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Prosecuting Violence/Reconstructing Community

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For two centuries, the private violence of American history has paraded into courts for public trial. Often dramatized by the spectacle of rape and murder, the public trials of private violence increasingly are seen to decide the fates of both the accused and the victim of crime. The fate of community, whether the community of the victim, the accused, or the public, seems at first blush untouched by such trials. Like victims and their families, however, communities struck by violence suffer profound loss. That loss is expressed in the destruction of public discourse, reason, and citizenship. This public ruin is not simply the result of interpretive and material violence; rather it is a consequence as well of the force of law and legal agents. The forum of law's violence is the criminal justice system. The agents of its advocacy are prosecutors and criminal defense lawyers. Their acts and ethics work to shape the prosecution of violence. When that prosecution confronts race, law and community each faces trial and, inevitably, the despoiling of public interracial dialogue. Indeed, the prosecution of racial violence typically silences the reasoned public deliberation and exchange necessary to construct interracial community. The norms and narratives of community and criminal justice heard at the trials of private racial violence by no means ordain this result. Reflecting the institutional and regulatory complexity of multiple prosecutorial roles and burdens, those norms and narratives grant both freedom and constraint in the prosecution of racially motivated violence. Guided by the lessons of law reform movements and the teachings of grassroots community organizations, the challenge for prosecutors in race cases is to overcome the burden of silencing tradition and to explore the discretionary freedom of reconstructing interracial community.

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This essay is dedicated to Evelyn Nay Grant, *great* grandmother to many.

INTRODUCTION

This essay explores the subject of law, violence, and community in contemporary America. Part of a larger project investigating the role of race, lawyers, and ethics in the American criminal justice system, the essay draws on both jurisprudential and interdisciplinary materials to probe the socio-legal text and the historical context of racially motivated violence in two recent high-profile criminal trials: the 1990-91 Central Park Jogger sexual assault trials in New York City[1] and the 1998-99 James Byrd murder trials in Jasper, Texas.[2] Exploding at the intersection of law, culture, and society, the socio-legal text of racial violence finds important, albeit partial, expression in the discourse of criminal justice advocacy. Inscribed in the speech, writing, and symbolic gesture of prosecutors and defense attorneys, that text signifies the juridical translation of violence into word.[3] For these pivotal legal actors, translation occurs in the language of law and in the adversarial conduct of lawyering.

The commonplace translation of speech and conduct in the criminal courtroom carries moral significance for both the quotidian plea bargain and the banner murder trial. Significance flows from the private and public construction of identity in the narratives of legal storytelling. Defendants and victims together bear the physical and psychological marks of identity: class, race, gender, ethnicity, sexual orientation, disability, even age. Semiotic adhesions, the marks attach as well to the geographic spaces of a community and to the institutional agents of the state.

Although often clashing as competing agents under the unequal wages of the state, prosecutors and defense attorneys nonetheless share in telling stories of identity. The stories pronounce narratives of guilt and innocence, pain and punishment, and remorse and forgiveness. The same stories some-

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1. For a comprehensive account of the Central Park Jogger trials, see TIMOTHY SULLIVAN, UNEQUAL VERDICTS: THE CENTRAL PARK JOGGER TRIALS (1992).

2. For concluding accounts of the James Byrd trials and their cultural significance, see Richard Stewart, *Grieving for "Son"; Although the Trials of His Killers Are Over, the Family of James Byrd Jr. Is Just Beginning to Deal With Personal Mourning*, HOUSTON CHRONICLE, Nov. 21, 1999, at A1; *Justice Wins Swiftly as Jasper Saga Ends*, SAN ANTONIO EXPRESS-NEWS, Nov. 23, 1999, at B4; Roberta Smith, *An Ugly Legacy Lives on, Its Glare Unsoftened by Age*, N.Y. TIMES, Jan. 13, 2000, at E1.

3. The subject of state violence and the juridical word evokes the work of Robert Cover. *See* Robert M. Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 GA. L. REV. 815 (1986); Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986); *see generally* NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER (Martha Minow, Michael Ryan, & Austin Sarat eds., 1992). Unlike Cover's writings, this essay, its accompanying series of case studies on criminal justice, and its predecessor series on poverty law, focus on the role of legal advocates, rather than adjudicators. *See, e.g.*, Anthony V. Alfieri, *The Ethics of Violence: Necessity, Excess, and Opposition*, 94 COLUM. L. REV. 1721 (1994) (reviewing LAW'S VIOLENCE (Austin Sarat & Thomas R. Kearns eds., 1992) and examining the role of poverty lawyers in the context of disability law advocacy).

times vocalize narratives of race. At trial, racial narratives occupy multiple forms, each contingent on the stance of the participating legal actor.

Consider for a moment the racial stance of lawyers and judges exhibited by the form of their narrative participation in the prosecution, defense, and adjudication of a criminal trial. Lawyers, for example, declare racial narratives in their opening statements and closing arguments. Moreover, they elicit and suppress such declarations from witnesses on direct and cross-examination. Judges, by comparison, proclaim racial narratives in adjudicating pretrial motions, deciding evidentiary objections, and issuing jury instructions.

The multiplicity and contingency of narrative form in race trials creates an opacity of color. Narratives that appear transparently racial or colored at first blush frequently acquire a density of racial meaning and a layering of color on closer inspection. The opaque quality and shifting form of racial narratives combine to render the meaning of color elusive and unstable. That rendering confounds substantive attempts to classify racial narratives in terms of their colorblind, color-coded, or color-conscious content.

The frustrations of evaluating narrative form and content when confronting race at trial in no way diminishes the importance of the inquiry. Like the customary narratives of criminal prosecution and defense, racial narratives describe the actions, emotions, and motivations of defendants, victims, and law enforcement agents. However mutable and contingent, the narratives also characterize the ethos of a community and the mores of a state. In doing so, they capture not only the racial tenor of a specific historical period, but also its morality, and its democratic progress.

Advocacy in both civil and criminal law proceedings unfolds against the backdrop of specific historical contexts. The contextual framework of racial violence intertwines historical strands of culture, economics, politics, and society. The culture of racial violence emerges from antebellum and postbellum traditions of black moral and scientific degradation. The economics of racial violence, in contrast, arise out of agrarian, industrial, and international systems of class competition and inequality. The politics of such violence stem from public contests over the acquisition and maintenance of racial power and privilege. Similarly, the social organization and relations of racial violence emanate from private and public group hierarchy and subordination.

American legal history teaches that socio-legal norms and narratives weave the strands of culture, economics, politics, and society into a recurrent pattern of racial violence: symbolic, spatial and textual. In the high-profile criminal trials under scrutiny here, this pattern of violence is marked by traditional figurations of racial identity, racialized narrative, and race-conscious representation. Rooted in antebellum and postbellum visions of racial status

and community, the figures of black and white identity, dominant and subordinate narrative, and color-conscious representation pervade the law, lawyering, and ethics of criminal justice.

The antebellum vision of racial status and community portrays people of African descent—the black juveniles of the Central Park Jogger case and James Byrd himself—as a primitive species of property. Consigned by this vision to a pitiable or pathologic place in the great chain of being, blacks and other people of color are perceived to inhabit a naturally inferior identity marked either by deviance and defiance, or by acquiescence and subservience, even when such servility plainly constitutes performatively disguised resistance. Descriptions of this deformed identity echo in the narrative tones of benevolence, discipline, and domination heard for two centuries in American courtrooms. These tones sound through the legal rhetoric of state-sanctioned segregation and the lawyer's art of race-conscious representation in the prosecution and defense of racial violence.

The idea of innate mental and moral inequality between the black and white races is not peculiar to eighteenth- and nineteenth-century American law and society. The postbellum vision of racial status and community propels that idea into the twentieth century in the stereotyped and ritualistic degradation of sharecropper and convict lease identity, and impoverished urban welfare identity. Narrative accounts of this abased status stress the marginality of, and the necessity of control over, former black chattel slaves and migrants, rather than the aspiration of inherent moral perfectibility. Emancipation and the Enlightenment idea of progress neither cure this condition nor bring about the unity of interracial community. Although emancipation enlarges the space for the growth of black individual resistance into group dissidence, it fails to displace the ambivalence toward interracial community animating the continued debate over differentiation and sameness in the politics, law, and ethics of the criminal justice system.

Entangled in constitutional history and political struggle, that debate turns on the conviction of and the commitment to race neutrality. Colorblind rules and sameness regimes comport with neutrality precepts. Color-conscious rules and differentiation regimes conflict with such precepts. At bottom, resolution hinges on the standing granted to moral claims of racial recognition and difference in law and politics.

The essay at hand joins the debate over the moral standing of race by interrogating the meaning of racial identity, racialized narrative, and color-conscious representation for law, lawyering, and ethics in cases of racially-motivated violence.[4] The purpose of the enterprise is both descriptive and

4. Prior works in this project traced the sometimes mutable configurations of racial identity, narrative, and representation through a battery of case studies. The first work demonstrated that *black* criminal defense stories portray competing visions of racial identity and articulate conflicting

prescriptive. Descriptively, the essay recounts the prosecution of racial violence in two prominent cases: the 1989 Central Park Jogger sexual assault in New York City and the 1998 James Byrd murder in Jasper, Texas. The account focuses on the nature of prosecutorial norms and narratives, their cultural and social significance, and their impact on interracial community. Prescriptively, the essay proposes to reform prosecutorial norms and narratives in order to reconstruct interracial community in the aftermath of racially-motivated violence. My thesis is that prosecutors and prosecutorial policies of community activism may play a valuable role in reconciling segregated communities divided by racial violence.

Part I of the essay examines the idea of community in American law, surveying relevant norms and narratives found in the criminal justice system. The survey highlights the community norms and narratives often embedded in the constitutional, statutory, and common law doctrines of state and federal criminal law. It searches out discursive evidence of such norms and narratives in the prosecution of the Central Park Jogger and James Byrd cases.

Part II describes the role, function, and regulation of prosecutors acting under state and federal criminal justice systems. The description culls prosecutorial norms and narratives from governing ethics rules and standards. Drawing on the Central Park Jogger and James Byrd trials, it demonstrates

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racialized narratives, some pernicious, others transformative. By black criminal defense stories, I mean stories urged on behalf of black criminal defendants for purposes of acquittal or mitigation. Advanced by black *and* white criminal defense lawyers, the stories present race-based narratives of innocence, justification, and mercy. *See* Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995) [hereinafter Alfieri, *Defending Racial Violence*] (studying black-on-white racially motivated violence, culled from the defense of Damian Williams and Henry Watson on charges of beating Reginald Denny and others during the 1992 South Central Los Angeles riots); *see also* Anthony V. Alfieri, *Race-ing Legal Ethics*, 96 COLUM. L. REV. 800 (1996) (responding to Robin Barnes' critique of a proposed alternative ethic of race-conscious responsibility).

The second work showed that *white* criminal defense stories likewise embody a narrative form and a racialized substance concordant with a history of black oppression. White criminal defense stories echo the same narratives of innocence, justification, and mercy but conjure up a different imagery and rhetoric of race. *See* Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063 (1997) (studying defense of white-on-black racially incited violence extracted from the criminal and civil trials of the Alabama Ku Klux Klan in the 1981 lynching of Michael Donald).

The third work established a classification scheme to map the discursive structure of race trials. *See* Anthony V. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293 (1998) (analyzing race trials winnowed from the successive state criminal and federal civil rights prosecutions of Lemrick Nelson and Charles Price based on four days of interracial violence in the Crown Heights section of New York City in 1991).

The fourth work confirmed the feasibility and legitimacy of race-conscious federal prosecution. *See* Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157 (1999) (explicating a race-conscious model of prosecutorial discretion garnered from the federal criminal civil rights prosecution of five white New York City police officers on charges of assaulting Abner Louima, a Haitian immigrant, at a Brooklyn station house in 1997).

that such norms and narratives construct multiple prosecutorial roles with accompanying burdens of freedom and constraint.

Part III explores methods of reconceiving the prosecutorial norms and narratives employed in cases of racial violence in the hope of reconstructing interracial community. The exploration considers the cultural and societal relevance of such norms and narratives in combating the varied forms, contexts, and categories of racial violence illustrated in the Central Park Jogger and James Byrd trials. It also assesses the potentially fruitful relationship of lawyers to community, citing examples from contemporary law reform movements. Finally it evaluates the compatibility of prosecutorial norms and narratives with the evolving jurisprudence of race in American law, particularly the notions of postmodern racial identity and community.

I. LAW AND COMMUNITY

The idea of community is fundamental to American law. It pervades federal and state constitutions, statutes, and common law doctrines. It also suffuses professional rhetoric and regulation. Most important, it links law to politics, culture, and society. Yet, the relationship of law to community stands unsure despite a growing jurisprudential and interdisciplinary literature on the meaning of community.[5] Applicable to both civil[6] and criminal law[7] fields, the literature assembles a wide-ranging collection of community norms and narratives.

The instant inquiry searches out a cluster of the community norms and narratives basic to the criminal justice system. Like any modern juridical admixture, the criminal justice system involves laws, legal agents, and sociolegal institutions. Criminal laws encompass constitutional injunctions, statutory proscriptions, and common law prohibitions. Legal agents include adjudicators, advocates (prosecutors and defense attorneys), and enforcement actors (police, parole, probation, and correction officers).[8] Juridical institutions comprise courts, law enforcement organizations, and correction agencies. Bound together, the laws and legal agents of the criminal justice system combine to produce contextually tailored institutional discourses and relations. The Central Park Jogger and James Byrd trials evince the normative

5. For examples of this multidisciplinary literature, see JOEL F. HANDLER, LAW AND THE SEARCH FOR COMMUNITY (1990); MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990); AVIAM SOIFER, LAW AND THE COMPANY WE KEEP (1995).

6. On community, social justice, and narrative, see Robert M. Cover, *The Supreme Court, 1982 Term: Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983).

7. On community, crime, and narrative, see Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996).

8. Additional legal agents germane to the criminal justice system include federal and state legislative and administrative officials.

framework and narrative content of such discourses and relations. Before parsing these trials, I turn first to the nature of community norms and narratives.

A. *Community Norms and Narratives*

Community norms and narratives express visions of human nature, politics, economics, culture, and society. In American law, community means more than popular sovereignty.[9] It captures notions of deliberative democracy and autonomy,[10] and the underlying assumptions of decisional competence and emotional capacity.[11] It also crosses the boundary line separating public and private spheres, forging a collective path to self-identity. For individuals in the private sphere, Michael Sandel observes, "[c]ommunity describes not just what they *have* as fellow citizens but also what they *are* . . . ."[12] To these individuals, community is "not a relationship they choose (as in a voluntary association) but an attachment they discover."[13] In this crucial sense, community is "not merely an attribute but a constituent of their identity."[14]

In public spheres, community represents something more than a univocal ideal.[15] Within its broad ambit, displayed in the Central Park Jogger and James Byrd trials, community finds diverse historical realization in race, class, gender, age, and geography.[16] Realization comes in the colors of black

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9. On the place of popular sovereignty in constitutional theory, see James E. Fleming, *We the Unconventional American People*, 65 U. CHI. L. REV. 1513, 1535 (1998) (reviewing BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998) and criticizing reductionist tendency in constitutional theory to overemphasize the value of popular sovereignty).

10. For careful mining of the underpinnings of deliberative democracy and autonomy, see James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 6-56 (1995).

11. Deliberative democracy and autonomy stand contingent on individual decisional competence and, by extension, emotional capacity. For an analysis of the linkage between emotional capacity and decision-making competence, see Paul S. Appelbaum, *Ought We to Require Emotional Capacity as Part of Decisional Competence?*, 8 KENNEDY INST. ETHICS J. 377, 379-84 (1998) (evaluating accounts of emotional capacity as an element of decision-making competence).

12. MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 150 (1982) (emphasis in original). On this view, community invokes "not just a *feeling* but a mode of self-understanding partly constitutive of the agent's identity." *Id.* (emphasis in original). He adds:

> [T]o say that the members of a society are bound by a sense of community is not simply to say that a great many of them profess communitarian sentiments and pursue communitarian aims, but rather that they conceive their identity—the subject and not just the object of their feelings and aspirations—as defined to some extent by the community of which the are a part.

Id. (emphasis in original).

13. *Id.*

14. *Id.*

15. James Bohman derides the assumption of a univocal public sphere. *See* James Bohman, *Citizenship and Norms of Publicity: Wide Public Reason in Cosmopolitan Societies*, 27 POL. THEORY 176, 198 (1999).

16. Bohman adverts to a variegated sense of the public. *See id.*

and white, the classes of privilege and impoverishment, the gendering of the masculine and feminine, and the geography of the urban and the rural. When such realizations intrude violently upon the private sphere of self- or collectively-governed community, or encroach wrongfully upon the shared public realm of state-sanctioned community, they spur protest, regulation, and here punishment. Spoken claims of protest inside the criminal courts of New York City or outside on the courthouse steps of Jasper County may assert the expressive injury of class, stigma, and racial silencing.[17] Clouded by the ambiguity of motive and the vagueness of offensive speech,[18] the susceptibility of such community claims of injury to the reasoned advocacy and adjudication of liberal legalism remains unresolved.

Despite their liberal antinomies, the norms of racial community appear steadfast. In the race trials of the Central Park Jogger and James Byrd, norms imbued by antebellum segregationist ideology and postbellum integrationist ideology collide. That collision shatters the integrationist pretense of enlightened liberal consensus and harmony in race relations.[19] The result reveals competing visions of community colored by overt racial animus and covert racial bias. Ideologies of racial consensus and harmony, though widespread,[20] cloak conflict over invidious discrimination in economics and politics as well as in culture and society. The sharpness of racial conflict and competition produces hate crimes of interracial violence.

The signifying systems of liberal legal narrative, oral and written,[21] circulate both antebellum segregationist ideology and postbellum integrationist

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17. On speech regulation, protest, and community, see Christina E. Wells, *Of Communists and Anti-Abortion Protesters: The Consequences of Falling Into the Theoretical Abyss*, 33 GA. L. REV. 1, 48-52 (1998) (discussing prior restraint doctrine in recent Supreme Court abortion protest decisions).

18. Wells points to the ambiguity of motive and the vagueness of offensive speech as impediments to state regulation of the multiple speech forms of community protest. *See id.* at 52-62. Vagueness plagues both civil and criminal law rules. *See, e.g.*, John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 219-42 (1985); Robert C. Post, *Reconceptualizing Vagueness: Legal Rules and Social Orders*, 82 CAL. L. REV. 491, 492-503 (1994).

19. Gary Peller understands integrationism "to comprise a set of attitudes and beliefs for perceiving the meaning of racist domination and for identifying the goals of racial justice." Gary Peller, *Race Consciousness*, DUKE L.J. 758, 767 (1990). For Peller, the key elements of integrationist ideology pertain to the concepts of prejudice, discrimination, and segregation. *Id.* at 767-68. The integrationist cure for race-based discrimination on an individual level, he explains, rests on "equal treatment according to neutral norms." *Id.* at 770.

20. On the meaning of harmony ideology in a racial setting, see LAURA NADER, HARMONY IDEOLOGY: JUSTICE AND CONTROL IN A ZAPOTEC MOUNTAIN VILLAGE 291-308 (1990) (analyzing dispute and self-determination as properties of harmony ideology within a system of hegemonic control).

21. Both oral and written narratives constitute socio-legal signifying systems. *See* Diana Digges & Joanne Rappaport, *Literacy, Orality, and Ritual Practice in Highland Columbia*, *in* THE ETHNOGRAPHY OF READING 139, 139-55 (Jonathan Boyarin ed., 1993) (examining the importance of oral narratives within a Columbian community).

ideology. Like cultural and societal narratives, legal narratives are nonlinear and multi-vocal.[22] As the Central Park Jogger and James Byrd trials show, the presence of "multi-vocal and nonlinear legalities in any given legal universe" fails to ensure that "each legal voice has the same authority or level of power."[23] The voices of antebellum and postbellum racial status and community consequently may be amplified and at other times repressed by the prosecution and defense traditions of the criminal justice system.

The multi-vocal and nonlinear quality of legal narratives leads to intertexuality. Narrative intertextuality denotes the interlinking of communicative forms of literacy and orality,[24] and the intersecting of multiple, conflicting narratives. Such linkages may generate transformative narratives that modulate debased images and problematize degrading archetypes.[25] Narratives modulate debased images by projecting a different vision of the subject (e.g., juvenile offender) and the experience of repressed subjectivity (abuse, impoverishment, and segregation). In the same way, they problematize degrading archetypes by infusing the reimagined subject with an alternate, elevated status of human agency. The process of reimagining and reinvesting racial images and archetypes gives rise to counter images and archetypes. To the extent that such counter figures open space for the voice of excluded or silenced histories,[26] they spur a transformative process empowering and integrating outsider communities.[27] Over time, transformative narratives may create alternative visions of law and community.

B. *The Central Park Jogger and James Byrd Trials*

The Central Park Jogger and the James Byrd, Jr. trials present random acts of group violence inspired by class, gender, and racial antagonisms.

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22. *See* Mark Ryan Goodale, *Literate Legality and Oral Legality Reconsidered*, 16 CURRENT LEGAL THEORY 3, 14 (1998) (noting that the very "processes by which legal meanings and identities are created and maintained are in every context *nonlinear* and *multi-vocal*" and contending that "there is never one legality, but multiple legalities, which can be understood as embodying different genres" of culture and society) (emphasis in original).

23. *Id.*

24. On narrative intertextuality in the oral and written traditions of the criminal law at trial, see SUSAN U. PHILIPS, IDEOLOGY IN THE LANGUAGE OF JUDGES: HOW JUDGES PRACTICE LAW, POLITICS, AND COURTROOM CONTROL 27-47 (1998).

25. Larry Backer contends that the modulation of imagery requires stories that problematize archetypes and create alternative characterizations. *See* Larry Cata Backer, *Queering Theory: An Essay on the Conceit of Revolution in Law*, *in* LEGAL QUEERIES: LESBIAN, GAY AND TRANSGENDER LEGAL STUDIES 185, 196 (Leslie J. Moran, Daniel Monk, & Sarah Beresford eds., 1998).

26. Backer looks to voice as "the measure of power." *Id.* He notes that "[t]hose who seek to speak, seek also to exclude, to limit the possibility that archetypes will be redrawn." *Id.*

27. Jean Love notes that "'outsider' narratives are an excellent vehicle for enabling legal reformers to hear previously-excluded voices." Jean C. Love, *The Value of Narrative in Legal Scholarship and Teaching*, 2 J. GENDER, RACE & JUSTICE 87, 97 (1998).

Located in urban and rural settings, the trials catalogue the grotesque violence of gang rape and lynching. The Central Park Jogger trials embroiled more than ten black and Hispanic young men, ages fourteen to eighteen, in the beating and rape of a white twenty-nine-year-old woman on April 19, 1989.[28] Assaulted during an early evening jog in Central Park, the woman, a well-educated investment banker, suffered multiple fractures and lacerations, placing her into a deep coma from which she nearly died and inflicting permanent disabilities.[29] Two trials and five plea bargains on felony charges of attempted murder, rape, sodomy, sexual abuse, and assault resulted in sentences ranging from six months to fifteen years in jail.[30]

Branded by media-driven public outrage,[31] the Central Park Jogger case exposed racial tensions in New York City[32] and provoked claims of disparate treatment[33] and invidious classification leveled against the New York City criminal justice system.[34] The James Byrd, Jr. trials, by comparison, involved the lynching of a black disabled forty-nine-year-old former vacuum cleaner salesman and father of three.[35] On June 7, 1998, Shawn Berry and Bill King, both aged twenty-three and avowed white supremacists[36] and their

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28. *See* TIMOTHY SULLIVAN, UNEQUAL VERDICTS: THE CENTRAL PARK JOGGER TRIALS 19-23 (1992).

29. *See id.* at 56, 129-31, 241-42.

30. *See id.* at 54, 288-312, 319-20.

31. *See* HELEN BENEDICT, VIRGIN OR VAMP: HOW THE PRESS COVERS SEX CRIMES (1992); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1268 (1991) (observing that none of the "many equally horrifying rapes" occurring during the Central Park jogger media coverage "elicited the public expression of horror and outrage that attended the Central Park rape") (footnote omitted).

32. *See* James Morsch, *The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivation*, 82 J. CRIM. L. & CRIMINOLOGY 659, 683 n.51 (1991) (commenting that the attack on the Central Park jogger by a gang of black youths and the subsequent criminal trial "illustrated the city's highly charged racial atmosphere, not simply a case of rape")

33. *See* James B. Jacobs & Kimberly A. Potter, *Hate Crimes: A Critical Perspective*, 22 CRIME & JUST. 1, 35 (1997) (mentioning that "the failure to bring a hate crime charge in the gang rape and near-fatal beating of the Central Park jogger led some observers to accuse the police and the mayor of adhering to a double standard in labeling hate crimes"); *see also* Nancy S. Ehrenreich, *O.J. Simpson & the Myth of Gender/Race Conflict*, 67 U. COLO. L. REV. 931, 944-45 (1996) (discussing white feminist response when crimes of black male violence against white female victims seem "taken much more seriously than similar crimes against women of color").

34. *See* Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 453, 456-57 (1996) (noting the racial theme of the "Black Beast" in cases of black-on-white rape).

35. *See* Terri Langford, *Third Trial to Begin in Jasper Death: Prosecutors to Focus on Suspect's 2 Stories*, DALLAS MORNING NEWS, Oct. 25, 1999, at 1A; Patty Reinert & Richard Stewart, *Last of Three Trials in Dragging Death Starting in Jasper*, HOUSTON CHRONICLE, Oct. 25, 1999, at A13.

36. *See* Patty Reinert, *Byrd's Slaying Called the Basis for Hate Group: Prosecutor Says King Wanted 'Respect' for New Racist Gang*, HOUSTON CHRONICLE, Feb. 17, 1999, at A1; Richard Stewart, *Suspect's Writings Point to Role as Organizer of 'Rebel Soldiers,'* HOUSTON CHRONICLE, Feb. 17, 1999, at 1; Richard Stewart, *Attorney: Defendant Not Racist: Jasper Court Told "He Has No Motive,"* HOUSTON CHRONICLE, Oct. 26, 1999, at A15.

roommate Russell Brewer, Jr., aged thirty-one, kidnapped and assaulted Byrd, sprayed his face with black paint, pulled his trousers and under shorts down, chained him by the ankles to a pickup truck, and dragged him alive and conscious along a three-mile rural paved road until a concrete culvert beside the road decapitated his body.[37] The three white men then dumped Byrd's "shredded torso, minus his head, an arm and shoulder" at the end of a country road "directly between a black cemetery and church."[38] Indicative of white supremacy,[39] the Byrd lynching belongs to a long pattern and practice of bias-motivated crimes in Texas[40] often incited locally by the Ku Klux Klan.[41] Originating in the postbellum era of the late nineteenth century,[42] that pattern and practice historically expressed a widespread community ethos celebrating racial violence.[43]

In early July, 1998, a Jasper County grand jury indicted King, Brewer, and Berry on capital murder charges alleging that they kidnapped Byrd and dragged him to his death.[44] In February, 1999, a predominantly white Jasper County jury found King guilty and sentenced him to death.[45] In late September, 1999, a mainly white Bryan County jury found Brewer also guilty and

37. *See* Patty Reinert & Richard Stewart, *Doctor Details "Devastating Pain" of Dragging: Prosecutors Finish Case with Gruesome Testimony*, HOUSTON CHRONICLE, Sept. 17, 1999, at A33; Barry Shlachter, *Officer Says Jasper Victim's Pants Taken Down*, FORT WORTH STAR-TELEGRAM, Sept. 15, 1999, at 1; Bruce Tomaso, *Prosecution Rests in 2nd Jasper Trial: Doctor Catalogs List of Injuries to Byrd*, DALLAS MORNING NEWS, Sept. 17, 1999, at 29A.

38. *See* Michael Graczyk, *Third Dragging Death Trial Begins with Start of Jury Selection*, ASSOCIATED PRESS, Oct. 25, 1999.

39. *See* Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 114 (1999) (commenting that that Byrd lynching constituted "a horrible manifestation of white supremacy and the social construction of black maleness as threatening and in need of violent restraint").

40. *See* Andrew M. Gilbert & Eric D. Marchand, *Splitting the Atom or Splitting Hairs—The Hate Crimes Prevention Act of 1999*, 30 ST. MARY'S L.J. 931, 945 (citing the Byrd incident as one of a number of recent bias-motivated crimes in Texas).

41. *See* Shelley Ross Saxer, Shelley v. Kraemer's *Fiftieth Anniversary: "A Time for Keeping; a Time for Throwing Away"?*, 47 KAN. L. REV. 61, 79 (1998) (noting that "two Ku Klux Klan groups have been particularly active in the area where this murder occurred") (footnote omitted).

42. *See* Allan Turner, *Racial Hate Crimes Sordid Part of State History*, HOUSTON CHRONICLE, June 10, 1998, at A10 ("Texas' violent history dates to the late 19th century when it was among the South's most lynch-prone states. At least 355 people, most of them blacks, died in Texas mob violence between 1889 and 1918.").

43. *See* Clarence Page, *Optimistic Message About Racial Harmony*, HOUSTON CHRONICLE, Feb. 3, 1999, at A20 ("The slayings tended to be community events, sometimes attended by children and backed with a distinctively religious zeal by white business, social and political leaders.").

44. *See* Richard Stewart, *Three Indicted by Grand Jury in Jasper Case: Charges of Capital Murder Face Whites in Black's Dragging Death*, HOUSTON CHRONICLE, July 7, 1998, at A1.

45. *See* Patty Reinert, Allan Turner & Richard Stewart, *Jasper Killer Gets Death Penalty: A Smirking King Shows No Remorse*, HOUSTON CHRONICLE, Feb. 26, 1999, at A1.

sentenced him to die.[46] On November 18, 1999, an all white Jasper County jury found Berry guilty of capital murder but sentenced him to life in prison.[47]

Viewed as a kind of collective injury[48] to the integrationist spirit of Jasper,[49] the Byrd lynching reignited local efforts toward community reconciliation[50] and interracial reformation.[51] The colorblind quality of the state prosecution fueled those efforts.[52] They received additional encouragement from the altruistic posture of the Byrd family exhibited toward the defendants' families[53] and the community at large.[54] This display of altruism took the form of public statements by the Byrd family[55] and private lobbying in

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46. *See Second Man Convicted In Dragging Death*, N.Y. TIMES, Sept. 21, 1999, at A18; *Jasper Finds Relief in Jury's Sentence: Blacks, Whites Agree Brewer Deserves Death*, HOUSTON CHRONICLE, Sept. 24, 1999, at A32.

47. *See Third Defendant Is Convicted In Dragging Death in Texas*, N.Y. TIMES, Nov. 19, 1999, at A29.

48. *See* Melanie Coffee, *Panel Takes a Hard Look at Hate Crimes: Lawmakers, Victims' Kin Agree Law Needs to Call for Swift and Severe Penalties*, HOUSTON CHRONICLE, July 26, 1998, at A29 ("Hate-filled acts of violence not only intimidate, but damage our collective spirit . . . .") (quoting Acting Assistant U.S. Attorney General Bill Lann Lee).

49. *See* Jim Henderson, *East Texas Racism Subtle But Persistent: Blacks Say Fear of Retribution Lets Routine Bigotry Go Unremarked*, HOUSTON CHRONICLE, Sept. 20, 1998, at A1 (describing the racial atmosphere of [Jasper] as "among the more enlightened and integrated communities in a region with a history of stubborn resistance to cultural change").

50. *See* Richard Stewart, *Symbol of Racial Division Tumbles: Jasper Dismantles Iron Fence that Split Cemetery into Black, White*, HOUSTON CHRONICLE, Jan. 21, 1999, at A21 (noting that municipal workers "removed the ancient wrought iron fence that divided the white and black sections of Jasper City Cemetery").

51. *See* Clarence Page, *Lesson for Others in Jasper's Healing Course*, HOUSTON CHRONICLE, MAR. 2, 1999, at A20 ("News accounts in the wake of the unspeakably brutal dragging death of James Byrd, Jr. describe the East Texas town of Jasper as a place pulling together to heal wounds that opened long before Byrd's death").

52. *See* Editorial, *Race, Memory and Justice*, N.Y. TIMES, June 14, 1998, at A14 ("In Jasper, the community has rallied around a sheriff bent on colorblind prosecution of this lynching by pickup truck.").

53. At capital sentencing in the trial of John William King, Mary Verret, Byrd's sister, addressed King's father, commenting: "I wanted to say to him we can understand his loss. We can understand his grief. Our hearts go out to him." *White Supremacist Sentenced to Die for Dragging Death of Black Man in Jasper*, 95 JET 13 (1999).

54. *See* Mark Shaffer, *Victim of Hate Promotes Healing*, THE ARIZONA REPUBLIC, Mar. 17, 1999, at B1 (reporting that Byrd's nephew espoused "a message of racial healing" at an Arizona civil rights community seminar).

55. An initial statement issued by the Byrd family announced: "Let this horrendous violation of the sanctity of life not be a spark that ignites more hatred and retribution. Rather, let this be a wake-up call for America—for all Americans. May it spark a new cleansing fire of self-examination and reflection." *Plea for a Wake-Up Call: Slain Jasper Man's Family Spurns Hatred*, HOUSTON CHRONICLE June 27, 1998, at A29. In a subsequent statement presented to the U.S. Senate Judiciary Committee, Renee Mullins, the eldest daughter of James Byrd, exclaimed: "I want all citizens to pray for these individuals who have such low self-esteem and who are so full of fear and hatred that they are cut out from the happiness of life." Steve Lash, *Prayer, Hate-Crime Bill Urged by Daughter of Jasper Victim*, HOUSTON CHRONICLE, July 9, 1998, at A1. Subsequently, Jamie Byrd, the youngest daughter of James Byrd, observed: "'Why should I hate? That would be what the men

support of the enactment of then pending Texas hate crimes legislation.[56] The legislation, titled the James Byrd Jr. Hate Crimes Act, ultimately failed to gain passage. [57]

However earnest the effort, the absence of federal and state hate crime prosecution in circumstances of racial violence may thwart community-based racially reformist practices.[58] Such practices may be stymied notwithstanding the "distinctive social meaning" attached to hate crimes.[59] Dan Kahan traces that meaning, at once expressive of the social estrangement of the accused and the inferior status of the victim, to the "modes of killing" hate crime offenders select, in this case lynching.[60] Lynching in southern history, Lu-in Wang mentions, "stands as the archetypal 'hate' crime" whether driven by economic self-interest or racist hostility.[61] In fact, Kahan remarks: "[B]y tying African-American James Byrd to the bumper of their car and dragging his body for miles, his white supremacist killers traded on the evocative connotations of lynching."[62] Without the normative meaning of dignity and equality supplied by hate crime prosecution, even communities dedicated to racial reform may be unable to transform the retributive spirit of criminal trials into the rehabilitative sentiment of group unification.

C. *Criminal Justice Norms and Narratives*

Criminal justice norms and narratives offer opposing visions of law and community rooted in punishment and mercy. Derived from federal and state criminal law, those norms and narratives establish the legitimacy of state punitive and remedial intervention in the affairs of community. State interven-

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who killed my father did, and I'm not like them. . . . We all need to just stand up and stop all this violence. I hate that my dad had to be killed for everybody to come together.'" Jamie Stockwell, *"Why should I hate?": Jamie Byrd says it's time to stop the violence*, HOUSTON CHRONICLE, Feb. 18, 1999, at A5. *See also* Richard Stewart, *Byrd Family Not Giving up on Passage of Hate-Crimes Bill*, HOUSTON CHRONICLE, May 19, 1999, at A23 (James Byrd Sr., the father of James Byrd, added: "We want to live together in peace and harmony.").

56. *See* Kathy Walt, *Byrd's Relatives Call on Bush to Get Behind Hate Crimes Bill*, HOUSTON CHRONICLE, May 7, 1999, at A1.

57. *See* Juan B. Elizondo, Jr., *Family Says Fate of Byrd Bill Is "Slap in the Face,"* AUSTIN AMERICAN-STATESMAN, May 18, 1999, at B1.

58. Newspaper accounts reported that "no federal charges were ever brought because investigators concluded that Byrd's slaying didn't violate federal hate crime laws." Richard Stewart, *Dragged into Infamy: Murder Case Forces Jasper to Revisit Horror of Slaying in June*, HOUSTON CHRONICLE, Jan. 24, 1999, at A1.

59. Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 464 (1999) (footnote omitted).

60. *See id.*

61. Lu-in Wang, *The Complexities of "Hate,"* 60 OHIO ST. L.J. 799, 831 (1999) (citing lynching as "the historical antecedent of contemporary 'hate' crimes and the original model on which contemporary images and understandings of such crimes are based").

62. Kahan, *supra* note 59, at 464.

tion to safeguard private rights or public welfare concedes the state-enforced power to dictate standards of conduct and to command physical compliance. This sovereign prerogative implies the right to control public and private space without internal or external interference. Under liberal theory, the sovereign right of state rule is contingent on popular consent and the derivative obligation to obey the law.[63]

1. *How liberal theory shapes prosecutorial visions of law.*

The concepts of consent and fidelity shape prosecutorial visions of law, community, and professional identity. Traditionally, consent and fidelity ally with a punitive rather than an emancipatory conception of the state. The consent of the state provides the enabling power for the prosecution function.[64] Fidelity to the state and by extension to society supplies legitimacy to that function. In this attenuated sense, society affords only a thin conception of community captured by the inanimate visage of the public, instead of the enlivened face of the victim or defendant. The centrality of the state to prosecutorial identity implies a strong adherence to legal positivism. For law, positivism indicates hard rules of legislative enactment. For community, it suggests bright lines of public and private authority. For prosecutors, it insinuates truncated forms of independence and discretion contingent on state power. The prosecution function, on this account, demands strict statutory enforcement and stringent public/private boundary demarcation without significant discretion or deviation in the realm of norms and narratives, especially when the race of the defendant or victim is on trial.

2. *How race upsets the liberal model.*

Race disturbs the positivist account of the prosecution function. Indeed, the race trials of the Central Park Jogger and James Byrd offer two shifting accounts of that function. The first emerges from the antebellum period in American law. The second arises out of the postbellum Reconstruction era. Both accounts define race and determine racial status through the discursive performance of advocacy.[65] Antebellum ideology casts race and racial status in terms of black natural inferiority and innate moral deficiency. It limits community to primitive forms of tribal assembly. Postbellum ideology pre-

63. *See* David Copp, *The Idea of a Legitimate State*, 28 PHIL. & PUB. AFF. 3, 18-31 (1999) (deploying Hohfeldian rights analysis to explicate the idea of a legitimate state).

64. On the linkage of community consent to the grand jury structure, see Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL'Y & L. 67, 67 (1995).

65. *See* Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 112-13 (1998) (describing the performative discourse of race in nineteenth-century southern race trials).

serves this subordinate black image in the gloss of "scientific racism"[66] but concedes a greater sense of subjectivity and community in the form of political rights and economic opportunity.

Antebellum and postbellum versions of racial status and community engender uncommon positional conflicts for prosecutors.[67] The conflicts mount over the meaning of race and community in the criminal law. The source of these conflicts lies outside the text of law. Nothing in the New York law of sexual assault or the Texas law of murder, for example, triggers conventional conflicts of interest for the prosecutors in the Central Park Jogger and James Byrd trials. Indeed, the deformities of race and the degeneracies of community reside unimpeded by law or ethics in both. The conflicts come instead from the rival demands of prosecutorial autonomy, public duty, victim obligation, and state fidelity. To the extent that these demands enhance prosecutorial accountability[68] to the public and the victim, and increase independence[69] from the state, they strain the positivist model[70] of prosecutorial discretion.

3. *Discretionary norms of punishment.*

Both antebellum and postbellum renditions of prosecutorial discretion emphasize the norms and narratives of punishment. The norms of punishment span retribution, restitution, and deterrence. Narratives of punishment carry

66. Ariela Gross notes that "the introduction of a 'scientific' discourse about race into the courtroom, traces its roots to the well-documented rise of 'racial science' among phrenologists and medical doctors during [the mid-nineteenth century.]" *Id.* at 153. Gross points to "evidence from courtroom battles over racial determination" to "suggest[] that, at least before the Civil War, racial science was not the predominant way of understanding racial identity." *Id.*; *cf.* GEORGE M. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817-1914 at 1-2, 71-96 (1971) (asserting that the white American "belief that black mental, moral, and psychological characteristics were the result of environment was not effectively challenged in th[e] period [1800-1812] and persisted as a respectable ethnological doctrine until the 1830s and 1840s") (footnote omitted).

67. For private and public law positional conflicts, see John S. Dzienkowski, *Positional Conflicts of Interest*, 71 TEX. L. REV. 457 (1993) (classifying litigational, lobbying, and transactional positional conflicts) and Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 STAN. L. REV. 1395, 1400-22 (1998) (assessing impact of positional conflicts on lawyer's autonomy in selecting pro bono work and on the distribution of public interest legal services).

68. On the principle of moral nonaccountability in criminal and civil paradigms, see DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 50-66 (1988).

69. For a strong defense of lawyer discretion, see William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1090-19 (1988).

70. For an early outline of lawyer positivism, see William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 41 (noting that "the lawyer's ends and his notions of social norms have no relevance" under positivist theory).

broad claims of epistemic power[71] regarding the discovery of fact and the judgment of blame. Powers of discovery go to the description of legal phenomena: the act of violence, the stunting of class, or the color of skin. Powers of judgment refer to the interpretation of such phenomena: the quality of guilt, the incentive of envy, or the racial content of motive. Overbroad claims of discovery earn criticism on the basis of questionable epistemology, for example, in the unsettled knowledge claims of legal narrative.[72] Overstated claims of judgment invite similar criticism on the ground of unverifiable self-performance.[73] These allied criticisms do not condemn narrative. Even the defenders of narrative,[74] however, seem unwilling to approve the use of narrative archetype and its imprimatur of judgment.[75] Such archetypal usage may be found in criminal law narratives, for instance in capital cases where prosecutors and defense attorneys together participate in the socio-legal construction of the defendant as monster and mendicant.[76]

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71. Andrew Taslitz offers the notion of epistemic power to explicate cognitive bias. *See* Andrew E. Taslitz, *Abuse Excuses and the Logic and Politics of Expert Relevance*, 49 HASTINGS L.J. 1039, 1059 (1998). Taslitz argues: "Epistemic power arises from judges and jurors bringing preconceptions and cognitive schemes to their task. Those preconceptions and schemes are rooted in cultural stories and class, race, and gender-based experience. Consequently, members of different groups often share particular visions of reality." *Id.* (footnotes omitted).

72. *See* Richard Delgado, *Making Pets: Social Workers, "Problem Groups," and the Role of the SPCA—Getting a Little More Precise About Racialized Narratives*, 77 TEX. L. REV. 1571, 1579-82 (1999).

73. For a rebuke of self-performance in narrative, see Abbe Smith, *Burdening the Least of Us: "Race-Conscious" Ethics in Criminal Defense*, 77 TEX. L. REV. 1585 (1999); *see also* Anne M. Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 VA. L. REV. 1229 (1995).

74. For a defense of narrative in the study of race, see Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803 (1994); *see also* Nancy Levit, *Critical of Race Theory: Race, Reason, Merit, and Civility*, 87 GEO. L.J. 795, 809 (1999) ("Questioning narrative methodology as 'unreasonable'—by which is meant 'atypical'—elides the logical and evidential basis of the questions that critical theorists are asking.").

75. *See* Backer, *supra* note 25, at 196 (noting that "[e]ach archetype carries with it judgment").

76. On capital case narratives, see James M. Doyle, *The Lawyers' Art: "Representation" in Capital Cases*, 8 YALE J.L. & HUMAN. 417, 425 (1996) (noting that "[t]he archetypal figure of the murderer supplies much of the meaning in the prosecutor's representation of the individual on trial") and Jeffrey J. Pokorak, *Dead Man Talking: Competing Narratives and Effective Representation in Capital Cases*, 30 ST. MARY'S L.J. 421, 469 (1999) (urging a balance and integration of competing narratives in defending against the application of state capital punishment statutes); *see also* Melissa J. Ganz, *Common Sinners and Moral Monsters: The Killer in American Culture*, 11 YALE J.L. & HUMAN. 517, 522 (1999) (reviewing KAREN HALTTUNEN, MURDER MOST FOUL: THE KILLER AND THE AMERICAN GOTHIC IMAGINATION (1998) and mentioning "the ambiguity and contestation that has characterized the popular response to deadly violence" in American society).

4. *Application of prosecutorial norms and narratives to the Central Park Jogger and James Byrd trials.*

Archetypal narratives of race flourish in the Central Park Jogger and James Byrd trials crisscrossing age, class, and gender. The Central Park Jogger trials depict juvenile black predators *wilding*[77] in an impoverished urban state of nature. By contrast, the James Byrd trials portray young white Klansmen *lynching* in the backwoods of Texas. Apparently, two of the defendants, Bill King and Russell Brewer, "were easy to paint as racist killers."[78] Newspapers reported that "[b]oth were ex-convicts and adorned with white supremacist tattoos."[79] In specific, they reported that "King and Brewer had joined a Ku Klux Klan splinter group, the Confederate Knights of America, while in prison together."[80] The Byrd "prosecutors used the tattoos as proof of King's and Brewer's racist beliefs."[81] Prosecutors "also introduced letters by King and Brewer, filled with racist language, to prove the men had motive to kill a black man."[82] A third defendant, Shawn Berry, lacked the "threatening" tattoos and "racist screeds" intimating the "idea of racial violence" espoused by King and Brewer.[83] For Berry, Jasper County District Attorney Guy James Gray explained: "Motive in this case is either one of two things: He lived with these klansmen and developed their way of thinking, or he's a thrill seeker who got caught up in the killing like he was in a pack of dogs."[84] Narrative predominance of these figures in black and white signals the historical presence of antebellum and postbellum modes of racial identity. That presence contains its own imaginative and historic opposition. As Gary Peller points out, the postbellum rhetoric of racial integration "has often been radically oppositional, spiritual, and communal."[85]

In law and lawyering, opposition comes from counter narratives. The prosecution function deals in archetypal stories and counter stories of crime

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77. Wilding is a term coined by the Central Park Jogger trial defendants to describe their group practice of inflicting random violence on victims—white and black—purely for entertainment. Wilders typically show no remorse for their actions. *See* CHARLES DERBER, THE WILDING OF AMERICA: HOW GREED AND VIOLENCE ARE ERODING OUR NATION'S CHARACTER 1-18 (1996) (offering variant interpretations of the term).

78. C. Bryson Hull, *Final Trial in Jasper Killing Begins Today*, AUSTIN AMERICAN-STATESMAN, Oct. 25, 1999, at B1.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*; Richard Stewart, *Prison Gang Experts May Testify in Jasper*, HOUSTON CHRONICLE, Dec. 10, 1999, at A25.

84. Hull, *supra* note 78, at B1.

85. Peller, *supra* note 19, at 812. Peller remarks: "One important dimension of integrationism, as it manifested itself in American culture, was the manner in which the goal of racial integration helped generate an authentic community of people who understood themselves as profoundly committed to the eradication of racial domination in American society." *Id.*

and punishment.[86] The stories mediate the norms of legal and moral punishment. But the separation of law and morality under positivism[87] strains this mediation, generating moral-formal dilemmas that counterpose obligations to morality against commitments to the state.[88]

5. *Prosecutorial tensions: The problems of competing goals.*

The dilemmas confronting the prosecution function under antebellum and postbellum racial visions stem from tensions internal to the criminal law. Both federal and state criminal law require the prosecution of wrongdoing not only to preserve order, but also to safeguard community. Indeed, the aim of prosecution is to maintain ordered community through punishment. By design, prosecution operates as an instrument of punitive rectification. Its object is to deter and to rectify criminal acts that breach the bonds of community. Criminal statutes and doctrines that combine incarceration and restitution exemplify this objective. Rectification, however, nowhere requires community healing or reconstruction. And yet, reconstructive forms of community activism long count among the criminal justice traditions of prosecution and policing.

Consider prosecutor-assisted community policing[89] as a means of creating community.[90] Insofar as community-based policing mitigates the unreliability of police intuition in community criminal law-deployment, it may foster state-community exchange and dialogue. Compare as well the use of prosecutor-aided police civilian review boards to integrate law and community[91] through extra-judicial approaches to correcting police prejudice in ex-

86. For illustration of the use of counter stories in the prosecution of police brutality, see 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, 21-22 (1999).

87. On the separation of law and morals under positivism, see H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

88. For elaboration on the moral-formal dilemma facing antebellum judges, see ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 197-256 (1975).

89. *See* Jerome H. Skolnick, *Terry and Community Policing*, 72 ST. JOHN'S L. REV. 1265, 1270 (1998) (noting early twentieth-century New York City police-community relations program); *see also* Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 576 (1997) (describing community policing "as a new policing philosophy that draws upon the idea of community-police reciprocity 'to redefine the overall purposes of policing, to alter the principal operating programs and technologies on which the police have relied, and to found the legitimacy and popularity of policing on new grounds'").

90. Mary Coombs remarks that community policing, by "maintaining order and preventing low level disruptions of public space," may contribute to the creation of a "viable community" and exert an "indirect effect on the rate of serious crime." Mary I. Coombs, *The Constricted Meaning of "Community" in Community Policing*, 72 ST. JOHN'S L. REV. 1367, 1370 (1998) (footnotes omitted).

91. Sean Hecker observes that civilian review "will improve the accountability of law enforcement and the perceived legitimacy of police practices, particularly in minority communities."

cessive force incidents or in racially-biased pretext stops. Not only do civilian review boards serve a symbolic function of demonstrating state interest in racial equity and tolerance, the assistance of the prosecution in instituting community policing promises community through group connection[92] and mercy.[93]

The promise of prosecution-fostered community under the guide of mercy flows from the enforcement discretion delegated under federal and state criminal law.[94] Embedded in constitutional, statutory, and common law domains, that discretion shapes criminal charging[95] and influences law enforcement custom and tradition.[96] Although the prosecutor may intend otherwise,[97] the force of tradition may compel jurispathic[98] forms of punishment destructive of community (retribution),[99] rather than jurisgenerative[100] forms of punishment conducive to community (mercy). Punitive traditions of a retribu-

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Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards*, 28 COLUM. HUM. RTS. L. REV. 551, 603 (1997).

92. Christopher Edley declares: "We should not simply tolerate our racial and ethnic differences; we should genuinely celebrate them as a source of richness in our lives and a source of strength in our social and economic endeavors." Christopher Edley, Jr., *Color at Century's End: Race in Law, Policy, and Politics*, 67 FORDHAM L. REV. 939, 951 (1998).

93. On mercy in the criminal justice system, see JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY (1988); Stephen P. Garvey, *"As the Gentle Rain from Heaven": Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989 (1996); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 366-72 (1996).

94. Daniel Richman points to the "extraordinary degree of discretionary authority" delegated by Congress to federal prosecutors. Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 763 (1999); *see also* Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 479-81 (1996).

95. *See* Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 671-82; Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 736-50 (1996).

96. On law-enforced racialized custom and tradition, see Linda Greene, *Jim Crowism in the Twenty-First Century*, 27 CAP. U. L. REV. 43, 45 (1998).

97. *See* Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365 (1987) (surveying the role of intent in the constitutional regulation of prosecutorial conduct).

98. Jurispathic forms of state punishment constitute juridical acts of physical and interpretive violence destructive of conflicting community norms and values. *See* Cover, *supra* note 6, at 40-44; *see also* Martha Minow, *Introduction: Robert Cover and Law, Judging, and Violence*, *in* NARRATIVE, VIOLENCE, AND THE LAW, *supra* note 3, at 1, 1-2 (citing the jurispathic power and practice of the state that "rules by displacing, suppressing, or exterminating values that run counter to its own").

99. The individualized nature of jurispathic justice clashes with the aspiration of constitutional community. Animated by retribution, rather than deterrence or restitution, jurispathic visions of justice accept the disintegration of community. Moreover, they hinder and sometimes preclude the attainment of shared value consensus. *See* Milton C. Regan, Jr., *Community and Justice in Constitutional Theory*, 1985 WIS. L. REV. 1073, 1073-74.

100. Embodied in the religious tradition and vocabulary of redemption, mercy signifies a jurisgenerative principle of punishment liberating defendant, victim, state, and society. *See* Cover, *supra* note 6, at 11-44.

tive sort in fact may reflect community norms.[101] At the same time, they may contravene the constitutional commitment to building a democratic culture of racial tolerance.[102] That commitment is weakly implanted in the history of postbellum reconciliation. The Central Park Jogger and Byrd trials expose the shallow roots of tolerance in the postbellum culture of racial community. For the wilding juveniles in the Central Park Jogger case, community intolerance demands rejection of the mitigating narratives of youthful innocence. For the southern white supremacists in the Byrd trials, intolerance dictates capital prosecutions and death sentences. Ironically, in Byrd it is the vengeance of the death penalty, and the concomitant showing of equal protection, that afford reconciliation.

6. *How to achieve the constitutional values of racial tolerance and equality.*

The importance of history to constitutional values seems well-settled.[103] Carving the value of racial tolerance from postbellum history to renew a commitment to constitutional community requires more than tightening the constraints inhibiting prosecutorial overreaching[104] in charging decisions under the Double Jeopardy Clause.[105] Neither these constraints nor closer regulatory supervision of lawyers under criminal statutes,[106] even with strin-

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101. *See* A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. REV. 409, 451 (1999) (noting that "[t]radition provides a means of gaining greater insight into community norms and expectations and serves as a reservoir of efficient norms and institutions") (footnote omitted).

102. *See* J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2315 (1997) (arguing that the American "Constitution is committed to the realization of a democratic culture, even though constitutional law—and indeed, law generally—cannot realize this goal by its own efforts").

103. *See* Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 51 (1998) (observing that "history inevitably holds the key to our constitutional values").

104. *See* Susan R. Klein & Katherine P. Chiarello, *Successive Prosecutions and Compound Criminal Statutes: A Functional Test*, 77 TEX. L. REV. 333, 340, 383-99 (1998) (seeking to measure prosecutorial overreaching by evaluating whether the provable justification for successively prosecuting impinges on constitutional values).

105. George Thomas argues that the constitutional safeguard of double jeopardy is tied to a legislative determination of both substantive and procedural blameworthiness in the enactment of criminal statutes. *See* GEORGE C. THOMAS III, DOUBLE JEOPARDY: THE HISTORY, THE LAW 272 (1998).

106. Bruce Green elucidates the regulatory role of the criminal law in supervising professional conduct. *See* Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 FORDHAM L. REV. 327 (1998). He observes:

> To the extent that criminal law proscribes conduct that is also proscribed by disciplinary norms, the criminal law allows criminal prosecutors a role, alongside that of disciplinary agencies and others, in enforcing standards of professional conduct. Additionally, criminal law has a role in defining the standards of professional conduct governing lawyers directly and, by influencing the drafters of disciplinary rules, indirectly. Finally, criminal law has a collateral role in the licensing process, in that the commission of a crime may serve as a ground for denying an individual admission to practice law or for suspending or disbarring a lawyer.

gent administrative enforcement by state bar agencies acting as quasi-common law courts,[107] will prevent the development of moral-formal dilemmas in the prosecution of race trials. Like abolitionist lawyers in the antebellum South,[108] prosecutors in race trials confront the dilemma of mixed loyalties expressed in their fidelity to the state, their duty to the public, their obligation to the victim, and their desire to pursue "piecemeal reform."[109] This dilemma is illustrated in the Central Park Jogger and James Byrd trials. In the Central Park Jogger case, for example, prosecutors seemed flummoxed by their inability to vindicate New York's punitive interest in deterrence and retribution, safeguard a divided white and black public, protect the privacy of the victim, and yet appear colorblind.[110] In the James Byrd case, prosecutors also seemed acutely sensitive to the dilemma of maintaining a race-neutral state punitive stance in the context of a segregated white and black public. A quick glance at other advocacy contexts reveals a growing awareness of race-based dilemmas spawned by divided loyalties.[111]

7. *Moral-formal dilemmas in the Central Park Jogger and James Byrd trials.*

The trials of the Central Park Jogger and James Byrd illustrate the ongoing contest within the prosecutorial tradition between antebellum and postbellum visions of racial status and community. Both trials deploy race as a metaphor.[112] In the Central Park Jogger trials, racial identity bisects class[113] and gender[114] distinctions. In the James Byrd trials, racial identity intersects with the culture and society of the postbellum South. By repro-

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Id. at 331.

107. *See* Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 DUKE L.J. 1013, 1019, 1055-68 (1998) (contending that regulatory "agencies have become modern America's common law courts").

108. *See* Alfred L. Brophy, *Humanity, Utility, and Logic in Southern Legal Thought: Harriet Beecher Stowe's Vision in* Dred*: A Tale of the Great Dismal Swamp*, 78 B.U. L. REV. 1113, 1150-54 (1998) (contemplating lawyers' perceived "need to remove themselves from participation in a legal system that treats their clients unjustly").

109. *Id.* at 1159 (footnote omitted).

110. *See* SULLIVAN, *supra* note 1, at 49-65, 101-63.

111. *See, e.g.*, David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030, 1068 (1995) (pointing out that "questions about the relationship among professional role, group affiliation, and personal morality arise in many more mundane areas of legal practice").

112. *See* ANN LAURA STOLER, RACE AND THE EDUCATION OF DESIRE: FOUCAULT'S *HISTORY OF SEXUALITY* AND THE COLONIAL ORDER OF THINGS 126 (1995) (arguing that "race serves as a charged metaphor with allegorical weight").

113. *See id.* at 107 (remarking that "questions of racial identity and class distinction pervaded the colonial discourses in the Dutch East Indies, French Indochina, British Malaya, and India in the nineteenth and early twentieth centuries at different moments but in patterned ways").

114. *See* Valerie Smith, *Split Affinities: The Case of Interracial Rape*, *in* CONFLICTS IN FEMINISM 271, 274-78 (Marianne Hirsch & Evelyn Fox Keller eds., 1990).

ducing the normative and narrative hierarchies that give meaning to racial status and community, the trials reenact the moral-formal dilemmas common to race trials. Resolving these dilemmas within the framework of prosecutorial tradition requires reconsideration of the meaning of racial status and community under both antebellum and postbellum regimes. Antebellum ideology posits a vision of racial community segregated along the barrier lines of black natural inferiority and moral degeneracy. White crossover, even in the spirit of uplift and redemption, risks tarnish and retaliation. Postbellum ideology endorses this vision of community while affording blacks limited, integrationist forms of political and economic participation. To the extent that prosecutorial role, function, and regulation permit the expansion of crabbed forms of interracial political and socioeconomic participation, prosecutor-initiated forms of community activism and outreach may be effective.

II. PROSECUTORIAL ROLE, FUNCTION, AND REGULATION

This Part describes the role, function, and regulation of prosecutors acting under criminal law jurisdictions within both federal and state systems. The description sorts out the ethics rules and standards that govern prosecutorial conduct. Drawing on the Central Park Jogger and James Byrd trials, it demonstrates that such rules and standards mold multiple prosecutorial roles with accompanying burdens of freedom and constraint. The multiple roles evolve in accordance with the responsibilities of constitutional, institutional, professional, cultural, community, and moral agency. Additional role-specific contextual responsibilities ensue from considerations of procedural fairness, organizational efficiency, and substantive justice.

A. *Ethics Rules and Standards*

The prosecution function is governed by federal and state ethics rules and standards. Promulgated by the American Bar Association,[115] state courts and bar associations,[116] federal courts and advisory groups,[117] and the U.S. Department of Justice,[118] the rules and standards regulate the prosecution of criminal cases, including the Central Park Jogger and James Byrd trials. In-

115. *See generally* MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1983); MODEL RULES OF PROFESSIONAL CONDUCT (1995); STANDARDS FOR CRIMINAL JUSTICE (1993).

116. *See generally* NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS (1991).

117. *See generally* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS (Tentative Draft No. 8, 1997).

118. *See generally* UNITED STATES DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL (1998).

stead of surveying the anecdotal literature on the prosecution of crime[119] or rehearsing debates over prosecutorial conflict,[120] disqualification,[121] unauthorized contact[122] and misconduct,[123] this analysis seeks to link prevailing ethics rules and standards to the prosecution of racially motivated violence under the weight of antebellum and postbellum traditions. That weight tips attention to racial identity and status independent of the adversary system and its asymmetry.[124] Although regulatory canons acknowledge the import of prosecutorial power in charging,[125] investigation,[126] plea bargaining,[127]

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119. *See, e.g.*, EDWARD HUMES, MEAN JUSTICE (1999) (testing in story the claimed innocence of a convicted murderer); WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIALS HAS BECOME AN EXPENSIVE FAILURE AND WHAT WE NEED TO DO TO REBUILD IT 117-39 (1999) (describing the undermining of truth and the demeaning of professionalism wrought by the adversarial battle of the criminal justice system); HAROLD ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE (1996) (critiquing of the criminal justice system by a former judge who employs stories from his own courtroom); H. RICHARD UVILLER, VIRTUAL JUSTICE: THE FLAWED PROSECUTION OF CRIME IN AMERICA (1996) (using actual cases to call into question the proposition that the criminal justice process actually produces just outcomes).

120. *See* Susan W. Brenner & James Geoffrey Durham, *Towards Resolving Prosecutor Conflicts of Interest*, 6 GEO. J. LEGAL ETHICS 415, 468-83 (1993) (examining the nature of prosecutor conflicts of interest).

121. *See* Neil W. Hamilton & Kevin R. Coan, *Are We a Profession or Merely a Business?: The Erosion of the Conflicts Rules Through the Increased Use of Ethical Walls*, 27 HOFSTRA L. REV. 57, 76-79 (1998) (tracing erosion of secondary disqualification conflicts rules as applied to government lawyers moving to private practice).

122. *See* Jennifer Marie Buettner, *Compromising Professionalism: The Justice Department's Anti-Contact Rule*, 23 J. LEGAL PROF. 121, 124-42 (1998-99) (delineating conflicts between ABA Model Rule 4.2 and DOJ rules regarding unauthorized government communication with represented parties); *see also* Roger C. Cramton & Lisa Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291, 318-24 (1992) (discussing federal policies exempting DOJ lawyers from anti-contact rule that otherwise prohibits lawyers from communicating directly with parties represented by counsel).

123. *See* Judy Platania & Gary Moran, *Due Process and the Death Penalty: The Role of Prosecutorial Misconduct in Closing Argument in Capital Trials*, 23 LAW & HUM. BEH. 471, 483 (1999) (reporting that improper statements made by prosecutors in closing argument influence participant-jurors' sentence decision-making by increasing the likelihood of death penalty recommendations).

124. *See* Alan Rogers, *"A Sacred Duty": Court Appointed Attorneys in Massachusetts Capital Cases, 1780-1980*, 41 AM. J. LEGAL HIST. 440, 465 (1997) (tracing evolution of presumption that "a compelling case for the defendant's guilt ameliorates the shortcomings of the defendant's court appointed attorney").

125. On the scope of prosecutorial charging discretion, see generally KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981).

126. *See* Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923, 934-74 (1996) (comparing adversarial and non-adversarial modes of prosecutorial investigation and arguing that the prosecutor should play the role of a non-adversarial, neutral fact-finder when acting as an investigator).

127. *See generally* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37.

trial practice,[128] and sentencing,[129] they attend sparingly to moral incentive[130] and racial motive.[131] The subjects of moral purpose and racial impetus also are largely absent from discussions of prosecutorial impropriety[132] and discipline.[133] That absence may be attributed to the neutral posture of governing ethics rules and standards.

1. *Prosecutorial obligations under the ethics rules and standards.*

Early in the twentieth century, the ABA Canons of Professional Ethics announced the prosecutorial duty "to see that justice is done."[134] The Canons cast the failure to discharge this duty of public prosecution in the shadow of moral opprobrium, declaring acts of fact suppression and witness sequestration to be "highly reprehensible."[135] This pronouncement resonates in the ABA Model Rules of Professional Conduct where commentary asserts the prosecutorial responsibility to serve as "a minister of justice."[136] The ABA Standards for Criminal Justice similarly affirm the prosecutorial obligation "to seek justice, not merely to convict."[137] Highlighting this justice-seeking

128. *See* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 60-102 (1991) (defining the prosecutor's duty to do justice at trial).

129. *See generally* Cynthia Y. K. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power Over Substantial Assistance Departures*, 50 RUTGERS L. REV. 199 (1997).

130. On the impact of institutional incentives, see generally Kenneth Bresler, *"I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537 (1996) (objecting to prosecutorial score-keeping and similar competitive behavior); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851 (1995) (proposing the use of financial awards to influence charging decisions and control prosecutorial misconduct occurring at trial); Jeffrey Standen, *An Economic Perspective on Federal Criminal Law Reform*, 2 BUFF. CRIM. L. REV. 249, 261-67 (1998).

131. *See* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 31-38 (1998) (asserting that prosecutorial decisions often discriminate against African-American defendants and victims, and contending that prosecutors should bear the responsibility to eliminate racism in the criminal process); Elizabeth L. Earle, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 COLUM. L. REV. 1212 *passim* (1992) (discussing prosecutorial racism and arguing that violation of the rule prohibiting prosecutors from injecting race into trial always should be identified, even where no remedy exists).

132. *See generally* Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. 699 (1998).

133. *See, e.g.*, Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 77-91 (1995) (discussing mechanisms for disciplining prosecutorial misconduct).

134. CANONS OF PROFESSIONAL ETHICS Canon 5 (1908); *see also* Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 215-54 (1988) (endorsing prosecutorial adoption of quasi-judicial role and values).

135. CANONS OF PROFESSIONAL ETHICS Canon 5.

136. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. (1995).

137. STANDARDS FOR CRIMINAL JUSTICE Standard 3-1.2 (c) (1993).

mission, the standards recognize the "critical role" of the prosecutor in the criminal justice system.[138] That role confers "a quasi-judicial position" entrusting the prosecutor with the duties of an "administrator of justice."[139] Led by "the interest of justice" and emancipated by "broad discretionary powers," the prosecutor-administrator thus seems unbridled in striving to attain a higher "quality" of criminal justice.[140] The Restatement (Third) of The Law Governing Lawyers echoes this sense of freedom and aspiration.[141]

A battery of four norms regulate the prosecutorial freedom to pursue the mission of public justice. Derived from the ABA Standards for Criminal Justice, and often buttressed by the more prosaic National Prosecution Standards, the norms draw upon the concepts of neutrality, prejudice, community, and mercy to guide the exercise of prosecutorial discretion. The starting point of discretion is neutrality. From the outset, the ABA standards call for "proper professional detachment" in the performance of the prosecutorial role.[142] Construing detachment in terms of conflicts of interest, the ABA urges prosecutors to safeguard their professional judgment and obligations from the influence of political or personal interests.[143] Under these dictates, "a prosecutor should not allow personal, ideological, or political beliefs to interfere with the professional performance of official duties."[144]

The logic of neutrality-deduced self-restraint directs the prosecutorial effort to curb prejudice in the adversary context of the criminal justice system. Promulgated to advance this effort, the standards apply broadly to the prosecutorial functions of investigation, charging, evidentiary production, jury argument, and even extrajudicial comment. In the discharge of both investigative and charging functions, the ABA cautions that prosecutors "should not invidiously discriminate against or in favor of any person on the basis of race, religion, sex, sexual preference, or ethnicity," whether the person appears as the defendant or the victim.[145] By any measure of neutrality, such an arbitrary or discriminatory exercise of prosecutorial discretion lies improper.[146]

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138. *Id.* Standard 3-1.2 (c) cmt.

139. *Id.*

140. *Id.*

141. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 156 cmt. h (1998).

142. STANDARDS FOR CRIMINAL JUSTICE Standard 3-1.2 cmt. (1993).

143. *Id.* Standard 3-1.3(f).

144. *Id.* Standard 3-1.3 cmt. ("A prosecutor's own interests, of whatever nature, should never be permitted to have an adverse effect on the professional performance of the prosecutor's official duties and obligations.").

145. *Id.* Standard 3-3.1(b) cmt.

146. *Id.* ("The integrity of the prosecution office is severely if not fatally compromised when such bias is introduced into the decision-making process; indeed, even the appearance of such a discriminatory motivation in this setting can hamper the effective operation of the prosecution function by diminishing respect for the office in the eyes of the public.").

Similarly, in the production of evidence, the ABA discourages the presentation of "unduly inflammatory" tangible evidence that might "tend to prejudice fair consideration" by a judge or a jury.[147] Also, in arguments to the jury, the ABA deplores claims "calculated to appeal to the prejudices of the jury."[148] Claims of this kind, evidently "calculated to evoke bias or prejudice," suffer especially harsh denunciation.[149] Likewise prosecutorial digression from evidence, for example in "[p]redictions about the effect of an acquittal on lawlessness in the community,"[150] and reference to facts outside the record receive condemnation for heightening "the risk of serious prejudice."[151] For the same reason, the standards discourage public, extrajudicial statement "if the prosecutor knows or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding."[152] When, however as here, "the matter of prejudice is itself an issue in a case," the standards acknowledge that "reference to the subject in argument would be appropriate if restricted to the evidence and inferences derived therefrom."[153]

The broad proscriptive sanction against prejudice under the standards extends beyond the defendant and his compelled proceeding to reach the greater community of the public. The standards posit the public as a sort of collective client, defining the client in reference to "the people who live in the prosecutor's jurisdiction."[154] On this definition, prosecutorial fiduciary and statutory duties run to the people; the exercise of professional judgment in turn accrues solely for their benefit.[155] It is the prosecutor's obligation "to enforce the rights of the public."[156] Curiously, this regulatory obligation appears race-conscious. Citing the community demographics of "racial, religious, and ethnic composition" and the benefits of "employing a diverse group of prosecutors that is reflective of the diversity in the makeup of the prosecutor's jurisdiction," the standards encourage "[s]pecial efforts" to recruit

147. *Id.* Standard 3-5.6(c) cmt.

148. *Id.* Standard 3-5.8(c).

149. *Id.* Standard 3-5.8 cmt. ("Where the jury's predisposition against some particular segment of society is exploited to stigmatize the accused or the accused's witnesses, such argument clearly trespasses the bounds of reasonable inference or fair comment on the evidence.").

150. *Id.* Standard 3-5.8 cmt.

151. *Id.* Standard 3-5.9 cmt. (finding such statements "particularly offensive" in jury trials).

152. *Id.* Standard 3-1.4(a).

153. *Id.* Standard 3-5.8 cmt.

154. *Id.* Standard 3-1.3 cmt.

155. *Id.*

156. *Id.* Standard 3-1.2 cmt.; *see also* NATIONAL PROSECUTION STANDARDS Standard 1.3 cmt. (1991) (asserting that the prosecutor "must place the rights of society in a paramount position in exercising prosecutorial discretion in individual cases and in the approach to the larger issues of improving the law and making the law conform to the needs of society").

"qualified women and members of minority groups for prosecutorial office."[157]

The prosecutorial obligation to the community of the public client goes to the charging decision as well.[158] Certain violations of criminal legislation, according to the standards, "occur in circumstances in which there is no significant impact on the community or on any of its members" or in which "the most serious threat to the security and order of the community" lies elsewhere.[159] Prosecutorial declination in these circumstances signals neither the neglect of public duty nor discrimination among offenders.[160] To the contrary, within the strictures of the standards, the public interest seems "best served and evenhanded justice best dispensed" by "a flexible and individualized application" of prosecutorial "norms through the exercise of a prosecutor's thoughtful discretion."[161] Yet, when confronted by community indifference to a serious crime such that "convictions seem quite unlikely, perhaps because of hostile community attitudes toward the victims," the standards insist that prosecutors "should nonetheless proceed in the interests of justice if satisfied that a serious crime has been committed, the offender can be identified, and the necessary evidence is available."[162] In the face of community division, prosecutorial investigative and charging actions may "represent more than gestures," indeed "such tactics can successfully alert the community to wrongdoing and create a community commitment to rectify the offending conditions."[163]

The vitality of community to the standards, outside of the symbolic import of the jury,[164] implicates the norm of mercy as an expression of public interest in forgiveness and redemption. The standards supply prosecutorial forms of mercy in the discretion to recommend noncriminal disposition[165] and to seek assistance "in the evaluation of cases for diversion from the criminal process."[166] More generally, they encourage "resort to other cor-

157. STANDARDS FOR CRIMINAL JUSTICE Standard 3-2.3(d) (1993); *see also* NATIONAL PROSECUTION STANDARDS Standard 8.8 cmt. (1991) (contending that the prosecutor's staff "should represent a cross-section of the local community and statewide legal community including racial, ethnic, and religious minority groups").

158. STANDARDS FOR CRIMINAL JUSTICE Standard 3-3.9(b) (1993) ("The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction.").

159. *Id.*. Standard 3-3.9 cmt.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* Standard 3-5.4 cmt. (noting "the jury's symbolic position as representatives of the community").

165. *Id.* Standard 3-3.8(a) (discussing "the availability of noncriminal disposition").

166. *Id.* Standard 3-3.8(b); *see also* NATIONAL PROSECUTION STANDARDS Standard 29.1 (1991) ("The prosecutor should be cognizant of and familiar with all community-based programs to

rective social processes."[167] These processes may include prosecutor participation in and partnership with grass-roots community organizations devoted to "the improvement of the criminal justice system."[168] In fact, the standards drafted by the National District Attorneys Association press prosecutors to "encourage the formation and growth of community-based organizations interested in aspects of the criminal justice system and crime prevention."[169] Of necessity, community formation and growth entails public education.[170]

At the same time, based on the fear of prejudice, the standards seek to check the prosecutorial role in sentencing. For example, they urge prosecutors to "avoid introducing evidence bearing on sentencing which will prejudice the jury's determination of the issue of guilt."[171] Further, by virtue of his status as a minister of justice, they stress that the prosecutor's "overriding obligation is to see that justice is fairly done."[172] Fairness concerns also affect the presentation of information relevant to sentencing, prompting disclosure of "all unprivileged mitigating information known to the prosecutor."[173] The same fairness concerns extend to victims. In this respect, the standards call for the victim-tailored prosecutorial provision of information and explanation, timely notice of proceedings and disposition, and the opportunity to consult.[174] Solicitude toward victims also applies to sentencing where the "prosecutor can reflect the victim's point of view regarding the appropriate sentence" in his recommendation.[175]

2. *The current ethical standards.*

The prosecutorial effort to meet a higher standard of public justice through community outreach and public education founders against the cur-

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which offenders may be sentenced, referred as a condition of probation, or referred as a diversionary disposition.").

167. STANDARDS FOR CRIMINAL JUSTICE Standard 3-3.8 cmt. (1993).

168. NATIONAL PROSECUTION STANDARDS Standard 17.1-.2 cmt. (1991).

169. *Id.* Standards 37.1, 17.1-.2 cmt. (urging "prosecutors in communities lacking such grass-roots organizations to consider appropriate ways and means whereby citizen interest in their formation can be stimulated.").

170. *Id.* Standard 37.3 cmt. ("The prosecutor should educate the public about the programs, policies, and goals of his office and alert the public to the ways in which the public may be involved and benefit from those programs, policies, and goals.").

171. STANDARDS FOR CRIMINAL JUSTICE Standard 3-6.1(c) (1993).

172. *Id.* Standard 3-6.1 cmt.

173. *Id.* Standard 3-6.2(b).

174. *Id.* Standard 3-3.2 cmt.; *see also* NATIONAL PROSECUTION STANDARDS Standard 26.2 (1991) (encouraging prosecutors to "provide an orientation to the criminal justice process for victims of crime" and to "explain prosecutorial decisions").

175. *See* NATIONAL PROSECUTION STANDARDS Standard 88.1-.4 cmt. (1991).

rent substance of the ABA Model Rules of Professional Conduct.[176] The Model Rules regulate the prosecution function under Rule 3.8.[177] The Rule proclaims four basic prosecutorial mandates. The first pertains to the quantum and temporal quality of prosecutorial evidence. It requires the prosecutor to support his charging decision by probable cause, and to issue timely disclosure of evidence relevant to guilt or sentencing mitigation, unless disclosure "could result in substantial harm to an individual or to the public interest."[178] The second mandate refers to the rights of the accused. It directs the prosecutor to safeguard the right of the accused to obtain counsel, and to protect the accused from the unknowing waiver of pretrial rights.[179] The third mandate belongs to the adversary system and the relationship of the prosecutor to defense counsel. It dictates the reasonable exercise of lawyer-targeted subpoena power to forestall intrusion into the client-lawyer defense relationship.[180] The last mandate concerns pretrial and trial publicity. It instructs the prosecutor to prevent prohibited extrajudicial statements of subordinates, and to refrain from extrajudicial comments serving "no legitimate law enforcement purpose" and tending to increase the likelihood of heightening public condemnation of the accused.[181]

3. *How federal criminal intervention hinders prosecutors in fulfilling their ethical duties.*

Neither the text of Rule 3.8 nor the spirit of its internal mandates advances the norms pronounced in the ABA standards. But for limited concessions to neutrality and prejudice, the rule assigns little import to community and mercy. Essential to prosecutor-facilitated racial reconstruction, these two animating norms suffer additional dilution under the pressure of federal criminal legislation and concurrent federal-state prosecution. Dual federal-state prosecution rests on a shared jurisdictional conception of cooperative criminal justice enforcement.[182] Although dual prosecutions appear rare,[183] the rapid

176. For a deft analysis of the regulatory failure of the justice standard, see Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 249-65 (1993).

177. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 (1995).

178. *Id.* Rule 3.8(a), (d) & cmt. (commenting that a protective order may be appropriate to circumstances of substantial harm); *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(A), (B) (1983) (requiring probable cause and timely disclosure of evidence).

179. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 (b), (c) cmt.

180. *Id.* Rule 3.8(f) & cmt.

181. *Id.* Rule 3.8(e), (g), & cmt.; *see also* Scott M. Matheson, Jr., *The Prosecutor, the Press, and Free Speech*, 58 FORDHAM L. REV. 865, 871-78 (1990) (discussing restrictions on extrajudicial lawyer comment).

182. *See Draft Memorandum of Understanding Between the National District Attorneys Association and the Department of Justice*, 32 THE PROSECUTOR 28 (1998).

federalization of criminal law[184] encourages federal incursions on state authority.[185] Federal criminal cases divert a "disproportionate and unprecedented" share of federal judicial resources from the civil justice system[186] while obtaining mixed results, for instance in combating violent street crime.[187] Well-intentioned attempts to guide intervention and improve these results have proven of uncertain value.[188]

Federal efforts to intercede in state law enforcement contexts seem thwarted by the disjunction in federal and state jurisdictional competence. Even when appropriate and cooperative, federal intervention in state criminal justice prosecutions appears jurisdictionally impractical and inefficient. Intervention seems impractical because the state enjoys superior expertise in the design, implementation, and monitoring of local law enforcement initiatives. It seems inefficient because the state possesses institutional advantages in terms of economies of scale and start-up costs. The combined impracticality and inefficiency of federal remedial intervention affords scarce opportunity to develop local program initiatives congruent with the grass-

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183. *See* Harry Litman & Mark D. Greenberg, *Dual Prosecutions: A Model for Concurrent Federal Jurisdiction*, 543 THE ANNALS 72, 77 (1996) (finding that federal prosecutors typically bring fewer than 150 dual prosecutions per year).

184. *See* TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE SECTION, THE FEDERALIZATION OF CRIMINAL LAW 5-17 (James A. Strazzella, Rep., 1998) (reporting a dramatic increase in the number and variety of federal crimes); Symposium, *Federalism and the Criminal Justice System*, 98 W. VA. L. REV. 757 (1996) (same); Symposium, *Federalization of Crime: The Role of the Federal and State Governments in the Criminal Justice System*, 46 HASTINGS L.J. 965 (1995) (same).

185. U.S. Department of Justice guidelines authorize federal intervention in criminal civil rights cases when it advances the "national interest." *See* UNITED STATES ATTORNEYS' MANUAL § 8-3.000 (1997); *see also* Robert G. Morvillo & Barry A. Bohrer, *Checking the Balance: Prosecutorial Power in an Age of Expansive Litigation*, 32 AM. CRIM. L. REV. 137, 155 (1995) (noting that the power of federal prosecutors has expanded together with the scope of federal law).

186. Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 THE ANNALS 39, 46-51 (1996).

187. *See* Philip B. Heymann & Mark H. Moore, *The Federal Role in Dealing with Violent Street Crime: Principles, Questions, and Cautions*, 543 THE ANNALS 103, 108-15 (1996) (rejecting enhanced federal role in dealing with street violence and drug dealing). *See generally* G. Robert Blakey, *Federal Criminal Law: The Need, Not for Revised Constitutional Theory or New Congressional Statutes, But the Exercise of Responsible Prosecutive Discretion*, 46 HASTINGS L.J. 1175 (1995).

188. Franklin Zimring and Gordon Hawkins propose four justifications for prohibition and intervention under federal criminal law. The justifications spring from the presence of a strong federal "substantive interest in the suppression of a particular behavior." Franklin E. Zimring & Gordon Hawkins, *Toward a Principled Basis for Federal Criminal Legislation*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 15, 23 (1996). Derivative of that substantive stake, a second justification accrues when the "national government has a larger interest in the control of a behavior than do units of either state or local government." *Id.* A third justification for federal intervention arises when there is a distinct federal advantage over state criminal justice systems "in detecting, prosecuting, or punishing a particular behavior." *Id.* A final, corresponding justification for intervention emerges when state criminal justice systems are "substantially ineffective" in detecting, prosecuting, or punishing wrongful behavior. *Id.*

roots norms of community empowerment, education, and mercy. Logistically better-situated in state prosecutor offices, such initiatives suffer both diminution and displacement under the imposition of federal intervention.

B. *Prosecutorial Roles and Burdens: Freedom and Constraint*

Prosecutorial norms and narratives construct multiple roles with accompanying burdens of freedom and constraint. The roles clothe prosecutors in different guises. Among these include the offices of constitutional guardian, managerial leader, professional champion, cultural advocate, community agitator, and moral hero. Additional role considerations relate to procedural fairness, organizational efficiency, and substantive justice. Together, these contextual considerations dictate the opportunities for and the limits of prosecutorial discretion. As the following sections demonstrate, proper execution of prosecutorial discretion is put to the test in cases of racial violence.

1. *Constitutional role.*

The constitutional role of the prosecutor is animated by both due process[189] and equal protection[190] values. These values form part of the moral structure of the Constitution.[191] In the Central Park Jogger and James Byrd trials, the equal protection norms of dignity and equality predominate. The indignity of rape suffered by the Central Park Jogger is indisputable. But the humiliation experienced by James Byrd in being spray painted, stripped to the ankles, and roped to the fender of a pickup truck is unequivocal as well. Both indignities deny the moral worth of the victims and deprive them of equal standing in their own communities.[192] The attempt to pursue even-

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189. John Edwards argues:

> The manner in which due process is administered in an open trial by the prosecutor and the court, as perceived by the public, the jury and the defendant, affects our criminal justice system more than the outcome of any given trial. Conscientious adherence to due process values gain for the criminal justice system citizen respect and support by which the system maintains its moral legitimacy.

John S. Edwards, *Professional Responsibilities of the Federal Prosecutor*, 17 U. RICH. L. REV. 511, 534 (1983). *See also* Michael T. Fisher, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process than the Bottom Line*, 88 COLUM. L. REV. 1298 (1988) (arguing that prosecutorial misconduct violates due process regardless of whether the violation is "harmless error").

190. On the prosecutorial embrace of the equal protection values of racial dignity and equality, see Alfieri, *Defending Racial Violence*, *supra* note 4, at 1162 ; *see also* Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 675-717 (1997) (reviewing burdens that equal protection places on prosecutors).

191. For an account of the moral structure of the Constitution, see Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 13-39 (1998).

handed prosecutions demonstrated by the broad felony indictment of defendants in the Central Park Jogger case and by the capital indictment of all three white defendants in the James Byrd case highlights the strength of the constitutional norm of equality.[193]

More specifically, racial dignity describes the physical and psychological integrity of the self.[194] Racial equality denotes the egalitarian treatment of the self by others, private and public.[195] For the Central Park Jogger prosecutors, dignitary and equality norms applied out of concern for individual victims of group-inspired racial violence. For the James Byrd prosecutors, those norms flowed out of sympathy for communities of color. At the trial of Shawn Berry, for example, prosecutor Guy James Gray remarked: "Up until [the King and Brewer trials], no Klansman had ever been convicted of harming a black man. Now they see that a white man can be given a death sentence for killing a black man."[196] That egalitarian sentiment translates into the prosecutorial commitment to procedural fairness realized in the even-handed governance of the adversary system.[197] The differential vindication of private and public rights under that system,[198] illustrated by the lack of civil rights charges in both cases, cabins the prosecutorial role to the detriment of the victim and the victim-community in cases of racial violence. Conversely, the disparate impact of prosecutorial imperatives on the rehabilitative function of the juvenile courts,[199] shown by the punitive treatment

192. Dan Kahan adverts to the gravity of that denial and the consequent harm to the collective value of equality. *See* Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 464-65 (1999) (maintaining that the indignity of hate crime "is visited not just upon the individual victim, but upon all those who share his defining commitments") (footnote omitted).

193. The authority of the equality norm in the Byrd case animated jury selection in the trial of Shawn Allen Berry. During voir dire, prosecutor Guy James Gray stated: "The only thing left is whether there are going to be any blacks left on this jury. It is important. It's good for the community, it's good for the nation. It needs to be a representative jury." ASSOCIATED PRESS, *Jury Set to Be Chosen Today*, Nov. 5, 1999.

194. *See* Alfieri, *Defending Racial Violence*, *supra* note 4, at 1162 (construing the experience of dignity "as an interior sense of worth and as an exterior acknowledgement of respect" that "confers self-esteem and the esteem of others outside the self").

195. *See id.* (asserting that egalitarian "treatment preserves equal racial standing and safeguards against discriminatory conduct in private and public transactions").

196. Richard Stewart, *Jasper Trial Site Undecided: Venue Arguments to Be Heard Today*, HOUSTON CHRONICLE, Nov. 8, 1999, at A1.

197. *See* Bruce A. Green, *The Ethical Prosecutor and the Adversary System*, 24 CRIM. L. BULL. 126, 145 (1988) (insisting that prosecutors consciously try to act fairly and lawfully despite the adversary system).

198. *See* Joan Meier, *The "Right" to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 WASH. U. L.Q. 85, 92 (1992) (remarking that the public prosecutorial role "appropriate in criminal prosecutions that seek to uphold the criminal law and effect public justice, has less place in contempt prosecutions brought by private litigants to vindicate private rights").

199. *See* Joseph B. Sanborn, Jr., *Guardian of the Public and/or the Child: Policy Questions and Conflicts for the Juvenile Court Prosecutor*, 18 JUST. SYS. J. 141, 152-54 (1995) (gauging prosecutorial impact on rehabilitative focus of juvenile court system).

of juveniles in the Central Park Jogger case, enlarges the prosecutorial role to the benefit of the victim of violence but to the detriment of victim and defendant-community reconciliation in race cases. The shifting dimensions of the prosecutorial role rests on the hierarchical order struck among the normative values of neutrality, prejudice, community, and mercy. Antebellum and postbellum visions of race and racial community align that order through the prosecutorial exercise of discretion.

2. *Institutional role.*

The institutional role of the prosecutor relates to the ethical dimension of his supervisory function within the criminal justice system, particularly in regard to local community policing. Extending to the supervision of police conduct in matters of investigation, interrogation, and custody,[200] the prosecutor's organizational role denotes an institutional turn in the study of the professions and professional ethics.[201] The institutionalization of the prosecutor's supervisory role incites controversies relevant to "ethics at the midlevel."[202] Located at the managerial level of institutional governance, the ethics of organizational decision-making, incentive and reward structures, and formal and informal bureaucratic restraints on discretion daily enter the calculus of prosecutorial regulation.[203] In the Central Park Jogger and James Byrd cases, midlevel ethics issues grew out of prosecutors' institutional supervision of police and sheriff officers, investigators, and experts aiding in the indictment, arrest, trial, and sentencing of both black and white defendants. In the Central Park Jogger case, for example, midlevel ethics issues pertained to the institutional supervision of police officers and investigators. In the James Byrd trials, midlevel issues concerned the possibility not only of overreach in the cooperative use of the U.S. Department of Justice, the U.S. Attorney's Office for the Eastern District of Texas, and the FBI,[204] but also

200. *See* SEUMAS MILLER, JOHN BLACKLER & ANDREW ALEXANDRA, POLICE ETHICS 14-27, 181-207, 209-22 (1997) (exposing ethical issues in police investigation, interrogation, and custody).

201. *See* Dennis F. Thompson, *The Institutional Turn in Professional Ethics*, 9 ETHICS & BEH. 109, 109 (1999) (highlighting the institutional context of professional ethics); *see also* Liam B. Murphy, *Institutions and the Demands of Justice*, 27 PHIL. & PUB. AFF. 251, 269-71 (1998) (examining the relation between institutional virtue and individual responsibility).

202. Thompson, *supra* note 201, at 110. Thompson's "ethics at the midlevel" refers to "the vast range of institutions that operate between the worlds of families, friends, and neighbors on one side and the realm of governments on the other—institutions like hospitals, schools, corporations, and the mass media." *Id.*

203. *See* Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 455-58 (1992) (claiming that a new prosecution ethos may be required to counter the overzealous nature of prosecutors).

204. *See* Carol Christian, *Houston FBI Office Devoted Full Resources in Jasper Case: Agency Working to Dispel Public Perception of Its Stance on Civil Rights*, HOUSTON CHRONICLE, Feb. 27, 1999, at A42.

of abuse in the employment of expert psychiatric witnesses at the sentencing phase of defendants' capital trials.[205]

3. *Professional role.*

The professional role of the prosecutor is also taken up in the exercise of discretion. Tempered by his status as a minister of justice, the prosecutor exerts a profound influence on the adjudication of a criminal case,[206] nowhere more pronounced than in the context of plea bargaining. Closely tied to political authority,[207] plea bargaining historically served as a power resource and a prerogative of the prosecutor.[208] The modern prosecution function expands this historical prerogative to charging, discovery, pretrial motions, trial practice, and sentencing. Each body of practice entails specific types of discretion.

Jurisprudentially, two types of discretion seem to predominate: express or avowed discretion and tacit or concealed discretion. Following the work of H.L.A. Hart, Anthony Sebok finds express discretion exhibited in the work of administrative agencies.[209] He uncovers tacit discretion in the work of judges and juries in interpreting statutes and reconciling precedents.[210] Within the work of both administrative agencies and judges and juries, Sebok like Hart observes a sense of normative competition among norms for dominant and subordinate positions.[211] Of course, normative competition of this sort occurs within every interpretive practice. As a result of that competition, certain norms achieve an elevated or privileged status in the practice of advocacy and adjudication.

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205. *See, e.g.*, C. Bryson Hull, *Psychiatrist: Brewer Remains Risk to Society*, ASSOCIATED PRESS, Sept. 21, 1999 (citing testimony of the prosecution's expert witness, Dr. Edward Gripon, describing Brewer as antisocial and a future risk to society).

206. For a comparison of other forms of influence, see Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1473-74 (1998).

207. *See generally* Mary E. Vogel, *The Social Origins of Plea Bargaining: Conflict and the Law in the Process of State Formation, 1830-1860*, 33 LAW & SOC'Y REV. 161 (1999) (maintaining that plea bargaining arose as part of a process to consolidate the political power of elites). Vogel adds:

> The story of plea bargaining suggests that construction of political authority as a basis of popular support relies not only on legal codes per se but also on practical social arrangements for interpreting them that create relationships between citizen and state, shape action and thinking in ways that solidify popular support, and promote acceptance of authority as binding.

Id. at 170 (footnote omitted).

208. *See id.* at 218-19.

209. Anthony J. Sebok, *Finding Wittgenstein at the Core of the Rule of Recognition*, 52 SMU L. REV. 75, 99-102 (1999).

210. *Id.* at 100.

211. *Id.*

Prosecutorial traditions of discretion furnish the background for the internal value competition between antebellum and postbellum visions of racial status and community. Although each vision is impoverished by its essentializing construction of race, postbellum ideology at least affords the aspiration of community, albeit muted. The prosecution function involves the discretionary application of this community norm for jurispathic and jurisgenerative purposes.[212] In either event, the result resembles an act of normative privileging. Unlike the jurispathic discretion exerted in the defense lawyer's community-decentered, paternalistic representation of clients with disabilities,[213] prosecutorial jurisgenerative discretion privileges the norm of victim-centered community in association with the value of defendant-extended community.[214] This type of discretion dictates whether the prosecutor will forsake or safeguard a victim's rights and whether he will reconcile the victim's rights with the obligations of mercy toward a defendant and his extended community. At the trials of the Central Park Jogger and James Byrd, protecting such rights contextualizes both the victims' lives, in death and in recovery, and the defendants' lives, in isolation and in community. Contextualizing the victim honors the dignity of the person and her place in the social order of a community. Conversely, contextualizing the defendant explicates his isolation and recasts his history of alienation, thereby reconfiguring his location in a community and furnishing an opportunity for atonement and forgiveness.[215] In this way, community norms give rise to a discretionary duty to teach the jury and the public about the realities of the racially segregated worlds inhabited by the victims[216] and the defendants.[217]

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212. For definitions of these terms, see notes 98-100 *supra* and accompanying text.

213. *See* Josephine Ross, *Autonomy Versus a Client's Best Interests: The Defense Lawyer's Dilemma When Mentally Ill Clients Seek to Control Their Defense*, 35 AM. CRIM. L. REV. 1343, 1368-81 (1998) (finding paternalism inherent in surrogate decisionmaking).

214. Prosecutorial integration of victim-centered and defendant-extended community norms transverses conventional boundaries dividing the prosecution and defense function. *Compare* Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691, 1698-1704 (1997) (maintaining that expansion of victim-centered participatory rights may result in unfairness to the accused and illegitimate prosecutorial skewing of the jury trial process) *with* Kim Taylor-Thompson, *Effective Assistance: Reconceiving the Role of the Chief Public Defender*, 2 J. INST. STUDY LEGAL ETHICS 199, 212 (1999) (urging public defenders to "develop[] partnerships with communities to create less retributive approaches to the problem of crime").

215. The notion of redemption here differs from Sumi Cho's theory of "racial redemption" as a psycho-social and ideological process through which whiteness maintains its fullest reputational value. *See* Sumi Chow, *Redeeming Whiteness in the Shadow of Internment: Early Warren, Brown, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73, 75 (1998).

216. *See* Myrna S. Raeder, *The Social Worker's Privilege, Victim's Rights, and Contextualized Truth*, 49 HASTINGS L.J. 991, 997 (1998) (recommending contextualized storytelling "[b]ecause the victim's reality may not be the same as that of the jurors, nor may their values be shared or even understood by the jurors without such information").

217. *See* Austin Sarat, *The Cultural Life of Capital Punishment: Responsibility and Representation in* Dead Man Walking *and* Last Dance, 11 YALE J.L. & HUMAN. 153, 163-78 (1999)

4. *Cultural role.*

The cultural role of the prosecutor is tied to the restoration of community. In the Central Park Jogger and James Byrd trials, prosecutors often confined their community teaching to lessons of scientific racial subordination and prophylactic racial segregation. These pedagogic narratives situated white and black agents of racial violence in milieus of cultural and social pathology. Outside of those settings, according to the narratives, white supremacists and black juveniles require preventive segregation, even death. At the trial of Lawrence Russell Brewer, for example, prosecutor Guy James Gray described Brewer as a "racist psychopath,"[218] asserting that Brewer "would surely inflict violence again if he were allowed to go on living—even behind bars."[219] Likewise, at the sentencing phase of John William King's trial, prosecutor Pat Hardy argued: "By giving Mr. King a life sentence, you're giving him at least 40 years to catch a black guard, a black nurse, a black doctor, a Jewish guard, a Jewish nurse, a Jewish doctor, or anybody else. You're giving him a chance to catch anybody . . . who doesn't believe in his satanic racist views."[220] The Byrd defendants contributed to this narrative construction of irrevocable pathology. In a statement released by his defense team, John William King declared: "Though I remain adamant about my innocence, it's been obvious from the beginning that this community would get what they desire .... So I'll close with the words of [Nazi doctrine author] Francis Yockey: 'The promise of success is with the man who is determined to die proudly when it is no longer possible to live proudly.'"[221]

Teaching such lessons, whether or not distorted, manufactures conflicts[222] that bear heavily on the cultural role of the prosecutor. Although culture may constitute a "meta-system, immutable in its totality," it is

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(asserting the responsibility to discuss the causes of crime); Austin Sarat, *Recapturing the Spirit of* Furman: *The American Bar Association and the New Abolitionist Politics*, 61 LAW & CONTEMP. PROBS. 5, 12-22 (1998) (urging death penalty defense lawyer narratives that educate jurors about the immorality of death sentences).

218. *Jury in Jasper Case Weighs Man's Fate, Jurors Weigh Fate of Byrd's Convicted Killer*, AUSTIN AMERICAN-STATESMAN, Sept. 23, 1999, at B6.

219. Bruce Tomaso, *Jury Reaches No Verdict on Jasper Killer's Fate. Deliberations Halt After 12 Hours, to Resume Today*, DALLAS MORNING NEWS, Sept. 23, 1999, at A33. *See also Jury in Jasper Case Weighs Man's Fate, supra* note 218, at B6 ("Under the circumstances of this case, obviously there is a serious need to protect future victims from this man.").

220. Clara Tuma & The Associated Press, *Texas Dragging Death Murderer Sentenced to Death*, COURT TV ON LINE, Feb. 25, 1999.

221. *Id.*

222. For speculations on victim-centered conflicts of interest, see Walker A. Matthews, III, *Proposed Victims' Rights Amendment: Ethical Considerations for the Prudent Prosecutor*, 11 GEO. J. LEGAL ETHICS 735, 744-47 (1998).

marked by "indeterminacy and fluidity," even play.[223] Doubtless, given its capacious sweep, culture "informs both law and morality."[224] The prosecutor's cultural function is to reinvigorate law and morality with the virtue of victim- and defendant-centered community. Virtue comes not simply from the pursuit of freedom in a collectivity,[225] but from the preservation of the moral character of a community. In early American history, preservation rested on the "primacy of local custom."[226] Yet, custom may conflict with the prosecutorial commitment to substantive justice. Manifested in the decree that "justice shall be done,"[227] this commitment is often equated with the public interest[228] tailored to both criminal and civil ends.[229] The Central Park Jogger and James Byrd trials juxtapose cultural commitments to segregated and integrated visions of community justice. In the Central Park Jogger case, prosecutors, criminal defense lawyers, the defendant families, and their community supporters insinuated a commitment to a segregated vision of community justice. In the James Byrd trials, Byrd's family and the Jasper community intimated a sense of cultural confidence in an integrated vision of community justice. For instance Jamie Byrd, the youngest of Bird's daughters, sounded the theme of connection and integration in public commentary: "Everyone needs to just come together and forget about black and white, and we're all the same inside. We have the same blood."[230] Furthermore, Texas prosecutors depicted the Byrd lynching as a threat to community integration, describing the killing as "a racially-motivated publicity event King and

223. Backer, *supra* note 25, at 192. Backer also notes that "[c]ulture acts as a meta-system because it contains within it all possibilities, all combinations possible, given the set of basic assumptions that define a group as 'distinct.'" *Id.*

224. Ronald J. Krotoszynski, Jr., *The Chrysanthemum, the Sword, and the First Amendment: Disentangling Culture, Community, and Freedom of Expression*, 1998 WIS. L. REV. 905, 907 (footnote omitted).

225. *See generally* THOMAS L. PANGLE, THE ENNOBLING OF DEMOCRACY: THE CHALLENGE OF THE POSTMODERN ERA 105 (1992) ("To be free is to be, not an independent individual, but the citizen of a polity in which one has direct access to, or at the very least eligibility to participate in, sovereign office and the deliberations that authoritatively shape communal life.").

226. Bruce Frohnen, *The Bases of Professional Responsibility: Pluralism and Community in Early America*, 63 GEO. WASH. L. REV. 931, 953 (1995). Frohnen notes as well that "lawyers had a special duty to read and apply statute and custom so as to maintain the community's proper character." *Id.* at 954.

227. Berger v. United States, 295 U.S. 78, 88 (1935). The Berger Court comments that "[i]t is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id.*

228. *See* Vera Langer, *Public Interest in Civil Law, Socialist Law, and Common Law Systems: the Role of the Public Prosecutor*, 36 AM. J. COMP. L. 279, 304 (1988) (remarking that prosecutors in civil and common law systems "possess inherent authority to protect and further the public interest in civil proceedings").

229. *See generally* James A. Trowbridge, *Restraining the Prosecutor: Restrictions on Threatening Prosecution for Civil Ends*, 37 MAINE L. REV. 41 (1985) (evaluating prosecutorial practice of bargaining for waiver of civil liability).

230. Ann Curry, *Jamie Byrd Talks About Life After Gruesome Racial Murder of Her Father, James Byrd Jr.*, TODAY NBC NEWS, May 18, 1999.

Brewer staged to launch their own fledgling hate group, the Texas Rebel Soldiers, a branch of the Confederate Knights of America the two men joined in prison."[231] Neither of these racialized commitments fully actualizes a community-oriented prosecutorial role.

5. *Community role.*

The community role of the prosecutor emanates from the attempt to advance the common good and to renew public trust by treating a violence-scarred community itself as a victim.[232] The role of community trustee restricts the prosecutor's right to unfettered use of his powers in deference to the common good, however vague and contested.[233] This trustee function may be derived from social contract theory, though, as Anita Allen points out, the contractarian rationale in law sometimes "masks judicial and other governmental coercion in a cloak of consensualism and rational self-interest."[234] Alternatively, the trusteeship function may be deduced from relational contract theory. On this reasoning, the prosecutorial function becomes allied in a relational covenant with a community.[235] Plainly, this alliance requires trust and reciprocity. But it is unclear whether the law's normatively supportive function[236] may satisfy those requirements. That function seems especially material to a "community-level explanation of" the causes of crime and a commitment to preventing crime.[237] Certain community-level characteristics may ensure that commitment, such as friendship networks, community-level group supervision, and individual participation in formal neighborhood organizations.[238] These arrangements may transform

231. Bryan Robinson, *Second Texas Dragging Defendant Gets the Death Penalty*, COURT TV ON LINE, SEPT. 23, 1999.

232. For a discussion of the impact of crime on communities, see Katie Long, *Community Input at Sentencing: Victim's Right or Victim's Revenge?*, 75 B.U. L. REV. 187, 201-08 (1995).

233. On the tension between the public interest and the common good for the government lawyer, see Elisa E. Ugarte, *The Government Lawyer and the Common Good*, 40 S. TEX. L. REV. 269, 274-78 (1999).

234. Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1, 15 (1999). Anita Allen endorses "the idea of the social contract as a source of legitimate and consensual authority." *Id.* at 5.

235. *See* Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551, 608-19 (1999) (discussing reciprocity and relationships in contract doctrine).

236. *See id.* at 630-33 (lauding view "that one function of the law is to support existing social norms").

237. For a useful discussion of community commitment in understanding and preventing crime, see Interdisciplinary Program Series Transcript, *The New Chicago School: Myth or Reality?*, 5 U. CHI. L.S. ROUNDTABLE 1, 8 (1998) (quoting Tracey L. Meares); *cf.* Kim Taylor-Thompson, *Effective Assistance: Reconceiving the Role of the Chief Public Defender*, 2 J. INST. STUD. LEGAL ETHICS 199, 211-20 (1999) (outlining a community-oriented role for public defenders).

238. *See* Interdisciplinary Program Series Transcript, *supra* note 237, at 8 (quoting Tracey L. Meares); *see also* Michael Tonry, *Public Prosecution and Hydro-Engineering*, 75 MINN. L. REV.

the prosecutor into a different sort of "people's warrior,"[239] one who is centered less on punitive sanctions and more on the "promotion of social organization."[240] That transformative role recasts the prosecutor as an agent of forgiveness and mercy, rather than retribution. In the Central Park Jogger and the James Byrd trials, prosecutors declined to serve as state agents of mercy espousing an ethos of community constituted by atonement, forgiveness, and reparation.[241] Instead, they pursued traditional practices of jurispathic prosecution driven by penal norms of victim punishment and community vengeance, thereby squandering the opportunity for moral leadership.

6. *Moral role.*

Public enunciation of the norms of mercy and forgiveness in the context of community gives rise to a moral prosecutorial role. This is a heroic role that prosecutors should strive to fulfill. The moral role of the prosecutor stems from his participation in the jurisgenerative practice of discretion. Engagement in the moral practice of law depends on the lawyer's exercise of normative freedom and autonomy within that practice. Traditionally, the prosecutor's role offers sparse autonomy outside of the racialized antebellum and postbellum performance of state fidelity.

Discussing the possibility of moral action in law, Thomas Morawetz contends that the exercise of autonomy within a practice requires "resisting physical, psychological, and conceptual coercion."[242] To Morawetz, this experience of autonomy derives from "engage[ment] in self-questioning, entertaining alternative arguments and points of view."[243] Indeed, for Morawetz, "it makes no sense to look for autonomy *from* the practice, any more than it makes sense to seek autonomy from life itself."[244] Instead, Morawetz's form of autonomy emphasizes the internal by requiring self inquiry. A lawyer engaged in such an inquiry might experience a tension char-

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971, 973 (1991) (urging closer prosecutorial ties to neighborhoods and local resident priorities and policies).

239. *See* Martin H. Belsky, *On Becoming and Being a Prosecutor*, 78 NW. U. L. REV. 1485, 1491 (1984) (reviewing DAVID M. NISSMAN & EDWARD HAGEN, THE PROSECUTION FUNCTION (1982)).

240. Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 L. & SOC'Y REV. 805, 812 (1998) ("Law enforcement policies should have as a goal the promotion of social organization—both the structural and cultural components of it—where the social processes that it comprises are weak.").

241. *See* Thomas L. Shaffer, *Forgiveness Disrupts Legal Order*, 4 GRAVEN IMAGES: J. CULTURE, L., & SACRED 127, 131-34 (1998) (exploring the political and theologic practices of communities constituted by forgiveness).

242. Thomas Morawetz, *Law as Experience: Theory and the Internal Aspect of Law*, 52 SMU L. REV. 27, 66 (1999).

243. *Id.* at 66.

244. *Id.* (emphasis in original).

acterized by a "struggle both with others who see things differently and would bring about what we see as an inimical state of affairs, and with ourselves to the extent that we question our own point of view and try out those of others."[245]

The struggle for autonomy in lawyering reflects the engagement in practical moral reasoning. Ideally, the prosecutor's ability to integrate moral considerations into legal reasoning and decision-making will cultivate moral character for the self, society, and the state.[246] In the James Byrd trials, paradoxically, the prosecutor's moral discourse of punishment and retribution contributed to the reconciliation of long-segregated communities in Texas and abroad. The paradox of the James Byrd trials lies in the emergence of community reconciliation through the moral discourse of colorblind equality in punishment, both in the deterrence of death and in the retribution for a life unjustly taken. Declaiming the equality of punishment and the impartiality of retribution at the trial of Lawrence Russell Brewer, prosecutor Guy James Gray remarked: "I don't like the death penalty, but that's what he deserves. The just punishment for his case and these facts and circumstances is death."[247] Reiterating his colorblind faith, Gray added: "There was never a worry that an all-white jury wouldn't do the correct thing. It just doesn't matter who the victim is. A murder is a murder."[248]

III. (RE)CONSTRUCTING INTERRACIAL COMMUNITY

This Part explores methods of reconceiving the antebellum and postbellum norms and narratives of criminal prosecution deployed in cases of racial violence. Such a reconsideration might ultimately result in reconstructing interracial community. The exploration considers the cultural and societal impact of such norms and narratives in combating the varied forms, contexts, and categories of racial violence like those illustrated in the cases of the Central Park Jogger and James Byrd. Additionally, it assesses the potentially fruitful relationship of lawyers to community, citing examples from contemporary law reform movements that mobilized community organization around civil rights, welfare rights, women's rights, and gay/lesbian rights. Further, it evaluates the compatibility of prosecutorial norms and narratives with the emerging jurisprudence of race in American law, particularly the notions of postmodern racial identity and community.

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245. *Id.*

246. For a discussion of the individual and national character-building effect of constitutional commitments, see MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 47-51 (1999).

247. Paul Duggan, *Second Conviction in Dragging Death: Former Leader of White Supremacist Prison Group Faces Death Penalty in Texas*, WASH. POST, Sept. 21, 1999, at A2.

248. *Id.*

A. *Cultural and Societal Impact*

The cultural and societal imprint of the norms and narratives of traditional prosecutorial discretion on the assorted forms, contexts, and categories of racial violence resists easy description. To gauge some rough measure of their impact on community values and discourses, this analysis distinguishes material and interpretive forms of violence. Moreover, it endorses a reconsideration of public and private violence. Lastly, it connects the categories of racial, gender, ethnic, and gay/lesbian violence.

1. *Material and interpretive forms of violence.*

Prosecutors confront multiple forms of violence. Often, these forms of violence are linked to a wide array of defendant-infected causes ranging from impulsive aggression[249] to neurobiologic[250] disorders and psychopathology.[251] The consequences of these varied mental states can be found in the material violence of hate crimes,[252] and in the interpretive violence of hate speech. Both forms of violence infect the Central Park Jogger and James Byrd trials. Consider the material violence of rape in the Central Park Jogger case. Given the nature of the crime, New York prosecutors were freed from having to address the doctrinal distinctions between fraud and coercion,[253] or the evidentiary demands of resistance[254]—the usual statutory elements of rape. Instead, they introduced evidence of the mental state of the individual defendants.[255] This seemingly mundane act evoked the scientific determin-

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249. *See* Ernest S. Barratt & Laura Slaughter, *Defining, Measuring, and Predicting Impulsive Aggression: A Heuristic Model*, 16 BEHAV. SCI. & L. 285, 297 (1998) (linking impulsive aggression "to low verbal information processing skills but not significantly to the personality traits of impulsivity or anger/hostility").

250. *See* Mitchell E. Berman & Emil F. Coccaro, *Neurobiologic Correlates of Violence: Relevance to Criminal Responsibility*, 16 BEHAV. SCI. & L. 303 *passim* (1998) (reviewing studies linking neurotransmitter functioning, adult aggressive behavior, and violent crime).

251. *See* Mark D. Cunningham & Thomas J. Reidy, *Antisocial Personality Disorder and Psychopathy: Diagnostic Dilemmas in Classifying Patterns of Antisocial Behavior in Sentencing Evaluations*, 16 BEHAV. SCI. & L. 333, 340-41 (1998) (finding antisocial personality disorder as "not invariably associated with criminality" and psychopathy screening protocol "as a more reliable construct of both maladaptive personality features and socially deviant behaviors that may be relevant to determinations of recidivism and violence risk assessment both in and out of an institutional setting").

252. *See generally* VALERIE JENNESS & KENDAL BROAD, HATE CRIMES: NEW SOCIAL MOVEMENTS AND THE POLITICS OF VIOLENCE (1997) (discussing hate crimes as a social problem); Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes*, 93 MICH. L. REV. 320 (1994).

253. *See* Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39 (1998) (surveying statutory elements of rape by fraud and coercion).

254. *See* Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 991-1008 (urging that resistance be considered evidence of both nonconsent and force).

255. Andrew Taslitz observes:

ism of eugenics[256] prevalent during the early postbellum period, now veiled behind modern racial masks.[257] The same evidence divulged class-based antagonisms and motivations common to postbellum race relations.[258]

Postbellum ideology reemerged in the James Byrd trials when the Texas prosecutors submitted evidence of white supremacist hate speech. Admitted to establish motive and state of mind, the evidence of a defendant's racial invective essentializes not only the white-other, but his community and culture as well.[259] Consider, for example, the proffered photographs of John William King's racist tattoos: "Nazi SS symbols, satanic stars, the symbol of a white supremacist group, and the lynching of a black man."[260] Although legitimately introduced to establish King's adherence to "racist ideology," the evidence overwhelms the juridical and social construction of King's character and color, reducing him to a one-dimensional cultural figure that prosecutors likened to "Adolf Hitler."[261] The very act of proffering evidence of hate speech in a race trial exacerbates postbellum stereotypes: white and black. The resulting impact disproportionately harms black males.[262]

> A broader conception of relevance recognizes that mental state determination is not a realist endeavor but an interpretive act. Such an act requires empathy, understanding in an emotionally powerful way the defendant's life story. But empathy requires multiplicity rather than linearity, knowing and feeling the many truths simultaneously present in a single human life.

Taslitz, *supra* note 71, at 1067. Extending this observation, mental state determinations imply not scientific objectivity but the subjectivity and bias of competing cultural and social norms.

256. For useful background on eugenics theory, see generally, ALLAN CHASE, THE LEGACY OF MALTHUS: THE SOCIAL COSTS OF THE NEW SCIENTIFIC RACISM (1977); MAROUF ARIF HASIAN, JR., THE RHETORIC OF EUGENICS IN ANGLO-AMERICAN THOUGHT 51-71 (1996); DANIEL J. KEVLES, IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY (1985); EDWARD J. LARSON, SEX, RACE, AND SCIENCE: EUGENICS IN THE DEEP SOUTH (1995); Gregory Michael Dorr, *Principled Expediency: Eugenics,* Naim v. Naim, *and the Supreme Court,* 42 AM. J. LEGAL HIST. 119 (1998).

257. *See* RICHARD MAJORS & JANET MANCINI BILLSON, COOL POSE: THE DILEMMAS OF BLACK MANHOOD IN AMERICA 55-66 (1992) (tracing the cultural genesis of black masking and acting as a model of black masculinity).

258. *See* JACK M. BLOOM, CLASS, RACE AND THE CIVIL RIGHTS MOVEMENT (1987). Bloom observes:

> It was not merely prejudice, hatred, or entrenched customs that stood in the way of blacks' being treated as humans, but also the vested interest of the agrarian elite. This class had mobilized for massive resistance to segregation to defend its own power and position in the name of the whole white population of the South. Black victory meant the defeat of this class.

Id. at 214.

259. *See* Backer, *supra* note 25, at 193 (noting that "the politics of struggle, like that of hegemony, militate strongly in favor of essentializing the 'other' and that other's culture").

260. Clara Tuma, *supra* note 220.

261. Patty Reinert, *Racist Guilty of Jasper Murder: Jury Convicts Supremacist in 2 Hours,* HOUSTON CHRONICLE, Feb. 24, 1999, at A1.

262. For a useful discussion of the disparate impact of stereotyping on black males, see Tracey Maclin, Terry v. Ohio's *Fourth Amendment Legacy: Black Men and Police Discretion,* 72 ST. JOHN'S L. REV. 1271, 1271-87 (1998) (cataloging police use of racialized stop and frisk practices in black communities); *see also* Sheri Lynn Johnson, *Race and the Decision to Detain a Sus-*

2. *Spatial geography of violence.*

Prosecutors confront the contexts and spatial geography of violence in both public and private acts.[263] Because acts of violence envelop public and private space, hard and fast jurisprudential distinctions remain elusive. For some, the public/private distinction hinges on the actual control exerted over social space,[264] at least when traceable to governmental or non-governmental authority.[265] The violence common to the Central Park Jogger and James Byrd cases occurred in public spaces weakly controlled by the state: a wooded park and a country road. Within that space, unlike the Central Park Jogger and her assailants, James Byrd and his executioners engaged in a private interchange: hitchhiking. Yet, the private nature of the interaction fails to erase the public quality of his lynching. More intimate, prolonged forms of private interchange similarly may fail to transcend the public setting of violence.[266]

Under antebellum and postbellum models of prosecutorial discretion, locating violence in the geographic terms of private and public space rests in part on evidentiary and evaluative judgments about the racial character of the actor and the act. In regard to the actor, character evaluations of defendants and victims rely on reputation.[267] Because evidentiary determinations of reputation entail normative assessment[268] of the virtue of the actor[269] and of

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pect, 93 YALE L.J. 214, 215 (1983) (addressing the "permissible components of probable cause and reasonable suspicion").

263. *See* Robert Weisberg, *Private Violence as Moral Action: The Law as Inspiration and Example*, *in* LAW'S VIOLENCE 175, 175-210 (Austin Sarat & Thomas R. Kearns eds., 1992) (pointing to the violence committed by private individuals against each other as an act of law enforcement by the perpetrator). Weisberg adverts to the "important moral and jurisprudential significance to the observed analogy between public and private acts of legal enforcement," yet he controverts that analogy problematizing the conjunction between public legal authority and private remedial violence. *Id.* at 192, 209. For prosecutors, the discernment of public and private acts of violence may prove elusive.

264. *See* Kam C. Wong, *Black's Theory on the Behaviour of Law Revisited III: Law as More or Less Governmental Social Control*, 26 INT'L J. SOC. L. 365, 387 (1998) (citing the "central relationship between social space and social control").

265. *See id.* (positing "meaningful differences between governmental v. non-governmental social control").

266. *See* James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 AM. CRIM. L. REV. 1, 5-19 (1998) (describing inmate sexual harassment).

267. *See* Elizabeth Lutes Hillman, *The "Good Soldier" Defense: Character Evidence and Military Rank at Courts-Martial*, 108 YALE L.J. 879, 881 (1999) (commenting that "permitting the introduction of good military character evidence during the guilt phase of a court-martial . . . encourages factfinders to focus on the reputation of accused individuals rather than on their alleged criminal acts").

268. *See* Victoria Nourse, *The New Normativity: The Abuse Excuse and the Resurgence of Judgment in the Criminal Law*, 50 STAN. L. REV. 1435 (1998) (reviewing JAMES Q. WILSON, MORAL JUDGMENT: DOES THE ABUSE EXCUSE THREATEN OUR LEGAL SYSTEM? (1997) and canvassing the revival of interest in evaluative approaches to criminal law theory).

the reasonableness of the act,[270] they harbor susceptibility to capriciousness.[271] Both assessments in fact depend on the unstable interpretive categories of race[272] and violence,[273] rather than some uniform evidentiary protocol.[274]

3. *The connection between sexual violence and race.*

Prosecutors encounter multiple categories of violence interlacing race, gender, ethnicity, sexual orientation, and even age. In the cases in which race constitutes a main element of this confrontation, prosecutorial interpretation becomes saturated by colonial and post-colonial era fantasy.[275] Rein-

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269. *See* Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423, 1423 (1995) (arguing that the criminal justice system assesses inculpation according to judgments about the virtue of the defendants).

270. *See* Jody D. Armour, *Race Ipsa Loquitur: Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994) (exploring the argument that it is reasonable for criminal defendants claiming self-defense to consider race in assessing the risk of violence posed by an assailant); Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 369 (1996) (examining the issue of self-defense through the lens of socially constructed stereotypes about race).

271. *See, e.g.*, Darcy F. Katzin, *The Relevance of "Execution Impact" Testimony as Evidence of Capital Defendants' Character*, 67 FORDHAM L. REV. 1193, 1211-14 (1998) (calling for uniformity in capital penalty trial evidentiary determinations).

272. Depictions of the culture of the black underclass, particularly its black male denizens, depends on factual predicates susceptible to bias. *See* Evan Stark, *Black Violence: Racism and the Construction of Reality*, 28 CLEARINGHOUSE REV. 433, 435 (1994) ("The problem with the portrait of an underclass of violent, drug-abusing black males is that its primary source—figures on the numbers of black males arrested and imprisoned for violent crimes—may itself be the product of racial discrimination.").

273. Sex offender statutes, and more recently sexually violent predator laws, indicate an interpretive shift from the analytic category of psychopathology to the literary category of monster. *See* Jonathan Simon, *Managing the Monstrous: Sex Offenders and the New Penology*, 4 PSYCHOL., PUB. POL'Y, & L. 452, 467 (1998) ("Sex offenders are the embodiment not of psychopathology, with the potential for diagnostic and treatment knowledge to provide better controls over such offenders, but of the monstrous and the limits of science to know or change people.").

274. Efforts to devise a formal protocol for the admission of group character evidence underestimate the racialized construction of character. *See* Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461 (1996).

275. *See, e.g.*, Grant Farred, *The Prettiest Postcolonial: Muhammad Ali*, *in* BOYS: MASCULINITIES IN CONTEMPORARY CULTURE 151-70 (Paul Smith, ed. 1996). Farred explains:

> In its 1960s manifestation, identity turned mainly on the issue of naming—the name to which an individual or nation responds; the name that such an entity independently assumes after having renounced an earlier, imposed one; the status afforded an individual or a nation by the local or world community. Whether or not that new name was respected and the different place the subject assumed in the world before and after its new political character was adopted were vitally important issues.

Id. at 157.

scribed in antebellum and postbellum sensibilities, the colonial mindset devalues and sometimes denies the reality of racialized sexual violence.[276]

Sexual violence against women, like racial violence, is culturally insinuated into masculine identity.[277] The Central Park Jogger case connects racialized sexual violence to the experience of masculinity.[278] Prosecutors forged this connection from the defendants' confessional narratives of rape.[279] Imposed here without intimacy,[280] the act of violence (gang rape) symbolized the "absolutely masculine subject-position"[281] of the young male defendants. To the defendants, the rape denotes their entry into selfhood and self-possession by asserting the claim of "masculine privilege in relation to white women."[282] This privilege of racialized sexual violence against women owes more to antebellum black myth than to the contemporary culture of masculinity.[283]

Prosecutors of gender-motivated violence may best understand masculine violence against women in terms of two categories: violence committed by strangers and violence committed by intimates.[284] The racialized sexual

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276. The colonial mindset survived to mediate the dynamics of law and culture during the antebellum and postbellum periods. *See* Nancy L. Cook, *In Celia's Defense: Transforming the Story of Property Acquisition in Sexual Harassment Cases into a Feminist Castle Doctrine*, 6 VA. J. SOCIAL POL'Y & L. 197, 313 (1999) (remarking on the "unacknowledged social and legal realities" of the slave world). *See also* JAMES W. CLARKE, THE LINEAMENTS OF WRATH: RACE, VIOLENT CRIME, AND AMERICAN CULTURE 148 (1998) (noting assumption that "black women welcomed sexual aggression"); DARYL MICHAEL SCOTT, SOCIAL POLICY AND THE IMAGE OF THE DAMAGED BLACK PSYCHE, 1880-1996 at 47 (1997) (commenting on claim of "freer sexual mores of rural blacks") (footnote omitted).

277. *See* LAWRENCE KRAMER, AFTER THE LOVEDEATH: SEXUAL VIOLENCE AND THE MAKING OF CULTURE 8 (1997) ("Built into the very structure of identity, sexual violence is always already sublimated into the inner or outer threat by which it (re)establishes itself as legitimate."); *see also* ARTHUR BRITTAN, MASCULINITY AND POWER 19-45 (1989) (theorizing models of masculine gender identity); Jo Goodey, *Understanding Racism and Masculinity: Drawing on Research with Boys Aged Eight to Sixteen*, 26 INT'L J. SOC. L. 393, 414-15 (1998) (citing intersection of masculinity and racism).

278. *See* VICTOR J. SEIDLER, RECREATING SEXUAL POLITICS: MEN, FEMINISM AND POLITICS 141-42 (1991) (approving the location of "male violence at the centre of an understanding of social relations").

279. *See* SULLIVAN, *supra* note 1, at 19-28.

280. *See* KENNETH POLK, WHEN MEN KILL: SCENARIOS OF MASCULINE VIOLENCE 27-57 (1994) (describing masculine lethal violence associated with sexual intimacy).

281. LAWRENCE KRAMER, AFTER THE LOVEDEATH: SEXUAL VIOLENCE AND THE MAKING OF CULTURE 6 (1997).

282. *Id.* ("Racial, sexual, and social polarities cut across gender polarity in complex ways and further deplete the position of [masculine] entitlement.").

283. *See* FRED PFEIL, WHITE GUYS: STUDIES IN POSTMODERN DOMINATION AND DIFFERENCE 260 (1995) (explicating "'new' forms of white straight masculinity").

284. For a helpful treatment of these two categories, see Julie Goldscheid, *Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement*, 22 HARV. WOMEN'S L.J. 123, 142-57 (1999) (proposing gender-motivation standard of assessment to guide courts in determining when acts of gender-biased violence warrant federal civil rights intervention).

violence of the Central Park Jogger case obscures these two categories under the veil of race. It also poses complications for the showing of gender animus required for prosecution under the 1994 federal Violence Against Women Act.[285] This Act is often heralded as one of the best new prosecutorial developments in combating sexualized violence. Injecting race into the statutory equation, however, may make it more difficult for prosecutors to establish gender animus. Although Julie Goldscheid contends that Congress's "inclusion of the term 'animus' does not change the nature or quantum of evidence required to establish gender-motivation,"[286] she concedes that relevant "legislative history indicates that allegations of domestic violence, rape, or sexual assault may not presumably be considered to be gender-motivated for the purpose of federal civil rights intervention."[287] Lacking this presumption, more evidence of a discriminatory purpose may be required. Yet, once race is added to the context, identifying a gender-related discriminatory purpose may prove even more onerous. Prosecuting racialized sexual violence under hate crimes statutes,[288] rather than the Violence Against Women Act, poses related obstacles of categorical race/gender ambiguity. Despite these difficulties, such statutes give prosecutors the opportunity to heighten public awareness of racialized sexual violence against women as part of a community-based movement to reconstruct interracial community.

B. *Lawyers and Community: Lessons in Grassroots Community Power*

The collaboration of lawyers and community is well documented in the modern law reform movements championing civil rights, welfare rights, women's rights, and gay/lesbian rights. The starting point for an analysis of

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Kristian Miccio refers to this latter category under the term "intimate" violence or "violence against women by intimate partners." G. Kristian Miccio, *A Reasonable Battered Mother? Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings*, 22 HARV. WOMEN'S L.J. 89, 89 n.1 (1999) (deconstructing legal and cultural standard of the battered mother). To Miccio, the act of intimate violence "is contextual and denotes physical or psychological acts committed by one against another with whom he or she has a relationship." *Id.* at 89 n.1.

285. *See* 18 U.S.C. § 2265 (1994).

286. Goldscheid, *supra* note 284, at 150. Goldscheid points out that "Congress used the term 'animus' to mean 'purpose', as in 'an animating force,' and it used the words 'animus,' 'purpose,' and 'motivation' interchangeably, dispelling any notion that disparate impact, i.e., proof that a violent act disproportionately affects women, alone would be sufficient to merit recovery." *Id.* at 150 (footnote omitted).

287. *Id.* at 152 (footnote omitted).

288. *See* Marguerite Angelari, *Hate Crime Statutes: A Promising Tool for Fighting Violence Against Women*, *in* PORNOGRAPHY, SEX WORK, AND HATE SPEECH 405, 442-46 (Karen J. Maschke ed., 1997) (underlining importance of exploding myths of violence against women and of new legal remedies for female victims of violence).

this collaboration is the notion of community itself.[289] The meaning of community may turn on the identity of the lawyer, client, or group. Because groups become actualized through social institutions and relations,[290] group identity is especially complex. Consequently, appeals to the common good[291] of the whole may be stymied. In this way, the politics of identity[292] provokes great uncertainty about the continued efficacy of lawyer/community collaboration in promoting court-induced political and socioeconomic change. Nevertheless, prior movements remain instructive.

1. *The civil rights movement.*

The civil rights movement provides an illuminating example of interracial collaboration. For prosecutors, the civil rights movement teaches lessons of racial identity, narrative, and community. To be sure, the history of civil rights advocacy leaves an ambiguous legacy of interracial community[293] and electoral politics.[294] Indeed, the history of black community mobilization is matched by countervailing white community resistance.[295] Even when unchallenged by white resistance, mobilization sometimes threatened community solidarity[296] and inspired distorted depictions of black culture.[297] Moreover, because of its confinement to the realm of local political and economic disobedience, rather than to regional or national economic market

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289. *See* Stephen L. Pepper, *Autonomy, Community, and Lawyers' Ethics*, 19 CAP. U. L. REV. 939, 957-61 (1990) (debating the meaning of community in legal representation).

290. *See* Catherine Connolly, *Not Always in Knots*, 33 LAW & SOC'Y REV. 247, 248 (1999) (reviewing MARTHA MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS, AND THE LAW (1997) and noting that "social institutions work to make [group identities] real; so do long histories of enslavement, subordination, or other sustained maltreatment.").

291. *See id.* ("It does little good to tell people to halt preoccupation with group identity and past pain and to defer to the common good.").

292. *See id.* at 248 (commenting that "[i]dentity politics help some people feel connected and empowered: for example, organizing against shared oppression builds a sense of belonging among members of social movements, and 'coming out' aids young gay men and lesbians to find acceptance in a new community").

293. *See generally* JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION (1994).

294. *See* Terry Smith, *Reinventing Black Politics: Senate Districts, Minority Vote Dilution and the Preservation of the Second Reconstruction*, 25 HASTINGS CONST. L.Q. 277, 286-308 (1998) (tracing the history of the Seventeenth Amendment).

295. *See* GREENBERG, *supra* note 293, at 212-22, 225-43, 267-84 (chronicling local and regional backlash against civil rights encroachment on structures of southern segregation).

296. For example, consider the use of the "race card" in jury selection. *See* Albert W. Alschuler, *How to Win the Trial of the Century: The Ethics of Lord Brougham and the O.J. Simpson Defense Team*, 29 MCGEORGE L. REV. 291, 311-17 (1998) (discussing the doctrinal and practical demands of color-blindness in the prosecutorial and defensive use of the "race card" during jury selection).

297. For an insightful discussion of harmful depictions of black culture, see Cedric J. Robinson, *Blaxploitation and the Misrepresentation of Liberation*, 40 RACE & CLASS 1, 11 (1998).

protests, mobilization often failed to facilitate and to restructure commercial exchange relationships.[298] Where it succeeded it demonstrated that "insurgents can, with the necessary mobilization and the proper combination of strategies, influence significant change,"[299] albeit on a small-scale.[300] Among these strategies, community education and organization hold crucial import for marshalling the defense of indigenous communities.[301]

2. *Welfare rights movement.*

The welfare rights movement also provides instructive lessons about the role of community education and mobilization.[302] The modern history of the welfare rights advocacy movement[303] may be traced through the early relief movement,[304] the subsequent emergence of the National Welfare Rights Organization,[305] and finally to the Poor People's Campaign of 1968.[306] Together these campaigns engaged in and responded to the racial construction of identity and community.[307] Weighing heavily on the meaning of moral character,[308] that construction continues to dominate current debates over

298. *See* Dmitri Mehlhorn, *A Requiem for Blockbusting: Law, Economics, and Race-Based Real Estate Speculation*, 67 FORDHAM L. REV. 1145, 1191 (1998) (speculating on civil rights advocacy aimed at facilitating contracts between resident whites and home-seeking blacks).

299. JAMES W. BUTTON, BLACKS AND SOCIAL CHANGE: IMPACT OF THE CIVIL RIGHTS MOVEMENT IN SOUTHERN COMMUNITIES 238 (1989).

300. One such small-scale change is community-based law enforcement partnerships. *See* THE SPECIAL COMMITTEE ON THE DRUG CRISIS, AMERICAN BAR ASSOCIATION, LAWYERS AS VOLUNTEERS: ADDRESSING SUBSTANCE ABUSE AND VIOLENCE IN COMMUNITIES—A PROGRAM GUIDE 33-39 (June 1995).

301. *See* Christine Zuni Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities*, 5 CLINICAL L. REV. 557, 571-90 (1999) (explicating theories of community lawyering and representation).

302. For an example of prosecutor-initiated community mobilization, see Robert E. Cramer, Jr., *The District Attorney as a Mobilizer in a Community Approach to Child Sexual Abuse*, 40 U. MIAMI L. REV. 209 (1985).

303. For useful accounts of the welfare rights movement, see LARRY R. JACKSON & WILLIAM A. JOHNSON, PROTEST BY THE POOR: THE WELFARE RIGHTS MOVEMENT IN NEW YORK CITY 13-51 (1973); FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL 264-361 (1977).

304. *See* PIVEN & CLOWARD, *supra* note 303, at 266-88 (tracing genesis of the poor relief movement).

305. *See id.* at 288-353 (charting the rise and fall of the National Welfare Rights Organization).

306. *See* GREENBERG, *supra* note 293, at 430-39 (documenting intersection of civil and economic rights organizing in poor people's movement).

307. On the expansion of the welfare rights movement into the racialized landscape of the southern states, see MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973, 56-69 (1993).

308. *See* JOEL F. HANDLER & YEHESKEL HASENFELD, THE MORAL CONSTRUCTION OF POVERTY: WELFARE REFORM IN AMERICA 9-11 (1991) (distinguishing normative rhetoric separating "deserving" and "undeserving poor").

race, welfare, and reproduction.[309] For example, strains of that debate have hampered the homeless rights movement[310] and curbed the expansion of legal services for impoverished immigrants.[311] Few vestiges of that character debate surround the low income community development movement.[312] Community economic development advocates recognize the links between the black urban experience and the economy, public policy and racism. Their agenda, which includes banking,[313] child care and "activist mothering,"[314] housing,[315] and even resident-controlled redevelopment,[316] is already supplying significant benefits to low-income communities of color.[317]

3. *Women's rights movement.*

The women's rights movement offers similar lessons of grassroots community power and leadership, through strategies of resistance, in spite of its

309. *See, e.g.*, DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 202-08 (1997) (discussing the racist origins of the welfare system).

310. *See* MARK LITWAK, COURTROOM CRUSADERS 11-40 (1989) (describing homeless advocacy in Los Angeles).

311. *See* Robert L. Bach, *Building Community Among Diversity: Legal Services for Impoverished Immigrants*, 27 U. MICH. J.L. REF. 639, 657 (1994) ("An effort to assure effective legal services for impoverished immigrants should recognize their shared problems with established residents, the range of resources and groups currently involved in providing help, and the potential for building a broad-based community revitalization reform movement.").

312. *See* Symposium, *Revitalizing America's Cities*, 27 MICH. J.L. REF. 613-875 (1994).

313. *See* Rochelle E. Lento, *Community Development Banking Strategy for Revitalizing Our Communities*, 27 U. MICH. J.L. REF. 773, 778-803 (1994) (outlining structure of community development banks and credit unions); *see generally* Richard Marsico, *A Guide to Enforcing the Community Reinvestment Act*, 20 FORDHAM URB. L.J. 165 (1993) (exploring the enforcement challenges of the Community Reinvestment Act); Anthony D. Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 HARV. L. REV. 1465 (1994) (examining the effect of globally and nationally controlled banking institutions on economic injustice).

314. *See* NANCY A. NAPLES, GRASSROOTS WARRIORS: ACTIVIST MOTHERING, COMMUNITY WORK, AND THE WAR ON POVERTY 109-30 (1998) (defining "activist mothering" in terms of both traditional kinship group mothering and nurturing, community-based practices of political and social activism); Peter Pitegoff, *Child Care Enterprise, Community Development, and Work*, 81 GEO. L.J. 1897 (1993) (claiming that child care "can be a vehicle for community-based economic development").

315. *See* Benjamin B. Quinones, *Redevelopment Redefined: Revitalizing the Central City with Resident Control*, 27 U. MICH. J.L. REF. 689, 752-68 (1994) (hereinafter *Redevelopment Redefined*) (surveying strategies, criticisms, burdens, and incentives of resident-controlled redevelopment); *see also* Benjamin B. Quinones, *Serving the Client in New Ways: Community Economic Development, CED on the Job*, 27 CLEARINGHOUSE REV. 773, 773 (1993).

316. *See* Quinones, *Redevelopment Redefined*, *supra* note 315, at 752-68.

317. *See generally* Henry L. Taylor, Jr., *Social Transformation Theory, African Americans and the Rise of Buffalo's Post-Industrial City*, 39 BUFF. L. REV. 569 (1991) (discussing the link between the black urban experience and the economy, pubic policy, and racism).

frequent neglect of the experience of women of color.[318] The women's rights movement teaches prosecutorial sensitivity to gender power and leadership,[319] stressing the collaborative significance of gender awareness and governance.[320] This lesson survives quarrels over the nature of women's situated knowledge and community.[321] In addition, it provides guidance for other movements seeking to overcome the contradictory identities and social locations[322] found at the intersection of gender, race, and class.[323]

4. *The gay/lesbian rights movement.*

The gay/lesbian rights movement, by comparison, demonstrates the prosecutorial insight gained from strategies of degendering and recomposing.[324] Additionally it underscores the values of honor and community to self and group identity.[325] Admittedly, historic rights-based anti-discrimination strategies[326] struggle in addressing "transsexual or overt

318. For examples of resistance and rights advocacy by women of color, see Allison M. Dussias, *Squaw Drudges, Farm Wives, and the Dann Sisters' Last Stand: American Indian Women's Resistance to Domestication and the Denial of Their Property Rights*, 77 N.C. L. REV. 637, 707-26 (1999) (describing Native American sisters' struggle since the late 1970s to protect their ranch); *see* Virginia P. Coto, *LUCHA, The Struggle for Life: Legal Services for Battered Immigrant Women*, 53 U. MIAMI L. REV. 749, 755-58 (1999) (describing representation of battered immigrant women through education, legal services, and organizing); Jenny Rivera, *The Violence Against Women Act and the Construction of Multiple Consciousness in the Civil Rights and Feminist Movements*, 4 J. L. & POL'Y 463, 477–81 (1996) (pointing to anti-violence strategies overlapping communities of color and women).

319. *See* Rita Mae Kelly & Georgia Duerst-Lahti, *The Study of Gender Power and Its Link to Governance and Leadership*, *in* GENDER POWER, LEADERSHIP, AND GOVERNANCE 39, 39-64 (Georgia Duerst-Lahti & Rita Mae Kelly eds., 1995) (linking gender to power in public leadership).

320. *See* Rita Mae Kelly & Georgia Duerst-Lahti, *Toward Gender Awareness and Gender Balance in Leadership and Governance*, *in* GENDER POWER, LEADERSHIP, AND GOVERNANCE 259, 259-71 (Georgia Duerst-Lahti & Rita Mae Kelly eds., 1995) (elaborating on gender as a set of practices imbued with symbolic meaning).

321. *See* ROSI BRAIDOTTI, PATTERNS OF DISSONANCE: A STUDY OF WOMEN IN CONTEMPORARY PHILOSOPHY 271-72 (1991) (noting that "[s]ituated knowledges make possible a vision of reality as a web of interconnected points, openings and moments of mutual receptivity that spin the web of social connectedness, communication and community").

322. *See* Sandra Harding, *Reinventing Ourselves as Other: More New Agents of History and Knowledge*, *in* AMERICAN FEMINIST THOUGHT AT CENTURY'S END: A READER 140, 145-53 (Linda S. Kaufman ed., 1993) (describing "outsider within" social locations and identities).

323. Joan Williams notes that the category of gender often verges into race and class. Joan Williams, *Implementing Antiessentialism: How Gender Wars Turn into Race and Class Conflict*, 15 HARV. BLACKLETTER J. 41, 47-71 (1999).

324. *See* R.W. CONNELL, MASCULINITIES 232-34 (1995) (defining degendering strategy as an attempt to dismantle "hegemonic masculinity").

325. *See* Leonard Harris, *Honor, Emasculation and Empowerment*, *in* RETHINKING MASCULINITY: PHILOSOPHICAL EXPLORATIONS IN LIGHT OF FEMINISM 275, 284 (Larry May, Robert Strikwerda & Patricia D. Hopkins eds., 2d. ed. 1996) (citing honor as a function of community).

326. For a historical review of rights-based gay and lesbian civil rights strategies, see DIANE HELENE MILLER, FREEDOM TO DIFFER: THE SHAPING OF THE GAY AND LESBIAN STRUGGLE FOR CIVIL RIGHTS 139-60 (1998).

transgender self-definition"[327] and the transgressive use of female roles.[328] This struggle, further burdened by the onus of class,[329] accentuates the importance of contemplating postmodern prosecutorial norms and narratives.

C. *Postmodern Prosecutorial Norms and Narratives*

Postmodern schools of thought extend to law[330] and lawyers.[331] Jurisprudentially, they offer a foundational critique of the possibility of objective knowledge and neutral judgment in the law. That critique sets postmodernism apart from liberalism in two fundamental ways. The first distinction goes to interpretation. Postmodernists claim that lawyers and judges are "always and already interpreting."[332] Interpretation, in turn, is "shaped by one's horizon of sociocultural prejudices and interests."[333] The second distinction relates to norms. Postmodernists excoriate the prescriptive thrust of liberal norms as implausible and unprincipled.[334]

In the realm of criminal prosecution, postmodern norms and narratives jar the antebellum and postbellum habits of prosecutorial discretion. Those

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327. Kathleen Chapman & Michael Du Plessis, *"Don't Call Me Girl": Lesbian Theory, Feminist Theory, and Transsexual Identities*, *in* CROSS-PURPOSES: LESBIANS, FEMINISTS, AND THE LIMITS OF ALLIANCE 169, 173 (Dana Heller ed., 1997) (mentioning that the transgressivley gendered seek self-definition and redefinition outside of a bi-polar identity-making system of gender and sexuality).

328. *See* Laura Harris & Liz Crocker, *Bad Girls: Sex, Class, and Feminist Agency*, *in* FEMME: FEMINISTS, LESBIANS, AND BAD GIRLS 93, 101 (Laura Harris & Elizabeth Crocker, eds., 1997) (discussing desire and self-imaging in female role categories). The transgressive use of the female role, for example, in the image of the prostitute as "femme bad girl" provides "a strong expression of a feminist consciousness" but seems inapt to traditional rights-based anti-discrimination strategies. *Id.* at 101.

329. *See* RUTHANN ROBSON, SAPPHO GOES TO LAW SCHOOL: FRAGMENTS IN LESBIAN LEGAL THEORY 205-13 (1998). Robson observes:

> [I]t is not simply that lower class or poor is a rhetorical category or identity that allows prosperity to be normalized and other economic conditions to be pathologized, creating a group of others who are deviant. The same process of categorization occurs in racial, ethnic, religious, and sexualized identities and may serve liberatory as well as repressive interests.

Id. at 207 (footnote omitted).

330. *See generally* GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END (1995) (exploring modern and postmodern movements in legal scholarship).

331. *See* Stephen M. Feldman, *Playing with the Pieces: Postmodernism in the Lawyer's Toolbox*, 85 VA. L. REV. 151, 152 (1999) (finding that enmeshed structures of scholarly and lawyerly discourse compel postmodernists to construct narratives and arguments using available modernist rhetorical tools and modes of discourse); *see also* Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 803-04 (1991) (mentioning trial lawyer manipulation of doctrine in postmodernist denunciation of the law's normative foundations).

332. Feldman, *supra* note 331 at 155-56 n.13.

333. *Id.*

334. *See generally* Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990) (attacking the inconsistencies and weaknesses of normative legal thought).

accrued myth-making habits of construing stable forms of racial identity and status are incompatible with the emerging postmodern jurisprudence of race in American law, particularly the notions of mutable racial identity and community.

1. *Postmodernism and race.*

The intersection of postmodernism and race is best illustrated in trials of racial identity. In fact, the postmodern break from prosecutorial tradition occurs, not in the repudiation of normative policy prescription, but in the clasp of racial identity. For prosecutors, postmodern racial identity is race-conscious. Conceived as an element of personhood, identity resists juridical translation and commodity fetishism. Indeed, it lacks a clear-cut juridical or commodity form transferable to a courtroom or a market economy.[335] This lack of structure, combined with the properties of thickness and mutability, precludes the complete translation and full commodification of identity. Nevertheless, prosecutors in race trials engage in a crude process of translation that produces raw images of racial identity, here in the figures of marauding black teenagers and sadistic white supremacists.

2. *Postmodernism and gender.*

Connecting identity to race occasions multiple alliances with the categories of gender, ethnicity, and sexuality.[336] However, the contingency of the lawyer's identity[337] and the intervention of the prosecutorial state raise the danger of disrupting those alliances either by distorting identity or by creating an ill-fitting new form of "public identity."[338] Even without such disruptions, state-imposed classifications of public and private identity still may not survive a courtroom's

335. For a discussion of inalienability under property regimes, see Jeanne L. Schroeder, *Three's a Crowd: A Feminist Critique of Calabresi and Melamed's* One View of the Cathedral, 84 CORNELL L. REV. 394, 417-18 (1999); *see also* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1849 (1987) (analyzing market-inalienability and presenting a justification rooted in human flourishing).

336. *Compare* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 604 (1990) *with* Jane Wong, *The Anti-Essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond*, 5 WM. & MARY J. WOMEN & L. 273, 289 (1999) (assailing Harris for suggesting that "only women of color possess a multiplicitous self and that a dividing line can be drawn between white and non-white women in terms of their race").

337. *See* Wilkins, *supra* note 111, at 1033 (discussing the professional and legal implications of a lawyer's "race-based personal commitments and group-based affiliations").

338. Janet E. Halley, *The Politics of the Closet: Legal Articulation of Sexual Orientation Identity, in* AFTER IDENTITY: A READER IN LAW AND CULTURE 24, 34 (Dan Danielsen & Karen Engle, eds. 1995) (noting that, "even as the court monopolizes the power to define and control the subjective experience of stigma, it simultaneously establishes the legal fiction that those harmed by government discrimination have chosen their injury") (footnote omitted).

"rational basis scrutiny."[339] As a result, prosecutorial attempts at state intervention through postmodern identity may accomplish little beyond domesticating a postmodern concept for the purpose of bolstering a modernist normative claim of community. Both civil rights and poverty lawyers implicitly acknowledge the dense postmodern quality of client identity only to domesticate it in order to advance constitutional or statutory entitlement claims and to promote some semblance of commonality.[340] In the Byrd case, prosecutors conceded evidence of the complexity of the defendants' white identity, yet fastened that identity to the foundational base of racism.[341]

3. *Racial identity in law and politics.*

The notion of racial identity and the accompanying principle of race-consciousness remain controversial in law and politics. In law, race-conscious practices embroil fields of education, employment, and housing. In politics, race-conscious policies entangle government subsidies and electoral voting.[342] Accordingly, pragmatic reorientation of the prosecution function requires that race-conscious practices defer in part to the colorblind spirit of American constitutionalism and jurisprudence. That colorblind spirit of identity lies underdeveloped in the model of postbellum discretion. Untapped by the sterile postbellum regime of limited political and economic rights, the rhetoric of colorblindness at times may furnish the crucial political joinder of identity to community.[343]

For prosecutors, postmodern racial community relocates the reality of the self in the context of community, creating an embodied agent for the self.

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339. *See generally* Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357 (1999) (explicating underlying principles of Supreme Court rational basis jurisprudence).

340. *See* Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769 (1992).

341. At the sentencing phase of the trial of Lawrence Russell Brewer, prosecutor Patrick Hardy commented: "It's tough on anybody that did the best they could to raise their children if a child turns out to be a Lawrence Russell Brewer." Bruce Tomaso, *Parents of Jasper Killer Plead for Son's Life: Jury to Decide Whether Brewer Will Be Executed*, DALLAS MORNING NEWS, Sept. 22, 1999, at A31. Brewer's father blamed his son's racist attitudes on the Texas prison system. *See* Michael Graczyk, *Parents of Convicted Killer Plead with Jurors*, ASSOCIATED PRESS, Sept. 21, 1999 ("My son is not what the press has made of him."). Newspaper editorials also pointed to "individual pathologies, perhaps shaped by the harsh environment of Texas penitentiaries . . . ." Editorial, *Jasper Slaying Stands Apart for Its Cruelty*, HOUSTON CHRONICLE, June 11, 1998, at A32.

342. *See, e.g.*, J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 270 (1999) ("Redistricting cannot be race-unconscious until the country ceases to be, and pretending that society or politics has become colorblind can only allow discrimination to go unchecked.").

343. Catherine Connolly points to identity politics as "a method that acknowledges both the atrocity committed upon one individual as well as the impact the event has on a whole community." Connolly, *supra* note 290, at 251. Indeed, for Connolly, identity politics presents "a way of conceptualizing shared reality." *Id.*

Self-embodiment of this kind incorporates collective discourse and action into subjective identity.[344] When the horizon of community prejudice precludes colorblind understanding, communication, and perception, and instead tolerates acts of hate based on race, the prosecution function may spurn regulation in favor of freedom of expression. Given its foundational ties to liberal legalism, the hate speech remedy[345] of postmodern censorship theory[346] may be unacceptable. But tolerance may be equally unacceptable.

4. *Liberal legalism, tolerance, and postmodern censorship of racist speech.*

At first glance, tolerance harbors the potential to "make possible both a politics of reason and a conception of political community that dignifies the capacity for reasonableness of all persons to be self-governing moral agents."[347] Yet, it provides no guidance in resolving the divergence of racial interests within communities.[348] Tactics of accommodating difference,[349] manifested, for example, in the appeal to common sense and intuition, [350] are

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344. *See* CALVIN O. SCHRAG, THE SELF AFTER POSTMODERNITY 82 (1997) (observing that historical agents must encounter each other "face-to-face in situations of agreement and dissent, harmony and discord, liberation and oppression, mastery and slavery"); *see also* Feldman, *supra* note 331 at 155 (remarking that "for the individual within the community, one's current horizon of sociocultural prejudices and interests always shapes understanding, communication, and perception in general, including normative values and goals").

345. *See generally* HENRY LOUIS GATES, JR., ANTHONY P. GRIFFIN, DONALD E. LIVELY, ROBERT C. POST, WILLIAM B. RUBENSTEIN & NADINE STROSSEN, SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES (1994) (challenging the notion that free speech and equal rights are antagonistic in the context of hate speech); MARI J. MATSUDA, CHARLES R. LAWRENCE III, RICHARD DELGADO, & KIMBERLE WILLIAMS CRENSHAW, WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993) (setting out a foundational argument for hate speech codes); HATE SPEECH AND THE CONSTITUTION (Steven J. Heyman, ed., 1996) (presenting both sides of the debate over hate speech).

346. *See generally, e.g.*, Stephen G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193 (1996).

347. David A.J. Richards, *Contractualist Impartiality in the American Struggle for Justice: A Comment on Professor Allen's "Social Contract Theory in American Case Law,"* 51 FLA. L. REV. 41, 61 (1999).

348. *See* Stefan R. F. Khittel, *The Law Concerning the Black Communities in Columbia: Ethnic Rights or Anti-Discrimination Rights?, in* LAW & ANTHROPOLOGY 265, 279 (René Kuppe & Richard Potz eds., 1999) (documenting interest divergence between indigenous groups and black communities in Columbia).

349. *See, e.g.*, Vrinda Narain, *Women's Rights and the Accommodation of "Difference:" Muslim Women in India*, 8 S. CAL. REV. L. & WOMEN'S STUD. 43, 66-71 (1998) (mentioning the limitations of women's rights discourse in accommodating the religious-cultural differences of the Muslim community in India).

350. *See* Richard E. Redding, *How Common-Sense Psychology Can Inform Law and Psychological Research*, 5 U. CHI. L.S. ROUNDTABLE 107, 110 (1998) (defining common sense psychology in terms of "the lay knowledge of human behavior").

unlikely to prevail against the force of unconscious racism.[351] An alternative appeal to the social contract groundwork of law and community may produce the same outcome. Although Anita Allen mentions that "social contract can foster the spirit of cooperation and compromise,"[352] contractual bargaining theory proves unhelpful because of the difficulty of making community-wide bargains.[353] This deficiency also condemns relational contract theory[354] employed in commercial[355] and marital contexts.[356] Admittedly, a derivative theory of relational, community-based contracts reliant on a regime of intra-community promises between parties over goals and community welfare offers some promise in mediating the divergent interests between community-based racial identities. But the ineffectiveness of non-state enforcement mechanisms and the involuntary nature of state enforcement systems are troubling, even when extra-state enforcement through "a complex network of social and relational norms"[357] appears feasible. Moreover, an extra-state network fails to guarantee mutual community commitment and trust.[358] It also neglects to cure the problem of race-infected inequity in bargaining.[359]

A final tactic of accommodating difference through tolerance adverts to racial empathy.[360] Integrating tolerance and empathy requires cultivated judgment[361] and inculcated learning.[362] It mixes responsivity and responsi-

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351. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186-1217 (1995) (discussing the cognitive biases and ingrained stereotypes that underlie discriminatory treatment); Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (locating the roots and causes of discrimination outside of conscious intent).

352. Allen, *supra* note 234, at 15.

353. *See* Stephen M. Nickelsburg, *Mere Volunteers? The Promise and Limits of Community-Based Environmental Protection*, 84 VA. L. REV. 1371, 1382-96 (1998) (enumerating structural factors that make community-wide bargains difficult).

354. *See generally* Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981).

355. *See generally* Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. LEGAL STUD. 597 (1990).

356. *See generally* Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225 (1998) (applying relational contractual theory to marriage).

357. *Id.* at 1229.

358. *See* Russell Hardin, *Trustworthiness*, 107 ETHICS 26, 42 (1996) (linking law and convention to reliability and interest).

359. *See* Blake D. Morant, *The Teachings of Dr. Martin Luther King, Jr. and Contract Theory: An Intriguing Comparison*, 50 ALA. L. REV. 63, 108-09 (1998) (noting that application of contextualism to contract analysis "permits exploration of the possible operation of stereotype and prejudice within the bargaining context") (footnotes omitted).

360. Peter Margulies urges postmodern progressives "to bridge the gap between interpersonal and political empathy" by embracing the conception of engagement. Engagement, Margulies cautions, "requires the person experiencing empathy to take some risk." Peter Margulies, *Re-Framing Empathy in Clinical Legal Education*, 5 CLINICAL L. REV. 605, 606 (1999).

361. *See generally* Thomas Morawetz, *Empathy and Judgment*, 8 YALE J.L. & HUMAN. 517 (1996).

bility[363] in the form of dialogue.[364] The prosecution function may enhance dialogue by reference to the concept that Amy Gutmann and Dennis Thompson call "an *economy of moral disagreement*."[365] Applied to a deliberative process of community exchange over the merits of "morally respectable positions," Gutmann and Thomas urge participants "to minimize the range of their disagreement by promoting policies on which their principles converge, even if they would otherwise place those policies significantly lower on their own list of political priorities."[366]

The Gutmann-Thompson approach to moral dialogue and community tolerance, while attractive, gives no direction to the resolution of racial policy divergence. Lacking a principle of interracial policy convergence, the approach slows in carving a path from community tolerance to assimilation of policies and positions.[367] The result may be discovered in black exit, not only from community, but also from electoral politics.[368] That result encourages the creation of alternative institutions outside politics, for example as a facet of inner-city economic development[369] and community-based environmental protection.[370]

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362. *See generally* Carrie Menkel-Meadow, *The Power of Narrative in Empathetic Learning: Post-Modernism and the Stories of Law*, 2 UCLA WOMEN'S J. L. 287 (1992) (book review).

363. Calvin Schrag introduces the notions of responsivity and responsibility in elaborating upon "[t]he profile of the self in community . . . ." SCHRAG, *supra* note 344, at 91. He explains: "Responsivity functions basically as a descriptive term; responsibility connotes, if not an explicitly prescriptive content, in a significant measure an ethical stance, an ethos, a way of dwelling in a social world that gives rise to human goals and purposes, obligations, duties, and concerns for human rights." *Id.*

364. *See* Nancy Levit, *Critical of Race Theory: Race, Reason, Merit, and Civility*, 87 GEO. L.J. 795, 817 (1999) (linking dialogue to a willingness both to listen and to tailor communication to the listeners' perspective).

365. Thompson, *supra* note 201, at 115 (emphasis in original); *see also* AMY GUTMANN & DENNIS F. THOMPSON, DEMOCRACY AND DISAGREEMENT 346-61 (1996) (proposing a conception of deliberative democracy constituted by both regulatory principles—reciprocity, publicity, and accountability—and substantive principles—basic liberty, basic opportunity, and fair opportunity—of moral reasoning).

366. *Id.* at 115-16.

367. Larry Backer comments that "The interplay between tolerance and assimilation can occur because of the interpretive potential of our core socio-cultural structural conduct norms." Backer, *supra* note 25, at 194. Such rules, Backer maintains, "allow for a range of possibility within which the group can identify." *Id.*

368. *See* Terry Smith, *A Black Party?* Timmons, *Black Backlash and the Endangered Two-Party Paradigm*, 48 DUKE L.J. 1, 51-66 (1998) (contemplating constitutional overtones of black exodus from American two-party system).

369. *See generally* Michael H. Schill, *Assessing the Role of Community Development Corporations in Inner City Economic Development*, 22 N.Y.U. REV. L. & SOC. CHANGE 753 (1996-97) (describing the rise of community development corporations (CDCs) and their efforts to improve the state of inner city neighborhoods).

370. *See* Nickelsburg, *supra* note 353, at 1409 (contending that vagaries of local choice and arbitrariness of local jurisdictional boundaries produce patchwork community-wide environmental solutions).

5. *The merits of collective action.*

Conceding the ultimate "limits of unilateral community-based self-help measures"[371] at block[372] and neighborhood levels fails to defeat the logic of collective action.[373] In the context of prosecution, that logic suggests that prosecutors take on the role of community organizer.[374] This state-initiated role puts aside the often-heard objections of elitism[375] and paternalism in order to explore a range of prosecutorial community-building strategies. It is inaccurate to call this strategic initiative non-adversarial in the traditional sense. Taken from experimental community-enhancing strategies of mediation,[376] community building through prosecution may in fact prove adversarial. Its main focus, however, is on the enabling process of community reconstruction.

Community-enabling strategies[377] afford a role for community but "it is a role that respects the autonomy and informed judgments of the parties."[378]

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371. MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 193 (1995).

372. *See* Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75, 78-85 (1998) (discussing advantages of block-level institutions).

373. *See generally* RUSSELL HARDIN, COLLECTIVE ACTION (1982) (introducing a dynamic model of collective action to explain large group cooperation over time); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965) (explicating dynamics of collective action among small and mass groups).

374. *Cf.* Brian Glick & Matthew H. Rossman, *Neighborhood Legal Services as House Counsel to Community-Based Efforts to Achieve Economic Justice: The East Brooklyn Experience*, 23 N.Y.U. REV. L. & SOC. CHANGE 105 (1997) (recounting the experience of the Brooklyn Legal Aid Services Corporation in operating as house counsel to low income communities).

375. *See* John C. Koritansky, *Temperance, Passions, and Lawyers in the American Democratic Regime*, *in* ETHICS AND CHARACTER: THE PURSUIT OF DEMOCRATIC VIRTUES 141, 155-56 (William D. Richardson, J. Michael Martinez & Kerry R. Stewart eds., 1998) (observing that "lawyers exemplify an indirect, partial, but still invaluable exception to the more general pronouncement that there can be no aristocratic element in democratic society that opposes democracy's natural propensities").

376. *See* Clark Freshman, *Privatizing Same-Sex "Marriage" Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. REV. 1687, 1749-60 (1997) (espousing a community-enhancing vision of dispute resolution). Freshman contends:

> [D]ispute resolution should enhance the salience of a particular community in either, or both, of two ways: (1) individuals should resolve disputes according to the community (including some combination of its norms, history, and practices); and (2) individuals should leave the process more firmly incorporating that community in their sense of who they are.

Id. at 1749.

377. *See id.* at 1762 ("A community-enabling mediation would encourage parties to consider the range of possible values and practices that could affect how they resolve a dispute or structure an agreement.") (footnote omitted).

378. *Id.* at 1761.

Wendy Brown Scott's notion of "transformative desegregation"[379] may prove useful in this respect. Scott advocates boundary-crossing to learn about other cultural identities and experiences.[380] Boundary crossing, Scott intimates, demands the sharing of power.[381] It is unclear whether this obligatory sharing may be more fairly analogized to "social duties voluntarily undertaken" by citizens or "civic obligations imposed by the state."[382] Voluntarism seems more consistent with autonomy and consensual community. Yet, because of tensions associated with racial identity, state-induced civic obligations may be warranted. No necessary diminution of autonomy or weakening of community seems implied from state intervention, though it is unlikely that a prosecutor/organizer may plausibly represent a collective or community entity under the aegis of the state. Such dual forms of representation already create ethical strains in the public and private law fields of family,[383] union,[384] and group advocacy[385] where members frequently fall unheard. Comparable criticisms of an intermediary role for lawyers may be fatal to the instant proposal.[386]

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379. Wendy Brown Scott, *Transformative Desegregation: Liberating Hearts and Minds*, 2 J. GENDER, RACE & JUSTICE 315, 319 (1999).

380. *Id.* at 318 ("The current desegregation-integration process-oriented paradigm overlooks the potential of non-hierarchical cultural interaction in an educational setting to reshape fundamental attitudes and beliefs about race and identity.") (footnote omitted).

381. *Id.* at 357-60.

382. LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 305 (1998) (distinguishing between voluntary social duties and state-imposed obligations in the sphere of domestic relations and the family).

383. *See* Russell G. Pearce, *Foreword: Reexamining the Family Values of Legal Ethics*, 22 SEATTLE U. L. REV. 1, 2-4 (1998) (promoting ethics rule accommodation to allow representation of families as entities); *see also* Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 FORDHAM L. REV. 1253, 1258 (1994) (advocating that families be able to elect a form of representation that treats the family as a unit despite conflicts of interest between individuals); Naomi Cahn & Robert Tuttle, *Dependency and Delegation: The Ethics of Marital Representation*, 22 SEATTLE U. L. REV. 97, 121-37 (1998) (approving concurrent representation of husband and wife, including spousal delegation of authority).

384. *See generally* Russell G. Pearce, *The Union Lawyer's Obligations to Bargaining Unit Members: A Case Study of the Interdependence of Legal Ethics and Substantive Law*, 37 S. TEX. L. REV. 1095 (1996) (discussing the conflicting obligations owed by a lawyer to a union client and to the individual members of the bargaining unit).

385. *See* Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103, 1105-06 (1992) (noting that group representation is a significant facet of a public interest lawyer's work).

386. *See generally* John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741; Alysa Christmans Rollock, *Professional Responsibility and Organization of the Family Business: The Lawyer as Intermediary*, 73 IND. L.J. 567 (1998) (pointing to practical and ethical considerations hindering lawyers in acting as intermediaries within family businesses).

CONCLUSION

Infirmities notwithstanding, the proposed embrace of a prosecutorial ethic of race-conscious community outreach in cases of racially motivated violence seems appropriate. The ethic garners justification on several grounds. Normatively, the notion of reconstructive community seems implicit in the punitive value of redemptive mercy. Functionally, community looks embedded in the role-discretion and regulatory standards guiding the prosecution function. Historically, community appears linked to lawyer-engineered reform movements. Jurisprudentially, community occurs central to emerging theories of race and identity.

Nonetheless, the groundwork upholding a prosecutorial ethic of race-conscious community outreach cannot pretend to guarantee against subsidence. The punitive value of retribution offers strong normative competition. Moreover, the traditions of statutory-bounded discretion and narrow regulation inhibit an enlarged sense of community function. Furthermore, the history of lawyer-dominated law reform movements suggests habits of advocacy antithetical to community. Last, postmodern theories of race and identity confound interpretive and practical efforts to construct community. And yet, the rise of interracial violence compels the laying of such groundwork both prescriptively, as a symbol of reconciliation, and descriptively, as a critique of law in action.

Theorizing about the relationship between prosecutorial norms and their impact on community entails both an implied critique and an express critique of the current prosecution function in the field of racially-motivated violence. The critique intends to fashion an alternative way of viewing prosecutorial roles. Plainly, some roles of the prosecutor seem more advantageous than others in the context of community violence. The task is to discover which roles are more suitable. Because roles carry attendant discourses, the next task is to connect the relationship between prosecutorial discourse (narratives) and the prosecution of violence. More broadly, the task is to fit an adversarial criminal justice system into a paradigm that can play a positive role in rebuilding community after major public incidents of violence.

Of course, theorizing without more will prove insufficient. Hence, the essay strives for the convergence of theory and practice in the development of different theoretical models of prosecutorial roles and narratives that already emerge from the law as seen in the trials of the Central Park Jogger and James Byrd. At different points, the trials signal a potentially positive relationship

between lawyers and community under prosecutorial policies of activism, outreach, and education.[387]

The groundwork for these policies is already in place. Close reading of the two trials show that the very idea of community is embedded in the norms and narratives of the criminal justice system whether grounded in constitutional, statutory, or common law foundations. Admittedly, this showing is not without objection. The notion of community is frustratingly vague. Moreover, the norms and narratives and cases cited for purposes of illustration are unrepresentative, the former distorted by criminal justice system values, the latter deformed by under-inclusive sampling and high-profile stature.

Resorting to an empirical posture limited to the description of the role, function, and regulation of prosecutors acting under state and federal criminal justice systems seems unresponsive to these objections. Even though the description sifts from prosecutorial ethics rules and standards to demonstrate that prevailing norms and narratives construct multiple prosecutorial roles with accompanying burdens of freedom and constraint, further objections mount. The objections do not quarrel with the proposition that such norms and narratives construct multiple prosecutorial roles in the guise of constitutional, institutional, professional, cultural, community, and moral agency. Neither do they contravene the claims that the same norms and narratives burden prosecutorial roles with considerations of procedural fairness, organizational efficiency, and substantive justice. Instead, the objections complain that the instant analysis misdescribes the role, function, and regulation of prosecutors in state and federal criminal justice systems. Similarly, they protest that the same analysis misderives prosecutorial norms and narratives from governing ethics rules and standards. It follows that this erroneous deduction misstates norms and narratives, and overstates their impact on law, culture, and society. The overstatement of the breadth and diversity of prosecutorial roles results in overestimating the available freedom to maneuver and in underestimating the constraints on the freedom of strategic movement, including misreading the influence of contextual considerations.

The effort to explore methods of reconceiving the prosecutorial norms and narratives applied in cases of racial violence in the hope of reconstructing interracial community seems vain in light of these additional objections. Likewise, the related attempts to evaluate the cultural and societal impact of such norms and narratives in combating the varied forms, contexts, and categories of racial violence illustrated in the Central Park Jogger and James

387. *See* Joni Hersch, *Teen Smoking Behavior and the Regulatory Environment*, 47 DUKE L.J. 1143, 1158-62 (1998) (recommending the use of education to combat youth smoking).

Byrd trials, and to assess the potentially fruitful relationship of lawyers to community based on contemporary law reform movements seem futile, particularly given the civil justice predicate for the civil rights, welfare rights, women's rights, and gay/lesbian rights movements.

To establish the compatibility of prosecutorial norms and narratives with the emerging jurisprudence of race in American law, especially the notions of postmodern racial identity and community, seems a barren exercise if the task of reconceiving prosecutorial norms and narratives amounts to folly. Denying the fallacy of reimagination may provide little comfort, for that denial summons the next objection condemning the utopian hope of reconstructing interracial community. In this respect, it is not only the vagueness of meaning surrounding the concept of interracial community, but also the implausibility of assessing the cultural and societal impact of prosecutorial norms and narratives that seem daunting.

Equally vexing, the forms of violence under scrutiny seem too wide-ranging, the contexts and spatial geography of violence too dissimilar, and the categories of violence too artificial. Add to this criticism the claimed misplaced relationship of lawyers to community in a civil setting, the arguably inappropriate analogy to and generalization from contemporary law reform movements, and the alleged incompatibility of prosecutorial norms and narratives with the emerging jurisprudence of race in American law. Even if the thesis proffered here survived this criticism, it may succumb to the contention of incoherence attached to the postmodern notions of racial identity and community.

Doubtless, to a great extent this essay and its proposals amount to a kind of prosecutorial heresy. Activist lawyers out of our professional past, however, well understand the importance of heresy.[388] Prosecutors grasp the same in constructing innovative strategies to combat racial violence. The strategy of prosecutorial intervention advanced here creates an opportunity for state participation in reasoned public debate and political conflict[389] over interracial community and violence in contemporary America. Tragically,

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388. Both clinical legal education and civil rights advocacy exemplify the evolution of one-time heresies into accepted methods of practice. *See* GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY (1978); GERALD P. LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992).

389. *See* Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 YALE L.J. 2475, 2504 (1997) ("A sound principle of public reason for a deliberative democracy would indeed require citizens and policymakers to justify their political advocacy and action by appeal to principles of justice and other moral principles accessible to their fellow citizens by virtue of their 'common human reason.'").

state violence will never end race-infected community violence. Only community—provisional and evanescent—momentarily formed inside and outside the modern state may resolve that ultimate irony of violence, the violence within its own borders and the violence shared with us.