar to the conviction integrity units that are increasingly becoming a part of progressive prosecutor platforms. See, e.g., Anthony C. Thompson, *Retooling and Coordinating the Approach to Prosecutorial Misconduct*, 69 RUTGERS U.L. REV. 623, 667–80 (2017) (describing conviction integrity units in Dallas, Manhattan, and Brooklyn).

CONCLUSION

There is much to be done in various arenas about the circumstances that led to the deaths of Breonna Taylor and George Floyd. The same can be said about the many other deaths of unarmed Black people that have become seared in the nation’s consciousness over the last eight years.⁹⁴ But one concern that clearly must be

94. Since the murder of Trayvon Martin, and long before, the United States has seen an uptick in widespread notoriety around the deaths of unarmed Black people. See Steve Martinot, *On the Epidemic of Police Killings*, 39 SOC. JUST. 52, 52–53 (2014). In 2012, Trayvon Martin, a Black teenager walking home, was followed and subsequently shot by a layperson adopting the role of law enforcement through neighborhood watch. His killer was subsequently acquitted. Martinot, *supra*, at 88. In 2014, Eric Garner was killed by New York police after being put into a choke hold on the suspicion of selling loose cigarettes. He uttered “I can’t breathe” eleven times during the altercation. *Breonna Taylor: Timeline of Black Deaths Caused by Police*, BBC NEWS (Jan. 6, 2021) [hereinafter *Timeline of Black Deaths*], <https://www.bbc.com/news/world-us-canada-52905408> [<https://perma.cc/BQ4S-25NL>]. That same year 18-year-old unarmed Michael Brown was shot six times by police in Ferguson, Missouri, for allegedly stealing a box of cigars. *Id.* The officer was not prosecuted. *Id.* Only three months later, 12-year-old Tamir Rice was shot dead in Cleveland, Ohio, after reports came in about a “juvenile” pointing a confirmed toy gun in the park. The officer faced no charges. *Id.* In 2015, Sandra Bland, a Black woman from Chicago, was found hanged in her jail cell after a confrontational traffic stop in Texas. *Id.* Though her death did not come by way of gunshot, her death was nonetheless the result of law enforcement decisions. David Montgomery, *Sandra Bland, It Turns Out, Filmed Traffic Stop Confrontation Herself*, N.Y. TIMES (May 7, 2019), <https://www.nytimes.com/2019/05/07/us/sandra-bland-video-brian-encinia.html> [<https://perma.cc/8AUF-Z5NN>]. In 2016, Alton Sterling and Philando Castile were killed only a day apart at the hands of law enforcement; the latter shot during a routine traffic stop as he reached for his license with his girlfriend and daughter in the car. *Timeline of Black Deaths, supra*. A month later, 23-year-old Korryn Gaines and her five-year-old child were both shot in their home by Baltimore police as the incident was live-streamed on social media; while her son survived, Korryn was killed. AP, *Police Officer Will Not Be Charged in Fatal Shooting of Korryn Gaines*, GUARDIAN (Sept. 22, 2016), <https://www.theguardian.com/us-news/2016/sep/22/korryn-gaines-fatal-police-shooting-baltimore-no-charges> [<https://perma.cc/7YFS-UCCZ>]. In 2018, Stephon Clark was gunned down by Sacramento police in his grandmother’s yard for holding a cellphone; the police alleged they thought it was a weapon and were not charged. *Timeline of Black Deaths, supra*. In 2019, 23-year-old Elijah McClain was stopped by police while walking home, put into a now-illegal chokehold, and was then injected with ketamine. Elijah subsequently died following the encounter. Lucy Tompkins, *Here’s What You Need to Know About Elijah McClain’s Death*, N.Y. TIMES (Feb. 23, 2021), <https://www.nytimes.com/article/who-was-elijah-mcclain.html> [<https://perma.cc/Z4TJ-88GM>]. Similar to Sandra Bland, Elijah’s death did not come from a bullet, but was otherwise the result of a police encounter. Finally, in 2020, Ahmaud Arbery, a 25-year-old Black man out for a jog, was pursued by two armed laypersons adopting the role of law enforcement who ultimately shot and killed him. It was three months before the perpetrators were charged. Richard Fausset, *Two Weapons, a Chase, a Killing and No Charges*, N.Y. TIMES (Feb. 28, 2021), <https://www.nytimes.com/2020/04/26/us/ahmed-arbery-shooting-georgia.html> [<https://perma.cc/UUS9-VTRK>]. While Arbery’s murder, like Trayvon Martin’s, did not come at the hands of law enforcement, but instead those acting in such capacity, every other killing here involved licensed law enforcement. While this list notes some of the more widely protested deaths of Black people killed by law enforcement or those acting in its capacity, the list is certainly not exhaustive. See *In*

addressed is the role the prosecutor plays in allowing racial bias to infect the criminal process when they accept a police officer's version of events leading or not leading to a criminal charge without further examination or turn to a grand jury determination to approve her own biased decision.

The deaths of Breonna Taylor and George Floyd provide an important opportunity to consider what guidance prosecutors follow in justifying the decision to criminally prosecute an individual. On a broad basis, prosecutors and the attorneys general who serve as the chief law enforcement officers among them should reconsider the widespread reliance by line prosecutors on police investigations that may encompass racially biased law enforcement decisions. Prosecutors must pursue ways to ensure that racially biased police decisions such as which neighborhoods to monitor more closely and what behavior is considered suspicious do not infect a line prosecutor's decisions on when, and how, to charge those who may have violated criminal laws. On a more particularized basis, prosecutors should reconsider the use of the grand jury in cases involving officer shootings where they have the discretion to do so. They should also consider adopting specific policies or practices to limit the influence of personal racial bias in the grand jury determination. Only in making these two significant changes can the state's chief prosecutor advance an agenda that is both compliant with prosecutors' ethical obligations and consistent with their role in the criminal process scheme to protect and maintain the stability of the community they represent. There are few things more deserving of society's moral condemnation than the unjustified taking of a human life. The taking of that life by those responsible for protecting and serving the lives of those in a community should invite heightened scrutiny and even more so if the taking was influenced by the type of racial bias that has plagued this nation since its inception.