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Community Prosecutors

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INTRODUCTION

This Essay addresses the ethic of community in criminal prosecution.[1] Long echoed in the rhetoric of criminal justice, the ethic continues to gain greater resonance through the expanding advocacy practice of community prosecution. Engrafted from the community-policing and community-court movements of the last decade, and invigorated by interdisciplinary research high-lighting the influence of community norms on civic character and society, the ethic emphasizes the values of citizen participation, institutional decentralization, and local accountability in the prosecution function. These values are intended to foster citizen-state collaboration and grassroots equality initiatives within the criminal-justice system. Aspiring to prevent individual crime and enhance collective welfare, the practice

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This Essay is dedicated to my father, John B. Alfieri, always here.

1. This Essay is part of a longer study of lawyers, ethics, and race in the American criminal-justice system. Earlier works in this seven-year project have studied the intersection of racial identity, narrative, and representation in the prosecution and defense of racial violence. Provocative in spirit, the works break from conventional treatments of the prosecution and defense functions. *See, e.g.*, Anthony V. Alfieri, *Race Prosecutors, Race Defenders*, 89 GEO. L.J. 2227 (2001); Anthony V. Alfieri, *Prosecuting Violence/Reconstructing Community*, 52 STAN. L. REV. 809 (2000); Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157 (1999); Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063 (1997); Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995). These departures have spurred criticism. *See, e.g.*, Christopher Slobogin, *Race-Based Defenses—The Insights of Traditional Analysis*, 54 ARK. L. REV. 739 (2002); Abbe Smith, *Burdening the Least of Us: "Race-Conscious" Ethics in Criminal Defense*, 77 TEX. L. REV. 1585 (1999).

envisions more responsive, community-oriented prosecutorial roles and strategies.

Academics praise community-prosecution programs for their "exciting new working partnerships with communities in preventing and addressing crime and in defining justice."[2] Some, like Anthony Thompson, temper their praise by pointing out that such programs operate without a "comprehensive analysis" or "coherent vision" of the prosecutorial role in community-based contexts.[3] Thompson complains of haphazard design and implementation, inadequate study, and insufficient programmatic reflection.[4] Although sympathetic, his complaints test the goals, values, and methods of the community-prosecution movement.

No less sympathetic, this Essay tests the community-prosecution movement on a more abstract plane. It surveys the theoretical foundation of the movement, tracing the role and rationale of prosecutors in community-based advocacy, specifically in communities of color.[5] Its main thesis is that the enlargement of citizen participation, institutional decentralization, and accountability of federal and state prosecution offices to local communities stimulates citizen-state collaboration and grassroots equality initiatives broadly within the criminal-justice system, thereby ameliorating the conditions of poverty, disempowerment, segregation, and crime pervading communities of color.

Prosecutors in communities of color make daily decisions about racial identity, racialized narrative, and race-conscious representation. These decisions shape the identities of both defendants and victims. Similar decisions inform the work of defense lawyers, judges, and law-enforcement agents. Together they produce race-coded strategies of advocacy and adjudication. Paradoxically, within the sphere of criminal justice and legal ethics, race shadows the actions of prosecutors and defenders yet often fails to rouse debate. Part of this silence stems from legal positivism and the practiced separation of law and morality. Part rises from the complexities of racial identity and narrative coupled with their inexorable slippage and historical density. Part also branches out from the practical necessities of legal representation and the strategic efficacy of "race-ing"[6] legal discourse for juries, judges, and the juridical public.

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2. *See* Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321, 324 (2002) (footnote omitted).

3. *Id.*

4. *Id.* at 325.

5. By communities of color, I mean communities where people of color (e.g., Black, Latino/a, Asian, Native American) comprise a majority of the population. For a resource that maps the experiences of diverse communities of color, see RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 91-428 (Juan F. Perea et al. eds., 2000).

6. "Race-ing" describes the coloring of identity in law, culture, and society. It occurs through speech and conduct, finding expression in symbol, performance, and text. *See* Charles R. Lawrence, *If*

Situated at the intersection of poverty, segregation, and crime, the community-prosecution movement offers the opportunity to challenge prosecutorial silence in matters of race. Meeting that challenge requires tolerance for ambiguity in the treatment of identity and narrative in legal agency, as well as skepticism about the use of pragmatism and necessitarian logic in advocacy. Most importantly, it requires scholars to cast aside traditional accounts of racial identity and racialized narrative, an act of rebellion that upsets dominant visions of the racialized subject and race-neutral representation.

In the academic and practice literature of the prosecution-and-defense process, defendant-specific accounts of the racial subject in criminal law frequently invoke the stereotyped image of the Black lawbreaker.[7] Likewise, defendant-based racialized narratives often describe a natural White/Black hierarchy, as in the subordinating story of Black rage.[8] Yet accounts of representation typically portray a race-neutral process of advocacy uninfected by prosecutorial, judicial, or juror bias.[9]

To be sure, neither theorists nor practitioners of the criminal-justice system fully embrace a racialized account of identity and narrative, nor do they accept the system's colorblind vision of advocacy. For many, identity is contingent.[10] Its features depend on the private and public location of the legal subject, for example in the domestic context of the family or in the market context of the workplace. For such commentators, narrative is rooted in voice and story. Its dissonance echoes the private and public tensions of subjectivity impelled by multiple roles and relationships. For these commentators, advocacy is embedded in competing visions of law, race, and society. Held within historically situated prosecution and defense practices, that competition produces the entrenched dichotomies of racial meaning. In fact, the prosecution and defense of criminal cases work in tandem

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He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 DUKE L.J. 431, 443 n.52 (discussing the genealogy of the term "race-ing").

7. On the identity construction of Black lawbreakers in White-majority and Black-minority communities, see Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1776-87 (1992).

8. For a useful history of the Black-rage defense, see PAUL HARRIS, BLACK RAGE CONFRONTS THE LAW 1-80 (1997).

9. For a discussion of racial bias in prosecutorial, juror, and judicial decision making, see Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63 (1993); Elizabeth L. Earle, Note, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 COLUM. L. REV. 1212 (1992); Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509 (1994).

10. On the contingency of identity in the social construction of race, gender, and sexuality, see Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 605-16 (1990); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 1, 36-204 (1995).

to create a public site for the meaning-making function of race-tailored sociolegal imagery and discourse. At the same time, they offer a public vista for re-envisioning the sociolegal relations and institutions of race.

Nowhere in the criminal-justice system is social meaning more debated and race more controverted than in the trials of racial violence.[11] In the race trials of White-on-Black and Black-on-White violence, racial identity is contested, racialized narrative is disputed, and advocacy is driven by a clash of color-coded tactics.[12] Such trials embroil prosecutors and defenders in a public struggle over not only epistemology and cognition, but also interpretation and discourse. Put simply, race trials challenge lawyers', judges', and jurors' habits of mind. Those habits affect our ways of knowing guilt, seeing wrongdoing, and fathoming harm. They also influence our ways of speaking about blame and seeking punishment. Fundamentally, race trials challenge the professional ideology and role of lawyers. More deeply, the trials confront the principles of partisanship and moral nonaccountability that inform the standard conception of the American adversary system.[13]

The racialized adversarial ideology of prosecutors and defenders comes at a cost to defendants, victims, and communities of color, though it

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11. For example, consider the recent decision of the U.S. Court of Appeals for the Second Circuit overturning a jury verdict against Lemrick Nelson and Charles Price for civil-rights violations in the allegedly race-incited 1991 killing of Yankel Rosenbaum in New York. The federal jury verdict and prior state prosecution followed four days of interracial street violence between Blacks and Hasidic Jews spurred by the motorcade-crash death of a seven-year-old Black child and the stabbing death of Rosenbaum in the Crown Heights section of Brooklyn. The state trial, on charges of second-degree murder and manslaughter, ended in acquittal. The federal trial, on charges that Nelson and Price interfered with Rosenbaum's federally protected public activities under a Reconstruction-era public-accommodations statute, resulted in convictions and prison sentences. United States v. Nelson, 277 F.3d 164 (2d Cir. 2002); *see also* Jane Fritsch, *New Trial for 2 in Killing of Hasid in 1991 Unrest in Crown Heights*, N.Y. TIMES, Jan. 8, 2002, at A19.

12. Consider again the clash of color-coded tactics in *United States v. Nelson*, *supra* note 11. In *Nelson*, federal prosecutors and defense lawyers sparred over the government's motion to stand the accused teenager, Lemrick Nelson, on trial as an adult on the disputed ground of his irredeemable and immutable deviance and, moreover, over the defense motion for judicial recusal on the explicit ground of Judge Trager's racial and religious bias. Trager is White and Jewish. *Id.*

Both teams also grappled over Trager's denial of the defendants' objection to the prosecutors' use of five out of nine (55%) of the government's peremptory challenges to strike African American candidates from the jury pool, and his denial of their for-cause challenge to a Jewish juror ("Juror 108") who had expressed grave doubts about his ability to be objective. *Id.*

Prosecution and defense teams additionally battled over Trager's controversial jury-selection decisions to bypass an alternate White juror, remove a second White juror from the panel, and select—out of order—an African American juror and Juror 108 from a list of alternates to fill two open places on the jury. Despite their prior objections, the defense teams, and Nelson and Price as well, consented to the court-initiated plan for empanelling Juror 108 on the main jury. The prosecution team not only approved the scheme, but also argued on appeal that the defendants' express consent constituted a waiver, extinguishing their Sixth Amendment and due-process rights. *Id. See also* Anthony V. Alfieri, *Ethics, Race, and Reform*, 54 STAN. L. REV. 1389 (2002).

13. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 50-55, 154-57 (1988); Anthony V. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293, 1339-63 (1998).

is presumed to be crucial to the guarantee of criminal justice. The cost weighs upon their individual dignity and their collective civic standing. A detailed accounting of the dignitary cost of race-tainted adversarial justice to defendants, victims, and communities of color is beyond the scope of this Essay. So too is a collective assessment of the civic harm (cultural, economic, and political) inflicted upon communities of color. Although crucial to the larger enterprise at stake, these more thoroughgoing appraisals must wait. Thus cabined in its aspirations, this Essay seeks to renew the normative commitment to community implicit in criminal prosecution and to reconfigure its meaning more closely with the civic and dignitary interests of a multicultural society.

Community-prosecution programs advance the civic and dignitary interests of victims, offenders, and communities of color by affording opportunities for citizen-state collaboration and by encouraging grassroots justice initiatives. Both public-private collaboration and grassroots mobilization enhance autonomy-based dignity and increase civic standing in politics and society.[14] The process of fostering street-level collaboration between citizens and the state, and moreover, promoting anticrime and criminal-justice campaigns in citizen-state coalitions, lays the groundwork for broader political empowerment.[15] By any measure, empowerment combines the spirit of normative and civic renewal.[16]

The Essay is divided into five parts. Part I outlines the history and structure of community-prosecution programs. Part II links the normative underpinnings of these programs to the jurisprudence of liberalism, feminism, and critical race theory. Part III assesses the normative import of

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14. Both cultural status and economic station may lag behind heightened civic standing. *See* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 108-26 (1992); DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 42-50 (1989).

15. Community organizers in impoverished and crime-ridden communities routinely combine antipoverty and anticrime initiatives in their organizing strategies. *See* Anthony V. Alfieri, *Practicing Community*, 107 HARV. L. REV. 1747, 1747-49 (1994).

16. Recent accounts of criminal law and the criminal-justice system display the same spirit of renewal. Spurred by a shared search for community in criminal law, the accounts signal a growing interest in normativity within the study of law and society. *See* Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 610-22 (1998); Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner-City*, 32 LAW & SOC'Y REV. 805, 809-30 (1998).

Distinct from a purely behavioral analysis of law, normative inquiry interrogates the private and public meaning of procedural rules, substantive laws, and social relationships for individuals, their affiliated groups, and their entwined communities. On the resurgence of social-norm theory in law, see Elizabeth Anderson, *Beyond Homo Economicus: New Developments in Theories of Social Norms*, 29 PHIL. & PUB. AFF. 170 (2000); Tanina Rostain, *Educating Homo Economicus: Cautionary Notes on the New Behavioral Law and Economics Movement*, 34 LAW & SOC'Y REV. 973 (2000).

Crafted to discern the meaning of community prosecution in the context of race-contaminated poverty, crime, and violence, this Essay extends the social meaning turn emerging in contemporary criminal-law scholarship and policy research. For historical background on the evolution and content of normative theory and social-meaning research, see Bernard E. Harcourt, *After the "Social Meaning Turn": Implications for Research Design and Methods of Proof in Contemporary Criminal Law Policy Analysis*, 34 LAW & SOC'Y REV. 179 (2000).

antecedent community-policing programs and community drug eourts. Part lV evaluates objections to community-based models of criminal prosecution from the standpoints of ethics, institutional function, and political legitimacy. Finally, Part V considers the application of community norms and practices in the prosecution of racial violence. The Essay concludes with an effort to distill and transform the sociolegal meaning of race, community, and criminal justice into a pedagogy of practiee for prosecutors.

I
COMMUNITY PROSECUTION

A. Locating Community in Prosecution

The evolving structure of community-prosecution programs derives from sociolegal norms and practices bound up in criminal law and post-war civil- and criminal-justice reform movements.[17] The norms of criminal law are founded on culpability and desert. The path from lawbreaking to culpability and from desert to punishment traverses the formal and informal processes of the state, its agents, and its institutions. The starting point of this pathway is community. Under the colorblind conventions of criminal law, lawbreaking is a breach of the community covenants of obligation and obedience, not an aet of racial defiance or fidelity. Culpability is a collective determination of communal breach, not a race-infected cultural inference. Desert is a collective assessment of consequence and worth, not a moment of racial subordination. Punishment, in the physicality of imprisonment and the sentence of death, is a collective expression of retribution, not an artifact of racial animus.

Criminal-law norms and practices evoke community and race through force and rhetoric. The multifaceted rhetoric of crime and criminal justice discloses both reconstructive and destruetive sentiments. Reconstructive instincts employ the rhetoric of atonement and forgiveness, as well as the rhetoric of rehabilitation and social reintegration.[18] They call for mercy and reconciliation. Destruetive impulses go beyond deterrence and prevention

17. *See* Victoria Nourse, *The New Normativity: The Abuse Excuse and the Resurgence of Judgment in the Criminal Law*, 50 STAN. L. REV. 1435 (1998) (book review) (comparing liberal and republican criminal-law conceptions of punishment and excuse).

18. On the rhetoric of atonement, forgiveness, and rehabilitation, see Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1218-45 (1998); Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1804-29 (1999); David M. Lerman, *Forgiveness in the Criminal Justice System: If It Belongs, Then Why Is It So Hard to Find?*, 27 FORDHAM URB. L.J. 1663, 1663-67 (2000).

to trumpet the rhetoric of vengeance and retributive punishment.[19] They call for pain and banishment.

The rhetorical tropes of crime and criminal justice are part of the ordinary discourse of law and culture.[20] Rhetoric shapes the domains of culture in the arts and in the media, and the perception of community in large and small configurations. Moreover, it molds the discernment of individual character, addressing in blunt and sometimes veiled tones each defendant, his victim, and their shared or separate communities.[21] A source of rhetoric and a servant of community as arbiter and guardian, the prosecutor mediates between the accused subjects and victimized objects of crime, spawning constructive as well as pernicious results.

The culture of criminal law and justice serves as a backdrop for the American prosecutor. The contemporary figure of the prosecutor springs from the historical evolution of the adversarial criminal trial.[22] Prior scholarly work on the cultural authority and social role of the prosecutor refers to both federal and state law-enforcement functions.[23] This familiar work highlights the prosecutor's pivotal role in making law and in establishing order.[24] It also underscores his role as an agent of the people and his

19. On the social function and meaning of deterrence, see Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 362-94 (1997); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 419-35 (1999).

20. Cultural attributions inform common understandings of criminal behavior. *See, e.g.*, James J. Sing, *Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law*, 108 YALE L.J. 1845, 1849-64 (1999); Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & HUMAN. 89, 109-16 (2000).

21. Encrusted by culture and society but self-animated, rhetoric produces a kind of subjectivity of knowledge. *See* Francis J. Mootz III, *The Quest to Reprogram Cultural Software: A Hermeneutical Response to Jack Balkin's Theory of Ideology and Critique*, 76 CHI.-KENT L. REV. 945, 958 (2000) ("Rhetorical knowledge emerges out of the preunderstandings embedded in patterns of social discourse and interaction, but it is distinguished from mere convention by the inventive representation and reinscription of 'prejudices' by the rhetorical actor.").

22. *See, e.g.*, DAVID J.A. CAIRNS, ADVOCACY AND THE MAKING OF THE ADVERSARIAL CRIMINAL TRIAL, 1800-1865, at 163-80 (1998); JOAN E. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY 3-43 (1980).

23. On federal law-enforcement functions, see H.W. Perry, Jr. *United States Attorneys—Whom Shall They Serve?*, 61 LAW & CONTEMP. PROBS. 129, 131-43 (1998); Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 224-45 (2000). On state law-enforcement functions, see William F. McDonald, *The Prosecutor's Domain*, *in* THE PROSECUTOR 15-51 (William F. McDonald ed., 1979).

24. *See, e.g.*, David T. Johnson, *The Organization of Prosecution and the Possibility of Order*, 32 LAW & SOC'Y REV. 247, 279-97 (1998); Dan M. Kahan, *Three Conceptions of Federal Criminal-Lawmaking*, 1 BUFF. CRIM. L. REV. 5, 15-22 (1997); Roberta S. Karmel, *Creating Law at the Securities and Exchange Commission: The Lawyer as Prosecutor*, 61 LAW & CONTEMP. PROBS. 33, 38-44 (1998).

mission in obtaining justice across a spectrum of cases.[25] It points as well to his transactional role in plea negotiations and in victim counseling.[26]

For federal and state prosecutors, discretion lies at the heart of their institutional function in litigation, bargaining, and counseling. The regulatory scope of federal and state prosecutorial discretion continues to be a matter of controversy.[27] Prosecutorial misconduct, still noteworthy in closing arguments and in grand jury investigations, continues to cause unease, particularly with regard to the constitutional repercussions of such misconduct and the curative adequacy of judicial remedies.[28]

A rising interest in race now joins the ongoing debate over prosecutorial regulation.[29] This interest surpasses the recent attention paid to bias-induced jury contamination, selective prosecution, and prosecutorial appeals to prejudice.[30] Cast more broadly, the interest is linked to mounting evidence of inequality in the criminal-justice system.[31] The colonial roots of racial inequality and its ineradicable connection to racially disproportionate rates of crime and urban decay, as well as disparate forms of

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25. *See* Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 612-25 (1999); Alan Vinegrad, *The Role of the Prosecutor: Serving the Interests of All the People*, 28 HOFSTRA L. REV. 895, 897-902 (2000).

26. On plea negotiations under the federal sentencing guidelines, see Cynthia K.Y. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power Over Substantial Assistance Departures*, 50 RUTGERS L. REV. 199, 216-39 (1997); Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-*Mistretta *Period*, 91 NW. U. L. REV. 1284, 1289-1311 (1997). On counseling victims, see Stacy Caplow, *What If There Is No Client?: Prosecutors as "Counselors" of Crime Victims*, 5 CLINICAL L. REV. I, 26-43 (1998); Kirk J. Nahra, *The Role of Victims in Criminal Investigations and Prosecutions*, PROSECUTOR, July-Aug. 1999, at 28, 30-32.

27. *See* Frank O. Bowman, III, *A Bludgeon by Any Other Name: The Misuse of "Ethical Rules" Against Prosecutors to Control the Law of the State*, 9 GEO. J. LEGAL ETHICS 665, 753-79 (1996); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 725-41, 765-73 (2001); Note, *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, 113 HARV. L. REV. 2080, 2083-93 (2000).

28. *See* Robert W. Clifford, *Identifying and Preventing Improper Prosecutorial Comment in Closing Argument*, 51 ME. L. REV. 241, 257-67 (1999); Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 815-31 (1999); Peter J. Henning, *Prosecutorial Misconduct in Grand Jury Investigations*, 51 S.C. L. REV. I, 10-25 (1999); Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 945-61 (1998).

29. *See, e.g.*, Paul Butler, *Starr Is to Clinton as Regular Prosecutors Are to Blacks*, 40 B.C. L. REV. 705, 708-15 (1999); Laura E. Gómez, *Race, Colonialism, and Criminal Law: Mexicans and the American Criminal Justice System in Territorial New Mexico*, 34 LAW & SOC'Y REV. 1129, 1174-95 (2000).

30. *See* Sheri Lynn Johnson, *Batson Ethics for Prosecutors and Trial Court Judges*, 73 CHI.-KENT L. REV. 475, 477-500 (1998); Andrea D. Lyon, *Setting the Record Straight: A Proposal for Handling Prosecutorial Appeals to Racial, Ethnic or Gender Prejudice During Trial*, 6 MICH J. RACE & L. 319, 324-35 (2001); Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605, 624-66 (1998).

31. *See generally* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 16-62, 101-68 (1999).

punishment, prompt both the local and national turn to community prosecution.

B. *Locating Prosecution in Community*

The literature of community prosecution defines the movement in the fairly "amorphous" terms of grassroots activism and outreach.[32] Boldly labeled as "the next stage" in the evolution of the conventional "charge-convict-sentence" paradigm,[33] the movement appears to be less of a paradigm shift or full-blown program than a public-safety strategy aimed at combating neighborhood crime and increasing civic empowerment.[34] Building upon popular theories of community-police partnership to build nimble, locally adaptable strategic organizations,[35] the movement

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32. *See* CATHERINE M. COLES ET AL., PROSECUTION IN THE COMMUNITY: A STUDY OF EMERGENT STRATEGIES—A CROSS SITE ANALYSIS, 34-115 (John F. Kennedy Sch. of Gov't Program in Criminal Justice Policy ed., Harvard Univ. 1998); Barbara Boland, *Community Prosecution: Portland's Experience, in* COMMUNITY JUSTICE: AN EMERGING FIELD 253-77 (David R. Karp ed., 1998); Catherine M. Coles, *Street Fighting Man: In Courts and D.A.'s Offices, "Community Prosecution" Is the New Watchword*, NEW DEMOCRAT, May-June 1997, at 20; Russ Freyman, *D.A.s in the Streets*, GOVERNING MAG., Sept. 1998, at 28; Sarah Glazer, *Community Prosecution*, 10 CQ RESEARCHER 1011 (2000); Paula Park, *DAs Still Getting Out on Street: After 10 years, Community Prosecution Is Growing; Some Worry About Funding*, 87 A.B.A. J. 26 (2001); Norma Mancini Stevens, *Defining Community Prosecution*, PROSECUTOR Mar.-Apr. 1994, at 13.

33. *See* Catherine M. Coles & George L. Kelling, *Prevention Through Community Prosecution*, 136 PUB. INT. 69, 72-83 (1999); Thompson, *supra* note 2, at 326.

34. *See* Douglas F. Gansler, *Implementing Community Prosecution in Montgomery County, Maryland*, PROSECUTOR, July-Aug. 2000, at 30, 32 (2000) ("[F]ield community prosecutors build partnerships with the police, citizen groups, faith-based organizations, schools and businesses in pursuit of improved public safety."); Eric H. Holder, Jr., *Community Prosecution*, PROSECUTOR, May-June 2000, at 31. Holder states:

> Community prosecution is not just a new program, it is a new strategy, a better way we—as prosecutors—can do our job. By working directly with the community and learning its problems and concerns and by becoming team players with other law enforcement agencies, prosecutors will be able to respond more effectively to the criminal justice problems in our neighborhoods.

Id. at 31-32.

35. *See* Barbara Boland, *What Is Community Prosecution?*, NAT'L INST. JUST. J., Aug. 1996, at 35, 38. Boland comments:

> To be effective, the new approach requires a highly flexible organization that allows NDAs [neighborhood district attorneys] to shape responses and strategies to meet the different needs of different neighborhoods. What concerns residents of one neighborhood may be irrelevant to another. Moreover, neighborhood conditions change over time, and street behaviors are dynamic and constantly changing, making prescribed operations of no value. Organizational capacity to adapt is essential.

Id. Gansler likewise states:

> In order to most effectively align prosecutorial resources with community needs and enable prosecutors to solve problems in partnership with the community, prosecutors need to be in the community daily. Only by having a daily presence in the community are prosecutors able to both gauge the seriousness of the community's public safety problems and play a positive role in their solution. In order to do this, prosecutors must be working side by side with the other primary public safety officials: the police.

Gansler, *supra* note 34, at 31.

postulates that local quality-of-life crimes[36] contribute to neighborhood blight and escalate criminal violence. Accordingly, it endorses community outreach through public-private ventures between government and non-governmental organizations and through need-specific local prosecutorial case and neighborhood assignments.[37] Proponents of this neighborhood-based assignment system laud "sending assistant district attorneys into the streets as a way of making a highly visible statement against the stubborn persistence of neighborhood crime and minor urban disorder."[38]

The emerging prosecutorial embrace of community arises from customary inclinations toward crime prevention and law enforcement, in effect complementing the trend in community policing.[39] The programs contemplate an assortment of community-based initiatives aimed chiefly at curbing the public violence of the street, but they are also generalizable and hence roughly applicable to the private violence of the home as well.[40] Like other crime-fighting initiatives, these pilot programs raise issues of priority and proportionality in prosecution.[41] Priority concerns the ranking or ordering of anticrime initiatives. Proportionality refers to the correspondence between the charging and sentencing of the offender and the nature of his crime. For the moment, no clear sense of priority among program initiatives seems to have materialized. Instead, local prosecutors typically seem to take up initiatives on a pragmatic case-by-case basis, their decisions

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36. Both the community-prosecution and community-policing movements call attention to quality-of-life crimes, defining such crimes broadly to include loitering, panhandling, prostitution, truancy, vandalism, even graffiti. *See* Freyman, *supra* note 32, at 28. Freyman observes:

> Community prosecution is an outgrowth of community policing. Prosecutors, like 1990s urban beat cops, are assigned to a small area and told to respond to grassroots concerns. They conduct meetings with business and community leaders, and deal with any crime, however minor, that affects the social fabric of the jurisdiction.

Id.

37. *See* Holder, *supra* note 34, at 32 ("Establishing partnerships with the community and law enforcement as well as strong and real working relationships with other public and private agencies, is a key element to a successful community prosecution approach."); Gansler, *supra* note 34, at 30 ("Prosecutors handle only cases arising from their [county police] districts and are assigned to specific beats and to schools within the police district for purposes of fostering community outreach."); Brian Forst, *Prosecutors Discover the Community*, 84 JUDICATURE 135, 135 (2000) ("A common denominator is that the programs typically aim to redirect service outside the court, with more sensitivity to the cultures and special needs of those served.").

38. *See* Freyman, *supra* note 32, at 28.

39. *See* George L. Kelling et al., *The Bureau of Justice Assistance Comprehensive Communities Program: A Preliminary Report*, NAT'L INST. JUST. RES. IN BRIEF, June 1998, at 1 (describing comprehensive community initiatives in policing); Susan P. Weinstein, *Community Prosecution: Community Policing's Legal Partner*, FBI L. ENFORCEMENT BULL., Apr. 1998, at 19.

40. *See* Mike Brogen & Sharon Harkin, *Community Rules Preventing Re-Offending by Child Sex Abusers*, 28 INT'L J. SOC. L. 45, 50-67 (2000); Richard Devine, *Targeting High Risk Domestic Violence Cases: The Cook County, Chicago, Experience*, PROSECUTOR, Mar.-Apr. 2000, at 30.

41. *See* Kevin M. Burke, *A Prosecution Model for the Millennium: The Continuum from Prevention to Priority Prosecution*, 34 NEW ENG. L. REV 651, 652-53 (2000); Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 FORDHAM L. REV. 723, 751-63 (1999).

compelled by public need and popular outcry. Similarly, no definite sense of proportionality in prosecutorial charging has emerged, though subject-matter trends (for example, in the case of quality-of-life crimes) seem identifiable. In the main, local prosecutors seem to press crime-fighting initiatives with more freewheeling than channeled discretion.

Community-prosecution programs provide a special opportunity for federal and state cooperation. Venues of cooperative federalism flow from the augmented federal role in revitalizing communities and preventing crime and violence. The U.S. Department of Justice has nationwide reach to implement the objectives of public safety and neighborhood justice under federal crime-control legislation authorizing local program implementation by U.S. Attorneys' Offices.[42] The national impetus is a byproduct of the federalization of local crime.[43] Intended to reduce crime, the federalization drive manifests itself in the congressional enactment of numerous crime-control and law-enforcement statutes.[44] That cumulative legislation authorizes the issuance of crime-prevention and community-based justice grants to states and local prosecutors.[45] Related provisions require prosecutors to cooperate and coordinate with educational, social service, and community resources to develop and deliver violence-prevention programs, especially those serving young offenders and victims.[46]

Congressional crime-control statutes enacted in the last two decades have fueled the growth of a diverse range of community-prosecution programs. Encouraged by the Department of Justice,[47] the programs strive to integrate local community initiatives and perspectives into the federal and state criminal-justice system and law-enforcement process. Examples of

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42. *See* DANIEL MCGILLIS & JOAN MULLEN, NEIGHBORHOOD JUSTICE CENTERS: AN ANALYSIS OF POTENTIAL MODELS 25-30 (1977); Catherine Conly & Daniel McGillis, *The Federal Role in Revitalizing Communities and Preventing and Controlling Crime and Violence*, NAT'L INST. JUST. J., Aug. 1996, at 24; Symposium, *The Office of U.S. Attorney and Public Safety: A Brief History Prepared for the "Changing Role of U.S. Attorneys' Offices in Public Safety" Symposium*, 28 CAP. U. L. REV. 753, 762-69 (2000); *see, e.g.*, Elizabeth Glazer, *How Federal Prosecutors Can Reduce Crime*, 136 PUB. INT. 85, 88-93 (1999); Elizabeth Glazer, *Thinking Strategically: How Federal Prosecutors Can Reduce Violent Crime*, 26 FORDHAM URB. L.J. 573, 581-605 (1999).

43. *See* JAMES A. STRAZZELLA, THE FEDERALIZATION OF CRIMINAL LAW 5-24, 32-35 (1998); John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 TEMP. L. REV. 673, 677-89 (1999).

44. *See, e.g.*, Public Safety Partnership and Community Policing Act of 1994, 42 U.S.C. § 3711 (2001); Safe Streets for Women Act of 1994, 42 U.S.C. § 13701 (2001); Victims of Child Abuse Act of 1990, 42 U.S.C. § 13001 (2001); Victims of Trafficking and Violence Protection Act of 2000, 42 U.S.C. § 7101 (2001).

45. *See* 42 U.S.C. § 13861 (2001).

46. *See* 42 U.S.C. § 13862 (2001). Legislative history, albeit scant, reinforces this purpose. *See* H.R. REP. No. 103-711 (1994); 140 CONG. REC. H2260 (1994).

47. *See* Robert L. Jackson, *"Community Prosecuting" Wins Fans, Federal Funds*, L.A. TIMES, Mar. 30, 1999, at A5; Sam Skolnik, *DOJ Puts Big Bucks Behind Community Prosecution*, LEGAL TIMES, Feb. 8, 1999 at 1; *Five Communities Receive Grants for Community Prosecution: Philosophy Allows Prosecutors to Consider Community's Perspectives During Process*, PRESS RELEASE NEWSWIRE, Mar. 11, 1999.

community-prosecution programs span numerous urban and suburban geographies, including Albany, Austin, Baltimore, Boston, Buffalo, Chicago, Denver, Indianapolis, Kansas City, Milwaukee, New York City, Oakland, Phoenix, Portland, South Bend, Washington, D.C., and a wide array of counties.[48]

The central tendency common to these widespread, often nascent programs is community outreach. Prosecutorial outreach involves more than attendance at community meetings and participation in police roll calls or patrols. It entails placement of prosecutors in police precincts and district attorney community branch offices, coordination with governmental-housing and social-services agencies, and engagement in neighborhood crime prevention and urban-revitalization partnerships with for-profit entities and nonprofit organizations.[49]

In summarizing these disparate programs, Thompson finds no "self-defining" vision or unitary meaning inherent to the concept of community prosecution.[50] Instead, he points to several strands interknitting the structure of programs and the design of local offices. Fundamental to both are decentralization and integration. Decentralization refers to the reallocation of resources and the reassignment of personnel (lawyers, community workers, and investigative and administrative staff) from traditional case-oriented courthouse offices to police precincts and neighborhood-based storefront offices. Integration refers to the incorporation of community prosecutors throughout traditional courthouse offices, rather than their separation into a discrete non-traditional unit. It also relates to the

48. *See, e.g.*, Barbara Boland, *Community Prosecution in Washington, D.C.: The U.S. Attorney's Fifth District Pilot Project*, NAT'L INST. JUST. RES. REP., Apr. 2001 (discussing community prosecution in Washington, D.C.); Barbara Boland, *Community Prosecution: The Manhattan Experiment*, *in* CRIME AND PLACE—PLENARY PAPERS OF THE 1997 CONFERENCE ON CRIMINAL JUSTICE RESEARCH AND EVALUATION, NAT'L INST. JUST. (1998) (discussing community prosecution in New York City); Janet Elliott, *Different Takes*, TEXAS LAW., Oct. 28, 1996, at 1 (discussing county-based community prosecution); Douglas F. Gansler, *Implementing Community Prosecution in Montgomery County, Maryland*, PROSECUTOR, July-Aug. 2000, at 20 (same); Michael B. Golden, *Teaching Tolerance Can Re-educate Those Who Hate*, CHI. SUN-TIMES, Feb. 23, 2001, at 39 (discussing community prosecution in Chicago); Pat Kossan & William Hermann, *Program Targets Problem Landlords*, ARIZ. REPUBLIC, Aug. 19, 2000, at A27 (discussing community prosecution in Phoenix); Henry K. Lee, *Oakland Tries Community Prosecuting; Crime Program Spotlights Needs in Neighborhoods*, S.F. CHRON., July 24, 1999, at A15 (discussing community prosecution in Oakland); Sukhjit Purewal, *Neighborhood Watch*, RECORDER, July 19, 2000, at 1 (discussing community prosecution in Santa Clara County); Christopher Toth, *Community Prosecution Program Aims at Securing Quality of Life*, S. BEND TRIB., Aug. 20, 2000, at B6 (discussing community prosecution in South Bend).

49. *See* Thompson, *supra* note 2, at 354-60; *see also* Richard A. Devine, *Chicago's Approach to Community Prosecution*, PROSECUTOR, Jan.-Feb. 2002, at 35; Steve Dillingham & Michael Kuykendall, *New Directions for Community Prosecution*, PROSECUTOR, July-Aug. 2001, at 30; Marna McLendon et al., *Community Justice Program of the Howard County State's Attorney's Office*, PROSECUTOR, Jan.-Feb. 2002, at 38; Elaine Nugent & Gerard R. Rainville, *The State of Community Prosecution: Results of a National Survey*, PROSECUTOR, Mar.-Apr. 2001, at 26.

50. *See* Thompson, *supra* note 2, at 354-55.

interaction of prosecutors with the police, victims, offenders, and neighborhood groups. For Thompson, even the best of the decentralized and well-integrated community-prosecution experiments suffer from the absence of a unifying vision. What vision exists, he observes, "remains inchoate in virtually every sense of the word: just beginning to develop; lacking structure; even chaotic."[51]

Thompson's trenchant observation and his careful synthesis of the concrete structural impediments confronting community-prosecution programs underscore the importance of binding the movement to a strong normative foundation. At its most robust, that foundation is comprised of the norms of collaborative citizenship, state decentralization and accountability, and participatory democracy. Those norms inform the jurisprudence of liberalism, the community-lawyering tradition, and the theory of restorative justice.

To cohere and effectively reach out to impoverished communities of color, the community-prosecution movement must combine the goals of crime prevention and criminal justice with the methods of neighborhood revitalization and the values of democratic citizenship. The community-lawyering tradition provides an approach to neighborhood defense and reclamation. The theory of restorative justice offers a model of democratic citizenship. Bundled together, they map a normative and practical strategy to guide community-prosecution programs in the pursuit of citizen-state collaboration and grassroots justice initiatives aimed at alleviating poverty, powerlessness, and racial violence.

The community-lawyering tradition evolved out of the grassroots advocacy and organizing initiatives of the Great Society era.[52] Dedicated to the innovative delivery of neighborhood legal services to indigent clients besieged by urban deprivation and pathology,[53] the tradition engrafts the

51. *Id.* at 360.

52. *See* Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 682-90 (1987-88); Raymond H. Brescia et al., *Who's in Charge, Anyway? A Proposal for Community-Based Legal Services*, 25 FORDHAM URB. L.J. 831, 848-62 (1998); Roger Conner, *Community Oriented Lawyering: An Emerging Approach to Legal Practice*, NAT'L INST. JUST. J., Jan. 2000, at 27, 28-32; Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. REV. 67, 101-26 (2000); Edward V. Sparer, *The New Public Law: The Relationship of State Administration to the Legal Problems of the Poor*, *in* COMMUNITY ACTION AGAINST POVERTY: READINGS FROM THE MOBILIZATION EXPERIENCE 302-20 (George A. Brager & Francis P. Purcell eds., 1967); Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101, 1129-55 (1990); Zenobia Lai et al., *The Lessons of the Parcel C Struggle: Reflections on Community Lawyering*, 6 UCLA ASIAN PAC. AM. L.J. 1, 23-34 (2000).

53. *See* Robin S. Golden, *Toward a Model of Community Representation for Legal Assistance Lawyering: Examining the Role of Legal Assistance Agencies in Drug-Related Evictions from Public Housing*, 17 YALE L. & POL'Y REV. 527, 529-35, 555-61 (1998); *see also* Jan Stokley & Anthony

well-worn norms and practices of group representation[54] onto the arenas of civil rights and poverty law.[55] Deploying a mix of legal remedies and social reforms, community lawyers tend to assert political rather than cultural commitments. Community representation of individuals and groups, however, melds political and cultural practices, particularly in indigenous communities.[56] At this level, legal action acquires the form of cultural action. Culture holds particular bearing for the goal of empowerment.[57] Doubtless the notion of empowerment suffers from conceptual elusiveness. In fact, empowerment takes different forms: cultural, sociolegal, and political. Often these forms converge and must be addressed as a whole; at other times they break apart or must be disentangled.[58]

The connection between empowerment and identity in the community-lawyering tradition also appears in the restorative-justice movement. The norms and practices of restorative justice hinge on empowering the objects of crime (victims) and the subjects of criminal justice (defendants) in the context of civic community and collaborative justice.[59]

Daysog, *Neighborhood Organizations Respond to Street Crime*, 28 CLEARINGHOUSE REV. 479, 482-83 (1994).

54. *See* GERALD P. LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 11-82 (1992); Janine Sisak, *If the Shoe Doesn't Fit . . . Reformulating Rebellious Lawyering to Encompass Community Group Representation*, 25 FORDHAM URB. L.J. 873, 876-81 (1998); Ann Southworth, *Collective Representation for the Disadvantaged: Variations in Problems of Accountability*, 67 FORDHAM L. REV. 2449, 2455-72 (1999).

55. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 39-169 (1991); STUART SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 131-48 (1974); STEPHEN L. WASBY, RACE RELATIONS LITIGATION IN AN AGE OF COMPLEXITY 99-140, 330-37 (1995); Ann Southworth, *Lawyers and the "Myth of Rights" in Civil Rights and Poverty Practice*, 8 B.U. PUB. INT. L.J. 469, 477-508 (1999).

56. Law and legal action in civil and criminal contexts impinge upon culture and foment cultural action directly when defending the prerogatives of custom or language and indirectly when facilitating education or expression in the arts. *See* Christine Zuni Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities*, 5 CLINICAL L. REV. 557, 571-90 (1999); Jeff Streiffer, *If You Can't Get There from Here, Then That's Not Where You Need to Go: Epistemological Priority, Cultural Action, and Lawyering for Social Change*, 19 HAMLINE J. PUB. L. & POL'Y 397, 405-12, 423-46 (1997).

57. *See* Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 460-79 (2001); William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455, 464-79 (1995).

58. Both law school clinics and lawyering skills courses increasingly recognize this multidimensionality and its critical linkage to identity, narrative, and community. *See* Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599, 1674-98 (1991); Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807, 1809-22 (1993).

59. *See* IAN BROWNLEE, COMMUNITY PUNISHMENT: A CRITICAL INTRODUCTION 5-61 (1998); Gordon Bazemore, *The "Community" in Community Justice: Issues, Themes, and Questions for the New Neighborhood Sanctioning Models*, 19 JUST. SYS. J. 193 (1997); Todd R. Clear & David R. Karp, *Toward the Ideal of Community Justice*, NAT'L INST. JUST. J., Oct. 2000, at 20, 21-27; *see also* PHILIP

Community-based empowerment strategies linked to neighborhood preservation and improvement tactics, citizen-state street-level collaborations, and equal justice initiatives are predicated on a transformative vision of identity as protean and reconstructive. Such a vision renews a civic obligation to criminal adversaries and regenerates a civic commitment to society as a whole. Intimately tied to both the victim and the accused, that transformative vision is crucial to restorative justice.[60]

Within the restorative-justice movement, victims and defendants construct identity and are in turn constructed and, indeed, reconstructed by the agents and institutions of criminal justice and their own cohort groups (families, friends, neighbors). In this way, the process of identity construction is both self-directed and structurally situated by community, culture, and society. Although historically bounded, this process is dynamic and shifting, undergoing internal and external revision in response to dialogue and domination. The agents of the criminal-justice system—police, prosecutors, defenders, and judges—participate in that process through the identity-making practices of arrest, advocacy, and adjudication. For these external agents, the social construction of identity occurs in institutional settings: police precincts, prosecution and defender offices, courts, and prisons. For victims and defendants, those settings are coercive theaters of domination where identity as a criminal object or subject is manufactured and imposed for instrumental purposes, for example in plea bargaining. Instrumentalism of this sort serves the ends of law enforcement and order maintenance.

However favorable this outcome, the means to achieve such ends are hardly benigu. Embodied in racialized identity-making practices of policing and prosecution, they preempt collaboration between the victim and the accused and hence preclude transformative dialogue. Restorative justice regimes reconstruct the identity of the victim and the accused to invite collaboration and permit dialogue. The regimes honor identity as an expression of the self, a product of institutional molding, and the complex outgrowth of multiple groups and communitics. Thus revised, identity guides the application of the restorative principles of reconciliation and restitution.[61] It determines the form of neighborhood-sanctioning models,

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SELZNICK, THE MORAL COMMON-WEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY, 428-76 (1992).

60. *See* JOHN BRAITHWAITE, CRIME, SHAME, AND REINTEGRATION 54-107 (1989); MARTIN WRIGHT, JUSTICE FOR VICTIMS AND OFFENDERS: A RESTORATIVE RESPONSE TO CRIME 100-31 (2d ed. 1996); Russ Immarigeon, *Restorative Justice, Juvenile Offenders and Crime Victims: A Review of the Literature, in* RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME 305-25 (Gordon Bazemore & Lode Walgrave eds., 1999).

61. *See* John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1743-50 (1999); Robert B. Coates, *Victim-Offender Reconciliation Programs in North America: An Assessment, in* CRIMINAL JUSTICE, RESTITUTION, AND RECONCILIATION 125-34 (Burt Galaway & Joe Hudson eds., 1990); Laura Nader & Elaine Combs-Schilling, *Restitution in*

such as reintegrative shaming ceremonies.[62] And it gives meaning to community-based crime prevention and criminal justice.[63] Having outlined the normative base and organizational structure of community-prosecution programs, this Essay turns next to their jurisprudential underpinnings.

II
COMMUNITY JURISPRUDENCE

The norms and practices common to the community-prosecution movement may be traced to the jurisprudence of liberalism and its often antagonistic offspring, feminism and critical race theory. Although none of these jurisprudential schools of thought are entirely expressed and integrated into the content of community-prosecution programs, their strands are visible in action and by design. Liberalism, rendered in republican and communitarian styles, is epitomized by the notions of autonomy, duty, and deliberation. Feminism is exemplified by the concepts of agency, trust, and reciprocity. Critical race theory is embodied by the ideas of identity, empowerment, and community. Community-prosecution programs contain each of these jurisprudential elements. The task here is to discern which are blossoming into dominance and which are falling into subordinating dormancy.

A. Liberal Theory

Liberalism is the essence of American public philosophy. It emphasizes the autonomy of the rational self, private-contractarian obligation between free economic agents, and state-circumscribed forms of public deliberation. When exercised for the self, autonomy enables individuals to flourish as isolated persons, while maintaining room for relationships and alliances based on consent. When exercised in association with others, autonomy enables groups to muster collective action. Under liberalism, individual autonomy, experienced as personhood, is intimately connected to moral responsibility. Individuals achieve autonomy through rational choice and the acceptance of responsibility. Rational choice implies moral

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Cross-Cultural Perspective, *in* RESTITUTION IN CRIMINAL JUSTICE: A CRITICAL ASSESSMENT OF SANCTIONS 27-44 (Joe Hudson & Burt Galaway eds., 1975).

62. On shaming, see Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL'Y & L. 645, 650-73 (1997); Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. REV. 1751, 1763-71 (1999); Richard Young & Benjamin Goold, *Restorative Police Cautioning in Aylesbury—From Degrading to Reintegrative Shaming Ceremonies?*, 1999 CRIM. L. REV. 126, 135-37.

63. On community justice, see Bazemore, *supra* note 59; Leena Kurki, *Restorative and Community Justice in the United States*, 27 CRIME & JUST. 235, 243-63 (2000). *See also* Lois Presser & Elaine Gunnison, *Strange Bedfellows: Is Sex Offender Notification a Form of Community Justice?*, 45 CRIME & DELINQ. 299, 303-10 (1999); Richard G. Zevitz & Mary Ann Farkas, *Sex Offender Community Notification: Assessing the Impact in Wisconsin*, NAT'L INST. JUST. RES. BRIEF, Dec. 2000, at 1, 10-11.

agency. Responsibility posits a sense of integrity revealed in reasoned constancy and fidelity. Taken as a whole, moral agency and integrity furnish the basis for consent, bestowing legitimacy on private-exchange relationships and public-governance alliances.[64]

Group autonomy, experienced as common-interest friendship or contractual association, also links to responsibility and consent.[65] Groups attain autonomy under liberalism through collective decision making and accountability. Collective decision making, like autonomous decision making, indicates agency, but of a plural sort. Accountability in the same way conveys integrity and its baseline of loyalty. The integrity of group decisions, and joint liability for their consequences, rests on the shared giving of consent in private and public transactions of economic value or political ratification.[66]

In communities of color, as elsewhere, individuals exercise autonomy both in solitude and in groups. Unlike individuals affiliated with economically prosperous majority-color communities, however, individuals within communities of color often labor under the burdens of living and working in crime-ridden, abandoned inner cities beleaguered by poverty and unemployment. Crime and privation may weaken the conditions for autonomy's actualization, though they do not preclude it.

Community prosecution in a liberal paradigm should strengthen the conditions of economic and political autonomy for individuals and groups in impoverished communities, especially communities of color. This result can be accomplished by mobilizing neighbors and revitalizing neighborhoods in a campaign against crime, decay, and displacement. Aiding in the rebuilding of the social infrastructure of communities enhances their chances of economic viability and their members' opportunities for political participation.

Mutual obligation, the centerpiece of liberal democratic community, provides a basis for the work of community-prosecution programs. Mutuality in the group decision making of civic participation, and the acknowledgement of a duty to others in socioeconomic networks, explicates the nature of this obligation.[67] Obligation denotes citizenship and at least a

64. Crudely fashioned for the limited purposes of this Essay, this distillation of political principals resembles the classical version of liberal contractarianism espoused by Rawls. *See* JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 95-96 (Erin Kelly ed., 2001).

65. *See* Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 2-7 (1989).

66. *See* Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy*, 85 GEO. L.J. 2073, 2079-81 (1997). *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971).

67. *See* Christopher Heath Wellman, *Toward a Liberal Theory of Political Obligation*, 111 ETHICS 735, 740-50 (2001); Christopher Heath Wellman, *Friends, Compatriots, and Special Political Obligations*, 29 POL. THEORY 217, 230-33 (2001).

qualified faith in community representation,[68] even when common interests run thin.

Citizenship is realized through private and public modes of intercourse.[69] Where badly integrated into society, race affects both modes of citizenship, restricting private and public interchange between majority and minority groups and undermining minority-group status, for example, in the realm of the family.[70] Failed minority-group integration into the ranks of majority-group citizenship is an affliction borne of difference and domination. Difference creates vulnerability in the cultural, economic, political, and social standing of the minority group and reinforces the legitimacy of majority-group domination. Multicultural difference magnifies civic vulnerability, particularly for women of color.[71] That sense of vulnerability invades private and public relationships and spaces.[72]

Communities of color suffer a pronounced sense of vulnerability on individual and collective planes. When beset by internal crime and surrounding poverty, the communities experience the violence of fear and impoverishment. In the private sphere of family and home, that experience may take the form of abuse, neglect, and helplessness. In the public sphere of the marketplace, the experience may manifest as employment discrimination and workplace exploitation, for example in the denial of a living wage.

A means of surmounting vulnerability, liberal autonomy and mutuality combine to erect the framework for individuals and groups to engage in public deliberation. Shared deliberation and tolerance are crucial to liberal community. Deliberative tolerance in fact supplies a means of abiding disagreement and dissent. Deficient in empathy, liberal tolerance may falter in the clash of color and interest-group conflict. Although the deliberative faith of democratic citizenship survives this deficiency, it struggles to

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68. JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 3 (1991). Shklar endows the idea of citizenship with four significant meanings: standing, nationality, active participation, and ideal republican citizenship. This Essay focuses on the notion of citizenship as inclusive civic participation. For juridical forms of community representation in the guise of the jury, see Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353, 360-76 (1999).

69. *See* Raia Prokhovnik, *Public and Private Citizenship: From Gender Invisibility to Feminist Inclusiveness*, 60 FEMINIST REV. 84, 89-96 (1998).

70. African Americans suffered both antebellum and postbellum statutory restrictions on the right to marry and maintain a family household. *See* Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251, 274-307 (1999).

71. *See* Romand Coles, *Tradition: Feminists of Color and the Torn Virtues of Democratic Engagement*, 29 POL. THEORY 488, 490-96, 501-11 (2001); Ayelet Shachar, *On Citizenship and Multicultural Vulnerability*, 28 POL. THEORY 64, 65-70 (2000); Nira Yuval-Davis, *Women, Citizenship and Difference*, 57 FEMINIST REV. 4, 8-19 (1997).

72. *See* Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 230-37 (1999).

overcome empathetic deficits in the fractured context of modern multiracial society, despite the entreaties of the republican revival.[73] To their credit, civil-society revivalists take seriously liberal claims of citizenship and collective deliberation.[74] The republican canon, however, buttresses deliberative democracy while underlining its limits as a group-based remedy for minority protest.[75] Those limits stifle minority-group participation in democratic deliberation and lead consequently to political alienation sometimes manifested in electoral apathy and community uprising. Communitarian doctrine similarly advances the democratic values of public deliberation and tolerance but also poorly reconciles competing autonomy rights[76] and conflicting intergroup relations.[77] This infirmity pertains to individual-rights competition, individual- and group-rights conflict, group-within-group contest, and group-against-group rivalry. That variation is illustrated by the widely inequitable treatment of minority rights under communitarian regimes, for instance in contemporary gay-rights struggles.[78]

Liberalism in its contractarian, republican, and communitarian guises struggles to accommodate difference. This struggle is heightened by gender or sexual ambiguity[79] and racial bias[80] in criminal law and the criminal-justice system. Difference, manifested either by ambiguity or deviation, dictates the cognitive status and interpretive rank of lawbreakers. For Black lawbreakers, cognitive prisms color identity and interpretive templates silence, and sometimes falsify, narrative. Like all interpretive communities, liberal regimes inhabit a bounded universe of revelatory narratives. The narratives permit dialogue under certain accepted conditions of understanding. These conditions stipulate the natural and indeed necessary quality of race neutrality. Colorblind conditions of this kind, however contrived,

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73. *See* Linda C. McClain & James E. Fleming, *Some Questions for Civil Society-Revivalists*, 75 CHI-KENT L. REV. 301, 314-22, 348-53 (2000).

74. *See* Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 CALIF. L. REV. 331, 354-86 (1994).

75. *See* Cynthia V. Ward, *The Limits of "Liberal Republicanism": Why Group-Based Remedies and Republican Citizenship Don't Mix*, 91 COLUM. L. REV. 581, 596-606 (1991).

76. *See* Candace Cummins Gauthier, *Moral Responsibility and Respect for Autonomy: Meeting the Communitarian Challenge*, 10 KENNEDY INST. ETHICS J. 337, 339-42 (2000).

77. *See* Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations after Affirmative Action*, 86 CALIF. L. REV. 1251, 1317-33 (1998); Christopher Heath Wellman, *Liberalism, Communitarianism, and Group Rights*, 18 LAW & PHIL. 13, 14-27, 33-38 (1999).

78. *See* Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615, 622-61 (1992); Carlos A. Ball, *Communitarianism and Gay Rights*, 85 CORNELL L. REV. 443, 510-17 (2000).

79. *See* Timothy V. Kaufman-Osborn, *Reviving the Late Liberal State: On Capital Punishment in an Age of Gender Confusion*, 24 SIGNS 1119, 1122-28 (1999).

80. *See* Gary Peller, *Criminal Law, Race, and the Ideology of Bias: Transcending the Critical Tools of the Sixties*, 67 TUL. L. REV. 2231, 2245-48 (1993).

fashion a kind of interpretive horizon beyond which meaning is distorted and understanding is lost.

Ambiguity and bias unsettle the interpretive conditions of liberalism. They obscure the horizon for understanding difference available to communities. This constraint inhibits legal and political agents, such as prosecutors and legislators, from grasping the meaning of difference and engaging in dialogue about appropriate responses to its varied forms.[81] Unsurprisingly, the search for responsive-justice communities of moral discernment,[82] unbridled by a punitive ethos[83] and a compulsion toward state violence, may lead to private-contractual and free-market versions of ethical conduct in the prosecution of crime. The fruits of that search include the dubious importation of private and narrow efficiency-based measures of criminal desert and justice.[84]

Alternate spaces for accommodating difference in American politics and society may prove more respectful of identity and receptive to community than efficiency-based measures. These alternate juridical spaces may be assembled from local sociolegal settings, perhaps at churches or at child-care centers, regularly found in communities of color. They also may be found in the civic and political traditions adjacent to criminal law and safeguarded by constitutional law.[85]

Local and national community embrace of difference and diversity serves important expressive and communicative functions in law and politics.[86] Symbolically, it signals a commitment to inclusion and egalitarianism. Discursively, it sounds themes of equality and conciliation. Few communities, however, can fully embrace the diversity of multiculturalism

81. *See* David L. Williams, *Dialogical Theories of Justice*, 114 TELOS 109, 117-27 (1999).

82. *See* Thomas L. Shaffer, *Towering Figures, Enigmas, and Responsive Communities in American Legal Ethics*, 51 ME. L. REV. 229, 237-38 (1999). Applied to criminal justice, Shaffer's notion of responsive communities evokes the death-penalty-abolitionist movement. *See* Anthony V. Alfieri, *Mitigation, Mercy, and Delay: The Moral Politics of Death Penalty Abolitionists*, 31 HARV. C.R.-C.L. L. REV. 325 (1996); Austin Sarat, *Narrative Strategy and Death Penalty Advocacy*, 31 HARV. C.R.-C.L. L. REV. 353 (1996).

83. *See* Markus Dirk Dubber, *The Right to Be Punished: Autonomy and Its Demise in Modern Penal Thought*, 16 LAW & HIST. REV. 113, 119-32 (1998).

84. *See* Andrew P. Morriss, *Returning Justice to Its Private Roots*, 68 U. CHI. L. REV. 551, 554-65 (2001) (book review).

85. *See* H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION 182-259 (1993); Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 YALE L.J. 1 (1989); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 343-75 (1998); Kraig James Powell, *The Other Double Standard: Communitarianism, Federalism, and American Constitutional Law*, 7 CONST. L.J. 69, 71-80 (1996); Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 396-404 (1998).

86. *See* Wibren Van Der Burg, *The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues*, 20 LAW & PHIL. 31, 41-52 (2001).

with its cacophony of voices and discordant interests.[87] Even outside the Black/White paradigm, few communities can toil free of racial stereotyping, as the Asian American experience persistently attests.[88] Witnessed and memorialized in narrative, stereotyping not only endures but also becomes entangled in the constituent branches of racial identity.[89] Feminist legal theory points out the significance of narrative, its supple form and rich content, and its intersection with ethnicity, race, and sexuality.[90] For an exposition of the narratives of agency, trust, and reciprocity in community, crime, and criminal justice, the next section turns to feminist theory.

B. Feminist Theory

Feminist theory exposes both the gendered style and substance of criminal-law norms and practices.[91] Basic to the feminist contribution is a subverting analysis of sociolegal power, its disciplining impact, and its relation to distinctive cultures of violence.[92] This analytic framework

87. *See* Chandran Kukathas, *Liberalism and Multiculturalism: The Politics of Indifference*, 26 POL. THEORY 686, 687-96 (1998).

88. *See generally* Rhoda J. Yen, *Racial Stereotyping of Asians and Asian Americans and Its Effect on Criminal Justice: A Reflection on the Wayne Lo Case*, 7 ASIAN L.J. 1, 21-22 (2000).

89. *See, e.g.*, Darren Lenard Hutchinson, *"Gay Rights" for "Gay Whites"?: Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1362-78 (2000); *see also* Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 306-16 (2001) (examining interrelationships among racism, heterosexism, patriarchy, and class oppression).

90. *See* Kathryn Abrams, *Hearing the Call of Stories*, 79 CALIF. L. REV. 971, 973-1012 (1991); Margaret H.R. Chon, *On the Need for Asian American Narratives in Law: Ethnic Specimens, Native Informants, Storytelling and Silences*, 3 ASIAN PAC. AM. L.J. 4, 13-22 (1995); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2435-41 (1988); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607, 611-31 (1994).

91. Research uncovering the quality of gendered virtue and lawbreaking illustrates the feminist contribution to criminal-law analysis and the criminalization question. *See* Mary L. Bellhouse, *Crimes and Pardons: Bourgeois Justice, Gendered Virtue, and the Criminalized Other in Eighteenth-Century France*, 24 SIGNS 959, 961-62 (1999); Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization*, 49 DEPAUL L. REV. 817, 818-22 (2000); Kathleen Daly, *Women's Pathways to Felony Court: Feminist Theories of Lawbreaking and Problems of Representation*, *in* CRIMINOLOGY AT THE CROSSROADS: FEMINIST READINGS IN CRIME AND JUSTICE 135-54 (Kathleen Daly & Lisa Maher eds., 1998); Malcolm M. Feeley & Deborah L. Little, *The Vanishing Female: The Decline of Women in the Criminal Process, 1687-1912*, 25 LAW & SOC'Y REV. 719, 721-24, 740-51 (1991); Kyron Huigens, *Virtue and Criminal Negligence*, 1 BUFF. CRIM. L. REV. 431, 434-39 (1998); Victoria Nourse, *The "Normal" Successes and Failures of Feminism and the Criminal Law*, 75 CHI.-KENT L. REV. 951, 953-76 (2000); Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2154-57 (1995); Symposium, *Feminism and the Criminal Law*, 4 BUFF. CRIM. L. REV. 709 (2001).

92. *See* Tosha Yvette Foster, *From Fear to Rage: Black Rage as a Natural Progression from and Functional Equivalent of Battered Woman Syndrome*, 38 WM. & MARY L. REV. 1851, 1858-69 (1997); Renée Heberle, *Disciplining Gender; Or, Are Women Getting Away with Murder?*, 24 SIGNS 1103 (1999); Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 N.Y.U. L. REV. 36, 43-60 (1995); Andrea C. Westlund, *Pre-Modern and Modern Power: Foucault and the Case of Domestic*

deciphers the coercive forces impinging upon women, as in cases of domestic violence and prostitution,[93] and it fashions a different posture toward criminal-law advocacy and adjudication.[94] The feminist posture increasingly infuses the lawyering process,[95] litigation strategy,[96] and the legal profession[97] with a more activist participatory sensibility applicable to individual clients, groups, and communities.[98] Further, it instills a feminist-practice ethic of care and caretaking[99] vital to fostering democratic community through group formation and interplay.[100] This caretaking ethic connects to feminist ideals of agency, trust, and reciprocity.

The ideals of agency, trust, and reciprocity provide an alternative jurisprudential foundation for the community-prosecution movement. Traditionally anchored in the liberal axioms of autonomy, duty, and deliberation, community-prosecution models strain to imbue participants in the criminal-justice system—defendants, victims, and their communities—with a sense of moral agency that affords self-directed independent action without severing the bonds of "other"-affirming collective action. This strain derives from the solitary, self-referential core of liberal autonomy that reduces mutuality and obligation to contractual duty and a market-inspired exchange relationship. Strictly seen, the feeble normative character of this relationship, and its crabbed sense of duty, does not exclude the

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Violence, 24 SIGNS 1045, 1053-65 (1999) (explicating legal means of disciplining gender roles and relations).

93. *See* Vednita Carter & Evelina Giobbe, *Duet: Prostitution, Racism, and Feminist Discourse*, 10 HASTINGS WOMEN'S L.J. 37, 40-45 (1999); Michelle S. Jacobs, *Prostitutes, Drug Users, and Thieves: The Invisible Women in the Campaign to End Violence Against Women*, 8 TEMP. POL. & CIV. RTS. L. REV. 459, 464-74 (1999).

94. *See* Bryna Bogoch, *Judging in a 'Different Voice:' Gender and the Sentencing of Violent Offences in Israel*, 27 INT'L J. SOC. L. 51, 52-59 (1999); Susan D. Carle, *Gender in the Construction of the Lawyer's Persona*, 22 HARV. WOMEN'S L.J. 239, 240-46 (1999).

95. *See* Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 49-50 (1985); Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 VA. J. SOC. POL'Y & L. 75, 86-97 (1994).

96. *See* Ruth Colker, *Feminist Litigation: An Oxymoron? A Study of the Briefs Filed in* Webster v. Reproductive Health Services, 13 HARV. WOMEN'S L.J. 137, 142-68 (1990).

97. On gendered structures and feminist histories in the legal profession, see Barbara Allen Babcock, *Feminist Lawyers*, 50 STAN. L. REV. 1689 (1998) (book review). *See also* Kathleen E. Hull & Robert L. Nelson, *Gender Inequality in Law: Problems of Structure and Agency in Recent Studies of Gender in Anglo-American Legal Professions*, 23 LAW & SOC. INQUIRY 681 (1998) (book review).

98. *See* Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1858-68, 1885-98 (1996); Linda G. Mills, *Intuition and Insight: A New Job Description for the Battered Woman's Prosecutor and Other More Modest Proposals*, 7 UCLA WOMEN'S L.J. 183, 187-92 (1997).

99. *See* Samantha Brennan, *Recent Work in Feminist Ethics*, 109 ETHICS 858, 867-74 (1999); Naomi Cahn, *The Power of Caretaking*, 12 YALE J.L. & FEMINISM 177, 181-88 (2000); Eva Feder Kittay, *A Feminist Public Ethic of Care Meets the New Communitarian Family Policy*, 111 ETHICS 523, 532-37 (2001).

100. *See* Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657, 1672-1703 (1997).

joint deliberations of grassroots organization and political governance. But it condemns such deliberations to a hollow exertion when compared to the ideal dialogues of trust-based reciprocity.

Feminist theory offers communities of color a glimpse of dialogues drawn from the self-direction of agency and the mutual devotion of trust. The resulting reciprocity of motive and means, while resonant of liberalism and its most altruistic strands of autonomy and obligation, ploughs a different ground for the community-prosecution movement. At a glance, that ground is more process-oriented and less ends-demarcated. Although traces of this new ground appear more frequently,[101] they are unsettled by the postmodern discord in feminist legal theory and the consequent fragmentation of community.[102] To an extent, upheaval in the feminist movement seems to be gradually leveling through the convergence of feminist criminology[103] and performative studies of gender.[104] Whatever convergence occurs, however, fails to settle the meaning of identity, calculate a formula for empowerment, or propound a recipe for reconciling multiracial community. Each of these analytic posts must be dug up and explored before community prosecution passes jurisprudential muster. Critical race theory provides the tools for further excavation.

C. *Critical Race Theory*

The progeny of the civil rights movement, critical race theory gives contemporary meaning to the concepts of identity, empowerment, and community in criminal law and the criminal-justice system.[105] Sympathetic to but located at an acute distance from liberal theory, critical race theory evaluates both procedural and substantive law for signs of de jure or de facto bias in the construction of identity.[106] It links identity and race

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101. *See* Cynthia Grant Bowman & Elizabeth M. Schneider, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 FORDHAM L. REV. 249, 255-71 (1998).

102. *See generally* Maxine Eichner, *On Postmodern Feminist Legal Theory*, 36 HARV. C.R.-C.L. L. REV. 1, 48-76 (2001); Catherine A. MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT L. REV. 687, 693-709 (2000).

103. *See* Kerry Carrington, *Postmodernism and Feminist Criminologies: Disconnecting Discourses?*, 22 INT'L J. SOC. L. 261, 263-71 (1994).

104. *See* Judith Resnik, *Asking about Gender in Courts*, 21 SIGNS 952, 977-80 (1996).

105. *See, e.g.*, CRITICAL RACE FEMINISM: A READER 223-86 (Adrien Katherine Wing ed., 1997); CRITICAL RACE THEORY: HISTORIES, CROSSROADS, DIRECTIONS (Jerome McCristal Culp, Jr. et al. eds.) (forthcoming 2002); CRITICAL RACE THEORY: THE CUTTING EDGE 179-212 (Richard Delgado & Jean Stefancic eds., 2d ed. 2000); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995); Roy L. Brooks & Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without a Difference?*, 82 CALIF. L. REV. 787, 792-803 (1994).

106. *See generally* BARBARA J. FLAGG, WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS & THE LAW 19-116 (1998) (discussing bias in substantive law); Darryl K. Brown, *The Role of Race in Jury Impartiality and Venue Transfers*, 53 MD. L. REV. 107, 113-24 (1994) (discussing bias in procedural law); M. Shanara Gilbert, *An Ounce of Prevention: A Constitutional Prescription*

consciousness[107] to the images and classifications of color in culture and commerce.[108] Moreover, it ties identity to privilege.[109] This tie foments a kind of identity suspicion that urges the interrogation of racial distinctions in cognition and interpretation.[110] Reproachful of privilege, identity suspicion offers a method by which to reach beyond the notion of Blackness to investigate multiracial categories, for example Latino/a and Asian American groupings of pan-racial ethnicity.[111] Identity suspicion breeds resistance when used to evaluate the racial tenor of crime and criminal justice.

Under critical race theory, resistance serves as an organizing principle and a cognitive precept. It guides the grassroots struggle for empowerment and community, insinuating itself into individual communications and group colloquies. Resistance also steers the interpretation of cultural artifacts and social structures, disinterring animus from the popular imagination and its institutional adaptations.

The predicate of empowerment, resistance is essential to community. It galvanizes relationships of union behind a universal cause. That cause may be singular or manifold, and it may range from culture to politics. When gathered outside or in opposition to the state, resistance targets a common oppressor. Honing in on a lone target frequently overcomes internecine disagreement. Granted, crystallizing oppression in this way may

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for Choice of Venue in Racially Sensitive Criminal Cases, 67 TUL. L. REV. 1855, 1887-1935 (1993) (same).

107. *See* Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 763-811 (1990) (contrasting integrationism and Black nationalism).

108. *See* Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1154-79 (2000); Hazel Waters, *Putting on 'Uncle Tom' on the Victorian Stage*, 42 RACE & CLASS 29, 39-43 (2001).

109. *See* John A. Powell, *Whites Will Be Whites: The Failure to Interrogate Racial Privilege*, 34 U.S.F. L. REV. 419, 421-27 (2000).

110. *See* R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1081-1115 (2001); Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409, 1416-25 (2000).

111. Still inchoate, that method is susceptible to the same essentialist tendency plaguing feminist legal theory. *See, e.g.*, Linz Audain, *Critical Cultural Law and Economics, the Culture of Deindividualization, the Paradox of Blackness*, 70 IND. L.J. 709, 715-34 (1995); Kitty Calavita, *The Paradoxes of Race, Class, Identity, and "Passing": Enforcing the Chinese Exclusion Acts, 1882-1910*, 25 LAW & SOC. INQUIRY 1, 10-31 (2000); Elizabeth M. Iglesias, *Foreword: Identity, Democracy, Communicative Power, Inter/National Labor Rights and the Evolution of LatCrit Theory and Community*, 53 U. MIAMI L. REV. 575, 586-629 (1999); Janine Young Kim, *Are Asians Black?: The Asian-American Civil Rights Agenda and the Contemporary Significance of the Black/White Paradigm*, 108 YALE L.J. 2385, 2393-2408 (1999); Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1185-1204 (2001). The added layers of class and gender in racial constructions exacerbate that tendency. *See, e.g.*, Clark D. Cunningham & N.R. Madhava Menon, *Race, Class, Caste . . . ? Rethinking Affirmative Action*, 97 MICH. L. REV. 1296, 1302-07 (1999) (discussing class); Joan Williams, *Implementing Antiessentialism: How Gender Wars Turn into Race and Class Conflict*, 15 HARV. BLACKLETTER L.J. 41, 61-72 (1999).

bring only a momentary halt to internal dissent. Nonetheless temporary cessation may prove imperative to community-building objectives.

Fundamental to empowerment and community, resistance is forged in the confrontation with the liberal state and its policies of racial reform. Viewed by critical race theorists as intransigent and repressive,[112] the state offers the possibility of accommodation as a remedy for the racial inequities of the criminal-justice system. By definition, accommodation entails compromise and cooptation. Demands must be muted. Affirmative regulation must be tempered. More troublesome, the act of regulation—administrative or legislative—may weaken the marshaling of protest, therefore diluting community power.

To mitigate the dissipating regulation that accompanies state accommodation to minority groups' egalitarian demands, critical race theory proffers an ethic of resistance.[113] That ethic is garnered daily from the interwoven histories of the environmental-justice, labor, and neighborhood-renewal movements.[114] These economic-justice movements tender no assurances against community-debilitating accommodation or the erection of a disfiguring model-minority status which may be divisive in its effect on many and unobtainable by most.[115] Instead, like the feminist ethic of care, the ethic furnishes a critical stance from which to appraise narrative declarations of racial identity.

The stance of resistance deduced from critical race theory seeks out racial bias and discrimination in the criminal-justice system in advocacy, adjudication, and policing.[116] The main purpose here is not to institute a policy of affirmative action in the regulation of crime or to test lay

112. *See* Wendy Brown-Scott, *The Communitarian State: Lawlessness or Law Reform for African-Americans?*, 107 HARV. L. REV. 1209, 1222-28 (1994).

113. *See* TRACI C. WEST, WOUNDS OF THE SPIRIT: BLACK WOMEN, VIOLENCE, AND RESISTANCE ETHICS 151-207 (1999).

114. *See* Sheila Foster, *Justice From the Ground Up: Distributive Inequalities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CALIF. L. REV. 775, 788-811 (1998) (discussing the ethic in relation to the history of environmental justice); Ankur J. Goel et al., *Black Neighborhoods Becoming Black Cities: Group Empowerment, Local Control and the Implications of Being Darker than Brown*, 23 HARV. C.R.-C.L. L. REV. 415, 425-56 (1988) (citing the ethic in relation to neighborhood incorporation); Elizabeth M. Iglesias, *Institutionalizing Economic Justice: A LatCrit Perspective on the Imperatives of Linking the Reconstruction of "Community" to the Transformation of Legal Structures that Institutionalize the Depoliticization and Fragmentation of Labor/Community Solidarity*, 2 U. PA. J. LAB & EMP. L. 773, 797-804 (2000) (noting the ethic in relation to the history of labor).

115. *See generally* Chris K. Iijima, *Political Accommodation and the Ideology of the "Model Minority": Building a Bridge to White Minority Rule in the 21st Century*, 7 S. CAL. INTERDISC. L.J. 1, 26-40 (1998).

116. *See* Kathleen Daly, *Criminal Law and Justice System Practices as Racist, White, and Racialized*, 51 WASH. & LEE L. REV. 431, 442-63 (1994); Joseph F. Sheley, *Structural Influences on the Problem of Race, Crime, and Criminal Justice Discrimination*, 67 TUL. L. REV. 2273, 2276-90 (1993); Christopher Stone, *Race, Crime, and the Administration of Justice*, NAT'L INST. JUST. J., Apr. 1999, at 26, 27-30; Ronald Weitzer & Steven A. Tuch, *Race, Class, and Perceptions of Discrimination by the Police*, 45 CRIME & DELINQ. 494, 502-04 (1999).

perceptions of crime, though some may pursue those objectives, but rather to find a nexus between crime and color.[117] That nexus may be unveiled in the courtroom, in jury deliberation, in the character of the defendant, or elsewhere in the myriad recesses of the criminal-justice system.[118] It may manufacture disparate outcomes observed in the contexts of gender, juveniles, and sexuality.[119] It moreover may produce discriminatory policies of underenforcement, for example in the prosecution of civil-rights crimes,[120] and overinclusion, in the case of racial profiling.[121] Most startling, the race-crime nexus may generate identity distortions, not out of "color blindness," but out of archaic stereotype.[122] It is these distortions that command the attention of critical race theory and that warrant consternation over the fate of communities of color. The next section considers the impact of community-policing programs and drug courts on the identity of

117. *See* KATHERYN K. RUSSELL, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESIONS 1-46 (1998); Andrew E. Taslitz, *An African-American Sense of Fact: The O.J. Trial and Black Judges on Justice*, 7 B.U. PUB. INT. L.J. 219, 223-46 (1998); Carolyn Wolpert, Note, *Considering Race and Crime: Distilling Non-Partisan Policy from Opposing Theories*, 36 Am. Crim. L. Rev. 265, 268-89 (1999).

118. *See* ARIELA J. GROSS, DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM 72-121 (2000); John M. Conley et al., *The Racial Ecology of the Courtroom: An Experimental Study of Juror Response to the Race of Criminal Defendants*, 2000 WIS. L. REV. 1185, 1187-95; Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 123-56, 180-81 (1998); Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 887-947 (1999); Nancy S. Marder, *The Interplay of Race and False Claims of Jury Nullification*, 32 U. MICH. J.L. REFORM 285, 301-14 (1998); Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367, 1376-78 (2000).

119. *See* Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Race and the "Crack Down" on Youth Crime*, 84 MINN. L. REV. 327, 340-81 (1999); Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 788-806 (2000); W. John Thomas et al., *Race, Juvenile Justice, and Mental Health: New Dimensions in Measuring Pervasive Bias*, 89 J. CRIM. L. & CRIMINOLOGY 615, 662-69 (1999); Adrien K. Wing & Christine A. Willis, *From Theory to Praxis: Black Women, Gangs, and Critical Race Feminism*, 11 LA RAZA L.J. 1, 4-9 (1999); *see also* Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 10-40 (1999) (discussing multifaceted identity and juridical outcomes in the context of sexuality); Lisa C. Ikemoto, *Male Fraud*, 3 J. GENDER, RACE & JUST. 511, 513-33 (2000) (same).

120. *See, e.g.*, David Harris, *Law Enforcement's Stake in Coming to Grips with Racial Profiling*, 3 RUTGERS RACE & L. REV. 9, 12-19 (2001) (discussing overinclusion in racial profiling); Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2200-23 (1993) (discussing underenforcement in prosecuting civil-rights crimes).

121. *See* Katheryn K. Russell, *Racial Profiling: A Status Report of the Legal, Legislative, and Empirical Literature*, 3 RUTGERS RACE & L. REV. 61, 68-80 (2001); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 983-98 (1999).

122. *See* Deborah L. Goldklang, *Post-Traumatic Stress Disorder and Black Rage: Clinical Validity, Criminal Responsibility*, 5 VA. J. SOC. POL'Y & L. 213, 222-29 (1997); Ariela J. Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640, 645-67 (2001); James H. McComas & Cynthia L. Strout, *Combating the Effects of Racial Stereotyping in Criminal Cases*, 23 CHAMPION 22, 23 (1999); Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77, 84-107 (2000).

communities of color, noting the implications for individual and collective empowerment.

III

COMMUNITY ANTECEDENTS: POLICING AND DRUG COURTS

The norms and practices employed in community-policing and drug-court programs carry substantial import for the community-prosecution movement. Their importance steps beyond extracting alternative institutional roles and relationships from the existing conventions of the criminal-justice system to destabilizing patterns of subordination through a process of culling and transforming entrenched roles and relationships. For communities of color, the subordinating patterns of identity degradation in policing and prosecution and at trial and sentencing undermine individual and collective dignity. Further, they damage civic standing in surrounding theaters of culture, politics, and society. The transformative act of interceding and halting the repetition of these patterns slows the operation and reproduction of racial hierarchy. Diminishing hierarchy is crucial to realigning the dominant and subordinate positions of not only the police, but also prosecutors, defendants, victims, and allied groups in criminal-law advocacy and adjudication. Realignment buttresses the normative underpinnings of the community-prosecution movement and thus reconstitutes the process and prescriptive goals of criminal justice.

The common locus of community-policing and community drug-court programs is the neighborhood itself. Designed to combat neighborhood crime, disorder, and decay, the programs combine the disparate elements of citizen organizing, economic revitalization, and community justice to forge novel local structures of civic power in law enforcement and corrections.[123] The purpose of these structures is to redefine citizen and state penal roles and relationships in order to prevent or reduce crime where possible and rehabilitate offenders where feasible.

To meet these goals, community-policing and like-minded drug-court programs implement a citizen-participatory approach to crime reduction and neighborhood renewal. Creatively gleaned from the normally harsh roles and relationships of the criminal-justice system, this approach endorses citizen-state collaboration, regulatory decentralization of the state

123. *See* WESLEY G. SKOGAN & SUSAN M. HARTNETT, COMMUNITY POLICING, CHICAGO STYLE 161-235 (1997); WESLEY G. SKOGAN, DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS 125-58 (1990); Todd R. Clear, *Toward a Corrections of "Place": The Challenge of "Community" in Corrections*, NAT'L INST. JUST. J., Aug. 1996, at 52; Patrick G. Donnelly & Charles E. Kimble, *Community Organizing, Environmental Change, and Neighborhood Crime*, 43 CRIME & DELINQ. 493, 502-10 (1997); Laurie Robinson, *Linking Community-Based Initiatives and Community Justice: The Office of Justice Programs*, NAT'L INST. JUST. J., Aug. 1996, at 4; Deborah Lamm Weisel & Adele Harrell, *Crime Prevention Through Neighborhood Revitalization: Does Practice Reflect Theory?*, NAT'L INST. JUST. J., Aug. 1996, at 18.

juridical function, and local accountability of governmental agencies to nongovernmental organizations and citizen groups. Consonant with the goal of prevention, the approach seeks to block crime-induced neighborhood deterioration, facilitate the provision of social services, and accelerate the revitalization of blighted neighborhoods.

Building coalitions from the bottom up, this participatory approach renders the state more receptive to the community-specific demands of grassroots justice campaigns in dealing with crime from arrest and indictment to conviction and sentencing. Moreover, it recognizes that citizen participation in law enforcement is the key to crime reduction, offender rehabilitation, and victim reconciliation. Participation curbs crime by expanding the normative base of law enforcement from state agents to citizens. It promotes rehabilitation and reintegration by enlarging the practical base of enforcement for the regulation of criminal offenders, especially drug offenders.

The participatory thrust of community-policing and drug-court programs gains force from their sensitivity to neighborhood identity and their attention to street-level empowerment. Effective community-policing strategies conform to the local customs and spatial contours of discrete neighborhoods. Few, if any, of such strategies will attain complete conformity. What seems suitable for one neighborhood will doubtless prove unsuitable for another. Nevertheless, fertile patterns of participation repeatedly emerge.[124] While effective, they are prone to the disruptions of multiracial difference, which permeate the customs of community groups. Divided customs and contested spaces portend internal competition and fracture the unity of community-policing programs, hampering the integrative progress of community drug courts in diverse neighborhoods. Once shattered, that unity is difficult to restore.[125]

A. Community Policing

Community policing combines state intervention and grassroots citizen activism.[126] Winnowed from intuition, experience, and empirical

124. For patterns of citizen participation in community-based crime-prevention strategies in New York City, Baltimore, San Francisco, and Seattle, see GEORGE L. KELLING & CATHERINE M. COLES, FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES 157-235 (1996).

125. Distinct from its usual connotation, unity in this instance describes an arrangement less fixed and immutable. Referring to the accord between citizen, community, and police, it is a loose, transient unity. This impermanent and experimental quality serves the interests of community policing and empowerment in unexpected ways. Its very transitory nature, its fluctuation from one strategic initiative to the next, actually encourages a greater flexibility and openness to untried innovation. As a consequence, incidents of failure or institutional breakdown deserve to be met with patience.

126. *See* Warren Friedman, *Grassroots and Persistent: The Chicago Alliance for Neighborhood Safety*, NAT'L INST. JUST. J., Aug. 1996, at 8; Tim Hope, *Community Crime Prevention*, 19 CRIME &

conjecture regarding crime, community decay, and civic disorder,[127] this burgeoning style of policing places community at the center of its strategic calculus.[128] That calculus relies on an inventive though truncated sharing of state power with citizen activists.[129] The sharing of state violence signals a move toward reciprocity in police-community partnerships.

Reciprocity initially emerges from the liberal premise of mutuality in social obligation and attends the feminist notion of caretaking.[130] Liberal obligation, rooted in limited political engagement and bare economic exchange, lacks the "other"-directed empathic character of caretaking. Its conception of dialogue relies on slender trust. Its corollary conception of responsiveness rests on partial commitment and limited interchange. Community caretaking puts forward a richer sense of personal bonds and common interests within neighborhoods. Absent from the early history of community policing, this sense of reciprocal care has achieved greater currency.[131]

The feminism-derived caretaking strand of community policing provides little diversion from the profound social meaning of the order-maintenance and zero-tolerance policies of law enforcement.[132] Rhetorical

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JUST. 21, 25-41 (1995); Wesley G. Skogan, *The Community's Role in Community Policing*, NAT'L INST. JUST. J., Aug. 1996, at 31.

127. The causal interweaving of crime, community decay, and civic disorder animates the "broken windows" thesis of community policing. The thesis posits that street-level crime prevention and law-enforcement strategies implemented by police in cooperation with community-based organizations may deter crime, curb decay, and avert disorder in targeted urban neighborhoods. That thesis is roiled by continuing theoretical and empirical debate. *See, e.g.*, BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 1-121 (2001); GEORGE L. KELLING & CATHERINE M. COLES, FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES 11-107, 157-93, 236-57 (1996); RALPH B. TAYLOR, BREAKING AWAY FROM BROKEN WINDOWS: BALTIMORE NEIGHBORHOODS AND THE NATIONWIDE FIGHT AGAINST CRIME, GRIME, FEAR, AND DECLINE 93-239 (2001); Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998); George L. Kelling, *"Broken Windows" and Police Discretion*, NAT'L INST. JUST. RES. REP., Oct. 1999, at 1 25-47; James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC, Mar. 1982, at 29-38.

128. *See* Daniel W. Flynn, *Defining the "Community" in Community Policing*, *in* COMMUNITY POLICING: CONTEMPORARY READINGS 491-504 (Geoffrey P. Alpert & Alex R. Piquero eds., 2d ed. 2000); Warren Friedman, *The Community Role in Community Policing*, *in* THE CHALLENGE OF COMMUNITY POLICING: TESTING THE PROMISES 263-69 (Dennis P. Rosenbaum ed., 1994); Philip B. Heymann, *The New Policing*, 28 FORDHAM URB. L.J. 407, 421-40 (2000).

129. *See* WILLIAM LYONS, THE POLITICS OF COMMUNITY POLICING: REARRANGING THE POWER TO PUNISH 135-62 (1999).

130. *See* Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEGAL F. 261 (1998).

131. *See* SUSAN L. MILLER, GENDER AND COMMUNITY POLICING: WALKING THE TALK 65-98, 139-64 (1999); *Community Policing in the 1990's*, NAT'L INST. JUST., Aug. 1992, at 2; *Innovative Neighborhood-Oriented Policing*, NAT'L INST. JUST., Aug. 1992, at 19.

132. *See* Judith A. Greene, *Zero Tolerance: A Case Study of Police Policies and Practices in New York City*, 45 CRIME & DELINQ. 171, 175-85 (1999) (describing zero-tolerance campaign by New York City police as "heavily reliant on traditional methods of law enforcement to eradicate quality-of-life problems"); Dorothy E. Roberts, *Race, Vagueness, and the Social Meaning of Order-Maintenance*

uplift and quality-of-life improvement notwithstanding,[133] community policing concretely involves police-community and police-corrections partnerships saturated by and susceptible to racialized styles of enforcement.[134] These styles sully the state construction of identity and community.[135]

The continuation of prejudicial styles of policing obliterates feminist norms of trust and reciprocity. Furthermore, this perpetuation of prejudice deeply wounds liberal norms of autonomy and duty while hindering the realization of autonomy in politics and economics. Prejudice also upends the basis for mutual obligation in society. Unabated, prejudice will impose additional and foreseeable obstacles to community activism and mobilization, hindering the outreach efforts necessary for the success of citizen-police partnerships and, by extension, community-prosecution programs.[136] The decline and likely collapse of collectively negotiated outreach and consensual partnership imperils community policing.[137] Curiously, community drug courts may escape this peril.

B. Community Drug Courts

Hailed and vilified for its foray into experimentalist government,[138] the community-drug-court movement alters the norms and practices of the

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Policing, 89 J. CRIM. L. & CRIMINOLOGY 775, 799-818 (1999) (pointing out that order-maintenance policing stigmatizes people of color and reinforces preexisting stereotypes of race-based criminality, disorder, and lawlessness); *see also* Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows:* Terry, *Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 496 (2000) ("In New York, the application of Broken Windows theories through [order-maintenance policing] strategies and stop and frisk tactics produced a style of racial policing with stigmatizing effects on minority communities.").

133. *See* Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997); Janet Reno, Address at the New England School of Law Barrister's Ball (May 20, 1996), *in* 31 NEW ENG. L. REV. 159, 165 (1996); U.S. DEP'T OF JUSTICE, THE CLINTON ADMINISTRATION'S LAW ENFORCEMENT STRATEGY: COMBATING CRIME WITH COMMUNITY POLICING AND COMMUNITY PROSECUTION—TAKING BACK OUR NEIGHBORHOODS ONE BLOCK AT A TIME (March 1999), *at* http//www.usdoj.gov/dag/pubdoc/crimestrategy.htm.

134. *See* Fagan & Davies, *supra* note 132, at 496-503; Ronald Weitzer, *Racialized Policing: Residents' Perceptions in Three Neighborhoods*, 34 LAW & SOC'Y REV. 129, 150-52 (2000).

135. *See* Trish Oberweis & Michael Musheno, *Policing Identities: Cop Decision Making and the Constitution of Citizens*, 24 LAW & SOC. INQUIRY 897, 899-906 (1999); Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99, 101-24 (1999).

136. *See* Michael E. Buerger, *A Tale of Two Targets: Limitations of Community Anticrime Actions*, 40 CRIME & DELINQ. 411, 428-30 (1994); Randolph M. Grinc, *"Angels in Marble": Problems in Stimulating Community Involvement in Community Policing*, 40 CRIME & DELINQ. 437, 449-50 (1994).

137. *See* Reenah L. Kim, *Legitimizing Community Consent to Local Policing: The Need for Democratically Negotiated Community Representation on Civilian Advisory Councils*, 36 HARV. C.R.-C.L. L. REV. 461, 482-96 (2001).

138. *See* Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1460-64, 1473-79 (2000) (criticizing drug courts); Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergency Experimentalist Government*, 53 VAND. L. REV. 831, 841-65 (2000) (lauding drug courts);

criminal-justice system. Alteration occurs at both jurisprudential and institutional levels. Institutionally, the movement lessens the adversarial formalism of prosecution and sentencing. Jurisprudentially, the movement inserts the value of compassion into criminal justice.[139] Dimly instilled within the liberal notions of autonomy and obligation, compassion becomes vivid in the feminist ideals of trust and reciprocity. But compassion is not a corrective. In spite of its feminist gloss, compassion neither deposes nor supplants punishment. Under the aegis of community drug courts, however, compassion and punishment reunite, recasting justice into a community mandate[140] with both distributive and restorative commands.[141]

Distributive commands go to the crux of neighborhood justice.[142] In the street-level drug economy, distributive considerations of fairness in criminal-law enforcement, in terms of both priority and proportionality, apply to community residents, drug offenders, and quality-of-life offenders as well.[143] But compassion-driven distributive fairness ponders more than even-handed justice. It undertakes an assessment closely tailored to the plight of the offender, his place in the community, and the risk of criminal recurrence.

Restorative commands speak plainly to the therapeutic prospects of rehabilitative punishment.[144] The visible institutional stability of community drug courts, and their attendant procedural regularity and substantive predictability, improves the therapeutic prospects of drug offenders,

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John Feinblatt et al., *Institutionalizing Innovation: The New York Drug Court Story*, 28 FORDHAM URB. L.J. 277, 282-92 (2000) (same); David B. Rottman, *Community Courts: Prospects and Limits*, NAT'L INST. JUST. J., Aug. 1996, at 46 (same).

139. *See* John J. Ammann, *Addressing Quality of Life Crimes in Our Cities: Criminalization, Community Courts and Community Compassion*, 44 ST. LOUIS U. L.J. 811, 815-19 (2000).

140. *See* IAN BROWNLEE, COMMUNITY PUNISHMENT: A CRITICAL INTRODUCTION 33-61, 161-85 (1998); Christopher Stone, *Community Defense and the Challenge of Community Justice*, NAT'L INST. JUST. J., Aug. 1996, at 41; Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 43-54 (2000-2001).

141. *See* John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 4-9 (1999); Frederick W. Gay, *Restorative Justice and the Prosecutor*, 27 FORDHAM URB. L.J. 1651, 1656-62 (2000).

142. *See* Sally Engle Merry, *Defining "Success" in the Neighborhood Justice Movement*, *in* NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA 172-92 (Roman Tomasic & Malcolm M. Feeley eds., 1982) (evaluating the quality of justice and perception of fairness in Neighborhood Justice Centers).

143. *See* Kay Levine & Virginia Mellema, *Strategizing the Street: How Law Matters in the Lives of Women in the Street-Level Drug Economy*, 26 LAW & SOC. INQUIRY 169, 181-85 (2001); Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 217-26 (1998).

144. *See* Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 442-50 (1999); Pamela L. Simmons, *Solving the Nation's Drug Problem: Drug Courts Signal a Move Toward Therapeutic Justice*, 35 GONZ. L. REV. 237, 258-62 (2000).

thereby fulfilling their reintegrative state function. Efforts by community-prosecution programs to safeguard that judicial function better serve the redemptive and rehabilitative interests of justice than more punitive sentencing approaches. Confined to drug offenders or expanded to family interventions, the community-court movement entertains alternative justice and punishment rationales that challenge prosecutors to reevaluate the meaning of citizenship, law, and state authority.[145] The same evaluation demands calculation of the costs and benefits of court decentralization for prosecutors, the state, and citizen victims and offenders. The calculation does little to establish or measure community courts' local accountability. At a basic level, accountability is tied to juridical responsiveness and standing. As with the community-prosecution movement, the civic standing of community courts rests on crime prevention, neighborhood revitalization, and public justice. Approbation alone, and the standing it bestows, may not save community prosecutors from grave objections.

IV
OBJECTIONS TO COMMUNITY PROSECUTION

Community-prosecution norms and practices face a gauntlet of objections. In this Part, the Essay will concentrate on three cardinal objections. The first strikes at the movement from the standpoint of ethics. The second seizes on the limits of institutional function. The third points out the constraints of political legitimacy.

A. Ethics

The objection to the community-prosecution movement from the stance of ethics expands the ordinary mapping of the field of professional responsibility. Typically sorted, prosecutorial responsibilities are distributed among the core subjects of discretion and a variety of peripheral topics, such as pretrial publicity or privilege.[146] These responsibilities rarely extend to choices among trial narratives, roles, or arguments touching upon collective identity.[147] Given the racial permeation of crime and law

145. *See* Deborah J. Chase et al., *Courts Responding to Communities: Community Courts and Family Law*, 2 J. CENTER CHILD. & CTS. 37, 45-50 (2000); John S. Goldkamp, *The Drug Court Response: Issues and Implications for Justice Change*, 63 ALB. L. REV. 923, 950-60 (2000). Reevaluation entails consideration of the feasibility and legitimacy of meaningful offender participation in the alternative, rehabilitative sentencing regimes instituted by community courts.

146. *See* Michael Stokes Paulsen, *Who "Owns" the Government's Attorney-Client Privilege?*, 83 MINN. L. REV. 473 (1998); H. Morley Swingle, *Prosecutors Beware: Pretrial Publicity May Be Hazardous to Your Career*, PROSECUTOR, Sept.-Oct. 2001, at 29, 32.

147. *See* Seyla Benhabib, *Sexual Difference and Collective Identities: The New Global Constellation*, 24 SIGNS 335, 350-51 (1999); Martha Merrill Umphrey, *The Dialogics of Legal Meaning: Spectacular Trials, the Unwritten Law, and Narratives of Criminal Responsibility*, 33 LAW & SOC'Y REV. 393, 402-05, 417-20 (1999); David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502, 1509-50 (1998).

enforcement, and the suffusion of racial bias in criminal justice, ignorance of ethical responsibilities increasingly seems contrived.

In fairness, earlier silence toward race in criminal-justice advocacy may be attributed to a stubborn preoccupation with the defender function. Pitched battles have been fought over the validity of that function and the defensibility of the adversary system.[148] Those battles left the matters of identity, narrative, and community largely unaddressed in the prosecutorial context. Their introduction and reevaluation in the recent literature of identity and subordination in the criminal-justice process may stem from the surfeit of high-profile race cases in the media and the ready availability of courts transcripts and records.[149] Whatever the exact cause, the discourse and imagery of race in criminal trials have attained wider circulation in academic and popular discussions of "the good lawyer" in American law and society. These discussions now veer more quickly into the morality of role and race-conscious responsibility.[150]

The reopening of race in parsing the duties of criminal prosecution fails to supply a cogent jurisprudential rationale or a practical scheme of implementation for a race-conscious, community-regarding ethic of criminal prosecution. The task of constructing a race-conscious community ethic of prosecution significantly reconnects ethics to narrative and, by extension, morality.[151] That linkage attaches a narrative ethic to professional roles and moral responsibility. This kind of narrative ethic urges collaboration and the creation of a transgressive legal practice within the interpretive community of criminal justice.[152] Transgressive practice borrows from the classical liberal norms of autonomy, duty, and deliberation that undergird the criminal-justice system. To raise the stake in community, the practice burnishes those norms with the feminist ideals of agency, trust, and reciprocity. This intermixing manufactures a method for advancing the values of identity, empowerment, and community in advocacy.

Practiced in communities of color, the prosecutorial ethic of narrative integrity in telling stories of racial violence deserves application independent of Black/White identity constructs. Surrendering to a Black/White

148. *See* David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1730-52 (1993); William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1707-22 (1993).

149. Recent race cases are predominantly criminal. *See* Peter Margulies, *Identity on Trial: Subordination, Social Science Evidence, and Criminal Defense*, 51 RUTGERS L. REV. 45, 52-73, 113-38 (1998).

150. *See* ARTHUR ISAK APPLBAUM, ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE 61-75, 207-39 (1999); W. Bradley Wendel, *Professional Roles and Moral Agency*, 89 GEO. L.J. 667, 671-90 (2001) (book review).

151. *See* Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 GEO. J. LEGAL ETHICS 1, 31-52 (2000).

152. *See* Andrew Goldsmith, *Is There Any Backbone in This Fish? Interpretive Communities, Social Criticism, and Transgressive Legal Practice*, 23 LAW & SOC. INQUIRY 373, 401-13 (1998).

narrative dichotomy will only reproduce stereotypes.[153] The ethic also demands that serious notice be paid to empowerment, embraced as much for its transformative potential as its liberating ambiguity.[154] Admittedly, under liberal, feminist, or critical-race canons, neither the yearning of potential nor a single transformative event secures a racially constructive outcome. Contemporary examples of racially reconstructive outcomes include the South African Truth and Reconciliation Commission and the Japanese American reparation movement.[155] Nor does the freedom implied by ambiguity pledge reconstructive results. At the same time, nothing in this embrace contemplates more than a halting movement toward community racial reconciliation. That seems like a small adjustment in a juridical process left otherwise intact.

The ethic of race-conscious, community-regarding prosecution and its corollary principle of narrative integrity strains conventional regulation under the American Bar Association's Model Rules and Model Code.[156] Yet prosecutors often operate outside of the purview of regulation. Furthermore, they easily navigate free of the strictures of code-defined responsibilities.[157] Like civil advocates and criminal defenders, prosecutors venture out with moral, prudential, and problem-solving resources at hand and, equally noteworthy, a vision of the common good.[158] Even so, they may founder on the limits of institutional function.

B. Institutional Function

The objection from institutional function to tying the ethic of race-conscious advocacy to the community-prosecution movement arises

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153. *See* Anthony V. Alfieri, *Black and White*, 85 CALIF. L. REV. 1647, 1676-85 (1997) (book review).

154. *See* Brook K. Baker, *Traditional Issues of Professional Responsibility and a Transformative Ethic of Client Empowerment for Legal Discourse*, 34 NEW ENG. L. REV. 809, 810, 858-903 (2000) (arguing that legal writing should expand to address "tranformative issues of outsider representation, client empowerment and social justice"); Julic A. White & John Gilliom, *Up from the Streets: Handler and the Ambiguities of Empowerment and Dependency*, 23 LAW & SOC. INQUIRY 203, 215-21 (1998).

155. *See* ERIC K. YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA 151-275 (1999).

156. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8 (2001) (enumerating affirmative and declination duties); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103 (1969) (citing duties in charging and timely disclosure); *cf.* STANDARDS FOR CRIMINAL JUSTICE 3-1.3–3-6.2 (1993) (amplifying regulatory force and specificity of prosecutorial duties).

157. *See* Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553, 557-67 (1999).

158. *See, e.g.*, Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401, 409-18 (2001); Robert F. Cochran, Jr., The *Criminal Defense Attorney: Roadblock or Bridge to Restorative Justice*, 14 J.L. & RELIGION 211, 223-26 (1999-2000); Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 287-306 (2001); Kim Taylor-Thompson, *Effective Assistance: Reconceiving the Role of the Chief Public Defender*, 2 J. INST. STUDY LEGAL ETHICS 199, 211-20 (1999).

initially out of organizational theory and the sociology of bureaucracy.[159] Put crudely, it is difficult to realign the practical facts of ensconced norms and institutions, particularly when bound up in the arms of the state and its pronouncements of law and order.[160] Considerations of competence bolster this objection. Organizational competence and efficiency may very well decrease in the realignment of the prosecution function. Resources may be diverted and reallocated. New investigative, charging, and trial procedures may be formulated. Novel labor-intensive alliances and collaborations may be pursued. To be sure, resource redistribution and procedural revision are not tantamount to the abdication of function. Nonetheless, concession should be made for practicability.

But the complaint of practicability involves a deeper concern relating to systemic function and futility. Some may properly object that the criminal-justice system is ill-equipped to prevent racial violence or violence of any kind.[161] More profoundly, they may object that the prophylactic and conciliatory programs instigated by community prosecution will be overwhelmed and undone by the ineluctable bond between law and violence. Even this overarching logic, however, does not dictate relegation of the prosecution function solely to deterrent and retributive purposes. Additional public purposes may be taken from restorative-justice experiments in community mediation and alternative sanctions, such as shaming.[162] Alternative sanctions espouse both forgiveness and transformation.[163]

159. On prosecutorial practice communities, see ROY B. FLEMMING ET AL., THE CRAFT OF JUSTICE: POLITICS AND WORK IN CRIMINAL COURT COMMUNITIES 23-76 (1992); PETER F. NARDULLI, ET AL., THE TENOR OF JUSTICE: CRIMINAL COURTS AND THE GUILTY PLEA PROCESS 85-197 (1988).

160. *See* D. Neil MacCormick, *Norms, Institutions, and Institutional Facts*, 17 LAW & PHIL. 301, 324-31 (1998) (pointing out that "acts and events in the framework of normative order" present discoverable "judgments of fact—of institutional fact—that are true so long as we assume the validity of appropriate norms within some normative order").

161. *See generally* Martha Minow, *Between Intimates and Between Nations: Can Law Stop the Violence?*, 50 CASE W. RES. L. REV. 851, 859-60 (2000).

162. *See* Gordon Bazemore & Curt Taylor Griffiths, *Conferences, Circles, Boards, and Mediations: The "New Wave" of Community Justice Decisionmaking*, 61 FED. PROBATION 25, 33-35 (1997); Robert A. Baruch Bush, *The Unexplored Possibilities of Community Mediation: A Comment on Merry and Milner*, 21 LAW & SOC. INQUIRY 715, 731-36 (1996); Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 743-62 (1998); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 605-30 (1996).

163. *See* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 9-24 (1988); JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 14-34, 162-86 (1988); B. Douglas Robbins, Comment, *Resurrection from a Death Sentence: Why Capital Sentences Should Be Commuted upon the Occasion of an Authentic Ethical Transformation*, 149 U. PA. L. REV. 1115, 1151-68 (2001); Jill Stauffer, Seeking the Between of Vengeance and Forgiveness: Martha Minow, Hannah Arendt, and the Possibilities of Forgiveness 1, 17 (May 2001) (unpublished manuscript, on file with the *California Law Review*) (arguing that Minow's account of forgiveness "lacks the futural orientation that allows Arendt to figure forgiveness as a remembrance that allows humans to learn from the past without being trapped in its repetition").

Unfortunately, in the crucible of violence, the most creative sanctions may fail to heighten civic participation, heal pain, or cure looming threats.[164]

Practicable race-conscious community-prosecution models tailored to incite citizen participation in neighborhood revitalization and criminal-justice initiatives may very well curtail state control and regulation of crime.[165] They may also ignite novel civil-rights claims and embolden state remedial action by courts and governmental institutions.[166] Although commentators acknowledge that a community prosecutor or a neighborhood district attorney "doesn't have more authority than one who operates out of a main office," they point out that "what he may have, based on his neighborhood connections, is certain knowledge that the offender is a problematic drug dealer and long-term nuisance to the community."[167] Hence, they stress, "[h]e can press the court to be tougher by explaining some of the history he knows. He can offer advice on when to throw the book at a suspect—and when to hold back."[168] Additionally, commentators observe, "[t]he neighborhood district attorney has access to government agencies and higher-level officials who may be the only ones with real standing to solve a problem."[169] The unresolved question is whether pressing these and other race-encumbered initiatives causes the community prosecutor to forgo his political legitimacy and thus forfeit his state authority. That is the essence of the last objection to community prosecution.

C. Political Legitimacy

The objection from political legitimacy to race-conscious community prosecution springs from public mistrust of law, diversity-based justice initiatives, and restorative-justice models.[170] The political legitimacy of the prosecution function is bound to the expressive purposes of even-handed law enforcement and fairly-warranted punishment.[171] Ordinarily,

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164. *See* Linda Mulcahy, *The Devil and the Deep Blue Sea? A Critique of the Ability of Community Mediation to Suppress and Facilitate Participation in Civil Life*, 27 J.L. & SOC'Y 133, 148-50 (2000).

165. *See* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 27-51, 167-205 (2001).

166. *See* Terence Dunworth & Gregory Mills, *National Evaluation of Weed and Seed*, NAT'L INST. JUST. RES. BRIEF, June 1999, 1, 7-8; Francesca Polletta, *The Structural Context of Novel Rights Claims: Southern Civil Rights Organizing, 1961-1966*, 34 LAW & SOC'Y REV. 367, 383-402 (2000); Elizabeth Lee Thompson, *Reconstructing the Practice: The Effects of Expanded Federal Judicial Power in Postbellum Lawyers*, 43 AM. J. LEGAL HIST. 306, 330 (1999).

167. *See* Freyman, *supra* note 32, at 28.

168. *Id.*

169. *Id.*

170. *See* David Owen, *Cultural Diversity and the Conversation of Justice: Reading Cavell on Political Voice and the Expression of Consent*, 27 POL. THEORY 579, 591-94 (1999); Tom R. Tyler, *Public Mistrust of the Law: A Political Perspective*, 66 U. CIN. L. REV. 847, 866-72 (1998).

171. *See* Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1376-1461 (2000); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of*

prosecutorial legitimacy is not linked to the encouragement of democratic deliberation or the arbitration of disagreement.[172] Matters of political deliberation and disagreement usually are left to civic engagement instead of state criminal supervision. But crime and democracy are closely intertwined.[173] Crime stunts participation in civic life by suppressing individual action and oppressing community activity. Intermixed with race and poverty, crime animates racial-identity coloring, thereby hindering opportunities for democratic inclusion. Unvarnished discrimination accomplishes the same result.

Despite their deleterious effect on racial community, crime and criminal prosecutions seem distinguishable from political violence.[174] For purposes of democratic engagement and civic renewal, their brand of state violence is more akin to the interpretive silencing of advocacy[175] and its diffusion of autonomy.[176] Community prosecution makes no promise to alleviate the silencing of participants in the criminal-justice system.[177] Further, it makes only awkward contributions to traditional rights advocacy and grants dubious benevolence to local community,[178] thus imperiling its own alternate claim to political legitimacy.

The enumerated objections to the community-prosecution movement from the stance of ethics, institutional function, and political legitimacy in no way exhaust the range of available protest. Even approving critics like Thompson assail the vague objectives and untested techniques of the

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Law: A General Restatement, 148 U. PA. L. REV. 1503, 1506-14, 1531-64 (2000); Daniel McDermott, *The Permissibility of Punishment*, 20 LAW & PHIL. 403, 407-13 (2001).

172. *See* Robert E. Goodin, *Democratic Deliberation Within*, 29 PHIL. & PUB. AFF. 81 (comparing external-collective and internal-reflective deliberation) (2000); Lynn M. Sanders, *Against Deliberation*, 25 POL. THEORY 347 (1997).

173. *See* Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 LAW & SOC. INQUIRY 1111, 1115-34 (2000).

174. *See* Susan Bibler Coutin, *The Oppressed, the Suspect, and the Citizen: Subjectivity in Competing Accounts of Political Violence*, 26 LAW & SOC. INQUIRY 63, 67-74 (2001).

175. *See generally* Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 33 U. MICH. J.L. REFORM 263, 288-95, 307-20 (2000); Camille A. Gear, Note, *The Ideology of Domination: Barriers to Client Autonomy in Legal Ethics Scholarship*, 107 YALE L.J. 2473, 2477-87, 2495-2500 (1998).

176. On the scope and justification of autonomy-limiting rules, see Fred C. Zacharias, *Limits on Client Autonomy in Legal Ethics Regulation*, 81 B.U. L. REV. 199, 203-29 (2001).

177. *See* Forst, *supra* note 37, at 141 ("Community prosecution programs aim principally to connect the prosecutor more closely to the community, not primarily to restore the victim. These programs leave intact the fundamental principle that the prosecutor represents the state, not the victim, in all criminal matters.").

178. *Id.* at 139-40. Forst complains that prosecutors

> are spending scarce resources on a loosely defined set of interventions having to do with "community outreach" and "cooperation" without the benefit of empirical evidence validating that some are really more effective than others, or indeed that any of those usually associated with community prosecution are useful for achieving the goals of prosecution.

Id.

movement's pioneer programs.[179] Vagueness, he remarks, is compounded by the absence of any systematic empirical study of program efficacy. Doubtless, revisions in program infrastructure and prosecutor role invite criticism. In assaying program infrastructure, for example, Thompson charts discontinuities in office design and management as well as in hiring, promotion, and training.[180] Similarly, in scrutinizing role performance, he traces growing fissures in professional role differentiation generated by the shift from a nonpartisan, adversarial crime-fighting mission emphasizing solitary zealous advocacy to a partisan, problem-solving crime-prevention strategy stressing the mutuality of learning in neighborhood partnership.[181]

In addition to this internal critique, the community-prosecution movement suffers external rebuke insofar as it allies with the restorative-justice movement. By force of implication, the rebuke condemns community prosecutors' recommended reliance on a restorative theory of justice and its feminist jurisprudential acclaim. Integral to citizenship norms and collaborative prescriptions, that reliance presumes the disavowal of retributive-justice principles and the presence of applicable indigenous community-justice practices.

For recent critics of restorative justice, such as Kathleen Daly, reliance of this sort is misplaced.[182] To Daly, counterposing restorative and retributive principles in oppositional tension is schematic and false. Further, urging the discovery and mechanical adoption of informal justice practices in communities of color overstates the plausible construction of restorative practices and overrides cultural differences and diversity specific to discrete communities. Instilling a feminist ethic of care in the content of restorative justice in order to salvage its appeal, Daly points out, merely reproduces dichotomous readings of, and essentialist reasoning in, law and justice. Therefore, Daly adds, to suggest that restorative-justice practices create transformative relationships in the aggregate sense of community mobilization or grassroots politics is at best hyperbole and at worst myth.[183] Having shaken the foundation of community prosecution, this Essay turns to its application in the setting of racial violence.

V

COMMUNITY PROSECUTION AND RACIAL VIOLENCE

Lauded for its institutional ambition and its systemic promise of criminal justice, the community-prosecution movement presents an affirmative instrument to combat racial violence. To the extent that the

179. *See* Thompson, *supra* note 2, at 350-60.
180. *Id.* at 367-71.
181. *Id.* at 360-67.
182. *See* Kathleen Daly, *Restorative Justice: The Real Story*, 4 PUNISHMENT & SOC'Y 55 (2002).
183. *Id.* at 58-67, 71-73.

movement engenders citizen participation, institutional decentralization, and local accountability in federal and state prosecution, it offers to kindle citizen-state modes of collaboration and ignite grassroots justice initiatives. Both the community-policing and community-court movements represent positive modes of citizen-state collaboration in the criminal-justice system. The restorative-justice movement and the community-lawyering tradition demonstrate that citizens, their legal agents, and state institutions can participate in that collaborative process with beneficial results. In theory, community-based collaboration by prosecutors, victims, offenders, and neighborhood groups around criminal-justice initiatives may help alleviate the conditions of poverty and repair the structures of political empowerment in communities of color.

Racial violence creates formidable barriers for the community-prosecution movement. Steeply erected, the barriers comprise countless types of aggression, forms of violence, and categories of victims. Instead of endeavoring to hurdle these barriers in a sweeping catalogue of violence, prudence recommends narrowing the instant inquiry. A helpful means of doing so without shuttering the matter too tightly is to contract the definitional parameters of racial violence.

Consider racial aggression first. Critical race theory delineates two kinds of aggression: micro and macro. Racial aggression differs from racial violence in its sparing use of material force and physicality. Exerted by individuals and at times groups, microaggression aims chiefly at the individual person of color: his or her state of mind, language, and daily act of being in the world. Macroaggression, in contrast, points to the collective community of color. Enacted by groups, often in concert with the state, or by the state itself, macroaggression unleashes cultural, economic, and political forces of harm. Those forces may cause cultural degradation, economic hardship, or political disenfranchisement.

Consider racial violence next. Critical race theory, in conjunction with the law-and-narrative movement,[184] discerns two analytic forms of violence: interpretive and physical. Interpretive violence connotes the violence of the word marked by the disfigurements of symbolic, oral, written, and performative texts.[185] Hate speech is a brazen kind of interpretive violence. "Race-ed" speech, enunciated by prosecutors and defenders in

184. *See* Paul Gewirtz, *Victims and Voyeurs: Two Narrative Problems at the Criminal Trial, in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 135-61 (Peter Brooks & Paul Gewirtz eds., 1996); Charles Ogletree, *Public Defender, Public Friend: Searching for the "Best Interests" of Juvenile Offenders, in* LAW STORIES 131-48 (Gary Bellow & Martha Minow eds., 1996); Abbe Smith, *On Representing a Victim of Crime, in* LAW STORIES, *supra*, at 149-67; Robert Weisberg, *Proclaiming Trials as Narratives: Premises and Pretenses, in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW, *supra*, at 61-83.

185. *See* Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2125-30 (1991) (discussing the way interpretive violence is fueled by the lawyering practices of marginalization, subordination, and discipline).

closing arguments or alluded to in jury selection, is less bold but no less derogatory. Physical violence, by comparison, denotes a raw material brutality. Hate crimes of assault or murder are blunt exemplars of blatant racial violence.

Last, consider the racial victim. Historical difference and diversity assemble a far-reaching variety of racial categories: Black, Asian American, Latina/o, Native American, and more. Each category intermingles to generate cross-racial and multi-ethnic permutations. Further, each category merges with gender and sexuality. The ubiquity of this merger and decades of intermingling prevent the easy unpacking of racial categories. Faced with a deeply striated victim identity, prosecutors are reluctant to relinquish long-standing racialized narrative strategies in favor of untested community-based advocacy practices, particularly when such practices may work to the detriment of victims. That reluctance is illustrated in the traditional prosecution of criminal, civil-rights, and hate-crime cases. It is a reluctance schooled in prosecutorial norms.

A. Prosecutorial Norms

The norms of criminal law and justice hold a fatal allure for prosecutors. These are the vaunted norms of prosecutorial discretion, the norms of the good prosecutor.[186] Good prosecutors are the virtuous agents of justice and the celebrants of truth.[187] Disciples of neutrality,[188] they imagine their function in the formalist terms of striving for independence and proportionality in charging, investigating, plea bargaining, and sentencing.[189] This

186. *See* Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511, 1515-29 (2000); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 372-96 (2001).

187. *See* Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 227-54 (1988) (discussing moral dimension of prosecutor's quasi-judicial role); Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 316-36, 351-53 (2001) (discussing prosecutorial duties of candor and disclosure); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 103-13 (1991) (discussing prosecutorial duty to pursue justice).

188. *See* H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1697-1705 (2000).

189. *See* Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 408-15 (2001); Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 149-157 (1994); Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 FORDHAM L. REV. 723, 733-50 (1999); Shelby A. Dickerson Moore, *Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion—Knowing There Will Be Consequences for Crossing the Line*, 60 LA. L. REV. 371, 377-91 (2000); Frank J. Remington, *The Decision to Charge, the Decision to Convict on a Plea of Guilty, and the Impact of Sentence Structure on Prosecution Practices*, *in* DISCRETION IN CRIMINAL JUSTICE: THE TENSION BETWEEN INDIVIDUALIZATION AND UNIFORMITY 73-133 (Lloyd E. Ohlin & Frank J. Remington eds., 1993); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1523-37 (1981).

self-serving formalism,[190] however, belies the bias immersed in criminal law[191] and the animus cloaked in law-enforcement discretion.[192] This masking of prejudice and overzealous excess overlooks the incidence of selective, race-based prosecution.[193] It also obscures the recurrent dilemmas of race and occasions for conscientious noncompliance in the prosecution process.[194]

Current debates over prosecutorial regulation, responsibility, and enforcement lend little to the resolution of these dilemmas.[195] Standards of impropriety and misconduct offer meager guidance as well.[196] The limited guidance available comes from past calls for proactive prosecution, leadership in the war on drugs, and authority in juvenile-justice proceedings.[197] Those calls summon prosecutors on behalf of the victim and the accused,[198] but seldom on behalf of the community. The explanation for this muted summons lies in the nature of racial norms.

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190. For a race-neutral variant of practice formalism, see HARRY I. SUBIN ET AL., THE CRIMINAL PROCESS: PROSECUTION AND DEFENSE FUNCTIONS 162-386 (1993).

191. *See generally* Note, *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1520-57, 1588-95 (1988) (discussing race and prosecutorial conduct in charging).

192. *See* David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1074-82 (1999); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 20-26, 31-38 (1998).

193. *See* Michael Tonry, *Racial Politics, Racial Disparities, and the War on Crime*, *in* POLITICS, CRIME CONTROL, AND CULTURE 3-22 (Stuart A. Scheingold ed., 1997).

194. *See* Bruce A. Green, *Lawyer Discipline: Conscientious Noncompliance, Conscious Avoidance, and Prosecutorial Discretion*, 66 FORDHAM L. REV. 1307, 1310-12 (1998); Kenneth B. Nunn, *The "Darden Dilemma": Should African Americans Prosecute Crimes?*, 68 FORDHAM L. REV. 1473, 1492-1509 (2000).

195. *See* Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 77-91 (1995); Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65 FORDHAM L. REV. 355, 359-77, 423-27 (1996); Kevin C. McMunigal, *Are Prosecutorial Ethics Standards Different?*, 68 FORDHAM L. REV. 1453, 1458-68 (2000); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 725-65 (2001); Fred C. Zacharias, *Who Can Best Regulate the Ethics of Federal Prosecutors, or, Who Should Regulate the Regulators?: Response to Little*, 65 FORDHAM L. REV. 429, 446-62 (1996).

196. *See* BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 14:1-14:20 (2d ed. 1999) (discussing standards of misconduct); JOSEPH F. LAWLESS JR., PROSECUTORIAL MISCONDUCT: LAW, PROCEDURE, FORMS 839-947 (2d ed. 1999); Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. 699, 704-19, 728-39 (1998).

197. *See* AM. PROSECUTORS RESEARCH INST., BEYOND CONVICTIONS: PROSECUTORS AS COMMUNITY LEADERS IN THE WAR ON DRUGS 241-88 (U.S. Department of Justice, Bureau of Justice Assistance ed., 1993); James C. Backstrom, *The Role of the Prosecutor in Juvenile Justice: Advocacy in the Courtroom and Leadership in the Community*, 50 S.C. L. REV. 699, 703-14 (1999); W. Allan Williams, *The Case for Proactive Prosecution*, 13 CRIM. JUST. J. 389, 390-94 (1992).

198. *See* Susan Bandes, *When Victims Seek Closure: Forgiveness, Vengeance and the Role of Government*, 27 FORDHAM URB. L.J. 1599, 1605 (2000).

B. Racial Norms

Race and racism seem pervasive in the criminal-justice system.[199] More pronounced than the discrimination still insidious elsewhere in the law, racial animus and imagery seem to grip criminal law even as crime rates decline.[200] Devastating to already-distressed communities, stereotypes in crime prevention and criminal prosecution betray the purported neutrality of legal decision makers.[201] The same stereotypes apparently foreclose expanding the institutional ranks of legal decision makers to rectify that bias.[202]

The virulence and tenacity of stereotypes in the criminal-justice system frustrate the prosecution of racial violence depicted in police brutality cases under criminal and civil-rights statutes in federal and state courts from New York City to Los Angeles.[203] Frustration stems from law as well as narrative.[204] Both police brutality and drug trials illustrate the impact of narrative.[205] The rhetoric of race in the thinly veiled jury narratives of such trials evokes racial identity and race-coded relations of hierarchy in law

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199. *See* CORAMAE RICHEY MANN, UNEQUAL JUSTICE: A QUESTION OF COLOR 115-219 (1993); Angela J. Davis, *Benign Neglect of Racism in the Criminal Justice System*, 94 MICH. L. REV. 1660, 1674-84 (1996); Scot Wortley et al., *Just Des(s)erts? The Racial Polarization of Perceptions of Criminal Injustice*, 31 LAW & SOC'Y REV. 637, 646-51, 664-70 (1997).

200. *See* Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1743-66 (1993).

201. On race infected legal decision making, see Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CALIF. L. REV. 733, 750-66 (1995).

202. *See* Naftali Bendavid, *Race, Hope, and Eric Holder; Some Black AUSAs Say Expectations for Advancement Have Remained Unfulfilled*, LEGAL TIMES, Apr. 18, 1996, at 1.

203. *See* ERWIN CHEMERINSKY, AN INDEPENDENT ANALYSIS OF THE LOS ANGELES POLICE DEPARTMENT'S BOARD OF INQUIRY REPORT ON THE RAMPART SCANDAL (Sept. 11, 2000) (discussing police-brutality prosecution in Los Angeles); Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1281-1309 (1999); Lou Cannon, *L.A.P.D. Confidential*, N.Y. TIMES MAG. (Oct. 1, 2000) at 32 (discussing police-brutality prosecution in Los Angeles); Erwin Chemerinsky, *The Rampart Scandal and the Criminal Justice System in Los Angeles County*, 57 GUILD PRACTITIONER 121, 131-32 (2000) (same); John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 802-11 (2000); Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 534-44 (1994); Gary C. Williams, *Policing the Criminal Justice System: Incubating Monsters?: Prosecutorial Responsibility for the Rampart Scandal*, 34 LOY. L.A. L. REV. 829, 835-41 (2001); Jessica A. Rose, Note, *Rebellious or Regnant: Police Brutality Lawyering in New York City*, 28 FORDHAM URB. L.J. 619, 652-60 (2000).

204. *See* Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URB. L.J. 587, 588-90 (2000).

205. *See* Mark S. Davies, *Enlisting the Jury in the "War on Drugs": A Proposed Ban on Prosecutors' Use of "War on Drugs" Rhetoric During Opening and Closing Argument of a Narcotics Trial*, 1994 U. CHI. LEGAL F. 395, 398-412 (1994); James Joseph Duane, *What Message Are We Sending to Criminal Jurors When We Ask Them to "Send a Message" with Their Verdict?*, 22 AM. J. CRIM. L. 565, 589-635 (1995); Anita Kalunta-Crumpton, *The Prosecution and Defence of Black Defendants in Drug Trials*, 38 BRIT. J. CRIMINOLOGY 561, 563-82 (1998); David Dante Troutt, *Screws, Koon, and Routine Aberrations: The Use of Fictional Narratives in Federal Police Brutality Prosecutions*, 74 N.Y.U. L. REV. 18, 96-121 (1999).

and society. This intractable hierarchy, and the explosive fears of its toppling, fuels the racial violence of hate crimes.[206]

The growth of hate-crime legislation and the prosecution of hate-incited racial violence show the breadth of institutional competence and the scope of political legitimacy enjoyed by prosecutors.[207] Like community prosecution, hate-crime prosecution endorses multiracial identity claims and democratic equality norms.[208] It too suffers regulatory complexities and fallacies of race-neutrality, enduring distinctive debates over penalty enhancement and incommensurability.[209] Although it continues to survive these objections, the legislation and prosecution of hate crimes will prevail only with federal and state remedial enforcement coupled with community mobilization.[210] Indeed, as with community prosecution, effective hate-crimes enforcement entails citizen participation, office decentralization, local integration, and sustained outreach. Like the prosecution of racial violence, anti-hate initiatives spur citizen-state collaboration and mobilize grassroots justice campaigns. In practice, however, community-based collaboration by prosecutors and neighborhood groups in criminal-justice campaigns against hate and racial violence may fail. That too frequent result consigns communities of color to poverty and powerlessness, and leaves the subject of law, crime, and community in disarray.

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206. *See* VALERIE JENNESS & KENDAL BROAD, HATE CRIMES: NEW SOCIAL MOVEMENTS AND THE POLITICS OF VIOLENCE 21-46 (1997); JACK LEVIN & JACK MCDEVITT, HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED 75-114 (1993).

207. *See* JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS 29-44, 92-110 (1998); FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 9-44, 110-60 (1999); Howard Cohen, *The Significance and Future of Racially Motivated Crime*, 27 INT'L J. SOC. L. 103, 107-12 (1999); James B. Jacobs & Kimberly A. Potter, *Hate Crimes: A Critical Perspective*, 22 CRIME & JUST. 1, 5-9 (1997) (discussing three categories of hate crime laws: substantive crimes, sentence enhancements, and reporting statutes); Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation Are Wrong*, 40 B.C. L. REV. 739, 758-65 (1999).

208. *See* Andrew Altman, The *Democratic Legitimacy of Bias Crime Laws: Public Reason and the Political Process*, 20 LAW & PHIL. 141, 162-67 (2001); Michael Blake, *Geeks and Monsters: Bias Crimes and Social Identity*, 20 LAW & PHIL. 121, 123-27 (2001); Alon Harel & Gideon Parchomovsky, *On Hate and Equality*, 109 YALE L.J. 507, 532-34 (1999); Tanya Kateri Hernandez, *Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence"*, 99 YALE L.J. 845, 847-55 (1990); Charles H. Jones, *Hate Crimes and Negro Freedom*, 1 RUTGERS RACE & L. REV. 357, 358-65 (1999); Lu-in Wang, *The Complexities of "Hate"*, 60 OHIO ST. L.J. 799, 808-15 (1999) (discussing penalty-enhancement models).

209. *See* Claudia Card, *Is Penalty Enhancement a Sound Idea?*, 20 LAW & PHIL. 195, 205-11 (2001); *see also* Apprendi v. New Jersey, 530 U.S. 466 (2000) (invalidating New Jersey "hate crimes" sentencing enhancement scheme under Sixth Amendment right to jury trial and Fourteenth Amendment Due Process Clause); Dan M. Kahan, *Punishment Incommensurability*, 1 BUFF. CRIM. L. REV. 691, 694-96 (1998).

210. *See* BRIAN K. LANDSBERG, ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE 23-59, 171-81 (1997); Jack Greenberg, *Civil Rights Enforcement Activity of the Department of Justice*, 8 BLACK L.J. 60 (1983); Gregory L. Padgett, *Racially-Motivated Violence and Intimidation: Inadequate State Enforcement and Federal Civil Rights Remedies*, 75 J. CRIM. L. & CRIMINOLOGY 103 (1984).

CONCLUSION

The subject of law, crime, and community is now an integral part of American civic and political culture. It connects usefully to larger studies of race, lawyers, and ethics in the criminal-justice system. Moreover, it focuses productively on the role of prosecutors in community-based advocacy, especially in communities of color. Pinioned by poverty and crime, it is a subject that reopens the mundane daily judgments by prosecutors about the racial identity of defendants and victims, the racialized narrative of pretrial and trial texts, and the race-coded strategies and tactics of representation. In sum, it is a break point for unconventional treatments of the prosecutorial function in the literature of criminal justice and legal ethics.[211]

Crucial to this ongoing search for community in criminal law is the effort to boil down and transform the social meaning of race, community, and criminal justice into a pedagogy of practice for prosecutors. This effort builds from the ideology of independence and self-regulating professional power.[212] It harnesses that ideology to recast the professional community of prosecutors and, in so doing, reinvigorates the idea of prosecuting for social justice.[213] To be of use in communities of color, this idea must endorse a race-sensitive, community-wide conception of justice. This conception can be rooted in an "other"-regarding, public-minded prosecutorial practice that reconceives the prosecution function in the spirit of cause lawyering for the common good.[214] That spirit entails commitments to democratic community and dialogue.

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211. This Colloquium and its scholars likewise establish a point of departure from traditional accounts of criminal law and the criminal-justice system. The scholars counted here search for community in the criminal law from exploratory stances shaped by an abiding normative interest in the private and public meaning of procedural rules, substantive laws, and social relationships. No doubt their rendering of the community-prosecution movement and its social meaning in contemporary criminal-law policy will swerve from mine. They will trace its history, assay its norms, and assess its practices differently. And they will rally separate and perhaps more powerful objections. Despite their divergent paths, the collective enterprise will continue.

212. *See* Bryant G. Garth, *Independent Professional Power and the Search for a Legal Ideology with a Progressive Bite*, 62 IND. L.J. 183, 186-205 (1987); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV 1, 30-69 (1988).

213. *See* Kevin R. Johnson, *Lawyering for Social Change: What's a Lawyer to Do?*, 5 MICH. J. RACE & L. 201, 215-27 (1999).

214. *See* John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 FORDHAM L. REV. 1927, 1932-40 (1999); Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. CAL. L. REV. 1273, 1339 (1998) ("In a public-minded view of law practice, reinforcing the constellation of collective endeavors reflected in the legal framework is an important function."); Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 3-28 (Austin Sarat & Stuart Scheingold eds., 1998); Elisa E. Ugarte, *The Government Lawyer and the Common Good*, 40 S. TEX. L. REV. 269, 274-78 (1999).

Prosecutor-instigated interracial dialogue involves the embrace of a community-leadership role and the reciprocal faith in community through secular and nonsecular coalitions. This faith in civic engagement gives force to a community ethic of prosecutorial practice.[215] Of course, community will vary by history and place.[216] Engagement will rise and fall according to chance and contingencies in particularized cultural and social contexts. Within these contexts "responsibility to and for others" is a dialogic obligation.[217] For this reason, prosecutors must pursue a kind of cooperative democratic experimentalism.[218]

The incantation of democratic experimentalism is hardly a call for professional abnegation or racial assimilation. Instead, it captures the hope for a sense of belonging, not simply to a group but to a community, even a polity.[219] That aspiration establishes an ethical stance of openness in which resistance provides a means of reconciliation.[220] Openness carries a sense of reciprocity and implies a promise of accountability found in liberal accounts of deliberative democracy,[221] though perhaps not solidarity.[222] The accounts run afoul when confronted by bad faith, identity politics, and

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215. *See* Anna Greenberg, *The Church and the Revitalization of Politics and Community*, 115 POL. SCI. Q. 377, 382-86 (2000) (discussing churches' attempts to stimulate civic engagement among their members); Symposium, *The Relevance of Religion to a Lawyer's Work: An Interfaith Conference*, 66 FORDHAM L. REV. 1075 (1998). Some postmodern scholars may envision this practice in the Foucaultian terms of denormalizing identity. *See* Michael Schwartz, *Repetition and Ethics in Late Foucault*, 117 TELOS 113, 114 (1999) ("Ethical practice, styled as an aesthetics of existence, may, then be construed as a Foucaultian tactic for denormalizing identity, with the hope of leading toward a more effective political challenge.") (footnote omitted).

216. *See* CAROL J. GREENHOUSE ET AL., LAW AND COMMUNITY IN THREE AMERICAN TOWNS 149-71 (1994); *see also* JOEL F. HANDLER, LAW AND THE SEARCH FOR COMMUNITY 82-106 (1990) (comparing modern and postmodern foundations of communitarian ethics).

217. *See* Richard K. Sherwin, Ethical Enchantment: An Affirmative Postmodern Approach to Law (Mar. 3, 2001) (unpublished manuscript, on file with the *California Law Review*) (positing an affirmative ethical vision of interpersonal commitment derived from postmodern cultural texts and practice norms); *see also* RICHARD K. SHERWIN, WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE 233 (2000); Paul Schiff Berman, *Telling a Less Suspicious Story: Notes Toward a Non-Skeptical Approach to Legal/Cultural Analysis*, 13 YALE J.L. & HUMAN. 95, 118-121, 124-38 (2001).

218. *See* ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 184 (1996) ("The overriding task in the design of arrangements conducive to practical progress is therefore always to imagine and establish the arrangements for cooperation, in the small and in the large, that are least likely to prevent permanent innovation.").

219. *See* Andrew Mason, *Political Community, Liberal-Nationalism, and the Ethics of Assimilation*, 109 ETHICS 261, 265-76, 282-85 (1999).

220. *See* PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE 233-34 (1998) (noting that "resistance involves a recognition that power is not something that is removed from and merely enframes social relations, but that power is something that circulates in and through everyday interactions").

221. For useful introductions to the notion of deliberative democracy, see Jon Elster, *Deliberation and Constitution Making*, *in* DELIBERATIVE DEMOCRACY 97-122 (Jon Elster ed., 1998).

222. *See* AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 52-94, 128-64 (1996); Marie A. Failinger, *Face-ing the Other: An Ethics of Encounter and Solidarity in Legal Services Practice*, 67 FORDHAM L. REV. 2071, 2110-19 (1999).

deficiencies in public reason.[223] These deficiencies heighten the importance of public accountability for a discourse of community and inclusion.[224]

The moral personality of the community prosecutor carries a commitment to civic and community education.[225] Activating that commitment risks the expansion of state authority and the approval of contestable moral claims that may advance private interests at the expense of public benefits. This risk may be the consequence of treating criminal law as a moral and political resource.[226] However, any meaning-making practice, legal or cultural, may sometimes prove costly and disabling,[227] especially when identity devolves into essentialism.

The proposal—to burden prosecutors with color-conscious policies that respect community identity and narrative integrity—reaches for a deeper account of political liberalism under democracy.[228] Broadening that account enriches our understanding of race, its distinctive epistemology, and its interpretation. The inclusion of race into the public dialogue and reasoning of criminal law is an experiment that may go awry. Likewise, community prosecution is described as "an evolving experiment in organizational change that is proceeding step by step and neighborhood by neighborhood in response to citizen complaints"[229] of fear and injustice that too may fall skewed.[230] Ironically, both enterprises mirror the evolving

223. *See* William H. Simon, *Three Limitations of Deliberative Democracy: Identity Politics, Bad Faith, and Indeterminacy*, *in* DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND DISAGREEMENT 49, 50-54 (Stephen Macedo ed., 1999).

224. *See* MARION SMILEY, MORAL RESPONSIBILITY AND THE BOUNDARIES OF COMMUNITY: POWER AND ACCOUNTABILITY FROM A PRAGMATIC POINT OF VIEW 225-54 (1992).

225. *See* WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE 241-56 (1991); Eamonn Callan, *Liberal Legitimacy, Justice, and Civic Education*, 111 SIGNS 141, 154-55 (2000).

226. *See* Richard Lempert, *A Resource Theory of the Criminal Law: Exploring When It Matters*, *in* HOW DOES LAW MATTER? 227-47 (Bryant G. Garth & Austin Sarat eds., 1998).

227. *See* Laura Hengehold, *Remapping the Event: Institutional Discourses and the Trauma of Rape*, 26 SIGNS 189, 211-12 (2000); Naomi Mezey, *Approaches to the Cultural Study of Law: Law as Culture*, 13 YALE J.L. & HUMAN. 35, 45-57 (2001).

228. On race, identity, and self-respect, see Michele M. Moody-Adams, *A Commentary on Color Conscious: The Political Morality of Race*, 109 ETHICS 408, 418-22 (1999).

229. *See* Barbara Boland, *Community Prosecution in Washington, D.C.: The U.S. Attorney's Fifth District Pilot Project*, NAT'L INST. JUST. RES. REP., Apr. 2001, at iii.

230. *See* Forst, *supra* note 37, at 141. Forst notes:

> As currently conceived, community prosecution programs do little either to make prosecutors more systematically accountable to citizens for their workaday, behind-the-scene performance in all felony cases or to promote a deep, transformational sense of justice. While these programs may offer superficial political advantages for prosecutors, and may even produce marginal gains in crime abatement, they represent no 'paradigm shift.' They may, in fact, divert the attention of prosecutors from reforms that could really serve members of the community most in need of relief of crime.

Id.

tensions between modern and postmodern jurisprudential movements in law and race.[231]

231. *See* Angela P. Harris, *The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 759-66 (1994).