



FOREWORD

PROSECUTORS, POWER, AND JUSTICE:
BUILDING AN ANTI-RACIST PROSECUTORIAL SYSTEM*Laura Cohen*[†]

On May 25, 2020, as the world was caught in the grip of the COVID-19 pandemic, 46-year-old George Perry Floyd, Jr., a former high school and college football and basketball star; hip-hop artist; and beloved son, brother, father, grandfather, and friend, was murdered by police in Minneapolis, Minnesota.¹ In the process of arresting Floyd for allegedly passing a \$20 counterfeit bill,² Derek Chauvin, a white police officer, pinned his knee on Floyd's neck for 9 minutes and 29 seconds as Floyd lay in the street, handcuffed, face down, and gasping for breath.³ Three other officers also restrained Floyd even as he told them more than 20 times that he could not breathe.⁴ As the torture continued, he cried out for his deceased mother and his children.⁵ His last words were desperate and horrifyingly prescient: *They'll kill me. They'll kill me.*⁶

[†] Laura Cohen is Distinguished Clinical Professor of Law; the Justice Virginia Long Scholar; and Director of both the Center on Criminal Justice, Youth Rights; and Race and the Criminal and Youth Justice Clinic at Rutgers Law School. She is deeply grateful to the symposium planning committee - Rutgers Law Review Editor-in-Chief Madeline Gayle, Symposium Editor Gisselly Perez-Astwood, Articles Editor Mary Clare Patterson, and Senior Notes and Comments Editor Jennifer Monge - for their vision, energy, creativity, and deep commitment to achieving racial and social justice. Thanks also to Habibah Johnson and Josephine Nagle for their unparalleled logistical assistance and to former Rutgers Law School Co-Dean David Lopez for his enthusiastic support for the symposium and the Center on Criminal Justice, Youth Rights, and Race.

1. Luis Andres Henao et al., *A Long Look at the Complicated Life of George Floyd*, CHI. TRIB. (Jun. 11, 2020), <https://www.chicagotribune.com/nation-world/ct-nw-life-of-george-floyd-biography-20200611-cxmlnpyvjczpbe6izfduzwv54-story.html>; *How George Floyd Died, and What Happened Next*, N.Y. TIMES (May 25, 2021), <https://www.nytimes.com/article/george-floyd.html>.

2. Nicholas Bogel-Burroughs and Will Wright, *Little Has Been Said About the \$20 Bill That Brought Officers to the Scene*, N.Y. TIMES (Apr. 19, 2021), <https://www.nytimes.com/2021/04/19/us/george-floyd-bill-counterfeit.html>.

3. See Richard A. Opiel Jr. and Kim Barker, *New Transcripts Detail Last Moments for George Floyd*, N.Y. TIMES (Jul. 8, 2020), <https://www.nytimes.com/2020/07/08/us/george-floyd-body-camera-transcripts.html>.

4. *Id.*

5. *See id.*

6. *See id.*

George Floyd's death set off a tsunami of protests around the country and the world. Even as millions took to the streets to demand an end to state-sanctioned violence against Black people, however, the killing continued. Ahmaud Arbery in Georgia.⁷ Daniel Prude in Rochester.⁸ Breonna Taylor in Louisville.⁹ Daunte Wright in Brooklyn Center, Minnesota, just a stone's throw from Minneapolis.¹⁰ All were unarmed, and all were killed between March of 2020 and April of 2021.¹¹ Daunte, who was just 20 years old, was shot and killed by a white police officer during a traffic stop as the trial of Derek Chauvin for Floyd's murder entered its third week.¹² In a chilling twist of fate, George Floyd's life partner had been his high school teacher.¹³

The pain and tragedy and unquantifiable harms of the murders of George Floyd and Breonna Taylor and countless others have focused public attention on law enforcement policies, practices, training, and discipline and sparked widespread demands to hold police accountable for excessive use of force. An increasingly wide swath of America is acknowledging the impact of bias, both explicit and implicit, on policing and calling for change, including the re-allocation of funds away from police departments and into economic and social supports for historically over-policed communities of color.¹⁴ At least one-half of the states, including New Jersey, have introduced or adopted police accountability measures during the last year.¹⁵

7. *Ahmaud Arbery Shooting: A Timeline of the Case*, N.Y. TIMES (Apr. 29, 2021), <https://www.nytimes.com/article/ahmaud-arbery-timeline.html>.

8. Michael Gold and Troy Closson, *What We Know About Daniel Prude's Case and Death*, N.Y. TIMES (Apr. 16, 2021), <https://www.nytimes.com/article/what-happened-daniel-prude.html>.

9. Richard A. Oppel Jr. et al., *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Apr. 26, 2021), <https://www.nytimes.com/article/breonna-taylor-police.html>.

10. *What We Know About the Death of Daunte Wright*, N.Y. TIMES (Apr. 23, 2021), <https://www.nytimes.com/article/daunte-wright-death-minnesota.html>.

11. *See id.*; Oppel, *supra* note 9; Gold, *supra* note 8; *Arbery Shooting*, *supra* note 7.

12. *See Daunte Wright*, *supra* note 10; Amir Vera and Daniel Wolfe, *Seeking Justice: A Timeline Since the Death of George Floyd*, CNN, <https://www.cnn.com/interactive/2021/03/us/george-floyd-case-timeline/> (last visited Aug. 22, 2021).

13. Cheryl Teh, *George Floyd's Girlfriend Courtney Ross Was Daunte Wright's High School Teacher*, INSIDER (Apr. 13, 2021), <https://www.insider.com/george-floyds-girlfriend-was-daunte-wrights-high-school-teacher-2021-4>.

14. *See, e.g.*, Rashawn Ray, *What Does "Defund the Police" Mean and Does it Have Merit?*, BROOKINGS INST. (June 19, 2020), available at <https://www.brookings.edu/blog/fixgov/2020/06/19/what-does-defund-the-police-mean-and-does-it-have-merit/>.

15. *See Legislative Responses for Policing—State Bill Tracking Database*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/civil-and-criminal-justice/legislative-responses-for-policing.aspx> (last visited Aug. 22, 2021); Mike Catalini, *New Jersey Launches Searchable Site of Police Use-of-Force Reports*, WHYY (Apr. 7, 2021),

Such measures are crucial. But those who work within the criminal and juvenile legal systems know that, while police wield tremendous authority in investigating and responding to suspected criminal activity, once a complaint is filed, the prosecutor assumes control.¹⁶ Virtually every decision, large or small, from charging to bail to sentencing, is driven by the exercise of prosecutorial discretion. It is no exaggeration to say that even the most junior of prosecutors hold people's lives in their hands every day in courtrooms all over this country. As one journalist has observed, "Prosecutors serve as both gatekeepers and sovereigns in this criminal justice system, determining whether and to what extent an individual is actually charged, and the resolution that will be available to him or her."¹⁷

And yet, that vast discretion goes largely unchecked, except by the broad boundaries of criminal law and procedure. The United States Supreme Court has consistently held that prosecutors enjoy near-absolute immunity from civil liability, even when they withhold or fabricate evidence or allow racial bias to infect their decision-making and advocacy.¹⁸

The twin forces of sweeping prosecutorial powers and lack of oversight have had profound consequences for those ensnared in the legal system and contributed substantially to structural racism and the resultant mass incarceration of Black and Brown people in the United States. A 2020 study by the National Registry of Exonerations determined that prosecutorial misconduct, including, *inter alia*, concealing exculpatory evidence and witness tampering, occurred in fully 30% of the 2,663 known exonerations in the U.S. since 1989.¹⁹ The report further determined that:

- Black exonerees were more likely than whites to have been victims of misconduct (57% to 52%), and this gap is even wider among exonerations for murder (78% to 64%),

<https://whyy.org/articles/new-jersey-launches-searchable-site-of-police-use-of-force-reports/>.

16. See generally Angela J. Davis, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007).

17. Mariana Fritz, *To Deal with Racial Injustice, Don't Stop with Police: Prosecutorial Conduct Matters, Too*, N.Y.L.J. (June 19, 2020, 1:22 PM), <https://www.law.com/newyorklawjournal/2020/06/19/to-deal-with-racial-injustice-dont-stop-with-law-enforcement-prosecutorial-conduct-matters-too/>.

18. See *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Connick v. Thompson*, 563 U.S. 51 (2011).

19. SAMUEL R. GROSS ET AL., NAT'L REGISTRY OF EXONERATIONS, *GOVERNMENT MISCONDUCT AND CONVICTING THE INNOCENT: THE ROLE OF PROSECUTORS, POLICE, AND OTHER LAW ENFORCEMENT* i-iv (2020).

particularly those with death sentences (87% to 68%), and for drug crimes (47% to 22%)²⁰

- In state court cases, prosecutors and police committed misconduct at similar rates, but federal prosecutors committed misconduct *more than twice as often as police*. In federal exonerations for white-collar crimes, prosecutors committed *misconduct seven times as often as police*.²¹
- Only 4% of prosecutors who engaged in misconduct faced some form of discipline, and in most cases disciplinary actions were relatively mild.²²

These findings, moreover, pertain only to known exonerations, which tend to occur only in the most serious categories of cases. Evading scrutiny almost entirely are prosecutorial practices in the state misdemeanor and municipal courts that pockmark the country and are the engine of the American criminal legal system.²³ Thirteen million, or nearly eighty percent, of criminal cases filed annually in the United States involve not the homicides, rapes, and complex financial crimes that are the stuff of podcasts and television procedurals but, instead, minor offenses that carry a maximum carceral sentence less than one year but that can have life-altering consequences for those convicted of them.²⁴ More than 97 percent of these cases are resolved through plea bargaining, a process controlled by prosecutors.

How prosecutorial discretion is exercised and by whom, and how prosecutors are hired, trained, supervised, rewarded and, when necessary, disciplined, are essential inquiries in the quest to dismantle the structural racism that defines our criminal legal system. Also demanding our collective attention and support are the efforts of a new generation of visionary prosecutors to be the agents of change, to reimagine and remake the prosecutorial role.

20. *Id.* at iii.

21. *Id.* at iv.

22. *Id.* at 153.

23. See generally ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018); Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964 (2021).

24. ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018). Those consequences include, among others, eviction, job loss, child welfare involvement, denial of federal student financial aid, and immigration consequences.

These pressing issues sparked “Prosecutors, Power, and Racial Justice: Building an Anti-Racist Prosecutorial System,” a four-part symposium hosted by the *Rutgers University Law Review* and the Rutgers Center on Criminal Justice, Youth Rights, and Race between February – April 2021. Participants included some of the nation’s leading scholars of adult and juvenile prosecutorial practices and ethics (Angela J. Davis, Kristin Henning, Irene Joe, Ellen Yaroshefsky, Cynthia Alkon, Fareed Hayat, and Mary Lynch), ground-breaking prosecutorial reformers (San Francisco District Attorney Chesa Boudin; Contra Costa County District Attorney Diana Becton; Commonwealth’s Attorney for Fairfax County and the City of Falls Church, Parisa Dehghani-Tafti; New Jersey Attorney General Gurbir Grewal; and Jamila Hodge, Director of the Reshaping Prosecution Program at the Vera Institute of Justice), emerging and creative voices on prosecutors, race, and communities (Adewale Oduye, Rigodis Appling, Zamir Ben-Dan, and Robert Holmes), and John Ramsey, who was wrongfully convicted of murder in 1981 due in part to prosecutorial misconduct. Over the course of the four sessions, panelists excavated and explored the nexus of prosecutors, race, and injustice; the role of prosecutors in perpetuating racial disparities and mass incarceration; institutional and political pressures that give rise to harmful prosecutorial practices; the recent successes of and challenges faced by reform-minded prosecutors as they attempt to implement anti-racist principles and policies in their offices; and innovative proposals for doctrinal, systemic, and practice-oriented change.

In addition to transcripts of the keynote addresses by Angela J. Davis, Distinguished Professor of Law at American University Washington College of Law and San Francisco District Attorney Chesa Boudin, this volume contains five illuminating articles by symposium participants. In *Bargaining Without Bias*, Professor Cynthia Alkon of Texas A&M University School of Law explores the impact of racial bias in plea bargaining and proposes strategies to reduce it. She calls on prosecutors’ offices to adopt policies for blind assessment of cases at their inception, with all indicia of race or ethnicity removed from the equation. She also exhorts prosecutor offices to expand and improve training and programs on empathy and developing “empathy skills” to change how prosecutors view those charged with crimes. New York City public defenders Zamir Ben-Dan and Rigodis Appling, in *Breaking the Backbone of Unlimited Power: The Case for Abolishing Absolute Immunity for Prosecutors in Civil Rights Lawsuits*, provide a nuanced analysis of *Imbler v. Pachtman*, in which the United States Supreme Court decision carved out absolute immunity for prosecutors in civil rights lawsuits makes the case for abolition of immunity as a means to achieving the end of racial, social and criminal justice. And, in *TWO BITES AT THE APPLE:*

REQUIRE DOUBLE JEOPARDY PROTECTION IN GANG CASES, Professor Fareed Nassor Hayat of CUNY School of Law argues that gang statutes, which punish alleged gang members for substantive crimes and then further punish them for committing those same crimes in furtherance of a gang, violate the Double Jeopardy Clause in three ways and proposes abolition of such laws.

The final two authors draw on their vast expertise as clinical law professors and scholars to promote those most deeply impacted by the system as leaders in the reform movement. In *Building an Anti-Racist Prosecutorial System through Adoption of a Community Oriented Lawyering Approach*, Professor Robert Holmes, the founder and director of the Community and Transactional Lawyering Clinic at Rutgers Law School, posits that the symbiosis between liberal democracy and racism led to the emergence of police and prosecutors as the primary perpetrators of the new “Jim Crow” caste system. He argues that, rather than attempting to achieve institutional change from within, advocates should seek ways to upend racial injustice by encouraging disdain for the status quo among individual actors within the system and providing those actors with models for rejecting unacceptable cultural norms. Professor Holmes concludes by offering community-oriented lawyering as such a model for change.

Finally, Professor Mary Lynch, who directs a domestic violence prosecution clinic at Albany Law School, argues in *Building an Anti-Racist Prosecutorial System: Observations from Teaching a Domestic Violence Prosecution Clinic* for centering, prioritizing, and supporting the diverse experiences and voices of women of color and LGBTQ+ persons who experience intimate crimes in system reform efforts. The article looks to social science literature to offer a lens for the perspectives and desires of criminal victim-survivors with regard to the anti-racist prosecution of intimate partners and offers suggestions to avoid unnecessary incarceration, reduce racism in the criminal justice system, and achieve the urgent safety and accountability goals of survivors of color.

These voices, and those of all the symposium speakers, are resonant, urgent, and compelling. It is incumbent on all of us to heed them, and to act.