The Missing Link: How Prosecutors Contribute to the Carceral System and Why They Must be Included in the Abolition Movement

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INTRODUCTION

In 2020, the continued police killings of Black people led to an increased call for defunding the police force.[1] The "sudden" rise of the Defund Movement came as the video of police officer Derek Chauvin kneeling on the neck of George Floyd went viral.[2] As the Defund Movement grew, it led to confusion and disagreement about its end goal. Is the mission to reform or abolish the police? Those firmly rooted in the reform camp often use the "bad apple" theory to support a reformist approach.[3] They claim that weeding out "bad apples" and implementing trainings, such as implicit bias training, will lead to systemic reforms substantial enough to remedy police misconduct and brutality.[4] However, like many organizers, scholars, and practitioners have noted, reform is not a viable option.[5] The police and carceral systems legally operating in the United States are rooted in white supremacy and the enforcement of slavery.[6] No amount of training or reforms can fix a system that was built to ensure the oppression and

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1. Eliza Collins, *Calls to Cut Funding for Police Grow in Wake of Protests: Push to Redirect Funding Toward Other Public Services Gains Momentum as Congress, Policy Makers Unveil Law-Enforcement Reforms,* WALL ST. J., June 9, 2020.

2. *See* Mychal Denzel Smith, *Incremental Change is a Moral Failure: Mere Reform Won't Fix Policing*, THE ATLANTIC, Sept. 15, 2020.

3. *See* Somil Trivedi & Nicole Gonzalez Van Cleve, *To Serve and Protect Each Other: How Police-Prosecutor Codependence Enables Police Misconduct*, 100 B.U. L. REV., 895, 902 (2020).

4. *Id.* Police misconduct is not limited to police brutality and killings. It includes tampering with evidence, obtaining evidence illegally, mistreating witnesses and suspects, and providing improper evidence to prosecutors, among other things. *See* Mariame Kaba, *To Stop Police Violence, We Need Better Questions – and Bigger Demands*, GEN MEDIUM, Sept. 25, 2020. Police brutality is a redundant phrase since it is impossible to separate violence from policing. This Note uses the phrase "police brutality" to avoid confusion and meet readers where they are at in their abolition journey.

5. *E.g.*, Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES, June 12, 2020 (noting that reform efforts have failed for centuries); Smith, *supra* note 2 (arguing that the skillset of police includes arresting, killing, and locking people in cages but does not include solving issues such as poverty, mental illness, and joblessness).

6. Kaba, *supra* note 5.

erasure of Black people.[7] The only way forward is to abolish the current police and carceral systems in the United States and begin anew.

The ideas and theories of defund, reformist reforms, and abolition have been around for decades, and advocates such as Angela Davis and Ruth Wilson Gilmore have been outspoken proponents for abolition.[8] The abolitionist movement does not conform to one clear definition.[9] Its identity has taken on many different definitions and encompasses a wide array of ideologies, systems, and methods.[10] For this Note, the abolitionist framework focuses on the carceral system. The carceral system relies on carceral logic which refers to using punishment as a means of reinforcement.[11] In the United States, the carceral system is traditionally carried out through the prison industrial complex.[12]

The abolitionist movement seeks to tear down the carceral systems existing in today's society, including the police force, mass incarceration, and the death penalty.[13] The abolitionist framework envisions a world where those systems are no longer needed because people have access to their basic human needs including affordable housing, living wages, and access to healthcare and mental health facilities.[14] Successfully implementing the structures required for an abolitionist society requires removing funding from police forces, to which billions of dollars go each year, and investing that money into community resources including housing, food, and education.[15] Activist and organizer Mariame Kaba summed up the abolition movement in stating, "[Abolitionists] have a vision of a different society, built on cooperation instead of individualism, on mutual aid instead of self-preservation."[16]

A lot of effort has been dedicated to exposing police misconduct by those seeking to reform or abolish the current system of carceral logic. Scholars, academics, victims, and advocates have written about police bias, excessive use of force, over-policing, and lack of public safety.[17] Organizers have written to their

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7. *See id.*

8. *See* Bill Keller, *What Do Abolitionists Really Want?*, THE MARSHALL PROJECT, (June 13, 2019), https://www.themarshallproject.org/2019/06/13/what-do-abolitionists-really-want [https://perma.cc/C8L6-RMLW].

9. *See* Sean Illing, *The "Abolish the Police" Movement, Explained by 7 Scholars and Activists,* VOX, (June 12, 2020), https://www.vox.com/policy-and-politics/2020/6/12/21283813/george-floyd-blm-abolish-the-police-8cantwait-minneapolis [https://perma.cc/NBV3-Y88E].

10. *See id.*

11. Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 4-5 (2019).

12. *See id.* at 7-10.

13. *Id.* at 4-5.

14. *The Future of Policing*, THE MARSHALL PROJECT, (Oct. 23, 2020), https://www.themarshallproject.org/2020/10/23/the-future-of-policing [https://perma.cc/QHP8-TL7T].

15. Kaba, *supra* note 5.

16. *Id.*

17. *E.g.*, Robin Smyton, *How Racial Segregation and Policing Intersect in America*, TUFTSNOW, June 17, 2020, (quoting Daanika Gordon, Assistant Professor of Sociology at Tufts University, discussing how Black communities "are simultaneously over-policed when it comes to surveillance and social control, and under-policed when it comes to emergency services."); Elizabeth Hinton et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. JUST. 7, (2018) (showing that police biases lead to more Black individuals being stopped, searched, and arrested).

legislators demanding the police budget be redistributed to other areas of need like education.[18] The public has used social medial platforms to bring awareness to incidents of police violence and carceral punishment more broadly.[19] While there is a relatively good understanding of the relationship between police conduct and the carceral system, there is relatively less research on prosecutors' role in the carceral system. This crucial missing link is often overlooked in the abolition movement. It begs the questions—how do prosecutors enable police misconduct and where does the abolition movement leave the role of the prosecutor?

Prosecutors contribute to the carceral system through their actions independent from policing as well as their actions in conjunction with and reliance on the police force. This Note will focus on the latter, arguing that prosecutors enable police misconduct through their unique relationship with police and thereby act as an additional hand on the "chokehold" which oppresses the rights and dignity of Black people in America.[20] As a result, prosecutors have a direct tie to maintaining the carceral logic, and it is critical to evaluate the prosecutorial function within the abolitionist framework. Part I of this Note will focus on the history of the carceral system, prosecutors in the United States, and the standards to which prosecutors are held. Part II will focus on the unique relationship between the prosecutor and the police. Part III will address the disparate impact of prosecutorial misconduct on Black communities. Finally, Part IV will present solutions for reevaluating the role of prosecutors in the advancement of the abolition movement.

I. HISTORY OF THE CARCERAL SYSTEM, PROSECUTORS AND PROSECUTORIAL STANDARDS

Part I will begin with a look at the history of the carceral system and prosecutors in the United States. The Note will first identify the roots of the carceral system and its impact on the foundation of the American prosecutorial system. That will be followed by a discussion on how the American system is distinguished from its English predecessor and identify how those changes impact modern prosecutorial functions. Finally, this section discusses the current standards that guide prosecutorial actions and discretion and how these standards aid prosecutorial misconduct.

A. HISTORY OF THE CARCERAL SYSTEM

The United States is a fervent proponent of carceral logic. Its roots trace back to the origins of the United States when colonizers brutally tortured and enslaved

18. *See* Kaba, *supra* note 5.

19. *See* Brooke Auxier, *Social Media Continue to be Important Political Outlets for Black Americans*, PEW RESEARCH CTR., Dec. 11, 2020.

20. *See* PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 11-12 (2017).

Indigenous and Black people.[21] The tenets of the carceral system—police, prisons, and capital punishment—have always been a means of controlling Black bodies.[22] The first police force was a slave patrol, responsible for monitoring the activity of enslaved persons to ensure they did not try to escape or rebel.[23] The purpose of monitoring and enforcing enslavement by overseers was to establish a racial hierarchy in the form of white supremacy.[24]

A modern version of slavery enforcement can be seen in the United States' prison system today. The United States leads the world in prison density—sending the highest number of people to prison compared to any other country in the world.[25] Over the last forty years, the United States' prison population has increased 500 percent, with an estimated 2.2 million people incarcerated today.[26] The incarceration statistics demonstrate the carceral system's continued preservation of racial and classist hierarchies. The expansion of the carceral state throughout the twentieth century has disproportionately affected marginalized populations. In the United States, white people make up sixty-four percent of the population but only forty percent of the correctional population.[27] Compare that to Black people who make up thirteen percent of the general population but thirty-nine percent of the correctional population; Latinx people who make up sixteen percent of the population and nineteen percent of the correctional population; and Native Americans who make up 0.9 percent of the general population but one percent of the correctional population.[28] Embedded in these statistics is the fact that prosecutors necessarily play a role in the disparate prison demographic since they choose who to charge and what to charge defendants with.

B. HISTORY OF PROSECUTORS

The idea of criminalizing certain behavior through the legal system is not new; it dates back to the influences of colonial England and was adopted by the colonies when they gained independence.[29] The American system differs from its English ancestor in that it adopted a public prosecution system,[30] and it comprises a federal prosecution system as well as a state prosecution system.[31] While certain

21. *See* Roberts, *supra* note 11, at 4.

22. *Id.*

23. Kaba, *supra* note 5.

24. Roberts, *supra* note 11, at 22.

25. Criminal Justice Facts, THE SENTENCING PROJECT, https://www.sentencingproject.org/criminal-justice-facts/ [https://perma.cc/SLN8-ZYDM] (last visited Apr. 13, 2021).

26. *Id.*

27. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POLICY INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/4A6L-QNC8]. These numbers come from the 2010 census which was the most recent census available when published.

28. *Id.*

29. *See* John. L. Worrall, *Prosecution in America a Historical and Comparative Account*, ST. U. N.Y. PRESS, ALB., 5 (2008).

30. *Id.*

31. *See* Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1530 (2012).

procedural and substantive elements of the American legal system can be traced back to its English ancestry, the role of the district attorney and the decentralized state system of prosecution is distinctly American.[32] Federal prosecutors have been, and remain, appointed government officials.[33] American prosecutors, however, have not always served a public role.[34] States experimented with different versions of prosecution in their early days, and ultimately, a system of public prosecution prevailed.[35]

The first public state prosecutors to exist were appointed, not elected.[36] The move to elected state prosecutors was the result of public demand for greater accountability, though some argue the reasoning goes well beyond that.[37] The public's desire for increased accountability, which partly helped create elected prosecutors, was an unrealistic expectation since prosecutorial decisions are rarely a matter of public record.[38] Some argue that the shift was the result of the government's financial interest in trying criminal cases, while others argue that the shift occurred to ensure that "respectable" classes were responsible for suppressing crime.[39] This theory is supported by evidence in today's criminal legal system where white men incarcerate Black people at disproportional rates. In the United States, ninety-five percent of prosecutors are white and seventy-five percent are men.[40] Compare this to the disproportionate incarceration of Black people in the United States. Black people are incarcerated at triple the rate of white people,[41] and of those serving life sentences, almost half are Black.[42]

The historical grounds American prosecution was built on do not promote accountability or public safety. Looking at the history of prosecutors and their roles as public officials, the shift to elect them was meant as a means of greater

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32. Worrall, *supra* note 29, at 6.

33. Ellis, *supra* note 31, at 1530.

34. Worrall, *supra* note 29, at 6.

35. *See* Worrall, *supra* note 29, at 7; Carolyn B. Ramsey, *The Discretionary Power of Public Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1311 (2002).

36. Worrall, *supra* note 29, at 7.

37. *See* Ramsey, *supra* note 35, at 1327-28 (noting that financial incentives for citizens to bring claims as well as the desire to have "respectable classes" of citizens suppressing crime were prominent reasons public prosecution prevailed).

38. Angela J. Davis, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR, OXFORD UNIV. PRESS, 11 (2007) (noting prosecutorial discretionary decisions tend to remain a secret).

39. Ramsey, *supra* note 35, at 1327-28. *See* Steve Martinot, *The Racialized Construction of Class in the United States*, 27 SOC. JUSTICE 43, 43-45 (2000) (discussing the history of race-based classifications in the United States placing white people at the top).

40. Ryan J. Reilly, *Elected Prosecutor Are Still Overwhelmingly White and Male*, HUFFPOST (Oct. 2019), https://www.huffpost.com/entry/elected-prosecutors-diversity_n_5db1b486e4b0131fa99ad093 [https://perma.cc/9L2Z-JJ8V].

41. Terry-Ann Craigie, *et. al.*, *Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality*, BRENNAN CTR. JUSTICE (Sept. 2020), https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal [https://perma.cc/2MPV-VV57].

42. *Id.*

accountability,[43] but their status as elected officials has only been detrimental to enforcing accountability and has instead resulted in prosecutors being less likely to enforce charges against police and more likely to incarcerate Black people.[44]

C. PROSECUTORIAL STANDARDS AND RESULTING DISCRETION

Former Attorney General and Supreme Court Justice Robert Jackson once said, "The prosecutor has more control over life, liberty and reputation than any other person in America."[45] The immense discretion that prosecutors wield is largely due to the lack of standards and limited guidelines enforced upon them. The current standards which guide prosecutorial conduct are derived from the American Bar Association, judicial precedent, and congressional legislation.

1. ABA GUIDELINES

The American Bar Association (ABA), a private organization that describes itself as "the national representative of the legal profession"[46] has released ethics standards for varying legal practice areas and practitioners, including standards for prosecutors. The *Model Rules of Professional Conduct* established by the ABA, and adopted by most jurisdictions, give guidance on attorney conduct. Of the nearly sixty *Model Rules* established by the ABA, only one of the *Model Rules* addresses prosecutorial conduct directly, Rule 3.8: Special Responsibilities of a Prosecutor. Model Rule 3.8 states, in part, the following:

> (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
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> (g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
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> (1) promptly disclose that evidence to an appropriate court or authority, and
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> (2) if the conviction was obtained in the prosecutor's jurisdiction,
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> (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

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43. *See supra* Part I.B.

44. *See* Asit S. Panwala, *The Failure of Local and Federal Prosecutors to Curb Police Brutality*, 30 FORDHAM URB. L.J. 639, 656 (2003).

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

46. *About the American Bar Association*., The Am. Bar Ass'n, https://www.americanbar.org/about_the_aba/ [https://perma.cc/H5JL-BAZ6].

> (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
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> (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.[47]

Unfortunately, the current ABA standards are not legally enforceable; they simply act as a guideline. Prosecutors are not required to follow the ABA standards, and if they do not, there are no repercussions attached.[48]

2. JUDICIAL STANDARDS

In addition to the ABA *Model Rule* guidelines, judicial precedent provides few standards for prosecutorial behavior.[49] These rulings and subsequent standards are unique because they provide a potential avenue of relief for the victim but no disciplinary action against the prosecutor.[50] The Supreme Court has identified a set of standards outlined over a series of cases. In *Brady v. Maryland*, the Court held "that suppression by the prosecution of evidence favorable to an accused *upon request* violates due process where the evidence is material either to guilt or to punishment."[51] The Court extended its decision in *Brady* to include materially exculpatory evidence that was not requested by the defendant.[52] Notably, the Court said the following, "[i]f the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."[53] This alarming language emphasizes the lack of accountability placed on prosecutorial misconduct.

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47. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2018).

48. *Criminal Justice Standards, Prosecution Function*, A.B.A. ("Because the Standards for Criminal Justice are aspirational, the words 'should' or 'should not' are used in these Standards, rather than mandatory phrases such as 'shall' or 'shall not,' to describe the conduct of lawyers that is expected or recommended under these Standards.").

49. *See* Brady v. Maryland, 373 U.S. 83, 87-88 (1963) (requiring that prosecutors turn over material evidence to defense counsel upon request).

50. *See, e.g., Brady*, 373 U.S. at 83 (1963) (holding that the prosecutor's withholding of evidence violated due process while making no note of prosecutorial consequences).

51. *Id.* at 87 (emphasis added).

52. U.S. v. Agurs, 427 U.S. 97, 107 (1976). Evidence is considered material if there is "reasonable probability" that failure to disclose such evidence would have resulted in a different outcome such that it undermines the confidence of the given outcome. U.S. v. Bagley, 473 U.S. 667, 682 (1985); The burden of materiality is higher on defendants. *Agurs*, 427 U.S. at 112 (noting "[u]nless every nondisclosure is regarded as automatic error, the constitutional standard of materiality must impose a higher burden on the defendant.").

53. *Agurs*, 427 U.S. at 110.

3. LEGISLATIVE STANDARDS

Prosecutors are also "constrained" by 42 U.S.C. § 1983.[54] Under Section 1983, parties may not bring claims against judicial actors acting within their judicial capacity.[55] In effect, this shields prosecutors from being prosecuted and excuses them for failing to bring charges against police officers.[56]

The culmination of these so-called standards gives prosecutors immense discretion with little to no threat of accountability. Prosecutors are one of, if not the, most powerful positions in the criminal legal system.[57] They are responsible for charging defendants, and often have more say in the defendant's sentencing than the judge assigned to the case.[58] Moreover, prosecutors have nearly unlimited discretion to make charging decisions and almost no accountability for those decisions.[59] Even in instances where their decisions are challenged and subsequently overturned, prosecutors rarely face repercussions for their misconduct.[60] In theory, judges can admonish them, sanction them, and report them to disciplinary authorities.[61] In reality, prosecutors are rarely held personally accountable for their actions. Only one prosecutor in the history of the American prosecutorial system has ever been jailed for misconduct leading to a false conviction.[62] Moreover, of those who have engaged in misconduct resulting in a wrongful conviction, only a handful have had their license revoked.[63] This Note does not advocate for increased prosecutor imprisonment, but it highlights the failure of the current system to curb prosecutorial misconduct.

II. THE UNIQUE PROSECUTOR-POLICE RELATIONSHIP

The police-prosecutor relationship has developed over centuries of interlocking, overlapping responsibilities and shared missions. The resulting relationship

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54. *See* 42 U.S.C. §1983 (2018); *See e.g.*, Connick v. Thompson, 563 U.S. 51 (2011).

55. 42 U.S.C. § 1983 (2018).

56. Trivedi & Gonzalez Van Cleve, *supra* note 3, at 931. For a discussion of 42 U.S.C. § 1983's protection of prosecutorial misconduct, see *infra* Part II.B.

57. Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 FORDHAM L. REV. 8, 12 (2018).

58. *Research Finds Evidence of Racial Bias in Plea Deals*, EQUAL JUSTICE INITIATIVE, (Oct. 26, 2017), https://eji.org/news/research-finds-racial-disparities-in-plea-deals/ [https://perma.cc/2AVH-5L86] (explaining that prosecutors are responsible for making initial charges, and therefore, determining what, if any, mandatory minimum sentences apply. In addition, they have the power to set the starting point for plea bargaining by determining the initial charges).

59. *See* DAVIS, *supra* note 38, at 11, 23.

60. *See* Daniele Selby, *Only One Prosecutor Has Ever Been Jailed for Misconduct Leading to a Wrongful Conviction*, THE INNOCENCE PROJECT (Nov. 11, 2020), https://innocenceproject.org/ken-anderson-michael-morton-prosecutorial-misconduct-h [https://perma.cc/58U4-G79Q].

61. Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 829 (1999).

62. Selby, *supra* note 60.

63. *Id.*

magnifies prosecutorial misconduct and compounds the miscarriages of justice carried out against Black communities and individuals. This is why the abolition movement must include the elimination of prosecutors. The following section outlines the development of prosecutors' reliance on police and the resulting misconduct committed by prosecutors.

A. DEVELOPMENT OF PROSECUTORS' RELIANCE ON POLICE

The carceral system relies on a series of enforcement mechanisms throughout the lifecycle of a case. The American judicial process was created in such a way that siloed responsibilities between police departments and prosecutors, such that no official accountability or oversight exists between the two organizations.[64] Rather, the relationship between police and prosecutors is one of horizontal alignment, lacking a hierarchical dimension, where neither has power or authority over the other.[65] Because of this structure, there is no functioning accountability system set up between the two.[66] The relationship between the police and the prosecutor is "disparate but interlocking."[67]

Even though no formal accountability system exists for police and prosecutor relationships, they are heavily dependent upon one another and work closely on a daily basis.[68] The two parties are required to work together to obtain what has become a hypocritical goal of the current legal system: justice. For a person to be held accountable for an alleged crime, police must investigate the crime, collect evidence, and often act as witnesses. Prosecutors are responsible for using the evidence collected by police to charge the defendant and either make a plea deal or bring the case to trial. Prosecutors, in their current form, cannot function without the help of the police.[69]

Police are responsible for initial investigations and arrest of suspects, and in this capacity, operate entirely autonomously from the prosecutor.[70] Police then hand over the case to the local prosecutor to try the case as the prosecutor sees fit.[71] Prosecutors may consult police officers, but they have no control over police protocol.[72] In reality, throughout the lifespan of a case, prosecutors and police will collaborate a great deal. They depend on each other to see a case from its

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64. David A. Harris, *The Interaction and Relationship Between Prosecutors and Police Officers in the U.S., and How This Affects Police Reform Efforts*, OXFORD UNIV. PRESS, 1, 1, (2011).

65. Daniel C. Richman, *Law Enforcement Organization Relationships*, THE OXFORD HANDBOOK ON PROSECUTORS AND PROSECUTION, RONALD WRIGHT, RUSSELL GOLD & KAY LEVINE, EDS., 2019, FORTHCOMING; COLUMBIA PUBLIC LAW RESEARCH PAPER NO. 14-616 (2019).

66. *See id*. at 1.

67. Harris, *supra* note 64, at 1.

68. *See* Erwin Chemerinsky, *The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles*, 8 VA. J. SOC. POL'Y & L., 305, 305 (2001).

69. *See id*.

70. Harris, *supra* note 64, at 1.

71. *Id*.

72. *See id*. at 2.

initial investigatory phase through to the sentencing phase.[73] Police officers do not have the authority to convict criminals, nor do they have the ability to sentence them.[74] After an arrest and before incarceration, prosecutors are responsible for bringing charges against defendants on behalf of the state.[75] In this role, prosecutors are given a wide berth of discretion regarding against whom to bring cases and which charges to prosecute.[76] In this capacity, they act as the conductor that keeps the carceral system's train on its tracks.

B. RESULTING MISCONDUCT

Prosecutors fail to charge police officers for their misconduct and brutality for three main reasons: 1) they do not want to jeopardize their relationship with the police force, whom they rely on for evidence in cases; 2) most prosecutors are elected officials and do not want to risk their chances at re-election by being known as someone who is tough on cops; 3) it is incredibly difficult to successfully bring a claim of police misconduct against an officer.[77] None of these reasons, however, are rooted in justice.

Prosecutors, as well as police, engage in misconduct after a defendant's arrest.[78] The study below found that prosecutors engaged in misconduct in thirty percent of cases and police in thirty-five percent of cases.[79] This misconduct results from, and is exacerbated by, the lack of accountability produced by the unique relationship shared between the police and prosecutors. Due to this unique relationship, prosecutors are reluctant to provide information regarding police misconduct to defense attorneys for fear of retaliation from the police force.[80] This incestuous relationship leads to a compounding of misconduct throughout the lifespan of a case and an overall lack of accountability resulting in impediments to a defendant's right to a fair trial.

"If prosecutors are to uphold their roles as ministers of justice, they must investigate and prosecute all police officers accused of wrongdoing."[81] Unfortunately, this truth is made infinitely harder by the fact that no guidelines, including the ABA Model Rules and judicial precedent, exist that signal when prosecutors should move forward with police brutality cases.[82] Police and prosecutors are often shielded by Section 1983 either because it makes it exceedingly difficult for citizens to bring successful cases against them or because prosecutors do not face

73. *See id.*
74. *See id.* at 1.
75. *See* Richman, *supra*, note 65, at 2.
76. *See supra* note Part I.C.
77. Panwala, *supra* note 44, at 643; *See* Harris, *supra* note 64.
78. *See infra*, Part III.B.
79. Samuel R. Gross, et al., *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police, and Other Law Enforcement*, NATIONAL REGISTRY OF EXONERATIONS, iv, (2020).
80. Trivedi & Gonzalez Van Cleve, *supra* note 3, at 905, 912; *see infra* Part III.B.
81. Panwala, *supra* note 44, at 639, 640.
82. *Id.* at 640.

disciplinary action when they choose not to advance charges against police officers.[83] In an example given in *The Failure of Local and Federal Prosecutors to Curb Police Brutality*, from 1992, the Los Angeles District Attorney's office received 382 referrals over the course of ten years regarding police misconduct.[84] Out of those 382 referrals, only one deputy from the Los Angeles Sheriff Department was prosecuted.[85] Another example includes police officer Derek Chauvin who was convicted of second and third-degree murder and second-degree manslaughter in the death of George Floyd.[86] Over Chauvin's two-decade career with the Minneapolis Police Department, he received seventeen complaints against him but was never charged or prosecuted.[87]

The instances of prosecutorial misconduct extend well beyond the cases that garner mass media attention. John Thompson was sentenced to death and spent fourteen years on death row for murder after he elected not to testify at trial because of a past robbery conviction.[88] Only weeks before he was set to be executed, his robbery charge was overturned after a private investigator found a lab report that the prosecutor never disclosed to Thompson's defense counsel.[89] The evidence was a lab report of blood evidence found at the scene of the robbery, which identified the perpetrator's blood as Type B.[90] The prosecutor had failed to inform defense counsel of this evidence and never tested Thompson's blood type, which is O.[91] After Thompson's robbery charge was overturned, the district attorney retried Thompson for murder; the jury found him not guilty after thirty-five minutes of deliberation.[92]

Thompson then sued the Orleans Parish district attorney, Harry Connick, claiming that he violated 42 U.S.C. § 1983 for failing to train his prosecutors as evidenced by the prosecutor's failure to inform defense counsel of the blood evidence or take a sample of Thompson's blood.[93] The Supreme Court held that Thompson failed to prove Connick acted with "deliberate indifference" under § 1983, even though Louisiana Courts had previously overruled four convictions due to *Brady* violations that occurred under Connick's supervision as district attorney.[94] Here, as in many cases, Section 1983 barred Thompson's recovery and shielded Connick from accountability. The *Connick* decision emphasizes how the

83. Trivedi & Gonzalez Van Cleve, *supra* note 3, at 931.

84. Panwala, *supra* note 44, at 640.

85. *Id*. at 641.

86. John Eligon et. al., *Derek Chauvin Verdict Brings a Rare Rebuke of Police Misconduct*, N.Y. TIMES, Apr. 20, 2021.

87. Shaila Dewan & Serge F. Kovaleski, *Thousands of Complaints Do Little to Change Police Ways*, N.Y. TIMES, May 30, 2020.

88. Connick v. Thompson, 563 U.S. 51, 53-54 (2011).

89. *Id*. at 56.

90. *Id*. at 55.

91. *Id*. at 55-56.

92. *Id*. at 90. (Ginsburg, J., dissenting).

93. *Connick*, 563 U.S. at 54.

94. *Id*. at 62-64.

current "accountability" measures for prosecutors are insufficient to bring about change.[95]

These examples demonstrate how the American prosecutorial system emboldens police misconduct. In doing so, prosecutors perpetuate the carceral logic and signal that the underlying racist structures on which the police force was built and which continues to criminalize and brutalize Black people is legally permissible.

III. THE DISPARATE IMPACT ON BLACK PEOPLE RESULTING FROM PROSECUTORIAL DISCRETION AND BIAS

Since the modern criminal legal system is a derivative of the slave patrol,[96] it is not surprising that the harmful and brutal effects of this system are directed at Black and marginalized communities. The following section outlines how the legal system subjects Black people to harsher outcomes than their white counterparts. The section will begin with a discussion of implicit racial bias. It will then discuss how implicit bias effects prosecutorial and police functions, leading to disproportionate carceral punishments for Black individuals.

A. IMPLICIT BIAS

Implicit racial bias is a cognitive process through which information is categorized and internalized in racially biased ways, even if the person is unaware that it is occurring.[97] Priming is a term that refers to "how expos[ure] to photos, symbolic representations, or members of stereotyped groups [can] activate a vast network of stereotypes" within the brain.[98]

B. INITIAL CHARGING

Prosecutors maintain a great deal of discretion. This is especially true when filing initial charges.[99] Sentencing times, including mandatory minimum sentences for particular crimes, are governed by criminal statutes enacted by the legislature.[100] A study conducted by Sonja B. Starr and M. Marit Rehavi, found that Black men were twice as likely as white men similarly situated to be initially charged with a crime that carried a mandatory minimum

95. David Kennan, et. al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct,* 121 YALE L. J., 203, 204 (2011).

96. *See supra* Part I.A.

97. Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 797 (2012).

98. *Id*. at 798.

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

100. Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C.L. Rev. 1187, 1196 (2018).

sentence.[101] Further, their study uncovered that initial charging discrepancies led to further otherwise-unexplained racial discrepancies in the sentencing phase.[102]

The initial charging phase asks two questions. First, should a prosecutor charge or release the potential defendant?[103] Second, if the prosecutor chooses to charge the defendant, with what crime should the defendant be charged? Each of these questions can be tainted by implicit racial bias.[104] With regard to the first question, Robert Smith and Justin Levinson give the example of a shooting that occurs in a parking lot.[105] In this example, two men get into an altercation in the parking lot. One of them (Man 1) reaches into his pocket, making the other man (Man 2) think that he is reaching for a gun.[106] At that time, Man 2 reaches for his own gun and shoots Man 1.[107] When speaking to the prosecutor, the suspect, Man 2, contends that he was acting in self-defense.[108] The prosecutor now has a decision to make. If the prosecutor believes that Man 2 was acting in self-defense, the prosecutor is less likely to charge him.[109] If the prosecutor is unconvinced, he may be more likely to charge him.[110] The race of both the victim and the suspect will play a role in the prosecutor's ultimate decision of whether or not to charge the suspect, potentially entirely unbeknownst to the prosecutor.[111]

Research, including the Implicit Association Test (IAT), finds that the majority of Americans associate more negative words with Black people such as "aggressive," "unpleasant," and "lazy."[112] The IAT also shows that "the vast majority of Americans implicitly associate Blacks with weapons and whites with harmless objects."[113] These implicit racial biases play a role in police officers' identification of the facts of a case and the prosecutor's ultimate charging decision. Consider how the outcomes of the parking lot hypothetical differ when the victim is Black and the suspect white compared to when the victim is white and the suspect Black. With unfettered discretion, prosecutors make it very difficult to account for and remedy the implicit bias that pervades prosecutorial decisions.

Implicit bias also plays a role when prosecutors determine which crime to charge a defendant with. In the example above, a prosecutor could charge the defendant with manslaughter or a charge carrying a lesser sentence.[114] These initial

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101. Starr & Rehavi, *supra* note 99, at 29.

102. *Id*. Study found that even after adding controls to the model, a ten percent sentencing gap existed between Black and white defendants that could not be attributed to the accounted for variables.

103. Smith & Levinson, *supra* note 97, at 806.

104. *Id*.

105. *See id*. at 807.

106. *Id*.

107. *Id*.

108. *See id*.

109. *See id*.

110. *See id*.

111. *Id*. at 807-08.

112. *Id*. at 802.

113. *Id*. at 807.

114. *Id*.

charging decisions will affect both the defendant and the prosecutor's actions and decisions as the case evolves.

In some instances, the crime that a prosecutor chooses to charge a defendant with could be a matter of life or death. While a jury ultimately decides whether a defendant is convicted or not, prosecutors hold the power to seek the death penalty against the defendant.[115] Importantly, prosecutors' initial charging decision is based on evidence obtained from the police.[116] This evidence has already been tainted by police bias and misconduct.[117] Prosecutor's implicit racial bias combined with police-manipulated evidence leads to Black people being more likely to be charged, more likely to be charged with more serious crimes, and more likely to serve longer sentences.[118]

The research outlined in a report from the National Registry of Exonerations exemplifies the impact that prosecutorial misconduct has across racial divides. Black exonerees are slightly more likely to have suffered from prosecutorial misconduct compared to white exonerees (fifty-seven percent compared to fifty-two percent).[119] The gap widens for exonerees originally convicted of murder with Black exonerees being fourteen percent more likely to have suffered from prosecutorial misconduct.[120] Of those, cases that carried a capital punishment sentence were especially pronounced, with a nineteen percent difference.[121] The largest gap between Black and white exonerees is seen in drug crime cases, where Black exonerees were twenty-five percent more likely to be the victim of prosecutorial misconduct.[122] Alarmingly, the study found that prosecutors engaged in misconduct in thirty percent of cases.[123] "Prosecutors were responsible for most of the concealing of exculpatory evidence and misconduct at trial and a substantial amount of witness tampering."[124] The study also found that police officers were engaging in behavioral misconduct in thirty-five percent of cases.[125] Police "were responsible for most of the witness tampering, misconduct in interrogation, and fabricating evidence – and a great deal of concealing exculpatory evidence and perjury at trial."[126] The disturbing results of this study demonstrate how the current legal system's corruption results in racially discriminatory outcomes. This corruption is unfixable because the system was built to oppress Black people and

115. *Id*. at 813.
116. *See* Chemerinsky, *supra* note 68, at 315.
117. *See* Gross, *supra* note 79, at 28.
118. *See* Timothy Williams, *Black People Are Charged at a Higher Rate Than Whites. What if Prosecutors Didn't Know Their Race?,* N.Y. TIMES, June 12, 2019, (describing the results of studies conducted in Wisconsin and San Francisco).
119. Gross, *supra* note 79, at 11.
120. *Id*.
121. *Id*. at 28.
122. *Id*.
123. *Id*. at 12.
124. *Id* at iv.
125. *Id* at 12.
126. *Id* at iv.

communities.[127] The only way forward is to overhaul the system, recognizing the important role prosecutors play in maintaining that system and why they must be included in the abolition movement.

IV. PROPOSED SOLUTIONS

Shifting prosecutorial standards is not a novel concept. Efforts have been made to improve accountability measures, create better transparency, and decrease bias within the system.[128] Even with these efforts, problems persist because just as with cops, the problem is not "bad apple" prosecutors. The problem is the system from which the prosecutorial mechanism is derived. Suggested trainings such as implicit bias trainings have proven not to work in other sectors, such as the police force.[129] While these studies tend to show that people have more of an awareness of implicit bias after implicit bias trainings, they fail to show that an accompanying behavior change results.[130] There is no reason to think the impact on prosecutors would be any different.

Including prosecutors in the abolition movement is the only way to effectively alleviate the burden they place on individuals in need of justice and enhanced public safety. When the only option is to dismantle the entire organizational structure of an entity, it is worth considering that the entity is not worth salvaging. In an abolitionist society, the current function of prosecutors within the existing carceral system would not exist. In place of this, a re-imagined role would arise, which would eliminate prosecutors and create a position better suited to work within an abolitionist society. This section proposes solutions implementable on the road to abolition and follows with proposals fit for an abolitionist society.

A. PROGRESSIVE PROSECUTORS ARE NOT THE ANSWER

There has been an emergence of progressive prosecutors over the last decade in response to new voter awareness of issues within the criminal legal system.[131] The idea of a "progressive prosecutor" is inconsistent with the abolitionist movement and unrealistic in practice. Progressive prosecutors are those who run on more "progressive" platforms including ending mass incarceration, bail reform, lessening minor drug charges, etc., with the hope of "bringing fairness and racial equity to our criminal justice system."[132] Progressive prosecutors' goals are to reform the system from the inside out. They make promises to the effect of

127. *See supra* Part I.A.

128. *See infra* Part IV.A (discussing "Blind Charging" programs) and Part IV.B (discussing implementation of *Brady* Lists).

129. *See* Martin Kaste, *NYPD Study: Implicit Bias Training Changes Minds, Not Necessarily Behavior*, NPR, Sept. 10, 2020, (discussing the effects of implicit bias training in the New York Police Department).

130. *Id*.

131. *See* Sam Reisman, *The Rise of the Progressive Prosecutor*, LAW 360 (Apr. 7, 2019), https://www.law360.com/articles/1145615/the-rise-of-the-progressive-prosecutor [https://perma.cc/3NMT-V2WV].

132. Davis, *supra* note 57, at 12.

prosecuting fewer nonviolent and drug-related crimes and getting tough on police misconduct.[133] As an example, in San Francisco, the District Attorney's office is one of the first to implement blind charging.[134] With blind charging, the prosecutor does not have access to a person's race, name, address, or other identifying information until they have made an initial charging decision.[135] The idea is to "'enhance fairness.'"[136] There have not been results of this study yet, but it leaves out a critical part. Evidence given to prosecutors for charging purposes has already been tainted by the police.[137] The evidence cannot be said to be immune from racial bias or other faulty police conduct.

Additionally, the current system is not set-up to support progressive prosecutors' missions. State's Attorney Marilyn J. Mosby filed charges against the officers involved in the death of Freddie Gray.[138] Gray died from a severed spinal-cord injury sustained after police arrested and shackled him and then failed to fasten his seatbelt while in transport – a requirement under department policy.[139] While many in the community lauded Mosby for using her position to enact change, the momentum did not last.[140] The first three officers were acquitted, after which Mosby declared that she was "professionally compelled" to drop the remaining charges against the three other officers.[141] Implicit in this statement is that there is a system in place that prevents accountability from being served against those who have committed wrongdoing under the guise of law enforcement.

Even when progressive prosecutors are elected to office, they do not have free rein to overhaul the current criminal legal system. Given the entrenched loyalist relationship between the prosecutor and police, even if guidelines were amenable to change, it would not be enough to absolve the system of its deep-seated problems. For this reason, progressive prosecutors cannot be the solution.

B. HARM REDUCTION MEASURES AND NON-REFORMIST REFORMS

One goal of abolition is to create avenues of opportunities for individuals to obtain the services they need, rather than criminalizing people for not adjusting to

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133. Richard A. Oppel Jr., *These Prosecutors Promised Change. Their Power is Being Stripped Away*, N.Y. TIMES, Nov. 25, 2019.

134. Williams, *supra* note 118.

135. *Id.*

136. *Id.*

137. *See supra* Part III.B.

138. *The Paradox of "Progressive Prosecution*," 132 HARV. L. REV. 748, 748. (2018).

139. Doug Donovan & Mark Puente, *Freddie Gray Not the First to Come Out of Baltimore Police Van with Serious Injuries*, BALT. SUN, Apr. 23, 2015.

140. *The Paradox of "Progressive Prosecution*," *supra* note 138, at 749.

141. *Id.* (Deciding that after a judge had reviewed the evidence and disagreed that the level of action or inaction used by the officers rose to the level of criminality required, there was such a low probability that the remaining defendants' outcomes would be different); *see Transcript: State's Attorney Marilyn Mosby on the Dropped Charges*, BALT. SUN, July 27, 2016.

and coping in a capitalistic, white-supremacist society.[142] These services and resources include things such as social workers, access to healthcare and rehabilitation facilities, housing advocates, and mental health professionals. Prosecutors are not trained in these areas, and as such, should not be given additional resources to try and wear all of these hats at once.[143] "The best thing prosecutors can do for people who need services is get out of the way."[144] The resources currently going toward prosecutors' offices should be funneled into the services listed above. They should be funneled to organizations that are trained in each respective field and who are actively engaging with the community to provide essential services.

This Note advocates that abolishing prosecutors is one end goal of the larger abolition movement. However, the process of abolition will not occur overnight. The following reforms are reformist reforms, meaning they are solution proposals to be implemented on the road to abolition, but they are not enough to solve the issue in its entirety.[145]

1. *BRADY* LISTS: RELEASE REPORTS ABOUT POLICE MISCONDUCT AND BRUTALITY

Every prosecutor's office has a different way of managing its docket and keeping track of police misconduct.[146] Previous authors have discussed the impact of prosecutorial discretion and how implementing guidelines would help alleviate some police misconduct.[147] One recommendation is to force disclosure of relevant evidence, including evidence of police misconduct, to defense counsel as a way to narrow the scope of *Brady* misconduct practices.[148] Another similar solution that has been implemented in many jurisdictions is the use of *Brady* Lists, which list officers whose conduct potentially undermines the integrity of the case.[149] The officers included on *Brady* Lists have a "histor[y] of falsifying reports, fabricating or tampering with evidence, lying on the witness stand, coercing witnesses, brutalizing people, accruing misconduct lawsuits or complaints, blatant racism, and more."[150] Implementing this solution benefits individual defendants and the system more broadly. Its focus is to track instances and

142. *See* Roberts, *supra* note 11, at 4-5.

143. *See Abolitionist Principles & Campaign Strategies for Prosecutor Organizing*, CMTY. JUSTICE EXCH., https://www.communityjusticeexchange.org/en/abolitionist-principles [https://perma.cc/S9ZL-4AYM] (last visited Apr. 15, 2021).

144. *Id.*

145. *See* Amna A. Akbar, *Demands for a Democratic Political Economy*, 132 HARV. L. REV. 90, 101-02 (2018).

146. Roberts, *supra* note 11, at 7.

147. *See* Chemerinsky, *supra* note 68, at 318.

148. *See id.*

149. Dan Barrett, *Brady Lists Track Police with Credibility Issues. We're Requesting the Lists.,* ACLU CONN., (Sept. 18, 2020), https://www.acluct.org/en/news/brady-lists-track-police-credibility-issues-were-requesting-lists [https://perma.cc/63M4-PWSQ].

150. *Id.*

patterns of police misconduct and brutality, as well as ensure that defendants are given a fair trial.[151] The downside is that it does not proactively change the landscape of police and prosecutorial misconduct.

Even though there are guidelines in place which suggest prosecutorial disclosure, such as the ABA calling for prosecutors to make timely disclosures to defense counsel regarding evidence that would mitigate the offense, the ABA rules are not legally enforceable.[152] One issue with current *Brady* Lists is they are not always made available to the public.[153] Following from this idea, this Note proposes a monthly report released to the public identifying issues of police brutality and misconduct. The purpose of the report is both proactive and reactive.

This solution has not been implemented in any cities in the United States to date. The registry serves three purposes: 1) by keeping a record and exposing the misconduct, prosecutors are better positioned to present evidence to the legislature regarding why laws should be changed to account for police misconduct and to create a system that holds them more accountable; 2) the exposure of police misconduct will educate the public by demonstrating how often behavior of misconduct occurs and what the consequences are. This evidence is not often aired on the news or written about unless its consequences are so severe and captured on video. This will help build a stronger base for the abolition movement; 3) the creation of this registry will help to demarcate the boundary between the police and the prosecutor's role in criminal prosecution. In doing so, it will create an accountability measure for police who will hopefully be less likely to engage in misconduct.

Prosecutors influence public policy and have a say in legislative reform.[154] They must use their platform to bring awareness to issues within the carceral system and push for change, including advocating for practical changes within their offices as well as advocating for legislative change on the system-wide level. Advocating for prosecutors to bring charges against police officers for misconduct and brutality works against the abolitionist framework. While in many cases prosecutors fail to bring suit against police officers for one of the many reasons listed above, bringing to light instances when charges *could* be brought is influential in creating awareness and change within the current system. Additionally, on the path to abolition these lists help to ensure defendants maintain access to a fair trial by disclosing evidence of the misconduct and to hold prosecutors and police more accountable for their actions.

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151. *Id.*

152. *See supra* Part II.

153. Steve Reilly & Mark Nichols, *Hundreds of Police Officers Have Been Labeled Liars. Some Still Help Send People to Prison*, USA TODAY, (Oct. 14 2019), https://www.usatoday.com/in-depth/news/investigations/2019/10/14/brady-lists-police-officers-dishonest-corrupt-still-testify-investigation-database/2233386001/ [https://perma.cc/AM7Y-K5KK].

154. Radley Balko, *Behind the Scenes, Prosecutor Lobbies Wield Immense Power*, WASH. POST, Apr. 23, 2018.

The reports released by prosecutors should specify the nature of the event and the current police protocol and legal precedent that allowed the event to take shape in the way it did. This practice will shed light on the number of times incidents of police brutality occur within certain jurisdictions, as well as nationwide. Additionally, it serves to highlight the repetitive patterns of behavior displayed by police officers. In doing so, the hope is twofold. First, the legislature feels compelled to pass legislation directed at combating unfettered police brutality. Second, the public becomes engaged in a more serious dialogue about an abolitionist world. In some circles, this is known as "base-building."[155] It is the process by which activists work to "increase the number of people who share [their] vision."[156] In this case, the vision is abolition. By bringing more attention to the instances of police brutality, the heightened attention and scrutiny provides a platform to shift the narrative and involve a wider audience, including the media.[157] As this shift takes place, people in positions of power, including the legislature, are more likely to shift their perspective and take action in line with the changing public opinion.[158]

2. STOP SEEKING THE DEATH PENALTY

Another reformist reform that prosecutors can proactively achieve is the elimination of the death penalty—a branch of the carceral logic which is unfairly administered and which prosecutors have strict control over.[159] The police cannot be trusted to provide credible evidence to prosecutors, nor can prosecutors be trusted to present all evidence fairly.[160] Using unfair evidence to incarcerate anyone is an egregious violation of justice; using this evidence to commit state-sanctioned murder is modern-day lynching.[161]

As described earlier, prosecutors have nearly unfettered discretion when it comes to charging suspects. Though the Court notes that prosecutors should be guided by standards as to not arbitrarily and capriciously impose the death penalty, it gives no explicit standards.[162] The Court in *Gregg* held, "[n]othing in any of our cases suggests that the discretion to afford the individual defendant mercy violates the Constitution."[163] As such, prosecutors who choose not to seek the death penalty are acting within the purview of their position and the law.

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155. *See Abolitionist Principles & Campaign Strategies for Prosecutor Organizing*, *supra* note 143.
156. *Id.*
157. *See id.*
158. *See id.*
159. Gross, *supra* note 79, at 28; Smith & Levinson, *supra* note 97, at 813.
160. *See supra* Part II.B.
161. *See* Akbar, *supra* note 145, at 102 (noting that modern carceral practices, including the death penalty, stem from lynching and enslavement).
162. *See* Gregg v. Georgia, 428 U.S. 153, 199 (1976).
163. *Id.*

Most prosecutors are elected officials and cannot be fired from their posts. Because of this, prosecutors who actively disengage with the death penalty are subject to review only from public opinion.[164] Moreover, this step is easily implementable. Prosecutors do not require new legislation to stop seeking the death penalty. They already have all the tools necessary to enact this change. This "solution" requires no additional resources or time. Admittedly, this does not decrease the carceral logic overall, as those who are no longer facing capital punishment charges will face lengthy prison sentences. However, on the road to abolition, it remains a beneficial step to be taken in the interim.

C. ABOLITIONIST SOLUTIONS

The following proposals are solutions for an abolitionist society. In such a society, the three pillars of the traditional carceral system — police, mass incarceration, and the death penalty — no longer exist.

1. GOVERNMENT CONTRACTORS

One reason that prosecutors need to be abolished is because they were created in a system that deprived them of the means and opportunity to properly execute justice. Once the police are abolished, it remains to be seen how prosecutors will obtain their evidence, but regardless of who takes that role, one thing will remain the same: prosecutors will be dependent on them and as such, their relationship will suffer from the same prejudices it does now. To alleviate ongoing violations resulting from entrenched loyalties, these two parties must be separated.

One solution to address this problem is to hire non-government attorneys to take cases on behalf of the government.[165] These government contracts will employ attorneys from third-party law firms, non-profits, or other organizations to take cases on behalf of the state.[166] Each government contract will be time-limited so that no one organization can establish roots leading to co-dependence and complacency with the investigative agency. Opting for non-government litigators to bring cases on behalf of the state will decrease the inter-organizational dependency that current prosecutors suffer from which will decrease the likelihood of engaging in misconduct.

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164. Admittedly, state district attorneys' decisions are capable of being superseded. This phenomenon is rare. Even if this occurs, the district attorney does not automatically lose their job. *See* Jonathan DeMay, *A District Attorney's Decision Whether to Seek the Death Penalty: Toward an Improved Process*, 26 FORDHAM URB. L.J. 767, 768 (1999); Charles J. Yaeger & Lee Hargrave, *The Power of the Attorney General to Supercede* [sic] *a District Attorney: Substance, Procedure & Ethics*, 51 LA. L. REV. 733, 748 (1991).

165. The abolitionist movement is also predominantly anti-capitalist. *See* Roberts, *supra* note 11, at 4. The purpose of a private solution is not to incentivize privatization but to allow for opportunity to break-up some of the inter-organizational relationships that lead to the perpetuation of misconduct.

166. While the use of the term prosecutor is employed, it is still an abolitionist solution as it is the same in name alone.

Attorneys outside the criminal legal system provide a wider network of individuals and firms to choose from and can be swapped between cases. In this model, the same attorneys or firms will not be consistently interacting with the organization responsible for collecting investigatory material when crimes are committed. The result should be lesser levels of intimacy and loyalty between the organizations which currently results in evidence being swept under the rug for fear of ruffling feathers.

2. RESTORATIVE JUSTICE EDUCATORS AND MINDFULNESS EFFORTS

Restorative justice is the process of remedying a wrong through cooperation between the stakeholders.[167] It emphasizes four main values: peaceful social life, respect, solidarity, and active responsibility.[168] This type of justice operates outside of the established criminal legal system, and its remedies operate outside of the prison industrial complex. One benefit of restorative justice that the current system lacks is the understanding that crime does not occur in a bubble.[169] It is the result of complex community relations and societal systems.[170] Studies have shown that the use of restorative justice leads to greater satisfaction from both parties involved than a traditional court proceeding.[171] Additionally, studies have shown that restorative justice programs can lead to a decrease in recidivism rates.[172]

Restorative justice focuses mostly on the victim. To have a balanced effect, implementing the techniques of mindfulness and meditation in conjunction with restorative justice takes a more holistic approach. Studies show that meditation and mindfulness techniques have both psychological and physiological effects.[173] There is evidence to suggest that meditation decreases recidivism rates.[174] Rehabilitation programs implemented in correctional facilities throughout Norway and the UK, which use a holistic approach including mental health measures and yoga, have shown a reduction in recidivism rates.[175] In Norway, the recidivism rate dropped twenty percent after two years, and in the UK, the

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167. *See What is Restorative Justice?* Centre for Justice & Reconciliation, http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-1-what-is-restorative-justice/#sthash.jiMs19bN.dpbs [https://perma.cc/FJ8L-GZNU] (last visited Apr. 15, 2021).

168. *Id*.

169. Vanessa Hernandez, *Restorative Justice Offers a Powerful Alternative to Prisons and Jails*, ACLU WASH., (Oct. 24, 2016), https://www.aclu-wa.org/story/restorative-justice-offers-powerful-alternative-prisons-and-jails#:~:text=Restorative%20justice%20provides%20an%20alternative,offense%20by%20locking%20them%20up. [https://perma.cc/MB7D-H3KL].

170. *Id*.

171. Mark S. Umbreit et. al., *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 273-74 (2005).

172. Dragana Derlic, *A Systematic Review of Literature: Alternative Offender Rehabilitation—Prison Yoga, Mindfulness and Meditation*, 26(4) J. OF CORRECTIONAL HEALTH CARE 1, 9 (2020).

173. *Id*. at 5.

174. *Id*. at 9.

175. *How Norway Turns Criminals Into Good Neighbours,* BBC NEWS, (July 2019), https://www.bbc.com/news/stories-48885846, [https://perma.cc/ABA3-8KHX].

recidivism rate dropped fifty percent within one year of implementation.[176] Using restorative justice in conjunction with meditation allows the victim to have closure and feel remedied while also giving attention to the perpetrator to reflect on their actions and reduce the likelihood of committing another crime.

CONCLUSION

Since the beginning of the American criminal legal system, prosecutors have spent centuries creating an unbreakable dependency on police departments. Their reliance on one another, coupled with their lack of authority over one another, has created a system which lacks all accountability and leads to great miscarriages of justice. Prosecutors fail to faithfully carry out their duties of seeking accountability and justice for fear of ruining relationships with police, being looked over for promotions, and not being popular enough to re-elect.[177] The current system gives prosecutors no guidance and unlimited discretion, a combination which has created an unstoppable force lacking all accountability.

The combination of "guidelines" that currently exist, including the ABA Model Rules, limited Supreme Court precedent, and 42 U.S.C § 1983, provide the most general of guidelines for prosecutors to follow, effectively allowing no accountability of police or prosecutorial misconduct. This is exacerbated through the close working relationship of police and prosecutors, which is also subject to limited accountability due to the horizontal nature of their relationship. What is more, is the fact that implicit bias permeates every decision made by police and prosecutors leading to anti-Black discrimination and violence at every stage of the criminal legal process.

For abolition to succeed, prosecutors cannot be overlooked in the movement. They play an essential role in perpetuating police misconduct and brutality and in harming Black communities through their furtherance of the carceral system. Reforming prosecutors is not a viable option since they were built on a foundation meant to rely on the police.[178] Rather than focusing on reform, solutions should be non-reformist reform with the goal being abolition. In an abolitionist world, this Note argues that the prosecutorial function should be shifted to non-government actors such as private firms or non-profits. In addition, this Note promotes a holistic process of criminal reform combining restorative justice with mindfulness practices such as meditation. The combination of these practices focuses on both the victim and perpetrator to ensure a fair outcome and a decreased rate of recidivism.

Overall, the system as it currently stands is flawed and subject to unfettered discretion and abuse with no recourse for those most harmed. To ignore the role of the prosecutor in re-evaluating the criminal legal system would be a misguided effort of abolition. The only way to achieve true abolition is to overhaul the entire system, prosecutors included.

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176. *Id.*
177. *See supra* Part II.B.
178. *See supra* Part I.A.