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How Grand Jury Secrecy and Bias Protects and Perpetuates Police- Suspect Impunity

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INTRODUCTION

In November 2014, Cleveland, Ohio, police officers were dispatched to a public park after receiving reports of a male pointing a pistol at random people. Importantly, the caller repeated that the pistol was “probably fake,” and the individual was “probably a juvenile”; however, these details were not conveyed to responding officers. Within three seconds of arriving on scene, Officer Timothy Loehmann shot Tamir Rice twice, ultimately leading to his death a day later. Prosecutors did not formally charge Officer Loehmann for this shooting.

In February 2022, police in Maplewood, Minnesota, served a no-knock search warrant linked to a homicide investigation and entered an apartment where Amir Locke was sleeping. Locke, who was not named in the warrant and was not a target of the homicide probe, was startled when police officers yelling commands rushed into the apartment. Wrapped in a blanket, Locke sat up while holding a gun. Officer Hanneman shot Locke three times within ten seconds from the time that the Minneapolis Police SWAT team had arrived. Thirteen minutes later

Locke was pronounced dead. Prosecutors did not formally charge Officer Hanneman for this shooting.

In May 2023, Indianola, Mississippi, officers responded to a residence after receiving a domestic disturbance call. When police arrived, they drew their service-issued firearms and ordered people inside the residence to come outside. Sergeant Greg Capers shot 11-year-old Aderrien Murry when he walked around the corner of a hallway in the residence to enter the family's living room. While Murry ultimately survived, prosecutors did not formally charge Sergeant Capers for this shooting.

These shootings, alongside the deaths of Eric Garner, Breonna Taylor, Ronald Greene, Tyre Nichols, and numerous others have renewed demands to hold police officers accountable for their fatal uses of force. Theoretically, various avenues of accountability exist, such as termination from employment, civil lawsuits, and criminal prosecution. Borrowing from Hill, Stinson, and Levine,¹ I focus my inquiry in this Article on the criminal law as it regards prosecutorial decision-making surrounding police-involved fatalities and other severe uses of force, a particular facet of “violence-related crime.”² Accordingly, this Article focuses on the prosecution of police officers for alleged criminality.

The first step in criminal adjudication is through criminal indictment, or formally charging an officer with a crime. Indictment, hypothetically speaking, seems promising as American prosecutors have expansive and “virtually unreviewable” discretionary power, making them the most powerful actors in the criminal legal system.³

¹ Aaron Hill, *Putting Police in the Paddywagon: An Analysis of the Difficulties of Prosecuting Police and Proposed Solutions*, 53 U. TOL. L. REV. 497, 497–526 (2022); Philip Matthew Stinson et al., *Police Integrity Lost: A Study of Law Enforcement Officers Arrested* 15, 22 (Apr. 2016) (unpublished manuscript) (on file with the National Institute of Justice, Office of Justice Programs, U.S. Department of Justice). See generally Kate Levine, *Police Suspects*, 115 COLUM. L. REV. 1197 (2016) (examining how police officers and their use of violence is arbitrated differently than lay civilians principally due to an officer's occupational status).

² As Stinson notes, violence-related police crime may also include domestic violence and gender-based violence. See Stinson et al., *supra* note 1, at 24, 38. I initially intended to exclude these specific crimes for my analysis, although some respondents did mention them in passing throughout the course of our conversations.

³ Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 WAKE FOREST L. REV. 319, 331 (2012); Bennett L. Gershman, *Prosecutorial Decisionmaking and Discretion in the Charging Function*, 62 HASTINGS L. REV. 1259, 1260 (2010); Mona Lynch, *Prosecutorial Discretion, Drug Case Selection, and Inequality in Federal Court*, 35 JUST. Q. 1309, 1313 (2018); Cassia Spohn, *Reflections on the Exercise of Prosecutorial Discretion*

Moreover, in considering the statistical probability of indictment, the overwhelming majority of criminal cases are indicted by grand juries.⁴ Accordingly, the grand jury today is known as a prosecutor's rubber stamp due to its pro forma tendency to almost always return true bills in favor of indictment.⁵ However, police-suspect⁶ charging declinations in the cases detailed above stand in stark contrast with the popular idea that a grand jury would indict a ham sandwich if asked to do so. This is because relative to the tens of thousands of civilian complaints received annually, and despite the presence of incriminating evidence, police officers are seldom indicted, much less convicted, for violent crimes.

To this end, data collected by the Bureau of Justice Statistics indicates that in 2002 “[l]arge State and local law enforcement agencies—those with 100 or more sworn officers—received more than 26,000 civilian complaints” about police use of force.⁷ About 7–10% of these excessive force complaints were sustained by internal investigators. However, “nonfederal law enforcement officers were arrested nationwide during 2005–2011 at a rate of 0.72 officers arrested per 1,000 officers, and at a rate of 1.7 officers arrested per 100,000 population nationwide.”⁸ Compare this to the violent crime arrest rate

50 Years After Publication of *The Challenge of Crime in a Free Society*, 17 CRIM. & PUB. POL. 321, 322 (2018); Peter F. Vaira, *The Role of the Prosecutor Inside the Grand Jury Room: Where Is the Foul Line?*, 75 J. CRIM. L. & CRIMINOLOGY 1129, 1131 (1984). See generally JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2017) (examining the prominence of prosecutors in the criminal legal system).

⁴ Roger A. Fairfax, *The Grand Jury's Role in the Prosecution of Unjustified Killings — Challenges and Solutions*, 52 HARV. C.R.-C.L. L. REV. 397, 399–400 (2017); 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. STATE L. REV. 519, 520–22 (2017).

⁵ Jeffrey Fagan & Bernard E. Harcourt, *Professors Fagan and Harcourt Provide Facts on Grand Jury Practice in Light of Ferguson Decision*, COLUM. L. SCH. (2014), <https://www.law.columbia.edu/news/archive/professors-fagan-and-harcourt-provide-facts-grand-jury-practice-light-ferguson-decision> [<https://perma.cc/F6YJ-DULA>]; Simmons, *supra* note 4, at 520; Vaira, *supra* note 3.

⁶ The operational definition of “police-suspects” I use in this Article refers to police officers under investigation for criminal conduct. My examination includes excessive force allegations surrounding officer-involved homicides, the use of less-lethal force like neck restraints and ballistic projectiles on civilian protestors, and may include other kinds of physical force like beatings and fights with civilians. See Levine, *supra* note 1.

⁷ Matthew Hickman, *Citizens Complaints About Police Use of Force*, in L. ENF'T MGMT. & ADMIN. STAT.: BUREAU OF JUST. STAT. SPECIAL REP. (Tina Dorsey & Marianna Zawitz eds., 2006).

⁸ Stinson et al., *supra* note 1, at 2.

of the civilian population which hovered between 172–207 per 100,000 inhabitants during the same period.⁹ Indeed, despite American police officers killing around 1,000 people every year, from 2005–2015 prosecutors filed only 302 murder or manslaughter charges.¹⁰ While it is important to avoid the suggestion that all police fatalities are indictable offenses, scholarship demonstrates that police misconduct is under-investigated, and even when evidence theoretically supports prosecution, officers rarely face trial.¹¹

What explains this dearth in police-suspect indictment? While prosecutors possess considerable occupational power, we know relatively little about the contexts and challenges they face when attempting to indict police officers following allegations of criminality. The prosecutorial black box of obscurity is particularly notable as it relates to feasibility of police-suspect indictment, a crucial stage within the criminal legal process, which raises “vexing equitable questions” about the prospect of police accountability more broadly.¹²

This Article demonstrates that the operation of legal rules within the grand jury context clarifies the discrepancy between civilian complaints, incriminating evidence, and police-suspect indictments. In this Article, I present three features that explain the rarity of police-

⁹ Press Release, Fed. Bureau of Investigation, FBI Releases its 2006 Crime Statistics (Sept. 24, 2007); Press Release, Fed. Bureau of Investigation, FBI Releases 2007 Crime Statistics (Sept. 15, 2008); Press Release, Fed. Bureau of Investigation, FBI Releases 2008 Crime Statistics (Sept. 14, 2009); Press Release, Fed. Bureau of Investigation, FBI Releases 2009 Crime Statistics (Sept. 13, 2010); Press Release, Fed. Bureau of Investigation, FBI Releases 2010 Crime Statistics (Sept. 19, 2011); Press Release, Fed. Bureau of Investigation, FBI Releases 2011 Crime Statistics (Oct. 29, 2012).

¹⁰ Philip Matthew Stinson, *Henry A. Wallace Police Crime Database*, BOWLING GREEN STATE UNIV., <https://policecrime.bgsu.edu> [<https://perma.cc/J8Q9-EVQB>] (last visited Dec. 28, 2023); Amelia Thomson-DeVeaux et al., *Why It's So Rare For Police Officers to Face Legal Consequences*, FIVETHIRTYEIGHT (June 4, 2020), <https://fivethirtyeight.com/features/why-its-still-so-rare-for-police-officers-to-face-legal-consequences-for-misconduct/> [<https://perma.cc/4Z8R-V296>]; see FRANKLIN E. ZIMRING, *WHEN POLICE KILL* 24, 31, 34–35, 39 (2017).

¹¹ See Douglas L. Colbert, *Prosecuting Baltimore Police Officers*, 16 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 185, 185–99 (2016); John V. Jacobi, *Prosecuting Police Misconduct*, 4 WIS. L. REV. 789, 803–05 (2000); C.J. OGLETREE JR. ET AL., *BEYOND THE RODNEY KING STORY: AN INVESTIGATION OF POLICE MINORITY COMMUNITIES* (1995); Caleb J. Robertson, *Restoring Public Confidence in the Criminal Justice System: Policing Prosecutions When Prosecutors Prosecute Police*, 67 EMORY L.J. 853, 853–87 (2018).

¹² Bowers, *supra* note 3, at 348; Spohn, *supra* note 3, at 324–27 (2018); see generally Megan S. Wright et al., *Inside the Black Box of Prosecutorial Discretion*, 50 U.C. DAVIS L. REV. 2133 (2022) (discussing the opacity and inscrutability of prosecutorial decision-making).

suspect indictment. First, grand juries are secret legal proceedings. In challenging cases or those in jurisdictions where legal officials are less motivated to investigate claims of police criminality, prosecutors can exploit grand jury confidentiality to conceal weak evidence. Prosecutors may deflect responsibility by attributing the lack of indictment to the grand jurors, using the grand jury's role as the ultimate decision-maker as a shield to protect themselves from criticism.

Second, I find that the grand jury selection process is cursory in comparison with petit juries, particularly when accounting for ideological opinions among jurors. This procedural limitation is important because police-suspect prosecutors reported encountering grand juries that are ideologically under-representative, politically conservative, and who, consistent with public polling, tend to support law enforcement. I argue the unrepresentative ideological composition of grand juries carries important implications for the feasibility of police-suspect indictment.

Third, prosecutors not only confront grand jurors focusing on the characteristics of the *victims* of police violence, rather than police-suspects, and exhibiting the tendency to victim blame in order to justify an officer's use of force, but they also encounter grand jurors who defer to police officer decision-making. Such an atmosphere adds to our understandings of how the attitudinal compositions of grand juries may influence the lack of indictment of police officers accused of criminal misconduct and raises questions about fairness, justice, and accountability in American criminal courts.

This Article proceeds in four parts. Part I introduces the theoretical frameworks for various questions involving police-suspect grand juries, including the structure and function of contemporary grand juries, the law surrounding examinations into an officer's use of force, modern prosecutorial influences, findings from social psychologists on the impacts of diversity on jury decision-making practices, and how police-suspect grand juries implicate unique political pressures. In this Part, I combine literatures on grand jury decision-making, the law, prosecutorial discretion, and public polling data to better understand the complex and multifaceted environment involved with police-suspect indictment.

Part II presents a description of my original methods of data collection. To investigate this setting, I conducted forty-seven in-depth, semi-structured interviews with twenty-one respondents in five field sites around the country. Respondents included civilians and legal

professionals working in the domain of police-suspect investigations and prosecutions.

Part III clarifies why police-suspect prosecutors have trouble filing and winning indictments, including the secrecy surrounding grand jury procedures, limited grand jury selection processes, and the unrepresentative ideological composition of grand juries, which skew more politically conservative.

Finally, Part IV presents four solutions to the problems uncovered in the previous Parts of this Article, including the dissemination of publicly available prosecutorial explanations regarding their grand jury presentations, the use of special grand juries, the use of updated forms of jury empanelment, and the development and implementation of federal resources to expand police-suspect prosecutorial expertise and experience.

I

WHAT WE KNOW ABOUT GRAND JURIES, THE LAW SURROUNDING POLICE USE OF FORCE, PROSECUTORIAL DECISION-MAKING, GRAND JUROR DECISION-MAKING, AND POLICE-SUSPECT GRAND JURIES

A. The Contemporary Structure of Grand Juries

The contemporary grand jury, comprised of twelve to twenty-four laypeople, functions as a prosecutor's tool in testing whether the sufficient level of evidence exists to formally charge an accused person with a crime.¹³ Accordingly, the grand jury is a crucial site, serving a dialogic function where localized deliberation and lay decision-making provides feedback to powerful legal practitioners regarding the appropriateness of state power. The grand jury also serves a democratic function, promoting transparency and visibility among communities that have been heretofore excluded from meaningful participation within the administration of the criminal law.¹⁴

The Fifth Amendment to the United States Constitution requires the use of grand juries in federal criminal prosecutions. The Fifth Amendment, however, does not apply to state prosecutions.¹⁵ Thus,

¹³ Bowers, *supra* note 3, at 323; *see also* Fairfax, *supra* note 4, at 399; Vaira, *supra* note 3, at 1129.

¹⁴ Bowers, *supra* note 3, at 324–25; Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1160 (2005); Mary R. Rose et al., *Juries and Viewpoint Representation*, 35 JUST. Q. 114, 114–15 (2018).

¹⁵ Fairfax, *supra* note 4, at 401; Bowers, *supra* note 3, at 326; Simmons, *supra* note 4, at 522.

local jurisdictions get to decide if they will use a grand jury process and how they want to structure it. As a result, there are over fifty different forms of grand juries today, “each with [their] own unique blend of structural rules, procedural constraints, and informal culture.”¹⁶

In both federal and state prosecution, there is a distinctive characteristic of grand juries that undergirds their operation: secrecy. Evidence, witness testimony, and grand jury member deliberations are rarely publicly released, and this opacity is in part a protective mechanism designed to shield an innocent person from the stigma associated with wrongful or inappropriate accusations of criminal conduct.¹⁷ Concealment also means prosecutorial decision-making is simultaneously hidden during the most critical stage of the entire criminal process.¹⁸ Prosecutors maintain control—and, in the words of Fairfax, an “outsized influence”—over the presentation of evidence, witness statements, and arguments within grand jury proceedings that are rarely publicly released.¹⁹ Other constitutional restrictions, such as the inadmissibility of prejudicial evidence and hearsay testimony, are also inapplicable within grand jury proceedings, enabling prosecutors to act with wide latitude regarding whether and how to present evidence to grand juries to win indictments.²⁰ This flexibility is important within grand jury processes because it also theoretically permits prosecutors to withhold relevant and implicating evidence with virtually no oversight.

B. The Law of Police Use of Force

The Supreme Court in *Graham v. Connor* affirmed that police officers acting under color of law are permitted to use deadly force in particular situations.²¹ The Court instructed that examinations surrounding a police officer’s alleged excessive force are judged under an objective reasonableness standard and “must be judged from the perspective of a reasonable officer on the scene, and its calculus must embody an allowance for the fact that police officers are often forced to make split-second decisions about the amount of force necessary in

¹⁶ Bowers, *supra* note 3, at 344–45.

¹⁷ See William B. Lytton, *Grand Jury Secrecy—Time for a Reevaluation*, 75 J. CRIM. L. & CRIMINOLOGY 1100, 1100–01 (1984).

¹⁸ Spohn, *supra* note 3.

¹⁹ Bowers, *supra* note 3, at 340; Fairfax, *supra* note 4, at 409.

²⁰ Bowers, *supra* note 3, at 344; Fairfax, *supra* note 4, at 408; Vaira, *supra* note 3, at 1139.

²¹ *Graham v. Connor*, 490 U.S. 386 (1989); *Tennessee v. Garner*, 471 U.S. 1 (1985).

a particular situation.”²² This means that the triers of fact—typically a jury, or a judge during a bench trial—must not rely on the 20/20 vision of hindsight or peaceful deliberation within “a judge’s chambers.”²³ A question of reasonableness is judged only by facts known to the officer at the moment they used force on scene, and with the understanding that fatal force may be necessary within rapidly evolving situations where officers have limited or incomplete information.

However, legal rules—such as the requirement to judge excessive force claims under an objective reasonableness standard—“don’t apply themselves.”²⁴ Rather, these fact-intensive inquiries involve interpretation and analysis among legal actors, therefore introducing personal values and idiosyncratic beliefs into legal decision-making and conclusions about an officer’s mental state.²⁵ Stated differently, the application of legal rules the Court described in *Graham*, while initially purported to be a detached and objective legal pursuit, is susceptible to many interpretations because “someone somewhere must do things and make choices.”²⁶ Accordingly, one potential mechanism clarifying the rarity of police-suspect indictment regards the individuals and the decision-making contexts under which evaluative questions—like the reasonableness of an officer’s use of force—are asked and answered. Therefore, examining how legal actors—like prosecutors and grand jurors—understand and apply legal rules under conditions of idiosyncratic preference, competing demands, resource constraints, and informational uncertainty may reveal important insights that clarify charging declinations in context of incriminating evidence and tens of thousands of civilian complaints received annually.²⁷

²² *Graham*, 490 U.S. at 387, 396–97.

²³ *Id.* at 396.

²⁴ ISSA KOHLER-HAUSMANN, *Jumping Bunnies and Legal Rules: The Organizational Sociologists and the Legal Scholar Should Be Friends*, in *THE NEW CRIMINAL JUSTICE THINKING* 246, 257 (Sharon Dolovich & Alexandra Natapoff eds., 2017).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* “Again, the mere fact that a statutory change does not immediately and mechanically translate into outcomes should not surprise us. Laws don’t apply themselves; someone somewhere must do things and make choices.” *Id.*

C. Modern Prosecutorial Influences

Research on legal decision-making suggests that law on the books does not “mechanically translate into outcomes.”²⁸ The criminal law is produced through social activity and the decisions of many actors—prosecutors chiefly among them—who are subject to complex occupational and political environments.²⁹ Accordingly, legal environments—and legal outcomes that flow from them—are not detached from the broader social and political milieu. Instead, they are *inhabited institutions*, where organizational participants “constantly interpret and make sense of rules[,] . . . structures[,]” and professional relationships that influence decision-making practices and legal outcomes.³⁰

Empirical insight into the black box of prosecutorial decision-making establishes that prosecutors weigh many concerns, such as the limited resources required to prosecute every single case, humanitarian compassion in pursuing justice, and proportionality of sanction in avoiding excessive punishment.³¹ Prosecutors are also influenced by longstanding relationships with national agencies, national occupational philosophies, local norms and legacies, ethical obligations and standards of conduct, and constitutional law and statutory provisions that affect their decision-making.³² As a result, prosecutors structure their work around legal, practical, and equitable concerns.³³ Prosecutors evaluate the law, or the statutory, constitutional, and precedential permissibility of a criminal

²⁸ *Id.*

²⁹ Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 LAW & SOC. INQUIRY 239, 240 (2005).

³⁰ JAMES EISENSTEIN ET AL., *THE CONTOURS OF JUSTICE: COMMUNITIES AND THEIR COURTS* (1988); JEFFERY T. ULMER, *Criminal Courts as Inhabited Institutions: Making Sense of Difference and Similarity in Sentencing*, in *AMERICAN SENTENCING: WHAT HAPPENS AND WHY?*, 48 U. CHI. PRESS, at 484 (Michael Tonry ed., 2019).

³¹ Angela M. Banks, *The Normative and Historical Case for Proportional Deportation*, 62 EMORY L.J. 1243, 1267 (2013); Spohn, *supra* note 3; Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415 (2012); Wright et al., *supra* note 12; Marjorie S. Zatz & Nancy Rodriguez, *The Limits of Discretion: Challenges and Dilemmas of Prosecutorial Discretion in Immigration Enforcement*, 39 LAW & SOC. INQUIRY 669 (2014).

³² Lynch, *supra* note 3; *see generally* Jeffery T. Ulmer, *The Localized Uses of Federal Sentencing Guidelines in Four U.S. District Courts: Evidence of Processual Order*, 28 SYMBOLIC INTERACTION 255 (2005) (discussing how federal sentencing guidelines, while intended to increase uniformity across jurisdictions, may be applied differently depending on local contexts).

³³ Lynch, *supra* note 3.

investigation and prosecution.³⁴ Prosecutors as legal professionals carry informed sensibilities of what constitutes reasonable and unreasonable police conduct vis-à-vis the law, legal precedent, and previous experience with juries. Courts have also prioritized prosecutors' professional perspectives and provided significant latitude to prosecutors acting on their individual determinations, but as Bowers notes, "It is, however, but one perspective" and "[t]here are many others," such as individual perceptions of grand jurors, as discussed below.³⁵

Prosecutors also evaluate practical concerns, principally the likelihood of conviction.³⁶ Frohmann labels this a "downstream orientation," where prosecutors attempt to anticipate how other legal participants, like jurors and judges, will interpret and respond to evidence, witness and victim testimony, and arguments put forth within case processing.³⁷ Within their predictions, prosecutors focus on the seriousness of the underlying offense, the strength of the evidence, the purported culpability and behavior of the defendant, and the background characteristics of the victim.³⁸ Prosecutors attempt to avoid uncertainty by filing charges in cases where the likelihood of conviction is good and rejecting cases when conviction seems unlikely.³⁹

Third, prosecutors consider equitable issues, contemplating whether they are fairly exercising their legal authority. Ruminations about what constitutes abstract concepts like appropriateness, justice, and accountability, and whether and how prosecutors should pursue these ends, oftentimes involves moral and ethical considerations.⁴⁰ In other words, just because a prosecutor can take a particular course of action does not necessarily mean they should. Importantly, equitable

³⁴ See Bowers, *supra* note 3.

³⁵ *Id.* at 356.

³⁶ See generally Catherine Ferguson-Gilbert, *It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL W.L. REV. 283 (discussing the binary win-loss record-keeping mentality of prosecutors). LAURA E. GÓMEZ, MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE (1997); Spohn, *supra* note 3.

³⁷ Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 LAW & SOC'Y REV. 531, 535 (1997).

³⁸ Spohn, *supra* note 3, at 325.

³⁹ Miller & Eisenstein, *supra* note 29, at 253; Spohn, *supra* note 3, at 325.

⁴⁰ Bowers, *supra* note 3, at 321, 330.

considerations “demand no specialized or technical training, [and] no instruction from the prosecutor.”⁴¹ Equitable concerns involve normative orientations, influenced by one’s personal combination of fairness, intuition, and morality and may vary from prosecutor to prosecutor and between prosecutor and grand jury members. As such, prosecutors must remain cognizant that a grand jury could decline an indictment even when sufficient levels of evidence exist because lay decision-makers foster different conceptions of justice, fairness, and blameworthiness.⁴² Thus, equitable issues may not only be lay but also extralegal because grand juries could overemphasize their individual sensibilities of fairness, justice, and blameworthiness of alleged perpetrators’ conduct and refuse to indict even when requisite legal thresholds may exist.⁴³

Taken collectively, prosecutorial decision-making encompasses dynamic and multifaceted sociolegal calculations. Prosecutors’ choices and the legal outcomes that flow from such them are a product of a multitude of political constraints, individual sensibilities, organizational pressures, and bureaucratic features influencing the criminal legal process.

D. Social Psychology and Jury Decision-Making

Final indictment capability rests with the grand jury, a group of residents retaining power to issue a true bill. Accordingly, this procedural step introduces lay participation into criminal justice processing. Jury pools, or the total population of eligible jury members, are typically sourced from voter registration rolls and driver’s license records kept by the state.⁴⁴ While the modern American jury is more democratic by virtue of its sampling procedure, it is not egalitarian in terms of racial and ethnic composition.⁴⁵ In the federal system, jury pools are drawn from larger geographic regions with less racial

⁴¹ *Id.* at 332.

⁴² *Id.* at 325; Fairfax, *supra* note 4, at 398. *See generally* Simmons, *supra* note 4 (discussing the legal, practical, and equitable factors that prosecutors look to in the administration of cases).

⁴³ Bowers, *supra* note 3, at 321–23.

⁴⁴ *See generally* Mary R. Rose et al., *Jury Pool Underrepresentation in the Modern Era: Evidence from Federal Courts*, 15 J. EMPIRICAL LEGAL STUD. 378 (2018) (exploring the composition and underrepresentation of jury pools in the federal system). JOANNA SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE 141–44 (2023).

⁴⁵ Rose et al., *supra* note 44; Neil Guzy, *Citizen Participation on Juries*, in *THE SOCIAL HISTORY OF CRIME AND PUNISHMENT IN AMERICA: AN ENCYCLOPEDIA* 256, 256–57 (Wilbur R. Miller ed., 2012).

diversity and therefore contribute to racial underrepresentation within federal juries.⁴⁶ For example, Miller and Eisenstein found that federal juries contain all white jurors or are predominantly white in composition.⁴⁷ African American exclusion is facilitated based on a majority of states disqualifying convicted felons, which disproportionately affects adult Black men.⁴⁸ Rose and colleagues labeled Latino and African American underrepresentation as a “ubiquitous” feature in their examination of federal jury representativeness.⁴⁹ Other analyses confirm that Latino underrepresentation is a pervasive phenomenon defining juries across the country.⁵⁰ As a result, despite legal precedent instructing juries must be drawn from a “fair cross section of the community,”⁵¹ social science research routinely finds that American juries rarely contain a representative racial or ethnic sample vis-à-vis the local community’s

⁴⁶ Paula Hannaford-Agor & Nicole L. Waters, *Safe Harbors from Fair-Cross-Section Challenges? The Practical Limitations of Measuring Representation in the Jury Pool*, 8 J. EMPIRICAL LEGAL STUD. 762, 782 (2011); SCHWARTZ, *supra* note 44.

⁴⁷ Miller and Eisenstein, *supra* note 29.

⁴⁸ 28 U.S.C. § 1865. *See generally* Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOCIO. REV. 777 (2002) [hereinafter Uggen & Manza, *Democratic Contraction?*]; Christopher Uggen et al., *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANNALS AM. ACAD. POL. & SOC. SCI. 281 (2006) [hereinafter, Uggen et al., *Citizenship, Democracy*]; Darren Wheelock, *A Jury of One’s “Peers”: Felon Jury Exclusion and Racial Inequality in Georgia Courts*, 3 JUST. SYS. J. 335 (2011).

⁴⁹ Rose et al., *supra* note 44, at 379. *See generally* Mary R. Rose et al., *Selected to Serve: An Analysis of Lifetime Jury Participation*, 9 J. EMPIRICAL LEGAL STUD. 33 (2012) (examining the factors that distinguish those who have ever had an opportunity to serve on a jury from those who have not).

⁵⁰ MAUREEN BERNER ET AL., A PROCESS EVALUATION AND DEMOGRAPHIC ANALYSIS OF JURY POOL FORMATION IN NORTH CAROLINA’S JUDICIAL DISTRICT 15B (2016); HIROSHI FUKURAI ET AL., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE (1993). *See generally* Jacinta M. Gau, *A Jury of Whose Peers? The Impact of Selection Procedures on Racial Composition and the Prevalence of Majority-White Juries*, 39 J. CRIME & JUST. 75 (2015) (examining jury selection processes to better understand the loss of minority representation); *see* Ronald Randall et al., *Racial Representatives of Juries: An Analysis of Source List and Administrative Effects of the Jury Pool*, 29 JUST. SYS. J. 71 (2008) (discussing racial representation on juries based on different source lists); Mary R. Rose & Michelle Brinkman, *Crossing the ‘Digital Divide’: Using the Internet to Impanel Jurors in Travis County, Texas*, 1 J. CT. INNOV. 5 (2008) (examining how updated methods of jury empanelment may affect racial representativeness in Travis County, Texas); Robert Walters & Mark Curriden, *A Jury of One’s Peers? Investigating Underrepresentation in Jury Venires*, 43 JUDGES’ J. 17, 19–20 (2004) (examining racial underrepresentation on jury venires throughout the United States).

⁵¹ 28 U.S.C. § 1861.

demographic makeup. Instead, racial and ethnic *underrepresentation* on American juries is the norm.

Jury underrepresentation is important to consider for a variety of reasons, but chief among them is evidence suggesting that racially diverse juries provide important differences within deliberation processes, which may affect verdicts.⁵² For example, demographic diversity within juries contributes to attitudinal diversity (a broader range of ideas and beliefs fostered among members) as well as increased information exchange (increased communication and dialogue) within jury deliberation.⁵³ Racially diverse juries also provide a collection of other features, including longer deliberations, more discussion of trial evidence, and the making of fewer factually inaccurate statements than racially homogenous juries.⁵⁴ Research also establishes that the more White individuals are seated on a jury, the more conviction-prone the jury is.⁵⁵ Relatedly, Black jurors are more lenient than White jurors.⁵⁶

Jury underrepresentation is important to consider not only because research establishes how racially diverse juries affect deliberation patterns and verdict outcomes, but because it also carries a conspicuous connection to American police violence. Police use of force, allegations of excessive use of police force, and officer-involved shootings are racially disproportionate.⁵⁷ Racial and ethnic underrepresentation on

⁵² Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q. J. ECON. 1017, 1040 (2012).

⁵³ Norbert L. Kerr et al., *Defendant-Juror Similarity and Mock Juror Judgments*, 19 L. & HUM. BEHAV. 545, 546 (1995). See generally Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCH. 597, 606 (2006) (discussing how diverse groups exchange a wider range of information than all-White groups).

⁵⁴ Sommers, *supra* note 53, at 604–05.

⁵⁵ See generally William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171 (2001) (finding that racial biases influence death penalty sentencing outcomes and White jurors were more likely to vote for death in cases involving Black defendants and White victims); Howard C. Daudistel et al., *Effects of Defendant Ethnicity on Juries' Dispositions of Felony Cases*, 29 J. APPLIED SOC. PSYCH. 317 (1999) (finding no statistical relation between defendant ethnicity and the probability of conviction); Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 L. & HUM. BEHAV. 695 (1999) (examining the effect of peremptory challenges on racial and gender representation on juries).

⁵⁶ See Rose, *supra* note 55.

⁵⁷ Frank Edwards et al., *Risk of Police-Involved Death by Race/Ethnicity and Place, United States, 2012–2018*, 108 AM. J. PUB. HEALTH 1241, 1241 (2018). See generally Frank Edwards et al., *Risk of Being Killed by Police Use of Force in the United States by Age*,

grand juries is therefore important to study because it may inordinately exclude perspectives from justice-impacted and highly policed communities, particularly when cases under grand jury examination involve police use of force.⁵⁸ As Meares and Kahan suggest, justice-impacted community members are excruciatingly sensitive to the individual and societal costs of invasive policing, and therefore may be uniquely situated to determine outcomes in police-suspect cases.⁵⁹

E. Views of the Criminal Legal System Are Divided by Race and Political Party

Contemporary views on the American criminal justice system vary amongst the public. Although 69% of the American public expresses a “fair amount of confidence” in police officers, the share of Americans that hold a “great deal of confidence” in police officers is decreasing, and Americans’ confidence in police declined six points from November 2020 to December 2021.⁶⁰ Black Americans are consistently more skeptical of police and police accountability in comparison with their White counterparts. Eighty-seven percent of Black Americans say multiple aspects of the criminal justice system need reform, 95% of Black Americans say major overhauls are necessary within policing, and 60% of Black respondents answered that police brutality was an “extremely or very big” problem for Black Americans.⁶¹ Overall, about half of Black Americans say policing and

Race-Ethnicity, and Sex, 116 PROC. NAT’L. ACAD. SCI. 16793, 16796 (2019) (discussing how the risk of being killed by police in the United States varies across social groups, finding that African American men and women, indigenous men and women, and Latino men face a higher lifetime risk of being killed by police than other white peers). FRANKLIN E. ZIMRING, *WHEN POLICE KILL* 46 (2017) (finding that Black and Latino men are at a higher risk than are White men for being killed by police).

⁵⁸ Bowers, *supra* note 3, at 356. See generally Robert O. Motley Jr. & Sean Joe, *Police Use of Force by Ethnicity, Sex, and Socioeconomic Class*, 9 J. SOC’Y SOC. WORK & RSCH. 49 (2018) (exploring the demographic composition of the victims of police violence in the United States).

⁵⁹ See generally TRACEY L. MEARES & DAN M. KAHAN, *URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES* (1999) (arguing that residents of inner-city communities are qualified to develop and strengthen individual criminal legal protections against police violence). Bowers, *supra* note 3, at 357.

⁶⁰ BRIAN KENNEDY ET AL., PEW RSCH. CTR., *AMERICANS’ TRUST IN SCIENTISTS, OTHER GROUPS DECLINES* 5 (2022).

⁶¹ KIANA COX & KHADIJAH EDWARDS, PEW RSCH. CTR., *BLACK AMERICANS HAVE A CLEAR VISION FOR REDUCING RACISM BUT LITTLE HOPE IT WILL HAPPEN* 6, 8, 81, 91 (2022); Katherine Schaeffer & Khadijah Edwards, *Black Americans Differ from Other*

the courts need to be completely rebuilt for Black people to be treated fairly.⁶²

Public polling data also reveals partisan splits among society's views of contemporary criminal justice. The Pew Research Center found that "[W]hite adults are consistently more positive about the performance of police around the country than Black adults, and Republicans are much more positive than Democrats."⁶³ Further, while 51% of Republicans view police as doing an excellent or a good job of holding officers accountable when misconduct occurs, only 13% of Democrats support this contention; these views have declined in recent years, falling from 64% for Republicans and 27% for Democrats in 2016.⁶⁴

Although ideas about American policing are generally delineated by a respondent's race and political party (in that Black Americans are typically more critical than White Americans, and Republicans are typically more supportive of law enforcement and the current operation of the criminal justice system than are Democrats), perceptions of trust and legitimacy of American criminal justice reveal intricacies based on the confluence of political ideology, gender, and race. Sixty-seven percent of Black Democrats, compared with 46% of Black Republicans, responded that racism and police brutality are "extremely big problems" for Black Americans.⁶⁵ Surveys also find that "Black Democrats are more likely than Black Republicans to say the prison system (57% vs. 35%), policing (52% vs. 29%) and the courts and judicial process (50% vs. 35%) should be completely rebuilt for Black people to be treated fairly."⁶⁶ In other words, the convergence of age, political orientation, gender, and income reveal important distinctions within perceptions of trust and legitimacy of American criminal justice.

In sum, examining prosecutorial power alongside how diverse juries differ in their decision-making and the attitudinal cleavages within mainstream society is relevant for investigating police-suspect grand juries. Though tremendous concentrations of prosecutorial power raise

U.S. Adults over Whether Individual or Structural Racism Is a Bigger Problem, PEW RSCH. CTR. (Nov. 15, 2022), <https://www.pewresearch.org/short-reads/2022/11/15/black-americans-differ-from-other-u-s-adults-over-whether-individual-or-structural-racism-is-a-bigger-problem/> [https://perma.cc/N4XS-UQH8].

⁶² Schaeffer & Edwards, *supra* note 61.

⁶³ PEW RSCH. CTR., MAJORITY OF PUBLIC FAVORS GIVING CIVILIANS THE POWER TO SUE POLICE OFFICERS FOR MISCONDUCT: LITTLE PUBLIC SUPPORT FOR CUTS IN SPENDING ON LOCAL POLICING (2020).

⁶⁴ *Id.* at 8.

⁶⁵ COX & EDWARDS, *supra* note 61.

⁶⁶ *Id.* at 14.

questions about what happens inside prosecutors' offices because they are the most powerful practitioners in the American criminal legal system, we still know relatively little about how prosecutors make decisions within police-suspect grand juries and how lay—and oftentimes exclusive—participation at this crucial stage influences police-suspect indictments.⁶⁷ Indeed, contemporary demand for increased prosecutorial transparency is primarily the result of prosecutors' internal office guidelines alongside the “rules, norms, and preferences” that are typically hidden from public view.⁶⁸ Yet, prosecutors are notoriously difficult to contact and, as a result, “[e]mpirical examinations of prosecutorial practices remain sparse, primarily as a result of data access challenges.”⁶⁹ This Article intervenes in this space through the use of original data to examine how prosecutors present evidence, attempt to influence police-suspect grand juries, and the barriers they perceive when interacting with police-suspect grand jury members.

II

HOW I WENT ABOUT EXAMINING POLICE-SUSPECT GRAND JURIES

A. Descriptive Features of the Cities Where I Conducted Research

In order to investigate police-suspect grand jury decision-making, I draw on evidence from forty-seven in-depth interviews with twenty-one civilians and legal professionals working in the domain of police-suspect investigations and prosecutions. As part of a broader project on the investigation and prosecution of police misconduct, I strategically selected five cities in the United States that were dealing with a crisis of legitimacy and facing external pressure for increased police accountability as the result of previous episodes involving notable and fatal police use of force. Multi-cited qualitative research projects enable the analysis of the similarities between, and the dynamics

⁶⁷ See generally Miller & Eisenstein, *supra* note 29 (exploring the overlap and working relationships between prosecutors on the state and federal level).

⁶⁸ Lynch, *supra* note 3, at 1313; Miller & Eisenstein, *supra* note 29; Wright et al., *supra* note 12.

⁶⁹ Mona Lynch et al., *Prosecutors, Court Communities, and Policy Change: The Impact of Internal DOJ Reforms on Federal Prosecutorial Practices*, 59 CRIMINOLOGY 480, 483 (2021).

within, each field site alongside the idiosyncrasies and differences across the assortment of research sites.⁷⁰

The cities where I conducted my fieldwork are hereafter referred to as City 1, City 2, City 3, City 4, and City 5. Cities included in this study range from small to major metro cities in the United States, as reflected in Table 1.

Table 1. Demographic Composition of Field Sites

	City 1	City 2	City 3	City 4	City 5
City Population	300,000	1,000,000	965,000	2,700,000	155,000
% Black	45	25	7	29	20
% Hispanic	4	3	33	28	48
% Asian	4	5	8	7	3
% Native-American	1	1	1	1	1
% White	46	67	66	45	53

Source: Data for this Table was provided by the U.S. Census Bureau.⁷¹

In each city, I identified persons knowledgeable about the investigation and prosecution process of police officers and requested to talk with them for an interview. As exposed later in this Article, the limited number of prosecutors who do these select types of cases around the United States made initial sampling a challenging endeavor, particularly considering respondents' initial hesitation in speaking with me due to fears of professional and personal reprisal. For this reason—and in alignment with Institutional Review Board protocols—individual confidentiality and anonymity agreements with research respondents alongside the deidentification of field sites were imperative for engendering rapport with those with whom I spoke. In other words, the anonymity of cities included within this Article and the concealment of personally identifiable details of research respondents is not only based on the best practices within the qualitative research community, but it was also a key strategic mechanism designed to enhance respondents' comfort in speaking with me.

⁷⁰ See generally Kevin G. Karpiak et al., *The Plurality of Police Oversight: A Method for Building upon Lessons Learned for Understanding an Evolving Strategy*, 45 POLICING: AN INT'L J. POLICE STRATEGIES & MGMT. 648, 650 (2022) (exploring variation within research sites provides comparative insights for social scientific understandings of civilian-led police oversight commissions).

⁷¹ *Quick Facts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045222#PST045222> (last visited Aug. 8, 2023).

Participant masking techniques were also necessary because this data was collected from a small number of subjects. These subjects are placed within a web of relations between specific individuals embedded within specific geographic places following unique historical moments.⁷² Connecting my work product with simple Google searches would likely reveal people and places. In other words, given how my research subjects live and work within noteworthy places and discuss unique fact patterns, disclosing additional detail through transcripts and revealing locations or people in such a public way presents massive risks to identification and gambles with respondents' professional tenure. Therefore, ethical obligations charge me with a distinct responsibility to protect these individuals and field sites by deidentifying and prohibiting the wider distribution of redacted work product.

To stimulate rapport, I started interviews by explaining my research focus: prosecutorial and civilian investigators' perspectives and experiences within police misconduct investigations. I also described the importance of gathering their unique insights and expertise. Interviews combined a semi-structured format covering topics like their backgrounds and the nature of each respondent's experience with police-suspect investigations and prosecutions and included follow-up, probing questions, and open-ended discussions of previous cases and their decision-making processes.⁷³ I followed the lead of the respondents, letting them elaborate as they felt necessary, probing details, and asking for clarification where relevant. Each interview lasted from one to two hours, and each respondent was interviewed at least twice, each taking place typically two to three weeks apart. This method of repeated interviews facilitated a high level of exposure with respondents and the capacity to develop a rapport over time to unlock deeper levels of detail during our time together.⁷⁴

Initial interviews with key respondents provided access to numerous other specialized prosecutors and other legal professionals who

⁷² Jack Katz, *Armor for Ethnographers*, 34 SOCIO. F. 1, 264, 265 (Mar. 2019), <https://onlinelibrary.wiley.com/doi/abs/10.1111/socf.12494>.

⁷³ Miller & Eisenstein, *supra* note 29.

⁷⁴ MATTHEW CLAIR, PRIVILEGE AND PUNISHMENT: HOW RACE AND CLASS MATTER IN CRIMINAL COURT 25–27 (2020); see Mario Small, 'How Many Cases Do I Need?' *On Science and the Logic of Case Selection in Field-Based Research*, 10 ETHNOGRAPHY 5, 5–38 (2009). See generally JAY MACLEOD, AIN'T NO MAKIN' IT: ASPIRATIONS AND ATTAINMENT IN A LOW-INCOME NEIGHBORHOOD (2008) (exploring social inequality, poverty, and racial inequality by way of qualitative methods).

referred me to other local personnel who worked closely with police suspect prosecutions. This method of snowball sampling ensured variability in occupational experience, location, perspective, and expertise throughout my sample of respondents and exposed how experience, tenure, and rank are relevant to prosecutorial decision-making.⁷⁵ Respondents in my sample, as reflected in Table 2, were assistant, junior, and line prosecutors and not solely elected district attorneys. Civilian investigators included in my broader research project also varied depending on rank and specialty.

Table 2. Demographic Information of Respondents

Pseudo-nym	Race	Gender	Federal or State	Unit or Specialization	City	# of Interviews
Aaron	White	Man	State	Assistant District Attorney; Special Prosecution Unit	3	3
Alice	White	Woman	State	Assistant County Counselor	2	4
Allen	White	Man	State	Assistant District Attorney	2	1
Brian	White	Man	N/A	Private Counsel, Civil Rights Attorney	1 & 2	1
Bryce	White	Man	State	Assistant State's Attorney; Civil Rights Unit, Office of the Attorney General	5	2
Chandra	White	Woman	Federal	Assistant United States Attorney, Lead Civil Rights Unit	1 & 2	3
Clayton	White	Man	State	Homicide Investigator	1 & 2	2
Darian	Black	Man	State	Police Officer	4	3
Deborah	White	Woman	Federal	Assistant United States Attorney	1 & 2	3

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⁷⁵ LAURA E. GÓMEZ, MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE 127 (1997).

Pseudo-nym	Race	Gender	Federal or State	Unit or Specialization	City	# of Interviews
Gina	Asian	Woman	Federal	Assistant United States Attorney; Chief Civil Rights Unit	5	2
Jamie	Black	Woman	State	Assistant District Attorney	4	2
Mark	White	Man	State	Public Defender	4	2
Matthew	White	Man	State	Assistant District Attorney; Special Prosecution Unit		5
Miranda	White	Woman	State	Civilian Investigator; Academy Trainer & Major Case Specialist	4	1
Oliver	White	Man	State	Private Counsel, Civil Rights Attorney	3	1
Oscar	Black	Man	State	Assistant District Attorney; Chief Special Prosecution Unit	3	5
Richard	White	Man	Federal	Assistant United States Attorney – Senior Litigation Counsel	1 & 2	1
Scott	White	Man	State	Civilian Investigator; Chief of Staff	4	1
Shannon	White	Woman	State	Civilian Investigator	4	2
Thomas	Black	Man	State	Assistant County Counselor	2	2
Veronica	Black	Woman	State	Civilian Investigator; Deputy Chief and Lead of Special Victims' Team	4	1

Following all interviews, I transcribed the recording via Otter.ai, identified key themes using Delve Qualitative Software, and wrote follow-up and clarification questions in anticipation of our next interview. In addition to audio recording each interview, jottings and fieldnotes were taken in real time to supplement the audio transcriptions.

As part of my broader project on police accountability, I employed a flexible coding scheme throughout my interviews. The importance of the grand jury for understanding the broader socio-legal context of the prosecution of police misconduct emerged as a major theme early in my initial interviews. In particular, prosecutorial strategies toward the presentation of evidence alongside grand jury members' skepticism

regarding the victims of police violence was a common topic of conversation with prosecutors. Accordingly, in subsequent interviews, I began by inviting prosecutors to describe experiences with police-suspect grand juries, their approaches to presenting evidence to the grand jury, and the responses they hear from grand jurors considering police-suspect indictment. Detailed data provided in multiple interviews allowed me to clarify details and understand the different office policies regarding prosecutors' use of police-suspect grand juries and what evidence grand jury members requested. Over time and with greater rapport, I was able to account for the variation in prosecutorial strategies, which invited me to consider how prosecutors employ previously successful strategies to win indictment in current cases, how they observe and strategize to differing attitudinal compositions of grand jury members, and how the exclusive composition of police-suspect grand juries is important for understanding the rarity of police-suspect indictment.⁷⁶ I supplemented these data with legal analysis of statutes and case law governing the grand jury protected by the Fifth and Sixth Amendments, public polling data regarding attitudes toward the criminal justice system, and data concerning ethnic and racial composition of grand and petit juries. To support the final writing process, I synthesized findings into shorter memos and eventually wrote longer sections to form a more cohesive whole.⁷⁷

III

KEY INSIGHTS ON POLICE-SUSPECT GRAND JURIES FROM INTERVIEWS WITH POLICE-SUSPECT PROSECUTORS

A. Grand Jury Secrecy Protects Prosecutorial Conflicts of Interest and Police Officer Criminality

Early in our conversation, Oscar, the Chief of the Special Prosecutions Unit in City 3, shared, "The fact is that it's always been that every police-suspect case went to the grand jury and nobody ever got indictments. The DA got covered, basically, right? 'Oh we took it to the grand jury. The grand jury decided to no bill.'" Throughout my conversations with prosecutors like Oscar, the significance of grand

⁷⁶ See Katherine Jensen & Javier Auyero, *Teaching and Learning the Craft: The Construction of Ethnographic Objects*, 16 RSCH. URB. SOCIO. 69, 69–87 (2019).

⁷⁷ Nicole M. Deterding & Mary C. Waters, *Flexible Coding of In-Depth Interviews: A Twenty-First-Century Approach*, 50 SOCIO. METHODS & RSCH. 708, 708–39 (2021); Victoria Reyes, *Ethnographic Toolkit: Strategic Positionality and Researchers' Visible and Invisible Tools in Field Research*, 21 ETHNOGRAPHY 220, 220–21 (2018).

jury secrecy emerged as a central theme explaining low indictments of police-suspects. My conversations with Oscar and Aaron, a police-suspect prosecutor and former member of the Special Prosecutions Unit in City 3, were emblematic of the ways in which police-suspect prosecutors spoke about the importance of grand jury secrecy. In the quote above, Oscar clarifies that grand jury secrecy enables a veiled presentation of evidence within the grand jury that allows prosecutors to hide behind grand jury determinations.

Oscar continued,

So that's why when the DA that hired me came to me and said, "Look, let's stop kidding ourselves. That gives DAs cover. The DAs don't want to do their job by coming out in front of the public and saying look, I think the shooting was justified. And the ones that I don't think are justified, I'm going to the grand jury."

In other words, police-suspect prosecutors recognize public perceptions of police-prosecutor entanglements, possible conflicts of interest, and grand jury secrecy, and are increasingly scrutinized by community members for these reasons.

Aaron described this method of prosecutorial obfuscation vis-à-vis grand jury secrecy more starkly: "I'm trying to think of a lighter word than cowardice. If you have a DA who is terrified of making the decision in these cases, then what is easier than saying, 'Well, the grand jury already decided. They made the call, not me!'" Here, Aaron precisely articulates the issue with grand jury secrecy: Hidden and confidential legal proceedings allow lopsided and lackluster prosecutorial presentations, even when evidence theoretically supports prosecution.⁷⁸

While police-suspect prosecutors in my sample appreciated the need to be more transparent about their decision-making practices, the calculus surrounding the use of a grand jury in allegations of police

⁷⁸ Douglas L. Colbert, *Prosecuting Baltimore Police Officers*, 16 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 185, 185 (2016). See generally John V. Jacobi, *Prosecuting Police Misconduct*, 4 WIS. L. REV. 789 (2000) (discussing the reluctance of local prosecutors to aggressively prosecute police criminality because of conflicts of interest and political tensions inherent between police departments and prosecutors' offices); CHARLES J. OGLETREE JR. ET AL., *BEYOND THE RODNEY KING STORY: AN INVESTIGATION OF POLICE CONDUCT IN MINORITY COMMUNITIES* (1995) (discussing the shortcomings of police misconduct investigations in high profile cases of police violence); Caleb J. Robertson, *Restoring Public Confidence in the Criminal Justice System: Policing Prosecutions When Prosecutors Prosecute Police*, 67 EMORY L.J. 853, 853–87 (2018) (arguing for systemic changes regarding the ways in which police officers are investigated in the criminal legal system).

misconduct became a political question for elected district attorneys. In particular, providing transparent explanations detailing the evidentiary strategy used within a grand jury reveals complex and dynamic political calculations. Oscar explains:

There are different schools of thought about how to deal with a grand jury. One school of thought is you just present all the facts and let the grand jury make the decision. Some view the prosecutor's role in front of the grand jury as purely being a facilitator of evidence and a conduit through which questions touching upon their service to be asked and answered. Others take the approach that it's perfectly acceptable as long as the grand jury knows that they're independent and they have the authority to make any decision that they want to.

In other words, even when prosecutors decide to take a case to the grand jury, there are discrepancies in how prosecutors strategize, plan, and present evidence to grand jurors. On one hand, prosecutors can be a neutral arbiter of evidence, simply conveying evidence to grand jurors. Alternatively, prosecutors can take a proactive stance and an affirmative position on the matter, explicitly arguing for indictment. Oscar explains:

There is a way to maximize your presentation in such a way it gives you the best chance of getting an indictment when you should get an indictment, but it requires you to be willing to approach the grand jury and be willing to address them from the posture of asking for the indictment. . . . So I think that the presentations have to be if you think an indictment ought to be returned, tailor the presentation in a way that the grand jury knows that the DA has a position and thinks of grand jury indictments is appropriate. But I think that's a core part of that is being willing to stand up in front of grand jury and say that you think an indictment's appropriate and it's appropriate because this is a matter, not so much that this person needs to get convicted and go to jail, but this is a matter that the most formal means of the community's voice, on one of the most important functions of a public servant, that they ought to be the final arbiters and it ought not stop here in the confines of a secret grand jury proceeding.

Here, Oscar clarifies how a prosecutor approaches the grand jury—as in what strategy (neutral or proactive) they use in presenting evidence—emphasizing a core discretionary feature of prosecutorial decision-making that is hidden within secretive grand jury proceedings. Being proactive with the solicitation of evidence and arguing for indictment is one approach. Prosecutors may also be neutral in the presentation of evidence and forgo putting forth an argument that the police-suspect should be indicted. Ultimately, these tactics are hidden from public view because what happens inside a grand jury room and

the deliberations grand jurors undertake are hidden and rarely publicly released.

Consequently, the evolving nature of movements for police accountability results in the development of new policies and practices by offices of district attorneys around the United States, creating further challenges for prosecutors. On the one hand, innovative strategies, like taking all police-suspect cases to the grand jury, are intended to signify that prosecutors in that jurisdiction take police misconduct seriously. In the words of Aaron, “It looks like we’re making sure you see that justice is done.” Aaron’s conspicuous word choice of “cowardice” above also exposes that these ostensibly proactive office policies may still be a farse, due to the secretive nature of the grand jury. As Aaron explains further:

It’s a little disingenuous because what happens in the grand jury is secret. So if a prosecutor goes in and says, “Hey guys, I got an officer-involved case. It’s crap. Don’t indict it.” Nobody will ever know. So going in to the grand jury on every case is a little disingenuous.

Here, Aaron explicitly elucidates that the ways in which prosecutors make decisions and their public messaging surrounding such choices oftentimes require community members to read in between the lines and intuit a deeper meaning behind the oftentimes highly stylized messages put forth justifying an officer’s use of force. Oscar explains:

It depends on who’s saying it, right? If it’s the establishment guys, “Oh, we go to grand jury with every case!” People are like “yadda yadda yadda,” they would say, “here we go again!” But nobody knows what goes on in front of the grand jury. All we know is that at the end of the day the cop was always no-billed. There’s always a no bill. He’s never indicted. But if you got somebody that’s super progressive and she says, “We’re going to grand jury on every case!” It sounds different now. Same words, but it’s somebody different saying it. See? That’s the distinction. So even the new progressive DA went back to the old policy of grand jury on every case. So now, you have to figure out how to tell the public you’re going to the grand jury on every case but we’re really going on this one! Alright? You understand what I’m saying? You’re going to grand jury on every case and you’re like, “Yeah you go! Yeah! But we’re really going on this one!” So how do you say that? You have to find some kind of way to communicate to people like, “Yeah I know we’re going on every one but this one is different.” So I don’t know what you say. I don’t know the answer to that. Remember I’m four years into this, which is no time in the scheme of things. Four years is nothing in terms of how long you’ve had the American prosecutor. I’m four years in and we’re trying to figure this out.

In sum, initial decisions within police-suspect processes, like whether to use the grand jury, hinge upon prosecutorial opacity and grand jury secrecy. Further, how police-suspect prosecutors use a grand jury—either proactively or neutrally—accentuates their discretionary power and underscores the importance of grand jury secrecy to protect it. Ultimately, this legal impenetrability carries implications for the feasibility of police-suspect indictments and the transparency of crucial stages of the criminal legal process surrounding police-suspect indictments.

B. Grand Jury Members' Equitable Concerns

Police-suspect prosecutors told me that the unrepresentative ideological composition of the grand jury influenced legal outcomes in police-suspect cases. For example, Gina, an Assistant United States Attorney and Chief of the Civil Rights Unit in City 5, told me that in the federal system, “Our juries are extremely white. One time, our jury was all white except for one woman who was multiracial. And it was overwhelmingly over fifty-five. So, we had a terrible jury. The jury was definitely skewed to be more conservative, definitely more pro-police.”

Here, Gina shares that in her experience, federal grand juries are demographically and politically unrepresentative. They are older, racially skewed, and politically align with conservative political philosophy. We also see how Gina’s experience interacting with grand juries aligns with public polling data indicating that older White individuals consistently report more positive views about the performance of police.

The sympathetic ideological orientation of grand jurors is brought into starkest relief when placed in context of the temporal and logistical procedure of grand juries. Illustratively, Chandra, an Assistant United States Attorney and lead of the Civil Rights Unit Cities 1 and 2, explains:

What’s really interesting and unusual about police-suspect cases is that in some ways, they’re backwards. I did drug cases for fifteen years and we parade into grand jury once a week and I put a police officer on the stand, normally a federal agent, but sometimes a local agent or a local detective, and we ask the grand jury to believe these people.

Here, Chandra clarifies that grand juries considering charges for a police-suspect are part and parcel of a broader grand jury process that is empaneled for a long period of time, oftentimes totaling nine months to a year in duration. This nine-to-twelve-month period is a

considerable temporal interval and it is significant to consider because it requires a substantial period of time in one's life to be set aside for jury service. While the federal district courts may offer undue hardship or extreme inconvenience excuses, and some state court systems may offer service postponements,⁷⁹ asking someone to participate in this body for this period of time may be quite disruptive to one's personal and professional life.

The temporal longevity of grand jury empanelment is also important because grand juries are not specially appointed for the purpose of considering only the indictment of police-suspects. Typically, grand jurors are considering the indictment of lay civilians by way of using police officer testimony and police reports produced by patrol officers. Chandra explains:

We ask them to rely on their testimony to support criminal charges against another person. So, over the course of doing that, and rightfully in the vast majority of instances, we rely on the grand jury believing those witnesses, right? If we can't believe our witnesses, then there is no indictment.

A unique contradiction is revealed when considering the temporal duration of grand jury empanelment because grand juries are typically not specially appointed for the purpose of considering only the indictment of police-suspects. Chandra continues:

When we bring a criminal charge against an officer to that same grand jury, we're now asking them to assume or to believe that a police officer committed a crime . . . There's a natural disconnect, like, "Well, wait a minute, for the last year, you've been coming in here once a week and asking me to believe what these people say. And now you're telling me one of them is bad?!" I think there is a tendency to build in a sense of trust in law enforcement and then we ask grand jurors to ignore that. You spend a year with a grand jury, asking them to give these police officers the benefit of the doubt and all reasonable inferences supporting their testimony. And now you're showing them or telling them about conduct that's undertaken by a police officer and I think they're like, "Well, but wait a minute, you've been telling me for a year that these are the good guys. And

⁷⁹ *Juror Qualifications, Exemptions, and Excuses*, U.S. CTS., <https://www.uscourts.gov/services-forms/jury-service/juror-qualifications-exemptions-and-excuses> [https://perma.cc/R765-88MQ] (last visited Oct. 26, 2024); Ariz. Rev. Stat. § 21-202 (2025), <https://www.azleg.gov/ars/21/00202.htm> [https://perma.cc/4JNM-J5EX]; *Service Policies*, FIFTH JUD. DIST. OF PA., <https://www.allegheycourts.us/juror-services/service-policies/> [https://perma.cc/Y77N-CRU6] (last visited Oct. 26, 2024).

now you're asking me to find that one of them is a bad guy?" So in some ways, I think your grand jurors do find it a little bit confusing.

The temporal and logistical arrangement of grand juries is essential because it exposes how grand jurors are primed to believe and trust police officers over a period of weeks and months. Chandra describes how prosecutors work hard to engender a sense of trust, credibility, and fidelity in law enforcement, who oftentimes serve as key witnesses and the conveyors of crucial pieces of evidence when presenting a case to a grand jury. This arrangement and the ideological sympathy generated are then upended when a police officer is under investigation and accused of wrongdoing. This analytical shift is difficult for grand jurors and affects their perceptions of wrongdoing in police-suspect cases. Chandra explains:

So I don't know if it's so much a question of confusion as it is contradiction. We ask the people all this through their entire grand jury service, we asked them to rely on the police and know the good guys and then we come in there and go, "Well, wait a minute, here's a bad apple. So now we're asking you to believe that this person did something really awful." So aside from just wanting to believe that police officers don't do that, now they're also being asked to find that one of the good guys is one of the bad guys and I think it's difficult for a lot of people.

Here, Chandra clarifies how the methods under which police misconduct investigations are presented to grand juries and the tenure of empanelment affects grand jurors' legal decision-making in police-suspect cases. The fact that grand jurors are empaneled for a period of weeks and months means they are predisposed to siding with law enforcement as credible crime-fighters, not perpetrators of it. Coupled alongside their skewed sociodemographic and ideological orientations, grand jurors make legal calculations that are more likely to side with police officers accused of criminality, at the expense of victims.

Police-suspect prosecutors attempt to probe the ideological orientation of prospective jurors to better understand their views of law enforcement and how they react to officers using force. Chandra describes her attempts to select a hospitable jury in the following way:

In my cases, sometimes we're picking a jury backwards. So, whereas in a drug case, for example, or a murder case, or violent crime, I want those jurors that say, "Yeah, I believe a cop 100% of the time. I don't think a cop would get on the witness stand and lie." People say that kind of stuff all the time. In my cases, I have to kind of mentally evaluate whether I want those people or don't want those people, right? Because what if the defendant testifies? So now I've got a bunch of jurors who have said, "Oh yeah, I believe everything a cop

says.” What if my cop and a bunch of his buddies all testify and say, “The government is wrong. It didn’t happen that way.” Do I really want those jurors, or do I want jurors that are skeptical of law enforcement that are gonna view them in a different light? So it’s weird because sometimes the attitudes that we don’t want in, for example, a violent crime or drug case, we do want in a case against a police officer. It’s almost backwards.

Through this explanation, we see how the temporal and logistical arrangement of grand juries—at minimum—predisposes grand jurors to confusing and contradicting information. Examples include whether and how to believe officer testimony, or risking excessive belief in officers’ account regarding their uses of force.

Police-suspect prosecutor experiences with skewed grand jury representativeness among jurors were so prevalent in my sample that I heard how they prompted strategic adjustments within case adjudications. For example, Bryce, an Assistant State’s Attorney in the Civil Rights Unit in the Office of the Attorney General in City 5, told me about his experiences with explicit pro-police commiserations within the pool of potential grand jurors. He recalled in one of his cases that “[t]here were concerns about the community being very sympathetic to the police officers, so they assembled the grand jury in a different city.” Here, Bryce indicates that police-suspect prosecutors may attempt different strategies to diversify the juror selection process, like drawing on jury pools in different jurisdictions.

I asked other police-suspect prosecutors about the ways in which they strategize their juror empanelment process as well. Matthew responded, “You have to remember that the judges select the grand jurors. They conduct the voir dire, not the prosecutors. So we’re not involved in anyone who gets selected.” In other words, police-suspect prosecutors attempting to select a prosecution-friendly grand jury would likely be unsuccessful in remedying known underrepresentation issues amongst experienced police-suspect prosecutors.

Other prosecutors explained that the grand jury selection process itself is limited. Chandra shared:

We don’t delve into specific questions about specific kinds of cases when we seat a grand jury. They’re not going to be asked things like “Do you hate police officers? Or do you love police officers? Or do you have an axe to grind?” They’re just asked basic, basic qualification questions. So we have a lot more information about our juries when we pick trial juries than grand juries.

Similarly, Chandra told me, “With grand jurors, we don’t participate in that process. When it comes to choosing grand jurors, grand jurors really just have to be minimally qualified.”

In sum, police-suspect prosecutors indicate that the process to empanel a trial jury is significantly more comprehensive than the procedure for prospective grand jurors. The procedural conciseness of grand juror empanelment is important to consider because it means that those with minimal qualifications are authorized to sit on grand juries and issues like biased ideological orientations among grand jurors are unlikely to be resolved in the prosecution’s favor. Further, it means that prosecutorial proactivity to formulate a prosecution-friendly grand jury is also an unlikely strategy to win indictment.

C. Pro-Police Bias Among Grand Jurors Protects Police-Suspect Criminality

Aside from logistical and temporal considerations of grand juries, police-suspect prosecutors overwhelmingly recognized an explicit pro-police bias among grand jurors. Illustratively, Aaron shared, “What my experience tells me is that juries are biased toward cops. I definitely think there is a bias toward cops. And I guess the question for DAs now is do you take that into account when trying cases?”

Respondents perceived two principal manifestations of pro-police biases: the blameworthiness directed toward the victims of police violence and the hesitancy among grand jurors to question an officer’s split-second decision-making.

1. Grand Jurors Blame the Victims of Police Violence

Early in our conversation, Gina commented that “[t]hese cases come to prosecutors warts and all.” I came to find that the label of “warts” Gina offered was a euphemism for the unsympathetic contexts and characteristics surrounding the victims of police violence that police-suspect prosecutors must account for when asking a grand jury for a true bill. Chandra shared that once she receives a case file, she immediately begins to inquire about the witnesses and victims of the officer’s use of force. She described her work accordingly, “I have to do things like evaluate witness credibility, right? I mean, if I have a witness, whether it’s a victim or whether it’s a third-party witness, who is simply not credible, then I have to discount that statement.” Oscar described Gina’s “warts” more specifically:

Most people that get shot by police officers are typically in places where, you know, they're out at three in the morning. Many of them are involved in something they shouldn't be involved in. They are involved in some criminal activity and many of them have backgrounds that . . . they have criminal records, drug abuse, sex workers, all kind of stuff.

Aside from whether Oscar's suppositions are empirically derived, Oscar suggests that police-suspect prosecutors perceive that a vital component of witness credibility is the contextual details oftentimes understood among grand jurors as unsavory "warts." Here, we see that a crucial component of police-suspect prosecutors' preliminary case evaluations regards witness and victim credibility. Chandra's description in combination with Gina's assertion and Oscar's specificity means that witness believability oftentimes hinges upon the contextual warts of the encounter.

Police-suspect prosecutors told me about their experiences with grand jurors fixating on these warts. For example, Aaron shared, "Consistent with actual juries looking for excuses for the cop, grand juries always want to know about the victim's criminal history. Like, was he a bad person or not? Was he on drugs?" Similarly, Gina reflected on one of her recent cases:

The victim who is now an adult but was a child at the time is like one of your undesirable victims, like he's had criminal history. And he kind of fought back a little bit on cross examination, and you know, maybe the grand jury didn't like it. So if a jury doesn't like a victim, they might not indict.

Here, prosecutors are describing not only how warts represent unattractive facts to the grand jury but also how they fester and become the crucial pieces of persuasive evidence within a case.

Prosecutors also experienced grand jurors explicitly referencing the warts within a case, fixating upon the "undesirable victim" and articulating skepticism as a result. Chandra shared, "I've had grand jurors in the middle of a grand jury presentation where a guy got beaten by an officer, I had to stop the grand juror from saying anything else, but basically say, 'He got what was coming to him.'" In other words, factual warts and undesirable victim characteristics are damaging for a prosecutor's case because grand jurors have the tendency to consume, and the power to overwhelm, other evidence, ultimately excusing an officer's use of force and justifying misconduct.

Prosecutors analogized jurors' fixation on warts within police-suspect cases to that of prosecuting sex crimes. Aaron explained:

It's like the practice of people that are accused of sexual assault. Almost no matter the facts, the jury will be like, "Well what was she wearing? Was she drunk?" You know, they'll look for reasons not to do their job, basically. And I do equate trying more cops with trying people charged with sexual assault, but I think they're both really hard to get convictions because whatever body of people you end up with is going to look for reasons not to convict.

Aaron listing the questions that grand jurors ask and linking them to an articulation of "reasons not to convict" clarifies how grand jurors fixate on contextual warts and victim blame to justify an officer's use of force. He continued, "In my experience, most jurors—no matter what they say in voir dire—they will come into any of these cases looking to find something unreasonable on the part of the civilian and not the cop."

Chandra labeled the consideration of contextual warts the most frustrating part of her job and observed these calculations among grand jurors so often that there was an informal name for it: *the run tax*.

One of the grand jurors said, "The guy that was [beat up] got what was coming to him. You run from the police, you should expect to get a beating." That's something that we hear quite a bit. They call it "the run tax." If you run from a police officer, you get taxed, and you get taxed when they beat you up. That's a fairly commonly understood phenomenon apparently in our city is the run tax. Drug dealers, felons, whoever people don't like, people who commit crimes understand that if you run from the cops, you're going to take a beating. We hear it quite a bit. . . . I think there are some people who accept that that's the case.

Because police-suspect prosecutors hear about the run tax so often, they employ unique strategies to win indictments. Prosecutors explicitly target the attitudinal composition of grand jurors and adapt evidentiary presentations to meet the ideological positionality of jurors. For example, Chandra described how prosecutors openly share about contextual warts, explain their irrelevance, and attempt to exclude members who inquire about them. She shared:

All we can do is address it. We address it in jury selection. We ask about it during jury selection: "Does everyone understand that the Constitution and laws of the United States apply equally to everybody, and everybody is entitled to their protection, whether or not they are suspected of committing a crime, or whether in fact, they have committed a crime?" And there are people that will say, "I think criminals should not have the same rights as regular people." And then we don't seat those people. We then address it again in closing argument. I remind them that I asked them that when you were in jury selection: "Do you remember back a few days ago when we first met and I was asking you questions during jury selection and one of the

things that I asked you is whether or not you all understood and agreed that the Constitution and laws of the United States apply equally to every person in this country, or at least they're supposed to? I'm going to hold you to your answer. You all told me that you understood that, and I'm going to hold you to it. I'm not asking you to invite this victim person—and I never say victim, I just call them by their names—I'm not asking you to invite him to your house for dinner. I'm not asking you to let him babysit your children. I'm not asking you to sit and have a beer with them. What I'm asking you is to honor your promise that the Constitution and laws of the United States apply equally to everybody. Okay?" And they all go, "Oh, uh huh. Yes. Yes." I get a lot of head nods.

Chandra's description indicates federal prosecutors also attempt to be transparent in sharing about contextual warts to be genuine with grand jurors. Chandra also describes a common script she uses—including emphasizing fundamental safeguards within the United States Constitution—as a proactive strategy that prosecutors use with grand jurors.

However, prosecutorial transparency coincides with jurors who continue to victim blame. Illustratively, Chandra shares:

Because even think of the worst, most heinous crime you can think of. Even a serial killer is entitled to those same protections of the Constitution as everyone else, right? Even though some people don't like that. Serial killer, serial rapist, pedophile, child molester, child murderer, everyone is entitled to those same Constitutional protections, right? Try convincing twelve lay people of that concept. The minute they hear that this "victim," who is a very real victim, he is a victim of a civil rights violation. Once they hear that that victim is accused of being a serial killer, being a child molester, being a serial rapist, being a woman abuser, whatever it may be, not only is there no sympathy for that victim, there is a complete unwillingness on some people's part to afford that person those constitutional protections. . . . "Why should I care if somebody breaks his jaw?" "Moral of the story: don't murder people. Don't rape women. Don't molest children. Don't whatever." "You don't deserve the protections of the Constitution because you are a lowlife, whatever, that's in jail because you're accused of murdering people."

Chandra describes the precarious position that police-suspect prosecutors must navigate. As legal professionals, they understand that the Constitution theoretically protects violations of one's civil rights. However, on the ground, theoretical protections conflict with practical judgments and contextual considerations that jurors engage in. Chandra described this dilemma most succinctly in the following: "It's hard to get a lay person to wrap their head around the fact that a criminal is

deserving of the same constitutional protections as everyone else.” Calculations such as these comprise the fundamental socio-legal predicament for police-suspect prosecutors. Police-suspect prosecutors exist in a liminal space where they attempt to advocate for victims of police violence and communicate how their victimhood is legitimate, regardless of their potentially unsavory backgrounds.

As a result, police-suspect prosecutors employ novel strategies like striking potential jurors for cause who articulate overtly biased positionalities. Chandra explains:

We’ve had a surprising number of prospective jurors who will say “I’m sorry but I can’t get on board with that. I think if somebody is accused of a crime or if somebody commits a crime then something bad happens to him then so be it.” They’ll be candid about it. And the good part about that is, is those people in large measure get struck for cause, right? So if they say, “I cannot be impartial. I can’t give the government a fair shake because this victim is accused of a serious crime,” they don’t get to be on the jury.

Here, Chandra describes that a key prosecutorial strategy is to attempt to exclude jurors that foster deferential ideological orientations toward law enforcement. Beyond attempts to strategically select jurors, remain transparent about contextual warts, and discount those warts’ relevance to the case, prosecutors indicated other strategies they used to win indictment. Prosecutors also shared that a comprehensive presentation, including a breadth of evidence, is persuasive within the evaluation of an officer’s use of force. Chandra said:

Certainly everything we can do to corroborate the testimony of the other witnesses is super helpful. We try to do that in every case, but in these cases, it is particularly important. We do that through eyewitness accounts, video, audio, or what have you. Obviously corroborating that evidence as much as possible is crucial because you don’t want to leave it. If you get yourself stuck in a credibility contest, in all likelihood, you’re not going to win.

Here, Chandra details that a key concern of police-suspect prosecutors is avoiding credibility contests between the victims of police violence and the suspect officer. Because prosecutors recognize that grand jurors make normative assessments comparing the sympathy of the victim of police violence to that of the officer, prosecutors attempt to buttress other pieces of evidence so grand jurors will not fixate on the warts of the case. An essential decision within this calculus is whether to call the victim to testify. To this end, Gina told me, “Colleagues tell me they have better luck in cases where they don’t call the victim at trial than where they do that because people want to

judge the victim. They want to be like, ‘Well, were you asking for it?’ Because if it goes bad, you’re sunk.” Again, not only is Gina explicitly describing the victim blaming and fixation on contextual warts described above, but she also suggests these are fundamental components of grand jurors’ deliberation on whether officers justifiably used force or whether they should be indicted.

In sum, police-suspect prosecutors’ descriptions of the contextual warts and the ubiquity of the run tax clarifies how unrepresentative ideological orientations and pro-police sensibilities structure grand jurors’ calculations, ultimately creating obstacles to indictment. Understanding the demographic influences undergirding grand juror calculations elucidates how grand jurors blame victims for their behavior. Even though prosecutors strike overtly partial jurors, warts remain influential and jurors continue to fixate upon them, despite repeated attempts to subdue their influence. In other words, addressing contextual warts, striking overtly biased jurors, and attempting to explain the warts’ irrelevance is a conscious, proactive, and oftentimes unsuccessful police-suspect prosecutorial strategy. According to Chandra, “The joke is that a grand jury would indict a ham sandwich. . . . That is not the case with police officer cases.”⁸⁰ Likewise, another police-suspect prosecutor shared, “There’s just a fair amount of skepticism. It’s different, like in another jurisdiction or case, the grand jury just hears those charges and they’re going to stamp their approval. That’s not so in these cases.”

Taken collectively, grand jurors’ fixation on the contextual warts of the encounter—whether the victim ran from police, if they were engaged in crime, the time of day, their previous drug use—comprises a powerful influence motivating the run tax and ultimately whether individuals should expect an officer to use force. Grand jurors expecting an officer to use force means grand jurors excuse it when they do.

2. Grand Jurors Foster Pro-Police Biases That Defer to an Officer’s Use of Force

Alongside questions about the contextual warts surrounding an officer’s use of force, the second influential feature police-suspect prosecutors perceived was that grand jurors were reluctant to question

⁸⁰ The methods of original data collection used in this Article are described in Part II below.

an officer's decision-making. Illustratively, Deborah, an Assistant United States Attorney in Cities 1 and 2, told me, "There is a sense that grand jurors are skeptical about whether we are expecting too much of an officer in a split second." Deborah's reflection reveals how police-suspect prosecutors interact with grand jurors who are not only skeptical of the victims of police violence, but who also foster sympathetic sociopolitical schemas regarding the occupation of policing and therefore defer to an officer's use of force. In other words, police-suspect prosecutors perceive conservative ideological orientations of jurors who question the legitimacy of one's victimhood and simultaneously grant more deference to police officers using force.

One of the most consistent findings in my work was the routine perception amongst police-suspect prosecutors that grand jurors were sympathetic and predisposed to siding with law enforcement. For example, Aaron told me that among grand jury members he understands "an inherent sympathy to cops because these people put themselves in harm's way for us all the time and there is a respect for authority." Matthew observed, "If I was prosecuting these cases out in rural parts of our state, they're going to listen to these cops and they're going to believe anything these cops have to say." Gina shared, "You can tell what media people consume, like extremely far-right radio. We had some of those on our jury. Things like that influence the deliberation and influence the outcome." Deborah, at a different point in our conversation reiterated:

When I started and would talk to my friends who work in an urban jurisdiction, I would hear about their juries that might, in fact, sympathize with the person who was beaten up and not with the police officer. I'd think, "Oh, that'd be nice!" I never had a jury like that. In most jurisdictions, you're not going to have a jury like that. In certain inner cities you might, but in most places, you're not going to, and so the jury is going to sympathize with the officer.

In other words, grand juries that police-suspect prosecutors engage with are not comprised of ideologically diverse community members. Rather, grand jurors embody conservative orientations that defer to an officer's judgment when using force.

Respondents' reflections, like Deborah's above, also clarify how police-suspect prosecutors encounter grand jurors who credit the policing occupation as difficult because officers are responsible for making rapid decisions, oftentimes under dynamic circumstances and with incomplete information. Accordingly, prosecutors perceive that grand jurors think officers should get more flexibility in deciding when

and under what circumstances to use force because officers do dynamic and complex jobs. Oscar echoes this sentiment:

What you end up having in a lot of these cases is people saying, “Man, this guy made a split-second decision and yeah, he probably shouldn’t have shot him, but it was a split-second decision. We don’t think he’s a murdering sociopath. He’s been an officer for 25 years, and he’s got his family, he’s otherwise been a great officer. We got this victim who was . . . I’m not saying I devalued this victim, but I’m not getting ready to throw this officer’s whole life away because of it. I’m not going to throw his career away for this mistake.” So it really has to do with how do you get people to not to engage in those sorts of comparative assessments of relative social value of people comparing the officer to the victim and how it will impact the officer versus your complainant or your victim? What is the loss? What is the net loss to our society? Are we gonna be better off if we take this guy who’s a twenty-five-year vet, who’s never done anything wrong, who made a mistake? Or are we net better off with that indictment? That’s the kind of thing that I think we run into.

Therefore, police-suspect prosecutors perceive that grand jurors are reluctant to question the difficulty of making split-second decisions with incomplete information. Accordingly, grand jurors’ calculations extend from simply victim blaming to also considering the complexity and difficulty involved with the roles and responsibilities inherent to the occupation of policing. Oscar explained further, “The biggest thing for us is how to . . .” He paused and sighed, collecting his thoughts, and eventually continued,

Police officers have one of the most difficult jobs imaginable. That’s just true. It’s just true. And on any given day they are dealing with things that require patience, all kinds of things that are beyond what any of us have to deal with. I think most people understand that. And moreover, it’s reasonable to understand that. So it’s like . . . the hard part is you can’t really quarrel with the things that are your biggest problems. You can’t quarrel with the source of your biggest problem. What you quarrel with is that those things become reasons not to hold people accountable. So that has to do with the whole paradigm and the whole worldview and perspective of individual jurors. It’s not as much rules as it is how do you deal with these attitudes of jurors?

Reflections such as these expose how police-suspect prosecutors encounter an exclusive ideological orientation fostered among grand jurors. In these cases, prosecutors are challenged to influence grand jurors who possess uncompromising attitudes regarding the inherent difficulty of policing. Chandra further described the precarious legal environment for police-suspect prosecutors, particularly within the charging phase:

There are some people, and we try to weed this out in jury selection, who just can't and will never . . . find a police officer guilty for something that happened on duty. They just do not believe they should be prosecuted like criminals. And so we believed that there was some possibility that he would be acquitted. I . . . was prepared to accept that. But if people, if a cross section—which don't get me started on that because we never get true cross sections of the community on juries—but if . . . a cross section of the community is prepared to watch the video of the beating and decide unanimously that that conduct is acceptable to them, then I really have no choice but to accept that. I think it's a tragedy. I think it would have been terrible. I think it would have been extremely upsetting. It would have been extraordinarily upsetting to me personally. But the question becomes at some point, "What is the community prepared to accept or tolerate?" And as, like I said, it is kind of silly and maybe Pollyanna as that sounds, but I truly believe that. So my job is to present the facts in the most competent, convincing way that I possibly can.

Chandra's articulation demonstrates a substantial hurdle that these indictments face: the fact that grand juries and petit juries engage in normative calculations where members fixate on victim characteristics and contextual warts. This issue is compounded by a widespread belief that the profession of policing is a thankless and difficult job, warranting more deference to officers when they use force. Moreover, the propensity for juries to engage in these calculations reflects jurors' ideological composition—prosecutors present evidence to rooms of ideologically unrepresentative individuals, who afford deference to police officers throughout their use of force. An ideological propensity to agree with law enforcement, even when presented with evidence to the contrary, is an enormous and oftentimes insurmountable uphill battle for indictments.

Prosecutors also describe how pro-police biases lead grand jurors to question whether police misconduct exists. Aaron described his experience in presenting to grand juries: "You can definitely see the surprise on people's faces. Like, it took a moment for them to process it. You definitely see surprise on their faces."

Such sentiment was not exclusive to Aaron. In my sample, police-suspect prosecutors across the nation perceived a pro-police bias that often manifested in grand jurors questioning whether police misconduct happens.

Chandra shared:

Then you add to that just a general sense of disbelief that police officers do those sorts of things. I mean, there's still a very large portion of the population that just wants to believe that misconduct

doesn't happen. So they're like, "Nobody would do that. That can't be true. Nobody would do that, right? Like a police officer wouldn't knowingly shoot somebody if they don't have the legal right to do that. Like, that just doesn't happen."

Matthew, a former violent crime and police-suspect prosecutor in City 1, presented a point of variation in my examination of grand jury representation. In sharing his experience with diversity on juries influencing the prospect of indictment, Matthew said:

The grand juries here in City 1, are similar to your juries that are going to be sitting in trials. They're generally a diverse group of people . . . because in City 1, we as prosecutors always talked about how we were the away team. We didn't have the advantage that these rural districts have where they just trust law enforcement. So you have a lot of people on juries, and some on grand juries who are very skeptical of law enforcement. So at least in our city, again, we're an away team. They're already skeptical of us. If you're gonna get an indictment pretty much anywhere in the country on an officer involved shooting case, I think you could have more money on it here than you really could almost anywhere in the country. I truly believe that.

Here, Matthew illustrates a few significant points for the prospect of police indictment. First, he suggests that in his jurisdiction, members of the grand jury commonly view prosecutors and police officers in collaboration and therefore associate them as members of the same team. This is important because he suggests that perceptions of trust and legitimacy of law enforcement (broadly construed to include both prosecutors and police officers) affect the prospect of indictment. Second, and perhaps most importantly, he details his experience with members of the grand jury who are skeptical of law enforcement—an important point of variation within my sample. Even among grand jurors who are comparatively more skeptical of law enforcement, Matthew continued to have trouble winning indictments, indicating the likelihood of challenges even when prosecutors are able to build a grand jury of individuals sympathetic to the victims of police violence and suspicious of law enforcement.

In sum, police-suspect prosecutors shared that jury composition is noticeably unsympathetic to the victims of police use of force, and jurors are more likely to empathize with police officers. This socio-legal environment is significant because I find that police-suspect prosecutors encounter grand juries comprised of an exclusive and partial sociopolitical orientation. Accordingly, this Article builds upon evidence suggesting that the collection of sensibilities and opinions

collected within grand juries is not representative of society writ large and is a product of the ways in which grand juries and juries are sampled.⁸¹ Specifically, findings indicate the ideological viewpoints of grand jurors are explicitly pro-police, which influence the investigative questions jurors ask (and do not ask) and their deliberation processes. This distinctive sociopolitical positioning serves to contextualize low numbers of police-suspect indictments even in cases of egregious uses of force.

IV

PROPOSITIONS FOR FUTURE ACCOUNTABILITY

This Article describes the heightened barriers to police-suspect indictment even when grand juries are asked to consider a relatively low threshold of evidence. Police-suspect prosecutors described many challenges to indictment: the analytical inconsistencies within case processing, the explicit pro-police sensibilities within the grand jury pool, tendencies among grand jurors to victim blame, the ideological patterns of grand jurors to understand policing as a difficult job and the resultant willingness to extend flexibility and latitude when an officer uses force, and unsuccessful strategies to produce an ideologically sympathetic grand jury. As Aaron told me, “What people think is reasonable depends on their politics and their life experiences.” In other words, a person’s broader philosophical perspective informs the questions they ask, the details they fixate upon, and their conclusions regarding an officer’s use of force within the specific cases they are tasked with reviewing. In the United States, those community members empaneled on grand juries are likely drawn from an unrepresentative sample, and, therefore, possess an exclusive political orientation vis-à-vis the larger community’s demographic makeup and political orientation. Accordingly, grand jury demographic and political underrepresentation directly influences the prospect of police-suspect indictments.

In their examination of grand juries, Bowers states, “lawyers and legal academics have tended to focus reform energies on legal fixes and have largely ignored potential fixes that lie beyond law.”⁸² This Article uncovers many sociolegal influences on grand juries that affect the viability of police-suspect indictment. As a result, the following

⁸¹ Shari Seidman Diamond & Mary R. Rose, *The Contemporary American Jury*, 14 ANN. REV. L. & SOC. SCI. 239, 239–58 (2018).

⁸² Bowers, *supra* note 3, at 339 (emphasis omitted).

propositions are designed to augment and enhance future police accountability. These propositions are intended to confront many of the contemporary challenges to police accountability efforts uncovered by this Article and facilitate future investigations and prosecutions of police-suspects, increasing the legitimacy, transparency, and thoroughness of these legal processes.

A. Proposition 1: Develop and Implement Publicly Available Office Policies Regarding the Dissemination of Evidence Presented and Presentation Strategies in Police-Suspect Grand Juries

Previous research established that prosecutorial discretion plays a central role in understanding the intricacies of the criminal legal process and ultimately criminal legal outputs like whether indictment and conviction occurs.⁸³ I find that the discretion regarding whether and how to present evidence and call witnesses within the grand jury affects the prospect of police-suspect indictment. On one hand, the Fifth Amendment demands grand juries in federal cases and, as a result, I find federal police-suspect prosecutors leverage this requirement as a helpful mechanism for conducting thorough and comparatively more expansive investigations of an officer's use of force. However, on the local level, grand jury use has been variable because no similar Fifth Amendment provision has been incorporated to the states.

Local prosecutors' ability to decide whether and how to use the grand jury—either by proactively arguing for indictment or being a neutral conduit of evidence—means that prosecutors retain power to adapt how they interact with the grand jury based on case-specific details and local-community contexts. Prosecutorial flexibility is a promising proposition for police accountability when local prosecutors are motivated and use their ambition to seek indictment in challenging cases that traditionally might not have been adjudicated. They can push in these cases, using the grand jury to collect a more robust body of evidence and adapt strategies and evidentiary presentations to work for indictment. However, in more difficult cases, police-suspect prosecutors can obfuscate and hide behind grand jury secrecy provisions to conceal weak presentations of evidence. In cases arising in localities where prosecutors are comparatively less motivated to

⁸³ See generally Gershman, *supra* note 3; Lynch, *supra* note 3; Spohn, *supra* note 3; Wright et al., *supra* note 12; Zatz & Rodriguez, *supra* note 31 (explaining how prosecutorial discretion is used in immigration policy and practice).

investigate and prosecute claims of police misconduct, biased prosecutorial sensibilities may influence a police-suspect prosecutor's willingness and motivation to seek indictment. Police-suspect prosecutors may "punt" and attribute the lack of indictment to the grand jurors themselves, exploiting the fact that the grand jury is the ultimate decision-maker as a cover to shield themselves against individual responsibility and personal attack. Accordingly, the lack of prosecutorial transparency surrounding police-suspect grand jury use invites ambiguity and a piecemeal approach to police accountability. Obscurity contributes to piecemeal and deficient police-suspect investigations and opacity regarding prosecutor veracity; and it ultimately engenders cynicism, promotes distrust, and presents continued barriers for the prospect of indictment in the future.

Accordingly, I suggest the development and implementation of transparency policies instructing when and under what circumstances police-suspect prosecutors use the grand jury and the specific evidentiary strategy they pursue. Documentation regarding the circumstances under which grand juries will and will not be empaneled should be publicly accessible. The decision not to empanel a grand jury should be accompanied by documentation of the rationale for declination, including the evidence, witness and victim testimony, and other case-specific details used to arrive at that conclusion.

B. Proposition 2:

Empanel Special Grand Juries in Cases Involving Police-Suspects

This Article compliments related research suggesting that police-suspect indictments are a reflection of legally relevant case characteristics, victim characteristics, and grand jurors' reluctance to second-guess police use of force.⁸⁴ In this Article, I provide descriptions of the ways in which prosecutors encounter and attempt to assuage the equitable concerns of grand jurors, chiefly among them grand jurors' fixation on unsympathetic characteristics of the victims of police violence, alongside the hesitancy to question a police officer's use of force. Prosecutors clarified that that a crucial component of what grand jurors want to know concerns the victim(s) of police use of force, not only the police officer under investigation. Such an environment extends Spohn's thesis that the credibility of the victim is a key factor

⁸⁴ Bowers, *supra* note 3, at 347; Simmons, *supra* note 4, at 524; Spohn, *supra* note 3, at 228; Cassia Spohn et al., *Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the "Gateway to Justice,"* 48 SOC. PROBS. 206, 206–35 (2001).

influencing indictment. Police-suspect prosecutors described how grand jurors inquire about the victims of police violence and the broader context undergirding the officer's use of force.⁸⁵ I find grand jurors' inquiries take on a conspicuous bent, oftentimes explicitly fixating upon unsympathetic contextual "warts" of the victims of police violence as reasons to justify an officer's use of force. Indeed, while prosecutors observed that, while it may be "natural" for the grand jury to ask about the victims of police use of force, prosecutors perceived that grand jury members' fixation on unsympathetic victim characteristics is intended to evaluate victim blameworthiness and their deservedness of an officer's conduct. Consequently, prosecutors rarely see grand jurors inquiring about victims as a positive, because in their estimation, requests for additional context about the use of force are a challenge to their efforts to win an indictment.

Evidence suggests that these sorts of inquiries reflect and relate to two fundamental components that prosecutors perceive in the grand jury: temporal logistical considerations of grand jury service, and the unrepresentative, skewed, and politically conservative ideological composition of grand juries. This Article argues that the length of time required for grand jury service fundamentally prejudices the prospect of police-suspect indictment. Grand jurors serving for a period of nine to twelve months are primed to believe police officers are acting legally and reasonably, and are therefore predisposed to side with police-suspects.

Second, this Article builds upon previous research establishing that juries are racially and ideologically under-representative vis-à-vis local community demographics. Indeed, police-suspect prosecutors articulated precisely this—that their juries are white, old, and politically conservative. Potential jurors with previous criminal justice contact and those hailing from communities disproportionately affected by police violence are oftentimes explicitly excluded from jury service.⁸⁶ This Article provides direct evidence describing police-suspect prosecutors' perceptions that the rarity of police-suspect indictment is produced by exclusive ideological compositions of the grand jury. Findings uncovered by this Article also indicate that grand jurors are predisposed to siding with police-suspects within grand jury deliberations, ultimately presenting an unfair advantage to police-

⁸⁵ Spohn et al., *supra* note 84.

⁸⁶ 28 U.S.C. § 1865; Uggen & Manza, *Democratic Contraction?*, *supra* note 48, at 778–79. See Uggen et al., *Citizenship, Democracy*, *supra* note 48; Wheelock, *supra* note 48.

suspects within the criminal legal process. This skewed political and demographic composition is influential for the ideological orientation of a grand jury, which manifests in justifying an officer's use of force based on unsympathetic victim characteristics and sympathy for law enforcement.

One solution to combat this inequity is to empanel special grand juries who consider only the indictment of police-suspects. This proposition enhances deliberations of police criminality that are not tainted by previous grand jury service where grand jurors are psychologically primed to believe police officers and credit their testimony. Special grand juries serving for a shorter period of time would combat the disruptive nature of a prolonged period of jury service and ostensibly address diversity issues.

Special grand juries in the federal system can investigate crimes and issue special reports, alongside approving criminal charges.⁸⁷ A solution is to convene a special grand jury for each individual instance of alleged police criminality and disband it upon its final decision (like the issuance of an investigative report or true bill).

C. Proposition 3: Revise Methods of Jury Empanelment to Include Broader Selection Procedures

Part III of this Article presented evidence regarding police-suspect prosecutors' perceptions of unique equitable challenges in attempting to win indictment by way of the demographic, political, and ideological orientation of grand jurors.⁸⁸ As the result of unrepresentative attitudes, grand jurors fixate on unsavory details of the victims of police violence and are hesitant to question an officer's use of force.⁸⁹ Police-suspect prosecutors are therefore challenged by the politically moderate and oftentimes uncompromising ideological postures of grand jury

⁸⁷ See generally Michael F. Buchwald, *Of the People, by the People, for the People: The Role of Special Grand Juries in Investigating Wrongdoing by Public Officials*, 5 GEO. J.L. & PUB. POL'Y 79 (2007) (exploring how special grand juries can be a useful mechanism to investigate wrongdoing by public officials).

⁸⁸ *Supra* Part III.

⁸⁹ James C. McKinley Jr. & Al Baker, *Grand Jury System, with Exceptions Favors the Police in Fatalities*, N.Y. TIMES (Dec. 7, 2014), <https://www.nytimes.com/2014/12/08/nyregion/grand-juries-seldom-charge-police-officers-in-fatal-actions.html>; Glen Martin, *Policing the Policing: New Demands to Reform the Rules for Secret Grand Juries*, CAL. ALUMNI ASS. (Jan. 7, 2015), <https://alumni.berkeley.edu/california-magazine/online/policing-police-new-demands-reform-rules-secret-grand-juries/> [<https://perma.cc/Z3DR-L5DZ>].

members.⁹⁰ Accordingly, this Article offers direct evidence suggesting that the exclusive attitudinal compositions of grand juries influence legal outcomes in police-suspect cases.

To remedy the shortcomings of grand juries, I argue for the implementation of updated sampling techniques that specifically audit demographic information, like race, wealth, and socioeconomic background, alongside experiential data, like exposure to police violence, to better inform who is included and excluded from the venire and from grand jury service. It is imperative to consider the conservative and relatively exclusive attitudinal composition of grand jury members and how the lack of ideological diversity on the grand jury affects perceptions of trust and legitimacy of criminal legal processes, and more directly, legal decision-making and legal outcomes.

Meaningful solutions to unrepresentative and ideologically skewed grand juries include combining special grand juries with the use of statewide grand jury procedures, alongside broader methods of empanelment. Methods include but are not limited to voter rolls, vehicle registration lists, driver's license registries, and "key-man" selection processes, affirmative action strategies, and not necessarily barring "nonrespondents" who fail to return qualification questionnaires.⁹¹ Some states specifically empower judges and jury commissioners to select who will serve as grand jurors in a supervisory capacity, rather than relying on a "wheel" or "pool" process,⁹² to explicitly ensure proportional representation on the grand jury. While the "key-man" system is prohibited within federal selection processes, on the state level, it provides a meaningful opportunity to diversify empaneled grand jurors to reflect the demographic and ideological composition of the surrounding community.⁹³ Additionally, affirmative action methods, like racially proportionate modeling, target racial composition of the grand jury to specifically reflect racial diversity within the jurisdiction.

Another critical solution is to incorporate existing research exposing the consequences of felon disenfranchisement laws into policies that

⁹⁰ McKinley Jr. & Baker, *supra* note 89.

⁹¹ See Hiroshi Fukurai, *Where Did Hispanic Jurors Go? Racial and Ethnic Disenfranchisement in the Grand Jury and the Search for Justice*, 2 W. CRIMINOLOGY REV. 10 (2000).

⁹² *Id.*

⁹³ *Id.*

address these injustices. Felony disenfranchisement disproportionately affects people of color, meaning that because Black Americans are overrepresented in felony convictions, felon jury restrictions exclude Black Americans from jury service by nearly one-third and in some locations by half.⁹⁴ Evidence indicates that excluding racially diverse jury members carries important implications for increasing conviction rates, particularly within the death penalty context.⁹⁵ Moreover, the emergence of research regarding the racial impact of felon jury exclusion has conspicuous connections to the criminal legal system. Wheelock states, “Ironically, it is precisely this group that is most likely to have their lives altered by contact with the criminal justice system,” and moreover, this group is disproportionately vulnerable to police violence.⁹⁶ Accordingly, we should contend with and reconsider felon juror exclusion for systematically prohibiting jury service for large swaths of the American population, particularly for nonviolent felonies and decades-old felony convictions.

D. Proposition 4: Develop, Implement, and Fund Federal Resources to Expand Police-Suspect Prosecutorial Expertise and Experience

Federal legislation is beneficial in providing supplemental support and resources to encourage community-coordinated responses to combating police impunity. Although police violence and the resulting impunity is a cognizable issue, and even when evidence supports prosecution of police-suspects, police officers accused of misconduct rarely see criminal legal accountability when perpetrating such violence. This Article explores the many unique challenges for police-suspect prosecutors and a rarity in expertise in how to successfully deliver accountability.

⁹⁴ Darren Wheelock, *A Jury of One's "Peers": The Racial Impact of Felon Jury Exclusion in Georgia*, 32 JUST. SYS. J. 335, 348 (2011); Chris Uggen et al., *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, THE SENT'G PROJECT (Oct. 30, 2020), <https://www.sentencingproject.org/reports/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/> [https://perma.cc/D8ZR-UA27]; Erin Kelley, *Racism & Felony Disenfranchisement: An Intertwined History*, BRENNAN CTR. FOR JUST. (May 9, 2017), <https://www.brennancenter.org/our-work/research-reports/racism-felony-disenfranchisement-intertwined-history> [https://perma.cc/Q4RL-9P26].

⁹⁵ See generally William J. Bowers, Marly Sandys & Thomas W. Brewer, *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing when the Defendant Is Black and the Victim Is White*, 53 DEPAUL L. REV. 1497 (2004) (exploring how racial bias influences sentencing decisions in capital cases).

⁹⁶ Wheelock, *supra* note 48, at 352.

There are several instructive analogues that provide untapped resources and expertise for enhancing police accountability. First, similar to the success of the Violence Against Women Act, federal monetary allocations to local community grant projects would help to address prosecutorial limitations and bolster the technical assistance required for prosecuting police misconduct. Education and training grant additional court personnel, which would aid prosecutors' ability to successfully prosecute those accused of police misconduct.

Second, a U.S. Department of Justice Task Force housed within the Office of Civil Rights should collect, coordinate, and recommend federal, state, and local strategies for prosecuting police misconduct. Moreover, this task force should emphasize robust interagency collaboration, biannual in-service trainings and other seminars, national conferences that facilitate an institutionalized network of support and expertise helpful for sharing information around the country, the development and implementation of model prosecution policies and evidentiary strategies, regional networks of mentorship for police-suspect prosecutors, interjurisdictional enforcement protocols, and wraparound programming dedicated to victim services and victim safety in local communities.

Third, the Federal Death Penalty Resource Counsel project, housed within the Administrative Office of the United States Courts, provides valuable assistance and appointed counsel in federal capital prosecutions.⁹⁷ An important analogue, here, the Police Prosecution Resource Counsel would monitor police homicide cases, serve as a clearinghouse to provide experience and expertise in the form of appointed or co-counsel services, and provide trainings and consultation programming to police-suspect prosecutors around the United States. Taken collectively, these three resources would support innovative practices and accountability procedures while encouraging actors in the criminal legal system to work with survivors and their advocates to find solutions to such violence.

CONCLUSION

This Article builds upon research arguing that legal rules do not “mechanically translate” into outcomes by describing how police-suspect indictments are products of complex social environments

⁹⁷ *Federal Capital Trial Projects*, FED. DEATH PENALTY RES. COUNS., <https://fdprc.capdefnet.org/> [<https://perma.cc/2PTB-NBAU>] (last visited Oct. 26, 2024).

where legal actors make choices given resource constraints, occupational pressures, and ideological preferences.⁹⁸ Venire sampling procedures and the technical restrictions used in formulating jury pools affect who is excluded and included within a deliberation room. As a result, prosecutors encounter a politically and ideologically moderate group of community members, oftentimes skeptical of victims and hesitant to second-guess the dynamic and complicated situations inherent to policing. Prosecutors perceive that grand jurors' focus, questions, and deliberate calculations on the reasonableness of an officer's use of force are products of their individual ideological orientations. Prosecutors share that grand jurors are ideologically predisposed to sympathize with the complicated nature of policing, which leads to victim blaming and restricts their willingness to question an officer's split-second decision-making.

This work exposes implications for the study of law and society and provides salient examples of the politicization of the criminal legal system. First, personnel changes like the election of "progressive prosecutors" are primarily symbolic and have limited import for key legal outcomes.⁹⁹ This Article demonstrates that elections of reform-oriented prosecutors have modest impact on key legal outcomes like indictment when prosecutorial power is checked or limited by uncompromising grand jury members. Second, district attorneys as elected political officials emphasize the importance of and the connections between the politicization of local electorates regarding criminal legal issues and the criminal legal process itself. While electability pressures may become a strong motivator for prosecutorial decision-making, prosecutors who have greater career aspirations may end up with a jury pool that does not enable them to win indictments because lay decision-makers' ideological orientations may conflict with those of the district attorney.

Finally, this Article builds upon scholarship documenting how the criminal law does not operate neutrally. Evidence presented within this Article establishes that when a grand jury considers police-suspect indictment, the processes are categorically different than grand jury

⁹⁸ KOHLER-HAUSMANN, *supra* note 24.

⁹⁹ See generally FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* (Princeton Univ. Press 2009) (demonstrating that landmark civil rights legislation, while propositioned as a strong legal mechanism to guarantee equal opportunity in the workplace, included too many vagaries to enact change); John W. Meyer & Patricia Bromley, *The Worldwide Expansion of "Organization,"* 31 SOCIO. THEORY 366 (2013) (discussing how modern organizational expansion is characterized not by a focus on effectiveness but rather on bureaucratic growth).

processes involving lay criminal suspects. This dissimilarity involves different ethical calculations, longer discovery periods, more extensive collections of documents and relevant testimony, and time-intensive presentations of evidence. Additionally, prosecutors described their perceptions of a higher evidentiary burden required in police-suspect cases, necessitating the establishment of extralegal evidentiary thresholds beyond probable cause, even at the preliminary stage of indictment.

Accordingly, the colloquial phrase, “a grand jury will indict a ham sandwich,” appears not to be the case within the police-suspect context. Thus, discordant and predatory power arrangements that are institutionalized in legal outcomes reify who is privileged and who is powerless in society, explaining the rarity of police-suspect indictment. Ultimately, police-suspect prosecutorial discretion and grand jury decision-making reveal how occupational status and professional privilege among law enforcement may afford protection from routinely violent procedures of the criminal law.¹⁰⁰

¹⁰⁰ See Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 100 CAL. L. REV. 1 (2022).

