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27TH ANNUAL ETHICS SYMPOSIUM
DIVERSITY IN THE CRIMINAL JUSTICE SYSTEM

FOREWORD

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FOREWORD: DIVERSITY IN DECISION-MAKING IN THE CRIMINAL JUSTICE SYSTEM

GUHA KRISHNAMURTHI†

The criminal justice system operates to safeguard some of a society's most foundational moral principles. The system does so for many reasons: to keep order, vindicate people's fundamental rights and dignity, and to express what is right and good, among others.[1] Whatever those reasons, a key component of the criminal justice system, as opposed to our other legal institutions, is that the system is concerned with moral condemnation.[2] A criminal conviction does not merely result in hard consequences such as incarceration and fines. A conviction also carries for the offender the moral condemnation by society for the offender's wrongful conduct.

Moral condemnation by society is grave. The foundations of the criminal justice system are constructed to recognize that fact. Most telling, to convict a criminal defendant, the factfinder must be convinced of the defendant's guilt beyond a reasonable doubt.[3] This is the highest evidentiary standard in law, reserved for criminal convictions.[4] Indeed, even if a defendant is sued in tort for the same putatively wrongful conduct, the standard of proof decreases to the civil standard—usually just a preponderance of the evidence.[5]

We also ensure that the determination of conviction and moral condemnation is made by various actors in the criminal justice system. In the first instance, law enforcement often must determine whether conduct merits further investigation. Then a prosecutor must decide that the conduct is

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1. *See generally* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW ch.1 (8th ed. 2018) (discussing theories of punishment).

2. DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 92–95 (2008).

3. *In re Winship*, 397 U.S. 358, 361 (1970).

4. Michael D. Pepson & John N. Sharifi, Lego v. Twomey*: The Improbable Relationship Between an Obscure Supreme Court Decision and Wrongful Convictions*, 47 AM. CRIM. L. REV. 1185, 1194 (2010) ("The highest standard of proof—proof beyond a reasonable doubt—is reserved for criminal cases where, at least insofar as elements of the charged offense are concerned, its status as a constitutional imperative is axiomatic.").

5. Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55, 68–69 (2006).

worthy of prosecution, and a judge must confirm that determination. If the case goes to trial, the defendants are constitutionally entitled to a jury of their peers, who must unanimously decide whether the defendants committed the criminal conduct beyond a reasonable doubt. And even if the jury decides in the affirmative, they have the opportunity to nullify based on a determination that the criminal conduct is not wrongful and thus does not merit societal condemnation. And if such a conviction is obtained, there are several layers of review by judges—by the trial judge, by an appellate court, and perhaps by a higher appellate court. After all of this, there is still the opportunity for clemency and pardon by the governing executive.

As a formal matter, this multi-layered system, along with the beyond-a-reasonable-doubt standard and other rights protections, would seem to protect defendants from wrongful conviction and moral condemnation. In practice, we know that it doesn't. There are a regrettable number of false convictions, improper moral condemnations, and instances of drastic over-punishment. In this Symposium, excellently organized and orchestrated by the 2020–2021 *South Texas Law Review* editorial board, the esteemed panel members addressed one locus of the problem: the lack of diversity in decision-makers of the criminal justice system. The stellar presentations explained—with real-life, practical details—how a lack of diversity in law enforcement, prosecutor offices, the judiciary, and juries could lead to pathological outcomes.

I had the esteemed honor of serving as a moderator of the discussions. In the course of those discussions, I thought of my own research in criminal law and procedure, which I believe shows the value of diversity in decision-makers in both evidentiary assessments and jury determinations.

First, consider the role of confession evidence in criminal proceedings. I contend we should abolish confession evidence from criminal proceedings.[6] I observe that confessions—that is, uncorroborated "I did it" statements—do not actually have any probative value themselves. Defendants who confess will do so, if it is in their rational interest, principally in an attempt to obtain a lower sentence. But defendants may have that motivation regardless of whether they actually committed the crime or not.[7] Nevertheless, confessions have great sway over jurors. As the Supreme Court observed:

> A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct.

6. Guha Krishnamurthi, *The Case for the Abolition of Criminal Confessions*, SMU L. REV. (forthcoming 2022), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3730499.

7. *Id.* at 5.

> Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.[8]

Thus, confession evidence is highly prejudicial when its probative value is rather low. And the practical and empirical evidence confirms this in droves: law enforcement and the prosecution press upon defendants to confess by appealing to their rational sensibilities;[9] studies show that defendants are nearly as likely to confess, regardless of their guilt;[10] and jurors prejudicially overweigh the value of confession evidence.[11] Moreover, the way of extracting confessions—through interrogation and the weight of jeopardy—imposes moral harms on defendants.[12] Finally, our doctrinal solutions to the harms of confession evidence—principally, attempting to regulate interrogation—have largely failed.[13] As a consequence, I argue that we should just abolish confession evidence altogether.

But in so arguing, I acknowledge that the extreme solution of abolishing confession evidence would not be necessary if our factfinders truly understood the lack of probative weight of confession evidence.[14] If they did, then they would not overvalue the evidence, and there would be no danger of prejudice to the defendant. This is no small task, however. Per the scholarship, the most promising way of doing so would be through expert evidence,[15] but often in litigation, there are dueling experts with opposing opinions that have no real impact on the jury. But there is another way of cultivating such understanding in the jury: by including in the jury pool people with an understanding of the criminal justice system from all vantage points, including those previously subjected to criminal investigative techniques or who know of such individuals. Often such individuals are excluded from the jury pool, either because they are explicitly barred from jury service or because prosecutors struck them from the jury. Consequently, we have a jury pool that is largely isolated from the realities of the criminal justice system. After all, investigative techniques can force even innocent

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8. Arizona v. Fulminante, 499 U.S. 279, 296 (1991) (internal citations omitted).

9. *E.g.*, Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L. REV. 891, 916 (2004).

10. *E.g.*, Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 59, 76 (2008).

11. *E.g.*, Saul M. Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 LAW & HUM. BEHAV. 469, 475–76 (1997).

12. Krishnamurthi, *supra* note 6, at 49–52.

13. *Id.* at 52–53.

14. *Id.* at 76–78.

15. Nadia Soree, *When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony*, 32 AM. J. CRIM. L. 191, 238–55 (2005); Brian Cutler et al., *Expert Testimony on Interrogation and False Confession*, 82 UMKC L. REV. 589, 600 (2014).

people to falsely confess due to fear and anxiety about facing lengthy punishments. Not having these people on the jury is a loss of experience that could be useful in forming an impartial, representative jury. Thus, diversity—along the dimension of experience with the criminal justice system—can repair this pathology of evidentiary assessments regarding confessions.

Second, consider the problem of pervasive juror prejudice. That is, in some cases, the jury pool may be overwhelmingly biased against a defendant, such that the jury does not afford the defendant the presumption of innocence and the right to a fair trial. In a recent article, I argue that as a result, we should enshrine a constitutional right to bench trial in criminal proceedings.[16] I explain that there are various reasons a jury may be biased against a defendant. Bias may arise due to the nature of the charges and defenses; juries may be inclined to convict in cases involving gruesome murders, tax evasion, or fraud charges.[17] Bias may arise to the nature or reputation of the defendants; juries may be inclined to convict an ignominious defendant.[18] Finally, bias may arise due to bigotry; juries may be prejudiced against defendants of a particular race, ethnicity, or religion.[19] In many jurisdictions, a defendant facing a prejudiced jury does not have a right to a bench trial; the prosecutor or the court must consent. I contend this may impose constitutional harms on the defendant in violating their presumption of innocence and the right to a fair trial. I explain how a bench trial may be the only way to preserve a defendant's rights when there is a pervasively prejudiced jury. I then go on to show, by appeal to empirical evidence, that pervasive juror prejudice may occur frequently, and that on some occasions, prosecutors or courts have opposed defendants' attempts to seek a bench trial. Finally, I explain doctrinally how the Sixth Amendment supports the ability for a defendant to waive their jury trial right and unilaterally opt for a bench trial. Nevertheless, I acknowledge that this remains a suboptimal solution. When there is pervasive juror prejudice, even if a defendant may opt for a bench trial, they are still denied their right to an impartial jury.

Here too, however, diversity in decision-making may greatly mitigate the problem of pervasive juror prejudice. Diversifying the jury pool so that it represents a larger cross-section of society and viewpoints and ensuring that jury selection does not prevent such actual representation can reduce the incidence of pervasive juror prejudice. This is especially true of pervasive juror prejudice arising from bigotry. Now, this may not eliminate all such prejudice from the jury pool—there may still be bigoted jurors who are

16. Guha Krishnamurthi, *The Constitutional Right to Bench Trial*, N.C. L. REV., 7–9, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4013938.

17. *Id.* at 18–20.

18. *Id.* at 21–22.

19. *Id.* at 22.

seated. But insofar as those are minority viewpoints, that would still allow a defendant to opt for a mostly impartial jury trial. That too is not perfect, but given that there are multiple jurors on the jury—generally unlike in a bench trial, with one judge—and the requirement of a unanimous jury verdict for conviction,[20] such a jury may still better vindicate the defendant's right to a fair trial.

In considering the role of confession evidence and problems with pervasive jury prejudice, the main principle of the Symposium emerges: that the criminal justice system needs a diversity of decision-makers to truly represent our polity, appropriately assess defendants' criminal liability and moral culpability, and consequently to do justice. The panelists and participants of this Symposium and the *South Texas Law Review* forged ahead through a pandemic and an epic freeze to initiate this important conversation. This is a beginning, but the lessons taught and the connections built during this Symposium will help us make real progress in further developing a diverse, inclusive, compassionate, and just criminal system.

20. *See* Ramos v. Louisiana, 140 S. Ct. 1390 (2020).

THOUGHTS ON DIVERSITY WITHIN THE CRIMINAL JUSTICE SYSTEM

NJERI MATHIS RUTLEDGE†

Diversity discussions are usually difficult because people assume that it is a platform to label all people in extremes; either you are active in the civil rights movement, or you are a member of the KKK—without recognizing everyone in between.

Bias impacts all of us—even me. I have been shocked and embarrassed by some of the results of implicit bias tests that I have taken. Now, although some of you may be feeling defensive or even skeptical when the topic of diversity and criminal justice comes up, I hope that you will be open to different perspectives.

How many of you believe that our criminal justice system is wonderful and works fairly and effectively for all people? Now we already know that the criminal justice system disproportionately impacts the poor—particularly poor people of color. I loved being a prosecutor for over three and a half years. I have also enjoyed serving as an associate judge for the city for over twelve years. And despite the belief of some, I do not believe that there is some big conspiracy, or that the police are in cahoots with prosecutors or judges to put black and brown people in jail. I believe evil exists and that bad choices should have consequences.

I also know that the war on drugs was actually a war on people. And it has resulted in a disruption of minority communities and families, armed invasions in people's homes by SWAT teams, and staggering incarceration rates.[1] I know that diversity matters. We cannot really discuss diversity within

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1. *See* Kimberly D. Bailey, *Watching Me: The War on Crime, Privacy, and the State*, 47 U.C. DAVIS L. REV. 1539, 1551–52 (2014); ACLU, WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING 5 (2014), https://www.aclu.org/report/war-comes-home-excessive-militarization-american-police [https://perma.cc/8ULF-HW79].

the criminal justice system, without discussing one of the most important participants. Although minorities are overrepresented as defendants, they are underrepresented in positions of power—particularly as prosecutors and judges. I recently googled the words "Texas" and "prosecutor," and here are the images that came up.[2] The most important participant in the criminal justice system is not the victim of the crime or the accused or the defense attorney. Most people assume the most important person is the judge, but that simply is not true.

The most powerful, important person is the prosecuting attorney. As Supreme Court Justice Robert H. Jackson wrote in 1940:

> The prosecutor has more control over life, liberty, and reputation than any other person in America. His [or her] discretion is tremendous. . . . While the prosecutor at his [or her] best is one of the most beneficent forces in our society, when [acting] from malice or other base motives, [the prosecutor is] one of the worst.[3]

As criminal justice reform advocate and former prosecutor Adam Foss explained, "When we talk about criminal justice reform, . . . [w]e [tend to] complain, we tweet, [and] we protest about the police [or] sentencing laws [or] prisons. [But] [w]e rarely . . . talk about the prosecutor."[4] How many of you know who your elected prosecutor is? How many know what they are doing and what they stand for?

While a judge does have power and discretion to make important rulings, a good judge is a neutral referee. The judge does not decide who to investigate, arrest, or charge. The judge does not decide what the charges will be, the number of charges, whether the charge will be enhanced as a hate crime or enhanced based on prior criminal convictions. In fact, a judge cannot even unilaterally dismiss a case. Cases are brought by prosecutors.

As a prosecutor working intake, the police would call me to decide whether someone was going to jail or going home. During my very first week as a prosecutor, I made decisions that impacted people's lives for a lifetime. Even more concerning, I made decisions without having any insight into who those people were and if they needed help. Now, interestingly, if you are in the trenches as a prosecutor, you probably have a crushing caseload, a million things on your desk, victims and police officers calling you, and a series of dockets, trials, and motions. The opportunity to fight for crime victims is noble and stressful. I have been to crime scenes. I have met victims inside

2. Author refers to images in her PowerPoint presentation. The images from the Google search depict only white male or female prosecutors.

3. Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC'Y 18, 18 (1940).

4. Adam Foss, *A Prosecutor's Vision for a Better Justice System*, TED (Feb. 2016), https://www.ted.com/talks/adam_foss_a_prosecutor_s_vision_for_a_better_justice_system/transcript [https://perma.cc/YV97-BY53].

their homes. I have seen images I can never forget. I have taken my own money for exhibits. I have given up weekends, gotten up early, and went to bed late—all because I believed in the work I was doing. I felt like I wore the "White hat," despite the media sometimes telling me I did not. If you are currently working as a prosecutor, you probably feel anything but powerful. But, you are. The only thing you needed to be given the vast discretion and responsibility you have was a law degree.

One of the most important aspects of the criminal justice system is plea bargaining. Over 97% of all criminal cases result in plea bargains.[5] Along with the power to plea comes the discretion to determine who will be given probation, sent to a specialized program, or go to jail. If a case is not indicted by a grand jury, it is the prosecutor who gets to decide whether to dismiss or re-present the case. As a judge, I have to wait for the prosecutor to make a motion to dismiss a case, unless there is a dispute about probable cause or evidence suppression. As I address diversity within criminal justice, I want to focus on the need for continued efforts towards diversity in the prosecutor's office.

I am going to read an excerpt from an essay I wrote from this anthology called *Meeting at the Table: African-American Women Write on Race, Culture and Community*.

> As a student in Atlanta, I remember strolling with a date through the leafy campus of Spelman College[,] as we shared our hopes and dreams. When I told him my dream of becoming a prosecuting attorney, I was startled by his response. "So, you want to put black men in jail?" In the heated debate that followed, I asked him, "Well, who would you have fight for crime victims who are black?" To that, he had no response.[6]

I proudly became a prosecutor—not to put black men in jail—but to prosecute crime in my community. Serving as a prosecuting attorney was one of my proudest career choices. I believe I made big and small differences. Although, I am disappointed by my companion's accusation that I wanted to somehow hurt my community—specifically black men. In retrospect, I should not have been surprised. Minority prosecutors, especially black prosecutors, are routinely accused of being a tool in a biased system by some and being too lenient when criminal justice reform is discussed by others;

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5. *Report: Guilty Pleas on the Rise, Criminal Trials on the Decline*, INNOCENCE PROJECT (Aug. 7, 2018), https://innocenceproject.org/guilty-pleas-on-the-rise-criminal-trials-on-the-decline/ [https://perma.cc/F2L4-WENQ].

6. Njeri Mathis Rutledge, *A Call for More Black Prosecutors, in* MEETING AT THE TABLE: AFRICAN-AMERICAN WOMEN WRITE ON RACE, CULTURE AND COMMUNITY 98, 101 (Tina McElroy Ansa & Wanda S. Lloyd eds., 2020).

nothing could be further from the truth. The reality is all prosecutors have valuable insight into the strengths and flaws of the system.

Sadly, law students are losing interest in this honorable calling. Ten years ago, half of my criminal law students wanted to become prosecutors. Today, virtually all want to be defense attorneys, especially the minority law students. Interest in criminal justice reform through defense work has grown, but the same is not true for prosecution. The horrific instances of police brutality, such as George Floyd's case, and the issues of systemic racism and mass incarceration are only furthering their resolve. Now I believe it is short-sighted to assume that defense attorneys alone can single-handedly reform criminal justice. There is no doubt that the defense bar makes a vital contribution. We need devoted lawyers on *both sides* of the process if we hope to ever have genuine criminal justice reform.

Minority prosecutors matter to the criminal justice system, to criminal defendants, and to crime victims. But let me also be perfectly clear: many white prosecutors are culturally competent and care very much about justice for all victims. But we should not underestimate the benefits of prosecution offices staffed to reflect the communities they serve. When many people think of prosecutors, they envision characters from television: generally older and distinguished white males wearing cheap dark suits. What is not on television, or the image that most people readily imagine, is a prosecutor who is a minority. This needs to change. Before becoming a law professor at South Texas College of Law Houston, I was a prosecutor, and I was an image far from those seen on television cop shows.

Vice President Kamala Harris's selection as President Joe Biden's running mate elevated the discussion of minority prosecutors. Harris's experience, which would have been seen as a tremendous asset a few decades ago, was routinely described as a liability. As one writer noted, the problem was not about Vice President Harris's record as a prosecutor, but that "she was ever a prosecutor at all."[7]

Others have condemned her for failing to atone for sending people to jail—which is an odd demand for someone whose job it was to prosecute crime. "Kamala is a cop" became a repeated negative slogan stated by detractors.[8] For a community that has a complicated relationship with law enforcement, that was akin to calling her untrustworthy. Of course, no

7. Briahna Gray, *A Problem for Kamala Harris: Can a Prosecutor Become President in the Age of Black Lives Matter?*, THE INTERCEPT (Jan. 20, 2019, 9:00 AM), https://theintercept.com/2019/01/20/a-problem-for-kamala-harris-can-a-prosecutor-become-president-in-the-age-of-Black-lives-matter/ [https://perma.cc/CC65-UCDZ].

8. *See* Camille Squires, *Kamala Was a Cop. Black People Knew It First,* MOTHER JONES (Dec. 9, 2019), https://www.motherjones.com/politics/2019/12/kamala-was-a-cop-Black-people-knew-it-first/ [https://perma.cc/Z92N-XTFG].

prosecutor should be above reproach or criticism. However, when minority prosecutors are more harshly criticized, law students take note. In contrast, Senator Amy Klobuchar was not criticized as a prosecutor until much later in the process and to a lesser extent.

Many local prosecutors move on to very powerful positions as federal prosecutors, judges, or politicians. The message this is sending is that serving as a prosecutor could hurt future aspirations if you are a minority, while it may open doors for non-minority students. Of course, every prosecutor should be held to the highest standard of ethics. However, similar to my date in college, there seems to be an increasing tendency to condemn minority prosecutors for their career choice instead of their conduct.

The last report to study the number of elected prosecutors found that 95% of elected prosecutors are white,[9] while just one percent are minority women.[10] Now, several black prosecutors have been elected in major cities since the study was released. Unfortunately, they have also been subjected to death threats and harsh criticism, which focused more on the prosecutor's race than their record.[11] I am going to share a very hate-filled voicemail that Baltimore's elected prosecutor Marilyn Mosby received. Now, I apologize in advance for the vitriolic tone and offensive language, but I think it is important that we hear it.

> How dare you come to St. Louis and say you've got the back of that lousy bitch State's Attorney Kim Gardner. She is just like you, that's why. Birds of a feather, bitches. That's what you are. You hate cops, you hate white people. You do everything you can to give all the blacks who are criminals every benefit of the doubt that everybody else is suspect.
>
> Black lives only matter when a white person takes it. You blacks can kill each other all you want. In fact, I think that's the grand solution. We need to start driving around the ghettos and just dropping boxes of bullets on every street corner. Let them take each other out. Things were much better in this world, in this country, when everybody stayed in their own goddamn neighborhoods by dusk.
>
> There's only one thing worse than a fat-ass empowered black woman. That's a fat-ass empowered black woman who's got public

9. Nicholas Fandos, *A Study Documents the Paucity of Black Elected Prosecutors: Zero in Most States*, N.Y. TIMES (July 7, 2015), https://www.nytimes.com/2015/07/07/us/a-study-documents-the-paucity-of-Black-elected-prosecutors-zero-in-most-states.html [https://perma.cc/Q8MT-NJSK].

10. Christina Carrega, *For the Few Black Women Prosecutors, Hate and 'Misogynoir' Are Part of Life*, ABC NEWS (Mar. 21, 2020, 9:05 AM), https://abcnews.go.com/US/Black-women-prosecutors-hate-misogynoir-part-life/story?id=68961291 [https://perma.cc/5JHP-9AML].

11. *See id*.

> reigns in her hands. If we'd known you all were going to be this much trouble, we would have picked our own fucking cotton.[12]

As disgustingly racist as that was, sadly, it is not the only incident towards elected prosecutors that revealed racist and misogynistic thought or misogynoir, defined as misogynistic attitudes directed towards black women specifically.[13] These kinds of racist attitudes cannot deter progress. We need more, not fewer, ethical individuals to work within criminal justice.

Indeed, the community—particularly minority communities—should be concerned by the disappearance—or the prospect of—black prosecutors and minority prosecutors disappearing altogether. Minority prosecutors bring an important perspective to their duties, a perspective that ideally helps bridge the many chasms between law enforcement and the public.[14] Minority prosecutors also bring a sensitivity to bias within the system that can make a difference in how a case is viewed.[15] Ideally, this should result in fairer outcomes. A minority prosecutor may also contribute to the message that the system cares about *all* crime victims, including minority crime victims. All victims ultimately want the same thing: to live safely in their communities. Some crime victims may be viewed as unsympathetic, but the assessment should not be based on a prosecutor's confusion about the victim's cultural norms.[16] A prosecutor needs to be able to appreciate the victim's perspective and life experiences. There is significant value in having diverse perspectives in important decisions.

Justice is simply much more complex than applying a criminal code; it requires an understanding, and yes, even an empathy for those caught up in the system.[17] Justice Jackson also stated:

> A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in

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12. *See* WMAR-2 News, *City State's Attorney Marilyn Mosby Receives Racist, Hate-Filled Voicemail*, YOUTUBE (Jan. 16, 2020), https://www.youtube.com/watch?v=tvE7Lf6_ljc [https://perma.cc/BGH5-J28F]; *see also* Marilyn Mosby (@MarilynMosbyEsq), TWITTER, https://twitter.com/MarilynMosbyEsq/status/1217926281616076808 [https://perma.cc/Q4B9-GZ2M] (last visited Jan. 21, 2022) (posting an unedited version of the voicemail). Prior to publication of this essay, the audio and transcription were removed from the Twitter account.

13. *See* Moya Bailey, *Misogynoir and Meghan Markle*, MOYA BAILEY (Mar. 13, 2021), https://www.moyabailey.com/tag/misogynoir/ [https://perma.cc/3BDU-7REM]; *see also* Carrega, *supra* note 10.

14. Rutledge, *supra* note 6, at 103.

15. *Id.* at 104.

16. *Id.*

17. See Njeri Mathis Rutledge, *Black Prosecutors Inspired Trust and Hope at the Derek Chauvin Trial. We Need More of Them*, USA TODAY (Apr. 28, 2021, 12:04 PM), https://www.usatoday.com/story/opinion/2021/04/28/derek-chauvin-trial-black-prosecutors-inspired-hope-trust-column/4869377001/ [https://perma.cc/9AML-T6D3], for a fuller understanding of this assertion.

> the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.[18]

Empathy does not mean ignoring the law. But it does mean ensuring equal and fair justice for both victims and defendants. The stakes are high. A lack of cultural competence can negatively impact minority defendants. "Consider a witness describing a defendant with having a braided hairstyle called cornrows, and the person arrested actually has a fade, a different hairstyle. Would a [non-minority] prosecutor pick up on the distinction, or would it be deemed irrelevant? The answer could have long-lasting implications."[19] According to a 2017 study of the National Registry of Exonerations, innocent blacks were seven times more likely to be wrongfully convicted of murder than innocent whites.[20] Now, it bears repeating that there are non-minority prosecutors—including white prosecutors and defense attorneys—who care about justice and making the system better. But we should never underestimate the benefits from prosecution offices that reflect the true diversity of their communities.

> As a felony prosecutor, I remember when a white prosecutor asked me to speak to a young black [victim] who had been raped and decided she did not want to go forward with the case. I had never worked with that prosecutor before and knew nothing about the case, but that prosecutor recognized that having me in the room would add some measure of comfort for the victim.[21]

A prosecutor's office that does not include diversity will tend to reflect one segment of the community. When prosecutors are skeptical about a minority victim's behavior because it does not conform to the norm, the minority victim may be viewed as unsympathetic. For example, a statistically significant number of minority domestic violence victims choose not to prosecute.[22] If a prosecutor is not culturally competent, the prosecutor may assume that the victim just wasted the government's time and she is weak. Minority prosecutors may understand that the victim does want help, but her fears about helping to place her minority partner in a system that is perceived as biased is a genuine fear. Minority prosecutors can make a positive difference in the criminal justice system in terms of both perception

18. Jackson, *supra* note 3, at 20.

19. Rutledge, *supra* note 6, at 104.

20. SAMUEL GROSS ET AL., RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES (2017), http://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf [https://perma.cc/3QU7-Q9FG].

21. Rutledge, *supra* note 6, at 104.

22. *See* NAT'L DIST. ATTORNEY'S ASS'N, NAT'L DOMESTIC VIOLENCE PROSECUTION BEST PRACTICES GUIDE 9 (2017), http://ncdsv.org/NDAA_National-DV-Prosecution-Best-Practices-Guide_3-16-2017.pdf [https://perma.cc/N8D3-U4B7].

and power. When all minority lawyers in a criminal courtroom are limited to serving as defense attorneys, I believe it sends the wrong message that minorities do not believe in law and order or accountability, or they are somehow not qualified for other important roles. The involvement of black prosecutors lends credibility to a system where blacks are frequently accused.

According to the American Bar Association and the Texas Code of Criminal Procedure, the actual job and duty of a prosecutor is a noble one; not to seek convictions, but to do and seek justice.[23] It was that call to do and seek justice that inspired me to serve in an overworked, underpaid, yet personally fulfilling job. I believe one can be called to be a prosecutor; the same way one can be called to be a defense attorney. We need both, working with integrity and honor in order to do justice. The potential to impact lives every day is substantial.

I lament that so many of my students, minorities and non-minorities, fail to see the nobility of the calling and tend to conflate the problems of highly-publicized police misconduct with the prosecutor's office. Not to say that some prosecutors have not made really poor and bad decisions, and not to say that there are some people who have been complicit, but the negative view of prosecutors and how they are displayed still saddens me. I came across one article that blamed prosecutors for the problem of mass incarceration.[24] Such a claim is over simplistic and misleading. The good, dedicated people who do the hard work are often in the shadows. Criminal justice is complicated. Whether I am a judge or a prosecutor, there are times when I feel like I am just a spoke in a very large wheel. We do not know how to help people who need it or deal with mental health issues. Therefore, mistakes are made.

But for me, serving as a prosecutor was an opportunity where I could make a positive difference. I would like to conclude with a brief clip from Adam Foss, a former prosecutor and criminal justice reform advocate:[25]

> My third year of law school, I defended people accused of small street crimes, mostly mentally ill, mostly homeless, mostly drug- addicted, all in need of help. They would come to us, and we would send them away without that help. They were in need of our assistance. But we weren't giving them any. Prosecuted, adjudged[,] and defended by people who knew nothing about them. The staggering inefficiency is what drove me to criminal justice work. The unfairness of it all made

23. *See* CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(b) (AM. BAR ASS'N 2017); TEX. CODE CRIM. PROC. ANN. art. 2.01.

24. Jayson Hawkins, *The Role of Prosecutors in Mass Incarceration*, PRISON LEGAL NEWS (Dec. 1, 2020), https://www.prisonlegalnews.org/news/2020/dec/1/role-prosecutors-mass-incarceration/ [https://perma.cc/LJC7-YA6G].

25. Author plays a video clip from her PowerPoint presentation.

> me want to be a defender. The power dynamic that I came to understand made me become a prosecutor.[26]

The power to affect change does indeed begin with the prosecutor. So, how do we move forward? One important impediment to students, particularly diverse students entering public service, is finances. We need more people to collaborate with groups dedicated to providing grants and scholarships for diverse law students interested in becoming prosecutors. One organization that I was involved with was the National Black Prosecutors Association. But there are others, including the Latino Prosecutors Association, the Asian-American Prosecutors Association, and the National Asian Pacific Islander Prosecutors Association.

In the end, diversity training and discussions on the role of diversity are only useful if there are follow-ups, the ability to be in intimate spaces, and have real genuine dialogue. Too often, people want a band-aid fix on race, which is an issue that has been toxic for hundreds of years. If we want to increase diversity in these spaces, we must be intentional about it. Now, I have been on many diets in my life, and I have learned that healthy eating has to be managed. The same is true for bias and racism. It takes maintenance, not a quick fix.

So, how did I respond to the accusation from my date that I wanted to put black men in jail? I responded: "No, of course not. Some people make bad choices. My focus is to prosecute crime. I want to help crime victims, including black victims, while making a difference in my community and criminal justice."

Thank you.

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26. Foss, *supra* note 4.

ETHICAL ISSUES RELATED TO MASS ARRESTS

AMANDA J. PETERS[†]

Today, I am going to speak about mass arrests. Given the subject of this symposium, it is important to note that mass arrests have impacted minorities. Mass arrests have impacted people of color disparately. These arrests have been used for decades on protestors, including Black Lives Matter protestors. I will address the ethical issues related to mass arrests past and present and ways to avoid the problems associated with them going forward.

I have researched and written about mass arrests. I will explain the law, but I want to start by showing you several images.[1] These images are from recent Black Lives Matter protests.

We see detained people. We see arrested people. The question is why these people were arrested immediately following the protests when people who protested, trespassed on federal property, or committed acts of insurrection on January 6, 2021, were not. Contrast the January 6th arrests with the approximately 17,000 people who were arrested in the summer of 2020 for anti-racism protests.

Probable cause to arrest and reasonable suspicion to detain must be particularized or individualized. What we see here is that officers sometimes arrest when they should not because they are arresting based on a group or a mass gathering of people, not because they have articulable facts or probable cause to believe these specific people are about to or have committed a crime.

The law requiring particularized reasonable suspicion and probable cause is clear. In 1948, the U.S. Supreme Court decided *United States v. Di Re*,[2] which was the first case to address a group arrest. In that case, there were three people in a car, two of whom were seated in the front seat selling gas rationing coupons. The case arose in World War II when gasoline had to be rationed. Police knew the two men in the front seat were selling fake gas

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1. Author refers to her PowerPoint presentation, at 2, located at [https://perma.cc/8JYU-MRMV].

2. United States v. Di Re, 332 U.S. 581 (1948).

rationing coupons, which was a crime. But there was also a guy asleep in the back seat who was not involved with selling coupons. Nevertheless, officers arrested all three of the men and charged them with fraud. The Supreme Court said officers cannot presume the guilt of everyone present because there is no guilt-by-association when it comes to Fourth Amendment jurisprudence. It was possible that Di Re, the man asleep in the back seat, was not engaging in criminal activity, did not know that other people were doing this, and the officers lacked individualized probable cause to arrest him.

In *Ybarra*,[3] another Supreme Court case, a bartender sold heroin to an undercover officer. Police officers obtained a search warrant to search the bar and an arrest warrant to arrest the bartender. While they were searching the bar for drugs, police officers conducted a *Terry* frisk, also known as a pat-down search, to see if any of the bar's patrons had contraband on their person or any weapons, a search which was permissible under these circumstances. One patron, Ybarra, had a cigarette pack in his pocket. After the initial pat down of all bar occupants, the police returned to Ybarra, searched his cigarette pack, and found drugs inside. The Supreme Court said the officers did not have probable cause to search Ybarra merely because he was in the bar. Ultimately, all the bar patrons maintained their individual rights to be protected and did not lose their Fourth Amendment rights.

In *Dinler*,[4] an unpublished civil rights case from the Southern District of New York, the judge said the Fourth Amendment does not recognize guilt-by-association. The judge also said he could envision a group committing a crime, particularly when the elements are easy to prove like trespass or curfew violations, where a person's presence in a specific area at a specific time is, in fact, a violation of the law. Those cases are different than officers rounding up and arresting everyone at the scene.

Mass arrests present a number of ethical problems. I became interested in this issue after a 2015 incident in Waco, Texas where nearly 200 bikers at a Twin Peaks restaurant following a "shoot out" were arrested. This incident fascinated and angered me. I learned about it after journalists contacted the law school looking for someone to comment. The law school directed them to me because of my experience in criminal practice. As I researched the incident, I learned more and grew more frustrated with what happened. As a former prosecutor, I could not imagine why the district attorney believed he was legally authorized to arrest all those people when he did not have probable cause to do so.

3. Ybarra v. Illinois, 444 U.S. 85 (1979).

4. Dinler v. City of New York, No. 04 Civ. 7921(RJS)(JCF), 2012 WL 4513352, at *1, *6 (S.D.N.Y. Sept. 30, 2012).

Let me explain the facts to those who are unfamiliar with this case. Every year, there is an annual biker conference in Texas. At that conference, motorcycle enthusiasts socialize, shop, and attend informational meetings. In 2015, there were some groups of bikers—Cossacks and Bandidos—at the conference who were considered "outlaw" bikers. There were also law-abiding bikers in attendance. Nearly 200 bikers of both kinds gathered at a Twin Peaks restaurant in Waco to eat during the conference. A group of men from the Cossacks biker club sat on the patio. These men ordered drinks and had begun to order food. At that time, a group of men from the Bandidos—a rival biker club—arrived. One Bandido biker rolled over a Cossacks member's feet in the parking lot with his motorcycle. This action led to a brawl between Cossacks and Bandidos. It is important to note that there were many other biker enthusiasts at the restaurant who were affiliated with neither group and that many of the men affiliated with these groups committed no crimes at the restaurant that day. All told, 177 people were arrested that day.[5]

The Twin Peaks restaurant had a lot of video footage from surveillance videos.[6] And in those surveillance videos, you see people react in different ways. The guy in the center of the picture has a gun, but if you watch the surveillance video, he does not shoot the gun. Instead, he covers people who are trying to leave the patio safely. The videos depict people crawling or running away from the scene. Officers found people hiding in bathrooms and detained people who were trying to run out of the front of the restaurant and flee. Indeed, very few people were fighting or shooting.

In a criminal case with a surveillance video, one of the first things the prosecutor does is subpoena the video surveillance and watch it. Prosecutors subpoena officer body-cam footage, DWI field sobriety tests, loss prevention videos that depict shoplifting, and many other kinds of videos. When you look at this video, you see that not everybody at the scene is culpable of violence. And yet, all 177 people were arrested that day. In many civil rights cases alleging an unlawful arrest, the prosecutor is the one who steps in and dismisses the cases for the lack of reasonable suspicion or probable cause. But in this case, McLennan County District Attorney Abelino "Abel" Reyna was the primary advocate for arresting all bikers that night and pursuing charges.[7] He had no probable cause in the overwhelming number of cases that day.

5. Author refers to her PowerPoint presentation, at 4, located at [https://perma.cc/8JYU-MRMV] (showing the mug shots of some of the 177 people arrested).

6. Author refers to her PowerPoint presentation, at 5, located at [https://perma.cc/8JYU-MRMV] (depicting a still image taken from a video of the crime scene).

7. Waco is in McLennan County. In Texas, district and county attorneys—who handle all criminal cases—are elected as county government officials.

There were many problems with this case. The bikers were all arrested despite a lack of individualized probable cause. Bail was set at a million dollars apiece by a local justice of the peace. The fastest acting attorneys were able to get a bail reduction in two weeks, which is a long time to wait in jail for a bail reduction. These defendants were in custody for anywhere between two weeks and five months. They lost their freedom, obviously. Many lost their jobs and reputations. Initially, the news coverage was heavily biased in favor of the police. Later, media outlets turned against the police and grew sympathetic to the bikers.

Those who were arrested obviously lost money due to the legal expenses and lengthy litigation. Some people retained court-appointed lawyers. Some people paid for lawyers. The cases clogged the local district courts' dockets. Multiple § 1983 cases were initiated alleging civil rights violations, and the appeals from those cases are still ongoing.[8] The federal judge with the § 1983 cases complained that the cases created a log jam on his docket.

Eventually 154 people were indicted by a grand jury who spent an average of five minutes reviewing each person's case. It's hard to imagine that the grand jury thoughtfully considered probable cause for each person's arrest in that short amount of time given the complexity of the scene and case. Vague, cookie-cutter indictments failed to provide the defense attorneys and the defendants with adequate notice of their alleged criminal conduct. All defendants were indicted for engaging in organized criminal activity by intentionally or knowingly causing the death of another. The "another" was not identified; instead, each indictment contained a list of the nine people who died. This was hardly adequate notice.

Officers were anticipating a fight at the restaurant that day. Some were stationed with long-range rifles, watching from a distance. Of the nine deaths, ballistics reports later established that police officers shot four of the people who died that day. Nevertheless, all defendants who were indicted were charged with killing nine people by shooting and/or stabbing and/or cutting and/or striking the victims. Prosecutors alleged that all 154 bikers did this with one of nine weapons, which again brings us back to the video and the footage that proves not all bikers were armed. All the defendants were alleged to have committed the crime as members of a criminal street gang, and all the defendants were alleged to have caused bodily injury to the twenty-four injured bikers the indictment named.

This charging instrument was problematic for several reasons. First, prosecutors should not charge individuals with crimes they cannot prove.

8. *See* 42 U.S.C. § 1983 (2021) ("Every person who . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . .").

Second, prosecutors are supposed to provide notice of the alleged conduct so that the lawyers who represent the defendant can prepare a defense. And third, the defendants in these cases were unable to prepare a defense because all the indictments were the same and alleged the same facts even though the defendants were not engaged in the same activity on that day.

Defense attorneys complained about a difficult discovery process. They said the McLennan District Attorney's Office hid the ball, refused to give them information, and was vague. The prosecutors' lack of individualized probable cause was more apparent when it was time to turn over information in discovery. How can you tell defense counsel what his client did during a criminal episode when the only thing you know is that his client was one of 177 people there that day?

Fearing another brawl between rival biker gangs during trials and dockets, McLennan County officials increased courthouse security. The county spent one million dollars on the first trial. The increased costs and manpower resulted in fewer trial observers. It decreased juror service; people were afraid to come to the courthouse because the media and county suggested it was unsafe. And after the county spent a million dollars for the first trial, the trial ended in a hung jury. The judge granted a mistrial for that defendant, arguably the most culpable defendant in the eyes of the district attorney's office because he was tried first. He was released to await another trial in the future. Meanwhile, dozens of other defendants awaited trial and wondered how long it would be before their cases went to trial.

The pre-trial hearings revealed that District Attorney Reyna stepped out of his traditional prosecutor role. He took on the role of director of law enforcement in a way that cost him the absolute immunity he enjoyed as a prosecutor. As a result, he was granted only qualified immunity. For aspiring prosecutors, make sure that you do not leave your traditional prosecutorial role to act and behave like an officer. If you do, you can be sued in your personal capacity. In this case, Abel Reyna became the person who directed officers on who would be arrested. He took over the whole investigation. This alone caused additional legal and ethical issues.

Independent counsel had to be brought in. There is a § 1983 law that states if you dismiss a case brought by a person who is filing a civil rights violation based on the Fourth Amendment, that can be used as evidence that there was a lack of probable cause or reasonable suspicion initially. This created a vested interest that encouraged Reyna, for personal reasons, not to dismiss these cases, even when they needed to be dismissed. After all, if Reyna dismissed any cases, those defendants could sue him under § 1983 and use the dismissals against him.

Reyna ultimately had no choice but to recuse his office from the prosecutions. The county had to hire four independent attorneys, all of whom

were from Houston, to serve as special prosecutors. I worked with these attorneys in the past; all have stellar reputations. The special prosecutors came in and started dismissing these cases right and left. Reyna lost his re-election bid, and the new district attorney, Barry Johnson, ended up dismissing all the other charges, which at that time, had been pending for three years with no movement forward.

Johnson believed there was probable cause to believe some of the defendants had committed the charged crime. After all, there were twenty-four injured people and five people who were killed by bikers at Twin Peaks. But he said all the cases were so mired in controversy and so stale that his office would not move forward with them. After years of waiting, all remaining cases were dismissed. In the end, millions of dollars were spent from jailing inmates to litigation. Then the county's civil attorneys had to fight civil rights lawsuits stemming from the unlawful arrests.

One would think this was the first instance in Texas with a mass arrest that went wrong. Sadly, it is not. In the early 2000s, the Houston Police Department (HPD) deployed "Operation E-Racer." It was designed to crack down on street racing, which was a huge problem at the time. In Houston, Westheimer Road is a nineteen-mile straight road that runs through central Houston. Street racers found it to be an ideal place to race because of its characteristics. In the early 2000s, young people raced cars at 150 miles per hour down this street. These races resulted in injuries, car crashes, property damage, and deaths. I was a prosecutor at the time, and I remember numerous racing cases, some with tragic results, on nearly every court docket. Because of the speed these cars traveled, police officers had difficulty catching them safely. As a result, the people in court represented a fraction of those who were illegally racing cars on public streets.

HPD's top officials started investigating how officers could crack down on the problem. They ultimately focused on a K-Mart parking lot, where a lot of the people who watched the races would gather, often late at night. The K-Mart parking lot had a Sonic and a strip mall with stores in it. Officers decided that they would cordon off the entire block with police officers who would descend on the parking lot, the Sonic, and the stores, before arresting everyone there.

HPD officers arrested nearly everyone who was present in that one city block that night. All told, 425 people were arrested.[9] Unfortunately, they tied the arrestees' hands with zip ties, sometimes too tight, which injured people. Some people suffered long-term injuries. [The] photo [on page nine of the presentation] is from a local news station's footage that night. In it, you can

9. Demmler v. City of Houston, No. Civ.A.H-04-1543, 2005 WL 1745459, at *1 (S.D. Tex. July 25, 2005).

see numerous people sitting in the parking lot with zip-tied hands.[10] Most of the people in the photo are young men, but there were women and entire families there as well.

Officers held arrestees in the parking lot for six hours because they did not have enough vehicles to transport everyone to jail. Local jails were overcrowded, and the booking process was clogged. When arrestees asked if they could use the bathroom at the scene, the officers told them no. Many ended up urinating or defecating on themselves. Parents in K-Mart who were arrested saw their kids taken away and remanded to Child Protective Services. Crying, screaming kids were terrified. Operation E-Racer ended up being a disaster for so many reasons.

When officers filed charges for attempted trespass against those arrested, the DA's office dismissed the charges outright. Ultimately, no one was charged with a crime. However, their detentions served as the basis for a § 1983 lawsuit; arrestees alleged the officers violated their civil rights in part because the detentions and arrests were unlawful. Nearly 300 plaintiffs sued the City of Houston, HPD, and HPD's Police Chief.

Federal Judge Nancy Atlas found there was no individualized reasonable suspicion to justify the detentions and no probable cause to justify the arrests.[11] The plan to detain all persons within the containment area, without regard to the fact that there were open businesses with customers inside, was unconstitutional. Atlas also found that the detention for more than six hours, based on the person's presence in that area alone, was more intrusive than necessary. Judge Atlas said that when the primary purpose of a mass detention is general interest in crime control, it is considered presumptively unconstitutional.

Sadly, this wasn't the first time a federal court ruled this way. The Operation E-Racer plan was cut from a playbook of a 1990s DeSoto, Texas case. That case also involved young people who were allegedly watching street racing in a shopping center parking lot.[12] In that case, several girls on a softball team who were arrested for trespass without probable cause sued the city of DeSoto for civil rights violations. The Fifth Circuit upheld their claims.[13] Obviously, HPD officers failed to do any research as to the legality of their plan. Had they done so, they would have concluded not only was the plan unlawful, but it would be costly as well.

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10. Author refers to her PowerPoint presentation, at 9, located at [https://perma.cc/8JYU-MRMV].

11. Ratliff v. City of Houston, No. Civ.A.H-02-3809, 2005 WL 1745468, at *1, *27 (S.D. Tex. Jul. 25, 2005).

12. Morgan v. City of DeSoto, Tex., 900 F.2d 811, 812 (5th Cir. 1990).

13. *Id.* at 814–16.

In the Operation E-Racer case, the city of Houston paid around one million dollars to the people who were arrested. However, that does not include the money it spent on litigation, on jailing and booking the hundreds who were detained, or any other costs associated with the botched operation.

Few cases that stem from these arrests result in successful prosecutions; instead, the cases lead to an entire breakdown of the criminal justice system. For example, following Hurricane Katrina, there were thousands of people who were arrested in New Orleans for curfew violations, looting, and other alleged crimes that were never proven. These arrests led to overcrowding in jails. It led to defense attorneys not being able to locate their clients in the jails or speak to them. It led to a failure of prosecutors to screen cases. It also resulted in very few successful prosecutions.[14]

There is also a lack of individualized assessment on bail and bond in these cases. Officials initially have a knee-jerk reaction to set bail high, like we saw in the Waco cases. The problem is oppressive bails are unlawful. Bail in Texas, for example, must be set based on each defendant's unique characteristics. In mass arrest scenarios, there is no inquiry as to whether this defendant can make this bail, whether this defendant is a risk to the community, whether this is a just decision, or whether it is commensurate with the offense that was allegedly committed. And so, there are problems that apply across the board to cases in the nation.

There are problems with the courts getting overwhelmed. Prosecutors become overwhelmed by these cases too. Defense attorneys—especially when there is one public defender's office with a limited number of attorneys—get overwhelmed easily too. The entire justice system's resources become tied up with cases that will likely get thrown out immediately or dismissed soon after charges are filed.

The lawsuits and settlements drain local communities and local governments of their finite resources. Instead of paying a million dollars to people who were unlawfully detained in a parking lot, that money could have been spent on things the community needs, like community welfare or safety, maintenance issues the city requires, social services, or new development. The city's decisions to arrest *en masse* then fight litigation impact the local community in only negative ways.

There are several commonalities in these cases. First, there is usually a perceived problem with crime, a threat to law and order, or civil disobedience that officers believe needs to be controlled immediately. Second, officers want to send a message that the behavior must end now, and they usually do

14. *See* Brandon L. Garrett & Tania Tetlow, *Criminal Justice Collapse: The Constitution after Hurricane Katrina*, 56 DUKE L.J. 127 (2006).

this with grand gestures. Third, officers forcefully, strictly, and excessively act against the perceived threat.

Fourth, officers are often willing to charge vague crimes to accomplish the goal. For example, in the Houston K-Mart raid, officers arrested people with attempted trespass charges. This "crime" is laughable to anyone who knows criminal law in Texas. A person trespasses when he (1) enters property he knew he was not authorized to enter, or (2) he enters another's property, was told to leave by the owner of that property but did not. The trespass crime relies upon a person being in a physical place unlawfully because he has been told or warned not to be there. It is a legal fiction to have an attempted trespass. A defendant is unlawfully on the property or he is not. He has been told to leave or he has not. There is no such thing as attempted trespass or a middle ground for trespass. That HPD officers tried to charge all arrestees with a fictional crime shows how tenuous Operation E-Racer was. In another mass arrest case that happened during the Toronto G20 summit, protesters were arrested for "attempted mischief." Again, officers charged people with ridiculous crimes.

Finally, in these cases, there is no long-term consideration about the consequences of the plan. Officials don't think about what happens next. What inevitably happens next is the people who were unlawfully detained or arrested sue the officers and local governments, then these entities often end up settling the cases for millions of dollars after initially refusing to apologize or make attempts to rectify the civil rights violations.

One would hope we would learn from the mistakes of past mass arrest cases, but we keep seeing history repeat itself. The Washington Post estimated that 17,000 people were arrested in the anti-racism protests following Breonna Taylor's, George Floyd's, and others' deaths at the hands of law enforcement.[15] Police arrested around seventy-five people at the Standing Rock Protests in North Dakota in 2017.[16] During the Occupy Wall Street protests of 2011, officers arrested approximately 8,000 people.[17] And following the arrests of 1,800 protesters at the Republican National Convention held in New York City in 2004, the City settled with arrested

15. Meryl Kornfield et al., *Swept Up by Police*, WASH. POST (Oct. 23, 2020), https://www.washingtonpost.com/graphics/2020/investigations/george-floyd-protesters-arrests/ [https://perma.cc/S8AE-B6QD].

16. Niraj Chokshi, *Dozens of Dakota Pipeline Protesters Are Arrested*, N.Y. TIMES (Feb. 2, 2017), https://www.nytimes.com/2017/02/02/us/dakota-pipeline-protesters-arrested.html [https://perma.cc/3NEZ-U7QV].

17. Caroline Fairchild, *Occupy Arrests Near 8,000 As Wall Street Eludes Prosecution*, HUFFINGTON POST (May 23, 2013), https://www.huffpost.com/entry/occupy-wall-street-arrests_n_3326640 [https://perma.cc/ERF2-HU4M].

protestors, none of whom were prosecuted, for civil rights violations to the tune of $18 million.[18]

We can look further back and see problematic mass arrests in history too. Mass arrests in America date back to the Revolution in the 1700s. British soldiers routinely arrested colonists in America who allegedly posed a threat to the Crown of England. There is some evidence that the Fourth Amendment was enacted and worded in such a way to encompass this situation: people being arrested, without reasonable suspicion or probable cause, *en masse*.

In the 1920s, there were concerns about Communists in America and people were arrested in large groups. During the Jim Crow Era, officials used vagrancy laws to arrest large numbers of African-Americans. During World War II, more than 120,000 Americans of Japanese descent were detained in internment camps. These detentions and arrests served as forms of harassment or worse.

Sometimes mass arrests do occur in relation to crime, rather than as a form of harassment. But even these arrests can be unlawful. For example, in New York during the 1960s, a group of forty-one women who were talking to men stopped in cars were repeatedly arrested without probable cause. Presumably prostitutes, they were never charged with that crime. These forty-one women were arrested a total of 2,500 times.[19] A court found that the officers violated their rights in arresting them for otherwise non-criminal activity: talking to someone on public property.[20]

Other mass arrests are based upon group affiliation. For example, a group of people in Colorado were arrested in the 1970s just because they were hippies. Someone walking by thought they were up to no good and called the police. The officers approached the group on the assumption they probably had drugs in their possession and arrested everyone present. The court said officers cannot arrest people on guilt-by-association or based upon some preconceived notion that this group has a propensity to commit crime.[21] In another case, a group of fifty-four bikers in Wisconsin were arrested on the suspicion that they were involved with the murder of another biker; their photos were posted in police stations as suspects even though there was no probable cause to arrest them.[22] A federal judge ruled that the police department had unlawfully arrested the men in a dragnet procedure, sullied their reputations by branding them criminals without any probable cause to

18. Haley Draznin, *New York to Pay $17.9 Million to 2004 Republican Convention Protesters*, CNN (January 16, 2014), https://www.cnn.com/2014/01/15/politics/new-york-republican-convention-settlement/index.html [https://perma.cc/9VVL-5Z2V].

19. People v. Williams, 286 N.Y.S.2d 575, 577 (N.Y. Crim. Ct. 1967).

20. *Id.* at 579.

21. People v. Feltch, 483 P.2d 1335, 1335–37 (Colo. 1971).

22. Urban v. Breier, 401 F. Supp. 706, 708–09 (E.D. Wis. Aug. 5, 1975).

arrest them, and therefore, all documents and records must be expunged.[23] Finally, in 2003, some 900 Iraq War protestors were arrested in Chicago.[24] Judge Posner wrote the opinion for the Seventh Circuit; in it, he said the Chicago police could not grant the protestors a right to protest, then five minutes later, arrest them for protesting.[25] The arrests were deemed unlawful.[26]

Mass arrests are frequently based solely upon the person's physical proximity to a crime. In Maine in the 1970s, twenty-eight people in a pool hall were arrested. The court said that there was no reason to search and arrest them just because they were present when someone else had committed a crime.[27] In another 1970s case, a man was murdered in Buffalo, New York, and the suspects were three African-American men. Officers detained and questioned between twenty-five and thirty African-American males in the neighborhood.[28] Eventually, one of the men they detained and questioned confessed. The court ruled that the officers obtained the man's confession through an illegal arrest that was not based upon probable cause and the extreme procedures used by police during the entire investigation were unlawful.[29]

I will conclude this historical section by comparing two protests that occurred in two different times. In the 1970s, more than 14,000 people were arrested for protesting the Vietnam War over a two-week period.[30] The federal court said, "[W]e are confronted by a situation in which the police did not govern themselves by their ordinary procedures, which are calculated to guard against an arrest without probable cause, even in the case of a massive civil disturbance."[31] The court held that the plaintiffs could pursue, through a class action lawsuit, dismissals and expunctions of criminal records for the cases.[32] Fast forward to the Black Lives Matter protests in 2020 where, over the course of two weeks, more than 17,000 individuals were arrested across fifty cities.[33] Not surprisingly, prosecutors are dismissing all criminal charges filed by police and civil rights lawsuits over those arrests are in the early

23. *Id.* at 711–16.
24. Vodak v. City of Chicago, 639 F.3d 738, 740 (7th Cir. 2011).
25. *Id.* at 746–47.
26. *Id.* at 750.
27. State v. Burns, 306 A.2d 8, 10–11 (Me. 1973).
28. Robinson v. Smith, 451 F. Supp. 1278, 1281 (W.D.N.Y. May 9, 1978).
29. *Id.* at 1292–93.
30. Sullivan v. Murphy, 478 F.2d 938, 942 (D.C. Cir. 1973).
31. *Id.* at 967.
32. *Id.* at 967–68.
33. Kornfield, *supra* note 15.

stages.[34] Once again, law enforcement officers and governments have failed to learn valuable lessons from the past.

So what can we as attorneys—prosecutors, criminal defense attorneys, and civil rights attorneys—do to protect against the ethical issues that arise in mass arrest cases? I wrote an article that goes into more detail about this subject.[35] For purposes of this symposium, it is important to consider that reasonable detention should be reasonable in duration and in that time, officers must investigate any suspected criminal activity. What I have found in my own research is that people are less likely to sue following a mere detention—even an unlawful detention—than following a full-blown arrest. Officers and departments should be aware of this and should adopt the least restrictive measures to investigate suspected or committed crimes.

We need to have more training for attorneys, particularly when it comes to the requirement that reasonable suspicion and probable cause must be individualized. Officers are required by law to have articulable reasons for detention or probable cause for arrest for each specific person. A guilt-by-association or group arrest mentality is unlawful. Anytime lawyers see a group of any size arrested, we need to look at whether there was reasonable suspicion or probable cause to support that detention or arrest of *each* person.

On the city level or police department level, there should be protocols in place that any mass arrest needs to be approved by someone with a more objective and law-trained viewpoint. Whether that is a high-ranking police official who is not on the scene, a government official like the city or county attorney's office, or a neutral prosecuting official, mass arrest decisions must be vetted. Local and state governments must invest in this process, given the personal, social, and financial costs associated with these events. Mass arrests are rarely lawful. Given the history of how they have impacted communities of color, citizens in our communities, and our community welfare, officers must exercise restraint and arrest individuals only after they have probable cause to support each and every arrest they make.

34. *E.g.*, Neil MacFarquhar, *Why Charges Against Protesters Are Being Dismissed by the Thousands*, N.Y. TIMES (Feb. 11, 2021), https://www.nytimes.com/2020/11/19/us/protests-lawsuits-arrests.html [https://perma.cc/L46C-G3Q8]; Kevin Rector, *Black Lives Matter Files Another Lawsuit over Floyd Protests in Santa Monica*, L.A. TIMES (June 29, 2021, 3:15 PM), https://www.latimes.com/california/story/2021-06-29/blm-files-another-lawsuit-over-floyd-protests-this-one-against-santa-monica [https://perma.cc/LV9K-MFJA].

35. Amanda J. Peters, *Mass Arrests and the Particularized Probable Cause Requirement*, 60 B.C. L. REV. 217 (2019).

RACE AND VOIR DIRE

ERIC J. DAVIS[†]

This topic is on race and juries. Now, I have often given this presentation to practitioners and mostly I talk about race and voir dire in that presentation, but I am going to focus and scale it back. I am not going to give a lot of practical ways to voir dire on race; however, I am going to discuss some of those ways because race, juries, and voir dire are very interesting. When it comes to the concept of race in the criminal legal system, it is something where people can see the same thing yet see something totally different. Nowhere was that more evident for me than in a case I handled a couple years ago.

I was here at the public defender's office, and I was assigned a case where there was a trucker who parked his rig in a secluded location in the Houston area. He drove rigs all across the country. Late one night, his wife drove him to his rig so that he could drive a load across the country. When he got to his rig, he hugged his wife (his wife was an off-duty police officer) and kissed her. They talked a little bit and then he went up to the rig to try to open the door. The door was stuck as he pulled on it. It was cold that night, so he thought maybe the weather had some effect on the door and caused the door to stick a little bit. He walked around to the passenger side of the rig and figured he would enter on that side. He reached for the door and pulled the door. It was stuck, but he pulled a little harder. When he pulled hard, he saw some hands on the other side of the door pulling it closed. He immediately started running around the rig yelling, "Honey they are trying to steal the rig! Get your gun honey, they're trying to steal the rig!" As soon as the trucker got to the other side, a figure emerged out of the cab carrying a crowbar headed towards his wife, swinging the crowbar.

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Immediately, the trucker got in the middle of his wife and this figure, and they started wrestling for this crowbar. The trucker wrestled for this crowbar, wrestled it away, and struck the figure several times. The police were called as he and his wife were trying to subdue him. The police came and helped subdue the person who emerged from the rig. The person had been high on crack cocaine and was stealing stuff out of the rig. The police arrested him. The ambulance came and took him away. On the way to the hospital, he died. The police eventually did an investigation of the whole scene.

Later, the case went to a grand jury who true billed the case. Prosecutors got on the case and refused to dismiss it. The trucker's case was headed to trial. When we were looking at his case we thought, "Man, this is a great self-defense case." I was assigned the case and I thought it was the kind of self-defense case you hope for as a defense lawyer. You have something happening at night, a guy protecting his wife, all these things going on that make it the kind of self-defense case you think everybody will be able to relate to and that everyone will be able to see it.

There was something about this case, though. The issue was the figure who emerged from the cab carrying a crowbar, high on crack cocaine, was white. The trucker was an African-American trucker whose wife drove him to the scene. We got the case and we thought, "Man, race is an issue in this case, and we have to do voir dire and talk about race." The client came to me and said, "Mr. Davis," as we were on the heels of Joe Horn[1] and there was media attention involved in the case, "we had Quanell X on the case and we had Deric X on this case.[2] If we talk about race to the jury, I am going to be prisoner *X*. We cannot talk about race on this case because the jury is going to convict me if we talk about race."

My co-counsel, who is now a district court judge here in Harris County, agreed. He said, "Yeah Eric, we can't talk about race. If we talk about race, we're going to alienate the jury. They're going to convict him if we talk about race in front of the jury." We went back and forth and debated about it, but they saw this idea of race and they met the concept with fear. They thought

1. Joe Horn is a white homeowner who killed two immigrants who were Black after they allegedly burglarized his neighbor's property. Horn's case was controversial for a number of reasons: Horn's citation of Texas's castle law, his disobedience of the 911-operator's command to stay indoors, and a subsequent grand jury who did not indict him. *See* Chris Bury & Howard L. Rosenberg, *Man Cleared for Killing Neighbor's Burglars*, ABC NEWS (Apr. 14, 2009, 12:18 PM), https://abcnews.go.com/TheLaw/story?id=5278638&page=1 [https://perma.cc/QW2W-ETSU].

2. Quanell X and Deric Muhammad (refered as "Deric X" in the presentation) are community activists in the Houston area.

talking about race would be perilous for the client, and they did not want to talk about race.

But it raises the question for me: How many other cases are like this where race is an issue in the case, and lawyers are afraid to talk about race? How many other cases are like this one where race actually has some motivation in the prosecutor? We realized that when we saw the carousel of black prosecutors who were assigned the case. The prosecutors would say, "Eric, I do not like this case, but my chief will not let me dismiss it." Then those prosecutors would get on the case, then leave the case, and the new prosecutor would come and say, "Eric, you know, I do not like this case, I'm just going to reset it. I'm not going to try this case. I cannot really do anything to resolve it because your guy will not take anything, and I cannot plea it." Then a different prosecutor will come in. Every prosecutor that had been assigned the case—at least three while I was on the case—were all African-American.

We knew race was an issue and, I think for lawyers oftentimes, race is like this.[3] In the video, an elephant moved around in the room and people were just pretty much trying to ignore it. There is a lady who is drinking some tea. There are some people taking some pictures, but they are pretty much trying to ignore the elephant in the room. They are not able to control the elephant in the room. So, race is the elephant in the room, basically. In cases, race is like that. I think in the criminal legal system, race has functioned much like that.

When you think about it, in terms of the history of the criminal legal system, we think back to the fugitive slave laws. The criminal legal system in America is heavily influenced by slavery and America's history and treatment of dealing with slavery. Even when you think back to the fugitive slave laws, the probable cause for an offense was skin color. If you had an idea that someone could be a runaway slave, the thing that would make you stop the individual and check to see if that person was a runaway slave was skin color. These pictures look very familiar, right?[4] They are very familiar because these are the instruments that were used by those who enforced runaway slave laws—the plantation police and runaway slave patrols. In American history, most of these organizations actually evolved into modern police departments. You can look at the history of police departments, and the departments will acknowledge where their history came from.

3. Author refers to a video in his PowerPoint presentation, at 11, located at [https://perma.cc/RY36-QD2U] (depicting a large elephant in a restaurant being ignored by patrons).

4. Author refers to images in his PowerPoint presentation, at 13, located at [https://perma.cc/RY36-QD2U] (showing images of slave patrol badges that look similar to badges worn by modern-day law enforcement officers).

Constable's offices were at one time called "Indian Constables," and they protected settlers from Native American raids. Indian Constables offices developed into modern police departments. Slave patrols and plantation police became modern and local police departments. So, the idea of controlling the behavior of minority populations originated long ago.[5]

And we all know about black codes. Black codes, after Reconstruction, were laws that were designed to try to re-enslave people. Laws were designed targeting African-Americans and people of color to try to re-enslave them. A lot of times those laws—the probable cause on those laws—involved skin color and the relationship between police and African-Americans. Because it was an "us" and "them" mentality, even way back when, it resulted in a lot of police brutality. And this police brutality we saw from the 1960s all the way until today.

Much, in terms of police interactions with people of color, has not really changed, and we see this all around the country and in all the national news. We have seen the concept of "driving while black"—something that is still happening today—where black people are stopped merely because of their skin color. Police officers will manufacture reasonable suspicion and a reason to stop black people basically because of skin color.

Race has not been limited just to the police and police behavior with African-Americans. It is extended to others. Here is a map of New Orleans.[6] It is an older map of New Orleans—a map that was used to redline districts. Most of you may have heard of redlining, which was basically federal laws enacted that systemized discrimination in housing. We saw redlining in the development of housing discrimination; that it was all based about race and where people lived. Race extended beyond policing.

Then we see all these other phenomena such as "selling water while black." A young African-American girl was selling water and a white lady saw her and asks her about having a permit. The lady decided to call the police on her.[7] Then, we saw the situation where a bunch of black women who are professionals—they were nurses and some of them were educators—were golfing on a golf course. Someone saw them on a golf course and figured, because they were black, they did not belong, and called the police

5. *See* Victor E. Kappeler, *A Brief History of Slavery and the Origins of American Policing*, EKU ONLINE (Jan. 7, 2014), https://ekuonline.eku.edu/blog/police-studies/brief-history-slavery-and-origins-american-policing/ [https://perma.cc/MER2-E9W5].

6. Author refers to a map in his PowerPoint presentation, at 20, located at [https://perma.cc/RY36-QD2U].

7. Ashley May, *'Permit Patty' Resigns as CEO of Cannabis Company Following Viral Video Backlash*, USA TODAY (June 27, 2018, 12:50 PM), https://www.usatoday.com/story/news/nation-now/2018/06/27/permit-patty-resigns-ceo-cannabis-company/737298002/ [https://perma.cc/832F-UKH7].

on them.[8] Then, we saw the Yale law student who was napping in the common area after studying. She is a *graduate student* at Yale and another student saw her, figured she did not belong because of her skin color and called the police. This made national news.[9] Then, of course, a young man was riding with his friends' kids. The friends entrusted him to babysit their kids. He took them to get ice cream. A white woman saw these two white kids with a black man. The kids were not in distress; they were laughing and joking, and they were eating ice cream. She asked them, "Are you okay?" And the kids did not talk to her because she was a stranger. So, she called the police. The police came and interrogated this young man and detained him, as well.[10] And then, recently, we all heard about the case of "birding while black." A board member of the Audubon Society was birding in Central Park. A woman, whom he has a disagreement with about her dog not being on a leash, called the police. This was a little different because she called the police and reported that the board member assaulted her. She lied to the police about him. But, he is out "birding while black," yet his skin color was an issue. It was made an issue because she said, "A black man is assaulting me."[11]

Here is a video of a young African-American couple who is in their own backyard, and they have a dispute with their neighbor.[12] Their neighbor is Caucasian and called the police on them every moment that she could; and she always complained about everything. On this particular occasion, they were arguing about the couple putting a patio in their backyard. The couple had all their proper permits and everything, and the neighbor was upset with them because they were putting the patio in their own backyard. The neighbor called the police and made an allegation that they assaulted her. But, there were other neighbors who were outside at the time, and they saw what happened. They told the police that that never happened, and the police

8. Ron Dicker, *Golf Club Calls Cops on 5 Black Women Members Playing . . . Golf*, HUFFPOST (Apr. 24, 2018, 2:52 PM), https://www.huffpost.com/entry/golf-club-calls-cops-on-five-black-women-members-playing-golf_n_5adf28fce4b0b2e811332d01 [https://perma.cc/7NN4-Q7WH].

9. Clarissa Hamlin, *Yale Graduate Student Calls Campus Cops on Black Classmate For, Uh, Sleeping*, NEWSONE (May 9, 2018), https://newsone.com/3797890/yale-student-calls-cops-sleeping-black-classmate/ [https://perma.cc/FRL6-3BVQ].

10. Melissa Gomez, *Babysitting While Black: Georgia Man Was Stalked by Woman as He Cared for 2 White Children*, N.Y. TIMES (Oct. 9, 2018), https://www.nytimes.com/2018/10/09/us/black-man-babysitting.html [https://perma.cc/XC6G-JY3R].

11. Sarah Maslin Nir, *White Woman is Fired After Calling Police on Black Man in Central Park*, N.Y. TIMES (Feb. 16, 2021), https://www.nytimes.com/2020/05/26/nyregion/amy-cooper-dog-central-park.html [https://perma.cc/P447-BQAL].

12. Author refers to a video in his PowerPoint presentation, at 27, located at [https://perma.cc/RY36-QD2U].

turned away.[13] This was in New Jersey during the pandemic. So, the couple was in their own backyard during the pandemic, and the neighbor called the police on them. They were actually not arrested, and nothing ever really happened to them.

Now, most of you know this picture.[14] This picture is of Willie Horton. If you do not know, Willie Horton was someone whose race was used in the electoral process. Michael Dukakis was running for president and was the governor of Massachusetts at the time. Massachusetts had a furlough program. In the furlough program, they would allow people who were convicted of very serious crimes to go out on work furloughs, and eventually end up being paroled. Willie Horton was given one of those work furloughs. While on the work furlough, he eloped—meaning he just walked away from it, went to a different state, and was convicted of raping a white woman. That case became the poster child of the Republican Party. Lee Atwater decided to use it as the battle cry against Michael Dukakis, and George Bush was elected President as a result of it. So, race has been used as a factor in the electoral process. This is not just something that happened over twenty years ago—it is still happening today. We saw it during the last presidential elections when there was much issue about building walls. There were issues about different people coming into the country and trying to restrict access to the country to those people. It always makes me wonder as to how some people are allowed to come into the country and others are not. A lot of the stuff that happened the last few years of the Trump administration were kind of endemic of what has happened throughout the country for centuries. But it seemed to be different when different people were immigrating to the United States. I think we have seen that in education as well. We have made some progress, but a lot of the things that we have seen in the past have all come back. Ultimately, they all have race in common.

What I want to show is a video clip from a trial that took place in the 1950s.[15] It was a trial of the men who were accused of killing Emmett Till. During the course of this trial, the person who described what happened was actually Emmett Hill's mother, Mamie Till. Mamie Till later described the outcome of the trial she went to and how, when the acquittal came in, there were guns firing, a lot of noise, and a lot of people. It was almost as if it was

13. Jen Maxfield, *Fight Between Black Couple, White Neighbor Over Home Patio in NJ Sparks Protest*, NBC N.Y. (July 2, 2020, 7:45 AM), https://www.nbcnewyork.com/news/local/fight-between-black-couple-white-neighbor-over-home-patio-in-new-jersey-goes-viral/2495241/ [https://perma.cc/DH75-QKHF].

14. Author refers to an image in his PowerPoint presentation, at 28, located at [https://perma.cc/RY36-QD2U].

15. Author refers to a video in his PowerPoint presentation, at 32, located at [https://perma.cc/RY36-QD2U].

a Fourth of July celebration when the acquittal happened of the men who were accused of killing her son.

For those who do not know, Emmet Till was a fourteen-year-old boy who was abducted and his body was found with a fan tied to it to weigh it down in the river. When they discovered his body, they investigated, found, and identified some men who had abducted him and taken him out of the house; those people were tried for his murder. Emmet Till, the fourteen-year-old, was found dead and the men who were accused of killing him were acquitted by an all-white jury.

So, race and juries are an issue in America as well. I do not know if you all are familiar with the 1855 trial of Celia, a slave. In that trial, Celia, a fourteen-year-old girl, was sold into slavery and purchased by a master for the sole purpose of raping her. He even created a house outside of his main house where he kept Celia and raped her. Her first night on the plantation as a fourteen-year-old girl, her master raped her. This went on for years, where he would go in and rape Celia. One night she got tired—she was older and decided to defend herself. In the course of defending herself, she killed her slave owner. Then, of course, a lynch mob formed, but their local sheriff stepped in and stopped it. He said, "We're going to guarantee a trial." So, within a couple of days, Celia was set for trial. She was convicted, given the death penalty, and later executed. She was convicted by an all-white, all-male jury.

I think you all might know about the 1930s trials of the Scottsboro Boys where some kids in Alabama were accused of raping two white women. The trial is about nine young black youths, ranging in ages from fourteen to nineteen. At the time, they would ride trains to Tennessee to try and find work. There were different trains where poor blacks and poor whites hitched a ride looking for odd jobs, different jobs they could do in neighboring states. On this particular night, they were on a train and some fights broke out. The police were called and decided to arrest these young men because two women—who were allegedly selling their bodies—accused them of rape. The result was multiple trials, multiple convictions, and multiple convictions being overturned; but most of the trials were with all-white juries. One of the cases started or led to *Batson v. Kentucky*.[16] *Swain v. Alabama*[17] was another case that came out of the trails of the Scottsboro Boys. Ultimately, the issue came down to it being trials featuring all-white juries.

16. Batson v. Kentucky, 476 U.S. 79 (1986).

17. Swain v. Alabama, 380 U.S. 202 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

I think we all know about Rodney King. King was being beaten and it was a crime captured on video.[18] Yet, when the officers went to trial, they went with an all-white jury and were acquitted even though the crime was captured on video. They went to trial a second time in federal court and their lawyers were bent on trying to get another all-white jury. It was so much so that some of the jurors noticed it. Some of the African-American perspective jurors noticed it and complained to the judge. The judge agreed that the lawyers were targeting them and specifically trying to eliminate them from the jury.[19] The judge seated those jurors, and when the officers went to trial a second time for violation of Rodney King's civil rights, they were convicted by a diverse jury.

We all know the case of O.J. Simpson. Simpson went to trial with, perhaps, the most diverse jury in the history of America and was acquitted by that jury. He did not go to trial by an all-white jury, and he was acquitted. The issue of race and jury was front and center.

I think we saw it recently in Bill Cosby's 2017 and 2018 cases where he was accused of raping a white woman. Bill Cosby's cases had predominately white jurors. In every case, there were *Batson* fights about the makeup of the jury. The juries were predominantly white, with different African-Americans being struck from those juries. Bill Cosby, even though he was acquitted in one trial, was convicted in the second trial.

What I am showing you now is a map of twitter activity based on hate speech or hate tweets.[20] You see the dark red areas are areas whether there is really significant hate speech, and in the light blue areas where there is some hate speech. You see that, in America, there is an issue with race and an issue with hate. Obviously, they define hate as being a little broader; they define it as being gender based and sexual orientation based. But in America there is an issue with hate.

Prosecutors are not immune to this issue of hate either. This is a video of Jack McMahon, who in 1996 (ten years after *Batson v. Kentucky*) is giving a prosecutor training.[21] At the training, he described and essentially talked about ways to win at trial by eliminating African-Americans from the jury. He did it on a recording and says that "you do not want blacks on the jury."

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18. Author refers to a video in his PowerPoint presentation, at 36, located at [https://perma.cc/RY36-QD2U].

19. *See Jury Sworn in for Police Beating Case*, N.Y. TIMES (Feb. 23, 1993), https://www.nytimes.com/1993/02/23/us/jury-sworn-in-for-police-beating-case.html?searchResultPosition=7 [https://perma.cc/AQV4-8BT4].

20. Author refers to an image in his PowerPoint presentation, at 39, located at [https://perma.cc/RY36-QD2U].

21. Author refers to a video in his PowerPoint presentation, at 40, located at [https://perma.cc/RY36-QD2U].

He says that you want to eliminate blacks from the jury because they are going to sympathize with the defendant. He says, "It might seem racist, but you are not really being racist—you are trying to win."[22] McMahon says all these racist things on a recording at a prosecutor training ten years after *Batson v. Kentucky*. In a concurring opinion to *Batson*, Justice Thurgood Marshall thought that preemptory challenges should be eliminated. And here is a prosecutor who is talking about using preemptory challenges to eliminate black jurors.

We see that in America there is this issue with race, but prosecutors are people too. And there was a Duke University study that showed that having black people present in the venire, not on a jury panel, but having black people present in the venire—the jury pool—impacts conviction rates.[23] So, the presence of African-Americans impacts conviction rates, and so I get to the point where I ask—why do you talk about race? Why are lawyers so afraid to talk about race? Should we talk about race? Should we have discussions on race?

Most lawyers do not talk about race in voir dire, and many lawyers argue against it because they think it is offensive to talk about race in voir dire. Even if there is an African-American client and there is a racial issue in the case, lawyers think it is offensive to talk about race. And they also think that nobody is ever really going to admit racial bias, so why even go into it? Why talk about race? Because nobody is going to come in and say, "Yeah, you know, I am prejudiced against black people. I am prejudiced against Latinos." No one is going to admit to it, so why even mention it in voir dire?

And then some think that the lawyer will be seen as "playing the race card" if they talk about race in voir dire—that they will be seen as being manipulative, in terms of voir dire. This is a clip from Muhammad Ali;[24] a young Muhammad Ali described an event that happened to him in life. He was riding in a limousine—he did not like to fly—so he would oftentimes take limousines. He was on a college tour in the South with others. And when they did that college tour, they drove up to a gas station. A gas station attendant came out. Ali basically mimicked the attendant and mimicked how

22. See Soccer #7, *Jury Selection with Jack McMahon All 1 Hour and 1 Minute*, YOUTUBE (Apr. 6, 2015), https://www.youtube.com/watch?v=Ag2I-L3mqsQ [https://perma.cc/P2F8-RAWD], for the full video of McMahon's comments on race and jury selection, starting at 39:00.

23. Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017 (2012).

24. Author refers to a video in his PowerPoint presentation, at 45, located at [https://perma.cc/RY36-QD2U] (showing an interview Ali did with David Frost). Author does not play the clip due to technical difficulties, but ad libs on Ali's statements. See Katherine Anthony, *Muhammad Ali Wins Over White Audience Talking About Blacks*, YOUTUBE (Sept. 15, 2016), https://www.youtube.com/watch?v=rq2RlOAuqVk [https://perma.cc/8HP6-XU6B], for a video clip of Ali's comments, paraphrased by the author, beginning at 4:10.

he talked. Ali changed his countenance and the inflection of his voice. He said the person said, "What can I do for you, boy?" And this is how Ali described the gas station attendant coming out to talk to him. Ali asked, "Restroom?" And the attendant said, "Nah, I don't think it's available." And Ali said, "Alright." Ali stated that he drove away.

The group left and Ali said, "I'm not going to argue with him. I'm the champion of the world. I'm the heavyweight champion. I'm a gold medal winner. I'm Muhammad Ali. I'm one of the most recognizable people in the country. I need to use your restroom." He said, "I'm not going to do any of that. I'm going to go someplace else. The Klan could be out there. Highway Patrol could be out there." He said, "I can't box that well enough to fight everybody." He said, "I'm just going to recognize the situation, and I'm going to just move on further down the road."

I think Ali's statement, this clip, has so much application to how we have to approach juries and how we have to approach voir dire as practitioners. We need to find out who people are—because people are who they are. We need to find out who they are and move on from them.

Ali did not spend time trying to change or debate the person he had the interaction with. He found out that this was a racist person who did not want him to use the toilet. As Ali said in the clip, "I can't even use the toilet, and you want me to fight in the war? I can't even use the toilet in the country!" He did not try to change that. He recognized what it was and moved on. I think in voir dire when people have certain ideas and feelings, we have got to recognize who they are and move on.

All people have some prejudice. All people have some biases. Some are racial. Some are ethnic. Some are sexual. Some are gender-based. Different people have prejudices and biases. The idea is to find out who they are and move on from them. Research, though, suggests that in the context of race and juries, that talking about implicit bias—or at least calling attention to implicit bias—will impact the trial. It encourages the jurors to view the evidence without their usual preconceptions and associations involving race—that most of us make—just by calling attention to implicit bias.[25] If we refer back to the Duke University study, just by having black people in the room impacts the equity of trials and racial disparities in trials.

Other studies have found that, regardless of the race of a particular mock juror, when they receive race-relevant voir dire questions, they are less likely to vote to convict the black defendant than jurors who do not receive the race-

25. *See* Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV. 843, 846 (2015).

relevant voir dire questions.[26] This gives the practitioner the idea that you have nothing to lose. That if you are involved in a trial and you have a race issue or if you have an African-American client, you have nothing to lose by using race in voir dire. Voir dire is the place and time to start, because if you wait until the evidence is viewed, people will already start to make conclusions and be prejudiced against your client. And based on what happened with George Floyd, what a lot of people have thought has actually moved out in front. A lot of people have had in the back of their minds that police might treat African-Americans poorly and treat black people differently. It is now right out in front, and people are seeing what is happening—especially with the recent Derek Chauvin trial. People are seeing that it is happening. African-Americans and others view the criminal legal system differently. Black people and white people view the criminal legal system differently.

Most black people think that their skin color impacts how police are involved or how police interact with them. And I think that the research seems to suggestion that, in voir dire, if we talk about implicit bias—even saliently—it affects people's perceptions of the trial and their decisions.[27] What other research has indicated as well is when racial issues are raised, white jurors are more likely to guard against the possibility of prejudicial feelings and maintain the appearance of fairness. And when racial issues are not made explicit, white jurors are lenient towards white defendants and more punitive towards black defendants.[28] By talking about race—or at least discussing race issues during trials—it impacts how white jurors even view the evidence favorable to a black defendant. So, I think as practitioners, in the voir dire context, you have got nothing to lose by having a discussion of race. I think race in voir dire is one of those issues where people see the same thing, but oftentimes, see things that are different.

The way I talk about race in voir dire is different. It has been received. I usually do not get a lot of friction about how I talk about race. Let me give you an example. I typically talk about race like this:

> Years ago, I was defending a case in rural Harris County. This was an area that was known for skinheads. In my case, there was some skinhead involvement. I was out investigating the crime scene and I was wearing jeans and a t-shirt. I had a baseball cap on.
>
> I did something stupid. I was not pay attention to my gas meter, and I ran out of gas. So, I parked my SUV on the side of the road, and I started walking because I remembered a gas station a few miles back.

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26. *See* Samuel R. Sommers & Phoebe C. Ellsworth, *The Jury and Race: How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, (2003).

27. *Id.* at 1011.

28. *Id.* at 1027.

> As I was walking, a truck that has these real big wheels flew by me. The truck had mud, stickers, and stuff in the back of the window. I cannot remember what they were. But as the truck flew by me, it started slowing down. My heart started beating fast. As I got closer to the truck, the window rolled down and an older white gentleman stuck his head out of the widow and said, "Son, you look like you need some help."
>
> We started talking and I got into the cab. He drove me to a gas station that would happen to be more than just a few miles up; it was like four or five miles up. He had a gas can in his trunk, and he got out and filled it up with gas and put it back in his truck. Afterwards, he drove me back towards my car. As we were driving, he told me, "Son, when I first saw you, I thought you were up to no good." I said, "Sir, when I first saw you, I thought you were up to no good, too." We both laughed.
>
> We talked. I learned that he was a youth pastor and I had been a youth pastor. I learned that he had four kids and I had four kids. I learned we had so much in common as we were talking and riding. As we got closer to my car, he said, "You know, son, it's amazing how we make assumptions about each other—about how we appear. It's amazing that we do that. You know I made assumptions about you." I replied, "I made assumptions about you. It is amazing about how we make assumptions about each other."

I use this story as a springboard to talk to juries about race. So, it is a little more received because of the way that I am approaching it. But there have been other times and cases where race is a direct issue in the case. I've talked about it; and I have not had an issue with it when talking to judges and juries.

Thank you.

INSIDE THE PROSECUTION OF A HATE CRIME

SHARAD S. KHANDELWAL†

I've been a federal prosecutor for about fifteen years; about half of that time in Washington, D.C. and half of that time here at the U.S. Attorney's Office for the Southern District of Texas. Like many of the folks who have spoken at this symposium, in law school I had to choose between a career in prosecution or in defense. I decided to be a prosecutor because I thought I could have more of an impact from inside the system, rather than outside. I wanted to try to see what good I could accomplish from the inside, and, in my personal experience, I have found that to be a rewarding decision. I try to speak up whenever I can, and I try to help with issues at the beginning of the process rather than after the initial decisions have already been made and people's minds are decided.

Currently, I serve as a Deputy Criminal Chief of a section called "Human Rights and Organized Crime," where I supervise about fourteen federal prosecutors working on a broad array of cases including hate crimes, use of force, immigration crimes, child exploitation, and human trafficking. About half of the federal prosecutors working in that section are minorities, and half are women. Not every section in the U.S. Attorney's Office is that diverse, of course, but in my personal experience I would say that diversity is on the rise in federal prosecution. That is important to recognize and to applaud. The changes many of us have hoped for are happening. I encourage law students who are considering a career in criminal law to think about prosecution, because if you really want to change the system, as Professor Rutledge said earlier, you have to be in the room where it happens. You have got to be in the room where the decisions are made. By the very nature of their jobs, prosecutors wield an enormous amount of power and discretion,

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and if you want to see the progress we have been talking about at the conference actually happen, it is important to have folks on the inside.

During this symposium, we've talked a little bit about the federal system and a lot about the state system. I want to highlight the core difference between the federal and state systems of criminal prosecution. Obviously, in the state system, prosecutors are inundated with cases—reacting to every single crime that is happening in your jurisdiction. It is an overwhelming caseload, and I have a lot of sympathy for the officers and prosecutors who must delve through that, trying to protect the community and trying to be mindful of these ethical issues that we are talking about.

On the federal side, we have the luxury of being more proactive. Our cases are generally larger and more complex, and we often have the opportunity to work on a case from the ground up. We get to pick and choose some of the prosecutions we take on, adopting them from the state system or running proactive investigations. And so, on the federal side we have luxuries that state prosecutors do not always have in prosecuting. We often have more time to think about some of the ethical issues ahead of time than is available to prosecutors on the state level who are busy responding to the latest fire.

We have talked about, for example, exculpatory evidence in the grand jury. In the federal system, prosecutors are expected to disclose exculpatory evidence to the grand jurors. And, for bail, we have an individualized assessment of every defendant's condition when deciding whether they should be detained or released. If they are released, the extensive system of bail that is so common on the state level is nowhere as significant—bonds are still theoretically possible, and it does happen—but most of the time it is a PR or an unsecured bond, and we often employ electronic monitoring and other methods to ensure defendants return to court. Finally, with respect to our criminal discovery obligations, we operate much closer to an "open file" system of discovery than our state level counterparts do. The Justice Department also instills the *Brady*[1] and *Giglio*[2] obligations in our federal prosecutors, and we try to address these and other ethical issues on the front end, rather than trying to deal with them after the fact.

During this symposium, we have talked a lot about all these principles, and how important diversity is in our systems of justice, but I want to talk about applying these principles in a particular hate crime case that I had the privilege to prosecute from 2017–2019.

1. Brady v. Maryland, 373 U.S. 83 (1963).
2. Giglio v. United States, 405 U.S. 150 (1972).

On January 28, 2017, the mosque in Victoria, Texas—which is about ninety miles south of Houston—was burned to the ground.[3] The timing of this was notable. This was shortly after the inauguration of a new president and right around the time of the so-called "Muslim Travel Ban." It was during a time where extraordinarily divisive rhetoric in this country about race and religion had really just begun to burst into the mainstream in a way that it had not before—at least not in my lifetime—even including right after 9/11. And when the mosque in Victoria, Texas burned to the ground, it immediately caused a reaction throughout Texas, and indeed the country as a whole.

This is a photograph of what the mosque looked like before the arson.[4] It was in a very peaceful and quiet residential neighborhood. Then, on January 28th, this is what the residents of Victoria woke up to see.[5] It went up in flames very, very quickly, and this is what the mosque looked like the next morning[6]—absolutely destroyed from the inside out. There was absolutely no way to try to fix it, and they had to eventually demolish it and simply build again.

There are about a hundred families in Victoria that attended this mosque, and this crime had a tremendous personal impact on them. At sentencing, we were able to get community impact statements from many of the victims, and we submitted each and every one of those to the court to consider. Here is one, handwritten by a nine-year-old boy:

> I pray at the mosque. Also, I am a student there. I love going there. I feel like it is my home. I was so sad and angry when the mosque was burned. I cried a lot. My whole family was so sad. Also, I am so glad we [now] have another beautiful mosque.

From ages nine to ninety-nine, the members of the mosque were devastated by the arson. There were many victims, especially the children, who refused to go to the new mosque after it was rebuilt because they were so scared about what could happen. All crimes have an emotional impact on their victims. For hate crimes, that impact is magnified because it is not just a crime against an individual, but an attack on their entire community. It attacks their sense of who they are and whether they consider themselves to

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3. Sanya Mansoor, *Two Texas Mosques Burned to the Ground this Month*, TEX. TRIB (Jan. 30, 2017, 5:00 PM) https://www.texastribune.org/2017/01/30/two-texas-mosques-burned-ground-january/ [https://perma.cc/3EAZ-E97R].

4. Author refers to an image in his PowerPoint presentation (on file with the author).

5. Author refers to a video in his PowerPoint presentation (showing the mosque being burned). See Jon Wilcox, *Fire Destroys Mosque; Cause Undetermined (w/video)*, VICTORIA ADVOC. (June 3, 2020), https://www.victoriaadvocate.com/news/local/fire-destroys-mosque-cause-undetermined-w-video/article_57a454bb-6ac5-5c29-a5ef-c27078218c01.html [https://perma.cc/QP3Q-MVB6], for a similar video.

6. Author refers to an image in his PowerPoint presentation (depicting an "after" image of the mosque after it was burned to the ground). See Wilcox, *supra* note 5, for similar images.

be valued members of our country. In a very real sense—and this was the way we addressed it at every stage of prosecuting this case—this was an attack on the very values that are inherent in America.

It was incredibly heartening to see that the community agreed. There was an immediate outpouring of support from the members of nearby churches and the other residents of Victoria, Texas. For example, the very next day, on Sunday morning, a prayer vigil was held on the ruins of the mosque. This photograph shows that prayer vigil, and the result of members of nearby churches walking from their own churches to the site of the mosque itself to join the members of the mosque.[7] Victoria is a small town. It was incredibly important to members of the mosque to know that they were not outsiders. They were welcomed into the community, and the entire community was just as horrified by the arson as they were.

This crime had an overwhelming response from the entire country and, in fact, the world. The mosque was not insured at the time that it was burned down. It was actually in the process of getting insured, but it had not been insured on that day. So, the members of the mosque were left holding the bag. They went on to GoFundMe, and they were able to raise, within a few days, over a million dollars to rebuild the mosque—from folks from around the country and from around the world. We were able to use this as evidence at trial because it showed how much of an impact this crime had locally, nationally and even internationally. This ended up being important in the trial because it was one of the ways we were able to establish the interstate commerce needed to federally prosecute this offense.

The arson sparked a law enforcement investigation that I had the privilege to help lead. It was a terrific example of how law enforcement and prosecutors can work together to bring about justice, and that is exactly what happened in this case. We have talked a lot about diversity at this symposium. It is fair to say that every single one of our lead agents was white and male. But of course, there was absolutely no hesitation by anyone in prosecuting this, and I think that is important to note. They were just as outraged as anybody and wanted to make sure that they got the bad guys who did this.

Although we had a terrific team of agents from the ATF, FBI, and the Victoria Fire Department, the investigation itself did not begin that well. At the very beginning, we did not have any suspects. We did not have any eyewitnesses to the arson that occurred in the middle of the night. Nobody saw anything; there was no surveillance. No identification evidence such as DNA or anything similar. Everything was burned in the mosque and there was no obvious evidence of motive at the time. Except, of course, that this was a very fortuitous event. It happened a few days after the inauguration,

7. Author refers to an image in his PowerPoint presentation.

and it was hard to ignore the charged rhetoric that was bouncing around this country at the time. But there wasn't any actual evidence of why someone burned the mosque just lying around.

Whenever a mosque—or any place of worship—gets burned down, one of the very first things any competent investigator would think is: Is this a hate crime? We had no obvious evidence that it was. The mosque hadn't received any threats, and no one anonymously or otherwise claimed responsibility for it afterwards, for example. Using the chronology of the case we used at trial, however, helped to show why we suspected this was an intentional act from the beginning.[8] The arson of the mosque took place on January 28th, but a week before the mosque had been broken into and burglarized. That was important to us because it suggested that this was not just an accident or some mechanical problem in the mosque that somehow sparked a fire. Rather, it suggested that there was something intentional going on that was targeting the mosque.

The next step was realizing that the arson of the mosque was also a burglary—and, as such, the second burglary of the mosque. One of the first things law enforcement did at the crime scene was ask the Imam and other members of the congregation what was inside the mosque when it was burned down. They then looked for these items but could not find one of them. One item was the Imam's laptop, which he had obtained after his laptop was taken in the first burglary a week before. This was a strong indication to us that this was an intentional act.

In the background, law enforcement also knew of an unusual fire-related incident that had occurred in Victoria about a week before the first burglary of the mosque. Someone unidentified had used a shotgun to fire at a car windshield, in what appeared to be an effort to break open a car windshield, and then throw several firecrackers that had been taped together into the opening—all to try to set the car on fire. At the scene we had found two of these firework bombs, one that went off, although outside the car because the windshield didn't break, and another bomb that had never been lit. The victims were not Muslim, and they had no connection to the mosque at all. But there was this very unusual fire-related incident that occurred in a relatively small town, and not far from the mosque. It was no surprise that our ATF agents in particular were very curious to see if there was any connection.

Still, at the beginning of this investigation, this was what we knew. Some suspicious activity, but certainly nothing that pointed to any particular individual. And if that is where the evidence had stayed, I think it is likely that this crime would not have been solved.

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8. Author refers to an image in his PowerPoint presentation.

We had two big breaks that broke open this investigation for us. We received a Crime Stopper tip about the defendant's Facebook account, about a very interesting message where he wrote something about the mosque. That led us to the second break, which was when we realized that the victim of the attempted car bombing was, in a way, a relative of the very same person whose Facebook account the tipster had alerted us to. Taken together, these breaks began to point us towards a suspect.

I am going to show you some slides from some of the evidence that we used at trial. Some of this evidence have some very charged language—it is a hate crime prosecution after all. And just as we explained to the jury, I apologize for this language, but these are the actual words that the defendant used. You cannot meaningfully talk about this crime in any detail without repeating and discussing his actual hateful language; so, that is what you are going to see now.[9]

I should also add that the only reason we got this Facebook message was because the defendant accidentally left this particular message on public instead of on private. Most of his stuff was kept on private, but he made a mistake and left this one public so anyone could see it. Someone the defendant knew saw this posted on the defendant's Facebook account after the arson occurred, became alarmed, and sent it into the police.

On the defendant's Facebook account, the tipster showed us a conversation between the defendant and a person who later was a witness at trial. A few days before the arson, the witness had written to the defendant, "How many mosques are there in Victoria?" The defendant responded, "One so far. It's been full then small with attendance of people. Always a person inside and outside." The witness wrote, "That's crazy. Victoria of all places—I don't trust those people." The defendant then says, "I know. I'm going to run a low-down recon because of how vigilant guards were." So, here the defendant is talking about the mosque and how there were guards, but, in fact, there were no guards at the mosque. To this day, I have no idea what he is talking about, other than puffery—he is just trying to puff up how much surveillance he is doing and what he was seeing.

The witness responded, "I would," and then said, "you are always keeping watch anyway." The witness, who was living in Houston, said: "I live here. The people are everywhere." The defendant replied, "Hard to track them and know what they'll do since Trump is claiming to send them all packing. How to know how many will go underground or be hid by Demos?"[10] The witness wrote back, "You're right. Keep your eyes posted."

9. Author refers to an image in his PowerPoint presentation (depicting a conversation over Facebook messenger between the defendant and a witness who testified at trial).

10. "Demos" was shorthand for Democrats.

And this is a critical response that the defendant gave—he wrote, "If recon is run and weapons are found, then it's going to be bad. I have plans ready, but the hardest is getting the town to believe evidence."

And then the defendant talks about how "everyone lives in the bliss of ignorance—that war never comes to us—but only us soldiers, both retired and forgotten, are the ones armed and ready." Interestingly, the defendant claimed he was a former soldier, but in fact, as we proved at trial, he actually washed out of basic training after about six days. So, the defendant could hardly make that claim. Nonetheless, that was his M.O. He tried to make himself out to be bigger than he was.

But, specifically in this message, the defendant was talking about reconnaissance. As we later revealed at trial, what he believed—obviously falsely—was that the mosque was being used as a staging ground for a takeover of the city of Victoria. This is very similar to a lot of the beliefs we are seeing with the Oath Keepers, the Three Percenters, and Proud Boys today. In fact, as you will see later, the defendant ascribed to the views of Three Percenters and tried to become part of that organization, although he didn't quite succeed.

So, what was driving the defendant was his idea that the mosque was being used as a staging ground for an attack, that there were plans being kept in the computers—remember the stolen laptops here—and that they were storing weapons at the mosque itself. The defendant then takes it a little bit further and asks the witness in this Facebook message, "Can you pinpoint any mosques that a team could get near to, or you'd need an operator to get close to?" Remember, the witness lives in Houston, and so the defendant is talking about moving on to Houston after the Victoria mosque. Obviously, this alarmed us quite a bit and our investigation immediately tried to ascertain if there was an attack being planned on Houston. In this Facebook message, the defendant and the witness then started going back and forth about the mosques—the Houston mosques.

Using this evidence, our law enforcement officers were able to obtain and execute a search warrant on the defendant's residence, about a month after the arson. And they found several very incriminating and powerful pieces of evidence that we were able to use at trial. They found a pistol grip shotgun. As you may recall, a shotgun was used in the attempted car bombing. Well, the defendant's pistol grip shotgun was a ballistics match to the shells left behind at that crime scene. Fireworks, identical to those used in that attempted car bombing, were also found in his home. But most tellingly, police found two laptops in his home; the laptop stolen from the burglary of the mosque on January 22nd, and the laptop that was stolen from the mosque on January 28th. With this evidence in hand, the defendant was

quickly arrested, and after a detention hearing, the defendant was held in custody. And he has been in custody ever since.

Our grand jury investigation began in earnest then. Now, we have talked a bit in this Symposium about how quick the grand jury process can sometimes be on the state's side. However, the grand jury process in this case was nothing like that. Complex cases like hate crimes often require lengthy grand jury investigations. This is because, in a hate crime case, the government essentially has to prove motive—why the defendant committed this crime. This isn't required in most other crimes, and requires you to infer a defendant's intent from his actions—what he has written about on social media, what he has told his friends and family, etc. Finding that evidence is time consuming. In this case, our grand jury investigation took about three months, and we probably interviewed forty to fifty different people. We eventually presented about twenty people in front of the grand jury—including members of the defendant's family. Obviously, with our obligation for exculpatory evidence, we wanted to make sure that if there was something that he had that was exculpatory, that we presented it to the grand jury and, perhaps more importantly as litigators, that we knew about it and could address it. We executed many search warrants, we interviewed lots of witnesses, and we secured cooperators. We learned that there were two juveniles that assisted the defendant in various parts of this, one that was with the defendant during the commission of this arson and another one who helped sell some of the stolen items afterwards. We used the grand jury process to help secure the juveniles' cooperation. We also used this time to secure expert witnesses to explain how the fire started, that it was in fact an arson and not an accident of some sort, and where exactly the fire was started in the mosque itself.

This was a very thorough grand jury investigation and I think more representative of an appropriate use of the grand jury. You cannot do this in every case, of course, but for important cases in the federal system, you definitely can, and in my view, should. Again, for a hate crime, you do not just prove that the defendant committed the actual crime, but you also must prove why. That is why a lot of prosecutors shy away from charging a crime as a hate crime. Proving motive is difficult and imposes a huge burden on a prosecutor. It can sometimes turn a relatively simple case into a much more challenging one. And with the way that hate statutes are often written, there is not much of a tactical advantage. In the end, even if you prove the defendant was motivated by hate, you may not receive much of an additional sentence.

However, a growing number of prosecutors and law enforcement members believe it is important to call a hate crime what it is. It is important to put that label on the crime because it addresses the actual victims of the

crime. Hate crimes are not crimes against just an individual victim, but against a community. These crimes either are designed to or have the effect of terrorizing an entire group of people into doubting their self-worth and their inclusion into the broader community. If you do not call a hate crime what it is, in my view at least, you are simply not achieving the full measure of justice.

So, in this case, we had to find evidence—of course—of the defendant's hate; using search warrants, we found loads of it on his Facebook account. As any prosecutor worth their salt will tell you, social media has been a huge boom for law enforcement because many defendants like to write out exactly what they are thinking and doing all over their social media accounts. This defendant was no exception. As you can see here in this evidence,[11] in these private Facebook messages to various folks, he talked about his sister and how he would "burn every mf'er with a raggedy towel on their head"—obviously talking about Arabs and Muslims. In another very important Facebook message, the defendant talked about how a "local response squad—Non-Three Percenters, but trained under me—is ready. Patrols are set around local mosques and centers." This was a critical Facebook message because it was sent after his attempt to blow up that car—which, as we learned during the grand jury investigation, he considered to be a training mission for some teenagers, whom he was trying to assemble into some sort of squad of folks who would help him. That worked, by the way. One of the teenagers who helped him with the car bombing went with him to the mosque when he set it on fire.

We were able to introduce additional evidence of his conversations with other Three Percenters. These weren't about the mosque itself but gave the jury a lot of insight into how the defendant was thinking, in general. In some of these conversations, he talked about how "rogue units would be good"—specifically, those that "operate away from prying eyes." At one point, the defendant wrote, "Get the job done. But do not be caught breaking the law and operating outside of it will be common." He then stated, "If we had volunteers, I can already think of several missions." This was written about a month before the car bombing, and about a month and a half before the burglary and arson of the mosque. Together with the other messages, and with what he knew from the teenagers we interviewed, it told a damning story of his attempt to create some sort of squad to commit hate crimes and specifically to attack Muslims.

We were also able to uncover terrific evidence from the defendant's cell phone. This is a "trophy" photo that the defendant took of the mosque

11. Author refers to an image in his PowerPoint presentation.

afterwards, when it actually was on fire.[12] Although it is a dark photograph, you can just make out in the left-hand side of this photograph the actual fire with the firefighters trying to douse the flames. We were able to locate where this photograph was taken—not through GPS data because there wasn't any metadata other than timestamps we could use—but because of a very capable Victoria Fire Department officer who knew the neighborhood very well and could tell because of various landmarks incidentally shown in the photographs where this photo must have been taken from. In the end, we were able to identify four such trophy photos he took, where these photos were taken, and when they were taken—which was critical in allowing us trace the defendant's route after he left the mosque.

Earlier in the symposium, we talked about exculpatory evidence. The defendant actually did have a potential alibi defense, and we presented it to the grand jury at length and at trial. The defendant's girlfriend gave birth to their second son maybe eighteen hours before he set the mosque on fire. I remember very vividly when we discovered that fact, because I remember thinking, "Oh my God, maybe he didn't do it?" After all, who would leave their newborn son at the hospital while they went down and burned a mosque? As a result, we dug deep into this issue and learned all we could of his whereabouts and potential alibi witnesses to find out the truth. We eventually concluded that he actually timed the arson of the mosque with his son's birth; in other words, he was trying to manufacture an alibi. We presented that evidence to the grand jury and at trial, as well. We even presented this issue affirmatively to the trial jury as one more piece of evidence that showed his planning.

Eventually, after the grand jury investigation, we indicted the defendant on three counts. The first was destroying religious real property under 18 U.S.C. § 247; that is a hate crime under federal law, and often known as the Church Arson Prevention Act. Second, we charged the defendant with using fire to commit a felony under 18 U.S.C. § 844. That carried a mandatory minimum sentence of ten years of incarceration. And third, we charged the defendant with the possession of an unregistered destructive device, for those firework bombs he created to try to blow up the car.

As a federal prosecutor, I've generally been able to get whatever resources I believe I need to prosecute my cases, and this case was no different. We used many of the great resources that already exist in federal government to help us tell the story to the jury. We used 3-D graphics to show the jury where the fire began—it began in the women's prayer room, as you

12. Author refers to an image in his PowerPoint presentation.

can see on that exhibit.[13] It started in a bookcase, where we later learned that there were copies of the Qur'an that were being kept. In other words, he set a bookcase full of copies of the Qur'an on fire—another clear indication of his motive that we were able to use to great effect at trial. We were able to use exhibits like this—very complicated chronologies that charted every piece of evidence on a timeline—that we built slowly over the course of trial.[14] When every significant fact came in through a witness or a piece of physical evidence, we would essentially add it to the timeline, so that which started out as pretty empty, became crammed with evidence by the end of the trial.

When this crime first occurred, I was more than a little concerned that this was a small city in Texas that was not as cosmopolitan as Houston. I did not know how a jury would react to this prosecution—to a hate crime case charged by the federal government. In my job, I've sometimes encountered hostility to the nature of hate crime charges, often couched as the view that these crimes unfairly favor certain groups. That is not true, of course, but that view is out there. When we came into jury selection, for example, we were concerned that some or many jurors would not react well to a hate crime charge and that we would have to bend over backwards to explain why this wasn't just an arson, but a hate crime. And of course, we did explain that. But we were pleasantly surprised that no one seemed particularly put out by our explanation, and we never got the impression that grand jurors or the jurors at trial had any problem with our charging this as a hate crime. More broadly, just as the city joined together to support the members of the mosque after the arson itself, throughout the grand jury investigation and trial and sentencing, we felt like we had the support of the community. The news covered the trial every single day on the front page and treated it very, very seriously.

The trial took place from July 9 to July 16, 2018, in the federal district court in Victoria, Texas, about a year and a half after the crime took place. We presented around twenty witnesses, the defense put on four witnesses, and the entire trial took a little over a week. The jury came back very quickly, in three hours, and convicted on all three counts. The judge eventually sentenced the defendant in October of that same year, and he had some very strong things to say at the sentencing. Our judge was very much a model judge; he never betrayed his personal views or anything like that at all during the many pretrial conferences and at trial. So, we did not really have any idea

13. Author refers to an image in his PowerPoint presentation (depicting a 3-D rendering of the first floor of the mosque).

14. Author refers to an image in his PowerPoint presentation (depicting a detailed timeline of how the events in the case unfolded).

of how he would handle sentencing. At sentencing when he did speak, it meant a lot to us. He stated emphatically, "This conduct will not be tolerated in our society." He vividly described the hate crimes as a "cancer to our society" and repeated that "this must stop." And, to that end, he imposed a twenty-four-and-a-half-year sentence on the defendant. If you know anything about federal sentencing, it is very different from the state, where you serve sometimes half the time imposed, or you are out in maybe even less. In the federal system, you generally serve a large portion of your time before you can be released—about eighty-five percent at minimum. So, this defendant is going to serve much of this time in federal prison for this heinous crime.

Aside from the normal prosecution, in this case, we also used principles of restorative justice when we had some of the teenagers who helped the defendant commit this crime meet directly with members of the mosque to apologize and understand one another. If you're going to try to fight hate, that's another way to accomplish our ultimate goal here. We couldn't do that with the defendant because he was never willing. But we were able to do it with the juveniles, and that I think it helped both those kids and the community to move forward in a positive direction.

In closing, I want to note we've talked a lot about how the criminal justice system works and sometimes doesn't work at this Symposium. I personally agree with a lot of the comments and critiques that folks today have made, but there is a flip side to that; the criminal justice system can be—and in fact is—a powerful tool for fighting hate. By prosecuting hate crimes when they happen, and by declaring them to be hate crimes and treating them with the seriousness they deserve, you can call out hate for what it is. Thank you.

RACIAL INEQUITIES IN MILITARY JUSTICE: DÉJÀ VU, ALL OVER, AND OVER, AGAIN.[1]

DRU BRENNER-BECK[†] AND JOHN A. HAYMOND[††]

In the summer of 2020, the House Armed Services Committee held hearings on the 2019 General Accountability Office (GAO) Report detailing demonstrated racial inequities in the administration of military justice.[2] At the direction of Congress, this report, *Military Justice: DOD and the Coast Guard Need to Improve Their Capabilities to Assess Racial and Gender Disparities* (*GAO Disparity Report*), was issued by the United States General Accountability Office (GAO) in May 2019. It analyzed military justice data

1. The title of this essay is borrowed and slightly altered from a post on *Just Security* summarizing the continuing issues of racial inequities in military justice, extending back to the 1972 Department of Defense Task Force set up by the Nixon Administration to determine the nature and extent of racial issues in the military justice system. *See* Barry K. Robinson & Edgar Chen, *Déjà Vu All Over Again: Racial Disparity in the Military Justice System*, JUST SEC. (Sept. 14, 2020), https://www.justsecurity.org/72424/deja-vu-all-over-again-racial-disparity-in-the-military-justice-system/ [https://perma.cc/8NZ5-PCBD]; *see also Racial Disparity in the Military Justice System – How to Fix the Culture*: *Hearing Before the Subcomm. on Mil. Pers. of the H. Comm. on Armed Services*, 116th Cong. (2020), https://armedservices.house.gov/2020/6/subcommittee-on-military-personnel-hearing-racial-disparity-in-the-military-justice-system-how-to-fix-the-culture [https://perma.cc/W2QP-NK2N] [hereinafter *Racial Disparity Hearing*]; U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-344, MILITARY JUSTICE: DOD AND THE COAST GUARD NEED TO IMPROVE THEIR CAPABILITIES TO ASSESS RACIAL AND GENDER DISPARITIES (2019), https://www.gao.gov/products/gao-19-344 [https://perma.cc/3LEL-RWFU] [hereinafter GAO DISPARITY REPORT]. But racial inequities in military justice extend far further back, and this essay will describe one of the most egregious examples of racial injustice in the U.S. Army's courts-martial following the Houston "Mutiny" or "Riot," an event that was neither mutiny nor riot. The trials resulted in the execution of nineteen African-American soldiers from the 3rd Battalion, 24th Infantry.

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2. *See Racial Disparity Hearing*, *supra* note 1.

collected from 2013 to 2017 and substantiated disturbing findings on racial inequities in the administration of military justice in the armed services.

In the 2020 hearings, The Judge Advocate General (TJAG) for each military service testified—acknowledging the disturbing statistics disclosed in the GAO report. Despite the passage of more than a year from the report's issuance, no TJAG was prepared to give answers to explain the existence of the racial disparities. This problem is not new. Although ostensibly race-neutral, in reality, military justice has long struggled with issues of racial inequities in its administration. Despite the U.S. military's role in leading the nation in the amelioration of racial discrimination resulting from President Truman's order requiring the integration of the military in 1948,[3] in the past seventy-four years, the U.S. military has grappled with its own legacy of institutional racism. In 1972, then-Secretary of Defense Melvin Laird created a task force to determine the nature, extent, and causes of racial discrimination in the U.S. military.[4] This Task Force on the Administration of Military Justice in the Armed Forces (1972 Task Force) determined that intentional and systemic discrimination remained in the armed forces, and both actual and perceived racial discrimination adversely affected discipline and the related military justice system.[5] Although the military implemented many of the remedies recommended by the 1972 Task Force, the 2019 *GAO Disparity Report* substantiated the continued and persistent presence of racial inequities in the administration of military justice. The truth is that racial discrimination in military justice goes back much further than the mid-twentieth century.

From November 1917 to March 1918, the Army tried 118 African-American soldiers for their alleged roles in what was termed the Houston "Mutiny" or "Riot" in a series of three courts-martial (*United States v. Nesbit, United States v. Washington,* and *United States v. Tillman*).[6] By the end of the third trial, the Army convicted 110 of the soldiers. Thirteen soldiers convicted in *Nesbit* were sentenced to death by hanging.[7] Under a legal

3. Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 28, 1948).

4. *See* DEP'T OF DEFENSE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES, REPORT ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES (1972), https://ctveteranslegal.org/wp-content/uploads/2013/03/DoD-Task-Force-on-the-Administration-of-Military-Justice-in-the-Armed-Forces-v1.pdf [https://perma.cc/GY7Y-UPQ6] [hereinafter LAIRD REPORT].

5. *Id.* at 3 (introductory letter from the DOD Task Force to Secretary Laird).

6. *See Clemency Petition, Returning the 24th Infantry Soliders to the Colors*, S. TEX. COLL. L. HOUS., Oct. 27, 2020, at 4, https://bit.ly/2R3Unp3 [https://perma.cc/7BNU-UWS3] [hereinafter *Petition*]; *see also* United States v. Nesbit, General Courts Martial Case no. 109045 (1917); United States v. Washington, General Courts Martial Case no. 109018 (1917); United States v. Tillman, General Courts Martial Case no. 114575 (1917).

7. *The History of the U.S. Army Court of Criminal Appeals*, THE JUDGE ADVOC. GEN.'S CORPS, https://www.jagcnet.army.mil/Sites/ACCA.nsf/home.xsp [https://perma.cc/7DUH-V6CB].

technicality possible because the nation was at war, their sentences were executed on December 11, 1917—within twelve hours of the findings and sentence of the court-martial being approved by the Convening Authority, MG John Ruckman—and without any outside review or opportunity to seek clemency.[8] An additional six soldiers tried in the subsequent trials (*Washington* and *Tillman*) were executed in 1918.[9] None of the white officers of the unit were charged, despite explicit recommendations by the two Inspector Generals who investigated these events that charges be brought against two specific officers.[10] Major Kneeland Snow, the battalion commander on the night of August 23, 1917, was later promoted by the Army.[11]

The *Nesbit*, *Washington*, and *Tillman* courts-martial are replete with significant due process failures, in addition to the execution of the original thirteen death sentences without outside review. The unreviewed executions resulted in a national outcry. In an attempt to prevent such hasty executions from recurring during World War I, the Army implemented General Order No. 7 on January 17, 1918, prohibiting the implementation of any sentence to death or dishonorable discharge without review by the Army Judge Advocate General.[12] The decision to execute the thirteen soldiers with no review or opportunity to seek clemency was legal, but General Ruckman's decision violated long-standing Army tradition and was never intended to operate within the United States—far from an active battlefield. The executions were criticized in Congress and roiled the African-American community. Nevertheless, prominent African-American leaders decided to "close ranks" with the U.S. Government and support the war effort against the enemy in Europe.[13] Few military lawyers know of these trials—let alone that they contributed to the development of the first appellate process in U.S.

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8. *See* C. Calvin Smith, *The Houston Riot of 1917, Revisited*, 13 THE HOUS. REV.: HIST. AND CULTURE OF THE GULF COAST 87, 97 (1991). Unlike a civilian trial, a military courts-martial is not complete until the Convening Authority takes final action to approve the findings and sentence adjudged by the courts-martial.

9. *Petition*, *supra* note 6, at 4.

10. *Id.* at 44.

11. *Id.* at 53.

12. *STATEMENT OF MR. SAMUEL T. ANSELL—Resumed*, in ESTABLISHMENT OF MILITARY JUSTICE: HEARINGS BEFORE A SUBCOMM. OF THE COMM. ON MIL. AFFS., 115, 132–33 (1919), https://www.loc.gov/rr/frd/Military_Law/pdf/08_26.pdf [https://perma.cc/P6UZ-PSCX] (providing both General Order No. 169 and 7); *see* U.S. WAR DEP'T, GEN. ORDS. & BULLS. (1918), http://www.314th.org/books/General_Orders_and_Bulletins_War_Department_1917.pdf [https://perma.cc/RMV7-NVGX] (indicating that General Order No. 169, issued on December 29, 1917, in the immediate aftermath of the December 11, 1917 executions in *U.S. v. Nesbit*, prohibited the execution of any soldier without review of the Judge Advocate General).

13. *See, e.g.*, W.E.B. DuBois, Editorial, *Close Ranks*, 16 THE CRISIS 108, 111 (1918).

military law, and fewer still know of the racial prejudice that permeated the trials and their aftermath.

On October 27, 2020, the authors of this essay, working with the Houston branch of the NAACP and South Texas College of Law Houston, petitioned the Secretary of the Army for posthumous clemency for all 110 soldiers convicted in these three courts-martial based on the egregious due process failures in the three trials. The Petition specifically asked that the characterizations of discharges be upgraded to honorable.[14] On December 5, 2021, an Addendum to this Petition was submitted to the Secretary[15] seeking both the upgrading of all characterizations of service to honorable and the forwarding of the Petition and Addendum to the Army Board for the Correction of Military Records (ABCMR). The Petition and Addendum asked that the ABCMR determine if all convictions from the three courts-martial should be overturned based on the numerous serious identified flaws,[16] and requested the Army to review the clemency request "through the lens of its values, which have been enduring and founded upon honor, respect, integrity, and loyalty."[17]

A similar clemency request was granted by the Army in 2007 for forty-one African-American soldiers convicted in the 1944 court-martial *United States v. Alston*[18] based on due process flaws that were remarkably similar to, but far less egregious than those present in the three Houston courts-martial.[19] *United States v. Nesbit,* the first of these trials, is the largest court-martial in U.S. history and a seminal example of inequity in the administration of military justice—for no one seriously contends that had the defendants been white, the due process irregularities and unreviewed executions would have been countenanced by either the Army or the nation. The two later trials only compounded the inequities which we describe below. Because these soldiers deserve the loyalty of the Army and the nation they served in peace and war,

14. *Petition*, *supra* note 6, at 8–10. The original petition (*Petition*) evaluates the events in Houston on August 23, 1917 and their aftermath. The general courts-martial was researched and prepared by John A. Haymond, MSc, FRHS, MSG (Ret.), U.S. Army and Dru Brenner-Beck, J.D., LL.M, LTC (Ret), U.S. Army. Assistance was provided by the Law Department at the U.S. Military Academy; the students in the Actual Innocence Clinic, South Texas College of Law Houston (STCLH); and research librarians at STCLH. This effort is supported by the national and Houston offices of the NAACP—which have worked for justice for these soldiers since 1917.

15. *Addendum to Petition: Returning the 24th to the Colors*, at 1 (Dec. 5, 2021) [hereinafter *Addendum to Petition*] (on file with authors).

16. *Petition*, *supra* note 6, at 6; *Addendum to Petition*, *supra* note 15, at 5.

17. *Petition*, *supra* note 6, at 6.

18. *Addendum to Petition*, *supra* note 15, at 13. In 1944, in *United States v. Alston*, the U.S. Army court-martialed forty-three African-American soldiers for rioting, with three of these soldiers additionally charged with murder, in the aftermath of a fight between African-American soldiers and Italian POWs at Fort Lawton, in Seattle, resulting in the lynching death of one Italian.

19. *Addendum to Petition*, *supra* note 15, at 13–17.

the Petition and Addendum asked the Army itself to correct the injustice experienced by the 110 convicted soldiers.

As a reflection of American society, integration of the U.S. armed forces has been "detailed and often dependent on the political, social, and cultural context of the [relevant] era."[20] Prior to the twentieth century, African-Americans served in every American conflict. Five thousand black soldiers served alongside white soldiers in the Revolutionary Army. The Louisiana Free Men of Color served with Andrew Jackson's forces during the Battle of New Orleans. One hundred eighty-six thousand black servicemembers fought in the Union Army and 30,000 in the Union Navy during the Civil War.[21] In every conflict, labor necessities drove the acceptance of African-American soldiers into the ranks.[22] Despite the realities of the racially segregated society and military in which they served, African-American servicemen were subject to the same system of military justice as their white counterparts.

Following the Civil War, Congress authorized permanent all-black regiments in the U.S. Army, in which in 1869 became the 9th and 10th Cavalry and the 24th and 25th Infantry Regiments.[23] These units served proudly on the frontier in the Indian Wars, in the Spanish-American War with Teddy Roosevelt's forces in Cuba, and during the Philippine Insurrection.[24]

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20. KRISTY N. KAMARCK, CONG. RSCH. SERV., R44321, DIVERSITY, INCLUSION, AND EQUAL OPPORTUNITY IN THE ARMED SERVICES: BACKGROUND AND ISSUES FOR CONGRESS 11 (2019).

21. MORRIS J. MACGREGOR, JR., INTEGRATION OF THE ARMED FORCES 1940–1965, at 4 (1981). Union Army African-American soldiers served in 149 segregated combat and labor units, but also unofficially as cooks, teamsters and laborers, with African-American sailors forming a quarter of the Union Navy's overall strength. *Id.*

22. *Id.* at 3–4 ("Progress toward equal treatment and opportunity in the armed forces was an uneven process, the result of sporadic and sometimes conflicting pressures derived from such constants in American society as prejudice and idealism and spurred by a chronic shortage of military manpower.").

23. *See id.* at 4; *see also* Dru Brenner-Beck & John A. Haymond, *The 1917 Houston Incident: Racism, Military Law, and a Crisis of National Security in the First World War*, 5 J. INT'L SEC. & STRATEGIC STUD. 25, 29 (2021) ("One of the famed 'Buffalo Soldier' regiments, the 24th Infantry was formed in Texas in 1869 by the consolidation of two of the original infantry regiments set aside for African-American soldiers following the Civil War. The unit served with distinction on the western frontier during the 1880s and 1890s in Texas, New Mexico, the Indian Territories, Utah and Wyoming. Six members of the unit were awarded the Medal of Honor during this period. In addition to the 9th and 10th Cavalry and 25th Infantry, the 24th Infantry deployed to Cuba in 1898, fought on the battlefields of El Caney and San Juan Hill, and nursed other soldiers stricken in the yellow fever epidemics that followed. Between 1899 and 1915 the Regiment completed three tours of duty in the Philippines, assisting in the defeat of the Philippine Insurrection and the ensuing pacification of the islands. During this time, their stateside assignments included postings to Utah, Wyoming, Washington, Montana, and Alaska. In 1916 the 24th Infantry deployed to the US–Mexican border to join the Punitive Expedition led by Brigadier General John Pershing against the Mexican guerrilla forces of Pancho Villa after Villa's attack on Columbus, New Mexico.").

24. *See* MACGREGOR, *supra* note 21, at 6.

Life after the Civil War also brought changes to the Navy. Given the circumstances of being in the Navy, it was not atypical for African-Americans to serve alongside whites in integrated settings. African-Americans constituted 20–30 percent of America's Navy. However, these numbers sharply declined in the twentieth century as the Navy began to restrict the majority of African-American service to staffing the galley or working the engine room.[25] Despite the fall in the proportion of black sailors in World War I to only 1.2 percent of the Navy's total enlistment, "a few black gunner's mates, torpedomen, machinist mates, and the like continued to serve in the 1930's" because their reenlistment had never been barred.[26]

As the nation entered World War I in April 1917, the United States implemented its first national conscription. "[I]ts active Army consisted of only 126,000 soldiers, 10,000 of whom were African-American troops belonging to the four segregated black regiments of the Regular Army . . . and the various support branches."[27] In August 1917, the War Department "approved a plan to create sixteen new black regiments to absorb 45,000 newly drafted black soldiers . . . ."[28] Although almost 400,000 African-Americans would serve in the U.S. Army in World War I, the events in Houston, Texas on August 23, 1917, drastically altered these plans and delayed the integration of the U.S. military by a generation.[29]

In August 1917, 652 men of the 3rd Battalion, 24th Infantry Regiment were deployed to Houston to guard the construction of Camp Logan, which was intended to be used as a training center for World War I's mobilization. Lieutenant Colonel William Newman, the battalion's commanding officer, sought to have these orders changed based on his past experience commanding black troops in Jim Crow Texas. He wrote:

> I had already had an unfortunate experience when I was in command of two companies of the 24th Infantry at Del Rio, Texas, April 1916, when a colored soldier was killed by a Texas Ranger for no other reason than that he was a colored man; that it angered Texans to see colored men in the uniform of a soldier.[30]

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25. *Id.* at 4–5.

26. *Id.* at 6.

27. Brenner-Beck & Haymond, *supra* note 23, at 26 (citing EMMETT J. SCOTT, SCOTT'S OFFICIAL HISTORY OF THE AMERICAN NEGRO IN THE WORLD WAR 32 (1919)).

28. *Id.*

29. *See id.* at 26–27 (indicating that three weeks after the events in Houston, Secretary of War, Newton Baker withdrew his support of the plans to create sixteen new black regiments, instead downsizing the plan to only one black division (four versus sixteen new regiments) which was provided minimal training in the United States before being sent overseas).

30. *Id.* at 29–30 (citing C. Calvin Smith, *The Houston Riot of 1917, Revisited*, 13 THE HOUS. REV.: HIST. AND CULTURE OF THE GULF COAST 87, 87–88 (1991)).

Newman's concerns were well founded. He was well aware of the pervasive racist attitudes held by white Texans regarding black soldiers. "[B]etween 1900 and 1917 at least five major incidents of racially motivated violence involving black soldiers occurred in the Texas cities of El Paso, Del Rio, San Antonio, Brownsville, and Waco."[31] Houston was to be no different for the soldiers of the 24th Infantry. They were to face a far more dangerous situation as they deployed to Houston—Jim Crow's hometown.

The Events of August 23, 1917

Despite LTC Newman's request, the War Department not only deployed the men of the 3rd Battalion to Houston, but also took no action to ensure that these soldiers were recognized as members of the U.S. Army or afforded the respect due their uniform.

> It did not take long for the conflict between the pervasive racism of the Jim Crow south and the pride of soldiers serving their nation to reach the point of implosion on the night of August 23, 1917; approximately 100 of these soldiers seized weapons and ammunition, disobeyed an earlier order to remain in camp, and marched into the San Felipe district of the city. Following the orders of a senior non-commissioned officer, these soldiers marched out to engage what they believed was a mob advancing to attack their camp. That they reacted to this threat is unsurprising considering they had endured weeks of racist provocations and physical violence, particularly at the hands of Houston's notoriously brutal police force. Facing threats that one of their unit would be lynched before the unit left Houston, events had come to a head earlier that day when two policemen shot at, beat, and arrested one of the battalion's non-commissioned officers, Corporal Charles Baltimore, who was acting in his official capacity as a duly appointed and conspicuously identified provost. Even after Baltimore was returned alive but bloodied to camp, the increasing anger and fear resulting from this latest episode of racist violence fed into the tension that gripped the 3rd Battalion camp that dark rainy August night.
>
> At the 6 p.m. retreat formation, the newly appointed battalion commander, Major Kneeland S. Snow, ordered that all members of the unit were to remain in camp that evening. After 8 p.m., when acting First Sergeant Vida Henry informed Snow of increasing unrest in the unit, Snow ordered that the men to assemble and turn their weapons in to the supply tents. Interrupting the completion of this process—Corporal Baltimore was in the process of handing in his rifle to the I Company supply tent—a sudden cry that a mob was coming was followed by gunfire. In the resulting panic soldiers rushed the supply

31. *Id.* at 29.

> tents to retrieve their weapons. Non-commissioned officers established hasty defensive positions within the camp, distributed ammunition to defend the camp from the perceived attack, and protected their officers as a twenty to thirty-minute outbreak of gunfire ensued. During this outbreak, one soldier was mortally wounded by friendly fire. Captain Bartlett James, the commander of L Company, established a skirmish line in the company street, and with the help of his non-commissioned officers retained control of his company. In contrast, Major Snow abandoned his battalion in a panic, fled toward town and left his company grade officers to attempt to regain control of the situation. In the absence of officer leadership, as the shooting subsided, Sergeant Henry, the I Company First Sergeant, ordered his unit to fall in. All most all soldiers within earshot complied. Believing that the unit was under attack by a mob, Sergeant Henry ensured that his troops had water and ammunition and then, in columns of fours, marched his unit from the camp toward the San Felipe district, the old black freeman town district of Houston. One element of the group attempted to induce L Company to join the column moving to meet the threat to the camp, but because of Captain James' leadership, his company stayed within the bounds to their camp and prepared to defend it.
>
> Some non-commissioned officers argued that the better tactical decision was to defend the camp in situ. However, Sergeant Henry, well aware of the deadly threat of racist mobs, instead chose to march out to meet the threat directly.[32] The soldiers who left camp under his leadership believed they were advancing to defend against an external attack. The actual violence that night lasted approximately three hours, during which time the soldiers fired at several houses as they passed (apparently to shoot out porch lights to give themselves tactical concealment in the darkness), and shot at several vehicles that approached them in the dark streets. In one of these cases, they fired on a vehicle occupied by men in uniform whom they mistook for policemen. In that incident an Army National Guard officer, Captain James Mattes, was killed, and an Army enlisted man was mortally wounded. Shortly afterward, the soldiers abandoned their march and attempted to return to camp. The Army later determined that six of the . . . casualties of that night were killed [or injured] by random gunfire from the initial gunfire in camp prior to the column marching out toward Houston. The concept of an advancing armed white mob was far from being a figment of the soldiers' imagination—martial law was declared in Houston on 24 August, in large measure to prevent armed mobs that formed the night of 23 August with the stated intention of attacking the 3rd Battalion's camp. The next day, the entire battalion—

32. The St. Louis Race Massacre had occurred only six weeks prior to this event, and members of the 3rd Battalion had engaged in fundraising to assist its victims.

> 652 men, including those whom the Army knew had remained in camp—was disarmed, and loaded on trains to Columbus, New Mexico.[33]

The events that night left four black soldiers, five police officers, two white soldiers, and nine white residents dead. Additionally, at least thirteen white civilians were wounded.

The Trials and Due Process Violations

As explained more fully in the Petition and Addendum, although these trials largely complied—at least in the formalist sense—with the requirements of the 1917 *Manual for Courts-Martial*, an in-depth review of the three trials disclosed significant violations of military law in the investigation and prosecution of the cases despite this pro forma compliance. A true assessment of the effect of these faults on the fairness of the trial is difficult to fully resolve more than one hundred years later, but their existence raises grave doubts that the trials achieved justice or fairness. When viewed in light of the pervasive racism that affected the investigation, trials, and subsequent clemency evaluations of the soldiers tried in the three courts-martial, those doubts deepen. The failures described in depth in our Clemency Petition fell into three categories.

First, the Petition highlighted issues that, although technically meeting the requirements of military law in 1917, nonetheless produce a visceral conclusion that justice failed. Significantly, Major Harry S. Grier represented all 110 soldiers in three back-to-back capital trials. Although trained in the law, Major Grier was not a lawyer, did not have significant courts-martial experience, and had minimal time to prepare three back-to-back capital trials with no investigatory or trial support. Although legal under the 1917 *Manual for Courts-Martial* and Articles of War, grave questions about the fairness of the trials are justifiable on these facts. Although representation by non-lawyers was common in military courts-martial, Army regulations required that officers serving in this role provide the same representation as "counsel for a defendant before civil courts in criminal cases." In 1917, that standard included both zealous advocacy and loyalty. Compounding the inherent conflict of interest arising from a single officer representing such a large number of defendants with significantly different roles in the events in Houston was Grier's decision to limit raising questions of race in the defense to an anodized summary of the racial hostility in Houston and his public concession on the second day of trial that the government had proved the

33. Brenner-Beck & Haymond, *supra* note 23, at 30–32.

charge of mutiny.[34] Further, although legal because the United States was at war, the immediate execution of the original thirteen soldiers with no outside review and no opportunity to seek clemency is troubling given its implementation far from an active battlefield and in contravention to the longstanding Army customs to defer executions pending the review of the President.

Second, the Petition outlined defects arising from the prosecution's violations of the laws governing courts-martial, including investigation illegalities accepted, directed, or furthered by the prosecuting judge advocates. The prosecution directed the regimental Board of Investigation to interrogate the confined soldiers, and clear evidence exists that the Board did so using threats of the noose and other deceptive practices in contravention of military law and regulation. The prosecution then introduced the coerced statements against the soldiers, further violating military law.[35]

The prosecution's case was principally dependent on the charge of mutiny, which created conspiratorial liability for all those proved to have joined the alleged mutiny. But mutiny requires the specific intent to override military authority, an intention far more serious than mere disobedience or insubordination. Mutiny is considered a crime of conspiracy and can be used to impose joint liability. As a result, once it was established that a soldier joined the mutiny, he was then criminally liable for all acts committed by the mutiny's participants—including acts of murder and assault allegedly committed during the mutiny. This liability resulted regardless of a particular soldier's violent acts or even if he lacked any knowledge of acts undertaken during the mutiny—it is a conspiratorial liability. The prosecution bootstrapped the remainder of its case—specifically the charges of murder and aggravated assault with the intent to commit murder—onto the joint liability resulting from a finding of mutiny. Because no victim or non-cooperating witness was able to identify any soldier as personally committing an act of murder or assault beyond a reasonable doubt, joint liability was critical to the prosecution of the case. Critically, however, the prosecution failed to prove the heightened specific intent required for the mutiny charge in the Houston courts-martial. Overwhelming evidence shows that the men who left the camp that night were ordered to fall in and marched out of camp by their First Sergeant in a military formation. The battalion commander, Major Kneeland Snow, had abandoned his unit in a panic and fled toward town and no other officer was present as Sergeant Henry marched his men out of camp to meet what he reasonably believed was an advancing mob. Although disobeying an earlier order to stay in camp that night, this

34. *See id.* at 24–28.
35. *Id.* at 31–35.

evidenced compliance with military authority, not the specific intent to override it.[36]

The prosecution also premised its case on unreliable evidence. First, the prosecution used cooperating immunized witness testimony, which changed dramatically between the first and third trial.[37] Second, the prosecution relied on faulty roll calls performed in the aftermath of the chaos resulting from the panicked shooting by the entire battalion in camp. The combination of unreliable evidence and witnesses, and inadequate accountability checks in camp, produced a reversal of the burden of proof on the accused soldiers to prove that they were not part of the mutiny.

Finally, the judge advocate obstructed the presentation of matters in extenuation. The judge advocate did not allow for much consideration of the hostile and racist environment into which the Army deployed this battalion. This obstruction was met by the tacit acceptance of the defense representative who did little to raise "race questions" in the trials. This was an omission for which Grier was commended by the prosecution after the first two trials.[38]

Third, the record discloses that the Army did not meet its own standards when it failed to both apply its justice system in an even-handed way to ensure accountability for all those responsible for the Houston violence and review and act upon the soldiers' clemency requests in good faith. First, the Army took no action to hold Major Kneeland Snow, the commanding officer of the 3rd Battalion, responsible for his dereliction of duty that August night. Overwhelming evidence demonstrates that he abandoned his command and ran away in a panic after the pandemonium that ensued after the call that a mob was coming. Major Snow left his company-grade officers to attempt to regain control of a camp in chaos. Despite his actions, the Army promoted him on August 31, 1918. Second, significant flaws were disclosed in the post-World War I reviews of the trials, yet the Army took no remedial action. And in 1922, Colonel John A. Hull, the judge advocate prosecuting the first two trials, personally reviewed the trials for the Army to provide information to the Secretary of War to respond to congressional inquiries into the fairness of the trials on behalf of the convicted soldiers. The Army response terminated the congressional inquiries and included a lie that a lawyer represented the soldiers.

For those interested in a fuller explanation of these significant due process flaws, the entire Petition with enclosures is available on the South

36. *See id.* at 35–38.

37. *See Addendum to Petition*, *supra* note 15, at 6 (specifying the significant discrepancies in sworn testimony across the three trials).

38. *Petition*, *supra* note 6, at 23.

Texas College of Law Library digital collections website under the tab "Houston Mutiny or Riot."[39]

Racial Inequities in Military Justice: All Over Again

In 1972, the Department of Defense established a task force to determine, among other issues, "the nature and extent" of racial disparities in the military justice system.[40] The task force acknowledged that both actual and perceived racial discrimination existed in the armed forces and its related justice system, including disparities in punishment rates (but not the quantum of punishment although the data was inconclusive on this point).[41] The task force recognized both the absolute imperative for a nation to ensure its military forces preserved discipline and "obedience to lawful authority" through its military justice system, and that "perceptions of unfairness are as corrosive an influence on the attitudes of servicemen toward the military justice system as is actual unfairness, and must be cured."[42]

An earlier report (the *Powell Report*) prepared in 1960 for the Secretary of the Army to assess "the effectiveness and the equity of the Code in the application of military justice within the Department of the Army" also recognized the interrelatedness of discipline and justice and between perception and actual achievement of justice:

> [Discipline] means an attitude of respect for authority developed by precept and by training. Discipline—a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task to be performed—is not characteristic of a civilian community. Development of this state of mind among soldiers is a command responsibility and a necessity. In the development of discipline, correction of individuals is indispensable; in correction, fairness or justice is indispensable. Thus, it is a mistake to talk of balancing

39. *Houston Mutiny & Riot Records*, S. TEX. COLL. OF L. HOUS. LIBR., https://bit.ly/2R3Unp3 [https://perma.cc/69YN-JXNN] (last updated June 18, 2021, 3:09 PM).

40. LAIRD REPORT, *supra* note 4, at 1 (introductory letter from the DOD Task Force to Secretary Laird). Included in the Task Force's mandate was the following directives relating to racial issues: "To identify and assess the impact of factors contributing to the disparity in punishment rates between racially identifiable groups as they relate to (1) circumstances prior to entry to active duty and (2) post-entry environment and conditions[;] To identify and assess the impact of racially related patterns or practices reflecting adversely upon the fair administration of justice or respect for the law. . . .[;] [and] [t]o make such recommendations to the Secretary of Defense as may be deemed appropriate to eliminate existing deficiencies and/or enhance the opportunity for equal justice for every American serviceman and servicewoman." *Id.* at 1.

41. *Id.* at 2–3 (introductory letter from the DOD Task Force to Secretary Laird).

42. *Id.* at 3 (introductory letter from the DOD Task Force to Secretary Laird).

> discipline and justice—the two are inseparable. An unfair or unjust correction never promotes the development of discipline.[43]

The 1972 *Laird Report* recognized, as do other authoritative studies of military justice, the finding of the *Powell Report* that "[i]t is not proper to say that a military court-martial has a dual function as an instrument of discipline and as an instrument of justice. It is an instrument of justice and in fulfilling this function it will promote discipline."[44]

Testimony before the House Armed Services Committee in June 2020 similarly recognized that the core purposes of the military justice system were "promoting justice while ensuring discipline [because t]hese are the pillars upon which our combat effectiveness rests, and they are the reasons why our Army is the best in the world."[45] But more importantly, The Judge Advocate General of the Army LTG Charles Pede testified that racial disparities in the military justice system was "a topic of vital importance to our Army and to our nation, ensuring that every soldier who swears to defend our Constitution is guaranteed its foundational promise, equal justice under the law."[46] This hearing addressed the 2019 *GAO Disparity Report* findings of racial disparities in the administration of military justice in the services. That study echoed the findings of the 1972 *Laird Report*, finding that minority service members are more likely to be brought before the military justice system, with "Black service members . . . more likely than White service members to be tried in summary courts-martial and to be subjects of non-judicial punishment in the Air Force and the Marine Corps."[47] However, the *GAO Disparity Report* showed that, once within the system, the conviction rates and quantum of punishment are not more severe for minorities.[48] Critically,

> Black, Hispanic, and male servicemembers were more likely than White and female servicemembers to be the subjects of recorded investigations in all of the military services, and were more likely to

43. THE COMMITTEE ON THE UNIFORM CODE OF MILITARY JUSTICE GOOD ORDER AND DISCIPLINE IN THE ARMY, REPORT TO WILBER M. BRUCKER, SECRETARY OF THE ARMY 11 (1960), https://www.loc.gov/rr/frd/Military_Law/Powell-report.html [https://perma.cc/2JLC-MTTU] [hereinafter POWELL REPORT].

44. *Id.* at 12; see also LAIRD REPORT, *supra* note 4, at 3 (introductory letter from the DOD Task Force to Secretary Laird) ("Justice and discipline are inextricable, and the latter cannot exist without the former.").

45. *Racial Disparity Hearing*, *supra* note 1 (statement of Lieutenant General Charles Pede, The Judge Advocate General of the Army).

46. *Id.*

47. *See* Robinson & Chen, *supra* note 1.

48. GAO DISPARITY REPORT, *supra* note 1, at 39.

> be tried in general and special courts-martial in the Army, the Navy, the Marine Corps, and the Air Force.[49]

The *GAO Disparity Report* emphasized that its "findings of racial and gender disparities, taken alone, do not establish whether unlawful discrimination has occurred, as that is a legal determination that would involve other corroborating information along with supporting statistics."[50] But as General Pede acknowledged, although the *GAO Disparity Report* "reached no conclusions on the causes of these disparities, this report raises difficult questions. Questions that demand answers."[51] Disappointingly, even after a year to study the issue, the Army Judge Advocate General acknowledged, "Sitting here today, we do not have those answers."[52]

Our quotation of General Pede's response is not to underestimate either the dedication of those entrusted with the responsibility to ensure the fair administration of military justice or the immense complexity of the task of determining the cause or remedy for the racial disparities in the military justice system that are "consistent and persistent" and "getting worse."[53] Instead, our quoting of his response is to highlight that one way to begin to rectify these problems is to study, understand, and forthrightly address the failures of the past.

This challenge has existed for more than a century, as the 1917–1918 Houston courts-martial make amply clear. Those three trials demonstrate fundamental failures in due process that the Uniform Code of Military Justice (Code), enacted in 1950, was designed to remedy: "[The Code] was born out of a concern for fundamental fairness for those suspected of a crime. Our Code's due process guarantees—zealous defense, impartial judges, and robust appellate review—are its cornerstones."[54] The fact that the Code's "robust appellate review" arose out of the fundamental failures of the first Houston court-martial, *United States v. Nesbit,* is shown by the implementation of General Order No. 7 on January 17, 1918—in the aftermath of the first unreviewed executions and subsequent incorporation of a formal appellate review process into the 1920 Articles of War.[55] The genesis of this particular due process cornerstone in the Houston courts-

49. *Id.* at 38.

50. *Id.* at 38 n.64.

51. *Racial Disparity Hearing*, *supra* note 1 (statement of Lieutenant General Charles Pede, The Judge Advocate General of the Army).

52. *Id.*

53. *Racial Disparity Hearing*, *supra* note 1 (statement of Lieutenant General Jeffrey A. Rockwell, The Judge Advocate General of the Air Force).

54. *Racial Disparity Hearing*, *supra* note 1 (statement of Lieutenant General Charles Pede, The Judge Advocate General of the Army).

55. Fred L. Borch III, *"The Largest Murder Trial in the History of the United States": The Houston Riots Courts-Martial of 1917*, ARMY L., Mar. 2012, at 30 & n.14.

martial certainly supports the Petition's conclusion that denial of the opportunities for TJAG review and requests for clemency in 1917 were fundamental due process failures.[56] The absence of, or impossibility for, zealous representation can be seen in Major Grier's representation of 118 accused soldiers in three back-to-back capital trials, where he eschewed raising race questions in the defense of his clients "because he never lost sight of his obligations to the government" and publicly conceded the charge of mutiny the second day of trial. Finally, the trials occurred long before military law incorporated a military judge to act as an impartial arbiter of courts-martial. The soldiers were subject to legal advice given to the courts-martial panels by the prosecuting judge advocates. Again, although this practice was legal under the 1917 Articles of War, given the demonstrated pattern of prosecutorial misconduct in the trials, it is fair to question whether the judge advocates in the three trials could "act as a minister of justice . . . [and] to focus on the attainment of justice, not mere conviction[,]"[57] as military law required.

The original Petition and its Addendum asked the Army to remedy these fundamental failures of injustice by upgrading the characterization of service for all 110 convicted soldiers and to follow its own process by forwarding the Petition and Addendum to the Army Board for the Correction of Military Records to evaluate whether overturning of all convictions obtained in the three flawed courts-martial is merited. In January 2022, the Secretary of the Army did just that. The Clemency Petition is currently being reviewed by the ABCMR to determine if the fundamental due process flaws that permeate these three trials merit the overturning of the convictions of all 110 soldiers of the 3rd Battalion, 24th Infantry Regiment. In our view, this remedy is more than merited if we as a nation and as an Army are to "ensur[e] that every soldier who swears to defend the Constitution is guaranteed its foundational promise, equal justice under the law."[58]

56. Not only did the Army issue General Order No. 7 on January 17, 1917, to prohibit the implementation of any sentence to death or dishonorable discharge prior to TJAG review, it also issued General Order No. 169 on December 29, 1917, to prohibit the execution of a sentence to death without TJAG review, immediately following the War Department's knowledge of the December 11, 1917 executions of the original thirteen soldiers resulting from the *Nesbit* trial. *See* General Order No. 169, War Dep't, Dec. 29, 1917.

57. *See Petition*, *supra* note 6, at 21.

58. *Racial Disparity Hearing*, *supra* note 1 (statement of Lieutenant General Charles Pede, The Judge Advocate General of the Army).

PROSECUTING PROSECUTORS: HOW THE CRIMINAL JUSTICE SYSTEM FOSTERS INJUSTICE THROUGH THE NEGLECT OF PROSECUTORIAL ACCOUNTABILITY

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† Shruti Modi, J.D. Candidate, Magna Cum Laude, South Texas College of Law Houston, May 2022. Senior Articles Editor, *South Texas Law Review*. B.S. Criminology and Criminal Justice, Arizona State University, 2018. Chicago native, first-generation American, and proud Indian daughter. I would first like to thank my dad, Alkesh Modi, who I lost to Amyotrophic Lateral Sclerosis in May 2017. Despite any hardships, my dad's devotion and love for his family have inspired me throughout my entire life. He pushed me always to be the best I could be, made me believe that I have infinite potential, and is largely responsible for making me the writer I am today. Further, I am forever grateful for my mom, Mamta Modi, as she has fulfilled the role of both parents since I lost my dad and has been my best friend through it all. Her support is unwavering, and she has been my rock during my lowest, most difficult times; for that, I am thankful beyond words. She is the light at the end of every tunnel, and I will never know anyone that even comes close to embodying the beauty and unconditional love that I see in her. Any and all of my accomplishments are for you, Mom and Dad. My brother, Shivam Modi, has also been a role model for me and he will never truly know the impact he has on me every single day. He is an incredible and exquisite human being, and I will always strive to be as dedicated, kind, and genuine as him. Moreover, my sincerest thanks to Professor Drury Stevenson and Professor Katherine Vukadin for their guidance and support throughout these past three years. Without the both of you, I could not have developed my writing skills and written this Comment. Finally, a special thank you to my best friend Gisela Aguilar for understanding me and being there for me every step of the way, and my other best friends Peyton Chesser, Whitney Vizzini, Betsy Nino, Molly Hatch, and Nini De Faria E Castro, for loving me and believing in me.

I. INTRODUCTION

An inexcusable injustice takes place when the deprivation of an innocent individual's right to life and liberty results from a prosecutor valuing a conviction over the freedom of a guiltless human being. The exercise of prosecutorial authority familiar to society concerns the imposition of charges and subsequent stages of criminal prosecution. However, the breadth of prosecutorial discretion is seldom recognized, despite its enormity. The criminal justice system fosters injustice by allowing the neglect of prosecutorial accountability, and widespread institutional reform is essential to resolving this complete systemic failure. This Comment will discuss the causality between systemic shortcomings and the perpetuation of prosecutorial misconduct, the prevalence and consequences of wrongful convictions, and how ameliorating certain issues could ultimately lead to a substantial decrease in the imprisonment of the innocent.

II. EXECUTIVE SUMMARY

This Comment first focuses on the duties of a prosecutor and how such broad discretionary authority is amenable to unintentional mistakes, negligent oversights, or even deliberate misconduct. This deficiency in our criminal justice system is further exacerbated by systemic shortcomings, the consequences of which have led to widespread societal anger. Additionally, this Comment explores the prevalence of wrongful convictions and the factors giving rise to this infuriating miscarriage of justice. Finally, this Comment discusses how these shortcomings may be mitigated, if not extinguished. I further conclude by suggesting the incorporation of prosecutorial oversight committees into the criminal justice system and legislative reform through the addition of a new rule to the Judicial Code of Conduct. This rule should mandate an investigation when there is any semblance of misconduct or impropriety in prosecution, as well as oblige judges to formally report every case of wrongful conviction to an independent, prosecutorial oversight committee. The system should implement policies allowing these committees to oversee all jurisdictions,

alongside the process of prosecution. This would help decrease wrongful convictions and change our criminal justice system into one where we can implement error prevention, instead of futile attempts at error remediation.

III. THE DUTY OF A PROSECUTOR

In our nation's criminal justice system, prosecutors have a duty to serve as the representative of public interest.[1] The prosecutor's objectives should be indistinguishable from that of the courts—the pursuit of justice.[2] Thus, they have no right to sacrifice "the public interest, which can never be promoted by the conviction of the innocent," to any pride emanating from professional ambition.[3] Prosecutorial law distinguishes itself from other fields of law because criminal prosecutors should not be aiming to *win* a trial, and instead, aim to ensure that justice is being done. "It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."[4]

Accordingly, the standard of accountability for prosecutors should align with the fact they are the criminal justice system's most powerful actors, "possess[ing] nearly unfettered discretion" in deciding whether to file charges.[5] However, the reality is that prosecutorial accountability is not equivalent to the amount of discretion a prosecutor possesses. Instead, prosecutors seldom face discipline when there is a finding of misconduct.[6] Their misconduct goes largely unpunished, and "cases that have led to disbarment or even criminal charges are few and far between."[7] Even on the off chance that they are disciplined, it is because their conduct is unjustifiably deliberate, and their punishments are often disproportional to the injury they imposed.[8]

The American Bar Association (ABA) believes prosecutors should be held to a higher standard of accountability. In 2008, paragraphs (g) and (h)

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1. Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 613 (1999) (citing Hurd v. People, 25 Mich. 404, 415–16 (1872)).

2. *Id.*

3. *Id.*

4. *Id.* at 614 (citing Berger v. United States, 295 U.S. 78, 88 (1935)).

5. K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 286 (2014).

6. Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143, 144 (2016).

7. Matt Ferner, *Prosecutors Are Almost Never Disciplined for Misconduct*, HUFFPOST (Feb. 11, 2016, 4:16 PM), https://www.huffpost.com/entry/prosecutor-misconduct-justice_n_56bce00fe4b0c3c55050748a [https://perma.cc/D3PM-GFTG].

8. *Id.*

were added to ABA Rule 3.8, detailing the special responsibilities of a prosecutor—specifically regarding post-conviction exculpatory evidence.[9] These subsections create post-conviction duties for prosecutors to disclose "new, credible and material evidence" they come to know of that "creat[es] a reasonable likelihood that a convicted defendant did not commit an offense" (paragraph (g)), and to "seek to remedy [a] conviction" when they come to know of "clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction . . . did not commit [the offense]" for which he or she was convicted (paragraph (h)).[10] In creating these subsections, the ABA attempts to advance the idea that a prosecutor has a duty beyond ensuring that every crime leads to a conviction—ascertaining the guilty party was the one convicted. Still, states mostly ignore the inclusion of these subdivisions and do not require prosecutors' compliance.[11]

IV. MISCARRIAGE OF PROSECUTORIAL AUTHORITY

Undoubtedly, wrongful convictions are the byproduct of multiple factors in the history of our criminal justice system. Although there is evidence of several possible causes,[12] the most worrisome ones involve this country's judicial system. The same system responsible for preventing injustice allows them to occur instead.[13] Our justice system cannot bear any responsibility for impeding the procurement of justice.

First, there is evidence of alarming forms of pre-conviction prosecutorial misconduct: hiding exculpatory evidence, ignoring relevant—potentially mitigating—evidence that could benefit the accused, "encourage[ing] witnesses to commit perjury, [and lying] to jurors, judges, and defense lawyers."[14]

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9. MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N 2008).

10. *Id.*; *see* AM. BAR ASS'N REP. 105B (2008) ("The obligation to avoid and rectify convictions of innocent people, to which the proposed provisions give expression, is the most fundamental professional obligation of criminal prosecutors. The inclusion of these provisions in the rules of professional conduct . . . will express the vital importance that the profession places on this obligation."); NYCBA Comm. on Pro. Ethics, Formal Op. 2018-2 (2018).

11. *See* Comm'n for Lawyer Discipline v. Hanna, 513 S.W.3d 175, 184 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (explaining that the Texas rule does not require post-conviction disclosure of exculpatory or mitigating evidence, finding the "duty to disclose evidence [does] not extend after conviction").

12. John Grisham, *Op-Ed: John Grisham: Eight Reasons for America's Shameful Number of Wrongful Convictions*, L.A. TIMES (Mar. 11, 2018, 5:15 AM), https://www.latimes.com/opinion/op-ed/la-oe-grisham-wrongful-convictions-20180311-story.html [https://perma.cc/E9WZ-QNEX].

13. *Id.*

14. *Id.*

Additionally, judges disregard their duty to conduct fair and impartial trials when they fail to hold misbehaving prosecutors accountable for their transgressions.[15] Prosecutorial misconduct would greatly decrease if "prosecutors [were required] to produce [any] exculpatory evidence" to a judge.[16] Further, the same would result if all judges were more attentive and questioned any inconsistencies between confessions and physical evidence, including the "questionable means" by which they may have been obtained.[17] This absence of vigilance is a likely consequence of the election element of the position, and for those "appointed rather than elected, the majority are former prosecutors."[18] Arguably, certain influences are beyond the control of the justice system. Yet, there are a profound number of issues that *are* within a prosecutor's realm of control and can be subjugated. With all these considerations, it is even more necessary that the standard of accountability for a prosecutor be heightened.

V. IMPEDIMENTS IN PROVING INNOCENCE

In the nineteenth century, a jury's verdict in a criminal matter was firmly held to be an "incontestable" truth.[19] This belief continued to be widely held throughout much of the twentieth century, where courts believed they did not have the authority to provide wrongfully convicted individuals any sort of redress.[20] "In some of the more egregious cases, defendants convicted of murdering individuals who were later discovered to be alive, and defendants convicted of committing robberies that never occurred, were denied legal remedies."[21] Without legitimate regard for the accuracy of a guilty verdict, the system was almost wholly focused on the belief that "cases must come to an end."[22] This senseless principle also served as the foundation of "[t]he judiciary's intractable resistance to re-opening judgments in criminal cases."[23]

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15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. Robert M. Casale et al., *Gould v. Commissioner of Correction and the Conundrum of Being Legally Guilty but Actually Innocent in the Criminal Justice System*, 86 CONN. B.J. 262, 265 (2012).
20. *Id.* (citing Donald R. Richberg, Comment, *Remedies Available to Convicted Defendant When New Facts Are Found*, 39 MICH. L. REV. 963, 963–64 (1941) ("For centuries it seems to have been assumed that there was no method by which the verdict of a jury, having once become final, might be set aside.")).
21. *Id.* at 265–66.
22. *Id.* at 266.
23. *Id.*

After years of this irrational preoccupation with finality, these issues were facially, if not actually, addressed. Currently, all jurisdictions make post-conviction relief available when new evidence is discovered; however, every state has "extremely high proof requirements that must be met to warrant judicial relief."[24] Thus, procedural strains still exist as the burden of proof has shifted from the prosecution to the innocent person following a conviction.[25] Most notably, this is because "[a]n exoneration based on innocence requires . . . overwhelming proof . . . to overcome the substantial procedural barriers to re-litigation of outcomes in criminal cases."[26]

Multitudes of factors collectively contribute to wrongful convictions.[27] Significantly, only a very small percentage of wrongful conviction cases "involve biological evidence [subjectable] to DNA testing, and even when such evidence exists, it is often lost or destroyed after a conviction."[28] Other notable causes of wrongful convictions "include mistaken eyewitness identification, erroneous forensic science, coerced confessions, police or prosecutorial misconduct, use of untruthful informants or other witnesses, and inadequate or incompetent legal assistance."[29] A wrongfully convicted individual's ability to prove the presence of one of these factors is a nearly impossible feat.[30] This issue is exacerbated by the fact that, when standing alone, proof of one of these factors will seldom be sufficiently conclusive proof of innocence.[31] These injustices thereby fail to become known.

> In consequence, the process of proving one's innocence (many times years after trial) through newly discovered evidence is so burdened with procedural restrictions that for all practical purposes no meaningful remedy exists. Ironically, it is much easier for the prosecution to obtain a guilty verdict against someone who is presumed by law to be innocent than it is for a person who is actually innocent to obtain relief after a wrongful conviction—even one based entirely on perjured testimony.[32]

The difficulties inherent in proving one's innocence are some of the most significant reasons why there are many cases where the conviction—though wrongful—cannot be proven to the level of certainty required. By

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24. *Id.*
25. *See* Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449, 452 (2001).
26. *Id.*
27. *The Causes of Wrongful Conviction*, INNOCENCE PROJECT, https://innocenceproject.org/causes-wrongful-conviction./ [https://perma.cc/5M6G-Q6N5].
28. *Id.*
29. Raymond, *supra* note 25, at 452.
30. *Id.*
31. *Id*.
32. Casale et al., *supra* note 19, at 266.

allowing procedural strains to remain intact, our justice system permits the neglect of legitimate justice. DNA exonerations have shed light on these other causes of wrongful conviction, and it is important to acknowledge the significant number of cases that do not involve biological evidence that can be genetically tested.[33] "For every case that involves DNA, there are hundreds that do not."[34] Therefore, many wrongfully convicted individuals will never be able to prove their innocence.

Each instance of unjust imprisonment occurs after the defendant was "presumably" given "a procedurally fair trial before an impartial jury, guilt was proven beyond a reasonable doubt, and appellate review found no serious legal error or evidentiary insufficiency."[35] In the eyes of our legal system, justice had been served.[36] In reality, each of these individuals was actually innocent.[37] Over hundreds of years, our justice system has implemented procedures aimed at preventing erroneous outcomes, nevertheless, the aforementioned contributing factors have resulted in many individuals being wrongfully convicted and imprisoned.[38]

Wrongfully convicted individuals bear many burdens, including the inability to afford lawyers, the passage of a lengthy amount of time, inaccessibility to the evidence necessary to establish conclusively that the conviction was erroneous, and the predisposed skepticism that already exists when an inmate claims innocence. These burdens are overwhelmingly influential in proving actual innocence. The burdens range from procedural and logistical obstacles to barriers so insurmountable they amount to closed doors instead—closed doors that eliminate any possibility of an exoneration resulting from the revelation of truth.

VI. REVERBERATING REPERCUSSIONS

Kirk Noble Bloodsworth was twenty-four years old when he received a death sentence for the rape and murder of a nine-year-old girl.[39] In 1993, biological material from the crime scene underwent DNA testing that "incontrovertibly established" that Bloodsworth was innocent.[40] While at a supermarket after being exonerated, a young girl and her mother recognized

33. *The Causes of Wrongful Conviction*, *supra* note 27.
34. *Id*.
35. *See* Casale et al., *supra* note 19, at 268.
36. *Id.*
37. *Id.*
38. *Id.* at 269.
39. *Kirk Bloodsworth*, THE NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3032 [https://perma.cc/9YJS-TL56] (last updated Oct. 6, 2021).
40. *Id.*

Bloodsworth from television. The mother immediately grabbed the girl, and told her not to "go near him."[41] In reflecting upon the incident, he stated, "No matter what happens to you, you are constantly put under this eye of distrust that you can never shake. . . . It never ends. It never ends. It never will be ended."[42]

James Richardson, another exoneree, was convicted of murdering his seven small children.[43] Losing a child is, in and of itself, unbearable; but the pain of losing seven children to murder and then being wrongfully convicted of killing them is unfathomable.[44] Being forced to deal with a wrongful conviction and subsequent imprisonment has unimaginable consequences. Assessments of these consequences have "revealed a pattern of disabling symptoms and psychological problems" that haunt the wrongfully convicted for the remainder of their lives.[45]

Simply letting wrongfully convicted individuals like Bloodsworth and Richardson out of prison does not undo the trauma they have already experienced. Exoneration will never be a proportionate remedy for wrongfully convicted individuals like Bloodsworth and Richardson, as releasing them from prison does not undo their experienced trauma. Facing a punishment for a crime not done by themselves, they also deal with the usual psychological harm that comes from prison, such as "being detained for many years, separated from loved ones, and divorced from any sense of autonomy."[46]

Psychology Professor John Wilson confirms that individuals wrongly imprisoned face a different set of psychological consequences from imprisonment versus individuals rightfully convicted.[47] Those rightfully convicted have "criminal personalities," which is not the case for the innocent.[48] The innocent are usually "normal people who by circumstance ended up in a very horrific [instance] of injustice by the criminal justice

41. Leslie Scott, *"It Never, Ever Ends": The Psychological Impact of Wrongful Conviction*, 5 AM. U. CRIM. L. BRIEF 10, 10 (2010), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1063&context=clb [https://perma.cc/LZA6-AV5U].

42. *Id.* (quoting Kirk Bloodsworth who was wrongfully convicted of the rape and murder of a nine-year-old girl).

43. Adam Wagner, *5 of the Worst Wrongful Convictions*, CRIM. ELEMENT (Oct. 6, 2016), https://www.criminalelement.com/5-of-the-worst-wrongful-convictions/ [https://perma.cc/BEF3-QHLZ].

44. *Id.*

45. Scott, *supra* note 41, at 14.

46. *Id.* at 13.

47. *Id.*

48. FRONTLINE, *Interview: John Wilson*, PBS (Dec. 10. 2002), https://www.pbs.org/wgbh/pages/frontline/shows/burden/interviews/wilson.html [https://perma.cc/Z2V5-FRB4].

system itself."[49] They are aware of this difference when entering the prison system, and this makes the usual trauma and stress even more burdensome.[50] Wilson elaborates:

> They're not a criminal mentality, they're not antisocial, they're not against society, they don't calculate to hurt people. . . . Looking at the spectrum of traumatization to their psyche—the many ways in which these injuries permeate their being—I believe that the injuries from a wrongful conviction and incarceration are permanent. I think they're permanent scars. And even though counseling and psychotherapy and treatments are helpful, I don't think you can undo the permanent damage to the soul of the person, to their sense of self, to their sense of dignity. There is no way that money or even being exonerated gives a person back what they lost.[51]

Their mental anguish after wrongful imprisonment also stems from struggling with reconnecting with friends and family members, adjusting to a world that is now foreign to them, and obtaining employment upon release.[52] Exonerated individuals often do not receive the same support that prison parolees do, such as "free job placement, temporary housing, and counseling."[53] This additional stressor compounds other difficulties they face.[54]

Many are hardened after imprisonment, and it seems that "their capacities for feeling do not exist anymore."[55] Neil Miller, another exoneree, explained how his wrongful conviction was responsible for taking his family away from him, as his marriage collapsed along with the relationship he had with his daughter.[56] Elaborating on his unhappiness, he lamented, "I feel like I am homeless. I am home, but I am not really home, because I do not know where home is."[57]

An estimated rate of two to ten percent of convictions are in error, which equates to approximately 46,000 to 230,000 innocent incarcerated people as of 2018.[58] Even a single wrongful conviction is one too many, as the occurrence in itself is unforgivable. Therefore, the criminal justice system must undergo expansive reformation to prevent these injustices from

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49. *Id.*
50. *Id.*
51. *Id.*
52. Scott, *supra* note 41, at 11.
53. *Id.* at 12 (citing Stephanie Armour, *Wrongly Convicted Walk Away with Scars*, USA TODAY, (Oct. 13, 2004), https://usatoday30.usatoday.com/money/workplace/2004-10-13-dna-exonerated-jobs_x.htm [https://perma.cc/SM6V-KXYH]).
54. *Id.*
55. *Id.* at 11.
56. *Id.*
57. *Id.*
58. Grisham, *supra* note 12.

occurring. When we see numbers—when these individuals are part of a statistic—we fail. We fail to acknowledge the gravity of the situation, how profoundly problematic it is within our criminal justice system, as well as the amount of agony that results. Behind each number, there is a human being that went through and will forever suffer an inconceivable amount of pain. Behind each number, there is a broken relationship, a broken family, or a broken human being. These individuals are completely undeserving of the hurt inflicted upon them by a system meant to protect the innocent—to protect *them*.

VII. CATALYSTS OF THESE CONSEQUENCES

An amalgamation of different forces has infected our criminal justice system, including foundational shortcomings and internal/external triggers. Consequently, these factors conjoinedly accommodate the intolerably frequent occurrences[59] of wrongful convictions and plague the administration of justice. Since 1989, the National Registry of Exonerations has recorded 3,003 cases with more than 26,700 years lost to wrongful imprisonment.[60]

> While this figure provides a general estimate, it likely understates the number of people who have been wrongfully convicted for the following reasons: (1) not every individual released from prison for a wrongful conviction is legally exonerated; and (2) not every individual who is wrongfully imprisoned receives an opportunity to have their conviction overturned.[61]

A. Foundational shortcomings

Over decades of legal reform, the law has supposedly evolved as necessitated by the demands of constitutionality. Although the law preaches constitutionality, the criminal justice system fails to acknowledge that—practically speaking—these rights are largely unattainable for those who need it most. As noble as the system holds itself out to be, the reality of the administration of justice is quite different from the way it is presented to the world.

In the landmark case of *Gideon v. Wainwright*, the Court noted, "[O]ur state and national constitutions and laws have laid great emphasis on

59. *Summary View,* NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={b8342ae7-6520-4a32-8a06-4b326208baf8}&SortField=Exonerated&SortDir=Desc [https://perma.cc/G5JZ-XJZ3] (last updated Feb. 14, 2021).

60. *Id.*

61. Chelsea N. Evans, *A Dime for Your Time: A Case for Compensating the Wrongfully Convicted in South Carolina*, 68 S.C. L. REV. 539, 548 (2017).

procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law[,]" thereafter stating this "noble ideal cannot be realized if the poor man charged with a crime has to face his accusers without a lawyer to assist him."[62] Yet the problems surrounding the rigidity of indigency determination standards seldom receive meaningful recognition.[63]

The Federal Poverty Guidelines serve as the standard by which defendants' eligibility for assigned counsel is determined and "redefine[s] what it means to be too poor to hire a lawyer."[64] This practice is inherently arbitrary and "ignores economic realities,"[65] thus requiring "defendants who are marginally indigent . . . to become indigent before counsel will be appointed."[66] As a result of these strict and unsound standards for determining indigency, defendants are effectively being denied their constitutional right to the assistance of counsel, "then forced to either represent themselves or to sell off their meager assets in order to hire a lawyer."[67] Accordingly, wrongful convictions have endured through time—despite procedural safeguards—because "justice . . . come[s] with a price tag attached to it."[68]

Even when defendants are provided with counsel, the assistance they receive rarely meets the level of constitutionally required effectiveness. The likelihood of mistakes is heightened when the defense does not evenly match up to the prosecution regarding legal necessities, "such as available time to devote to the case, training, experience, and resources."[69] Though efforts are noble, "quality defense work is simply impossible because of inadequate funding, excessive caseloads, a lack of genuine independence, and insufficient availability of other essential resources," among other problems.[70] Without providing defendants with adept counsel that can legitimately perform all the functions that representation requires, there is no protection against prosecutorial oversight, misconduct, or carelessness.

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62. John P. Gross, *Too Poor to Hire a Lawyer but Not Indigent: How States Use the Federal Poverty Guidelines to Deprive Defendants of their Sixth Amendment Right to Counsel*, 70 WASH. & LEE L. REV. 1173, 1174 (2013) (citing Gideon v. Wainwright, 372 U.S. 335, 344 (1963)).

63. *Id.*

64. *Id.* at 1218.

65. *Id.*

66. *Id.* at 1213.

67. *Id.* at 1218.

68. *Id.* at 1219.

69. Norman Lefstein, *A Broken Indigent Defense System: Observations and Recommendations of a New National Report*, HUM. RTS. MAG. (Apr. 1, 2009), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol36_2009/spring2009/a_broken_indigent_system_observations_and_recommendations_of_a_new_national_report/ [https://perma.cc/P3VW-Y9XW].

70. *Id.*

B. Internal factors

Like any human being, prosecutors generally cannot control their psychological makeup, the corresponding reactions that they have to external stimuli, and their socially dictated understandings of justice. Thus, it is even more important to recognize that the psychological makeup of a prosecutor can have a defining influence on why a prosecutor would choose to engage in other misconduct, such as withholding clearly exculpatory evidence. The failure to recognize the subjectivity of any prosecutor's psychological makeup and its determinative influence on a case is answerable for the system fostering injustice.

First, an inherent self-serving character trait likely exists in prosecutors who purposefully engage in misconduct to obtain a conviction. Seemingly, they have no regard for the guilt or innocence of the accused, only focusing on and prioritizing that which is most beneficial to the prosecutor's interests. In fact, the system can quite easily encourage this behavior by offering perverse incentives to prosecutors, such as bonuses, promotions, and success in elections.[71] The legal system has become increasingly politicized in many jurisdictions, "reward[ing] law enforcement officials for high conviction rates, rather than meting out justice."[72] When there is a high-profile conviction, more career opportunities are available to prosecutors.[73]

However, with an onus so taxing, situations arise often where prosecutors engage in misconduct without having the explicit intent to do so. In some situations, new prosecutors learn this type of behavior just because they routinely witness it.[74] One ex-prosecutor wrote about how "nobody taught [him] to think that way, and nobody had to."[75] He learned by repeatedly seeing how the senior prosecutors worked a system that was "indifferent[] and merciless[]" and watching that system "crush" clients with "minimal effort or cause."[76] He even learned from "watching prosecutors commit misconduct . . . [and] make ridiculous and bad-faith arguments [about

71. *See* Jessica Fender, *DA Chambers Offers Bonuses for Prosecutors Who Hit Conviction Targets*, DENV. POST (Mar. 23, 2011, 4:11 PM), https://www.denverpost.com/2011/03/23/da-chambers-offers-bonuses-for-prosecutors-who-hit-conviction-targets/ [https://perma.cc/Q4SV-RT9W] ("The threshold for an assistant district attorney to earn the average $1,100 reward: Participate in at least five trials during the year, with 70 percent of them ending in a felony conviction. Plea bargains or mistrials don't count.").

72. Edward P. Stringham, *Prosecutors Are Rewarded for Convictions, Not Justice*, INDEP. INST. (May 22, 2007), https://www.independent.org/news/article.asp?id=2024 [https://perma.cc/2ERM-Z7LL].

73. *Id.*

74. Ken White, *Confessions of an Ex-Prosecutor*, REASON (June 23, 2016, 10:00 AM), https://reason.com/2016/06/23/confessions-of-an-ex-prosecutor/ [https://perma.cc/8WGE-HLT4].

75. *Id.*

76. *Id.*

the Constitution or] defending law enforcement, and prevail on them. . . . [All] *because they could*, and because judges would indulge them."[77]

Another major issue increasing the risk of wrongful conviction is confirmation bias. Confirmation bias is "the tendency to seek out confirmatory information once a hypothesis is developed."[78] This causes individuals to rule out or dismiss the value of any evidence that does not back the hypothesis. This is more commonly known as *tunnel vision*—a methodology that all humans are susceptible to.[79] It is essentially "the 'compendium of common heuristics and logical fallacies' . . . that lead actors in the criminal justice system to 'focus on a suspect, select and filter the evidence that will build a case for conviction while ignoring or suppressing evidence that points away from guilt.'"[80]

Because the absence of a conviction after a criminal act is often viewed as a failure of the justice system, the role of a prosecutor coincides with an innate ambition to find the individual criminally responsible. Yet, the true concern is when this ambition begins to blur the distinction between hypothesis and reality. Unconscious biases, stemming from confirmation bias and overzealous ambition, can limit the avenues of an investigation and prevent the prosecution from legitimately considering other potential suspects.[81]

Procedural safeguards have become the new standard for justice. Although aiming for procedural fairness aids the pursuit of actual justice, it is important to remember that adherence to procedural mechanisms cannot guarantee the procurement of actual justice. Using DNA testing as an evidentiary instrument was first undertaken in 1986.[82] Now, nearly thirty-five years later, it continues to be regarded as the "gold standard in forensic science,"[83] and serves as the most effective means by which actual guilt can be confirmed. DNA testing has also shown "that so many people are innocent because of mistaken eyewitness identification, false confession, jailhouse snitch testimon[y], and . . . bad lawyers."[84] At the same time, these revelations

77. *Id.*

78. Katherine Judson, *Bias, Subjectivity, and Wrongful Convictions*, 50 U. MICH. J.L. REFORM 779, 782 (2017).

79. *Id.* at 784.

80. *Id.* (citing Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292 (2006)).

81. *Id.*

82. Celia Henry Arnaud, *Thirty Years of DNA Forensics: How DNA Has Revolutionized Criminal Investigations*, CHEM. & ENG'G NEWS (Sept. 18, 2017), https://cen.acs.org/analytical-chemistry/Thirty-years-DNA-forensics-DNA/95/i37 [https://perma.cc/4BNX-4U9z].

83. *Id.*

84. FRONTLINE, *Interview: Barry Scheck*, PBS, https://www.pbs.org/wgbh/pages/frontline/shows/case/interviews/scheck.html [https://perma.cc/ZM8L-KFLF].

should also force our criminal justice system to recognize unknown additional causes of wrongful convictions that exist and how frequent these causes may occur.[85] In consideration of the cases that do not involve biological evidence, our justice system should be extremely concerned; yet it fails to appreciate the seriousness of these systemic issues.[86]

These concerns are amplified when the "key to freedom" requires tremendous efforts to find potentially exculpatory evidence.[87] The existence of "trained incapacity" in a prosecutor has the ability to influence them into avoiding contentions, or making rash and dismissive judgment calls.[88] Trained incapacity occurs when people deflect certain ideas or theories in a way that constrains the manner in which they think.[89] It can cause an inability to think beyond what one's mind has already assumed to be true.[90] Trained incapacity is an attitude that says:

> "I don't want to look for that evidence, that's too old. It may be in some warehouse. It must have been destroyed." So I'll just say to you, "It must have been destroyed." When in fact—when we push and push and push and look harder—we find it. And that becomes the key to freedom.[91]

Wrongful conviction of an innocent individual is the complete opposite of what the criminal justice system should be responsible for. Barry Scheck from the Innocence Project says:

> We're talking about people who are actually innocent. And that has to command our respect and attention and concern unlike any other kind of case. And in fact it's quite the opposite . . . I think [prosecutors] just don't want to deal with it. They regard the exoneration of an innocent person wrongly convicted as an attack upon the system.[92]

And this mentality is exactly the reason why innocent persons are still being imprisoned.[93] Our system has placed procedural fairness on a higher ground than the actuality of somebody's innocence.[94] In doing so, the criminal justice system continues to foster injustice.

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85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* (illustrating what a prosecutor might say to a defense attorney if asked for the long buried evidence).
92. *Id.*
93. *See id.*; *see also* NAT'L REGISTRY OF EXONERATIONS, *supra* note 59.
94. FRONTLINE, *supra* note 84 ("The system is set up where we care more about procedural fairness than we do about the substance of whether somebody is really innocent.").

C. External factors

Seemingly, the criminal justice system turns a blind eye when mistakes occur.[95] There is no attempt to figure out what led to a wrongful conviction; this is essential to finding what flaws exist in the system.[96] When someone is proven innocent after being wrongfully convicted, a judge merely signs an order vacating the conviction with no opinion provided, and that is the end of the matter.[97] In contrast, when a potential malpractice issue confronts hospitals, or manufacturers face a potential product liability issue, the issue is taken very seriously.[98] Employees are called in, evaluations are made, and reports are written up—all to identify the problem and the best possible solution.[99] "But in the criminal justice system when you have the ultimate error, the conviction of an innocent person, they just cut an order and there's no analysis" of this complete system failure.[100] Our justice system must recognize the severity of a wrongful conviction and the systemic issues that led to the occurrence. The system must thereafter react in accordance with the magnitude of this failure to prevent another injustice in the future.

Public perception is another aspect deserving consideration when looking at the influences of wrongful convictions. When the evilness of a crime increases, so does the prosecutorial motivation to convict.[101] This is likely because the nature of a crime is decisive when evaluating the risk of error.[102] A correlation exists "between the heinousness of a crime and erroneous evidence," which results from the prosecution playing a huge part in evidence production.[103] As noted by analysts Phillips and Richardson, this conclusion is not surprising.[104]

> It is understandable that police officers, prosecutors, and state crime labs shift into overdrive in response to horrendous crimes. How could state actors *not* be moved by the rape, torture, and strangulation of an elderly woman who was out for an evening stroll? . . . [Or] the annihilation of an entire family of small children just to rob the home of a few dollars? Such . . . [instances] do not produce dispassionate

95. *See id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. Scott Phillips & Jamie Richardson, *The Worst of the Worst: Heinous Crimes and Erroneous Evidence*, 45 HOFSTRA L. REV. 417, 446 (2016).
102. *Id.*
103. *Id.*
104. *Id.* ("[O]ne of the root causes of wrongful conviction is the seriousness of the crime: police and prosecutors are under pressure to pursue serious crimes even if the evidence is questionable, and serious crimes often produce questionable evidence.").

> responses. . . . But shifting into overdrive can lead to a high-speed crash. High-speed crashes also cause more damage and take longer to repair, as each additional evidentiary problem prolongs the time that a defendant spends behind bars before being exonerated.[105]

A prosecutor is immediately placed under a spotlight because the public perceives this individual as the powerful authority responsible for the procurement of justice. Accordingly, a "long, frustrating, unsuccessful investigation" can be, and often is, comparable to a "humiliating public failure."[106] These emotions can be substantially intensified if a prosecutor is answerable for a wrongful conviction, as she or he harmed the innocent without bringing the guilty to justice.

For some prosecutors, a guilty verdict defines justice.[107] Instead, a commitment to justice should premise charging decisions.[108] When prosecutors are "influenced by [their] desire to inflate the success rate of the office or [their own professional] success rate," justice is not served.[109] Prosecutorial motivation should not stem from conviction rates, as their true responsibility is only to seek justice.[110] Many legal scholars have noted that substantive justice cannot truly be defined, but that is not the case when it comes to procedural justice.[111] Distinctly delineated procedural rules are a sharp contrast from this inability to define substantive justice. Procedural justice is equivalent to following these given guidelines, and that conclusion remains the same regardless of whether it led to a substantively unjust outcome. Our criminal justice system needs to be reformed in a manner that prioritizes substantive justice and aligns procedural guidelines in a way that safeguards that outcome.

VIII. NOTORIETY THAT CAN NO LONGER BE IGNORED

Today, a significant portion of society recognizes that our system is broken and stands against misconduct stemming from judicial authority. Therefore, the time has come for this country to commit to the resolution of the institutional issues that plague the world of jurisprudence. The breadth of discretion that is available to prosecutors is essentially autonomous, and

105. *Id.* (emphasis added).

106. Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFFALO L. REV. 469, 478 (1996).

107. Catherine Ferguson-Gilbert, Comment, *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, 285–86 (2001).

108. *Id.*

109. *Id.*

110. *Id.* at 308.

111. *Id.*

recent tragedies have shown that the prosecutorial handling of a case is almost always determinative of its outcome.

A. Ahmaud Arbery

On February 23, 2020, three white men engaged in an elaborate chase in pursuit of Ahmaud Arbery, a twenty-five-year-old black man out jogging in Brunswick, Georgia.[112] The men hit Arbery "with a truck as he tried to escape them," eventually shooting and killing him.[113] Two of these men were Gregory and Travis McMichael, a father and son, who commenced the series of events that transpired.[114] The McMichaels were then joined by another white man, their neighbor, and all three men continued to chase Arbery before killing him.[115] The third man was William Bryan Jr., who recorded a disturbing video of Arbery's murder.[116] Until this video of the incident surfaced online—provoking widespread outrage—there were few public developments.[117]

Beginning in 1995, Gregory McMichael was an investigator for the district attorney's office until he retired in 2019.[118] Immediately after the shooting, the McMichaels were not arrested "allegedly because of instructions from [former] District Attorney Jackie Johnson, who served in that role [from] 2010 [to 2020]."[119] Johnson had an ethical duty to report that she had a conflict of interest with the defendants; yet, she waited four days to do so after giving the case to District Attorney Paul Barnhill from another jurisdiction.[120] According to Georgia law, Johnson did not have the authority to give away cases on her own, but she requested this case still be transferred

112. Eliott C. McLaughlin, *Ahmaud Arbery Was Hit with a Truck Before He Died, and His Killer Allegedly Used a Racial Slur, Investigator Testifies*, CNN (June 4, 2020, 10:44 PM), https://www.cnn.com/2020/06/04/us/mcmichaels-hearing-ahmaud-arbery/index.html [https://perma.cc/V6X8-BQNJ].

113. *Id.*

114. *Id.*

115. Eliott C. McLaughlin & Devon M. Sayers, *Guilty Verdicts in the Trial of Ahmaud Arbery's Killers Met With Relief and Joy in Georgia and Beyond*, CNN (Nov. 24, 2021, 9:34 PM), https://www.cnn.com/2021/11/24/us/ahmaud-arbery-killing-trial-wednesday-jury-deliberations/index.html [https://perma.cc/H4S4-5F5A].

116. *Id*.

117. Sarah Mervosh, *Ahmaud Arbery Video Was Leaked by a Lawyer Who Consulted With Suspects*, N.Y. TIMES (May 8, 2020), https://www.nytimes.com/2020/05/08/us/ahmaud-arbery-video-lawyer.html [https://perma.cc/E6WL-2XKW].

118. David L. Hudson Jr., *Prosecutorial Ethics Are in the Spotlight After the Death of Ahmaud Arbery*, A.B.A. J. (July 16, 2020, 11:00 AM), https://www.abajournal.com/web/article/prosecutorial-ethics-are-in-the-spotlight-after-the-shooting-of-ahmaud-arbery [https://perma.cc/3LRD-53YF].

119. *Id.*

120. *Id.*

to Barnhill.[121] What she did not divulge, however, was that she had employed Barnhill's son in the past, and one of the cases they had worked on together—along with Gregory McMichael—involved prosecuting Arbery back when he was in high school.[122] This was a conflict of interest that required disclosure and recusal, yet Barnhill did not disclose it until April 7, 2020—weeks after he "provided a . . . written opinion to the . . . subsequent prosecutor, insisting there were no grounds to arrest the McMichaels."[123]

It was not until September 2, 2021, that some semblance of accountability came into existence.[124] The ex-Brunswick district attorney had been under investigation for her failure to bring forth charges after the killing of Arbery, and Johnson was finally indicted for her misconduct.[125] It was found that "she [had] used her position to shield the men who chased and killed Ahmaud Arbery from being charged with crimes," and—in doing so—had "violat[ed] her oath of office and hinder[ed] a law enforcement officer."[126]

Further, on November 24, 2021, all three men were found guilty and convicted of murder.[127] The state secured a guilty verdict on all charges presented to the jury for the case against Travis McMichael, who pulled the trigger on Arbery.[128] The charges were "malice murder, four counts of felony murder, two counts of aggravated assault, false imprisonment and criminal attempt to commit a felony."[129] Gregory McMichael was found guilty of the same charges except malice murder.[130] Finally, William Bryan Jr., was convicted of "three counts of felony murder, one count of aggravated assault, false imprisonment, and criminal attempt to commit a felony."[131] All three men were sentenced to life in prison, with the McMichaels' sentences being

121. *Id.*
122. *Id.*
123. *Id.*
124. Ariel Zilber, *Georgia DA Is Indicted for Obstructing Cops in Ahmaud Arbery Murder Case After She 'Blocked the Arrest of Her Former Investigator and His Son'*, DAILY MAIL (Sept. 2, 2021, 10:36 PM), https://www.dailymail.co.uk/news/article-9952731/Ex-prosecutor-indicted-misconduct-Ahmaud-Arbery-death.html [https://perma.cc/WJ4P-SH65].
125. *Id.*
126. *Id.*
127. McLaughlin & Sayers, *supra* note 115.
128. *Id*.
129. *Id*.
130. *Id*.
131. *Id*.

without the possibility of parole.[132] In addition to the state convictions, the three men were convicted of various hate crimes at the federal level.[133]

Prosecutorial misconduct has a pronounced, often determinative impact on an investigation, as evidenced here. Perhaps in response to the prosecutors' misconduct in in the Arbery case, a bill was introduced in the Georgia legislature to create a commission to supervise the state's district attorneys.[134] The bill would have empowered the commission to discipline district attorneys for misconduct.[135] Had the bill passed and the commission formed, prosecutors might have been more judicious in how they handle cases.[136] One commentator believes that an oversight commission of this kind "could have a significant effect in deterring, disclosing and remedying prosecutorial misconduct, . . . [which would] be the first of its kind in the nation."[137] It is not hard to wonder why states are so hesitant to make oversight directives to encourage heightened accountability of their prosecutors. It is easier to question whether the handling of this case would have received this level of scrutiny had such extensive media coverage and social outrage not occurred.

B. Breonna Taylor

After midnight on March 13, 2020, Louisville, Kentucky officers broke down the front door of an apartment with a "no-knock" narcotics warrant to search the residence.[138] The apartment belonged to Breonna Taylor, a twenty-six-year-old black woman who was with her boyfriend Kenneth Walker.[139] Believing that the individuals breaking in were intruders, Walker responded to police ramming down the door with a single gunshot.[140] It remains disputed whether the officers knocked a few times, announced themselves, and waited for approximately a minute to "give them a chance to answer the door."[141] The other narrative is that Taylor and her boyfriend's repeated requests for

132. Press Release, Dep't of Justice, Federal Jury Finds Three Men Guilty of Hate Crimes in Connection with the Pursuit and Killing of Ahmaud Arbery (Feb. 22, 2022), https://www.justice.gov/opa/pr/federal-jury-finds-three-men-guilty-hate-crimes-connection-pursuit-and-killing-ahmaud-arbery [https://perma.cc/CV3Z-ZRE9].

133. *Id*.

134. Hudson Jr., *supra* note 118.

135. *Id.*

136. *Id.*

137. *Id.*

138. *See* Dylan Lovan & Piper Hudspeth Blackburn, *Recordings Reveal Confusion Behind Breonna Taylor's Death*, AP NEWS (Oct. 2, 2020), https://apnews.com/article/breonna-taylor-louisville-shootings-archive-kentucky-0d4713571ce932ff0d526d10472ad5b6 [https://perma.cc/EZ84-HTJX].

139. *Id.*

140. *Id.*

141. *Id.* (quoting a police officer).

the men at the door to identify themselves were ignored and the officers simply began to hit the door with the battering ram to get inside the apartment.[142] However, investigators determined conclusively that Detective Myles Cosgrove shot sixteen bullets into Breonna Taylor's home.[143] Six of these rounds shot Taylor, causing her death.[144]

The prosecution presented the grand jury in this case with only three charges of "wanton endangerment" against one officer involved in the incident, and it was not Cosgrove.[145] According to one juror, the grand jury was told no additional charges were going to be presented to them "because the prosecutors didn't feel they could make them stick."[146] This information was disclosed after Judge Annie O'Connell allowed the juror's statements to be made public. A second juror then corroborated the statements.[147] Kentucky Attorney General Daniel Cameron subsequently confirmed the jurors' public statements. He maintained that the two officers not charged had used a "justifi[able]" amount of force and all the evidence was still presented.[148]

A lawyer for Taylor's family, Sam Aguiar, claimed that "Cameron should be ashamed of himself" and the "political agenda" that motivated his decisions.[149] Aguiar further added that Cameron's abuse of the system had been exposed, and "Breonna Taylor's family deserves and is entitled to a prosecutor committed to doing the job with morals, ethics and a commitment to the law."[150] It is common knowledge in the legal world that a grand jury determines if there is enough evidence for an indictment, which is not a high burden of proof to meet.[151] Prosecutors are able to present the facts in their chosen narrative, and these grand juries "almost always end with an indictment."[152] After all, prosecutors could even persuade a grand jury to "indict a ham sandwich," Judge Sol Wachtler once quipped.[153]

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142. *Id.*

143. *Id.*

144. Andrew Wolfson et al., *A Shadowy Figure, an 'Ambush': Officers Give Jumbled Accounts of Night Breonna Taylor Died*, USA TODAY (Oct. 5, 2020, 9:41 AM), https://www.usatoday.com/story/news/nation/2020/10/04/breonna-taylor-grand-jury-recordings-what-police-told-investigators/3619610001/ [https://perma.cc/D6Q8-CKCA].

145. Ray Sanchez & Elizabeth Joseph, *A Second Breonna Taylor Grand Juror Says Panel Wasn't Given a Chance to Consider Homicide Charges*, CNN (Oct. 22, 2020, 10:39 PM), https://www.cnn.com/2020/10/20/us/breonna-taylor-grand-juror-ruling/index.html [https://perma.cc/D6Q8-CKCA].

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. Cody Nelson et al., *Grand Juries, Explained*, MPR NEWS (Jan. 24, 2018, 7:02 PM), https://www.mprnews.org/story/2018/01/24/grand-jury-explain [https://perma.cc/V762-7H3S].

152. *Id.*

153. *Id.*

Due to the Taylor case coming to such a disappointing close at the state level, as well as the widespread attention that the case continued to receive, federal authorities finally intervened. Thereafter, U.S. Attorney General Merrick Garland opened a Justice Department civil investigation into Kentucky's Louisville Government and Metro Police Department "to assess whether [the police department] engages in discriminatory policing."[154] The goal is to ascertain constitutionality and lawfulness in policing practices, which requires "law enforcement officers to treat all people fairly and equitably, regardless of race, disability, or participation in protected First Amendment activities."[155]

Overall, the prosecution's failure to allow grand jury consideration of all applicable charges in the case of Breonna Taylor highlights the need for and importance of prosecutorial accountability. With grand jury information usually kept secret, allowing jurors to speak publicly is incredibly rare. If Judge Annie O'Connell refused to release the grand jury's statements in the Taylor case, people would wonder if the prosecution consciously failed to present other charges. Further, it would be unclear whether there was categorically insufficient evidence to establish the probable cause necessary for an indictment.

When it comes to prosecutors' employment of their broad discretion, the lack of oversight and transparency is fundamentally answerable for the cultivation of societal distrust in the criminal justice system. Concurrently, due to the widespread media coverage and societal outrage that resulted from the killing of Mr. George Floyd, society witnessed a different outcome: the administration of true justice.

C. George Floyd

On May 25, 2020, George Floyd, a forty-six-year-old black man, was arrested by police officers in Minneapolis, Minnesota.[156] Police arrested Floyd after he allegedly used counterfeit money to purchase cigarettes at a convenience store.[157] While arresting him, officers restrained him in a manner

154. Press Release, Dep't of Justice, Department of Justice Announces Investigation of the Louisville/Jefferson County Metro Government and Louisville Police Department (Apr. 26, 2021), https://www.justice.gov/opa/pr/department-justice-announces-investigation-louisvillejefferson-county-metro-government-and [https://perma.cc/SV5U-4CDW]; *see* Merrick B. Garland, Att'y Gen., Office of the Att'y Gen., U.S. Dep't of Justice, Attorney General Merrick B. Garland Delivers Remarks at Announcement of Pattern or Practice Investigation into the Louisville Police Department (Apr. 26, 2021).

155. *Id.*

156. Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html [https://perma.cc/JV7K-FWR9].

157. *Id.*

that rendered him unconscious.[158] Videos confirmed the officers blatantly disregarded department policies.[159] A white officer "kept his knee on Mr. Floyd's neck for at least eight minutes and 15 seconds, . . . [and] did not remove his knee even after Mr. Floyd lost consciousness" and paramedics arrived.[160]

Shortly after ten members of the state legislature expressed concern about the county prosecutor's impartiality, Governor Tim Walz appointed Attorney General Keith Ellison as the lead prosecutor for cases arising from the death of George Floyd.[161] Walz stated that "our constituents, especially constituents of color, have lost faith in the ability of [the county prosecutor] to fairly and impartially investigate and prosecute these cases."[162] Upon appointment, Ellison accentuated his strong commitment to the pursuit of justice, truth, and accountability, saying there would be no hesitation to ensure "[e]very single link in the prosecutorial chain [came] under attack."[163] After the nationally broadcasted and closely watched trial came to an end, the jury "found former Minneapolis police officer Derek Chauvin guilty . . . of unintentional second-degree murder, third-degree murder, and second-degree manslaughter"—every count Chauvin was charged with by the state.[164]

D. Paving the way for change.

The proper prosecutorial handling of the George Floyd case is something that all district attorney offices must aim to mirror.[165] The widespread dissemination of information relating to criminal matters today has brought many issues to the surface—some that many did not even realize existed. The hunger for justice and accountability led to inescapable societal pressure on law enforcement. The social outrage that followed the deaths of Ms. Taylor in Louisville and Mr. Floyd in Minneapolis at the hands of law enforcement prompted federal investigations into these cities' police

158. *Id.*
159. *Id.*
160. *Id.*
161. Alex Johnson, *Minnesota Attorney General to Take Over Prosecutions in George Floyd's Death*, NBC NEWS (May 31, 2020, 8:12 PM), https://www.nbcnews.com/news/us-news/minnesota-attorney-general-take-over-prosecutions-george-floyd-s-death-n1220636 [https://perma.cc/KER3-XRCE].
162. *Id.*
163. *Id.*
164. Laurel Wamsley, *Derek Chauvin Found Guilty of George Floyd's Murder*, NPR NEWS (Apr. 20, 2021, 5:37 PM), https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/04/20/987777911/court-says-jury-has-reached-verdict-in-derek-chauvins-murder-trial [https://perma.cc/334L-Q7WY].
165. *See id.*

departments.[166] Thus, having an open dialogue about these injustices could lead to legislators finally noticing the severity of these systemic issues; and therefore, pave the way towards enacting some profound changes within the system.

There is an undeniable need "to bring substantive reform to the system"[167] and resolving these systemic defects would be holistically beneficial. Legislative and systemic reform could eventually lead to the deterrence of misconduct in the criminal justice system. Heightening prosecutorial accountability will prevent injustices—not just those within the realm of prosecutorial authority, but misconduct by *all* state actors.

IX. REMEDYING THE INEFFABLE RAMIFICATIONS OF INJUSTICE

Heightening prosecutorial accountability would help the justice system prevent the frequency of wrongful imprisonment.[168] Accordingly, there would be better means to prevent punishment of the undeserving, to uphold justice for victims by catching the real perpetrators, and to prompt the public to develop "greater confidence in the system."[169] When misconduct that stems from within the criminal justice system leads to the deprivation of someone's life, civil rights, or liberties as a human being, legal redress is utterly indispensable—even though it will never undo the injustice that has occurred. Yet, by undergoing the necessary reform to ensure these injustices do not occur in the first place, the criminal justice system would prevent the need for redress entirely.

A. Formation of Conviction Review Units in Prosecutor's Offices

When asked how much confidence they had in the criminal justice system in 2021, 39% of Americans said they had *very little*.[170] Thus, public distrust in the judicial system has reached a point where the necessity of addressing it is irrefutable.[171] As a likely collateral, yet positive outcome of this tension, the creation of Conviction Review Units (CRUs) is on the rise

166. Jess Clark, *DOJ to Probe Louisville Police in Response to Breonna Taylor's Death*, NPR NEWS (Apr. 27, 2021, 5:07 AM), https://www.npr.org/2021/04/27/991117906/doj-to-probe-louisville-police-in-response-to-breonna-taylors-death [https://perma.cc/S6U3-HR94].

167. *Exonerate the Innocent*, INNOCENCE PROJECT, https://www.innocenceproject.org/exonerate/ [https://perma.cc/BP3G-KHUW].

168. *Policy Reform*, INNOCENCE PROJECT, https://www.innocenceproject.org/policy/ [https://perma.cc/G4F5-5XHP].

169. *Id.*

170. Megan Brenan, *Americans' Confidence in Major U.S. Institutions Dips*, GALLUP (July 14, 2021), https://news.gallup.com/poll/352316/americans-confidence-major-institutions-dips.aspx [https://perma.cc/DUS6-9FDC].

171. *See id.*

in recent years. A CRU "conducts extrajudicial, fact-based review of secured convictions to investigate plausible allegations of actual innocence."[172] Reviewing cases where actual innocence is alleged "ha[s] always been a part of a prosecutor's job," yet the scrutiny employed can be inherently partial.[173] Bias is inherent in the practice of prosecutors reviewing the convictions of individuals that their own departments have convicted. Moreover, considering all the matters that prosecutors are already responsible for, it is extremely difficult for them to give each of these cases the amount of time and dedication that is required of actual innocence review.

Creation of public standalone CRUs that are separate from the prosecutorial divisions of the district attorney's office have started to gain publicity—"there is a ground swell of support" for CRUs.[174] An independent CRU can pave the way for strengthening the public's faith in the criminal justice system, as it would dedicate "100% of its time and resources" to investigating claims of innocence.[175] The publicizing of CRUs has also led to a push for the creation of CRUs in other jurisdictions. The University of Pennsylvania Law School's Quattrone Center for the Fair Administration of Justice recently created a website to help guide prosecutors in the creation of CRUs.[176] The website's objective is to provide prosecutors who have CRUs with resources to promote "high standards of independence, flexibility, and transparency."[177] The most important distinction between prosecutorial review through post-conviction appellate litigation and implementation of CRUs stems from the collaborative nature of the latter; thus, by eliminating the innate adversity of litigation, CRUs are able to "truly improve the functioning of the criminal justice system."[178] Done right, CRUs can prevent future errors and promote fairness in the system.[179]

The necessity of post-conviction review, independent from the prosecutor's office, is further realized when considering the disparity of power and resources between prosecutors and criminal defense attorneys. Although prosecutorial offices have attempted to conduct their own reviews of claims alleging innocence and wrongful conviction, the innate partiality of

172. John Hollway, *Conviction Review Units: A National Perspective,* FAC. SCHOLARSHIP PENN. L. 1614 (Apr. 2016) [https://perma.cc/JQ9X-VXUW].

173. *Id*.

174. *Id.* (citing a prosecutor in Dallas County, TX).

175. *Id.*

176. *See* Olivia Haynie, *Quattrone Center Launches Website to Help Prosecutors Establish Wrongful Conviction Units,* THE DAILY PENNSYLVANIAN (Mar. 30, 2021, 9:34 PM), https://www.thedp.com/article/2021/03/penn-quattrone-center-wrongful-convictions-website [https://perma.cc/PE78-9WMF].

177. *Id.*

178. *See* Hollway, *supra* note 172, at 75.

179. *Id.*

the process does not align with one of the most significant foundations of our criminal justice system. Our legal system is, in part, founded upon the notion that defendants are entitled to the assistance of counsel. This assumption of fairness in the legal system is entirely dependent upon having counsel that can competently protect the rights of the individual defendant, while also ensuring that prosecutors are not taking advantage of the power that they hold. Yet, there are many practical obstacles that prevent defendants from being constitutionally protected. Most importantly, court-appointed defense counsel and public defender offices are largely overworked, underfunded, and limited on resources and time. This leads to obvious disparities when it comes to their ability to defend a client to the very best of their ability. As a result, the power of a wrongfully convicted prisoner is essentially nonexistent when compared to prosecutorial authority.

B. State Efforts to Hold Prosecutors Accountable

The next step in accomplishing a change of such large-scale importance is to hold prosecutors much more accountable for misconduct. The ABA's recognition of the need for reform is apparent by the addition of paragraphs (g) and (h) to the rule stating a prosecutor's post-conviction duties pertaining to exculpatory evidence.[180] State bars, however, fail to hold their prosecutors to this standard. Inadvertent mistakes by prosecutors are not the only occurrence that should be subject to blame. The amount of power prosecutors hold is indisputable, yet our country is founded upon the ideals of checking and balancing the power of governmental entities. There are many different avenues of doing so that were crafted during the evolution of our criminal justice system. Of these avenues, I believe that increased accountability at the state level is the most beneficial and impactful starting point.

Though American jurisprudence often recognizes the importance and power of prosecutors, it neglects to acknowledge the potential for abuse of that power. Generally, statutes that attempt to remedy this issue do not provide necessary sanctions to prevent these mistakes. Without statutes mandating legitimate ramifications for prosecutorial negligence, carelessness, and misconduct, our legal system will fail to provide adequate deterrence. Practically speaking, the preaching and preservation of the ethical rules does not afford a legitimate solution when prosecutors are rarely disciplined. Thus, this preservation "becomes a meaningless gesture unless those few irresponsible prosecutors . . . are culled from the prosecutorial

180. *See* MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N 2008).

herd."[181] There has to be a "higher ethical standard for prosecutors than for other attorneys engaging in trial practice" in order to achieve legitimate deterrence of prosecutorial misconduct; however, prosecutors frequently managing to escape disciplinary action has the exact opposite effect.[182]

Moreover, individuals wrongfully convicted are unaware that there are model rules that should inform a prosecutor's actions; therefore, the wrongfully convicted consequently fail to file complaints with the state bar. Increased awareness is necessary, alongside an imposition holding prosecutors to a higher standard of accountability. However, for these changes to gain any traction, the aid of other actors in the legal system is indispensable. Judges must require strict adherence to all evidentiary and procedural requirements—even the smallest acts of leniency can have devastating impacts on the liberty of another. Thus, the Judicial Code should be amended to guide reactive measures when some form of prosecutorial misconduct or noncompliance takes place.

Amelioration of these problems can be accomplished by adding a rule to the Code of Judicial Conduct. This rule should require a judge ordering the release of someone wrongfully imprisoned to simultaneously reverse their conviction and notify the state bar. In doing so, state bars will have better insight into whether the criminal proceedings within their state are operating ethically. Such awareness of any troubling occurrences is essential to recognize problems that need addressing.

Strict enforcement of these rules pertaining to all lead actors of the criminal justice system is necessary at every level of investigation and prosecution. This uniform accountability must be applied in a standardized manner to all individuals holding law enforcement positions, as this is the only manner in which misconduct or inadvertent negligence can be identified and remedied before a conviction.

Our system cannot ignore any discovered missteps, especially given the rarity of truly disciplining prosecutorial misconduct. Where misconduct is suspected and proven, corrective measures must be implemented, and specific consequences must be mandated for any violations. These penalties should correlate with the intentionality of the at-fault individual and the gravity of the conduct's actual and/or potential consequences.

181. HARRY P. CARROLL & WILLIAM C. FLANAGAN, MASSACHUSETTS PRACTICE SERIES: TRIAL PRACTICE § 1:16 (3rd ed. 2021) (discusses ethical advocacy and holding prosecuting attorneys to a higher ethical standard).

182. *Id.*

C. Prosecutorial Oversight Committees

Rules exist limiting the discretion of a prosecutor, yet prosecutors are not monitored adequately enough. This is evidenced by the frequency of wrongful convictions stemming from prosecutorial misconduct. This lack of oversight also means that the system is unaware of the frequency of mistakes and misconduct. Though there have been attempts to implement after-the-fact reviews of wrongful conviction claims, this form of review must take place in concurrence with investigation and prosecution. It is time for unbiased prosecutorial oversight to become part of each stage of the criminal prosecution process.

Alleviating this issue can be accomplished if each state bar has a subcommittee that monitors prosecutors for violations, before and after a conviction. In doing so, any misconduct, especially of a kind that relates to wrongful convictions, could not only be recognized, but also be recognized *earlier*. If each state bar required that prosecutors be monitored in real-time by these subcommittees, prosecutorial misconduct relating to exculpatory evidence would be mitigated. Further, unintentional mistakes would be lessened by having an extra set of eyes on any new evidence that becomes known. Consequently, prosecutors would be considerably more wary when dealing with new evidence that is potentially exculpatory or mitigating. This would naturally result from recognizing that carelessness can lead to dire professional consequences.

Committees that are solely for prosecutorial oversight must be established so that every American jurisdiction is accounted for. Oversight of a few jurisdictions may be feasible, dependent upon a committee's respective caseload, jurisdictional populations, as well as the availability of resources. In addition, these oversight committees should perform a concurrent review of the district attorney's tasks. As best stated by the Supreme Judicial Court of Massachusetts:

> The district attorney is the officer charged with the duty of enforcing the law in his district by bringing offenders to trial and securing their conviction and punishment. The office of district attorney is one of the most important offices in the Commonwealth. The primary duty of all government—the protection of life and property—depends upon the efficient, capable, and honest performance of the duties of this office. Those duties are in very large part quasi-judicial. They are of the most delicate nature. They demand of the holder of the office the exercise of a high degree of discretion and sensitive moral judgment upon the conduct of others. The public good requires that such an office be held by a man capable of keen and accurate discrimination between right

> and wrong and of firm determination not to allow himself to stray from the course of upright and honorable conduct.[183]

Oversight committees should be comprised of properly vetted former/retired law enforcement employees. Their review should be completely randomized, and each review should involve a thorough inspection of the district attorney's office operations. Frequent and randomized inspections will prevent potential carelessness stemming from predictability, and thereby will ensure constant vigilance.

Further, the procedures should require any errors to be reported to the state bar or other regulatory judicial authority. Errors should be classified by their behavioral nature, such as deliberate, careless/reckless, or negligent conduct. These reports should also reflect the seriousness of the mistake or violation, i.e., extremely negligent vs. moderately reckless. Moreover, all relevant, factual details must be disclosed, as the record needs to be thorough to foster true, substantive justice. By reporting these occurrences to the designated regulatory authority, the criminal justice system will be much less likely to overlook details that could have devastating consequences on an individual's liberty. Additionally, this reporting will result in institutional identification of what offices are probably being overworked, in need of more resources, or both.

Creation of these committees would allow review and investigation to occur simultaneously, while also becoming a procedural mechanism that checks the integrity of a district attorney's office. By engaging a neutral, independent commission responsible for oversight, prosecution will become much less flawed. Additionally, this implementation would encourage prosecutors to reconsider their own thought processes, as prosecutors will inevitably be mindful of how any careless or reckless conduct will be reprimanded accordingly. Holistically, the criminal prosecution process would become much less prone to error if these changes were manifested through large-scale systemic reform.

X. CONCLUSION

A wrongful conviction can result from purposeful prosecutorial misconduct, unintentional oversight, or unconscious influences that created some form of systemic bias. Claiming that only prosecutors are responsible for wrongful convictions is an ignorant assertion. There are huge pitfalls throughout our entire criminal justice system. Negligence, bias, and pitfalls regularly work in conjunction when a wrongful conviction results. Practices and regulations have been created as attempts to manifest the true meaning

183. Attorney Gen. v. Flynn, 120 N.E.2d 296, 301–02 (Mass. 1954).

of justice in our criminal justice system. Systemic reform, however, is far from reach right now, and this contention is supported by the overwhelming societal outrage occurring repeatedly in our country.

To develop preventative measures, we must distinguish whether prosecutorial and systemic bias deliberately or negligently dictates decision-making in the criminal justice system. Regardless, the motivation, or lack thereof, behind a grave miscarriage of justice is immaterial to the outcome, because—irrespective of intentionality—the trauma inflicted upon a wrongfully convicted individual will be of the same magnitude.

Conclusively, a wrongful conviction's lasting effects on an individual can never truly be remedied. Notwithstanding this unforgivable truth, many systemic faults need to be addressed to lessen the frequency of wrongful convictions. Implementing a change of this magnitude requires a herculean effort, and only concerted actions can lead to reformation that prevents injustices from taking place. Perhaps, if this were accomplished, imprisonment of the innocent would no longer plague this nation's criminal justice system.