

SYMPOSIUM INTRODUCTION

THE TIME IS NOW: CRIMINAL JUSTICE REFORM IN THE WAKE OF GEORGE FLOYD'S KILLING

by
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On May 25, 2020, an encounter between George Floyd (Black) and Minneapolis police officers Derek Chauvin (white), Tou Thao (Asian), J. Alexander Keung (Black), and Thomas Lane (white)—most of which was recorded by numerous bystanders—turned deadly.¹ After arresting Floyd for allegedly passing a counterfeit bill, Keung and Lane tried to put Floyd in the backseat of their police vehicle, but Floyd protested, saying that he was claustrophobic.² Chauvin and Thao arrived on the scene, and Floyd eventually ended up lying on the ground, face down.³ At that point, Chauvin put his knee on the back of Floyd's neck.⁴ Nine minutes and twenty-nine seconds later, he was dead.⁵ Floyd had complained over a dozen times that he could not breathe.⁶ As of this writing, three of the officers are facing charges while Chauvin has been convicted of murder.⁷

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¹ See, e.g., Tim Arango et al., *Body Camera Video Provides a Devastating Account of the Floyd Killing*, N.Y. TIMES, July 16, 2020, at A16.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*; see Eric Levenson, *Former Officer Knelt on George Floyd for 9 Minutes and 29 Seconds—Not the Infamous 8:46*, CNN (Mar. 30, 2021, 6:27 AM), <https://www.cnn.com/2021/03/29/us/george-floyd-timing-929-846/index.html>.

⁶ Arango et al., *supra* note 1.

⁷ *When Will Derek Chauvin Be Sentenced?*, BBC: GEORGE FLOYD (Apr. 23, 2021), <https://www.bbc.com/news/world-us-canada-56829289>.

Floyd's killing was shocking, but it was hardly the first time the nation was able to see a video recording of multiple police officers using brutal force against a lone, unarmed Black man. Six years earlier, Eric Garner died as a result of a chokehold placed on him by New York City police officer Daniel Pantaleo.⁸ Other officers joined Pantaleo in pressing Garner down; Garner kept stating, "I can't breathe."⁹ He passed out and died an hour later.¹⁰ Garner's friend Ramsey Orta recorded the incident.¹¹ A local grand jury declined to indict Pantaleo, and after five years, the United States Justice Department opted not to bring federal civil rights charges.¹² In response to the Justice Department announcement, "a parade of family members, community leaders, local politicians and civil rights lawyers vented their fury at [Attorney General] Barr and other officials."¹³

I could go further back in time with more examples (and that is without even getting into the separate category of unarmed Black men being shot to death by police officers),¹⁴ but perhaps the most stunning fact is that the first instance of a video recording of officers brutally attacking a Black man was 30 years ago. That was when four white Los Angeles Police Department officers beat motorist Rodney King repeatedly with their batons while over a dozen other officers (L.A.P.D. and California Highway Patrol) stood by and watched without intervening.¹⁵ Most of the incident was captured on videotape by George Holliday, who watched from his apartment balcony nearby.¹⁶ All four officers were tried on excessive force charges but the jury acquitted three and deadlocked on the fourth,¹⁷ resulting in rioting throughout parts of south central Los Angeles.¹⁸

Police brutality is only one facet of the problem with the American criminal justice system. The arrest of a suspect by police officers is only the beginning of the criminal process, which continues through pre-trial criminal discovery, disposition (whether by guilty plea or trial), sentencing, appeals, and post-conviction review,

⁸ Al Baker et al., *Beyond the Chokehold*, N.Y. TIMES, June 14, 2015, at A1.

⁹ *Id.*

¹⁰ *Id.* at A27.

¹¹ *Id.* at A26.

¹² See Katie Benner, *No U.S. Charge Against Officer in Garner Case*, N.Y. TIMES, July 17, 2019, at A1.

¹³ *Id.* at A27.

¹⁴ See, e.g., *Breonna Taylor: Timeline of Black Deaths Caused by Police*, BBC (Jan. 6, 2021), <https://www.bbc.com/news/world-us-canada-52905408> (listing Michael Brown, Tamir Rice, Walter Scott, Alton Sterling, Philando Castile, Stephon Clark, and Breonna Taylor as some of the victims of fatal shootings by police officers since 2014).

¹⁵ See LOU CANNON, OFFICIAL NEGLIGENCE: HOW RODNEY KING AND THE RIOTS CHANGED LOS ANGELES AND THE LAPD 25–37 (1999).

¹⁶ *Id.* at 32.

¹⁷ *Id.* at 260.

¹⁸ *Id.* at 281–302.

not to mention the related issues of prison conditions. These other stages of the criminal justice system are also crying out for reform; the United States incarcerates people at the highest per capita rate in the world,¹⁹ with severe disparate impacts on people of color, particularly Black men.²⁰ We have a public defense system with dedicated and talented lawyers working in the public interest, but the offices are often understaffed and under-resourced.²¹

Nevertheless, police brutality—and the reform efforts or lack thereof—is a useful barometer of the progress of the criminal justice system as a whole. For one thing, the images of police brutality are vivid and shocking, and easily grasped by non-legal audiences, whereas most of the other criminal justice issues are more conceptual in nature. For another, a system that fails to respond adequately to police brutality may be doubted as to its willingness to address its more complex problems.

Accordingly, the fact that these horrific instances of police brutality have continued across the decades may imply that the criminal justice system as a whole has failed to improve at all in 30 years.

Yet, that is not entirely accurate. Beginning in 2015 with Baltimore, a number of large jurisdictions such as Philadelphia (2017), Chicago (2019), and Portland (2020), among other jurisdictions, have elected top prosecutors who ran on progressive platforms to decriminalize minor non-violent crimes and adopt a generally less punitive approach to prosecution.²² In Lewis & Clark Law School's hometown of Portland, for example, the new Multnomah County District Attorney, Mike Schmidt, won election with over three-quarters of the vote “on a campaign of talking about mass incarceration, talking about the overuse of the criminal justice system, [and] talking about using jails in lieu of addiction treatment and mental

¹⁹ See RONALD ALLEN ET AL., *COMPREHENSIVE CRIMINAL PROCEDURE* 1463 (4th ed. 2014) (noting U.S. per capita incarceration rate as of 2013 of 698 per 100,000, compared to 450 for Russia, 165 for China, 212 for Mexico, 151 for Australia, 148 for the United Kingdom, and 106 for Canada, among other nations).

²⁰ Michelle Alexander notes that in the mid-2000s, one-third of young Black men were in prison or jail, or on probation or parole. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 11 (2020). Because a felony conviction is a “negative credential” for employment, see Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 942 (2003), the predictable result is higher unemployment rates for Black men. Because employment appears to be a positive factor in reduction of recidivism, see NAT'L RESEARCH COUNCIL, *PAROLE, DESISTANCE FROM CRIME, AND REINTEGRATION* 23–24 (2007), the disparate impact of the negative credential can act as a trap for Black men.

²¹ See, e.g., *State v. Peart*, 621 So. 2d 780, 788–92 (La. 1993) (acknowledging the heavy caseload of the state's public defenders and holding that there would be a rebuttable presumption of ineffective assistance of counsel on behalf of criminal defendants due to the underfunding of the public defender's offices).

²² See, e.g., EMILY BAZELON, *CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION* 147–48, 150, 161–64 (2019).

health.”²³ As an example of Schmidt’s policies, he announced during the summer 2020 protests that his office would not pursue criminal charges against protesters/rioters who had been arrested unless they were alleged to have damaged or destroyed property or to have used force; those arrested solely for rioting would not be prosecuted.²⁴

Preceding this wave of progressive prosecutors were two major legislative acts that reversed the trend from the 1980s and 1990s of steadily increasing the punitive force of federal criminal law. The first was the Fairness in Sentencing Act of 2010,²⁵ which was signed into law by President Obama, and reduced the disparity in treatment of defendants convicted of possession of crack cocaine compared to those convicted of possession of powder cocaine.²⁶ Prior to the Fairness in Sentencing Act, crack cocaine was treated for sentencing purposes as if it were 100 times the equivalent weight of powder cocaine; since 500 grams of powder cocaine triggers a five year mandatory minimum sentence, this meant possession of 5 grams of crack cocaine would also trigger the five year mandatory minimum sentence.²⁷ Crack cocaine prosecutions disproportionately involved Black defendants,²⁸ so this sentencing disparity no doubt contributed to the racial disparity of the federal prison population. The Fairness in Sentencing Act did not eliminate the disparity, but did reduce it to 18-to-1.²⁹

Eight years later, President Trump signed the First Step Act into law.³⁰ This law made a number of changes to both conditions of incarceration in the federal system and reduced mandatory sentences for some drug crimes, provided for increased good time credits (to earn early release), and made the changes in the Fairness in Sentencing Act retroactive.³¹ CNN’s Van Jones and Jessica Jackson wrote

²³ See Dan Tilkin, ‘*Fire in Portland*’: Area DAs Split on Ideological Lines, KOIN (Feb. 3, 2021, 5:00 PM), <https://www.koin.com/news/special-reports/fire-in-portland-area-das-split-on-ideological-lines>.

²⁴ See Maxine Bernstein, *Hundreds of Portland Protesters Will See Their Criminal Cases Dropped As DA Announces Plan to ‘Recognize the Right to Speak’*, OREGONLIVE (Aug. 11, 2020), <https://www.oregonlive.com/crime/2020/08/hundreds-of-portland-protesters-will-see-their-criminal-cases-dropped-as-da-announces-plan-to-recognize-the-right-to-speak.html>.

²⁵ Fairness in Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010).

²⁶ Matt Apuzzo, *Unlikely Allies Push for a Liberalization of Sentencing Laws*, N.Y. TIMES, Mar. 4, 2014, at A13.

²⁷ 21 U.S.C. § 841(b)(1)(B).

²⁸ See, e.g., *United States v. Armstrong*, 517 U.S. 456 (1996) (noting that in 1991, all 24 crack cocaine defendants in the Central District of California were Black).

²⁹ Pub. L. No. 111-220, § 2, 124 Stat. at 2372.

³⁰ First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018); Philip Bump, *Evaluating What Trump Has Done for Black America, by His Own Standards*, WASH. POST (June 19, 2020, 7:43 AM), <https://www.washingtonpost.com/politics/2020/06/19/evaluating-what-trump-has-done-black-america-by-his-own-standards/>.

³¹ Pub. L. No. 115-391, § 404, 132 Stat. at 5222.

about the First Step Act: “For some, it’s hard to imagine anything good happening in the middle of the Trump era—especially for Black, brown, and low-income people. But believe it or not, something truly beautiful is happening in Washington, DC, on the least likely of issues—criminal justice reform.”³²

Criminal justice reform has also been the subject of mainstream academic writing over the past several decades. One of the most widely-read recent books has been Michelle Alexander’s *The New Jim Crow*, which contends that mass incarceration has been a deliberate effort to institute a new racial caste,³³ with devastating impact on the Black community in particular.³⁴ Her solutions are not incremental improvements, but wholesale changes, including the end of the drug war,³⁵ mandatory collection of racial impact data,³⁶ increased funding for re-training and re-entry programs, and a complete change in societal mindset that begins with the abandonment of colorblindness.³⁷ According to *The New Yorker*, Alexander’s book “was hardly an immediate best-seller, but after a couple of years it took off and seemed to be at the center of discussion about criminal-justice reform and racism in America.”³⁸

By no means was *The New Jim Crow* the only book to examine race and the criminal justice system. In *Locking Up Our Own*, James Forman, Jr. critically examined the role played by Black prosecutors, police chiefs, and legislators in perpetuating and aggravating the racial disparities in prisons.³⁹ This book landed on the *New York Times*’ weekly recommendations,⁴⁰ and won the 2018 Pulitzer Prize for Non-Fiction.⁴¹

Some two decades earlier (but still after the Rodney King beating), Randall Kennedy published *Race, Crime, and the Law*, which was one of the first books to

³² Van Jones & Jessica Jackson, *10 Reasons to Celebrate the First Step Act*, CNN (Dec. 21, 2018), <https://www.cnn.com/2018/12/21/opinions/ten-reasons-to-celebrate-first-step-act-jones-and-jackson/index.html>.

³³ ALEXANDER, *supra* note 20, AT 14–15.

³⁴ See *id.* at 11 (noting that one-third to one-half of young Black men are “currently under correctional control—in prison or jail, on probation or parole”).

³⁵ *Id.* at 288.

³⁶ *Id.* at 289–90.

³⁷ *Id.* at 298–303.

³⁸ See David Remnick, *Ten Years After “The New Jim Crow,”* NEW YORKER (Jan. 17, 2020), <https://www.newyorker.com/news/the-new-yorker-interview/ten-years-after-the-new-jim-crow>.

³⁹ JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017).

⁴⁰ See *Editors’ Choice, Staff Picks from the Book Review*, N.Y. TIMES, Apr. 23, 2017, at Sunday Book Review 23.

⁴¹ See *The 2018 Pulitzer Prize Winner in General Nonfiction*, PULITZER, <https://www.pulitzer.org/winners/james-forman-jr> (last visited Mar. 26, 2021).

diagnose the role of race in the criminal justice system and to offer prescriptive remedies.⁴² This book won the 1998 Robert F. Kennedy Book Award in journalism.⁴³

Still, there are signs that the George Floyd killing has accelerated the pace of change in a way that the earlier killings and beatings did not. Large parts of Los Angeles reacted in fury to the acquittal of the police officers who beat Rodney King, with resulting riots in the city that lasted five days,⁴⁴ but for the most part, it was local reaction. In contrast, the Black Lives Matter protest (which, to be fair, encompasses more than George Floyd's killing) reached an estimated 500,000 participants in over 500 cities on a single day in June 2020.⁴⁵ The *New York Times* reported:

More than 40% of counties in the United States — at least 1,360 — have had a protest. Unlike with past Black Lives Matter protests, nearly 95 percent of counties that had a protest recently are majority white, and nearly three-quarters of the counties are more than 75 percent white.⁴⁶

This widespread support for the protests may lay the groundwork for even more significant criminal justice reform than has taken place. There are additional indicators that the time is ripe for reform.

One of the longstanding obstacles to recovery for civil rights violations (such as excessive use of force) has been qualified immunity, which prevents civil rights plaintiffs from recovering damages unless they can show that the law enforcement officer-defendants violated clearly established law.⁴⁷ Since George Floyd's killing, Colorado and Connecticut have enacted laws to restrict or eliminate qualified immunity,⁴⁸ and congressional members introduced multiple bills in June 2020 to end

⁴² RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1998).

⁴³ See 1998, ROBERT F. KENNEDY BOOK AWARD, <https://rfkhumanrights.org/people/1998-randall-kennedy-samuel-hynes> (last visited May 26, 2021).

⁴⁴ See Anjali Sastry & Karen Grigsby Bates, *When LA Erupted in Anger: A Look Back at the Rodney King Riots*, NPR (Apr. 26, 2017, 1:21 PM), <https://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots>.

⁴⁵ See Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.

⁴⁶ *Id.*

⁴⁷ See, e.g., *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992) (en banc), *abrogated by Chavez v. Martinez*, 538 U.S. 760 (2003) (plurality).

⁴⁸ See, e.g., Cary Aspinwall & Simon Weichselbaum, *Colorado Tries New Way to Punish Rogue Cops*, MARSHALL PROJECT (Dec. 18, 2020, 4:00 PM), <https://www.themarshallproject.org/2020/12/18/colorado-tries-new-way-to-punish-rogue-cops>.

qualified immunity in the federal system—notably, with authors from both parties.⁴⁹ In late March 2021, the New York City Council greatly restricted the scope of qualified immunity within its jurisdiction.⁵⁰

Public support for reform goes beyond policing issues. A national poll taken after Floyd’s killing found that two-thirds of Americans supported either a “complete overhaul” of or “major changes” to the criminal justice system, and only 5% felt there was no need for any reform.⁵¹

As noted above, more commonly discussed areas for reform include further decriminalization of marijuana (and perhaps other controlled substances),⁵² reduction in sentences, and reallocation of some funding from police departments to other agencies.⁵³ While policing and sentencing are worthy areas for reform, the criminal justice system is much broader, and it would be foolhardy to believe that there are no other aspects worthy of critical review.

The articles in this Symposium cover a wide swath of topics related to several of these aspects of criminal justice reform. Michael White, Henry Fradella, and Michaela Flippin address police accountability,⁵⁴ while Mirko Bagaric, Gabrielle Wolf, Daniel McCord, Brienna Bagaric, and Nick Fischer examine the recent American support for reducing mass incarceration and provide guidance on ensuring that such reform is long-lasting rather than fleeting.⁵⁵

⁴⁹ See George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020); Ending Qualified Immunity Act, H.R. 7085, 116th Cong. (2020); Reforming Qualified Immunity Act, S. 4036, 116th Cong. (2020).

⁵⁰ Jeffrey C. Mays & Ashley Southall, *It May Soon Be Easier to Sue the N.Y.P.D. for Misconduct*, N.Y. TIMES (Mar. 25, 2021), <https://www.nytimes.com/2021/03/25/nyregion/nyc-qualified-immunity-police-reform.html>.

⁵¹ See *Widespread Desire for Policing and Criminal Justice Reform*, AP-NORC (June 2020), <https://apnorc.org/projects/widespread-desire-for-policing-and-criminal-justice-reform/>; see also Shaila Dewan, *Criminal Justice Reform Unites Both Parties*, N.Y. TIMES, Nov. 25, 2020, at A16.

⁵² See, e.g., Thomas Fuller, *Voters Ease Drugs Charges and Legalize Marijuana*, N.Y. TIMES, Nov. 5, 2020, at P13.

⁵³ One of the common reform demands in the summer of 2020 was to “defund the police.” While some proponents did apparently mean that police departments should be disbanded altogether, the more typical understanding was that some public funding should be reallocated from police budgets to other social service agencies, which would assume responsibility for some public welfare matters that police officers currently respond to. See generally Juana Summers, *Most U.S. Mayors Do Not Support Reallocating Police Resources, Survey Finds*, NPR (Jan. 21, 2021, 6:00 AM), <https://www.npr.org/2021/01/27/960883916/most-u-s-mayors-do-not-support-reallocating-police-resources-survey-finds>.

⁵⁴ Michael D. White et al., *How Can We Achieve Accountability in Policing?: The (Not-So-Secret) Ingredients to Effective Police Reform*, 25 LEWIS & CLARK L. REV. 405 (2021).

⁵⁵ Mirko Bagaric et al., *American Exceptionalism at Its Finest: “Soft on Crime” Now a Vote Winner in the World’s Largest Incarcerator*, 25 LEWIS & CLARK L. REV. 489 (2021).

The death penalty is a form of punishment that has been falling out of fashion with a trend toward abolition over the past few decades. Meggie Kirchner tackles the intersection of the federal death penalty with Native American tribal law, and identifies a legal loophole that permits the United States to force its will upon the tribes despite the ostensible control given to the latter in the Federal Death Penalty Act.⁵⁶

Alison Lynch and Michael Perlin discuss the role that recent neuroscience research may play in determining appropriate punishments for offenders based on whether those offenders are likely to respond to such punishments, with a related goal of reducing the racial bias that plagues current psychiatric examinations used to assist the sentencing of criminal defendants.⁵⁷

The remaining three articles focus on reforms at the trial level. Connor McDermott argues that reforming the default mental state for crimes away from its current hodgepodge to a standard “knowingly” element would provide a degree of protection to defendants by making it clear in advance what conduct is criminal.⁵⁸ Itay Ravid and Eric Werner separately consider ways the criminal justice system currently lets down the victims of crime. Ravid compares the depiction of Black crime victims in the media with that of white victims and finds that the former are underrepresented, reinforcing their “second class” status as victims, with attendant disadvantages in recognition and support; Ravid offers counter-narratives to counteract this dynamic.⁵⁹ Finally, Werner highlights the need for prosecutors to become trauma-informed so as to avoid inflicting a “second assault” on crime victims through the criminal prosecution.⁶⁰

The time is now for meaningful criminal justice reform. This Symposium aims to provoke a widespread consideration of ways in which such reform might proceed.

⁵⁶ Mary Margaret L. Kirchner, *The Execution of Lezland Mitchell: An Analysis of Federal Indian Law Criminal Jurisdiction and the Death Penalty As Applied to Native Americans*, 25 LEWIS & CLARK L. REV. 649 (2021).

⁵⁷ Alison J. Lynch & Michael L. Perlin, “*I See What Is Right and Approve, but I Do What Is Wrong*”: *Psychopathy and Punishment in the Context of Racial Bias in the Age of Neuroimaging*, 25 LEWIS & CLARK L. REV. 453 (2021).

⁵⁸ Connor B. McDermott, *Mess Rea*, 25 LEWIS & CLARK L. REV. 607 (2021).

⁵⁹ Itay Ravid, *Inconspicuous Victims*, 25 LEWIS & CLARK L. REV. 529 (2021).

⁶⁰ Eric M. Werner, *Avoiding the Second Assault: A Guidebook for Trauma-Informed Prosecutors*, 25 LEWIS & CLARK L. REV. 573 (2021).