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OVERVIEW

The Journal of International Criminal Law (*JICL*) is a scientific, online, peer-reviewed journal, first edited in 2020 by Prof. Dr. Heybatollah Najandimanesh, mainly focusing on international criminal law issues.

Since 2023 JICL has been co-managed by Prof. Dr. Anna Oriolo as General Editor and published semiannually in collaboration with the International and European Criminal Law Observatory (IECLO) staff.

JICL Boards are powered by academics, scholars and higher education experts from a variety of colleges, universities, and institutions from all over the world, active in the fields of criminal law and criminal justice at the international, regional, and national level.

The aims of the JICL, *inter alia*, are as follow:

- to promote international peace and justice through scientific research and publications;
- to foster study of international criminal law in a spirit of partnership and cooperation with the researchers from different countries;
- to encourage multi-perspectives of international criminal law; and
- to support young researchers to study and disseminate international criminal law.

Due to the serious interdependence among political sciences, philosophy, criminal law, criminology, ethics and human rights, the scopes of JICL are focused on international criminal law but not limited to it. In particular, the Journal welcomes high-quality submissions of manuscripts, essays, editorial comments, current developments, and book reviews by scholars and practitioners from around the world addressing both traditional and emerging themes, topics such as

- the substantive and procedural aspects of international criminal law;
- the jurisprudence of international criminal courts/tribunals;
- mutual effects of public international law, international relations, and international criminal law;
- relevant case-law from national criminal jurisdictions;
- criminal law and international human rights;
- European Union or EU criminal law (which includes financial violations and transnational crimes);
- domestic policy that affects international criminal law and international criminal justice;
- new technologies and international criminal justice;
- different country-specific approaches toward international criminal law and international criminal justice;
- historical accounts that address the international, regional, and national levels; and
- holistic research that makes use of political science, sociology, criminology, philosophy of law, ethics, and other disciplines that can inform the knowledge basis for scholarly dialogue.

The dynamic evolution of international criminal law, as an area that intersects various branches and levels of law and other disciplines, requires careful examination and interpretation. The need to scrutinize the origins, nature, and purpose of international criminal law is also evident in the light of its interdisciplinary characteristics. International criminal law norms and practices are shaped by various factors that further challenge any claims about the law's distinctiveness. The crime vocabulary too may reflect interdisciplinary synergies that draw on domains that often have been separated from law, according to legal doctrine. Talk about "ecocide" is just one example of such a trend that necessitates a rigorous analysis of law *per se* as well as open-minded assessment informed by other sources, *e.g.*, political science, philosophy, and ethics. Yet other emerging developments concern international criminal justice, especially through innovative contributions to enforcement strategies and restorative justice.

The tensions that arise from a description of preferences and priorities made it appropriate to create, improve and disseminate the JICL as a platform for research and dialogue across different cultures, in particular, as a consequence of the United Nations push for universal imperatives, *e.g.*, the fight against impunity for crimes of global concern (core international crimes, transboundary crimes, and transnational organized crimes).

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Pass The Plea:
The Role of Black Prosecutors in Socially Engineering an Equalitarian Legal System in America

by Ian L. Courts[*]

ABSTRACT: Pass the Plea highlights and encourages Black American prosecutors following in the jurisprudential tradition of Charles Hamilton Houston to socially engineer a more equitable criminal justice system. In this piece, I encourage Black Prosecutors to advocate for racially conscious charging decisions, equitable sentencing recommendations, and the support of international anti-apartheid provisions in public issue campaigns for reform.

KEYWORDS: American Criminal Justice; Apartheid; Justice; Prosecutors; Racism.

I. Introduction

"Race consciousness forms the social lens through which we assign value to experiences."[1] American society, specifically the American criminal justice system, operates on the classification of race. Race plays a predominant role both directly and indirectly in the imposition of punishment, the assignment of charges, and the enforcement of the law in the American system of justice. According to a study published by the University of California Davis Law Review, "Blacks are arrested for marijuana at a higher rate—while making up around 13% of the U.S. population, they account for 24% of marijuana arrests."[2] The study concludes that "people of color are disproportionately arrested for drugs; Such disparities are likely due to the types of drugs targeted by law enforcement and not due to any racial group's greater involvement in the drug trade."[3] Moreover, through the lens of race, many people's assumptions about the American justice system are formed, shaped, and cemented. Racial consciousness does and should play an essential role in executing one of the most vital components of our legal system, which is the plea bargaining process. The vast majority of cases are settled in plea bargaining negotiations.[4] Black Americans make up the majority of criminal defendants whose cases are decided in plea bargaining processes.[5]

DOUBLE BLIND PEER REVIEWED ARTICLE

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[1] Lenese C. Herbert, *Et in Arcadia Ego: A Perspective on Black Prosecutors' Loyalty within the American Criminal Justice System*, 49(2) HOWARD LAW JOURNAL 495 (2006), at 501.
[2] Joseph Kennedy, Issac Unah *et al*., *Sharks and Minnows in the War on Drugs: A Study of Quantity, Race, and Drug Type in Drug Arrests*, 52(2) UC DAVIS LAW REVIEW 729 (2018), at 730.
[3] *Id*.
[4] PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN, A RENEGADE PROSECUTOR'S RADICAL THOUGHTS ON HOW TO DISRUPT THE SYSTEM (2017).
[5] *Id*., at 221.

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Black prosecutors must ensure that the plea bargaining process and its outcomes are equitable and fair because they essentially represent Black Americans in the legal system.[6]

Further, as representatives of Black people in the legal system, Black progressive prosecutors owe a duty of loyalty to their convictions and experiences as Black people and the effects the criminal justice system has on Black communities.[7] Black progressive prosecutors can serve as social engineers by reforming the criminal justice system through racially conscious policies, bridging the gap between community advocacy and prosecution. One of the primary beneficiaries of this equalitarian legal order, the Black Progressive prosecutors may engineer, are Black Americans.[8]

This discussion will discuss the critical role of progressive Black prosecutors in achieving an equalitarian legal outcome in plea bargaining negotiations through racially conscious policy application, equitable sentencing recommendations, and prioritizing redirection alternatives instead of incarceration. This discussion aims to advocate for more racially conscious prosecutorial policies within plea bargaining negotiations to achieve equalitarian legal outcomes. Equalitarian legal results are outcomes that truly treat everyone "equal under the law" and do not create significant racial disparities that we see presently at play in our legal system. Furthermore, with the emergence of notable Black prosecutors such as Wesley Bell, Kimberly Fox, and numerous other Black elected law enforcement officers, it's essential to discuss the significant role these Black-progressive prosecutors can play in establishing a more equitable legal order and system.

II. My Brother's Keeper

Black progressive prosecutors are uniquely positioned to advocate for progressive policies in the American plea system because they can understand the criminal justice system's impact on the Black American experience. The preceding point is further articulated generally by Charles Hamilton Houston, where he described the attorney, specifically the Black attorney, as "social engineers."[9] The goal, according to Mr. Houston, of the Black attorney, was to create a society that treated everyone fairly under the law.[10] Black lawyers were encouraged to use the law to improve the community for Black Americans.[11] This point is supported in the writings of William Henry Hastie, a contemporary of Mr. Houston, who described the work of Black attorneys during the civil rights era as establishing an "equalitarian legal order."[12] An equalitarian legal order in the American criminal justice system is a system where everyone is treated equally and fairly under the law. Black prosecutors, as Black attorneys, are critical to the engineering of an equalitarian criminal justice system in America.

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[6] Mary Wright, *Mission Accomplished: The Unfinished Relationship between Black Law Schools and Their Historical Constituencies*, 39(1) NORTH CAROLINA CENTRAL LAW REVIEW 1 (2016), at 7; Black lawyers are trained for the political, social and economic causes of Black individuals and communities.
[7] Herbet, *supra* note 1, at 502.
[8] BUTLER, *supra* note 5, at 221.
[9] Leland Ware, *A Difference in Emphasis: Charles Houston's Transformation of Legal Education*, 32 HOWARD LAW JOURNAL 479 (1989), at 484; Mr. Houston did not trust white lawyers to advocate effectively and passionately for civil rights because he believed there was an inherent conflict of interest. Houston believed that Black lawyers who were trained in Black law schools were critical to the advancement of civil rights causes and litigation.
[10] *Id*.
[11] *Id*.
[12] William H. Hastie, *Toward an Equalitarian Legal Order, 1930-1950,* 407(1) THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 18 (1973).

Nevertheless, I do anticipate that my interpretation of Mr. Houston's social engineering theory for Black attorneys may seem too comprehensive because he was speaking in context to Black attorneys who argued on behalf of individual plaintiffs and Black organizations against the government and not to prosecutors who essentially represent the government and its interests. Moreover, many Black Americans view Black prosecutors with suspicion and mistrust, viewing them as race-betrayers and deserters for representing the American criminal justice system.[13] However, prosecutors should be central players in establishing an equalitarian legal order because they hold significant power in the American criminal justice system. Further, Black prosecutors who advocate for progressive and racially conscious policies are essential to creating more equitable and fair criminal justice outcomes, especially for those historically victimized by the system. I argue and assume for this discussion that Black progressive prosecutors are social engineers and are actively crafting an equalitarian legal order through encouraging racially conscious policy application and more equitable criminal justice solutions for Black Americans.

In marrying Charles Hamilton Houston's and William Hastie's intellectual conceptualization of the Black attorney and their duty to Black Americans, with the modern trend of Black progressive prosecutors elected across the country, I believe it's clear that Black progressive prosecutors are in the process of socially engineering society to produce equalitarian legal outcomes. Moreover, many Black prosecutors enter prosecutorial offices seeking to create a more equitable criminal justice system.[14] One of the early examples of a Black prosecutor who viewed her role as a social engineer for fairer criminal justice outcomes is Kamala Harris. Mrs. Harris penned in her 2019 memoir that her goal in becoming a prosecutor was to "[fight] from the inside at the table where decisions were being made. [So] when activists came marching and banging on the doors, I wanted to be on the other side to let them in."[15] Moreover, within the modern trend of Black progressive prosecutors, Wesley Bell in St. Louis and Kimberly Fox in Chicago ran on platforms seeking to end mass incarceration, engage the community in the prosecutorial process, target severe crime, and offer more leniency concerning marijuana prosecution.[1617] Black prosecutors view their role as social engineers for a more equalitarian legal system. This discussion will promote how Black prosecutors can actively work to achieve an equalitarian system by implementing more racially-conscious policy applications and encouraging more equitable sentencing solutions.

III. "Woke" Policy Application

"A point of contention in certain district attorneys' offices center on prosecutors sending out plea offers without supervisor approval...if you offered a plea and the defendant received a more favorable sentence than he or she should have under office guidelines, you might be in for a serious reprimand."[18] Several binding rules govern the discretion of prosecutors. Many of these rules governing the exercise of prosecutorial discretion are constitutional provisions, case law,

[13] Herbet, *supra* note 1, at 495.
[14] MARTINIS M. JACKSON, JUSTICE MY WAY: MEMOIRS OF A BLACK PROSECUTOR (2018), at 17.
[15] KAMALA D. HARRIS, THE TRUTHS WE HOLD, AN AMERICAN JOURNEY (2019), at 25.
[16] See generally; Wesley Bell, Campaign website for St. Louis County, Missouri, Prosecuting Attorney, https://www.votewesleybell.com/issues-overview.
[17] See generally: Kimberly Foxx, Campaign website for Cook County, Illinois, State Attorney, https://www.kimfoxx.com/priorities.
[18] *Id*., at 84.

state statutes, local courthouse rules, and internal office policies established by supervisors and the elected or appointed official heading the office.[19] For this section of my discussion, I will examine how Black progressive prosecutors can advocate and implement "woke" policy applications.

The popular and trending term "Woke" means having an awareness or consciousness about the impact of racial disparities in American society. Moreover, "woke" policy application means being racially conscious and aware of the disparities of American culture in the application of internal prosecutorial policies. As representatives of Black people in prosecutorial offices, Black progressive prosecutors are uniquely positioned to advocate for "woke" policy application because many intimately understand Black people's lived racial experience in America.[20] "Woke" policy application includes understanding the racial bias-reality in the American plea system. All persons arrested are *de jure* assumed to be innocent until proven guilty beyond a reasonable doubt. However, the *de facto* reality of the American plea system is that if you are arrested, everyone, including judges, attorneys, and prosecutors, presumes you guilty, especially if you are Black.[21] Black progressive prosecutors, in understanding the guilt presumption issue, can advocate for policy application in plea negotiations that encourage more equitable solutions.

Black progressive prosecutors can also encourage their office to implement community panels that actively engage community members in the policy drafting, proposing, and writing process. Community panels involve identifying and selecting community members who hold significant influence or have extensive interaction with law enforcement, faith leaders, and community persons impacted by crime in their community. An ideal community panel would be rotating in membership and have several diverse perspectives represented on the panel. The opportunity and ability for the community to be involved in policymaking can positively impact community lifestyle and attitudes toward law enforcement. The importance of the community as a gathering place of ideas is critical to Black progressive prosecutors in advocating for more "woke" policy application.

Black progressive prosecutors can also advocate in their legislatures for reform to post-incarceration services such as parole and probation. In the United States, most parole and probation officers have very little, if any, training or experience in social welfare services and counseling. Moreover, many of our criminal defendants who re-enter society have high recidivism rates. Social welfare training incorporates into criminal justice services the understanding that crime and criminality are impacted by access to social resources such as education, housing, and health care.

There are many models progressive prosecutors may advocate for, such as integrating social services with post-release programs, such as the Scotland and New Zealand models.[22] The Scotland model's post-release probation services are handled primarily by the social services personnel.[23] While the New Zealand model requires all probation and parole officers to undergo social service training.[24] Both the Scotland and New Zealand models provide a more holistic model of care for persons re-entering society after prison. Black progressive prosecutors advocating for a change in state statute and policy can incorporate programs such as the

[19] *Id.*, at 83.
[20] *Id.*, at 33.
[21] BUTLER, *supra* note 5, at 221.
[22] Chris Trotter, *Community Corrections: Welfare or Punishment*, 6(1) INTERNATIONAL CRIMINAL JUSTICE REVIEW 121 (1996), at 122.
[23] *Id.*
[24] *Id.*

Scotland or New Zealand models in plea bargaining negotiations to provide a holistic approach to delivering parole and probation services. The changing of prosecutorial guidelines to be more "Woke" or racially conscious is one way Black progressive prosecutors can ensure that the plea bargaining process in this country is more equitable and fair.

IV. Rethinking Vengeance: The Move Toward Equitable Sentencing Recommendations

"The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite."[25] For many, Sir James Stephens's preceding quote sounds rather odd and unsettling because of its comparison between criminal law to revenge and sex. However, one of the prominent legal and philosophical presumptions is the concept of "vengeance." Vengeance is defined according to Oliver W. Holmes, Jr., as "a feeling of blame, and an opinion, however, distorted by passion, that a harm has been intentionally committed.".[26] Sentencing in a modern American context is defined as the formal legal consequences applied, whether via statute or case precedent, for a legal violation, normally, a criminal transgression.[27] Moreover, many law students, practitioners, and laymen rarely, if ever, think of vengeance as an influence of criminal law. Despite the fact that many people today rarely discuss vengeance in a criminal context, the concept of "vengeance" is one that has been discussed throughout the study of law. Many of our law schools shy away from teaching the underlying principles or philosophical origins of the law and operate on a presumption that the law is legitimate morally and philosophically. However, I find it important to examine and understand the philosophical and moral underpinnings behind the rule of law in our American jurisprudence. Specifically, this discussion will examine Justice Oliver Wendell Holmes's philosophical proposition that the source of criminal law stems from the expression and desire for "vengeance," and "vengeance's" influence on modern criminal sentencing.[28] Additionally, I believe this discussion concerning the influence of vengeance on modern criminal sentencing is important because of the current national climate around criminal justice reform. The 2020 death of George Floyd and the subsequent massive protests against police brutality have highlighted a decades-long discussion around ending qualified immunity, eliminating cash bail, and restructuring sentencing schemes. Further, in order for there to be substantial criminal justice reform around sentencing, there has to be a challenge to our understanding and underlying presumptions around sentencing, such as this concept of vengeance. Black prosecutors play a pivotal role in reshaping sentencing away from vengeance toward rehabilitation.

Oliver Wendell Holmes was an American jurist, most notably, an associate justice on the United States Supreme Court from 1902 to 1932.[29] Justice Holmes was known for his expertise and knowledge in the English and American common law traditions. Moreover, Justice Holmes was known for giving packed-out lectures where he expounded upon the history and heritage

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[25] SIR JAMES STEPHEN, GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND (2014), at 99.
[26] OLIVER W. HOLMES, JR., THE COMMON LAW, at 2.
[27] Cornell Law School, *Legal Information Institute (L11)*, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/sentencing, "Sentencing: A criminal sentence refers to the formal legal consequences associated with a conviction. … Criminal law theorists believe that sentences serve two purposes. First, they serve the goal of deterring future crime by both the convict and by other individuals contemplating a committal of the same crime. Second, a sentence serves the goal of retribution, which posits that the criminal deserves punishment for having acted criminally.".
[28] HOLMES, *supra* note 26, at 24.
[29] HOLMES, OLIVER WENDELL, THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. (1996).

of the common law tradition in English and American Courts.[30] Justice Holmes was lauded in England and America for being highly devoted to the common law tradition. Justice Holmes in many of his lectures, discussed the underlying impulses or influences of the common law, one of those being the concept of vengeance. According to Holmes, vengeance is described as an inflamed impulse that "imparts a feeling of blame, and an opinion, however, distorted by passion, that a wrong has been done.".[31] Moreover, this inflamed impulse that believes some personal wrong has been done is also viewed as deserving of punishment. Society believes that once a harm or crime has been committed, regardless of its violent nature, the transgression is an offense against society and thus needs to be punished by society. Criminal sentencing in the American system's main objectives are to punish the wrongdoer and deter through fear other people from acting in a transgressive way. Vengeance requires that society receive its retribution through the use of public-state-sanctioned revenge on an individual while appropriating a survivor's experience.[32] Moreover, because vengeance fuels our criminal sentencing, and the punitive nature of sentences creates greater harm in communities, especially and particularly in communities of color, sometimes, in a greater share than the transgression caused by the individual-sentenced actor. Black prosecutors, through effective sentencing policy, can move away from the vengeance impulse toward a more equitable and fair sentencing program.

Sentencing is one of the most critical areas where Black progressive prosecutors can impact the creation a more equalitarian legal system. Sentencing is the process in which a judicial official (judge, justice of the peace, magistrate) applies a punishment or limitation on a defendant's liberties due to the court's finding of the defendant's guilt. Judicial officials rely on state or federal statutes in determining appropriate sentences that fit the set of circumstances relating to the defendant's guilt.[33] Judicial officials have broad discretion in applying sentencing ranges and duration. However, most rely on the recommendations given by the prosecutor in plea negotiations.[34] A prosecutor has broad discretion within the limits of the relevant statutes to recommend certain sentencing sanctions or not.[35] Moreover, the Black progressive prosecutor can use that discretion to guide more equalitarian legal outcomes, such as redirection or deferral.

Redirection is the process in which a criminal defendant is referred to an alternative sentencing method that does not include incarceration or active prison time.[36] Redirection can come in many forms, such as community service, juvenile educational-advocacy programs, and deferred prosecution programs. One example of a deferred prosecution redirection program is the Back on Track program in San Francisco.[37] District Attorney Kamala Harris crafted a plan that connected first-time nonviolent offenders with educational training, job readiness, and financial literacy programs.[38] Also, the program provided drug treatment and therapy for persons who needed it.[39] The Back on Track program connected community organizations with the prosecutor's office for the benefit of keeping young offenders out of the system and helping

[30] *Id.*
[31] HOLMES, *supra* note 26, at 3.
[32] Austin Sarat, *Vengeance, Victims and the Identities of Law*, 6(2) Social & Legal Studies 163 (1997), at 165.
[33] Melanie D. Wilson, *Sentencing Inequality versus Sentencing Injustice*, 61(5) FEDERAL LAWYER 59 (2014), at 60.
[34] See generally ZACHARY C. BOLITHO, G. NICHOLAS HERMAN, PLEA BARGAINING (2017).
[35] JACKSON, *supra* note 15, at 84-88; BOLITHO, HERMAN *supra* note 35, at 255.
[36] Toni Keller, *The Emergence of Individualized Sentencing*, 45(3) Temple Law Quarterly 351 (1972), at 369.
[37] KAMALA HARRIS, SMART ON CRIME: A CAREER PROSECUTOR'S PLAN TO MAKE US SAFE (2009), at 44.
[38] *Id.*
[39] *Id.*

them become productive citizens.[40] The Back on Track program implemented by District Attorney Harris generally worked, having about a 10% re-offense rate for participants.[41]

Deferred prosecution is an arsenal in a prosecutor's toolbox that consists of holding open a criminal charge or case without proceeding to an official conviction and sentencing.[42] The ability of the Black progressive prosecutors to enter deferred prosecutions of criminal defendants is essential because the defendant can avoid a criminal conviction and potentially rehabilitate their behavior. A deferred prosecution allows the Black progressive prosecutor the opportunity to impose certain rehabilitative conditions on a criminal defendant's plea agreement without convicting and incarcerating the defendant.[43]

Also, Black progressive prosecutors can advocate for the elimination of mandatory minimum sentences.[44] Mandatory minimums have disproportionately impacted Black and poor communities. The imposition of mandatory minimums contributes to mass incarceration and the proliferation of racial bias in sentencing. For example, instead of an internal policy guideline that imposes mandatory minimums, progressive Black prosecutors can argue for, in situations where state statutes do not impose a mandatory minimum, the office adopts a community-focused initial approach. This community-focused approach would center around initial deference to community punishment instead of mandatory minimum active sentencing.[45] The community that suffered harm should play an essential part in implementing prosecutorial policies and guidelines because they will ultimately be the ones impacted by those policies.

In the exercise of their prosecutorial discretion, black progressive prosecutors may redirect criminal defendants to programs that seek to help the individual reenter society with an education and job skills to make the community safe and provide better life opportunities for the defendant. Moreover, Black prosecutors can help reduce the mass incarceration state by advocating for abolishing or limiting mandatory minimums in plea negotiations and with the state and federal Legislatures.

Additionally, Black prosecutors can strategically utilize the post-conviction process to initiate resentencing and conviction-integrity review, including exonerations. Many states, such as North Carolin, give explicit authority to prosecutors to agree to and initiate post-conviction (or judgment) review and exoneration proceedings.[46] In North Carolina, prosecutors may *sua spontae* open a sentencing and conviction review inquiry, and petition or agree with a defense

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[40] *Id*.
[41] *Id*., at 45.
[42] BOLITHO, HERMAN *supra* note 35, at 323. Deferred prosecutions are commonly applied to corporate actors.
[43] *Id*. Deferred prosecutions allow the prosecutor to impose certain limitations in a plea agreement that the defendant must comply with in order for a conviction to be withheld.
[44] See generally; Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28(2) WAKE FOREST LAW REVIEW 199 (1993), Mandatory minimums were imposed as a response to what was seen as a rampant increase in criminal activity and the need for punishment and deterrence of similar crimes. Mandatory minimums compel a mandatory active sentence that a judge must impose and a criminal defendant has to serve. Many African Americans were disproportionately impacted by the imposition of mandatory minimum sentences.
[45] See generally; Margaret R. Holmgren, *Punishment as Restitution: The Rights of the Community*, 2(1) CRIMINAL JUSTICE ETHICS 36 (1983), at 37, Community punishment or community alternatives allows members of the societal-community impacted by the actions of a criminal activity to be engaged in the justice process such as through restitution.
[46] Moreover, in North Carolina, prosecutors are required by the NC State Bar Rules of Professional Conduct to review prior convictions within their jurisdiction and make revised sentencing recommendations to the court. North Carolina Rules of Professional Conduct Rule 3.8 Special Responsibilities of a Prosecutor; North Caroline State Bar, Rule 3.8 Special Responsibilities of a Prosecutor, NORTH CAROLINA STATE BAR, https://www.ncbar.gov/for-lawyers/ethics/rules-of-professional-conduct/rule-38-special-responsibilities-of-a-prosecutor/.

attorney for a post-conviction investigation and potential relief.[47] Routinely, new evidence, witness recantations, and confessions may cause previous convictions to be overturned or necessitate reductions in previous sentences. Prosecutors, rather than defense attorneys, hold the most powerful cards to provide robust, effective, efficient, and fair post-conviction review. Fair and Just Prosecution, a national prosecutorial reform organization, has recommended prosecutorial offices (a) implement internal policies that encourage evidence-based sentencing review, (b) promote legislation that provides greater access to post-conviction relief, and (c) ensure data is collected on the racial impact of sentencing outcomes and resentencing relief.[4849]Black prosecutors hold significant authority and have a moral imperative to use their office to advocate and practice more equitable sentencing policies and outcomes.

V. Appeal to International Law for Juridical and Ideological Support for Equitable Justice Reform

International law provides powerful moral and ideological support to Black prosecutors engaged in socially progressive engineering in the American justice system. In many state courts across the country, defendants raise numerous international law claims in state criminal courts. These international claims encompass several international treaties, such as the United Nations Charter, the Hague Convention, the Universal Declaration of Human Rights, and the Rome Statute of the International Criminal Court. The claims raised by defendants concern violations of human rights allegedly committed by judicial, legal, and correctional officers, whether coercion to enter a guilty plea, inhumane prison conditions, due process violations, and/or excessive sentencing. Most of the claims are never addressed on the merits by state criminal courts because federal jurisprudence inhibits state courts from incorporating or implementing international law, and state courts are generally not learned in international law to be able to provide a sufficient meritorious adjudication. However, international criminal law claims will continue to be brought before state courts, and it's important for Black prosecutors in their fight to make the criminal justice system more equitable to recognize (a) what jurisdictional hurdles inhibit courts from addressing these claims on the merits; and (b) what ways international law can address these claims in legal dicta. The Rome Statute of the International Criminal Court codified the crime of apartheid, a crime that arguably applies to the disparate racial conditions in the American justice system:

> The crime of apartheid means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.[50]

Apartheid is more than just disparate racial conditions but extends to systemic discrimination, especially that which is manifested in a nation's criminal justice system:

[47] North Carolina General Assembly, Statute, 15A-1420 (e), Motion for Appropriate Relief; Procedure (Dec. 1, 2017).
[48] Fair and Just Prosecution, Conviction Integrity Units and Internal Accountability Mechanisms (Sep. 25, 2019), https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.ConvictionIntegrity.9.25.pdf.
[49] Fair and Just Prosecution, Revisiting Past Extreme Sentences: Sentencing Review and Second Chances, (Feb. 2020), https://fairandjustprosecution.org/wp-content/uploads/2020/02/FJP_Issue-Brief_SentencingReview.pdf.
[50] UN, Rome Statute of the International Criminal Court (Rome Statute) (July 1, 2002), art. 7(1)(j), art. 7(2)(h).

> a. denial to a member or members of a racial group or groups of the right to life and liberty of person: . . .(iii)by arbitrary arrest and illegal imprisonment of the members of a racial group or groups.[51]

The maintenance of the American racial order is supported by the executive and judicial functions of its justice systems. The International Court of Justice in Judge Holte's separate opinion, defined apartheid as:

> The ordinary meaning of the term "apartheid" … is a State-sanctioned and institutionalized régime of discrimination which has the purpose of establishing and maintaining domination and oppression by one racial group over another. This core definition of apartheid comprises three elements: first, the relevant policy and practice must concern the relationship between racial groups; second, the relevant policy and practice must display an objective element (*actus reus*) which consists in the commission of "inhumane acts" of a structural and institutionalized nature 11; third, the relevant policy and practice must be motivated by a subjective element (*mens rea*) which not only requires the intentional commission of inhumane acts of a certain gravity, nature and scale, but also that the purpose of these acts is the establishment and maintenance of an institutionalized régime of domination and oppression (*dolus specialis*)12.[52]

Arguably, the American criminal justice system satisfies the above factors because many of its laws, such as the different classifications between crack and cocaine, have a particularized racial impact.[53] Second, because of the disparate sentencing laws, racial-minorities experience significant disproportionate death sentences and excessive life sentences, two of the harshest aspects of the American justice system.[54] Lastly, the deficiencies and disparities in the American social and political system, which are vestiges of America's *de jure* apartheid past, are legitimized and promulgated in its policing and law enforcement.[55] Black prosecutors in their public-facing role should be at the forefront of legislative advocacy and public information campaigns highlighting the strengths and deficiencies of the American criminal justice system in light of global political customs (*"jus cogens"*) and international law—even if it does not make them many political friends or wins. Furthermore, the antiapartheid provisions of international law provide clarion support for Black prosecutors to pursue reform in the American justice system. As the Supreme Court of Canada determined in *R v. Finta*, '[t]he strongest source in international law for crimes against humanity, however, are the common domestic prohibitions of civilized nations'.[56] Apartheid's inclusion in the Rome Statute and *jus cogens* provides ideological and moral support to Black prosecutors' crusade to ensure the American criminal justice system evolves from the vestiges of its apartheid state.

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[51] UN, Convention on the Prevention and Punishment of the Crime of Genocide (Jan. 12, 1951), art. 2(c).
[52] International Court of Justice, *Seperate Opinion of Judge Nolte 186 - Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem,* INTERNATIONAL COURT OF JUSTICE (July 19, 2024), https://www.icj-cij.org/index.php/node/204168.
[53] Congress Gov, *H.R.5484 - Anti-Drug Abuse Act of 1986,* CONGRESS GOV, https://www.congress.gov/bill/99th-congress/house-bill/5484.
[54] In the five years after the passage of the crime bill, 74% of defendants given death penalty recommendations by federal prosecutors were people of color—44% of these defendants were Black and 21% were Hispanic (American Progress, 2019).
[55] DRAGAN MILOVANOVIC, KATHERYN K. RUSSELL-BROWN, PETIT APARTHEID IN THE US CRIMINAL JUSTICE SYSTEM (2001), at 333.
[56] Supreme Court of Canada, R v. Finta, 23023, 23097, Judgment (Mar. 24, 1994), at 716-717.

VI. Conclusion

Black progressive prosecutors are integral to creating a more equitable legal order with fair outcomes for Black Americans. Moreover, as then Senator Kamala Harris writes:

> The job of a progressive prosecutor is to look out for the overlooked, to speak up for those whose voices aren't being heard, to see and address the causes of crime, not just their consequences, and to shine a light on the inequality and unfairness that lead to injustice. It is to recognize that nor everyone needs punishment, that what many need, quite plainly, is help.[57]

Our modern Black progressive prosecutors are tasked with the duty Charles Hamilton Houston charged all Black attorneys— to utilize the power of their office to craft a legal system that was, as William Hastie framed, "equalitarian." The American criminal justice system is riddled with problems, "both complex and interrelated." The system needs massive foundational-revolutionary change and incremental reforms. Black progressive prosecutors can produce real reforms such as more racially-conscious policy application, advocating for more equitable sentencing guidelines, and integrating more community involvement in the prosecutorial process. However, all these changes discussed in this essay are incremental, and significant legislative and political reformation is needed to make the system fair for Black Americans.[58] Additionally, international law provides a persuasive moral and ideological framework by which to challenge discriminatory justice culture and practice. Nevertheless, Black progressive prosecutors are positioned right now to establish an equalitarian legal system that would lay the groundwork for major structural changes in our American plea system. Black Progressive Prosecutors, it is time for you to pass the plea and begin engineering a more equalitarian legal system.

[57] HARRIS, *supra* note 15, at 49-50.
[58] BUTLER, *supra* note 5, at 179.