
THE RUTGERS UNIVERSITY LAW REVIEW
VOLUME 73 | ISSUE 5 FALL 2021

BUILDING AN ANTI-RACIST PROSECUTORIAL SYSTEM THROUGH THE ADOPTION OF A COMMUNITY-ORIENTED LAWYERING APPROACH

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ABSTRACT

For decades civil rights activists were motivated by the belief that racism in America was merely "an odious holdover from slavery, a terrible and inexplicable anomaly stuck in the middle of our liberal democratic ethos."[1] A more recent—and more enlightened—view describes American racism as not simply "an excrescence on a fundamentally healthy liberal democratic body," but instead "what shapes and energizes the body."[2] Liberal democracy and racism "are historically, even inherently, reinforcing."[3] What was once viewed as an anomaly "is an actual symbiosis."[4] To defend and protect American democracy then requires a defense of American racism. When the civil rights movement appeared to be "overcoming" the symbiosis between liberal democracy and racism, opponents of the civil rights revolution had to devise a new strategy for maintaining the subordinated status of African Americans. That new strategy called for associating race with welfare and race with crime. "Fusing anxiety about crime to anxiety over racial change and riots, civil rights and racial disorder—initially defined as a problem of minority disenfranchisement—were defined as a crime problem, which helped shift debate from social reform to punishment."[5] What American institutions are in a better position to carry out this new "Jim Crow" caste system than police and prosecutors? To seek ways to upend the status quo of racial injustice in our criminal justice system is to seek ways to

1. DERRICK BELL, FACES AT THE BOTTOM OF THE WELL, THE PERMANENCE OF RACISM 9 (1992) (internal quotation marks omitted); *see also* GUNNAR MYRDAL, AN AMERICAN DILEMMA; THE NEGRO PROBLEM AND AMERICAN DEMOCRACY xix (1st ed. 1944).

2. Bell, *supra* note 1, at 9 (quoting JENNIFER L. HOCHSCHILD, THE NEW AMERICAN DILEMMA 5 (1974)).

3. *Id.*

4. *Id.*

5. DERRICK BELL, RACE, RACISM AND AMERICAN LAW 289 (6th ed. 2008).

attack this frontline defense of that injustice and its goal of maintaining African Americans as a subordinated class of citizens. A likely more effective approach to this challenge than seeking institutional change within the overall prosecutorial system is to find ways to encourage disdain for the status quo among individual actors within the system and to provide those individuals with tested models for making changes to unacceptable cultural norms within the system of which they are a part. I attempt in this Article to do this with a particular emphasis on community-oriented lawyering as a model, recognizing that prosecutors are lawyers.

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INTRODUCTION

> [I]f one really wishes to know how justice is administered in a country, one does not question the policemen, the lawyers, the judges, or the protected members of the middle class. One goes to the unprotected – those, precisely, who need the law's protection most! – and listens to their testimony. James Baldwin[6]

How wonderful life would now be for African Americans if Gunnar Myrdal's hypothesis – in his well-known 1944 study, *The American Dilemma: The Negro Problem and Modern Democracy* – had been correct: that the idea of racism in America was merely an odious hold over from slavery, "a terrible and inexplicable anomaly stuck in the middle of our

6. Evan Elkins, *James Baldwin in Nine Quotes*, WRANGLER, thewrangleronline.com/31842/blackhistory-month/jamesbaldwin-in-nine-quotes// (last visited June 5, 2021).

liberal democratic ethos."[7] While the efforts and beliefs of generations of civil rights advocates relied on Myrdal's philosophy, more enlightened scholars and critical race theorists understand and teach us that "liberal democracy and racism in the United States are historically, even inherently, reinforcing; American society as we know it exists only because of its foundation in racially based slavery, and it thrives only because racial discrimination continues. The apparent anomaly is an actual symbiosis."[8] To defend and protect American democracy then requires a defense of American racism. When the civil rights movement appeared to be "overcoming"[9] the symbiosis between liberal democracy and racism, opponents of the civil rights revolution had to devise a new strategy for maintaining the subordinated status of African Americans.[10] That new strategy called for associating race with welfare and race with crime.

The "permanence of [a] symbiosis" between liberal democracy and racism ensures that "civil rights gains will be temporary and setbacks inevitable."[11] If the goal of social equality or social equity for African Americans is indeed an elusive pursuit, then why continue the struggle; why, as Jesse Jackson puts it, "Keep Hope Alive?" In response to this question and the question of why constant setbacks and mistreatment had not caused him to give up the struggle, Martin Luther King, Jr. replied, "[T]hey fail, however to perceive the sense of affirmation generated by the challenge of embracing struggle and surmounting obstacles."[12] In Professor Bell's view, "continued struggle can bring about unexpected benefits and gains that themselves justify continued endeavor."[13] It is the "pull of unfinished business" that is "sufficient to strengthen and spur determination."[14]

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7. MYRDAL, *supra* note 1, at xix; BELL, *supra* note 1, at 9.

8. HOCHSCHILD, *supra* note 2, at 5.

9. The promise of "We Shall Overcome," the signature song of the Civil Rights Movement, gained significant force when the words were spoken by President Lyndon B. Johnson on the eve of signing a sweeping Civil Rights Bill in 1964. *See* Colleen Shogan, *"We Shall Overcome:" Lyndon Johnson and the 1965 Voting Rights Act*, WHITE HOUSE HIST. ASS'N, https://www.whitehousehistory.org/we-shall-overcome-lbj-voting-rights (last visited June 13, 2021).

10. *See* Angie Maxwell, *What We Get Wrong About the Southern Strategy*, WASH. POST (July 26, 2019), https://www.washingtonpost.com/outlook/2019/07/26/what-we-get-wrong-about-southern-strategy/.

11. BELL, *supra* note 1, at 10.

12. BELL, *supra* note 1, at xi; *see also* Martin Luther King, Jr., *A Testament of Hope*, *in* A TESTAMENT OF HOPE*:* THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 313, 314 (James Washington ed., 1981).

13. BELL, *supra* note 1, at 199.

14. *See* DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 5 (1989).

I believe Professor Jennifer Hochschild's *New American Dilemma* would call upon the prosecutorial system to pursue racial equity as opposed to racial equality based upon an understanding of the fact that past experiences of Black people in America call for unique treatment of that group of individuals to assure for them a full and healthy life.[15] In addition to a New American Dilemma there is an African American Dilemma: how do Black people in America avoid responding with anger to the ever-present sting of racism and thereby provide justification for use of the new weapon for rivals of civil rights progress – i.e., defining racial discord as criminal and thereby imbuing crime with race? In Professor Bell's words, "[F]using anxiety about crime to anxiety over racial change and riots, civil rights and disorder – initially defined as a problem of minority disenfranchisement – were defined as a crime problem, which helped shift debate from social reform to punishment."[16] What American institutions are in a better position to carry out this new "Jim Crow" caste system than police and prosecutors? To seek ways to upend the status quo of systemic racial injustice in our criminal justice system is to seek ways to attack the frontline defense of that injustice and its goal of maintaining African Americans in a subordinated class of citizens. To seek ways to change the attitude and behavior of individual actors in the criminal justice system is to seek ways to attack "white fragility,"[17] "racial bonding,"[18] and individual "implicit bias[es]."[19]

The African American dilemma is complex. To react to mistreatment and institutional racism with anger – or violence – directly feeds the racist justification for subordinating African Americans. To choose a strategy of nonviolence – as popularized by Martin Luther King, Jr.— avoids the race equals crime and violence justification but at the same time invites more of the abuse and mistreatment that would justify anger and possible violent retaliation. The strategic justification for the non-

15. Racial Equality would seek to treat all people equally in terms of what is delivered to them to assure that they can live full and healthy lives. Racial Equity on the other hand would seek to understand the unique needs of certain groups within the American citizenry to assure that those groups can live full and healthy lives. The legacy of slavery, Jim Crow laws, and centuries of racial injustice, for example, create special needs for African Americans if they are to live full and healthy lives.

16. BELL, *supra* note 5, at 289.

17. *See generally* ROBIN DIANGELO, WHITE FRAGILITY: WHY IT'S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM (2018). Diangelo describes white fragility as the process by which white people, when confronted with racial stress resort to "defensive responses" that include "emotions such as anger, fear, and guilt and behaviors such as argumentation, silence, and withdrawal from the stress-inducing situation." *Id.* at 2. She goes on to say "[T]hough white fragility is triggered by discomfort and anxiety, it is born of superiority and entitlement." *Id.*

18. BELL, *supra* note 1, at 9*; see also* BELL HOOKS, FEMINIST THEORY FROM MARGIN TO CENTER 54 (1984).

19. DIANGELO, *supra* note 17, at xiii.

violent approach is that the abuse it invites will elicit a feeling of outrage among decent Americans who might offer support and relief as a legitimate representation of "We the People" standing against racial injustice. Perhaps it is possible to move a critical mass of individual actors within the prosecutorial system into this realm of "We the People." But at what cost in terms of suffering for African Americans? Might there be a better way?

Prosecutorial misconduct and abuse of discretion have been thoroughly documented and discussed in past and recent literature. Not nearly as extensive is literature addressing remedies for this socially undesirable behavior. More particularly, to the extent the misconduct has a disproportionately harsh impact on the African American community, this aspect of the problem begs for thoughtful writings. Leading examples of prosecutorial misconduct contributing to racial injustice include suppressing potential exculpatory evidence; offering inadmissible evidence into court; encouraging deceit from witnesses; and using intimidation tactics generally intended to illicit false confessions.[20] Prominent examples of prosecutorial abuse of discretion include calling for multi-defendant trials to encourage defendants to turn on one another; naming unidentified co-conspirators to intimidate potential defense witnesses with the threat of retaliatory prosecution; "horse trading" with defense counsel in a manner that is not in the best interest of the defendant; and staying depositions in a civil trial that might include exculpatory evidence in a contemporary criminal prosecution.[21] To expose the disparate impact of prosecutorial misconduct and abuse of discretion on the African American community we would add to these examples racial profiling – the act of suspecting or targeting a person for criminal prosecution on the basis of assumed characteristics or behavior of a racial or ethnic group rather than on individual suspicion – and the

20. Kimberly Cogdell Boies, *Misuse of DNA Evidence Is Not Always A "Harmless Error": DNA Evidence, Prosecutorial Misconduct, and Wrongful Conviction*, 17 TEX. WESLEYAN L. REV. 403, 426 (2011) ("Issues of bias and racism often lurk in the background of prosecutorial misconduct cases.")

21. *See, e.g.*, David Leonhardt, *Two Men, Two Decades, No Evidence*, N.Y. TIMES (Feb. 16, 2021), https://www.nytimes.com/2021/02/16/briefing/winter-storm-adam-kinzinger-pelosi-congress.html ("We look at two men who spent decades behind bars for crimes they didn't commit."); *see also* SAMUEL R. GROSS ET AL., NATIONAL REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf (last visited June 28, 2021) [hereinafter NATIONAL REGISTRY OF EXONERATIONS]. The National Registry of Exonerations is a project of the Newkirk Center for Science and Society at the University of California Irvine Newkirk Center for Science and Society, the University of Michigan Law School, and Michigan State University College of Law. *Id.* Founded in 2012 in conjunction with the Center on Wrongful Convictions at Northwestern University School of Law, the Registry maintains detailed information about every known exoneration in the United States since 1989. *Id.*

prevalent practice of selective prosecution – again, based on race. The nature and extent of prosecutorial misconduct and abuse of discretion that uniquely affects African Americans can be easily documented:[22]

- While African Americans make up 13% of the population of America, they make up a majority of defendants wrongfully convicted of crimes and later exonerated.
- As of October 2016, African Americans accounted for 47% of 1,900 exonerations and the great majority of the more than 1,800 defendants who were framed, convicted and later cleared in group exonerations.
- African Americans are 7 times more likely to be convicted of murder than whites and 50% more likely to be innocent than other convicted murderers.
- 15% of African American murder victims were white, yet 31% of innocent African American exonerees were convicted of killing white people.
- In the area of sexual assault, African Americans are three and a half times more likely than whites to be innocent and serve substantially longer prison terms for similar offenses committed by white defendants.
- In the area of drug crimes, African Americans and whites have a similar rate of usage yet African Americans are 5 times more likely to go to prison for drug possession than whites and innocent African Americans are 12 times more likely to be convicted.

A 2017 Report of the National Registry of Exonerations reveals that of the 139 exonerations in that year 66 involved African Americans and 84 were the result of official misconduct.[23] The National Registry adds to its striking statistics the observation that most wrongful convictions are never discovered, an unsettling reality for the African American community out of which the majority of wrongful convictions arise.[24]

Unfair prosecutions based on race that result in unfair and excessive incarceration exact a significant toll on African American families. Individuals wrongfully accused or convicted of nonviolent crimes (marijuana possession, for example) may be deprived of access to a college education, employment opportunities, credit or business licenses.[25]

22. NATIONAL REGISTRY OF EXONERATIONS, *supra* note 21, at 1–6.
23. *See id.*
24. *See id.* at 24.
25. Deborah M. Ahrens, *Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform*, 110 J. CRIM. L. & CRIMINOLOGY 379, 424

Families are torn apart. African American communities are compromised trying to cope with vulnerabilities attending the loss, in most cases, of a significant part of the male population. And the whole of society is affected in its effort to deal with issues related to prisoner reentry and the lack of trust accorded the prosecutorial system by African Americans that could with trust contribute to cooperative efforts capable of serving both interests in a positive way. It is the potential for trust and cooperation between prosecutors, in their role as lawyers, and African American communities, as clients, that give rise to my view of the possibility that the adoption of a community-oriented approach to lawyering can contribute to the creation of an anti-racist prosecutorial system.

The Symposium for which this article is being written seeks to explore "the power of prosecutors to perpetuate or upend the status quo of racial injustice in our criminal and juvenile legal systems."[26] There are myriad examples of asymmetric relationships that confer power on a group that, if abused, can result in harm to the subservient individual or group. The abusive outcome is more likely to occur and continue in those instances in which the empowered group is virtually unchecked. Such is the case with prosecutors and the prosecutorial system. They are immune from personal liability for their actions – however egregious – and state district attorneys, who present the bulk of criminal cases in the United States answer to no one.[27] They have near unlimited resources to advance a case; they have police departments working with them cooperatively; they have easy access to the judiciary; and they have a one-sided grand jury process to support their selective decisions to pursue a prosecution.[28] Defendants and defense attorneys find themselves to be on the subservient side of an asymmetrical relationship. 95% of all elected prosecutors in the United States are white.[29] At the root of race-based prosecutorial misconduct and the racial injustice that follows is the misuse of the unchecked institutional power given to the group coupled

(2020) ("[T]he incarcerative experience itself damages and severs family relationships, employment and housing arrangements, financial well-being, and community standing.").

26. Mary Clare Patterson, RUTGERS L. REV., *Call For Submissions: Rutgers University Law Review Spring 2021 Symposium*, SCHOLASTICA, https://jbam.scholasticahq.com/conversation/questions/call-for-submissions-rutgers-law-school-spring-2021-symposium (last visited Nov. 3, 2021).

27. *See* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 16–17 (1998).

28. *See, e.g.*, *The Power of Prosecutors*, ACLU, https://www.aclu.org/issues/smart-justice/prosecutorial-reform/power-prosecutors (last visited Aug. 5, 2021).

29. Nicholas Fandos, *A Study Documents the Paucity of Black Elected Prosecutors: Zero in Most States*, N.Y. TIMES (July 7, 2015) https://www.nytimes.com/2015/07/07/us/a-study-documents-the-paucity-of-black-elected-prosecutors-zero-in-most-states.html?smid=pl-share.

with a collective implicit bias within the group against non-white minority groups.

As a foundation for addressing race-based prosecutorial misconduct and resulting racial injustice and racial inequity, I offer the following maxims: 1) to root out race-based prosecutorial misconduct requires social change;[30] 2) social change can occur only if power is shifted from those who misuse their power to those who are victims of the misuse;[31] and 3) power concedes nothing without a demand. It never has and it never will.[32] In this article I offer the concept of community-oriented lawyering as a possible approach for enlightened prosecutors to adopt that concedes some of their power to the communities of people they are charged with serving while preserving the principal objectives of their work.

In Part I of the article I discuss truths related to race relations in America that contribute to the challenge of upending racial injustice and racial inequality in any context. I include in this Part vignettes from my own life growing up black in America seeking to identify factors that can contribute to aligning individuals against racial injustice. In Part II I explore ways that power, while resistant to being conceded, can be attacked within the boundaries of American-style democracy either from the outside or from within. External pressure might be brought to bear by way of social movements, political campaigning, more stringent enforcement of rules governing lawyers' conduct or by way of citizen review boards and commissions. Internal pressure can conceivably be applied by way of the bully pulpit associated with the office of the United States Attorney General. In Part III I discuss upending racial injustice within the prosecutorial system through enforcement of the Rules of Professional Conduct governing all lawyers and ABA standards specifically directed at prosecutors. In Part IV I offer a possible model for the voluntary conceding of power in an asymmetrical relationship in the form of a discussion of the evolution of value and mission statements of private foundations. In Part V, remembering again that prosecutors are lawyers first, I present numerous examples of how a community oriented approach to lawyering presents in my view an encouraging possibility for building an anti-racist prosecutorial system.

Whether motivated by demands embedded in external pressure, like that created by the Black Lives Matter Movement, or by internal

30. *See generally infra* Section V ("Community-Oriented Lawyering").

31. *See, e.g.,* Richard D. Marsico, *Working For Social Change and Preserving Client Autonomy: Is There a Role For 'Facilitative' Lawyering?*, 1 CLINICAL L. REV. 639, 646 (1995).

32. Frederick Douglass, If There Is No Struggle, There Is No Progress, Speech at Canandaigua, New York on the Occasion of the 23rd Anniversary of the West Indian Emancipation (Aug. 3, 1857).

pressure, possibly generated by enlightened high ranking officials within the ranks of the prosecutorial system, or by the emergence of a critical mass of enlightened actors within the prosecutorial system, the current climate may be ripe for culture shifts within the prosecutorial system that will upend racial injustice within that system.

I. "RACE MATTERS"

> Race is central to every aspect of the criminal justice system in the United States. The conviction of innocent defendants is no exception.[33] National Registry of Exonerations.
>
> The basic aim of a democratic regime is to curb the use of arbitrary powers – especially of government and economic institutions – against its citizens. Cornel West.[34]

It is difficult to improve upon Professor Cornel West's double entendre, "Race Matters" when we seek to understand how race fits into the exercise of prosecutorial discretion. To discuss matters of race in any meaningful way we must accept the fact that race comes into play – that is, it matters – in all areas of life in America. Shirley Chisholm, a former Congresswoman and the first African American to seek election to the office of President of the United States, made the point this way: "Racism is so universal in this country, so widespread and deep-seated, that it is invisible because it is so normal."[35] More recently author Robin DiAngelo brings the concept of racial injustice even closer to the context of America's prosecutorial system. She writes:

> "[R]acism – like sexism and other forms of oppression – occurs when a racial group's prejudice is backed by legal authority and institutional control. This authority and control transforms individual prejudices into a far-reaching system that no longer depends on the good intentions of individual actors; it becomes the default of the society and is reproduced automatically."[36]

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33. NATIONAL REGISTRY OF EXONERATIONS, *supra* note 21.

34. *See* CORNEL WEST, RACE MATTERS xiv (2d ed. May 2001).

35. SHIRLEY CHISHOLM, UNBOUGHT AND UNBOSSED 147 (Take Root Media ed., 2010). A similar observation about the pervasiveness of racism in America is ascribed to recording artist Beyonce' Knowles by Michael Eric Dyson in his Foreword to *White Fragility, Why It's So Hard for White People to Talk About Racism*. *See* DIANGELO, *supra* note 17, at xi (characterizing racism as the "collapse of whiteness into national identity"). Dyson quotes Ms. Knowles as saying, "It's been said that racism is so American that when we protest racism, some assume we're protesting America.").

36. DIANGELO, *supra* note 17, at 21.

Alicia Garza makes a similar point when she writes "I learned that racism, like most systems of oppression, isn't about bad people doing terrible things to people who are different from them but instead is a way of maintaining power for certain groups at the expense of others."[37]

We might also look to Professor West for a justification of our effort to uproot racial injustice and racial inequality in select American contexts – like the prosecutorial system. In Professor West's words, "[t]he basic aim of a democratic regime is to curb the use of arbitrary power – especially of government and economic institutions – against its citizens."[38] On this point, the late John Lewis said it this way: "A democracy cannot thrive where power remains unchecked and justice is reserved for a select few. Ignoring these cries and failing to respond to this movement is simply not an option for peace cannot exist where justice is not served."[39]

After 1965, public attitudes "began associating race with welfare and race with crime."[40] A study by Glen Loury – as reported by Professor Derrick Bell – found, for example, that The War on Drugs escalated even as the number of drug dealers declined.[41] The Loury study further found that while a serious crime wave of the early 1990's declined there was nevertheless no corresponding decline in the rate of incarceration—particularly among African Americans.[42] The study further describes a punitive turn in the nation's social policy away from forgiveness and the extension of a second chance, an outcome the study concludes "can be fully grasped only when viewed against the backdrop of America's often ugly and violent racial history. . . ."[43] Loury's study cites political scientist Vesla Mae Weaver, who argues that "the punitive turn represented a political response to the success of the civil-rights movement."[44] Opponents of the civil rights revolution, Weaver argues, "sought to regain the upper hand by shifting to a new issue. Rather than reacting directly to civil-rights developments, and thus continuing to

37. *The Purpose of Power Quotes*, Goodreads, https://www.goodreads.com/work/quotes/83646968-the-purpose-of-power (last visited Nov. 3, 2021) (quoting ALICIA GARZA, THE PURPOSE OF POWER: HOW WE COME TOGETHER WHEN WE FALL APART (2020)).

38. WEST, *supra* note 34, at xiv.

39. The George Floyd Justice in Policing Act: Hearing on H.R. 7120, 116th Cong. (2020) (Statement of Rep. John Lewis).

40. *See* DERRICK BELL, RACE, RACISM AND AMERICAN LAW 288 (6th ed. 2008) (reporting on Glen Loury, *Why Are So Many Americans in Prison? Race and the Transformation of Criminal Justice*, BOST. REV. (July 1, 2007), http://bostonreview.net/loury-why-are-so-many-americans-in-prison).

41. Loury, *supra* note 40.

42. *Id.*

43. *Id.*

44. *Id.*

fight a battle they had lost, those opponents . . . shifted attention to a seemingly race-neutral concern over crime . . . ."[45]

I found it instructive to reflect, through a number of vignettes, on my own experiences growing up black in America. I continue in this section of the Article to seek ways to break through the symbiosis between liberal democracy and racism that might be applied to the prosecutorial system that continues to be reinforced by "white fragility," "racial bonding," and implicit biases.

I grew up in New Jersey in a lower middle class household with both parents and an older sister. Urban Renewal pushed the family from Elizabeth to Edison in 1954. My high school yearbook caption read: "A combination rare and true, athlete, friend and scholar too." I earned a BA degree from Cornell University and a JD degree from Harvard Law School. I offer these personal details not for the purpose of creating context for the vignettes to follow but rather to make the point that my origins, family values, and achievements mattered very little compared to my race. It mattered less who I was than what I was. That I lived in New Jersey – as opposed to the south – is also an insignificant detail. New Jersey has been described as the "slave state of the north."[46] By 1830, New Jersey was home to two-thirds of the entire population of enslaved people in the north.[47] New Jersey opposed the Emancipation Proclamation and was the last northern state to abolish slavery.[48] Following the Civil War, New Jersey refused to ratify the Reconstruction Amendments and continues to this day to exhibit some of the worst racial disparities in the country when it comes to wealth, health and criminal justice.[49] In the area of criminal justice, the ratio of adult incarceration, black to white, is 12:1; the ratio of police encounters, black to white, is 3:1; and the ratio of the likelihood of children being locked up, black to white, is 21:1, the highest in the nation.[50]

Born in 1945, it recently occurred to me that I have been around for all or part of nine decades. While I make no claim to being precocious in

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45. *Id.*

46. George M. Point, *Curiosity Leads to Discoveries in Black History*, N.Y. TIMES (Feb. 2, 1992) https://www.nytimes.com/1992/02/02/nyregion/curiosity-leads-to-discoveries-in-black-history.html. Data that follows can be found in RYAN P. HAYGOOD ET AL., N.J. INS. FOR SOC. JUST., ERASING NEW JERSEY'S RED LINES: REDUCING THE RACIAL WEALTH GAP THROUGH HOMEOWNERSHIP AND INVESTMENT IN COMMUNITIES OF COLOR (2020), https://d3n8a8pro7vhmx.cloudfront.net/njisj/pages/689/attachments/original/1588358478/Erasing_New_Jersey's_Red_Lines_Final.pdf?1588358478#:~:text=Erasing%20New%20Jersey's%20Red%20Lines,provide%20resources%20to%20New%20Jersey's.

47. HAYGOOD, *supra* note 46, at 8.

48. *Id.* at 7.

49. *See id.*

50. *See* INCARCERATION TRENDS IN NEW JERSEY, VERA INST. OF JUST. (Dec. 2019), https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-new-jersey.pdf.

the 1940's or prescient about what might happen as we move further beyond 2021, I do have vivid race-related memories from all nine decades. For my vignettes I measure a decade, for example the 1940's, from 1941-1950. While I might begin earlier in the decade of the 1940's with stories about long car trips[51] to Virginia to visit my father's family without the benefit of the ability to stop along the way, I skip to the year 1950 when I started school. I was instructed to learn to read from a book entitled "Little Black Sambo."[52] I was chosen to read out loud because the teacher offered me to the class to better understand who – or what – was this character called little black sambo. Being the only "colored" student in the class, I knew I was different, but I also knew that I did not resemble the character in the book in appearance or behavior. John Lewis might be proud that I was willing to get into "good trouble" at such an early age by refusing to read. I spent the rest of the class session sitting in the corner. Significance for the prosecutorial system does not derive from my response but from that of my mother. Anger begets violence. My mother was absolutely ready to "go to war." Fortunately, a fair-minded school principal calmed her down before she got herself into "bad trouble." What would fair-minded prosecutors do? Assuming my mother stopped short of physically harming the teacher, they would likely have dismissed the incident as unfortunate but not worthy of prosecution. But could or should a prosecutor take a further step to challenge the root cause of the incident—in an effort to seek racial equity for a group that should not be driven to anger in such an "unacceptable way"? Would the presence of such an obnoxious book in the school system outrage them enough to orchestrate a movement among their peers to remove the book from all school systems thereby reducing the likelihood of a parent getting caught up in the criminal justice system?

I move to the decade of the 1950's with a similar story (inasmuch as it involves my mother and me). A well-known restaurant and banquet facility in Edison, New Jersey, the "Pines Manor," was once the site of swim club, the "Pines." While private, the Pines swim club had a policy that any person who participated in the town's Memorial Day parade was permitted to enter the pool and its facilities on that day. I was a 14 year old ninth-grader in the school band. When the parade ended my mother drove me to the Pines to enjoy an afternoon in the pool. I was prevented from entering while I watched my white fellow band members enter

51. The New Jersey Turnpike, for example, was not completed until 1951. *About NJTA*, N.J. TURNPIKE AUTH., https://www.njta.com/about/who-we-are (last visited June 29, 2021). We were traveling from Elizabeth, New Jersey to Culpeper and Sperryville, Virginia.

52. In 1932, Langston Hughes criticized the book as a typical "picaninny" storybook which was hurtful to Black children. David Pilgrim, *The Picaninny Caricature Archived*, FERRIS STATE UNIV. JIM CROW MUSEUM OF RACIST MEMORABILIA (2012), available at https://www.ferris.edu/HTMLS/news/jimcrow/antiblack/picaninny/homepage.htm.

through the turn style. Very quickly thereafter several police cars arrived. They insisted that we leave immediately. My mother insisted that I immediately proceed through the turnstile. It was clear in her voice that she dared anyone to touch me. I, of course, dutifully followed my mother's instructions. I heard an officer threaten to arrest my mother if she did not call me back. I will never forget her words: "If you want him out you go get him and be sure to tell him why you're making him leave." Like the fair-minded school principal in the earlier story, the fair-minded white mayor[53] arrived on the scene – probably concerned about an incident that required the attention of multiple members of the town's not very large police force. I learned from my mother later that the mayor was "outraged." Had an arrest been made would the local prosecutor also have been outraged and if he/she was outraged what action besides exercising his/her discretion not to prosecute might he/she have taken to contribute to discouraging such incidents from occurring in the future? Does the motivation for the outrage matter? The mayor, for example, was likely more outraged by the inefficient deployment of his limited police force than by the mistreatment of my mother and me. The incident did create a lasting bond between the mayor and my mother: my mother now having a go-to person for local grievances and the mayor having a loyal political supporter with influence in the town.

It is difficult to choose a single example from the decade of the 1960's. I have chosen two. First, in 1962 I turned 17 and, of course, rushed to get a driver's license. Much of my driving was on the Garden State Parkway. Leaving areas north of Edison my best route home was through the town of Clark. Rare was the occasion that I could drive through and out of Clark without getting stopped by the police. I was particularly nervous following one such stop because of the heightened hostility of the white officer. He accused me of tailgating the vehicle in front of me. I wasn't. He clearly attempted to bait me into exhibiting the anger I was in fact feeling. My rescue this time was by another white Clark police officer who fortuitously had been close enough to have observed that I had not done what I was being accused of doing. He confronted his fellow officer and while they continued to argue, he motioned for me to move on. Had the "good" cop not prevailed and I had been charged with who knows what, I can only wonder whether he might still have convinced the local prosecutor that the arrest was bogus and further that something needed to be done about local police practicing racial profiling.

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53. Anthony Yelencsics died in 1989 near the end of his sixth four-year term as mayor of the Township of Edison, New Jersey. *Obituary of Anthony Yelencsics, 67, a Mayor in New Jersey*, N.Y. TIMES (April 26, 1989), https://www.nytimes.com/1989/04/26/obituaries/anthony-yelencsics-67-a-mayor-in-jersey.html.

I offer the second vignette to make the point that the outrage that gives rise to action that ostensibly responds to abusive treatment of blacks is often more closely related to the protection of white interests. In 1966 following my junior year at Cornell University I enjoyed an internship in Washington D.C. with the U.S. Agency for International Development. Two classmates, Roger Abrams[54] and Mark Green,[55] were in D.C. as State Department and White House interns, respectively. Roger and I agreed that we would share an apartment for the summer and that he would go to D.C. before me while I participated in a track and field tour through Great Britain. Roger secured a two-bedroom apartment on upper Wisconsin Avenue directly across the street from Washington's National Cathedral. He advised management that his roommate would join him later.[56] When I arrived I was greeted with a scene that resembled my experience at the Pines swim club, only this time I did not have my mother to guide and protect me. How Roger's father arrived so quickly I do not know but his presence and a call or two to our respective employers removed the arrest threat. I was in the apartment but also in for a summer filled with nasty incidents. Roger and his father were outraged – perhaps not entirely by the mistreatment of me but also by the affront to Roger's legitimate and honest actions related to the apartment rental. During that summer, Mark Green invited Roger and me to join him at the pool associated with his suburban Maryland apartment which created yet another Pines-type event when residents called the police (after, of course, removing their children from the pool). Mark was outraged and managed, with a preview of his later formidable legal skills, to back down the police – for me or to assert his own rights and to express his own offense and embarrassment? The motivation for Roger's, Mark's or Roger's father's outrage is less important than the impact the event had on all three and their subsequent involvement in movements to reduce the likelihood of such events becoming normal in America.

My 1970's example is presented to make the point that blacks are regularly called upon to "maintain the peace" in black neighborhoods or

54. Roger Abrams is a best-selling author, law professor and former Dean of Rutgers Law School-Newark (1993-1998). He and I were classmates and fraternity brothers at Cornell University and classmates at Harvard Law School.

55. Mark Green is a best-selling author, public interest lawyer and Democratic politician. He served as Consumer Affairs Commissioner and was elected Public Advocate in the City of New York. He also won primary elections for the U.S. House of Representatives, the U.S. Senate and the office of the Mayor of New York City. Like Roger Abrams, Mark and I were classmates and fraternity brothers at Cornell University and classmates at Harvard Law School.

56. That the future occupant was a person named Holmes who was in England at the time didn't raise any red flags with management.

to "calm the waters" when anger is not curbed and violence does erupt. From 1974 to 1979 I served as Assistant Commissioner of the N.J. Department of Community Affairs. Aside from the common insult, as I traveled around the state, of being overlooked as being the boss in favor of any white staffer who might have joined me,[57] I can recall being called upon to convince a very angry "mob" of Community Action Program leaders and the Programs' beneficiaries to discontinue its action of taking over the DCA offices and holding its occupants hostage, a role commonly assigned to diverse elements of leadership in black communities. It is bad enough that African Americans are victims of the myth that racial discord equals crime, but then some are also called upon to support and defend the myth.

I will offer one final example—one from the decade of the 1980's. Following my time at the New Jersey Department of Community Affairs, I accepted the position of Executive Director of the Newark Watershed Corporation. The Watershed Corporation was charged with providing stewardship for the thirty-five thousand acre Newark-Pequannock watershed lands while allowing limited access for recreational purposes. The corporation was also responsible for advancing a land-use plan funded by the Ford Foundation.[58] As the corporation attempted to implement its limited development plan, the watershed communities[59] resisted with hostility that threatened to spill over into violence.[60] Signs I had posted inviting hunting, for example, were replaced with signs calling for "open season on coons." Similar signs were left on the windshield of my car. Numerous improved parcels within the watershed property, including a recently constructed campsite for Newark youth, were destroyed by arson fires. To whom should I have turned for support and protection? For my protection and proper investigation of the arson fires, I turned to the State police and the Newark fire department, respectively. Race Matters!

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57. Judge Bruce Wright, in his book *Black Robes White Justice,* describes a similar treatment he received when he was passed over in a hospital emergency room – in favor of a "white derelict"- when emergency room personnel were advised that a judge was waiting for medical attention. BRUCE WRIGHT, BLACK ROBES, WHITE JUSTICE 24–25 (1990).

58. The Ford Foundation-sponsored study supported the position that some parts of the expansive Pequannock Watershed lands could be developed without endangering the water supply.

59. The thirty-five thousand contiguous acres constituting the Newark Pequannock Watershed covered parts of five municipalities (W. Milford Twp.; Kinnelon Boro; Jefferson Twp; Hardyston Twp.; and Vernon Twp.) in three counties.

60. Watershed communities were enjoying the benefits of having it both ways: taxing municipal-owned watershed lands as if they were developable while at the same time assigning excessively restrictive zoning designations to the same lands.

II. SHIFTING POWER

A. *From the Outside: The Role of Social Movements*

As originally enacted, the United States Constitution reserved a direct role for We the People in its interpretation and enforcement. Based on their own experience, the founders placed far more reliance on the constitutional sensibilities of ordinary citizens than on judicial review. If government were to abuse the liberties of the people, then We the People would correct the problem either by voting or, if that did not suffice, by exercising our right of assembly and enforcing the Constitution ourselves. Professor James Gray Pope[61]

Social movements have over the course of American history been effective in their attempt to persuade others of their views and thereby bring about social change. As evidence of this fact we can look at the effects of the civil rights movement, the labor movement, the women's rights movement, and the gay and lesbian rights movement. I am guided in this part of the discussion by an unpublished article by my colleague, James Gray Pope, who explores *The Role of Social Movements in Constitutional Interpretation and Enforcement.* While Professor Pope focuses on the power – and legitimacy – of social movements to interpret and enforce the Constitution, he contends that "constitutional movements usually go further. Instead of respectfully petitioning for changes in the official law, they implement movement interpretations in the here and now."[62] He offers as examples of this assertion the Boston Tea Party, free-speech fights of the early twentieth century, the sit-down strikes of the 1930's, the sit-ins of the 1960's, the abortion clinic blockades of recent decades, fugitive slave rescues, the early suffragists' efforts to vote, and the invasion of bars by temperance activists among others.[63] Professor Pope goes on to remind the reader that not all social movements are successful, but that they might "persist in such activities even after their interpretations have been rejected by the Supreme Court."[64] In this grouping of social movements he includes abolitionist constitutionalists, labor unionists, proponents of gay and lesbian rights, and pro-life activists.[65] These movements, he contends, "persevered in implementing their interpretations after the Supreme Court decisively rejected them."[66]

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61. James Gray Pope, *The Role of Social Movements in Constitutional Interpretation and Enforcement* (unpublished manuscript).

62. *Id.* at 3.

63. *Id.* at 3–4.

64. *Id.* at 4.

65. *Id.*

66. *Id.*

He goes on to say, "these movements struggled not merely to influence courts and other governmental actors, but also to establish their claimed rights directly, on the ground."[67] When they succeed, "the courts' role may be reduced to the recognition of a pre-existing constitutional settlement."[68]

A number of social movements are currently bucking the forces of existing law and cultural norms. Included among them would be the Black Lives Matter Movement, an international social movement founded in the United States in 2013 and dedicated to fighting racism and anti-Black violence, especially in the form of police brutality.[69] This grouping would also include the March for Our Lives Movement created by teenage victims of a mass shooting at the Parkland School and dedicated to harnessing "the power of young people across the country to fight for sensible gun violence prevention policies that save lives,"[70] and a social movement to protect and preserve voting rights for African Americans that were achieved through significant struggle and personal sacrifice. In lieu of pushing for a new social movement to change official laws governing the behavior of prosecutors, perhaps activists in the Black Lives Matter Movement can be encouraged to expand the scope of their movement to include fighting racism and anti-black violence (in the form of unfair prosecutions, unfair convictions and excessively lengthy incarceration) in the form of prosecutor misconduct and abuse of power.

Notwithstanding James Madison's warning that allowing pressure from citizens in self-interested groups – otherwise known as "factions" – would lead to the undoing of the proposed new representative democracy, overall the Founding Fathers did reserve a direct role for "We The People" in checking abuses of the liberties of the people.[71] Against the reality that for every social movement there will likely be a counter movement, having prosecutors add their individual voices to the cause of

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67. *Id.*

68. *Id.*

69. *See About*, BLACK LIVES MATTER, https://blacklivesmatter.com/about/ (last visited Aug. 31, 2021).

70. *Mission & Story*, MARCH FOR OUR LIVES, marchforourlives.com/mission-story (last visited June 28, 2021).

71. JAMES MADISON, THE FEDERALIST No. 10 (1787); *see also* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 24–29, 44–49 (2004); Larry D. Kramer, *The Supreme Court: 2000 Term,* Foreword: *We the Court,* 115 Harv. L. Rev. 4, 71–74 (2001); JAMES MADISON, THE FEDERALIST No. 46 (1788) (stating that governmental checks and balances "are neither the sole nor the chief palladium of constitutional liberty. The people who are the authors of this blessing must also be its guardians."); ALEXANDER HAMILTON, THE FEDERALIST No. 60 (1788) (an attempt by the federal government to make improper use of its power to regulate elections would cause "an immediate revolt of the great body of the people.").

upending racism in the prosecutorial system would go a very long way to meeting the threshold of "We the People."

B. *From the Inside: Bully Pulpit of the United States Attorney General*

We need lawyers as litigators and advocates, but their highest calling is "problem solving and peacemaking."[72] It is easy to conclude that little positive impact can be expected in the area of building an anti-racist prosecutorial system from the top down when the Attorney General of the United States is heard to say "I don't think there are two justice systems for Black and white Americans."[73] "I don't agree [that] there is systemic racism in police departments generally in this country."[74] On the other hand, going back to the Clinton Administration and the tenure of the nation's first female Attorney General, Janet Reno, some hope can be placed in use of the bully pulpit to increase the level of social justice in the criminal justice system. Reno proclaimed for all to hear that she considered the highest calling of lawyers – including prosecutors – to be "problem solving" and "peacemaking."[75] She called upon all lawyers to see their role as to "serve the people and solve their problems, rather than just winning their cases . . . ."[76] These are words from a person who was herself a strong-minded prosecutor in a tough area in the state of Florida. While in that position, she launched innovative programs designed to steer non-violent drug offenders away from jail and she espoused the rights of criminal defendants.[77] During her tenure as a local prosecutor she was also accused of being anti-police when she moved to prosecute

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72. Roger Conner, *Community Oriented Lawyering: New Approach for Public Sector Lawyers*, 8 PUB. LAW. 2, 3 (Summer 2000) (quoting U.S. Attorney General Janet Reno).

73. Caitlin Oprysko, *Barr: 'I Don't Think There are 2 Justice Systems' for Black and White Americans*, POLITICO (Sept. 2, 2020, 7:34 PM), https://www.politico.com/news/2020/09/02/barr-race-justice-system-407929.

74. Reuters, *William Barr: 'I Don't Agree There is Systemic Racism in Police Departments' – video*, GUARDIAN, (July 28, 2020, 1:28 PM), https://www.theguardian.com/us-news/video/2020/jul/28/william-barr-i-dont-agree-there-is-systemic-racism-in-police-departments-video. We might also consider in these regards the reputation of Jefferson "Jeff" Sessions who served as U.S. Attorney General from 2017 to 2018. For example, while state Attorney General in Alabama, Sessions in 1981 was reluctant to prosecute Klansmen believed (in fact known) to have committed the heinous crime of lynching 19 year old Michael Donald. *See* Adam Serwer, *What Jeff Sessions's Role in Prosecuting the Klan Reveals About His Civil-Rights Record*, ATL. (Jan. 9, 2017), https://www.theatlantic.com/politics/archive/2017/01/sessions-kkk-case/512600/.

75. *Community Oriented Lawyering*, *supra* note 72.

76. *Janet Reno's Address to the American Association of Law Schools*, https://www.justice.gov/archive/ag/speeches/1999/aals.htm (last visited Aug. 31, 2021) (internal quotation marks omitted).

77. Carl Hulse, *Janet Reno, First Woman to Serve as U.S. Attorney General, Dies at 78*, N.Y. TIMES (Nov. 7, 2016), https://www.nytimes.com/2016/11/08/us/janet-reno-dead.html.

five Miami police officers in the beating of a black insurance executive following a routine traffic stop.[78] Her response to the street violence that followed acquittal of the officers in that case was to reach out to the black community to address the community's concerns about the general state of racial injustice in the Miami area. Following her tenure as Attorney General – the longest in U.S. history – Janet Reno continued to espouse the rights of the criminally accused and further sought to protect those rights as a member of the Board of Directors of the Innocence Project. For all of her contributions to the lofty mission of reshaping the legal profession away from success defined in terms of winning cases and more toward serving communities and solving their problems, we continue today to seek ways to upend the status quo of racial injustice in our criminal and juvenile legal systems.

Perhaps prompted by the pull of unfinished business, or responsive to the urging of Rev. Jackson to "keep hope alive," I look ahead to what we might expect from the newly appointed U.S. Attorney General, Merrick B. Garland. Beginning the inquiry with only a nominal level of hope or expectation that Garland will, or even can, influence whether the status quo of racial injustice in the criminal justice system will be perpetuated or upended, a cursory review of his record as a judge in the D.C. Circuit Court of Appeals lowers both my expectation and my hope in these regards. The following comments are taken from the ACLU Report on the Nomination of Judge Merrick B. Garland:[79]

- With respect to cases he decided involving the Fourteenth Amendment, "opinions make it clear that he is reluctant to second-guess the decisions made by law enforcement and is deferential to lower courts findings of fact."[80]
- With respect to sentencing, his "decisions. . . demonstrate a pro-prosecution perspective."[81]
- With respect to Miranda rights, he "demonstrated a government bias."
- With respect to exculpatory evidence, he "most often sided with the prosecution."[82]

78. *Id*.

79. ACLU, REPORT ON THE NOMINATION OF JUDGE MERRICK B. GARLAND TO BE ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT (Apr. 7, 2016), aclu.org/other/aclu-report-supreme-court-nominee-judge-merrick-b-garland.

80. *Id*. at 10.

81. *Id*. at 17.

82. *Id*. at 22.

On the other hand, given his personal understanding of racial oppression and injustice through his experience with anti-Semitism and his apparent understanding of the unique relationship of communities of color to the criminal justice system – as evidenced by his use of the words racial equity as opposed to racial equality – I am willing to keep hope alive that General Garland will at least make a sincere attempt to contribute to upending racial injustice in the nation's criminal justice system.

III. PROSECUTORS' ACCOUNTABILITY AS MEMBERS OF THE LEGAL PROFESSION

> Prosecutors have an overall duty to pursue justice and have a responsibility to use their discretion to help eradicate the discriminatory treatment of African Americans in the criminal Justice system. Angela Davis[83]
>
> *The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.* ABA Standing Committee on Ethics and Professional Responsibility, Prosecutor Function, Function and Duties of the Prosecutor.[84]

With the monopoly granted to the legal profession with respect to the practice of law, comes the privilege to be self-regulated and the corresponding responsibility to act in an ethical manner. Prosecutors are lawyers and are, therefore, subject to rules governing lawyers' professional conduct no less so than lawyers in private practice. Rules specifically intended to regulate the behavior of prosecutors can be easily enumerated as can rules of general applicability to prosecutors in their capacity as lawyers.

Two Supreme Court cases continue to provide the most fundamental parameters of prosecutorial accountability. In *Brady v. Maryland*,[85] the court held that the government's withholding of evidence that is material to the determination of either guilt or punishment of a criminal defendant violates the defendant's constitutional right to due process. In Kyles v. Whitley,[86] the court upheld and repeated the *Brady* decision and added the principal that prosecutorial withholding of exculpatory

83. See BELL *supra* note 5, at 287-88 (quoting ANGELA DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007)).

84. ABA, CRIMINAL JUSTICE STANDARDS, PROSECUTION FUNCTION (2017), available at https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/.

85. 373 U.S. 83, 87 (1963).

86. 514 U.S. 419, 432 (1995).

evidence was a violation of the defendant's constitutional right to due process, "irrespective of the good faith or bad faith of the prosecutor."

The Model Rules of Professional Conduct provide even broader standards for accountability.[87] Under Rule 3.8(d), for example, the U.S. Supreme Court's principle that prosecutors are required to disclose evidence to the defense that is materially favorable to the defendant's case is repeated except without the materiality requirement.[88] Model Rule 3.8(a) is relevant and significant in these regards with its emphasis on the principle that prosecutors may not prosecute a charge the prosecutor knows is not supported by probable cause.[89] This rule might come into play, for example, in instances in which the trial court enters an order suppressing evidence that bars a finding of probable cause. In such instances, under Rule 3.8(a) the prosecutor would be required to dismiss the case.

Prosecutorial misconduct might also be tested under Model Rule 3.3, entitled "Candor to the Tribunal[.]"[90] This Rule might be invoked, for example, to challenge a prosecutor's misrepresentation of a defendant's prior record at a sentencing hearing. Model Rule 3.6 might be invoked to discipline a prosecutor for making an extrajudicial statement that the prosecutor would expect to be disseminated by means of public communication when the prosecutor knows or should reasonably know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Finally, Model Rules 8.4 and 8.3 should be part of the arsenal of tools to sanction prosecutors for acts of misconduct or abuse of discretion. The former states that "it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation" or to engage in "conduct that is prejudicial to the administration of justice."[91] The Rule goes on to state that it is also professional misconduct for a lawyer to engage, in a professional capacity, in conduct involving discrimination because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap, where the conduct is likely to cause harm."[92] Model Rule 8.3 requires any lawyer who observes misconduct under Rule 8.4 to report the misconduct to "the appropriate

87. The rules, comments and examples that follow can be found at MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2020), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/.

88. MODEL RULES OF PRO. CONDUCT r.3.8(d), 8.4(c)–(d) (AM. BAR ASS'N 2020).

89. MODEL RULES OF PRO. CONDUCT r.3.8(a).

90. MODEL RULES OF PRO. CONDUCT r.3.3.

91. MODEL RULES OF PRO. CONDUCT r. 8.4(c)–(d).

92. MODEL RULES OF PRO. CONDUCT r. 8.4(g).

professional authority.[93] I can report from my personal experience serving a four-year term on the New Jersey Supreme Court Disciplinary Review Board that not a single among the hundreds of disciplinary cases I heard was brought against a prosecutor.

In addition to endorsing the Model Rules of Professional Conduct, the ABA has developed and promulgated a set a Criminal Justice Standards in part directed specifically at the Prosecution Function.[94] While encouraging in their emphasis on conduct that would discourage, if not outright prohibit, prosecutorial misconduct or abuse of discretion, the ABA standards make clear the fact that the Standards are merely aspirational and recommendations for "best practices" and not "intended to serve as the basis for the imposition of professional discipline, to create substantive or procedural rights for the accused or convicted persons, to create a standard of care for civil liability or to serve as a predicate for a motion to suppress evidence or dismiss a charge."[95] The standards are, therefore, expressed in terms of "should" or "should not" and not in terms of "shall" or "shall not." Nonetheless, it is instructive to note some of the language in the ABA standards regarding the prosecution function. Were the Standards enforceable, for example, our search for a way to upend racism in the prosecutorial system could well end here:

Standard 3-1.2: Functions and Duties of the Prosecutor:

- "The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict."[96]
- "The prosecutor's office should be available to assist community efforts addressing problems that tend to, or result from criminal activity or personal flaws in the criminal justice system," and "the prosecutor should make use of ethical guidance offered by existing organizations."[97]
- "The prosecutor is not merely a case-processor but also a problem solver responsible for considering broad goals of the criminal justice system."[98]
- "The prosecutor should be knowledgeable about, consider, and where appropriate develop or assist in developing

93. MODEL RULES OF PRO. CONDUCT r. 8.3(a).
94. *See* PROSECUTION FUNCTION, *supra* note 84, at Standard 3-1.2.
95. *Id.*
96. *Id.* (a).
97. *Id.* (e), (d).
98. *Id.* (f).

alternatives to prosecution or conviction that may be applicable in individual cases or classes of cases."[99]

Standard 3-1.3: The Client of the Prosecutor:

- "The prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim."[100]

Standard 3-1.6: Improper Bias Prohibited:

- "The prosecutor should not manifest or exercise, by words or conduct, bias or prejudice upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status."[101]
- "A prosecutor's office should be proactive in efforts to direct, investigate, and eliminate improper biases like race, in all of its work. A prosecutor's office should regularly assess the potential for biased or unfairly disparate impacts of its policies in communities within the prosecutor's jurisdiction and eliminate those impacts that cannot be properly justified."[102]

Standard 3-1.12: Duty to Report and Respond to Prosecutorial Misconduct:

- "The prosecutor's office should adopt policies to address allegations of prosecutorial misconduct, including violations of law, by prosecutors. At a minimum such policies should require internal reporting of reasonably suspected misconduct to supervisory staff within the office, and authorize supervisory staff to quickly address the allegations. Investigations of allegations within the prosecutor's office should be handled in an independent and conflict-free manner."[103]

Standard 3-4.4: Discretion in Filing, Declining, Maintaining, and Dismissing Criminal Charges:

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99. *Id.* (e).
100. *Id.* 3-1.3.
101. *Id.* 3-1.6.
102. *Id.*
103. *Id.* 3-1.12.

- "In order to fully implement the prosecutor's function and duties, including the obligation to enforce the law while exercising sound discretion, the prosecutor is not obliged to file or maintain all criminal charges which the evidence might support."[104]
- "Among the factors which the prosecutor may properly consider in exercising discretion to initiate, decline, or dismiss a criminal charge, even though it meets the requirements of Standard 3-4.3 are:
    - The extent or absence of harm caused by the offense;
    - Any improper conduct of law enforcement;
    - Unwarranted disparate treatment of similarly situated persons;
    - The possible influence of any collateral, ethnic, socioeconomic or other improper biases."[105]

In 2018 Governor Andrew Cuomo signed into law creation of the nation's first prosecutor misconduct commission.[106] The eleven-member commission was designed to look into misconduct claims against New York State District Attorneys and their assistants.[107] It enjoyed power to censure or admonish a prosecutor and the power to recommend to the governor that a prosecutor be removed.[108] In a lawsuit brought by The District Attorneys Association, the law was struck down as unconstitutional by acting Supreme Court Justice David Weinstein.[109] In judge Weinstein's opinion, the statute violated the separation of powers and impermissibly interfered with fundamental law enforcement functions and prosecutor discretion.[110] The judge further ruled that the need for a new four-member Appeal panel to hear appeals from commission decisions was also unconstitutional under the state constitution.[111]

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104. *Id.* 3-4.4.
105. *Id.*
106. *See* Jon Campbell, *New York Had a Law to Investigate Prosecutors. Why a Judge Just Tossed It*, DEMOCRAT & CHRON. (June 17, 2021, 10:31 PM), https://www.democratandchronicle.com/story/news/politics/albany/2020/01/29/judge-throws-out-new-york-panel-review-district-attorney-misconduct/4608152002/.
107. *Id.*
108. Ryan Tarinelli, *New York Judge Strikes Down Prosecutor Misconduct Commission*, NBC N.Y. (Jan. 29, 2020, 5:11 PM), https://www.nbcnewyork.com/news/local/new-york-judge-strikes-down-prosecutor-misconduct-commission/2271937/.
109. *See id.*
110. *Id.*
111. Campbell, *supra* note 106.

IV. LESSONS FROM THE WORLD OF PRIVATE FOUNDATIONS

> I want to use the platform of being president of the Ford Foundation to really deeply interrogate the structure and systems and cultural practices in our country that increase the likelihood of more inequality in our society and of more exclusion and marginalization of people, particularly low-income people, people of color. Darren Walker[112]

Author, and former columnist for *The New York Times*, Anand Giridharadas, in his highly acclaimed book, *Winners Take All: The Elite Charade of Changing the World,* provides us with a view of philanthropy and philanthropists as "[clinging] to a sincere if dubious belief that what's best for humanity happens to be what's best for them."[113] Sound like the prosecutorial system, where winning cases is the only definition of success? Using the Sackler family's undeniable contribution to a global opioid epidemic, Giridharadas offers for consideration the question of whether philanthropists are obliged not only to contribute to solutions but also to answer about their role in causing the problems. Like the Sacklers' eventual generosity, prosecutors otherwise imposing success at winning criminal cases may reasonably be characterized as a cover-up for the role the prosecutorial system plays in creating, or at least perpetuating, the very social problems they purport to solve. Such actors can be said to be ready to do more good but nevertheless harm. Consistent with the view of social change earlier ascribed to scholars like Richard Marsico, Giridharadas concludes that "we need a change in how we seek change – and a massive transformation in our power structure."[114]

Like many other elements of society, motivated by troubling evidence of repulsive examples of racial injustice and racial inequality in America's criminal justice system, prominent private foundations have recently moved into a strategic planning mode to find ways to foster an anti-racist culture and vision. Perhaps the prosecutorial system should consider doing the same. Foundations begin the process by posing guiding questions. For example, they might ask, who is the audience;

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112. *See* ANAND GIRIDHARADAS, WINNERS TAKE ALL: THE ELITE CHARADE OF CHANGING THE WORLD 170 (2018).

113. *Id.* (text found on original book cover).

114. Giridharadas describes Darren Walker's approach to philanthropy, embedded in his article "Toward a New Gospel of Wealth," and distinguishes that approach from Andrew Carnegie's earlier published "Gospel of Wealth." *See id.* at 176-77. Carnegie's approach is built upon the Machiavellian philosophy that "the end justifies the means"—that is, it doesn't matter what harm you may have caused on your path to becoming wealthy so long as you share the wealth once obtained. *See id.* Walker's approach would hold a person who becomes wealthy responsible for harm that person may have caused on the wealth building path.

what are the behaviors we want to activate in our intended audiences; and how will we be held accountable for our actions under the new business paradigm? Prosecutors might answer: we seek to reach law abiding citizens and cause them to have a greater trust in our interest in serving their communities in ways they value; and we will police and regulate ourselves in keeping with these goals.

Prosecutors would next organize a Statement of Values. They might, for example, place value on generating outcomes that the community values; on imbuing diverse communities with a feeling of trust that the prosecutorial system functions in the communities' best interest; that the prosecutorial system recognizes the inherent worth and dignity of all individuals; that the system reimagines traditional practices to innovatively support local visionaries; and that the system is committed to building an equity-centered internal culture and to actively contributing to the dismantling of structural racism in whatever areas are within the reach of the prosecutorial system's power. From this, an overall Vision Statement might read: the prosecutorial system envisions a society that experiences less crime and thereby less incarceration of criminals, including unjust incarcerations. To support and advance its new values, the prosecutorial system might adopt a Mission Statement that reads: America's prosecutorial system works to reduce the need for incarceration and the too frequent occurrence of unjust incarceration by redefining its definition of success from simply winning cases to solving, or at least reducing the severity, of a community's problems.

A few examples can be offered to illustrate how private foundations are seeking ways to foster an anti-racist culture and vision. The Marguerite Casey Foundation is a $700,000,000 private foundation founded in 2001 in Seattle, Washington.[115] The foundation presents as its mission and motto that [it] "supports leaders who work to shift the balance of power in their communities toward working people and families and who have the vision and capacity for building a truly representative society."[116] The foundation's Value Statement includes the following: "we are intentional and vigilant in identifying and undoing racism and white supremacy on every level in order to create an environment where acceptance, dignity, and justice are experienced by all; we recognize the inherent value of people and relationships."[117] The Value Statement also notes that the Foundation members are "direct and timely in our communication and treat everyone with care and humility;

115. *Who We Are*, MARGUERITE CASEY FOUND. https://www.caseygrants.org/who-we-are (last visited Nov. 3, 2021).

116. *Id.*

117. *Id.*

and we show and earn trust through honesty, transparency, and being responsible for our actions, words, attitudes, and follow-through."[118]

The Akonadi Foundation, a relatively small family foundation founded in 2000 in Oakland, California, describes the foundation's mission as [supporting] "the development of powerful social change movements to eliminate structural racism."[119] The foundation's vision reads, "a racially just Oakland – where young people of color have the support systems they need to thrive in schools and communities."[120] And the foundation offers among its values that "we invest in racial justice organizing and policy advocacy that will lead to enduring systems change, with a strategic emphasis on ending criminalization of Black youth and youth of color in Oakland and Alameda County."[121] The Foundation also notes that they "believe it is critical to support movements led by people of color who are invested in power-building, organizing, litigating cultural expressing and strategic narrative change efforts to achieve racial justice; and we invest in and support community power to redesign systems to be just and equitable for all."[122]

Another place-based foundation, The Horning Family Foundation, has as its vision, "we envision a just and equitable Washington, DC in which all Black children and families thrive." The foundation's mission calls for the organization to "[partner] with organizations and community led-efforts to strengthen the movements for individual and institutional change that build power, transform systems and achieve racial justice for Black children and their families."[123] The foundation's Statement of Values or Core Beliefs are worth setting forth in detail:

> **Justice and Power**
>
> We acknowledge the inherent tension between our origins as a white foundation and the harm of centering on our whiteness. We recognize that we benefit from the long history of white supremacy and its intention to oppress Black, indigenous and other people of color. Justice requires a realignment of power. We share and cede our individual and foundation power as we are led by the ideas, innovations, and aspirations of those who are most adversely affected by racial injustice. Direct services help

118. *Id.*
119. *Mission and Vision*, AKONADI FOUND., https://akonadi.org/about/mission-values/ (last visited Nov. 3, 2021).
120. *Id.*
121. *Id.*
122. *Id.*
123. *About*, HORNING FAMILY FOUND., https://www.horningfamilyfund.org/about/mission (last visited Nov. 3, 2021).

> mitigate the effects of inequity for individuals, but community organizing, advocacy and leadership development are essential elements in creating systemic change and achieving justice.
>
> **Equity**
>
> Racial, economic and social inequities are the cumulative result of discriminatory policies and practices that most adversely affect Black people and other people of color. By intentionally focusing on anti-black racism and by reimagining and creating new equitable policies and practices, including within our foundation, we believe that racial equality can be achieved for all.
>
> **Collaboration**
>
> The movement for sustainable system change and racial justice requires the coordinated efforts of community members, non profits, business, government, and philanthropy; a deep understanding of the unique ways that each of us can contribute to the effort; and a commitment to collectively evaluate our efforts. Together we can create far better outcomes that any one of us can achieve on our own.
>
> **Continuous Learning**
>
> Advancing racial justice and equity requires a long-term commitment to continuous learning and growth as individuals and as a foundation. We value and promote learning in partnership with others and with the members of our family – including the next generations - as an essential part of the foundation's role in advancing justice and equity.[124]

While the prosecutorial system can, if it is so inclined, learn a great deal from the world of philanthropy about how to move in the direction of being characterized as anti-racist, inasmuch as prosecutors are lawyers, a more fitting model for learning and possible emulation can be found in the world of community lawyers.

V. COMMUNITY-ORIENTED LAWYERING

Communities know best what communities need.[125] Michael Wright

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124. *Id.*

125. Michael Wright, *Reversing the Prison Landscape: The Role of Drug Courts in Reducing Minority Incarceration*, 8 RUTGERS RACE & L. REV 79, 86 (2006).

Successful community lawyering has just as much to do with process as it does with outcome, and when one values community, process becomes critical. Christine Zuni Cruz[126]

Community-oriented lawyering has been succinctly described as "practicing law, within the limits of professional responsibility, to generate more outcomes the community values; tends to involve a proactive problem-solving approach and extensive collaboration with agencies outside the given lawyer's office, in addition to vigorous advocacy in particular cases; thought by some to be in conflict with the proper role of lawyers…and by others to be the very definition of excellence in the practice of law."[127]

A Summer 2000 article in *the Public Lawyer* provides a comprehensible comparison of the prosecutorial culture and approach to lawyering and the culture and approach of so-called community-oriented lawyers.[128] The article describes the "unit of work" as being different.[129] Prosecutors define their work in terms of crimes, cases and complaints; community-oriented lawyers in terms of people, problems and relationships.[130] The article suggests, for example, that community-oriented lawyers would think beyond an individual drug sale to the drug market itself and beyond the nuisance action to a strategy for redeveloping a house or block.[131] The "definition of success" is different.[132] Typically, for a prosecutor, success is defined in terms of winning cases and upholding the law.[133] For a community-oriented lawyer, success is defined as reducing the severity of a community's problem and generally improving the lives of individuals living in the community, for example by increasing neighborhood safety or preventing crime.[134] The "relationship to the community" is different.[135] For prosecutors, communities are a source of clients and witnesses, the prosecutors' constituencies.[136] A community-oriented lawyer looks to the community as a partner to influence priorities and to help define success.[137] A

126. Christine Zuni Cruz, *Community Lawyering in Indigenous Communities*, 24 AM. INDIAN L. REV. 229, 235 (1999).

127. *Community Oriented Lawyering*, *supra* note 72, at 2; *see also* Roger Conner, *An Emerging Approach to Legal Practice*, http://www.ncjrs.gov/pdffiles1/jr000242e.pdf (last visited July 5, 2021).

128. *See generally Community Oriented Lawyering*, *supra* note 72.

129. *Id.* at 5.

130. *See id.*

131. *Id.*

132. *Id.*

133. *See id.*

134. *Id.*

135. *Id.*

136. *See id.*

137. *Id.*

lawyering approach focused on problem solving and generating outcomes beyond winning cases would necessarily require prosecutors to cede power to the communities they serve as well as to other organizations and agencies both public and private.[138] The "tool kit" is different.[139] For a prosecutor, the tool kit consists of the power to investigate, negotiate and litigate.[140] For community-oriented lawyers, the tool kit is much larger and would include training, civil remedies, negotiated voluntary compliance, and encouraging agency cooperation, including, for example, community courts.[141] Finally, the article suggests that the "key question" is different.[142] Prosecutors will ask "what happened?" in an attempt to assign responsibility for what has happened; community-oriented lawyers will ask "what's happening?" to reshape what will happen.[143]

How community-oriented lawyering can be put into practice can be presented and understood through descriptions of the lawyering approach provided by a number of scholars. According to Professor Michael Diamond, for example, because the chronic problem that exists in low-income communities is not strictly legal, the lawyer must be an activist participating in social, economic and political aspects of the community, and "not merely a technical adjunct."[144] "Such a role facilitates problem solving and empowers the client."[145]

Community-oriented lawyering has been defined by different names by different scholars and takes different forms. Community-oriented lawyering has, for example, been called "rebellious lawyering" (an influential form of collaborative lawyering) by some scholars.[146] In *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice*, Professor Gerald Lopez describes the theory and practice of community-based lay lawyering which empowers poor people to solve their own problems.[147] According to Professor Lopez, lawyers should teach clients self-help and lay lawyering which results in their empowerment because it shows clients that they can help themselves even in legal contexts.[148]

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138. *Id.*
139. *Id.*
140. *Id.* at 3-5.
141. *See id.*
142. *Id.* at 5.
143. *Id.*
144. See Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67, 73–76 (2000).
145. *Id.* at 73.
146. *See, e.g.*, Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLINICAL L. REV. 147, 161 (2000) (citations omitted).
147. *See* Daniel S. Shah, *Lawyering for Empowerment: Community Development for Social Change,* 6 CLINICAL L. REV. 217, 217 n.1 (1999).
148. *Id.*

"Empowered clients can begin to speak in their own voice— and to solve their own problems – without relying on the advocacy of lawyers."[149]

Professor Juliet M. Brodie identifies community-oriented lawyering as a "social justice lawyering" practice that places its commitment to the community.[150]

Community-oriented lawyering has also been called "poverty lawyering" or "reconstructive poverty lawyering."[151] Professor Anthony V. Alfieri's version of "poverty lawyering" urges community-oriented lawyers to learn about the community neighborhoods in which they work – from the neighbors.[152] He emphasizes the importance of client narratives and opines that "in poverty law advocacy, the integrity of a client's story stems from the revelations and integration of client voices and narratives in lawyer storytelling."[153] When the client's voices are silenced and displaced by the lawyer's narratives, "client integrity is tarnished and client story is lost."[154] He proposes a new interpretive paradigm that requires new methods of interviewing, counseling, investigation, negotiation, and litigation capable of integrating client empowering narratives into lawyer storytelling.[155] These methods, according to Professor Alfieri, must be "ploughed up from lawyering traditions."[156]

Richard D. Marsico calls community lawyering "facilitative lawyering" and emphasizes the importance of the authenticity of the engagement with the community.[157] For Professor Marsico the facilitative lawyer is more like a corporate counsel, performing important supportive tasks, but leaving the client intact.[158]

Professor Michael Wright opines that community-oriented lawyering originates from the concept that "communities know best what communities need."[159] He notes that this approach to lawyering particularly helps the low income neighborhood to voice its concerns and

149. Angelo N. Ancheta, *Community Lawyering,* 81 CAL. L. REV. 1363, 1374 (1993) (reviewing GERALD P. LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VIEW OF PROGRESSIVE LAW PRACTICE (1992)).

150. *See* Juliet M. Brodie, *Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-based Community Lawyering Clinics,* 15 CLINICAL L. REV. 333, 333–39 (2009).

151. *See, e.g.,* Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative,* 100 YALE L.J. 2107 (1991).

152. *Id.* at 2119.

153. *Id.*

154. *Id.*

155. *Id.* at 2140.

156. *Id.* at 2147.

157. Richard D. Marsico, *supra* note 31, at 658.

158. *Id.*

159. Michael Wright, *Reversing the Prison Landscape: The Role of Drug Courts in Reducing Minority Incarceration*, 8 RUTGERS RACE & L. REV. 79, 86 (2006).

effect change.[160] His model provides the community with organizational and legal tools helping to build associations, corporations, and community-owned businesses.[161]

Professor David Dominguez believes that community-oriented lawyering involves empowering poor communities to assert themselves as problem solvers through joint-gain negotiation among themselves and with community agencies and public officials.[162] According to Professor Dominguez, low-income residents should tackle the challenges they encounter, and community lawyers should act as a catalyst to help these clients find "their group voice in public settings."[163]

Professor Christine Zuni Cruz advocates that lawyering is effective when the lawyers understand the community, its culture and peoples' goals coupled with the belief that the community is capable of their own representation.[164] Professor Cruz believes that successful community lawyering entails both the process of lawyering and the outcome achieved.[165] She emphasizes the criticality of the lawyering process as she believes that "community lawyering is about self-determination, both for the community and the individual, about recognizing traditional norms and practice, and about valuing relationships."[166]

Professor William Quigley defines community lawyering as "empowerment lawyering" and notes that the "purpose of empowerment lawyering with community organizations is to enable a group of people to gain control of the forces which affect their lives."[167] This requires joining the persons represented rather than leading them.[168] For Professor Quigley, the primary goal of lawyering is building up the community.[169] He notes that "lawyering involves not advocacy for individual interests, but advocacy with a group of people organized to reclaim what is rightfully theirs, their own power."[170] He goes on to remind his readers that lawyers are not organizers.[171] I have, in an earlier writing, expressed the view that the role of a community organizer and the role of a

160. *Id.* at 87.
161. *Id.*
162. David Dominguez, *Community Lawyering*, UTAH BAR J. 31–35 (May 2004).
163. *Id.* at 32.
164. Christine Zuni Cruz, *[On the] Road Back in: Community Lawyering in Indigenous Communities*, 24 AM. INDIAN L. REV. 229, 235 (1999).
165. *Id.*
166. *Id.*
167. William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N. UNIV. U.L. Rev. 455, 455–56 (1994).
168. *Id.* at 456.
169. *Id.* at 464–478.
170. *Id.* at 472.
171. *Id.* at 456.

community-oriented lawyer are mutually exclusive.[172] I see the clash manifested most acutely in the areas of confidentiality and conflicts of interest due to the following common practices among community lawyers: i) community lawyers are almost always involved in multiple contexts in the communities in which they work; ii) community lawyers will instinctively seek to create partnerships and other collaborations among diverse community interests in order to maximize the impact of their work; iii) community lawyers will often have a reason to publicize and promote the substance of their work with community groups.

Professor Shin Imai notes that there are three core skills necessary for successful community lawyering: collaborating with members of the community—by establishing a less hierarchical structure; acknowledging personal identity, race and emotion for a better understanding of individual situations; and taking a community perspective on legal problems.[173]

Another group of scholars touch on similar themes for community lawyering. Professor Lucie E. White examines the relationship between attorney and client in situations in which legal remedies are to a large extent non-existent.[174] She argues for a change-oriented lawyering method that "presumes that social subordination penetrates into the consciousness of the disempowered and directs its efforts at empowering clients will be more effective in achieving multi-dimensional emancipation."[175] According to this model, the lawyer and the client collaborate in an interactive and non-hierarchical manner to "challenge the patterns of domination."[176] Problems and remedial options are presented by both the attorney and other members of the group. Decisions regarding proposed actions are a result of deliberation of the entire group. In another article, Professor White acknowledges that community lawyering can be very difficult because it requires staying in for the long haul and "a mix of hope, shrewdness, and patience."[177]

Professor Sheila R. Foster and Professor Brian Glick refer to community lawyering as "integrative lawyering."[178] They contend that "community lawyers need to work 'integratively' in two interconnected

172. Robert C. Holmes, *Coming into Community Within the Rules of Professional Responsibility,* presented but not published (2006).

173. Shin Imai, *A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering,* 9 CLINICAL L. REV. 195, 200–01 (2002).

174. Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 699 (1988).

175. *Id.*

176. *Id.* at 763.

177. Lucie E. White, *Facing South: Lawyering for Poor Communities in the Twenty-First Century*, 25 FORDHAM URB. L.J. 813, 824 (1998).

178. Sheila R. Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CAL. L. REV. 1999, 2005 (2007).

ways: 'role integration' and 'organizational integration.'"[179] At the level of role integration, "lawyers, like their client, need to integrate a broad range of practice areas, skills, and roles when seeking to build/enhance community efficacy."[180] At the "level of organizational integration, they also need to ensure that their work is thoroughly integrated into the overall strategy, programs, and processes of community-based organizations so that their lawyering ties closely with an organization's efforts to build community capacity and power."[181]

CONCLUSION

And so what, if anything, can be recommended to move toward building an anti-racist prosecutorial system? Existing safeguards against prosecutor misconduct and abuse of power both seem to fall short of meeting this challenge. They include, for example, better judicial oversight; enforcement of the Rules of Professional Conduct; enforcement of ABA Standards related to the Prosecution Function; efforts from the bully pulpit occupied by the U.S. Attorney General; elimination of qualified immunity for prosecutors; and the creation of prosecutor misconduct commissions.

A look at examples of an anti-racist agenda from among countless other asymmetric relationships susceptible – if not prone – to abuses of power provides evidence that progress can be made in these regards. These examples uniformly adopt the principle that it is not enough to work in or for a community. The empowered entity must work with the community and seek outcomes the community values. Adherence to these principles itself creates a shift in power that is essential to bringing about social change. Private foundations provide one such excellent model in these regards. Inasmuch as prosecutors are lawyers, the growing ranks of community-oriented lawyers provide an even better model. Given the racial composition of management in each of these models – predominantly white – it would appear that challenges associated with individual attributes like white fragility, racial bonding and implicit biases, can be overcome. More confounding is the challenge associated with the unique role that has been thrust upon police and prosecutors to defend American democracy's leaning toward the preservation of a "Jim Crow" caste system between white and black citizens through the fusing of anxiety about crime to anxiety about racial change, civil rights and disorder. The favored non-violent approach adopted by civil rights activists to achieve full enfranchisement for African Americans does

179. *Id.* at 2006.
180. *Id.*
181. *Id.*

avoid supporting the current strategy of white supremacists for maintaining a subordinated status for African Americans; it further allows the mistreatment associated with this display of institutional racism to come to the light. On the other hand, however, the approach also fosters heightened anger and an even greater urging toward violent retaliation or self preservation.

If it is outrage at the suffering caused by misconduct or abuse of power that brings about attitudinal and cultural change then the ultimate challenge may be to elicit outrage without the need for additional human suffering in the process. Images from the past should suffice, including the shocking statistics related to mass incarceration and unjust convictions as documented by the National Registry of Exonerations. Individual prosecutors should be made to feel outraged or at least embarrassed by their potential complicity in these atrocities. An informed electorate can force a prosecutor candidate to express his/her feelings in these regards. An uninformed electorate might make matters worse as a result of a natural propensity toward being unsympathetic to criminal defendants that can result in support for the candidate simply feeding the culture of winning that is in part at the root of prosecutorial misconduct. Similar pressure to find candidates who are outraged by the racial injustice they see should be directed at the appointing authority in those instances in which prosecutors are appointed. In both instances, increasing the number of African American prosecutors would also contribute to the desired outcomes.[182]

Recognizing the authority of "We The People" to interpret and enforce America's stated ideals, prosecutors must be led – one-by-one if necessary – into the ranks of we the people who demand an anti-racist prosecutorial system. In the words of Martin Luther King, Jr., "[W]e have to repent in this generation not merely for the vitriolic words and actions of the bad people but for the appalling silence of the good people."[183]

182. We learn from Part I of a recent documentary film entitled *The People v. The Klan* that but for the intervention of Thomas Figures, a black Assistant U.S. Attorney, Klansman may not have been prosecuted for the murder and lynching of 19 year old Michael Donald in Mobile, Alabama in 1981. *The People v. The Klan* (CNN television broadcast Apr. 11, 2021).

183. Dr. Martin Luther King, Jr., Speech at Illinois Wesleyan University (Feb. 10, 1966).