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Prosecutors, Ethics, and the Pursuit of Racial Justice

Roger A. Fairfax, Jr.*

INTRODUCTION

The 2020 murder of George Floyd catalyzed a national reckoning on race, and scrutiny of barriers to racial justice, rightfully focused on policing. However, as this Symposium has demonstrated, it is also critical to interrogate the prosecutorial function, given the outsize role prosecutors play in the criminal legal system. Scholars and advocates have utilized a number of frames to explore a key topic of this symposium—the intersection between prosecutorial discretion, prosecutorial ethics, and racial inequity.¹

Although the renewed interest in the prosecutor's role in the pursuit of racial justice raises many new questions and opportunities, the scaffolding for such work already exists in many of the current ethical rules and standards governing the prosecution function. This brief essay, based on my remarks at the Symposium, explores some of the ways in which the ethical guidance provides a justification for—and in some instances even compels—the active pursuit of racial justice by prosecutors.

* Dean, American University Washington College of Law. This Essay is based on remarks given at the Symposium on Prosecutorial Elections: The New Frontline in Criminal Justice Reform, panel on "Prosecutorial Biases as a Catalyst for Systemic Racism—The intersect between prosecutorial discretion, prosecutorial ethics, and racial inequity in criminal justice." Special thanks to Samantha Pugh, Sarah Roveda, and the editors of the Ohio State Journal of Criminal Law. I am grateful to Kristen Powell for her helpful research assistance.

¹ This is an exciting time in the academy to be focused on these issues. First, there is an unprecedented level of collaboration between legal scholars and scholars from other disciplines—including criminology, sociology, history, and public health—and it is producing impactful interdisciplinary work. See, e.g., ELIZABETH HINTON, *AMERICA ON FIRE: THE UNTOLD STORY OF POLICE VIOLENCE AND BLACK REBELLION SINCE THE 1960S* (2021); *The Justice Collaboratory*, YALE LAW SCHOOL, <https://law.yale.edu/justice-collaboratory/about-us> [<https://perma.cc/T2CN-C2XE>] (last visited May 3, 2021). Just as importantly, we are seeing much greater collaboration between the academy and advocacy communities, including productive collaborations with more traditional advocacy organizations, such as legacy civil rights groups and well-funded think tanks. See, e.g., *Policing Reform Campaign*, NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., <https://www.naacpldf.org/justice-for-george-floyd/> [<https://perma.cc/64GU-EFPT>] (last visited May 3, 2021); *Reshaping Prosecution*, VERA INSTITUTE FOR JUSTICE, <https://www.vera.org/projects/reshaping-prosecution-program/learn-more> [<https://perma.cc/9L65-UDSD>] (last visited May 3, 2021). This includes grassroots, community-driven research being done by scholars at the direction of the affected communities. See, e.g., DC JUSTICE LAW, <https://dcjusticelab.org/> [<https://perma.cc/R64M-NMYC>] (last visited May 3, 2021); Amna Akbar, Sameer Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821 (2021).

I. ETHICAL FRAMEWORK FOR PROSECUTORS' PURSUIT OF RACIAL JUSTICE

There are a number of frames for exploring the intersection of the prosecutorial role and the pursuit of racial justice. They can be clustered into three broad themes: (1) prosecutorial discretion and decision-making; (2) selection, identity, and demographics of prosecutors; and (3) broader systemic impact of prosecutors. Importantly, many of these frames map onto existing ethical rules and standards.

The American Bar Association Model Rules of Professional Conduct contain a number of relevant provisions. As noted in the Preamble to the Model Rules, a prosecutor, like any lawyer, is both "an officer of the legal system and a public citizen having special responsibility for the quality of justice."² The Preamble elaborates on this special responsibility on the part of all lawyers:

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.³

As it relates specifically to prosecutors, the Model Rules make clear that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate."⁴ While this responsibility certainly relates to instrumental matters that help to advance racial justice, including due process and the avoidance and

² MODEL RULES OF PROF'L CONDUCT Preamble 1 (AM. BAR ASS'N 1983).

³ MODEL RULES OF PROF'L CONDUCT Preamble 6 (AM. BAR ASS'N 1983).

⁴ MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 1983); *see also* MODEL CODE OF PROF'L RESP. EC 7-13 (AM. BAR ASS'N 1969) ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.").

rectification of wrongful convictions,⁵ it also implicates broader responsibilities referenced in the Preamble.

A. Prosecutorial Discretion and Decision-making

1. Color Blindness and Color Consciousness in Prosecutorial Decision-making

The American Bar Association Criminal Justice Standards speak to bias in the prosecution function:

Standard 3-1.6 Improper Bias Prohibited

(a) The prosecutor should not manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status. A prosecutor should not use other improper considerations, such as partisan or political or personal considerations, in exercising prosecutorial discretion. A prosecutor should strive to eliminate implicit biases, and act to mitigate any improper bias or prejudice when credibly informed that it exists within the scope of the prosecutor's authority.⁶

Some scholars have interrogated the efficacy of color-blind approaches to prosecutorial decision-making as a way to achieve racial justice.⁷ For their part, the ethical rules and standards contain specific provisions arguably supporting color-blindness in prosecution decision-making. For example, the ABA Criminal Justice Standards prohibit consideration of "the impermissible criteria" in the above provision.⁸ However, the same Standard eschews a passive, laissez faire, merely color-blind approach,⁹ in favor of a robust, active model of addressing, through the prosecutorial function, the vestiges of past discrimination:

⁵ MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 1983) ("This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.").

⁶ CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-1.6(a) (AM. BAR ASS'N 2017).

⁷ See Andrew E. Taslitz, *Racial Blindsight: The Absurdity of Color-Blind Criminal Justice*, 5 OHIO ST. J. CRIM. L. 1 (2007); Justin Murray, *Reimagining Criminal Prosecution: Toward a Color-Conscious Professional Ethic for Prosecutors*, 49 AM. CRIM. L. REV. 1541, 1548–51 (2012).

⁸ See CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION standard 3-4.4(b) (AM. BAR ASS'N 2017) (Discretion in Filing, Declining, Maintaining, and Dismissing Criminal Charges:

(b) In exercising discretion to file and maintain charges, the prosecutor should not consider:

(iii) the impermissible criteria described in Standard 1.6 above.)

⁹ Cf. EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* 7 (2006) (cited in Murray, *supra* note 7, at 1543 n.10).

Standard 3-1.6 Improper Bias Prohibited

(b) A prosecutor's office should be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race, in all of its work.¹⁰

Others have promoted color *consciousness* in prosecutorial decision-making.¹¹ This view acknowledges that prosecutors, in some contexts, have embraced color consciousness with regard to Black *victims* of crime. Examples include hate crime prosecutions and enforcement strategies centering crime control in Black communities. However, as Justin Murray argues, this color consciousness should extend to a prosecutorial commitment to promoting racial justice for Black *defendants*.¹² This would include a number of mechanisms, such as acknowledging the possibility of existing racial bias in the exercise of prosecutorial discretion, using prosecutorial influence to challenge racial profiling, factoring racial bias in criminal history, and ensuring that racial bias does not infect jury selection and advocacy strategies.¹³

¹⁰ CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-1.6(b) (AM. BAR ASS'N 2017).

¹¹ See, e.g., Murray, *supra* note 7.

¹² See, e.g., Murray, *supra* note 7.

¹³ See, e.g., Murray, *supra* note 7. A number of ethical standards seem to provide support for some of these ideas. See, e.g., CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-6.3: (AM. BAR ASS'N 2017).

Selection of Jurors

(b) The prosecutor should not strike jurors based on any criteria rendered impermissible by the constitution, statutes, applicable rules of the jurisdiction, or these standards, including race, sex, religion, national origin, disability, sexual orientation or gender identity. The prosecutor should consider contesting a defense counsel's peremptory challenges that appear to be based upon such criteria.

See, e.g., CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-6.8 (AM. BAR ASS'N 2017).

Closing Arguments to the Trier of Fact

(c) The prosecutor should not make arguments calculated to appeal to improper prejudices of the trier of fact. The prosecutor should make only those arguments that are consistent with the trier's duty to decide the case on the evidence, and should not seek to divert the trier from that duty.

See, e.g., CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-4.4 (AM. BAR ASS'N 2017).

Discretion in Filing, Declining, Maintaining, and Dismissing Criminal Charges

(a) In order to fully implement the prosecutor's functions and duties, including the obligation to enforce the law while exercising sound discretion, the prosecutor is not obliged to file or maintain all criminal charges which the evidence might support. Among the factors which the prosecutor may properly consider in exercising discretion to initiate, decline, or dismiss a criminal charge, even though it meets the requirements of Standard 3-4.3, are:

- (ix) unwarranted disparate treatment of similarly situated persons;
- (xii) the possible influence of any cultural, ethnic, socioeconomic or other improper biases;

2. Racial Disparities in the Exercise of Prosecutorial Discretion

As Professor Angela J. Davis has explained:

As the most powerful officials in the criminal justice system, [prosecutors'] discretionary decisions—especially their charging and plea bargaining decisions—play a very significant role in creating and maintaining the racial disparities in the criminal justice system. The good news is that prosecutors can, if they wish, use that same power and discretion to help reduce these disparities.¹⁴

The American Bar Association Criminal Justice Standards call for examination of biases that might infect prosecutorial decisions and lead to racial disparities:

Standard 3-1.6 Improper Bias Prohibited

(b) . . . A prosecutor's office should regularly assess the potential for biased or unfairly disparate impacts of its policies on communities within the prosecutor's jurisdiction, and eliminate those impacts that cannot be properly justified.¹⁵

Accordingly, there have been efforts to examine the impact of the race of the defendant and the race of the victim on the exercise of prosecutorial discretion.¹⁶ For example, the Vera Institute of Justice Prosecution and Racial Justice Program has studied prosecutorial discretion in a number of jurisdictions, including Mecklenburg, North Carolina, and Milwaukee, Wisconsin.¹⁷

Importantly, these inquiries are relevant not only to the ultimate charging decision (i.e., whether or what to charge) or plea posturing, but also to other critical issues, such as pre-trial detention, juvenile to adult transfer determinations, and sentencing decisions. Furthermore, prosecutorial discretion extends to certain

¹⁴ See, e.g., Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 821, 823 (2013).

¹⁵ See, e.g., CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-1.6: (AM. BAR ASS'N 2017).

¹⁶ *Id.* at 823; Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998).

¹⁷ See, e.g., VERA INSTITUTE OF JUSTICE, A PROSECUTOR'S GUIDE TO ADVANCING RACIAL EQUITY (November 2014); Wayne McKenzie et al., PROSECUTION AND RACIAL JUSTICE: USING DATA TO ADVANCE FAIRNESS IN CRIMINAL PROSECUTION, VERA INSTITUTE OF JUSTICE (March 2009); see also Davis, *Racial Justice*, *supra* note 14. The Vera Institute of Justice currently runs a Reshaping Prosecution Project, which provides technical assistance to prosecutor offices, utilizing data analysis and training to help prosecutors in those jurisdictions mitigate racial disparities. See Vera Institute of Justice, *Reshaping Prosecution Program*, <https://www.vera.org/projects/reshaping-prosecution-program> [<https://perma.cc/CBV4-G6BY>] (last visited May 3, 2021); Sameer Rao, *The Vera Institute's Jamila Hodge on Reshaping Prosecution*, LAW 360, May 2, 2021.

decisions made outside of the litigation of criminal matters—most notably, the discretionary prosecutorial decisions for alternative programs, such as pre-trial diversion, drug court programs, and mediation.¹⁸

Such studies can equip prosecutors with the data necessary to determine whether unwarranted racial disparities exist. With that data in hand, prosecutors can further goals set forth in the ethical standards to “strive to eliminate implicit biases, and act to mitigate any improper bias or prejudice when credibly informed that it exists within the scope of the prosecutor’s authority.”¹⁹

In addition, some jurisdictions have developed community-based entities that can help to monitor prosecutorial performance related to racial justice issues.²⁰ There also have been positions with a specific focus on racial justice established *within* prosecutor’s offices. Some offices have created the position of “Director of Racial Justice Initiatives,” with responsibility for “overseeing and addressing racial equity issues in the investigation and prosecution of crime.”²¹

B. Selection, Identity, and Demographics of Prosecutors

1. Electing Prosecutors

The vast majority of prosecutors in the United States are elected.²² However, until relatively recently,²³ there has been scant focus on these elections and how electoral politics might impact and shape the prosecutorial agenda related to racial

¹⁸ Cf. CRIM. JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION STANDARD 3-1.13 (AM. BAR ASS’N 2017).

Training Programs

3-1.13(b): In addition to knowledge of substantive legal doctrine and courtroom procedures, a prosecutor’s core training curriculum should address the overall mission of the criminal justice system. A core training curriculum should also seek to address: investigation, negotiation, and litigation skills; compliance with applicable discovery procedures; knowledge of the development, use, and testing of forensic evidence; available conviction and sentencing alternatives, reentry, effective conditions of probation, and collateral consequences; civility, and a commitment to professionalism; relevant office, court, and defense policies and procedures and their proper application; exercises in the use of prosecutorial discretion; civility and professionalism; appreciation of diversity and elimination of improper bias.

¹⁹ CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-1.6(b) (AM. BAR ASS’N 2017).

²⁰ See, e.g., ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 184–86 (2007).

²¹ *Position Description, Director of Racial Justice Initiatives*, Middlesex District Attorney’s Office <https://www.middlesexda.com/sites/g/files/vyhlf4691/f/uploads/director20of20racial20justice20initiatives.pdf> [<https://perma.cc/XLV3-JWAB>].

²² See DAVIS, *supra* note 20, at 166.

²³ See, e.g., Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581 (2009); see also Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593 (2014).

justice. First, elections determine *who* serves in the role of chief prosecutor. Although line prosecutors have tremendous influence on the culture of prosecutors' offices,²⁴ the chief prosecutor sets enforcement priorities, allocates resources, and provides leadership of the office's overall effort. Despite justified skepticism in the past about the efficacy of electoral politics in this arena,²⁵ an informed electorate can prompt the election of candidates who see the pursuit of racial justice as part of the prosecutor's role.²⁶

2. Identity and Diversity in the Prosecutorial Ranks

The American Bar Association Criminal Justice Standards speak to considerations of diversity in the prosecution function:

Standard 3-2.2 Assuring Excellence and Diversity in the Hiring, Retention, and Compensation of Prosecutors

(b) In selecting personnel, the prosecutor's office should also consider the diverse interests and makeup of the community it serves, and seek to recruit, hire, promote and retain a diverse group of prosecutors and staff that reflect that community.²⁷

In addition to fascinating work being done around personal and professional identity of prosecutors,²⁸ there has been increased attention on the demographics of prosecutors' offices and how that might relate to the pursuit of racial justice.²⁹ Scholars have engaged on issues of diversity in the staffing of prosecutor's offices,

²⁴ See, e.g., David Alan Sklansky, *Commentary, The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647, 672 (2017).

²⁵ See, e.g., Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 449 (2001); Wright, *How Prosecutor Elections Fail Us*, *supra* note 23, at 581, 583; Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 963 (1997).

²⁶ See, e.g., Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415 (2021); Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537 (2020); Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1 (2019); Cheryl Corley, *Newly Elected DAs Vow to Continue Reforms, End Policies Deemed Unfair*, NPR, (November 26, 2020), <https://www.npr.org/2020/11/26/938425725/newly-elected-das-vow-to-continue-reforms-end-policies-deemed-unfair> [<https://perma.cc/C8YT-YKTS>].

²⁷ CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-2.2 (AM. BAR ASS'N 2017).

²⁸ See, e.g., Ronald F. Wright & Kay L. Levine, *Career Motivations of State Prosecutors*, 86 GEO. WASH. L. REV. 1667 (2018).

²⁹ See, e.g., Melanie D. Wilson, *Biden's Prosecutors*, 2021 U. ILL. L. REV. ONLINE: BIDEN'S FIRST 100 DAYS 68, *Promote Diversity Within the District Attorney's Office*, ACLU, <https://meetyourda.org/platform/promote-diversity-within-district-attorneys-office/> [<https://perma.cc/ULU2-TWD4>] (last visited May 3, 2021).

which actually are less diverse than are police departments.³⁰ One response to this lack of diversity in the prosecutorial ranks has been the creation of positions focused specifically on the problem.³¹ In addition to demographics, there has been some exploration regarding how the racial identity of prosecutors may impact their professional identity and notions of racial justice.³²

C. Prosecutors' Broader Systemic Impact

The American Bar Association Standards on Criminal Justice, Prosecution Function, explicitly outline the responsibility of prosecutors in connection with the pursuit of reforms of the criminal legal system:

The prosecutor is not merely a case-processor but also a problem-solver responsible for considering broad goals of the criminal justice system. The prosecutor should seek to reform and improve the administration of criminal justice, and when inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, the prosecutor should stimulate and support efforts for remedial action.³³

In this vein, prosecutors are not expected to be passive and isolated from community efforts at reform, but rather “should be available to assist community efforts

³⁰ See, e.g., Jeffrey Bellin, *Theories of Prosecution*, 108 CAL. L. REV. 1203, 1246 n. 245 (2020); David Alan Sklansky, *The Progressive Prosecutor's Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25, 41 (2017).

³¹ See, e.g., *Chief Diversity Equity, and Inclusion Officer Position Description*, Bronx County Office of the District Attorney, <https://bronxda.applicantstack.com/x/detail/a2q700t4thaf> [<https://perma.cc/2CUN-YQ5P>] (last visited May 3, 2021) (creating the position of “Director of Diversity, Equity, and Inclusion Officer” which has responsibility for creating “a diversity, equity, and inclusion strategic plan with goals for hiring, retention, and promoting talent”); see also *Creating a Culture of Racial Equity*, INSTITUTE FOR INNOVATION IN PROSECUTION (February 2021) (recommending the hiring of “an outside diversity and inclusion expert to conduct focus groups with prosecutors in the office, and gauge how they view the office’s efforts to promote racial justice” and recommending the recruitment of “Black and Brown attorneys” and “[s]upport[ing] the creation of cultural affinity groups within the office”); but see TCR Staff, *Why Culture Change for Prosecutors is ‘More Than Hiring People of Color,’* THE CRIME REPORT (March 11, 2021).

³² One high-profile instance demonstrating the intersection of racial identity and the pursuit of racial justice can be found in the remarkable letter published by a group of African-American prosecutors in the District of Columbia. See Keith L. Alexander, *32 Black Federal Prosecutors in Washington Have a Plan to Make the Criminal Justice System More Fair*, WASH. POST, (September 5, 2020); but cf. JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017) (exploring representation of African Americans within political and criminal justice infrastructure in Washington, D.C. during ramp-up of enforcement and sentencing policies disproportionately impacting African Americans); PAUL BUTLER, *LET’S GET FREE: A HIP HOP THEORY OF JUSTICE*, 112–14 (2009) (critiquing “strategic benefit in having African American prosecutors, especially in jurisdictions in which most defendants are African American”).

³³ CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-1.2(f) (AM. BAR ASS’N 2017).

addressing problems that lead to, or result from, criminal activity or perceived flaws in the criminal justice system.”³⁴

1. Decarceration

Scholars have also advocated prosecutorial policies that seek to reverse mass incarceration.³⁵ Among these are reforms of prosecutors’ charging, plea bargaining, and sentencing policies.³⁶ Even if these proposed efforts are not explicitly directed at racial justice, it is rational to assume they will benefit Black and Brown people who have been disproportionately impacted by hyper-incarceration policies.³⁷ That said, some have argued that prosecutorial efforts to advance decarceration are insufficient and “must . . . actively seek to advance racial justice on top of . . . decarceration efforts.”³⁸ Under this view, it is not enough to simply continue to slow down or reverse the trend of hyperincarceration; rather, prosecutors must affirmatively pursue racial justice. As two prominent criminal justice reform advocates have noted, “efforts to undo the harmful legacy of mass incarceration must go hand in hand with explicit and intentional racial justice strategies.”³⁹ Indeed, as discussed in this essay, there is an ethical grounding for prosecutors explicitly seeking to promote racial justice.

³⁴ *Id.* at 3-1.2(e).

³⁵ See, e.g., EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2019); Shima Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration*, 94 S. CAL. L. REV. (forthcoming 2021); Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301 (2017); Cynthia Alkon, *An Overlooked Key to Reversing Mass Incarceration: Reforming the Law to Reduce Prosecutorial Power in Plea Bargaining*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 192 (2015); see also Rachel E. Barkow, *Can Prosecutors End Mass Incarceration?*, 119 MICH. L. REV. 1365, 1388 (2021).

³⁶ See *id.*

³⁷ See, e.g., Keith Humphreys & Ekow Yankah, *Prison are Getting Whiter. That’s One Way Mass Incarceration Might End*, WASH. POST (Feb. 26, 2021), https://www.washingtonpost.com/outlook/prisons-are-getting-whiter-thats-one-way-mass-incarceration-might-end/2021/02/26/28db008c-7535-11eb-948d-19472e683521_story.html [<https://perma.cc/AQ7Q-M8N9>].

³⁸ Daniel Fryer, *Race, Reform, & Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 769 (2020).

³⁹ Leah Sakala & Nicole D. Porter, *Criminal Justice Reform Doesn’t End System’s Racial Bias*, USA TODAY (Dec. 12, 2018), <https://www.usatoday.com/story/opinion/policing/politics-policing/2018/12/12/racial-injustice-criminal-justice-reform-racism-prison/2094674002/> [<https://perma.cc/HZ69-BM6Z>].

2. Wrongful Convictions

The problem of wrongful convictions is a racial justice issue. As one study showed:

African Americans are only 13% of the American population but a majority of innocent defendants wrongfully convicted of crimes and later exonerated. They constitute 47% of the 1,900 exonerations listed in the National Registry of Exonerations (as of October 2016), and the great majority of more than 1,800 additional innocent defendants who were framed and convicted of crimes in 15 large-scale police scandals and later cleared in “group exonerations.”⁴⁰

American Bar Association Model Rule 3.8 speaks clearly to prosecutorial obligations in the area of wrongful convictions.⁴¹ In addition, the American Bar Association Standards on Criminal Justice, Prosecution Function explain:

Duty To Defend Conviction Not Absolute

The prosecutor has a duty to defend convictions obtained after fair process. This duty is not absolute, however, and the prosecutor should temper the duty to defend with independent professional judgment and discretion. The prosecutor should not defend a conviction if the prosecutor believes the defendant is innocent or was wrongfully convicted, or that a miscarriage of justice associated with the conviction has occurred.⁴²

Aside from adhering to the clear ethical guidance designed to rectify wrongful convictions, prosecutors can also support the establishment and utilization of conviction integrity units, which can uncover past miscarriages of justice.⁴³

⁴⁰ Samuel R. Gross, ed., *Race and Wrongful Convictions in the United States*, NATIONAL REGISTRY OF EXONERATIONS, (March 7, 2017).

⁴¹ MODEL RULES OF PROF. CONDUCT r. 3.8 (g) & (h) (AM. BAR ASS'N 1983); *see id.*, cmt.7 & 8.

⁴² CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-8.1 (AM. BAR ASS'N 2017).

⁴³ *See, e.g.*, The National Registry of Exonerations, *Conviction Integrity Units*, <https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx> [<https://perma.cc/ML3G-EVR4>] (last visited May 3, 2021); Fair and Just Prosecution, *21 Principles for the 21st Century Prosecutor*, BRENNAN CENTER FOR JUSTICE (2018); John Hollway, *Conviction Review Units: A National Perspective*, QUATTRONE CENTER FOR THE FAIR ADMINISTRATION OF JUSTICE, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL (April 2016).

3. Prosecutorial Role in Police Accountability

The role of prosecutors in holding police officers accountable in cases involving the unjustified killings of Black and Brown people has become quite pronounced in recent years. There have been varied results in high-profile cases such as the successful prosecution of Derek Chauvin for the murder of George Floyd,⁴⁴ the acquittal of Jeronimo Yanez for the killing of Philando Castile,⁴⁵ and the failure to secure grand jury indictments against the former police officers who killed Michael Brown, Eric Garner, Tamir Rice, and Breonna Taylor.⁴⁶

To be sure, these types of cases present many knotty issues, including questions of the need for greater prosecutorial independence and the barriers to transparency and accountability posed by grand jury secrecy and procedure.⁴⁷ Also, there are other dynamics in police use of lethal force cases—such as the state of the law on justification of law enforcement use of deadly force—which make them particularly difficult.⁴⁸ Nevertheless, prosecutors can play a significant role in pursuing racial justice in cases involving unjustified police use of lethal force.

Public reaction to revelations surrounding the grand jury decision in the Breonna Taylor case laid bare the utter lack of confidence in many corners of society

⁴⁴ See John Eligon et al., *Derek Chauvin Verdict Brings a Rare Rebuke of Police Misconduct*, NEW YORK TIMES (April 20, 2021), <https://www.nytimes.com/2021/04/20/us/george-floyd-chauvin-verdict.html/> [https://perma.cc/ZT68-6UHV].

⁴⁵ See Sarah Horner, *Relief and Outrage as St. Anthony Police Officer is Acquitted in Philando Castile's Shooting Death*, TWIN CITIES PIONEER PRESS (June 16, 2017), <https://www.twincities.com/2017/06/16/philando-castile-yanez-police-shooting-officer-jeronimo-falcon-heights-st-paul-verdict/> [https://perma.cc/BH8Q-5B4R].

⁴⁶ See Roger A. Fairfax, Jr., *The Grand Jury and Police Violence Against Black Men*, in ANGELA J. DAVIS, ED., *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT* 209 (2017); Mark Berman, *Breonna Taylor's Case Shines Spotlight on Grand Juries, Which Usually Operate Out of Public Eye*, WASH. POST (October 2, 2020), https://www.washingtonpost.com/national/breonna-taylors-case-shines-spotlight-on-grand-juries-which-usually-operate-out-of-public-eye/2020/10/01/9b9b078c-043f-11eb-b7ed-141dd88560ea_story.html [https://perma.cc/8QDE-PTCM].

⁴⁷ See Fairfax, *supra* note 42, at 209; Roger A. Fairfax, Jr., *The Grand Jury's Role in the Prosecution of Unjustified Police Killings—Challenges and Solutions*, 52 HARV. C.R.-C.L. REV. 397, 399 (2017); Ric Simmons, *The Role of the Prosecutor and the Grand Jury in Police Use of Deadly Force Cases: Restoring the Grand Jury to Its Original Purpose*, 62 CLEVE. ST. L. REV. 519, 530–32 (2017); Ric Simmons, *Why Prosecutors Should Give Grand Juries Influence in Deciding Whether to Charge Police in Lethal Force Cases*, SCHOLARS STRATEGY NETWORK (September 2017), <https://scholars.org/contribution/why-prosecutors-should-give-grand-juries-influence-deciding-whether-charge-police> [https://perma.cc/WU5A-99YC].

⁴⁸ See, e.g., Paul H. Robinson, Opinion, *'All or Nothing' in the Prosecution of Police Shootings*, THE HILL (July 20, 2020), <https://thehill.com/opinion/criminal-justice/507590-all-or-nothing-in-the-prosecution-of-police-shootings> [https://perma.cc/JN9B-KY3A].

that prosecutors will use their power to promote racial justice.⁴⁹ With public confidence in government officials—both police officers and the prosecutors sworn to hold them accountable—already frayed, episodes like hyper incarceration that which transpired in Louisville have the potential to extinguish public trust and the belief that prosecutors can be change agents for racial justice.⁵⁰

Aside from allocating resources to robust, professional, and independent prosecution efforts when such an incident has taken place,⁵¹ prosecutors can use their influence to shape policies designed to prevent these tragedies from occurring in the first place.⁵² Prosecutors can perform the role of mediator—and, hopefully, advocate—in the conversation about policing and race and reform. For example, a significant number of the traditional reforms found in police reform legislation such as the George Floyd Justice in Policing Act are aimed at empowering prosecutors to pursue racial justice.⁵³ Prosecutors should help to build the political support necessary to get those common-sense reforms across the finish line.⁵⁴

CONCLUSION

The above discussion only scratches the surface with regard to many ways in which prosecutors can advance racial justice. For example, prosecutors could utilize their often expansive power to investigate corruption, cover-ups of misconduct, or

⁴⁹ See, e.g., Shalia Dewan et al., *In the Breonna Taylor Case, a Battle of Blame Over the Grand Jury*, NEW YORK TIMES (September 29, 2020), <https://www.nytimes.com/2020/09/29/us/breonna-taylor-grand-jury.html> [<https://perma.cc/32LT-6WV3>].

⁵⁰ Sam Levin, *Killed by Police, Then Vilified: How America's Prosecutors Blame Victims*, THE GUARDIAN (March 21, 2019), <https://www.theguardian.com/us-news/2019/mar/20/us-police-killings-district-attorney-prosecutor-reports> [<https://perma.cc/QXL3-DD4E>].

⁵¹ See, e.g., Tim Arango, *'Gentle Steering of the Ship': How Keith Ellison Led the Prosecution of Chauvin*, NEW YORK TIMES (April 21, 2021) <https://www.nytimes.com/2021/04/21/us/keith-ellison-chauvin-trial.html> [<https://perma.cc/M8TV-HJPZ>]; see also Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1487–94 (2016); Kami Chavis Simmons, *Increasing Police Accountability: Restoring Trust and Legitimacy Through the Appointment of Independent Prosecutors*, 49 WASH. U.J.L. & POL'Y 137 (2015); Alvin Bragg, *In Wake of Floyd, Blake Shootings, Five Lessons Prosecutors Should Heed When Investigating Cops*, USA TODAY (September 4, 2020), <https://www.usatoday.com/story/opinion/policing/2020/09/04/wake-floyd-blake-shootings-lessons-prosecutors-investigating-cops/5701174002/> [<https://perma.cc/V338A56D>].

⁵² See, e.g., INSTI. FOR INNOVATION IN PROSECUTION, HOW PROSECUTORS CAN SUPPORT A REIMAGINED POLICE RESPONSE (February 2021), <https://static1.squarespace.com/static/5c4fbec5697a9849dae88a23/t/601c016d449b4d752f6290ed/1612448109440/How+Prosecutors+Can+Support+A+Reimagined+Police+Response.pdf> [<https://perma.cc/HMQ5-KJJZ>].

⁵³ See George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (2021).

⁵⁴ See, e.g., Letter from Ten State Attorneys General to Sen. Charles Schumer and Sen. Mitch McConnell, in Support of the George Floyd Justice in Policing Act of 2021, https://ag.ny.gov/sites/default/files/2021.04.07_ltr_to_senate_supporting_george_floyd_jip_act_-_final.pdf [<https://perma.cc/DQ9M-YZBY>] (last visited May 3, 2021).

the proliferation of racial animus within law enforcement agencies.⁵⁵ Prosecutors can also deploy their investigative authority to address racial justice issues beyond prosecuting and policing, including scrutinizing and illuminating the potential influence of private prison industries on legislators and judges,⁵⁶ and investigating conditions of confinement within prisons and jails where marginalized groups are overrepresented.⁵⁷ In short, prosecutors have a central role to play not only in criminal justice reform, but in advancing racial justice. Importantly, this work on racial justice is not only consistent with prevailing ethical rules and standards, in many cases it *implements* that ethical guidance.

⁵⁵ See, e.g., Bart Jansen, 'A Nightmare Scenario': Extremists in Police Ranks Spark Growing Concern After Capitol Riot, USA TODAY (March 21, 2021), <https://www.usatoday.com/in-depth/news/politics/elections/2021/03/21/police-charged-capitol-riot-reignite-concerns-racism-extremism/4738348001/> [<https://perma.cc/CP3Y-5YYX>]; William Finnegan, *Law Enforcement and the Problem of White Supremacy*, THE NEW YORKER (February 27, 2021), <https://www.newyorker.com/news/daily-comment/law-enforcement-and-the-problem-of-white-supremacy> [<https://perma.cc/TPQ6-RUAS>].

⁵⁶ See, e.g., Madison Pauly, *Private Prison Companies Poured Record Cash Into the 2018 Elections*, MOTHER JONES (November 12, 2018), <https://www.motherjones.com/politics/2018/11/private-prison-companies-poured-record-cash-into-the-2018-elections/> [<https://perma.cc/US4S-43MV>]; Michael Cohen, *How For-Profit Prisons Have Become the Biggest Lobby No One Is Talking About*, WASH. POST (April 28, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/04/28/how-for-profit-prisons-have-become-the-biggest-lobby-no-one-is-talking-about/> [<https://perma.cc/2ESC-MXKR>].

⁵⁷ See, e.g., *St. Louis Circuit Attorney to Investigate Conditions at Jail*, ASSOCIATED PRESS (February 8, 2021), <https://apnews.com/article/st-louis-coronavirus-pandemic-e13ac4fbd54654fc059267dc3a1f43a> [<https://perma.cc/U63K-RBET>]; Lucy Lang, *Prosecutors Need to Take the Lead in Reforming Prisons*, THE ATLANTIC (August 27, 2019), <https://www.theatlantic.com/ideas/archive/2019/08/urgency-prison-reform-and-what-prosecutors-can-do-about-it/596884/> [<https://perma.cc/996U-LN9A>].

