Episode 1: Past
Fight the Power: The Evolution of Prosecutorial Discretion

Music

KAMRON: Hello and thank you for tuning into our first episode of *Fight the Power: The Evolution of Prosecutorial Discretion*. Join us, a journalism class at Washington and Lee University, as we walk through the history of prosecutorial power in the South to figure out when—and how—popular resistance—or the lack of it—molded the nation's criminal justice system into its present form. Stick with us through all three episodes as we explore the past, present and future of prosecutorial power—and examine possible solutions that might reshape how American prosecutors exert their control over criminal law.

To understand efforts to "*Fight the Power,"* this episode tracks the legal history of prosecution from the nation's founding up through the civil rights era. We want to show "what changed" to enable this *fight* to grow momentum at three critical periods in American history, beginning when slavery was the law of the land.

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As Frederick Douglass told crowds in 1857, ""If there is no struggle there is no progress…Power concedes nothing without a demand."

My name is Kamron Spivey**.**

HANNAH: I'm Hannah Nolton.

WILLIAM: And I'm William Van Arsdall.

KAMRON: *We* invite you to join us as we seek to understand what *power* Douglass was scrutinizing over 150 years ago.

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KAMRON: I began with this quote from Douglass because its meaning transcends his time. Douglass' address that August afternoon in upstate New York focused primarily on commemorating the successful emancipation efforts of the British and — more importantly, to Douglass — the West Indian slaves. But in asserting that "Power concedes nothing without a demand," Douglass also famously foreshadowed the American Civil War. It took several years and hundreds of thousands of deaths before the demands to abolish slavery were met. In the process, this struggle ultimately destroyed centuries of Southern legal code, only to resurface under a new name: Jim Crow.

Of course, Douglass would not have framed the institution of American chattel slavery as "legal." In his 1845 autobiography, Douglass sought in part to convince Northern critics that he had in fact endured the horrible conditions of that institution. But he also described what he called "two instances of murderous cruelty" against the enslaved: he wrote that nothing was done

in either case—either by arrest or judicial investigation. “By the slave code,” he wrote, “there is no legal protection…for the slave population.”

Slaves were technically entitled to more legal rights in court proceedings as the antebellum era progressed. But the actual application of these rights was another story altogether. Before jumping ahead, let’s look at how the Constitution framed the legal status of enslaved Black men in 1787.

I interviewed Dr. Lynn Uzzell, a visiting assistant professor of politics at Washington and Lee University. An expert on the Constitutional Convention, Uzzell zeroed in on what she says “became the most hated of the clauses within the Constitution.”

We’re talking about Article IV, Section 2, Clause 3, better known as the Fugitive Slave Clause.

UZZELL: One of the unusual things about the fugitive Slave clause is that…there appears to have been very little debate prior to its adoption, and that's unlike so many other clauses within the Constitution.

KAMRON: What’s more, she says, is that the Framers intentionally avoided using the word “slavery” anywhere in the Constitution.

UZZELL: [T]hey were very particular about omitting the idea that there was justice or moral legality in holding slaves.

KAMRON: Pierce Butler and Charles Pinckney, two delegates from South Carolina, introduced the clause late in the Convention**.** But Uzzell says that James Wilson of Pennsylvania and Roger Sherman of Connecticut objected to the original wording: it implied that northern states would cover the expenses in capturing runaway slaves. Significantly, not one of the Framers condemned the clause’s underlying purpose.

UZZELL: And then we have the wording…’under the laws thereof,’ suggesting that slavery is an institution that is upheld by state law, by positive law within certain states, but under no other sort of sanction.

KAMRON: Written in passive voice, the Framers made it intentionally ambiguous, likely an effort to avoid further debate on an obviously contentious issue.

UZZELL: If the escaped slave shall be delivered up, who is responsible for delivering them up? The Constitution clearly is just not clear.

In the real world, what happens is that the owners of the escaped slaves or the agents of the owners -- essentially paid slave catchers -- would go into the free States and capture the slaves or the alleged slaves and forcibly carry them back into the South.

But this creates obviously a problem that they may not be too particular about distinguishing between those who are escaped slaves and those who are free black residents within some of the northern states.

KAMRON: Many northern states adopted personal liberty laws intended to protect free Black citizens from being kidnapped and taken down South.

UZZELL: Pennsylvania, right from the beginning had these personal liberty Laws, and therefore the first time you get any federal legislation trying to enforce the fugitive slave clause, came out of a case of a couple of agents of a slave owner who went into Pennsylvania and simply captured someone they alleged was a slave and carried them out of the state.The executive of Pennsylvania then called for the extradition of those men on the grounds that they were kidnappers.

KAMRON: In response, Congress passed the Fugitive Slave Law, which did not require much for a slave hunter to justify a capture.

UZZELL: The federal guideline was minimal, so those who were claiming the removal of the slaves really just had to provide a bare minimum of facts to show that the person had escaped and that the person who was captured resembled in some ways the person who is alleged to have escaped. And this was to be presented before a federal magistrate.

KAMRON: The Fugitive Slave Law highlights the harsh legal realities for enslaved—and even *allegedly* enslaved people. Blacks were a legal other. Black men and women had no guarantee of rights. And unlike their white neighbors, challenges against Black rights rarely entered the courtroom.

Historian Daniel Flanigan summed it up in his 1974 article in the *Journal of Southern History*: as he put it, "there was no sharp break between public and private law enforcement." The progression from master to magistrate was a gradual one, he wrote**,** and the law recognized several intervening stages where neither the master nor the courts exercised exclusive jurisdiction.

The North had slave hunters. The South had "slave patrols." Both had enormous power, serving as pseudo-prosecutors.

The members of slave patrols either volunteered or were drafted by local magistrates. The Arkansas Supreme Court once commended them for being "partly judicial as well as executive." They were like cops who could act as investigator, judge, and jury.

Since slaves could not testify against white men, they were powerless to challenge the prosecution's witnesses**,** many of whom weren't even asked to take an oath to tell the truth. Other procedural errors and discriminatory codes—many of which were imposed in the seventeenth century— stripped slaves of other legal rights. And in several states like Louisiana, *only slaveholders* could serve on juries in cases against the enslaved.

Flanigan wrote that Virginia had the distinction of maintaining the most repressive system of criminal laws regarding slavery. In Virginia criminal proceedings, whites and free Blacks had the right to a hearing before a justice of the peace, an "examining court," a Grand Jury indictment, and a trial by jury. But slaves were not entitled to any such rights.

Not until 1865 did a Virginia slave ever successfully appeal a county court decision.

But conditions of the enslaved had not improved at all by the American Civil War. The Supreme Court had ruled in *Dred Scott v. Sandford* (1856) that Black men and their descendants could never be citizens of the United States.

The threat of being captured as a "fugitive" also loomed large. Shortly after Southern states seceded, the Confederate Government began confiscating the "property" of Northern sympathizers. Often, this "property" included enslaved men, women, and children.

I spoke with Seth McCormick-Goodhart, the assistant director of Special Collections and Archives at Washington and Lee University. He showed me an especially-rare example of one of these wartime confiscation orders.

GOODHART: In Rockbridge County, Virginia, Judge John Brockenbrough, who was an officer judge in the District Court in this region of Virginia, of the Confederacy. Also, the future founder of the W&L Law School, approved an order to seize whom the court described as, and I'll quote "a negro woman named Emily" and her infant child…in February of 1862.

Emily and her daughter had belonged to Cyrus McCormick. He was a Rockbridge County native, who along with his brothers, had removed with their family successful business to Chicago in 1847. And I'll mention too that one of the brothers, Leander, was my great, great grandfather.

SPIVEY: Although the McCormicks had moved North, they had leased Emily and her daughter out to another Rockbridge family, whom this Confederate court order had summoned.

GOODHART: Because McCormick lived in Illinois by the beginning of the American Civil War...this court document had labeled him an *alien enemy* and enabled the court to *sequester*, *hold*, and *dispose* of his quote property as the Confederacy saw fit.

SPIVEY: Northern states, meanwhile, had continued to *fight the power* that slave hunters held over alleged fugitives. The most notable case was *Prigg v. Pennsylvania* (1842). As Professor Uzzell says, it was a pro-slavery ruling from a U.S. Supreme Court justice who personally opposed slavery.

UZELL: This case was tragic. It involved an alleged escaped slave by the name of Margaret Morgan and her children, and Margaret Morgan had essentially never lived as a slave. She had lived her childhood on the property of someone who owned her parents. But her parents were getting elderly, and they essentially lived as free persons, but their owner never formally freed them, much less their daughter Margaret. And therefore, when Margaret grew up, she married a man. She had a family. She moved from Maryland to Pennsylvania."

But the heirs of her parents' owners claimed Margaret as a slave, as after she had lived as a wife and mother in Pennsylvania for years, and that owner…hired a slave catcher by the name of Prigg who went into Pennsylvania and tried to remove Margaret Morgan and her children. The state magistrate refused to have anything to do with this case and therefore Prigg simply forcibly removed Margaret and her children back to Maryland.

KAMRON: Professor Uzzell says that in writing the majority opinion, Supreme Court Justice Joseph Story removed any procedural rights left for the alleged slaves.

UZZELL: [I]t suggested that there was a *self-help rule*…that the slave catcher, the slave owner, or his agent was able to effectively enforce the law on their own.

KAMRON: But abolitionists used a small phrase in Story's ruling to their advantage.

UZZELL: Justice story said…that he believed that states could not be compelled to participate in the recapture of slaves, and therefore he meant to…put the authority entirely in the hands of the federal government. But without state participation, it meant that the slave capturer had almost no aid whatsoever.

KAMRON: A northern sheriff, for example, might forbid a slave catcher from using his jail or any local resources to detain the alleged fugitive.

UZZELL: And, therefore, what happened is that slave catchers found it *harder* to recapture alleged fugitive slaves after that ruling than before it[.]

States in response to the Prigg decision decided that not only were state officials, state and local officials not required to help participate, but they began passing laws forbidding state officials from participating in any way in the recapture of slaves. And therefore, a lot of these slave hunters were finding it impossible…to effectively capture slaves within territory that didn't want them to achieve their purpose.

KAMRON: President Abraham Lincoln turned the tables on slaveholders beginning in 1863, when his *Emancipation Proclamation* authorized Union forces to capture and seize slaves across several Southern states.

After the Civil War, the 13th, 14th, and 15th Amendments proclaimed equality under the law. But the promises didn't last as prosecutorial discretion once again grew unchecked and fell back into private hands. Slave patrols turned into Klan patrols, and Douglass' emphasis on struggle would be repeated by future generations.

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HANNAH: Thanks, Kamron! We hope you are enjoying the episode so far! I'm Hannah and I will be taking over as your tour guide on our journey through the past. In the coming minutes, you will learn about the ways in which prosecutorial power evolved in the Reconstruction and Jim Crow eras.

For a little background, Reconstruction refers to the time period after the Civil War when union forces occupied the South from 1865-1877. The Jim Crow era followed and was marked by both state and local laws that legalized racial segregation. The earliest laws were passed in 1865, and lasted until the mid 20th century.

During this time, prosecutors gained power in the criminal justice system. Towards the end of the 19th century cities grew and crime grew with it. I recently talked to Mustafa Ali-Smith a program associate with the Vera Institute of Justice's Reshaping Prosecution Initiative.

I asked him how prosecutorial power changed from antebellum to Reconstruction.

ALI-SMITH: Slave patrols came in to provide this law and order. They maintain this security for prosecutors, right, because during this time prosecutors maintained that what they were doing was legal. And, so during this time, whenever enslaved folks wanted to escape the plantation, and then were brought back the slave patrols were not penalized for doing this, and a lot of that was due to prosecutors and how again they showed up into in the in their role. The slave patrols maintain this immunity essentially from prosecution.

HANNAH: But during Reconstruction, prosecutors continued to do what they wanted.

ALI-SMITH: You had things like the 13th Amendment, which essentially was known to abolish slavery, but it actually was creating this space that allowed for continued oppression.

ALI-SMITH: At the end of the day, both of these systems were meant to do one thing, and that was to oppress black and brown folks and prosecutor's role was and that was to uphold what that system and caste system was meant to do.

HANNAH: For a time, Southern prosecutors and Southern mobs were checked by a federal entity known as the Freedmen's Bureau. Union military officers, most of whom had experience during the Civil War, would constantly report back to Washington and affiliated districts.

The Bureau in Lexington, Virginia, for example, wrote several letters both to the federal government and to local authorities regarding their fears of racial violence against Black men and women. In May 1863 the commissioner of the Lexington district of the Bureau reached out to Robert E. Lee, then president of Washington College, to warn him about rumors that students were going to storm the jail and kill a Black man suspected of shooting a student in a street dispute.

Nothing happened, but it shows how a military presence kept a lid on racial tension and prevented further violence. Congress compromised with Southern democrats in 1877, agreeing to end military occupation in exchange for selecting Republican candidate Rutherford B. Hayes as president in a divided election. That meant that after 1877, racial violence in the South was unchecked by federal authorities.

HANNAH: As a consequence of Reconstruction, prosecution began to shift from the hands of private citizens to the public. A private prosecutor had been an attorney hired by plantation owners or businessmen to represent them. A public prosecutor worked for the people.

ALI-SMITH: These entities were closely tied to the plantation or this, or the the the slave owners and prosecutors during this time were also connected to those entities so they could have been the friend of the slave patrols. Or they could have been a close relative, right, of the plantation owner and so. It they all worked together in a sense, right? There was no accountability by the prosecutor to the community at large, right? It was only accountability to the slave patrols or the plantation owners or other folks who had who had owned enslaved people, they weren't accountable to enslave people at all. They didn't enslave people, did not have anyone to look after them. And so how we have seen this kind of shift throughout history is that prosecutors have been made more to be public figures that are supposed to bring about public safety for the masses. They are meant to be individuals who are accountable to the entire community, not certain parts of the community, but to everyone. And they are supposed to

ensure that everyone feels safe, and so it did it shifted throughout time of being this entity that only representative of some to being an entity that is supposed to be representative of all and bring about that safety for all, not just a a small group of individuals.

HANNAH: Arizona State University history professor Johnathan Barth wrote about how the state became the focal point of prosecution. Ali-Smith agrees.

ALI-SMITH: The intention was there to start to shift for it to be for the masses, because in theory is that if you elect this person that if you elect this person into this position that they are going to be the representative of this of this community, that's in theory, right what is happening or what you would want to happen, but you know like I mentioned earlier, you had these things like black codes which in some cases restricted African Americans from even being able to vote. So when you have these systems put in place of who can and cannot participate in democracy, right, who can participate in voting for the prosecutor if you limit this group and only allow a certain group to vote for the prosecutor. This goes back to what I said earlier about reinventing this caste system, right? It is shaping itself into another form over time, and so the intention was there for prosecutors to represent the masses, but other laws will put into place to prevent African Americans and other people of color from participating in the democratic process that even elected prosecutors to begin with.

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HANNAH: Stanford law professor George Fisher says there was an uptick in the number of cases that ended in plea bargains in the 1860s.

FISHER: Later in the 1860s, what happened, at least in Massachusetts, is that clear plea bargaining began to take hold not only in some less serious offenses, but also in the most serious offenses in homicide cases, and part of what gave rise to the increasing plea bargaining in homicide cases is that jurisdictions, well in Massachusetts, the state began to divide murder into degrees, and once you have not only murder and manslaughter, which had existed earlier, but murder and 2nd degree murder and manslaughter, then there there are more options in the plea bargaining process for the prosecutor to say in exchange for a guilty plea to this offense, I will reduce the charge to some lesser offense that carries a lesser charge.

HANNAH: In the 1890's, Fisher says, there was an explosion in plea bargaining.

FISHER: And then the dynamics were different. The pressure on the system from the perspective of judges began to change because there were more and more lawsuits on the civil side. What we call in law tort lawsuits, personal injury lawsuits and they began to explode during that era because of the spread of heavy mechanized equipment, and especially because of the spread of railroading and streetcars and other instruments of the Industrial Revolution that could give rise to many, many injuries and therefore many many lawsuits. And therefore the system simply began to be overwhelmed by the exploding caseloads, which led to pressure to to economize in one way or another, and plea bargaining was one way that already existed, in which courts could economize.

HANNAH: Even back then, Fisher says, people sensed there was something wrong with plea bargaining.

FISHER: There was newspaper commentary at the time, especially in New York, where the local press was deeply critical of prosecutors for engaging in bargaining justice rather than real justice turning the courts into a game rather than a system in which the truth is sought out. I think that is true to some degree today. I think people watch the court system sometimes do come away with the impression that plea bargaining is simply a system of dickering in which the deals are struck, but we never get to the bottom of exactly what the criminal conduct was, and whether this particular person was guilty of committing that conduct.

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WILLIAM: Hi, my name is William. After World War II, the U.S. thrived and became the leader of the free world. Many Americans began buying homes, cars, and television sets. To many, the 1950s represented the American Dream.

For millions of black Americans, the American dream was just that—a dream.
From the 1950s through the 1960s, black Americans struggled to fight the oppression of a segregated South. They picketed, boycotted, and protested — only to be met with the full force of prosecutorial and judicial power.

Early in the Civil Rights era, prosecutors used the law to get the results they wanted. They brought unrelated charges against protesters, such as loitering, vagrancy and hitchhiking. They enjoyed the full support of white judges and all-white juries.
They also used bail in efforts to financially cripple the protest movement.

In 1954, the Supreme Court ruled in *Brown v. Board of Education* that "Separate but Equal" was unconstitutional in public schools.

The ruling empowered people like Rosa Parks.

On December first, 1955, Parks was riding on a Montgomery city bus when everyone in a row with her—all black people—were told to get up and move to the back. They were told to get up and make room for one white passenger. Parks refused. Her arrest started a movement, and the Montgomery Bus Boycott began.

Less than one month later, Montgomery's mayor announced a get-tough policy, which led to arrests of black people participating in the boycott. Two days later, the Reverend Martin Luther King Jr. was arrested, fingerprinted, photographed, and jailed for driving five miles an hour over the speed limit.

Retired University of Maine sociology Professor Dr. Steven A. Barkan says that southern prosecutors used the law to suppress these protests.

BARKAN: They would routinely get arrested either for acts of civil disobedience by deliberately violating the law or just out of fear of harassment by legal authorities, such as walking down the street. They could get arrested for loitering and things like that.

WILLIAM: After the boycott, the black community relied on a carpool system to help people get to work. The police began arresting the drivers for operating illegal taxi services, even though the drivers were not paid being by passengers. Police also arrested passengers who were waiting for a ride.

BARKAN: Prosecutors knew that going in. So, in a sense, all these trials that happened were what we might call show trials, meaning they were put on just for show. They were in a sense, a pretense to legitimize what was happening to the civil rights movement.

WILLIAM: Judges supported the prosecutors' approach. And when prosecutors sought high bail for civil rights protestors, judges backed them up.

BARKAN: Bail is determined by the judge but often with prosecutors' recommendation, which the judge doesn't have to listen to. But in terms of in terms of, first of all, whether the defendant should be released, and if so, what the bail amount should be. But in the southern legal system at the time, in a sense, we had cooperation between the local judges and the prosecutors. They were on the same page in terms of their hostility to civil rights forces. So, I don't think there was much of a problem in the prosecutor being able to get fairly high bail for the kinds of alleged crimes that were committed.

WILLIAM: It got worse for protestors. They couldn't find lawyers to represent them. Defense attorneys who tried to help were threatened by the Ku Klux Klan. They were also threatened with disbarment by the courts.

Prosecutors relied on another tool to tip the scales—and that was the use of what are called peremptory challenges. During jury selection, prosecutors and defense attorneys get a certain number of chances to eliminate people they do not want on the panel. Prosecutors used the peremptory challenges, or strikes, during the civil rights era to achieve all-white juries.

In 1986, the Supreme Court ruled in Batson v. Kentucky that prosecutors cannot use peremptory strikes to exclude jurors solely based on race. Former U.S. Department of Justice lawyer Justin Murphy says the decision did not end the practice.

MURPHY: Batson versus Kentucky held that for peremptory challenges based on race, ethnicity or sex, they're unconstitutional when used by criminal prosecutors. So, there's three steps to making a Batson challenge. The first is that the party objecting to the challenge has the burden of showing that the totality of facts gives rise to an inference of a discriminatory purpose in a peremptory challenge. And it's a relatively less demanding standard. The relevant facts are circumstance, usually circumstances of defendants, and can vary. The second part of the Batson challenge is that if you can make that, if you can clear that hurdle, then the second step is that the burden shifts to the other party to offer a non-discriminatory purpose or reason for the exclusion. But sometimes even something that's superstitious, can be sufficiently neutral to survive the second step. But there's some standards. And the explanation for the printer challenge that you made has to be clear, and reasonably specific. You can't just pull something out of thin air. And then third, of course, is that the trial court makes its determination. So that's it. It is not

something that you can just make out of thin air. But if you do a peremptory challenge, and it's based on race, and the judge agrees with that objection, it's likely that the entire case is gone.

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HANNAH: Thanks for listening. Please tune in for our next episode of *Fight the Power: The Evolution of Prosecutorial Discretion* as we look at prosecutors' use of plea bargaining.

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