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# The Just Prosecutor

Brandon Hasbrouck
*Washington and Lee University School of Law*, bhasbrouck@wlu.edu

# THE JUST PROSECUTOR

**BRANDON HASBROUCK***

ABSTRACT

*As the most powerful actors in our criminal legal system, prosecutors have been and remain one of the principal drivers of mass incarceration. This was and is by design. Prosecutorial power derives from our constitutional structure—prosecutors are given almost unfettered discretion to determine who to charge, what to charge, and, often, what the sentence will be. Within that structure, the prosecutor's duty is to ensure that justice is done. Yet, in exercising their outsized power, some prosecutors have fully embraced a secondary, adversarial role as a partisan advocate at the significant cost of seeking justice.*

*The necessary reforms of our carceral system must begin with the prosecutor. Our adversarial system of justice so compellingly turns prosecutors away from doing justice to maximizing convictions that it can seem impossible to be both a good person and a good prosecutor. When even progressive prosecutors can be turned into win-seekers rather than neutral agents of justice, Blackness is punished. Black people are disproportionally arrested, charged, convicted, and sentenced for longer than the population overall. Rejecting adversarialism is therefore essential, but that alone will not be enough—in order to act in the interest of justice, a prosecutor must consciously replace adversarialism as a guiding ideology.*

*This Article imagines prosecutors as solely just actors in our criminal legal system. The prosecutor's function as a minister of justice remains underexamined and undertheorized. So, what is a just prosecutor? My thesis is that abolition constitutionalism, critical originalism, and the liberation justice of hip-hop and the Movement for Black Lives can be used in constructing a prosecutor that improves the ideology and administration of justice in the United States. Abolition constitutionalism demands that prosecutors advance civil liberties, equal protection, and due process rights*

* Assistant Professor, Washington and Lee University School of Law. J.D., Washington and Lee University School of Law. I want to thank Paul Butler, Angela Davis, Alex Klein, David Bruck, J.D. King, Cary Martin Shelby, Carliss Chatman, Matthew Shaw, Erin Collins, Etienne Toussaint, and Jilliann Hasbrouck for their inspiration, guidance, and feedback. Thanks are also due to participants of the University of Richmond School of Law Emroch Colloquy Series. Shout out to my research assistant, Warren Buff, whose outstanding work made this Article better. Mad props to the amazing editors at the *Washington University Law Review* (Shelby Saxon, Rachel Mudra, Aidan Browoleit, Maya Kieffer, Alex Siemers, and David Reck) for superb editing and thoughtful comments that significantly advanced this piece. For my daughters. Black Lives Matter.

*for criminal defendants throughout the entire criminal process. For example, prosecutors should provide Brady exculpatory material to defendants prior to entering any plea agreements and join a prisoner's post-conviction motion when they are actually innocent of the underlying crime. Critical originalism confirms that the criminalization of the use of drugs was driven by racial considerations and requires that prosecutors leverage statutes, such as the Speedy Trial Act, to create robust diversion programs for non-violent drug offenders. And prosecutors that understand liberation justice appreciate that our system was designed to target and imprison Black and Brown people. Because of this profound unfairness, prosecutors must become movement lawyers who work to dismantle white supremacy through decriminalization of drug offenses, prosecutorial nullification, expungement motions, and the elimination of cash bail. There is much common ground in these seemingly disparate threads of theory, where justice is painted—not in definitional words, but in concrete actions—for prosecutors.*

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*Rule-following, legal precedence, and political consistency are not more important than right, justice and plain commonsense.*

–W.E.B. Du Bois[1]

## INTRODUCTION

The prosecutor's role in our criminal legal system has recently reignited a national conversation about race, identity, and criminal justice.[2] For good reason. The Netflix miniseries "When They See Us" underscores

1. W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 299 (1935).
2. *See, e.g.*, Bethonie Butler, *'When They See Us' prompts renewed backlash for former prosecutor Linda Fairstein*, WASH. POST (June 4, 2019, 6:00 PM EDT), https://www.washingtonpost.com/arts-entertainment/2019/06/04/when-they-see-us-prompts-renewed-backlash-former-prosecutor-linda-fairstein/ [https://perma.cc/Y6JS-ACEH].

prosecutors' direct involvement in the wrongful conviction of the "Exonerated Five" (formerly the "Central Park Five")—five Black and Latino teenagers—for the assault and rape of a white woman jogging in Central Park.[3] The prosecutors, despite lacking DNA evidence linking any of the five teenagers to the crime, obtained coerced confessions that resulted in their convictions.[4] After spending years in prison, DNA evidence from a man who confessed to the attack vindicated all five innocent men.[5] Then there is "Time: The Kalief Browder Story," a documentary that provides an historical account on how Kalief Browder—a Black high-school student accused of stealing a backpack—was detained on Rikers Island for three years, two of which were in solitary confinement, without being tried or convicted.[6] The prosecutors, with no direct or circumstantial evidence, repeatedly delayed Browder's trial, requesting—on several occasions—more time to prepare for trial because "[t]he People [were] not ready."[7] Browder raised concerns with the trial court about prosecutorial abuse, stating, "These guys are just playing with my case."[8] In the documentary, Browder discusses the trauma and mental anguish he endured in prison awaiting trial. Two years after the charges were dropped, Browder committed suicide at his mother's home.[9]

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3. *See* Ava DuVernay, *When They See Us*, NETFLIX (2019), https://www.netflix.com/title/80200549; *see also* Aisha Harris, *The Central Park Five: 'We Were Just Baby Boys,'* N.Y. TIMES (May 30, 2019), https://www.nytimes.com/2019/05/30/arts/television/when-they-see-us.ht ml# [https://perma.cc/52QJ-U4FS] (providing an overview of the case).

4. *See* Saul Kassin, *False Confessions and The Jogger Case*, N.Y. TIMES (Nov. 1, 2002), https://www.nytimes.com/2002/11/01/opinion/false-confessions-and-the-jogger-case.html?module=inline [https://perma.cc/9E6V-XJN7] (detailing the prosecutors' involvement in coercing confessions); Lara Bazelon, *Linda Fairstein's Central Park Five role is a case study for restorative justice*, L.A. TIMES (June 7, 2019, 3:10 AM), https://www.latimes.com/opinion/op-ed/la-oe-bazelon-fairstein-central-park-five-restor ative-justice-20190607-story.html (documenting lead prosecutor Linda Fairsetin's admission that she personally oversaw interrogation of the teens and boasting that she was "the 800-pound-gorilla" in the room).

5. *See* Ron Stodghill, *True Confession of The Central Park Rapist*, TIME MAG. (Dec. 9, 2002), http://content.time.com/time/magazine/article/0,9171,397521,00.html [https://perma.cc/484F-LJVA] ("Matias Reyes, a convicted murderer and rapist serving a 33-years-to-life sentence, confessed that he alone had raped the jogger. Citing new DNA evidence that corroborated Reyes' involvement in the crime and noting discrepancies in the earlier confessions, Manhattan district attorney Robert Morgenthau last week asked a judge to throw out the convictions of the five men.").

6. *See* Jenner Furst, Julia Willoughby Nason & Nick Sandow, *Time: The Kalief Browder Story*, NETFLIX (2017), https://www.netflix.com/title/8018 7052.

7. *See* Jennifer Gonnerman, *Before the Law: A Boy Was Accused of Taking a Backpack. The Courts Took the Next Three Years of His Life*, NEW YORKER (Sept. 29, 2014), https://www.newyorker.com/magazine/2014/10/06/before-the-law [https://perma.cc/5EBM-792S] (providing transcript of the prosecutor's request to delay trial).

8. *Id.*

9. *See* Benjamin Weiser, *Kalief Browder's Suicide Brought Changes to Rikers. Now It Has Led to a $3 Million Settlement*, N.Y. TIMES (Jan. 24, 2019), https://www.nytimes.com/2019/01/24/nyregion/kalief-browder-settlement-lawsuit.html [https://perma.cc/WT46-6SZH].

These are just two of many tragic examples that demonstrate the power and abuse of prosecutorial discretion. Both cases illustrate that any efforts at meaningful systemic criminal justice reform must start with the prosecutor.[10] As the most powerful actors in our criminal legal system, prosecutors have been and remain one of the principal drivers of mass incarceration.[11] President Barack Obama, in the first ever law-review article by a sitting president, acknowledged this, stating that research shows "the important role prosecutors have played in escalating the length of sentences and can play in easing them."[12]

Prosecutors derive their power from our constitutional structure—prosecutors are given almost unfettered discretion under the separation-of-powers principle to determine who to charge, what to charge, and, often, what the sentence will be.[13] Within that structure, the prosecutor's duty is to ensure that justice is done.[14] The Supreme Court has reaffirmed this foundational principle on many occasions, stating that the government's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done."[15] Yet, in exercising their outsized power, many prosecutors have fully embraced a secondary, adversarial role as a partisan advocate at the significant cost of seeking justice.[16]

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10. While the examples above both concern prosecutorial abuses in New York City, the problem is national in scope. *See* Innocence Project, *Exonerate the Innocent*, INNOCENCE PROJECT, https://www.innocenceproject.org/exonerate/ [https://perma.cc/M37N-2J54] ("To date, 375 people in the United States have been exonerated by DNA testing, including 21 who served time on death row.").

11. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 87 (2010) ("One might think that judges are the most powerful, or even the police, but in reality the prosecutor holds the cards. It is the prosecutor . . . who holds the keys to the jailhouse door."); JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 206 (2017) (contending that unregulated prosecutors are "the engines driving mass incarceration"); Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xiii n.69 (2015) (stating that "prosecutors—more than cops, judges, or legislators—[are] the principal drivers of the increase in the prison population" (quoting Jeffrey Toobin, *The Milwaukee Experiment: What Can One Prosecutor Do About The Mass Incarceration of African-Americans?*, NEW YORKER (May 11, 2015), http://www.newyorker.com/magazine/2015/05/11/the-milwaukee-experiment)).

12. Barack Obama, Commentary, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 824–825 n.53 (2017).

13. *See* Wayte v. United States, 470 U.S. 598, 607 (1985) ("This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review."); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

14. *See, e.g.*, Connick v. Thompson, 563 U.S. 51, 71 (2011) ("The role of a prosecutor is to see that justice is done.").

15. Berger v. United States, 295 U.S. 78, 88 (1935).

16. The literature on American prosecutors suggest that this view is commonly held. *See, e.g.*, MARK BAKER, D.A.: PROSECUTORS IN THEIR OWN WORDS 78–79, 82 (1999); *id.* at 79 ("It really came down ultimately to getting a plea or winning a trial so I could go home that day and say, 'Okay, I won today. That game is over.'"); MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 111 (1978) ("What the new prosecutor is taught is

Stakeholders have recognized this shift and the necessity of reform, as prosecutors play a critical role in our modern-day carceral state. Many prominent scholars have called for independent oversight committees to police prosecutors,[17] and for the election of progressive and Black prosecutors to address racial and economic disparities in our system.[18] Some, such as Professor Rachel E. Barkow, contend that these measures would result in institutional changes and serve as a fundamental check on prosecutorial decisionmaking.[19] Others disagree. They have argued that good people should not be prosecutors as the system has leaned away from doing justice to maximizing convictions.[20] As one former prosecutor stated, "Becoming a prosecutor to help resolve unfairness in the criminal legal system is like enlisting in the army because you are opposed to the current war."[21]

The adversary system derails many prosecutors, including progressive prosecutors, and turns them into win-seekers instead of neutral agents of justice.[22] The pressure to win presents an insurmountable obstacle for many prosecutors who are concerned with racial and economic justice.[23] This is

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that no matter how solid a case he[/she] has, there is always the possibility that he[/she] will lose at trial. And a defeat at trial means total loss. . . ."); NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT 70–71, 136–37 (2016); Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 206–07 (1988); Lara Bazelon, *The Innocence Deniers*, SLATE (Jan. 10, 2018), https://slate.com/news-and-politics/2018/01/innocence-deniers-prosecutors-who-have-refused-to-admit-wrongful-convictions.html [https://perma.cc/N5QX-B6NC].

17. *See, e.g.*, RACHEL E. BARKOW, PRISONERS OF POLITICS 143–164 (2019).

18. *See, e.g.*, ANGELA J. DAVIS, POLICING THE BLACK MAN, 178–205 (2017); *see also* Emily Bazelon & Miriam Krinsky, *There's a Wave of New Prosecutors. And They Mean Justice*, N.Y. TIMES (Dec. 11, 2018), https://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html [https://perma.cc/3PCT-LU4A] ("In the past two years, a wave of prosecutors promising less incarceration and more fairness have been elected across the country."); Christopher Connelly, *National Advocacy Groups Back Candidates To Challenge Local Prosecutors*, NPR (Apr. 10, 2018, 5:01 AM ET) https://www.npr.org/2018/04/10/598440346/national-advocacy-groups-back-candidates-to-challenge-local-prosecutors [https://perma.cc/RHD9-TEEY] (chronicling reform movement).

19. *See, e.g.*, BARKOW, *supra* note 17, at 143–164.

20. I. Bennett Capers, *The Prosecutor's Turn*, 57 WM. & MARY L. REV. 1277, 1297 (2016) [hereinafter Capers, *The Prosecutor's Turn*] ("[W]e we are more likely to insist that prosecutors be zealous advocates in a criminal justice system that is adversarial by design.").

21. PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 102 (2009) [hereinafter BUTLER BOOK].

22. The perverse incentives of adversarialism extend to the decision not to charge police officers who violate people's civil rights; many prosecutors prefer instead to maintain a cozy relationship with their chief source of—all too often unreliable—evidence. *See* Chesa Boudin, *The Police Answer to Us. What Will We Do About It?*, N.Y. TIMES (July 27, 2020), https://www.nytimes.com/2020/07/27/opinion/Boudin-prosecutor-reform.html [https://perma.cc/CZE2-RGME] ("We know what can happen when prosecutors get too cozy with the police. The refusal to prosecute the police after the deaths of Stephon Clark in Sacramento in 2018 and Sean Monterrosa in Vallejo, Calif., in June are just two local examples of the system's failure.").

23. *See* BUTLER BOOK, *supra* note 21, at 115 ("Progressives who become prosecutors have signed up with the wrong team.").

especially troubling given the uncontroverted results of prosecutorial adversarialism: Blackness is punished. To be Black, as Professor Kimani Paul-Emile argues, means to face increased likelihood—relative to whites—of being stopped by the police,[24] searched by the police, being killed during a routine police encounter,[25] and receiving longer prison sentences.[26] One in three Black men go to prison in their lifetime;[27] Black women are three times more likely than white women to be incarcerated;[28] and Black boys are seen as guiltier than white boys.[29] In addition, although there is no evidence that Blacks are more likely to use or sell drugs, we are more likely to be arrested, charged, and convicted for those crimes.[30] For all of these reasons, adversarialism should be rejected.[31] But doing so is not enough.

The problem, though, begins even earlier than the adversarial process. Even if prosecutors could resist the siren's call to become *more* interested in winning, the culture of prosecutors' offices selects for new hires with the willingness to get convictions—including those of juveniles—even in entry-level positions.[32] These initial points of contact for hiring new

24. *See* Kimani Paul-Emile, *Blackness as Disability?*, 106 GEO. L.J. 293, 340–44 (2018).

25. *Id.*

26. *See* U.S. SENT'G COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 108 (2012) (finding that prison sentences of Black men were 19.5% longer than those of white men for similar crimes between 2007 and 2011); *see also* Joe Palazzolo, *Racial Gap in Men's Sentencing*, WALL ST. J. (Feb. 14, 2013, 5:36 PM ET), https://www.wsj.com/articles/SB10001424127887324432004578304463789858002.

27. *See* Cassia Spohn, *Race, Crime, and Punishment in the Twentieth and Twenty-First Centuries*, 44 CRIME & JUST. 49, 55 (2015) (noting that in 2001 "the chances of ever going to prison were highest among black males (32.2 percent) and Hispanic males (17.2 percent)").

28. *See* E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUST., PRISONERS IN 2011 8 (2012), http://www.bjs.gov/content/pub/pdf/p11.pdf [https://perma.cc/HR99-5D39].

29. *Black Boys Viewed as Older, Less Innocent Than Whites, Research Finds*, AM. PSYCHOL. ASS'N (Mar. 6, 2014), https://www.apa.org/news/press/releases/2014/03/black-boys-older [https://perma.cc/LWE9-PRPD].

30. U.S. DEP'T OF HEALTH & HUMAN SERVS., RESULTS FROM THE 2013 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 26 (2014) (reporting rates of illicit drug use in the United States in 2013 among persons aged twelve and older were 10.5% for Black people and 9.5% for whites). Black adults in 2014, however, constituted "close to a third of those arrested for drug possession [and] . . . were more than four times as likely to be arrested for marijuana possession than white adults." Tess Borden, *Every 25 Seconds: The Human Toll of Criminalizing Drug Use in the United States*, HUMAN RIGHTS WATCH (Oct. 12, 2016), https://www.hrw.org/report/2016/10/12/every-25-seconds/human-toll-criminalizing-drug-use-united-states# [https://perma.cc/Y5BV-2TU9].

31. *See infra* Section II.

32. The following excerpts from some recent job postings for entry-level prosecutors are illustrative of this problem. The City of Chesapeake, Virginia, recently described a prosecutor's job as follows:

> Prosecution of certain misdemeanors, including but not limited to, DUIs, crimes on school property and domestic violence in the General District and Juvenile Courts and misdemeanor appeals in Circuit Court. Preparation and trial of all felonies, including but not limited to drug cases, crimes of violence, vehicular manslaughters, larcenies, fraud cases and any other

prosecutors make no bones about the fact that the work load will be intense.[33] Seldom do job postings make any mention of an expectation that a novice prosecutor would be expected to utilize discretion as a tool of mercy in charging and plea bargaining.[34] If prosecutors learn early on that convictions come first, they are expected to produce a lot of those, and their discretion is primarily for determining what they *can* win rather than what they *should*, why would we expect them to pursue justice in any wider sense?

This Article imagines our criminal legal system with prosecutors who are single mindedly focused on ensuring that justice is done. The prosecutor's function as a minister of justice[35] remains underexamined and

assignments as made by the Commonwealth's Attorney. Prosecution of *felony cases in J&D Court*, General District Court and Circuit Court.

City of Chesapeake, Virginia, Assistant Commonwealth's Attorney I (closing Jan. 7, 2021) (emphasis added) (on file with the author). Nor is the prosecution of minors by prosecutors fresh out of law school unique to Virginia. Centre County, Pennsylvania listed similar job duties in a recent posting. *See* Centre County District Attorney's Office, ADA Job Listing 1 (undated job posting) (on file with the author) ("Represents the Commonwealth in Juvenile Court proceedings and all appeals therefrom."). The prevalence of juvenile prosecutions is great enough that some offices feel the need to note when it will *not* be part of a prosecutor's duties. *See, e.g.*, Montgomery County, Kansas, Assistant County Attorney (undated job posting), https://ndaa.org/wp-content/uploads/Assistant-County-Attorney.pdf ("No appellate or juvenile work/cases.").

33. *See, e.g.*, Williams County, North Dakota, Assistant State's Attorney (undated job posting) (on file with the author) (requiring prosecutors to "be available to provide on-call legal assistance outside of normal work hours"); Okanogan County, Washington, Deputy Prosecuting Attorney (undated job posting), https://ndaa.org/wp-content/uploads/District-Court.pdf ("Ability to plan and organize multiple tasks and responsibilities. Ability to work under pressure and meet deadlines. Ability to successfully perform responsible and complex work assignments using independent judgment and personal initiative without direct daily supervision."); Fulton County, Georgia, Assistant District Attorney I (480007) (undated job posting), https://ndaa.org/wp-content/uploads/480007-Assistant-District-Attorney-I-1.pdf ("Manages case load: attends scheduled court appearances, including plea and arraignment, status, case management, final plea, motions, and trial calendar; and schedules trial and hearing dates with judges and case managers.").

34. Of the job postings cited in the previous two footnotes, none used the word "discretion." Even oblique references to the possibility that a novice prosecutor would be trusted *not* to bring a case were uncommon and often implied that this should be restricted to unwinnable cases. *See* Centre County, Pennsylvania, Assistant District Attorney (undated job posting) (on file with the author) ("An Assistant District Attorney is responsible for evaluating cases, taking into consideration resources, strength of the evidence, severity of the crime, any impact on victims and the community and policy considerations."); Okanogan County, Washington, Deputy Prosecuting Attorney (undated job posting), https://ndaa.org/wp-content/uploads/District-Court.pdf ("Reviews reports for legal sufficiency and determines appropriate charges to be filed."); Fulton County, Georgia, Assistant District Attorney I (480007) (undated job posting), https://ndaa.org/wp-content/uploads/480007-Assistant-District-Attorney-I-1.pdf ("Prepares cases and indictments for presentation to Grand Jury: reviews case file and analyze the facts and evidence of the case; reviews criminal histories of defendants; determines appropriate charges; ensures sufficient probable cause; *drafts indictments for indictable cases*; subpoenas law enforcement officers and witnesses; and presents cases to Grand Jurors." (emphasis added)).

35. *See* MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2017) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

undertheorized. So, what is a just prosecutor?[36] My thesis is that abolition constitutionalism, critical originalism, and liberation justice can be used in constructing a prosecutor that improves the ideology and administration of justice in the United States. It does so in the following ways:

*Abolition Constitutionalism*.[37] The prosecutor—like all criminal justice actors—swears an oath to uphold the Constitution. The Constitution provides protections, in the form of civil rights and civil liberties, which were deliberately extended to include Black Americans through the Reconstruction Amendments. That oath, fully understood, requires not just rejection of the systemic racism baked into much of the criminal legal system, but active antiracism. This is more than simply "progressive" constitutionalism[38]—it's *abolition* constitutionalism. A brief explanation is necessary.

While the Constitution was largely understood to support and protect slavery, abolitionists historically developed alternative constitutional interpretations to oppose slavery.[39] These arguments motivated and informed the origins of the Reconstruction Amendments.[40] But the promise of this radical vision went unrealized at the hands of white supremacist courts.[41] The effects of this history of anti-Black jurisprudence on business as usual in our criminal legal system are many, though prosecutors retain sufficient authority to reshape these processes to abolitionist ends.

In many instances in our criminal legal system judges are unable to effectively control prosecutors' actions, as former federal public defender

36. Some argue that the prosecutor's duty to ensure that justice is done "is an analytical dead end" because "[i]t offers neither a meaningful standard to govern prosecutors, nor a useful guideline for generating specific rules. This core theoretical failing, more than any other factor, explains why academics, judges, and practitioners have made so little progress articulating concrete guidance for prosecutorial behavior." Jeffrey Bellin, *Theories of Prosecution*, 108 CAL. L. REV. 1203, 1210 (2020). This Article is a much-needed attempt to fill this gap.

37. *See* Dorothy E. Roberts, *The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 50–51 (2019) ("Antislavery activists not only chose to fight on constitutional ground, but, in the process, also crafted an alternative reading of the Constitution that proved highly influential for a period of time. Moreover, the fact that the Constitution remains open to these varying interpretations highlights the potential for prison abolitionists to reclaim an abolition constitutionalism—or construct a new one—that facilitates rather than impedes the completion of the freedom struggle begun by their predecessors.").

38. *See* Mark Tushnet, *Progressive Constitutionalism: What Is "It"?*, 72 OHIO ST. L.J. 1073, 1077 (2011) (describing progressive constitutionalism as a framework of political constitutionalism geared toward reducing and eliminating severe material deprivation).

39. *See* Roberts, *supra* note 37, at 55–57 (explaining abolitionist arguments rooted in the Preamble, Due Process Clause, and notions of birthright citizenship).

40. *See id.* at 54 ("Abolitionists fought for the amended Constitution to embody their radical constitutional vision and to install a 'second founding' of the nation built on equal citizenship and freedom of labor.").

41. *See id.* at 73–74 ("In a series of decisions, beginning with the *Slaughter-House Cases* in 1873, the Court developed an anti-abolition jurisprudence that preserved white capitalist domination and shaped constitutional law for the next century.").

Eric S. Fish convincingly argues in *Prosecutorial Constitutionalism*.[42] For example, the due process clause requires prosecutors to reveal exculpatory evidence before the defendant's criminal trial.[43] It is unclear—indeed there is a circuit split—whether a prosecutor is required to provide the defendant with that same evidence prior to a defendant entering a guilty plea.[44] In some jurisdictions, therefore, a prosecutor can keep material exculpatory evidence from the defense prior to entering a plea agreement.[45] Additionally, there are times in our criminal justice process when judges choose not to accord full weight to defendants' constitutional rights out of concern for the separation of powers or the limitations of judicial doctrine.[46] Specifically, there is very little judicial oversight in prosecutorial decisionmaking involving charging decisions, plea bargaining, sentencing, and post-conviction decisions.[47]

When judges provide so little oversight, prosecutors have the discretion to either create or counteract inequality. Too often, they use that discretion in ways that substantially increase inequality. For example, Blacks systematically face more and harsher charges than whites—and those charges usually carry a mandatory-minimum sentence.[48] No one can seriously contend that, in these circumstances, Blacks receive equal protection of the laws. We do not. In these situations, prosecutors should preserve defendants' constitutional rights even if judicial doctrine does not require it, and even at the expense of obtaining convictions.

The same is true concerning civil liberties. It is generally understood that the Framers of our Constitution were distrustful of law enforcement and that the Bill of Rights intentionally makes it harder for police to do their jobs.[49] Prosecutors, however, have asked judges to adopt restrictive interpretations

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42. *See generally* Eric S. Fish, *Prosecutorial Constitutionalism*, 90 S. CAL. L. REV. 237, 260 (2017) [hereinafter Fish, *Prosecutorial Constitutionalism*].

43. Brady v. Maryland, 373 U.S. 83, 87–88 (1963).

44. *See* Miriam H. Baer, *Timing* Brady, 115 COLUM. L. REV. 1, 13–14 (2015) (discussing split); Russell D. Covey, *Plea-Bargaining Law After* Lafler *and* Frye, 51 DUQ. L. REV. 595, 601–02 (2013) (surveying courts).

45. *See, e.g.*, Orman v. Cain, 228 F.3d 616, 617 (5th Cir. 2000) ("*Brady* requires a prosecutor to disclose exculpatory evidence for purposes of ensuring a fair trial, a concern that is absent when a defendant waives trial and pleads guilty.").

46. *See* Alexandra L. Klein, *Meaningless Guarantees: Comment on Mitchell E. McCloy's "Blind Justice: Virginia's Jury Sentencing Scheme and Impermissible Burdens on a Defendant's Right to a Jury Trial"*, 78 WASH. & LEE L. REV. 585, 593–95 (2021) (discussing the Supreme Court's reluctance to meaningfully enforce the Sixth Amendment).

47. *See* Wayte v. United States, 470 U.S. 598, 607 (1985).

48. Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 YALE L.J. 2, 27–31 (2013).

49. *See, e.g.*, Erwin Chemerinsky, *Losing Liberties: Applying a Foreign Intelligence Model to Domestic Law Enforcement*, 51 UCLA L. REV. 1619, 1638 (2004) ("The framers of the Constitution were deeply distrustful of executive power and of the police.").

of the Constitution that have resulted in racial profiling,[50] pretextual stops,[51] and use of excessive force.[52] This has led to what many refer to as police "superpowers."[53] It is these superpowers, according to Professor Devon Carbado, that help create and perpetuate a Blue-on-Black violence ecosystem: police violence against Black people persists because constitutional structure and qualified immunity "create a disincentive for police officers to exercise care with respect to when and how they employ violent force."[54] Prosecutors have the power to play a pivotal role in reining in those superpowers by advancing individual rights. Prosecutors can do this by taking a more expansive view of individual rights and by unilaterally choosing not to take advantage of existing precedent to infringe on that individual right.

*Critical Originalism.*[55] Originalism in statutory construction is the notion that legal texts mean what they meant at the time of their enactment.[56] It requires "immersing oneself in the political and intellectual atmosphere of the time"[57] to determine the meaning of a statutory or constitutional provision. When applied with an awareness of the linguistic tools of minority subjugation, these methods can help to illuminate the racial animus

50. *See* Whren v. United States, 517 U.S. 806, 810–13 (1996); *id.* at 813 ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); *see also* Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CAL. L. REV. 125, 129–30 (2017) (arguing that the "Supreme Court's legalization of racial profiling is embedded in the very structure of Fourth Amendment doctrine"); Kevin R. Johnson, *How Racial Profiling in America Became the "Law of the Land":* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Rebellious Lawyering*, 98 GEO. L.J. 1005, 1009–45 (2010).

51. *See Whren*, 517 U.S. at 811 (holding that when police officers have probable cause to stop vehicles for traffic infractions, it is irrelevant whether they do so for pretextual reasons); *see also* Elizabeth E. Joh, *Discretionless Policing: Technology and the Fourth Amendment*, 95 CALIF. L. REV. 199, 209 (2007) (suggesting that pretextual stops occur "when the justification offered for the detention is legally sufficient, but is not the actual reason for the stop").

52. Scott v. Harris, 550 U.S. 372 (2007); *see also* Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1452 (2016).

53. *See, e.g.*, PAUL BUTLER, CHOKEHOLD 56 (2017) [hereinafter BUTLER, CHOKEHOLD] ("U.S. police officers have super powers . . . The police have been granted these powers [by] . . . the United States Supreme Court . . . .").

54. Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L. J. 1479, 1485 (2016).

55. "Critical Originalism is the melding of anti-subordination deconstruction principles of Critical Race Theory with the interpretive methodology of Originalism Theory." Jasmine B. Gonzales Rose, *Language Disenfranchisement in Juries: A Call for Constitutional Remediation*, 65 HAST. L.J. 811, 841 (2014).

56. *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 78–82 (2012); Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 ALA. L. REV. 667, 676 (2019) ("There has always been an 'originalist' aspect of 'new textualism,' but this Term's cases reveal a new emphasis on originalism in statutory interpretation. Justice Gorsuch appears to be leading the way.").

57. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989).

behind many facially neutral laws.[58] Critical originalism also accounts for the radical nature of the Reconstruction Amendments.[59] This mode of interpretation provides prosecutors two important tools to do justice.

First, critical originalism provides context: it confirms that the criminalization of the use of drugs was driven by racial considerations as "no one"[60] at the time these criminal statutes were enacted would have believed otherwise. Specifically, the criminalization of opium, cocaine, and marijuana was in response to racial concerns. For example, cocaine use became a crime after false allegations surfaced that it gave Blacks superhuman powers—it was reported that several bullets could not stop "cocaine-crazed negroes."[61]

Second, under originalist principles, prosecutors need not prosecute non-violent drug offenses under federal law. Instead, prosecutors should create robust diversion programs. They can do this by identifying and leveraging statutes, such as the Speedy Trial Act,[62] to enter in deferred-prosecution agreements—an agreement not to prosecute a defendant for alleged criminal wrongdoing provided the defendant satisfies certain conditions, such as completion of a drug-treatment program—with non-violent drug offenders. Although the original intent behind deferred-prosecution agreements was to accomplish just this,[63] prosecutors have used that tool almost exclusively for corporations. Businesses responsible for the sale of defective products, for example, are not typically prosecuted.[64] This is justified by broad

58. *See* Gonzales Rose, *supra* note 55, at 841–42 ("[A]pplying Originalist principles of interpretation under a lens of Critical Race Theory can help reveal the racially discriminatory intent behind colorblind laws. However, unlike traditional Originalists, whose starting point is a text's plain meaning, a criticalist approach asks us to be concerned about minority subordination, and thus questions facial neutrality and delves below a law's epidermis to discern its true original aim and impetus.").

59. *See, e.g.*, Rebecca E. Zietlow, *The Ideological Origins of the Thirteenth Amendment*, 49 HOUS. L. REV. 393, 401–02 (2012) (chronicling the radical politics of James Ashley and his influence on the Reconstruction Congress's amendments); Lydia D. Johnson, *What Does Justice Have to Do with Interpreters in the Jury Room?*, 84 UMKC L. REV. 941, 959–60 (2016) (applying critical originalist analysis of the Fourteenth Amendment to the exclusion of non-Anglophone jurors).

60. Justice Antonin Scalia often applied "no one" originalism to issues. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2628 (2015) (Scalia, J. dissenting) ("When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases.").

61. Edward Huntington Williams, *Negro Cocaine "Fiends" Are a New Southern Menace*, N.Y. TIMES (Feb. 8, 1914), https://timesmachine.nytimes.com/timesmachine/1914/02/08/100299245.pdf.

62. 18 U.S.C. § 3161(h)(2).

63. *See, e.g.*, United States v. Saena Tech Corp., 140 F. Supp. 3d 11, 22–23 (D.D.C. 2015) ("The relevant legislative history demonstrates that deferred-prosecution agreements were originally intended to give prosecutors the ability to defer prosecution of individuals charged with certain non-violent criminal offenses to encourage rehabilitation.").

64. *See, e.g.*, Information, *United States v. Toyota Motor Corp*., 2014 WL 10584763 (S.D.N.Y. Mar. 20, 2014) (No.14-CRIM-186), http://www.justice.gov/sites/default/files/opa/legacy/2014/03/19/toyota-def-pros-agr.pdf [https://perma.cc/PDT6-7FTC]. In this case, Toyota knowingly sold defective cars

concerns with the collateral consequences of criminally prosecuting corporations, namely the potential harm to shareholders and employees.[65] This rationale becomes even more compelling when an individual offender is punished—there are severe collateral consequences to both the family structure and community.

*Liberation Justice*.[66] In his groundbreaking law review article, *Much Respect: Toward a Hip-Hop Theory of Punishment*, Professor Paul Butler argues that hip-hop music and culture can transform our criminal legal system in several important ways.[67] First, the hip-hop nation identifies the problems with our system (including prosecutorial discretion) from the bottom up.[68] They make an extraordinary case that our system was designed to target and imprison Black, Brown, and poor people. For example, while Blacks represent about fourteen percent of monthly drug users, they account for more than fifty-six percent of people incarcerated for drug use.[69] Because of these concerns, there must be a deep commitment by prosecutors to establish integrity and fairness in our system.

Second, hip-hop acknowledges that punishment is appropriate in certain contexts, but, in others, the unintended collateral consequences of potential punishment outweigh the perceived benefits.[70] Prosecutors, thus, must consider their effect on others in the community. Hip-hop is decidedly

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to consumers and misled regulators that resulted in the deaths of eighty-nine people. The docket sheet indicates that, on March 19, 2014, "A deferred prosecution agreement was entered and the case was adjourned until March 20, 2017." *Id.*

65. *See* Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 330 (2007) (noting that deferred-prosecution agreements were designed, in part, to "achieve[ ] a result that minimizes the collateral damage to shareholders and employees").

66. I coin this term to represent a synthesis of the underlying philosophies found in the work of hip-hop artists, the activism of the Movement for Black Lives, and a great deal of prior Critical Race scholarship. At its core, liberation justice requires an approach of empathy and respect for the essential dignity of criminal defendants, prisoners, and their communities. Section III.C will explore the contours of liberation justice in detail. While my initial application in this article addresses issues of race in criminal justice, the philosophical framework must be understood to apply structurally and intersectionally. Further application of this approach could address issues such as selective prosecution in domestic violence and sex work cases; the failure of the criminal legal system to protect trans persons—and in particular trans women of color; the juvenile/adult charging decision; the role of defendant wealth in prosecutorial decisions; the threat of deportation as a prosecutorial tool; and differential incarceration rates in rural and urban communities. "Whatever affects one directly, affects all indirectly." Martin Luther King, Jr., *Letter from a Birmingham Jail* (Apr. 16, 1963).

67. Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983, 986–87 (2004) [hereinafter *Butler Article*].

68. BUTLER BOOK, *supra* note 21, at 134 ("These voices are worth listening to; they evaluate criminal justice from the bottom up. Our current punishment regime has been designed from the top down, and that, in part, explains why many perceive it to be ineffective or unfair.").

69. *Id.* at 140; *see also* Pierre Thomas, *1 in 3 Young Black Men in Justice System*, WASH. POST, Oct. 5, 1995, at A1.

70. *See* Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004) (arguing that mass incarceration damages social networks, distorts social norms, and destroys social citizenship).

abolitionist. Hip-hop culture advances sound solutions to the problem of the carceral state, including, among others, that drug users should not be punished because of their addiction; that the cruelty of prison should only be used, if at all, to remove those who become too violent to coexist safely within society; that rights be restored and criminal records for non-violent offenses be expunged; and that criminal law no longer be used for racial subordination. Therefore, prosecutors who understand liberation justice should support, in certain circumstances, decriminalization of drug offenses, the elimination of bail for nonviolent offenses, prosecutorial nullification,[71] expungement motions, and the Movement for Black Lives, which seeks accountability for police killings of Black people.[72]

Liberation justice demands that the prosecutor's thumb be removed from the scales of justice. The prosecutor's biases are too often a motivating factor in charging decisions—why young Black and Brown people are charged, convicted, and incarcerated for petty crimes, while police officers walk free after killing them. The prosecutor's adversarial drive to win at all (legal) costs leads to unjust differences in charges, convictions, punishments, and collateral consequences. If Black lives are to matter in our criminal legal system, it is incumbent upon prosecutors to employ their discretion in the pursuit of justice rather than victory.

This Article is a beginning. It is an early attempt to fashion a prosecutor that is solely concerned with doing justice. That construction is informed by and committed to abolition constitutionalism, critical originalism, and liberation justice principles. There is much common ground in these seemingly disparate threads of theory. It is in these spaces where justice is painted—not in definitional words, but in concrete actions—for prosecutors. My novel construction of the prosecutor will help ensure that justice finally becomes the touchstone of our criminal legal system.

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71. *See* Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1252 (2011) (discussing "prosecutorial nullification," meaning when prosecutor declines to prosecute because of disagreement with the law or belief that its application would be unwise or unfair).

72. *See* Amna A. Akbar, *How Defund and Disband Became the Demands*, N.Y. REVIEW (June 15, 2020), https://www.nybooks.com/daily/2020/06/15/how-defund-and-disband-became-the-demands/ ("From coast to coast, the target of these protests is the very institution of policing, rather than 'a few bad apples.' The demands reflect growing recognition that the problem is not individual police or isolated bad acts, and that reforms like body cameras and civilian review boards simply will not lead to the profound change that many know is necessary. The protesters are saying, loud and clear, that the only solution to the violence of policing is less policing—or maybe, none at all."); Josiah Bates, *Sherrilyn Ifill Says This Is the Time for 'Transformative' Change in America*, TIME (June 23, 2020, 1:44 PM), https://time.com/5857188/sherrilyn-ifill-time100-talks-police-reform/ ("Coupled with the impact of the global coronavirus pandemic, Floyd's death, as well as the killings of Breonna Taylor, Ahmaud Arbery and other Black Americans has led to this moment of reckoning, she explained."); Helier Cheung, *George Floyd Death: Why US Protests Are So Powerful This Time*, BBC NEWS (June 8, 2020), https://www.bbc.com/news/world-us-canada-52969905 [https://perma.cc/YZW6-SB4A] ("Local governments, sports and businesses appear readier to take a stand this time - most notably with the Minneapolis city council pledging to dismantle the police department.").

The remainder of this Article proceeds as follows. Part I examines the modern-day prosecutor. There, this Article will accomplish three things. First, it briefly discusses how prosecutorial power is rooted in the separation-of-powers principle. This is very important to note upfront because prosecutorial power became more entrenched in our constitutional jurisprudence—essentially making prosecutors untouchable—during the mass incarceration era. Second, it provides a general overview on how prosecutors exercise their discretion within our criminal legal system. Third, it explores prosecutorial adversarialism and how that structure turns prosecutors into win-seekers. Part II examines the mass incarceration crisis. There, this Article will draw a direct line from the concentration of power in prosecutors to mass incarceration. Specifically, this Article contends that the racial disparities in our criminal legal system exists because prosecutorial adversarialism punishes Blackness. For this reason, adversarialism should be rejected. Finally, Part III argues that prosecutors must fully embrace their duty to seek justice. In this Part, I attempt to bring theoretical clarity to what precisely doing justice means. The answer is found in abolition constitutionalism, critical originalism, and liberation justice. That's where the just prosecutor can be built.

## I. THE MODERN-DAY PROSECUTOR

It has long been true that "[t]he prosecutor has more control over life, liberty, and reputation than any other person in America."[73] A survey of criminal justice literature reveals a modern consensus that prosecutors "rule the criminal justice system."[74] Indeed, many prominent scholars and jurists have argued that prosecutors—not legislators, judges, or police—"are the criminal justice system's real lawmakers."[75] The breadth of prosecutors'

73. Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 3 (1940).

74. *See* Jed S. Rakoff, *Why Prosecutors Rule the Criminal Justice System—And What Can Be Done About It*, 111 NW. U. L. REV. 1429, 1436 (2017) ("[F]or the immediate future at least, prosecutors . . . will be the real rulers of the American criminal justice system."); Erik Luna & Marianne Wade, *Introduction*, 67 WASH. & LEE L. REV. 1285, 1285 (2010) ("For all intents and purposes, prosecutors *are* the criminal justice system . . . ."); Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 172 (2019) ("Compelling assertions about prosecutorial dominance leap off the pages of the criminal justice literature.").

75. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001) ("The definition of crimes and defenses plays a . . . much smaller role in the allocation of criminal punishment than we usually suppose. In general, the role it plays is to empower prosecutors"); *see also* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004) ("[T]he law that determines who goes to prison and for how long—is chiefly written by prosecutors, not by legislators or judges."). This is not to say that those actors do not affect criminal justice outcomes. They do in significant ways. For a recent excellent discussion on how police officers, legislators, and judges impact our criminal legal system, see Jeffrey Bellin, *supra* note 74, at 187–203.

discretion and control over the criminal legal system warrants scrutiny.[76] This Part examines the source of prosecutorial power, discusses how prosecutors exercise their power, and explores adversarialism.

### *A. The Prosecutor: Money, Power, and Respect*

"It's the key to life: Money, Power, and Respect."[77] Although prosecutors may not have the money—in the sense of being overcompensated for their work—they have extraordinary power and command much respect in our criminal legal system. This power is so expansive as to effectively combine executive, legislative, and adjudicatory powers. So, where does this power and respect come from?

The prevailing view today is that prosecutorial power is rooted in the separation-of-powers principle.[78] That is, prosecutors have broad discretion as members of the executive branch to decide who to charge, what to charge, whether to offer a plea agreement, and, in many instances, what the sentence will be. Courts generally will hesitate to inquire into—and will show respect to—the prosecutor's decisionmaking process.[79] Prosecutorial decisionmaking rests exclusively in the province of the executive branch and thus only rarely must be explained.[80]

The prosecutor's broad and remarkable authority seems to be an anomaly in our constitutional structure.[81] The aim of the Framers of our Constitution was to "divide and arrange the several offices [of government] in such a manner as that each may be a check on the other. . . ."[82] Yet prosecutors, who wield both executive and adjudicative powers, elude this arrangement.[83] The prosecutor's power to enforce often turns into their power to adjudicate because the prosecutor who investigates the case can make the final charging decision, determine what plea to accept, and effectively decide the ultimate sentence. Even though courts routinely

76. Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 821, 832 (2013).

77. THE LOX FEATURING DMX & LIL' KIM, *Money, Power & Respect*, *on* MONEY, POWER & RESPECT (Bad Boy Records 1998).

78. Lawrence A. Cunningham, *Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform*, 66 FLA. L. REV. 1, 46 (2014) ("As the Supreme Court has explained, prosecutorial discretion is entailed by constitutional separation of powers . . . .").

79. *See, e.g.*, Newman v. United States, 382 F.2d 479, 481 (D.C. Cir. 1967) ("It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary power of the attorneys of the United States in their control over criminal prosecutions.").

80. *Id.*

81. *See* Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 11 (2009) ("The federal prosecutor's broad and unreviewable authority is an anomaly in our system of separated powers.").

82. THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob Ernest Cooke ed., 1961).

83. Krauss, *supra* note 81, at 11.

review executive and adjudicatory actions by executive branch administrative agencies, they frustratingly condone this concentration of power in prosecutors.[84] For example, Professor Rachel Barkow persuasively argues that because we have combined prosecutorial and adjudicatory powers in a single actor, which can lead to gross abuses, we need to consider an administrative law solution to "assess the bigger [prosecutorial] policy calls and check them for irrationality."[85]

There used to be some institutional balance. The Constitution vests judicial actors—judges and juries—with tools to protect defendants from government overreach.[86] Juries can, and as some advocates argue should, practice jury nullification[87]—the decision to disregard the evidence and acquit an otherwise guilty defendant. Juries, "unlike any official, are in no wise accountable, directly or indirectly, for what they do . . . ."[88] Their unreviewable power to acquit allows juries to check executive overreach in a particular case, which is "the great corrective of law in its actual administration."[89] Judges, too, were able to check prosecutorial excess by formulating individualized sentences for defendants.[90]

In addition, there are constitutional protections in place to shield individual defendants. The Due Process Clause, for example, requires prosecutors to operate in good faith, barring them from tricking a defendant into pleading guilty or reneging on their promises once a binding plea agreement was entered into.[91] A defendant could also theoretically bring an equal protection claim for vindictive or selective prosecution on "an unjustifiable standard such as race, religion, or other arbitrary classification," but the courts have set such high hurdles for doing so that almost no one succeeds.[92] All of these constitutional safeguards in criminal cases have been greatly diminished.

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84. *See, e.g.*, Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 993 (2006) (arguing that "the existing approach to separation of powers in criminal matters cannot be squared with constitutional theory or sound institutional design"); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 869 (2009) [hereinafter Barkow, *Policing of Prosecutors*].

85. BARKOW, *supra* note 17, at 136.

86. U.S. CONST. art. III, § 2, cl. 3 and amend. VI.

87. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679 (1995) ("Considering the costs of law enforcement to the black community and the failure of white lawmakers to devise significant nonincarcerative responses to black antisocial conduct, it is the moral responsibility of black jurors to emancipate some guilty black outlaws.").

88. United States *ex rel.* McCann v. Adams, 126 F.2d 774, 775–76 (2d Cir. 1942), *rev'd on other grounds*, 317 U.S. 269 (1942).

89. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18 (1910).

90. BARKOW, *supra* note 17, at 128.

91. Santobello v. New York, 404 U.S. 257 (1971).

92. United States v. Armstrong, 517 U.S. 456, 464 (1996) (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)).

No one should be surprised when this institutional balance broke down. Three distinct but related events in the 1960s, 70s, and 80s, led to the deep entrenchment of prosecutorial power in our constitutional system, ushering in the mass incarceration era. First, the legislative landscape changed in the 1960s and 70s. In an effort to get tough on crime, Congress and state legislatures expanded criminal codes and created mandatory-minimum sentencing regimes that gave prosecutors the ability to choose between a greater range of possible charges to file or threaten to file.[93] The new statutes often dictated a mandatory sentence, which judges were required to follow.[94] This diminished the judicial check on prosecutors.

Second, although "plea bargaining existed as a sub-rosa practice for most of the nation's history," the Supreme Court officially approved this practice in 1971, which "led to astronomical increases in the rates of cases settled outside of trial . . . ."[95] Today, over 97.1% of convictions in the federal system are the result of pleas.[96] This diminished the jury check, too.

Finally, the Supreme Court made prosecutors practically untouchable by unequivocally insulating prosecutorial discretion in the separation-of-powers principle and turning a blind eye to the anti-Blackness exercised in prosecutorial discretion.[97] The Court thereby diminished its own appellate check.

Although executive discretion was linked to the separation-of-powers principle in the 1920s,[98] the Supreme Court did not begin to grapple with the meaning of discretion until the 1970s. Indeed, "prosecutorial discretion"

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93. *See* Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 3, 12 (2013) ("Capitalizing on overwhelming public opinion in favor of more rigid crime control, conservative politicians at the national and state levels stoked their constituents' fear of crime waves and endorsed policies designed to put more offenders in prison for longer periods of time."); *id.* at 21–22 (discussing the proliferation of mandatory minimum sentences for drug and gun charges and the connection between their reliance on numerical elements of charges and the lengths of sentences Black defendants received).

94. *See* ALEXANDER, *supra* note 11, at 87; BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 2 (2006).

95. BARKOW, *supra* note 17, at 129–30.

96. *See* Lafler v. Cooper, 566 U.S. 156, 170 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."); U.S. SENT'G COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2015, 4 (June 2016), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/FY15_Overview_Federal_Criminal_Cases.pdf ("Case Disposition: In fiscal year 2015 the vast majority of offenders (97.1%) pleaded guilty.").

97. *See* United States v. Labonte, 520 U.S. 751, 761–62 (1997) (accepting a prosecutor's decision to seek enhanced penalties for one defendant but not another as an appropriate and integral feature of the criminal legal system); Krauss, *supra* note 81, at 28–32 (2009) (describing the development of the modern theory of prosecutorial discretion).

98. Ponzi v. Fessenden, 258 U.S. 254, 262 (1922) (identifying the Attorney General as "the hand of the President in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offenses be faithfully executed").

did not enter into the Court's lexicon until 1961 when Justice Harlan described a state prosecutor's ability to enforce the laws as "unbounded prosecutorial discretion."[99] In 1978, right before our prison population explosion, the Court firmly planted "prosecutorial discretion" in the separation-of-powers principle in *Bordenkircher v. Hayes*.[100] In that case, defendant Paul Hayes rejected a plea deal that would have capped his sentence for forging a check—for $88.30—to five years. The prosecutor then followed through on his threat to seek mandatory life imprisonment under the state's three-strike law. The Court found no due process violation and upheld the life sentence, stating "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."[101] After this case, the Court, in subsequent opinions, described prosecutorial discretion as "broad"[102] and, in 1985, explicitly stated that the prosecutor's "broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review."[103] Indeed, as several commentators have observed, prosecutorial discretion has been enhanced and entrenched to the point of absorbing legislative power.[104]

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99. Poe v. Ullman, 367 U.S. 497, 530 (1961) (Harlan, J., dissenting).

100. 434 U.S. 357 (1978). This is not to say that other courts did not already conclude that prosecutorial discretion rests robustly in the separation-of-powers principle. As Professor Bennett Capers elucidates:

> One of the clearest examples . . . arose out of the riots at the Attica Correctional Facility in 1971. As guards were ostensibly taking steps to regain control of the prison, they retaliated by killing several prisoners and continued to assault and beat prisoners after regaining control. When . . . prosecutors declined to pursue charges against the guards, prisoners and family members sued. The Second Circuit Court of Appeals dismissed the claims, citing the discretionary power of prosecutors.

Capers, *The Prosecutor's Turn*, *supra* note 20, at 1296 n.89.

The Second Circuit concluded: "The primary ground upon which this traditional judicial aversion to compelling prosecutions has been based is the separation of powers doctrine." Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 379 (2d Cir. 1973).

101. *Bordenkircher*, 434 U.S. at 364 (1978).

102. United States v. Goodwin, 457 U.S. 368, 380 n.11, 382 (1982).

103. Wayte v. United States, 470 U.S. 598, 607 (1985).

104. *See* Logan Sawyer, *Reform Prosecutors and Separation of Powers*, 72 OKLA. L. REV. 603, 618 (2020) ("[P]rosecutors legislate every time they set generally applicable, prospective rules about who to prosecute, rather than determine whether to prosecute based on a case-by-case analysis of individual facts."); Barkow, *Policing of Prosecutors*, *supra* note 84, at 871 n.9 ("Given the broad wording of many federal criminal laws, one could argue that prosecutors possess legislative power as well."); Jonathan Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers*, 51 UCLA L. REV. 1079, 1097 (2004) ("That is, given the range of permissible enforcement actions under criminal laws (and many other laws) is extremely broad, it is the prosecutors' pattern of decisions that shape the meaning of the law, not the underlying statute itself. Where prosecutors make law in the course of executing a statute, the command to separate lawmaking from law implementation seems nonsensical.") (quoting M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1193 (2000) (citations omitted)).

Around the same time, the Supreme Court—as former federal prosecutor Bennett Capers expounds in his tour-de-force article *The Prosecutor's Turn*—decided to take a "hands-off approach" when confronted with the most troubling features of prosecutorial discretion.[105] Two cases illustrate this point. First, in *McClesky v. Kemp*, the Court passed the buck when confronted with "uncontroverted evidence of widespread racial discrimination in the selection of capital defendants", [106] stating, "Legislatures . . . are better qualified to weigh and 'evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.'"[107] Second, in *United States v. Armstrong*, the Court disregarded evidence indicating that the prosecutor engaged in selective prosecutions by singling out particular defendants on the basis of their race, holding that the defendant failed to show that the government did not prosecute similarly situated suspects of other races.[108] The Court's abdication of its duty to enforce constitutional protections in these cases made prosecutors virtually untouchable.

In sum, executive, legislative, and adjudicatory powers are consolidated in prosecutors. In exercising their powers, prosecutors are granted broad discretion, which courts enforce through the separation-of-powers principle. This deferential approach gives prosecutors nearly unchallenged control of the criminal legal system.

105. Capers, *The Prosecutor's Turn*, *supra* note 20, at 1296.

106. *Id.* at 1296–97.

107. McCleskey v. Kemp, 481 U.S. 279, 319 (1987) (quoting Gregg v. Georgia, 428 U.S. 153, 186 (1976)). In *McCleskey v. Kemp*, the Court held that a study proffered by Mr. McCleskey, which showed significant racial disparities in capital sentencing, did not demonstrate a constitutional violation because of the "safeguards designed to minimize racial bias in the process" and the value of jury trials. 481 U.S. 279, 313 (1987). Yet that study showed that a majority of defendants sentenced to death for killing white victims would not have faced capital punishment if their victims had been Black—and Black defendants convicted of killing white victims were by far the most likely to face execution. *See id.* at 321 (Brennan, J., dissenting). This was not simply a comparison of rates subject to nitpicking over factors it left out; the study accounted for about 230 nonracial factors to find the racial disparity—and the majority still discounted it. *See id.* at 325 (Brennan, J., dissenting).The Court accepted the validity of the study and its findings, but nonetheless declined to reverse Mr. McCleskey's death sentence. Because the study did not prove that the prosecutors in Mr. McCleskey's case intended to discriminate against him because of his race, the Court rejected his claim. *Id.* at 286–87. The case's infamy is only compounded by the majority opinion's author—by then retired—repudiating his vote a mere four years later. *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451 (1994).

108. United States v. Armstrong, 517 U.S. 456, 468 (1996).

### *B. The "Untouchables" Superpower: Prosecutorial Discretion and Control*

Power, in the sense prosecutors wield it, is control.[109] Prosecutors' near-plenary control over many stages of the criminal adjudication process mean that they, rather than the legislators, judges, and police also shape our criminal legal system, typically determine the ultimate outcome.[110] Below, I discuss how prosecutors utilize their discretion to exercise disproportionate control of many of the most critical stages of the process.

At the beginning of a criminal case the prosecutor has enormous discretion to decide whether to charge the defendant, and, if so, with what crimes.[111] Because the crime charged often carries a mandatory-minimum sentence, the prosecutor has "a basically unreviewable power to decide how much or how little punishment the defendant may face."[112] Even judicial tools for granting shorter sentences are subject to prosecutorial control.[113]

The prosecutor's unilateral control continues in grand jury proceedings and plea bargaining as Professor Eric Fish demonstrates in his works.[114] In the American system the prosecutor heavily influences the indictment decision by selecting the evidence a grand jury will see with virtually no

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109. *See Power*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/power [https://perma.cc/8RVD-9LZA] (defining power as "possession of control, authority, of influence over others"); *Power*, DICTIONARY.COM, https://www.dictionary.com/browse/power [https://perma.cc/A26A-CYA9] (defining power as "the possession of control or command over people").

110. I want to be clear here. I understand that, as argued by some, "it takes a village" to send someone to prison. *See* Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 837 (2018) (reviewing JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM (2017)). Notwithstanding the fact that the "track is laid by legislators and passes through critical gateways controlled by police, judges, and other actors," Jeffrey Bellin, *supra* note 74, at 181, it is the prosecutor (and only the prosecutor), as explained above, that executive, legislative, and adjudicatory power are consolidated in.

111. *See* Fish, *Prosecutorial Constitutionalism*, *supra* note 42, at 260 ("A judge cannot require that the prosecutor charge or not charge a particular crime, nor can a judge supervise prosecutorial charging decisions across cases to ensure that different defendants are treated similarly.").

112. *Id.*

113. *See* U.S. SENT'G GUIDELINES MANUAL § 5K1.1 (U.S. SENT'G COMM'N 2018); Wade v. United States, 504 U.S. 181, 185 (1992) (providing for a departure from mandatory minimum sentences for defendants who provide "substantial assistance"—but only if the prosecutor files a motion asking for one); *see also* Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 108 (1994) ("The most a court can do if it disagrees with the prosecutor's assessment of the defendant's assistance is review the prosecutor's failure to file a substantial assistance motion for an unconstitutional motive."). The prosecutor's authority is the same under 18 U.S.C. § 3553(e), which provides that the court only has authority to impose a sentence below the mandatory-minimum sentence proscribed by law if the government files a motion.

114. Fish, *Prosecutorial Constitutionalism*, *supra* note 42, at 262; *see also generally* Eric S. Fish, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419 (2018) [hereinafter Fish, *Against Adversary Prosecution*].

judicial oversight [115] A prosecutor who does not want to bring charges—even those the grand jury might support—can simply choose not to present the relevant statutes, as the prosecutors in the grand jury investigating Breonna Taylor's death did.[116] This control over charging continues through plea bargaining: the prosecutor determines what charges to retain, the benefits a defendant may receive from cooperation, and recommend sentences.[117] Prosecutors can pressure defendants by charging them with many offenses for the same conduct.[118] Mandatory minimum sentences and felony enhancements can mean that refusing a bargain exposes defendants to much higher penalties and costs at trial.[119] Given the choice between either pleading guilty and receiving a five-year sentence or risking a mandatory life sentence at trial,[120] defendants often take the deal, even when they are innocent.[121] Under such circumstances, a guilty plea is a safer choice—and prosecutorial power is one reason why. [122]

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115. *See* United States v. Williams, 504 U.S. 36, 48 (1992) ("[I]n its day-to-day functioning, the grand jury generally operates without the interference of a presiding judge. It swears in its own witnesses and deliberates in total secrecy.") (citations omitted); William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 174 (1973) ("[T]he grand jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at any time, for almost anything, before any grand jury."); Fish, *Prosecutorial Constitutionalism*, *supra* note 42, at 260; Ben Casselman, *It's Incredibly Rare for a Grand Jury to Do What Ferguson's Just Did*, FIVETHIRTYEIGHT (Nov. 24, 2014, 9:30 PM), http://fivethirtyeight.com/dtalab/ferguson-michael-brown-indictment-darren-wilson ("According to the Bureau of Justice Statistics, U.S. attorneys prosecuted 162,000 federal cases in 2010, the most recent year for which we have data. Grand juries declined to return an indictment in 11 of them.").

116. *See* Elizabeth Joseph, *Breonna Taylor grand jurors say there was an 'uproar' when they realized officers wouldn't be charged with her death*, CNN (Oct. 30, 2020, 5:18 PM), https://www.cnn.com/2020/10/29/us/breonna-taylor-grand-jurors/index.html [https://perma.cc/7DVM-H5SU] ("'Even though we asked for other charges to be brought, we were never told of any additional charges. We were just told that they didn't feel that they can make any charges stick' and that LMPD officers were justified in returning fire,' the juror said." (missing quotation mark in original)).

117. Fish, *Prosecutorial Constitutionalism*, *supra* note 42, at 263; *see also* Barkow, *Policing of Prosecutors*, *supra* note 84, at 876–84.

118. Fish, *Prosecutorial Constitutionalism*, *supra* note 42, at 263; *see also* DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 22–23 (2008); Stuntz, *supra* note 75, at 2567–68.

119. *See* John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12–19 (1978) ("contrast[ing] plea bargaining with medieval European law of torture"); Richard A. Oppel, Jr., *Sentencing Shift Gives New Clout to Prosecutors*, N.Y. TIMES, Sept. 26, 2011, at A1 ("After decades of new laws to toughen sentencing for criminals, prosecutors have gained greater leverage to extract guilty pleas from defendants and reduce the number of cases that go to trial, often by using the threat of more serious charges with mandatory sentences or other harsher penalties.").

120. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

121. The "innocence problem" is a common complaint about plea bargaining. *See* Gregory M. Gilchrist, *Plea Bargains, Convictions and Legitimacy*, 48 AM. CRIM. L. REV. 143, 148 (2011) ("The objections that have been leveled against plea bargaining are numerous and diverse, but most stem from a common problem: plea bargaining reduces the ability of the criminal justice system to avoid convicting the innocent.").

122. DARRYL K. BROWN, FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW 92 (2016) (emphasis original).

Additionally, exercising the trial right carries significant financial costs, including, in many states, a "surcharge on defendants who exercise their constitutional rights to counsel, confrontation, and trial by jury."[123] For example, Virginia charges a $50 tax on "the defendant's constitutional right to confront witnesses."[124] The number of pleas has increased because prosecutorial leverage increased.[125]

These structural barriers make prosecutors practically untouchable when exercising their full discretion to control many stages of our criminal justice process. When prosecutors are driven to win, this power distorts the balance of justice and leaves criminal defendants to bear the losses.

### *C. Adversarialism: "You Win or You Lose"*

The modern prosecutor inhabits the conflicting roles of an adversary and an administrator of justice. On the one hand, prosecutors are to dispassionately ensure that justice is done, which "requires attentiveness to systemic concerns, including the rights of defendants."[126] After all, the front wall of the Department of Justice proclaims that "[t]he United States wins its point whenever justice is done its citizens in the courts."[127] But the prosecutor's business is also against the accused person.[128] Indeed, "[i]sn't the whole idea of becoming a prosecutor to put the bad guys behind bars and keep the public safe?"[129] The tension between diligently and fairly

123. John D. King, *Privatizing Criminal Procedure*, 107 GEO. L.J. 561, 561 (2019) (discussing the practice of surcharging defendants who exercise their constitutional rights).

124. *Id.* at 578; *see also* VA. CODE ANN. § 19.2–187.1(F) (West 2017) (imposing a fee on defendants who demand confrontation and are found guilty).

125. Many commentators have argued that "American criminal justice would grind to a halt" if "the vast majority of defendants did not plead guilty." *See, e.g.*, BUTLER, *supra* note 53, at 222. This could also, as argued by Michelle Alexander, create a productive chaos in the criminal legal system that would force lawmakers to deal with mass incarceration. *See* Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. TIMES (May 10, 2012) https://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html [https://perma.cc/FAP4-2Y5D].

126. Fish, *Against Adversary Prosecution*, *supra* note 114, at 1428 (2018).

127. Brady v. Maryland, 373 U.S. 83, 87 (1963); *see id.* at 88 (finding that prosecutors "do[] not comport with standards of justice" when suppressing material evidence).

128. *See* Jocelyn Simonson, *The Place of "the People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 270–71 (2019) (examining the ways in which constitutional criminal procedure treats criminal defendants as effectively banished from the polity and providing independent reasons for why we should refer to prosecutors as representatives of the state rather than the people).

129. Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets* Brady, 109 PENN ST. L. REV. 1133, 1140 (2005); *see also* Herring v. New York, 422 U.S. 853, 862 (1975) ("The very premise of our *adversary system* of criminal justice is that *partisan advocacy on both sides* of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." (emphasis added)).

prosecuting defendants [130] is irreconcilable because adversarialism incentivizes winning above all else.[131] As one scholar put it, "There is a courthouse saying—known by anyone who has ever practiced criminal law—that expresses the ethos of winning over everything else in a grisly, sardonic way: 'Any prosecutor can convict the guilty. It takes real talent to convict the innocent.'"[132]

It is worth briefly highlighting the incentives that have created an "adversarial mindset at the root of modern prosecutorial excess." [133] Prosecutors face professional pressures and incentives "to focus on punishment and conviction to the exclusion of all else." [134] Although prosecution is a highly local affair in the United States, there appears to be one common thread in each prosecutor's office: conviction rates matter and attorneys who have a reputation for winning are promoted.[135] Some "offices even give prosecutors conviction bonuses, have them compete over the number of convictions they secure, shame them for losing cases, and perform rituals to celebrate trial victories."[136] Prioritizing competition, with the attendant pressures or adversarial responses from other stakeholders in

130. *See* Viereck v. United States, 318 U.S. 236, 247–48 (1943) (describing the dual roles of the prosecutor and stating that the prosecutor in the case at hand chose to address the jury with "highly prejudicial" remarks at the expense of fairness and justice); United States v. Wilson, 578 F.2d 67, 71 (5th Cir. 1978) ("Caught up in the adversary process and the emotional atmosphere of trial combat, prosecutors too often pursue strategies with a singular determination rather than with a careful deliberation.").

131. *See* Daniel S. Medwed, *The Prosecutor As Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 36 (2009) (emphasizing that the "image of the prosecutor as carnivorous aggressor in the adversarial den of the criminal courts is alive and well"); Catherine Ferguson-Gilbert, *It is Not Whether You Win or Lose, It is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283, 295 (2001) (arguing that because prosecutors' promotions are based upon conviction rates, "prosecutors seek convictions to boost their 'score' rather than seeking justice.").

132. Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 388–91 (2001) (stating that the overriding self-interest of prosecutors to win a case at times trumps their obligation to seek justice); *see also* THE THIN BLUE LINE (Third Floor Productions 1988) (according to the appellate attorney, Melvyn Carson Bruder, "[p]rosecutors in Dallas have said for years—any prosecutor can convict a guilty man. It takes a great prosecutor to convict an innocent man").

133. Bellin, *supra* note 36, at 1212.

134. *See* Fish, *Against Adversary Prosecution*, *supra* note 114, at 1432; *see also* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 3 (2007); DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 2–4 (2013).

135. *See* Fish, *Against Adversary Prosecution*, *supra* note 114, at 1432; *see, also* DAVID A. HARRIS, FAILED EVIDENCE: WHY LAW ENFORCEMENT RESISTS SCIENCE 104 (2012) ("[P]rosecutors' careers advance according to their conviction rates. The higher the rate, the better they do.").

136. Fish, *Against Adversary Prosecution*, *supra* note 114, at 1432; *see also* VAN CLEVE, *supra* note 16, at 70–71; Evan Moore, *'Win at All Costs' Is Smith County's Rule, Critics Claim*, HOUS. CHRON. (last updated July 29, 2011, 2:36 AM), http://www.chron.com/news/article/Win-at-all-costs-is-Smith-County-s-rule-1632942.php [https://perma.cc/5MT7-N59M]; Maurice Possley & Ken Armstrong, *Part 2: The Flip Side of a Fair Trial*, CHI. TRIB. (Jan. 11, 1999, 2:00 AM), http://www.chicagotribune.com/news/watchdog/chi-020103trial2-story.html [https://perma.cc/48 L8-VHKQ].

the criminal legal system, keeps prosecutors fixated on winning.[137] This creates a "them or us" mindset—prosecutors are part of a team, and they want to win.[138] Most prosecutors cede the responsibility of considering the defendant's interests to defense lawyers. Prosecutors rationalize this choice by relying on the defense attorney's obligation to represent their client's interests and rights.[139]

In sum, prosecutors are primarily interested in winning, which means securing a conviction. That motivation does not evaporate when a prosecutor has a weak case and a sweeter plea deal for the defendant is still a conviction. So long as prosecutors stay within the rules, they are compelled to bend all their decisions toward the strategic goal of winning the case. After all, "the prosecutor who is too sympathetic toward the defendant's plight or too suspicious of police is not doing her job."[140]

* * *

There is one important case, which is often overlooked, that demonstrates all the points this Article made in the previous three sections and deserves our attention—*Darden v. Wainwright*.[141] Willie Jasper Darden, a Black man, was charged and convicted of robbery, assault with intent to kill, and murder.[142] The alleged facts of this case are quite disturbing. Darden allegedly, on furlough from a Florida prison, robbed a furniture store, shot and killed the owner of the furniture store, sexually assaulted the owner's wife, and shot and wounded an innocent bystander.[143] During the guilt phase of the criminal trial, the prosecutor, a white man,

137. *See* Fisher, *supra* note 16, at 207 ("The moral and political climate in an agency can foster a 'conviction psychology' more powerfully than can any specific policy basing promotions on an assistant's conviction rate."); Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 792 (2003) ("[O]ne ought not underestimate the unifying influence of a shared commitment to 'getting the bad guys,' hardened by the adversarial process, nurtured by mutual respect and need, and on occasion lubricated by alcohol." (citations omitted)); Ken White, *Confessions of an Ex-Prosecutor*, REASON (June 23, 2016, 10:00 AM), http://reason.com/archives/2016/06/23/confessions-of-an-ex-prosecutor [https://perma.cc/95VE-MHBZ] ("[M]y experience showed me that prosecutors are strongly influenced to disregard and minimize rights by the culture that surrounds them. Disciplining or firing miscreants may be necessary, but it's not enough: It doesn't address the root causes of fearful culture and bad incentives.").

138. *See* United States v. Cronic, 466 U.S. 648, 657 (1984) ("'While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.'") (quoting United States *ex rel.* Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975)).

139. BUTLER BOOK, *supra* note 21, at 114–15.

140. *Id.* at 115.

141. 477 U.S. 168 (1986).

142. *Id.* at 170–71.

143. *Id.* at 171–75.

referred to Darden before an all-white[144] jury as an "animal" and stated that, among other incendiary comments, "he shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash."[145] Most strikingly, the "prosecutor expressed the desire to see [Darden] sitting at counsel table with his face blown away by a shotgun."[146] The jury convicted and sentenced Darden to death despite conflicting evidence of his innocence.[147] On appeal, Darden argued that his due process right to a fair trial was violated when the prosecutor made a summation that contained those extremely inflammatory comments. Although the Court acknowledged that those comments were inappropriate, it held that any error was harmless as the weight of the evidence against Darden was "heavy."[148] Darden was executed in 1989.

In a stinging dissent, Justice Harry Blackmun exclaimed the following:

> This Court has several times used vigorous language in denouncing government counsel for such conduct as that of the prosecutor here. But, each time, it has said that, nevertheless, it would not reverse. Such an attitude of helpless piety is, I think, undesirable. It means actual condonation of counsel's alleged offense, coupled with verbal disapprobation. If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. . . . [O]ur rules on the subject are pretend-rules. . . . Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice of this court—recalling the bitter tear shed by the Walrus as he ate the oysters—breeds a deplorably cynical attitude towards the judiciary.[149]

These words contain a deep warning: Prosecutors have become largely untouchable in our criminal legal system. Their discretion—imbued with executive, legislative, and adjudicatory power—will lead to gross injustice if left unchecked in an adversarial system. At heart, what Justice Blackmun was really struggling with was this: *quis custodiet ipsos custodies*? Who will guard the guards themselves? The answer: *no one*, as the Black community knows to be true. The country did not heed Justice Blackmun's

144. At the time of Darden's trial, Batson v. Kentucky, 476 U.S. 79 (1980), had not been decided. In *Batson*, the Supreme Court held that a criminal defendant's equal protection rights were violated when a prosecutor used his peremptory challenges to remove jurors based on race.

145. *Darden*, 477 U.S. at 180 n.11; *Id.* at n.12.

146. Welsh S. White, *Prosecutors' Closing Arguments at the Penalty Trial*, 18 N.Y.U. REV. L. & SOC. CHANGE 297, 306-08 (1990-91) (citing *Darden*, 477 U.S. at 180 n.12).

147. *See Darden*, 477 U.S. at 199–200 (Blackmun, J., dissenting).

148. *Id.* at 182.

149. *Id.* at 205–06 (Blackmun, J., dissenting) (quoting United States v. Antonelli Fireworks Co., 155 F.2d 631, 661 (2d Cir. 1946) (Frank, J., dissenting)).

warning. Consequently, prosecutors—tethered to adversarialism—became (and remain) the principal drivers of mass incarceration.[150]

## II. WHO PAYS THE PRICE OF PROSECUTORIAL POWER?

Two of the most influential books about race in many years—*The New Jim Crow* by Michelle Alexander[151] and *Between the World and Me* by Ta-Nehisi Coates[152]—tackle, in different ways, the question posed by hip-hop artists Meek Mill and Jay-Z: "What's Free?"[153] The question is asked several times during the track after the artists make the compelling case that the criminal legal system was designed to target and punish Blacks.[154] Both Alexander and Coates agree with this assessment. Moreover, both contend that "mass incarceration is a form of social control of Blacks"[155] and that prosecutors—more than any other actor—are responsible.[156] It is the prosecutors, according to Alexander, that "holds the keys to the jail-house door."[157] So, to answer the question: nothing is free in a criminal legal system that declared Blacks public enemy number one. And, in an adversarial system—where prosecutors value winning above all else, including doing justice—Blackness is punished. This section explores my answer more fully.

### *A. "Tryna Fix the System and the Way That They Designed It": The War on Drugs and Mass Incarceration*

It is no secret that some crimes were created specifically to target and punish Black and Brown people. The origins of the "war on drugs" are found in racist policies[158] and statutes that were and continue to be implemented by prosecutors. There is general agreement that the "war on

150. *See* PFAFF, *supra* note 11, at 206.

151. ALEXANDER, *supra* note 11.

152. TA-NEHISI COATES, BETWEEN THE WORLD AND ME (2015).

153. MEEK MILL FEATURING JAY-Z & RICK ROSS, *What's Free, on* CHAMPIONSHIPS (Atlantic Records 2018).

154. *See, e.g., id.* ("Tryna fix the system and the way that they designed it/ I think they want me silenced (Shush)/ Oh, say you can see, I don't feel like I'm free/ Locked down in my cell, shackled from ankle to feet/ Judge bangin' that gavel, turned me to slave from a king/ Another day in the bing, I gotta hang from a string.").

155. Butler, *supra* note 52, at 1435 (2016).

156. *See* ALEXANDER, *supra* note 11, at 87; COATES, *supra* note 152, at 7–12.

157. ALEXANDER, *supra* note 11, at 87.

158. *See* IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 13–20 (2019) (providing definitions for racist policies and ideas). Dr. Kendi states that "[a] racist policy is any measure that produces or sustains racial inequity between racial groups" and that "[a] racist idea is any idea that suggests one racial group is inferior or superior to another racial group in any way." *Id.* at 18, 20. This Article uses these terms, as described, in this Section.

drugs" is "the single most important explanation for mass incarceration."[159] A brief historical account captures this.

*1. The Racist Origins of the War on Drugs*

In 1971, President Richard Nixon launched the "war on drugs," declaring Blacks as public enemy number one: "you have to face the fact that the whole problem is really the blacks."[160] In an attempt to conceal their racist intent, the Nixon Administration made it appear that they were troubled by the rise in the use of recreational drugs and thus agreed to market any campaign as a public health issue.[161] After all, "the key [was] to devise a system that recognizes [their racist intent] while not appearing to."[162] President Nixon argued that crime and violence in the community was a consequence of a lenient criminal legal system. It was his belief that the "solution to the crime problem is not the quadrupling of funds for any governmental war on poverty but more convictions."[163] Thus, the real goal behind the "war on drugs" since the Nixon Administration was to create a strong carceral state to control and punish the Black and poor.[164]

In the 1980s, Ronald Reagan's Administration aggressively continued the "war on drugs."[165] President Reagan, who believed Blacks were inferior

159. BUTLER BOOK, *supra* note 21, at 46.

160. Roger Casement, *Comment to Nixons's Drug War—Re-Inventing Jim Crow, Targeting the Counter Culture*, THOM HARTMANN PROGRAM (Sept. 21, 2012, 10:47 AM) http://www.thomhartmann.com/forum/2012/09/nixons-drug-war-re-inventing-jim-crow-targeting-counter-culture#sthash.yO6ZEQvY.dpuf [https://perma.cc/XDE2-JVEP]; *see also* MEMORANDUM FOR THE PRESIDENT FROM DANIEL P. MOYNIHAN TO PRESIDENT NIXON 4 (Jan. 16, 1970), https://www.nixonlibrary.gov/virtuallibrary/documents/jul10/53.pdf [https://perma.cc/5LZK-GZ8Q] ("The incidence of anti-social behavior among young black males continues to be extraordinarily high. Apart from white racial attitudes, this is the biggest problem black Americans face, and in part it helps shape white racial attitudes. Black Americans injure one another. Because blacks live in de facto segregated neighborhoods, and go to de facto segregated neighborhoods, the socially stable elements of the black population cannot escape the socially pathological ones. Routinely their children get caught up in the anti-social patterns of the others.").

161. *See* PBS, *Thirty Years of America's Drug War: A Chronology*, FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/ [https://perma.cc/S2ZF-46P8]; DAN BAUM, SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE 7 (1996).

162. Casement, *supra* note 160.

163. Emily Badger, *Is This the End of 'Tough on Crime'?,* WASH. POST (Sept. 9, 2014, 3:32 PM CDT), https://www.washingtonpost.com/news/wonk/wp/2014/09/09/is-this-the-end-of-tough-on-crime/ [https://perma.cc/5DU2-KS5H] (quoting KATHERINE BECKETT & THEODORE SASSON, THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA 52 (2d ed. 2004)).

164. Larry Gabriel, *Joining the Fight: Not Your Grandfather's NAACP*, DETROIT METRO TIMES (Aug. 10, 2011), https://www.metrotimes.com/detroit/joining-the-fight/Content?oid=2148184 ("Look, we understood we couldn't make it illegal to be young or poor or black in the United States, but we could criminalize their common pleasure . . . . We understood that drugs were not the health problem we were making them out to be, but it was such a perfect issue . . . that we couldn't resist it.") (quoting John Ehrlihcman, Nixon's White House counsel).

165. MARC MAUER, RACE TO INCARCERATE 60 (2d ed. 2006).

to whites,[166] developed a law enforcement strategy that targeted Blacks with surgical precision. His strategy led to three major developments.

First, President Reagan created a narrative that America must "'get tough' on street crime."[167] During his campaigns and media appearances, President Reagan would claim, in a statement echoed by another presidential candidate nearly forty years later, "we must make America safe again . . . ."[168] He fed the media a narrative that there is a "crime epidemic" plaguing communities, that courts are not tough enough on criminals, and that our laws, particularly drug laws, need to "crack[] down on hardened criminals . . . ."[169] Television news media became dominated by stories about crime as it parroted Reagan's message that "street" crime is a major threat to (white) civil society, and that the main perpetrators are Black men.[170]

Second, to get tough on crime, President Reagan championed federalizing more crimes and creating robust drug sentencing regimes. Politicians followed his lead: they created new prisons, picked longer sentences and limited judicial discretion to shorten them, added new federal crimes, and created harsh laws to punish recidivists.[171] Specifically, as Professor Angela J. Davis details exhaustively in her work, Congress added new mandatory minimums that barred judges from exercising discretion over sentencing. These mandatory minimums did not take into account whether someone was a first-time offender or only played a minor part in the offense—mandatory minimums meant that they still received lengthy prison sentences.[172]

These "tough-on-crime" punishment regimes were driven by racial stereotypes, particularly in laws addressing crack cocaine.[173] Crack cocaine was believed to be the preferred drug in the Black community, as "whites strongly associated crack with . . . inner city blacks . . . ."[174] The media

166. Tim Naftali, *Ronald Reagan's Long-Hidden Racist Conversation With Richard Nixon*, ATLANTIC (July 30, 2019), https://www.theatlantic.com/ideas/archive/2019/07/ronald-reagans-racist-conversation-richard-nixon/595102/ [https://perma.cc/LS6T-SJUK] ("To see those, those monkeys from those African countries—damn them, they're still uncomfortable wearing shoes!").

167. Badger, *supra* note 163.

168. *See, e.g.*, President Ronald Reagan, Radio Address to the Nation on Crime and Criminal Justice Reform (Sept. 11, 1982), https://www.reaganlibrary.gov/archives/speech/radio-address-nation-crime-and-criminal-justice-reform [https://perma.cc/3N7S-MYHD].

169. *Id.*

170. *See* MAUER, RACE TO INCARCERATE 172–74 (1st ed. 1999).

171. *Butler Article*, *supra* note 67, at 987–88.

172. Angela J. Davis, *The Prosecutor's Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 1063, 1066 (2016).

173. DAVID COLE, NO EQUAL JUSTICE (1999).

174. David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1293 (1995). This Article also provides an in-depth analysis of the legislative history of the federal crack sentencing laws.

reported and perpetuated racist topes about crack cocaine that ultimately were proven to be false.[175] Congress instituted a mandatory sentence for possession of crack cocaine, but not powder cocaine, with five- and ten-year mandatory-minimum prison terms for first-time drug dealers,[176] depending on the type and quantity of the drug.[177] This resulted in a one-hundred-to-one disparity between penalties for crack and powder cocaine offenses, meaning the distribution of just five grams of crack carried a mandatory minimum five-year federal prison sentence, while distribution of five hundred grams of powder cocaine carried the same sentence. Congress didn't study or evaluate the propriety of the one-hundred-to-one disparity between the penalties for crack and powder cocaine offenses.[178] Rather, this disparity was the result of a "spitting contest" between political parties to determine who was tougher on crime.[179] No supporting evidence—scientific or otherwise—was presented to justify *any* disparity, much less one set at one to a hundred.[180] Perhaps even worse, many states were inspired by the federal government and followed its lead, codifying mandatory-minimum sentencing regimes in law.[181] Some states even passed harsher drug sentencing laws, including three-strike laws.[182]

Finally, President Reagan entrusted prosecutors—an extension of the executive—with even more power and control. The "consequences of sentencing guidelines and mandatory minimum sentences was the transfer of discretion and power from judges,"[183] who President Reagan argued were soft on crime, to prosecutors. It was made abundantly clear to prosecutors

175. *See Crack Babies: Twenty Years Later*, NPR (May 3, 2010, 12:00 PM ET), http://www.npr.org/templates/story/story.php?storyId=126478643 [https://perma.cc/RX6F-UYD7] (addressing the false media reports about developmental disabilities in the children of crack cocaine users); DEBORAH J. VAGINS & JESSELYN MCCURDY, AM. CIV. LIBERTIES UNION, CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW 4–5 (2006) (dispelling all the common myths about crack cocaine).

176. VAGINS & MCCURDY, *supra* note 175, at 2.

177. *See* U.S. SENT'G COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 110–39 (1995).

178. BUTLER BOOK, *supra* note 21, at 38.

179. *Id.*

180. Many members of Congress made this point. Representative Barney Frank, for example, described the statute as "the legislative equivalent of crack" saying "[i]t yields a short-term high, but some dangerous long-term consequences." Jacob V. Lamar Jr., *Rolling Out the Big Guns: The First Couple and Congress Press the Attack on Drugs*, TIME, Sept. 22, 1986, at 25 (quoting Massachusetts Democrat Barney Frank).

181. *See* Christopher Mascharka, Comment, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FLA. ST. U. L. REV. 935, 936 n.4 (2001) (citing various sources regarding the mandatory minimum sentences imposed by the drug laws of thirty-seven states).

182. *See* KARA GOTSCH, AM. CONST. SOC'Y, "AFTER" THE WAR ON DRUGS: THE FAIR SENTENCING ACT AND THE UNFINISHED DRUG POLICY REFORM AGENDA 2 (2011).

183. Davis, *supra* note 172, at 1070.

that they were directly responsible to rein in "lawlessness."[184] To this end, Congress authorized twelve new regional drug task forces, including over one thousand new FBI and DEA agents and federal prosecutors.[185]

*2. War Correspondence from Occupied Black America*

Hip-hop culture prominently features a deep understanding of the consequences of this selective prosecution. Carlton Ridenhour (a.k.a. Chuck D) contrasted rap with mainstream news outlets; while mainstream news routinely relies on white anxiety about Black criminality, rap conveys the experiences of artists of color in their own words.[186] Jay-Z recently argued that the criminal legal system "stalks black people."[187] This harassment does not go unnoticed and is represented in hip-hop terminology. For example, Nipsey Hussle, among others, have talked about how they or their loved ones "[caught] a case." [188] This hip-hop slang for being arrested demonstrates "the culture's view of the almost arbitrary nature of criminal justice. . . . The language connotes the same combination of responsibility and happenstance as when one 'catches' the common cold."[189]

Catching a case often results in punishment through incarceration. The experiences of those in prison—and how the criminal legal system is used to control Blacks—has been well documented in hip-hop and "[t]he portrait is ugly."[190] To Nas, prison is "the belly of the belly of the beast" and "the beast love to eat black meat / And got us n****s from the hood, hangin off his teeth."[191]

Hip-hop raises a larger question: whether punishment actually works. Many have argued that the cruelty of putting people in cages is unnecessary.

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184. *See, e.g.*, President Ronald Reagan, Remarks Announcing Federal Initiatives Against Drug Trafficking and Organized Crime (Oct. 14, 1982), https://www.reaganlibrary.gov/archives/speech/remarks-announcing-federal-initiatives-against-drug-trafficking-and-organized-crime [https://perma.cc/VBF6-HDKN].

185. MAUER, *supra* note 165, at 60–61.

186. *See* Veryl Pow, *Rebellious Social Movement Lawyering Against Traffic Court Debt*, 64 UCLA L. Rev. 1770, 1822 n.200 (2017) ("Carlton Ridenhour, professionally known as Chuck D, the emcee of rap group Public Enemy, characterized rap as the Black CNN because unlike the characterizations of Blacks as criminals by mainstream news outlets, rap is written by artists of color whose content reflects experiences at the bottom." (citing CHUCK D WITH YUSUF JAH, FIGHT THE POWER: RAP, RACE, AND REALITY 256 (1998))).

187. Jay-Z, Opinion, *The Criminal Justice System Stalks Black People Like Meek Mill*, N.Y. TIMES (Nov. 17, 2017), https://www.nytimes.com/2017/11/17/opinion/jay-z-meek-mill-probation.html [https://perma.cc/XX4G-RDN8].

188. *Nipsey Hussle Signs with Maybach Music*, TRUE MAG. (2012), https://true-magazine.com/nipsey-hussle-signs-with-maybach-music-exclusively-announce-with-true-magazine-his-new-album-dropping-this-year/ [https://perma.cc/DT9C-EK9Y].

189. *Butler Article*, *supra* note 67, at 998.

190. *Id.* at 1014.

191. *See* NAS, DMX, METHOD MAN & JA RULE, *Grand Finale*, *on* BELLY (Def Jam Recordings 1998).

Abolition focuses on addressing systemic problems to prevent the need for incarceration.[192] Hip-hop approaches this same conclusion from two premises. First, prison is cruel. It strips away a person's dignity and dehumanizes them. Hip-hop artist Common captured this sentiment stating, "I think one of the things that I've experienced from meeting men and women who were incarcerated was that they wanted to feel humanized."[193] Second, prison does not deter because it is not viewed as legitimate.[194] This is why "[s]hout outs" to inmates—"expressions of love and respect to them"[195] —are commonplace in hip-hop music. Jay-Z, in "A Ballad for the Fallen Soldier," sends a "shout-out to my n****z that's locked in jail / P.O.W.'s (prisoner of war) that's still in the war for real . . . They all winners to me."[196] Professor Paul Butler makes this point crystal clear:

> When a large percentage of the people you know, respect, and love get locked up, them being locked up seems to say more about the state than about the inmate. We are supposed to be disgusted with the people the law labels as criminals, but that would mean we are disgusted with one in three black men. The hip-hop community consists of these young men and other people who know and love them. It does not find them to be disgusting people. Just the opposite.[197]

In their effort to rein in purported lawlessness, prosecutors gave their adversaries in the "war on drugs" a face—a Black face. This resulted in what Michelle Alexander poignantly calls "The New Jim Crow"—mass incarceration.[198]

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192. Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES MAG. (April 17, 2019), https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html [https://perma.cc/7RXJ-UFSY].

193. Marcela Isaza, *A Host of Celebrities Speak out on Criminal Justice Reform*, AP NEWS (May 23, 2019), https://www.apnews.com/1b6023d6436d48f2b5e35c520f5f62d4 [https://perma.cc/EU9V-DWMB].

194. This is a consequence of the "war on drugs." As Fourth Amendment jurisprudence granted greater leeway for police and prosecutorial errors and omissions, the legitimacy of convictions has evaporated. *See* Thomas A. Durkin, *Apocalyptic War Rhetoric: Drugs, Narco-Terrorism, and a Federal Court Nightmare from Here to Guantanamo*, 2 NOTRE DAME J. INT'L & COMP. L. 257, 263 (2012) ("Boldfaced lying to justify the seizure of huge quantities of drugs, something once reserved for the province of the state courts, became silently accepted by many prosecutors and judges in the federal courts sadly permitting many deserving drug dealers a basis to go off to prison with a legitimate complaint about the system.").

195. *Butler Article*, *supra* note 67, at 984.

196. *See* JAY-Z, *A Ballad for the Fallen Soldier*, on THE BLUEPRINT2: THE GIFT & THE CURSE (Roc-A-Fella 2002).

197. BUTLER BOOK, *supra* note 21, at 131.

198. *See* ALEXANDER, *supra* note 11.

### *B. "The Black Body: The Clearest Evidence That America Is the Work of Men"*

In our criminal legal system "race matters."[199] Indeed, "many of the problems that plague the criminal justice system—mass incarceration, over-criminalization, and capital punishment, to name just a few—are only intelligible through the lens of race."[200] These problems can be directly traced to prosecutors. They, among others,[201] have subordinated Blacks at every step. A close examination of the United States' prison statistics provides powerful proof.

The "war on drugs" resulted in a 628% explosion in the prison population—the largest expansion of prison population in the free world—and unprecedented racial disparities.[202] There are currently 2.2 million people in America's prisons and jails.[203] Blacks account for approximately half of the people in prison, even though we make up only about thirteen percent of the overall population.[204] While "one in every seventeen white males can expect to go to prison in his lifetime, that likelihood increases to one in every six Hispanic males," and one in every three Black males.[205] One explanation for this abhorrent statistic is that although Blacks represent about fourteen percent of monthly drug users, we account for more than thirty-eight percent of people incarcerated for drug use in state prisons.[206] Although there is no evidence that Blacks are more likely to use or sell

199. CORNEL WEST, RACE MATTERS (2d ed. 2001); *see also* W.E.B. Du Bois, *Of the Dawn of Freedom*, *in* THE SOULS OF BLACK FOLK 8, 8 (Henry Louis Gates, Jr. ed., 2007) ("The problem of the twentieth century is the problem of the color-line . . . .").

200. I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 5 (2019) [hereinafter Capers, *Afrofuturism*].

201. *See, e.g.*, COATES, *supra* note 152, at 7–12 (discussing how police officers too have control over the Black body).

202. *See* I. Bennett Capers, *The Under-Policed*, 51 WAKE FOREST L. REV. 589, 591–93 (2016) [hereinafter Capers, *The Under-Policed*]. The number of federal prisoners alone has grown by 800% during the past three decades. "Over 80 percent of the increase in the federal prison population from 1985 to 1995 was due to drug convictions." Kevin B. Zeese, *Engaging the Debate: Reform vs. More of the Same*, 30 FORDHAM URB. L.J. 465, 478–79 (2003).

203. *See* I. Bennett Capers, *Defending Life*, *in* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? 167, 179 (Charles Ogletree, Jr. & Austin Sarat eds., 2012); SENT'G PROJECT, TRENDS IN U.S. CORRECTIONS 2 (2015), http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf.

204. *See* MAUER, *supra* note 170, at 124.

205. Capers, *The Under-Policed*, *supra* note 202, at 592 (citing SENT'G PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE 1 (2013), http://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justi ce-Shadow-Report-ICCPR.pdf [https://perma.cc/K2R8-T23P]).

206. *See* E. ANN CARSON, U.S. DEP'T OF JUST., PRISONERS IN 2014 30 App. tbl.4 (2015), http://bjs.ojp.usdoj.gov/content/pub/pdf/p14.pdf [https://perma.cc/FG5G-WU6T]; *see also* Thomas, *supra* note 69.

drugs, we are more likely to be arrested, charged, and convicted for those crimes.

In a criminal legal system where more than 1.5 million people were arrested for drug law violations in 2014—nearly 1.3 million of whom were arrested for possession—the number of Black people "being roped into the criminal justice machinery"[207] is staggering.[208] It is no wonder why hip-hop artists such as Kendrick Lamar,[209] Nobel laureate author Toni Morrison,[210] movie director Jordan Peele,[211] and comedian Dave Chappelle,[212] among others, complain about selective prosecution, which "sometimes seems to border on paranoia."[213] As the old joke goes, "Just because you are paranoid . . . doesn't mean they're not out to get you."[214]

Race—the defendant's, as well as that of the victim—is not just the elephant in the room for our adversarial criminal legal system; it *is* the room, the frame in which all criminal justice actors operate. As Professor Daniel Epps contends, from choosing whom to prosecute to what sentence to seek, race and other factors influence prosecutors' decisions even when they should be, "as a matter of law and justice . . . irrelevant." Even for prosecutors who never consciously consider race, unconscious racism significantly shapes their assessment of what charges are appropriate.[215] Anti-Black bias affects the choice of whether to bring charges at all and

207. Capers, *The Under-Policed*, *supra* note 202, at 601.

208. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., CRIME IN THE UNITED STATES, 2014: ARRESTS 2 (2015), https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/persons-arrested/persons-arrested.pdf [https://perma.cc/TEF3-VSTF]; FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., CRIME IN THE UNITED STATES, 2014: ARRESTS FOR DRUG ABUSE VIOLATIONS TABLE, FBI, https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/arrest-table.xls [https://perma.cc/79EB-2GNB].

209. KENDRICK LAMAR, *The Blacker the Berry*, *on* TO PIMP A BUTTERFLY (Aftermath Entertainment 2015).

210. Oliver Laughland, *Toni Morrison: 'I Want to See a White Man Convicted for Raping a Black Woman'*, GUARDIAN (April 20, 2015, 11:56 AM EDT), https://www.theguardian.com/books/2015/apr/20/toni-morrison-race-relations-america-criminal-justice-system [https://perma.cc/T4KH-A6JT] ("They don't stop and frisk on Wall Street, which is where they should really go.").

211. Zach Sharf, *'Get Out': Jordan Peele Reveals the Real Meaning Behind the Sunken Place*, INDIEWIRE (Nov. 30, 2017, 1:33 PM), https://www.indiewire.com/2017/11/get-out-jordan-peele-explains-sunken-place-meaning-1201902567/ [https://perma.cc/6DN8-7PHV] (discussing Jordan Peele's movie "Get Out," in which Peele describes the "sunken place" as this: "No matter how hard we scream, the system silences us").

212. Tom Fairclough, *Dave Chappelle and His White Friend Chip*, YOUTUBE (Nov. 17, 2008), https://www.youtube.com/watch?v=OH4GMaNWdwU.

213. BUTLER BOOK, *supra* note 21, at 140.

214. *Id.*

215. *See* Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202, 205–10 (2007).

what penalty to seek. Epps demonstrates how both "anecdotal and statistical evidence confirm that such discrimination persists."[216]

Many scholars have acknowledged this troubling aspect of prosecutorial adversarialism.[217] The need to win cases and induce plea bargains encourages prosecutors, even unprejudiced prosecutors, to target racial minorities.[218] This is because—as study after study suggests—juries and judges are more easily persuaded, whether because of racial animus or unconscious stereotypes, to convict Black and Brown people.[219] Others, such as Epps, have argued that discriminatory decisionmaking by prosecutors—what he refers to as adversarial asymmetry—can perhaps be prevented if the criminal process allowed more adversarialism.[220] That is, prosecutors should purely be focused on the maximization of punishment.[221] Perhaps. But perhaps it would just lead to more of the same "hyperadversarialism."[222] And when the defendant is Black, we know what the same is.

To be Black in our criminal legal system means that prosecutors are more likely to bring harsher charges against you, especially when it comes to

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216. Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. REV. 762. 801 (2016). (citing Starr & Rehavi, *supra* note 48, at 27–31 and COLE, *supra* note 173, at 143 (1999)). Epps highlights one example that highlights discriminatory prosecution.

> Georgia law permits (but does not require) district attorneys to seek an automatic life sentence for a second drug offense. As of 1995, prosecutors appeared much more likely to use their discretion to punish Black defendants: prosecutors "had invoked it against only 1 percent of white defendants facing a second drug conviction, but against more than 16 percent of eligible Black defendants."

(quoting COLE, *supra* note 173, at 143 (1999)). The Georgia Supreme Court, despite this statistical evidence, rejected an equal protection claim. Stephens v. State, 456 S.E.2d 560 (Ga. 1995).

217. *See, e.g.*, Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1142 (2012) ("[T]he conditions under which implicit biases translate most readily into discriminatory behavior are when people have wide discretion in making quick decisions with little accountability. Prosecutors function in just such environments.").

218. *See* Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of* Armstrong, 73 CHI.-KENT L. REV. 605, 651 (1998) ("Prosecutors will sometimes improve their trial win rate or plea bargaining record by targeting minorities.").

219. For reviews of such studies, see Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1616–51 (1985); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 75–99 (1993); Cynthia K.Y. Lee, *Race and the Victim: An Examination of Capital Sentencing and Guilt Attribution Studies*, 73 CHI.-KENT L. REV. 533 (1998).

220. Epps, *supra* note 216, at 765–68 (arguing that more adversarial prosecutors with a focus on maximizing punishment would solve a number of problems in the criminal legal system); *see also id.* at 803 (conceding that, under a maximization of punishment model, "*some* decisions by punishment-maximizing prosecutors could still be infected by bias").

221. *Id.* Admittedly, Epps explains that his "proposal is offered more as a thought experiment than a reform proposal . . . ." *Id.* at 837.

222. *See, e.g.*, Hadar Aviram, *Legally Blind: Hyperadversarialism,* Brady *Violations, and the Prosecutorial Organizational Culture*, 87 ST. JOHN'S L. REV. 1 (2013).

charges carrying mandatory minimums.[223] Black men are nearly twice as likely as white men to be charged with an offense carrying a mandatory minimum sentence.[224] They also continue to receive longer sentences than similarly situated white men by a substantial margin.[225] Black women are three times more likely than white women to be incarcerated;[226] and Black boys are seen as guiltier than white boys.[227] Even worse, Black people are more likely to be wrongfully convicted than any other race.[228] Prosecutors are often responsible for this serious injustice against Blacks.[229]

This discretionary disparity extends to the decision to seek the death penalty. [230] Although it is unconstitutional to execute people with intellectual disabilities,[231] prosecutors selectively recognize the existence of systemic racism to exploit the flaws of racist IQ tests and ask judges to add five to fifteen points to the IQ scores of Black and Brown people.[232] This bump masks the disabilities of Black inmates, allowing their execution[233]—and many states permit this practice.[234]

In addition, to be Black means you are under constant surveillance because prosecutors advance contorted interpretations of our Constitution.[235] Black people thus face an increased likelihood—relative to whites—of being stopped by the police, searched by the police, and being

223. Starr & Rehavi, *supra* note 48, at 27–31.

224. *Id.* at 28–29; *see also* Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 192–93 (2008).

225. U.S. SENT'G COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING (2017), https://www.ussc.gov/research/research-reports/demographic-differences-sentencing [https://perma.cc/E6LD-ZD5H].

226. *See* CARSON & SABOL, *supra* note 28, at 9.

227. *See Black Boys Viewed as Older*, *supra* note 29.

228. *See generally* Samuel R. Gross, Maurice Possley & Klara Stephens, *Race and Wrongful Convictions in the United States*, NAT'L REGISTRY EXONERATIONS (Mar. 7, 2017), http://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf [https://perma.cc/EHC7-CGQ6] (examining vastly disproportionate rates of wrongful convictions).

229. *See, e.g.*, *infra* III.A.3 (discussing the prosecutor's role in wrongful convictions); Aviram, *supra* note 222, at 6–8 (discussing the "tragic" and "infuriating" prosecutors who withheld *Brady* evidence that resulted in the wrongful conviction of John Thompson for murder); BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION (2014) (discussing the wrongful conviction of Walter McMillian, a man sentenced to death for a murder he did not commit).

230. *See* McCleskey v. Kemp, 481 U.S. 279, 287 (1987).

231. Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that the execution of individuals with intellectual disabilities is unconstitutional).

232. *See* Robert M. Sanger, *IQ, Intelligence Tests, "Ethnic Adjustments" and* Atkins, 65 AM. UNIV. L. REV. 87, 89 (2015); *id.* at 90 ("[A]fter increasing [a capital defendant's IQ] test scores, the prosecution argues that the defendant is not eligible for relief from execution under *Atkins v. Virginia*.").

233. *Id.*

234. *See id.* at 109–11.

235. Toni Morrison, *On the Backs of Blacks*, TIME (Dec. 2, 1993), http://content.time.com/time/subscriber/article/0,33009,979736,00.html. Critical Race Theorist Devon Carbado convincingly shows how Fourth Amendment jurisprudence was developed "on the backs of blacks." *See* Carbado, *supra* note 50, at 148–49 (providing Fourth Amendment Supreme Court cases that involve black defendants).

killed during a routine police encounter.[236] This overpolicing predictably results in positive feedback with aggressive and adversarial prosecution—Black people are more likely to face prosecution because of racist policing, and racist policing is legitimized by adversarial-minded prosecutors who seek to win at all costs.

In sum, to be Black means to be punished because you are Black. When race so predominates over other considerations as to become the entire metaphorical room, everything else gets filtered through that room. This is the greatest sin of prosecutorial adversarialism.

* * *

The concentration of power in prosecutors is not likely to change. How they use that power, however, must change. The adversarial system works poorly in practice for all, but especially Blacks. We must be more than willing to reconsider basic structural arrangements in criminal justice, we must be prepared to rebuild the system with an antiracist frame. The next part does precisely that, imagining prosecutors as solely just actors in our criminal legal system.

## III. THE JUST PROSECUTOR

*We are gifted by an ability to imagine a different world—to offer alternative values—if only because we are not inhibited by the delusion that we are well served by the status quo*.[237]

–Charles R. Lawrence, III.

Hip-hop artist Nas once pondered what the criminal legal system would look like if "[he] ruled the world."[238] Nas would go on to claim that he would "free all his sons" from prison by "open[ing] every cell in Attica, send 'em to Africa."[239] In 1971, there was a riot in New York's Attica prison after Black inmates discovered, among other things, racial biases with past

236. *See, e.g.*, Camelia Simoiu, Sam Corbett-Davies & Sharad Goel, *Testing for Racial Discrimination in Police Searches of Motor Vehicles*, SOC. SCI. RES. NETWORK 15–16 (July 18, 2016); Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 UCLA L. Rev. 1108, 1123 (2020) ("Yet even in cities with police forces that are more representative of their populations' racial diversity, the problem of police violence continues, in part because of fundamental failings of even 'community policing' reforms.").

237. Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2239 (1992).

238. NAS FEATURING LAURYN HILL, *If I Ruled the World (Imagine That), on* IT WAS WRITTEN (Sony Records 1996).

239. *Id.*

prison sentences and parole decisions.[240] The uprising ended after state troopers fired 3,000 rounds that resulted in the death of thirty-nine inmates; an additional eighty inmates were treated for gunshot wounds.[241] President Nixon hoped that this would send a message to Black activists—the "Angela Davis crowd," as he put it—that challenged racist criminal justice polices.[242] Angela Y. Davis, a historian and former member of the Black Panther Party, has advocated for the abolition of prisons and has challenged experts to "creatively explor[e] new terrains of justice . . . ."[243] Nas would go on to quip, "imagine that."[244]

This Part imagines that our criminal legal system had prosecutors who were single mindedly focused on ensuring that "justice shall be done"—the Supreme Court's iconic description of prosecutors.[245] It is my contention that abolition constitutionalism, critical originalism, and liberation justice can be used in constructing a prosecutor that improves the ideology and administration of justice in the United States. A caveat is in order. This project is an early attempt intended to bring theoretical clarity to what precisely doing justice means. That is not to say that my construction—or imagination—is exhaustive or even the most creative. The claim is more limited, but I hope still profound. And, while many scholars have contended that this inquiry is "an analytical dead end,"[246] an exploration of a few approaches to justice will demonstrate alternatives to the unjust status quo.

Each of the following sections—abolition constitutionalism, critical originalism, and liberation justice—provides an overview of each theory

240. *See* Becky Little, *What the Nixon Tapes Reveal About the Attica Prison Uprising*, HISTORY (updated Sept. 11, 2019), https://www.history.com/news/nixon-tapes-attica-prison-uprisi ng [https://perma.cc/G3W7-VSE3]. As Professor Bennett Capers writes, "As guards were ostensibly taking steps to regain control of the prison, they killed several prisoners in retaliation and continued to assault and beat prisoners after regaining control. When prosecutors declined to pursue charges against the guards, prisoners and family members sued." Capers, *The Prosecutor's Turn*, *supra* note 20, at 1296 n.89. The Second Circuit Court of Appeals dismissed the claims, citing the discretionary power of prosecutors, concluding: "The primary ground upon which this traditional judicial aversion to compelling prosecutions has been based is the separation of powers doctrine." Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 379 (2d Cir. 1973). The calcification of this doctrine in Supreme Court jurisprudence is discussed in Section I.A. above.

241. Little, *supra* note 240.

242. *Id.*

243. Beth Potier, *Abolish Prisons, Says Angela Davis*: *Questions the Efficacy, Morality of Incarceration*, HARV. GAZETTE (Mar. 13, 2003), https://news.harvard.edu/gazette/story/2003/03/abolish-prisons-says-angela-davis/ [https://perma.cc/CWX4-8HAY].

244. NAS, *supra* note 238.

245. *See* Berger v. United States, 295 U.S. 78, 88 (1935). Indeed, the American Bar Association's Model Rules of Professional Conduct instruct that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate," and that this responsibility entails ensuring "that the defendant is accorded procedural justice . . . ." MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2017).

246. Bellin, *supra* note 36, at 1210; *see also* OTTO A. BIRD, THE IDEA OF JUSTICE (1967) (discussing how philosophers have had little success defining "justice").

and offers concrete solutions on how prosecutors can ensure that justice is done.

### *A. Abolition Constitutionalism*

As a Black man, it is hard to start with the Constitution for several reasons. It is that document that tells us, as Jay-Z poignantly states, "Three-fifths of a man, I believe is the phrase."[247] The three-fifths compromise shows us that white supremacy birthed, nurtured, and financed American democracy.[248] White supremacy "was reinforced during 250 years of bondage."[249] And, despite the addition of the Thirteenth, Fourteenth, and Fifteenth Amendments, white supremacy "was further reinforced during another century of Jim Crow"[250] and another fifty years of mass incarceration, racial gerrymandering, voter suppression, and discriminatory policies. The Constitution is, nevertheless, ours—it is "we who have been the perfecters of this democracy."[251] Blacks "have never been the problem but the solution[.]"[252] It is through this frame that prosecutors can see how they can establish constitutional norms in our criminal legal system.

Prosecutors take a solemn oath to uphold the Constitution and must interpret and apply it in good faith.[253] Previous scholars have addressed how non-judicial government actors should approach constitutional interpretation.[254] Their works examine how actors "should make constitutional decisions in domains where courts have little say."[255] Some, such as Professor Eric Fish, have offered important and significant insights on how prosecutors should approach constitutional interpretation.[256] But this is not enough. Restricting the Constitution's anti-racism to a prohibition

247. MILL, *supra* note 153.

248. Ta-Nehisi Coates, *Other People's Pathologies*, ATLANTIC (Mar. 30, 2014), https://www.theatlantic.com/politics/archive/2014/03/other-peoples-pathologies/359841/ [https://perma.cc/Q7XW-2ZCR].

249. *Id.*

250. *Id.*

251. Nikole Hannah-Jones, *The 1619 Project, Our Democracy's Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True*, N.Y. TIMES MAG. (Aug. 14, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html [h ttps://perma.cc/S9AL-HVX9].

252. *Id.*

253. *See* U.S. CONST. art. VI, cl. 3; 4 U.S.C. § 101 (oath for state officers); 5 U.S.C. § 3331 (oath for federal officers); *see also* John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69, 110 (2008) ("Formally, no express clause of the Constitution singles out one branch or the other for exclusive responsibility of constitutional assessment. Indeed, members of all branches take an oath to uphold the Constitution.").

254. *See generally* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 62–63 (2005); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

255. Fish, *Prosecutorial Constitutionalism*, *supra* note 42, at 249.

256. *Id.* at 248–53.

of racial animus has led to the "color-blind" racism which justifies the more covert, systemic racism of the present day.[257] We need prosecutors who are abolitionists willing to carry on the necessary work of Reconstruction.[258]

This Article builds on Fish's groundbreaking work and offers new analyses through a critical race theory lens.[259] It does so by offering antiracist guidelines for the situations in which prosecutors operate beyond intra-government checks either due to a lack of oversight or "underdefined" or "underenforced" constitutional rights. In these situations, prosecutors should prioritize the antiracist potential of the Constitution and preserve defendants' constitutional rights even if judicial doctrine does not require it and even if doing so lowers the chance of obtaining a conviction. This Article focuses on three specific areas where abolition constitutionalism demands that prosecutors implement constitutional norms—the charging and plea bargaining process, individual rights and policing, and the post-conviction arena.

### *1. The Charging and Plea Bargaining Process*

There are many opportunities in the charging and plea bargain process for prosecutors to promote and preserve equal protection and due process norms. Prosecutorial discretion is especially great in the charging and plea bargaining process where judges are often unable to effectively control prosecutors' actions. Indeed, because of separation-of-powers concerns and limitations of judicial doctrine, there is very little judicial oversight at these junctures. It is here where prosecutors must define and implement defendants' constitutional rights if those rights are to have any meaning, especially for Blacks.

#### *a. Charging Decisions and Equal Protection*

Blacks systematically face more and harsher charges than whites—those charges usually carry a mandatory-minimum sentence.[260] No one can seriously contend that, in these circumstances, Blacks receive equal

257. *See* EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES 3 (5th ed. 2018).

258. *See* Roberts, *supra* note 37, at 71 ("[A]n abolitionist methodology identifies systemic oppression by evaluating modern institutions' antecedents in slavery and other freedom-denying systems, as well as their current repressive impact.").

259. Critical Race Theory (CRT) aims "to develop a jurisprudence that accounts for the role of racism in American law and that works toward the elimination of racism as part of a larger goal of eliminating all forms of subordination." Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1331 n.7 (1991). For an excellent overview of CRT, see Capers, *Afrofuturism*, *supra* note 200, at 20–30.

260. Starr & Rehavi, *supra* note 48, at 27–31.

protection of the laws. We do not. Even worse, the Supreme Court has interpreted the Fourteenth Amendment's Equal Protection Clause to only prohibit intentional or purposeful discrimination—"it does not reach policies that have discriminatory effects."[261] Indeed, the Court has created a Catch-22:

> Equal protection is violated only when a prosecutor purposefully enforces a facially neutral statute against a person based on an impermissible factor such as race, but a defendant can only obtain evidence needed to prove such purposeful discrimination by establishing a substantial threshold showing of purposeful discrimination. In other words, a defendant can only prove that she was selected for prosecution in federal court rather than state court based on her race with evidence that will normally be in the possession of federal prosecutors. This evidence, however, is not discoverable because of the presumption of constitutional validity of discretionary prosecutorial decisionmaking.[262]

There are, however, *many* criminal laws—for example, drug laws and death penalty laws—that have discriminatory effects.[263]

To combat these obvious and provable discriminatory practices, prosecutors can establish anti-racist[264] policies and thus reinforce equal protection norms.[265] Prosecutors bear some of the responsibility for giving the "war-on-drugs" a Black face but have the power to change their role in that process moving forward. For example, they can decide not to charge non-violent drug offenders, irrespective of race. Moreover, as Fish argues, prosecutors can also establish a data-collection system to analyze charging and sentencing decisions and the reasons for those decisions, which could help detect systemic bias.[266] Tracking this data allows prosecutors to identify racial discrepancies in their decisionmaking.[267]

In addition, Congress and state legislatures should create independent review committees specifically instructed to consider any allegations of

261. Fish, *Prosecutorial Constitutionalism*, *supra* note 42, at 286–87 (citing Washington v. Davis, 426 U.S. 229, 248 (1976)); *see also* McCleskey v. Kemp, 481 U.S. 279, 312–13 (1987).

262. Robert Heller, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309, 1323 (1997).

263. *See supra* Section II.

264. This includes the idea that there is nothing right or wrong with any racial group.

265. *See* KENDI, *supra* note 158, at 13–20.

266. Fish, *Prosecutorial Constitutionalism*, *supra* note 42, at 288. Some prosecutors' offices have already implemented such a system. *See For Prosecutors*, VERA INST. OF JUST., https://www.vera.org/unlocking-the-black-box-of-prosecution/for-prosecutors [https://perma.cc/NQ9S-VHLW].

267. Fish, *Prosecutorial Constitutionalism*, *supra* note 42, at 288.

individual or systemic racial bias in charging or sentencing decisions.[268] Committee membership should be determined on a similar basis to that of independent redistricting committees, consisting of many different stakeholders, including members of the community.[269] It should not be solely composed of prosecutors. That's like letting the police run disciplinary tribunals.[270]

All of these efforts will help promote and preserve equal protection norms by requiring prosecutors to approach decisions implicating constitutional rights with a commitment to equal justice, fairness, and neutrality.

*b. Due Process and Plea Bargaining*

The plea-bargaining process presents another—and perhaps the most significant—vehicle to establish due process norms. Plea bargaining is largely unsupervised by judges and free from juries' democratic check on executive power: prosecutors exercise unilateral control over this process. Over 95% of criminal cases are resolved through plea bargaining. Because the "great majority of cases are resolved through a shadow system of private settlement in which prosecutors' offices decide what terms to offer defendants,"[271] it is of extraordinary importance that prosecutors preserve defendants' constitutional protections. Prosecutors can do this in two important ways.

First, prosecutors should extend *Brady* to plea bargaining. Defendants should be entitled to all material exculpatory and mitigating information about the government's evidence, rather than merely being entitled to it before trial, as *Brady v. Maryland* requires.[272] Most courts have not extended *Brady* to cases where the defendant pleads guilty before trial.[273] Instead, they should follow the lead of federal district court Judge Emmet G. Sullivan, whose standing *Brady* order directs prosecutors in each case "to produce to defendant in a timely manner any evidence in its possession

268. *See* U.S. ATT'YS' MANUAL § 9-10.130 (2015) (describing such a review committee in the federal death penalty context).

269. *See* Shane Grannum, Note, *A Path Forward for Our Representative Democracy: State Independent Preclearance Commissions and the Future of the Voting Rights Act After* Shelby County v. Holder, 10 GEO. J.L. & MOD. CRIT. RACE PERSP. 95, 119–22 (2018) (describing the methods that Arizona and California have implemented to ensure the independence of their state redistricting commissions while including stakeholder voices).

270. *See* Stephen Rushin, *Police Disciplinary Appeals*, 167 U. PA. L. REV. 545, 566 (2019) (exploring the effects of methods for selecting the arbitrator on police disciplinary appeals, with restrictions imposed by police union contracts often resulting in reduced discipline for officer misconduct).

271. Fish, *Prosecutorial Constitutionalism*, *supra* note 42, at 289.

272. 373 U.S. 83, 87–88 (1963).

273. S*ee* Baer, *supra* note 44, at 13–14.

that is favorable to defendant and material either to defendant's guilt or punishment. This government responsibility *includes producing, during plea negotiations*, any exculpatory evidence in the government's possession."[274] Without that extension, and coupled with prosecutors' coercive power in plea negotiations, *Brady* is effectively meaningless.[275] This is of particular concern in the Black community because in far too many instances, prosecutors obtain wrongful convictions after failing to disclose *Brady* material. Even worse, prosecutors usually require defendants—as a condition of the plea agreement—to waive their right to exculpatory evidence.[276]

Second, as Professor Bennett Capers argues, the due process norms of plea bargaining must be revitalized.[277] In far too many cases, defendants who are factually innocent plead guilty—criminal justice's "dark secret."[278] This is because prosecutors use coercive measures—they threaten additional charges and lengthier sentences, or even charges against family members—and the specter of prison rape as a negotiating tool.[279] All of these practices must cease; prosecutors should ensure fundamental fairness in the plea bargaining process. A line of Supreme Court decisions reads "the Due Process Clause as capacious, and as a catch-all right to protect the innocent *as well as the guilty*, to ensure accuracy, to level the playing field [between prosecutors and defendants], and even to further the goal of racial equality."[280] These cases—many involving Black defendants—stand for the proposition that due process requires a baseline of fundamental fairness: confessions obtained by torture,[281] coercion, or deceit,[282] or threats of additional charges[283] or to the defendant's family[284] violate due process. And, although the Supreme Court has narrowed its interpretation of the Due

274. Emmet G. Sullivan, *Standing* Brady *Order*, at 2–3, https://www.dcd.uscourts.gov/sites/dcd/files/StandingBradyOrder_November2017.pdf [https://perma.cc/5YFE-PPA2] (emphasis added). This order satisfies the requirement recently added to the Federal Rules of Criminal Procedure that each district court promulgate a model order for reminding prosecutors of their *Brady* obligations—a requirement that does not go far enough. *See* FED. R. CRIM. P. 5(f)(2).

275. Fish, *Prosecutorial Constitutionalism*, *supra* note 42, at 291.

276. 3 CHARLES ALAN WRIGHT & ARTHUR H. MILLER, FEDERAL PRACTICE AND PROCEDURE § 586 (4th ed. 2015) ("A term in a plea agreement waiving any right to *Brady* disclosure as part of a plea bargain is enforceable.").

277. Capers, *The Prosecutor's Turn*, *supra* note 20, at 1299–1300.

278. John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 165 (2014) (describing evolution of "plea bargaining system whereby extremely coercive 'deals' were offered to defendants both in terms of incentives to forego trial and avoidance of much harsher punishment").

279. *See, e.g.*, I. Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1284–88 (2011).

280. Capers, *The Prosecutor's Turn*, *supra* note 20, at 1300 (emphasis added).

281. *See* Brown v. Mississippi, 297 U.S. 278, 285–86 (1936).

282. *See* Walker v. Johnson, 312 U.S. 275, 286 (1941).

283. *See* Rogers v. Richmond, 365 U.S. 534, 535 (1961).

284. *See* Machibroda v. United States, 368 U.S. 487, 493 (1962).

Process Clause in this context—a prosecutor can threaten to bring additional charges in order to induce a plea[285]—prosecutors should implement these due process norms to realize the abolitionist goals of the Reconstruction Amendments.

### *2. Individual Rights and the Fourth Amendment*

There is something very real and raw about the way hip-hop artist J. Cole searches in lyrics to describe the Black experience living under police surveillance and control. In his track "Be Free," J. Cole asks, "Are we all alone, fighting on our own?"[286] He then pleads, "Please give me a chance . . . Don't just stand around."[287] The genius of these lyrics—written in response to Ferguson, Missouri police killing Michael Brown[288]—is that the message is unequivocally clear: the law, as interpreted by the Supreme Court, does not require Black lives to matter to police. But even where courts allow police to disregard the spirit of the Bill of Rights, prosecutors retain the power to maintain its protections.

The Supreme Court has granted police officers permission to racially profile,[289] to conduct pretextual stops,[290] and to use excessive force.[291] Justice Sonia Sotomayor's dissents highlight a disturbing trend in our constitutional jurisprudence—specifically, the Court's reluctance to restrain the prosecution of Black people with the Fourth Amendment. For example, in *Utah v. Strieff*,[292] she cited a whole shelf of Black literature to demonstrate the Court's complicity in creating a criminal "justice" system that is "anything but"[293] for Black and Brown people.[294] She also discussed how *Strieff*—a case involving a white defendant—will be used to increase

285. *See* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

286. J. COLE, *Be Free*, on BE FREE (By Storm 2014).

287. *Id.*

288. *See* Kory Grow, *J. Cole Mourns Michael Brown in Somber New Song 'Be Free'*, ROLLING STONE (Aug. 15, 2014, 1:32 PM ET), https://www.rollingstone.com/music/music-news/j-cole-mourns-michael-brown-in-somber-new-song-be-free-169276/ [https://perma.cc/9QBV-W3WR] ("'Be Free' is Cole's response to the police shooting of an unarmed African-American teenager, Michael Brown, in the St. Louis suburb of Ferguson, Missouri.").

289. Whren v. United States, 517 U.S. 806, 810–13 (1996); *see also* Carbado, *supra* note 50, at 129–30; Johnson, *supra* note 50, at 1009–45.

290. *See Whren*, 517 U.S. at 811; *see also* Joh, *supra* note 51, at 209.

291. Scott v. Harris, 550 U.S. 372 (2007).

292. 136 S. Ct. 2056, 2064 (2016) ("We hold that the evidence Officer Fackrell seized as part of his search incident to arrest is admissible because his discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to arrest.").

293. *Id.* at 2071 (Sotomayor, J., dissenting).

294. *Id.* ("We must not pretend that the countless people who are routinely targeted by police are 'isolated.' They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere.").

African-Americans' encounters with the criminal justice machinery.[295] In *Mullenix v. Luna*, [296] Justice Sotomayor stated that the Court has "sanction[ed] a 'shoot first, think later' approach to policing" thereby "render[ing] the protections of the Fourth Amendment hollow."[297]

Although the Supreme Court has been reluctant to interpret the Fourth Amendment in a manner that would strengthen individual rights for Black people, prosecutors can (and should) choose a different path—a path that reins in police powers and acknowledges the humanity and equal rights of Black people. Prosecutors can be actively antiracist by expanding constitutional protections *beyond* the judiciary's mere color-blindness. Even when the Court defines a constitutional right too narrowly, it seldom requires a prosecutor to infringe that right. For example, when evidence suggests that a police officer engaged in racial profiling or conducted a pretextual stop, prosecutors should exercise their discretion to either not bring charges, exclude tainted evidence, or conduct an independent investigation against the police officer for civil rights violations. This would fulfill the vision of the Framers: the Fourth Amendment intentionally makes it harder for police to do their jobs. [298] Prosecutors, as abolition constitutionalists, should no longer stand around, as J. Cole pleaded, allowing the ends to justify the means.

### *3. Post-Conviction Innocence and Illegal Sentences*

In his groundbreaking hit "Testify," hip-hop artist Common uses prose to highlight Black innocence in our criminal legal system.[299] He speaks to the manner in which the police use confidential informants, snitches, and coercive tactics that lead to the wrongful conviction of innocent Black people for various crimes. Interestingly and, perhaps, most compellingly, Common specifically identifies the prosecutor's role in wrongful convictions. He fires, "that's when the prosecutor realized what happened," referring to the wrongful conviction of an innocent Black man; but still, the prosecutor did nothing.[300] What Common accomplished through lyrics in

295. *Id.* at 2070 ("[I]t is no secret that people of color are disproportionate victims of this type of scrutiny."). The Court's decision tells "everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged." *Id.* at 2070–71.

296. 577 U.S. 7 (2015) (holding that a police officer was entitled to qualified immunity for fatally shooting a fleeing suspect four times despite his superior officer's instruction to stand by).

297. *Id.* at 26 (Sotomayor, J., dissenting).

298. *See, e.g.*, Chemerinsky, *supra* note 49, at 1638 ("The framers of the Constitution were deeply distrustful of executive power and of the police.").

299. COMMON, *Testify*, *on* BE (GOOD Music 2005).

300. *Id.*

"Testify" is nothing short of brilliant—he identified an important problem, wrongful convictions, and the actors best positioned to bring about a solution, prosecutors.

All of the many exoneration studies examining wrongful convictions indicate that Black people are significantly more likely to be wrongfully convicted of most crimes, including murder, sexual assault, and drugs.[301] Innocent Black people are—relative to innocent white people—about seven times more likely to be convicted of murder, three and a half times more likely to be convicted of sexual assault, and twelve times more likely to be convicted of drug crimes.[302] In total, Black people make up the majority of the over 3,700 people exonerated through 2016.[303] Many of these wrongful convictions were because of prosecutorial and police misconduct, which was critically examined in "When They See Us"—the Netflix miniseries based on the events leading to the exoneration of five wrongfully convicted teenagers for the brutal rape and assault of a woman in Central Park, New York.[304] Such actual innocence and wrongful sentences claims raise significant constitutional concerns involving due process, separation of powers, and cruel and unusual punishment.[305]

Prosecutors' control over the ultimate relief provided to wrongfully convicted or sentenced defendants is well documented, making them the most logical party to redress the rights of wrongfully convicted or imprisoned people.[306] Prosecutorial responses to these types of claims influence their outcomes.[307] Therefore, as Professor Daniel Medwed argues, "prosecutors should take all reasonable steps to verify" the viability of an actual innocence or unlawful sentence claim, and—upon confirmation—

301. *See, e.g.*, Gross, *supra* note 228.

302. *Id.*

303. *Id.* at 1.

304. *See When They See Us*, *supra* note 3.

305. *See* Brandon Hasbrouck, *Saving Justice: Why Sentencing Errors Fall Within the Savings Clause, 28 U.S.C. § 2255(e)*, 108 GEO. L. J. 287, 288 (2019) (arguing that a sentencing error is any error in statutory interpretation by courts that alters the statutory range Congress prescribed for punishment—the ceiling or the floor—because such an error raises separation-of-powers and due process concerns).

306. *See, e.g.*, Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 132 (2004) ("[T]he reaction of prosecutors to post-conviction innocence claims has had and will continue to have a great bearing on whether actually innocent prisoners receive justice."); Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171, 186–87 (2005) (noting that the "prosecutor's consent to a motion for a new trial may have persuasive effect"); Bob Herbert, *Justice, at Long Last*, N.Y. TIMES, Oct. 29, 1998, at A31 (discussing the case of Jeffrey Blake, a convicted Black man freed after Brooklyn District Attorney Charles Hynes joined in a motion to the Court to set aside the guilty verdict).

307. *See* Medwed, *supra* note 306, at 128 (citation omitted) ("[W]here post-conviction innocence claims are unrelated to DNA testing, such as those involving statements by previously unknown witnesses or confessions by the actual perpetrator, the prosecution can influence how courts will resolve the claims by deciding whether to cooperate with the defense . . . .").

"assist in exonerating that defendant."[308] Prosecutors can do so by facilitating a post-conviction investigation into the claim's merits, readily consenting to scientific testing of evidence—for example DNA testing—and, when appropriate, joining the defendant's post-conviction motion for relief.[309] Prosecutors who want to realize the abolitionist promise of the Reconstruction Amendments—safeguarding liberty against systems of racial subjugation—can readily do so by setting aside their adversarialism in post-conviction claims.[310] Towards this end, prosecutors could, among other things, lobby for more robust post-conviction testing statutes and support forensic evaluations when new techniques are developed.

### *B. Critical Originalism*

At my barber shop, we often debate the greatest conscious hip-hop album of all time, "where political, social and cultural issues are hashed out in verse."[311] Although there is never a consensus, one album always in the conversation is Lauryn Hill's "The Miseducation of Lauryn Hill." On one of her tracks, "Lost Ones," Hill describes my relationship with originalism: "My emancipation don't fit your equation."[312] A statement of Black resistance against elderly white infallibility. Allow me to briefly explain.

Originalism—as a mode of constitutional interpretation—almost always assumes that the meaning of any particular constitutional provision is fixed at the historical moment of its adoption. Originalism thus seeks to "obstruct modernity"[313] and "to prevent current majorities from diluting or altering the values of the past."[314] Preserving the values of the past, however, also

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308. *See* Medwed, *supra* note 131, at 48.

309. *Id.*

310. Professor Daniel S. Medwed, a leading expert on wrongful convictions, observed the following disturbing trend amongst prosecutors:

> One study by the Innocence Project at the Benjamin N. Cardozo School of Law demonstrated that prosecutors had consented to post-conviction DNA testing in *less than half* the cases in which DNA testing ultimately exonerated an inmate. The annals of criminal law are also rife with tales of prosecutors behaving defensively even when faced with strong evidence of innocence exculpating the convicted. At the extreme end of the spectrum, prosecutors have apparently destroyed evidence to maintain a trial result; less extreme but still deeply worrisome, prosecutors confronted with the likelihood of a wrongful conviction in their jurisdiction have more than once concocted revised theories of the case that bear scant resemblance to the approach at trial in order to rationalize the continued incarceration of a defendant.

*Id.* at 50–51 (citations omitted).

311. Teresa Wiltz, *We the Peeps: After Three Decades Chillin' in the Hood, Hip-Hop Is Finding Its Voice Politically*, WASH. POST, June 25, 2002, at C2.

312. LAURYN HILL, *Lost Ones*, *on* THE MISEDUCATION OF LAURYN HILL (Columbia 1998).

313. *See* Antonin Scalia, *Modernity and the Constitution*, *in* CONSTITUTIONAL JUSTICE UNDER OLD CONSTITUTIONS 313, 315 (Eivind Smith ed., 1995).

314. Jamal Greene, *Originalism's Race Problem*, 88 DENV. L. REV. 517, 521 (2011).

preserves its racism.[315] As Professor Jerome Culp writes, [Originalism] ask[s] black concerns to defer to white concerns. . . . 'Defer to the past' is the implicit message. Listen to the wiser and greater (and whiter) founders."[316] Professor Jamal Greene perfectly captures my feelings as a Black man: "a narrative of restoration is deeply alienating; what America *has been* is hostile to my personhood and denies my membership in its political community."[317] This section, however, serves as a necessary bridge to allow different minds to find common ground on important issues concerning the prosecutor and race.[318]

Specifically, there can be common understanding on the statutory interpretation front. Originalism in statutory construction is the notion that legal texts mean what they meant at the time of their enactment.[319] It requires "immersing oneself in the political and intellectual atmosphere of the time"[320] to determine the meaning of a statutory provision. This mode of interpretation provides prosecutors two important tools to do justice. First, originalism provides context—it confirms that the criminalization of the use of drugs was driven by racial considerations as "no one"[321] at the time these criminal statutes were enacted would have believed otherwise. Second, under originalist principles, prosecutors need not prosecute non-violent drug offenses under federal law.

315. *Id.* at 522.

316. Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 75.

317. Greene, *supra* note 314, at 521.

318. Originalism also presents an opportunity for common ground in the fight for broader interpretation of the Reconstruction Amendments. *See, e.g.*, Christopher W. Schmidt, *Originalism and Congressional Power to Enforce the Fourteenth Amendment*, 75 WASH. & LEE L. REV. ONLINE 33, 38 (2018) ("The people who framed the Fourteenth Amendment and advocated for its passage believed that Congress, using its Section 5 power, would play a leading role in protecting constitutional rights."); Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493, 502 (2013) ("There is, however, a strong textual and historical argument for recognizing an equality component in the Fourteenth Amendment's Citizenship Clause under both original intent and original public meaning theories of originalism."); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (arguing that the Reconstruction Congress made clear the meaning of the Fourteenth Amendment through its passage of the Civil Rights Acts of 1866 and 1875). *But see* Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. 1627, 1631 (2013) ("[I]f the normative arguments in favor of originalism do not hold water when applied to the Fourteenth Amendment, then, as a practical matter, the normative appeal of originalism is severely diminished.").

319. *See, e.g.*, SCALIA & GARNER, *supra* note 56, at 78–82.

320. Scalia, *supra* note 57, at 856.

321. Justice Antonin Scalia often applied "no one" originalism to issues.

*1. Our Racialized Drug Laws*

Our drug laws have racist origins. This understanding was conveyed to me through my mother when she gave me "the talk"[322] and through hip-hop music. For example, Tupac Shakur (a.k.a. 2Pac), one of the greatest hip-hop artists of all time, observed this in his emotional hit "Changes."[323] There, he implores the United States to make significant changes to criminal justice policy. Tupac discusses how all he sees are "racist faces" in power and that the "penitentiary's packed and it's filled with blacks" because "[t]hey got a war on drugs so the police can bother me."[324] And, yet, despite how our drug laws have been racialized, he "see[s] no changes" and concludes, "[s]ome things'll never change."[325] Originalism confirms these points.

For most of the history of the United States, drugs were legal, until legislatures criminalized opium, cocaine, and marijuana for invidious—and racist—purposes.[326] Our courts have repeatedly recognized the association between the enactment of criminal drug laws and hostility directed at Black and Brown people.[327] Throughout our history, media reports tapping into racial fears have stoked panic in support of racially-biased criminal drug legislation. Legal scholars such as Paul Butler, Gabriel Chin, and David Sklansky, and Michael Pinard provide detailed historical accounts that demonstrate that once drugs were associated with unpopular segments of society, criminal sanctions were imposed.[328]

In 1875, the criminalization of drugs began in San Francisco.[329] It started with widespread fear that Chinese men were using opium to seduce white

322. "For generations, black and brown parents have given their children 'the talk' – instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger – all out of fear of how an officer with a gun will react to them." Utah v. Strieff, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting).

323. 2PAC, *Changes*, on GREATEST HITS (Amaru Records 1998).

324. *Id.*

325. *Id.*

326. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 355 (1993) ("Cocaine raised the specter of the wild Negro, opium the devious Chinese, morphine the tramps in the slums.").

327. *See, e.g.*, United States v. Clary, 846 F. Supp. 768, 774 (E.D. Mo. 1994) ("Early in our nation's history, legislatures were motivated by racial discrimination to differentiate between crimes committed by whites and crimes committed by blacks."), *rev'd on other grounds*, 34 F.3d 709 (8th Cir. 1994); *id.* at 774–76.

328. *See, e.g.*, BUTLER BOOK, *supra* note 21, at 44; Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 257–58 (2002); Sklansky, *supra* note 174, at 1292–94 (1995); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 514 (2010).

329. Kurt L. Schmoke, *An Argument in Favor of Decriminalization*, 18 HOFSTRA L. REV. 501, 507 (1990) (arguing that an 1875 ordinance closing Chinese opium dens in San Francisco was "not passed out of any concern for addiction, but out of a concern that Chinese opium dens were being frequented by white women and men of 'good family.'").

women, enslave white women, and destroy white men.[330] The federal government shared these unfounded concerns and began to regulate opium with the 1909 Opium Exclusion Act.[331]

In the early 1900s, the pattern repeated with concerns that "Black cocaine fiends [were] raping white women or going on murderous sprees while they were high on the drug."[332] Doctors claimed that cocaine gave Blacks superhuman powers—even that several bullets could not stop "cocaine-crazed negroes."[333] Because of this racialized hysteria, the federal government enacted the Harrison Act in 1914, which criminalized the distribution of cocaine.[334]

Criminalization tracks racism. As with cocaine, white legislators' irrational racist beliefs about Mexicans and Blacks triggered regulation—and criminalization—of marijuana. On legislative floors during the early 1900s, state legislative representatives contended that "[a]ll Mexicans are crazy, and this . . . [marijuana] is what makes them crazy."[335] Similarly, Blacks were accused of using marijuana to seduce white women and, when under the influence of marijuana, committing violent crimes.[336] State and local governments were the first to react to racist rhetoric about marijuana, with California prohibiting the sale or possession of marijuana in 1913.[337] By 1937, every state criminalized marijuana possession.[338] These attitudes persisted, allowing Nixon and later administrations to use the "war on drugs" to control and punish Blacks.

Against this historical backdrop, prosecutors can fully appreciate the racist origins of many of our criminal drug laws. The vestiges of those racist

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330. Craig Reinarman & Harry G. Levine, *Crack in Context: Politics and Media in the Making of a Drug Scare*, 16 CONTEMP. DRUG PROBS. 535, 557 (1989) ("The campaign against smoking opium . . . included lurid newspaper accusations of Chinese men drugging white women into sexual slavery.").

331. Opium Exclusion Act, ch. 100, 35 Stat. 614 (1909).

332. BUTLER BOOK, *supra* note 21, at 44.

333. Williams, *supra* note 61.

334. Harrison Anti-Narcotic Act, ch. 1, 38 Stat. 785 (1914) (addressing the importation of opium for medicinal purposes and the interstate trade of cocaine, morphine, and heroin); *see also* United States v. Moore, 486 F. 2d 1139, 1219 (D.C. Cir. 1973) (Wright, J., dissenting) ("Although possession was not itself made criminal, it was to be treated as prima facie evidence of the proscribed acts.").

335. Charles Whitebread, Speech to the California Judges Association 1995 Annual Conference: The History of the Non-Medical Use of Drugs in the United States, https://www.druglibrary.net/schaffer/History/whiteb1.htm [https://perma.cc/3QRD-SQEH].

336. *See* Malik Burnett & Amanda Reiman, *How Did Marijuana Become Illegal in the First Place?*, DRUG POL'Y ALLIANCE (Oct. 8, 2014), https://drugpolicy.org/blog/how-did-marijuana-become-illegal-first-place [https://perma.cc/L7MD-MVQF] ("During hearings on marijuana law in the 1930's, claims were made about marijuana's ability to cause men of color to become violent and solicit sex from white women."); JEROME L. HIMMELSTEIN, THE STRANGE CAREER OF MARIHUANA: POLITICS AND IDEOLOGY OF DRUG CONTROL IN AMERICA 52 (1983) (detailing the transference of stereotypes from Mexican to Black users of marijuana in New Orleans and the Southwest).

337. Gonzales v. Raich, 545 U.S. 1, 5 (2005).

338. STEVEN W. BENDER, RUN FOR THE BORDER: VICE AND VIRTUE IN U.S.-MEXICO BORDER CROSSINGS 97 (2012).

policies continue to plague our criminal legal system. Prosecutors, however, can change the complexion—literally and figuratively—of our criminal legal system. They can do this by treating drug crimes, especially possession crimes, as a medical problem—not a criminal justice problem. Indeed, prosecutors—federal and state—have responded to the recent opioid epidemic in precisely this manner.[339] But this crisis has a *white face*.[340]

The difference is stark compared with the response of "harsh sentencing laws" and "harsher rhetoric" to the crack epidemic in the 1990s, which the government gave a Black face.[341] In many police departments, heroin abuse is seen as a crisis that merits medical, rather than criminal treatment.[342] The National District Attorneys Association recently released a white paper concerning the opioid crisis arguing that a gentler and more humane war on drugs is necessary.[343] The key takeaway is that prosecutors believe the opioid epidemic to be a health crisis and contend that the criminal legal system should treat it as such by declining to prosecute non-violent offenders.[344]

This same response is necessary for *all* non-violent criminal drug offenders. Such programs find support in originalist principles.

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339. *See* Barbara Fedders, *Opioid Policing*, 94 IND. L.J. 389, 431 (2019) ("The arresting officer sends the arrest record to the misdemeanor or felony prosecutor—these offices maintain the records and the authority to charge the arrested person. However, the presumption is that charges will *not* be filed if the individual completes both the initial screening as well as a full intake assessment with LEAD case managers within thirty days of the referral."); C. Currin Hammond & Shannon Taylor, *Personal Reflections on the Opioid Epidemic and Legal Responses*, 20 RICH. PUB. INT. L. REV. 175, 182 (2017) ("It is unrealistic to think that Public Safety and the Courts do not have a role to play in this Opioid epidemic, but the definition of that role is delicate—the attempt to balance the interests of a public health crisis revolving around a criminal activity."). *But see* Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770, 808–09 (2020) ("While these guilty pleas do not create a legal precedent that is binding on future cases, they nevertheless result in the conviction of pregnant women for crimes involving substance use during pregnancy.") (citation omitted).

340. Ekow N. Yankah, *When Addiction Has a White Face*, N.Y. TIMES, (Feb. 9, 2016), https://www.nytimes.com/2016/02/09/opinion/when-addiction-has-a-white-face.html [https://perma.cc/L82B-8TK7]; Clyde Haberman, *Heroin, Survivor of War on Drugs, Returns with New Face*, N.Y. TIMES (Nov. 22, 2015), https://www.nytimes.com/2015/11/23/us/heroin-survivor-of-war-on-drugs-returns-wit h-new-face.html [https://perma.cc/E4RF-RL5J]. According to the American Medical Association, ninety percent of the people who have tried heroin for the first time in recent years are white. *Id.*

341. *See, e.g.*, BUTLER, CHOKEHOLD, *supra* note 53, at 71 ("U.S. police officers have super powers . . . The police have been granted these powers [by] . . . the United States Supreme Court . . . .").

342. *Id.*; *see also* Katharine Q. Seelye, *In Heroin Crisis, White Families Seek Gentler War on Drugs*, N.Y. TIMES (Oct. 30, 2015), https://www.nytimes.com/2015/10/31/us/heroin-war-on-drugs-parents.html [htt ps://perma.cc/2ENJ-5A8W].

343. NAT'L DIST. ATT'YS ASS'N, THE OPIOID EPIDEMIC: A STATE AND LOCAL PROSECUTOR RESPONSE (Oct. 12, 2018), https://ndaa.org/wp-content/uploads/NDAA-Opioid-White-Paper.pdf [https://perma.cc/TB6A-N3V9].

344. *Id.*

*2. An Originalist Hook: Diversion Programs*

One of the most underrated and underappreciated hip-hop tracks is Mos Def's "Mathematics." His goal is to use numbers as lyrics to expose profound racial disparities in our criminal legal system. Mos Def discusses the consequences of a drug conviction—from gross punishment, three-strikes laws, to six million people being under correctional supervision—and then asks, "Why did one straw break the camel's back?"[345] His response, "Here's the secret / The million other straws underneath it / It's all mathematics."[346] The criminal legal system is broken precisely because it treated non-violent Black drug offenders as criminals instead of addicts in need of medical treatment or hustlers in need of economic opportunity. Hip-hop tells this story vividly through experience. And now, many prosecutors have the power to change the plot.[347]

There is a consensus building among scholars, experts, and courts that prosecutors should implement and support robust diversion programs for non-violent offenders, especially drug offenders.[348] As background, diversion programs—sometimes referred to as deferred prosecution or pre-trial diversion—provide a conditional opportunity for defendants to have their charges dismissed.[349] Defendants might be required to make amends through restitution or community service or improve themselves through rehabilitation, drug or alcohol treatment, or a program for education or employment. When the diversion program's requirements are met, the prosecutor dismisses the charges.[350] Indeed, scholars have argued persuasively that prosecutors should consider diversion programs as a

345. *See* MOS DEF, *Mathematics*, *on* BLACK ON BOTH SIDES (Rawkus Records 1999).

346. *Id.*

347. *But see* Beth McCann, Courtney Oliva & Ronald Wright, *Prosecution Office Culture and Diversion Programs*, 11 CRIM. L. PRAC. 33, 33 (2020) ("A prosecutor who wants to expand the use of diversion programs must find partners in the community to fund these initiatives and measure their success. They must also achieve buy-in from other actors in the local criminal justice system, including judges and law enforcement. Just as important, chief prosecutors must understand and address the internal culture of their own offices, convincing their line prosecutors to embrace and willingly utilize diversion programs with enthusiasm and sound judgment.").

348. *See, e.g.*, U.S. DEP'T OF JUST., SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 4 (2013), https://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf [https://perma.cc/TWA6-7GF8] ("Incarceration is not the answer in every criminal case. Across the nation, no fewer than 17 states have shifted resources away from prison construction in favor of treatment and supervision as a better means of reducing recidivism. . . . Federal law enforcement should encourage this approach. In appropriate instances involving non-violent offenses, prosecutors ought to consider alternatives to incarceration, such as drug courts, specialty courts, or other diversion programs.").

349. *See, e.g.*, Griffin, *supra* note 65, at 321–22.

350. *Id.*

method to end mass incarceration.[351] Originalism provides an important missing hook to the discussion.

Federal prosecutors can leverage statutes, such as the Speedy Trial Act,[352] to create and sustain diversion programs for non-violent drug offenders (and really non-violent offenders in general). The Speedy Trial Act, specifically § 3161(h)(2), allows for the exclusion of "[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct."[353] The plain text of this provision "give[s] prosecutors the ability to defer prosecution of individuals charged with certain non-violent criminal offenses to encourage rehabilitation."[354]

The legislative history further demonstrates that § 3161(h)(2) was intended to encourage practices that had been ongoing in certain courts, which permitted *non-violent offenders* to enter into a diversion program. Specifically, the Senate Judiciary Committee cited two successful projects—one in New York City, the Manhattan Court Employment Project, and the other in the District of Columbia, Project Crossroads–as examples of the types of deferred prosecution it intended with this provision.[355] These projects intervened after a defendant's arrest, offering counseling, medical treatment, and vocational opportunities for ninety days and dismissing all charges if the defendant cooperated.[356] Both of these projects "convert[ed] a defendant's arrest from a losing to a winning experience" for all parties and were particularly successful at employing defendants and reducing recidivism.[357]

At this time, however, diversion programs "appear to be offered relatively sparingly to individuals, and instead are used proportionally more frequently to avoid the prosecution of corporations, their officers, and

351. *See, e.g.*, Davis, *supra* note 172, at 1081 (2016).

352. 28 U.S.C. § 3161(h)(2).

353. *Id.*

354. United States v. Saena Tech Corp., 140 F. Supp. 3d 11, 22–23 (D.D.C. 2015).

355. S. REP. NO. 93-1021, at 36–37 (1974).

356. *See* VERA INST. OF JUST., THE MANHATTAN COURT EMPLOYMENT PROJECT OF THE VERA INSTITUTE FOR JUSTICE: FINAL REPORT NOVEMBER 1967 – DECEMBER 31, 1970, at 1 (1970), https://www.vera.org/downloads/Publications/the-manhattan-court-employment-project-of-the-vera-institute-of-justice-final-report-november-1967-december-31-1970/legacy_downloads/the-manhattan-court-employment-project.pdf [https://perma.cc/H8JG-APTB].

357. *Id.*; *see id.* at 12 ("[S]upportive and rehabilitative services *can* significantly alter the incidence of repeated criminal activity."); *see also* ROBERTA ROVNER-PIECZENIK, NAT'L COMM. FOR CHILDREN AND YOUTH, PROJECT CROSSROADS AS PRE-TRIAL INTERVENTION: A PROGRAM EVALUATION 17 (1970), *available at* http://files.eric.ed.gov/fulltext/ED113651.pdf [https://perma.cc/CMT6-ZV4D] (concluding that the rate of recidivism to be the "most dramatic positive finding related to the project's legal 'success'"); *id.* at 17-18 ("[T]here is little doubt that recidivism in . . . [the] 15–month period following initial arrest was markedly lower for participants favorably terminated from the project.").

employees."[358] Corporations responsible for the sale of defective products, for example, are not typically prosecuted.[359] The justification provided by prosecutors is that there are broad concerns with collateral consequences if corporations are criminally prosecuted, namely it could be bad for shareholders and employees.[360] But this rationale is even more compelling when an individual offender is punished—there are severe collateral consequences to both the family structure and community.[361]

Prosecutors have strayed significantly from Congress's original intent. The opioid crisis has provided a moment of introspection for many prosecutors, and their response thus far is right: addiction should not be criminalized and punished but instead treated through diversion programs. This is the just outcome no matter the person's race.

### *C. Liberation Justice: From Hip-Hop to Black Lives Matter*

Hip-hop music empowered, enriched, and educated my mind. This Article in many ways is me fulfilling my promise to myself that when I have "one mic, one beat, and one stage,"[362] I would use that platform to argue for meaningful criminal justice transformation. I am reminded everyday—through my own experiences and through others'—that, in the criminal justice context, among others, we "need some soul searchin', the time is now."[363] For prosecutors, hip-hop provides a pathway to liberation justice that establishes integrity and fairness in the criminal legal system. It does so by "describ[ing], with eloquence, the problems with" American criminal justice, "and articulat[ing], with passion, a better way."[364] This section is, as hip-hop artist Nas states, my "One Mic."

Liberation justice builds on the work of Amna A. Akbar, Sameer M. Ashar, and Jocelyn Simonson on movement law.[365] "Occupy, Black Lives Matter, and the Standing Rock Water Protectors have reminded us of the circular rather than linear nature of history, the ongoing centrality of indigenous genocide and anti-Black violence—and the ongoing power of

358. *Saena Tech Corp.*, 140 F. Supp. 3d at 23.

359. *See supra* note 64.

360. *See* Griffin, *supra* note 65, at 330 (citation omitted) (noting that deferred-prosecution agreements were designed to "achieve[ ] a result that minimizes the collateral damage to shareholders and employees").

361. These unintended consequences are explored in verse in many hip-hop albums, *see* discussion *supra* Section III.C.1.a.

362. *See* NAS, *One Mic*, *on* STILLMATIC (Columbia 2002).

363. *Id.*

364. *Butler Article*, *supra* note 67, at 987.

365. *See* Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. (forthcoming 2021) (manuscript at 4) (on file) ("Movement law is not the study *of* social movements; rather it is investigation and analysis *with* social movements.").

people's resistance to shaping the country."[366] In *Much Respect: Toward a Hip-Hop Theory of Punishment*, Professor Paul Butler argued that hip-hop music and culture can transform the way our criminal legal system thinks about punishment.[367] Movement law carries this a step further: rather than merely acknowledging the experiences of marginalized communities through their art, it calls on us to lend our efforts to their active resistance.[368] Liberation justice, then, is a call to do both, and furthermore to contextualize contemporary art and activism within the long struggle for freedom and equality under the law.

In the past decade, calls to address systemic racism and instill respect for the humanity and dignity of Black people have found new activist expressions in the Movement for Black Lives. The Movement calls for radical and revolutionary changes, including ending police militarization against and surveillance of Black communities, pretrial detention and cash bail, the death penalty, the carceral state, and the use of past criminal history as a bar to full civil and social participation.[369] These calls to action all stem from a common understanding that the punitive burdens of our criminal legal system are designed to fall disproportionately on Black, Brown, and poor people. Prosecutors are well positioned to begin this liberationist reimagining the criminal legal system by practicing empathy toward the Black lives they encounter on a daily basis.

Section 1 will explore the perspectives from hip-hop and the Movement for Black Lives that can inform prosecutors of the collateral consequences of their actions. Section 2 will outline some of the avenues for change available to prosecutors who embrace these liberation justice perspectives, including the decriminalization of drugs, using their prosecutorial discretion to nullify charges, removing the lingering penalties of a conviction following the completion of a sentence, and eliminating cash bail. These, along with the reforms explored from constitutionalist and originalist perspectives above, provide a starting point for prosecutors who would embrace liberation justice.

366. *Id.* (manuscript at 6).

367. *Butler Article*, *supra* note 67, at 986–87.

368. *See* LAW FOR BLACK LIVES, *Movement Lawyering In Moments of Crisis*, http://www.law4blacklives.org/respond [https://perma.cc/V3EN-KTFX] ("Movement lawyering means taking direction from directly impacted communities and from organizers, as opposed to imposing our leadership or expertise as legal advocates. It means building the power of the people, not the power of the law.").

369. *See* Movement for Black Lives, *End the War on Black People*, M4BL (2020), https://m4bl.org/end-the-war-on-black-people/ [https://perma.cc/26E6-344D].

### *1. Perspectives on the System Inherent in the Problems*

Prosecutors can learn much from the "Black CNN."[370] Hip-hop identifies important problems in our criminal legal system with accuracy, passion, and love. Hip-hop interrogates criminal justice through the mass incarceration lens. It is there where obvious problems of race, power, and punishment intersect in ways that raise profound questions of fairness. In recent years, the Movement for Black Lives has centered its activism around such questions, calling for fundamental changes in policing and punishment. A prosecutor must be able to see these intersections and listen to the calls for change in order to understand them and advance justice.

#### *a. Hip-Hop Approaches to Justice as Fairness*

The recognition that criminal justice favors—or, perhaps, protects—whites, especially white elites, is prevalent in hip-hop music. The system does this by turning a blind eye to white crime while over-policing and locking up innocent Blacks. As an example, we need look no further than the divergent police responses to the protests in the summer of 2020 after Derek Chauvin, a police officer, brutally murdered George Floyd. Police officers rammed protesters with cars, gassed them, kettled and arrested them, and shot projectiles at them. By contrast, police turned a blind eye to white vigilantes standing around with firearms and other weapons, escalating the crisis.[371]

Kendrick Lamar's album "Damn" captures in rhythmic dynamism criminal justice's oppression and unequal treatment of Black people. He calls out how criminal justice's "race barriers make inferior you and I";[372] its bias and inequality, stating, "It's nasty when you set us up, then roll the dice, then bet us up / You overnight the big rifles, then tell Fox to be scared of us / Gang members or terrorists, et cetera, et cetera / America's reflections of me, that's what a mirror does."[373] He also critiques its permission to kill Blacks, predicting, "I'll prolly die from one of these bats and blue badges / Body slammed on black and white paint, my bones snappin'."[374] In the last track, "Duckworth," Kendrick—still hopeful—calls on criminal justice to

370. CHUCK D WITH YUSUF JAH, *supra* note 186, at 256.

371. Mark Johnson, Annysa Johnson & Talis Shelbourne, *Kenosha Videos of Jacob Blake, Kyle Rittenhouse Shootings Prompt Fierce Debate over Race and Justice*, USA TODAY (Aug. 29, 2020, 1:20 PM), https://www.usatoday.com/story/news/nation/2020/08/29/kenosha-videos-show-difference-blake-rittenhouse-police-treatment/5667702002/ [https://perma.cc/5S3N-GR4K].

372. *See* KENDRICK LAMAR, *Pride*, *on* DAMN (Aftermath 2017).

373. *See* KENDRICK LAMAR FEATURING U2, *XXX.*, *on* DAMN (Aftermath 2017).

374. *See* KENDRICK LAMAR, *FEAR.*, *on* DAMN (Aftermath 2017).

treat Black people with humanity: "Pay attention / That one decision changed both of they lives, one curse at a time / Reverse the manifest."[375]

Other hip-hop artists address how the criminal legal system is used to protect white supremacy. Eminem, a prominent white hip-hop artist, powerfully tackles race and law in his track "Untouchable." There, he focuses on white privilege and policing, rapping, from a police officer's perspective, "Black boy, black boy, we ain't gonna lie to you / Black boy, black boy, we don't like the sight of you . . . / White boy, white boy, you're untouchable."[376] He concludes arguing that America—and in particular white Americans—have committed genocide by killing "its Natives" and have publicly executed Blacks without punishment.[377] Big L complains that prosecutors "wanna lock me up even though I'm legit / They can't stand to see a young brother pockets thick."[378] Pep Love laments, "Even if we not locked up, we on our way."[379] And, Jay-Z pleads, "I am not poison / Just a boy from the hood that got my hands in the air / In despair don't shoot / I just wanna do good."[380] Hip-hop exposes our criminal legal system by stating what should be self-evident: no one should have confidence in a criminal legal system in which the law—and the actors that enforce it—punishes Blackness while blameworthy conduct by white people goes unpunished.

The hip-hop community has given much thought to criminal punishment. Its vision is intensely informed by empathy and compassion and braided in love—criminals are not just criminals, but fathers, mothers, sons, and daughters. We must experience people as more than the conduct that brought them before the criminal legal system and understand that "each of us is more than the worst thing we've ever done."[381] The Notorious B.I.G.'s introduction to his massively successful autobiographical hit, "Juicy," encapsulates this idea of empathy in a very emotional and real way: "Yeah, this album is dedicated to all the teachers that told me I'd never amount to nothin' / To all the people that lived above the buildings that I was hustlin' / In front of that called the police on me when I was just tryin' / To make some money to feed my daughter."[382] All this frames hip-hop's vision of crime and punishment.

375. *See* KENDRICK LAMAR, *DUCKWORTH.*, *on* DAMN (Aftermath 2017).
376. *See* EMINEM, *Untouchable*, *on* REVIVAL (Aftermath 2017).
377. *Id.*
378. *See* BIG L, *The Enemy*, *on* THE BIG PICTURE (Rawkus 2000).
379. *See* HIEROGLYPHICS, *All Things*, *on* 3RD EYE VISION (Hieroglyphics Imperium Recordings 1998).
380. *See* JAY-Z, *spiritual* (RocNation 2016).
381. STEVENSON, *supra* note 229, at 17.
382. THE NOTORIOUS B.I.G., *Juicy*, *on* READY TO DIE (Bad Boys 1994).

Hip-hop embraces retributive justice, the idea that there are certain crimes—specifically violent crimes—that deserve punishment. It is "the unwritten law in rap," according to Jay-Z, that "if you shoot my dog, I'ma kill yo' cat . . . know dat / For every action there's a reaction."[383] Hip-hop also offers, as Professor Paul Butler advanced, a utilitarian "remix"[384] — this appreciation that non-violent offenders, especially drug offenders, should not be punished because any form of punishment is massively outweighed by the harmful collateral consequences to the community. The cost-benefit analysis of criminal conviction and punishment is a central theme to hip-hop.

Collateral consequences are a life sentence of a different kind. Many collateral consequences include, among others, denial of voting rights and jury service, occupational licenses, public housing and public assistance, employment discrimination, and ineligibility for personal, business, and school loans.[385] All of this exacerbates existing challenges within Black communities, including poverty and unemployment, while the risk of recidivism increases.[386] In "Ghetto Gospel," Tupac Shakur compared collateral consequences to "another form of slavery."[387] Erykah Badu in "Otherside of the Game," sings "What you gonna do when they come for you / Work ain't honest but it pays the bills / What we gonna do when they come for you / God I can't stand life withoutcha."[388] Both samples underscore that while prosecutors often decline to hold corporations or executives accountable for *serious* crimes because of the potential collateral consequences to innocent third parties, they should also take innocent third-party interests into account for individual crimes. To provide legitimacy to criminal law, hip-hop suggests that these same considerations—individual and community collateral effects—must be applied to Black communities.[389] Prosecutors can address these collateral effects through diversion programs[390] and post-conviction relief[391] while continuously informing their routine decisionmaking.

383. JAY-Z, *Justify My Thug*, *on* THE BLACK ALBUM (Roc-A-Fella 2003).

384. *Butler Article*, *supra* note 67, at 984.

385. *See* Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 461–69 (2010).

386. *Id.*

387. 2PAC, *Ghetto Gospel*, *on* LOYAL TO THE GAME (Amaru Entertainment & Interscope 2004).

388. ERYKAH BADU, *Otherside of the Game*, *on* BADUIZM (Kedar Records 1997).

389. *See* Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 TEX. L. REV. 1383, 1384 (2002) (arguing that "[m]itigating third-party interests . . . is necessary to maintain the legitimacy of criminal law, even as conflicting commitments to distributive fairness, retributive justice, and crime prevention necessitate some punishment.").

390. *See supra* Section III.B.2.

391. Discussed *supra* Section III.A.3. and *infra* Section III.C.2.c.

*b. The Movement for Black Lives*

The Movement for Black Lives, in many ways, has undertaken reimagining our criminal legal system as something more. In her brilliant article *Toward A Radical Imagination of Law*, Professor Amna Akbar examines how The Movement is "working to build another state—another world even—organized differently than the one we have inherited. They are aiming to use the law as a tool to build that alternative future."[392] The Movement advances a decarceral, abolitionist agenda with a demand to "End to the War against Black People[, specifically,] the criminalization, incarceration, and killing of our people."[393] The Movement proffers many revolutionary and radical solutions to end racist regimes and structures that perpetuate this war on Black people. This "grand vision" provides much thought on several issues—including policing—that prosecutors can learn from.[394]

Black people are being killed by police. In such situations, The Movement *demands that prosecutors prosecute the cops* the way that they have prosecuted Blacks. [395] This demand, as Akbar notes, demonstrates the lawlessness with which the police act—while demanding Black compliance.[396] The Movement understands that police violence is a consequence of the erosion of Black civil liberties—police can and do racially profile and conduct pretextual stops. Prosecutors can—and should—do more to end these practices, including exercising their discretion to either not bring charges against the victim of such practices, exclude tainted evidence, and/or prosecute the police officer for civil rights violations.[397] This, however, raises a larger question in The Movement—should policing be abolished? I previously argued that reform alone is insufficient and that the racist aspects of policing must be abolished:

392. Amna A. Akbar, *Toward A Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 412 (2018).

393. *See* Movement for Black Lives, *Vision for Black Lives*, M4BL (2020), https://m4bl.org/policy-platforms/ [https://perma.cc/NP4U-NSV8].

394. Akbar, *supra* note 392, at 412.

395. *See, e.g.*, *Louisiana Protesters Demand Prosecution of Police in Fatal Shooting*, WIS. GAZETTE (July 7, 2016), http://www.wisconsingazette.com/news/louisiana-protesters-demand-prosecution-of-police-in-fatal-shooting/article_42a4c289-e45a-5bae-be76-cc8fed9a7fe8.html [https://perma.cc/XFK8-H VBG]; Greg Moore, *Protesters Call for Prosecution of Police in Fatal Shooting*, KAN. CITY STAR (Nov. 21, 2015, 9:27 AM), http://www.kansascity.com/news/nation-world/national/article45795855.html [https://perma.cc/7Y3H-4UQ6]; Jane Morice, *Tamir Rice's Mother Continues to Demand Justice Two Years After Son's Fatal Shooting by Cleveland Police*, CLEVELAND.COM (Nov. 23, 2016), http://www.cleveland.com/metro/index.ssf/2016/11/tamir_rices_mother_continues_t.html [https://perma.cc/UNE7-22M7].

396. Akbar, *supra* note 392, at 467.

397. *See supra* Section III.A.2.

> [T]o date, progressive police reform measures have simply not worked. One frequently suggested remedy is reform in police hiring, focusing on local citizens so that the composition of police departments accurately reflects their cities' populations. Yet even in cities with police forces that are more representative of their populations' racial diversity, the problem of police violence continues, in part because of fundamental failings of even "community policing" reforms. The Minneapolis Police Department embraced and implemented progressive police reforms—from community policing and diversity, to implicit bias and de-escalation trainings, to bans on "warrior style" policing, among other things—and still George Floyd was murdered.[398]

This point is important—racialized police cannot police effectively because they ignore—or actively harm—Black communities. This in turn means that some communities cannot rely on the police, even in a crisis, because they fear the consequences. Asking whether to abolish the police, despite disagreements, leads to important conversations about the role of police in mass incarceration.[399] Prosecutors must be actively engaged in these necessary conversations.

### *2. Practical Applications*

It is no secret that many Americans—and especially Black Americans—have been frustrated with every aspect of our criminal legal system, from policing through imprisonment. Not only does the hip-hop nation express itself through words, but they and the Movement are on the frontlines advocating for change. Hip-hop artists and Black Lives Matter activists have been working the streets, meeting with both United States and state legislators, and touring prisons to find solutions to dire criminal justice problems. Many have created or joined movements with the express goal of reforming the way criminal justice is administered in the United States. For example, Meek Mill and Jay-Z created the REFORM Alliance in hopes to leverage "our considerable resources to change laws [and] policies" that will "dramatically reduce the number of people who are unjustly under the control of the criminal justice system."[400] Common has toured prisons and

398. Hasbrouck, *supra* note 236, at 1122–24; *see also* Mychal Denzel Smith, *Abolish the Police. Instead, Let's Have Full Social, Economic, and Political Equality*, NATION (Apr. 9, 2015), https://www.thenation.com/article/archive/abolish-police-instead-lets-have-full-social-economic-and-political-equali ty/ [https://perma.cc/MKX3-JL4F] ("What use do I have for an institution that routinely kills people who look like me, and make it so I'm afraid to walk out of my home?").

399. Akbar, *supra* note 392, at 471.

400. *Mission Statement*, REFORM ALLIANCE, https://reformalliance.com/ [https://perma.cc/9R6M-LCP6].

hosted community concerts alongside J. Cole to campaign for criminal justice reform.[401] And, Kanye West, among others, lobbied President Donald Trump to pass The First Step Act, a federal sentencing and prison reform bill.[402] All of these efforts are viewed as necessary to end mass incarceration—the civil and human rights crisis of our time.

But more must be done—and prosecutors are at the center. This section briefly explores several solutions that prosecutors committed to liberation justice can implement, including: decriminalization of non-violent drug offenses; nullification; restoration of rights through expungement; and eliminating bail and pretrial detention.

*a. Decriminalization of Drugs*

The hip-hop community acknowledges the harmful consequences that some drugs have for individuals and communities.[403] Hip-hop culture "is not as quick as some scholars to label drug crimes 'victimless.'"[404] Still, hip-hop makes the basic claim for the decriminalization of drug offenses. The "war on drugs" has taken a nightmarish toll on Black communities with limited, if any, value in exchange.[405] For this reason, members of the hip-hop community have called for the decriminalization of drugs, arguing for the reinvestment of any resulting savings and revenue into reparations, restorative services, mental health services, job programs, and other programs supporting those impacted by the "war on drugs."[406] These benefits of decriminalization cannot be overstated. Most immediately, the prison population, especially Black populations, would be greatly reduced.[407] Several states have started this process by decriminalizing

401. Nerisha Penrose, *Common to Host Free Community Concert with J. Cole & More to Advocate for Criminal Justice Reform*, BILLBOARD.COM (Aug. 16, 2017), https://www.billboard.com/articles/columns/hip-hop/7905216/common-j-cole-free-community-concert-sacramento-justice-reform [https://perma.cc/9XPK-S69H].

402. First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222.

403. *See, e.g.*, ICE CUBE, *Us, on* DEATH CERTIFICATE (Lench Mob 1991) ("And all y'all dope-dealers . . . You're as bad as the po-lice cause ya kill us.").

404. BUTLER BOOK, *supra* note 21, at 142.

405. Epps, *supra* note 216, at 828.

406. *See, e.g.*, Movement for Black Lives, *Invest-Divest Platform*, M4BL, https://m4bl.org/policy-platforms/invest-divest/ [https://perma.cc/R7C5-7DMM]; *Killer Mike Says Rappers Deserve Credit for Decriminalization of Marijuana*, VIBE (June 18, 2019, 6:15 PM), https://www.vibe.com/2019/06/killer-mike-says-rappers-deserve-credit-decriminalization-marijuana-wee d [https://perma.cc/G8VC-W3CJ].

407. *See* Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women's Prisons*, 42 HARV. C.R.-C.L. L. REV. 45, 52–53 (2007); Marne L. Lenox, *Neutralizing the Gendered Collateral Consequences of the War on Drugs*, 86 N.Y.U. L. REV. 280, 284 (2011); *see also* Wilbert L. Cooper and Christie Thompson, *Will Drug Legalization Leave Black People Behind?*, MARSHALL PROJECT (Nov. 11, 2020; 1:40 PM), https://www.themarshallproject.org/2020/11/11/will-drug-legalization-leave-black-people-behind

marijuana possession, noting that this change will help combat gross racial disparities.[408] Prosecutors should support decriminalization policies. Until decriminalization laws are passed, prosecutors have the ability to (and should) create diversion programs as a quasi-decriminalization measure or even effectively nullify unjust laws.[409]

*b. Prosecutorial Nullification*

Hip-hop culture has not only shined a light on unequal treatment in the criminal legal system, but has also encouraged people to fight unjust laws.[410] For prosecutors, this can be accomplished by nullifying unjust criminal laws, which will help combat our racist criminal legal system.[411] As Professor Roger Fairfax explained, "prosecutorial nullification [occurs when] a prosecutor has sufficient evidence to secure a conviction against a defendant for conduct that violates a criminal law, but declines prosecution because of a disagreement with the law or [because prosecution] would be unwise or unfair.[412] In other words, prosecutors can—and occasionally do—decline to charge a person "due to fundamental disagreement with substantive law or discomfort with the severity of the likely penalty."[413]

Prosecutors should not defend or enforce laws that are discriminatory.[414] In 2014, then-Attorney General Eric Holder issued a statement in response to same-sex marriage bans, arguing that state attorneys general are not

[https://perma.cc/WR3J-2AKV] ("Activists in Oregon pointed to a statewide study that found drug convictions for Black and Native people would drop by nearly 95 percent under the state's decriminalization law.").

408. *States That Have Decriminalized*, NORML (2017), http://norml.org/aboutmarijuana/item/states-that-have-decriminalized [https://perma.cc/5LW7-9WDF]; Sophie Quinton, *In These States, Past Marijuana Crimes Can Go Away*, HUFF. POST (Nov. 20, 2017, 10:09 AM ET), https://www.huffingtonpost.com/entry/in-these-states-past-marijuana-crimes-can -go-awayus5a12e8e8e4b023121e0e94e3 [https://perma.cc/DV4D-CFZ2].

409. *See supra* Section III.B.2.

410. *See, e.g.*, VERNON REID, PHAROAHE MONCH, IMMORTAL TECHNIQUE, *W.A.R.*, *on* W.A.R. (WE ARE RENEGADES) (W.A.R. Media 2011) ("We are renegades. This means W.A.R. 16s bust to break unjust laws.").

411. Prosecutors clearly understand how to use their discretion to nullify laws when it comes to prosecuting police. Hasbrouck, *supra* note 236, at 1128 (arguing that Congress should create a section of the Department of Justice specifically to prosecute civil rights violations by police to avoid discretionary decisions not to charge by local federal prosecutors); Mark Joseph Stern, *The Police Lie. All the Time. Can Anything Stop Them?*, SLATE (Aug. 4, 2020, 11:51 AM), https://slate.com/news-and-politics/2020/08/police-testilying.html [https://perma.cc/KXQ6-X9D8] ("Prosecutors rely on officer testimony, true or not, to secure convictions, and merely acknowledging the problem would require the government to admit that there is almost never real punishment for police perjury.").

412. *See* Fairfax, Jr., *supra* note 71, at 1252–54.

413. Epps, *supra* note 216, at 778.

414. Matt Apuzzo, *Holder Sees Way to Curb Bans on Gay Marriage*, N.Y. TIMES (Feb. 24, 2014), https://www.nytimes.com/2014/02/25/us/holder-says-state-attorneys-general-dont-have-to-defend-gay-marriage-bans.html?ref=us&_r=0 [https://perma.cc/ERN6-KC2R].

obligated to defend laws that they believe are discriminatory.[415] Attorney General Holder contended that discriminatory laws raise constitutional equal protection concerns, and, in such situations, prosecutors should apply the highest level of scrutiny before they enforce or defend those laws. Prosecutors should apply these same concerns to our criminal legal system.[416]

When laws discriminate based on race *or* when the collateral consequences to the individual and community are unfair, prosecutors should engage in nullification. This will likely include many misdemeanors, such as marijuana possession, fistfights, public drinking, and traffic infractions. These types of crimes are the majority of what Black people are arrested for, which induct us into the criminal legal system.[417]

*c. Expungement and Restoration of Rights*

Hip-hop culture understands that racial animus played a major role in collateral consequence policies, such as felony disenfranchisement and welfare and public benefit restrictions tied to drug offences. [418] Unsurprisingly then, these laws disproportionately impact Black people.[419] Hip-hop has responded by creating organizations to lobby state legislatures to change collateral consequence policies and expungement laws.[420] There has been much resistance to change, however, as many "prosecutors and judges remain skeptical or outright opposed to record clearing. Philosophically they don't think those who've broken the law should get a clean slate."[421]

Collateral consequences—especially the criminal record—can result from almost any contact with the criminal legal system, including nonconvictions and dropped charges. Even these collateral consequences fall within prosecutors' influence. State legislatures have empowered prosecutors to wield "remarkable influence over the procedural and

415. *Id.*

416. *See supra* Section III.A.1.

417. BUTLER, CHOKEHOLD, *supra* note 53, at 65.

418. Pinard, *supra* note 385, at 470–71.

419. *Id.*; *see also* Commonwealth v. Malone, 366 A.2d 584, 587–88 (Pa. Super. Ct. 1976) ("Economic losses themselves may be both direct and serious. Opportunities for schooling, employment, or professional licenses may be restricted or nonexistent as a consequence of the mere fact of an arrest, even if followed by acquittal or complete exoneration of the charges involved.").

420. *See, e.g.*, Movement for Black Lives, *supra* note 406.

421. Eric Westervelt, *Scrubbing the Past to Give Those with a Criminal Record a Second Chance*, NPR (Feb. 19, 2019, 4:58 AM ET), https://www.npr.org/2019/02/19/692322738/scrubbin g-the-past-to-give-those-with-a-criminal-record-a-second-chance [https://perma.cc/XPA5-RDTK].

substantive aspects of expungement law."[422] A prosecutor's decision to join a petitioner's motion to expunge or not object to such motion, in many states, can result in *automatic expungement* of any non-violent conviction.[423] Some state laws even *mandate expungement* when the prosecutor consents to or does not object to the expungement motion.[424] In a criminal legal system designed to punish Blackness—which has accomplished this goal with surgical precision—expungement matters. Prosecutors have a significant role to play in its availability as a remedy for people, especially Black people, struggling to overcome racist barriers after their formal punishment has long ended.

*d. Eliminating Cash Bail*

Sandra Bland died in jail before her relatives could pay her $500 bond.[425] Kalief Browder spent three years in Rikers when he was unable to pay $3000 bail, resisting multiple attempts by prosecutors to plead guilty to the charge of stealing a backpack in exchange for his release.[426] While their tragic deaths are extreme examples of the collateral consequences of the decision to request cash bail, their detention is typical in America, where hundreds of thousands of people are held in jail because they cannot make bail.[427] "Bail amounts of $5000, $1000, and sometimes even sums as low as $250 or $100, routinely stand in the way of a person's freedom."[428] While

422. Brian M. Murray, *Unstitching Scarlet Letters?: Prosecutorial Discretion and Expungement*, 86 FORDHAM L. REV. 2821, 2846 (2018). Murray's Article provides an excellent survey of all state expungement laws.

423. *See id.* at 2846–51 (collecting states).

424. *Id.* at 2848; *see also* CAL. PENAL CODE § 851.8(a) (stating that "concurrence of the prosecuting attorney" requires the arresting agency to seal arrest records); COLO. REV. STAT. § 24-72-705(1)(d)(II), (e)(II) (mandating expungement of various grades of misdemeanor convictions when the prosecutor does not object); GA. CODE ANN. § 35-3-37(n)(2) (noting that for pre-2013 arrests, "if record restriction is approved by the prosecuting attorney, the arresting law enforcement agency shall restrict the criminal history record information"); 20 ILL. COMP. STAT. 2630/5.2(d)(6)(B) (providing for automatic expungement if no objection); IOWA CODE ANN. § 901C.1 (providing for automatic expungement upon no objection or initiation by a prosecutor, which is allowed under the statute); KY. REV. STAT. ANN. § 431.076(3) (same); MINN. STAT. ANN. § 609A.025(a) (providing for automatic expungement unless the court finds it contrary to the public interest); N.Y. CRIM. PROC. LAW § 160.50(1); VT. STAT. ANN. TIT. 13, § 7602(a)(3); WYO. STAT. ANN. §§ 7-13-1401(c), 7-13-1501(f), 7-13-1502(f).

425. Molly Hennessy-Fiske, *Sandra Bland's Family Cites 'Plethora of Questions,' Files Suit over Her Death in Texas Jail*, L.A. TIMES, (Aug. 4, 2015, 6:31 PM), https://www.latimes.com/nation/la-na-sandra-bland-lawsuit-20150804-story.html [https://perma.cc/K4N9-2CXR].

426. Alysia Santo, *No Bail, Less Hope: The Death of Kalief Browder*, MARSHALL PROJECT (June 9, 2015, 6:04 PM), https://www.themarshallproject.org/2015/06/09/no-bail-less-hope-the-death-of-kalief-browder [https://perma.cc/KH7Y-2ARG].

427. *Id.*

428. Insha Rahman, *Undoing the Bail Myth: Pretrial Reforms to End Mass Incarceration*, 46 FORDHAM URB. L.J. 845, 847 (2019); *see also* THE FAT BOYS, *Jail House Rap*, *on* FAT BOYS (Sutra Records 1984) ("And the next thing you know I was headed upstate / In jail, in jail, without no bail.").

judges set bail, the decision to do so typically originates with prosecutors, often with severe evidentiary advantages over defendants in bail proceedings.[429] It should come as no surprise that cash bail is one of the primary targets of Larry Krasner and other "progressive prosecutors."[430] As Browder's case demonstrates, bail is often one of the prosecutor's primary tools in plea bargaining, driving convictions not on the basis of actual guilt, but on an imprisoned defendant's desire to be set free.[431]

Forgoing the request for cash bail would force prosecutors to plea bargain in good faith based on the merits of their case against the defendant rather than use the coercion of ongoing imprisonment to secure quick convictions. The coercive strength of cash bail is rooted in the collateral consequences of pretrial detention—defendants who cannot make bail risk losing their jobs, housing, and even custody of their children.[432] "[I]f bail is set in an amount higher than a defendant can pay, that defendant is incentivized to plead guilty early in the process, without the benefit of extended discussions with counsel, case investigation, or discovery from the prosecution."[433] Defendants held in pretrial detention experience difficulty in obtaining private counsel and assisting in their own defense.[434] While these circumstances have become typical, they undermine the purpose of the right to bail: protecting the pretrial liberty of defendants in all but the most serious cases.[435] The practice of setting bail that prevents pretrial release as a tool for adversarial advantage, then, is not merely cruel, but violates the purpose of constitutionally protecting pretrial liberty and the

429. Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1354–55 (2012) ("When the defense lacks knowledge of the evidence against him, the defendant cannot properly challenge the detention request, meaningfully participate in the hearing, or refute any secret evidence because the proceeding is one-sided."); *see also* 2PAC, *Out on Bail*, *on* LOYAL TO THE GAME (Amaru Entertainment & Interscope Records 2004) ("I'm stuck in jail, the D.A.'s tryin' to burn me / I'd be out on bail, if I had a good attorney.").

430. *See* Abbe Smith, *Good Person, Good Prosecutor in 2018*, 87 FORDHAM L. REV. ONLINE 3, 4 (2018).

431. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2468 (2004) ("The vast majority of criminal cases are small ones, in which defendants face only modest amounts of jail time. If a defendant is denied or cannot make bail, the length of pretrial detention may approach or even dwarf the likely sentence after trial. Thus, detained defendants strike bargains for time served instead of awaiting their day in court. Plea bargaining, then, often happens in the shadow not of trial but of bail decisions.").

432. *See* Ashli Giles-Perkins, *Justice Delayed is Justice Denied: Holding Cash Bail Unconstitutional*, 25 PUB. INT. L. REP. 102, 103 (2020) ("People with money to bail themselves out can get back to their lives and fight their case from the outside, while those too poor to post bail may lose their jobs, housing and even custody of their children as they wait.").

433. Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 589 (2017).

434. *See* Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 555 (2012); Amy McCrossen, Note, *Bailout: Leaving Behind Pennsylvania's Monetary Bail System*, 57 DUQ. L. REV. 415, 430 (2019).

435. *See* Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 947–48 (2013) (presenting an originalist defense of a fundamental right to bail as a protection of pretrial liberty resting on "sufficient sureties").

right to a fair trial. A prosecutor informed by liberation justice should—at a minimum—forgo bail in all nonviolent cases.

* * *

There is much common ground in seemingly disparate threads of theory. These overlaps provide a construction of a prosecutor that is solely concerned with doing justice. It is in these spaces that justice is painted—not in definitional words—but in concrete actions. These actions lie entirely within the power of modern prosecutors, if they choose to embrace them. If they do not, then perhaps they could be motivated by the elimination of absolute prosecutorial immunity [436] —a change which could be accomplished by the same Congressional power I previously applied to policing in *Abolishing Racist Policing With the Thirteenth Amendment*.[437]

All of the solutions proposed in this Article find support in each theory—from establishing constitutional norms to strengthening civil liberties; from decriminalizing—in policy or action—non-violent drug offenses to nullifying discriminatory laws and eliminating cash bail; and from expungement to post-conviction relief. Most importantly, perhaps, there is support in each theory that justice requires Black lives to matter.

## CONCLUSION

*I feel my ancestors unrested inside of me. It's like they want me to shoot my chance in changing society.*[438]

–Joey Bada$$

This Article is my chance to change the way the United States administers criminal justice. It reimagines our criminal legal system with prosecutors who are single mindedly focused on ensuring that justice is done. The vision of justice shared in this Article is informed by and committed to abolition constitutionalism, critical originalism, and liberation justice principles. And, that vision, I hope, has the potential to profoundly reshape criminal justice. It not only identifies important problems in our criminal legal system but builds bridges across the ideological spectrum toward necessary solutions. This Article is a pathway forward—the blueprint for prosecutors to begin to address the extraordinary racial and

436. *See* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 57 ("The reconsideration of absolute prosecutorial immunity is especially urgent for two reasons: (1) recent empirical studies establish that prosecutorial misconduct is a significant factor contributing to numerous wrongful convictions of innocent people; and (2) emerging circuit splits on the application of the absolute prosecutorial immunity doctrine suggest that it is becoming increasingly unworkable and is in fact undermining the goals it was designed to achieve.").

437. Hasbrouck, *supra* note 236, at 1108.

438. JOEY BADA$$, *Land of the Free, on* ALL-AMERIKKKAN BADA$$ (Pro Era 2017).

economic disparities in our system. Much can and should be done by the prosecutor and justice demands so. We cannot rest in the struggle to bring justice to the criminal legal system but must be prepared to face fantastic resistance to our efforts.[439]

439. *See* James Baldwin, *A Talk to Teachers*, SATURDAY REV. (Dec. 21, 1963), https://richgibson.com/talktoteachers.htm [https://perma.cc/5U52-XGXQ] ("[I]n the attempt to correct so many generations of bad faith and cruelty . . . you will meet the most fantastic, the most brutal, and the most determined resistance.").