

58 Hous. L. Rev. 847

Houston Law Review
Symposium, 2021

Commentary

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AWAKENING THE AMERICAN JURY: DID THE KILLING OF GEORGE FLOYD ALTER JUROR DELIBERATIONS FOREVER?

ABSTRACT

In the summer of 2020, the witnessing of George Floyd's death triggered an outpouring of public expression far beyond other cases in modern times. While the experience led some to advocate for reform and participate in antiracism rallies, marches, and campaigns, it also forced many others into internal reflection, awareness, and awakening to the knowledge of a lived experience with police different from their own. The gruesome realities of the video were irreconcilable with those prior beliefs and did not comport with any moral or legal standards of dignity. Prior to witnessing George Floyd's death on video at the hands of multiple *848 police officers, the majority of society believed such things were just not possible. A consistent belief has also been exhibited by jurors, as demonstrated in their frequent acquittals, mistrials, no bills, and dismissals in police brutality and excessive force cases.

Dean Onwuachi-Willig's article entitled *The Trauma of Awakening to Racism: Did the Tragic Killing of George Floyd Result in Cultural Trauma for Whites?* analyzes the experience of being a witness to the George Floyd killing through the lens of whiteness. This Commentary considers whether the collective trauma of witnessing police violence in 2020 has any translative impact upon the American jury and its future deliberations. To investigate whether the killing of George Floyd will forever change how juries view police-initiated violence, this Commentary examines prior cases of police and vigilante violence directed at unarmed Black victims like George Floyd. The Commentary also questions whether post-Floyd public opinion polling data and individual personal reflection narratives provide sufficient evidence to reasonably predict that juries will trend toward convicting police violence. Lastly, the Commentary discusses the two juridical personalities in police violence scenarios: criminal prosecution and civil litigation, which frequently have diverging outcomes despite identical facts.

Ultimately, it may be too early to realistically opine on the full extent to which potential jurors have been impacted by witnessing George Floyd's death. However, the recent grand jury decision not to criminally indict the police officers responsible for killing Breonna Taylor, notwithstanding the \$12 million civil settlement on the same facts, indicates a trend toward the status quo of inequity. At the time of this publication, a \$27 million civil settlement has been reached for the Floyd family, yet America awaits the outcome of the pending criminal prosecution. Criminal charges have been formally alleged, and the case outcome is in the hands of the jurors.

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***849 I. INTRODUCTION**

Trial lawyers make it their business to understand what is on the minds of their jurors.¹ Some cases benefit from the advice of jury consultants or mock trial presentations in order to learn the potential public reaction to certain case facts.² If litigators want to know what potential jurors think about police brutality cases and excessive force cases, prior trends in verdicts, particularly the vast majority of acquittals, mistrials, no bills, and dismissals, might be the best place to look.³ However, after the summer of 2020 and a purported “awakening to racism,” there may be more to analyze.⁴

It is often not an easy task to learn what potential jurors are thinking, but in 2020 the witnessing of George Floyd's death triggered an outpouring of public expression far beyond other cases in modern times.⁵ Some participated in rallies and marches, proclaimed support for Black-owned businesses, and affirmed that Black lives matter;⁶ others initiated antiracism campaigns complete with reading lists and learning tours, provided scholarships to historically Black colleges and universities, and advocated for criminal justice reform.⁷ For others, the experience *850 of what they witnessed forced them into internal self-reflection, a progression of awareness and awakening to the knowledge of a lived experience with police different from their own.⁸ Some shared their personal journeys formally in newspaper articles, informally across social media platforms, and even politically in Congress as well as on the world stage at the United Nations.⁹ Somehow this one incident created a new public conversation related to the adjudication of right and wrong,¹⁰ and one could say it was suddenly easy to know what potential jurors were pondering. However, what appeared less clear was whether the main issue of public concern was a legal one, a social one, or instead--due to the circumstances surrounding George Floyd's death--a necessary combination of both.

Prior to 2020, jurors have exhibited an overwhelmingly stable viewpoint toward police brutality.¹¹ In the many cases involving criminal allegations against police officers or proxy police actors poised as vigilantes, jurors consistently reject indicting or convicting on serious criminal charges of murder.¹² Could 2020 be a “[t]ipping [p]oint”¹³ in the personality of the American jury in cases alleging police brutality or excessive force? Did the trauma of witnessing the killing of George Floyd awaken jurors to the *851 dynamics of racism and impact how they will deliberate cases of police violence in the future?

Dean Onwuachi-Willig's article in this volume, entitled *The Trauma of Awakening to Racism: Did the Tragic Killing of George Floyd Result in Cultural Trauma for Whites?*, analyzes the experience of being a witness to the George Floyd killing through the lens of whiteness.¹⁴ Using the discipline of sociology, her article expands one's awareness of human social relationships, cultures, and institutions as they collectively intersect with the lived experience of being a White witness to racialized violence, specifically police-involved violence, and more specifically alleged *criminal police-involved homicidal violence* directed at a Black victim.¹⁵ Being a witness to violence, especially homicidal criminal violence, triggers trauma.¹⁶ Witnessing government agents as the actors in the violence and an unarmed and handcuffed individual as the victim of the violence adds complexities to the trauma.¹⁷ Witnessing unlawful police violence¹⁸ imprints an unforgettable *852 image and, potentially, produces an irreversible trauma.¹⁹ As frightening as the visual of criminal activity committed by armed police officers might be,²⁰ its impact is multiplied by the millions that witnessed it and rewitnessed it on video reel replayed on news outlets and social media for several days.²¹ The video of the death of George Floyd became ubiquitous in the public domain across America and the globe in the summer of 2020.²²

The uniqueness of the true trauma of being a witness to George Floyd's homicide occurs in its disruption of cultural norms that previously formed a certain baseline of “comfort” regarding safety, fairness, and the proper order of things in the context of encounters with police.²³ Prior to witnessing George Floyd's death on video at the hands of multiple police officers, the majority of *853 society believed such things were just not possible.²⁴ Yet, the gruesome realities of the video were irreconcilable with those prior beliefs and did not comport with any moral or legal standards of human dignity, domestic or international.²⁵ The acts appeared to go beyond simple criminality into unreserved inhumane treatment in a way that most White Americans never believed police could engage.²⁶ This Commentary considers whether the collective trauma of witnessing police violence in 2020, as outlined in Dean Onwuachi-Willig's social-legal analysis, has any translative impact upon the American jury and its future deliberations.

Using the framework that Dean Onwuachi-Willig summarizes as the post-Floyd social-legal climate in America, and the dynamics of the potential “awakening to racism” that may have occurred in the summer of 2020, this Commentary pursues the succeeding related questions: Can the experience of a collective awakening to racism now prime jurors to view evidence

differently or convict police officers more readily than in times past? Now awakened, due to their shared witnessing of the killing of George Floyd, are American juries ready to condemn police violence? Can prosecutors harness this “awakened jury” and convert would-be acquittals into criminal convictions and meaningful criminal punishment to end the era of perceived impunity for police violence?

To investigate whether the killing of George Floyd will forever change how juries view police-initiated violence, this Commentary examines prior cases of police and vigilante violence directed at unarmed Black victims like George Floyd. In each of these criminal cases, the exercise of prosecutorial discretion is the first and most critical origin point to begin one's analysis of the public's response to police-initiated violence. The cases outlined in this Commentary are exclusively those that prosecutors selectively sought to pursue and in no way represent the broad range of *854 alleged incidents of police brutality.²⁷ The prudence underlying prosecutors' decisions on which cases to pursue is not a small matter and instead is inextricably linked to the quality of justice the community can ultimately achieve.²⁸ Each decision to pursue criminal charges is difficult and multi-layered,²⁹ whether the decision to prosecute is based solely on the prosecutor's sound judgment or incorporates consideration of public outcry, unrest, or persistent protests.³⁰ This Commentary acknowledges the prosecutorial discretion dynamic, yet saves for another time the discussion surrounding the full complexities of its exercise, its *855 timing--swift or delayed--and the severity of the ultimate criminal charges filed--maximum or minimum. Irrespective of the contours of the very important, yet always controversial, exercise of the prosecutorial function that undergirds every case of alleged criminality, this Commentary will address most specifically how criminal juries ultimately respond to cases of police violence in which prosecutors choose to seek criminal punishment.

This examination of the American jury is focused on the *jurors*: the grand jurors that vote on the sufficiency of the probable cause to support an indictment³¹ and the petit (trial) jurors that determine the final judgment of criminal convictions based on their unanimous belief in the truth of the charge.³² Part II will provide a brief description of recent high-profile cases, including cases that captured the victim's death on video as well as cases wherein jurors only had eye- and ear-witness accounts of the killings by police. The outcomes in these cases prior to 2020 provide context and a potential understanding of how jurors have responded to allegations of police violence. Part II questions whether the post-Floyd public opinion polling data and individual personal reflection narratives analyzed in Onwuachi-Willig's work provide sufficient evidence to reasonably predict that jurors will change and view future cases differently to the extent of rendering a new trend toward convicting police violence.

Part III of the Commentary recognizes that each of these police violence cases actually has two juridical personalities. Although much attention is played to the criminal prosecution of these cases, there is a significant and even more relevant civil litigation story that accompanies police violence. Part III will summarize the contrasting civil litigation in these same police violence cases and identify the trend of consistently diverging outcomes in the civil settlements predicated on identical case facts of police violence. Ultimately, it may be too early to realistically *856 opine on the full extent to which potential jurors have been impacted by witnessing George Floyd's death. However, the recent grand jury decision not to criminally indict the police officers responsible for killing Breonna Taylor, notwithstanding the \$12 million civil settlement on the same case facts,³³ indicates a trend toward the status quo of inequity.

II. JURORS RESPOND TO CRIMINAL ALLEGATIONS OF POLICE VIOLENCE

Reflecting on a sampling of cases prior to 2020, juries have routinely rejected criminal allegations for killing unarmed Black victims like George Floyd.³⁴ For example, in the killing of Trayvon Martin, the trial jury returned a not guilty verdict,³⁵ and in the killing of Michael Brown, the grand jury voted not to indict.³⁶ Neither Trayvon Martin nor Michael Brown's deaths were captured on video for the jurors to analyze;³⁷ therefore, the factual controversies and inconsistencies of eye- and ear-witness accounts likely dominated those juries' deliberations. Thus, potentially, if jurors had the opportunity to view a video account of the victims' deaths, like the video of George Floyd, the outcome in the trials may have been different.

*857 The killings of Eric Garner and Walter Scott were both captured on video.³⁸ Those jurors were able to witness Eric Garner being held in an illegal chokehold while pleading to the officer “I can't breathe,”³⁹ and Walter Scott being shot in the back while running away from the police.⁴⁰ Both victims were unarmed, both Black, both male. Both encountered the police based on very minor, nonviolent infractions: Garner for allegedly selling single cigarettes⁴¹ and Scott for a broken brake light

and a possible warrant for unpaid child support.⁴² Both juries rejected the criminal allegations against the police for these killings.⁴³ The grand jury in Eric Garner's case issued a no bill, deciding not to indict.⁴⁴ The trial jury in Walter Scott's case was split, as an insufficient number of jurors were willing to convict, thus rendering it a mistrial due to a hung jury.⁴⁵ The killing of Tamir ***858** Rice is another example in which the jurors were able to view the killing on video.⁴⁶ In the Rice case, similar to the Garner case, the jurors rejected criminal charges, instead finding the police conduct justified.⁴⁷ The jurors' decisions in these cases are consistent with the overwhelming trend.⁴⁸ Notably, in the last fifteen years, only five police officers have been convicted of murder for on-duty shootings, although 110 were charged during that period.⁴⁹

One of the rare police officer convictions for an unjustified homicide was in Minnesota, the same state of George Floyd's killing. The convicted Minnesota officer was Mohamed Noor, a Black officer (Somali-American), for the shooting-death of Justine Damond, a White Australian woman.⁵⁰ Commentators have opined that the race of the officer may trigger dynamics of bias, implicitly or explicitly, in cases wherein blackness attaches to the police-officer-defendant.⁵¹ It is suggested that Black officers are more likely to be punished, convicted, and harshly sentenced than their White police officer counterparts engaged in similar conduct.⁵²

However, post-2020, due to the “awakening to racism,” will we see a different reaction from juries? Is there such a thing as an “awakened jury”? What does it mean for the community consciousness to be awakened--to remain primed to address injustices?

***859** It might be harder than anticipated for the majority of jurors to “remain awake” and primed to condemn police violence inflicted upon racial minorities. The detailed polling data Onwuachi-Willig discusses, as well as the sociology of cultural trauma theory, cuts both ways in their predictive value of whether future jurors will view cases differently after the collective experience of 2020. Although some social change may have occurred as the collective awareness regarding allegations of unfair or even racially motivated violence at the hands of the police was heightened, the part that 2020 cannot undo is the long history of criminal research that connects the outcome of the case and the severity of the punishment to the race of the victim.

The Baldus study, conducted in the 1970s and highlighted in *McCleskey v. Kemp*,⁵³ provided statistical evidence of racial disparities in the execution of prosecutorial discretion as well as in the ultimate conviction and the imposition of the death penalty.⁵⁴ Professors Phillips and Marceau continued Professor Baldus's research and confirmed even broader racial biases in the imposition of criminal sentences as well as appeals therefrom.⁵⁵ It is well-settled in criminal law research that the race of the victim is a dominant factor in analyzing the strength of the likely ***860** punishment.⁵⁶ In the context of police violence against Black victims, some scholars opine that the lack of criminal convictions is consistent with social dominance theory in which the acquittal of police officers for violence against the subordinate group is dominance-enhancing conduct, and thereby the jury, made up primarily of the dominant group, refuses to punish such conduct.⁵⁷ “Social dominance theory provides an insightful investigation into social inequality across human societies. As a multilevel integrative theory of intergroup relations, Social Dominance Theory combines broad social analysis with examinations of human psychology.”⁵⁸ The social-dominance issues that intertwine with the analysis of police-initiated violence expand beyond a mere consideration of actus reus, mens rea, and proximate causation and well beyond the traditional application of self-defense. Racialized police-initiated violence as a means of control and subordination is centuries old. One case, even a case as extreme as the haunting, videotaped killing of George Floyd, cannot disrupt the culture and practice connected to how and why jurors view such evidence in favor of nonconviction of police officers.

There is another reason why it might be even harder than expected to shift old patterns in racialized police-violence cases. The documentary *The Color of Fear* exposed the root of why the “awakened” state is likely unsustainable.⁵⁹ A White participant in *The Color of Fear*, a movie often used in racial diversity trainings,⁶⁰ maybe unintentionally explained why Whites--or anyone in the socially dominant hierarchical position--cannot remain awake to the discrimination and even violence against the subordinate racial minority group.⁶¹ The White participant explained that it is hard to believe that people could be so cruel against one another.⁶² In other words, to “remain awoken” one must keep the reality of this collective trauma of 2020 active and ***861** vivid. Without this affirmative effort to maintain the awakened state, it's hard for jurors to believe that police could be so cruel.

In all cases it is hard for jurors to believe that police are the wrongful actors.⁶³ In the prosecution of police for violence against unarmed Black men and boys, it's even harder for the "awakening to racism" to remain salient because it is working against a deep-rooted, century-old, counternarrative of inhumanity. The polling data already shows that the awakening waned even before 2020 ended.⁶⁴

Whether or not the larger American collective consciousness has awakened to the point of triggering changes in patterns of juries and convictions of police, there exists a substitute system of justice--financial civil settlements in these cases--that serves as government compensation to victims' families.

III. CIVIL SETTLEMENTS CAPTURE THE TORT, AND THE CRIME REMAINS UNPUNISHED

The public dialogue often focuses on *criminality* in circumstances of unjustified police violence. However, the legal analysis in police brutality cases does not end with a discussion of criminality, as additional laws are relevant to this lethal conduct. Law students are taught the difference between a tort and a crime in their first-year classes; however, it may be confusing to distinguish how the same set of facts could establish both a crime and a tort. A tort is a civil wrong and a crime is a criminal wrong. A primary distinguishing factor between these two legal wrongs is the consequence: serious and violent crimes are punished with loss of liberty or prison time. Serious and violent torts are punished with money damages. Further, in our modern American justice system, criminal cases are filed by the government and civil cases are filed by private parties.⁶⁵

***862** What further distinguishes a criminal conviction from a civil wrong is "formal and solemn pronouncement of the moral condemnation of the community."⁶⁶ Part II listed examples of police violence cases in which jurors rejected charging and convicting the offending police officers.⁶⁷ In those same cases, civil settlements were reached based on allegations of civil wrongs on the same case facts.

In the Trayvon Martin case, the trial jury returned a not guilty verdict on criminality for his killing, but a civil settlement was reached with the homeowners association where the incident took place.⁶⁸ In the Michael Brown case, the grand jury rejected the criminal allegations and failed to recommend indictment, but a civil settlement of \$1.5 million was reached with the city of Ferguson for the police officer's conduct.⁶⁹ In the Eric Garner case, captured on video, the grand jury refused to indict the officers that choked him, yet the city issued Mr. Garner's family a civil settlement in the amount of \$5.9 million.⁷⁰ In the Walter Scott case, trial jurors hung on the question of criminal murder, but the civil case on the same facts settled for \$6.5 million.⁷¹ In the Tamir Rice case, the grand jury found the police violence to be justified, yet the city paid the Rice family \$6 million in a cash settlement.⁷² The outcomes of the criminal charges for the killing of George Floyd remain unknown as the trial is still ongoing at the time of this publication. Yet, notwithstanding the uncertainty of the ***863** criminal case, the city of Minneapolis reached a record-breaking civil settlement of \$27 million for the Floyd family.⁷³

The list of cases that are discussed here is in no way complete. Further, police violence is not exclusive to Black male victims. Professor Kimberlé Crenshaw's scholarship and awareness campaign #SayHerName⁷⁴ requires my list to include Sandra Bland--no criminal charges for her killing but a \$1.9 million civil settlement to the Bland family⁷⁵--and Breonna Taylor--no indictment, yet a \$12 million civil settlement to the Taylor family.⁷⁶

Although an acknowledgment of police misconduct has some level of retributive value, it's hard to accept it as justice. Some may even see it as a financial transaction of sorts, subsidized by taxpayers--an operational cost of maintaining a social hierarchy. Using the language of the social dominance theory, the lopsided system of no criminal punishment yet cash civil settlements essentially underwrites the dominant group's status in the hierarchy and absolves police for harming the subordinate group.⁷⁷

The current state of inconsistent community-condemnation of illegal police-violence has acted as an accelerant in our American culture instead of the needed deterrent against excessive force by the police. However, the change needed to curb police brutality is more than what law can do. It's a culture shift towards a universal understanding of human dignity.

Incidents of police-initiated violence have been noticed by other tribunals. For example, at the domestic level, the Minnesota Department of Human Rights filed a civil rights complaint against ***864** the Minneapolis Police Department following the

Floyd killing.⁷⁸ The global outcry against police violence in the United States has been reignited from the infamous petition, entitled “We Charge Genocide,” received in 1951 at the Paris Meeting of the United Nations General Assembly alleging police brutality, among other offenses, against Black Americans.⁷⁹ Modernly, testimony has been received at the United Nations from Black families like Philonise Floyd,⁸⁰ Sybrina Fulton,⁸¹ and other mothers who have lost their sons to police-initiated violence⁸² --all while American criminal jurors continue to reject criminal retribution for these harms.

IV. CONCLUSION

2020 was an unprecedented year in many ways. A year that history will continue to write about and analyze. Communities of all types reached out to one another because of the health crisis, because of social unrest, and because of economic hardship. The death of George Floyd remains a collective, somber moment among the tragic events of 2020. Many will never forget it. Some will even be changed permanently by it. However, the structures of justice remain unmoved by it. The particulars of the remedial measures to flow to the specific actors in the case are still unknown. *865 However, the responses of jurors in other cases post-Floyd foreshadow a continuation of the status quo.⁸³

It may be too early to fully predict whether the killing of George Floyd has altered juror deliberations forever. The polling data indicate meaningful movement regarding perceptions and opinions Whites and Blacks hold regarding police and the existing gap in resulting jury verdicts.⁸⁴ As the communities await a change to the status quo, the criminal justice system is becoming more and more powerless in its ability to properly address deaths resulting from police brutality, leaving victims' families with civil settlements instead of community condemnation for their loved ones' homicidal deaths at the hands of the police.

Footnotes

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Thank you to the *Houston Law Review* for the opportunity to participate as a commentator to the keynote Frankel Lecture delivered by Dean Angela Onwuachi-Willig, recently ranked fourth in the nation for scholarly impact among all legal scholars. Special thanks to Dean Leonard Baynes for his support of the lecture series and leadership in making a space for diverse scholars to share their voices. I thank the *Law Review* for inviting me to participate and Professor Jessica Roberts for moderating the lecture. I applaud the previous Board's Editor in Chief, Drew Padley, and this year's Editor in Chief, Reagan Lutter, for their stellar foresight in planning and executing the Frankel Lecture, dedicated to the topic of race for the first time in its twenty-five-year annual tradition. I extend additional gratitude to Priyanka Kasnavia for her contributive vision for the symposium, professionalism, and patience. Thank you also to Erin Horan Mendez for her exceptional editing on my Commentary.

Finally, I warmly thank my colleagues and friends, Dean Angela Onwuachi-Willig of Boston University School of Law and Professor Aya Gruber of the University of Colorado Law School, for their engaged and captivating contributions and for allowing me to be a part of it.


¹ Jim R. Carrigan, *Fine-Tuning Jury Trial*, 20 INT'L SOC'Y BARRISTERS Q. 424, 432-33 (1985).

² Stephanie Leonard Yarbrough, *The Jury Consultant--Friend or Foe of Justice*, 54 SMU L. REV. 1885, 1893-95 (2001).

³ See Asit S. Panwala, *The Failure of Local and Federal Prosecutors To Curb Police Brutality*, 30 FORDHAM URB. L.J. 639, 642-44, 647 (2003).

⁴ Marie Chisholm-Burns, *The Disease of Racism*, 77 AM. J. HEALTH-SYS. PHARMACY 1537, 1537 (2020).

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- 6 Chavez et al., *supra* note 5; Buchanan et al., *supra* note 5; *In This Together*, NAT'L MINORITY SUPPLIER DEV. COUNCIL (June 5, 2020), <https://nmsdc.org/in-this-together/> [<https://perma.cc/S2KZ-ZLWU>].
- 7 See, e.g., *Racial Justice, Racial Equity, and Anti-Racism Reading List*, HARV. KENNEDY SCH., <https://www.hks.harvard.edu/faculty-research/library-knowledge-services/collections/diversity-inclusion-belonging/anti-racist> [<https://perma.cc/F36P-LLV5>] (last visited Feb. 6, 2021); Jordan Freiman, *Three HBCUs Announce They Received the Largest Donations in the Schools' Histories*, CBS NEWS (July 29, 2020, 3:42 PM), <https://www.cbsnews.com/news/hbcu-record-donations-schools-histories-howard-hampton-xavier/> [<https://perma.cc/4QMU-YM2D>]; Martin Austeruhle, *Here's What Black Lives Matter D.C. Is Calling For, and Where the City Stands*, NPR (June 9, 2020), <https://www.npr.org/local/305/2020/06/09/872859084/here-s-what-black-lives-matter-d-c-is-calling-for-and-where-the-city-stands> [<https://perma.cc/FZ6Z-RQZL>].
- 8 Justin Worland, *The Overdue Awakening*, TIME, June 22, 2020, at 26, 28, 30.
- 9 Amy Harmon & Audra D.S. Burch, *White Americans Say They Are Waking Up to Racism. What Will It Add Up To?*, N.Y. TIMES (June 24, 2020), <https://www.nytimes.com/2020/06/22/us/racism-white-americans.html> [<https://perma.cc/A8M2-FUBL>]; Emily Stewart & Shirin Ghaffary, *It's Not Just Your Feed. Political Content Has Taken over Instagram.*, VOX (June 24, 2020, 11:20 AM), <https://www.vox.com/recode/2020/6/24/21300631/instagram-black-lives-matter-politics-blackout-tuesday> [<https://perma.cc/VZP4-PM2D>]; Dartunorro Clark, *'Was that a Nerve?': House Hearing on Police Reform Sidetracked by Two Congressmen over Race*, NBC NEWS, <https://www.nbcnews.com/politics/congress/was-nerve-house-hearing-police-reform-sidetracked-explosive-argument-over-n1231365> [<https://perma.cc/3W2J-7ZCB>] (June 17, 2020, 9:06 PM); *UN Holds Dialogues To Examine Racism in Its Ranks*, UN NEWS (Nov. 19, 2020), <https://news.un.org/en/story/2020/11/1078152> [<https://perma.cc/9XT9-H2S8>].
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- 12 Ric Simmons, *The Role of the Prosecutor and the Grand Jury in Police Use of Deadly Force Cases: Restoring the Grand Jury to its Original Purpose*, 65 CLEV. ST. L. REV. 519, 524 (2017).
- 13 See MALCOLM GLADWELL, THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE 12 (2000).
- 14 Angela Onwuachi-Willig, *The Trauma of Awakening to Racism: Did the Tragic Killing of George Floyd Result in Cultural Trauma for Whites?*, 58 HOUS. L. REV. 817, 831-33 (2021).

- 15 *Id.* at 833-34.
- 16 Individual psychological trauma and collective cultural trauma differ. Sociologist Kai Erikson defines individual trauma as “a blow to the psyche that breaks through one’s defenses so suddenly and with such brutal force that one cannot react to it effectively” while defining collective trauma as “a blow to the basic tissues of social life that damages the bonds attaching people together and impairs the prevailing sense of communality.” Gilad Hirschberger, *Collective Trauma and the Social Construction of Meaning*, 9 FRONTIERS PSYCH., Aug. 10, 2018, at 1, 3.
- 17 *See, e.g.*, Thema Bryant-Davis et al., *The Trauma Lens of Police Violence Against Racial and Ethnic Minorities*, 73 J. SOC. ISSUES 852, 854±55 (2017) (discussing the additional trauma of witnessing police brutality, such as “remain[ing] in a psychological state of high vigilance”).
- 18 *See* Code Switch, *A Decade of Watching Black People Die*, NPR (May 31, 2020, 11:15 AM), <https://www.npr.org/2020/05/29/865261916/a-decade-of-watching-black-people-die> [<https://perma.cc/P4K5-XABL>] (discussing a number of high-profile police brutality cases, including Eric Garner’s death by chokehold in 2014). *See generally* PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 60 (2017) (“They put [Eric Garner] in a chokehold, which killed him. The chokehold was against NYPD regulations but not against the U.S. Constitution.”);  *Scott v. Harris*, 550 U.S. 372, 375-76 (2007) (granting a police officer qualified immunity after he ended a car chase in a manner that rendered the respondent a quadriplegic); *Majority of Public Favors Giving Civilians the Power to Sue Police Officers for Misconduct*, PEW RSCH. CTR. (July 9, 2020), <http://www.pewresearch.org/politics/2020/07/09/majority-of-public-favors-giving-civilians-the-power-to-sue-police-officers-for-misconduct/> [<https://perma.cc/9DX2-8ZYW>] (stating that more than 72% of Americans support reform proposals to create a police misconduct registry, require de-escalation training, and make it a crime for police to use chokeholds; more than 65% support qualified immunity reform).
- 19 Irreversible is defined as “not reversible; incapable of being changed.” *Irreversible*, DICTIONARY, <https://www.dictionary.com/browse/irreversible> [<https://perma.cc/V2VP-WR72>] (last visited Feb. 6, 2021). Although witnessing police violence results in an irreversible trauma that is grounded in reality, the experience is comparable to fixed delusions, which are false beliefs of which a person is certain and cannot be convinced by contrary arguments. *See* Patrick Barta & Paul Rivkin, *Delusions*, JOHNS HOPKINS PSYCHIATRY GUIDE, https://www.hopkinsguides.com/hopkins/view/Johns_Hopkins_Psychiatry_Guide/787024/all/Delusions [<https://perma.cc/7Z86-4G2F>] (last visited Feb. 6, 2021).
- 20 Notably, the killing of George Floyd was not accomplished with a gun, club, or taser, but instead with a known deadly technique of cutting off a person’s air supply via a chokehold or neck restraint. Neil MacFarquhar, *In George Floyd’s Death, a Police Technique Results in a Too-Familiar Tragedy*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/us/knee-neck-george-floyd-death.html> [<https://perma.cc/2SM5-YN4S>].
- 21 Sara Morrison, *Questions to Ask Yourself Before Sharing Images of Police Brutality*, VOX (June 11, 2020, 9:00 AM), <https://www.vox.com/recode/2020/6/11/21281028/before-sharing-images-police-brutality-protest-george-floyd-ahmaud-arbery-facebook-instagram-twitter> [<https://perma.cc/XPA9-4C6V>].
- 22 *See* Alex Altman, *Why the Killing of George Floyd Sparked an American Uprising*, TIME (June 4, 2020, 6:49 AM), <https://time.com/5847967/george-floyd-protests-trump/> [<https://perma.cc/6E7C-BHDF>]; Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/video/us/100000007159353/george-floyd-arrest-death-video.html> [<https://perma.cc/JFV2-Y4UX>].
- 23 *See, e.g.*, George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020) (“An act to hold law enforcement accountable for misconduct in court, improve transparency through data collection, and reform police training and policies.”). H.R. 7120, commonly referred to by its short title *George Floyd Justice in Policing Act of 2020*, was

proposed on June 8, 2020, in response to the killing of George Floyd while handcuffed in police custody. *Id.* It passed the House 236-181 but subsequently died in Committee in the Senate. 166 CONG. REC. H2505 (daily ed. June 25, 2020); *see also* George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. § 1 (2021) (passed the House on March 3, 2021, by 220-212); 167 CONG. REC. H1070 (daily ed. March 3, 2021); S. 230, 2019-20 Leg. (Cal. 2019); S. S6670, 2019-2020 Leg., Reg. Sess. (N.Y. 2020); D.C. CODE § 23-151 (2020), <https://code.dccouncil.us/dc/council/laws/23-151.html> [<https://perma.cc/CC9S-JWAX>]; Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 661-75 (advocating for legislative reform on police use of deadly force that was, in part, implemented in D.C. Code § 23-151).

24 *See* Hannah Gilberstadt, *A Month Before George Floyd's Death, Black and White Americans Differed Sharply in Confidence in the Police*, PEW RSCH. CTR. (June 5, 2020), <https://www.pewresearch.org/fact-tank/2020/06/05/a-month-before-george-floyds-death-black-and-white-americans-differed-sharply-in-confidence-in-the-police/> [<https://perma.cc/QKA5-CMBK>].

25 *See* Pub. Affs. Off., *Statement of U.S. Bishop Chairmen in Wake of Death of George Floyd and National Protests*, U.S. CONF. OF CATH. BISHOPS (May 29, 2020), <https://www.usccb.org/news/2020/statement-us-bishop-chairmen-wake-death-george-floyd-and-national-protests> [<https://perma.cc/F6RS-4VUM>].

26 Gilberstadt, *supra* note 24.

27 *Cf.* Tamara F. Lawson, *Powerless Against Police Brutality: A Felon's Story*, 25 ST. THOMAS L. REV. 218, 221, 233-35 (2013) (explaining how in *Dukes v. Miami-Dade County*, No. 05-22665-CIV, 2010 WL 119494 (S.D. Fla. 2010), a prosecutor attempted to cover up an incident of police brutality by persuading the victim--an ex-felon--to plead guilty to a charge of attempted murder of a police officer in exchange for a guarantee of no prison time).

28 Tamara F. Lawson, "Whites Only Tree," *Hanging Nooses, No Crime?: Limiting the Prosecutorial Veto for Hate Crimes in Louisiana and Across America*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 123, 128 (2008) (explaining how ungirdled prosecutorial discretion "exacerbates certain citizens' ability to realize freedom"); *see also* William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2034-35 (2008) (describing how a prosecutor's control over plea bargains can lead to discrimination); Darryl K. Brown, *Criminal Enforcement Redundancy: Oversight of Decisions Not To Prosecute*, 103 MINN. L. REV. 843, 856-57 (2018) (discussing how the failure to prosecute police accused of using excessive force has caused suspicion and distrust in minority communities).

29 *See* CRIM. JUST. STANDARDS, PROSECUTION FUNCTION, STANDARD 3-4.4(a)(i)-(xvi) (AM. BAR ASS'N 2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/ [<https://perma.cc/HJ2T-2RMY>] (listing the many factors that prosecutors must consider). Issues of the bias or neutrality of the prosecutor regarding whether the case should be led by a special prosecutor from another venue assigned by the governor or a line deputy from the same jurisdiction as the offense do not drive the analysis. *See* Tamara F. Lawson, *A Fresh Cut in an Old Wound--A Critical Analysis of the Trayvon Martin Killing: The Public Outcry, the Prosecutors' Discretion, and the Stand Your Ground Law*, 23 U. FLA. J.L. & PUB. POL'Y 271, 284-85 (2012). As I have explained in a previous article:

It is hard to label prosecutors' decisions as clearly good or bad, just or unjust. Achieving justice is the prosecutor's duty, but it is debatable if justice is achieved in any particular case. The query requires one to analyze the prosecutor's dual objectives of rigorously enforcing the law and ensuring that all charges filed can be proven beyond a reasonable doubt. Most cases and their charging decisions are straightforward and uneventful: identify the crime, charge the crime, and then move on to next case. But nothing in law is really that simple, and not all crimes that are identified are charged. That is what makes charging decisions discretionary, and ultimately controversial. In actuality, there are fundamental policy goals that drive decisions to charge and decisions not to charge. Further, these policy goals often change depending on the politics of the current prosecutor in power, including that prosecutor's vision and priorities. Thus, the purely legal issues are not the sole factors considered when making charging decisions.

Id. (footnotes omitted).

- 30 *See* CRIM. JUST. STANDARDS, *supra* note 29, at 3-4.4(a)(iv) (explaining that prosecutors have broad discretion to consider a number of factors in deciding whether to file criminal charges).
- 31 The standard is low for indictment decisions, requiring only probable cause. *See* CRIM. JUST. STANDARDS, *supra* note 29, at 3-4.6(a); U.S. DEPT OF JUST. C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPT 22-23 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<https://perma.cc/KY55-XD7X>] (explaining that it is a violation of the Fourth Amendment for police officers to enter “wanted” or “stop orders”—which are less administratively burdensome substitutes for arrest warrants—without probable cause).
- 32 Standard jury instructions explain that the trial jury must unanimously believe “beyond a reasonable doubt” that the charges are true. *See, e.g.*, Kevin F. O'Malley et al., 1A FED. JURY PRAC. & INSTR. § 10:01 (6th ed. 2020), Westlaw (database updated Aug. 2020) (providing examples of standard jury instructions that state it is “the government’s obligation to produce proof beyond a reasonable doubt of the [indictment charge] that is brought”).
- 33 Richard A. Oppel, Jr. et al., *What to Know About Breonna Taylor’s Death*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/article/breonna-taylor-police.html> [<https://perma.cc/9QT5-UQ64>].
- 34 Rodney King was the victim of a high-profile police brutality case captured on bystander video in the 1990s, which a predominantly White jury found the police officers not guilty. *See* Anjali Sastry & Karen Grigsby Bates, *When LA Erupted in Anger: A Look Back at the Rodney King Riots*, NPR (Apr. 26, 2017, 1:21 PM), <https://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots> [<https://perma.cc/2W5Z-KU6M>].
- 35 Judgment of Not Guilty, *State v. Zimmerman*, No. 12-CF-1083-A (Fla. Cir. Ct. July 13, 2013).
- 36 *See* Eyder Peralta & Krishnadev Calamur, *Ferguson Documents: How the Grand Jury Reached a Decision*, NPR (Nov. 25, 2014, 6:41 AM), <https://www.npr.org/sections/thetwo-way/2014/11/25/366507379/ferguson-docs-how-the-grand-jury-reached-a-decision#docs> [<https://perma.cc/F92Z-JTVU>].
- 37 *Zimmerman Credibility May Be Issue in Martin Case*, NBC MIA., <https://www.nbcmiami.com/news/local/zimmerman-credibility-may-be-issue-in-martin-case/1896483/> [<https://perma.cc/P7AG-HGHR>] (June 2, 2012, 2:20 PM); Josh Sanburn, *The One Battle Michael Brown’s Family Will Win*, TIME (Nov. 25, 2014, 10:26 PM), <https://time.com/3606376/police-cameras-ferguson-evidence/> [<https://perma.cc/SX5E-E27L>]. Audio captured a cry for help during the Trayvon Martin and George Zimmerman encounter, yet during the trial, it was highly contested whether Martin or Zimmerman was the one crying for help—an issue ultimately for the jury to decide. Lizette Alvarez, *Trayvon Martin’s Father Says Screams on 911 Call Were His Son’s*, N.Y. TIMES (July 8, 2013), <https://www.nytimes.com/2013/07/09/us/friends-testify-that-zimmerman-is-the-one-screaming-for-help-on-911-call.html> [<https://perma.cc/59ZE-WKHJ>].
- 38 *‘I Can’t Breathe’: Eric Garner Put in Chokehold by NYPD Officer-Video*, GUARDIAN (Dec. 4, 2014, 2:46 PM), <https://www.theguardian.com/us-news/video/2014/dec/04/i-cant-breathe-eric-garner-chokehold-death-video> [<https://perma.cc/JM7V-R6EL>]; *Video Shows Fatal Police Shooting*, N.Y. TIMES (Apr. 7, 2015), <https://www.nytimes.com/video/us/10000003615939/video-shows-fatal-police-shooting.html> [<https://perma.cc/6EHS-C2PN>].
- 39 Chloé Cooper Jones, *Fearing for His Life*, VERGE (Mar. 13, 2019, 10:00 AM), <https://www.theverge.com/2019/3/13/18253848/eric-garner-footage-ramsey-orta-police-brutality-killing-safety> [<https://perma.cc/7NH8-67RD>]; BUTLER, *supra* note 18, at 3±4, 60 (explaining that, although the New York

Police Department banned chokeholds, Officer Pantaleo still used a chokehold on Garner for approximately twenty seconds--causing his death); Ashley Southall, *'I Can't Breathe': 5 Years After Eric Garner's Death, an Officer Faces Trial*, N.Y. TIMES (May 12, 2019), <https://www.nytimes.com/2019/05/12/nyregion/eric-garner-death-daniel-pantaleo-chokehold.html> [<https://perma.cc/EGV4-J8H7>].

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41 Southall, *supra* note 39.

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43 *In re Dist. Att'y of Richmond Cnty.*, 8 N.Y.S.3d 856, 859 (Sup. Ct. 2014) (the grand jury did not indict the officer who killed Eric Garner); Alan Blinder, *Mistrial for South Carolina Officer Who Shot Walter Scott*, N.Y. TIMES (Dec. 5, 2016), <https://www.nytimes.com/2016/12/05/us/walter-scott-michael-slager-north-charleston.html> [<https://perma.cc/SH24-E8S4>] (the trial in Walter Scott's case resulted in a hung jury and a mistrial); *see also United States v. Slager*, 912 F.3d 224, 227 (4th Cir. 2019) (discussing the outcome of the state court case against the officer involved in the Walter Scott murder).

44 *Dist. Att'y of Richmond Cnty.*, 8 N.Y.S.3d at 858-59; Jeffrey Fagan & Bernard E. Harcourt, *Fact Sheet in Richmond County (Staten Island) Grand Jury in Eric Garner Homicide*, COLUM. L. SCH. (Nov. 26, 2014), <https://www.law.columbia.edu/news/archive/fact-sheet-richmond-county-staten-island-grand-jury-eric-garner-homicide> [<https://perma.cc/FJR6-LVUP>].


45 Blinder, *supra* note 43.

46 *See* Jonathan Witmer-Rich, *Restoring Independence to the Grand Jury: A Victim Advocate for Police Use of Force Cases*, 65 CLEV. ST. L. REV. 535, 539 n.16 (2017).

47 Ric Simmons, *The Role of the Prosecutor and the Grand Jury in Police Use of Deadly Force Cases: Restoring the Grand Jury to Its Original Purpose*, 65 CLEV. ST. L. REV. 519, 528, 533 (2017); Timothy Williams & Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. TIMES (Dec. 28, 2015), <https://www.nytimes.com/2015/12/29/us/tamir-rice-police-shooting-cleveland.html> [<https://perma.cc/5GN9-2X6V>].

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49 *Id.*; *cf.* Paul Butler, Opinion, *It Is Not Easy to Convict Cops. So Start with Structural Reforms*, WASH. POST (June 19, 2020), <https://www.washingtonpost.com/opinions/2020/06/19/it-is-not-easy-convict-cops-so-start-with-structural-reforms/> [<https://perma.cc/H2WW-U8E8>] (“[S]ince 2005, fewer than 5 officers have been convicted of murder and had those convictions upheld by higher courts.”).

- 50 Philip M. Stinson, Opinion, *If Minnesota Officer Had Been White, Would He Have Been Convicted?*, USA TODAY, <https://www.usatoday.com/story/opinion/policing/spotlight/2019/05/23/officer-murderminnesota/1145769001/> [https://perma.cc/PB8W-LCA7] (May 23, 2019, 6:44 PM) (“The fact that Noor is black points to the twisted way that justice hits black men in police ranks. For any crime, black officers are more likely to be convicted of a felony. The white officers who are convicted frequently receive lighter sentences.”).
- 51 *Id.*
- 52 *Id.*
- 53  *McCleskey v. Kemp*, 481 U.S. 279, 286-87 (1987).
- The Baldus study is actually two sophisticated statistical studies that examine over 2,000 murder cases that occurred in Georgia during the 1970's. The raw numbers collected by Professor Baldus indicate that defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases. ...
- Baldus also divided the cases according to the combination of the race of the defendant and the race of the victim. He found that the death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims. Similarly, Baldus found that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims.
- Id.*
- 54 David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 673, 706-07, 709-10 (1983).
- 55 Scott Phillips & Justin F. Marceau, *Whom the State Kills*, 55 HARV. C.R.-C.L. L. REV. 585, 605-07 (2020) (picking up where Professor Baldus's research left off and further studying death penalty cases through the appellate and execution process, determining that the Baldus study even underestimated the racial disparities inherent in death penalty cases).
- 56 *See* Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 105-06 (1984).
- 57 *See, e.g.*, Darren Lenard Hutchinson, “Continually Reminded of Their Inferior Position”: *Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL'Y 23, 46-48, 110, 113-14 (2014) (stating that the grand jury decision-making process in the killing of Michael Brown reflected the social dominance theory).
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- 60 E. Allen Eason, *The Color of Fear*, 62 INT'L J. GRP. PSYCHOTHERAPY 165, 165 (2012) (video review).

- 61 DVD: *The Color of Fear*, *supra* note 59.
- 62 *Id.*
- 63 See Chris Trainor, *Why Do Juries Sometimes Acquit Police Officers in Brutality Cases?*, CHRISTOPHER TRAINOR & ASSOCS. (Apr. 10, 2020), <https://michiganlegalcenter.com/why-do-juries-sometimes-acquit-police-officers-in-brutality-cases/> [<https://perma.cc/499C-7T4S>].
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- 65 See *How Courts Work: Steps in a Trial*, ABA (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/cases/ [<https://perma.cc/4VAL-9EEZ>].
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- 76 Richard A. Oppel Jr. et al., *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/article/breonna-taylor-police.html> [https://perma.cc/PX75-KQUY].
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- 84 Onwuachi-Willig, *supra* note 14, at 833-38.

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