

**Prosecutorial Discretion**  
**Police Killing & Sexual Abuse**  
**A Talk with Professors Bruce Green and Rebecca Roiphe**

- Prosecutors' power and discretion
  - Prosecutors have the power to make decisions that have deep impact on the lives of arrestees and defendants.
  - Prosecutors have enormous discretion. Discretion comes up at every stage of the criminal proceedings. Their actions in any individual case may be reviewed, but their overall conduct or general exercise of discretion is rarely reviewed or subject to oversight.
  - They exercise broad discretion to:
    - Initiate charges and select charges
    - Offer plea bargains and negotiate terms of deals
    - Seek sentences
    - Employ investigative methods
    - To present and try the case
- Prosecutor ethics
  - ABA Model Rule 3.8 "Special Responsibilities of a Prosecutor" governs the ethical duties specific to prosecutors.
  - Every state court has adopted rules of professional conduct to ethical responsibilities of lawyers in that jurisdiction. In many states, the rule specific to prosecutors have been modeled after the ABA Model Rule.
  - The ABA's Criminal Justice Standards for the Prosecution Function serves as guidance. The guidance states that prosecutors should exercise "sound discretion" in performing the various prosecution functions and offers various factors to consider when making discretionary decisions.<sup>1</sup>
  - Though there are general guidance and office-specific policies, there is no professional consensus on how prosecutors should exercise discretion in high-profile, high-public-interest cases.
- Probable cause standard and charging decisions
  - At minimum, both ethical and legal standards require probable cause to bring charges.
    - Under ABA Model Rules of Professional Conduct 3.8(a), the prosecutor must refrain from prosecuting a charge he knows is not supported by probable cause.<sup>2</sup>

---

<sup>1</sup> ABA Criminal Justice Standards for the Prosecution Function, [https://www.americanbar.org/groups/criminal\\_justice/standards/ProsecutionFunctionFourthEdition/](https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/).

<sup>2</sup> ABA Model Rules of Professional Conduct, Rule 3.8 Special Responsibilities of a Prosecutor [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_3\\_8\\_special\\_responsibilities\\_of\\_a\\_prosecutor.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor.html)

- In theory, prosecutors can be reprimanded for brings charges without probable cause, but in reality, they are very rarely disciplined.
  - How convinced should the prosecutor be to bring charges?
    - Minimum standard requires probable cause. Conviction requires proof beyond a reasonable doubt. Whether the prosecutors' office decides to impose a higher standard is a matter of discretion.
    - Example: Manhattan DA's charges against Dominique Strauss-Kahn in 2011. The Manhattan DA's office decided to drop sexual assault and rape charges against Dominique Strauss-Kahn, former director of the International Monetary Fund, in 2011. In its Recommendation for Dismissal, the DA's office noted that it was not convinced beyond a reasonable doubt that they knew what happened, the standard that would need to be proven in trial.<sup>3</sup>
  - Prosecutorial conduct and strategy in a grand jury proceeding
    - Prosecutors act as advisors to the grand jury. They express an opinion, often implicitly but sometimes explicitly, as to how they think the grand jury should find. They decide which charges to present to the grand jury and how the evidence should be presented.
    - Example: prosecutor statements regarding grand jury proceedings of the officers involved in the shooting of Breonna Taylor. After grand jury proceedings regarding the death of Breonna Taylor, shot and killed by police officers inside her apartment on March 13, 2020, Kentucky Attorney General Daniel Cameron announced in a news conference that that the grand jury agreed that the officers were justified in returning fire. He stated the grand jury is independent of the court and prosecutor and from outside influence.<sup>4</sup> Several grand jurors spoke out after the announcement, stating that AG Cameron misrepresented in his public statements how he presented the case to the grand jury.<sup>5</sup> In a rare move, a court released some of the recorded grand jury proceedings in which testimony and evidence presented to the jurors can be heard but does not include any statements given by the prosecutors.<sup>6</sup>

---

<sup>3</sup> See Rashbaum, W., & Eligon, J., District Attorney Asks Judge to Drop Strauss-Kahn Case, N.Y. Times (August 23, 2011), <https://www.nytimes.com/2011/08/23/nyregion/strauss-kahn-case-should-be-dropped-prosecutors-say.html>.

<sup>4</sup> See Tobin, Ben, *Read what Daniel Cameron said about the grand jury's findings in the Breonna Taylor case*, Louisville Courier Journal (September 30, 2020), <https://www.msn.com/en-us/news/crime/read-what-daniel-cameron-said-about-the-grand-jurys-findings-in-the-breonna-taylor-case/ar-BB19mlhJ>.

<sup>5</sup> See Lovan, Dylan, *Grand juror speaks after judge ruling in Breonna Taylor case*, AP News (October 20, 2020), <https://apnews.com/article/breonna-taylor-shootings-kentucky-b37fd44ffd2fe5358da22f949ad68e73>.

<sup>6</sup> See Chappell, Bill, *Court Releases Grand Jury Recording In Breonna Taylor Case*, NPR (October 2, 2020), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/10/02/919245689/court-releases-grand-jury-recording-in-breonna-taylor-case>.

- If a prosecutor believes that a jury in a jurisdiction would acquit in a high-profile case, should the prosecutor still bring the case? Is it still a legitimate use of prosecutorial power to make a point?
  - Example: prosecutor strategy in pursuing a case against officers involved in the death of Freddie Gray. After the death of Freddie Gray while in police custody, Baltimore prosecutor Marilyn Mosby filed charges against six police officers, including second-degree murder, manslaughter, and assault. Two of the officers were found not guilty, and charges against the other four officers were eventually dropped. Some criticized Mosby for rushing to pursue charges that were unsustainable given the evidence available.
- Conflicts of interest issues in police-involved shootings
  - In general, a lawyer has conflict of interest when the lawyer's self-interest or the interests of another adversely affect the lawyer's representation of the client.<sup>7</sup>
  - Conflicts of interest issues can be especially complicated for prosecutors when it comes to cases involving police shootings. Conflicts issues involve not personal interests as they commonly do for other types of cases but office-wide or institutional conflicts. Prosecutors work closely with police departments and depend on officers to carry out this charge.
- Prosecutors may elect to go to the grand jury even when they think charges are not appropriate so that they have an opportunity to lay out the evidence. In some high-profile cases, the prosecutor will present all the evidence available in a neutral fashion and let the grand jury decide whether there is probable cause to bring a charge.
  - Grand jury proceedings are typically not public. In rare instances, particularly in high-profile cases like police shootings, grand jury recordings or minutes may be made public that give the public a view into the case that they normally do not see.
  - Example: grand jury proceedings in officer shooting death of Michael Brown in Ferguson, MO. After 25 days, the grand jury in St. Louis County, Missouri ultimately declined to indict police officer Darren Wilson who fatally shot Michael Brown. The prosecutor, Robert McCulloch, did not recommend a particular charge and presented all the evidence, not just the evidence that would support an indictment. The court made testimony, reports, and other documents from the grand jury proceeding publicly available. Some of the forensic evidence released supported the officer's account of the shooting.
- Overcharging and prosecutorial discretion
  - Overcharging

---

<sup>7</sup> ABA Model Rule 1.7: Conflicts of Interest: Current Clients, [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_7\\_conflict\\_of\\_interest\\_current\\_clients/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_7_conflict_of_interest_current_clients/).

- Practice of issuing multiple charges for a single criminal act or charging at a higher level than what may seem warranted.
  - Because charging decisions are discretionary, whether a prosecutor is overcharging or not is in the eye of the beholder. If a prosecutor believes there is probable cause, even if others believe evidence is insufficient, he may bring charges.
  - In general, prosecutors are trained to make decisions in light of broad principles like proportionality, with the understanding that serious crimes should receive priority over less serious crimes and that it may not be appropriate to pursue the most serious charges for all instances.
  - Example: DOJ felony charges for social justice protests in 2020. The DOJ announced in September 2020 that more than 300 people were charged with federal felony crimes, some for crimes like damaging federal property and inciting a riot.
    - The DOJ is well within its power to charge or overcharge for crimes so long as it meets minimum ethical and legal standards. However, the reality is that federal sentencing guidelines for many of those means that those individuals may be facing decades of jail time.
    - State prosecutors in many jurisdictions made office-wide decisions to not bring charges for certain kinds of minor crimes that occurred during these protests.
- Progressive prosecution movement
  - A prosecutor's personal criminal justice philosophy has huge bearing on the prosecutor's charging decisions.
  - Most chief prosecutors are elected officials. Their views and activities tend to reflect the political and social climate of the community. During the '80s and '90s, many prosecutors were "tough on crime" and continued the trends in the 2000s. In the past few years, "progressive" prosecutors have started beating incumbents in major jurisdictions. They campaign on platforms of ending mass incarceration, increased transparency and police accountability, and prosecutorial reforms.
  - Many progressive prosecutors think of their role in a different way from traditional prosecutors. They believe that prosecutors have contributed to mass incarceration and racial biases in our current criminal justice system and that prosecutors have a role to play in reversing those injustices. They may look at ways to address criminal behavior through other restorative justice measures.
- Prosecutorial discretion in #MeToo cases
  - Prosecutorial conduct scrutinized in cases involving powerful, wealthy people.
  - Example: Florida federal prosecutors' plea deal with Jeffrey Epstein. In 2008, then US Attorney for the Southern District of Florida Alex Acosta made a plea deal with Jeffrey Epstein in which federal charges including sex trafficking charges against him would be dropped and he would plead guilty to state

- prostitution charges. The prosecutors did not notify victims of the deal, and a court later found that it violated the federal Crime Victims' Rights Act. The litigation revealed a trove of evidence against Epstein collected by the US Attorney's office that indicated that the charges could be sustained. The DOJ Office of Professional Responsibility investigation concluded that Acosta exercised "poor judgment" by allowing Epstein to enter a non-prosecution agreement over alleged sex crimes, but cleared him and other prosecutors of any professional misconduct in their handling of the case.<sup>8</sup>
- Discipline for abuses of discretion or misconduct
    - Prosecutors may be held accountable for misconduct in their own offices, in courts where they may be shamed by name, or have their convictions reversed. In very rare cases, they may be sanctioned. Generally, formal discipline for misconduct is rare.
    - Example: discipline for misconduct in Duke University lacrosse case
      - In a rare instance, the DA of Durham, North Carolina, Mike NiFong was disbarred for, among other things, withholding exculpatory evidence, a Brady violation. The Brady Rule requires prosecutors to disclose materially exculpatory evidence in the government's possession to the defense.<sup>9</sup>
    - Discipline for abuse of discretion is even rarer, exactly because those decisions are discretionary, especially for decisions like overcharging.
    - Disciplinary authorities in states typically do not discipline for abuses of discretion because ethical and professional conduct rules do not address discretion.
    - One way prosecutors are held accountable is through elections.

---

<sup>8</sup> Department of Justice Office of Public Affairs Press Release: Statement on DOJ Office of Professional Responsibility Report on Jeffrey Epstein 2006-2008 Investigation (November 12, 2020), <https://www.justice.gov/opa/pr/statement-doj-office-professional-responsibility-report-jeffrey-epstein-2006-2008>.

<sup>9</sup> See *Brady v. Maryland*, 373 U.S. 83 (1963).