PROBABLE CAUSE AND PERFORMING “FOR THE PEOPLE”

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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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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.

TABLE OF CONTENTS

Introduction ............................................................................................ 139
I.  Background ........................................................................................ 142
II.  The Inequity of the Usual Probable Cause Inquiry ..................... 147
III.  The Grand Jury Performance Problem ........................................ 151
Conclusion ............................................................................................... 159

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

interaction, one police officer was shot in the leg, Walker was unhurt, and Taylor was struck by eight bullets. Protests ensued soon after the shooting, 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. 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. This officer was charged with wantonly endangering Taylor’s neighbors with his errant gunshots. 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.

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 the officer’s knee. 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.
6. See Daniel Cameron Transcript, supra note 5.
2021] PERFORMING “FOR THE PEOPLE” 141

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

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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-1220636 [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.

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. 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. 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. Probable cause is considered a relatively low standard, only requiring proof that some criminal behavior has occurred, and the accused person is likely responsible. 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.

return an indictment for homicide or a related charge against the
officers involved in Taylor’s shooting reflected the public’s
incredulosity 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. 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.
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.

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.

https://www.wdrb.com/in-depth/breonna-taylor-warrant-was-misleading-louisville-police-
investigators-find/article_5066abb4-08ee-11eb-983a-6d7458a23340.html

18. Kate Linthicum, Protests Erupt After Grand Jury Does Not Charge Louisville Officers
world-nation/story/2020-09-23/grand-jury-indictment-in-breonna-taylor-case

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
-11.pdf

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


22. See Ben Terris, Americans Want Justice for George Floyd. Keith Ellison Is in Charge of
case about the killing of Floyd was actually initiated without a grand jury determination of probable cause. 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.

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. The Rules require all lawyers to engage in legal practices that maintain the integrity of the legal system and advance improvements where necessary. 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. It provides guidance for prosecutors to do so ethically.

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. 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


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 Brady 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/VT95-SW4C] (“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 Oritsewuyinmi 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. 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. 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 SOCY (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.”).

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. 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.

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. 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

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36. See Just. in Pub. Safety Project, supra note 19, at 3.
37. For further examples of this, see the discussion infra Part III.
believe they can prove the case beyond a reasonable doubt, the more demanding standard of proof required to find a defendant guilty at trial. This moment of racial reckoning, 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. 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).
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.
Prosecutors should question whether the arresting officer’s presence in a certain area was based on or influenced by racial prejudice. 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. 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.

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

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improve the very nature of policing. This reconciliation would have to consider the systemic problems that have plagued the relationship between law enforcement and the communities they serve by policing. 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.

As scholars have noted, prosecutors play an important public policy role in the criminal justice system. 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. This could be

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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.


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

52. See Green, supra note 49, at 1201.
53. See, e.g., Ashley Southall, Police Body Cameras Cited as ‘Powerful Tool’ Against Stop-
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).
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. 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. 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. 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.

In some ways, the grand jury can be performative for highly publicized cases. This is because aspects of the criminal process are naturally performative. Criminal law is most clearly defined as a system of regulating behavior that is deserving of society’s moral condemnation. Hence, the laws are established by a group of the community’s representatives and violations of the law are determined by community members. 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

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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).


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).


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. 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. 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. The prosecutor also asks the grand jury members to make decisions on only the charges the prosecutor deems appropriate. 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.

Scholars have argued that prosecutors should rely on grand juries for cases involving law enforcement’s use of force. Grand jury scholar
Ric Simmons notes the low indictment and conviction rates for police officers whose use of force has caused the death of citizens. 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. 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. 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. 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.

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.

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, 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. 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, Cuyahoga County Prosecutor Tim McGinty presented manipulated evidence to a grand jury that resulted in its decision not to indict the officer involved.

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

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75. See Simmons, supra note 69, at 527.
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.
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.
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.99 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  
     [https://perma.cc/BY6W-K8GM].
model and the Grand Jury as a Legitimate Community Voice facilitate noncompliance with ethical rules. 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. 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. But one concern that clearly must be
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.